U.S. Customs and Border Protection

Slip Op. 14–108

TIANJIN WANHUA CO. LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 14–00183

[Plaintiff-Intervenors' motions for preliminary injunction granted.]

Dated: September 18, 2014

David J. Craven, Riggle and Craven of Chicago, IL for Plaintiff Tianjin Wanhua Co., Ltd.

Peter J. Koenig, Squire Sanders (US) LLP, of Washington, DC for Plaintiff Shaoxing Xiangyu Green Packing Co., Ltd.

John D. Greenwald, *Jonathan M. Zielinski*, and *Thomas M. Beline*, Cassidy, Levy, Kent (USA) LLP, of Washington, DC, for Plaintiff-Intervenors, DuPont Teijin Films China Ltd., DuPont Hongji Films Foshan Co., Ltd, and DuPont Teijin Films Hongji Ningbo, Co. Ltd.

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director.

Jeffrey I. Kessler, *David M. Horn*, *Patrick J. McLain*, and *Ronald I. Meltzer*, Wilmer Hale, of Washington, DC for Defendant-Intervenors Mitsubishi Polyster Film, Inc., and SKC, Inc.

J. Michael Taylor, *Mark T. Wasden*, and *Stephen A. Jones*, King & Spalding, LLP, of Washington, DC for Defendant-Intervenor Terphane, Inc.

MEMORANDUM AND ORDER

Gordon, Judge:

Pending before the court are Plaintiff-Intervenors Dupont Teijin Films China Ltd., DuPont Hongii Films Foshan Co., Ltd., and DuPont Teijin Films Hongji Ningbo, Co. Ltd.'s (collectively "DuPont") partial consent motions for preliminary injunction to enjoin Defendant United States from liquidating DuPont's entries of polyethylene terephthalate film, sheet, and strip ("PET") subject to *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 79 Fed. Reg. 37,715 (Dep't of Commerce July 2, 2014) (final results admin. review) ("*Final Results*") and accompanying Issues and Decision Memorandum, A-570–924 (Dep't of Commerce June 24, 2014), available at http://enforcement.trade.gov/frn/summary/prc/

2014–15574–1.pdf (last visited this date). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012) and 28 U.S.C. § 1581(c). For the reasons set forth below, the court grants Plaintiff-Intervenors' motions for preliminary injunctive relief.

Commerce published the *Final Results* on July 2, 2014. Plaintiffs then commenced separate actions, with Tianjin Wanhua Co., Ltd. ("Wanhua") filing its summons on July 30, 2014 and its complaint on August 5, 2014 (Court No. 14–00183), and Shaoxing Xiangyu Green Packing Co., Ltd. ("Green Packing") filing its summons and complaint on August 1 and August 15, 2014, respectively (Court No. 14–00183). Wanhua raised three substantive challenges to the *Final Results*, whereas Green Packing raised six substantive challenges, two of which are identical to those of Wanhua. *See* Wanhua Complaint, ECF No. 6; Green Packing Complaint, ECF No. 8. The court thereafter enjoined Defendant from liquidating both Wanhua and Green Packing's entries of merchandise subject to the *Final Results*.

On August 29, 2014, Plaintiff-Intervenors filed consent motions to intervene, which the court granted. Along with its motions to intervene, DuPont filed the instant motions, followed by requests for temporary restraining orders ("TRO's"). The court issued the TRO's on September 4, 2014. Thereafter, upon consultation with the parties, the court ordered consolidation of the two actions, Court Nos. 14–00183 and 14–00185, under Consol. Court No. 14–00183. *See* Order, Sept. 5, 2014, ECF No. 34 (order of consol.)

Discussion

DuPont challenges the *Final Results* and seeks to enjoin Defendant from liquidating certain entries of subject merchandise until after this matter is resolved, including all appeals. "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.* , 555 U.S. 7, 20 (2008); *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375–1376 (Fed. Cir. 2009). "In international trade cases, the [Court of International Trade] has authority to grant preliminary injunctions barring liquidation in order to preserve a party's right to challenge the assessed duties." *Qingdao Taifa Group Co. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009).

Defendant does not dispute DuPont's eligibility for a preliminary injunction under the four factor test. Rather the United States contends that the court lacks the authority to grant DuPont its requested relief. Defendant, relying on *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT 212, 477 F. Supp. 2d 1298 (2007), argues that as Plaintiff-Intervenors, DuPont, may not expand the issues in this consolidated action beyond those identified in the underlying complaints by seeking to enjoin the liquidation of its entries. Specifically, Defendant maintains that the granting of DuPont's injunction would impermissibly alter the nature of this action, *i.e.*, enlarge the action, by enjoining entries that that are not the subject of either Wanhua or Green Packing's complaints. *See* Def.'s Opp. to DuPont's Mot. for Prelim. Inj. 3–4 (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944); *Laizhou Auto Brake Equip. Co.*). Defendant further argues that DuPont's role in the litigation is confined to supporting the position of Plaintiffs in asserting their own claims for relief.

The court disagrees. The concept of enlargement is one that is best "reserved for situations in which an intervenor adds new legal issues to those already before the court." *NSK Corp. v. United States*, 32 CIT 161, 166, 547 F. Supp. 2d 1312, 1318 (2008) (citing references omitted); *see also Union Steel v. United States*, 33 CIT 614, 617 F. Supp. 2d 1373 (2009) ("*Union Steel I*"); *Union Steel v. United States*, 34 CIT ___, 704 F. Supp. 2d 1348 (2010). Those circumstances are not present in this action. In its motions for preliminary injunctive relief DuPont does not raise any substantive issues other than those identified by Wanhua and Green Packing in their respective complaints. Here DuPont is not introducing any new issues or legal theories into the litigation, rather they are seeking to simply obtain for its entries the benefit of any affirmative relief that may inure to Wanhua or Green Packing. *See* DuPont's Partial Consent Mot. for Prelim. Inj. 3, 5–6, ECF No. 13 (Court No. 14–00183); DuPont's Partial Consent Mot. for Prelim. Inj. 3, 5–6, ECF No. 16 (Court No. 14–00185). Granting an injunction to DuPont will do "no more than allow the final judicial determination resulting from this litigation to govern entries that already were the subject of the [underlying] administrative review" and *Final Results*, and will "not, in any meaningful sense, 'compel an alteration of the nature of the proceeding.'" *Union Steel I*, 33 CIT at 624, 617 F. Supp. 2d at 1382 (quoting *Vinson*, 321 U.S. at 498). To deny DuPont's motions for a preliminary injunction would be tantamount to providing Plaintiff-Intervenors (as interested parties to the underlying administrative proceeding) with a statutory right to participate in the litigation (via intervention under 28 U.S.C. § 2631(j)) without any chance for relief. The end result would in effect require all similarly situated interested parties to file a summons and complaint challenging Commerce's determinations simply to bring the subject entries under the authority of the court, which the court believes is needless and inefficient.

As to the four-factor test, DuPont's success on the merits is intrinsically tied to that of Plaintiffs. The court has already concluded that Plaintiffs have satisfied this factor, and there is no reason to conclude otherwise for DuPont. DuPont also satisfies the irreparable harm factor. *See Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983); *Qingdao Taifa*, 581 F.3d at 1380 (absent "any other statutory framework or process to challenge the duties, . . . an injunction [i]s the only way to preserve [a domestic interested party's] ability to challenge the applicable rates"). The public interest is served by the issuance of a preliminary injunction enjoining the liquidation of DuPont's entries to allow the assessment of the accurate dumping margin to those entries in accordance with the court's final judgment. *See Smith-Corona Group v. United States*, 1 CIT 89, 98, 507 F. Supp. 1015, 1023 (1980).

Finally, the court believes the balance of the hardships favors Plaintiff-Intervenors. U.S. Customs and Border Protection ("Customs") already holds cash deposits for these entries. A preliminary injunction will ensure that the accurate dumping duties ultimately are assessed. If the final rate after judicial review differs from the *Final Results*, then Customs will collect or refund, with interest, the correct dumping duties, ensuring that domestic and foreign parties are protected under the law. The United States will not be disadvantaged because granting DuPont's requested relief will only postpone the liquidation of the subject entries. *Corus Staal BV v. United States*, 31 CIT 826, 833, 493 F. Supp. 2d 1276, 1283 (2007). By contrast, absent a preliminary injunction, liquidation would deprive DuPont of effective relief by precluding any revision of the dumping margin in accordance with the court's final judgment.

DuPont has therefore demonstrated its entitlement to preliminary injunctive relief. Accordingly, it is hereby

ORDERED that DuPont's motions for preliminary injunction are granted; it is further

ORDERED that Defendant United States, together with the delegates, officers, agents and employees of the International Trade Administration of the U.S. Department of Commerce and U. S. Customs and Border Protection, shall be, and hereby are enjoined pending a final and conclusive court decision in this litigation, including all appeals and remand proceedings, from causing or permitting liquidation of unliquidated entries of polyethylene terephthalate film, sheet, and strip from the People's Republic of China that

(1) were entered, or withdrawn from warehouse, for consumption during the period November 1, 2011 through October 31, 2012, inclusive;

(2) were the subject to the antidumping duty administrative review, the final results of which were published as *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 79 Fed. Reg. 37,715 (Dep't of Commerce July 2, 2014) (final results admin. review) and accompanying Issues and Decision Memorandum, A-570–924 (Dep't of Commerce June 24, 2014), available at http://enforcement.trade.gov/frn/summary/prc/2014–15574–1.pdf; and

(3) were exported by DuPont Teijin Films China Limited, DuPont Hongji Films Foshan Co., Ltd., or DuPont Teijin Films Hongji Ningbo Co., Ltd.; and it is further

ORDERED that this injunction shall expire on entry of a final and conclusive court decision in this litigation, including all appeals, as provided for in 19 U.S.C. § 1516a(e) (2012).

Dated: September 18, 2014
New York, New York

/s/ Leo M. Gordon
Judge Leo M. Gordon

Slip Op. 14–109

Shah Bros., Inc., Plaintiff, v. United States, Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 10–00205

[granting plaintiff's motion for attorneys' fees and expenses]

Dated: September 18, 2014

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

Edward F. Kenny, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. Also on the briefs were *Stuart F. Delery,* Assistant Attorney General, and *Amy M. Rubin,* Assistant Director, International Trade Field Office.

OPINION AND ORDER

Pogue, Senior Judge:

Plaintiff Shah Bros., Inc. ("Shah Bros.") – an importer of a smokeless tobacco product from India called "gutkha" – seeks an award of its attorney's fees, expenses, and costs in connection with this action, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (2012) ("EAJA").[1] As explained below, because Shah Bros. was the prevailing party; because the agency determination upon which this action is based was not substantially justified; and because no special circumstances exist in this case that would make an EAJA fees and costs award unjust, Shah Bros. is entitled to an award of the fees and costs reasonably incurred in this action. Accordingly, Plaintiff's motion is granted.

BACKGROUND

At issue in this litigation was the tariff classification of Shah Bros.' gutkha, entered in May 2009 and classified by U.S. Customs and Border Protection ("Customs") as "snuff" under Subheading 2403.99.2040 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] In protesting this classification, Shah Bros. argued that the merchandise instead should have been classified as "chewing tobacco" under HTSUS Subheading 2403.99.2030.[3]

Prior to this action, in April 2009, Shah Bros. had brought an earlier suit challenging Customs' classification of previously-entered gutkha as "snuff" rather than "chewing tobacco." *See Shah Bros., Inc. v. United States*, __ CIT __, 751 F. Supp. 2d 1303 (2010) ("*Shah Bros. I*"); Pl.'s Br. at 3 (noting that "[t]he underlying facts of this case are the same as those in [*Shah Bros. I*]"). On November 27, 2009, the Government moved for entry of judgment in favor of Shah Bros. in that earlier case, agreeing to reclassify Shah Bros.' entries of gutkha

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[1] Pl.'s Mem. in Supp. of its Appl. for Att'y Fees & Expenses Under the Equal Access to Justice Act, ECF No. 93–1 ("Pl.'sBr.").

[2] *See* Am. Compl., ECF No. 19, at ¶ 2, 57.

[3] *See id.* at ¶¶ 2, 92(a). Classification as "chewing tobacco" rather than "snuff" does not alter the applicable tariff rate but does lower the applicable excise tax. *See* HTSUS 2403.99.20;26 U.S.C. § 5701(e)(1)-(2). The gutkha imported by Shah Bros. "is a grayish/beige substance consisting of dry rough chunks of betel nut pieces and bits of tobacco leaf, coated with a powdered blend of the spices." Am. Compl. at ¶ 36. "Snuff" is defined as "any finely cut, ground, or powdered tobacco that is not intended to be smoked," 26 U.S.C. § 5702(m)(2), whereas "chewing tobacco" is "any leaf tobacco that is not intended to be smoked." *Id.* at § 5702(m)(3). According to Shah Bros., its gutkha "is not finely cut, ground or powdered," and when "the gutkha is rinsed in a fine mesh strainer, the spice coating is washed off, and the remaining components, i.e., crushed betel nut and tobacco leaf, are plainly visible and identifiable as such." Am. Compl. at ¶ 36.

at the tariff and tax rates applicable to "chewing tobacco," rather than "snuff," and to refund to Shah Bros. any excess duties and taxes paid, along with lawful interest.[4]

Meanwhile, after commencing its prior challenge (April 2009) but before the Government confessed judgment in that case (November 2009), Shah Bros. imported an additional entry of gutkha, which was also classified by Customs as snuff (May 2009). *See* Am. Compl. at ¶ 57. Shah Bros. filed a protest of the classification of this later entry, which Customs denied on June 22, 2010. Id. at ¶¶ 2–3. Shah Bros. then commenced this action to challenge the denial of the protest. *See* id. at ¶ 5; Summons, ECF No. 1, at 2. Despite confessing judgment as to the proper classification of Shah Bros.' prior entries in November 2009, the Government did not similarly confess judgment in this case until October 28, 2013, nearly four years later. *See* Def.'s Mot. for Entry of Confession of J. in Pl.'s Favor, ECF No. 81 ("Def.'s Mot. to Confess J.").

LEGAL FRAMEWORK

Under the EAJA, a party prevailing in a civil action brought by or against the United States is entitled to an award of the attorneys' fees and other expenses incurred by that party in such action, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d).

The "position of the United States," as contemplated by 28 U.S.C. § 2412(d), "means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D).[5] "The Government's 'position' includes both the underlying agency action that gave rise to the civil litigation and the arguments made during the litigation itself." *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012) (citations omitted).

To be "substantially justified," the Government's position must have "a reasonable basis in law and fact" and be "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). "[A] position can be justified even though it is not correct, and . . . it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct." Id. at 566 n.2. Thus, "to

[4] Def.'s Mot. for Entry of Confession of J. in Pl.'s Favor, Ct. No. 09–00180, ECF No. 34; Order, Jan. 27, 2010, Ct. No. 0900180, ECF No. 40 (granting the Government's motion for entry of judgment in Plaintiff's favor). *See also Shah Bros. I*,__ CIT at __, 751 F. Supp. 2d at 1305, 1308.

[5] Except that "fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." *Id.*

determine whether the overall position of the United States is substantially justified, trial courts are instructed to look at the entirety of the government's conduct and [determine] whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (footnotes omitted). "[I]n assessing the justification of the government's position, courts consider the clarity of the governing law, that is, whether judicial decisions on the issue left the status of the law unsettled, and whether the legal issue was novel or difficult." Norris v. SEC, 695 F.3d 1261, 1265 (Fed. Cir. 2012) (per curiam) (internal quotation marks and citations omitted).

The Government bears the burden of proving that its position was substantially justified. *Libas, Ltd. v. United* States, 314 F.3d 1362, 1365 (Fed. Cir. 2003). To meet this burden, the Government must "show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Gavette v. Office of* Pers. Mgmt., 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original, citations omitted).

As for "special circumstances [that would] make an award [of fees and costs to the prevailing party] unjust," 28 U.S.C. § 2412(d), such "[s]pecial circumstances have been recognized where the government unsuccessfully advanced novel and credible legal theories in good faith." Am. Air Parcel Forwarding Co. v. United States, 12 CIT 850, 853, 697 F. Supp. 505, 507 (1988). Such circumstances do not exist, however, where the Government advances legal theories that were previously rejected by the courts. *See* Fakhri v. United States, 31 CIT 1287, 1294, 507 F. Supp. 2d 1305, 1314 (2007) ("That the Government chose to relitigate an issue after [the courts] ruled against its position is not a special circumstance within the meaning of EAJA.") (footnote omitted).

DISCUSSION

I. Entitlement to an EAJA Fee Award

The Government argues that Shah Bros. should not be awarded its fees and costs in this case because the Government's position was substantially justified or, in the alternative, because special circumstances make such an award unjust.[6] Each argument is addressed in turn.

[6] Def.'s Mem. in Opp'n to Pl.'s Appl. for Att'ys Fees & Expenses Under the [EAJA], ECF No. 96 ("Def.'s Opp'n").

A. *The Government Has Not Shown that its Position Was Substantially Justified.*

First, the Government argues that its position was substantially justified because gutkha is particularly difficult to classify, there was no clear law on the subject, and because Shah Bros. had described its merchandise as "ground" (a word that appears in the statutory definition of "snuff"[7]) when protesting the classification of the entries at issue in Shah *Bros. I*.[8] But while this may have been true with regard to the entries at issue in Shah Bros. I, by the time Shah Bros. protested the classification of the entry at issue here, Customs already had the benefit of and experience from the litigation in *Shah Bros. I*.

In *Shah Bros. I*, the Government conceded that Shah Bros.' gutkha should have been properly classified as chewing tobacco, not snuff. *See Shah Bros. I*, __ CIT at __, 751 F. Supp. 2d at 1305. Despite this concession, however, Customs denied Shah Bros.' subsequent request to reclassify the entry now at issue in the same manner as Customs had agreed to classify the entries at issue in *Shah Bros. I*,[9] notwithstanding the fact that the entry was of apparently materially-

[7] See 26 U.S.C. § 5702(m)(2) (defining "snuff" as "any finely cut, *ground*, or powdered tobacco that is not intended to be smoked") (emphasis added).

[8] See Def.'s Opp'n at 9–11 (referring to Shah Bros.' August 2008 Memorandum in Support of Protest and Application for Further Review); cf. Am. Compl., Ct. No. 09–00180, ECF No. 43, at ¶ 40 (the amended complaint in the case underlying Shah Bros. I, stating that, on August 12, 2008, Shah Bros. filed a Protest and Application for Further Review of the classification of entries at issue in that case).

[9] While it is true that, due to "the unique and continually shifting facts of merchandise classifications, 'a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise by the same parties,'" *Gulfstream Aerospace Corp. v. United States,* 21 CIT 1083, 1093, 981 F. Supp. 654, 664 (1997) (footnote omitted) (quoting *Schott Optical Glass, Inc. v. United States,* 750 F.2d 62, 64 (Fed. Cir. 1984) (relying on *United States v. Stone & Downer Co.,* 274 U.S. 225 (1927))), the rationale behind this jurisprudence does not apply where, as here, Customs seemingly arbitrarily treats identical merchandise, imported by the same importer and during substantially the same time period, without any intervening change in law or fact, differently. *See, e.g., Heartland By-Products, Inc. v. United States,* 26 CIT 268,277, 223 F. Supp. 2d 1317, 1328 (2002) (discussing the "significant subsequent narrowing of the [*Stone & Downer*] principle by statute and case law," and noting that the rationale behind the Stone & Downer decision and its progeny was a narrow concern "that a [classification] decision would create binding law between one [importer] and Customs that would be applied to another [importer], without giving the second [importer] a chance to litigate any distinguishing elements"); *Gulfstream Aerospace,* 21 CIT at 1094, 981 F. Supp. at 665 (distinguishing *Stone & Downer* and holding that the outcome of prior litigation regarding a challenge to Customs' specific procedure for classifying the type of merchandise at issue in that case was preclusive against Customs in a later litigation challenging Customs' use of the same procedure to classify subsequent entries of the same merchandise).

identical merchandise to that at issue in *Shah Bros I*,[10] imported by the same importer shortly after commencement of that action. Because Customs denied its protest and reclassification request, Shah Bros. incurred expense to bring this legal action, which the Government ultimately conceded in Shah Bros.' favor, agreeing that, as in *Shah Bros. I,* the entry of Shah Bros.' gutkha that is now in question should also have been properly classified as chewing tobacco rather than snuff. *See* Def.'s Mot. to Confess J.

Given these circumstances, Customs has not established justification for its decision, reached months after its concession in Shah Bros. I, to deny Shah Bros.' request to reclassify its materially-identical merchandise in the same way, and for the same reasons, as the Government had agreed to classify the merchandise at issue in Shah Bros. I. The Government makes no argument in this regard,[11] and, as no justification is otherwise apparent, the circumstances of this case indicate that, although Customs may have been substantially justified in classifying Shah Bros.' merchandise as snuff prior to the litigation underlying *Shah Bros. I,* the Government has not met its burden to show that its *subsequent* denial of Shah Bros.' protest to reclassify materially identical merchandise was substantially justified.

Because Customs' unjustified decision to deny Shah Bros.' protest directly caused Shah Bros. to incur the expense of bringing this litigation, an award of fees and costs in this case furthers the remedial purpose of the EAJA, as well as its intent "to deter the unreasonable exercise of Government authority." *See Ardestani v. Immigration & Naturalization Srv.,* 502 U.S. 129, 138 (1991).

B. No Special Circumstances Make an Award Unjust.

The Government also argues, in the alternative, that special circumstances exist in this case that would make the award unjust because Customs was only trying to do its job, working in a difficult area of the law, in the absence of guiding case law, and attempting in good faith to coordinate with the Tobacco Tax and Trade Bureau ("TTB"), which is "the agency responsible for enforcing the relevant

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10 *Compare* Am. Compl. at ¶ 36 (describing the merchandise at issue here), *with,* Am. Compl., Ct. No. 09–00180, at ¶ 27 (describing the merchandise at issue in *Shah Bros. I*).

11 *See* Def.'s Opp'n at 9–11 (arguing that the Government's position was substantially justified because "there was a genuine dispute between the parties as to whether the gutkha fit the definition of snuff found in 26 U.S.C. § 5702(m)(2)" but offering no explanation or justification for Customs' decision to deny Shah Bros.' reclassification request *after* conceding this dispute in Shah Bros.' favor in the litigation underlying *Shah Bros. I*).

Internal Revenue Statute for tobacco products domestically."[12] But again, though this all may have been true with regard to the classification of merchandise at issue in *Shah Bros. I,* by the time Shah Bros. protested the classification of the merchandise at issue here, the Government had already agreed that such merchandise should indeed be reclassified as chewing tobacco. Thus the Government's fairness argument fails for the same reasons as its argument that its position was substantially justified – namely that, with the benefit of and experience from the litigation in *Shah Bros. I,* the Government could no longer claim good-faith confusion with regard to a difficult question when it denied Shah Bros.' request to reclassify an additional entry of the same merchandise that the Government had already agreed to reclassify in *Shah Bros. I.*

C. Conclusion

Accordingly, because Shah Bros. is the prevailing party in this civil action brought against the United States;[13] because the United States has not shown that the agency action "upon which [this] civil action is based"[14] – i.e., the denial of Shah Bros.' classification protest after confession of judgment in *Shah Bros. I* – was substantially justified; and because the Government has not shown that special circumstances exist in this case that would make a fee award unjust, Shah Bros. is entitled to an award of reasonable and appropriate fees and expenses incurred in this litigation, except insofar as there is "any portion of [this] litigation in which [Shah Bros.] has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D). The next question before the court, therefore, is what constitutes a reasonable and appropriate award in this case.

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[12] Def.'s Opp'n at 10; *see id.* at 12 (arguing that an award of EAJA fees here "would be unfair to the Government," which was working with "a particularly puzzling product for classification purposes," while "operating in an unsettled legal environment. . ., with few clear standards by way of judicial precedent, or otherwise," and "coordinating with TTB on the application of the relevant tax statu[t]es which they jointly enforce").

[13] *See Shah Bros., Inc. v. United States*, __ CIT __,953 F. Supp. 2d 1328, 1332 (2013) ("*Shah Bros. III*") (granting the Government's motion to confess judgment in favor of Shah Bros. and explaining that "the Government has agreed to provide all the relief that is legally available to Shah Bros. – by reliquidating the merchandise in question at the tariff and tax rates claimed in the amended complaint"); Judgment & Order, ECF No. 91 (entering judgment for Shah Bros. and ordering Customs to reclassify the subject merchandise as requested by Shah Bros.). *Cf. Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) ("[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.") (internal quotation marks and citations omitted).

[14] 28 U.S.C. § 2412(d)(2)(D) (defining "position of the United States" within the meaning of 28 U.S.C. § 2412(d)).

II. Appropriate Magnitude of EAJA Fee Award

During a telephone conference with the parties held on June 18, 2014, the court suggested that the parties engage in settlement discussions regarding the amount of a reasonable and appropriate EAJA fee award in this case, and report back to the court on July 17, 2014. *See* ECF Nos. 97, 99. When the parties failed to reach a negotiated agreement by July 17, 2014, the court ordered the parties to file their final arguments regarding the appropriate number of hours and attorneys to be compensated by an EAJA fee award, as well as the appropriate rate of compensation. *See* ECF No. 100. The parties filed their respective statements, covered by a Protective Order, *see* ECF No. 101, on August 8, 2014.[15]

The parties' main point of contention regards the hourly rates to be used to calculate the fee award. Plaintiff claims - and the Government objects to - a "special factor" exception to the general statutory cap on the hourly rate at which EAJA fee awards are to be calculated.[16] Specifically, the statute provides that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living *or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee*." 28 U.S.C. § 2412(d)(1)(D)(2)(A)(ii) (emphasis added). A "special factor" enhancement based on the "limited availability of qualified attorneys" is appropriate where the attorneys involved have "some distinctive knowledge or specialized skill [necessary] for the litigation in question – as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation," and such necessary qualifications can only be obtained at rates in excess of the statutory cap. *Pierce,* 487 U.S. at 572 (construing 28 U.S.C. § 2412(d)(1)(D)(2)(A)(ii)).

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[15] Pl.'s Statement of Remaining Issues for Pl.'s Appl. for Att'ys Fees & Expenses Under EAJA, ECF No. 103 ("Pl.'s Stmt."); Def.'s Resp. to the Ct.'s Request for a Concise Statement Regarding Number of Hours, Billing Att'ys & Rate Appropriate for Pl.'s[EAJA] Fee Claim, ECF No. 102 ("Def.'s Stmt."). The Government moves to strike a portion of Shah Bros.' filing that reveals certain statements made during settlement negotiations.[Gov't's] Mot. to Strike, ECF No. 104 (relying on Fed. R. Evid. 408(a)(2) (statements made during settlement negotiations may not be used to prove a claim)). As the parties were unable to reach agreement, the court has decided this matter on the basis of the evidence presented, without relying on any confidential statements made while attempting settlement. The Government's motion is therefore denied as moot. In addition, Shah Bros. correctly points out that the Government may not raise new arguments at this stage, beyond the scope of its original opposition to Plaintiff's fee application, *see* Pl.'s Stmt. at 3n.2; Def.'s Stmt. at 2–4, and the court accordingly has not considered these new arguments. *Cf., e.g., Stauffer v. Brooks Bros. Grp., Inc.,* 758 F.3d 1314, 1322 (Fed. Cir. 2014) (declining to consider new arguments raised for the first time in a reply brief) (citing *DSND Subsea AS v. Oceanografia, S.A. de CV*, 569 F. Supp. 2d 339, 347 (S.D.N.Y. 2008)).

[16] Pl.'s Br. at 19–22; Def.'s Opp'n at 13–15.

This Court has previously held that, "[a]lthough cases involving customs law are not automatically worthy of elevated attorneys' fees," a special factor fee enhancement may be appropriate where specialized skills in customs law are both necessary and limited. *Libas, Ltd. v. United States,* 27 CIT 1193, 1197, 283 F. Supp. 2d 1327, 1332 (2003); *see also Jazz Photo Corp. v. United States,* 32 CIT 1293, 1297, 597 F. Supp. 2d 1364, 1369 (2008) ("The court considers customs law to be a specialized practice area, distinct from general and administrative law, for purposes of EAJA.") (citation omitted).[17] Moreover, here, as held above, an EAJA fee award is warranted because this litigation resulted from the Government's unjustified denial of Shah Bros.' protest to reclassify an additional entry of merchandise that is materially identical to the entries that the Government had already agreed to reclassify seven months earlier, in *Shah Bros. I*. As the Government emphasizes, *Shah Bros. I* presented "particularly difficult" Customs classification issues,[18] which Shah Bros.' counsel successfully helped to resolve in Shah Bros.' favor. And while the material identity of the merchandise and circumstances surrounding the additional entry at issue here arguably should have made this a simple and straightforward case for the Government, it is precisely this continuity with *Shah Bros. I* that necessitated the specialized expertise of Plaintiff's counsel to challenge the denial of Shah Bros.' protest on the same grounds as *Shah Bros. I*.[19]

[17] Here, as in *Jazz Photo,* "the credentials and expertise of plaintiff's attorneys in customs law" are not in dispute. *See Jazz Photo,* 32 CIT at 1297, 597 F. Supp. 2d at 1369; Def.'s Opp'n, ECF No. 96, at 13–16 (arguing that specialized customs knowledge was not necessary to this litigation, without challenging the expertise of plaintiff's attorneys).

[18] Def's Opp'n at 10.

[19] *Cf. Diamond Sawblades Mfrs. Coalition v. United States,*__ CIT __, 816 F. Supp. 2d 1342, 1361 (2012) (explaining that, in that case, the plaintiff had "succeeded in the judicial process that resulted in administrative reversal on remand of the original [agency] determination, . . . [but] Commerce subsequently refused to issue an antidumping duty order and begin the collection of cash deposits, which forced [the plaintiff] to file the underlying litigation seeking mandamus, on which [the plaintiff] prevailed, and on which this EAJA petition [was] solely concerned," and holding that while "[s]eeking mandamus as a general matter is a process well within that which would be considered the general lawyerly knowledge and ability useful in all litigation, . . . obtaining the writ in *this* instance required the distinctive knowledge or specialized skill of an international trade law attorney in order to successfully prevail") (emphasis in original, internal quotation marks and citations omitted); *see also id.* ("Members of the international trade bar are expected to (and do) have a solid understanding of the interrelationship of U.S. and customs laws and administration as applied to international trade."). Plaintiff's counsel in this case has represented Shah Bros.' international trade related interests for nearly 20 years, including in the successful *Shah Bros. I* litigation. Decl. of Elon A. Pollack, ECF No. 93–2 ("Pollack Decl.") at ¶ 12.

Thus here there was an extremely “limited availability of qualified attorneys for the proceedings involved” because the qualified attorneys were those customs attorneys familiar with the legal theories and proceedings in, and the facts underlying, *Shah Bros. I*. Accordingly, on the particular facts of this case, “the limited availability of qualified attorneys for the proceedings involved” is a special factor that “justifies a higher fee” than $125 per hour.[20]

For its counsel’s specialized work, Shah Bros. seeks attorneys’ fees ranging from $375 per hour to $595 per hour.[21] In support of the reasonableness of these rates, Shah Bros. submits affidavits from partners at three firms whose practice is “exclusively in the area of customs and international trade matters.”[22] Each partner independently attests that there are approximately 200 Customs law practitioners in the U.S., and that the hourly rates customarily charged for experienced attorneys who specialize in these areas of law are generally “not less than $300 per hour and range up to more than $700 per hour.”[23] Each affiant also declares that associates are billed depending on their level of experience – ranging from $225 to $525 per hour at one firm, $225 to $360 at the second firm, and $300 to $550 at the third firm – with two of the three partners emphasizing that attorneys with ten or more years of experience are usually billed at the higher end of that range.[24] With regard to more experienced, partner-level attorneys, the affiants declare that senior partners at their firm charge “as high as $900”, “as high as $645”, and “[sometimes] higher than $700” per hour for Customs-related matters.[25]

Although the Government opposes Shah Bros.’ claim to an award at the $375 to $595 per hour rates billed by its attorneys, the Government has submitted no evidence to contradict these experienced practitioners in the specialized field of Customs law. Thus, these affidavits corroborate Shah Bros.’ claim that attorneys’ fees ranging from $375 to $595 per hour are within the range of rates customarily charged for

[20] *See* 28 U.S.C. § 2412(d)(1)(D)(2)(A)(ii); *Pierce*, 487 U.S. at 572.

[21] Ex. A to Pollack Decl., ECF No. 93–2 (“Compilation of Attorney fees re: Shah Brothers, Inc. v. U.S. Court No. 10–00205”). Specifically, “JCS” - an associate with 6 years of experience –was billed at $375 per hour; “KO” - an associate with 12 years of experience – was billed at $425 per hour; “XL,” with 16 years of experience, was billed at $475 per hour; “BNS,” with 37 years of experience, was billed at $525 per hour; “JPC,” with 36 years of experience, was billed at $595 per hour; and “EAP,” with 41 years of experience, was billed at $475, $495, and $595 per hour. *Id.;* Pollack Decl., ECF No. 93–2 at ¶ 9; Ex. B to Pollack Decl., ECF No. 93–3 (Attorneys’ Resumes).

[22] Ex. F to Pollack Decl., ECF No. 93–3 (Decls. of Erik D. Smithweiss, Evelyn Suarez, and Jonathan M. Fee) at respective¶¶ 3.

[23] *Id.* at respective ¶¶ 4–5.

[24] *Id.*

[25] *Id.*

legal work in this field. But fitting within a customary range does not necessarily mean that the claimed rates, which fall at the higher end of that customary range, are reasonable in this particular case. As the evidence here establishes that the customary rates charged for legal work in this field normally range from $300 to $700 per hour, with rates for associates with less than ten years of experience billed as low as $225,[26] and as there is no evidence to situate the relative complexity of this case as compared to the type of legal work at either the high or the low end of that range, a cap at $450 per hour for the more experienced attorneys, and $300 per hour for attorneys with less than ten years of experience, appears both sufficient and reasonable on the evidence presented here.[27]

In addition, the EAJA compensation to which Shah Bros. is entitled in this case does not cover *all* of its incurred litigating expenses in this action. As the court opined in granting the Government's motion for confession of judgment, the live controversy at issue here was solely the liquidation of an entry of Shah Bros.' merchandise at the tariff and tax rates applicable to snuff, rather than chewing tobacco. From Customs' denial of Shah Bros.' classification protest until the Government's ultimate agreement to reliquidate in this case, Shah Bros. incurred litigating expenses to achieve the same treatment of this entry as would have resulted from the Government's grant of Shah Bros.' protest on the same basis as the Government's decision to reclassify materially-identical entries in response to the challenge in *Shah Bros. I.* From this it follows that an award of those litigating expenses that are directly related to or caused by the Government's apparently unjustified delay in agreeing to reclassify this additional entry after it had agreed to do so with regard to the five prior materially-identical entries in *Shah Bros. I* would serve the EAJA's remedial and deterrent purposes, by compensating Shah Bros. for the litigation expenses unnecessarily incurred to correct an unjustified agency decision and thereby deterring the Government from unreasonably exercising its authority. But it also follows that an award relating to litigating expenses that were *not* directly caused by the

[26] *Id.*

[27] Only JCS, whose time was billed at $375 per hour, had less than ten years of experience. Accordingly, JCS's compensable hours shall be compensated at $300 per hour. All other attorneys' compensable hours shall be compensated at a maximum of $450 per hour. The only attorney other than JCS who was billed at less than $450 per hour was KO, who was billed at $425 per hour. Because KO had more than ten years of experience, KO's compensable hours shall be compensated at $425 per hour as billed.

Government's delay in agreeing to reliquidate this entry would *not* serve these purposes.[28] Accordingly, the fee award may not cover hours that were not reasonably and unambiguously related to effecting the reclassification of the entry in question in accordance with the outcome in *Shah Bros. I*.[29]

In this regard, the Government correctly identified the entries in Plaintiff's itemized attorneys' bill that are not compensable by an EAJA fee award in this case because they were related to an unsuccessful separate claim; involved work not reasonably related to the case; involved unreasonably vague time entries; involved clerical work billed at attorney rates; reflected overstaffing or duplicative work; involved work on unfiled motions; and involved unnecessary work protracting the litigation.[30] Each of these suggested amendments to the itemized fee bill is reasonable, for the individualized reasons the Government provides.[31] The fee award in this case shall accordingly be calculated in accordance with the Government's amendments to Shah Bros.' itemized fee bill, as detailed in ECF Nos.

[28] *See also Libas,* 27 CIT at 1198, 283 F. Supp. 2d at 1333 ("It is well grounded that attorneys' fees apply only to the proceedings surrounding the action at hand.") (citing *Gavette,* 808 F.2d at 1461; *Cox Const. Co. v. United States*, 17 Cl. Ct. 29, 36 (1989)). As previously noted, EAJA fees and expenses "may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D). Here, Shah Bros. opposed the Government's motion for entry of judgment in Shah Bros.' favor, which sought to provide all of the relief legally available to Shah Bros. by reliquidating the subject merchandise as requested in Shah Bros.' amended complaint. *See Shah Bros. III,* __ CIT at __, 953 F. Supp. 2d at 1329–30. In granting the Government's motion over Shah Bros.' opposition, the court concluded that, "the Government having agreed to redress the Plaintiff in full, no controversy or injury remains for the court to address," *id.* at 1332, and, accordingly, "[b]ecause this Court decides legal questions only in the context of actual cases or controversies, the Government's agreement to reliquidate the subject entry as 'chewing tobacco' under HTSUS Subheading 2403.99.2030 [as requested in Shah Bros.' amended complaint] concludes this litigation." Id. at 1330 (citing U.S. Const. art. III, § 2; *Alvarez v. Smith,* 558 U.S. 87, 93 (2009) (holding that an abstract legal dispute regarding the lawfulness of Governmental procedures "falls outside the scope of the constitutional words 'Cases' and 'Controversies'" when such dispute "is no longer embedded in any actual controversy")).

[29] *See* Def.'s Opp'n at 16–21.

[30] *Id. See* ECF Nos. 96–2 & 96–3 (reproducing Plaintiff's itemized attorneys' bill, ECF No. 93–2, and highlighting each challenged entry and providing explanations and authority for each challenge).

[31] For example, the Government suggests the exclusion of entries billing for work related to Plaintiff's "unsuccessful separate claim based upon [28 U.S.C. §] 1581(i) jurisdiction against the Tobacco Tax and Trade Bureau for which the Court ultimately found no jurisdiction." Ex. 5 (Shah fee bill annotated to show hours and rates contested by the Government) to Def.'s Opp'n, pt.1, ECF No. 96–2, at 2 (citing *Hensley,* 461 U.S. 424 (no fee awarded on unsuccessful separate claim); *Traveler Trading Co. v. United States,* 13 CIT 380, 713 F. Supp. 409 (1989) (no fee award for unsuccessful defense against defendant's partial motion to dismiss for lack of jurisdiction)); *see also, e.g.,* Ex. 5 to Def.'s Opp'n, pt. 2, ECF No. 96–3, at 41 (arguing that a special factor enhancement is not warranted for time spent in

96–2 and 96–3, with the exception of entries relating to time spent traveling to and from depositions.[32]

CONCLUSION

Upon careful review of all filings and proceedings had in this action, the court concludes that an award of Plaintiff's reasonable legal fees, incurred as a direct result of the Government's unjustified action that lead to this litigation, is appropriate pursuant to the EAJA. Because the litigation required special expertise of limited availability, awarding compensation for fees billed at hourly rates exceeding the normal statutory cap of $125 per hour is justified, and the evidence suggests that rates up to $300 for attorneys with less than ten years of experience, and up to $450 per hour for more experienced attorneys, are reasonable in this case. Accordingly, Plaintiff shall be awarded its attorneys' fees, for the hours and at the rates specified in this opinion – i.e., the hours and rates detailed in ECF No. 93–2, as amended by the Government's edits, ECF Nos. 96–2 and 96–3, with the exception for the government's challenges to entries referring to deposition travel time. The parties shall calculate the resulting amount certain and submit a joint statement stating such amount by October 2, 2014. In addition, Shah Bros. is entitled to an award of its costs and expenses, in the amount of $10,586.79,[33] which was not contested.[34]

It is SO ORDERED.

Dated: September 18, 2014
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

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preparation of the EAJA petition (citing *Diamond Sawblades,* __ CIT at __, 816 F. Supp. 2dat 1362 ("Attorney's fees are not entitled to a special factor enhancement for the time spentin preparation of the EAJA petition.") (citing *Ragan v. Comm'r of Internal Revenue,* 210 F.3d 514, 518–19 (5th Cir. 2000)))). For a complete inventory of the Government's challenges, *see* Ex. 5 to Def.'s Opp'n, pts. 1 and 2, ECF Nos. 96–2 and 96–3.

[32] With regard to travel time, the Government objects to an enhanced rate because the relevant entries in the itemized bill do not state that the attorney was performing work relevant to this litigation while traveling, *see, e.g.,* Ex. 5 to Def.'s Opp'n, pt. 1, ECF No. 96–2, at 28, but Shah Bros. explains that the entries include work relating to the depositions. *See* Pl.'s Stmt., ECF No. 103, at 5. Thus the contested travel entries shall be compensated at the enhanced rates. However, time spent in preparation of the EAJA petition shall be compensated at the normal statutory cap of $125 per hour. *See Diamond Sawblades,* __ CIT at __, 816 F. Supp. 2d at 1362 ("Attorney's fees are not entitled to a special factor enhancement for the time spent in preparation of the EAJA petition.") (citations omitted).

[33] *See* Pollack Decl., ECF No. 93–2, at ¶ 5; Ex. A (expenses) to Ex. A (compilation of attorneys' fees) to Pollack Decl., ECF No. 93–2.

[34] *See* Def.'s Opp'n (making no argument with respect to Plaintiff's claim for costs).

Slip Op. 14–110

STREETSURFING LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Senior Judge
Court No. 09–00136

[Defendant's motion for summary judgment is granted; plaintiff's cross-motion for summary judgment is denied.]

Dated: September 22, 2014

Russell A. Semmel and *Elyssa Emsellem*, Neville Peterson LLP, of New York, NY, argued for plaintiff. With them on the brief were *John M. Peterson* and *Maria E. Celis*.

Marcella Powell, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, and *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office. Of counsel on the brief was *Paula S. Smith*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of New York, NY.

OPINION

EATON, Senior Judge:

This matter is before the court on the cross-motions for summary judgment of plaintiff Streetsurfing LLC ("plaintiff" or "Streetsurfing") and defendant United States ("defendant"). Def.'s Mot. for Summ. J. (ECF Dkt. No. 52); Pl.'s Cross Mot. for Summ. J. (ECF Dkt. No. 71) ("Pl.'s Cross Mot."). Jurisdiction lies pursuant to 28 U.S.C. § 1581(a) (2006). At issue is the proper classification of Streetsurfing's waveboards, the "Ripple Board" and "The Wave" (collectively, "merchandise" or "waveboards").

For the reasons set forth below, defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied, and the court finds that plaintiff's waveboards are properly classified under the Harmonized Tariff Schedule of the United States ("HTSUS")[1] subheading 9506.99.60.

BACKGROUND

The facts described below have been taken from the parties' USCIT Rule 56(h) statements. Citation to the record is provided where a fact, although not admitted in the parties' papers, is uncontroverted by record evidence.

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[1] "The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1266 (Fed. Cir. 2013).

The merchandise at issue is the "Ripple Board" and "The Wave," which are waveboards[2] manufactured by Streetsurfing.[3] Def.'s Statement of Undisputed Material Facts ¶¶ 2, 3 (ECF Dkt. No. 52) ("Def.'s Statement"). Streetsurfing's patent for the waveboards describes the merchandise as a "*skateboard* having a front board, [a] rear board, a connecting element which interconnects the front board and the rear board in a spaced relationship, [and] at least one direction-caster[4] mounted on the underside of each of the front board and the rear board." Def.'s Statement ¶ 17 (emphasis added) (internal quotation marks omitted). Unlike a traditional skateboard, however, the waveboards possess two wheels and two flexible platforms that can partially rotate, rather than four wheels and a single inflexible platform. *See* Appendix *infra*; Def.'s Statement ¶ 6. The waveboards are propelled "by the rider pushing his back foot forward or back, or moving the whole board in a transverse wave motion. This form of propulsion allows the rider to move uphill as well as downhill." Def.'s Statement ¶ 7. Moreover, "[o]nce on the board, and riding, . . . the rider [can] turn or even propel the board forward without removing his or her feet from the board." Ex. A, at 2, Mem. of Streetsurfing LLC in Supp. of Pl.'s Cross-mot. for Summ. J. and Resp. in Opp'n to Def.'s Mot. for Summ. J. (ECF Dkt. No. 71) ("Pl.'s Br."). Thus, to ride the waveboard, users must coordinate their balance, steering, and propulsion all at once. Def.'s Statement ¶ 24.

After importation, Streetsurfing, which "describes itself as a sporting goods product and lifestyle company," sells its waveboards to large retail stores (e.g., Walmart), toy stores (e.g., Toys "R" Us), sporting goods stores (e.g., Dick's Sporting Goods and Modell's Sporting

[2] "Waveboards" are Streetsurfing's brand of "casterboards." Def.'s Statement of Undisputed Material Facts ¶ 2 (ECF Dkt. No. 52). "Casterboards" are "a two-wheeled, human-powered land vehicle." Ex. A, at 1, Mem. of Streetsurfing LLC in Supp. of Pl.'s Cross-mot. for Summ. J. and Resp. in Opp'n to Def.'s Mot. for Summ. J. (ECF Dkt. No. 71) ("Pl.'s Br."). They possess "[t]wo narrow platforms known as 'decks[,]' [and] are joined by a 'torsion bar[,]' which consists of a metal beam, usually coated by rubber, that houses a strong spring." Ex. A, at 1, Pl.'s Br. Casterboards also use "[o]ne polyurethane wheel [that] is connected to each deck with a caster so that . . . each wheel can steer independently, and each caster has a steering axis that is tilted about 30° back from the vertical." Ex. A, at 1, Pl.'s Br; *see also* Appendix *infra*.

[3] The Ripple Board and The Wave are described by the parties as identical to one another in terms of their components and the ride offered to their users. *See* Def.'s Statement of Undisputed Material Facts ¶¶ 5, 6 (ECF Dkt. No. 52) ("The 'Wave Ripple Board' model offers the same ride as The Wave, but it is for younger riders."). The parties, however, have provided the court only with a sample of The Wave. *See* Appendix *infra*.

[4] A "caster" is a "small wheel on a swivel, attached under a piece of furniture or other heavy object to make it easier to move." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 290 (4th ed. 2000). Here, the casters are one-directional because, unlike a traditional skateboard, the waveboards can only be propelled in the direction of the board's nose.

Goods), and online retailers (e.g., Amazon.com, Shopping.com, Sportchalet.com, and Getboards.com). Def.'s Statement ¶ 8 (internal quotation marks omitted); Ex. G, at 8, Pl.'s Resp. to Def.'s First Interrogatories and Request for Production of Documents and Things (ECF Dkt. No. 52–4). In toy stores, such as Toys "R" Us, the waveboards are sold in the "wheeled sporting goods aisles" next to skateboards. Ex. B, at 8, Report of Findings Related to the Case by Robert F. Valerio (ECF Dkt. No. 52–1). Plaintiff markets its waveboards as "a new sport that combines the natural fluidity of surfing with the smooth maneuverability of snowboarding and skating into one new action sport known as Street Surfing." Def.'s Statement ¶ 10 (internal quotation marks omitted).

Streetsurfing LLC, the importer of record of the merchandise in question, entered twenty-six shipments of waveboards between June 2007 and September 2007 at the Port of Los Angeles, California. Def.'s Statement ¶ 1; Summons at 3–4 (ECF Dkt. No. 1). Upon liquidation[5] of the entries, the U.S. Customs and Border Protection Agency ("Customs") classified the waveboards under HTSUS 9506.99.60,[6] which covers "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Other: Other: Other," at 4% *ad valorem*. Pl.'s Statement of Material Facts as to Which No Genuine Issue Exists ¶ 3 (ECF Dkt. No. 71) ("Pl.'s Statement"). The Explanatory Notes to the Harmonized Commodity Description and Coding System, 4th ed., 95.06 (2007) ("Explanatory Notes"), which "are generally indicative of the proper interpretation of the various HTSUS provisions," expressly list skateboards as covered by HTSUS Heading 9506. *N. Am. Processing Co. v. United States,* 236 F.3d 695, 698 (Fed. Cir. 2001) (citation omitted); Explanatory Notes 95.06.

Plaintiff submitted a timely protest of Customs' tariff classification on October 29, 2008 (Protest No. 2704–08–103793), which was subsequently denied by Customs. *See* Summons 1. After paying all required duties, plaintiff commenced this action, claiming that Customs erred in its classification of the merchandise as "sports

[5] "Liquidation means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2012); *see also Shinyei Corp. of Am. v. United States*, 524 F.3d 1274, 1276–77 (Fed. Cir. 2008).

[6] Plaintiff's Summons and Cross Motion for Summary Judgment appear to misidentify Customs' classification of the merchandise as under HTSUS 9506.91.00. *See* Summons 2; Pl.'s Cross Mot. at 1. The record, however, demonstrates clearly that plaintiff's waveboards were classified under HTSUS 9506.99.60.

equipment" under HTSUS 9506.99.60. *See* Pl.'s Br. 17. Rather, plaintiff urges that the merchandise should have been classified as "other wheeled toys," and thus, should be reliquidated under HTSUS 9503 which covers "Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls, other toys; reduced-scale ('scale') models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof." *See* Pl.'s Br. 7–8. Heading 9503 is duty-free.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (citing *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). In the context of a classification action, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citations omitted).

DISCUSSION

I. LEGAL FRAMEWORK

The objective in a classification case is to determine the correct tariff provision for the subject merchandise. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). This Court reviews Customs' classification decisions *de novo*. *Sony Elecs., Inc. v. United States*, 37 CIT __, __, Slip Op. 13–153, at 4 (2013) (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)). In reaching its conclusions, the Court engages in a two-step inquiry: first, it "must construe the meaning of terms in a given tariff provision." *Deckers Corp. v. United States*, 752 F.3d 949, 954 (Fed. Cir. 2014) (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). "Second, the trial court must determine if the merchandise at issue falls within the tariff provision that the court just construed." *Id.* (citing *Orlando Food*, 140 F.3d at 1439). "The first step is a question of law; the second is a question of fact." *Dependable Packaging Solutions, Inc. v. United States*, 37 CIT __, __, Slip Op. 13–23, at 7 (2013) (citing *Pomeroy Collection, Ltd. v. United States*, 35 CIT __, __, 783 F. Supp. 2d 1257, 1259 (2011)).

The General Rules of Interpretation ("GRI") "govern classifications of imported goods under [the] HTSUS and [are] appl[ied] in numerical order." *CamelBak*, 649 F.3d at 1364 (citing *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007)). "Under GRI 1, the court must determine the appropriate classification 'according to the terms of the headings and any relative section or chapter notes.'" *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009) (quoting GRI 1, HTSUS). Only after a court has "determin[ed] that a product is classifiable under the heading[, may it] look to [a] subheading[]." *Orlando Food*, 140 F.3d at 1440 (citation omitted). "In other words, tariff headings are construed without reference to their subheadings. Accordingly, a court should not look to subheadings to either limit or broaden the scope of a heading." *Dependable Packaging*, 37 CIT at __, Slip Op. 13–23, at 7 (citing *Orlando Food*, 140 F.3d at 1440).

This Court is further directed to interpret "[t]he terms of the HTSUS . . . according to their common commercial meanings." *Millenium Lumber*, 558 F.3d at 1329 (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003)). In doing so, "the court may rely on its own understanding of the term as well as upon lexicographic and scientific authorities." *Len-Ron*, 334 F.3d at 1309 (citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)).

As noted, "[t]he court may also refer to the Explanatory Notes accompanying a tariff subheading." *Id.* (citing *Mita*, 21 F.3d at 1082). Although the Explanatory Notes do "not constitute controlling legislative history[, they] are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting" the HTSUS. *Mita*, 21 F.3d at 1082 (citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992)). Therefore, although "not legally binding or dispositive," the Explanatory Notes "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *N. Am. Processing*, 236 F.3d at 698 (citation omitted).

II. CLASSIFICATION UNDER HEADINGS 9503 AND 9506

The court finds, and the parties agree, that the waveboards should be classified under HTSUS chapter 95, which covers "Toys, games and sports equipment; parts and accessories thereof." The parties' dispute is under which specific heading the merchandise should be classified. Defendant maintains that the appropriate heading for classification of the merchandise is HTSUS 9506.99.60, while plaintiff claims that the proper heading is 9503.00.00. Mem. in Supp. of Def.'s Mot. for Summ. J. 3 (ECF Dkt. No. 52) ("Def.'s Br."); Pl.'s Br. 6.

The parties are correct that plaintiff's proposed heading, 9503.00.00, is a principal use provision,[7] while the heading under which Customs classified the merchandise, 9506.99.60, is a residual provision. *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1351, 1354 (Fed. Cir. 2002); Def.'s Reply Mem. in Further Supp. of its Mot. for Summ. J. and in Opp'n to Pl.'s Cross-mot. for Summ. J. 2 (ECF Dkt. No. 87); Reply of Streetsurfing LLC in Supp. of Pl.'s Cross-mot. for Summ. J. 1–2 (ECF Dkt. No. 93). Thus, if the merchandise is *prima facie* classifiable under the more specific heading of 9503, HTSUS, urged by plaintiff, it cannot be classified under Heading 9506, HTSUS. *See BASF Corp.*, 482 F.3d at 1326.

III. THE WAVEBOARDS ARE NOT PROPERLY CLASSIFIABLE UNDER HEADING 9503 AS WHEELED TOYS

A. Construction of Heading 9503

Plaintiff's preferred HTSUS Heading 9503 covers "Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls, other toys; reduced-scale ('scale') models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof." The Explanatory Notes describe wheeled toys as

> articles . . . usually designed for propulsion either by means of pedals, hand levers or other simple devices which transmit power to the wheels through a chain or rod, or, as in the case of certain scooters, by direct pressure of a person's foot against the ground. Other types of wheeled toys may be simply drawn or pushed by another person or driven by a motor.

Explanatory Notes 95.03. Further, the exemplars identified in the Explanatory Note to Heading 9503 include the following items:

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[7] Principal use provisions are governed by HTSUS Additional U.S. Rule of Interpretation 1, which states, in part, that "a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use." ARI 1, HTSUS (2012). "The rule 'call[s] for a determination as to the group of goods that are commercially fungible with the imported goods.'" *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1380 (Fed. Cir. 2011) (alteration in original) (quoting *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999)). The term "'[p]rincipal use' in this context has been defined as the use 'which exceeds any other *single* use.'" *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (quoting *Lenox Collections v. United States*, 20 CIT 194, 196 (1996)). "[T]he purpose of 'principal use' provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use." *BenQ Am. Corp.*, 646 F.3d at 1380 (citing *Primal Lite*, 182 F.3d at 1364).

> (1) Children's tricycles and the like, but excluding bicycles of heading 87.12.
>
> (2) Two-or three-wheeled scooters designed to be ridden by children, as well as youngsters and adults, with an adjustable or non-adjustable steering column and small solid or inflatable wheels. They are sometimes equipped with a bicycle-type handle-bar, a hand brake or a foot brake on the rear wheel.
>
> (3) Pedal-or hand-propelled wheeled toys in the form of animals.
>
> (4) Pedal cars, frequently in the form of miniature sports cars, jeeps, lorries, etc.
>
> (5) Wheeled toys, propelled by hand levers.
>
> (6) Other wheeled toys (with no mechanical transmission system) which are designed to be drawn or pushed, and are large enough for children to ride.
>
> (7) Children's cars powered by a motor.

Explanatory Notes 95.03. As noted, although the Explanatory Notes "are not legally binding or dispositive, they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *N. Am. Processing*, 236 F.3d at 698 (citation omitted).

Classification as a toy under HTSUS Heading 9503 requires that the article be principally used as a toy. *See StoreWALL, LLC v. United States*, 644 F.3d 1358, 1365–66 (Fed. Cir. 2011). Toys have been found to include "'articles whose principal use is amusement, diversion, or play, rather than practicality.'" *Processed Plastics*, 473 F.3d at 1169, 1170 (quoting *Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, 110 F. Supp. 2d 1020, 1027 (2000)) ("We agree with the standard adopted in *Minnetonka* to determine whether merchandise should be classified as a toy.").

Plaintiff insists that its waveboards are specifically covered by Heading 9503 because they are wheeled toys principally used for amusement. Pl.'s Br. 10. Thus, plaintiff reasons that, because the merchandise is principally used for amusement, it is *prima facie* classifiable only under Heading 9503 and cannot fall under the less specific heading, 9506.

While the court is mindful that in *Processed Plastics* the Federal Circuit found that "wheeled toys" under HTSUS Heading 9503 must be principally used for amusement, the Explanatory Note accompanying this heading makes clear that the provision is narrower than plaintiff claims. That is, Heading 9503 does not cover *every* item with wheels that is principally used for amusement, as plaintiff would have the court hold. Rather, the Explanatory Notes indicate that, in addition to being principally used for amusement, a wheeled toy properly classifiable under HTSUS Heading 9503 is also characterized by other common features.

For example, the exemplars listed in the Explanatory Notes, such as children's tricycles, pedal cars, and wheeled cars designed to be drawn or pushed, and large enough for children to ride, are all items that require no training prior to their use and involve no meaningful risk of injury. Rather, these items can be safely used by a child, with minimal supervision, and without prior instruction.

In addition, items, such as pedal cars and wheeled toys designed to be drawn or pushed with a child riding inside, involve no development or practice of individual skills in order for them to be used to their maximum capacity. Nor do these items afford a user a reasonable degree of exercise or physical activity. That is, there is no minimum degree of skill required in order to fully use a wheeled toy, and wheeled toys do not provide notable exercise or require athletic ability.

Further, as noted, all articles listed as wheeled toys are propelled "by means of pedals, hand levers or other simple devices which transmit power to the wheels through a chain or rod, . . . by direct pressure of a person's foot against the ground," or by "simply [being] drawn or pushed by another person or driven by a motor." Explanatory Notes 95.03. Thus, wheeled toys all conform to a general design, characterized by the support of an assistive device, such as one or more seats, additional wheels, hand levers, handle bars, pedals, or breaks.

Accordingly, in addition to being an item with wheels that is used principally for amusement, a wheeled toy under Heading 9503 is also characterized by the following features: (1) the absence of a training requirement prior to its use; (2) the absence of a meaningful risk of injury involved in its use; (3) the lack of acquired skill to fully utilize the item; (4) the lack of exercise or athletic aspect in the item's use; and (5) the presence of an assistive device.

B. Heading 9503 Does Not Cover the Waveboards

1. Need for Training

Both parties agree that riding the waveboard requires the coordination of a user's balance, steering, and propulsion in unison. Def.'s Statement ¶ 24. As a result, the waveboards are packaged with a tutorial video that demonstrates how to safely ride the merchandise, and similar instructional material is also available on Streetsurfing's website. *See* Ex. A, Instructional DVD for the Sample of The Wave ("Instructional DVD"); Ex. G, at 23, Pl.'s Resp. to Def.'s First Interrogatories and Request for Production of Documents and Things. In addition, Streetsurfing employed professional instructors to "visit[] thousands of schools and t[each] millions of students how to ride" its waveboards. Def.'s Statement ¶ 29 (internal quotation marks omitted). Thus, it is apparent that, unlike wheeled toys, riding waveboards require more than merely stepping onto the device and setting off. That the waveboards require a certain level of training prior to their use separates them from wheeled toys.

Thus, the presence of this additional feature in the use of the waveboards, the requirement of training prior to use, weighs against classifying the merchandise under Heading 9503 as wheeled toys.

2. *Meaningful Risk of Injury*

Another distinctive characteristic of a wheeled toy under HTSUS Heading 9503 is that the item's use does not involve any meaningful risk of injury. Here, as evidenced by the product's labeling and other record evidence, a waveboard's use carries a meaningful risk of injury that is lacking with the wheeled toy exemplars of HTSUS Heading 9503. According to plaintiff, its waveboards are prohibited in over ninety percent of the skate parks in the United States "because they are dangerous in the parks." Pl.'s Statement ¶ 8 (internal quotation marks omitted). Moreover, The Wave itself and the box in which it is packaged and sold state that the merchandise contains a safety manual that should be read prior to its use, that protective gear should be worn at all times, and that adult supervision is required. *See* Ex. A, Sample of The Wave ("WARNING[:] . . . Children require competent adult supervision."); Ex. A, Box of the Sample of The Wave ("READ AND UNDERSTAND THE ENCLOSED SAFETY MANUAL BEFORE RIDING. ALWAYS WEAR SAFETY EQUIPMENT SUCH AS A HELMET, KNEE PADS, AND ELBOW PADS WHILE RIDING. . . . COMPETENT ADULT SUPERVISION RECOMMENDED.").

Hence, unlike the wheeled toy items listed by the Explanatory Notes as classifiable under HTSUS Heading 9503, the waveboards do involve a meaningful risk of injury to users, therefore further indicating that the merchandise falls outside the realm of what constitutes a wheeled toy.

3. Skill

In addition to possessing wheels and being principally used for amusement, the wheeled toy examples found in the Explanatory Notes require no acquisition of skill by their riders in order to get the maximum use from the toys. It is clear to the court that the waveboards do not share this quality, and to the contrary, require that a user acquire a certain level of skill to fully use the merchandise. Therefore, as with a skateboard, users need considerable skill and experience in order to develop their technique and master the use of the waveboards in order to be able to perform "tricks" or "stunts." *See* Ex. A, Instructional DVD; Def.'s Statement ¶ 30.

Thus, record evidence demonstrates that the waveboards fail to meet this additional indicator of wheeled toy status: that users need not develop a degree of skill to use, and take full advantage of, the waveboards, further showing that classification of the merchandise under HTSUS Heading 9503 as wheeled toys is improper.

4. Exercise

As to exercise, the exemplars in the Explanatory Note to HTSUS Heading 9503, such as pedal cars, children's motor cars, wheeled toys propelled by hand levers, or wheeled toys designed to be drawn or pushed, and large enough for children to ride, do not provide their user with a workout. The waveboards' users, on the other hand, get "good exercise," working their "lower muscles, . . . the stomach and [their] legs." Def.'s Statement ¶¶ 20, 21, 22 (internal quotation marks omitted). Indeed, plaintiff introduced its waveboards to thousands of schools as part of the schools' physical education programs, because the waveboards are "a physical activity" teaching students "a new skill that works on core stability utilizing balance, weight transfer[,] and movement through space." Def.'s Statement ¶¶ 28, 29.

Because the waveboards afford users a reasonable degree of exercise or physical activity, classification as a wheeled toy under HTSUS Heading 9503 is not appropriate.

5. Design

Another feature that characterizes wheeled toys is their common design. Specifically, those items classified under Heading 9503 by the Explanatory Notes all include the presence of an assistive device. That the waveboards fail to conform to this common design feature further supports defendant's claim that plaintiff's waveboards cannot be classified as wheeled toys under Heading 9503.

As previously discussed, the Explanatory Notes describe wheeled toys under HTSUS Heading 9503 as

> articles . . . usually designed for propulsion either by means of pedals, hand levers or other simple devices which transmit power to the wheels through a chain or rod, or, as in the case of certain scooters, by direct pressure of a person's foot against the ground. Other types of wheeled toys may be simply drawn or pushed by another person or driven by a motor.

Explanatory Notes 95.03. According to plaintiff, after pushing off with his or her foot, "[t]he rider on the subject waveboard propels himself by mak[ing] a twisting motion to the left with respect to the front board, and biases the board to the left, while the rear board biases to the right, in order to keep the rider steady. The rider moves forward simply by twisting and releasing the boards." Pl.'s Statement ¶ 6. Unlike wheeled toys, waveboards do not possess pedals, hand levers, or any other device that transmits power to the wheels. Rather, the waveboards are propelled forward by the riders shifting their weight from side to side while maintaining their balance without the support of an assistive device, such as one or more seats, additional wheels, hand levers, handle bars, pedals, or brakes, which is present in the exemplars identified by the Explanatory Notes.

Accordingly, it weighs further against their classification as wheeled toys that plaintiff's waveboards fail to conform to the design methods presented by the examples found in the Explanatory Note to Heading 9503.

6. Conclusion

Based on the foregoing, the court finds that the scope of HTSUS Heading 9503 is too narrow to encompass the waveboards. Although items with wheels that can provide amusement, plaintiff's waveboards fail to conform to the other necessary criteria needed for classification as wheeled toys under Heading 9503. That is, because plaintiff's waveboards (1) require training prior to their use, (2) involve a meaningful risk of injury, (3) require that a user develop a degree of skill, (4) provide the user with considerable exercise, and (5) do not conform to the design of wheeled toys because they do not employ an assistive device for users, the waveboards lack the necessary elements for classification as wheeled toys. Accordingly, the waveboards cannot be classified as such under HTSUS Heading 9503.

IV. THE WAVEBOARDS ARE PROPERLY CLASSIFIABLE UNDER HEADING 9506 AS SPORTS EQUIPMENT OR ARTICLES FOR GENERAL PHYSICAL EXERCISE OR ATHLETICS

Because HTSUS Heading 9503 is a principal use provision, it is more specific than HTSUS Heading 9506, which is a residual provision. *See BASF Corp.*, 482 F.3d at 1326. Thus, were the waveboards *prima facie* classifiable under Heading 9503 as wheeled toys, they would be precluded from classification under Heading 9506 as sports equipment or articles for general physical exercise or athletics. Because, as has been seen, the waveboards are not properly classifiable under HTSUS Heading 9503, the court turns to defendant's proposed classification.

A. Construction of Heading 9506

HTSUS Heading 9506 encompasses "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof." The heading's accompanying Explanatory Note identifies a number of items covered by Heading 9506, including snow-skis, water-skis, ice skates, surfboards, roller skates, and *skateboards*.[8] Explanatory Notes 95.06.

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[8] The complete list of exemplars identified by the Explanatory Note to HTSUS Heading 9506 is as follows:

(B)Requisites for other sports and outdoor games (other than toys presented in sets, or separately, of heading 95.03), e.g.:

(1) Snow-skis and other snow-ski equipment (e.g., ski-fastenings (skibindings), ski brakes, ski poles).

(2) Water-skis, surf-boards, sailboards and other water-sport equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as 'snorkels') for swimmers or divers.

(3) Golf clubs and other golf equipment, such as golf balls, golf tees.

(4) Articles and equipment for table-tennis (ping-pong), such as tables (with or without legs), bats (paddles), balls and nets.

(5) Tennis, badminton or similar rackets (e.g., squash rackets), whether or not strung.

(6) Balls, other than golf balls and table-tennis balls, such as tennis balls, footballs, rugby balls and similar balls (including bladders and covers for such balls); water polo, basketball and similar valve type balls; cricket balls.

(7) Ice skates and *roller skates*, including skating boots with skates attached.

(8) Sticks and bats for hockey, cricket, lacrosse, etc.; chistera (jai alai scoops); pucks for ice hockey; curling stones.

(9) Nets for various games (tennis, badminton, volleyball, football, basketball, etc.).

(10) Fencing equipment: fencing foils, sabres and rapiers and their parts (e.g., blades, guards, hilts and buttons or stops), etc.

(11) Archery equipment, such as bows, arrows and targets.

This Court has held that an activity falls within the meaning of a "sport" when "[i]t possesses to a meaningful degree the . . . attributes of healthy, challenging[,] and skillful recreation." *Newman Importing Co. v. United States*, 76 Cust. Ct. 143, 143, 415 F. Supp. 375, 376 (1976). In *Newman*, the Court rejected the claim "that a sport must involve competition either between individuals or against the natural elements." *Id.* Moreover, "[t]o qualify as 'equipment' for a sport, the good should generally provide 'what is necessary, useful, or appropriate [for that sport]." *Lemans Corp. v. United States*, 660 F.3d 1311, 1318 (Fed. Cir. 2011) (alterations in original) (citation omitted) (internal quotation marks omitted). The parties agree that the waveboards are the only piece of equipment necessary to engage in "streetsurfing." *See* Pl.'s Br. 17–18; Def.'s Br. 3.

B. The Presence of Organized Competition and Rules for an Activity Is Not Dispositive as to Whether Articles Used to Participate in That Activity Are Classifiable Under Heading 9506

Plaintiff contends that its waveboards are not sports equipment, and thus, not classifiable as such under Heading 9506, because waveboarding is not a sport. Pl.'s Br. 17. For plaintiff, because waveboarding is not recognized by the general public as a sport and does not possess specific rules or involve competition, its merchandise cannot be covered by Heading 9506. *See* Pl.'s Br. 22.

This Court's previous holdings make clear that an activity qualifies as a "sport" when it provides "skillful recreation." *Newman*, 76 Cust. Ct. at 143, 415 F. Supp. at 376. In *Newman*, the Court held that backpacking is a sport and rejected the "contention that a sport must involve competition either between individuals or against the natural elements." *Id.* Rather than competitiveness, the Court explained that what is indicative of a sport is an activity involving "the element of enjoyment or recreation arising from the development or practice of individual skills." *Id.* at 144, 415 F. Supp. at 376.

By way of contrast, in *Camel Manufacturing Co. v. United States*,

(12) Equipment of a kind used in children's playgrounds (e.g., swings, slides, see-saws and giant strides).

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards, ice hockey pants with built-in guards and pads.

(14) Other articles and equipment, such as requisites for deck tennis, quoits or bowls; *skate boards*; racket presses; mallets for polo or croquet; boomerangs; ice axes; clay pigeons and clay pigeon projectors; bobsleighs (bobsleds), luges and similar non-motorised vehicles for sliding on snow or ice.

Explanatory Notes 95.06 (emphasis added).

this Court found that "camping out" is not a sport. *Camel Mfg. Co. v. United States*, 12 CIT 426, 427–28, 686 F. Supp. 912, 913 (1988). In doing so, the Court narrowed the holding in *Newman*, cautioning that not every activity that contains "a certain degree of challenge and skill . . . [can] be considered a sport." *Id.* at 427, 686 F. Supp. at 913. The Court explained, however, that the purpose of the holding in *Newman* was to "prevent[] a superficial standard of interpersonal competition from becoming the identifying essence of sports." *Id.* at 428, 686 F. Supp. at 914.

Plaintiff's position that its waveboards do not qualify as sporting goods because "waveboarding" does not possess set rules or regular competition is without merit. This Court's holdings in *Newman* and *Camel Manufacturing* sensibly found that competition or a set of organized rules are not essential to the determination of whether an activity is a sport.

Indeed, the exemplars identified in the Explanatory Note to HTSUS Heading 9506 support this conclusion. The presence of listed items, such as children's playground equipment (e.g., swings, slides, and seesaws), equipment for snorkeling and diving, and ice axes, indicate that the drafters did not intend to limit the heading's scope to activities that incorporate a competitive structure, a formal league, or rules. Further, despite the presence of competition in the use of roller skates (e.g., roller derbies) or skateboards, for example, roller skates and skateboards are not primarily used in organized competition, nor is the common use of these items characterized by sets of rules.

It is clear, then, that the scope of Heading 9506 encompasses more than plaintiff claims, and includes merchandise used for general physical exercise and athletics, in addition to articles used for organized and competitive sports. Thus, whether "waveboarding" possesses formal rules or involves organized competition is not only not dispositive to the question of whether the activity is a sport, but it also is not relevant to the classification of plaintiff's merchandise under Heading 9506, which also covers articles for general physical exercise or athletics.

Thus, it is evident that whether "waveboarding" is a sport with formal rules or competition is not determinative of whether plaintiff's waveboards qualify for coverage under Heading 9506.

C. The Waveboards Possess the Necessary Features to Qualify for Coverage Under HTSUS Heading 9506

As noted, the Explanatory Notes are regularly used by this Court to determine the intent of the drafters with respect to the provisions of the HTSUS. *See Mita*, 21 F.3d at 1082. In this instance, the Explanatory Note accompanying Heading 9506 provides the court with additional insight as to those items with wheels that are intended to be classified under Heading 9506 as sporting goods or articles for general physical exercise or athletics. Because the waveboards conform to the features that characterize items covered by HTSUS Heading 9506, the heading encompasses plaintiff's merchandise.

1. Training

After reviewing the exemplars listed under HTSUS Heading 9506, it is clear that a common element among those items with wheels listed as sports equipment or articles for general physical exercise or athletics (e.g., skateboards and roller skates) is that the items' users require a certain degree of training prior to their use. Moreover, generally, the non-wheeled articles listed under the Explanatory Note for Heading 9506, such as snow-and water-ski equipment, golf clubs, equipment for racket sports, ice skates, and archery and fencing equipment, all require prior training.[9] A child or adult user would be unable to employ any one of these items with meaningful precision or effectiveness without prior instruction.

As has been set out earlier in this opinion, prior training is required in order to ride waveboards. Users require prior training and practice to be able to enjoy using the waveboards in any meaningful capacity, which requires that riders be able to balance themselves on the board, propel the board forward, and steer the board all at once. *See* Def.'s Statement ¶¶ 23, 24. This training requirement indicates that the waveboards qualify as sporting goods or articles for general physical exercise or athletics under HTSUS Heading 9506.

2. Skill

A review of the accompanying Explanatory Note for HTSUS Heading 9506 also makes clear that those items classified under HTSUS 9506 (e.g., water-skis, surfboards, skateboards, ice skates, tennis rackets, ice hockey equipment, and archery equipment) require that one develop a degree of skill in order to take full advantage of the products. Indeed, this observation is supported by this Court's prior holding in *Newman*. *See Newman*, 76 Cust. Ct. at 144, 415 F. Supp. at 376 ("In any event the element of enjoyment or recreation arising from the *development or practice of individual skills*, different from those involved in routine daily activities, is a better indication of a sport than competitiveness." (emphasis added)).

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[9] The notable exception to this finding is playground equipment, items far removed from waveboards.

As previously discussed, record evidence shows that users must acquire a degree of skill in order to be proficient in riding the waveboards and take full advantage of the merchandise. While a rider, with prior training, may be able to use the waveboards in a limited fashion, it is with further practice and the acquisition of a greater degree of skill that users will be able to expand on the product's uses. As demonstrated by Streetsurfing's sales literature and instructional DVD packaged with the merchandise, users with greater skill are able to ride the waveboards with greater speed and a higher degree of precision, on more uncertain terrain (e.g., hills and sidewalks), and may even become proficient enough to perform "tricks" and "stunts" similar to those performed using a skateboard. *See* Ex. A, Instructional DVD; Def.'s Statement ¶ 30. Skill is required for a rider to take full advantage of the articles covered by HTSUS Heading 9506, and the presence of this element further favors classification of plaintiff's waveboards under this heading, as sporting goods or articles for general physical exercise or athletics.

3. Exercise

Another common feature exhibited by the exemplars listed by the Explanatory Note for HTSUS Heading 9506 is that the activities for which the listed items are used afford a user a reasonable degree of exercise or physical activity. As noted, record evidence shows that using the waveboards provides users with a workout, giving them "good exercise," working their "lower muscles, . . . the stomach and [their] legs." Def.'s Statement ¶¶ 20, 21, 22 (internal quotation marks omitted). The listed exemplars all provide users with meaningful exercise and a reasonable degree of physical activity, whether it be equipment used for skiing, racket sports, fencing, water sports and activities, or even children's playground equipment.

Therefore, because plaintiff's waveboards conform to the additional features that characterize those items that, according to the Explanatory Notes, are properly classified as sporting goods or articles for general physical exercise or athletics, the classification of the waveboards under HTSUS Heading 9506 is favored.

D. The Court's Examination of the Merchandise

As this Court and the U.S. Court of Appeals for the Federal Circuit have confirmed, "the merchandise itself is often a potent witness in classification cases." *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (citation omitted); *see also Dependable Packaging*, 37 CIT at __, Slip Op. 13–23, at 17 (citation omitted);

Lerner N.Y., Inc. v. United States, 37 CIT __, __, 908 F. Supp. 2d 1313, 1318 (2013) (citation omitted). Having examined the sample of The Wave supplied by the parties and its accompanying instructional DVD, in the court's view, plaintiff's waveboards are akin to skateboards. *See* Appendix *infra*. Although there are certain minor distinguishable characteristics between the items, plaintiff's waveboards are undeniably almost visually identical, as well as duplicative in their components, physical characteristics, and use as skateboards. As noted, a skateboard is listed by the Explanatory Notes as an example of an item that is properly classified as sports equipment or an article for general physical exercise or athletics under HTSUS Heading 9506.

E. Customs Properly Classified the Merchandise Under HTSUS Heading 9506

Based on the foregoing, Customs properly classified the waveboards under HTSUS 9506.99.60. Despite plaintiff's arguments to the contrary, this Court has held that the presence of organized competition and specific rules is not determinative of whether an activity qualifies as a sport, nor is it determinative of whether the article qualifies for coverage under Heading 9506. That is, the argument that "waveboarding" does not involve competition or possess rules does not aid plaintiff's case because Heading 9506 is much broader than plaintiff claims and covers items in addition to those used for organized sports.

Further, the Explanatory Notes to the two competing tariff provisions indicate that there are additional criteria that distinguish wheeled items under Heading 9506 from wheeled toys under Heading 9503. The use of items qualifying as sports equipment or articles for general physical exercise or athletics requires a degree of training and a certain level of skill and athleticism, which are features absent from the use of wheeled toys, but which characterize plaintiff's waveboards. Additionally, the use of the wheeled toy items does not involve any meaningful risk of injury, an element that is clearly present in the use of the waveboards, nor do wheeled toys provide exercise. Moreover, wheeled toys all share a common design, in that they each possess an assistive device for the user, which is lacking in the waveboards and the exemplars listed for Heading 9506. Finally, the court's own examination of the merchandise only reaffirms its conclusion that there can be no doubt that the waveboards resemble skateboards.

Accordingly, the court finds that Customs properly classified the waveboards under HTSUS 9506.99.60 because they are sporting goods or articles for general physical exercise or athletics. *See Jarvis Clark*, 733 F.2d at 878.

CONCLUSION

Based on the foregoing, the court concludes that the correct tariff classification for the Ripple Board and The Wave is subheading 9506.99.60, HTSUS, subject to a duty rate of 4% *ad valorem*. Judgment will enter accordingly.

Dated: September 22, 2014
New York, New York

/s/ Richard K. Eaton
Richard K. Eaton

APPENDIX

Streetsurfing's "The Wave"

Slip Op. 14–111

Diamond Sawblades Manufacturers' Coalition, Plaintiff, v. United States Department of Commerce and United States International Trade Commission, Defendants.

Before: Richard K. Eaton, Senior Judge
Court No. 13–00391

[United States Department of Commerce's motion to dismiss is denied; plaintiff's motion for summary judgment is granted.]

Dated: September 23, 2014

Daniel B. Pickard and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, D.C., argued for plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, D.C., argued for defendant United States Department of Commerce. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Nathaniel Halvorson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, of Washington, D.C.

David B. Fishberg, Attorney-Advisor, Office of the General Counsel, United States International Trade Commission, of Washington, D.C., argued for defendant United States International Trade Commission. With him on the brief was *Neal J. Reynolds*, Assistant General Counsel for Litigation.

MEMORANDUM AND ORDER

EATON, Senior Judge:

This action concerns the five-year, or "sunset," review of the antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China ("PRC"), for which the United States Department of Commerce ("Commerce" or the "Department") published a notice in the Federal Register on December 2, 2013, and which was initiated on January 23, 2014. Initiation of Five-Year ("Sunset") Review, 78 Fed. Reg. 72,061 (Dep't of Commerce Dec. 2, 2013) ("Initiation Notice"); Diamond Sawblades and Parts Thereof From China Institution of a Five-Year Review, 78 Fed. Reg. 72,116, 72,117 (Int'l Trade Comm'n Dec. 2, 2013). The sole question posed by this case is whether the review was initiated at the proper time. Before the court is the motion[1] of plaintiff Diamond Sawblades Manufacturers' Coalition ("plaintiff" or the "Coalition"), seeking a ruling declaring that the ongoing review is *ultra vires*, halting that review, and instructing defendants to initiate a sunset review on November 4, 2014. Pl.'s Mot. (ECF Dkt. No. 30). Defendants,[2] the Department and the International Trade Commission ("ITC") (collectively, "defendants"), oppose the motion on the merits, and the Department has separately moved to dismiss the case for lack of subject matter jurisdiction. *See* Def.'s Resp. to Pl.'s Mot. for J. on the Administrative R. (ECF Dkt. No. 40) ("Dep't's Br."); Def. United States International Trade Commission's Resp. in Opp'n to Pl.'s Mot. for J. on the Administrative R. (ECF Dkt. No. 41); Def.'s Mot. to Dismiss Pl.'s Compl. for Lack of Jurisdiction (ECF Dkt. No. 46) ("Dep't's Mot. to Dismiss"). For the following reasons, the Department's motion to dismiss is denied and plaintiff's motion is granted.

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[1] While styled as a motion for judgment on the agency record, the court will treat plaintiff's motion as one for summary judgment pursuant to USCIT Rule 56.

[2] Although the International Trade Commission has submitted a brief agreeing with, and fully supporting, the arguments made by Commerce, because it makes no arguments of its own, the court will address only those arguments made by the Department. *See* Def. United States International Trade Commission's Resp. in Opp'n to Pl.'s Mot. for J. on the Administrative R. (ECF Dkt. No. 41).

BACKGROUND

In 2005, the ITC initiated an injury investigation regarding certain diamond sawblades imported from the PRC and the Republic of Korea ("Korea").[3] *See Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374, 1376 (Fed. Cir. 2010) ("*Diamond Sawblades V*"). The ITC preliminarily determined that there was a reasonable likelihood of injury to a United States industry as a result of the importation of subject merchandise, but then altered its position and found no material injury or threat of material injury in its final determination. *Id.* at 1376–77. For its part, the Department made preliminary and final determinations that diamond sawblades were being sold at less than fair value in the United States. *Id.* at 1376.

The Coalition brought an action in this Court, challenging the ITC's final negative material injury determination and Commerce's less than fair value determinations. *Id.* at 1377. The *Diamond Sawblades* Court remanded the case to the ITC, finding that its negative injury determination was insufficiently supported. *Diamond Sawblades Mfrs. Coal. v. United States*, 32 CIT 134, 135, 151 (2008) ("*Diamond Sawblades I*"). On remand, the ITC found a threat of material injury and the *Diamond Sawblades* Court affirmed that determination. *Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 48, 48, 67 (2009) ("*Diamond Sawblades II*").

After the issuance of *Diamond Sawblades II*, Commerce continued the suspension of liquidation of the subject imports of diamond sawblades, but took the position that it was not required to publish antidumping duty orders or direct the collection of cash deposits on ongoing imports of subject merchandise until the appeal of *Diamond Sawblades II* to the U.S. Court of Appeals for the Federal Circuit had been resolved. *Diamond Sawblades V*, 626 F.3d at 1377. Disputing this position, the Coalition petitioned the *Diamond Sawblades* Court for "a writ of mandamus directing Commerce to publish antidumping duty orders and immediately begin collecting cash deposits," and the *Diamond Sawblades* Court granted the writ. *Id.*; *Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT 1422, 1452–53, 650 F.

[3] Korea is no longer covered by the antidumping duty order because the Department revoked it with respect to "diamond sawblades from Korea, pursuant to a proceeding under section 129 of the Uruguay Round Agreements Act to implement the findings of the World Trade Organization dispute settlement panel in [the] United States." Diamond Sawblades and Parts Thereof From Korea, 78 Fed. Reg. 36,524, 36,525 (Dep't of Commerce June 18, 2013) (final results of antidumping duty administrative review, 2010–2011) (citation omitted).

Supp. 2d 1331, 1357 (2009) ("*Diamond Sawblades III*").[4] Thereafter, on September 30, 2009, the *Diamond Sawblades* Court issued its judgment directing Commerce to forthwith "issue and publish antidumping duty orders and require the collection of cash deposits on subject merchandise." *Diamond Sawblades III*, 33 CIT at 1422, 1453, 650 F. Supp. 2d at 1331, 1357.

On November 4, 2009, the Department published the antidumping duty order in the Federal Register. Diamond Sawblades and Parts Thereof From the PRC and Korea, 74 Fed. Reg. 57,145 (Dep't of Commerce Nov. 4, 2009) (antidumping duty orders) ("Antidumping Order"). Therein, the Department stated the effective date of the Antidumping Order as January 23, 2009 and further stated that it would direct U.S. Customs and Border Protection ("Customs") to collect cash deposits for unliquidated merchandise "as of" that date. Antidumping Order, 74 Fed. Reg. at 57,146. Thus, Commerce stated that it would direct the retroactive collection of cash deposits. *See* Antidumping Order, 74 Fed. Reg. at 57,146.

Following its publication, the Department conducted three administrative reviews[5] under 19 U.S.C. § 1675(a)(1) (2006), and used November 4, 2009 as the anniversary date of the Antidumping Order's publication. The reason for this choice was given in the notice for the first review. Therein, the Department stated that it chose the November 4 date rather than the January 23, 2009 effective date set out in the Antidumping Order because November was the anniversary for the publication of the Antidumping Order, and its regulations directed the use of that date. Thus, the Department stated:

> Although the effective date of the [Antidumping Order] is January 23, 2009, based on the date of the suspension of liquidation, the Department designates November as the anniversary

[4] While the appeal in *Diamond Sawblades III* was pending, the Federal Circuit issued an opinion affirming *Diamond Sawblades II*. *Diamond Sawblades Mfrs. Coal. v. United States*, 612 F.3d 1348, 1362 (Fed. Cir. 2010) ("*Diamond Sawblades IV*"). Thereafter, in *Diamond Sawblades V*, the Federal Circuit affirmed the issuance of the writ of mandamus and rejected the Department's position that it was not required to publish the antidumping duty order until after all appeals relating to the order had been resolved. *Diamond Sawblades V*, 626 F.3d at 1382–83.

[5] The period of review for the first administrative review of the Antidumping Order was January 23, 2009 through October 31, 2010. Diamond Sawblades and Parts Thereof From the PRC, 78 Fed. Reg. 11,143, 11,143 (Dep't of Commerce Feb. 15, 2013) (final results of antidumping duty administrative review). For the second administrative review of the Antidumping Order, the period of review was November 1, 2010 through October 31, 2011. Diamond Sawblades and Parts Thereof From the PRC, 78 Fed. Reg. 42,930, 42,931 (Dep't of Commerce July 18, 2013) (amended final results of antidumping duty administrative review; 2010–2011). The period of review for the third administrative review was November 1, 2011 through October 31, 2012. Diamond Sawblades and Parts Thereof From the PRC, 79 Fed. Reg. 35,723, 35,723 (Dep't of Commerce June 24, 2014) (final results of antidumping duty administrative review; 2011–2012).

> month for the[] diamond sawblades order[] because this is the month in which the Department published the notice for the [Antidumping Order]. In its regulations, the Department defines the anniversary month as the calendar month in which the anniversary of the date of publication of an order . . . occurs. Therefore, consistent with section 751(a)(1) of the Tariff Act of 1930 [(19 U.S.C. § 1675(a)(1))], as amended, and [19 C.F.R. § 351.213(b)], the first opportunity to request a review of the above-referenced order[] will be in November 2010.

Diamond Sawblades and Parts Thereof From the PRC and Korea, 75 Fed. Reg. 969, 970 (Dep't of Commerce Jan. 7, 2010) (notice of anniversary month and first opportunity to request an administrative review) (citation omitted). The November 4 date was also used in the succeeding administrative reviews. *See, e.g.*, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 78 Fed. Reg. 79,392, 79,392, 79,394 (Dep't of Commerce Dec. 30, 2013).

Although it consistently used November 4 for purposes of initiating administrative reviews, Commerce determined that it would use January 23, 2009 as the date to calculate the five-year period after which to conduct the sunset review, based on the stated effective date in the Antidumping Order. As a result, when the Department published the notice of initiation of the sunset review on December 2, 2013, it stated that the sunset review would be initiated on January 23, 2014. *See* Initiation Notice, 78 Fed. Reg. at 72,061; Diamond Sawblades and Parts Thereof From China Institution of a Five-Year Review, 78 Fed. Reg. at 72,117. Plaintiff, by its motion, now challenges defendants' decision to use January 23, 2009 as the anniversary date on which to begin conducting the sunset review, rather than November 4, 2009, the actual date of publication.

On July 11, 2014, during the pendency of this action, the Department published its portion of the sunset review that commenced on January 23, 2014, finding "that revocation of the antidumping duty order on diamond sawblades from the PRC would be likely to lead to continuation or recurrence of dumping at weighted-average margins up to 164.09 percent." Diamond Sawblades and Parts Thereof from the PRC, 79 Fed. Reg. 40,062, 40,063 (Dep't of Commerce July 11, 2014) (final results of the expedited sunset review of the antidumping duty order). At this time, the ITC's portion of the review has barely begun. Oral Arg. Tr. 29:23–25, Aug. 5, 2014 (ECF Dkt. No. 51) ("Oral Arg. Tr.").

DISCUSSION

I. SUBJECT MATTER JURISDICTION AND MOTION TO DISMISS

The Department has separately moved to dismiss this action for lack of subject matter jurisdiction under the theory that plaintiff now has, and has always had, the ability to obtain complete relief by challenging the final determination once the sunset review is finished. Dep't's Mot. to Dismiss 5 ("[T]he Coalition may challenge the sunset review pursuant to 28 U.S.C. § 1581(c).").

Plaintiff initiated this action under 28 U.S.C. § 1581(i) (2006) and, following the publication of the Department's determination in its portion of the sunset review, on July 11, 2014, plaintiff brought another case under 28 U.S.C. § 1581(c), challenging that determination for the same reasons as those put forward in this case. Compl. ¶ 2 (ECF Dkt. No. 2); Summons, No. 14–00171 (2014), ECF Dkt. No. 1.

Under law developed by this Court and the Federal Circuit, "jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292–93 (Fed. Cir. 2008) (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)). This Court has previously held that a determination requiring a party to participate in an unlawful unfair trade proceeding is reviewable during the pendency of the proceeding under 28 U.S.C. § 1581(i). *See Dofasco Inc. v. United States*, 28 CIT 263, 268, 326 F. Supp. 2d 1340, 1345 (2004) ("[F]orcing Dofasco to wait until a final determination has been issued before it may challenge the lawfulness of the administrative review, would mean that Dofasco's opportunity for full relief—i.e., freedom from participation in the administrative review—would be lost." (citations omitted)); *see also Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1381, 1388–89 (2014) (recognizing a line of cases in which plaintiffs "sought to stop an allegedly unnecessary or ultra vires administrative proceeding before [they] were burdened with" it and in which jurisdiction under 19 U.S.C. § 1581(i) was confirmed by this Court); *Diamond Sawblades Mfrs.' Coal. v. U.S. Dep't of Commerce*, 38 CIT __, __, 968 F. Supp. 2d 1338, 1342 (2014), *appeal dismissed*, 560 F. App'x 998 (Fed. Cir. 2014). In other words, this Court has found that, when faced with an unlawfully commenced review, waiting for the final determination of the review to challenge its unlawful commencement is "manifestly inadequate," and jurisdiction under section 1581(i) is available.

Despite Commerce's arguments to the contrary, relief under section 1581(i) is still available to plaintiff. As the parties each acknowledged at oral argument, although the Department has completed its part of the sunset review, the ITC's portion of the sunset review is in its nascent stage. Oral Arg. Tr. 29:23–25. Indeed, that process, which counsel for the ITC recognized can be onerous for interested parties, has not entered its most burdensome period. Oral Arg. Tr. 29:23–30:5. Thus, plaintiff still seeks a remedy that 28 U.S.C. § 1581(c) cannot provide, namely being excused from further participation in an ongoing *ultra vires* proceeding.[6]

Accordingly, the court continues to have jurisdiction under 19 U.S.C. § 1581(i) and the Department's motion to dismiss is denied.

II. THE SUNSET REVIEW WAS UNTIMELY COMMENCED

Plaintiff maintains that defendants have acted beyond the scope of their authority by seeking to conduct a sunset review of the Antidumping Order prior to the five-year anniversary of November 4, 2009, the date of publication of the order in the Federal Register. Pl. Diamond Sawblades Manufacturers' Coalition's Mem. in Supp. of its Mot. 27 (ECF Dkt. No. 30) ("Pl.'s Br."). For plaintiff, November 4, 2009, the actual date of publication of the Antidumping Order in the Federal Register, is the date of publication for purposes of 19 U.S.C. § 1675(c)(1). Pl.'s Br. 12. There is no dispute that the actual publication date of the Antidumping Order was November 4, 2009. Pl.'s Br. 12; Dep't's Br. 4. Therefore, plaintiff insists that the plain language of the statute requires the Department to wait until November 4, 2014 to commence the sunset review. Pl.'s Br. 12. For plaintiff, the early commencement is *ultra vires*, and accordingly, the court should direct that the sunset review be halted. Pl.'s Br. 27.

In the Antidumping Order itself, the Department's sole reason given for choosing the effective date of January 23, 2009 was that,

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[6] Defendants insist that cases in this Court have held that, where the question is the "timing" of the commencement of agency action, jurisdiction under section 1581(i) is unavailable. Department of Commerce's Reply in Supp. of its Mot. to Dismiss Pl.'s Compl. for Lack of Jurisdiction 3–4 (ECF Dkt. No. 55) (citing *Tianjin Magnesium Int'l Co. v. United States*, 32 CIT 1, 533 F. Supp. 2d 1327 (2008); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 29 CIT 1280, 403 F. Supp. 2d 1287 (2005)). Those cases are distinguishable from the facts presented here, because, in those cases, commencement of the proceeding was clearly left to the discretion of Commerce. Here, defendants' actions are clearly beyond their discretion and are *ultra vires*. In other words, the cases stand for the proposition that jurisdiction can be controlled by the facts. In addition, the *Tokyo* Court found that participation in the early stage of the review would not be burdensome, a far different set of facts than present here. *See Tokyo*, 29 CIT at 1287, 403 F. Supp. 2d at 1294.

"because suspension of liquidation[7] is already in effect for all entries of diamond sawblades from the PRC . . . entered, or withdrawn from the warehouse, for consumption on or after January 23, 2009, the effective date of the[] antidumping duty order[] . . . is January 23, 2009." Antidumping Order, 74 Fed. Reg. at 57,146. It is worth noting that the Department understood that no court directed the use of the January 23, 2009 date. *See* Antidumping Order, 74 Fed. Reg. at 57,146 ("The CIT's order of September 30, 2009, did not address the effective date of any potential antidumping duty orders . . . ."). Nor, for that matter, did plaintiff seek this earlier effective date. Rather, defendants determined, on their own, to use the earlier date and now apparently claim that Commerce was acting within its authority to determine an effective date of January 23, 2009. *See* Dep't's Mot. to Dismiss 5–6. The court finds defendants' position to be untenable and that the sunset review was untimely commenced. Thus, plaintiff's motion is granted.

A. Legal Framework

Under 19 U.S.C. § 1675(c)(1), the Department "and the ITC must review antidumping and countervailing duty orders every five years." *Nucor Corp. v. United States*, 601 F.3d 1291 (Fed. Cir. 2010) (citing 19 U.S.C. § 1675(c)(1) (2006)); *see also* 19 C.F.R. § 351.102(b)(49) (2012) (defining the term "sunset review" to mean a review under 19 U.S.C. § 1675(c)) . Pursuant to 19 U.S.C. § 1675(c)(1),

> 5 years after *the date of publication* of . . . an antidumping duty order . . . the administering authority and the Commission shall conduct a review to determine . . . whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping . . . and of material injury.

19 U.S.C. § 1675(c)(1) (emphasis added) (footnote omitted). Thus, in accordance with the statute, five years "after the date of publication of" the *Diamond Sawblades* Antidumping Order, the Department and the ITC are required to conduct a sunset review to determine whether or not the Antidumping Order should be revoked. Additionally, under the Department's regulations, a notice of initiation of a sunset review of an antidumping duty order must be published "[n]o later than 30 days before the fifth anniversary date of an order . . . ." 19 C.F.R. § 351.218(c)(1) (2012).

[7] Liquidation is "the 'final computation or ascertainment of duties . . . accruing upon entry' of the goods." *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1351 (Fed. Cir. 2006) (alteration in original) (quoting 19 C.F.R. § 159.1) (citing 19 U.S.C. § 1500(d)). Here, liquidation was suspended January 23, 2009.

B. Plaintiff's Motion Is Granted

The court grants plaintiff's motion for several reasons, namely because (1) the plain language of the statute explicitly directs Commerce to begin a sunset review "5 years after the date of publication of . . . an antidumping duty order" in the Federal Register, (2) the use of the November 4, 2009 date is consistent with the Department's application of the phrase "date of publication" in other parts of the same statute, (3) use of the January 23 date is inconsistent with Commerce's interpretation of the phrase "date of publication" when commencing administrative reviews of the Antidumping Order, (4) defendants' use of the January 23 date does not comport with the unfair trade laws' statutory scheme, and (5) defendants' theory of notice by "constructive publication" is without merit. 19 U.S.C. § 1675(c)(1) (footnote omitted).

1. The Plain Language of the Statute

The plain language of 19 U.S.C. § 1675(c)(1) requires the Department to commence the sunset review of an antidumping duty order five years after the date of publication of the order in the Federal Register. *See* 19 U.S.C. § 1675(c)(1). Although the term "date of publication" is not defined in the statute, plaintiff is correct that the "phrase is no term of art" and that the general understanding of the term "is not an ambiguous definition[. P]ublication of an antidumping duty order occurs when such an order is communicated to the public, whether in printed form or otherwise." Pl.'s Br. 10. Indeed, defendants concede as much. *See* Dep't's Br. 5.

The word publication is understood by English speakers to mean "[t]he act or process of publishing printed matter." *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1416 (4th ed. 2000). Legal sources do not indicate a contrary meaning. *See, e.g.*, BLACK'S LAW DICTIONARY 1423 (10th ed. 2014) (defining the term "publication" as "[g]enerally, the act of declaring or announcing to the public"). The language of the statute is, thus, a clear and unambiguous directive to the Department.

Indeed, the Department's sunset review regulations do not contain a definition of "date of publication," indicating that Commerce understands the statutory directive to be clear. Moreover, Commerce makes no claim for deference under *Chevron*. *See* Dep't's Br.; Dep't's Mot. to Dismiss. "The so-called *Chevron* line of cases provides guidance to Courts when a statute is silent or ambiguous." *Beijing Tianhai Indus. v. United States*, 38 CIT __, __, Slip Op. 14–104, at 7 (2014) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)). "[A]gencies are entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'" *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (quoting *Chevron*, 467 U.S. at 843). Here, because there is no gap to be filled, the Department has not sought, and is not entitled to, deference under *Chevron*. That is, section 1675(c)'s command to conduct a sunset review "5 years after the date of publication of . . . an antidumping duty order" is not ambiguous. 19 U.S.C. § 1675(c)(1) (footnote omitted). Therefore, the use of any date other than November 4, 2009 as the "date of publication" conflicts with the plain meaning of the statute and, thus, fails as a matter of law. *See* ROBERT A. KATZMANN, JUDGING STATUTES 50 (2014) (noting that, under the canons of statutory construction, "if the language is plain, construction is unnecessary").

2. Consistent Use Within the Same Statute

Next, the use of November 4, 2009 is in keeping with how the Department has interpreted the phrase "date of publication" in other parts of the statute. In particular, 19 U.S.C. § 1675(a)(1) allows administrative reviews of antidumping duty orders to be conducted "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order." 19 U.S.C. § 1675(a)(1). As the Department acknowledges, it has consistently treated the "date of publication" of antidumping duty orders as the same date for administrative reviews and sunset reviews. Dep't's Br. 12. Indeed, to accept any other result would be to adopt inconsistent definitions of the same term, not only within the same statute, but within the same section of the statute. Thus, the Department's use of January 23, 2009 as the "effective date" of publication would violate the rule of statutory construction that "[t]he same words used twice in the same act are presumed to have the same meaning." NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6, at 249 (7th ed. 2007); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (citations omitted) ("[T]he term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions.").

3. Consistent Use Under the Antidumping Order

The court also finds that using the January 23 date for purposes of initiating the sunset review would be inconsistent with how the Department has interpreted "date of publication" with respect to determinations it has made pertaining to administrative reviews under the Antidumping Order itself. Again, pursuant to 19 U.S.C. §

1675(a)(1), "[a]t least once during each 12-month period beginning on the anniversary of the date of publication" of an order, the Department, upon request, shall conduct an administrative review. 19 U.S.C. § 1675(a)(1). As has been noted, for each of the administrative reviews conducted under the Antidumping Order, Commerce has used November 4 as the anniversary date of the "date of publication." *See, e.g.*, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 78 Fed. Reg. at 79,392, 79,394 (identifying the Antidumping Order as having a November anniversary date); Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 78 Fed. Reg. 65,612, 65,613 (Dep't of Commerce Nov. 1, 2013) (noting that the anniversary month for which interested parties can request an administrative review of the Antidumping Order is the month of November). To use the January 23, 2009 date as the date of publication for sunset review purposes would thus be inconsistent with all other "date of publication" determinations made under the Antidumping Order and would thus violate the Department's past practice.

4. Statutory Scheme

In addition, although Commerce and the ITC argue that their use of the January 23 date is consistent with the statutory scheme, this is decidedly not the case. Dep't's Br. 9. In making their argument, defendants rely on the notion that plaintiff has had the protection of the antidumping laws from January 23, 2009 because the liquidation of entries of diamond sawblades was "continued"[8] from that date and

[8] In their papers, defendants place great emphasis on the continued suspension of liquidation from January 23, 2009, as directed by the Antidumping Order. The importance of this direction to continue the suspension of liquidation, however, is difficult to see. Pursuant to 19 U.S.C. § 1671b(d)(2), liquidation of entries of diamond sawblades had been suspended from December 29, 2005, the date of publication of the Department's preliminary dumping determination. Diamond Sawblades and Parts Thereof from the PRC, 70 Fed. Reg. 77,121, 77,121, 77,134 (Dep't of Commerce Dec. 29, 2005) (preliminary determination of sales at less than fair value, postponement of final determination, and preliminary partial determination of critical circumstances). This suspension remained in effect following the Department's final determination of dumping on May 22, 2006. Diamond Sawblades and Parts Thereof from the PRC, 71 Fed. Reg. 29,303, 29,303, 29,309 (Dep't of Commerce May 22, 2006) (final determination of sales at less than fair value and final partial affirmative determination of critical circumstances). Absent the "'continued' suspension of liquidation" pursuant to the *Timken* Notice, this suspension would nonetheless have remained in effect following the publication of the Antidumping Order on November 4, 2009, and up until the first administrative review was requested. *Tembec, Inc. v. United States*, 30 CIT 1519, 1525–26, 461 F. Supp. 2d 1355, 1360–61 (2006). Therefore, liquidation would have been suspended through November 4, 2009 without publication of the *Timken* Notice. Thus, with respect to suspension from liquidation, defendants' claimed effective date provided no greater relief to the domestic industry than would have been achieved by the use of the actual effective date of the Antidumping Order, which was November 4, 2009.

because cash deposits were retroactively imposed from that date when the Antidumping Order was published on November 4, 2009.

> The protections offered by the order—including cash deposit rates—have covered that period. Waiting until November 2014 to conduct the sunset review would keep the order in place for five years and nine months—far beyond the contemplated five-year mark. Under the statutory scheme described by the [Statement of Administrative Action], Commerce's regulations, and the Federal Circuit's decisions, such a result would be unreasonable.

Dep't's Br. 11. It is worth noting, however, that liquidation had been suspended from December 29, 2005, the date of Commerce's preliminary dumping determination, and that there is no record evidence that any, let alone all, of the cash deposits were actually retroactively collected. Diamond Sawblades and Parts Thereof from the PRC, 70 Fed. Reg. 77,121, 77,121, 77,134 (Dep't of Commerce Dec. 29, 2005) (preliminary determination of sales at less than fair value, postponement of final determination, and preliminary partial determination of critical circumstances). Thus, there is little to indicate that the domestic producers benefitted from any of the claimed protections.

In addition, as plaintiff points out, 19 U.S.C. § 1673e(a) mandates that an antidumping duty order contain, among other things, a directive that "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise *at the same time as estimated normal customs duties on that merchandise are deposited*." 19 U.S.C. § 1673e(a)(3) (2006) (emphasis added); Pl.'s Br. 9. Here, for the entries made between January 23, 2014 and November 4, 2014, no antidumping cash deposits were required at the time of entry. Rather, only normal customs duties were imposed. The Department did not order the retroactive collection of cash deposits until the publication of the Antidumping Order in the Federal Register on November 4, 2009. Antidumping Order, 74 Fed. Reg. at 57,145, 57,146. Thus, defendants' proposed use of January 23, 2009 as the anniversary date does not comport with the statutory scheme for collection of cash deposits (and the protection afforded the industry thereby) because they were not collected at the time that normal duties were collected.

More importantly, in making its "statutory scheme" argument, defendants point only to the protections provided to domestic producers by the unfair trade laws. Dep't's Br. 7–11. Although an antidumping duty order protects domestic producers by imposing duties and providing for the collection of cash deposits, the portion of the statutory scheme providing for sunset reviews fulfills a different intention. The purpose of a sunset review is to determine if the imposition of an antidumping duty order has had the effect of causing those covered by the order to mend their ways, i.e., to discover if they have stopped dumping. Thus, publication of the Antidumping Order put producers and exporters of diamond sawblades on notice that (1) the order was in place, (2) administrative reviews could be requested in the future, and (3) if the Antidumping Order survived, a sunset review would be commenced. This notice, however, was only given to those interested on November 4, 2009.

With respect to sunset reviews, in accordance with our treaty arrangements,[9] Congress chose a five-year period as the time-frame to be examined. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP.NO. 103–316, vol. 6, at 879 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4205. As with administrative reviews, in a sunset review, Commerce looks backward[10] to *see* what the behavior of the producers and exporters has been during a preceding time period. Therefore, in a sunset review, Commerce looks five years back to determine whether the dumping and injury to the domestic industry have subsided in the years following the imposition of the order.

> In determining whether revocation of an order . . . would likely lead to continuation or recurrence of dumping, the Department considers the margins established in the investigation and/or reviews conducted during the sunset review period, as well as the volume of imports for the periods before and after issuance of the order (or acceptance of the suspension agreement).

ENFORCEMENT & COMPLIANCE ANTIDUMPING MANUAL Ch. 25, at 7 (Oct. 13, 2009) (footnote omitted). Thus, defendants' assertion that the "effective date performs all the legal functions normally associated with publication" is not correct because it ignores the notice function of publication. Dep't's Br. 5–6.

Were the court to adopt defendants' use of the January 23, 2009 effective date of the Antidumping Order, the period of useful exami-

[9] The Uruguay Record Agreements Act revised the Tariff Act of 1930 by requiring that antidumping and countervailing duty orders be reviewed every five years. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP.NO. 103–316, vol. 6, at 879 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4205.

[10] The antidumping statutory scheme is "inherently retroactive." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381 (Fed. Cir. 2008). Thus, the statute "'expressly calls for the retrospective application of antidumping review determinations.'" *SeAH Steel Corp. v. United States*, 34 CIT __, __, 704 F. Supp. 2d 1353, 1362 (2010) (quoting *Am. Permac, Inc. v. United States*, 10 CIT 535, 539, 642 F. Supp. 1187, 1191 (1986)).

nation for the now underway sunset review would be shortened to four years and three months. This is because no one was put on notice that the Antidumping Order was in place on January 23, 2009, nor were cash deposits being collected following that date. While defendants rely on the idea that domestic producers gained the protection of the Antidumping Order from January 23, 2009, they ignore the purpose of the Antidumping Order to give notice to foreign producers and exporters (and, more importantly, the importers who actually pay the duties) that it was in effect. Thus, between January 23, 2009 and November 4, 2009, diamond sawblades were entering the United States with the producers and exporters believing that no order was in place and without the burden of cash deposits. Therefore, no producer or exporter was put on notice that its behavior in the five years succeeding January 23, 2009 would be examined to determine whether the Antidumping Order should continue. Because no one was put on notice of the existence of the Antidumping Order until November 4, 2009, defendants' claim that the statutory scheme confirms the use of the January 23 date is unconvincing because it does not take into account either the notice function of publication or the purpose of sunset reviews.

5. Constructive Notice by Publication

Finally, a word is needed on defendants' theory of notice by "constructive publication." According to Commerce and the ITC, notice of the Antidumping Order was "effectively" given on January 23, 2009 because it was "constructively published" on that date. Dep't's Br. 6. They base this claim on their argument that the retroactive collection of antidumping duties fully protected the domestic industry. Dep't's Br. 6 ("Here, however, the order was made retroactively operative, and its protections were made to extend back *before* its *Federal Register* date."). For defendants, this "constructive publication" necessarily provided constructive notice.

Constructive notice by publication is a legal fiction that presumes that persons have read something that they may have never seen. Thus, "[w]hen a court says that the defendant received 'constructive notice[,]' . . . it means that he didn't receive notice but we'll pretend he did." *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005). While constructive notice by publication has its place, the sole case relied on by defendants, for the proposition that the publication on November 4, 2009 somehow provided constructive notice that the Antidumping Order was in effect as of January 23, 2009, does not support their argument. *See* Dep't's Br. 6 (citing *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT 1541, 1549 n.10, 285 F. Supp. 2d

1371, 1378 n.10 (2003) (citations omitted)). The *Cathedral Candle* Court found that publication in the Federal Register of a notice stating that the ITC was preparing a list of those "potentially eligible" to receive "Byrd"[11] funds resulted in constructive notice to interested parties of the "existence of the list." *Cathedral Candle*, 27 CIT at 1549 n.10, 1550, 285 F. Supp. 2d at 1378 n.10, 1379 ("It is well established by both statutes and cases that publication of an item in the Federal Register constitutes constructive notice of anything within that item. Plaintiffs were on constructive notice of the existence of the list and Customs' request that questions be directed to the ITC *from the time of publication* onward." (emphasis added) (citations omitted)). Nothing in the case indicates that publication can constitute constructive notice effective on a date prior to actual publication. Rather, it holds that constructive notice is effective "from the time of publication onward." *Id.* at 1549 n.10, 285 F. Supp. 2d at 1378 n.10. In other words, the interested parties were put on notice of the existence of the list from the date of publication forward, whether they actually saw the published notice or not, but were not charged with knowledge prior to the date of publication.

The Department and the ITC assert that, on January 23, 2009, the public was somehow put on notice of the Antidumping Order even though it first appeared in the Federal Register over nine months later. Defendants' claim of constructive notice by publication, of course, completely changes that concept. Constructive notice, rather than actual notice, can occur when, for instance, persons are served with process by publication. Then, although those served may never *see* the notice that the law affords, notice is presumed and service is good from the date of publication forward. Here, defendants would change the rule so that *failure* to publish would notify those interested that the Antidumping Order was in place. Defendants cite no law and make no compelling argument to support their notice by "constructive publication" claim. Because no one was put on notice either constructively or actually of the existence of the Antidumping Order until November 4, 2009, this argument fails.

CONCLUSION AND ORDER

As the Department points out, it is unlikely that the facts present here will be repeated. *See* Oral Arg. Tr. 16:1–9. If true, then no practice or precedent will be established by this case. Therefore, the time for correcting this one-time mistake has come.

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[11] Pursuant to the continued Dumping and Subsidy Offset Act of 2000, codified at 19 U.S.C. § 1675c (2000) ("Byrd Amendment"), certain "affected domestic producers" were entitled to distributions of antidumping and countervailing duties collected by the United States.

For the foregoing reasons, the Department's motion to dismiss is denied, plaintiff's motion is granted.

Defendants are hereby

ORDERED to rescind the Final Results published by Commerce on July 11, 2014; it is further

ORDERED that defendants cease further activity with respect to the sunset review initiated on January 23, 2014; and it is further

ORDERED that defendants initiate the sunset review of the Antidumping Order on November 4, 2014.

Dated: September 23, 2014
New York, New York

/s/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 14–112

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, GANG YAN DIAMOND PRODUCTS, INC., CLIFF INTERNATIONAL LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., HEBEI HUSQVARNA-JIKAI DIAMOND TOOLS CO., LTD., WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., BOSUN TOOLS CO., LTD., and BOSUN TOOLS INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00241

[Remanding second administrative review of antidumping duty order on diamond sawblades and parts thereof from the People's Republic of China.]

Dated: September 23, 2014

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, DC, for plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel on the brief was *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Neeley and *Michael S. Holton*, Hush Blackwell, LLP, of Washington, DC, for defendant-intervenors Beijing Gang Yan Diamond Products Company, Gang Yan Diamond Products, Inc., and Cliff International Ltd.

John D. Greenwald, *Robert C. Cassidy*, *Jr.*, and *Thomas M. Beline,* Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenors Husqvarna Construction Products North America and Hebei Husqvarna-Jikai Diamond Tools Co., Ltd.

Max F. Shutzman and *Dharmendra N. Choudhary*, Grunfeld, Desiderio, Lebowitz, Silverman & Kledstadt, LLP, of Washington, DC, for defendant-intervenor Weihai Xiangguang Mechanical Industrial Co., Ltd.

Gregory S. Menegaz and *J. Kevin Horgan*, deKeiffer & Horgan, of Washington, DC, for defendant-intervenors Bosun Tools, Co., Ltd. and Bosun Tools Inc.

OPINION AND ORDER

Musgrave, Senior Judge:

This opinion considers the motion of plaintiff Diamond Sawblades Manufacturers Coalition ("DSMC") for judgment on *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36166 (Jun. 17, 2013) ("*Second Review*"), PDoc 471, *amended* 78 Fed. Reg. 42930 (Jul. 18, 2013) ("*Amended AR2 Final*"), PDoc 487, and accompanying issues and decision memorandum ("I&D Memo") (July 11, 2014), PDoc 455. The complaint challenges these determinations: (I) to grant a separate rate to the "AT&M entity"[1] and not to collapse the AT&M entity with its parent, the China Iron & Steel Research Group ("CISRI"), and assign the collapsed entity the 164.09% PRC-wide margin, and the effect of the foregoing on the margin for non-selected separate rate respondents; (II) to reject the DSMC's targeted dumping allegation against Weihai Xiangguang Mechanical Industrial Co., Ltd. ("Weihai"); and (III) to alter the preliminary methodology used to value steel sawblade cores used in Weihai's production.

Jurisdiction is here pursuant to 28 U.S.C. §1581(c). Administrative determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law" are to be held unlawful. 19 U.S.C. §1516a(b)(1)(B)(i). The matter is remanded as follows.

I

In light of the current posture of *Advanced Technology & Materials Co. v. United States*, 37 CIT ___, 938 F. Supp. 2d 1342 (2013), *appeal docketed*, No. 14–1154 (Fed. Cir. Dec. 9, 2013), which sustained an administrative determination of separate-rate ineligibility[2] with re-

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[1] The AT&M entity comprises a "collapsed" group of related companies, *see* 19 C.F.R. § 351.401(f), including Beijing Gang Yan Diamond Products ("BGY"), its direct parent, Advanced Technology & Materials Co., Ltd. ("AT&M"), and two sister companies, HXF Saw Co., Ltd. (formerly Yichang HXF Circular Saw Industrial Co., Ltd.), and AT&M International Trading, Inc.

[2] In administering the antidumping law, Commerce presumes that the operations of companies within a non-market economy are government-controlled and therefore distorted. *See* Import Administration Policy Bulletin 05.1 (Dep't of Comm. Apr. 5, 2005). A non-market economy company may be determined eligible to receive a separate rate if it rebuts this presumption by demonstrating an absence of *de jure* and *de facto* governmental control over its operations. *Id*.

spect to the AT&M entity during the investigation phase, the defendant requests voluntary remand to reconsider the AT&M entity's separate rate determination and the related issues of collapsing "and the calculation of the all-others rate." Def's Resp. at 7.

Commerce may request remand, without confessing error, in order to reconsider its previous position. If the "concern is substantial and legitimate, a remand is usually appropriate." *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). Certain non-selected separate rate ("NSSR") respondents, namely Husqvarna Construction Products North America, Hebei Husqvarna-Jikai Diamond Tools Co., Ltd., Bosun Tools Co., Ltd. and Bosun Tools Inc., defendant-intervenors here, oppose the voluntary remand request as overbroad. They argue Commerce cannot lawfully alter and apply a margin to them that differs from the zero percent separate rate margin determined for them, ultimately pursuant to the *Amended AR2 Final*.

While facially innocuous, Commerce's remand request implicates the determination of the "all-others" margin as aforesaid. Pursuant to 19 U.S.C. §1673d(c)(5), for companies entitled to a separate rate that margin is equal to the weighted-average of margins determined for exporters and producers individually investigated, excluding any margins based on adverse inferences or *de minimis*. For exporters and producers not individually investigated, Commerce "may use any reasonable method to establish the estimated all-others rate". 19 U.S.C. §1673d(c)(5)(B). In the original investigation, upon finding that the mandatory respondents both received zero margins, Commerce's "reasonable method" for determining the all-others margin was "to average the weighted-average dumping margins calculated for the selected respondents." *Amended AR2 Final*, 78 Fed. Reg. at 42931. Reconsideration of the AT&M entity's eligibility for a separate margin rate necessary implicates the all-others rate.

The court finds that Commerce has here expressed a substantial and legitimate concern for reconsidering the AT&M entity's separate rate issues pertinent to this matter insofar as *Advanced Technology* addressed the same issues and nearly identical facts that are contested in the complaint regarding the AT&M entity. The NSSR respondents' arguments against alteration of the PRC-wide margin, in the context of voluntary remand of those issues concerning the AT&M entity's entitlement to a separate rate, does not provide a basis for denying Commerce's request since, as mentioned, any determination that the AT&M entity is ineligible for a separate rate would implicate the NSSR margin calculation process, which is necessarily derivative.

The separate rate issues, including their impact on derivative issues, are therefore, and hereby, remanded.[3]

II

The DSMC also challenge Commerce's rejection of their targeted dumping "allegation" against Weihai as "late" and "prejudicial". *See Second Review* I&D Memo at 15.

A

By way of background, in 2012 Commerce announced that for administrative reviews to be processed, after April 16, 2012 the "typical" margin determination would be based upon a comparison (without the application of "zeroing") of monthly weighted-average export prices ("EP") or constructed export prices ("CEP"), as applicable, with monthly weighted-average normal values ("A-A" methodology). *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 77 Fed. Reg. 8101, 8102 (Feb. 14, 2012) (final modification). Announcement of new default methodology was a significant departure from employment of the traditional "A-T" (average-to-transaction) methodology. Resort to "alternative" methodology, now including A-T, along with the rarely-used transaction-to-transaction ("T-T") methodology, would thenceforth be on a "case by case" basis. *See id*.

The DSMC point out, however, that Commerce never issued regulations specifying deadlines for when parties to an administrative review should request that the agency consider calculating the margins under alternative methodology, *see generally id.,* nor in the *Second Review*, the review before the court under appeal, did Commerce issue any memoranda providing a deadline for such requests or otherwise indicate to the parties its expectations with respect to timing. The DSMC also point out that Commerce considered petitions to use the methodology in several administrative reviews in the months immediately leading up to the administrative briefing stage of this proceeding, again without articulating any specific practice in those cases with respect to timing of allegations, albeit (Commerce adds) prior to determining preliminary results in those instances.

Commerce contends that when the DSMC filed their targeted

[3] In remanding this issue, the court here acknowledges the briefing of defendant-intervenors BGY, Gang Yang Diamond Products, Inc. and Cliff International Ltd. to the effect that Commerce was "fully aware" of the *Advanced Technology* decision at the time it issued the *Final Results*, but the court does not perceive that as a reason, in itself, for denying Commerce's remand request.

dumping "allegation" in this matter , *i.e.,* about two months after the preliminary determination and 49 days before the statutory deadline for Commerce to file its final results, the briefing schedule for case and rebuttal briefs had already been set, and the timing of the allegation provided Weihai only 6 days to provide a rebuttal or response. In Commerce's view, this period was inadequate to address "such a complicated issue." Def's Resp. at 18. The defendant further argues that the DSMC recognize that "in practice" targeted dumping allegations "are typically" submitted at the preliminary stages of a proceeding, although the defendant also admits that Commerce's practice in this area is "evolving". *Id*. at 17–18, referencing Pl's Br. at 36–37.

At any rate, Commerce found that the DSMC had ample opportunity to file its allegation prior to December 3, 2012, that the DSMC's filing was "prejudicial" and raised due process concerns, and that the "late filing" did not permit Commerce sufficient time to analyze the allegations. *See id*. at 18–19. In short, Commerce states that it declined to "spring" A-T methodology upon the parties for the first time in the final results, as a "*fait accompli*, depriving them of any opportunity to provide input." *Id*. at 19. Nonetheless, the DSMC point out, one hundred and eleven days elapsed prior to the actual issuance of the *Final Results*, and Wehai did, in fact, provide substantive comment. In that post-briefing period, they also point out, the agency conducted further analysis of calculation issues regarding the valuation of Weihai's cores, *see infra*, and in connection therewith the DSMC note that Commerce solicited and obtained input from the parties after the normal briefing period had run. *See id*.; *see*, *e.g.*, *Second Review* I&D Memo at 23.

B

Be that all as it may, the court considers the statute, not the foregoing chronology, paramount. Pursuant to 19 U.S.C. §1677f-1(d)(1)(B), Commerce "may" determine whether subject merchandise is being sold in the United States at less than fair value utilizing A-T methodology "if . . . there is a pattern" of EP or CEP prices "that differ significantly among purchasers, regions, or periods of time" and Commerce "explains why such differences cannot be taken into account" using "normal" comparison methodology. Rather than request additional briefing of this targeted dumping issue in advance of the issuance of this opinion, in view of the fact that the matter is being remanded in any event (*see* above), Commerce on remand is requested to explain where in the statute or other authority it finds the non-ministerial discretion *not* to determine "*if* . . . there is a pattern" of differing EP or CEP prices based on the record as developed, with the assistance of interested parties, in these sorts of proceedings and regardless of whether an "allegation" is raised to that effect -- and notwithstanding the agency's statutory discretion to determine whether it will employ alternative methodology even "if" such a "pattern" is found. *Compare* 19 U.S.C. §1677f-1(d)(1)(B) *with*, *e.g.*, 19 U.S.C. §1673b(e)(1) ("[i]f a petitioner *alleges* critical circumstances . . .") *and* 19 U.S.C. §1673d(a)(3) (". . . in any investigation in which the presence of critical circumstances *has been alleged* . . ."); *cf. also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. 3773 ("In this regard, so that the exceptions are properly applied, the Administration intends that Commerce will continue to require that foreign companies report sales on a transaction specific basis, and that Commerce will request information on sales to particular customers and regions. Transaction-specific information *must* be made available so Commerce *may* determine: (1) the appropriate product and/or transaction categories for which averages should be calculated; *and* (2) whether the exception for targeted dumping is applicable.") (italics added). Commerce may attempt to persuade on remand as to the existence of reasonable ambiguity, but to this court that portion of the statute appears plain, and Commerce must reconsider the issue anew, *if* that is the correct result in consequence of this opinion.

III

The DSMC also challenge Commerce's determination to alter the preliminary methodology it used to value steel sawblade cores used in Weihai's production.

A

For merchandise imported from a non-market economy ("NME"), Commerce must derive normal value on the basis of the factor of production ("FOP") values utilized in producing the merchandise. 19 U.S.C. §1677b(c)(1). "[T]he particular aim of the statute is to determine the non-distorted cost of producing such goods" in order to derive the most accurate dumping margins possible. *Home Meridian International, Inc. v. United States*, 37 CIT ___, ___, 922 F. Supp. 2d 1366, 1371 (2013) (citation omitted).

Steel sawblade cores are produced from FOPS that include steel coil, labor, and electricity. In addition to being subject merchandise, steel sawblade cores are a type of FOP in their own right when consumed in producing finished sawblades. Weihai produced some steel sawblade cores in-house, purchased some from market economy ("ME") countries, and purchased the remainder from NME suppliers.

The defendant states that Commerce had to determine the value of the cores obtained "in each of these three ways" in order to calculate the normal value of Weihai's sawblades. Def's Resp. at 10. It avers Commerce "calculated the value of cores that Wehai produced in-house by identifying the surrogate value for the factors consumed in their production" and then "consistent with its policy for [ME] inputs, Commerce valued the cores that Weihai purchased from [ME] sources using the prices that Weihai actually paid."[4] Both the defendant and Weihai state that there is no dispute here as to valuation of Wehiai's in-house produced and ME-purchased cores (surrogate or otherwise), and that the dispute here concerns Commerce's surrogate valuation of Wehai's NME-sourced cores, since NME home-market selling prices are presumed distorted by governmental interference. *See*, *e.g.*, *Taian Ziyang Food Co. v. United States*, 33 CIT 828, 835, 637 F. Supp. 2d 1093, 1105 (2009); *Magnesium Corp. of America v. United States*, 20 CIT 1092, 1113, 938 F. Supp. 885, 905 (1996).

The defendant contends that for these NME-sourced cores (*i.e.,* cores 1, 2, and 3) Commerce preliminarily determined to use the DSMC's proposed "multiplier" approach for their valuation. *See* Memorandum from Yang Jin Chun to The File, re: *Antidumping Duty Administrative Review on Diamond Sawblades and Parts Thereof from the People's Republic of China: Preliminary Analysis Memorandum for Weihai Xiangguang Mechanical Industrial Co., Ltd.*, PDoc 368, CDoc 310 (Dec. 3, 2012) ("*Weihai Preliminary Analysis Memo*").[5] The DSMC's description of this methodology is that it consists of calculating the simple average of Weihai's ME purchase prices for cores, calculating the simple average of Weihai's ME purchase prices

[4] Def's Resp. at 10–11, referencing *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61716, 61717–18 (Oct. 19, 2006) (explaining that where NME respondents can document purchases from market economy suppliers, Commerce may use the documented purchase prices a respondent actually paid for the input, in lieu of relying on the normal surrogate value methodology). *See Second Review* I&D Memo at 22–23; *see also Lasko Metal Prods. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 317 (1992) ("[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country"); Weihai Resp. at 5. Weihai's response essentially repeats that this is indeed what Commerce has done, although its support for that proposition is simply to cite page 10 of the defendant's brief.

[5] The defendant explains that pursuant to administrative practice Commerce would have valued Weihai's NME-sourced cores based on the price of such cores from a surrogate country, but no such prices were available on the record, as there was no appropriate Harmonized Tariff Schedule provision for sawblade cores. *See Weihai Preliminary Analysis Memo* at 4–5.

for steel (the cores' primary input), calculating the percentage difference of the two averages, and then applying that percentage to the ME value of the steel that Weihai used in producing cores. Pls' Br. at 40, referencing *id*. at 4–5.

B

After publication of the preliminary results for this second administrative review, several months later Commerce published the final results for the first administrative review. *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 78 Fed. Reg. 11143 (Feb. 15, 2013) ("*First Review*") and accompanying I&D Memo[6] at 25–26 (discussing surrogate value for sawblade cores). Therein, Commerce considered the similar issue as follows:

> According to the petitioner, the Department stated in [the final less than fair value investigation ("*LTFV Final*")] and the accompanying I&D Memo at Comment 11A that it could not rely on an HTS code covering cores and finished diamond sawblades (which are a downstream product from cores) to value cores because there was significant value added to the core in order to make a finished blade. The petitioner explains that the Department also found in *LTFV Final* and the accompanying I&D Memo at Comment 11A that cores are stamped pieces of the steel inputs. Thus, the petitioner suggests, the Department can construct a value for cores purchased from NME companies by reference to the values of the steel input and the prices Weihai has paid to market economy producers for cores.
>
> Specifically, the petitioner explains that Weihai's core 1 is made of steel 3 (65 MN NH steel), core 2 is made of steel 4 (SCM 435 H steel), and core 3 is made of steel 5 (SCM 435 NH steel). Moreover, the petitioner states that the Department valued steels 3, 4, and 5 independently using the surrogate value for steel 3 and [ME] purchase prices Weihai reported for steels 4 and 5. According to the petitioner, the difference between the input steel and the resulting core is yield loss, plus amounts for energy and labor, and this difference can be calculated using information on the record of this review. In particular, the petitioner claims that the [ME] purchase prices of cores 2 and 3 reflect the value added to steels 4 and 5 respectively and, taken

[6] Available at http://enforcement.trade.gov/frn/summary/prc/2013–03481–1.pdf (last visited on the date of this opinion). The defendant avers that the delay in issuance of final results for the first administrative review, which was "highly unusual" since Commerce is required by statute to have been completed before the results of the second review are completed, was necessitated due to the investigation of fraud allegations that were raised during that proceeding.

together, they can be used to compute a simple average percentage multiplier representing the average conversion costs for all three cores. This multiplier would then be applied to the surrogate value for the corresponding type of steel. The petitioner argues that the surrogate value for cores used in the *Preliminary Results* does not reflect the value added to steel to produce a core.

Finally, the petitioner explains that pursuant to *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61717–18 (October 19, 2006) (Market Economy Inputs Methodologies), the Department's practice is to value FOPs (1) using the [ME] prices of purchased inputs when those purchases account for more than 33 percent of the input purchases during the POR and (2) by averaging the [ME] prices with the surrogate value when the [ME] purchase[s] are less than 33 percent. The petitioner requests that the Department, at least, use Weihai's market economy purchases of cores on a proportional basis regardless of the data it uses to value the remaining portion.

Department's Position: For its self-produced cores, Weihai reported the FOPs it used to produce the cores, *i.e.*, steels, direct and indirect labor, and electricity. In the *Preliminary Results*, we inadvertently applied the surrogate values for cores to both self-produced cores and purchased cores. For the final results, we have valued the FOPs for Weihai's *self-produced* cores. For Weihai's *purchased cores*, we agree with Weihai and the petitioner that HTS code 73261990 is not the best available information on the record for valuing cores. For the final results, we have valued Weihai's *purchased cores* as follows.

Weihai purchased cores from [ME] economy countries and NME companies. The information on the record shows that the quantities of cores Weihai purchased from [ME] countries were not meaningful, *i.e.*, less than 33 percent of the total purchases of cores. Therefore, we valued Weihai's *purchased* cores using a quantity-weighted average of the prices Weihai paid for cores it purchased from [ME] countries and Weihai's FOPs for self-produced cores (to reflect the value of the cores Weihai purchased from NME suppliers).[ ]

* * *

First Review I&D Memo at 24–25 (citations omitted; italics and brackets added).

C

Shortly after issuance of the *First Review*, Commerce issued a certain "post-preliminary" memorandum from Gary Taverman, Senior Advisor, Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Sec'y for Import Administration, re: *Administrative Review of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof From the People's Republic of China for the 2010–2011 Period: Post-Preliminary Analysis*, dated March 19, 2013. PDoc 440 ("*Post-Prelim Memo*"). *See* Pl's Appx 14. The parties here take the position that this memorandum indicated Commerce's intention to value Weihai's purchased cores for the *Second Review*'s final results using the method Commerce had employed for the final results of the *First Review*. *See* Pl's Comments at 12; Def's Resp. at 13; Weihai's Resp. at 7; *see also* Letter from Wiley Rein LLP to Acting Sec'y of Commerce, re: *Diamond Sawblades and Parts Thereof from the People's Republic of China: Comments on Post-Preliminary Analysis Memorandum* (Mar. 26, 2013), PDoc 445 ("*DSMC Post-Prelim Memo*"), at 2–5 (contending that except for citation to the *First Review* the agency did not describe the reasons for abandoning the preliminary results, describe its new methodology, or provide any new calculations, and pleading that "the agency disclose updated calculations that would permit meaningful comments on the agency's proposal").[7]

The DSMC then filed comments for the second administrative review that argued Commerce had not provided any reasoning for abandoning its preliminary methodology, and that the preliminary methodology was a sound and accurate method for valuing NME-purchased cores. *DSMC Post-Prelim Memo*, PDoc 445. The DSMC also requested that Commerce provide the parties with updated calculations that would permit them to review how the proposed change was to be implemented. *Id*. Weihai responded by reiterating arguments included in its February 19, 2013 administrative case brief

[7] The referenced memorandum, as provided in the plaintiff's appendix, does not appear to reveal any such intention, only brief mention of the investigation of the fraud allegation concerning the *First Review* and preliminary determination that "respondents' sales and cost data are reliable" and (as the DSMC point out) invitation for comment, albeit on this post-preliminary "analysis" and not with respect to Commerce's alleged intention to alter the core valuation methodology for Weihai. *See* Pl's App'x 14 at 2. *Cf*., however, Memorandum from Yang Jin Chun to The File re *Diamond Sawblades and Parts Thereof from the People's Republic of China: Surrogate Values for the Final Results of Review* (June 10, 2013), PDoc 456 ("*Final SV Memo*").

against using the multiplier methodology. *See* Letter from Grunfeld, Desidero, Lebowitz, Silverman & Klestadt to Sec'y of Commerce, re: *Weihai-Ehwa's Rebuttal to Petitioner's Comments on the Post-Preliminary Analysis Memorandum in the Second Administrative Review of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof from the People's Republic of China, Case No. A-570–900* (Apr. 1, 2013), PDoc 446 ("*Weihai Post-Prelim Rebuttal*").

In its *Second Review* I&D Memo, Commerce stated that because no Global Trade Atlas data for cores are available and Weihai did not purchase meaningful quantities of cores from market economy countries, *i.e.*, circumstances similar to those considered in the *First Review*, an alternative method was needed "to value the cores that Weihai purchased from NME suppliers." *Second Review* I&D Memo at 22 (citation omitted and italics added). Commerce then explained that, for that purpose,

> [c]onsistent with the prior review of this order, we are using Weihai's reported FOPs for self-produced cores.[ ] This methodology is based on Weihai's NME experience and, therefore, better reflects Weihai's experience of purchasing cores from NME suppliers than the methodology we used in the *Preliminary Results*.
>
> Our purpose of stating in the post-preliminary analysis our intent to change the methodology for the valuation of cores was to provide an opportunity for interested parties to comment on our intended methodology, not our calculations using the intended methodology, for the final results. We described the intended methodology, and cited to the additional details provided in the final results of the previous administrative review.[ ] Thus, parties had notice and opportunity to comment on the intended changes.

Id. at 22–23 (footnotes referencing *ARI Final* I&D Memo at Comment 11 omitted). In yet another memorandum, dated contemporaneously with the final results for *Second Review*, Commerce added:

> This memorandum outlines the changes in the final results to the methodology and selection of surrogate values used in the calculation of normal value and U.S. price for the preliminary results . . ..
>
> * * *
>
> . . . We recalculated the surrogate values for cores Weihai purchased from [NME] suppliers. We valued cores Weihai pur-

> chased from NME suppliers using Weihai's reported FOPs for self-produced cores. For cores that it produced, Weihai reported inputs for steel, labor, and electricity. First, we calculated the average of the input Weihai reported for each of these three FOP categories. Then we multiplied each average by the applicable per-unit surrogate value to calculate the total surrogate value for each input. Then we added the total surrogate value for each input to calculate the per-unit surrogate value for cores Weihai purchased from NME suppliers.

Final SV Memo at 1–2 (court's bracketing), referencing *Second Review* I&D Memo at cmt. 8.

D

In anticipation of this opinion the court has considered, *intrinsecus*, the parties' arguments on this issue as briefed. In the interest of brevity, and to avoid further obfuscation, the court concludes: that the DSMC's arguments are persuasive; that this is not a case of "less than ideal clarity" that may be sustained "if the agency's path may reasonably be discerned", *see Bowman Transp. Inc. v. Arkansas Best Freight System*, 419 U.S. 281, 286 (1974); and that the matter cannot be sustained on the basis of *post-hoc* rationale articulated in the briefs. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943).

In particular, it is unclear whether Commerce's methodology in the second administrative review is in fact consistent with the expressed methodology in the first administrative review. No opinion is here expressed on the reasonableness of the methodology employed in the *First Review*, but in that review is described the application of a single weighted-average formula to value all of Weihai's purchased cores, both ME and NME. The *Second Review* I&D Memo describes valuation of Weihai's NME-purchased cores separately, apart from the value assigned to Weihai's ME-purchased cores, "using Weihai's reported FOPs for self-produced cores."[8] Regardless of the arguments thereon in the parties' administrative and post-preliminary briefs, the court has no basis for forming an opinion, from the explanations provided in (and for) the *Second Review* and the briefs before the court, on whether the methodology and results of the *Second Review* are "consistent" with the *First Review*, *i.e.*, whether those review determinations are consistent from a logical or mathematical per-

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[8] The *Final SV Memo* provides more detail thereof, although it does not, contrary to the defendant's restatement, employ such precise terms as "usage rates", *etc*., to describe what Commerce has done with respect to "the average of each input" multiplied by "the applicable per-unit surrogate value" in order to obtain "the total surrogate value for each input."

spective, or whether the final results of the *Second Review* are the "more accurate" as compared with the preliminary determination even if they are, *arguendo*, consistent with the results of the *First Review*. At least the issue must be remanded for clarification and further explanation, with particular attention paid and explanation provided as to why the methodology chosen from among available alternatives produces the more accurate and undistorted dumping margin as compared with the preliminary methodology. *See*, *e.g.*, *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 37 CIT ___, Slip Op. 13–30 at 10 (2013); *Mittal Steel Galati, S.A., v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308–09 (2007).

On remand, therefore, Commerce is hereby ordered: (1) to explain how the *Second Review* methodology for valuing Weihai's cores (purchased or produced) is "consistent" with the *First Reivew*; (2) to explain (a) why, given that companies operating with an NME are presumed distorted, "Weihai's NME experience . . . better reflects Weihai's experience of purchasing cores from NME suppliers than the methodology [Commerce] used in the Preliminary Results" and why that is a desirable goal, notwithstanding the absence of a challenge to Weihai's reported FOPs for its self-produced cores; and (3) to provide to the parties a full explanation of its chosen methodology in its draft final results of redetermination, together with either the calculations for the proposed final methodology or the relevant computer programming language that would encompass the same (since those calculations and/or the intended program appear integral not only to validating whether the computed output adheres to the described methodology but also to understanding the latter in the first place) or provide a full explanation detailing why release of either of those should be considered inappropriate (or otherwise) for comment on both the final determination and the draft final results of redetermination.

Notwithstanding the foregoing, of course, Commerce is not precluded from reconsidering the issue anew, should it choose to do so in its discretion.

Conclusion

In accordance with the foregoing, *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 36166 (Jun. 17, 2013) ("*Final Results*"), *as amended*, 78 Fed. Reg. 42930 (Jul. 18, 2013) , is hereby remanded to the International Trade Administration, U.S. Department of Commerce for further proceedings not inconsistent with this opinion. The results of remand shall be due

January 15, 2015. Within five (5) business days of such filing, the parties shall confer concerning a joint proposed scheduling order for comments, if any, on the results of remand, or indication of none, which the plaintiff shall submit by such time.

So ordered.

Dated: September 23, 2014
New York, New York

/s/ R. Kenton Musgrave
R. Kenton Musgrave, Senior Judge

Slip Op. 14–113

Rubbermaid Commercial Products LLC, Plaintiff, v. United States, Defendant.

Court No. 11–00463

[Granting Motion for Judgment on the Agency Record and remanding scope determination to agency]

Dated: September 23, 2014

Alexander H. Schaefer, Crowell & Moring LLP, of Washington, D.C., argued for Plaintiff. With him on the brief were *Daniel J. Cannistra*, Crowell & Moring LLP, and *R. Kevin Williams* and *Jessica R. Rifkin*, Clark Hill PLC, of Chicago, Illinois.

Tara K. Hogan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Joanna Theiss*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Rubbermaid Commercial Products LLC ("Rubbermaid") – a U.S. importer of certain cleaning system components – contests the determination of the U.S. Department of Commerce ("Commerce") that Rubbermaid's products are within the scope of the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China ("PRC"). *See* Antidumping (AD) and Countervailing Duty (CVD) Orders on Aluminum Extrusions from the People's Republic of China (PRC): Final Scope Ruling on Certain Cleaning System Components (Oct. 25, 2011) (IA Doc. No. 4) ("Final Scope Ruling").[1]

[1] For ease of reference, citations to the administrative record are to documents filed under

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which Rubbermaid argues that the merchandise at issue should be excluded from the coverage of the antidumping and countervailing duty orders ("the Orders") based on language defining the scope of the Orders to exclude "finished merchandise" and "finished goods kits." Rubbermaid contends that this matter should be remanded to Commerce with instructions to make a determination that the merchandise is excluded from the scope of the Orders. *See generally* Memorandum of Law in Support of Plaintiff's Motion for Judgment on the Agency Record ("Pl.'s Brief"); Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Pl.'s Reply Brief").

The Government opposes Rubbermaid's motion and maintains that Commerce's Final Scope Ruling is supported by substantial evidence and is otherwise in accordance with law, and thus should be sustained. *See generally* Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Brief").[2]

Jurisdiction lies under 28 U.S.C. § 1581(c) (2006).[3] For the reasons summarized below, Rubbermaid's Motion for Judgment on the Agency Record must be granted, and Commerce's Final Scope Ruling must be remanded for reconsideration.

I. *Background*

In May 2011, Commerce published antidumping and countervailing duty orders on aluminum extrusions from the PRC. *See* Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011) ("Antidumping Duty Order"); Aluminum Extrusions From the People's Republic of China:

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the antidumping case number (A-570–967), although the documents filed in the countervailing duty case are identically numbered. During the course of this proceeding, Commerce began using an electronic filing system known as IA ACCESS. Certain documents filed through IA ACCESS were submitted to the court under a separate index which was generated by IA ACCESS instead of Commerce's Central Records Unit (CRU). The indices of the documents provided by each of the two filing systems are not numbered sequentially within the administrative record. Thus, the administrative record is divided into two sections, with one designated as "CRU Doc. No. ___" for documents from the CRU index, and the other designated as "IA Doc. No. ___" for documents from the IA ACCESS index. The administrative record for this scope proceeding consists entirely of public information.

[2] The Aluminum Extrusions Fair Trade Committee – petitioners in the underlying administrative proceedings – submitted comments to Commerce concerning Rubbermaid's request for a scope ruling, and initially intervened as a defendant-intervenor in this action, representing the interests of domestic producers of subject merchandise. However, the Committee subsequently withdrew from the litigation.

[3] All citations to federal statutes are to the 2006 edition of the United States Code. Similarly, all citations to federal regulations are to the 2011 edition of the Code of Federal Regulations.

Countervailing Duty Order, 76 Fed. Reg. 30,653 (May 26, 2011) ("Countervailing Duty Order"). The Orders define the covered merchandise, in relevant part:

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of [a] finished goods "kit" . . . . The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.
>
> Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks . . . . Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

Antidumping Duty Order, 76 Fed. Reg. at 30,650–51; Countervailing Duty Order, 76 Fed. Reg. at 30,654.

The Orders expressly carve out exclusions from the scope of the Orders for certain merchandise, including "finished merchandise" and "finished goods kits." In particular:

> The scope . . . excludes *finished merchandise* containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "*finished goods kit*." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product.

Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphases added); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (emphases added).

After the Orders issued, Rubbermaid sought a ruling from Commerce that 13 of its products – containing aluminum extrusions, along with other components – are beyond the scope of the Orders. *See* Rubbermaid's Request for Scope Ruling at 2 (July 20, 2011) (CRU Doc. No. 2) ("Request for Scope Ruling"); Final Scope Ruling at 6–7.[4] The products include a variety of mop frames and handles, a squeegee blade replacement, and a mopping kit. Request for Scope Ruling at 2–3.[5] The mop frames and handles are specially designed to be interchangeable, and feature swiveling mounts that allow users to connect a mop frame, for instance, to any handle in Rubbermaid's cleaning system. *See id.* at 2. The products also give users the ability to "attach a variety of damp or dry mops and cleaning cloths to [any] frame." *Id.*

In the Request for Scope Ruling, Rubbermaid argued that all of its products are excluded from the scope of the Orders. *See* Request for Scope Ruling at 4–5. In particular, Rubbermaid argued that its mop frames and handles "fall squarely within the ["finished merchandise"] exclusion" because the products are "fully and permanently assembled with other components at the time of entry." *Id.* at 4; *see also id.* at 3 (stating that "[t]he frames, handles and mop handles are completely assembled and ready for sale to end-user[s] at the time of importation").

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[4] Rubbermaid's original scope inquiry request (dated July 7, 2011) was filed with Commerce on July 8, 2011. Rubbermaid Request for Scope Ruling (CRU Doc. No. 1). However, that original request referenced the wrong case numbers. At Commerce's request, Rubbermaid refiled – referencing the correct case numbers – on July 20, 2011. *See* Rubbermaid Request for Scope Ruling (CRU Doc. No. 2) ("Request for Scope Ruling").

[5] Describing its products in greater detail, Rubbermaid explained:

> The frame consists of a flat aluminum extrusion. Rounded plastic caps are attached to each end. These serve to protect walls and furniture. A swiveling, Quick-Connect mount is attached to the center of the frame. The mount allows the user to connect any Quick-Connect handle in the system to the frame. The user can attach a variety of damp or dry mops and cleaning cloths to the frame.
>
> The Quick-Connect handles are designed for quick attachment and detachment to the frame and other components of the HYGEN™ Microfiber Cleaning System. The Q750 handle includes one extruded aluminum tube. The Q745 and Q755 handles include two extruded aluminum tubes. One of the tubes is of a smaller diameter so that it will telescope inside the other. The telescoping tubes allow the user to adjust the length of the handle. All three Quick-Connect handles have a user friendly grip on one end and a quick-connect mechanism on the other. The quick-connect mechanism attaches to the frames used by the HYGEN™ system.
>
> [The] Q969 Rubbermaid Pulse™ mopping kit consists of an extruded aluminum tube, a trigger handle, a 21 ounce refillable reservoir and an 18″ Q560 wet/dry frame. The reservoir holds cleaning solution which the user can apply to the floor using the trigger handle.

Request for Scope Ruling at 2–3.

To determine whether a particular product is included within the scope of an antidumping or countervailing duty order, Commerce first analyzes the language of the order at issue. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (explaining that "a predicate for the interpretive process is language in the order that is subject to interpretation"). If the terms of the order alone are not dispositive, Commerce looks to the factors listed in 19 C.F.R. § 351.225(k)(1) – specifically, the descriptions of the merchandise included in the petition, in the initial investigation, and in determinations of Commerce and the International Trade Commission ("ITC"), including prior scope determinations. *See* 19 C.F.R. § 351.225(k)(1); *Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1376–77, 1379 (Fed. Cir. 2007).

If Commerce determines that a § 351.225(k)(1) analysis is dispositive, then Commerce issues a final scope ruling. When that analysis is not dispositive, however, Commerce considers the five additional criteria set forth in 19 C.F.R. § 351.225(k)(2), known as the *Diversified Products* criteria – (1) the physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. *See* 19 C.F.R. § 351.225(k)(2); *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983). In conducting the scope inquiry at issue here, Commerce found the § 351.225(k)(1) analysis to be dispositive, *i.e.*, that the physical description of the subject merchandise in the Orders and in the initial investigation, together with prior scope rulings, provided a sufficient predicate for an agency determination. *See generally* Final Scope Ruling.

In its Final Scope Ruling, Commerce determined that Rubbermaid's products are not excluded from the scope of the Orders. Final Scope Ruling at 9–10. As to Rubbermaid's cleaning system components other than mopping kits, Commerce first determined that individual cleaning system components (for example, a mop frame or a mop handle) "do not constitute a final, finished good." *Id.* at 9. Commerce recognized that Rubbermaid's various system components "are designed to function collaboratively [*i.e.*, in conjunction with one another] in order to form a completed cleaning device (*e.g.*, a pole connected to a frame head, which in turn is connected to a mop head or cloth)." *Id.* However, Commerce determined that, as imported, the merchandise does not include all components needed "to make a final cleaning device," such as a mop. *Id.* Commerce thus found that "the components to make a final cleaning device are not part of a packaged combination at the time of importation.” *Id.* As a result, Commerce concluded that Rubbermaid’s cleaning system components “do not meet the exclusion for ‘finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry.’” *Id.*

In reaching its determination, Commerce relied on two previous scope determinations relating to the Orders in question. Final Scope Ruling at 9 (citing Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the People’s Republic of China at 27–28 (comment 3.H) (April 4, 2011) (“Baluster Kits Determination”); Final Scope Ruling on Certain Retractable Awning Mechanisms (Oct. 14, 2011) (“Awnings Scope Ruling”)). The first determination, which assessed whether baluster kits met the exclusionary language for a “finished goods kit,” concluded that the baluster kits were not excluded from the scope of the Orders because the kits “represent[ed] a packaged collection of individual parts, . . . a single element of a railing or deck system,” rather than a “finished product” such as a complete railing or deck system. Baluster Kits Determination at 27–28; *see also* Final Scope Ruling at 5. The second determination, assessing whether certain imported retractable awning mechanisms met the exclusionary language for “finished goods kit,” concluded that the awning mechanisms were not excluded because, at the time of importation, the mechanisms “lack[ed] the integral components [*i.e.*, the textile awnings] necessary to assemble . . . full and complete finished goods kit[s].” Awnings Scope Ruling at 9–10; *see also* Final Scope Ruling at 6. In the Final Scope Ruling at issue here, Commerce found Rubbermaid’s products to be “no different” than the products addressed in the Baluster Kits Determination and the Awnings Scope Ruling. *See* Final Scope Ruling at 9 (citing Baluster Kits Determination; Awnings Scope Ruling).

As to Rubbermaid’s mopping kits, Commerce concluded that they do not constitute “finished goods kits” because, although each kit includes “a tube, a trigger handle, a soap reservoir, and a wet/dry frame on which disposable mops are attached,” there are no disposable mop heads or mop ends included in the kits at the time of importation. Final Scope Ruling at 9. And, according to Commerce, “[a] complete mopping kit would require inclusion of a mop end to meet the exclusionary language that defines a finished goods kit.” *Id.*

Because Commerce ruled that Rubbermaid’s cleaning system components and mopping kits do not fall within the Orders’ express exclusions for “finished merchandise” and “finished goods kits,” Rubbermaid’s products are subject to antidumping and countervailing duties as merchandise within the scope of the Orders. *See* Final Scope Ruling at 9–10.

II. *Standard of Review*

In an action reviewing a scope determination by Commerce, the agency's determination must be upheld except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same). Moreover, any evaluation of the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). That said, the mere fact that it may be possible to draw two inconsistent conclusions from the record does not prevent Commerce's determination from being supported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

While Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319–20. Nevertheless, "the path of Commerce's decision must be reasonably discernable" to support judicial review. *Id*. (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see generally* 19 U.S.C. § 1677f(i)(3)(A) (requiring Commerce to "include in a final determination . . . an explanation of the basis for its determination").

In scope determinations, Commerce "enjoys substantial freedom to interpret and clarify its . . . orders," but Commerce "cannot 'interpret' an . . . order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *See Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); *Duferco Steel*, 296 F.3d at 1095 (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001)). Antidumping and countervailing duty orders "may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel*, 296 F.3d at 1089.

III. *Analysis*

Rubbermaid contends that Commerce's Final Scope Ruling erred in determining that the 13 products at issue do not fall within either the "finished merchandise" exclusion or the "finished goods kit" exclusion, and are thus subject to antidumping and countervailing duties pursuant to the Orders. As outlined below, Rubbermaid maintains that all but one of the 13 products fall within the "finished merchandise" exclusion. The exception is Rubbermaid's Q969 Pulse™ Mopping Kit, which – unlike the other products at issue – is not entered into the U.S. as fully assembled merchandise. According to Rubbermaid, this final item falls within the scope of the exclusion for "finished goods kits."

As explained in greater detail below, Commerce's Final Scope Ruling cannot be sustained, and this matter must be remanded to the agency for further consideration.

A. *Final Scope Ruling on "Finished Merchandise" Exclusion*

Rubbermaid contends that, other than its Q969 Pulse™ Mopping Kit, all of the merchandise at issue falls within the first of the two exclusions at issue here – specifically, the "finished merchandise" exclusion, which covers "finished merchandise, containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *See generally* Pl.'s Brief at 8–11, 12–31; Pl.'s Reply Brief, *passim*.

In support of its claim that Commerce erred in ruling to the contrary, Rubbermaid advances four basic arguments. Rubbermaid first contends that Commerce conflated the "finished merchandise" exclusion and the second exclusion at issue in this case – *i.e.*, the exclusion for "finished goods kits." Rubbermaid also takes issue with Commerce's focus on the fact that the merchandise at issue is designed to be used in conjunction with other merchandise. Rubbermaid further claims that Commerce's rationale effectively precludes merchandise that is designed to be adaptable/interchangeable from being considered "finished merchandise." In addition, Rubbermaid proffers its own definition of "finished merchandise," and relies on that definition to support its assertion that the merchandise in question falls within the "finished merchandise" exclusion.

Each of Rubbermaid's four arguments is addressed in turn below.

1. *Alleged Conflation of Two Exclusions*

Rubbermaid first claims that Commerce's analysis in the Final Scope Ruling conflated the "finished merchandise" exclusion and the "finished goods kit" exclusion, which – according to Rubbermaid – have significantly different terms. Rubbermaid contends that Commerce, in effect, defined the term "finished merchandise" (as the term is used in the "finished merchandise" exclusion) by reading into it language that appears only in the exclusion for "finished goods kits." *See generally* Pl.'s Brief at 8–9, 12–16; Pl.'s Reply Brief at 1–2.

Rubbermaid emphasizes that the requirement that imported merchandise "contains, at the time of importation, all of the necessary parts to fully assemble a final finished good" is central to the "finished goods kit" exclusion, but that the requirement "is found nowhere in the language of the 'finished merchandise' exclusion." Pl.'s Brief at 13–14; *see also* Pl.'s Reply Brief at 2–3, 5; Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654. Rubbermaid argues that, rather than defining the term "finished merchandise" as that term is used in the "finished merchandise" exclusion, Commerce instead "concluded that Rubbermaid's goods did not satisfy the ["finished merchandise" exclusion] based on factors specified in the *second*, separate[] exclusion, that for finished goods kits." Pl.'s Brief at 14; *see also* Pl.'s Reply Brief at 2–4.

In support of its argument, Rubbermaid notes that Commerce's analysis in the Final Scope Ruling here relied very heavily on two prior determinations: the agency's Awnings Scope Ruling and the agency's Baluster Kits Determination, both of which involved the "finished goods kit" exclusion and therefore concerned, *inter alia*, whether the merchandise at issue in each case "contain[ed], at the time of importation, all of the necessary parts to fully assemble a final finished good." *See* Pl.'s Brief at 14–15; Pl.'s Reply Brief at 3. As the Final Scope Ruling explained, Commerce determined in the Awnings Scope Ruling that the awning mechanisms there at issue "lacked the integral components necessary to assemble full and complete finished goods kits, and, thus[] . . . 'did not constitute a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good.'" Final Scope Ruling at 9 (quoting Awnings Scope Ruling at 9–10). As such, Commerce determined that the awning mechanisms did not fall within the "finished goods kit" exclusion and thus were covered by the Orders. The Final Scope Ruling similarly explained that the merchandise at issue in the Baluster Kits Determination fell within the scope of the Orders because the merchandise was a "packaged collection of individual parts, which comprised [only] a single element of a railing or deck system," and did not contain all necessary parts for such a system. Final Scope Ruling at 9 (quoting Baluster Kits Determination at 28).

Rubbermaid notes that, after briefly summarizing the Awnings Scope Ruling and the Baluster Kits Determination, the Final Scope Ruling concluded that Rubbermaid's goods do not fall within the "finished merchandise" exclusion because – according to Commerce – Rubbermaid's goods "*are no different* from those addressed in [the Baluster Kits Determination] and the Awning[s] Scope Ruling," in that "[i]ndividually, the cleaning system components at issue do not constitute a final, finished good" and "*the components to make a final cleaning device are not part of a packaged combination at the time of importation*." *See* Pl.'s Brief at 15 (quoting Final Scope Ruling at 9) (emphases added by Plaintiff); *see also* Pl.'s Reply Brief at 3–4.

Rubbermaid reads that latter statement (*i.e.*, that "the components to make a final cleaning device are not part of a packaged combination at the time of importation") as a restatement of the requirement that, to fall within the "finished goods kit" exclusion, merchandise must "contain, at the time of importation, all of the necessary parts to fully assemble a final finished good." *See* Pl.'s Brief at 15–16; Pl.'s Reply Brief at 4. Rubbermaid protests that "the Orders do *not* require that goods falling within the first exclusion (the 'finished merchandise' exclusion) 'contain, at the time of importation, all of the necessary parts to fully assemble a final finished good.'" Pl.'s Brief at 16 (quoting Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654); *see also* Pl.'s Reply Brief at 2. To the contrary, according to Rubbermaid, the Orders "require only that goods falling within the first exclusion be finished goods which are fully and permanently assembled and completed at the time of entry" – a test that Rubbermaid asserts its goods "amply met." Pl.'s Brief at 16.

As Rubbermaid points out, there are striking differences between the language of the "finished merchandise" exclusion and the language of the "finished goods kit" exclusion, including, in particular, the language that Rubbermaid highlights that requires that, to fall within the "finished goods kit" exclusion, merchandise must "contain[], at the time of importation, all of the necessary parts to fully assemble a final finished good."[6] It is also true, as Rubbermaid notes, that Commerce's analysis in the Final Scope Ruling here cited only

[6] Rubbermaid further observes that "[t]he goods covered by the first exclusion are simply described as 'finished merchandise,'" while "the goods covered by the second exclusion are described . . . as kits containing all of the necessary parts to fully assemble a 'final finished good,'" which Rubbermaid asserts is "a different standard than a 'finished good.'" Pl.'s Brief

prior determinations that involved the "finished goods kit" exclusion, and that the language that the agency used in the Final Scope Ruling was much closer to the language of the "finished goods kit" exclusion than it was to the language of the "finished merchandise" exclusion. Indeed, in addition to the general phrasing that Rubbermaid emphasizes, the Final Scope Ruling specifically concluded that Rubbermaid's merchandise is not a "final, finished good" (a term used in the "finished goods kit" exclusion, but conspicuously absent from the "finished merchandise" exclusion), and also made reference to "a packaged combination" (again, a term used in the "finished goods kit" exclusion, but missing from the "finished merchandise" exclusion). *Compare* Final Scope Ruling at 9 *and* Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654.

All in all, Rubbermaid makes out a reasonably colorable case that, in evaluating whether the merchandise at issue falls within the "finished merchandise" exclusion, Commerce subjected that merchandise to a requirement that is relevant only to the "finished goods kit" exclusion. The Government, on the other hand, maintains that Commerce's Final Scope Ruling did not conflate the two exclusions. The Government argues that, at the time of the Final Scope Ruling, Commerce had not yet issued a determination concerning the "finished merchandise" exclusion, and that it was therefore entirely appropriate for the agency here to rely on the Awnings Scope Ruling and Baluster Kits Determination, even though both of those determinations concerned only the "finished goods kit" exclusion. *See* Def.'s Brief at 13–14. The Government characterizes the language of the two exclusions as "very similar," and asserts that the sole difference between the two is that the "finished merchandise" exclusion covers merchandise that contains aluminum extrusions as parts and is "fully and permanently assembled at entry" while the "finished goods kit" exclusion covers merchandise that contains aluminum extrusions as parts and is "unassembled at entry." *See id.* at 12–13.

There is a seductive logic and symmetry to the notion that the two exclusions are intended to largely parallel one another, with one exclusion addressed to merchandise that is already assembled at the time of entry and the other exclusion addressed to merchandise that is unassembled. However, if that was Commerce's intent, the agency could have made that intention more clear, by using much the same

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at 16 n.2. In other words, the two exclusions at issue here use three similar but different terms – "finished merchandise," "finished goods," and "final finished goods" – with no indication as to whether, or how, their meanings differ.

terminology in the two provisions. It is an elementary canon of construction that, if the same language is used in two different provisions, the language is presumed to have the same meaning. *See generally* 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 46:6 (7th ed. 2014). By the same token, where – as here – the language that is used is different, it is reasonable to assume that different meanings were intended.

In any event, the Government's explanation of the relationship between the two exclusions must be disregarded as impermissible *post hoc* rationale. It is black letter law that an agency determination cannot be sustained on the basis of a rationale supplied after-the-fact by litigation counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). As the Supreme Court has explained, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.

On the strength of the existing record, it is impossible to say whether or not Commerce applied the proper test in determining that Rubbermaid's merchandise does not fall within the "finished merchandise" exclusion. On the strength of the existing record, it is not even possible to discern Commerce's definition of "finished merchandise." Accordingly, Rubbermaid's motion must be granted as to its claim concerning the "finished merchandise" exclusion, and this matter must be remanded to Commerce to afford the agency the opportunity to address Rubbermaid's arguments directly and in detail, and, among other things, to permit the agency to supply a clear and cogent definition of "finished merchandise" (and other key terms, as necessary), to clarify the reach of the "finished merchandise" exclusion, to explain the relationship between the "finished merchandise" exclusion and the "finished goods kit" exclusion (taking into consideration the differences in the language of the two provisions), and, if appropriate, to reconsider the agency's determination on the applicability of the "finished merchandise" exclusion to the merchandise at issue here.

2. *Treatment of Merchandise Designed to Function in Conjunction With Other Merchandise*

Rubbermaid further contends that Commerce erred in the Final Scope Ruling by (implicitly) defining "finished merchandise" to exclude all merchandise that is designed to function collaboratively, "in conjunction with other parts" or components that are not included at the time of importation. *See generally* Pl.'s Brief at 21–25; Pl.'s Reply Brief at 2. Rubbermaid argues that Commerce determined that the merchandise at issue does not fall within the "finished merchandise" exclusion because the products are "designed to function collaboratively in order to form a completed cleaning device" and "the components to make a final cleaning device are not part of a packaged combination at the time of importation." *See* Pl.'s Brief at 21 (quoting Final Scope Ruling at 9). Stressing that its products are "missing no parts required to perform their functions as mop handles, mop frames, etc." and that the products are not "subject to any further manufacturing or processing," Rubbermaid challenges Commerce's conclusion that the products "cannot be finished merchandise because they are designed to function in conjunction with other parts." Pl.'s Brief at 21.

As a threshold matter, Rubbermaid asserts that there is nothing in the "common meaning" of the terms "finished goods" and "finished merchandise" which would limit those terms to only those goods that are not intended to be attached to, or used in conjunction with, other merchandise. Pl.'s Brief at 21.[7] The Government does not dispute this point.

Rubbermaid also argues that defining "finished merchandise" in such a way as to exclude merchandise simply because that merchandise is designed to function collaboratively, "in conjunction with other parts" or components that are not included at the time of importation contravenes the language of the Orders themselves. Rubbermaid notes in particular that the scope language in the Orders lists "finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels" as examples of "finished merchandise" containing aluminum extrusions as parts that fall within the "finished merchandise" exclusion. *See* Pl.'s Brief at 22. And Rubbermaid argues that – like the Rubbermaid products at issue here – each and every one of the examples of products covered by the "finished merchandise" exclusion that are listed in the Orders "must be attached to or work in conjunction with other goods in order to fulfill its ultimate intended function." *Id.* Thus, Rubbermaid concludes, sustaining the construction of the "finished merchandise" exclusion that Commerce set forth in the Final Scope Ruling here "would render the portion of the Orders listing examples of finished goods excluded from the Orders a nullity, because none of the[] enumerated goods would be able to meet the 'test' used by [Commerce] in

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[7] Rubbermaid argues that – if "finished goods" and "finished merchandise" were interpreted to limit the terms to only those goods that are not intended to be attached to, or used in conjunction with, other merchandise – "goods that are widely considered by the commercial world to be 'finished,' such as, for example, seats to be installed in automobiles, batteries to be installed in radios, bearings for use in machinery, etc., could never be considered 'finished,' but would only be considered to be 'intermediate goods.'" Pl.'s Brief at 21–22.

the Scope Ruling." *Id.*

The Government casts Rubbermaid's position as a slippery slope. According to the Government, "Rubbermaid's interpretation of 'finished' as including any aluminum extrusions product that is fabricated and identified by an end-use, such as a mop frame, renders all products 'finished,' in opposition to the language of the scope of the Orders, which includes parts for final finished goods." Def.'s Brief at 11.[8] *But see* Pl.'s Reply Brief at 11–12, 12–14. However, the Government ignores the elephant in the room. To date, neither Commerce nor the Government has made any effort to explain how or why the fact that Rubbermaid's products "must be attached to or work in conjunction with other goods in order to fulfill [their] ultimate intended function[s]" precludes Rubbermaid's merchandise from falling within the "finished merchandise" exclusion, when – at the same time – each of the referenced examples of products listed in the Orders as covered by the "finished merchandise" exclusion also "must be attached to or work in conjunction with other goods in order to fulfill its ultimate intended function."

As Rubbermaid aptly observes: "'Finished windows with glass' cannot serve their function (to allow the occupants of a room or building to view outside that room or building) until they are attached to a window frame, and, ultimately to a house or building. 'Doors with glass or vinyl' cannot serve their function (to allow or bar ingress to or egress from a room or building) until they are attached to a door frame, and again, to a house or building. 'Picture frames with glass pane and backing material' cannot serve their ultimate function (to display pictures or other graphic material of [a user's] choice) until the user inserts the picture or other graphic material into the picture frame. 'Solar panels' cannot serve their ultimate function (to collect solar energy) until they are installed in or attached to the roof a

[8] For example, the scope language of the Orders states (in relevant part):

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture. Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of [a] finished goods "kit" . . . . The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.
>
> Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks . . . . Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

Antidumping Duty Order, 76 Fed. Reg. at 30,650–51; Countervailing Duty Order, 76 Fed. Reg. at 30,654.

building or house." Pl.'s Brief at 22; *see also* Pl.'s Reply Brief at 5–6, 13.

The question that lies at the heart of this case is this: If – as Commerce ruled here – Rubbermaid's products are not "finished merchandise" but are instead (in essence) "mop parts," why are doors and windows "finished merchandise" and not mere "house parts" or "building parts"? Thus far, Commerce and the Government have offered little more than *ipse dixit*. It seems that Commerce's position on "finished merchandise" is akin to Justice Potter Stewart's take on obscenity – Commerce can't define it, but it "know[s] it when [it] see[s] it." *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

On remand, Commerce shall reconsider its analysis of the "finished merchandise" exclusion and its application to merchandise that is designed to function in conjunction with other merchandise that is not included at the time of importation, and, among other things, shall articulate a clear and coherent rationale for distinguishing between Rubbermaid's merchandise and the examples of goods listed in the Orders as falling within the "finished merchandise" exclusion (assuming that the agency continues to draw such a distinction).

In a related argument, Rubbermaid emphasizes the fact that the domestic producers' Petition in the underlying antidumping and countervailing duty investigations distinguished between *finished goods* containing aluminum extrusions (which were to be excluded from the scope of the Orders) and *intermediate goods* containing aluminum extrusions (which were to fall within the scope of the Orders). *See* Pl.'s Brief at 23–24 (citing Petition For The Imposition of Antidumping And Countervailing Duties Against Aluminum Extrusions From The People's Republic of China (March 31, 2010) ("Petition")). That distinction between excluded finished goods and included intermediate goods was consistent with the Petition's description of the physical characteristics and uses of the domestic like product: "The extrusions produced generally serve as intermediate parts in a wide range of downstream products." *See* Pl.'s Brief at 24 (quoting Petition at 17). To the same end, Rubbermaid also points to the Preliminary Report of the U.S. International Trade Commission ("ITC") in the underlying investigations, which stated that the aluminum extrusions subject to investigation "*are all used as inputs* (*i.e.*, *an intermediate product*) *in the production of downstream products*." *See* Pl.'s Brief at 24 (quoting Certain Aluminum Extrusions From China: Investigation Nos. 701-TA-475 and 731-TA-1177 (Preliminary), USITC Pub. 4153 at I-8 – I-9 (June 2010) ("ITC Preliminary Report" or "ITC Report")) (emphasis added by Plaintiff).

Rubbermaid invokes the evidence summarized above as additional support for its claim that Commerce erred in the Final Scope Ruling by (in effect) treating Rubbermaid's merchandise as "intermediate goods" solely because the products function only in conjunction with other merchandise. Rubbermaid argues that "the common and commercial understanding of an 'intermediate' good . . . does *not* encompass fully . . . manufactured, finished products" such as the merchandise at issue here. Pl.'s Brief at 24. To illustrate its point, Rubbermaid cites to a U.S. Department of Labor source for the proposition that the "category of intermediate materials, supplies, and components consists partly of already processed commodities that require further processing. Examples of such semifinished goods include flour, cotton yarn, steel mill products, and lumber." *Id.* (citing Bureau of Labor Statistics). Rubbermaid states that, according to the Labor Department source, "[t]he intermediate goods category also encompasses nondurable, physically complete goods purchased by business firms as inputs for their operations. Examples include diesel fuel, belts and belting, paper boxes, and fertilizers." Pl.'s Brief at 24–25 (citation omitted).

Rubbermaid sums up by asserting that its mop handles and mop frames "are clearly not 'semifinished' *intermediate* goods that require further processing, nor are they goods such as diesel fuel that [is] consumed as [an] input[] for business operations." Pl.'s Brief at 25. To the contrary, according to Rubbermaid, its products are "finished, completely manufactured products ready for sale to the ultimate consumer." *Id.* Rubbermaid concludes that the Final Scope Ruling improperly "treated *finished* goods as *intermediate* goods, in derogation of the clear division between the two outlined in the Petition." *Id.*

The Government treats Rubbermaid's argument as little more than a straw man. The Government first reduces the argument to a bare claim that "the Petition demonstrates that the scope [of the Orders] was not intended to include 'fully assembled finished goods containing aluminum extrusions.'" *See* Def.'s Brief at 14.[9] The Government

[9] The Government raises an initial objection to Rubbermaid's reliance on the language of the Petition and the ITC Report, asserting that Rubbermaid "did not argue during the scope proceeding that these sources supported the exclusion of its products, and so failed to exhaust its administrative remedies," but then proceeds to address the merits of Rubbermaid's points. *See* Def.'s Brief at 14. Rubbermaid responds that it "fully raised the issue (that its products are finished goods and therefore must be excluded from the scope as 'finished merchandise') for which these sources [*i.e.*, the Petition and the ITC Report] are cited as support in [Rubbermaid's] submissions in the scope proceeding," which (Rubbermaid contends) were "more than adequate to apprise [Commerce] of the issue to which it

then responds by "agree[ing] that finished merchandise is excluded from the scope of the Orders," but asserting that "this fact does not assist Rubbermaid because its products are not finished merchandise." *Id.* Rubbermaid's arguments and evidence merit greater consideration.

As to Rubbermaid's reliance on the language in the ITC Report indicating that the aluminum extrusions which were subject to the investigations "are all used as inputs (*i.e.*, an intermediate product) in the production of downstream products," the Government quotes language elsewhere in the same report stating that "aluminum extrusions are used in a wide variety of applications." *See* Def.'s Brief at 14–15 (quoting ITC Preliminary Report). But the language that the Government quotes does not in any way diminish the significance of the excerpt on which Rubbermaid relies. On remand, Commerce shall take into account Rubbermaid's points concerning the language of the Petition and the ITC Report, and shall reflect the agency's consideration of those points in the agency's remand determination.

3. *Treatment of Merchandise Specifically Designed to Be Adaptable and Interchangeable*

Rubbermaid also argues that Commerce's (implicit) definition of "finished goods" in the Final Scope Ruling is flawed because – to the extent that (as here) some component is not included in the merchandise as imported – Commerce's definition excludes merchandise that is designed to be adaptable, interchangeable, and flexible, and thus limits "finished goods" to merchandise that is designed to be permanently assembled (and not adaptable, interchangeable, and flexible). *See generally* Pl.'s Brief at 25–31; Pl.'s Reply Brief at 6–8.

Rubbermaid argues that – unlike conventional cleaning products – its products are specifically designed "to provide ultimate flexibility and adaptability to the ultimate consumer, and to be connected, disconnected, and reconnected in whichever combination best suits the consumer's cleaning needs at any particular time." Pl.'s Brief at 25; *see also id*. at 26–27. As Rubbermaid explains, "[t]here is no one 'permanent' combination of the various components" of Rubbermaid's cleaning system; "rather, the components are designed to be assembled and reassembled to meet the user's changing needs at any

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would specifically need to respond." Pl.'s Reply Brief at 12 n.3. Even more to the point, however, Rubbermaid underscores that the specific sources in question – *i.e.*, the Petition and the ITC Report – are documents that 19 C.F.R.§ 351.225(k)(1) obligated Commerce to consider in any event. *Id*.

particular point in time." *Id.* at 27. Under such circumstances, Rubbermaid maintains, "the presence or absence of any particular component at importation cannot serve as any reasonable basis for a conclusion that the components are not 'finished merchandise.'" *Id.*

To buttress its argument on this point, Rubbermaid relies on two scope rulings issued by Commerce in cases where the merchandise at issue could serve its ultimate function only when used in conjunction with some component not included with the merchandise at the time of importation – the Banner Stands Ruling and the EZ Fabric Wall Systems Ruling. *See generally* Pl.'s Brief at 2731 (discussing Final Scope Ruling on Banner Stands and Back Wall Kits (Oct. 19, 2011) ("Banner Stands Ruling"); Final Scope Ruling on EZ Fabric Wall Systems (Nov. 9, 2011) ("EZ Fabric Wall Systems Ruling")); *see also* Pl.'s Reply Brief at 6–8. Because the merchandise at issue was designed to be modified or adapted according to the end user's specifications and needs, Commerce found in both cases that it would be unreasonable for the agency to conclude that the absence of an interchangeable component precluded treatment of the goods as "finished good kits" for purposes of the "finished goods kit" exclusion.

The merchandise at issue in the Banner Stands Ruling consisted of banner stands and back wall kits that were designed to showcase graphics and other marketing materials at trade shows and exhibitions. Banner Stands Ruling at 7. At the time of importation, the merchandise included a base, a folding pole, and top trim, but was missing graphics and marketing materials. *Id.* Commerce ultimately found that the merchandise was specifically designed to incorporate interchangeable graphic materials, depending on the particular user's needs. *Id.* at 10. Commerce therefore determined that it was not reasonable to require that the merchandise "be accompanied with affixed graphical material that cannot be removed or altered at a later date" in order for the merchandise to be treated as "finished goods kits" for purposes of the "finished goods kit" exclusion. *Id.* Commerce concluded that the banner stands and back wall kits at issue were excluded from the scope of the Orders. *Id.* at 1, 9–11; *see generally* Pl.'s Brief at 27–28; Pl.'s Reply Brief at 7.

Similarly, at issue in the EZ Fabric Wall Systems Ruling were temporary commercial displays which were designed to incorporate fabric panels with printed graphics. EZ Fabric Wall Systems Ruling at 7. At the time of importation, the merchandise included wall units, headers, and columns, but fabric panels were missing. *Id.* at 7, 10. In its scope ruling, Commerce found that the fabric panels were not integral, permanent parts of the wall systems. *Id.* at 10. Commerce therefore determined that it was not reasonable to rule that the status of the wall systems as "finished goods kits" was dependent on whether or not "readily interchangeable fabric covers with graphics" accompanied the merchandise at the time of importation. *Id.* As with the merchandise at issue in the Banner Stands Ruling, Commerce concluded that the merchandise at issue in the EZ Fabric Wall Systems Ruling was excluded from the scope of the Orders as "finished goods kits," notwithstanding the fact that – due to the merchandise's interchangeable design – the merchandise as imported did not include all components necessary for it to serve its intended function. *Id.*; *see generally* Pl.'s Brief at 28–30; Pl.'s Reply Brief at 7.

For much the same reasons articulated by Commerce in the Banner Stands Ruling and in the EZ Fabric Wall Systems Ruling, Rubbermaid contends that "it was unreasonable for the [agency] to in essence require that [the company's] cleaning system components be imported in any one particular configuration so as to be considered out-of-scope merchandise," because those components "are not designed to be permanently affixed or combined in any one combination." Pl.'s Reply Brief at 7. To the contrary, Rubbermaid's cleaning system components "are designed to be flexible, replaceable, and interchangeable, and to be configured and reconfigured according to the end user's particular cleaning needs over the life of the products." *Id.*

Neither the Banner Stands Ruling nor the EZ Fabric Wall Systems Ruling was addressed in the Final Scope Ruling here.[10] And the Government's brief gives the two rulings very short shrift. The Government argues that the scope language in the Orders "makes no distinction as to whether [the] assembly [of subject merchandise assembled after importation] is permanent or flexible." Def.'s Brief at 15. In addition, the Government argues that, in both the Banner Stands Ruling and the EZ Fabric Wall Systems Ruling, the merchandise in question was display kits and the missing components were "graphical material" which was "meant to be created and inserted by a downstream consumer after importation." *See id.* The Government thus seeks to distinguish the two cases that Rubbermaid cites from the facts of this case, asserting that the missing components in the other two cases were created by the user, and were not "known and limited to" a manufacturer's specific parts, as in this case. *Id.* at 15–16.

The Government's arguments are unavailing. To the extent that the Government suggests that it is immaterial whether the assembly of merchandise following importation is "permanent or flexible," the

[10] Although the EZ Fabric Wall Systems Ruling post-dated the Final Scope Ruling in this case, the Banner Stands Ruling was issued prior to the Final Scope Ruling.

Government seems to miss the point of the two rulings, which focused on – and gave great weight to – the flexible, adaptable, interchangeable nature of the merchandise. Thus, as Rubbermaid puts it, the gravamen of the two rulings is that "finished goods which must work in combination with other goods to form a flexible, interchangeable system are not rendered mere in-scope 'parts' simply because some of the components of the combination are missing at the time of importation." *See* Pl.'s Reply Brief at 7–8.

The Government's attempt to distinguish the facts of the other two cases from the facts here is equally lacking in substance. Contrary to the Government's implication, Commerce did not base its rulings in those cases on the fact that the components missing at the time of importation were to be "created by the customer." *See* Def.'s Brief at 15–16. Instead, the focus of Commerce's rulings was on the fact that – like Rubbermaid's components here – "the graphic material was designed to be impermanent and replaceable, and . . . that the *entire system* [therefore] was designed to be flexible and interchangeable." Pl.'s Reply Brief at 8.

On remand, Commerce shall consider Rubbermaid's arguments concerning the interchangeable and adaptable design of the company's merchandise directly and in detail, in light of the Banner Stands Ruling and the EZ Fabric Wall Systems Ruling (in addition to any other rulings, as appropriate), and the agency shall reflect that review in its remand determination.

4. *Rubbermaid's Proposed Definition of "Finished Merchandise"*

Quite apart from Rubbermaid's numerous attacks on the (implicit) definition of "finished merchandise" that Commerce applied in the Final Scope Ruling here (discussed above), Rubbermaid also proposes its own definition of "finished merchandise" and argues that its products satisfy that definition. Specifically, relying on dictionaries and other specialized lexicographic sources, Rubbermaid argues that "finished merchandise" ("finished goods") means "goods as to which the manufacturing process has been fully completed, ready for sale to the ultimate user." Pl.'s Brief at 17; *see generally id.* at 17–20. Rubbermaid further asserts that each of its products at issue meets the definition of "finished merchandise" that it proposes, because, *inter alia*, its products are "at the time of importation, complete, and will undergo no further assembly, processing, or manufacture"; because each product "at the time of importation, contains all necessary parts and properties to perform its function as a mop handle or mop frame"; and because each product "is, at the time of importation, intended and ready for sale (through Rubbermaid's distributors) to the ultimate consumer, who after purchase will configure and reconfigure the components in whichever combination is required to meet the consumer's cleaning needs." *Id.* at 19–20.

The Government objects that Rubbermaid's proposed definition of "finished merchandise" "would exclude any aluminum extrusion with an identified end-use that is ready for use at the time of importation" and argues that the proposed definition therefore must be rejected because, according to the Government, the proposed definition would effectively nullify portions of the scope language in the Orders. *See* Def.'s Brief at 10; *see also id.* at 9 (noting that scope language of Orders includes "subject aluminum extrusions [that] are described at the time of importation as parts for final finished products that are assembled after importation" and aluminum extrusions that are "identified with reference to their end use"). The Government quotes the scope language in the Orders which specifies that aluminum extrusions are "subject merchandise if they otherwise meet the scope definition, *regardless* of whether they are ready for use at the time of importation." *Id.* at 10–11 (quoting Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654). *But see* Pl.'s Brief at 20 n.4 (analyzing the scope language on which the Government relies); Pl.'s Reply Brief at 8–10.

Whatever may be the merits of the Government's position, it is not sufficient for Commerce (or the Government) to content itself with poking holes in definitions that Rubbermaid or other parties proffer. If Commerce is going to rule (as it has) that Rubbermaid's products are not "finished merchandise," then it is incumbent upon Commerce to affirmatively define that term (as well as any other terms on which the agency's rationale relies). In any event, there is no need to reach the substance of the parties' respective positions at this time. Defining "finished merchandise" is properly the prerogative of Commerce – not Rubbermaid, and not the court – at least in the first instance. On remand, Commerce shall do so in accordance with all instructions above, and taking into account Rubbermaid's proposed definition of the term. *See generally Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) (explaining that court accords substantial deference to Commerce's interpretation of its own orders); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998) (noting that "the order's meaning and scope are issues particularly within [Commerce's] expertise").

B. *Final Scope Ruling on Exclusion for "Finished Goods Kits"*

The last of the 13 pieces of merchandise subject to this action is Rubbermaid's Q969 Pulse™ Mopping Kit, which Rubbermaid contends falls under the second of the two exclusions at issue here – specifically, the "finished goods kit" exclusion. Pl.'s Brief at 31 n.5. That exclusion covers "finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit,'" which, in turn, is described in the Orders (in relevant part) as "a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, . . . and is assembled 'as is' into a finished product." Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654.[11]

In its Final Scope Ruling, Commerce concluded that Rubbermaid's mopping kits do not constitute "finished goods kits," because – even though the kits include "a tube, a trigger handle, a soap reservoir, and a wet/dry frame" – the kits "lack . . . disposable mop ends at the time of importation" and, according to Commerce, "[a] complete mopping

[11] As noted above, according to Rubbermaid, the Pulse™ Mopping Kit is the only one of the 13 items at issue that is not entered into the U.S. as fully assembled merchandise, which is why Rubbermaid contends that it is excluded from the scope of the Orders under the "finished goods kit" exclusion (rather than the "finished merchandise" exclusion). *See*, *e.g.*, Pl.'s Brief at 14 (explaining that, "[w]ith the exception of a single product (the Rubbermaid Pulse Mopping Kit . . .), the products [at issue] are imported fully, completely, and permanently assembled," and that Rubbermaid therefore claimed in its Request for Scope Ruling that all merchandise other than the Pulse™ Mopping Kit "fell within the *first* exclusion, for finished merchandise"); Pl.'s Reply Brief at 5 (stating that, "[w]ith the exception of the mopping kit, Rubbermaid's goods did not enter unassembled").

In its briefs in this forum, Rubbermaid is crystal clear that the Pulse™ Mopping Kit is the only piece of merchandise that it claims is covered by the exclusion for "finished goods kits." *See*, *e.g.*, Pl.'s Brief at 9 (stating that, "[w]ith the exception of one product (the Rubbermaid Pulse Mopping Kit), Rubbermaid demonstrated that all of the goods for which it sought a scope ruling fell within the ["finished merchandise"] exclusion"); *id*. at 14 (explaining that "Rubbermaid explicitly and specifically claimed when seeking the scope ruling that with the exception of the Rubbermaid Pulse Mopping Kit, its goods fell within the . . . exclusion . . . for finished merchandise"); *see also* Pl.'s Reply Brief at 4 n.1 (noting that, in its Request for Scope Ruling, "Rubbermaid claimed that the 'finished goods kit' exclusion applied to one imported product, a mopping kit"); *id*. at 5 (stating that, "[w]ith the exception of the mopping kit" (singular), "Rubbermaid's goods did not enter unassembled").

However, it appears that – in the Final Scope Ruling – Commerce analyzed two other Rubbermaid products under the rubric of "mopping kits," in addition to the Pulse™ Mopping Kit. *See* Final Scope Ruling at 9 n.11 (referring to the "Q979 Flow Finish Flow Kit Flat" and the "Q989 Flow Finish Kit String," in addition to the "Q969 Rubbermaid Pulse Mopping Kit"); *see also* Def.'s Brief at 3–4 (stating that Rubbermaid "imports a mopping kit, which includes an aluminum extrusions tube, a trigger handle, a reservoir and a wet/dry frame, as well as two other mopping kits, both of which include a frame, handle, and portable reservoir").

kit would require inclusion of a mop end to meet the exclusionary language that defines a finished goods kit." Final Scope Ruling at 9. But Rubbermaid argues that – much like the graphic material and the fabric walls that were missing from the merchandise at issue in the Banner Stands Ruling and in the EZ Fabric Wall Systems Ruling – the disposable mop ends or mop heads that are not included in Rubbermaid's mopping kit are "specifically designed to be impermanent, disposable, and replaceable." Pl.'s Brief at 30; *see also id*. at 31 n.5 (citing EZ Fabric Wall Systems Ruling for proposition that a component that is interchangeable is not a necessary component under the exclusionary language for "finished goods kit").

As discussed in section III.A.3 above, both the Banner Stands Ruling and the EZ Fabric Wall Systems Ruling involved the "finished goods kit" exclusion, and, in both cases, Commerce concluded that the merchandise at issue was excluded from the scope of the Orders as "finished goods kits," despite the fact that – due to the merchandise's interchangeable design – the merchandise as imported did not include all components necessary for it to serve its intended function. *See* EZ Fabric Wall Systems Ruling at 10; Banner Stands Ruling at 9–10. In the words of Commerce in its EZ Fabric Wall Systems Ruling, the fabric walls that were missing when the merchandise at issue there was imported were "designed to be readily interchangeable and to be modified according to the end user's needs and specifications," and thus did not constitute "integral components" that were "necessary to assemble a full and complete 'finished goods kit.'" EZ Fabric Wall Systems Ruling at 10. So too Rubbermaid here argues that the mop ends or mop heads in question are not "integral components" that are "necessary to assemble a full and complete 'finished goods kit,'" because they are specifically designed to be not only "readily interchangeable," but – in fact – "ultimately disposable." Pl.'s Brief at 31 n.5; *see also id*. at 30.

For its part, the Government characterizes the mop ends or mop heads as "necessary for the *functionality* of the finished product" and seeks to analogize the mop ends or mop heads to the textile covers in the Awnings Scope Ruling. Def.'s Brief at 16 (emphasis added). However, Commerce's scope ruling must stand or fall based on the reasoning articulated by the agency itself. No weight can be accorded to counsel's *post hoc* focus on "functionality." *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50; *Burlington Truck Lines*, 371 U.S. at 168–69. In any event, in rulings such as the Banner Stands Ruling and the EZ Fabric Wall Systems Ruling, Commerce has determined that merchandise may fall within the scope of the "finished goods kit" exclusion even if the merchandise as imported does not contain all components necessary to the functionality of the product. *See generally* Banner Stands Ruling; EZ Fabric Wall Systems Ruling.

In light of the above, Commerce's determination in the Final Scope Ruling that the Rubbermaid's Q969 Pulse™ Mopping Kit does not fall within the "finished goods kit" exclusion cannot stand. Rubbermaid's motion must be granted as to its claim concerning the "finished goods kit" exclusion, and this matter must be remanded to Commerce for further consideration, taking into consideration, among other things, the assertedly "infinitely flexible and interchangeable" nature of Rubbermaid's merchandise (*see* Pl.'s Brief at 30), and taking into consideration the Banner Stands Ruling, the EZ Fabric Wall Systems Ruling, and other any other applicable rulings that may be relevant. *See generally* section III.A.3, *supra* (addressing significance of the adaptable, interchangeable nature of Rubbermaid's merchandise for purposes of "finished merchandise" exclusion).

C. *Resort to the Diversified Products Criteria*

As a parting shot, Rubbermaid argues in the alternative that – in the event that the factors listed in 19 C.F.R. § 351.225(k)(1) (*i.e.*, the descriptions of the merchandise set forth in the petition, in the initial investigation, and in other determinations by Commerce and the ITC, including prior scope determinations) should be found not to be dispositive – Rubbermaid's merchandise nevertheless would be "clearly excluded from the scope of the Orders under the *Diversified Products* criteria set forth in 19 C.F.R. § 351.225(k)(2)." *See generally* Pl.'s Brief at 31–33; section I, *supra* (discussing *Diversified Products* criteria).

As the Government notes, however, Commerce here determined that the scope language of the Orders, as well as the sources listed in 19 C.F.R. § 351.225(k)(1), were dispositive. *See generally* Def.'s Brief at 17–18; Final Scope Ruling at 9.[12] And, although this matter is being remanded to Commerce for further consideration, no party has suggested that resort to 19 C.F.R. § 351.225(k)(2) and the *Diversified Products* criteria is necessary. There is therefore no need to reach Rubbermaid's *Diversified Products* claims at this time.

IV. *Conclusion*

For the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record must be granted, and this matter remanded to the Department of Commerce for further action not inconsistent with this opinion.

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[12] As an initial matter, the Government argues that Rubbermaid waived any right to argue its case under 19 C.F.R. § 351.225(k)(2) and the *Diversified Products* criteria because the company did not raise any such argument before Commerce. *See* Def.'s Brief at 17–18. In light of the disposition herein, there is no need now to address this exhaustion argument.

A separate order will enter accordingly.

Dated: September 23, 2014
New York, New York

/s/ Delissa A. Ridgway
DELISSA A. RIDGWAY
JUDGE