U.S. Court of International Trade

Slip Op. 20–12

M S International, Inc., Plaintiff, v. United States of America, United States Department of Commerce, and Secretary Wilbur L. Ross, Jr., Defendants, and Cambria Company LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 19–00132

[Motions to dismiss for lack of subject matter jurisdiction granted.]

Dated: January 30, 2020

Jonathan T. Stoel, Jared R. Wessel, and *Nicholas R. Sparks*, Hogan Lovells US LLP, of Washington, D.C., for Plaintiff M S International Inc.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendants United States, U.S. Department of Commerce, and Wilbur L. Ross, Jr., Secretary of Commerce. With him on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Mykhaylo Gryzlov*, Senior Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

Roger B. Schagrin, Luke A. Meisner, Elizabeth J. Drake, and *Kelsey M. Rule*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Cambria Company LLC.

OPINION and ORDER

Gordon, Judge:

In this action, M S International, Inc. ("Plaintiff" or "MSI") challenges the U.S. Department of Commerce's ("Commerce") industry support determinations made as part of the initiation of the antidumping ("AD") and countervailing duty ("CVD") investigations ("Investigations") regarding quartz surface products ("QSPs") from India and the Republic of Turkey. *See Certain Quartz Surface Products from India and the Republic of Turkey,* 84 Fed. Reg. 25,529 (Dep't of Commerce June 3, 2019) (notice of India and Turkey AD investigation initiation) ("AD Notice"); *Certain Quartz Products from India and the Republic of Turkey,* 84 Fed. Reg. 25,524 (Dep't of Commerce June 3, 2019) (notice of India and Turkey CVD investigation initiation) ("CVD Notice"). MSI asserts that the court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(i).

Defendants move pursuant to USCIT Rule 12(b)(1) to dismiss this action for lack of subject matter jurisdiction. Defendant-Intervenor, Cambria Company LLC ("Cambria"), also moves to dismiss this action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction, and alternatively pursuant to USCIT Rule 12(b)(6) for failure to state a claim. *See* Defs.' Mot. to Dismiss, ECF No. 22 ("Defs.' Mot."); Def.-Intervenor's Mot. to Dismiss Pl.'s Compl., ECF No. 23 ("Cambria's Mot."); *see also* Pl.'s Resp. to Defs.' and Def.-Intervenor's Motions to Dismiss, ECF No. 33 ("Pl.'s Resp."); Def.-Intervenor's Reply in Supp. of its Mot. to Dismiss, ECF No. 37 ("Cambria's Reply"); Defs.' Reply in Supp. of Mot. to Dismiss, ECF No. 38 ("Defs.' Reply"). Lastly, Cambria moves to dismiss because MSI's claim is not ripe for judicial review. *See* Cambria's Mot. For the following reasons, the motions to dismiss for lack of subject matter jurisdiction are granted.

I. Background

In May 2019, Cambria filed AD and CVD petitions with Commerce regarding QSPs from India and Turkey. QSPs are a stone composite building material used for countertop surfaces in residential, commercial, and industrial properties. Pl.'s Resp. at 5. The QSP production process generally entails (1) the creation of a raw QSP slab, followed by (2) a fabrication process that transforms slabs into products suitable for installation. *Id* . at 5–6. For a petitioner, like Cambria, to initiate an AD or CVD investigation, it must first file a petition with Commerce that meets the requirements of Sections 702(b)(1) and 732(b)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671a(b)(1) and 1673a(b)(1).[1] These provisions require that the petitions must be filed "on behalf of an industry." As the initial step in an investigation, the petition must show that: (1) the domestic producers who support the petition account for at least 25 percent of the total production of the domestic like product, and (2) the domestic producers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. 19 U.S.C. §§ 1671a(c)(4)(A), 1673a(c)(4)(A).

MSI, an importer of QSPs from India and Turkey, argued before Commerce that the petitions failed to satisfy the industry support requirement because they did not include QSP fabricators within the domestic industry. Commerce rejected MSI's contentions, determined that the petitions had sufficient industry support, and initiated the Investigations. *See* AD Notice; CVD Notice.

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

Plaintiff seeks immediate judicial review of Commerce's industry support determinations. *See* Complaint, ECF No. 4. Plaintiff argues that by excluding QSP fabricators from Commerce's industry support determinations, Commerce violated 19 U.S.C. §§ 1671a and 1673a. MSI further contends that the Investigations have created a huge burden of time and resources as a result of MSI's participation in the allegedly unlawful Investigations. MSI argues that the court has jurisdiction under 28 U.S.C. § 1581(i) to review its claims and seeks (1) a declaration that the Investigations are unlawful and (2) a remand for Commerce to reconsider its industry support determinations.

II. Standard of Review

The claimant carries "the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432, (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a motion to dismiss for lack of subject matter jurisdiction, the court assumes "all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

III. Discussion

Plaintiff does not assert jurisdiction under 28 U.S.C. § 1581(c) where challenges to Commerce decision-making in antidumping and countervailing duty proceedings ordinarily lie. That avenue requires a "final determination," 19 U.S.C. § 1516a(a)(2)(B)(iii), and is available when Commerce publishes its final determination of the investigations in the *Federal Register.* 19 U.S.C. § 1516a(a)(2). Although Commerce did not agree with Plaintiff's industry support arguments, Plaintiff may submit a case brief commenting on Commerce's industry support determination. 19 C.F.R. § 351.309. If Plaintiff in good faith believes Commerce violated the statute, and that violation has invalidated the whole investigation, Plaintiff can focus its case brief on that one point. Assuming arguendo Plaintiff is correct, and Commerce then fails to correct the error, Plaintiff may challenge Commerce's industry support determinations in this Court under 28 U.S.C. § 1581(c) as a reviewable final determination under 19 U.S.C. § 1516a(a)(2)(B)(iii). This Court has the power to declare Commerce's proceeding unlawful and order Commerce to redo the investigation, if necessary. 28 U.S.C. §§ 1585, 2643(c). The court can also enjoin liquidation of any entries subject to unlawful affirmative antidumping and countervailing determinations that result, and order that any cash deposits paid on those entries be refunded in full. Plaintiff therefore has a full and complete remedy under 28 U.S.C. § 1581(c). Plaintiff, though, is not waiting for Section 1581(c) jurisdiction to attach. It seeks immediate relief under 28 U.S.C. § 1581(i), this Court's oft-litigated residual jurisdiction provision:

> Under 28 U.S.C. § 1581(i), the Court has jurisdiction to hear "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—... (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section." However, § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable ... by the Court of International Trade under section 516A(a) of the Tariff Act of 1930..." 28 U.S.C. § 1581(i). The legislative history of § 1581(i) demonstrates Congress intended "that any determination specified in section 516A of the Tariff Act of 1930, [as amended,] or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A." H.R. Rep. No. 96–1235, at 48 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60. Thus, the Court's § 1581(i) jurisdiction is available only if the party asserting jurisdiction can show the Court's § 1581(a)-(h) jurisdiction is unavailable, unless the remedies afforded by those provisions would be manifestly inadequate. *See Miller & Co. v. United States,* 824 F.2d 961, 963 (Fed. Cir. 1987) ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." (citations omitted)).
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> When jurisdiction under another provision of § 1581 "is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Id.* at 963 (citations omitted). That judicial review may be delayed by requiring a party to wait for Commerce's final determination in a countervailing duty investigation is not enough to make judicial review under § 1581(c) manifestly inadequate. *Gov't of People's Republic of China v. United States,* 31 CIT 451, 461, 483 F. Supp. 2d 1274, 1282 (2007). Neither the burden of participating in the administrative proceeding nor the business uncertainty caused by such a

> proceeding is sufficient to constitute manifest inadequacy. *See, e.g., id.* at 461, 483 F. Supp. 2d at 1282, 1385 (citing *FTC v. Standard Oil*, 449 U.S. 232, 244, (1980)); *Abitibi-Consolidated Inc. v. United States*, 30 CIT 71 4, 717–18, 437 F. Supp. 2d 1352, 1356–57 (2006). Essentially, the type of review sought by a plaintiff asserting the court's § 1581(i) jurisdiction must not already be provided for by 19 U.S.C. § 1516a (2006). *Abitibi-Consolidated Inc.*, 30 CIT at 717–18, 437 F. Supp. 2d at 1356–57.
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> The Court's § 1581(c) jurisdiction makes final determinations by Commerce reviewable via 19 U.S.C. § 1516a(a)(2). The Court of Appeals for the Federal Circuit has held that § 1516a(a)(2) allows for judicial review of both matters of procedural correctness, as well as the substantive merits of the determination. *See Miller & Co.*, 824 F.2d at 964 ("Under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial review." (citations omitted)). That Commerce has conducted the administrative proceeding in a manner that is contrary to law is an allegation made expressly reviewable by 19 U.S.C. § 1516a(b)(1), which directs the court to "hold unlawful any determination, finding, or conclusion found—... (B)(i) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law..."

Borusan Mannesmann Boru Sanayi v. Ticaret A.S., 38 CIT ___, ___, 986 F. Supp. 2d 1381, 1384–85 (2014). To this, the court would add the helpful reminder that Plaintiff's 1581(i) claim is nothing more than an Administrative Procedure Act[2] claim, subject to its requirements, including that "[a]gency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). This APA provision is necessarily mirrored in the court's residual jurisdiction case law, which as noted above prescribes that Section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or manifestly inadequate. Section 704 of the APA also provides that "[a] preliminary, *procedural*, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704 (emphasis added).

The legislative history to 1581(i), the case law, and the Administrative Procedure Act *all* discourage piecemeal review of Commerce Department international trade proceedings. They are problematic

[2] 5 U.S.C. §§ 701–706.

for any plaintiff who is challenging preliminary administrative actions regarding industry support that will be incorporated in or superseded by the final determination. Since challenges to industry support determinations are routinely reviewed under 19 U.S.C. § 1516a as part of a final AD or CVD determination, the court has jurisdiction to review Plaintiff's claims under § 1581(c) after Commerce issues its final determinations for the Investigations, as Plaintiff well knows. *See, e.g., M S Int'l Inc. v. United States*, Court Nos. 19–00140 & –00141 (Plaintiff's actions brought under § 1581(c) challenging Commerce's industry support findings in the AD and CVD Investigations of Certain QSPs from the People's Republic of China); *see also* H.R. Rep. No. 98–725, at 47 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127 (In amending 19 U.S.C. § 1516a, Congress eliminated interlocutory judicial review, in most instances, so as to avoid costly and time consuming legal action where the issue can be resolved just as equitably at the conclusion of the administrative proceedings.).

Plaintiff's arguments that it is suffering a substantial financial burden and business harm by having to participate and await final determinations in these Investigations, *see* Pl.'s Resp. at 7–8, are to no avail. Participating in an administrative proceeding, incurring the attendant litigation expense, and enduring the collateral consequences of such participation, business or otherwise, does not, and cannot, constitute irreparable harm. *See FTC v. Standard Oil*, 449 U.S. 232, 244 (1980). Otherwise, every issue in every trade case would be eligible for piecemeal review and Section 1581(i) would completely swallow Section 1581(c).

There is no merit in Plaintiff's jurisdictional arguments or Section 1581(i) claim. If Commerce reaches affirmative final determinations in the Investigations, Plaintiff may then seek relief by bringing its claims under Section 1581(c) as it has done in other matters. *See, e.g., M S Int'l. Inc. v. United States*, Court Nos. 19–00140 & –00141.

IV. Conclusion

For the foregoing reasons, the court grants Defendants' and Cambria's USCIT Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction.

Dated: January 30, 2020
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 20–13

JIAXING BROTHER FASTENER CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 14–00316

[Sustaining in part and remanding in part the U.S Department of Commerce's remand redetermination in the fourth administrative review of the antidumping duty order on certain steel threaded rod from the People's Republic of China.]

Dated: February 3, 2020

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiffs Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Elizabeth Anne Speck*, Senior Trial Counsel. Of Counsel was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Roger B. Schagrin and *Paul W. Jameson*, Schagrin Associates, of Washington, D.C., for defendant-intervenor Vulcan Threaded Products Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *Jiaxing Brother Fastener Co., Ltd., a/k/a Jiaxing Brother Standard Part Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. v. United States*, 43 CIT __, 380 F. Supp. 3d 1343 (2019) ("*Jiaxing I*"). *See also* Final Results of Redetermination Pursuant to Court Remand, Aug. 27, 2019, ECF No. 105 ("*Remand Results*"). In *Jiaxing I*, the court sustained in part and remanded in part Commerce's final determination in the fourth administrative review of the antidumping duty ("ADD") order on certain steel threaded rod ("STR") from the People's Republic of China ("PRC"). *See Certain [STR] from the [PRC]: Final Results of [ADD] Admin. Review; 2012–2013*, 79 Fed. Reg. 71,743 (Dep't Commerce Dec. 3, 2014) ("*Final Results*") and accompanying Issues & Decision Memo. for the Final Results of the Fourth Admin. Review of the [ADD] Order on Certain [STR] from the [PRC], A-570–932, (Nov. 21, 2014), ECF No. 23–2 ("Final Decision Memo."); *Certain [STR] from the [PRC]: Notice of [ADD] Order*, 74 Fed. Reg. 17,154 (Dep't Commerce Apr. 14, 2009).

In *Jiaxing I*, the court remanded for further explanation or reconsideration its calculation of surrogate financial ratios as related to labor. 380 F. Supp. 3d at 1361–62. The court also ordered Commerce to further explain or reconsider its decision not to adjust costs associated with acquiring letters of credit and the weight assigned to shipping containers in the calculation of brokerage and handling ("B&H") costs. *Id.* at 1366–68. On remand, Commerce determined it appropriate to exclude the cost of obtaining letters of credit from the total B&H costs. *See Remand Results* at 3. However, Commerce declined to reallocate labor expenses in the surrogate financial statements, *id.* at 11–16, and to adjust the weight assigned to shipping containers in its surrogate value calculation of B&H costs. *Id.* at 4–7.

Plaintiffs Jiaxing Brother Fastener Co., Ltd., a/k/a Jiaxing Brother Standard Parts Co., Ltd., IFI & Morgan Ltd., and RMB Fasteners Ltd. (collectively, "Jiaxing") challenge Commerce's remand redetermination as unsupported by substantial evidence. *See* [Pls.'] Cmts. Opp'n Remand Results at 1, 11, Sept. 27, 2019, ECF No. 109 ("Pls.' Br.").[1] Defendant and Defendant-Intervenor Vulcan Threaded Products Inc. ("Vulcan") request the court to uphold the *Remand Results* in its entirety. *See* Def.'s Resp. Parties' Cmts. on [Remand Results] at 1–2, 15, Nov. 14, 2019, ECF No. 112 ("Def.'s Br."); Def.-Intervenor's Cmts. Supp. Remand Results at 1,4, Nov. 14, 2019, ECF No. 113 ("Def.-Intervenor's Br."). For the following reasons, the court sustains Commerce's decision not to adjust the surrogate financial statements. However, the court remands Commerce's calculation of B&H costs regarding its use of a 10,000-kilogram container weight.

BACKGROUND

The court assumes familiarity with the facts of this case, as set out in the previous opinion, *see Jiaxing I*, 380 F. Supp. 3d at 1349–50, and recounts those facts relevant to the court's review of the Remand Results. In this fourth administrative review of the ADD order on certain STR,[2] Commerce selected Thailand as the primary surrogate country, *see* Final Decision Memo. at 14, and calculated surrogate financial ratios for selling, general, and administrative ("SG&A") costs, manufacturing overhead, and profit using the financial state-

[1] Plaintiffs support Commerce's deduction of the cost of acquiring letters of credit from B&H costs and present no challenge with respect to that aspect of Commerce's *Remand Results*. *See* Pls.' Br. at 1.

[2] The fourth administrative review covers the period April 1, 2012 through March 31, 2013. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part*, 78 Fed. Reg. 33,052, 33,056 (Dep't Commerce June 3, 2013).

-ments of two Thai companies. *Id.* at 19. Commerce also valued labor hours using data from Thailand's Labor Force Survey of Whole Kingdom published by the National Statistical Office of the Government of Thailand ("NSO data"). *Id.*; *see also* Surrogate Values for the Prelim. Results at 6–9, Exs. 7–9, PD 104–05, bar codes 3202737–01–02 (May 16, 2014) ("Prelim. SV Memo").[3] Commerce used the costs of "manufacturing" labor identified in the "Industry" column in Tables 15 and 16 of the NSO data to derive a single country industry-specific wage rate denominated in U.S. dollars. *See* Prelim. SV Memo. at Exs. 7A–7B at Tables 15–16.[4] In preparing the surrogate value of labor, Commerce determined it was not necessary to re-allocate certain line items in the surrogate financial statements to avoid double counting labor costs associated with SG&A costs in the calculation of Jiaxing's surrogate financial ratios. Final Decision Memo. at 19–22. Commerce also selected the World Bank's "Doing Business 2014: Thailand"[5] report ("Doing Business report") to generate a surrogate value for Jiaxing's B&H costs. *Id.* at 23–26. Commerce did not make a deduction for the cost of acquiring letters of credit from the B&H costs derived from that report. *Id.* at 25–26. Commerce also generated B&H costs on a per-kilogram basis by assigning each shipping container of Jiaxing's STR a weight of 10,000 kilograms. *Id.* at 27–28.

In *Jiaxing I*, the court ordered Commerce to reconsider or further explain three aspects of the final determination: (1) Commerce's decision not to subtract the cost of obtaining letters of credit from B&H costs; (2) its decision to calculate B&H with an assumption that each 20-foot shipping container weighs 10,000 kilograms; and, (3) Com-

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[3] On January 26, 2015, Defendant filed on the docket the indices to the public and confidential administrative records at ECF Nos. 23–4–5. Subsequently, on August 29, 2019, Defendant also filed indices to the public and confidential remand record at ECF Nos. 106–2–3. All further references to documents from the administrative records are identified by the numbers assigned by Commerce in these indices.

[4] The NSO data covers the third quarter of 2012 and the first quarter of 2013, with such data respectively contained in Exhibits 7A and 7B. *See* Prelim. SV Memo. at Exs. 7A–7B. These exhibits do not need to be distinguished in this analysis, as the structure of the tables contained in them is the same.

[5] The "Doing Business 2014: Thailand" report is one of a series of annual reports prepared by the World Bank for various countries which "measures and tracks changes in regulations affecting 11 areas in the life cycle of a business" to show "how easy or difficult it is for a local entrepreneur to open and run a small to medium-size business when complying with relevant regulations." Prelim. SV Memo at Ex. 15 at 4. The relevant "Trading Across Borders" section employed by Commerce to prepare Jiaxing's surrogate B&H costs measures the "cost (excluding tariffs and the time and cost for sea transport) associated with exporting and importing a standard shipment of goods by sea transport." *Id.* at Ex. 15 at 72. For exports, such costs include (1) customs clearance and technical control, (2) ports and terminal handling, (3) inland transportation and handling, (4) bills of lading, (5) certificates of origin, (6) commercial invoices, (7) customs export declaration, and (8) terminal handling receipts. *Id.* at Ex. 15 at 78–79. These costs are derived from questionnaires concerning a standardized case scenario and refer to business in Thailand's largest business city. *Id.* at Ex. 15 at 102–03.

merce's decision not to adjust surrogate financial ratios. *See* 380 F. Supp. 3d at 1367–68. First, the court faulted Commerce for failing to address detracting evidence that suggested the Doing Business report incorporates costs of acquiring letters of credit, warranting deduction of those costs from the cost of B&H. *See id.* at 1364–66. The court referred specifically to correspondence that established earlier versions of the Doing Business report incorporated costs of obtaining letters of credit, and, further, the World Bank's statement that it applied the same methodology in each version of the Doing Business report. *See id.* Second, the court noted that the Doing Business report provided B&H costs on a "per container" basis yet did not expressly state that the B&H costs are dependent on a specific 20-foot shipping container weight. *Id.* at 1366–67. The court determined that Commerce failed to consider record evidence that indicated that B&H costs—such as costs of document preparation, customs clearance and technical control, and ports and terminal handling—are not affected by the weight of a particular shipping container. *See id.* Third, with respect to surrogate financial ratios, the court explained that Commerce failed to address record evidence that would indicate an adjustment to the calculation of financial ratios was necessary to avoid potentially double counting labor costs associated with SG&A labor. *See id.* at 1360–62. Specifically, the court pointed to Table 8 of the NSO data that, in listing average wages of occupations within the "manufacturing" industry, includes several occupations associated with SG&A labor costs (e.g., "senior officials and managers," "professionals," "technicians and associate professionals," and "clerks"). *Id.* at 1361. The court noted that inclusion of these occupations inflates the cost of manufacturing labor compared to what manufacturing labor would cost, if derived solely from average income of occupations directly associated with manufacturing. *Id.*

On remand, Commerce determined that the costs of obtaining letters of credit should be excluded from the B&H costs reported in the Doing Business report, and, as a result, adjusted the B&H surrogate value from $0.0385 to $0.0325 per kilogram. *Remand Results* at 3. Commerce, however, continued to use a 10,000-kilogram denominator in the calculation of the B&H surrogate value, because surveyed respondents of the Doing Business report were asked to provide B&H costs based upon a 20-foot shipping container weighing 10,000 kilograms. *See id.* at 5–7. With respect to the surrogate financial ratios, Commerce continued to find no adjustment was warranted, because there was no basis in the surrogate financial statements themselves that would support allocating all SG&A labor costs to labor in the calculation of surrogate financial ratios. *Id.* at 12. Further, Commerce, in reviewing the NSO data, explained that the record evidence did not provide the necessary information to adjust either the labor wage rate or the surrogate financial statements. *See id.* at 12–16. As a result of its remand redetermination, Commerce revised the weighted-average dumping margins assigned to Jiaxing. *See id.* at 2.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii), and 28 U.S.C. § 1581(c) (2012),[6] which grant the court authority to review actions contesting the final determination in a review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Adjustment of Surrogate Financial Ratios

Jiaxing challenges as unsupported by substantial evidence Commerce's decision not to reclassify as labor certain SG&A labor-related line items[7] in the surrogate financial statement to calculate surrogate financial ratios. *See* Pls.' Br. at 7. Given Commerce had found the NSO data used to value labor included all costs related to labor, Jiaxing further contends that Commerce should have allocated certain SG&A labor-related line items to the denominator of the surrogate financial ratios. *See id.* Jiaxing also argues that Commerce's justifications not to adjust the financial ratios are unsupported by substantial evidence or by its Labor Methodologies. *See id.* at 7–8. Defendant and Defendant-Intervenor respond that Commerce reasonably found it would be inappropriate to adjust the surrogate

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

[7] Specifically, Jiaxing identified in the surrogate financial statements the SG&A labor-related line items as comprising, inter alia, salary and bonus, welfare, social security, and compensation. *See* Jiaxing Case Brief at 34–35, Ex. 2, PD 121–25, bar codes 3219798–01–05 (Aug. 4, 2014).

financial ratios, because no record evidence supported an adjustment and, further, an adjustment would introduce distortions into the surrogate financial ratio calculations. *See* Def.'s Br. at 10–15; Def.-Intervenor's Br. at 2–4. For the reasons that follow, Commerce reasonably declined to adjust the surrogate financial ratios.

In an antidumping proceeding, if Commerce considers an exporting country to be an NME, like the PRC, it will identify one or more market economy countries to serve as a "surrogate" for that NME country in the calculation of normal value.[8] *See* 19 U.S.C. § 1677b(c)(1), (4). Normal value is determined on the basis of factors of production ("FOPs") from the surrogate country or countries used to produce subject merchandise. *See id.* at § 1677b(c)(1). FOPs to be valued in the surrogate market economy include "quantities of raw materials employed," "amounts of energy and other utilities consumed," and, "representative capital cost, including depreciation[,]" and "hours of labor required[.]" *See id.* at § 1677b(c)(3). However, the statute does not distinguish between production labor, or labor used to produce subject merchandise, and non-production labor, or labor associated with SG&A functions. *See generally Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010). Section 1677b requires Commerce to use "the best available information" to value FOPs. 19 U.S.C. § 1677b(c)(1). Commerce has discretion to determine what constitutes the best available information. *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). "Commerce generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review" (collectively, "selection criteria"). *Qingdao Sea-Line Trading Co., Ltd. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* Import Admin., U.S. Dep't Commerce, *Non-Market Economy Surrogate Country Selection Process*, Pol'y Bulletin 04.1 (2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Jan. 28, 2020). After calculating the total value of FOPs, Commerce will add to normal value "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." 19 U.S.C. § 1677b(c)(1).

Thus, Section 1677b(c)(1) provides for the separate valuation of hours of labor as a FOP and of general expenses and profit in the

[8] Dumping occurs when merchandise is imported into the United States and sold at a price lower than its "normal value," resulting in material injury (or the threat of material injury) to the U.S. industry. *See* 19 U.S.C. §§ 1673, 1677(34), 1677b(a). The difference between the normal value of the merchandise and the U.S. price is the "dumping margin." *See id.* at § 1677(35). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin are imposed to offset the dumping. *See id.* at § 1673; *see generally Dorbest*, 604 F.3d at 1367.

normal value calculation. *See* 19 U.S.C. § 1677b(c)(1). To value hours of labor, Commerce generally relies on labor costs reported in the International Labor Organization's ("ILO") Chapter 6A data, which captures both direct and indirect labor costs, unless another data source better accounts for those labor costs. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 11, 2011) ("Labor Methodologies").[9] To value general expenses and profit, Commerce calculates surrogate financial ratios that the agency derives from the financial statements of one or more companies that produce identical or comparable merchandise in the primary surrogate country. *See* 19 C.F.R. § 351.408(c)(4) (2014); *Dorbest*, 604 F.3d at 1368. Specifically, Commerce calculates separate surrogate financial ratios for SG&A, manufacturing overhead, and profit from the surrogate financial statement. *See, e.g., Manganese Metal From the [PRC]*, 64 Fed. Reg. 49,447, 49,448 (Dep't Commerce Sept. 13, 1999) (final results of second admin. review). To do so, Commerce analyzes each financial statement line item and either assigns the line item value to a particular category—i.e., raw materials, labor, energy, manufacturing overhead, finished goods, and profit—or excludes the value from its calculation. Commerce then calculates separate surrogate financial ratios—for manufacturing overhead, SG&A, and profit—based on the total value of each category. *Id.* Relevant here, to calculate the SG&A surrogate financial ratio, Commerce divides the total SG&A value (numerator) by the total cost of manufacturing (denominator), i.e., the sum of raw materials, labor, energy, manufacturing overhead, and finished goods. *See, e.g.*, Final SV Spreadsheet at Exs. 10A–10B, PD 131, bar code 3243140–01 (Nov. 21, 2014) ("Final SV Spreadsheet").

Commerce will make adjustments to the calculation of surrogate financial ratios to avoid double-counting labor costs, "when the available information—in the form of itemized indirect labor costs—demonstrates that labor costs are overstated."[10] *See* Labor Method-

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[9] Commerce originally valued labor with ILO Chapter 5B data, which only captured direct labor costs. *See* Labor Methodologies, 76 Fed. Reg. at 36,093. In its Labor Methodologies, Commerce announced that it would, instead, use ILO Chapter 6A data, because the ILO Chapter 5B data could result in an undercounting of indirect labor costs, if indirect labor costs were not itemized—and reflected in—surrogate financial ratios. *See id.* However, the effect of switching from data that captured only direct labor costs to a source that reflected both indirect and direct labor costs, could result in an overstatement of labor costs. To minimize this risk, Commerce stated that it will "adjust the surrogate financial ratios when the available record information—in the form of itemized indirect labor costs—demonstrates that labor costs are overstated." *Id.* at 36,094.

[10] Generally, double counting is disfavored in antidumping calculations because it is distortive and renders margins less accurate. *See, e.g., Zhaoqing Tifo New Fibre Co. v. United States*, 41 CIT __, __ n.8, 256 F. Supp. 3d 1314, 1319 n.8 (2017) (collecting cases).

ologies, 76 Fed. Reg. at 36,094; *see also* Issues & Decision Memo. for the Final Determination of the [ADD] Investigation of Drawn Stainless Steel Sinks from the [PRC] at 15, A-570–983, (Feb. 19, 2013), *available at* https://enforcement.trade.gov/frn/summary/prc/2013–04379–1.pdf (last visited Jan. 28, 2020) (stating that "because the NSO data include all labor costs, the Department has treated itemized SG&A labor costs in the surrogate financial statements as a labor expense rather than an SG&A expense, and we have excluded those costs from the surrogate financial ratios"). In such a case, Commerce will determine whether the surrogate financial statements "include disaggregated overhead and [SG&A] expense items that are already included in the [record data used to value labor], [Commerce] will remove these identifiable costs items." *See* Labor Methodologies, 76 Fed. Reg. at 36,094.

Here, Commerce valued hours of labor with the NSO data, because it found the data to be more industry-specific and contemporaneous with the POR than the ILO Chapter 6A data. *See* Final Decision Memo at 19; *Remand Results* at 11. Further, Commerce derived surrogate financial ratios from the financial statements of two Thai companies. *See* Prelim SV Memo. at 9; Final Decision Memo. at 19–22; *Remand Results* at 11. Each company's financial statements itemized SG&A labor-related costs separately from other labor costs. *See* Prelim. SV Memo. at 10, Ex. 10. Commerce treated all SG&A labor-related line items as SG&A, rather than labor. *See* Prelim. SV Memo. at 9–10; *see also Remand Results* at 19–23. As a result, the numerators of the surrogate financial ratios included SG&A labor line items—e.g., salary, welfare, and social security—along with other SG&A expenses and interest; and, the denominators contained, inter alia, labor costs. *See* Final SV Spreadsheet at Exs. 10A–10B.

On remand, Commerce reasonably declined to adjust the surrogate financial ratios to remove SG&A labor-related line items from the numerator because the record did not enable Commerce to determine whether such an adjustment would appropriately compensate for Jiaxing's unreported SG&A labor hours when using the NSO data to value labor hours. *See Remand Results* at 11–16. As instructed by the court, Commerce reviewed the NSO data, *id.* at 14–15, and noted that the labor rate represented the average remuneration paid to workers in manufacturing and non-manufacturing activities. *Id.* at 13–14. In addition, because the NSO data included items like bonus, social security, workmen's compensation fund, and health insurance, Commerce inferred that the labor rate was "likely to be a much broader average than one representing only wages and salaries[.]" *Id.* at 14. Therefore, Commerce concluded that the NSO data captured all labor costs. *Id.* at 13–14. Despite determining that the NSO data—like the ILO Chapter 6A data it generally uses to value labor hours—reflected all labor costs, Commerce explained that any adjustment to the surrogate financial ratios—to remove SG&A labor-related line items from the numerator—may not accurately compensate for any potential overstatement of SG&A labor in the NSO data's labor rate.[11] *Id.* at 14, 16; *see also* Labor Methodologies, 76 Fed. Reg. at 36,093–94. Commerce explained that the tables in the NSO report did not provide the information necessary to determine the extent to which the labor rate captured SG&A labor.[12] *See id.* at 13–14. Therefore, record evidence did not support a finding that the labor rate was higher—and by what amount—than what it would have been if derived solely from production labor.[13] *See id.* at 14. Moreover, given that respondents did not report labor hours associated with SG&A staff, Commerce reasonably declined to assume that the NSO data would accurately compensate for, and not overstate, respondents' unreported SG&A labor hours.[14] *See id.* at 13–16. Without an indication of the extent to which the NSO data also covered SG&A labor, Commerce reasonably declined to transfer the surrogate financial statements'

[11] Plaintiffs contend that "there is no reason for the Department to quantify how much the NSO rate is overstated." Pls.' Br. at 8. Although, as Plaintiffs observe, Commerce's Labor Methodologies refers only to overstatement in the respondent's cost of labor, and does not require Commerce to calculate the exact extent of overstatement, *see id.* at 7–8; Labor Methodologies, 76 Fed. Reg. at 36,093–94, Commerce's determination of whether to adjust surrogate financial statements necessitates quantification on the extent to which the NSO data also captures SG&A labor costs. The difference between production and non-production labor rates in the NSO data could be small, meaning Jiaxing's proposed adjustment to the surrogate financial ratios would result in an understatement of SG&A labor and a less accurate calculation of normal value. Therefore, Commerce reasonably declined to make an adjustment that would potentially create a scenario where indirect labor costs are unrepresented. *See* Labor Methodologies, 76 Fed. Reg. at 36,093.

[12] In *Jiaxing I*, the court noted that Table 8 of the NSO data, which lists the number of employees by nine occupations in the "manufacturing" sector, included occupations related to SG&A activities, which may suggest that the NSO data cover indirect labor hours. 380 F. Supp. 3d at 1361. Commerce, on remand, considered Table 8 of the NSO data, but found that it could not discern a relationship between those occupational groupings and the average wages reported in Table 15 that it had used to derive labor hours. *Remand Results* at 14–15. Specifically, Commerce pointed to the mismatch in numbers of persons surveyed in Table 8 compared to Table 15, and noted that the lesser number of persons surveyed in Table 15 rate indicated that some persons surveyed for occupation in Table 8 were excluded from the calculation of the average wage rate. *Id.* The court cannot say that Commerce draws an unreasonable conclusion.

[13] Defendant-Intervenor observes that the number of those employed in the manufacturing industry in Table 8 are "heavily weighted" towards direct manufacturing-related occupations. *See* Def.-Intervenor's Br. at 3–4.

[14] Commerce multiplies a respondent's direct and indirect labor hours by the surrogate labor rate, here the NSO data. *See, e.g., Remand Results* at 12–13.

SG&A labor-related line items to the denominator in the surrogate financial ratio calculation.[15]

II. Shipping Container Weight

Jiaxing challenges as unsupported by substantial evidence Commerce's use of a 10,000-kilogram denominator in the surrogate value ("SV") calculation of B&H costs because Commerce fails to acknowledge the "commercial reality" that the cost of shipping a container does not depend on the weight of that container. Pls.' Br. at 1–2. Instead, according to Jiaxing, Commerce should base its calculation of B&H costs on the maximum payload weight of a 20-foot shipping container or the respondent's own container weight. *Id.* at 6–7. Defendant and Defendant-Intervenor respond that Commerce's decision is reasonable, because the 10,000-kilogram denominator matches the container-weight assumption by which respondents reported costs in the Doing Business report and, moreover, using a different container load would result in a mismatch with using B&H values from that report. Def.'s Br. at 6–7; Def.-Intervenor's Br. at 1–2. For the reasons that follow, Commerce's decision to apply a 10,000-kilogram denominator is inadequately explained and unsupported by substantial evidence.

In calculating normal value, Commerce subtracts "costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser."

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[15] In declining to adjust the surrogate financial ratios, Commerce referred to its practice to not "go behind" a surrogate financial ratio. *See Remand Results* at 15. This practice refers to Commerce's preference to accept surrogate financial statement line items as listed to avoid introducing distortions, because Commerce cannot compel a response from the surrogate company, as if it were an interested party to the proceeding, to ask questions or verify information. *See* Issues and Decision Memo. for the [ADD] Investigation of Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the [PRC]: Final [ADD] Determination at 72, A-570–958, (Sept. 20, 2010), *available at* https://enforcement.trade.gov/frn/summary/prc/2010–24159–1.pdf (last visited Jan. 28, 2020) (declining to exclude line items when the financial statement did not segregate specific types of expenses); Issues and Decision Memo. for the Final Results of the Admin. Review of the [ADD] Order on Wooden Bedroom Furniture from the [PRC] at 35, A-570–890, (Aug. 5, 2011), *available at* https://enforcement.trade.gov/frn/summary/prc/2011–20434–1.pdf (last visited Jan. 28, 2020) (declining to adjust financial statements by applying a packing materials ratio when the companies did not separately report a packing material expense); *see also Dongguan Sunrise Furniture Co., Ltd. v. United States*, 36 CIT 860, 888, 865 F. Supp. 2d 1216, 1244 (2012) (sustaining Commerce's decision not to exclude selling costs from surrogate financial statement to match respondent's exact expenses). However, where there is information on the record to exclude certain expenses to avoid double-counting in the normal valuation calculation, Commerce will exclude those line items. *See, e.g.*, Issues and Decision Memo. for the [ADD] Investigation of Certain Frozen and Canned Warmwater Shrimp from the [PRC] at 55–56, A-570–893, (Nov. 29, 2004), *available at* https://enforcement.trade.gov/frn/summary/prc/04–26976–1.pdf (last visited Jan. 28, 2020); *see also* Labor Methodologies, 76 Fed. Reg. at 36,094 ("[W]hen the surrogate financial statements include disaggregated overhead and SG&A expense items that are already included in the ILO's definition of Chapter 6A, Commerce will remove those identifiable cost items.").

19 U.S.C. § 1677b(a)(6)(B)(ii). Among the deductions are amounts that represent the costs for B&H export costs and cost of freight. The subtraction of these B&H costs from a respondent's normal value is intended to allow a fair comparison to net (or ex-factory) prices, which are not affected by the extra costs experienced by an exporter in shipping products around the world.

For the *Final Results*, Commerce generated a surrogate B&H cost per kilogram for each shipping container of STR shipped by Jiaxing to the United States based on costs associated with exporting a 20-foot, 10,000-kilogram shipping container in the "Doing Business 2014: Thailand" report. *See* Final Decision Memo. at 27–28; *see also* Prelim. SV Memo. at Ex. 12. First, Commerce added the costs reported "per container" for document preparation ($175), customs clearance and technical control ($50), and ports and terminal handling ($160), totaling $385 as the numerator in its calculation. *See* Prelim. SV Memo at Ex. 12, Ex. 15 at 72, 78; *see also* Final Decision Memo at 27–28. Commerce then selected 10,000 kilograms to represent container weight for the denominator from a stated assumption in the Doing Business report's methodology by which surveyed respondents provided costs, i.e., that "[t]he traded product travels in a dry-cargo, 20-foot, full container load . . . [and] weighs 10 tons and is valued at $20,000."[16] *See* Final Decision Memo. at 27; *see also* Ex. A Trading Across Borders Methodology, Feb. 26, 2019, ECF No. 92–1 ("World Bank Methodology"). Commerce explained that if it were to use a different container weight, "it would be using a weight unrelated to the costs reported in Doing Business" that "would yield a distorted result." Final Decision Memo. at 27.

On remand, Commerce's continued use of a 10,000 kilogram container weight from the Doing Business report is not reasonable. Commerce fails to explain why a 10,000-kilogram container weight relates to B&H costs, when those costs were specifically catalogued "per container," i.e., based on the broader assumption that the goods are "transported in a dry-cargo, 20-foot full container load." *See* Prelim. SV Memo. at Ex. 15 at 72, 78. Further, Commerce does not address detracting evidence that indicate B&H fees are established by container size and load, rather than by weight. *See generally Remand Results* at 4–7.

The Doing Business report, which provides information on the time and costs associated with importing and exporting a standardized cargo of goods by sea, fixed overall parameters to enable standardized comparisons across economies, including the assumption that "[t]he traded product travels in a dry-cargo, 20-foot, full container load . . .

[16] Ten tons is approximately 10,000 kilograms.

[and] weighs 10 tons and is valued at $20,000." *See* World Bank Methodology. However, simply because an overall data collection parameter reflects a fixed container weight does not necessarily mean that surveyed respondents reported information, such as B&H costs, by that specific weight to the World Bank. *See Jiaxing I*, 380 F. Supp. 3d at 1367. Indeed, the Doing Business report catalogues B&H costs more broadly on a "per container" basis, by container size and load, *see* Prelim. SV Memo. at Ex. 15 at 72, 78; it does not expressly state that B&H costs are dependent on a specific weight of a 20-foot container of goods. Therefore, the "per container" B&H costs may reflect reported B&H costs for containers that weigh more or less than 10,000 kilograms or cost more or less than $20,000. There is no basis in the report for Commerce to assume that a relationship exists between B&H costs and container weight, when B&H costs were catalogued by container size and load. *See Remand Results* at 5, 7.

Indeed, Plaintiffs placed on the record evidence that suggest container size rather than weight establishes B&H fees. That evidence includes information from a Thai exporter on its incurred B&H costs[17] and B&H rate schedules from an international freight forwarder Hapag-Lloyd, all indicating that B&H costs are not established on a specific loaded container weight.[18] *See* Pls.' Br. at 5; *see also Jiaxing I*, 380 F. Supp 3d at 1367 n.33. To illustrate, Plaintiffs point to Hapag-Lloyd's 20-foot and a 40-foot container freight charge schedules, which are set per container, per bill of lading, or by percent—not by weight. *See* Pls.' Br. at 3 (citing Jiaxing Prelim. SV Submission at Ex. SV-34, PD 62–80, bar codes 3178063–01–19 (Jan. 31, 2014) ("Jiaxing SV Info.")). The document charges and carriage fees are the same for both container sizes, and the handling and freight charges increase by container size, not by weight. *See id.* This evidence seems to indicate that companies are charged by container,

[17] Specifically, Jiaxing provided a declaration by the Vice President of Far East American (a company specializing in the importation and distribution of plywood and related wood products from certain countries in Asia) dated June 13, 2013. *See* Jiaxing SV Info. at Ex. SV-31. The declarant states that in his professional experience he has found "on a global basis brokerage fees are not established with any regard for the actual kilograms or cubic meters actually loaded per container." *Id.* at ¶ 3. The declarant then recounts how he sought to confirm this point through "field research" in the Philippines between May 12, 2013, and May 18, 2013. *See id.* at ¶¶ 4–10. The declaration makes reference to the "Doing Business: Philippines 2013" report several times. *See id.* at ¶¶ 5–6.

[18] Hapag-Lloyd describes the B&H costs of 20-foot and 40-foot containers from Thailand, the Philippines, and Ukraine. *See* Jiaxing's Final SV Submission at Ex. SV-16, PD 95–98, bar codes 3195965–01–04 (Apr. 16, 2014) (providing estimated freight charges from Thailand to the USA for 20-foot and 40-foot shipping containers dated June 24, 2010); Jiaxing SV Info. at Ex. SV-34, (providing estimated freight charges from the Philippines to the USA for a standard 20-foot shipping container dated December 2, 2011); Jiaxing SV Info. at Ex. SV-22 (providing estimated freight charges from various Baltic seaports for a "Factory Stuffed" 40-foot shipping container dated March 1, 2013).

and, further, that the B&H costs reported in the Doing Business report—such as the cost of document preparation, customs clearance and technical control, and ports and terminal handling—do not relate to a particular container weight.[19] Pls.' Br. at 2–5. Therefore, the Doing Business report may be read as reporting B&H costs by container—by container size and load—rather than by weight.

Defendant points out that Jiaxing proposes to use a different weight of container, either the maximum payload weight of a 20-foot container or an average weight of Jiaxing's shipments, neither of which resolve Jiaxing's concern that B&H costs are not established on the basis of container weight.[20] *See* Def.'s Br. at 8. Defendant misconstrues Jiaxing's argument. Jiaxing proposes these alternatives, because they, unlike the 10,000-kilogram figure, reflect the "commercial reality" of shippers. Pls.' Br. at 6–7. As Plaintiffs explain, the 10,000-kilogram denominator from the Doing Business report does not relate to Jiaxing's shipped weights. *Id.* at 6. Therefore, Commerce, on remand, should explain why using a 10,000-kilogram denominator is reasonable, and support its determination with substantial evidence.[21]

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[19] The Doing Business report catalogues data on B&H costs "per container." *See* Prelim. SV Memo. at Ex. 15 at 72, 78. One cannot assume that a parameter by which surveyed respondents reported data to the World Bank conformed exactly to those parameters, especially when, as here, there is evidence that indicates shippers do not set B&H costs on container weight.

[20] Defendant also considers that Jiaxing's reliance on *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT __, 977 F. Supp. 2d 1347 (2014), and two other cases that apply similar reasoning addressing B&H costs, to be misplaced, because, those cases were concerned with Commerce's presumption that B&H costs increase in proportion to container size or weight. *See* Def.'s Br. at 7 (citing *DuPont Teijin Films China Ltd. v. United States*, 38 CIT __, 7 F. Supp. 3d 1338 (2014); *CS Wind Vietnam Co. v. United States*, 38 F. Supp. 3d __, 971 F. Supp. 2d 1271 (2014)). According to Defendant, "proportionality" is not at issue here. *Id.* However, in those cases, Commerce assumed a relationship between container weight and B&H costs. If such a relationship were to exist, then, as a consequence, B&H costs would increase and decrease in proportion to container weight. The fact that Commerce selected a fixed container weight does not set this case apart, when, underlying each, is the same assumption that B&H costs relate to container weight. *See Since Hardware*, 977 F. Supp. 2d at 1361–63; *DuPont Teijin Films China*, 7 F. Supp. 3d at 1351–52; *CS Wind Vietnam*, 38 F. Supp. 3d at 1294–95.

Further, Defendant's assertion that *Since Hardware*, and this line of cases, does not apply when proportionality is implicated does not find support in its citation to *Aristocraft of America, LLC. V. United States*, 41 CIT __, 269 F. Supp. 3d 1316 (2017). In that case, the court distinguished *Since Hardware, CS Wind Vietnam Co.*, and *DuPont Teijin Films China* factually, given that those actions involved challenges to Commerce's assumptions underlying how respondents shipped their goods. *Aristocraft of America*, 269 F. Supp. 3d at 1329–30. Although the court sustained Commerce's use of a 10,000-kilogram denominator in calculating B&H costs, the plaintiffs did not substantiate their argument that B&H costs and container weight are unrelated. *Id.* at 1330.

[21] An agency's determination is supported by substantial evidence when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The "substantiality of evidence must take

CONCLUSION

For the reasons set forth above, the *Remand Results* are sustained in part and remanded in part. Accordingly, it is

ORDERED that Commerce's calculation of surrogate financial ratios as related to labor is sustained; and it is further

ORDERED that Commerce's determination to adjust Plaintiffs' surrogate brokerage and handling costs to take into account the cost of acquiring letters of credit is sustained; and it is further

ORDERED that Commerce's use, in calculating Plaintiff's brokerage and handling costs, of an assumed weight of 10,000 kilograms for a 20-foot shipping container is remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 60 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination.

Dated: February 3, 2020
New York, New York

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

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into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Slip Op. 20–14

Janssen Ortho LLC, Plaintiff, v. United States, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 13–00296

[At the conclusion of a bench trial, holding that darunavir ethanolate is properly classified under HTSUS subheading 2935.00.60 and eligible for duty-free treatment under the Pharmaceutical Appendix.]

Dated: February 6, 2020

Gregory L. Diskant, Amy N. Vegari, Andrew D. Cohen, Daniel M. Eisenberg, Emma Ellman-Golan, and *Joshua A. Kipnees*, Patterson Belknap Webb & Tyler LLP, of New York, N.Y., argued for Plaintiff Janssen Ortho LLC. Of counsel was *Kathryn A. Meisel*, Johnson & Johnson of New Brunswick, N.J., and *Richard M. Belanger*, Sidley Austin, LLP, of Washington, D.C. *Irina Royzman* and *Sean H. Murray*, Patterson Belknap Webb & Tyler LLP, of New York, N.Y., also appeared.

Monica P. Triana and *Guy R. Eddon*, Trial Attorneys, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With them on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Patricia M. McCarthy*, Assistant Director, and *Jason M. Kenner*, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, Civil Division, New York, N.Y. Of counsel was *Alexandra Khrebtukova*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, N.Y.

OPINION

Choe-Groves, Judge:

The court conducted a bench trial to determine whether darunavir ethanolate, a medicine for the treatment of the human immunodeficiency virus (HIV), should be classified as a pharmaceutical eligible for duty-free treatment when imported into the United States. Plaintiff Janssen Ortho LLC ("Plaintiff" or "Janssen") asserts that it has paid approximately $100 million in duties in this case for its Prezista medicine that should have been duty-free. The trial focused on the classification of darunavir ethanolate under the Harmonized Tariff Schedule of the United States ("HTSUS") and the treatment of the subject merchandise under the Pharmaceutical Appendix to the Tariff Schedule ("Pharmaceutical Appendix"). Based on the following findings of fact and conclusions of law, the court concludes that the subject merchandise is properly classified under HTSUS subheading 2935.00.60 and is eligible for duty-free treatment under the Pharmaceutical Appendix.

PROCEDURAL HISTORY

Janssen filed this action to contest the denial by U.S. Customs and Border Protection ("CBP") of Janssen's protests as to the tariff classification of darunavir ethanolate. Compl. ¶¶ 1–4, Dec. 11, 2013, ECF No. 5; *see also* First Am. Compl. ¶¶ 1, 6–9, 75–76, Mar. 7, 2019, ECF No. 129 ("Am. Compl."). Plaintiff sought leave to amend its complaint to add a claim pursuant to the Due Process Clause of the Fifth Amendment of the United States Constitution on July 13, 2015. Pl. Janssen's Mot. Am. Compl. Opp. Def.'s Mot. Prot. Order, July 13, 2015, ECF No. 31; *see* U.S. Const. amend. V. The United States ("Government" or "Defendant") opposed. Def.'s Mem. Law Opp'n Pl.'s Mot. Leave to File Am. Compl., Aug. 24, 2015, ECF No. 37. Following oral argument, the court held Janssen's motion to amend in abeyance pending the resolution of the classification claim. Oral Argument, Nov. 18, 2015, ECF No. 56; Order, Nov. 19, 2015, ECF No. 59. Discovery concluded on November 1, 2016. *See* Scheduling Order, July 22, 2014, ECF No. 17; Scheduling Order, Aug. 3, 2016, ECF No. 100. The case remained pending without further action for several years.

The case was reassigned on January 18, 2019. Order of Reassignment, Jan. 18, 2019, ECF No. 123. Following a status conference, the court granted Plaintiff's motion to amend the complaint. Hr'g, Mar. 5, 2019, ECF No. 126; Order, Mar. 5, 2019, ECF No. 128. Janssen filed its First Amended Complaint on March 7, 2019. Am. Compl. ¶ 1. In addition to Plaintiff's claims contesting CBP's denial of Janssen's protests as to the tariff classification of darunavir ethanolate, Plaintiff alleged that the CBP officials involved in the protest denial "lacked the neutrality and detachment required by the Due Process Clause of the Fifth Amendment by virtue of their actual or institutional interest in the outcome of the proceeding." *Id.* ¶¶ 75–76, 79. Defendant filed a partial motion to dismiss. Def.'s Partial Mot. to Dismiss, Apr. 8, 2019, ECF No. 136 ("Def.'s Partial Mot. to Dismiss"). Plaintiff responded. Pl.'s Mem. Opp'n Def.'s Partial Mot. to Dismiss, Apr. 26, 2019, ECF No. 165; Pl.'s Mem. Opp'n Def.'s Partial Mot. to Dismiss, Apr. 29, 2019, ECF No. 167. Defendant replied. Def.'s Mem. Law Further Supp. Partial Mot. to Dismiss, May 6, 2019, ECF No. 168. The Parties submitted a list of stipulated facts. The Parties' List of Stipulated Facts for Trial ¶ 5, Apr. 26, 2019, ECF No. 164 ("Stipulated Facts").

The court bifurcated the action into two trials. Order, Jun. 28, 2019, ECF No. 187 ("Bifurcation Order"). The court ordered that the first trial would consider the merits of Janssen's First, Second, Third, and Fourth Claims for Relief pertaining to the classification of darunavir ethanolate. *Id.* at 1. The court ordered that the second trial would address Janssen's Fifth Claim for Relief as to whether Janssen's application for further review was "heard and decided by a neutral and detached CBP adjudicator." *Id.* at 2; *see also* Am. Compl. ¶¶ 53, 56, 117–21. The court scheduled the first trial to begin on July 29, 2019. Bifurcation Order at 2. The court stayed Defendant's Partial Motion to Dismiss and reserved scheduling of the second trial pending the outcome of the first trial. *Id.* at 1–2.

The Parties filed pretrial briefs and schedules. Pl. Janssen's Pretrial Mem., July 15, 2019, ECF No. 211 ("Pl.'s Pretrial Mem."); Def.'s Pretrial Brief, July 15, 2019, ECF No. 210; Pl. Janssen's Pretrial Schedules, July 9, 2019, ECF No. 192–1 ("Pl.'s Schedule"). Def.'s Pretrial Schedules, July 9, 2019, ECF Nos. 190–91 ("Def.'s Schedule"). The court conducted a bench trial in July 2019. Bench Trial, July 31, 2019, ECF No. 248. The court heard live testimony from: Ms. Sigrid Stokbroekx, M.S., Scientific Director, Global Head Scientific Integration Drug Product Development, Janssen Pharmaceutical Companies of Johnson & Johnson; Dr. Jeffrey Kinzer, Ph.D., Director, Regulatory Affairs, CMC, at Janssen Pharmaceutical Companies of Johnson & Johnson; Dr. Paul Reider, Ph.D., Professor, Princeton University Department of Chemistry; Dr. Bernhardt Trout, Ph.D., Massachusetts Institute of Technology Department of Chemical Engineering; Dr. Rao Kambhampati, Ph.D., U.S. Food and Drug Administration; Dr. Hugh Hemmings, M.D., Ph.D., Weill Cornell Medical College; and Dr. Matthew Toussant, Ph.D., CAS, a division of the American Chemical Society. Trial Transcript Vol. I, Sept. 3, 2019, ECF No. 253; Trial Transcript Vol. II, Sept. 18, 2019, ECF No. 261; Trial Transcript Vol. III, Sept. 18, 2019, ECF No. 262. The Parties filed post-trial briefs and responses. Pl. Janssen's Post-Trial Mem., Sept. 9, 2019, ECF No. 258; Post-Trial Br., Sept. 9, 2019, ECF No. 259; Pl. Janssen's Resp. to the Gov't's Post-Trial Mem., Oct. 4, 2019, ECF No. 265 ("Pl.'s Resp. to Gov't Post-Tr. Mem."); Def.'s Post-Trial Resp. Br., Oct. 4, 2019, ECF No. 266. Closing arguments were held in November 2019. Closing Arguments, Nov. 27, 2019, ECF No. 270.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). The court reviews classification cases based on the record made before the court. 28 U.S.C. § 2640(a).

FINDINGS OF FACT

The court makes the following findings of fact:

1. The subject merchandise is darunavir ethanolate. Stipulated Facts ¶ 12.
2. The following chemical names describe darunavir ethanolate:

> Carbamic acid, N-[(1S,2R)-3-[[(4-aminophenyl)sulfonyl](2-methylpropyl)amino]-2hydroxy-1-(phenylmethyl)propyl]-, (3R, 3aS, 6aR)-hexahydrofuro[2,3-b]furan-3-yl ester, compd. with ethanol (1:1)
>
> and
>
> Carbamic acid, [(1S,2R)-3-[[4-aminophenyl)sulfonyl](2-methylpropyl)amino]-2hydroxy-1-(phenylmethyl)propyl]-, (3R, 3aS, 6aR)-hexahydrofuro[2,3-b]furan-3-yl ester, compd. with ethanol (1:1) (9CI).

Stipulated Facts ¶ 33; Zregistry Entry for 635728–49–3, PTX-063.

3. Darunavir ethanolate is created by crystallizing darunavir and ethanol molecules into a crystal lattice structure. Ms. Sigrid Stokbroekx Test. 94:2–13; 107:10–12, Sept. 3, 2019, ECF No. 253 (“Stokbroekx Test.”).
4. Darunavir ethanolate is a channel solvate. Stokbroekx Test. 94:17–19.
5. Ethanol molecules in the channels of darunavir ethanolate support the crystal lattice. Stokbroekx Test. 94:10–16.
6. Darunavir is crystalized in an ethanol bath to form darunavir ethanolate. Dr. Bernhardt Trout Test. 489:21–490:15, Sept. 18, 2019, ECF No. 261 (“Trout Test.”).
7. Darunavir contains a sulfonamide moiety. Prezista Full Prescribing Information at 10, PTX-069.
8. Darunavir ethanolate is a sulfonamide. Dr. Hugh Hemmings Test., 653:5–11, 653:19–654:1–12, Sept. 18, 2019, ECF No. 262 (“Hemmings Test.”); Elke Van Gyseghem, Sigrid Stokbroekx, Hector Novoa de Armas, Jules Dickens, Marc Vanstockem, Lieven Baert, Jan Rosier, Laurent Schueller, Guy Van den Mooter, 38 Eur. J. of Pharmaceutical Sciences 489, 489–90, 494 (2009), PTX-020 (“Van Gyseghem”).
9. The International Non-proprietary Name (“INN”) for Prezista is darunavir. Stipulated Facts ¶ 16; *see also* European Medicines Agency Assessment Report for Prezista at 1.1, PTX-102.
10. The INN for darunavir ethanolate is darunavir. Dr. Paul Reider Test. 338:13–341:14, 351:2–16, Sept. 18, 2019, ECF No. 261 (“Reider Test.”).
11. Darunavir ethanolate is also known as darunavir. Reider Test. 416:8–11; AIDS*info* Drug Database, PTX-104.
12. Other names for darunavir include: darunavir ethanolate, Prezista, TMC-114, and TMC114.ethanolate. Stokbroekx Test. 93:9–22; Hemmings Test. 687:8–688:1; Chemical Abstracts Service (“CAS”) Entry Registry Number 206361–99–1,

PTX-062; Johnson & Johnson Pharmaceutical Research & Development Mem., Subj: TMC114.ethanolate: Evaluation of TMC114.ethanolate. (Aug. 1, 2002), PTX-317.

13. The prescribing information for Prezista describes the product as "PREZISTA (darunavir), in the form of darunavir ethanolate[.]" Full Prescribing Information at 29, PTX-069.
14. The United States Adopted Name ("USAN") for Prezista is darunavir. Dr. Jeffrey Kinzer Test. 151:11–20, Sept. 3, 2019, ECF No. 253 ("Kinzer Test."); Hemmings Test. 687:16–688:1; Reider Test. 356:2–11.
15. Prezista is a human immunodeficiency virus (HIV-1) protease inhibitor indicated for the treatment of HIV-1 Infection. Full Prescribing Information at 1, PTX-069.
16. Darunavir ethanolate is the drug substance in Prezista. Full Prescribing Information at 1, PTX-069; Label for Prezista (Darunavir) 800 mg Tablets, PTX-615.
17. The active pharmaceutical ingredient in Prezista is darunavir in the form of darunavir ethanolate. Stipulated Facts ¶ 5.
18. Janssen has not developed darunavir in a form other than darunavir ethanolate for commercial use. Stokbroekx Test. 93:6–8.
19. Darunavir ethanolate is the only commercially available form of darunavir. Reider Test. 416:8–17.

CONCLUSIONS OF LAW

I. Legal Framework

Classification of goods under the HTSUS is a two-step process that involves: (1) determining the proper meaning of terms in the tariff provisions, and (2) determining whether the goods fall within those terms. *Kalle USA, Inc. v. United States*, 923 F.3d 991, 995 (Fed. Cir. 2019). The proper meaning of a tariff provision's terms is a question of law. *Rubies Costume Co. v. United States*, 922 F.3d 1337, 1342 (Fed. Cir. 2019). Whether the subject merchandise falls within the description of a tariff provision is a question of fact. *Id.* When there is no dispute as to the nature of the merchandise, the two-step classification analysis collapses entirely into a question of law. *Gerson Co. v. United States*, 898 F.3d 1232, 1235 (Fed. Cir. 2018).

Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, but this presumption does not apply to pure questions of law. 28 U.S.C. § 2639(a)(1); *see Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court has an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms. *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). It is the court's duty "to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original).

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRI") and, if applicable, the Additional U.S. Rules of Interpretation ("ARI"), which are applied in numerical order. *Rubies Costume Co.*, 922 F.3d at 1342. Under GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. Absent contrary legislative intent, HTSUS terms are to be construed according to their common and popular meaning. *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999).

In construing the terms of the headings, the court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The court may also consult the World Customs Organization's Harmonized Commodity Description and Coding System Explanatory Notes ("Explanatory Notes"), which are not legally binding or dispositive, but provide a commentary on the scope of each heading of the Harmonized System and are generally indicative of proper interpretation of the various provisions. *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013); H.R. Rep. No. 100–576, 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information. *See Kahrs Int'l, Inc.*, 713 F.3d at 644–45.

II. Competing Tariff Provisions

The Government maintains that the subject merchandise should be classified under HTSUS subheading 2935.00.60. Def.'s Schedule D-2. The tariff provision reads:

2935.00	Sulfonamides.
	Other:
	Drugs:
2935.00.60	Other.

HTSUS subheading 2935.00.60.[1] Janssen argues that if the subject merchandise is classified under 2935.00.60, then the subject merchandise is entitled to duty-free treatment under either Table 1 of the Pharmaceutical Appendix or a combination of terms in Tables 1 and 2 of the Pharmaceutical Appendix. Pl.'s Schedule D-1; Pl.'s Resp. to Gov't Post-Tr. Mem. at 11. The Government contends that the subject merchandise is not entitled to duty-free treatment. Def.'s Post-Tr. Br. at 12.

In the alternative, Janssen contends that the subject merchandise is classifiable under HTSUS subheading 3003.90.00. Pl.'s Pretrial Br. at 25. The tariff provision provides:

3003	Medicaments . . . consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms of packing for retail sale:
3003.90.00	Other.

HTSUS subheading 3003.90.00.

III. Analysis of the Tariff Terms

Before addressing the classification of the subject merchandise, the court first assesses whether the tariff terms are *eo nomine* or use provisions. An *eo nomine* provision "describes an article by a specific name," whereas a use provision describes an article according to its principal or actual use. *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1164 (Fed. Cir. 2017).

HTSUS subheading 2935.00 provides for "Sulfonamides." HTSUS subheading 2935.00. Both Parties agree that HTSUS subheading 2935.00.06 is an *eo nomine* provision. Def.'s Schedule D-2; Pl.'s Pretrial Mem. at 4. Sulfonamides are a class of chemicals containing the general formula ($R^1SO_2NR^2R^3$). Explanatory Note 29.35. Because the tariff term identifies subject merchandise by name, the court concludes that HTSUS subheading 2935.00.06 is an *eo nomine* provision.

HTSUS Heading 3003 provides for "Medicaments . . . consisting of two or more constituents which have been mixed together for therapeutic or prophylactic *uses*, not put up in measured doses or in forms of packing for retail sale[.]" HTSUS Heading 3003 (emphasis added).

[1] The subject merchandise was entered between September 2010 and April 2012. Summons, Aug. 21, 2013, ECF No. 1; Case File. The effective editions of the HTSUS include the: 2010 Revision 2 Edition, 2011 Basic Edition, 2011 Revision 1 Edition, 2012 Preliminary Edition, 2012 Basic Edition, and 2012 Revision 1 Edition. *See* 19 C.F.R. § 141.69. There are no material differences between the terms of the relevant tariff provisions in the effective editions of the HTSUS. *See also* Pl.'s Pretrial Mem. vi, n.1, 5; Def.'s Pretrial Br. at 1 & n.2, July 15, 2019, ECF No. 209.

The Parties agree that HTSUS Heading 3003 is a use provision. Pl.'s Pretrial Br. at 4; Def.'s Pretrial Br. at 31; Def.'s Post-Tr. Br. at 19. Because HTSUS Heading 3003 describes articles by use, the court concludes that HTSUS Heading 3003 is a use provision. *See also Warner-Lambert Co. v. United States*, 28 CIT 939 (2004), *aff'd*, 425 F.3d 1381 (Fed. Cir. 2005) (noting that the court previously found that HTSUS subheading 3003.90.00 is a principal use provision).

IV. Classification

A. Classification Under HTSUS Subheading 2935.00

Because HTSUS Heading 3003 pertains to a "mixed" product, and all goods classified under HTSUS Chapter 29 are to be treated as unmixed products, the court begins its analysis as to whether the subject merchandise is classified under HTSUS subheading 2935.00.[2] HTSUS subheading 2935.00 provides for "Sulfonamides." The HTSUS Chapter 29 Notes state that:

> 1. Except where the context otherwise requires, the headings of this chapter apply only to:
>
> (a) Separate chemically defined organic compounds, whether or not containing impurities;
>
> . . .
>
> (e) Products mentioned in (a) . . . above dissolved in other solvents provided that the solution constitutes a normal and necessary method of putting up these products adopted solely for reasons of safety or for transport and that the solvent does not render the product particularly suitable for specific use rather than general use;
>
> (f) The products mentioned in (a) . . . or (e) above with an added stabilizer . . . necessary for their preservation or transport[.]

See also Explanatory Note 1 to Chapter 29. The Chapter 29 Subheading Note adds that:

> 1. Within any one heading of this chapter, derivatives of a chemical compound (or group of chemical compounds) are to be classified in the same subheading as that compound (or

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[2] The HTSUS Chapter 30 Notes state, in relevant part, that:

> 3. For the purposes of headings 3003 . . . the following are to be treated—
>
> (a) As unmixed products:
>
> . . .
>
> (2) All goods of chapter 28 or 29[.]

> group of compounds) provided that they are not more specifically covered by any other subheading and that there is no residual subheading named "*Other*" in the series of subheadings concerned.

The Explanatory Notes state that: "[a] separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a crystal lattice, the molecular species corresponds to the repeating unit cell." Explanatory Notes, Chapter 29, Chapter Note 1, VI-29–3 (2007); Explanatory Notes, Chapter 29, Chapter Note 1, VI-29–3 (2012).

To be classified in HTSUS Chapter 29, darunavir ethanolate must be a "[s]eparate chemically defined organic compound[]" whether or not it contains impurities. HTSUS Chapter 29 Note 1(a). Janssen argues that the subject merchandise should not be classified under HTSUS subheading 2935.00 because darunavir ethanolate is not a separate chemically defined compound. Pl.'s Post-Trial Mem. at 3. Janssen contends that darunavir ethanolate is a channel solvate and that because ethanol and water molecules can exchange position in the channels, darunavir ethanolate does not exhibit a constant ratio of elements such that darunavir ethanolate can be classified under Chapter 29. *Id.* at 3–8. Defendant counters that darunavir ethanolate is classified under HTSUS subheading 2935.00 because the subject merchandise consists of a separate chemically-defined organic compound containing impurities. Def.'s Post-Tr. Br. at 7.

Plaintiff's argument against classification of the subject merchandise under HTSUS Chapter 29 is unavailing. Janssen agrees that darunavir ethanolate is a crystal lattice made of darunavir and ethanol molecules. Pl.'s Post-Trial Mem. at 3–4; Stokbroekx Test. 94:2–13; 107:10–12. The Explanatory Notes clarify that "[i]n a crystal lattice, the molecular species corresponds to the repeating unit cell." Explanatory Notes, Chapter 29, Chapter Note 1, VI-29–3 (2007); Explanatory Notes, Chapter 29, Chapter Note 1, VI-29–3 (2012). In this case, the repeating unit cell is comprised of four darunavir molecules linked to four ethanol molecules by hydrogen bonds. VAN GYSEGHEM at 494; Hemmings Test. 662:8–20.[3]

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[3] Q: Does the fact that darunavir – that in darunavir ethanolate, the darunavir and ethanol molecules are linked by hydrogen bonds rather than covalent, ionic, and . . . metallic bonds . . . does that change your opinion that darunavir ethanolate consists of one molecular species?

Dr. Hemmings: No. I think having the crystal structure showing the precise arrangement of the ethanol and the darunavir is really the definition of molecular species. It shows the stable interaction between the ethanol and darunavir through a chemical bond to form the

The evidence in this case shows that the composition of the repeating unit cell is defined by a constant ratio of elements, consisting of four darunavir molecules and four ethanol molecules. Hemmings Test. 661:16–665:12; Van Gyseghem at 494. Plaintiff argues that there is not a constant ratio of ethanol to darunavir in darunavir ethanolate. Pl.'s Post-Trial Br. at 1, 5, 7. Plaintiff's argument overlooks the word "defined" in the Explanatory Notes. The Explanatory Notes define the question of determining whether a substance consists of a molecular species as whether the "composition is defined by a constant ratio of elements[.]" Explanatory Notes, Chapter 29, Chapter Note 1, VI-29–3 (2007); Explanatory Notes, Chapter 29, Chapter Note 1, VI-29–3 (2012). Whether the purity of darunavir ethanolate decreases over time and the rate at which it does so does not bear on the controlling question of whether the composition of darunavir ethanolate is defined by a constant ratio of elements. Hemmings Test. 664:22–665:7.[4]

In this case, the tariff schedule accounts for the conversion of darunavir ethanolate to darunavir hydrate as an impurity. Note 1(a) to HTSUS Chapter 29 identifies that the tariff provisions apply to separate chemically defined organic compounds, whether or not those compounds contain impurities. HTSUS Chapter 29 Note 1(a). "The term 'impurities' applies exclusively to substances whose presence in the single chemical compound results solely and directly from the manufacturing process (including purification). These substances may result from any of the factors involved in the process[.]" Explanatory Notes, Chapter 29, Chapter Note 1.

The evidence and testimony at trial shows that the presence of darunavir hydrate in the subject merchandise is an impurity resulting from the manufacturing process. Janssen manufactures darunavir ethanolate by crystalizing darunavir in an ethanol bath. Trout Test. 493:15–495:5. Darunavir ethanolate converts to darunavir hydrate when exposed to ambient atmosphere over time. Reider Test. 314:15–315:6; Stokbroekx Test. 84:17–86:15; Trout Test. 496:11–497:7, 501:2–505:19; Van Gyseghem at 494. To preserve the ethanol in the subject merchandise, darunavir ethanolate is removed from the ethanol bath and packed in two low density polyethylene bags or liners that are closed with plastic seals. Container

molecular species in a precise ratio.
Hemmings Test. 662:8–20.

[4] Q: In your opinion, does the fact that the darunavir ethanolate product can degrade over time, does that change your opinion that there is a constant ratio of darunavir to ethanol in this product?

Dr. Hemmings: No. I think there's an ideal ratio in the preparation, but like all drugs, the stability is an issue, and over time they degrade.
Hemmings Test. 664:22–665:7.

Closure System, PTX-422. The two polyethylene bags are placed in an aluminum-polyethylene laminated bag, which is hot-sealed, and a high-density polyethylene open top drum with a high-density polyethylene lid and steel clamping ring. *Id.* The subject merchandise is then shipped to Puerto Rico for further manufacturing. Reider Test. 333:8–13. This process is described as "continuous manufacturing." Stokbroekx Test. 135:18–136:5. Janssen's manufacturing, storing, and packing procedures for the subject merchandise are designed to maximize the ethanol in channels of darunavir ethanolate and minimize ethanol loss. Kinzer Test. 202:19–203:3 (testifying that "we know that the ethanol is lost during routine handling, exposure to environmental conditions, shipment [and] manufacturing[.]").

The evidence also shows that the molecular species, i.e., the repeating unit cell, can be represented by a definitive structural diagram, as structural diagrams have been published in the scientific literature. VAN GYSEGHEM at 496 (representing the repeating unit of the darunavir ethanolate molecule as depicted below).

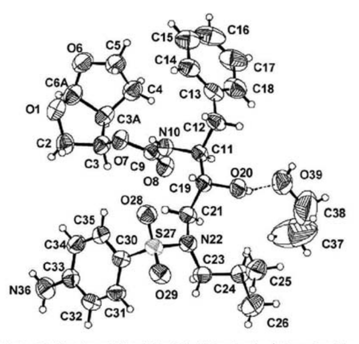

Fig. 8. Oak ridge thermal ellipsoid plot (ORTEP) showing the conformation of the TMC114 ethanolate molecule in the crystalline state and its atomic numbering scheme. Displacement ellipsoids are drawn at 50% probability level for non-H atoms. The hydrogen bond linking the ethanol molecule to the host TMC114 molecule is denoted by dashed lines.

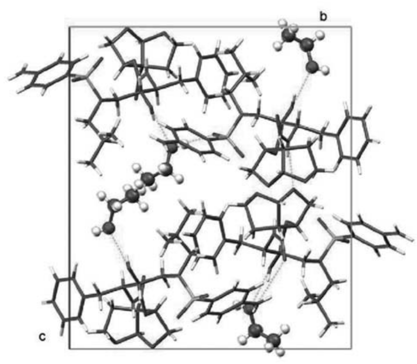

Fig. 9. Unit cell view showing the packing of the TMC114 ethanolate molecules down crystallographic axis *a*. The hydrogen bonds are denoted by dashed lines and the ethanol molecules are depicted as ball and stick models.

Because the repeating unit cell is defined by a constant ratio of elements and can be represented by a definitive structural diagram, the subject merchandise meets the criteria of a separately chemically defined organic compound subject to HTSUS Chapter 29. HTSUS Chapter 29 Note 1(a).

Having concluded that darunavir ethanolate is a separate chemically defined compound, the court addresses whether the subject merchandise is classifiable under HTSUS subheading 2935.00, "Sulfonamides," an *eo nomine* provision. HTSUS subheading 2935.00.

An *eo nomine* provision includes all forms of the named article. *Kahrs Int'l., Inc.*, 713 F.3d at 646 (citation omitted). "Sulphonamides have the general formula ($R^1SO_2NR^2R^3$) where R^1 is an organic radical of varying complexity having a carbon atom directly attached to the SO2 group and R^2 and R^3 are either : [*sic*] hydrogen, another atom or an inorganic or organic radical of varying complexity (including double bonds or rings)." Explanatory Note 29.35. A separate chemically defined compound including this formula are forms of sulfonamides. *Id.*

The evidence at trial shows that darunavir ethanolate is a sulfonamide. Dr. Kinzer testified that darunavir ethanolate contains a sulfonamide moiety. Kinzer Test. 245:7–16. The prescribing information for Prezista establishes that darunavir, as darunavir ethanolate, contains a sulfonamide moiety. Prezista Full Prescribing Information at 7, 10, PTX-069. Dr. Hemmings testified that darunavir ethanolate is a sulfonamide. Hemmings Test. 653:5–11, 653:22–654:1.[5] The scientific literature published about darunavir ethanolate also shows that darunavir ethanolate has the form $R^1SO_2NR^2R^3$. *See* Van Gyseghem at 496, Figure 8, PTX-020. Based on the evidence and testimony at trial, the court concludes that darunavir ethanolate is a sulfonamide. Because darunavir ethanolate is a sulfonamide, the court concludes that the subject merchandise belongs to the "[s]ulfonamides" class or kind of organic compounds that are classifiable under HTSUS subheading 2935.00.60.

B. Classification Under HTSUS Heading 3003

Alternatively, Plaintiff argues that darunavir ethanolate is a mixture classifiable under HTSUS Heading 3003. Pl.'s Pretrial Mem. at 34; Pl.'s Schedule D-1. The Government argues that the subject merchandise is excluded from classification under HTSUS Heading 3003 by operation of HTSUS Chapter 30 Note 3. Def.'s Pretrial Br. at 31. HTSUS Heading 3003 covers "[m]edicaments . . . consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale[.]" HTSUS Heading 3003. The HTSUS Chapter 30 Notes state, in relevant part, that:

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[5] Dr. Hemmings: [T]his shows the molecular structure of darunavir, which is an organic molecule formed by chemical bonds between carbons, nitrogens, hydrogens, and sulfur. The sulfur is part of the sulfonamide moiety of darunavir, and the sulfonamide consists of the sulfonyl group with an amide. So it's the sulfur with the two double bonded oxygens, and the amide is the sulfur nitrogen bond.

So with the phenol amine, that makes the sulfonamide moiety, and the rest of the molecule consists of Bis, tetrahydrofuran . . . . And then there's also another amide ester . . . .

Q: So if I understand correctly, you're testifying that this is the sulfonamide here, the sulfur with the two oxygens; is that right (indicating)?

Dr. Hemmings: Correct.

Hemmings Test. 653:22–654:21.

> 3. For the purposes of headings 3003 . . . the following are to be treated—
>
> (a) As unmixed products:
>
> . . .
>
> (2) All goods of chapter 28 or 29[.]

HTSUS Chapter 30 Note 3(a)(2).

Plaintiff's arguments in favor of classification under HTSUS Heading 3003 are unpersuasive. Because the court has determined that the subject merchandise is classifiable under Chapter 29, the notes to Chapter 30 require that the subject merchandise be treated as an unmixed product for the purposes of HTSUS Heading 3003. HTSUS Chapter 30 Note 3(a)(2). Because HTSUS Heading 3003 pertains only to mixed products, the subject merchandise does not meet the terms of the heading and is not classifiable under HTSUS Heading 3003. This analysis is consistent with the Explanatory Notes, which state, in relevant part, that:

> This heading covers medicinal preparations for use in the internal or external treatment or prevention of human . . . ailments. These preparations are obtained by mixing together two or more substances. . . . The heading includes:
>
> (1) Mixed medicinal preparations such as those listed in an official pharmacopoeia, proprietary medicines, etc., including those in the form of . . . other preparations **not falling** in **heading 30.02, 30.05** or **30.06**.
>
> However, this should not be taken to mean that preparations listed in an official pharmacopeia, proprietary medicines, etc. are always classified in **heading 30.03**. . . .

Explanatory Note 30.03, VI-3003–1 (2012) (emphasis in original). The court concludes that the subject merchandise is not classifiable under HTSUS Heading 3003.

V. Pharmaceutical Appendix

Plaintiff contends that if darunavir ethanolate is classifiable under HTSUS subheading 2935.00.60, then the subject merchandise is eligible for duty-free treatment under the Pharmaceutical Appendix. Janssen argues that: (1) darunavir ethanolate is also known as darunavir, and that "darunavir" is listed on Table 1 of the Pharmaceutical Appendix, or in the alternative, that (2) darunavir ethanolate is identifiable based on a combination of terms in Tables 1 and 2 of the Pharmaceutical Appendix. Pl.'s Schedule D-1. The Government counters that darunavir ethanolate is not eligible for duty-free treatment because (1) darunavir ethanolate is not identified by the CAS registry number adjoining darunavir in the Pharmaceutical Appendix, and (2) "ethanolate" is not a permissible suffix under Table 2 of the Pharmaceutical Appendix. Def.'s Pretrial Br. at 22, 26–29.

HTSUS subheading 2935.00.60 lists "K" in the special duty rate column, which cross-references the Pharmaceutical Appendix. As part of the Uruguay Round Agreements, the United States agreed to the reciprocal elimination of duties on approximately 7,000 pharmaceutical products, chemical intermediates to be used for the production of pharmaceuticals, and certain derivatives of pharmaceutical products. *Advice Concerning the Addition of Certain Pharmaceutical Products and Chemical Intermediates to the Pharmaceutical Appendix to the Harmonized Tariff Schedule of the United States*, Inv. No. 332–476, USITC Pub. 3883 (Sept. 2006), *available at* 2006 ITC LEXIS 978 ("Addition of Certain Pharmaceutical Products and Chemical Intermediates to the Pharmaceutical Appendix"). The elimination of duties on certain pharmaceutical products, their derivatives, and chemical intermediates was reflected in the tariff schedule by changes to HTSUS Chapters 29 and 30 as well as by the addition of the Pharmaceutical Appendix. *Id.* The Pharmaceutical Appendix is applied through HTSUS General Note 13, which states, in relevant part:

> [w]henever a rate of duty of "Free" followed by the special symbol "K" in parentheses appears in the "Special" subcolumn for a heading or subheading, any product (by whatever name known) classifiable in such provision which is the product of a country eligible for tariff treatment under column 1 shall be entered free of duty, *provided* that such product is included in the pharmaceutical appendix to the tariff schedule.

General Note 13.[6] Table 1 of the Pharmaceutical Appendix "enumerates products described by International Non-proprietary Names (INN) which shall be entered free of duty under general note 13 to the tariff schedule." Pharmaceutical Appendix, Table 1, Chapeau. The chapeau to Table 1 adds that "[t]he Chemical Abstracts Service (CAS) registry numbers also set forth in this table are included to assist in the identification of the products concerned. For purposes of the tariff schedule, any references to a product enumerated in this table includes such product by whatever name known." *Id*. Table 1 lists

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[6] There is no dispute that the products were imported from eligible countries. *See* Case File (identifying the subject merchandise country of origin as either Ireland or Switzerland); Am. Compl. ¶ 48; Label for Prezista (Darunavir) 800 mg Capsules, PTX-615; *see also Compl*. ¶ 48.

"darunavir[,]" along with the CAS registry number "206361–99–1[.]" Pharmaceutical App'x Table 1 at 16.[7]

A. Identification of Darunavir by Other Known Names

There is no dispute that "darunavir" is a product listed on the Pharmaceutical Appendix. Rather, the Parties dispute whether "darunavir ethanolate" is a name by which darunavir is known, and therefore is within the term "darunavir" as listed in Table 1 of the Pharmaceutical Appendix. Janssen argues, *inter alia*, that (1) the INN "darunavir" describes darunavir ethanolate, a name by which darunavir is known, and (2) CAS number 206361–99–1 assists in the identification of darunavir ethanolate. Pl.'s Post-Tr. Mem. at 11. The Government contends that darunavir ethanolate is not within the scope of Table 1 of the Pharmaceutical Appendix because darunavir ethanolate is assigned a separate CAS registry number. Def.'s Post-Tr. Br. at 14–16.

The Government's arguments are unavailing. First, the chapeau to Table 1 of the Pharmaceutical Appendix states that "any references to a product enumerated in this table include such product by whatever name known." Pharmaceutical App'x, Table 1, Chapeau. The evidence at trial shows that darunavir ethanolate is a name by which the INN darunavir is known. For example, the World Health Organization ("WHO") identifies that the INN "[d]arunavir" is manufactured as "[d]arunavir (ethanolate)[.]" Medicines/finished pharmaceutical products, Reference Number HA529 (a) at 1–2, PTX-108; *see also* World Health Organization Application to Add "Darunavir" to the Essential List of Medicines at 1, 3, PTX-106 (identifying the International Non-proprietary Name as "[d]arunavir" and reporting that approved formulations included "[d]arunavir (as ethanolate)[.]").AIDS*info*, which is a database maintained by the National Institutes of Health, states that another name for "[d]arunavir" is "darunavir ethanolate[.]" AIDS*info* Drug Database at 1, PTX 104. The National Center for Biotechnology Information PubChem Compound database identifies "darunavir" as also known as "[d]arunavir ethanolate[.]" PubChem Compound Summary for: CID23725083, PTX-613. The prescribing information for Prezista describes the product as "PREZISTA (darunavir), in the form of darunavir ethanolate[.]" Full Prescribing Information at 29, PTX-069; *see also* Dr. Rao Kambhampati Test. 564:5–565:2, Sept. 18, 2019, ECF No. 261 ("Kambhampati Test.") (Dr. Kambhampati, a chemist with the U.S. Food and Drug Administra-

[7] The INN darunavir was included in the proposed additions to the Pharmaceutical Appendix in 2006. Addition of Certain Pharmaceutical Products and Chemical Intermediates to the Pharmaceutical Appendix, 2006 ITC LEXIS 978, at *30.

tion, who was called as a witness by the Government at trial, testified that the USAN for the drug substance in Prezista is darunavir, and that the USAN does not include the name of the solvent in the name). Based on these facts established at trial, the court finds that darunavir ethanolate is a name by which darunavir is known.

Second, a CAS number listed on the Pharmaceutical Appendix is not dispositive as to whether a particular product is covered by the Pharmaceutical Appendix. The chapeau to Table 1 of the Pharmaceutical Appendix directly addresses this issue. Pharmaceutical App'x, Table 1, Chapeau ("The Chemical Abstracts Service (CAS) registry numbers also set forth in this table are included *to assist* in the identification of the products concerned." (emphasis added)). By the terms of the chapeau, CAS registry numbers are not exclusive or exhaustive identifiers as to whether a named product is within the scope of the Pharmaceutical Appendix.

The court concludes that darunavir ethanolate is a name by which darunavir is known, and is within the terms of Table 1 of the Pharmaceutical Appendix.

B. Whether Darunavir Ethanolate Receives Duty-Free Treatment Based on a Combination of Terms in Tables 1 and 2 of the Pharmaceutical Appendix

Plaintiff argues that the subject merchandise should receive duty-free treatment because darunavir ethanolate is included in the Pharmaceutical Appendix through a combination of terms on Tables 1 and 2, i.e., "darunavir" on Table 1, and either "ethyl hydroxide" or "ethyl hydrate," which are combinations of terms on Table 2. Plaintiff avers that "ethyl hydroxide" or "ethyl hydrate" are synonymous for ethanol. Pl.'s Post-Trial Mem. at 1–2. The Government counters that the subject merchandise should not receive duty-free treatment because "ethanolate" is not a term listed on Table 2 and that the terms ethyl, hydrate, or hydroxide cannot be combined to create a new prefix or suffix that may be appended to a product of Table 1. Def.'s Post-Tr. Br. at 17–19.

The chapeau to Table 2 of the Pharmaceutical Appendix states that:

> Salts, esters and hydrates of the products enumerated in table 1 above that contain in their names any of the prefixes or suffixes listed below shall also be entered free of duty under general note 13 to the tariff schedule, *provided* that any such salt, ester or hydrate is classifiable in the same 6-digit tariff provision as the relevant product enumerated in table 1. For purposes of the tariff schedule, any reference to the product covered by this table includes such product by whatever name known.

Pharmaceutical App'x, Table 2 at 61. "Ethyl[,]" "Hydrate[,]" and "Hydroxide" are prefixes or suffixes listed on Table 2 of the Pharmaceutical Appendix.

Because the court concludes that the subject merchandise is entitled to duty-free treatment per Table 1 of the Pharmaceutical Appendix, the court does not reach the issue of whether the subject merchandise qualifies for duty-free treatment under a combination of terms in Tables 1 and 2.

CONCLUSION

For the foregoing reasons, the court concludes that Plaintiff's subject merchandise is classified properly under HTSUS subheading 2935.00.60 and is eligible for duty-free treatment under the Pharmaceutical Appendix. Judgment will be entered accordingly.

Dated: February 6, 2020
New York, New York

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

Slip Op. 20–15

UTTAM GALVA STEELS LIMITED, Plaintiff, v. UNITED STATES, Defendant, CALIFORNIA STEEL INDUSTRIES INC., and STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Court No. 19–00044

[Commerce's *Final Results* sustained in part and remanded in part.]

Dated: February 6, 2020

John M. Gurley and *Aman Kakar*, Arent Fox LLP, of Washington, DC, for Plaintiff Uttam Galva Steels Limited.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Roger B. Schagrin and *Christopher T. Cloutier*, Schagrin Associates of Washington, DC, for Defendant-Intervenors California Steel Industries, Inc. and Steel Dynamics, Inc.

OPINION and ORDER

Gordon, Judge:

This action involves the final results of the administrative review conducted by the U.S. Department of Commerce ("Commerce") of the countervailing duty ("CVD") order of certain corrosion-resistant steel products ("CORE") from India. *See Certain Corrosion-Resistant Steel Products from India*, 84 Fed. Reg. 11,053 (Dep't of Commerce Mar. 25, 2019) (final results admin. review) ("*Final Results*"); *see also* accompanying Issues and Decision Memorandum, C-533–864, PD[1] 193 (Dep't of Commerce Mar. 18, 2019), *available at* https://enforcement.trade.gov/frn/summary/india/2019–05647–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court is the USCIT Rule 56.2 motion for judgement on the agency record filed by Plaintiff Uttam Galva Steels Limited ("Uttam Galva" or "UGSL"). *See* Pl.'s Mem. in Supp. of its 56.2 Mot. for J. on the Agency R., ECF No. 25[2] ("Pl.'s Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 26 ("Def.'s Resp."); Def.-Intervenors' Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 27 ("Def.-Intervenors' Resp."); Reply Br. of Pl. Uttam Galva, ECF No. 28 ("Pl.'s Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i)[3], and 28 U.S.C. § 1581(c) (2012). For the reasons that follow, the court sustains in part and remands in part the *Final Results*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407

[1] "PD" refers to a document in the public administrative record, which is found in ECF No. 20–3, unless otherwise noted. "CD" refers to a document in the confidential administrative record, which is found in ECF No. 20–2, unless otherwise noted.

[2] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

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

F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

II. Discussion

A. Application of Total Adverse Facts Available to Uttam Galva

In initiating its administrative review of the CVD order of CORE from India, Commerce examined whether producers/exporters of the subject merchandise are cross-owned with one another, a parent or holding company, or with their input suppliers. 19 C.F.R. § 351.525(b)(6). Commerce required respondents, including Uttam Galva, to disclose the firms with which they are affiliated and cross-owned as part of their initial questionnaire response. *See Decision Memorandum* at 25. Specifically, the questionnaire referenced the definition of "Affiliated Persons" in 19 U.S.C. § 1677(33), which includes:

> (1) members of the same family, (2) any officer or director of an organization and such organization, (3) partners, (4) employers and their employees, and (5) any person or organization directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization. In addition, affiliates include (6) any person who controls any other person and that person, or (7) any two persons who directly control, are controlled by, or are under common control with, any person. "Control" exists where one person is legally or operationally in a position to exercise restraint or direction over the other person.

Id. Commerce explained that affiliation information for respondents is critical to how Commerce conducts the administrative review. "Commerce considers the identification of affiliates ... to be so integral to its countervailing duty proceedings that ... it seeks information regarding affiliates prior to submission of all the other information solicited by the questionnaire. From a procedural standpoint, Commerce uses [this affiliation information] to determine the universe of companies from which additional information may need to be solicited." *Id.* Commerce further explained that "[i]f Commerce requests a full questionnaire of a company identified in a respondent's affiliation response, Commerce then uses the information in that ... response to determine ... whether or not cross-ownership exists between the respondent and the affiliate for the purposes of the countervailing duty law, in accordance with 19 CFR 351.525(b)(6)(vi)." *Id.* at 25–26.

In its initial questionnaire response, Plaintiff identified several affiliates and Commerce preliminarily found that "cross-ownership exists among UGSL, [Uttam Value Steels Limited ("UVSL")], and an affiliated input supplier, Uttam Galva Metallics Limited (UGML)." *See* Memorandum from J. Maeder to G. Taverman, re: Post-Preliminary Analysis, at 2 (Dep't of Commerce Dec. 19, 2018), PD 182 ("*Post-Preliminary Analysis Memo*"). Additionally, in its initial questionnaire response, UVSL "identified its controlling shareholders as First India Infrastructure Private Limited ("FIIPL") and Metallurgical Engineering and Equipment Limited ("MEEL")." *Id.* at 4. Notably, Uttam Galva did not identify any affiliation with FIIPL or MEEL, even though these entities are "owned by Anuj and Ankit Miglani, who were in turn the managing director and director, respectively, of UGSL during the [period of review ("POR")]." *Id.* Moreover, Uttam Galva failed to report any affiliation with Lloyds Steels Industries Limited ("LSIL"). *See Decision Memorandum* at 26 (citing *Post-Preliminary Analysis Memo*).

In the course of evaluating new subsidy allegations brought by petitioners,[4] Commerce placed on the record certain financial statements of LSIL covering the POR. *See Post-Preliminary Analysis Memo* at 5. "[T]hese financial statements identif[ied] FIIPL and MEEL as owners of 46.11 percent of the shares in LSIL and identified a 'scheme of arrangement' between UVSL and LSIL regarding a demerger of the Engineering Division from the former to the latter." *Id.* Commerce invited interested parties to comment on the LSIL financial statements but received no comments. *Id.* Commerce then issued a supplemental questionnaire to Plaintiff for the purpose of

[4] Petitioners alleged in the new subsidy allegations that "UGSL and UVSL benefitted from debt-to-equity swaps provided to UVSL prior to the POR, when it was known as Lloyds Steel Industries Limited (Lloyds Steel)." *Post-Preliminary Analysis Memo* at 5. UGSL explained that FIIPL and MEEL "acquired a controlling number of shares in Lloyds Steel in 2012, whereupon the name was changed to UVSL." *Id.*

clarifying the role of its previously disclosed affiliates and its relationship with LSIL, including the "demerger arrangement" identified in the LSIL documents. *Id.* In response, Plaintiff submitted information acknowledging that FIIPL and MEEL owned 46.11 percent of the shares in both UVSL and LSIL during the POR. *Id.* Commerce noted that:

> Nearly 11 months passed between UGSL's submission of its November Affiliation Response and its response to the Third Supplemental Questionnaire, in October, nearly a full year later. In the intervening time, Commerce issued its Preliminary Results, while UGSL continued to obfuscate its relationship with LSIL via common shareholding through the Miglani family, and moreover continued to not identify the Engineering Division which it also acquired. At no point prior to Commerce placing the LSIL Memorandum on the record did UGSL proffer the information that the same Miglani family that controlled the Uttam group of companies also owned significant shares in LSIL. Instead, the company provided false information that it acquired control of a single division of Lloyds Steel[5] as a corporate entity, without providing any detail regarding how Lloyds Steel was in fact acquired as whole, and only during the POR effectively divided into two affiliated companies, UVSL and LSIL.

Id. at 5–6. Ultimately, Commerce found that Plaintiff had "withheld necessary information that was requested of it, failed to provide information within the deadlines established, and significantly impeded this proceeding by not fully disclosing its affiliation with LSIL, a company with which we found to be cross-owned, and submitting an incomplete response on behalf of UVSL." *Id.* at 6. Commerce elaborated that "[b]y doing so, UGSL has undermined Commerce's ability to fully investigate the universe of affiliated and cross-owned companies that may have subsidies attributable to UGSL as a producer of CORE." *Id.*

As a result, Commerce determined that it would "rely on facts otherwise available...with respect to UGSL, pursuant to [19 U.S.C. § 1677e(a)(2)(A)–(C).]" *Id.*; *see also Decision Memorandum* at 26. Moreover, Commerce found that Plaintiff "did not cooperate to the best of its ability to comply with the requests for information in this investigation." *Id.* Accordingly, Commerce determined that an adverse inference was warranted under 19 U.S.C. § 1677e(b) because Plaintiff's failure to timely provide Commerce with complete and accurate

[5] See footnote 4 regarding "Lloyds Steel."

affiliate information deprived Commerce of the opportunity to examine the issues of affiliation and cross-ownership between Uttam Galva and LSIL. *Id.*

Plaintiff concedes that it failed to provide information regarding LSIL in its initial questionnaire response. *See* Pl.'s Br. at 7. Despite this concession, Plaintiff maintains that Commerce's decision to apply AFA with respect to the issues of affiliation and cross-ownership between Uttam Galva and LSIL was unreasonable. *Id.* Plaintiff provides a detailed history of the origin of LSIL, noting that LSIL is the present name of the former Engineering Division of Lloyds Steel. *Id.* at 8–10. Plaintiff further explains that Lloyds Steel was composed of both an engineering division and a steel division, and that Plaintiff gained a controlling share of only the steel division. *Id.* Although the two divisions were technically part of the same company, Plaintiff argues that they operated separately (separate business activities, separate teams, separate manufacturing locations, separate accounting systems). *Id.* Plaintiff also notes that there was an informal agreement or a "mutual understanding" that ownership and control of the steel division would be transferred to FIIPL and MEEL (owned and operated by the Miglani family) as part of a "Demerger Scheme," while control of the engineering division would remain with the original owners of Lloyds Steel. *Id.* at 10. According to this agreement, the Miglanis were to transfer their ownership stake in LSIL to the original owners. *Id.* Plaintiff acknowledges that this transfer has not yet occurred and continues to maintain that although the Miglani family owns 46.11 percent of the shares in LSIL, they do not have "managerial control." *Id.* at 10–11.

Commerce considered and rejected Plaintiff's arguments as to why it was unreasonable for Commerce to conclude that affiliation existed between Plaintiff and LSIL during the POR. *See Decision Memorandum* at 27–28. Commerce explained that despite Plaintiff's arguments regarding the demerger scheme,[6] the agency did not "consider the date of the demerger to be especially relevant in the first place, as the Miglani's ownership stake in LSIL was acquired upon the demerger of the UVSL Engineering Division to LSIL. Therefore, the Miglani family's stake in UVSL was merely substituted with an identical stake in a new affiliate, LSIL." *Id.* at 28. Accordingly, Commerce found that "[r]egardless of whether UVSL or LSIL owned and

[6] Plaintiff argues that Commerce dismissed the significance of the dates of the demerger scheme without providing an adequate reason. *See* Pl.'s Reply at 6. Plaintiff contends that in considering the demerger scheme of the steel and engineering divisions, Commerce ignored the "appointed date," which was before the POR, and focused on the "effective date," which was within the POR. *Id.*

operated the Engineering Division, common ownership with Uttam Galva and LSIL exists via the Miglani family." *Id.*

Given this explanation, the court concludes that Plaintiff has failed to demonstrate that Commerce's finding of cross-ownership was unreasonable. Plaintiff points to the information it (belatedly) provided to Commerce regarding the unique ownership agreement and control scheme of LSIL between the original owners and the Miglani family. *See* Pl.'s Br. at 9–13. However, as Commerce emphasized, "Uttam Galva acknowledges that this understanding between the parties is not documented anywhere." *Decision Memorandum* at 28. Plaintiff urges the court to direct Commerce to infer from the record that LSIL operated outside of the control of Uttam Galva and the Miglani family, but the court will not overturn Commerce's reasonable refusal to make this inference given that "the sole fact remains that a significant ownership share of LSIL remained within the Miglanis *during the POR*." *Id.*; *see also Aristocraft of Am., LLC v. United States*, 42 CIT ___, ___, 331 F. Supp. 3d 1372, 1380 (2018) ("What the court cannot do is direct Commerce to favor Plaintiffs' preferred evidentiary inference over another reasonable inference."); *Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (internal citation and quotation marks omitted)).

Plaintiff challenges Commerce's finding that Uttam Galva hindered the CVD proceeding and that "Commerce had no opportunity to consider whether Uttam Galva should provide a full questionnaire response." *See* Pl.'s Br. at 13. Plaintiff notes that "Commerce had four months after the third supplemental questionnaire for consideration but did not ask for any supplemental or full questionnaire responses from Uttam Galva." *Id.* Plaintiff argues that these four months gave Commerce ample time to request any additional information and because the agency did not do so, Uttam Galva cannot be said to have "impeded the investigation." *Id.*

Plaintiff's argument ignores the importance that Commerce places on receiving affiliated company information early in the proceeding. *See Decision Memorandum* at 25–26 (describing importance of Commerce receiving affiliation information early in proceeding in order to conduct cross-ownership evaluation pursuant to 19 C.F.R. § 351.525(b)(6)(vi)). As Commerce emphasized, Plaintiff's submission of additional affiliate information "nearly 11 months after the [due date of the] response to the affiliation section of the initial questionnaire" effectively deprived Commerce of the ability to evaluate whether additional information from LSIL was necessary to determine the existence of cross-ownership between Uttam Galva and LSIL. *See Decision Memorandum* at 26 & n.69. “Agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources.” *Torrington Co. v. United States*, 68 F. 3d 1347, 1351 (Fed. Cir. 1995). The court will not second-guess Commerce’s assessment of its own workload, and Plaintiff has failed to demonstrate that Commerce acted unreasonably by not further investigating LSIL after Plaintiff belatedly supplemented the record with affiliation information.

Commerce’s determination as to whether programs are countervailable is a fact-intensive examination that the agency is entitled to undertake, and Plaintiff cannot preclude it by failing to provide a response. *See Essar Steel Ltd. v. United States*, 34 CIT 1057, 1073, 721 F. Supp. 2d 1285, 1298–99 (2010) (“Regardless of whether [the respondent] deemed the information relevant, it nonetheless should have produced it [in] the event that Commerce reached a different conclusion...”); *see also Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986) (holding that “it is Commerce, not the respondent, that determines what information is to be provided,” despite any claim by respondent that information request “cannot legally serve as the basis” for agency’s view). Commerce reasonably found that “Uttam Galva failed to provide information requested of it regarding its affiliates, failed to provide information by established deadlines, and significantly impeded Commerce’s ability to conduct this administrative review.” *Decision Memorandum* at 25. Commerce also reasonably found that Uttam Galva’s failure to provide the affiliation information regarding LSIL in a timely manner demonstrated that Plaintiff “failed to cooperate in this proceeding to the best of its ability.” *Id.* at 26. Accordingly, the court sustains Commerce’s determination that Uttam Galva’s failure to disclose its affiliation with LSIL merited the application of AFA pursuant to 19 U.S.C. § 1677e.

B. Calculation of AFA Rate

As AFA, Commerce assigned LSIL’s use of applicable subsidy programs to Uttam Galva, resulting in the assignment of an AFA rate of 588.43 percent for Uttam Galva. *See Decision Memorandum* at 24, 41–45. Plaintiff contends that Commerce erred in its application of AFA when it determined “that LSIL used all of the applicable programs under review, and [attributed] the use of these programs to

Uttam Galva." *Id.* at 24. Specifically, Plaintiff contends that Commerce's AFA analysis was not reasonable because it "Failed to Evaluate the Situation or Provide a Reasoned Explanation for Its Selection of Rates for Each Countervailable Program Commerce Identified." Pl.'s Br. at 20–25. Plaintiff highlights that for at least one of the program rates that Commerce assigned, a 16.63 percent rate for the "Market Access Initiative Program," Commerce's proffered basis for that rate only supports a 6.06 percent rate. *Id.* at 21–22.

Additionally, Plaintiff maintains that Commerce's AFA rate selection for Uttam Galva was unreasonable regarding several programs from "which LSIL could not have benefited based on the record evidence." *Id.* at 25. Plaintiff specifies that "(1) Hot-Rolled Steel for LTAR, (2) SGUP Exemption from Entry Tax for the Iron and Steel Industry, (3) SGUP Long-term Interest Free Loans Equivalent to the Amount of VAT and CST Paid; and (4) SGUP's Interest Free Loans Under the SGUP Industrial Development Promotion Rules 2003 are programs that were assigned an AFA rate and aggregated as part of the total AFA rate in the *Final Results* but were never in the initial questionnaire or initiated as a part of the new subsidy allegations during the administrative review." *Id.* Plaintiff also contends that there are several other programs for which Commerce assigned AFA rates that "are plainly inapplicable to LSIL" given the record. *Id.* at 26–27. Plaintiff argues that "Commerce should have considered record evidence that LSIL could not have used all of the programs for which it determined AFA rates." *Id.* at 27.

Defendant, for its part, appears to recognize the merit of some of Plaintiff's arguments and has requested a remand for Commerce to reconsider its determination of AFA rates with respect to the Market Access Initiative Program, as well as the other four programs specifically identified by Plaintiff (*i.e.*, Hot-Rolled Steel for LTAR, SGUP Exemption from Entry Tax for the Iron and Steel Industry, SGUP Long-term Interest Free Loans Equivalent to the Amount of VAT and CST Paid; and SGUP's Interest Free Loans Under the SGUP). *See* Def.'s Resp. at 16–19. The court will therefore remand the matter to Commerce to reconsider these issues. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029–30 (Fed. Cir. 2001).

This leaves the question of the scope of the remand. Defendant seeks to have the court sustain its AFA subsidy rate assignments for Uttam Galva, excluding the five specific rates for which Commerce requests a remand. *See* Def.'s Resp. at 19–28. Plaintiff has highlighted that Commerce provided a limited explanation for why each of the 70 AFA rates assigned to LSIL and Uttam Galva was reasonable.

See Pl.'s Br. at 20–25. Furthermore, Plaintiff has identified record evidence indicating that LSIL could not have benefitted from certain countervailed programs. *See id.* at 25–28. Because the issue of Uttam Galva and LSIL's cross-ownership was not resolved until late in the proceeding, it appears that Commerce has not had the opportunity to address Plaintiff's arguments as to the specific rates assigned as AFA to LSIL and Uttam Galva. The remand sought by Defendant provides Commerce with an opportunity to address Plaintiff's arguments in the first instance as to why certain rates should not be included and to further explain its rate selections. The court therefore declines to limit the scope of the remand, and the court will reserve decision on the reasonableness of Commerce's AFA rate selections.

III. Conclusion

Accordingly, it is hereby

ORDERED that Commerce's decision to apply AFA to Uttam Galva is sustained; it is further

ORDERED that this matter is remanded for Commerce to reconsider and further explain its AFA rate assignments; it is further

ORDERED that Commerce shall file its remand results on or before May 6, 2020; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: February 6, 2020
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 20–16

MID CONTINENT STEEL & WIRE, INC. et al., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and PT ENTERPRISE INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00213

[Granting Plaintiffs' motion for injunctive relief.]

Dated: February 7, 2020

Adam Henry Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for plaintiff and consolidated defendant-intervenor Mid Continent Steel & Wire, Inc.

Ned Herman Marshak and *Andrew Thomas Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, and Washington, DC, for consolidated plaintiffs and defendant-intervenors PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corporation, President Industrial Inc., and Liang Chyuan Industrial Co., Ltd.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court is Plaintiffs' PT Enterprise Inc. ("PT"), Pro-Team Coil Nail Enterprise Inc. ("Pro-Team"), Unicatch Industrial Co., Ltd. ("Unicatch"), WTA International Co., Ltd. ("WTA International"), Zon Mon Co., Ltd. ("Zon Mon"), Hor Liang Industrial Corp. ("Hor Liang"), President Industrial Inc., and Liang Chyuan Industrial Co., Ltd ("Liang Chyuan") (collectively "Taiwan Plaintiffs") motion for a preliminary injunction to enjoin liquidation of entries of certain steel nails subject to the antidumping duty ("ADD") order in *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015) ([ADD] orders) ("*ADD Order*"). *See* Taiwan Plaintiffs' Mot. Prelim. Inj., Jan. 10, 2020, ECF No. 136 ("Pls.' Br."). Taiwan Plaintiffs specifically seek an injunction, pursuant to U.S. Court of International Trade Rule ("USCIT") Rules 56.2(a) and 65(a) and Section 516A(c)(2) of the Tariff Act of 1930,[1] as amended, 19 U.S.C. § 1516a(c)(2) (2012),[2] that covers unliquidated entries, subject to the *ADD Order*, produced or exported by Taiwan Plaintiffs, and entered, or withdrawn from warehouse, for consumption into the United States on or after May 20, 2015. *See* Pls.' Br. at 1, Proposed Order. Defendant partially opposes Taiwan Plaintiffs' motion and does not consent to the proposed "indefinite and open-ended" injunction. Def.'s Partial Opp'n [Pls.' Br.] at 1–2, Jan. 31, 2020, ECF No. 138 ("Def.'s Br."). Instead, Defendant requests that any injunction entered

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[1] Taiwan Plaintiffs seek an injunction based upon 19 U.S.C. § 1516a(c)(2), which provides that "the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances."

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

by the court be limited to the period May 20, 2015 to June 30, 2018, the end of which corresponds to the conclusion of the third period of review. *Id.* at 2. Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent")[3] opposes Taiwan Plaintiffs' motion, and requests that the court either deny the motion in full or set June 30, 2018 as the end-date to the proposed injunction. *See* [Mid Continent's] Resp. Opp'n [Pls.' Br.] at 1, Jan. 31, 2020, ECF No. 137 ("Def.-Intervenor's Br."). For the reasons that follow, this court grants Taiwan Plaintiffs' motion for injunctive relief for unliquidated entries of subject merchandise, subject to the *ADD Order*, entered or withdrawn from warehouse for consumption, on and after May 20, 2015.

BACKGROUND

On May 20, 2015, Commerce published its final determination in its less-than-fair value ("LTFV") investigation of certain steel nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam. *See Certain Steel Nails from Taiwan*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at [LTFV]) ("*Final Results*") and accompanying Issues and Decisions Memo. for the [*Final Results*], A-583–854, (May 13, 2015), *available at* https://enforcement.trade.gov/frn/summary/taiwan/2015–12247–1.pdf (last visited Feb. 6, 2020). Commerce instructed Customs and Border Protection ("CBP") to suspend liquidation of entries subject to the ADD investigation. *See Final Results*, 80 Fed. Reg. at 28,961. Following an affirmative injury determination, Commerce issued an ADD order, where it directed CBP to continue to suspend liquidation from the publication date of its final determination, May 20, 2015, and to collect cash deposits on subject merchandise. *See ADD Order*, 80 Fed. Reg. at 39,996.

Mid Continent and Taiwan Plaintiffs commenced separate actions challenging various aspects of the *Final Results*, which were later consolidated. *See* Summons, Aug. 6, 2015, ECF No. 1; Compl., Sept. 4, 2015, ECF No. 9; *see also* Order, Nov. 19, 2015, ECF No. 20 (consolidating Ct. Nos. 15–00213 and 15–00220 under Ct. No. 15–00213). The court remanded in part Commerce's final determination in *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1326, 1351 (2017) ("*Mid Continent I*"), and, following Commerce's redetermination, this court sustained Commerce's remand results. *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1161, 1170 (2017) ("*Mid Continent II*"). Mid Continent and Taiwan Plaintiffs appealed the court's decision. The

[3] Mid Continent is also a plaintiff in this proceeding. *See* Summons, Aug. 6, 2015, ECF No. 1; Compl., Sept. 4, 2015, ECF No. 9.

Court of Appeals for the Federal Circuit ("Court of Appeals") affirmed in part, and vacated and remanded in part, Commerce's final determination concerning PT's margin. *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 675 (Fed. Cir. 2019) ("*Mid Continent III*"). Commerce's remand results are expected March 16, 2020. Scheduling Order, Dec. 11, 2019, ECF No. 135.

Concurrent with litigation surrounding Commerce's LTFV determination, Commerce concluded its first and second annual reviews. On February 13, 2018, Commerce published the final results in the first administrative review ("AR 1") covering entries for the period of review May 20, 2015 to June 30, 2016 ("POR 1"). *See Certain Steel Nails from Taiwan*, 83 Fed. Reg. 6,163 (Dep't Commerce Feb. 13, 2018) (final results of [ADD] admin. review and partial rescission of admin. review; 2015–2016). PT, Pro-Team, Unicatch, Hor Liang, and Romp Coil Nails Industries Inc. ("Romp") obtained injunctions for those entries, pending judicial review of Commerce's AR 1 final determination. *See* Order, Feb. 23, 2018, ECF No. 12, from associated docket Ct. No. 18–00027; *see also* Order, Feb. 28, 2018, ECF No. 15, from associated docket Ct. No. 18–00028. On March 27, 2019, Commerce published the final results in the second administrative review ("AR 2"), covering the entries for the period of review July 1, 2016 to June 30, 2017 ("POR 2"). *See Certain Steel Nails from Taiwan*, 84 Fed. Reg. 11,506 (Dep't Commerce Mar. 27, 2019) (final results of [ADD] admin. review and partial rescission of admin. review; 2016–2017). Unicatch obtained an injunction on entries for the period of review, pending judicial review of the AR 2 final determination. *See* Order, Apr. 17, 2019, ECF No. 10, from associated docket Ct. No. 19–00052.

The final results in the third administrative review ("AR 3"), covering the period of review July 1, 2017 to June 30, 2018 ("POR 3"), are pending. *See Certain Steel Nails from Taiwan*, 84 Fed. Reg. 48,116 (Dep't Commerce Sept. 12, 2019) (prelim. results of [ADD] admin. review; 2017–2018). Pursuant to Commerce's liquidation instructions to CBP, liquidation for entries for Liang Chyuan, PT, Pro-Team, Unicatch, Hor Liang, and Romp, i.e., companies that requested review, remain suspended. *See Certain Steel Nails from Taiwan*, 84 Fed. Reg. 6,361 (Dep't Commerce Feb. 27, 2019) (partial rescission of [ADD] admin. review; 2017–2018).

The fourth administrative review ("AR 4"), covering the period of review July 1, 2018 to June 30, 2019 ("POR 4"), is also pending. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 84 Fed. Reg. 47,242, 47,247–48 (Dep't Commerce Sept. 9, 2019).

Given that all Taiwan Plaintiffs, except for WTA International, requested review, liquidation for those companies' entries is administratively suspended.

JURISDICTION AND STANDARD OF REVIEW

The Court continues to have jurisdiction pursuant to Section 516a(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation of an ADD order.

Section 1516a(c)(2) authorizes the Court to enjoin liquidation "upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). To obtain the relief of an injunction, a plaintiff carries the burden to establish that: (1) it is likely to suffer irreparable harm without the injunction; (2) it is likely to succeed on the merits; (3) the balance of equities favors plaintiff; and, (4) granting the injunction will not run counter to the public's interest. *See Ugine & Alz Belgium v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). No one factor is dispositive, and "the weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993); *see also Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009). "Whether to grant a preliminary injunction is a matter within the trial court's discretion." *Ugine*, 452 F.3d at 1292. The purpose of an injunction is to preserve the status quo during the pendency of judicial proceedings so to provide the parties with any relief the court ultimately grants. *See* 19 U.S.C. § 1516a(c)(2); *Ugine*, 452 F.3d at 1297.

DISCUSSION

Taiwan Plaintiffs request the court to enjoin liquidation of entries entered, or withdrawn from warehouse, for consumption into the United States on and after May 20, 2015. *See* Pls.' Br. at 1, Proposed Order. Taiwan Plaintiffs explain that liquidation would deprive them of a remedy to recover duties paid, should Commerce ultimately determine, following its remand redetermination ordered by the Court of Appeals, that all margins in the final determination are de minimis, resulting in revocation of the *ADD Order*. *See* Pls.' Br. at 4, 9–10, 12–14. Defendant partially opposes the motion, countering that there is no immediate threat of liquidation until the end of an administrative review ("AR"), or where review has not been requested, until liquidation instructions issue. *See* Def.'s Br. at 1–2. Insofar as Taiwan Plaintiffs request an "indefinite and open-ended" injunction, Defendant opposes Taiwan Plaintiffs' motion; however, Defendant consents to an injunction with an end date corresponding to the end of POR 3. *Id.* at 2. Mid Continent opposes Taiwan Plaintiffs' motion and requests the court to either deny the motion or partially grant the motion by limiting the period of injunctive relief to correspond to the end of POR 3, i.e., June 30, 2018. *See* Def.-Intervenor's Br. at 1. For the reasons that follow, the court grants Taiwan Plaintiffs' motion to enjoin liquidation of entries made on and after May 20, 2015, because Taiwan Plaintiffs have demonstrated that there is a present risk that entries subject to AR 1 and subsequent reviews may liquidate prior to judicial resolution of this proceeding and that they will suffer irreparable harm should their entries liquidate. Balancing this concern along with the other factors, i.e., likelihood of success on the merits, the balance of equities, and the public interest, favors the injunctive relief sought.[4]

An antidumping proceeding begins with an investigation. By statute, Commerce is directed, in making a final determination that imports of subject merchandise are being sold, or likely to be sold, at LTFV, to disregard de minimis margins. *See* 19 U.S.C. § 1673d(a)(4); *see also id.* at § 1673b(b)(3) (defining a de minimis margin as "less than 2 percent ad valorem or the equivalent specific rate"). If, however, an LTFV investigation yields affirmative findings, and the International Trade Commission also issues an affirmative injury finding, Commerce will publish an ADD order that imposes antidumping duties on subject merchandise. *See id.* at § 1673e(a).

Once the ADD order is in place, Commerce conducts administrative reviews of the rates set forth in the order, and parties must provide cash deposits to secure any duties that are ultimately assessed. *See id.* at §§ 1673e(a), 1675(a).[5] Because the U.S. has a retroactive system of duties, Commerce is required to look back at a period of review ("POR") during an administrative proceeding to determine the extent

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[4] Taiwan Plaintiffs move for an injunction pursuant to USCIT Rule 56.2(a), which provides that "[a]ny motion for a statutory injunction to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown." USCIT R. 56.2(a). "Good cause" exists for this injunction, even though more than 30 days have passed since Taiwan Plaintiffs filed their complaint on September 4, 2015. *See generally* Compl. At that time, entries were not susceptible to liquidation. Since then, the change in circumstances that gives rise to Taiwan Plaintiffs' request for injunctive relief, namely the passage of time allowing for several PORs and the Court of Appeals' remand order for Commerce to reconsider the *Final Results*, constitutes good cause. *See generally Midwest III*, 940 F.3d, and subsequent ARs concluded.

[5] Interested parties may request administrative review "during the anniversary month of the publication of an antidumping or countervailing duty order." 19 C.F.R. § 351.213(b)(1).

of those duties. *See* 19 C.F.R. § 351.212(a) (2014). While Commerce conducts an AR, it administratively suspends liquidation of entries for all entities subject to its review, so that it will ultimately be able to assess any antidumping duties. *See id.* at §§ 351.212(b), 351.213(a)–(b); *see also* 19 U.S.C. §§ 1675, 1673e(a). If no review is requested, or requests for review are withdrawn, Commerce will issue automatic liquidation instructions for CBP to assess antidumping duties at the cash deposit rates in effect at the time of entry. 19 C.F.R. § 351.212(c); *see also* 19 U.S.C. § 1504(d). Following completion of an AR, Commerce issues instructions to CBP lifting suspension of liquidation for that POR, unless parties seek judicial review and obtain an injunction. 19 U.S.C. § 1516a(c)(1)–(2) (authorizing liquidation of entries in accordance with Commerce's original determination, unless liquidation is enjoined). Injunctions are generally issued on consent and remain in effect for the duration of the court proceeding including all appeals. *See id.* at § 1516a(e). Otherwise, if there is no court-ordered injunction, Commerce issues instructions to CBP to lift suspension of liquidation, and CBP will liquidate, within six months, entries made during the POR at the cash deposit rate in effect at the time of entry. *Id.* at § 1504(d).

Here, Taiwan Plaintiffs have established a "presently existing, actual threat" of irreparable harm for entries subject to AR 1 and subsequent administrative reviews. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (quoting *S.J. Stile Associated Ltd. v. Snyder*, 646 F2d 522, 525 (C.C.P.A. 1981) (internal quotations omitted)). Taiwan Plaintiffs challenge before this court Commerce's *Final Results*, which resulted in the *ADD Order* that serves as the basis for subsequent ARs. If, following completion of judicial review, Commerce ultimately determines all weighted average dumping margins are de minimis, that finding effectively nullifies an affirmative LTFV determination[6] and, therefore, cannot serve as the basis for an ADD order to impose duties, *see* 19 U.S.C. § 1673 (providing that antidumping duties may only be assessed when there is a valid determination of dumping), or for subsequent administrative reviews. All unliquidated entries are subject to liquidation at that revised zero rate, irrespective of date of entry. *See id.* at § 1516a(e). Given that there is no provision, by statute, that permits reliquidation, *see Zenith*, 710 F.2d at 810, the liquidation of entries constitutes irreparable harm. Therefore, securing the full benefits of judicial review of the *Final Results*, which may result in the revocation of the

[6] If Commerce's final LTFV determination is negative, the investigation terminates, and Commerce will publish notice of the negative determination. It will also terminate suspension of liquidation and refund any cash deposits collected pursuant to 19 U.S.C. § 1673b(d)(1)(B).

ADD Order, requires an injunction to forestall liquidation prior to the completion of judicial review and ensure liquidation in conformity with the court's final decision.

The danger of liquidation pending judicial review of an investigation constitutes irreparable harm. As explained in *Husteel Co., Ltd. v. United States*, 38 CIT __, 34 F. Supp. 3d 1355 (2014), the procedural complexities in the administration of antidumping and countervailing duty orders renders the threat of irreparable harm sufficiently imminent to warrant injunctive relief in connection with judicial review of an investigation. *Id.*, 38 CIT at __, 34 F. Supp. 3d 1359–63. In that case, movants sought an injunction on entries covered by a final determination, arguing that liquidation would moot their challenge. *Id.* 38 CIT __, 34 F. Supp. 3d at 1358. Focusing on irreparable harm, the court noted that final ADD rates are not settled until the completion of the AR, and, that if a party does not request review, entries are liquidated without notice at the cash deposit rate. *Id.* 38 CIT at __, 34 F. Supp. 3d at 1360. Although Commerce administratively suspends liquidation of entries during ARs, not all entities seek AR. *Id.* Moreover, an administrative suspension of liquidation may terminate during judicial review. The court explained that issuing the injunction was "proper at this time, even if the threat of injury is not 'imminent' in the same sense it is following an administrative review[,]" because it would ensure that movants would receive the "full benefit" of their judicial challenge and possibly "obviate" the need for future administrative reviews. *Id.*

The danger of liquidation becomes sufficiently imminent when an ADD order is published. Pursuant to section 1673e(a), Commerce, in an ADD order, directs Customs to, inter alia, assess antidumping duties "after the date on which [Commerce] receives satisfactory information upon which the assessment may be based." 19 U.S.C. § 1673e(a). Commerce will, if requested, conduct an annual review under section 1675(a)(1) to determine the amount of ADD, which will be the duty assessed on entries during the POR. *Id.* at § 1675(a)(1); *see also* 19 C.F.R. § 351.212(a)–(b). Courts have long recognized that "[t]he necessary implication of reading section 1673e(a) together with section 1675, in *pari materia*, is that the suspension of liquidation of an entry must remain in effect throughout an administrative review by Commerce."[7] *See American Power Pull Corp. v. United States*, 40 CIT __, __, 121 F. Supp. 3d 1296, 1301 (2016) (citing *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir.

[7] Additionally, section 1673d(c)(1)(B)(3) requires Commerce suspend liquidation in cases where the preliminary determination by the administering authority was negative and the final determination was affirmative. *See* 19 U.S.C. § 1673d(c)(1)(B)(3). Such was the case

1984)). When Commerce publishes the final results of the AR, Customs has six months to liquidate entries covered by the POR. 19 U.S.C. § 1504(d). If, however, an entity does not request administrative review, its entries are subject to automatic liquidation. 19 C.F.R. § 351.212(c).

Defendant's objection to Taiwan Plaintiffs' proposed injunction stems from its view that, because ARs are still in progress, the threat of harm is not sufficiently imminent. *See* Def.'s Br. at 7–13. Likewise, Mid Continent views any injunction as duplicative because of the suspensions of liquidation stemming from the ARs.[8] *See* Def.-Intervenor's Br. at 1–2. Both Defendant and Mid Continent fail to acknowledge the threat of harm that flows from the fact that the suspensions of liquidation for the ARs may be lifted with little notice while judicial review of the investigation remains pending.[9] Here, most, but not all, Taiwan Plaintiffs have or are currently participating in ARs 1–4. If, following Commerce's remand redetermination, the *ADD Order* is revoked, Taiwan Plaintiffs that have not participated in the ARs, or those that choose not to challenge the final results of an AR, will have no recourse to reimbursement for duties paid on liquidated entries. Likewise, if judicial review of an AR concludes without an injunction in the investigation, entries will be subject to liquidation in short order. Securing the full benefits of judicial review of the *Final Results* should not require participation in each AR. Otherwise, Taiwan Plaintiffs who fail to seek review will continue to face the risk that their entries will be liquidated at a rate that ultimately proves to

here. *See Certain Steel Nails from Taiwan*, 79 Fed. Reg. 78,053 (Dep't Commerce Dec. 29, 2014) (negative prelim. determination of sales at [LTFV] and postponement of final determination). However, entries which are not subject to AR will be subject to automatic liquidation. 19 C.F.R. § 351.212(c).

[8] Mid Continent would have Taiwan Plaintiffs take the "correct course of action" and seek extensions of current injunctions, as well as administrative suspensions of liquidation for entries under review. Def.-Intervenor's Br. at 2–3. Mid Continent argues that injunctions only issue to prevent presently existing and actual threats of injury, none of which exist here. *Id.* at 2.

[9] Defendant contends that "[w]hen another mechanism such as an administrative review or statutory injunction prevents liquidation, the irreparable harm from which the applicant seeks immediate relief is absent," and cites to *Sumecht NA, Inc. v. United States*, 923 F.3d 1340 (Fed. Cir. 2019), as support. *See* Def.'s Br. at 9. Therefore, according to Defendant, an administrative injunction on entries from July 1, 2018 forward would not support a injunctive relief. *Id.* However, Defendant's reliance on *Sumecht* is misplaced. In *Sumecht*, the Court of Appeals agreed with the CIT that plaintiff Sumec had not demonstrated irreparable harm, because Sumec had obtained an injunction in a countervailing duty case covering the same entries in the ADD case. *Id.* at 1346–47. The Court of Appeals did not find Sumec's citations to other CIT cases persuasive, because none "require[] such overlapping injunctions." *Id.* at 1346. However, the Court of Appeals declined to "constrain the CIT's discretion by imposing this type of acontextual rule," and narrowly held that, "[u]nder these circumstances, Sumec's entries are currently protected from liquidation due to the Statutory Injunction." *Id.* at 1346–47.

be wrongful. *See Laclede Steel Co. v. United States*, 20 CIT 712, 717, 928 F. Supp. 1182, 1187 (1996). Requiring Taiwan Plaintiffs to traverse this route would not only risk denying Taiwan Plaintiffs the full benefits of judicial review, it would create perverse incentives to challenge, and seek judicial review of, each of Commerce's AR determinations. A litigant without a good faith basis to believe that an agency's AR determination was unreasonable on the record would be hard-pressed not to challenge the determination in court in order to fully preserve the remedy that would flow from a successful challenge to the initial investigation. True, a respondent could seek an injunction against liquidation after it decides not to seek judicial review of an AR, but the court fails to see why doing so should be required. The potential harm flows from the results of the investigation, not from the decision to forgo judicial review of an AR.

Indeed, the purpose of an injunction is to preserve the status quo during the pendency of judicial proceedings so as to provide the parties with any relief the court ultimately grants. *See* 19 U.S.C. § 1516a(c)(2); *Ugine*, 452 F.3d at 1297. The harm is immediate in light of the purpose behind the injunction, which is to secure judicial remedy in the instant case; failure to grant this remedy may deprive Taiwan Plaintiffs of that remedy, and the harm will be irreparable. Preserving the status quo until conclusion of this dispute demands enjoining liquidation of any Taiwan Plaintiffs' entries within the scope of the challenged order. Therefore, an injunction against liquidation should apply to all entries from AR 1 going forward, until conclusion of the dispute.

Moreover, the remaining three factors that guide a court's evaluation of whether to grant an injunction also support Taiwan Plaintiffs request.[10] Regarding likelihood of success on the merits, numerous cases have explained that "[w]hen the irreparable harm factor tilts decidedly in favor of the movant, the burden of showing likelihood of success is lessened." *See Husteel*, 38 CIT __, 34 F. Supp. 3d at 1362 (citing *Qingdao*, 581 F.3d at 1378–79; *Ugine*, 452 F.3d at 1292–93). Taiwan Plaintiffs have raised a number of substantial questions concerning the *Final Results*. *See id.* at 1362 (citing *NMB Sing. v. United States*, 24 CIT 1239, 1245, 120 F. Supp. 2d 1135, 1140 (2000) (When a movant demonstrates irreparable harm, "it will ordinarily be sufficient that the movant has raised serious, substantial, difficult and

[10] The court traditionally applies a "sliding scale" approach, where no single factor is dispositive, and the strength of one factor may overcome the weakness of another. *See Ugine*, 452 F.3d at 1292–93 (quoting *Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353–54 (2002). Given that the risk of irreparable harm is generally considered the most crucial, *see, e.g.*, *Corus*, 26 CIT at 942, 217 F. Supp. 2d at 1354 (collecting cases), the burden to make a showing of the remaining three factors diminishes.

doubtful questions that are the proper subject of litigation.") (internal quotations omitted)). Taiwan Plaintiffs commenced this action to contest, inter alia, Commerce's choice of methodology that supported its affirmative LTFV determination and led to the issuance of the *ADD Order*. *See generally* Compl. Following litigation before this court and appeal concerning this issue, Commerce, on remand, may determine that all margins are de minimis. Without opining on the correct reading and probative value of the Court of Appeals' decision in *Mid Continent III*, which Defendant contests, *see* Def.'s Br. at 13–14,[11] its remand order is sufficient to show that Taiwan Plaintiffs have at least a fair chance of success on the merits.

Further, the balance of equities favors an injunction.[12] As noted, Taiwan Plaintiffs face an immediate threat of irreparable harm, as entries could liquidate prior to the completion of judicial review in this case, leaving Taiwan Plaintiffs without remedy. By contrast, Defendant and Mid Continent have not provided an explanation of any prejudice that the government or Mid Continent would suffer if the court grants the injunction as requested. Despite Defendant's and Mid Continent's contentions to the contrary, such an injunction would not be "open ended" or "indefinite." The injunction against liquidation would tie to the judicial proceeding, such that the injunction would expire once this proceeding concludes. Even if one adopts the characterization of "open-ended" or "indefinite" put forth by Defendant and Mid Continent, it is unclear how either party would suffer harm. Therefore, the balance of equities favors injunctive relief.

[11] Defendant contends that Taiwan Plaintiffs have not demonstrated a likelihood of success on the merits, because the Court of Appeals upheld Commerce's methodology and, in its remand instructions to Commerce, requested Commerce to further explain that choice. Def.'s Br. at 13–14. Defendant implies that because Taiwan Plaintiffs have not demonstrated threat of irreparable harm, they must demonstrate more than a minimal likelihood of success. *See* Defs.' Br. at 13–14 (citing *Fuyao Glass Indus. Grp. Co. v. United States*, 27 CIT 1166, 1171 (2003)). However, for the reasons discussed above, Taiwan Plaintiffs have made a sufficient showing of immediate irreparable harm. Therefore, Defendant's argument that Taiwan Plaintiffs must demonstrate a "high" likelihood of success on the merits is misplaced. Def.'s Br. at 13–14.

[12] Defendant limits its discussion of this factor to a scenario where the court issues an "open ended" preliminary injunction, arguing that "a broader injunction covering such future entries is not necessary to maintain the status quo." Def.'s Br. at 14–15. Defendant seems concerned that if the court were to grant the injunction Taiwan Plaintiffs seek that parties would routinely seek preemptive relief in the form of a request for an injunction in a case challenging an investigation. *Id.* at 15. But as the statutory and regulatory scheme make clear, in most cases suspension of liquidation will flow from the AR process such that litigants will not need to incur the expense of obtaining an injunction in connection with an investigation. However, even if parties were to make such preemptive motions, Congress specifically provided for injunctions to protect against liquidation in 19 U.S.C. § 1516a(c). The harm that flows from liquidation is irreparable; there seems to be no harm at all to the government or domestic parties stemming from an injunction on liquidation; and, ultimately, ensuring duties are imposed only when warranted is within the public's interest.

Finally, the public interest is served by the proposed injunction. Preventing liquidation maintains the status quo until the final resolution of this case and ensures that Commerce properly administers antidumping laws. *See, e.g.*, *Husteel*, 38 CIT at __, 34 F. Supp. 3d at 1363. Here, an injunction not only safeguards Taiwan Plaintiffs' interests and may even obviate the need for future ARs, it also helps to ensure that duties will only be imposed when warranted, which is in the public interest.

CONCLUSION

On balance, the factors support granting an injunction. Therefore, it is

ORDERED that Taiwan Plaintiffs' Motion for Preliminary Injunction is granted; and it is further

ORDERED that Defendant, United States, together with the delegates, officers, agents and employees of the International Trade Administration of the United States Department of Commerce and the U.S. Customs and Border Protection, shall be, and hereby are, enjoined, pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings, from issuing instructions to liquidate or otherwise causing or permitting liquidation of unliquidated entries of subject merchandise from Taiwan that:

(1) are subject to antidumping duty order on certain steel nails from Taiwan published as *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015) (antidumping duty orders);

(2) were produced and/or exported by PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corp., President Industrial Inc., and Liang Chyuan Industrial Co., Ltd.;

(3) were entered, or withdrawn from warehouse, for consumption into the United States on and after May 20, 2015;

(4) remain unliquidated the day upon which this Order is granted; and it is further

ORDERED that the entries covered by this injunction shall be liquidated in accordance with the final court decision in this action, including all appeals and remand proceedings, as provided for in section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e).

Dated: February 7, 2020
New York, New York

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