U.S. Customs and Border Protection

Slip Op. 15–39

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP. ET AL., Plaintiffs, v. UNITED STATES, Defendant, and SIOUX HONEY ASSOCIATION and AMERICAN HONEY PRODUCERS ASSOCIATION, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 02–00064

[Plaintiffs' motion for preliminary injunction is granted.]

Dated: April 27, 2015

Bruce M. Mitchell, *Ned H. Marshak*, and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for plaintiffs.

Michael J. Coursey and *R. Alan Luberda*, Kelley Drye & Warren LLP, of Washington, D.C., for defendant-intervenors.

OPINION AND ORDER

EATON, Judge:

Before the court is the motion for a preliminary injunction of plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA) Inc., Evergreen Coyle Group Inc., Evergreen Produce Inc., Pure Sweet Honey Farm Inc., and Sunland International Inc. ("plaintiffs"), seeking to enjoin liquidation of any unliquidated entries subject to the antidumping duty order on honey from the People's Republic of China ("PRC") until the final resolution of all appellate review proceedings in this action,[1] which challenges certain aspects of the International Trade Commis-

[1] Although normally styled as a preliminary injunction, the relief sought by plaintiffs has both preliminary and more permanent aspects. The asked for injunction is preliminary in the sense that it would maintain the status quo until the conclusion of this litigation. *See* 19 U.S.C. § 1516a(c)(2). It would be permanent, however, because "entries, the liquidation of which was enjoined[,] . . . shall be liquidated in accordance with the final court decision

sion's ("ITC") affirmative material injury determination.[2] *See* Partial Consent Mot. for Prelim. Inj. 1–2 (ECF Dkt. No. 36) ("Pls.' Mot."); Honey From the PRC, 66 Fed. Reg. 63,670 (Dep't of Commerce Dec. 10, 2001) (notice of amended final determination of sales at less than fair value and antidumping duty order). Defendant, the United States, the party that will receive whatever duties are assessed at the close of this litigation, consents to plaintiffs' motion. *See* Pls.' Mot. 8. Defendant-intervenors, Sioux Honey Association and American Honey Producers Association ("defendant-intervenors"), however, object to the issuance of a preliminary injunction and urge denial of the motion. *See* Def.-ints.' Opp'n to Pls.' Partial Consent Mot. for Prelim. Inj. 1–2 (ECF Dkt. No. 41) ("Def.-ints.' Br."). For the reasons that follow, the court grants plaintiffs' motion.

BACKGROUND

In August 2000, the suspension agreement for the less-than-fair-value ("LTFV") investigation of honey from the PRC expired, and the United States Department of Commerce ("Commerce" or the "Department") and the ITC resumed its previously suspended investigations.[3] *See* Termination of Suspended Antidumping Duty Investigation on Honey From the PRC, 65 Fed. Reg. 46,426, 46,426 (Dep't of Commerce July 28, 2000); *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 27 CIT 1827, 1828–31 (2003). On December 10, 2001, as a result of the affirmative findings resulting from the ITC's investigation, and following its own investigation and resulting determination of sales at LTFV, the Department issued an antidumping duty order on honey from the PRC. *See* Honey From the PRC, 66 Fed. Reg. at 63,670–72. The antidumping duty order set rates ranging between of 25.88 percent and 183.80 percent on plaintiffs' subject merchandise. *See* Honey From the PRC, 66 Fed. Reg. at 63,672. Plaintiffs separately appealed the Department's final LTFV determination and the ITC's final affirmative injury determination. On May 16, 2002, this case was stayed, pending the final

in the action." *See* 19 U.S.C. § 1516a(e)(2). Thus, the injunction sought here would serve as a source of relief if, after the close of the litigation, the United States Customs and Border Protection Agency liquidated the entries at a rate other than that determined by the "final court decision."

[2] Plaintiffs seek to enjoin liquidation of all entries subject to the antidumping duty order that were entered on or after May 11, 2001. Partial Consent Mot. for Prelim. Inj. 1–2 (ECF Dkt. No. 36).

[3] The investigation had been commenced on May 1, 1994 and notice of the suspension of the LTFV investigation, as a result of the suspension agreement entered into by Commerce, had been published on August 16, 1995. *See* Honey From the PRC, 60 Fed. Reg. 42,521, 42,522 (Dep't of Commerce Aug. 16, 1995) (suspension of investigation).

disposition of *Nippon Steel Corp. v. United States International Trade Commission*, Court No. 01–00103. Order to Stay Further Proceedings (ECF Dkt. No. 25). On January 30, 2008, following the final decision in *Nippon Steel* and the lifting of the stay, the court subsequently stayed the action pending the final disposition of *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, Court No. 02–00057, which was plaintiffs' appeal challenging Commerce's LTFV determination regarding imports of honey from the PRC. *See* Order (ECF Dkt. No. 27).

In court number 02–00057 (the LTFV case), plaintiffs, with the consent of all parties, obtained a preliminary injunction on March 10, 2003, enjoining liquidation of entries of honey from the PRC that were imported by plaintiffs into the United States and that were subject to the antidumping duty order. *See* Order, *Zhejiang*, Ct. No. 02–00057, ECF Dkt. No. 36. On August 26, 2004, the *Zhejiang* Court issued its ruling in court number 02–00057, sustaining the Department's final results of redetermination, thereby extinguishing the preliminary injunction. *See Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 28 CIT 1427, 1437 (2004), *rev'd and remanded*, 432 F.3d 1363 (Fed. Cir. 2005). Thereafter, plaintiffs obtained a second preliminary injunction, enjoining liquidation of the subject merchandise, pending their appeal in court number 02–00057 to the Federal Circuit. *See* Order, *Zhejiang*, Ct. No. 02–00057, ECF Dkt. No. 51. On October 10, 2014, a final decision was issued by the Federal Circuit in court number 02–00057 (the LTFV case), and a mandate was subsequently issued on December 1, 2014, as a result of which the second preliminary injunction was lifted. *See Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 580 F. App'x 906 (Fed. Cir. 2014); Mandate, *Zhejiang*, Ct. No. 02–00057, ECF Dkt. No. 135. In addition, because of the final disposition in court number 02–00057, the stay that had been issued in this action, which challenges the ITC's final affirmative material injury determination, was also lifted. Following plaintiffs' motion for a preliminary injunction in the now active ITC case, the court, on its own motion, temporarily restrained the United States Customs and Border Protection Agency from liquidating any unliquidated entries of subject merchandise until the court rendered its decision on plaintiffs' motion. *See* Order (ECF Dkt. No. 44).

DISCUSSION

I. LEGAL FRAMEWORK

The purpose of a preliminary injunction is to keep the status quo while an action is pending, and this Court and the Federal Circuit

have observed that, "[i]n antidumping and countervailing duty cases preliminary injunctions against liquidation have become almost automatic due to the retrospective nature of U.S. trade remedies, the length of the judicial review process, and the cruciality of unliquidated entries for judicial review." *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95–96 (Fed. Cir. 2014) (alteration in original) (citations omitted) (quoting *Wind Tower Trade Coal. v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1349, 1352 (2013)) (internal quotation marks omitted). "The purpose and effect of granting such an injunction is to preserve the status quo during the pendency of the judicial proceedings in order to ultimately provide parties any relief the court grants." *Husteel Co. v. United States*, 38 CIT __, __, 34 F. Supp. 3d 1355, 1358–59 (2014) (citing 19 U.S.C. § 1516a(e)(2); *Belgium v. United States*, 452 F.3d 1289, 1297 (Fed. Cir. 2006)).

In deciding whether to grant a motion for a preliminary injunction and thus enjoin liquidation, the court must consider the following factors: (1) whether the movant "is likely to suffer irreparable harm in the absence of preliminary relief"; (2) whether the movant "is likely to succeed on the merits"; (3) whether "the balance of equities tips in . . . favor" of the movant; and (4) whether "an injunction is in the public interest." *Wind Tower*, 741 F.3d at 95 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (internal quotation marks omitted). This Court "has traditionally applied a 'sliding scale' approach to this determination, whereby no single factor will be treated as necessarily dispositive, and the weakness of the showing on one factor may be overcome by the strength of the showing on the others." *Husteel*, 38 CIT at __, 34 F. Supp. 3d at 1359 (citing *Belgium*, 452 F.3d at 1292–93; *Corus Grp. PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353–54 (2002)); *see also Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009) ("A request for a preliminary injunction is evaluated in accordance with a 'sliding scale' approach." (quoting *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 170 (7th Cir. 1988)) (internal quotation marks omitted)). Further, this Court has also explained that, where, as here, "the irreparable harm factor tilts decidedly in favor of the movant, the burden of showing likelihood of success on the merits is lessened." *Husteel*, 38 CIT at __, 34 F. Supp. 3d at 1362 (citing *Qingdao*, 581 F.3d at 1378–79; *Belgium*, 452 F.3d at 1292–93). In like manner, the Federal Circuit has found that, "the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." *Qingdao*, 581 F.3d at 1378–79 (quoting *Kowalski*, 854 F.2d at 170) (internal quotation marks omitted).

II. TIMELINESS OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

As an initial matter, defendant-intervenors object to plaintiffs' motion for a preliminary injunction on the grounds that it is untimely. Def.-ints.' Br. 10. The merchandise at issue was entered on or after May 11, 2001, i.e., the date of publication of Commerce's preliminary LTFV determination in the Federal Register, in which it found that critical circumstances existed with respect to plaintiffs' imports of honey. *See* Honey From the PRC, 66 Fed. Reg. 24,101, 24,107– 08 (Dep't of Commerce May 11, 2001) (notice of preliminary determination of sales at LTFV); Pls.' Mot. 1–2.

The domestic producers maintain that, pursuant to USCIT Rule 56.2(a), a motion to enjoin liquidation of entries must be filed within thirty days after service of the complaint. Def.-ints.' Br. 10. Thus, for defendant-intervenors, because plaintiffs brought this lawsuit on February 8, 2002, they had until March 8, 2002 to seek a preliminary injunction to enjoin liquidation of the entries at issue, thereby rendering their current application, made nearly thirteen years later, untimely. Def.-ints.' Br. 10. They also argue that plaintiffs have failed to make a showing that they are entitled to take advantage of the "good cause" exception to USCIT Rule 56.2(a), which would forgive plaintiffs' delay in seeking to enjoin liquidation. *See* Def.-ints.' Br. 11–12.

The court is unconvinced by defendant-intervenors' arguments. United States Court of International Trade Rule 56.2(a) reads, in relevant part: "Any motion for a preliminary injunction to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, *or at such later time, for good cause shown*." USCIT R. 56.2(a) (2015) (emphasis added). Although "[n]either this [C]ourt's rules nor case law defines 'good cause' as it applies in Rule 56.2(a)," courts have found, in other contexts, the term to generally mean, "in a nutshell, that good reason must exist and that relief must not unfairly prejudice the opposing party or the interests of justice." *Carpenter Tech. Corp. v. United States*, 31 CIT 1, 4, 469 F. Supp. 2d 1313, 1316 (2007) (quoting USCIT R. 56.2(a)); *Am. Honda Motor Co. v. Richard Lundgren, Inc.*, 314 F.3d 17, 21 (1st Cir. 2002) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001); *FDIC v. Kooyomjian*, 220 F.3d 10, 14 (1st Cir. 2000)); *see also United States v. Gieswein*, 346 F. App'x 293, 297 (10th Cir. 2009) (citing *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 32 (1st Cir. 2007)). Although the rule was adopted for the purpose of "reduc[ing] costs and procedural delays in antidumping and countervailing litigation by encouraging the early filing of motions for pre-

liminary injunction," it cannot be said that this goal overwhelms the primary purpose of a preliminary injunction in a trade case, which is to ensure that a prevailing party obtains the full benefit of its victory by the proper assessment of duties. *See Laclede Steel Co. v. United States*, 20 CIT 712, 714, 928 F. Supp. 1182, 1185 (1996).

Here, it is clear that there is good cause to excuse plaintiffs' delay in seeking an injunction. The *Zhejiang* Court enjoined liquidation of plaintiffs' entries at issue in this case as early as March 2003[4] in the related appeal of Commerce's LTFV determination. *See* Order, *Zhejiang*, Ct. No. 02–00057, ECF Dkt. No. 36; Order, *Zhejiang*, Ct. No. 02–00057, ECF Dkt. No. 51. It was not until the Federal Circuit issued its mandate on October 10, 2014, following a final decision in plaintiffs' challenge to Commerce's LTFV determination, that liquidation of the entries was no longer enjoined and the merchandise became susceptible to liquidation. In other words, it was not until October 10, 2014 that plaintiffs had reason to make a motion for a preliminary injunction in this ITC case, because the entries were enjoined from liquidation by means of the preliminary injunctions that had previously been in place in court number 02–00057 (the LTFV case).

United States Court of International Trade Rule 56.2(a) is a rule of practice whose time limit has not been adhered to strictly by this Court, and the court declines defendant-intervenors' invitation to do so here. Indeed, this Court has recognized that "Congress considered an injunction against liquidation to be so significant to the judicial review of a determination in an [unfair trade] proceeding that it expressly provided the opportunity for such an injunction in 19 U.S.C. § 1516a(c)(2)." *Union Steel v. United States*, 33 CIT 614, 625, 617 F. Supp. 2d 1373, 1383 (2009). Moreover, defendant-intervenors have not suggested that the grant of an injunction at this point in the proceedings would be prejudicial or otherwise inequitable. *See Husteel*, 38 CIT at __, 34 F. Supp. 3d at 1361. Given the unusual procedural history of this case and the public policy that directs that entries should be liquidated at the lawful rate, the court finds that plaintiffs' motion for a preliminary injunction was timely made for purposes of USCIT Rule 56.2(a).

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[4] Administrative suspension of liquidation of the subject merchandise had been in effect since the publication of Commerce's preliminary determination of sales at LTFV. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002) (citing 19 U.S.C. § 1673b(d) (1998); 19 U.S.C. § 1673d(c)(1)(C) (1994)); *see also Tembec, Inc. v. United States*, 30 CIT 1519, 1525–26, 461 F. Supp. 2d 1355, 1361–62 (2006), *vacated on other grounds*, 31 CIT 241 (2007).

III. STANDING

Defendant-intervenors make various claims that plaintiffs lack Article III standing to bring suit, mostly centering on the idea that, because "thirteen years after this appeal was filed . . . some of the named importer plaintiffs may no longer exist, [those importers] thus no longer have a legally cognizable interest to seek an injunction on their own behalf." Def.-ints.' Br. 6.

Article III of the United States Constitution "only allows the federal courts to adjudicate 'Cases' and 'Controversies.'" *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014) (quoting U.S. CONST. art. III, § 2, cl. 1). In order "[t]o establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). "By particularized, [courts] mean that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992).

In their complaint, plaintiffs state that they are all either "exporters of [h]oney subject to the ITC's final determination," "importers of honey subject to the antidumping duty order," or "trade association[s,] a majority of whose members import merchandise subject to the antidumping duty order." Am. Compl. ¶ 3 (ECF Dkt. No. 20). Plaintiffs also assert in their complaint that they are all interested parties under 19 U.S.C. § 1677(9) because they were all "parties to the proceeding that led to the determination challenged herein." *See* Am. Compl. ¶ 3 (internal quotation marks omitted). Other than speculation, in their brief, as to the current status of particular plaintiffs, defendant-intervenors have offered no affidavits or other evidence tending to substantiate their claims that plaintiffs lack Article III standing to sue. Because there is nothing on the record to support defendant-intervenors' claims, their arguments as to standing will not be considered.

IV. PRELIMINARY INJUNCTION FACTORS

As noted, in order to obtain a preliminary injunction against liquidation, the movant (in this case, plaintiffs) bears the burden of establishing that (1) it is likely to suffer irreparable harm unless a preliminary injunction issues, (2) it is likely to succeed on the merits, (3) the balance of equities tips in its favor, and (4) the issuance of a preliminary injunction is in the public interest. *Wind Tower*, 741 F.3d at 95 (citing *Winter*, 555 U.S. at 20).

A. Irreparable Harm

Plaintiffs insist that they will suffer irreparable injury should a preliminary injunction not issue because "all of [their] entries may be liquidated with antidumping duties assessed," in which case, in addition to "the economic loss occasioned by the liquidation," they will also be "depriv[ed] of [their] statutory right to obtain meaningful judicial review." *See* Pls.' Mot. 4,5 (citation omitted). In other words, according to plaintiffs, should their entries of subject merchandise be "liquidated prior to the completion of judicial review and plaintiffs ultimately prevail, [they] will be without a remedy to recover wrongfully paid antidumping duties." Pls.' Mot. 6. For plaintiffs, then, should they succeed in having the antidumping duty order revoked by this lawsuit, the liquidation of their entries with antidumping duties would constitute irreparable injury.

Defendant-intervenors assert that plaintiffs have failed to demonstrate that they will suffer irreparable injury absent the enjoinment of liquidation of the entries at issue "[b]ecause liquidation of the entries in question would not deprive [p]laintiffs of the relief they seek—revocation of the antidumping duty order—nor deprive the [c]ourt of a controversy on which to base jurisdiction . . . ." Def.-ints.' Br. 14. Defendant-intervenors thus argue that liquidation of the entries would still leave in place the primary purpose of plaintiffs' suit, i.e., a finding that the antidumping duty order was unlawfully imposed and to have the order revoked. *See* Def.-ints.' Letter Br. 2 (ECF Dkt. No. 49). Therefore, for the domestic producers, because liquidation of plaintiffs' entries would not moot all of their case, plaintiffs would not suffer irreparable harm upon liquidation.

While defendant-intervenors can find support in case law for the proposition that preliminary injunctions are not available to continue the administrative suspension of liquidation during a lawsuit contesting the final results of an investigation, as distinct from an administrative review, the most recent cases have held that, at least where, as here, the final results of the investigation were affirmative, an injunction may issue. *Compare Am. Spring Wire Corp. v. United States*, 7 CIT 2, 5–6, 578 F. Supp. 1405, 1407–08 (1984), *with Wind Tower*, 741 F.3d at 100, *Husteel*, 38 CIT at __, 34 F. Supp. 3d at 1359–62, 1363–64, *and Wind Tower*, 37 CIT at __, 904 F. Supp. 2d at 1358. Under the facts of this case, liquidation has been suspended from the publication in the Federal Register of the Department's preliminary determination in May 2001. *See* Honey From the PRC, 66 Fed. Reg. at 24,108. Without the temporary restraining order entered by the court in this case, plaintiffs' merchandise entered on or after May 11, 2001 would have become subject to liquidation on December

1, 2014 when the Federal Circuit issued its mandate. Should a preliminary injunction not issue at the expiration of the temporary restraining order, plaintiffs' entries would be subject to liquidation at the rates ranging between 25.88 percent and 183.80 percent. *See* Honey From the PRC, 66 Fed. Reg. at 63,672. Thereafter, if plaintiffs win this case and the antidumping duty order is revoked, as to any liquidated entry it will be too late. That is, because the already liquidated entries cannot be reliquidated, the revocation of the antidumping duty order as to those entries will have no effect. Thus, plaintiffs are right that, with respect to those entries, upon liquidation, they would lose their only remedy. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) ("The statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if Zenith is successful on the merits. Once liquidation occurs, a subsequent decision by the trial court on the merits of Zenith's challenge can have no effect on the dumping duties assessed on entries of television receivers during the '79–'80 review period.").

The purpose of a preliminary injunction is to maintain the status quo while a case is pending. Here, because liquidation has been suspended since publication in the Federal Register of the preliminary determinations, the status quo at the close of the investigations was that the merchandise was preserved for liquidation at the lawful rate at the close of the administrative proceedings. The entry of the preliminary injunctions in court number 02–00057 (the LTFV case) maintained that status quo up to the point where plaintiffs made the present motion. Were the merchandise to be liquidated prior to the close of this case, plaintiffs, should they prevail, would indeed face the prospect of losing the only remedy they have with respect to those entries, i.e., liquidation at the lawful rate. Thus, the more recent cases have found that a party can show the irreparable harm needed to obtain a preliminary injunction once the final determination in an investigation has been published and a lawsuit with respect to that final determination has commenced. "As in most cases before the court, the movants seeking injunctions against liquidation will be protected from their judicial challenges being mooted, while there will be little, if any, harm to the other parties by granting the injunctions." *Husteel*, 38 CIT at __, 34 F. Supp. 3d at 1363. Hence, while a victory for plaintiffs in this case would result in the revocation of the antidumping duty order and therefore provide prospective relief, as to the liquidated entries, without a preliminary injunction their case

would be moot. Based on the foregoing, then, plaintiffs have shown that they face the prospect of irreparable injury in the absence of a preliminary injunction.

Indeed, it is apparent that irreparable harm can be shown irrespective of whether the results of an investigation are negative or affirmative, find sales at LTFV, or whether the injunction is sought by foreign producers or exporters, or by domestic producers. In each of these cases, without injunctive relief, the parties face the prospect of losing the only remedy they have with respect to merchandise liquidated prior to a court ruling.

B. Likelihood of Success on the Merits

Where, as here, plaintiffs have demonstrated that they will be irreparably harmed should a preliminary injunction not issue, "it will ordinarily be sufficient that the movant has raised 'serious, substantial, difficult and doubtful' questions that are the proper subject of litigation." *NMB Singapore Ltd. v. United States*, 24 CIT 1239, 1245, 120 F. Supp. 2d 1135, 1140 (2000) (quoting *PPG Indus. v. United States*, 11 CIT 5, 8 (1987)) (citing *Floral Trade Council v. United States*, 17 CIT 1022, 1023 (1993)). Although defendant-intervenors have spent many pages rehearsing their case in their brief, they have not shown, as they insist, that plaintiffs' case is entirely without merit. Indeed, there are substantial questions remaining as to the ITC's material injury determination. For instance, plaintiffs' claim that the ITC "failed to adequately consider the effect of the suspension agreement on preventing or mitigating any alleged injury or threat of injury to the domestic industry caused by subject imports from [the PRC]" must still be resolved by the court. Am. Compl. ¶ 20. Therefore, plaintiffs have satisfied their burden of raising serious questions in their lawsuit and this factor favors plaintiffs.

C. Balance of the Equities

Before granting a preliminary injunction, a court must "determine which party will suffer the greatest adverse effects as a result of [its] grant or denial." *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000). Plaintiffs have shown that they will suffer substantial hardship if the preliminary injunction is not granted, by demonstrating the irreparable harm that could result if their entries are liquidated prior to the outcome of this case on the merits.

Defendant-intervenors do not claim that they will be harmed by the issuance of a preliminary injunction and it is difficult to see how they can be harmed by the imposition of the lawful duties at the conclusion of this case. Thus, the factor favors plaintiffs.

D. Public Interest

"It is well-settled that the public interest is served by 'ensuring that [Commerce] complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly.'" *Int'l Bhd. of Elec. Workers v. United States*, 29 CIT 74, 84 (2005) (alterations in original) (quoting *Ugine-Savoie*, 24 CIT at 1252, 121 F. Supp. 2d at 690). Further, "the public interest is best served when all parties can obtain effective judicial review." *Id.* (citing *SKF USA Inc. v. United States*, 28 CIT 170, 176, 316 F. Supp. 2d 1322, 1329 (2004)). This being the case, "[g]ranting [p]laintiffs' motion for preliminary injunction will ensure judicial review of Commerce's determination and will further the public interest of an accurate assessment of antidumping duties." *Int'l Bhd.*, 29 CIT at 85 (quoting *SKF*, 28 CIT at 176, 316 F. Supp. 2d at 1329) (internal quotation marks omitted).

Here, accurate antidumping duties will be assessed at the conclusion of this case. Public policy favors this result and disfavors the result urged by defendant-intervenors. This is evidenced by the administrative suspension of liquidation following publication in the Federal Register of both the ITC's and Commerce's preliminary determinations, and the orders enjoining liquidation that have been in force since the suspensions were lifted. Were plaintiffs' entries to be liquidated now, all of these safeguards against premature liquidation, safeguards that have been in place since the publication of Commerce's preliminary determination, might be for naught depending on the case's outcome. Accordingly, this factor, too, supports plaintiffs' application.

V. POSTING OF SECURITY

Defendant-intervenors urge the court to require plaintiffs to post additional security or demonstrate an ability to pay the duties owed should the court grant plaintiffs' motion to enjoin liquidation of plaintiffs' unliquidated entries of honey. Def.-ints.' Br. 27. As previously noted, defendant-intervenors maintain that some plaintiff importers are no longer in business. *See* Def.-ints.' Br. 28. According to defendant-intervenors, "[b]ecause many of the administrative review rates are higher than the original investigation rates, [the p]laintiff importers will pay higher duties on the related entries upon liquidation if the appeal in this case fails." Def.-ints.' Br. 28. Thus, defendant-intervenors argue that, because "it is not clear that any of the [p]laintiff importers have the ability or intention to pay the higher duties at assessment that are likely to come with a loss for them in this case," yet "seek an injunction to preserve the financial benefit of a victory, .

. . they should be required to provide security or assurances that they have the ability and [intention] to make good on their duty obligations should they lose this case." *See* Def.-ints.' Br. 30.

Defendant-intervenors' argument for requiring certain plaintiffs to post additional security or demonstrate an ability to pay suffers from the same deficiency as their objection to the standing of these same plaintiffs: defendant-intervenors have not offered sufficient proof, or indeed any proof at all, that these plaintiff importers are no longer in business and will thus be unable to pay any additional duties owed in the future.

More importantly, defendant-intervenors have failed to show any harm to them that might result from the entry of a preliminary injunction that would justify a demand for security. United States Court of International Trade Rule 65(c), which is modeled after the parallel Federal Rule of Civil Procedure, states, in relevant part, that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper *to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained*." *See* USCIT R. 65(c) (2015) (emphasis added); *see also* FED.R.CIV.P. 65(c). "The purpose of this security is to provide recoverable damages that arise from operation of the injunction itself, not from damages occasioned by the underlying suit." *Badger-Powhatan v. United States*, 10 CIT 454, 457 n.4, 638 F. Supp. 344, 348 n.4 (1986) (citing *Lever Bros. Co. v. Int'l Chem. Workers Union, Local 217 , 554 F.2d 115, 120 (4th Cir. 1976)).* Although, pursuant to the rule, this Court has required the posting of security or a bond to indemnify the defendant should it ultimately be determined that the defendant was wrongfully enjoined or restrained by thepreliminary injunction, Courts have construed the language "as the court deems proper" to mean that "the district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined" by the injunction itself. *Compare Hyundai Pipe Co. v. U.S. Dep't of Commerce*, 11 CIT 238, 245 (1987), *Timken Co. v. United States*, 6 CIT 76, 83–84, 569 F. Supp. 65, 71–73 (1983), *and Zenith Radio Corp. v. United States*, 2 CIT 8, 11, 518 F. Supp. 1347, 1350 (1981), *with Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974) (citations omitted), *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991), *People ex rel. Van De Kamp v. Tahoe Reg'l Plan*, 766 F.2d 1319, 1325 (9th Cir. 1985), *Crowley v. Local No. 82, Furniture & Piano Moving*, 679 F.2d 978, 999–1001 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring);

U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc., 775 F.3d 128, 141 (2d Cir. 2014) ("A wrongfully restrained defendant may recover against a [temporary restraining order] security 'to cover the costs and damages *incurred as a result of complying with a wrongful* [temporary restraining order].' The Rule 65(c) security, however, 'is not security for the payment of damages on an ultimate judgment on the merits.'" (emphasis added) (citations omitted) (quoting *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 560 (2d Cir. 2011); *Global Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 21 (1st Cir. 2007))); *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1339 (Fed. Cir. 2012) ("This bond requirement is designed to protect the enjoined party's interests in the event that future proceedings show the injunction issued wrongfully." (citing *MITE Corp.*, 457 U.S. at 649 (Stevens, J., concurring))); *Badger-Powhatan*, 10 CIT at 457 n.4, 638 F. Supp. at 348 n.4.

Here, in addition, to having failed to provide any proof that the plaintiff importers are no longer in business and thus will be unable to pay any additional duties owed in the future, defendant-intervenors have not shown how the entry of the preliminary injunction itself can harm them. Thus, the court will not require the posting of security.

CONCLUSION

Because plaintiffs have satisfied their burden of establishing that a preliminary injunction enjoining the United States Customs and Border Protection Agency from liquidating its entries of subject merchandise is proper, the court grants plaintiffs' motion for a preliminary injunction. Accordingly, a preliminary injunction will be entered.

Dated: April 27, 2015
New York, New York

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

Slip Op. 15–40

CERAMARK TECHNOLOGY, INC. Plaintiff, v. UNITED STATES, Defendant, and SGL CARBON LLC and SUPERIOR GRAPHITE CO., Defendant-Intervenors.

Before: Donald C. Pogue, Plaintiff, Senior Judge
Court No. 13–00357

[Action dismissed for failure to exhaust administrative remedies.]

Dated: May 1, 2015

Brian W. Stolarz, LeClairRyan, of Alexandria, VA, and *Katherine A. Calogero*, Sheppard, Mullin, Richter & Hampton LLP, of Washington, DC, for the Plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

R. Alan Luberda and *Katherine E. Wang*, Kelley Drye & Warren LLP, of Washington, DC, for the Defendant-Intervenors.

OPINION

Pogue, Senior Judge:

This action returns to court following redetermination on remand. Prior to remand, in its initial decision, the U.S. Department of Commerce ("Commerce") determined that Plaintiff, Ceramark Technology, Inc. ("Ceramark"), had circumvented the antidumping duty order on small diameter graphite electrodes ("SDGE") from the People's Republic of China ("PRC").[1] Ceramark challenged this decision as not in accordance with law and unsupported by a reasonable reading of the record evidence.[2] The court agreed in part, and remanded, ordering Commerce to consider important aspects of the record that weighed against Commerce's determination. *Ceramark, Tech., Inc. v. United States*, __ CIT __, 11 F. Supp. 3d 1317, 1323–25 (2014). During the remand, however, Ceramark did not file comments on Commerce's draft redetermination. Final Results of Redetermination Pursuant to Ct. Remand, ECF Nos. 50–1 (conf. ver.) & 51–1 (pub. ver.) ("*Final Redetermination*"), at 5. In that redetermination, Commerce again concluded that Plaintiff had circumvented the *SDGE Order*. *Id.* at 1. Defendant and Defendant-Intervenors now seek dismissal for failure to exhaust administrative remedies.[3] Plaintiff argues that exhaustion

[1] *[SDGE] From the [PRC]*, 78 Fed. Reg. 56,864, 56,864–65 (Dep't Commerce Sept. 16, 2013) (affirmative final determination of circumvention of the antidumping duty order and rescission of later-developed merchandise anticircumvention inquiry) ("*Final Redetermination*"), and accompanying Issues & Decision Memorandum, A–570–929 (Sept. 10, 2013) ("*I & D Mem.*"); *see also [SDGE] from the [PRC]*, 74 Fed. Reg. 8775 (Dep't Commerce Feb. 26, 2009) (antidumping duty order) ("*SDGE Order*")

[2] Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF Nos. 24–1 (conf. ver.) & 25–1 (pub. ver.) ("*Rule 56.2 Mem.*").

[3] *See* Def.'s Resp. to Pl.'s Comments on the Remand Redetermination, ECF No. 61, ("*Def.'s Resp.*"), at 4–6; Def.'s Sur-reply to Pl.'s Remand Comments, ECF Nos. 70 (conf. ver.) &71 (pub. ver) ("*Def.'s Surreply*"); Def.-Intervenors' Resp. to Pl.'s Comments on the Dep't of Commerce's Redetermination, ECF Nos. 60 (conf. ver.) & 62 (pub. ver.) ("*Def.-Intervenors' Resp.*"), at 11–12; Surreply Br. of Def.-Intervenor SGL Carbon LLC & Superior Graphite Co., ECF No. 69 ("*Def.-Intervenors' Surreply*").

is not required here because further comment would have been futile.[4]

Contrary to Plaintiff's arguments, as explained below, exhaustion was appropriate, not futile, because Commerce's remand redetermination involved new factual findings and a reweighing of all the record evidence upon which the agency's decision was based. Therefore, this action is dismissed for failure to exhaust administrative remedies.

BACKGROUND

This controversy stems from an antidumping duty order on SDGE from the PRC. That order covers "all [SDGE] of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less . . . ." *SDGE Order*, 74 Fed. Reg. at 8775.[5] Subsequently, Commerce determined, pursuant to § 781(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677j(c) (2012), [6] that 17-inch graphite electrodes constituted a circumventing minor alteration of the order. *Final Determination*, 78 Fed. Reg. at 56,864–65.

Plaintiff, an importer of 17-inch graphite electrodes, challenged Commerce's minor alteration determination, *Compl.*, ECF No. 9 at ¶2, as not in accordance with law and unsupported by substantial evidence on the record. *Rule 56.2 Mem.*, ECF Nos. 24–1 (conf. ver.) & 25–1 (pub. ver.). The court agreed in part and remanded because the agency had not reasonably considered: (1) the prior commercial availability of 17-inch graphite electrodes; (2) the importance of diameter as a defining characteristic of graphite electrodes; and (3) the decision made by petitioners, Commerce, and the ITC to exclude 17-inch graphite electrodes from the original antidumping duty order. *Ceramark*, __ CIT at __, 11 F. Supp. 3d at 1323–25.

On remand, Commerce re-weighed all the record evidence, including the previously unconsidered facts, and found that the evidence emphasized by the court did not so detract from the substantiality of

[4] Pl.'s Reply to Def. & Def.-Intervenors' Resps. to Pl.'s Comments on the Dep't of Commerce's Remand Redetermination, ECF Nos. 67 (conf. ver.) & 68 (pub. ver.) ("*Pl.'s Reply*").

[5] This scope definition was derived from the petition and is coextensive with that used by the International Trade Commission ("ITC"). *See Ceramark*, __ CIT at __, 11 F. Supp. at 1319–20 (citing *[SDGE] from the [PRC]*, 73 Fed. Reg. 8287, 8287 (Dep't Commerce Feb. 13, 2008) (initiation of antidumping duty investigation); *[SDGE] from the [PRC]*, 74 Fed. Reg. 2049, 2050 (Dep't Commerce Jan. 14, 2009) (final determination of sales at less than fair value and affirmative determination of critical circumstances); *[SDGE] from China*, USITC Pub. 4062, Inv. No. 731-TA-1143 (Feb. 2009) at 6, 9–10).

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

the evidence as to dictate a different outcome. The agency again found that 17-inch graphite electrodes constituted a circumventing minor alteration. Draft Remand Redetermination, ECF No. 72–1 ("*Draft Redetermination*"), at 4–9. Commerce circulated its draft redetermination, requesting comments. *See* Remand Admin. Rec. Index, ECF No. 52, at 1 (Public Document 2 (letter from Commerce to interested parties setting deadline for comments)). Plaintiff, despite participating fully in prior administrative and judicial proceedings, did not respond. *Final Redetermination*, ECF No. 51–1, at 5.[7] Commerce then filed its final redetermination, substantially the same as the draft, finding "no reason to alter" its prior circumvention determination. *Final Redetermination*, ECF No. 51–1, at 1.

Defendant and Defendant-Intervenors now seek dismissal for failure to exhaust administrative remedies. *Def.'s Resp.*, ECF No. 61, at 4–6; *Def.'s Surreply*, ECF No. 71; *Def.-Intervenors' Resp.*, ECF No. 62, at 11–12; *Def.-Intervenors' Surreply*, ECF No. 69. In response, Plaintiff argues that exhaustion of administrative remedies is not required because the futility exception applies. *Pl.'s Reply*, ECF No. 68.

DISCUSSION

I. Exhaustion of Administrative Remedies

Plaintiffs, "where appropriate," are required to exhaust administrative remedies before seeking judicial relief. 28 U.S.C. § 2637(d). This means that, with limited exception, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)).

Here, Ceramark has not exhausted its administrative remedies because it did not comment on Commerce's draft during the remand proceeding. *Final Redetermination*, ECF No. 51–1, at 5; *see also Pl.'s Reply*, ECF No. 68, at 1 (arguing that exhaustion of remedies not appropriate here).

II. The Futility Exception

Failure to exhaust is not *per se* fatal to Ceramark's challenge – exhaustion is a practical, not absolutist, doctrine. It accommodates exceptions. Exhaustion is meant to "protect[] administrative agency

[7] Defendant (citing to the administrative record), suggests that the Plaintiff's sudden silence may have been the result of some sort of error (on Plaintiff's part) attendant to a change in law firm. *See Def.'s Resp.*, ECF No. 61, at 3–4. However Plaintiff at no point makes this argument (instead relying solely on the futility exception to the exhaustion doctrine).

authority," *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), by "ensur[ing] Commerce has the opportunity to consider arguments during agency proceedings, and before a judge intervenes on appeal." *Blue Field (Sichuan) Food Indus. Co. v. United States*, __ CIT __, 949 F. Supp. 2d 1311, 1322 (2013).[8] Further, exhaustion "promot[es] judicial efficiency," *McCarthy*, 503 U.S. at 145, by "promoting development of an agency record that is adequate for later court review and by giving an agency a full opportunity to correct errors and thereby narrow or even eliminate disputes needing judicial resolution," *Itochu Bldg. Products v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citing *McCarthy*, 503 U.S. at 145–46). However, "where the obvious result would be a plain miscarriage of justice," exhaustion is not required. *Hormel v. Helvering*, 312 U.S. 552, 558 (1941). Where exhaustion serves no purpose, when further comment would be futile — that is, "a useless formality," *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (citation omitted), or involving "obviously useless motions in order to preserve [parties'] rights," *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quotation marks and citations omitted) – exhaustion is not required.

Ceramark argues that there is "no practical reason to apply the exhaustion doctrine" here, because further comment on its part during the remand proceedings would have been futile. *Pl.'s Reply*, ECF No. 68, at 10. Ceramark claims that it had already repeatedly presented all its arguments to Commerce, Commerce had repeatedly rejected those arguments, and "there is nothing in the record or in Commerce's Redetermination to suggest that Ceramark's arguments would have been considered any differently had Ceramark presented them again." *Id*., at 6. Ceramark considers it "disingenuous for Commerce to urge this Court to apply the exhaustion doctrine, since Commerce itself stated that Ceramark's arguments were before the agency on remand and were, in fact considered and, as usual, rejected." *Id*. at 5–6.

It is possible, indeed likely, that if Ceramark had simply resubmitted its previous comments, Commerce would not have changed its position. This is because Commerce was already considering these same comments on remand, in accordance with *Ceramark*, __ CIT at __, 11 F. Supp. 3d at 1323–25. *See Draft Redetermination*, ECF No. 72–1, at 5–6, 8–9. But repetition is not what the Plaintiff was re-

[8] *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness" to the agency and interested parties "requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")

quired to do here. Rather, Plaintiff was required to comment on new factual findings, and the resultant new balance of evidence, that Commerce undertook specifically for this redetermination.[9] The best indication of this is Plaintiff's own comments on the redetermination filed with this Court, which offered additional, fact-based arguments tailored to the remand.[10] While Commerce still might not have agreed with Ceramark's arguments on remand, the "mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies." *Corus Staal*, 502 F.3d at 1379.[11] Providing comments on remand would have, at the very least, provided "the agency an opportunity to set forth its position in a manner that would facilitate

[9] *Compare I & D Mem.* cmt. 1 at 11 (reasoning that the prior existence of a product "does not preclude the Department from conducting a minor alterations anticircumvention analysis," and therefore has "no relevance" to the minor alteration inquiry) (citation omitted) *with Final Redetermination*, ECF No. 51–1, at 6–8 (finding that, given "the record evidence as a whole," 17 inch graphite electrodes were a circumventing, not alternate, product, because, while 17 inch graphite electrodes existed prior to the order, they were not a standard, common product). *Compare I & D Mem.* cmt. 1 at 10 (finding that a minor alteration need not be "insignificant" as long as it meets the requirements of Commerce's five factor minor alteration test) *with Final Redetermination*, ECF No. 51–1, at 9 (finding that neither a one nor two inch difference in diameter would "represent a significant difference without more information with regard to how the electrode is used in comparison to in-scope merchandise"). As Defendant argues, "Commerce had not made any of these findings before its draft remand results. Ceramark did not — and *could not* – have presented any arguments challenging these findings before those results were released." *Def.'s Surreply*, ECF No. 71, at 3 (emphasis original).

[10] *Compare* Pl.'s Comments on the Dep't of Commerce's Redetermination, ECF Nos. 54 (conf. ver.) & 55 (pub. ver.) ("*Pl.'s Comments*"), at 2–5 (arguing that, in there determination, Commerce's commercial availability analysis was flawed because it "erroneously conflated ['standard product' and 'commercial availability']," focusing too much on "standard product" (production volume) rather than "commercial availability" (presence, as an alternative product, on the market)), *with Rule 56.2 Mem.*, ECF No. 25–1, at 14 (arguing that Commerce's complete "disregard of the commercial availability of the 17-inch diameter [graphite electrodes] prior to the investigation was erroneous"); Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 45, at 6–7 (same), *and* Ceramark Initial Questionnaire Resp., A-570–929 Anticircumvention Inquiry (Aug. 3 2012), *reproduced in* Pub. App. to Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("Pub. App. to Rule 56.2 Mem."), ECF Nos. 28–2 (pub. ver.) & 29–2 (conf. ver.) at Tab 2, at 1–3, 12–13 (arguing that 17 inches graphite electrodes are a standard product), Ceramark's 1st Supp. Questionnaire Resp., A-570–929 Anticircumvention Inquiry (Oct. 17, 2012), *reproduced in* Pub. App. to Rule 56.2 Mem., ECF Nos. 28–7 (pub. ver.) & 29–7 (conf. ver.) at Tab 7, at 1–2, 6–7 (same); Ceramark's 2d Supp. Questionnaire Resp., A-570–929 Anticircumvention Inquiry (Nov. 30, 2012), *reproduced in* Pub. App. to Rule 56.2 Mem., ECF Nos. 28–8 (pub. ver.) & 29–8 (conf. ver.) at Tab 8, 1, 5–6, 8–9 (same).

[11] *See, e.g.*, *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, __ CIT __, 968 F. Supp. 2d 1255, 1266 (2014) (Exhaustion is futile when a party "has already fully presented its arguments to [Commerce] in some form and had those arguments rejected, but not where it declines to present the arguments at all because it believes the agency will be unlikely to

judicial review." *Id*. at 1380.[12] Certainly the court's review would have benefited had Commerce had the opportunity to consider whether its new factual findings, reconsideration, and resultant redetermination were based on a reasonable reading of the entire record.

CONCLUSION

Because Ceramark did not provide comments to Commerce during remand proceedings, Ceramark did not exhaust its administrative remedies. Because filing comments would not have been a useless formality, the futility exception does not apply. Accordingly, this action is dismissed for failure to exhaust administrative remedies.

IT IS SO ORDERED.

Dated: May 1, 2015
New York, NY

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

Slip Op. 15–41

NAVNEET PUBLICATIONS (INDIA) LTD., MARISA INTERNATIONAL, SUPER IMPEX, PIONEER STATIONARY PVT. LTD., SGM PAPER PRODUCTS, LODHA OFFSET LIMITED, AND MAGIC INTERNATIONAL PVT. LTD., Plaintiffs, v. UNITED STATES, Defendant, and ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00204

accept them."); *Pakfood Pub. Co. v. United States*, __ CIT __, 724 F. Supp. 2d 1327, 1351 (2010) (Exhaustion may be futile when "an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider," but only if "the agency's commitment to its position [is] so strong as to render requiring a party to raise the issue with the agency inequitable and an insistence of a useless formality.") (internal quotation marks and citations omitted).

[12] Ceramark argues that any comment at all would have been futile because the agency exhibited an "unwillingness to change its position," *Pl.'s Reply*, ECF No. 68, at 9, akin to that seen in *Itochu*, where "there was no reasonable prospect that Commerce would have changed its position . . . [because] Commerce's apparent position," as defended in a concurrent case, "made such comments legally immaterial." 733 F.3d at 1147; *see Pl.'s Reply*, ECF No. 68, at 6–7. But that is not the case here, where Commerce was presented with a factual question – an issue of substantial evidence. While, as in *Itochu*, Commerce was defending a similar position in a concurrent case, *Deacero S.A.P.I. de C.V. v. United States*, CIT Ct. No. 12–00345, because both *Ceramark* and *Deacero* presented unique questions of fact, any decision or disposition in one did not make comments immaterial in the other. Rather, that Commerce had been instructed to consider Ceramark's prior arguments on remand suggests that Commerce "might have been receptive to [further] counter-arguments" on fact-specific questions related to those arguments. *See Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1384 (Fed. Cir. 2008).

[Sustaining the Department of Commerce's 0.5% all-others antidumping rate on remand.]

Dated: May 4, 2015

Neil R. Ellis, *Richard L.A. Weiner*, and *Rajib Pal*, Sidley Austin LLP, of Washington, DC, for plaintiffs.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Elika Eftekhari*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *Timothy C. Brightbill*, and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor.

OPINION

Goldberg, Senior Judge:

This case comes before the court following remand. In its previous opinion, the court invalidated the 11.01% weighted average dumping margin that the U.S. Department of Commerce ("Commerce" or "the agency") had established for companies that neither failed to cooperate with the agency nor were selected for individual investigation (the "all-others rate" or "rate"). The court gave two reasons: (1) Commerce justified the all-others rate partly on the basis of the low number of individually investigated companies, which was a product of Commerce's own decision-making, and (2) Commerce failed to corroborate the rate with economic reality. *Navneet Publ'ns (India) Ltd. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1354, 1362–66 (2014). On remand, Commerce provided a new all-others rate together with a reasonable explanation of that rate. The court accordingly sustains Commerce's redetermination.

BACKGROUND

The court presumes familiarity with its prior opinion, including the explanation of the role of all-others rates, and the statutory guidelines for establishing those rates set forth in 19 U.S.C. § 1673d(c)(5) (2012).[1] The abridged facts that follow will suffice for the sake of this decision.

In 2011, Commerce initiated its fifth administrative review of an antidumping duty order on certain lined paper products from India. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. 67,133, 67,134 (Dep't Commerce Oct. 31, 2011).

[1] The statutory provisions are called as guidelines because they expressly apply only to investigations, but Commerce nonetheless uses the provisions to inform its analysis in administrative reviews. *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1358.

The review covered fifty-seven Indian producers and exporters of the subject merchandise. Resp't Selection Mem. at 2–3, PD 61 (Jan. 20, 2012). Commerce determined that it could not individually investigate all fifty-seven companies subject to the review and instead limited its review to the two respondents accounting for the largest known volume of subject merchandise. *Id.* at 7–8; *see* 19 U.S.C. § 1677f-1(c)(2). The two individually investigated respondents were Riddhi Enterprises ("Riddhi") and SAB International ("SAB"). Resp't Selection Mem. at 9. In its Final Results, Commerce assigned zero percent individual rates to both Riddhi and SAB. *Certain Lined Paper Products from India*, 78 Fed. Reg. 22,232, 22,234 (Dep't Commerce Apr. 15, 2013) (final admin. review).

For the other fifty-five companies, Commerce assigned one of two rates. Four companies had not cooperated by providing data during the administrative review; as a result, Commerce applied an adverse facts available ("AFA") rate of 22.02%. *Id.* at 22,233–34. The AFA rate matched the highest non-aberrational transaction-specific dumping margin calculated for Riddhi during the review. *Id.*

With respect to companies that were neither uncooperative nor selected for individual investigation, Commerce applied a rate of 11.01%. *Id.* Commerce established the 11.01% rate by simple averaging both individually investigated respondents' zero-percent rates with 22.02% rates from two of the uncooperative companies. *Id.* Commerce chose this method pursuant to 19 U.S.C. § 1673d(c)(5)(B). Under that provision, Commerce chooses "any reasonable method" for establishing all-others rates when, *inter alia*, all individually investigated respondents have been assigned zero-percent rates. *Id.*; *see also* Issues & Decision Mem. ("I&D Mem.") at 13–14, PD 188 (Apr. 9, 2013).[2] According to Commerce, including uncooperative companies' AFA rates in the all-others average was reasonable because, without data from the uncooperative companies, Commerce could not know whether the individually investigated respondents' zero-percent rates "serve[d] as a proper basis" for establishing the all-others rate. I&D Mem. at 14. Commerce limited the number of AFA rates to two because that was the number of respondents Commerce had deter-

[2] In choosing the method, Commerce forewent both the "reasonable method" expressly contemplated in § 1673d(c)(5)(B) and another "reasonable method" the agency had used in past reviews. The "reasonable method" contemplated by statute is to average individually investigated respondents' rates; the method used in past reviews is to average recently calculated non-zero rates (from either individually investigated respondents or all-others companies, depending on the circumstances). *See* I&D Mem. at 13–14. Commerce explained that it did not use the "reasonable method" from past reviews because all recent non-zero rates had been calculated using the zeroing methodology, which the agency no longer employs. *Id.*

mined it could individually investigate. *Id.* As such, had the uncooperative companies cooperated, Commerce might have individually investigated "up to two." *Id.*

Plaintiffs (all of them companies assigned the all-others rate) filed suit at the Court of International Trade on May 15, 2013. Summons, ECF No. 1. Plaintiffs claimed that Commerce's decision to include AFA rates in the all-others average was both contrary to statute and unsupported by substantial evidence.

The court accepted plaintiffs' substantial-evidence claim, and accordingly invalidated the 11.01% all-others rate. *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1362–66. The court offered two reasons for its holding. First, Commerce's inability to confirm the representativeness of Riddhi's and SAB's zero-percent rates was in part a product of Commerce's own decision to individually investigate only those two companies. *Id.* at 1363. Second, Commerce had failed to "verify that the [11.01% rate] reflects economic reality." *Id.* Commerce never cited any record evidence corroborating the accuracy of the 11.01% rate, and, in fact, record evidence affirmatively undermined that rate. *Id.* at 1363–64.

As to Commerce's failure to square the 11.01% rate with record evidence, the court rejected a belated argument made by the Government during litigation. *Id.* at 1364. The Government had noted that the AFA rate matched Riddhi's highest non-abberational transaction-specific margin, and also argued that the 11.01% was not "far in excess" of Riddhi's or SAB's zero-percent rates. *Id.* at 1364. The court rejected the Government's reasoning as outside the agency record. The court also explained that the AFA rate was "purposely selected with adversity in mind," and that merely asserting that 11.01% was not "far in excess" of zero percent did not constitute substantial evidence. *Id.*

As to record evidence affirmatively undermining the 11.01% all-others rate, the court highlighted two sets of evidence. First, the all-others rates in the past four reviews stood between one and four percent, and correlated closely with the rates for individually investigated respondents. *Id.* at 1364–65. Second, comparing Riddhi's and SAB's average unit values to those of six all-others respondents suggested that the six respondents should have lower rates. *Id.* at 1365–66. Based on the foregoing, the court remanded for Commerce to reconsider its method of establishing the all-others rate.

On remand, Commerce assigned an all-others rate of 0.5%, the lowest rate above *de minimis*. Final Results of Redetermination

Pursuant to Ct. Remand 7, 14, ECF No. 71 ("Remand Results").[3] In order to reach this rate, Commerce made an assumption about the behavior of the uncooperative companies that had been assigned the 22.02% AFA rate: namely, that those companies acted rationally, choosing not to cooperate because that course of action yielded the companies a lower rate than cooperation would. *Id.* at 13–14. Based on this assumption, Commerce inferred that the uncooperative companies' dumping margins were neither zero nor *de minimis* during the period of review. *Id.* Commerce next reasoned that, had the companies cooperated, Commerce might have selected "up to two" as mandatory respondents. *Id.* Had Commerce done so, it would have established an all-others rate above *de minimis*. *Id.*; *see* 19 U.S.C. § 1673d(c)(5)(A). Commerce therefore concluded that a 0.5% all-others rate—above *de minimis*—was reasonable. Finally, to buttress this conclusion, Commerce noted that Riddhi and SAB had non-aberrational transaction-specific margins that were above *de minimis*, including the 22.02% transaction-specific margin that formed the basis for the AFA rate. Remand Results 7, 14.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain the agency's decisions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

The court now sustains the Remand Results. The court previously invalidated Commerce's 11.01% all-others rate for two reasons: (1) Commerce justified the rate partly on the basis of the low number of individually investigated companies, which was a product of Commerce's own decision-making, and (2) Commerce failed to corroborate the rate with economic reality. On remand, Commerce remedied both of these defects through a new 0.5% all-others rate supported by substantial evidence.

I. Commerce's 0.5% All-Others Rate is Supported by Substantial Evidence

The court holds that Commerce's new all-others rate is supported by substantial evidence, because the agency's new rate remedies both of the defects that justified the court's remand. First, rather than impermissibly relying on the dearth of individually investigated com-

[3] Under 19 C.F.R. § 351.106(c), Commerce treats review rates below 0.5% as *de minimis*, and declines to levy antidumping duties.

panies to justify the 0.5% rate, Commerce instead based the 0.5% rate on the behavior of the uncooperative companies. Commerce assumed that the companies' failure to cooperate was a rational choice, that is, that the companies would have cooperated if cooperation would yield them a lower rate. Remand Results 13–14. This assumption is supported by precedent from the Federal Circuit, as well as by prior opinions of this court. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002) (inferring from respondent's noncooperation that the "highest [previously calculated] margin reflects the current margin[]" (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990))); *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1336, 1347 (2011) ("In other words, [*Rhone Poulenc*] stands for the proposition that a respondent can be assumed to make a rational decision to either respond or not respond to Commerce's questionnaires, based on which choice will result in the lower rate."). Commerce next inferred that the uncooperative companies' actual dumping margins were neither zero nor *de minimis*. Remand Results 13–14. And Commerce finally reasoned that, had Commerce selected one or more uncooperative companies for individual investigation, the agency would have established an all-others rate above *de minimis*. *Id.*; *see* 19 U.S.C. § 1673d(c)(5)(A). Therefore, a rate of 0.5%, above *de minimis*, was appropriate. *Id.* These latter steps in Commerce's reasoning, too, are supported by prior opinions of this court. *See Changzhou Hawd Flooring, Co. v. United States*, 39 CIT __, __, Slip Op. 15–07 at 13–16 (Jan. 23, 2015); *Changzhou Wujin Fine Chem. Factory Co. v. United States,* 37 CIT __, __, 942 F. Supp. 2d 1333, 1340 (2013). In sum, Commerce justified the 0.5% rate not by referencing a shortage of individually investigated companies—a course the court invalidated in its prior opinion—but rather by invoking reasoning tested and approved by the courts.

Commerce's 0.5% all-others rate also cures the second defect with the original 11.01% rate, insofar as the new rate comports with economic reality. As Commerce noted, both individually investigated companies had non-aberrational transaction-specific margins above the *de minimis* threshold, thus suggesting "some amount of dumping" during the period of investigation. Remand Results 7, 14. Provided that some dumping occurred during the period of investigation, applying an above *de minimis* all-others rate makes sense. Furthermore, the 0.5% all-others rate aligns with rates in past reviews, which invariably fell between one and four percent. *Navneet*, 999 F. Supp. 2d at 1364–65.

Defendant-intervenor American Association of School Paper Suppliers ("AASPS") counters that the 0.5% all-others rate cannot reflect economic reality because the uncooperative companies were assigned AFA rates of 22.02%, a far cry from 0.5%. Def.-Intervenor Ass'n of Am. Sch. Paper Suppliers' Cmts. on Final Results of Redetermination Pursuant to Ct. Remand 6–7, ECF No. 68 ("AASPS Comments"). This argument fails because it conflates the economic reality of the uncooperative companies with that of plaintiffs (who were neither uncooperative nor selected for individual investigation). On remand, Commerce was tasked only with ensuring that the all-others rate reflected plaintiffs' reality. *Navneet*, 999 F. Supp. 2d at 1363–64. That the 0.5% all-others rate aligns with all-others rates from past reviews suggests that Commerce fulfilled this task. *See id.* at 1364–65. Besides, the 22.02% AFA rate was "purposely selected with adversity in mind," suggesting that it makes a poor bellwether for the economic reality of even the uncooperative companies. *Id.* at 1364.

In sum, Commerce's 0.5% all others rate is supported by substantial evidence. Rather than relying on an absence of evidence to reach the 0.5% rate, Commerce reasonably inferred an above *de minimis* rate from the behavior of the uncooperative companies. Furthermore, the 0.5% rate comports with plaintiffs' economic reality.

II. Commerce Was Not Compelled to Adopt AASPS's Proposed 7.34% All-Others Rate

AASPS proposes a 7.34% all-others rate. AASPS Comments 7–9.[4] AASPS reaches this rate by averaging the zero-percent rates of Riddhi and SAB with the 22.02% AFA rate from one uncooperative company. According to AASPS, this is the most reasonable rate because it is "within the realm of all-others rates calculated in prior reviews," "is based on margins actually calculated in the underlying review," and comports with a "recently assigned . . . preliminary dumping margin of 7.79%." *Id.*

Despite AASPS's proposal, Commerce was not compelled to adopt a 7.34% all-others rate. First, the 7.34% rate is more than five times all but one past all-others rate, and all but two past mandatory respondents' rates. *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1364–65. Therefore, to the extent that the 7.34% rate can be considered "within the realm" of past all-others rates, the 0.5% rate is still closer. AASPS

[4] AASPS also reiterates the argument it made prior to remand, that the 11.01% all-others rate was reasonable for the reasons stated by Commerce in the I&D Memo. AASPS Comments 4–6. These reasons have already been rejected by the court. *Navneet*, 999 F. Supp. 2d at 1362–66. Moreover, the fact that another all-others rate might have been reasonable does not indicate that the all-others rate now adopted by Commerce is unreasonable. *See Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Comments 7. Second, there is no requirement that Commerce arrive at the all-others rate through an average of rates from the current review. 19 U.S.C. § 1673d(c)(5)(B) instructs Commerce to "establish" (as opposed to "calculate") the all-others rate, and this court has held that "establish" is the broader of the two terms. *Changzhou Hawd Flooring*, 39 CIT at __, Slip Op. 15–07 at 11. If averaging current-review rates leads to a rate that runs counter to economic reality, then assigning a rate close to past all-others rates can be reasonable. All the more so because the court remanded to Commerce following the agency's initial decision to assign an average-based rate, which the agency had calculated using a methodology similar to the one used to calculate the 7.34% rate. *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1362–66. Third, the 7.34% rate's resemblance to a single preliminary dumping margin (7.79%) is outmatched by the 0.5% rate's similarity to an array of past all-others rates (which do not exceed 3.05%). *Id.* at 1364–65. Finally, even were the 7.34% rate itself reasonable (even the most reasonable), that would not render the 0.5% rate unreasonable: Commerce has discretion to choose between reasonable alternatives, and it did so here. *See Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966).

III. Commerce Need Not Adopt Plaintiffs' Proposed Zero-Percent All-Others Rate

Although plaintiffs "conditionally support" Commerce's decision to assign an all-others rate of 0.5%, plaintiffs also propose a zero-percent rate. Cmts. of Non-Selected Resp'ts on Draft Remand Redetermination ("Pls.' Comments") at 3–7, PD 4 (Nov. 17, 2014). [5] According to plaintiffs, the court's opinion prior to remand bore the "strong implication" that the proper all-others rate was zero percent. Pls.' Comments at 3, 6. Plaintiffs further argue that this case is analogous to *Honey from Argentina*, 77 Fed. Reg. 36,253 (Dep't Commerce June 18, 2012) (final admin. review), where the court reached a zero-percent all-others rate by averaging the zero-percent rates of both individually investigated companies. Pls.' Comments at 5–6 (citing 77 Fed. Reg. 36,253 and accompanying I&D Mem. at cmt. 1). [6]

[5] In their comments before this court, plaintiffs adopted their comments on the draft remand results. Pls.' Cmts. on Remand Results, ECF No. 69.

[6] Plaintiffs also argue that Commerce assigned a 0.5% all-others rate because the agency labored under the mistaken belief that 19 U.S.C. § 1673d(c)(5) is binding and forbids a zero or *de minimis* rate. Pls.' Comments at 3–6. Plaintiffs cite *Honey from Argentina* as evidence that Commerce is not so bound. But the court does not read Commerce's *Remand Results* to be premised on the assumption that statute forbids a zero or *de minimis* rate, and therefore rejects plaintiffs' argument.

Finally, plaintiffs argue that Commerce should explicitly acknowledge a preliminary injunction issued by this court on October 6, 2014, pertaining to the seventh administrative

The court disagrees. First, it is Commerce's province, not the court's, to establish the all-others rate. The court's review is limited to ensuring that the rate established by Commerce is a reasonable one. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351–52 (Fed. Cir. 2006). Put another way, the court may not imply proper or improper rates. And given that the 0.5% all-others rate chosen by Commerce hews closely to past all-others rate, the court cannot hold Commerce's choice to be unreasonable. *Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1364–65.

Second, *Honey from Argentina* is meaningfully distinguishable from this case. In *Honey from Argentina*, Commerce assigned a zero-percent all-others rate in part because the individually investigated respondents received *de minimis* rates not only in the immediate review, but also in three previous reviews. 77 Fed. Reg. 36,253 and accompanying I&D Mem. at cmt. 1. In this case, by contrast, the individually investigated respondents never received a *de minimis* rate before the review at issue. *See Navneet*, 38 CIT at __, 999 F. Supp. 2d at 1364–65. There is therefore less evidence suggesting the propriety of a zero-percent all-others rate.

CONCLUSION

The court originally remanded to Commerce because the agency explained its choice of all-others rate through reference to inadequacies the agency itself had created, and also because Commerce's chosen rate failed to comport with economic reality. On remand, Commerce addressed both concerns. The court sustains the agency's remand redetermination, and judgment will enter accordingly.

Dated: May 4, 2015
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 15–42

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

review. Pls.' Comments at 9 (citing *Navneet Publ'ns (India) Ltd. v. United States* (*Navneet Preliminary Injunction Order*), 38 CIT __, Slip Op. 14–119 (Oct. 6, 2014)). In the injunction order, the court specified that the all-others rate from the fifth review (that is, the rate at issue in this remand) would also be applied in the seventh review. *Navneet Preliminary Injunction Order*, 38 CIT at __, Slip Op. 14–119 at 6. Commerce has thus far complied with the court's October 6 order, and the court expects that the agency will continue to do so.

Before: Gregory W. Carman, Senior Judge
Court No. 08–00055

[Defendant's Motion to Dismiss in Part Plaintiff's Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Which Relief Can Be Granted is granted]

Dated: May 5, 2015

Gregory H. Teufel, OGC Law, LLC, of Pittsburgh, PA, and *Jeremy L.S. Samek*, Eckert Seamans Cherin & Mellott, LLC, of Pittsburgh, PA, for plaintiff.

Edward F. Kenny, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of Counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Carman, Senior Judge:

Defendant United States ("Defendant" or "Customs") moves to dismiss Plaintiff International Custom Products, Inc.'s ("Plaintiff" or "ICP") complaint in part for lack of subject matter jurisdiction under 28 U.S.C. § 1581(h) (2006)[1] pursuant to USCIT Rule 12(b)(1) and failure to state a claim for which relief can be granted for Counts III and IV pursuant to USCIT Rule 12(b)(5). *See* Def.'s Mot. to Dismiss N [*sic*] Part Pl.'s Compl. for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Which Relief Can Be Granted ("Def.'s Mot."), ECF No. 20. For the reasons stated below, Defendant's motion is granted for lack of subject matter jurisdiction asserted under 28 U.S.C. § 1581(h) and for failure to state a claim upon which relief may be granted with regard to Counts III and IV.

BACKGROUND

This action is the seventh in a flurry of cases involving the same parties and the same product known as "white sauce." These cases have a long and winding history, with which the reader is presumed to be familiar. The facts are basically the same in all the cases. *See* Def.'s Mot. at 1–3. An overview of the ICP cases is provided in a prior ICP decision. *See Int'l Custom Prods., Inc. v. United States,* 36 CIT __, 878 F. Supp. 2d 1329 (2012).

This case involves one entry, number 180–05980802, ("2007 Entry"), which Plaintiff imported "for the purpose of determining the correct classification" of white sauce. Compl. ¶ 11. On May 22, 2007,

[1] All references to the United States Code refer to the 2006 edition, unless otherwise stated.

ICP imported the 2007 Entry, and on July 20, 2007, Customs liquidated this entry under tariff provision 0405.20.3000 of the Harmonized Tariff Schedule of the United States ("HTSUS") in accordance with a ruling issued by Customs headquarters, referred to as "HQ 967780" by Defendant but referred to as the "Revocation" by Plaintiff because it revoked a prior ruling letter regarding white sauce. Summons, ECF No. 1; Compl. ¶ 11. Plaintiff timely filed a protest challenging Customs' tariff classification, properly appealed the denial of that protest, and paid all requisite duties and other charges assessed by Customs in order to bring this suit in this court. Compl. ¶¶ 11–13. These facts are not in dispute.

DISCUSSION

I. CIT Rule 12(b)(1)

Defendant asserts that Plaintiff lacks subject matter jurisdiction asserted under 28 U.S.C. § 1581(h) ("§1581(h)") pursuant to USCIT Rule 12(b)(1). Plaintiff claimed jurisdiction under 28 U.S.C. § 1581(a) ("§1581(a)") and § 1581(h). Compl. ¶¶ 11, 14. It is well-settled that jurisdiction is a threshold issue, and thus the Court will first review whether jurisdiction lies under either of Plaintiff's claimed jurisdictional provisions. *See Manufacture de Machines du Haut-Rhin v. Von Raab,* 6 CIT 60, 62, 569 F. Supp. 877, 880 (1983) ("*Manufacture de Machines*"). Plaintiff has the burden of establishing jurisdiction. *Id*.

A. Jurisdiction pursuant to § 1581(a)

Plaintiff asserted the Court has jurisdiction under §1581(a) "with respect to a single white sauce entry that ICP imported [] for the purpose of determining the correct classification" of white sauce. Compl. ¶ 11. Defendant does not challenge § 1581(a) jurisdiction. It is uncontested that Plaintiff satisfied the requirements of § 1581(a) by filing a protest, appealing the denial of the protest and paying all applicable duties on the 2007 Entry. Accordingly, the Court finds that it has jurisdiction to hear Plaintiff's claims regarding the 2007 Entry asserted under § 1581(a). Defendant agrees that § 1581(a) is the "jurisdictional predicate" for ICP's challenge to Customs' application of HQ 967780 to the 2007 Entry at issue in this case. Def.'s Mot. at 5.

B. Jurisdiction pursuant to § 1581(h)

Defendant does challenge, however, Plaintiff's claim that the Court has subject matter jurisdiction under § 1581(h) with respect to future entries. Def.'s Mot. at 3–6. In its Complaint, Plaintiff asserted that the Court has jurisdiction "over this matter pursuant to [] § 1581(h) with respect to future entries," Compl. ¶14, but in its response brief to Defendant's motion to dismiss, Plaintiff concedes §1581(h) juris-

diction, Pl.'s Resp. at 1 ("ICP does not contest the other portions of the Motion, but the government's motion to dismiss ICP's Due Process Clause cause of action (Count IV) should be denied."). Accordingly, the Court finds that it lacks subject matter jurisdiction to hear Plaintiff's claims regarding future entries asserted under § 1581(h).

II. CIT Rule 12(b)(5)

A. Count III

In Count III of the Complaint, ICP claims Customs violated the law by failing to demonstrate a compelling reason for revocation. Compl. ¶¶ 46–49. Defendant moves to dismiss this count for failure to state a claim upon which relief may be granted. Def.'s Mot. at 6–8. Plaintiff did not defend against the motion as to Count III, declining to contest the dismissal of this count. Pl.'s Resp. at 1 (stating that "ICP does not contest" any portion of the motion except that regarding Count IV). The Court also notes that it earlier issued a final order on this very issue in a separate case, Court No. 07–00318. There, the Court dismissed the same claim regarding Customs' revocation of the same ruling letter. The claim in Count III is therefore *res judicata*. *See Int'l Custom Prods., Inc. v. United States*, 32 CIT 302, 311–13, 549 F. Supp. 2d 1384, 1394–95 (2008) ("Because Customs does not need to state a compelling reason for modifying or revoking a ruling or decision, ICP's claim that Customs failed to do so when the agency revoked ICP's classification ruling does not state a claim upon which relief can be granted. As a result, the Court dismisses Count III of ICP's complaint.") Because ICP does not contest dismissal of the claim, and because the matter is *res judicata*, the Court dismisses Count III of the Complaint with prejudice.

B. Count IV

In Count IV of the Complaint, ICP claims that Customs violated its Constitutional right to due process. Compl. ¶¶ 50–55. Plaintiff subsequently explained that "the due process violation here is substantive, and not procedural." Pl.'s Resp. at 2. Plaintiff argues it was deprived of a "property interest without due process" stemming "from the irrational, egregious, arbitrary and capricious nature of the government's revocation of [a] Ruling, despite the lack of any changes in the relevant facts or governing law." Pl.'s Resp. at 1. In its argument, Plaintiff relies on *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), which stated that substantive due process is violated where the government has acted in an arbitrary and irrational manner. *Id.* at 2. Defendant moves to dismiss this count for failure to state a claim upon which relief may be granted. Def.'s Mot. at 8–11. This is the only point of Defendant's motion that Plaintiff addresses in its response.

Defendant counters that Plaintiff's "position has no merit or legal basis" because there is "no substantive due process right to import." Reply Mem. in Supp. of Def.'s Mot. to Dismiss in Part Pl.'s Compl. for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Which Relief Can Be Granted ("Def.'s Reply") at 2, ECF No. 22. Defendant asserts that it is "well settled that possessing a substantive right is a prerequisite to a claim alleging a violation of substantive due process, and no importer has a substantive right to engage in foreign commerce." *Id*. Further, Plaintiff's reliance on *Usery* is misplaced. That case involved due process claims of compensation for death and disability arising out of employment and whether statutes enacted subsequent to the injury were applicable. It is inapposite here.

Defendant correctly asserts that Plaintiff lacks a substantive right to bring a substantive due process claim because the U.S. Constitution does not confer a substantive right to import. The U.S. Court of Appeals for the Federal Circuit has declared that "engaging in foreign commerce is not a fundamental right protected by notions of substantive due process." *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (1998) (citing *Buttfield v. Stranahan,* 192 U.S. 470, 492–93 (1904)); *see also Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1284 (Fed. Cir. 2006) ("executive actions involving foreign trade, such as the imposition of tariffs, do not constitute the taking of property without due process of law"), *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989) ("It is beyond cavil that no one has a constitutional right to conduct foreign commerce in products excluded by Congress."). Simply, the act of importing is not a protected entitlement.

Defendant further asserts that "not only is there no general substantive right to import, but an importer can obtain no substantive property right in a Customs ruling since 19 U.S.C. § 1625(c) patently contemplates that rulings can and will be revoked." Def.'s Reply at 3. Because Plaintiff has no substantive right to import, the Court need not address whether there was a violation of substantive due process. S*ee id*. at 4–6.

Upon consideration of these well-settled principles of Constitutional law, Plaintiff's substantive due process claim cannot pass muster. Accordingly, the Court dismisses Count IV of the complaint.

CONCLUSION

For the foregoing reasons, the Court grants Defendant's motion to dismiss Plaintiff's complaint in part for lack of subject matter jurisdiction under 28 U.S.C. § 1581(h) pursuant to USCIT Rule 12(b)(1)

and failure to state a claim for which relief can be granted for Counts III and IV pursuant to USCIT Rule 12(b)(5).

Subsequent to the filing of Defendant's motion to dismiss, Plaintiff filed a Consent Motion and Brief in Support of a Renewed Stay. ECF No. 28. The Court grants this motion as to the remaining claims. This case is stayed until 30 (thirty) days after the final resolution of all appellate review proceedings in *International Customs Products, Inc. v. United States*, U.S. Court of Appeals for the Federal Circuit, Number 14–1644.

Dated: May 5, 2015
New York, New York

/s/ GREGORY W. CARMAN
Gregory W. Carman,
SENIOR JUDGE

Slip Op. 15–43

DONGBU STEEL CO., LTD., Plaintiff, and UNION STEEL MANUFACTURING CO., LTD., Consolidated Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 14–00098

[Plaintiffs' motion for judgment on the agency record is granted.]

Dated: May 5, 2015

Brady Warfield Mills, *Donald Bertrand Cameron*, *Julie Clark Mendoza*, *Rudi Will Planert*, *Mary Shannon Hodgins*, and *Sarah Suzanne Sprinkle*, Morris, Manning & Martin, LLP, of Washington, D.C., for Plaintiff Dongbu Steel Co., Ltd. and Consolidated Plaintiff Union Steel Manufacturing Co., Ltd.

Loren Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Michael Thomas Gagain*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brightbill, and *Alan Hayden Price*, Wiley Rein LLP, of Washington, D.C., for Defendant-Intervenor.

OPINION AND ORDER

Kelly, Judge:

Plaintiff Dongbu Steel Co., Ltd. ("Dongbu") and Consolidated Plaintiff Union Steel Manufacturing Co., Ltd. ("Union Steel") (collectively "Plaintiffs") bring this action pursuant to 28 U.S.C. § 1581(c) (2012) [1] to challenge the United States Department of Commerce's ("Com-

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

merce" or "Defendant") final determination in *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea*, 79 Fed. Reg. 17,503 (Dep't Commerce Mar. 28, 2014) (final results of antidumping duty administrative review; 2011–2012) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea; 2011–2012, A-580–816, (Mar. 24, 2014), *available at* http://enforcement.trade.gov/frn/summary/koreasouth/2014–06995–1.pdf (last visited Mar. 30, 2015) ("IDM"). Plaintiffs move, pursuant to USCIT Rule 56.2, for judgment on the agency record on their claim that Commerce's decision to disregard certain sales made below the cost of production was unsupported by substantial evidence and based on a legally erroneous interpretation of the cost recovery test in 19 U.S.C. § 1677b(b)(2)(D) (2012).[2] Moreover, Plaintiffs argue that Commerce's use of costs incurred outside the period of review ("POR") was unlawful because Commerce does not have authority under the statute to use such costs. Defendant argues that Commerce's interpretation of 19 U.S.C. § 1677b(b)(2)(D) was reasonable in light of the unusual circumstance of the review, and that Commerce reasonably used cost data for the five and a half months after the POR to calculate the cost of production under 19 U.S.C. § 1677b(b)(1). The court finds that Commerce's interpretation of the cost recovery test was contrary to law. Further, while the statute grants Commerce the discretion to calculate the cost of production for the below cost sales test using cost data outside the POR, Commerce has not adequately explained why its resort to such data in this case was reasonable. Therefore the court grants Plaintiffs' motions for judgment on the agency record.

BACKGROUND

This dispute arises from the operation of two distinct administrative proceedings performed in connection with the same antidumping and countervailing duty orders—an administrative review and a sunset review. Upon request, Commerce will conduct an administrative review at least once every 12 months. *See* 19 U.S.C. § 1675(a)(1)(A)–(B). Annual administrative reviews must be initiated by the last day of the month following the month in which the order was published (called the anniversary month), *see* 19 C.F.R. §§ 351.221(b)(1), (c)(1)(i), and normally have a POR that covers "entries,

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

exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month." 19 C.F.R. § 351.213(e)(1)(i).

Commerce also conducts sunset reviews once every five years to determine whether revoking the order would lead to continued dumping (or subsidization) and material injury. 19 U.S.C. § 1675(c). Sunset reviews are separate proceedings, distinct from the annual administrative reviews. If either Commerce or the International Trade Commission ("ITC") determines that an order should be revoked, then Commerce publishes notice of the revocation in the Federal Register. *See* 19 C.F.R. § 351.222(f)(2). However, the effective date for revocation is five years from the date of the order at issue if it is the first sunset review and five years from the date of any continuation order if it is a subsequent sunset review. *See* 19 C.F.R. § 351.222(i)(2).

In this case, Plaintiffs are foreign respondents that participated in the antidumping duty administrative review that led to the *Final Results* at issue. *See Final Results* at 17,503. The review was initiated on September 26, 2012, with a POR from August 1, 2011 through July 31, 2012.[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 59,168 (Dep't Commerce Sept. 26, 2012); IDM at cmt. 1. Separately, on March 11, 2013, the ITC published its final determination in the third sunset review on corrosion-resistant carbon steel flat products from Korea, revoking the antidumping and countervailing duty orders with an effective date of February 14, 2012. *Corrosion-Resistant Carbon Steel Flat Products From Germany and the Republic of Korea*, 78 Fed. Reg. 16,832, 16,833 (Dep't Commerce Mar. 19, 2013) (revocation of antidumping and countervailing duty orders) ("*Revocation Notice*"). *See also Corrosion-Resistant Carbon Steel Flat Products From Germany and Korea*, 78 Fed. Reg. 15,376 (Int'l Trade Comm'n Mar. 11, 2013) (determinations).

On March 19, 2013, Commerce published notice that the antidumping order ("ADD Order") in this case would be revoked, but that Commerce would "complete any pending or requested administrative reviews of these orders covering entries prior to February 14, 2012." *Revocation Notice* at 16,833. In the Preliminary Results, issued on September 9, 2013, Commerce shortened the POR for the ongoing

[3] For this review, Commerce found reasonable grounds to believe certain sales of the foreign like product were made below the cost of production and therefore undertook a cost of production analysis. Decision Memorandum for the Preliminary Results of Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea at 10, A-580816, (Aug. 30, 2013), *available at* http://enforcement.trade.gov/frn/summary/koreasouth/2013–21890–1.pdf (last visited Apr. 28, 2015).

administrative review to reflect the effective date of revocation, resulting in a new POR from August 1, 2011 through February 14, 2012. *See Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 78 Fed. Reg. 55,057, 55,058 (Dep't Commerce Sept. 9, 2013) (preliminary results of antidumping duty administrative review; 2011–2012) ("*Preliminary Results*").

In its normal value[4] determination for the review at issue here, Commerce only considered sales made during the revised POR from August 1, 2011 to February 14, 2012. *See, e.g.*, Dongbu's CM Log Database, CD 109 (Sept. 4, 2013); Dongbu's Margin Log Database, CD 111 (Sept. 4, 2013). In conducting its cost of production analysis, Commerce continued to use the costs provided by respondents for the original POR, which reflected costs of production incurred from August 1, 2011 to July 31, 2012. *See* IDM at cmt. 1. Therefore, the sales considered were limited to those within the shortened POR, but the cost database included costs of production incurred after the POR. *See* Commerce's Antidumping Duty Questionnaire Sections A–E at section D, PD 24 (Nov. 19, 2012) (asking respondents to report the "actual costs incurred by your company during the period of review" for the original POR prior to revocation). In their case briefs below, submitted on November 8, 2013, Plaintiffs argued Commerce had violated the cost recovery test in 19 U.S.C. § 1677b(b)(2)(D) by testing Dongbu's home market sales for the revised POR against the weighted average cost of production for the original POR. Dongbu's Case Br. at 2, 7, PD 129 (Nov. 8, 2013); Union Steel's Case Br. at 2–3, PD 130 (Nov. 8, 2013). *See also* Mot. Pl. Dongbu Supp. Mot. J. 7, Oct. 2, 2014, ECF No. 27–1 ("Pl.'s Mot."); Br. Pl. Union Steel Supp. Mot. J. Agency R 7, Oct. 2, 2014, ECF No. 28–1.[5] Plaintiffs also argued that

[4] In an administrative review of antidumping duties Commerce determines "(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(i)–(ii). Commerce calculates dumping margins by comparing the export price for each entry during the POR to a normal value reasonably corresponding to the same time frame. The statute states that "[t]he normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title." 19 U.S.C. § 1677b(a)(1)(A). *See also* 19 U.S.C. § 1677f-1(d)(2). The normal value may be the sales price in the home market, the sales price in a third country, or the constructed value. *See* 19 U.S.C. § 1677b(a)(1)(B), (4). Export price is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States," 19 U.S.C. § 1677a(a), and constructed export price is "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise . . . ." 19 U.S.C. § 1677a(b).

[5] Union Steel's motion for judgment on the agency record closely mirrors Dongbu's motion for judgment on the agency record. Therefore, the court will cite only Dongbu's motion, the mandatory respondent below, unless otherwise necessary.

Commerce unlawfully used costs beyond the POR and those costs do not reasonably reflect the actual costs during the POR. Dongbu's Case Br. at 8–9. *See also* Pl.'s Mot 18. Plaintiffs argued Commerce should have requested new cost data for the revised POR and should recalculate the dumping margin. Dongbu's Case Br. at 7; Union Steel's Case Br. at 2–3. *See also* Pl.'s Mot. 7. In the *Final Results*, Commerce dismissed Plaintiffs' arguments, finding instead that "the use of the 12-month average cost data [wa]s reasonable and appropriate in this situation." IDM at cmt. 1.

Plaintiffs now challenge Commerce's determination to use the 12-month cost of production data instead of using cost data that reflects the shortened POR. Plaintiffs argue the language of the cost recovery test in 19 U.S.C. § 1677b(b)(2)(D) is mandatory and requires Commerce to measure the prices of the below cost sales against the weighted average cost of production for the POR. Moreover, Plaintiffs argue that Commerce was statutorily obligated "to compare home market sales for the POR to costs for that same POR in its sales below cost test." Pl.'s Mot. 21.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c), and 19 U.S.C. § 1516a(a). "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Cost Recovery

Plaintiffs argue Commerce's cost recovery determination violated the plain language of 19 U.S.C. § 1677b(b)(2)(D) because Commerce used a weighted average cost of production based on costs incurred outside the revised POR ending on February 14, 2012. Defendant argues that despite the language of § 1677b(b)(2)(D), Commerce's interpretation of the statute should govern because it "is based on a reasonable interpretation of a statutory provision in light of this case's highly unusual facts." Def.'s Opp'n Pls.' Mots. J. Agency R. 6, Jan. 29, 2015, ECF No. 39 ("Def.'s Opp'n"). In effect, Defendant argues that because the statute does not specifically contemplate the precise factual scenario here, the statutory language requiring the weighted average cost of production to be calculated for the POR does not apply.

The question before the court involves the cost recovery test, which provides:

> If prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

19 U.S.C. § 1677b(b)(2)(D). The precise question here is whether Congress unambiguously prohibited Commerce from using a period other than the POR to calculate the weighted average cost of production to determine which prices provide for cost recovery over a reasonable time. In other words, may Commerce interpret the phrase "for the period of investigation or review" to mean something other than the actual period of investigation or review in a given case. The court finds that, as a matter of law, the language of the cost recovery test in § 1677b(b)(2)(D) does not afford Commerce the discretion to ignore the POR.

This case involves a question of statutory interpretation. "[T]he 'starting point in every case involving construction of a statute is the language itself.'" *United States v. Hohri*, 482 U.S. 64, 69 (1987) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)). "Absent a clearly expressed legislative intention to the contrary, [the] language [of the statute] must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[A]lthough agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (1999) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

In order for Commerce to disregard below cost sales, Commerce must make three findings. The statute requires Commerce to determine whether 1) sales of the foreign like product were made below the cost of production of that product, [6] 2) the below cost sales were made within an extended period of time and in substantial quantities, [7] and

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[6] Commerce determines whether there are reasonable grounds to believe or suspect that there are below cost sales of the foreign like product. After establishing reasonable grounds to investigate below cost sales, Commerce calculates the cost of production. *See, e.g.*, *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 65 Fed. Reg. 5554, 5563 (Dep't Commerce Feb. 4, 2000) (notice of final determination of sales at less than fair value).

[7] An extended period of time is statutorily defined in § 1677b(b)(2)(B) as "a period that is normally 1 year, but not less than 6 months." 19 U.S.C. § 1677b(b)(2)(B). "Substantial quantities" is defined in § 1677b(b)(2)(C), which provides that

3) the below cost sales were not made at prices which permit the recovery of all costs within a reasonable period of time. The statute provides that if Commerce determines it has

> reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of that product, [Commerce] shall determine whether, in fact, such sales were made at less than the cost of production. If [Commerce] determines that sales made at less than the cost of production—
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

19 U.S.C. § 1677b(b)(1).

Congress explicitly defined when sales provide for recovery of costs over a reasonable period of time in the cost recovery test:

> If prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

19 U.S.C. § 1677b(b)(2)(D). [8] Prices below the per unit cost of production but above the weighted average cost of production for the period

> [s]ales made at prices below the cost of production have been made in substantial quantities if—
> (i) the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value, or (ii) the weighted average per unit price of the sales under consideration for the determination of normal value is less than the weighted average per unit cost of production for such sales.

19 U.S.C. § 1677b(b)(2)(C)(i)–(ii).

[8] There is a slight difference in the wording of 19 U.S.C. § 1677b(b)(1)(B) and 19 U.S.C § 1677b(b)(2)(D) with respect to the recovery of costs. Section 1677b(b)(1)(B) asks Commerce to determine if sales "were not at prices which permit recovery of *all* costs within a reasonable period of time." 19 U.S.C. § 1677b(b)(1)(B) (emphasis added). The cost recovery test of 19 U.S.C. § 1677b(b)(2)(D) does not say "all costs." Instead it says:

of review provide "for recovery of costs within a reasonable period of time . . . ." 19 U.S.C. § 1677b(b)(2)(D). Thus, § 1677b(b)(2)(D) identifies a floor created by the weighted average cost of production for the POR and § 1677b(b)(1) precludes Commerce from excluding below cost sales which are above the floor from the normal value calculation.[9]

The court finds that Congress unambiguously prohibited Commerce from using cost data for a period other than the POR to calculate the weighted average cost of production for purposes of the cost recovery test. The statute explicitly directs Commerce to compare "prices which are below the per unit cost of production at the time of sale," with "the weighted average per unit cost of production for the period of investigation or review . . . ." 19 U.S.C. § 1677b(b)(2)(D). The language identifies a particular time frame, "for the period of investigation or review." There is no ambiguity in the phrase "for the period of . . . review." The phrase "for the period of investigation or review" can only mean the actual period of review established for the review. Whether any other part of the cost recovery test may contain an ambiguity is not before the court. The subsection does not include any words that would connote a grant of discretion to Commerce to expand the period from which costs can be calculated. Congress could have chosen words that afforded Commerce greater discretion. It did not.

Nothing in the statutory framework contradicts the cost recovery test's plain language regarding the POR. The statute contemplates two distinct inquiries for below cost sales and cost recovery. In the below cost sales inquiry, the statute instructs Commerce to compare sales prices for the foreign like product under consideration for normal value to the cost of production. The cost of production is

> an amount equal to the sum of—
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
> (B) an amount for [SG&A] based on actual data pertaining to production and sales of the foreign like product by the exporter

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If prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production for the period of investigation or review, such prices shall be considered to provide for recovery of *costs* within a reasonable period of time.

19 U.S.C. § 1677b(b)(2)(D) (emphasis added). Neither party has argued that this difference has any effect on the issue before the court.

[9] If below cost sales were made at prices below the floor, Commerce has discretion to exclude them from the normal value calculation.

> in question; and
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C § 1677b(b)(3)(A)–(C). Commerce has some discretion in determining what cost information to use to calculate the cost of production, but it must come from "a period which would ordinarily permit the production of that foreign like product in the ordinary course of business . . . ." 19 U.S.C. § 1677b(b)(3)(A); *see also Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1084 (Fed. Cir. 2001) (explaining that the statutory language in § 1677b(b)(3) and § 1677b(e) does not "specify[] the period to be used when determining costs, and no other statute or regulation provides further guidance."). Certain facts may require Commerce to make certain adjustments to the cost reporting period. *See Thai Pineapple*, 273 F.3d at 1085.

In the cost recovery inquiry, Commerce compares the sales prices of the foreign like product under consideration for normal value to the "weighted average per unit cost of production for the period of investigation or review . . . ." 19 U.S.C. § 1677b(b)(2)(D). This provision stands in contradistinction to the cost of production, calculated in accordance with 19 U.S.C. § 1677b(b)(3), that is to be compared to normal value in the below cost sales test. Section 1677b(b)(3)(A) provides for the cost of production calculation to include the costs for producing the "foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business . . . ."[10] Likewise, the special rules for the calculation of cost of production provide that:

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

[10] The language in subsections (B) (*i.e.*, "pertaining to the production and sales of the foreign like product") and (C) ("other expenses incidental to placing the foreign like product in condition packed ready for shipment") also confer discretion on Commerce. *See* 19 U.S.C § 1677b(b)(3)(B)–(C).

> for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

19 U.S.C. § 1677b(f)(1)(A). Thus, the statutory scheme provides for two separate inquiries—a cost of production inquiry for below cost sales, and the weighted average cost of production for the POR in the cost recovery test.[11] The language of the former provision provides discretion to Commerce, while the latter does not.

Moreover, the legislative history for the cost recovery test does not undermine the plain language of 19 U.S.C. § 1677b(b)(2)(D). Congress made it clear that for the cost recovery test, as opposed to below cost sales analysis, it would limit Commerce's discretion to choose a time period. As Congress explained in the Statement of Administrative Action ("SAA"),

> new section [1677b(b)(2)(D)] specifies when particular prices provide for cost recovery within a reasonable period of time. Under current law, there is no clear definition of cost recovery — the measure of cost recovery could have been based on speculative estimates of future production costs. Under the amended law, if prices which are below costs at the time of sale are above weighted-average costs for the period of investigation or review, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 832 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4170 ("SAA"). This statement demonstrates that Congress contemplated, but rejected, the notion that cost recovery could be measured with reference to any period other than the POR.

Defendant makes several arguments, none of which persuades the court to ignore the plain meaning of the statute. First, Defendant

[11] Specifically, 19 U.S.C. § 1677b(b)(1) provides Commerce with discretion to disregard sales made at below the cost of production and 19 U.S.C. § 1677b(b)(2)(D) provides for the cost recovery test. While Congress provided separately for these inquiries, Commerce as a matter of policy chooses to employ the same initial methodology for both. *See* IDM at cmt. 1 ("In a normal case, we calculate the COP in the same way for use in the sales-below-cost and cost-recovery tests, based on the annual weighted-average cost during the POI or POR.") So long as that methodology falls within the permissible statutory framework, Commerce is free to adopt such a policy. In other words, Commerce has the discretion to calculate costs based on the annual weighted average cost during the POI or POR. However, it is required to calculate costs for purposes of the cost recovery test based on the annual weighted average cost during the POI or POR. If it exercises its discretion to deviate from this methodology for purposes of its below cost sales analysis, it is not excused from its obligation to use the POR for cost recovery purposes.

argues that the cost recovery test is ambiguous due to the unusual facts here, and therefore the court should accept its reasonable interpretation of the statute. Def.'s Opp'n 16. As the court held above, the cost recovery test is not ambiguous but requires Commerce to calculate the weighted average cost of production for the POR. The plain language of the cost recovery test does not contemplate any particular factual scenario. It merely defines when Commerce must find that below cost prices allow for recovery of costs within a reasonable period of time. Commerce does not acquire discretion to sidestep the POR in the cost recovery test simply because the cost recovery test does not specifically provide for the situation where a POR changes. Moreover, Defendant's argument proves too much. If a statute became ambiguous simply because it was applied to a unique set of facts, there could be no unambiguous statutes.

In addition, Defendant argues that other provisions of the antidumping and countervailing duty statute, as well as the SAA, suggest the POR language in the cost recovery test is ambiguous. Defendant claims 19 U.S.C. § 1675(a) suggests the POR should be 12 months and that therefore, the cost recovery test's reference to "the POR" should be interpreted to mean the "12 month POR." However, the antidumping and countervailing duty statute does not define the length of the POR as 12 months. It provides that at least once during any 12 month period, if Commerce receives a request for review of an order, it must initiate a review. [12] *See* 19 U.S.C. § 1675(a). Commerce's regulations in 19 C.F.R. § 351.213(e) state that normally the POR will be 12 months. The regulations temper Commerce's discretion to set the length of the POR in each case, but Commerce must use that POR consistently throughout the review.

As indicated, Defendant claims that ambiguity stems from the unusual circumstances of this case. Def.'s Opp'n 6. Putting aside the

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[12] The statute provides that

> [a]t least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—
>
> (A) review and determine the amount of any net countervailable subsidy,
>
> (B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and
>
> (C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,
>
> and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

19 U.S.C. § 1675(a).

illogic of this assertion, 19 U.S.C. § 1675(c), 19 C.F.R. § 351.218(c)(2), and 19 C.F.R. § 351.222(i)(2)(i) clearly envision the situation where the effective date for revocation in a sunset review does not coincide with the POR for the annual administrative review. By regulation, an annual administrative review and the POR it covers are determined according to the anniversary month of the date of publication of the antidumping or countervailing duty order. *See* 19 C.F.R. § 351.213(b), (e). Normally, the POR covers the 12 months immediately prior to the anniversary month. 19 C.F.R. § 351.213(e). The later an order is published in the month, the more time there is between the last day of the POR and the publication date of the order. If as a result of the first sunset review, either Commerce or the ITC decides to revoke the order, the revocation will be effective on the five year anniversary date of the order. *See* 19 C.F.R. § 351.222(i)(2)(i). If the first sunset review does not revoke the order, the effective date of revocation for all subsequent sunset reviews will not be the anniversary date of the order. Rather, the revocation date for subsequent sunset reviews will be the date that the prior sunset review ordered continuation of the order. 19 C.F.R. § 351.222(i)(2)(i).[13] Therefore, if the original order is published any day after the first of the month, and the first sunset review revokes the order, the POR in an annual administrative review would still differ from the date of revocation by at least one day. In addition, both Commerce and the ITC may expedite the sunset review, making the review period less than 360 days, or extend the review beyond 360 days, altering the publication date for the sunset review's determination to continue the order. *See* 19 U.S.C. § 1675(c)(3), (5)(B); 19 C.F.R. § 351.218(e)(1), (e)(2)(i). Therefore, it is not only foreseeable, but more than likely that revocation as a result of a sunset review will be effective on a date other than the anniversary date of the order. As a result, a gap in the date of the revocation order and the POR in the annual administrative review is to be expected. Commerce might infrequently need to apply the cost recovery test in a situation where the POR has changed because there has been a revocation. However, it cannot be the case that the occurrence of a circumstance foreseeable by virtue of the statute and the regulations would render otherwise clear statutory language ambiguous.

As a related matter, Defendant's claim that its interpretation of the cost recovery test is reasonable also fails. As the court has already held, the cost recovery test is not ambiguous. It requires the weighted average cost of production to be calculated for the POR. Therefore,

[13] Pursuant to Commerce's regulations, in a decision to revoke an order made pursuant to a sunset review, "the revocation or termination will be effective on the fifth anniversary of the date of publication in the Federal Register of the order or suspended investigation, as applicable." 19 C.F.R. § 351.222(i)(2)(i).

Defendant's argument that the decision to use costs of production from outside the POR was a reasonable interpretation of the cost recovery test because "Commerce found that '[a]n annual-average cost period provides a better, more accurate measure'" of the costs for Plaintiffs' sales is of no moment. Def.'s Opp'n 15 (quoting IDM at cmt. 1); *see also* Def.-Intervenor Nucor Corp.'s Resp. Pls.' Briefs 11, Jan. 29, 2015, ECF No. 38 ("Nucor's Resp."). Similarly, whether or not Commerce has previously used costs of production from outside the POR in its cost recovery analysis does not establish its legal authority to refuse to follow the plain language of the statute.[14] The administrative determinations cited by Defendant are not currently before the court and do not control the court's determination that the language of the cost recovery test is clear on its face.

Defendant also argues the SAA indicates the cost recovery test is a flexible provision. Defendant notes that the SAA provides an exception for adjusting the costs of production. Def.'s Opp'n 14. However, as Defendant itself admits, the exception for when Commerce may make any adjustment to costs is to be made "before testing for cost recovery." *Id.* at 14 (quoting SAA at 832, 1994 U.S.C.C.A.N. at 4170) (internal quotation marks omitted). Any flexibility provided by this exception specifically occurs before the application of the cost recovery test.

Below Cost Sales

Plaintiffs argue that the use of costs outside the POR is unlawful as a general matter because Commerce is required to use costs of production that "reasonably reflect the costs associated with the production and sale of the merchandise, during the period of review," and that those costs must be the costs for the POR. Pl.'s Mot. 18–19. Plaintiffs argue that there is "no legal basis for Commerce to utilize

[14] Defendant claims that it has previously calculated the costs of production using costs from outside the POR in the administrative review of certain cold-rolled and corrosion-resistant carbon steel flat products from Korea. *See* Def.'s Opp'n 17 (citing *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea*, 66 Fed. Reg. 47,163 (Dep't of Commerce Sept. 11, 2001) (notice of preliminary results of antidumping duty administrative review)). Originally, the POR in that case was from August 1, 1999 through July 31, 2000. Commerce revoked the antidumping duty order for cold-rolled carbon steel products as of January 1, 2000. Therefore, Commerce shortened the POR for cold-rolled carbon steel products to August 1, 1999 through December 31, 1999. However, the cost data outside the POR was from July 1999, which was never included in the POR either before or after revocation. Furthermore, the parties there did not contest the use of the cost data from the month prior to the POR. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 67 Fed. Reg. 11,976 (Dep't Commerce Mar. 18, 2002) (notice of final results of antidumping duty administrative reviews).

cost information for the five and a half months after revocation for testing whether sales made during the POR can be used as normal value for price comparison purposes." *Id.* at 18. Defendant argues that Commerce acted reasonably when it "rejected using shorter period data because 'the shorter averaging period may reflect erratic production levels throughout the year, and improperly result in the exclusion of certain expenses only recorded sporadically during the year.'" Def.'s Opp'n 20 (quoting IDM at cmt. 1). Plaintiffs *see* this as a question of whether the statute unambiguously prohibits Commerce from using cost data for five and a half months outside of the POR, while Defendant sees this as a question of reasonableness. The court agrees with Defendant that 19 U.S.C. § 1677b(b)(1) grants Commerce the discretion to include costs outside of the POR in calculating the cost of production for its below cost sales analysis. However, the court finds Commerce's explanation as to why it was reasonable on the facts of this case to use costs incurred five and a half months after the POR had ended, inadequate.

Congress has provided Commerce with discretion in calculating the cost of production. As discussed above, Commerce must use costs for "a period which would ordinarily permit the production of that foreign like product in the ordinary course of business . . . ." 19 U.S.C. § 1677b(b)(3)(A). Further, Commerce is instructed to calculate costs based upon the exporter's or producer's records where those records "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). This language affords Commerce significant discretion to choose what cost reporting period to use.[15] The language is broad enough to afford Commerce the discretion to use costs outside of the POR, possibly even up to five and a half months outside the POR.

As the Defendant points out, the SAA further provides:

> Costs shall be allocated using a method that reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review. In determining whether to accept the cost allocation methods proposed by a specific producer, Commerce will consider the production cost information available to the producer and whether such information could reasonably be used to compute a representative measure of the materials, labor and other costs, in-

[15] Defendant-Intervenor argues that 19 U.S.C. § 1677b(f)(1)(A) and 19 U.S.C. § 1677b(b)(1) fail to support Plaintiffs' position because the provisions only "involve the manner in which costs should be calculated and whether to disregard sales from normal value," and do not address the question of the cost reporting period. Nucor's Resp. 12. These provisions do implicate Commerce's obligations regarding the cost reporting period because they cabin Commerce's discretion for how to calculate the cost of production in the below cost sales test.

> cluding financing costs, incurred to produce the subject merchandise, or the foreign like product.

Def.'s Opp'n 21–22 (quoting SAA at 835, 1994 U.S.C.C.A.N. at 4172). Under this language, when Commerce evaluates a company's records to calculate the cost of production it must determine if the method used "reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review." It is not implausible that in certain situations, costs incurred outside the POR might reasonably reflect and accurately capture the actual costs incurred for the merchandise sold during the POR.

However, Commerce must explain its decision in this case that the costs incurred after the POR reasonably reflect the costs of the product under review. Although Commerce's explanation does not have to be a model of clarity the court must be able to discern why Commerce believed that costs outside the POR "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). It is not enough for Commerce to summarily conclude that "there is no reason to believe that the annual-average cost data is unsuitable or otherwise unrepresentative . . . ." Def.'s Opp'n 22 (quoting IDM at cmt. 1) (internal quotation marks omitted). Nor is it sufficient for Defendant to argue that Plaintiffs failed to show how Commerce's choice led to any distortion. *Id.* at 23 (citations omitted). The explanation cannot simply provide any reason as to why Commerce would prefer to use this data. Commerce must explain why, in light of the statute, it decided to use this data. The statute grants Commerce the discretion to calculate costs "during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business," 19 U.S.C. § 1677b(b)(3)(A), and to rely upon records that "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Commerce must explain how the costs used reasonably reflect the costs for the merchandise under consideration in its determination of normal value.

Defendant argues that nothing mandates that Commerce "must use data specifically pegged to the review period . . . ." Def.'s Opp'n 22 (citation omitted). While the statute affords Commerce discretion to use cost of production data from outside the POR, Commerce must still provide an adequate explanation for its decision. As discussed above, that Defendant cites other instances in which Commerce has used costs from outside the POR does not establish the reasonableness of its decision to do so in this case.

Administrative Burden

Finally, Defendant contends Plaintiffs raised arguments regarding the cost data for cost recovery and below cost sales analysis too late in the administrative proceeding. Defendant argues "even if Commerce had agreed with plaintiffs' position, Commerce could not reopen the record because doing so would have impeded its ability to complete the administrative review within the statutorily prescribed deadline." *Id.* at 28.[16] As discussed above, the cost recovery test requires Commerce to collect the cost data for the POR. A clear and unambiguous statute does not give way to administrative constraints. Therefore, it is not a matter of whether the administrative burden reasonably outweighed the decision to comply with Plaintiffs' request. Commerce was required to follow the statute. It may not disregard the statute simply because to do so would create administrative costs. While Commerce has discretion as to how it calculates the cost of production for below cost sales, it must explain the reasonableness of its decision, however it chooses to proceed in light of the data it collects.

CONCLUSION

In accordance with the foregoing, it is hereby

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

ORDERED that Commerce shall issue a remand determination that is supported by substantial record evidence and is in accordance with law; and it is further

ORDERED that Commerce may reopen the record to collect any information that may be necessary to make its determination upon remand; and it is further

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

ORDERED that Plaintiff shall have 30 days thereafter to file objections; and it is further,

ORDERED that Defendant and Defendant-Intervenor shall have 15 days thereafter to file responses.

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[16] In the Issues and Decision Memorandum for the Final Results, Commerce stated that if it had agreed with Plaintiffs, it would have had to

> (1) require both respondents to report entirely new product-specific cost files, (2) analyze the revised cost data, (3) issue supplemental questionnaires seeking additional clarification of the newly reported information (if needed), (4) allow a new round of case and rebuttal briefs on the new data, and (5) address all comments contained in the newly filed case and rebuttal briefs prior to issuing our final results.

IDM at cmt 1.

Dated: May 5, 2015
New York, New York

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