U.S. Court of International Trade

Slip Op. 19–137

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., and TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., Plaintiffs, CANADIAN SOLAR INC., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, SOLARWORLD AMERICAS, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 17–00198
PUBLIC VERSION

[Commerce's Remand Redetermination in the Third Administrative Review of the Countervailing Duty Order pertaining to photovoltaic cells from the People's Republic of China is partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: November 8, 2019

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OPINION AND ORDER

Restani, Judge:

This action concerns 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*, 352 F. Supp. 3d 1316 (CIT 2018) ("*Changzhou Trina I*"); *see* Final Results of Redetermination Pursuant to Court Remand, ECF No. 103–1 (Dep't Commerce Apr. 25, 2019) ("*Remand Results*").

In *Changzhou Trina I*, the court determined that remand was necessary for Commerce to further explain several of its decisions in

the underlying review, or otherwise alter its determination. Specifically, the court remanded for Commerce to explain and/or reconsider whether: (1) respondents benefitted from the People's Republic of China's ("PRC") Export Buyer's Credit Program ("EBCP"), (2) the provision of aluminum extrusions for less than adequate remuneration ("LTAR") was a specific subsidy, (3) the inclusion of potentially overbroad United Nations Comtrade data in its calculation of the aluminum extrusion and solar glass benchmarks was appropriate, (4) Commerce should have considered Canadian Solar's data on polysilicon imports as a tier-one metric, and (5) the provision of electricity for LTAR was a specific subsidy. On remand, Commerce has attempted to clarify its decisions, but its decision remains largely unaltered.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in its prior opinion, *Changzhou Trina I*, and thus recounts relevant facts only as necessary below. This matter involves a challenge by plaintiffs Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd. (collectively, "Trina"); consolidated plaintiffs BYD (Shangluo) Industrial Co., Ltd. and Shanghai BYD Co., Ltd. (collectively, "BYD");[1] and plaintiffs and plaintiff-intervenors Canadian Solar Inc., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Changshu), Inc., Canadian Solar Manufacturing (Luoyang), Inc., Canadian Solar (USA) Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., and CSI Solar Manufacture Inc. (collectively, "Canadian Solar") against Commerce's remand redetermination in the Third Administrative Review of Commerce's Countervailing Duty Order pertaining to photovoltaic cells from the PRC. SolarWorld Americas. Inc. ("SolarWorld") is a defendant-intervenor.[2]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2) (2012). The court upholds Commerce's remand

[1] As in *Changzhou Trina I*, here BYD does not present its own arguments, but rather adopts the arguments made by Trina and Canadian Solar. *See* BYD's Comments on the Final Remand Redetermination, ECF No. 115 (June 19, 2019).

[2] Although SolarWorld filed a response to plaintiff and plaintiff-intervenors' comments objecting to the remand results, its response is simply a statement of agreement with Commerce's decision on the EBCP and its specificity findings regarding aluminum extrusions and electricity. *See* SolarWorld's Response to Comments on Final Results of Redetermination Pursuant to Court Remand, ECF No. 122 (Aug. 14, 2019).

redetermination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Export Buyer's Credit Program

Lately, the Export Buyer's Credit Program ("EBCP') has been the subject of frequent litigation in the court. *See Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1358–60 (CIT 2019) (collecting cases). The EBCP promotes PRC exports by providing preferential loan rates to foreign purchasers of PRC goods. *See* GOC Initial CVD Questionnaire Response, at 147–51, P.R.[3] 100–102, C.R. 16–18, 20 (May 3, 2016). Commerce found that following 2013 revisions to the EBCP, that the prior $2 million-dollar contract minimum to qualify for the program had been repealed and that EBCP loans may be routed through third-party banks and not simply issued from the Export-Import Bank of China ("EX-IM Bank") as previously understood. *See I & D Memo* at 13; *Prelim I & D Memo* at 31. The Government of China ("GOC") refused to provide information on the 2013 revisions, including internal guidelines. *See I & D Memo* at 13. Because of the GOC's non-cooperation, Commerce found that it was unable to verify respondent's certifications of non-use. *I & D Memo*, at 13. Accordingly, Commerce found that respondents, through the application of AFA,[4] had used the program despite their cooperation in the review. *Id.*[5]

The court remanded this issue concluding that Commerce did not demonstrate that respondent's certifications were unverifiable. *Changzhou Trina I*, 352 F. Supp. 3d at 1327. The court held that although Commerce may apply AFA in a way that collaterally affects a cooperating party, Commerce had not tried to avoid that undesirable consequence. *See id.* at 1325–27. Additionally, Commerce did not explain "how an adverse inference regarding the operation of the EBCP logically leads to a finding that respondents used the program." *Id.* at 1326.

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[3] "P.R." refers to a document contained in the public administrative record. "C.R." refers to a document contained in the confidential administrative record. "Rem." refers to documents submitted following Commerce's Remand Redetermination.

[4] When a party fails to cooperate to the best of its ability, Commerce may "use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available." *See* 19 U.S.C. § 1677e(b). Commerce refers to this process as "AFA" or "adverse facts available."

[5] In its third administrative review Commerce found that cooperating parties used the EBCP despite respondents' certifications of non-use, whereas in the second administrative review Commerce found certifications to be sufficient to support non-use of the program. *See Changzhou Trina I*, 352 F. Supp. 3d at 1324. Commerce claims the 2013 revisions called into question the verifiability of non-use certifications such that they would no longer be considered sufficient to establish non-use of the EBCP. *Id*.

On remand, Commerce continues to find the certifications unverifiable and imputes usage of the EBCP based on the application of AFA. *Remand Results* at 12–24. Commerce refers to a discussion with an EX-IM Bank official who apparently indicated that the 2013 revisions eliminated the contract minimum. *See id.; see also* Administrative Review of Countervailing Duty Order on Citric and Certain Citrate Salts: Verification of the Questionnaire Resp. Submitted by the GOC, at 2, P.R. 150 (Oct. 7, 2014) ("EX-IM Discussion"). In addition, Commerce cites a questionnaire submitted by the GOC in a different investigation indicating that an EBCP "borrower must be an importer or a bank approved by the China EX-IM Bank." *See* GOC's 7th Supp. Resp., Certain Amorphous Silica Fabric from China CVD Investigations (C-570–039), P. R. 150 (Sep. 6, 2016) ("GOC Silica Questionnaire Resp."). Commerce states that it cannot conduct verification using its normal practices given these uncertainties about the EBCP's potential use of third-party banks to distribute EBCP funds. *Remand Results* at 19–20. Commerce claims it requires the GOC's disclosure of the 2013 internal guidelines and other information, because without this information, effective verification is stymied, if not completely impeded, as Commerce would be unable to effectively sort through and identify potentially-suspect transactions given the size of the respondent companies.[6] *Id.* at 21–23. Finally, Commerce finds that respondents benefitted from the program after applying an adverse inference to evidence that the EX-IM Bank provided loans to "new and high-tech projects" and because "energy projects are eligible for this financing." *Id.* at 24.

Canadian Solar and Trina argue that Commerce has failed to show that it is missing any information regarding the *usage* of the EBCP and rather, that Commerce identifies a potential gap in information concerning the *operation* of the EBCP. Canadian Solar Comments on Final remand Redetermination, ECF NO. 113 at 2–6 (June 19, 2019) ("Canadian Solar Br."); Trina Comments on Final Results of Redetermination Pursuant to Court Remand, ECF No. 111 at 5–6, 9–12 (June 19, 2019) ("Trina Br."). They also argue that the record demonstrates that obtaining loans through the EBCP actively involves both the U.S. importer and Chinese exporter such that either can verify usage. Canadian Solar Br. at 8–9; Trina Br. at 9 (citing GOC Initial CVD Questionnaire Response at 151). Most notably, Canadian Solar cites

[6] Commerce infers that given the size of the respondent companies and their "substantial amount of business activity," there would be too much financial data to sort through. *Id.* at 21–22.

evidence showing that the exporter receives funds *directly* from the EX-IM Bank. Canadian Solar Br. at 9–10. Respondents claim that Commerce overstates the difficulty in verifying whether respondents or their customers used the program. *See* Canadian Solar Br. at 13–14; Trina Br. at 15–18.[7] They assert because Commerce has not requested relevant records, Commerce's claim about the difficulty of verification is speculative. *Id.* at 14–15; Trina Br. at 15–20. Finally, Trina claims that Commerce improperly relies on "uncorroborated statements from the petition" in its AFA analysis. Trina Br. at 11–12. The government claims Commerce sufficiently explained its need to understand the operation of the EBCP in order to conduct verification and that the use of AFA was appropriate. *See* Defendant's Reply to Comments on Remand Redetermination, ECF No. 120 at 10–11 (Sep. 14, 2019) ("Gov. Br.").

The court must determine whether substantial evidence exists by reviewing the record as a whole. *See e.g., Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003). From the documents submitted by the government, it appears that the Commerce became concerned about the verifiability of customer certifications of non-use following a discussion with an EX-IM Bank official in a different administrative review. *See Remand Results* at 17–18. During that discussion, the official apparently informed Commerce that in 2013 the $2 million-dollar contract minimum was eliminated. *See* EX-IM Discussion at 2. This prompted Commerce to review EX-IM Bank documents including "The Implementing Rules for the Export-Buyer's Credit of the Export-Import Bank of China" which Commerce claims appears to indicate the involvement of "intermediary Chinese bank[s]." *See Remand Results* 18. When asked to clarify, the GOC failed to do so. *Id.* at 19. The record indicates, however, that the GOC had in another investigation a month earlier explained that:

> According to the Ex-Im Bank, in order to make a disbursement, the Ex-Im Bank lending contract requires the buyer (importer) and seller (exporter) to open accounts with either the Ex-Im Bank or one of its partner banks. While these accounts are typically opened at the Ex-Im Bank, sometimes a customer prefers another bank (e.g., the Bank of China) which is more accessible than an account with the Ex-Im Bank. The loan agreement also stipulates that the borrower (generally the importer/customer) must grant the Ex-Im Bank authorization to

[7] For instance, respondents argue that at verification Commerce often performs a "spot check" rather than full analysis, and that such a sampling could be done here. Canadian Solar Br. at 15; Trina Br. at 18–20. The government rejects that a "spot-checking verification procedure" would be possible given what it expects will be a "substantial amount of business activity" to search through. Gov. Br. at 12–13.

> conduct transactions in the account opened specifically for this financing. After all conditions for disbursement are met, the Ex-Im Bank will disburse the funds according to the lending agreement. The funds are first sent from the Ex-Im Bank to the borrower's (importer) account at the Ex-Im Bank (or other approved partner bank). The Ex-Im Bank then sends the funds from the borrower's (importer) account to the seller's (exporter) bank account.

GOC Silica Questionnaire Resp. at 4–5. Thus, it appears that "other approved partner bank[s]" may be involved in some capacity in the disbursement of EBCP funds. The discussion with the EX-IM official indicates that after the importer's application for the EBCP is approved, "[t]he foreign importer will then instruct EXIM bank to pay the Chinese exporter by assigning payment to the Chinese exporter's bank account." *See* EX-IM Discussion at 2. Considering the evidence as a whole, it may be that even if funds are temporarily routed to banks outside the EX-IM bank, funds are sent back to the EX-IM bank and that it disburses those funds to the exporter. If this is indeed the situation, then Commerce would apparently need to verify only whether the exporter had received any funds from the EX-IM bank and then, if so, ask them to provide documentation showing the purpose of those funds. In this situation, verification seems relatively straightforward.

If, however, the funds are not routed back through the EX-IM bank prior to reaching the exporter, verification would admittedly be more difficult. But, so long as Commerce were able to access the importer's and exporter's records, it appears that Commerce could cross-reference the records to see if any funds appeared to originate from the EX-IM bank, even if the funds went through an intermediary bank at some point. This seems especially doable with Trina and its affiliated U.S. importer, given that it has only one U.S. customer. *See* Trina Br. at 3. The court suspects that doing so will either confirm non-use or at least help clarify how the EBCP operates.

The court cannot sustain Commerce's determination that verification would be impossible or unduly onerous. Although Commerce has shown that the GOC failed to answer certain questions regarding the EBCP's operation, it is still not entirely clear to the court that the missing information is required to effectively verify respondent's non-use of the program. In order to avoid unnecessarily impacting cooperating parties because of the GOC's failure to cooperate, Commerce needs to at least attempt to verify the certifications of non-use in this case. *See Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (CIT 2013) (noting that Commerce should "seek to

avoid" adversely impacting a cooperating party). There appears to be enough information on the record for Commerce to identify potential suspect financial entries. As respondents indicate, this may require Commerce to deviate from its standard verification procedures. The court suggests ways in which Commerce might attempt verification, but respondents have suggested others that may be preferable. On remand, the parties should discuss potential ways forward and Commerce should request records that may answer the question of EBCP use from respondents, and, if necessary, their importers. Commerce should detail its process in its remand redetermination.

Should verification fail to clarify whether respondents benefited from the EBCP, and Commerce continue to apply adverse facts, the court would consider Commerce's reliance on the verification checklist in this analysis problematic. Although Commerce cites the results of the investigation and the accompanying issues and decision memorandum as facts available supporting the notion that EX-IM Bank and EBCP loans are made to "new and high-tech projects" such as energy projects, that finding appears to be based on the petitioner's allegations in the petition.[8] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012), and accompanying Issues and Decision Memorandum at 59 (Oct. 9, 2012). This does not logically lead to Commerce's remand results for two reasons. First, after review of the Initiation Checklist, it appears that this allegation may relate to the EX-IM Bank's *seller's* credit and not the *buyer's* credit program at issue here. *See* Import Administration Office of AD/CVD Operations Countervailing Duty Investigation Initiation Checklist, C-570–980 at 24 (Nov. 8, 2011) ("Initiation Checklist'"). This potential discrepancy relates to the court's other problem with Commerce's remand redetermination on this issue—Commerce relies on the Initiation Checklist, and ostensibly the underlying supporting documentation, but does not submit the latter to the court.

As noted in both the relevant statutory and regulatory provisions, a petition can serve as a source of information for the selection of adverse facts. 19 U.S.C. § 1677e(b)(2)(A); 19 C.F.R. § 351.308(c)(1)(i) (stating that information derived from the petition is "secondary information"). These provisions also state, however, that when relying on secondary information, Commerce shall "to the extent practicable, corroborate that information from independent sources that

[8] In the *Remand Results*, Commerce cites the underlying investigation and issues and decision memorandum to support its claim that energy projects use the EBCP. *See Remand Results* at 24. In turn, the issues and decision memorandum cites the Initiation Checklist, which lists documents supporting this claim that have not been placed on the record in this case.

are reasonably at [Commerce's] disposal." 19 U.S.C. § 1677e(c)(1); 19 C.F.R. § 351.308(d). In this case, it is unclear what, besides the allegations made in the petition, supported Commerce's finding regarding solar industry usage of the EBCP. Although there may be underlying documents that corroborate this finding, those documents have not been submitted to the court. *See Deacero S.A.P.I. de C.V. v. United States*, 393 F. Supp. 3d 1280, 1286 (CIT 2019) (noting that the Initiation Checklist is part of Commerce's pre-initiation analysis and that "[t]he independent sources may be embedded in the pre-initiation analysis; however, the pre-initiation analysis itself is not an independent source") (footnote omitted). If Commerce continues to apply AFA in determining that respondents' buyers benefitted from the EBCP, Commerce should explain what evidence beyond petitioner's allegations in the investigation supports Commerce's finding.

II. Provision of Aluminum Extrusions for LTAR

The court remanded Commerce's finding that the subsidization of aluminum extrusions represented a countervailable subsidy as Commerce failed to adequately explain whether "the actual recipients of the subsidy, whether considered on an enterprise or industry basis, [were] limited in number." *See* 19 U.S.C. § 1677(5A)(D)(iii)(I). The record appeared to indicate that aluminum extrusion use was widespread, which would render the subsidy non-specific, and thus non-countervailable. *See Changzhou Trina I*, 352 F. Supp. 3d at 1330–31 (noting that aluminum extrusions were utilized for "building and construction; transportation; electrical; machinery and equipment; consumer durables; and other industries").

On remand, Commerce continued to find the subsidization of aluminum extrusions *de facto* specific, but further explained its finding that "those sectors that actually consume aluminum are limited in number." *Remand Results* at 25–27. Commerce noted that within the six broad industries mentioned, the actual users within those industries are also limited in number. *Id.* Commerce explained that "usage is limited to certain enterprises involved in the production" of a narrow set of applications,[9] even though those enterprises may fall

[9] Specifically, Commerce points to evidence that demonstrates that even though aluminum extrusions are used in "building and construction," within that potentially broad category, the major applications of aluminum extrusions are "'frames of doors and windows,' 'curtain wall,' 'structural frames,' 'bridges,' and 'guard bars.'" *See Remand Results* at 26. Similarly, although finding that aluminum extrusions are used by "machinery and equipment," the GOC only listed as major applications "'elevator and escalator,' 'shield, handrail and terrace,' 'agricultural machinery,' 'radiator,' and 'shape-setting equipment and assembly-line equipment.'" *Id.* Commerce asserts that this shows that within these broad sectors, usage is limited to a narrow range of applications and thus only certain enterprises. *Id.* at 26–27.

into larger industrial categories. *Id.* at 26–27. Thus, Commerce found that although six broad sectors use aluminum extrusions, upon further examination the enterprises within those industries are limited. *Id.* Finally, Commerce considered whether the makeup of users of aluminum extrusions "could be considered something akin to the whole of the Chinese economy," and found, based on record evidence, that comparatively numerous industries do not benefit from its subsidization.

Canadian Solar argues that Commerce misunderstands the court's order and still fails to properly assess specificity. Canadian Solar Br. at 18–22. It argues that as most industries in the GOC use aluminum, a specificity finding is unwarranted. *Id.* For support it cites a GOC submission claiming that "as many as 113 industries out of 124 industries in China consume aluminum." GOC Initial CVD Questionnaire Resp. re Canadian Solar, P.R. 123 at 44 (June 10, 2016). The government responds that Commerce's finding of specificity should nonetheless be sustained because although aluminum may be used by many industries, the usage within those industries is limited on an enterprise basis. *See* Gov. Br. at 14–18.

Commerce has adequately explained its aluminum extrusions specificity determination. Although some evidence indicates that aluminum extrusions are used by many Chinese industries, the record also supports Commerce's contention that in practice these subsidies are primarily used in a narrow range of applications. Although the evidence cited by Commerce is not definitive, Commerce's decision is nonetheless sufficiently supported by the record. *See Nippon Steel*, 458 F.3d at 1351. Although aluminum extrusions may be used by broad sectors of the PRC's economy, the actual applications of extrusions are primarily limited to a relatively narrow range of applications. Accordingly, the court sustains Commerce's aluminum extrusions specificity determination.

III. Use of Comtrade/IHS data in Computing a Benchmark for Aluminum Extrusions

In computing the benchmark calculation for aluminum extrusions, Commerce averaged datasets from UN Comtrade ("Comtrade") and IHS Technology/Markit ("IHS").[10] The court remanded and ordered Commerce to consider whether the Comtrade dataset was overinclusive of irrelevant aluminum products such that it was "too flawed to

[10] As detailed throughout the court's previous opinion, the Comtrade data is based on various HTS subheadings but is computed monthly whereas the IHS data is based on the exact product at issue but is a weighted annual average. *Changzhou Trina I*, 352 F. Supp. 3d at 1331.

be probative of the world market price" for aluminum extrusions. *Changzhou Trina I*, 352 F. Supp. 3d at 1332–33.

On remand, Commerce continues to average both data sets.[11] It distinguishes a similar issue involving the benchmark price for solar glass, detailed below, and states that no record evidence distinguishes solar frames from other types of aluminum extrusions contained in the Comtrade data. *Remand Results* at 27–28. Commerce cites the IHS Report as evidence to support that the price of solar frames fluctuates [[ ]]. *Id.* at 30 (IHS PV Materials Report at 303 (Nov. 15, 2016) ("IHS Report")). Because the Comtrade data is the only data on record that captures monthly-price fluctuations, Commerce continues to find its inclusion necessary. *Id.*

Canadian Solar and Trina continue to argue that the Comtrade data is overinclusive. *See* Canadian Solar Br. at 22–26; Trina Br. at 29–39. Canadian Solar argues that the use of a six-digit heading is a "basket category" that is "overly general regardless of whether they individually reflect the inputs used by Canadian Solar." Canadian Solar Br. at 24–25. Trina argues that the differences between solar frames and the products contained within the subheadings used by the Comtrade data contains physical differences and applications. Trina Br. at 30. Finally, Canadian Solar and Trina argue that Commerce misreads the IHS Report that it claims supports a finding of monthly price fluctuations and that the Comtrade data alone shows monthly fluctuations. Canadian Solar at 25–26; Trina Br. at 24–28. The government defends Commerce's position and cites a recent decision by the Court of Appeals for the Federal Circuit that recently upheld the use of HTS heading 7604.29 for valuing solar frames in the surrogate value context. Gov. Br at 18–29; *see also SolarWorld Americas, Inc. v. United States*, 910 F.3d 1216, 1223 (Fed. Cir. 2018).

Commerce has failed to address the court's concerns that the monthly fluctuations evinced by the Comtrade data might be caused by fluctuations in the price other products encompassed in the Comtrade headings unrelated to solar frames. Although Commerce's inference from the IHS data that monthly variations in price exist for solar frames is not unreasonable, its decision that the Comtrade data is reflective of this fluctuation is unreasonable.

First, the IHS Report appears to indicate [[ ]] while the Comtrade data

[11] Commerce ceased using HTS subheading 7610.10 after finding that it was not a subheading under which aluminum solar frames are imported. *See Remand Results*, at 30–31. It now solely relies on HTS subheadings 7604.21 and 7604.29 from the Comtrade data. *Id.* at 31.

shows the opposite trend. *See* IHS Report; Revised Benchmarks and Final Rates Calculations for Trina Solar, Rem. P.R. 19, Rem. C.R. 6–9 (Dep't Commerce Apr. 26, 2019) ("Calculations"). While the IHS Report states that the price of aluminum frames is [[ ]], it does not necessarily follow that the HTS headings used in the Comtrade data are reflective of this correlation. *See id.* at 13.

Second, the record indicates that solar frames [[ ]] and while this does not necessarily mean that the aluminum extrusions in HTS headings 7604.21 and 7604.29 are not comparable, it undercuts Commerce's finding that they are comparable. IHS Report. Rather than address evidence that contradicts Commerce's ultimate conclusion, Commerce simply states that there "is no evidence on the record that such differences are significant enough to warrant abandoning the sole source of a monthly benchmark on the record." *Remand Results* at 71. Although the evidence that solar frames differ from aluminum extrusions more generally is not definitive, it is enough to render unsupported by substantial evidence Commerce's dismissal of this concern without further analyzing the merchandise captured by the HTS headings used by Comtrade. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1340 (Fed. Cir. 2011) (the court looks "to the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence"). Commerce has not adequately accounted for "factors affecting comparability." 19 C.F.R. § 351.511(a)(2)(ii).[12]

A preference for monthly values cannot overcome data that does not reasonably relate to the product at issue. Accordingly, the court again remands Commerce's decision to use the Comtrade data in computing a benchmark. Commerce must use the IHS data alone in computing the benchmark. Unless Commerce can demonstrate, however, that the HTS subheadings used by Comtrade are not grossly overinclusive and determines that the merchandise is sufficiently comparable to solar frames.

IV. Use of Comtrade/IHS data in Computing a Benchmark for Solar Glass

After finding the provision of solar glass to be a countervailable subsidy, Commerce constructed a benchmark based on an average of

[12] The decision in *Solarworld Americas*, does not control here as it involved surrogate values, which are inherently less reliable and involve differing procedural and factual considerations. *See* 910 F.3d at 1222–25.

Comtrade and IHS data.[13] *See Changzhou Trina I*, 352 F. Supp. 3d at 1333. As with the aluminum extrusions benchmark, the court remanded after finding the Comtrade data potentially overinclusive of non-subject merchandise. *Id.* at 1334–35. The court stressed the importance of accounting "for factors affecting comparability." *See id.* at 1335 (citing 19 C.F.R. § 351.511(a)(2)(ii)). Finally, the court expressed concern that the Comtrade data did not include information from major solar glass producing countries. *Id.*

On remand, Commerce continues to average the Comtrade and IHS datasets, finding that neither is sufficient on its own to compute a benchmark price. Commerce did, however, remove HTSUS heading 7007.29 from the Comtrade benchmark, recognizing that it is "an overbroad representation of the price of solar glass on the record of this case." *Id.* at 34.[14] To support its continued use of the Comtrade data, Commerce points to record evidence showing that the price for solar glass fluctuates year-to-year. *Id.* at 34. It extrapolates that as prices fluctuate on a year-to-year basis, fluctuation is "likely to occur on a month-to-month basis." *Id.* Usage of the Comtrade data is suitable, Commerce claims, as it is the only data on record that can "provide any evidence of how such fluctuations might have occurred on a month-to-month basis." *Id.*

Canadian Solar and Trina continue to find the use of the Comtrade data problematically overinclusive. Canadian Solar Br. at 31–35; Trina Br. at 34–40. Canadian Solar notes that the Comtrade data is also underinclusive in that it fails to contain data from at least two major solar glass producing countries. Canadian Solar at 32–33. The government responds that use of the Comtrade data is appropriate, especially now that Commerce removed HTS 7007.29 data. Gov. Br. at 29–34. It argues that solar glass is similar in "in design, core function, and purpose" to other glass categorized under HTS heading 7007.19, such that the Comtrade data is probative of the price of solar glass. *Id.* at 32–33.

Commerce has not adequately addressed the court's concern that the Comtrade data's monthly fluctuations may be caused by non-solar glass merchandise. *See Changzhou Trina I*, 352 F. Supp. 3d at

[13] The Comtrade data was not specific to solar glass, which Commerce recognizes is a type of glass with unique properties. *See Remand Results* at 27, 32–33. Instead the Comtrade data included glass under the U.S. Harmonized Tariff Schedule ("HTS") headings 7007.19 and 7007.29, which includes other types of non-solar tempered or laminated glass. *Id.* at 32–34. In contrast, the IHS dataset is specific to solar glass. *Id.* at 33.

[14] Commerce also removed Comtrade data from countries that were shown to have not produced solar glass. *See Remand Results* at 35–36.

1333–34. In *Changzhou Trina I*, the court faulted Commerce for using the Comtrade data based on purported price fluctuations of solar glass, when the only evidence of price fluctuations appeared to be the challenged Comtrade dataset. *Id.* at 1335. Although Commerce provides evidence that the price of solar glass fluctuates on a year-to-year basis, this does not necessarily mean that the monthly fluctuations in the Comtrade data set are caused by solar glass rather than non-solar glass. In fact, the IHS Report that Commerce cites to support the notion that the price for solar glass fluctuates year-to-year [[

]], but the Comtrade data shows the opposite trend. *Compare* IHS Report *with* Calculations (listing the monthly Comtrade data points). Thus, the data cited by Commerce as evidence that monthly data needs to be included undermines the inclusion of the Comtrade data and supports respondents' contention that non-solar glass accounts for the price variation.

Further, Commerce failed to explain whether the inclusion of non-solar glass in the Comtrade data set made it unusable. The *Remand Results* do not take into account the factors of comparability required of its regulations. *See* 19 C.F.R. § 351.511(a)(2)(ii). Although the glass covered by HTS heading 7007.19 may have similarities to solar glass, this does not adequately address the court's concern that the fluctuations in the Comtrade data may be due to fluctuations in the price of the non-solar glass products in that subheading. Finally, Commerce made no effort to address concerns that the Comtrade data failed to include data from major solar glass-producing countries. *See Changzhou Trina I*, 352 F. Supp. 3d at 1335. Commerce's contention that the countries included in the Comtrade data set "are not on the 'non-producer'" country list provided by Canadian Solar does not sufficiently address this deficiency. *See Remand Results* at 35–36. Even if every country included in the Comtrade data did in fact produce solar glass, the lack of data from major producers further undermines its use in constructing a solar glass benchmark.

Because the Comtrade data is fatally overinclusive of non-solar glass and underinclusive of data from countries with major solar glass producers, its usage in deriving a benchmark is unsupported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Thus, the court remands this issue and directs Commerce to use the IHS data alone in computing a solar glass benchmark. In the alternative, if Commerce chooses to reopen the record because it has identified a dataset that is both specific to solar glass and computed on a monthly basis, it should use that dataset in computing the benchmark.

V. Commerce's Rejection of Canadian Solar's Import Pricing Data in Computing a Benchmark Price for Polysilicon

After finding that the provision of polysilicon for LTAR was a countervailable subsidy, Commerce estimated adequate remuneration using a tier-two metric claiming that the GOC's involvement in the polysilicon market distorted domestic prices, thus rendering unusable tier-one prices based on a "market-determined price for the good or service resulting from actual transactions in the country in question." *See* 19 C.F.R. § 351.511(a)(2)(i)–(ii); *I& D Memo* at 31. Canadian Solar contested Commerce's decision to resort to tier two data, claiming that its "arms-length imports with market-economy suppliers" should have been considered as tier-one data. *Changzhou Trina I*, 352 F. Supp. 3d at 1336–37. The court concluded that Commerce failed to explain how the GOC's market participation resulted in import distortion and remanded for Commerce to either explain or else use the import data as a tier-one metric. *Id.* at 1336. The court noted that while market interference could result in import price depression, without "sufficient information about polysilicon's fungibility or the dynamics of the market," the court could not conclude that Commerce's decision was supported by substantial evidence. *Id.* at 1337.

On remand, Commerce continues to resort to tier-two metrics, finding that the GOC's participation in the market forced importers to lower their prices to compete in the domestic market. *Remand Results* at 36–39. Commerce calls this a "basic economic inference drawn from the logic of a competitive marketplace." *Id.* at 38. It claims that this inference is reasonable when, as here, domestic producers supply most of the polysilicon domestically consumed.[15] Commerce further noted that there was "no information on the record indicating that imports and domestic purchases are not fungible." *Id.*

Canadian Solar claims that Commerce confuses the analysis. In its estimation, what matters is not whether the domestic production accounts for the majority of domestically consumed polysilicon, but whether the government involvement is so great as to manipulate the market. Canadian Solar Br. at 29–30. It notes that this occurs when the "'government provider' constitutes a majority of the market." *Id.* at 29. Canadian Solar claims that record evidence shows that this is

[15] Specifically, Commerce cites record evidence supplied by the GOC that shows domestic producers supply 66 percent of domestic consumption and imports account for the remaining 34 percent. *Remand Results* at 38 (citing GOC Initial CVD Questionnaire Resp. at 73–74).

not the situation in the GOC. *Id.* at 29–30. The government responded that Canadian Solar is attempting to re-litigate Commerce's finding that the market in the PRC is distorted by government participation. Gov. Br. at 41–42.

After reviewing the record, the court finds Commerce's rationale in rejecting Canadian Solar's import data unsupported. The GOC submitted information about its involvement in the polysilicon industry, but noted that it did not track the solar-grade polysilicon specifically. Commerce found that this made the GOC's responses unreliable such that an adverse inference was warranted. *See I & D Memo*, at 31; *Prelim. I & D Memo*, at 25–27.[16] Accordingly, Commerce stated that "the GOC's involvement in the PRC's solar grade polysilicon market leads to significantly distorted solar grade polysilicon prices in the PRC." *I & D Memo* at 31. The record shows that the GOC has an ownership or management interest in roughly [[ ]] of the domestic polysilicon produced which equates to just [[ ]] of the total amount of polysilicon domestically consumed, obviously a small percentage. *See* GOC Initial CVD Questionnaire Resp. at 73–74. Although the court must accept Commerce's findings so long as "a reasonable mind might accept the evidence as sufficient to support the finding," *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citations omitted), the court cannot conclude that the evidence reasonably supports Commerce's finding that the price of solar-grade polysilicon imports is distorted by the GOC's participation in the market.

Commerce "must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.,* 463 U.S. 29, 42 (1983) (quotation and citation omitted). It has not done so here. As noted in the *Preamble; Countervailing Duties; Final Rule*, unless a "government provider constitutes a majority, or in certain circumstances, a substantial portion of the market," the effect on the market will normally be minimal. 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) ("*Preamble*"); *see also, Maverick*, 857 F.3d at 1362.

The government neither provides evidence to support that either of these circumstances exist nor provides an explanation for why, even

[16] In the preliminary issues and decisions memorandum, Commerce listed other documents relevant in making its determination regarding the polysilicon industry including a WTO Dispute Settlement Panel Determination, as cited by the petition in the underlying antidumping and countervailing duty investigation on solar cells from the PRC; a New York Times article; and an article on the production of polysilicon. *See Prelim. I & D Memo* at 26. The parties have not made any argument regarding these documents and it is unclear whether and how these materials influence Commerce's finding that the solar-grade polysilicon market is distorted.

without these circumstances, the solar-grade polysilicon market is so distorted as to depress the price of arm's-length imports. Although it is theoretically possible that the GOC's influence over a small percentage of the *general* polysilicon industry results in a majority control of the production of *solar-grade* polysilicon, the court concludes that this possibility is too remote, without more, to serve as substantial evidence that this influence disrupts import pricing. The court has, in different circumstances, given credence to Commerce's finding that market distortion makes import prices unreliable as a tier-one price. *See Archer Daniels*, 917 F. Supp. 2d at 1343 (CIT 2013). In *Archer Daniels*, however, the finding was based on the state's controlling over half of domestic production of the input at issue and the GOC's imposition of an export tax on that input during the relevant period. *Id.; see also Guangdong Wireking Housewares & Hardware Co., v. United States*, 900 F. Supp. 2d 1362, 1380–82 (CIT 2013) (ruling that where 47.97 percent of domestic production was state-controlled, imports only comprised 1.53 percent of the domestic market, and export tariffs were in place, a finding of market distortion was reasonable). Here, Commerce's decision to resort to tier-two price information was not reasonable. *See Preamble* at 65,377 (noting that "[w]here it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy").

Accordingly, the court must one again remand this issue. Commerce must either use Canadian Solar's proffered import data as a tier-one metric or else provide sufficient evidence supporting Commerce's contention that the GOC's participation in the solar-grade polysilicon industry renders this data unreliable.

VI. Electricity Subsidy Specificity

After the GOC failed to provide information required to assess whether electricity prices were set in accordance with market principles, Commerce continued to find, resorting to facts available with an adverse inference, that the provision of electricity in the PRC is a countervailable subsidy. *See I & D Memo* at 40–41; *Prelim. I & D Memo* at 27–28. The court remanded for Commerce to fully "explain how adverse inferences lead to the conclusion that the provision of electricity in China is a countervailable subsidy." *Changzhou Trina I*, 352 F. Supp. 3d at 1342.

Commerce now explains that despite the GOC's claim that electricity prices are based on market principles, the GOC refused to provide "key information" necessary to verify these claims. *Remand Results* at 39–40. Commerce claims that the GOC refused to provide docu-

ments to clarify why prices vary among provinces. *Id.* at 40. Commerce placed on the record, as evidence of specificity, the Initiation Checklist from the investigation, which asserts that preferential electricity rates are "limited to priority industries, such as the solar power industry." *Id.* at 40–41. Thus, Commerce finds that the program is *de facto* specific under 19 U.S.C. § 1677 (5A)(D)(iii)(i).[17] *See id.* Commerce explains that the GOC's failure to provide sufficient information regarding the variation among provincial electricity pricing and how price adjustments occur between provinces and the National Development and Reform Commission ("NDRC"), creates gaps in the record justifying its use of AFA. *Remand Results* at 39–40; *see also* 19 U.S.C. § 1677e(b).

Canadian Solar claims that "[t]he only gap in the record has to do with variation among provinces." Canadian Solar Br. at 39. It argues that Commerce can confirm that electricity prices do not vary on the basis of industry and that Commerce has insufficient support for the notion that the solar industry disproportionately benefits from the subsidy. *Id.* at 38–42. Canadian Solar also takes issue with Commerce's citation to the Initiation Checklist for support. *Id.* at 41–42.

The court concludes that Commerce has identified potentially-material gaps in the record that could allow Commerce to rely on facts otherwise available and draw adverse inferences based on non-cooperation. Submissions by the GOC appear to indicate that the NDRC maintains some input over provincial electricity pricing and it is unclear whether adjustments made by the NDRC are made in accordance with market principles as the GOC claims. *See GOC Initial CVD Questionnaire Response*, at 95–102. When asked directly about how adjustments are made, the GOC provided some documents, including price schedules, but Commerce maintains that these documents do not clarify "whether preferential prices might be limited to certain industries or enterprises," *Remand Results* at 40.[18]

For the first time in this administrative review,[19] Commerce states that the provision of electricity is specific because it is limited to

[17] To impose countervailing duties, Commerce must show that an authority is providing a subsidy, that confers a benefit, and that is specific. *See* 19 U.S.C. § 1677(5). Canadian Solar challenges specificity only. *See* Canadian Solar Br. at 39.

[18] Commerce claims that the GOC failed to provide "price proposals for each of the relevant provinces that might demonstrate the provinces are setting prices and that they are setting prices in accordance with supply, demand, and cost; a detailed description of the cost elements and price adjustments that were discussed between the provinces and the NDRC; and, province-specific explanations linking particular costs to retail prices." *See Remand Results* at 39–40.

[19] The court has recently encountered the question of whether the provision of electricity in the PRC is a specific subsidy, in a case involving a challenge to the final determination and

certain industries, rather than geographical regions. *See* 19 U.S.C. § 1677 (5A)(D)(iii)(i). Commerce relies on information in the Initiation Checklist as "facts available," as Commerce is permitted to do. *See* 19 U.S.C. § 1677e(b)(2); 19 C.F.R. § 351.308(c). Commerce, however, has not added to the record the supposedly supportive documentation it specifically relied on in the Initiation Checklist.[20] As noted above, in this case, without the underlying exhibits relied upon as support, the court cannot evaluate Commerce's specificity finding. *See Deacero*, 393 F. Supp. 3d at 1286. Further, as indicated Commerce does not state how its finding that the GOC is subsidizing specific industries relates to the gap created by the GOC's non-cooperation, so that it may draw the adverse inference that specific industries are subsidized. The court surmises that Commerce understands that the subsidization of these specific industries is, at least in part, a reason for the price variation among provinces and because of the gaps in the record it cannot determine exactly why or how that occurs. On remand, Commerce should expressly set forth its reasoning under the statutory steps for drawing adverse inferences to fill record gaps.

CONCLUSION

For the foregoing reasons this matter is remanded for proceedings consistent with this opinion. Commerce may reopen the record and supplement it as necessary. Remand results should be filed by January 7, 2020. Objections are due February 6, 2020 and Responses to Objections are due February 20, 2020.

Dated: November 8, 2019
New York, New York

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

countervailing duty order on certain aluminum foil from the PRC. *See Jiangsu Zhongji Lamination Materials Co. v. United States*, Slip Op. 19–122, 2019 WL 4467099 (CIT Sept. 18, 2019). In that case, the court held that Commerce relied in part on submissions from the GOC that indicated that price variations were at least in part due to type of use. *Id.* at *11–12. The court upheld Commerce's finding in that case given the substantial evidence supporting its decision. Although sufficient evidence may exist in this case, Commerce has not yet put forth such evidence.

[20] The *Remand Results* cite to the *Initiation Checklist*, which in turn lists documents supporting the allegation that solar cell producers benefit from subsidized electricity rates. *See Remand Results* at 41 (citing *Initiation Checklist* at 12–13). Those supporting documents have not been placed on the record.

Slip Op. 19–138

POSCO, Plaintiff, NUCOR CORPORATION, Consolidated Plaintiff, ARCELORMITTAL USA LLC and SSAB ENTERPRISES LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SSAB ENTERPRISES LLC, NUCOR CORPORATION, ARCELORMITTAL USA LLC and POSCO, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Consol. Court No. 17–00137

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

Dated: November 8, 2019

Donald B. Cameron, Julie C. Mendoza, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Eugene Degnan, and *Ragan W. Updegraff*, Morris, Manning & Martin LLP, of Washington, DC, for plaintiff and defendant-intervenor *POSCO*.

Christopher Weld, Alan H. Price, and *Adam M. Teslik*, Wiley Rein, LLP, of Washington, DC, for consolidated plaintiff and defendant-intervenor *Nucor Corporation*.

John Herrmann and *Christopher Cloutier*, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiff-intervenor and defendant-intervenor *ArcelorMittal USA LLC*.

Roger B. Schagrin, Schagrin Associates, of Washington DC, for plaintiff-intervenor and defendant-intervenor *SSAB Enterprises LLC*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant *United States*. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Reza Karamloo*, Senior Attorney, Office of the Chief Counsel Commercial Litigation Branch for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Katzmann, Judge:

The court returns to Plaintiff POSCO's challenge to the U.S. Department of Commerce's ("Commerce") final affirmative determination in the countervailing duty investigation of certain carbon and alloy cut-to-length ("CTL") plate from Korea. *Certain Carbon and Alloy Steel Cut-To-Length Plate From the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination* ("*Final Determination*"), 82 Fed. Reg. 16,341 (Dep't Commerce Apr. 4, 2017), P.R. 505 and accompanying Issues and Decision Memorandum ("*IDM*") (Mar. 29, 2017), P.R. 497. Before the court now are Commerce's Final Results of Redetermination Pursuant to Court Remand ("*Remand Results*") (Dep't Commerce July 1, 2019), ECF No. 97, which the court ordered in *POSCO v. United States*, 42 CIT __, 353 F. Supp. 3d 1357 (2018) ("*POSCO I*") and *POSCO v. United States*, 43 CIT __, __, 382 F. Supp. 3d 1346 (2019) ("*POSCO II*"). The court sustains Commerce's *Remand Results*.

BACKGROUND

The relevant legal and factual background of the underlying action is set forth in greater detail in *POSCO I*, 353 F. Supp. 3d at 1363–69 and *POSCO II*, 382 F. Supp. 3d at 1348.

In 2016, Commerce initiated a countervailing duty investigation of certain carbon and alloy steel cut-to-length ("CTL") plate from Korea, with a period of investigation ("POI") of January 1, 2015 through December 31, 2015. *Certain Carbon and Alloy Steel Cut-to-Length Plate from Brazil, the People's Republic of China, and the Republic of Korea: Initiation of Countervailing Duty Investigations*, 81 Fed. Reg. 27,098 (Dep't Commerce May 5, 2016), P.R. 59. POSCO was a mandatory respondent. Respondent Selection Memorandum (Dep't Commerce May 31, 2016), P.R. 102. On April 4, 2017, Commerce issued its *Final Determination*, imposing a countervailing duty ("CVD") rate of 4.31 percent on POSCO.

Before the court, POSCO challenged several aspects of Commerce's Final Determination, including POSCO M-Tech's failure to report R&D grants received by companies it had acquired, Commerce's application of AFA to POSCO Chemtech's failure to timely report port usage grants, and Hyundai's failure to report assistance received under Korea's Restriction on Special Taxation Act ("RSTA") Article 22. *POSCO I* and *POSCO II*. Nucor, moreover, challenged Commerce's determination with regards to the attribution of electricity subsidies. *Id.*

In *POSCO I*, the court affirmed several aspects of Commerce's Final Determination. The court upheld Commerce's application of AFA to POSCO M-Tech's unreported additional government subsidies, but remanded to the agency for reconsideration of its determination that the assistance received by POSCO M-Tech was countervailable. Pertinent to the *Remand Results* now under review, the court concluded that (1) Commerce failed to make the requisite factual findings to meet the specificity and benefit requirements of countervailability for the R&D grants received by Ricco Metal and Nine-Digit; and (2) Commerce did not conduct a fact-specific inquiry necessary to justify its application of the highest AFA rates to POSCO. *POSCO I*, 353 F. Supp. 3d at 1374–76. Accordingly, it remanded the Final Determination to Commerce to make those required fact-specific inquiries and for reconsideration of "why the highest available rate should apply to POSCO." *Id.* at 1383. Given that the court remanded "the issue of the use of the highest available AFA rate . . . the court [did] not address POSCO's contention that Commerce failed to corroborate the AFA rates under 19 U.S.C. § 1677e(c)(1)." *Id.* at 1383 n.15.

POSCO moved for the court to reconsider its affirmance of (1) Commerce's application of the 1.05 percent AFA rate to POSCO M-Tech for unreported government subsidies received by Ricco Metal and Nine-Digit, both companies acquired by POSCO M-Tech; and (2) Commerce's application of the 1.05 percent AFA rate to Hyundai and attribution of this rate to POSCO. Mot. of Pl. POSCO for Reh'g. and Recons. at 2–3, Dec. 21, 2018, ECF No. 83. In *POSCO II*, responding to the motion for reconsideration, the court concluded that "Commerce did not provide any additional explanation of how it determined that there was no identical program before moving to the second step of its AFA methodology — using the rate in another investigation — and thus did not make the requisite factual findings to address POSCO's contention that the [Industrial Technology Innovation Promotion Act] ITIPA grant was an identical program in the proceeding." *POSCO II*, 382 F. Supp. 3d at 1349. The court thus additionally remanded to Commerce for further consideration the issue of whether, under the first step of the AFA methodology, a program identical to the assistance received by Ricco Metal and Nine-Digit existed. *Id.* However, the court denied POSCO's motion to reconsider the application of AFA to Hyundai and the attribution of that rate to POSCO. *POSCO II*, 382 F. Supp. 3d at 1346.

Commerce filed the *Remand Results* with the court on July 1, 2019. Commerce (1) concluded that POSCO M-Tech's R&D grants received by Ricco Metal and Nine-Digit were countervailable because the benefit and specificity requirements were met; (2) found that the use of the highest AFA rate was appropriate in light of POSCO's failure to cooperate; (3) reconsidered the use of the 1.64 percent rate for the port usage grants and reduced the rate to 1.05 percent; and (4) addressed whether an identical program existed as part of the AFA methodology. *Remand Results* at 1–2. POSCO and Nucor filed their comments on the *Remand Results* on July 31, 2019. POSCO's Br.; Nucor's Br. The Government filed its reply to the comments on the *Remand Results* on August 15, 2019. Def.'s Br.

DISCUSSION

Commerce's *Remand Results* are consistent with the court's remand orders in *POSCO I* and *POSCO II*. POSCO and Nucor do not challenge Commerce's findings on remand that the benefit and specificity requirements were met such that the assistance received by POSCO M-Tech was countervailable. POSCO's Br.; Nucor's Br. POSCO does, however, argue that Commerce failed to comply fully with the court's orders in *POSCO I* and *POSCO II* because it did not explain whether an identical program existed before moving on the second step of the

AFA methodology as applied to POSCO M-Tech's ITIPA grants and failed to conduct the additional analysis required by 19 U.S.C. § 1677e(d)(2) to justify the use of the highest AFA rate out of all possible rates. POSCO's Br. at 3. POSCO also asserts that Commerce did not corroborate the 1.64 percent rate from *Refrigerators from Korea* but agrees with the resulting 1.05 percent rate for the port usage grants on remand. *Id.* (stating that "POSCO agrees with the result of Commerce's reconsideration of this issue and has no comments"). Nucor asks the court to sustain Commerce's *Remand Results* with respect to Commerce's application of the highest AFA rate to POSCO M-Tech's R&D grant assistance but contends that Commerce's reduction of the 1.64 percent rate to 1.05 percent rate was unlawful because it exceeded the scope of the court's orders in *POSCO I* and *POSCO II*. Nucor's Br. at 2–3. POSCO and Nucor's arguments are not meritorious, and the court sustains the *Remand Results*.

I. Commerce's Countervailability Determination

As has been noted, in *POSCO I*, the court concluded that Commerce failed to make the "prerequisite factual findings" to meet the benefit and specificity requirements of a countervailability finding, as required by 19 U.S.C. § 1677(5), for the assistance received by Ricco Metal and Nine-Digit. *POSCO I* 353 F. Supp. 3d at 1376. The court, therefore, remanded to "Commerce for reconsideration its determination that the assistance received by Ricco Metal and Nine-Digit was countervailable." *Id.* On remand, the Government contends that "Commerce explained that: (1) record evidence indicates research and development grants provided by the Korean government to steel producers are de jure specific; (2) such grants constitute financial contributions in the form of direct transfer of funds; and (3) the subsidies at issue confer a benefit in the form of a grant." Def.'s Br. at 6 (emphasis omitted). POSCO and Nucor do not dispute Commerce's benefit and specificity findings on remand, and thus this issue is deemed waived. *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1350 (Fed. Cir. 2016). The court thus sustains Commerce's countervailability determination for the assistance received by Ricco Metal and Nine-Digit.

II. Commerce's Application of the Highest AFA Rate to POSCO

A. Commerce's Justification of the Highest AFA Rate Available

POSCO first objects to Commerce's use of the highest available AFA rate because it argues that Commerce failed to justify the use of that rate, as required by 19 U.S.C. § 1677e(d)(2). POSCO's Br. at 2.

POSCO contends that on remand Commerce "merely restated the same facts that contributed to its decision to apply AFA in the first place," and "continues to insist that 19 U.S.C. § 1677e(d)(2) does not require additional analysis." POSCO's Br. at 2. POSCO, however, does not elaborate on where in the *Remand Results* Commerce merely restates the same facts.

In *POSCO I*, the court held that 19 U.S.C. § 1677e(d)(2) requires Commerce "to do 'something more—i.e., an evaluation of the specific situation,' to justify its decision to apply the highest available rates out of all possible rates." *POSCO I*, 353 F. Supp. 3d at 1382 (quoting *POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1349 (2018) and citing *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009)). Commerce must "conduct a fact-specific inquiry and [] provide its reasons for selecting the highest rate out of all potential countervailable subsidy rates in a particular case." *POSCO I*, 353 F. Supp. 3d at 1382 (quoting *POSCO v. United States*, 42 CIT __, __, 337 F. Supp. 3d 1265, 1278 (2018)). The court thus remanded for reconsideration Commerce's use of the highest AFA rate "[b]ecause Commerce failed to evaluate — beyond its adverse inference determination — why the highest available rate should apply to POSCO." *POSCO I*, 353 F. Supp. 3d at 1383.

While the Government continues to argue that 19 U.S.C. § 1677e(d)(2) does not require additional analysis beyond that which was done in the *Final Determination*, Commerce nonetheless conducted the requisite fact-specific inquiry under respectful protest. *Remand Results* at 20–26. On remand, Commerce first conducted the requisite analysis under sections 19 U.S.C. § 1677e(a) and (b) to reach the rates available under section 19 U.S.C. § 1677e(d)(1), explaining that it applied AFA to POSCO for "(1) failing to disclose additional government subsidies received by its cross-owned company POSCO M-Tech; (2) failing to disclose receipt of port usage grants by its cross-owned company POSCO Chemtech; and (3) Hyundai's failure to disclose a tax exemption under Korea's RSTA Article 22." *Remand Results* at 17. Commerce explained that POSCO's "inaccurate reporting created gaps in the evidentiary record and that POSCO and Hyundai failed to act to the best of its ability . . ." *Id.* Commerce then outlined the factors it considered in selecting an AFA rate, including the "need to induce cooperation," "the relevance of a rate to the industry in the country under investigation," and "the relevance of a particular program." *Remand Results* at 13. Among the pool of rates, Commerce used these factors to determine which rate to apply at each step of the AFA hierarchy. *Remand Results* at 14.

Commerce addressed the rates applied to POSCO M-Tech, POSCO Chemtech, and Hyundai. With respect to POSCO M-Tech, Commerce noted that "POSCO M-Tech's counsel stated at verification that it exercised its discretion in not reporting these subsidies" and that POSCO M-Tech's decision to withhold the information "precluded Commerce from fully investigating the program and its use by POSCO M-Tech." *Id.* at 17. Commerce further explained that there was nothing on the record to suggest another rate and that Commerce thus continued to apply the 1.05 percent rate calculated in *Washers from Korea* to POSCO M-Tech. *Id.* Commerce then reiterated POSCO's failure to report the port usage grants for POSCO Chemtech by the deadline, as well as its failure to cooperate and act to the best of its ability in reviewing other records indicating assistance. *Id.* at 18. As addressed below, however, Commerce adjusted the rate applied to POSCO Chemtech from the 1.64 percent rate in *Refrigerators from Korea* to the 1.05 percent rate in *Washers from Korea* to "be consistent with the cold rolled steel and hot rolled steel proceedings." *Id.* at 18. Lastly, Commerce explained why its application of the AFA hierarchy was appropriate based on Hyundai's failure to submit the correct tax return information. *Id.* at 18–19. Commerce asserted that the rates were appropriate because POSCO failed to cooperate in several respects, and Commerce applied the highest possible rate only after evaluating the "situation," as required by 19 U.S.C. § 1677e(d)(2). *Id.* at 19–20.

In light of Commerce's authority to "apply any of the countervailable subsidy rates or dumping margins specified under [19 U.S.C. § 1677e(d)(1)], including the highest such rate or margin, based on [its] evaluation of the situation that resulted in . . . using an adverse inference in selecting among the facts otherwise available,"[1] and Commerce's explanation of why the highest rate should apply here, the court sustains the 1.05 percent rate from *Washers from Korea* as supported by substantial evidence and otherwise in accordance with law.

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[1] 19 U.S.C. § 1677e(d)(1)(A) provides for possible subsidy rates that Commerce may apply when relying on an inference that is adverse to the interests of the party at issue in a countervailing duty proceeding. Commerce may:

> (i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or
>
> (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use

19 U.S.C. § 1677e(d)(2) provides that:

> In carrying out paragraph (1), the administering authority may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.

B. Commerce's Finding of No Identical Program with a Non-Zero Rate Under Step One of the AFA Methodology

POSCO next contends that Commerce failed to comply with the court's order in *POSCO II* because it failed to make the requisite factual findings regarding whether an identical program existed before moving to the second step of the AFA methodology. POSCO's Br. at 3. According to POSCO, Commerce "ignore[d] contrary record evidence discussed in POSCO's Rule 56.2 brief regarding the operation of the ITIPA program and its own verification report that describes the discovered R&D benefits as being the same as the ITIPA program" and thus Commerce "merely restated the same fact that contributed to its decision to apply AFA in the first place." POSCO's Br. at 3.

The court is not persuaded by POSCO's argument and instead determines that Commerce's finding on remand that no identical program existed was sufficient to move to the second step of the AFA hierarchy. In *POSCO II*, the court concluded that Commerce had not "provide[d] any explanation of how it determined that there was no identical program before moving to the second step of its AFA methodology – using the rate in another investigation – and thus did not make the requisite factual findings to address POSCO's contention that the ITIPA grant was an identical program in the proceeding." *POSCO II* 382 F. Supp. 3d at 1349. Addressing POSCO's Comments on Commerce's Draft Results of Redetermination, Commerce explained:

> We disagree that record information regarding the R&D subsidies received by Nine-Digit and Ricco Metal demonstrates that these grants were received under the ITIPA program. The verification report details the fact that POSCO M-Tech provided two contradictory explanations regarding the nature of these subsidies – neither of which comports with our understanding of how the ITIPA program works.

Remand Results at 30. Commerce then noted that POSCO M-Tech "did not identify the specific program under which Ricco Metal received its R&D subsidy." *Id.* POSCO, moreover, "claimed at verification that Nine-Digit repaid the R&D subsidy in full," but "record evidence indicates that the ITIPA program requires companies to repay only 40 percent of a received grant." *Id.* (emphasis omitted). Commerce also found a discrepancy between the royalty paid by Nine-Digit and the percentage of the royalty exempted under the ITIPA program. *Id.* at 31. Commerce next explained that it lacked sufficient evidence to "draw inferences about the tax treatment of

ITIPA subsidies. . .” *Id.* Lastly, Commerce noted that the Government of Korea provided information on ITIPA grants for certain respondents but did not do so for Ricco Metal or Nine-Digit. *Id.* Commerce thus concluded in its *Remand Results* that, without ITIPA, “there are no non-zero rates calculated for a cooperating company in this investigation for an identical program.” *Id.* at 24. Commerce, therefore, set out its rationale and made the requisite factual findings to move beyond step one of the AFA hierarchy. Commerce’s AFA rate of 1.05 percent for POSCO M-Tech is supported by substantial evidence and thus sustained.

III. Commerce’s Reconsideration of the Rate Applied to POSCO for the Port Usage Grants

Nucor argues that Commerce’s reconsideration of the AFA rate applied to the port usage grants for the Pohang Youngil Program exceeded the scope of this court’s order. Nucor contends that because the court declined to “address POSCO’s contention that Commerce failed to corroborate the AFA rates,” the court should hold unlawful Commerce’s decision to revise the calculation and use the 1.05 percent rate from *Washers for Korea* in lieu of the 1.64 percent rate from *Refrigerators for Korea*. Nucor’s Br. at 1. Nucor asserts that “Commerce’s unilateral decision to reconsider an aspect of the final determination with which the [c]ourt has yet to find error, that the agency continues to assert was correct, and that has a material impact on the effectiveness of the countervailing duty order” cannot be sustained. *Id.* at 3. While “Commerce’s determinations on remand are limited by the scope of the court’s remand orders,” Nucor’s Br. at 2, Commerce’s actions were within the scope of the court’s orders. The court thus sustains the rate of 1.05 percent as applied to the port usage grants.

Contrary to Nucor’s narrow interpretation of the court’s orders, the court ordered Commerce to reconsider its application of the highest AFA rates, make the requisite factual findings pursuant to AFA hierarchy, and justify the rates among those available. Commerce did just this. The court’s orders here cannot be construed so narrowly as to “prevent[] Commerce from undertaking a fully balanced examination that might have produced more accurate results.” *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1038–39 (Fed. Cir. 2003). Commerce determined that the 1.05 percent rate was “reasonable [and] reliable” and “maintains consistency across agency proceedings.” *Remand Results* at 28. Commerce further explained how it selected the 1.05 percent rate under the AFA hierarchy as the appropriate rate. *Remand Results* at 22–26. The court thus sustains the new rate of 1.05 percent as applied to the POSCO Chemtech port usage grants be-

cause Commerce's determination was supported by substantial evidence and in accordance with law.

CONCLUSION

The court concludes that (1) Commerce's factual findings of benefit and specificity met the countervailability requirement for the assistance received by Ricco Metal and Nine-Digit; (2) Commerce sufficiently justified its application of the highest AFA rate available; (3) Commerce made the requisite finding of no identical program under the first step of the AFA hierarchy before proceeding to the second step; and (4) Commerce did not exceed the scope of the court's orders in revising the AFA rate as applied to the port usage grants. The court thus sustains the *Remand Results*.

SO ORDERED.

Dated: November 8, 2019
New York, New York

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

Slip Op. 19–139

YC RUBBER CO. (NORTH AMERICA) LLC and SUTONG TIRE RESOURCES, INC. (formerly known as SUTONG CHINA TIRE RESOURCES), Plaintiffs, KENDA RUBBER (CHINA) CO., LTD., Plaintiff-Intervenor, and MAYRUN TYRE (HONG KONG) LIMITED and ITG VOMA CORPORATION, Consolidated-Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Consol. Court No. 19–00069

[Denying Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.'s motion to modify the statutory injunction.]

Dated: November 8, 2019

Lizbeth R. Levinson, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP of Washington, D.C., for Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

OPINION AND ORDER

Barnett, Judge:

Before the court is Plaintiff-Intervenor Kenda Rubber (China) Co., Ltd.'s ("Kenda") motion to modify the statutory injunction entered on

July 2, 2019, to cover more than 250 entries of Kenda's subject merchandise during the period of review that were liquidated on June 14 and 21, 2019. *See* Confidential Pl.-In't's Mot. to Modify the Statutory Inj., ECF No. 31; Confidential Mem. of P&A in Supp. of Pl.-Int.'s Mot. to Modify the Statutory Inj. ("Kenda's Mem."), ECF. No. 31–1. Defendant United States ("the Government") opposes Kenda's motion. *See* Def.'s Resp. in Opp'n to Int.'s Mot. to Modify the Statutory Inj. ("Def.'s Resp."), ECF No. 33. For the following reasons, Kenda's motion is denied.

BACKGROUND

On April 26, 2019, Commerce published the final results of the second administrative review of the antidumping duty order covering certain passenger vehicle and light truck tires from the People's Republic of China for the period of review of August 1, 2016, through July 31, 2017.[1] *See Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China*, 84 Fed. Reg. 17,781 (Dep't Commerce Apr. 26, 2019) (final results of antidumping duty admin. review and final determination of no shipments; 2016–2017) ("*Final Results*"), ECF No. 24–4, and accompanying Issues and Decision Mem., A-570–016 (Apr. 19, 2019), ECF No. 24–5. Of relevance to this motion, Commerce assigned a weighted-average dumping margin to Kenda in the amount of 64.57 percent. *Final Results*, 84 Fed. Reg. at 17,782. Commerce informed interested parties that it "intend[ed] to issue appropriate assessment instructions directly to [U.S. Customs and Border Protection ("Customs")] 15 days after publication of the final results of this administrative review." *Id*. at 17,783.

On May 14, 2019, 18 days after Commerce published the *Final Results*, Commerce sent liquidation instructions to Customs covering relevant entries of subject merchandise from Kenda, among others. Def.'s Resp. at 2 (citing Message No. 9134302, Liquidation Instructions for Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China Exported by Various Companies for the Period 08/01/2016 through 07/31/2017, A-570–016, (May 14, 2019) ("Liquidation Instructions")); *see also* Kenda's Mem. at 1–2.

On May 23, 2019, Plaintiffs YC Rubber Co. (North America) LLC and Sutong Tire Resources, Inc. (formerly known as Sutong China Tire Resources) filed a summons and complaint in this case. *See* Summons, ECF No. 1; Compl., ECF No. 2. On May 24, 2019, Plaintiffs filed Form 24 proposed orders for statutory injunctions and said

[1] Commerce signed the *Final Results* on April 19, 2019, *see* Def.'s Resp. at 1, and publication occurred a week later.

orders were entered the same day.[2] *See* Orders for Statutory Inj. Upon Consent (May 24, 2019), ECF Nos. 11–12. These injunctions did not cover Kenda's entries of subject merchandise. *See id.*

On June 14 and 21, 2019, pursuant to the Liquidation Instructions, Customs liquidated over 250 (but not all) of Kenda's entries of subject merchandise at the rate determined in the *Final Results*. *See* Kenda's Mem. at Ex. 1 (Decl. of Robin Pickard, Vice President of Finance and Accounting at Kenda (undated) ("Pickard Decl.")), ¶ 4. By June 25, 2019, Kenda became aware that Customs had liquidated these entries. *Id*. Upon learning of these liquidations, Kenda contacted counsel about intervening in this litigation. *Id.* ¶ 5.

On June 27, 2019, Kenda filed a consent motion to intervene in this litigation. *See* Proposed Pl.-Int.'s Consent Mot. to Intervene as a Matter of Right, ECF No. 18. The following day, the court granted Kenda's motion to intervene. Order (June 28, 2019), ECF No. 21.

On July 2, 2019,[3] Kenda filed a Form 24 proposed order for a statutory injunction to enjoin Commerce or Customs from "issuing instructions to liquidate or making or permitting liquidation of any unliquidated entries of" subject merchandise exported by Kenda that were subject to the *Final Results*. Proposed Inj. at 1–2. Kenda's proposed order covered "any entries inadvertently liquidated after this order [was] signed but before this injunction [was] fully implemented by [Customs] . . . ." *Id.* at 3. The court entered the injunction later that same day. *See* Injunction.

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)[4] and 28 U.S.C. § 1581(c) (2012). Alternatively, to the extent that it is properly before the court, *see infra* note 7, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) to review Kenda's challenge to Commerce's issuance of the Liquidation Instructions pursu-

[2] Form 24 is a streamlined form a party may use to propose a statutory junction, pursuant to which the party indicates the consent of the other parties and agreement that they have made "a proper showing . . . that the requested injunctive relief should be granted under the circumstances." *See* U.S. Court of International Trade ("USCIT"), Form 24 Order for Statutory Inj. Upon Consent (July 1, 2019) https://www.cit.uscourts.gov/sites/cit/files/Form%2024.pdf.

[3] Kenda initially filed a Form 24 proposed order for a statutory injunction on July 1, 2019. *See* [Proposed] Order for Statutory Inj. Upon Consent, ECF No. 22. The next day, Kenda filed a revised Form 24, *see* [Revised Proposed] Order for Statutory Inj. Upon Consent ("Proposed Inj."), ECF No. 25, which the court granted, *see* Order (July 2, 2019) ("Injunction"), ECF No. 26.

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

ant to its 15-Day Policy.[5] *See Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 738–39, 491 F. Supp. 2d 1273, 1280 (2007) (stating that "this vexing jurisdictional question. . . is largely academic" because the court has jurisdiction pursuant to either 28 U.S.C. § 1581(c) or (i)). With respect to Kenda's motion, the facts are not in dispute; the only questions are whether Customs' liquidation of the relevant entries was inconsistent with the purpose of the injunction, meriting use of the court's equitable powers to reverse liquidation, and whether Commerce's issuance of the Liquidation Instructions was not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (providing that the court "shall hold unlawful" actions brought pursuant to 28 U.S.C. § 1581(c) that are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law"); 28 U.S.C. § 2640(e) (specifying that "civil action[s] not specified in this section" are reviewed as provided in 5 U.S.C. § 706 (2012)); 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, . . . found to be [] arbitrary, capricious and abuse of discretion, or otherwise not in accordance with the law").

DISCUSSION

A. The Liquidation of Kenda's Entries Was Not Inconsistent with the Injunction and the Court Will Not Exercise Its Equitable Powers

The court entered the Injunction pursuant to 19 U.S.C. § 1516a(c)(2), which provides that the court "may enjoin the liquidation of some or all entries of merchandise covered by a determination of [Commerce]." Here, while Kenda moves to modify the Injunction, Kenda does not seek to have the court enjoin the liquidation of additional unliquidated entries. To the contrary, while only ever addressing the issue in terms of modifying the Injunction, in substance, Kenda would have the court order the reversal of liquidation of Kenda's entries that were liquidated in accordance with the *Final Results* at a time when no injunction was in place.

Kenda does not allege that the liquidation of these entries occurred contrary to the terms of the Injunction. In fact, Kenda could not make such an argument. It is clear from the Pickard Declaration that Kenda knew these entries had been liquidated and only then considered intervening in this litigation. *See* Pickard Decl. ¶¶ 3–6.

[5] As used in this Opinion and Order, the term "15-Day Policy" refers to Commerce's policy of issuing instructions to Customs to liquidate entries subject to the final results of an administrative review 15 days after publishing the results of that review. *See generally* Announcement Concerning Issuance of Liquidation Instructions Reflecting Results of Admin. Reviews (Aug. 9, 2002), *available at* http://ia.ita.doc.gov/download/liquidation-announcement.html (updated Nov. 9, 2010) (last visited Nov. 8, 2019).

Kenda nevertheless suggests that the liquidation of these entries must be reversed in accordance with the "purpose" of the Injunction. Kenda's Mem. at 3–5. Kenda's claim is at least disingenuous, if not outright false. Kenda had actual knowledge that the entries in question had already been liquidated when it filed its proposed injunction, Pickard Decl. ¶¶ 3–6; therefore, when it sought the Injunction, which, on its face, applies only to unliquidated entries, it could not have been Kenda's purpose (much less the purpose of any other party consenting to the proposed injunction) that the Injunction cover previously liquidated entries. *See* Proposed Inj. at 1 (enjoining the liquidation "of any unliquidated entries"); Injunction at 1 (same). Thus, the liquidation of Kenda's entries did not violate the terms or purpose of the Injunction.

Kenda also requests the court to grant relief as an exercise of the court's equitable powers. Kenda's Mem. at 2–5 (citing *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187 (Fed. Cir. 2009); *Clearon Corp. v. United States*, 34 CIT 970, 717 F. Supp. 2d 1366 (2010)). That being said, Kenda's argument for relief in equity merely restates its arguments regarding the purpose of the Injunction.

While the court has equitable powers to modify an injunction to achieve its intended purpose, *see, e.g., Clearon*, 34 CIT at 979, 717 F. Supp. 2d at 1373, here, the purpose of the Injunction was to maintain the status quo as of the time the Injunction was entered. The particular entries in question were liquidated prior to the entry of the Injunction, and Kenda only sought to intervene after learning of the liquidation. *See* Pickard Decl. ¶¶ 4–5. Consequently, Kenda's arguments based on equity and the purpose of the Injunction must fail.[6] *See, e.g., An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 41 CIT ___, ___, 211 F. Supp. 3d 1346, 1351 n.6 (2017) (finding that the court's equitable powers do not extend to "reliquidat[ing] entries that liquidated prior to the entry of the statutory injunction and that were not covered by the terms of that injunction").

[6] Denial of Kenda's motion does not moot Kenda's ability to challenge Commerce's *Final Results* because, while Kenda's cause of action as to the liquidated entries may be lost, *see Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983), the liquidated entries in question constitute a subset of the universe of Kenda's entries during the period of review. Other entries remain unliquidated and the liquidation of those entries is enjoined pursuant to the Injunction.

B. Commerce's Issuance of Liquidation Instructions Was Not Unlawful

The only legal basis that Kenda asserts for possibly reversing the liquidation of the entries in question is that Commerce's issuance of the Liquidation Instructions was unlawful.[7] The court is unpersuaded.

In the *Final Results*, Commerce provided notice that it would issue liquidation instructions 15 days after the publication of the *Final Results*. Such notice was consistent with Commerce's 15-Day Policy. Citing *Jinan Farmlady Trading Co., Ltd. v. United States*, 41 CIT ___, 228 F. Supp. 3d 1351 (2017), and *SKF USA Inc. v. United States*, 33 CIT 370, 611 F. Supp. 2d 1351 (2009), Kenda contends that Commerce's issuance of the Liquidation Instructions less than 30 days after publication of the *Final Results* is unlawful. Kenda's Mem. at 5–7. In both *Jinan* and *SKF*, the court found the issuance of liquidation instructions pursuant to the 15-Day Policy unlawful because it abbreviated the 30-day period parties have following the publication of the final results to decide whether to file suit. *See Jinan*, 228 F. Supp. 3d at 1358; *SKF*, 33 CIT at 389, 611 F. Supp. 2d at 1367; *see generally* 19 U.S.C. § 1516a(c).

In this case, the Liquidation Instructions were issued 18 days after publication of the *Final Results*. *See* Def.'s Resp. at 2. Obviously, that is less than the statutory 30-day period afforded by 19 U.S.C. § 1516a(c)(2) to file suit following the publication of a determination as identified in 19 U.S.C. § 1516a(a)(1). However, liquidation itself did not occur until 49 to 56 days after publication. Pickard Decl. ¶ 4. Thus, Kenda, in fact, had more than 30 days to decide whether to file suit or intervene.[8]

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[7] Defendant did not object that Kenda, as a Plaintiff-Intervenor, impermissibly enlarged the Plaintiff's case with this claim. Plaintiff-Intervenors do not enlarge a case by seeking an injunction to cover their own entries. *See, e.g., N.M. Garlic Growers Coal. v. United States*, 41 CIT ___, ___, 256 F. Supp. 3d 1373, 1376 (2017). However, by requesting the court to declare Commerce's 15-Day Policy unlawful and order the reversal of liquidation, it appears that Kenda's motion is improper to the extent that it would enlarge the issues in the case. *See Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). In the absence of argument on this issue by the Parties, the court will note this as an alternative basis for its denial of Kenda's motion.

[8] Given that Kenda filed its motion to intervene 62 days after Commerce published the *Final Results* and 44 days after Commerce issued the Liquidation Instructions, Kenda has failed to make a case that the 15-Day Policy forced Kenda to file its motion to intervene or seek an injunction "in a rushed manner." *Juancheng Kangtai Chem. Co., Ltd v. United States*, 41 CIT ___, ___, 322 F. Supp. 3d 1351, 1358–59 (2018), *aff'd*, 932 F.3d 1321 (Fed. Cir. 2019); *see also Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 738–39 (2007) (stating that the 15-Day Policy may cause a "lack of certainty of when liquidation will occur," causing interested parties to "almost immediately" file with this court a complaint, summons, and motion to enjoin liquidation).

Kenda argues, however, that the reasoning of *Jinan* and *SKF* should be extended to hold unlawful the issuance of liquidation instructions until Kenda's full time period for determining whether to intervene and obtain a statutory injunction has run its course. *See* Kenda's Mem. at 5–7. Such a period could be as long as 120 days. *See* 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (a civil action to challenge the final results of an administrative review must be commenced within 30 days of publication of the results in the Federal Register); USCIT Rule 3(a)(2) (a complaint must be filed within 30 days of filing the summons that commenced the action); USCIT Rule 24(a) (providing for intervention no later than 30 days after service of the complaint); USCIT Rule 56.2(a) ("[A]n intervenor must file a motion for statutory injunction . . . no later than 30 days after the date of service of the order granting intervention . . . ."). In other words, Kenda suggests that because an intervenor is permitted to wait as long as 30 days after service of a complaint (which, pursuant to 19 U.S.C. § 1516a, might not be filed until as late as 60 days from the publication of the final results) to intervene in an action, *see* USCIT Rule 24(a)(3), and to wait another 30 days after its motion to intervene is granted to request a statutory injunction, *see* USCIT Rule 56.2(a), that any issuance of liquidation instructions and actual liquidation prior to such deadline is unlawful.

The court declines to extend the logic of *Jinan* and *SKF* as requested by Kenda. The statute is clear that liquidation of entries of merchandise subject to a preliminary or final determination in an antidumping investigation is suspended by operation of law. *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002); *Am. Power Pull Corp. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1296, 1301 (2015). Publication of the final results of an administrative review provides notice to Customs of the lifting of the suspension of liquidation of entries covered by that administrative review. *Int'l Trading*, 281 F.3d at 1275. That notice marks the start date for measuring the six-month period by the end of which Customs must have liquidated the covered entries, otherwise they are deemed liquidated at the entered rate. 19 U.S.C. § 1504(d). Thus, in the absence of a judicial challenge to the final results of an administrative review, the liquidation of the covered entries is either suspended by law, or it is not.

Following the issuance of the final results of an administrative review, a party may challenge those results at the U.S. Court of International Trade. *See* 19 U.S.C. § 1516a. Again, the statute is clear regarding the consequences associated with such a court challenge: If liquidation of the covered entries is enjoined by the court, such en-

tries must be liquidated in accordance with the final court decision in the action, 19 U.S.C. § 1516a(e); otherwise, the entries must be liquidated in accordance with Commerce's determination, 19 U.S.C. § 1516a(c)(1). Thus, following the publication of the final results and the lifting of the suspension of liquidation, the liquidation is either enjoined by the court, or it is not.[9]

This is a detailed scheme created by Congress and defined by statute that addresses the status of entries covered by an administrative review by which their liquidation is either suspended or not and, if not suspended, either enjoined or not. What Kenda would do is ask this court to create an additional status whereby entries that are neither suspended by law nor enjoined by the court, nevertheless, may not be liquidated. Moreover, Kenda would ask that this period of inaction cover four of the six months within which Customs must act to liquidate the entries. Kenda's request is both unwarranted and unreasonable.

Just as it is clear that Congress knew how to provide for the status of entries subject to an administrative proceeding by Commerce—that is, the suspension of liquidation and the lifting of that suspension with the publication of the final results of the administrative review—so too did Congress know how to provide for a period for parties to file a summons and then a complaint challenging those final results. Congress, however, chose not to extend the period of suspension of liquidation to encompass the period in which a party may elect to challenge Commerce's final results.[10] Similarly, 19 U.S.C. § 1504(d) makes it plain that Congress intended to provide Customs with a six-month period—which begins to run on the date the final results are published—during which the suspension is lifted and Customs may liquidate entries in accordance with the agency's final results. *Cf. Int'l Trading*, 281 F.3d at 1273 ("[T]here is nothing untoward about having the six-month period for liquidation run during the period between the time Commerce publishes the final results and the time Commerce directs Customs to liquidate the entries that are covered by those results."). To suggest that there exists some extended waiting period after the notice lifting suspension of liqui-

[9] Special procedures exist in the case of a bi-national panel review pursuant to the NAFTA, which are not relevant here. *See, e.g.*, 19 U.S.C. § 1516a(g)(5).

[10] In that vein, the court in *SKF* specifically rejected the argument "that 19 U.S.C. § 1516a(a)(2) requires Commerce to wait sixty days (or alternatively, according to USCIT Rule 56.2(a), ninety days) from the date of publication before issuing liquidation instructions." 33 CIT at 382, 611 F. Supp. 2d at 1362.

dation is published but before the agencies may begin the process of liquidating an entry (absent an injunction) is inconsistent with Congress's statutory framework.[11]

For these reasons, the court declines to extend the logic of *Jinan* or *SKF* in this case.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Kenda's motion to modify the statutory injunction (ECF Nos. 31, 32) is denied.

Dated: November 8, 2019
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 19–140

SHAKE AND SHINGLE ALLIANCE, Plaintiff, and GOVERNMENT OF CANADA, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00228

[Remanding the U.S. Department of Commerce's final scope ruling as to cedar shakes and shingles.]

Dated: November 13, 2019

Joel R. Junker, Junker & Nakachi P.C., of Seattle, WA, for Plaintiff Shake and Shingle Alliance. *Heather Jacobson* also appeared on the brief.

[11] The court has suggested in previous opinions that Congress left a statutory gap by not prescribing a schedule or methodology for Commerce's issuance of liquidation instructions, and that Commerce may not fill that gap by use of an earlier version of the 15-Day Policy. *See, e.g., Jinan*, 228 F. Supp. 3d at 1358. However, the court "must . . . defer to Commerce's reasonable construction of its governing statute where Congress 'leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred authority and other statutory circumstances.'" *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (citation omitted). And while the court looks for reasoned analysis or explanation to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion, *id*., here, Commerce has provided that explanation by public announcement (i.e., the 15-Day Policy, *see supra* note 5), in which it explained its reasoning in light of the six-month deemed liquidation deadline and other challenges. Notwithstanding Commerce's reasoning, the agency might consider whether its 15-Day Policy could be amended so that regardless of when Commerce issues the liquidation instructions to Customs, the instructions specify some time period before which Customs may not act on those instructions in order to provide greater clarity to all parties and to better address some of the concerns raised in the numerous court cases addressing the 15-Day Policy. *See, e.g., Mukand Int'l Ltd. v. United States*, 30 CIT 1309, 1314–15, 452 F. Supp. 2d 1329, 1334–35 (2006).

Eric S. Parnes, Joanne E. Osendarp, Stephen R. Halpin III, and *Daniel M. Witkowski*, Hughes Hubbard & Reed LLP, of Washington, D.C., for Plaintiff-Intervenor Government of Canada.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Mercedes Morno*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

David A. Yocis, Lisa W. Wang, Whitney M. Rolig, and *Zachary J. Walker*, Picard, Kentz & Rowe LLP, of Washington, D.C., for Defendant-Intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations.

OPINION

Choe-Groves, Judge:

Plaintiff Shake and Shingle Alliance ("Alliance" or "Plaintiff"),an entity comprised of Canadian producers and exporters of certain cedar shakes and shingles ("CSS"), brings this action challenging the U.S. Department of Commerce's ("Commerce") final scope ruling on certain softwood lumber products from Canada. Summons, Nov. 8, 2018, ECF No. 1; Compl. ¶¶ 1–3, Nov. 8, 2018, ECF No. 2. Commerce determined that Alliance's CSS are within the scope of the antidumping and countervailing duty orders on certain softwood lumber products from Canada. *See* Final Scope Ruling – Cedar Shakes and Shingles, A-122–857/C-122–858, PD 18 (Sept. 10, 2018) ("Final Scope Ruling"); *see Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 350 (Dep't Commerce Jan. 3, 2018) (antidumping duty order and partial amended final determination) and *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (amended final affirmative countervailing duty determination and countervailing duty order) (collectively, "Orders").

Before the court are Plaintiff's and Plaintiff-Intervenor's motions for judgment on the agency record. Pl.'s Mot. for J. on the Agency R., Apr. 23, 2019, ECF No. 35; Pl.-Intervenor's Rule 56.2 Mot. for J. on the Agency R., Apr. 24, 2019, ECF No. 36. For the reasons discussed below, the court concludes that Commerce's scope determination is not in accordance with the law. The court remands Commerce's scope ruling for redetermination consistent with this opinion.

PROCEDURAL HISTORY

Defendant-Intervenor Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("Coalition," "Petitioner," or "Defendant-Intervenor") sought the imposition of antidumping and countervailing duties on imports of certain softwood lumber products from Canada on November 25, 2016. Petitions for the Imposition of Antidumping and Countervailing Duties on Imports

of Certain Softwood Lumber Products from Canada, bar code 3525127–10 (Nov. 25, 2016) ("Coalition Petition"). Commerce issued antidumping and countervailing duty orders on certain softwood lumber products from Canada on January 3, 2018. *See* Orders. The *Orders* contained identical scope language, which provided the following description of the subject merchandise:

> The merchandise covered by the order is softwood lumber, siding, flooring, and certain other coniferous wood (softwood lumber products). The scope includes:
>
> - Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.
> - Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.
> - Coniferous drilled and notched lumber and angle cut lumber.
> - Coniferous lumber stacked on ends and fastened together with nails, whether or not with plywood sheathing.
> - Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.
>
> Finished products are not covered by the scope of this order. For the purposes of this scope, finished products contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to this order at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the type of merchandise that is considered "finished," for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

Orders, 83 Fed. Reg. at 351; 83 Fed. Reg. at 349. Commerce issued a Preliminary Scope Memorandum on June 23, 2017. *Certain Softwood Lumber Products from Canada: Preliminary Scope Decision*, PD 21 (Dep't Commerce June 23, 2017). Approximately two months after Commerce issued its Final Scope Ruling, U.S. Customs and Border Protection ("CBP") issued a notice that "coniferous shingles and sawn shakes from Canada fall within the scope of [the Orders]." CBP, CSMS #18–000223, Coniferous Shingles and Sawn Shakes AD/CVD (Mar. 15, 2018), *available at* https://csms.cbp.gov/viewmssg.asp?Recid=23419&page=7&srch_argv=&srchtype=&btype=&sortby=&sby= (last visited Nov. 6, 2019).

Plaintiff filed a scope ruling request seeking a determination that CSS were beyond the scope of the Orders. Certain Softwood Lumber from Canada (A-122–857/C-122–858) Request for Scope Determination for Certain Cedar Shakes and Shingles, PD 1 (June 12, 2018). Plaintiff asserted that CSS were neither softwood lumber nor softwood lumber products, "were not the subject of or included within the underlying investigations[,]" and were "not described by the scope language of the Orders." *Id.* at 2. Plaintiff argued that CSS are a separate and distinct product and industry. *Id.* at 25. Alternatively, Plaintiff averred that even if CSS were within the scope of the investigations, CSS met the "finished goods" exclusion from the Orders. *Id.* at 34–38.

Coalition opposed Alliance's Scope Request on June 28, 2018. Certain Softwood Lumber Products from Canada: Comments on Request for a Scope Ruling by the Shake and Shingle Alliance, PD 8 (June 28, 2018). Coalition argued that the scope of the Orders expressly covered CSS, that CSS do not constitute "finished products" and that excluding CSS would present circumvention and administrability concerns. *See id.* at 3–14.

Alliance and the Government of Canada filed rebuttal comments. Certain Softwood Lumber from Canada (A-122–857/C-122–858) Response to Petitioner's Comments on the Alliance's Scope Ruling Request, PD 12 (July 17, 2018) ("Alliance Rebuttal Comments"); Certain Softwood Lumber Products from Canada (A-122–857/C-122–858): Government of Canada's Response to Petitioner's Comments on Request for a Scope Ruling by the Alliance, PD 17 (Aug. 3, 2018) ("Pl.-Intervenor's Rebuttal Comments"). The Government of Canada argued that Commerce had found CSS distinct from softwood lumber in five previous investigations and two international agreements, that when faced with a situation similar to past investigations, Commerce should either adhere to its decades-long practice of treating CSS distinctly from softwood lumber or explain its reason for deviating

from its practice, and that if CSS were determined to be within the scope, then CSS met the "finished products" exception. Pl.-Intervenor's Rebuttal Comments 3–7. The Government of Canada attached an annex to its rebuttal comments comparing relevant scope language from the current Orders to prior orders on softwood lumber issued by Commerce and two international agreements between the United States and Canada addressing the softwood lumber trade, which the court reproduces below:

Annex I

Scope Language Comparison[37]

Scope Language From Current Orders Relied upon by CBP

Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters

Scope Language in Current Orders v. Lumber III

Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, ~~whether or not~~ sanded, or ~~whether or not~~ finger-jointed, of an ~~actual~~ thickness exceeding six millimeters

Scope Language in Orders v. SLA 1996

Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, ~~whether or not~~ sanded, or ~~whether or not~~ finger-jointed, of an ~~actual~~ thickness exceeding six millimeters

Scope Language in Current Orders v. Lumber IV

Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, ~~whether or not~~ sanded, or ~~whether or not~~ finger-jointed, of an ~~actual~~ thickness exceeding six millimeters

Scope Language in Current Orders v. SLA 2006

Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, ~~whether or not~~ sanded, or ~~whether or not~~ finger-jointed, of an ~~actual~~ thickness exceeding six millimeters

Scope Language in Current Orders v. HTSUS 4407.10.01

Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, ~~whether or not~~ sanded, or ~~whether or not finger~~-jointed, of an ~~actual~~ thickness exceeding six millimeters

[37] Struck language demonstrates the edits necessary to form the prior orders' scope language.

Commerce issued its Final Scope Ruling on September 10, 2018. Final Scope Ruling 20. Commerce determined that the 19 C.F.R. § 351.225(k)(1) factors are dispositive as to whether CSS are merchandise subject to the Orders, and Commerce did not consider the additional factors specified in 19 C.F.R. § 351.225(k)(2). *Id.* at 5, 12.

Plaintiff commenced this action on November 8, 2018. Summons, Nov. 8, 2018, ECF No. 1; Compl. ¶¶ 1–3, Nov. 8, 2018, ECF No. 2.

Plaintiff and Plaintiff-Intervenor filed motions for judgment on the agency record. Pl.'s Mot. for J. on the Agency R. and Mem. in Supp. of Pl.'s Rule 56.2 Mot. for J. on Agency R., Apr. 23, 2019, ECF No. 35 ("Pl.'s Br."); Pl.-Intervenor's Rule 56.2 Mot. for J. on the Agency R., Apr. 24, 2019, ECF No. 36; Pl.-Intervenor's Mem. in Supp. of Rule 56.2 Mot. For J. on the Agency R., Apr. 24, 2019, ECF No. 36–1 ("Pl.-Intervenor's Br."). Defendant and Defendant-Intervenor opposed. Def.'s Resp. Pls.' Rule 56.2 Mots. J. Agency R., May 24, 2019, ECF No. 42 ("Def.'s Opp'n"); Def.-Intervenor's Resp. Opp'n Pl.'s and Pl.-Intervenor's Mot. J. Agency R., May 24, 2019, ECF No. 41 ("Def.-Intervenor's Opp'n"). Plaintiff and Plaintiff-Intervenor replied. Pl.'s Reply to Defs.' Resp. Pl.'s Mot. J. Agency R., June 7, 2019, ECF No. 43; Pl.-Intervenor's Reply Mem. Supp. Rule 56.2 Mot. J. Agency R., June 7, 2019, ECF No. 44 ("Pl.-Intervenor's Reply"). The court held oral argument. Oral Argument, Aug. 16, 2019, ECF No. 49.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to review Commerce's scope determination under 28 U.S.C. § 1581(c) (2012) and Section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(B)(vi) (2012). The court will uphold Commerce's final scope determination unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework

When an importer requests a scope ruling to determine if a product is included within the scope of an antidumping or countervailing duty order, Commerce must first examine the language of the order itself. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). If the scope language is ambiguous, Commerce must then consider the descriptions of the merchandise contained in the petition, how the scope was defined in the initial investigation, and "the determinations [issued by] [Commerce] (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). These factors are known as the "(k)(1)" sources. *Id.* If the (k)(1) sources are dispositive, Commerce will issue a final scope ruling. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). If the (k)(1) sources are not dispositive, Commerce must address additional criteria known as the "(k)(2) factors," which are: the product's physical characteristics, ultimate purchasers' expectations, the ulti-

mate use of the product, trade channels in which the product is sold, and the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2).

Scope orders may be interpreted as including subject merchandise only if the orders' language specifically or may be reasonably interpreted to include the subject merchandise. *Duferco Steel, Inc.*, 296 F.3d at 1089. A final scope order may be clarified but cannot be modified and interpreted in a way contrary to its terms. *Id.* at 1097 (citations omitted). Antidumping and countervailing duty orders should not be interpreted in isolation bereft of any consideration of how an order's scope language is used in the relevant industry. *See ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 88 (Fed. Cir. 2012). "Because the primary purpose of an . . . 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." *Id.*

If Commerce fails to consider or discuss record evidence which, on its face, provides significant support for an alternative conclusion, then Commerce's determination is unsupported by substantial evidence. *Ceramark Tech., Inc. v. United States*, 38 CIT __, __, 11 F. Supp. 3d 1317, 1323 (2014) (citing *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000)). Although Commerce's explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court. *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted)).

II. 19 C.F.R. § 351.225(k)(1) Factors

Commerce found the 19 C.F.R. § 351.225(k)(1) factors dispositive as to whether the scope of the Orders covers CSS. Final Scope Ruling 12. The parties dispute how adding the word "actual" in the first category and the phrase "angle cut lumber" in the third category of the scope language covers CSS. *See* Pl.'s Br. 14–15, Pl.-Intervenor's Br. 21–28; Def.'s Br. 12–16, Def.-Intervenor's Br. 14–22. Plaintiff and Plaintiff-Intervenor argue, *inter alia*, that previous investigations involving lumber from Canada with similar scope language are relevant to the court's analysis because Commerce concluded that CSS were excluded from the scope in prior investigations. Pl.'s Br. 22–23, 32–35; Pl.-Intervenor's Br. 9–18, 21. The Government of Canada argues that the International Trade Commission's final injury determination shows no intent to include CSS because the Commission's domestic like-product analysis does not address or include CSS and none of the

import data the Commission relied on in making its final determination included 4418.50, Harmonized Tariff Schedule of the United States ("HTSUS")—the applicable CSS tariff subheading covering "shingles and shakes." Pl.-Intervenor's Br. 28–30; *see* Softwood Lumber Products From Canada, USITC Pub. 4749, Inv. Nos. 701-TA-566 and 731-TA-1342 (Final) (Dec. 2017) (describing the relevant merchandise as "softwood lumber products from Canada, provided for in subheadings 4407.10.01, 4409.10.05, 4409.10.10, 4409.10.20, 4409.10.90, 4418.90.10 of the [HTSUS]"). The Government of Canada argues that if Petitioner, Commerce, or the Commission intended to depart from decades of prior proceedings and international agreements to now include CSS as subject merchandise, then it belies belief that Petitioner, Commerce, or the Commission failed to include the relevant HTSUS subheading covering "shingles and shakes." Pl.-Intervenor's Br. 30.

Defendant responds that the scope of prior lumber investigations does not govern Commerce's interpretation of the Orders because Commerce's analysis is exclusively governed by its regulations set out in 19 C.F.R. § 351.225(k).[1] Def.'s Opp'n 18, 26–27. Although Defendant and Coalition recognize that Commerce must consider the Commission's determinations in its (k)(1) analysis, Def.'s Opp'n 27; Def.-Intervenor's Br. 14, 25, neither Defendant nor Coalition address the Government of Canada's arguments about how the Commission's final injury determination in *Lumber V* shows a lack of intent to include CSS.

A. Description of the Merchandise Contained in the Petition

The Government of Canada argues that Petitioner listed more than 50 HTSUS subheadings under which subject merchandise may be entered into the United States, but Petitioner omitted subheading 4418.50, HTSUS, which covers:

> Builders' joinery and carpentry of wood, including cellular wood panels and assembled flooring panels; shingles and shakes:
>
> Shingles and shakes

4418.50, HTSUS (2018).[2] Pl-Intervenor's Br. 25 n.21, 29–30.

[1] Defendant also asserts exhaustion of administrative remedies and circumvention arguments. Def.'s Opp'n 16–18, 20.

[2] Defendant-Intervenor proposed the following scope underlying the investigation in this case:

> The merchandise covered by these petitions is softwood lumber, siding, flooring and certain other coniferous wood ("softwood lumber products"). The scope includes:

B. The Initial Investigation

Commerce's Final Scope Ruling addressed, *inter alia*, prior scope rulings from the present investigation that Commerce deemed relevant. Final Scope Ruling 5, 13. Commerce noted that the "sawn lengthwise" language found in the first category of merchandise covers CSS because the CSS production process involves a "diagonal cut, which is . . . partially lengthwise." *Id.* at 13. Commerce found that similar to its treatment of wood shims in the investigations, CSS was covered under additional scope language for merchandise having "an actual thickness exceeding six millimeters." *Id.* Commerce concluded that the "actual thickness" language encompasses CSS because the subject merchandise exceeds six millimeters at some point. *Id.* at 14. Commerce found that CSS falls under the scope language for "angle cut lumber" because CSS is lumber and the CSS production process involves many cuts, including the distinctive diagonal cut that occurs

- Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.
- Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.
- Coniferous drilled and notched lumber and angle cut lumber.
- Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.
- Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above are within the scope of these investigations.

Softwood lumber product imports are generally entered under Chapter 44 of the Harmonized Tariff Schedule of the United States ("HTSUS"). This chapter of the HTSUS covers "Wood and articles of wood." Softwood lumber products that are subject to these petitions are currently classifiable under the following ten-digit HTSUS subheadings in Chapter 44:

4407.10.01.01; 4407.10.01.02; 4407.10.01.15; 4407.10.01.16; 4407.10.01.17; 4407.10.01.18; 4407.10.01.19; 4407.10.01.20; 4407.10.01.42; 4407.10.01.43; 4407.10.01.44; 4407.10.01.45; 4407.10.01.46; 4407.10.01.47; 4407.10.01.48; 4407.10.01.49; 4407.10.01.52; 4407.10.01.53; 4407.10.01.54; 4407.10.01.55; 4407.10.01.56; 4407.10.01.57; 4407.10. 01.58; 4407.10.01.59; 4407.10.01.64; 4407.10.01.65; 4407.10.01.66; 4407.10.01.67; 4407.10.01.68; 4407.10.01.69; 4407.10.01.74; 4407.10.01.75; 4407.10.01.76; 4407.10.01.77; 4407.10. 01.82; 4407.10.01.83; 4407.10.01.92; 4407.10.01.93; 4409.10.05.00; 4409.10.10.20; 4409.10.10.40; 4409.10.10.60; 4409.10.10.80; 4409.10.20.00; 4409.10.90.20; 4409.10.90.40; and 4418.90.25.00.

Subject merchandise may also be classified as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, and door and window frame parts under the following ten-digit HTSUS subheadings in Chapter 44: 4415.20.40.00; 4415.20.80.00; 4418.90.46.05; 4418.90.46.20; 4418.90.46.40; 4418.90.46.95; 4421.90.70.40; 4421.90.94.00; and 4421.90.97.80.

Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Petitions for the Imposition of Antidumping and Countervailing Duties of Imports on Certain Softwood Lumber Products from Canada at 26–27, PD 24 (Nov. 25. 2016).

at an angle. *Id.* at 14–15. Commerce found that CSS do not meet the "finished products" exclusion because CSS cannot be readily differentiated from the subject merchandise. *Id.* at 16.

C. Determinations of Commerce

i. Prior Proceedings

Under 19 C.F.R. § 351.225(k)(1), Commerce must consider determinations made in prior proceedings. Commerce has conducted investigations into softwood lumber products from Canada since at least 1983, through five investigations (*Lumber I* through *Lumber V*) and two international agreements (SLA 1996 and SLA 2006), as discussed below. The Government of Canada contends that the history of prior lumber investigations is replete with consistent usage of similar scope language showing that CSS is distinct from Canadian softwood lumber and thus is relevant in this action. Pl-Intervenor's Br. 7. The court briefly recounts the points of contention arising in the prior investigations.

In *Lumber I*, a coalition of U.S. lumber producers filed a petition with Commerce seeking to impose countervailing duties on softwood lumber from Canada. *See* Initiation of Countervailing Duty Investigations; Certain Softwood Lumber Products From Canada, 47 Fed. Reg. 49,878 (Nov. 3, 1982). In dismissing the petition, Commerce recognized that "softwood shakes and shingles" are distinct from "softwood lumber." *See* Final Negative Countervailing Duty Determinations; Certain Softwood Products From Canada, 48 Fed. Reg. 24,159, 24,174–75 (Dep't Commerce May 31, 1983). Commerce found that "softwood lumber" covered products of the Tariff Schedules of the United States (1982) ("TSUS") in items 202.03–202.30 (rough, dressed, or worked softwood lumber), but "[f]or purposes of this investigation, the term 'softwood shakes and shingles' refers only to those products designated in TSUS as item 200.85." *Id.* The Commission found that lumber, shakes and shingles, and fencing constitute three distinct industries and that under the Canadian and United States industrial classification systems, lumber, shakes and shingles, veneer and plywood, furniture, sashes and doors, and pulp and paper are identified as separate industries and are listed under several major industry groups. *Id.* at 24,182. Commerce concluded that any subsidies received for softwood lumber, shakes and shingles, and fencing were *de minimis* and issued negative determinations as to each product. *Id.* at 24,195.

In *Lumber II*, Commerce continued treating CSS as distinct from softwood lumber in *Lumber I*. The scope of the investigation covered:

> softwood lumber, rough, dressed, or worked (including softwood flooring classified as lumber), provided for in TSUS items 202.03 through 202.30, inclusive; softwood siding, not drilled or treated, provided for in items 202.47 through 202.50, inclusive; other softwood siding, provided for in items 202.52 and 202.54; and softwood flooring provided for in item 202.60 of the TSUS.

Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,454 (Dep't Commerce Oct. 22, 1986). At the time, CSS was classified under TSUS 200.85 ("Wood shingles and shakes"). *See* Int'l Trade Comm'n, Tariff Schedules of the United States Annotated (1987), Schedule 2: Wood & Paper; Printed Matter, *available at* https://www.usitc.gov/publications/docs/tata/hts/bychapter/tsussched2.pdf (last visited Nov. 6, 2019). Commerce did not issue a final determination in *Lumber II* because the United States and Canada reached a Memorandum of Understanding from which Canada later withdrew in 1991, prompting Commerce to self-initiate an investigation. *See* Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products From Canada, 56 Fed. Reg. 56,055, 56,055 (Dep't Commerce Oct. 31, 1991).

The scope in *Lumber III* covered certain softwood lumber products but contained no indication as to covering CSS. Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, 22,570 (Dep't Commerce May 28, 1992). Commerce did reference CSS as part of a list of non-lumber products that are made using timber, such as "lumber, plywood, veneer, poles and posts, and shakes and shingles." *Id.* at 22,583.

After Commerce's *Lumber III* investigation, the United States and Canada entered into the 1996 Softwood Lumber Agreement ("SLA 1996"). Softwood Lumber Agreement, U.S.Can., May 29, 1996, 35 I.L.M. 1195, *available at* https://www.jstor.org/stable/20698601?seq=1#metadata_info_tab_contents (last visited Nov. 6, 2019); *see* Canadian Exports of Softwood Lumber, 61 Fed. Reg. 28,626 (U.S. Trade Rep. June 5, 1996) (Notice of Agreement; Monitoring and Enforcement Pursuant to Sections 301 and 306). The SLA 1996's definition of softwood lumber does not mention cedar shakes and shingles or the tariff subheading 4418.50.00.

In *Lumber IV*, Commerce issued orders after its antidumping and countervailing duty investigations on softwood lumber from Canada, but Commerce did not include CSS or its tariff subheading within the scope of its *Lumber IV* orders. Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada, 67

Fed. Reg. 36,070, 36,070 (Dep't Commerce May 22, 2002). In its issues and decision memorandum, Commerce explained that CSS are distinct from products that "resulted from the lumber production process" which justified excluding CSS from the scope of the *Lumber IV* orders. *See* Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, PD 15 (Dep't Commerce Mar. 21, 2002). In its final determination in the *Lumber IV* antidumping duty investigation, Commerce expressly ruled that the scope language includes angle cut lumber but does not include CSS. *See* Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada, PD 16 (Dep't Commerce Mar. 21, 2002) ("[W]e have determined that, had Customs considered that the specialty cuts constituted a shake or shingle, these products[, specialty cut lumber,] would have been classified under HTSUS 4418.50.00, articles of shingles and shakes, which are not covered by the scope of these investigations.").

The *Lumber IV* proceedings terminated when the United States and Canada entered into the 2006 Softwood Lumber Agreement ("SLA 2006"). Softwood Lumber Agreement, U.S.-Can., Sept. 12, 2006, Temp. State Dep't No. 07–222, *available at* https://ustr.gov/sites/default/files/uploads/factsheets/Trade%20Topics/enforcement/softwood%20lumber/2006%20U.S.-Canada%20Softwood%20Lumber%20Agreement.pdf (last visited Nov. 6, 2019). As in *Lumber IV*, the SLA 2006 language contains no mention of CSS or its relevant tariff subheading: HTSUS 4418.50.

ii. Application of Prior Proceedings

Plaintiff argues that Commerce's decision to disregard its prior softwood lumber determinations, in which Commerce found CSS not to be within the scope of the corresponding investigation and that CSS was a separate industry from softwood lumber, was not in accordance with the law. *See* Pl.'s Br. 31–32. The Government of Canada claims that the scope language in the Orders is substantively the same as the scope language used in prior lumber proceedings. Pl.-Intervenor's Br. 7–8, 21–28. The Government of Canada contends that the history of softwood lumber investigations, which spans nearly 40 years and includes two agreements between the United States and Canada, supports the exclusion of CSS from the scope of the Orders. Pl.-Intervenor's Br. 28–29. The Government of Canada finds fault in Commerce's reliance on the USDA Wood Handbook to support its contention that CSS is "lumber" since the Wood Handbook notes that the lumber industry "has also produced" an array of prod-

ucts, including "shingles and shakes." Pl.-Intervenor's Reply 8. The Government of Canada contends that just because lumber producers manufacture other products, such as shingles and shakes, that does not make those other products lumber. *Id.* The Government of Canada points to Commerce having recognized that lumber-producing sawmills also produce such products as wood chips, saw dust, and hog fuel—products that fall outside the scope of the Orders. *Id.* (citing Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances of Certain Softwood Lumber Products from Canada, bar code 3636100–01 (Dep't Commerce Nov. 1, 2017)).

As to the history of prior softwood lumber proceedings and prior scope rulings, Commerce concluded that it was "not faced with an identical scenario or a 'similar situation' to the earlier proceedings referenced by [Plaintiff] and [Plaintiff-Intervenor]" because the Orders' scope language was a "clear departure[] from previous scope language." Final Scope Ruling 19. Commerce supported this conclusion by mentioning the scope provisions pertaining to angle cut, semi-finished, and finished products that are made from softwood lumber. *Id.*

When determining the scope of an order, Commerce must consider the (k)(1) sources, including "the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). The court notes that Commerce's Final Scope Ruling contains no substantive discussion of prior lumber proceedings or prior scope determinations in which Commerce found CSS to be distinct from softwood lumber since at least 1983. *See* Final Scope Ruling 19. CBP relied on language treating CSS within the scope of the Orders as being similar to the language used in *Lumber III*, SLA 1996, *Lumber IV*, and SLA 2006, which neither CBP nor Commerce treated as covering CSS. Given that past proceedings involved the same subject (softwood lumber) and country (Canada) and included scope language substantively identical to the current scope language, the court concludes that Commerce cannot claim to have sufficiently addressed the prior proceedings by its passing reference to the history of contrary prior softwood lumber investigations in its Final Scope Ruling.

Accordingly, the court determines that Commerce's Final Scope Ruling does not adequately address how Commerce concluded that the prior lumber proceedings or prior scope determinations compared with or were distinguishable from the current scope determination in

accordance with 19 C.F.R. § 351.225(k)(1). The court concludes that Commerce's Final Scope Ruling is not in accordance with the law.

III. 19 C.F.R. § 351.225(k)(2) Factors

Plaintiff argues that Commerce's decision to not consider the enumerated factors provided by 19 C.F.R. § 351.225(k)(2) was not in accordance with law. Pl.'s Br. 40–41. Commerce did not address the 19 C.F.R. § 351.225(k)(2) factors because Commerce found the 19 C.F.R. § 351.225(k)(1) factors dispositive. Final Scope Ruling 5, 12. Because the court finds that Commerce's Final Scope Ruling is not in accordance with the law, the court does not reach this issue.

CONCLUSION

For the foregoing reasons, the court concludes that Commerce's Final Scope Ruling is not in accordance with the law.

Upon consideration of all papers and proceedings in this action, it is hereby

ORDERED that Commerce's Final Scope Ruling is remanded for further consideration of the record as it pertains to the determination of the subject merchandise; and it is further

ORDERED that Commerce's Final Scope Ruling is remanded for further consideration of the evidence in the investigation as it pertains to the determination of whether CSS are within the scope; and it is further

ORDERED that Commerce's Final Scope Ruling is remanded for further consideration of prior determinations, including but not limited to scope rulings, in accordance with 19 C.F.R. § 351.225(k)(1); and it is further

ORDERED that Commerce shall file its remand determination on or before January 13, 2020; and it is further

ORDERED that Commerce shall file the administrative record on or before January 27, 2020; and it is further

ORDERED that Parties' comments in opposition to the remand determination shall be filed on or before February 26, 2020; and it is further

ORDERED that Parties' comments in support of the remand determination shall be filed on or before March 27, 2020; and it is further

ORDERED that the Joint Appendix shall be filed on or before April 10, 2020.

Dated: November 13, 2019
New York, New York

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

Slip Op. 19–142

TRANSPACIFIC STEEL LLC, Plaintiff, v. UNITED STATES et al., Defendants.

Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges
Court No. 19–00009

[Denying Defendants' motion to dismiss Plaintiff's amended complaint for failure to state a claim for which relief may be granted. Judge Katzmann files a separate concurrence.]

Dated: November 15, 2019

Matthew Nosher Nolan and *Russell A. Semmel*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief were *Nancy A. Noonan*, *Diana Dimitriuc Quaia*, and *Aman Kakar*.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, and *Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Joshua E. Kurland*, Trial Attorney.

OPINION AND ORDER

Kelly, Judge:

Transpacific Steel LLC ("Transpacific" or "Plaintiff") seeks a refund of the difference between the 50 percent tariff imposed on certain steel products ("steel articles") from the Republic of Turkey ("Turkey"), pursuant to Presidential Proclamation 9772, issued on August 10, 2018, and the 25 percent tariff imposed on steel articles from certain other countries. *See Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11,625 (Mar. 15, 2018) ("Proclamation 9705"); *Proclamation 9772 of August 10, 2018*, 83 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772"); Am. Compl. ¶¶ 2, 4, Prayer for Relief, Apr. 2, 2019, ECF No. 19 ("Am. Compl.").[1] Plaintiff contends relief is warranted because Proclamation 9772 lacks a nexus to national security as statutorily required, fails to follow mandated procedures within the statute, arbitrarily distinguishes importers of steel products from Turkey and importers of steel products from all other countries in violation of equal protection under the Fifth Amendment, and violates Fifth Amendment Due Process guarantees. Am. Compl. ¶¶ 3, 70;

[1] Plaintiff previously also sought declaratory and injunctive relief from the implementation of Proclamation 9772. However, on May 21, 2019, the additional tariffs imposed by Proclamation 9772 on Turkey were lifted. *See* Pl.'s Resp. Br. at 1; *see also* Defs.' Reply Supp. Mot. Dismiss at 2 n.1, July 10, 2019, ECF No. 27 ("Defs.' Reply Br.") (citing *Proclamation 9886 of May 16, 2019*, 84 Fed. Reg. 23,421, 23,421 (May 21, 2019)). The parties agree that the case is not moot, because Plaintiff still seeks a refund. *See* Pl.'s Resp. Br. at 1; Defs.' Reply Br. at 2 n.1.

see also Pl.'s [Transpacific] Resp. Opp'n Defs.' Mot. Dismiss, May 29, 2019, ECF No. 24 ("Pl.'s Resp. Br."). Defendants move to dismiss Plaintiff's Amended Complaint pursuant U.S. Court of International Trade ("USCIT") Rule 12(b)(6) for failure to state a claim for which relief may be granted. Defs.' Mot. Dismiss for Failure State Cl., Apr. 3, 2019, ECF No. 20 ("Defs.' Br."). Defendants' motion to dismiss is denied. Based upon the facts alleged, Plaintiff's arguments that the President failed to follow the procedure set forth in the statute and, further, that singling out importers from Turkey violated the equal protection guarantees under the U.S. Constitution, support its claim for a refund and defeat Defendants' motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *see also* USCIT R. 12(b)(6).

BACKGROUND

Section 232 of the Trade Expansion Act of 1962, as amended 19 U.S.C. § 1862 (2012),[2] ("section 232") delineates the particular circumstances of when and how the President may take action to address imports that threaten to impair the national security of the United States. The statute also sets forth the conduct and timing of the antecedent investigation into the potential national security threat.

Specifically, section 232 authorizes the Secretary of Commerce to commence an investigation "to determine the effects on the national security of imports" of any article, and to consult with the Secretary of Defense and other officials. 19 U.S.C. § 1862(b). Within 270 days, the Secretary of Commerce must then report the investigation's findings to the President. *See* 19 U.S.C. § 1862(b)(3)(A).[3] In that report, the Secretary must advise the President if "such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]" *Id.* Within 90 days after receiving the Secretary's affirmative findings, the President must determine whether he or she concurs. 19 U.S.C. §

[2] Further citations to the Tariff Expansion Act of 1962, as amended, are to the relevant provisions of the United States Code, 2012 edition.

[3] The statute further provides for consultation during the investigation process. To this end, the Secretary of Commerce must "immediately provide notice to the Secretary of Defense" of the investigation's commencement and, in the course of the investigation, "consult with the Secretary of Defense regarding the methodological and policy questions raised[.]" 19 U.S.C. §§ 1862(b)(1)(B), (b)(2)(A)(i). The Secretary of Commerce must also "(ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." 19 U.S.C. § 1862(b)(2)(A)(ii)–(iii). If requested by the Secretary of Commerce, the Secretary of Defense shall also provide the Secretary of Commerce "an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section." 19 U.S.C. § 1862(b)(2)(B).

1862(c)(1)(A)(i). Should he or she concur, the statute empowers the President to act to end that threat to national security. 19 U.S.C. § 1862(c)(1)(A)(ii). In doing so, the President must "determine the nature and duration of the action" that in his or her judgment "must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id.* If, and once, the President decides to act, he or she must implement the action within 15 days. 19 U.S.C. § 1862(c)(1)(B).

On April 19, 2017, the Secretary of Commerce initiated an investigation to determine the effect of steel imports on national security. *See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205, 19,205 (Bureau Indus. & Sec. Apr. 26, 2017) (background). The Secretary issued his report and recommendation to the President on January 11, 2018 ("Steel Report" or "January 11 Report"), within the time frame provided under section 232. *See* Am. Compl. at Ex. 4 (BUREAU OF INDUS. & SECURITY, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS ON THE NATIONAL SECURITY (2018) ("STEEL REPORT")). On March 8, 2018, within 90 days of receiving the report, the President issued Proclamation 9705 imposing a 25 percent tariff on imports of steel articles from all countries, including Turkey, effective March 23, 2018.[4] *See* Am. Compl. at Ex. 1.

On August 10, 2018, the President issued Proclamation 9772, which imposed a 50 percent tariff on steel articles imported from Turkey as of August 13, 2018. *See* Proclamation 9772, 83 Fed. Reg. at 40,429.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581(i)(2), (4) (2012).

[4] In addition to remedial action of adjusting imports through tariff increases, section 1862(c)(3)(A) also grants the President authority to negotiate trade agreements to reduce the number of imports. 19 U.S.C. § 1862(c)(3)(A). Stemming from the January 11 Report, the President pursued negotiations with certain countries to reach an agreement that "limits or restricts the importation into . . . the United States" of steel articles, and successfully reached agreement with certain countries within the statutorily prescribed 180-day period. *See* 19 U.S.C. § 1862(c)(3)(A). The President adjusted action accordingly and published timely notice in the Federal Register, issuing three Presidential Proclamations that announced agreements on alternate measures or deferred imposition of the tariffs on certain countries pending negotiation. *See Proclamation 9711 of March 22, 2018*, 83 Fed. Reg. 13,361, 13,361 (Mar. 28, 2018) (reporting ongoing negotiations with Canada, Mexico, the Commonwealth of Australia ("Australia"), the Argentine Republic ("Argentina"), the Republic of Korea ("South Korea"), the Federative Republic of Brazil ("Brazil"), and the European Union member countries and deferring the tariff on steel articles from those countries); *Proclamation 9740 of April 30, 2018*, 83 Fed. Reg. 20,683, 20,683–84 (May 7, 2018) (limiting the temporary exemption for Canada, Mexico, and European Union member countries until June 1, 2018 and announcing an agreement with South Korea on a range of alternative measures, including a quota); *Proclamation 9759 of May 31, 2018*, 83 Fed. Reg. 25,857, 25,857–58 (June 5, 2018) (exempting from the steel tariffs Argentina, Australia, and Brazil, which had reached agreement with the United States on alternative measures).

The court will dismiss a complaint for failure to state a claim if it fails to allege facts "plausibly suggesting (not merely consistent with)" a showing that entitles the party to relief. *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citation omitted). In deciding a motion to dismiss, the court "must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

DISCUSSION

Plaintiff has stated a claim for which relief may be granted. Plaintiff's factual allegations, which appear to be undisputed, support its claim to a refund of excess duties. Plaintiff alleges facts to demonstrate that, at the very least, the President issued Proclamation 9772 in violation of the equal protection component of the Fifth Amendment and without observing the statutorily required procedure under section 232. Either theory defeats Defendants' motion to dismiss.

Plaintiff's arguments that Proclamation 9772 violates equal protection are sufficient to defeat Defendants' motion to dismiss. "[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[5] *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (quotation marks and citation omitted). Defendants do not have a high hurdle to clear to survive a rational basis challenge—Defendants merely need to articulate any set of facts that rationally justify a distinction in classification, irrespective of whether the President himself actually justified his action at the time it was taken. *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Especially in the area of economic regulation, this standard is forgiving. *See Armour v. City of Indianapolis*, 566 U.S. at 680 (noting "where 'ordinary commercial transactions' are at issue, rational basis review requires deference to reasonable underlying legislative judg-

[5] Although the Fifth Amendment does not contain a formally recognized equal protection clause, the Supreme Court has recognized an implicit protection where there exists "discrimination that is so unjustifiable as to be violative of due process." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 n.1 (2017) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975)). This implicit protection is treated ″precisely the same as equal protection claims under the Fourteenth Amendment." *Id.* (citations and internal quotation marks omitted) (alteration in original).

ments") (citations omitted); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (sustaining legislation treating plastic and non-plastic milk containers differently). Given this standard, it is difficult to imagine Presidential action in connection with section 232 where one would be at a loss to conjure a rational justification; yet, the reality of this case proves otherwise. Defendants submit no set of facts that justify identifying importers of steel from Turkey as a class of one.

In their motion to dismiss, Defendants point to a general need to increase the tariffs. *See* Defs.' Br. at 17–18; Defs.' Reply Br. at 17. A general need to increase tariffs, however, does not explain the singular imposition of a 50 percent tariff on Turkish steel articles. Defendants also attempt to distinguish imports from Turkey as a class by referring to "the relatively high import volumes" of steel from Turkey and the 14 antidumping and countervailing duty ("AD/CVD") orders against its steel exports. Defs.' Reply Supp. Mot. Dismiss at 17, July 10, 2019, ECF No. 27 ("Defs.' Reply Br."); *see also* Defs.' Br. at 17–18, 25. However, the Steel Report identifies five countries with higher steel import volumes than Turkey.[6] *See* STEEL REPORT at 28. Further, the 14 AD/CVD orders on Turkish steel products do not make Turkey remarkable but typical, compared, for example, to China's 28 AD/CVD orders, India's 15 AD/CVD orders, Japan's 14 AD/CVD orders, and Taiwan's 13 AD/CVD orders. *See* STEEL REPORT at App. K. Defendants' contention, that it is rational to "confront the national security threat from imports from all countries by specifically targeting countries" with high import volumes or numerous AD/CVD orders, does not explain what differentiates Turkey from other similarly situated countries—for the President to target alone. Defs.' Reply Br. at 17–18; *see Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (holding that plaintiff homeowner could assert an equal protection claim where village demanded a 33-foot easement, while requiring 15-foot easements from similarly situated property owners). At oral argument, when pressed on this question, counsel for Defendants offered other possible reasons but did not connect them to Turkey. Oral Arg. at 1:01:59–1:02:38 (arguing it would be appropriate for the President to differentiate countries based on anticipated increased import volumes or currency devaluation). Whatever the President's real moti-

[6] The President entered into negotiations with four of those countries—Canada, South Korea, Brazil, and Mexico—and reached agreements on alternative measures, thereby exempting those countries' steel exports. *See* Proclamation 9740, 83 Fed. Reg. at 20,683–84; Proclamation 9759, 83 Fed. Reg. at 25,857–58. With respect to Russia, which exported nearly one million metric tons of steel more than Turkey to the United States in 2017, the 25 percent tariff remains in effect. *See* STEEL REPORT at 28.

vation may be, it is not this court's concern.[7] *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the [decision maker].").[8] But we also cannot sustain a classification for which there is no offered—or even possible—rational justification tethered to the statute. *See id.* at 312–13.

Plaintiff also alleges facts that demonstrate that the President issued Proclamation 9772 in violation of the procedure set forth by Congress. The statute's clear and unambiguous steps—of investigation, consultation, report, consideration, and action—require timely action from the Secretary of Commerce and the President. However, the President did not issue Proclamation 9772 following this procedural path. The Secretary of Commerce submitted his report to the President on January 11, 2018, which launched a 90-day period for the President to act. The President acted on March 8, 2018 by imposing a 25 percent tariff on steel articles through Proclamation 9705. *See* 19 U.S.C. § 1862(c)(1)(B). However, the President issued Proclamation 9772 on August 13, 2018, far beyond the 90 days permitted to decide to act and the further 15 days allowed for implementation, to impose a 50 percent tariff on steel articles from Turkey. *See id.* The Secretary's January 11 Report, which serves as the foundation for Proclamation 9705, does not serve as the foundation for Proclamation 9772.

The attempt to justify Proclamation 9772 as a continuation or modification of Proclamation 9705 fails. *See* Defs.' Br. at 20–23. Defendants contend that the President retains power to modify any action taken under section 232, without conducting a new investiga-

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[7] Plaintiff points to the President's comment on social media: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!" *See* Pl.'s Resp. Br. at 35; Am. Compl. at Ex. 10. The President's views of the United States' relationship with Turkey do not weigh in our analysis.

[8] Although Plaintiff and Defendants agree that the rational basis test applies, *see* Defs.' Br. at 23 and Pl.'s Resp. Br. at 30, the parties do not agree on the content of the rationality standard. Plaintiff asserts that the standard of rationality must have "some footing in the realities of the subject addressed by the legislation." Pl.'s Resp. Br at 30 (quoting *Heller v. Doe*, 509 U.S. 312, 321 (1993)). Defendant contends that a less searching standard applies, arguing that the rationality standard may be satisfied by any "reasonably conceivable state of facts," and that such facts may be based on "rational speculation unsupported by evidence or empirical data." Defs.' Reply Br. at 18 (quoting *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1318 (Fed. Cir. 2003) (internal citations omitted)) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1993)). For purposes of this motion, it is not necessary to resolve this issue. Assuming Defendants' less searching standard applies, Defendants have not proffered any facts, even those based on "rational speculation," that support the President's decision to increase tariffs on Turkish steel only.

tion or following the procedures set forth in the statute. *See id.; see also* Defs.' Reply Br. at 7–12, 15. Likewise, the President seems to have envisioned the Secretary of Commerce's January 11 Report as empowering him to take ongoing action. The President in Proclamation 9705 states "[t]he Secretary shall continue to monitor imports of steel articles and shall, from time to time, . . . review the status of such imports with respect to the national security. The Secretary shall inform the President of any . . . need for further action by the President." Proclamation 9705, 83 Fed. Reg. at 11,628 ¶ (5)(b). In Proclamation 9772, the President invokes Proclamation 9705 stating, "I also directed the Secretary to monitor imports of steel articles and inform me of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232 with respect to such imports." Proclamation 9772, 83 Fed. Reg. at 40,429 ¶ 3.[9] The President's expansive view of his power under section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose.

Section 232 requires that the President not merely address a threat to national security; he must do all, that in his judgment, will eliminate it. *See* 19 U.S.C. §§ 1862(c)(1)(A), (c)(3)(A) (instructing the President to take action "so that such imports will not threaten to impair the national security").[10] Although the statute grants the President great discretion in deciding what action to take, it cabins the President's power both substantively, by requiring the action to eliminate threats to national security caused by imports, and procedurally, by setting the time in which to act.[11]

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[9] The Proclamation continues: "The Secretary has informed me that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report. Although imports of steel articles have declined since the imposition of the tariff, I am advised that they are still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level." Proclamation 9772, 83 Fed. Reg. at 40,429 ¶ 4.

[10] Presidential Proclamation 9705 seems to envision an approach that "addresses" a threat rather than removing it. "Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security." Proclamation 9705, 83 Fed. Reg. at 11,626 ¶ 8.

[11] Although, as Defendants note, courts cannot review "the President's actions to determine whether the facts support the remedy selected by the President in his exercise of the discretion afforded to him under the statute[,]" *see* Defs.' Reply Br. at 6, that discretion extends only to his concurrence that a threat exists and his selection of remedial action. *See also Am. Inst. for Int'l Steel v. United States*, 43 CIT __, __, 376 F. Supp. 3d 1335, 1344–45 (Mar. 25, 2019). ("[J]udicial review would allow neither an inquiry into the President's motives nor a review of his fact-finding."). Indeed, should the Secretary of Commerce not find a threat to impair national security, the President has no basis to disagree and no authority to take action. *See* 19 U.S.C. § 1862(c)(1)(A).

In 1988, Congress added specific time limits to section 232, which preclude Defendants' arguments. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, §§ 1501(a), (b)(1), 102 Stat. 1107, 1257–60 (1988) (codified as amended at 19 U.S.C. § 1862). Those amendments now impose a 90-day limit for the President to act against imports that threaten the national security.[12] They also fix a 15-day deadline for the President to implement any action. *Id.* at 1258; *see also* H.R. REP. NO. 100–576 at 711 (1988).[13] The legislative history clarifies that Congress wanted the President to do all that he thought necessary as soon as possible. *See Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 99th Cong., 2d Sess. 1282 (1986) (statement of Hon. Barbara B. Kennelly, former Member, H. Comm. On Ways & Means) (discussing the need to set a deadline by which the President should act); *Comprehensive Trade Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 100th Cong., 1st Sess. 466–67 (1987) (statement of Phillip A. O'Reilly, Chairman and CEO of Houdaille Industries, Inc., accompanied by James H. Mack, Public Affairs Director) (discussing delays in section 232 implementation); H.R. REP. NO. 99–581, pt. 1, at 135 (1986) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible."); H.R. REP. NO. 100–40, pt. 1, at 175 (1987) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible.").

Defendants also argue requiring the procedures of 19 U.S.C. § 1862(b)–(c) in support of Proclamation 9772 make no sense, because, by implication, these procedures would then have to be followed "any time a tariff is reduced or an exception is made for a particular product." Defs.' Br. at 23. However, the statute specifically grants the President power to "determine the . . . duration of the action[,]" a power to end any action. 19 U.S.C. § 1862(c)(1)(A)(ii). Likewise, Defendants' arguments that each exception from the steel tariffs for a

[12] The amendments also shortened the time limit for investigations by the Secretary of Commerce from one year to 270 days. *See* 102 Stat. at 1258; *see also* H.R. REP. NO. 100–576, at 709–10 (1988).

[13] Defendants argue that Presidents "frequently used Section 232 (and its predecessor in prior acts) to modify the means of accomplishing the necessary adjustment of imports without first receiving additional investigations and reports from the Secretary of Commerce (or predecessor advisor)." Defs.' Br. at 20. All instances cited by Defendants occurred before the 1988 amendments, which impose a 90-day deadline for action and a 15-day deadline for implementation of action. Though Defendants concede that these deadlines reflect Congress's desire that the President act "without undue delay[,]" Defs.' Br. at 22, they fail to confront the necessary implication of the 90- and 15-day deadlines. If the President has the power to continue to act, to modify his actions, beyond these deadlines, then these deadlines are meaningless.

particular product would require a new set of procedures are meritless, when Proclamation 9705 authorized the Secretary of Commerce to establish the overall process to exempt particular products, under certain conditions. *See* Defs.' Br. at 23; Defs.' Reply Br. at 15–16; *see also* Proclamation 9705, 83 Fed. Reg. at 11,629 ¶ (3).

The procedural safeguards in section 232 do not merely roadmap action; they are constraints on power. The Supreme Court has made clear that section 232 avoids running afoul of the non-delegation doctrine because it establishes "clear preconditions to Presidential action." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). The time limits, in particular, compel the President to do all that he can do immediately, and tie presidential action to the investigative and consultative safeguards.[14] If the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action. However, Congress affirmatively linked the investigative and consultative safeguards to Presidential action, and Congress strengthened that link when it imposed time limits on the President's discretion to take action. Congress embedded these limits within its broad delegation of power to the President. As this court has recognized, "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." *Am. Inst. for Int'l Steel v. United States*, 43 CIT ___, ___, 376 F. Supp. 3d 1335, 1344 (2019) ("*AIIS*"). Further, it may be the case that judicial review will be unable to reach "a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority." *Id.* at 14. The broad discretion granted to the President and the limits on judicial review only reinforce the importance of the procedural safeguards Congress provided, and which the President appears to have ignored.

Therefore, the Plaintiff has stated a claim for a refund because after the time periods set by Congress for Presidential action had passed, the President lacked power to take new action and issued Proclamation 9772 without the procedures as required by Congress.[15] The

[14] In addition to the investigative and consultative steps required by the Secretary of Commerce, the statute only affords the President the power to act when the Secretary of Commerce's report finds that imports of an article threaten national security. If the President concurs, he has only the power to do what he "deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." *Algonquin*, 426 U.S. at 559 (citation and internal quotations omitted).

[15] Where Congress envisioned ongoing action by the President it provided for it. In subsection (c)(3), Congress provided for continuing action where the President sought to negotiate an agreement under subsection (c)(1), granting the President an additional 180 days to act.

court need not reach Plaintiff's arguments that Proclamation 9772 is ultra vires or runs afoul of due process at this time.

CONCLUSION

In support of its motion, Defendants have failed to show that Plaintiff's complaint must be dismissed for failure to state a claim for a refund of duties on which relief can be granted.

ORDERED Defendants' motion to dismiss is denied, and it is further

ORDERED, the parties shall confer and submit a joint status report as to the issues to be briefed and a proposed scheduling order by Monday, December 9, 2019.

Dated: November 15, 2019
New York, New York

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

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

Katzmann, J., *concurring*. I agree with my colleagues that the instant litigation can continue in the face of the Government's motion to dismiss the plaintiff's complaint, although the ultimate outcome remains for determination after further proceedings. I write separately to note what is before the court in this case — whether a statute has been violated — and what is not — whether that statute is constitutional.

The question before us at this preliminary stage is this: Has the plaintiff, an American importer of Turkish goods containing steel articles subjected to tariffs imposed by Presidential Proclamation invoking Section 232 of the Trade Expansion Act of 1962, as amended in 18 U.S.C. § 1862 ("section 232"), countered the Government's motion by alleging sufficient facts in its complaint that those tariffs have been imposed in violation of that statute, which provides that the President may impose tariffs on imports which "threaten to impair the national security"?

Not before us now is the fundamental constitutional question: Does section 232, which provides power to the President in international trade without meaningful limitation, violate the Constitution's separation of powers, as it is Congress that exclusively has the "power To

Thereafter, if such an agreement were "ineffective in eliminating the threat to the national security" the President "shall take such other actions as the President deems necessary." 19 U.S.C. § 1862(c)(3).

lay and collect Taxes, Duties, Imposts and Excises" and "to regulate Commerce with foreign Nations"? U.S. Const. art. 1 § 8.[16] That question was presented to this court earlier this year in *American Institute for International Steel, Inc. v. United States*, 43 CIT __, 376 F. Supp. 3d 1335 (2019) ("*AIIS*"). There, this court unanimously concluded that it was bound by the Supreme Court decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which, in different circumstances involving licensing fees, stated that section 232's standards were "clearly sufficient" to confine presidential action consistent with the separation of powers.[17] In a *dubitante* opinion in *AIIS*, 376 F. Supp. 3d at 1345–52, I respectfully suggested that section 232, lacking ascertainable standards, "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress," in violation of the separation of powers. *Id.* at 1352. "[T]he fullness of time" and "real recent actions" may provide an empirical basis to revisit assumptions and inform understanding of the statute. *Id.*

I submit that the case before us may well yield further evidence of the infirmity of the statute.[18] To so note is not to diminish, in other arrangements not involving constitutional authority lodged exclusively in Congress, the dependence of Congress on executive officials to implement its programs. *See Gundy v. United States*, 139 S. Ct. 2116, 2147 (2019); *AIIS*, 376 F. Supp. 3d at 1352. Nor is it to diminish the flexibility allowed the President in the conduct of foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), or, for example, the authority of the executive to impose sanctions on foreign entities which endanger American interests. *See, e.g.,* U.S.

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[16] Under the Constitution, "[t]he president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president's authority is almost entirely statutory." Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 Yale J. Int'l L. Online 16 (2018) (footnotes omitted), http://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/. *See Am. Inst. for Int'l Steel, Inc. v. United States*, 43 CIT __, 376 F. Supp. 3d 1335, 1352 n.8 (2019) ("*AIIS*").

[17] The Court cautioned "that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized." *Algonquin*, 426 U.S. at 571 (emphasis in original).

[18] The *AIIS* plaintiffs filed an appeal in the United States Court of Appeals for the Federal Circuit, *appeal docketed*, No. 19–1727 (Fed. Cir. Mar. 25, 2019) and also sought direct review by the Supreme Court. 379 F. Supp. 3d 1335, *cert. denied*, 139 S. Ct. 2748 (2019). The Supreme Court denied the petition for direct review (without addressing the appeal filed before the United States Court of Appeals for the Federal Circuit or potential appeals therefrom). *Id.* The *AIIS* appeal is now before the Federal Circuit. 379 F. Supp. 3d 1335, *appeal docketed*, No. 19–1727 (Fed. Cir. Mar. 25, 2019).

Dep't of Treasury, *Financial Sanctions: United States Statutes*, https://www.treasury.gov/resource-center/sanctions/Pages/statutes-links.aspx (last visited Nov. 12, 2019) (listing a selection of sanctions statutes as identified by the U.S. Department of Treasury, Office of Foreign Asset Control).

In the end, as the case before us is framed, we proceed assuming the constitutionality of the statute. The statute's investigative and consultative steps, within prescribed time limits, are not advisory and, as my colleagues have set forth, cannot be ignored without consequence. Based on the facts alleged in the complaint, the violation of procedure and the absence of a rationale to justify differential treatment, warrant the conclusion at this preliminary stage that the Government has failed to show that plaintiff's complaint must be dismissed for failure to state a claim for a refund of duties on which relief can be granted.

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