U.S. Court of International Trade

Slip Op. 18–61

JINKO SOLAR CO., LTD. et al., Plaintiffs and Consolidated Plaintiff, and YINGLI GREEN ENERGY AMERICAS, INC. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00080

[Sustaining the U.S. Department of Commerce's second remand determination in its antidumping investigation of certain crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: May 25, 2018

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OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") second remand determination in the antidumping duty ("ADD") investigation of certain crystalline silicon photovoltaic products from the People's Republic of China ("PRC" or "China"), filed pursuant to the court's order in *Jinko Solar Co., Ltd. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1253, 1264–65 (2017) ("*Jinko Solar II*"). *See* Final Results of Second Redetermination Pursuant to Court

Order, Mar. 13, 2018, ECF No. 134–1 ("*Second Remand Results*"); *see also Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) and accompanying Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value, A-570–010, (Dec. 15, 2014), ECF No. 34–5 ("Final Decision Memo").

On second remand, Commerce reconsidered its selection of South African import data for subheading 8548.10, Harmonized Tariff Schedule ("HTS"), to value the respondent's scrapped solar module by-product offset when calculating normal value. *See Second Remand Results* at 5–8. Under protest, Commerce has on second remand discontinued its use of South African import data for HTS 8548.10 and has instead valued the scrapped solar modules using Thai import data for subheading 2804.69, HTS. *See id.* at 6–9. Commerce has complied with the court's remand order in *Jinko Solar II*, and the court sustains the *Second Remand Results*.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the two prior opinions, *see Jinko Solar Co., Ltd. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1333, 1338–39 (2017) ("*Jinko Solar I*"); *Jinko Solar II*, 41 CIT at __, 279. F. Supp. 3d at 1256–58, and here restates the facts relevant to the court's review of the *Second Remand Results*.

Changzhou Trina Solar Energy Co., Ltd. ("Trina") and Renesola Jiangsu Ltd. were selected as the mandatory respondents in this investigation. *See* Decision Mem. for the Prelim. Determination in the [ADD] Investigation of Certain Crystalline Photovoltaic Products from the [PRC] at 3, PD 698, bar code 3217803–01 (July 24, 2014);[1] Section 777A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1(c)(2)(B) (2012).[2] Because China is a nonmarket economy country, in the final determination Commerce determined the normal value of the subject merchandise by valuing the respondents' reported factors of production, expenses, profit, and offsets using surrogate values. 19 U.S.C. § 1677b(c)(1). Only one surrogate valuation is relevant on second remand: in its final determination, Commerce valued

[1] On July 7, 2015, Defendant filed on the docket the indices to the public and confidential administrative records. These indices are located on the docket at ECF No. 34. All further references in this opinion to administrative record documents include the administrative record numbers assigned by Commerce in the indices.

[2] 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.

respondent Trina's offset for scrapped solar cells,[3] which Trina reported as a by-product of its solar module production, using import data from South Africa for subheading 8548.10, HTS, covering "Waste and scrap of primary cells, primary batteries and electric storage batteries; spent primary cells, spent primary and electric storage batteries." Final Decision Memo at 50–51. Commerce determined that import data under subheading 8548.10, HTS, constituted the best available information with which to value Trina's scrapped solar modules because, as a subheading that "contains only scrapped materials, including scrapped cells," imports within it are more similar to solar cells than are imports within subheading 2804.69, HTS.[4] *Id.* at 51. Commerce emphasized that the only alternative on the record, subheading 2804.69, HTS, "is only specific to one raw material contained in the solar [module] – silicon – and is not specific to scrap materials." *Id.*

SolarWorld challenged this selection, arguing that it was unreasonable for Commerce to find South African import data for subheading 8548.10, HTS, to be the best available information on this record. *See* SolarWorld's Rev. Non-Conf. Br. Supp. Rule 56.2 Mot. J. Agency R. at 22–25, Mar. 10, 2017, ECF No. 93. SolarWorld contended that heading 8548, HTS, "has nothing at all to do with photovoltaic products," such as solar modules, and that the products within it differ substantially from solar cells in both manufacturing processes and raw material inputs. *Id.* at 23. SolarWorld asserted that subheading 2804.69, HTS, constitutes the best available information because it is specific

[3] As noted in the prior opinion, Commerce referred to Trina's by-product in the final determination as "scrap solar cells," *see* Final Decision Memo at 51, but clarified on first remand that the offset is in fact for scrapped solar modules, rather than cells. *See Jinko Solar II*, 41 CIT at __, 279 F. Supp. 3d at 1255 n.1; *see First Remand Results* at 15 ("Although the petitioner and the Department have previously referred to the offset as an offset for scrap solar cells, we clarify here that the offset in question is *module* scrap and should be valued as such." (emphasis in original)). On second remand, Commerce continues to refer to the by-product as scrapped solar modules. *See Second Remand Results* at 2 n.7.

[4] On second remand, Commerce notes that, in the course of the second remand proceedings, it discovered that it had throughout these proceedings misstated the nature of the material covered by subheading 2804.69, HTS, referring to it incorrectly as "polysilicon" rather than "silicon," or referring to the two terms interchangeably, at times in the final determination and on first remand:

> Silicon is "made from ordinary sand and quartz." The polysilicon that is used in the production of solar modules is not classified under HTS 2804.69 because it has a different purity level than silicon. Thus, Commerce was incorrect when it stated in the [Final Decision Memo] . . . that "the HTS category for polysilicon (HTS subheading 2804.69), ... is only specific to one raw material contained in the solar cell – polysilicon . . . ." Commerce was also incorrect when it stated in [the *First Remand Results*] . . . that ". . . HTS 2804.69 only accounts for polysilicon, which is merely one of the many raw materials in a solar module." Rather, the record shows that "[p]hotovoltaic manufacturing starts with polysilicon, a refinement of silicon materials."

Second Remand Results at 7–8.

to polysilicon, the primary raw material in the scrap by-product, and because the less-pure nature of the polysilicon covered by that category accounts for the "'scrap' nature" of Trina's by-product. *Id.* at 25.

In *Jinko Solar I*, the court sustained in part and remanded in part Commerce's final determination.[5] *Jinko Solar I*, 41 CIT at __, 229 F. Supp. 3d at 1361. One of two remanded issues was Commerce's selection of South African import data for subheading 8548.10 HTS, to value Trina's scrapped solar module by-product offset.[6] *See id.*, 41 CIT at __, __, 229 F. Supp. 3d at 1353–55, 1361. The court determined that Commerce did not explain why the selection of subheading 8548.10, HTS, is reasonable on this record, given that the category is specific to electrical products and therefore covers imports that are entirely dissimilar to Trina's scrapped solar modules. *Id.*, 41 CIT at __, 229 F. Supp. 3d at 1354–55. The court remanded the issue to Commerce to reconsider or further explain its determination that, on this record, it is reasonable to consider subheading 8548.10, HTS, the best available information with which to value Trina's scrapped solar module by-product. *Id.*

On first remand, Commerce continued to value Trina's scrapped solar modules with South African import data under HTS 8548.10. *See* Final Results of Redetermination Pursuant to Court Remand at 15–18, 25–29, Aug. 2, 2017, ECF No. 105–1 ("*First Remand Results*"). Commerce explained that there were only two potential surrogate values on the record for this by-product, neither of which was import data for an HTS category that explicitly covers scrapped solar modules. *Id.* at 16. Commerce acknowledged that it was "[f]aced with [two] imperfect options," *id.*, and that, after further review, it continued to find subheading 8548.10, HTS, to be the best available information for valuing this by-product because the alternative, subheading 2804.69, HTS, is not "at all specific to scrap materials." *Id.* at 17. Commerce stated that the scrap materials covered by subheading 8548.10, HTS, "are more akin to" the materials in the scrapped solar

[5] In *Jinko Solar I*, the court sustained Commerce's determinations: 1) that Mustek's financial statements constitute the best available information to value respondents' general expenses and profit; 2) that import data for articles covered under subheading 7604, HTS, constitutes the best available information for valuing respondents' aluminum frames; 3) to accept, for purposes of adjusting Trina's U.S. prices, the information provided by Trina during verification related to quality insurance expenses covering the entire period of investigation; and 4) that respondents' ADD cash deposit rate should be offset by the full amount of export subsidy calculated based on adverse facts available in the companion countervailing duty investigation. *See Jinko Solar I*, 41 CIT at __, 229 F. Supp. 3d at 1361.

[6] The court also remanded, for further explanation or reconsideration, Commerce's determination to collapse the affiliated Renesola entities (i.e., Renesola Jiangsu Ltd. and Renesola Zhejiang Ltd. (collectively "ReneSola group")) with the affiliated Jinko entities (i.e., Jinko Solar Co., Ltd. and Jinko Solar Import & Export Co., Ltd. (collectively "Jinko group")), treating these companies as a single entity for purposes of the dumping margin calculation. *See Jinko Solar I*, 41 CIT at __, 229 F. Supp. 3d at 1343–47, 1361.

modules and "more closely reflec[t] the material composition of scrap solar modules, which include wire, metals, glass, and chemical compounds." *Id.* Commerce stated that

> [r]ecord information demonstrates that a variety of chemical compounds (*e.g.*, nitride), metals (incorporated on both sides of the cell), special solar glass, junction boxes, and aluminum frames are introduced into solar modules at various stages of production. HTS 8548 covers waste and scrap of primary batteries, electrical accumulators, spent primary batteries and spent electrical accumulators. These items are engineered products that similarly include metal components and chemicals which, although not identical to the metal and chemical components in solar modules, are nonetheless metals and chemicals used in an engineered product designed to generate electricity that is no longer usable because of breakage, cutting up, wear, or other reasons[.]

First Remand Results at 16 (citations omitted). Commerce emphasized again, as it had in the final determination, that, while HTS category 2804.69 is specific to raw polysilicon, "solar modules consist of many more raw materials than just polysilicon." *Id.* at 16; *see* Final Decision Memo at 51 (noting that "solar cells consist of many more raw materials than polysilicon."). Commerce concluded that HTS category 2804.69 "would not fully value the scrap module materials." *First Remand Results* at 17. Accordingly, Commerce continued to value Trina's scrapped solar modules with South African import data under subheading 8548.10, HTS. *See First Remand Results* at 15–18, 25–29.

SolarWorld continued to challenge Commerce's selection of this surrogate value as an unreasonable selection that is not supported by the record. *See* [SolarWorld]'s Comments on [Commerce]'s Final Results of Redetermination Pursuant to Court Remand Non-Conf. Version at 6–9, Sept. 5, 2017, ECF No. 112. SolarWorld contended that the selected HTS category 8548.10 is dissimilar to Trina's by-product, as polysilicon is not a material in "primary batteries or electrical accumulators of the sort covered by HTS 8548.10." *Id.* at 7. SolarWorld also argued that it is unreasonable for the agency to reject a subheading on the basis of its conclusion that it is specific to just one material input of the scrapped modules, when that input is the primary input, in the absence of any "evidence that products under 8548.10 have *any* raw material whatsoever in common with solar cells." *Id.* (emphasis in original). SolarWorld further contended that, contrary to Commerce's suggestion, "polysilicon is reclaimed from the scrap modules, and there is no record evidence that any other mate-

rials are reclaimed." *Id.* at 7–8. SolarWorld argued that Commerce on remand had again not reasonably explained why it found HTS category 8548.10 to be a better selection than HTS category 2804.69, which is specific to polysilicon, "the primary raw material input into solar cells (and modules) and the raw material that is reclaimed when solar cells (and modules) are scrapped." *Id.* at 6.

In *Jinko Solar II*, the court remanded the *First Remand Results* to Commerce on this one issue.[7] *See Jinko Solar II*, 41 CIT at __, 279 F. Supp. at 1261–65. The court determined that Commerce still had not adequately supported its selection of a surrogate value for the scrapped solar module by-product offset and still had not explained why, on this record, it is reasonable to determine that HTS category 8548.10 is the best available information. *Id.*, 41 CIT at __, 279 F. Supp. at 1262–64. Specifically, the court found that Commerce had unreasonably relied upon the "scrap nature" of the products covered by HTS subheading 8548.10 and the respondents' solar module by-product to justify its conclusion that HTS category 8548.10 is the best available information. *Id.*, 41 CIT at __, 279 F. Supp. at 1264. The court found this conclusion unreasonable given the record, which shows that the scrapped materials covered by HTS category 8548.10 differ from the scrapped materials in solar modules; the court emphasized that the word "scrap," on its own, does not indicate the value of a scrapped material. *Id.*, 41 CIT at __, 279 F. Supp. at 1263–64. The court reasoned that, because all materials that have been scrapped do not share a similar value, the word "scrap," without more, cannot indicate that an HTS subheading with the word "scrap" in it is a reasonable surrogate value, representative of the value of Trina's scrapped solar modules. *Id.* Further, the court noted that it was similarly unreasonable for Commerce to justify its selection on the fact that the scrapped modules and the products within HTS category 8548.10 are capable of generating electricity, "without some explanation as to why generating electricity relates to the products' value." *Id.*, 41 CIT at __, 279 F. Supp. at 1264. The court remanded so that Commerce could reconsider or further explain why, on this record and in light of these arguments, HTS category 8548.10 provides a reasonable value for Trina's scrapped solar modules by-product offset. *See id.*, 41 CIT at __, 279 F. Supp. at 1262–64.

On second remand, under respectful protest, Commerce did not continue to value the scrapped solar modules using South African

[7] In *Jinko Solar II*, the court sustained Commerce's determination to collapse the ReneSola group with the Jinko group, treating these companies as a single entity for purposes of the antidumping duty analysis. *Jinko Solar II*, 41 CIT at __, 279 F. Supp. at 1258–61, 1264.

import data for HTS category 8548.10, and instead selected Thai import data for HTS category 2804.69, which covers imports of silicon of less than 99.99 percent purity. *See Second Remand Results* at 5–9. Commerce noted that "there are no changes to the dumping margins for any respondent pursuant to [the *Second Remand Results*]."[8] *Id.* at 9. Commerce received no comments on the draft determination, *id.* at 8, and no parties submitted comments to the court in opposition to the *Second Remand Results*.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Commerce determines whether a company is engaged in dumping by comparing the normal value of the subject merchandise with the actual or constructed export price of the merchandise. 19 U.S.C. § 1677b(a). The normal value of the merchandise is the price of the merchandise when sold for consumption in the exporting country. *Id.* § 1677b(a)(1)(B). However, when the exporting country is, like China, a nonmarket economy country, Commerce calculates the normal value for subject merchandise by valuing inputs including the factors of production utilized in producing the merchandise and "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1). Commerce selects a surrogate value for each of these inputs from a source in a market economy country that is economically comparable to the nonmarket economy

[8] Commerce emphasizes specifically that "Trina's calculated margin is unaffected by the change in surrogate value due to the very small per-unit quantity of scrapped solar modules reported by Trina." *Second Remand Results* at 9 n.34 (citing Analysis Mem. for the Draft Results of Redetermination Pursuant to Second Court Remand in the [ADD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC], Remand PD 1, bar code 3674144–01 (Feb. 20, 2018) ("Analysis Memo")). The Analysis Memo is filed on the administrative record of the second remand proceedings; on March 13, 2018, Defendant filed the index for the administrative record of the second remand proceedings. *See* Def.'s Notice of Filing of the Admin. Record, Mar. 13, 2018, ECF No. 135. The Analysis Memo is identified by the bar code and item number assigned by Commerce in the second remand administrative index.

country and is a significant producer of comparable merchandise. *Id.* § 1677b(c)(4)(A)–(B); *see* 19 C.F.R. § 351.408(b) (2014).[9] To select a surrogate value for each of these inputs, Commerce uses "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]."[10] 19 U.S.C. § 1677b(c)(1); *see* 19 C.F.R. § 351.408(a)–(c). With "best available information" not defined in the statute, Commerce has discretion to determine what data constitutes the best available information for valuing the inputs.[11] *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

Here, on second remand, Commerce reevaluated the record evidence and its selection of a surrogate value for Trina's scrapped solar module by-product. *See Second Remand Results* at 5–9. Under protest,[12] the agency determined that it would not continue to value the solar module by-product using South African import data for HTS 8548.10 and would instead value the by-product using Thai import data for HTS 2804.69. *Id.* at 6–7. Commerce reiterated that the South African import data for HTS 8548.10 and the Thai import data for HTS 2408.69 were the only two potential surrogate values on record and, as "[n]either of these categories explicitly covers scrapped solar modules," the agency had to make a selection based on two imperfect options. *Id.* at 6. Commerce explained:

> Our previous findings that solar modules were more similar to batteries relied primarily on the fact that both items are engineered products that similarly include metal components and chemicals. We considered the battery and solar module components similar in nature and found that both sets of components were used in an engineered product designed to generate electricity. Thus, we found not only that the function of batteries and solar modules were similar, but also that they consisted of similar components to achieve this function. However, the Court

[9] Further citation to the Code of Federal Regulations is to the 2014 edition.

[10] Commerce has a regulatory preference to value all inputs using data from a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2).

[11] Commerce's practice in determining the "best available information" is to "use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." *See* U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process* 2 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited May 22, 2018).

[12] By complying with the court's order under protest, Commerce preserves for appeal the arguments and positions it presented in the final determination and *First Remand Results*. *See Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1376–77 (Fed. Cir. 2003).

> determined that Commerce could not rely on the common function of batteries and solar modules (*i.e.*, electricity generation) without explaining why such a function was relevant to the value of these items. Commerce further noted that HTS 8548.10 consisted of scrapped materials, while HTS 2804.69 did not. However, the Court found the fact that HTS 8548.10 covers scrap materials and HTS 2804.69 does not is not, in itself, indicative of which HTS subheading is an appropriate surrogate value for the scrap solar module offset.

Second Remand Results at 6. Responding to the court's request that the agency explain why its selection is reasonable and why it provides a representative value for Trina's scrapped solar modules, Commerce explained that it would not continue to value Trina's solar module by-product using HTS 8548.10. *See id.* at 5–8.

Commerce has on second remand complied with the court's order in *Jinko Solar II*. The court stated that the agency could not, without more, rely on the fact that HTS 8548.10 covers certain materials that, like Trina's solar modules, have been scrapped and are capable of generating electricity. *Jinko Solar II*, 41 CIT at __, 279 F. Supp. at 1263–64. On second remand Commerce declined to provide an alternate explanation for selecting HTS 8548.10 that did not rely upon those justifications, and instead selected the other available category, import data for subheading 2408.69, HTS, as the best available information for valuing Trina's scrapped solar module by-product. *Second Remand Results* at 6–7. It is reasonably discernible that Commerce determined that it was unable to support a selection of HTS 8548.10 without focusing on the appearance of the word "scrap" and the products' ability to generate electricity. As the court explained in *Jinko Solar II*, because neither of those characteristics innately relate to the products' value, Commerce must explain how these characteristics nevertheless indicate that import data for subheading 8548.10, HTS, would provide a representative surrogate value for Trina's scrapped solar modules. *Jinko Solar II*, 41 CIT at __, 279 F. Supp. at 1263–64. Commerce's implicit acknowledgement that it could not provide the required explanation to justify the selection of HTS 8548.10 renders its selection of the alternate option, HTS 2804.69, which covers the raw material that makes up the primary input in this by-product, reasonable on this record. Commerce has complied with the court's order in *Jinko Solar II*, and the *Second Remand Results* are sustained.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination to use Thai import data under subheading 2804.69, HTS, to value Trina's by-product offset for scrapped solar modules in this investigation. The *Second Remand Results* are sustained, and judgment will enter accordingly.

Dated: May 25, 2018
New York, New York

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

Slip Op. 18–62

U.S. AUTO PARTS NETWORK, INC., Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SECRETARY KIRSTJEN NIELSEN, and CHIEF FREDERICK J. EISLER, III, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00068

[Granting Plaintiff's motion for a preliminary injunction.]

Dated: May 25, 2018

Barry F. Irwin, Christopher D. Eggert, Iftekhar Ahmad Zaim, and *Reid P. Huefner*, Irwin IP LLC, of Burr Ridge, IL, argued for Plaintiff U.S. Auto Parts Network, Inc.

Beverly A. Farrell and *Monica P. Triana*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendants United States, U.S. Department of Homeland Security, Secretary Kirstjen Nielsen, and Chief Frederick J. Eisler, III. With them on brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel was *Edward N. Maurer*, U.S. Customs and Border Protection.

OPINION AND ORDER

Choe-Groves, Judge:

Before the court is a motion submitted by Plaintiff U.S. Auto Parts Network, Inc. ("U.S. Auto") to convert the temporary restraining order to a preliminary injunction. U.S. Auto is a publicly traded company incorporated in Delaware and headquartered in Carson, California. Plaintiff initiated this action to contest the imposition of an enhanced single entry bond requirement in the amount of three times the entire shipment value on each container of merchandise imported by U.S. Auto ("SEB Requirement"), which U.S. Customs and Border Protection ("Customs") mandated in response to Plaintiff's continued importation of goods alleged to infringe trademarks in violation of 15 U.S.C. § 1124 (2012)[1] and 19 U.S.C. § 1526(e). The treble bond requirement, enforced against each of U.S. Auto's shipments, resulted in a single entry bond totaling approximately $9 million at the time Customs imposed the SEB Requirement. This is in contrast to the previous continuous bond of $200,000 for all of U.S. Auto's annual shipments. Because the court determines that Plaintiff has met its burden of proof with respect to the requisite four factors, the motion for preliminary injunction is granted.

[1] All further citations to the U.S. Code are to the 2012 edition. The merits of the underlying trademark dispute are not before the court.

BACKGROUND

The court presumes familiarity with the facts of this case. *See U.S. Auto Parts Network, Inc. v. United States*, Slip Op. 18–38, 2018 WL 1725767, at *1–2 (CIT Apr. 6, 2018). This court issued an order granting in part and denying in part Plaintiff's Motion for Temporary Restraining Order on April 6, 2018, which partially enjoined the ability of Defendants (collectively, "Government") to enforce the SEB Requirement. *See id.* at *6. Pursuant to a telephone conference requested by Defendants, the court issued an order clarifying the implementation of the Temporary Restraining Order on April 12, 2018. *See* Order, April 12, 2018, ECF No. 28. Plaintiff requested conversion of the temporary restraining order into a preliminary injunction during the telephone conference, resting on its previous submissions. *See id.; see also* Mem. P. & A. Supp. U.S. Auto's Appl. TRO, Apr. 2, 2018, ECF No. 6; Letter Regarding Issues Relating TRO, Apr. 11, 2018, ECF No. 26. Defendants filed their timely response to the motion for preliminary injunction. *See* Defs.' Resp. Pl.'s Mot. Prelim. Inj., Apr. 16, 2018, ECF No. 29. The court held a hearing on this matter on May 9, 2018. *See* Preliminary Injunction Hearing, May 9, 2018, ECF No. 44; *see also* Tr. Prelim. Inj. Hr'g, May 21, 2018, ECF No. 56 ("Hr'g Tr.").

DISCUSSION

This court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(4). Rule 65(a) of the Rules of this Court allows for the issuance of a preliminary injunction in an action. USCIT R. 65(a). The court considers four factors when evaluating whether to grant a temporary restraining order or preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). These factors are: (1) whether the party will incur irreparable harm in the absence of such injunction; (2) whether the party is likely to succeed on the merits of the action; (3) whether the balance of hardships favors the imposition of the injunction; and (4) whether the injunction is in the public interest. *See id.; see also Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014). No one factor is "'necessarily dispositive,' because 'the weakness of the showing regarding one factor may be overborne by the strength of the others.'" *Belgium v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (citing *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). The factors should be weighed according to a "sliding scale," however, which means that a greater showing of irreparable harm in Plaintiff's favor lessens the burden on Plaintiff to show a likelihood of success on the merits. *See id.* (internal citations omitted). The court will evaluate each of the four factors in turn.

A. Irreparable Harm

Plaintiff must show that it will suffer irreparable harm absent a grant of injunctive relief. *See Winter*, 555 U.S. at 20. Irreparable harm includes "a viable threat of serious harm which cannot be undone." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (internal citations omitted). An allegation of financial loss alone generally does not constitute irreparable harm if future money damages can provide adequate corrective relief. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Bankruptcy or substantial loss of business may constitute irreparable harm, however, because "loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review." *Harmoni Int'l Spice, Inc. v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1298, 1307 (2017) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)). "Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities" may also constitute irreparable harm. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (internal citations omitted).

Mr. Coleman, U.S. Auto's Chief Executive Officer, testified at the Preliminary Injunction Hearing. He described how U.S. Auto "spent about 20 years establishing [its] supply chain across 350 factories." *See* Hr'g Tr. 59. Plaintiff's witness testified that without the relief granted in a preliminary injunction, "those suppliers will be forced to go and . . . offer their capacity to other retailers or our competitors. So we would not be able to reestablish probably any of those." *See id.* at 59–60. Because of the lack of inventory, U.S. Auto has also experienced impact to its wholesale business, a decrease in revenues and margins, and a forced reduction to its workforce. *See id.* at 60–61.

Plaintiff's witness provided testimony at the hearing describing the company's inability to pay the SEB Requirement. U.S. Auto's EBITDA in 2017 was the highest it has been in the past five years, at $11.4 million.[2] *See id.* at 51. At the time Customs imposed the SEB Requirement, U.S. Auto would have been required to put up a bond valued at $9 million. *See id.* at 48. Because inventory continues to grow, the bond value required also increases, due to the nature of a single-entry bond. *See id.* at 47–48 ("The bond amount is a point in time. So it all depends on how much inventory is there. But, remember, inventory grows each week, so it required new bonding."). U.S. Auto was not able to post the $9 million bond because various sureties required full cash collateral for the bond. *See id.* at 49–50 (Mr. Coleman's testimony), 127–29 (Mr. Roberts' testimony). Mr. Coleman testified that U.S. Auto would have been able to meet the SEB Require-

[2] U.S. Auto's EBITDA in 2013 was approximately negative $2 million; $3.5 million in 2014; $6 million in 2015; and $8.5 million in 2016. *See* Hr'g Tr. 51.

ment, "at best, a couple weeks," before going out of business. *See id.* at 51. Given the difficulties that U.S. Auto faced in paying the exorbitant SEB Requirement, the company's "inability to predict" Customs' actions, and "the disruption that this has caused" the business, Mr. Coleman stated that U.S. Auto has stopped importing vehicle grilles completely, which represents "roughly $8 million" of the company's annual revenue. *See id.* at 46.

Based on the credible testimony proffered at the hearing, the court concludes that Plaintiff has adequately shown irreparable harm in support of its motion for injunctive relief.

B. Balance of Hardships

When evaluating a request for a preliminary injunction, it is the court's responsibility to balance the hardships on each of the Parties. *See Winter*, 555 U.S. at 20. In addition to the significant financial burden and business disruption caused by the SEB Requirement, as discussed above, Plaintiff's witness described at the hearing how U.S. Auto struggled to alter its importation plans and supply chain in order to comply with the demands of Customs officers at the Port of Norfolk. Mr. Coleman testified that U.S. Auto has a "very large and complex supply chain" with "over 350 different factories," which results in a "long time between when we send an order for something to be removed from future orders before it is actually removed across the entire supply chain." Hr'g Tr. 32. Due to the time it takes for international transit and fulfillment of each shipment, "on grilles, most orders would end up being ordered two to four months in advance." *Id.* at 33. "Items that are in the container are impossible to turn around," and "[i]tems that have left the factory are near impossible to turn around." *Id.* For certain grille models, Mr. Coleman stated that it may take six to seven months to shut down the supply chain. *Id.* at 84. Plaintiff illustrated through testimony how difficult it was for U.S. Auto to remove allegedly infringing grilles from its supply chain.

Mr. Coleman also testified that U.S. Auto had approximately 160 containers residing at the Port of Norfolk at the time of the hearing. *See id.* at 56. Approximately 99% of the goods in these containers are legitimate, non-infringing inventory that is unavailable for sale. Each container incurs, furthermore, a demurrage fee[3] of $150 to $200 per

[3] Mr. Coleman defined a demurrage fee as a cost incurred when a company does not return a container back to the ocean freight partner. *See* Hr'g Tr. 57. "You get a grace period; so if you import a product and the container arrives week one, you are allowed a couple of weeks to process that container and return it to them. We haven't been returning containers to our ocean partners for several months due to the product not flowing in Norfolk. So that fee increases daily." *Id.*

container per day. *See id*. Mr. Coleman estimated the total outstanding demurrage fees at the time of the hearing to be over one million dollars, which would increase as time passed. *See id.* at 57.

Defendants' witness from Customs at the Preliminary Injunction Hearing, Mr. Mark Laria, testified as to the strain on the Port of Norfolk associated with physically reviewing each of U.S. Auto's shipments, including the effect it had on other importers. *See id.* at 182–83. He further stated that the purpose of the SEB Requirement was to "gain compliance" from U.S. Auto. *See id.* at 207. Notwithstanding the challenges faced by Customs, given the significant financial hardships and business disruptions experienced by U.S. Auto, including the real threat of closing its business due to the enhanced bond requirement, the court concludes that the balance of hardships tips in favor of Plaintiff.

C. Likelihood of Success on the Merits

In order to obtain a preliminary injunction, Plaintiff bears the burden of showing that it is likely to succeed on the merits of its claims. *See Winter*, 555 U.S. at 20. U.S. Auto alleges the following claims against the Government: violations of the Administrative Procedure Act, violation of the Eighth Amendment's Excessive Fines Clause, and violation of Plaintiff's right to due process under the Fifth Amendment. *See* Am. Verified Compl. ¶ 22, Apr. 5, 2018, ECF No. 17 ("Compl."). Plaintiff requests both injunctive and monetary relief. *See id.* ¶¶ A–H. The court will now evaluate each of the claims alleged in Plaintiff's complaint.

1. Counts I and II: Agency Action in Violation of the Administrative Procedure Act

U.S. Auto asserts that Customs' application of the SEB Requirement on all of its shipments constitutes an agency action that is reviewable under the Administrative Procedure Act. *See id.* ¶¶ 65–73. Plaintiff contends specifically that Customs, in setting the SEB Requirement, acted arbitrarily and capriciously, as well as beyond its statutory mandate, applicable regulations, and own Customs Directive. *See id.*

The Administrative Procedure Act prohibits an agency from acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An agency cannot act "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." *Id.* § 706(2)(C), (D). The court considers whether the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter

to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Al. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (stating the same).

Customs' own directive provides guidance in determining the amount of a bond. The directive states, in relevant part, "The purpose of the bond is to protect the revenue and ensure compliance. . . . However, it is not Customs *[sic]* intent to require bond amounts which unnecessarily put an excessive burden on a person or firm, or place them in an impossible situation." Compl. Ex. E, at 2, Apr. 5, 2018, ECF No. 17–5.

Here, the single entry triple bond contravenes the directive by placing an excessive burden on U.S. Auto and by placing it in an arguably near-impossible position. The court notes that the Government previously represented to the court that approximately 99% of the goods imported by U.S. Auto are not implicated by Customs' counterfeit allegations. *See* Teleconference at 0:42:55–0:43:06, Apr. 6, 2018, ECF No. 19. The Government confirmed further that the SEB Requirement seeks to ensure compliance with respect to only 1% of U.S. Auto's (allegedly infringing) shipments, but burdens all of U.S. Auto's imports.

Mr. Laria testified that he has served as Area Port Director for the Port of Norfolk for seventeen years. *See* Hr'g Tr. 145. He also testified that he made the decision to impose the SEB Requirement on U.S. Auto, which he had never done before to any other importer. *See id.* at 185. Mr. Laria stated that he imposed the SEB Requirement on U.S. Auto "[b]ecause [he] was 39 seizures into it, ten months into it, and they kept coming with those goods." *Id.* at 215. Mr. Laria apparently did not take into account the fact that U.S. Auto was attempting to ameliorate the situation by issuing stop-shipment orders to its suppliers around the world, and that U.S. Auto had stopped importing grilles altogether. Mr. Laria apparently also did not take into account the fact that the enhanced triple bond applied to 100% of the shipment value while directed to only 1% of infringing goods in each container. Mr. Laria noted during his testimony that U.S. Auto had informed Customs that there are "just a few pieces [of infringing goods] in each container." *Id.* at 207. Mr. Laria represented during his testimony in court that he did not know that the SEB Requirement would cause U.S. Auto, a publicly traded U.S.-based company, to go out of business at the time of imposition, but when he did learn of the fact, he kept the requirement in place nonetheless. *See id.*

Customs' action of imposing an enhanced, punitive bond on 100% of Plaintiff's imports, when only 1% of the goods are allegedly counterfeit, appears to contravene Customs' own directive. It places an excessive burden on U.S. Auto and places it in an arguably impossible position that will likely cause the company to go out of business if it were to pay the enhanced bond. The court concludes, at this juncture of the case, that Plaintiff has raised meritorious claims against Defendants with respect to Counts I and II.

2. Count III: Excessive Fines

U.S. Auto claims that the SEB Requirement constitutes a punitive bond requirement and is unconstitutional as excessive under the Excessive Fines Clause enumerated in the Eighth Amendment of the Constitution of the United States. *See* Compl. ¶ 75. It is unclear whether an enhanced bond, which an importer posts as security for entry of its imported merchandise, constitutes a punitive measure within the meaning of the Eighth Amendment. The court concludes that Plaintiff has not met its burden of proof at this stage of the litigation with respect to Count III of its complaint.

3. Count IV: Due Process

Plaintiff further contends that Customs' imposition of the SEB Requirement "without giving U.S. Auto the opportunity to challenge the underlying factual and legal determinations judicially or the ability to challenge the bond requirement is contrary to the law" and amounts to a violation of the Fifth Amendment's Due Process Clause. *See* Compl. ¶¶ 76–81.

The Fifth Amendment prohibits the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. V. "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.'" *Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)), *cert. denied*, 136 S. Ct. 2408 (2016). 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.

Although Plaintiff elicited some testimony regarding notice to U.S. Auto regarding the SEB Requirement, *see* Hr'g Tr. 204, Plaintiff has failed to proffer evidence to show it is likely to succeed in litigating its due process claim because it has not shown deprivation of a consti-

tutionally protected interest. Courts have recognized that individuals do not have a protectable interest to engage in international trade under the Constitution. *See Int'l Custom Prods., Inc.*, 791 F.3d at 1337 (citing *Am. Ass'n of Exps. & Imps.—Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985)). Plaintiff has not shown, therefore, a likelihood of success on the merits with regard to Count IV in its complaint.

Notwithstanding the court's decision with respect to U.S. Auto's constitutional challenges, the court concludes that U.S. Auto has satisfied its burden of showing that it is likely to succeed on the merits of its claims under the Administrative Procedure Act.

D. Public Interest

Plaintiff must also demonstrate that a grant of a preliminary injunction serves the public interest. *See Winter*, 555 U.S. at 20. The court continues to recognize that the public benefits from the efficient administration and enforcement of the law. *See U.S. Auto Parts Network, Inc.*, 2018 WL 1725767, at *5. Plaintiff showed at the Preliminary Injunction Hearing, however, that the prospective harms described at the temporary restraining order stage of this action have now come to fruition, especially with regard to employment of its U.S.-based employees. Since the imposition of the SEB Requirement, Plaintiff has "had to force time off and reduce temporary headcount" at its facilities. Hr'g Tr. 61. The court finds that the public interest impact of both Customs' desire to enforce the law and U.S. Auto's efforts to employ its U.S. workforce are compelling. The court concludes that the public interest factor weighs equally in favor of Plaintiff and Defendants.

CONCLUSION

For the aforementioned reasons, the court concludes that Plaintiff has sufficiently met its burden of proof for the issuance of a preliminary injunction. Accordingly, upon consideration of Plaintiff's motion for preliminary injunction, and all other papers and proceedings in this action, it is hereby

ORDERED that Plaintiff's motion for preliminary injunction is granted; and it is further

ORDERED that the Temporary Restraining Order currently in place in this action is dissolved; and it is further

ORDERED that Defendants and their officers, employees, and agents are restrained from enforcing a requirement that, for each shipment into the United States, U.S. Auto Parts Network, Inc. submit a single entry bond at three times the shipment value in order to obtain entry into the United States; and it is further

ORDERED that Defendants and their officers, employees, and agents are restrained from collecting a bond from U.S. Auto Parts Network, Inc., other than the $200,000 continuous bond currently in place in order to obtain entry of shipments into the United States; and it is further

ORDERED that Defendants and their officers, employees, and agents shall use their best efforts to process all of U.S. Auto's backlogged shipping containers and release to U.S. Auto all imports not implicated by Customs' underlying trademark infringement allegations in a timely manner; and it is further

ORDERED that Plaintiff's security, deposited with the Court on April 23, 2018, shall remain in an interest-bearing account for the duration of this preliminary injunction; and it is further

ORDERED that the Parties shall file a joint status report and proposed scheduling order with the court on or before June 25, 2018.

Dated: May 25, 2018
New York, New York

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

Slip Op. 18–63

OMG, INC., Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 17–00036

[Commerce's *Final Results* are remanded and plaintiff's motion for judgment on the agency record is granted in part.]

Dated: May 29, 2018

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiff. With him on the brief were *David M. Murphy* and *Andrew T. Schutz*.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Adam Gordon, The Bristol Group PLLC, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Ping Gong*.

OPINION

Katzmann, Judge:

A prominent psychologist once suggested that it must be tempting "if the only tool you have is a hammer, to treat everything as if it were a nail." ABRAHAM MASLOW, PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15–16 (1966). Plaintiff OMG, Inc. ("OMG") believes that the Department of Commerce ("Commerce") made such an error, and challenges Commerce's determination that zinc anchors imported by OMG fall within the scope of the Antidumping and Countervailing Duty Orders on Certain Steel Nails from the Socialist Republic of Vietnam. *Certain Steel Nails from the Socialist Republic of Vietnam: Final Scope Ruling on OMG, Inc.'s Zinc Anchors* (Feb. 6, 2017), P.D. 29 ("*Final Scope Ruling*"); *Certain Steel Nails from the Socialist Republic of Vietnam: Countervailing Duty Order*, 80 Fed. Reg. 41,006 (July 14, 2015) and *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (July 13, 2015) (collectively the "*Orders*"). OMG argues that its anchors are not steel nails and, therefore, do not fall within the scope of the orders and that Commerce's analysis and scope determination is unsupported by substantial evidence on the record and is otherwise not in accordance with law. Compl., Feb. 21, 2017, ECF No. 7; Pl.'s Mot. For J. on the

Agency R. and Br. in Supp., June 29, 2017, ECF No. 26 ("Pl.'s Br."); Pl's Reply, Nov. 30, 2017, ECF No. 34. The court concludes that Commerce's determination was not in accordance with law, for the reasons stated below.

BACKGROUND

A. *Legal and Regulatory Framework of Scope Reviews Generally.*

Dumping occurs when a foreign company sells a product in the United States for less than fair value — that is, for a lower price than in its home market. *Huzhou Muyun Wood Co., Ltd. v. United States*, 42 CIT ___, ___, 279 F. Supp. 3d 1215, 1218 (2017) (citing *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012)). Similarly, a foreign country may countervailably subsidize a product and thus artificially lower its price. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To empower Commerce to offset economic distortions caused by dumping and countervailable subsidies, Congress enacted the Tariff Act of 1930.[1] *Huzhou*, 279 F. Supp. 3d at 1218–19. Under the Tariff Act's framework, Commerce may — either upon petition by a domestic producer or of its own initiative — begin an investigation into potential dumping or subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Id.*

In order to provide producers and importers with notice as to whether their products fall within the scope of an antidumping or countervailing duty order, Congress has authorized Commerce to issue scope rulings clarifying "whether a particular type of merchandise is within the class or kind of merchandise described in an existing . . . order." 19 U.S.C. § 1516a(a)(2)(B)(vi). As "no specific statutory provision govern[s] the interpretation of the scope of antidumping or countervailing orders," Commerce and the courts developed a three-step analysis. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015); *Polites v. United States*, 35 CIT ___, ___, 755 F. Supp. 2d 1352, 1354 (2011); 19 C.F.R. § 351.225(k).

Because "[t]he language of the order determines the scope of an antidumping duty order[,]" any scope ruling begins with an examination of the language of the order at issue. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) (citing *Duferco*

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

Steel, Inc. v. United States, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). If the terms of the order are unambiguous, then those terms govern. *Id.* at 1382–83.

However, if Commerce determines that the terms of the order are either ambiguous or reasonably subject to interpretation, then Commerce "will take into account . . . the descriptions of the merchandise contained in the petition, the initial investigation, and [prior] determinations [of Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1) ("(k)(1) sources"); *Polites*, 755 F. Supp. 2d at 1354; *Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017). To be dispositive, the (k)(1) sources "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Polites*, 755 F. Supp. 2d at 1354 (quoting *Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)). If Commerce "can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of . . . section [351.225], whether a product is included within the scope of an order . . . [Commerce] will issue a final ruling[.]" 19 C.F.R. § 351.225(d).

If a section 351.225(k)(1) analysis is not dispositive, Commerce will initiate a scope inquiry under § 351.225(e), and apply the five criteria from *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983) as codified in 19 C.F.R. § 351.225(k)(2).[2] *Polites*, 755 F. Supp. 2d at 1355.

B. *Factual and Procedural History of this Case*

In May 2014, Mid Continent Steel & Wire ("Mid Continent") petitioned Commerce to impose antidumping and countervailing duties on steel nails from a number of countries, including the Socialist Republic of Vietnam ("Vietnam"). Certain Steel Nails from the Socialist Republic of Vietnam: OMG Scope Request: Zinc Anchors ("Scope Ruling Request") at Ex. 10, Petition for the Imposition of Antidumping and Countervailing Duties, P.D. 1–5 (May 29, 2014). In July 2015, after having determined that dumping was occurring, Commerce issued the antidumping and countervailing duty *Orders* covering certain steel nails from Vietnam. The scope of the *Orders* reads in full:

> The merchandise covered by the Orders is certain steel nails having a nominal shaft length not exceeding 12 inches. Certain steel nails include, but are not limited to, nails made from round

[2] These criteria are: (1) The physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2); *see Diversified Prods.*, 572 F. Supp. at 889.

wire and nails that are cut from flat-rolled steel. *Certain steel nails may consist of a one piece construction or be constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and may have any type of surface finish, head type, shank, point type and shaft diameter. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, including but not limited to electroplating or hot dipping one or more times), phosphate, cement, and paint.* Certain steel nails may have one or more surface finishes. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the nail using a tool that engages with the head. Point styles include, but are not limited to, diamond, needle, chisel and blunt or no point. Certain steel nails may be sold in bulk, or they may be collated in any manner using any material.

Excluded from the scope of the Orders are certain steel nails packaged in combination with one or more non-subject articles, if the total number of nails of all types, in aggregate regardless of size, is less than 25. If packaged in combination with one or more non-subject articles, certain steel nails remain subject merchandise if the total number of nails of all types, in aggregate regardless of size, is equal to or greater than 25, unless otherwise excluded based on the other exclusions below.

Also excluded from the scope are certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article falls into one of the following eight groupings: 1) builders' joinery and carpentry of wood that are classifiable as windows, French-windows and their frames; 2) builders' joinery and carpentry of wood that are classifiable as doors and their frames and thresholds; 3) swivel seats with variable height adjustment; 4) seats that are convertible into beds (with the exception of those classifiable as garden seats or camping equipment); 5) seats of cane, osier, bamboo or similar materials; 6) other seats with wooden frames (with the exception of seats of a kind used for aircraft or motor vehicles); 7) furniture (other than seats) of wood (with the exception of i) medical, surgical, dental or veterinary furniture;

and ii) barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements); or 8) furniture (other than seats) of materials other than wood, metal, or plastics (e.g., furniture of cane, osier, bamboo or similar materials). The aforementioned imported unassembled articles are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

Also excluded from the scope of the Orders are steel nails that meet the specifications of Type I, Style 20 nails as identified in Tables 29 through 33 of ASTM Standard F1667 (2013 revision).

Also excluded from the scope of the Orders are nails suitable for use in powder-actuated hand tools, whether or not threaded, which are currently classified under HTSUS subheadings 7317.00.20.00 and 7317.00.30.00.

Also excluded from the scope of the Orders are nails having a case hardness greater than or equal to 50 on the Rockwell Hardness C scale (HRC), a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

Also excluded from the scope of the Orders are corrugated nails. A corrugated nail is made up of a small strip of corrugated steel with sharp points on one side.

Also excluded from the scope of the Orders are thumb tacks, which are currently classified under HTSUS subheading 7317.00.10.00.

Certain steel nails subject to the Orders are currently classified under HTSUS subheadings 7317.00.55.02, 7317.00.55.03, 7317.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11, 7317.00.55.18, 7317.00.55.19, 7317.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60 and 7317.00.75.00. Certain steel nails subject to the Orders also may be classified under HTSUS subheading 8206.00.00.00 or other HTSUS subheadings.

> While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the Orders is dispositive.

Orders (emphasis added).

On August 5, 2016, OMG, an importer of zinc anchors, filed a request with Commerce for a scope ruling that its zinc anchors should be excluded from the scope of the *Orders*. Scope Ruling Request. In its Scope Ruling Request, OMG described its zinc anchors as follows:

> Each Zinc Anchor consists of two components: (1) a zinc alloy body, which comprises approximately 62% of the total weight of the complete Zinc Anchor; and (2) a zinc plated steel pin, which comprises approximately 38% of the Zinc Anchor's total weight. The zinc body and zinc plated pin are produced in Vietnam, and then assembled together in Vietnam, resulting in a one-piece article of commerce: a Zinc Anchor. While it may be physically possible to separate the zinc body from the steel pin after the Zinc Anchor has been created, disassembly is not commercially realistic, in light of the Zinc Anchor's cost and use, as well as the likelihood that the components will be damaged and rendered useless by the disassembly process.
>
> The zinc body of each Zinc Anchor contributes approximately 74% of the total cost of the Zinc Anchor, while the steel pin contributes 17% of the total cost. The balance of cost, 9%, is comprised of packing materials and assembly labor. While one thousand Zinc Anchors cost approximately $31.50, one thousand subject steel nails similar to the pin mechanically attached to the Zinc Anchor costs approximately $5.30 (i.e., approximately 17% of the total cost).
>
> In order to secure termination bars to concrete or masonry walls, Zinc Anchors are inserted into predrilled holes, which must be a minimum of 1/2 [inch] deeper than the Zinc Anchor embedment. The Zinc Anchors are then installed with a hammer, which is used to drive the steel pin, thereby expanding the zinc body in the predrilled hole. The pin facilitates the expansion of the Zinc Anchor in all directions. In other words, the termination bar is secured to a wall by the expanded zinc body. The steel pin is used only to expand the zinc body.

Id. at 3–4.

Following OMG's scope ruling request, Mid Continent submitted comments arguing that OMG's zinc anchors were within the scope of

the *Orders*. Letter from the Bristol Group PLLC to Sec'y Commerce, P.D. 8 (Aug. 16, 2016). OMG filed timely rebuttal comments. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y Commerce, P.D. 9 (Aug. 24, 2016).

On February 6, 2017, Commerce issued its *Final Scope Ruling*, in which it determined that OMG's zinc anchors were unambiguously within the scope of the *Orders* based upon the plain meaning of the *Orders* and stated that the (k)(1) factors also supported its conclusion. *Final Scope Ruling* at 10.

OMG filed a complaint with this court contesting the *Final Scope Ruling* and on June 29, 2017, OMG submitted its Motion for Judgment on the Agency Record and Brief in Support. Compl.; Pl.'s Br. The Government and defendant-intervenor Mid Continent submitted their briefs in opposition on October 30, 2017. Def.'s Br., ECF No. 31; Def.-Inter.'s Br., ECF No. 32. OMG replied on November 30, 2017. Pl.'s Reply. Oral argument was held before this court on May 9, 2018. ECF No. 41. OMG presented the court with samples of its merchandise at oral argument and confirmed that the samples were identical to the merchandise subject to this action. Resp. to Court's Request, May 14, 2018, ECF No. 42. OMG and the Government filed supplemental authority on May 15 and 16, 2018, respectively. ECF Nos. 43–44.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(vi). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

The Government argues that: (1) Commerce's determination that OMG's zinc anchors fit within the plain language of the *Orders* is in accordance with law; (2) there is substantial evidence that the (k)(1) sources dispositively place OMG's product within the scope of the orders; (3) a formal scope inquiry was unnecessary and thus Commerce did not need to consider the (k)(2) sources; and (4) Commerce may instruct CBP to retroactively suspend liquidation on OMG's shipments entered prior to the date of Commerce's ruling. "[T]he question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that

we review de novo." *Meridian*, 851 F.3d at 1382. The court concludes that the product at issue is not a nail within the plain meaning of the word "nail" and is, therefore, outside the scope of the *Orders*.

As the Federal Circuit has held, the terms of an order govern its scope. *Duferco*, 296 F.3d at 1097*; see Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998). Additionally, "[a]lthough the scope of a final order may be clarified, it can not be changed in a way contrary to its terms." *Duferco*, 296 F.3d at 1097 (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). For that reason, "if [the scope of an order] is not ambiguous, the plain meaning of the language governs." *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012).

"In determining the common meaning of a term, courts may and do consult dictionaries, scientific authorities, and other reliable sources of information, including testimony of record." *NEC Corp. v. Dep't of Commerce*, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999) (quoting *Holford USA Ltd. Inc. v. United States*, 19 CIT 1486, 1493–94, 912 F. Supp. 555, 561 (1995)). Furthermore, "[b]ecause the primary purpose of an antidumping order is to place foreign exporters on notice of what merchandise is subject to duties, the terms of an order should be consistent, to the extent possible, with trade usage." *ArcelorMittal*, 694 F.3d at 88.

A nail, as defined by THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE ("AMERICAN HERITAGE") (4th ed. 2000), is "[a] slim, pointed piece of metal hammered into material as a fastener." Similarly, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) ("WEBSTER'S") (1993) defines a nail as "a slender and usually pointed and headed fastener designed for impact insertion." These definitions present a "single clearly defined or stated meaning": a slim, usually pointed object used as a fastener designed for impact insertion. *Unambiguous*, WEBSTER'S (1986), *quoted in Meridian*, 851 F.3d at 1381 n.7. Therefore, "nail" is an unambiguous term.

The merchandise at issue here does not fit into the above definitions. OMG described its zinc anchor as: "(1) a zinc alloy body . . . and (2) a zinc plated steel pin." Scope Ruling Request at 3. Commerce made its determination based upon the steel pin, arguing "the securely fastening steel nail or 'pin' operates as a critical component of the OMG anchors, without which the anchors could not function as a fastener." *Final Scope Ruling* at 10. As both parties agreed at oral argument, the steel pin fits within the common definition of a nail.

Oral Arg. However, as Commerce noted in its *Final Scope Ruling*, and as both parties agreed at oral argument, OMG's zinc anchor is a unitary article of commerce. *Id.*; *Final Scope Ruling* at 4–5. As such, the entire product, not just a component part, must be defined as a nail to fall within the scope of the orders.

The entire product here is not a nail. The definitions of a nail cited above define a nail as a fastener inserted by impact into the materials to be fastened. The merchandise at issue is not inserted by impact into the materials to be fastened. Rather, OMG's anchors are "inserted into predrilled holes which must be a minimum of 1/2 [inch] deeper than the Zinc Anchor embedment." Scope Ruling Request at 4. A hammer is then used to strike the steel pin, which expands the zinc body into firm contact with the materials to be fastened. *Id.* Nor is the steel pin acting as the primary fastener; rather, the materials are fastened by the expanded zinc body while the steel pin is only used to facilitate expansion. *Id.*

Trade usage further supports the conclusion that OMG's zinc anchors are not nails. Multiple industry actors categorize anchors with steel pins as anchors rather than as nails. Scope Ruling Request at Exs. 5–9. Where the word "nail" is used in the description of these products, it is used as an explicit or an implicit modifier for the noun "anchor" as in "Hammer Drive Nail-In *Anchors*," "Drive Nail *Anchors*," or "Nail-Ins." Scope Ruling Request at Ex. 8 (emphases added). These examples indicate that industry usage accords with the plain meaning of the word "nail." Thus, according to industry usage, the pin is a nail but the unitary article of commerce is an anchor.

The Government asserts that Commerce "considered how the language of the orders is used in the relevant industry and [found] the language and marketing of masonry anchors is not dissimilar to the variety of nails marketed in different categories." Def.'s Br. at 13–14 (quoting *Final Scope Ruling* at 10). However, neither Commerce in its *Final Scope Ruling* nor the Government in its brief furnished support for this proposition.

Therefore, OMG's zinc anchor, taken as a unitary article of commerce, is not a nail within that word's plain meaning and thus does not fall within the unambiguous scope of the *Orders*.

CONCLUSION

The court remands to Commerce for further consideration consistent with this opinion. Commerce shall issue appropriate instruction to U.S. Customs and Border Protection regarding the retroactive suspension of liquidation. Commerce shall file with the Court and provide to the parties a revised scope determination within 90 days of

the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the Court and the parties shall have 15 days thereafter to file reply briefs with the Court.

SO ORDERED.

Dated: May 29, 2018
New York, New York

/*s*/ *Gary S. Katzmann*
GARY S. KATZMANN, JUDGE