U.S. Court of International Trade

Slip Op. 19–32

APPLE INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 13–00239
PUBLIC VERSION

[Denying Plaintiff's motion for summary judgment and granting Defendant's cross-motion for summary judgment.]

Dated: March 11, 2019

David Phillips Sanders, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for plaintiff Apple Inc. With him on the brief was *Nina Ritu Tandon*.

Beverly A. Farrell, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, International Trade Field Office, of New York, NY, argued for defendant. With her on the brief were *Amy M. Rubin*, Assistant Director, and *Chad A. Readler*, Acting Assistant Attorney General. Of Counsel on the brief was *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Kelly, Judge:

The action before the court concerns the classification of two models of the iPad 2 Smart Cover ("Smart Cover"). Plaintiff, Apple, Inc., moves for summary judgment, requesting the court find, as a matter of law, that both models of Plaintiff's imports are properly classified within subheading 8473.30.51, Harmonized Tariff Schedule of the United States (2011) ("HTSUS"),[1] and order United States Customs and Border Protection ("CBP" or "Customs") to reliquidate the subject merchandise as such and refund the excess duties paid with interest. Pl.'s Mem. Law Supp. of Pl.'s Mot. Summary J., Mar. 1, 2019, ECF No. 117–1 ("Pl.'s Br.").[2] Defendant opposes the motion and cross-moves for

[1] All references to the HTSUS refer to the 2011 edition, the most recent version of the HTSUS in effect at the time of the last entries of Plaintiff's merchandise. *See* Am. Compl. ¶ 3, Aug. 2, 2013, ECF No. 11; Answer to Am. Compl. ¶ 3, Dec. 9, 2013, ECF No. 19.

[2] Plaintiff refiled the confidential and public versions of its moving brief in compliance with the court's February 8, 2019, letter notifying the parties of their inconsistent and significant use of bracketing and requesting the parties confer, review, and refile corrected versions. Ct.'s Letter Regarding Use of Brackets, Feb. 8, 2019, ECF No. 107. Plaintiff also refiled the exhibits that are attached to its moving brief; docketed at ECF Nos. 116–2 (confidential) and 117–2 (public). No substantive changes were made. Plaintiff did not file a new copy of its motion for summary judgment or a new appendix. Plaintiff's original moving brief has been sealed and is docketed at ECF Nos. 60–1 and 61–1, filed September 23, 2016. Defendant did not refile any of its briefs.

summary judgment, requesting the court find, as a matter of law, that imports of the Smart Cover model with the plastic outer layer are properly classified within subheading 3926.90.99, HTSUS. *See* Def.'s Mem. Law Opp'n Pl.'s Partial Mot. Summary J. & Supp. Def.'s Cross-Mot. Partial Summary J. at 8–20, Jan. 27, 2017, ECF No. 69 ("Def.'s Resp. Br."). Defendant also argues that this Court does not have jurisdiction to hear Plaintiff's challenge to CBP's classification of the Smart Cover model with the leather outer layer because that merchandise was liquidated duty-free and Plaintiff can claim no injury for which this Court can provide a remedy. *See id.* at 7–8; Def.'s Resp. Pl.'s Suppl. Br. at 3–6, Jan. 19, 2018, ECF No. 102 ("Def.'s Suppl. Br."). For the reasons that follow, Plaintiff's motion is denied and Defendant's cross-motion is granted.

BACKGROUND

At issue is the proper classification of one entry containing two models of a product known as the "Smart Cover" for the Apple iPad 2. *See* Def.'s Statement Material Facts as to Which There are no Genuine Issues to be Tried ¶ 1, Mar. 1, 2019, ECF No. 115–1 ("Def.'s 56.3 Statement");[3] Pl.'s Resp. [Def.'s 56.3 Statement] ¶ 1, Mar. 1, 2019, ECF No. 117–3 ("Pl.'s Resp. Def.'s 56.3 Statement"). On July 8, 2011, CBP liquidated the plastic Smart Cover under subheading 6307.90.98, HTSUS,[4] dutiable at seven percent, and the leather Smart Cover under subheading 4205.00.80, HTSUS,[5] duty-free. Am. Compl. ¶ 4, Aug. 2, 2013, ECF No. 11 ("Am. Compl."); Answer to Am. Compl. ¶ 4, Dec. 9, 2013, ECF No. 19 ("Answer"); Def.'s 56.3 Statement ¶¶ 4–5; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 4–5.

Plaintiff timely filed an administrative protest asserting that the proper classification for the leather and plastic Smart Cover is subheading 8473.30.51, HTSUS, duty-free. Am. Compl. ¶¶ 5–7; Answer ¶¶ 5–7. Subheading 8473.30.51, HTSUS, covers:

[3] The docket contains several versions of the parties' USCIT R. 56.3 statements and associated responses. These include, Defendant's original USCIT R. 56.3 statement and response to Plaintiff's USCIT R. 56.3 statement docketed at ECF Nos. 69–1–2 and 70–1–2, filed January 27, 2017; refiled versions of the same reflecting updated bracketing to capture additional confidential information docketed at ECF Nos. 85 and 86, filed August 7, 2017; and, finally, Plaintiff's and Defendant's USCIT R. 56.3 statements and associated responses filed on March 1, 2019, to comply with the court's request that parties confer, review, and refile these submissions in light of the significant and inconsistent use of bracketing therein. Ct.'s Letter Regarding Use of Brackets at 1–2. No substantive changes were made, and the versions filed prior to March 1, 2019, have been sealed.

[4] Subheading 6307.90.98, HTSUS, covers "Other made up articles, including dress patterns: Other: Other."

[5] Subheading 4205.00.80, HTSUS, covers "Other articles of leather or of composition leather: Other: Other: Other."

> Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472: Parts and accessories of the machines of heading 8471: Other.

Subheading 8473.30.51, HTSUS. In the interim between filing its protest and CBP issuing a ruling, Plaintiff submitted a letter to the Center of Excellence and Expertise in Long Beach, California, seeking classification guidance; the letter prompted the generation of an Internal Advice Request. *See* Am. Compl. ¶ 8; Answer ¶ 8. On October 9, 2012, CBP's Office of International Trade, Commercial and Trade Facilitation Division ("CBP Headquarters"), responded to the request and issued ruling HQ H216396. Am. Compl. ¶ 9; Answer ¶ 9. The ruling addressed the proper classification of leather and plastic covers, the model numbers of which are not covered by Plaintiff's protest but that are materially similar to the leather and plastic Smart Covers at issue here. *See* Am. Compl. ¶ 9; Answer ¶ 9; Exs. to Pl.'s Mem. Law. Supp. Mot. Summary J. at Ex. D at 1–3, Mar. 1, 2019, ECF No. 117–2 ("HQ H216396")[6] (reproducing the ruling and describing the two models at issue as iPad Smart Covers with a microfiber lining capable of buffing off fingerprints or smudges and a top layer consisting of either plastic or leather). The ruling rejected Plaintiff's position that the iPad Smart Covers, leather and plastic, are classifiable under heading 8473, HTSUS, and instead ruled that the plastic iPad Smart Cover is properly classified under subheading 3926.90.99, HTSUS ("Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other"), dutiable at a rate of 5.3%, and the leather iPad Smart Covers under subheading 4205.00.80, HTSUS ("Other articles of leather or of composition leather: Other: Other: Other"), duty-free. *See* Am. Compl. ¶ 10; Answer ¶ 10; HQ H216396 at 5–8. On January 9, 2013, CBP denied Plaintiff's protest, did not reliquidate the merchandise at the tariff classifications identified in the ruling, and continued to apply the classifications and duty rates under which the imports were liquidated. *See* Am. Compl. ¶¶ 11–13; Answer ¶¶ 11–13.

Plaintiff commenced this action to contest CBP's denial of its protest. Summons, July 2, 2013, ECF No. 1 (subsequently amended by ECF No. 10); Compl., July 2, 2013, ECF No. 5 (subsequently amended by ECF No. 11). Plaintiff alleges that both models of its merchandise are properly classified within subheading 8473.30.51, HTSUS. Am.

[6] Although CBP Headquarters' ruling relied on the 2012 editions of the HTSUS and Explanatory Notes, the implicated headings, subheadings, and explanatory notes are substantively the same in relevant part to the 2011 editions on which this court's analysis relies.

Compl. at 7; *see* Pl.'s Br. at 15–31. Specifically, Plaintiff alleges that although heading 8473, HTSUS, excludes "covers, carrying cases and the like," the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes") to that heading carve out an exception to the exclusion for covers that are also stands, like the Smart Cover. *See* Pl.'s Br. at 20–26. The Explanatory Note Plaintiff invokes states,

> [b]ut [ ] heading [8473, HTSUS] excludes covers, carrying cases and felt pads: these are classified in their appropriate headings. It also excludes articles of furniture (e.g. cupboards or tables) whether or not specifically designed for office use (heading 94.03). However, stands for machines of headings 84.69 to 84.72 not normally usable except with the machines in question, remain in this heading.

EN 84.73. Defendant contends that the plastic Smart Cover model is not classifiable within subheading 8473.30.51, HTSUS, because it is a cover and covers are explicitly excluded from that subheading and that the Explanatory Note's exception applies to stands of furniture, which the Smart Cover is not. *See* Def.'s Resp. Br. at 10–17. As to the leather Smart Cover model, Defendant contends that Plaintiff failed to allege a redressable injury and that the claim should be dismissed for lack of jurisdiction. *See id.* at 7–8. On September 20, 2017, the court held oral argument. Partially Closed Oral Arg., Sept. 20, 2017, ECF No. 87 ("Oral Arg.").

This action was reassigned pursuant to 28 U.S.C. § 253(c) (2012)[7] and Rule 77(e)(4) of the Rules of the U.S. Court of International Trade. *See* Order of Reassignment, Jan. 9, 2019, ECF No. 104.

STANDARD OF REVIEW

The court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

[7] Further citations to Titles 19 and 28 of the U.S. Code are to the 2012 edition.

UNDISPUTED FACTS

Plaintiff is the importer of record of the merchandise in the one entry at issue in this case, which entered at the port of San Francisco International Airport, San Francisco, California on January 28, 2011. Am. Compl. ¶ 20; Answer ¶ 20; Pl.'s [56.3 Statement] ¶ 2, Mar. 1, 2019, ECF No. 117–2 ("Pl.'s 56.3 Statement") (appearing as Ex. A to Pl.'s Br.); Def.'s Resp. Pl.'s [56.3 Statement] ¶ 2, Mar. 1, 2019, ECF No. 115–2 ("Def.'s Resp. Pl.'s 56.3 Statement"). The merchandise consists of two models of the Smart Cover. Def.'s 56.3 Statement ¶ 1; Pl.'s Resp. Def.'s 56.3 Statement ¶ 1. The two models differ as to their outer layer—one is composed of plastic,[8] the other of leather. Def.'s 56.3 Statement ¶ 3; Pl.'s Resp. Def.'s 56.3 Statement ¶ 3. CBP liquidated the former merchandise under subheading 6307.90.98, HTSUS, dutiable at seven percent, and the latter merchandise under subheading 4205.00.80, HTSUS, duty free. Def.'s 56.3 Statement ¶¶ 4–5; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 4–5. Plaintiff filed a timely protest. Pl.'s 56.3 Statement ¶¶ 4–5; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 4–5.

The Smart Cover is rectangular in shape and is constructed of rectangular panels that enable the user to fold the Smart Cover into a "stand" position or to reveal the iPad 2's back facing camera. Pl.'s 56.3 Statement ¶ 12; Def.'s Resp. Pl.'s 56.3 Statement ¶ 12; Def.'s 56.3 Statement ¶¶ 27, 35; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 27, 35. It is sized to fit directly and precisely over the screen of an iPad 2, and was designed to be used exclusively and only with that device. Pl.'s 56.3 Statement ¶¶ 16–19; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 16–19. The Smart Cover's spine is an aluminum hinge. Def.'s 56.3 Statement ¶ 17; Pl.'s Resp. Def.'s 56.3 Statement ¶ 17. The Smart Cover aligns with the iPad 2 by means of magnets that are integrated into the edge of the iPad 2 and the Smart Cover's spine. Pl.'s 56.3 Statement ¶ 20; Def.'s Resp. Pl.'s 56.3 Statement ¶ 20. The magnets in the Smart Cover also allow it to remain attached to the iPad 2 when it is in transport or being moved. Def.'s 56.3 Statement ¶ 22; Pl.'s Resp. Def.'s 56.3 Statement ¶ 22.

The iPad 2 is a portable device, Def.'s 56.3 Statement ¶ 29; Pl.'s Resp. Def.'s 56.3 Statement ¶ 29, and is an automatic data processing machine classifiable under heading 8471, HTSUS. Pl.'s 56.3 Statement ¶ 11; Def.'s Resp. Pl.'s 56.3 Statement ¶ 11. The Smart Cover serves a subordinate function to the iPad 2 and is not essential to that

[8] Although both parties agree that the outer layer of one model is composed of plastic, *see, e.g.*, Def.'s 56.3 Statement ¶ 3, Pl.'s Resp. Def.'s 56.3 Statement ¶ 3, Plaintiff avers that the outer layers are more specifically "comprised of polyethylene and polyurethane." Pl.'s Resp. Def.'s 56.3 Statement ¶ 3.

machine's operation. Pl.'s 56.3 Statement ¶¶ 23, 25; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 23, 25. The iPad 2 contains a sensor that can detect whether the Smart Cover is open or closed. Def.'s 56.3 Statement ¶ 24; Pl.'s Resp. Def.'s 56.3 Statement ¶ 24. Magnets in the Smart Cover align with the sensor to darken and illuminate the screen. Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Specifically, when the Smart Cover is closed, the iPad 2 automatically enters sleep mode, and when it is open, the iPad 2 turns on without the user pressing any buttons. Def.'s 56.3 Statement ¶ 23; Pl.'s Resp. Def.'s 56.3 Statement ¶ 23; Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. When the Smart Cover is closed, its microfiber lining comes in direct contact with the screen of the iPad 2, Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13, and keeps the screen clean by "gently buff[ing] off any smudges or fingerprints[.]" Def.'s 56.3 Statement ¶¶ 19–20; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 19–20. The merchandise [[

]] Def.'s 56.3 Statement ¶ 18; Pl.'s Resp. Def.'s 56.3 Statement ¶ 18. The Smart Cover can be folded into two different positions that prop up the iPad 2 to facilitate video watching and typing. Pl.'s 56.3 Statement ¶¶ 27–28; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 27–28; Def.'s 56.3 Statement ¶ 25; Pl.'s Resp. Def.'s 56.3 Statement ¶ 25. When the Smart Cover is folded it creates a triangular position. Pl.'s 56.3 Statement ¶ 12; Def.'s Resp. Pl.'s 56.3 Statement ¶ 12.

DISCUSSION

I. Jurisdiction

The Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [Tariff Act of 1930, as amended, 19 U.S.C. § 1515]," 28 U.S.C. § 1581(a), and reviews such actions de novo. 28 U.S.C. § 2640(a)(1). The party seeking the Court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Constitution constrains the federal courts' jurisdiction to cases which involve "actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."); *see* U.S. Const. art. III, § 2, cl. 1. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy require-

ment of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, plaintiff must demonstrate that its claim represents an "injury in fact." *Id.* An "injury in fact" is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical[,]" "fairly traceable to the challenged action," and "likely" to be "redressed by a favorable decision." *Id.* at 560–61. Accordingly, regardless of a statutory grant of jurisdiction, the court must dismiss as non-justiciable any claim that fails to meet Article III criteria.

Plaintiff challenges CBP's decision to classify the leather Smart Cover under subheading 4205.00.80, HTSUS, a duty-free provision. Plaintiff alleges that although it incurred no duty upon liquidation, it nevertheless suffered an injury in fact as a result of needing to expend additional administrative costs to process, enter, and submit separate entry paperwork for the leather and plastic Smart Covers. *See* Pl.'s Post-Hearing Suppl. Br. at 1–3, Mar. 1, 2019, ECF No.117–4 ("Pl.'s Suppl. Br.").[9] Plaintiff also claims incorrect CBP classification decisions distort statistical records, which in turn affect its business strategies as to sales and manufacturing.[10] *Id.* at 2. Finally, Plaintiff contends that all Smart Covers need to be classified consistently, regardless of the material composing its outer layer, to ensure consistency in and clarity of classification decisions. *Id.* at 2–3. Defendant argues that Plaintiff's identified injuries do not rise to the level of a justiciable case or controversy. *See* Def.'s Suppl. Br. at 4–6.

Plaintiff does not have standing to challenge Customs' classification of the leather Smart Covers and therefore its claim is non-justiciable. Here, the leather Smart Covers were liquidated duty-free. Def.'s 56.3 Statement ¶ 5; Pl.'s Resp. Def.'s 56.3 Statement ¶ 5. This Court has held that challenges to the correctness of Customs' classification decisions where the liquidation is duty-free present a "moot question or an abstract proposition" because plaintiff has not suffered an injury or harm that the court's order can redress. *See 3V, Inc. v. United States*, 23 CIT 1047, 1049–52, 83 F. Supp. 2d 1351, 1353–55 (1999).

[9] In compliance with the court's February 8, 2019, letter, Plaintiff refiled the corrected confidential and public versions of its supplemental briefing; the original briefs can be found at ECF Nos. 94 and 95, filed November 30, 2017. Plaintiff did not refile the exhibits attached to the supplemental briefing.

[10] Plaintiff's argument that this Court has recognized, as a cognizable injury in fact, a competitive injury arising out of an incorrect categorization of an entry, *see* Pl.'s Suppl. Br. at 2 (citing *Luggage & Leather Goods Mfrs. Of America, Inc. v. United States*, 7 CIT 258, 268–69, 588 F. Supp. 1413, 1421–22 (1984)), is not persuasive. Unlike Plaintiff here, the plaintiffs in *Luggage & Leather Goods*, a domestic trade association and labor union, submitted uncontradicted evidence that the President's designation of a product as duty-free had caused them injury by negatively affecting their profitability, sales, employment, and economic health. *See Luggage & Leather Goods*, 7 CIT at 260, 268–69, 588 F. Supp. at 1415–16, 1421–22. In that case, therefore, the plaintiffs had alleged an actual and not speculative economic harm and supported their allegation.

Plaintiff's other bases for injury are broad and non-specific in nature and invoke unsubstantiated and speculative future economic harm.[11] Accordingly, Plaintiff failed to demonstrate that it suffered a legally cognizable injury arising from Customs' classification of the leather Smart Covers and its claim must be dismissed on Constitutional grounds. The Court, however, does have jurisdiction over Plaintiff's claim challenging Customs' classification of the plastic Smart Cover under subheading 6307.90.98, HTSUS, dutiable at seven percent. Plaintiff argues the plastic Smart Cover should be classified in subheading 8473.30.51, HTSUS, duty-free, and seeks a refund of the duties collected with interest. *See* Pl.'s Br. at 15–32; Am. Compl. at 7. Plaintiff has, therefore, alleged an economic injury that can be redressed by this court's order and this Court has jurisdiction over that claim pursuant to 28 U.S.C. § 1581(a).

II. Classification of the Plastic Smart Covers

Classification involves two steps. First, the court determines the proper meaning of the tariff provisions, which is a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the merchandise properly falls within the scope of the tariff provisions, which is a question of fact. *Id.* Where there is no genuine "dispute as to the nature of the merchandise, then the two-step classification analysis collapses entirely into a question of law." *Id.* at 965–66 (citation omitted). In such a case, the court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878

[11] To the extent Plaintiff alleges economic injury, i.e., additional administrative costs it will incur by having to enter the plastic and leather Smart Covers under different subheadings of the HTSUS, Pl.'s Suppl. Br. at 1–2, such injury is hypothetical and speculative. Plaintiff explains that it

> devotes significant time and employee resources to administrative work required in order to enter its merchandise. This administrative work includes, in no small part, data entry, coding, completing and filing forms necessary to enter goods into the United States pursuant to legal requirements. Should the denial of Plaintiff's protest by United States Customs and Border Protection ("CBP") in connection with the classification of the Smart Cover as reflected in HQ H216396 stand, Plaintiff will suffer economic injury in the form of lost resources resulting from the necessity to do additional administrative work in order to enter the Smart Covers with outer material of plastic under subheading 3926.90.99, HTSUS, and the Smart Covers with outer material of leather under subheading 4205.00.80, HTSUS.

Id. Thus, Plaintiff's alleged injury is that it will be economically harmed by the added necessity of filling out extra entry paperwork and/or expending more resources to process paperwork that involves an additional HTS number. Plaintiff makes no attempt to specifically identify or quantify these costs. The court refuses to recognize, as a basis for standing, theoretical costs incurred by a party or its staff needing to record, track, or otherwise process additional HTS numbers. Further, the recovery of hypothetical administrative costs or costs relating to business strategies are not among the remedies available for actions brought under 28 U.S.C. § 1581(a), as enumerated in 19 U.S.C. § 1514(a).

(Fed. Cir. 1984). The court must find the correct classification, irrespective of the subheadings asserted by the parties. *See id.*

A. The Meaning of the Tariff Terms

1. Heading 8473, HTSUS

Classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation ("GRIs"), which are part of the HTSUS statute. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728, 730 (Fed. Cir. 2014). The GRIs are applied in numerical order beginning with GRI 1. When determining the correct classification for merchandise, the court first construes the language of the headings in question "and any relative section or chapter notes." GRI 1; *La Crosse Technology, Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013); *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The terms of the HTSUS are "construed according to their common and commercial meanings, which are presumed to be the same." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court defines HTSUS tariff terms relying upon its own understanding of the terms and "may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc.*, 195 F.3d at 1379 (citation omitted). A heading that describes goods according to "their common and commercial meaning[,]" is an eo nomine provision and "will ordinarily include all forms of the named article." *Id.* (citations omitted).

The court may also be aided by the Explanatory Notes to help construe the relevant chapters where appropriate. *See StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). Although the "Explanatory Notes are not legally binding, [they] may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision." *Roche Vitamins*, 772 F.3d at 731. GRI 2 applies to unfinished or incomplete articles and mixtures or combinations of materials or substances.[12]

[12] GRI 2 provides:

> (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.
>
> (b) Any reference in a heading to a material or a substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.

GRI 2.

The court resorts to GRI 3 to determine the proper classification of a good that is prima facie classifiable under two or more headings of the HTSUS. When such a good is before the court, classification shall be based upon the following:

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3(a)–(c).[13]

Heading 8473, HTSUS, covers "Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472." The court discerns the common and commercial meanings of "accessory" and "covers" as found in subheading 8473.30.51, HTSUS, aided by dictionary definitions.

The term "accessory" is not defined by either the HTSUS or in the Explanatory Notes. Several dictionary definitions aid the court in discerning the common and commercial meaning of "accessory." *See Accessory*, Merriam-Webster.com, *available at* https://www.merriam-webster.com/dictionary/accessory (last visited Mar. 6, 2019) (*Accessory*: 1a : an object or device that is not essential in itself but adds to the beauty, convenience, or effectiveness of something else; b: a thing

[13] GRI 6 guides the court's determination of the appropriate subheading for the merchandise at issue and provides that

> the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above [GRIs], on the understanding that only subheadings at the same level are comparable.

GRI 6.

of secondary or lesser importance); Webster's Third New International Dictionary 11 (Philip Babcock Gove, Ph.D. & Merriam-Webster Editorial Staff eds. 1993) (*Accessory*: 1 a: a thing of secondary or subordinate importance (as in achieving a purpose or an effect) . . . b (1): an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else); *Accessory*, The American Heritage Dictionary of the English Language 10 (4th ed. 2000) (*Accessory* : 1.a. A subordinate or supplementary item; an adjunct. b. Something nonessential but desirable that contributes to an effect or result); *Accessory*, oed.com, *available at* http://www.oed.com/view/Entry/1046?redirectedFrom=accessory#eid (last visited Mar. 6, 2019) (*Accessory* : 2.a. A subordinate or auxiliary thing; an adjunct; an accompaniment); *see also Rollerblade, Inc. v. United States*, 24 CIT 812, 816–17, 116 F. Supp. 2d 1247, 1253 (defining the term "accessory" and finding that an accessory "must relate directly to the thing accessorized[ ]" and serve a subordinate or secondary function to the article at issue), aff'd 282 F.3d 1349, 1352 (Fed. Cir. 2002) (adopting the lower court's conclusion that an "'accessory' must bear a direct relationship to the primary article that it accessories."). An "accessory" is therefore something that relates directly to and serves a secondary or subordinate function to the item accessorized.

Heading 8473, HTSUS, however, affirmatively excludes parts or accessories that are "covers, carrying cases and the like[.]" Explanatory Note 84.73 to Chapter 84 (2011).[14] Reading the heading with the exclusion in mind, a cover or an item that is like a cover and a carrying case, even if produced as an accessory that is "suitable for use solely or principally with the machines of headings 84.69 to 84.72," is not included in heading 8473, HTSUS.

Several dictionary definitions aid the court in discerning the common and commercial meaning of "cover." *See Cover*, *Oxford English Dictionary* Vol. XIX, 1073 (J.A. Simpson & E.S.C. Weiner eds., Oxford University Press, 2nd ed. 1989) (*Cover*: I.1.a. That which covers: anything that is put or laid over, or that naturally overlies or overspreads an object, with the effect of hiding, sheltering, or enclosing it, often a thing designed or appropriated for the purpose; 3.d. Something that hides, conceals, or screens; a cloak, screen, disguise, pretense.); *Cover*, The American Heritage Dictionary of the English Language 432 (4th ed. 2000) (*Cover*: 1. Something that covers or is laid, placed, or spread over or upon something else, as: a. A lid or top. b. A binding or enclosure of a book or magazine. c. A protective

[14] All citations to the Explanatory Notes are to the 2011 version, the most recently promulgated edition at the time of the entries of the merchandise.

overlay, as for a mattress or furniture); *Cover*, oed.com, available at http://www.oed.com/view/Entry/43347?rskey=CFS7RB&result=1&isAdvanced=false#eid (last visited Mar. 6, 2019) (*Cover*: I. Generally: something that covers. 1.a. That which covers: anything that is put or laid over, or that naturally overlies or overspreads an object, with the effect of hiding, sheltering, or enclosing it; often a thing designed or appropriated for the purpose.); *Cover*, Merriam-Webster.com, *available at* https://www.merriamwebster.com/dictionary/cover (last visited Mar. 6, 2019) (*Cover*: 2: something that is placed over or about another thing: . . . c: an overlay or outer layer especially for protection); Webster's Third New International Dictionary 524 (Philip Babcock Gove, Ph.D. & Merriam-Webster Editorial Staff eds. 1993) (*Cover*: as a verb, 3: to put, lay, or spread something over, on, or before (as for protecting, enclosing, or masking)).[15] A "cover" is therefore something that goes over or encompasses a specific object and offers protection.

The Explanatory Notes, although not controlling, provide interpretive guidance. *E.T.* Horn Co. v. United States, 367 F.3d 1326, 1329 (Fed. Cir. 2004). The language of an Explanatory Note, however, may not be read as to contradict or narrow the language of the heading. *See Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1280–81 (Fed. Cir. 2016). The Explanatory Notes to heading 8473, HTSUS, include a standalone paragraph composed of three sentences that identify items that are excluded from that heading and establish an exception to the exclusion for a specific kind of item. EN 84.73. First, it states that "covers, carrying cases and felt pads" are excluded from heading 8473, HTSUS, and directs such items to "be classified in their appropriate headings." *Id.* Subsequently, in the second sentence, it states that "articles of furniture (e.g., cupboards and tables) whether or not specifically designed for office use (heading 94.03)" are also excluded. *Id.* However, the third sentence provides that "stands for machines of headings 84.69 to 84.72 not normally usable except with the machines in question, remain in [ ] heading [8473]." *Id.* Therefore, the first sentence identifies items that are affirmatively excluded from heading 8473, HTSUS, i.e., "covers, carrying cases and

[15] Defendant provides three additional definitions for "cover"—"[a]nything that covers, as a bookbinding, the front binding of a magazine, jar lid, box top, etc." Def.'s Resp. Br. at 11 (quoting Webster's New World Dictionary, 320 (3rd College Ed. 1988)); "[t]hat which covers or is laid over something else. 2. Shelter; protection; concealment, as from enemy fire;" and, as a verb, defined as "[t]o place something over or upon, as to protect or conceal[,]" *id.* (quoting Funk & Wagnalls, Standard College Dictionary, 311 (1973)); and "[s]omething that covers, as the lid of a vessel or the binding of a book...protection; shelter; concealment;" and, as a verb, defined as "to place something over or upon, as for protection or concealment[,]" *id.* (quoting The Random House Dictionary of the English Language, 336 (1969)). Plaintiff did not provide any definitions for "cover" to the court.

felt pads" and provides that such items are classifiable under other headings. EN 84.73. The first sentence is a complete thought that identifies items excluded from heading 8473, HTSUS, and directs how such items should be classified. The second sentence introduces "articles of furniture" as "also" being excluded from heading 8473, HTSUS, and in the third sentence qualifies the scope of the exclusion to retain in heading 8473, HTSUS, stands "not normally usable except" with machines like the iPad 2. *Id.* The Explanatory Note, therefore, carves out an exception for pieces of furniture that are stands and continues to consider such items as parts or accessories covered by heading 8473, HTSUS.[16] Otherwise, the Explanatory Note's first sentence would have simply read "the heading excludes covers, carrying cases, felt pads, and articles of furniture," the second sentence would have been omitted, and the sentence that reads, "[h]owever, stands for machines of headings 84.69 to 84.72, nor normally usable except with the machines in question, remain in [ ] heading [8473][,]" retained.

2. Heading 3926, HTSUS

Subheading 3926.90.99, HTSUS, covers "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other." Chapter 39 "plastics" refer to

> materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Note 1, Chapter 39, HTSUS. Further, "textiles and textile articles" of Section XI, of which Chapter 63 is part, are not covered by Chapter 39. Note 2(p), Chapter 39, HTSUS. Heading 3926, HTSUS, is an "other" provision and covers articles of plastic not classifiable elsewhere in Chapter 39. Heading 3926, HTSUS, subdivides into subheadings that identify more specifically "other" kinds of plastics cov-

[16] Plaintiff's supplemental brief argues that a [[ ]] of countries have read heading 8473 to cover Smart Covers for the iPad 2 and that this court should be informed by such rulings for the sake of having a consistent and uniform reading of the HTS. *See* Pl.'s Suppl. Br. at 3–4. This Court reviews Customs' classification de novo, *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006), based on the record made before it. 28 U.S.C. § 2640(a)(1). The Supreme Court in *Mead* addressed the level of deference afforded to U.S. Customs rulings, explaining that deference is commensurate with the power to persuade. *See United States v. Mead*, 533 U.S. 218, 231–34 (2001). The rulings of foreign tribunals are entitled to respectful consideration. *Cummins*, 454 F.3d 1366. The rulings submitted here do not persuade the court.

ered and include items such as rain apparel, school or office supplies, furniture fittings, imitation gemstones and beading, and apparel and like accessories. Subheading 3926.90.99, HTSUS, is the final subdivision and covers any other remaining articles of plastic.

3. Heading 6307, HTSUS

Subheading 6307.90.98, HTSUS, covers "Other made up articles, including dress patterns: Other: Other." Goods classified under heading 6307, HTSUS, are "made up articles of any textile material" that are not mentioned elsewhere in the Nomenclature or specifically included in headings of Section XI (covering Chapters 50 through 63 of the HTSUS). EN 63.07. Heading 6307, HTSUS, is an "other" provision that covers made up articles of any textile materials not classifiable under headings 6301 through 6306, HTSUS. Heading 6307, HTSUS, subdivides into subheadings that cover a wide range of "other" made up textile articles like dishcloths and similar cleaning cloths, lifebelts and lifejackets, lacings for corsets and footwear, surgical towels and specific bedding items, pet toys, and banners. Subheading 6307.90.98, HTSUS, is the final subdivision and covers any other remaining articles made of textile fabric.

B. The Merchandise at Issue

Here, there is no dispute as to the characteristics of Plaintiff's merchandise. The parties agree that the Smart Cover serves a subordinate function to the iPad 2 and is not essential to that machine's operation. Pl.'s 56.3 Statement ¶¶ 23, 25; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 23, 25. The parties also agree that the Smart Cover was designed to fit precisely over the iPad 2, that it attaches to the iPad 2 by means of magnets that are embedded into the edge of the iPad 2 and the spine of the Smart Cover, and that it may be folded as to elevate the iPad 2 and facilitate video watching and typing. Pl.'s 56.3 Statement ¶¶ 17–20, 28; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 17–20, 28. Further, the parties agree that the Smart Cover's microfiber lining comes in direct contact with the screen of the iPad 2 when in the closed position, Pl.'s 56.3 Statement ¶ 13; Def.'s Resp. Pl.'s 56.3 Statement ¶ 13, and keeps the screen clean by "gently buff[ing] off any smudges or fingerprints[.]" Def.'s 56.3 Statement ¶¶ 19–20; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 19–20. Specifically, it [[

]]. Def.'s 56.3 Statement ¶ 18; Pl.'s Resp. Def.'s 56.3 Statement ¶ 18.

An "accessory" is something that relates directly to and serves a secondary or subordinate function to the item accessorized. A "cover" is something that goes over or encompasses a specific object and offers

protection. The undisputed facts establish that the Smart Cover meets both the definition of an accessory and of a cover. A Smart Cover is an accessory because it serves a subordinate function to the item it accessories, i.e., the iPad 2. The Smart Cover also meets the requirements of the definition of a cover because it perfectly overlays and hides the screen of the iPad 2, thereby serving a protective function. Therefore, although the Smart Cover is an accessory, it is also a cover and "covers, carrying cases and the like" are excluded from heading 8473, HTSUS.

Nothing in the Explanatory Note contradicts the court's construction of the exclusionary language in heading 8473, HTSUS, or its application in this case. In fact, Explanatory Note 84.73 states that "covers, carrying cases and felt pads" are excluded from heading 8473, HTSUS, and only carves out an exception for articles of furniture that have stand capabilities and that are "not normally usable except" with machines listed in headings 84.69 through 84.72, of which the iPad 2 is part. Accordingly, even if the Smart Cover provides a stand function, it is not the kind of stand that the Explanatory Note encompasses, and it is excluded from heading 8473, HTSUS.[17]

Plaintiff contends that the Explanatory Note's exception for stands should be read as modifying both the first and second sentences of the

[17] Plaintiff argues that because the Smart Cover performs several functions—covers, acts as a stand to facilitate typing and video watching, and conserves battery power—it cannot be reduced to just being a cover. Pl.'s Br. at 26–27. Instead, Plaintiff contends that the Smart Cover is a "composite machine," as defined by Note 3 to Chapter 84, and a composite machine's classification is determined by the component "which performs the principal function[;]" which for the Smart Cover, Plaintiff argues, is to be an accessory to the iPad 2. *Id.* at 26 (quoting Note 3, Chapter 84). Plaintiff cannot argue that the Smart Cover is both a composite machine and an accessory to a machine. Further, Plaintiff misapplies Note 3 to Chapter 84 because a "machine," according to Note 5 to Chapter 84 is defined as "any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of chapter 84 or 85." Notes 3 and 5, Chapter 84. A Smart Cover is not a machine recognized by the relevant headings.

Plaintiff also argues that the Smart Cover is classifiable under heading 8473, HTSUS, "[s]hould the Court choose to analyze [its] classification . . . through GRI 3(b) instead of GRI 1[.]" *See* Pl.'s Br. at 27. Plaintiff's argument misstates how the GRIs, which are statutory, operate. The GRIs are applied in numerical order and are not simply general interpretive principles that can be mixed and matched. The court only proceeds to a GRI 3 analysis if a good is prima facie classifiable under two or more headings of the HTSUS. In fact, the legislative history of the GRIs and relevant case law reveal that the HTSUS is constructed as to enable "most classification questions [to] be answered by GRI 1," and diminish the "need to delve into the less precise inquiries presented by GRI 3." *Telebrands Corp. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1277, 1280 (2012) (footnotes omitted), *aff'd*, 522 F. App'x 915 (Fed. Cir. 2013). For the Smart Cover to be prima facie classifiable as an accessory under heading 8473, HTSUS, it cannot be a cover because "covers, carrying cases and the like" are specifically excluded. As explained above, because the Smart Cover is a cover and is excluded from heading 8473, HTSUS, it cannot be prima facie classifiable in heading 8473, HTSUS, for purposes of triggering a GRI 3 analysis and prompting the court to inquire into the good's essential character.

standalone paragraph, narrowing the exclusionary language in heading 8473, HTSUS, to "covers, carrying cases and the like" that are not also stands. *See* Pl.'s Br. at 22–25; Pl.'s Reply Br. at 9–12. Plaintiff's suggestion cannot be reconciled with the structure of the standalone paragraph when read in its entirety. As discussed above, the construction of the standalone paragraph in the Explanatory Note reveals that only stands that are articles of furniture are exempt from the exclusionary language in heading 8473, HTSUS, and remain classified in that heading. Plaintiff's construction of the Explanatory Note is unpersuasive.[18]

The undisputed facts demonstrate that the Smart Cover is not solely composed of one material. In addition to the plastic outer layer, the Smart Cover contains a microfiber lining, an aluminum hinge, and magnets. Pl.'s 56.3 Statement ¶¶ 13, 20; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 13, 20; Def.'s 56.3 Statement ¶¶ 3, 17; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 3, 17. The Smart Cover is therefore a composite good that is prima facie classifiable under either subheading 3926.90.99, HTSUS, that provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other[ ]" or subheading 6307.90.98, HTSUS, that provides for "Other made up articles, including dress patterns: Other: Other."[19] To classify the Smart Cover, the court must determine which component provides the good its essential character. GRI 3(b).[20]

The plastic outer layer of the Smart Cover gives the merchandise its essential character. The plastic layer protects the screen and is the

[18] Plaintiff also argues that the word "stand" can include items that are not strictly articles of furniture and that Defendant acknowledges the broader definition. Pl.'s Reply Br. at 11–12; *see also* Oral Arg. at 01:41:23–01:41:42 (stating that Defendant acknowledges that a stand encompasses items other than furniture (citing Def.'s Reply Br. at 12)). Although Defendant acknowledges that "a stand is not required to be furniture[,]" it argues, and the court agrees, that the context of Explanatory Note 84.73 limits the kinds of stands that remain in heading 8473, HTSUS, to stands that are articles of furniture. Def.'s Reply Br. at 12.

[19] Defendant contends that Plaintiff "concedes that the dispute as to the plastic Smart Covers is whether they are properly classifiable in Heading 3926 or Heading 8473." Def.'s Resp. Br. at 8 (citing Pl.'s Br. at 12). Plaintiff does not make such a concession on the page Defendant cites and the court, having reviewed all of Plaintiff's submissions, cannot locate such a concession elsewhere. It is possible that Defendant infers the concession because Plaintiff, in identifying the "Tariff Provisions at Issue" on the cited page, omits subheading 6307.90.98, HTSUS, covering other made up articles of textile material. Pl.'s Br. at 12. In any event, the court is charged with finding the correct classification. *Jarvis*, 733 F.2d at 878.

[20] Here, the court proceeds to a GRI 3(b) analysis because the Smart Cover is excluded from heading 8473, HTSUS, under GRI 1, and given that GRI 2(b) provides that "[a]ny reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance[,]" and the Smart Cover is both an article of plastic and an article of textile, it is prima facie classifiable in two headings, 3926, HTSUS, and 6307, HTSUS. The court is therefore statutorily directed to a GRI 3(b) analysis.

backing onto which the microfiber lining is attached. Def.'s 56.3 Statement ¶¶ 16, 19; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 16, 19. It also encapsulates the magnets that align with the sensor in the iPad 2 that prompt the machine to enter or exit sleep mode. Def.'s 56.3 Statement ¶¶ 23–24; Pl.'s Resp. Def.'s 56.3 Statement ¶¶ 23–24; Pl.'s 56.3 Statement ¶ 35; Def.'s Resp. Pl.'s 56.3 Statement ¶ 35. Finally, the plastic outer layer is the part that is folded to create the two different positions that prop up the iPad 2 to facilitate video watching and typing. Pl.'s 56.3 Statement ¶¶ 27–28; Def.'s Resp. Pl.'s 56.3 Statement ¶¶ 27–28.

CONCLUSION

For the foregoing reasons, the plastic covers are properly classifiable within subheading 3926.90.99, HTSUS, and Plaintiff's challenge to Customs' classification of the leather Smart Covers is dismissed. Therefore, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted. Judgment will enter accordingly.

Dated: March 11, 2019
New York, New York

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

Slip Op. 19–35

MACLEAN POWER, L.L.C., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 17–00265

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; now therefore, in conformity with said decision it is hereby

ORDERED, ADJUDGED, and DECREED that the *Final Results of Redetermination Pursuant to Court Remand*, Ct. No. 17–00265, Doc. No. 51, by the United States Department of Commerce are **SUSTAINED**.

Dated: March 19, 2019
New York, New York

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

Slip Op. 19–79

PERFECTUS ALUMINUM, INC., Plaintiff, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 18–00085

[Defendant-Intervenor's motion to dismiss is denied. Plaintiff's motion to supplement the record by taking judicial notice of the complaint in *United States v. Real Property Located at 10681 Production Avenue, Fontana California*, Court No. 5:17-cv-01872 is granted. Plaintiff's motion for judgment on the agency record is denied.]

Dated: July 1, 2019

David J. Creegan, White and Williams LLP, of Philadelphia, PA, argued for plaintiff. With him on the brief was *Platte B. Moring, III*; and *J. Kevin Horgan*, deKieffer & Horgan, of Washington, DC, argued for plaintiff.

Amie Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Orga Cadet*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Robert E. DeFrancesco, III, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was Alan H. Price.

OPINION

Katzmann, Judge:

Can an electronic transmission — or only snail mail — qualify as a "mailing?" Do certain pallet products fall within the plain meaning of the scope of an order seeking to effectuate fair trade for domestic producers and industry? This case involves these jurisdictional and scope interpretation issues. Plaintiff Perfectus Aluminum, Inc., ("Perfectus") is an importer and distributor of aluminum extrusions. Defendant-Intervenor Aluminum Extrusions Fair Trade Committee ("AEFTC") is a trade association of domestic producers of aluminum extrusions that requested a scope ruling finding that Perfectus's pallet products composed of aluminum extrusions are subject to the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) ("*Antidumping Duty Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) ("*Countervailing Duty Order*") (collectively, the "*Orders*"). The United States Department of Commerce ("Commerce") found that Perfectus's merchandise is within the plain language of the scope of

the *Orders* and instructed United States Customs and Border Protection ("Customs") to continue to suspend liquidation of entries back to the date of the first suspension of Perfectus's merchandise. Perfectus appeals Commerce's determination. AEFTC counters that this appeal is untimely because it was commenced more than thirty days after notification of the final scope ruling through email notification, that the case should be dismissed for lack of jurisdiction, and that, in any event, Commerce did not err in its scope ruling. The court (1) concludes that jurisdiction over this action exists because Perfectus's complaint seeking review of the scope ruling was filed within thirty days of the mailing by post of that ruling as required by statute and was therefore timely, and (2) sustains Commerce's finding that the pallet products fall within the plain language of the scope of the *Orders*.

BACKGROUND

I. Legal and Regulatory Framework of Scope Reviews Generally

Dumping occurs when a foreign company sells a product in the United States for less than fair value — that is, for a lower price than in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012)). Similarly, a foreign country may provide a countervailable subsidy to a product and thus artificially lower its price. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To empower Commerce to offset economic distortions caused by dumping and countervailable subsidies, Congress enacted the Tariff Act of 1930.[1] *Sioux Honey Ass'n*, 672 F.3d at 1046–47. Under the Tariff Act's framework, Commerce may — either upon petition by a domestic producer or of its own initiative — begin an investigation into potential dumping or subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Id.*

Because the description of products contained in the scope of an antidumping or countervailing duty order must be written in general terms to encompass the full range of subject merchandise, issues may arise as to whether a particular product is included within the scope of the order. *See* 19 C.F.R. § 351.225(a). To provide producers and importers with notice as to whether their products fall within the scope of an antidumping or countervailing duty order, Congress authorized Commerce to issue scope rulings clarifying "whether a particular type of merchandise is within the class or kind of merchandise

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

described in an existing . . . order." 19 U.S.C. § 1516a(a)(2)(B)(vi). As "no specific statutory provision govern[s] the interpretation of the scope of antidumping or countervailing orders," Commerce and the courts developed a three-step analysis. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015); *Polites v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1352, 1354 (2011); 19 C.F.R. § 351.225(k).

Because "[t]he language of the order determines the scope of an antidumping duty order[,]" any scope ruling begins with an examination of the language of the order at issue. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). If the terms of the order are unambiguous, then those terms govern. *Id.* at 1382–83. "[T]he question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists is a question of law that we review de novo." *Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017). "Although the scope of a final order may be clarified, it can not be changed in a way contrary to its terms." *Duferco*, 296 F.3d at 1097 (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). For that reason, "if [the scope of an order] is not ambiguous, the plain meaning of the language governs." *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012).

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

If Commerce determines that the terms of the order are either ambiguous or reasonably subject to interpretation, then Commerce "will take into account . . . the descriptions of the merchandise contained in the petition, the initial investigation, and [prior] determinations [of Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1) ("(k)(1) sources"); *Polites*, 755 F. Supp. 2d at 1354; *Meridian*, 851 F.3d at 1382. To be dispositive, the (k)(1) sources "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question."

Polites, 755 F. Supp. 2d at 1354 (quoting *Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)). If Commerce "can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of . . . section [351.225], whether a product is included within the scope of an order . . . [Commerce] will issue a final ruling[.]" 19 C.F.R. § 351.225(d).

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

II. Factual and Procedural History of the Orders

On May 26, 2011, after the International Trade Commission had determined that imports of certain aluminum extrusions were materially injuring United States industry, Commerce issued antidumping and countervailing duty orders covering 1xxx, 3xxx, and 6xxx aluminum extrusions from China. *Orders*. The scope of the *Orders* reads, in relevant part:

> The merchandise covered by the order is aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 . . .
>
> The scope . . . excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

Antidumping Duty Order, 78 Fed. Reg. at 30,650–51.[3]

III. Factual and Procedural History of this Case

On March 3, 2017, AEFTC filed a request with Commerce to determine that certain 6xxx aluminum extrusions from China are within the scope of the *Orders*. Petitioner's Scope Ruling Request for 6xxx Series Aluminum Pallets (Mar. 3, 2017), Public Record ("P.R.") 1–7, Confidential Record ("C.R.") 1–7 ("6xxx Scope Ruling Request"). In

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

[3] The *Antidumping Duty Order* and *Countervailing Duty Order* are materially similar for purposes of this proceeding.

the 6xxx Scope Ruling Request, AEFTC described the merchandise at issue as follows: "extruded profiles made of series 6xxx aluminum alloy cut-to-length and welded in the shape of pallets . . . regardless of producer or exporter." *Id.* at 5.

Commerce issued the requested scope ruling on June 13, 2017, finding that the merchandise at issue is subject to the *Orders*. *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Certain Aluminum Pallets* (June 13, 2017), P.R. 28 ("*6xxx Final Scope Ruling*"). Specifically, Commerce found that the merchandise at issue is within the plain language of the scope of the *Orders*, the finished merchandise exclusion does not apply here, and the merchandise at issue is in existence. *Id.* at 13, 15. Commerce further instructed Customs to continue to suspend liquidation of entries back to the merchandise at issue's date of first suspension. *Id.* at 15. On March 27, 2018, upon realizing that it had not previously done so, Commerce mailed the notice of the *6xxx Final Scope Ruling*.[4] *See* Memorandum re: Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: March 27, 2018 Mailing of Final Scope Ruling on Certain Aluminum Pallets, (June 4, 2017), P.R 34 ("Proof of Mailing"). Within thirty days of that mailing, Perfectus filed a summons and complaint with this court. Summ., Apr. 23, 2018, ECF No. 1; Compl., Apr. 25, 2018, ECF No. 9.

On August 3, 2018, AEFTC moved to dismiss this case on the grounds that Perfectus's complaint was untimely. Def.-Inter.'s Mot. to Dis., ECF No. 25 ("Def.-Inter.'s MTD Br."). Perfectus and the Government both filed briefs opposing AEFTC's motion on August 28, 2018. Pl.'s Resp. to Mot. to Dis., ECF No. 28 ("Pl.'s Resp. to MTD"); Def.'s Resp. to Mot. to Dis., ECF No. 26 ("Def.'s Resp. to MTD"). AEFTC filed a brief in further support of its motion to dismiss on October 29, 2018. Def.-Inter.'s Mot. to Dis. Reply, ECF No. 32 ("Def.-Inter.'s MTD Reply"). On October 30, 2018, Perfectus moved for judgment on the agency record pursuant to Rule 56.2 of this court. Pl.'s Mot. for J. on the Agency Record, ECF No. 34. Earlier, on August 28, 2018, Perfectus had filed its brief in support of a motion for judgment on the agency record. Pl.'s 56.2 Br., ECF No. 27. The Government and AEFTC both responded to Perfectus's motion on November 16, 2018. Def.'s Resp. to 56.2 Mot., ECF No. 36; Def.-Inter.'s Resp. to 56.2 Mot., ECF No. 37. Perfectus filed its reply to the Government and AEFTC

[4] Although the communications themselves are not part of the administrative record, Perfectus states that on (i) August 15, 2017, it alerted Commerce that it had yet to receive mailed notice of the *6xxx Final Scope Ruling* and (ii) on March 26, 2018, Perfectus threatened to sue Commerce if it did not provide mailed notice of the *6xxx Final Scope Ruling*. Pl.'s Opp'n to Mot. to Dismiss, Aug. 28, 2018, ECF No. 28 at Exs. A, B.

on December 31, 2018. Pl.'s Reply to 56.2 Mot., ECF No. 39. On January 10, 2019, Perfectus moved to supplement the record. Pl.'s Br. for Mot. to Suppl., ECF No. 42. The Government responded on February 8, 2019. Def.'s Resp. to Mot. to Suppl., ECF No. 48.[5] Oral argument was held before this court on March 20, 2019. ECF No. 53. On June 12, 2019, the parties filed supplemental submissions. Pl.'s Suppl. Br., ECF No. 60; Def.'s Suppl. Br., ECF No. 61; Def.-Inter.'s Suppl. Br., ECF No. 62.

DISCUSSION

I. Motion to Dismiss

Subject matter jurisdiction constitutes a threshold inquiry. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Where subject matter jurisdiction is challenged pursuant to USCIT Rule 12(b)(1), "the burden rests on plaintiff to prove that jurisdiction exists." *Lowa, Ltd. v. United States,* 561 F. Supp. 441, 443 (1983), *aff'd,* 724 F.2d 121 (Fed. Cir. 1984) (quoted in *Pentax Corp. v. Robison,* 125 F.3d 1457, 1462 (Fed. Cir. 1997), *modified in part,* 135 F.3d 760 (Fed. Cir. 1998)). Here, AEFTC filed a motion to dismiss, alleging that Perfectus failed to timely commence this action as required by the jurisdictional requirements set forth in 19 U.S.C. § 1516a(a)(2)(A), and that as a result, the court lacks subject matter jurisdiction over Perfectus's complaint pursuant to USCIT Rule 12(b)(1). *See* Def.-Inter.'s MTD at 1.

Perfectus, as plaintiff, contends that there is subject matter jurisdiction. The defendant, the Government — though urging that on the merits plaintiff's motion for judgment on the agency record should fail — at the same time supports Perfectus's contention that the complaint was timely filed and that this court has jurisdiction.

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[5] The court grants the motion to supplement and takes judicial notice of the fact that the United States filed a complaint in United States District Court for the Central District of California in a matter captioned *United States v. Real Property Located at 10681 Production Avenue, Fontana California*, Court No. 5:17-cv-01872. *See United States v. New-Form Mfg. Co.*, 27 CIT 905, 917 n.14, 277 F. Supp. 2d 1313, 1325 n.14 (2003) (noting that courts frequently take judicial notice of other courts' records) (citing *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1417 n.7 (Fed. Cir. 1997)). The court further takes judicial notice of the contents of that complaint, but only to the extent that the United States made the allegations and other statements contained within and filed them in district court. The court does not take judicial notice of the contents of the complaint for the truth of what it asserts because the factual allegations contained therein may be subject to reasonable dispute. *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *see also* 28 U.S.C. § 2641 (stating that the Federal Rules of Evidence apply to all civil actions, with certain exceptions not relevant here, in the U.S. Court of International Trade). Even if the court were to take judicial notice of the complaint for the truth of what it asserts, this matter's disposition would not change.

Perfectus filed this action asserting jurisdiction under 28 U.S.C. § 1581(c). Compl. ¶ 3; First Amended Compl. ¶ 3, May 2, 2018, ECF No. 12. 28 U.S.C. § 1581(c) confers on this court "exclusive jurisdiction of any civil action commenced under section 516A . . . of the Tariff Act of 1930," as amended (the "Act"). 28 U.S.C. § 1581(c). The Act was amended to include the provisions on judicial review through the Trade Agreements Act of 1979. H. Rep. No. 96–317 at 179–82 (1979); S. Rep. 96–249 at 27–28 (1979). Section 516A of the Act, *codified at* 19 U.S.C. § 1516a, enumerates eight different determinations in antidumping and countervailing duty proceedings subject to judicial review. Through the Trade and Tariff Act of 1984, Congress added the provision to 19 U.S.C. § 1516a specifically identifying scope rulings as reviewable determinations and providing the deadline to appeal such determinations. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi) (making reviewable "[a] determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order"); H. Rep. No. 98–1156, at 91 (1984) (Conf. Rep).

The statute distinguished between those determinations for which the deadline for filing an appeal would be based on the date of publication of the applicable determination in the Federal Register and those determinations for which the deadline for filing an appeal would be based on the date of mailing of a determination. Section 1516a(a)(2) provides that, "in general," judicial review of determinations on the record must be commenced within thirty days after "the date of publication in the Federal Register." 19 U.S.C. § 1516a(a)(2)(A)(i). However, judicial review of a determination described in clause (vi) of subparagraph (B) — such as the *6xxx Final Scope Ruling* currently before the court — must be commenced thirty days after "the date of mailing of a determination." 19 U.S.C. § 1516a(a)(2)(A)(ii).[6] This distinction was necessary for scope determinations by Commerce because they, unlike the other determinations identified in the statute, were not published in the Federal

[6] 19 U.S.C. § 1516a(a)(2)(A) provides that:

(A)In general.

Within thirty days after -

(ii) the date of mailing of a determination described in clause (vi) of subparagraph (B), an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

Register.[7] When these provisions were added to the statute, in 1984, email or electronic notification of Commerce's determinations was not possible. Thus, for a determination that would not be published in the Federal Register, the only way to notify interested parties of a final ruling was by post.

Section 1516a(a)(2)(A)(ii) does not define "mailing." With respect to review of a scope determination, Commerce has interpreted "mailing" to mean the transmission of materials by mail or courier as understood in common parlance — for example, via the United States Postal Service — and as was understood in 1984 when the statute was enacted. Here, Commerce issued a final scope ruling concerning the merchandise at issue on June 13, 2017, and subsequently mailed that final scope ruling to Perfectus on March 27, 2018. Proof of Mailing. Perfectus commenced this action within thirty days of that mailing: on April 23, 2018, Perfectus filed a summons with this court. Summ. Perfectus (joined by the Government) thus asserts that it commenced its action within the requisite thirty days and that this court therefore has jurisdiction.

AEFTC, however, argues that Perfectus did not timely commence this action. AEFTC notes that Commerce notified the parties of the final scope ruling through an email notification produced by the Antidumping and Countervailing Duty Centralized Electronic Service System ("ACCESS")[8] on June 14, 2017. Def-Inter.'s MTD Br. at Ex. 3. According to AEFTC, this email notification constitutes a "mailing," and thus Perfectus's commencement of this action on April 23, 2018 was outside the statutory window and untimely. AEFTC asserts that "the Court should interpret 'mailing' within the meaning of 19 U.S.C. § 1516a(a)(2)(A) to include electronic mail notifications" because "[t]he term mail in the statute does not expressly limit itself to only hand mailing." *Id.* at 7.

The court does not consider AEFTC's argument persuasive. "Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to

[7] Some years after the 1984 statute was enacted, Commerce's regulations regarding Federal Register publication provided for publication on a quarterly basis of scope rulings (although there was no amendment to the statute). *See* 19 C.F.R. § 351.225, 62 Fed. Reg. 27,405 (May 19, 1997) ("On a quarterly basis, the Secretary will publish in the Federal Register a list of scope rulings issued within the last three months. This list will include the case name, reference number, and a brief description of the ruling.").

[8] ACCESS is Commerce's centralized electronic service system that has been in effect since 2010. *See Import Administration IA ACCESS Pilot Program*, 75 Fed. Reg. 32,341 (Dep't of Commerce June 8, 2010); *Antidumping and Countervailing Duty Proceedings* : *Electronic Filing Procedures; Administrative Protective Order Procedures*, 75 Fed. Reg. 44,163 (Dep't of Commerce July 28, 2010); *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures*, 76 Fed. Reg. 39,263 (Dep't of Commerce July 6, 2011).

be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986) (citing *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981)); *see also Orlando Food Corp. v. United States*, 423 F.3d 1318, 1320 (Fed. Cir. 2005) ("Courts are not free to infer waivers of sovereign immunity.") (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)). Where a waiver of sovereign immunity is at issue, the language of the statute must be strictly construed, and any ambiguities resolved in favor of immunity. *See Orlando Food*, 423 F.3d at 1320 (noting that "any express waivers must be narrowly construed") (citing *Library of Cong.*, 478 U.S. at 318); *United States v. Williams,* 514 U.S. 527, 531 (1995) (stating that, in resolving questions about the waiver of sovereign immunity, "we may not enlarge the waiver beyond the purview of the statutory language"). Here, a strict construction limits the definition of "mailing" to a physical, hand-mailing — extant in 1984 when the legislation was enacted — as opposed to an electronic missive (not then available). AEFTC has not presented any authority suggesting that Congress intended the "date of mailing" to include transmission by electronic means, nor has the court found such authority.

The court's conclusion is consistent with this court's prior, persuasive cases addressing whether electronic forms of communication constitute "mailing." In *Bond Street, Ltd. v. United States*, where plaintiff commenced the action for review after fax notification but there was no mailing of the final scope ruling, this court held that a fax did not satisfy the statutory mailing requirement and dismissed the matter, without prejudice, for want of jurisdiction. 31 CIT 1691, 1695, 521 F. Supp. 2d. 1377, 1381–82 (2007) (citing *Georgetown Steel*, 801 F.2d at 1312). Similarly, in *Medline Indus. v. United States*, where plaintiff commenced the action after email notification but before the mailing of the final scope ruling, this court held that an "email message" did not satisfy the statutory "mailing" requirement and disposed of the matter in the same fashion as the *Bond Street* court. 37 CIT __, __, 911 F. Supp. 2d 1358, 1361–62 (2013).[9]

AEFTC contends that *Bond Street* and *Medline* are distinguishable because the plaintiffs in *Bond Street* and *Medline* did not wait "an

[9] *Bond Street* and *Medline* were cases in which this court dismissed actions as premature because a party attempted to commence an action *before* the mailing of a final scope ruling. Conversely, this court dismissed an action as untimely where a party failed to commence an action within thirty days of the mailing of a final scope ruling. *See Bags on the Net Corp. v. United States*, 33 CIT 315, 325, 612 F. Supp. 2d 1341, 1348 (2009) (dismissing the action because plaintiff commenced the action more than 75 days after the mailing of the final scope ruling). In these cases, in contrast to the case now before the court, the Government challenged the court's jurisdiction.

unreasonable amount of time" prior to filing. Perfectus's diligence is not relevant here because (i) the statute does not contain a diligence requirement and (ii) Perfectus filed within thirty days of Commerce's physical mailing. Even if the statute contained a diligence requirement, Perfectus notified Commerce in August 2017 that it had yet to receive a physical mailing of the final scope ruling. Additionally, Perfectus even threatened litigation to compel the mailing. *See supra*, n.4.

AEFTC also argues that *Bond Street* and *Medline* are distinguishable because the underlying proceedings pre-date ACCESS's use in antidumping and countervailing duty proceedings, and that an ACCESS notification constructively satisfies the "mailing" requirement. General widespread use of email and fax technology pre-dates both *Bond Street* and *Medline*, yet the court in those cases declined to expand the statutory definition out of concern for impermissibly enlarging the waiver of sovereign immunity contained in section 1516a(a)(2)(A). *See, e.g., Medline*, 911 F. Supp. 2d at 1361 ("Although email is a widespread means of communication, Medline has not demonstrated that an email is sufficient to commence the filing period under section 1516a(a)(2)(A)(ii)."). Therefore, *Bond Street* and *Medline* are not distinguishable from the case here and are persuasive.

AEFTC also draws attention to Perfectus's concession of actual notice of the final scope ruling as of June 14, 2017. Def.-Inter.'s MTD Reply at 10. However, the statute does not reference actual notice when setting the filing deadline; it only refers to the date of mailing. 19 U.S.C. § 1516a(a)(2)(A)(ii). Therefore, the court finds this argument unpersuasive.[10]

In short, AEFTC's assertion that a notification generated by ACCESS triggers the clock[11] for judicial review is unsupported.[12]

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[10] AEFTC contends that several cases before this Court have proceeded without explicit reference to a physical mailing. Def.-Inter.'s MTD Reply at 6–7. However, the question of physical mailing was not raised in any of those cases and any speculation as to jurisdiction is not warranted.

[11] Further undercutting AEFTC's assertion is that Commerce's ACCESS Handbook on Electronic Filing Procedures, available on the ACCESS website and attached as Exhibit 2 to AEFTC's motion, expressly states that the Handbook does not supersede the requirements of the Tariff Act of 1930 and Commerce's regulations:

> In event of a conflict between the Tariff Act of 1930, as amended ("the Act"), the Department's regulations, and this Handbook, the applicable provisions of the Act and the Department's regulations shall govern. This Handbook is designed to be read in conjunction with the Department's regulations, 76 FR 39263 ("Final Rule") and the ACCESS External User Guide. This Handbook does not alter or waive any provisions governing the filing of documents with entities and/or persons other than the Department.

ACCESS Handbook at 5. The Department's regulations incorporate the ACCESS handbook. 19 C.F.R. § 351.303(b)(2).

[12] In support of its argument that ACCESS email notification constitutes "mailing" within the meaning of 19 U.S.C. § 1516a(a)(2)(A)(ii), AEFTC states that "this [c]ourt no longer

This case was brought within thirty days after the date of mailing of Commerce's determination. Commerce mailed the *6xxx Final Scope Ruling* on March 27, 2018. Proof of Mailing. Perfectus commenced this case on April 23, 2018, 27 days after the date on which Commerce mailed the scope ruling. The court concludes that Perfectus's complaint was timely and denies AEFTC's motion to dismiss. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(vi).

II. Motion for Judgment on the Agency Record

The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." According to Perfectus, its merchandise is not within the scope of the *Orders* because it qualifies for the finished merchandise exclusion. Perfectus further argues that Commerce's issuance of a scope ruling here was improper because it did not initiate a formal scope inquiry and that the record does not indicate the merchandise at issue was being produced or imported at the time the scope ruling was issued. Perfectus also contends that Commerce should not have instructed Customs to retroactively suspend liquidation because liquidation of the merchandise at issue was never suspended in the first place. For the reasons described below, the court denies Perfectus's motion for judgment on the agency record.

A. The Merchandise at Issue Fits Within the Plain Language of the Scope of the Orders and Does Not Qualify for Any Exclusions.

According to the Government, the finished merchandise exclusion does not apply to the merchandise at issue for two reasons: first, the merchandise at issue consists entirely of aluminum extrusions, and, second, the merchandise at issue is not suitable for use as a pallet and is thus not a finished product. Perfectus contends that both these bases are incorrect.[13]

The relevant scope language includes "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from

hand-mails its decisions and it provides notice through its electronic docketing system called CM/ECF." Def.Inter.'s MTD Br. at 11. Needless to say, the procedures of this court do not concern whether email notification triggers the time to contest scope rulings, and in any event, do not supersede the laws conferring subject matter jurisdiction on this court.

[13] Commerce did not address Perfectus's argument that "fake" pallets or "scrap" are necessarily outside the scope of the *Orders*, but this argument is unpersuasive, as the *Orders*' plain language includes scrap aluminum extrusions. Moreover, this argument is only relevant to Commerce's alternative basis for its conclusion which, as discussed *infra*, n.14, the court need not reach.

aluminum alloys having metallic elements corresponding to the alloy series designations published by the Aluminum Association commencing with the numbers 1, 3, and 6." *Antidumping Duty Order*, 76 Fed. Reg. at 30,650. Further, "[a]luminum extrusions are produced and imported in a wide variety of shapes and forms, . . . [and] may also be fabricated, i.e., prepared for assembly[,] . . . [which] include[s], but [is] not limited to, extrusions that are cut-to-length." *Id.* "Subject extrusions may be identified with reference to their end use . . . . Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation." *Id.* at 30,651. The relevant language excludes from the scope "finished merchandise containing aluminum extrusions *as parts* that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *Id.* (emphasis added). The merchandise at issue consists of "certain aluminum extrusions from [China] made of series 6xxx aluminum alloy which are cut-to-length and welded together in the form of a pallet, regardless of producer or exporter." *6xxx Final Scope Ruling* at 1.

The court concludes that Commerce's determination that the pallets are within the scope of the *Orders* and do not qualify for the finished merchandise exclusion because they exist entirely of aluminum extrusions and contain no other materials "as parts" is in accordance with law.[14] First, an alternative interpretation would result in reading out the "as parts" term from the relevant scope language. Second, the plural construction of "as parts" requires the finished merchandise exclusion to cover products consisting of both aluminum extrusions and non-extruded aluminum parts; an alternative interpretation would, as Commerce noted in its *6xxx Final Scope Ruling*, allow the finished merchandise exclusion to "swallow the rule embodied by the scope." Third, the examples given in the finished merchandise exclusion's text contain both an aluminum extrusion and a non-aluminum component. Thus, in light of the plain language of the *Orders*, the court concludes that Commerce did not err by concluding that the meaning of "as parts" in the context of the finished merchandise exclusion requires both aluminum extrusion and non-aluminum extrusion components.

In Perfectus's view, this interpretation is incorrect because the Federal Circuit's opinion in *Whirlpool Corp. v. United States*, 890 F.3d 1302 (Fed. Cir. 2018), "made it clear that Commerce erred in interpreting the Orders to require goods qualifying for the finished mer-

[14] The court therefore does not address Commerce's alternative basis for its determination.

chandise exclusion to also have non-extruded aluminum components." Pl.'s 56.2 Br. at 14. However, the Federal Circuit made no such pronouncement in *Whirlpool*. In that case, the product at issue was finished merchandise containing aluminum extrusions and non-aluminum extrusions; the Federal Circuit addressed whether an exception for fasteners to the finished good kits exclusion applied to the finished merchandise exclusion as well. The fastener exception states that "[a]n imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product." *Whirlpool*, 890 F.3d at 1306 (quoting *Meridian*, 851 F.3d at 1385). The Federal Circuit held that, based on the plain language of the fastener exception, the fastener exception applied only to the finished good kits exclusion from the scope order and remanded to Commerce on that basis. *Id.* at 1310–11. The Federal Circuit did not decide whether the products at issue in that case "me[t] the requirements for the finished merchandise exclusion." *Id.* at 1311. Nor did the Federal Circuit determine that a product composed entirely of aluminum extrusions — unlike the product at issue in *Whirlpool*, which contained non-aluminum extrusion parts — would be eligible for the finished merchandise exclusion. Perfectus's argument is therefore inapposite.

Moreover, *Meridian*, 851 F.3d 1375, supports Commerce's interpretation. In *Meridian*, the Federal Circuit, in interpreting the separate "finished goods kit" exclusion of the *Orders* at issue here, noted that "[a]lthough not necessary to our analysis . . . [t]he plain text of the other passages in the Orders thus contemplates a basic divide between products whose components relevant to the scope inquiry consist of non-aluminum extrusion parts, which *are* excluded from the scope of the Orders, and products whose components relevant to the scope inquiry contain only aluminum extrusion parts, which *are not* excluded." *Meridian*, 851 F.3d at 1384.

Perfectus argues that the relevant language in *Meridian* concerns the finished goods kit exclusion, not the finished merchandise exclusion, and is thus inapposite.[15] Pl.'s Reply to 56.2 Mot. at 11 n.13. However, the issue in *Meridian* and the issue here are meaningfully similar. *Meridian*'s analytical approach to the text of the *Orders* — the contemplation of a "basic divide" between merchandise containing

[15] Perfectus also cites *Rubbermaid Com. Prods. LLC v. United States*, No. 11–00463, 2015 WL 4478225 at *3 n.2 (Ct. Int'l Trade 2015). Pl's Reply to 56.2 Mot. at 10 n.9. *Rubbermaid* involved interpreting the *Orders* at issue here. According to Perfectus, *Rubbermaid* supports the proposition that the finished merchandise exclusion covers products consisting only of aluminum extrusion parts. This argument is unavailing, as the *Rubbermaid* court's footnoted discussion of this issue explicitly did not resolve it.

only aluminum extrusions and merchandise with non-aluminum extrusion components — easily applies to the finished merchandise exclusion.

Perfectus also takes issue with Commerce's reliance on the fact that the listed examples in the exclusion's text are unlike the products at issue. Perfectus casts a wide net in search of authority supporting the proposition that lists need not be exhaustive, Pl.'s Reply to 56.2 Mot. at 11 n.11, but fails to persuade the court that Commerce's interpretation was incorrect.

As Commerce noted, a product consisting entirely of aluminum extrusions, "real" or otherwise, is unlike any of the examples listed. The authority Perfectus cites, *see* Pl.'s Reply to 56.2 Mot. at 11 n.11, only suggests that lists do not need to be exhaustive. It does not affirmatively suggest that products unlike items entered on a list should receive treatment identical to the listed items. The issue Perfectus faces here is not that the list of example products covered by the finished merchandise exclusion is exhaustive — it clearly is not — but instead that the product Perfectus would have covered by the finished merchandise exclusion is substantially unlike any of the examples provided. Perfectus's products consist entirely of aluminum extrusions, whereas all the examples in the *Orders* are made of both aluminum extrusions and non-aluminum extrusion parts. *See, e.g., Antidumping Duty Order*, 76 Fed. Reg. at 30,651. For these reasons, the court concludes that Commerce's determination Perfectus's merchandise does not qualify for the finished merchandise exclusion and is within the plain language of the scope is in accordance with law.

B. Commerce Properly Issued a Scope Ruling Without Initiating a Formal Scope Inquiry.

Commerce issued a final scope ruling in this matter without initiating a formal scope inquiry. Perfectus argues that this was inappropriate because the merchandise at issue was not unambiguously within the *Orders*' scope. The court concludes that Commerce's instructions were proper because the merchandise at issue was unambiguously within the plain language of the *Orders*' scope.

As discussed above, the plain language of the *Orders* places the merchandise at issue within the scope, and the finished merchandise exclusion does not cover products consisting entirely of aluminum extrusions. However, Perfectus argues that the *6xxx Final Scope Ruling*'s reference to the 19 C.F.R. § 351.225(k)(1) factors — and

particularly to prior scope rulings[16] — means that Commerce must have determined that the text of the *Orders* is ambiguous. Pl.'s 56.2 Br. at 7. Perfectus's contention is unpersuasive. Prior to reaching the (k)(1) analysis, Commerce had determined that the plain language of the *Orders* sufficed to place the products at issue within the scope. Commerce's subsequent (k)(1) analysis is part of a "belt-and-suspenders" approach, and it would be strange to penalize an agency's analytical thoroughness. The fact that the *6xxx Final Scope Ruling* describes how its interpretation is consistent with prior final scope rulings neither means that Commerce's determination relies on this consistency, nor renders the text of the *Orders* ambiguous.

Finally, Perfectus argues that the fact Commerce previously declined to find that 6xxx pallets were within the scope means that the products at issue in this case were necessarily outside the scope. Pl.'s 56.2 Br. at 23–24 (citing *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Certain Aluminum Pallets* (Dec. 7, 2016), P.R. 31 ("1xxx Final Scope Ruling")). However, the 1xxx Final Scope Ruling declined to make a determination about products made of aluminum alloy in any series other than 1xxx because the record in that proceeding did not include evidence of existing merchandise for any alloy other than 1xxx. For these reasons, the court concludes that Commerce properly issued a scope ruling despite not initiating a formal scope inquiry.

C. Commerce Properly Issued a Scope Ruling Because the Merchandise at Issue Was in Existence.

Perfectus argues that Commerce improperly issued a scope ruling by allegedly deviating from a practice of only issuing scope rulings for products "currently in production." Pl.'s Reply to 56.2 Mot. at 16. Perfectus asserts that the 1xxx Final Scope Ruling and a Federal Register notice are evidence of this practice. *See* Pl.'s 56.2 Br. at 18–20 (quoting 1xxx Final Scope Ruling at 12; *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures*, 73 Fed. Reg. 3634, 3639 (January 22, 2008) ("Federal Register Notice")). Both the 1xxx Final Scope Ruling and the Federal Register Notice do discuss evidence of production; however, Perfectus mischaracterizes Commerce's practice by ignoring key language in both documents. Commerce explains that its practice is to "not con-

[16] *See, e.g., Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Ruling on Certain Aluminum Pallets* (Dec. 7, 2016), P.R. 31 (finding that pallets composed of 1xxx alloy aluminum extrusions were within the scope of the *Orders*).

duct hypothetical scope rulings on products that are *not yet in production*," 1xxx Final Scope Ruling at 12 (emphasis added); that is, Commerce "will not issue a scope ruling or conduct a scope inquiry on a purely hypothetical product," Federal Register Notice, 73 Fed. Reg. at 3639. In this context, Commerce's determination, as explained in the *6xxx Final Scope Ruling*, is consistent with conducting scope inquiries on existing — i.e., not hypothetical — products:

> [Commerce]'s practice with respect to scope ruling requests is not limited to products which are continuously being imported, but, rather, the requesting party must be able to show that the product is in existence, for instance, by demonstrating that the product is in commercial production or has been imported. We find that the petitioner has satisfied this burden, regardless of whether the merchandise is already imported.

6xxx Final Scope Ruling at 15. Moreover, even were Commerce's decision to issue a scope ruling for a product in existence, but not currently in production, a deviation from its typical practice, Commerce provided an appropriate explanation: "[w]ere we to adopt the view of Perfectus, this would limit our scope rulings only to products which were continually subject to importation, creating a loophole for parties to avoid a ruling on merchandise which might otherwise be subject to an AD/CVD order." *Id.*; *see Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) ("If that analysis shows that Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary.") (citing *RHP Bearings v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002)); *Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 1272, 1276–77, 587 F. Supp. 2d 1303, 1307–08 (2008) (noting that Commerce may "change its policies and practices as long as they are reasonable and consistent with their statutory mandate [and] may adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record") (quoting *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 32 CIT 663, 533 F. Supp. 2d 1290, 1297 (2008)); *Hyundai Steel Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1349, 1371 (2017). Thus, Commerce's issuance of a scope ruling was not improper.

D. The Issue of Liquidation Is Moot.

Commerce instructed Customs to continue to suspend liquidation of entries made prior to the date of the 6xxx Scope Ruling Request. *See, e.g., Countervailing Duty Order*, 76 Fed. Reg. 30,653 at 30,654. As

discussed above, the plain language of the *Orders* places the merchandise at issue here within the scope — therefore, the products at issue here were clearly subject to suspension of liquidation. *See Sunpreme Inc. v. United States*, 924 F.3d 1198, 1213 (Fed. Cir. 2019) (noting that "[w]hen, based on examination of the product in question and the plain meaning of the words in an antidumping or countervailing duty order, there is no question that the product is [] within . . . the scope of the order," Customs' suspension of liquidation is a lawful performance of "its ministerial duties because the duty order in question is not ambiguous as to whether it applies to the particular imported products") (citations omitted). Nonetheless, Perfectus argues that the liquidation of two entries of its merchandise in 2012 demonstrates that suspension of liquidation had never occurred and thus suspension for entries of its products could not "continue." .[17] Pl.'s Reply to 56.2 Mot. at 17–18; *6xxx Final Scope Ruling* at 15; Pl.'s Suppl. Br. at 2–3.

The suspension of liquidation issue is moot, as it appears that Perfectus's entries were liquidated, without being subject to antidumping or countervailing duties, prior to the initiation of the anticircumvention inquiry. *See* Perfectus's EOA and APO Application at Ex. A (Mar. 13, 2017), P.R. 10 ("Perfectus's EOA and APO App."). The parties do not dispute that these liquidations are final.[18] *See* Def.'s Resp. to 56.2 Mot. at 23 (noting that "any entries made in 2015 would also have been liquidated before the initiation of the scope inquiry in 2017, presuming they were entered like its two entries on the record and mischaracterized as Type 01"); Pl.'s Reply to 56.2 Mot. at 18 ("All entries of Perfectus' Series 6xxx aluminum pallets in years 2011 to 2015 have been liquidated and are now final.").[19] The court therefore can provide no further relief, rendering the issue of Commerce's

[17] Perfectus's reference to *United Steel and Fasteners, Inc. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1235, 1241 (2017) is inapposite because the circumstances are not, as Perfectus claims, "directly analogous." Pl.'s Reply to 56.2 Mot. at 17. *United Steel* concerned a matter where the plain language of the relevant antidumping and countervailing duty orders was insufficient to determine whether the products at issue in that case were within the scope. That is manifestly different from this case, as Commerce has correctly determined that the merchandise at issue is within the scope per the *Orders*' plain language.

[18] Voluntary reliquidation by Customs is governed by 19 U.S.C. § 1501, and Customs is time-barred by the relevant version of the statute from reliquidating those entries to include the assessment of antidumping and countervailing duties. *See* 19 U.S.C. § 1501 (2012) (providing for reliquidation within 90 days "from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent"); 19 U.S.C. § 1501 (Supp. V 2012) (providing for reliquidation within "[90] days from the date of the original liquidation").

[19] The parties do not dispute that all the entries were liquidated pursuant to Customs' ordinary practice. To the extent that any entries had remained unliquidated, Commerce's instructions to Customs were proper. The Government notes that the entries Perfectus

liquidation instructions to Customs moot. *See Heartland By-Prod., Inc. v. United States*, 568 F.3d 1360, 1368 (Fed. Cir. 2009) (finding liquidation instruction issue moot when company no longer imported subject merchandise and Customs would not be reliquidating the relevant entries to include the duties).

CONCLUSION

The court concludes that Perfectus timely filed its complaint and that Commerce properly issued the *6xxx Final Scope Ruling* finding that (1) the plain meaning of the unambiguous language of the *Orders* includes the merchandise at issue, and (2) the finished merchandise exclusion does not cover the products at issue because they consist entirely of aluminum extrusions without initiating a formal scope inquiry. Commerce's determination is sustained.

SO ORDERED.

Dated: July 1, 2019
New York, New York

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

placed on the record, *see* Perfectus's EOA and APO Application at Ex. A (Mar. 13, 2017), P.R. 10, were liquidated only because they were misidentified as Type 01 (for which suspension of liquidation did not apply) instead of Type 03 (for which suspension of liquidation did apply). Def.'s Resp. to 56.2 Mot. at 23; Def.'s Suppl. Br. at 3.

Further, the cases Perfectus cites to support its argument that Commerce is not permitted to continue to suspend liquidation "for entries of products that were not suspended prior to the initiation of a scope inquiry" are distinguishable. Pl's 56.2 Br. at 21; Pl.'s Suppl. Br. at 2–3. *AMS Assocs. v. United States*, 737 F.3d 1338 (Fed. Cir. 2013) and *Sunpreme*, 924 F.3d 1198 are distinguishable because, in those cases, Commerce clarified a product's status with respect to the scope. *AMS*, 737 F.3d at 1343; *Sunpreme*, 924 F.3d at 1215 (stating that "the holding in this case applies only in a narrow set of circumstances because, when the duty order is clear and unambiguous, Customs can suspend liquidation of subject merchandise pre-scope inquiry and Commerce is free to continue that suspension") (citing *AMS*, 737 F.3d at 1344). That is not the issue here; as Commerce correctly concluded, Perfectus's products fall within the scope per the *Orders*' plain language, and were thus unambiguously included within the scope of the *Orders*. As discussed above, although Commerce's determination also referenced (k)(1) factors, that reference was not a concession that the language of the *Orders* was ambiguous. Therefore, the court finds that Commerce properly instructed Customs to continue to suspend liquidation of entries made prior to the date of the scope ruling request.

Slip Op. 20–8

ASOCIACIÓN DE EXPORTADORES E INDUSTRIALES DE ACEITUNAS DE MESA, ACEITUNAS GUADALQUIVIR, S.L.U., AGRO SEVILLA ACEITUNAS S. COOP. AND., and ANGEL CAMACHO ALIMENTACIÓN, S.L., Plaintiff, v. UNITED STATES, Defendant, and COALITION for FAIR TRADE in RIPE OLIVES, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 18–00195

[Plaintiffs' motion for judgment on the agency record is granted in part and Commerce's *Final Determination* is remanded consistent with this opinion.]

Dated: January 17, 2020

Matthew P. McCullough, Curtis Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for plaintiff. With him on the joint brief were *Christopher A. Dunn* and *Tung Nguyen*.

Tara K. Hogan, Assistant Director, and *Sonia W. Murphy*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel was *Saad Y. Chalchal*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

David J. Levine and *Raymond Paretzky*, McDermott Will & Emery LLP, of Washington, DC, argued for defendant-intervenor.

Opinion

Katzmann, Judge:

This case presents two issues of first impression under Sections 771 and 771B of the Tariff Act of 1930,[1] respectively: (1) the interpretation and application of the term "expressly limits" in the countervailable domestic subsidy provision, 19 U.S.C. § 1677(5A)(D)(i) ("Section 1677(5A)"); and (2) the interpretation and application of the term "substantially dependent" in the agricultural countervailable subsidies provision, 19 U.S.C. § 1677–2 ("Section 1677–2").[2] The case involves a claim from the U.S. domestic olive industry that the gov-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are not to the U.S. Code 2012 edition, but to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. § 1677e (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015). The TPEA amendments are applicable to all determinations made on or after August 6, 2015, and therefore, are applicable to this proceeding. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2015).

[2] Further citations to Section 1677–2 denote the specific subsection of that provision, if applicable. *See* 19 U.S.C. § 1677–2(1) ("Section 1677–2(1)"); 19 U.S.C. § 1677–2(2) ("Section 1677–2(2)").

ernments of the European Union ("EU") and Spain unfairly subsidized Spanish olives that were then imported into the U.S. to the detriment of the U.S. industry. *See* Petition for Imposition of AD and CVD Duties, Vol. I (June 21, 2017), P.R. 7 ("Pet. Vol. I"). Based on a petition filed by the Coalition for Fair Trade in Ripe Olives ("Coalition" or "Defendant-Intervenor"), the Department of Commerce ("Commerce") initiated an investigation into subsidies received by the Spanish olive industry. Commerce's investigation resulted in a determination that subsidies given to growers of raw olives were de jure specific to olive growers under Section 1677(5A) and those subsidies were attributable to downstream processors of those raw olives into ripe olives under Section 1677–2. Therefore, using information collected from interested parties during its investigation, Commerce calculated countervailing duties ("CVDs") for imports of ripe olives from Spain. *See Ripe Olives From Spain: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 37,469 (Dep't Commerce August 1, 2018), P.R. 1417 ("*Amended Final Determination*").

Asociación de Exportadores e Industriales de Aceitunas de Mesa ("Asemesa"),[3] Aceitunas Guadalquivir, S.L.U. ("Guadalquivir"), Agro Sevilla Aceitunas S. Coop. And. ("Agro Sevilla"), and Angel Camacho Alimentación, S.L. ("Angel Camacho") (collectively, "Plaintiffs"), major producers and/or exporters of ripe olives from Spain, brought this action against the United States ("the Government") in opposition to Commerce's CVD determination and moved for judgment on the agency record pursuant to Rule 56.2 of the Rules of the Court of International Trade. The court grants, in part, Plaintiffs' motion for judgment on the agency record.

BACKGROUND

I. Legal and Regulatory Framework for Countervailing Duty Determinations

To empower Commerce to offset economic distortions caused by countervailable subsidies and dumping, Congress enacted the Tariff Act of 1930. *Sioux Honey Ass'n v. Hartford Fire Ins.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012); *ATC Tires Private Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1365, 1366 (2018). Under the Tariff Act's framework, Commerce may — either upon petition by a domestic

[3] Asemesa describes itself as an interested "business association a majority of the members of which are producers, exporters, or importers of [subject] merchandise" as defined by Section 771(9)(A) and 516A(f)(3) of the Tariff Act of 1930. Compl. at 2, Sept. 28, 2018, ECF No. 7 (citing 19 U.S.C. §§ 1677(9)(A), 1516a(f)(3)).

producer or of its own initiative — begin an investigation into potential countervailable subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Sioux Honey*, 672 F.3d at 1046–47; *ATC Tires*, 322 F. Supp. 3d at 1366–67; 19 U.S.C. §§ 1671, 1673. A subsidy is countervailable if the following elements are satisfied: (1) a government or public authority has provided a financial contribution; (2) a benefit is thereby conferred upon the recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. 19 U.S.C. § 1677(5). Specific subsidies are also referred to as "coupled" subsidies. "Decoupled" refers to the fact that a subsidy does not encourage production of a specific agricultural product, i.e. is not a specific subsidy. At issue here, a domestic subsidy is de jure specific "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i).

If Commerce determines that the government of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, sold, or likely to be sold for import, into the United States, and the International Trade Commission ("ITC") determines that an industry in the United States is materially injured or threatened with material injury thereby, then Commerce shall impose CVD upon such merchandise equal to the amount of the net countervailable subsidy. *See* 19 U.S.C. § 1671(a). However, when the merchandise subject to investigation involves a processed agricultural product that meets the criteria under Section 1677–2, Commerce will include in its analysis countervailable subsidies received by producers or processors of the raw agricultural product and will deem such subsidies to be received by manufacturers, producers, and exporters of the processed product. *See* 19 U.S.C. § 1677–2. Because the Tariff Act is silent on the calculation methodology for imposing CVDs, Commerce calculates a duty rate by formulating a calculation methodology in line with the statutory language and purpose. *See Solarworld Americas, Inc. v. United States*, 40 CIT __, __ 182 F. Supp. 3d 1372, 1376 (2016).

II. Factual and Procedural History of This Case

On June 22, 2017, Commerce received a CVD petition, filed on behalf of Coalition, regarding imports of ripe olives from Spain. *See* Pet. Vol. I. Raw olives become edible and ready for consumers by either becoming table olives or olive oil. *See* Pet. Vol. I at 7. Ripe olives

are one type of table olive, commonly referred to black olives.[4] *See Id.* at 1–2; Agro Sevilla's Affiliations Questionnaire Response at 8 (August 18, 2017), P.R. 344. To produce ripe olives, raw olives "are cured for multiple days in a de-bittering solution, usually alkaline," then rinsed in water several times, followed by possible pitting, slicing, chopping, or wedging, as applicable. Pet. Vol. I at 7. Ripe olives are then packaged in a container and topped with salt brine. *Id.* In its petition, Coalition alleged that the EU through the Government of Spain provided countervailable subsidies to raw olive growers that must then be attributed to processors of ripe olives. Petition for the Imposition of Antidumping and Countervailing Duties, Vol. III at 10 (June 21, 2017), P.R. 58. Coalition claims these "subsidized imports of ripe olives . . . from Spain have materially injured the U.S. domestic industry producing ripe olives and threaten to cause further material injury if remedial action is not taken." Pet. Vol. I at 1.

On July 12, 2017, based on Coalition's petition, Commerce initiated a CVD investigation on ripe olives from Spain. *Ripe Olives from Spain: Initiation of Countervailing Duty Investigation* 82 Fed. Reg. 33050 (Dep't Commerce July 19, 2017), P.R. 126. Commerce selected as mandatory respondents[5] three producers that accounted for the largest volume of ripe olives during the period of investigation: Guadalquivir, Agro Sevilla, and Angel Camacho, all of which are plaintiffs in this action.[6] Respondent Selection Memo at 1 (July 28, 2017), P.R. 132. Commerce then issued questionnaires to these respondents regarding their use of subsidy programs as well as information about their sources of raw olives that were used to produce ripe olives.

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[4] Commerce described with specificity the ripe olives that were subject to investigation. That description and more detail on Commerce's subject merchandise is discussed in detail below. *See* Background *infra* Sec. B. ii.

[5] In CVD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may—
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to—
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.
>
> The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

[6] As noted above, Asemesa joins the respondents as a plaintiff in this action.

Questionnaire on Sources of Raw and Ripe Olives Aceitunas Guadalquivir at 1 (August 4, 2017), P.R. 139 ("Guadalquivir Questionnaire"). Commerce simultaneously issued questionnaires to the European Commission and the Government of Spain regarding the subsidy programs applicable to respondents. Initial CVD Questionnaire to European Commission (Aug. 4, 2017), P.R. 160; Initial CVD Questionnaire to Spain Embassy (Aug. 4, 2017), P.R. 227. Commerce used the data and information collected through the questionnaire responses (1) in determining whether subsidies provided to imported Spanish olives were countervailable as de jure specific domestic subsidies under Section 1677–2; (2) in determining whether the subsidies could be attributed to ripe olives as the latter stage product; and (3) in calculating applicable duties under 19 U.S.C. § 1671(a). *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Ripe Olives from Spain at 33 (Dep't Commerce June 11, 2018), P.R. 1300 ("IDM").

A. Commerce's Determination That EU Subsidy Payments Are De Jure Specific to Olive Growers.

In the investigation, Commerce examined the EU's Common Agricultural Policy ("CAP"),[7] which includes the subsidy programs applicable to Plaintiffs, in order to determine whether these domestic subsidies were specific to the olive industry pursuant to Section 1677(5A). The Basic Payment Scheme ("BPS") is the most recent iteration of EU (and its predecessor the European Community) agricultural subsidy programs that apply to Spanish olives. Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Ripe Olives from Spain at 18–19 (November 20, 2017), P.R. 1075 ("Preliminary Decision Memo"). Because parts of the current BPS program are based on past iterations of the EU's agricultural subsidy program, Commerce traced the history of these programs in making its determination that the current program is de jure specific. *See id*.

From 1997 to 2003, the Common Organization of Market in Oils and Fats ("the Common Market Program") was the annual grant-to-farmer program applicable to Spanish olive growers. Preliminary

[7] CAP includes various "Pillars," or categories of subsidy programs. *See* Preliminary Decision Memo at 23. The Basic Payment Scheme ("BPS") and Single Payment Scheme ("SPS") are part of Pillar I of CAP. Preliminary Decision Memo at 19. BPS includes three subprograms: Direct Payment, Greening, and Aid to Young Farmers. Preliminary Decision Memo at 18. Commerce also examined subsidies under CAP Pillar II. Preliminary Decision Memo at 27. However, Plaintiffs did not challenge Commerce's determination regarding the Aid to Young Farmers program nor Pillar II subsidies. *See* Pls.' Br. at 47–53. Thus, they will not be addressed here. All references to BPS are inclusive of the Direct Payment and Greening subprograms.

Decision Memo at 22. The Single Payment Scheme ("SPS") replaced the Common Market Program in 2003 and remained in effect until 2014. *Id.* at 19, 22. The SPS program was then replaced by BPS, which took effect in 2015 and is the current grant-to-farmer program applicable to those Spanish olive growers that meet the eligibility requirements and apply for subsidies. European Union's CVD Questionnaire Response at 20 (September 18, 2017), P.R. 383.

Both the SPS and BPS subsidies are based on a geographical indicator system created from information requested by the EU and provided by Spain regarding farmland productivity prior to the implementation of those programs. Preliminary Decision Memo at 19, 22. During the Common Market Program, between 1999 and 2002, Spain collected data on farmland per hectare, the type of crop produced in each hectare, and the amount of crop each hectare produced. *Id.* at 19. For olive growers, a value per hectare was calculated depending on whether the olives were grown for olive oil production or table olive production. *Id.* at 22–23. This value was then multiplied by a farm's number of hectares to determine the amount of aid that the farmer would receive. *Id.* at 22. In this way, the SPS program specifically identified certain crops and benefitted their producers by providing individual payments based on historical reference to the value per hectare calculated from the period of the Common Market Program. *Id.* at 23; *see* European Union's CVD Questionnaire Response at 12. Put simply, the SPS program distributed subsidies to farmers based on the type and amount of crop their land historically produced.

As the EU explained in its questionnaire response to Commerce, the SPS system was decoupled from production of a particular crop between 2006 and 2010, when Spain began providing subsidies to farmers regardless of the crop or amount of crop produced. European Union's CVD Questionnaire Response at 11–12. The implementation of the BPS program continued this decoupled model. *Id.* at 20. Under the EU's Council Regulation (EC) No. 1307/2013 and Spain's accompanying implementing legislation Section 6(1) of Royal Decree 1076/2014, Spain used the data previously used to create the SPS program to then create fifty agricultural regions to facilitate payments under the new BPS program. IDM at 33; *see also Ripe Olives from Spain: Final Affirmative Countervailing Duty Determination*, 83 Fed. Reg. 28,186 (Dep't Commerce June 18, 2018), P.R. 1394 ("*Final Determination*"). Each region was assigned a rate based on its productive potential and its productive orientation.[8] Preliminary Decision Memo

[8] "[P]roductive orientation is categorized as rainfed land, irrigated land, permanent crops, and permanent pastures. Olive groves are considered permanent crops." Preliminary Decision Memo at 19–20 (quotations omitted).

at 19. Commerce found that these regions facilitated the determination of payments distributed under BPS. IDM at 33–34.

Therefore, Commerce attributed regional variations in current BPS payments to the use of crop-specific, historic regional data originally used to calculate subsidy rates under the SPS program. *See* Preliminary Decision Memo at 24. Commerce summarized its finding of a chain of specificity:

> In summary, the annual grant amount provided to olive farmers under BPS is based on the annual grant amount provided to olive farmers under SPS. The grant amount provided to olive farmers under SPS is based on the average grant amount olive farmers received in 1999 through 2002 under the Common Organization of Markets in Oil program. The grant amount provided in 1999 through 2002 to eligible farmers, which included olive farmers, was based on the type of crop grown and the production value created from the crop. Therefore, the annual grant amount provided under BPS are based on annual grant amounts that were crop specific, thus the grant amounts received by olive growers under BPS in 2016 are directly related to the grant amount only olive growers received under Common Organization of Markets in Oil program. All respondents and many of the olive growers that supply them, received benefits under this program during the [period of investigation].

Id. at 24. Commerce thus determined that, under Section 1677(5A), BPS subsidy payments as provided by the EU through the Spanish government were de jure specific to olive growers because the two predecessor programs to BPS — SPS and the Common Market Program — calculated annual grant amounts based on the type of crop and the volume of production; those amounts provided the foundation for the current BPS subsidy determination via express reference in the current regulation. *Id.* at 18–27.

In sum, Commerce preliminarily determined that BPS subsidy payments were countervailable as a government provided financial benefit to a specific industry, here olive growers. *See id.*

B. Commerce's Determination Under Section 1677–2

Having determined that Spain's BPS program constituted countervailable subsidies, Commerce next determined that those subsidies could be attributed to ripe olive producers. Section 1677–2 provides that Commerce may treat countervailable subsidies provided to producers of a raw agricultural product as though the subsidies have been provided to processors of the raw agricultural product, if two criteria are met. The statute states:

> In the case of an agricultural product processed from a raw agricultural product in which –
>
> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity,
>
> countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

19 U.S.C. § 1677–2.

Commerce's investigation covered whether countervailing duties applied to the "subject merchandise," ripe olives, which Commerce defined as follows:

> The subject merchandise includes all colors of olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multilayered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.
>
> Included are all ripe olives grown, processed in whole or in part, or packaged in Spain. Subject merchandise includes ripe olives that have been further processed in Spain or a third country, including but not limited to curing, fermenting, rinsing, oxidizing, pitting, slicing, chopping, segmenting, wedging, stuffing, packaging, or heat treating, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in Spain.
>
> Excluded from the scope are: (1) specialty olives (including "Spanish-style," "Sicilian-style," and other similar olives) that have been processed by fermentation only, or by being cured in an alkaline solution for not longer than 12 hours and subsequently fermented; and (2) provisionally prepared olives unsuit-

able for immediate consumption (currently classifiable in subheading 0711.20 of the Harmonized Tariff Schedule of the United States (HTSUS)).

Preliminary Decision Memo at 6–7.

Ripe olives are a type of processed table olive. Agro Sevilla's Affiliations Questionnaire Response at 8. Data from the Food Information and Control Agency, which is within Spain's Ministry of Agriculture, shows that of the 7.4 million tons of raw olives produced in Spain in 2016, only eight percent were used for table olives. *Id.* at 9. Of the 7.4 million tons of raw olives produced, only three percent were used for the subject merchandise, ripe olives. *See* Supplier Supplemental Response of Aceitunas Guadalquivir S.L.U. at 3 (November 8, 2017), P.R. 1057. Raw olives become ripe olives through the processing and packaging described above. *See* Pet. Vol. I at 7. The remaining ninety-two percent of raw olives produced in Spain are used for olive oil production. *Id.*

Applying both prongs of Section 1677–2, Commerce determined that demand for the prior stage product, raw olives, was substantially dependent on demand for the latter stage product, which Commerce defined as all table olives, and that the processing of raw olives into table olives added only limited value to the raw commodity. Preliminary Decision Memo at 15. In so concluding, Commerce relied on the legislative history of Section 1677–2,[9] as well as its prior determinations,[10] to find that the term "latter stage product" is not limited to the subject merchandise of ripe olives, but rather encompasses the next-stage product of processed olives. *Id.* at 15.

Under Section 1677–2(1), Commerce determined that the eight percent of raw olives grown in Spain that are processed into table olives was a substantial amount and that the demand for raw olives is dependent on the demand for table olives. *Id.* at 16. Commerce reasoned that eight percent of raw olives in Spain were grown for the purpose of producing table olives and that if this demand were to cease, then eight percent of the market, or millions of dollars in

[9] For example, during debate over the bill, Senator Baucus explained that without Section 1677–2 "a foreign nation could avoid a U.S. countervailing duty on an agricultural product merely by doing some minor processing of the agricultural product before it is exported to the United States. For example, a duty on raspberries could be avoided by merely freezing the raspberries before they are shipped to the United States." 133 Congressional Record S8814 (June 6, 1987) ("Statement of Senator Baucus").

[10] Specifically, Commerce referred to *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada; Final Affirmative Countervailing Duty Determination*, 50 Fed. Reg. 25097–01 (Dep't Commerce June 17, 1985), *Rice from Thailand; Final Results of Countervailing Duty Administrative Review*, 51 Fed Reg. 12356 (Dep't Commerce April 10, 1986), and *Rice from Thailand; Final Results of Countervailing Duty Administrative Review*, 59 Fed. Reg. 8906 (Dep't Commerce Feb. 24, 1994) in making its determination. These determinations are discussed in further detail below. *See* Discussion, *infra* Sec. II. A.

export sales to the United States, would be negatively affected. *Id.* Based on this reasoning, Commerce concluded that the demand for raw olives was "substantially dependent" on the demand for table olives. *Id.*

Under Section 1677–2(2), Commerce determined that the three percent value in processing raw olives represented a "limited value" added to the raw commodity. *Id.* Although Plaintiffs submitted data in their response questionnaires that total processing costs, including packaging, equaled sixty percent of the cost of the delivered product, Commerce relied on its prior determinations on agricultural subsidies to not include packaging costs in determining the value added by processing the raw product. *Id.*; *see also* Supplier Supplemental Response of Guadalquivir at 5. Commerce also noted that regardless of the relationship between cost and value, the processing of raw olives to table olives did "not change the essential character of the olive" and, therefore, satisfied Section 1677–2(2). Preliminary Decision Memo at 16.

Thus, Commerce concluded that BPS subsidies provided to Spanish olive growers could be attributed to ripe olive producers pursuant to Section 1677–2.

C. Commerce's Countervailing Duty Calculation

In accordance with these statutory threshold determinations, Commerce next calculated the duty rate that should apply to each producer of ripe olives as attributed recipients of countervailable subsidies. Commerce calculates CVD rates based on the authority provided to it by 19 U.S.C. § 1671(a). However, the statute does not specify how a CVD rate should be calculated. Commerce thus promulgated a regulation which governs the calculation of this rate. *See* 19 C.F.R. § 351.525. Generally, Commerce "calculate[s] an CVD rate by dividing the amount of the benefit allocated to the period of investigation . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy under paragraph (b)." 19 C.F.R. § 351.525.

In this case, in its preliminary determination of Plaintiffs' CVD rate, Commerce attributed the subsidy in question to all raw olives. Preliminary Determination Calculation Memoranda for Aceitunas Guadalquivir, S.L.U.; Angel Camacho Alimentacion, S.L.; and Agro Sevilla Aceitunas S.Coop. (November 20, 2017), P.R. 1109. The equation used by Commerce is demonstrated as:

$$\frac{\text{Weighted Average Per Kilogram Benefit} \times \text{Kilograms of Raw Olives Purchased}}{\text{Sales of Olives and Olive Products}}$$

See id. at 2–3. Applying this equation in its preliminary CVD calculation, Commerce calculated CVD rates of 2.31 percent for Guadalquivir, 2.47 percent for Agro Sevilla, 7.24 percent for Angel Camacho, and an all-others rate of 4.47 percent. *Ripe Olives From Spain: Preliminary Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 56,218, 56,218 (Dep't Commerce Nov. 28, 2017), P.R. 1160 ("*Preliminary Determination*"). In its final determination, Commerce changed its methodology, concluding that:

> the applicability of section 771B of the Act . . . requires us to refine our methodology with regard to measuring the benefit provided to the production of subject merchandise . . . . This methodology comports with the statutory intent set forth within section 701 of the Act, because we have accurately measured the subsidy conferred upon the subject merchandise.

IDM at 44.

Commerce changed both the numerator and the denominator of the equation in order to reflect only purchases and sales of the subject merchandise rather than all raw olives and their subsequent processed products. The equation used by Commerce in its final determination is demonstrated as:

$$\frac{\text{Weighted Average Per Kilogram Benefit} \times \text{Kilograms of Raw Olives Purchased for Subject Merchandise}}{\text{Sales of Subject Merchandise}}$$

See id. Based on this new equation and in response to ministerial error comments, Commerce calculated a final CVD rate of 27.02 percent for Guadalquivir, 7.52 percent for Agro Sevilla, 13.76 percent for Angel Camacho, and an all-others rate of 14.97 percent. *Amended Final Determination* at 37,470.

In calculating these rates, Commerce used data from Plaintiffs' questionnaire responses regarding their sources of raw olives. Preliminary Decision Memo at 17–18. The parties dispute whether the initial questionnaires requested data on Plaintiffs' sources of all raw olives or strictly sources of raw olives that were processed into ripe olives. *See* Pls.' Mot. for J. on Agency R. and Supp. Opening Br. at 30, February 28, 2018, ECF No. 25 ("Pls.' Br."); Def.'s Resp. in Opp'n to Pls.' Mot. for J. on the Agency R. at 34, ECF No. 30 ("Def.'s Br."). The dispute arises because Commerce used this initially requested data in the altered CVD equation it applied in the *Final Determination* to calculate Plaintiffs' respective CVD rates. One of the plaintiffs, Guadalquivir, contends that, in contrast to the other plaintiffs, its sole submission to Commerce was data on its purchases of all raw olives and thus Commerce used an incorrect input for data on purchases of raw olives processed into ripe olives. *See* Pls.' Br. at 31–37. Commerce

nonetheless relied on Guadalquivir's submitted data in its final CVD calculation. Amended Final Determination of Countervailing Duty Investigation Pursuant to Ministerial Error Allegation at 5 (July 12, 2018), P.R. 1406 ("Amended Final Investigation").

D. Commerce's Investigation Results

On November 28, 2017, Commerce published its preliminary affirmative CVD determination. *Preliminary Determination*. Commerce determined that producers of ripe olives benefitted from the countervailable subsidies provided to growers of raw olives during the period of investigation. Preliminary Decision Memo at 1. As such, Commerce calculated preliminary CVD rates for each plaintiff. *Preliminary Determination* at 56,218.

On June 18, 2018, following receipt of case and rebuttal briefs submitted by interested parties, Commerce published its final CVD determination, affirming its preliminary findings. *Final Determination*. However, both Coalition and Plaintiffs alleged ministerial errors, which Commerce accounted for by amending the *Final Determination* on August 1, 2018. Amended Final Investigation; *Amended Final Determination*. On July 25, 2018 the ITC informed Commerce of its requisite determination of material injury to the domestic olive industry because of the subsidies provided to ripe olives imported from Spain. ITC Notification, July 25, 2018, P.R. 1415. As noted above, on August 8, 2018 Commerce then applied CVD rates of 27.02 percent for Guadalquivir, 7.52 percent for Agro Sevilla, and 13.76 percent for Angel Camacho, as well as an all-others rate of 14.97 percent. *Amended Final Determination* at 37,470.

Plaintiffs challenge the *Amended Final Determination* before the court. Compl., Sept. 28, 2018, ECF No. 7. Coalition moved for and the court granted its intervention as a defendant-intervenor on October 17, 2018. Consent Mot. to Intervene as Def.-Inters., ECF No. 10; Court's Order, ECF No. 14. Plaintiffs filed a motion for judgment on the agency record on February 28, 2019. Pls.' Br. The Government and Coalition filed their responses on May 31, 2019. Def.'s Br.; Def.-Inter.'s Resp. to Pls.' Mot. for J. on the Agency R., ECF No. 29 ("Def.-Inter.'s Br."). Plaintiffs replied on July 1, 2019. Pls.' Reply Br. in Supp. of Mot. for J. on Agency R., ECF No. 31 ("Pls.' Reply"). The court held oral argument on November 6, 2019. ECF No. 38.

JURISDICTION, STANDARD OF REVIEW, AND INTERPRETATIVE FRAMEWORK

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) because the action arises from a CVD determination by Commerce. The court reviews determinations by Commerce according to

19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

"A finding is supported by substantial evidence if 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) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

To determine whether Commerce's interpretation and application of a statute is in accordance with the law, the court must apply the two-step test laid out in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See also Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1329 (Fed. Cir. 2017). Under *Chevron*, the court first asks "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If yes, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* Deference to the agency's interpretation of a statute is only required by *Chevron* when that interpretation is reasonable. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994). The court must give *Chevron* deference to an agency's policy changes, but if an agency changes its prior practice, it must provide an "adequate explanation" for its change or reversal of a policy. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011). *See also Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007). If Commerce's methodology is arbitrary and capricious, it is contrary to law and will be set aside. *Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1374 (Fed. Cir. 2012). *See also Shandong Rongxin Import & Export Co. v. United States*, 42 CIT __, __ 331 F. Supp. 1390, 1405 (2018). "Agencies act contrary to law if decision-making is not reasoned." *Burlington Truck Lines*, 371 U.S. at 167–168.

DISCUSSION

Plaintiffs moved for judgment on the agency record, arguing that: (1) Commerce improperly concluded that Spain's CAP Pillar I pay-

ments are de jure specific subsidies under Section 1677(5A), Pls.' Br. at 47; (2) Commerce improperly interpreted and applied Section 16772(1) in concluding that the demand for raw olives is "substantially dependent" on the demand for processed table olives, *id.* at 7; (3) Commerce improperly interpreted and applied Section 16772(2) in concluding that the processing operation that transforms raw olives into processed table olives adds only "limited value," *id.* at 17; (4) Commerce improperly deviated from its general attribution practice for calculating the CVD rate by attributing subsidies received by growers of raw olives to sales of ripe olives rather than to sales of raw olives, *id.* at 23; and (5) Commerce improperly determined that Guadalquivir's reported raw olive purchase data was sufficiently indicative of its purchases of raw olives used to produce ripe olives, *id.* at 29.

The Government responds that: (1) Commerce properly found that Spain's CAP Pillar I subsidy payments are de jure specific, Def.'s Br. at 40; (2) Commerce properly determined that Section 1677–2 applied to ripe olives from Spain, *id.* at 10; (3) Commerce's calculation methodology for determining the benefit attributable to Plaintiffs from subsidies provided to growers of raw olives is supported by substantial evidence on the record and in accordance with law, *id.* at 25; and (4) Commerce properly determined the benefit to Guadalquivir by using Guadalquivir's reported purchase volume of raw olives that were processed into ripe olives, *id.* at 33.

The court grants Plaintiffs' motion for judgment on the agency record with respect to two issues. First, the court holds that Commerce's conclusion that BPS subsidy payments provided by the EU and Spain are de jure specific to the olive industry has not been sufficiently explained because Commerce did not provide an interpretation of the statute in reaching its determination based on the record. Second, the court holds that Commerce applied an impermissible interpretation of the term "substantially dependent," pursuant to Section 1677–2(1), given the plain meaning and legislative history of the statute. Despite the court's decision to remand these two issues alone, the court addresses the remaining issues in the interest of judicial efficiency to ensure that Commerce makes its determination on remand consistent with the court's findings.

I. Commerce's Finding That the BPS Program Constitutes De Jure Specific Subsidies Did Not Include a Reviewable Interpretation of the Statute.

Commerce did not set forth an interpretation of Section 1677(5A) in determining that BPS subsidies to olive growers are de jure specific, and thus without more the court cannot determine whether it was supported by substantial evidence and in accordance with law. For a

subsidy to be countervailable, it must be specific under Section 1677(5A). Under Section 1677(5A), a subsidy is de jure specific where the authority providing the subsidy "*expressly limits* access to the subsidy to an enterprise or industry" (emphasis added).

In determining that the subsidies at issue are de jure specific, Commerce analyzed the specificity of three separate programs — BPS, SPS, and the Common Market Program. In summary, Commerce determined that: (1) the Common Market Program, in place from 1999–2002, was de jure specific; (2) SPS, in place from 2003–2014, retained this specificity; and (3) BPS, in place since 2015, relied on data from both programs and as a result is also de jure specific. *See supra* Background, Sec. II. A. The Government contends that Commerce correctly determined that the subsidies were de jure specific under Section 1677(5A) to olive growers because "[t]he reliance on the annual grant amounts under the Common Market Program as a historical basis for the annual grants provided during the period of investigation results in variations in individual payments and, thus, access to the subsidies received by the olive farmers is expressly limited to olive farmers." Def.'s Br. at 47.

Plaintiffs argue that even if BPS payments are linked to a land region and its historical production of crops, the payments are not dependent upon the production of specific crops under the present program, and thus they have been decoupled from the olive industry. Pls.' Br. at 51–52. Under BPS, any farmer that was entitled to payments under the Common Market Program or SPS is entitled to payments under BPS, regardless of the type of crop or volume produced. *See id.* In other words, BPS payments reflect data of a farm that grew olives from 1999–2002 and that historical data does not change even if the same farm changed the crop it grew or the amount it produced. Plaintiffs thus argue that "[b]y definition, . . . these programs are *not* expressly limited to an enterprise or industry, and therefore Commerce lacks evidence to reach a finding of specificity under 19 U.S.C. § 1677(5A)(D)(i)." Pls.' Br. at 50. In responding to this argument, the Government says that Commerce's determination that the subsidies were by operation of Spanish law "expressly based on the annual grant amounts provided on a de jure specific basis" is sufficient to support their conclusion. Def.'s Br. at 47.

However, the Government fails to explain how a program expressly based on programs that limited access of payments to a specific crop is equivalent to the statement that BPS itself "expressly limit[s]" access of payments to a specific crop, as the statute requires. *See* 19 U.S.C. § 1677(5A)(D)(i). The Government merely repeats Commerce's

logic in responding to Plaintiff's argument that expressly based does not equate to the statutory requirement that a subsidy be expressly limited. *See* Def.'s Br. at 45–47. Neither Commerce nor the Government provides an explanation or interpretation of the statute to support its conclusion that the BPS program is de jure specific. Nor does the Government explain how references to past subsidy programs as part of a larger subsidy calculation satisfy the "express" requirement of the statute because neither Commerce nor the Government makes more than a conclusory statement about the application of the statute to the facts of this subsidy program. This does not constitute a sufficient explanation of why the BPS subsidies are expressly limited as the statute requires. Without such an explanation of Commerce's interpretation of the statute, the court cannot analyze whether Commerce made a decision supported by substantial evidence and in accordance with law.

Because Commerce did not set forth an interpretation of the statute in determining that the BPS subsidy payments are de jure specific, the court remands this determination to Commerce so that it may provide an explanation of its interpretation of the statute.

II. Commerce's Application of Section 1677–2(1) Is Not in Accordance with Law and Is Arbitrary.

The court concludes that Commerce's determination that processors of raw to ripe table olives could be attributed subsidies received by olive growers pursuant to Section 1677–2(1) is not in accordance with law because Commerce applied an impermissible interpretation of the statutory term "substantially dependent" based on its plain language and legislative history. Furthermore, Commerce's interpretation of "substantially dependent" is arbitrary because it constitutes an unexplained and unjustified deviation from its past practice. Finally, the court dismisses count two of the complaint as waived.

A. Commerce Applied an Impermissible Interpretation of Section 1677–2(1) in Determining That the Production of Raw Olives Is Substantially Dependent on the Production of Table Olives.

Section 1677–2(1) states the first of two requirements in determining whether countervailable subsidies apply to an agricultural product processed from a raw product: "the demand for [a] prior stage product is substantially dependent on the demand for [a] latter stage product." Under *Chevron*, the court must look to the "traditional tools of statutory construction" in determining the reasonableness of the agency's interpretation of the statute. *Timex V.I., Inc. v. United*

States, 157 F.3d 879, 882 (Fed. Cir. 1998) (quoting *Chevron*, 467 U.S. at 843 n.9). Plaintiffs argue that the plain meaning and the legislative history of Section 1677–2(1) support their claim that Commerce applied an impermissible interpretation of the statute to its CVD determination of ripe olives. Pls.' Br. at 10–13. The court finds Plaintiffs' argument to be persuasive.

The court begins with the statute's plain meaning and, accordingly looks to the dictionary definition of "substantially" and "dependent" and the structure of the phrase where "substantially" modifies the adjective "dependent." "Substantial" is defined as "[o]f, relating to, or involving substance," "[i]mportant, essential, and material," and "[c]onsiderable in amount or value." *Substantial*, BLACK'S LAW DICTIONARY (10th ed. 2009). "Substantial" is also defined as "being largely but not wholly that which is specified." *Substantial*, MERRIAM-WEBSTER (Jan. 14, 2020, 3:30 PM), https://www.merriam-webster.com/dictionary/substantial. "Dependent" is defined as "determined or conditioned by another: contigent" and "relying on another for support." *Dependent*, MERRIAM-WEBSTER (Jan. 14, 2020, 3:35 PM), https://www.merriamwebster.com/dictionary/dependent. The plain meaning thus requires the demand for the prior stage product must be "largely, but not wholly," "contingent" on the demand for the latter stage product. *See Substantial*, MERRIAM-WEBSTER (Jan. 14, 2020, 3:30 PM), https://www.merriamwebster.com/dictionary/substantial; *Dependent*, MERRIAM-WEBSTER (Jan. 14, 2020, 3:35 PM), https://www.merriam-webster.com/dictionary/dependent. The meaning of this phrase is determined by reading the terms "substantially" and "dependent" in conjunction because "substantially" is an adverb that modifies the adjective "dependent." The court thus concludes that an analysis of "substantially dependent" that does not link those two terms is an impermissible interpretation of the statute.

In interpreting Section 1677–2(1), Commerce did not read these two terms in conjunction, but instead separated those terms to reach its conclusion that the demand for raw olives is substantially dependent upon the demand for table olives. Commerce found the amount of raw olives used for processing into table olives, eight percent of all raw olives, to be substantial. Def.'s Br. at 16; Preliminary Decision Memo at 16; IDM at 21–22. Commerce then found the demand for raw olives was dependent on the demand for table olives because eight percent of the market, or millions of dollars in export sales to the United States, depends upon the demand for table olives. *Id.* Commerce's interpretation was impermissible under the plain meaning of the statute because it failed to assess whether the demand for raw olives was "substantially dependent," or "largely, but not wholly," "contin-

gent" on the demand for table olives. *See Substantial*, MERRIAM-WEBSTER (Jan. 14, 2020, 3:30 PM), https://www.merriam-webster.com/dictionary/substantial; *Dependent*, MERRIAM-WEBSTER (Jan. 14, 2020, 3:35 PM), https://www.merriamwebster.com/dictionary/dependent. Under step one of *Chevron*, the statutory language is unambiguous regarding the threshold of demand required to satisfy Section 1677–2(1).[11] Therefore, the court need not defer to Commerce's interpretation of the statute.

The legislative history of Section 1677–2(1) illuminates Congress's unambiguous intent for the meaning of "substantially dependent." Plaintiffs argue that the legislative history of Section 1677–2(1) is consistent with the statute's plain meaning. Pls.' Br. at 13. The court agrees. Congress enacted Section 1677–2 in response to *Canadian Meat Council v. United States*, in which the court held that Commerce had no statutory authority to impose CVDs on a processed agricultural product where the raw agricultural product was being subsidized.[12] 11 CIT 362, 661 F. Supp. 622 (1987), *vacated on other grounds*, 12 CIT 108, 680 F. Supp. 390 (1988). Plaintiffs correctly argue that the enactment of Section 1677–2 affirmed Commerce's past practice as applied in *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada: Final Affirmative Countervailing Duty Determination*, 50 Fed. Reg. 25,097 (Dep't Commerce June 17, 1985) ("*Pork from Canada 1985*") and *Rice from Thailand: Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 12,356 (Dep't Commerce April 10, 1986) ("*Rice from Thailand 1986*"). Pls.' Br.

[11] Although the court finds that Section 1677–2(1) is unambiguous under *Chevron* step one, the court will address the Government's arguments pursuant to *Chevron* step two. *See supra*, Jurisdiction, Standard of Review, and Interpretative Framework. The Government does not cite to case law interpreting the specific statute in question but rather argues that case law supports Commerce's interpretation of the word "substantial". Def.'s Br. at 17–18 (citing *Committee for Fairly Traded Venezuelan Cement v. United States*, 372 F.3d 1284, 1289–1290 (Fed. Cir. 2004) ("[The word substantial] does not imply a specific number or cut-off. What may be substantial in one situation may not be in another situation. The very breadth of the term 'substantial' undercuts [Plaintiff's] argument that Congress spoke clearly in establishing a standard for the Commission's regional antidumping and countervailing duty analyses. It therefore supports the conclusion that the Commission is owed deference in its interpretation of 'substantial proportion.'")). This view of "substantial" is inapposite in light of the legislative history specific to this statute, discussed below. As such, Commerce's application of the term "substantially dependent" is not reasonable and not in accordance with law under step two of *Chevron*.

[12] As Senator Baucus noted:

> The court said, "If the [current] statutory approach is inadequate, it is not the role of Commerce or the court, but the Congress to remedy any deficiency." . . . The glitch must be dealt with through a floor amendment. That is why Senator Grassley and myself, with the support of Senator Pryor, are today offering an amendment to the trade bill that directs the Commerce Department to place duties on processed agricultural products if the raw agricultural product is being subsidized.

Statement of Senator Baucus.

at 13–14; *see* 133 Cong. Rec. S8814 (June 26, 1987).[13] Therefore, Commerce's understanding and application of this analysis in both determinations is persuasive in understanding Congress's intent in enacting Section 1677–2.

In *Pork from Canada 1985*, Commerce noted that, due to the agricultural nature of the products, a distinct approach from its typical analysis of upstream manufactured products would be required to determine whether producers of processed fresh, chilled, and frozen pork from hogs could be attributed subsidies offered to Canadian hog farmers. *See Pork from Canada 1985* at 25,098. Specifically, Commerce focused on two criteria: (1) "the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product" and (2) whether the processed product "contribute[s] significantly to the value" of the raw product. *See id.* at 25,098–99. In explaining the first criterion, Commerce stated that it would be met where "demand for the prior stage good is derived *almost exclusively* from the demand for the latter stage . . . ." *Id.* at 25,098 (emphasis added). Commerce relied on the ITC's industry analysis, which determined that producers of a raw agricultural product and producers of the processed product could be collapsed into a single industry where the raw product "enters a single continuous line of production resulting in one end product." *Id.* at 25,099 (internal quotations omitted). Commerce went on to cite a decision by this court upholding an ITC finding that grape growers and wine producers could not be combined into a single industry because grapes were not "completely devoted to the production of the more advanced product under investigation." *See id.* (quoting *American Grape Growers v. United States*, 9 CIT 103, 104, 604 F. Supp. 1245 (1985)). Based on this reasoning, Commerce found in *Pork from Canada 1985* that the "primary, if not the sole, purpose of all segments of the industry in this case is to produce a single end product – pork meat." *Id.*

Prior to the enactment of Section 1677–2, Commerce also issued a final determination for *Rice from Thailand 1986*, relying on the standard developed in *Pork from Canada 1985*. *See Rice from Thailand 1986* at 12,358. Commerce attributed subsidies for growers of paddy rice to producers of milled rice because "[a]lmost all of the raw agricultural product, paddy rice, is dedicated to the production of milled rice." *See Rice from Thailand 1986* at 12,358. Commerce also used the

[13] "[T]he Department of Commerce developed the rule codified in the proposed amendment. The rule was most recently applied in the final affirmative countervailing duty determination: *[Pork from Canada 1985*], and in the final affirmative countervailing duty determination and countervailing duty order: *Rice from Thailand* [*1986]*. . . ." Statement of Senator Grassley, 133 Cong. Rec. S8814 (June 26, 1987) ("Statement of Senator Grassley").

same language it used in *Pork from Canada 1985* in stating that there was a "single, continuous line of production from paddy rice to milled rice," which was offered as evidence that the demand for milled rice is substantially dependent on the demand for paddy rice. *See Rice from Thailand 1986* at 12,358.

The consistency in reasoning and analysis of Commerce's agricultural subsidy attributions in *Pork from Canada 1985* and *Rice from Thailand 1986* is strong support for Plaintiffs' argument that Commerce's determination that the demand for raw olives substantially depends on the demand for table olives was not in accordance with the law enacted by Congress adopting these two decisions. Here, eight percent of raw olives used to produce table olives cannot reasonably be considered "[a]lmost all" of raw olives produced, *see Rice from Thailand 1986* at 12,358, nor can it be said that the demand for raw olives "is derived almost exclusively" from the demand for table olives, *see Pork from Canada 1985* at 25,098. Therefore, in determining that the demand for table olives was substantial and that the demand for raw olives was dependent on the demand for table olives, Commerce impermissibly applied an interpretation of Section 1677–2(1) that deviated from the plain language and Congress's unambiguous intent. In short, Commerce did not act in accordance with law.

B. Commerce's Deviation From its Past Practice Was Arbitrary and Thus Not in Accordance with Law.

Furthermore, Commerce's interpretation and application of the term "substantially dependent" deviated from its past practice and was arbitrary and capricious. Commerce may "enjoy[] wide latitude" in its application of Section 1677–2, but this discretion is not unlimited. *See* Def.'s Br. at 21. Commerce deviated from its past interpretations of Section 1677–2(1) but failed to provide an "adequate explanation" for this deviation, and thus its treatment of similar raw agricultural subsidy attribution was arbitrary. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001), *aff'd*, 332 F.3d 1370 (Fed. Cir. 2003) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)); *see also Huzhou Muyun Wood Co. v. United States*, 42 CIT __, __, 324 F. Supp. 3d 1364, 1375 (2018), *as amended* (July 27, 2018). In stating that eight percent of the market would be negatively affected if the demand for table olives were to cease, Commerce did not explain why the olive industry should be treated distinctly from its previous investigations into pork and rice. *See* Def.'s Br. at 16.

In addition to the determinations in *Pork from Canada 1985* and *Rice from Thailand 1986* detailed above, Commerce made similar determinations regarding pork and rice after the enactment of Section 1677–2. *See Fresh, Chilled, and Frozen Pork from Canada: Final Affirmative Countervailing Duty Determination*, 54 Fed. Reg. 30,774 (Dep't Commerce July 24, 1989) ("*Pork from Canada 1989*"); *Rice from Thailand: Final Results of Countervailing Duty Administrative Review*, 59 Fed. Reg. 8,906 (Dep't Commerce Feb. 24, 1994) ("*Rice from Thailand 1994*"). In 1989, Commerce applied the newly enacted Section 1677–2 to the same Canadian pork industry and again determined that "the demand for live swine depends substantially upon the demand for fresh, chilled, and frozen pork" because "[s]wine producers raise most swine for slaughter[,] [p]ork constitutes the primary product of the slaughtered pig[, and] [t]hus, the demand for pork and for live swine are inextricably linked." *Pork from Canada 1989* at 30,775. In 1994, Commerce published a further order on rice applying Section 1677–2 that stated "substantially all of the raw agricultural product, paddy rice, is dedicated to the production of milled rice" in explaining its determination that the demand for paddy rice is substantially dependent upon the demand for milled rice. *See Rice from Thailand 1994* at 8,909. Thus, Commerce developed a consistent practice in these decisions that it then deviated from here by concluding that the eight percent of raw Spanish olives processed into table olives constituted a substantially dependent demand upon table olives, despite not being almost exclusively, almost all, most, or substantially all the demand for raw olives. *See, e.g.*, *Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) ("An action . . . becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure.") (citations omitted); *Huvis Corp. v. United States*, 31 CIT 1803, 525 F. Supp. 2d 1370, 1378 (2007) (same) (citations omitted).

First, Commerce deviated from its past interpretation of "substantially dependent," which it previously found to include most or at least half of the demand of the raw agricultural product. *See, e.g., Pork from Canada 1985*; *Rice from Thailand 1986*; *Pork from Canada 1989*; *Rice from Thailand 1994*. Second, it is significant that there is not a "single continuous line of production" resulting in one end product, as previously considered by Commerce in *Pork from Canada 1985* and *Rice from Thailand 1986*. Rather there are at least two clear end products, olive oil and table olives. Of the two, it would be more reasonable to consider the demand for raw olives to be "sub-

stantially dependent" on the demand for olive oil, constituting ninety-two percent of the demand for raw olives. These two end products make this industry more like the grape industry under investigation in *American Grape Growers*, which Commerce relied on in formulating the substantially dependent prong later adopted by Congress. *See* 604 F. Supp. at 1247–48 (affirming the ITC's decision not to treat the grape industry in a continuous line with the wine industry because raw grapes were used to produce both wine and fruit).

Notably, the Government relies on Commerce's analysis of Section 1677–2(1) in the Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China, C-570–98978 (August 19, 2013) ("Shrimp from China IDM"), where Commerce applied the same deconstructed analysis of "substantially dependent" as it did here. In the Shrimp from China IDM, Commerce attributed subsidies provided to growers of fresh shrimp to producers of frozen shrimp, finding that 44.7 percent of fresh shrimp used for processing into frozen shrimp was "substantial" and that the demand for fresh shrimp is "dependent" on the demand for frozen shrimp. ¶ 195. Even considering the Shrimp from China IDM, 44.7 percent is significantly higher than eight percent; therefore, Commerce's current finding with respect to table olives cannot be considered consistent with its past determinations.

In sum, based on its previous findings of countervailable subsidies on processed products, Commerce's finding that the demand for raw olives is substantially dependent on the demand for table olives is an arbitrary deviation from its past practice and thus is not in accordance with law.

C. Plaintiffs' Argument That Commerce Improperly Defined "Latter Stage Product" Under Section 1677–2(1) as Table Olives Is Waived as a Matter of Law.

Plaintiffs also alleged in count two of their complaint that Commerce's finding under Section 1677–2(1) that the "latter stage product" comprises all table olives is not supported by substantial evidence and is otherwise contrary to law. *See* Amended Compl. ¶¶ 15–17. The Government correctly argues in its responding brief that under this court's well-established law, arguments that a plaintiff does not raise in its opening brief are considered waived. *See* Def.'s Br.

at 15 n.4 (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006)). Accordingly, the court dismisses count two of the complaint.[14]

III. Remaining Questions

Apart from the previously discussed issues regarding the interpretation and application of Section 1677A and Section 1677–2(1), Plaintiffs raise three other questions which, while arguably could be deferred, the court now addresses in the interest of judicial and litigation economy. The court concludes the following: (A) Commerce's application of Section 1677–2(2), that processing adds only "limited value," was supported by substantial evidence on the record and in accordance with law; (B) Commerce's calculation methodology regarding the attribution of subsidy benefits to ripe olive producers was supported by substantial evidence on the record and in accordance with law and; and (C) Commerce's determination that Guadalquivir's reported raw olive purchase data was sufficiently indicative of its purchases of raw olives used to produce ripe olives is supported by substantial evidence.

A. Commerce's Application of Section 1677–2(2) Was Supported by Substantial Evidence and in Accordance with Law.

The court concludes that Commerce's application of Section 1677–2(2) to determine that the processing of ripe olives added only limited value to raw olives was supported by substantial evidence on the record and in accordance with law as evidenced by legislative history citing two CVD determinations issued by Commerce.

i. Commerce Applied the Unambiguous Intent of Congress in Finding That the Processing of Ripe Olives Added Only Limited Value to Raw Olives in Accordance with Law.

After determining that the demand for raw olives was substantially dependent upon table olives under Section 1677–2(1), Commerce then concluded that the processing of raw olives into table olives added only limited value to the prior stage product under Section 1677–2(2). IDM at 6, 22-23. Commerce applied a permissible interpretation of Section 1677–2(2) consistent with the legislative intent behind the statute and Commerce's prior determinations on which the statute is based. The second requirement for a finding of countervailable subsidies on processed agricultural products, codified under 19 U.S.C. §

[14] Further, at oral argument on November 6, 2019, Plaintiffs acknowledged that they did not raise count two in its opening brief and took no issue with dismissal of the argument.

1677–2(2), states that where an agricultural product is processed from a raw agricultural product, "the processing operation [must] add only limited value to the raw commodity . . . ." Plaintiffs argue that Commerce's finding that processing table olives from raw olives added only limited value to ripe olives is unsupported by substantial evidence and contrary to law because (1) Commerce failed to address Plaintiffs' argument that processing changes the essential character of the raw olive and (2) Commerce failed to consider that packaging of table olives is an inherent part of processing the raw product. Pls.' Br. at 19–23. The Government argues that the legislative history and record evidence support Commerce's determination that processing for table olives added only limited value to the raw olive. Def.'s Br. at 21–25. The court agrees.

Applying *Chevron*, the court notes that the legislative history of Section 1677–2 reveals the unambiguous intent of Congress in the meaning of "limited value" under Section 1677–2(2). *See Chevron*, 467 U.S. at 842–43. The legislative history evidences that the purpose of the statute is to prevent a foreign nation from circumventing a CVD on an agricultural product "merely by doing some minor processing of the agricultural product before it is exported to the United States." Statement of Senator Baucus, 133 Cong. Rec. S8814 (June 26, 1987). Senator Baucus mentions pork and raspberries as two examples of this. Specifically, he states that "[h]ogs and pork are both the same product" and that the process of freezing raspberries created the "same raspberries--they[]'re just frozen." *Id.*

Plaintiffs argue that "Commerce did little more than state that 'an olive, is an olive, is an olive.'" Pls.' Br. at 22. In fact, Commerce concluded that ripe olives "are olives when they are raw and olives when they are processed." IDM at 23. In coming to this conclusion, Commerce reasoned that the processing operations that convert raw olives into ripe olives "do not change the 'essential character' of the raw product." *Id.* Plaintiffs further argue that processing of ripe olives does change the "essential character" of raw olives because "processing renders the raw olive edible and ready for its intended use." Pls.' Br. at 22.

The court finds that this argument is without merit. As discussed above, Congress relied on Commerce's *Pork from Canada 1985* decision in enacting Section 1677–2. *See* Discussion *supra* Sec. II. A. There, Congress adopted Commerce's limited value analysis. *See* 133 Cong. Rec. S8814 (June 26, 1987). A hog is not edible until it becomes pork, yet Congress believed such processing only added limited value to the raw product. *See* 133 Cong. Rec. S8814 (June 26, 1987); *Pork*

from Canada 1985. In *Pork from Canada 1985*, Commerce found that the processing of the subject merchandise, fresh, chilled pork, which consisted of "immobilizing, stunning, dehairing, eviscerating, and splitting," constituted only ten percent of the value added to the final product. *Pork from Canada 1985* at 25,099. As such, Commerce determined that processing added only limited value to latter stage product. *Id.* Although the process in *Pork from Canada 1985* is not identical to the process of producing ripe olives from raw olives, *see* Background *supra* Sec. II, the number of steps and value added by these operations is comparable. Since Congress relied on this CVD determination in enacting 19 U.S.C. § 1677–2, the determinations indicating Commerce's prior analysis of processing operations for the purposes of Section 1677–2(2) are persuasive. Given this legislative history, Commerce's finding that the processing operations of ripe olives added only limited value to the raw product is in accordance with law.

ii. Commerce Relied on Substantial Evidence in Determining That Processing of Ripe Olives Added Only Limited Value to Raw Olives.

Commerce's application of Section 1677–2(2) to Plaintiffs' processing operations is permissible and consistent with Commerce's prior determinations and supported by record evidence. Commerce determined that forty percent of the product value of ripe olives is attributable to the cost of the raw product, that only three percent is attributable to processing, and that the remaining fifty-seven percent is "attributable to post-processing operations, including packaging." Def.'s Br. at 23. Plaintiffs do not dispute that a total of sixty percent of the value of ripe olives is attributable to processing *and* packaging. Pls.' Br. at 20 (emphasis added). Rather, Plaintiffs argue that Commerce failed to consider that the packaging of ripe olives is an inherent part of the processing operations; however, Plaintiffs have not cited any precedent or authority that would require Commerce to make such a consideration. Pls.' Br. at 20–21. The Government points to its prior determinations to support Commerce's position that it need not consider packaging costs. *See* Def.'s Br. at 23 (citing *Pork from Canada 1989* at 30,776; *Rice from Thailand 1994* at 8,909). In neither of these determinations did Commerce consider packaging as part of the processing operations used to determine the added value to the raw product. *See Pork from Canada 1989* at 30,775; *Rice from Thailand 1994* at 8,909. Plaintiffs, in support of their contention that packaging of ripe olives is inseparable from the processing of ripe olives, argue that "[r]ipe olives are not delivered to the consumer in a

truck and then dumped at their doorstep. Packaging is an inherent part of the processed product." Pls.' Br. at 20.

Under the Plaintiffs' rationale, Commerce would have to include packaging in its analysis of value added to the raw product for every agricultural product sold. For example, pork is packaged and then sold to purchasers – the meat is not "dumped at their doorstep." *See* Pls.' Br. at 20. Yet, Commerce cannot, and did not, consider this packaging as inherent to the processing operations of pork simply because it would be inconsistent with Congress's intent.[15] See *Pork from Canada 1989* at 30,776. In excluding the fifty-seven percent of processing attributable to packaging from its analysis of value added to raw olives in the production of ripe olives, Commerce acted consistently with its prior practice. As such, Commerce's finding that three percent of added value to the raw product is considered "limited value" under Section 1677–2(2) is reasonable and supported by substantial evidence. *See Maverick Tube*, 857 F.3d at 1359; *Consol. Edison*, 305 U.S. at 217.

B. Commerce's Calculation Methodology for Determining the Benefit Attributable to Plaintiffs from Subsidies Provided to Growers of Raw Olives Is Supported by Substantial Evidence and in Accordance with Law.

The court concludes that Commerce applied a permissible methodology in calculating Plaintiffs' CVD rates given its attribution of subsidies pursuant to Section 1677–2. When calculating a CVD rate, Commerce will divide the amount of benefit allocated to the period of investigation by the sales value during the same period of the product or products to which Commerce attributes the subsidy. 19 C.F.R. § 351.525. In general, "if a subsidy is tied to the production or sale of a particular product, [Commerce] will attribute the subsidy only to that product." 19 C.F.R. § 351.525(b)(5)(i). Plaintiffs argue that Commerce improperly deviated from its general attribution practice for calculating the CVD rate by attributing subsidies received by growers of raw olives to sales of ripe olives rather than to sales of raw olives. Pls.' Br. at 24. The Government argues that 19 C.F.R. § 351.525 does not "strictly govern" Commerce's attribution of agricultural subsidies for the purposes of its CVD calculation because the typical attribution or "tying" rules under the regulation do not comport with the application of Section 1677–2. Def.'s Br. at 31, 33. The court agrees.

[15] The legislative history of Section 1677–2 explained that countervailable duties should not be evaded "merely by changing the form of the product" by subjecting it to packing or processing, citing examples of frozen raspberries or fresh, chilled pork. *See* Statement of Senator Grassley.

Commerce stated that its authority in selecting a calculation methodology stemmed from 19 U.S.C. § 1671, which states, "[if] the administering authority determines that the government of a country . . . is providing . . . a countervailable subsidy[,] . . . then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy." IDM at 43. In order to ensure that any methodology used to determine the amount of countervailable subsidy accurately measures the subsidies conferred upon the subject merchandise, Commerce implemented attribution rules under 19 C.F.R. § 351.525. *Id.* However, the Government argues that "[t]he Preamble also states that [Commerce's] intent is to apply these attribution rules as harmoniously as possible, recognizing that unique and unforeseen factual situations may make complete harmony among these rules impossible." Def.'s Br. at 28 (citing IDM at 43); *see also Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348, 65,400 (Dep't Commerce November 25, 1998)). It is Commerce's position that the application of Section 16772 was a "unique factual scenario" that required a deviation from the rules of 19 C.F.R. § 351.525. Def.'s Br. 28. Specifically, neither Section 1677–2 nor 19 C.F.R. § 351.525 provided an attribution methodology for agricultural subsidies under Section 1677–2. The Government cites *Solarworld Americas, Inc. v. United States* for the proposition that "'Commerce has considerable discretion to develop a methodology' when 'neither the statute nor the regulation' dictate a methodology." Def.'s Br. at 29 (quoting *Solarworld Americas, Inc.*, 40 CIT __, __ 182 F. Supp. 3d 1372, 1376 (2016)). The Government further contends that Commerce's methodology was a "reasonable means of effectuating the statutory purpose . . . ." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–405 636 F. Supp. 961, 966 (1986).

Plaintiffs first argue that Commerce's reliance on 19 U.S.C. § 1671 is misplaced because Commerce offered no explanation for why its altered methodology is more accurate than its traditional tying practice. Pls.' Br. at 26–27. Plaintiffs state that "[h]igher subsidy margins are not a benchmark for accuracy." *Id.* at 27. However, as the Government asserts, Commerce changed both the numerator and the denominator in the final calculation to reflect "the same universe of goods," ripe olives, in order to avoid "over- or understat[ing] the subsidy attributable to the subject merchandise." *See* Def.'s Br. at 30 (quoting *Certain Iron-Metal Castings from India: Final Results of Countervailing Duty Administrative Review*, 62 Fed. Reg. 32,297, 32,302 (Dep't of Commerce June 13, 1997)). Commerce explained that by changing both the numerator and denominator to ripe olive data, Commerce's calculation more accurately reflected subsidies attrib-

uted to the subject merchandise pursuant to Section 1677–2. IDM at 44. The court concludes this was a reasonable adjustment to the calculation methodology in line with the statute's purpose of countervailing attributed subsidies.

Plaintiffs next argue that Commerce's reliance on Section 1677–2 is misplaced because the statute does not explicitly include an attribution methodology for agricultural subsidies. Pls.' Br. at 28. Specifically, Plaintiffs argue that nothing in the statute or the regulation, 19 C.F.R. § 351.525(b), expressly applies to agricultural subsidies. *Id.* The Government responds that Commerce is entitled to deference in constructing a new methodology to calculate CVD rates for agricultural subsidies that comports with Congress's intent. Def.'s Br. at 29. The court agrees and notes that it is precisely because the statute and regulation are silent on what methodology Commerce should use in calculating CVD rates for agricultural subsidies that Commerce has "considerable discretion" in selecting a particular methodology. *See Solarworld Americas*, 182 F. Supp. 3d at 1376.

In sum, Commerce's methodology for calculating the CVD rate, in this instance, by attributing subsidies received by growers of raw olives to sales of table olives is supported by substantial evidence and in accordance with law.

C. Commerce's Determination That Guadalquivir's Reported Raw Olive Purchase Data Was Sufficiently Indicative of its Purchases of Raw Olives Used to Produce Ripe Olives Is Supported by Substantial Evidence.

Commerce acted permissibly in calculating Guadalquivir's CVD rate given the evidence on the record, which, as in all cases, Plaintiffs were responsible for providing. Commerce issued questionnaires to each Plaintiff regarding their sources of raw olives that were processed into ripe olives during the period of investigation. *See, e.g.,* Guadalquivir Questionnaire. Commerce used the data submitted by Plaintiffs in the numerator of its calculation for the CVD rate.[16] Def.'s Br. at 36. Plaintiffs contend that the initial purchase data submitted by Guadalquivir was for *all* raw olives and that this data was never updated with its purchase data for only raw olives that were then processed into ripe olives. Pls.' Br. at 33–35. According to Plaintiffs, Commerce found that the original data submitted by Guadalquivir on its raw olive purchases was "indicative" of its purchases of raw olives used for production of ripe olives in the *Final Determination*. Pls.' Br. at 36. Plaintiffs argue that this finding is not supported by substan-

[16] The numerator referred to is the amount, in kilograms, of raw olives purchased for processing into ripe olives. *See* Background *supra* Sec. C. ii.

tial evidence. Pls.' Br. at 38–46. Plaintiffs' main contentions are that (1) Commerce failed to adequately limit its request for purchase data from Guadalquivir to raw olives used for ripe olive production; (2) Commerce failed to give Guadalquivir notice of the data it required for its CVD calculation; and (3) Commerce's finding that Guadalquivir's reported purchases of raw olives is indicative of its purchases of raw olives produced into ripe olives is unreasonable. *Id.* The Government and Defendant-Intervenor respond that Commerce made reasonable conclusions regarding data submitted by Guadalquivir based on the evidence of record. Def.'s Br. at 37–40; Def-Inter.'s Br. at 37–39. The court agrees.

It is Plaintiffs' position that Commerce failed to request data from Guadalquivir on its purchases of raw olives limited to those produced into ripe olives. Pls.' Br. at 40. However, the Government is correct in its response that "Commerce has not 'hidden the ball' in this case." Def.'s Br. at 37–38 (citing *Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1443 215 F. Supp. 2d 1322, 1339 (2000)). In the cover letter to the initial questionnaire sent to Guadalquivir, Commerce requested "information on [Guadalquivir's] sources of raw olives that were processed into ripe olives during the period of investigation . . . ." Guadalquivir Questionnaire at 1. Plaintiffs argue that Commerce's request regarding "sources" is not equal to a request regarding "purchases" because supplier-specific information is not the same as use-specific information. Pls.' Br. at 41. The court finds this argument to be misleading because it ignores that Guadalquivir must purchase raw olives from its sources in order to process them into ripe olives.

Plaintiffs further argue that the cover letter directed Guadalquivir to answer questions that did not limit the raw olive data requested to only data of raw olives processed into ripe olives. *Id.* While Plaintiffs point to multiple questions from Commerce asking for data in raw olive inputs, Plaintiffs highlight the portions of these questions that support their theory yet fail to consider the portions in context of the whole question. *See* Pls.' Br. at 30–31. For example, Question 5 asks that "processors" of ripe olives complete a questionnaire on their raw olive suppliers. Guadalquivir Questionnaire, Attach. 1 at ¶5. Data of a ripe olive processor's raw olive suppliers inherently refers to the purchase of raw olives for processing into ripe olives. This analysis can be applied to all the questions cited by Plaintiffs in support of their theory. *See* Pls.' Br. at 30–31. The cover letter and questions sent by Commerce in the initial questionnaire are sufficient evidence such that a "reasonable mind might accept as adequate" to support the

Government's argument that Commerce made clear requests for data on Guadalquivir's raw olive purchases for processing into ripe olives. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison*, 305 U.S. at 229 (1938)).

Next, Plaintiffs point to the Clarification Letter sent by Commerce on September 27, 2017, which requested information on volume and value of all raw olive purchases by Plaintiffs. Pls.' Br. at 42–43 (citing Clarification of the Department's September 26, 2017 Letter at 2 (September 27, 2017), P.R. 984 ("Clarification Letter")). Specifically, Plaintiffs argue that this request reflects Commerce's "original expectation" in the initial questionnaire for data regarding all raw olive sources and that, by not submitting updated responses, Guadalquivir implied that its original responses reflected data on all raw olive sources. Id. However, these contentions support the Government's argument that its request was clear from the beginning in two ways. See Def.'s Br. at 38. First, Commerce issued the Clarification Letter to receive new information on raw olive sources, regardless of the processed product for which the raw olives were used. *See* Clarification Letter. Commerce's original expectation is irrelevant when its revised understanding of the initial data submitted by Plaintiffs was that the original data reflected raw olive purchases used to process ripe olives. Based on this understanding, the court agrees with the Government that it is "reasonable for Commerce to find that Guadalquivir's reported purchase volume was responsive to the original questionnaire . . . ." Def.'s Br. at 39. Plaintiffs contend that Commerce failed to provide Guadalquivir with notice of what data it required in its investigation, Pls. Br. at 43, but it is Guadalquivir that "had a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce," Def.'s Br. at 38 (quoting *Allegheny*, 215 F. Supp. 2d at 1339–1340). Nothing in the record evidence suggests that Guadalquivir reached out to Commerce in an attempt to clarify its understanding of what data Commerce requested nor was there any reason for Commerce to believe that Guadalquivir misunderstood what data it needed to provide.

Commerce further gave Guadalquivir another opportunity to clarify the data it provided to Commerce in its initial questionnaire during Commerce's verification of Guadalquivir's responses. Verification of the Questionnaire Responses of Aceitunas Guadalquivir, S.L.U. (March 22, 2018), P.R. 1222 ("Verification"). Upon verification, Commerce "discovered a considerable volume of additional unreported olive purchases." Amended Final Investigation at 5. Guadalquivir explained this discrepancy by reminding Commerce that

"[Guadalquivir] explained that because Commerce requested only purchases of ripe olives, [Guadalquivir] reported only olives purchased in acetic acid." *Id.* at 7.

This explanation provided by Guadalquivir itself suggests that it understood that Commerce required data on raw olives that would ultimately become ripe olives. Guadalquivir made specific distinctions in the data it reported based on whether the resulting product was subject or non-subject merchandise, which supports the Government's argument that Commerce had no reason to doubt Guadalquivir's understanding of what data Commerce required.

Plaintiff reiterates that the missing data on Guadalquivir's raw olive purchases used to process into ripe olives created a significant disparity in calculated subsidy margins. Pls.' Br. at 46. However, "[w]hen either necessary information is not available on the record or a respondent (1) withholds information that has been requested by Commerce, (2) fails to provide such information by Commerce's deadlines for submission of the information or in the form and manner requested, (3) significantly impedes an antidumping proceeding, or (4) provides information that cannot be verified, then Commerce shall use the facts otherwise available in reaching the applicable determination." *Shandong Rongxin Import & Export Co. v. United States*, 43 CIT __, __ 355 F. Supp. 3d 1365, 1370 (2019) (quoting *Dillinger France S.A. v. United States*, 42 CIT __, __ 350 F. Supp. 3d 1349, 1356 (2018) (additional citations omitted)).(2018)). Commerce's initial request for the parties' purchase data was clear, and Commerce provided additional opportunities in the Clarification and Verification for Guadalquivir to submit the requested data, despite Commerce not being required to do so. *See Shandong Rongxin*, 355 F. Supp. 3d at 1374 (quoting *ABB Inc. v. United States*, 43 CIT __, __ 355 F. Supp. 3d 1206, 1222 (2019) ("Commerce is not obligated to issue a supplemental questionnaire to the effect of, 'Are you sure?'")). Guadalquivir's continuous failure to correct its submitted data on its sources of raw olives, or to even clarify what data Commerce required gives rise to "reasonable inferences" that support the reasonableness of Commerce's conclusions. *See Matsushita Elec. Ind. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Given the reasoning set forth above, Commerce's finding that Guadalquivir's original reported raw olive purchase data was sufficiently indicative of its purchases of raw olives used to produce ripe olives is supported by substantial evidence.

CONCLUSION

The court remands to Commerce for further proceedings consistent with this opinion. Specifically, the court remands to Commerce on issues of (1) Commerce's determination that the EU and Spain's subsidies to olive growers are de jure specific pursuant to Section 1677(5A); and (2) Commerce's analysis of subsidies attributed to ripe olives pursuant to Section 1677–2(1). Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: January 17, 2020
New York, New York

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