U.S. Court of International Trade

Slip Op. 19–115

CHINA MANUFACTURERS ALLIANCE, LLC AND DOUBLE COIN HOLDINGS LTD., et al., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 15–00124

[Sustaining a remand redetermination issued in response to court order in an action contesting the final results of an administrative review of an antidumping duty order on pneumatic off-the-road tires from the People's Republic of China]

Dated: September 3, 2019

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs China Manufacturers Alliance, LLC and Double Coin Holdings Ltd. With him on the brief were *James P. Durling*, *Matthew P. McCullough*, and *Tung A. Nguyen.*

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Import and Export Co., Ltd. With him on the brief were *Brandon M. Petelin*, *Dharmendra N. Choudhary*, *Andrew T. Schutz*, and *Jordan C. Kahn*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *James H. Ahrens II*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Stanceu, Chief Judge:

In this consolidated case, plaintiffs contested a final determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") concluding the fifth periodic administrative review of an antidumping duty order on certain off-the-road pneumatic tires ("OTR tires") from the People's Republic of China ("China" or the "PRC").

Before the court is the Department's decision (the "Second Remand Redetermination") responding to the court's order in *China Mfrs. Alliance, LLC. v. United States*, 43 CIT __, 357 F. Supp. 3d 1364 (2019) ("*CMA II*"). *Final Results of Redetermination Pursuant to Ct. Remand* (Apr. 16, 2019), ECF No. 231–1. The court sustains the Second Remand Redetermination because it complies with the court's order in *CMA II* and because no party has commented in opposition.

I. BACKGROUND

Background on this case is presented in the court's prior opinions and supplemented briefly herein. *CMA II*, 43 CIT at __, 357 F. Supp. 3d at 1366–68; *China Mfrs. Alliance, LLC v. United States*, 41 CIT __, 205 F. Supp. 3d 1325 (2017) ("*CMA I*").

A. The Parties

Plaintiffs China Manufacturers Alliance, LLC and Double Coin Holdings Ltd. (collectively, "Double Coin"), and plaintiffs Guizhou Tyre Co., Ltd. and Guizhou Tyre Export and Import Co., Ltd. (collectively, "GTC") were the mandatory respondents in the fifth review. They are the plaintiffs in this litigation. Defendant is the United States.

B. The Contested Decision

The contested administrative decision is *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 26,230 (Int'l Trade Admin. May 7, 2015) ("*Amended Final Results*"). Commerce issued the Amended Final Results to correct a ministerial error in its earlier decision, *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 80 Fed. Reg. 20,197 (Int'l Trade Admin. Apr. 15, 2015) ("*Final Results*"). In the Amended Final Results, Commerce assigned GTC a weighed average dumping margin of 11.41%. Commerce determined that Double Coin was a member of the "PRC-wide entity," concluding that Double Coin had failed to establish its independence from the government of the PRC and assigned it the rate it determined for that entity, which was 105.31%.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2012), which grants the Court of International Trade jurisdiction of any civil action commenced under 19 U.S.C. § 1516a.[1] The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

[1] All citations to the United States Code herein are to the 2012 edition.

B. Prior Judicial Proceedings

In *CMA I*, the court remanded the Amended Final Results to Commerce with respect to four determinations. Only one of those determinations pertained to Double Coin: the court rejected the Department's decision to assign Double Coin the 105.31% rate that Commerce determined for the PRC-wide entity and directed Commerce to assign Double Coin the weighted-average dumping margin of 0.14% (a *de minimis* margin) that Commerce determined from its examination of Double Coin's own sales. *CMA I*, 41 CIT at __, 205 F. Supp. 3d at 1334–41. The other three determinations pertained to GTC's margin. First, the court held unlawful the Department's decision to make an 8% reduction in the starting prices used to determine export price ("EP") and constructed export price ("CEP") to account for what Commerce termed "irrecoverable" value-added tax ("VAT"). *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1344–51. The court reasoned that Commerce, based on an impermissible construction of 19 U.S.C. § 1677a(c)(2)(B), resorted to a presumption in reducing the starting prices without reaching a finding that any specific amount actually was imposed by the government of the PRC as an "export tax, duty, or other charge" within the meaning of that provision. *Id.* Second, the court ordered Commerce to reconsider its calculations of deductions from CEP for GTC's brokerage and handling costs and ocean freight costs, concluding that the Department's finding that these calculations were free of "double counting" was not supported by substantial evidence on the record. *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1356–58. Finally, the court ordered Commerce to reconsider its decision not to make an inflation adjustment for GTC's domestic warehousing costs. *Id.*, 41 CIT at __, 205 F. Supp. 3d at 1358–59.

In *CMA II*, the court ruled on the decision ("First Remand Redetermination") Commerce submitted to the court in response to the court's opinion and order in *CMA I*. In the First Remand Redetermination, Commerce, under protest, assigned Double Coin a weighted average dumping margin of 0.14% (*de minimis*). Making several changes to its calculations, Commerce revised GTC's margin from 11.41% to 11.33%. *CMA II*, 43 CIT at __, 357 F. Supp. 3d at 1367.

CMA II sustained two of the changes to GTC's margin calculation in the First Remand Redetermination, changes to which neither party objected. Commerce concluded that one element of its calculation of deductions from CEP for GTC's brokerage and handling and ocean freight expenses, "Shanghai Port Charges," was double counted and made a correction for this purpose. Commerce also redetermined GTC's surrogate warehousing expenses, adjusting for inflation. *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1369.

In the First Remand Redetermination, Commerce, under protest, assigned Double Coin the 0.14% margin it had calculated based on Double Coin's own sales, in response to the court's order. *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1381. After Commerce submitted the First Remand Redetermination to the court, defendant moved for a partial remand that would allow Commerce to revisit the issue of Double Coin's weighted-average dumping margin in light of the decision of the Court of Appeals for the Federal Circuit in *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304 (Fed. Cir. 2017) ("*Diamond Sawblades*"). *Id.* Three issues then remained in this litigation: (1) defendant's motion for a partial remand to reconsider Double Coin's rate; (2) whether the Department's deductions from the EP and CEP starting prices for irrecoverable VAT were lawful; and (3) whether elements of the Department's calculation of deductions for GTC's brokerage and handling costs, and ocean freight costs, other than the Shanghai Port Charges, also were double counted.

In considering defendant's motion for a partial remand, the *CMA II* opinion analyzed the holdings in *Diamond Sawblades*, one of which the court considered to bear on this case. The opinion described that holding as follows: "*Diamond Sawblades* holds that the Tariff Act allows Commerce to assign the rate it assigns to the PRC-wide entity to a cooperative respondent it selected as a mandatory respondent, provided the respondent fails to rebut the Department's presumption of control by the government of the PRC." *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1382. Without deciding the question of whether Double Coin had rebutted the Department's presumption of government control, the *CMA II* opinion concluded, for various reasons as explained therein, that "the only rate supported by the record evidence that Commerce reasonably could apply to the PRC-wide entity—and therefore to Double Coin—were the court to grant the requested partial remand, would be one equivalent to the 0.14% margin Commerce already determined for Double Coin in the Remand Redetermination." *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1388. The court observed that "Commerce never requested any information from the government of the PRC or from any part of the PRC-wide entity other than Double Coin." *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1387. The court also observed that only four exporters or producers of OTR tires specifically were included in the fifth review. *Id.* Two of these were the mandatory, and fully cooperating, respondents, i.e., Double Coin and GTC, and the other two were unexamined respondents Commerce found to have demonstrated independence from the PRC government, both of which were assigned the rate determined for GTC. *Id.* Noting that Double Coin was the only Chinese exporter or producer of OTR

tires that Commerce considered to be part of the PRC-wide entity and that can be identified from the record as actually being in the fifth review, the court concluded that "the only record information relevant to determining a rate for the PRC-wide entity was the information pertinent to Double Coin." *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1388. The court reasoned that because Commerce already had assigned the 0.14% *de minimis* rate to Double Coin in the First Remand Redetermination and "does not seek to reconsider the 105.31% rate it assigned to the PRC-wide entity (except with respect to Double Coin), granting defendant's motion for a partial remand would serve no purpose." *Id.*

For the First Remand Redetermination, Commerce retained the 8% reduction in GTC's EP and CEP starting prices for what Commerce considered to be irrecoverable value-added tax. The court set aside that decision as unlawful in *CMA II*. Citing *Qingdao Qihang Tyre Co. v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1329, 1338–47 (2018), which was issued after *CMA I* was decided, the court concluded that the statutory interpretation under which Commerce made deductions from EP and CEP starting prices for irrecoverable VAT "contravenes the plain meaning, statutory history, and legislative history" of 19 U.S.C. § 1677a(c)(2)(B). *CMA II*, 43 CIT at __, 357 F. Supp. 3d at 1375. After discussing provisions in the Tariff Act that addressed domestic taxes such as value-added taxes separately from the export taxes falling within the scope of § 1677a(c)(2)(B), the court concluded that "Congress had a specific intent with respect to VAT imposed by an exporting country on subject merchandise or the materials used to produce it." *Id.* "Congress did not intend that irrecoverable VAT, i.e., VAT that was not refunded or avoided by reason of exportation of the good, would increase a dumping margin (although it did intend that *recoverable* VAT, in some circumstances not present here, could reduce a dumping margin.)" *Id.* "In addition, Commerce erred in finding, without any evidentiary support, that Chinese irrecoverable VAT is a tax not imposed on the domestic good." *Id. CMA II* ordered Commerce to "take the appropriate corrective action to remove from the calculation of GTC's margin its downward EP and CEP adjustments for VAT." *Id.*

CMA II held that substantial evidence on the record was not available to support the Department's finding in the First Remand Redetermination that only one cost category of the brokerage and handling and ocean freight costs, i.e., the Shanghai Port Charges, were double counted. *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1379. The court ordered Commerce to ensure that no costs are double counted either as between brokerage and handling costs and ocean freight costs, or as

between ocean freight costs and U.S. inland freight costs. *Id.*

C. The Second Remand Redetermination

In the Second Remand Redetermination, Commerce recalculated GTC's weighted average dumping margin, reducing it from 11.33%, as determined in the First Remand Redetermination, to 4.59%. *Second Remand Redetermination* 14. Commerce, under protest, eliminated its deductions for irrecoverable VAT and, reconsidering its calculations of GTC's brokerage and handling and ocean freight costs, eliminated additional cost elements it determined to have been double counted. The court addresses each of these changes below.

1. Elimination of Irrecoverable VAT Adjustment in Calculating GTC's Dumping Margin

In *CMA II*, the court directed Commerce to recalculate EP and CEP without making a reduction in the EP and CEP starting prices for irrecoverable VAT. Commerce, in response, eliminated its irrecoverable VAT deduction. Commerce stated that "[w]e respectfully disagree with the court's decision in *China Mfr. Alliance II* [*CMA II*] concerning the irrecoverable VAT adjustment used in GTC's weighted-average margin calculation," *Second Remand Redetermination* 4, but provided no explanation of why it disagreed with the analysis of the VAT issue in *CMA II*.

2. Recalculation of GTC's Ocean Freight Surrogate Value

Commerce obtained a surrogate value for GTC's export brokerage and handling costs from a World Bank publication, *Doing Business 2014: Indonesia*, Indonesia being the surrogate country Commerce used for surrogate values in the review. *CMA II*, 43 CIT at __, 357 F. Supp. 3d at 1375. Commerce valued GTC's trans-Pacific ocean freight using shipping price quotes published online by Descartes Systems Group, Inc. ("Descartes"). *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1376. It also used Descartes price data to derive a value for U.S. inland freight. *Id*. In *CMA II*, the court ordered Commerce to "ensure that no costs are double counted either as between (1) brokerage and handling (based on the *Doing Business* report) and ocean freight (based on the Descartes quotes), or (2) ocean freight (based on the Descartes quotes) and U.S. inland freight (based on the Descartes price lists)." *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1379. The court concluded in *CMA II* that Commerce did not explain why seven charges identified as ocean freight charges in Descartes price quotes were not accounted for again in the U.S. inland freight charges. These were the Automated Manifest System ("AMS") Charge, Chassis Usage Charges,

International Ship and Port Security Charges, ISD Handling Charges, Traffic Mitigation Fee, Clean Truck Fee, and Documentation Charges. *Id.*, 43 CIT at __, 357 F. Supp. 3d at 1378.

Commerce stated in the Second Remand Redetermination that, pursuant to the court's order in *CMA I*, it reopened the record to solicit information on potential double counting. *Second Remand Redetermination* 6. On the basis of the expanded record, Commerce eliminated the Shanghai Port Charge from the ocean freight calculation. *Id.* Upon re-examining the record, Commerce concluded in the Second Remand Redetermination that no additional double counting of costs occurred between the brokerage and handling and the ocean freight cost categories. *Id.* at 8. Also, Commerce noted that, after the Shanghai Port Charge was removed from the ocean freight surrogate value, no party argued that additional double counting occurred between brokerage and handling costs and ocean freight costs. *Id.*

In examining potential double counting between ocean freight charges and U.S. inland freight charges, Commerce concluded that four of the seven charges listed above appeared on only one of the twenty-four ocean freight price quotes Commerce used and therefore did not appear to be customary charges. Commerce eliminated this price quote from its calculation. Commerce then considered whether the remaining three types of charges—AMS Charges, Documentation Charges, and Traffic Mitigation Fees—were duplicated in the data it used for inland freight charges. *Id.* at 9–10.

Of the three charges in question, Commerce concluded that only the Traffic Mitigation Fees are reasonably attributable to inland freight expenses and removed these fees from its calculation of international freight expense. Commerce cited record evidence from the first remand in concluding that the Traffic Mitigation Fees are "charged to truck freight carriers upon pick-up of cargo from the port, to fund operations of the port to allow for off-peak hour pick up of freight from the ports of Los Angeles and Long Beach to mitigate traffic congestion," *id.* at 12 (footnote omitted), and are "reasonably attributable to U.S. inland freight expenses," *id.* at 13.

Commerce cited record information—specifically, the Descartes logistics and supply chain glossary—in concluding that the Automated Manifest System Charge is an ocean freight expense related to arrival of cargo at the port of destination. *Id.* at 11. The record information indicates that the charge is for the providing electronic transmission of manifest information from the vessel to Customs and Border Protection. *Id.* The record supports the Department's conclusion that the charge is not related to U.S. inland movement of freight and therefore was not double counted.

Commerce stated that "Documentation Charges" appear on approximately half of the Descartes quotes for ocean freight charges. *Id.* at 11–12. Commerce reiterated its finding from the First Remand Redetermination that these charges relate to documents such as the master bill of lading, which covers all containers aboard an ocean-going vessel, and to U.S. destination document fees. *Id.* at 12. Commerce concluded that evidence did not support a finding that these documentation charges related to inland freight, *id.*, a conclusion the record supports.

In summary, the court concludes that Commerce's findings and conclusions pertaining to possible double counting were supported by substantial evidence on the augmented record and comply with the court's order in *CMA II*.

II. CONCLUSION

The court concludes, for the reasons discussed above, that the Second Remand Redetermination complies with the court's order in *CMA II*. Judgment sustaining the determinations therein will enter accordingly.

Dated: September 3, 2019
New York, New York

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

Slip Op. 19–116

NEXTEEL CO., LTD., Plaintiff, HYUNDAI STEEL COMPANY, HUSTEEL CO., LTD., AJU BESTEEL CO., LTD., MAVERICK TUBE CORPORATION, AND SEAH STEEL CORPORATION, Consolidated Plaintiffs, and HUSTEEL CO., LTD., HYUNDAI STEEL COMPANY, AND ILJIN STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., MAVERICK TUBE CORPORATION, AND UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00091

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand redetermination following an administrative review of the antidumping order on oil country tubular goods from the Republic of Korea.]

Dated: September 4, 2019

J. David Park, Michael T. Shor, Henry D. Almond, Daniel R. Wilson, Leslie C. Bailey, and *Kang W. Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff NEXTEEL Co., Ltd. and Consolidated Plaintiff Hyundai Steel Company.

Donald B. Cameron, *Eugene Degnan*, *Brady W. Mills*, *Julie C. Mendoza*, *Mary S. Hodgins*, and *Rudi W. Planert*, Morris, Manning & Martin, LLP, of Washington, D.C., for Consolidated Plaintiff Husteel Co., Ltd.

Jarrod M. Goldfeder and *Robert G. Gosselink*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiff AJU Besteel Co., Ltd.

Gregory J. Spak, *Frank J. Schweitzer*, and *Kristina Zissis*, White & Case, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Maverick Tube Corporation.

Jeffrey M. Winton and *Amrietha Nellan*, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., for Consolidated Plaintiff SeAH Steel Corporation. *Jordan Fleischer* also appeared.

Roger B. Schagrin, *Elizabeth J. Drake*, and *Christopher T. Cloutier*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc. *Paul W. Jameson* also appeared.

Thomas M. Beline and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

Hardeep K. Josan, Attorney, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

Joel D. Kaufman and *Richard O. Cunningham*, Steptoe & Johnson LLP, of Washington, D.C., for Plaintiff-Intervenor ILJIN Steel Corporation.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the U.S. Department of Commerce's ("Commerce") administrative review of the antidumping order on oil country tubular goods ("OCTG") from Korea. *See Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of antidumping duty administrative review; 2014–2015), as amended, 82 Fed. Reg. 31,750 (Dep't Commerce July 10, 2017) (amended final results of antidumping duty administrative review; 2014–2015) ("*Final Results*"). Before the court are the Final Results of Redetermination Pursuant to Court Remand, Apr. 2, 2019, ECF No. 169 ("*Remand Redetermination*"), pursuant to the court's decision in *NEXTEEL Co., Ltd. v. United States*, 43 CIT __, __, 355 F. Supp. 3d. 1336, 1343 (2019) ("*NEXTEEL I*"). For the following reasons, the court sustains in part and remands in part the *Remand Redetermination*.

PROCEDURAL HISTORY

The court presumes familiarity with the facts of this case. *See NEXTEEL I*, 355 F. Supp. 3d at 1344–52, 1357–58, 1360–61. In *NEXTEEL I*, the court considered seven Rule 56.2 motions for judgment on the agency record and fourteen issues presented by the Parties. *See id.* at __, 355 F. Supp. 3d at 1343–44. The court sustained

in part and remanded in part Commerce's *Final Results*. *Id.* at 1344, 1364. Consolidated Plaintiff SeAH Steel Corporation ("SeAH") and Defendant-Intervenors Maverick Tube Corporation, TMK IPSCO, Vallourec Star, L.P., Welded Tube USA, and United States Steel Corporation filed motions for reconsideration of the court's decision in *NEXTEEL I* as to SeAH's ocean freight expenses, Commerce's application of differential pricing analysis, and the particular market situation adjustment. *See*, 43 CIT __, __, __ F. Supp. 3d __, __, Consol. Court No. 17–00091, 2019 WL 2218739, at *1 (CIT May 21, 2019) ("*NEXTEEL II*"). The court denied both motions for reconsideration. *Id.* at *4.

Commerce filed its *Remand Redetermination* on April 2, 2019. *See Remand Redetermination*. Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL") and Plaintiff Intervenor Hyundai Steel Company ("Hyundai Steel") filed comments. Comments of NEXTEEL and Hyundai Steel in Support of the U.S. Dep't of Commerce's Final Results of Redetermination Pursuant to Ct. Remand, May 2, 2019, ECF No. 174 ("NEXTEEL and Hyundai Steel Br."). Consolidated Plaintiff AJU Besteel Co., Ltd. ("AJU Besteel") filed comments. Comments of Consolidated Pl., AJU Besteel Co., Ltd., on Commerce's Remand Redetermination May 2, 2019, ECF No. 175 ("AJU Besteel's Br."). Plaintiff-Intervenor Husteel Co., Ltd. ("Husteel") filed comments. Husteel's Comments on Redetermination Pursuant to Ct. Remand Order, May 2, 2019, ECF No. 171 ("Husteel Br."). SeAH filed comments. Comments of SeAH Steel Corp. on Commerce's April 2, 2019, Redetermination, May 2, 2019, ECF No. 173 ("SeAH Br.").[1] Defendant-Intervenors TMK Ipsco, Vallourec Star, L.P., Welded Tube USA Inc., Maverick, and United States Steel Corporation filed comments. Def.-Intervenors' Comments on Commerce's Remand Results, May 2, 2019, ECF No. 172 ("Def.-Intervenors' Br.").

Defendant United States replied. Def.'s Resp. to Comments Regarding the Remand Redetermination, Jun. 3, 2019, ECF No. 178 (Def.'s Reply Br."). Maverick replied. Reply of Def.-Intervenor Maverick Tube Corp. to Comments of SeAH Steel on Commerce's Final Results of Redetermination Pursuant to Ct. Remand, Jun. 3, 2019, ECF No. 179 ("Maverick's Reply Br."). NEXTEEL and Hyundai Steel replied. Reply of NEXTEEL and Hyundai Steel to Def. Intervenors' Comments on the U.S. Dep't of Commerce's Final Results of Redetermination Pursuant to Ct. Remand, Jun. 3, 2019, ECF No. 180 ("NEXTEEL's and Hyundai's Reply Br.").

[1] SeAH submitted comments requesting that the court remand the dumping margin recalculation issue as to SeAH's ocean freight costs. The court considers the issue moot following the court's ruling in *NEXTEEL II*. *See* 43 CIT __, __, __ F. Supp. 3d __, __, Consol. Court No. 17–00091, 2019 WL 2218739, *1.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c), which grant the court the authority to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce's determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

I. Particular Market Situation

During the initial administrative proceedings, Commerce did not find the existence of a particular market situation in its preliminary results, but later relied on the same administrative record to reverse its position and conclude that a particular market situation existed in the final results. *See NEXTEEL I*, 43 CIT at __, 355 F. Supp. 3d at 1345–46. The court concluded that Commerce's determination was unsupported by substantial evidence and instructed Commerce on remand to remove its finding of a particular market situation from its antidumping duty calculations. *See id.* at __, 355 F. Supp. 3d at 1349–51.

On remand, Commerce recalculated the dumping margin for SeAH, NEXTEEL, and the non-examined companies under protest. *Remand Redetermination* 5–6, 23. Commerce did not apply the particular market situation adjustment in the recalculated margins. *Id.*[2]

Defendant-Intervenors argue that the *Remand Redetermination* is unsupported by substantial evidence and that a second remand is warranted. Def.-Intervenors' Br. 1–2. Defendant counters that Commerce complied with the court's instructions, Commerce could not have reached a different result on the basis of a party's comments, and Defendant-Intervenors already sought reconsideration of the particular market situation issue. Def.'s Reply Br. 5–7; *see also NEXTEEL II*, 43 CIT at __, __ F. Supp. 3d at ___, 2019 WL 2218739, at *1. Husteel and AJU Besteel agree that Commerce's *Remand Redetermination* complies with the court's remand instructions and request

[2] In *NEXTEEL I*, the court did not reach the issue of Commerce's adjustment of NEXTEEL's input costs based on a separate administrative proceeding that resulted from Commerce's finding of a particular market situation. *See NEXTEEL I*, 43 CIT __, __, 355 F. Supp. 3d. at 1351. Because Commerce removed the particular market situation adjustment on remand, Commerce recalculated NEXTEEL's margins, and NEXTEEL requests that the court sustain the *Remand Redetermination* as to particular market situation, the court considers this issue moot. *See Remand Redetermination* 6; NEXTEEL and Hyundai Steel Br. 7.

that the court affirm the *Remand Redetermination* as to the particular market situation issue. Husteel Br. 2; AJU Besteel Br. 1–2.

Defendant-Intervenors' arguments are unpersuasive. First, Defendant-Intervenors argue that Commerce's removal of a particular market situation adjustment is unsupported by substantial evidence. Def.-Intervenors' Br. 6–7. To the contrary, in the underlying administrative proceeding, Commerce found that the record did not support any of Maverick's four allegations of a particular market situation in Korea. *See NEXTEEL I*, 43 CIT at __, 355 F. Supp. 3d at 1349–51 (citing Department's Memorandum Pertaining to Maverick's Particular Market Situation Allegations, PD 531, bar code 3545522–01 (Feb. 22, 2017)). Defendant-Intervenors fail to point to any evidence to support Defendant-Intervenors' contention that Commerce's decision on remand to remove the particular market situation adjustment is unsupported by substantial evidence. *See* Def.-Intervenors' Br. 1–2.

Second, Defendant-Intervenors' arguments regarding the court's instructions to Commerce as to particular market situation were briefed when Defendant-Intervenors sought reconsideration of the court's opinion. *See NEXTEEL II*, 43 CIT at __, __ F. Supp. 3d at __, 2019 WL 2218739, at *3–4, *8–10. Defendant-Intervenors do not identify any arguments that would be raised in comments to Commerce that Defendant-Intervenors did not raise in their motion for reconsideration or other briefing before Commerce or this court. *See* Def.-Intervenors' Br. 5–6.

Because Commerce recalculated the dumping margin for SeAH, NEXTEEL, and the non-examined companies without applying the particular market situation adjustment in the recalculated margins, the court concludes that Commerce's *Remand Redetermination* is consistent with the court's remand order and opinion in *NEXTEEL I* as to the issue of particular market situation. *See NEXTEEL I*, 43 CIT at __, 355 F. Supp. 3d at 1364.

II. Classification of Proprietary SeAH Products

In *NEXTEEL I*, the court addressed Commerce's decision to combine SeAH's proprietary OCTG under reporting code 075 with reporting code 080. *See* 43 CIT at __, 355 F. Supp. 3d at 1357–58. During the investigation, Commerce's initial questionnaire asked SeAH to report a separate reporting code for proprietary grades of OCTGs that were not listed in the American Petroleum Institute ("API") Specification for Casing and Tubing ("API Specification 5CT"). *See Remand Redetermination* 6; *see also* Initial Questionnaire, PR 100, bar code 3441771–01 (Feb. 12, 2016) ("Initial Questionnaire"). SeAH informed

Commerce that SeAH sold three proprietary grades of OCTG in the United States during the period of review that had "the same tensile strength required by the N-80 specification but is not heat treated (by normalization or by quenching-and-tempering) in the manner required by the N-80 norms." SeAH's Initial Section B–E Response at 8 n.4, PD 140, bar code 3454399–02 (Mar. 31, 2016) ("SeAH's Initial Section B–E Response"). In the *Final Results*, Commerce combined SeAH's reported code 075 with code 080. *See* Issues and Decision Memorandum for the Final Results of the 2014–2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, 95–97, A-580–870, ECF No. 58–2 (Apr. 17, 2017) ("Final IDM"). Commerce found that because SeAH's proprietary OCTG products shared the same mechanical properties as OCTG under reporting code 080 (*i.e.*, tensile and hardness requirements), the goods should be grouped together and that "[a]ny differences between these grades were already captured in other product characteristics." *Id.* at 96.

The court determined in *NEXTEEL I* that Commerce did not distinguish meaningfully between a product's physical characteristics and production process in the *Final Results* and that Commerce did not address evidence on the record adequately in making its determination. *NEXTEEL I*, 43 CIT at __, 355 F. Supp. 3d at 1358. The court concluded that Commerce's classification of SeAH's proprietary OCTG products was unsupported by substantial evidence. *Id.*

On remand, Commerce explained that the model match methodology used to determine dumping margins in this action contained a hierarchy of criteria designed to reflect differences between products, and that Commerce ranked those differences in order of importance. *See* Def.'s Reply Br. 7–8. The more important matching characteristics were listed higher than the less important criteria in the hierarchy. *Remand Redetermination* 7. Commerce ranked physical characteristics (such as grade) above production processes (such as heat treatment). *Id.* at 7–8. In the hierarchy, grade was the third-highest product characteristic, and heat treatment was the ninth-highest. *Id.*; *see also* Initial Questionnaire B-6–B-12. Commerce noted that the absence of the heat treatment process was the distinguishing characteristic between API Specification 5CT grade code N-80 products and SeAH's proprietary products. *Remand Redetermination* 7. Under the model match hierarchy, the distinguishing characteristic of heat treatment was captured by the ninth-highest criteria. *Id.* Commerce assessed that the distinction between the physical characteristics and production process stemmed from the effect of those criteria on the

products' performance capabilities. *Id.* at 7–10; *see also id.* at 8 (identifying that "[b]ecause OCTG are used in the well and, thus, must withstand significant internal and external pressures at various depths, the key physical properties, such as tensile strength and hardness, are essential to determining the capabilities of a particular OCTG product") (internal quotation omitted). Commerce concluded that it was not logical to create a grade distinction at the third-level of the model match hierarchy for heat treatment because heat treatment was captured by the ninth-highest level. *Id.*

Addressing the record on remand, Commerce identified that SeAH's proprietary products "offered higher strength levels than [API Specification 5CT grade code] J-55 or K-55, equivalent with N-80 grade products" and had "the same mechanical properties (*i.e.*, tensile strength and hardness) required by the N-80 specification, which [had] the assigned code 080." *Id.* at 7–10 (citing Administrative Review of the Antidumping Order on Oil Country Tubular Goods from Korea – Case Brief of SeAH Steel Corporation, 10–11, bar code 3541806–01 (Feb. 9, 2017)) (internal quotations omitted); *see also* Administrative Review of the Antidumping Order on Oil Country Tubular Goods from Korea – Case Brief of SeAH Steel Corporation, 11, bar code 3541806–01 (Feb. 9, 2017); SeAH's Initial Section B–E Response 8, 55–56. Commerce noted that "SeAH stated that it developed its proprietary grades specifically to compete with N-80 grade products and upgradeable L-80 products in the North American market, but without going through the heat treatment process." *Remand Redetermination* 8; *see also* SeAH Steel's Response to July 1 Supplemental Questionnaire, P.D. 253 (Jul. 29, 2016) at 11 n.6.

SeAH argues that Commerce's *Remand Redetermination* does not correctly classify SeAH's proprietary products as API Specification 5CT grade code N-80 based on the mechanical properties of the pipe. SeAH Br. 2–5. SeAH contends that under the API grading criteria, it would be possible for a particular pipe to be categorized under multiple grade codes based on mechanical properties such as yield strength and tensile strength, if heat treatment is not considered. *Id.* at 4–5. SeAH also asserts that the stencil on the OCTG product, which identifies the grade of the pipe, constitutes a physical characteristic of the pipe. SeAH Br. 5–6.

Defendant counters that the model match hierarchy employed in this case was adopted to compare products with similar characteristics for the purpose of determining the dumping margin. *See* Def.'s Reply Br. 7–8, 10; *Remand Redetermination* 6–9. Defendant contends that the model match hierarchy does not equate tensile strength with

grade, and that the API standards are designed to establish specifications for certain products, not compare products with similar physical characteristics. *See* Def.'s Reply Br. 11–12. Defendant also counters that stenciling is not a physical characteristic because if the stencil is required, then SeAH would not create non-API grade proprietary products to compete with API grade code N-80 products.

The court is not persuaded by SeAH's arguments. First, while API Specification 5CT may be informative, it is not controlling as to the methodology employed by Commerce. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (1996).[3] Second, Defendant's model match hierarchy did not classify SeAH's products within the precise meaning of the API Specification 5CT. Commerce's questionnaire asked SeAH to report OCTG product grades and provided a reference chart to allow conversion between API Specification 5CT grade code N-80 and Commerce's reporting code 080. Initial Questionnaire 9. For proprietary products not fitting within the API Specification 5CT, the Initial Questionnaire directed the creation of a separate reporting code along with technical documentation describing how the additional grades compared to Commerce's reporting codes and API Specification 5CT. *Id.*

Because Commerce's additional explanation of the record supports Commerce's decision to combine SeAH's proprietary OCTG under reporting code 075 with 080, the court concludes that Commerce's model match hierarchy distinguishes between a product's physical characteristics and production process and that Commerce's *Remand Redetermination* is supported by substantial evidence. *See NEXTEEL I*, 43 CIT at __, 355 F. Supp. 3d at 1357–58; *Fujitsu Gen.*, 88 F.3d at 1044. The court affirms Commerce's *Remand Redetermination* as to Commerce's classification of SeAH's proprietary products.

III. Deduction of General and Administrative Expenses as U.S. Selling Expenses

In the *Final Results*, Commerce deducted general and administrative ("G&A") expenses from constructed export price ("CEP") related to resold United States products for SeAH's U.S. affiliate Pusan Pipe America Inc. ("PPA"). *See Remand Redetermination* at 11–12; Final IDM at 6, 87–88. Commerce explained that "[b]ecause PPA's G&A activities support the general activities of the company as a whole, including its sales and further manufacturing functions of all prod-

[3] *See also* SeAH's Section A Questionnaire Resp., API Specification 5CT, App'x A–10, PR 130 (Mar. 18, 2016) ("API publications necessarily address problems of a general nature. . . . API publications are published to facilitate the broad availability of proven, sound engineering and operating practices. . . . Users of this specification should not rely exclusively on the information contained in this document.").

ucts," Commerce applied the "G&A ratio to the total cost of further manufactured products . . . as well as to the cost of all resold products." Final IDM at 87–88. The court noted that Commerce's explanation did not clarify why it deducted PPA's G&A expenses for resold products and did not clarify how Commerce determined that it would apply all of PPA's G&A expenses to resold products. *NEXTEEL I*, 355 F. Supp. 3d. at 1360–61. The court concluded in *NEXTEEL I* that Commerce's decision to deduct G&A expenses in the *Final Results* was unsupported by substantial evidence on the record and remanded this issue for clarification or reconsideration of Commerce's methodology. *Id.* at 1361.

On remand, Commerce explained that "Commerce did not apply 'all' of PPA G&A expenses to directly resold products" and "Commerce allocated PPA G&A expenses proportionally to all of the products PPA sold (*i.e.*, products which PPA directly resold and products PPA further processed and then resold)." *Remand Redetermination* at 11–12. For further manufactured products, Commerce "applied PPA's G&A expense ratio to the total cost of further manufacturing, plus the cost of production . . . of imported OCTG pipe that was further manufactured, and [Commerce] included the amount as further manufacturing under 19 U.S.C. § 1677a(d)(2)." *Id.* at 14. Commerce also "applied PPA's G&A expense ratio to the [cost of production] of the imported OCTG for products not further manufactured and included the amount as indirect selling expenses under 19 U.S.C. § 1677a(d)(1)(D)." *Id.*

An antidumping duty represents the amount by which the normal value of the merchandise exceeds its export price or CEP. 19 U.S.C. § 1673. CEP is the price at which the subject merchandise is first sold in the United States by a seller affiliated with the producer or exporter to a non-affiliated purchaser. 19 U.S.C. § 1677a(b). When calculating CEP, Commerce must make adjustments for certain expenses. *Id.*; 19 U.S.C. § 1677a(d). Under 19 U.S.C. § 1677a(d)(2), Commerce is directed to reduce CEP by "the cost of any further manufacture or assembly (including additional material and labor). . . ." 19 U.S.C. § 1677a(d)(2). Commerce also must reduce the constructed export price by:

> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
>
> (A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C).

19 U.S.C. § 1677a(d)(1)(A)–(D).

SeAH argues that Commerce's methodology is inconsistent with 19 U.S.C. § 1677a(d), that Commerce may not reclassify G&A expenses as selling expenses, that Commerce does not explain why G&A expenses may be reclassified as indirect selling expenses, and that Commerce's treatment of G&A expenses as indirect selling expenses is not consistent with Commerce's treatment of home-market G&A expenses. SeAH Br. at 9–12.

Commerce counters that G&A expenses can be treated as indirect selling expenses when reselling activity occurs, and all G&A expenses can be treated as further manufacturing expenses when further manufacturing activity occurs. *Remand Redetermination* at 22; Def.'s Reply Br. 14. Commerce supports its application of G&A expenses as selling expenses in this case because "PPA, SeAH's affiliated reseller in the United States, employs individuals responsible for overseeing, coordinating, and supporting sales of both further manufactured and non-further manufactured products." Def.'s Reply Br. 14. Commerce does not provide support for this proposition. *Id.*; *see also* SeAH Br. at 9–12. Based on that proposition, Commerce concludes that "PPA's G&A activities support the general activities of the company, encompassing the sale and further manufacture of products, and the sale of non-further manufactured products." *Remand Redetermination* at 14. Commerce's explanation on remand does not identify what record evidence supports treatment of G&A expenses as selling expenses. Commerce also responds that treatment of G&A expenses as indirect selling expenses was consistent with its treatment of home-market G&A expenses because Commerce did not calculate a CEP offset in this case. Def.'s Reply Br. at 16.

Commerce's explanation on remand does not explain adequately what evidence specifically supports the treatment of G&A expenses as selling expenses or why Commerce may treat G&A expenses as selling expenses. *See also* Final IDM 87–88; Issues and Decision Memorandum for Certain Oil Country Tubular Goods from the Republic of Korea, 12, A-580870 (Oct. 5, 2016) (preliminary results),

available at https://enforcement.trade.gov/ frn/summary/korea-south/ 2016–24800–1.pdf (last visited September 4, 2019). The court concludes that Commerce's *Remand Redetermination* as to the deduction of G&A as selling expenses is not supported by substantial evidence on the record. The court remands this issue for Commerce to provide additional clarification of Commerce's calculation of CEP as to PPA, further explanation of why Commerce may treat G&A expenses as selling expenses as to PPA, and record evidence support for the treatment of PPA's G&A expenses as selling expenses.

CONCLUSION

For the foregoing reasons, the court concludes that:

1. Commerce's finding of a particular market situation and dumping margin calculation for non-examined companies is supported by substantial evidence;

2. Commerce's classification of proprietary SeAH products is supported by substantial evidence;

3. Commerce's decision to deduct SeAH's general and administrative expenses as selling expenses is unsupported by substantial evidence.

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

ORDERED that Commerce shall file its remand determination on or before November 4, 2019; and it is further

ORDERED that Commerce shall file the administrative record on or before November 18, 2019; and it is further

ORDERED that Parties' comments in opposition to the remand determination shall be filed on or before December 4, 2019; and it is further

ORDERED that Parties' comments in support of the remand determination shall be filed on or before January 3, 2020; and it is further

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

Dated: September 4, 2019
New York, New York

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

Slip Op. 19–117

AMERICAN CAST IRON PIPE COMPANY, et al., Plaintiff v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 19–00083

[Plaintiff's motion for an injunction of liquidation is granted]

Dated: September 4, 2019

Timothy C. Brightbill, *Tessa V. Capeloto*, *Laura El-Sabaawi*, *Elizabeth S. Lee*, *Adam M. Teslik*, and *Maureen E. Thorson*, Wiley Rein, LLP, of Washington, D.C., for Plaintiffs, American Cast Iron Pipe Company, Berg Steel Pipe Corp., Berg Spiral Pipe Corp., Dura-Bond Industries, and Stupp Corporation, individually and as members of the American Line Pipe Producers Association; Greens Bayou Pipe Mill, LP; JSW Steel (USA) Inc.; Skyline Steel; Trinity Products LLC; and Welspun Tubular LLC.

Eric J. Singley, *Jeanne E. Davidson*, *Joseph H. Hunt*, and *Patricia M. McCarthy*, International Trade Field Office, U.S. Department of Justice, of New York, NY, for defendant. Of counsel was *Brendan S. Saslow*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Restani, Judge:

American Cast Iron Pipe Company, Berg Steel Pipe Corp., Berg Spiral Pipe Corp., Dura-Bond Industries, and Stupp Corporation, individually and as members of the American Line Pipe Producers Association; Greens Bayou Pipe Mill, LP; JSW Steel (USA) Inc.; Skyline Steel; Trinity Products LLC; and Welspun Tubular LLC (collectively, "Plaintiff")[1] brought an action contesting the U.S. Department of Commerce's ("Commerce") final determination in an antidumping duty investigation on large diameter welded pipe ("welded pipe") from the Republic of Korea ("Korea"). *See* Complaint, ECF No. 8 (June 28, 2019) ("Compl."); *Amended Final Determination*, 84 Fed. Reg. 18,767 (Dep't Commerce May 2, 2019) ("Final Determination"). Before the court is Plaintiff's motion for a preliminary injunction,[2] asking the court to enjoin the government from causing or permitting liquidation of certain unliquidated entries of welded pipe from Korea

[1] Plaintiff is an interested party as it was the petitioner in the underlying antidumping duty investigation and has standing to bring this claim. *See* 28 U.S.C. § 2631(c) (2012); 19 U.S.C. § 1516a(d); § 1677(9)(C) & (E).

[2] Although Plaintiff and the government continually refer to this motion as a preliminary injunction, the motion is brought pursuant to 19 U.S.C. §§ 1516a(c),(e) and will permanently enjoin liquidation not in accordance with the final decision of this court pursuant to a litigant's statutory rights. Thus, the court refers to this measure as a "statutory injunction" in order to distinguish from a preliminary injunction, which is granted under the court's equitable powers rather than by statute.

that are subject to the Final Determination.[3] Mot. Prelim. Inj., ECF No. 10 (July 29, 2019) ("Pl. Mot."). The government opposes the motion. Def.'s Resp. to Pl.'s Mot. Prelim. Inj., ECF No. 13 (Aug. 19, 2019) ("Def. Resp.").

BACKGROUND

On January 17, 2018, Plaintiff filed a petition with the International Trade Commission and Commerce alleging, in relevant part, that domestic industry was materially injured or threatened with material injury by the dumping of welded pipe from Korea into the U.S. market. *See Large Diameter Welded Pipe from Canada, Greece, India, the People's Republic of China, the Republic of Korea, and the Republic of Turkey: Petitions for the Imposition of Antidumping and Countervailing Duties*, POI: 1/1/2017–12/31/2017, A-580–897 (Jan. 17, 2018) ("Petition"). During the investigation, Plaintiff submitted information claiming that global steel overcapacity and a combination of distortive market practices drove down the price of welded pipe imports. Plaintiff urged Commerce to adjust for this particular market situation by using its proposed regression analysis, but Commerce ultimately did not employ that analysis in arriving at the final dumping margins. *See Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Korea*, POI: 1/1/2017–12/31/2017, A-580–897, at 15–18 (Dep't Commerce Feb. 19, 2019).

In its complaint, Plaintiff contends that Commerce's adjustment methodology was "insufficient to account for the particular market situation in Korea that distorted the [cost of production] for [welded pipe] and, accordingly, was unsupported by substantial evidence and not in accordance with law. Compl., ECF No. 8 at ¶ 16 (June 28, 2019). Further, Plaintiff alleges that "Commerce's margin calculation for respondents Hyundai RB and SeAH in the investigation including the 'all others' dumping margin," was unsupported by substantial evidence and not in accordance with law. *Id.* at ¶ 18.

[3] Specifically, Plaintiff asks that subject welded pipe that "were entered, or withdrawn from warehouse for consumption, on or after August 27, 2018 up to and including February 22, 2019, and on or after April 19, 2019 up to and including April 30, 2020," and that "were produced or exported by Hyundai RB Co., Ltd., SeAH Steel Corporation, Samkang M&T Co., Ltd, and any others subject to the "all-others rate," be enjoined from liquidation pending the outcome of this case. Pl. Mot. at 2.

JURISDICTION

The court has jurisdiction over the underlying action pursuant to 28 U.S.C. § 1581(c) and has the authority to grant injunctive relief in this case under 19 U.S.C. § 1516a(c)(2).

DISCUSSION

The purpose of a statutory injunction is to preserve the status quo during judicial proceedings so that relief may be provided in accordance with the final litigation results. It is often stated that in order to succeed on a motion for a statutory injunction a moving party must demonstrate "(1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the petitioner." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). "No one factor, taken individually is necessarily dispositive." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). But where the issue is preserving the court's jurisdiction, the first factor normally controls. *See Zenith*, 710 F.3d at 810; *Husteel*, 34 F. Supp. 3d at 1359–60.

I. Immediate and Irreparable Injury

During an investigation into dumping, if Commerce preliminarily determines that a product is being sold at less than fair value ("LTFV"), it suspends liquidation on all covered merchandise pending a final determination. 19 U.S.C. § 1673b(d)(2). If a final determination similarly finds sales at LTFV and the International Trade Commission finds material injury or threat of material injury caused by these sales, then an antidumping duty order will issue. 19 U.S.C. § 1673d(c)(4)(A). After the final determination, Commerce instructs Customs to assess antidumping duties. *See* 19 U.S.C. § 1673e(a)(1). Commerce, however, will not liquidate until at least a year has passed from the publishing date of the order to allow for an interested party to request a periodic administrative review. *See* 19 U.S.C. § 1675(a)(1); *see also OKI Elec. Indus. Co. v. United States*, 669 F.Supp. 480, 483 (CIT 1987).

The amended final affirmative determination and antidumping duty order in this case stated that Commerce would direct Customs to reinstitute suspension of liquidation on subject merchandise and would "upon further instruction by Commerce pursuant to section 736(a)(1) of the Act, [assess] antidumping duties for each entry." *Large Diameter Welded Pipe from the Republic of Korea: Amended Final Affirmative Antidumping Determination and Antidumping*

Duty Order, 84 Fed. Reg. 18,767, 18,768 (Dep't Commerce May 2, 2019) ("Order"). As indicated and as Plaintiff acknowledges, however, liquidation instructions will not be issued until at least one year after the date of the Final Determination. Pl. Mot. at 4.

Plaintiff contends that should liquidation occur, it will face irreparable injury. Pl. Mot. at 3–5. The government responds that because liquidation of the relevant entries is currently administratively suspended, and liquidation is not imminent, Plaintiff faces no immediate harm of injury. Def. Mot. at 5–8. Additionally, the government argues that Plaintiff could request an administrative review to ensure liquidation is suspended until review is complete. Def. Resp. at 5. The government cites *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States*, No. 19–00122, 2019 WL 3406919 (CIT 2019), for the proposition that a domestic producer is not entitled to a statutory injunction in this instance. Def. Resp. at 6–7.

The threat of injury in this case may not be "imminent in the same sense it is following an administrative review." *Husteel Co., Ltd. v. United States*, 34 F. Supp. 3d 1355, 1360 (CIT 2014) (quotations omitted). But the court has previously held that because an injunction "likely will be needed at some point" in these types of cases and that Commerce does not necessarily notify interested parties when liquidation instructions are issued, delaying an injunction "likely will invite trouble." *Id.* at 1361–62.

The government's argument that an affected party may bring an action during the first administrative review in order to ensure continued suspension of liquidation is unavailing. There are issues unique to the investigation phase of unfair trade proceedings that would be improper to challenge during an administrative review and requesting a review simply to get an injunction pending the outcome of a case would be unduly wasteful not just for private parties, but for Commerce as well, should an administrative review not otherwise be required. Further, 19 U.S.C. § 1516a(c)(2), allowing for injunctive relief, applies to both investigations and administrative reviews, i.e. all of the determinations listed in 19 U.S.C. § 1516a(a)(2). We can assume that Commerce intended the parties to be able to obtain the remedies provided by statute without limitation to a subset of the proceedings referenced.

Further, since 1984 administrative reviews have not been mandatory and if one is not requested Commerce will, "without additional notice" to interested parties, instruct Commerce to liquidate the entries at the rates noted in the Order. *See* 19 U.S.C. § 1675(a); 19 C.F.R.

§§ 351.213(b); 351.212(c); *see also OKI Elec.*, 669 F. Supp at 629.[4] In this situation, assuming it was even aware of the lack of requests, Plaintiff would be under enormous time pressure to obtain an injunction at that point, which might not be accepted by the court. As the court in *Husteel* noted, the U.S. Court of International Trade Rule 56.2 could be interpreted to prevent a party from later obtaining a statutory injunction when liquidation is truly imminent as "[a]ny motion for a statutory injunction to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown." USCIT R. 56.2(a); *see also Husteel*, 34 F. Supp. 3d at 1361. Determining good cause simply invites litigation. The court refuses to create the potential for such a situation.

Eventual harm here is clear. Liquidation would permanently deprive Plaintiff of its ability to challenge the rate with regard to affected entries. *See Zenith*, 710 F.3d at 810; *Husteel*, 34 F. Supp. 3d at 1359. There is no statutory provision allowing for the recovery post-liquidation of duties Commerce directs Customs to impose, even if that liquidation rate is later found incorrect. *Zenith*, 710 F.3d at 810; *see also Cemex, S.A. v. United States*, 384 F.3d 1314, 1323 n.9 (noting the absence of a statutory remedy for domestic producers in the case of improper liquidation). Although an administrative suspension is currently in place, mistakes can occur. In the case of mistaken liquidation by Customs, domestic producers do not have the statutory right of protest afforded to importers. *See Cemex*, 384 F.3d at 1323; *FMC Corp.*, 3 F.3d at 430–31; *Husteel* 34 F. Supp at 1364; 19 U.S.C. § 1514(c)(2) (providing for protest by importers et al., but not domestic industry parties). Accordingly, domestic producers appear to have no statutory recourse in that situation and would lose the ability to obtain any meaningful relief, barring voluntary action by Customs. *See Husteel*, 34 F. Supp. 3d at 1364 (in this situation "domestic producers have a stronger interest in having an injunction granted, as they otherwise do not have the same protections as importers."); *see also* 19 U.S.C. § 1514(c)(2). This potential loss of any statutory relief is irreparable harm that is prevented by issuance of a statutory injunction enjoining liquidation. *See Husteel*, 34 F. Supp. 3d at 1364 (noting that a court retains jurisdiction in the event that Customs liquidates in contravention of a court-ordered injunction).

Although liquidation of relevant entries is not slated to occur immediately, given the irreparable harm that would result to Plaintiff should liquidation occur, and the possibility that an injunction will be

[4] See discussion in *Husteel*, of Commerce's 15-day policy for liquidation instructions. 34 F. Supp. 3d at 1361.

necessary at some point in this litigation, the court finds that this factor strongly weighs in favor of granting the injunction.[5]

II. Likelihood of Success on the Merits

The "greater the potential harm to the Plaintiff, the lesser the burden on Plaintiffs to make the required showing of likelihood of success on the merits." *Belgium v. United States*, 452 F.3d 1289 (Fed. Cir. 2006). Nonetheless, the Plaintiff must, at minimum, demonstrate "a fair chance of success on the merits." *Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375, 1381 (Fed. Cir. 2009) (quotations omitted).

Plaintiff contends that when irreparable harm is firmly established, that all Plaintiff must do is raise a question as to whether Commerce's Final Determination is unsupported by substantial evidence of otherwise not in accordance with law. Pl. Mot. at 6–7. The government argues that there is no chance of irreparable harm here and that plaintiff has failed to provide any support for the notion that they are likely to succeed on the merits. Def. Resp. at 9–10.

As indicated, in the face of irreparable harm, Plaintiff's burden to show likelihood of success on the merits is lessened. *See Qingdao*, 581 F.3d at 1378–79. In this case, while the Plaintiff has failed to provide support for its claim that it will ultimately succeed, the government has failed to provide any support for the notion that Plaintiff's claims are meritless. Because neither party has discussed the merits of the case, the court will assume that this is a normal unfair trade case in which there are close, difficult issues that may be resolved in either party's favor. *See* Compl. at ¶¶ 15–18 (Plaintiff contends that Commerce insufficiently accounted for the particular market situation in Korea and that Commerce's dumping margin calculation for two respondents was unsupported by substantial evidence and otherwise not in accordance with law).

III. Public Interest

The public interest is best served by the accurate assessment of duties. *See SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1329

[5] The government's reliance on *Comm. Overseeing Action for Lumber* is misplaced. No. 1900122, 2019 WL 3406919 (CIT 2019). In that case, the Plaintiff was, at least in part, responsible for the potential liquidation of importer entries because Plaintiff had withdrawn a request for an administrative review that would have suspended liquidation pending the outcome of that review. *Id.* at *6. Here, Plaintiff has not similarly contributed to the precarious circumstances in which it is found. Further, the court in that case also did not consider some of the concerns noted above that could result should an injunction be denied. Motions to grant injunctions at the investigation stage have had various outcomes. *See e.g.*, *Perry Chemical Corp. v. United States*, 375 F. Supp. 3d 1324, 1336 n.13 (CIT 2019) (collecting cases that have granted and denied injunctions).

(CIT 2004); *see also Zenith Radio Corp. v. United States*, 505 F. Supp. 216, 220 (CIT 1980). Further, granting an injunction in this case promotes judicial efficiency by obviating a need to revisit this issue later in the litigation under time constraints. An injunction may also avoid the necessity of an administrative review. *See OKI Elec.*, 669 F. Supp at 486.

IV. Balance of the Equities

As this court has said on several occasions, suspension of liquidation is at most an inconvenience to the government. *See SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1328 (CIT 2004); *OKI Elec. Indus.*, 669 F. Supp. at 486 (CIT 1987); *see also Timken Co. v. United States*, 569 F. Supp. 65, 71 (CIT 1983). Equities do not favor the government as it will ultimately collect the full amount owed with interest and in the meantime will collect cash deposits at the rate currently set by the Final Determination. *See* 19 U.S.C. § 1677g(a).

CONCLUSION

The court concludes that Plaintiff has met its burden to warrant an issuance of an injunction. Taken together, three of the four factors support granting Plaintiff's injunction. There is no harm in granting a statutory injunction to ensure that remedies remain available throughout the pendency of this case, and there is serious potential for irreparable harm if the court does not grant the motion. Accordingly, Plaintiff's motion for a statutory injunction is granted.

An order will issue accordingly.

Dated: September 4, 2019
New York, New York

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