U.S. Court of International Trade

Slip Op. 20–64

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Plaintiffs and Consolidated Plaintiffs, and JA SOLAR TECHNOLOGY YANGZHOU CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenor and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00176
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the fourth administrative review of crystalline silicon photovoltaic-cells, whether or not assembled into modules, from the People's Republic of China.]

Dated: May 13, 2020

Jonathan Michael Freed, Trade Pacific, PLLC, of Washington, DC, argued for plaintiff, defendant-intervenor, and consolidated defendant-intervenor Changzhou Trina Solar Energy Co., Ltd., and plaintiffs Trina Solar (Changzhou) Science &Technology Co., Ltd. and Trina Solar (U.S.) Inc. With him on the briefs was *Robert George Gosselink*.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, for consolidated plaintiffs and plaintiff intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd. and JingAo Solar Co., Ltd. With him on the briefs were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Bryan P. Cenko*

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, DC, argued for consolidated plaintiff and defendant-intervenor SolarWorld Americas, Inc. With him on the briefs were *Laura El-Sabaawi*, *Usha Neelakantan*, *Stephen J. Obermeier*, and *Enbar Toledano*.

Tara K. Hogan, Assistant Director, argued for defendant. With her on the brief were *Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *Mercedes Morno*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC. Also appearing as Of Counsel was *Ian A. McInerney*, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Kelly, Judge:

This consolidated action is before the court on motions for judgment on the agency record filed by Changzhou Trina Solar Energy Co., Ltd., Trina Solar (Changzhou) Science & Technology Co., Ltd., Yancheng Trina Solar Energy Technology Co., Ltd., Changzhou Trina Solar Yabang Energy Co., Ltd., Turpan Trina Solar Energy Co., Ltd., Hubei Trina Solar Energy Co., Ltd., and Trina Solar (Hefei) Science &

Technology Co., Ltd., (collectively, "Trina"); JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd. and JingAo Solar Co., Ltd. (collectively, "JA Solar"); and SolarWorld Americas, Inc. ("SolarWorld").[1] *See* [Trina's] 56.2 Mot. J. Agency R., Feb. 15, 2019, ECF No. 41; Consol. Pls.' & Pl.-Intervenors' 56.2 Mot. J. Agency R., Feb. 15, 2019, ECF No. 43; SolarWorld's Mot. J. Agency. R., Feb. 15, 2019, ECF No. 44.

Trina, JA Solar, and SolarWorld challenge various aspects of the U.S. Department of Commerce's ("Commerce") final determination in the fourth administrative review of the antidumping duty ("ADD") order covering crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells" or "solar panels"), from the People's Republic of China ("PRC" or "China"). *See* [Trina's] Memo. Supp. Mot. J. Agency R. Confidential Version, Feb. 15, 2019, ECF No. 42 ("Trina's Br."); [JA Solar's] Memo. Supp. 56.2 Mot. J. Agency R., Feb. 15, 2019, ECF No. 43–1; [SolarWorld's] Memo. Supp. 56.2 Mot. J. Agency R. Revised Confidential Version, Feb. 15, 2019, ECF No. 45 ("SolarWorld's Br."); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 35,616 (Dep't Commerce July 27, 2018) (final results of [ADD] admin. review and final determination of no shipments; 2015–2016) ("*Final Results*") and accompanying Issues and Decisions Memo. for the [*Final Results*], A-570–979, (July 11, 2018), ECF No. 36–5 ("Final Decision Memo"); *see also Initiation of [ADD] & Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 10,457 (Dep't Commerce Feb. 13, 2017) ("*Initiation of Reviews*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value, and [ADD] order) ("*ADD Order*").

For the reasons that follow, the court sustains Commerce's decisions to include zero quantity Thai import data when calculating surrogate values, derive surrogate financial ratios using KCE's unconsolidated financial statements, and value Trina's nitrogen inputs using Mexican import data. However, the court remands for further explanation or reconsideration Commerce's refusal to adjust Trina's constructed export price ("U.S. Price") to account for a countervailed subsidy, as well as its reliance on Maersk Line ("Maersk") rate quotes to value Trina's international freight expenses.

---

[1] SolarWorld and Changzhou Trina Solar Energy Co., Ltd. also appear as defendant-intervenors in this consolidated action.

BACKGROUND

On December 7, 2012, Commerce published its determination to issue an ADD order on solar cells from the PRC. *See generally ADD Order*. On February 13, 2017, in response to timely requests, Commerce initiated its fourth administrative review of the *ADD Order*. *See generally Initiation of Reviews*. Commerce selected Trina as the sole mandatory respondent for individual examination.[2] *See* Resp't Selection Memo. [for 2015–2016 ADD Admin. Review], PD 147, bar code 3571565–01 (May 12, 2017);[3] *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 1,018 (Dep't Commerce Jan. 9, 2018) (prelim. results of [ADD] admin. review and prelim. determination of no shipments; 2015–2016) ("*Prelim. Results*") and accompanying Issues and Decisions Memo. for the [*Prelim. Results*] at 2–3, A-570–979, PD 363, bar code 3657733–01 (Jan. 2, 2018) ("Prelim. Decision Memo"). Commerce considers the PRC to be a nonmarket economy ("NME"); thus, when calculating Trina's dumping margin, Commerce determined the normal value of Trina's merchandise by using prices from a surrogate market economy country to value factors utilized to produce the subject merchandise ("factors of production" or "FOPs").[4] *See* Section 773(c)(4) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c)(4) (2012).[5] Commerce chose Thailand as the primary surrogate country. *See* Prelim. Decision Memo at 14–17.

For the *Prelim. Results*, when calculating Trina's dumping margin, Commerce declined to increase Trina's U.S. Price to account for the

---

[2] Canadian Solar Inc. and Canadian Solar (USA) Inc. were also selected for individual examination, but timely withdrew their request for administrative review, and further requested Commerce rescind review of all Canadian Solar entities. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 83 Fed. Reg. 1,018 (Dep't Commerce Jan. 9, 2018) (prelim. results of [ADD] admin. review and prelim. determination of no shipments; 2015–2016) ("*Prelim. Results*") and accompanying Issues and Decisions Memo. for the [*Prelim. Results*] at 5–6, A-570–979, PD 363, bar code 3657733–01 (Jan. 2, 2018) (citing Letter of Withdrawal at 1–2, PD 133, bar code 3567268–01 (May 1, 2017)); *see also* 19 C.F.R. § 351.213(d)(1) (2017).

[3] On November 9, 2018, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 36–4 and 36–2–3, respectively. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in those indices and preceded by "PD" and "CD" to denote public or confidential documents.

[4] The term "nonmarket economy country" means any foreign country that Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). In such cases, Commerce must "determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . [together with other costs and expenses]." *Id.* § 1677b(c)(1).

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

5.46 percent *ad valorem* countervailing duty ("CVD") rate it imposed, based on facts available with an adverse inference, on the subject merchandise in the most recent review of the companion CVD order ("companion CVD review"). *See* Prelim. Decision Memo at 30; *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 82 Fed. Reg. 32,678 (Dep't Commerce July 17, 2017) (final results of [CVD] admin. review, and partial rescission of [CVD] admin. review; 2014) ("*3rd CVD AR*") and accompanying Issues and Decisions Memo. for [*3rd CVD AR*] at Cmts. 1–2, C-570980, (July 10, 2017), *available at* https://enforcement.trade.gov/frn/summary/prc/2017–14957–1.pdf (last visited Apr. 30, 2020) ("3rd CVD AR IDM").[6] When calculating Trina's ocean freight expenses, Commerce relied on international freight rates from Maersk, a transportation and logistics company. *See* Prelim. Decision Memo at 25–26. When calculating Trina's selling, general and administrative ("SG&A") expenses, overhead, and profit, Commerce found that financial statements from three Thai companies—Hana Microelectronics Public Co., Ltd., KCE Electronics Public Company Limited ("KCE"), and Styromatic (Thailand) Co., Ltd. ("Styromatic")—constituted the best available information for deriving surrogate financial ratios. *See* Prelim. Decision Memo at 26–27. Finally, although Commerce chose Thailand as the primary surrogate country, when valuing Trina's liquid and compressed nitrogen ("nitrogen") FOPs, Commerce relied on Mexican import data—citing concerns that the Thai import data "may not correctly reflect the actual broad market average price for nitrogen in Thailand[.]" Prelim. Surrogate Value Memo. [for 2015–2016 ADD Admin. Review] at 4, PD 364, bar code 3658331–01 (Jan. 2, 2018) ("Prelim. SV Memo"); *see also* Prelim. Decision Memo at 24 (citing Prelim. SV Memo).

On July 27, 2018, after receiving comments from interested parties, Commerce published its *Final Results*. *See Final Results*, 83 Fed. Reg. at 35,616. For the *Final Results*, as in the *Prelim. Results*, Commerce declined to increase Trina's U.S. Price to account for the 5.46 percent CVD rate from the companion CVD review. *See* Prelim. Decision Memo at 30; Final Decision Memo at 17–20; 3rd CVD AR IDM at Cmts. 1–2. Commerce declined Trina's request to rely on data from Xeneta AS ("Xeneta"), a market research firm in logistics, and continued to rely on Maersk data to calculate freight expenses. *See* Final Decision Memo at 27–32; *see also* [Trina's] Surrogate Value Freight Submission at Exs. 1–3, CD 186, bar code 3594073–01 (July

[6] In the companion CVD review, Commerce based the 5.46 percent CVD rate on a total facts available with an adverse inference finding that the Ex-Im Bank of China's Export Buyer's Credit Program ("Credit Program") was a countervailable subsidy. *See* Final Decision Memo at 19–20; *see also* 3rd CVD AR IDM at Cmts. 1–2.

17, 2017) ("Xeneta Freight Data"). Commerce also declined Trina's request to exclude Thai import data with zero quantities when calculating its dumping margin. *See* Final Decision Memo at 20–22. To derive Trina's surrogate financial ratios, Commerce chose statements from Styromatic and KCE, *see* Final Decision Memo at 39–49, specifically relying on the unconsolidated version of KCE's statements. *See* Final Decision Memo at 48. Finally, when valuing Trina's nitrogen FOPs, Commerce continued to use Mexican import data. *See* Final Decision Memo at 32–38.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review actions contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Adjusting Trina's Net U.S. Price

Trina challenges Commerce's refusal to increase its U.S. Price by the CVD imposed on the subject merchandise in the companion CVD review. *See* Trina's Br. at 4–9. Defendant counters that Commerce is not required to increase the U.S. Price because the CVD in the companion CVD review was not based on an affirmative finding that the Ex-Im Bank of China's Export Buyer's Credit Program ("Credit Program") was an export subsidy. *See* Def.'s Resp. Mot. J. [Agency] R. at 8–10, Sept. 10, 2019, ECF No. 55 ("Def.'s Br."). SolarWorld adds that intervening changes to the Credit Program have rendered inapposite Commerce's previous findings that the program is a countervailable export subsidy. *See* Def.-Intervenor [SolarWorld's] Resp. Mots. J. Agency R. at 8–10, Sept. 18, 2019, ECF No. 59 ("Def.-Intervenor's Br."). For the following reasons, Commerce's refusal to increase Trina's U.S. Price is contrary to law.

When reviewing an ADD order, Commerce determines antidumping duties owed on subject imports by calculating the amount by which the normal value of the merchandise exceeds its U.S. Price. *See* 19 U.S.C. §§ 1673, 1675(a)(2)(A), (C); *see also id.* § 1677(35). The normal value represents the price of the subject merchandise in the exporting country, *see id.* § 1677b, and the U.S. Price represents the price at which the subject merchandise is sold in the United States. *See id.* § 1677a. However, where the subject merchandise is also covered by a

CVD order, Commerce is required to increase the U.S. Price by the amount of any CVD imposed on the merchandise to offset an export subsidy. *Id.* § 1677a(c)(1)(C).[7]

To impose a CVD, Commerce must find that an exporter benefited from a countervailable subsidy. *See* 19 U.S.C. §§ 1671(a)(1), 1677(5)(B). A "countervailable subsidy" is a financial contribution, price support, or funding mechanism, provided by the government of a country, or any public entity within the territory of the country, that confers a benefit to its recipient. *Id.* § 1677(5)(B). The subsidy must also be "specific", meaning it is an (i) import substitution subsidy, (ii) export subsidy, or (iii) domestic subsidy that is specific, in law or fact, to an enterprise or industry within the jurisdiction of the authority providing it. *Id.* § 1677(5)(A); *see also id.* § 1677(5A)(A)–(D).[8] Thus, to impose a CVD, Commerce must find that an exporter both benefited from a subsidy and that the subsidy was specific. *See* 19 U.S.C. §§ 1671(a)(1), 1677(5). An export subsidy is per se specific, *see id.* § 1677(5A), and is defined as "a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions." *Id.* § 1677(5A)(B).

When determining specificity, or any statutory element for imposing a CVD, Commerce necessarily determines facts before deciding whether to impose an adverse inference. Subject to 19 U.S.C. § 1677m(d), Commerce shall use facts otherwise available to reach its final determination when "necessary information is not available on

---

[7] When adjusting antidumping margins to account for countervailed export subsidies, Commerce relies on export subsidy rates found in the most recently completed segment of the companion CVD proceeding. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From [PRC]*, 80 Fed. Reg. 40,998 (Dep't Commerce July 14, 2015) (final results of [add] admin. review and final determination of no shipments; 2012–2013) ("*Solar Cells from China*") and accompanying Issues and Decisions Memo. for the [*Solar Cells from China*] at Cmt. 28, A-570–979, (July 7, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–17238–1.pdf (last visited Apr. 30, 2020) (citations omitted).

[8] In general, a subsidy is countervailable if it "is specific as described in paragraph(5A)." 19 U.S.C. § 1677(5)(A). According to paragraph (5A), "[a] subsidy is specific if it is an export subsidy described in subparagraph (B) or an import substitution subsidy described in subparagraph (C), or if it is determined to be specific pursuant to subparagraph (D)." 19 U.S.C. § 1677(5A)(A). The statute provides the following definitions for such subsidies:

> (B) Export subsidy
>
> An export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.
>
> (C) Import substitution subsidy
>
> An import substitution subsidy is a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions.
>
> (D) Domestic subsidy
>
> In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy[.]

the record"; as well as when a party "withholds information that has been requested by [Commerce]," fails to provide the information timely or in the manner requested, "significantly impedes a proceeding," or provides information Commerce is unable to verify. 19 U.S.C. § 1677e(a). Thereafter, under certain circumstances, such as a party's failure to comply to the best of its ability 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." 19 U.S.C. § 1677e(b)(1)(A). Commerce and parties generally refer to this two-step process by the shorthand "AFA" or "adverse facts available." Employing AFA "does not obviate the need for Commerce to affirmatively find that the elements of the statute [it is applying] have been satisfied." *See Guizhou Tyre Co. v. United States*, 43 CIT __, 415 F. Supp. 3d 1335, 1342 (2019) (quoting *Changzhou Trina Solar Energy Co. v. United States*, 43 CIT __, 359 F. Supp. 3d 1329, 1338 (2019) ("*Changzhou*")). Accordingly, when Commerce imposes a CVD based on AFA, it still finds facts that establish the benefit conferred and specificity of the subsidy. *See* 19 U.S.C. §§ 1671, 1677(5), (5A).

Here, Commerce declines to increase Trina's U.S. Price by the CVD it imposed on the subject merchandise when countervailing the Credit Program in the most recent review of the companion CVD order. Final Decision Memo at 19–20. Commerce explains that it does not increase Trina's U.S. Price because it did not determine that the Credit Program was an export subsidy in the companion CVD review. *Id.* Rather, Commerce contends that it employed AFA to countervail the Credit Program. *Id.* Commerce implies that, because it relied on AFA in the companion CVD review, it could have countervailed the Credit Program without determining whether the program was an export subsidy. *See id.*

Commerce's refusal to increase Trina's U.S. Price is contrary to law because record evidence demonstrates that Commerce understood the Credit Program to be specific because it is an export subsidy, and it necessarily found the program to be specific as an export subsidy in the companion CVD review. *See* 19 U.S.C. §§ 1671, 1677(5), (5A); 3rd CVD AR IDM at Cmt. 1; *see also Changzhou*, 43 CIT at __, 359 F. Supp. 3d at 1338–39; 19 U.S.C. § 1677e. To find the Credit Program "specific" based on AFA, the statute requires Commerce to draw the adverse inferences from facts available on the record. *See* 19 U.S.C. § 1677e(a), (b). In this case Commerce confronted whether the program was either an (i) import substitution subsidy, (ii) export subsidy, or, (iii) a domestic subsidy that is specific. *See* 19 U.S.C. §§ 1677e(a), (b), 1677(5A); *see also* 19 U.S.C. 1516a(b)(1)(B)(i). The only information about the Credit Program available to Commerce when employing

AFA demonstrates that, between an import substitution subsidy, an export subsidy, and a domestic subsidy, Commerce necessarily found the program was specific because it is an export subsidy.[9]

For instance, to calculate the AFA rate in the companion CVD review, Commerce relied on a description of the Credit Program that could only indicate the program is an export subsidy. Namely, Commerce used the Government of China's description that the Ex-Im Bank's "Credit Program provides loan support through export buyer's credits" to find the Credit Program comparable to another lending program for purposes of selecting the AFA CVD rate. 3rd CVD AR IDM at Cmt. 2. Between an import substitution subsidy, an export subsidy, and a domestic subsidy, a program that provides loan support through export buyer's credits can only be understood to be "a subsidy that is . . . contingent upon export performance." 19 U.S.C. § 1677(5A)(B) (defining export subsidy).

Similarly, in the CVD investigation underlying the companion CVD order, as well as a separate CVD investigation into solar panels from the PRC, Commerce described the Credit Program as an export subsidy. In both investigations, Commerce determined that the Ex-Im Bank of China uses the Credit Program "to provide[ ] loans at preferential rates for the purchase of exported goods from the PRC." *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the [PRC]*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012) (final affirmative [CVD] determination and final affirmative critical circumstances determination) ("*CVD Investigation Final*") and accompanying Issues and Decisions Memo. for [*CVD Investigation Final*] at 20, C-570–980, (Oct. 9, 2012), *available at* https://enforcement.trade.gov/frn/summary/prc/2012–25564–1.pdf (last visited Apr. 30, 2020) ("CVD Investigation IDM"); *[CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products From the [PRC]*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative [CVD] determination) ("*Solar Panels from China Investigation*") and accompanying Issues & Decision Mem. for the Final Determination in the [CVD] Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC] at 30, C-570–011, (Dec. 15, 2014) *available at* https://enforcement.trade.gov/frn/summary/prc/2014–30071–1.pdf (last visited Apr. 30, 2020) ("Solar Panels from China Investigation IDM").[10] Thus, for purposes of this review, and lacking an apparent

[9] Commerce can derive an adverse inference from potential sources including information contained in the petition, a final determination in the investigation, any previous review under 19 U.S.C. § 1675 or determination under 19 U.S.C. § 1675b, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b)(2)(A)–(D).

[10] In *Solar Panels from China Investigation*, Commerce determined that it could not verify reported "non-use" of the export buyer's credits and predicated its finding of "use" based on

explanation from Commerce in the companion CVD review as to the basis for its AFA determination that the Credit Program was "specific",[11] the court must infer that Commerce found the Credit Program to be "specific" in the companion CVD review because it found the program to be an export subsidy. 19 U.S.C. § 1677(5A)(B) (defining export subsidy); *see also* 3rd CVD AR IDM at Cmt. 2; CVD Investigation IDM at 20; Solar Panels from China Investigation IDM at 30. Consequentially, Commerce's refusal to increase the U.S. Price is contrary to law.

Defendant argues that Commerce's refusal to increase Trina's U.S. Price is consistent with agency precedent and Commerce's need to have confidence that any adjustment made under 19 U.S.C. § 1677a(c)(1)(C) relates solely to export subsidies. *See* Def.'s Br. at 9 (citing *Circular Welded Carbon-Quality Steel Pipe from Pakistan*, 81 Fed. Reg. 36,867 (Dep't Commerce June 8, 2016) (affirmative prelim. determination of sales at less than fair value and postponement of final determination and ext. of provisional measures) ("*CWP from Pakistan*") and accompanying Prelim. Decision Memo for [*CWP from Pakistan*] at 13, A-535–903, (May 31, 2016), *available at* https://enforcement.trade.gov/frn/summary/pakistan/2016–13481–1.pdf (last visited Apr. 30, 2020) (unchanged in final determination) ("*CWP from Pakistan IDM*")); *see also* Oral Arg. at 00:21:46–00:24:06, Mar. 11, 2020, ECF No. 82 ("Oral Arg."). The statutory adjustment prevents a double remedy and unless the countervailed program is an export subsidy, there may be no double remedy warranting an adjustment.[12] Commerce suggests that agency precedent, as exempli-

AFA. *See* Solar Panels from China Investigation IDM at 30. However, Commerce still determined that the Credit Program "provides loans at preferential rates for the purchase of exported goods from the PRC." Solar Panels from China Investigation IDM at 30.

[11] Commerce's determination to countervail the Credit Program based on AFA was challenged and remanded on grounds not directly relevant to this dispute. *See Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, 352 F. Supp. 3d 1316,1325–27 (2018).

[12] Domestic subsidies presumably affect both normal value and U.S. Price and therefore should not affect the dumping margin. *See e.g.*, *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 735 n.2 (Fed. Cir. 2011) ("[The] adjustment [to U.S. Price to account for countervailing duties based on export subsidies] is not made for countervailing duties based on domestic subsidies presumably because these subsidies are already reflected in the normal value.") ("*GPX Int'l Tire Corp.*"), *superseded in part by statute as recognized in* 678 F.3d 1308 (Fed. Cir. 2012); *Low Enriched Uranium From France*, 69 Fed. Reg. 46,501, 46,506 (Dep't Commerce Aug. 3, 2004) (notice of final results of [ADD] admin. review) ("*Low Enriched Uranium From France*"). Export subsidies benefit only exports, resulting in a lower U.S. Price and a higher margin. This margin could be attributed to dumping or subsidization. Where Commerce has already determined that the margin is attributed to subsidization and imposes a CVD, Congress requires an adjustment to the U.S. Price in a companion dumping proceeding to avoid the possibility of a double remedy that exists with an export subsidy, and not a domestic subsidy. *See* 19 U.S.C. § 1677a(c)(1)(C); *see also GPX Int'l Tire Corp.*, 666 F.3d at 735 n.2; *Low Enriched Uranium From France*, 69 Fed. Reg. at 46,506.

fied by *CWP from Pakistan*, supports its position that where it imposes a CVD based on AFA it will not consider that CVD as one made to offset an export subsidy for purposes of the statutory adjustment. *See* Final Decision Memo at 19–20. However, putting to the side whether Commerce's practice in *CWP from Pakistan* is reasonable in that case, the case is inapposite here. In the companion CVD investigation to that proceeding, Commerce received allegations that some of the programs it would go on to countervail based on AFA were export subsidies, CWP from Pakistan IDM at 13, but did not assess the veracity of those allegations because all of the mandatory respondents failed to cooperate. *See id.*; *see also Circular Welded Carbon-Quality Steel Pipe from Pakistan*, 81 Fed. Reg. 20,619 (Dep't Commerce Apr 8, 2016) (prelim. affirmative [CVD] determination and alignment of final [CVD] determination with final [ADD] determination) ("*CWP from Pakistan CVD*") and accompanying Prelim. Decision Memo for [*CWP from Pakistan CVD*] at 11–14, C-535–904, (Apr. 1, 2016), *available at* https://enforcement.trade.gov/frn/summary/pakistan/2016–08147–1.pdf (last visited Apr. 30, 2020) ("CWP from Pakistan CVD IDM"). In the companion CVD review to this proceeding, as explained, Commerce had access to various record-based findings that the Credit Program was an export subsidy.

Defendant-Intervenor SolarWorld argues that, by the time of the companion CVD review, there had been changes to the Credit Program that render Commerce's understanding of the program inapposite for purposes of applying an adjustment in this proceeding. *See* Def.-Intervenor's Br. at 9–10. Commerce does not reference such changes in its explanation below. Instead, Commerce explains its refusal to increase the U.S. Price by noting that it based its decision to countervail the Credit Program in the companion CVD review on AFA. *See* Final Decision Memo at 19–20. Further, even if the rationale that Defendant-Intervenor advances were reasonably discernible from Commerce's explanation, it would fail nonetheless. Although, in the companion CVD review, Commerce did note changes to the Credit Program, *see* 3rd CVD AR at Cmt. 1, Commerce's discussion of those changes indicate that a lack of record information left the agency uncertain about whether the respondents in that proceeding used, or benefitted from, the program. *See id.* There is no indication that the changes undermine Commerce's understanding of whether the program is an export subsidy. *See id.* Defendant and Defendant-Intervenor SolarWorld do not point to any instance where Commerce has described the Credit Program as anything other than an export subsidy. To the extent that Defendant and Defendant-Intervenor So-

larWorld argue that an AFA determination does not represent an affirmative determination, Commerce's reliance on AFA does not obviate the need to render findings based on the record. *See Changzhou*, 43 CIT at __, 359 F. Supp. 3d at 1339. For these reasons, Commerce's determination is contrary to law.

II. International Freight Expenses

Trina challenges Commerce's reliance on the Maersk data to calculate its international freight expenses. *See* Trina's Br. at 10–18. Defendant counters that Commerce reasonably relied on the Maersk data because, in addition to satisfying the agency's selection criteria, the Maersk data is itemized, allowing Commerce to remove handling charges. *See* Def.'s Br. at 10–14. For the following reasons, Commerce's reliance on the Maersk data is not supported by substantial evidence.

In antidumping proceedings involving NMEs, Commerce generally determines normal value of the subject merchandise by valuing FOPs and adding an amount for profits and expenses. *See* 19 U.S.C. § 1677b(c)(1). Commerce values a respondent's FOPs and expenses using data from surrogate market economy countries that are: "(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). To the extent possible, Commerce's regulatory preference is to "value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2017).[13]

When valuing a respondent's FOPs and expenses, Commerce must use the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." *See* 19 U.S.C. § 1677b(c)(1). Commerce has broad discretion to decide what constitutes "the best available information," as the phrase is not statutorily defined. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) ("*QVD Food Co.*"). However, the agency must ground its selection in the overall purpose of the statute, which is to calculate accurate dumping margins. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("*Rhone Poulenc, Inc.*"); *see also Parkdale Int'l. v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) ("*Parkdale Int'l*").

Commerce selects the best available information by evaluating data sources based on their: (1) specificity to the input; (2) tax and import duty exclusivity; (3) contemporaneity with the period of review; (4) representativeness of a broad market average; and (5) public avail-

[13] Further citations to Title 19 of the Code of Federal Regulations are to the 2017 edition.

ability. *See* Import Admin., U.S. Dep't Commerce, *Non-Market Econ. Surrogate Country Selection Process*, Policy Bulletin 04.1 (Mar. 1, 2004), *available at* https://enforcement.trade.gov/policy/bull04–1.html (last visited Apr. 30, 2020); *see also* Prelim. Decision Memo at 21.

Commerce acknowledges that both the Maersk and Xeneta datasets equally satisfy its selection criteria of tax exclusivity, contemporaneity, and public availability. Final Decision Memo at 29–32. Commerce acknowledges that the "Xeneta rates appear to [capture] a broader average rate than Maersk rates[.]" *Id.* at 31. Nonetheless, Commerce chooses Maersk based upon the belief that only the Maersk data allows the agency to remove U.S. handling charges and avoid double counting those charges when calculating Trina's net U.S. Price.[14] *See id.*

Commerce must further explain or reconsider its choice of Maersk data because record evidence contradicts Commerce's observation that handling charges can only be removed from the Maersk data. Record evidence indicates the Xeneta data's default settings can be—and indeed were—adjusted to exclude handling charges. *See* Xeneta Freight Data at Exs. 1, 3. Exhibit 3 to the Xeneta Freight Data depicts the filter "OTHC and DTHC excluded" as selected when the rates were submitted. *See* Xeneta Freight Data at Ex. 3. Exhibit 1 to the Xeneta Freight data indicates that "THC" stands for "terminal handling charges." *See id.* at Ex. 1. Record evidence contradicts Commerce's rationale for relying on the Maersk data, therefore, the court must remand the determination to Commerce for further explanation or reconsideration.[15]

Additionally, regarding specificity, Commerce reasons that "the Maersk rates are for shipping electronic goods while the Xeneta data

[14] Specifically, Commerce explains that:

> Trina reported U.S. brokerage and handling expense (i.e., the USBROKU variable) together with other U.S. movement expenses under the R_INLFWCU variable. Moreover, the record does not contain the information to segregate U.S. brokerage and handling expense (i.e., the USBROKU variable) from the other U.S. movement expenses reported in the R_INLFWCU variable. Because the Xeneta data includes U.S. handling expense and cannot be adjusted to remove this charge, and the U.S. brokerage and handling expense (i.e., the USBROKU variable) cannot be segregated from the other U.S. movement expenses reported in the R_INLFWCU variable, using the Xeneta rate would double count Trina's handling charge when calculating net U.S. price.

Final Decision Memo at 31 (footnotes and citations omitted).

[15] During oral argument, Defendant-Intervenor SolarWorld acknowledged that the Xeneta data filter could be adjusted, but argued that there is no evidence Trina actually provided the data to Commerce free of handling charges. *See* Oral Arg. At 00:37:00–00:38:16. The record evidence contradicts that argument, *see* Xeneta Freight Data at Ex. 3, and furthermore, Commerce did not rely on this rationale below. *See* Final Decision Memo at 30–31. This court cannot now consider SolarWorld's ex post facto rationalization of Commerce's determination. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

do not specify the products." Final Decision Memo at 31. Commerce explains that the Maersk rates "are for shipping electronic goods, which would include solar panels, while the Xeneta rates are not for shipping a particular type of product." *Id.* at 30. However, Commerce does not cite record evidence to support the assumption that shipping solar panels requires special handling or containers, or incurs special charges, such that the Maersk rates for electronics would be more specific than rates derived from the Xeneta data. Indeed, the record indicates that both datasets provide information for 40 foot, high-cube, dry containers—the container used by Trina—and that solar panels are loaded and moved on pallets. *See* Trina's Br. at 12; *see also* Trina's Verification at Ex. 18, CDs 428, 433, bar codes 3641644–01, 3641644–06 (Nov. 15, 2017). On remand, if Commerce continues to rely on Maersk data, it should further explain or reconsider its determination that the Maersk data is more specific and its resulting choice of the Maersk data.

III. Inclusion of Zero Quantity Import Data

Trina contests Commerce's refusal to exclude Thai import data with zero quantities when calculating surrogate values. *See* Trina's Br. at 18–21. Defendant maintains that Commerce's use of zero quantity import data is reasonable because record evidence indicates that using the data does not result in error. *See* Def.'s Br. at 14–17. Commerce's decision to include zero quantity import data is reasonable.

Commerce maintains that Trina's concerns about occurrences of zero quantity values in the Thai import data are unfounded. *See* Final Decision Memo at 21–22. Commerce explains that occurrences of zero quantities in the Thai import data result from the fact that the Global Trade Atlas ("GTA"), the source of the import data, reports data as whole numbers. *Id.* Commerce thus reasons that instances of zero quantities do not indicate that the data is unreliable because the zeros are the result of rounding. *See id.* Further, Commerce observes that including the zero quantities would not distort its calculations because "[r]ounding has both upward and downward effects[,]" resulting in an offsetting effect. *Id.* at 21. Trina counters that Commerce's offsetting rationale applies for all numbers that might be included in the data except zero. *See* Trina's Br. at 19–20. Trina submits that, unlike every other whole number, there will never be an instance of rounding a quantity up to zero, as only a negative quantity can be rounded up to zero. *See id.*

Even if correct, Trina's argument does not detract from Commerce's determination that the zero quantities in the Thai import data are the result of rounding and the inclusion of those quantities does not render the data distorted. *See* Final Decision Memo at 21–22. It is logical for Commerce to assume that a dataset that reports quantities as whole numbers does so as a result of rounding, and that the zero quantities are the result of quantities rounded down to zero. *See id.* Commerce adequately addresses arguments that would undermine this logical assumption. For example, Commerce explains that if zero quantities were the result of error, it would expect the same error to occur with respect to reported values—a phenomenon that does not occur within the data. Final Decision Memo at 21. As Commerce explains, Trina's argument fails to affirmatively demonstrate that the zero quantity values are the result of error, or that the inclusion of zero quantity values significantly distorts the data. *See id.* Although Trina's suggestion to remove the zero quantities from the data might be a reasonable alternative, it does not demonstrate that Commerce's approach was unreasonable. *See* Trina's Br. at 18–20. Indeed, as Commerce notes, none of the parties challenge the reliability of the GTA import data as a whole. *See* Final Decision Memo at 21. Thus, Commerce's determination to include zero quantity import data is reasonable.[16]

IV. Surrogate Financial Ratios

SolarWorld challenges Commerce's reliance on KCE's unconsolidated statements to derive surrogate financial ratios when calculating Trina's overhead, SG&A expenses, and profit. *See* SolarWorld's Br. at 7–12. SolarWorld argues that KCE's consolidated statements are a better representation of Trina's structure and experience because both KCE and Trina are multi-layer corporations with numerous subsidiaries. *See id.* Defendant responds that Commerce's choice is reasonable because, unlike KCE's unconsolidated statements, KCE's consolidated statements both reflect operations outside the surrogate country and capture the experience of producers of noncomparable merchandise. *See* Def.'s Br. at 17–19. For the following reasons, Commerce's determination is supported by substantial evidence.

In an ADD review involving an NME country, to value SG&A expenses, factory overhead, and profit, Commerce uses "financial ratios derived from financial statements of producers of comparable

[16] Trina contends that it is arithmetically incorrect to divide a number by zero. *See* Trina's Br. at 20. However, it is not clear that Commerce made such an attempt, and therefore it is unclear how Trina's contention undermines Commerce's determination.

merchandise in the surrogate country." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319–20 (Fed. Cir. 2010) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010)). Commerce prefers to use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. 19 C.F.R. § 351.408(c)(1), (4).

When calculating Trina's margin, Commerce used KCE's unconsolidated statements to derive surrogate financial ratios. *See* Final Decision Memo at 48–49. Commerce explains there is no evidence that KCE's unconsolidated statements "reflect operations outside of Thailand." *Id.* at 48. Commerce also observes that there is no evidence that "KCE's unconsolidated statements reflect production of non-comparable merchandise[.]" *Id.* (footnotes and citations omitted). By contrast, Commerce notes that KCE's consolidated statements "include several subsidiaries that are located outside of Thailand (i.e., Taiwan, Singapore, and United States), and subsidiaries that do not produce comparable merchandise (i.e., laminates and chemical solutions)." *Id.* (footnotes and citations omitted). Given Commerce's regulatory preference for information gathered from producers of identical or comparable merchandise in the surrogate country, *see* 19 C.F.R. § 351.408(c)(4), Commerce's determination is reasonable.

SolarWorld alleges that, contrary to Commerce and Defendant's representations, KCE's consolidated statements do not include statements from subsidiaries in Taiwan and the United States. *See* [SolarWorld's] Reply Br. Supp. Rule 56.2 Mot. J. Agency R. at 4–5, Oct. 30, 2019, ECF No. 70 ("SolarWorld's Reply Br.") (citing to Letter to Commerce Pertaining to Surrogate Values Submission at Ex. 10, CD 170–85, PD 175–87, bar codes 3591341–01–16, 3591420–01–13 (July 10, 2017) ("KCE Financial Statements"); *see also* Def.'s Br. at 18–19; Final Decision Memo at 48. SolarWorld avers that KCE's Taiwanese and United States entities are listed as associates, not subsidiaries, and that their activities would not be reflected in KCE's consolidated statements. *See* SolarWorld's Reply Br. at 4–5; *see also* KCE Financial Statements. The remaining Singaporean entity, SolarWorld explains, is a single subsidiary that represents a very small fraction of KCE's revenues. *See* SolarWorld's Reply Br. at 5.

Notwithstanding SolarWorld's claim, it is reasonably discernible that Commerce found that KCE's Taiwanese and United States entities reported business activities that are reflected in KCE's consolidated statements. *See* Final Decision Memo at 48. Moreover, SolarWorld fails to persuade that Commerce's determination is unreasonable because the consolidated statements still include infor-

mation from producers of non-comparable merchandise. *See* Final Decision Memo 48–49.

SolarWorld argues that Commerce's justifications for using KCE's unconsolidated statements contradict agency precedent. *See* SolarWorld's Reply Br. at 3–4 (citing *Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1082–83, 638 F. Supp. 2d 1325, 1353 (2009) ("*Fujian*"); *Qingdao Sea-Line Trading Co. v. United States*, 36 CIT 451, 467 (2012) ("*Qingdao*")). SolarWorld cites Commerce's tendency to find that "that the greatest number of financial statements yields the most representative data from the relevant manufacturing sector, and thus provides the most accurate portrayal of the economic spectrum." *Id.* (quoting *Fujian*, 33 CIT at 1082–83, 638 F. Supp. 2d at 1353). SolarWorld's appeal to agency precedent is unavailing because, as explained, Commerce found that KCE's consolidated statements contain information from producers of non-comparable merchandise. *See* Final Decision Memo at 48. As Defendant points out, more data is only better if that data has probative value. *See* Oral Arg. at 00:58:34–00:59:25, Mar. 11, 2020, ECF No. 82 ("Oral Arg."). Moreover, as Defendant also points out, SolarWorld's argument obscures the fact that Commerce did not rely solely on KCE's unconsolidated statements, but Styromatic's statements as well. *See* Final Decision Memo at 43–44, 48–49; *see also* Oral Arg. at 00:58:34–00:59:25. SolarWorld fails to demonstrate that Commerce's reliance on the unconsolidated statements is unreasonable.[17] *See Consolo. v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"); *see also Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (explaining that the inquiry is whether the record reasonably supports an agency's decision, not whether some other reasonable inference exists).

[17] SolarWorld also notes that Commerce's analysis fails to account for the fact that Trina also has subsidiaries outside of China. SolarWorld's Br. at 11. Commerce explains that it has a preference for not using consolidated statements when those statements reflect operations outside of the surrogate country or production of non-comparable merchandise. *See* Final Decision Memo at 48. From this statement it is reasonably discernible that Commerce determined that KCE's unconsolidated statements would yield more reliable and accurate surrogate financial ratios than would relying on statements that include information from entities outside of Thailand, regardless of whether Trina had subsidiaries outside of China. *See* Final Decision Memo 48–49. SolarWorld's argument fails to demonstrate how Commerce's preference is unreasonable.

V. Valuing Trina's Nitrogen Input Using Mexican Import Statistics

SolarWorld challenges Commerce's decision to value Trina's nitrogen input using Mexican import data. *See* SolarWorld's Br. at 12–18. SolarWorld argues that Commerce's determination that the Thai import data for nitrogen is unreliable is unsupported, and that Commerce's departure from the primary surrogate country is contrary to agency practice. *See id.* Defendant contends that Commerce reasonably determines that the two sources of Thai import data for nitrogen are unreliable because they contradict each other, and Commerce's reliance on Mexican import data under such circumstances is consistent with established agency precedent. *See* Def.'s Br. at 19–21. For the following reasons, Commerce's determination to value Trina's nitrogen FOPs is reasonable.

As explained, in antidumping proceedings involving NMEs, Commerce determines normal value based on the FOPs used to produce the subject merchandise, with an amount added for profits and expenses. *See* 19 U.S.C. § 1677b(c)(1). When valuing a respondent's FOPs, Commerce has discretion to choose what constitutes the best available information on the record for purposes of satisfying its statutory mandate to calculate accurate dumping margins. *See QVD Food Co.*, 658 F.3d at 1323; *Rhone Poulench, Inc.*, 899 F.2d at 1191; *Parkdale Int'l.*, 475 F.3d at 1380. Commerce normally relies on the primary surrogate country to calculate all surrogate values. 19 C.F.R. § 351.408(c)(2). Nonetheless, Commerce will resort to a secondary surrogate country when data from the primary surrogate country is unreliable. *See e.g.*, *Sodium Hexametaphosphate From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 59375 (Dep't Commerce Sept. 27, 2012) (final results of [ADD] admin. review) and accompanying Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Sodium Hexametaphosphate from the [PRC], A-570–908, at 4 & n.15 (Sept. 19, 2012), available at http://enforcement.trade.gov/frn/summary/prc/2012–23832–1.pdf (last visited Apr. 30, 2020); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,366–67 (Dep't Commerce May 19, 1997).

Commerce relies on Mexican import data, rather than Thai import data, to value Trina's nitrogen FOPs. *See* Final Decision Memo at 34–35. Commerce explains that it did not use the Thai import data "because the two Thai sources [it] considered for valuing nitrogen present significantly dissimilar prices," thus "rais[ing] questions as to

which Thai data [source] on the record, namely the [GTA] Thai import data or the GasWorld Thailand data, reflect the actual broad market average price of nitrogen in Thailand." *See* Final Decision Memo at 35.[18] Commerce reasonably questions the reliability of the Thai import data because such divergent sources logically suggest that at least one source cannot be correct. Commerce's concern is not that the data is unreliable because it is aberrational as SolarWorld suggests. *See* SolarWorld's Br. at 12–18. Rather, Commerce found that the two sources of Thai import data undermine each other. *Id.*

SolarWorld maintains that Commerce failed to demonstrate that the GasWorld Thai import data is a reliable benchmark against which to measure the GTA Thai import data. *See* SolarWorld's Reply Br. at 10. Commerce explains that it did not use the GasWorld data as a benchmark to determine that the GTA data was aberrant. *See* Final Decision Memo at 35. Rather, it found that the two sources of Thai data contradict each other, and are therefore, unreliable. *See id.* Similarly, SolarWorld's contentions regarding Commerce's deviation from agency precedent miss the mark, *see* SolarWorld's Br. at 12–16, because they speak to Commerce's methodology for determining whether data is aberrational, not whether it is reliable. Commerce's decision is supported by substantial evidence.

CONCLUSION

For the foregoing reasons, it is

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

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

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

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

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

---

[18] Commerce contrasts the GTA Thai average unit value for nitrogen, which is "$27.10 per kilogram," with the GasWorld Thai domestic prices for nitrogen, which are "$0.14 per kilogram (i.e., liquid nitrogen) and $0.05 per kilogram (i.e., nitrogen gas)." Final Decision Memo at 35.

Dated: May 13, 2020
New York, New York

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

Slip Op. 20–74

LOCKHART TEXTILES INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00099

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

Dated: May 29, 2020

John M. Peterson, *Richard F. O'Neill*, and *Patrick B. Klein*, Neville Peterson LLP of New York, NY for Plaintiff Lockhart Textiles, Inc.

Marcella Powell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, NY for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-In-Charge. Of counsel on the brief was *Paula S. Smith*, Senior Attorney, Office of Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

OPINION

Gordon, Judge:

Plaintiff Lockhart Textiles, Inc. ("Lockhart") contests the decision of U.S. Customs and Border Protection ("Customs") denying Lockhart's protests of Customs' classification of the imported wearing apparel consisting of 100 percent polyester knit women's trousers ("subject merchandise") under the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Pl. Lockhart Textile's Stmt. of Mat. Facts not in Dispute Pursuant to USCIT Rule 56.3 ("PSOF") at ¶ 1, ECF No. 33–3; Def.'s Amend. Resp. to Pl.'s Rule 56.3 Statement ("Def.'s Resp. to PSOF") at ¶ 1, ECF No. 40; *see also* Def.'s Amend. Stmt. of Mat. Facts not in Dispute Pursuant to USCIT Rule 56.3 ("DSOF"), ECF No. 40; Pl. Lockhart Textile's Resp. to Def.'s Rule 56.3 Stmt. ("Pl.'s Resp. to DSOF"), ECF No. 43. Before the court are cross-motions for summary judgment. *See* Pl.'s Mot. for Summ. J., ECF No. 33 ("Pl.'s MSJ"); Def.'s Cross-Mot. for Summ. J. and Opposition to Pl.'s Mot. for Summ. J., ECF No. 38 ("Def.'s XMSJ"); *see also* Pl.'s Reply in Supp. of Mot. for Summ. J. and Resp. to Def.'s Cross Mot. for Summ. J., ECF No. 46 ("Pl.'s Reply"); Def.'s Reply in Further Supp. of Cross Mot. for Summ. J., ECF No. 49 ("Def.'s Reply").

Customs classified the subject merchandise as "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other [than bib or brace overalls]: Other" under HTSUS subheading 6104.63.20, with duty at

the rate of 28.2% ad valorem. Lockhart claims that the subject merchandise is properly classified as "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Trousers, bib and brace overalls, breeches and shorts: Of other textile materials: Other" under HTSUS subheading 6104.69.80, dutiable at a rate of 5.6% ad valorem. The parties agree that proper classification of the subject merchandise (*i.e.*, trousers of "synthetic fibers" under HTSUS subheading 6104.63.20 vs. trousers of "other textile materials" under HTSUS subheading 6104.69.80) hinges on first determining the correct classification for the yarn used to make the subject merchandise ("Best Key Metalized Yarn" or "BKMY"). The Government maintains that BKMY is classifiable as "synthetic fibers" covered by HTSUS Chapter 54, but Lockhart contends that BKMY is properly classified as "metalized yarn" under HTSUS heading 5605. *See* Def.'s XMSJ at 6–9; Pl.'s MSJ at 3–6. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). For the reasons set forth below, Plaintiff's motion for summary judgment is denied, and Defendant's cross-motion for summary judgment is granted.

I. Standard of Review

The court reviews Customs' protest decisions de novo. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

A classification decision involves two steps. The first step addresses the proper meaning of the relevant tariff provisions, which is a question of law. *See Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed, which, when disputed, is a question of fact. *Id.*

While the court accords deference to Customs' classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS

terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

II. Discussion

Classification disputes under the HTSUS are resolved by reference to the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation. *See Carl Zeiss*, 195 F.3d at 1379. The GRIs are applied in numerical order. *Id.* Interpretation of the HTSUS begins with the language of the tariff headings, subheadings, their section and chapter notes, and may also be aided by the Explanatory Notes ("ENs") published by the World Customs Organization. *Id.* "GRI 1 is paramount. . . . The HTSUS is designed so that most classification questions can be answered by GRI 1 . . . ." *Telebrands Corp. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1277, 1280 (2012). Under GRI 1, merchandise that is described "in whole by a single classification heading or subheading" is classifiable under that heading or subheading. *CamelBak Prods. LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011). If that single classification applies, the succeeding GRIs are inoperative. *Mita Copystar Am. v. United States*, 160 F.3d 710, 712 (Fed. Cir. 1998).

The court construes tariff terms according to their common and commercial meanings, and may rely on both its own understanding of the term as well as upon lexicographic and scientific authorities. *See Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). The court may also refer to the Explanatory Notes "accompanying a tariff subheading, which—although not controlling—provide interpretive guidance." *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron*, 334 F.3d at 1309).

At issue is HTSUS heading 5605 that covers "Metalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal in the form of thread, strip or powder or covered with metal." Plaintiff argues that "[w]hile the technology used to produce [BKMY] is novel and in some ways revolutionary, it is clear that yarns containing any amount of metal are treated as metalized yarns for tariff purposes." Pl.'s MSJ at 6. Defendant contends that Plaintiff's proposed interpretation "contravenes the plain language of the statute." Def.'s XMSJ at 4. Instead, Defendant maintains that the plain meaning of heading 5605 provides that the heading only covers "products that are the end product of metal that was added to a yarn, strip, or the like, such as film." *Id.* at 11. Defendant further argues that "[t]he term 'metalized' refers to

metal added to the surface of the yarn, strip, or film. It does not encompass a manufacturing process that adds metal to a polyester slurry." *Id.* For the reasons set forth below, the court concludes that the Government's interpretation is persuasive and that BKMY is not classifiable under HTSUS heading 5605. Accordingly, the subject merchandise is properly classified as women's trousers "of synthetic fibers" under HTSUS subheading 6104.63.20.

At the outset, the court notes that the parties' arguments are not new. Rather, the issue of classifying BKMY as "metalized yarn" or not has been the subject of at least two prior formal rulings by Customs. *See* Headquarters Ruling Letter HQ H202560, dated September 17, 2013 ("Revocation Ruling"), which revoked New York Ruling Letter ("NY") N187601 (Oct. 25, 2011) ("Yarn Ruling"); *see also* Pl.'s MSJ at 8 ("The instant trousers are made from a yarn initially developed by Hong Kong based Best Key Manufacturing Inc. Best Key Metalized Yarn is made by forming metal filament directly from the liquid phase. Metal nanopowders are combined with liquid polyester, and the mixture is ejected (extruded) through the small holes of a spinneret, forming monofilament yarns."). The Yarn Ruling classified BKMY under HTSUS heading 5605 as "metalized" yarn. The Revocation Ruling replaced the Yarn Ruling, holding that BKMY is not a metalized yarn of heading 5605 but a polyester yarn under HTSUS Chapter 54.

Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, but this presumption does not apply to pure questions of law. 28 U.S.C. § 2639(a)(1); *see also Universal Elecs. Inc. v. United States*, 112 F. 3d 488, 492 (Fed. Cir. 1997). While the parties' dispute focuses on the proper classification of BKMY, the Government also argues that Plaintiff has not provided sufficient admissible evidence to establish that the subject merchandise is actually made from yarn that contained metal. *See* Def.'s XMSJ at 18–20; Def.'s Reply at 12–13 ("There is no evidence in the record establishing how and when the zinc was added, or evidence linking the yarn to the trousers at issue."). Because the court concludes that BKMY is not classifiable under heading 5605, summary judgment in favor of Defendant is appropriate as Plaintiff does not have any legal basis for relief even drawing all factual inferences in Plaintiff's favor.

Plaintiff acknowledges that HTSUS heading 5605 "has highly specific requirements," but maintains that the BKMY used to create the subject merchandise satisfies all of the requirements to be classified as "metalized yarn." *See* Pl.'s MSJ at 11. Plaintiff highlights that for yarn to fall within heading 5605, it must "must first qualify as a

textile yarn ... of heading 5404—*i.e.*, a [synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm.]" *Id.* (internal quotation marks omitted). Plaintiff further notes that "the provision not only requires that the yarn be combined with metal upon importation, but it further requires that the metal be added in a specified form—*i.e.*, thread, strip, or powder." *Id.* Plaintiff argues that because BKMY is comprised of "synthetic monofilaments of 75 decitex ... in which no cross-sectional dimension exceeds 1 mm," and because BKMY contains metal in the form of zinc nanopowders, BKMY thus meets all of the criteria to be properly classified under heading 5605. *Id.*

Defendant argues that Plaintiff ignores the limitations of the specific language used in heading 5605. *See* Def.'s XMSJ at 10–11, 15–17. Specifically, Defendant identifies two distinct requirements of heading 5605, namely that "a product must be (i) a 'textile yarn, or strip or the like of heading 5404 or 5405,' which is (ii) 'combined with metal in the form of thread, strip or powder or covered with metal.'" *Id.* at 10–11. Defendant contends that "[t]he plain meaning of these terms demonstrate that the 'metalized yarn' covered by heading 5605 refers to products that are the end product of metal that was added to a yarn, strip, or the like, such as film. ... It does not encompass a manufacturing process that adds metal to a polyester slurry." *Id.* at 11; *see also id.* at 21 ("a metalized yarn refers to either a pre-existing yarn consisting of any textile material combined with metal, or a plastic film deposited with metal and slit into yarn, generally for decorative purposes").

Both parties rely on the ENs to HTSUS heading 5605 in support of their proposed interpretations. *See* Pl.'s MSJ at 11–12 (arguing that the ENs "indicate that *any amount of metal* present in a yarn (which also satisfies the above-listed requirements for classification under heading 5605) causes it to be a metalized yarn of heading 5605"); Pl.'s Reply at 7–8 ("The Explanatory Notes Do Not Constrain the Scope of Heading 5605"); Def.'s XMSJ at 12–14 ("The Notes make clear that heading 5605, HTSUS, does not cover every product combining textile material and metal or every textile yarn that contains metal."); Def.'s Reply at 8–9 ("The Explanatory Notes To Heading 5605, HTSUS, Do Not Support Lockhart's Interpretation Of That Heading"). Here, the ENs provide helpful guidance as to the limitations of the scope of heading 5605. The ENs explain that heading 5605 includes:

> (1) **Yarn consisting of any textile material (including monofilament, strip and the like and paper yarn), combined with metal thread or strip**, whether obtained by a process of twisting, cabling or by gimping, whatever the proportion of the metal present. ...

> (2) **Yarns of any textile material (including monofilament, strip and the like and paper yarn) covered with metal byany other process**. This category includes yarn covered with metal by electro-deposition, or by giving it a coating of adhesive (e.g., gelatin) and then sprinkling it with metal powder (e.g., aluminum or bronze).
>
> The heading also covers products consisting of a core of metal foil (generally of aluminum), or of a core of plastic film coated with metal dust, sandwiched by means of an adhesive between two layers of plastic film.

Def.'s XMSJ at 12–13 (quoting ENs).

While Plaintiff urges the court to focus on the language in paragraph (1) that permits classification of metalized yarn regardless of "the proportion of the metal present," Lockhart ignores the context of that language and the limitations of the Heading's scope described in the ENs. The two paragraphs quoted above describe different methods by which metal may be added to pre-existing textile yarn and qualify for classification under heading 5605. Paragraph (1) specifies that when textile yarn is "combined" with "metal thread or strip," the resulting product should be classified under heading 5605 "whatever the proportion of the metal present." Paragraph (2) provides that textile yarn "covered with metal by any other process" also qualifies as metalized yarn under heading 5605. Notably, despite Plaintiff's insistence that the method of production is irrelevant to classification under heading 5605, the ENs expressly provide for different classification qualifications depending on how the product is made.

While Plaintiff emphasizes that paragraph (1) provides for classification of yarn to which metal has been added regardless of the proportion of the metal in the product, Plaintiff ignores the fact that paragraph (2) contains no such disclaimer. Problematically for Plaintiff, paragraph (1) only applies to products where textile yarn is combined with "metal thread or strip." The BKMY that Lockhart seeks to have classified under heading 5605 does not contain metal thread or strip, only zinc nanopowders. *See* PSOF ¶¶ 5–8; Def.'s Resp. to PSOF at ¶¶ 5–8. Plaintiff's reliance on paragraph (1) of the ENs is therefore misplaced.

Paragraph (2) also does not aid Lockhart. While applying to products created by "any other process" (*i.e.*, those not mentioned in paragraph (1)), and not providing any limitation on the type of metal that may be added to textile yarn to be classified under heading 5605, paragraph (2) by its own terms applies to products comprised of

textile yarn "covered with metal." BKMY is not "*covered*" with any type of metal. The trace amounts of zinc nanopowders added to a molten slurry cannot be reasonably said to "cover" the resulting yarn end-product of BKMY. *See* Pl.'s Reply at 5 & n.3 (acknowledging that "combine with" is broader than "cover," and citing *Merriam-Webster Dictionary* ("to lay or spread over something") *https://merriamwebster.com/dictionary/cover* (last accessed this date); and *Cambridge English Dictionary* ("to put or spread over something; or to lie on the surface of something") *https://dictionary.cambridge.orgdictionary/english/cover?q=covered*); *see also* Def.'s XMSJ at 14 ("Best Key's yarn is not 'covered' with metal because the metal powder is not overlaid or placed over anything, but rather mixed into slurry.").

In addition to broadly describing the types of yarn that fit within heading 5605, the ENs also specify certain types of yarn combined with metal that are *not* to be classified in heading 5605:

> The heading **does not include:**
>
> (a) Yarn composed of a mixture of textile materials and metal fibres conferring on them an antistatic effect (**Chapters 50 to 55**, as the case may be)
>
> (b) Yarn reinforced with metal thread (**heading *56.07***).
>
> (c) Cords, galloons or other articles having the character of ornamental trimmings (**heading *58.08***).
>
> (d) Wire or strip of gold, silver, copper, aluminum or other metals (**Sections XIV and XV**).

Id. at 13 (quoting ENs). The ENs make clear that heading 5605 does not cover every product combining textile material and metal or every textile yarn that contains metal.[1] Accordingly, the court concludes that the ENs do not support the Plaintiff's proposed interpretation of heading 5605.

---

[1] In its opening brief, Plaintiff argued that Note 2(A) and (B) to HTSUS Section XI requires that fabrics that are in "chief weight of metalized yarns are classified as garments of 'other' fabrics, rather than as garments of 'synthetic yarns.'" Pl.'s MSJ at 6. According to Lockhart, BKMY satisfies all of the statutory requirements for "metalized yarn" of heading 5605, HTSUS, and are of "chief weight" of that yarn. Therefore, the trousers at issue are properly classifiable as garments of "other textile materials" in subheading 6104.69.80, HTSUS. However, as Defendant pointed out in its response, Note 2 only applies to goods comprised of more than one textile material, such as yarns comprised in part of metalized yarns and part other yarns. *See* Def.'s XMSJ at 14–15. The trousers at issue are made with 100% of the same textile yarn. *See* PSOF at ¶¶ 1, 5–10; Def.'s Resp. to PSOF at ¶¶ 1, 5–10. Thus, Note 2 is not applicable to the classification of the subject merchandise. Plaintiff, perhaps recognizing this, appears to have abandoned its Note 2 argument in favor of only arguing that the trousers at issue are comprised of "metalized yarn" of heading 5605. *See generally* Pl.'s Reply.

Beyond the language of heading 5605 and its ENs, Plaintiff also argues that some of Customs' Informed Compliance Publications ("ICPs") support Lockhart's proposed interpretation of "metalized yarn." *See* Pl.'s MSJ at 14–15. Specifically, Lockhart cites to the ICPs "Classification: Apparel Terminology under the HTSUS" (June 2008) and "Classification of Fibers and Yarns" (Sept. 2011), to support its contention that *any* presence of metals in textile yarn would qualify the product as a metalized yarn of heading 5605. *Id.* at 14. Defendant responds that "Lockhart has taken CBP's statements out of context and overlooks their import." *See* Def.'s XMSJ at 23. While Defendant agrees that if "a yarn meets the statutory requirements of [heading 5605], the amount of metal contained in the yarn is not determinative," Defendant maintains that BKMY does not meet the requirements of heading 5605. *Id.* As Defendant explains, all of the rulings cited by Lockhart "involve yarns that met the requirements for metalized yarns of heading 5605, HTSUS, and none of those yarns involved a metal-in-the-slurry manufacturing technique." *Id.* None of the materials or rulings cited by Plaintiff discuss whether a product made by adding nanometals to polyester slurry results in a metalized yarn in the first instance. Accordingly, the court concludes that the ICPs and prior Customs rulings do not support Plaintiff's position.

Lastly, Plaintiff contends that heading 5605, an undisputed *eo nomine* tariff provision, "covers all forms of the named article," including "future-developed version of the named product if it bears an 'essential resemblance' to the goods or exemplars identified in the tariff heading." *See* Pl.'s MSJ at 16–17 (citing *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988)). However, an *eo nomine* provision does not cover all forms when such coverage is contrary to legislative intent or when the articles are limited by the terms of the statute. *See Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995). In that instance, the provision only includes those articles embraced by the provision's language. Def's XMSJ at 10 (citing *United States v. Charles R.* Allen, Inc., 37 CCPA 110, C.A.D. 428 (1950), and *RMS Elecs., Inc. v. United States*, 83 Cust. Ct. 37, 43, 480 F. Supp. 302, 306 (1979)). Further, although heading 5605 appears to cover all forms of yarn-and-metal combinations, the language cannot be interpreted literally, because it was not, in fact, intended to cover all forms, as evident in the ENs' specific exclusion of four classes of articles from coverage (*e.g.*, antistatic yarns). *See supra* pp. 10–11 (discussing products expressly excluded from heading 5605 listed by ENs). Industry sources also confirm that the commercial meaning of "metalized yarn" does not encompass every pos-

sible form of yarn with metal added, nor do they reference products like BKMY created from a polyester slurry incorporating trace amounts of metal. *See* Def.'s XMSJ at 11 (citing various dictionary definitions of "metalized yarn" and "metalized," none of which "refer to processes that involve metal that is added a polyester slurry"). The Government's argument that heading 5605 does not in fact cover "all forms" of yarn-and-metal combinations is persuasive; Lockhart's arguments to the contrary are not.

Lockhart's reliance on the "essential resemblance" classification analysis mentioned in *Brookside Veneers* is also misplaced. In *Brookside Veneers*, the U.S. Court of Appeals for the Federal Circuit reversed a classification decision by the Court of International Trade, holding that the plaintiff-importer's product at issue was not classifiable as "wood veneers, other" under Schedule 2, Part 1 of the (now superseded) Tariff Schedules of the United States ("TSUS"). *See Brookside Veneers*, 842 F.2d at 786–87. In ruling, the Court of Appeals addressed the trial court's conclusion that the product at issue should be classified as a "wood veneer" under Schedule 2, Part 1 of the TSUS because the product bore an "essential resemblance" to the articles described in the statute. *Id.*, 842 F.2d at 789 (citing *U.S. v. Standard Surplus*, 667 F.2d 1011, 1014 (CCPA 1981). The court highlighted that "in headnote l(a) Congress explicitly limited the definition of sliced wood veneers to those 'sheets or strips' sliced from 'logs or flitches.'" *Id.*, 842 F.2d at 788. After examining the definitions of "logs" and "flitches" at the time of enactment of the TSUS, the court concluded that Congress intended the tariff schedule at issue to cover only "*natural* logs and *natural* flitches." *Id.*, 842 F.2d at 790. The court therefore concluded that "Brookside's contention that logs and flitches can reasonably be read to include the manmade blocks which it produces because these blocks bear an 'essential resemblance' to natural logs and flitches is misplaced. Brookside presented no evidence indicating that log or flitch ever referred to anything other than wood in its natural state." *Id.*, 842 F.2d at 791. Thus, to the extent that Court of Appeals endorsed the "essential resemblance" concept in *Brookside Veneers*, it did so in the context of interpreting and applying the TSUS, and it refused to apply the concept where plaintiff's proposed interpretation appeared to violate Congressional intent to limit the scope of the tariff provision. *Id.*

Given that the dispute in this matter involves interpretation of the HTSUS, not the TSUS, the court determines that the "essential resemblance" concept discussed in *Brookside Veneers* is of limited

relevance. *See JVC Co. of Am. v. United States*, 234 F.3d 1348, 1353–54 (Fed. Cir. 2000) (explaining that precedent involving tariff provisions under the TSUS is "not controlling on issues under the HTSUS"); *see also Nidec Corp. v. United States*, 68 F.3d 1333, 1337 (Fed. Cir. 1995) (noting that extent to which interpretative doctrine applied under TSUS may continue to apply to HTSUS was "undecided and unclear"). Plaintiff has not identified any cases applying the "essential resemblance" concept under the HTSUS. *See* Pl.'s Br. at 16–17 (citing *Brookside Veneers* and U.S. Court of Customs and Patent Appeals cases from the 1980's). Moreover, in the cases Plaintiff relies upon, there is no discussion or analysis of how the court is to apply the "essential resemblance" concept (*i.e.*, the factors, the test, the guiding principles, etc.). The TSUS concept of "essential resemblance" must therefore remain a relic of the TSUS.

The court understands the novel nature of the BKMY manufacturing process in creating a synthetic yarn from a molten slurry containing metal nanopowders; however, Plaintiff has failed to persuade the court that BKMY is correctly classified as "metalized yarn" under HTSUS heading 5605. The subject merchandise is correctly classified as women's trousers "of synthetic fibers" under HTSUS subheading 6104.63.20.

III. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment is denied, and Defendant's cross-motion for summary judgment is granted. Judgment will be entered accordingly.

Dated: May 29, 2020
New York, New York

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

Slip Op. 20–75

ADEE HONEY FARMS, et al., Plaintiffs, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 16–00127

[Granting in part and denying in part defendants' Rule 12(b)(6) motion for dismissal of consolidated action as untimely according to statute of limitations]

Dated: June 1, 2020

Paul C. Rosenthal, Kelley Drye & Warren LLP, of Washington, D.C., argued for plaintiffs Adee Honey Farms; A. H. Meyer & Sons Inc.; Mark Almeter; Jim Baerwald; Bailey Enterprises Inc.; Beaverhead Honey Co. Inc.; Bee Box Ranch; Bee Haven Inc.; Bill Rhodes Honey Company LLC; Mark T. Brady; Brian N. Hannar; Curt Bronnenberg; Browns Honey Farms; Carys Honey Farms Inc.; Charles L Emmons; Robert S. Fullerton; Clyde A. Gray; Paul Hendricks; Coy's Honey Farm Inc.; Culps Honey Farm LLC; Danzig Honey Company; Darren Cox; David W. Stroope Honey Company; Dency's Inc.; Evergreen Honey Company Inc.; Fischer's Honey Farm Inc.; Gause Honey; Mark R. Gilberts; Godlin Bees, Inc.; Grand River Honey Co., Inc.; Harvest Honey Inc.; Hiatt Honey; Honey House Ent; Bill Hurd; Ray L. Johnson, Jr; Johnston Honey Farms; Kohn, Donald; Las Flores Apiaries Inc.; Longs Apiaries Inc.; Long's Honey Farms Inc.; Mackrill Honey Farms & Sales; McCoy's Sunny South Apiaries Inc.; Merrimack Valley Apiaries Inc.; Old Mill Apiaries; Dirk W. Olsen; William H Perry; Robertson Pollination Service; Schmidt Honey Farms; Sioux Honey Association; Smoot Honey Co. Inc.; Steve E. Park Apiaries; Strachan Apiaries Inc.; Talbott's Honey; Don Wiebersiek; Wilmer Farms Inc.; Elmer J. Yaddof; Christopher Ranch, LLC; The Garlic Company; Vessel and Company, Inc.; Monterey Mushrooms, Inc.; L.K. Bowman Co., a division of Hanover Foods Corporation; A & S Crawfish; Acadiana Fisherman's Cooperative; Arnaudville Seafood Plant; Atchafalaya Crawfish Processors, Inc.; Bayou Land Seafood, LLC; Blanchard's Seafood, Inc.; Bonanza Crawfish Farm, Inc.; Cajun Seafood Distributor, Inc.; Carl's Seafood a.k.a. Dugas Seafood; Catahoula Crawfish Inc.; Choplin Seafood; CJL Enterprises, Inc. d.b.a. C.J.'s Seafood & Purged Crawfish; Crawfish Enterprises, Inc.; Harvey's Seafood; L.T. West, Inc.; Louisiana Premium Seafoods, Inc.; Louisiana Seafood Company; Phillips' Seafood; Prairie Cajun Wholesale Distributors, Inc.; Randol, Inc. a.k.a. Randol's Seafood and Restaurant; Riceland Crawfish, Inc. a.k.a. Beaucoup Crawfish of Eunice, Inc.; Seafood International, Inc.; Sylvester's Crawfish; and Teche Valley Seafood. With him on the briefs were *Michael J. Coursey*, *John M. Herrmann II*, *Jennifer E. McCadney*, and *Cameron R. Argetsinger* of the same firm and *Louis S. Mastriani*, Adduci, Mastriani & Schaumberg, LLP, also of Washington, D.C.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY. argued for defendants United States, R. Gil Kerlikowske, Commissioner of Customs, and U.S. Customs and Border Protection. With her on the briefs were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Amy M. Rubin*, Assistant Director, *Justin R. Miller*, Attorney-in-Charge, and *Edward F. Kenny*, Trial Attorney. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs contest a decision of U.S. Customs and Border Protection ("Customs" or "CBP") under which Customs did not include a type of interest ("delinquency interest") in monetary distributions Customs made to them under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").

Before the court is defendants' motion to dismiss this consolidated action under USCIT Rule 12(b)(6) for failure to state a claim on which relief can be granted, arguing that the action is untimely under the applicable two-year statute of limitations. The court grants defendants' motion in part and denies it in part.

I. BACKGROUND

The CDSOA, 19 U.S.C. § 1675c,[1] enacted in October 2000 and repealed in February 2006,[2] amended the Tariff Act of 1930 ("Tariff Act") to direct Customs to distribute assessed antidumping and countervailing duties to "affected domestic producers" ("ADPs"), on a federal fiscal year basis, as compensation for certain qualifying expenditures. An "affected domestic producer" is a U.S. "manufacturer, producer, farmer, rancher, or worker representative" that was a "petitioner or interested party in support of a petition with respect to which an antidumping duty . . . or a countervailing duty order was entered." 19 U.S.C. § 1675c(b)(1).

Under the CDSOA, domestic parties who qualified as petitioners or parties in support of a petition were identified initially by the U.S. International Trade Commission, which then provided a list of these parties to Customs. *Id.* § 1675c(d)(1). Customs was required to publish annually a notice of intent to distribute CDSOA funds for the relevant fiscal year that included the current list and invited submissions of certifications of eligibility, each of which was required to include, *inter alia*, a certification of qualifying expenditures. *Id.* § 1675c(d)(2). Distributions for a fiscal year were required to occur

[1] All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2017 edition unless otherwise noted.

[2] Under the terms of the 2006 legislation repealing the CDSOA, Customs is to distribute antidumping and countervailing duties assessed on entries made before October 1, 2007, subject to certain limitations imposed in 2010. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006), *amended by* Claims Resolution Act of 2010, Pub. L. No. 111291, § 822, 124 Stat. 3069, 3163 (2010), *amended by* Tax Relief, Unemployment Insurance Reauthorization & Job Creation Act of 2010, Pub. L. No. 111–312, § 504, 124 Stat. 3296, 3308 (2010) (current version at 19 U.S.C. § 1675c note).

within 60 days following the first day of the succeeding fiscal year. *See id.* § 1675c(d)(3).

A. Plaintiffs in this Consolidated Action

The 85 plaintiffs in this consolidated action[3] are ADPs that received CDSOA distributions under one of four antidumping duty orders (on honey, fresh garlic, preserved mushrooms, and crawfish, all from the People's Republic of China ("China")). Plaintiffs first became ADPs under the CDSOA in various fiscal years beginning in Fiscal Year 2001; Fiscal Year 2010 was the most recent fiscal year in which any plaintiff first was an ADP and received distributions.[4]

Fifty-six plaintiffs received distributions from duties assessed under an antidumping duty order on honey from China. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Honey From the People's Republic of China*, 66 Fed. Reg. 63,670 (Int'l Trade Admin. Dec. 10, 2001).

Three plaintiffs received distributions of antidumping duties assessed on fresh garlic from China. *See Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59,209 (Int'l Trade Admin. Nov. 16, 1994).

Two plaintiffs received distributions of antidumping duties assessed on preserved mushrooms from China. *See Notice of Amendment of Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From the People's Republic of China*, 64 Fed. Reg. 8308 (Int'l Trade Admin. Feb. 19, 1999).

Twenty-four plaintiffs received distributions of antidumping duties assessed on crawfish from China. *See Notice of Amendment to Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 48,218 (Int'l Trade Admin. Sept. 15, 1997).

B. Interest under the CDSOA

In administering the CDSOA, Customs treated differently two types of interest that pertain to antidumping and countervailing

[3] The court consolidated four cases on September 20, 2016: *Adee Honey Farms, et. al. v. United States*, Ct. No. 16–00127; *Christopher Ranch, et. al. v. United States*, Ct. No. 16–00129; *Monterey Mushrooms, Inc., et. al. v. United States*, Ct. No. 16–00130; and *A & S Crawfish, et. al. v. United States*, Ct. No. 16–00131. *See* Order, ECF No. 13.

[4] *See* First Am. Compl. of Adee Honey Farms, et al. (Court No. 16–127) Ex. 1 (Feb. 6, 2017), ECF No. 22 ("Honey Compl."); First Am. Compl. of Christopher Ranch, LLC, et al. (Court No. 16–129) ¶ 2 (Feb. 6, 2017), ECF No. 24 ("Garlic Compl."); First Am. Compl. of Monterey Mushrooms, Inc. (Court No. 16–130) ¶ 2 (Feb. 6, 2017), ECF No. 25 ("Mushrooms Compl."); First Am. Compl. of A&S Crawfish, et al. (Court No. 16–131) ¶ 2 (Feb. 6, 2017), ECF No. 23 ("Crawfish Compl.").

duties: pre-liquidation interest on under-deposited antidumping and countervailing duties that accrued pursuant to 19 U.S.C. § 1677g ("Section 1677g interest")[5] and post-liquidation interest accrued pursuant to 19 U.S.C. § 1505(d) (the aforementioned "delinquency interest," also identified herein as "Section 1505(d) interest").[6] Section 1677g interest applies only to underpayments (and overpayments) of antidumping and countervailing duties; Section 1505(d) interest applies to duties, taxes, and fees generally.[7] During the period for which plaintiffs claim entitlement to delinquency interest, Customs included Section 1667g interest, but not Section 1505(d) interest, in CDSOA distributions made to ADPs, including plaintiffs.

Section 1677g interest arises from the process of assessing antidumping or countervailing duties. An importer entering goods subject to an antidumping or countervailing duty order deposits estimated antidumping or countervailing duties, with such estimate typically based on the duty rate from the investigation or most recently completed annual review of the order. *See* 19 C.F.R. § 141.101–03. When the actual amount of antidumping or countervailing duties owed on the entry is assessed at liquidation, the importer is billed for any underpayment and the accrued Section 1677g interest on the underpayment. *See* 19 U.S.C. § 1677g(a)

Section 1505(d) interest, or delinquency interest, arises after Customs liquidates an entry. An importer is allowed thirty days to pay the full amount owed as calculated at liquidation, which will include any ordinary duties and special duties (including antidumping and countervailing duties), taxes, fees, and interest, including any Section 1677g interest on under-deposited antidumping and countervailing duties. 19 U.S.C. § 1505(b). Delinquency interest begins to accrue if any of that full amount remains unpaid after 30 days and continues to accrue at each 30-day interval thereafter. *Id.* § 1505(d).

---

[5] "Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—(1) the date of publication of a countervailing or antidumping duty order under this subtitle . . . ." 19 U.S.C. § 1677g.

[6] The Tariff Act provision on delinquency interest reads as follows:

> If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) [30 days after issuance of a bill for payment], any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary [of the Treasury] from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

19 U.S.C. § 1505(d).

[7] Pre-liquidation interest on duties and fees is addressed generally in 19 U.S.C. § 1505(b) ("The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund an excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.").

Prior to 2016, Customs deposited accrued Section 1677g interest, but not Section 1505(d) interest, into the special accounts for distributions made to ADPs under the CDSOA. Defs.' Mot. to Dismiss 4 (Feb. 27, 2017), ECF No. 26 ("Defs.' Mot."). In 2016, Congress required specified types of interest received after September 31, 2014 from a bond or a surety on a bond, including Section 1505(d) interest, to be deposited in the special accounts for CDSOA distributions made on or after the date of enactment, February 24, 2016. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 605, 130 Stat. 122, 187–88 (2016) ("TFTEA"). Plaintiffs here "assert[] claims under the CDSOA only as it existed prior to its amendment by Section 605 of the Trade Facilitation and Trade Enforcement Act of 2015, because all of the interest at issue here was received by Customs prior to October 1, 2014." First Am. Compl. of Adee Honey Farms, et al. (Court No. 16–127) ¶ 29, ECF No. 22 ("Honey Compl.")[8]

C. Proceedings in the Court of International Trade

Plaintiffs commenced their separate actions on July 15, 2016. Summons, Ct. No. 1600127, ECF No. 1; Compl., Ct. No. 16–00127, ECF No. 2; Summons, Ct. No. 16–00129, ECF No. 1; Compl., Ct. No. 16–00129, ECF No. 2; Summons, Ct. No. 16–00130, ECF No. 1; Compl., Ct. No. 16–00130, ECF No. 2; Summons, Ct. No. 16–00131, ECF No. 1; Compl., Ct. No. 1600131, ECF No. 2. The court consolidated the four cases on September 20, 2016. Order, ECF No. 13.

After consolidation, defendants filed a motion to dismiss on January 9, 2017. Defs.' Mot. to Dismiss, ECF No. 19. On February 6, 2017, plaintiffs filed four amended complaints. Honey Compl.; First Am. Compl. of Christopher Ranch, LLC, et al. (Court No. 16–129), ECF No. 24 ("Garlic Compl."); First Am. Compl. of Monterey Mushrooms, Inc. (Court No. 16–130), ECF No. 25 ("Mushrooms Compl."); First Am. Compl. of A&S Crawfish, et al. (Court No. 16–131), ECF No. 23 ("Crawfish Compl").

Defendants filed a motion to dismiss the amended complaints on February 27, 2017. Defs.' Mot. Plaintiffs filed a memorandum in opposition on September 15, 2017. Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss, ECF No. 39 ("Pls.' Mem."). Defendants replied in support of their motion on September 28, 2018. Defs.' Reply Mem. in Further Supp. Of Defs.' Mot. to Dismiss, ECF No. 50. The court held oral argument on May 1, 2019.

[8] The complaints and amended complaints in the pre-consolidation cases are nearly identical, with differences pertaining to the commodities and specific ADPs at issue. For ease of reference, the court will cite the Honey Complaint throughout this Order when discussing all amended complaints where these complaints do not differ and specifically will refer to other complaints when necessary.

On July 24, 2019, the court ordered supplemental briefing on two issues: (1) whether the Customs regulation implementing the CDSOA provided adequate notice of a decision not to distribute delinquency interest to ADPs, and (2) under an assumption that Customs provided adequate notice, the time at which plaintiffs' claims accrued. Order, ECF No. 74.

In response to the court's inquiries, plaintiffs filed a supplemental brief in opposition to the motion to dismiss on August 23, 2019. Pls.' Suppl. Mem. in Opp'n to Defs.' Mot. to Dismiss, ECF No. 76 ("Pls.' Suppl. Mem."). Defendants filed a response on September 30, 2019. Defs.' Resp. to Pls.' Suppl. Mem. and in Further Supp. of Defs.' Mot. to Dismiss, ECF No. 80.

II. DISCUSSION

A. Subject Matter Jurisdiction

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), (i)(4). Paragraph (i)(2) of § 1581 grants this Court jurisdiction of a civil action "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(2). Paragraph (i)(4) grants this Court jurisdiction of a civil action arising "out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection." *Id.*§ 1581(i)(4).

B. Rule 12(b)(6) Motions

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true (even if doubtful in fact) and draws all reasonable inferences in a plaintiff's favor. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("*Twombly*"); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). USCIT Rule 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint need not contain detailed factual allegations, but it must plead facts sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

C. Plaintiffs' Claims

Plaintiffs claim that CBP's practice of not distributing Section 1505(d) interest is unlawful and seek an order directing Customs to distribute the Section 1505(d) interest they claim they should have received. Specifically, they seek delinquency interest they contend Customs should have included in annual CDSOA distributions dating all the way back to the first fiscal years for which they were eligible to receive, and did receive, distributions as ADPs. Their demands include delinquency interest collected by Customs on payments that were made by sureties, as well as importers, and also include payments of delinquency interest that were made in cases in this Court that were litigated or settled. *See, e.g.*, Honey Compl., ¶¶ 30–50. The Crawfish Complaint also sought distribution of funds from the litigation in *United States v. Great American Insurance Company of New York*, Ct. No. 09–187 (Ct. Int'l Trade 2009) ("*Great American*"); this claim has been settled and dismissed. Order (Aug. 16, 2017), ECF No. 38.

D. Defendants' Motion to Dismiss

Defendants argue that plaintiffs' claims are barred by the applicable two-year statute of limitations. Defs.' Mot. 5; *see* 28 U.S.C. § 2636(i) (barring an action brought under the jurisdiction of 28 U.S.C. § 1581(i) "unless commenced in accordance with the rules of the court within two years after the cause of action first accrues"). Defendants' primary argument is that all of plaintiffs' claims are time-barred, basing their argument on the September 21, 2001 publication of CBP's implementing regulation, which, defendants argue, constitutes the agency decision being challenged in this litigation. Def's. Mot. 8–19. Defendants argue in the alternative that even were the court to hold that plaintiffs' claims accrued each year in which plaintiffs received CDSOA distributions, the statute of limitations still would bar all claims to delinquency interest on distributions made more than two years prior to the commencement of the four actions on July 15, 2016. Defs.' Mot. 19–23.

The court rules that defendants' motion to dismiss must be granted in part and denied in part. Plaintiffs' causes of action are timely to the extent plaintiffs seek Section 1505(d) interest relating to CDSOA distributions occurring during the two-year period prior to their initiating their actions on July 15, 2016. All claims for interest relating to CDSOA distributions made prior to that two-year period are barred by the statute of limitations.

E. The Agency's Regulation Implementing the CDSOA Provided Adequate Notice of a Regulatory Decision that Delinquency Interest Would Not Be Distributed to ADPs

The CDSOA required Customs to establish a "special account" in the U.S. Treasury for each qualifying antidumping or countervailing duty order, into which Customs would deposit all duties assessed under that order and from which Customs would make distributions to ADPs on an annual, fiscal-year basis. 19 U.S.C. § 1675c(e)(1)–(e)(3). Two provisions in the CDSOA addressed the interest to be deposited into the special accounts and distributed to ADPs. The CDSOA required that Customs "deposit into the special accounts, all antidumping or countervailing duties (*including interest earned on such duties*) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established." *Id.* § 1675c(e)(2) (emphasis added). The statute also provided that Customs "shall distribute all funds (including *all* interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2) [§ 1675c(d)(2)]." *Id.* § 1675c(d)(3) (emphasis added). The CDSOA directed that Customs "shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made." *Id.* § 1675c(e)(3).

Plaintiffs allege that prior to July 2014 they did not know Customs had announced a practice under which delinquency interest would not be distributed to ADPs. They allege specifically that, prior to conversations with Customs officials occurring between July 18, 2014 and July 30, 2014 regarding the *Great American* litigation, they "did not know . . . of any specific instance" in which Customs received and did not distribute delinquency interest. Honey Compl. ¶¶ 12, 19–24. Plaintiffs further allege that Customs stated in a letter dated November 14, 2014 that no delinquency interest arising from the settlement in *Great American* would be distributed to ADPs. *Id.* ¶ 25. For the purpose of ruling on the motion to dismiss, the court accepts these alleged facts as true. *See Gould*, 935 F.2d at 1274.

Defendants argue that the 2001 publication of CBP's implementing regulation placed plaintiffs on notice that Customs had decided not to place collected delinquency interest in the special accounts for distribution under the CDSOA. Defs.' Mot. 11 (relying on 44 U.S.C. § 1507, under which Federal Register publication of a document generally "is sufficient to give notice of the contents of the document to a person subject to or affected by it").

Customs published a notice of proposed rulemaking (the "Proposed Rule") on June 26, 2001 on administration of the CDSOA. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 33,920 (Dep't Treas. Customs Serv. June 26, 2001) (to be codified at 19 C.F.R. § 159.61–159.64 (2002)). After receiving comments, Customs published a notice of final rulemaking (the "Final Rule") on September 21, 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Dep't Treas. Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)) ("*Final Rule*").[9] Referring to the statutory special accounts (into which antidumping and countervailing duties would be placed upon liquidation) and certain "clearing accounts" Customs also established for administering the CDSOA (into which would be placed estimated antidumping and countervailing duties deposited upon entry), the Final Rule provides that "no interest will accrue in the[] accounts." 19 C.F.R. § 159.64(e). The provision then states: "However, statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer." *Id.*

The regulatory provision, standing alone, informs the reader that interest on antidumping and countervailing duties "charged . . . at liquidation" will be placed into the special accounts for distribution to ADPs. *Id.* The reference to statutory interest "charged" on antidumping and countervailing duties "at liquidation" connotes an intent to deposit into the special accounts interest accrued under 19 U.S.C. § 1677g, which governs interest on underpaid (and overpaid) antidumping and countervailing duties that accrues up until liquidation. *See* 19 U.S.C. § 1677g. It cannot correctly be read as a reference to delinquency interest under 19 U.S.C. § 1505(d), for that type of interest is not charged at liquidation and can accrue only after liquidation has occurred and only if the importer does not satisfy the obligation to pay the liquidated duties within the allowed 30-day period. *See* 19 U.S.C. § 1505(d). In identifying for placement in the special accounts "interest charged on antidumping and countervailing duties at liquidation," 19 C.F.R. § 159.64(e) implies, but does not expressly state, that other types of interest (such as delinquency interest) will not be placed into the special accounts.

The preamble accompanying the Final Rule upon promulgation also referred to the topic of interest that will be deposited into the special accounts for distribution to ADPs. *See Final Rule*, 66 Fed. Reg. at 48,550. In response to a question posed by a commenter on the Proposed Rule on whether funds in the special accounts (or the

[9] The regulations at issue remain unchanged since the promulgation of the Final Rule.

related "clearing accounts" established by the regulation) would bear interest, Customs replied as follows:

> Because Congress did not make an explicit provision for the accounts established under the CDSOA to be interest-bearing, no interest may accrue on these accounts. Thus, only interest charged on antidumping and countervailing duty funds themselves, pursuant to the express authority in 19 U.S.C. 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA.

Id. Two things are noteworthy about this language in the preamble. First, unlike the regulation to which it pertains, it contains the word "only," the plain meaning of which is to exclude all other types of interest from the interest "transferred to the special accounts and be made available for distribution." *Id.* Second, by referring expressly to 19 U.S.C. § 1677g, it refers unambiguously to pre-liquidation interest of the type that 19 C.F.R. § 159.64(e) identified as interest that will be deposited into the special accounts and distributed to ADPs.

The court concludes that 19 C.F.R. § 159.64(e), when read together with the preamble language that pertained to it, provided adequate notice of the agency's decision that no type of interest other than Section 1677g interest would be deposited into the special accounts for distribution to ADPs. In both § 159.64(e) and the associated preamble language, Customs linked the issue of what interest it had decided would be deposited into the special accounts with the agency's decision on the issue of whether the accounts themselves will earn interest (a decision plaintiffs do not challenge in this litigation). While this method of drafting, which linked two separate issues, perhaps was less than ideal, the court cannot conclude that linking the two issues made unclear the decision on what type of interest would be deposited into the accounts. Because delinquency interest collected according to 19 U.S.C. § 1505(d) unquestionably is "interest," the meaning conveyed by the Final Rule is sufficiently clear to have placed interested parties on notice of the agency's decision as to the type of interest Customs would place into the special accounts and thereby make available for distribution to ADPs. Plaintiffs make a number of arguments to support their contention to the contrary.

Plaintiffs argue that the CDSOA limited Customs to promulgating "procedural" regulations and therefore did not allow Customs to promulgate a substantive regulation excluding delinquency interest from distribution. Pls.' Mem. 20–21. They maintain that "Customs' clear exclusion of delinquency interest would have been *ultra vires*, as agency regulations that violate the law that authorized them are void

ab initio" (citation omitted), and that "nothing in the CDSOA thus gave Plaintiffs fair warning that Customs would attempt to deprive ADPs in the CDSOA regulations of their substantive right to receive collected delinquency interest through CDSOA distributions." *Id.* at 21. The issue before the court relating to the instant motion is whether the Final Rule informed affected parties of what § 159.64(e) did, not whether the regulation was *ultra vires* in doing so. Thus, the issue of statutory authority for the regulation goes to the merits of this dispute, not to the question of the timeliness of plaintiffs' claims. The court fails to see why the issue plaintiffs raise concerning CBP's regulatory authority should be held to have defeated the sufficiency of the notice accomplished by Federal Register publication of the Final Rule.

Plaintiffs argue, further, that "the inclusion of 'only' in Customs' 'response' merely further clarifies that of the three types of potential interest being discussed in that response, 'only' § 1677g interest would be distributed, because only § 1677g interest had been authorized by statute." *Id.* at 24. Plaintiffs continue their argument by stating that "[a]s § 1505(d) also has been authorized by Congress by statute, and as nothing in the CDSOA itself, the CDSOA regulations, or Customs' response in those regulations' Supplementary Information [the preamble] indicates either Congress' or Customs' intent to exclude delinquency interest, Customs' use of 'only' in that response could not reasonably have put Plaintiffs on notice that Customs nevertheless would exclude § 1505(d) interest from CDSOA distribution." *Id.* The court interprets this argument to be that Customs did not mean to inform the public that delinquency interest, which is not mentioned in the preamble discussion at issue, would not be placed into the special accounts. This argument is unconvincing because the plain meaning of the preamble sentence in question is that Section 1677g interest is the "only" interest that will be distributed to ADPs. *Final Rule*, 66 Fed. Reg. at 48,550 ("[O]nly interest charged on antidumping and countervailing duty funds themselves, pursuant to the express authority in 19 U.S.C. 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA."). The ambiguity upon which plaintiffs' argument would depend is not present in that sentence.

Plaintiffs also allege ineffectiveness of regulatory notice where it is "hidden" or otherwise would not be noticed by a reasonable and interested reader. Pls.' Suppl. Mem. 2–8. Citing *MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) ("*MCI Telecomms.*"), plaintiffs argue that it was impermissible for Customs to turn notice into a "game of hide and seek." Pls.' Suppl. Mem. 7. The

case plaintiffs cite is not analogous. In that case, the discussion of the relevant issue was limited to a footnote in the "Background" section and appeared solely in the notice of proposed rulemaking. *MCI Telecomms.*, 57 F.3d at 1141–42. Here, the notice of final rulemaking contained a relevant regulatory provision and text in the preamble, under a heading titled "Interest," that clarified its meaning.

Finally, plaintiffs allege in their supplemental briefing that there were procedural flaws in the promulgation process of 19 C.F.R. § 159.64(e) such that the CBP's decision not to distribute delinquency interest is *void ab initio*. They argue that Customs needed to provide reasoning for its decision not to distribute delinquency interest, that material in a preamble cannot be the basis of an agency's final rule, and that the changes in the Final Rule are void as they are not the "logical outgrowth" of the Proposed Rule. Pls.' Suppl. Mem. 7–8. These arguments have to do with the legal validity of the Final Rule, not with the adequacy of the notice provided.

F. Plaintiffs Have No Valid Claims Other than Those Relating to Application of the Regulation to Their Individual Distributions

In summary, the September 21, 2001 promulgation of the Final Rule was adequate notice of a Customs decision, set forth in § 159.64(e) thereof, that only Section 1677g interest would be distributed to ADPs. Disputing this conclusion, plaintiffs allege that government officials took actions in 2014 relating to the *Great American* litigation that gave them their first notice of CBP's practice on interest. Pls.' Mem. 28–31, *see* Honey Compl. ¶¶ 21–22. Plaintiffs view these actions as signifying the accrual of their causes of action. The court disagrees.

The claims of all plaintiffs in this litigation arose under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706; *see Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006). The agency regulatory action on which plaintiffs' claims are based is the Final Rule, which in § 159.64(e) defined and limited the type of interest that would be deposited into the special accounts and thereby made available for distribution to ADPs. No subsequent agency decision repealed or modified that decision, and no government official had authority to deviate from it. Consequently, any actions that may have been taken by a government official affecting the type of interest paid to plaintiffs necessarily stemmed from the regulation itself.

Plaintiffs argue that even if the Final Rule provided legal notice of CBP's decision not to distribute Section 1505(d) interest (and they do not concede that it did), the earliest plaintiffs knew they were harmed

by that decision, and thus had standing to sue, was in July 2014, when plaintiffs who were ADPs under the antidumping duty order on crawfish from China learned as result of the judgment in the *Great American* litigation that Customs was not distributing delinquency interest. Pls.' Suppl. Mem. 10. Plaintiffs are correct that their individual causes of action could not have accrued prior to their having acquired standing to sue, which they could not have acquired until they knew (or had reason to know) they were adversely affected by CBP's decision. *See, e.g.*, *SKF USA Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337, 1348–49 (Fed. Cir. 2009), *cert. denied*, 560 U.S. 903 (2010) ("*SKF*"). They are incorrect in arguing that they did not acquire standing to sue until 2014.

Stated simply, each plaintiff's claim is that Customs unlawfully failed to deposit the Section 1505(d) interest into the special accounts for distribution to ADPs to which they claim a legal right to have received. Their claims rest upon their interpretation of the CDSOA and thereby raise a pure question of law. Their interpretation of the statute is that the CDSOA required Customs to deposit into the special accounts *all* interest Customs collected that related to antidumping duties, including delinquency interest stemming from unpaid antidumping duties. The Final Rule constituted adequate notice to plaintiffs that Customs had adopted an interpretation of the statute inconsistent with their own.

Plaintiffs contend they were unaware until July 2014 of a "specific instance" in which Customs was not distributing Section 1505(d) interest, but the Tariff Act itself, in 19 U.S.C. § 1505(d), made them aware that Customs has a duty to collect delinquency interest upon unpaid duties as determined at liquidation. A comparison of the Final Rule to the CDSOA placed them on notice that Customs had interpreted the CDSOA, and would administer the CDSOA, such that they would be receiving only Section 1677g interest, and therefore would not be receiving Section 1505(d) interest, in any annual CDSOA distribution. Plaintiffs are charged with knowledge of the statutory provisions essential to their claim as well as with knowledge of the contents of the Final Rule.

Any person with ADP status that stood to receive a CDSOA distribution at the time the Final Rule was promulgated would have had standing to sue at that time to claim a right to receive delinquency interest in its upcoming CDSOA distributions. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Because the loss of the claimed right to receive delinquency interest in the future is an

injury sufficient to confer a right to bring an APA cause of action, such a person would not have been required to demonstrate the ripeness of its claim by establishing that it already had been deprived of any delinquency interest. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Each plaintiff in this litigation, therefore, acquired standing to challenge the Final Rule either upon promulgation of the Final Rule or upon the first time thereafter it was placed on notice that it stood to receive a CDSOA distribution.

Plaintiffs became ADPs eligible to receive CDSOA distributions for various fiscal years, Fiscal Year 2010 being the most recent fiscal year for which any plaintiff received its first CDSOA distribution. *See* Honey Compl. Ex. 1; Garlic Compl. ¶ 2; Mushrooms Compl. ¶ 2; Crawfish Compl. ¶ 2. Plaintiffs seek "recovery of any and all delinquency interest CBP unlawfully withheld from each fiscal year's CDSOA distribution through 2014." Pls.' Suppl. Mem. 8–9; *see also* Honey Compl. ¶ 29. But because all plaintiffs filed suit on July 15, 2016, no plaintiff in this case has a timely claim challenging the regulation that accrued on the date the regulation was promulgated (September 21, 2001) or on the date the regulation first was applied to it. All such claims became time-barred prior to the commencement of these actions.

The only issue remaining to be decided is whether all of plaintiffs' claims are time-barred or whether any of their claims survive because they accrued during the two-year period prior to their bringing these actions on July 15, 2016.

G. Plaintiffs' Claims Challenging the Regulation Were Untimely for CDSOA Distributions Made Prior to July 15, 2014

Relying on the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF*, plaintiffs argue that a separate cause of action accrued each year in which they were denied delinquent interest on their CDSOA distributions. Pls.' Suppl. Mem. 12. Plaintiffs are correct.

In *SKF*, the Court of Appeals considered, and rejected, plaintiff SKF USA Inc.'s constitutional (First Amendment and Equal Protection) challenges to the "petition support" requirement in the CDSOA, 19 U.S.C. § 1675c(a), which limited ADP status to petitioners and parties in support of an antidumping or countervailing duty petition. *SKF*, 556 F.3d at 1351–60. In the litigation, SKF USA Inc. had sought to receive CDSOA distributions under antidumping duty orders for Fiscal Year 2005. *Id.* at 1345. The Court of Appeals rejected various arguments that SKF USA Inc.'s suit was untimely, including the

argument that SKF USA Inc. was required to bring its action seeking Fiscal Year 2005 distributions within two years of the October 28, 2000 enactment of the CDSOA. *Id.* at 1348–49. The Court of Appeals concluded in *SKF* that SKF USA Inc. could have brought a facial challenge to the statute but could not bring its action seeking distributions for Fiscal Year 2005 until it was on notice that duties would be available for distribution, and knew that it had qualifying expenditures, for that fiscal year. *Id.* at 1349.

SKF indicates that claims for CDSOA distributions accrue annually, as of each year's distribution. Court of Appeals precedent recognizes that "substantive" challenges to an agency regulation (as opposed to procedural challenges to the method of promulgation), such as those brought by these plaintiffs, may accrue either at the time of promulgation or the time of an application to an aggrieved party. *See Hyatt v. Patent & Trademark Office*, 904 F.3d 1361, 1372 (Fed. Cir. 2018). Cases on which the Court of Appeals rested its decision in *Hyatt* reflect the principle that an aggrieved party may make a substantive challenge to *any* application of a regulation to it, not merely the first. *See id.* at 1373; *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 n.1 (D.C. Cir. 1990) ("[W]here the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review" (quoting *Montana v. Clark*, 749 F.2d 740, 744 n.8 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985)) (omission accepted)); *Wind River Mining Corp. v. United States,* 946 F.2d 710, 714–15 (9th Cir. 2001) (similar). Consistent with *SKF*, *Hyatt*, and the decisions upon which they are based, the court concludes that these plaintiffs may challenge the substance of CBP's regulations as applied to them with each CDSOA distribution they received within two years prior to the commencement of their respective actions on July 15, 2016. Therefore, those of their claims that accrued during the two-year period prior to commencement of their actions on July 15, 2016 are timely, and those of their claims that accrued prior to that two-year period are not.

Defendants' arguments to the contrary are not convincing. Defendants cite *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449 (Fed. Cir. 1997) ("*Brown Park*"), and *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), for the principle that a claim flowing from a single event accrues from the event itself and not from the subsequent recurrence of damage. Defs.' Mot. 18. These cases, which involve the question of the applicability of the "continuing claim doctrine" to actions arising under the Tucker Act, do not speak to the issue plaintiffs' claims raise under the statute of limita-

tions. *Cf. Brown Park*, 127 F.3d at 1454 (statute of limitations is jurisdictional under Tucker Act); *Hart*, 910 F.2d at 817 (Tucker Act's statute of limitations is strictly construed). The principle defendants would have the court apply to this case effectively would insulate regulations from substantive review under the APA by parties who initially were affected by them but only in later years were harmed seriously enough to make a judicial challenge worthwhile. *See Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("[U]nlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.").

III. CONCLUSION AND ORDER

For the reasons discussed above, the court holds that plaintiffs' claim are time-barred, and therefore must be dismissed, to the extent these claims seek Section 1505(d) interest on any CDSOA distributions they received prior to July 15, 2014. Therefore, upon all papers and proceedings held herein, and upon due deliberation, it is hereby

ORDERED that defendants' Motion to Dismiss (Feb. 27, 2017), ECF No. 26, be, and hereby is, granted in part and denied in part; it is further

ORDERED that the claims of all plaintiffs seeking Section 1505(d) interest on any CDSOA distributions received prior to July 15, 2014 are dismissed as untimely according to the two-year statute of limitations of 28 U.S.C. § 2636(i); and it is further

ORDERED that the parties shall consult and submit to the court, within fourteen (14) days of the date of this Opinion and Order, a joint proposed schedule or, if agreement cannot be reached, a status report on the scheduling issues to be resolved.

Dated: June 1, 2020
New York, New York

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

Slip Op. 20–76

AMERICAN DREW, et al., Plaintiffs, v. UNITED STATES, et al., Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 17–00086

[Granting in part and denying in part defendants' Rule 12(b)(6) motion for dismissal of action as untimely according to statute of limitations]

Dated: June 1, 2020

J. Michael Taylor, King & Spalding LLP, of Washington D.C., argued for plaintiffs American Drew; American of Martinsville; Basset Furniture Industries Inc.; Carolina Furniture Works, Inc.; Century Furniture LLC d/b/a Century Furniture Industries; Harden Furniture Inc.; Johnston Tombigbee Furniture Mfg. Co.; Kincaid Furniture Company Inc.; L & J G Stickley, Inc.; La-Z-Boy Casegoods, Inc.; Lea Industries; MJ Wood Products, Inc.; Mobel Inc.; Perdues Inc. d/b/a Perdue Woodworks Inc.; Sandberg Furniture Mfg. Co., Inc.; Stanley Furniture Company, Inc.; T Copeland and Sons, Inc.; Tom Seely Furniture LLC; Vaughan Bassett Furniture Company, Inc.; Vermont Quality Wood Products, LLC; Webb Furniture Enterprises, Inc. With him on the briefs were *Jeffrey M. Telep* and *Neal J. Reynolds*.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY. argued for defendants United States, Kevin K. McAleenan, Acting Commissioner of Customs, and U.S. Customs and Border Protection. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Amy M. Rubin*, Assistant Director. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs contest a decision of U.S. Customs and Border Protection ("Customs" or "CBP") under which Customs did not include a type of interest ("delinquency interest") in monetary distributions Customs made to them under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").

Before the court is defendants' motion to dismiss this action under USCIT Rule 12(b)(6) for failure to state a claim on which relief can be granted, arguing that the action is untimely under the applicable two-year statute of limitations. The court grants defendants' motion in part and denies it in part.

I. BACKGROUND

The CDSOA, 19 U.S.C. § 1675c,[1] enacted in October 2000 and repealed in February 2006,[2] amended the Tariff Act of 1930 ("Tariff Act") to direct Customs to distribute assessed antidumping and countervailing duties to "affected domestic producers" ("ADPs"), on an annual basis, as compensation for certain qualifying expenditures. An "affected domestic producer" is a U.S. "manufacturer, producer, farmer, rancher, or worker representative" that was a "petitioner or interested party in support of a petition with respect to which an antidumping duty . . . or countervailing duty order was entered." 19 U.S.C. § 1675c(b)(1).

Under the CDSOA, domestic parties who qualified as petitioners or parties in support of a petition were identified initially by the U.S. International Trade Commission, which then provided a list of these parties to Customs. *Id.* § 1675c(d)(1). Customs was required to publish annually a notice of intent to distribute CDSOA funds for the relevant fiscal year that included the current list and invited submissions of certifications of eligibility, each of which was required to include, *inter alia*, a certification of qualifying expenditures. *Id.* § 1675c(d)(2). Distributions for a fiscal year were required to occur within 60 days following the first day of the succeeding fiscal year. *See id.* § 1675c(d)(3).

A. Plaintiffs in this Action

The 20 plaintiffs in this action are ADPs (or successors to ADPs) that received CDSOA distributions under the antidumping duty order on wooden bedroom furniture from the People's Republic of China (the "Order"). Compl. ¶ 3 (Apr. 18, 2017), ECF No. 5; *see Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg 329 (Int'l Trade Admin. Jan. 4, 2005). Plaintiffs first became ADPs under the CDSOA in 2005 and

[1] All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), which are citations to 19 U.S.C. § 1675c as in effect prior to its repeal. All citations to the Code of Federal Regulations are to the 2017 edition unless otherwise noted.

[2] Under the terms of the 2006 repeal legislation, Customs is to distribute antidumping and countervailing duties assessed on entries filed before October 1, 2007, subject to certain limitations imposed in 2010. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006), *amended by* Claims Resolution Act of 2010, Pub. L. No. 111291, § 822, 124 Stat. 3069, 3163 (2010), *amended by* Tax Relief, Unemployment Insurance Reauthorization & Job Creation Act of 2010, Pub. L. No. 111–312, § 504, 124 Stat. 3296, 3308 (2010) (current version at 19 U.S.C. § 1675c note).

2006; Fiscal Year 2006 was the most recent fiscal year in which any plaintiff first was an ADP and received distributions.[3]

B. Interest under the CDSOA

In administering the CDSOA, Customs treated differently two types of interest that pertain to antidumping and countervailing duties: pre-liquidation interest on under-deposited antidumping and countervailing duties that accrued pursuant to 19 U.S.C. § 1677g ("Section 1677g interest")[4] and post-liquidation interest that accrued pursuant to 19 U.S.C. § 1505(d) (the aforementioned "delinquency interest," also identified herein as "Section 1505(d) interest").[5] Section 1677g interest applies only to underpayments (and overpayments) of antidumping and countervailing duties; Section 1505(d) interest applies to duties, taxes, and fees generally.[6] During the period for which plaintiffs claim entitlement to delinquency interest, Customs included Section 1677g interest, but not Section 1505(d) interest, in CDSOA distributions made to ADPs, including plaintiffs.

Section 1677g interest arises from the process of assessing antidumping or countervailing duties. An importer entering goods subject to an antidumping or countervailing duty order deposits estimated antidumping or countervailing duties, with such estimate typically based on the duty rate from the investigation or most recently completed annual review of the order. *See* 19 C.F.R. § 141.101–03. When the actual amount of antidumping or countervailing duties owed on the entry is assessed at liquidation, the importer is billed for any underpayment and the accrued Section 1677g interest on the underpayment. *See* 19 U.S.C. § 1677g(a).

Section 1505(d) interest, or delinquency interest, arises after Customs liquidates an entry. An importer is allowed thirty days to pay the

---

[3] *See* Compl. Ex. A (Apr. 18, 2017), ECF No. 5.

[4] "Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—(1) the date of publication of a countervailing or antidumping duty order under this subtitle . . . ." 19 U.S.C. § 1677g.

[5] The Tariff Act provision on delinquency interest reads as follows:

> If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) [30 days after issuance of a bill for payment], any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary [of the Treasury] from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

19 U.S.C. § 1505(d).

[6] Pre-liquidation interest on duties and fees is addressed generally in 19 U.S.C. § 1505(b) ("The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund an excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.").

full amount owed as calculated at liquidation, which will include any ordinary duties and special duties (including antidumping and countervailing duties), taxes, fees, and interest, including any Section 1677g interest on under-deposited antidumping and countervailing duties. 19 U.S.C. § 1505(b). Delinquency interest begins to accrue if any of that full amount remains unpaid after 30 days and continues to accrue at each 30-day interval thereafter. *Id.* § 1505(d).

Prior to 2016, Customs deposited accrued Section 1677g interest, but not Section 1505(d) interest, into the special accounts for distributions made to ADPs under the CDSOA. Defs.' Mot. to Dismiss 4 (Sept. 12, 2018), ECF No. 19 ("Defs.' Mot."). In 2016, Congress required specified types of interest received after September 31, 2014 from a bond or a surety on a bond, including Section 1505(d) interest, to be deposited in the special accounts for CDSOA distributions made on or after the date of enactment, February 24, 2016. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 605, 130 Stat. 122, 187–88 (2016) ("TFTEA"). Because the TFTEA provision was effective upon enactment, *id.* § 605(a), CDSOA distributions for Fiscal Year 2016 were the first distributions affected by the change.

C. Proceedings in the Court of International Trade

Plaintiffs commenced this action on April 18, 2017. Summons, ECF No. 1; Compl. Defendants filed a motion to dismiss on September 12, 2018. Defs.' Mot. Plaintiffs filed a memorandum in opposition on November 7, 2018. Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss, ECF No. 25 ("Pls.' Mem."). Defendants replied in support of their motion on November 28, 2018. Defs.' Reply Mem. in Further Supp. Of Defs.' Mot. to Dismiss, ECF No. 26. The court held oral argument on May 2, 2019.

On July 24, 2019, the court ordered supplemental briefing on two issues: (1) whether the Customs regulation implementing the CDSOA provided adequate notice of a decision not to distribute delinquency interest to ADPs, and (2) under an assumption that Customs provided adequate notice, the time at which plaintiffs' claims accrued. Order, ECF No. 47.

In response to the court's inquiries, plaintiffs filed a supplemental brief in opposition to the motion to dismiss on August 23, 2019. Pls.' Suppl. Brief Responding to the Court's Questions and in Opp'n to Defs.' Mot. to Dismiss, ECF No. 50 ("Pls.' Suppl. Br."). Defendants filed a response on October 2, 2019. Defs.' Resp. to Pls.' Suppl. Mem. of Law and in Further Supp. of Defs.' Mot. to Dismiss, ECF No. 54.

II. DISCUSSION

A. Subject Matter Jurisdiction

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), (i)(4). Paragraph (i)(2) of § 1581 grants this Court jurisdiction of a civil action "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(2). Paragraph (i)(4) grants this Court jurisdiction of a civil action arising "out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection." *Id.* § 1581(i)(4).

B. Rule 12(b)(6) Motions

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true (even if doubtful in fact) and draws all reasonable inferences in a plaintiff's favor. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("*Twombly*"); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). USCIT Rule 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint need not contain detailed factual allegations, but it must plead facts sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

C. Plaintiffs' Claims

Plaintiffs claim that CBP's practice of not distributing Section 1505(d) interest is unlawful and seek an order directing Customs to distribute the Section 1505(d) interest they claim they should have received. Specifically, they seek delinquency interest they contend Customs should have included in annual CDSOA distributions dating all the way back to the first fiscal years for which they were eligible to receive, and did receive, distributions as ADPs. Their demands include delinquency interest collected by Customs on payments that were made by sureties, as well as importers, and also include payments of delinquency interest that were made in cases in this Court that were litigated or settled. Compl. ¶ 31.

D. Defendants' Motion to Dismiss

Defendants argue that plaintiffs' claims are barred by the applicable two-year statute of limitations. Defs.' Mot. 6; *see* 28 U.S.C. § 2636(i) (barring an action brought under the jurisdiction of 28 U.S.C. § 1581(i) "unless commenced in accordance with the rules of the court within two years after the cause of action first accrues"). Defendants' primary argument is that all of plaintiffs' claims are time-barred, basing their argument on the September 21, 2001 publication of CBP's implementing regulation, which, defendants maintain, constitutes the agency decision being challenged in this litigation. Def's. Mot. 9–16. Defendants argue in the alternative that even were the court to hold that plaintiffs' claims accrued each year in which plaintiffs received CDSOA distributions, the statute of limitations still would bar all claims to delinquency interest on distributions made more than two years prior to the commencement of this action on April 18, 2017. Defs.' Mot. 16–20.

The court rules that defendants' motion to dismiss based on the statute of limitations must be granted in part and denied in part. Plaintiffs' causes of action are timely to the extent plaintiffs seek Section 1505(d) interest relating to CDSOA distributions occurring during the two-year period prior to their initiating their actions on April 18, 2017, but all claims for interest relating to CDSOA distributions made prior to that two-year period are barred by the statute of limitations.

Defendants also allege that one plaintiff, La-Z-Boy Casegoods, Inc. ("La-Z-Boy"), was not an ADP that received CDSOA distributions under the Order. Defs.' Mot. 11 n.7. Plaintiffs reply, first, that their complaint alleged that all plaintiffs were either ADPs themselves or successors in interest to ADPs, with La-Z-Boy being the latter, and second, that in any case various named plaintiffs that are listed recipients of CDSOA distributions are "divisions of" LaZ-Boy or, in one case, was "merged into" La-Z-Boy, as disclosed on plaintiffs' corporate disclosure statement. Pls.' Mem. 11, n.16; *see* Disclosure of Corporate Affiliations and Financial Interest (Apr. 18, 2017), ECF No. 3. Taking these allegations to be true for purposes of the instant motion, see *Twombly*, 550 U.S. at 555, the court will not dismiss La-Z-Boy at this stage of the proceedings.

E. The Agency's Regulation Implementing the CDSOA Provided Adequate Notice of a Regulatory Decision that Delinquency Interest Would Not Be Distributed to ADPs

The CDSOA required Customs to establish a "special account" in the U.S. Treasury for each qualifying antidumping or countervailing

duty order, into which Customs would deposit all duties assessed under that order and from which Customs would make distributions to ADPs on an annual, fiscal-year basis. 19 U.S.C. § 1675c(e)(1)–(e)(2). Two provisions in the CDSOA addressed the interest to be deposited into the special accounts and distributed to ADPs. The CDSOA required that Customs "deposit into the special accounts, all antidumping or countervailing duties (*including interest earned on such duties*) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established." *Id.* § 1675c(e)(2) (emphasis added). The statute also provided that Customs "shall distribute all funds (including *all* interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2) [§ 1675c(d)(2)]." *Id.* § 1675c(d)(3) (emphasis added). The CDSOA directed that Customs "shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made." *Id.* § 1675c(e)(3).

Plaintiffs allege that prior to July 15, 2016 they did not know Customs had announced a practice under which delinquency interest would not be distributed to ADPs. They allege specifically that, prior to the July 15, 2016 filing in this Court of a complaint by another group of ADPs raising a claim on delinquency interest similar to that of plaintiffs' here, *Adee Honey Farms, et. al. v. United States*, Consol. Ct. No. 16–00127 ("*Adee Honey*"), they "did not know . . . of any specific instance" in which Customs received and did not distribute delinquency interest. Compl. ¶¶ 13, 16. Plaintiffs further allege that, in the alternative, they were made aware of CBP's practice by congressional statements in February 2016, prior to, and culminating in, the passage of TFTEA. *Id.* ¶¶ 15–16 (citing 132 Cong. Rec. S836–46 (daily ed. Feb. 11, 2016) (statement of Senator John Thune)). For the purpose of ruling on defendants' motion to dismiss, the court accepts these alleged facts as true. *See Gould*, 935 F.2d at 1274.

Defendants argue that the 2001 publication of CBP's implementing regulation placed plaintiffs on notice that Customs had decided not to place collected delinquency interest in the special accounts for distribution under the CDSOA. Defs.' Mot. 11.

Customs published a notice of proposed rulemaking (the "Proposed Rule") on June 26, 2001 on administration of the CDSOA. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 33,920 (June 26, 2001) (to be codified at 19 C.F.R. § 159.61–159.64 (2002)) ("*Proposed Rule*"). After receiving comments, Customs published a notice of final rulemaking (the "Final

Rule") on September 21, 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)) ("*Final Rule*").[7] Referring to the statutory special accounts (into which antidumping and countervailing duties would be placed upon liquidation) and certain "clearing accounts" Customs also established for administering the CDSOA (into which would be placed estimated antidumping and countervailing duties deposited upon entry), the Final Rule provides that "no interest will accrue in the[] accounts. 19 C.F.R. § 159.64(e). The provision then states: "However, statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer." *Id.*

The regulatory provision, standing alone, informs the reader that interest on antidumping and countervailing duties "charged . . . at liquidation" will be placed into the special accounts for distribution to ADPs. *Id.* The reference to statutory interest "charged" on antidumping and countervailing duties "at liquidation" connotes an intent to deposit into the special accounts interest accrued under 19 U.S.C. § 1677g, which governs interest on underpaid (and overpaid) antidumping and countervailing duties that accrues up until liquidation. *See* 19 U.S.C. § 1677g. It cannot correctly be read as a reference to delinquency interest under 19 U.S.C. § 1505(d), for that type of interest is not charged at liquidation and can accrue only after liquidation has occurred and only if the importer does not satisfy the obligation to pay the liquidated duties within the allowed 30-day period. *See* 19 U.S.C. § 1505(d). In identifying for placement in the special accounts "interest charged on antidumping and countervailing duties at liquidation," 19 C.F.R. § 159.64(e) implies, but does not expressly state, that other types of interest (such as delinquency interest) will not be placed into the special accounts.

The preamble accompanying the Final Rule upon promulgation also referred to the topic of interest that will be deposited into the special accounts for distribution to ADPs. *See Final Rule*, 66 Fed. Reg. at 48,550. In response to a question posed by a commenter on the Proposed Rule on whether funds in the special accounts (or the related "clearing accounts" established by the regulation) would bear interest, Customs replied as follows:

> Because Congress did not make an explicit provision for the accounts established under the CDSOA to be interest-bearing, no interest may accrue on these accounts. Thus, only interest charged on antidumping and countervailing duty funds them-

[7] The regulations at issue remain unchanged since the promulgation of the Final Rule.

> selves, pursuant to the express authority in 19 U.S.C. § 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA.

Id. Two things are noteworthy about this language in the preamble. First, unlike the regulation to which it pertains, and contrary to plaintiffs' assertion that this sentence "only explained that [CBP's] special accounts would not be made interest-bearing," Pls.' Mem. 6, the preamble uses the word "only" to modify the word "interest," the plain meaning of which is to exclude all other types of interest from the interest that will be "transferred to the special accounts and be made available for distribution." *Final Rule*, 66 Fed. Reg. at 48,550. Second, by referring expressly to 19 U.S.C. § 1677g, the preamble refers unambiguously to pre-liquidation interest of the type that 19 C.F.R. § 159.64(e) identified as interest that will be deposited into the special accounts and distributed to ADPs.

The court concludes that 19 C.F.R. § 159.64(e), when read together with the preamble language that pertained to it, provided adequate notice of the agency's decision that any type of interest other than Section 1677g interest would not be deposited into the special accounts for distribution to ADPs. In both § 159.64(e) and the associated preamble language, Customs linked the issue of what interest it had decided would be deposited into the special accounts with the agency's decision on the issue of whether the accounts themselves will earn interest (a decision plaintiffs do not challenge in this litigation). While this method of drafting, which linked two separate issues, perhaps was less than ideal, the court cannot conclude that the agency's linking the two issues made unclear or uncertain the agency's decision on what type of interest would be deposited into the accounts. Because delinquency interest collected according to 19 U.S.C. § 1505(d) unquestionably is "interest," the meaning conveyed by the Final Rule is sufficiently clear to have placed interested parties on notice of the agency's decision as to the type of interest Customs would place into the special accounts and thereby make available for distribution to ADPs. *See* 44 U.S.C. § 1507 (publication of a document in the Federal Register generally "is sufficient to give notice of the contents of the document to a person subject to or affected by it"). Plaintiffs make a number of arguments to support their contention to the contrary.

Plaintiffs argue, first, that the Proposed Rule contained clear language expressing CBP's intent to distribute delinquency interest. Pls.' Mem. 12–14. Proposed 19 C.F.R. § 159.64(e) provided that the Special Accounts and Clearing Accounts would not bear interest but

further stated: "However, statutory interest charged on antidumping and countervailing duties at liquidation, will be transferred to the Clearing Account or Special Account, as appropriate, when collected from the importer." *Proposed Rule*, 66 Fed. Reg. at 33,926. This proposed provision refutes rather than supports plaintiffs' argument. Interest charged on antidumping and countervailing duties at liquidation is Section 1677g interest, not Section 1505(d) interest. The preamble to the Proposed Rule stated as follows: "[I]f there is interest paid by the importer on any antidumping or countervailing duties billed in the liquidation process for the import entries, that interest will be transferred to the Clearing Account or Special Account, as appropriate." *Id.* at 33,922; *see* Pls.' Mem. 13. The most that can be said for plaintiffs' argument is that this preamble sentence is ambiguous. It can be read to mean that the interest transferred to the accounts will be interest that is billed during the liquidation process, or it can be read to mean that the interest transferred to the accounts will be interest on *duties* that are billed during the liquidation process. The former refutes plaintiffs' argument, as the only interest billed in the liquidation process (as opposed to the collection process) is pre-liquidation interest. *See* 19 U.S.C. § 1505(b), (d). The latter interpretation is more plausible given the proximity of the words "billed in the liquidation process" to the word "duties," but even if so interpreted it is still ambiguous on the *type* of interest on duties that is contemplated. It is not clear whether the reference to interest paid on the duties is to pre-liquidation or post-liquidation interest. And even if this sentence in the Proposed Rule unambiguously were to have supported plaintiffs' argument, it would not resolve the issue of notice because the relevant provisions in the Proposed Rule and the Final Rule were notice to the contrary.

Plaintiffs next argue that the Final Rule did not provide adequate notice that Customs intended not to distribute delinquency interest. Pls.' Mem. 15–18. But as the court discussed previously, the Final Rule provided adequate notice of CBP's administrative decision. Plaintiffs also argue that the Final Rule did not provide adequate notice because "the clarity of the statutory language" requiring Customs to distribute delinquency interest made plaintiffs believe that Customs would do so. *Id.* at 18. Even were the court to accept, *arguendo*, plaintiffs' statutory interpretation, the court still would reject this argument because plaintiffs were placed on notice of the contents of the Final Rule.

In their supplemental briefing, plaintiffs argue that the preamble to the Final Rule did not provide adequate notice because preambles are not legally binding. Pls.' Suppl. Br. 5–9. Whether the preamble had

the force of law as a binding regulation is not the issue before the court; rather, the issue is the adequacy of notice provided by the notice of final rulemaking, an issue for which language in the preamble is unquestionably relevant. Citing *MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) ("*MCI Telecomms.*"), plaintiffs further argue that the sentence of the preamble was too "obscure" to provide effective notice. Pls.' Suppl. Br. at 10–12. *MCI Telecomms.* is not analogous to this case. There, the discussion of the relevant issue was limited to a footnote in the "Background" section and appeared solely in the notice of proposed rulemaking. *MCI Telecomms.*, 57 F.3d at 1141–42. Here, the notice of final rulemaking contained a relevant regulatory provision and text in the preamble, under a heading titled "Interest," that clarified its meaning.

F. Plaintiffs Have No Timely Claims that Accrued upon the Promulgation of the Final Rule or the First Time the Final Rule Was Applied to Them

In summary, the September 21, 2001 publication of the Final Rule was adequate notice of a Customs decision, set forth in § 159.64(e) thereof, that Section 1677g interest would be the only type of interest distributed to ADPs. Disputing this conclusion, plaintiffs allege that either of two events in 2016, the July 15, 2016 filing of complaints in this Court in *Adee Honey*, another action seeking delinquency interest under the CDSOA, or, in the alternative, legislative commentary during the passage of TFTEA, provided them their first notice of CBP's practice on interest. Pls.' Mem. 10, *see* Compl. ¶ 16. Plaintiffs view these actions as signifying the accrual of their causes of action. The court disagrees.

The claims of all plaintiffs in this litigation arose under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706; *see Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2008). The agency regulatory action on which plaintiffs' claims are based is the Final Rule, which in § 159.64(e) defined and limited the type of interest that would be deposited into the special accounts and thereby made available for distribution to ADPs. No subsequent agency decision repealed or modified that decision, and no government official had authority to deviate from it.

Plaintiffs argue that even if the Final Rule provided legal notice of CBP's decision not to distribute Section 1505(d) interest (and they do not concede that it did), the earliest plaintiffs knew they were harmed by that decision, and thus had standing to sue, was in July 2016, when the complaints in *Adee Honey* were filed in this Court. Pls.' Mem. 10. Plaintiffs are correct that their individual causes of action

could not have accrued prior to their having acquired standing to sue, which they could not have acquired until they knew (or had reason to know) they were adversely affected by CBP's decision. *See, e.g.*, *SKF USA Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337, 1348–49 (Fed. Cir. 2009), *cert. denied*, 560 U.S. 903 (2010) ("*SKF*"). They are incorrect in arguing that they did not acquire standing to sue until 2016.

Stated simply, each plaintiff's claim is that Customs unlawfully failed to deposit the Section 1505(d) interest into the special accounts for distribution to ADPs to which they claim a legal right to have received. Their claims rest upon their interpretation of the CDSOA and thereby raise a pure question of law. Their interpretation of the statute is that the CDSOA required Customs to deposit into the special accounts *all* interest Customs collected that related to antidumping duties, including delinquency interest stemming from unpaid antidumping duties. The Final Rule constituted adequate notice to plaintiffs that Customs had adopted an interpretation of the statute inconsistent with their own.

Plaintiffs contend they were unaware until July 2016 of a "specific instance" in which Customs was not distributing Section 1505(d) interest, but the Tariff Act itself, in 19 U.S.C. § 1505(d), made them aware that Customs has a duty to collect delinquency interest upon unpaid duties as determined upon liquidation. A comparison of the Final Rule to the CDSOA placed them on notice that Customs had interpreted the CDSOA, and would administer the CDSOA, such that they would be receiving only Section 1677g interest, and therefore would not be receiving Section 1505(d) interest, in any annual CDSOA distribution. Plaintiffs are charged with knowledge of the statutory provisions essential to their claim as well as with knowledge of the contents of the Final Rule.

Any person with ADP status that stood to receive a CDSOA distribution at the time the Final Rule was promulgated would have had standing to sue at that time to claim a right to receive delinquency interest in its upcoming CDSOA distributions. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Because the loss of the claimed right to receive delinquency interest in the future is an injury sufficient to confer a right to bring an APA cause of action, such a person would not have been required to demonstrate the ripeness of its claim by establishing that it already had been deprived of any delinquency interest. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154

(1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Each plaintiff in this litigation, therefore, acquired standing to challenge the Final Rule either upon promulgation of the Final Rule or upon the first time thereafter it was placed on notice that it stood to receive a CDSOA distribution.

Plaintiffs became ADPs eligible to receive CDSOA distributions in fiscal years 2005 and 2006, with 2006 being the most recent fiscal year for which any plaintiff received its first CDSOA distribution. *See* Compl. Ex. A. Plaintiffs seek recovery of any and all delinquency interest CBP unlawfully withheld from each fiscal year's CDSOA distributions. Compl. ¶ 31. But because all plaintiffs in this case filed suit on April 18, 2017, no plaintiff has a timely claim challenging the regulation that accrued on the date the regulation was promulgated (September 21, 2001) or on the date the regulation first was applied to it. All such claims became time-barred prior to the commencement of these actions.

The only issue remaining to be decided is whether all of plaintiffs' claims are time-barred or whether any of their claims survive because they accrued during the two-year period prior to their bringing these actions on April 18, 2017.

G. Plaintiffs' Claims Challenging the Regulation Were Untimely for CDSOA Distributions Made Prior to April 18, 2015

Relying on the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF*, plaintiffs argue that a separate cause of action accrued each year in which they were denied delinquent interest on their CDSOA distributions. Pls.' Suppl. Br. 14–15. Plaintiffs are correct.

In *SKF*, the Court of Appeals considered, and rejected, plaintiff SKF USA Inc.'s constitutional (First Amendment and Equal Protection) challenges to the "petition support" requirement in the CDSOA, 19 U.S.C. § 1675c(a), which limited ADP status to petitioners and parties in support of an antidumping or countervailing duty petition. *SKF*, 556 F.3d at 1351–60. In the litigation, SKF USA Inc. had sought to receive CDSOA distributions under antidumping duty orders for Fiscal Year 2005. *Id.* at 1345. The Court of Appeals rejected various arguments that SKF USA Inc.'s suit was untimely, including the argument that SKF USA Inc. was required to bring its action seeking Fiscal Year 2005 distributions within two years of the October 28, 2000 enactment of the CDSOA. *Id.* at 1348–49. The Court of Appeals concluded in *SKF* that SKF USA Inc. could have brought a facial challenge to the statute but could not bring its action seeking distri-

butions for Fiscal Year 2005 until it was on notice that duties would be available for distribution, and knew that it had qualifying expenditures, for that fiscal year. *Id.* at 1349.

SKF indicates that claims for CDSOA distributions accrue annually, as of each year's distribution. Court of Appeals precedent recognizes that "substantive" challenges to an agency regulation (as opposed to procedural challenges to the method of promulgation), such as those brought by these plaintiffs, may accrue either at the time of promulgation or the time of application to an aggrieved party. *See Hyatt v. Patent and Trademark Office*, 904 F.3d 1361, 1372 (Fed. Cir. 2018). Cases on which the Court of Appeals rested its decision in *Hyatt* reflect the principle that an aggrieved party may make a substantive challenge to *any* application of a regulation to it, not merely the first. *See id.* at 1373; *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 n.1 (D.C. Cir. 1990) ("[W]here the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review" (quoting *Montana v. Clark*, 749 F.2d 740, 744 n.8 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985)) (omission accepted)); *Wind River Mining Corp. v. United States,* 946 F.2d 710, 714–15 (9th Cir. 2001) (similar). Consistent with *SKF*, *Hyatt*, and the decisions upon which they are based, the court concludes that these plaintiffs may challenge the substance of CBP's regulations as applied to them with each CDSOA distribution they received within two years of the commencement of their respective actions on April 18, 2017. Therefore, those of their claims that accrued during the two-year period prior to commencement of their actions on April 18, 2017 are timely, and those of their claims that accrued prior to that two-year period are not.

Defendants' arguments to the contrary are not convincing. Defendants cite *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449 (Fed. Cir. 1997) ("*Brown Park*"), and *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), for the principle that a claim flowing from a single event accrues from the event itself and not from the subsequent recurrence of damage. Defs.' Mot. 15. These cases, which involve the question of the applicability of the "continuing claim doctrine" to actions arising under the Tucker Act, do not speak to the issue plaintiffs' claims raise under the statute of limitations. *Cf. Brown Park*, 127 F.3d at 1454 (statute of limitations is jurisdictional under Tucker Act); *Hart*, 910 F.2d at 817 (Tucker Act's statute of limitations is strictly construed). The principle defendants would have the court apply to this case effectively would insulate regulations from substantive review under the APA by parties who initially were affected by them but only in later years were harmed

seriously enough to make a judicial challenge worthwhile. *See Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("[U]nlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.").

III. CONCLUSION AND ORDER

For the reasons discussed above, the court holds that plaintiffs' causes of action are barred by the two-year statute of limitations of 28 U.S.C. § 2636(i) to the extent they seek Section 1505(d) interest on any CDSOA distributions they received prior to April 18, 2015. Claims seeking Section 1505(d) interest on distributions received within the two years prior to the commencement of their actions on April 18, 2017 are timely. Therefore, upon all papers and proceedings held herein, and upon due deliberation, it is hereby

ORDERED that defendants' Motion to Dismiss (Sept. 12, 2018), ECF No. 19, be, and hereby is, granted in part and denied in part; it is further

ORDERED that the claims of all plaintiffs seeking Section 1505(d) interest on any CDSOA distributions received prior to April 18, 2015 are dismissed as untimely according to the two-year statute of limitations of 28 U.S.C. § 2636(i); it is further

ORDERED that the parties shall consult and submit to the court a joint proposed schedule for this litigation, including submission of plaintiff's Rule 56.1 motion, defendants' response thereto, plaintiffs' reply, and requests for oral argument.

Dated: June 1, 2020
New York, New York

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

Slip Op. 20–77

HILEX POLY CO., LLC, et al., Plaintiffs v. UNITED STATES, et al., Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 17–00090

[Granting in part and denying in part defendants' Rule 12(b)(6) motion for dismissal of action as untimely according to statute of limitations]

Dated: June 1, 2020

J. Michael Taylor, King & Spalding LLP, of Washington D.C., argued for plaintiffs Hilex Poly Co., LLC; Superbag Corporation; Unistar Plastics LLC; Grand Packaging Inc. d/b/a Command Packaging; Roplast Industries Inc.; and US Magnesium LLC (successor to Magnesium Corporation of America). With him on the briefs were *Jeffrey M. Telep* and *Neal J. Reynolds*.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY. argued for defendants United States, Kevin K. McAleenan, Acting Commissioner of Customs, and U.S. Customs and Border Protection. With her on the briefs were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Amy M. Rubin*, Assistant Director. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs contest a decision of U.S. Customs and Border Protection ("Customs" or "CBP") under which Customs did not include a type of interest ("delinquency interest") in monetary distributions Customs made to them under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment").

Before the court is defendants' motion to dismiss this action under USCIT Rule 12(b)(6) for failure to state a claim on which relief can be granted, arguing that the action is untimely under the applicable two-year statute of limitations. The court grants defendants' motion in part and denies it in part.

I. BACKGROUND

The CDSOA, 19 U.S.C. § 1675c,[1] enacted in October 2000 and repealed in February 2006,[2] amended the Tariff Act of 1930 ("Tariff

[1] All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), which are citations to 19 U.S.C. § 1675c as in effect prior to its repeal. All citations to the Code of Federal Regulations are to the 2017 edition unless otherwise noted.

[2] Under the terms of the 2006 repeal legislation, Customs is to distribute antidumping and countervailing duties assessed on entries filed before October 1, 2007, subject to certain limitations imposed in 2010. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, §

Act") to direct Customs to distribute assessed antidumping and countervailing duties to "affected domestic producers" ("ADPs"), on an annual basis, as compensation for certain qualifying expenditures. An "affected domestic producer" is a U.S. "manufacturer, producer, farmer, rancher, or worker representative" that was a "petitioner or interested party in support of a petition with respect to which an antidumping duty . . . or countervailing duty order was entered." 19 U.S.C. § 1675c(b)(1).

Under the CDSOA, domestic parties who qualified as petitioners or parties in support of a petition were identified initially by the U.S. International Trade Commission, which then provided a list of these parties to Customs. *Id.* § 1675c(d)(1). Customs was required to publish annually a notice of intent to distribute CDSOA funds for the relevant fiscal year that included the current list and invited submissions of certifications of eligibility, each of which was required to include, *inter alia*, a certification of qualifying expenditures. *Id.* § 1675c(d)(2). Distributions for a fiscal year were required to occur within 60 days following the first day of the succeeding fiscal year. *See id.* § 1675c(d)(3).

A. Plaintiffs in this Action

The 20 plaintiffs in this action are ADPs (or successors to ADPs) that received CDSOA distributions under one or more antidumping duty orders: on polyethylene retail carrier bags from Thailand (A-549–821), polyethylene retail carrier bags from Malaysia (A-557–813), polyethylene retail carrier bags from the People's Republic of China ("China") (A-570–886), pure magnesium in granular form from China (A-570–864), alloy magnesium from China (A-570–896), and pure magnesium from China (A-570–832) (the "Orders")[3] . Compl. ¶ 2 (Apr. 18, 2017), ECF No. 2. Plaintiffs have been ADPs under the CDSOA for various fiscal years from 2001 to 2016. *Id.* ¶ 2.

7601(b), 120 Stat. 4, 154 (2006), *amended by* Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3069, 3163 (2010), *amended by* Tax Relief, Unemployment Insurance Reauthorization & Job Creation Act of 2010, Pub. L. No. 111–312, § 504, 124 Stat. 3296, 3308 (2010) (current version at 19 U.S.C. § 1675c note).

[3] *Antidumping Duty Order: Polyethylene Retail Carrier Bags From Thailand*, 69 Fed. Reg. 48,204 (Int'l Trade Admin. Aug. 9, 2004); *Antidumping Duty Order: Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 Fed. Reg. 48,201 (Int'l Trade Admin. Aug. 9, 2004); *Antidumping Duty Order: Polyethylene Retail Carrier Bags From Malaysia*, 69 Fed. Reg. 48,203 (Int'l Trade Admin. Aug. 9, 2004); *Antidumping Duty Order: Pure Magnesium in Granular Form From the People's Republic of China*, 66 Fed. Reg. 57,936 (Int'l Trade Admin. Nov. 19, 2001); *Notice of Antidumping Duty Order: Magnesium Metal From the People's Republic of China*, 70 Fed. Reg. 19,928 (Int'l Trade Admin. Apr. 15, 2005); *Notice of Antidumping Duty Orders: Pure Magnesium From the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium From the Russian Federation*, 60 Fed. Reg. 25,691 (Int'l Trade Admin. May 12, 1998).

B. Interest under the CDSOA

In administering the CDSOA, Customs treated differently two types of interest that pertain to antidumping and countervailing duties: pre-liquidation interest on under-deposited antidumping and countervailing duties that accrued pursuant to 19 U.S.C. § 1677g ("Section 1677g interest")[4] and post-liquidation interest that accrued pursuant to 19 U.S.C. § 1505(d) (the aforementioned "delinquency interest," also identified herein as "Section 1505(d) interest").[5] Section 1677g interest applies only to underpayments (and overpayments) of antidumping and countervailing duties; Section 1505(d) interest applies to duties, taxes, and fees generally.[6] During the period for which plaintiffs claim entitlement to delinquency interest, Customs included Section 1677g interest, but not Section 1505(d) interest, in CDSOA distributions made to ADPs, including plaintiffs.

Section 1677g interest arises from the process of assessing antidumping or countervailing duties. An importer entering goods subject to an antidumping or countervailing duty order deposits estimated antidumping or countervailing duties, with such estimate typically based on the duty rate from the investigation or most recently completed annual review of the order. *See* 19 C.F.R. § 141.101–03. When the actual amount of antidumping or countervailing duties owed on the entry is assessed at liquidation, the importer is billed for any underpayment and the accrued Section 1677g interest on the underpayment. *See* 19 U.S.C. § 1677g(a).

Section 1505(d) interest, or delinquency interest, arises after Customs liquidates an entry. An importer is allowed thirty days to pay the full amount owed as calculated at liquidation, which will include any ordinary duties and special duties (including antidumping and countervailing duties), taxes, fees, and interest, including any Section 1677g interest on under-deposited antidumping and countervailing

[4] "Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—(1) the date of publication of a countervailing or antidumping duty order under this subtitle . . . ." 19 U.S.C. § 1677g.

[5] The Tariff Act provision on delinquency interest reads as follows:

> If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) [30 days after issuance of a bill for payment], any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary [of the Treasury] from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

19 U.S.C. § 1505(d).

[6] Pre-liquidation interest on duties and fees is addressed generally in 19 U.S.C. § 1505(b) ("The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund an excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.").

duties. 19 U.S.C. § 1505(b). Delinquency interest begins to accrue if any of that full amount remains unpaid after 30 days and continues to accrue at each 30-day interval thereafter. *Id.* § 1505(d).

Prior to 2016, Customs deposited accrued Section 1677g interest, but not Section 1505(d) interest, into the special accounts for distributions made to ADPs under the CDSOA. Defs.' Mot. to Dismiss 4 (Sept. 12, 2018), ECF No. 19 ("Defs.' Mot."). In 2016, Congress required specified types of interest received after September 31, 2014 from a bond or a surety on a bond, including Section 1505(d) interest, to be deposited in the special accounts for CDSOA distributions made on or after the date of enactment, February 24, 2016. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 605, 130 Stat. 122, 187–88 (2016) ("TFTEA"). Because the TFTEA provision was effective upon enactment, *id.* § 605(a), CDSOA distributions for Fiscal Year 2016 were the first distributions affected by the change.

C. Proceedings in the Court of International Trade

Plaintiffs commenced this action on April 18, 2017. Summons, ECF No. 1; Compl. Defendants filed a motion to dismiss on September 12, 2018. Defs.' Mot. Plaintiffs filed a memorandum in opposition on November 7, 2018. Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss, ECF No. 25 ("Pls.' Mem."). Defendants replied in support of their motion on November 28, 2018. Defs.' Reply Mem. in Further Supp. Of Defs.' Mot. to Dismiss, ECF No. 26. The court held oral argument on May 2, 2019.

On July 24, 2019, the court ordered supplemental briefing on two issues: (1) whether the Customs regulation implementing the CDSOA provided adequate notice of a decision not to distribute delinquency interest to ADPs, and (2) under an assumption that Customs provided adequate notice, the time at which plaintiffs' claims accrued. Order, ECF No. 47.

In response to the court's inquiries, plaintiffs filed a supplemental brief in opposition to the motion to dismiss on August 23, 2019. Pls.' Suppl. Brief Responding to the Court's Questions and in Opp'n to Defs.' Mot. to Dismiss, ECF No. 50 ("Pls.' Suppl. Br."). Defendants filed a response on October 2, 2019. Defs.' Resp. to Pls.' Suppl. Mem. of Law and in Further Supp. of Defs.' Mot. to Dismiss, ECF No. 54.

II. DISCUSSION

A. Subject Matter Jurisdiction

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), (i)(4). Paragraph (i)(2) of § 1581 grants this Court jurisdiction of a civil

action "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(2). Paragraph (i)(4) grants this Court jurisdiction of a civil action arising "out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection." *Id.* § 1581(i)(4).

B. Rule 12(b)(6) Motions

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true (even if doubtful in fact) and draws all reasonable inferences in a plaintiff's favor. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("*Twombly*"); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). USCIT Rule 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint need not contain detailed factual allegations, but it must plead facts sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

C. Plaintiffs' Claims

Plaintiffs claim that CBP's practice of not distributing Section 1505(d) interest is unlawful and seek an order directing Customs to distribute the Section 1505(d) interest they claim they should have received. Specifically, they seek delinquency interest they contend Customs should have included in annual CDSOA distributions dating all the way back to the first fiscal years for which they were eligible to receive, and did receive, distributions as ADPs. Their demands include delinquency interest collected by Customs on payments that were made by sureties, as well as importers, and also include payments of delinquency interest that were made in cases in this Court that were litigated or settled. Compl. ¶ 31.

D. Defendants' Motion to Dismiss

Defendants argue that plaintiffs' claims are barred by the applicable two-year statute of limitations. Defs.' Mot. 6; *see* 28 U.S.C. § 2636(i) (barring an action brought under the jurisdiction of 28 U.S.C. § 1581(i) "unless commenced in accordance with the rules of the court within two years after the cause of action first accrues"). Defendants' primary argument is that all of plaintiffs' claims are time-barred, basing their argument on the September 21, 2001 publication of CBP's implementing regulation, which, defendants maintain, constitutes the agency decision being challenged in this litigation. Defs'.

Mot. 9–16. Defendants argue in the alternative that even were the court to hold that plaintiffs' claims accrued each year in which plaintiffs received CDSOA distributions, the statute of limitations still would bar all claims to delinquency interest on distributions made more than two years prior to the commencement of this action on April 18, 2017. Defs.' Mot. 17–21.

The court rules that defendants' motion to dismiss based on the statute of limitations must be granted in part and denied in part. Plaintiffs' causes of action are timely to the extent plaintiffs seek Section 1505(d) interest relating to CDSOA distributions occurring during the two-year period prior to their initiating their actions on April 18, 2017, but all claims for interest relating to CDSOA distributions made prior to that two-year period are barred by the statute of limitations.

E. The Agency's Regulation Implementing the CDSOA Provided Adequate Notice of a Regulatory Decision that Delinquency Interest Would Not Be Distributed to ADPs

The CDSOA required Customs to establish a "special account" in the U.S. Treasury for each qualifying antidumping or countervailing duty order, into which Customs would deposit all duties assessed under that order and from which Customs would make distributions to ADPs on an annual, fiscal-year basis. 19 U.S.C. § 1675c(e)(1)–(e)(2). Two provisions in the CDSOA addressed the interest to be deposited into the special accounts and distributed to ADPs. The CDSOA required that Customs "deposit into the special accounts, all antidumping or countervailing duties (*including interest earned on such duties*) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established." *Id.* § 1675c(e)(2) (emphasis added). The statute also provided that Customs "shall distribute all funds (including *all* interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2) [§ 1675c(d)(2)]." *Id.* § 1675c(d)(3) (emphasis added). The CDSOA directed that Customs "shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made." *Id.* § 1675c(e)(3).

Plaintiffs allege that prior to July 15, 2016 they did not know Customs had announced a practice under which delinquency interest would not be distributed to ADPs. They allege specifically that, prior to the July 15, 2016 filing in this Court of a complaint by another group of ADPs raising a claim on delinquency interest similar to that of plaintiffs' here, *Adee Honey Farms, et. al. v. United States*, Consol.

Ct. No. 16–00127 ("*Adee Honey*"), they "did not know . . . of any specific instance" in which Customs received and did not distribute delinquency interest. Compl. ¶¶ 13, 16. Plaintiffs further allege that, in the alternative, they were made aware of CBP's practice by congressional statements in February 2016, prior to, and culminating in, the passage of TFTEA. *Id.* ¶¶ 15–16 (citing 132 Cong. Rec. S836–46 (daily ed. Feb. 11, 2016) (statement of Senator John Thune)). For the purpose of ruling on defendants' motion to dismiss, the court accepts these alleged facts as true. *See Gould*, 935 F.2d at 1274.

Defendants argue that the 2001 publication of CBP's implementing regulation placed plaintiffs on notice that Customs had decided not to place collected delinquency interest in the special accounts for distribution under the CDSOA. Defs.' Mot. 11.

Customs published a notice of proposed rulemaking (the "Proposed Rule") on June 26, 2001 on administration of the CDSOA. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 33,920 (June 26, 2001) (to be codified at 19 C.F.R. § 159.61–159.64 (2002)) ("*Proposed Rule*"). After receiving comments, Customs published a notice of final rulemaking (the "Final Rule") on September 21, 2001. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)) ("*Final Rule*").[7] Referring to the statutory special accounts (into which antidumping and countervailing duties would be placed upon liquidation) and certain "clearing accounts" Customs also established for administering the CDSOA (into which would be placed estimated antidumping and countervailing duties deposited upon entry), the Final Rule provides that "[n]o interest will accrue in the[] accounts. 19 C.F.R. § 159.64(e). The provision then states: "However, statutory interest charged on antidumping and countervailing duties at liquidation will be transferred to the Special Account, when collected from the importer." *Id.*

The regulatory provision, standing alone, informs the reader that interest on antidumping and countervailing duties "charged . . . at liquidation" will be placed into the special accounts for distribution to ADPs. *Id.* The reference to statutory interest "charged" on antidumping and countervailing duties "at liquidation" connotes an intent to deposit into the special accounts interest accrued under 19 U.S.C. § 1677g, which governs interest on underpaid (and overpaid) antidumping and countervailing duties that accrues up until liquidation. *See* 19 U.S.C. § 1677g. It cannot correctly be read as a reference to delinquency interest under 19 U.S.C. § 1505(d), for that type of

[7] The regulations at issue remain unchanged since the promulgation of the Final Rule.

interest is not charged at liquidation and can accrue only after liquidation has occurred and only if the importer does not satisfy the obligation to pay the liquidated duties within the allowed 30-day period. *See* 19 U.S.C. § 1505(d). In identifying for placement in the special accounts "interest charged on antidumping and countervailing duties at liquidation," 19 C.F.R. § 159.64(e) implies, but does not expressly state, that other types of interest (such as delinquency interest) will not be placed into the special accounts.

The preamble accompanying the Final Rule upon promulgation also referred to the topic of interest that will be deposited into the special accounts for distribution to ADPs. *See Final Rule*, 66 Fed. Reg. at 48,550. In response to a question posed by a commenter on the Proposed Rule on whether funds in the special accounts (or the related "clearing accounts" established by the regulation) would bear interest, Customs replied as follows:

> Because Congress did not make an explicit provision for the accounts established under the CDSOA to be interest-bearing, no interest may accrue on these accounts. Thus, only interest charged on antidumping and countervailing duty funds themselves, pursuant to the express authority in 19 U.S.C. § 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA.

Id. Two things are noteworthy about this language in the preamble. First, unlike the regulation to which it pertains, and contrary to plaintiffs' assertion that this sentence "only explained that [CBP's] special accounts would not be made interest-bearing," Pls.' Mem. 6, the preamble uses the word "only" to modify the word "interest," the plain meaning of which is to exclude all other types of interest from the interest that will be "transferred to the special accounts and be made available for distribution." *Final Rule*, 66 Fed. Reg. at 48,550. Second, by referring expressly to 19 U.S.C. § 1677g, the preamble refers unambiguously to pre-liquidation interest of the type that 19 C.F.R. § 159.64(e) identified as interest that will be deposited into the special accounts and distributed to ADPs.

The court concludes that 19 C.F.R. § 159.64(e), when read together with the preamble language that pertained to it, provided adequate notice of the agency's decision that any type of interest other than Section 1677g interest would not be deposited into the special accounts for distribution to ADPs. In both § 159.64(e) and the associated preamble language, Customs linked the issue of what interest it had decided would be deposited into the special accounts with the agency's decision on the issue of whether the accounts themselves will

earn interest (a decision plaintiffs do not challenge in this litigation). While this method of drafting, which linked two separate issues, perhaps was less than ideal, the court cannot conclude that the agency's linking the two issues made unclear or uncertain the agency's decision on what type of interest would be deposited into the accounts. Because delinquency interest collected according to 19 U.S.C. § 1505(d) unquestionably is "interest," the meaning conveyed by the Final Rule is sufficiently clear to have placed interested parties on notice of the agency's decision as to the type of interest Customs would place into the special accounts and thereby make available for distribution to ADPs. *See* 44 U.S.C. § 1507 (publication of a document in the Federal Register generally "is sufficient to give notice of the contents of the document to a person subject to or affected by it"). Plaintiffs make a number of arguments to support their contention to the contrary.

Plaintiffs argue, first, that the Proposed Rule contained clear language expressing CBP's intent to distribute delinquency interest. Pls.' Mem. 12–14. Proposed 19 C.F.R. § 159.64(e) provided that the Special Accounts and Clearing Accounts would not bear interest but further stated: "However, statutory interest charged on antidumping and countervailing duties at liquidation, will be transferred to the Clearing Account or Special Account, as appropriate, when collected from the importer." *Proposed Rule*, 66 Fed. Reg. at 33,926. This proposed provision refutes rather than supports plaintiffs' argument. Interest charged on antidumping and countervailing duties at liquidation is Section 1677g interest, not Section 1505(d) interest. The preamble to the Proposed Rule stated as follows: "[I]f there is interest paid by the importer on any antidumping or countervailing duties billed in the liquidation process for the import entries, that interest will be transferred to the Clearing Account or Special Account, as appropriate." *Id.* at 33,922; *see* Pls.' Mem. 12. The most that can be said for plaintiffs' argument is that this preamble sentence is ambiguous. It can be read to mean that the interest transferred to the accounts will be interest that is billed in the liquidation process, or it can be read to mean that the interest transferred to the accounts will be interest on *duties* that are billed in the liquidation process. The former refutes plaintiffs' argument, as the only interest billed in the liquidation process (as opposed to the collection process) is pre-liquidation interest. *See* 19 U.S.C. § 1505(b), (d). The latter interpretation is more plausible given the proximity of the words "billed in the liquidation process" to the word "duties," but even if so interpreted it is still ambiguous on the *type* of interest on duties that is contemplated. It is not clear whether the reference to interest paid on the

duties is to pre-liquidation or post-liquidation interest. And even if this sentence in the Proposed Rule unambiguously were to have supported plaintiffs' argument, it would not resolve the issue of notice because the relevant provisions in the Proposed Rule and the Final Rule were notice to the contrary.

Plaintiffs next argue that the Final Rule did not provide adequate notice that Customs intended not to distribute delinquency interest. Pls.' Mem. 15–17. But as the court discussed previously, the Final Rule provided adequate notice of CBP's administrative decision. Plaintiffs also argue that the Final Rule did not provide adequate notice because "the clarity of the statutory language" requiring Customs to distribute delinquency interest made plaintiffs believe that Customs would do so. *Id.* at 18. Even were the court to accept, *arguendo*, plaintiffs' statutory interpretation, the court still would reject this argument because plaintiffs were placed on notice of the contents of the Final Rule.

In their supplemental briefing, plaintiffs argue that the preamble to the Final Rule did not provide adequate notice because preambles are not legally binding. Pls.' Suppl. Br. 5–9. Whether the preamble had the force of law as a binding regulation is not the issue before the court; rather, the issue is the adequacy of notice provided by the notice of final rulemaking, an issue for which language in the preamble is unquestionably relevant. Citing *MCI Telecommunications Corp. v. F.C.C.*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) ("*MCI Telecomms.*"), plaintiffs further argue that the sentence of the preamble was too "obscure" to provide effective notice, Pls.' Suppl. Br. 10–13. *MCI Telecomms.* is not analogous to this case. There, the discussion of the relevant issue was limited to a footnote in the "Background" section and appeared solely in the notice of proposed rulemaking. *MCI Telecomms.*, 57 F.3d at 1141–42. Here, the notice of final rulemaking contained a relevant regulatory provision and text in the preamble, under a heading titled "Interest," that clarified its meaning.

F. Plaintiffs Have No Timely Claims that Accrued upon the Promulgation of the Final Rule or the First Time the Final Rule Was Applied to Them

In summary, the September 21, 2001 publication of the Final Rule was adequate notice of a Customs decision, set forth in § 159.64 thereof, that Section 1677g interest would be the only type of interest distributed to ADPs. Disputing this conclusion, plaintiffs allege that either of two events in 2016, the July 15, 2016 filing of complaints in

this Court in *Adee Honey*, another action seeking delinquency interest under the CDSOA, or, in the alternative, legislative commentary during the passage of TFTEA, provided them their first notice of CBP's practice on interest. Pls.' Mem. 10, *see* Compl. ¶ 16. Plaintiffs view these actions as signifying the accrual of their causes of action. The court disagrees.

The claims of all plaintiffs in this litigation arose under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706; *see Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2008). The agency regulatory action on which plaintiffs' claims are based is the Final Rule, which in § 159.64(e) defined and limited the type of interest that would be deposited into the special accounts and thereby made available for distribution to ADPs. No subsequent agency decision repealed or modified that decision, and no government official had authority to deviate from it.

Plaintiffs argue that even if the Final Rule provided legal notice of CBP's decision not to distribute Section 1505(d) interest (and they do not concede that it did), the earliest plaintiffs knew they were harmed by that decision, and thus had standing to sue, was in July 2016, when the complaints in *Adee Honey* were filed in this Court. Pls.' Mem. 10. Plaintiffs are correct that their individual causes of action could not have accrued prior to their having acquired standing to sue, which they could not have acquired until they knew (or had reason to know) they were adversely affected by CBP's decision. *See, e.g.*, *SKF USA Inc. v. U.S. Customs & Border Protection*, 556 F.3d 1337, 1348–49 (Fed. Cir. 2009), *cert. denied*, 560 U.S. 903 (2010) ("*SKF*"). They are incorrect in arguing that they did not acquire standing to sue until 2016.

Stated simply, each plaintiff's claim is that Customs unlawfully failed to deposit the Section 1505(d) interest into the special accounts for distribution to ADPs to which they claim a legal right to have received. Their claims rest upon their interpretation of the CDSOA and thereby raise a pure question of law. Their interpretation of the statute is that the CDSOA required Customs to deposit into the special accounts *all* interest Customs collected that related to antidumping duties, including delinquency interest stemming from unpaid antidumping duties. The Final Rule constituted adequate notice to plaintiffs that Customs had adopted an interpretation of the statute inconsistent with their own.

Plaintiffs contend they were unaware until July 2016 of a "specific instance" in which Customs was not distributing Section 1505(d) interest, but the Tariff Act itself, in 19 U.S.C. § 1505(d), made them aware that Customs has a duty to collect delinquency interest upon

unpaid duties as determined upon liquidation. A comparison of the Final Rule to the CDSOA placed them on notice that Customs had interpreted the CDSOA, and would administer the CDSOA, such that they would be receiving only Section 1677g interest, and therefore would not be receiving Section 1505(d) interest, in any annual CDSOA distribution. Plaintiffs are charged with knowledge of the statutory provisions essential to their claim as well as with knowledge of the contents of the Final Rule.

Any person with ADP status that stood to receive a CDSOA distribution at the time the Final Rule was promulgated would have had standing to sue at that time to claim a right to receive delinquency interest in its upcoming CDSOA distributions. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Because the loss of the claimed right to receive delinquency interest in the future is an injury sufficient to confer a right to bring an APA cause of action, such a person would not have been required to demonstrate the ripeness of its claim by establishing that it already had been deprived of any delinquency interest. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Each plaintiff in this litigation, therefore, acquired standing to challenge the Final Rule either upon promulgation of the Final Rule or upon the first time thereafter it was placed on notice that it stood to receive a CDSOA distribution.

Plaintiffs have been ADPs eligible to receive CDSOA distributions in various fiscal years from 2001 through 2016. *See* Compl. ¶ 2. Plaintiffs seek recovery of any and all delinquency interest CBP unlawfully withheld from each fiscal year's CDSOA distributions. *Id.* ¶ 31. But because all plaintiffs in this case filed suit on April 18, 2017, no plaintiff has a timely claim challenging the regulation that accrued on the date the regulation was promulgated (September 21, 2001). Any plaintiff who first became an ADP eligible to receive a distribution prior to April 18, 2015 does not have a timely challenge on the first application of the regulation to it. All such claims became time-barred prior to the commencement of these actions.

The only issue remaining to be decided is whether all of plaintiffs' claims are time-barred or whether any of their claims survive because they accrued during the two-year period prior to their bringing these actions on April 18, 2017.

G. Plaintiffs' Claims Challenging the Regulation Were Untimely for CDSOA Distributions Made Prior to April 18, 2015

Relying on the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF*, plaintiffs argue that a separate cause of action accrued each year in which they were denied delinquent interest on their CDSOA distributions. Pls.' Suppl. Br. 14–15. Plaintiffs are correct.

In *SKF*, the Court of Appeals considered, and rejected, plaintiff SKF USA Inc.'s constitutional (First Amendment and Equal Protection) challenges to the "petition support" requirement in the CDSOA, 19 U.S.C. § 1675c(a), which limits ADP status to petitioners and parties in support of an antidumping or countervailing duty petition. *SKF*, 556 F.3d at 1351–60. In the litigation, SKF USA Inc. had sought to receive CDSOA distributions under antidumping duty orders for Fiscal Year 2005. *Id.* at 1345. The Court of Appeals rejected various arguments that SKF USA Inc.'s suit was untimely, including the argument that SKF USA Inc. was required to bring its action seeking Fiscal Year 2005 distributions within two years of the October 28, 2000 enactment of the CDSOA. *Id.* at 1348–49. The Court of Appeals concluded in *SKF* that SKF USA Inc. could have brought a facial challenge to the statute but could not bring its action seeking distributions for Fiscal Year 2005 until it was on notice that duties would be available for distribution, and knew that it had qualifying expenditures, for that fiscal year. *Id.* at 1349.

SKF indicates that claims for CDSOA distributions accrue annually, as of each year's distribution. Court of Appeals precedent recognizes that "substantive" challenges to an agency regulation (as opposed to procedural challenges to the method of promulgation), such as those brought by these plaintiffs, may accrue either at the time of promulgation or the time of application to an aggrieved party. *See Hyatt v. Patent and Trademark Office*, 904 F.3d 1361, 1372 (Fed. Cir. 2018). Cases on which the Court of Appeals rested its decision in *Hyatt* reflect the principle that an aggrieved party may make a substantive challenge to *any* application of a regulation to it, not merely the first. *See id.* at 1373; *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 n.1 (D.C. Cir. 1990) ("[W]here the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review" (quoting *Montana v. Clark*, 749 F.2d 740, 744 n.8 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985)) (omission accepted)); *Wind River Mining Corp. v. United States,* 946 F.2d 710, 714–15 (9th Cir.

2001) (similar). Consistent with *SKF*, *Hyatt*, and the decisions upon which they are based, the court concludes that these plaintiffs may challenge the substance of CBP's regulations as applied to them with each CDSOA distribution they received within two years of the commencement of their respective actions on April 18, 2017. Therefore, those of their claims that accrued during the two-year period prior to commencement of their actions on April 18, 2017 are timely, and those of their claims that accrued prior to that two-year period are not.

Defendants' arguments to the contrary are not convincing. Defendants cite *Brown Park Estates-Fairfield Development Co. v. United States*, 127 F.3d 1449 (Fed. Cir. 1997) ("*Brown Park*"), and *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), for the principle that a claim flowing from a single event accrues from the event itself and not from the subsequent recurrence of damage. Defs.' Mot. 15. These cases, which involve the question of the applicability of the "continuing claim doctrine" to actions arising under the Tucker Act, do not speak to the issue plaintiffs' claims raise under the statute of limitations. *Cf. Brown Park*, 127 F.3d at 1454 (statute of limitations is jurisdictional under Tucker Act); *Hart*, 910 F.2d at 817 (Tucker Act's statute of limitations is strictly construed). The principle defendants would have the court apply to this case effectively would insulate regulations from substantive review under the APA by parties who initially were affected by them but only in later years were harmed seriously enough to make a judicial challenge worthwhile. *See Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 546 (D.C. Cir. 1958) ("[U]nlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.").

III. CONCLUSION AND ORDER

For the reasons discussed above, the court holds that plaintiffs' causes of action are barred by the two-year statute of limitations of 28 U.S.C. § 2636(i) to the extent they seek Section 1505(d) interest on any CDSOA distributions they received prior to April 18, 2015. Claims seeking Section 1505(d) interest on distributions received within the two years prior to the commencement of their actions on April 18, 2017 are timely. Therefore, upon all papers and proceedings held herein, and upon due deliberation, it is hereby

ORDERED that defendants' Motion to Dismiss (Sept. 12, 2018), ECF No. 19, be, and hereby is, granted in part and denied in part; it is further

ORDERED that the claims of all plaintiffs seeking Section 1505(d) interest on any CDSOA distributions received prior to April 18, 2015

are dismissed as untimely according to the two-year statute of limitations of 28 U.S.C. § 2636(i); it is further

ORDERED that the parties shall consult and submit to the court a joint proposed schedule for this litigation, including submission of plaintiff's Rule 56.1 motion, defendants' response thereto, plaintiffs' reply, and requests for oral argument.

Dated: June 1, 2020
New York, New York

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

Slip Op. 20–78

LUOYANG BEARING CORPORATION (GROUP) Plaintiff, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 19–00026

[The court denies Plaintiff's motion and enters judgment for Defendant because Plaintiff failed to exhaust administrative remedies before Commerce.]

Dated: June 1, 2020

Edmund W. Sim, Appleton Luff Pte Ltd, of Washington, DC, argued for plaintiff. With him on the briefs were *Kelly A. Slater* and *Jay Y. Nee*.

Kelly A. Krystyniak, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Nikki Kalbing*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC. Of counsel on the brief was *James Henry Ahrens II*.

Geert De Prest, Schagrin Associates, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Nicholas J. Birch*.

OPINION

Katzmann, Judge:

This case implicates the exhaustion of administrative remedies requirement of the Customs Courts Act of 1980, 28 U.S.C. § 2637(d) (2018), and provides occasion to consider the "futility" exception to that statute.

Plaintiff Luoyang Bearing Corporation (Group) ("Luoyang"), a foreign producer and exporter of tapered roller bearings ("TRBs")[1] from China, brought an action against the United States ("the Government") to challenge a final determination by the United States Department of Commerce ("Commerce"), *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2016–2017*, 84 Fed. Reg. 6,132–34 (Dep't Commerce Feb. 26, 2019) ("*Final Results*"), in which Commerce denied Luoyang's separate rate application and applied the country-wide antidumping ("AD") rate after finding de facto government control over Luoyang's board of directors. Mem. of P. & A. in Supp. of Pl. Luoyang Bearing Corp. (Grp.)'s R. 56.2 Mot. for J. on the Agency R. at 1, Aug. 1, 2019, ECF

[1] A "bearing" is "a machine part in which another part (such as a journal or pin) turns or slides." *Bearing*, Merriam Webster, https://www.merriam-webster.com/dictionary/bearing (last visited May 18, 2020). "TRBs are a type of antifriction bearing made up of an inner ring (cone) and an outer ring (cup). Cups and cones sell either individually or as a preassembled 'set.'" *NTN Bearing Corp. of Am. v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997).

No. 28 ("Pl.'s Br."). Luoyang failed to raise any arguments to Commerce contesting an adverse preliminary determination before bringing a challenge to the court. Luoyang requests that the court remand Commerce's decision as "not in accordance with law or unsupported by substantial evidence." Compl. at 4, Mar. 4, 2019, ECF No. 4. The Government and Defendant-Intervenor the Timken Company ("Timken") respond that the court should deny Luoyang's motion for judgment on the agency record for failing to first exhaust administrative remedies. Def.'s Opp'n to Pl.'s Mot. for J. upon the Admin. R. at 6–9, Oct. 1, 2019, ECF No. 37 ("Def.'s Br."); Resp. Br. of Timken at 1, Oct. 1, 2019, ECF No. 36 ("Def.-Inter.'s Br."). The court denies Luoyang's motion without reaching the merits of its claims because Luoyang failed to first exhaust its administrative remedies before Commerce.

BACKGROUND

I. Legal and Regulatory Framework

Congress's AD statute empowers Commerce to impose remedial duties on imported goods when those goods are sold in the United States at less-than-fair value and the International Trade Commission determines that the domestic industry is thereby "materially injured, or is threatened with material injury." *See* 19 U.S.C. § 1673(2)(A)(i)–(ii) (2018); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018), *aff'd*, 779 F. App'x 744 (Fed. Cir. 2019) ("*Rongxin*"). "Sales at less than fair value are those sales for which the 'normal value' (the price a producer charges in its home market) exceeds the 'export price' (the price of the product in the United States)." *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1326 (Fed. Cir. 2017) (quoting *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)). In these instances, "the amount of the [AD duty] is 'the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.'" *Rongxin*, 331 F. Supp. 3d at 1394 (quoting 19 U.S.C. § 1673). Upon request, Commerce may conduct an administrative review of its AD duty determination and recalculate the applicable rate. 19 U.S.C. § 1675(a)(1)–(2); *see also Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010); *Rongxin*, 331 F. Supp. 3d at 1394.

When a proceeding concerns a non-market economy ("NME") country,[2] such as China, "Commerce presumes that all respondents to the proceeding are government-controlled and therefore subject to a single country-wide [AD] duty rate." *Rongxin*, 331 F. Supp. 3d at 1394 (citing *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1349–50 (Fed. Cir. 2015)). *See also Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). However, respondents may rebut this presumption of government control and establish eligibility for a rate separate from the country-wide rate by demonstrating freedom from both de jure (legal) and de facto (factual) government control. *Dongtai Peak Honey*, 777 F.3d at 1350; *Rongxin*, 331 F. Supp. 3d at 1394.

Prior to challenging a determination by Commerce before the court, both statute, 28 U.S.C. § 2637(d), and Commerce's own regulation, 19 C.F.R. § 351.309(c)(2), require respondents to exhaust all administrative remedies available at the agency level. The statute, in relevant part, states that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court may exercise its discretion to excuse a respondent from this procedural administrative exhaustion requirement in specific narrow circumstances. *See id.* (requiring exhaustion "where appropriate"). One such narrow circumstance is when the respondent can demonstrate that raising the issue would have been futile. *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013).

II. Factual and Procedural History

On June 7, 2017, Commerce published a notice of opportunity to request an administrative review of its AD order on TRBs from China for the period of June 1, 2016 through May 31, 2017. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 82 Fed. Reg. 26,441, 26,441 (Dep't Commerce June 7, 2017). Luoyang, among the two largest Chinese TRB exporters during the period of review ("POR"), timely requested an administrative review, and Commerce selected Luoyang for individual examination. *See* 19 U.S.C. § 1677f-1 (2012); Mem. from I. Baig (AD/CVD Operations) to M. Skinner (AD/CVD Operations), re: Selection of Respondents for Individual Review at 5 (Dep't Commerce Aug. 24, 2017), P.R. 41. In response, Commerce

[2] A non-market economy country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

issued an initial questionnaire to Luoyang. *See* Letter from Luoyang to Sec'y of Commerce, re: Sec. A Resp. (Sept. 29, 2017), P.R. 100. Commerce later requested supplemental questionnaire responses on November 9, 2017, to which Luoyang responded on November 27, 2017. Letter from S. Thompson (AD/CVD Operations) to Luoyang, re: Suppl. Sec. A Questionnaire (Dep't Commerce Nov. 9, 2017), P.R. 127; Letter from Luoyang to Sec'y of Commerce, re: Suppl. Sec. A Resp. (Nov. 27, 2017), P.R. 133 ("Luoyang's Suppl. Sec. A Resp."). That response constitutes the final communication between Luoyang and Commerce regarding this review prior to the initiation of the instant case.

Commerce published preliminary results on July 12, 2018, denying Luoyang separate rate status because it failed to rebut the presumption of governmental control over its export activities. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Intent to Rescind the Review in Party; 2016–2017*, 83 Fed. Reg. 32,263 (Dep't Commerce July 12, 2018) ("*Preliminary Results*"). Consequently, Luoyang was subject to the 92.84 percent China-wide AD rate. *Id.* Commerce based its decision on Luoyang's corporate ownership structure and associated shareholder control. Mem. from G. Taverman (AD/CVD Operations) to W. Frankel (AD/CVD Operations), re: Decision Mem. for the Prelim. Results of the 2016–17 AD Duty and Admin. Review of TRBs and Parts Thereof, Finished and Unfinished, from the People's Republic of China at 10 (July 3, 2018), P.R. 223 ("PDM"). Luoyang is majority owned by Henan Machinery, which is wholly owned by Henan SASAC, a government-owned entity that oversees China's assets in Henan Province. *Id.* Commerce found government control because the Chinese government, as majority shareholder, "exercises its rights inherent in majority ownership as would be expected." *Id.* "Because of . . . the control that [government] ownership on its own establishes, we preliminarily conclude that Luoyang does not satisfy the criteria demonstrating an absence of de facto government control over export activities, consistent with our determination in the [*Final Results of Redetermination Pursuant to Diamond Sawblades Manufacturers' Coalition v. United States*, (Dep't Commerce Dec. 1, 2015), *available at* http://enforcement.trade.gov/remands/15–92.pdf.]" *Id.* Luoyang did not submit an administrative case brief between the publication of the *Preliminary Results* and the *Final Results*. *See* Pl.'s Reply Br. in Supp. of Pl. Luoyang's R. 56.2 Mot. for J. on Agency R. at 2, Oct. 21, 2019, ECF No. 39 ("Pl.'s Reply"); Def.'s Br. at 6; Def.-Inter.'s Br. at 7. Thus, Commerce continued to apply the countrywide rate to Luoyang in the *Final Results*. *Final Results* at 6,133.

Luoyang commenced this action on March 4, 2019. Summons, ECF No. 1; Compl. On August 1, 2019, Luoyang moved for judgment on the agency record, challenging Commerce's *Final Results* as neither supported by substantial evidence or otherwise in accordance with law. Pl.'s Br. at 1. The Government and Timken responded on October 1, 2019. *See* Def.'s Br.; Def.-Inter.'s Br. Luoyang replied on October 21, 2019. Pl.'s Reply. The court held oral argument via teleconference on April 8, 2020. ECF No. 49.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(b)(1)(B)(i). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." As noted, however, preceding a review by the court of the merits of a given claim, a party challenging agency action must have first exhausted its administrative remedies or demonstrated to the court that it should be exempted from that requirement. *See Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017).

DISCUSSION

For the reasons stated below, the court denies Luoyang's motion for judgment on the agency record, without reaching the merits of its claims, because Luoyang failed either to exhaust its administrative remedies before Commerce or to articulate a persuasive ground for the court to exercise its discretion to exempt Luoyang from so doing.

I. Luoyang Did Not Exhaust its Administrative Remedies, and Exhaustion Would Not Have Been Futile.

A. Parties' Contentions in Context

As has been recited, the burden is on the separate rate applicant to overcome the presumption of government control in an NME. Preliminarily, Commerce found that Luoyang was ineligible for a separate rate because the Chinese government indirectly owns a majority of its shares. PDM at 10. The record demonstrates, and Luoyang does not contest, that Luoyang's last communication to Commerce occurred on November 27, 2017, in which it provided answers to Commerce's supplemental questionnaire responses — answers that re-

sulted in a preliminary denial of its separate rate application. *See* Luoyang's Suppl. Sec. A Resp..; Pl.'s Reply at 2. In other words, it is undisputed that Luoyang failed to exhaust its administrative remedies.

The Government and Timken argue that Luoyang's claims should be dismissed because Luoyang did not exhaust its administrative remedies before Commerce as required by statute and Commerce's regulations. *See* Def.'s Br. at 6–9; Def.-Inter.'s Br. at 6–9. Luoyang contends that, because evidence of its ownership and shareholder structure did not change between the publication of the *Preliminary Results* and the *Final Results* and Commerce used this evidence to deny Luoyang a separate rate, it would have been futile for Luoyang to submit a case brief to Commerce raising arguments to challenge the preliminary denial of a separate rate. Pl.'s Reply at 2; *see* PDM at 10. Luoyang acknowledges the narrowness of the futility exception but argues that "an adverse separate rates decision before Commerce was more than just 'likely:' it was virtually guaranteed." Pl.'s Reply at 4 (quoting *Corus Staal*, 502 F.3d at 1379). To support this contention, Luoyang highlights Commerce's practice of reviewing similarly situated entities that, in Luoyang's view, is "focused almost exclusively around any degree of government ownership in the respondent, however attenuated." Pl.'s Reply at 5. As a result, Luoyang argues, "it would appear that any degree of government ownership in a respondent renders futile any efforts for a respondent to demonstrate otherwise a lack of government control over its export operations, whether substantial evidence bears this out or not." *Id.* Accordingly, Luoyang argues that the court should employ the discretion that 28 U.S.C. § 2637(d) provides to waive the otherwise strict requirement of administrative exhaustion by a respondent in an investigation by Commerce and thus hear its claim. *Id.* at 6. To address this question, the court first examines the law of administrative exhaustion, and then the futility exception.

B. Basic Principles

The Federal Circuit has made clear that 28 U.S.C. § 2637(d), the exhaustion statute, "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal*, 502 F.3d at 1379. Under this framework, the Federal Circuit explained that respondents in Commerce investigations are "procedurally required to raise" all issues and arguments in case briefs to Commerce "at the time Commerce [is] addressing the issue." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (citing

Mittal Steel Point Lisas Ltd. v. United States, 548 F.3d 1375, 1383 (Fed. Cir. 2008)). The requirement derives from concerns regarding "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, [requiring] as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)). "[A] failure to enforce the exhaustion of administrative remedies principle could lead to 'frequent and deliberate flouting of the administrative processes [that] could weaken the effectiveness of an agency by encouraging people to ignore [administrative] procedures.'" *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 453, 773 F. Supp. 1549, 1555 (1991) (quoting *McKart v. United States*, 395 U.S. 185, 195 (1969)). Further, the Federal Circuit has explained that the exhaustion requirement protects "an agency's interest in being the initial decisionmaker . . . [and] serve[s] judicial efficiency by promoting development of an agency record that is adequate for later court review and by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes." *Itochu Bldg. Prods.*, 733 F.3d at 1145. *See also McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Respondents can meet the exhaustion requirement by submitting a case brief to Commerce after the publication of preliminary results that includes "all arguments that continue in the submitter's view to be relevant" to the final results, "including any arguments presented before the date of publication of the preliminary determination or preliminary results." 19 C.F.R. § 351.309(c)(2). *See Corus Staal*, 502 F.3d at 1378. "The exhaustion requirement in this context is therefore not simply a creature of court decision, as is sometimes the case, but is a requirement explicitly imposed by the agency as a prerequisite to judicial review." *Corus Staal*, 502 F.3d at 1379.[3]

Exceptions to the exhaustion requirement are limited, including where raising the claim is futile or where the question is one of pure law and does not require further factual development. *Itochu Bldg.*

[3] The Government notes that "Commerce considers arguments raised in case and rebuttal case briefs, and can — indeed, often does — alter the methodology applied, or correct mistakes, in its final determination." Def.'s Resps. to Ct.'s Questions for Oral Arg. at 6, Apr. 6, 2020, ECF No. 47 ("Def.'s Suppl. Br."). The Government observes that "[c]ase briefs and rebuttal case briefs offer a mechanism through which interested parties can raise and debate points of law or fact arising during the proceedings, and before Commerce makes a final determination." *Id.* at 6. Respondents can use this opportunity to "flag any errors that Commerce may have made in its preliminary determinations, or point to evidence on which it believes Commerce should rely." *Id.* "[T]he case brief process almost certainly reduces the volume of litigation arising from Commerce's determinations" and elsewhere "permits Commerce to develop the administrative record and address arguments that are raised, facilitating judicial review of Commerce's decisions." *Id.*

Prods., 733 F. Supp. 3d at 1146; *Zhongce Rubber Grp. Co. v. United States*, 42 CIT __, __, 352 F.3d 1276, 1279–80 (2018), *aff'd*, 787 F. App'x 756 (Fed. Cir. 2019). *See also Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (listing exceptions as (1) futility; (2) a subsequent court decision that may impact the agency's decision; (3) a pure question of law; or (4) when plaintiff had reason to believe the agency would not follow established precedent). Relevant here, the court may excuse the exhaustion of administrative remedies requirement in situations where plaintiffs prove futility by showing that exhaustion would "require[] [them] to go through obviously useless motions in order to preserve their rights." *Corus Staal*, 502 F.3d at 1379 (citations omitted); *Itochu Bldg. Prods*., 733 F.3d at 1146 (explaining that the futility exception may apply "where it is clear that additional filings with the agency would be ineffectual"). However, the futility exception to the administrative exhaustion requirement "is a narrow one." *Corus Staal*, 502 F.3d at 1379. "The mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Id*. (citation omitted).

C. Analysis

Federal Circuit precedent, analyzing and rejecting claims of futility very similar to that posed by Luoyang, informs the court's disposition of the instant litigation. In *Corus Staal*, a seminal case addressing the futility exception to administrative exhaustion, the Federal Circuit reviewed a respondent's argument that addressing an issue in a case brief to Commerce would have been futile because it had already presented those arguments to Commerce in its questionnaire response and received an adverse preliminary determination. 502 F.3d at 1378–81. There, Corus "claim[ed] that it put Commerce on notice as to its position with regard to the [] issue in its . . . submission in response to Commerce's request for information, and Commerce responded by rejecting those arguments in the preliminary results." *Id*. at 1378. Corus maintained that "in the past Commerce had consistently taken a position contrary to Corus's legal arguments regarding [the issue] and was therefore unlikely to accept those arguments if Corus pressed them in its case brief." *Id*. Luoyang's argument is nearly identical to the one Corus presented to the Federal Circuit. *See* Pl.'s Reply at 5 ("[B]ecause Luoyang effectively has no chance of success to be gained by raising its de facto separate rates arguments before Commerce based on additional and arguably substantial evi-

dence of non-governmental control over its export operations, it is in effect pointless for Luoyang to raise those arguments in the first place.").

The Federal Circuit in *Corus Staal* rejected the plaintiff's argument: "it is not obvious that the presentation of [Corus's] arguments to the agency would have been pointless[,]" and "Corus has provided nothing by way of affirmative justification for its failure to raise the . . . issue in its case brief." 502 F.3d at 1380–81. The Federal Circuit explained that "[t]he response that Commerce gave in the preliminary results . . . was brief and was expressly designated as preliminary; it was not designed to be Commerce's last word on the matter." *Id*. at 1380. Indeed, requiring respondents to set forth their arguments in a case brief before the final determination has "potential value either by resulting in possible relief for [respondents] or at least providing the agency an opportunity to set forth its position in a manner that would facilitate judicial review." *Id*. This requirement is particularly important where the issue involves the exercise of Commerce's discretion, such as in policy or fact-based methodology questions where Commerce could change its determination based on interested party arguments. *See id*. ("Even if it is unlikely that Commerce would adopt Corus's legal arguments . . . , it was still possible that upon full airing, Commerce might have accepted Corus's factual showing that it had not absorbed antidumping duties, thereby obviating the need for judicial review."). *Id*. Crucially, the court noted that a likely adverse decision without more "does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Id*. at 1379. In other words, Corus failed to exhaust its administrative remedies with the agency and did not present facts indicating that further argumentation before Commerce would have been futile. *Id*. at 1381. Accordingly, the Federal Circuit ruled that this court did not abuse its discretion by refusing to hear the merits of the claim. *Id*.

Luoyang's argument cannot prevail for the reasons the Federal Circuit relied on in *Corus Staal. See id.* at 1380. Luoyang had the same opportunity that the respondent in *Corus Staal* had: to present legal arguments concerning Commerce's practice and its application in this instance and to present factual issues that Luoyang asserts support its claims. Luoyang chose to do neither. Commerce's initial separate rate denial was preliminary, and Luoyang was required to give Commerce a full opportunity to address Luoyang's arguments before bringing a challenge to the court. *See id.* Despite Commerce's consistent position regarding indirect ownership and de facto inde-

pendence from government control, indicating that an adverse final decision may have been likely, Luoyang was still required to present a case brief. *See id.* at 1379–80. The agency decision at issue was whether the respondent, based on the agency's criteria, had overcome the presumption of government control so as to be eligible for separate rate status. That decision involves the evaluation of facts that vary substantially from case to case and criteria that have frequently been the subject of litigation. *See, e.g., Shandong Rongxin Import & Export Co. v. United States*, 43 CIT __, 355 F. Supp. 3d 1365 (2019); *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, 350 F. Supp. 3d 1308 (2018); *Advanced Tech. & Materials Co. v. United States*, 37 CIT __, 938 F. Supp. 2d 1342 (2013), *aff'd*, 581 F. App'x. 900, 901 (Fed. Cir. 2014). Indeed, in its Separate Rate Certification filed at the outset of this annual review, Luoyang certified that it had in fact received separate rate status in several prior reviews of the AD order on TRBs from China. Letter from Luoyang to Sec'y of Commerce, re: Luoyang's Separate Rate Certification at 3 (Aug. 31, 2017), P.R. 66. *See also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2003–2004 Administrative Review*, 71 Fed. Reg. 2,517 (Dep't Commerce Jan. 17, 2006); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000–2001 Administrative Review*, 67 Fed. Reg. 68,991 (Dep't Commerce Nov. 14, 2002); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review*, 66 Fed. Reg. 57,421 (Dep't Commerce Nov. 15, 2001). Luoyang's premise — that an adverse decision in the 2016–2017 review was "virtually guaranteed" — is hardly self-evident. *See* Pl.'s Reply at 4. Luoyang's assertions, without more, fail to justify an exercise of the court's discretion to exempt it from the exhaustion requirement of 28 U.S.C. § 2637(d).[4]

[4] The Government argues, Def.'s Suppl. Br. at 3–4, and the court agrees, that the present case is distinct from *Itochu Building Products*. *See* 733 F.3d 1140. That case presented rare circumstances not applicable here. There, in a changed circumstances review involving a statute governing administrative reviews, the plaintiff had "submitted comments, met with Commerce officials, and provided legal authority" before Commerce issued its preliminary results, but failed to later submit a case brief. *Id.* at 1142. The Federal Circuit ruled that exhaustion need not apply to arguments regarding the effective date of the revocation when there was "no reasonable prospect" that Commerce, based on its interpretation of the statute, would have modified the effective date. *Id.* at 1146–48. The Federal Circuit determined that the futility exception should apply where "Commerce had heard everything on the issue that [the plaintiff] had to say" prior to the publication of the preliminary results. *Id.* at 1147. The *Itochu Building Products* court also distinguished the result required by Commerce's interpretation of a statute in that case from the fact dependent determination in *Corus Staal*, 502 F.3d 1370, in which Commerce may have changed its position based on additional factual and legal arguments. *Itochu Bldg. Prods.*, 733 F.3d at 1147–48. Like the

CONCLUSION

Considering all the relevant circumstances, the court determines that Luoyang has failed to demonstrate futility and concludes that no justification has been shown for making an exception to the exhaustion requirement set forth in 28 U.S.C. § 2637(d). Pursuant to USCIT Rule 56, the court will enter judgment in favor of Defendant.

SO ORDERED.

Dated: June 1, 2020
New York, New York

/s/ Gary S. Katzmann
JUDGE

plaintiff in *Corus Staal*, Luoyang could have made additional arguments or highlighted record evidence that Commerce could then adopt or address on the administrative record. Second, as the Government and Timken note, the determination at issue here was a fact-based methodological one. Def.'s Suppl. Br. at 2; Resp. of Timken to Questions for Oral Arg. at 2, Apr. 6, 2020, ECF No. 48. That is, Commerce's separate rate determination was fact specific, unlike the determination at issue in *Itochu Building. Products. See* 733 F.3d at 1148; PDM at 6–8. In short, the court finds that this case is similar to *Corus Staal*, 502 F.3d at 1379, in which the Federal Circuit required exhaustion, and unlike *Itochu Building Products*, in which it applied the futility exception. *See* 733 F.3d at 1147–48.

Slip Op. 20–79

J. CONRAD LTD, Plaintiff, v. UNITED STATES et al., Defendants.

Ct. No. 20–00052

Before: Timothy C. Stanceu, Chief Judge, and Jennifer Choe-Groves and M. Miller Baker, Judges

METROPOLITAN STAPLE CORP., Plaintiff, v. UNITED STATES et al., Defendants.

Ct. No. 20–00053

[Plaintiffs' motions for temporary restraining orders and preliminary injunctions are denied.]

Dated: June 1, 2020

Jeffrey Neeley, Husch Blackwell LLP of Washington, DC, argued for Plaintiffs, *J. Conrad LTD* and *Metropolitan Staple Corp.* With him on the briefs were *Nithya Nagarajan*, *Stephen W. Brophy*, *Joseph S. Diedrich*, and *Julia B. Banegas*.

Stephen Tosini, Senior Trial Counsel, and *Kyle Beckrich*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for Defendants. With them on the briefs were *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

OPINION

Baker, Judge:

In these twin cases, two importers of steel nails seek temporary restraining orders and preliminary injunctions against implementation or further enforcement of Presidential Proclamation 9980, which imposes tariffs on certain imported steel-derivative products, including steel nails, on national security grounds. The Court ordered consolidated briefing and heard argument for both cases together.

Based on our findings of fact and conclusions of law set out below, *see* USCIT R. 52(a)(2), we deny Plaintiffs' motions for preliminary injunctions because they have failed to demonstrate a likelihood of irreparable harm absent such relief. Given Plaintiffs' failure to carry their burden on this essential element, we need not address the other three elements required to grant preliminary injunctive relief. In view of our denial of Plaintiffs' preliminary injunction motions, we deny Plaintiffs' TRO motions as moot.

I. Statutory Background

These cases involve a challenge to actions taken by the President of the United States pursuant to Section 232 of the Trade Expansion Act of 1962, codified as amended at 19 U.S.C. § 1862. As its heading

indicates, Section 232 authorizes the President to take certain actions to reduce imports of goods to "[s]afeguard[] national security." 19 U.S.C. § 1862.

A. Section 232

As relevant here, Section 232 directs that upon receipt of a request from the head of a department or agency, upon application of an interested party, or *sua sponte*, the Secretary of Commerce is to conduct an "appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request." 19 U.S.C. § 1862(b)(1)(A). The Secretary shall, "if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Id.* § 1862(b)(2)(A)(iii).

The statute provides that within 270 days of commencing the investigation, the Secretary shall submit a report to the President summarizing the investigation's findings and offering recommendations for action or inaction; in addition, if the Secretary concludes the subject article's imports are in quantities or under circumstances that "threaten to impair the national security," the report shall so state. *Id.* § 1862(b)(3)(A).

If the Secretary finds a threat to national security, the President then has 90 days from his receipt of the report to determine whether he "concurs" with the Secretary's finding. *Id.* § 1862(c)(1)(A)(i). If the President concurs, he is then to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii). If the President elects to take such action, the statute provides he shall "implement" that action within 15 days after the day on which he decides to act. *Id.* § 1862(c)(1)(B).

B. Customs Duties

A customs duty is a tariff or tax that may be imposed, in various circumstances and for various purposes, upon imported goods entering the United States.[1] U.S. Customs and Border Protection ("Customs") is the agency that administers and enforces tariffs, including those at issue in these cases. Imported goods are subject to rates of duty, or are designated as free of duty, as set forth in the Harmonized Tariff Schedule of the United States. Most goods are subject to an "ad

[1] *See* U.S. Customs & Border Prot., *Customs Duty Information*, https://www.cbp.gov/travel/international-visitors/kbyg/customs-duty-info (accessed May 19, 2020).

valorem" duty rate, which is a percentage of the merchandise's value.[2] The cases before the Court, for example, involve a controversy over a 25 percent ad valorem duty on imported steel nails. Estimated duties and fees must be deposited upon entry. *See* 19 U.S.C. § 1505(a).

An importer's liability is not fixed until the entry is "liquidated," which refers to Customs's "final computation or ascertainment of duties" owed on an entry of merchandise. *See* 19 C.F.R. § 159.1; *see also* 19 U.S.C. § 1500. Following liquidation, Customs either collects any additional amounts due, with interest, if the importer's deposit was lower than the final assessment or refunds any excess deposit, with interest, if the deposit was higher than the final assessment. 19 U.S.C. § 1505(b).

II. Factual Background

A. Commerce's Investigation of Steel Imports

In 2017, the Secretary of Commerce initiated a Section 232 investigation to determine the effects of steel imports on national security. *See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017). Following a period of investigation that included public hearings, the Secretary issued his report and recommendation to the President on January 11, 2018, within the statutory 270-day period.[3]

The Secretary found that steel is important to U.S. national security, *supra* note 3 at 2–3, that steel imports were of quantities that injured the domestic steel industry, *id.* at 3–4, that displacement of domestic steel due to excessive imports weakens the U.S. economy, *id.* at 4, and that global excess steel capacity further weakens the U.S. economy, *id.* at 4–5.

Based on those findings, the Secretary concluded that steel imports impaired national security for purposes of Section 232 and "that the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity." *Id.* at 5. Accordingly, the Secretary recommended the President "take immediate action by adjusting the

---

[2] U.S. Customs & Border Prot., *Importing into the United States: A Guide for Commercial Importers* at 40 (2006), https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf.

[3] *See generally* U.S. Dep't of Commerce, Bureau of Industry & Security, *The Effect of Imports of Steel on the National Security* (Jan. 11, 2018), https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file.

level of [steel] imports through quotas or tariffs ... to enable U.S. steel producers to operate at an 80 percent or better average capacity utilization rate based on available capacity in 2017 ... ." *Id.* at 6.

B. Proclamation 9705's Tariffs on Steel Products

On March 8, 2018, within 90 days of receiving the Secretary's report and recommendation, the President issued Proclamation 9705, in which he "concur[red] in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States ... ." *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel into the United States*, ¶ 5, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018).

Proclamation 9705 imposed a 25 percent ad valorem tariff on steel articles from all countries except Canada and Mexico*, id.* ¶ 8, 83 Fed. Reg. at 11,626, and, *inter alia*, directed the Secretary to "continue to monitor imports of steel articles" and advise the President whether any further action should be taken. *Id.* cl. (5)(b), 83 Fed. Reg. at 11,628.

C. Proclamation 9980's Extension of Tariffs to Steel Derivative Products

On January 24, 2020, the President issued Proclamation 9980, which extended Proclamation 9705's tariffs to apply to certain steel article derivatives not previously addressed by the Secretary's report and recommendation or by Proclamation 9705. *See Proclamation 9980 of January 24, 2020, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5281 (Jan. 29, 2020).[4]

The President stated that, pursuant to Proclamation 9705's instruction that the Secretary continue to monitor steel imports, the Secretary had informed him that

> imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas. The net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of ... steel and undermine the purpose of the proclamations adjusting imports of ... steel articles to remove the threatened impairment of the national security.

Id. ¶ 5, 85 Fed. Reg. at 5282.

[4] Proclamation 9980 also extended tariffs to certain aluminum article derivatives not at issue in these two cases.

Accordingly, Proclamation 9980 imposed an additional 25 percent ad valorem tariff on, *inter alia*, imported steel derivative articles (as defined in the proclamation's Annex II) with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after February 8, 2020. *Id.* cl. 1, 85 Fed. Reg. at 5283. The proclamation exempted imports of steel derivative articles from six countries. *Id.* Steel derivative articles subject to Proclamation 9980 include, but are not limited to, steel nails. *Id.* Annex II ¶ 3(ii)(B), 85 Fed. Reg. at 5291.

D. These Lawsuits

Plaintiffs J. Conrad LTD and Metropolitan Staple Corp. filed these two cases on March 2, 2020. They are importers and nationwide distributors of fasteners, including steel nails, not encompassed by Proclamation 9705 but encompassed by Proclamation 9980. Affidavit of Mark Buedel, ECF 10–2, at 16;[5] Affidavit of Howard Kastner, Court No. 20–53, ECF 8–2, at 16.

The defendants are the United States, the President, the U.S. Department of Commerce, the Secretary of Commerce, Customs, and the Acting Commissioner of Customs.

The substantively identical complaints allege that the Secretary violated the Administrative Procedure Act in forwarding the information the President cited in Proclamation 9980 (Count I), that the President violated Section 232 by issuing Proclamation 9980 outside the statutory timetable (Count II), that the President violated Plaintiffs' Fifth Amendment due process rights by issuing Proclamation 9980 without providing notice and an opportunity for comment (Count III), that the Secretary's alleged APA violations also violated Section 232 (Count IV), and that Proclamation 9980 violated the Fifth Amendment Due Process Clause's equal protection component through disparate treatment of manufacturers and importers of steel derivatives from the exempted countries (Count V). *See* Amended Complaint, ECF 10.

E. The TRO and Preliminary Injunction Motions

J. Conrad moved for a TRO and preliminary injunction on March 4, 2020. ECF 23. Metropolitan Staple filed a virtually identical motion two days later. Court No. 20–53, ECF 21.

In relevant part, Plaintiffs' motions ask the Court to (1) enjoin the government from collecting cash deposits for duties imposed by Proc-

[5] As Plaintiffs' filings in these two cases are virtually identical for all relevant purposes, this opinion cites the record in Court No. 20–52 unless otherwise indicated. Citations to page numbers in the record (including the parties' briefs) refer to the pagination found in the ECF header at the top of each page.

lamation 9980 on Plaintiffs' entries filed on or after February 8, 2020, and (2) order the government to suspend liquidation of all entries of articles subject to Proclamation 9980 filed by Plaintiffs until this litigation, including any appeals, is resolved. ECF 23, at 2.

On March 10, 2020, the Court ordered consolidated briefing of the twin TRO/preliminary injunction motions, set a briefing schedule, and ordered expedited discovery. In view of the then-developing public health concerns, the Court further advised the parties to "anticipate the possibility that it may not be advisable or possible for witnesses to appear in open court and that the court may require submission of deposition testimony in lieu of live testimony. The court encourages counsel to reasonably cooperate regarding requests for expedited telephonic or videoconference depositions." ECF 31, at 5–6.

We[6] heard oral argument on Plaintiffs' TRO and preliminary injunction motions via teleconference (due to the COVID-19 pandemic) on April 7, 2020.[7] Neither side proffered either deposition or live (telephonic) witness testimony; instead, the parties relied upon the written record consisting of affidavits attached to Plaintiffs' complaints and documents produced by Plaintiffs in expedited discovery and submitted by the government in its response to Plaintiffs' motions.

III. Jurisdiction

We have jurisdiction under 28 U.S.C. § 1581(i), which provides that this Court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for ... tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," 28 U.S.C. § 1581(i)(2), and "administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection ...," *id.* § 1581(i)(4).

IV. Discussion

We begin by examining the applicable standard for issuance of a preliminary injunction. We then apply that standard as we understand it to the preliminary injunction motions pending here.

---

[6] On March 12, 2020, Chief Judge Stanceu assigned these two cases to this three-judge panel. *See* 28 U.S.C. § 255(a) (authorizing the chief judge to designate a three-judge panel to hear and determine any civil action which "(1) raises an issue of the constitutionality of ... a proclamation of the President ...; or (2) has broad or significant implications in the administration or interpretation of the customs laws."). Chief Judge Stanceu concurrently assigned several other related cases challenging Proclamation 9980 to the same panel.

[7] The hearing was closed to the public because Plaintiffs' motions relied upon confidential business information filed under seal.

A. Preliminary Injunction Standard

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20 (citing, *inter alia*, *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)).

1. The issue

The parties agree on the four preliminary injunction elements but disagree on how the Court should apply them. Plaintiffs contend "[a] request for a preliminary injunction is evaluated in accordance with a 'sliding scale' approach: the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." Pl. Br., ECF 32, at 16 (quoting *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009)). According to Plaintiffs, under this sliding scale approach, a party seeking a preliminary injunction need only show that it has "at least a fair chance of success on the merits." *Id*. (quoting *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018)). And thus, say Plaintiffs, "[n]o one factor is 'necessarily dispositive, because the weakness of the showing regarding one factor may be overborne by the strength of the others.' " Pl. Reply, ECF 48, at 7 (quoting *Belgium v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006)).

The government, in response, argues that "plaintiffs must show that each prong of the test is 'likely,' as opposed to a balancing or sliding-scale test. Thus, if plaintiffs fail to establish any one factor by a 'clear showing,' the motion must be denied." Govt. Br., ECF 42, at 29 (citation omitted) (citing *Winter*, 555 U.S. at 20, 21, and *Mazurek*, 520 U.S. at 972). Plaintiffs contend the government misreads *Winter*, which they argue "merely reiterates how the Court must consider all four factors, which Plaintiffs do not dispute." Pl. Reply, ECF 48, at 8.

2. *Winter*

The Ninth Circuit in *Winter*—applying that circuit's sliding scale test—held that a plaintiff demonstrating a "strong likelihood of success on the merits" need only show a "possibility," rather than a

likelihood, of irreparable harm to obtain a preliminary injunction. *See Nat. Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 696–97 (9th Cir.), *rev'd*, 555 U.S. 7 (2008) (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007)). Rejecting this dilution of the irreparable harm requirement, the Supreme Court held that "the Ninth Circuit's 'possibility standard' is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22.

Therefore, whatever else it may mean, *Winter* at least stands for the proposition that a showing of a *likelihood* of irreparable harm is a necessary condition for the award of preliminary injunctive relief. *Cf. D.T. v. Sumner Cty. Schs*., 942 F.3d 324, 329 (6th Cir. 2019) (Nalbandian, J., concurring) ("If we know one thing from *Winter*, it's that a plaintiff must establish irreparable injury."). Insofar as the sliding scale standard relaxes the necessary showing of irreparable harm to something less than a likelihood, that standard is no longer viable after *Winter*. Thus, contrary to Plaintiffs' argument that "[n]o one factor is 'necessarily dispositive, because the weakness of the showing regarding one factor may be overborne by the strength of the others,'" Pl. Reply, ECF 48, at 7 (quoting *Belgium*, 452 F.3d at 1292–93), the failure to establish a likelihood of irreparable harm *is* dispositive.

Insofar as Plaintiffs rely on *Belgium* to contend that they do not need to demonstrate a likelihood of irreparable harm so long as they make a strong showing on the merits, such reliance is misplaced. That decision antedates the Supreme Court's 2008 decision in *Winter*. Moreover, *Silfab Solar* expressly reserved whether *Winter* permits relaxation of the success on the merits element under the sliding scale standard,[8] *see* 892 F.3d at 1345, which we read as an acknowl-

[8] The question reserved by *Silfab Solar* is at the center of an unresolved circuit split.The Third and Ninth Circuits read *Winter* as not abrogating circuit precedent permitting relaxation of the likelihood of success element under the sliding scale standard when there is a strong showing of irreparable harm. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 176–79 (3d Cir. 2017); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011). *But see Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

The Fourth and Tenth Circuits, however, read *Winter* as precluding relaxation of any of the four preliminary injunction elements. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 345–47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010) (mem.), and *adhered to in relevant part*, 607 F.3d 355, 356 (4th Cir. 2010); *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281–82 (10th Cir. 2016). The Fifth and Eleventh Circuits applied this standard prior to *Winter*. *See PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

The Second Circuit holds that its own unique balancing test survives *Winter*. *See Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010). Nevertheless, in cases where the government is the party against

edgment that *Winter* precludes relaxation of the irreparable harm element under that standard.

For the reasons set forth below, we conclude Plaintiffs here have failed to demonstrate a likelihood of irreparable harm. Because this failure is dispositive under *Winter*, we need not address any of the three remaining elements.

B. Likelihood of Irreparable Harm

Plaintiffs contend that absent a preliminary injunction, they will be irreparably harmed pending a decision on the merits by (1) payment of cash deposits for the 25 percent duties imposed by Proclamation 9980; (2) Customs's liquidation of all entries filed by them subject to Proclamation 9980; (3) the alleged deprivation of their procedural due process rights; and (4) competitive injury due to the entry of consent preliminary injunctions in related cases brought by their competitors challenging Proclamation 9980. We examine in turn each of these asserted forms of irreparable harm.

1. Cash deposits

a. Plaintiffs' evidence

In the teleconference preliminary injunction hearing, Plaintiffs did not proffer any deposition testimony in lieu of live witness testimony as the Court invited in its order of March 10, 2020. Instead, Plaintiffs relied upon affidavits attached to their respective complaints and cited in their respective motions.[9] J. Conrad submitted an affidavit

whom preliminary injunctive relief is sought, the Second Circuit declines for separation of powers reasons to relax the likelihood of success element even when there is a strong showing of irreparable harm. *Id.* at 35 n.4.

The Sixth, Seventh, and D.C. Circuits continue to apply various formulations of the sliding scale or balancing standard that relax the likelihood of success element when there is a strong showing of irreparable harm but have not directly confronted whether so doing is congruent with *Winter*. *See, e.g.*, *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 526–27 (6th Cir. 2017); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009). *But see D.T. v. Sumner Cty. Schs.*, 942 F.3d 324, 328–29 (6th Cir. 2019) (Nalbandian, J., concurring); *Davis*, 571 F.3d at 1295–96 (Kavanaugh, J., concurring); *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011).

[9] "As a general rule, a preliminary injunction should not issue on the basis of affidavits alone." *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575 (Fed.Cir. 1990). Insofar as this pronouncement represents Federal Circuit law for our purposes rather than merely the application of regional circuit law in a patent case—*Atari* is unclear in that regard—we read *Atari* as establishing not a *per se* rule but rather something akin to a rebuttable presumption that affidavits standing alone will not support entry of a preliminary injunction. Affidavits or their equivalent (i.e., declarations executed pursuant to 28 U.S.C. § 1746 or a verified complaint) that are detailed, non-conclusory, and non-speculative might support a preliminary injunction in an appropriate case. *See, e.g.*, *Int'l Custom Prods., Inc. v. United States*, 30 CIT 21, 28 (2006) ("A prayer for an injunction based solely on affidavits should be denied unless the affidavits attest with crystal clarity and without speculation to the imminence of real injury to the movant.") (brackets omitted) (quoting

from its vice president, Mark Buedel. ECF 10–2 at 16–17.[10] Metropolitan Staple submitted an affidavit from its president, Howard Kastner. Court No. 20–53, ECF 8–2 at 16–17.

The Buedel and Kastner affidavits are substantially identical.[11] Each affiant states (¶ 7) that his company did not anticipate the additional costs imposed by the 25 percent duties on steel nail imports. Each contends that these costs "will directly and *severely* affect our cash flow and our profitability." (Emphasis added). Each then cites his respective company's total profits in 2019 and says that

> this [anticipated] cost burden [in 2020] on a relatively small company is significant. It will require an unexpected revision of our business plans with respect to our sourcing of products covered by Proclamation 9980, and a large outflow of cash to pay the new duties.

Id. Each further states that he asked staff members "to analyze current orders and our projected orders and imports in 2020 to assess the impact of the duties on our future operations." ¶ 8. Based on those data showing projected imports, each offers estimated cost burdens on his company and asserts "[t]he disruption of our planned pricing and plans for quantities to be sold for the derivative steel products *make it highly unlikely that the 25% cost increase caused by the new tariffs will be able to be passed along in full to our customers*." *Id.* (emphasis added).

These affidavits' factual assertions about Plaintiffs' ability, or inability, to pass on the tariff-induced cost increases to their customers are too conclusory to independently support any factual finding to that effect. The affidavits' factual assertions that Plaintiffs' asserted higher costs will *severely* affect cash flow and profitability are likewise too conclusory to support such a finding.

b. Defendants' evidence

The government's brief includes a 41-page exhibit containing documents J. Conrad produced and a 99-page exhibit containing docu-

Leland v. Morin, 104 F. Supp. 401, 404 (S.D.N.Y. 1952)). Nevertheless, a plaintiff seeking a preliminary injunction that relies solely on affidavits does so at its peril, especially when the affiants are interested parties; the prudent practice is to proffer witness testimony subject to cross-examination, either via the submission of deposition testimony or (preferably when possible) live testimony in open court.

[10] J. Conrad later received leave of court to file an amended Buedel affidavit (ECF 36–1) to correct an error and resulting miscalculations.

[11] Because the specific financial data set forth in the affidavits are not relevant to our decision on the preliminary injunction motions, the citations here are to the affidavits' public versions.

ments Metropolitan Staple produced. Of those, the government cites ten pages of J. Conrad's materials[12] and three pages of Metropolitan Staple's. *See* Govt. Br., ECF 42, at 64 (citing ECF 40–1, at 32–41, and ECF 40–2, at 79–80, 83). In their reply, seeking to rebut the government's citations, Plaintiffs cite only one page of J. Conrad's materials and five pages of Metropolitan Staple's; in both instances, the pages are distinct from the ones the government cited. *See* Pl. Reply, ECF 48, at 27–30 (citing ECF 40–1, at 2, and ECF 40–2, at 2, 17, 56, 61, 67).

The documents the parties cite, construed in the aggregate, show that to some unquantified degree, Plaintiffs have been able to pass on some increased costs from Proclamation 9980's cash deposits to some portion of their customer bases, while at the same time some other customers have resisted accepting Plaintiffs' price increases. Therefore, we find that Plaintiffs are likely to be forced by market pressures to absorb at least some unquantified portion of their cash deposit costs. We further find that this evidence supports Plaintiffs' assertion that their cash deposit costs will reduce their cash flow and profitability, but Plaintiffs have failed to quantify these effects or demonstrate the practical impact on their business operations resulting from these unquantified higher costs.

c. Analysis

i. Higher costs

Messrs. Buedel's and Kastner's self-interested assertions that the costs of paying 25 percent cash deposits on steel nail imports "likely cannot be passed along in full" to Plaintiffs' customers are at best conclusory. *See* 11A Wright & Miller, *Fed. Practice & Procedure* § 2949 (3d ed. 2014) ("All affidavits should state the facts supporting the litigant's position clearly and specifically. Preliminary injunctions [are frequently] denied if the affidavits are too vague or conclusory to demonstrate a clear right to relief under Rule 65.").

Plaintiffs' business records cited by the parties are evidence that Plaintiffs will not be able to recoup at least some portion of their increased cash deposit payments. These documents, however, do not provide context to allow us to know how many customers Plaintiffs have or how many of them cancelled orders versus seeking to negotiate, so at most the documents show that *in some cases* Plaintiffs were unable to pass on (to varying degrees) the increased costs.

[12] To be clear, the government's brief cites to Bates pages JConrad00032–34 and JConrad00035–41 in Exhibit A to the government's confidential brief. Our review reveals that Bates pages 39–41 do not exist. Accordingly, we assume the page number citations are to the ".PDF pages" of Exhibit A, i.e., ECF 40–1, at 32–41.

More importantly, Plaintiffs have not alleged, let alone established a likelihood through the submission of evidence, that any inability to pass along their higher costs would produce business failure or other harm that could not be remedied by a refund of duties. Economic loss does not constitute irreparable harm when plaintiffs can be made whole by a money judgment at the litigation's conclusion. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction], are not enough." *Id.*

On the other hand, where a plaintiff demonstrates "a viable threat of serious harm which cannot be undone," *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (emphasis removed) (quoting *S.J. Stile Assocs. v. Snyder*, 646 F.2d 522, 525 (CCPA 1981)), such harm, economic or otherwise, can constitute irreparable injury. For example, "[t]he damage award may come too late to save the plaintiff's business. He may go broke while waiting, or may have to shut down his business but without declaring bankruptcy." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (Posner, J.). Or "[t]he nature of the plaintiff's loss may make damages very difficult to calculate." *Id*.

The record here, however, lacks any evidence to support Plaintiffs' argument that they cannot "absorb this [asserted] profit loss" resulting from cash deposit payments. Pl. Reply, ECF 48, at 28. The Buedel and Kastner affidavits make no claim that Plaintiffs' cash deposit payments threaten their respective companies' viability nor otherwise claim that Plaintiffs' reduced cash flow and profitability resulting from paying cash deposits—assertions we accept as true—will result in injury that cannot be compensated by a money judgment.

Similarly, nothing in Plaintiffs' business records cited by the parties supports the assertion that the economic cost of absorbing these higher costs is so severe that the return of cash deposits with interest at the close of this litigation—if Plaintiffs prevail—is an inadequate remedy at law. In sum, nothing on this record shows that the payment of the challenged cash deposits is likely a matter of economic life or death for Plaintiffs or likely constitutes some other severe hardship that a money judgment in due course cannot remedy.[13]

As noted above, Plaintiffs argue that "Defendants' assumption that a small business like J. Conrad can simply absorb this profit loss under current conditions or pass along the 25% duties is not based on

[13] In their reply and during the teleconference preliminary injunction hearing, Plaintiffs asserted that since they filed their preliminary injunction motions in early March, their respective economic situations had deteriorated due to the national economic effects of the COVID-19 pandemic. Although Plaintiffs' assertions regarding the pandemic's effects are plausible, they submitted no evidence to that effect and did not move for leave to do so.

record evidence but rather on speculation." *Id.* Plaintiffs have it exactly backwards: it is *their* burden to produce "record evidence" showing at least a likelihood that they cannot "simply absorb this profit loss under current conditions"—not the government's burden to produce record evidence to rebut Plaintiffs' unsubstantiated assertions. Plaintiffs failed to carry their burden.

ii. Business plan revisions

In addition to claiming the economic harm of higher costs, the Buedel and Kastner affidavits assert that the additional duties (and hence cash deposits) imposed by Proclamation 9980 will require "unexpected revision[s] of [Plaintiffs'] business plans with respect to [their] sourcing of products covered by Proclamation 9980 ... ." ECF 10–2, at 16 ¶ 7. These assertions, while relevant to the issue of likely irreparable harm, are too vague to lend significant probative weight, offering no insight into what the revisions to the business plans are. Even if presumed true, they would still be unsupported by an allegation or demonstration of how the business plan revisions likely threaten Plaintiffs' continued viability or are otherwise likely to constitute the type of economic harm that would suffice for a preliminary injunction.

* * *

For the reasons explained above, even if we presume that Plaintiffs' higher costs likely cannot be passed along in full to their customers, that does not suffice to establish a likelihood of irreparable harm. Plaintiffs have not demonstrated a likelihood that absorbing some portion of the duty costs will cause insolvency, force them to cease operations, or cause other serious harm that could not be remedied by a money judgment at the close of this litigation. Finally, we conclude that Messrs. Buedel's and Kastner's assertions that payment of cash deposits will require revision of Plaintiffs' business plans are too vague to lend significant probative weight in support of a finding of likely irreparable harm to Plaintiffs' viability as business enterprises.

2. Liquidation of entries

Plaintiffs also seek to preliminarily enjoin Customs's liquidation of all their entries subject to the duties imposed by Proclamation 9980. We conclude Plaintiffs have not demonstrated a likelihood of irreparable harm should the entries liquidate while this litigation is pending.

We understand Plaintiffs' concern that liquidation of the relevant entries while these cases are pending, if deemed to be final and conclusive for all purposes, would deny them the ultimate remedy for

which they brought these actions and would thereby constitute irreparable harm. But should Plaintiffs ultimately prevail on the merits, any liquidations that occurred would not become final and conclusive so as to prevent the Court from ordering a refund of the 25 percent duties with interest. Defendants have expressed their agreement with this conclusion. *See* Govt. Supp. Br., ECF 56, at 2.

This Court possesses "all the powers in law and equity" of a district court. 28 U.S.C. § 1585. Accordingly, with exceptions not applicable here, this Court may award any form of relief appropriate in a civil action, *id.* § 2643(c)(1), including, generally, a money judgment against the United States in a civil action commenced under 28 U.S.C. § 1581. *Id.* § 2643(a)(1).

In a case such as this one, which involves neither a protestable decision by Customs[14] nor an action arising under 19 U.S.C. § 1516a,[15] the finality of the entries' liquidation attaching according to 19 U.S.C. § 1514 is no bar to the Court's ordering appropriate relief. *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004) (concluding that finality under 19 U.S.C. § 1514 applies to decisions by Customs and did not preclude an order of reliquidation by the CIT in that action brought under 28 U.S.C. § 1581(i) because of the Court's grant of "broad remedial powers"); *see also Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1348 (Fed. Cir. 2019) (rejecting presumption that availability of *Shinyei* relief is uncertain for purposes of irreparable harm in § 1581(i) actions, and also noting estoppel effect of government's representation that such relief would potentially be available should plaintiff prevail).

---

[14] Customs's decisions regarding import duties involving "some sort of decision-making process," *Indus. Chems., Inc., v. United States*, 941 F.3d 1368, 1371 (Fed. Cir.2019) (internal quotation marks and citations omitted), including, e.g., decisions regarding appraisals and classification of imported merchandise, become "final and conclusive" unless a timely protest is filed with Customs or a civil action contesting Customs's denial of such a protest is timely brought in this Court. *See* 19 U.S.C. § 1514(a). Such non-ministerial decisions by Customs are described as "protestable." *Indus. Chems.*, 941 F.3d at 1371.

Customs's execution of Proclamation 9980 by the collection of 25 percent duties in these cases is merely ministerial and hence not protestable. *See id*. ("[M]inisterial actions are not protestable under 19 U.S.C. § 1514(a).") As a result, any liquidation by Customs in these cases will not become "final and conclusive" pursuant to 19 U.S.C. § 1514(a).

[15] Under longstanding precedent, antidumping and countervailing duty cases brought under 19 U.S.C. § 1516a may become moot upon liquidation of entries due to the absence of any statutory provision allowing subsequent reliquidation if a challenge succeeds. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). A plaintiff in a case brought under 19 U.S.C. § 1516a therefore faces a likelihood of irreparable harm "because liquidation would eliminate its only available remedy: there assessment of dumping duties in accordance with a corrected duty rate." *Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1190 (Fed. Cir. 2009) (citing *Zenith*, 710 F.2d at 810, 812). These suits do not involve antidumping or countervailing duties and therefore were not brought under 19 U.S.C. § 1516a.

For the foregoing reasons, liquidation of Plaintiffs' relevant entries prior to judgment would not constitute irreparable harm.

3. Procedural injury

Plaintiffs argue that "procedural injury" can constitute irreparable harm for both APA and procedural due process purposes. Pl. Br., ECF 32, at 37–38 (citing *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1290 (CIT 2019)). Plaintiffs, however, have withdrawn their APA claim for purposes of the pending motions,[16] and *Invenergy* did not involve a procedural due process claim.

Injunctive relief for an alleged violation of procedural due process, like any other alleged legal violation, requires a showing of a likelihood of irreparable harm. *See, e.g.*, *Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir. 2005) (affirming grant of injunctive relief for procedural due process violation because there was no adequate remedy at law for the "financial ruin" the violation was likely to cause). In other words, a procedural due process violation does not establish irreparable harm *per se*. *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 81 n.7 (1st Cir. 2009) ("The alleged denial of procedural due process, without more, does not automatically trigger a finding of irreparable harm.") (brackets and internal quotation marks omitted) (quoting *Pub. Serv. Co. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987)).

Here, Plaintiffs' own argument demonstrates why the procedural due process violation they allege—denial of the opportunity to comment upon and thus influence Proclamation 9980's tariffs on derivative steel products such as nails that Plaintiffs import—does not likely cause irreparable injury: Plaintiffs "suffer from ongoing harm every day *after duties are implemented* because the ability to comment may have prevented these tariffs from being initiated by the President under Proclamation 9980 in the first place." Pl. Br., ECF 32, at 39 (emphasis added). As Plaintiffs implicitly acknowledge, the harm to them is the cost of paying additional duties (in the form of cash deposits) imposed by Proclamation 9980, not the inability to comment.

As explained above, however, Plaintiffs have not submitted any evidence demonstrating that they have no adequate remedy at law for their economic injury of making cash deposit payments pending

[16] In their motions, Plaintiffs argued that Commerce's alleged APA violations also constitute irreparable harm. Pl. Br., ECF 32, at 37–39. In their reply, Plaintiffs withdrew their APA claim for purposes of their preliminary injunction motions. Pl. Reply, ECF 48, at 26 n.6. Plaintiffs' counsel confirmed that withdrawal in the teleconference motions hearing. As a result, we express no view on whether Plaintiffs have sufficiently demonstrated a likelihood of irreparable "procedural harm" for purposes of their APA claim.

the outcome of this litigation. It is undisputed that if Plaintiffs prevail, they can recover their cash deposits with interest, thus remedying the injury to Plaintiffs (the tariffs) resulting from the alleged procedural due process violation (being denied the opportunity to comment upon the steel derivative tariffs before the President imposed them). Plaintiffs have not established a likelihood of irreparable harm for purposes of their procedural due process claim.

4. Competitive injury

In their reply, Plaintiffs argue for the first time that "[t]he harm to Plaintiffs in this case will be particularly severe, because the Court has already granted preliminary injunctions to [three of their] competitors in parallel cases that result in the 'irremediable competitive harm Plaintiffs are incurring relative to other importers.' " Pl. Reply, ECF 48, at 30 (Plaintiffs' brackets omitted) (quoting *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 751 F. Supp. 2d 1318, 1377 (CIT 2010)); *see also id*. at 27 ("Plaintiffs are thus now competing against importers that have received injunctive relief and do not have the same burden of paying the 25% tariff at issue."). Plaintiffs' combined opening brief contains no references to this argument. Nor is this asserted injury even mentioned, much less substantiated, in the affidavits of Messrs. Buedel and Kastner.

Plaintiffs' decision to wait until their reply brief to raise the "competitive harm" theory means we cannot consider that theory. Arguments raised for the first time in a reply brief are not properly before us except where the circumstances indicate adhering to that general rule would result in unfairness. *Norman v. United States*, 429 F.3d 1081, 1091 n.5 (Fed. Cir. 2005). Applying that rule here does not result in unfairness, as Plaintiffs were on notice of these consent injunctions and had the opportunity to raise this argument in their combined opening brief.[17] And as in *Norman*, even if Plaintiffs here had raised the argument in their initial motion, we would find it unconvincing because it is merely a generalized statement without any evidentiary support. *See* 429 F.3d at 1091 n.5.

[17] Two of the three preliminary injunctions to which Plaintiffs refer were entered by consent prior to March 4, 2020, the date on which J. Conrad filed its preliminary injunction motion. *See PrimeSource Bldg. Prods, Inc. v. United States*, Court No. 2032, ECF 40 (Feb. 13, 2020); *Oman Fasteners, LLC v. United States*, Court No. 20–37, ECF 35 (Feb. 21, 2020). The third preliminary injunction was entered by consent on March 4, 2020, two days prior to the date on which Metropolitan Staple filed its preliminary injunction motion. *See Huttig Bldg. Prods., Inc. v. United States*, Court No. 20–45, ECF 30 (Mar. 4, 2020). Thus, Plaintiffs were on notice when they moved for injunctive relief that certain competitors had obtained injunctions against the collection of cash deposits, but Plaintiffs chose not to address the issue in their combined opening brief and evidentiary submissions.

Conclusion

For the reasons stated above, we conclude Plaintiffs have failed to demonstrate a likelihood of irreparable harm absent preliminary injunctive relief. Because we read *Winter* to hold that a plaintiff must always show a likelihood of irreparable harm to obtain such relief, we must deny Plaintiffs' motions for preliminary injunctions. In doing so, we need not, and therefore do not, consider whether Plaintiffs have satisfied any of the other three elements for preliminary injunctive relief, i.e., likelihood of success on the merits, balance of the hardships, and the public interest. *Cf. Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392, 2423 (2018) (citing *Winter* and declining to address other preliminary injunction elements when the plaintiff failed to establish a likelihood of success on the merits).

Pursuant to USCIT Rule 58(a), separate interlocutory orders will issue in each of these cases **DENYING** the motions for preliminary injunctions and **DENYING** the motions for temporary restraining orders as moot.

Dated: June 1, 2020
New York, New York

/s/ *Timothy C. Stanceu*
CHIEF JUDGE
/s/ *Jennifer Choe-Groves*
JUDGE
/s/ *M. Miller Baker*
JUDGE