U.S. Court of International Trade

Slip Op. 20–1

AMCOR FLEXIBLES SINGEN GMBH, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 15–00240
PUBLIC VERSION

[Granting Plaintiff's Rule 56 motion for summary judgment and denying Defendant's Rule 56 cross-motion for summary judgment.]

Dated: January 3, 2020

Wm. Randolph Rucker, Drinker Biddle & Reath LLP argued for Plaintiff Amcor Flexibles Singen Gmbh.

Jamie L. Shookman, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice and *Aimee Lee*, Senior Trial Counsel argued for Defendant United States. With them on the brief was *Joseph H. Hunt*, Assistant Attorney General and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of Counsel was *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

"Louis, I think this is the beginning of a beautiful friendship."[1] When the aluminum layer of Formpack Coldform Laminate ("Formpack") is merged with multiple layers of plastic, the foil and plastics commence a symbiotic relationship that endures far beyond the moment of importation.

At issue in this case is the tariff classification of this flexible packaging material commercially known as Formpack. Plaintiff Amcor Flexibles Singen Gmbh ("Amcor") challenges a decision by United States Customs and Border Protection ("Defendant") to classify Formpack under Heading 3921 in the Harmonized Tariff Schedule of the United States (HTSUS), which covers plastics and carries a 4.2% *ad valorem* duty. Plaintiff argues that the product is correctly classified under Heading 7607, which covers aluminum and is duty free, while Defendant seeks to sustain Customs' plastics classification. The question presented is whether Formpack is properly classified under Heading 3921 of the HTSUS as plastic or under Heading 7607 as aluminum.

Plaintiff filed suit challenging the decision by Customs and Border Protection denying Plaintiff's protests of Customs' classification un-

[1] CASABLANCA (Michael Curtiz/Hal Wallis Productions 1942).

der the HTSUS of Plaintiff's packaging material. The parties filed cross-motions for summary judgment addressing the proper classification of the imported flexible packaging material. *See* Pl.'s Mem. in Supp. Of Pl. Mot. for Summ. J., ECF No. 50 ("Pl. Br."); Mem. in Opp. to Pl.'s Mot. For Summ. J. and in Supp. of Def. Cross-Mot. for Summ. J., ECF No. 58 ("Def. Br."). *See* Summons, ECF No. 1; Compl., ECF No. 15. The court has subject matter jurisdiction pursuant to 28 U.S.C. 1581(a) (2012). For the following reasons, the court determines that Formpack is correctly classified under the aluminum heading.

BACKGROUND

I. The Imported Merchandise

From 2007 to 2014, the aluminum company Amcor imported 46 entries of the subject merchandise into the United States through six different ports. The Amcor Flexibles division of the company manufactures seven different configurations of the merchandise at its factory in Germany, Pl.'s Statement of Material Facts Not In Issue ¶ 12, ECF No. 50 ("Pl. Stmt. Facts"); Def.'s Resp. to Pl.'s Statement of Material Facts Not In Issue ¶ 12 (Def. Resp. Pl. Stmt.), and markets, advertises and sells Formpack as a flexible packaging material that can be used to create an "aluminum blister pack." Pl. Stmt. Facts ¶ 24; Def. Resp. Pl. Stmt. ¶ 24.[2] All seven configurations of the merchandise are used to form the base material of cavities that are part of "blister packs," which vary based on the needs of the customer.

Despite the differing variations of Formpack, all configurations share a common structure consisting of multiple layers of plastics combined with a single layer of aluminum foil sandwiched in between the plastic layers. Pl. Ex. 1 at 3–4. The basic structure is: (1) a layer of oriented polyamide (oPA) film; (2) a layer of aluminum foil; and (3) a plastic sealant layer, comprised of polypropylene (PP), polyvinyl chloride (PVC) or polyethylene (PE) plastic film. *Id.* Adhesives and primer facilitate merging the different layers together. Pl. Stmt. Facts ¶ 15; Def. Resp. Pl. Stmt. ¶ 15. Amcor manufactures the aluminum foil at a rolling mill, then laminates the aluminum and plastic films together at a converting facility, creating Formpack. Pl. Stmt. Facts ¶ 20; Def. Resp. Pl. Stmt. ¶ 20. At the time of importation, the Formpack arrives in a standard, uniform condition: on rolls as a flat material in slit reel or coil form. Pl. Stmt. Facts ¶ 23; Def. Resp. Pl. Stmt. ¶ 23.

[2] Another division of the company, Amcor Rigid Plastics, manufactures plastic pharmaceutical packaging. Pl. Stmt. Facts ¶ 14; Def. Resp. Pl. Stmt. ¶ 14. None of the merchandise at issue is manufactured by this division.

Each of Formpack's three layers imparts different properties. One plastic layer, oPA film, is puncture-resistant and elastic. Def. Ex. 1 at 12; *see also* Pl. Ex. 8 at 10–12. Its strength and elasticity aid in preventing the aluminum foil layer from cracking during cold-forming, which is the process by which a customer creates cavities in Formpack by stretching it into the desired shape. Def. Ex. 1 at 12. The middle layer, aluminum foil, serves as the barrier layer. The foil acts as a barrier to prevent moisture, light, oxygen and other gases from penetrating the inside of the package. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29.

The other plastic layer, composed of one of the three materials noted above, provides an airtight closure for "sealing" when Formpack is heat-sealed to another material (the lidding foil) as part of a package. Pl. Ex. 1 at 7–8. Some Formpack models also contain an additional layer of plastic laminated to the standard three-layer construction. Pl. Stmt. Facts ¶ 19; Def. Resp. Pl. Stmt. ¶ 19. The actual structure of Formpack varies, depending on the weight and thickness of each layer in a particular product as well as the number of layers of plastics. Pl. Ex. 1 at 4. Whether the customer selects PP, PVC or PE plastic film as the sealant layer depends on which type of sealing layer the customer intends to use for the lid or what will be stored in the finished blister pack. Pl. Stmt. Facts ¶ 56; Def. Resp. Pl. Stmt. ¶ 56. All the layers are combined through an adhesive lamination process. Pl. Stmt. Facts ¶ 15; Def. Resp. Pl. Stmt. ¶ 15.

After importation, customers use Formpack to create a finished blister pack, which consists of Formpack base material sealed with a lidding material. Customers create blister cavities in Formpack through "cold-forming," whereby Formpack— aluminum foil and the plastic film layers—is molded into the desired shape. This cold forming process contrasts with a heat-formed process, which is used to create blister cavities for a base material comprised solely of plastic. Pl. Stmt. Facts ¶ 33; Def. Resp. Pl. Stmt. ¶ 33.

Cavities are formed in Formpack to conform to the shape of the contents of the package. The "cold-forming" process, also known as "stretch-forming," Pl. Ex. 8 at 42:20–43:13, involves forming Formpack into its desired shape, similar to a stamping process. *Id.* at 44:3–45:7. The blister packs function as packaging containers for pharmaceutical products including tablets, caplets, gel-caps, powders, medical devices and diagnostics.[3] The containers consist of both a base and lid material. Pl. Ex. 1 at 3. The lid is heat-sealed together

[3] Amcor manufacturers two types of blister packs: aluminum/aluminum and plastic/aluminum. Pl. Stmt. Facts ¶ 26; Def. Resp. Pl. Stmt. ¶ 26. Only the plastic/aluminum type is at issue in this case.

with the blister pack to enclose the contents within each individual blister. Pl. Ex. 1 at 6–8. The lid material (which is not at issue in this case) is comprised of an easily punctured material to facilitate accessing the package contents.

STANDARD OF REVIEW & LEGAL FRAMEWORK

I. Standard of Review

Customs' protest decisions are reviewed *de novo* by the court. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine dispute as to any material fact...." USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing version of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). "A genuine factual dispute is one potentially affecting the outcome under the governing law." *Anderson*, 477 U.S. at 248.

The court reviews classification cases on "the basis of the record made before the court." 28 U.S.C. § 2640(a). 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) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS. *See* 28 U.S.C. § 2639(a)(1). Plaintiff bears the burden to show that the government's classification is incorrect. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). If that burden is met, the court then has the responsibility to determine the correct classification. *Id.*

"The ultimate question in a classification case is whether the merchandise is properly classified under one or another classification heading," which is "a question of law." *Bausch & Lomb v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). The determination of whether an imported item has been properly classified involves a two-step analysis. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994); *see also Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). First, the court must construe

the proper meaning of specific terms of the tariff provision. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Second, the court must determine whether the merchandise at issue comes within the description of such terms as properly construed. *Id.* The first step is a question of law, while the second is one of fact. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999). When the parties do not dispute any facts regarding the merchandise, then resolution of the classification depends solely on the first step. *Cummins Inc.*, 454 F.3d at 1363.

Every new entry of goods into the United States constitutes a new cause of action because every classification involves both the interpretation of the relevant statute as well as questions of fact regarding the merchandise. *Stare decisis* binds the court to prior legal determinations and bars the relitigation of issues decided in those actions. *United States v. Mercantil Distribuidora, S.A.*, 45 CCPA 20, 23–24 (1957). However, "circumstances justify limiting the finality of the conclusion in customs controversies to the *identical* importation." *United States v. Stone & Downer Co.*, 274 U.S. 225, 236 (1927) (emphasis supplied). Since *stare decisis* "deals only with law," *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993), judicial precedent holds weight only with respect to the legal construction of specific terms or provisions, not questions of fact. *Id.*

II. Legal Framework

The General Rules of Interpretation ("GRIs") of the HTSUS govern the proper classification of merchandise entering the United States. The GRIs "are applied in numerical order." *ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n. 4 (Fed. Cir. 2005). "The HTSUS is designed so that most classification questions can be answered by GRI 1." *Telebrands Corp. v. United States*, 37 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012), *aff'd* 522 Fed. Appx. 915 (Fed. Cir. 2013). The GRIs consist of six rules, but "if an earlier rule resolves the classification question, the court does not look to subsequent rules." *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). According to GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. Therefore, "a court first construes the language of the heading, and any section or chapter notes in question." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998).

HTSUS terms are construed according to their common commercial meanings. *Len–Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). A court may rely on its own understanding of terms

as well as secondary sources such as lexicographic and scientific authorities, dictionaries and other reliable information to construe a given term. *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (2001). For additional direction on the scope and meaning of tariff headings and chapter and section notes, the court may also consult the Explanatory Notes to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization (WCO).

Explanatory Notes are "generally indicative of the proper interpretation of a tariff provision." *Agfa Corp. v. United States*, 520 F.3d 1326, 1239 (Fed. Cir. 2008) (citation omitted). "Unlike Chapter Notes, Explanatory Notes are not legally binding." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n. 1 (Fed. Cir. 2013). However, "the Explanatory Notes are persuasive authority for the court when they specifically include or exclude an item from a tariff heading." *H.I.M. / Fathom Inc. v. United States*, 21 CIT 776, 779, 981 F. Supp. 610, 613 (1997); *see also BASF Corp. v. United States*, 30 CIT 227, 232 F. Supp. 2d 1200, 1205 n.6 (2006), *aff'd*, 497 F.3d 1309 (Fed. Cir. 2007).

DISCUSSION

I. Positions of the Parties

Pursuant to GRI 1, Plaintiff seeks classification of the subject merchandise under Heading 7607, which covers aluminum. Pl. Br. at 2. Specifically, Plaintiff contends that the merchandise is classifiable under Heading 7607.20.50, which provides as follows:

7607	Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm:
7607.20	Backed:
7607.20.50	Other: Flexible.....free

Plaintiff contends that Heading 7607 provides specifically for aluminum foil "backed" with a "backing" material and that when the terms "backed" and "backing" are properly construed, the subject merchandise is properly classified as "backed foil" under subheading 7607.20.50. Plaintiff argues that Formpack is not properly classified as plastic because Formpack would have to "assume the character" of plastic in order to shift the classification out of Heading 7607, and here it does not. According to Plaintiff, Formpack retains the character of "backed," laminated aluminum foil, Pl. Br. at 36, and the plastic film layers are merely support materials that do not define the character of the good. Plaintiff argues that, according to GRI 1, Formpack is correctly classified as aluminum under Heading 7607, and not as plastic under Heading 3921.

Defendant, however, maintains that Formpack is properly classified under Heading 3921 as "[o]ther plates, sheets, film, foil and strip, of plastics." Def. Br. at 16. Defendant contends that the materials are properly classified as plastic film under subheading 3921.90.40. Def. Br. at 12–13. The relevant subheading provides as follows:

3921	Other plates, sheets, film, foil and strip, of plastics:	
3921.90	Other:	
3921.90.40	Other: Flexible	4.2%

Defendant relies on the decision of the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *Alcan Food Packaging (Shelbyville) v. United States*. 771 F.3d 1364 (Fed. Cir. 2014). In that case, the CAFC considered the classification of Flexalcon—a different good, though one consisting also of plastic and aluminum layers laminated together—and determined that the good satisfied the definition of "plastic film" under Heading 3921. 771 F.3d 1364 (Fed. Cir. 2014).

Alcan considered the importation of Flexalcon, a flexible food packaging material. Formpack consists of different components, in different quantities and in a different configuration, and Formpack performs a different function than Flexalcon. In *Alcan*, this court found that Flexalcon has "so many layers other than the foil layer" and "so many properties beyond that of aluminum foil" that the subject merchandise was properly classified under Heading 3921. *Alcan*, 929 F. Supp at 1351–1352, *aff'd*, *Alcan*, 771. F.3d 1364. Because the plastic layers "define Flexalcon as a flexible food packaging solution for the military," the court found that Flexalcon "retains the essential character of plastic and does not assume the character of aluminum foil." *Id.* at 1352, and the CAFC affirmed this judgment. *Alcan*, 771 F.3d 1364.

Defendant argues that, because the same two tariff provisions were considered in *Alcan* and the court determined that Heading 3921 covered the merchandise at issue, that, therefore, the classification analysis in this case properly begins under Heading 3921. Defendant argues further that Formpack's plastic layers "dominate" with respect to quantitative factors as well as in relation to the product's use, Def. Br. 24–26, and that the plastic layers are indispensable to the product's use as pharmaceutical packaging. *Id.* at 30. According to Defendant, because Formpack "assumes the character" of plastics, Note 1(d) of Chapter 76 grants priority to Chapter 39.

II. Competing Tariff Provisions

Heading 3921: Plastic Film

Heading 3921 covers "Other plates, sheets, film, foil and strip, of plastics." According to the HTSUS, plastics are "those materials of

Headings 3901 to 3914 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence." Note 1 to Chapter 39. The HTSUS does not define "plastic film," but the court has stated that plastic film is "made from polyvinyl chloride, polyethylene, polypropylene, polystyrene, Mylar, and other resins; used for wrapping, sealing, garment waterproofing, and coating wood, paper, or fabric." *Alcan*, 929 F. Supp. 2d at 1344 (citing McGraw Hill Dictionary of Scientific and Technical Terms at 1613 (2003), *aff'd, Alcan*, 771 F.3d 1364 (Fed. Cir. 2014).

By its own language, Heading 3921 covers merely plastics, without mention of any other material. To interpret Heading 3921 to encompass a combination material consisting of plastic and aluminum specifically, it is necessary to construe Heading 3921 in conjunction with Heading 3920. Reading the provisions together supports the conclusion that Heading 3921 covers aluminum foil laminated with plastic. That is because while Heading 3920 covers plastics "*not* reinforced, laminated, supported or similarly combined with other materials," Heading 3921 is intended to cover "'*other'* plastic goods excluded from 3920," *e.g.*, plastics laminated with aluminum foil (emphasis supplied).

The Explanatory Notes to Chapter 39 further elucidate Heading 3921's scope through addressing the classification of plastics combined with other materials.[4] The Explanatory Notes state:

> This Chapter also covers the following products, whether they have been obtained by a single operation or by a number of successive operations *provided* that they retain the essential character of articles of plastics:
>
> ....
>
> (b) Plates, sheets, etc., of plastics, separated by a layer of another material such as metal foil, paper, paperboard."

General Explanatory Notes to Chapter 39 (emphasis in original). The Explanatory Notes to Chapter 39, read together with the text of Heading 3920, therefore suggest that Heading 3921 is intended to cover plastics merged with other materials, but also that an analysis of the combined material is necessary to determine whether plastic or the other material constitutes the "essential character" of the article. The Explanatory Notes to Heading 3921 further clarify:

[4] Citations of the Explanatory Notes in this Opinion are to the 5th edition. *See* World Customs Org., Harmonized Commodity Description and Coding System.

> This heading covers plates, sheets, film, foil and strip, of plastics, other than those of heading *39.18, 39.19* or *39.20*or of *Chapter 54*. It therefore covers only cellular products or those which have been reinforced, laminated, supported or similarly combined with other materials.

(emphasis in original). It follows logically, then, that plastic film combined with other materials may in some cases fall under Heading 3921 depending on the composition of the material, due to the effect of the Explanatory Notes.

Heading 7607: Aluminum

Heading 7607 applies to "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm," thus covering combination materials such as multilayer laminate packing materials. The HTSUS defines neither "aluminum" nor "aluminum foil," but the court has defined "aluminum" as a "bluish-white metal characterized by its lightness" and "aluminum foil" as a "thin, aluminum sheet, widely used as a food wrapping, cooking sheet, and insulation backing." *Alcan*, 929 F. Supp. 2d at 1346 (citing Academic Press of Science and Technology at 87 (1992), *aff'd*, *Alcan*, 771 F.3d 1364.

The terms "backed" and "backing" are not defined in the HTSUS and have also not been defined by the courts. The most common meaning of "backing" varies by dictionary. The most common meaning according to both the *Random House Dictionary of the English Language* ("*Random House Dictionary*") ("aid or support of any kind," *Random House Dictionary* (2nd ed. Unabridged, 1987, at 151)) and Oxford English Dictionaries ("help or support," Backing, Oxford English Dictionaries, *available* at https://en.oxforddictionaries.com/definition/backing), emphasizes the general concept of support, while the most common meaning in the Merriam-Webster Dictionary accentuates a positional reference ("something forming a back," Backing, MerriamWebster Dictionary, *available* at https://www.merriam-webster.com/dictionary/backing). The most common meaning of "backed" reflects a similar emphasis: according to Oxford English Dictionaries, "backed" is to "give financial, material or moral support to," (Backing, Oxford English Dictionaries, *available* at https://en.oxforddictionaries.com/definition/backing), while in the *Random House Dictionary* the most common meaning is "having a back, backing, setting, or support (often used in combination)." *Random House Dictionary* at 151.[5] Ordinary dictionaries thus show that while

[5] Merriam-Webster Dictionary does not contain a separate definition for "backed."

"backed" and "backing" may be construed either to emphasize the idea of support or aid or to have a positional reference, the former is the more common meaning. As discussed in more detail below, in the context of Heading 7607, "backed" is most appropriately construed to mean "supporting."

Heading 7607 permits several types of processes to come within the scope of the heading. "Products and articles of aluminum are frequently subjected to various treatments to improve the properties or appearance of the metal, to protect it from corrosion, etc." General Explanatory Notes to Chapter 76. These treatments do not affect the classification of the aluminum goods, and the Explanatory Notes specifically identify "lamination" as coming within the list of treatments that do not affect the heading in which flat-surfaced aluminum goods are classified. General Explanatory Notes to Chapter 72.

In construing Heading 7607, Note 1(d) to Chapter 76 must also be followed. The Note provides that:

> Headings 7606 and 7607 apply, inter alia, to plates, sheets, strips and foil with patterns (for example, grooves, ribs, checkers, tears, buttons, lozenges) and to such products which have been perforated, corrugated, polished or coated, provided that they do not thereby *assume the character* of articles or products of other headings.

(Emphasis supplied.) This provision indicates that certain articles, which could conceivably fit under Headings 7606 or 7607, are properly classified under a different heading if those articles are further processed.

III. Classification of the Product at Issue

The court's inquiry begins with an assessment of whether any chapter contains a heading that describes the merchandise in question. No tariff provision specifically enumerates the term "flexible packaging materials," but both plastic and aluminum constitute their own chapters of the HTSUS. Headings under both Chapters 39 and 76 plausibly could cover the good in question. Heading 7607 by its terms directly covers aluminum foil laminated with plastic, without the need to reference any other tariff provision or note. The provision covers "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm."[6] Heading 3921 can also be read to encompass a plastic combined with another material. However, to read Heading 3921 to encompass plastic sheets sepa-

[6] The parties do not dispute that all the layers of Formpack do not exceed 0.2 mm.

rated by a layer of aluminum foil, it is necessary to interpret Heading 3921 in conjunction with Heading 3920. As noted, GRI 1 dictates that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. Since Heading 7607 directly covers the merchandise with specificity and without requiring reference beyond the four corners of the tariff provision itself, unlike Heading 3921, the court begins its analysis under Chapter 76.

Whether Chapter 76 covers the merchandise at issue depends on whether Formpack is "aluminum . . . backed with . . . plastics." Heading 7607. Defendant urges an interpretation of "backing" according to which the plastic layers of Formpack do not qualify as "backing." Under Defendant's reading, "backed" foil refers to a product in which the plastics are located on only a single side of the foil, *i.e.*, the "back." Def Br. at 35. One definition of "backed" in the *Random House Dictionary* is "having a back, setting, or support," and the same dictionary defines "backing" as "that which forms the back or is placed at or attached to the back of anything to support, strengthen, or protect it." However, aluminum has no "back" side; its two sides are essentially identical.

"Where a tariff term has various definitions or meanings and has broad and narrow interpretations, the court must determine which definition best expresses the congressional intent." *Quaker Pet Group, LLC v. United States*, 42 CIT ___, ___, 287 F. Supp. 3d. 1348, 1355 (2018). Imposing a positional reference on "backed" aluminum would render the entire concept of "backed" aluminum a nullity because without a "back," aluminum could never be "backed." To do so would contravene the interpretive canon against surplusage—the idea that all provisions should be given effect and none should be given an interpretation to have no consequence. *Nielson v. Preap*, 139 S.Ct. 954, 955 (2019). To interpret "backed" in the context of Heading 7607 as a positional reference would thus contravene core rules of statutory construction and defy logic.

Moreover, the word "back" does not appear in the language of the heading. Had the congressional intent been for "backed" foil to refer only to aluminum foil with a backing on the "back" side, the language could have reflected this preference. The use of "backed" instead in this context suggests an intent not to impose a positional reference but to refer to material that supports the aluminum foil. It is common sense that aluminum foil may be thin or flimsy, therefore requiring support. Especially because aluminum foil contains no back side,

applying "backed" as "supported," and "backing" as "supporting," appears to effectuate the language of Heading 7607 best in this context.

The purpose of a "backing" material, based on the Explanatory Notes to Chapter 74, further substantiates this reading. The Explanatory Notes to Chapter 74, which apply, *mutatis mutandis*, to Heading 7607, do not define the terms "backed" and "backing," but they provide guidance on the purpose of a backing material. The Explanatory Notes to Heading 7410 state that foil is "often backed with paper, paperboard, plastics or similar backing materials, either for convenience of handling or transport, or in order to facilitate subsequent treatment, etc." The Explanatory Notes thus demonstrate the function that a backing material provides for backed foil and they clearly suggest a support role for the backing material.

This elucidation of "backing" is consistent also with how the WCO has interpreted this language in the context of Heading 7607. WCO Harmonized System Committee ("HSC") Document NC19831E1a. The WCO has stated that the "backing" is intended to "serve solely to make up for the flimsiness of the foil, which could not otherwise withstand the handling necessary for transport and subsequent treatment". *Id.* A "WCO classification may be consulted for "persuasive value," *Cummins Inc.*, 454 F.3d at 1366, and may be entitled to "respectful consideration." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006). In sum, the dictionary definition, Explanatory Notes and WCO's interpretation all support interpreting "backing" as "supporting."

The relationship between the aluminum foil layer of Formpack and the oPA plastic layer demonstrates that the plastic layer plays the supporting role that would be expected from a "backing" material. Aluminum foil provides the impermeable barrier component to Formpack. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. This barrier trait is the primary consideration for a customer selecting blister pack material. Pl. Stmt. Facts ¶ 42; Def. Resp. Pl. Stmt. ¶ 42. The oPA layer enhances the formability of the merchandise, Def. Resp. Pl. Stmt. ¶ 34, and helps prevent the foil from breaking or fracturing during cold-forming. Pl. Stmt. Facts ¶ 53; Def. Resp. Pl. Stmt. ¶ 53. *See* Def. Resp. Pl. Stmt. ¶ 35 ("the fact that the plastic layers are not permanently deformed by the cold-forming process gives these layers 'spring back strength' that helps strengthen and stabilize the aluminum foil"). *See also* Recording of Oral Argument at 0:56:50 – 0:58:151 (According to Defendant's counsel, "Plastic's tendency to spring back . . . that property strengthens and stabilizes the foil, and . . . adds value to the product . . . The plastic is there to support [the foil] . . .

without that plastic . . . the foil could not be formed into as deep or sharp a cavity."). The role of the oPA plastic layer aligns with the expected function of a backing material—to provide support.

In the alternative, "backing" could be interpreted to mean "on *only one* side." Since *either* side may conceivably be considered to be the "back," the language of the HTSUS, dictionary definitions and other guidance noted above do not limit "backed" or "backing" such that that only Side A of the item may have a material affixed to it, while Side B may not.

To the contrary, neither the HTSUS nor other authorities cited limit the placement of materials to only a single side of the material being backed, and no other limitation precludes specifically a foil laminated with materials on both sides from being classified as aluminum foil. *See, e.g.*, NYRL F84357 (March 27, 2000) *available* at https://rulings.cbp.gov/ruling/F84357 (classifying aluminum foil with plastic film on one side and a heat sealant on the other under Heading 7607). To determine that Formpack does not qualify as backed foil because of the presence of a sealant material on "Side B" of the foil would be to read into the language of the statute a requirement that does not appear there: that the side of the foil without the "backing" may not have anything affixed or attached to it. Moreover, as Defendant's counsel acknowledges, "Whether there are materials on both sides as opposed to films on both sides . . . the answer to both is that yes, such a product could theoretically be classified in Heading 7607." Recording of Oral Argument at 1:17:00–1:17:18. In this way, Formpack may properly be considered "backed" irrespective of which definition of "backed" is applied.

This classification under Heading 7607 is proper because Formpack does not "assume the character" of plastic, thus not activating the rule in Note 1(d) to Chapter 76 that would otherwise shift the classification to another chapter. According to Note 1(d), Heading 7607 applies "to plates, sheets, strip and foil . . . which have been perforated, corrugated, polished or coated, provided that they do not thereby assume the character of articles or products of other headings." The *Alcan* court described Note 1(d) as a "priority rule, giving priority to another heading that covers the composite product." 929 F. Supp. 2d at 1368, *aff'd*, *Alcan*, 771 F.3d at 1364. For the rule to apply, the court must determine that Formpack "assumes the character" of another article—here, plastic.

Neither Heading 7607, Note 1(d), nor *Alcan* provides insight into the meaning of "assume the character" in the context of Chapter 76. However, the court finds guidance in the interpretation of identical

language in a chapter note to Chapter 72 of the HTSUS. That note to Chapter 72, which contains the identical proviso of the note to Chapter 76, was considered in *Motor Wheel Corp. v. United States*, 19 CIT 385 (1995).

In *Motor Wheel*, the court was presented with the question of whether stamped articles of steel should be classified as flat-rolled products or "advanced steel products." *Id.* at 388 (emphasis in original). The court described its inquiry in that case as "whether the process of stamping sufficiently advances the flat-rolled steel such that the resulting blank (or stamped article) is so distinct from the flat-rolled steel coil input from which it was produced that it can no longer be described by the common meaning of the term 'flat-rolled steel' but instead assumes the character of a different article under the tariff schedule." *Id.* at 388. Under this approach, for Formpack to "assume the character" of plastic, the process of backing aluminum foil would have to alter the product so significantly that the plastic layers subsume the foil—to the point where the good could no longer be described as foil.

The record before the court does not support the conclusion that the foil "assume[s] the character" of plastic once the layers are merged together. The primary characteristic that the aluminum layer provides for the good is to serve as an absolute barrier to moisture, light, oxygen, other gases, and bacteria. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. Once the plastic layers are merged with the aluminum, the aluminum foil still provides the impermeable barrier that remains the critical component of Formpack. Formpack undoubtedly *gains* properties of plastic as the aluminum foil is laminated with the plastic layers. However, Formpack is not "so distinct" from the aluminum foil layer as it exists prior to its merger with the plastic layers that it can no longer be described by the common meaning of the term "aluminum foil."

The processing of the foil changes the character of the material by imparting additional properties, but the characteristics of Formpack after the foil is combined with plastics do not mark a transformation in the character of the foil such that it no longer may be considered foil: to the contrary, Formpack retains its aluminum characteristics. In the formulation of the *Motor Wheel* court, the merging of plastic with the aluminum does not advance Formpack beyond the scope of the aluminum tariff provision. To take on characteristics of plastic film is not to "assume the character" of plastic that would activate the rule in Note 1(d) to Chapter 76. Formpack is *prima facie* classifiable under Heading 7607 and it is not excluded by Note 1(d), because the character of the plastic does not subsume that of the aluminum.

However, the inquiry does not end there because the court has an independent obligation to determine the correct classification. *Jarvis Clark*, 733 F.2d at 878. To that end, the court examines the possibility of whether Formpack properly falls under any other heading of the HTSUS. Accordingly, the analysis shifts to Heading 3921 to determine whether Formpack properly falls under a second heading.

Heading 3921 covers "Other plates, sheets, film, foil and strip, of plastics." Read alone, Heading 3921 does not directly name and include, and does not appear to cover, multilayer laminate packaging materials. The plain language of the heading by itself mentions only plastic, not aluminum. However, when Heading 3921 is read together with an adjacent heading (Heading 3920), Heading 3921 may then be read to include multilayer laminate packaging materials, including materials that are not plastics. While Heading 3920 covers "[o]ther plates, sheets, film, foil and strip, of plastics, non-cellular and *not reinforced, laminated, supported or similarly combined with other materials*," (emphasis supplied), Heading 3921 covers "*Other* plates, sheets, film, foil and strip, of plastics" (emphasis supplied). The canon of statutory construction *in pari materia* ("upon the same matter or subject") instructs to read the headings together, providing the basis to elucidate the meaning of the term "other." Reading the two headings together allows for interpreting "other" in Heading 3921 as covering goods excluded from Heading 3920, namely, "plastic goods that either are cellular or are 'reinforced, laminated, supported or similarly combined with other materials.'" *Alcan*, 771 F. Supp. 2d at 1367.

Strictly by its own terms, then, Heading 3921 does not appear to cover a plastic-aluminum combination article such as Formpack. However, considering the language of Heading 3921 in relation to Heading 3920 and in light of the Explanatory Notes to Chapter 39, conceivably brings an article such as Formpack within the tariff provision. First, as defined by Note 1 to Chapter 39,[7] the oPA, PVC, PE and PP components of Formpack all constitute "plastic." Second, these layers all constitute "sheets" or "films" of plastic. *See* Pl. Stmt. Facts ¶ 3; Def. Resp. Pl. Stmt. ¶ 3 (describing oPA, PVC, PP and PP as "films"). And, third, the sheets or films of plastic are "separated by a layer of another material such as metal foil." Explanatory Notes to Heading 3921.

[7] Note 1 to Chapter 39 provides: "Throughout the tariff schedule the expression '*plastics*' means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence."

However, the Explanatory Notes to Chapter 39 state that the chapter covers plastics separated by a layer of another material such as metal foil only as long as they "retain the essential character of articles of plastics." *See* Explanatory Notes to Heading 3921; *see also*, *Alcan*, 771 F.3d at 1367. Therefore, if the language of the Explanatory Notes suggests that Formpack does not properly belong under Heading 3921, then that language together with the analysis above would indicate that Chapter 39 does not cover Formpack. The inquiry thus shifts to the Explanatory Notes.

The language of the Explanatory Notes suggests an essential character analysis to determine the scope of Heading 3921. The court assesses the product's character based on the condition of the product at the time of importation. *Gen Elec. Co.-Med. Sys. Grp. v. United States*, 247 F.3d 1231, 1235 (Fed. Cir.), *opinion amended on' reh'g*, 273 F.3d 1070 (Fed. Cir. 2001). The GRIs do not define "essential character" but the Explanatory Notes to GRI 3(b) provide guidance to make this determination. *See* General Explanatory Notes to Chapter 39. Because "essential character" typically arises in the context of GRI 3(b), the court looks to the interpretation of this language within that context to elucidate its meaning here.

To be clear, the court looks to the guidance from the analytical framework provided by GRI 3(b) and decisions of the Federal Circuit and this court applying GRI 3(b) to elucidate the "essential character" language of the pertinent EN to Chapter 39, and not to suggest that the court believes an analysis under GRI 3(b) is appropriate to this case. To the contrary, the court's analysis of the potential applicability of Heading 3921 continues to proceed under GRI 1.

"The essential character inquiry is factual in nature . . . [and] involves weighing a number of diverse factors." *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004). The "factor which determines essential character will vary as between different kinds of goods" and "may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." Explanatory Notes to GRI 3(b). *See also Alcan*, 929 F. Supp. 2d at 1348 (quoting Explanatory Notes to GRI 3(b)), *aff'd, Alcan*, 771 F.3d at 1364. No single, objective factor determines essential character. The "primary function" of an article may also be the basis for a determination of essential character. *3G Mermet Fabric Corp. v. United States*, 25 CIT 174, 181, 135 F. Supp. 2d 151, 159 (2001). The CAFC has found "no error" when this court has "carefully considered all of the facts" and conducted a "reasoned balancing of all the facts"

to determine essential character. *Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir. 1997).

"Essential character conclusions may well differ from imported product to imported product, and prior rulings with respect to similar but non-identical items are also of little value in assessing the correctness of the classification of a similar but not identical item." *Structural Indus., Inc.*, 356 F.3d at 1371. Thus, the determination of Formpack's essential character is made solely on the basis of Formpack's character and unrelated to the essential character of any other, similar article. The "essential character" of an article is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Home Depot USA, Inc. v. United States*, 30 CIT 445, 460, 427 F. Supp. 2d 1278, 1293 (2006), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007) (citing *A.N. Deringer, Inc. v. United States*, 66 Cust. Ct. 378, 383 (1971)).

The court's "essential character" inquiry begins with a quantitative comparison of the plastic and aluminum in Formpack. Presuming that Formpack's plastic layers are aggregated for purposes of this comparison, neither the plastic layers nor the aluminum layer predominates. The parties do not dispute that Formpack consists of aluminum foil, combined with plastic film layers using an adhesive lamination process, Pl. Stmt. Facts ¶ 15; Def. Resp. Pl. Stmt. ¶ 15, with minor variance in the proportion of plastic to aluminum depending on the configuration. Pl. Stmt. Facts ¶ 3; Def. Resp. Pl. Stmt. ¶ 3. However, Plaintiff and Defendant employ different formulas to determine the relative share of thickness, value and weight of the plastic as aggregated compared to the aluminum. *See* Pl. Ex. 1 at 5–6. Def. Ex. at 1. In particular, some of Defendant's quantitative measurements include adhesive and primer as coming within the share of the material considered to be plastics.[8] This approach stands in contrast to the approach used by this court and in *Alcan*. 929 F. Supp. 2d 1338, *aff'd, Alcan*, 771 F.3d 1364.

Nevertheless, even under Defendant's methodology, plastics comprise a greater share of Formpack's thickness and value, while aluminum outweighs plastic by weight for six out seven models. Among the seven types of Formpack at issue, plastic layers comprise between [[ ]] of the product's thickness, or an average of [[ ]] and

[8] The Defendant includes adhesive and primer in calculating the weight of the plastic relative to aluminum. Pl. Ex. 1 at 5–6. The precise formula used by the Defendant for other measures is unclear. *Id.*

between [[ ]] of its value, or an average of [[ ]]. Def. Ex. 1 at 11.[9] Aluminum represents a greater share of the weight for six of the seven models, comprising between [[ ]] of the total weight, or an average of [[ ]]. *Id.*

Which factors are most important for determining essential character will vary for different types of goods. *See Structural Indus.*, 356 F.3d at 1370. However, when one component material does not *clearly predominate* over another, quantitative differences alone may not form the basis for a determination of essential character. *See, e.g.*, *Swimways Corp. v. United States*, 42 CIT ___, ___, 329 F. Supp. 3d 1313, 1322 (2018) (emphasis supplied) (finding, in a quantitative comparison, that "both the textile materials and the plastic materials [were] present in significant, but not clearly predominant, proportions" so a quantitative comparison was not persuasive). In sharp contrast to *Alcan*, where the court found that "plastic predominates in Flexalcon according to traditional measures like bulk, quantity, weight, and value," 771 F.3d at 1367, the uncontested facts in this case do not support a conclusion that any single class of materials predominates in Formpack by all quantitative measures. Whereas in *Alcan* every quantitative measure favored plastic [[ ]], here both aluminum and plastic are "present in significant, but not clearly predominant, proportions," *Swimways Corp.*, 329 F. Supp. 3d at 1322. Aluminum outweighs the plastic by weight, plastic prevails with respect to value and for the reasons noted, the court determines that thickness in this case does not weigh in favor of either material. Accordingly, the court determines that Formpack's quantitative traits do not weigh in favor of either aluminum or plastics as the product's "essential character."

When assessing a product's essential character, the court also considers the "role of a constituent material in relation to the use of the goods." Explanatory Notes to GRI 3(b). The principal use of Formpack is to serve as the base material for blister packs containing pharmaceutical products. Central to its ability to function as a container is the ability to protect and preserve the contents, and the aluminum foil is the sole layer in Formpack critical to serving as a barrier: aluminum provides an "impermeable barrier to moisture, light, oxygen, and other gases [sic]." Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. Comprised solely of plastics, a base material cannot achieve the

[9] Since aluminum foil serves as an absolute barrier regardless of thickness, Pl. Stmt. Facts ¶ 66; Def. Resp. Pl. Stmt. ¶ 66, a thicker aluminum foil layer would increase the cost of Formpack without enhancing its functionality. Since increased thickness does not correlate with increased functionality, the utility of thickness as a barometer of essential character is considerably less persuasive.

same level of barrier as a base material that contains a layer of aluminum. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. Amcor's all-plastic base materials have a "very high moisture barrier, *but they are nowhere near foil*." Pl. Ex. 8, Wittemer Dep. at 47–48 (emphasis supplied).

While plastic helps to render the shape of Formpack and provides sealability, aluminum is the indispensable component for the "contain" function because of the barrier property it imparts. The majority of Plaintiff's customers are healthcare or pharmaceutical companies, Pl. Br. at 12, so providing an effective barrier against moisture is of particular importance. Blocking moisture allows the package to maintain the effectiveness of the product and prolongs its shelf-life. Plastics also contribute to Formpack's barrier function, but in a supporting capacity: both the sealant and oPA plastic layers help to prevent the aluminum from fracturing and plastic provides strength that prevents the collapse of the blister shape. Def. Ex. 1 at 16. In sum, the plastic layers facilitate and enable the aluminum layer to provide the indispensable barrier property.

Still, the plastic layers impart multiple, independent functions to Formpack, which are also critical, albeit secondary, functions relative to the properties imparted by the foil. Plastics are critical to impart the ability to transport a good: the plastic layers enable Formpack to endure the process of storage and distribution. *See* Pl. Ex. 1 at 7–8. Plastic is also critical to inform the customer of what the blister pack contains: drug information may be printed on Formpack's outer layer of oPA film, *see* Def. Ex. 1 at 12, but it may not be printed on the foil layer. Transporting the good and informing the customer are both secondary to Formpack's principal function as a packaging material that acts as a barrier to protect the blister pack's contents.

While both plastic and aluminum impart critical functions to Formpack, it is the aluminum that provides to Formpack the barrier property to serve effectively as a container for pharmaceuticals. In making a determination of essential character, the court considers "whether the component part (plastic film or aluminum foil) imparts qualities that are 'indispensable' to the functioning of the subject merchandise." *Alcan*, 929 F. Supp. 2d at 1348–1349, *aff'd*, Alcan, 771 F.3d 1364 (citing *3G Mermet Fabric Corp.*, 135 F. Supp. 2d at 158–59). This ability to isolate the contents of the blister package from its external environment is the precise feature that is sought by customers when selecting blister package material, Pl. Stmt. Facts ¶ 42; Def. Resp. Pl. Stmt. ¶ 42, and it therefore distinguishes Formpack as an article. It is the "qualit[y] that define[s] [Formpack] as a product." 929

F. Supp. 2d at 1350, *aff'd*, *Alcan*, 771 F.3d 1364. A base material comprised only of plastics is unable to attain the same level of barrier as a base material that contains a layer of aluminum. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. The record demonstrates the parties' agreement that no commercially available all-plastic materials provide equivalent barrier characteristics as aluminum. Pl. Stmt. Facts ¶ 47; Def. Resp. Pl. Stmt. ¶ 47. The parties agree that aluminum provides the impermeable barrier property; in this way, it serves as the "key ingredient[]" to Formpack. 929 F. Supp. 2d at 1350, aff'd, *Alcan*, 771 F.3d at 1364. Plastics impart critical functions to Formpack, but it is the aluminum that "imparts a defining characteristic that is fundamental to its commercial identity." *Swimways*, 329 F. Supp. 3d at 1324.

Finally, the court considers two additional factors that are pertinent to an essential character analysis: design and processing. *See 3G Mermet Fabric Corp.*, 135 F. Supp. 2d. at 151 (in which the court considered the production process of a composite plastic-fiberglass window/shade fabric in determining its essential character). A determination of essential character rests on characterizing the merchandise *as a whole*, but in so doing the court may consider how the product is designed as well as the production process. *Id.* In this case, the design and processing of Formpack both weigh in favor of classifying Formpack as aluminum. Since the very idea of "backed" foil implies processing, it would be illogical not to consider how Formpack is manufactured. The constituent components of Formpack exist as three separate layers before any processing occurs. The foil is then laminated with plastic, and lamination is typically considered a finishing operation that does not affect classification. *See* General Explanatory Notes to Chapter 72; General Explanatory Notes to Chapter 76.[10] The manufacturing of Formpack, buttressed by the further processing that Formpack undergoes after importation, suggests that it has the essential character of aluminum.

The essential character of an article is "the component which is indispensable to the structure, core, or condition of the article, *i.e.* the attribute which strongly marks or serves to distinguish what it is." *Home Depot USA Inc.*, 427 F. Supp. 2d. at 1284, *aff'd*, 491 F.2d 1334 (Fed. Cir. 2007). The constituent material that most strongly distinguishes Formpack is aluminum, so its essential character is aluminum. While a plastic-aluminum combination material may conceiv-

[10] Moreover, the cold-forming process by which Plaintiff's customers create blister cavities in Formpack is a form of processing that is not suited for plastic: blister pack base materials consisting entirely of plastic cannot be cold-formed to create blister cavities. Pl. Stmt. Facts ¶ 35; Def. Resp. Pl. Stmt. ¶ 35. For the court to determine that Formpack is essentially plastic, only then to undergo processing not suited for plastic, would not make sense.

ably be classified under Heading 3921, Formpack is not correctly classified under this heading because Formpack does not "retain the essential character of plastics": the multiple, secondary functions imparted by the plastic do not comport with what is typically associated with the "essential character" of a good. Instead, it is the aluminum that creates the barrier property that distinguishes Formpack.

Having classified the product under the appropriate heading, the court turns to the subheadings. *See* GRI 6. Subheading 7607.20.50 applies expressly to "backed" foils that do not fit under subheading 7607.20.10, which are those "[c]overed or decorated with a character, design, fancy effect or pattern." In this way, the subheading specifically provides for aluminum foil that has been "backed" with a "backing" material. Formpack properly belongs under this classification.

The court believes that it has reached the legally correct outcome for this case. Nonetheless, the court takes judicial notice that its conclusion could be seen to be at variance with the suggestion of Mr. Maguire as he advised Benjamin Braddock on his future in the 1967 Mike Nichols film, *The Graduate*, based on the 1963 novel of the same name by Charles Webb, and which garnered Nichols the Academy Award for Best Director.[11] *See Mitsubishi Polyester Film, Inc. v. United States*, 42 CIT ___, ___, 321 F. Supp. 2d 1298, 1300 n. 1 (2018).

"Ben," Mr. Maguire said.

"Mr. Maguire?" Ben replied.

"Ben."

"Mr. Maguire?"

"Come away with me for a minute, I want to talk to you...." Maguire escorted Ben outside to the pool area. "I just want to say one word to you. Just one word."

"Yes, sir?"

"Are you listening?"

"Yes, I am."

"Plastics."

"Exactly how do you mean?"

"There's a great future in plastics. Think about it. Will you think about it?"

"Yes, I will."

"Shhh. Enough said. That's a deal."

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[11] THE GRADUATE (Mike Nichols/Lawrence Turman Productions 1967).

CONCLUSION

Enough said. For the foregoing reasons, summary judgment is granted in favor of Plaintiff and Defendant's cross-motion is denied. Customs' classification is reversed and judgment will be entered accordingly.

Dated: January 3, 2020
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 20–2

HUSTEEL CO., LTD. et al., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and CALIFORNIA STEEL INDUSTRIES et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00169
PUBLIC VERSION

[Remanding the U.S. Department of Commerce's final determination in the first administrative review of the antidumping duty order covering welded line pipe from the Republic of Korea.]

Dated: January 3, 2020

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Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel was *Reza Karamloo*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Elizabeth J. Drake, Schagrin Associates, of Washington, DC, argued for defendant-intervenors California Steel Industries, TMK IPSCO, and Welspun Tubular LLC USA. With her on the brief was *Roger B. Schagrin*, *Christopher T. Cloutier*, and *Luke A. Meisner*.

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OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on motions for judgment on the agency record filed respectively by SeAH Steel Corporation ("SeAH"), Hyundai Steel Company ("Hyundai"), NEXTEEL Co., Ltd. ("NEXTEEL"), and Husteel Co., Ltd. ("Husteel"). *See* Pl. [SeAH]'s Mot. J. Agency R., Feb. 1, 2019, ECF No. 37; Consol. Pl. [Hyundai]'s 56.2 Mot. J. Agency R., Feb. 1, 2019, ECF No. 39; Consol. Pl. [NEXTEEL]'s 56.2 Mot. J. Agency R., Feb. 1, 2019, ECF No. 41; Pl. [Husteel]'s Mot. J. Agency R., Feb. 1, 2019, ECF No. 42. These parties challenge various aspects of the final results of the U.S. Department of Commerce's ("Department" or "Commerce") first administrative review of the antidumping duty ("ADD") order covering welded line pipe from the Republic of Korea ("Korea"). *See* [SeAH]'s Br. Supp. 56.2 Mot. J. Agency R. Confidential Version, Feb. 1, 2019, ECF No. 37–1 ("SeAH's Br."); Consol. Pl. [Hyundai]'s Memo. Supp. 56.2 Mot. J. Agency R. Confidential Version, February 1, 2019, ECF No. 39–1 ("Hyundai's Br."); Consol. Pl. [NEXTEEL]'s Memo. Supp. 56.2 Mot. J. Agency R., Feb. 1, 2019, ECF No. 41–1 ("NEXTEEL's Br."); Pl. [Husteel]'s Br. Supp. Mot. J. Agency R., Feb. 1, 2019, ECF No. 42–1 ("Husteel's Br."); *see also Welded Line Pipe from the Republic of Korea*, 83 Fed. Reg. 33,919 (Dep't Commerce July 18, 2018) (final results of [ADD] admin. review; 2015–2016) ("*Final Results*") *as amended by Welded Line Pipe from the Republic of Korea*, 83 Fed. Reg. 39,682 (Dep't Commerce Aug. 10, 2018) (amended final results of [ADD] admin. review; 2015–2016) ("*Amended Final Results*") and accompanying Issues and Decisions Memo. for the Final Results of the 2015–2016 Admin. Review of the [ADD] Order on Welded Line Pipe from Korea, A-580–876, (July 11, 2018), ECF No. 25–5 ("Final Decision Memo.").

SeAH challenges as contrary to law and unsupported by substantial evidence Commerce's decision to reject third country sales and use constructed value to calculate its margins. SeAH's Br. at 11–19. Plaintiffs challenge as contrary to law and unsupported by substantial evidence Commerce's particular market situation ("PMS") finding and subsequent adjustments. *See* SeAH's Br. at 19–27; Hyundai's Br. at 17–29; Husteel's Br. at 11–19; *see generally* NEXTEEL's Br. Husteel challenges Commerce's statutory authority to adjust reported costs of production to account for a PMS in Korea. *See* Husteel's Br. at 18–19. Husteel also challenges Commerce's calculation of the non-examined companies' rate. *See* Husteel's Br. at 19–23.

For the reasons that follow, this court remands Commerce's adjustment of the reported costs of production for welded line pipe for purposes of the sales below costs test when calculating normal value; Commerce's determination that distortions in the Korean market give rise to a particular market situation; Commerce's decision to resort to constructed value when calculating SeAH's margins; and accordingly, Commerce's calculation of the all-others rate for non-examined respondents.

BACKGROUND

On February 13, 2017, in response to timely requests by interested parties, Commerce initiated an administrative review of various ADD and countervailing duty ("CVD") orders and findings, including an ADD order covering welded line pipe ("WLP") from Korea.[1] *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 80 Fed. Reg. 10,457 (Dep't Commerce Feb. 13, 2017); *see also Welded Line Pipe from the Republic of Korea*, 82 Fed. Reg. 75,056 (Dep't Commerce Dec. 1, 2015) ([ADD] orders). On March 7, 2017, Commerce selected Hyundai and SeAH as mandatory respondents. *See* Selection of Resp't for Individual Review at 2–4, PD 22, bar code 3549464–01 (Mar. 7, 2017).

Commerce published its preliminary results on January 9, 2018. *See Welded Line Pipe from Korea*, 83 Fed. Reg. 1,023 (Dep't Commerce Jan. 9, 2018) (prelim. results of [ADD] admin. review; 2015–2016) ("*Prelim. Results*") and accompanying Decisions Memo. for the [*Prelim. Results*], A-580–876, PD 259, bar code 3657712–01 (Jan. 2, 2018) ("Prelim. Decision Memo."). Commerce calculated SeAH's margin by using Canada as the comparator market because the aggregate volume of SeAH's home market sales were insufficient to permit a proper comparison with United States sales. *See* Prelim Decision Memo. at 15–16 (citing to section 773(a)(1)(C)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(a)(1)(C)(ii) (2012))[2] . On September 22, 2017, Defendant-Intervenor Maverick Tube Corporation ("Maverick") sent to Commerce a letter alleging that a PMS in Korea distorted the cost of production ("COP") of WLP. *See generally* Letter from [Maverick] Pertaining to PMS Allegation and Factual Info., CD 230–297, bar codes 3622608–01–68 (Sept. 22, 2017). Namely, Maverick alleged that the PMS in Korea distorted the cost of hot-rolled coil ("HRC"), an

[1] Each year during the anniversary month of the publication of an ADD duty order, interested parties may request that Commerce conduct an administrative review of that order. *See* 19 C.F.R. § 351.213; *see also* 19 U.S.C. § 1677 (defining interested parties).

[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.

input in the production of WLP. *See generally id.* To account for the PMS, Commerce made an upward adjustment to Hyundai's and SeAH's reported costs for the HRC input when calculating normal value. *See generally* Prelim. Decision Memo. Commerce preliminarily calculated weighted-average dumping margins of 19.42 percent for Hyundai, 2.30 percent for SeAH, and 10.86 percent for non-selected respondents. *Prelim. Results* 83 Fed. Reg. at 1,024.

On June 25, 2018, Commerce placed on the record the Canadian International Trade Tribunal's ("CITT")[3] final determination that SeAH's sales of steel line pipe into Canada were dumped and permitted interested parties to comment. *See* Memo. from Commerce Pertaining to Canadian [ADD] Final Determination on [WLP], PD 303, bar code 3722970–01 (June 25, 2018) ("CITT Final Determination"); *see also id.* Attachment at 2. On August 10, 2018, Commerce published its *Amended Final Results*, and recalculated the weighted-average dumping margins. *See generally*, *Amended Final Results* and Final Decision Memo.[4] Commerce continued to apply the upward adjustment to Hyundai and SeAH's reported HRC costs. Final Decision Memo. at 12–17. Relying on the CITT's dumping determination, Commerce calculated SeAH's margin using the constructed value methodology. Final Decision Memo. at 45–47. After correcting for ministerial errors, *see* Final Decision Memo. at 3, Commerce assigned rates of 18.77 percent for Hyundai, 14.39 percent for SeAH, and 16.58 percent for non-selected respondents. *See Amended Final Results*, 83 Fed. Reg. at 39,682.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) 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. 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).

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[3] The CITT reviews determinations made by the Canada Border Services Agency ("CBSA"). When referencing the dumping determination at issue, the parties refer interchangeably to both the CITT and the CBSA. Commerce placed on the record the CITT's findings. Because both references pertain to the same dumping determination at issue, this court will refer to the CITT's determination.

[4] Commerce amended its Final Results to correct for ministerial error not relevant to this dispute. *Amended Final Results*, 83 Fed. Reg. at 39,682.

DISCUSSION

I. The Statute Precludes Commerce's PMS Adjustment

A. Exhaustion and Waiver

As a threshold matter, Defendant argues Husteel failed to exhaust its argument that Commerce lacked authority to make a PMS adjustment to COP for purposes of determining below cost sales before the agency. Defendants also argue that Husteel waived its claim with respect to this argument before this court. Because the question before the court concerns a pure question of law, the court will not require exhaustion before the agency. Moreover, Husteel sufficiently pled and briefed its claim that Commerce acted contrary to law before this court.

Parties are required to exhaust administrative remedies before the agency by raising all issues in their initial case briefs before Commerce. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing to 19 C.F.R. § 351.309(c)(2), (d)(2); *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)). However, the court has discretion not to require exhaustion of administrative remedies where a pure legal question arises. 19 U.S.C. § 2637(d); *see also Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029–30 (Fed. Cir. 2007).[5] The court is not required to resort to agency expertise or factual determinations to dispose of this purely legal question. As explained below, the language of the statute precludes Commerce's action and therefore exhaustion is not appropriate.

Further, Husteel has not waived its claim that Commerce acted contrary to law. At paragraph 15 of its complaint, Husteel states that "Commerce's [PMS] determination and resulting adjustment are unsupported by substantial record evidence and contrary to law in a number of respects." *See* Husteel's Compl. ¶ 15, Aug. 2, 2018, ECF No. 6. Moreover, Husteel fully explicates the argument in support of its claim in its moving brief. Thus, Husteel's claim and legal arguments are not waived.

[5] The "pure legal question" exception generally does not apply where determination of the pertinent issue requires any additional development of a factual record either before or after the court's review. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003–04 (Fed. Cir. 2003); *see also Consol. Bearings Co. v. United States*, 25 CIT 546, 166 F. Supp. 2d 580 (2001), rev'd on other grounds, 348 F.3d 997 (Fed. Cir. 2003) (synthesizing from numerous decisions four non-exhaustive requirements for application of the "pure legal question" doctrine: (a) a new argument that is (b) purely legal and (c) does not require agency involvement or fact finding and (d) does not create undue delay) (internal citations omitted).

B. Commerce's Below Cost Sales Adjustment

The statutory scheme precludes Commerce's PMS adjustment to COP for purposes of a below cost sales analysis. Congress specifically delineated Commerce's options to account for a PMS whether using market sales or constructed value as normal value. Congress also provided for how to calculate the COP to identify sales below cost in the market sales context and, in doing so, did not provide a means to adjust for a PMS. Here, Commerce eschewed the options, provided by Congress, to account for a PMS; Commerce instead chose to adjust the COP in a manner not permitted by statute. The plain language of the statute prohibits Commerce's action and therefore its PMS adjustment is contrary to law.[6]

In order to determine whether subject merchandise is sold at less than fair value "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). The statute explains how a comparison is made between normal value and export price. First, the statute provides a methodology for determining which sales should be considered, and disregarded, when calculating normal value, *see* § 1677b(a)(1), (b)(1); second, the statute sets forth what adjustments, if any, should be made to normal value, *see* § 1677b(a)(6), (7); and, third, the statute provides for what should be done if Commerce determines that, because of a PMS, a fair comparison between normal value and export price or constructed export price cannot be made. *See* 19 U.S.C. §§ 1677(15); 1677b(a)(1)(B), (C), 1677b(a)(4).

First, when determining normal value, Commerce may disregard sales that are not made in the ordinary course of trade. The statute defines normal value as the price at which the foreign like product is "first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade[.]" 19 U.S.C. § 1677b(a)(1)(B)(i). Therefore, sales outside the ordinary course of trade cannot be included in normal value. "Ordinary course of trade" is defined by statute and specifically excludes below cost sales, certain transactions between affiliated parties, and situations

[6] Defendant and Defendant-Intervenor argue that, to the extent that the statute is ambiguous, Commerce's interpretation is reasonable and thus entitled to *Chevron* deference. Def.'s Resp. Br. at 8–9, 12–23; Resp. Br. Def.-Intervenors California Steel Industries, TMK IPSCO, & Welspun Tubular LLC USA at 8–9, 11–15, July 29, 2019, ECF No. 63 ("Resp. Br. Def.-Intervenors"); *see also Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Here, Congress clearly set forth the means by which Commerce is to calculate COP for purposes of the below cost sales test. Congress has spoken to the precise issue and therefore the matter is resolved according to the plain meaning of the statute.

where a PMS would not allow for a proper comparison between normal value and export price or constructed export price. 19 U.S.C. § 1677(15)(A)–(C).[7]

When identifying normal value sales, Commerce may also disregard sales made at less than the COP. 19 U.S.C. § 1677b(b)(1). The COP is defined by statute to include the costs of materials and fabrication, amounts for selling and general expenses, and the cost of containers and other expenses incidental to putting the product into a condition ready for shipment.[8] Congress provided additional special rules for the calculation of COP including adjustments to be made in

[7] (15) Ordinary course of trade.
The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
(A) Sales disregarded under section 1677b(b)(1) of this title.
(B) Transactions disregarded under section 1677b(f)(2) of this title.
(C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.

[8] More specifically the statute provides that the cost of production equals the sum of:
(A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
(B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.
For purposes of subparagraph (A), if the normal value is based on the price of the foreign like product sold for consumption in a country other than the exporting country, the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation.
19 U.S.C. § 1677b(b)(3). Defendant argues that the phrase "ordinary course of business" in section 1677b(b)(3)(A) is similar to "ordinary course of trade" so as to justify reading a PMS adjustment into this portion of the statute. Def.'s Resp. Br. at 22. This argument proves contrary to Defendant's position. Congress amended the statute in 2015. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 504, 129 Stat. 362 (2015) ("TPEA"). In doing so, Congress authorized Commerce to adjust its constructed value methodology where it finds that a PMS exists. *Id.* Congress also amended § 1677b(e)(1) to change the phrase "ordinary course of business" to "ordinary course of trade." *Id.* It amended the definition of "ordinary course of trade." *Id.*Congress did not modify section 1677b(f). That Congress chose to leave the phrase "ordinary course of business" in section 1677b(f) when it changed the very same phrase in section 1677b(e) to "ordinary course of trade" indicates that it did not intend to incorporate a PMS adjustment to the sales-below-cost analysis. Defendant-Intervenor points out that the phrase "ordinary course of trade" is nonetheless found in the provision of the statute which tasks Commerce to disregard below costs sales. Oral Arg. at 00:46:05–00:46:20, Nov. 26, 2019, ECF No. 101. *See also* Def.-Intervenors Resp. Br. at 14. The statute provides that where sales have been disregarded, normal value shall be based on the "remaining sales of the foreign like product in the ordinary course of trade." 19 U.S.C. § 1677b(b)(1). The mere presence of this phrase in this portion of the statute does not advance Defendant's position.

certain circumstances. *See* 19 U.S.C. § 1677b(f).[9] Specifically, the statute provides:

> Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

19 U.S.C. § 1677b(f)(1)(A). The statute provides for adjustments to be made for startup operations when determining COP,[10] and makes provisions for transactions between affiliated persons.[11]

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[9] These rules also apply to calculation of constructed value. Notably, the constructed value portion of the statute includes a provision for accounting for a PMS, which is not included here. *Compare* 19 U.S.C. § 1677b(e) *with id.* § 1677b(f).

[10] 19 U.S.C. § 1677b(f)(1)(C)(ii) and (iii) provide:

> (ii) Startup operations.
>
> Adjustments shall be made for startup operations only where—
>
> (I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and
>
> (II) production levels are limited by technical factors associated with the initial phase of commercial production.
>
> For purposes of subclause (II), the initial phase of commercial production ends at the end of the startup period. In determining whether commercial production levels have been achieved, the administering authority shall consider factors unrelated to startup operations that might affect the volume of production processed, such as demand, seasonality, or business cycles.
>
> (iii) Adjustment for startup operations. The adjustment for startup operations shall be made by substituting the unit production costs incurred with respect to the merchandise at the end of the startup period for the unit production costs incurred during the startup period. If the startup period extends beyond the period of the investigation or review under this title, the administering authority shall use the most recent cost of production data that it reasonably can obtain, analyze, and verify without delaying the timely completion of the investigation or review. For purposes of this subparagraph, the startup period ends at the point at which the level of commercial production that is characteristic of the merchandise, producer, or industry concerned is achieved.

[11] Transactions between affiliated persons are provided for under the transactions disregarded rule and the major input rule. Specifically, 19 U.S.C. § 1677b(f)(2) provides:

> Transactions disregarded. A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the

Second, when using market prices to determine normal value, Commerce may need to make certain adjustments. Congress provided for those adjustments, specifically to account for the cost of containers and other expenses incident to making the goods ready for shipment, direct taxes, differences in the quantities sold or physical differences and differences in the circumstances of sale.[12] Additional adjustments are allowed for differences in levels of trade.[13]

information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(3) provides:

Major input rule. If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

[12] 19 U.S.C. § 1677b(a)(6) provides for adjustments:

The price described in paragraph (1)(B) shall be—

(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

(B) reduced by—

(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional 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, and

(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—

(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

(ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) of this title is used in determining normal value, or

(iii) other differences in the circumstances of sale.

[13] 19 U.S.C. § 1677b(a)(7) provides for additional adjustments.

(A) Level of trade. The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade—

(i) involves the performance of different selling activities; and

(ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

Third, when using home market sales for normal value, Commerce may discover there is a PMS that prevents the proper comparison of normal value and export price or constructed export price. Congress specifically provided for such situations. If Commerce determines that a PMS "prevents a proper comparison with the export price or constructed export price" then normal value will be determined by third country sales or constructive value. 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), 1677b(a)(1)(C)(iii), 1677b(a)(4).

If there are insufficient home market or third country sales, or if a PMS prevents the fair comparison of normal value and export price or constructed export price, Commerce may use constructed value to determine the price for comparison to export price. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii), § 1677b(a)(1)(C)(iii), 1677b(b)(1), 1677b(a)(4). Commerce shall determine constructed value by adding "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade[.]" *See* 19 U.S.C. § 1677b(e)(1). If, however when determining constructed value, Commerce determines that a PMS exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the COP in the ordinary course of trade, Commerce may use "any other calculation methodology." 19 U.S.C. § 1677b(e).

Therefore, the plain language of the statute provides: a definition of normal value as based on home market sales, third country sales, or constructed value, 19 U.S.C. § 1677b(a)(1), (4); sales to be disregarded, § 1677b(a)(1)(B)(i), (b)(1); available adjustments, § 1677b(a)(6), (7); and, alternatives where a PMS prevents a proper comparison between normal value and export price or constructed export price, § 1677b(a)(1)(B), (C); 1677b(a)(4). The statute separately provides that when Commerce is using constructed value and encounters a PMS that it may resort to "any other calculation methodology." 19 U.S.C. § 1677b(e).

Here, Commerce chose a path not permitted by the statutory scheme. Commerce misappropriated the language of 19 U.S.C. § 1677b(e), which provides that when using constructed value, Commerce may use any reasonable calculation methodology if it finds a PMS affected the COP. In the Final Decision Memo., Commerce explains its authority to act:

> Section 504 of the TPEA added the concept of "particular market situation" in the definition of the term "ordinary course of

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

> trade," for purposes of CV under section 773(e) of the Tariff Act of 1930, as amended (the Act), and through these provisions for purposes of the COP under section 773(b)(3) of the Act. Section 773(e) of the Act states that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.

Final Decision Memo. at 12 (footnote omitted). Although Commerce's phrasing "and through these provisions for purposes of the COP under section 773(b)(3) of the Act" is vague, it appears to be saying that the "any other calculation" language of the constructed value portion of the statute applies to the COP and below cost sales portion of the statute.

However, there is nothing in the statutory scheme which can be read to grant Commerce the authority to modify the below cost sales test to account for a PMS. Indeed, the statute precludes a PMS adjustment to COP for the below cost sales analysis because it specifically lists the method of calculation and the adjustments to be made, and there is no ambiguity in this portion of the statute. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–44 (1992) (a cardinal canon of statutory interpretation is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotations omitted). Section 1677b(b)(3) lays out how to calculate the COP and does not provide for PMS adjustments. *Compare* 19 U.S.C. § 1677b(b)(3) *with id.* § 1677b(e). 1677b(e).

Commerce apparently assumes, and Defendant argues, that when Congress amended the statute to define "ordinary course of trade" in 2015, it enabled Commerce to make PMS adjustments to the COP for purposes of the below cost sales test. *See* Final Decision Memo. at 12–18; Def.'s Resp. Pls.' Mots. J. Agency R. at 21–23, July 29, 2019, ECF No. 64 ("Def.'s Resp. Br."). Section 504 of the Trade Preferences Extension Act of 2015 amended section 1677(15) to provide that "situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price" are considered to be outside the ordinary course of trade. Trade Preferences Extension Act of 2015,

Pub. L. No. 11427, § 504, 129 Stat. 362 (2015) ("TPEA"); *see also* 19 U.S.C. § 1677(15); Final Decision Memo. at 12; Def.'s Resp. Br. at 22–23. However, this amendment does not help Commerce's position. If a PMS prevents a proper comparison with export price or constructed export price, sales would indeed be considered outside the ordinary course of trade; as such, they shall be disregarded. *See* 19 U.S.C. § 1677b(a)(1); *see also id.* § 1677(15). Alternatively, the existence of the PMS would justify Commerce using third country sales or constructed value. § 1677b(a)(1)(B)(ii), (a)(4). However, Commerce is not authorized to tinker with the below cost sales calculation because of a PMS. No part of the statute allows Commerce to use "any other methodology" when market sales are used for normal value. The "any other methodology" language is reserved solely for when normal value is determined by constructed value.[14]

Defendant argues that it would be "illogical to conclude that Congress intended for Commerce not to rely on costs distorted by a [PMS] for constructed value, but still to rely on those same distorted costs for purposes of cost of production and the sales-below-cost test." Def.'s Resp. Br. at 23. Defendant explains that Commerce reasoned that the language of the constructed value portion of the statute that allows Commerce to use "any other calculation methodology" must therefore apply to the COP portion of the statute and allow Commerce to adjust the COP for the purposes of its below cost sales analysis in the normal value portion of the statute. Def.'s Resp. Br. at 22–23 (citing Final Decision Memo. at 12). Defendant's argument is not persuasive.

The plain meaning of the statutory scheme is not illogical. Congress provided for the existence of a PMS when market sales are used for normal value by allowing Commerce to disregard specific sales (because they were made outside the ordinary course of trade) or to move off of home market sales to use third country sales or constructed value. 19 U.S.C. § 1677b(a)(1)(B)–(C), (a)(4). Congress provided for the existence of the PMS in a constructed value context by allowing Commerce to choose another reasonable means to calculate costs. Indeed, Congress's choice makes a great deal of sense. A PMS that affects costs of production would presumably affect prices for domestic sales and export sales so there would be no reason to adjust only the home market prices. If the PMS was of a kind that only affected domestic sales, then it would be one which prevented "a proper com-

[14] Indeed, Commerce found that "the collective impact of Korean HRC subsidies, Korean imports of HRC from China, strategic alliances, and government involvement in the Korean electricity market, a PMS exists in Korea which distorts the cost of production for WLP." Final Decision Memo. at 13. The statute enquires whether the PMS "prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15).

parison with the export price or constructed export price" and Commerce would move to either third country sales or constructed value. 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), (C)(iii); *see also id.* § 1677b(a)(4).

If a PMS only affected some sales, then those sales would be outside the ordinary course of trade and would be disregarded by Commerce in identifying normal value. At oral argument Defendant argues that, effectively, Commerce did simply disregard sales affected by a PMS in this case. Oral Arg. at 00:14:45, Nov. 26, 2019, ECF No. 101. In its Final Decision Memo, Commerce does not claim it is disregarding sales that are outside the ordinary course of trade because they are affected by a PMS. More importantly, that is not what Commerce did. Commerce did not exclude sales affected by a PMS, it adjusted reported costs affected by a PMS. Final Decision Memo. at 13–15. Commerce alleged a PMS that pertained to a specific input, HRC. Commerce made an adjustment to its COP calculation for purposes of its below cost sales analysis. Thereafter, some portion of sales were excluded as being below COP.

Ultimately, Commerce's argument hinges upon a view that when Congress amended the statute in 2015 to add the PMS language to the constructed value section of the statute that it also amended the below cost sales test to allow Commerce to calculate the COP to account for a PMS. Undeniably Congress did not amend either section 1677b(b)(1) (below costs sales) or section 1677b(f) (calculation of a cost of production) to allow for a PMS adjustment.[15] Commerce attempts to bootstrap such an amendment in its Final Decision Memo. by stating "Section 504 of the TPEA added the concept of 'particular market situation' in the definition of the term 'ordinary course of trade,' for purposes of CV under section 773(e) of the Tariff Act of 1930, as amended (the Act), and through these provisions for purposes of the COP under section 773(b)(3) of the Act." Final Decision Memo. at 12. Commerce and the Defendant thus claim that although the PMS language was not added to the cost of sales or calculation of COP sections of the statute, the PMS concept should be read into those provisions because of the phrase "ordinary course of trade" language was amended to exclude situations where a PMS prevents a proper comparison with the export price or constructed export price. However, between the below cost sales section, and the COP section, the only reference to "ordinary course of trade" simply says that where sales have been disregarded, normal value shall be based on the "remaining sales of the foreign like product in the

[15] Section 505 of the TPEA did amend the below cost sales in ways not relevant here. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

ordinary course of trade." *See* 19 U.S.C. § 1677b(b)(1). The words of the statute cannot support the adjustment made here by Commerce.

C. Commerce's PMS Determination

Plaintiffs also challenge Commerce's PMS determination as unsupported by substantial evidence and contrary to law. Commerce relied in part on its analysis in past reviews. Final Decision Memo. at 12–13 ("[W]e determine that the circumstances present during this review–that is, the PMS allegation itself and the record evidence concerning the allegation–remained largely unchanged from those which led to the finding of a PMS in Korea in the other reviews.") Commerce found that the "collective impact of Korean HRC subsidies, Korean imports of HRC from China, strategic alliances, and government involvement in the Korean electricity market" constituted a PMS in Korea "which distorts the cost of production for WLP." *Id.* Commerce's PMS finding is unsupported by substantial evidence.[16]

To establish the existence of a PMS, Commerce must demonstrate both that there are distortions present in the market and that those distortions prevent a proper comparison of normal value with export price or constructed export price. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III), (C)(iii) (stating that home market or third market prices that Commerce determines are affected by a PMS which prevents a proper comparison with export price or constructed price cannot be used to calculate normal value). Those determinations must be supported by substantial evidence. The evidence must be sufficient that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evi-

[16] SeAH does not challenge Commerce's statutory authority to make the PMS adjustment to cost of production for purposes of the sales below cost test under normal value—as Commerce calculated SeAH's margins using constructed value. However, SeAH challenges Commerce's PMS finding as unsupported by substantial evidence, *see* SeAH's Br. at 19–26, and its subsequent adjustment as contrary to law. *See* SeAH's Br. at 26–27. SeAH argues that, by relying on an AFA subsidy rate in a previous proceeding to calculate the adjustment to SeAH's COP, Commerce effectively applied AFA against a cooperative respondent. *See id.* Commerce's PMS finding is unsupported by substantial evidence, and thus, this court does not reach the issue of the lawfulness of Commerce's resulting adjustment.

Hyundai and SeAH both argue that Section 19 U.S.C. § 1677–1 which allows Commerce to remedy upstream subsidies precludes the use of the PMS provision in this case as a matter of law. Hyundai's Br. at 31–33; SeAH's Br. at 26. Defendant argues that the PMS provisions and the upstream subsidy provisions are two distinct provisions that serve different purposes. Def.'s Resp. Br. at 20–21. The question before Commerce in this proceeding was whether a confluence of factors gave rise to a PMS that affected the less than fair value equation when calculating margins pursuant to an [ADD] order review–not whether or not there existed remediable subsidies within the Korean market. Therefore, the court need not reach the argument posed by Hyundai and SeAH as to whether the statutory provisions remedying upstream subsidies preclude the use of the PMS provisions to remedy alleged market distortions that affect the cost of an input, where those alleged distortions include allegations of subsidies.

dence. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Here, Commerce found that four factors, based on their cumulative effect, warranted a PMS finding and subsequent adjustment. Final Decision Memo. at 13. Nonetheless, Commerce acknowledged that the information on the record was insufficient to permit it to quantify three out of four of those factors. *See* Final Decision Memo. at 14–15, 18, 23, and 24. Commerce possessed only enough information to quantify the impact of Korean HRC subsidies, and in doing so, relied on AFA[17] CVD rates assigned to HRC producers from a previous administrative proceeding. Final Decision Memo. at 14–15 (citing to *Hot-Rolled Steel Flat Products from Korea*, 81 Fed. Reg. 53,439 (Dep't Commerce Aug. 12, 2016) (final affirm. determination) *as amended by* 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) ("*Hot-Rolled Steel from Korea*") and accompanying Issues and Decisions Memo. for [*Hot-Rolled Steel from Korea*], C-580884, (Aug. 4, 2016) *available at* https://enforcement.trade.gov/frn/summary/koreasouth/2016–19377–1.pdf (last visited Dec. 30, 2019)).[18]

Commerce failed to substantiate three out of the four factors upon which it relied. Defendant argues that Chinese overcapacity affects the Korean market in particular because Chinese imports constitute a significant and growing portion of the HRC market in Korea, resulting in a downward pressure on steel prices and incentives for government interventions which would cause further distortions, *see* Def.'s Resp. Br. at 26–27 (citing, *inter alia*, Final Decision Memo. at 13, 17; Prelim. Decision Memo. at 15). However, Defendant concedes that Chinese overcapacity is "not a phenomenon specific to the Korean market." *See* Def.'s Resp. Br. at 27. Although 19 U.S.C. § 1677b may not demand that a PMS be such that it only affects the subject market, there is no evidence on the record that Chinese overcapacity affects the Korean market in some way that is specific to the Korean market at all. Commerce's support for the other factors is likewise

[17] Parties and Commerce sometimes use the shorthand "AFA" or "adverse facts available" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. AFA, however, encompasses a two-part inquiry established by a statute. *See* 19 U.S.C. § 1677e(a)–(b). It first requires Commerce to identify information missing from the record, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *Id.*

[18] The only record evidence of strategic alliances on the record appears to be a declaration from the [[ ]], that these alliances exist. *See* [Maverick's] Particular Market Situation Allegation at Ex. 31, CD 296, barcode 3622608–67 (Sept. 25, 2017) ("[[ ]] Declaration").

lacking.[19] Regarding evidence of strategic alliances and government involvement in the Korean electricity market, both Defendant and Commerce seem to acknowledge that these factors support the PMS finding only to the extent that they lend credence to a determination based on the totality of the circumstances in the market. *See* Def.'s Resp. Br. at 27–28; *see also* Final Decision Memo. at 13, 17–18. Defendant and Commerce rely on the cumulative effect of these distortions taken together. *Id.*; *see also* Final Decision Memo. at 13. Although Commerce may rely on the cumulative effect of multiple distortions to arrive at a PMS determination, it cannot use that phrase to circumvent a meaningful review of the sufficiency of the record.

Furthermore, even if this court agreed that Commerce's findings of various distortions were supported, Commerce fails to explain how these distortions prevent a proper comparison. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 822 (1994) *reprinted in* 1994 U.S.C.C.A.N 4040, 4162 ("SAA"). Chinese overcapacity may affect the COP by lowering the price of HRC, however, it is unclear how that finding alone would support the determination that the home market price and export price (or constructed export price) cannot be compared because Commerce does not address whether costs would be lowered on both sides of the less than fair value equation. *See id.* Therefore, Commerce's PMS finding is unsupported by substantial evidence.[20]

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[19] Defendant cites to a declaration in support of Commerce's finding that there are strategic alliances in the Koreans government, *see generally* [[ ]] Declaration, and previous administrative proceeding in support of Commerce's finding that electricity operates as a tool of the government's industrial policy in Korea. Def.'s Resp. Br. at 27–28 (citing, *inter alia Oil Country Tubular Goods from The Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of [ADD] admin. rev.; 2014–2015) ("*OCTG from Korea*") and accompanying Issues and Decisions Memo. for [*OCTG from Korea*] at 13–14, A-580–870, (Apr. 10, 2017) *available at* https://enforcement.trade.gov/frn/summary/korea-south/2017–07684–1.pdf (last visited Dec. 30, 2019).

[20] Hyundai argues that Commerce's determination is contrary to law because it failed to make a respondent-specific determination. *See* Hyundai's Br. at 18–22; Def.'s Resp Br. at 12–23. Hyundai argues that Commerce has "historically" and "properly focused its analysis 'on the behavior of the specific respondent(s) under [investigation or review.]" *See* Hyundai Br. at 21–22 (quoting *Certain Pasta from Italy*, 72 Fed. Reg. 7,011 (Dep't Commerce Feb. 14, 2007) (notice of final results of the ninth admin. review of the [ADD] order on certain pasta from Italy) ("*Certain Pasta from Italy*"), accompanying Issues and Decisions Memo. for [*Certain Pasta from Italy*] cmt. 1 at 9, A-475–818, (Feb. 14, 2007), *available at* https://enforcement.trade.gov/frn/summary/ITALY/E7–2563–1.pdf (last visited Dec. 30, 2019) ("Certain Pasta from Italy IDM"); *see also id.* (citing *Steel Concrete Reinforcing Bar from Taiwan*, 82 Fed. Reg. 34,925 (Dep't Commerce July 27, 2017) (final determination of sales at less than fair value) ("*Rebar from Taiwan*") and accompanying Issues and Decisions Memo. for [*Rebar from Taiwan*], A-583–859, (July 20, 2017) *available at* https://enforcement.trade.gov/frn/summary/taiwan/2017–15840–1.pdf (last visited Dec. 30, 2019) ("Rebar from Taiwan IDM"). In the proceedings Hyundai cites, however, Commerce either

D. Third Country Sales

Commerce's finding that third country sales are unrepresentative is unsupported by substantial evidence. After finding that there were insufficient home market sales for purposes of normal value, Commerce considered, but ultimately rejected, SeAH's sales into the Canadian market. Commerce based its finding on the CITT's determination that SeAH's sales into the Canadian market were dumped. Here, it is unreasonable to rely solely on the CITT's determination when confronted with evidence that those findings are not reliable.

Where Commerce finds that home market sales are an inappropriate basis for determining normal value, it may resort to third country sales. *See* 19 U.S.C. § 1677b(a)(1). Commerce may only rely on third country sales where the prices are representative, where the aggregate quantity of sales are at a sufficient level, and where Commerce does not determine that a PMS prevents a proper comparison between the export price, or constructed export price, and the third country price. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii). If Commerce determines that the conditions for third country sales are not met, then it resorts to constructed value. *See* 19 U.S.C. § 1677b(a)(4), 1677b(e).

Here, Commerce relied on CITT's final determination that SeAH's sales into Canada were dumped to find that those sales were not representative. Final Decision Memo. at 45–47; *see also* 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). Commerce's determination is not supported by substantial evidence because Commerce failed to consider contradictory evidence that Canadian antidumping law was materially inconsistent with U.S. law. Specifically, SeAH argued that the Canada Border Services Agency ("CBSA") applied the equivalent of facts available to SeAH for failing to report home market sales of merchandise produced by another manufacturer. Final Decision Memo. at 45; *see also* [SeAH]'s Resp. New Factual Information at 2, PD 318, bar

deviates from the respondent-specific approach or expressly acknowledges there are circumstances where a general market-analysis (i.e., "totality of the circumstances") approach would be appropriate. *See e.g.*, *Biodiesel from Indonesia*, 83 Fed. Reg. 8,835 (Dep't Commerce Mar. 1, 2018) (final determination of sales at less than fair value) and accompanying Issues and Decisions Memo. for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Indonesia at 23, A-560–830, (Feb. 20, 2018) *available at* https://enforcement.trade.gov/frn/summary/indonesia/2018–04138–1.pdf (last visited Dec. 30, 2019) (adopting a general market-analysis approach and stating that Commerce "do[es] not believe [a comparison of specific sales and transactions to the general market] is always appropriate within the context of a PMS analysis); Certain Pasta from Italy IDM at 8–9 (stating that "it may be appropriate in some instances to consider general market conditions in determining whether a PMS exists[.]"); Rebar from Taiwan IDM cmt. 1 at 10 (acknowledging the totality of the circumstances approach taken in *OCTG from Korea* because of the confluence of distortions present in that proceeding) (internal citation omitted); *see also* Def.'s Resp. Br. at 19. Commerce's practice is to vary its approach based on the facts presented to it and this practice is reasonable. Commerce has discretion to determine its methodology in the first instance as long as it does not exercise its discretion in an arbitrary and unlawful manner.

code 3725459–01 (June 27, 2018) ("SeAH's NFI Resp."); *id.* at Attachment 1. SeAH explained that, under U.S. law, the reporting of such sales in unnecessary, because the "home market sales of merchandise produced by one manufacturer may not be used to calculate [normal value] for exports of merchandise produced by another manufacturer." *Id.* Commerce thus noted SeAH's apparent contention that there is no evidence Canada would have found SeAH's sales to be dumped if it had applied Commerce's methodology. *See id.* In response, Commerce explained that "the fact that Commerce's methodology may differ from that of the CBSA does not negate Canada's finding of dumping." Final Decision Memo. at 46. This response does not engage the apparent flaw in the evidence upon which Commerce is relying to find that SeAH's sales into the Canadian market were not representative. Further, Commerce did not give weight to its previous determination that SeAH's sales into the Canadian market were representative.[21] *See* SeAH's Br. at 9; *see also Oil Country Tubular Goods from The Republic of Korea*, 82 Fed. Reg. 18,105 (Dep't Commerce Apr. 17, 2017) (final results of [ADD] admin. rev.; 2014–2015) ("*OCTG from Korea*") and accompanying Issues and Decisions Memo. for [*OCTG from Korea*] at 13–14, A-580–870, (Apr. 10, 2017) *available at* https://enforcement.trade.gov/frn/summary/korea-south/2017–07684–1.pdf (last visited Dec. 30, 2019). Commerce instead relied solely on the CITT's findings. For these reasons, Com-

[21] In its Final Decision Memo, Commerce explained that it based its decision on *Alloy Piping Prods., Inc. v. United States* to rely exclusively on a foreign government's antidumping determination when deciding between use of third country sales and constructed value. Final Decision Memo at 46 n.242 (citing to *Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 341, 201 F. Supp. 2d 1267, 1277 (2002) ("*Alloy Piping*"); *see also* Def.'s Resp. Br. at 44 (stating that this court has indicated Commerce may rely on a foreign government's antidumping findings when deciding third country sales are inappropriate for use as normal value; identifying *Alloy Piping* as the basis for Commerce's decision). However, Commerce's reliance on *Alloy Piping* is misguided. *Alloy Piping* held that Commerce's decision to use third country sales as the basis for normal value was supported by substantial evidence, and otherwise in accordance with law, where Commerce's record-based consideration of the representativeness of sales made to a single customer in a third country market is met with unsupported contentions that a market comprised of such sales cannot be representative. *See Alloy Piping*, 26 CIT at 340–42, 201 F. Supp. 2d at 1276–78. The court disposed of respondent's argument that Commerce must avoid using prices "that it has 'reason to believe or suspect' may be dumped" because it determined that the "reason to believe or suspect" standard applied to non-market economy proceedings. *See Alloy Piping*, 26 CIT at 240–41, 201 F. Supp. 2d. at 1277–78. The court then reasoned, in the alternative, that respondent's application of the standard would not apply to a "suitable comparison market" analysis absent a formal finding of dumping. *Id.* The present dispute is whether Commerce's decision to rely on the antidumping findings produced by a methodology inconsistent with U.S. law is supported by substantial evidence. Commerce cannot rely on *Alloy Piping* in order to circumvent its statutory obligations to render decisions based on substantial evidence and to reasonably explain its determinations below.

merce's decision to disregard third country sales and calculate SeAH's sales based on constructed value are not supported by substantial evidence.[22]

E. All-Others Rate

Husteel argues that the all-others rate is unlawful and unsupported by substantial evidence because it is the product of a margin calculated with reference to rates that were based on total and partial AFA. Husteel's Br. at 19–23. Defendant counters that this methodology is appropriate because Commerce may average rates that are based on AFA when calculating the all-others rate, and also because the AFA rates were only incorporated into the calculation of the all-others rate to the extent that Commerce adjusted the cost of certain inputs when determining the margins for the mandatory respondents. *See* Def.'s Resp. Br. at 40–42. Because Commerce's PMS adjustment and determination are being remanded the court will not reach Husteel's argument.

The expected method for calculating the estimated margin, also known as the "all-others" rate, is to weight average the margins assigned to the mandatory respondents— excluding all zero margins, de minimis margins, and margins determined entirely under 19 U.S.C. § 1677e. 19 U.S.C. § 1673d(c)(5); *see also* SAA 1994 U.S.C-.C.A.N at 4201. However, if the only margins available to Commerce are those excluded under 19 U.S.C. § 1673d(c)(5), Commerce may either apply the expected method to those margins, or resort to any reasonable method to establish the separate rate. *Id.* When calculating the all-others rate using the expected method, section 1673d(c)(5) provides that where no other margins are available, zero, de minimis, and "any margins determined entirely under section 1677e" can be used to calculate the separate rate. This court—in remanding to Commerce its PMS methodology and determination as unlawful and unsupported by substantial evidence, respectively—does not reach the issue of whether the all-others rate is lawful in this instance because Commerce's re-calculations on remand may result in a change to the all-others rate.[23]

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[22] Indeed, in *NEXTEEL Co. v. United States*, 43 CIT __, Slip Op. 19–1 at 21 (Jan. 2, 2019), this court sustained Commerce's determination that SeAH's sales to Canada were an appropriate basis for normal value as reasonable. The only discernible difference between that proceeding and this one is that the CITT rendered its final determination in the interim. *See* Def.'s Resp. Br. at 45 (citing to CITT Final Determination). Commerce must explain why the CITT's determination reasonably justifies its decision to discard third country sales and instead rely on constructed value when determining SeAH's margin.

[23] SeAH also complains that Commerce's differential pricing analysis is not supported by substantial evidence and not in accordance with law. SeAH's Br. at 4, 29–30. As both parties agree, "at this moment . . . the issue is moot" because Commerce's differential pricing

CONCLUSION

The plain meaning of the statute precludes Commerce's PMS adjustment to Hyundai's reported costs of production for purposes of the sales-below-cost test when calculating normal value. Further, Commerce's determination that sales of WLP in the Korean market are affected by a PMS is not supported by substantial evidence. Finally, Commerce's decision to resort to constructed value when calculating SeAH's margin is unsupported by substantial evidence.

For the foregoing reasons, it is

ORDERED that Commerce's determination is remanded for further consideration and/or explanation consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 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 15 days to file their replies to comments on the remand redetermination.

Dated: January 3, 2020
New York, New York

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

Slip Op. 20–5

CHINA STEEL CORP., Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, NUCOR CORP., and SSAB ENTERPRISES LLC, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 17–00152

JUDGMENT

Before the court is the United States Department of Commerce's ("Commerce") remand redetermination ("Remand Results"), ECF No. 110, issued pursuant to the court's order in *China Steel Corp. v. United States*, 43 CIT __, Slip Op. 19–106 (Aug. 13, 2019) ("*China Steel*"). No party contests the Remand Results. *See* Letter from China Steel Corp., Response to Court's Request for Comments on Remand Results, ECF No. 112 ("China Steel Corporation does not intend to comment on the final remand determination.").

analysis did not affect the calculation of SeAH's dumping margins. *Id.*; *see also* Def.'s Resp. Br. at 46. Therefore, this court does not reach the issue.

In *China Steel*, the court directed Commerce to recalculate its difference-in-merchandise (DIFMER) adjustment to normal value without using data that had been affected by Commerce's use of adverse inferences:

> Commerce shall compute the DIFMER adjustment to normal value using information from China Steel's final COP2 cost database, without the application of an adverse inference, and may use facts available in filling in missing or replacing unverifiable necessary information.

China Steel, 43 CIT at __, Slip. Op. 19–106 at 42. Under protest, Commerce calculated a rate of 6.23 percent for Plaintiff, in compliance with the court's order:

> Pursuant to the Court's order, we calculated a weighted-average margin for China Steel without the use of AFA in the DIFMER test. Based on this approach, we calculated a dumping margin of 6.73 percent for China Steel.

Remand Results 10.

Upon consideration of the Remand Results, the parties' submissions, and the papers and proceedings had herein, it is hereby

ORDERED that the Remand Results are sustained.

Dated: January 9, 2020
New York, New York

Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 20–6

AIREKO CONSTRUCTION, LLC, Plaintiff, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 15–00319

[Sustaining the U.S. Department of Commerce's determination that the solar modules of Aireko Construction, LLC, are subject to the antidumping and countervailing duty orders covering crystalline silicon photovoltaic products from the People's Republic of China.]

Dated: January 13, 2020

Peter S. Herrick, Peter S. Herrick, P.A., of St. Petersburg, FL, for plaintiff Aireko Construction, LLC.

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, and *Tara K. Hogan*, Assistant Director. Of

counsel was *Ian McInerney*, Attorney, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

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

OPINION AND ORDER

Kelly, Judge:

This action is before the court on a U.S. Court of International Trade 56.2 motion for judgment on the agency record. *See* Pl.'s Br. Supp. Pl.'s Mot. J. Agency R., July 31, 2019, ECF No. 57 ("Pl.'s Mot. & Br."). Plaintiff Aireko Construction, LLC ("Aireko") challenges the U.S. Department of Commerce's ("Commerce" or "Department") scope ruling in its antidumping and countervailing duty ("AD/CVD") investigations of crystalline silicon photovoltaic ("CSPV") products from the People's Republic of China ("PRC"). *See Certain [CSPV] Products from the [PRC]*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) ("Final AD Determination"); *Countervailing Duty [("CVD")] Investigation of Certain [CSPV] Products from the [PRC]*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative CVD determination) ("Final CVD Determination"); [CSPV] Products from the [PRC]: Scope Ruling on [Aireko's] Solar Modules Composed of U.S.-origin Cells, Nov. 12, 2015, ECF No. 16–4 ("Scope Ruling"). Commerce imposed antidumping and countervailing duties on the importation of solar cells and modules, laminates and/or panels containing solar cells imported or sold for importation to the United States from the PRC. *Certain [CSPV] Products from the [PRC]*, 80 Fed. Reg. 8,592 (Dep't Commerce Feb. 18, 2015) (antidumping [("AD")] duty order; and am. final affirmative [CVD] determination and [CVD] order) ("AD/CVD Orders").

Plaintiff contests as contrary to law and unsupported by substantial evidence Commerce's determination that Aireko's solar modules are within the scope of the AD/CVD Orders. *See* Pl.'s Mot. & Br. at 5, 6–11. Aireko also contends that the U.S. Customs and Border Protection ("CBP") assessed AD/CVD duties retroactively, in a manner contrary to law. *See id.* at 5, 8–9. Defendant and Defendant-Intervenor SolarWorld Americas, Inc. ("SolarWorld") argue that because Aireko's solar modules meet the physical description of the merchandise covered in the AD/CVD orders, the court should affirm Commerce's Scope Ruling. *See* Def.'s Opp'n Br. to Pl.'s R. 56.2 Mot. J. Agency R. at 8–14, Oct. 1, 2019, ECF No. 59 ("Def.'s Br."); Def.-Intervenor [SolarWorld's] Resp. to Mot. J. Agency R. at 1–2, Oct. 1, 2019, ECF No. 60. Defendant further contends that this Court lacks jurisdiction over Aireko's claim that CBP assessed duties retroactively. *See* Def.'s Br. at 8, 14–16. For the reasons that follow, the court sustains Commerce's Scope Ruling.

Further, the court lacks jurisdiction over a claim that CBP retroactively assessed antidumping duties.

BACKGROUND

Following its AD/CVD investigations concerning imports of CSPV products from the PRC and Taiwan, *see Certain [CSPV] Products from the [PRC] and Taiwan*, 79 Fed. Reg. 4,661 (Dep't Commerce Jan. 29 2014) (initiation of [AD] investigations); *see also Certain [CSPV] Products from the [PRC]*, 79 Fed. Reg. 4,667 (Dep't Commerce Jan. 29, 2014) (initiation of [CVD] investigation), Commerce issued final AD/CVD determinations that defined the scope of subject merchandise as, inter alia, "modules laminates and/or panels assembled in the [PRC] consisting of [CSPV] cells produced in a customs territory other than the PRC." Final AD Determination, 79 Fed. Reg. at 76,972; Final CVD Determination, 79 Fed. Reg. at 76,963 (collectively, "Final AD/CVD Determinations").

In 2015, interested parties appealed these determinations, contending that Commerce's final scope determinations departed from Commerce's prior rule to determine country of origin. *See SunPower Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1286, 1288 (2016) ("*SunPower I*"). The court reviewed Commerce's decision to assess country of origin based on country of assembly rather than by applying the "substantial transformation" test[1] it had used in prior investigations of CSPV products from the PRC ("*Solar I* investigations"). *Id.* at 1289–93 (2016).[2] It remanded, for further explanation, this apparent departure from the *Solar I* investigations in determining

[1] Commerce, when applying the substantial transformation test, determines whether, "as a result of manufacturing or processing steps . . . [,] the [product] loses its identity and is transformed into a new product having a new name, character and use" and, consequently, takes on the country of origin where that transformation occurred. *Bell Supply Co., LLC v. United States*, 888 F.3d 1222, 1228 (Fed. Cir. 2018) (quoting *Bestfoods v. United States*, 165 F.3d 1371, 1373 (Fed. Cir. 1999)) (internal quotations omitted).

[2] In the *Solar I* investigations, Commerce investigated CSPV cells, whether or not assembled into modules, from the PRC. *See [CSPVs], Whether or Not Assembled Into Modules, from the [PRC]*, 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part) ("Solar I Final AD Determination"); *[CSPVs], Whether or Not Assembled Into Modules, from the [PRC]*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012) (final affirmative [CVD] determination and final affirmative critical circumstances determination). Commerce applied the substantial transformation test to determine country of origin for solar modules assembled using CSPV cells produced in the PRC and third countries. *See* Solar I Final AD Determination, 77 Fed. Reg. at 63,791 and accompanying Issues and Decision Memo. at 5–9, A-570–979, Oct. 9, 2012, *available at* https://enforcement.trade.gov/frn/summary/prc/2012–25580–1.pdf (last visited Jan. 7, 2020) ("Solar I IDM"). Commerce determined that solar module assembly did not substantially transform the CSPV cells such that assembly changed the country of origin. *See* Solar I IDM at 5–6. Therefore, the scope of the investigation, and the resultant orders, did not cover solar modules assembled in the PRC using third-country CSPV cells. *See id.*; *see also [CSPV] Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7,

solar panels' country of origin. *Id.* at 1300–08. Following remand, the court sustained Commerce's redetermination. *See SunPower Corp. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1275, 1294 (2017) ("*SunPower II*"). Specifically, the court considered Commerce's explanation reasonable that it had applied a country of assembly test, rather than the substantial transformation test, to address allegations of injurious antidumping and subsidization with respect to solar panel assembly in the PRC. *Id.* at 1288–90. The Court of Appeals for the Federal Circuit affirmed. *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 917–22 (Fed. Cir. 2019).

Aireko did not participate as an interested party in the *SunPower II* proceedings. Instead, it filed a scope ruling request on August 17, 2015, asking Commerce to find that its solar panels were outside the AD/CVD Orders' scope. *See* Scope Ruling Request Regarding [Aireko's] Imported CSPV Products at 1, PD 1, bar code 3299166–01 (July 17, 2015) ("Scope Ruling Request").[3] Commerce declined. *See* Scope Ruling at 1. On December 11, 2015, Aireko appealed Commerce's Scope Ruling. *See* Summons, Dec. 11, 2015, ECF No. 1; Complaint, Dec. 12, 2015, ECF No. 4. Given that Aireko appealed the Scope Ruling as interested parties were challenging *SunPower II*, the court stayed Aireko's case pending the disposition and appeals of *SunPower II*. *See* Order, Mar. 4, 2016, ECF No. 22; Order, July 14, 2016, ECF No. 27; Order, Oct. 20, 2017, ECF No. 50.[4] The court lifted the stay on June 6, 2019, following the issuance of the Court of Appeals for the Federal Circuit's decision in *Canadian Solar*. *See* Order, June 6, 2019, ECF No. 55.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Plaintiff's challenge to the Scope Ruling under 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012)[5] and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting scope determinations that find certain merchandise to be within the

2012) (amended final determination of sales at less than fair value and [AD] order); *[CSPV] Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) ([CVD] order).

[3] On January 7, 2016, Defendant filed indices to the public administrative records underlying Commerce's scope ruling in its antidumping and countervailing duty orders on certain CSPV products from the PRC, on the docket, at ECF No. 16–2–3. Citations to administrative records in this opinion are to the numbers Commerce assigned to such documents in the antidumping administrative index.

[4] This consolidated action was originally assigned to Judge Donald J. Pogue. On November 17, 2016, pursuant to U.S. Court of International Trade Rule 77(e)(4) and 28 U.S.C. § 253(c) (2012), the case was reassigned following Judge Pogue's death. Order of Reassignment, Nov. 17, 2016, ECF No. 34.

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

class or kind of merchandise described in an antidumping or countervailing duty order. The court must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). As for Plaintiff's challenge to CBPs assessment of duties and liquidation of entries, the court lacks jurisdiction as discussed more fully below.

DISCUSSION

I. Commerce's Scope Ruling

Plaintiff challenges Commerce's determination that Aireko's solar modules were within the scope of the AD/CVD Orders as contrary to law and unsupported by substantial evidence. *See* Pl.'s Mot. & Br. at 5–7, 10–11. According to Aireko, Commerce's Scope Ruling "impermissibly expanded the scope of the [AD/CVD] Orders in a manner inconsistent with the terms of the Orders[.]" *Id.* at 5. Defendant counters, to the extent that Aireko challenges the lawfulness of scope language, that *Canadian Solar*'s holding binds this Court. *Id*. at 12–13. Defendant also contends that the Scope Ruling should be affirmed because Aireko does not dispute that its solar modules fall within the Scope Ruling's language. *See* Def.'s Br. at 8–14. For the reasons that follow, Commerce's Scope Ruling is in accordance with law and supported by substantial evidence.

An antidumping or countervailing duty order must "include[] a description of the subject merchandise, in such detail as the administering authority deems necessary[.]" 19 U.S.C. §§ 1671e(a)(2), 1673e(a)(2); *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002). This description is referred to as the scope. The statute further defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, [or] an order[.]" 19 U.S.C. § 1677(25). The language of an order dictates its scope, and the words of an order serve as the basis for the inclusion or exclusion of merchandise within the scope of the order. *Duferco*, 296 F.3d at 1096–97.

Commerce's regulations outline the necessary steps for assessing whether a product is included within the scope of an order. *See* 19 C.F.R. § 351.225 (2015). Commerce will take into account "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). Should these "(k)(1) factors" not be dispositive, Commerce will then turn to subsection (k)(2), which lists the following "(k)(2) factors" to consider: "(i) [t]he physical characteristics of the

product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2). Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)).

Aireko's contrary to law challenge centers on Commerce's alleged failure to consider its prior scope determinations in *Solar I* and, as a consequence, Aireko alleges that the Scope Ruling is unlawful. *See* Pl.'s Mot. & Br. at 6–7. Specifically, Aireko notes that here, unlike the prior *Solar I* determinations, Commerce determined that solar cell origin, not assembly of solar panels, conferred country of origin. *See id.* However, to the extent that Aireko contends that Commerce deviated from existing precedent, that precedent does not concern the construction of the scope language but the validity of the scope language itself. *Compare* 19 U.S.C. § 1516a(a)(2)(B)(vi) and 19 C.F.R. § 351.225(c)(1) (A scope ruling is a determination as to "as to whether a particular product is within the scope of an order") *with* 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012) (granting the court authority to review final determinations). Therefore, Aireko's argument that Commerce unlawfully "ignored" precedent that CSPV cells' origin, not assembly, confer origin is inapposite to its scope ruling challenge. *See* Pl.'s Mot. & Br. at 7.

Moreover, as explained above, the Court of Appeals for the Federal Circuit's decision in *Canadian Solar* upheld the scope language in the AD/CVD Final Determinations. *See* 918 F.3d at 918–22.[6] Aireko, nonetheless, attempts to argue around that holding, contending that the decision is not binding here because Aireko did not participate in the litigation. *See* Pl.'s Mot. & Br. at 10. Aireko is mistaken.[7] Decisions of the Court of Appeals for the Federal Circuit bind this Court, unless overruled by an *en banc* decision by that court or by the

[6] Specifically, in *Canadian Solar*, the Court of Appeals for the Federal Circuit upheld Commerce's decision to not apply the substantial transformation test, finding its country of assembly test to be reasonable and based on adequate explanation. *See* 918 F.3d at 918–22.

[7] Aireko is also mistaken to suggest that the decision in *Canadian Solar* results in an inconsistency with U.S. Customs and Border Protection's ("CBP") country of origin determinations. *See* Pl.'s Mot. & Br. at 10. CBP makes country of origin determinations under a different authority than that by which Commerce determines country of origin for purposes of applying AD/CVD duties. *See, e.g.*, 19 U.S.C. § 1304; *see also SunEdison, Inc. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1309, 1323 n.77 (2016) (explaining that CBP's country of origin determinations are inapposite to Commerce's country of origin determinations).

Supreme Court. *Cemex, S.A. v. United States*, 384 F.3d 1314, 1321 n.5 (Fed. Cir. 2004). Further, in challenging the very same AD/CVD Orders at issue in *Canadian Solar*, Aireko makes arguments akin to those raised by appellants regarding Commerce's application of a country of assembly test that were rejected by that court. *Compare* Pl.'s Mot. & Br. at 10 *with Canadian Solar*, 918 F.3d at 918–22. Here, the ruling in *Canadian Solar* compels the conclusion that the AD/CVD Order's scope language is valid.

Further, Commerce's determination that Aireko's solar modules fell within the scope of the AD/CVD Orders is supported by substantial evidence because, consistent with the (k)(1) factors, Commerce reasonably evaluated the descriptions of merchandise contained in the Scope Ruling Request and initial investigation as well as prior scope determinations.[8] First, Commerce looked to Aireko's Scope Ruling Request, which described the merchandise as "solar modules assembled in the PRC" that contain solar cells "not manufactured in the PRC." *See* Scope Ruling at 5 (citing Scope Ruling Request at 3). Second, Commerce noted that the AD/CVD Orders state that "subject merchandise includes modules . . . assembled in the PRC consisting of [CSPV] cells in a customs territory other than the PRC" and, therefore, determined that the AD/CVD Orders "explicitly include modules assembled in the PRC consisting of solar cells produced in a third-country (e.g., the United States)." *Id.* Third, Commerce further explained that, for the Final AD/CVD Determinations, it had clarified the initial scope language to "include[] all modules, laminates and/or panels assembled in the PRC that contain [CSPV] cells produced in a customs territory other than the PRC." *Id.*(citing Issues and Decision Memo. in the [CVD] Investigation of [CSPV] Products from the [PRC] at 36, C-570–011 (Dec. 15, 2014), https://enforcement.trade.gov/frn/summary/prc/2014–30071–1.pdf (last visited Jan. 7, 2020)).[9] Given the foregoing factors, Commerce reasonably determined that, because Aireko's solar modules are assembled from U.S.-origin solar cells, the modules are within the scope of the Final AD/CVD Orders.

II. CBP's Assessment of AD Duties and Liquidation of Entries

Aireko contends that CBP assessed AD/CVD duties retroactively, in a manner contrary to law, and requests the court to order reliquidation of three entries at the rate of duty applicable at time of entry. *See*

[8] Aireko does not challenge Commerce not reaching, and not considering, (k)(2) factors in the Final Scope Ruling.

[9] Commerce also explained that it had rejected an exemption for solar products assembled from U.S.-origin solar cells. *See* Scope Ruling at 5 (citing Final Countervailing Duty Decision Memo. at 54–55).

Pl.'s Mot. & Br. at 5, 8–9; *see also* Pl.'s Reply Br. at 6–10. Defendant counters that Aireko must await the denial of a protest and pay the liquidated duties, to establish a jurisdictional basis for the court to consider Aireko's claim. *See* Def.'s Br. at 14–16. For the reasons that follow, the court finds that it lacks jurisdiction to review Aireko's claim that CBP assessed AD/CVD duties retroactively.[10]

Aireko invokes 28 U.S.C. § 1581(c) as the basis for jurisdiction, which grants this Court exclusive jurisdiction to review, inter alia, Commerce's scope ruling determinations. *See* Compl. at ¶ 1. Pursuant to section 1581(c), the court has jurisdiction to review any action commenced under, as here, section 516A of the Tariff Act of 1930, namely, a determination by Commerce "as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing . . . antidumping or countervailing duty order." *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a. Aireko, however, alleges that CBP erroneously liquidated its entries.[11] The jurisdictional foundation for Aireko to contest a scope ruling does not also support a challenge to CBP's actions which would include CBP's decisions incident to liquidation. Likewise, no other provision of section 1581(c) would support jurisdiction. 28 U.S.C. § 1581(c). Therefore, the court lacks jurisdiction to review this claim. *Compare* 28 U.S.C. § 1581(c) *with* 28 U.S.C. § 1581(a).[12]

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determination that the solar modules of Aireko Construction, LLC, are sub-

[10] Defendant contends that Plaintiff had waived any claim regarding alleged retroactive liquidation of AD/CVD duties, because it was not raised in the complaint. *See* Def.'s Br. at 15. Given that the court lacks jurisdiction over this challenge, the court does not reach this issue.

[11] Specifically, Aireko appears to argue that CBP, in liquidating its three entries of solar modules, had failed to perform its ministerial function and follow Commerce's instructions to assess duties on subject merchandise entered on or after December 23, 2014. *See* Pl.'s Mot. & Br. at 8; *see also* Customs Instructions from USDOC to CBP Pertaining to Aireko, PD 10, bar code 3427260-01 (Dec. 18, 2015). According to Aireko, it elected as the date of its three entries to be December 19, 2014 and December 21, 2014 on CBP Form 3461. *See* Pl.'s Mot. & Br. at 9. These entry dates differ from those listed on the entry documentation attached to Aireko's scope ruling request. *See* Scope Ruling Request at Ex. 2. Aireko's claim therefore relates to CBP's determination fixing the date of entry. *See* Pl.'s Mot. & Br. at 8–9 (citing 19 C.F.R. 141.68(a)(2)).

[12] The liquidation of entries is a protestable decision, *see* 19 U.S.C. § 1514(a)(5), and, by statute, the Court has exclusive jurisdiction over actions "to contest the denial of a protest[.]" 28 U.S.C. § 1581(a). Therefore, for Aireko to invoke jurisdiction over CBP's liquidation of its entries, Aireko must have filed a timely protest that is ultimately denied and pay all liquidated duties and charges. *See* 28 U.S.C. § 2637(a); *see also* 28 U.S.C. § 1581(a). Aireko indicates that it has only filed a protest; it has not paid the liquidated duties. *See* Pl.'s Reply Br. at 9. Even assuming Aireko had a claim that CBP assessed AD/CVD duties retroactively, the court could not review Aireko's challenge unless and until all jurisdictional prerequisites under 28 U.S.C. § 1581(a) are met.

ject to the antidumping and countervailing duty orders covering crystalline silicon photovoltaic products from the People's Republic of China. Judgment will enter accordingly.

Dated: January 13, 2020
New York, New York

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