U.S. Court of International Trade

Slip Op. 17–93

ITG VOMA CORPORATION, Plaintiff, and CHINA RUBBER INDUSTRY ASSOCIATION and SUB-COMMITTEE of TIRE PRODUCERS of the CHINA CHAMBER of COMMERCE of METALS, MINERALS & CHEMICAL IMPORTERS, Consolidated Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, and UNITED STEEL, PAPER and FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 15–00255
PUBLIC VERSION

[Sustaining the U.S. International Trade Commission's final affirmative material injury determination in the antidumping and countervailing duty investigations of certain passenger vehicle and light truck tires from the People's Republic of China.]

Dated: July 28, 2017

Jonathan Thomas Stoel, Hogan Lovells US LLP, of Washington, DC, argued for Plaintiff ITG Voma Corporation. With him on the brief were *Craig Anderson Lewis* and *Sean-Michael Lawrence Carlesimo*.

Ned Herman Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC and New York, NY, argued for Consolidated Plaintiffs China Rubber Industry Association and Sub-Committee of Tire Producers of the China Chamber of Commerce of Metals, Minerals & Chemical Importers. With him on the brief were *Bruce M. Mitchell*, *Andrew Thomas Schutz*, and *Max F. Schutzman*.

Courtney Sheehan McNamara, Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington DC, argued for Defendant United States. With her on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Elizabeth Jackson Drake, Stewart and Stewart, of Washington, DC, argued for Defendant-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC. With her on the brief were *Philip Andrew Butler* and *Terence Patrick Stewart*.

OPINION

Choe-Groves, Judge:

This consolidated action involves passenger vehicle and light truck ("PVLT") tires. PVLT tires are new pneumatic tires made of rubber, with a passenger vehicle or light truck designation. Tires covered by

this case include tube-type, tubeless, radial, or non-radial tires that are intended for sale to original equipment manufacturers or the replacement market. *See* Majority and Dissenting Views at 6, CD 440, Doc. No. 562493 (Aug. 5, 2015) ("Commission Views"). The matter before the court challenges the final material injury determination of the U.S. International Trade Commission ("Defendant," "ITC," or "Commission") in the antidumping and countervailing duty investigations of certain passenger vehicle and light truck ("PVLT") tires from the People's Republic of China ("China"). *See Certain Passenger Vehicle and Light Truck Tires From China*, 80 Fed. Reg. 47,000, 47,000 (Int'l Trade Comm'n Aug. 6, 2015); *see also Certain Passenger Vehicle and Light Truck Tires From China*, USITC Pub. 4545 at 1–45, Inv. Nos. 701-TA-522 and 731-TA-1258 (Aug. 2015), *available at* https://www.usitc.gov/publications/701_731/pub4545.pdf (last visited July 10, 2017) ("USITC Pub. 4545"); Commission Views at 3–67.

Before the court are Rule 56.2 motions for judgment on the agency record filed by Plaintiff ITG Voma Corporation ("ITG Voma") and Consolidated Plaintiffs China Rubber Industry Association and the Sub-Committee of Tire Producers of the China Chamber of Commerce of Metals, Minerals & Chemical Importers (collectively, "CRIA"). *See* Pl.'s Rule 56.2 Mot. J. Agency R., Feb. 16, 2016, ECF No. 37; Pls. Rule 56.2 Mot. J. Agency R., Feb. 16, 2016, ECF No. 38. ITG Voma and CRIA contend that the Commission's final determination that imports of PVLT tires from China have materially injured the U.S. PVLT tire industry was unsupported by substantial evidence and not in accordance with the law. *See* Pl. ITG Voma's Mem. P. & A. in Supp. Rule 56.2 Mot. J. Agency R., Feb. 16, 2016, ECF No. 37–1 ("ITG Voma Rule 56.2 Br."); Br. in Supp. Pls. Rule 56.2 Mot. J. Agency R., Feb. 16, 2016, ECF No. 38 ("CRIA Rule 56.2 Br.").

The ITC and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC ("USW" or "Defendant-Intervenor") oppose the Rule 56.2 motions and request that the court sustain the Commission's final determination. *See* Def. Int'l Trade Comm'n's Opp'n Pls.' Mots. J. Agency R., May 2, 2016, ECF No. 51 ("Def. Resp. Br."); Def.-Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC's Opp'n Pls.' Mots. J. Agency R., June 2, 2016, ECF No. 57.

For the reasons set forth below, the court sustains the Commission's final determination and denies the motions for judgment on the agency record.

BACKGROUND

USW filed antidumping and countervailing duty petitions with the ITC and the U.S. Department of Commerce ("Commerce") on June 3, 2014, alleging that the domestic industry had been materially injured or threatened with material injury from imports of Chinese PVLT tires that benefitted from countervailable subsidies and were sold at less than fair value. *See* Staff Report Investigation Nos. 701-TA-522 and 731-TA-1258 (Final) at I-1, CD 429, Doc. No. 560025 (July 2, 2015) ("Staff Report"). The ITC and Commerce instituted antidumping and countervailing duty investigations.[1] *See Certain Passenger Vehicle and Light Truck Tires From China*, 79 Fed. Reg. 32,994 (Int'l Trade Comm'n June 9, 2014) (institution of antidumping and countervailing duty investigations and scheduling of preliminary phase investigations); *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 79 Fed. Reg. 42,285 (Dep't Commerce July 21, 2014) (initiation of countervailing duty investigation); *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 79 Fed. Reg. 42,292 (Dep't Commerce July 21, 2014) (initiation of antidumping duty investigation).

Commerce completed its antidumping and countervailing duty investigations in June 2015. *See Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 80 Fed. Reg. 34,893 (Dep't Commerce June 18, 2015) (final determination of sales at less than fair value) ("*AD Final Determination*"); *Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 80 Fed. Reg. 34,888 (Dep't Commerce June 18, 2015) (final affirmative determination) ("*CVD Final Determination*"). Commerce found that the subject PVLT tires were being, or were likely to be, sold at less than fair value and calculated final dumping margins ranging

[1] Prior to the commencement of the antidumping and countervailing duty investigations at issue in this case, USW filed a petition with the ITC requesting a safeguard investigation of PVLT tires from China pursuant to section 421 of the Trade Act of 1974. *See Certain Passenger Vehicle and Light Truck Tires From China*, 74 Fed. Reg. 19,593 (Int'l Trade Comm'n Apr. 29, 2009) (institution and scheduling of a hearing). The Commission determined that PVLT tires were being imported between 2004 and 2008 from China into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption, and recommended that the President impose additional duties on imports of PVLT tires from China for a three-year period. *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 74 Fed. Reg. 34,363 (Int'l Trade Comm'n July 15, 2009). The President provided the domestic industry with import relief from Chinese PVLT tires by imposing additional duties on imports for a period of three years in the amount of 35 percent *ad valorem* in the first year, 30 percent *ad valorem* in the second year, and 25 percent *ad valorem* in the third year, effective September 26, 2009. *See* Proclamation No. 8414, 74 Fed. Reg. 47,861 (Sept. 14, 2009). The section 421 safeguard measures expired on September 26, 2012 and were not renewed.

from 14.35 percent to 87.99 percent. *See AD Final Determination*, 80 Fed. Reg. at 34,893–96. Commerce also found that producers and exporters of PVLT tires from China were being provided with countervailable subsidies and calculated final countervailing duty rates ranging from 20.73 percent to 100.77 percent. *See CVD Final Determination*, 80 Fed. Reg. at 34,888–89.

The ITC published its final material injury determination in August 2015 after completing its investigation. *See Certain Passenger Vehicle and Light Truck Tires From China*, 80 Fed. Reg. at 47,000. The period of investigation spanned January 1, 2012 through December 31, 2014. *See* Commission Views at 4. Based on the information obtained during the investigation,[2] an evenly divided Commission determined that an industry in the United States had been materially injured by reason of imports of PVLT tires from China that Commerce found to be sold at less than fair value and subsidized by the government of China.[3] *See Certain Passenger Vehicle and Light Truck Tires From China*, 80 Fed. Reg. at 47,000; USITC Pub. 4545 at 1–45; Commission Views 3–67.

The ITC began its injury analysis by defining the domestic product that is like or most similar to the imported PVLT tires and then identifying the industry responsible for producing the domestic like-product. *See* Commission Views at 5–20. PVLT tires range from 13 to 26 inches in diameter and are designed for use on standard-type passenger cars, sport utility vehicles, multipurpose passenger vehicles, or light trucks. *See id.* at 8 (citing Staff Report at I-16–I-17). The Commission's definition of the domestic like-product was coter-

[2] The ITC obtained information regarding the domestic industry from questionnaire responses submitted by nine U.S. producers of PVLT tires, which accounted for all known domestic production of PVLT tires during the period of investigation. *See* Commission Views at 4 (citing Staff Report at I-1). Thirty-seven companies submitted Import data in questionnaire responses, which collectively accounted for [[ ]] percent of imported PVLT tires from China and [[ ]] percent of all imports of PVLT tires during the final year in the period of investigation. *See id.* at 4 (citing Staff Report at IV-1). The Commission also collected data from questionnaire responses submitted by 48 foreign exporters and producers whose production accounted for [[ ]] percent of total PVLT tire production in China and whose exports accounted for [[ ]] percent of PVLT tires imported from China during 2014. *See id.* at 4–5 (citing Staff Report at VII-5). The ITC held a public hearing on June 9, 2015, *see* Staff Report at I-1, and received pre-and post-hearing briefs from importers, purchasers, and producers of PVLT tires who participated in the investigation. *See* Commission Views at 4.

[3] Vice Chairman Dean A. Pinkert and Commissioners Irving A. Williamson and Rhonda K. Schmidtlein voted in the affirmative determining that the domestic PVLT tire industry was materially injured by reason of subject imports, while Chairman Meredith M. Broadbent and Commissioners David S. Johanson and F. Scott Kieff voted in the negative. *See* Commission Views at 3 n.1. By statute, "[i]f the Commissioners voting on a determination by the Commission . . . are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination." 19 U.S.C. § 1677(11) (2015); *see also Gerald Metals, Inc. v. United States*, 132 F.3d 716, 718 (Fed. Cir. 1997).

minous with the scope of the imported PVLT tires subject to the investigations, which was described by Commerce as "new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation" that "may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers [("OEM")] or the replacement market."[4] *Id.* at 6–11. Three Commissioners found that the domestic industry included all nine U.S. producers of PVLT tires, and the remaining three Commissioners found that the domestic industry included eight of the nine U.S. producers.[5] *See id.* at 11–20.

The Commission assessed the conditions of the U.S. PVLT tire market in its material injury analysis. *See id.* at 20–35. The Commission observed that domestic consumption of PVLT tires increased from 274.3 million tires in 2012 to 301 million tires in 2014, an overall increase of 9.7 percent during the period of investigation. *See id.* at 20–21 n.89 (citing Staff Report at Table IV-6). Demand for PVLT tires, particularly for higher-value and larger-diameter PVLT tires, increased due to "a rebounding economy, an increase in the number of miles driven as gasoline prices have declined, and an increase in vehicle sales." *Id.* at 21 (citing Staff Report at II-25, II-28, II-32). The cost of raw materials used to produce PVLT tires, including natural and synthetic rubber, declined during the period of investigation.[6] *See id.* at 34–35 (citing Staff Report at V-1–V-2 and Figure V-1). China provided the largest source of imported PVLT tires and increased its share of the U.S. PVLT market from 11.5 percent in 2012 to 19.3 percent in 2014. *See id.* at 23–24 (citing Staff Report at Tables IV-2, IV-3, and IV-6). The Commission found a moderate to high degree of substitutability between domestically-produced PVLT tires and sub-

[4] Expressly excluded from the investigations were (1) racing car tires, (2) certain tire sizes, (3) tires that are not new, including recycled and retreaded tires, (4) non-pneumatic tires, (5) tires designed and marketed exclusively as temporary spare tires, (6) tires designed and marketed exclusively for specialty use, and (7) tires designed and marketed exclusively for off-road use. *See* Commission Views at 7 n.15.

[5] The U.S. producers of PVLT tires are Bridgestone, Continental, Cooper, Goodyear, Michelin, Pirelli, Specialty Tires, Toyo, and Yokohama. *See* Commission Views at 12. Vice Chairman Pinkert and Commissioners Williamson and Schmidtlein found that [[ ]] should be excluded from the domestic industry as a related party because "[[ ]] had a [[ ]] ratio of subject imports to domestic production, indicating that its principal interest is importing rather than domestic production." *Id.* at 18–19 n.79. The three Commissioners noted, however, that including or excluding [[ ]] from the domestic industry would not alter their conclusions regarding material injury. *See id.*

[6] During the period of investigation, (1) the cost of ribbed smoked sheets declined by 58 percent, (2) the cost of technically specified rubber (a general purpose natural rubber) declined by 59.4 percent, (3) the cost of styrene butadiene rubber declined by 22.2 percent, and (4) spot prices for crude oil declined by 8.3 percent. *See* Commission Views at 35 n.169 (citing Staff Report at V-1 and Figure V-1). The ratio of raw material costs to the total cost to manufacture PVLT tires declined from 56.8 percent in 2012 to 52.6 percent in 2014. *See id.* at 34 (citing Staff Report at V-1).

ject imports. *See id.* at 25–27. The Commission recognized that PVLT tires differ based on brand, quality, and price, but explained that the record did not warrant finding clear dividing lines among categories of tires in the market. *See id.* at 27–34. Based on its assessment of the market, the Commission concluded that subject imports competed in a meaningful way with domestically-produced PVLT tires and that the competition was based primarily on price. *See id.* at 33–34.

The Commission then considered the volume of subject imports, the effect subject imports had on the price of domestically-produced PVLT tires, and the impact subject imports had on the domestic industry. *See id.* at 35–60. The ITC found that the volume and increase in volume of imports from China were significant. *See id.* at 41–45. Subject imports significantly undersold the domestic like product, but the Commission could not determine from the record evidence whether it was the underselling or the decline in raw material costs that was responsible for lowering the prices of domestic PVLT tires. *See id.* at 45–52. The ITC also found that subject imports had a significant adverse impact on the domestic industry. *See id.* at 53–58. The ITC noted that the domestic industry experienced a decline in U.S. shipments, net sales volumes, net sales values, production, capacity, and employment during a time of increased demand, increased consumption, and lower raw material costs. *See id.* at 55 (citing Staff Report at Table C-2).

Although the domestic industry was increasingly profitable during the period of investigation, *see id.* at 55 (citing Staff Report at Tables VI-3 and C-2), the Commission determined that the domestic industry was materially injured by reason of subject imports that captured market share at the expense of the domestic industry. *See id.* at 58–60. The Commission found that this market share effect caused the domestic industry to earn lower revenues than it would have otherwise earned. *See id.* Accordingly, Commerce issued antidumping and countervailing duty orders on PVLT tires from China. *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 80 Fed. Reg. 47,902 (Dep't Commerce Aug. 10, 2015) (amended final antidumping duty determination and antidumping duty order; and amended final affirmative countervailing duty determination and countervailing duty order).

ITG Voma and CRIA subsequently brought this consolidated action to challenge the ITC's final affirmative material injury determination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012)[7] and Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2015),[8] which grant the court authority to review actions contesting the ITC's final injury determination following an antidumping or countervailing duty investigation. The court will uphold the ITC's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2014). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the Commission's determinations, findings, or conclusions are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (quoting *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)); *see also Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

DISCUSSION

I. Legal Framework

The ITC must support an affirmative material injury determination with findings that (1) "material injury" existed and (2) the material injury was caused "by reason of" the subject imports. *See Swiff-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997)). Material injury is defined by statute as harm that "is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). To determine whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly subsidized or less than fair value imports, the Commission considers:

(I) the *volume of imports* of the subject merchandise,

(II) the *effect of imports* of that merchandise *on prices* in the United States for domestic like products, and

(III) the *impact of imports* of such merchandise *on domestic producers* of domestic like products, but only in the context of production operations within the United States.

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

[8] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2015 edition.

19 U.S.C. § 1677(7)(B)(i) (emphases added). The Commission may "consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii). No single factor is dispositive and "the significance to be assigned to a particular factor is for the ITC to decide." *See* S. Rep. No. 96– 249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.

The statute neither defines the phrase "by reason of," nor provides the ITC with guidance on how to determine whether the material injury is by reason of subject imports. The Court of Appeals for the Federal Circuit has interpreted the "by reason of" statutory language to require the Commission to consider the volume of subject imports, their price effects, their impact on the domestic industry, and to establish whether there is a causal connection between the imported goods and the material injury to the domestic industry. *See Swiff-Train Co.*, 793 F.3d at 1361; *see also* S. Rep. No. 96–249, at 57–58, 74–75 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 443–44, 460–61.

II. The Parties' Challenges to the Commission's Final Material Injury Determination

ITG Voma and CRIA challenge various aspects of the Commission's final determination. First, ITG Voma asserts that it was denied due process because the Commission conducted its material injury analysis under a statute that was amended by Congress during the course of the investigation without providing ITG Voma with notice and an opportunity to comment. *See* ITG Voma Rule 56.2 Br. 7–9, 12–13. Second, ITG Voma and CRIA challenge the Commission's findings regarding the conditions of competition in the market, contending that competition between imports of PVLT tires from China and the domestic like product was attenuated and was not based primarily on price. *See id.* at 34–42; CRIA Rule 56.2 Br. 23–36. Third, ITG Voma contests the Commission's determination that the volume and increase in volume of subject imports was significant. *See* ITG Voma Rule 56.2 Br. 29–34. Fourth, ITG Voma and CRIA dispute the Commission's determination that subject imports had a significant adverse impact on the domestic industry and caused it material injury. *See id.* at 7–11, 14–27, 31–32, 34–44; CRIA Rule 56.2 Br. 6–22, 36–45.

a. The Commission's Application of the Trade Preferences Extension Act of 2015

Congress enacted the Trade Preferences Extension Act of 2015 ("TPEA") on June 29, 2015, during the course of the ITC's investiga-

tion in this matter. *See* Pub. L. No. 114–27, 129 Stat. 362, 384–85 (2015). Section 503 of the TPEA amended the statute that governs the Commission's material injury analysis.[9] *See* 19 U.S.C. § 1677(7). The Commission's final determination on August 5, 2015 applied the amended version of the statute in its material injury analysis. *See* Commission Views at 53 n.245.

ITG Voma argues that it was denied due process because the Commission did not provide ITG Voma with notice or an opportunity to comment before applying the amended statute. *See* ITG Voma Rule 56.2 Br. 7–9, 12–13. ITG Voma requests that the court remand the final determination to allow ITG Voma an opportunity to comment on the application of the amended provisions of the statute. *See id.* at 13. Defendant responds that parties are presumed to know the law and that ITG Voma had an opportunity to comment on the amended statutory provisions. *See* Def. Resp. Br. 28–30.

"The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985)). "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *See Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2408 (2016) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)) (internal quotations omitted). Only after establishing that the plaintiff has been deprived of a protected interest will the court evaluate whether the afforded procedures comport with due process requirements. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59.

ITG Voma cannot raise a genuine due process claim here because it has not been deprived of a protected interest. ITG Voma is an importer that participated in the investigation and filed suit to challenge the Commission's final determination, which resulted in the imposition of antidumping and countervailing duties on ITG Voma's imports of PVLT tires from China. Neither importing merchandise under an existing duty rate nor engaging in international trade is a protectable interest under the U.S. Constitution. *See Int'l Custom Prods., Inc.*, 791 F.3d at 1337; *see also Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933); *A Classic Time v. United*

[9] In relevant part, the amended statute requires the ITC to evaluate "gross profits, operating profits, net profits, ability to service debt, . . . [and] return on assets" in considering the impact on the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(iii)(I). The amended statute additionally proscribes the ITC from reaching a negative material injury determination "merely because the [domestic] industry is profitable or because the performance of that industry has recently improved." 19 U.S.C. § 1677(7)(J).

States, 123 F.3d 1475, 1476 (Fed. Cir. 1997); *Am. Ass'n of Exps. & Imps.–Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985). ITG Voma's due process claim lacks a constitutionally protected interest in property or liberty and thus is without merit.

Notwithstanding the absence of a constitutionally protected interest, ITG Voma argues that the Commission was required to provide notice before applying the amended statute in its final determination. The court disagrees. An agency is required to apply the law that is in effect at the time that it issues its final determination, even when a change in legislation occurs during the administrative proceeding. *See Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943); *Aaacon Auto Transp., Inc. v. Interstate Commerce Comm'n*, 792 F.2d 1156, 1161 (D.C. Cir. 1986). An agency is under no obligation to provide notice of changes in legislation. *See Texaco, Inc. v. Short*, 454 U.S. 516, 535–36 (1982). The legislative process provides notice to the public. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915)). The Commission was required to make its final determination in accordance with the amended statute because the TPEA went into effect during the investigation.[10] The Commission was not required to provide notice of the amendments prior to making a final determination. *See Texaco, Inc.*, 454 U.S. at 535–36; *see also Logan*, 455 U.S. at 433 (citing *Bi-Metallic Inv. Co.*, 239 U.S. at 445–46).

ITG Voma asserts that the law required the Commission to provide ITG Voma with an opportunity to comment on the application of the TPEA before making a final determination. *See* ITG Voma Rule 56.2 Br. 12–13 (citing 19 U.S.C. § 1677m(g)). The Commission is required by statute to provide parties with an opportunity to comment on all information obtained during an investigation. *See* 19 U.S.C. § 1677m(g). The statute provides that:

> Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The

[10] Section 503 of the TPEA is silent regarding the effective date for the amendments made to the Commission's material injury analysis. The default rule in such a situation is that the effective date is the date of enactment. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."); *see also Ad Hoc Shrimp Trade Action Comm.*, 802 F.3d 1339, 1348–52 (Fed. Cir. 2015) (determining that section 502 of the TPEA applies to determinations made on or after the date of enactment). Section 503 of the TPEA thus went into effect on June 29, 2015. Neither ITG Voma nor CRIA argues that the ITC was required to apply the pre-TPEA version of 19 U.S.C. § 1677.

> administering authority and the Commission, before making a final determination . . . shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission . . . upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

Id.; see also 19 C.F.R. § 207.30 (regulatory provision implementing statutory mandate). According to the statute, ITG Voma was entitled to an opportunity to comment on the information obtained by the Commission during the investigation.

The court must determine whether the ITC's application of the amended statute violated its obligation to afford parties an opportunity to comment on information in the record. Prior to the enactment of the TPEA, the ITC was required to consider the impact on the domestic industry by evaluating the domestic industry's "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity." 19 U.S.C. § 1677(7)(C)(iii)(I) (2012). Section 503 of the TPEA amended this statutory provision by (1) substituting "profits" with gross profits, operating profits, and net profits, and (2) additionally requiring the Commission to evaluate the actual and potential decline in the domestic industry's ability to service debt and return on assets. *See* Pub. L. No. 114–27, 129 Stat. 362, 384–85 (2015). Even though the TPEA was enacted shortly before the Commission issued its final determination, the record of the investigation already contained data pertaining to the newly required factors, enabling the Commission to apply the amended statute without the need to obtain additional information. *See* Staff Report at VI-21–VI-24, Tables C-1–C-2, VI-1–VI-3; Hearing Transcript at 215, PD 275, document number 558534 (June 10, 2015). ITG Voma had several opportunities to comment on this record data before the Commission issued its final determination. *See* Prehearing Brief of ITG Voma Corporation and American Omni Trading Company, CD 410, document number 558120 (June 2, 2015); Hearing Transcript, PD 275, document number 558534 (June 10, 2015); Posthearing Brief of ITG Voma Corporation, CD 421, document number 558875 (June 16, 2015); *see also* 19 C.F.R. § 207.23–25 (providing opportunities to comment during an investigation). The Commission did not violate its statutory obligation to afford parties an opportunity to comment on information in the record.

ITG Voma argues that the Commission was required to provide an opportunity to comment on the Staff Report. The Staff Report was issued on July 2, 2015 after the TPEA was enacted and recited the statutory criteria for the Commission's material injury analysis according to the statute prior to the TPEA amendments. *See* ITG Voma Rule 56.2 Br. 9, 12. ITG Voma's argument is unavailing. Even if the court were to presume that the law recited in the Staff Report constitutes "information" under 19 U.S.C. § 1677m(g), ITG Voma had an opportunity to comment on the Staff Report when it submitted final comments on July 10, 2015. *See* Final Comments of ITG Voma Corporation, PD 333, document number 560461 (July 10, 2015). Counsel for ITG Voma acknowledged during oral argument that ITG Voma "perhaps . . . should have" submitted comments relating to the amended statute. *See* Oral Argument at 01:47:12– 01:47:20, April 26, 2017, ECF No. 83. Counsel for ITG Voma also noted during oral argument that the ITC never rejected an attempt to submit comments pertaining to the amended statute. *See id.* at 00:12:11–00:12:28. Significantly, the court notes that Defendant-Intervenor addressed the amended law in its final comments submitted to the ITC. *See* Petitioner's Final Comments, CD 437, document number 560455 (July 10, 2015). The fact that another party in this case submitted comments relating to the amended law underscores the fact that ITG Voma had a meaningful opportunity to comment. Moreover, ITG Voma has failed to identify any information on the record that was not previously subject to comment during the investigation. The Commission provided ITG Voma with all the process that was due under 19 U.S.C. § 1677m(g).

The court holds, therefore, that ITG Voma was not deprived of its due process and was otherwise afforded notice and an opportunity to comment.

b. The Commission's Assessment of the Conditions of Competition

ITG Voma and CRIA challenge the Commission's assessment of the conditions of competition in the U.S. PVLT tire market, specifically the Commission's findings that PVLT tires imported from China competed in a meaningful way with domestically-produced PVLT tires and that the competition was based primarily on price. *See* ITG Voma Rule 56.2 Br. 34–42; CRIA Rule 56.2 Br. 23–36. ITG Voma and CRIA assert that the Commission's findings were unsupported by substantial evidence because the competition between the two products was attenuated and was based primarily on brand. *See* ITG Voma Rule 56.2 Br. 34–42; CRIA Rule 56.2 Br. 23–36. Defendant

argues that the record contained substantial evidence to support its findings and that ITG Voma and CRIA have failed to demonstrate otherwise. *See* Def. Resp. Br. 7–18.

The Commission must "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry" when considering the impact of subject imports on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). The statute does not provide further guidance, giving the Commission discretion to assess the conditions of competition in a particular industry. The Commission's findings regarding competition and market conditions must be supported by substantial evidence in the record. *See Siemens Energy, Inc.*, 806 F.3d at 1369 (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

The Commission found that "subject imports from China compete[d] in a meaningful way with the domestic industry's PVLT tires" and that the competition "depend[ed] primarily on price." Commission Views at 33–34. The Commission supported its conclusions by relying on a number of subsidiary findings, including that: (i) the domestic like product consisted of all PVLT tires; (ii) there was a moderate to high degree of substitutability between the domestic like product and subject imports; (iii) there was significant overlap in the competition between domestic producers and importers of subject merchandise; and (iv) price was an important purchasing factor. *See id.* at 9–11, 25–34. As explained below, these subsidiary findings were supported by substantial evidence on the record and validated the Commission's conclusions that the competition between subject imports and domestic tires was meaningful and depended primarily on price.

First, the Commission defined the domestic like product to consist of all PVLT tires, despite variations in size and design features. *See id.* at 9–11. The Commission observed that all PVLT tires are produced from the same basic raw materials,[11] have the same basic components,[12] and are used for mounting on wheels of passenger vehicles and light trucks. *See id.* at 9 (citing Staff Report at I-17–I-21). The Commission noted that PVLT tires are generally produced using common manufacturing facilities, production equipment, production processes, and employees. *See id.* at 9–10 (citing Staff Report at I-24–I-30). These characteristics are common to all PVLT tires, regardless of whether the tires are produced domestically or in China.

[11] PVLT tires are made of "approximately 40 percent rubber (natural and synthetic) by weight, 28 percent carbon black reinforcement, 17 percent reinforcing fabric body ply and other additives, and 15 percent steel (belts and bead wire)." Staff Report at I-17.

[12] The basic components of PVLT tires include an inner liner, body ply, sidewall beads, belt package, and tread. *See* Commission Views at 9 (citing Staff Report I-17–I-21).

Id. at 11. The Commission also noted that "customers and producers view PVLT tires as a single product category." *Id.*

Second, the Commission found that there is a moderate to high degree of substitutability between the domestic like product and subject imports. *See id.* at 25–27. Producers in both the United States and China manufacture PVLT tires in "a broad range of sizes, styles, and performance characteristics." *Id.* at 25 (citing Staff Report at I-22–I-25, II-32, Tables V-5– V-10). PVLT tires of the same size can fit the same vehicles and be used interchangeably even if the tires have different style and performance characteristics. *See id.* at 11, 25–26; Staff Report at Table II-17 (producers, importers, and purchasers reported that domestic PVLT tires and PVLT tires from China are "always" or "frequently" interchangeable), V-8 n.12 (questionnaire responses provided that different speed ratings do not affect comparability of products). The Commission also noted that the majority of responding purchasers reported that PVLT tires produced in the United States and in China are "'comparable' in terms of discounts offered, extension of credit, packaging, private label, product consistency, quality both meets and exceeds industry standards, reliability of supply, and U.S. transportation costs." *Id.* at 26 (citing Staff Report at II-39, Table II-16). All PVLT tires sold in the U.S. market must meet certain safety standards and marking requirements set by the National Highway Traffic Safety Administration and the U.S. Department of Transportation. *See* Staff Report at II-1. The record supports the Commission's finding that there was a moderate to high degree of substitutability between subject imports and domestic PVLT tires.

Third, the Commission found that there was significant overlap in the competition between domestic PVLT tires and subject imports. *See* Commission Views at 26–30. Domestic producers and importers of subject merchandise: (1) supplied the market with branded and private-label tires,[13] (2) had a larger share of shipments that involved branded tires, (3) sold tires in the OEM and replacement segments of the market,[14] (4) directed a larger share of shipments to the replacement segment of the market, and (5) sold PVLT tires in the same geographic regions in the United States. *See id.* at 27–30; Staff Report at Tables II-1, II-3, II-5, III-7, IV-7 (tabulating market share by

[13] The Commission defined 'branded' tires as "those produced or packaged for sale under the name of the manufacturer of the tire or a brand name owned by that manufacturer." Commission Views at 27–28 (citing Staff Report at III-21 n.27). The Commission defined 'private-label' tires as "those that are produced or packaged for sale under a name other than the manufacturer's name or a brand name owned by that manufacturer." *Id.*

[14] PVLT tires in the OEM segment are sold to manufacturers for mounting on new vehicles or trucks, and PVLT tires in the replacement segment are sold to distributors and retailers for replacing existing tires on a vehicle. *See* Commission Views at 21 (citing Staff Report at II-1).

segment, channels of distribution, geographic markets, shipments of branded tires, and shipments of private-label tires). This record evidence supported the Commission's finding.

Fourth, the Commission found that price was an important purchasing factor. *See* Commission Views at 26–27, 34. The Commission observed that PVLT tires in the market differed based on brand, quality, and price. *See id.* at 31–32, 34 (citing Staff Report at II-12 and App. D). The Commission observed that prices of private-label tires influence what purchasers are willing to pay for branded tires, prices of tires in the replacement segment influence what purchasers are willing to pay for tires in the OEM segment, and prices of lower-category tires influence what purchasers are willing to pay for higher-category tires. *See id.* at 49 n.232, 49 n.235, 50 n.236. Half of the responding U.S. producers and a majority of importers and purchasers reported that differences other than price were "'sometimes' or 'never' important when comparing PVLT tires made in the United States and China." *Id.* at 27 (citing Staff Report at Table II-19). The Commission reasonably found that price was an important factor for customers who purchase PVLT tires in the domestic market.

Each of the above findings was supported by substantial evidence on the record. The Commission relied on these findings and reasonably concluded that the competition between imports of PVLT tires from China and domestically-produced PVLT tires was meaningful and based primarily on price. Therefore, the Commission's findings regarding the conditions of competition were supported by substantial evidence.

ITG Voma and CRIA maintain, however, that the competition between subject imports and domestically-produced PVLT tires was "attenuated." *See* ITG Voma Rule 56.2 Br. 34–42; CRIA Rule 56.2 Br. 23–36. To support their position, ITG Voma and CRIA argue that subject imports were not competitive with domestic PVLT tires because the PVLT tires sold in the OEM segment were predominantly domestically-produced or imported from non-subject producers.[15] *See* ITG Voma Rule 56.2 Br. 34–37; CRIA Rule 56.2 Br. 23–27. This argument fails to persuade the court that the Commission's finding is unsupported by substantial evidence. ITG Voma and CRIA would prefer to have the Commission analyze the OEM and replacement segments of the market independently, but the law imposes no such requirement on the Commission. *See Far E. Textile Ltd. v. U.S. Int'l*

[15] Between [[ ]] and [[ ]] percent of the PVLT tires sold in the OEM segment of the market during the period of investigation were manufactured by domestic producers. *See* Staff Report at Table II-1. Between [[ ]] and [[ ]] percent were manufactured by non-subject producers. *See id.* Imports from China were responsible for between [[ ]] and [[ ]] percent of the PVLT tires sold in the OEM segment. *See id.*

Trade Comm'n, 25 CIT 999, 1004 (2001) (citing *Makita Corp. v. United States*, 21 CIT 734, 755, 974 F. Supp. 770, 788 (1997)). ITG Voma and CRIA have not cited to any authority that required the Commission to engage in a segmented analysis in this investigation. The Commission elected to analyze the market as a whole and supported its competition findings with substantial evidence. The Commission acknowledged that the vast majority of tires in the OEM segment were supplied by domestic producers and non-subject imports, but noted that "the replacement segment accounted for a larger share of the U.S. market . . . than the OEM segment."[16] *See* Commission Views at 21, 29 (citing Staff Report at Tables II-1 and II-3). Even though domestic producers were responsible for the vast majority of PVLT tires sold in the OEM market, domestic producers' shipments to OEMs accounted for a modest portion of their total shipments during the period of investigation.[17] *See* Commission Views at 44–45 (citing Staff Report at Table II-3). Most of the PVLT tires manufactured by domestic producers were directed to the replacement segment of the market.[18] The fact that a substantial proportion of both domestically-produced PVLT tires and subject imports were sold in the larger replacement segment[19] of the market supports the Commission's conclusion that PVLT tires produced in the United States competed with tires produced in China.

ITG Voma and CRIA argue that the competition between subject imports and domestic tires was attenuated because the U.S. PVLT tire market was divided into distinct categories and subject imports did not compete with higher-category tires. *See* ITG Voma Rule 56.2 Br. 38–42; CRIA Rule 56.2 Br. 27–36. The argument of ITG Voma and CRIA is unavailing because the Commission reasonably found that the U.S. PVLT tire market was not divided into clear and distinct categories of tires based on brand, quality, and price. *See* Commission Views at 29–34. A majority of responding U.S. producers reported

[16] The replacement segment accounted for approximately [[ ]] percent and the OEM segment accounted for approximately [[ ]] percent of the U.S. market. *See* Commission Views at 21 (citing Staff Report at Table II-3). The record evidence indicated that the replacement segment was growing, given that "[t]he average age of U.S. vehicles on the road increased by almost 18 percent over the past decade." *Id.* at 21–22 (citing Staff Report at 4).

[17] Shipments to the OEM segment of the market accounted for slightly more than 25 percent of domestic producers' total U.S. shipments and about 20 percent of domestic producers' total production. *See* Staff Report at Tables II-3 and III-5.

[18] Shipments to the replacement segment of the market accounted for slightly less than 75 percent of domestic producers' total U.S. shipments and about 55 percent of domestic producers' total production. *See* Staff Report at Tables II-3 and III-5.

[19] Shipments to the replacement segment of the market accounted for slightly less than 75 percent of all PVLT tires imported from China. *See* Staff Report at Tables II-3 and IV-2.

that the market was not divided into categories. *See id.* at 31 (citing Staff Report at II-11). Most importers and purchasers reported that the market was divided, but there was wide disagreement regarding the divisions in the market. *See id.* at 31–33. Aside from some agreement regarding top-tier PVLT tires,[20] the record contained conflicting information regarding the number of categories in the market, the characteristics that differentiated one category from another, where specific brands fell within these alleged categories, and the size of each category. *See id.* at 31–32 (citing Staff Report at II-11, App. D, Table II-4). The Commission recognized that PVLT tires in the market differed based on brand, quality, and price, but found that the conflicting information in the record did not warrant finding clear divisions in the market.[21] *See id.* at 34. The Commission found that domestic PVLT tires and subject imports competed across product categories, regardless of how the categories of tires in the market are defined. *See id.* (citing Staff Report at App. D). Substantial evidence in the record supported the Commission's finding that the market was not divided into clear and distinct categories of tires based on brand, quality, and price.

ITG Voma and CRIA assert that the competition in the U.S. PVLT tire market was based primarily on brand, rather than price. *See* ITG Voma Rule 56.2 Br. 38–42; CRIA Rule 56.2 Br. 27–36. The Commission recognized that brand influenced the prices that consumers were willing to pay for PVLT tires because "brand names communicate the quality and performance of the tire" and "consumers are willing to pay more for the perception of higher quality and performance levels." Commission Views at 28 (citing Staff Report at II-34–II-35). Most purchasers reported, however, that brand is not an important factor in purchasing PVLT tires. *See id.* at 49 n.234 (citing Staff Report at Table II-11). Some consumers confirmed that they would pay a higher price for a better brand, but also stated that the importance of brand

[20] Parties that responded to questionnaires agreed that top-tier PVLT tires possessed the following characteristics: "higher price, better/premium quality, strong and sophisticated marketing and retail programs, brand recognition, mileage warranty, major original equipment manufacturers, and high level of technology." Commission Views at 32 n.154. Responding parties most frequently identified Bridgestone, Continental, Goodyear, Michelin, and Pirelli as suppliers of top-tier tires. *See id.* at 32 n.155 (citing Staff Report at II-12 and App. D).

[21] The Commission also noted that it previously confronted this issue and reached the same conclusion in the section 421 investigation that investigated subject imports between 2004 and 2008. *See* Commission Views at 30 (citing *Certain Passenger Vehicle and Light Truck Tires From China*, USITC Pub. 4085 at 21, Inv. No. TA-421–7 (July 2009), *available at* https://www.usitc.gov/publications/safeguards/pub4085.pdf (last visited July 10, 2017)).

diminishes if the price gap is large.[22] *See id.* The Commission also noted that PVLT tires marked with domestic producers' brand names sometimes were manufactured domestically and other times were manufactured in China because domestic producers imported PVLT tires from China. *See id.* at 32 n.155, 34 n.164 (citing Staff Report at Tables III-9, E-1, and E-2). It was reasonable for the Commission to conclude that the competition in the market was based primarily on price due to the degree of substitutability among PVLT tires, the overlap in competition in the market, and the importance of price in purchasing PVLT tires.

The court holds, therefore, that the Commission's findings regarding the conditions of competition in the U.S. PVLT tire market were supported by substantial evidence.

c. The Commission's Volume Determination

ITG Voma argues that the Commission's volume determination was not supported by substantial evidence because the volume and increase in volume of subject imports from China were not significant. *See* ITG Voma Rule 56.2 Br. 29–34. Defendant maintains that its volume determination was supported by substantial evidence. *See* Def. Resp. Br. 18–20.

The ITC is required to consider the volume of subject imports in determining whether a domestic industry has been materially injured. *See* 19 U.S.C. § 1677(7)(C)(i). When evaluating volume, the Commission must consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i); *see also Nucor Corp. v. United States*, 414 F.3d 1331, 1335 (Fed. Cir. 2005). The statute does not define what is considered 'significant' because, "[f]or one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant." *See* S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474. The court will uphold the Commission's volume determination unless it is unsupported by substantial evidence in the record. *See Siemens Energy, Inc.*, 806 F.3d at 1369 (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

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[22] Subject imports undersold domestic tires with sizeable and increasing margins throughout the period of investigation. *See* Commission Views at 46. According to pricing data obtained for six PVLT tire products, the Commission found that "subject imports undersold the domestic like product in 72 of 72 possible quarterly comparisons, or 100 percent of the time, at margins reaching as high as [[ ]] percent and averaging [[ ]] percent." *Id.* (citing Staff Report at Tables V-5–V-10).

The Commission found that the volume and increase in volume of subject imports from China was significant in absolute terms and relative to consumption and production in the United States. *See* Commission Views at 41–45. The volume of subject imports and domestic consumption increased progressively during the period of investigation,[23] but the volume of subject imports increased at a much faster rate.[24] *See id.* at 41–42 n.194–96 (citing Staff Report at Tables IV-6 and C-2). Subject imports benefitted from the increased consumption and nearly doubled their share of the domestic market,[25] whereas domestic producers experienced an overall decline in shipments and loss of market share.[26] *See id.* at 42 n.197. Domestic producers and importers of subject merchandise reported modest increases in shipments in the smaller OEM segment of the market.[27] *See* Staff Report at Table II-3. In the larger replacement segment, domestic producers' shipments declined by 4 million tires and shipments of subject imports increased by 17 million tires. *See id.* The replacement segment grew at a rate of 9.1 percent during the period of investigation and subject imports in that segment increased by 72.7 percent. *See* Commission Views at 45 (citing Staff Report at II-7). The Commission noted that the increasing presence of subject imports was apparent when considered relative to U.S. production.[28] *See id.* at 42 n.198. The Commission also noted that non-subject imports' share of the market declined during the period of

[23] A total of 31.4 million tires were imported from China in 2012 and 58.0 million tires were imported from China in 2014. *See* Commission Views at 41 n.194 (citing Staff Report at Tables IV-6 and C-2). Domestic consumption increased from 274.3 million tires in 2012 to 301.0 million tires in 2014. *See id.* at 41 n.195.

[24] Domestic consumption increased at an overall rate of 9.7 percent during the period of investigation, whereas subject imports increased at an overall rate of 84.3 percent. *See* Commission Views at 41–42 n.196 (citing Staff Report at Table C-2).

[25] Subject imports increased their share of the market from 11.5 percent in 2012 to 19.3 percent in 2014, for an overall increase of 7.8 percent. *See* Commission Views at 42 n.198 (citing Staff Report at Tables IV-6 and C-2).

[26] Shipments of domestically-produced PVLT tires declined from [[ ]] tires in 2012 to [[ ]] tires in 2014, for an overall decline of [[ ]] percent. *See* Commission Views at 42 n.197 (citing Staff Report at Table C-2). Domestic producers' share of the market declined from [[ ]] percent in 2012 to [[ ]] percent in 2014, for an overall loss of [[ ]] percent. *See id.* at 42 n.199 (citing Staff Report at Table C-2).

[27] Domestic producers increased shipments by 800,000 tires and importers of subject merchandise increased shipments by 27,000 tires. *See* Staff Report at Table II-3.

[28] "The ratio of subject imports to domestic production was [[ ]] percent in 2012, [[ ]] percent in 2013, and [[ ]] percent in 2014." *See* Commission Views at 42 n.198 (citing Staff Report at Table C-2).

investigation.[29] *See id.* at 42 n.199, 44 n.208. The increase in volume of subject imports amounted to substantial evidence in the record that supported the Commission's conclusion.

ITG Voma argues, however, that the Commission failed to explain why the volume of subject imports was significant in light of the domestic industry's strong financial performance and capacity constraints. *See* ITG Voma Rule 56.2 Br. 29–33. The statute requires the Commission to determine "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). ITG Voma's argument presumes incorrectly that the Commission is required by law to consider the domestic industry's condition and financial performance in its volume analysis. Rather, the Commission must consider the domestic industry's condition and financial performance when analyzing whether subject imports adversely impacted the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(iii). The court will not "ask more of the Commission than required by the statute." *Altx, Inc. v. United States*, 370 F.3d 1108, 1123 (Fed. Cir. 2004).

The court holds that the Commission's volume determination was supported by substantial evidence.

d. The Commission's Impact Determination

ITG Voma and CRIA challenge the Commission's impact determination as unsupported by substantial evidence. *See* ITG Voma Rule 56.2 Br. 7–11, 14–27; CRIA Rule 56.2 Br. 6–22, 44–45. They argue that the Commission failed to consider a number of the statutory impact factors and failed to address detracting evidence in the record regarding the domestic industry's overall health and strong financial performance throughout the period of investigation. *See* ITG Voma Rule 56.2 Br. 9–10, 14–34; CRIA Rule 56.2 Br. 7 n.2, 10–22, 44–45. Defendant contends that its impact determination was supported by substantial evidence. *See* Def. Resp. Br. 20, 24–43.

As part of the material injury analysis, the Commission must consider "the impact of [subject imports] on domestic producers of domestic like products, but only in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(III). The statute specifies a number of factors that are relevant in determining whether subject imports have had an adverse impact on domestic producers:

[29] The volume of PVLT tires imported from non-subject countries increased slightly, but the share of non-subject imports in the market fell from 41.9 percent in 2012 to 38.8 percent in 2014. *See* Commission Views at 42 n.199, 44 n.208 (citing Staff Report at Tables II-3 and C-2).

(I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,

(II) factors affecting domestic prices,

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,

(IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). The Commission is directed to "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). No single factor is dispositive and "the significance to be assigned to a particular factor is for the ITC to decide." *See* S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.

Here, the Commission determined that subject imports had a significant adverse impact on the domestic industry. *See* Commission Views at 53–58. The Commission acknowledged that the domestic industry was increasingly profitable during the period of investigation due to increasing domestic consumption and declining raw material costs. *See id.* at 55. Operating income, gross profits, and net income all increased for the domestic industry.[30] *See id.* at 55 n.250. The Commission explained, however, that this strong financial performance did not accurately represent the state of the domestic industry. Domestic producers experienced an overall decline in domestic shipments, net sales volume, net sales value, production,

[30] Operating income increased from $[[ ]] in 2012 to $[[ ]] in 2014, gross profits increased from [[ ]] percent in 2012 to [[ ]] percent in 2014, and net income increased from $[[ ]] in 2012 to $[[ ]] in 2014. *See* Commission Views at 55 n.250 (citing Staff Report at Table C-2).

employment, and productivity.[31] *See id.* at 55 (citing Staff Report at Table C-2). The U.S. PVLT market was growing, but the domestic industry's stagnation resulted in a loss of market share.[32] *See id.* Domestic producers made sizeable expenditures for capital improvements, research, and development in order to keep up with the increasing demand, expand capacity, and upgrade equipment; but these expenditures were to no avail, as production capacity declined overall by the end of the period of investigation.[33] *See id.* at 56. Even with the decline in production capacity, the Commission found that the domestic industry was not operating at full capacity and thus was capable of supplying the additional demand and consumption of PVLT tires.[34] *See id.* at 57. The Commission reasoned that the domestic industry could have obtained additional revenue by using its available capacity to produce and sell more PVLT tires. *See id.* at 58. In light of the record evidence, the Commission's determination that subject imports adversely impacted the domestic industry was reasonable. The Commission considered the statutory impact factors, explained its findings, and relied upon substantial evidence in the record to support the conclusion that the domestic industry was adversely impacted by subject imports.

ITG Voma and CRIA argue that the Commission's impact analysis was not supported by substantial evidence because the Commission failed to consider new statutory impact factors added by the TPEA, specifically the domestic industry's ability to service debt and return

[31] U.S. shipments declined from [[ ]] tires in 2012 to [[ ]] tires in 2014. *See* Commission Views at 55 n.252 (citing Staff Report at Table C-2). Net sales volume was [[ ]] tires in 2012 and [[ ]] tires in 2014. *See id.* at 55 n.253 (citing Staff Report at Table C-2). Net sales value was $[[ ]] in 2012 and $[[ ]] in 2014. *See* id. at 55 n.254 (citing Staff Report at Table C-2). Domestic production declined from [[ ]] tires in 2012 to [[ ]] tires in 2014. *See id.* at 55 n.255 (citing Staff Report at Table C-2). Hourly wages for employees increased, but the average number of production and related workers employed declined from [[ ]] in 2012 to [[ ]] in 2014. *See id.* at 55 n.256 (citing Staff Report at Table C-2). Productivity was [[ ]] PVLT tires per hour in 2012 and [[ ]] tires per hour in 2014. *See id.*

[32] Domestic consumption of PVLT tires increased at an overall rate of 9.7 percent during the period of investigation. *See* Commission Views at 42 n.196 (citing Staff Report at Table C-2). The record indicated that the larger replacement segment of the market was continuing to grow as "[t]he average age of U.S. vehicles on the road increased by almost 18 percent over the past decade." Commission Views at 21–22 (citing Staff Report at II-4). Despite this growth, the domestic industry's share of the market fell from [[ ]] percent in 2012 to [[ ]] percent in 2014. *See* Commission Views at 55 n.257 (citing Staff Report at Table C-2).

[33] The domestic industry incurred a total of over $[[ ]] in capital expenditures and approximately $[[ ]] in research and development expenses during the period of investigation. *See* Commission Views at 56 n.259 (citing Staff Report at Tables VI-4 and C-2).

[34] The highest capacity utilization rate achieved during the period of investigation was [[ ]] percent in 2012. *See* Commission Views at 57 n.264 (citing Staff Report at Table C-2).

on assets. *See* ITG Voma Rule 56.2 Br. 9–11; CRIA Rule 56.2 Br. 7 n.2. The Commission considered the impact factors added by the TPEA in making its final determination. *See* Commission Views at 53 n.245. The statute requires the Commission to consider a number of factors in assessing the impact on the domestic industry. *See* 19 U.S.C. § 1677(7)(C)(iii). Other than highlighting the fact that the Commission did not provide a lengthy discussion, ITG Voma and CRIA have not supplied the court with any reason to believe that the Commission failed to consider the factors added by the TPEA in making its final determination. *See* 28 U.S.C. § 2639(a)(1) (providing that injury determinations made by the ITC are presumed to be correct and the burden of proving otherwise rests upon the challenging party). Consideration of a factor does not require an in-depth discussion of that factor and the court will not "ask more of the Commission than required by the statute." *Altx, Inc.*, 370 F.3d at 1123. ITG Voma asserts that the statute required the Commission to supply a more robust explanation. *See* ITG Voma Rule 56.2 Br. 10 (citing 19 U.S.C. § 1677f(i)(3)). The statutory provision that ITG Voma relies upon, however, is merely a codification of the Commission's pre-existing requirement to support its final determination with substantial evidence in the record. *See Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354–57 (Fed. Cir. 2005).

ITG Voma and CRIA also argue that the Commission failed to address detracting evidence in the record regarding the domestic industry's strong financial performance during the period of investigation. *See* ITG Voma Rule 56.2 Br. 14–27; CRIA Rule 56.2 Br. 10–15. To the extent that ITG Voma and CRIA argue that a profitable industry cannot be materially injured, the statute expressly proscribes the Commission from reaching such a conclusion. *See* 19 U.S.C. § 1677(7)(J).[35] The Commission acknowledged that the domestic industry was increasingly profitable, but noted that this was "not unexpected during a period of increasing apparent U.S. consumption and declining raw material costs for natural and synthetic rubber." Commission Views at 55. The Commission reasonably decided to assign greater weight to other factors, which indicated that the domestic industry was in decline or in a state of stagnation when the PVLT tire market was growing. *See id.* at 55–56; *see also* S. Rep. No. 96–249, at

[35] "The Commission may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved." 19 U.S.C. § 1677(7)(J).

88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474 ("[T]he significance to be assigned to a particular factor is for the ITC to decide."). According to the Commission's analysis, the domestic industry could have been even more profitable.

CRIA argues that domestic producers shifted production to higher-value and more profitable PVLT tires and ceded their share of the market for lower-value PVLT tires. *See* CRIA Rule 56.2 Br. 36–39. This argument is unavailing because it assumes that higher-value domestically-produced PVLT tires do not compete with subject imports. As explained above, the Commission found substantial evidence in the record indicating that subject imports competed with PVLT tires across the market, regardless of differences in brand, quality, and price. *See* Commission Views at 34 (citing Staff Report at App. D). Subject imports were competitive with both higher- and lower-value domestic PVLT tires.

ITG Voma and CRIA argue that subject imports did not adversely impact the domestic industry because domestic producers already operated at full capacity during the period of investigation. *See* ITG Voma Rule 56.2 Br. 17–22; CRIA Rule 56.2 Br. 15–22. The Commission addressed this argument in its final determination and cited substantial evidence showing that the domestic industry had available capacity.[36] The Commission noted that the highest capacity utilization rate experienced during the period of investigation was considerably lower than the utilization rate of 96.3 percent achieved in 2004, which was the first year in the period of investigation for the section 421 safeguard proceeding. *See id.* at 57 n.266 (citing USITC Pub. 4085 at 16). Domestic producers confirmed that they had additional capacity during the period of investigation, and USW reported that domestic production increased after the petitions were filed. *See id.* at 58. The record supported a finding that the domestic industry had available capacity to produce and sell more PVLT tires. ITG Voma and CRIA argue that whatever available capacity the domestic industry had was insufficient to supply the total increased demand

[36] The Commission observed the following regarding the domestic industry's capacity utilization during the period of investigation:

> The domestic industry's capacity utilization declined from [[ ]] percent in 2012 to [[ ]] percent in 2013 when subject imports surged into the U.S. market after the safeguard measure expired, so in 2013 the domestic industry did not operate at the higher level that it had achieved in 2012. After the petitions in these investigations were filed in June 2014 and the monthly volume of subject imports from China declined between July and December 2014, the domestic industry was able to increase its capacity utilization for full-year 2014 to [[ ]] percent.

Commission Views at 57 (internal footnotes omitted).

for PVLT tires, *see* ITG Voma Rule 56.2 Br. 31–32; CRIA Rule 56.2 Br. 15– 22, but this does not undermine the Commission's finding that the domestic industry had unused available capacity.

ITG Voma argues that the Commission cannot rely on its price effects analysis to support its impact determination because the Commission found that subject imports did not depress or suppress prices of the domestic like product to a significant degree. *See* ITG Voma Rule 56.2 Br. 27–28. ITG Voma's argument fails for two reasons. First, ITG Voma's argument misstates the Commission's findings. In its price effects analysis, the Commission found that low-priced subject imports undersold the domestic like product significantly and there was an overall decline in domestic tire prices during the period of investigation, but there was insufficient evidence in the record for the Commission to conclude that subject imports depressed or suppressed prices. This did not amount to a finding that subject imports did not depress or suppress prices as ITG Voma claims. Rather, the Commission was unable to make a finding regarding price depression or suppression because it was unclear from the record whether it was the underselling or the decline in raw material costs that was responsible for lowering the prices of domestic tires. Second, ITG Voma's argument presumes incorrectly that price depression or suppression is required to find that imports have had an adverse effect on domestic prices. The statute directs the Commission to consider price effects by separately considering whether there has been significant underselling and whether subject imports depressed or suppressed domestic prices to a significant degree. *See* 19 U.S.C. § 1677(7)(C)(ii). Although there was insufficient evidence in the record for the Commission to make a finding regarding price depression or suppression, the Commission found that the low-priced subject imports significantly undersold the domestic like product. This underselling resulted in loss of shipments and market share for domestic producers, even though domestic demand and consumption increased. The Commission concluded, therefore, that subject imports had an adverse effect on the price of domestic tires because significant underselling by subject imports put competitive pressure on the domestic industry. The Commission was not required to find price depression or suppression in order to find that subject imports adversely affected domestic prices. *See Grupo Ind. Camesa v.* United States, 85 F.3d 1577, 1582 (Fed. Cir. 1996); *Cleo Inc. v. United States*, 30 CIT 1380, 1396 (2006), *aff'd*, 501 F.3d 1291 (Fed. Cir. 2007). The Commission's price effects analysis supported its determination that subject imports adversely impacted the domestic industry.

The court holds that the Commission's impact determination was supported by substantial evidence.

e. The Commission's Causation Determination

ITG Voma and CRIA argue that the Commission's causation determination was unsupported by substantial evidence because any material injury incurred by the domestic industry was not attributable to imports of PVLT tires from China. *See* ITG Voma Rule 56.2 Br. 34–44; CRIA Rule 56.2 Br. 15–22, 36–44. Defendant argues that it relied upon substantial record evidence in determining that the domestic industry was materially injured by reason of subject imports. *See* Def. Resp. Br. 36–43.

The Commission must determine whether the injury to the domestic industry was "by reason of" the subject imports. *See* 19 U.S.C. § 1671d(b)(1), 1673d(b)(1). Subject imports do not need to be the sole, principal, substantial, or significant cause of the material injury. *See Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003); S. Rep. No. 96–249, at 57, 74 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 443, 460. The causation element of the material injury analysis is satisfied "so long as the effects of [the subject imports] are not merely incidental, tangential, or trivial." *Nippon Steel Corp.*, 458 F.3d at 1357 (citing *Gerald Metals*, 132 F.3d at 721–22). The Commission is not required "to employ any particular methodology for determining whether this causation element has been met." *See Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006) (citing *United States Steel Grp. v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996)). "The Commission is simply required to give full consideration to the causation issue and to provide a meaningful explanation of its conclusions." *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 878 (Fed. Cir. 2008) (citing *Bratsk*, 444 F.3d at 1376).

The Commission found that there was a causal nexus between subject imports and the state of the domestic industry because subject imports were good substitutes for domestically-produced PVLT tires, the volume and increase in volume of subject imports were significant,[37] subject imports undersold the domestic like product at signifi-

[37] The Commission noted that information in the record suggested that the surge of subject imports following the expiration of the section 421 safeguard measure stymied the domestic industry's expansion efforts. *See* Commission Views at 56 n.262. The volume of subject imports steadily increased until the antidumping and countervailing duty petitions were filed in 2014, at which point domestic producers were able to increase production, capacity expansion plans, and new product launches. *See* Commission Views at 57–58.

cant margins,[38] and competitive low-priced PVLT tires from China put pricing pressure on tires throughout the market and gained market share at the domestic industry's expense.[39] *See id.* at 53–58. The Commission also found that the domestic industry had available capacity, and the surge of subject imports prevented domestic producers from increasing production and selling more PVLT tires. *See id.* at 54–58. For these reasons, the Commission concluded that, "because of subject imports, the domestic industry had fewer shipments and consequently obtained lower revenues than it would have otherwise had." *Id.* at 58.

The Commission also considered whether factors other than subject imports had an adverse impact on the domestic industry during the period of investigation, in order to ensure that the Commission was not attributing injury from other factors to the subject imports. *See id.* at 58–60. Demand and consumption did not adversely impact the domestic industry because both increased during the period of investigation. *See id.* at 58–59. Production costs did not adversely impact domestic producers because the cost of raw materials declined. *See id.* at 59. The Commission examined the role of non-subject imports, noting that Canada and Korea were the two largest sources of PVLT tires from non-subject countries. *See id.* at 59–60 (citing Staff Report at Table IV-3). Non-subject imports increased during the period of investigation, but their share of the market declined.[40] *See id.* (citing Staff Report at Table C-2). Because non-subject imports consisted predominantly of branded PVLT tires and were frequently priced higher than subject imports, the Commission reasoned that the domestic industry's loss in market share and reduced shipments were adverse effects caused by subject imports. *See id.* at 59–60. The Commission determined, therefore, that the domestic industry was materially injured by reason of subject imports. *See id.* at 60. The court finds that substantial evidence in the record supported the Commission's causation determination.

ITG Voma and CRIA claim that the Commission improperly analyzed whether imports from non-subject countries caused the mate-

[38] As noted earlier in this opinion, the Commission found that "subject imports undersold the domestic like product in 72 of 72 possible quarterly comparisons, or 100 percent of the time, at margins reaching as high as [[ ]] percent and averaging [[ ]] percent." Commission Views at 46 (citing Staff Report at Tables V-5–V-10).

[39] Subject imports increased their share of the market from 11.5 percent in 2012 to 19.3 percent in 2014, while domestic producers' market share declined from [[ ]] percent in 2012 to [[ ]] percent in 2014. *See* Commission Views at 42 n.198–99 (citing Staff Report at Table C-2).

[40] PVLT tire imports from non-subject countries increased from 114.9 million tires in 2012 to 116.8 million tires in 2014, but their market share declined from 41.9 percent in 2012 to 38.8 percent in 2014. *See* Commission Views at 60 n.273 (citing Staff Report at Table C-2).

rial injury. *See* ITG Voma Rule 56.2 Br. 42–44; CRIA Rule 56.2 Br. 39–44. The court will affirm the Commission's causation determination if it considered other potential causes of harm to the domestic industry and provided a reasonable explanation that the harm was attributable to the imports under investigation. *See Mittal Steel*, 542 F.3d at 878 (citing *Bratsk*, 444 F.3d at 1376). The Commission considered factors other than subject imports and reasonably explained that non-subject imports were not the cause of the injury to the domestic industry because non-subject imports consisted of predominantly branded tires, were frequently priced higher than subject imports, and lost market share during the period of investigation. *See* Commission Views at 59–60. ITG Voma argues nonetheless that the record required the Commission to find that non-subject imports caused the alleged injury to the domestic industry because the increased volume of non-subject imports matched the domestic industry's decline in U.S. shipments over the period of investigation. *See* ITG Voma Rule 56.2 Br. 43. Without evidence of a causal nexus between the increased volume of non-subject imports and the decline in the domestic industry's U.S. shipments, ITG Voma fails to demonstrate that the Commission's determination was unsupported by substantial evidence. CRIA argues that the absence of subject imports would have resulted in an increase of non-subject imports rather than an increase in domestic production. *See* CRIA Rule 56.2 Br. 39–44. CRIA's argument implies that the Commission was required to explain why eliminating subject imports would benefit the domestic industry and would not result in non-subject imports replacing the role of subject imports in the market. The Commission reasonably found, however, that it was not required to engage in a counterfactual analysis in this case. *See* Commission Views at 38–40; *see also Mittal Steel*, 542 F.3d at 877–79 (clarifying the analysis required in *Bratsk*); *Bratsk*, 444 F.3d at 1373 (explaining that a counterfactual analysis is required when "commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market"). The Commission's analysis adequately addressed whether the material injury to the domestic industry was attributable to imports from non-subject countries.

ITG Voma and CRIA may disagree with the Commission's weighing of the record evidence, but are unable to show that the Commission's injury determination was unsupported by substantial evidence. Without a showing of a lack of substantial evidence, the court may not reweigh the evidence and will not disturb the conclusion reached by the agency. *See Downhole Pipe & Equip., L.P. v. United States*, 776

F.3d 1369, 1377 (Fed. Cir. 2015) (quoting *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992)). The court holds, therefore, that substantial evidence supported the Commission's determination that the domestic industry was materially injured by reason of subject imports.

CONCLUSION

For the foregoing reasons, the court concludes that: (1) the Commission did not deprive ITG Voma of due process; (2) the Commission's findings regarding competition in the U.S. PVLT tire market were supported by substantial evidence; (3) the Commission's volume determination was supported by substantial evidence; (4) the Commission's impact determination was supported by substantial evidence; and (5) the Commission's causation determination was supported by substantial evidence. Therefore, the court sustains the Commission's final determination in all respects and denies the Rule 56.2 motions for judgment on the agency record filed by ITG Voma and CRIA.

Judgement will be entered accordingly.

Dated: July 28, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–95

MOREX RIBBON CORP., PAPILLON RIBBON and BOW INC., and AD-TECK RIBBON, LLC, Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC VERSION
Before: Leo M. Gordon, Judge
Court No: 15–00141

[Commerce's final results sustained.]

Dated: August 1, 2017

Jonathan M. Zelinski, Cassidy Levy Kent (USA) LLP of Washington, DC argued for Plaintiffs Morex Ribbon Corp., Papillon Ribbon and Bow Inc., and Ad-Teck Ribbon, LLC (dba Wrap Ribbon). With him on the briefs were *James R. Cannon, Jr.* and *Ulrika K. Swanson*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Renée Gerber*, Trial Attorney. Of counsel was *Amanda T. Lee*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Gregory C. Dorris, Pepper Hamilton LLP of Washington, DC argued for Defendant-Intervenor Berwick Offray LLC.

OPINION

Gordon, Judge:

This action involves the third administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering narrow woven ribbons with woven selvedge ("NWR") from Taiwan. *See Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 80 Fed. Reg. 19,635 (Dep't of Commerce Apr. 13, 2015) (final results of admin. review), ECF No. 19–4 ("*Final Results*"), and accompanying *Issues and Decision Mem. for the Final Results of the Antidumping Duty Admin. Rev. on Narrow Woven Ribbons with Woven Selvedge from Taiwan*, A-583–844 (Dep't of Commerce Apr. 6, 2015) ("*Decision Mem.*"), ECF No. 19–5.

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record of Plaintiffs Morex Ribbon Corp., Papillon Ribbon and Bow Inc., and Ad-Teck Ribbon, LLC (collectively, "Plaintiffs" or "Morex"). *See* Pls.' R. 56.2 Mem. Supp. Mot. J. Agency R., ECF No. 23 ("Morex Br."); *see also* Def.'s Opp'n Pls.' Mot. J. Admin. R., ECF No. 29 ("Def.'s Resp."); Def.-Intervenor Berwick Offray LLC's Opp'n Pls.' Mot. J. Admin. R., ECF No. 33; Pls.' Reply Br. Supp. Mot. J. Agency R., ECF No. 37 ("Morex Reply"). The court has jurisdiction pursuant to

Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

I. BACKGROUND

Plaintiffs imported NWR from Hen Hao Trading Co. Ltd. a.k.a. Taiwan Tulip Ribbons and Braids Co. Ltd. ("Hen Hao"), a producer of NWR from Taiwan, during the period of review ("POR"). Each plaintiff paid cash deposits at the rate of 4.37%–the rate required by Commerce at the time of entry. Compl. ¶ 7. Commerce identified Hen Hao and another Taiwanese producer of NWR, King Young Enterprises Co., Ltd., along with King Young's affiliates, Ethel Enterprise Co., Ltd. and Glory Young Enterprise Co., Ltd. (collectively "King Young"), as mandatory respondents in the administrative review and forwarded questionnaires to them. *See Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 79 Fed. Reg. 60,449 (Dep't of Commerce Oct. 7, 2014) (prelim. results), PD 86[2]; *see also Decision Mem. for the Prelim. Results of the Admin. Rev. of the Antidumping Duty Order on Narrow Woven Ribbons with Woven Selvedge from Taiwan*, A-583–844 (Dep't of Commerce Sept. 25, 2014), PD 87.

King Young cooperated with Commerce during the administrative review and received a calculated rate of 30.64%. *Final Results*, 80 Fed. Reg. at 19,636. Hen Hao, on the other hand, withdrew from the review without submitting any information. *See* Hen Hao's Notice of Withdrawal, PD 25 at bar code 3186563–01 (Mar. 7, 2014). Consequently, Commerce applied facts available with an adverse inference[3] and assigned Hen Hao a total adverse facts available ("AFA") rate of 137.20%–the highest rate alleged in the petition ("Petition Rate"). *Decision Mem.* at 34.

In this action Plaintiffs challenge the assignment of the Petition Rate to Hen Hao. For the reasons set forth below, the court sustains Commerce's determination.

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[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[2] "PD" refers to a document contained in the public administrative record, which is found in ECF No. 19–1, unless otherwise noted. "CD" refers to a document contained in the confidential administrative record, which is found in ECF No. 19–2, unless otherwise noted.

[3] Under 19 U.S.C. § 1677e(a)(2), if Commerce finds that a respondent's information is unreliable because the respondent has withheld information that Commerce requests, failed to provide requested information in a timely manner or in the form or manner requested, or significantly impeded the progress of the proceeding, Commerce is required to calculate that respondent's margin using the facts otherwise available. Having decided to apply facts available, Commerce then may draw an adverse inference against a respondent in selecting from among the facts otherwise available when it finds that a respondent "has failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b).

II. STANDARD OF REVIEW

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., Administrative Law and Practice § 9.24[1] (3d ed. 2017). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A, West's Fed. Forms, National Courts § 3.6 (5th ed. 2017).

III. DISCUSSION

In a total AFA scenario Commerce typically cannot calculate an antidumping rate for an uncooperative respondent because the information required for that calculation was not provided. As a substitute, Commerce relies on other sources of information ("secondary information"), *e.g.*, the petition, the final determination from the investigation, prior administrative reviews, or any other information placed on the record, 19 U.S.C. § 1677e(b), to select a proxy that should be a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

When selecting an appropriate AFA proxy, Commerce's general practice is to choose the higher of (1) the highest rate alleged in the petition or (2) the highest margin rate calculated in any segment of the proceeding, "unless these rates cannot be corroborated or there

are case-specific reasons that these rates are not acceptable." *Decision Mem.* at 39 (citations omitted). The proxy's purpose "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *de Cecco*, 216 F.3d at 1032. Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (citing *de Cecco*, 216 F.3d at 1032); *see also Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004) ("Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance."). Commerce must select a rate that is a "'reasonably accurate estimate of the respondent's actual rate,'" *Gallant Ocean*, 602 F.3d at 1323 (quoting *de Cecco*, 216 F.3d at 1032), and has "some grounding in commercial reality." *Id.* at 1324; *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (Fed. Cir. 2016).[4]

Commerce, to the extent practicable, must corroborate secondary information with independent sources reasonably at its disposal. 19 U.S.C. § 1677e(c). In practice, "corroboration" involves confirming that secondary information has "probative value," 19 C.F.R. § 351.308(d) (2014), by examining its "reliability and relevance." *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007) (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,711, 54,712–13 (Dep't of Commerce Sept. 16, 2005) (final results admin. revs.)).

A. AFA RATE SELECTION

In the *Final Results* Commerce considered the following choices for an AFA rate for Hen Hao: (1) the Petition Rate of 137.20% (the highest rate alleged in the petition); (2) 4.37% (the only affirmative dumping margin calculated in the less than fair value investigation); (3) 30.64% (the weighted-average margin calculated for King Young in the current segment of the proceeding); and (4) various margins calculated using a subset of King Young's data. *Decision Mem.* at 39. In selecting an AFA rate for Hen Hao, Commerce determined that the Petition Rate was the only rate that was sufficient to deter non-

[4] The court notes that Congress amended the antidumping duty statute to *eliminate the* requirement that a total AFA proxy reflect a respondent's "commercial reality." *See* Trade Preferences Extension Act of 2015. Pub.L. No. 114–27, 129 Stat. 362 (2015). "Commerce is . . . no longer required to tie an AD duty margin to the 'commercial reality' of the interested party." *Fresh Garlic Producers Association v. United States*, 39 CIT ___, 121 F. Supp. 3d 1313, 1329 (2015). That amended provision does not apply to this action.

compliance. *Id.* Commerce reasonably determined that the 4.37% rate would not sufficiently deter non-compliance because it is Hen Hao's current cash deposit rate and "at this rate Hen Hao's NWR has continued to be imported into the United States." *Id.*(citing Mem. Regarding Release of Customs Entry Data from U.S. Customs and Border Protection, PD 6 at bar code 3164169–01, CD 1 at bar code 3164167–01 (Nov. 19. 2013)). Commerce also reasonably determined that the 30.64% rate would not deter noncompliance because it was the actual calculated dumping rate assigned to King Young, the sole cooperative respondent for the POR. *Id.* Additionally, Commerce declined to choose a rate calculated using a subset of King Young's data, finding that use of a contemporaneous rate calculated for a cooperative respondent "would be at odds with the statutory purpose of AFA to induce cooperative behavior." *Id.* at 40. That left the Petition Rate of 137.20%.

Plaintiffs contend that the AFA rate is unreasonably high because as independent importers they will be responsible to pay the increased duties, even though they had no control over Hen Hao's decision to withdraw from the administrative review. Morex Br. 9. This very scenario was alluded to by the U.S. Court of Appeals for the Federal Circuit in *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010). There, plaintiff KYD, an independent U.S. importer of polyethylene retail carrier bags, challenged Commerce's assignment of the petition rate, as AFA, to an uncooperative foreign producer and exporter of the subject merchandise. KYD argued that "Commerce should apply AFA rates only against uncooperative parties" and that "a cooperative, independent importer should not be required to pay an assessment based on an AFA dumping margin imposed on an uncooperative producer/exporter." *Id.* at 768.

The Federal Circuit rejected KYD's argument because it "would allow an uncooperative foreign exporter to avoid the adverse inferences permitted by statute simply by selecting an unrelated importer, resulting in easy evasion of the means Congress intended for Commerce to use to induce cooperation with its antidumping investigations." *Id.* The court also recognized that in some cases "domestic importers will have to pay enhanced antidumping margins because of the uncooperativeness of the exporters from whom they purchase goods," and that the possibility that U.S. importers would have to pay increased duties was consistent with the intent behind the statute permitting the use of AFA. *Id.* ("In the aggregate, . . . the importers' exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal or doing so indirectly, by leaving uncoop-

erative exporters without importing partners who are willing to deal in their products."). Therefore, the possibility that Plaintiffs as domestic (U.S.-based) importers may bear contingent liability resulting from the uncooperative behavior of its unaffiliated exporter cannot invalidate Commerce's AFA rate selection.

Next, Plaintiffs argue that Commerce unreasonably failed to consider as a mitigating factor Hen Hao's reasons for failing to comply with Commerce's requests for information. Morex Br. 12. Specifically, Morex contends that Hen Hao's failure to comply was not the result of a business decision that Hen Hao would gain a better or equivalent rate by not cooperating. Rather the burden of responding to those requests was "simply beyond the capabilities of [Hen Hao's] employees." *Id.* (quoting Hen Hao's Notice of Withdrawal at 1–2, PD 25 at bar code 3186563–01 (Mar. 7, 2014)). Unfortunately for Plaintiffs, "section 1677e(b) does not by its terms set a 'willfulness' or 'reasonable respondent' standard, nor does it require findings of motivation or intent. Simply put, there is no *mens rea* component to the section 1677e(b) inquiry." *Nippon Steel Corp.v. United States*, 337 F.3d 1373, 1383 (Fed. Cir. 2003).

Finally, Plaintiffs contend that to calculate a non-punitive rate that represents the uncooperative respondent's commercial reality Commerce must use a cooperative respondent's rate from the same POR, or a nearby period, as a baseline and add a premium for deterrent effect. Morex Br. 10–11 (citing *Lifestyle Enter., Inc. v. United States*, 36 CIT ___, ___, 844 F. Supp. 2d 1283 (2012) ("*Lifestyle Enterprise I*"); *Lifestyle Enter. Inc. v. United States*, 36 CIT ___, 865 F. Supp. 2d 1284 (2012) ("*Lifestyle Enterprise II*"); *Gallant Ocean*, 602 F.3d 1319; *Dongguan Sunrise Furniture Co. v. United States*, 39 CIT ___, 2015 WL 179003 (Jan. 14, 2015) ("*Dongguan Sunrise Furniture IV*")). The court disagrees.

Plaintiffs maintain that the appropriate baseline for Hen Hao's AFA rate is one derived from the rates calculated for cooperative respondents—0% and 4.37% in prior segments and 30.64% in this segment. Based on those rates, Morex contends that Commerce's selection of the Petition Rate is unsupported by the record. In particular, Plaintiffs argue that the Petition Rate is over 4.5 times higher than the highest calculated rate, and therefore is unnecessarily punitive, *i.e.*, more than a mere deterrent. Citing *Dongguan Sunrise Furniture I*, 37 CIT ___, ___, 931 F. Supp. 2d. 1346, 1355 (2013), Plaintiffs also argue that Commerce failed to explain its rationale for selecting the Petition Rate and why a lower rate—somewhere above 30.64% and below 137.20%— would not provide a sufficient deterrent.

The court disagrees. In *Lifestyle Enterprise I*, the court rejected the AFA rate because the rate was "an extreme outlier" when viewed in light of the prior reviews and because the record suggested that the uncooperative respondent's commercial reality "differ[ed] significantly" from the respondent in the review from which the AFA rate was taken. *Lifestyle Enterprise I*, 36 CIT at ___, 844 F. Supp. 2d at 1291. In contrast, in this action, the Petition Rate was not an "extreme outlier" as Commerce used that rate in the first and second administrative reviews. The first administrative review was challenged, and this Court sustained Commece's use of the Petition Rate. *Hubscher Ribbon Corp. v. United States*, 37 CIT ___, 942 F. Supp. 2d 1375 (2013). Additionally here, unlike in *Lifestyle Enterprise I*, Commerce tied the Petition Rate to Hen Hao's commercial reality. Specifically, Commerce found that Hen Hao supplied NWR to a Canadian reseller who was assigned the Petition Rate as AFA in the first administrative review. *Decision Mem.* at 42.

Plaintiffs' reliance on *Lifestyle Enterprise II* is also misplaced. There the court held that the AFA rate used in that case was based on "an impermissibly small percentage" of sales and that the transactions selected by Commerce were "outside of the mainstream." *Lifestyle Enterprise II*, 865 F. Supp. 2d at 1290. In reaching its holding, the court stated that the case was "[u]nlike cases in which the rate and amount of deterrent were facially within the bounds of commercial reality." *Id.* at 1292. Here, Commerce corroborated the Petition Rate using King Young's margins. These margins represented a significant number of King Young's U.S. sales of products within the range of the mainstream products sold by King Young during the POR.[5] *Decision Mem.* at 44.

Similarly, the circumstances in the *Dongguan Sunrise Furniture* cases are distinct from those in this action. The question before the court in *Dongguan* was whether a partial AFA rate assigned to a mostly-cooperating respondent reflected that company's commercial reality. *See Dongguan Sunrise Furniture IV*, 39 CIT at ___, 2015 WL 179003, at * 4. Although the court remanded the underlying decision to Commerce, it did so out of a concern that Commerce failed to account for "the large variety of individual products and dumping margins reflected in [the respondent's] reported sales . . . ." *Id.* In contrast, here, Hen Hao did not report any sales data for the POR.

[5] Commerce found that [[ ]] transaction-specific margins, or [[ ]] of King Young's transactions, were higher than the Petition Rate. *See* Corroboration of Adverse Facts Available Rate for the Final Results at 1, CD 122 at bar code 3269505–01 (Apr. 6, 2015).

Lastly, *Gallant Ocean* is also distinguishable. In *Gallant Ocean*, the Federal Circuit rejected Commerce's use of the highest dumping margin stated in the petition as AFA because the rate could not be corroborated when viewed in the context of the facts of that record. *See Gallant Ocean*, 602 F.3d at 1324–25. Here, on the other hand, Commerce corroborated the Petition Rate, establishing a link between the rate and Hen Hao's commercial reality. *See infra.*

B. CORROBORATION

To corroborate the 137.20% rate, Commerce reviewed transaction-specific margins submitted by King Young regarding hundreds of U.S. sales of NWR during the POR. *Decision Mem.* at 41. Plaintiffs do not question Commerce's use of King Young's sales data to corroborate the Petition Rate. Rather, Plaintiffs argue that Commerce used an insufficient number of transaction-specific margins calculated for King Young. Morex Br. 15–16. The court does not agree. The administrative record supports Commerce's finding that a substantial number of King Young's actual U.S. transactions were dumped at rates "at an even higher level than [the Petition Rate]."[6] Commerce found that King Young's sales represented "numerous models and thousands of spools, at rates equaling or exceeding the [P]etition [R]ate." *Decision Mem.* at 41. These sales "were not isolated sales of unusual models, but rather they [fell] well within the range of the mainstream products sold by King Young during the POR." *Id.*; *see KYD*, 607 F.3d at 767 (Commerce may use cooperative companies' transaction-specific margins to support an AFA rate when that rate is within the range of actual selling prices). Consequently, Commerce determined that King Young's sales data provided a reasonable basis to corroborate the Petition Rate and determined that the Petition Rate was "neither aberrational nor divorced from commercial reality." *Decision Mem.* at 41.

Commerce also corroborated the Petition Rate based on other record evidence, concluding that the Petition Rate was relevant and reliable. Commerce determined that the Petition Rate was relevant to Hen Hao in that King Young, who, like Hen Hao, is a Taiwanese producer/exporter selling NWR to the United States, was found to be dumping NWR at rates similar to, or higher than, the Petition Rate during the POR. *Decision Mem.* at 42. Commerce noted that Plaintiffs themselves recognized that "Hen Hao's commercial reality is linked to King Young's, given that [the importers] suggest various alternative AFA rates which are derived from King Young's data," and that "in

[6] *See* footnote 5 *supra.*

every segment of this proceeding, [Commerce has] found that NWR produced in Taiwan and exported to the United States [was] being dumped in rates exceeding 100 percent." *Id.*; *see Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 77 Fed. Reg. 72,825 (Dep't of Commerce Dec. 6, 2012) (final results first admin. rev.) (dumping margin of 137.20%); *Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 78 Fed. Reg. 50,377 (Dep't of Commerce Aug. 19, 2013) (final results second admin. rev.) (same). Additionally, Commerce determined that the Petition Rate was relevant to Hen Hao because Hen Hao previously supplied NWR to a Canadian reseller who Commerce found to be dumping at the 137.20% rate in the first administrative review, *Decision Mem.* at 42, and the application of this rate to the Canadian reseller was ultimately sustained, *see Hubscher Ribbon*, 37 CIT ___, 942 F. Supp. 2d 1375.

Lastly, Commerce determined that the Petition Rate of 137.20% rate continued to be reliable. *Decision Mem.* at 42. Given the absence of any information on the record to the contrary, no basis exists to conclude that Commerce's determination was unreasonable. *See id.* (noting there was "no evidence on the record that Hen Hao [did] not continue to sell dumped NWR to the United States . . . ."). Therefore, Commerce's corroboration of the Petition Rate as relevant and reliable is supported by substantial evidence.

IV. CONCLUSION

For the foregoing reasons, the court sustains Commerce's assignment of an AFA rate based on the Petition Rate to Hen Hao. Judgment will be entered accordingly.

Dated: August 1, 2017
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 17–96

THE GERSON COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00225

[Determining, upon cross-motions for summary judgment, the tariff classification of certain imported candle-like articles containing light-emitting diodes]

Dated: August 2, 2017

Ralph H. Sheppard, Meeks, Sheppard, Leo & Pillsbury, of Fairfield, CT, for plaintiff The Gerson Company. With him on the brief was *Robert J. Leo*.

Amy M. Rubin, Assistant Director, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, for defendant United States. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Hardeep K. Josan*, Trial Attorney. Of counsel on the brief was *Sheryl A. French*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection.

OPINION

Stanceu, Chief Judge:

In this action to contest the denials of its administrative protests by U.S. Customs and Border Protection ("Customs"), plaintiff The Gerson Company ("Gerson") contests the tariff classification Customs determined for certain imported articles that resemble candles and that use as a source of illumination internal, battery-powered light-emitting diodes.

Before the court are cross motions for summary judgment. The court awards summary judgment in favor of defendant United States.

I. BACKGROUND

Gerson was the importer of record on 27 entries of the merchandise at issue in this litigation. Summons (June 30, 2011), ECF No. 1. The entries were made during the period of January 6 through October 16, 2009, at the Port of Kansas City, Missouri. *Id*. Customs liquidated the entries between November 20, 2009 and September 3, 2010, inclusive, and Gerson contested the liquidations by filing four protests, on May 12, June 8, August 31, and September 14, 2010, respectively. *Id.* Customs denied all four protests on January 4, 2011, and this action followed.

Plaintiff moved for summary judgment in July 2016; defendant filed its cross motion the following November. Pl.'s Br. and Exs. in Supp. of its Mot. for Summ. J. (July 15, 2016), ECF No. 43–2 ("Pl.'s

Mot."); Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. (Nov. 4, 2016), ECF No. 53 ("Def.'s Mot.").[1]

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006), according to which the court has jurisdiction over an action brought under section 515 of the Tariff Act of 1930 ("Tariff Act"), *as amended*, 19 U.S.C. § 1515 (2006), to contest a denial of a protest by Customs. In such an action, the court proceeds *de novo*. *See* Customs Courts Act of 1980 § 301, 28 U.S.C. § 2640(a)(1) (2006).

B. Description of the Merchandise

The facts as stated in this Opinion are not in dispute between the parties. *See* Agreed Statement of Facts (July 15, 2016), ECF No. 43–1; Def.'s Resp. to Pl.'s Agreed Statement of Facts (Nov. 4, 2016), ECF No. 53–1.

The merchandise at issue consists of various models of what Gerson terms "candles" and "tea lights."[2] Pl.'s Mot. 5. Each of these articles is comprised principally of translucent wax or plastic and is made to resemble a style of an ordinary candle (such as a votive, pillar, taper, or tea light). *Id.* Instead of providing illumination by means of a wick and the combustion of candle wax, as does an ordinary candle, each of these articles provides illumination by means of an internal semiconductor that is a "light-emitting diode," or "LED," powered by a battery contained within the article. *Id.* Catalogue illustrations of the articles show that when the LED is energized by the battery, the illuminated article resembles a lit candle. *See* Pl.'s Mot., Ex. 3c, ECF No. 43–7. The illustrations also show that Gerson's articles provide decoration as well as illumination and that some are in holiday themes, including Christmas. *See id.*

C. Tariff Classification under the General Rules of Interpretation, HTSUS

Tariff classification is determined according to the General Rules of Interpretation ("GRIs"), and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs"), of the Harmonized Tariff Schedule of the United States ("HTSUS"). GRI 1 directs that tariff classification, in

[1] The court held a telephonic conference with the parties on July 18, 2017, during which plaintiff waived its prior request for oral argument.

[2] A "tea light" is "a small round candle in a disposable metal container." *Dictionary.com*, http://www.dictionary.com/browse/tea-light (last visited July 25, 2017).

the first instance, "be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS (2009).[3] Once merchandise is determined to be correctly classified under a particular heading of the HTSUS, a court then looks to the HTSUS subheadings to determine the correct classification of the merchandise in question. GRI 6, HTSUS; *see Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998).

Unless there is evidence of "contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) ("*La Crosse*") (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375 (Fed. Cir. 1999)). Although not binding law, the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System ("Harmonized System" or "HS"), maintained by the World Customs Organization, "may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision."[4] *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007).

In cases involving a disputed tariff classification, the court first considers whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Plaintiff has the burden of showing the government's determined classification to be incorrect. *Id.* at 876. If plaintiff meets that burden, the court has an independent duty to arrive at "the correct result, by whatever procedure is best suited to the case at hand." *Id.* at 878.

D. Summary Judgment under USCIT Rule 56

The court will award summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). In a tariff classification dispute, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). In ruling on a summary judgment motion, the court credits the non-moving party's evidence and draws all inferences in that party's favor. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255

[3] Because all entries of the merchandise at issue occurred in 2009, all citations herein to the Harmonized Tariff Schedule of the United States ("HTSUS") are to the 2009 version of the HTSUS.

[4] All citations to the World Customs Organization's Harmonized Commodity Description and Coding System ("HS") Explanatory Notes ("ENs") contained herein are to the 2007 version.

(1986) ("*Anderson*")). A genuine factual dispute is one potentially affecting the outcome under the governing law. *Anderson*, 477 U.S. at 248.

In this case, the court concludes that there are no disputed facts material to the tariff classification of Gerson's merchandise.

E. Contentions of the Parties

Upon liquidation, Customs classified the imported articles in subheading 9405.40.80, HTSUS ("Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; . . . : Other electric lamps and lighting fittings: Other"), subject to duty at 3.9% *ad val*. In its cross motion for summary judgment, defendant argues that the classification as determined by Customs upon liquidation was correct. Def.'s Mot. 3.

Before the court, plaintiff's primary claim is that the merchandise is properly classified in subheading 8543.70.70, HTSUS ("Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; . . . : Other machines and apparatus: Electric luminescent lamps"), subject to duty at 2% *ad val*. Pl.'s Mot. 1.

Plaintiff claims in the alternative that the articles at issue are classifiable in subheading 8543.70.96, HTSUS ("Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; . . . : Other machines and apparatus: Other: Other: Other"), subject to duty at 2.6% *ad val. Id.*

As a third alternative, plaintiff claims classification in subheading 8541.40.20, HTSUS (" . . . light-emitting diodes: light-emitting diodes (LED's)"), free of duty. *Id.*

As a fourth alternative, plaintiff argues for classification in subheading 8541.50.00 ("Diodes, transistors and similar semiconductor devices; . . . : Other semiconductor devices"), free of duty. *Id.*

F. Application of GRI 1, HTSUS, to Determine the Correct Heading of the HTSUS

Because GRI 1, HTSUS directs that classification be determined, in the first instance, "according to the terms of the headings and any relative section or chapter notes," the court first considers the candidate headings identified by the parties and any additional headings that might merit consideration. The candidate HTSUS headings, shown in numerical order and with the heading terms relevant to the classification issue presented by this case, are as follows:

8541	Diodes, transistors and similar semiconductor devices; . . . light-emitting diodes; . . .
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; . . .
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; . . .

As GRI 1, HTSUS requires, the court also considers "relative section or chapter notes." Considering these notes and the HTSUS headings in general, the court concludes that there are no other plausible candidate headings.[5] Therefore, the court will analyze three candidate headings, two of which are in chapter 85 and one of which is in chapter 94, HTSUS.

Gerson's articles, not being designed to be attached to another article or surface (as is a lighting fixture), are not described by the term "lighting fitting" but fall within common definitions of the word "lamp."[6] Note 1(f) to Chapter 94, HTSUS provides that "[t]his chapter [94] does not cover: . . . Lamps or lighting fittings of chapter 85." The threshold question, therefore, is whether Gerson's "candles" and "tea lights" fall within the scope of chapter 85, HTSUS. Further to the discussion above, the two headings within the chapter that are relevant to this issue are headings 8541 and 8543, HTSUS.

[5] Certain of Gerson's articles have decorative characteristics, and plaintiff's exhibit, for example, shows that many of them have holiday or festive themes (e.g., Christmas and Halloween). Pl.'s Br. and Exs. in Supp. of its Mot. for Summ. J., Ex. 3c (July 15, 2016), ECF No. 43–7. Neither party advocates classification under heading 9505, HTSUS ("Festive, carnival or other entertainment articles . . ."), and the court concludes that classification thereunder would be contrary to the intent of the drafters of the HS, who intended that durable articles such as Christmas tree lights ("electric garlands"), even though performing a decorative as well as an illuminating function, would fall outside the scope of that heading and within the scope of HS heading 94.05. *See* EN 94.05 (instructing that "electric garlands," including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees, are within the scope of HS heading 94.05); *see also* EN 85.05. In contrast, certain articles that may be described as decorations "which in view of their intended use are generally made of non-durable material" such as paper or metal foil, are classified under HS heading 95.05, even if containing illumination. EN 95.05. Both EN 94.05 and EN 95.05 give as an example of the latter class of goods "Chinese lanterns."

The court also eliminates from consideration heading 3406, HTSUS ("Candles, tapers and the like") because the articles in question are not "candles" within the common meaning of that term. *See*, e.g., *Merriam Webster*, www.merriam-webster.com/dictionary/candle (last visited July 25, 2017) ("a usually molded or dipped mass of wax or tallow containing a wick that may be burned (as to give light, heat, or scent or for celebration or votive purposes)").

[6] *See*, e.g, *Merriam Webster*, www.merriam-webster.com/dictionary/lamp (last visited July 25, 2017) ("a: *any of various devices for producing light* or sometimes heat: such as (1): a vessel with a wick for burning an inflammable liquid (such as oil) to produce light (2): a glass bulb or tube that emits light produced by electricity (such as an incandescent light bulb or fluorescent lamp) b: a decorative appliance housing a lamp that is usually covered by a shade") (emphasis added).

1. Gerson's Articles Are Not within the Scope of Heading 8541, HTSUS

The uncontested facts pertaining to the physical and functional characteristics of the merchandise require the court to eliminate from consideration heading 8541, HTSUS, which contains the terms "semiconductor devices" and "light-emitting diodes." Each article at issue contains a light-emitting diode as a source of illumination, but the article as a whole contains other major components as well and, therefore, does not conform to a common or commercial definition of the term "semiconductor device" or the term "light-emitting diode."[7]

Gerson takes issue with what it describes as the position of Customs that heading 8541, HTSUS is limited to discrete semiconductors. Pl.'s Mot. 15. Gerson argues, specifically, that "this Customs attempt to limit heading 8541 to discrete semiconductors has been unequivocally rejected by the Court of International Trade in *ABB Power Transmission v. United States*, 19 CIT 1044, 896 F. Supp. 1279 (1995)." Pl.'s Mot. 15. In support of its argument that the terms of heading 8541, HTSUS describe its goods, Gerson relies in part on note 8 to chapter 85, HTSUS, which provides that "[f]or the classification of the articles defined in this note, headings 8541 and 8542 shall take precedence over any other heading in the Nomenclature, except in the case of heading 8523, which might cover them by reference to, in particular, their function." Note 8 to ch. 85, HTSUS. The court is not convinced by these arguments. *ABB Power Transmission* is not on point, having involved the tariff classification of a module consisting of six thyristors, heatsinks, voltage divider circuits and other circuitry that was a component of a larger system (a direct current conversion station for power generation). 19 CIT at 1044–45, 896 F. Supp. at 1280. The court concluded that the assembled module functioned as a single thyristor, a semiconductor. *Id.* at 1049, 896 F. Supp. at 1283. Gerson's articles are stand-alone items, not components within larger systems, and they perform both decorative and illuminating functions that are beyond those of a semiconductor device or LED, whether or not "discrete." Gerson's reliance on note 8 to chapter 85, HTSUS is also unavailing because its goods are not "articles defined in this note." *See* note 8 to ch. 85, HTSUS.

[7] Note 8(a) to chapter 85, HTSUS provides that the term "diodes, transistors and other semiconductor devices," which appears in the article description for heading 8541, refers to "semiconductor devices the operation of which depends on variations in resistivity on the application of an electric field." The HTSUS does not define "light-emitting diode," but the Explanatory Note to heading 85.41 states that "**[l]ight emitting diodes**, or **electroluminescent diodes**, (based, *inter alia*, on gallium arsenide or gallium phosphide) are devices which convert electric energy into visible, infra-red or ultra-violet rays. They are used, e.g., for displaying or transmitting data in control systems." EN 85.41(C).

2. Gerson's Articles Are Classified under Heading 9405, HTSUS, Not Heading 8543, HTSUS

It is plausible to read the pertinent terms of heading 8543, HTSUS as encompassing the merchandise in question. *See* heading 8543, HTSUS ("Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; . . ."). As does any electric lamp, each Gerson article depends for illumination on the operation of electricity. Also, it can be argued that these articles have "individual functions."

The qualification "not specified or included elsewhere in this chapter [85]" contained within the article description for heading 8543, HTSUS would be met by Gerson's articles. Although the headings of chapter 85 other than heading 8543 include articles that may be described as "lamps," Gerson's articles are not described by any of these other headings. *See* HTSUS headings 8512 (electrical lighting equipment for cycles or motor vehicles); 8513 (certain portable electric lamps such as flashlights); 8530 (certain electrical signaling equipment); 8531 (visual signaling apparatus other than those of heading 8512 or 8530); 8539 (electric filament (i.e., incandescent) or discharge (i.e., fluorescent) lamps; arc lamps); the aforementioned 8541 (light-emitting diodes); and heading 8545 (lamp carbons). Therefore, were Gerson's merchandise properly held to fall within the scope of heading 8543, HTSUS as an "electrical machine" or an "electrical apparatus," then consideration of heading 9405, HTSUS, would be precluded by operation of note 1(f) to chapter 94, HTSUS. Moreover, because heading 9405, HTSUS is limited to lamps and lighting fittings "not elsewhere specified *or included*," Gerson's articles could not be classified thereunder if they fall within the scope of heading 8543, HTSUS. *See* heading 9405, HTSUS ("Lamps and lighting fittings . . . not elsewhere specified or included" (emphasis added)). Gerson makes this argument (among others). Pl.'s Mot. 15.

If Gerson's proffered interpretation of the scope of heading 8543, HTSUS were adopted, Gerson would have met its burden of establishing that the government's classification under heading 9405, HTSUS is incorrect. Concluding to the contrary, the court rejects Gerson's broad interpretation of the scope of heading 8543, HTSUS and its position classifying the articles at issue thereunder. The court concludes instead that heading 9405, HTSUS is the correct heading for Gerson's articles. In brief summary, these articles are within a class or kind of electric lamps that are self-contained, i.e., independently used. In addition, they have a decorative as well as an illuminating function. The class or kind of goods to which Gerson's articles

belong falls generally within chapter 94, under heading 9405, HTSUS, not within chapter 85, under heading 8543, HTSUS.

Chapter 85, HTSUS includes within it certain electric "lamps" that are excluded from chapter 94 by operation of note 1(f) to chapter 94. Such lamps necessarily include those within the article descriptions of HTSUS headings 8512, 8513, 8530, 8531, 8539, and 8541, each of which the court discussed previously, and they also include the "lamp carbons" of heading 8545, HTSUS, whether or not considered to be "lamps." As to the proper heading for Gerson's articles, the precise question presented is whether the term "electrical machines and apparatus, having individual functions," as used in the article description for heading 8543, HTSUS was intended to refer to the entire class or kind of goods comprised of electric lamps, and thereby, as a result of note 1(f) to chapter 94, exclude that entire class or kind from the scope of chapter 94, HTSUS in general and from the scope of heading 9405, HTSUS in particular.

The term "electrical machines and apparatus" as used in heading 8543, HTSUS is not free of ambiguity. Terms in a tariff statute are to be given their "common and commercial" meaning, *La Crosse*, 723 F.3d at 1358. While any electric lamp (or electric lighting fitting) may be described as an "electrical machine" or an "electrical apparatus" in a hyper-technical sense, the term "electrical machines and apparatus" is not necessarily read so broadly, in the common and ordinary sense, as to include the class or kind of goods exemplified by Gerson's articles, which are stand-alone items designed to provide decoration and illumination in the household. Resolving the ambiguity requires the court to give meaning to the context imparted by other, related HTSUS provisions. In this case, reading the term "electrical machines and apparatus" as used in heading 8543, HTSUS so broadly as to include *all* electric lamps and lighting fittings produces an anomalous result with respect to the relative scopes of the two HTSUS headings, 8543 and 9405, under which the latter would be confined to *non*-electric lamps and lighting fittings. Such a reading would impose a specific, and drastic, limitation on the scope of heading 9405, HTSUS that the article description for that heading does not express or suggest. Moreover, this interpretation would be contrary to the intent of the drafters of the Harmonized System, as expressed in various HS Explanatory Notes.

Referring specifically to the inclusion within HS heading 94.05 of "[l]amps and lighting fittings, not elsewhere specified or included," EN 94.05 instructs that "[l]amps and lighting fittings of this group can . . . use *any* source of light (candles, oil, petrol, paraffin (or kerosene), gas, acetylene, *electricity*, etc.)." EN 94.05 (emphasis

added). A wide variety of examples is given; *see* EN 94.05(I)(1) ("This heading covers, in particular: . . . **Lamps and lighting fittings normally used for the illumination of rooms**, e.g.: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps . . ."). The examples provided of lamps for the illumination of rooms necessarily would include those with decorative as well as illuminating functions.

The general Explanatory Note to HS Chapter 85 lends further support to the conclusion that many electric lamps and lighting fittings fall within HS heading 94.05 and outside of HS chapter 85. This EN clarifies that chapter 85 includes "[c]ertain electrical goods not generally used independently, but designed to play a particular role as components, in electrical equipment, e.g., . . . lamps (heading 85.39) . . . ." EN 85(A)(6). This reference to the "lamps" of HS heading 85.39 would encompass what are commonly referred to as "light bulbs," including incandescent ("filament") and fluorescent ("discharge") light bulbs. *See* HS heading 85.39 ("Electrical filament or discharge lamps, including sealed beam lamp units and ultra-violet or infra-red lamps; arc-lamps"). Similarly, chapter 85 also includes electric lighting and signaling equipment for motor vehicles (HS heading 85.12). The HS drafters adopted as a general organizing principle that chapter 85 includes "lamps" (including those commonly referred to as "bulbs") that are not used independently, and those that are used independently were as a general matter left to fall within chapter 94, in HS heading 94.05. An exception to the general organizing principle is HS heading 85.13, which contains certain "portable" lamps, some of which, such as flashlights, are used "independently." Nevertheless, when the applicable heading terms and legal notes are construed according to the clarification provided by the Explanatory Notes, it is apparent that the HS drafters intended for the class or kind of goods comprised of self-contained, independently-used furnishings such as electric household lamps and lighting fittings to be classified under HS heading 94.05 and not under HS heading 85.43. In reaching this conclusion, the court attaches significance to the instruction in EN 94.05 that heading 94.05 "covers in particular: . . . **Lamps and lighting fittings normally used for the illumination of rooms**." EN 94.05(I)(1). The lamps and lighting fittings specified by the headings of HS chapter 85 either are not designed for, or are not designed exclusively or specifically for, interior illumination. *See* ENs for HS headings 85.12 (motor vehicle lighting and signaling equipment), 85.13 (certain portable electric lamps, including flashlights), 85.30 (certain electrical signaling equipment), 85.31 (other signaling equipment), 85.39 (electric filament (including incandescent) or discharge (including fluorescent)

lamps), 85.41 (light-emitting diodes), and 85.45 (carbons for use in arc lamps and electric resistance lamps).

As the court discussed above, EN 85.39 uses the term "electric filament or discharge lamps" to refer to various classes of goods that commonly may be described as electric light bulbs. EN 85.39 is also instructive as to the delineation between the scope of that heading and that of HS heading 94.05. EN 85.39 defines "electric light lamps" as consisting of "glass or quartz containers, of various shapes, containing the necessary elements for converting electrical energy into light rays (including infra-red or ultra violet rays)." EN 85.39. The sentence in the EN following the above-quoted definition is as follows: "The heading covers *all* electric light *lamps*, whether or not specially designed for particular uses (including flashlight discharge lamps)." *Id.* (emphasis added). This sentence could be read broadly as to refer to the household lamps and lighting fittings of heading 94.05. Nevertheless, to interpret it so broadly would be to read it mistakenly, out of the context provided by this and related ENs, which point to HS heading 94.05, not to HS chapter 85, for lamps that are self-contained and, in the words of the EN to chapter 85, "used independently." In short, the "lamps" that may be described as light bulbs and similar such electrical devices not used independently are classified generally within HS chapter 85, and those that are used independently are classified generally within HS chapter 94.[8]

The intent of the drafters to adopt the general organizing principle the court has identified is further demonstrated by EN 85.43: "This heading covers all electrical appliances and apparatus, **not falling** in any other heading of this Chapter, **nor covered more specifically** by a heading of any other Chapter of the Nomenclature . . . ." HS heading 85.43 does not refer to lamps or lighting fittings but only generally to electrical machines and apparatus; HS heading 94.05, in contrast, specifically provides for lamps and lighting fittings and encompasses them provided they are not elsewhere specified or included.

In summary, when considered together, the ENs relating to HS chapter 85, to certain headings therein, and to HS heading 94.05 support the conclusion that goods such as Gerson's articles, which are self-contained, i.e., "independently used," lamps suitable for household use as illuminating and decorative articles, were intended by the Harmonized System drafters to fall within HS heading 94.05, not HS heading 85.43.

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[8] The lamps and lighting fittings of heading 9405, HTSUS would be classified under that heading even if imported without bulbs (in the parlance of the ENs, "lamps") or, if battery-operated, batteries. *See* GRI 2, HTSUS. Analogously, heading 9405, HTSUS includes candelabras, *see* EN 94.05(I)(6), but it does not include candles (heading 3406, HTSUS).

In arguing for classification of its articles under heading 8543, HTSUS, Gerson argues that EN 85.43(16) gives as an example of goods of that heading "**Electro-luminescent devices**, generally in strips, plates or panels, and based on electro-luminescent substances (e.g., zinc sulphide) placed between two layers of conductive material." Pl.'s Mot. 8 (quoting EN 85.43). In that regard, Gerson also directs the court's attention to the presence under the heading of subheading 8543.70.70, HTSUS ("Other machines and apparatus: Electric luminescent lamps"). *Id.* at 12. Gerson argues that its articles are electric, are luminescent, and are lamps; it submits, therefore, that heading 8543, HTSUS is the correct heading and 8543.70.70, HTSUS is the correct subheading. The court, of course, first considers the scope of the heading itself and will not construe a subheading to have the effect of enlarging the scope of a heading, as that would be inconsistent with the requirement of GRI 1, HTSUS and the organization of the remaining GRIs, including in particular GRI 6, HTSUS.

The reference in EN 85.43 to electro-luminescent devices is not necessarily read so broadly as to describe articles such as those at issue in this case. To the contrary, the phrase used therein, "*generally in strips, plates or panels*, and based on electro-luminescent substances . . . *placed between two layers of conductive material*," EN 85.43 (emphasis added), connotes a device that is itself more directly the source of the illumination than is one of Gerson's articles, each of which contains an LED (presumably, a device of HS heading 85.41) among various other components that together form a stand-alone, decorative and illuminating article. Consistent with the general principle expressed by the Explanatory Notes that electric lamps of HS chapter 85 are those not used independently, the class or kind of goods to which Gerson's articles belong, i.e., household furnishings such as stand-alone lamps, generally are classified under HS heading 94.05, not HS heading 85.43.

Gerson argues that classification of its goods under subheading 8543.70.70, HTSUS ("Electric luminescent lamps") would not drastically limit ("empty") the scope of heading 9405, HTSUS because the subheading is limited to electric luminescent lamps. Pl.'s Mem. of Law Rebutting Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Opposing Def.'s Cross Mot. for Summ. J. 5 (Dec. 12, 2016), ECF No. 54. The flaw in this argument is Gerson's reading too much into the terms of that subheading, which are not necessarily interpreted so broadly as to encompass the independently-used goods at issue here. The placement of this U.S.-specific eight-digit subheading under a four-digit internationally-harmonized heading cannot correctly be interpreted as an intended enlargement of the scope of that heading. *See* GRIs 1, 6, HTSUS. Moreover, the court sees no indication of congressional intent to place within heading 8543, HTSUS a self-contained,

independently-used, decorative household-type lamp simply because it uses an LED or other electric luminescent device as a light source. The terms of heading 8543, HTSUS create no such distinction, nor is there is an indication of a congressional intent to depart from the established HS nomenclature. Moreover, the premise underlying Gerson's argument would raise a tariff classification question as to any of a class of decorative electric lamps that are made to resemble candles and typically are designed to be fitted with a specially-shaped incandescent bulb. The implication of Gerson's argument that the classification it advocates would not empty heading 94.05 is that this similar class or kind of goods still would be classified under heading 9405, HTSUS, while Gerson's articles (which are highly similar in form and function and differ principally only in the type of light source) instead would be classified under heading 8543, HTSUS because the light source is electro-luminescent or because it is an LED. But such a distinction would not be supported by the relevant terms of the two competing headings and would contravene the intent of the drafters of the HS as indicated by the Explanatory Notes.

In summary, for the reasons discussed above, the court concludes that by operation of GRI 1, HTSUS, Gerson's "candles" and "tea lights" are not properly classified under heading 8543, HTSUS as "[e]lectrical machines and apparatus" but instead fall within the scope of heading 9405, HTSUS as "[l]amps . . . not elsewhere specified or included." Because the correct heading for these articles is determined by operation of GRI 1, the classification issue presented does not call for consideration of the remaining GRIs.

G. Application of GRI 6, HTSUS to Determine the Correct Subheading of the HTSUS

The first subheading within heading 9405, HTSUS is subheading 9405.10, HTSUS ("Chandeliers and other electric ceiling or wall lighting fittings . . ."), which does not describe the goods at issue. Nor does the second subheading, subheading 9405.20, HTSUS ("Electric table, desk, bedside or floor-standing lamps"), which sets forth terms applicable to lamps specially designed for these four specific placements. Instead, Gerson's articles do not fit within any of these categories of lamps and, as indicated in the catalogue illustrations, are suitable for placement on any horizontal surface (e.g., on an article of furniture or a fixture such as a shelf or fireplace mantle), in the manner of a candle. Subheading 9405.30, HTSUS is confined to "[l]ighting sets of a kind used for Christmas trees." Therefore, the correct subheading is 9405.40.80, HTSUS (applying to "Other electric lamps . . . :" not of

base metal), the classification determined by Customs upon liquidation and advocated by defendant before the court.

III. CONCLUSION

For the reasons stated above, the court will grant defendant's cross motion for summary judgment, concluding that the merchandise at issue is properly classified in subheading 9405.40.80, HTSUS ("Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; . . . : Other electric lamps and lighting fittings: Other"), subject to duty at 3.9% *ad val*.

Judgment will enter accordingly.

Dated: August 2, 2017
New York, NY

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