U.S. Court of International Trade

Slip Op. 20–61

THE CHEMOURS COMPANY FC, LLC, Plaintiff, UNITED STATES, Defendant, and AGC CHEMICALS AMERICA, et al., Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 18–00174
PUBLIC VERSION

[The Determination of the United States International Trade Commission is remanded in conformity with this opinion.]

Dated: May 6, 2020

Mary J. Alves, Cassidy Levy Kent (USA) LLP of Washington, DC, argued for plaintiff. With her on the brief were *James R. Cannon, Jr.*, *Ulrika K. Swanson,* and *James E. Randsell*.

Karl S. von Schriltz, Attorney-Advisor, United States International Trade Commission of Washington, DC, argued for defendant. With him on the brief were *Andrea C. Casson*, Assistant General Counsel for Litigation, and *Dominic L. Bianchi*, General Counsel.

Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz Silverman & Klestadt LLP of New York, NY, for defendant-intervenors PTFE Processors Alliance and Chinese respondents. With him on the brief was *Max F. Schutzman*.

Russell A. Semmel, Arent Fox, LLP of Washington, DC, for defendant-intervenors Gujarat Fluorochemicals Limited. With him on the brief were *Matthew M. Nolan*, *John M. Gurley,* and *Claudia D. Hartleben*,

OPINION

Reif, Judge:

Before the court is the motion for judgment on the agency record, pursuant to United States Court of International Trade ("USCIT") Rule 56.2, of plaintiff The Chemours Company FC, LLC. *See* Pl.'s Mot. For J. on the Agency R., ECF No. 69–1 ("Pl. Br."). By its motion, plaintiff contests the final negative material injury and threat of material injury determinations of the United States International Trade Commission ("Commission") in its antidumping and countervailing duty investigations of Polytetrafluorethylene Resin ("PTFE") from the People's Republic of China ("China") and India. *See Polytetrafluoroethylene Resin from China and India,* Inv. Nos. 701-TA-588 and 731-TA-1392–1393, USITC Pub. 4801 (July 2018) (Final)*,* and *Polytetrafluoroethylene Resin from China and India*, Inv. Nos. 731-TA-1392–1393, USITC Pub. 4841 (Nov. 2018) (Final) (collectively, "*Final Determinations*").

The Commission opposes plaintiff's motion, asking the court to sustain the Commission's determinations. Def. ITC's Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 82 ("Def. Opp. Br.").

Defendant-intervenors, the PTFE Processors Alliance ("PPA"), Chinese Respondents[1] and Gujarat Fluorochemicals Limited ("GFL") join the Government in opposing plaintiff's motion. *See* Def.-Ints.' PPA and Chinese Respondents Resp. to Pl.'s Rule 56.2 Mot. For J. on the Agency R., ECF No. 84 ("Chinese Def.-Ints.' Br."); Resp. Br. of Def.-Ints. GFL in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 86 ("GFL Def.-Ints.' Br."). For the reasons discussed below, the Final Determinations are remanded to the Commission for action in conformity with this decision.

BACKGROUND

On September 28, 2017, plaintiff filed antidumping and countervailing duty petitions with the United States Department of Commerce ("Commerce") and the Commission. *Polytetrafluoroethylene ("PTFE") Resin from China and India,* 82 Fed. Reg. 46,284 (Int'l Trade Comm'n Oct. 4, 2017) (institution of antidumping and countervailing duty investigations). On November 13, 2017, the Commission published preliminary affirmative injury determinations. *Polytetrafluoroethylene (PTFE) Resin from China and India*, Inv. Nos. 701-TA-588 and 731-TA-1392–93 (Preliminary), USITC Pub. 4741 (Nov. 2017) at 3. On February 28, 2018, Commerce published its preliminary countervailing duty determination concerning India. *Polytetrafluoroethylene Resin from India*, 83 Fed. Reg. 9842 (Dep't Commerce Mar. 8, 2018) (preliminary determination). On April 30, 2018, Commerce published its preliminary antidumping duty determinations. *Polytetrafluoroethylene Resin from the People's Republic of China*, 83 Fed. Reg. 20039 (Dep't Commerce May 7, 2018); *Polytetrafluoroethylene Resin from India*, 83 Fed. Reg. 20035 (Dep't Commerce May 7, 2018) (preliminary determination). On May 14, 2018, Commerce published its final countervailing duty determination. *Polytetrafluoroethylene Resin from India*, 83 Fed. Reg. 23422 (Dep't Commerce May 21, 2018). On July 6, 2018, the Commission published its final negative determination with respect to subsidized imports from India. *Polytetrafluoroethylene Resin from India*, 83 Fed. Reg. 32150 (Int'l Trade Comm'n July 11, 2018); Views of the Commission (Final), CD 321 (Int'l Trade Comm'n July 6, 2018), ECF No. 33–1

[1] The Chinese respondents are Zhejiang Jusheng Fluorochemical Co., Ltd., Shandong Dongyue Polymer Material Co., Ltd., Shanghai Huayi 3F New Materials Sales Co., Ltd., Zhonghao Chenguang Research Institute of Chemical Industry Co., Ltd., Jiangxi Lee & Man Chemical Ltd., Jiangsu Meilann Chemical Co., Ltd., and China Chamber of Commerce of Metals, Minerals & Chemical Importers.

(“*Views*”). On September 26, 2018, Commerce published its final antidumping duty determinations concerning China and India. *Polytetrafluoroethylene Resin from the People’s Republic of China*, 83 FR 48590 (Dep’t Commerce September 26, 2018); *Polytetrafluoroethylene Resin from India*, 83 FR 48594 (Dep’t Commerce September 26, 2018). On November 13, 2018, the Commission published its final negative determination with respect to dumped imports from China and India. *Polytetrafluoroethylene (PTFE) Resin from China and India*, 83 Fed. Reg. 51501 (Int’l Trade Comm’n Oct. 11, 2018); Views of the Commission (Final), CD 324 (Int’l Trade Comm’n Nov. 13, 2018).[2]

Plaintiff challenges the following findings of the Commission: (1) the definition of domestic industry included processors of PTFE; (2) the volume of the subject imports, while significant, fluctuated “in tandem” with demand; (3) the prices of the subject imports brought pervasive underselling that (a) did not cause a shift in the domestic industry’s market share, (b) did not cause significant price depression or price suppression, and (c) continued through the final quarter of the period of investigation (“POI”); (4) the subject imports did not significantly impact the domestic industry; and, (5) the domestic industry was not threatened with material injury. Pl. Br. at 9–12, 34.

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

STANDARD OF REVIEW

This Court is required to assess the factual and legal findings underpinning the Commission’s determinations and “hold unlawful any determination, finding or conclusion ... unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 USC § 1516a(b)(1)(B)(i). The substantial evidence standard is both limited and deferential. “Substantial evidence” means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. NLRB*, 349 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 205 U.S. 197, 229 (1938)). Substantial evidence is “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n,* 383 U.S. 607, 620 (1966). *See also ITG Vonna Corp. v. U.S. Int’l Trade Comm’n,* 41 CIT ___, ___, 253 F. Supp. 3d 1339, 1347 (2017), *aff’d*, 753 Fed. App’x 913 (Fed. Cir. 2019).

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[2] The record for these injury determinations in the two antidumping investigations are the same as the record for the injury determination in the countervailing duty investigation. *See Views* at 4 n.4; Views of the Commission (Final) at 4, CD 324 (Int’l Trade Comm’n Nov. 13, 2018). The Commission’s *Views* in connection with the latter determination are cited throughout this opinion.

The court's review of a Commission determination is limited to the administrative record. 19 U.S.C. § 1516a(b)(1)(B)(i). This Court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States,* 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). To provide a reasoned explanation, the Commission must "make the necessary findings and have an adequate evidentiary basis for its findings" and "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *In re NuVasive, Inc.,*842 F.3d 1376, 1382 (Fed. Cir. 2016) (internal citations omitted).

DISCUSSION

Under the Tariff Act of 1930, the Commission is charged with determining whether a domestic industry is materially injured or threatened with material injury by reason of unfairly subsidized or dumped imports. 19 U.S.C. § 1671d(b)(1); 19 U.S.C. § 1673d(b)(1). The Commission will issue an affirmative determination if it finds "present material injury or a threat thereof" and makes a "finding of causation." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006) (citation and quotation marks omitted). "Material injury" is defined as "harm [to the domestic industry] which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A).

In making a material injury determination, the Commission evaluates: (1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and, (3) the impact of subject imports on the domestic producers of domestic like products in determining whether there is material injury, or threat of material injury, by reason of the subject imports. 19 U.S.C. § 1677(7)(B)(i)(I)-(III).

I. Domestic Industry

The Tariff Act of 1930 defines "industry" as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A).

In the present investigations, the Commission defined the "domestic like product" as all domestically manufactured products corresponding to the imports within the scope of the investigations, including PTFE in granular, dispersion and fine powder forms. *Views* at 7.[3] Plaintiff does not challenge the Commission's definition of the like product. *See* Pl. Br. at 6.

The Commission in turn defined the domestic industry to include not only the two *integrated* chemical manufacturers of PTFE (The Chemours Company FC, LLC and Daikin America Inc.), but also six[4] domestic *processors* of PTFE.[5] *Views* at 20. The Commission applied a multi-factor test in reaching its determination, examining: (1) the source and extent of the firm's capital investment; (2) technical expertise; (3) value added to the product in the United States; (4) employment levels; and, (5) the quantity and type of U.S.-sourced materials used in production of the like product. *Views* at 18 - 20. Based on its review of the five factors, the Commission determined to include the PTFE processors in the domestic industry on the grounds that the processors "engage[d] in sufficient production-related activity," in particular, demonstrating "high levels of employment, value added, and technical expertise." *Id*. at 20.

The Commission stated that the capital investments of the integrated manufacturers were "far greater than those of processors," *Views* at 18, but found that the capital investments of the processors were nonetheless "not insubstantial." *Id.* at 19. Capital investments by integrated manufacturers were [[ ]] on a net asset basis from 2015 to 2017, while capital investments by processors were [[ ]], also on a net asset basis for the same period. *Final Staff Report*, at Table III4, CD 285 (Int'l Trade Comm'n June 11, 2018), ECF No. 33–2 ("*Staff Report*").

Next, the Commission considered the technical expertise of the integrated producers and processors. The Commission (1) described their respective production processes, (2) reported their respective average hourly wages, and (3) noted their respective research and development (R&D) expenditures. The Commission assessed that technical expertise involved in U.S. production activities by inte-

[3] The Commission described PTFE as

> a polymer more commonly known as Teflon, a registered trade name of Chemours. It is used for various applications primarily for its low friction properties. PTFE is used to produce gaskets, pipe liners, films, or coatings on another surface, among other products.
>
> All forms of PTFE are produced from tetrafluoroethylene ("TFE"). Because TFE is a volatile chemical, all domestic manufacturers of PTFE begin first by producing TFE on site and then polymerizing it to produce PTFE. PTFE is produced in granular, fine powder, and dispersion (liquid) forms.

Views at 7–8.

[4] The Commission determined to exclude one processor, GFL, from the "domestic industry" based on the Commission's application of the "related parties" provision of the statute. *Views* at 26 (citing 19 U.S.C. § 1677(4)(B)).

[5] The Commission refers to all blenders, fillers and compounders of PTFE as "processors" because they all perform similar functions and the terms are used interchangeably by parties to the investigation. *Views* at 17 n.71.

grated producers amounted to [[ ]] based on aggregate research and development in 2017, while for processors the total was significantly higher, at [[ ]] on the same basis. *Views* at 18 (citing *Staff Report* at Table III-4). The Commission acknowledged that integrated producers utilized "volatile chemicals" in a "highly controlled process" to produce PTFE. *Views* at 18. The Commission noted that, in contrast, PTFE processing involved "many diverse formulas and recipes for manufacturing filled, blended or compounded PTFE." *Id.* The Commission observed that integrated producers paid production and related workers ("PRWs") hourly wages of [[ ]] to [[ ]] from 2015 to 2017, while PTFE processors paid PRWs higher hourly wages of [[ ]] to [[ ]] over the same period. *Views* at 18 (citing *Staff Report* at Tables III-15 and III-16). The Commission found that "processors' R&D expenses during the POI exceeded those of [the integrated producers]," referencing data that showed that processors spent [[ ]] falling slightly to [[ ]], annually, on research and development over the 2015 to 2017 period, while integrated producers spent [[ ]] rising to [[ ]], annually, on R&D over the same period. *Views* at 18 (citing *Staff Report* at Table VI-8). The Commission noted the difference in chemical operations between processors and integrated producers in its *Views*, but relied on the wage and R&D information in arriving at its finding that processors possessed a high degree of technical expertise. *Views* at 19.

Turning to value added, the Commission stated that "although [integrated producers] contribute[] greater value added than PTFE processing, the value added by PTFE processing is still high." *Views* at 19. The Commission found that value added by integrated producers was [[ ]] percent of the total cost of goods sold ("COGS") from 2015 to 2017, while finding that processors' value added was [[ ]] percent from 2015 to 2017. *Id.* (citing Staff *Report* at Table III-4).

The Commission stated that the employment numbers for integrated producers and processors "are roughly comparable." *Views* at 19. The Commission noted that integrated producers employed [[ ]] workers from 2015 to 2017, while processors employed [[ ]] workers during the same period. *Id*. (citing *Staff Report* at Table III-4).

The Commission stated that processors received an "appreciable proportion" of their inputs from domestic sources, although "this proportion was smaller than the proportion of subject import inputs."

Views at 20. Integrated producers sourced [[ ]] of materials from the United States from 2015 to 2017, while processors sourced [[ ]] of materials from the United States during the same period. *Views* at 18 - 19; *Staff Report* at Table III-4.

Based on its review of the five factors — technical expertise, value added, employment levels, quantity and type of parts sourced in the United States and capital investment — the Commission determined that "the processors engage[d] in sufficient production-related activity to be considered producers of the domestic like product." *Views* at 20.

Plaintiff first takes issue with the Commission's finding that the processors possess sufficient technical expertise. Pl. Reply Br. at 4. Plaintiff argues that workers for processors do not have to work with "volatile chemicals" and, therefore, "do not undergo the same hazardous material safety training that [workers for integrated producers] need to avoid explosions." Pl. Reply Br. at 4. Plaintiff argues further that average wages and R&D expenses cannot be the data on which the Commission relies in determining the level of technical expertise provided by PTFE processors. Pl. Br. at 18. Plaintiff argues in particular that dumped and subsidized imports adversely affected the hourly wages and R&D of integrated producers; therefore, the data as to those factors cannot be compared to those data for the processors. *Id.* With regard to the four other factors, plaintiff argues that because processors engaged in lower levels of production-related activities than integrated producers with respect to each factor, "the [Commission's] determination that processors perform[ed] sufficient production-related activities is not supported by the record." Pl. Br. at 19.

The Commission considered and reasonably responded to these contentions. The Commission noted, for example, that it is not relevant whether the activities of processors were at the same level as or at a higher level than integrated producers, but rather whether the activities of processors were sufficient on their own for the processors to qualify as domestic producers. See Views at 18 – 20. *See* also Def. Opp. Br. at 2. The Commission expressly recognized processors' lower levels of production-related activities regarding capital investment, value added, employment and U.S.-sourced materials. *Views* at 19 - 20. Specifically, the Commission found that capital investment was "not insubstantial," that processors contributed less value added than integrated producers but that the level of value added was "still high," that employment numbers were "roughly comparable," and that processors used an "appreciable portion" of U.S.-sourced materials. *Views* at 19 - 20.

The court concludes that the Commission's determination reflects that it considered plaintiff's arguments and the record in making its determination. Accordingly, the Commission's determination to include PTFE processors in the domestic industry is supported by substantial evidence.

II. Volume

The Tariff Act of 1930 mandates that the Commission consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

In this case, the Commission determined that the volume of subject imports, both in absolute terms and relative to consumption, was significant. *Views* at 43. In its *Views*, the Commission found that the volume of subject imports fluctuated "in tandem" with demand during the POI. *Views* at 42. Subject imports declined in 2016, when apparent U.S. consumption declined, and subject imports increased in 2017, along with apparent U.S. consumption. *Views* at 42 - 43. The Commission found, in addition, that cumulated subject imports gained market share from 2015 to 2017, but solely at the expense of nonsubject imports rather than at the expense of the domestic industry. *Views* at 43. The Commission added that demand "fluctuated but ultimately showed little change." *Views* at 38.

Plaintiff argues that the Commission's characterization that subject import volume fluctuated "in tandem" with demand is not supported by substantial evidence. Plaintiff points to data in the record that demonstrate that "subject imports increased at a [[ ]] greater rate" than U.S. consumption during the POI. Pl. Br. at 22.

The Commission noted that its use of "in tandem" was intended to state only that the subject imports and demand fluctuated in the same direction, not necessarily at the same rate. Def. Opp. Br. at 26. As the Supreme Court stated, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). *See also NSK Corp. v. United States*, 32 CIT 966, 969, 577 F. Supp. 2d 1322, 1329 (2008). As this Court held in *NSK*, "the fact that plaintiffs 'can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive.'" *NSK*, 32 CIT at 968–69, 577 F. Supp. 2d at 1329 (citing *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d

927, 936 (Fed. Cir. 1984)). The *NSK* court continued, "[t]herefore, the court will not 'displace' an agency's 'choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Id.* at 969, 1329 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)). In sum, the court concludes that the Commission's volume analysis was supported by substantial evidence.

III. Price

Section 771(7)(C)(ii) of the Tariff Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether:

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). The statute requires that the Commission consider whether subject imports have engaged in significant price underselling, as well as whether there has been significant price depression or suppression.

A. Effects on Market Share and Domestic Prices

In its *Views*, the Commission examined: (1) underselling by the subject imports; (2) the relationship of price trends to trends in (a) import volumes and (b) domestic demand and apparent consumption; and, (3) significant price suppression or depression. The court examines in turn the Commission's consideration of and findings as to each.

First, with respect to underselling, the Commission collected quarterly pricing data from U.S. producers and importers for five PTFE products, accounting for [[ ]] percent of U.S. producers' U.S. shipments of PTFE, [[ ]] percent of U.S. shipments from China and [[ ]] percent of U.S. shipments from India in 2017. *Views* at 44. The Commission found that price was one of several important factors in PTFE purchasing decisions, and that there was "significant underselling by subject imports." *Id.* at 44 - 45. The Commission found further that the cumulated subject imports undersold the domestic like product in 92 of 104 comparisons by an average margin of 29.4 percent, with overselling in the remaining comparisons by an average margin of 17.1 percent. *Id.* at 45.

The Commission also examined the relationship between price trends, on the one hand, and import demand, domestic consumption and U.S. industry market share, on the other. The Commission found that, despite significant volumes of low-priced subject imports, the domestic industry did not lose market share to the subject imports during the POI. *Id.* at 44 - 45. In fact, the Commission found that the domestic industry gained market share in 2017, when cumulated subject import volume was highest and those imports were engaged in pervasive underselling. *Views* at 45 - 46; Def. Opp. Br. at 28 - 29.[6]

The Commission relied also on purchaser data for its analysis of market share trends during the POI. *Views* at 46 -47 n.225. In this regard, the Commission found that these data showed that even if some purchasers increased purchases of subject imports due to low prices, these purchases did not lead the domestic industry to lose market share over the POI. *Id*. Purchaser data indicated that [[ ]] responding purchasers specified price as a primary reason that they purchased subject imports instead of the domestic like product. However, the Commission found that, overall, responding purchasers increased their share of total purchases from the domestic industry during the POI. *Id.* Therefore, the Commission determined that significant underselling did not enable the subject imports to capture market share from the domestic industry and that, in fact, the domestic industry captured market share from nonsubject imports. *Id.* at 48.

In regard to price suppression and price depression, the Commission found that cumulated subject imports did not depress prices to a significant degree or prevent price increases to a significant degree. *Id.* at 46 - 48. With respect to price depression, the Commission observed that prices for the domestic like product "generally decreased from 2015 to 2016, and then increased in 2017." *Id.* at 46. In fact, the Commission observed, "when prices for the domestic like product declined to their lowest level during the POI, the volume of cumulated subject imports also declined . . . to the lowest levels of the POI." *Id*. The Commission added, "[p]rices for the domestic like product increased in 2017, as the volume and market penetration of cumulated subject imports also increased and underselling remained pervasive." *Id.*[7]

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[6] *See also Views* at 50 (citing *Staff Report* at Table C-6). The Commission found that the domestic industry's market share increased from [[ ]] percent in 2015, to [[ ]] percent in 2016, and to [[ ]] percent in 2017, notwithstanding significant underselling by subject imports. *Id.*

[7] The Commission states that it did not find it necessary to respond specifically to Plaintiff's argument concerning its 2016 business strategy, Pl. Br. at 31, since the Commission's

On this basis, the Commission found that "the record does not indicate a causal nexus between subject import volumes and the declines in prices for the domestic like product during 2016," and "the cumulated subject imports did not depress prices of the domestic like product to a significant degree." *Id.* Rather, the Commission found that the record indicated that price trends for the domestic like product correlated with demand trends and other conditions of competition in the U.S. market during the POI. *Id.* at 47.[8]

The Commission also found that cumulated subject imports did not prevent price increases for the domestic like product that otherwise would have occurred. *Id.* at 47 - 48. The Commission observed that the domestic industry's cost of goods sold to net sales ("COGS/NS") ratio worsened from 2015 to 2016. *Id*. However, because demand also declined in 2016, the Commission found that the domestic industry could not have expected to increase prices that would be reflected in a better COGS/NS ratio that year. *Id*. Because the domestic industry was able to improve its cost recovery in 2017, *Id.* at 47, the Commission found that cumulated subject imports did not cause price suppression. *Id.* The Commission determined that "the record indicates that prices for the domestic like product correlate with demand trends in the U.S. market rather than the presence of cumulated subject imports in the market." *Id*.

Plaintiff raises two principal types of objections to the Commission's price analysis. First, plaintiff argues that the Commission in several areas "paid little heed to the record evidence" related to pricing. Pl. Br. at 29. For example, plaintiff maintains that the Commission did not focus on the pricing evidence, but "[i]nstead ... focused on the domestic industry's market share." *Id.* Plaintiff argues that the Commission missed the point — the way in which subject imports were able to capture market share from nonsubject imports was by offering lower prices, thereby, "gaining more from nonsubject imports than the domestic industry during a [POI] marked by limited demand change." *Id.* at 30.

In that regard, plaintiff argues further that "the fact that the large and increasing subject import volumes did not reduce the domestic industry's overall market share does not mean that the domestic industry did not lose sales to subject imports or suffer from depressed

reasoning with respect to the relationship between subject imports and price was clear in its *Views*. Def. Opp. Br. at 31.

[8] Further, the Commission argues that it noted "confirmed lost revenue reports from purchasers" in its analysis. Def. Opp. Br. at 32. However, the Commission did not find this evidence to "detract from its finding that cumulated subject imports did not have significant price effects" because "the record contains a low number of confirmed lost revenue reports from purchasers." *Views* at 46 n.225.

and suppressed price levels." *Id.* at 29. Plaintiff argues that the domestic industry had to reduce prices to avoid the risk of losing sales and being unable to operate at high capacity utilization in 2016. *Id.* at 31. Plaintiff discusses the deterioration of the COGS/NS ratio from 2015 to 2016, and then its improvement in 2017, arguing that the improvement was due only to the actions of the domestic industry in reducing prices. *Id.* Plaintiff contends that the Commission dismissed this evidence in its analysis. *Id.* at 31 - 32.

Plaintiff also raises several additional arguments with respect to the Commission's evaluation of the pricing data. For example, plaintiff maintains that "the statute does not require underselling, let alone significant underselling, for affirmative determinations." *Id.* at 27. Similarly, plaintiff argues that "[b]ecause the Commission found significant underselling, it was not necessary for the Commission also to find additional price effects such as price depression or price suppression." *Id.* at 30. Finally, plaintiff states that the Commission "in effect, engrafted onto the statutory language a new condition that there must be a shift in market share from the domestic industry to the subject imports." *Id.* at 4.

This Court has consistently upheld the right of the Commission to weigh the evidence and has rejected challenges to Commission determinations when those challenges relied only upon an alternative view of the evidence. *See, e.g., CP Kelco US, Inc. v. United States,* 38 CIT ___, ___, 24 F. Supp. 3d 1337, 1341 - 42 (2014) (affirming the Commission's finding that there was no price depression or suppression based on patterns in the COGS/NS ratio of the domestic industry); *Nitrogen Solutions Fair Trade Comm. v. United States,*29 CIT 86, 99–102 (2005) (finding that the failure of subject imports to decline exactly in tandem with natural gas prices did not refute the existence of the positive correlation found by the Commission)*; JMC Steel Group v. United States,* 28 CIT ___, ___, 24 F. Supp. 3d 1290, 1320 (2004) (rejecting plaintiff's argument for a *per se* rule that a growing volume of subject imports which undersell the domestic like product, in the context of a highly competitive market for a fungible good, necessarily must produce negative price effects)*; Acciai Speciali Terni, S.P.A. v. United States,* 19 CIT 1051, 1061 -62 (1995) (concluding that the Commission's determination was supported by substantial evidence and that plaintiff's alternative view of the evidence, including the price data, did not "disturb" the determination).

The court determines that the Commission's price analysis pertaining to underselling is supported by substantial evidence. In its *Views*, the Commission considered precisely the same data on which plaintiff bases its argument, including nonsubject import data and demand trends. *See Views* at 46 - 47. Plaintiff's arguments amount to a request that the court reweigh the evidence in plaintiff's favor, rather than that the Commission did not consider certain evidence in its *Views*.

The court determines further, based on the discussion of the Commission's determination above, that the Commission's price depression and suppression findings are supported by substantial evidence.

B. Post-Petition Data

The Tariff Act of 1930 instructs the Commission to consider "whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition ... is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury." 19 U.S.C. § 1677(7)(I). According to the SAA, the grant of this discretion is in recognition that the filing of the petition "can create an artificially low demand for subject imports, thereby distorting post-petition data compiled by the Commission." Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, at 854 (1994), *reprinted in* 1994 U.S-.C.C.A.N. 4040, 4186. The Commission has wide discretion in deciding how to weigh post-petition information. *Nitrogen Solutions Fair Trade Comm. v. United States*, 19 CIT 86, 101, 358 F. Supp. 2d 1314, 1329 (2005) ("Cases applying [19 U.S.C. § 1677(7)(I)] have recognized the ITC's significant discretion in its weighing of such information"); *LG Elecs., Inc. v. United States*, 38 CIT ___, ___, 26 F. Supp. 3d 1338, 1353 (CIT 2014) ("the language of [19 U.S.C. § 1677(7)(I)] grants broad discretion to the Commission to consider whether 'any change' is 'related to the pendency of the investigation'").

Plaintiff in this case presents two arguments in challenging the Commission's post-petition analysis. Pl. Br. at 35. First, the Commission declined, despite plaintiff's request during the investigation, to accord reduced weight to pricing data — in particular, prices for the subject imports — for the fourth quarter of 2017. *Views* at 44 - 45. In plaintiff's view, the filing of the petitions led to increased prices for the subject imports. Pl. Br. at 35. Plaintiff challenges the Commission's decision to focus on prices of the *domestic* like product in this aspect of its determination. *Id.*

Second, plaintiff argues that the Commission erred in declining to associate the rise in prices with the filing of the petition. *Id.* at 35 (citing *Views* at 44 - 45). The Commission made this determination based on the increase of subject import volume "throughout 2017, even after the filing of the petitions." *Id.* Regarding this determination, plaintiff criticizes the Commission's reliance on increases in post-petition subject import volume data, because the statute does not require a decline in the volume of subject imports for the Commission to apply reduced weight to post-petition data. Pl. Br. at 35.

The Commission's determination stated the following, in relevant part:

> We consider *all quarterly price comparisons* for our price effects analysis. Petitioner argues that we should accord reduced weight to the data for the fourth quarter of 2017, maintaining that the filing of the petitions in this investigation led to increased *prices*. However, we observe that subject import *volume* increased throughout 2017, even after the filing of the petitions, and *prices for the domestically produced products* began to rise in early 2017, prior to the filing of the petitions in September 2017. Additionally, quarterly pricing product data on the record do not show that subject *import quantities* fell consistently following the filing of the petition.

Views at 44 – 45 (emphasis supplied).

The Commission in its *Views* did not address the increase in *subject import prices* in the final quarter of 2017. Because the Commission failed to address this evidence, it is not clear, based on the Commission's *Views*, that the Commission considered all of the evidence on the record. It is not sufficient for the Commission to state in passing that "it considered all quarterly price comparisons," when, as here, the Commission thereafter declined to make any mention of import price data even as it mentioned import volume and domestic price data. Rather, the Commission's determination must address and provide an explanation for how those data are consistent with the Commission's decision not to discount the data for the fourth quarter of 2017. *See Timken U.S. Corp. v. United States*, 28 CIT 62, 82, 310 F. Supp. 2d 1327, 1344 (2004); *Taiwan Semiconductor Indus. Ass'n v. United States*, 24 CIT 220, 238, 105 F. Supp. 2d 1363, 1379 - 80 (2000).

Contrary to plaintiff's argument, the Commission did not suggest that a decrease in subject import volume in the post-petition period is required to apply reduced weight to post-petition data. *Views* at 43 - 48. The Commission's analysis appears to show simply that a decrease in the volume of the subject imports buttressed consideration of subject import volume as one of the three factors (volume, price effects, and impact) identified by the statute. *Id.*

The Commission's decision to rely on domestic price trends in assessing a possible change in the price effects of subject imports was not supported by substantial evidence. The Commission in its *Views* did not address the increase in *subject import* prices in the final quarter of 2017. By failing to address these prices, it is not clear, based on the Commission's *Views*, that the Commission considered all of the evidence on the record. It is notable that the Commission has previously considered subject import prices in determining whether to apply reduced weight to post-petition data. *See Softwood Lumber from Canada*, Inv. Nos. 701-TA-566 and 731-TA-1342 (Final)(Remand), USITC Pub. 5010 (Dec. 2019); *Xanthan Gum from Austria and China*, Inv. No. 731-TA-1202–1203 (Final), USITC Pub. 4411 at 30, n. 223 (Jul. 2013).

This Court has previously affirmed the Commission's reliance on domestic price trends in assessing post-petition effects. *See LG Elecs., Inc. v. United States Intern. Trade Comm'n*, 26 F. Supp. at 1353 (affirming the Commission's finding of post-petition effects based in part on the industry's ability to realize the benefits of higher prices post-petition). However, in *LG Elecs., Inc.*, unlike in this case, the Commission relied on those data in the context of a substantial amount of corroborating evidence related to price suppression and price depression. *Id.* at 1350. The court ruled that "[t]he Commission reasonably exercised the discretion afforded to it by Congress to discount the value of post-petition data." *Id.* at 1355. By contrast, in the instant case, the Commission did not identify substantial corroborating data for its findings with respect to prices for the *domestic* like product.

Accordingly, the court remands this determination to the Commission to explain its lack of findings with respect to subject import prices in the Commission's post-petition analysis. The Commission may make additional determinations that it deems necessary to account for such explanations. *See JMC Steel Group v. United States,* 39 CIT ___, ___, 70 F. Supp. 3d 1309, 1312 - 13 (2015).

IV. Impact

Section 771(7)(C)(iii) of the Tariff Act provides that, in evaluating the impact of subject imports on the domestic industry, the Commission "shall evaluate all relevant economic factors which have a bearing on the state of the industry," including, but not limited to:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,

> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under part II of this subtitle [concerning the imposition of antidumping duties], the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). The statute requires that the Commission analyze these factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

The Commission found that the domestic PTFE industry improved by nearly all performance measures during the POI. *Views* at 49. Specifically, "almost every indicator of industry performance was in a better position in 2017 than in 2015," despite several indicators declining in 2016, when U.S. demand fell. *Id.* The Commission considered the domestic producers' capacity, production, capacity utilization, U.S. shipments, inventories, share of apparent U.S. consumption, number of workers, hours worked, total wages paid, average hourly wages, worker productivity, capital expenditure, R&D expenses, total net sales, gross profits, COGS, operating income, net income, the ratio of gross profits to sales, the COGS/NS ratio and the ratio of operating income to sales. *Id.* at 49 - 52. The Commission observed that the domestic industry experienced increasing market share as demand fluctuated and as cumulated subject imports increased in volume. *Id.* at 52.

The Commission explicitly considered but did not accord weight to plaintiff's argument during the investigations that the domestic industry should have gained more market share in 2017 than it did. *Views* at 52 - 53. In rejecting this argument, the Commission noted that there were numerous purchaser requests that the domestic industry was unable or unwilling to fulfill. *Id.* at 53. The Commission determined, therefore, that the low-priced subject imports in the market in 2017 did not "prevent[] the domestic industry from increasing its output or market share materially that year." *Views* at 53 - 54.

Plaintiff disputes both the Commission's selection of the period of investigation as well as the Commission's assessment of the record evidence based on this POI. *See* Pl. Br. at 36. With respect to the former issue, plaintiff argues that the Commission should have selected the 2014 to 2017 period to analyze impact and causation for the final phase of the investigations, rather than the 2015 to 2017 period highlighted by the Commission. Pl. Br. at 36.

The Commission's selection of the POI was in accordance with law. The Commission has broad discretion to choose the POI. *See Nucor v. United States*, 414 F.3d 1331, 1337 (Fed. Cir. 2005) ("the Commission has broad discretion with respect to the period of investigation that it selects for purposes of making a material injury determination . . . because the statute 'does not expressly command the Commission to examine a particular period of time'") (internal quotation and citation omitted). Determining the appropriate period of investigation is within the discretion of the Commission. *Steel Auth. of India, Ltd. v. United States*, 25 CIT 472, 477, 146 F. Supp. 2d 900, 906 - 07 (2001).

Moreover, plaintiff did not contest the selected POI in the draft questionnaires for the final phase of the investigation. Recording of Oral Argument at 1:25:57 - 1:26:25. This Court has "'generally take[n] a strict view of the need [for parties] to exhaust [their] remedies by raising all arguments' in a timely fashion so that they may be appropriately addressed by the agency." *See Consol. Fibers, Inc. v. United States*, 32 CIT 855, 860 62, 574 F. Supp. 2d 1371, 1379 (2008) (holding that plaintiff was not permitted to contest the manner in which the Commission collected data since plaintiff did not address the issue in its comments on the draft questionnaires). *See also Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1205 (2004) (citation omitted). Based on the broad discretion that the Commission maintains to determine the POI as well as plaintiff's failure to raise the issue during the investigation, the Commission's choice of the POI is in accordance with law.

Plaintiff also argues that the Commission's findings using the 2015 to 2017 POI disregarded the [[ ]] taken by domestic producers to generate output, capacity utilization and profits in response to the competition brought by low-priced subject imports, following the decline of nearly all trade and financial indicators from 2015 to 2016, and that 2014 financial data illustrate this point. Pl. Br. at 36. Plaintiff highlights specifically that [[

]].

Id. at 36 - 37.

Plaintiff further challenges the Commission's factual finding that the domestic industry was unable to supply all demand during the POI. Pl. Br. at 38. Plaintiff argues that the inability of the domestic industry to supply all demand does not compel a finding that the industry was not materially injured. *Id.* Plaintiff explains that the supply constraints were due to demand for the [[ ]] that the domestic industry no longer supplied, an action taken specifically in response to subject imports. Pl. Br. at 39. Plaintiff maintains that the Commission's emphasis on [[ ]] throughout the POI was an improper interpretation of the record. Plaintiff argues that the decision [[ ]] is not a normal business strategy and was related solely to the substantial presence of low-priced subject imports in the market. *Id.*

The Commission reasonably addressed these arguments. In its *Views*, the Commission found that the domestic industry's performance improved during the POI. *Views* at 49. The Commission found that improvements in the industry's performance despite flat demand and increased subject imports supported the determination that the cumulated subject imports did not have a significant adverse impact on the domestic industry. *Id.* at 49 - 51. The Commission found that Chemours' decision to discontinue production of certain unprofitable grades of PTFE was voluntary because Chemours regularly [[ ]] during the POI. *Views* at 53 n.258. The Commission added that Chemours discontinued production of these products despite having an economic incentive to increase sales as long as the marginal revenues generated by the sales exceeded Chemours' marginal cost. *Id.*[9]

Further, the Commission did not predicate its negative determinations on the domestic industry's inability to supply all demand. *See Views* at 55. The supply constraints merely lent support to the finding that supply difficulties did not prevent domestic producers from increasing their output, market share and capacity utilization materially in 2017. *Id.* at 52 - 54.

For these reasons, the court concludes that the Commission's determination that the domestic industry did not suffer material injury by reason of the subject imports was supported by substantial evidence and in accordance with the law.

V. Threat

Section 771(7)(F) of the Tariff Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted." 19 U.S.C. § 1677(7)(F)(ii). The Tariff Act

[9] For example, Chemours was unable to supply dispersion PTFE [[ ]] in 2017. *Views* at 53, n.258.

further provides that any threat determination by the Commission is to be made on the basis that the evidence shows that the threat of material injury is real and that actual injury is imminent. 19 U.S.C. § 1677(7)(F)(ii).

The threat of material injury provisions of U.S. law set out the factors that the Commission is required to consider:

> (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and whether imports of the subject merchandise are likely to increase,
>
> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products, ...
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i).

In its *Views*, the Commission focused its threat analysis on likely increases in volume, likely future price effects and likely future impact. *Views* at 58 - 62. On likely volume, the Commission found that while "subject import volume and market share reached period peaks in 2017, these gains did not occur at the expense of the domestic industry." *Id.* at 58. According to the Commission, the record did not show a significant rate of increase of subject import volume during the POI; instead, import volume followed the same trends as demand. *Id.* Further, the Commission found that if subject import volume were to increase, the increase would likely come at the expense of nonsubject imports unless a change in conditions of competition took place. *Id.* at 61 - 62.[10] Finally, the Commission also considered a number of other factors, including U.S. and foreign inventories, home market and third country shipments from the subject countries and worldwide growth in demand relative to U.S. increases in demand. *Id.* at 59 - 60. Based on all of these factors, the Commission found that there was no likelihood of an imminent increase in volume that would support an affirmative threat finding. *Id.* at 59 - 61.

On price, the Commission determined that the record indicated "no likely imminent change in conditions of competition which would likely change the lack of causal relationship between significant volumes of low-priced subject imports and prices of the domestic like product observed during the POI." *Id.* at 61. On likely impact, the Commission found that its record did not indicate a probability that material injury by reason of subject imports was imminent. *Id.* at 62.

Plaintiff argues that the Commission's negative threat determination was not supported by substantial evidence on the record. Pl. Br. at 39–43. Plaintiff bases these contentions on arguments related to the Commission's assessment of the volume of the subject imports during the POI as well as what plaintiff sees as likely increases due to capacity, price trends during the POI and impact, arguing: "the increase in imports and pervasive underselling, together with the Commission's findings regarding the conditions of competition, are inconsistent with the negative threat determination." Pl. Br. at 39 - 41.

[10] The Commission also pointed to evidence in the record relating to what it calls plaintiff's "speculation that subject imports might increase at the domestic industry's expense after driving nonsubject imports from the U.S. market." Def. Opp. Br. at 47. According to the Commission, the record does not support this speculation. The Commission claims that not only did it reasonably find that subject import volume was unlikely to undergo an imminent, significant increase, *Views* at 58 -61, the Commission also found that the market share of nonsubject imports as a percentage of all PTFE in the U.S. market in 2017 renders it highly unlikely that subject imports would imminently drive nonsubject imports out from the U.S. market. *Id.* at 40.

The Commission reasonably addressed all of these arguments in its determination. “In reaching a threat determination, the Commission is afforded discretion in interpreting the data, and the court does not weigh the evidence.” *United States Steel Group – a Unit of USX Corp. v. United States*, 18 CIT 1190, 1224, 873 F. Supp. 673, 703 (1994). “A record may support several acceptable alternatives... the court may not substitute its view of the data for that of the Commission but may only consider whether a challenged determination is supported by substantial evidence.” *Bando Chem. Indus. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 226.

Because the Commission supported its findings with substantial evidence, the court will not “reweigh the evidence or substitute its own judgment for that of the agency.” *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004). The statute directs the Commission to consider threat factors “as a whole” in determining “whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur” unless an order is issued. 19 U.S.C. § 1677(7)(F)(ii). In finding no threat of material injury, the Commission reasonably relied, *inter alia*, on its volume and price findings. *Views* at 62. Affording the appropriate discretion to the Commission to interpret these data, the court finds that the Commission permissibly determined, on the basis of substantial evidence in the record, that the domestic industry was not threatened with material injury by reason of subject imports.

CONCLUSION

Niccolò Machiavelli, in the 16th-century political treatise *The Prince*, declares that, “If an injury has to be done to a man it should be so severe that his vengeance need not be feared.”[11] Pursuant to this remand, it is not necessary that the Commission meet such a high threshold for injury as was pronounced by Machiavelli.

However, for the reasons provided above, the Commission is directed to explain further its decision not to discount post-petition data, taking into account the increase in subject import prices in the final quarter of 2017. The court, therefore, grants in part and denies in part Plaintiff’s Motion for Judgment on the Agency Record and remands the *Final Determinations* to the Commission for further proceedings in accordance with this opinion. The Commission, in its discretion, may collect additional evidence relevant to the remanded issue. The Commission may also reconsider any aspect of the *Final Determinations* it relied upon or took into consideration in its prior findings on the remanded issue.

[11] Niccolò Machiavelli, *The Prince* (1532).

For the foregoing reasons, the Commission shall file its remand redetermination with the court within 90 days of the date of this decision. The parties shall have 30 days after the date of filing of the remand determination to file comments on the remand determination. Replies on the comments are due 15 days thereafter.

Dated: May 6, 2020
New York, New York

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

Slip Op. 20–65

CALGON CARBON CORPORATION and CABOT NORIT AMERICAS, INC., Plaintiffs, and CARBON ACTIVATED TIANJIN CO., LTD. and CARBON ACTIVATED CORPORATION, et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and CARBON ACTIVATED TIANJIN CO., LTD. and CARBON ACTIVATED CORPORATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00232
Public Version

[Remanding the U.S. Department of Commerce's final results in the tenth administrative review of the antidumping duty order on activated carbon from the People's Republic of China.]

Dated: May 13, 2020

David A. Hartquist, *R. Alan Luberda*, *John M. Herrmann*, and *Melissa M. Brewer*, Kelley Drye & Warren LLP, of Washington, DC, for Plaintiffs/Defendant-Intervenors Calgon Carbon Corp. and Cabot Norit Americas, Inc.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Francis J. Sailer, *Dharmendra N. Choudhary*, and *Jordan C. Khan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Consolidated Plaintiffs/ Defendant-Intervenors Carbon Activated Tianjin Co., Ltd., Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd., and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the tenth administrative review ("AR10") of the antidumping duty order on certain activated carbon from the People's Republic of China ("the PRC" or "China") for the period of review April 1, 2016 through March 31, 2017 ("the POR"). *See Certain Activated Carbon From the People's Republic of China*, 83 Fed. Reg. 53,214 (Dep't Commerce Oct. 22, 2018) (final results of antidumping duty admin. review; 2016–2017) ("*Final Results*"), ECF No. 29–4, and accompanying Issues and Decision Mem., A-570–904 (Oct. 16, 2018) ("I&D Mem."), ECF No. 29–5, as amended by *Certain Activated Carbon From the People's Republic of China*, 83 Fed. Reg. 58,229 (Dep't Commerce Nov. 19, 2018) ("*Amended Final Results*") (am. final results of antidumping duty admin. review; 2016–2017).[1]

Plaintiffs Calgon Carbon Corporation and Cabot Norit Americas, Inc. (together, "Calgon") challenge Commerce's selection of partial adverse facts available ("partial AFA") and surrogate values for certain of Carbon Activated Tianjin Co. Ltd.'s ("Carbon Activated") factors of production ("FOP"), specifically, coal tar and financial ratios. *See* Pls.' Mot. for J. on the Agency R., ECF No. 33 and Confidential Pls.' Rule 56.2 Mem. of Law ("Calgon's Mem."), ECF No. 34. Consolidated Plaintiffs Carbon Activated Corporation ("CAC"), Carbon Activated, Datong Juqiang Activated Carbon Co., Ltd. ("DJAC"), and Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. ("Cherishmet") (collectively, "Carbon Activated Group")[2] challenge Commerce's selection of surrogate values for carbonized material and hydrochloric acid; the agency's refusal to apply Carbon Activated Group's methodology to cap the coal tar surrogate value; and the agency's adjustments to the surrogate financial ratios. *See* Confidential Pls.' Mot. For J. on the Agency R. Pursuant to Rule 56.2 and Confidential Mem. of Law in Supp. of Pls.' Mot. For J. on the Agency R. Pursuant to USCIT Rule 56.2 ("Carbon Activated Group's Mem."), ECF No. 35.

[1] The administrative record filed in connection with the *Final Results* is divided into a Public Administrative Record ("PR"), ECF No. 29–1, and a Confidential Administrative Record ("CR"), ECF No. 29–2. Parties submitted public and confidential joint appendices containing record documents cited in their briefs. *See* Non-Confidential J.A., ECF Nos. 55–1 (Vol. I), 55–2 (Vol. II), 55–3 (Vol. III); Confidential J.A. ("CJA"), ECF Nos. 54–1 (Vol. I), 54–2 (Vol. II), 54–3 (Vol. III). The court references the confidential version of the relevant record documents throughout this opinion, unless otherwise specified.

[2] The court refers to Consolidated Plaintiffs as "Carbon Activated Group." The court refers to those Consolidated Plaintiffs that participated in the underlying administrative proceedings—CAC, Carbon Activated, and DJAC—together, as "Respondents." *See* Selection of Respondents for Individual Review (June 26, 2017) at 1, CR 3, PR 30, CJA (Vol. I) Tab 7; Case Br. of [DJAC], [Carbon Activated] and [CAC] (June 18, 2018) ("Respondents' Case Br.") at 1, CR 199, PR 226, CJA (Vol. III) Tab 30.

On February 5, 2019, the court consolidated the member cases in which Calgon had intervened under this lead case. *See* Docket Order (Feb. 5, 2019) ECF No. 28; *Carbon Activated Tianjin Co., Ltd., et al. v. United States, et al.*, Court No. 18–00243; *Datong Juqiang Activated Carbon Co., Ltd., et al. v. United States, et al.*, Court No. 18–00245.

Defendant United States ("the Government") filed a response supporting Commerce's determination and arguing that Carbon Activated Group failed to exhaust administrative remedies with respect to its financial-ratios argument. *See* Confidential Corrected Def.'s Resp. to Pls.' and Consol. Pls.'/Def.-Ints.' Rule 56.2 Mot[s]. For J. Upon the Agency R. ("Gov't's Resp."), ECF No. 59. Calgon and Carbon Activated Group each filed a response as Defendant-Intervenors, *see* Confidential Def.-Ints.' Carbon Activated, DJAC and Cherishmet's Resp. to [Pls.'] Rule 56.2 Mot[]. for J. Upon the Agency R. ("Carbon Activated Group's Resp."), ECF No. 46; Resp. Br. of Calgon Carbon Corp. and Cabot Norit Americas, Inc. ("Calgon's Resp."), ECF No. 48, and a reply in support of their respective motions, *see* Pls.' Reply Br. ("Calgon's Reply"), ECF No. 49; Confidential Consol. Pls.' Reply to Def. and Def.-Ints.' Resp. to Consol. Pls.' Rule 56.2 Mot. for J. on the Agency R. ("Carbon Activated Group's Reply"), ECF No. 50.

For the following reasons, the court remands Commerce's choice of surrogate value for carbonized material and the agency's adjustments to the surrogate financial ratios. The *Final Results*, as amended by the *Amended Final Results*, are otherwise sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012),[3] and 28 U.S.C. § 1581(c)(2012). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Selection of Partial AFA

A. Legal Framework

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines,

[3] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, the Trade Preferences Extension Act ("TPEA"), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e. *See* TPEA § 502. The TPEA amendments affect all antidumping duty determinations made on or after August 6, 2015. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793 (Dep't Commerce Aug 6, 2015) ("*TPEA Effective Date*"). Accordingly, all references to 19 U.S.C. § 1677e are to the amended version of the statute.

"significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." *Id.* § 1677e(a). Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *Id*. Pursuant to § 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory deadlines, provide "an opportunity to remedy or explain the deficiency." *Id*. § 1677m(d).

If Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id*. § 1677e(b). As AFA, Commerce may rely on any of the following sources of information: "(A) the petition, (B) a final determination in the investigation under this subtitle, (C) any previous review under section 1675 of this title or determination under section 1675b of this title, or (D) any other information placed on the record." *Id.* § 1677e(b)(2).

The statute "gives Commerce substantial discretion to decide which record information to use." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1346 (Fed. Cir. 2016). "[T]he purpose of the adverse facts statute is 'to provide respondents with an incentive to cooperate' with Commerce's investigation." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017) (quoting *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012)). Nevertheless, AFA is not intended to result in "punitive, aberrational, or uncorroborated margins." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). The statute does not obligate "Commerce to select facts that reflect a certain amount of sales, yield a particular margin, fall within a continuum according to the application of particular statistical methods, or align with standards articulated in other statutes and regulations." *Nan Ya*, 810 F.3d at 1347.

B. Background

One of Carbon Activated's suppliers ("Supplier X")[4] purchased activated carbon from another company and sold it to Carbon Activated

[4] The supplier in question was [[ ]] and is referred to throughout as Supplier X. Final Results Margin Calculation for Carbon Activated (Oct. 16, 2018) ("Final AFA Calculation Mem.") at 2, CR 211–17, PR 251, CJA (Vol. III) Tab 36.

as subject merchandise after performing certain processing to the merchandise. I&D Mem. at 5–6. Rather than report the factors of production for the producer that sold to Supplier X as instructed by Commerce, Carbon Activated instead reported Supplier X's purchases of activated carbon as its own input material to be assigned a surrogate value. *Id.* at 5. Commerce did not consider Supplier X to be the producer of the activated carbon in question and found that Carbon Activated failed to provide the appropriate factors of production as requested. Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review (May 3, 2018) ("Prelim. Decision Mem.") at 17–18, PR 214, CJA (Vol. I) Tab 2. Therefore, Commerce used AFA to determine the normal value "for the sales corresponding to the FOP data for which [S]upplier X reported subject merchandise as an input." *Id.* at 17.

For the *Preliminary Results*, *see generally Certain Activated Carbon From the People's Republic of China*, 83 Fed. Reg. 23,254 (Dep't Commerce May 18, 2018) ("*Prelim. Results*") (prelim. results of antidumping duty admin. review and prelim. determination of no shipments; 2016–2017), PR 213, CJA (Vol I) Tab 1, Commerce selected Carbon Activated's highest calculated normal value for any CONNUM[5] as AFA, Prelim. Decision Mem. at 18. For the *Final Results*, Commerce agreed with some of the concerns raised by Calgon and indicated that, as AFA, it would select the highest calculated normal value for any respondent in AR10. I&D Mem. at 6. Commerce indicated that this change would resolve concerns based on Carbon Activated's perceived ability to manipulate the selection of AFA.[6] *Id.*

C. Parties' Contentions

Calgon argues that Commerce's AFA selection fails to satisfy the statutory intent to ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. Calgon's Mem. at 25–28. Calgon further complains that, as a result of Commerce's selection of two mandatory respondents, Commerce's AFA methodology would allow a respondent to manipulate the record to its benefit. *Id.* at 27. As an alternative, Calgon contends that Commerce should use the intermediate input methodology to value Supplier X's activated carbon purchases. *Id.* at 28–30.

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[5] CONNUM refers to "control number," which is a number designed to reflect the "hierarchy of certain characteristics used to sort subject merchandise into groups" and allow Commerce to match identical and similar products across markets. *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT ___, ___, 324 F. Supp. 3d 1344, 1347 (2018).

[6] Despite modifying the methodology, [[

]]. Final AFA Calculation Mem. at 2.

The Government[7] responds that Commerce's AFA selection is supported by substantial evidence because: (1) the agency has substantial discretion in selecting AFA, Gov't's Resp. at 16 (citing *Nan Ya*, 810 F.3d at 1346); (2) Commerce's AFA selection was an appropriate use of its discretion, *id.* at 16–17; and (3) Calgon's concerns that Carbon Activated manipulated (or could have manipulated) the AFA selection are unfounded and speculative, *id.* at 17–19. Because Commerce's selection of AFA is supported by substantial evidence, the Government argues, the agency was not obligated to apply the intermediate input methodology. *Id.* at 19.

D. Substantial Evidence Supports Commerce's Selection of Partial AFA

Here, Commerce considered three options to fill the gap in the record as partial AFA: "1) the highest calculated [normal value] for any of Carbon Activated's suppliers; 2) Thai Global Trade Atlas (["]GTA["]) import data to calculate a [surrogate value] for activated carbon; or 3) the highest [normal value] calculated for any respondent and its suppliers." I&D Mem. at 6. Commerce explained that the first option presented the potential that a respondent could manipulate their reporting to reduce their antidumping margin. *Id.* Commerce declined to use a surrogate value for the input because the agency has "a practice of not valuing subject merchandise using [surrogate values] and [has] departed from that practice only when the upstream FOPs have been found to be inadequate." *Id.* Commerce chose the third option because it mitigated the potential for manipulation, was "based on adequately reported FOPs," and was "sufficiently adverse to ensure cooperation." *Id.* Thus, Commerce reasonably exercised its discretion and explained its reasoning: the agency had three options, it assessed each option, and explained why it selected the third option.

The court is not persuaded by Calgon's arguments that the AFA data selected is not sufficiently adverse. Commerce reasonably addressed this argument following the *Preliminary Results* by changing its AFA methodology to use the highest normal value for any respondent. *See id.* The possibility that Commerce could have exercised its discretion to select a higher value as AFA is an insufficient basis for

[7] Carbon Activated Group supports the Government's opposition to Calgon's arguments. Carbon Activated Group's Resp. at 14; *see id.* at 16–20 (supporting the Government's arguments regarding interpretation of *Nan Ya*, the likelihood that Carbon Activated knew it would be selected as a respondent, and against using an intermediate input methodology). The court does not address Carbon Activated Group's arguments opposing the use of AFA because Carbon Activated Group did not challenge Commerce's determination with regard to that issue.

finding that Commerce's exercise of discretion in this case was inconsistent with the law. The agency is not required to select data that yields the highest possible margin when choosing AFA. *See Nan Ya*, 810 F.3d at 1347. As the U.S. Court of Appeals for the Federal Circuit ("the Federal Circuit") said in *Nan Ya*, "Congress decided what requirements Commerce must fulfill in reaching its determination, § 1677e(b), and we do not impose conditions not present in or suggested by the statute's text." *Id*. The mere fact that Calgon can imagine methodologies or data that would yield a higher margin for Carbon Activated does not mean that Commerce failed to select an AFA value that is insufficient to deter uncooperative behavior in the future. Calgon's policy-based arguments are best made to Commerce and do not provide a basis for the court to disturb Commerce's determination.

Thus, Commerce's selection of AFA is consistent with law and must be sustained.

II. Surrogate Values

A. Legal Framework

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[8] in a surrogate country, *see id*. § 1677b(c)(1), and those values are referred to as "surrogate values." In selecting its surrogate values, Commerce generally prefers publicly-available, "nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(c)(1), (4).

The phrase "best available information" is not defined in the statute, consequently, Commerce has broad discretion to determine what value(s) satisfy that requirement. *See, e.g.*, *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). In making its selection, Commerce is not required to duplicate the precise experience of the manufacturer in the non-market economy country, but instead must identify the surrogate value that "most accurately represents the fair market value" of the relevant factor of production. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (citation omitted).

[8] The factors of production include but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

B. Coal Tar

1. Background

Commerce selected Mexican import data under HTS 2706.00 to value "coal tar" and Thai[9] import data under HTS subheading 2708.10 to value "pitch."[10] Surrogate Values for the Final Results (Oct. 16, 2018) ("Final SV Mem.") at 2, Attach. 1, Master SV, PR 248–49, CJA (Vol. III) Tab 35.[11] The parties raise two interwoven issues with respect to Commerce's valuation of coal tar.

The first issue is whether Commerce accurately determined that coal tar is a distinct input from pitch. Respondents' filings with Commerce use inconsistent terminology to describe coal tar—interchangeably referred to as "coal tar pitch"—as distinct from pitch. I&D Memo at 10. Respondents reported consuming coal tar with roughly [[ ]] and [[ ]] percent pitch content. *See* DJAC Resp. to Suppl. Sec. D Questionnaire (Jan. 5, 2018) ("DJAC's SQDR"), Ex. SD-43, CR 135–51, PR 171–72, CJA (Vol. III) Tab 22; Suppl. Sec. D Questionnaire Resp. (Jan. 9, 2018) ("Carbon Activated's SDQR"), Ex. SD-18, CR 152–62, PR 173–74, CJA (Vol. III) Tab 23. Respondents explained in their case brief that coal tar with between [[ ]] percent pitch content is "crude coal tar," not pitch. Respondents' Case Br. at 21. Calgon, however, asserted that "coal tar pitch" and pitch should be valued as the same input because they are used for the same purpose in Respondents' production process. Pet'rs' Rebuttal Br. (July 5, 2018) at 5, CR 202–03, PR 234, CJA (Vol. III) Tab 33.

Commerce cited Respondents' financial reporting and production process as evidence that coal tar and pitch are two separate inputs. I&D Mem. at 10 & n.68 (citations omitted). "Whether [the inputs] were used for the same purpose in the production process is inapposite to what the inputs actually were." *Id.* at 10. Commerce did not value a third input (i.e., coal tar pitch). *See id.*; Final SV Mem., Attach. 1, Master SV.

The second issue is whether Mexican import data are the best information available to value coal tar. Commerce determined that the Mexican import data under HTS heading 2706.00 constituted the

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[9] Commerce selected Thailand as the primary surrogate country. *See* I&D Mem. at 1 (explaining that Commerce followed its determination in the *Preliminary Results*, excepting changes that Commerce made to "the margin calculations for the final results"); Prelim. Decision Mem. at 15 (selecting Thailand as the primary surrogate country).

[10] In the *Preliminary Results*, Commerce referred to the input "pitch" as "coal tar pitch." Surrogate Values for Preliminary Results (May 3, 2018) ("Prelim. SV Mem.") at 1, PR 215–218, PJA (Vol. III) Tab 28.

[11] Due to its size, Attachment 1 to Commerce's Final SV Memorandum was filed manually with the court. *See* Notice of Manual Filing (Jan. 28, 2020), ECF No. 64.

best available information because: (1) Mexico is at the same level of economic development as China; and (2) Mexico had the largest volume of reliable data as compared to other potential surrogate countries. I&D Mem. at 11. While Commerce normally seeks to value all factors of production from a single surrogate country, 19 C.F.R. § 351.408(c)(2), Commerce explained that all Thai imports under HTS heading 2706.00 were imported under a basket-category subheading and, thus, were not specific to the input. *Id.* at 10–11.

2. Parties' Contentions

Calgon contends that Commerce's valuation of coal tar is not supported by substantial evidence for two reasons. First, Calgon argues that Commerce's distinction between coal tar and pitch is not based on substantial evidence given Respondents' inconsistent terminology and record evidence that coal tar and pitch are used for the same purpose in Respondents' production process. Calgon's Mem. at 12–17. Second, for valuation purposes, assuming that coal tar and pitch are distinct inputs, Commerce failed to consider whether the Mexican data exhibited the same flaw as the Thai data. *Id.* at 17–21.

Carbon Activated Group acknowledges that Mexican import data under HTS 2706.00 are the "best among the set of GTA HTS 2706.00 import data" to value coal tar but argues that Commerce should have applied Carbon Activated Group's proposed methodology to cap the Mexican data. Carbon Activated Group's Mem. at 20. Carbon Activated Group's methodology would limit the surrogate value of coal tar by both the price of 100 percent pitch and the price of metallurgical coke. *Id.* at 21–22.

The Government contends that Commerce sufficiently explained its determination that coal tar and pitch are different inputs even if the agency did not fully address all of Calgon's arguments. Gov't's Resp. at 22–23. The Government also contends that the Mexican data do not exhibit the same flaws as the Thai data. *Id.* at 23. The Government further contends that Carbon Activated Group's proposed methodology uses the average of pitch values from countries that are not at the same level of economic development as China and there is no evidence those countries' data otherwise meets Commerce's requirements for consideration as surrogate values. *Id.* at 25. In any event, the Government contends, Commerce was not obligated to demonstrate that its methodology was the only reasonable methodology. *Id.* at 24–25.

3. Substantial Evidence Supports Commerce's Valuation of Coal Tar

First, substantial evidence supports the agency's conclusion that coal tar and pitch are distinct inputs notwithstanding Respondents' inconsistent use of terminology. I&D Mem. at 10. Commerce identified substantial evidence upon which to support its conclusion that Respondents consumed coal tar (e.g., coal tar pitch) and pitch as separate inputs, *id.* at 10 & n.68 (citing Carbon Activated Resp. to Sec. D of Questionnaire (Sept. 15, 2017) ("Carbon Activated's DQR"), Attach. C, Ex. D-5, CR 60–104, PR 111–15, CJA (Vol. I) Tab 19; Carbon Activated's SDQR at 11).

The court discerns from Commerce's discussion that the separate inputs of coal tar and pitch reflect what the "inputs actually were," I&D Mem. at 10, based on pitch content of the input material and not simply the label Respondents attached to the input, Respondents' Case Br. at 21.[12] Calgon's argument that Respondents used the inputs "coal tar pitch" and pitch for the same purpose in their production process, Calgon's Mem. at 16, is unavailing. As Commerce explained, that "coal tar and pitch were used for the same purpose in the production process" does not necessarily mean that the inputs were identical. I&D Mem. at 10.

Second, Commerce's selection of Mexican import data to value coal tar is also supported by substantial evidence. Commerce normally values all FOPs from a single surrogate country. 19 C.F.R. § 351.408(c)(2). Here, Commerce explained that the Thai imports were not the best information available to value coal tar because the Thai data were imported under a basket subheading including "other" coal tar rather than the two subheadings that "more accurately describe the input in question." I&D Mem. at 10–11. Commerce then found that Mexican data were the best available information to value coal tar. *Id.* at 11. While Calgon is correct that Commerce did not examine the Mexican subheadings relevant to its valuation of coal tar in the same way it examined the Thai subheadings, Calgon's Mem. at 20, the Mexican data placed on the record did not include a comparable breakdown of imports by subheading. *See* DJAC and CAC Final SV Submission (Apr. 2, 2018), Ex. 4, PR 192–193, CJA (Vol. III) Tab 24. Thus, Calgon has failed to establish that the Mexican data exhibits the same problems. It is the responsibility of interested parties—not Commerce—to build the factual record supporting its position. *QVD Food*, 658 F.3d at 1324.

[12] Calgon acknowledges that coal tar contains some pitch. Calgon's Mem. at 14 ("Coal tar extracted from coking coal, and refined coal tar *with a specific pitch content*, must be further distilled and refined into a 'pitch' . . . .") (emphasis added).

Finally, Commerce was not obligated to adopt Carbon Activated Group's proposed methodology to cap the value of coal tar. *See* Carbon Activated Group's Mem. at 18–22. Carbon Activated Group's methodology is premised on accepting what it asserts is an "axiomatic" pricing relationship between the values of coal tar, pitch, and metallurgical coke. *See id.* at 20 ("[I]t is axiomatic that the unit value of [Carbon Activated Group]'s input . . . cannot exceed the value of the principal product – metallurgical coke – of which it is a mere by-product."). Even if Commerce were to accept that the production process suggests a relationship between the costs of producing each of these materials, nothing requires Commerce to limit or otherwise ignore observed prices for the input in question in a surrogate market economy country. In short, while Carbon Activated Group may have identified an alternative method for valuing coal tar, it ignores the fact that its cap is based on prices in countries not at the same level of economic development and, more importantly, the existence of an alternative value is insufficient to establish that the value selected by Commerce is unreasonable. *See JMC Steel Grp. v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1313 (2014). For these reasons, the court sustains Commerce's valuation of coal tar.

C. Hydrochloric Acid

1. Background

Respondents reported consuming hydrochloric acid ("HCl") of [[ ]] and [[ ]] percent concentration. Carbon Activated SDQR, Ex. SD-18; DJAC's SDQR, Ex. SD-56. Commerce selected Thai GTA import data under HTS subheading 2806.10.00102 with a concentration of 15 to 33 percent (referred to as "the eleven-digit data") to value HCl. I&D Mem. at 19–20. Commerce explained that the eleven-digit data were superior to the other data in the record because those other data did "not indicate a concentration range." *Id.* at 20.

Respondents urged Commerce to consider data from the Independent Chemical Information Services ("ICIS"),[13] which indicates a concentration range of 33 to 35 percent, as a benchmark for comparing the Thai data. Respondents' Case Br. at 49–55; First Surrogate Value Cmts. by DJAC and [Carbon Activated] (Sept. 15, 2017) ("Respondents' First SV Cmts."), Ex. 3, PR 116–21, CJA (Vol. II) Tab 20. Commerce declined to do so because the ICIS data "are not from economically comparable countries." I&D Mem. at 21.

[13] ICIS is a publisher of price data for chemicals and provides European and U.S. HCl prices. I&D Mem. at 17.

Commerce used the less-specific (i.e., not indicating a concentration range) GTA import data under HTS 2806.10 (referred to as "the six-digit data") from economically comparable countries as benchmarks. *See id.* at 20–21; Prelim. Decision Mem. at 13 (identifying economically comparable countries). Comparisons to these benchmarks showed that the average unit value ("AUV") of the eleven-digit data was "not the highest reported figure"; it was lower than the Thai and South African six-digit AUVs. I&D Mem. at 20. Commerce relied on this comparison to conclude that the eleven-digit data are not distortive despite representing a small import quantity. *Id.* at 21.

Commerce also compared the eleven-digit data to historical values. *Id.* at 20. The agency found that the eleven-digit data have a lower AUV than "the Thai import values under the eleven-digit subheading used" in each of the three preceding reviews.[14] *Id.* However, after Commerce published the *Amended Final Results*, the agency changed its surrogate value for HCl in AR7 and AR8 pursuant to court remands, resulting in substantially lower AUVs for HCl in those reviews.[15] *See* Carbon Activated Group's Reply at 11–12.

2. Parties' Contentions

Carbon Activated Group advances three arguments: (1) Commerce improperly rejected the ICIS data as benchmarks, Carbon Activated Group's Mem. at 25–26; (2) Commerce should have addressed data from Bulgaria and Romania when evaluating import quantity and AUV of the eleven-digit data, *id.* at 26–27;[16] and (3) Commerce's comparison to historical data is invalid in light of changes made upon remand in AR7 and AR8, Carbon Activated Group's Reply at 10–12.[17]

The Government contends that substantial evidence supports Commerce's determination that the eleven-digit data are specific to the input and the agency adequately explained its rejection of the ICIS

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[14] The three previous administrative reviews are referred to as "AR7," "AR8," and "AR9," respectively.

[15] Pursuant to the court's instructions on remand in AR7 and AR8, Commerce selected a primary surrogate country other than Thailand and did not use Thai data to value HCl. *See Jacobi Carbons AB v. United States*, 43 CIT ___, ___, 422 F. Supp. 3d 1318, 1321 (2019) (selecting Malaysia as the primary surrogate country in AR8 and using Malaysian data to value all FOPs except carbonized material and financial ratios); *Jacobi Carbons AB v. United States*, 43 CIT ___, ___, 422 F. Supp. 3d 1308, 1311 (2019) (using "Indonesian data for all surrogate values with the exception of the surrogate financial ratios" in AR7).

[16] Carbon Activated Group styles this argument as two separate arguments. Carbon Activated Group's Mem. at 26–29 (second and fourth arguments). The court will address these arguments together because both assert that Commerce failed to consider the Bulgarian and Romanian data in comparing the AUVs of the six-digit Thai and South African data to the eleven-digit Thai data. *Id.*

[17] Carbon Activated Group also contends that Commerce should have relied on the ICIS data to value HCl. Carbon Activated Group's Mem. at 29–30.

data. Gov't's Resp. at 26–27.[18] The Government contends that Commerce considered other AUVs such that its determination that the eleven-digit data are not aberrational is supported by substantial evidence. *Id.* at 29–30. The Government supports Commerce's comparison to historical data but did not have the opportunity to explain how the newly-selected data in AR7 and AR8 affect that comparison. *See id.* at 29.[19] Finally, the Government avers that Commerce sufficiently considered the Bulgarian and Romanian data in finding the eleven-digit data reliable. *Id.* at 29–30.

3. Commerce's Valuation of Hydrochloric Acid is Supported bySubstantial Evidence

Carbon Activated Group contends that Commerce erred in rejecting ICIS data for benchmarking purposes. *See* Carbon Activated Group's Mem. at 25. This argument is not persuasive.

Although the ICIS data indicate a concentration range, their relevance is limited because they derive from economically non-comparable countries. *See* I&D Mem. at 21; *Jacobi Carbons AB v. United States* ("*Jacobi (AR7) II*"), 42 CIT ___, ___, 313 F. Supp. 3d 1308, 1337 (2018) ("[E]conomic comparability and, thus, the usefulness of proffered benchmarks, is a matter of degree."). Commerce supported its surrogate value selection by comparing it to several benchmarks from economically comparable countries and finding that the eleven-digit data's AUV was not the highest reported figure. *See* I&D Mem. at 20. In other words, Commerce assigned significant weight to benchmarks from economically comparable countries and no weight to the ICIS data. The court will not second guess Commerce's assignment of weight to these benchmarks. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (explaining that the court does not reweigh the evidence).[20]

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[18] Calgon agrees with and incorporates the Government's arguments with respect to the HCl surrogate value. Calgon's Resp. at 6.

[19] Carbon Activated Group did not raise Commerce's revised surrogate values in AR7 and AR8 as an issue until its reply. Carbon Activated Group's Reply at 10–12. Thus, this argument would typically be subject to waiver. *See Fuji Photo Film Co., Ltd. v. Jazz Photo Corp.*, 394 F.3d 1368, 1375 n.4 (Fed. Cir. 2005). Nevertheless, the court will address Carbon Activated Group's argument regarding the HCl data used in previous reviews because Commerce only made those remand determinations in AR7 and AR8 after Carbon Activated Group filed its initial memorandum. *See supra*, note 15.

[20] Carbon Activated Group avers that Commerce may not reject benchmarks solely because they derive from economically non-comparable countries. Carbon Activated Group's Mem. at 25–26 (citing *Jacobi (AR7) II*, 313 F. Supp. 3d at 1336–37). This argument is not persuasive. In *Jacobi (AR7) II*, the court was unable to discern Commerce's rationale for excluding certain historical benchmarks from countries that were currently non-comparable but might have been comparable in the past. 313 F. Supp. 3d at 1337–38. The court is able to discern Commerce's reasons for rejecting the ICIS data and it is not analogous to the fact pattern in *Jacobi (AR7) II*.

Carbon Activated Group is correct that Commerce changed its surrogate values for HCl in the redeterminations upon remand in AR7 and AR8. Carbon Activated Group's Reply at 11. As Carbon Activated Group contends, these changes significantly lower the combined average value of HCl in the past three reviews. *Id.* at 12. But Commerce did not compare the Thai eleven-digit data for HCl in this review to the combined average value of HCl in the past three reviews. Rather, the agency compared the AUV of the eleven-digit data to the individual AUVs for HCl in each of the previous reviews and concluded that the eleven-digit data were not aberrational because its AUV is lower than the individual AUVs in the previous reviews. *Id.* at 20. To that end, the AUV for HCl in AR9, which is higher than the AUV at issue in this review,[21] has not been modified. *See* Carbon Activated Group's Reply at 11. Thus, the AR9 data continues to support Commerce's conclusion that the eleven-digit data in this review is not aberrantly high in light of historical data.[22]

Commerce found that the eleven-digit data in this review is within an acceptable range of values when compared to the six-digit Thai and South African data for this POR. I&D Mem. at 20. Commerce used the same comparison to determine that the eleven-digit data's small import quantity did not render it unreliable. *Id.* at 21. Carbon Activated Group asserts that Commerce should have included the Bulgarian and Romanian data (representing larger import quantities and smaller AUVs) in these comparisons. Carbon Activated Group's Mem. at 26–29. However, Commerce considered the AUVs of the Romanian and Bulgarian data and was not persuaded that they impeached the eleven-digit data because the data were derived from a broader HTS category. I&D Mem. at 20–21. The fact that a party can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Thus, Carbon Activated Group's argument fails.

For these reasons, the court sustains Commerce's valuation of HCl. Because substantial evidence supports Commerce's selection of data, the court does not reach Carbon Activated Group's argument that the

[21] The Thai data in AR9 has an AUV of $1,723.21 per metric ton, and the eleven-digit data in this review has an AUV of $1,717 per metric ton. *See* Carbon Activated Group's Reply at 11.

[22] The court rejects the argument that Commerce would have reconsidered the HCl value in AR9 given the opportunity, Carbon Activated Group's Reply at 12, because it is speculative and without support.

agency should have relied on other data to value HCl. *See* Carbon Activated Group's Mem. at 29–30.

D. Carbonized Material

1. Background

Commerce valued carbonized material using Thai import data under HTS subheading 4402.90.10000. I&D Mem. at 14. At issue are imports from France and Japan that are included in the Thai data. *See* Prelim. SV Mem. at 3, Attach. 1, Circulated_SV_Data.[23] The French imports include wood-based charcoal; a material dissimilar from and with a substantially higher AUV than the AUV of the other imports under subheading 4402.90.10000.[24] *See* Respondents' First SV Cmts., Ex. 4A (discussing "quantities of wood charcoal . . . exported from France to Thailand" in email correspondence, and attaching information regarding the quantities imported from France). The Japanese imports represent a small import quantity with a substantially higher AUV. *See* Prelim. SV Mem., Attach. 1, Circulated_SV_Data.

Commerce rejected Respondents' argument that Commerce should exclude the French and Japanese imports from the Thai data. I&D Mem. at 15–16; *see also* Respondents' Case Br. at 39–45. With respect to the French imports, Commerce found that the "record lacks information that demonstrates that French imports under HTS 4402.90.1000 were indeed wood-based charcoal." I&D Mem. at 15. Commerce stated that, contrary to Respondents' claim that "all French imports were comprised of wood-based charcoal powder," the evidence Respondents placed on the record only "cover[ed] *part* of the POR." *Id.* (emphasis added). Commerce thus found that "the record lacks sufficient basis . . . to conclude that Thai GTA import data for the *entire* POR [are] aberrational." *Id.* (emphasis added).

Commerce did not exclude the Japanese imports because "merely appearing on the low or high end of the range of values is not enough to find such data aberrational." *Id.* at 16.

2. Parties' Contentions

Carbon Activated Group contends that substantial evidence undermines Commerce's inclusion of the Japanese and French imports.

[23] Due to its size, Attachment 1 to Commerce's Preliminary SV Memorandum was filed manually with the court. *See* Notice of Manual Filing (Jan. 28, 2020), ECF No. 64.

[24] French imports comprise 141,130 Kg (or 52 percent) of the total Thai GTA import data (270,570 Kg). Prelim. SV Mem., Attach. 1, Circulated_SV_Data. The French imports' AUV is 44.64 Baht per kilogram ("Baht/Kg") (i.e., 6,300,491 Baht divided by 141,130 Kg). *Id.* This is more than twice the AUV for the other imports—including the Japanese imports—18.68 Baht/Kg (i.e., 2,418,033 Baht divided by 129,440 Kg). *Id.*

Carbon Activated Group's Mem. at 31–38.[25] Carbon Activated Group avers that Commerce's inclusion of the French data is based on inconsistent reasoning and contrasts with Commerce's decision to exclude French imports from Thai import data in AR8 and AR9. *Id.* at 31–34. Carbon Activated Group asserts that the Japanese data's quantity and AUV undermine Commerce's conclusion that the data are not aberrational. *Id.* at 37. Accordingly, Carbon Activated Group contends that Commerce should have relied on Philippine data to value carbonized material. *Id.* at 37–38.

The Government contends that Commerce's finding that "Thai import data from France . . . cover a part of the [POR]" is supported by substantial evidence. Gov't's Resp. at 32 (quoting I&D Mem. at 15) (emphasis omitted). The Government avers that Commerce's reasoning for not finding the Japanese data aberrational—"merely appearing on the low or high end of a range of values is not enough to find such data aberrational"—has been affirmed by the court in other cases. *Id.* at 33 (quoting I&D Mem. at 16). The Government, however, does not respond to Carbon Activated Group's argument that Commerce's reasoning for including the French imports is inconsistent.

3. Commerce's Inclusion of French and Japanese Imports in the Thai Data Must be Remanded for Further Explanation or Reconsideration

Commerce has not sufficiently explained its reasoning for including the French and Japanese import data in the Thai surrogate value.

Commerce's apparent recognition that the Thai data contain French imports (wood-based charcoal) for part of the POR contradicts its finding that the "record lacks information that demonstrates that French imports under HTS 4402.90.1000 were indeed wood-based charcoal." I&D Mem. at 15. Because of this contradiction, the court cannot adequately discern the agency's reasoning for selecting the surrogate value for carbonized material. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("[T]he path of Commerce's decision must be reasonably discernable to a reviewing court.").

[25] Carbon Activated Group asserts that remand is required because "substantial evidence directly contradicts Commerce's underlying findings" for valuing carbonized material. Carbon Activated Group's Mem. at 31. This assertion mischaracterizes the standard of review, which requires that Commerce support its determination with substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). Commerce's determination is not unsupported by substantial evidence even when evidence on the record supports a different conclusion. As the Supreme Court of the United States explained in *Consolo v. Federal Maritime Commission*, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." 383 U.S. 607, 619–20 (1966).

Commerce failed to explain why the fact that the French imports do not cover the entire POR is a basis for not excluding them as otherwise aberrational or distortive. The imports from France comprise 52 percent of the Thai GTA import quantity and have an AUV twice that of the remaining Thai import data. *See supra*, note 24. Commerce failed to address this evidence. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (noting that an agency determination is "arbitrary and capricious" if the agency "failed to consider an important aspect of the problem").[26]

Commerce also failed to sufficiently explain its refusal to exclude the Japanese imports. Evidence shows that the Japanese data are based on a small quantity (16 Kg) and have an AUV of 910.94 Baht/Kg, Prelim. SV Mem., Attach. 1, Circulated_SV_Data, which is almost 30 times higher than the AUV of the Thai import data (32.22 Baht/Kg), Final SV Mem., Attach. 1, Master SV. Commerce's refrain that "appearing on the low or high end of a range of values is not enough to find such data aberrational," I&D Mem. at 15, does not address the "enormous disparity between the values shown" in the Thai data compared to the Japanese data, *Jacobi Carbons AB v. United States*, 42 CIT ___, ___, 313 F. Supp. 3d 1344, 1365 (2018) (quoting *Peer Bearing Co.-Changshan v. United States*, 35 CIT ___, ___, 752 F. Supp. 2d 1353, 1371 (2011)).

On remand, Commerce must reconsider or clarify its surrogate value selection for carbonized material consistent with this Opinion and the court need not reach Carbon Activated Group's argument that Commerce must rely on the Philippine data.

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[26] Additionally, in AR8 and AR9, Commerce excluded French imports from the Thai GTA import data under HTS 4402.90.10000 because it agreed that the French data were not specific to the input in question. *See Certain Activated Carbon From the People's Republic of China*, 81 Fed. Reg. 62,088 (Dep't Commerce Sept. 8, 2016) (final results of antidumping admin. review; 2014–2015) and accompanying Issues and Decision Mem., A-570–904 (Aug. 31, 2016) at 32–33, *available at* https://enforcement.trade.gov/frn/summary/prc/2016–21660–1.pdf (last visited May 13, 2020); *Certain Activated Carbon From the People's Republic of China*, 81 Fed. Reg. 51,607 (Dep't Commerce Nov. 7, 2017) (final results of antidumping duty admin. review; 2015–2016) and accompanying Issues and Decision Mem., A-570–904 (Nov. 1, 2017) at 25, *available at* https://enforcement.trade.gov/frn/summary/prc/2017–24184–1.pdf (last visited May 13, 2020). Respondents argued in their fillings to Commerce that the agency's reasoning for excluding the French import data in AR8 and AR9 demonstrated that the Thai import data are distorted in this review. Respondents' Case Br. at 43–45. Commerce ignored this argument. *See* I&D Mem. at 14–16. On remand, if the agency continues to rely on the Thai import data inclusive of the French imports, then Commerce must reconcile its findings based on the relevant review records.

E. Financial Statements

1. Background

For the *Final Results*, Commerce valued financial ratios using the 2016 financial statement from the Romanian[27] company, Romcarbon SA (“Romcarbon”). I&D Mem. at 27–28. This determination represented a change from the *Preliminary Results*, for which Commerce relied on the 2011 financial statement of Carbokarn Co., Ltd. (“Carbokarn”), a Thai producer of activated carbon. Prelim. Decision Mem. at 27.

Commerce acknowledged its preference to value all factors or production in a single surrogate country (in this case, Thailand) but reasoned that Carbokarn’s financial statement was not the best information available because it contained “tax coupon receivables,” which refers to a program the agency found to provide a countervailable subsidy in a separate countervailing duty investigation. I&D Mem. at 27 & n.193 (citing *Certain Frozen Warmwater Shrimp From Thailand*, 78 Fed. Reg. 50,379 (Dep’t Commerce Aug. 19, 2013) (final negative countervailing duty determination) (“*Thai Shrimp*”) and accompanying Issues and Decision Mem., C-549–828 (Aug. 12, 2013) (“Shrimp I&D Mem.”) at 36–38, *available at* https://enforcement.trade.gov/frn/summary/thailand/2013–20166–1.pdf (last visited May 13, 2020)). Commerce also noted that Carbokarn’s 2011 financial statement was not contemporaneous with the POR. *Id*. at 27.

The agency found that Romcarbon’s financial statement was superior to Carbokarn’s even though Romcarbon primarily produces noncomparable products and materials and only some activated carbon. *Id.*[28] Commerce reasoned that Romcarbon’s 2016 financial statement was from a country at a comparable level of economic development to China and contemporaneous with the POR. *Id*.

For the *Final Results*, Commerce made several adjustments to information presented in Romcarbon’s financial statement to calculate the financial ratios. These adjustments are identified in a spreadsheet attached to the final surrogate value memorandum and discussed in that memorandum. *See* Final SV Mem. at 2–3, Attach. 1, Romcarbon.

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[27] Romania was included on Commerce’s list of economically comparable countries with significant production of comparable merchandise. Prelim. Decision Mem. at 13–14.

[28] Commerce also explained why it rejected 2016 financial statements from Kekwa Indah Sdn. Bhd. and Century Chemical Works Sendirian Berhad, both of Malaysia. I&D Mem. at 27. No party argues that Commerce erred in rejecting these financial statements.

2. Parties' Contentions

a. *Commerce's Selection of Romcarbon's Financial Statement*

Calgon argues that Commerce was obligated to perform a "side-by-side" analysis of the Carbokarn and Romcarbon financial statements, and its failure to do so prevents its determination from being supported by substantial evidence. Calgon's Mem. 33–37 (citing, *inter alia*, *CP Kelco US, Inc. v. United States*, Slip Op. 15–27, 2015 WL 1544714 (CIT Mar. 31, 2015)). Calgon further contends Romcarbon's financial statement is not the best information available because Romcarbon's operations focus mainly on products that are not comparable to the subject merchandise. *Id.* at 39. Calgon argues that Commerce provided no analysis or discussion of the "tax coupon receivables" subsidies found to be countervailable in the *Thai Shrimp* case or how they relate to a producer of activated carbon. *Id.* at 41; Calgon's Reply at 16.

The Government asserts that Commerce adequately considered the strengths and weaknesses of the financial statements at issue and its decisional path is clear.[29] Gov't Resp. at 35–38 (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)). The Government argues that Commerce has discretion in selecting surrogate financial statements and Congress has directed Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized." *Id.* at 39 (quoting I&D Mem. at 26); *see also*Carbon Activated Group's Resp. at 13–14 (citing 19 U.S.C. § 1677b(c)(5)).

b. *Commerce's Adjustments to the Financial Statement*

Carbon Activated Group argues that certain adjustments made by Commerce to the data in Romcarbon's financial statement are not supported by substantial evidence and Commerce failed to provide an explanation for the adjustments. Carbon Activated Group's Mem. at 8–16.

The Government argues that Carbon Activated Group failed to exhaust its administrative remedies with regard to its adjustment arguments. Gov't's Resp. at 39. While Carbon Activated Group was aware that Romcarbon's financial statements were under consideration, the Government argues, Carbon Activated Group failed to raise

[29] Carbon Activated Group agrees with the Government that Commerce adequately analyzed the two financial statements. Carbon Activated Group's Resp. at 8.

any arguments regarding adjustments to those financial statements and no exception to the exhaustion requirement applies. *Id.* at 41–42.

3. Substantial Evidence Supports Commerce's Selection of Surrogate Financial Statements, But the Agency's Adjustments to the Financial Statements Must be Remanded for Further Explanation

a. *Commerce's Selection of Romcarbon's Financial Statement to Determine Surrogate Financial Ratios is Supported bySubstantial Evidence*

Substantial evidence supports Commerce's assessment of the respective strengths and weaknesses of the available financial statements and its conclusion that Romcarbon's financial statement was the best available information. I&D Mem. at 27–28.

First, Commerce explained its concerns with the Carbokarn financial statement. *Id.* at 27. Commerce explained that the "Carbokarn[] 2011 financial statement is not contemporaneous with the POR, as it covered calendar year 2011." *Id.* Moreover, the Carbokarn financial statement lists "Tax coupon receivables," which Commerce found, in *Thai Shrimp*, was a countervailable subsidy. I&D Mem. at 27 & n.193 (citing, *inter alia*, Shrimp I&D Mem. at 36–38); *see also* Pet'rs' Submission of Surrogate Values (Sept. 15, 2017), Attach. 4 (ECF No. 54–2 at p. 1219), PR 122–25, CJA (Vol. II) Tab 21 (listing "Tax coupon receivables" under "Trade and other receivables"). Commerce properly exercised its discretion to "disregard price or cost values without further investigation," having determined "that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values." 19 U.S.C. § 1677b(c)(5). Thus, Commerce's determination that the Carbokarn financial statement contains evidence of the company's receipt of a countervailable subsidy is supported by substantial evidence.

Second, Commerce explained why the 2016 Romcarbon financial statement was an appropriate source for valuing financial ratios. Commerce acknowledged that the Romcarbon financial statement is from a producer whose "principal manufacturing activities are polyethylene, polypropylene, polyvinyl chloride, polystyrene processing, filters, and protective materials," but found that "Romcarbon produces some activated carbon." I&D Mem. at 27. Commerce also found that Romania is at the same level of economic development as China and that the financial statement is audited, complete, publicly available, contemporaneous with the POR, and does not indicate receipt of any countervailable subsidies. *Id.*

Commerce's assessment of the financial statements show that it sufficiently considered and explained its reasons for selecting Romcarbon's as the "best available information." *Id.* at 28. Calgon argues that "Romcarbon is not a significant producer of merchandise identical to or comparable to activated carbon." Calgon's Mem. at 40. But Calgon fails to identify a standard for determining the reliability of financial statements based on the level of production of the same or comparable merchandise. Moreover, Commerce recognized that Romcarbon's principal manufacturing activities related to other types of materials, but that it produced some activated carbon. I&D Mem. at 27. The court will not reweigh the evidence considered by Commerce.

Calgon's reliance on the court's opinion in *CP Kelco US* is unavailing. As discussed above, this is not a situation in which Commerce "effectively ignored the weakness" of one financial statement. 2015 WL 1544714, at *6. Contrary to Calgon's argument, and the holding in *CP Kelco*, this is also not a situation in which Commerce was required to conduct a side-by-side evaluation of the 2011 Carbokarn financial statement to the 2016 Romcarbon financial statement. *CP Kelco* reviewed a 2013 final determination by Commerce, 2015 WL 1544714, at *1, one made prior to the effective date of the 2015 amendment to the Tariff Act of 1930 adding 19 U.S.C. § 1677b(c)(5), which expressly allows Commerce to "disregard price or cost values without further investigation if [it] has determined that . . . particular instances of subsidization occurred with respect to those price or cost values." *See TPEA Effective Date*, 80 Fed. Reg. at 46,795 (applying 19 U.S.C. § 1677b(c)(5) "to determinations made on or after August 6, 2015"). Thus, the statute expressly authorizes Commerce to disregard a financial statement found to include countervailable subsidies such as Carbokarn's without further investigation and *CP Kelco* is inapposite to this case.[30]

[30] Calgon also argues that Commerce has found Carbokarn's financial statements superior to Romcarbon's in AR8 and AR9. Calgon's Mem. at 38. However, in AR8, pursuant to court remand, Commerce declined to use Carbokarn's financial statement and selected Romcarbon's financial statement to value financial ratios. *See Jacobi Carbons AB v. United States*, 43 CIT ___, ___, 365 F. Supp. 3d 1344, 1348 (2019). Commerce's AR9 Final Results were not subject to judicial challenge. In any event, it is well settled that each administrative review is a separate exercise of Commerce's authority and allows for different conclusions based on different facts in the record. *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2014). Thus, Commerce's previous valuations of financial ratios did not require the agency to select the Carbokarn financial statement in this review.

b. *Commerce's Adjustments to Romcarbon's Financial Statement Are Remanded for Further Explanation.*

Congress has directed the U.S. Court of International Trade ("USCIT") to, "whe[n] appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). While exhaustion is not jurisdictional, *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1363–64 (Fed. Cir. 2019), the statute "indicates a congressional intent that, absent a strong contrary reason, the [USCIT] should insist that parties exhaust their remedies before the pertinent administrative agencies," *id.* at 1362 (quoting *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2010)).

Here, the Government's argument that Carbon Activated Group had an opportunity to raise its arguments regarding adjustments to Romcarbon's financial statements, Gov't's Resp. at 40–41, lacks merit. While Respondents argued for using Romcarbon's financial statement to calculate surrogate financial ratios, Respondents' Case Br. at 74–77, no party argued that, if selected, Romcarbon's financial statements would require any adjustments and Carbon Activated Group's argument is not substantively distinct from that position. Thus, this case is not analogous to the facts before the Federal Circuit in *Boomerang*, when that court found that parties "either knew or should have known" that that the selection of certain data were at issue and all arguments should have been raised at that time. 856 F.3d at 913. *Boomerang* stands for the proposition that parties having notice of an issue may not withhold pertinent arguments at the administrative level, seeking a new "bite at the apple" before the courts. *See id. Boomerang* does not require parties to anticipate issues that have not been raised by a party or the agency at that point. *Cf. Unicatch Industrial Co., Ltd. v. United States*, Slip Op. 19–162, 2019 WL 6879197, at *5 (CIT Dec. 17, 2019) ("Unicatch had the opportunity to present this adjustment to Commerce; it must bear the consequences of its failure to do so.").

Because Respondents did not have an opportunity to address their objections to the adjustments to Romcarbon's financial statements before the agency and Commerce did not have the opportunity to consider those objections, the *Final Results* are remanded so that Commerce may consider Carbon Activated Group's arguments in the first instance.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results*, as amended by the *Amended Final Results*, are remanded; it is further

ORDERED that, on remand, Commerce shall, consistent with this Opinion, clarify or reconsider its selection of surrogate data to value carbonized material; it is further

ORDERED that, on remand, Commerce shall, consistent with this Opinion, clarify or reconsider the adjustments to the surrogate financial statement; it is further

ORDERED that Commerce shall file its remand redetermination on or before August 11, 2020; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 4,000 words.

Dated: May 13, 2020
New York, New York

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

Slip Op. 20–66

UNITED STATES, Plaintiff, v. CHU-CHIANG "KEVIN" HO, and ATRIA CORPORATION, Defendants.

Before: Timothy M. Reif, Judge
Court No. 19–00038

[Quashing plaintiff's service of process upon defendant, denying defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1), and extending the time period for plaintiff to effect service of process pursuant to USCIT Rule 4(l).]

Dated: May 15, 2020

William George Kanellis, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for plaintiff. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director and *Patricia M. McCarthy*, Assistant Director.

Elon A. Pollack and *Kayla R. Owens*, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA for defendant.

OPINION

"We are all honorable men here, we do not have to give each other assurances as if we were lawyers." — Mario Puzo.[1]

* * *

[1] Francis Ford Coppola, THE GODFATHER NOTEBOOK (1969).

Reif, Judge:

The United States of America ("Government" or "plaintiff") brings this enforcement action against Atria Corporation ("Atria") and Chu-Chiang "Kevin" Ho ("defendant") (together, "defendants") to recover penalties pursuant to 19 U.S.C. § 1592 (2012).[2] Defendant requests that the United States Court of International Trade ("USCIT" or "CIT") dismiss the Government's complaint against him in his individual capacity pursuant to USCIT Rules 12(b)(1), 12(b)(2), 12(b)(5) and 12(b)(6). Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 4 ("Def. Mot. Dis."). Mr. Ho claims that: (1) the court lacks subject matter jurisdiction because plaintiff failed to exhaust its administrative remedies; (2) the court lacks personal jurisdiction over Mr. Ho due to insufficient service of process; and, (3) plaintiff fails to state a claim upon which relief can be granted. Def. Mot. Dis. at 1.

After review of the filings and applicable law, this court quashes plaintiff's service of process upon defendant and orders that plaintiff properly serve defendant within 60 days of this Order. The court also denies defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction.[3] However, it is premature for the court to rule on defendant's motions to dismiss pursuant to USCIT Rules 12(b)(2), 12(b)(5) and 12(b)(6), because of the extension of time for service of process granted herein. Until service is effected, the court does not have personal jurisdiction over defendant. "Not only does logic compel initial consideration of the issue of jurisdiction over the defendant — a court without such jurisdiction lacks power to dismiss a complaint for failure to state a claim." *I Mark Marketing Servs., LLC v. Geoplast S.p.A*, 753 F. Supp. 2d 141, 149 (D.D.C. 2010) (citation omitted). Thus, at this time, the court "lacks power to dismiss a complaint for failure to state a claim" pursuant to USCIT Rule 12(b)(6). *Id.* (referring to the analogous FRCP 12(b)(6)); *see also Norberg v. Shutterfly, Inc.*, 152 F. Supp. 3d 1103, 1104 (N.D. Ill. 2015) ("[I]f there is no *in personam* jurisdiction the Court will be unable to reach the Rule 12(b)(6) matter.").

[2] All references to the United States Code are to the 2012 edition, unless otherwise stated.

[3] "A court presented with a motion to dismiss under both Fed.R.Civ.P. 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction." *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 915 F. Supp. 2d 574, 588 (S.D.N.Y. 2013) (quoting *Homefront Organization, Inc. v. Motz*, 570 F. Supp. 2d 398, 404 (E.D.N.Y. 2008) (internal quotation marks omitted)).

Subject Matter Jurisdiction

BACKGROUND

On March 19, 2019, the Government filed a complaint against Mr. Ho and Atria for violations of 19 U.S.C. § 1592. Complaint, ECF No. 2 ("Compl."). Mr. Ho was the owner and director of Atria, a California company that claims to have manufactured and distributed indoor and warehouse lighting products. Compl. ¶¶ 3–4. In March 2014, defendants Atria and Mr. Ho are alleged to have "attempted to enter, or attempted to cause to be entered, into the United States" HID headlight conversion kits falsely described as ballasts for interior track lighting fixtures. *Id.* ¶¶ 5–9. HID kits are prohibited from importation into the United States because they violate U.S. Department of Transportation safety laws. *Id.* ¶ 5. Atria and Mr. Ho are alleged to have "submitted, or caused to be submitted, to Customs documents which falsely described the HID headlight conversion kits as ballasts for interior track lighting fixtures." *Id.* ¶ 10.

In June 2018, United States Customs and Border Protection ("Customs") issued pre-penalty notices to Atria and Mr. Ho. *Id.* ¶ 12. Two weeks later, Customs issued a penalty notice to both Mr. Ho and Atria at "all addresses known to be associated with [Mr. Ho]" — in Fremont, California and Milpitas, California — and to Atria's corporate address in Irvine, California. *Id.* ¶¶ 14, 15. One of the three penalty notices was returned undelivered. ECF No. 7, Ex. 1 ¶ 7, 8. While Mr. Ho acknowledges receipt of the pre-penalty notice at the Fremont, California address, Compl. ¶ 15, Mr. Ho claims to have "never received any penalty notice from U.S. Customs and Border Protection in this matter," ECF No. 4, Ex. 3 ¶ 4, including at the Fremont, California address.

STANDARD OF REVIEW

Adjudication of a case before the court is not proper unless the court has subject matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Like all federal courts, this Court is one of limited jurisdiction. It is thus "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); s*ee Atanasio v. O'Neill*, 235 F. Supp. 3d 422, 424 (E.D.N.Y. 2017) (quoting 5B Wright & Miller, Fed. Prac. & Proc. Civ.

§ 1353 (3d. ed.)) ("A federal court's entertaining a case that is not within its subject matter jurisdiction is no mere technical violation . . ."). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *Milecrest Corp. v. United States*, 41 CIT __, __, 264 F. Supp. 3d 1353, 1362 (2017) (citations omitted), and, therefore, "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (citations omitted). When deciding a motion to dismiss for lack of subject matter jurisdiction, "[t]he court must draw all reasonable inferences in favor of the non-movant. *Milecrest Corp.*, 264 F. Supp. at 1362.

LEGAL FRAMEWORK

This Court has exclusive jurisdiction over actions by the United States to recover penalties imposed for a violation of 19 U.S.C. § 1592. 28 U.S.C. § 1582(1). The Court, "where appropriate, shall require the exhaustion of administrative remedies." *Id.* § 2637(d). Under the doctrine of exhaustion of administrative remedies, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *United States v. Int'l Trading Servs., LLC*, 40 CIT __, __, 190 F. Supp. 3d 1263, 1269 (2016).

This Court has found that to exhaust its administrative remedies, Customs "must perfect its penalty claim in the administrative process . . . by issuing a pre-penalty notice and a notice of penalty." *Int'l Trading Servs., LLC*, 190 F. Supp. 3d at 1269. The pre-penalty notice must include certain information. 19 U.S.C. § 1592(b). Upon findinG a violation, Customs also "shall issue a written penalty claim." *Id.* § 1592(b)(1). The penalty claim "shall specify all changes in the information" provided in the pre-penalty notice and provide a "reasonable opportunity . . . to make representations, both oral and written." *Id.*

However, "[i]t is [] well established that § 2637(d) grants the court the discretion to waive § 1592(b) exhaustion in appropriate circumstances." *United States v. Nitek Elecs., Inc.*, 36 CIT __, __, 844 F. Supp. 2d 1298, 1303 (2012). The exhaustion of administrative remedies is not "strictly speaking a jurisdictional requirement." *United States v. Rotek, Inc.*, 22 CIT 503, 508 (1998) (citations omitted). Thus, "the court must focus not on a rigid application of the agency's regulations, but rather, on whether the defendant was afforded sufficient opportunity to be heard so as to justify the court's retention of jurisdiction without further exhaustion of the administrative remedies." *Id.*

DISCUSSION

I. Positions of the Parties

Defendant moves to dismiss for lack of subject matter jurisdiction on the basis that plaintiff failed to exhaust its administrative remedies. Def. Mot. Dis. at 1. Mr. Ho claims that while the Government alleges to have issued a notice of penalty on June 21, 2018, Compl. ¶ 14, Mr. Ho claims to have never in fact received the notice. ECF No. 4, Ex. 3 ¶ 4.

The purpose of "issu[ing] a written penalty claim" is both to "specify all changes in the information" provided in the pre-penalty notice as well as to provide "a reasonable opportunity . . . to make representations, both oral and written." 19 U.S.C. § 1592(b)(2). It is on that basis that Mr. Ho argues that "he did not have a reasonable opportunity to be heard so as to justify the Court's retention of jurisdiction in this case." Def. Mot. Dis. at 10. Customs "must perfect its penalty claim in the administrative process . . . by issuing a pre-penalty notice *and* a notice of penalty," Mr. Ho argues to the court. Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, ECF No. 8 ("Def. Rep.") at 9 (citing *Int'l Trading Servs., LLC*, 190 F. Supp. 3d at 1269). Defendant submits that proximity to the expiration of the statute of limitations rendered the circumstance "exceptional" such as to require the use of certified mail and/or Federal Express appropriate. Def. Rep. at 9. "Because Customs was behind its own deadline . . . such a circumstance would be considered 'exceptional.'" *Id.*

The Government argues that subject matter jurisdiction is proper on the basis that CBP exhausted its administrative remedies as required under 19 U.S.C. § 1592(b)(2). Pl. Opp. Mot. at 5–8. The Government argues that administrative remedies were exhausted because Customs issued a penalty notice, and the "mailbox rule" presumes that it was received by Mr. Ho.[4] *Id.* at 5–6. The penalty notice was mailed to Mr. Ho and Atria at three different addresses, and only one of the notices was returned undelivered. ECF No. 7, Ex. 1 ¶¶ 5–8. Moreover, Mr. Ho admitted to receipt of the pre-penalty notice at one of the same addresses to which the penalty notices were sent. Pl. Opp. Mot. at 6. In the alternative, the Government argues

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[4] The mailbox rule is a tool used to determine – when evidence is inconclusive – whether or not receipt has been accomplished. It instructs that:

> if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

Rios v. Nicholson, 490 F.3d 928, 930–31 (Fed. Cir. 2007) (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)).

that defendant here had sufficient opportunity to be heard based on receipt of the pre-penalty notice so that jurisdiction is proper without exhaustion of administrative remedies. *Id.* at 7.

II. Analysis

Defendant's claim that this Court lacks subject matter jurisdiction fails because Customs exhausted its administrative remedies by following the procedure for issuance of both pre-penalty and penalty notices specified under 19 U.S.C. § 1592. Even if exhaustion were a matter of jurisdiction, the court finds that Customs exhausted administrative remedies in this case.

This Court has found that to exhaust its administrative remedies, Customs must issue a pre-penalty notice and a notice of penalty. *Int'l Trading Servs., LLC*, 190 F. Supp. 3d at 1269. Here, evidence offered by the Government demonstrates that Customs adhered to the administrative process. Notwithstanding defendant's allegation that he did not receive a copy of the penalty notices, Customs issued both notices as required by 19 U.S.C. § 1592(b). As discussed above, copies of the penalty notice were mailed to Mr. Ho and Atria at three separate addresses (including the address at which Mr. Ho confirmed receipt of the pre-penalty notice), and only one mailing was returned undelivered. ECF No. 7, Ex. 1 ¶¶ 5–8. The "mailbox rule" presumes that Mr. Ho received the penalty notice. *See Rios*, 490 F.3d at 930–31.

Customs' standard process is to send notices by regular mail, *Id.* ¶ 4, but Mr. Ho would like the court to find the Government at fault in this case for Customs' failure to employ special mail procedures. Whether or not use of regular mail was proper in this case, "[p]rocedural errors by Customs are harmless unless the errors are 'prejudicial to the party seeking to have the action declared invalid.'" *Am. Nat'l Fire Ins. Co. v. United States*, 30 CIT 931, 942, 441 F. Supp. 2d 1275, 1287 (2006) (quoting *Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990)). Any such harmless error here would not justify dismissal of the complaint.

Even assuming *arguendo* that Mr. Ho never received the notice, dismissal for lack of subject matter jurisdiction would not be appropriate here. Since Mr. Ho "was afforded sufficient opportunity to be heard," *Rotek, Inc.*, 22 CIT at 508, a waiver of the exhaustion requirement would be warranted based on the circumstances.

Whether a defendant has sufficient opportunity to be heard depends on whether defendant has notice of the allegations against him, *id.*; notice may be actual or constructive.[5] Defendant has not made a sufficient showing that he did not have not have a reasonable opportunity to be heard in this case. Customs sent the first pre-penalty notice for this case on June 8, 2018, Compl. ¶ 12, and Mr. Ho confirmed receipt of this notice. ECF No. 4, Ex. 1 ¶ 3. As the Government points out, Pl. Opp. Mot. at 67, over six months elapsed from the issuance of the pre-penalty notice to the filing of this lawsuit, providing Mr. Ho "ample opportunity to participate at the administrative level." *United States v. KAB Trade Co.*, 21 CIT 297, 301 (1997) (defendant had "ample opportunity" when more than two years elapsed from the date of the pre-penalty notice to the beginning of the enforcement action). Since a pre-penalty notice was issued, Mr. Ho "had constructive — if not actual — notice of the administrative proceedings and the potential for his personal liability." *Int'l Trading Servs., LLC*, 190 F. Supp. 3d at 1271. Record evidence shows that Mr. Ho "was or should have been aware" of the allegations against him. *KAB Trade Co.*, 21 CIT at 300.

In sum, Mr. Ho was provided notice of the allegations against him as required by the statute. Accordingly, his argument that Customs failed to exhaust administrative remedies lacks merit and this Court has jurisdiction over the claim. Even if administrative remedies were not exhausted, the circumstances indicate that Mr. Ho had a sufficient opportunity to be heard.

Service of Process and Personal Jurisdiction

BACKGROUND

It is uncontested that on April 8, 2019, Mr. Ho was served at his residence in Fremont, California by Timothy Ault, the Government's process server.[6] However, Mr. Ho was served with two copies of the complaint only (one for himself and one for the company) and no summons. ECF No. 4, Ex. 1 ¶ 5. Plaintiff's Sur-Reply in Support of Its Opposition to Defendant's Motion to Dismiss, ECF No. 20 ("Pl. Sur-Rep.") at 3. The Government thus sought to serve Mr. Ho again to cure this defect in the initial attempted service. The Government claims that Mr. Ault attempted to serve Mr. Ho on May 27, 28, 29, and

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[5] A defendant "has constructive notice if she 'was or should have been aware that under certain circumstances she could be held accountable' for customs penalties owed by a corporation." *United States v. KAB Trade Co.*, 21 CIT 297, 300 (1997) (quoting *United States v. Priority Products, Inc.*, 793 F.2d 296, 301 (Fed. Cir. 1986)).

[6] According to Mr. Ault's declaration of service, he has been a registered process server since 1992, during which time he has completed service between 7,000 and 8,000 times per year, on average. ECF No. 14, Ex. 2 ¶ 1. According to Mr. Ault, "[i]t is extremely rare that defendant [sic] that I have served claims to have not been served. There were 5 claims in all of 2018." *Id.*

30, 2019, including attempts early in the morning and late in the evening, but, according to Mr. Ault, there was no answer at the residence for any of those attempts. Pl. Sur-Rep. at 4.

The Government claims that Mr. Ault was finally able to effect service of process on June 1, 2019. *Id.* at 9–11. To support this claim, the Government relies on the account of Mr. Ault — who claims that he personally effected service when he "left [the documents] on the ground in [Mr. Ho's] presence," ECF No. 14, Ex. 2 ¶ 4 — as well as video footage from outside Mr. Ho's residence. Exhibit A to Declaration of Kevin Ho, ECF No. 9. However, defendant contests this assertion by providing evidence that defendant was away from his residence at this time, thus precluding the possibility that service was effected pursuant to USCIT Rule 4(d). Def. Opp. Mot. at 5–8. Defendant also denies that video footage supports the Government's claim because the only person to appear in them is Mr. Ault himself. *Id.*

STANDARD OF REVIEW

USCIT Rule 12(b)(5) allows a defendant to seek dismissal for insufficient service of process. A party filing a motion under USCIT Rule 12(b)(5) "is essentially contesting the manner in which process of service was performed." *Ramirez De Arellano v. Colloides Naturels Int'l*, 236 F.R.D. 83, 85 (D.P.R. 2006) (describing a motion to dismiss for insufficient service of process under the analogous FRCP 12(b)(5) rule). Specifically, "[a] Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or the lack of delivery of the summons and complaint." 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1353 at 340 (3d. ed.).

Once the sufficiency of service of process is challenged, the burden shifts to plaintiff to prove proper service. *Lopez v. Municipality Dorado*, 979 F.2d 885, 887 (1st Cir. 1994). In the case of a factual dispute regarding service, a judge may make factual findings necessary to resolve motions to dismiss for lack of personal jurisdiction and ineffective service of process. *See, e.g.*, *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 713 (7th Cir. 2002) (personal jurisdiction); 5B Wright & Miller, *supra* § 1353 at 340, 345 (stating that "the defense of improper service of process involves a matter in abatement and does not go to the merits of the action" and that any "factual question raised by the affidavits or other evidence presented on . . . a Rule 12(b)(5) motion should be determined by the district court").

When the validity of service of process is unclear, "the simplest solution . . . is to quash [service of] process and allow the plaintiff another opportunity to serve the defendant." 5B Wright & Miller, *supra*, § 1354. *See also Bakhshi v. McCleod-Wilson*, No. 03–5592, 2006 U.S. Dist. LEXIS 58305, at *1 (E.D.N.Y. Aug. 10, 2006) ("[t]he remedy for service of a defective summons is to quash service of process — not to dismiss the action"). In doing so, the Court has the "discretion to order conditions, including time constraints, within which the plaintiff may make [another] attempt at service." 5B Wright & Miller, *supra*, § 1354.

LEGAL FRAMEWORK

I. Effective Service of Process

USCIT Rule 4(d) governs the methods of service of process in this action. Rule 4(d)(2)(A) specifically prescribes that "an individual . . . may be served in a judicial district of the United States by . . . delivering a copy of the summons and complaint to the individual personally." Rule 4(d)(1) also allows for service to be effected by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where service is made." In this case, that state is California. California Code of Civil Procedure § 415.10 mirrors USCIT Rule 4(d)(2)(A), stating that, "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery."

California courts have long held that, pursuant to the California rule, a party may not evade service by physically refusing it. For example, California courts will not permit a defendant "to defeat service by rendering physical service impossible." *Khourie v. Sabek, Inc.*, 220 Cal. App. 3d 1009, 1013 (1990). More specifically:

> [W]hen [people] are within easy speaking distance of each other and facts occur that would convince a reasonable [person] that personal service of a legal document is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand.

In re Application of Ball, 2 Cal. App. 2d 578, 579 (1934). In such a case, in which the person being served declined to accept the documents offered, service may be made merely by depositing the documents in some appropriate place where they would be most likely to come to the attention of the person being served." *Crescendo Corp. v. Shelted, Inc.*, 267 Cal. App. 2d 209, 212 (1968).[7]

[7] USCIT Rule 4(d)(2)(B) also states that an individual may be served by "leaving a copy of [the summons and the complaint] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." California law similarly allows for an individual to be served by leaving copies with certain other persons at the individual's

Finally, federal courts may not exercise personal jurisdiction over a defendant until "the procedural requirements of service [are] satisfied." *Nuance Communications, Inc. v. Abby Software House, et al.*, 626 F.3d 1222, 1236 (Fed. Cir. 2011) (citing *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)). "[A]ctual notice alone" will not suffice. *Osrecovery, Inc. v. One Group Int'l, Inc. et al.*, 234 F.R.D. 59, 60–61 (S.D.N.Y. 2005); *see also Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 808 (1997). "Although minor or technical defects in a summons in certain circumstances do not render service invalid, defects that . . . show a flagrant disregard for the rule do," such as failing to serve the summons upon the defendant. *Osrecovery, Inc.*, 234 F.R.D. at 59; *see also Dill v. Berquist Const. Co., Inc.*, 24 Cal. App. 4th 1426, 1439, n.12 (1994) (stating that while the requirement of service in California should be construed liberally, such liberal construction may not excuse a total failure to comply with the rule).

II. Time Limits for Service of Process

The plaintiff must also effect service within a specified period of time. USCIT Rule 4(l) governs the time limits for service of process in this action. The rule provides, in relevant part, that:

> If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

USCIT Rule 4(l). Thus, the CIT *must* grant more time to complete service if the plaintiff demonstrates good cause for failing to serve defendant within the 90-day period. *See id*. In addition, the CIT *may* grant an extension even absent good cause, as a matter of the court's discretion. *See id.*; *United States v. Rodrigue*, 33 CIT 1453, 1471, 645 F. Supp. 2d 1310, 1329 (2009) (citing *Henderson v. United States*, 517 U.S. 654, 662–63 (1996), and the corollary Federal Rule of Civil Procedure 4(m), Advisory Committee Note, 1993 Amendments).

"usual mailing address," but additional requirements, including "mailing a copy of the summons and complaint by first-class mail," are not prescribed in the analogous USCIT Rule 4(d)(2)(B). *See* California Code of Civil Procedure § 415.20. Whether Mr. Ho was served by "someone of suitable and age discretion" besides Mr. Ault is not at issue in this case.

DISCUSSION

I. Whether Service Was Effected

A. Positions of the Parties

The Government's argument for service of process is based on a claim of evasion. Pl. Sur-Rep. at 9–10. As discussed above, under California law a party may not evade service by physically refusing it. *Khourie*, 220 Cal. App. 3d at 1013. The Government claims that on June 1, "Mr. Ho answered the door, recognized Mr. Ault from his prior service . . . and immediately shut the door to prevent Mr. Ault from handing him the documents." Pl. Sur-Rep. at 10. Mr. Ault claims that he and defendant were "within easy speaking distance of each other." *In re Application of Ball*, 2 Cal. App. 2d at 579. Thus, Mr. Ho's alleged refusal "to take the documents offered" would allow for service to be made "by merely depositing the documents in some appropriate place where they would be most likely to come to the attention of the person being served," *Crescendo Corp.*, 267 Cal. App. 2d at 212, as Mr. Ault evidently did here by leaving the papers on the "ground in his [Mr. Ho's] presence." ECF No. 14, Ex, 1 ¶ 4. The Government also argues that video evidence supports Mr. Ault's declaration because it shows Mr. Ault "reacting" to Mr. Ho at the door,[8] Exhibit A to Declaration of Kevin Ho, ECF No. 9, while footage from a second camera system "may also reflect that Mr. Ho opened the door" from another angle.[9] Pl. Sur-Rep. at 2. If the events occurred as the Government alleges, then service was effected under California law in accordance with USCIT Rule 4(d)(1).

However, defendant rejects Mr. Ault's account and claims that no one was at his residence at the time of Mr. Ault's attempted service, thus precluding the possibility that service was effected. Def. Opp. Mot. at 5–8. Defendant provides evidence that he was "either at [a] restaurant or at [his] parents' home during [the] time of the purported service," ECF No. 16, Ex. 5, and did not return to his residence until several days later. *Id.* Def. Rep. at 2–3. Defendant attempts to cast doubt on the credibility of Mr. Ault by pointing out the Government's admission that Mr. Ault misidentified Mr. Ho in the companion case, *United States v. Ho*, CIT No. 19–00102 ("*HO II*"), ECF No. 9 at 3. In

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[8] To be clear, the Government infers Mr. Ho's presence based on Mr. Ault's own body movements in the video footage.

[9] Mr. Ho provided a recording from a second device — a Ring Doorbell System. According to the Government, "[Mr. Ho] edited it to include only the process server's initial few seconds standing at his door. The remainder of the Ring Video should show the process server reacting to Mr. Ho answering the door." Pl. Sur-Rep. at 2.

HO II, Mr. Ault claimed to have personally served Mr. Ho on a date, June 30, when it was later proven that Mr. Ho was out of the country. *Id.* Defendant emphasizes that the only person to appear in the video footage from June 1 is Mr. Ault, and neither Mr. Ho, nor anyone else, emerges from the residence in the videos provided. Def. Rep. at 2–3. If defendant's account is correct, then service could not have been effected in accordance with USCIT Rule 4(d).

B. Analysis

Here, the court concludes that service was not effected because "plaintiffs have the burden of proving proper service," *Lopez*, 979 F.2d at 887, and the record indicates that Mr. Ault did not serve Mr. Ho on the date in question. In particular, the reliability of the process server, the absence of any individual other than Mr. Ault in video recordings, and the credible evidence provided by defendant that he was elsewhere on the afternoon of June 1, all call into question the Government's claim that Mr. Ault personally interacted with and served Mr. Ho at his residence.

The Government asks the court to resolve a factual dispute regarding service of process in the Government's favor by relying upon the account of Mr. Ault and by making inferences from Mr. Ault's body movements captured in the video footage ("At approximately 3:10:20, Mr. Ault turns to the right. It again *appears* that he is reacting to something to his front right.") Pl. Sur-Rep. at 6 (emphasis supplied).

The video footage does not support the inferences that the Government suggests. The video exhibits ordinary body movements by Mr. Ault outside of the entrance to Mr. Ho's door from which the court does not infer the presence of a second individual. To the contrary, the video shows that Mr. Ault rings the doorbell twice, then reaches down to place the service papers on the ground outside the door, without any discernible interaction with another individual.[10]

Moreover, the record provides ample reason to question the reliability of Mr. Ault's account. Not only did Mr. Ault fail to serve Mr. Ho with a copy of the summons on April 8, 2019, but he also claimed to have served Mr. Ho in *HO II* on June 30, 2019, a date on which Mr. Ho is confirmed by Customs to have been out of the country. *HO II*, ECF No. 9 at 3. Further, the Government does not explain adequately

[10] The court does not believe that additional video footage would contribute to its understanding of the circumstances surrounding the alleged service of process. Accordingly, the court declines to order production of any additional video footage.

its decision to replace Mr. Ault in *HO II*. Teleconference, ECF No. 26 at 44:50–46:30. The weight of the evidence suggests that the decision related to Mr. Ault's demonstrated unreliability, despite assertions by the Government to the contrary.

Finally, the declarations of Mr. Ho and other individuals, the receipts and other evidence of his whereabouts that afternoon, as well as the video recordings, all suggest that Mr. Ho's residence was unattended during the alleged service of process.

For these reasons, the Government failed to carry its burden of proof that service of process was made. As stated above, when the service of process is defective or plaintiff has not met its burden, "the simplest solution . . . is to quash [service of] process and allow the plaintiff another opportunity to serve the defendant." 5B Wright & Miller, *supra*, § 1354. *See also Bakhshi v. McCleod-Wilson*, 2006 U.S. Dist. LEXIS 58305, at *1 ("[t]he remedy for service of a defective summons is to quash service of process — not to dismiss the action").

Since the Government has not sufficiently demonstrated proper service, the appropriate remedy is to quash service. Accordingly, and for the reasons stated above, the court hereby quashes service of process that purportedly occurred on June 1, 2019.

II. Whether the Court Should Extend Time for Service

The court, in quashing service of process, has the "discretion to order conditions, including time constraints, within which the plaintiff may make [another] attempt at service." 5B Wright & Miller, *supra*, § 1354. Thus, this court orders that plaintiff effect service upon defendant by 60 days from the date of this Order.

Defendant may object to the extension of time for service on the grounds that the service period prescribed by USCIT Rule 4(l) has since expired. However, it is within this court's power to grant an extension of time even absent good cause, as a matter of the court's discretion. *See* USCIT Rule 4(l); *Rodrigue*, 33 CIT at 1471 (citing *Henderson v. United States*, 517 U.S. 654, 662–63 (1996), and the corollary Federal Rule of Civil Procedure 4(m), Advisory Committee Note, 1993 Amendments).

The court does not make a finding on whether good cause exists for an extension of time because, regardless of the outcome of that inquiry, the court chooses to extend the service period as a matter of its own discretion. "To decide otherwise would be a waste of the Court's and the parties' time and resources." *Rivera-Otero,* 317 F.R.D. at 329. The defects in the Government's service of process on April 8, 2019, and June 1, 2019, are easily curable, and there is no significant prejudice to defendant in defending suit due to this extension. On the other hand, the potential prejudice to the Government is high if this court elects to dismiss the suit because the statute of limitations will prevent the Government from refiling.

CONCLUSION

During Episode 5 of Season 2 of the recently concluded Showtime series *Homeland*, based on the Israeli series *Prisoners of War*,[11] Nicholas Brody (played by Damian Lewis) is brought to an unknown location while in the custody of the Central Intelligence Agency. Taking over the interrogation, Carrie Mathison (Clare Danes) confronts Brody about his shifting explanations for the period of time during which he was held captive by al-Qaeda as a prisoner of war, in particular regarding the possibility that he was turned by the enemy and poses a significant risk to national security.[12]

"What do you say, when people ask you what it was like over there?" Carrie asks.

"As little as possible," Brody replies.

"But if they insist?" asks Carrie.

"I lie. Tell them stories they want to hear," responds Brody.

Carrie declares in response, "It's the lies that undo us. It's the lies we think we need to survive. When was the last time you told the truth?"

* * *

In quashing service of process here, this court need not determine nor speculate as to whether the Government's process server, Mr. Ault, misrepresented the circumstances of the alleged service or merely mistakenly identified another individual as Mr. Ho. Ultimately, such a determination is unnecessary for this court to render the service of process insufficient.

For the reasons stated above, defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) is denied, and service of process upon defendant is quashed. Further, defendant's motion to dismiss for insufficiency of service of process is, for the time being, denied. The Government is provided sixty (60) days from the date of this Order to effect proper service on defendant. If service is not made on defendant within that time, the motion to dismiss for insufficient service of process will be granted. Until proper service of process is accom-

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[11] PRISONERS OF WAR, or חטופים, *Hatufim* – literally "Abductees" – was created and directed by Gideon Raff and originally aired in Israel from 2010 to 2012.

[12] HOMELAND (Teakwood Lane Productions, Cherry Pie Productions, Keshet Broadcasting, Fox 21 (2011–14), Fox 21 Television Studios (2015–2020), Showtime Networks, Studio Babelsberg; Executive Producers Debora Cahn, Alex Gansa, Howard Gordon, et al., 2011–2020).

plished, this Court lacks personal jurisdiction to entertain any further proceedings in this cause of action. The court does not rule on defendant's 12(b)(2) and 12(b)(5) motions, and, as a result, is unable to address the 12(b)(6) motion at this time.

Dated: May 15, 2020
New York, New York

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

Slip Op. 20–67

THE NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiff, THE BEER INSTITUTE, Intervenor-Plaintiff v. UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS AND BORDER PROTECTION, STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY, and JOHN SANDERS, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants.

Before: Jane A. Restani, Judge
Court No. 19–00053

[The motion to stay the court's judgment pending appeal is denied]

Dated: May 15, 2020

Peter D. Keisler, *Virginia A. Seitz*, *Tobias S. Loss-Eaton*, and *Barbara G. Broussard*, Sidley Austin, LLP, of Washington, D.C., *Catherine E. Stetson* and *Susan M. Cook*, Hogan Lovells US LLP, of Washington, D.C., *Peter C. Tolsdorf* and *Leland P. Frost*, Manufacturers' Center for Legal Action, of Washington, D.C., for Plaintiff The National Association of Manufacturers.

James E. Tysse, *Lars-Erik A. Hjelm*, *Raymond P. Tolentino*, *Devin S. Sikes*, and *Jeffrey W. Kane*, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, D.C., for Intervenor-Plaintiff The Beer Institute.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., and *Alexander J. Vanderweide*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendants U.S. Department of the Treasury, U.S. Customs and Border Protection, *Steven T. Mnuchin*, and *John Sanders*. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C., *David M. Morrell*, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, of Washington, D.C., *Jeanne E. Davidson*, Director, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., *Claudia Burke*, Assistant Director, National Courts Section, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of counsel on the brief were *Daniel J. Paisley*, U.S. Department of the Treasury, of Washington, D.C., and *Alexandra Khrebtukova*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

John M. Peterson, *Richard F. O'Neill*, and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., for *Amicus Curiae* Customs Advisory Services, Inc.

OPINION AND ORDER

Restani, Judge:

In a recent opinion, the court held that certain regulations affecting duty drawback were inconsistent with the animating statute. *See Nat'l Ass'n of Mfrs v. United States*, 427 F. Supp. 3d 1362, Slip Op. 20–9 (CIT 2020) ("Slip Op 20–9"); *see also* Judgment, ECF No. 45 (Feb. 18, 2020). The government has appealed that decision to the Court of Appeals for the Federal Circuit. *See* Notice of Appeal, ECF No. 49 (April 17, 2020). The matter presently before the court is a motion by the government under USCIT Rule 62(e) to stay the court's judgment in this case pending appeal. Mot. for a Stay of the Enforcement of J. and Suspension of Drawback Claims Pending Appeal, ECF No. 50 (April 17, 2020) ("Gov. Mot."). The plaintiff, intervenor-plaintiff, and *amicus curiae* oppose the motion. Pl. and Intervenor-Pl.'s Joint Opp. To Def.s' Mot. for a Stay and Suspension of Drawback Claims Pending Appeal, ECF No. 52 (May 8, 2020) ("Pl. Opp."); Br. of Amicus Curiae, Customs Advisory Services, Inc. Opp. Def.s' Mot. to Stay Enforcement of J. and Suspension of Drawback Claims Pending Appeal, ECF No. 53 (May 8, 2020) ("CASI Br."). For the reasons stated below, the government has failed to demonstrate that a complete stay of the judgment is warranted. Thus, to preserve the status quo, the court denies the government's motion and instead will order suspension of liquidation of relevant entries pending the resolution of the current appeal, as the finality of liquidation appears to be the main claim of harm by the government.

I. DISCUSSION

USCIT Rule 62(e) permits a court to stay the enforcement of a judgment pending an appeal taken by the government. *See* USCIT Rule 62(e). A stay is not reflexively given as it is an "intrusion into the ordinary process of administration and judicial review." *See Nken v. Holder*, 556 U.S. 418, 428 (2009). A party seeking a stay bears the burden of showing that one is justified under the circumstances. *Id.* at 433–34. The court considers four factors in determining whether a stay is warranted:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 426 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Each is taken in turn.

a. The Government will not likely Succeed on Appeal

Although a "substantial legal question," may be sufficient to show a likelihood of success on the merits, *see E.I. DuPont De Nemours & Co. v. Phillips Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987), the government must still make a strong showing that a substantial legal question exists such that success on appeal is likely. *See Nken*, 556 U.S. at 434 (it is "not enough that the chance of success on the merits be 'better than negligible.'") (citation omitted).

The government's arguments for the likelihood of success on the merits are largely the same ones[1] this court considered and rejected. *See* Gov. Mot. at 10–15. As detailed in the court's opinion, the regulation unlawfully expands the understanding of "drawback," which results in obvious and irreconcilable statutory conflicts. *See* Slip Op. 20–9 at 9–13. The government's attempt to undermine the court's reasoning with the same arguments it made previously are no more persuasive now than they were then.[2] Much of the government's argument for its likelihood of success on appeal is predicated upon its faulty definition of "drawback." *See id*. For instance, the government argues that the court's decision perpetuates "untenable results" with regard to 19 U.S.C. § 1313(v) and that its reading gives that provision "no effect at all." Gov. Mot. at 14. This ignores that the court's opinion and judgment *maintain* the regulatory definition of drawback prior to the change at issue. See Slip Op. 20–9 at 9–10, 13; *see also* Judgment (invalidating the final sentence added to the definition of drawback). Section 1313(v) is not rendered meaningless by the court's opinion, it is simply given its prior meaning. The government makes no new argument in its motion that causes the court to doubt its prior determination that the promulgated regulations conflicted with the unambiguous text of the statute. Success on appeal appears remote.

Agencies cannot "override Congress' statutory command through regulatory means," as they attempt to do here. *See Natural Res. Def. Council, Inc. v. Ross*, 348 F. Supp. 3d 1306, 1312 (2018). That the issue presented is "a question of first impression," Gov. Mot. at 10, is

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[1] The government mentions that the court did not directly address their passing argument regarding 19 U.S.C. §§ 1313(n) and (o). The government's argument is that use of "refunded, waived or reduced" in these subsections supports its understanding of "drawback." Defs. Mem. in Resp. to the Mots. for J. on the Agency R., at 11 ECF No. 30 (Aug. 28, 2019). As plaintiffs point out, however, this language is pulled from trade agreements and is concerned with, and only applies to customs duties on imports, not excise tax. Pl. Opp. at 7–8. Thus, these provisions do little, if anything, to further the government's position.

[2] The government overreads the court's opinion with regard to the "notwithstanding" clause of 19 U.S.C. § 1313(j)(2) in arguing that it could be read to nullify various provisions limiting drawback. *See* Gov. Mot. at 12–13. As 19 U.S.C. § 1313(j)(2) goes hand and hand with the calculation methodology of 19 U.S.C. § 1313(l) the court cannot discern how the court's decision regarding those sections would nullify totally unrelated and very specific restrictions on drawback.

insufficient to demonstrate a likelihood of success on appeal. The government has not made a strong showing that they will prevail on appeal.

b. The Government will Not Suffer Irreparable Injury Absent a Stay

The government argues that absent a stay, it will be irreparably harmed if the court's judgment is overturned on appeal. Gov. Mot. at 4–7. The government expresses concern that entries will be deemed liquidated by operation of law during the appeals process, leaving the government without statutory recourse should its appeal succeed. *Id.*

As noted by the opposing parties, *see* Pl. Opp. at 11–17, it appears that any potential for irreparable harm to the government is avoided by a much narrower form of relief—suspension of liquidation. By suspending liquidation of the entries at issue, while simultaneously requiring the government to process fully-bonded claims for accelerated drawback, the court ensures that the government will be able to recoup any improperly issued drawback payments if it ultimately prevails on appeal. *See* 19 U.S.C. § 1504(a)(1); *see also* 19 C.F.R. § 190.92 (allowing for accelerated payment of drawback prior to liquidation, if a claimant furnishes sufficient bond); 19 C.F.R. § 191.92 (same).[3] With the ability to recover any improperly paid drawback funds, then the only apparent "harm" to the government is the administrative costs in issuing drawback. *See* 19 C.F.R. § 113.65 (b) (detailing the requirement to repay erroneous accelerated drawback payment determined at liquidation). But the scheme Congress established to allow accelerated drawback and later recoupment if the claimant does not prevail necessarily involves administrative costs. Thus, the regulatory burden of processing accelerated payments that could, hypothetically, be found unlawful on appeal does not meet the standard for irreparable harm here as any harm is resultant from defendants' statutory and regulatory mandated obligations. *See Philipp Bros., Inc. v. United States*, 640 F. Supp. 261, 265 (CIT 1986).

c. A Stay of Judgment will Injure Other Parties

The government incorrectly argues that opposing parties will face no substantial injury if a stay is granted. Gov. Mot. at 7–8. Not so. In

[3] Even in the absence of an order suspending liquidation, it is likely that the court would be able to reliquidate any improperly liquidated entries under its equitable powers. *See Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1347 (Fed. Cir. 2019). Likewise, the government, in certain situations that may be applicable here, *see* CASI Br. 9–10, is enabled to suspend liquidation on its own accord. *See* 19 U.S.C. § 1504(b). To avoid the potential for further litigation, however, the court will not rely on these potential avenues for relief. The government does not object to suspension of liquidation if a broader stay is not granted. *See* Teleconference, ECF No. 58 (May 14, 2020).

contrast to the government's speculative claims of harm, granting a stay of judgment will cause opposing parties certain harm should this court's judgment be affirmed. As noted in this case, and in this court's previous opinion in *Tabacos de Wilson v. United States*, defendants have flouted their statutory obligations to promulgate regulations in a timely fashion, which has resulted in some drawback claims remaining unprocessed for years. *Tabacos de Wilson v. United States*, 324 F. Supp. 3d 1304, 1315 (CIT 2018) (holding that agency failed to meet the two-year legislative deadline to publish regulations to implement the Trade Facilitation and Trade Enforcement Act of 2015). This delay in passing the regulations has resulted in the delayed or nonpayment of drawback to claimants.[4]

To require the prevailing parties to continue to wait the time it takes to complete this appeal will cause them to lose the time value of money should they prevail, as drawback payments due not account for interest. *See* 19 C.F.R. § 190.22(a)(1)(ii). As plaintiffs and *amicus curiae* highlight, the delay in drawback payment might adversely impact the working capital of claimants. *See* CASI Br. at 12–13; Pl. Opp. Exs. B, C (declarations describing the significant sums of money plaintiffs claim they are owed in drawback). Taking these financial impacts together, granting the government's motion would likely injure numerous drawback claimants, including those who are not presently before the court. At least here, where the court has already adjudicated the rights of the parties, the harm to claimants' working capital and other financial consequences weighs against a stay.

d. The Public Interest Favors Denying a Stay

The government is correct that the public interest is served by the protection of the public fisc. *See* Gov. Mot. at 8–9; *see also* 19 U.S.C. § 1623. But the public interest is also served by the timely execution and adherence to our laws. *See Kwo Lee, Inc. v. United States*, 24 F. Supp. 3d 1322, 1332 (CIT 2014) (weighing Customs' "public interest in protecting the revenue of the United States," against the public interest in "accurate and effective, uniform and fair enforcement of trade laws.") (citations omitted). As noted above, the government is fully bonded when issuing accelerated drawback, so any harm to the public fisc is speculative at best. The government's contention that it would need to "undertake a massive regulatory overhaul," to implement the judgment is a bald statement unsupported by any proffered

[4] Further, the government informed the court that although judgment was entered in February, it believes it will take even more time to begin the process of paying drawback. *See* Gov. Status Report, ECF No. 55 (May 13, 2020). The court has directed the parties to consult on appropriate ways to move this matter forward. *See* Teleconference, ECF No. 58 (May 14, 2020).

evidence. *See* Gov. Mot. at 8–9. Although processing claims certainly takes administrative effort, the ability to file and receive substitution drawback existed well before the invalidated regulations were enacted, and the court sees no reason why whatever systems the government had in place to process those claims before the passage of those regulations would be inadequate now. In these circumstances, the public interest is best served by allowing drawback claimants the benefit of the judgment.

II. CONCLUSION

On balance, the government has failed to demonstrate that a stay pending appeal is warranted. The court holds that plaintiff and intervenor-plaintiffs' suggestion to suspend liquidation sufficiently allays any harm to the government. Accordingly, upon consideration of government's motion for a stay, all papers and proceedings in this action, and upon due deliberation, the government's motion for a stay is denied. A form of order suspending liquidation will issue after appropriate language is submitted by plaintiffs.

Dated: May 15, 2020
New York, New York

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

Slip Op. 20–68

THE KALENCOM CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 15–00011

[Denying plaintiff's Rule 56 motion for summary judgment and granting defendant's Rule 56 cross-motion for summary judgment.]

Dated: May 18, 2020

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OPINION

Melanie (played by Reese Witherspoon), in a darkened space: "Andrew, are you on some sort of medication? What's going on? Where are we?" The lights brighten slightly to reveal that Melanie and Andrew are inside the main floor of Tiffany's Fifth Avenue: "Oh, my God . . . Oh, my God . . . Oh, my God."

Andrew (Patrick Dempsey), getting down on his knees: "Melanie Carmichael . . . will you marry me?"

Melanie: "Are you sure? I mean, a-a-are you really sure? Because if you're not sure, we could just go back to the car. It's only been eight months, Andrew — "

Andrew, standing: "You know I never do anything rash. And I usually never ask a question I don't already know the answer to . . . so . . . at the risk of being rejected *twice*, I'm gonna ask you again. Will you marry me?"[1]

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Reif, Judge:

At issue in this case is the classification of several different styles of jewelry boxes imported by The Kalencom Corporation ("Kalencom" or "plaintiff") into the United States. Plaintiff challenges a decision by United States Customs and Border Protection ("Customs") to classify the jewelry boxes under subheading 4202.92.90 of the Harmonized Tariff Schedule of the United States (HTSUS),[2] which covers "jewelry boxes . . . and similar containers" "with outer surface of sheeting of plastics" and carries a 17.6% *ad valorem* duty. Plaintiff argues that the product is correctly classified under subheading 4202.99.10, which covers "jewelry boxes . . . and similar containers" "wholly or mainly covered with paper" and carries a 3.4% *ad valorem* duty. The question presented is whether the subject merchandise should be classified under subheading 4202.92, because the articles have an "outer surface of sheeting of plastics" or under subheading 4202.99, because they are "wholly or mainly covered with paper."

Plaintiff filed suit challenging Customs' decision to deny plaintiff's protests of Customs' classification under the HTSUS of the jewelry boxes. Complaint, ECF No. 11 ("Compl.") ¶¶ 2, 4. *See also* Joint Procedural History and Joint Statement of Undisputed Facts, ECF No. 70 ("Jnt. Stmt. Facts") ¶ 7. The parties filed cross-motions for summary judgment addressing the proper classification of the jewelry boxes. *See* Pl.'s Mem. in Supp. Of Pl. Mot. for Summ. J., ECF No. 50 ("Pl. Br.") at 1; Mem. in Opp'n. to Pl.'s Mot. For Summ. J. and in Supp. of Def. Cross-Mot. for Summ. J., ECF No. 61 ("Def. Br.") at 1.

[1] Sweet Home Alabama (Touchstone Pictures 2002).

[2] All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2013 edition. This version was in effect from June through December 2013, during which time Kalencom entered the subject merchandise. *See* 19 C.F.R. § 141.69.

See also Pl.'s Opp. to Def. Cross-Mot. for Summ. J., ECF No. 66 ("Pl. Resp. Br.") at 1; Reply Mem. in Supp. of Gov. Cross-Mot. for Summ. J., ECF No. 68 ("Def. Reply Br") at 1. This Court has jurisdiction under 28 U.S.C. § 1581(a) (2012), which provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under 19 U.S.C. § 1515." For the following reasons, the court determines that the jewelry boxes are correctly classified under subheading 4202.92.90.

BACKGROUND

From June to December 2013, Kalencom imported into the United States 16 entries of different styles of jewelry boxes. The subject merchandise consists of jewelry boxes covered in one of three different types of covering material: Skivertex®, Metal-X®, or Pellaq®. Jnt. Stmt. Facts ¶ 12. These types of covering material generally function as "the exterior covering or wrap of a large variety of items, including books, packaging . . . menus, [and] photo albums." Def. Ex. 6 (Deposition of Jeffrey Hopkins) ("Hopkins Dep.") at 29:22–25. One of the key features of these types of covering material is their durability. *Id.* at 43:9–16. However, customers also seek out the visual effect, which is created based on the material's color, gloss and embossing. Jnt. Stmt. Facts ¶ 17. The coating process along with the saturation together form a single look, which also has a protective function. *Id.* ¶ 48.

These types of covering material are grouped into three "series," each defined by different colors and features. *Id.* ¶ 19. Series 1 type of covering material undergoes an embossing process; a roller, with heat and pressure, makes imprints on the covering material. *Id.* ¶¶ 19, 51. The Series 2 type "feature[s] varied ink patterns and then embossing." *Id.* ¶ 19. The Series 3 type is embossed and then "tipped." The embossing creates indentations that result in "peaks" and "valleys," and then the covering material is "tipped," whereby ink is applied only to the peaks created by the embossing. *Id.* ¶ 61, 62. Skivertex® is available in Series 1, 2 and 3, while Metal-X® is available only in Series 1 and Pellaq® is available only in Series 3. *Id.* ¶ 19.

Each of the three series of covering material consists of base paper applied with three layers of coating and additives (altogether, hereinafter the "constituent ingredients") and are manufactured through the same process. *Id.* ¶ 20. First, wood pulp is refined or formed into base paper. *Id.* ¶ 22.[3] The base paper is then saturated in an acrylic

[3] The base paper for Skivertex® and Pellaq® is approximately 0.24mm thick. Jnt. Stmt. Facts ¶ 23. The base paper for Metal-X® is approximately 0.1651mm or 0.1778mm thick. *Id.* ¶ 23.

polymer dispersion, comprised of polymers dispersed in water as well as additives, including clay, colorants and fixatives. *Id.* ¶¶ 24 - 25. Afterward, the saturated base paper is then heated to remove the water in the dispersion so that only the polymers and additives remain. *Id.* ¶ 31.

Next, the coating is created through a three-step process. The three steps result in three layers stacked on top of each other. Each step involves the use of acrylic based products. *Id.* ¶ 24. In the first step, one side of the impregnated base paper is applied with a bond coating that ensures that future layers of coating stay on top of the base paper rather than seep into it.[4] *Id.* ¶ 35. The main component of the bond coating consists of acrylic polymers dispersed in water, which contain additives such as defoamers and surfactants. *Id.* ¶ 36. Defoamers prevent "foaming" (the formation of bubbles that ruin the visual quality of the covering material) and other defects while surfactants help even out the bond coating. *Id.* The bond coating is then dried in a heated oven to remove all water, leaving the polymers and additives on one side of the covering material. *Id.* ¶ 37.

At this point, a coating of starch that acts as a glue is then added to the back side of the covering material. *Id.* This coating process is the only step that involves the back side of the covering material. The back side is ultimately affixed to the box and is not part of the outward facing side of the covering material.

The second step for the front side is called color coating and provides the covering material with "hide."[5] Color coating provides opacity and "hides" the base paper from sight. *Id.* ¶ 42. Applied on top of the bond coating, this layer consists of acrylic polymers dispersed in water and additives such as colorants, defoamers, and surfactants. *Id.* ¶ 38. The additives make the color coating merge smoothly with the other coatings and prevent foaming. *Id.* Once the color coating is applied, the covering material again goes through a heated dryer to remove all water, leaving only the acrylic polymer and the additives in the color coating. *Id.* ¶ 39.

The third step leads to the creation of the top coat — also known as the top layer — which prevents the color from rubbing off and provides abrasion resistance.[6] *Id.* ¶ 45. Applied above the color coating, the top coat consists of acrylic polymers dispersed in water and additives such as silicone oil, defoamer, surfactants and waxes. *Id.* ¶ 44. The silicone oil and waxes provide the covering material with

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[4] The bond coating is approximately 0.01mm thick. Jnt. Stmt. Facts ¶ 37.

[5] The color coating is approximately 0.04mm thick. *Id.* ¶ 40.

[6] The top coat is approximately 0.004mm thick. *Id.* ¶ 43.

"slip," allowing the material to slide off another slippery material. *Id.* After the top coat is applied, the covering material is dried to remove water from the top coating, leaving only the acrylic polymer and the additives in the top coat. *Id.* ¶ 45.

The three-step coating process is not the end; the covering material undergoes a final processing, which varies by series. Series 1 covering material must go through an embossing process. *Id.* ¶ 50. Series 2 covering material must go through two additional steps after the top coat is applied. In the first step, an ink pattern is printed on top of the top coat. *Id.* ¶ 57. The ink used is the same material used to make the top coat, augmented with some additional pigment. *Id.* In the second step, the covering material is embossed. *Id.* ¶ 58. Series 3 covering material must also go through two additional steps after the top coat is applied. In the Series 3 first step, the covering material is embossed to create indentations or "valleys" in the material. *Id.* ¶ 61. The ink used for Pellaq® "consists of a 100% solids formulated mixture continuing [sic] short-chained polymers (acrylic chemistry and possibly others), pigments, and additives." *Id.* ¶ 63.[7]

STANDARD OF REVIEW

United States Court of International Trade ("USCIT") Rule 56 permits summary judgment when "there is no genuine dispute as to any material fact . . . ." USCIT R. 56(a). The court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* "'[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . .,'" then summary judgment is appropriate. *Essex Mfg. v. United States*, 30 CIT 1, 3 (2006) (quoting USCIT R. 56(c)). "A genuine factual dispute is one potentially affecting the outcome under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Because there are no material facts disputed in this case,[8] summary judgment is appropriate.

This Court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a)(1). "[I]n cases contesting the denial of a protest, the court makes its findings of fact *de novo* based upon the record made before the court, 28 U.S.C. § 2640(a)." *Lerner New York, Inc. v. United States*, 908 F. Supp. 2d 1313, 1317 (CIT 2013).

[7] According to the covering materials' manufacturer, this ink is an acrylic polymer. Jnt. Stmt. Facts ¶ 63.

[8] The court concludes that the parties' joint statement of undisputed facts covers all material facts relevant to the classification of the subject merchandise.

This Court independently determines the correct classification of the subject merchandise. "The plaintiff has the burden of establishing that the government's classification of the subject merchandise was incorrect . . . ." *Lerner New York*, 908 F. Supp. 2d at 1317–8. "[The plaintiff] does not bear the burden of establishing the correct classification; instead, it is the court's independent duty to arrive at 'the correct result' . . . . " *Id*. (citations omitted). Further, "all 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).

Merchandise is to be classified based on the condition in which it is imported. *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). A two-step process guides the court in determining the proper classification of merchandise. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). First, the court must determine the meaning of "relevant tariff provisions." *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371 (Fed. Cir. 2009). This is a question of law. Next, the court must determine "whether the merchandise at issue falls within a particular tariff provision as construed." *Id.* at 1371–2. This is a question of fact. "[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)). As there is no dispute over material facts here, the court need consider only the first step.

LEGAL FRAMEWORK

The General Rules of Interpretation ("GRIs") of the HTSUS govern the proper classification of merchandise entering the United States. Codified at 19 U.S.C. § 1202, the HTSUS has the force of statutory law. *Aves. In Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). The GRIs "are applied in numerical order." *ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n.4 (Fed. Cir. 2005). GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. Both tariff classifications at issue in this case fall under the same heading. Accordingly, GRI 6, which concerns subheadings, guides the analysis. Under GRI 6, "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable." Further, "the relative section, chapter and subchapter notes also apply, unless the context otherwise requires." GRI 6.

Absent contrary legislative intent, HTSUS tariff terms are to be understood according to their common and commercial meanings. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). When interpreting a tariff term, the court may rely on its own understanding of the term and on secondary sources such as scientific authorities and dictionaries. *See North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (2001).

The court may also refer to the Explanatory Notes to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization (WCO) ("ENs"). Though the ENs are not binding on the court, they may guide the interpretation of a tariff term since they are "intended to clarify the scope of HTSUS subheadings and to offer guidance in their interpretation." *Len–Ron Mfg. Co.*, 334 F.3d at 1309. Although not binding, the ENs are "generally indicative of the proper interpretation of a tariff provision." *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007).

DISCUSSION

First, the court sets out the competing tariff provisions at issue in this case. Second, the court discusses the parties' contentions: the case of the United States ("defendant") for subheading 4202.92.90 and plaintiff's case for subheading 4202.99.10. Third, the court proceeds to the classification of the goods. In this respect, the court begins by considering the question of the "outer surface" — or, precisely what is on the exterior, facing outward — of the jewelry boxes. After finding that the three coating layers, in their entirety, are properly considered the outer surface of the jewelry boxes, the court analyzes whether the outer surface is comprised of "plastics," and, whether, as such, it constitutes a "sheeting of plastics" within the meaning of subheading 4202.92.90. Because the court determines that the outer surface of the jewelry boxes constitutes a sheeting of plastics, the goods are properly classified under subheading 4202.92.90. Subheading 4202.99.10, by its own language, omits jewelry boxes with an outer surface of sheeting of plastics, so no further consideration of this tariff provision is necessary. Accordingly, the court sustains Customs' classification.

I. Competing Tariff Provisions

Chapter 42 of the HTSUS covers "articles of leather; saddlery and harness; travel goods, handbooks and similar containers; articles of animal gut (other than silkworm gut)." In determining the classification of the subject merchandise, the parties agree that the products are appropriately classified under Heading 4202 of the HTSUS, which covers:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

However, the parties disagree on the proper subheading of the subject merchandise. Heading 4202 is first divided by the type of product: (1) "[t]runks, suitcases, vanity cases . . . and similar containers;" (2) "[h]andbags . . .;" (3) "[a]rticles of a kind normally carried in the pocket or in the handbag;" or, (4) "[o]ther." At the 6-digit subheading level, the "[o]ther" category of Heading 4202 is divided according to the composition of the product's "outer surface."

Defendant seeks classification of the jewelry boxes under subheading 4202.92, which covers products "with outer surface of sheeting of plastics or of textile materials." Plaintiff seeks to have the subject merchandise classified under subheading 4202.99, which is the "other" provision. This provision covers merchandise that does not fit into one of the other subheadings — specifically, that which is made "[o]f materials (*other than* leather, composition leather, sheeting of plastics, textile materials, vulcanized fiber or paperboard) *wholly or mainly covered with paper*." Subheading 4202.99 (emphasis supplied).

II. Positions of the Parties

As noted, defendant claims that the subject merchandise should be classified under subheading 4202.92.90, because it is comprised of jewelry boxes with an outer surface of sheeting of plastics. Def. Br. at 13–14. "Specifically, the boxes each have [sic] a covering material as its exterior surface and that covering material exhibits, on its outer surface, a continuous film of plastic, which is very thin compared to its length and breadth." *Id.* at 13. Defendant argues that the outer surface is comprised of plastics because "all of the elements of the HTSUS definition of 'plastic' are satisfied by the ingredients and process used to create [the covering material] — the materials that make up the outer surface." *Id.* at 21–22. With respect to sheeting, defendant relies on dictionary definitions to rebut plaintiff's claim that "sheeting" must have a specific thickness. *Id.* at 26–29. To the contrary, defendant argues, thickness may be used to differentiate between plastic "sheeting" and "film," but no authority supports the existence of a specific, absolute thickness requirement. *Id.* Further, defendant argues that the outer surface is comprised of plastics because the ENs to Chapter 39 state that plastics with non-plastic ingredients are still considered to be plastics despite the presence of those non-plastics. *Id.* at 19–21. For all of these reasons, according to defendant, the subject merchandise is appropriately classified as jewelry boxes with an outer surface of sheeting of plastics.

Plaintiff claims that the subject merchandise should be classified under subheading 4202.99.10 as "jewelry boxes" that are "wholly or mainly covered with paper". Pl. Br. at 4. Plaintiff argues against classification in subheading 4202.92 on the basis that the "outer surface" of the subject merchandise is neither "sheeting" nor made "of plastics", as provided in subheading 4202.92. *Id.* at 12–18. According to plaintiff, the top coating, plaintiff claims, "is disqualified as a 'sheeting of plastic' [sic] . . . because it is not a *continuous* sheet of plastic." *Id.* at 14 (emphasis supplied). Plaintiff also introduces dictionary definitions of "sheeting" to support the proposition that "sheeting" must have a thickness of at least 0.25mm. *Id.* at 6–7. In the case of the subject merchandise, because the top layer is less than 0.25mm thick, plaintiff argues that this layer does not constitute sheeting within the meaning of subheading 4202.92.90. *Id.* at 14. Further, plaintiff argues that the top layer is not comprised of "plastics" due to the presence of non-plastic materials. *Id.* at 15. In sum, plaintiff argues that "the coverings of these boxes, taken as wholes, are articles of paper, and do not constitute 'sheeting of plastic' [sic]. The chief ingredients of the assemblies are the papers . . . As such, they are not 'sheeting of plastic [sic].'" *Id.* at 20.

III. Classification of the Subject Merchandise

The court has an independent responsibility to determine the proper classification of the product," *Lerner New York*, 908 F. Supp. 2d at 1317–18, and the GRIs guide the court's analysis. GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." The parties agree that the subject merchandise constitutes "jewelry boxes" with covering material on their exterior. Jnt. Stmt. Facts ¶ 12. Since Heading 4202 explicitly covers "jewelry boxes," Heading 4202 covers the product. Classification thus hinges on interpreting GRI 6 to determine the proper subheading for the merchandise at issue.

The question presented is whether the subject merchandise should be classified under subheading 4202.92, because the articles have an "outer surface of sheeting of plastics" or under subheading 4202.99, because they are "wholly or mainly covered with paper." Subheading 4202.99 specifically excludes articles such as jewelry boxes and similar articles as designated by the heading if the "outer surface" is comprised of a "sheeting of plastics." Accordingly, if the court determines that the jewelry boxes have an "outer surface of sheeting of plastics," consistent with subheading 4202.92, that is the end of the inquiry and further consideration of subheading 4202.99 is unnecessary.

To determine whether subheading 4202.92 accurately characterizes the subject merchandise, the court must interpret each pertinent term of the subheading. This final step requires the court to decide: (1) which materials comprise the "outer surface;" (2) whether the materials that comprise this outer surface, collectively, should be considered plastics; and, (3) if the outer surface is comprised of plastics, whether the materials consist of "sheeting of plastics."

A. The Question of the "Outer Surface"

To determine whether the outer surface of the merchandise qualifies as a sheeting of plastics, the court must first decide which part of the jewelry boxes comprises the outer surface. The HTSUS does not define "outer surface," so the court looks to the common meaning of these words to define the term.[9] "Outer" is defined as "situated or belonging on the outside," Def. Ex. 24 (WEBSTER'S NEW COLLEGIATE DICTIONARY 808 (1979)), or "[o]f, pertaining to, or being on the outside; external . . . ." Def. Ex. 25 (WEBSTER'S NEW INTERNATIONAL DICTIONARY UNABRIDGED, Second Edition 1732 (1955)). Synonyms for "outer" include "exterior, external, outside [and] outward." Def. Ex. 26 (WEBSTER'S COLLEGIATE THESAURUS 572 (1976)). "Surface" is defined as "[t]he exterior, external, outside [and] outward." Def. Ex. 26 (WEBSTER'S COLLEGIATE THESAURUS 572 (1976)). *See also* Def. Ex. 24 (WEBSTER'S NEW COLLEGIATE DICTIONARY 1163 (defining "surface" as "the exterior or upper boundary of an object or body")). Accordingly, the "outer surface" of an article consists of those ingredients that are outward facing or constituting the exterior of the article.

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[9] Defendant offers definitions of both "outer" and "surface," Def. Br. at 17–18, and "[p]laintiff thoroughly agrees with the definitions offered by defendant concerning the terms 'outer' and 'surface." Pl. Resp. Br. at 1.

In this case, the jewelry boxes at issue have an "outer surface," and that outer surface consists of the exterior of the covering material – Skivertex®, Metal-X®, or Pellaq®. "All of the jewelry boxes at issue are covered in one of three types of covering material." Jnt. Stmt. Facts ¶ 12. The parties agree that the covering material is "generally used as 'the exterior covering' or wrap of a large variety of items." *Id.* ¶ 16. Def. Ex. 6 (Hopkins Dep.) at 29:22–25. The covering material here fulfills that same purpose, and there is no suggestion to the contrary from either party.

The court classifies merchandise and considers its character based on its condition at the time of importation. *See Mita Copystar Am.*, 21 F.3d at 1082. Here, when the goods are imported, the coating layers are indivisible, comprising a single entity: "[t]he layers of coating cannot be peeled apart or otherwise separated." Jnt. Stmt. Facts ¶ 49. The layers, *together*, form a "single look" and provide a single function, despite variations in the ingredients and manufacturing processes of Skivertex®, Metal-X®, or Pellaq®. *Id.* ¶ 48.

Despite the parties' agreement that the exterior of the jewelry boxes is comprised of the covering material, *Id.* ¶ 12, plaintiff would have the court divide the covering material into its constituent layers for the purpose of analyzing what constitutes the "outer surface." *See* Pl. Br. at 14. Despite plaintiff's declaration that the "[t]he exterior surface would appear to be the top coat," Pl. Resp. Br. at 2, plaintiff argues that the thickness of the top coat is so "insignificant" that the top coat does not meet the requirements of subheading 7202.90.92, Pl. Br. at 13, and as a result, it is "disqualified as a 'sheeting of plastic [sic].'" *Id.* at 14.

To divide the coating layers of the covering material into constituent layers when such division is not even physically possible at the time of importation defies logic. Skivertex®, Metal-X®, or Pellaq® are themselves products — products manufactured by a third-party, Neenah Paper. Jnt. Stmt. Facts ¶¶ 13–14. The parties agree that the three types of covering material generally function as "the exterior covering" of items, Jnt. Stmt. Facts ¶ 14, and they fulfill that function here. Moreover, the parties agree that despite the multi-step process, the layers added to the base paper qualify as "a coating" — a single entity. *Id*. ¶ 24. Accordingly, this coating is appropriately considered the exterior of the jewelry boxes and thus it serves as the "outer surface."

B. Whether the Outer Surface is Comprised of Plastics

Having determined that the exterior of the covering material constitutes the outer surface of the jewelry boxes, the court turns to an analysis of whether the outer surface is comprised of plastics. The court determines that the outer surface, in fact, consists of plastics.

The tariff term "plastic" is defined in the HTSUS. Specifically, "plastic" is defined in Chapter 39, Note 1 as "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."

Heading 3906 specifically covers "[a]crylic polymers in primary forms." The "primary forms" of plastics include "[l]iquids and pastes, including dispersions (emulsions and suspensions) and solutions." HTSUS Chapter 39, Note 6. The ENs to Chapter 39 provide additional guidance regarding plastics in the "primary form" of "liquids and pastes." Specifically, the ENs clarify the scope of the primary forms of plastics by stating that liquids "used . . . as impregnating materials, surface coatings" may also be classified as plastics. The ENs also state that "these liquids or pastes may contain other materials such as plasticisers, stabilisers, fillers and colouring matter, chiefly intended to give the finished products special physical properties or other desirable characteristics." General EN to HTSUS Chapter 39. Accordingly, materials consisting of non-plastic ingredients may still properly be classified as plastics despite the presence of the other substances.

Here, the outer surface qualifies as plastics because the coatings consist of plastics — specifically, acrylic polymers.[10] The presence of additives does not alter this plastic character because the Explanatory Notes specifically contemplate a composition including non-plastic components. *Id*.

The exterior of the covering material consists of coating layers and additives — which are reviewed here in turn. First, all three coating layers used to manufacture Skivertex®, Metal-X®, and Pellaq® consist of dried acrylic polymer dispersions. *See* Jnt. Stmt. Facts ¶¶ 36–45. Each of the three steps of the coating process applies acrylic based products. "These acrylic based products, as a general category, are referred to as 'pigmented acrylic (water based) synthetic latex." Jnt. Stmt. Facts ¶ 24 (quoting Def. Ex. 8). The heated oven drying process, in which the water in the acrylic polymer dispersion is removed, Jnt. Smt. Facts ¶ 30–31, shows that the covering material

[10] The base paper also — even prior to the coating process — is itself saturated in an acrylic polymer dispersion. Jnt. Stmt. Facts ¶ 24.

as a whole is capable of being "formed under external influence," another requirement to qualify as plastics. Since Heading 3906 specifically covers acrylic polymers in this form, *see* HTSUS Chapter 39, Note 6, the covering material's exterior consists of plastics.

Based on the high concentration of plastics in the coating layers, the court, therefore, determines that the outer surface is comprised of plastics, and this conclusion is consistent with subheading 4202.92.90, notwithstanding that the dispersions used contain non-plastic additives such as defoamers, surfactants and colorants. However, "[a]dditives generally constitute less than 5–10% of the total formula." *Id.* ¶ 29. Moreover, the General EN to Chapter 39 states that plastics in liquid or paste form "may contain other materials such as plasticisers, stabilisers, fillers and colouring matter . . . ." Since having a composition consisting exclusively of polymers is not a requirement for a material to be considered "plastics" under the HTSUS, the court declines to impose such a limitation for tariff classification purposes here.

Plaintiff contends that the "inks" used to decorate the Series 2 and Series 3 covering materials exclude them from having an "outer surface of sheeting of plastics." Pl. Br. at 16–18. This claim is made on the basis that "the outermost surface is . . . covered by and consist[s] of ink." *Id.* at 17. The court again rejects the partition of the covering material into different coating layers for any part of the classification analysis because, as discussed above, the covering material is a single entity surrounding the jewelry box. *See* Pl. Stmt. Facts ¶ 49. Accordingly, all aspects of the court's analysis rely on the covering material in its entirety, rather than on a single, constituent ingredient or layer.[11]

Determination of whether the outer surface is comprised of plastics depends on consideration of the outer surface as a whole of the jewelry boxes. Because the outer surface is comprised of plastics and the non-plastic ingredients do not alter the character of the outer surface, the court determines that the outer surface is, in fact, comprised of plastics.

C. Whether the Outer Surface Constitutes a "Sheeting" of Plastics

Having determined that the outer surface of the merchandise is comprised of plastics, the court must determine whether the outer surface constitutes a "sheeting." The court declines to invoke the

[11] Even assuming *arguendo* that the outer surface is covered by ink, "[t]he ink used to make Skivertex® Series 2 is essentially the same material that is used to make the top coat, with some additional pigment." Jnt Stmt Facts ¶ 57. The ink itself is also an acrylic polymer. *Id.* ¶ 63. The ink, therefore, does not detract from the plastic character of the outer surface.

selective conception of "sheeting" favored by plaintiff and instead determines that the outer surface qualifies as "sheeting of plastics."

First, the court must define the term "sheeting." Unlike plastics, sheeting is not defined in the HTSUS, so the court looks at its common meaning for interpretation. Relevant case law states that the common meaning of statutorily undefined tariff terms can be determined by consulting dictionaries. *See Sarne Handbags Corp. v. United States*, 24 CIT 309, 315, 100 F. Supp. 2d 1126, 1133 (2000) ("To determine the common meaning of a tariff term, a court may consult dictionaries, lexicons, the testimony in the record, and other reliable sources of information"). *See also Cargill, Inc. v. United States*, 28 CIT 401, 410 (2004) ("To ascertain a tariff term's common meaning, the Court may consult dictionaries and scientific authorities, as well as its own understanding of the term").

Dictionary sources describe "sheeting" in general as a continuous film of some material (such as plastic), which is thin, but not limited to a specific thickness in absolute terms. The Merriam-Webster Online Dictionary defines "sheeting" as "material in the form of sheets or suitable for forming into sheets: such as . . . material (such as a plastic) in the form of a continuous film." The Collins Online Dictionary defines "sheeting" as metal, plastic, or other material that is made in the form of sheets." "Sheet" is defined in Funk & Wagnalls New International Dictionary of the English Language 1159 (Comprehensive Edition, 1987) as "a very thin and broad piece of any substance; that which is or can be spread, as upon a surface, or can be laid in broad folds; anything having a considerable expanse with very little thickness" and in Webster's New International Dictionary 2308 as "[i]n general, a piece of anything, or an extent of some substance, that is usually very thin in relation to its length and breadth." McGraw Hill Dictionary of Scientific and Technical Terms 1716 (4th Ed. 1989) defines "sheeting" as "[a] continuous film of a material such as plastic." The same source defines "film" as "[a] flat section of a thermoplastic resin, a regenerated cellulose derivative, or other material that is extremely thin in comparison to its length and breadth and has a nominal maximum thickness of .25 millimeter." These definitions, therefore, buttress the definition of "sheeting" as adopted in *Sarne Handbags Corp.*, in which this court defined sheeting as "material in the form of or suitable for forming into a broad surface of something that is unusually thin, or [] a material in the form of a continuous thin covering or coating." 100 F. Supp. 2d at 1134.

Plaintiff's proposed selective conception of the meaning of "sheeting" is based on dictionary definitions of "sheeting" which, according to plaintiff, impose a minimum thickness requirement of 0.25mm.[12] Pl. Resp. Br. at 3–8. These definitions refer to "sheeting" as having a thickness greater than 0.25mm. KIRK-OTHMER ENCYCLOPEDIA OF CHEMICAL TECHNOLOGY, VOL. 10, 216 (3rd Ed. 1980) states that:

> [a] film, as defined by the Modern Plastics Encyclopedia and as dealt with for the purposes of this article is a flat section of thermoplastic resin or a generated cellulostic material which is very thin in relation to its length and breadth and has a nominal thickness not greater than 0.25mm. *The same materials in greater thicknesses are classified as sheets*.

(emphasis supplied). In contrast, "[f]ilms are generally regarded as being 0.25 mm or less, whereas sheet may range from this thickness to several centimeters thick." KIRK-OTHMER ENCYCLOPEDIA OF CHEMICAL TECHNOLOGY, VOL. 10, 761 (4th Ed. 1994). In light of this distinction, plaintiff argues that "the actual term 'plastic sheeting' (or 'sheeting of plastics') has a common meaning, and that common meaning is as a layer of plastic with a thickness greater than 0.25mm." Pl. Resp. Br. at 7.

The dictionary definitions do not purport to set out parameters as to what qualifies as a "sheeting" in all contexts.[13] Accordingly, the court does not find a basis to favor this selective definition over the *Sarne* court's more general definition. "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). Here, the court finds no evidence that the scope of the tariff term in question was intended to be defined narrowly in the way plaintiff proposes.[14] In line with the *Sarne* court, the court rejects the notion that "sheeting" must have a certain thickness and finds that "sheeting" is a relatively thin

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[12] Plaintiff also proposes that the court distinguish between "sheeting" and "film" as different terms with different meanings. Pl. Resp. Br. at 5–6. Plaintiff cites the language of headings outside HTSUS Chapter 42 — Headings 3919, 3920 and 3921 — all of which provide for "plates, sheets, film, foil and strip, of plastics." Plaintiff argues that these provisions serve as evidence that sheeting and film are "separate terms." *Id.* at 5. Notwithstanding that the headings to which plaintiff cites specifically refer to "sheets," rather than "sheeting," the court does not consider that drawing such a distinction is appropriate here, let alone necessary. The tariff provision at issue in this case does not include the term "film." Moreover, the inclusion of "film" in definitions of "sheeting" in multiple dictionaries suggests that the two terms are not, in fact, mutually exclusive.

[13] The KIRK-OTHMER ENCYLOPEDIA OF CHEMICAL TECHNOLOGY specifies that the definition is "as dealt with for the purposes of *this* article," (emphasis supplied), not *any* article.

[14] In fact, other sections of the HTSUS specifically define the scope of a tariff provision by thickness. *See* HTSUS subheading 3920.79.10 (explicitly providing for "sheets, not over 0.076mm in thickness." No such specification is present in the subheading at issue.

material that can cover a broad surface area and rejects a narrower definition.

The inquiry then turns to whether the subject merchandise has “an outer surface of sheeting of plastics.” The court finds that sheeting must be thin, continuous and wide enough to cover a surface. The outer surface of all three types of covering materials — Skivertex®, Metal-X®, and Pellaq® — meet these requirements. As discussed above, because the coating layers are an acrylic polymer dispersion, they qualify as plastics. The material comprising the outer surface is also continuous; since the manufacturing of the layers results in a single, indivisible layer, it is “continuous” — not separated by any other material. The exterior is also thin (.054mm) relative to the length and breadth of the jewelry boxes as a whole, Def. Ex. 11 (Ingredient List); Def. Ex. 7 (Chaney-Ryan Dep.) at 135:9–15, and covers the entirety of the merchandise. Therefore, the outer surface of the merchandise is a “sheeting of plastics” as stated in subheading 4202.92.90.

Since the outer surface of the jewelry box is a sheeting of plastics, the subject merchandise may not be “wholly or mainly covered with paper,” as stated in subheading 4202.99.10. Subheading 4202.99.10 specifically *excludes* merchandise comprised of sheeting of plastics (“[o]f materials (other than ... sheeting of plastics ...) wholly or mainly covered in paper.” Since the merchandise at issue is comprised of a sheeting of plastics, subheading 4202.99.10 is thus inapplicable.

CONCLUSION

In the 2009 rom-com, *The Proposal*, there are two title scenes. The first proposal — disingenuous and sarcastic — occurs directly in front of 26 Federal Plaza, at the corner of Broadway and Thomas Street, just steps from the CIT courthouse. In the scene, Andrew Paxton (Ryan Reynolds) turns around to Margaret Tate (Sandra Bullock), after exiting the building following an interview with immigration officer Gilbertson (portrayed with comic perfection by Denis O’Hare), and proceeds to direct her to propose to him:

Andrew: “Ask me nicely.”

Margaret: “Ask you nicely, what?”

Andrew: “Ask me nicely to *marry* you, Margaret.”

Margaret: “What does that *mean* ?”

Andrew: “You heard me. On your knee.”

Margaret, speechless, looks around, swallows hard, extends her arm for him to assist her to kneel down: “Fine.”

Andrew extends his arm.

Margaret, cell phone in one hand, purse over the other: “Does this work for you?”

Andrew, flat: “Oh, I like this. Yeah.”

Margaret, flat, speedily: “Will you marry me?”

Andrew: “No. Say it like you mean it.”

Margaret shakes her head, swallows: “Andrew?”

Andrew: “Yes, Margaret.”

Margaret: “Sweet Andrew?”

Andrew: “I’m listening.”

Margaret: “Will you, pretty please, with cherries on top, marry me?”

Andrew, thinks, looks around: “Okay. I don’t appreciate the sarcasm, but I’ll do it. See you at the airport tomorrow.” She extends her hand for him to help her up as he turns and walks away.[15]

* * *

The court does not walk away from its obligation to decide this case. For the foregoing reasons, summary judgment is granted in favor of defendant. Customs’ classification is upheld and judgment will be entered accordingly.

Dated: May 18, 2020
New York, New York

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

Slip Op. 20–69

NEXTEEL CO., LTD., Plaintiff, and SEAH STEEL CORPORATION, Consolidated Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, et al., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00083

[Sustaining in part and remanding in part the U.S. Department of Commerce’s remand redetermination following the 2015–2016 administrative review of the antidumping duty order on oil country tubular goods from the Republic of Korea.]

Dated: May 18, 2020

J. David Park, *Henry D. Almond*, *Daniel R. Wilson*, *Leslie C. Bailey*, and *Kang Woo Lee*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff NEXTEEL Co., Ltd.

Jeffrey M. Winton and *Amrietha Nellan*, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff SeAH Steel Corporation.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*,

[15] THE PROPOSAL (Touchstone Pictures, K/O Paper Products, Mandeville Films 2009).

Director, and *Claudia Burke*, Assistant Director. Of counsel was *Mykhaylo Gryzlov*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

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Gregory J. Spak, *Frank J. Schweitzer*, *Kristina Zissis*, and *Matthew W. Solomon*, White & Case LLP, of Washington, D.C., for Defendant-Intervenors Maverick Tube Corporation and Tenaris Bay City, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

The court revisits the second administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from the Republic of Korea ("Korea") conducted by the Department of Commerce ("Commerce"), covering the period from September 1, 2015 to August 31, 2016. *See Certain Oil Country Tubular Goods From the Republic of Korea*, 83 Fed. Reg. 17,146 (Dep't Commerce Apr. 18, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Results of the 2015–2016 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, P.R. 368 (Apr. 11, 2018) ("Final IDM").[1] Before the court are Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 81–1 ("*Remand Redetermination*"), which the court ordered in *NEXTEEL Co., Ltd. v. United States*, 43 CIT ___, 392 F. Supp. 3d 1276 (2019) ("*NEXTEEL II*").

I. BACKGROUND

The court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the court's review of the *Remand Redetermination*. *NEXTEEL II*, 392 F. Supp. 3d at 1283–84.

In this second administrative review of OCTG from Korea ("OCTG II"), Commerce selected Plaintiff NEXTEEL Co., Ltd. ("NEXTEEL") and Consolidated Plaintiff SeAH Steel Corporation ("SeAH") (together, "Plaintiffs") as mandatory respondents for individual examination. In the *Final Results*, Commerce concluded that: (1) NEXTEEL failed to cooperate to the best of its ability and thus calculated its dumping margin using total facts available with an

[1] Citations to the administrative record reflect the public administrative record ("P.R.") document numbers.

adverse inference ("AFA"), *id.* at 43; (2) an upward adjustment to SeAH's reported costs of producing OCTG was warranted to correct for a particular market situation that existed for hot-rolled coil in Korea, *id.* at 17; (3) SeAH's proprietary grade OCTG products should be classified as grade code "080," *id.* at 84; and (4) SeAH's general and administrative expenses related to resold U.S. products for its U.S. affiliate, Pusan Pipe America Inc. ("PPA"), should be deducted as U.S. selling expenses, *id.* at 89.[2]

Plaintiffs filed separate actions challenging several aspects of the *Final Results*, which were later consolidated before this Court. *NEXTEEL II*, 392 F. Supp. 3d at 1284. In *NEXTEEL II*, the court sustained in part and remanded in part the *Final Results*. *Id.* at 1282. Specifically, the court ordered Commerce to reconsider or further explain: (1) the application of total AFA to NEXTEEL's margin calculation, *id.* at 1286; (2) the finding of a particular market situation in Korea, *id.* at 1288; (3) the classification of SeAH's proprietary products, *id.* at 1292; and (4) the deduction of PPA's G&A expenses as U.S. selling expenses, *id.* at 1293–94.

On remand, Commerce filed under protest and "calculated NEXTEEL's dumping margin based on NEXTEEL's reported data rather than [AFA]." *Remand Redetermination* at 44.[3] As to the particular market situation finding, Commerce reviewed the record *de novo*, provided more explanation, and again found that a particular market situation in Korea distorted the cost of producing OCTG. *See id.* at 19–29 (adjusting the mandatory respondents' margins based on a countervailing duty rate found in an investigation of certain hot-rolled steel flat products from Korea).[4] Commerce further explained the basis for classifying SeAH's proprietary grade OCTG products as grade code "080" (the grade for normalized N-80 pipe) and for deducting PPA's G&A expenses as U.S. selling expenses. *See id.* at 30–42. Commerce thus recalculated the weighted-average dumping margins

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[2] Commerce did not apply a particular market situation adjustment to NEXTEEL's dumping margin because NEXTEEL's rate was based on total AFA. Final IDM at 16.

[3] Commerce preserves its right to appeal when making a finding under protest, which the Court later sustains after remand. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

[4] *Remand Redetermination* at 18 & n.84 (citing *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Final Affirmative Determination*, 81 Fed. Reg. 53,439 (Aug. 12, 2016), as amended by *Certain Hot-Rolled Steel Flat Products From Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 Fed. Reg. 67,960 (Oct. 3, 2016); and *Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Notice of Court Decision Not in Harmony With Amended Final Determination of the Countervailing Duty Investigation*, 84 Fed. Reg. 23,019 (May 21, 2019) (reducing POSCO's total AFA CVD rate from 56.68% to 41.57%) (collectively, "*Hot-Rolled Steel Flat Products from Korea*")).

of NEXTEEL, SeAH, and the non-examined companies, which changed from 6.75% to 5.41%, 75.81% to 46.71%, and 6.75% to 26.06%. *Id.* at 76.

Plaintiffs oppose certain aspects of the *Remand Redetermination*. Comments of SeAH Steel Corp. on Commerce's Nov. 5, 2019, Remand Redetermination, ECF No. 83 ("SeAH Br."); Pl. NEXTEEL's Comments in Opp'n to Remand Redetermination, ECF No. 85 ("NEXTEEL Br."). Defendant United States and Defendant-Intervenors Maverick Tube Corp. ("Maverick"), Tenaris Bay City, and United States Steel Corporation ("U.S. Steel") urge the court to sustain the *Remand Redetermination*. Responsive Comments of Def.-Intervenors Maverick Tube Corp. and Tenaris Bay City, Inc. in Supp. of Commerce's Remand Redetermination, ECF No. 88 ("Maverick Br."); Def.'s Resp. to Comments Regarding the Remand Redetermination, ECF No. 89 ("Def. Br."); and Def.-Intervenor United States Steel Corp.'s Comments in Supp. of Commerce's Remand Redetermination, ECF No. 90 ("U.S. Steel Br."). For the following reasons, the court sustains in part and remands in part the *Remand Redetermination*.

II. JURISDICTION AND STANDARD OF REVIEW

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

III. DISCUSSION

A. Particular Market Situation Finding

Plaintiffs challenge the particular market situation finding on multiple fronts. Plaintiffs argue that the court's remand instructions in *NEXTEEL II* barred Commerce from conducting a new examination and finding a particular market situation on remand because Commerce neither reopened the record nor gathered additional facts. NEXTEEL Br. at 6; *see* SeAH Br. at 3 (asserting that Commerce cannot use its redetermination "as a vehicle for relitigating the issues on which the Court ruled against it"). Plaintiffs also contend that Commerce's reliance on the same record developed during the prior (first) OCTG administrative review ("OCTG I") infects Commerce's finding of a particular market situation here in OCTG II. In OCTG I, this Court found Commerce's particular market situation finding was unsupported by substantial evidence. Additionally, here, Commerce considered a new fifth factor that was absent from the OCTG I review: an alleged "steel industry restructuring effort" by the Korean Government. *See* NEXTEEL Br. at 6; SeAH Br. at 2–3. NEXTEEL further adds that Commerce's consideration of the fifth factor was procedurally improper because, until this remand proceeding, Commerce gave respondents no notice or opportunity to rebut the claim that industry restructuring efforts contributed to a particular market situation. NEXTEEL Br. at 26–27. Even if considered, Plaintiffs contend that the record evidence Commerce identified as showing government-influenced steel industry restructuring efforts cannot fill the evidentiary void infecting the particular market situation finding because there is no evidence of actual restructuring and no evidence of actual government interference. *Id.* at 27–28; *see* SeAH Br. at 6–8.

In OCTG I, Commerce reviewed Maverick's four allegations as each supporting a finding of a particular market situation in Korea: (1) subsidization of Korean hot-rolled coil ("HRC") products by the Korean Government; (2) distortive pricing of unfairly-traded Chinese HRC; (3) "strategic alliances" between Korean HRC suppliers and Korean OCTG producers; and (4) distortive government control over electricity prices in Korea. *NEXTEEL Co., Ltd. v. United States*, 43 CIT at ___, 355 F. Supp. 3d 1336, 1345–46 (2019) ("*NEXTEEL I*"). Addressing each allegation in turn, Commerce made a preliminary determination that no particular market situation existed based on the record evidence. *Id.* at 1346 (citation omitted). Nevertheless, without receiving any new record evidence, Commerce reversed itself and found an extant particular market situation in OCTG I based on the "cumulative effect" of the four allegations. *Id.* at 1346, 1349. Although "Commerce's particular market situation approach was reasonable in theory[,]" the court held that the finding was unreasonable as unsupported by substantial evidence because a reasonable mind could not find that "individually the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion." *Id.* at 1351. The court directed Commerce "to reverse the finding of a particular market situation and recalculate the dumping margin for the mandatory respondents and non-examined companies." *Id.*

In OCTG II, Commerce again found that a particular market situation in Korea distorted the cost of producing OCTG. *NEXTEEL II*, 392 F. Supp. 3d at 1287–88. Maverick again made the same four particular market situation allegations that Commerce reviewed in OCTG I and submitted the same supporting exhibits. *Id.* at 1288. Commerce used the same "totality of the circumstances" methodology and found that the circumstances present in the Korean market in the OCTG II review remained "largely unchanged" since the prior OCTG I review because the "facts in the [OCTG II] administrative review are largely identical to the facts in the [OCTG I] administrative review, and the same evidence is on the record of the instant [OCTG II] review." *Id.* Commerce reasoned that the "collective impact" of the same four factors considered in its particular market situation analysis in OCTG I and the "largely identical" facts here in OCTG II compelled finding a particular market situation. *Id.* Given that the OCTG I particular market situation finding was based on substantially the same facts and record evidence, the court concluded that Commerce's particular market situation finding in OCTG II likewise "[wa]s unsupported by substantial evidence." *NEXTEEL II*, 392 F. Supp. 3d at 1288.[5]

In the *Remand Redetermination*, Commerce examined the same four factors that Maverick alleged as creating a particular market situation (subsidization, effects of Chinese HRC imports, strategic alliances, and government control over electricity prices) but also cited a new fifth factor as supporting a particular market situation—an allegation of a "steel industry restructuring effort by the Korean [G]overnment." *Remand Redetermination* at 19–20. Commerce reasoned that the cumulative effects of these five factors supported a conclusion that a particular market situation distorted the cost of production of OCTG and compelled making an upward adjustment to the mandatory respondents' reported costs of production for Korean OCTG. *Id.* at 18 (making the particular market situation adjustment based on the CVD rate found in *Hot-Rolled Steel Flat Products From Korea*).

The TPEA amended certain subsections of the Tariff Act of 1930. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015) ("TPEA"). Section 504 of the TPEA permits Commerce to consider certain sales and transactions to be outside the ordinary course of trade" when "the particular market situation prevents a proper comparison with the export price or constructed export price." 19 U.S.C. § 1677(15). When calculating constructed value under the revised statute, if Commerce finds an extant particular market situation, "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of

[5] The court rejected Defendant-Intervenor U.S. Steel's contention that the administrative record developed in OCTG II was distinguishable from OCTG I because the OCTG II record contained more evidence when that evidence "consisted mostly of news articles, and Commerce did not rely on them when making its ultimate decision." *NEXTEEL II*, 392 F. Supp. 3d at 1288.

production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." *Id.* § 1677b(e).

Here, Commerce's reexamination and further explanation of the record evidence supporting the particular market situation finding continues to be unsupported by substantial evidence.

As to the first factor, Commerce's analysis on the impact of subsidization remains unchanged from OCTG I, to OCTG II, to the *Remand Redetermination*. Commerce examined the impact of subsidization in Korea in OCTG I, preliminarily determined that there was no evidence to support the claim, and, based on the same evidence, reversed its conclusion, which the court found unreasonable and unsupported by record evidence. *See NEXTEEL I*, 355 F. Supp. 3d at 1350–51. Commerce's finding of a particular market situation in the *Remand Redetermination* relies on its continued argument that, despite the lack of evidence regarding Korean subsidization, the factors viewed collectively could support a particular market situation.

The court notes that an examination of the impact of Korean subsidization in the *Remand Redetermination* still fails to support a finding of a particular market situation. Commerce's conclusion that the Government of Korea subsidized HRC production through the primary input of OCTG based on a subsidy rate found in *Hot-Rolled Steel Flat Products from Korea* has a temporal problem. The almost 60% AFA-based subsidy rate assigned to mandatory respondent POSCO in *Hot-Rolled Steel Flat Products from Korea* was in calendar year 2014. Commerce performed its first review of the countervailing duty order on HRCs covering calendar year 2016—finding a much lower subsidy rate of 0.54% for POSCO, 0.58% for Hyundai Steel Co., Ltd., and 0.56% for all others.[6] Commerce rejected Plaintiffs' contentions that the HR Korea CVD I investigation had any overlap with the period of review at issue here in OCTG II (September 1, 2015 to August 31, 2016). *Remand Redetermination* at 60.[7] Yet the HR Korea CVD I Review covered calendar year 2016, overlapping eight of the

[6] *See Certain Hot-Rolled Steel Flat Products from Korea: Preliminary Results of Countervailing Duty Administrative Review, 2016*, 83 Fed. Reg. 55,517 (Nov. 6, 2018); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2016*, 84 Fed. Reg. 28,461 (Dep't Commerce June 19, 2019), as amended by *Certain Hot-Rolled Steel Flat Products from Korea: Amended Final Results of the First Administrative Review*, 84 Fed. Reg. 35,604 (July 24, 2019) (collectively, "HR Korea CVD I Review"). Commerce determined that the application of AFA to POSCO and Hyundai Steel Co., Ltd. was unwarranted.

[7] Commerce reasoned, in pertinent part, that:

> NEXTEEL's and SeAH's continued assertions that Commerce has found that POSCO was subsidized at much lower rates in the subsequent POR of *Hot-Rolled Steel Flat Products from Korea* are misplaced. *Commerce's determinations regarding the level of POSCO's subsidization in subsequent PORs have no bearing on subsidization during the earlier period of time at issue in this proceeding.* The levels of subsidization and the

twelve months of the OCTG II period of review. HR Korea CVD I Review and accompanying Issues and Decisions Memorandum at 5 (explaining that although the period of review ran from August 12, 2016, to December 31, 2016, Commerce "analyzed data for the period January 1, 2016, through December 31, 2016, to determine the countervailable subsidy rate[s]"). Thus, Commerce's statement that the HR Korea CVD I Review rates "have no bearing on subsidization during the earlier period of time at issue" and that the HR Korea CVD I Review rates are "derived from future periods in relation to the [period of review]" appears premised on a misunderstanding of the time periods of review covered by the various proceedings. *Remand Redetermination* at 59–60. The HR Korea CVD I Review is not some "future period." Based on the record evidence and repackaged subsidization analysis, the court again views Commerce's finding that subsidization contributed to distortions of Plaintiffs' costs to produce OCTG in Korea as unsupported by substantial evidence. The court finds that Commerce's conclusion of a particular market situation based on subsidization in Korea is not supported by substantial evidence.

As to the second factor, impact of Chinese HRC imports, the two documents relied on by Commerce do not bear out a conclusion that the onslaught of imported "cheap Chinese steel products" in the Korean steel market "plac[ed] downward pressure on Korean domestic steel prices." *Remand Redetermination* at 21–22 (citing (1) a January 2016 Asian Steel Watch article titled "China's Steel Exports Reaching 100 Mt: What It Means to Asia and Beyond" ("Asian Steel Watch article") and (2) a translated document excerpt, dated September 30, 2016, titled "Announcement for and Excerpts from Relevant Ministries of the Government of Korea, Proposal for Strengthening the Competitiveness of the Steel Industry" ("Announcement")).[8]

> amount of benefit may change up or down during the different time periods. Commerce has reasonably relied on this information to determine the valuation of NEXTEEL and SeAH's HRC because *it is the timeliest*, most input-specific information available for the POR of the instant review of OCTG and the most appropriate for determining a value of HRC inputs. *If Commerce were to use the most recent rates of subsidization established for HRC, as NEXTEEL and SeAH suggest, the data for subsidization would post-date the POR (i.e., would be derived from the future periods in relation to the POR).* We are not persuaded that such approach is warranted here, where we have relevant information that does not post-date the POR and, thus, does not present the timing problem of using information that did not exist at the time of the POR.

Remand Redetermination at 59–60 (emphasis added).

[8] Defendant-Intervenor U.S. Steel submitted the Asian Steel Watch article as evidence supporting a particular market situation allegation. Final IDM at 21 n.75 (citing United States Steel Particular Market Situation Submission, Ex. 2, P.R. 225–27 (Aug. 7, 2017)). Maverick submitted the Announcement document as an exhibit accompanying its particular market situation allegation. Maverick's Particular Market Situation Submission, Ex. 5, P.R. 217–20 (Aug. 7, 2017).

The Asian Steel Watch article contains a discussion of market conditions in 2014—several months preceding this OCTG II period of review. The article references trade volumes and the amount of steel exported, but there is nothing "particular" in reading that both China and Korea are major steel producers and consumers with imports and exports. The Announcement document refers to global trends in the steel industry, remarks that Chinese imports are "primarily for construction uses" in the domestic market, and mentions a price "differential" between domestic and Chinese HRC below a chart noting that Chinese imports accounted for 25% market share. There is no reference to "downward pressure on Korean domestic steel prices" as Commerce claims. *Id.* at 21. Commerce also found "it significant that the Korean [G]overnment's [Announcement] document indicates that Chinese excess supply is 'especially targeted' towards Korea." *Id.* at 22. Yet the full quote actively subverts that conclusion. The Announcement states that "China's excess supply [is] *especially targeted towards Korea, ASEAN, and EU*." Maverick's Particular Market Situation submission, Ex. 5, P.R. 217–220 (emphasis added). It would be unreasonable for Commerce to conclude that this evidence demonstrates that Chinese excess supply is "especially targeted towards Korea" alone, when Chinese HRC imports were also aimed at ten countries comprising the Association of Southeast Asian Nations (ASEAN) and twenty-eight countries comprising the European Union (prior to the United Kingdom's exit from the European Union). Besides, Commerce's own determination undermines its claims of "downward pressure" on prices. Final IDM at 30 ("[W]e are unable to quantify the effect of Chinese imports on Korean HRC[.]"). Indeed, it is consistent with what Commerce found in the *Final Results*. *See* Final IDM at 21 ("We agree with NEXTEEL that the petitioners have not pointed to any evidence that Chinese overcapacity is directed toward the Korean market. That Chinese steel overcapacity affects the whole world is not disputed."). Given the analytical deficiencies, along with the unsupported finding of significant subsidization, the court finds that the record evidence does not support a conclusion that the global glut of Chinese HRC imports caused price distortions specific to the Korean steel market. Thus, Commerce's conclusion that excess capacity of Chinese HRC imports demonstrates a particular market situation in Korea is not supported by substantial evidence.

As to the third factor, the finding that "strategic alliances" between certain Korean HRC and Korean OCTG producers affect prices in the Korean steel market, is unsupported by substantial evidence. Commerce references the same evidence that the court previously rejected as not constituting substantial evidence, such as an outdated affidavit provided by Maverick that "pertained to discussions that occurred before the period of review and did not contain information about specific agreements." *NEXTEEL I*, 355 F. Supp. 3d at 1350; *see* Final IDM at 30 (Because of limited data in the review, Commerce found "that strategic alliances could not be used to quantify the impact of the particular market situation[.]"). Commerce now puts forth purely speculative conclusions that strategic alliances "may have created distortions" and "have the potential to impact HRC pricing." *Remand Redetermination* at 23; Final IDM at 18 ("Although the record does not contain specific evidence showing that strategic alliances directly created a distortion in HRC pricing in the current [OCTG II] period of review, Commerce nonetheless finds that these strategic alliances between Korean HRC suppliers and Korean OCTG producers are relevant . . . in that they *may have* created distortions in the prices of HRC in the past, and *may* continue to impact HRC pricing in a distortive manner during the [OCTG II] [period of review] and in the future."). The court affords no weight to these speculative and conclusory statements as evidence. Commerce considered no new evidence here, and the court's determination that this element of the *Final Results* was unsupported by substantial evidence applies equally on remand. The court concludes that Commerce's determination that strategic alliances between Korean HRC and OCTG producers affected prices in the Korean steel market to create a particular market situation is not supported by substantial evidence.

As to the fourth factor, Commerce claims that the Korean Government's regulation of the Korean electricity market contributes to a particular market situation, but the record evidence is plagued with factual deficiencies that cannot be cured with more explanation. Again, based on insufficient record evidence, Commerce was "unable to quantify the effect of [distortions in] the electricity market on the particular market situation," that being the cost to produce OCTG. Final IDM at 22, 30. On remand, Commerce noted the Korean Government's "tight control" of pricing in the electricity market, discussed the impact of electricity prices on the OCTG manufacturing process, and made the inferential leap that Korean electricity prices to OCTG producers distort the prices for HRC in Korea. *See Remand Redetermination* at 23–25. Even recognizing the Korean Government's hands-on approach to regulating the electricity market, Commerce has found in prior CVD investigations, more than once, no evidence that Korean steel producers received countervailable subsidies as to electricity.[9] The court concludes that Commerce's determination that the Korean Government's regulation of the Korean electricity market contributes to a particular market situation is not supported by substantial evidence.

Commerce introduced a new fifth factor on remand, that the Korean Government's steel industry restructuring efforts contributed to a particular market situation. *Remand Redetermination* at 25–26. This analysis pertaining to the Korean Government's steel industry restructuring efforts was never considered before by Commerce in its particular market situation assessments. The record here creates another temporal problem because reports of the industry restructuring effort came several months after the OCTG II period of review concluded on August 31, 2016. Commerce cites a press release from the Korean Ministry of Strategy and Finance announcing the Korean Government's "2017 Action Plan for Industrial Restructuring," dated January 25, 2017—five months after the period of review. *See id.* at 25. Commerce also considered an article from Invest Chosun, noting that "[t]he *investment* industry is expressing the opinion that additional restructuring is necessary." *Id.* (emphasis added). There is no record evidence here of any actual restructuring, nor evidence of government interference. It was unreasonable for Commerce to find that a government announcement of industry restructuring efforts five months after the OCTG II period of review ended showed that "the conditions that [led] to the government's announcement existed during the [OCTG II period of review]." *Id.* at 26. That is an untenable and speculative conclusion. The court finds that Commerce's determination that the Korean Government's steel industry restructuring demonstrates a particular market situation in Korea is unsupported by substantial evidence.[10]

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[9] In a countervailing duty investigation of hot-rolled steel flat products from Korea, this Court upheld Commerce's finding that the Korean Government's provision of electricity to subject producers for less than adequate remuneration did not confer a benefit. *POSCO v. United States*, 42 CIT ___, 337 F. Supp. 3d 1265 (2018). Commerce has made similar findings as to the Korean Government's provision of electricity in countervailing duty investigations for other steel products, which this Court has also upheld. *See, e.g.*, *POSCO v. United States*, 42 CIT ___, 353 F. Supp. 3d 1357 (2018) (sustaining in part Commerce's investigation of certain carbon and alloy steel cut-to-length plate from Korea and noting that the "Korean electricity market is controlled by a state-run monopoly"); *POSCO v. United States*, 42 CIT ___, 296 F. Supp. 3d 1320 (2018) (sustaining in part Commerce's countervailing duty investigation of cold-rolled steel flat products from Korea); *Maverick Tube Corp. v. United States*, 41 CIT ___, 273 F. Supp. 3d 1293 (2017) (sustaining Commerce's countervailing duty investigation of welded line pipe from Korea).

[10] The court need not address NEXTEEL's procedural impropriety argument beyond mentioning that the mandatory respondents were given no notice that Commerce was considering whether steel industry restructuring efforts contributed to a particular market situation until this remand proceeding and were thus unable to submit factual information to rebut this new factor Commerce relied upon in finding a particular market situation in Korea.

The court concludes that Commerce's analysis and explanation of the five factors supporting a particular market situation in Korea are unsupported by substantial record evidence, both when viewing the five factors individually and collectively. The court remands and directs Commerce to reverse its finding of a particular market situation and to recalculate the mandatory respondents' and non-examined companies' dumping margins.[11]

B. Classification of Proprietary SeAH Products

SeAH disputes the classification of its proprietary OCTG products as grade 080—the same code in the model-match hierarchy as American Petroleum Institute (API) Specification 5CT grade N-80. SeAH Br. at 23 (asserting that SeAH has its own unique specification for an OCTG product that has the same tensile strength but without the heat treatment found in N-80 grade code products). SeAH faults "Commerce's attempt to equate the API grades with tensile strength[,]" arguing that the record contradicts Commerce's methodology. *Id.* at 24. Even if comparing mechanical properties on the pipe, such as yield and tensile strength, and discounting heat treatment, SeAH contends that its products could meet more than one model grade code. *Id.* SeAH also argues that stenciling on OTCG products, which describes the relevant grade, "is a physical characteristic that distinguishes different grades of pipe." *Id.* at 26.

Defendant responds that Commerce's model-match hierarchy comparing physical characteristics of products supports the basis for classifying SeAH's products as N-80 grade products. Def. Br. at 32. Defendant asserts that SeAH's reliance on the absence of heat treatment being a distinguishing characteristic that compels a different grade code is flawed because Commerce's model-match methodology already captures heat treatment in a separate field as the ninth model-match characteristic. *Id.*; *Remand Redetermination* at 34–35. Defendant also finds SeAH's characterization that Commerce "equate[d] API grades with tensile strength[]" mistaken because "Commerce found that other than the absence of heat treatment, SeAH did not identify any physical differences between N-80 grade products and its proprietary products, which were designed specifically to compete with N-80 grade products." Def. Br. at 32.

On remand, Commerce explained how the use of the model-match hierarchy supported a finding that physical properties, such as grade, were valued higher than a production process such as heat treatment.

[11] Plaintiffs challenged other aspects of Commerce's particular market situation finding, including Commerce's failure to conduct a respondent-specific analysis and the particular market situation adjustment based on the AFA rate from *Hot-Rolled Steel Flats from Korea*. The court does not reach those issues.

Remand Redetermination at 72 (The "model-match methodology is not intended to exactly align with API standards."). The model-match methodology guided how Commerce ranked product differences, with grade the third highest product characteristic, while heat treatment was the ninth highest. *Id.* at 7. Here, the sole difference between the products at issue was the absence of heat treatment in SeAH's products. *Id.* at 31 ("[O]n this record, the absence of the heat treatment process is the sole distinguishing characteristic between N-80 grade products and SeAH's proprietary products."). Commerce's model-match methodology recognized and captured heat treatment in a separate field. Commerce explained that elevating heat treatment from ninth in its methodology above other model-match characteristics would cause similar products to be disregarded on heat treatment and result in Commerce comparing less similar products, which flouts the purpose of using the model-match methodology. *Id.* at 31, 35. The court accepts Commerce's explanation as reasonable. The court declines SeAH's invitation to alter Commerce's methodology because the model-match hierarchy "capture[d] the similarities and differences (heat treatment) between SeAH's proprietary grades and the N-80 grade at the appropriate level in its hierarchy." *Remand Redetermination* at 36. Commerce's explanation for using its model-match methodology and reasons for combining SeAH's proprietary grades under reporting code 075 with 080 is supported by substantial evidence. The court sustains Commerce's classification of SeAH's proprietary products.

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

In the *Final Results*, Commerce deducted the G&A expenses of SeAH's U.S. affiliate, PPA, from the price used to calculate constructed export price. Final IDM at 89–90. Commerce determined that "PPA's employees are responsible for overseeing and coordinating both sales and further manufacturing activities related to all subject products." *Id.* at 90. Commerce concluded that "PPA's G&A activities support the general activities of the company as a whole," as the activities included "(1) the sale and further manufacture or further manufactured products; and (2) the sale of non-further manufactured products." *Id.* Thus, Commerce applied PPA's G&A ratio to the cost of the imported pipe, irrespective of whether the pipe was manufactured in the United States and "attributed a portion of PPA's G&A activities, which includes selling functions, to the resold products." *Id.* The court remanded for clarification or reconsideration of Commerce's methodology and decision to deduct G&A expenses as being unsupported by substantial record evidence. *NEXTEEL II*, 392 F. Supp. 3d at 1293–94.

On remand, Commerce clarified its methodology and continued applying the G&A expense ratio to both PPA's resold and further manufactured products. *Remand Redetermination* at 38. Commerce examined PPA's activities and found that "it is significant that PPA is not performing further manufacturing on its own and does not maintain any production facilities for further manufacturing." *Id.* at 75. Commerce also found that these processes are performed by unaffiliated processors and "SeAH's involvement in further manufacturing is perfunctory in nature and is limited to paying a processing fee, which [Commerce] accounted for as a further manufacturing expense." *Id.* (noting that SeAH is "asking that PPA be treated the same as companies performing further manufacturing (which have production facilities, factory overhead and other significant expenses associated with further manufacturing) when *PPA is not performing further manufacturing*."). Apart from paying the already accounted-for processing fee, "SeAH is predominantly a selling entity and, thus it is reasonable to treat its G&A expenses as selling expenses." *Id.*

SeAH disputes "Commerce's reclassification of G&A expenses as selling expenses" because "Commerce has not explained how the allocation of G&A expenses to imported products transforms them from G&A expenses to selling expenses." SeAH Br. at 31. Defendant responds that the antidumping statute provides ample discretion in calculating U.S. prices using the constructed export price methodology and that the controlling statute covering adjustments to constructed export price, 19 U.S.C. § 1677a(d), affords discretion to allocate a selling entity's G&A expenses. Def. Br. at 34–35; *see* Maverick Br. at 11–12.

An antidumping duty represents the amount by which the normal value of the merchandise exceeds its export price or constructed export price. 19 U.S.C. § 1673. When, as here, a foreign producer or exporter sells a product to a U.S. selling affiliate, the law permits using "constructed export price" in calculating the dumping margin. *Id.* § 1677a(d). Constructed export price is the price at which the subject merchandise is first sold in the United States by a seller affiliated with the producer or exporter to a non-affiliated purchaser. *Id.* § 1677a(b).

Commerce must deduct both the selling expenses and costs of further manufacture from the price used to determine constructed export price. *Id.* § 1677a(d). One such expense is "the cost of any further manufacture or assembly (including additional material and labor)[.]” *Id.* § 1677a(d)(2). Another is for expenses “incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling subject merchandise[.]” *Id.* § 1677a(d)(1). The statute provides for deducting four categories of expenses incurred between importation and resale: “(A) commissions for selling subject merchandise in the United States;” (B) direct selling expenses; (C) any selling expenses that the seller pays the purchaser; and “(D) *any selling expenses not deducted under subparagraph (A), (B), or (C)* [.]” *Id.* § 1677a(d)(1)(A)–(D) (emphasis added).

In “calculating indirect selling expenses, Commerce generally will include G&A expenses incurred by the United States selling arm of a foreign producer.” *Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1101 (1995) (“*Aramide*”). “[I]ndirect selling expenses . . . implicitly contemplate[] the exclusion of all expenses that relate to sales of non-subject merchandise, as well as the exclusion of . . . all expenses that are entirely unrelated to sales.” *U.S. Steel Corp. v. United States*, 34 CIT 252, 266 (2010). The court affords Commerce deference in developing a methodology for including G&A expenses in the constructed value calculation because it is a determination “involv[ing] complex economic and accounting decisions of a technical nature[.]” *Fujitsu Gen. Ltd. v. United States,* 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) (reiterating that Commerce must provide a cogent explanation supporting its exercise of discretion).

Here, Commerce exercised its statutory discretion in allocating the G&A expenses of SeAH’s U.S affiliate, PPA, both to directly resold and further manufactured products upon finding that PPA’s G&A activities supported the general activities of the company. Commerce determined that “SeAH’s involvement in further manufacturing is perfunctory in nature and is limited to paying a processing fee, which [Commerce] accounted for as a further manufacturing expense.” *Remand Redetermination* at 75; *see* Def. Br. at 37–38 (asserting that “SeAH is a real producer with real production facilities and significant factory overhead[,]” while “PPA is essentially a paper company that produces nothing[]”). The unaffiliated processors’ further manufacturing expenses can reasonably be expected to incur G&A expenses funded by PPA’s fee. *Remand Redetermination* at 75. Because Commerce already treats PPA’s fee as a further manufacturing expense, allocating a portion of PPA’s G&A expenses to further manufacturing, as requested here by SeAH, would result in impermissible double counting. Commerce’s explanation of its accounting treatment methodology for classifying PPA’s G&A expenses as indirect selling expenses and deducting the expenses when calculating constructed export price is reasonable and responsive to the court's request for clarification. The court sustains Commerce's finding as to the treatment of SeAH's G&A expenses.

IV. CONCLUSION

The court concludes that Commerce's particular market situation determination is not supported by substantial evidence. The court also concludes that Commerce's classification of proprietary SeAH products and decision to deduct SeAH's G&A expenses as U.S. selling expenses are supported by substantial evidence.

Accordingly, it is hereby

ORDERED that the *Remand Redetermination* is remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that this case will proceed per the following schedule:

(1) Commerce must file the second remand redetermination on or before August 18, 2020;

(2) Commerce must file the administrative record on or before September 1, 2020;

(3) Comments opposing the second remand redetermination must be filed on or before October 1, 2020;

(4) Comments in support of the second remand redetermination must be filed on or before November 2, 2020; and

(5) The Joint Appendix must be filed on or before November 16, 2020.

Dated: May 18, 2020
New York, New York

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

Slip Op. 20–70

WIRTGEN AMERICA, INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00027

[Granting Plaintiff's motion for [partial] summary judgment regarding Customs' exclusion of Plaintiff's redesigned road-milling machines from entry into the United States; Denying Defendants' motion to dismiss and cross-motion for summary judgment; Denying as moot Plaintiff's motion for preliminary injunction and bond; and Dismissing as moot the second count of Plaintiff's complaint.]

Dated: May 18, 2020

Daniel E. Yonan, Dallin G. Glenn, *Michael E. Joffre*, *Donald R. Banowit*, *and Kristina C. Kelly*, Sterne, Kessler, Goldstein & Fox, PLLC, of Washington, D.C., and *Ryan D. Levy*, Patterson Intellectual Property Law, P.C., of Nashville, TN argued for Plaintiff Wirtgen America, Inc. *Seth R. Ogden* also appeared.

Guy R. Eddon, Trial Attorney, *Edward F. Kenny* and *Marcella Powell*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendants United States; U.S. Department of Homeland Security and Acting Secretary Chad F. Wolf; and U.S. Customs and Border Protection, Acting Commissioner Mark A. Morgan, Director of Machinery Center of Excellence and Expertise Juan J. Porras, and Chief of the Intellectual Property Rights and Restricted Merchandise Branch of the Office of Trade Charles R. Steuart. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy* and *Justin R. Miller*, Assistant Directors, and *Jason Kenner*, Senior Trial Counsel. *Aimee Lee* also appeared.

OPINION

Choe-Groves, Judge:

This action concerns road-milling machines that were redesigned to avoid infringing upon a registered patent. Plaintiff Wirtgen America, Inc. ("Plaintiff" or "Wirtgen") commenced this action to obtain judicial review of a decision by U.S. Customs and Border Protection ("Customs") excluding the entry of six redesigned 1810 Series road-milling machines ("Redesigned RMM(s)") pursuant to a Limited Exclusion Order issued by the International Trade Commission ("Commission" or "ITC"). Plaintiff challenges Customs' denial of Wirtgen's protest regarding the exclusion of the Redesigned RMMs sought to be entered into the United States. Compl. ¶¶ 1–2, ECF No. 7. Plaintiff seeks a declaratory judgment and a court order directing Customs to grant entry of the Redesigned RMMs. *Id.* ¶¶ 3–4.

Before the court are Plaintiff's Motion for [Partial] Summary Judgment, ECF No. 40 ("Pl.'s Mot. Summ. J.")[1] , Plaintiff's Renewed Motion for Preliminary Relief and Bond, ECF No. 59 ("Pl.'s PI Mot."), and Defendants' Renewed Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment, ECF No. 80 ("Defs.' Mot. Dism."). The court takes notice that Defendants no longer contest Wirtgen's allegation of non-infringement. Defs.' Mot. Dism. 17, 25. For the following reasons, the court grants Plaintiff's Motion for [Partial] Summary Judgment, denies Plaintiff's Renewed Motion for Preliminary Relief and Bond as moot, denies Defendants' Renewed Motion to Dismiss, or, in the Alternative, Cross-Motion for Summary Judgment, and dismisses Count II of the Complaint as moot.

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[1] Because Plaintiff moves for summary judgment as to Count I but not Count II of the Complaint, the court will treat Plaintiff's motion as a motion for partial summary judgment.

I. BACKGROUND

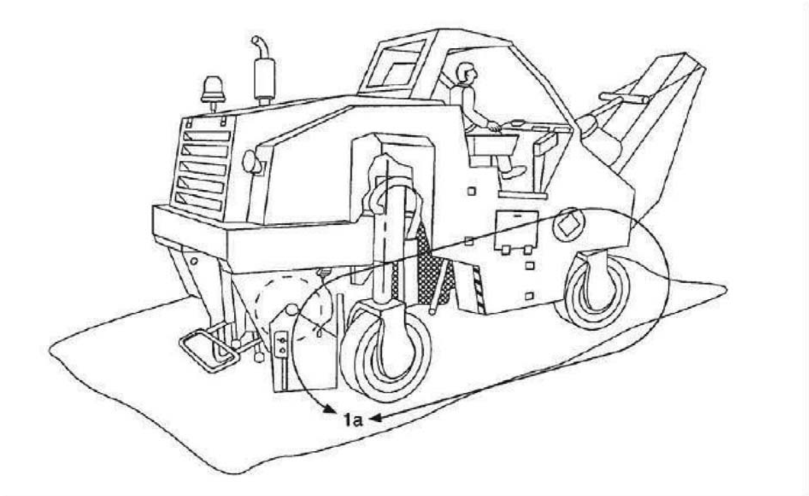
Wirtgen is the exclusive U.S. importer of Wirtgen Group's heavy machinery under the Wirtgen, Vögele, Hamm, and Kleemann brands used primarily in road construction and maintenance. Compl. ¶¶ 9–10; Prelim. Inj. Hr'g Tr. 18:9–13, Apr. 2, 2020, ECF No. 76 ("PI Tr."). Wirtgen delivers the subject merchandise to a network of domestic dealers who sell to end-use customers. PI Tr. 17:21–18:6. This case involves Wirtgen-brand road-milling machines (used interchangeably with roto millers, and cold-milling and cold-planer machines), which remove surface layers in the first stage of pavement resurfacing or maintenance. Compl. ¶ 12; Mem. P. & A. Supp. Wirtgen's Mot. Prelim. Relief & Bond 1, 5, ECF No. 60 ("Pl.'s PI Br."); PI Tr. 65:13–17.

The ITC initiated Investigation 337-TA-1088 ("1088 Investigation") under Section 337 of the Tariff Act of 1930 ("Section 337"), 19 U.S.C. § 1337, upon a patent infringement complaint filed by Caterpillar, Inc. and Caterpillar Paving Products, Inc. (collectively, "Caterpillar").[2] *Certain Road Construction Machines and Components Thereof,* 82 Fed. Reg. 56,625, 56,625 (Int'l Trade Comm'n Nov. 29, 2017) (institution of investigation by Commission into Section 337 violations). Caterpillar[3] alleged that Wirtgen infringed U.S. Patent No. 7,140,693 B2 ("'693 Patent"). *See id.* The '693 Patent claims, in relevant part, the invention of an extendable and retractable swing leg: "one wheel or track [ ] connected to a [ ] lifting column connected to [the frame of a work machine] . . . " where rotating the "wheel or track . . . includes rotating [the] lifting column." Compl. Ex. A, at 13, ECF No. 7–1 ("'693 Patent").[4] The '693 Patent includes the following illustration:

[2] Wirtgen filed a patent infringement complaint against Caterpillar. The Commission initiated Investigation No. 337-TA-1067 and found that Caterpillar infringed Wirtgen's patent. *Certain Road Milling Machines and Components Thereof*, 82 Fed. Reg. 40,595 (Int'l Trade Comm'n Aug. 25, 2017). Caterpillar appealed the Commission's decision to the U.S. Court of Appeals for the Federal Circuit. Caterpillar's appeal and Wirtgen's appeal have been consolidated in Federal Circuit Appeal No. 19–2306. Defs.' Mot. Dism. 13.

[3] Gregory Henry Dubay, Michele Orefice, and Dario Sansone are the inventors and Bitelli S.p.A. is the assignee listed on the '693 Patent. Bitelli S.p.A. assigned its rights to Caterpillar Paving Products, Inc., the current owner of the '693 Patent. Pl.'s PI Br. Ex. 2, at 7.

[4] The pages of the '693 Patent are not consecutively numbered, so, when necessary, the court will cite the '693 Patent through ECF pagination.



’693 Patent, at 4.

In the ITC proceeding, the experts disagreed on whether the yoke, a bracket that fits over the wheel track, is part of the lifting column. Pl.’s PI Br. Ex 2, at 34–35, ECF No. 60–2 (Final Initial Determination, “FID”); see ’693 Patent, at 13. Caterpillar’s expert opined that in the Bitelli SF 102 C[5] (“Bitelli Prior Art”), a Bitelli cold planer machine sold in the 1990s–2000s, the yoke was distinct from the lifting column because the lifting column did not rotate when the yoke rotated the rear wheel tracks, unlike the ’693 Patent. FID 29, 34–35. The Administrative Law Judge agreed, concluding in the Final Initial Determination that Claim 19 is not anticipated because “[u]nlike the coaxial sleeve and bracket claimed as part of the lifting colmnn in the ’693 patent, the yoke in the [Bitelli Prior Art] is a distinct structure that rotates the tracks on a separate axis from the lifting column ....” Id. at 35–36.

The ITC adopted the Administrative Law Judge’s Final Initial Determination that the Wirtgen W 100 CFi, W 120 CFi, and W 130 CFi Series 1810 road-milling machines (collectively, “Original RMMs”) infringed Claim 19 of the ’693 Patent. *Certain Road Construction Machines and Components Thereof,* 84 Fed. Reg. 31,910, 31,911 (Int’l Trade Comm’n July 3, 2019) (notice of Commission final determination); Pl.’s PI Br. 6; FID 84–85.

Contemporaneous with the ITC proceeding, Wirtgen redesigned the swing leg of the Original RMMs based on the Bitelli Prior Art to avoid

[5] “A Bitelli SF 102 C machine ... was inspected during discovery in this investigation, and numerous photos and videos from the inspection were admitted into evidence.” FID 29.

infringing Claim 19 of the ’693 Patent and presented the swing leg redesign as evidence during the trial before the Administrative Law Judge. Statement of Undisputed Material Facts Supp. of Wirtgen’s Mot. For Summ. J. ¶ 13, ECF No. 44 (“SUMF”); Compl. ¶¶ 36–41; FID 24–25. The Administrative Law Judge declined to consider the redesigned swing leg because the “design[ ] [had] not been implemented in any imported articles, however, and [was] thus outside the scope of [the] investigation. Th[is] alternate swing-leg design[ ] [was] not ripe for a determination of infringement or non-infringement in this investigation.” Compl. ¶¶ 42–43; FID 25. The ITC issued a Limited Exclusion Order (“LEO”) barring importation by Wirtgen of products infringing Claim 19 of the ’693 Patent and issued a cease-and-desist order against Wirtgen. Limited Exclusion Order, USITC Inv. No. 337-TA-1088 (June 27, 2019), ECF No. 7–5, Ex. 4 (“LEO”); 84 Fed. Reg. at 31,911. Paragraph 1 of the LEO states: “Road construction machines and components thereof that infringe claim 19 of the ’693 patent . . . are excluded from entry for consumption into the United States [or] entry for consumption from a foreign-trade zone . . . .” LEO ¶ 1. Wirtgen’s appeal of the ITC’s determination remains under review at the U.S. Court of Appeals for the Federal Circuit. Compl. ¶ 34; SUMF ¶ 12.

Wirtgen incorporated the redesigned swing leg into 1810 Series machines that bear the new branding of W 100 XFi, W 100 XTi, W 120 XFi, W 120 XTi, W 130 XFi, and W 130 XTi. *Id.* ¶¶ 46–54. The “X” indicates that the machines have a new swing-leg redesign.[6] Compl. ¶¶ 55–56; SUMF ¶¶ 21–26.

Wirtgen’s counsel met with Customs officials to explain the structure, operation, and new branding of the Redesigned RMMs on August 13, 2019. Compl. ¶¶ 65–66; Pl.’s PI Br. 7; SUMF ¶ 29. In a September 5, 2019 memorandum (“Wirtgen Memorandum”) to Customs, Wirtgen’s counsel submitted six photographs and nine videos of a W 120 XFi Redesigned RMM, serial number 18101069, which depict the distinction between the Redesigned RMMs and the Original RMMs, demonstrating to Customs officials that the Redesigned RMMs do not infringe Claim 19 of the ’693 Patent. *See* SUMF ¶¶ 31–34; Compl. ¶¶ 68–82. The Wirtgen Memorandum depicts the “rotational coupling” of the Original RMM swing leg that the Administrative Law Judge found infringed Claim 19, compared to the “rotational decoupling” of the Redesigned RMM swing leg designed to avoid Claim 19 by incorporating the swing leg design of the Bitelli

[6] “F” and “T” indicate cost-related differences irrelevant to this case. Compl. ¶¶ 57–58; SUMF ¶ 27–28.

Prior Art. Compl. Ex. 6, at 7–10 ("Wirtgen's Mem."). The Wirtgen Memorandum also includes photographs identifying a "keyway" or visible vertical groove down the length of the lifting column. *Id.* at 10–13. The series of photographs of the wheel track and yoke in straight, steering left, and steering right positions shows that the lifting column keyway remains stationary regardless of the rotation of the wheel track and yoke. *See id.*; SUMF ¶¶ 83–85. The Wirtgen Memorandum also explains how to identify the first Redesigned RMM scheduled to arrive at the Port of Baltimore, Maryland, by the manifest and visual inspection. Compl. ¶¶ 83–85; SUMF ¶¶36–37. Wirtgen offered to make a technician available at the port to demonstrate the Redesigned RMM's operation and answer questions. Compl. ¶ 86; SUMF ¶ 38–39; Pl.'s PI Br. 7. The following Redesigned RMMs were released by Customs and allowed entry:

Imported Machines				
Machine	**Serial Number**	**Bill of Lading**	**Port**	**Date of Importation**
W 120 XFI	18101069	WLWHDE1991383	Baltimore	9/9/2019
W 120 XFI	18101071	WLWHDE1998465	Hueneme	10/23/2019
W 120 XFi	18101082	KKLUHAM504913	Brunswick	11/11/2019
W 120 XFi	18101083	WLWHDE2005736	Baltimore	11/4/2019
W 120 XTi	18101085	WLWHDE2005736	Baltimore	11/4/2019
W 120 XFi	18101087	WLWHDE2008279	Baltimore	11/12/2019
W 120 XFi	18101091	KKLUHAM505319	Baltimore	11/23/2019
W 120 XFi	18101093	KKLUHAM505319	Baltimore	11/23/2019
W 120 XTi	18101095	KKLUHAM505566	Brunswick	12/13/2019
W 120 XTi	18101096	KKLUHAM505566	Brunswick	12/13/2019

Pl's PI Br. Ex. 1, ¶ 24, Compl. ¶¶ 88–89, 91. Customs detained the following six Redesigned RMMs that are at issue in this case:

Machines Detained and Not Released					
Machine	**Serial Number**	**Bill of Lading**	**Port**	**Date of Detention**	**Date of Exclusion**
W 120 XFi	18101084	WLWHDE2007062	Brunswick	11/18/2019	12/17/2019
W 120 XTi - KB	18101086	WLWHDE2007062	Brunswick	11/18/2019	12/17/2019
W 120 XTi - KB	18101088	KKLUHAM505320	Brunswick	11/21/2019	12/17/2019
W 120 XTi - KB	18101089	KKLUHAM505320	Brunswick	11/21/2019	12/17/2019
W 120 XFi - KB	18101092	KKLUHAM505320	Brunswick	11/21/2019	12/17/2019
W 120 XFi	18101094	WLWHDE2013112	Baltimore	12/3/2019	12/27/2019

Pl's PI Br. Ex. 1, ¶ 26; *see* Compl. ¶¶ 93–100; SUMF ¶¶ 42–45, 49–50.[7] On December 9, 2019, Wirtgen submitted certifications, dated Sep-

[7] Customs claims that the ten admitted Redesigned RMMs "came in very soon after the LEO was transmitted to CBP and so CBP at that moment was still in the process of creating

tember 9, 2019, stating that the six detained Redesigned RMMs were outside the scope of the LEO. Compl. ¶ 104. Customs issued three notices excluding the six detained Redesigned RMMs. Compl. Exs. B–D, ECF Nos. 7–2, 7–3, 7–4 (collectively, "Exclusion Notices"). The Exclusion Notices explain that Customs applies the LEO to all products that infringe the '693 Patent. *Id.* at 2. Customs asserted in the Exclusion Notices that Wirtgen failed to meet its burden of showing that the excluded Redesigned RMMs are non-infringing. *Id.* at 3. Customs recounted the ITC Administrative Law Judge's determination that the redesign was not ripe for a determination of infringement or non-infringement. *Id.* at 3–4 (citing FID 24–25). Customs refused to accept Wirtgen's certification without an ITC or Customs determination. *Id.* at 5. The Exclusion Notices advise that importers may seek prospective guidance on whether a product is subject to an exclusion order through an ITC advisory opinion or a Customs Part 177 ruling. *Id.* (citing 19 C.F.R. § 210.79; 19 C.F.R. pt. 177).

The U.S. Patent Trial and Appeal Board ("PTAB") issued a Final Written Decision as to Wirtgen's petition for *inter partes* review of the '693 Patent. *Wirtgen America, Inc. and Joseph Vögele AG v. Caterpillar Paving Prods., Inc.*, IPR2018–01201, Paper 32 (PTAB Dec. 13, 2019). The PTAB concluded that all claims, including Claim 19, were unpatentable as obvious according to certain prior art.[8] *Id.* at 34–35. Wirtgen is not challenging the validity of the '693 Patent before this court.

On December 24, 2019, Wirtgen filed a protest as to the first five Redesigned RMMs excluded by Customs on December 17, 2019. Compl. Ex. E, ECF No. 7–5. Wirtgen lodged a protest on December 31, 2019 as to the sixth Redesigned RMM excluded on December 27, 2019. Compl. Ex. F, ECF No. 7–6. The protests included the non-infringement argument and substantiation from the Wirtgen Memorandum, with the complete Wirtgen Memorandum attached. Compl. Ex. E, at 13–22. Customs denied both protests and announced that Customs believes its exclusion decisions are not subject to protest or

the tools necessary to identify those machines so that it could . . . enforce the LEO." PI Tr. 178:10–15. The court notes that the record does not support this assertion. For example, Customs detained five Redesigned RMMs at the Port of Brunswick in November 2019, then subsequently allowed entry of two Redesigned RMMs at the same Port in December 2019. During oral argument, the Government could not provide a reason why some Redesigned RMMs were detained and some Redesigned RMMs were allowed entry. Customs' arbitrary application of the LEO to some Redesigned RMMs and not others undermines the Government's argument in this case.

[8] The PTAB issued a second Final Written Decision concluding that all claims were valid and patentable on separate grounds based on different prior art. *Wirtgen America, Inc. and Joseph Vögele AG v. Caterpillar Paving Prods., Inc.*, IPR2018–01202, Paper 29 (PTAB Dec. 23, 2019). The two Final Written Decisions are independent; the second Final Written Decision has no effect on the PTAB's conclusion in the first Final Written Decision. PI Tr. 159:17–160:11.

review by the U.S. Court of International Trade because the ITC is the only agency with authority to make infringement determinations in the context of Section 337. Compl. Exs. G, H, at 2, 18, ECF Nos. 7–7 ("HQ H308232"), 7–8 ("HQ H308399") (collectively, "Protest Denials")[9]; Defs.' Mot. Dism. 24.

Wirtgen brought an action against Defendants in the U.S. District Court for the District of Columbia, 20-cv-0195, claiming that Customs' application of the LEO to the Redesigned RMMs was arbitrary and capricious, violated the Appointments Clause of the U.S. Constitution, and denied procedural due process. Compl. ¶ 7. Wirtgen sought a temporary restraining order, preliminary injunction, and declaratory relief to prevent Defendants from excluding or seizing Redesigned RMMs imported in the future. *Id.* The case was dismissed by the U.S. District Court for the District of Columbia for lack of subject matter jurisdiction. Notice Suppl. Auth., ECF No. 53. Wirtgen has appealed the dismissal to the U.S. Court of Appeals for the District of Columbia Circuit, which denied Wirtgen's request for expedited review on April 6, 2020. Defs.' Opp'n to Pl.'s Renewed Mot. Prelim. Relief & Bond, at 6 & n.2, ECF No. 74 ("Defs.' Opp'n") (citing USCA Case No. 20–5064, Doc. No. 1836940).

The ITC initiated a modification proceeding of the LEO on January 16, 2020. *Id.* at 5. The parties to the modification proceeding have exchanged contentions and an inspection of a Redesigned RMM was conducted at a port in Georgia. PI Tr. 207:18–25. The modification proceeding in the ITC is ongoing, with a determination and recommendation expected in approximately June 2020. Pl.'s PI Br. 2 n.2; PI Tr. 207:25–208:9.

Before this Court, Wirtgen sought a temporary restraining order and preliminary injunction. Pl.'s Mot. TRO & Prelim. Inj., ECF No. 8. Wirtgen withdrew that motion, ECF No. 36, in favor of the pending [partial] summary judgment motion. Pl.'s Mot. Summ. J. The court issued an expedited scheduling order. Sch. Order, ECF No. 54, *as amended*, Order, ECF No. 63, *as amended*, Order, ECF No. 65, *as amended*, Order, ECF No. 78. Wirtgen filed a renewed motion for preliminary relief and bond. Pl.'s PI Mot. The court held a preliminary injunction and bond hearing. Conf. Prelim. Inj. Hr'g, ECF No. 72. The parties agreed to postpone discovery and proceed with summary judgment briefing. Joint Mot. Modify Sch. 3, ECF No. 77 ("Joint Mot."). On summary judgment, Defendants challenge Wirtgen's assertions that the Redesigned RMMs do not fall within the scope of the

[9] The second denial HQ H308399 incorporated the first denial HQ H308232 by reference, so, when necessary, the court will cite the Protest Denials through the first denial HQ H308232 pagination.

LEO and that Customs was wrong to reject Wirtgen's certification, but no longer contest Wirtgen's assertion of non-infringement. Defs.' Mot. Dism. 17–23. In Defendants' words, the "Government takes no position on Wirtgen's factual allegations on the issue of infringement. Rather, we will defer to the final determination of the ITC, which is considering the question as part of the modification proceeding of the LEO and respectfully request that the Court do the same." *Id.* at 6, 25.

II. DEFENDANTS' RENEWED MOTION TO DISMISS

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (protest-denied jurisdiction). *See Wirtgen Am., Inc. v. United States*, No. 20–00027, 2020 Ct. Intl. Trade LEXIS 30, at *31 (Ct. Int'l Trade Mar. 4, 2020) ("*Wirtgen I*"). It is well-settled that a federal court's jurisdiction is conferred solely by statute; an administrative agency cannot enlarge or limit a court's jurisdiction. *See Myers v. United States*, 272 U.S. 52, 64 (1926); *Bell v. New Jersey & Pennsylvania*, 461 U.S. 773, 777 (1983).

Defendants revive their argument in Defendants' Renewed Motion to Dismiss that this Court lacks subject matter jurisdiction based on Wirtgen's purported challenge to the scope of the limited exclusion order, which Defendants argue is within the purview of the ITC rather than this Court. Defs.' Mot. Dism. 9. Defendants do not provide any new facts or persuasive law in support of their renewed motion to dismiss for lack of jurisdiction. The court relies on its prior opinion in *Wirtgen I* regarding the Court's jurisdiction, and addresses here some additional jurisdictional issues raised by Defendants.

Defendants support their renewed motion to dismiss for lack of jurisdiction by citing a non-precedential opinion by a District Court Judge for the District of Columbia, who opined in dicta that this Court lacks jurisdiction. It is apparent that the D.C. District Court Judge's opinion is based on a fundamental misunderstanding of Plaintiff's claims. Defendants state, "[a]t its heart, Wirtgen's complaint challenges the scope of a limited exclusion order." *Id.* at 7. This pronouncement miscasts Plaintiff's claims pending before this Court, which actually challenge Customs' denials of Plaintiff's protests, and do not seek to litigate the Section 337 patent infringement case or modify the scope of the LEO.

Customs has the authority to enforce exclusion orders. 19 U.S.C. § 1337(d) ("The Commission shall notify the Secretary of the Treasury [Customs] of its action under this subsection directing such exclusion from entry, and upon receipt of notice, the Secretary shall, through the proper officers, refuse such entry."). Customs' authority to act against imported merchandise is limited to the language of the ITC's Section 337 exclusion order. The LEO excludes from entry Wirtgen's "[r]oad construction machines . . . that infringe claim 19 of the '693 Patent. . . ." LEO ¶ 1; Statement of Undisputed Material Facts Supp. of Wirtgen's Mot. For Summ. J. Ex. 6 (Feb. 24, 2020), ECF No. 44 ("SUMF"). As noted in this Court's prior decision regarding jurisdiction, while ordering the exclusion from entry of Wirtgen's "[r]oad construction machines . . . that infringe claim 19 of the '693 Patent . . . ", LEO ¶ 1, the Limited Exclusion Order does not address the Redesigned RMMs. *Wirtgen I* at 7. "Thus, according to the facts Wirtgen alleges, the ITC did not direct Customs to exclude the six Redesigned 1810 Series machines from entry, and, accordingly, the decision to exclude the six Redesigned 1810 Series machines was made by Customs." *Id.* at 8. The court is not persuaded by Defendants' jurisdictional arguments and finds that Customs made a reviewable decision to exclude the Redesigned RMMs, which is subject to this Court's jurisdiction. Customs' denials of Wirtgen's timely protests of the exclusion of its entries vests this Court with jurisdiction pursuant to 28 U.S.C. § 1581(a).

In addition, Defendants' jurisdictional contention ignores Customs' own regulations and directives setting forth the rules governing how Customs makes decisions when administering the ITC Section 337 exclusion order enforcement process. In deciding whether Wirtgen's Redesigned RMMs infringe Claim 19 of the '693 Patent under the LEO, Customs was required to follow its own regulations and directives to enforce the exclusion order. *See United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382–83 (Fed. Cir. 2009) (citing *Ft. Stewart Schools v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations.")); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 875–76 (Fed. Cir 1995) ("[W]e strongly deplore Commerce's or any other agency's failure to follow its own regulations. Such failure harms those who assume agency compliance and are prejudiced by the non-compliance.").

Customs' regulation governing the enforcement of exclusion orders is found at 19 C.F.R. § 12.39, which states in relevant part:

> (b)(1) If the Commission finds a violation of Section 337, or reason to believe that a violation exists, it may direct the Secretary of the Treasury [Customs] to exclude from entry into the United States the articles concerned which are imported by the person violating or suspected of violating Section 337. . . . [A]rticles covered by the determination will be refused entry.

19 C.F.R. § 12.39(b)(1).

Customs Directive No. 2310–006A sets forth Customs' policies and procedures concerning Section 337 exclusion orders as follows:

> **Exclusion Orders. . . .**
>
> 3. **Background**. . . . Subsequent to an investigation of an alleged violation under Section 337, where the U.S. International Trade Commission (ITC) determines that Section 337 has been violated, the Commission may issue orders directing the Secretary of the Treasury [Customs] to exclude the subject goods from entry into the United States. . . .
>
> 4. **Enforcement**. In general, Exclusion Orders issued by the ITC are administered by the [Customs] Office of Regulations & Rulings, IPR Branch. . . .
>
> 4.1.1. ***Given the highly technical nature of articles which are the subject of most Exclusion Orders, Customs officers should seek the advice of Customs laboratories, which provide technical assistance in determining whether goods meet the parameters of the subject patent.*** Field officers may contact the designated field laboratory servicing their geographic area or the Laboratories and Scientific Services at Customs Headquarters for advice.
>
> 4.1.2. ***Where goods determined to be subject to an Exclusion Order are presented to Customs, field officers must exclude the goods from entry into the United States*** and permit export. . . .
>
> 4.1.3. Written notification of such exclusion must be provided to the importer. A sample letter to be issued to the importer in such a case is attached to this Directive. . . .
>
> 5. **Responsibilities**. Customs field officers are responsible for following this Directive. Area/Port Directors, Assistant Port Directors (Trade Operations), supervisory import specialists, and supervisory inspectors are responsible for ensuring that their staffs are aware of the content of this Directive and adhere to the guidelines provided.

Exclusion Orders, Customs Directive No. 2310–006A (Dec. 16, 1999), https://www.cbp.gov/sites/default/files/documents/2310–006a_3.pdf (last visited May 2, 2020) ("Customs Directive") (emphasis added). This Customs Directive demonstrates clearly to the court that Customs plays an active role "in determining whether goods meet the parameters of the subject patent." *Id.* The Customs Directive also makes apparent that Customs must render substantive decisions as to whether "goods [are] determined to be subject to an Exclusion Order." *See id.*

Moreover, the Customs Directive specifies Customs' procedures in conducting a substantive assessment of whether goods meet the parameters of the subject patent, which directly contradicts Defendants' position in this litigation that Customs plays no role in assessing infringement and that the ITC has sole jurisdiction over patent analyses subject to ITC Section 337 exclusion orders. The court is unpersuaded by Defendants' assertion that it is not proper or possible for Customs to conduct a substantive patent analysis to determine whether proposed entries fit within the parameters of a Section 337 exclusion order. Defendants' argument suggests that, absent a preimportation ruling request to Customs under Part 177, only the ITC can make an infringement determination before allowing an entry into the United States. Defendants' argument seeks to render the protest process null and void when goods that could be subject to an exclusion order are presented to Customs, and directly contradicts Customs' own directives. It simply does not make sense to condone Customs' failure to follow its own regulations and directives. The court concludes that Customs must determine whether goods meet the parameters of the subject patent when enforcing a Section 337 exclusion order.

In this case, the LEO did not specify which road construction machines were infringing, so Customs was required to conduct an examination according to its policies and procedures to determine whether Wirtgen's unadjudicated entries were excludable under the LEO for meeting the parameters of Claim 19 of the '693 Patent. Even though Customs did not issue a written patent infringement analysis as it has in similar cases, *see, e.g.*, *One World Techs. v. United States*, 42 CIT __, 357 F. Supp. 3d 1278 (2018), and *Corning Gilbert, Inc., v. United States*, 37 CIT __, 896 F. Supp. 2d 1281 (2013), the court notes that the policies and procedures in Customs Directive No. 2310–006A applied to Customs' actions here. The court concludes that Customs' written Exclusion Notices had the effect of determining that the entries in question met the parameters of the subject patent. Customs' decision that Wirtgen's Redesigned RMMs infringe Claim 19 of the '693 Patent and fall within the LEO was more than the performance of a merely ministerial function to simply enforce the LEO. *See, e.g.*, Exclusion Notices at 7 (Customs stated that Wirtgen's Redesigned RMMs are "excluded from entry for consumption into the United States"). Because the entries were not released by Customs within the prescribed time, and because Customs issued its decisions excluding Wirtgen's entries, the unreleased subject merchandise are considered excluded for the purposes of 19 U.S.C. § 1514. Wirtgen filed timely protests of the exclusion from entry pursuant to 19 C.F.R.

§ 174. Although Customs claims that the exclusion made pursuant to the LEO "is not a subject matter subject to protest," the court concludes that Customs' Protest Denials serve as *de facto* denials of Wirtgen's protests pursuant to 28 U.S.C. § 1581. *See* HQ H308232, at 3.

Customs cannot attempt to limit this Court's jurisdiction by purporting that it did not make an exclusion determination and did not deny Wirtgen's protests. *See Myers*, 272 U.S. at 64 (1926); *Bell*, 461 U.S. at 777. The court concludes that Customs made a reviewable determination when it excluded the Redesigned RMMs and denied Wirtgen's timely-filed protests of the exclusion from entry of the Redesigned RMMs under the LEO. *See* Exclusion Notices, at 2 ("The above-identified exclusion order . . . extends to all products . . . that infringe the relevant intellectual property."). Thus, jurisdiction is properly vested in this Court pursuant to 28 U.S.C. § 1581(a) for protests denied.

This Court previously issued an opinion explaining at length that the U.S. Court of International Trade has proper jurisdiction over this matter. *See Wirtgen I*. Defendants have not argued that the occurrence of subsequent events have impacted this Court's jurisdiction, nor have Defendants put forward any persuasive arguments that would warrant disturbing this Court's prior analysis finding jurisdiction. Upon consideration of Defendants' Renewed Motion to Dismiss, nothing provided by Defendants convinces this Court that it is ousted of jurisdiction over this matter. Accordingly, for the reasons stated in *Wirtgen I* and in this opinion, the Court denies Defendants' Renewed Motion to Dismiss.

III. WIRTGEN'S MOTION FOR [PARTIAL] SUMMARY JUDGMENT

Summary judgment, including partial summary judgment, is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Wirtgen's Complaint focuses on whether Customs' denial of Wirtgen's protests of the exclusion of the six Redesigned RMMs was improper because the Redesigned RMMs do not infringe Claim 19 of the '693 Patent. Pl.'s PI Br. 10. The sole issue before this court on summary judgment is whether Customs properly excluded the six Redesigned RMMs as infringing merchandise pursuant to the LEO. The court reviews actions involving denied protests *de novo*. 28 U.S.C. § 2640(a)(1).

The court concludes that Customs' exclusion was not proper because the redesigned RMMs are non-infringing. It is undisputed that the redesigned machines do not infringe Claim 19 of the '693 Patent, based on the significant development that Defendants are not contesting Wirtgen's assertion of non-infringement. Joint Mot. 4; Defs.' Mot. Dism. 17, 25. The Parties stated in a joint motion that "Defendants do not contest Wirtgen's allegation of non-infringement and will take no position on the issue of non-infringement in opposition to Wirtgen's pending motion for summary judgment beyond seeking deference to the [ITC's modification proceeding]." Joint Mot. 4. Defendants' brief in opposition to Plaintiff's motion for summary judgment does not argue affirmatively that the Redesigned RMMs infringe Claim 19 of the '693 Patent, but instead takes the position that "the ITC is the agency with paramount authority and responsibility for making infringement determinations in the context of section 337." Defs.' Mot. Dism. 24.

The court finds that Defendants have waived any argument of infringement because the Government failed to contest non-infringement in its opposition to Plaintiff's motion for summary judgment. *See* USCIT R. 56(e); *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1369 (Fed. Cir. 2006) (noting that when a party fails to provide opposing evidence to respond to a moving party's motion for summary judgment, a court can enter judgment against the nonresponsive party if the moving party is otherwise entitled as a matter of law). In this case, Wirtgen as the movant alleged that its Redesigned RMMs do not infringe Claim 19 of the '693 Patent, and Defendants failed to provide any opposing evidence responsive to Wirtgen's claim of non-infringement. Accordingly, the court finds that Defendant waived any argument of infringement to rebut Plaintiff's allegation of non-infringement in support of its motion for summary judgment. It is undisputed, therefore, that Wirtgen's Redesigned RMMs are non-infringing.

For the foregoing reasons, based on the undisputed facts, the court holds that Wirtgen's Redesigned RMMs do not infringe Claim 19 of the '693 Patent. The court holds also that Customs' denials of Wirtgen's protests were improper because the non-infringing Redesigned RMMs should not have been excluded pursuant to the LEO. Plaintiff's motion for [partial] summary judgment is granted.

IV. REMEDY

The court considers the proper remedy in light of the granting of partial summary judgment for Plaintiff.

This Court has the authority to order Customs to release articles for entry into the United States. 19 U.S.C. § 1499(c)(5)(C). In granting a permanent injunction, a court must be satisfied that: "(1) [the plaintiff] has suffered an irreparable injury;" (2) legal remedies, including monetary damages, "are inadequate to compensate the injury;" (3) the balance of the parties' hardships warrants equitable relief; and (4) "the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

In this case, Wirtgen has demonstrated irreparable injury. Wirtgen is unable to recognize revenue and profits for the excluded Redesigned RMMs, PI Tr. 109:14–110:4, Pl.'s PI Br. 30–31, and has suffered loss of goodwill. PI Tr. 58:12–14; Pl.'s PI Br. 32–33 (citing Pl.'s PI Br. Ex. 4, Decl. of Robert Forest McDuff, Ph.D ¶ 29, Jan. 13, 2020, ECF No. 60–4 ("McDuff Decl."); Pl.'s PI Br. Ex. 1, Decl. of Jan Schmidt ¶ 4, 30–35, 37, 40, Jan. 12, 2020, ECF No. 60–1 ("Schmidt Decl.")). Wirtgen has also established a likelihood of loss of sales and market share if its customers who verbally committed to purchase the Redesigned RMMs rescind and look for alternatives from Wirtgen's competitors due to Wirtgen's failure to deliver. Schmidt Decl. ¶¶ 7, 10, 11, 39; PI Tr. 20:13–15, 22:4–8, 24:16–24; 98:10–18; Pl.'s PI Br. 3.

Wirtgen explained that its injury cannot be compensated through legal remedies. Loss of goodwill and market share destroys Wirtgen's relationships with its end-use customers that have been developed over decades based on Wirtgen's reliability in a competitive and time-sensitive industry. *See* PI Tr. 58:12–14; Pl.'s PI Br. 32 (citing McDuff Decl. ¶ 29; Schmidt Decl. ¶¶ 30– 35, 37, 40). Damage to business relationships and the loss of future sales to loyal customers cannot be repaired by money damages available at law.

The balance of hardships favors equitable relief. Wirtgen has demonstrated hardship in the form of irreparable injury. Defendants have not asserted any hardship that would befall Defendants if the court were to issue an injunction and release the Redesigned RMMs.

Defendants contend that the public interest favors protecting intellectual property rights and domestic industries by excluding Wirtgen's Redesigned RMMs. Defendants undermined their own arguments, however, because Customs permitted ten Redesigned RMMs to enter the United States between September and December 2019, *see* Schmidt Decl. ¶ 24; PI Tr. 178:8–9, and Defendants do not contest Wirtgen's assertion of non-infringement, Defs.' Mot. Dism. 17, 25. The public interest in protecting domestic intellectual property rights is not served where undisputedly non-infringing goods are denied entry into the United States.

In sum, equity warrants a permanent injunction for the immediate release of the six excluded Redesigned RMMs for entry into the United States.

V. WIRTGEN'S MOTION FOR PRELIMINARY INJUNCTION AND BOND

Pending before the court is Plaintiff's Renewed Motion for Preliminary Relief and Bond, ECF No. 59. In light of the granting of the ultimate relief requested by Wirtgen in its motion for [partial] summary judgment, the preliminary injunction and bond requests are now moot. The court denies Plaintiff's Renewed Motion for Preliminary Relief and Bond as moot.

VI. COUNT II OF WIRTGEN'S COMPLAINT

Under Article III of the U.S. Constitution, this court has jurisdiction over cases and controversies. U.S. Const. art. III, § 2. A case ceases to be an "actual and concrete dispute" required by Article III when a plaintiff obtains the relief sought. *Monk v. Shulkin*, 855 F.3d 1312, 1316 (Fed. Cir. 2017) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974)) (internal citations omitted). In light of the granting of the ultimate relief requested by Wirtgen in its Complaint, Count II of the Complaint is now moot. The court dismisses as moot Count II of the Complaint.

VII. CONCLUSION

For the foregoing reasons, the court grants Plaintiff's Motion for [Partial] Summary Judgment, denies as moot Plaintiff's Renewed Motion for Preliminary Relief and Bond, denies Defendants' Renewed Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment, and dismisses as moot Count II of the Complaint. Judgment will enter accordingly.

Dated: May 18, 2020
New York, New York

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