Slip Op. 19–90

NEW IMAGE GLOBAL, INC., Plaintiff, v. UNITED STATES, Defendant,

Before: Jane A. Restani, Judge
Consol. Court No. 15–00175

[Regarding tobacco excise taxes, Defendant's motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied]

Dated: July 23, 2019

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Justin R. Miller, Attorney-in-Charge, International Trade Field Office, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Hardeep K. Josan*, Trial Attorney, Civil Division, U.S. Department of Justice, Commercial Litigation Branch. Of Counsel on the brief were, *Beth C. Brotman* and *Yelena Slepak*, Attorneys, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Restani, Judge:

This matter arises from a challenge to the excise tax assessed against Plaintiff New Image Global, Inc. ("New Image") by the United States Customs and Border Protection ("Customs"). New Image and Defendant ("the Government") have filed cross-motions for summary judgment. *See* Def.'s Mot. for Summ. J., ECF No. 91 (Dec. 7, 2018) ("Def. Mot. S. J."); Pl.'s Rev. Mot. for Summ. J., ECF No. 96 (Dec. 7, 2018) ("Pl. Mot. S. J."). The core legal issue before the court is whether or not Customs' procedures for weighing New Image's tobacco "wraps"[1] in order to assess the proper excise tax owed is in accordance with the law. For the reasons stated below, defendant's motion for summary judgment is granted and plaintiff's motion is denied.

BACKGROUND

In 2009, Congress passed the Children's Health Insurance Program Reauthorization Act, which expanded the federal excise tax on to-

[1] As the parties do, we use the commercial term "wraps" as opposed to the common term "wrapper."

bacco products to include "roll-your-own tobacco." *See* Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111–3 (2009); 26 U.S.C. § 5702(o) (2016).[2] New Image is a producer of homogenized tobacco cigar wraps ("wraps") that qualify as "roll-your-own-tobacco."[3] Pl's. Statement of Undisputed Facts ¶ 1, ECF. No. 94–1 (Dec. 7, 2018) ("Pl. Stmt. Facts"); Def.'s Resp. to Pl.'s Statement of Undisputed Facts ¶ 1, ECF No. 102–1 (Apr. 8, 2019) ("Def. Resp. Pl. Stmt.); *see* 26 U.S.C. § 5702(o). New Image declared a 0.75 grams per XXL style wrap on its entry documents 2009–2012. Pl. Stmt. Facts ¶ 26; Def.'s Statement of Undisputed Facts ¶ 7, ECF. No. 91 (Dec. 7, 2018) ("Def. Stmt. Facts").

In 2011, Customs began investigating New Image for alleged underpayment of excise tax. Pl. Stmt. Facts ¶ 27–29; Def. Resp. Pl. Stmt. ¶ 27. In December 2011, Customs conducted the first weighing of New Image's tobacco products for excise tax calculation purposes using the "direct" method. Pl. Stmt. Facts ¶¶ 29–31; Def. Resp. Pl. Stmt. ¶ 31. The "direct" method consisted of Customs removing the tobacco cigar wraps from the packaging and, after letting the wraps dry for twenty-four hours, placing a wrap directly on a scale. Pl. Stmt. Facts ¶ 31; Def. Resp. Pl. Stmt.¶ 31. The average calculated weight using this method was 0.71 grams per wrap. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt.¶ 32.

During the investigation, and in response to a memorandum from an import specialist, the Customs laboratory conducted a second weighing of New Image's wraps. *See* Def. Stmt. Facts ¶ 8; Pl.'s Resp. to Def.'s Statement of Undisputed Facts ¶ 8, ECF. No. 103–2 (Apr. 8, 2019) ("Pl. Resp. Def. Stmt.") ¶ 8. The second weighing occurred in April 2012, using what Customs referred to as the "indirect method." Pl. Stmt. Facts ¶ 38; Def. Resp. Pl. Stmt. ¶¶ 38. The "indirect" method entails measuring the weight of the sealed product, then separately measuring the weight of all materials without the tobacco wrap, and "indirectly" achieving the weight of the tobacco cigar wrap by subtracting the weight of the non-tobacco materials from the weight of the sealed product.[4] Pl. Stmt. Facts ¶¶ 38, 39; Def. Resp. Pl. Stmt. ¶

[2] Roll-your-own-tobacco is defined as: "any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof." 26 U.S.C. § 5702(o).

[3] The style of tobacco cigar wraps at issue in the present case are EZ Roll/XXL style wraps, which New Image, a U.S. company, produces in its factory in Mexico. Pl. Stmt. Facts ¶ 7; Def. Stmt. Facts ¶ 7.

[4] Each individual package contained two tobacco papers, two straws, and sometimes two game pieces. The weight of the tobacco paper recorded was the weight of the sealed package minus the wrapper, straws, and game pieces. *See* Reports from Customs Laboratory, Ex. 19, ECF No. 91-19, (April 16, 2012).

38. Customs claims the "indirect" method[5] was used in order to account for the dissipation of volatile flavor additives,[6] which caused the wraps to lose weight once the packages were opened and as the wraps dried. *See* Pl. Stmt. Facts. ¶ 31; Def. Resp. Pl. Stmt. ¶ 31. This method resulted in weights ranging from 0.875 to 0.96 grams per wrap, with an average weight of 0.915 grams per wrap. Pl. Resp. Def. Stmt. ¶ 41; Def. Stmt. Facts ¶ 10.

In September 2012, New Image made two entries of the wraps at issue here: Entry Number BIM-1124040–0, on September 5, and BIM-1124346–1 on September 17, at the port of San Diego, California. Def. Stmt. Facts ¶¶ 1, 2; Pl. Resp. Def. Stmt. ¶¶ 1, 2. New Image declared the weight of the imported tobacco cigar wraps on its entry documents to be ".75 gm per wrap," as it had claimed previously. Pl. Stmt. Facts ¶ 26; Def. Resp. Pl. Stmt. ¶ 26.

On November 19, 2014, Customs issued a notice of action to New Image for these two entries. Def. Stmt. Facts ¶ 13; Pl. Resp. Def. Stmt. ¶ 13. In the notice of action, Customs used the 0.915 grams per wrap average weight from its second weighing to determine the proper excise tax for the imported wraps, rather than New Image's declared weight of 0.75 grams per wrap. Def. Stmt. Facts ¶¶ 11, 14; Pl. Resp. Def. Stmt. ¶¶ 11, 14.

In December 2014, Customs liquidated the entries with an increased excise tax based on the 0.915 weight. *See* Protest Denial, ECF No. 10 (June 10, 2015) (noting the date of liquidation as December 29, 2014). New Image protested the liquidation, which Customs subsequently denied. *Id.* The denial was issued "because the invoice weights were contrary to, and significantly lower than, New Image's own manufacturer's production weights, and were not based on any scientific methodology." *Id.*

On July 1, 2015, New Image filed a timely Complaint against Customs in this court. Complaint, ECF No. 6 (July 1, 2015). On January 20, 2016, a scheduling order was issued to begin discovery, *see* Scheduling Order, ECF No. 19 (Jan 20, 2016), and took place over the next two years. *See* Amended Scheduling Order, ECF. No. 74 (Aug. 28, 2017). On December 7, 2018, the parties filed cross-motions for summary judgment. *See* Def. Mot. S. J.; Pl. Mot. S. J. On April 8, 2019, both the Government and New Image responded to each other's

[5] The "indirect" method is also referred to as the "difference" method. Pl.'s Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. at 7, 24, ECF No. 107 (May 31, 2019) ("Pl. Reply Br.").

[6] New Image's tobacco wraps contain varying percentages of ethanol, water, and other chemicals in liquid form that are sprayed on the strips of tobacco and binder material of the wrap. Pl. Br. at 5; *see also* Def.'s Resp. to Pl.'s Mot. for Summ. J. at 3–4, ECF No. 102 (Apr. 8, 2019) ("Def. Resp. Br."). The court will refer to these chemicals as "additives" throughout this opinion.

motion for summary judgment, *see* Def. Resp. Br.; Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J., ECF No. 103 (April 8, 2019) ("Pl. Resp. Br."), and subsequently submitted their corresponding reply briefs on May 31, 2019. *See* Def.'s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 106 (May 31, 2019) ("Def. Reply Br."); Pl. Reply Br. Because the parties present a variety of detailed and complex arguments, the following opinion addresses the factual background for each in turn.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (protest denied jurisdiction). Summary judgment is appropriate "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 Rule 56(a). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248 (1986). Denied protests are subject to de novo review "upon the basis of the record made before the court." *See* 28 U.S.C. § 2640(a)(1).

DISCUSSION

I. Incongruity Between New Image's Complaint and Motion for Summary Judgment

Before moving to the central legal issues raised in New Image's motion for summary judgment, the court addresses the Government's assertion that New Image raises issues in its motion for summary judgment that significantly differ from the claims raised in its Complaint. Gov. Resp. Br. at 29–30. Upon review, the court agrees that the motion diverges significantly from the claims in the Complaint. Accordingly, the court must consider whether the claims raised in the Complaint are deemed waived by New Image's failure to brief them in its motion and whether the claims raised by New Image in its motion, but not included in the Complaint, are properly before the court for review.

In the Complaint, New Image raised five claims: (1) Customs' improper delegation of authority to calculate New Image's excise tax to the Alcohol and Tobacco Tax and Trade Bureau ("TTB"), Compl. ¶¶ 21–23, (2) Customs' failure to include a calculation of the tax owed and the amount of the rate advance in the Notice of Action, Compl. ¶¶ 24–25, (3) Customs' failure to properly calibrate the scale used to weigh the tobacco wraps and subsequent reliance on unreliable data in assessing tax liability, Compl. ¶¶ 26–27, (4) Customs' weighing of sample products not taken from the entries at issue, but from an earlier shipment of similar products, Compl. ¶¶ 28–29, and (5) Cus-

toms' failure to comply with notification of liquidation requirements. Compl. ¶¶ 30–31. New Image then asked that the court order reliquidation of the entries at the invoice rate of 0.75 grams and refund New Image accordingly, order that Customs comply with the notice of liquidation requirements in 19 C.F.R. § 159.9 (2016), and order that Customs produce actual entry documents for inspection and declare the liquidation date as the date that these documents are made available to the importer. Compl. at 9.

In its motion for summary judgment, however, New Image changes course and argues (1) that the TTB Ruling referenced by Customs should be disregarded and/or interpreted differently, Pl.'s Mem. in Supp. of Pl.'s Mot. for Summ. J. ("Pl. Br.") at 15–18, ECF No. 94 (Dec. 7, 2018), (2) that Customs' first wrap weighing should be used for assessing the taxation rate, Pl. Br. at 18–23, and (3) that the second test was scientifically unreliable for multiple reasons. Pl. Br. at 32–34. For relief, New Image now asks that the court order that Customs use the 0.71 gram per wrap weight from Customs' first weighing to assess the excise tax owed. Pl. Br. at 38. Although New Image raises some claims that are similar to those in in its Complaint, they are notably different.

The Government argues that New Image has waived the claims in its Complaint that were not briefed in its motion for summary judgment. Def. Reply Br. at 2. Whether or not that is so, New Image has waived those claims because the Government raised them in its motion for summary judgment and New Image failed to respond to them. *See* Fed. R. Civ. P. 56(e); *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1369 (Fed. Cir. 2006) (noting that when a party fails to respond to an opposing party's motion for summary judgment, a court can enter judgment against the nonresponsive party if the moving party is otherwise entitled as matter of law). Accordingly, the court grants the Government's motion for summary judgment as it relates to (1) the omission of calculations of taxes owed by New Image in the Notice of Action, (2) Customs' purported failure to comply with notification of liquidation requirements, and (3) the representativeness of the wrap samples weighed by Customs.[7]

The court also holds that New Image did not properly respond to Customs' explanation regarding the calibration of the scale. New Image, in a footnote, states that it "continues to question whether Customs properly calibrated the scale," but that the issue is "peripheral to the core legal issues that control the outcome of the litigation."

[7] In two footnotes, New Image concedes that the "'notice of liquidation' argument" made in the Complaint is "no longer pertinent to the court's review and disposition of this case," and that it is no longer challenging the representativeness of the wraps weighed by Customs. Pl. Resp. Br. at 2–3, ns.1–2.

Pl. Resp. Br. at 3 n.2. Because New Image did not respond with any legal argument or specific material facts to contradict the Government's assertion that Customs properly calibrated the scale, this issue is also deemed waived. *See Saab Cars*, 434 F.3d at 1369; USCIT Rule 56(e) (facts may be considered undisputed for purposes of the summary judgment motion when not contested).

In filing its motion for summary judgment, the Government's argument understandably relied on the Complaint and accordingly addressed the claims raised therein. Although the Government was not properly on notice regarding the changes to New Image's argument when the Government filed its motion, it was made aware by New Image's motion and was able to, and did, respond to the newly-raised arguments in its response and reply. The court now considers whether the claims raised in New Image's motion for summary judgment, but not made in its Complaint, are properly before the court.

Rule 15(b)(2) of the Rules of the USCIT allow an issue not raised in a pleading to be tried by "the parties' express or implied consent" as if it had been properly raised in the pleadings. USCIT R. 15(b)(2). This Rule substantively mirrors Federal Rule of Civil Procedure 15(b)(2).[8] *See NSK Corp. v. United States*, 593 F. Supp. 2d 1355, 1362 n.6 (CIT 2008) (stating that given the similarity between the two sets of rules, jurisprudence from other circuits is a "valuable interpretative tool"). Subsection 15(b) in both the USCIT Rules and FRCP applies to "Amendments During and After Trial." *See* USCIT R. 15(b); Fed. R. Civ. P. 15(b). The Supreme Court has not clarified, and the circuit courts are split as to whether this rule applies at the summary judgment stage.[9] Neither the Federal Circuit nor this Court has

[8] The following are the texts of the two provisions with the differences in language underlined:

> The FRCP reads: "(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it *must* be treated in all respects as if raised in the pleadings. A party may move—at any time, *even after judgment*—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."
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> The USCIT Rule reads: "(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent it *will* be treated in all respects as if *it had been* raised in the pleadings. A party may move—at any time—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."

[9] At least the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have applied Fed. R. Civ. P. 15(b) to arguments first raised in summary judgment motions. *See New Mexico v. Dept. of Interior*, 854 F.3d 1207, 1232 (10th 2017) (applying Fed. R. Civ. P. 15(b) at summary judgment); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 988 (6th Cir. 2012) (recognizing that the court has applied 15(b) at the summary judgment stage); *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367 (4th Cir. 2001) (applying Fed. R. Civ. P. 15(b) at summary judgment); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 (2d Cir. 2000) (same); *Whitaker v. T.J. Snow Co.*, 151 F.3d 661, 663 (7th Cir. 1998) (same); *United States ex rel. Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987)

directly opined on this issue.[10] The court decides, in the interests of ruling on issues fairly presented, that the majority approach of applying Rule 15(b)(2) when a party raises an unpled issue at the summary judgment stage is the proper course of action so long as the opposing party consents, implicitly or explicitly, to argue the issue.

Although the Supreme Court has not ruled on whether Rule 15(b) applies at the summary judgment stage, it has held that the rule applies at evidentiary hearings so long as the respondent had "a full and fair opportunity to present evidence bearing on the claim's resolution" *Banks v. Dretke*, 540 U.S. 668, 704–5 (2004) (internal quotations omitted). Thus, the touchstone in deciding whether a party has impliedly consented is whether there is no motion, in essence, to strike the argument and whether that party had fair notice and an opportunity to respond so as to avoid being unfairly prejudiced by the new issue. *See* 6A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1493 (3d ed. 2019) (noting that implied consent is generally found in situations where an opposing party is not prejudiced, when a party has not objected to a new argument, and when the opposing party has responded to the issue); *see also Dretke*, 540 U.S. at 704–5. The court is satisfied that the parties have fully briefed the issues first raised in New Image's summary judgment motion. Ac-

(same); *Jackson v. Hayakawa*, 605 F.2d 1121, 1129 (9th Cir. 1979) (same); *but see Crawford v. Gould*, 56 F.3d 1162, 1168–69 (9th Cir. 1995) (holding that Rule 15(b) did not apply to an argument first raised sua sponte at a hearing on cross-motions for summary judgment). The Eleventh Circuit, by contrast, has refused to apply the rule at summary judgment. *See Blue Cross Blue Shield v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990) (Rule 15(b) is "inapposite" when case is decided on summary judgment rather than a trial). The Third and District of Columbia Circuits have acknowledged the issue but have not resolved it. *See Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 676 F.3d 318, 327 (3d Cir. 2012) (assuming for the sake of argument, "without holding, that Rule 15(b) applies at summary judgment"); *Indep. Petroleum Ass'n. of Am. v. Babbitt*, 235 F.3d 588, 596 (D.C. Cir. 2001) (noting that "[i]t is an open question whether the Federal Rules permit parties to impliedly consent to 'try' issues not raised in their pleadings through summary judgment motions").

[10] This Court addressed a similar situation in *Gen. Elec. Co.-Med. Sys. Grp. v. United States*, 86 F. Supp. 2d 1291 (CIT 2000). In that case, a party submitted a proposed amended complaint in connection with its reply brief but failed to file a motion for leave to amend. *Id.* at 1299. The court refused to accept the amended complaint because of the failure to file the motion and similarly refused to accept it under USCIT Rule 15(b) because the case was decided on summary judgment and "by its terms [USCIT Rule 15(b)] applies only where a trial has been or is being held." *Id.* at 1299. This case was later reversed by the Federal Circuit, but that court did not reach a decision on whether the lower court "committed prejudicial error by failing to amend the pleadings to conform to the evidence under local rule 15(b)." *Gen. Elec. Co.-Med. Sys. Grp. v. United States*, 247 F.3d 1231, 1236 n.[1] (Fed. Cir. 2001). Here both parties have argued the issues raised in New Image's motion for summary judgment, thus that case is not instructive. Similarly, in another case, this Court decided that Rule 15(b) was not the "proper vehicle by which to raise [a] pending motion," in a case where motions for summary judgment were also pending. *See Ford Motor Co. v. United States*, 896 F. Supp. 1224, 1230 (CIT 1995). In that case, however, the defendant was actively objecting to the opposing party's motion and so was clearly not consenting to the newly-raised issue as required for a claim to be properly heard under USCIT R. 15(b). *Id.* Accordingly, that decision is inapposite. Rule 15 is intended to allow for flexibility and fairness and the court will not constrain it unduly here.

cordingly, the court finds there to be implied consent for the court to address these issues and now considers the substance of those claims. *See Timken Co. v. United States*, 630 F. Supp. 1327, 1332, n.1 (CIT 1986) (finding that because the parties had fully briefed the issue, the parties had impliedly consented to the issue such that amendment to the Complaint was not required).

II. The Taxable Weight of Tobacco Wraps

New Image argues that the court should hold that Customs overreached its statutory authority by taxing non-tobacco components of roll-your-own tobacco. Pl. Br. at 13–14; *see* 26 U.S.C. § 5702(o). It further takes issue with Customs' purported use of TTB Ruling 2009–1[11] as a source of authority in interpreting the statute. *Id.* at 12–15.

In response, the Government argues that the statute makes clear that component parts of a completed tobacco product are taxed, not just the tobacco content. Def. Resp. Br. at 10–16. By way of example, the Government emphasizes, that when assessing the tax on cigars and cigarettes, the statute has long been read to include the component parts, such as the filter or mouthpiece, in the taxable weight. *Id.* at 15 (citing Rev. Rul. 64–11, 1964–1 C.B. 573 of the Internal Revenue Service (holding that "filters or mouthpieces as an integral part of the finished product . . . must be included in the weight of the cigars or cigarettes in determining the weight of the product per thousand for tax purposes")). The Government argues that similarly the additives in roll-your-own tobacco should be included in assessing the weight of the taxable product. *Def. Resp. Br.* at 13–16. In regard to the TTB Ruling, while the Government argues that New Image overstates its significance in Customs' decision, *id.* at 16–18, the Government points out that Customs' consideration of the TTB's understanding in making its own determination helps ensure consistency of excise tax application regardless of whether the product was produced domestically or abroad. *Id.* at 18. Finally, the Government stresses that the TTB Ruling is consistent with a longstanding rule of customs law that products be analyzed at the time of import and in the condition as imported. *Id.* at 14.

It is part of Customs' "revenue function" to assess and collect excise taxes on imports, which includes "classifying and valuing merchan-

[11] The TTB issued Ruling 2009–1 regarding the taxable weight of tobacco products in response to requests for advice. In part, the TTB Ruling states that taxes on "roll-your-own tobacco are based upon the amount (by weight) of the product removed from the factory or released from customs custody." TTB Ruling 2009–1 at 3 (Apr. 23, 2009). Further, it states that everything that is an "integral part of the finished product," should be included in the taxable weight "including non-tobacco ingredients and components." *Id.*

dise for purposes of such assessment." 6 U.S.C. § 215(1); *see also* 27 C.F.R. § 41.62 (discussing Customs' duty to collect internal revenue taxes on tobacco imports). New Image's argument that TTB somehow usurped this authority is not well taken. There is no indication that Customs acted out of some misplaced understanding that the TTB Ruling was somehow binding on its assessment of excise taxes. The record indicates that Customs merely considered the ruling and came to a similar conclusion on how to interpret the excise tax statute. As the court has noted previously, Customs may consider TTB determinations. *See Shah Bros. v. United States*, 770 F. Supp. 2d 1367, 1369 (CIT 2011) (noting that Customs considers TTB decisions in classifying tobacco products); *Shah Bros. Cv. United States*, 751 F. Supp. 2d. 1303, 1311–12 (CIT 2010) (discussing the authority of Customs to administer the excise tax over imported tobacco and the purview of the TTB over domestically produced tobacco). Customs is fully within its discretion to consider the TTB Ruling and keep its practices aligned with those of the TTB, if possible. In fact, given that a failure to consider the practice of TTB could potentially result in an unintended disparate treatment of domestic versus foreign tobacco products for excise tax purposes, Customs' consideration of the TTB Ruling was the preferred approach.

The statute defines roll-your-own tobacco as "any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof." 26 U.S.C. § 5702(o). The Government is correct that the additives are part of what makes the product marketable and "suitable for use" for its intended purpose. *Id.*[12] Weighing all components essential to the final product in determining the correct tax is in accordance with the statute's definition of roll-your-own tobacco and is administratively practicable. 26 U.S.C. § 5702 (c) refers to "tobacco products" not just "tobacco." Had Congress intended to tax only the tobacco itself, and not the entire processed tobacco product, then the excise tax statute would have been written so that the tax is determined on the basis of

[12] In its reply brief, New Image argues that allowing the wraps to dry out does not render the product unusable. Pl. Reply Br. at 10–11. New Image's quality control supervisor, Mr. Felix Hernandez, however, explicitly states that the tobacco wraps needs to be sufficiently moist to be useable. *See* Deposition of Felix Hernandez at 130–132, Ex. 11, ECF No. 91–11 (Nov. 2, 2016) (confirming that if the wrap is "not appropriately dampened, you can't use it" and that New Image sought a weight of .864 grams per wrap in order to ensure that the product was not too dry). In fact, Mr. Hernandez states that "a customer doesn't want something dry" so New Image actively takes measures to ensure that the product remains moist. *Id.* at 131. Thus, there is no genuine dispute over whether the wraps are useable when dry.

raw tobacco inputs rather than finalized products. Instead, Congress sought to expand the federal excise tax to include previously excluded tobacco *products*. *See* Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111–3 (2009) (emphasis added) (expanding the statute to include roll your-own tobacco).

In addition, to the extent New Image argues that the calculation of the weight of a product at import is somehow a TTB Ruling creation or otherwise incorrect,[13] the court is unpersuaded. Assessing a product in its condition at importation is a longstanding tenet of customs' law. *See Worthington v. Robbins*, 139 U.S. 337, 341 (1891) (noting that the court determines dutiable classification "in the condition in which [a product] is imported"); *see also* 19 C.F.R. § 158.7 (noting that merchandise "shall be appraised in its condition as imported"). Although *Worthington* and its progeny involve the point at which classification is determined, not the point at which Customs must assess the dutiable weight of a product, the court finds it both consistent and reasonable for Customs to apply the *Worthington* standard in deciding when to determine the dutiable weight of an import and whether to assess taxes on the "condition" of the product at importation, i.e. the final homogenized product.

For the reasons stated above, the court denies New Image's motion for summary judgment insofar as it relates to Customs' reference to TTB Ruling 2009–1 and Customs' determination that the excise tax on tobacco wraps includes additives essential to the final product and grants defendant's motion on these matters as there is no genuine dispute of material fact and defendant prevails as a matter of law.

III. The Validity of Customs' Procedures Used to Weigh Tobacco Wraps

New Image raises two central issues with Customs' second weighing. First, it argues that the record indicates that Customs' was biased in ordering the second testing and that the order instructing the lab to reweigh the wraps evinced a results-oriented rationale for

[13] New Image also raises an argument regarding a rule of statutory construction, in which the court must construe taxability in favor of the taxpayer. Pl. Br. at 3–4, 8–10. This rule, however, applies only when there is unclear or ambiguous language within the statute or regulation that results in a doubtful interpretation of the statute. *See Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1485–86 (Fed. Cir. 1997). New Image argues that because there is no guidance on how to properly weigh the wraps under 26 U.S.C. § 5702(o), the tax liability must be construed in favor of the lower weight. Pl. Br. at 3–4, 8–10, 36–37. New Image is misguided as the statute clearly states that the wraps made by New Image are subject to excise tax, *see* 26 U.S.C. § 5702(o), and that all excise tax is based on the weight of the product per pound or "fractional parts" thereof. 26 U.S.C. § 5701(g). Although there is no indication in the statute on the protocol to use when weighing the wraps, there is no ambiguity as to how the tax is imposed (per pound) and what is taxed (roll-your-own tobacco). 26 U.S.C. §§ 5702(o), 5701(g). The statute need not specify the weighing procedures to provide sufficient clarity.

conducting the second testing. Pl. Br. at 19–21, 32–34. Second, New Image contends that the way in which Customs conducted its second testing did not conform to the *Daubert* standards of scientific reliability. *Id.* at 20–21; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

a. The Decision to Reweigh New Image's Wraps

New Image argues that the Government improperly weighed its wraps a second time using a different method in order to achieve higher weights. Pl. Br. at 15–18. New Image's argument is based on a document now before the court. In her memorandum ordering that the Customs' lab engage in new testing of New Image's products, import specialist Janet Ayers noted that drying out the wraps for twenty-four hours, as was done in the first weighing, resulted in a difference that "can be as much as 25% less" when compared to weights assessed immediately. *See* Ayers Memorandum, Ex. 1, ECF No. 94–2 (Apr. 3, 2012). New Image takes this as an indication that Customs' specifically sought out a higher weight, given that the resulting second weight average was "approximately 26% higher" than the first weight average. Pl. Br. at 20.

In the memorandum, Ayers references the TTB Ruling and her newfound understanding of how the first weighing occurred. As discussed earlier, Customs' decision that the weight needed to include the flavor additives was in accordance with law. Given this understanding, Customs properly assessed its testing procedures to ensure that they accounted for the entire taxable product. Although, as New Image points out, the TTB Ruling does not explain procedures for how to weigh wraps, Customs was correct in deciding that to weigh the product in the condition in which it would be "released from Customs custody," the product could not be left to dry out for twenty-four hours. *See* TTB Ruling 2009–1 at 3. New Image points to no other facts that support the claim that the testing was impermissibly results-oriented and there is nothing else on the record that bolsters that inference.[14] Accordingly, even construing the facts and reasonable inferences drawn therefrom in New Image's favor, the court finds

[14] The only other record evidence identified by New Image that tangentially supports this claim is a statement from Customs' Assistant Laboratory Director, Dr. Sheila Eng, stating that she did not believe that the first testing was flawed. *See* Pl. Br. at 19. But this mischaracterizes Dr. Eng's testimony. Although Dr. Eng was satisfied with the data of the first weighing, that weighing occurred before Customs properly decided to include the volatile chemicals in the assessed weight. Her satisfaction with the 2011 data at the time it was conducted does not equate to a belief that the 2011 methodology was appropriate after Customs decided to include the additives as part of the taxable product. Eng Deposition at 89, Ex. 4, ECF No. 94–2 (Oct. 28, 2016) ("Eng Dep.").

that New Image is not entitled to summary judgment but rather grants defendant's motion for summary judgment on this issue.

b. Application of *Daubert* to Customs' Weighing Protocol

As noted above, the second weighing occurred with the understanding that the tobacco wraps at least needed to be weighed immediately after opening in order to include the volatile ingredients that Customs' decided needed to be included in the weighing to satisfy the excise tax statute. New Image contends that Customs' was required to consider the *Daubert* factors in order to devise proper testing protocols. Pl. Br. at 18–23, 29–30, 36. *Daubert* laid out non-exhaustive factors for a court to consider in assessing the validity of scientific expert testimony. *See Daubert* 509 U.S. at 593–594. The factors are ones for a court to consider, not necessarily factors that Customs must formally consider.

The Court of Appeals for the Federal Circuit has found *Daubert's* factors to be relevant in customs cases "when the question involves a technical process where the reliability of a scientific or technical methodology has been raised as an issue." *Libas, Ltd. v. United States*, 193 F.3d 1361, 1367 (Fed. Cir. 1999) (stating that the *Daubert* factors are an appropriate starting point in certain Customs classification cases). Although *Libas* involved a classification case, the court finds that the reasoning of that case applies here given the technical methodology at issue. Accordingly, the court must ascertain whether the challenged methodology is scientifically valid and properly applied to the inquiry at issue. *See Daubert*, 509 U.S. at 592–93. The *Daubert* factors are not exhaustive nor always all relevant to an issue, but include assessing: (1) the testability of a given methodology, (2) whether the methodology has been subject to peer review and publication, (3) the known or potential error rate, and (4) acceptance in the scientific community. *See Libas*, 193 F.3d at 1366–67; *Daubert*, 509 U.S. at 593–94. Except for the first factor, which is not in contention,[15] the court addresses each below.

Customs employed a method described as USP 1251 in weighing the tobacco wraps. *See* "<1251> Weighing on an Analytical Balance" at 938–40, U.S. Pharmacopeia and National Formulary, Vol. 1, Ex. 11, ECF. No. 107–12 (2011) ("USP 1251"). The court notes that New Image does not challenge Customs' use of this method as being unpublished or lacking peer review. Nonetheless, although the record

[15] No party argues that determining the weight of a tobacco wrap is an untestable prospect and both parties have offered ways to accomplish such a task. Def.'s Mem. in Supp. of Def.'s Mot. for Summ. J. ("Def. Br.") at 18–24, ECF No. 91 (Dec. 7, 2018); Pl. Br. at 18–32. Thus, this factor does not require additional attention.

does not explicitly indicate that the USP 1251 is subject to peer review, it does make clear that this method is published and that U.S. Pharmacopeia ("USP") is an organization that sets validation standards. *See id.*; Spingarn Dep. at 59, Ex. 5, ECF No. 94–3 (July 25, 2017) ("Spingarn Dep."). Accordingly, the court finds that this method was published and at least open to peer review.

The record sufficiently indicates that the error rate of Customs' chosen methodology was considered. First, USP 1251 discusses various ways in which data can be compromised and how to avoid these issues. Second, Customs' lab reports indicate the standard deviation between the weights and estimated uncertainty of the results. *See* Customs' Laboratory Reports, Ex. 19, ECF No. 91–19 (Apr. 16–23, 2012) ("Customs' Lab Reports 2012"). New Image argues that a "validation study" is necessary to identify "product specific issues that might cause error in testing," but fails to offer any support that such issues exist. Pl. Resp. at 7. Bare allegations that there may be unknown issues with weighing tobacco wraps are not sufficient to raise doubt over Customs' verified method of weighing products.

In both Customs' first and second tests, the lab sought to achieve a steady weight. Eng Dep. 43 (noting that lab accreditation requires that the lab measure the steady weight, or non-fluctuating weight, of products). To achieve a steady weight by weighing the tobacco wrap directly, both the Customs laboratory technician[16] and New Image's witness, Dr. Neil Spingarn, agree that the wrap needs to be allowed to dry out for some length of time after opening to militate against weight fluctuations caused by the dissipation of volatile additives once the package is opened. Eng Dep. at 42–43; Spingarn Dep. at 47–51, 57. In line with this understanding, when Customs conducted its first test it did just that and allowed the wraps to dry out for twenty-four hours prior to weighing them to achieve a steady weight. *See* Customs' Laboratory Report at 28–40, Ex. 3, ECF No. 94–2 (2011) ("Customs' Lab Reports 2011"). After it was determined, however, that the additives needed to be included in the dutiable weight of the product, Customs decided to employ a different method of weighing that still resulted in a steady weight but did not allow for the dissipation of the additives. *See* Eng Dep. at 38. In accordance with USP 1251 and Customs' regulations, the lab used the indirect method to

[16] New Image raises the point that import specialists Janet Ayers and Donna Peterson do not have chemistry expertise as support for the notion that the second testing lacked scientific reliability. Pl. Br. at 20–21. But as New Image later notes, *see id.* at 21, it is the Customs lab personnel that determine what procedures to use, Ayers and Peterson's lack of scientific background is immaterial.

determine the dutiable weight. *See* USP 1251; 19 C.F.R. § 159.22(a).[17] Dr. Eng explains that the indirect method was used to account for the volatile additives that would have otherwise "gassed off" when the wrap was opened and prevented Customs' from achieving a stable weight.[18] *See* Eng Dep. at 57–59. New Image's expert does not dispute this assertion and, in fact, agrees that the flavor additives dissipate as the product dries out, preventing a stable weight from being assessed immediately after opening the package. *See* Spingarn Dep. at 37–48.

Despite New Image's protestations to the contrary, the second weighing method used by Customs does not result in an inconsistent or unrepeatable result, but achieves a steady weight. *See* Pl. Br. at 31. Dr. Eng's testimony and the lab reports themselves elucidate that the indirect method achieves a stable weight of the wrap by weighing the empty package and non-wrap components (such as the straw), which do not change weight, and subtracting that from the total weight of the unopened package. Eng Dep. at 31–33, 52, 59; Customs' Lab Reports 2012 (describing the testing procedures and listing the weights of wraps using both the indirect method ultimately adopted and the weight of the wrap when taken directly out of the packaging). Dr. Spingarn does not directly challenge the scientific validity of Customs' testing in this regard, but instead seems to primarily take issue with the testing based on an understanding that the flavor additives should not be included in the taxable weight. *See* Spingarn Dep. at 37–38. His testimony, thus, is not probative because the court has sustained Customs decision that the additives *should* be included in the weight.

Because USP 1251 is a valid procedure, New Image only properly challenges the methodology insofar as it is not tailored specifically to the weighing of tobacco wraps that are "highly volatile, weigh less than one gram, and are subject to dramatic weight fluctuations." Pl.

[17] 19 C.F.R. § 159.22(a) reads:

> (a) Determination of net weight. The net weight of merchandise dutiable by net weight, or upon a value dependent upon net weight, shall be determined insofar as possible by obtaining the actual weight, or by deducting the actual or schedule tare from the gross weight. Actual tare may be determined on the basis of tests when the tares of the packages in a shipment are reasonably uniform.

[18] Customs did assess the weight of the wraps directly during the second testing immediately after opening the product but did not use these weights in assessing tax liability given their expected instability. The average difference between this unstable weight and the weight calculated using the indirect method was, nonetheless, seemingly very small. *See* Customs' Lab Reports 2012 (showing that the average difference in the two weights ranged between 0.28% and 0.83%).

Resp. Br. at 7.[19] But New Image's argument is internally inconsistent. As noted earlier, New Image argues that this Court should adopt Customs' first weighing from 2011. Pl. Br. at 32, 38. But notably this method was also conducted in accordance with USP 1251 standards. *See* Customs' Lab Reports 2011. Although the first weighing used a drying out procedure rather than an indirect one to obtain a steady weight, both were done using verified USP procedures. Ultimately, there is simply no support beyond bare assertions that this method lacks support in the scientific community.

There are no material facts that preclude a finding of summary judgment. New Image's challenges to the reliability[20] of Customs' weighing methodology are without merit. Customs' use of the indirect method in weighing the wraps was in accordance with law.

CONCLUSION

For the reasons stated above, the court grants defendant's motion for summary judgment and denies New Image's motion for summary judgment.[21] Judgment will be entered accordingly.

Dated: July 23, 2019
New York, New York

/*s*/*Jane A. Restani, Judge*
JANE A. RESTANI, JUDGE

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[19] New Image also, for the first time, raises additional challenges to the USP methodology in its reply brief. The court declines to consider these late-raised arguments but notes, in any event, New Image fails to cite adequate support to substantiate these new challenges. *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (holding that arguments first waived in reply briefs are waived).

[20] New Image makes one additional challenge to Customs' procedures, arguing that there is an underlying "systematic bias." Pl. Br. at 32–33. This argument appears to stem from Dr. Spingarn's testimony regarding the difference between the weights Customs obtained from the indirect method and the weight obtained from directly weighing the wrap after removing it from the package. *See* Pl. Br. at 24–25 (citing Dr. Spingarn's testimony). The Government asserts that the difference is due to the "gassing off" of the additives upon opening. Def. Resp. at 23–25. New Image has not put any evidence on the record that sufficiently calls in to question Customs' procedures or explanations for the difference. Even assuming that there is some unaccounted-for reason why the indirect method might produce higher rates than directly weighing the wrap, the fact is immaterial because, even if so, it is not enough to overcome the overwhelming evidence that Customs' test was reliable. *See Liberty Lobby*, 477 U.S. at 248 (noting that a fact is not material if it would not change the outcome).

[21] Because the court grants the Government's motion, it does not address the Government's alternative argument. The Government proposes that if the court does not adopt the 0.915 gram per wrap as the proper weight for calculating the excise tax then, in the alternative, the court should apply a weight of 0.874 grams per wrap, which is the weight New Image recorded at the end of its production process. Def. Br. at 32.

Slip Op. 19–91

JINDAL POLY FILMS LIMITED OF INDIA (A.K.A. JINDAL POLY FILMS, LTD. (INDIA)), Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 18–00038

JUDGMENT

This case having been submitted for decision, and the court, after due deliberation, having rendered an opinion; now, in conformity with that opinion it is hereby

ORDERED that the final results of the administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip from India, *see Polyethylene Terephthalate Film, Sheet, and Strip from India*, 83 Fed. Reg. 6,162 (Dep't Commerce Feb. 13, 2018) (final results of antidumping duty admin. review; 2015–2016), as further modified by Final Results of Redetermination Pursuant to Court Remand, ECF No. 49–1, are **SUSTAINED**; and it is further

ORDERED that the subject entries enjoined in this action, *see* Order for Statutory Inj. Upon Consent (Mar. 1, 2018), ECF No. 10, must be liquidated in accordance with the final court decision, including all appeals, as provided for in section 516A(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e) (2012).

Dated: July 23, 2019
New York, New York

/*s*/ *Mark A. Barnett*
JUDGE

Slip Op. 19–92

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. AND CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00199

[Sustaining the U.S. Department of Commerce's remand redetermination in the first administrative review of the antidumping duty order covering certain crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: July 25, 2019

Jonathan Michael Freed, *Robert George Gosselink*, and *Jarrod Mark Goldfeder*, Trade Pacific, PLLC, of Washington, DC, for plaintiff, defendant-intervenor, and consolidated defendant-intervenor Changzhou Trina Solar Energy Co., Ltd., and plaintiffs Trina Solar (Changzhou) Science & Technology Co., Ltd. and Trina Solar (U.S.) Inc.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, DC, for consolidated plaintiff and defendant-intervenor SolarWorld Americas, Inc.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Reginald T. Blades, Jr.*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Changzhou Trina Solar Energy Co. v. United States*, 43 CIT __, 359 F. Supp. 3d 1329 (2019) ("*Changzhou Trina I*"). *See* Final Results of Remand Redetermination, Apr. 25, 2019, ECF No. 78–1 ("*Remand Results*").

In *Changzhou Trina I*, the court determined that Commerce's decision not to offset the Ex-Im Bank Export Buyer's Credit Program in the first administrative review of the antidumping duty ("ADD") order covering certain crystalline silicon photovoltaic products from the People's Republic of China ("PRC" or "China") was contrary to law and ordered Commerce to recalculate Trina's U.S. selling prices on remand.[1] *Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at

[1] The collective entity Commerce refers to as "Trina" encompasses Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science and Technology Co., Ltd., Yangcheng Trina Solar Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., and Hubei Trina Solar Energy Co., Ltd. *Remand Results* at 1 n.2. The court adopts the shorthand in this opinion.

1337–42, 1344; *see also Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]*, 82 Fed. Reg. 32,170 (Dep't Commerce July 12, 2017) (final results of ADD admin. review and final determination of no shipments; 2014–2016) ("*Final Results*") and accompanying Issues & Decision Mem. for the Final Results of ADD Admin. [Review]: Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]; 2014–2016, A-570–010, (July 5, 2017), ECF No. 19–3 ("Final Decision Memo"); *Certain Crystalline Silicon Photovoltaic Prods. from the [PRC]*, 80 Fed. Reg. 8,592, 8,593–95 (Dep't Commerce Feb. 18, 2015) (ADD order).

On remand and "under respectful protest," Commerce increased Trina's U.S. selling prices by the amount countervailed to offset the Ex-Im Bank Export Buyer's Credit Program. *See Remand Results* at 1, 5. As a result, Trina's weighted-average dumping margin decreased from 9.61 percent to 3.42 percent. *See id.* at 6–7. The separate rate respondents' rate similarly changed. *Id.* at 7. For the following reasons, the court sustains the *Remand Results*.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in the prior opinion, *see Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1332–33, and here recounts the facts relevant to the court's review of the *Remand Results*. The first administrative review covered subject imports entered during the period of July 31, 2014, through January 31, 2016. *See Initiation of [ADD] and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 20,324, 20,335 (Dep't Commerce Apr. 7, 2016). Commerce selected Changzhou Trina Solar Energy Co., Ltd./Trina Solar (Changzhou) Science & Technology Co., Ltd. as the sole mandatory respondent for individual review. *See* Resp't Selection Mem. [for 2014–2016 ADD Admin. Review] at 5, PD 94, bar code 3472551–01 (May 24, 2016).[2] Pertinent here, in the parallel countervailing duty ("CVD") investigation, Commerce imposed CVDs against the mandatory respondents[3] to countervail the Ex-Im Bank Export Buyer's Credit Program. *See* [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Prods. From the [PRC], 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative [CVD] determination) and accompanying Issues & Decision Mem. for

[2] The court's citations to administrative record documents are to numbers Commerce assigns to such documents in its public and confidential administrative record indices; here, located on the docket at ECF Nos. 19–4–5 and 79–2–3.

[3] One of the mandatory respondents in the parallel CVD investigation was Changzhou Trina Solar Energy Co., Ltd. and its cross-owned affiliate Trina Solar (Changzhou) Science & Technology Co., Ltd. CVD Investigation Final Decision Memo at 2.

the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Prods. from the [PRC] at 30, C-570–011, (Dec. 15, 2014) ("CVD Investigation Final Decision Memo") *available at* http://ia.ita.doc.gov/frn/summary/prc/2014–30071–1.pdf (last visited July 22, 2019). In the final determination, Commerce declined to increase Trina's U.S. selling prices (which would reduce Trina's antidumping duty) by the amount countervailed to offset the Ex-Im Bank Export Buyer's Credit Program. *See* Final Decision Memo at 9–10. Specifically, Commerce stated that it was not required to adjust Trina's U.S. selling prices because it had not found the Ex-Im Bank Export Buyer's Credit Program to be contingent on export performance and thus had not determined the program to be an export subsidy. *Id.* For the *Final Results*, Commerce calculated a weighted-average dumping margin of 9.61 percent for the mandatory respondent and assigned the same margin to the separate rate respondents. *Final Results*, 82 Fed. Reg. at 32,171.

In *Changzhou Trina I*, the court sustained in part and remanded in part Commerce's *Final Results*.[4] *See Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1344. The court determined that Commerce's refusal to increase Trina's U.S. selling prices for the amount countervailed to offset the Ex-Im Bank Export Buyer's Credit Program was contrary to law. *See id.* at __, 359 F. Supp. 3d at 1337–42, 1344. The court directed the agency to recalculate Trina's U.S. selling price. *See id.* at __, 359 F. Supp. 3d at 1342, 1344.

JURISDICTION AND STANDARD OF REVIEW

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)[5] and 28 U.S.C. § 1581(c) (2012). The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). "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)).

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[4] Specifically, in *Changzhou Trina I*, the court sustained Commerce's selection of surrogate values for aluminum frames, module glass, and financial ratios. *Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1334–37, 1344. The court also sustained Commerce's decisions to include import data with reported quantities of zero in the surrogate value calculations and to deny offsetting respondent's U.S. indirect selling expenses by the debt restructuring income reported by its U.S. sales affiliate. *Id.* at __, 359 F. Supp. 3d at 1342–44.

[5] 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.

DISCUSSION

In the *Remand Results*, Commerce, "under protest," increased Trina's U.S. selling prices by the amount countervailed in the parallel CVD investigation for the Ex-Im Bank Export Buyer's Credit Program. *See Remand Results* at 1, 5. SolarWorld Americas, Inc. ("SolarWorld") argues that Commerce's decision, on remand, to offset Trina's U.S. selling prices by the countervailed subsidy program is contrary to law and unsupported by substantial evidence. *See* [SolarWorld's] Comments [*Remand Results*] Pursuant Ct. Order at 2–4, May 28, 2019, ECF No. 84 ("SolarWorld's Comments"). Plaintiffs and Defendant request the court to sustain the *Remand Results*. *See* [Pls.'] Comments [*Remand Results*] at 2, May 28, 2019, ECF No. 83; Def.'s Resp. Comments [*Remand Results*] at 3, June 27, 2019, ECF No. 87. For the reasons that follow, Commerce's decision to increase Trina's U.S. selling prices to account for the CVD amount imposed for the Ex-Im Bank Export Buyer's Credit Program complies with the court's remand order and is in accordance with law.

To impose a CVD, Commerce must find that an exporter both benefited from a subsidy and that the subsidy was specific. 19 U.S.C. § 1677(5). A "countervailable subsidy" is a financial contribution, price support, or funding mechanism, provided by an "authority," that confers a benefit to its recipient. 19 U.S.C. § 1677(5)(B). A countervailable subsidy must be specific, meaning it is an (i) import substitution subsidy, (ii) export subsidy, or (iii) domestic subsidy that is specific, in law or fact, to an enterprise or industry within the jurisdiction of the authority providing it. 19 U.S.C. § 1677(5)(A); 19 U.S.C. § 1677(5A)(A)–(D). An export subsidy is defined as "a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions." 19 U.S.C. § 1677(5A)(B). Where goods are subject to both antidumping and countervailing duties, "[t]he price used to establish export price and constructed export price shall be—(1) increased by . . . (C) the amount of any countervailing duty imposed on the subject merchandise under part I of this subtitle to offset an export subsidy[.]" 19 U.S.C. § 1677a(c)(1)(C). In the final determination, Commerce refers to the export price and constructed export price as the "U.S. selling price." Final Decision Memo at 9.

Where Commerce has difficulty accessing and verifying the information it needs to satisfy the statutory elements for imposing a CVD it may, subject to 19 U.S.C. § 1677m(d), use facts otherwise available to reach its final determination. Specifically, Commerce may use facts available when "necessary information is not available on the record," a party "withholds information that has been requested by [Commerce]," fails to provide the information timely or in the manner

requested, "significantly impedes a proceeding," or provides information Commerce is unable to verify. 19 U.S.C. § 1677e(a). Further, under certain circumstances, such as a party's failure to comply to the best of its ability with a request for information, Commerce may "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). This two-step process is generally referred to by the shorthand "adverse facts available" or "AFA."

However, and as explained in *Changzhou Trina I*, the AFA process does not relieve Commerce of its obligation to affirmatively find that the elements of a statute have been satisfied. *See Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d 1338–41. To impose a CVD, Commerce must find that an exporter benefited from a specific subsidy. *See* 19 U.S.C. § 1671; 19 U.S.C. § 1677(5), (5A). That Commerce resorts to AFA in determining an exporter benefited from a specific subsidy does not mean that Commerce did not make the statutorily required findings.

In the *Remand Results*, Commerce increased Trina's U.S. selling prices by the amount countervailed to offset the Ex-Im Bank Export Buyer's Credit Program "under protest[.]" *See Remand Results* at 1, 5. Commerce's actions on remand comply with the court's order in *Changzhou Trina I* that Commerce recalculate Trina's U.S. selling prices to account for the amount countervailed. *See Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1332, 1337–42, 1344. Commerce's *Remand Results* are also in accordance with law because it is reasonably discernible from Commerce's description of the Ex-Im Bank Export Buyer's Credit Program in the parallel CVD investigation that Commerce found that program to be an export subsidy because the benefits it provided were contingent upon export. *See* CVD Investigation Final Decision Memo at 30 (finding that through the Export Buyer's Credit Program the "[Ex-Im Bank] provides loans at preferential rates for the purchase of exported goods from the PRC"). Commerce did not resort to facts available or adverse inferences when describing the Export Buyer's Credit Program. Rather, Commerce explicitly stated that it relied on AFA to determine that respondents used the Export Buyer's Credit Program, not that the program was specific. *See id.* at 91–94. Further, Commerce's descriptions of the Ex-Im Bank Export Buyer's Credit Program do not suggest that it considered the program to be anything other than an export subsidy. *See Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1339. Given that 19 U.S.C. § 1677a(c)(1)(C) uses the mandatory "shall" to direct Commerce's actions as to offsets when Commerce imposes a countervailing duty and here Commerce imposed such a duty, the increase to

Trina's U.S. selling prices by the amount countervailed to offset the export subsidy is in accordance with law.

In making its determination under protest, Commerce argues that the CVD investigation on solar products is not before the court and that determinations made in distinct proceedings are based on segment-specific information and thus do not necessarily inform determinations in other segments of the same proceedings. *Remand Results* at 5 n.24 (citing *e.g.*, *Hyundai Steel Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1349, 1371–72 (2017)). Commerce's protest is misplaced because the statutory directive that Commerce "shall" increase the price underlying the export price or constructed export price of the subject merchandise by the amount of any CVD imposed on that merchandise to offset an export subsidy, 19 U.S.C. § 1677a(c)(1)(C), necessarily requires it to look back at a CVD imposed in a countervailing duty proceeding separate from the antidumping proceeding in which that CVD amount is being offset. In *Changzhou Trina I*, the court explained that it was reasonably discernible from Commerce's descriptions of the export buyer's credit program in relevant CVD proceedings that the program was specific because the benefits it provided were contingent upon export. *Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1337–42; *see also* CVD Investigation Final Decision Memo at 30, 91–94. Such a finding is necessarily within the court's scope of review under 19 U.S.C. § 1516a(b)(1)(B)(i).

SolarWorld argues that Commerce's high-level description of the subsidy program as generally relating in some way to "exported goods" does not constitute a specific determination that the program in question was contingent on export performance. *See* SolarWorld's Comments at 3–4. SolarWorld further argues Commerce lacked information necessary to find the Ex-Im Bank Export Buyer's Credit Program to be an export subsidy because the Government of China failed to provide relevant information during the CVD investigation. *See* SolarWorld's Comments at 3–4. In the CVD Investigation Final Decision Memo, Commerce states "this program, the Export-Import Bank of China (Ex-Im Bank) provides loans at preferential rates for the purchase of exported goods from the PRC[,]" but then adds that "the Department was not able to verify the reported non-use" of this program. *See* CVD Investigation Final Decision Memo at 30. Commerce implicitly found the program was an export subsidy; no party challenged its characterization as an export subsidy. The only challenge in the parallel investigation to Commerce's determination about the program was whether Commerce could, as it did, rely on an adverse inference to select among the facts available to determine that respondents used the Ex-Im Bank Export Buyer's Credit Pro-

gram. *See* CVD Investigation Final Decision Memo at 30, 91–94. Commerce did not use AFA to conclude the Ex-Im Bank Export Buyer's Credit Program was contingent on export performance.[6]

CONCLUSION

For the foregoing reasons, the *Remand Results* comply with the court's order in *Changzhou Trina I* and are in accordance with law, and are therefore sustained. Judgment will be entered accordingly.

Dated: July 25, 2019
New York, New York

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

[6] Commerce challenges *Changzhou Trina I*'s citation to and reliance on the results of a first administrative review of a CVD order on crystalline silicon photovoltaic cells, whether or not assembled into modules from the PRC. *See Remand Results* at 5 n.24; *Changzhou Trina I*, 43 CIT at __, 359 F. Supp. 3d at 1339 (citing Issues & Decision Mem. for the Final Results of the [CVD] Admin. Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the [PRC] at 33, C-570–980, (July 7, 2015) *available at* http://ia.ita.doc.gov/frn/summary/prc/2015–17241–1.pdf (last visited July 22, 2019) ("CVD Review")). The cited review does cover a different product; however, it also demonstrates Commerce's determination regarding the same program at issue here. In that review, Commerce similarly relied on AFA to determine respondents' use of the Ex-Im Bank Export Buyer's Credit Program, but not whether the program was specific because it was contingent on export performance. CVD Review at 33 ("program is specific because it is contingent upon export performance, within the meaning of section 771(5A)(A)–(B) of the [Tariff] Act [of 1930, as amended, 19 U.S.C. § 1677(5A)(A)–(B)]."). Similarly, here, Commerce relied on AFA to determine use and nowhere in its final determination or parallel CVD investigation does Commerce indicate that this program is anything other than an export subsidy or that it resorted to AFA to determine specificity.

Slip Op. 19–93

SIMPSON STRONG-TIE COMPANY, Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 17–00057

[United States Department of Commerce's Final Results of Redetermination pursuant to Court Remand are sustained.]

Dated: July 25, 2019

George R. Tuttle, III, The Law Offices of George R. Tuttle, A.P.C., of Larkspur, CA, for plaintiff.

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 *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David W. Campbell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for defendant-intervenor.

OPINION

Katzmann, Judge:

The court returns to the question of whether plaintiff Simpson Strong-Tie Company's ("Simpson") zinc and nylon anchor products are nails. Before the court now is the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand (Dep't Commerce Dec. 20, 2018) ("*Remand Results*"), ECF No. 50, which the court ordered in *Simpson Strong-Tie Co. v. United States*, 42 CIT __, 335 F. Supp. 3d 1311 (2018). Under protest, Commerce found that Simpson's zinc and nylon anchors were outside the scope of *Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) and *Certain Steel Nails from the People's Republic of China*, 76 Fed. Reg. 30,101 (Dep't Commerce May 24, 2011) (Final Results of Changed Circumstances Review) (collectively "the *Orders*"). Simpson requests that the court sustain Commerce's finding on remand that its products fall outside the scope of the *Orders*. Pl.'s Comments on the Dep't of Commerce's Final Results of Redetermination Pursuant to Court Remand ("Pl.'s Br."), Jan. 22, 2019, ECF No. 52. Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent") requests that the court reconsider its previous decision and remand order. Def.-Inter.'s Comments on Remand Redetermination ("Def-Inter.'s Br."), Jan. 22, 2019, ECF No. 51. The court sustains Commerce's *Remand Results*.

BACKGROUND

The relevant legal and factual background of the proceedings involving Simpson has been set forth in greater detail in *Simpson*, 335 F. Supp. 3d at 1314–18. Information pertinent to the instant matter is set forth below.

On March 20, 2017, Commerce determined that Simpson's zinc and nylon anchors fell within the scope of antidumping and countervailing duty orders covering steels nails from China. *Antidumping and Countervailing Duty Order on Certain Steel Nails from the People's Republic of China: Final Scope Ruling on Simpson Strong-Tie Company's (Zinc and Nylon Nailon) Anchors*, 73 Fed. Reg. 44,961 (Dep't Commerce Mar. 20, 2017), P.R. 36 ("*Final Scope Ruling*"). Simpson appealed the *Final Scope Ruling* to this court, arguing that its anchors are not steel nails and, thus, could not fall within the scope of the orders. In *Simpson*, 335 F. Supp. 3d at 1317–21, the court held that the plain language of the *Orders* excluded Simpson's zinc and nylon anchors and remanded to Commerce for redetermination consistent with its opinion. On December 3, 2018, Commerce issued a Draft Remand Redetermination in which it found, pursuant to the court's remand order, that Simpson's anchors are outside the scope of the *Orders*. *See Remand Results* at 2. Simpson and Mid Continent submitted timely comments in response, *see id.*, and Commerce issued its *Remand Results* on December 20, 2018, *see generally id.* Under respectful protest, Commerce again found that Simpson's zinc anchors fell outside the scope of the *Orders*. *Id.* at 2, 5–8. Simpson and Mid Continent submitted their comments on the *Remand Results* on January 22, 2019. Pl.'s Br.; Def.-Inter.'s Br. Defendant the United States ("the Government") submitted its response to these comments on March 8, 2019. Def.'s Resp. to the Parties' Comments on the Dep't of Commerce's Final Results of Redetermination ("Def.'s Resp."), ECF No. 56. At the court's request, the parties submitted supplemental comments on June 14, 2019. Def.'s Resp. to Court Order, ECF No. 61; Def.-Inter.'s Resp. to Court Order, ECF No. 62; Pl.'s Resp. to Court Order, ECF No. 63.

DISCUSSION

Commerce's *Remand Results* are consistent with the court's remand order and previous opinion. However, Mid Continent urges the court to reconsider its previous decision, and expresses concerns about the court's use of dictionaries in interpreting the plain language of the scope, whether the court "judicially voided" scope language stating that "steel nails may . . . be constructed of two or more pieces," and whether the court's decision is consistent with the Federal Circuit's

opinion in *Meridian Prods., LLC v. United States*, 890 F.3d 1272 (Fed. Cir. 2018). Def.-Inter.'s Br. at 2–6. These asserted concerns are not meritorious. The court based its determination in *Simpson*, 355 F. Supp. 3d at 1317–21, not only on dictionary definitions of nails, *see NEC Corp. v. Dep't Commerce*, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999), but also upon close consideration of all of the scope language in the *Orders* — including the phrase "of two or more pieces" — and record evidence, including evidence of trade usage, *see ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012).[1] Simpson's zinc and nylon anchors are simply not nails "constructed of two or more pieces" because, as discussed in *Simpson*, 335 F. Supp. 3d at 1318–19, they do not function like nails and because record evidence demonstrates that anchors like Simpson's are considered a separate type of product from nails by the relevant industry. The court reiterates that *Meridian Prods.*, 890 F.3d 1272, does not undermine this analysis or determination. *See Simpson*, 335 F. Supp. 3d at 1320 n.6.

Nor does the court agree with Mid Continent that *Midwest Fastener Corp. v. United States*, 42 CIT __, 348 F. Supp. 3d 1297 (2018) undermines the court's prior analysis or determination. *Midwest Fastener* held that there was ambiguity as to whether the plaintiff's strike pin anchor product[2] fell within the plain language of the scope of the same *Orders* at issue here and remanded the case to Commerce to conduct a formal scope inquiry and analysis pursuant to 19 C.F.R. § 351.225(k)(2). *Id.* at 1306. Commerce found on remand that the strike pin anchor product fell within the scope of the *Orders* and that only the steel pin component of the merchandise would be subject to the *Orders*. *See Midwest Fastener*, Court No. 17–000231, Final Results of Redetermination Pursuant to Remand at 2, 11, Apr. 25, 2019, ECF No. 61. That determination is not controlling in the matter before the court here. It is well established that the determination whether merchandise falls within the scope of an order varies depending upon the particular product at issue and its relation to the plain language of the *Orders*' scope; *Midwest Fastener* involves a different, distinct product and an entirely separate administrative record from the merchandise and administrative record in this case.[3] *See* 19 U.S.C. §

[1] Commerce acknowledges that the court's decision was not "based solely on the common dictionary definition of a nail." *See* Def.'s Resp. at 6.

[2] Midwest's strike pin anchors have four components – a steel pin, a threaded body, a nut and a flash washer. *Midwest Fastener*, 348 F. Supp. 3d at 1299.

[3] Quite apart from the fact that the products are different and distinct, it is also notable that the *Midwest Fastener* court has not yet had occasion to address the remand results in that case. The remand results thus do not necessarily reflect the ultimate disposition of that case.

1516a(a)(2)(B)(vi) (giving Commerce authority to issue scope rulings clarifying "whether a *particular* type of merchandise is within the class or kind of merchandise described in an existing . . . order." (emphasis added)); *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012) ("A scope ruling is a highly fact-intensive and case-specific determination."); *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1356 (Fed. Cir. 2010) ("Each case must be decided on the particular facts."); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) ("Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.").

CONCLUSION

Commerce's *Remand Results* are sustained.

SO ORDERED.

Dated: July 25, 2019
New York, New York

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