U.S. Court of Appeals for the Federal Circuit

WORLDWIDE DOOR COMPONENTS, INC., Plaintiff-Appellee v. UNITED STATES, ENDURA PRODUCTS, INC., Defendants ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Appellant

Appeal No. 2023–1532

Appeal from the United States Court of International Trade in No. 1:19-cv-00012-TCS, Senior Judge Timothy C. Stanceu.

COLUMBIA ALUMINUM PRODUCTS, LLC, Plaintiff-Appellee v. UNITED STATES, ENDURA PRODUCTS, INC., Defendants ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Appellant

Appeal No. 2023–1534

Appeal from the United States Court of International Trade in No. 1:19-cv-00013-TCS, Senior Judge Timothy C. Stanceu.

Decided: October 8, 2024

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JEREMY WILLIAM DUTRA, Squire Patton Boggs (US) LLP, Washington, DC, argued for plaintiff-appellee Columbia Aluminum Products, LLC. Also represented by PETER JOHN KOENIG.

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Before PROST, LINN, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

In this consolidated appeal, Aluminum Extrusions Fair Trade Committee (AEFTC) appeals two decisions from the United States Court of International Trade (trial court). In those decisions, the trial court affirmed scope rulings issued under protest by the Department of Commerce (the agency). The scope rulings held that door thresholds imported by Appellees do not fall within the scope of the antidumping and countervailing duty orders on aluminum extrusions from the

People's Republic of China. For the reasons explained below, we reverse the trial court's second remand order and vacate all subsequent opinions.

I

The current appeal addresses whether the products imported by Appellees Worldwide Door Components, Inc. and Columbia Aluminum Products, LLC fall within the scope of existing antidumping and countervailing duty orders.[1] We begin with a brief explanation of the scope language and the products at issue in this case. We then summarize this case's extensive procedural history before turning to the merits.

A

In 2011, the Department of Commerce issued antidumping and countervailing duty orders on aluminum extrusions from China. *See Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't of Commerce May 26, 2011); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't of Commerce May 26, 2011) (collectively, the Orders). The scope of the Orders describes the subject merchandise as "aluminum extrusions" that "are shapes and forms, produced by an extrusion process, made from" specified aluminum alloys. *Antidumping Duty Order*, 76 Fed. Reg. at 30,650.[2] Relevant here, the scope language explains what goods may be considered "subject merchandise:"

> Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture.

[1] We note at the outset that, for the purposes of this appeal, we treat Appellees' products as interchangeable. Neither of the two Appellees opposed AEFTC's motion for consolidation, *see* ECF 13 (motion to consolidate); ECF 15 (order granting motion), and the consolidated Appellees submitted a single brief, which nowhere argued that the two companies should be treated differently with respect to the disposition of this case. *See generally* Appellees' Br. Even so, counsel for Columbia seemed to argue for the first time at oral argument that Appellees should be treated differently, asserting that the agency's first remand redetermination considered Worldwide products but failed to consider Columbia products. Oral Arg. at 46:38–48:19, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23–1532_07112024.mp3. We conclude that, by raising the issue for the first time at oral argument, Columbia failed to preserve this argument and, like previous panels of this court, "we exercise our discretion to find forfeiture." *ABS Glob., Inc. v. Cytonome/ST, LLC*, 984 F.3d 1017, 1027 (Fed. Cir. 2021) (collecting cases).

[2] The Orders recite the same scope. *See Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1379 n.4 (Fed. Cir. 2017). *Compare* Antidumping Duty Order, 76 Fed. Reg. at 30,650–51, *with* Countervailing Duty Order, 76 Fed. Reg. at 30,653–54. For ease of reference, we cite only to the scope in the Antidumping Duty Order.

> Such parts that otherwise meet the definition of aluminum extrusions are included in the scope. The scope includes the aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise unless imported as part of the finished goods 'kit' defined further below. The scope does not include the non-aluminum extrusion components of subassemblies or subject kits.
>
> Subject extrusions may be identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or heat sinks (that do not meet the finished heat sink exclusionary language below). Such goods are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation.

Id. at 30,650–51. In addition to the stated inclusions, "[t]he scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *Id.* at 30,651.

Under agency regulations, "[a]n interested party may submit a scope ruling application requesting that the Secretary conduct a scope inquiry to determine whether a product . . . is covered by the scope of an order." 19 C.F.R.§ 351.225(c)(1). In August 2017 and March 2018, respectively, Worldwide and Columbia each submitted Scope Ruling Requests to the agency, seeking determinations that their imported door thresholds are not subject to the Orders. J.A. 969. Worldwide argued that its door thresholds are exempt from the Orders under the finished merchandise exclusion because they (1) are assemblies, containing both extruded aluminum components and non-aluminum components, and (2) are imported fully assembled and ready "for installation within a door frame, or residential or commercial building, without requiring any further finishing or fabrication." J.A. 976; J.A. 988. Likewise, Columbia argued that its door thresholds are exempt from the Orders under the finished merchandise exception because the thresholds are composed of both extruded aluminum components and non-aluminum components and are "ready for use at the time of import and require no further processing or manufacturing." J.A. 996.

Appellant AEFTC was the petitioner in the underlying antidumping and countervailing duty investigations for Appellees' thresholds and submitted comments as a domestic party in the scope ruling proceedings. *See* J.A. 970 n.6. AEFTC subsequently became a party to the case when it intervened in the trial court proceedings to defend the agency's in-scope ruling.

B

1

On December 19, 2018, the agency resolved both Scope Ruling Requests in a single determination. *See Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components Inc., MJB Wood Group Inc., and Columbia Aluminum Products Door Thresholds* (Dep't of Commerce Dec. 19, 2018) (hereinafter, *Original Scope Ruling*); J.A. 969–1006. Pursuant to 19 C.F.R. § 351.225(k)(1), the agency determined that Appellees' door thresholds were covered by the scope of the Orders. After an extensive recitation of Appellees' arguments and a discussion of relevant prior scope rulings, the agency provided three alternative bases for its determination, finding that the thresholds qualified as subject merchandise as either "parts for final finished products," "subassemblies," or "extrusions that may be identified with reference to their end-use." J.A. 1000–02. The agency also rejected Appellees' position that the door thresholds were excluded from the Orders under the finished merchandise exception.

First, with respect to "parts for final finished products," the agency found that "that the aluminum extruded components of [Appellees'] door thresholds may be described as parts for final finished products, *i.e.*, parts for doors, which are assembled after importation (with additional components) to create the final finished product, and otherwise meet the definition of in-scope merchandise." J.A. 1001. Next, with respect to subassemblies, the agency found that "the door thresholds, which constitute aluminum extrusion components attached to non-aluminum extrusion components, may also be described as subassemblies pursuant to the scope of the Orders." J.A. 1002. Based on the subassemblies conclusion, the agency noted that the non-aluminum extrusion components of the thresholds would not be included in the scope of the Orders. Finally, the agency concluded that Appellees' products were subject merchandise because the "scope of the Orders also expressly covers aluminum extrusions that may be identified with reference to their end-use, such as door thresholds," "regardless of whether they are ready for use at the time of importation." J.A. 1002. The agency then found that Appellees' reliance on the finished merchandise exception was "inapposite," reasoning that to hold otherwise "would render the express inclusion of 'door thresholds' meaningless." J.A. 1003–04.

2

Appellees appealed the *Original Scope Ruling* to the trial court. On September 14, 2021, the trial court issued opinions for both Worldwide and Columbia, remanding the case back to the agency for further consideration. *See Worldwide Door Components, Inc. v. United States*, 537 F.Supp.3d 1403 (Ct. Int'l Trade 2021) (hereinafter, *First Remand Order*); J.A. 1–17.[3] In the *First Remand Order*, the trial court held that the agency misinterpreted the language of the scope and therefore erred in finding Appellees' door thresholds were covered by the Orders. In the trial court's view, the agency erred when it relied on the scope language stating "[s]ubject aluminum extrusions may be described at the time of importation as parts for final finished products" and "[s]ubject extrusions may be identified with reference to their end use." J.A. 6–8. According to the trial court, "[Appellees'] door thresholds are not 'aluminum extrusions' at the time of importation; rather, they are door thresholds that contain an aluminum extrusion as a component in an assembly." J.A. 7. Therefore, based on its interpretation of the general scope language as excluding assembled goods, the trial court held that such language was "inapplicable to the issues presented by [Appellees'] imported products" and could not be used as the basis for finding the products to be subject merchandise. J.A. 7. During its analysis of the scope language, the trial court acknowledged that the agency made a finding on subassemblies but did not discuss the implications or accuracy of this finding.

The trial court also held that the agency erred in refusing to consider whether Appellees' thresholds satisfied the finished merchandise exception. Because the agency had relied on its interpretation of the "end use" provision to make its finding that the finished merchandise exception was inapplicable, the trial court reasoned that this conclusion must also fail. On remand, the trial court instructed the agency to "give full and fair consideration to the issue of whether this exclusion applies." J.A. 16.

3

On remand, the agency again found that Appellees' door thresholds were subject merchandise under the Orders. *Final Results of Redetermination Pursuant to Court Remand; Worldwide Door Components, Inc. v. United States* (Dep't of Commerce Dec 23, 2020) (here-

[3] For simplicity, we cite only the agency scope orders and trial court decisions where Worldwide appears as the captioned party. Although the agency and the trial court formally issued separate decisions for both parties in most instances, the pairs of decisions are substantively identical. *See, e.g.*, J.A. 1–17 (trial court's *First Remand Order* for Worldwide); J.A. 104–27 (trial court's *First Remand Order* for Columbia).

inafter, *First Remand Redetermination*); J.A. 1437–74. At the outset, the agency noted that it disagreed with the trial court's interpretation of the Orders. However, in order to comply with the trial court's order, and "under respectful protest," the agency did not consider whether Appellees' door thresholds were covered by the general scope language as "parts for final finished products" or as "subject aluminum extrusions identified with reference to their end use." J.A. 1450. The agency also disagreed, under respectful protest, with the trial court's conclusion that certain Federal Circuit rulings discussing subassemblies were inapplicable in this case.

Because the trial court did not rule on the agency's determination in the *Original Scope Ruling* that Appellees' door thresholds are subassemblies, the agency once again considered the language's applicability to the merchandise at hand. Like the *Original Scope Ruling*, the agency again found that Appellees' door thresholds can be classified as subassemblies. The agency explained that a subassembly is broadly defined as "partially assembled merchandise," and noted that, "[i]n other words, a subassembly could also be described as an intermediate product or any other partially assembled product that is something less than the full, permanent, and completed final finished product that would satisfy the finished merchandise exclusion." J.A. 1453. In the context of Appellees' door thresholds, the agency found that the thresholds "do not function on their own, but rather are incorporated into a larger downstream product." J.A. 1459 (explaining that "Worldwide stated that its door thresholds contain all the necessary components for installation within a door frame or residential or commercial building, and provided a report from a testing laboratory documenting how the door thresholds are mounted within door frames and permanent building structures").

With respect to the trial court's order to consider the finished merchandise exception, the agency found that because the door thresholds were subassemblies, they could not also qualify as finished merchandise, since subassemblies and finished merchandise are mutually exclusive categories.

4

Appellees again sought review in the trial court, and the trial court once more remanded for further consideration by the agency. *Worldwide Door Components, Inc. v. United States*, 537 F.Supp.3d 1403 (Ct. Int'l Trade 2021) (hereinafter, *Second Remand Order*); J.A. 19–44. In this opinion, the trial court held that the agency's "new decision impermissibly relies on a factual finding or inference pertaining to [Appellees'] door thresholds that is contradicted by certain evidence on the record and unsupported by any specific evidence that Commerce cited." J.A. 20. Further, the trial court disagreed with the agency's analysis of our precedent and its conclusion that subassemblies and finished merchandise were mutually exclusive categories. J.A. 36 n.5 ("These decisions by the Court of Appeals for the Federal Circuit do not support the Department's position that it need not consider the finished merchandise exclusion if it deems the good at issue to be a 'subassembly.'").

In reviewing the *First Remand Redetermination*, the trial court focused on a passage from the decision where the agency examined record evidence indicating that door units are highly customizable, which might require additional cutting and machining of the door threshold. The agency determined that this information was consistent with and supported its prior determination that Appellees' door thresholds were not final finished products, but rather an intermediate product that is meant to be incorporated into a larger downstream product. Upon review, the trial court held that this evidence was "contrary to certain record evidence," J.A. 38, including Appellees' description of the door thresholds as "fully assembled at the time of entry, complete with all of the necessary components to be ready for installation within a door frame, or residential or commercial building *without any further finishing or fabrication*," J.A. 38 (quoting Worldwide's Scope Ruling Request, emphasis added by trial court). The trial court held that the record evidence "d[id] not constitute substantial evidence to support a conclusion or inference that [Appellees'] door thresholds are so designed and manufactured." J.A. 39. The trial court further explained:

> [B]ecause Commerce relied, at least in part, on this evidence to conclude that the finished merchandise exclusion was not applicable to [Appellees'] door thresholds, the court must remand the agency's decision once again. The issue to which this evidence pertains, i.e., whether [Appellees'] door thresholds are designed and manufactured so as to require cutting or machining prior to use, is directly relevant to the applicability of the finished merchandise exclusion, which pertains to "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled *and completed* at the time of entry."

J.A. 39–40 (quoting Antidumping Duty Order, 76 Fed. Reg. at 30,651, emphasis added by trial court).

The trial court also held that the agency did not offer a "plausible explanation of why the articles mentioned in the 'door' and 'window' exemplars of the finished merchandise exclusion satisfy that exclusion but that [Appellees'] door thresholds, as described in the Scope Ruling Request, do not." J.A. 43. Accordingly, the trial court held that "Commerce did not comply fully with the court's instruction in [the *First Remand Order*] with respect to the finished merchandise exclusion." J.A. 43. The trial court instructed:

> On remand, Commerce must undertake this task again. After reaching a finding from the record evidence that the door thresholds at issue in this case either are, or are not, so designed and produced as to require cutting or machining prior to use, Commerce must consider that finding in deciding anew whether the finished merchandise exclusion applies to the specific door thresholds at issue in this litigation.

J.A. 43–44.

5

Following the *Second Remand Order*, the agency considered, for the third time, whether Appellees' door thresholds meet the definition of finished merchandise. *Final Results of Redetermination Pursuant to Court Remand; Worldwide Door Components, Inc. v. United States* (Dep't of Commerce Sept. 14, 2021) (hereinafter, *Second Remand Redetermination*); J.A. 1589–1604. In the *Second Remand Redetermination*, the agency found, under respectful protest, that Appellees' door thresholds were excluded from the scope of the Orders under the finished merchandise exception. The agency noted its disagreement with nearly all of the *Second Remand Order*'s analysis, but ultimately stated that its new determination was "consistent with the [trial court's] opinion and analysis." J.A 1604. The agency concluded its opinion stating, "[s]hould the Court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly." J.A. 1604.

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Upon review, the trial court remanded the case back to the agency for the third and final time, finding both procedural and substantive error. *Worldwide Door Components, Inc. v. United States*, 589 F.Supp.3d 1185 (Ct. Int'l Trade 2022) (hereinafter, *Third Remand Order*); J.A. 45–67. With respect to the procedural error, the trial court held that the *Second Remand Redetermination* was "not a decision in a form the court may sustain" due to its phrasing at the end stating "[s]hould the Court sustain these Final Results of Redetermination, we will issue a revised scope ruling accordingly," because such a determination would not be self-effectuating if the trial court were to affirm the agency. J.A. 60–61 (citing *Second Remand Redetermination*, J.A. 1604).The trial court instructed the agency that it must "issue a third remand redetermination that . . . is a scope ruling or determination for the court's review, and it must be in a form that would go into effect if sustained upon judicial review." J.A. 61. Next, the trial court held that the *Second Remand Redetermination* was substantively flawed because it presented no reasoning for its scope ruling, "other than its incorrect conclusion that the court ordered Commerce to do so." J.A. 61–62. The trial court explained the various ways that it thought the agency had misinterpreted its *Second Remand Order* and identified issues that needed further analysis to be legally sustainable.

7

The agency issued its final redetermination, again finding, under protest, that Appellees' door thresholds are finished merchandise and therefore excluded from the Orders. *Final Results of Redetermination Pursuant to Court Remand; Worldwide Door Components, Inc. v. United States* (Dep't of Commerce Aug. 10, 2022) (hereinafter, *Third Remand Redetermination*); J.A. 1698–1717. The agency noted that, consistent with the *Third Remand Order*, it provided additional explanation for the basis of its finding. After further discussion of the record, the agency stated, "because we conclude that [Appellees'] door thresholds are: (1) fully assembled and completed at the time of entry; and (2) contain extruded aluminum and nonextruded aluminum components, we find that [Appellees'] door thresholds satisfy the criteria for the finished merchandise exclusion." J.A. 1712. The agency also noted that "[i]f the [trial court] sustains this redetermination, a *Federal Register* notice will be published stating that [Appellees'] door thresholds are excluded from the scope of the *Orders* based on the finished merchandise exclusion" and "instructions will be issued to [Customs and Border Patrol], directing [it] to give effect to this determination as appropriate." J.A. 1717.

8

On appeal for the fourth time, the trial court sustained the agency's scope determination. *Worldwide Door Components, Inc. v. United States*, 606 F.Supp.3d 1363 (Ct. Int'l Trade 2022) (hereinafter, *Final Opinion*); J.A. 68–84. In its *Final Opinion*, the trial court concluded that the agency had complied with the *Third Remand Order* and had "ma[d]e a decision on whether the goods are within the scope of the Orders based on the record as a whole" and "done so . . . in a form the court is able to sustain." J.A. 81. The trial court rejected arguments AEFTC raised on appeal.

AEFTC appeals. We have jurisdiction under 28 U.S.C.§ 1581(c).

II

We review the trial court's decisions de novo and apply anew the same standard it used. *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1308 (Fed. Cir. 2020) (en banc). Under that standard, this court must uphold the agency's determinations 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); *see also Sunpreme*, 946 F.3d at 1308. The plain meaning of an antidumping or countervailing duty order, including whether an ambiguity exists with respect to the scope of the order, is a question of law reviewed de novo. *Meridian Products, LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017). In contrast, "[t]he question of whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence." *Id.*

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) (quoting *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). Our review "is limited to the record before Commerce in the particular proceeding at issue and includes all evidence that supports and detracts from Commerce's conclusion." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1348 (Fed. Cir. 2015). Further, the agency's findings "may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence." *Id.*

III

On appeal, AEFTC challenges the trial court's remand orders, arguing that the agency's *Original Scope Ruling* was supported by substantial evidence and otherwise in accordance with law. Appellees disagree, asserting instead that the *Original Scope Ruling* is incompatible with our precedent, whereas the *Third Remand Redetermination* is consistent with prior court decisions. The parties present argument with respect to all three bases that the agency considered in the *Original Scope Ruling*, namely, whether Appellees' door thresholds can be considered subject merchandise as (1) "parts for final finished products," (2) products "identified with reference to their end use," or (3) "subassemblies." We begin our discussion with the subassemblies provision of the Orders.

A

In the *Original Scope Ruling*, the agency unquestionably made a finding that Appellees' door thresholds could be considered subassemblies. *See* J.A. 1002 ("Additionally, we find that the door thresholds, which constitute aluminum extrusion components attached to non-aluminum extrusion components, may also be described as subassemblies pursuant to the scope of the *Orders*."). However, the agency did not go further with its subassemblies analysis. Perhaps understandably so, because the primary focus of the *Original Scope Ruling* was the agency's finding that the door thresholds were included within the scope of the Orders under the "end use" provision.

Aside from noting that the agency *did* make a finding about subassemblies, the trial court did not address the accuracy or the sufficiency of the agency's subassembly finding, instead holding that the agency committed reversible error with its interpretation of the other two at-issue provisions of the Orders. J.A. 8 (trial court stating "[a]fter concluding that the 'subassemblies' provision applied to the aluminum extrusion component of each of [Appellees'] door thresholds, the Scope Ruling again misinterpreted a provision within the scope language. . .").

In reviewing the agency's *Original Scope Ruling* anew, we hold that its in-scope determination relying on the subassemblies portion of the Orders is not supported by substantial evidence. The analysis section of the *Original Scope Ruling* dedicated only two sentences to the subassembly finding, neither of which discussed Appellees' door thresholds specifically or explained *why* they should be categorized as subassemblies. Additionally, even though the agency discussed prior relevant scope determinations—some of which resulted in a determination that the merchandise was a subassembly—the agency does not explain why Appellees' door thresholds might be similar to or different from those examples. Further, to the extent that the agency does discuss Appellees' products, *see* J.A. 1002 (quoting the antidumping and countervailing duty petitioner's argument that "aluminum extrusions are incorporated into window and *door frames and sills*, curtain walls, *thresholds*, and gutters" (emphasis in original)); J.A. 1004 (stating "we find that a door threshold may be described as a part for a door"), it is unclear whether this finding is related to the subassemblies determination, or is a rebuttal to Appellees' arguments about the finished merchandise exception. While the substantial evidence standard of review does not impose a high bar, there must be at least some citation and analysis of the record evidence.

B

Nevertheless, any defect in the agency's subassemblies analysis was cured in the *First Remand Redetermination*, where the agency's analysis was substantially more fulsome.

In the *First Remand Redetermination*, the agency began with an analysis of the scope language, focusing on the interplay between the "subassemblies" portion of the general scope language and the "finished merchandise" exception. The agency noted three particular points: (1) the subassemblies language "is broad enough to cover single aluminum extrusion components that are attached to other aluminum extrusion components, or attached to non-aluminum extrusion components, or some combination thereof, at the time of importation;" (2) "a subassembly could also be described as an intermediate product or any other partially assembled product that is something less than the full, permanent, and completed final finished product that would satisfy the finished merchandise exclusion;" and (3) the subassemblies provision contains a specific reference to the finished goods kit exclusion, "which means that products which satisfy the subassemblies language may, nonetheless, be excluded under the finished goods kit exclusion," however, the subassemblies provision contains no similar exception for finished merchandise. J.A. 1453–54. Ultimately, the agency concluded that "products that are included in the scope because they satisfy the subassemblies language cannot also be excluded as finished merchandise under the finished merchandise exclusion." J.A. 1454.

Next, the agency turned to the facts of this case. There, the agency found that "the door thresholds constitute 'partially assembled merchandise,' or an intermediate product, and therefore, they are not the fully and permanently assembled and completed final finished product, that would satisfy the finished merchandise exclusion." J.A. 1459. The agency cited record evidence from Appellees, stating that their "door thresholds contain all the necessary components for installation within a door frame or residential or commercial building," and noting that Appellees "provided a report from a testing laboratory documenting how the door thresholds are mounted within door frames and permanent building structures." J.A. 1459. To the agency, this evidence indicated that the "door thresholds do not function on their own, but rather are incorporated into a larger downstream product." J.A. 1459. The agency also noted other record evidence explaining that the door thresholds are "designed for use in 'single or double exterior doors,'" and that "the door thresholds at issue are designed to fit standard door sizes in the United States." J.A. 1459–60.

The *First Remand Redetermination* also addressed Appellees' arguments that the door thresholds should be categorized as finished merchandise because, "according to [Appellees], they are 'finished merchandise' that are 'fully and permanently assembled and completed at the time of entry' and do not require 'further finishing, fabrication or cutting, or repackaging after importation.'" J.A. 1460. Ultimately, the agency rejected Appellees' argument, stating that Appellees' "description of its door thresholds as 'ready for use at the time of import' and requiring 'no further processing or manufacturing' at the time of entry does not mean that such thresholds constitute finished merchandise under the exclusion." J.A. 1461. The agency found that one of our cases was instructive here, noting that we have affirmed the agency's finding that certain "curtain wall units did not fall within the finished merchandise exclusion because the curtain wall units at issue were subassemblies meant to be fastened together to form a completed curtain wall." J.A. 1460 (citing *Shenyang Yuanda Aluminum Indus. Engr. Co., Ltd. v. United States*, 776 F.3d 1351, 1358 (Fed. Cir. 2015)). Next, the agency determined that its analysis was consistent with a previous agency determination where it found that certain door handles were "'subassemblies' that were intended to 'become part of a larger whole' and that therefore, they were not finished merchandise containing extrusions." J.A. 1460–61.

Following the agency's main analysis section of the *First Remand Redetermination*, where it conclusively found that Appellees' door thresholds should be categorized as subassemblies and not finished merchandise, the agency recited and responded to the "Interested Party Comments on Draft Results of Redetermination." *See* J.A. 1463–71. Relevant here, AEFTC and another interested party, Endura Products, Inc., cited additional record evidence, which allegedly constituted substantial evidence for the agency's subassembly finding:

> The petitioner and Endura also submitted information in the underlying scope proceeding demonstrating that door thresholds are highly customizable and generally require further finishing and fabrication before assembly into a finished door unit. Although door thresholds are available in standard lengths, they are generally manufactured to a longer length that is cut or machined according to order-specific requirement.
>
> Because of the need to customize door thresholds to meet the requirements of a specific door assembly, it would not make economic sense to finish customization of a threshold prior to importation, and it is likely that imported door thresholds are further cut to size at the importers' domestic facilities or at pre-hangers' facilities.

J.A.1470. The agency noted that AEFTC's evidence "indicates that the completed door unit is highly customizable, and may require additional cutting and machining of the door threshold." J.A. 1472. The agency ultimately concluded that "the information submitted by [AEFTC] and Endura is consistent with and supports our determination that [Appellees'] door thresholds are not, in and of themselves, final finished products, but are, rather, an intermediate product that is meant to be incorporated into a larger downstream product, which is the finished merchandise." J.A. 1473.

As discussed, *supra* I.B.4., the trial court's *Second Remand* order held that the agency's *First Remand Redetermination* relied on improper inferences or factual findings not supported by the record and that the agency had erred in failing to consider the finished merchandise exception. J.A. 20. For both issues, we disagree.

We begin with the question of whether the agency's subassemblies finding was supported by substantial evidence, and we answer that question in the affirmative. First, the agency engaged in a thorough analysis of the scope language, explaining precisely how it defined a subassembly. Then, based on that discussion, the agency reviewed record evidence—including statements made by Appellees themselves that described the door thresholds as parts that are incorporated into finished door frames—to conclude that the goods at issue meet the definition of a subassembly. The agency even took the additional step of analogizing the door thresholds to other products that had been previously categorized as subassemblies, including curtain wall units and door handles. This is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See In re Gartside*, 203 F.3d at 1312.

That the trial court may be able to point to certain record evidence that is less persuasive or could support a contrary finding does not make the agency's decision unsupported by substantial evidence. *See Ad Hoc Shrimp Trade Action Comm.*, 802 F.3d at 1348. The trial court seemed to focus on the agency's citation of AEFTC and Endura's record evidence indicating that door units are highly customizable and might require additional cutting and machining of the door threshold. The trial court found that this statement by the agency was contrary to the record evidence where Appellees asserted that the door thresholds are "fully assembled at the time of entry, complete with all of the necessary components to be ready for installation within a door frame, or residential or commercial building *without any further finishing or fabrication*." J.A. 38. We first note that, to us, it does not appear that the agency actually relied on this evidence in making its subassemblies determination. Rather, the agency found that the evidence was "consistent with and supports our determination" that the door thresholds are subassemblies. J.A. 1473. Further, the agency decision acknowledged, and subsequently rejected, Appellees' argument that their door thresholds are finished merchandise because they are "ready for use at the time of import." J.A. 1461. Because the agency found that the door thresholds "must be attached to other components after importation to become part of the downstream product," it concluded that the door thresholds could qualify as subassemblies *even if* they did not require any further finishing after importation. J.A.1461.

The trial court also took issue with the agency's failure to discuss particular exemplars listed in the finished merchandise exception of the Orders: "[t]he Remand Redetermination does not offer a plausible explanation of why the articles mentioned in the 'door' and 'window' exemplars of the finished merchandise exclusion satisfy that exclusion but that [Appellees'] door thresholds, as described in the Scope Ruling Request, do not." J.A. 43; *see also* Antidumping Duty Order, 76 Fed. Reg. at 30,651 (listing examples of finished merchandise such as "finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels"). We acknowledge the trial court's concern with line-drawing in the context of these Orders and agree that a discussion distinguishing the categories could have been a helpful addition to the agency's decision. Nevertheless, such an omission does not constitute reversible error. As explained earlier, "whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence." *Meridian*, 851 F.3d at 1382.

Finally, we disagree with the trial court's assertion that the agency was required to consider the finished merchandise exception, notwithstanding its finding that the door thresholds were subassemblies. J.A. 36 n.5 (trial court stating that the agency's cited opinions "do not support the Department's position that it need not consider the finished merchandise exclusion if it deems the good at issue to be a 'subassembly'"). In a recent opinion, we firmly foreclosed that position, making clear that "parts or subassemblies are not finished products and thus cannot qualify for the finished merchandise exclusion." *China Custom Mfg. Inc. v. United States*, 61 F.4th 956, 960 (Fed. Cir. 2023); *see also Shenyang Yuanda Aluminum*, 776 F.3d at 1358 ("A part or subassembly, here a curtain wall unit, cannot be a finished product."). Because subassemblies and finished merchandise are mutually exclusive categories for the purpose of the Orders, it was error for the trial court to remand the case back to the agency for failure to consider the finished merchandise exception in light of its subassembly finding.

In sum, to the extent that the agency's in-scope determination relies on the subassemblies provision of the Orders, we hold that the agency's *Original Scope Ruling* was deficient with respect to its analysis of record evidence. The subassembly determination was therefore not supported by substantial evidence and remand for further consideration was appropriate. The agency subsequently cured any defect with respect to its subassembly findings in the *First Remand Redetermination* by supporting its decision with substantial record evidence. Accordingly, the trial court's second remand order holding otherwise was erroneous.

IV

The agency's finding that Appellees' door thresholds are subassemblies is an independent basis for sustaining its in-scope determination. Therefore, we need not reach the alternative bases for an in-scope determination that were at issue in the prior proceedings, namely, the "parts for final finished products" and goods "identified with reference to their end use" provisions of the Orders.

For the reasons explained above, we reverse the trial court's *Second Remand Order*, reinstate the non-protested portions of the agency's *First Remand Redetermination*, and vacate the trial court's subsequent opinions and orders in this case.

REVERSED-IN-PART AND VACATED-IN-PART

COSTS

No costs.

J.D. Irving, LTD., Plaintiff-Appellant v. United States, Department of Commerce, Defendants-Appellees

Appeal No. 2023–1652

Appeal from the United States Court of International Trade in No. 1:21-cv-00641-TMR, Judge Timothy M. Reif.

Decided: October 10, 2024

JAY CHARLES CAMPBELL, White & Case LLP, Washington, DC, argued for plaintiff-appellant. Also represented by WALTER SPAK.

ERIC LAUFGRABEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellees. Also represented by BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M. MCCARTHY; ELIO GONZALEZ, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

Before STOLL and CUNNINGHAM, *Circuit Judges*, and CECCHI, *District Judge*.[1]

STOLL, *Circuit Judge*.

The sole issue in this appeal is whether the U.S. Court of International Trade (CIT) erred in holding that it lacked subject matter jurisdiction under 28 U.S.C. § 1581(i), the CIT's residual grant of jurisdiction. J.D. Irving (JDI), a Canadian producer, exporter, and importer of merchandise subject to a January 2018 antidumping duty order on certain softwood lumber products from Canada, appeals the CIT's dismissal of its case for lack of subject matter jurisdiction. Although JDI acknowledged that its action would normally arise under 28 U.S.C. § 1581(c), it asserted that the CIT has subject matter jurisdiction pursuant to § 1581(i). We determine that jurisdiction under § 1581(c) could have been available to JDI absent binational panel review because (1) the true nature of JDI's suit is a challenge to the Final Results of a second administrative review, and (2) JDI has not met its burden to show that administrative review and binational panel review would be manifestly inadequate. Because jurisdiction under § 1581(i) is strictly limited and may not be invoked when jurisdiction under § 1581(c) could have been available, we affirm the CIT's dismissal for lack of subject matter jurisdiction under § 1581(i).

[1] Honorable Claire C. Cecchi, District Judge, United States District Court for the District of New Jersey, sitting by designation.

BACKGROUND

I

Before addressing the relevant facts and procedural history of this action, we begin with a brief overview of the applicable legal framework.

The U.S. Department of Commerce may levy antidumping duties on goods "sold in the United States at less than . . . fair value." *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014) (quoting 19 U.S.C. § 1673). Upon the entry of merchandise covered by an antidumping duty order, "an importer must make a cash deposit of estimated duties (cash deposit rate)." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1000 (Fed. Cir. 2003) (citing 19 U.S.C. § 1673e(a)(3)). Under Commerce's accounting system, the actual liquidation—i.e., final computation of duties—of entries subject to an antidumping duty order may occur years after importation. *Id.* "Before final liquidation, any interested party may request an administrative review of the antidumping duty order." *Id.* (citing 19 U.S.C. § 1675). The statute providing for administrative review is 19 U.S.C. § 1675(a)(1). *N.M. Garlic Growers Coal. v. United States*, 953 F.3d 1358, 1360 (Fed. Cir. 2020). The Final Results of an administrative review "shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." *Consol. Bearings*, 348 F.3d at 1000 (quoting 19 U.S.C. § 1675(a)(2)(C)). Commerce's implementing regulation, 19 C.F.R. § 351.212, provides for the calculation of assessment rates. *Am. Signature, Inc. v. United States*, 598 F.3d 816, 820 n.5 (Fed. Cir. 2010). Absent a request for administrative review, "Commerce liquidates the merchandise at the cash deposit rates (i.e., the deposit rates at the time of entry)." *Consol. Bearings*, 348 F.3d at 1000 (citing 19 C.F.R. § 351.212(c)(1)(i)).

Section 1581(c) of Title 28 provides the CIT with exclusive jurisdiction over civil actions commenced under 19 U.S.C. § 1516a, which governs judicial review of Commerce's determinations in antidumping duty proceedings. *Rimco Inc. v. United States*, 98 F.4th 1046, 1052 (Fed. Cir. 2024). Someone wishing to challenge an antidumping duty order may bring suit before the CIT, or, if the "dumped" goods originated in Mexico or Canada, the antidumping order may be challenged before a binational panel. *Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1347 (Fed. Cir. 2011). Liquidation of entries may be suspended pending a decision by either the CIT or a binational panel. *See id.*; 19 U.S.C. § 1516a(g)(5)(C).

The United States–Mexico–Canada Agreement (USMCA) went into effect on July 1, 2020, superseding the North American Free Trade Agreement (NAFTA). USMCA Article 10.12, entitled "Review of Final Antidumping and Countervailing Duty Determinations," provides a dispute settlement mechanism for purposes of reviewing antidumping duty determinations issued by the United States, Canada, and Mexico. *See* United States–Mexico–Canada Agreement, art. 10.12, July 1, 2020, OFF. U.S. TRADE REP., https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/10_Trade_Remedies.pdf [hereinafter USMCA]. In pertinent part, USMCA Article 10.12 provides:

> 1. . . . [E]ach Party [i.e., the United States of America, the United Mexican States, and Canada] shall replace judicial review of final antidumping . . .duty determinations with binational panel review.
>
> 2. An involved Party may request that a panel review, based on the administrative record, a final antidumping . . . duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping . . . duty law of the importing Party. For this purpose, the antidumping . . . duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.
>
> ...
>
> 4. A request for a panel shall be made in writing to the other involved Party within 30 days following the date of publication of the final determination in question in the official journal of the importing Party. ...
>
> ...
>
> 8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. . . .
>
> 9. The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.
>
> ...
>
> 15. . . . [E]ach Party shall:

> (a) maintain or amend its statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping . . . duties operate to give effect to a final panel decision that a refund is due;
>
> ...
>
> (c) maintain or amend its statutes or regulations to ensure that:
>
> (i) domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 has expired . . . .

USMCA art. 10.12 ¶¶ 1, 2, 4, 8, 9, 15.

Section 1516a(g) of Title 19 codifies the binational panel review process set forth in USMCA Article 10.12. Section 1516a(g)(2) provides:

> (g) Review of . . . antidumping duty determinations involving free trade area country merchandise
>
> ...
>
> (2) Exclusive review of determination by binational panels
>
> If binational panel review of a determination is requested pursuant to . . . article 10.12 of the USMCA, then, except as provided in paragraphs (3) and (4)—
>
> (A) the determination is not reviewable under subsection (a), and
>
> (B) no court of the United States has power or jurisdiction to review the determination on any question of law or fact by an action in the nature of mandamus or otherwise.

19 U.S.C. § 1516a(g)(2).

Section 1581(i) of Title 28 is the CIT's "residual" grant of jurisdiction that allows the court to take jurisdiction over designated causes of action founded on other provisions of law. *See Rimco*, 98 F.4th at 1052. It provides:

> (i)(1) In addition to the jurisdiction conferred upon the [CIT] by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the [CIT] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (A) revenue from imports or tonnage;
>
> (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(C) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)-(h) of this section.

(2) This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable by—

(A) the [CIT] under [19 U.S.C. 1516a(a)]; or

(B) a binational panel under [19 U.S.C. 1516a(g)].

28 U.S.C. § 1581(i).

II

In January 2018, Commerce published an antidumping duty order on certain softwood lumber products from Canada. On April 1, 2019, Commerce initiated a first administrative review (AR 1), which covered entries made between June 30, 2017, and December 31, 2018. On March 10, 2020, Commerce initiated a second administrative review (AR 2), which covered entries made between January 1, 2019, and December 31, 2019. Upon publication of the AR 1 Final Results on November 30, 2020, Commerce assigned to JDI the non-selected companies' assessment rate of 1.57%.

On March 4, 2021, Commerce initiated a third administrative review (AR 3), which covered entries made between January 1, 2020, and December 31, 2020. No party requested that Commerce review JDI's entries that would have been subject to AR 3. On April 16, 2021, Commerce instructed U.S. Customs and Border Protection: (1) to liquidate JDI's entries that would have been subject to AR 3 at the 1.57% rate then in effect, and (2) to continue to collect cash deposits on JDI's entries at this 1.57% rate.

On May 27, 2021, Commerce published its preliminary AR 2 results. Commerce assigned non-selected companies a preliminary rate of 12.05%, which would serve as the assessment rate and the cash deposit rate. On July 8, 2021, JDI filed a case brief in AR 2 addressed to the Secretary of Commerce, J.A. 88–89, asserting that "the [antidumping duty] cash deposit rate established for the year-2020 [period of review] must remain [JDI]'s cash deposit rate going forward (until changed in a review for a subsequent period, e.g., 2021, 2022, 2023)." J.A. 98.

On November 23, 2021, Commerce issued the AR 2 Final Results in an Issues and Decision Memorandum, in which it: (1) addressed the arguments JDI raised in its July 2021 case brief, and (2) amended the non-selected companies' rate to 11.59%. Commerce explained that although JDI "is under review in this 2019 review [i.e., AR 2] . . . no review of [JDI]'s 2020 sales is being conducted" and "[w]hen an entity is not under review, such as [JDI] in 2020 administrative review [i.e., AR 3], [Commerce] do[es] not update its cash deposit rate." J.A. 175. Accordingly, "consistent with [19 U.S.C. § 1675(a)(1)], [Commerce's] regulations, and numerous rulings by the courts, [Commerce] . . . assigned [JDI] a cash deposit rate based on the non-selected companies' rate determined for these final results [in AR 2]." J.A. 176. Commerce published the AR 2 Final Results on December 2, 2021. On December 9, 2021, Commerce instructed Customs to collect cash deposits on JDI entries at the 11.59% rate assigned in the AR 2 Final Results.

On December 28, 2021, other interested parties requested binational panel review of the AR 2 Final Results pursuant to USMCA Article 10.12. Two days later, JDI filed a complaint and commenced an appeal of Commerce's Cash Deposit Instructions before the CIT. JDI requested that the CIT:

> (A) Enter judgment in favor of [JDI];
>
> (B) Hold and declare that it was unlawful for Commerce to issue *Cash Deposit Instructions* assigning [JDI] the [antidumping duty] cash deposit rate determined for Non-Selected Companies in the final results of the 2019 [antidumping duty] review;
>
> (C) Order Commerce to instruct [Customs] (1) to reinstate [JDI]'s lawful [antidumping duty] cash deposit rate of 1.57% for imports of subject merchandise produced and exported by [JDI] entered on or after December 2, 2021, and (2) to refund [antidumping duty] cash deposits provided for such entries in excess of the 1.57% rate; and
>
> (D) Grant [JDI] such additional relief as the [CIT] may deem just and proper.

J.A. 49. In the complaint, JDI asserted that, although the CIT's jurisdiction "would normally lie under 28 U.S.C. § 1581(c)," the CIT instead has jurisdiction over its action pursuant to § 1581(i). J.A. 33–34.

In January 2023, the CIT concluded that it lacked subject matter jurisdiction under § 1581(i) to hear the action and granted the Government's motion to dismiss. JDI appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the CIT's dismissal for lack of subject matter jurisdiction and its statutory interpretation de novo as a question of law. *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325, 1328 (Fed. Cir. 2012). "The burden of establishing jurisdiction rests on the party invoking it." *Rimco*, 98 F.4th at 1051.

I

We start our analysis by reviewing our precedent analyzing the CIT's residual jurisdiction under § 1581(i). In *Rimco*, our court held the CIT lacked jurisdiction under § 1581(i) because jurisdiction would have been available and the remedy adequate under § 1581(c). There, Rimco did not request administrative review of Commerce's antidumping duty or countervailing duty orders. Instead, after Commerce issued liquidation instructions directing Customs to assess entries subject to the orders, Rimco filed a protest challenging Customs' assessment of antidumping duties and countervailing duties on its imported goods as "'excessive fines' in contravention of the Eighth Amendment," which Customs denied. *Rimco*, 98 F.4th at 1050–51. Rimco then filed an action before the CIT, seeking judicial review of Customs' denial of the protest, asserting, in pertinent part, that the CIT had exclusive jurisdiction under § 1581(i). *Id.* at 1051. The CIT dismissed for lack of subject matter jurisdiction. *Id.* at 1049.

On appeal, we explained that "[w]hether a party may properly invoke § 1581(i) is a two-step inquiry": (1) "we determine whether jurisdiction under a different subsection of § 1581 could have been available"; and if so, (2) "we ask whether the provided remedy would have been manifestly inadequate." *Id.* at 1053 (citing *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019)). Starting with the first step, we explained that "[b]ecause the availability of jurisdiction under other subsections of § 1581 depends on the particular type of agency action challenged, we must first determine the true nature of an action." *Id.* at 1052–53 (explaining that the "true nature" factual inquiry "requires our court to identify the particular agency action underlying the claimed harm"). Viewing "the totality of Rimco's allegations," we agreed with the CIT "that the true nature of Rimco's action was to challenge Commerce's [antidumping duty] and [countervailing duty] rate determinations." *Id.* at 1053. We explained that "[i]nterested parties," such as Rimco, are directed to challenge Commerce's antidumping duty and countervailing duty determinations "via administrative review proceedings" and that "[s]ubsequent judicial review of such proceedings is available under the CIT's § 1581(c) exclusive jurisdiction." *Id.* at 1054.

Turning to step 2, we explained that because § 1581(c)jurisdiction was available, the CIT's § 1581(i) residual jurisdiction was unavailable unless the appellant could show that the remedy afforded by § 1581(c) would be manifestly inadequate. We further explained that a "manifestly inadequate remedy" is "an exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain." *Id.* (internal quotation marks omitted). Attempting to frame the § 1581(c) remedy as inadequate, Rimco unsuccessfully argued that Commerce "lacks institutional competence to judge the constitutionality of its own determinations." *Id.* We explained that: (1) "Commerce could have removed the constitutional issue by addressing the statutory appropriateness of its rate determinations"; and (2) even when Commerce is unable to make constitutional findings, it "will nevertheless serve its immensely useful record-development and fact-finding functions." *Id.* at 1055. Rimco "could have sought . . . administrative review to sufficiently challenge" Commerce's antidumping duty and countervailing duty determinations, and, had Rimco been "dissatisfied with Commerce's administrative review determination, it could have rightfully sought judicial review on the record under the CIT's exclusive jurisdiction." *Id.* We thus held that the "statutory process outlined by Congress in § 1581(c) . . . is neither unworkable, nor futile." *Id.*

In *Consolidated Bearings*, on the other hand, we held that "no other subsection of 28 U.S.C. § 1581 was or could have been a basis for jurisdiction" and, thus, the CIT had correctly found jurisdiction under § 1581(i). *Consol. Bearings*, 348 F.3d at 999. There, the appellant brought suit in the CIT: (1) to challenge liquidation instructions from 1998, by which Commerce directed Customs to liquidate all entries of antifriction bearings from Germany that had not been liquidated by the instructions from 1997; and (2) to compel Commerce to apply the antidumping rates in the June 1997 amended final results to the appellant's entries of antifriction bearings from Germany. *Id.* at 1001. The appellant did not challenge or object to the final results; rather, it sought "application of those final results." *Id.* at 1002. We explained that, because the appellant was "not challenging the final results," § 1581(c) could not have been a source of jurisdiction. *Id.* (acknowledging that, had the appellant brought the action to challenge the final results of the administrative review, the argument that § 1581(c) jurisdiction could have been available might have more merit). Because no other subsection of § 1581 was or could have been a basis for jurisdiction, we did not reach step 2—whether the remedy would have been "manifestly inadequate." *See id.*

II

Turning to the facts of this case, we conclude that the CIT did not err in holding that it lacked subject matter jurisdiction under § 1581(i) because: (1) § 1581(c) jurisdiction could have been available to JDI, and (2) JDI has not met its burden to show that the alternative remedy (administrative review and binational panel review) would be manifestly inadequate. *See Rimco*, 98 F.4th at 1052.

JDI argues that the "true nature" of its action is a challenge to Commerce's "administration and enforcement" of the AR 2 Final Results, as opposed to a challenge to the Final Results themselves. Appellant's Br. 24. We are not persuaded.

Similar to *Rimco*, we view the "true nature" of JDI's suit as a challenge to the AR 2 Final Results. The "particular agency action underlying [JDI's] claimed harm" is Commerce's assignment of a cash deposit rate higher than 1.57% in the AR 2 preliminary results and Final Results. *Rimco*, 98 F.4th at 1052. Commerce explained in its November 23, 2021 Issues and Decision Memorandum for the AR 2 Final Results that it "will assign [JDI] a cash deposit rate based on the final results of this administrative review [i.e., AR 2]." J.A. 175. JDI confirmed on December 21, 2021, that "[t]he title of the final determination" for which it intended to commence judicial review is "Certain Softwood Lumber Products From Canada: Final Results of Antidumping Duty Administrative Review; 2019" published on December 2, 2021—not Commerce's instructions from December 9, 2021. J.A. 110. Accordingly, the proper source of the CIT's jurisdiction over JDI's action would have been § 1581(c). *See Consol. Bearings*, 348 F.3d at 1002 ("Subsection (c) grants the [CIT] jurisdiction over actions brought under [19 U.S.C. § 1516a], which includes challenges to the final results of an administrative review by a participant in that review."). In fact, JDI conceded in its complaint that the CIT's jurisdiction "would normally lie under 28 U.S.C. § 1581(c)." J.A. 34.

During oral argument, JDI nonetheless asserted that § 1581(c) jurisdiction was unavailable because "the final results of the 2019 review [i.e., AR 2] were taken to a USMCA binational panel." Oral Arg. at 1:59–2:11, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23–1652_06062024.mp3. We reject JDI's attempt to use § 1581(i) to make an end run around the binational panel's exclusive review. Indeed, § 1581(i)(2)(B) expressly prohibits JDI's assertion, stating that the subsection "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable by . . . a binational panel under [19 U.S.C. § 1516a(g)]." Allowing the CIT to exercise concurrent jurisdiction with a binational panel "would strongly [and impermissibly] discourage the use of the [binational] panel system to challenge antidumping duties and make that procedure far less effective and useful than it was intended and expected to be." *Canadian Wheat*, 641 F.3d at 1351. USMCA Article 10.12 explicitly provides that the United States, Mexico, and Canada "shall . . . maintain or amend [their] statutes or regulations to ensure that . . . domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 [i.e., 30 days following the publication date of the final determination] has expired." USMCA art. 10.12 ¶¶ 4, 15(c)(i). Section 1516a also provides that, "[f]or a determination with respect to which binational panel review has commenced," a CIT action "may not be commenced" until "the day after the date as of which" the binational panel "has dismissed binational panel review of the determination for lack of jurisdiction." 19 U.S.C. § 1516a(a)(5)(C); *see also id.* § 1516a(g)(12) (providing for the "[t]ransfer of final determinations for judicial review *upon suspension of article 10.12 of the USMCA*" (emphasis added)). It is clear from the USMCA and statutory language that when an antidumping duty determination is reviewable by a binational panel, judicial review by the CIT is unavailable unless and until the time for requesting a panel has expired or the panel has dismissed its review for lack of jurisdiction (or, the operation of USMCA Article 10.12 has been suspended).

JDI next asserts that the CIT has jurisdiction under § 1581(i) because neither binational panel review nor the administrative review process can provide adequate relief. Again, we disagree.

Binational panels have the authority to review a final antidumping determination and determine whether it "was in accordance with" the importing country's antidumping duty law, which "consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing [country] would rely on such materials in reviewing a final determination." USMCA art. 10.12 ¶ 2. And if the panel remands the determination (instead of upholding it), the administering authority—i.e., Commerce—"*shall*, within the period specified by the panel . . . , take action *not inconsistent with the decision of the panel*." 19 U.S.C. § 1516a(g)(7)(A) (emphases added); *see also* USMCA art. 10.12 ¶ 8. Accordingly, here, if the binational panel holds that Commerce's AR 2 Final Results are not in accordance with U.S. antidumping duty law and remands, Commerce must take action consistent with the panel's decision, which is "binding on the involved Parties." USMCA art. 10.12 ¶ 9.

In *Canadian Wheat*, a NAFTA binational panel found that the record lacked substantial evidence that the "dumping" at issue had materially injured the domestic wheat industry and remanded the case to the International Trade Commission for further consideration. *Canadian Wheat*, 641 F.3d at 1347. On remand, the Commission found that the domestic industry was not "materially injured" by the importation of the Canadian wheat, which the NAFTA panel then affirmed. *Id.* Commerce then revoked the antidumping duty order, while entries were still "suspended and unliquidated." *See id.* at 1347–49. We explained that "[o]nce the NAFTA panel had finally determined that the unliquidated antidumping duty order was invalid . . . Commerce had no valid basis for retaining the unliquidated duties that the Canadians had deposited pursuant to that order." *Id.* at 1349–50 ("One would expect that, after an antidumping duty order has been finally invalidated [by a binational panel], Commerce thereafter would refuse to enforce it."). Accordingly, here, if the binational panel invalidates the AR 2 Final Results, Commerce would not assess JDI's suspended and unliquidated entries at AR 2's final 11.59% rate, and JDI would receive appropriate refunds for deposits made at that higher rate. *See* 19 U.S.C. § 1516a(g)(5)(C) (providing for the suspension of liquidation); USMCA art. 10.12 ¶ 15(a) (a binational panel may enter a final decision that a refund is due). Accordingly, we reject JDI's argument that binational panel review and administrative review would be manifestly inadequate.

JDI nonetheless argues that USMCA panel review of the AR 2 Final Results would be manifestly inadequate because such panels lack equitable or injunctive power. Although a remand by the binational panel differs from an injunction, the inquiry here is not whether the provide dremedy would have been equal to JDI's desired remedy; rather, it is whether the provided remedy would have been manifestly inadequate. *E.g.*, *Rimco*, 98 F.4th at 1054. Because JDI has not shown that administrative review and USMCA panel review would be manifestly inadequate, § 1581(i) jurisdiction is improper.

CONCLUSION

We have considered JDI's other arguments and find them unpersuasive. For the foregoing reasons, we conclude that the Court of International Trade did not err in dismissing the case for lack of subject matter jurisdiction.

AFFIRMED

U.S. Court of International Trade

Slip Op. 24–106

GLOCK, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 23–00046

[Granting in part and denying in part Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant.]

Dated: October 4, 2024

John F. Renzulli and *Peter V. Malfa*, Renzulli Law Firm, LLP, of White Plains, N.Y., and *Jason M. Kenner*, Sandler, Travis & Rosenberg, PA, of New York, N.Y., for Plaintiff Glock, Inc.

Justin R. Miller, Attorney-in-Charge, and *Marcella Powell*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Taylor Bates*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection. *Monica P. Triana* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Glock, Inc. ("Plaintiff" or "Glock") brings this action to contest the liquidation, appraisement, and valuation by U.S. Customs and Border Protection ("Customs") of a single entry of pistol component parts imported as kits. Compl., ECF No. 7. Before the Court is Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant. Pl.'s Mot. Deem Admitted Reqs. Admis. & Compel Other Disc. Resps. Def. ("Plaintiff's Motion" or "Pl.'s Mot."), ECF No. 18. Plaintiff seeks an order (1) deeming Plaintiff's First Requests for Admissions Directed to Defendant ("Plaintiff's Requests for Admissions") admitted by Defendant United States ("Defendant"), (2) striking Defendant's objections to Plaintiff's First Interrogatories Directed to Defendant ("Plaintiff's Interrogatories") as untimely, (3) overruling Defendant's objections to Plaintiff's First Requests for Production of Documents and Things Directed to Defendant ("Plaintiff's Requests for Production") and Plaintiff's Interrogatories, (4) directing Defendant to respond to Plaintiff's Requests for Production and Plaintiff's Interrogatories, and (5) awarding attorneys' fees. *Id.*; *see also* Pl.'s Mot. at Ex. A ("Pl.'s Reqs. Produc."), ECF No. 18–1; Pl.'s Mot. at Ex. B ("Pl.'s Interrog."), ECF No. 18–2; Pl.'s Mot. Ex. C ("Pl.'s Reqs. Admis."), ECF No. 18–3. Defendant filed Defendant's Response to Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses. Def.'s Resp. Pl.'s Mot. Deem Admitted Reqs. Admis. & Compel Other Disc. Resps. ("Defendant's Response" or "Def.'s Resp."), ECF No. 34. Plaintiff filed Plaintiff's Reply in Support of its Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant. Pl.'s Reply Supp. Mot. Deem Admitted Reqs. Admis. & Compel Other Disc. Resps. Def. ("Plaintiff's Reply" or "Pl.'s Reply"), ECF No. 36. For the below discussed reasons, Plaintiff's Motion is granted in part and denied in part.

BACKGROUND

Plaintiff is a United States company that produces Glock pistols. Compl. ¶ 1. Plaintiff manufactures certain models of pistols from domestically manufactured components and assembles other models using imported components produced by foreign manufacturers. *Id.* The Glock trademarks were and are owned by Value Privatstiftung ("Value"), a private foundation formed under Austrian law. *Id.* ¶ 18. Plaintiff is a party to a licensing agreement with Value for the exclusive right to the commercial use of the Glock trademark in the United States. *Id.* ¶ 19–20. Under the licensing agreement, Plaintiff pays royalties to Value based on the net sales of licensed products. *Id.* ¶ 21–24.

The subject merchandise entered at the Port of Atlanta, Georgia on November 10, 2021. *Id.* ¶ 3. At the time of entry, Plaintiff appraised the subject merchandise on the basis of deductive value, in accordance with 19 U.S.C. § 1401a(d)(2)(A)(iii), relying on the value of the subject merchandise after assembly in the United States. *Id.* ¶ 29. Plaintiff included the royalty value paid to Value as part of the dutiable value in its appraisal. *Id.* Customs valued the entry as entered and did not apply a deduction for Plaintiff's royalty payments. *Id.* ¶ 30. Plaintiff filed a protest challenging Customs' valuation, which was deemed denied by operation of law. *Id.* ¶ 4. Plaintiff filed this action challenging the denied protest on March 1, 2023. Summons, ECF No. 1.

The Court entered a Scheduling Order on March 26, 2024, establishing a schedule for discovery. Order (Mar. 26, 2024), ECF No. 15. Plaintiff served Plaintiff's Requests for Production and Plaintiff's Interrogatories on March 27, 2024. Pl.'s Reqs. Produc.; Pl.'s Interrog. Plaintiff served Plaintiff's Requests for Admissions on April 2, 2024. Pl.'s Reqs. Admis. Defendant provided its Response to Plaintiff's First Requests for Admissions ("Defendant's Requests for Admissions Response") on May 2, 2024. Pl.'s Mot. at Ex. G ("Def.'s Reqs. Admis. Resp."), ECF No. 18–7. By letter of May 8, 2024, Plaintiff notified Defendant that Plaintiff considered Defendant's Requests for Admissions Response to be deficient. *Id.* at Ex. H ("Pl.'s Reqs. Admis. Resp."), ECF No. 18–8. Plaintiff sent an email to Defendant on May 13, 2024, in which Plaintiff agreed to extend the deadline for Defendant to respond to Plaintiff's Requests for Production and Plaintiff's Interrogatories, "excluding objections which were waived pursuant to USCIT Rule 33(b)(4)." *Id.* at Ex. F at 2–3, ECF No. 18–6. Defendant responded to Plaintiff's email on May 15, 2024 and expressed its belief that the Parties had agreed to extend the deadline for Defendant to respond to Plaintiff's Requests for Production and Plaintiff's Interrogatories to May 28, 2024. *Id.* at 1. Defendant provided its Responses to Plaintiff's First Requests for Production of Documents ("Defendant's Requests for Production Response") and Responses to Plaintiff's First Interrogatories Directed to Defendant ("Defendant's Interrogatories Response") on May 28, 2024, which included objections. *Id.* at Ex. D ("Def.'s Reqs. Produc. Resp."), ECF No. 18–4; *id.* at Ex. E ("Def.'s Interrog. Resp."), ECF No. 18–5. By letter of June 4, 2024, Plaintiff notified Defendant that it considered Defendant's Requests for Production Response and Defendant's Interrogatories Response deficient. *Id.* at Ex. K ("Pl.'s June 4 Letter"), ECF No. 18–11. Plaintiff's Motion was filed on June 20, 2024. Pl.'s Mot.

JURISDICTION

The U.S. Court of International Trade has jurisdiction pursuant to 28 U.S.C. § 1581(a), which grants the Court authority over claims contesting a denial of a protest under 19 U.S.C. § 1514 by Customs. The Court reviews the agency's determination based on the record made before the Court. 28 U.S.C. § 2640(a).

LEGAL STANDARD

The USCIT Rules allow for parties to serve on any other party interrogatories; requests for production of documents, electronically stored information, and tangible things; and requests for admissions. USCIT R. 33, 34, 36. Such discovery requests must be consistent with USCIT Rule 26(b), which limits discovery to:

> any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in re-

> solving the issues, and whether the burden or expense of the discovery outweighs its likely benefit.

USCIT R. 26(b). "Relevancy in discovery is to be construed broadly, subject only to certain limitations." *FDK Am., Inc. v. United States*, 38 CIT 462, 465, 973 F. Supp. 2d 1315, 1318 (2014) (citing *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947)). If a party fails to answer an interrogatory submitted under USCIT Rule 33 or to produce documents as requested under USCIT Rule 34, the party seeking discovery may move for an order compelling an answer, designation, production, or inspection. USCIT R. 37(a)(2)(B). If a party fails to admit a request for admission under USCIT Rule 36 that is later proven to be genuine or true, the requesting party may move to recover reasonable expenses incurred in making the proof. USCIT R. 37(c)(2). Because USCIT Rules 33, 34, 36, and 37 are substantively identical to Federal Rules of Civil Procedure 33, 34, 36, and 37, the Court treats interpretations of the corresponding Federal Rules as persuasive. USCIT R. 1; *compare* USCIT R. 33, 34, 36, *and* 37 *with* Fed. R. Civ. P. 33, 34, 36, *and* 37.

DISCUSSION

I. Plaintiff's Requests for Admissions

Plaintiff served the following requests for production on Defendant:

> 1. Admit that [Customs] defines "generally accepted accounting principles" in accordance with 19 C.F.R. § 152.102(c)(1), which states that the phrase "refers to any generally recognized consensus or substantial authoritative support regarding which economic resources and obligations should be recorded as assets and liabilities; which changes in assets and liabilities should be recorded; how the assets and liabilities and changes in them should be measured; what information should be disclosed and how it should be disclosed; and which financial statements should be prepared."
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> 2. Admit that the accounting rules, standards, and procedures issued by the Financial Accounting Standards Board (FASB) are "generally accepted accounting principles" within the meaning of 19 C.F.R. § 152.102(c)(1).
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> 3. Admit that the accounting rules, standards, and procedures issued by the Governmental Accounting Standards Board (GASB) are "generally accepted accounting principles" within the meaning of 19 C.F.R. § 152.102(c)(1).

> 4. Admit that 19 U.S.C. § 1401a(d)(3)(B)(i) obligates [Customs] to accept an importer's determination of usual profit and general expenses under the provisions of deductive value when the determination is carried out utilizing information prepared in a manner consistent with Generally Accepted Accounting Principles in the United States.
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> 5. Admit that if Glock correctly determined cost allocations in accordance with U.S. Generally Accepted Accounting Principles, [Customs] is prohibited from substituting Glock's allocation methodology with its own allocation methodology.
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> 6. Admit that a royalty payment that is based on a percentage of the net sales of a product(s) may properly be recorded as a selling expense under U.S. Generally Accepted Accounting Principles.
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> 7. Admit that under U.S. Generally Accepted Accounting Principles, a selling expense is a period cost.
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> 8. Admit that under U.S. Generally Accepted Accounting Principles, production costs do not include period costs.
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> 9. Admit that [Customs] substituted Glock's cost accounting methodology with its own methodology when it denied Protest No. 1704–22–05518 and assessed duty on Glock's royalty payment.
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> 10. Admit that the amount of a royalty payment that is based on a percentage of the net sales of a product(s) cannot be known until after the product(s) is sold.
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> 11. Admit that the obligation to pay a royalty that is based on net sales of a product(s) is not precipitated until after a sale of the product(s).

Pl.'s Reqs. Admis.

Plaintiff contends that Defendant's Requests for Admissions Response is "woefully deficient" and that Defendant's objections are frivolous. Pl.'s Mot. at 6–9. Plaintiff argues that Defendant is attempting to hinder discovery and that the Court should rule each of Plaintiff's requests admitted. *Id.* at 9. In response, Defendant contends that its responses are appropriate and that several of the requests for admission are improper. Def.'s Resp. at 13–19.

USCIT Rule 36 governs requests for admission and permits a party to serve requests for admission on another party concerning "the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either and (B) the genuineness of any described documents." USCIT R. 36(a)(1). When responding to a request for admission:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

USCIT R. 36(a)(4). If a responding party objects to a request for admission, it must clearly state the grounds for the objection. USCIT R. 36(a)(5). If the requesting party believes the responses or objections provided to be insufficient or inappropriate, it may "move to determine the sufficiency of an answer or objection." USCIT R. 36(a)(6). If the responding party's objection is determined to be unjustified, the Court must order an answer to be served. *Id.* If a responding party's answer is insufficient under the rules, the Court may order the request for admission to be admitted or that an amended answer be served. *Id.*

The purpose of USCIT Rule 36, and the corresponding Federal Rule of Civil Procedure 36, is to expedite trial by "eliminating the necessity of proving essentially undisputed and peripheral issues" and narrowing the remaining issues for trial. *Beker Indus. Corp. v. United States*, 7 CIT 361, 362 (1984); *see also* Fed. R. Civ. P. 36 advisory committee's note to 1970 amendment ("Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be."). The rule is not a tool to force or trick an opposing party into conceding an essential element of a case. *United States v. Greenlight Organic, Inc.*, 46 CIT __, __, 542 F. Supp. 3d 1409, 1414 (2021).

Defendant objects to each of Plaintiff's Requests for Admission. Def.'s Reqs. Admis. Resp.; *see also* Pl.'s Reqs. Admis. Defendant's objections fall into three categories: (A) legal conclusions and legal issues that do not involve application of law to the facts of the case, (B) reliance on undefined or vague terms, and (C) use of hypotheticals.

A. Pure Legal Conclusions and Legal Issues

Defendant objects to Plaintiff's Requests for Admissions one, two, three, four, five, six, seven, eight, ten, and 11 as "pure legal conclusion[s] or legal issue[s]" that "[do] not involve the application of law to fact or facts." Def.'s Reqs. Admis. Resp. at 1–4. "[A] request for admission is not objectionable even if [it] require[s] opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case. [Conversely, r]equests to admit pure conclusions of law unrelated to facts in the case are objectionable." *See Kansas City Power & Light Co. v. United States*, 132 Fed. Cl. 28, 34 (2017) (alteration in original) (internal quotation omitted) (interpreting Rule 36(a) of the Rules of the U.S. Court of Claims, which is identical to Federal Rule of Civil Procedure 36(a) and USCIT Rule 36(a)); *see also Thompson v. Beasley*, 309 F.R.D. 236, 241 (N.D. Miss. 2015) ("While the rule allows a party to request an admission of the application of law to fact, requests for purely legal conclusions . . . are generally not permitted." (internal quotations and citation omitted)); *Stark-Romero v. Nat. R.R. Passenger Co. (Amtrak)*, 275 F.R.D. 551, 553–54 (D.N.M. 2011) (observing that Federal Rule of Civil Procedure 36(a) permits requests applying law to fact, but "one party cannot demand that the other party admit the truth of a legal conclusion" (citations omitted)). It is permissible for a request to seek an admission as to how a particular legal source applies to a specific given set of facts. *See Miller v. Holzmann*, 240 F.R.D. 1, 5 (D.D.C. 2006).

All of Plaintiff's Requests for Admissions, except numbers five and nine, seek a conclusion or opinion of law without connecting the request to the particular facts of this case. Requests for Admission one through four each involve an interpretation or application of 19 C.F.R. § 152.102(c)(1), which defines "generally accepted accounting principles." Pl.'s Reqs. Admis. at 1–2; 19 C.F.R. § 152.102(c)(1). Requests for Admission six, seven, and eight seek admissions of how generally accepted accounting principles might be applied in the abstract. *Id.* Requests for Admission ten and eleven ask Defendant to make admissions regarding when royalty obligations attach and when the amount of such obligations can be determined without reference to a specific contract or the circumstances of a particular royalty arrangement. *Id.* at 4. Each of these requests involves a conclusion or opinion on a legal obligation derived from statute, regulation, or contract. Plaintiff has connected none of these requests to the specific facts and circumstances of this case.

Defendant's objection to Request for Admission five is the lone outlier in that it relies on the application or interpretation of the law to the specific facts of the dispute. Request for Admission five reads:

"Admit that if Glock correctly determined cost allocations in accordance with U.S. Generally Accepted Accounting Principles, [Customs] is prohibited from substituting Glock's allocation methodology with its own allocation methodology." Pl.'s Reqs. Admis. at 3. Because this case involves a dispute over the valuation methodologies proposed by Glock and adopted by Customs, this request is sufficiently tied to the facts of the case.

The Court sustains Defendant's objections to Requests for Admission one, two, three, four, six, seven, eight, ten and 11 on the grounds that they improperly seek conclusions of law. The Court overrules Defendant's objection to Request for Admission five.

B. Undefined or Vague Terms

Defendant objects to Plaintiff's Requests for Admissions two through 11 for including "undefined, vague, and ambiguous" terms. Def.'s Reqs. Admis. Resp. at 1–4. A request for admission must be sufficiently unambiguous to allow for the responding party to easily admit or deny the request. *See Henry v. Champlain Enter., Inc.*, 212 F.R.D. 73, 77 (N.D.N.Y. 2003) ("Requests for Admissions should be drafted in such a way that a response can be rendered upon a mere examination of the request."); *Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 194 F.R.D. 76, 79 (W.D.N.Y. 2000) ("Ambiguous and vague requests which cannot be fairly answered will not be enforced."); *Johnstone v. Cronlund*, 25 F.R.D. 42, 45 (E.D. Pa. 1960) ("[W]e observe that if a party is compelled to answer vague and indefinite questions capable of more than one interpretation, and which in fairness to either party require an explanation, then one of the purposes of the rules is immediately thwarted, since at the trial a great deal of the necessary time devoted to determining the issue would be taken up with explanations of answers to improper questions."). The party responding to a request for admission is expected to use reason and common sense in interpreting the meaning of phrases, assume common and reasonable definitions, and, if necessary, attempt to obtain clarification of the questioned term. *See Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 580 (N.D. Tex. 2018).

None of the terms objected to by Defendant are so ambiguous or vague as to make the requests unintelligible or a response impossible. Defendant objects to the terms "accounting rules, standards, and procedures" in Requests for Admission two and three, despite Plaintiff defining the terms as the rules, standards, and procedures promulgated by the Financial Accounting Standards Board and the Governmental Accounting Standards Board. Def.'s Reqs. Admis. Resp. at

1–2. Defendant objects to the use of the term "Generally Accepted Accounting Principles" in Requests for Admission four, five, seven, and eight. *Id.* at 2–3. "Generally Accepted Accounting Principles" is defined under Customs' regulation and is a commonly used and understood term in trade law. *See* 19 C.F.R. § 152.102(c) (defining "Generally Accepted Accounting Principles"). Defendant objects to the terms "Glock's allocation methodology" in Request for Admission five and "Glock's cost accounting methodology" in Request for Admission nine. Def.'s Reqs. Admis. Resp. at 2–3. The meaning of these terms could be determined from the context of the underlying administrative dispute or through a request for clarification from Plaintiff. The remaining objections are to words and phrases commonly used in the context of trade or the everyday parlance of an average person: "obligates," "usual profit and general expenses," "royalty payment," "percentage of the net sales," "product," "selling expense," "period cost," "production costs," "royalty," "net sales," and "precipitated." *Id.* at 2–4. Plaintiff also provided definitions for these terms in response to Defendant's objections. *See* Pl.'s Reqs. Admis. Resp.

None of the challenged terms are so vague or ambiguous as to prevent Defendant from making a good faith effort to respond to the Requests for Admission. Defendant could have responded assuming the obvious or common usage of the terms. If there existed actual ambiguity that affected Defendant's ability to answer, Defendant could have provided a qualified response. The Court overrules Defendant's objections to Plaintiff's Requests for Admission based on terms being "undefined, ambiguous, or vague."

C. Hypotheticals

Defendant objects to Plaintiff's Requests for Admissions five, six, ten, and 11 as relying on improper hypotheticals. Def.'s Reqs. Admis. Resp. at 1–4. USCIT Rule 36 permits a party to serve on another party a request for admission relating to "facts, the application of law to facts, or opinions about either." USCIT R. 36(a)(1). Hypothetical factual scenarios unrelated to the underlying facts of a case are not appropriate in the context of a request for admission. *See Abbott v. United States*, 177 F.R.D. 92, 93 (N.D.N.Y. 1997). Request of Admission six reads: "[a]dmit that a royalty payment that is based on a percentage of the net sales of a product(s) may properly be recorded as a selling expense under U.S. Generally Accepted Accounting Principles." Pl.'s Reqs. Admis. at 3. Request for Admission ten reads: "[a]dmit that the amount of a royalty payment that is based on a percentage of the net sales of a product(s) cannot be known until after the product(s) is sold." *Id.* at 4. Request for Admission 11 reads: "[a]dmit that the obligation to pay a royalty that is based on net sales of a product(s) is not precipitated until after a sale of the product(s)." *Id.* None of these requests pose improper hypothetical scenarios, but, rather, seek Defendant's opinions regarding the application of the law to alleged facts. Request for Admission five, which reads: "[a]dmit that if Glock correctly determined cost allocations in accordance with U.S. Generally Accepted Accounting Principles, [Customs] is prohibited from substituting Glock's allocation methodology with its own allocation methodology," does present a hypothetical scenario. *Id.* at 3. Such request to "admit that if a certain factual situation is found to exist, a certain legal outcome results ...is precisely the kind of request contemplated by Rule 36(a)." *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 423–24 (N.D. W. Va. 2006); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 281 F.R.D. 1, 11 (D.D.C. 2011). Defendant's objections to Plaintiff's Requests for Admissions as improper hypotheticals are overruled.

In summary, the Court sustains one of Defendant's objections to Requests for Admission one, two, three, four, six, seven, eight, ten, and 11. The Court overrules all of Defendant's objections to Requests for Admission five and nine. In responding to Request for Admission nine, Defendant denied the request, not withstanding its objections. Defendant is now ordered to respond to Plaintiff's Request for Admission five.

II. Plaintiff's Interrogatories

Plaintiff served the following interrogatories on Defendant:

> 1. What does [Customs] contend is the meaning of "addition usually made for profit and general expenses" as the phrase is used in 19 U.S.C. § 1401a(d)(3)(A)(i) and 19 C.F.R. § 152.105(d)(1)?
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> 2. Explain in detail what factors [Customs] considers when determining whether expenses other than trademark royalties and licensing fees are an "addition usually made for profit and general expenses" deductible from dutiable value under 19 U.S.C. § 1401a(d)(3)(A)(i) and 19 C.F.R. § 152.105(d)(1)?
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> 3. Does CBP contend that the phrase "addition usually made for profit and general expenses" as used in 19 U.S.C. [§] 1401a(d)(3)(A)(i) and 19 C.F.R. § 152.105(d)(1) excludes all trade dress and non-trade dress trademark royalties and/or licensing fees?

4. If the answers to Interrogatory 3 above is "no," explain in detail what factors [Customs] considers when determining whether or not a trade dress and/or a non-trade dress trademark royalty and/or licensing fee is an "addition usually made for profit and general expenses" under 19 U.S.C. [§] 1401a(d)(3)(A)(i) and 19 C.F.R. § 152.105(d)(1).

5. If the answer to Interrogatory 3 above is "yes," please explain the basis for your contention and identify all sources reviewed and/or relied upon including but not limited to internal [Customs] manuals or guidelines, statutes, case law, regulations, explanatory notes, ruling letters, informed compliance publications, articles, books or other texts, or any other information.

6. Does [Customs] contend that any of the factors detailed in response to Interrogatory 4 are dispositive, if so, list all factors that [Customs] believe are dispositive of whether a royalty and/or licensing fee is dutiable under deductive value.

7. What does [Customs] contend is the meaning of "use in commerce" as the phrase is used in 15 U.S.C [§] 1127?

8. Does [Customs] contend that the assembly of the merchandise at issue without a subsequent sale constitutes "use in commerce" of the trade dress trademarks as that phrase is used in 15 U.S.C [§] 1127? If yes, please explain in full and provide all sources consulted, reviewed and/or relied upon in responding including but not limited to statutes, case law, regulations, journals, articles, books, persons, or any other information or source.

9. Identify all persons involved in researching, drafting, authorizing, consulting on, and/or issuing HQ Ruling HQ H304606, dated June 24, 2021, and identify their role.

10. Explain, in detail, the complete factual basis for Defendant's decision in HQ H304606 that the royalty payments made by Glock and referenced in HQ H304606 are costs related to the production or assembly of the imported pistol kits.

11. Explain, in detail, the complete legal basis for Defendant's decision in HQ H304606 that the royalty payments made by Glock and referenced in HQ H304606 are dutiable including identifying all sources consulted, reviewed and/or relied upon including but not limited to statutes, case law, regulations, journals, articles, books, persons, or any other information or source.

> 12. Does [Customs] contend that Internal Revenue Service regulations are relevant to [Customs'] determination of whether an expense is an "addition usually made ... profit or general expense" under Section [§] 1401a(d)(3)(A)(i)? If the answer is anything other than an unqualified no, please identify all support for this response including statutes, regulations, ruling letters, etc.
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> 13. Identify any and all instances where [Customs] applied, consulted, or relied upon Internal Revenue Service regulations or Treasury Decisions in determining proper customs valuation, whether in Ruling letters or otherwise.
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> 14. Explain, in detail, the complete factual basis for Defendant's statement in HQ H304606 that "[w]ithout the right to use the trade dress trademarks, the importer could not assemble the [pistols] in the United States without infringing the registered trademarks in violation of the Lanham act" (Ruling at 10–11) including identifying the source of each fact.
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> 15. Explain, in detail, the complete legal basis for Defendant's statement in HQ H304606 that "[w]ithout the right to use the trade dress trademarks, the importer could not assemble the [pistols] in the United States without infringing the registered trademarks in violation of the Lanham act" (Ruling at 10–11) including all sources reviewed and/or relied upon in making the statement including but not limited to statutes, case law, regulations, journals, articles, books or any other information.
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> 16. Does [Customs] contend that any patented processes are used in the assembly of pistols from the imported Kits at issue. If the answer is yes, please explain the basis of the Government's contention.
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> 17. Does [Customs] contend that Glock could not buy the pistol kits without paying the royalty? If the answer to this Interrogatory is yes, please explain the basis of the Government's contention.
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> 18. How, if at all, does [Customs] differentiate between "assembly" and "manufacturing" with respect to operations performed on merchandise after importation.

Pl.'s Interrog. at 3–6. Plaintiff contends that Defendant waived its objections to Plaintiff's Interrogatories by failing to provide a response on or before the deadline established under the Court's rules. Pl.'s Mot. at 9–10; Pl.'s Reply at 5–7. Plaintiff further argues that if

Defendant's objections are not waived, they should be overruled and Defendant should be required to respond to Plaintiff's Interrogatories. Pl.'s Mot. at 10–12. Defendant does not dispute that its responses were untimely, but argues that even if its objections are deemed waived, the Court has discretion to deny a motion to compel responses to Plaintiff's Interrogatories that are improper. Def.'s Resp. at 27–28.

USCIT Rule 33(b)(2) provides that a "responding party must serve its answers and any objections within 30 days after being served with the interrogatories." USCIT R. 33(b)(2). A party's failure to respond to discovery requests by the deadline imposed under the applicable rules can result in the waiver of the party's ability to raise objections. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981)) ("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection."); *see also Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 238 F.R.D. 536, 538 (D. Conn. 2006) ("A party who fails to file timely objections waives all objections."); *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 187 F.R.D. 528, 529 (E.D. Pa. 1999) ("[W]hen a party fails to serve objections to interrogatories and/or document requests within the time required, in absence of good cause or of an extension of time to do so, they have generally waived the right to raise objections later.").The court may excuse a party's failure to timely respond if good cause is shown. USCIT R. 33(b)(4) ("Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.").

Plaintiff served Plaintiff's Interrogatories on March 27, 2024. Pl.'s Interrog. Under the Court's rules, Defendant was required to serve its responses and objections on or before April 26, 2024. USCIT R. 33(b)(2). Defendant did not request an extension of the response deadline before the deadline had expired. Through an email of May 13, 2024, Plaintiff notified Defendant:

> With regards to the government's responses to [Plaintiff's Requests for Production] and [Plaintiff's Interrogatories], we again note that the government has failed to serve any responses to-date. While we understand that you requested an extension of time—albeit after the response deadline passed—we note that Glock has not yet agreed to an extension of time. Nevertheless, in a good faith attempt to move the matter forward, we agree to an extension for the [Plaintiff's Requests for Production] responses until May 27, 2024, and the same extension for the

> government's answers to [Plaintiff's] Interrogatories, excluding objections which were waived pursuant to USCIT Rule 33(b)(4).

Pl.'s Mot. at Ex. F. Defendant responded on May 15, 2024, "[T]hank you for providing the extension of time until May 27th for the responses to [P]laintiff's requests for production of documents and interrogatories. May 27th is Memorial Day. Thus, we presume that [P]laintiff meant May 28th. We will provide the responses that are complete by that date." *Id.* Defendant served Defendant's Interrogatories Response, including objections, on May 28, 2024. Def.'s Interrog. Resp.

It is undisputed that Defendant did not respond to Plaintiff's Interrogatories by the deadline under the applicable rules. The Court begins its inquiry, therefore, with whether the Parties agreed to extend the response deadline. In its May 13, 2024 email, Plaintiff offered to extend the deadline for responses "excluding objections which were waived pursuant to USCIT Rule 33(b)(4)." *Id.* This language indicates that Plaintiff's willingness to agree to the extension was conditioned on the understanding that Defendant had already waived objections. In accepting the extension offer, Defendant did not oppose or reject Plaintiff's condition. *Id.* The Court finds that the Parties did not agree to extend the deadline for Defendant to object to Plaintiff's Interrogatories and concludes that the objections included in Defendant's Interrogatories Response were untimely.

Having determined the objections to be untimely, the Court considers whether good cause exists to excuse Defendant's failure to respond timely. USCIT R. 33(b)(4). Prohibiting a party from raising legitimate objections is a severe sanction and should only be imposed to remedy bad conduct or intentional efforts to impair the proceedings. *See Ritacca v. Abbott Lab'ys*, 203 F.R.D. 332, 335 (N.D. Ill. 2001) ("Minor procedural violations, good faith attempts at compliance, and other such mitigating circumstances militate against finding waiver. In contrast, evidence of foot-dragging or cavalier attitude towards following court orders and discovery rules supports finding waiver." (internal citation omitted)).

In this case, Defendant responded to Plaintiff's Interrogatories one month after the deadline. Defendant only requested an extension retroactively after the deadline had passed, suggesting carelessness and a lack of appropriate due diligence. Defendant also failed to offer any explanation or justification for its inability to meet the deadline or its delay in requesting an extension. *See Starlight Int'l, Inc. v. Herlihy*, 181 F.R.D. 494, 496–97 (D. Kan. 1998). No good cause exists for excusing Defendant's failure to timely object. The Court concludes that Defendant waived its objections to Plaintiff's Interrogatories.

Plaintiff moves the Court to compel Defendant to respond to Plaintiff's Interrogatories. Pl.'s Mot. at 10. Defendant argues that it "responded to every interrogatory, and did not stand on any objections as a basis for not responding." Def.'s Resp. at 28. Defendant also contends that Plaintiff's Interrogatories one, two, three, four, five, seven, eight, ten, 11, 12, 13, 14, and 15 were improper. *Id.* Defendant did not challenge the propriety of Plaintiff's Interrogatories six, nine, 16, 17, and 18 in its response. *See id.* Plaintiff counters that the responses provided by Defendant were non-responsive, evasive, or inappropriate. Pl.'s Reply at 6–8.

Defendant contends that Plaintiff's Interrogatories one, three, seven, and eight improperly seek legal conclusions. Def.'s Resp. at 28. Plaintiff's Interrogatories one, three, and seven each ask for the meaning given by Customs to specific statutory language. Pl.'s Interrog. at 3–4. USCIT Rule 33(a)(2) provides that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact." USCIT R. 33(a)(2). Plaintiff's Interrogatories one, three, and seven do not ask Defendant how the identified terms have been applied in past cases or how they were applied to the facts of this case. Instead, they seek definitions and interpretations in the abstract. Because Plaintiff's Interrogatories one, three, and seven are inquiries into pure legal matters, they are inappropriate and the Court will not compel a response. Conversely, Plaintiff's Interrogatory eight asks "[d]oes [Customs] contend that the assembly of the merchandise at issue without a subsequent sale constitutes 'use in commerce' of the trade dress trademarks as that phrase is used in 15 U.S.C [§] 1127" and then requests Customs' support of its position. Pl.'s Interrog. at 4. This interrogatory asks for a legal opinion connected to the specific facts of the case and the basis for Customs' position. Plaintiff's Interrogatory eight is appropriate.

Defendant contends that Plaintiff's Interrogatories ten, 11, 14, and 15 seek irrelevant information relating to Customs Headquarters Ruling H304606. Def.'s Resp. at 28. "Relevancy in discovery is to be construed broadly, subject to certain limitations." *FDK Am., Inc.*, 38 CIT at 465, 973 F. Supp. 2d at 1318. Plaintiff asserted in its Complaint that it appraised the subject merchandise in accordance with its understanding of Headquarters Ruling H304606. Compl. ¶ 29. Plaintiff's Interrogatories ten, 11, 14, and 15 are sufficiently relevant for purposes of discovery.

Defendant argues that Plaintiff's Interrogatories two, four, five, 12, and 13 seek information that is irrelevant and disproportionate to the needs of this case. Def.'s Resp. at 28. Plaintiff's Interrogatories two and four ask what factors are considered by Customs in making determinations. Pl.'s Interrog. at 3. Plaintiff's Interrogatory five asks Defendant to explain its positive response to a prior interrogatory and to identify what sources are considered by Customs in making a determination. *Id.* Plaintiff's Interrogatories 12 and 13 seek information on Customs' use of Internal Revenue Service regulations in determining valuation. *Id.* at 4–5. In Headquarters Ruling H304606, Customs relied on Internal Revenue Service regulations in support of its ruling. *See* HQ H304606 (June 24, 2021) at 14, ECF. No. 22–1. Plaintiff's Interrogatories two, four, five, 12, and 13 are adequately relevant to Plaintiff's claims for purposes of discovery. Defendant has not demonstrated through Defendant's Response or Defendant's Interrogatories Response in what ways Plaintiff's Interrogatories two, four, five, and 12 are disproportionate to the needs of the case.

In its response to Plaintiff's Interrogatory 13, Defendant stated "the deadline provided for a response, including the extension, does not allow a reasonable amount of time to identify 'any and all instances where [Customs] applied, consulted, or relied upon Internal Revenue Service regulations or Treasury Decisions in determining proper customs valuation, whether in Ruling letters or otherwise.'" Def.'s Interrog. Resp. at 8. The Court observes that Defendant's Interrogatories Response was served almost one month after the deadline. Regardless, this case involves a single entry and requesting Defendant to "identify any and all instances" of Customs taking a specific action without some reasonable limitations is disproportionate to the needs of the case. Plaintiff's Interrogatory 13 is inappropriate.

Having determined that Plaintiff's Interrogatories one, three, seven, and 13 are inappropriate, the Court now considers whether Defendant's responses to the surviving interrogatories are adequate. Defendant's Interrogatories Responses five, ten, 11, 14, and 15 refer only to other interrogatory responses or the text of Headquarters Ruling H304606. Def.'s Interrog. Resp. at 4, 7, 8–9. "An answer to an interrogatory must be responsive and complete in itself, and should not refer to the pleadings, depositions, documents, or other interrogatories." *NEC Am., Inc. v. United States*, 10 CIT 323, 325, 636 F. Supp. 476, 479 (1986). Plaintiff's Interrogatory five reads: "If the answer to Interrogatory 3 above is yes, please explain the basis for your contention and identify all sources reviewed and/or relied upon ...." Pl.'s Interrog. at 3. Defendant's Interrogatories Response five refers back to responses 3 and 4. Def.'s Interrog. Resp. at 4. Because this is fully responsive to the question posed, which itself referred to a prior interrogatory, this response is adequate. Defendant's Interrogatories Responses ten, 11, 14, and 15, which direct Plaintiff to certain pages of Headquarters Ruling H304606, are not fully responsive to the interrogatories. *Id.* at 7–9. The Court orders Defendant to respond to Plaintiff's Interrogatories ten, 11, 14, and 15.

Defendant's Interrogatories Responses 12, 16, 17, and 18, each state only that Defendant will "amend or supplement its response" to the interrogatory should additional information become available. *Id.* at 7–11. These responses are not sufficient. Though USCIT Rule 33(a)(2) permits a party to delay answering an interrogatory until after designated discovery, doing so requires approval from the Court. USCIT R. 33(a)(2). The Court has not granted such approval in this case and Defendant has made no showing as to why it would be appropriate. Defendant must provide complete responses to Plaintiff's Interrogatories 12, 16, 17, and 18.

The Court has reviewed Defendant's Interrogatories Responses two, four, six, eight, and nine and determined each to be appropriate. The Court orders Defendant to provide complete responses to Plaintiff's Interrogatories two, four, six, eight, nine, ten, 11, 12, 14, 15, 16, 17, and 18.

III. Plaintiff's Requests for Production

Plaintiff served the following requests for production on Defendant:

> 1. Produce all documents, records and things reviewed in preparation for drafting the Defendant's Answer whether or not relied upon in formulating Defendant's Answer.
>
> 2. Produce all documents, records or things reviewed in preparation for the Defendant's response to the Plaintiff's first set of Interrogatories whether or not Defendant relied upon the document in formulating its responses.
>
> 3. Produce all documents, training materials, manuals, or instructions discussing or relating to [Customs'] determination of the deductive value of imported merchandise.
>
> 4. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines the dutiability of royalty payments and licensing fees related to the use of patents.

5. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines the dutiability of royalty payments and licensing fees related to the use of trademarks.

6. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether an expense is an "addition usually made for profits and general expenses" deductible under 19 U.S.C. § 1401a(d)(3)(A)(i) and 19 C.F.R. § 152.105(d)(1).

7. Produce all documents, including email, memoranda, casefiles, and/or internal messages, discussing or relating to HQ H304606.

8. Produce all email communications with all attachments sent from, and/or received by, the email address sean.a.headley@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

9. Produce all email communications with all attachments sent from, and/or received by, the email address bernard.ash@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

10. Produce all email communications with all attachments sent from, and/or received by, the email address hans.maxime@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

11. Produce all email communications with all attachments sent from, and/or received by, the email address kimberly.d.wiggins@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

12. Produce all email communications with all attachments sent from, and/or received by, the email address amy.a.moore@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

13. Produce all email communications with all attachments sent from, and/or received by, the email address cynthia.m.reese@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

14. Produce all email communications with all attachments sent from, and/or received by, the email address monikarice.brenner@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

15. Produce all email communications with all attachments sent from, and/or received by, the email address tracie.r.siddiqui@cbp.dhs.gov which concern, refer to or in any way relate to Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fall-

back method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements.

16. Produce all documents, including email, memoranda, and/or internal messages, discussing or relating to [Customs'] valuation of Glock's pistol kits.

17. Produce all documents, training materials, manuals, or instructions discussing or relating to the applicability of the Internal Revenue Code and Internal Revenue Service regulations to customs valuation determinations.

18. Produce all documents, training materials, manuals, or instructions discussing or relating to the deductibility of costs qualifying under Generally Accepted Accounting Principles ("GAAP") as profits and general expenses ("P&GE") from deductive value under 19 U.S.C. § 1401a(d)(3)(A)(i).

19. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether a royalty payment and/or licensing fee is a condition of sale of imported merchandise for exportation to the United States.

20. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether a royalty payment and/or licensing fee is related to manufacturing merchandise in the United States.

21. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether a royalty payment and/or licensing fee is related to assembling merchandise in the United States.

22. Produce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether a royalty payment and/or licensing fee is related to selling merchandise in the United States.

23. Produce all documents, training materials, manuals, or instructions discussing or relating to the elements of trademark infringement under the Lanham Act.

24. To the extent not produced in response to Requests for Production 1–23 above, produce all documents, records or things

> identified or described in Defendant's responses to Plaintiff's first set of Interrogatories and correlate the document to the specific interrogatory answer.

Pl.'s Reqs. Produc. Defendant objects to each of Plaintiff's Requests for Production. Def.'s Reqs. Produc. Resp. Plaintiff contends that the Court should overrule Defendant's objections. Pl.'s Mot. at 10–11. Defendant asserts that its responses to Plaintiff's Request for Production are appropriate. Def.'s Resp. at 19–27.

A. Publicly Available Information

Defendant objects to Plaintiff's Requests for Production one, two, three, four, five, six, 17, 18, 19, 20, 21, 22, 23, and 24 on the grounds that the information requested is publicly available. Def.'s Reqs. Produc. Resp. at 1–4, 16–19. There is a split amongst courts as to whether a party can be compelled to produce publicly available information. *Compare CRST Expedited, Inc. v. Swift Transp. Co. of Ariz., LLC*, 328 F.R.D. 231, 237 (N.D. Iowa 2018) (finding that publicly available information is subject to production), *and Shatsky v. Syrian Arab Rep.*, 312 F.R.D. 219, 223–24 (D.D.C. 2015) (same) *with Bleecker v. Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 738–39 (E.D.N.C. 2000) (finding that a party is not required to produce publicly available documents accessible to the other opposing party), *Dushkin Publ'g Grp. v. Kinko's Serv. Corp.*, 136 F.R.D. 334, 335 (D.D.C. 1991) (denying motion to compel production of pleadings and discovery filed with the court in another litigation that were available to the public), *and SEC v. Samuel H. Sloan & Co.*, 369 F. Supp. 994, 996 (S.D.N.Y. 1973). It does not appear from the Court's review that the U.S. Court of Appeals for the Federal Circuit or this court has previously expressed an opinion on this question. The language of USCIT Rule 34 is expansive, allowing for a party to request production of "any designated documents or electronically stored information" "in the responding party's possession, custody, or control." USCIT R. 34(a)(1). The rule does not exclude information that might be easily available from a public source. As information becomes more accessible through the internet and other technologies, imposing such an exclusion would inevitably result in unnecessary complications for litigants. Accordingly, Defendant is obligated to produce documents and information in its custody or possession, even if such documents and information are publicly available or otherwise accessible to Plaintiff. Defendant's objections to Plaintiff's Requests for Production one, two, three, four, five, six, 17, 18, 19, 20, 21, 22, 23, and 24 as requesting publicly available information are overruled.

B. Plaintiff's Request for Production Seven

Defendant objects to Plaintiff's Request for Production seven on the ground that:

> it is not related to the claims in the Complaint because, in HQ H304606, [Customs] did not review the entry or the "imported merchandise," "merchandise at issue," or "pistol kits," as defined in the "Definitions" section accompanying these requests for production, at issue in this action. In HQ, H3040606, [Customs] did not review the "Amended Intellectual Property Agreement, dated January 1, 2022" identified in Plaintiff's Rule 26(a)(1)(A)(ii) Disclosure as item no. 1. Defendant further objects to this request on the ground that it is not proportionate to the needs of this de novo action.

Def.'s Reqs. Produc. Resp. at 4. A request for production is limited in scope to documents, information, and things that are relevant to the case. USCIT R. 34(a); *see also* USCIT R. 26(b). In its Complaint, Plaintiff alleges that it appraised the value of the subject merchandise based on Headquarters Ruling H304606. Compl. ¶ 29. For this reason, some discovery related to Headquarters Ruling H304606 is relevant. However, this litigation is not an opportunity for Plaintiff to challenge the correctness of Headquarters Ruling H304606. Discovery related to Headquarters Ruling H304606 should be limited to only whether Customs' valuation in this case was proper. For example, evidence of whether this case concerns "transactions involving the same merchandise and like facts" as those considered in the Headquarters Ruling H304606 or whether Customs deviated from its past practice might be relevant to Plaintiff's claims. *See* 19 C.F.R. § 177.9(b)(3); *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) (acknowledging that "[w]hen an agency changes its practice, it is obligated to provide an adequate explanation for the change"). Evidence related to Customs' reasoning and process in issuing Headquarters Ruling H304606 are less likely to be relevant in challenging Customs' valuation in this case. As drafted, Plaintiff's Request for Production seven is overbroad and not limited to information and documents relevant to this case. Therefore, Defendant's objection is sustained.[1]

[1] The Court understands that subsequent to the filing of Plaintiff's Motion, Defendant indicated that it will produce non-privileged documents contained in the ruling file for Headquarters Ruling H304606.

C. Plaintiff's Requests for Production four, five, six, 17, 19, 20, 21, 22, and 23

Defendant objects to Plaintiff's Requests for Production four, five, six, 17, 19, 20, 21, 22, and 23 on the grounds that the information requested is irrelevant. Def.'s Reqs. Produc. Resp. at 2–4, 16–18. Defendant argues that in a valuation case, the plaintiff carries the burden of proving (1) that Customs' appraisement of the subject merchandise was incorrect and (2) the proper valuation. Def.'s Resp. at 25 (citing *United States v. Arnold Pickle & Olive Co.*, 68 CCPA 85, 88, 659 F.2d 1049, 1052 (1981)). At this stage of the proceedings, relevance is construed broadly. *FDK Am., Inc.*, 38 CIT at 465, 973 F. Supp. 2d at 1318.

Requests for Production four, five, and six request Defendant to "[p]roduce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines" the "dutiability of royalty payments and licensing fees related to the use of" patents and trademarks and "whether an expense is an 'addition usually made for profits and general expenses' deductible under 19 U.S.C. § 1401a(d)(3)(A)(i) and 19 C.F.R. § 152.105(d)(1)." Pl.'s Reqs. Produc. at 5. These requests seek information related to how Customs determines valuation. Count one of Plaintiff's Complaint argues that Plaintiff's royalty payment based on net sales of licensed products is not dutiable and should have been treated as a general expense. Compl. ¶¶ 32–38. Plaintiff's Requests for Production four, five, and six are relevant at this stage of the proceedings.

Plaintiff's Requests for Production 19, 20, 21, and 22 request Defendant to "[p]roduce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether a royalty payment and/or licensing fee" is related to certain conditions. Pl.'s Reqs. Produc. at 8. Defendant objects to Plaintiff's Requests for Production 19, 21, and 22 arguing that "Plaintiff has not alleged that the value of the pistol kits includes a licensing fee." Def.'s Reqs. Produc. Resp. at 17–18. Count one of Plaintiff's Complaint alleges that a royalty payment is not dutiable. Compl. ¶¶ 32–38. Each of the challenged Requests for Production refer to "royalty payments and/or licensing fees." Pl.'s Req. Produc. at 8. The Complaint explains that the royalty payment is required under a licensing agreement and is calculated based on the net sales of licensed products. Plaintiff's Requests for Production 19, 21, and 22 are relevant.

Plaintiff's Request for Production 20 also concerns royalty payments and licensing fees and asks Defendant to "[p]roduce all documents, training materials, manuals, or instructions discussing or relating to how [Customs] determines whether a royalty payment and/or licensing fee is related to manufacturing merchandise in the United States." *Id.* Defendant objects to this request, arguing that Plaintiff conceded in its Complaint that "[n]o manufacturing processes are used in the assembly of pistols from [the subject merchandise]." Def.'s Reqs. Produc. Resp. at 17 (quoting Compl. ¶ 13). Plaintiff has not demonstrated how Plaintiff's Request for Production 20 is relevant when it does not seek information related to the facts of this case. Defendant's objection to Plaintiff's Request for Production 20 is sustained.

Defendant objects to Plaintiff's Request for Production 17 on the ground that "Plaintiff has not alleged, nor is there any evidence in the record of this action, indicating that the pistol kits were appraised using the "Internal Revenue Code" and/or "Internal Revenue Service regulations." *Id.* at 16. In Headquarters Ruling H304606, Customs relied on Internal Revenue Service regulations in support of its ruling. *See* HQ H304606 at 14. To the extent that Plaintiff is relying on Headquarters Ruling H304606 to support its valuation position, Plaintiff's Request for Production 17 is relevant for purposes of discovery.

Defendant objects to Plaintiff's Request for Production 23 on the grounds that it is irrelevant because "Plaintiff has not alleged that trademark infringement is an issue in this action." Def.'s Reqs. Produc. Resp. at 18. In Headquarters Ruling H304606, Customs stated:

> we believe the trade dress trademarks are directly related to the production or assembly of the subject [articles]. In our view, these trade dress trademarks are inextricably linked to the production of the [articles]. As such, royalties for the use of these trade dress trademarks are costs of production and part of the cost of goods sold. They are not general expenses deductible under the deductive value method of appraisement.

HQ H304606 at 11. To the extent that Plaintiff is relying on Headquarters Ruling H304606 to support its valuation position, Plaintiff's Request for Production 23 is relevant.

Defendant also objects to Plaintiff's Requests for Production four, five, six, 17, 19, 21, 22, and 23 as overbroad. Def.'s Reqs. Produc. Resp. at 2–4, 16–18. Each of these requests ask Defendant to "[p]roduce all documents, training materials, manuals, or instructions discussing or relating to" how Customs determines valuations. Pl.'s Reqs. Produc. at 5, 7–8. Defendant contends that the use of broad terms such as "all documents" and "relating to" make the requests disproportionate to the needs of the case. Def.'s Resp. at 25–26. The Court agrees. This case involves a single entry. Plaintiff's production requests include no limitations on time, location, or type of goods, and as drafted, would require Defendant to undertake the Herculean task of reviewing countless cases and documents. Because Plaintiff has relied on the 2021 Headquarters Ruling H304606, the Court cannot presume that Plaintiff intended to limit its request to only documents, training materials, manuals, or instructions considered in this case. As drafted, Plaintiff's Requests for Production four, five, six, 17, 19, 21, 22, and 23 are overbroad and Defendant's objections are sustained.

D. Plaintiff's Requests for Production Eight, Nine, Ten, 11, 12, 13, 14 and 15

Plaintiff's Requests for Production eight, nine, ten, 11, 12, 13, 14 and 15 each request Defendant to produce all email communications and attachments from certain email addresses that relate to "Glock, including the pistol kits, Glock trademarks, Glock patents, Glock's royalty payments, Glock's use of the fallback method based on the deductive value of imported merchandise, Glock's use of a weighted average to determine model price, the assembly of Glock pistols, and/or Glock licensing agreements." Pl.'s Req. Produc. at 5–7. Defendant objects to these requests as irrelevant, overbroad, and duplicative of other requests. Def.'s Reqs. Produc. Resp. at 4–15. Plaintiff has indicated that the individuals associated with the identified email addresses "are known to have addressed matters pertaining specifically to Glock and the valuation of its import entries." Pl.'s Mot. at 11. Plaintiff's requests are not limited to only the subject entry in this case, but request all emails related to Glock. Seeking production of emails concerning other Glock entries that are unrelated and irrelevant to the instant case is overbroad and disproportionate to the needs of this case. Therefore, Defendant's objections are sustained.

E. Plaintiff's Requests for Production 16 and 24

Defendant has indicated that it "continues to search for responsive documents and reserves the right to amend its response[s]" to Plaintiff's Requests for Production 16 and 24. Def.'s Reqs. Produc. Resp. at 15–16, 18–19. Defendant has provided no reason for the delay in producing the requested documents. Defendant has provided no objection to Plaintiff's Request for Production 16. *Id.* at 15–16. Defendant's only objection to Plaintiff's Request for Production 24 is that the request might seek documents that are publicly available. *Id.* at 18–19. Defendant must promptly produce the documents and information requested in Plaintiff's Requests for Production 16 and 24.

For these reasons, the Court sustains at least one of Defendant's objections to Plaintiff's Requests for Production four, five, six, seven, eight, nine, ten, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, and 23. The Court overrules all of Defendant's objections to Plaintiff's Requests for Production one, two, three, 16, 18, and 24 and orders Defendant to provide responses.

IV. Attorneys' Fees

Plaintiff argues that the Court should award Plaintiff its attorneys' fees and expenses related to litigating Plaintiff's Motion. Pl.'s Mot. at 12–13. Defendant contends that costs and fees should not be awarded because its objections and responses were substantially justified. Def.'s Resp. at 28–29.

USCIT Rule 37 provides that if a motion to compel discovery is granted or disclosure or discovery is provided after the motion is filed, the Court must require the responding party to "pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," unless the movant did not attempt to obtain discovery in good faith, the nondisclosure, response, or objection was substantially justified, or an award of expenses would be unjust. USCIT R. 37(a)(4)(A). If a motion to compel discovery is denied, the Court must order the moving party to pay the responding party's "reasonable expenses incurred in opposing the motion, including attorney's fees," unless the motion was substantially justified or an award of expenses would be unjust. USCIT R. 37(a)(4)(B). If a motion to compel discovery is granted in part and denied in part, the Court "may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion." USCIT R. 37(a)(4)(C). Plaintiff's Motion is granted in part and denied in part and the Court holds that each Party shall bear its own costs and fees.

CONCLUSION

Upon consideration of Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant, ECF No. 18, Defendant's Response to Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses, ECF No. 34, Plaintiff's Reply in Support of its Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant, ECF No. 36, and all other papers and proceedings in this action, it is hereby

ORDERED that Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant, ECF No. 18, is granted in part and denied in part; and it is further

ORDERED that Defendant's objections to Plaintiff's Requests for Admission one, two, three, four, six, seven, eight, ten, and 11 are sustained. Defendant's objections to Plaintiff's Requests for Admission five and nine are overruled. Defendant shall provide a complete response to Plaintiff's Request for Admission five on or before October 25, 2024; and it is further

ORDERED that Defendant's objections to Plaintiff's Interrogatories are deemed waived. Defendant shall provide complete responses to Plaintiff's Interrogatories two, four, six, eight, nine, ten, 11, 12, 14, 15, 16, 17, and 18 on or before October 25, 2024; and it is further

ORDERED that Defendant's objections to Plaintiff's Requests for Production four, five, six, seven, eight, nine, ten, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, and 23 are sustained. Defendant's objections to Plaintiff's Requests for Production one, two, three, 16, 18, and 24 are overruled. Defendant shall provide complete responses to Plaintiff's Request for Production one, two, three, 16, 18, and 24 on or before October 25, 2024; and it is further

ORDERED that each Party shall bear its own costs associated with litigating and defending against Plaintiff's Motion to Deem Admitted its Requests for Admission and Compel Other Discovery Responses from Defendant.

Dated: October 4, 2024
New York, New York

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

Slip Op. 24–107

MAQUILACERO S.A. DE C.V. AND TECNICAS DE FLUIDOS S.A. DE C.V., Plaintiffs, and PERFILES LM, S.A. DE C.V., Consolidated Plaintiff, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 23–00091

[Remanding the U.S. Department of Commerce's final results in the 2020–2021 administrative review of the antidumping duty order on light-walled rectangular pipe and tube from Mexico.]

Dated: October 4, 2024

Diana Dimitriuc-Quaia, *John M. Gurley*, *Mario A. Torrico*, ArentFox Schiff LLP, of Washington, D.C., and *Yun Gao*, ArentFox Schiff LLP, of New York, N.Y., for Plaintiffs Maquilacero S.A. de C.V. and Tecnicas De Fluidos S.A. de C.V. *Leah N. Scarpelli* also appeared.

Jeffrey M. Winton, *Michael J. Chapman*, *Amrietha Nellan*, *Vi N. Mai*, *Jooyoun Jeong*, and *Ruby Rodriguez*, Winton & Chapman PLLC, of Washington, D.C., for Consolidated Plaintiff Perfiles LM, S.A. de C.V.

Franklin E. White, Jr., Assistant Director, and *Kristin E. Olson*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Christopher Kimura*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C. *Kara M. Westercamp* also appeared.

Alan H. Price, *Robert E. DeFrancesco, III*, *Jake R. Frischknecht,* and *Kimberly A. Reynolds*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor Nucor Tubular Products, Inc.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiffs Maquilacero S.A. de C.V. ("Maquilacero") and Tecnicas de Fluidos S.A. de C.V. ("TEFLU") (collectively, "Plaintiffs") filed this action pursuant to 19 U.S.C. § 1675 contesting the final results in the 2020-2021 administrative review of the U.S. Department of Commerce ("Commerce") in *Light-Walled Rectangular Pipe and Tube from Mexico* ("*Final Results*"), 88 Fed. Reg. 30,723 (Dep't of Commerce May 12, 2023) (amended final results of antidumping duty admin. review; 2020–2021), PR 160, and accompanying Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review, 2020–2021: Light-Walled Rectangular Pipe and Tube from Mexico (Dep't of Commerce Mar. 7, 2023) ("Final IDM"), PR 146.[1]

[1] Citations to the administrative record reflect the public administrative record ("PR") and confidential administrative record ("CR") document numbers. ECF Nos. 46, 47.

On August 5, 2008, Commerce published an antidumping duty order on light-walled rectangular pipe and tube from Mexico, the People's Republic of China, and the Republic of Korea. *Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea*, 73 Fed. Reg. 45,403 (Dep't of Commerce Aug. 5, 2008) (notice of amended final determination of sales at less than fair value) ("*Order*").

Maquilacero, Perfiles y Herrajes LM, S.A. de C.V. ("Perfiles"), and Regiomontana de Perfiles y Tubos S.A. de C.V. ("Regiopytsa") participated in Commerce's administrative reviews for the years 2016–2017 and 2018–2019. *See Final Results*, 88 Fed. Reg. 30,723; *Light-Walled Rectangular Pipe and Tube from Mexico* ("*LWRPT from Mexico 2018–19 Final Results*"), 86 Fed. Reg. 33,646 (Dep't of Commerce Jun. 25, 2021) (final results of antidumping duty admin. review; 2018–2019), and accompanying Issues and Decision Memorandum ("LWRPT from Mexico 2018–19 Final IDM"); *Light-Walled Rectangular Pipe and Tube from Mexico* ("*LWRPT from Mexico 2016–17 Final Results*"), 84 Fed. Reg. 16,646 (Dep't of Commerce Apr. 22, 2019) (final results of antidumping duty admin. review; 2016–2017), and accompanying Issues and Decision Memorandum ("LWRPT from Mexico 2016–17 IDM").

Commerce conducted this administrative review for the period from August 1, 2020 through July 31, 2021. Initiation of Antidumping and Countervailing Duty Admin. Reviews, 88 Fed. Reg. 55,811, 55,813 (Dep't of Commerce Oct. 7, 2021), PR 11.

Commerce selected Maquilacero/TEFLU (collapsed as a single entity) and Regiopytsa as the mandatory respondents in the review. *See* Commerce's 2020–2021 Antidumping Duty Admin. Review of Light-Walled Rectangular Pipe and Tube from Mexico: Respondent Selection ("Resp. Selection Mem.") (Oct 27, 2021), PR 21. Plaintiffs submitted their questionnaire responses. Sec. A Questionnaire Resp. Maquilacero S.A. de C.V. ("Maquilacero's Sec. A QR"), PR 36–38, CR 13–21; Sec. B Questionnaire Resp. Maquilacero S.A. de C.V. ("Maquilacero's Sec. B QR"), PR 50, CR 25; Section C Questionnaire Resp. Maquilacero S.A. de C.V. ("Maquilacero's Sec. C QR"), PR 51, CR 28; Maquilacero S.A. de C.V.'s Downstream Sales Submission of Tecnicas De Fluiodos S.A. de C.V. ("Maquilacero's Downstream Sales Resp."), PR 57, CR 88; Resp. Maquilacero S.A. de C.V.'s First Suppl. Sec. A & D Questionnaire Resp. ("Maquilacero's First Suppl. Sec. A & D QR") (July 26, 2022), PR 92, CR 152–57.

On September 8, 2022, Commerce published its preliminary determination. *Light-Walled Rectangular Pipe and Tube from Mexico*

("*Preliminary Results*"), 87 Fed. Reg. 54,965 (Dep't of Commerce Sept. 8, 2022) (prelim. results and part. rescission of the antidumping duty admin. review; 2020–2021), PR 111, and accompanying Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review ("PDM"), PR 103. Commerce determined preliminarily that Plaintiffs made sales of subject merchandise at prices below normal value during the period of review, continued to collapse and treat Maquilacero and TEFLU as a single entity, classified certain sales made by Maquilacero/TEFLU through the Program for the Promotion of Manufacturing, Maquiladora, and Expert Services ("IMMEX" or "IMMEX Program") as home market sales, and applied a differential pricing analysis. *See* PDM at 1, 5–9.

The Parties submitted additional briefing. Maquilacero's Post-Prelim. Suppl. QR, PR 119, CR 207–19; Resubmission of Maquilacero's Admin. Case and Rebuttal Brs., PR 140, CR 246; Resubmission of Nucor's Admin. Rebuttal Br., PR 141, CR 248.

Commerce published its final determination on March 14, 2023 and issued its amended *Final Results* and Final IDM on May 12, 2023 to correct a ministerial error raised by Regiopytsa. *Final Results*, 88 Fed. Reg. 30,723; *Light-Walled Rectangular Pipe and Tube from Mexico*, 88 Fed. Reg. 15,665 (Dep't of Commerce Mar. 14, 2023) (final results of antidumping duty admin. review; 2020-2021); Final IDM. Commerce continued to collapse Maquilacero and TEFLU, considered TEFLU's further processed products as in-scope merchandise under the antidumping order, continued to classify Maquilacero/TEFLU's virtual export sales through the IMMEX Program as home market sales, declined to adjust Commerce's computer programming to include a further processing variable to differentiate between the products produced by Maquilacero and TEFLU, and declined to adjust its differential pricing analysis or its application of the Cohen's *d* test. Final IDM at 9–10, 22–23, 26–28.

Plaintiffs filed this action pursuant to 19 U.S.C. § 1675 contesting Commerce's *Final Results*. *See* Compl., ECF No. 7.

Before the Court is Plaintiffs' Motion for Judgment on the Record Pursuant to USCIT Rule 56.2. Pls.' Mot. J. Agency R. Mem. Law Supp. Mot. J. Agency R. Pursuant USCIT R. 56.2 ("Plaintiffs' Motion" or "Pls.' Br."), ECF Nos. 31, 32. Also before the Court is Consolidated Plaintiff Perfiles LM, S.A. de C.V.'s ("Consolidated Plaintiff" or "Perfiles") Motion for Judgment on the Agency Record. Mot. Consol. Pl. J. Agency R. ("Consolidated Plaintiff's Motion" or "Consol. Pl.'s Mot."), ECF No. 29; *see also* Br. Perfiles LM, S.A. de C.V. Supp. R. 56.2 Mot. J. Agency R. (“Consol. Pl.’s Br.”), ECF No. 29–1.[2]

Defendant United States (“Defendant”) filed Defendant’s Response to Plaintiff’s and Plaintiff-Intervenor’s Rule 56.2 Motions for Judgment on the Agency Record. Def.’s Resp. Pl.’s Pl.-Interv.’s R. 56.2 Mots. J. Agency R. (“Def.’s Resp.”), ECF No. 37, 39. Defendant-Intervenor Nucor Tubular Products, Inc. (“Defendant-Intervenor” or “Nucor”) filed Defendant-Intervenor’s Response to Motion for Judgment on the Agency Record. Def.-Interv.’s Resp. Mots. J. Agency R. (“Def.-Interv.’s Resp.”), ECF Nos. 40, 41.[3] Plaintiffs filed their reply brief. Reply Br. Def. Def.-Interv.’s Resp. Br. (“Pls.’ Reply Br.”), ECF Nos. 44, 45.

Oral argument was held on June 26, 2024. Oral Arg., ECF No. 53. Plaintiffs filed with the Court excerpts from the joint appendix that were referenced during oral argument. Resp. Court Request, ECF Nos. 54, 55.

For the following reasons, the Court remands the *Final Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce’s determination that TEFLU’s further processed products are in-scope merchandise is supported by substantial evidence and in accordance with law;
2. Whether Commerce’s determination to collapse Maquilacero/TEFLU is supported by substantial evidence and in accordance with law;
3. Whether Commerce’s rejection of the manufacturer code and the further processing variable in its model match methodology is supported by substantial evidence and in accordance with law;
4. Whether Commerce’s determination to treat TEFLU’s sales made through the IMMEX program as home market sales is supported by substantial evidence and in accordance with law; and
5. Whether Commerce’s determination to rely on the Cohen’s *d* test in conducting the differential pricing analysis is in accordance with law and supported by substantial evidence.

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[2] Perfiles y Herrajes LM, S.A. de C.V. incorporates by reference all arguments made by Plaintiffs in challenging the *Final Results*. *See* Consol. Pl.’s Br. at 2–3 (“We understand that Maquilacero and TEFLU are making arguments in their brief to the Court . . . we will not repeat those explanations, but incorporate them by reference.”).

[3] The Court granted Defendant-Intervenor’s Consent Motion for Errata, ECF No. 42, for corrections to be deemed made without physical substitution of Defendant-Intervenor’s Response to Motions for Judgment on the Agency Record. Order (Jan. 17, 2024), ECF No. 43.

JURISDICTION

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination 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

I. Scope Determination

A. Legal Framework for Scope Determination

The descriptions of merchandise covered by the scope of an antidumping or countervailing duty order must be written in general terms, and questions may arise as to whether a particular product is included within the scope of an order. *See* 19 C.F.R. § 351.225(a). When such questions arise, Commerce's regulations direct it to issue scope rulings that clarify whether the products are in scope or out of scope. *Id.* Commerce is guided by case law and agency regulations in their scope rulings. *See Meridian Prods., LLC v. United States* ("*Meridian Prods.*"), 851 F.3d 1375, 1381 (Fed. Cir. 2017); 19 C.F.R. § 351.225.

Commerce's inquiry must begin with the relevant scope language. *See, e.g.*, OMG, Inc. v. United States, 972 F.3d 1358, 1363 (Fed. Cir. 2020). If the scope language is unambiguous, "the plain meaning of the language governs." *Id.* If the language is ambiguous, however, Commerce interprets the scope with the aid of the sources set forth in 19 C.F.R. § 351.225(k)(1). *Meridian Prods.*, 851 F.3d at 1382. If the (k)(1) sources do not dispositively answer the question, Commerce may consider the (k)(2) factors under 19 C.F.R. § 351.225(k)(2). *Id.*

Commerce may consider the following interpretive sources under 19 C.F.R. § 351.225(k)(1) to determine whether merchandise is covered by the scope of an order:

(A) The descriptions of the merchandise contained in the petition pertaining to the order at issue;

(B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue;

(C) Previous or concurrent determinations of the Secretary, including prior scope rulings, memoranda, or clarifications pertaining to both the order at issue, as well as other orders with same or similar language as that of the order at issue; and

(D) Determinations of the Commission pertaining to the order at issue, including reports issued pursuant to the Commission's initial investigation.

19 C.F.R. § 351.255(k)(1). Secondary interpretive sources include any other determinations of the Secretary or the Commission not identified above, rulings or determinations by U.S. Customs and Border Protection ("Customs"), industry usage, dictionaries, and any other relevant record evidence. *Id.* If there is a conflict between these secondary interpretive sources and the primary interpretive sources of this section, the primary interpretive sources will normally govern in determining whether a product is covered by the scope of the order at issue. *Id.*

It is well-established that "Commerce cannot 'interpret' an antidumping order so as to change the scope of th[e] order, nor can Commerce 'interpret' an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001). When a party challenges a scope determination, the Court must determine whether the scope of the order "contain[s] language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States* ("*Duferco*"), 296 F.3d 1087, 1089 (Fed. Cir. 2002).

B. Plain Language of the Scope Order

The scope language of the *Order* in this case states in relevant part:

> The merchandise subject to these orders is certain welded carbon quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm.
>
> The term carbon-quality steel includes both carbon steel and alloy steel which contains only small amounts of alloying elements. Specifically, the term carbon-quality includes products in which none of the elements listed below exceeds the quantity by weight respectively indicated: 1.80 percent of manganese, or 2.25 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.15 percent vanadium, or 0.15 percent of zirconium.
>
> The description of carbon-quality is intended to identify carbon-quality products within the scope. The welded carbon-quality

> rectangular pipe and tube subject to these orders is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of these orders is dispositive.

Order, 73 Fed. Reg. at 45,404.

Commerce did not mention in the Final IDM whether the scope language was unambiguous, or whether Commerce needed to examine any (k)(1) or (k)(2) sources under 19 C.F.R. § 351.225. Commerce did not clearly articulate any determinations analyzing the plain scope language of the *Order*. In its Final IDM, Commerce stated merely that, "We disagree with Maquilacero/TEFLU and continue to find that TEFLU's further processed merchandise is within the scope of the *[Order]*." Final IDM at 12. Commerce did not purport to conduct a (k)(1) analysis, but in "finding that TEFLU's merchandise is within the scope of the *Order*," Commerce mentioned the following sources in its scope analysis: a previous scope ruling by Commerce (LWRPT from Mexico 2016–17 Final IDM), the Petition, a report by the International Trade Commission ("ITC"), and a ruling by a panel appointed by the North American Free Trade Agreement ("NAFTA") for this dispute in the underlying investigation. *Id.* at 12–15; *see* Antidumping and Countervailing Duty Orders on Certain Carbon Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, the People's Republic of China, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the Republic of South Africa, Taiwan, and Turkey: Scope Ruling Request (October 11, 2017) ("PCS Scope Ruling"); Letter, Antidumping Duty Petition on Light-Walled Rectangular Pipe and Tube from Korea, Mexico, and the People's Republic of China and Turkey and Countervailing Duty Petition on Light-Walled Rectangular Pipe and Tube from the People's Republic of China (June 27, 2007) ("Petition")[4]; Light-Walled Rectangular Pipe and Tube from Turkey, Inv. No. 731-TA-1121, USITC Pub. 4001 (May 2008) (Final) ("ITC Report"); Light Walled Rectangular Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review; 2016–2017, USA-MEX-2019–1904–01 at 10 (June 27, 2022) ("NAFTA Panel Ruling").

[4] Commerce did not provide any other identifying citations for the Petition in the *Final Results* or previous administrative reviews. The Petition was not placed on the record filed with the Court.

C. Parties' Contentions

In light of Commerce's failure to articulate either a plain language scope analysis or a (k)(1) analysis in the Final IDM, Defendant and Defendant-Intervenor argue post hoc in their briefs that the Court should sustain Commerce's plain language analysis, and that Commerce's examination of (k)(1) sources was appropriate. Def.'s Resp. at 14–18; Def.-Interv.'s Resp at 14–24. Although Commerce did not articulate such analyses in its Final IDM or *Final Results*, the Court examines Commerce's determinations within the plain language and (k)(1) contexts.

Plaintiffs contend that Commerce's determination was not in accordance with law because the plain language of the scope described only pipe and tube, with no references to downstream products or automotive parts, and Commerce's determination unlawfully expanded the *Order*. *See* Pls.' Br. at 23; Pls.' Reply at 8. Plaintiffs concede that Maquilacero produces in-scope pipe and tube and sells such merchandise to TEFLU for further processing into automotive parts. Pls.' Br. at 24. Plaintiffs argue that because TEFLU manufactures custom-made auto parts made from in-scope light-walled rectangular pipe and tube provided by Maquilacero, TEFLU's downstream products are not in scope. *Id.* at 23–24. Plaintiffs explain that the plain language of the scope order describes light-walled rectangular pipe and tube of standard sizes, lengths, and weight, while TEFLU sells automotive parts that are custom-made for original equipment manufacturer ("OEM") customers and have a dedicated use as auto parts. *Id.* at 24. Plaintiffs note further that:

> [T]he products sold by TEFLU to its OEM customers are not the same class or kind as in-scope [light-walled rectangular pipe and tube] classified under HTSUS heading 7306. Rather, these parts underwent substantial transformation into auto parts classified under [different] HTS Headings.

Id. at 28. For these reasons, Plaintiffs assert that Commerce's determination that TEFLU's downstream products are within the scope of the *Order* based on the plain scope language is not in accordance with law and not supported by substantial evidence. *See id.* at 23–33; *see also Order*.

Defendant and Defendant-Intervenor contend that the plain language of the scope of the *Order* (and the interpretative sources pursuant to 19 C.F.R. § 351.225(k)) support Commerce's determination that TEFLU's products are in-scope merchandise. Def.'s Resp. at 21–26; Def.-Interv.'s Resp. at 15–19.

Commerce stated that TEFLU's merchandise is within the scope of the *Order* because:

> *[A]bsent exclusionary language* or evidence that the further processing alters the carbon make-up or cross section of the [light-walled rectangular pipe and tube], "it is not reasonable to conclude that simply because a particular type of [light-walled rectangular pipe and tube] is not specially mentioned in the scope, that product is not covered."

Final IDM at 12 (quoting LWRPT from Mexico 2016–17 Final IDM) (emphasis added). Commerce further explained that there is no language excluding light-walled rectangular pipe and tube based on end-use restrictions. *See id.* at 14 (citing *King Supply Co. LLC v. United States* ("*King Supply*"), 674 F.3d 1343 (Fed. Cir. 2012)).

D. Commerce's Scope Ruling Based on Plain Language Must Be Remanded

The scope language at issue here covers certain welded carbon quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm. *Order*, 73 Fed. Reg. at 45,404.

The Court notes at the outset that remand is required for Commerce to determine whether Plaintiffs' further manufactured products are outside the scope based on the further processing of the merchandise. Commerce determined incorrectly that TEFLU's products met the description of subject merchandise in the *Order* and proceeded to consider whether the scope contained exclusionary language based on further processing and end use. *See* Final IDM at 12 ("absent exclusionary language or evidence that the further processing alters the carbon make-up or cross section of the [light-walled rectangular pipe and tube], 'it is not reasonable to conclude that simply because a particular type of [light-walled rectangular pipe and tube] is not specifically mentioned in the scope, that product is not covered.").

Commerce instead should have considered: *whether TEFLU's further manufactured products, which are light-walled rectangular pipe and tube that underwent a process of saw-cutting, laser cutting-to-length, drilling, perforation, bending, or other further processing, were downstream products outside of the scope.* Plaintiffs argue that "the plain language of the scope describes pipe and tube, not auto parts." Pls.' Br. at 23. TEFLU's automotive parts and other products were bent, pressed, or had holes drilled in them during manufacturing, which Plaintiff argues caused the products to become distinct, downstream products that no longer met the scope's description of the light-walled rectangular pipe and tube. *Id.* at 23–24. On remand, Commerce must reconsider whether TEFLU's imported automotive and other parts are downstream products that no longer meet the description of the scope as welded carbon-quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm.

Defendant cites *King Supply* for the proposition that the plain language of an order is paramount in determining whether particular products are included within the scope. *See* Def.'s Resp. at 14–15. While Defendant is correct that the plain language of an order is significant to the scope inquiry, Defendant's reliance on *King Supply* is inapposite here because that case addressed a scope order with an end-use restriction, but the *Order* in this case does not contain an end-use restriction. *See King Supply*, 674 F.3d at 1348 ("End-use restrictions in [antidumping] orders, while appropriately utilized in certain cases, are disfavored because they can be difficult to enforce."). Thus, an end-use restriction analysis is inapplicable in this case.

It is apparent that Commerce's plain language determination focuses on *silence* in the scope language of the *Order*. In other words, because the *Order* neither includes nor excludes automotive parts or other downstream products, Commerce determined that it was reasonable to consider TEFLU's products in-scope.

It is well-established that subject merchandise may be included in-scope only if the scope language specifically includes the merchandise or may be reasonably interpreted to include it. *Duferco*, 296 F.3d at 1089.

Commerce's position that the *silence* of the scope language permits Commerce to interpret TEFLU's products as within the scope of the *Order* is the opposite of the well-established principle set forth in *Duferco*. The Court agrees with Plaintiffs' argument that Commerce's position would allow the agency to read *any* product into the scope of an order if the scope language is silent, which is contrary to the principle articulated in *Duferco*. Here, the plain scope language does not mention automobile parts or downstream products, and thus it is not in accordance with law for Commerce to have determined that the plain scope language suggests that the products were in-scope based on the silence of the *Order*.

Similarly, Commerce asserts that a product may be interpreted as in-scope as long as there is no language excluding such product. This is not a reasonable principle that complies with the *Duferco* standard and the Court cannot sustain Commerce's plain language determination in this regard.

In addition, the *Order* mentions that:

> [T]he welded carbon-quality rectangular pipe and tube subject to the *Order* is currently classified under the Harmonized Tariff Schedule of the United States [HTSUS] subheadings 7306.61.50.00 and 7306.61.70.60. While HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of these orders is dispositive.

Order, 73 Fed. Reg. at 45,404. Although the HTSUS headings mentioned in the *Order* may not be dispositive, Plaintiffs explained at oral argument that TEFLU's custom-made, downstream products are classified under HTSUS headings other than those listed in the *Order*. *See* Oral Arg. at 28:09:31–34:25:55. The fact that TEFLU's products are classified in HTSUS headings other than those listed in the *Order* supports the Court's conclusion that Commerce's plain language determination is not in accordance with law.

The Court observes that the scope language in the *Order* makes no reference to downstream products or automotive parts, nor does Commerce cite any language suggesting that downstream products or automotive parts may be reasonably included within the scope of the *Order* under the *Duferco* standard. Instead, the scope language refers only to "certain welded carbon-quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 mm." *Order*. The scope language does not suggest that downstream products or automotive parts should be included in-scope.

The scope language's silence and lack of exclusionary provisions do not permit Commerce to conclude, based upon a plain language reading of the scope provision, that TEFLU's further processed automotive products fall within the scope of the *Order*. For these reasons, the Court remands Commerce's plain language scope determination.

E. Commerce's Analysis Regarding Further Processing of Merchandise is Not in Accordance With Law

Commerce failed to answer the appropriate question in its Final IDM. Commerce should have focused its inquiry on whether TEFLU's further processed products became downstream products that rendered the products out of scope.

The U.S. Court of Appeals for the Federal Circuit ("CAFC") has explained that the question of whether a product "meets the order's physical specifications *only begins* the inquiry." *A.L. Patterson, Inc. v. United States*, 585 F. App'x 778, 784–85 (Fed. Cir. 2014) (unpublished) (emphasis added) (holding that although Patterson's steel coil rod facially fell within the language of the order at issue, Commerce failed to offer substantial evidence that the merchandise fell within the domestic industry that the ITC investigated and did not sufficiently address contrary evidence that the merchandise was physically distinguishable from the merchandise that the Petitioner intended to be covered by the order).

The Court of International Trade ("CIT") has held similarly that the scope language of the *Order* may not be reasonably interpreted to suggest that "all light-walled rectangular pipe and tube further manufactured for one of the identified uses remains within the scope regardless of the downstream product's shape or the degree of further manufacturing." *See Stein Indus. Inc. v. United States* ("*Stein*"), 43 CIT ___, ___, 365 F. Supp. 3d 1364, 1373 (2019). Subject merchandise may fall out of the ambit of an order based on how much processing has been performed on such merchandise, whether the further processed products are realistically interchangeable with the merchandise covered by the scope, and whether the ITC investigated the industry of the further processed product. These are questions that Commerce must address on remand.

The court has recognized a distinction between a "finished product" that falls outside of an antidumping order and an intermediate product that stays within the scope of an antidumping order. Depending on the amount of further processing performed on a product, when an intermediate good (also called an input, raw material, unfinished good, or upstream product) has been processed into a "finished product" (also called a downstream product), such product may be outside the scope of an antidumping order. *See, e.g.*, *Trendium Pool Prod., Inc. v. United States*, 43 CIT ___, ___, 399 F. Supp. 3d 1335 (2019); PCS Scope Ruling; Rubbermaid Com. Prod. LLC v. United States, 39 CIT ___, ___, 2015 WL 4478225, at *4 (July 22, 2015) (holding that subject merchandise was out of scope by the express "finished merchandise" exclusion); *see also Dillinger France S.A. v. United States*, 42 CIT ___, ___, 350 F. Supp. 3d 1349, 1357 n.3 (2018) (defining "downstream" as "in or toward the latter stages of a usually industrial process or the stages (such as marketing) after manufacture."); *Bell Supply Co., LLC v. United States*, 348 F. Supp. 3d 1281, 1289 (discussing the terms "upstream production" and "downstream production" as to the substantial transformation factor of "nature and sophistication of processing in the country of exportation").

1. Description of TEFLU's Merchandise

Plaintiffs describe TEFLU's merchandise as follows: Maquilacero manufactures and sells commercial light-walled rectangular tube produced to ASTM A-513, the Standard Specification for Electric-Resistance-Welded Carbon and Alloy Steel Mechanical Tubing, to customers in the home market and the United States. Compl. ¶ 10; *see also* Final IDM at 13. Maquilacero's affiliated party, TEFLU, is a Mexican producer of automotive parts for original equipment manufacturers that uses light-walled rectangular tube produced by Maquilacero as an input into its own production of auto parts or other end products. Compl. ¶ 10. The input light-walled rectangular tube is further processed by TEFLU in its own facilities, using distinct production equipment and machinery, into a new product that is customized for a single use, in a specific automotive subassembly. *Id.* The products made by TEFLU are customized to a single customer for a single end use in a specific subassembly, unlike commercial pipe and tube produced by Maquilacero that are made to standard specifications and sizes. *Id.* TEFLU's custom-made automotive parts are sold and purchased based on a production parts approval process ("PPAP"), a detailed process that the supplier must undergo at the request of the customers. Oral Arg. at 24:16–24:44. TEFLU's products are cut by laser, cut to length, drilled, notched, bent, and pressed. *Id.* at 24:44–25:13.

2. Further Processing

During oral argument, the Parties disagreed whether TEFLU's merchandise were intermediate or finished products, and the amount of processing that must occur for such products to be considered out of scope.

Plaintiffs contended that TEFLU's merchandise were manufactured into finished automobile parts that customers referred to by names other than pipe and tube, and the subassembly and parts to which the products pertained were dedicated to a single, final use. *See id.* at 38:38–38:51.

Defendant asserted that TEFLU's merchandise were considered only intermediate products, absent the addition of further materials or other processes performed on TEFLU's goods. *See id.* at 1:02:17–1:03:15. Defendant acknowledged that the automotive parts produced by TEFLU underwent additional design and testing, along with meeting specific architectural or engineering requirements, but Defendant argued that these processes of cutting by laser or saw, drilling, perforating, or bending of TEFLU's products, were not sufficient to change their chemical or physical nature to render them outside the scope. *Id.* Defendant analogized TEFLU's further processing of its custom parts to a piece of paper being bent and folded, arguing that TEFLU's products, like a piece of paper, would remain the same in nature regardless of the processes described, and would continue to be a product that met the physical description of the language in the scope. *See id.* Defendant also suggested that the finished product would be an automobile, rather than TEFLU's products, even if their end use was within an automobile. *See id.* at 1:09:10–1:09:44.

Defendant-Intervenor argued that TEFLU's products were intermediate goods, rather than finished products, because the manufactured parts were not "plug and play" products in an automobile. *See id.* at 1:30:42–1:32:49. Defendant-Intervenor suggested that after the parts were attached to an automobile, TEFLU's products would then be substantially transformed into a finished product. *See id.* at 01:09:10–01:09:44. Defendant's and Defendant-Intervenor's arguments are unconvincing and misplaced.

Questions that Commerce must address instead are: *(1) whether TEFLU's further processed products were within an industry that was investigated by the ITC when the ITC determined that certain pipe and tube caused material injury or threat of material injury to domestic producers; and (2) whether TEFLU's further processed products were interchangeable with the pipe and tube covered under the scope. See A.L. Patterson*, 585 F. App'x at 784–86 (concluding that "Patterson presented evidence showing that coil rod is a distinct domestic market that the Commission did not investigate" and noting that the petition did not mention coil or any uses of coil rod, no domestic producers of coil rod were named in the petition, and there was no evidence that the petitioner intended to cover coil rod in the petition due to competition from imports); *see also TMB 440AE, Inc. v. United States*, No. 18–00095, 44 CIT ___. ___, 2020 WL 1672841, at *2–7 (Apr. 6, 2020) (stating that "[b]y the text of the Orders alone without the context of the investigation, AEC pipe would appear to fall within their scope" and remanding for Commerce to conduct a complete and fair review of the petition and the ITC investigation to determine whether the orders were intended to cover AEC's type of pipe, and to determine whether AEC's pipe was interchangeable with the types of pipe covered by the Orders).

In the Final IDM, Commerce described TEFLU's further manufactured merchandise as "[light-walled rectangular pipe and tube] [which] undergoes a process of 'saw-cutting, laser cutting-to-length, drilling, perforation and/or bending.'" Final IDM at 12. Commerce determined that the specifications of TEFLU's further processed product did not exceed those listed in the scope of the *Order*. *Id.* (citing LWRPT from Mexico 2016–17 Final IDM). Commerce determined that TEFLU's further manufactured merchandise was within the scope of the *Order* based on physical or chemical specifications, the ITC Report, the Petition, and NAFTA Panel Ruling. *See id.* at 12–15. Commerce's narrow focus on the physical and chemical specifications of TEFLU's products is incorrect; Commerce must instead examine the ITC's investigation into the industry of TEFLU's further manufactured products and the interchangeability of TEFLU's products with the merchandise covered by the scope.

Despite its cursory conclusions that TEFLU's products were in-scope due to their physical properties, Commerce failed to address substantial record evidence of approximately 83 different custom parts that were manufactured by TEFLU for several OEM customers. *See* Maquilaero's Sec. A QR at Ex. A-6; Maquilacero's Post-Prelim. Suppl. QR at Ex. 2S-7. These products included seat assemblies, hinges for the trunk of an automobile, articulated arms of an excavator, a cabin frame for a tractor, trunk lids, and racks for 3-D printing machines, among other various products.[5] *See* Pls.' Br. at 24, 28; Oral Arg. at 45:42–46:02. Many of these customized parts were further processed into distinct shapes and sizes for both automobile and non-automobile manufacturers. For example, TEFLU manufactured a decklid hinge gooseneck, which was twisted into a curved shape with holes punched throughout the product. *See* Maquilacero's Sec. A QR at Ex. A-6.

The Court observes that this case is analogous to *Stein*, in which the court remanded Commerce's determination that a merchandising bar and adjustable welded mounted bar kit were within the scope based on the scope language in the *Order* and the subject ITC report. *Stein*, 365 F. Supp. 3d at 1371–74. The *Stein* court reasoned that Commerce failed to address the argument that the subject merchandise were outside of the scope based on the lack of uniform cross section and that the subject ITC report could not be reasonably interpreted by Commerce to suggest that both intermediate and downstream products were within the scope. *Id.* On remand, Commerce determined that the subject merchandise were out of scope. *See Stein Indus. Inc. v. United States*, 385 F. Supp. 3d 1380 (2019) (judgment sustaining remand results).

As in *Stein*, Commerce determined here that the ITC Report reflected that light-walled rectangular pipe tube was an intermediate product with a variety of end uses, whereas Plaintiffs, being the

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[5] During oral argument, Plaintiffs waived the confidentiality of TEFLU's products and the HTSUS codes under which such products were categorized. *See* Oral Arg. at 34:18–37:33.

challenging parties, contend that further processing of the subject merchandise rendered the downstream products outside of the scope of the *Order*. Commerce must consider on remand the degree to which each of TEFLU's approximately 83 products were processed by saw-cutting, laser cutting-to-length, drilling, perforation, bending, or other further manufacturing processes, and whether such further processing rendered each of the approximately 83 products outside the scope of the *Order* as downstream products, particularly within the context of the Petition and the ITC investigation, and comparing the interchangeability of TEFLU's further processed products with the pipe and tube covered under the *Order*.

The present case is also analogous to *Trendium*, in which the court concluded that merchandise that were processed enough to no longer be considered intermediate products may fall outside the scope of an antidumping order. *Trendium*, 43 CIT at ___, 399 F. Supp. 3d at 1337. Trendium had requested a scope inquiry clarifying that its pool products, partially made from corrosion resistant steel ("CORES") from Italy and the People's Republic of China ("China"), did not fall within the antidumping duty order for CORES from Italy and China. *Id.* Commerce determined that Trendium's pool products were covered by the scope order, and Trendium argued that the plain language of the antidumping order did not cover downstream products. *Id.* The *Trendium* order included the following language:

> Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching and/or slitting or *any other processing that would not otherwise remove the merchandise from the scope* of the [antidumping order].

Id. at 1340 (emphasis added) (citing *Certain Corrosion-Resistant Steel Products From India, Italy, Republic of Korea and the People's Republic of China*, 81 Fed. Reg. 48,387, 48,389, App. I (Dep't of Commerce July 25, 2016) (countervailing duty order). The court held that the antidumping order only covered CORES from Italy and China, not finished pool products that could no longer be used as raw input, with Trendium's processing "so extensive and particular to the product's use as pool walls that the CORES is no longer CORES for the purposes of a scope determination" and that "the amount of processing the CORES components underwent transformed them from a raw input into a finished product, with the only practical use as an above-ground pool." *Id.* at 1343.

Additionally, the CIT has also recognized that specialized products that are not "realistically interchangeable" with covered merchandise may be excluded from an antidumping order. *See TMB 440AE*, 44 CIT at ___, 2020 WL 1672841, at *5.

Thus, on remand, under the principles articulated in *A.L. Patterson*, *Stein*, *Trendium,* and *TMB 440AE*, Commerce must examine TEFLU's further processed products to determine whether the amount of processing transformed them from a raw input into a downstream product, whether TEFLU's further processed products were within an industry that was investigated by the ITC when the ITC determined that certain pipe and tube caused material injury or threat of material injury to domestic producers, and whether TEFLU's further processed products were realistically interchangeable with the raw input of light-walled rectangular pipe and tube of rectangular cross section having a wall thickness of less than 4 mm.

Plaintiffs contend that the record evidence demonstrates that TEFLU's products have been processed from raw light-walled rectangular pipe into finished, downstream products for specific customers. Pls.' Br. at 27–28.

Plaintiffs highlight Maquilacero's First Supplemental Sections A & D Questionnaire Response, asserting that each automotive part is assembled for a specific customer and a specific subassembly with no other possible use. *Id.* at 27 (citing Maquilacero's First Suppl. Sec. A & D QR at 5). Maquilacero's First Supplemental Sections A & D Questionnaire Response described TEFLU's further processing of raw light-walled rectangular pipe tube, in relevant part:

> [T]he products sold by TEFLU undergo further processing of the [light-walled rectangular pipe tube] from Maquilacero, using production steps that are specific to each part. No two auto parts produced by TEFLU are the same, but they are customized, therefore the processing steps differ from product to product. . . .. The processes TEFLU undertakes include cutting with laser and/or punching, bending tapping and drilling/perforating the tube using dedicated equipment in order to make the [light-walled rectangular pipe tube] tubing into parts for the automotive industry. For some parts, the processing by TEFLU consists of cutting the tubing to the customer's specification, using sophisticated laser cutting machines. Please see Exhibit S-3 for the processing operations and the machines used by TEFLU.

Maquilacero's First Suppl. Sec. A & D QR at 5; *see also id.* at Ex. S-3 (photographs of the facility and machines used by TEFLU to process light-walled rectangular pipe tube).

In support of its argument that TEFLU's products are customized, Plaintiffs also contend that Maquilacero's Section A Questionnaire Response demonstrated that TEFLU's products do not overlap in use with typical light-walled rectangular pipe tube. Pls.' Br. at 28 (citing Maquilacero's Sec. A QR at Ex. A-6). During oral argument, Plaintiffs asserted that Exhibit A-6 of Maquilacero's Section A Questionnaire Response showed five sample products produced by TEFLU, with each product specifically made for a different OEM customer: a "deck-lid hinge gooseneck" (used for a trunk of a car), a "tubing steel upper 40 LH," a front axle product, a tube front boom for a tractor, and a frame. *See* Maquilacero's Sec. A QR at Ex. A-6; Resp. Court Request. Plaintiffs argue that these five products were visibly different and custom-made for corresponding customers, and were processed by saw-cutting, laser cutting-to-length, drilling, perforating and/or bending to some degree. *Id.* Plaintiffs cite additional examples of the types of products sold by TEFLU, such as automotive parts and racks for 3-D printing machines, in Maquilacero's Post-Preliminary Supplemental Questionnaire Response. Pls.' Br. at 28 (*citing* Maquilacero's Post-Prelim. Suppl. QR at Ex. 2S-7). The photographs in these documents demonstrated that some of these parts had multiple cuts, were cut at specific angles, had holes drilled, or had cuts with prongs at the ends of the pipes. Maquilacero's Post-Prelim. Suppl. QR at Ex. 2S-7.

Plaintiffs assert that TEFLU's products were sold in conformity with drawings and specifications by the OEM customers, whereas Maquailacero's products were sold based on commercial specifications and standard sizes, and Plaintiffs cite to sales information and other documentation on the record that detract from Commerce's determination. Pls.' Br. at 28 (citing Maquilacero's Sec. A QR at Exs. A-10, A-14, A-24, A-32; Maquilacero's Post-Prelim. Suppl. QR at 2S-6.1–2S-6.2). Sales information in Maquilacero's Section A Questionnaire Response showed that TEFLU's parts were identified by part number, by their function, and by the subassembly of the final product, while Maquilacero's parts did not have any such identification. Maquilacero's Sec. A QR at Exs. A-10 (sample documentation for a U.S. sale of light-walled rectangular pipe tube by Maquilacero), A-14 (sample documentation for a sale from Maquilacero to TEFLU, a sale of customized parts to a customer from TEFLU, and a sample PPAP). Other documentation in Maquilacero's Section A Questionnaire Response and Maquilacero's Post-Preliminary Supplemental Questionnaire Response included a flowchart of TEFLU's production process, which showed the steps taken from producing a raw material to a finished good; a brochure describing the activities, final products, and processing operations performed by TEFLU; and invoices from

TEFLU's virtual export sales (also known as "pedimentos"), showing the different parts sold to different customers. Pls.' Br. at 28 (citing Maquilacero's Sec. A QR at Exs. A-24, A-32; *see also* Resp. Court Request (including Maquilacero's Post-Prelim. Suppl. QR at Exs. 2S-6.1–2S-6.7)).

In the Final IDM, Commerce failed to address this substantial contrary evidence suggesting that TEFLU's further processing of the raw light-walled rectangular pipe tube resulted in TEFLU's 83 products becoming customized, downstream products. Accordingly, Commerce's determination that all of TEFLU's products fall within the scope of the *Order* is in not accordance with law or supported by substantial evidence.

F. Commerce's Analysis of the (k)(1) Factors Must Be Remanded

As noted earlier, Commerce did not mention in the *Final Results* that (k)(1) sources should be considered in this case, although it is apparent that Commerce considered certain sources in the Final IDM. Nor did Commerce conduct a complete and full review of the (k)(1) sources, both positive and negative, to determine whether downstream products were intended to be covered in the scope of the *Order*. Commerce made cursory conclusions with minimal citations and failed to include most of the documents on the record before the Court.

Defendant and Defendant-Intervenor contend that the interpretative sources pursuant to 19 C.F.R. § 351.225(k) support Commerce's determination that TEFLU's products are in-scope. *See* Def.'s Resp. at 18–21; Def.-Interv.'s Resp. at 17–19. Commerce reasoned that TEFLU's merchandise was within the scope of the *Order* according to the (k)(1) sources because: (1) the Petition in the original investigation underlying the *Order* stated that any product that meets physical characteristics of the scope is covered regardless of whether it is produced to "an ASTM, proprietary or other industry specification"; (2) the ITC Report stated that light-walled rectangular pipe and tube is an intermediate product with "many end-use applications," including "fences, gates, hand rails, furniture, sports equipment, and automotive equipment"; (3) the PCS Scope Ruling is not applicable to this review; and (4) the NAFTA Panel Ruling found that Commerce's determination that TEFLU's further processed merchandise as in-scope was not contrary to law. Final IDM at 12–15.

Commerce stated that the Petition and ITC Report supported its determination that any product that met the physical characteristics of the Order were in scope, and rejected Maquilacero's administrative argument that the customization of TEFLU's further processed products caused the merchandise to be out of scope. *See* Final IDM at 13 (citing Petition; ITC Report at 13). Commerce relied on the ITC Report to support its determination that TEFLU's products were not downstream products. *Id.* ("[The] LWRPT ITC Report states that [light-walled rectangular pipe and tube] is an intermediate product with 'many end-use applications,' including 'fences, gates, hand rails, furniture, sports equipment, and automotive equipment.'").

Commerce did not provide any substantive explanations regarding how the information in these sources supported Commerce's determinations. Commerce failed to discuss, for example, whether the ITC investigated downstream products as part of the investigated domestic industry that was injured, and whether further processed products were interchangeable with raw inputs covered in the *Order*. Rather, Commerce simply stated that TEFLU's products were in scope. *See, e.g.*, *id.* at 13 ("In [*LWRPT from Mexico 2016–17 Final IDM*], we found that the specifications of the further-processed product did not exceed the physical or chemical specifications listed in the scope of the *Order*.").

In addition, Commerce failed to provide specific citations or page numbers for the Petition, and failed to place the Petition and the pages of the ITC Report cited in the Final IDM on the record filed with the Court. *See* Maquilacero's First Suppl. Sec. A & D QR at S-14 (excerpts from the ITC Report).

Commerce also relied on a NAFTA Panel Ruling to support its determination that TEFLU's further processed merchandise were within the scope because the NAFTA Panel ruled that Commerce's determination was a "reasonable interpretation of the pertinent scope language and a reasonable way of applying the regulation." Final IDM at 15 (citing NAFTA Panel Ruling at 11–15). The Court observes that Commerce failed to provide any substantive analysis as to why the NAFTA Panel Ruling was correct, particularly in the context of how further processed products were interchangeable with the raw input light-walled rectangular pipe and tube or whether downstream products were covered in scope, and Commerce failed to place the NAFTA Panel Ruling document on the record filed with the Court. More importantly, rulings by a NAFTA Panel do not have precedential value on the scope ruling as they are not considered a (k)(1) source. *See* 19 C.F.R. § 351.225(k).

Therefore, because Commerce did not do a complete and fair substantive analysis of the (k)(1) sources (considering both positive and negative sources), and did not place on the record many of the documents on which it apparently relied for its (k)(1) analysis, Commerce's determinations under the (k)(1) analysis are neither in accordance with law nor supported by substantial evidence and must be remanded.

II. Collapsing of Maquilacero and TEFLU

Plaintiffs challenge Commerce's collapsing determination under 19 C.F.R. § 351.401(f), arguing that Commerce improperly relied on its prior administrative review. *See* Pls.' Br. at 12–23; *see also LWRPT from Mexico 2018–19 Final Results*.[6] Commerce determined that TEFLU and Maquilacero should be collapsed in this case, based in part on Commerce's determination that TEFLU's further processed merchandise were within the scope of the *Order*. Final IDM at 12–15.

Under 19 C.F.R. § 351.401(f), Commerce may treat two or more producers as a single entity in antidumping proceedings when three requirements are satisfied: (1) the entities must be affiliated; (2) the affiliated producers must "have production facilities for *similar or identical products* that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and (3) "there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1) (emphasis added). For a collapsing analysis, "Commerce must consider the 'totality of circumstances' between all entities when it evaluates whether, for purposes of collapsing entities, there is significant potential for manipulation of price or production to circumvent antidumping duties." *Prosperity Tieh Enters. Co., Ltd. v. United States*, 965 F.3d 1320, 1326 (Fed. Cir. 2020) (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,298, 27,346 (May 19, 1997) (noting that collapsing determinations "are very much fact-specific in nature, requiring a case-by-case analysis")). An analysis of the totality of circumstances requires an evaluation of all pertinent evidence. *Id.* at 1327.

Because the Court remands Commerce's scope determination of TEFLU's products, and TEFLU's further processed products may not be within the scope of the *Order* as downstream products, Commerce must reconsider on remand whether the products produced by Maquilacero and TEFLU are similar or identical under the 19 C.F.R. § 351.401(f)(1) collapsing analysis. Therefore, the Court also remands Commerce's collapsing determination.

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[6] The 2018–2019 administrative review was the most recent proceeding in which Commerce had reviewed Maquilacero individually because Maquilacero was not selected as a mandatory respondent in the 2019–2020 administrative review. *See Light-Walled Rectangular Pipe and Tube From Mexico*, 87 Fed. Reg. 13,973 (Dep't of Commerce Mar. 11, 2022) (final results of antidumping duty administrative review; 2019–2020).

III. Rejection of Manufacturer Code and Further Processing Variable

Plaintiffs challenge Commerce's determination to not modify the SAS programming by including a manufacturer code and the further processing variable (or the "FURPROCESSH/U" variable) as not in accordance with law or supported by substantial evidence. *See* Pls.' Br. at 33–38. Plaintiffs assert that Commerce's failure to incorporate the manufacturer code and the further processing variable was a deviation from prior practice. *Id.* at 35–38.

Because the Court remands Commerce's scope and collapsing determinations, the Court defers the issues of the correct manufacturer code and further processing variable because Commerce must reevaluate the commercial and physical differences between standard light-walled rectangular pipe and tube produced by Maquilacero compared to customized further processed products produced by TEFLU. Commerce should reconsider these issues as appropriate based on the remand redetermination.

IV. Classification of IMMEX Sales

Plaintiffs challenge Commerce's determination to treat TEFLU's sales made through IMMEX (referred to as "virtual exports") as home market sales as not in accordance with law or supported by substantial evidence. *Id.* at 38–43. Plaintiffs contend that record evidence demonstrates and the nature of the IMMEX program suggests that TEFLU had constructive knowledge that its IMMEX sales were destined to be exported to the United States or a third country due to the nature of the IMMEX Program. Pls.' Br. at 38–43; Pls.' Reply at 18–23.

In antidumping proceedings, Commerce determines the export price of the subject merchandise and assigns sales of that merchandise to the party who sets the export price for the purpose of calculating that party's antidumping margin. *See* 19 U.S.C § 1677a. Export price is defined as:

> 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 the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . .

Id. § 1677a(a) (emphasis added). In assigning sales to the foreign producer or exporter, Commerce focuses on the term "first sold" in the statute, interpreting it as denoting the first party in the sales chain with knowledge of the merchandise's United States destination at the time of sale, which reflects Commerce's view that the party who first sells the subject merchandise destined for the United States is the likely "price discriminator," and thus the one who "may have engaged in dumping." *JA Solar Int'l Ltd. v. United States*, 606 F. Supp. 3d 1370, 1373 (2022).

Because the Court remands Commerce's scope and collapsing determinations, the Court also defers ruling on Commerce's determination to classify TEFLU's IMMEX sales as home market sales, which may be affected by possible modification of the SAS programming.

V. Differential Pricing Methodology

Plaintiffs challenge Commerce's application of its differential pricing methodology as not in accordance with law because Commerce failed to resolve concerns regarding the Cohen's *d* test articulated by the CAFC in *Stupp Corp. v. United States* ("*Stupp III*"), 5 F.4th 1341 (Fed. Cir. 2021) and *Mid Continent Steel Wire, Inc. v. United States* ("*Mid Continent V*"), 31 F.4th 1367 (Fed. Cir. 2022).[7] *See* Pls.' Br. at 43–48.[8] Because the Court remands Commerce's scope determination of TEFLU's products, the Court defers ruling on the differential pricing issue at this time.

CONCLUSION

For the foregoing reasons, the Court remands the issues of Commerce's collapsing of Maquilacero and TEFLU and the scope determination of TEFLU's further processed merchandise for further consideration consistent with this Opinion. The Court defers Commerce's rejection of the manufacturer code and the further processing variable in its SAS programming code, its treatment of TEFLU's sales made through the IMMEX Program as home market sales, and its application of the differential pricing analysis with the Cohen's *d* test pending the outcome of the scope redetermination on remand.

To summarize, on remand Commerce must answer the following question: whether TEFLU's further manufactured products, which are light-walled rectangular pipe and tube that underwent a process of saw-cutting, laser cutting-to-length, drilling, perforation, bending, or other further processing, were downstream products outside of the

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[7] The Court notes that this case has been abbreviated as "*Mid Continent II*" in the administrative filings and case briefs.

[8] Specifically, the CAFC has remanded (1) Commerce's use of a simple average, rather than a weighted average, in its calculation of the denominator when in *Mid Continent Steel & Wire, Inc. v. United States* ("*Mid Continent V*"), 31 F.4th 1367 (Fed. Cir. 2022) for its lack of adequate explanation for departing from academic literature and (2) Commerce's application of Cohen's *d* test without the observation of certain statistical assumptions, including the normality, sufficient size, and roughly equal variances of the considered populations, in *Stupp Corp. v. United States* ("*Stupp III*"), 5 F.4th 1341 (Fed. Cir. 2021).

scope. Commerce must determine the degree to which TEFLU's products were processed by saw-cutting, laser cutting-to-length, drilling, perforation, bending, or other further manufacturing processes, and whether each product was further processed so as to no longer fall within the scope, rather than base its scope determination solely on the physical and chemical composition of TEFLU's products. Commerce must also address whether TEFLU's further processed products are within an industry that was investigated by the ITC when the ITC determined that certain pipe and tube caused material injury or threat of material injury to domestic producers, and whether TEFLU's further processed products are realistically interchangeable with the pipe and tube covered under the scope.

Accordingly, it is hereby

ORDERED that that this case shall proceed according to the following schedule:

(1) Commerce shall file its remand determination on or before December 4, 2024;

(2) Commerce shall file the administrative record on or before December 18, 2024;

(3) Comments in opposition to the remand determination shall be filed on or before January 17, 2025;

(4) Comments in support of the remand determination shall be filed on or before February 18, 2025; and

(5) The joint appendix shall be filed on or before February 25, 2025.

Dated: October 4, 2024
New York, New York

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

Slip Op. 24–108

KEYSTONE AUTOMOTIVE OPERATIONS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 21–00215

[Denying both Plaintiff's and Defendant's motions for summary judgment and ordering a trial in a Customs classification matter.]

Dated: October 7, 2024

Eric R. Rock, *Michael G. Hodes*, and *Serhiy Kiyasov*, Rock Trade Law, LLC, of Chicago, IL, for Plaintiff Keystone Automotive Operations, Inc. *Austin J. Eighan* and *Lawrence R. Pilon* also appeared.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, and *Brandon A. Kennedy*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel was *Valerie Sorensen-Clark*, General Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y. *Alexandra Khrebtukova* also appeared.

OPINION AND ORDER

Choe-Groves, Judge:

This case addresses whether various side bars, nerf bars, and bars (collectively "subject merchandise") attached to motor vehicles are considered "side protective attachments" as described in U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the Harmonized Tariff Schedule of the United States ("HTSUS") and are therefore excluded from a 25% *ad valorem* rate of duty applied to various products imported from the People's Republic of China ("China"). *See Notice of Product Exclusion Extensions*, 85 Fed. Reg. 48,600 (USTR Aug. 11, 2020) (China's acts, policies, and practices related to technology transfer, intellectual property, and innovation); U.S. Note 20(iii)(213), Subchapter III, Chapter 99, HTSUS.

Before the Court are cross-motions for summary judgment. Pl.'s Mot. Summ. J. & Mem. Law Supp. Pl.'s Mot. Summ. J. (Dec. 7, 2023) ("Pl.'s Br."), ECF Nos. 48, 49; Def.'s Cross-Mot. Summ. J. & Mem. Law Supp. & Opp'n Pl.'s Mot. Summ. J. (Feb. 16, 2024) ("Def.'s Br."), ECF Nos. 50, 51.

Keystone Automotive Operations, Inc. ("Plaintiff" or "Keystone") argues that the subject merchandise are subject to the exclusion from the 25% *ad valorem* rate of duty because they meet the description of "side protective attachments" that are made of steel, were entered into the United States for consumption within the timeframe provided in the exclusion notice, and were properly classified under ten-digit HTSUS subheading 8708.29.5060. Pl.'s Br. at 11–20.

The Government counters that the subject merchandise do not meet the exclusion's description of "side protective attachments" made of steel because all of Keystone's imported products consist of rubberized plastic steps mounted on steel bars that attach to the sides of vehicles and whose primary function and use is assisting an individual in entering and exiting a high road clearance vehicle by using the step pads. Def.'s Br. at 13–27.

For the reasons that follow, the Court denies both Plaintiff's and Defendant's cross-motions for summary judgment and will schedule a bench trial forthwith.

ISSUE PRESENTED

Whether the subject merchandise meet the description of "side protective attachments" in U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the HTSUS and are subject to an exclusion from the 25% *ad valorem* rate of duty.

UNDISPUTED FACTS

Pursuant to USCIT Rule 56.3, Plaintiff and Defendant submitted separate statements of material facts and responses. Pl.'s Statement Undisputed Facts (Dec. 7, 2023) ("Pl.'s Facts"), ECF Nos. 48–1, 49–1; Def.'s Resp. Pl.'s Statement Undisputed Facts (Feb. 16, 2024) ("Def.'s Resp. Pl.'s Facts"), ECF Nos. 50–2, 512; Def.'s Statement Material Facts (Feb. 16, 2024) ("Def.'s Facts"), ECF Nos. 501, 51–1; Pl.'s Resp. Def.'s Statement Material Facts (Apr. 8, 2024) ("Pl.'s Resp. Def.'s Facts"), ECF Nos. 53–1, 54–1; Pl.'s Reply Def.'s Resp. Pl.'s Statement Undisputed Facts (Apr. 8, 2024) ("Pl.'s Reply"), ECF Nos. 53–2, 54–2. The following facts are not in dispute.

I. Procedural History

Plaintiff's import of the subject merchandise from China entered the United States through the Port of Newark, New Jersey, in November 2020. Pl.'s Facts ¶ 4; Def.'s Resp. Pl.'s Facts ¶ 4; Protest No. 4601–21–126305, ECF No. 9–1. The U.S. Customs and Border Protection ("Customs") liquidated the subject merchandise with a duty rate increase of 25% *ad valorem* under ten-digit HTSUS subheading 8708.29.5060 and HTSUS heading 9903.88.03 on February 5, 2021. Pl.'s Facts ¶ 5; Def.'s Resp. Pl.'s Facts ¶ 5; Protest No. 4601–21–126305. Customs reliquidated the subject merchandise on February 19, 2021. Pl.'s Facts ¶ 6; Def.'s Resp. Pl.'s Facts ¶ 6; Compl. ¶ 21, ECF. No. 10; Ans. ¶ 21, ECF No. 17. The subject merchandise were properly classified under ten-digit HTSUS subheading 8708.29.5060. Pl.'s Facts ¶ 21; Def.'s Resp. Pl.'s Facts ¶ 21.

Plaintiff filed a timely protest challenging Customs' classification of the subject merchandise under HTSUS heading 9903.88.03 on March 9, 2021. Pl.'s Facts ¶ 7; Def.'s Resp. Pl.'s Facts ¶ 7; Protest No. 4601–21–126305. Keystone's protest was deemed denied by operation of law on April 8, 2021. Pl.'s Facts ¶ 8; Def.'s Resp. Pl.'s Facts ¶ 8; Compl. ¶ 4; Ans. ¶ 4. Keystone paid all duties, charges, and exactions assessed at liquidation pertaining to the subject merchandise. Pl.'s Facts ¶ 10; Def.'s Resp. Pl.'s Facts ¶ 10; Compl. ¶ 6. Plaintiff timely filed this action within 180 days of the protest being deemed denied. Pl.'s Facts ¶ 9; Def.'s Resp. Pl.'s Facts ¶ 9. The matter was subsequently designated as a test case. Order (Dec. 20, 2021), ECF No. 22. The Court held oral argument on July 26, 2024. Oral Arg. (July 26, 2024), ECF No. 66.

II. Description of Subject Merchandise

The subject merchandise consist of various side bars, nerf bars, and bars designed for motor vehicles and come in various lengths of stainless-steel tubes between 53.15 inches and 125.2 inches, either straight or curved at each end, in widths between 4.02 inches and 13.23 inches, with or without welded end caps. Pl.'s Facts ¶¶ 11–12; Def.'s Resp. Pl.'s Facts ¶¶ 11–12. The subject merchandise have mounting backets and fasteners and are usually purchased by an end-user of a vehicle as pieces of after-market equipment. Pl.'s Facts ¶¶ 13, 15; Def.'s Resp. Pl.'s Facts ¶¶ 13, 15. The vehicles on which the subject merchandise are generally attached to are pick-up trucks, Jeeps, and off-road vehicles. Pl.'s Facts ¶ 16; Def.'s Resp. Pl.'s Facts ¶ 16. On such vehicles, the subject merchandise are attached to the frames on either side and serve as lowered steps that make it easier to get in and out of lifted vehicles and wipe dirt off shoes. Pl.'s Facts ¶¶ 16, 19; Def.'s Resp. Pl.'s Facts ¶¶ 16, 19; Def.'s Facts ¶¶ 3–4, 7–8; Pl.'s Resp. Def.'s Facts ¶¶ 3–4, 7–8.

The subject merchandise have a sleek and stylish look and provide a degree of protection against stone pecking, road hazards, road debris, side impact, and collisions with shopping carts and other objects. Pl.'s Facts ¶ 18; Def.'s Resp. Pl.'s Facts ¶ 18; Def.'s Facts ¶¶ 24–25; Pl.'s Resp. Def.'s Facts ¶¶ 24–25. All models of the subject merchandise contain plastic step features that allow users to use the subject merchandise as step-ups into the vehicle. Pl.'s Facts ¶ 19; Def.'s Resp. Pl.'s Facts ¶ 19.

Plaintiff's imported products, including the subject merchandise, are sold online through various websites and in physical retail locations and showrooms. Def.'s Facts ¶ 27; Pl.'s Resp. Def.'s Facts ¶ 27. Plaintiff is responsible for a Facebook page for TrailFX products, which include the subject merchandise. Def.'s Facts ¶ 19; Pl.'s Resp. Def.'s Facts ¶ 19. Plaintiff's customers are able to access Keystone's online product pages to read the product descriptions, refer to the product pictures, and decide if they want to purchase the products. Def.'s Facts ¶ 17; Pl.'s Resp. Def.'s Facts ¶ 17. Plaintiff does not have any specific data or metrics showing the percentage of customers who use the subject merchandise in a certain manner or how often the customers use the subject merchandise. Def.'s Facts ¶ 26; Pl.'s Resp. Def.'s Facts ¶ 26. For example, Defendant highlighted that the A&A Auto Store's website sells products like the subject merchandise, nerf bars, and steps in the category of exterior products, but does not sell them in the "vehicle protection" subcategory of the exterior products category. Def.'s Facts ¶¶ 29–30; Pl.'s Resp. Def.'s Facts ¶¶ 29–30.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court reviews classification cases de novo. *Cont'l Auto. Sys., Inc., v. United States*, 46 CIT __, __, 589 F. Supp. 3d 1215, 1220 (2022); 28 U.S.C. § 2640(a)(1); *Telebrands Corp. v. United States*, 36 CIT 1231, 1234, 865 F. Supp. 2d 1277, 1279–80 (2012).

The Court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

DISCUSSION

I. Legal Framework

In a tariff classification dispute, "the court first considers whether 'the government's classification is correct, both independently and in comparison with the importer's alternative.'" *Shamrock Bldg. Materials, Inc. v. United States*, 47 CIT __, __, 619 F. Supp. 3d 1337, 1342 (2023) (quoting *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)). The plaintiff has the burden of demonstrating that the government's classification is incorrect. *Jarvis Clark*, 733 F.2d at 876. Independent of the arguments presented, the Court has a statutory mandate to "reach a correct result." *Id.* at 878; *see* 28 U.S.C. § 2643(b).

A two-step process guides the Court in determining the correct classification of merchandise. *Ford Motor Co. v. United States*, 926 F.3d 741, 748 (Fed. Cir. 2019) (citing *ADC Telecomms., Inc. v. United States*, 916 F.3d 1013, 1017 (Fed. Cir. 2019)). First, the Court ascertains the proper meaning of the terms in the tariff provision. *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the Court determines whether the merchandise at issue falls within the terms of the tariff provision. *Id.* The former is a question of law, which the Court reviews de novo, and the latter is a question of fact, which the Court reviews for clear error. *Id.*"[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs"), which are both applied in numerical order. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citing *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001)). GRI 1 instructs that, "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1. "Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (alteration in original) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 534 (Fed. Cir. 1994)).

Chapter 99 of the HTSUS includes U.S. Notes, which are enacted by Congress or proclaimed by the President. *See, e.g.*, *Maple Leaf Mktg., Inc. v. United States*, 45 CIT __, __, 528 F. Supp. 3d 1365, 1370 (2021) ("The President implemented the tariffs by modifying Subchapter III of Chapter 99 of the Harmonized Tariff Schedule of the United States ('HTSUS') to add a new note and a new tariff provision under the heading 9903.80.01."). "Unless the context requires otherwise, the general notes and rules of interpretation, the section notes, and the [chapter notes]" apply to Chapter 99. U.S. Note 2, Subchapter III, Chapter 99, HTSUS. Generally, these Notes only relate to specific headings at the eight-digit level, so they are "not binding for determining prima facie classifiability," but they are "persuasive as to what

Congress intended." *Sarne Handbags Corp. v. United States*, 24 CIT 309, 317–18 (2000).

In construing the terms of the headings, the Court "may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. of P.R.*, 182 F.3d at 1337–38)). The Court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), which "are not legally binding or dispositive," *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but "provide a commentary on the scope of each heading of the Harmonized System" and are "generally indicative of proper interpretation of the various provisions." H.R. Rep. No. 100–576, 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582; *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

II. Relevant HTSUS Headings and U.S. Note 20(iii)(213)

Effective September 24, 2018, the Office of the United States Trade Representative ("USTR") "imposed additional duties on goods of China with an annual trade value of approximately $200 billion as part of the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation." *Notice of Product Exclusion Extensions*, 85 Fed. Reg. at 48,600. Relevant to this case are goods classifiable under HTSUS heading 9903.88.03, which covers "articles the product of China, as provided for in U.S. note 20(e) to this subchapter and as provided for in the subheadings enumerated in U.S. note 20(f)" except the goods covered in, among others, HTSUS heading 9903.88.56. Heading 9903.88.03, HTSUS.

U.S. Note 20(e) provides that:

> For the purposes of heading 9903.88.03, products of China, as provided for in this note, shall be subject to an additional 25 percent ad valorem rate of duty. The products of China that are subject to an additional 25 percent ad valorem rate of duty under heading 9903.88.03 are products of China that are classified in the subheadings enumerated in U.S. note 20(f) to subchapter III. All products of China that are classified in the subheadings enumerated in U.S. note 20(f) to subchapter III are subject to the additional 25 percent ad valorem rate of duty

> imposed by heading 9903.88.03, except products of China granted an exclusion by the U.S. Trade Representative and provided for in . . . (15) heading 9903.88.56 and U.S. note 20(iii) to subchapter III of chapter 99.

U.S. Note 20(e), Subchapter III, Chapter 99, HTSUS. U.S. Note 20(f) states that "[h]eading 9903.88.03 applies to all products of China that are classified in the following 8-digit subheadings, except products of China granted an exclusion by the U.S. Trade Representative and provided for in . . . heading 9903.88.56 and U.S. note 20(iii) to subchapter III of chapter 99." U.S. Note 20(f), Subchapter III, Chapter 99, HTSUS.

On August 11, 2020, the USTR issued a Federal Register Notice stating that certain products from China would be excluded from the 25% *ad valorem* rate of duty imposed on goods from China classified under 5,757 full and partial subheadings of the HTSUS. *Notice of Product Exclusion*, 85 Fed. Reg. at 48,601. Each exclusion was governed by the scope of ten-digit HTSUS subheadings, and the accompanying product descriptions were provided in Annexes for Extensions of Certain Product Exclusions from Tranche 3. *Id.* Subchapter III to Chapter 99 of the HTSUS was modified by inserting heading 9903.88.56, which was "[e]ffective with respect to entries on or after August 7, 2020, and through December 31, 2020, articles the product of China, as provided for in U.S. note 20(iii) to [Subchapter III], each covered by an exclusion granted by the U.S. Trade Representative." Heading 9903.88.56, HTSUS.

At issue in this case is U.S. Note 20(iii) to Subchapter III of Chapter 99 of the HTSUS, which provides that:

> The U.S. Trade Representative determined to establish a process by which particular products classified in heading 9903.88.03 and provided for in U.S. notes 20(e) and 20(f) to this subchapter could be excluded from the additional duties imposed by heading 9903.88.03. See 83 Fed. Reg. 47974 (September 21, 2018) and 84 Fed. Reg. 29576 (June 24, 2019). Pursuant to the product exclusion process, the U.S. Trade Representative has determined that, as provided in heading 9903.88.56, the additional duties provided for in heading 9903.88.03 shall not apply to the following particular products . . . :
>
> . . .
>
> (213) Tire carrier attachments, roof racks, fender liners, side protective attachments, the foregoing of steel (described in statistical reporting number 8708.29.5060).

U.S. Note 20(iii)(213), Subchapter III, Chapter 99, HTSUS.

HTSUS subheading 8708.29.5060 covers:

8708	Parts and accessories of the motor vehicles of headings 8701 to 8705:
8708.29	Other:
8708.29.50	Other:
8708.29.5060	Other

Subheading 8708.29.5060, HTSUS. The Parties do not dispute that the subject merchandise are classifiable under the ten-digit HTSUS subheading 8708.29.5060. *See* Pl.'s Facts ¶ 21; Def.'s Resp. Pl.'s Facts ¶ 21.

III. Analysis of "Side Protective Attachments" as Used in U.S. Note 20(iii)(213)

A. Whether "Side Protective Attachments" is a Principal Use Provision

As noted previously, the Court first considers whether the Government's classification of the subject merchandise is correct, both independently and compared to the importer's alternative. *See Shamrock Bldg. Materials*, 619 F. Supp. 3d 1342; *Jarvis Clark*, 733 F.2d at 876. Thus, the Court must assess initially whether U.S. Note 20(iii) to Subchapter III of Chapter 99 of the HTSUS is a use provision as alleged by the Government or an *eo nomine* provision as alleged by Plaintiff.

An *eo nomine* provision describes articles by specific names. *S.C. Johnson & Son Inc. v. United States*, 999 F.3d 1382, 1388 (Fed. Cir. 2021) (citing *Schlumberger Tech Corp.*, 845 F.3d at 1164)). A principal use provision classifies articles based on their principal or actual use. *Schlumberger Tech Corp.*, 845 F.3d at 1164; *see also R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1355 (Fed. Cir. 2014).

Defendant contends in its cross-motion for summary judgment that U.S. Note 20(iii) is a principal use provision. Def.'s Br. at 13–14. Defendant asserts that "side protective attachments" should be understood as a principal use provision because the phrase "side protective attachments" does not describe a product by a specific name that is common in commerce, which Defendant argues would be indicative of an *eo nomine* provision. *Id.* at 14.

Plaintiff argues, on the contrary, that U.S. Note 20(iii) is not a principal use provision because "conditioning an exclusion on some additional characteristic or criterion that is not part of the exclusion's description—such as principal use—will result in a limitation that is not provided for and not intended by the drafters of the exclusion language." Pl.'s Resp. Def.'s Cross-Mot. Summ. J. & Reply Further Supp. Pl.'s Mot. Summ. J. (Apr. 8, 2024) ("Pl.'s Resp. Br.") at 12, ECF Nos. 53, 54. Plaintiff asserts that U.S. Note 20(iii) should be treated as an *eo nomine* provision and that the subject merchandise are classifiable as "side protective attachments" because the products are made of steel, attach to motor vehicles, and protect the sides of the vehicle. Pl.'s Br. at 13–16; Pl.'s Resp. Br. at 11–20.

A principal use provision does not need to expressly use the words "used for." *S.C. Johnson & Son Inc.*, 999 F.3d at 1389 (citation omitted). Generic terms that are preceded by an adjective that suggests a manner of use can constitute a principal use provision. *Id.* (citing *Stewart-Warner Corp. v. United States*, 748 F.2d 663, 667 (Fed. Cir. 1984)).

ARI 1(a), which governs use provisions, provides that:

> 1. In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use[.]

ARI 1(a). Principal use "has been defined as the use 'which exceeds any other single use.'" *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (emphasis omitted) (quoting *Lenox Collections v. United States*, 20 CIT 194, 196 (1996)).

The relevant provision at issue is "side protective attachments, the foregoing of steel." U.S. Note 20(iii)(213), Subchapter III, Chapter 99, HTSUS. This provision contains two adjectives, "side" and "protective," which modify the noun "attachments." Although the term "protective" is an adjective, in the context of "side protective attachments," it modifies the word "attachments" in a way that convincingly suggests that the attachments on the side of the vehicle must be used in a protective manner. *See Stewart-Warner Corp.*, 748 F.2d at 667 (explaining that employing a term to modify another generic term "compels one to consider some aspect of use" as opposed to using a "purely descriptive" term).

The Oxford English Dictionary defines "protective" as "[h]aving the quality, character, or effect of protecting someone or something; preservative; defensive." *Protective*, OXFORD ENGLISH DICTIONARY (2d ed. revised 2007). This dictionary definition is informative and leads the

Court to conclude that the phrase "side protective attachments" inherently suggests use because the phrase connotes that an attachment that is described by U.S. Note 20(iii) is an article that *protects* the vehicle on the side on which it is attached. *See* U.S. Note 20(iii)(213), Subchapter III, Chapter 99, HTSUS. The Court agrees with Defendant that "something that is 'protective' is something whose use or function is to provide protection, *i.e.*, covering or shielding something from exposure, injury, damage, or destruction." Def.'s Reply Mem. Further Supp. Cross-Mot. Summ. J. ("Def.'s Reply Br.") (May 29, 2014) at 8, ECF Nos. 56, 57. In other words, the attachment on the side must be used to protect the vehicle, and the adjective "protective" suggests a manner of use constituting a principal use provision. *See S.C. Johnson & Son Inc.*, 999 F.3d at 1389.

As an aside, the Court concludes that "side protective attachments" does not require that only the side of the vehicle must be protected (as opposed to, for example, the bottom or other parts of the vehicle being protected). If the provision were intended to require only the protection of the side of the vehicle, the language would presumably have been written as "side-protective attachments," which would have indicated a more specific intention of protecting the side of the vehicle. Because the two adjectives "side" and "protective" are not written as one combined term, the Court concludes that a less specific meaning was intended, that the attachment would be located on the side of the vehicle, and must be used in a protective manner.

The Court concludes that the term "side protective attachments" in U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the HTSUS is a principal use provision. The Court construes the tariff provision "side protective attachments" under ARI 1 to mean steel products that are attached to the side of a vehicle and are used to protect the vehicle.

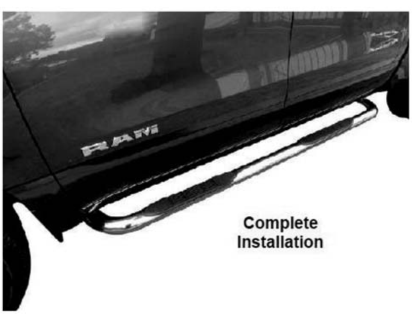
B. Whether "Side Protective Attachments" is an *Eo Nomine* Provision

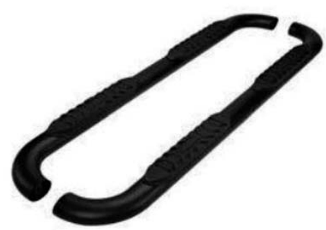
Notwithstanding the Court's conclusion that the tariff provision at issue is a principal use provision as alleged by Defendant, the Court also considers whether the tariff provision is an *eo nomine* provision as alleged by Plaintiff. An *eo nomine* provision describes articles by specific names and includes all forms of the named article, even the article's improved forms. *Ford Motor Co.*, 926 F.3d at 750; *see Schlumberger Tech Corp.*, 845 F.3d at 1164; *see, e.g.*, *Otter Prods., LLC v. United States*) 834 F.3d 1369, 1375–76 (Fed. Cir 2016) (concluding that HSTUS heading 4202 is an *eo nomine* provision that described articles by their specific names because HTSUS heading 4202 covers, among other things "[t]runks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters, and similar containers”).

U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the HTSUS lists “side protective attachments” as products that are excluded from the 25% *ad valorem* rate of duty. U.S. Note 20(iii)(213), Subchapter III, Chapter 99, HTSUS. The Court observes that the term “side protective attachments” as it is used in U.S. Note 20(iii)(213) does not refer to the specific name of products. As discussed at oral argument, there are no products called “side protective attachments.” Oral Arg. Tr. (“Oral Arg.”) at 19:16–20:8, 52:2–4, 57:17–24, ECF No. 67.

Relevant to this analysis, the Court observes that Polaris Inc. (not a party to this litigation) submitted the original request for an exclusion from Section 301 tariffs to USTR for parts used in the manufacture, repair, and service of powersports vehicles, including Polaris’ “Smittybilt side armor” products. Compl. Ex. A. In response, USTR granted an exclusion to Polaris. Rather than using the phrase “side armor” or another term for Polaris’ products, however, USTR included the term “side protective attachments” in U.S. Note 20(iii) to cover Polaris’ “side armor” products. Plaintiff argues that its nerf bars, side bars, and bars are similar to Polaris’ Smittybilt side armor products, and therefore should be treated as excluded “side protective attachments” under U.S. Note 20(iii).

The following are examples of Plaintiff’s products:





Pl.’s Br. Ex. B-1 at 37, 55.

Plaintiff admitted at oral argument that its products are not called “side protective attachments,” but suggested that the phrase is a description of a class or kind of good that are attached to the side of a vehicle. *See* Oral Arg. at 19:16–20:8. The Court is persuaded by Defendant’s counterargument that there is no evidence on the record that Plaintiff or anyone else in the automotive industry uses the term "side protective attachments" in commerce. *See* Def.'s Reply Br. at 3. Defendant also notes that "the evidence in the record shows that the subject merchandise is commonly referred to as truck steps, step bars, steps, side steps, nerf bars with steps, or side bars with steps." *Id.*

It is well-established that a heading is *eo nomine* when it describes a commodity by a specific name, usually one common in commerce. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). Because there is no evidence on the record establishing that the term "side protective attachments" identifies an article or a product by a specific name, or a product common in commerce, the Court concludes that "side protective attachments" is not an *eo nomine* provision.

C. Whether Plaintiff's Products are "Side Protective Attachments" Under a Principal Use Analysis

A "principal use" provision is defined as one in which the use "exceeds any other *single* use" in the context of ARI 1(a). *Aromont USA, Inc.*, 671 F.3d at 1312. Principal use provisions require the Court to determine whether the group of goods are "commercially fungible with the imported goods" in order to identify the use "which exceeds any other single use." *Id.* In analyzing whether the subject merchandise in this case are commercially fungible, the Court considers the *Carborundum* factors, which are

> [1] use in the same manner as merchandise which defines the class; [2] the general physical characteristics of the merchandise; [3] the economic practicality of so using the import; [4] the expectation of the ultimate purchasers; [5] the channels of trade in which the merchandise moves; [6] the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed; and [7] the recognition in the trade of this use.

Id. at 1313 (citing *United States v. Carborundum*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976)). ARI 1(a) requires examination of the principal use not only of Plaintiff's subject merchandise, but also of all similar merchandise.

The undisputed facts establish that the subject merchandise have steel and plastic characteristics and that they are attached to the frames on either side of a motor vehicle. Pl.'s Facts ¶¶ 14, 16, 19–20; Def.'s Resp. Pl.'s Facts ¶¶ 14, 16, 19–20. The undisputed facts demonstrate that the subject merchandise are sold online and that on the A&A Auto Store's website, the subject merchandise, particularly the nerf bars and step bars, are sold under the category of exterior products, but not within the "vehicle protection" subcategory of the exterior products category. Def.'s Facts ¶¶ 29–30; Pl.'s Resp. Def.'s Facts ¶¶ 29–30. The undisputed facts also show that Plaintiff does not have any specific data or metrics showing the manner in which Keystone's customers use the subject merchandise or how often they use them in a specific manner or for a specific purpose. Def.'s Facts ¶ 26; Pl.'s Resp. Def.'s Facts ¶ 26.

Although the undisputed facts describe some of the general physical characteristics of the subject merchandise and the environment in which the subject merchandise are sold, the Parties dispute whether the subject merchandise are used in the same manner as the side protective attachments that are excluded from the 25% *ad valorem* rate of duty. *See* Def.'s Br. at 23–25; Pl.'s Resp. Br. at 28–29. The Parties dispute, for example, whether Plaintiff's side bars, nerf bars, and bars are used principally for protection of the vehicle or are used principally as devices on which to step into an elevated vehicle such as a truck or SUV. *See* Def.'s Br. at 8, 13–16; Pl.'s Resp. Br. at 20–23. The Parties also dispute how Plaintiff's side bars, nerf bars, and bars compare to the Smittybilt side armor products that were granted the exclusion from Section 301 tariffs by USTR. *See* Pl.'s Br. at 18; Def.'s 28–29; Pl.'s Resp. Br. at 2–3, 7–11. The undisputed facts do not show what the expectations of the ultimate purchasers of the subject merchandise are or whether products that meet the description of "side protective attachments" are sold in a different environment than the subject merchandise. *See* Def.'s Facts ¶¶ 26, 29–30; Pl.'s Resp. Def.'s Facts ¶¶ 26, 29–30. There is also a dispute whether the primary use of Plaintiff's side bars, nerf bars, and bars is for stepping into higher vehicles, rather than a secondary use of protecting the vehicles, and whether this would affect if the subject merchandise can be deemed to have the same function and principal use as the side protective attachments provided for in U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the HTSUS. *See* Def.'s Br. at 16–20; Pl.'s Resp. Br. at 24–26; Def.'s Reply Br. at 11–15.

The undisputed facts are not sufficient for the Court to fully analyze whether the subject merchandise are commercially fungible with the side protective attachments described in U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the HTSUS. The undisputed facts do not adequately address all the *Carborundum* factors, particularly the factors regarding the use of the subject merchandise in the same manner as the side protective attachments, the economic practicality of so using the import, the expectation of the ultimate purchasers, and the recognition in the trade of the use of the subject merchandise.

Because relevant material facts remain in dispute, the Court is unable to grant either Plaintiff's or Defendant's motion for summary judgment at this stage of litigation.

CONCLUSION

For the foregoing reasons, the Court will hold a bench trial to make a preliminary determination as to the principal use of the subject merchandise and a subsequent determination "as to the group of goods that are commercially fungible with the imported goods." *Aromont*, 671 F.3d at 1312 (quoting *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999)). After making these determinations at trial, the Court will decide whether the subject merchandise are commercially fungible with the side protective attachments described in U.S. Note 20(iii)(213) to Subchapter III of Chapter 99 of the HTSUS, and are therefore excluded from the 25% *ad valorem* rate of duty as provided for under HTSUS heading 9903.88.56.

Accordingly, it is hereby:

ORDERED that Plaintiff's Motion for Summary Judgment, ECF Nos. 48, 49, is denied; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment, ECF Nos. 50, 51, is denied; and it is further

ORDERED that a bench trial will be held on a date to be determined.

Dated: October 7, 2024
New York, New York

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

Slip Op. 24–109

INTERGLOBAL FOREST LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00240

[Denying Plaintiff's application for attorney fees pursuant to the Equal Access to Justice Act.]

Dated: October 7, 2024

Thomas H. Cadden, Cadden & Fuller LLP, of Irvine, CA for Plaintiff InterGlobal Forest LLC.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Jennifer Petelle*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

OPINION

Barnett, Chief Judge:

Before the court is an application by Plaintiff InterGlobal Forest LLC ("IGF" or "Plaintiff") for attorney fees. Confid. Appl. for Fees and Other Expenses Pursuant to the Equal Access to Justice Act ("Form 15"),[1] ECF No. 23; *see also* Confid. Consol. Pl. [IGF's] Mot. for Att'y Fees and Expenses Pursuant to the Equal Access to Justice Act (EAJA) ("IGF Mem."), ECF No. 20 (accompanying memorandum).[2] Plaintiff seeks an award for expenses and fees allegedly incurred in defending against U.S. Customs and Border Protection's ("Customs") evasion determination pursuant to the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018). For the following reasons, the court denies IGF's application.

BACKGROUND

Plaintiff seeks an award of attorney fees associated with litigation challenging Customs' evasion determination related to the antidumping and countervailing duty orders on certain hardwood plywood from the People's Republic of China ("China"). *See Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (am. final determination of sales at

[1] IGF's application for attorney fees was submitted on the U.S. Court of International Trade's Form 15 and is referred to as such herein.

[2] This filing is titled "motion," but in substance it is a memorandum in support of the application. This filing also includes a copy of IGF's Form 15 that was subsequently revised in the now-operative version docketed at ECF No. 23.

less than fair value, and antidumping duty order); *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (countervailing duty order) (together "the *Plywood Orders*"). The evasion investigation prompted other agency actions, including a covered merchandise referral to the U.S. Department of Commerce ("Commerce"), which in turn led to separate challenges at the court. The court assumes familiarity with the litigation underlying this application and the related challenges as set out in previous decisions. *See Viet. Finewood Co. v. United States*, 47 CIT __, 633 F. Supp. 3d 1243 (2023) (remanding affirmative scope determination); *Far East Am., Inc. v. United States*, 47 CIT __, 654 F. Supp. 3d 1308 (2023) ("*Far East Scope*") (sustaining negative scope remand redetermination *sub nom. Far East Am., Inc.* after the court dismissed Vietnam Finewood Co. as a party to the litigation); *Far East Am., Inc. v. United States*, 47 CIT __, 673 F. Supp. 3d 1333 (2023) ("*Far East EAPA I*") (granting the defendant's motion to remand affirmative evasion determination); *Far East Am., Inc. v. United States*, 48 CIT __, 693 F. Supp. 3d 1378 (2024) ("*Far East EAPA II*") (sustaining negative evasion remand redetermination). The court recounts the following events relevant to this application for attorney fees.

In 2018, Customs' Trade Remedy Law Enforcement Directorate ("TRLED") initiated an evasion investigation pursuant to EAPA. *See Far East I*, 673 F. Supp. 3d at 1335–36. The investigation was based upon an allegation that several importers, including IGF, were evading the *Plywood Orders*. *See id.* at 1336. While the investigation was pending and despite interim measures suspending liquidation of the entries in question, Customs liquidated the entries subject to the investigation inclusive of antidumping and countervailing duties. *See Far East EAPA II*, 693 F. Supp. 3d at 1379–80 (describing liquidation). IGF (and other importers) protested those liquidations, and Customs suspended the protests. *See id*.

Meanwhile, Customs was unable to determine whether the merchandise at issue (i.e., that which was shipped from China to Vietnam) was covered merchandise and, pursuant to 19 U.S.C. § 1517(b)(4)(A), submitted a covered merchandise referral to Commerce. *Far East I*, 673 F. Supp. 3d at 1336. Commerce issued an affirmative scope determination, finding that the merchandise at issue was covered by the scope of the *Plywood Orders*. *Id.* Following that determination, TRLED issued an affirmative evasion determination. *Id.* Upon administrative review, Customs' Office of Regulations and Rulings ("OR&R") affirmed that determination. *Id.*

Three separate lines of cases followed.[3] In the litigation underlying this motion, importers, including IGF, challenged Customs' evasion determination. *Far East EAPA I*, 673 F. Supp. 3d 1333. In the second line of cases, importers, including IGF, challenged Commerce's scope determination. *Far East Scope*, 654 F. Supp. 3d 1308. Finally, in the third line of cases, importers, including IGF, contested the liquidation of the entries by Customs pursuant to 28 U.S.C. § 1581(i) (2018). *See* Compl., *InterGlobal Forest LLC v. United States*, Consol. Ct. No. 20–00155 (CIT Aug. 14, 2020).

In the challenge to Commerce's scope determination, the court remanded Commerce's affirmative scope determination and, on remand, Commerce reversed its original determination and found that the merchandise in question shipped from China to Vietnam was not within the scope of the *Plywood Orders*. *Far East Scope*, 654 F. Supp. 3d at 1310. The court sustained Commerce's remand determination. *Id.* at 1311. After the scope litigation concluded and after the plaintiffs in the evasion litigation had filed their motions for judgment on the agency record, the United States voluntarily requested, and the court granted, a remand for Customs to reconsider its affirmative finding in light of Commerce's negative scope determination. *Far East EAPA I*, 673 F. Supp. 3d at 1339. On remand, Customs reached a negative evasion determination, and the court sustained that determination. *Far East EAPA II*, 693 F. Supp. 3d at 1380–81. Separately, relevant to the litigation challenging Customs' liquidation of the entries subject to the evasion proceeding, Customs granted the suspended protests, and some plaintiffs dismissed their cases. *See*, Order, *InterGlobal Forest LLC v. United States*, Consol. Ct. No. 20–00155 (CIT Aug. 26, 2024), ECF No. 37. The court dismissed IGF's case as moot after IGF's protests were granted, the bills for antidumping and countervailing duties were canceled, and IGF failed to respond to the court's notice affording IGF the opportunity to provide a legal basis for continuing the suit. *See id.*; Order, *InterGlobal Forest LLC v. United States*, Consol. Ct. No. 20–00155 (CIT Sept. 4, 2024), ECF No. 38.

After the court entered judgment in the evasion litigation, IGF filed this application for attorney fees. Form 15; *see also* IGF Mem. Plaintiff also requests the application of a special factor in determining the

[3] A fourth case (not involving IGF) sought to rely on the court's residual jurisdiction to challenge Customs' "scope referral to Commerce; Commerce's alleged delay in acting on the referral; Customs' imposition of interim measures; and Customs' alleged failure to complete the investigation within the statutory timeframe." *Viet. Finewood Co. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1273, 1280 (2020). The court dismissed that case for lack of jurisdiction. *Id.* at 1287.

award of attorney fees. IGF Mem. at 14; *see also* 28 U.S.C. § 2412(d)(2)(A). Defendant United States ("the Government" or "Defendant") argues that Plaintiff is not entitled to an award of attorney fees because IGF was not the prevailing party in the litigation and the Government's position was substantially justified. Confid. Def.'s Resp. to Pl.'s Appl. For Att'y Fees Under the Equal Access to Justice Act ("Gov't Resp.") at 14–26, ECF No. 28. The Government further argues that even if IGF is entitled to an award, the requested amount is contrary to law and otherwise unreasonable. *Id.* at 26–42.

JURISDICTION

The court has jurisdiction over the underlying case pursuant to section 517(g)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g)(1), and 28 U.S.C. § 1581(c). After issuing a judgment, the court retains jurisdiction to adjudicate a party's timely application for fees and expenses. 28 U.S.C. § 2412(d).[4]

DISCUSSION

Under the Equal Access to Justice Act ("EAJA"), if timely requested, an eligible, prevailing party in an action against the United States may recover attorney fees if the government fails to show that its position "was substantially justified." 28 U.S.C. § 2412(d)(1)(A). "[A]ttorney fees shall not be awarded in excess of $125 per hour," except under certain circumstances. *Id.* § 2412(d)(2)(A). The court addresses each element in turn and concludes that, in this litigation challenging Customs' evasion determination, IGF was not the prevailing party and the Government's position was substantially justified.

I. Timely Filing

As a threshold matter, IGF has timely filed this application in connection with the litigation challenging Customs' evasion determination. The applicant must file an application within 30 days of the final judgment. 28 U.S.C. § 2412(d)(1)(B); USCIT Rule 54.1(a). The court issued its judgment in this case on April 8, 2024. J. (Apr. 8, 2024), ECF No. 19. The judgment became final on June 7, 2024, after the deadline for appeal expired without appeal. *See* USCIT Rule 54.1(a) (referencing 28 U.S.C. § 2412(d)(2)(G)). This application was timely filed on July 8, 2024. *See* 28 U.S.C. § 2412(d)(1)(B); USCIT Rule 54.1(a); USCIT Rule 6(a)(1)(C) (providing for timely filing on a non-holiday Monday when the deadline ends on a Sunday).

[4] Changes made in 2019 to this section of the statute are not material to this decision.

II. Eligible Party

IGF is an eligible "party" within the meaning of EAJA. With certain exceptions not relevant here, a "party" for the purpose of this statute includes "any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). IGF had a net worth of less than $7,000,000 and fewer than 500 employees when the case was filed on August 17, 2022. Confid. Decl. of Kurt Winn in Supp. of Consol. Pl. [IGF's] Appl. for Att'y Fees and Expenses Pursuant to the [EAJA] (July 8, 2024) ¶ 13 & Ex. 1, ECF No. 20–1. The Government does not dispute that IGF is an eligible party.

III. Prevailing Party

The first contested element is whether IGF is a prevailing party. Whether a party is a prevailing party is a question of law. *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1363 (Fed. Cir. 2003). A party seeking an EAJA award bears the burden of proving that it is the prevailing party. *Thompson v. Shinseki*, 682 F.3d 1377, 1381 (Fed. Cir. 2012). IGF avers that it is the prevailing party because Customs' reversal of its affirmative evasion determination was a success for IGF on a significant issue. IGF Mem. at 5–6. The Government responds that IGF is not the prevailing party because Customs' remand request was not based on Customs' error and therefore did not "materially alter the legal relationship between the parties." Gov't Resp. at 14.

The "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship between the parties" and that "change must be marked by 'judicial *imprimatur*.'" *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 421–22 (2016) (first quoting *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989), then quoting *Buckhannon Bd & Care Home, Inc. v. W. Va. Dep't of Health Res.*, 532 U.S. 598, 605 (2001)).[5] "[E]nforceable judgments on the merits and court-ordered consent decrees create" this

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[5] *CRST* addresses the "prevailing party" issue for the fee-shifting provision of Title VII of the Civil Rights Act of 1964. 578 U.S. at 421. *Texas State Teachers Ass'n* addresses the "prevailing party" issue for the award of attorney fees pursuant to 42 U.S.C. § 1988. 489 U.S. at 784. *Buckhannon* addresses the "prevailing party" issue for a request for attorney fees under the Fair Housing Act Amendments. 532 U.S. at 601. These decisions nevertheless are applicable in the EAJA context. *See, e.g.*, *Winters v. Wilkie*, 898 F.3d 1377, 1380–82 (Fed. Cir. 2018) (relying on all three cases in deciding an EAJA application).

alteration. *Buckhannon*, 532 U.S. at 604. However, litigation resulting in "a nonjudicial alteration of actual circumstances" or "the sought-after destination without . . . any judicial relief" does not confer prevailing party status. *Id.* at 606 (quotations omitted).[6]

In the context of administrative agency remands, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has emphasized the role of agency error in determining prevailing-party status. "A remand to an administrative agency for further proceedings can provide the requisite relief required to confer prevailing-party status" but "only if the remand is predicated—either explicitly or implicitly—on agency error." *Robinson v. O'Rourke*, 891 F.3d 976, 980–81 (Fed. Cir. 2018) (collecting cases). When a remand is ordered "without a judicial finding of administrative error or a concession of error by the agency, the default rule is that the remand is not based on administrative error for EAJA purposes." *Thompson*, 682 F.3d at 1381 (quoting *Davis v. Nicholson*, 475 F.3d 1360, 1366 (Fed. Cir. 2007)). For example, remands "to consider the effects of legislation enacted while the case was on appeal" or "for consideration of new evidence discovered for the first time while the case was on appeal" do not necessarily involve agency error and therefore generally do not confer prevailing-party status. *Former Emps. of Motorola Ceramic Prods.*, 336 F.3d at 1366 (citing *Vaughn v. Principi*, 336 F.3d 1351, 1355 (Fed. Cir. 2003)).

After *CRST* reaffirmed the importance of the change in the legal relationship of the parties, the Federal Circuit declined to "reconsider or clarify [its] precedent requiring administrative error in cases of remand for further agency proceedings." *Robinson*, 891 F.3d at 982; *see also id.* at 982 n.3 (noting its precedent "likely is not inconsistent with *CRST*"). In *Robinson*, the Federal Circuit considered both whether the remand was based on administrative error and whether the remand materially altered the legal relationship between parties, concluding that under either standard, the applicant for attorney fees was not the prevailing party. *Id.* at 982–86; *cf. Winters*, 898 F.3d at 1381–82, 1384 (considering both "whether the remand was predicated either explicitly or implicitly on agency error" and whether

[6] By contrast, "a favorable ruling on the merits is not a necessary predicate to find that a *defendant* has prevailed." *CRST*, 578 U.S. at 421 (emphasis added). *But see Buckhannon*, 532 U.S. at 603 (noting a prevailing party must receive "some relief on the merits"); *Tex. State Tchrs. Ass'n*, 489 U.S. at 791–92 (1989) (same). The Court's use of "defendant" appears significant. The Court explained that "[p]laintiffs and defendants come to court with different objectives." *CRST*, 578 U.S. at 431. "A defendant seeks to *prevent* [a material alteration in the legal relationship between parties] to the extent it is in the plaintiff's favor." *Id.* (emphasis added). "The defendant has . . . fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision." *Id.* Thus, a "defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Id.*

there was "a material alteration in the legal relationship between parties"). Having reviewed the case law from both the Supreme Court of the United States and the Federal Circuit, the court does not find inconsistency in the legal standard for the purpose of IGF's application.

The court concludes that IGF was not the prevailing party in this challenge to Customs' evasion determination because neither court order (the order remanding Customs' determination and the judgment sustaining the remand determination) was based on a judicial finding of error by Customs. This conclusion requires the court to consider, in the EAJA context, the effect of a Commerce scope determination on a Customs evasion determination. In this litigation, at no point did the court make a finding of error on the part of Customs in its evasion determinations. Rather, the court concluded that a remand was appropriate upon request from Defendant because of a change in Commerce's scope determination—a change resulting from separate litigation challenging a separate determination by a separate agency and from which IGF did not seek an award of attorney fees.[7] Although Commerce's scope determination was relevant to Customs' evasion determination, the two administrative determinations, and the separate lines of cases challenging each, are distinct. "Congress was expressly aware of the possibility of parallel litigation stemming from an EAPA investigation because the statute . . . recognizes that Commerce determinations responsive to [Customs] covered merchandise referrals may give rise to separate litigations pursuant to 19 U.S.C. § 1516a(a)(2)." *Royal Brush Mfg., Inc. v. United States*, 47 CIT __, __, 675 F. Supp. 1282, 1293 (2023). Defendant's request for a remand to take account of another agency's redetermination here, like remands based on changes in legislation or the discovery of new evidence, was based on changes outside the relevant agency's control and does not confer prevailing-party status for the purpose of EAJA. *See Former Emps. of Motorola Ceramic Prods.*, 336 F.3d at 1366.

Put another way, any change in legal relationship occurred between *Commerce* and IGF when the court assessed Commerce's scope determination, found error, and ordered reconsideration. While Customs ultimately changed its evasion determination subsequent to and based upon Commerce's change, the order granting the remand to Customs did not form the basis for the change, only the opportunity. Customs' finding of no evasion in the remand determination did not

[7] Because IGF did not file an EAJA application in the scope litigation and because the evasion litigation and scope litigation are separate, the court does not consider whether IGF would have qualified as a prevailing party in the scope litigation.

stem from a court evaluation of that position in this litigation, but rather distinct litigation involving a separate administrative agency. Without an opinion that Customs' evasion determination lacked merit in this litigation, Customs' change in position lacks the necessary judicial *imprimatur* for IGF to qualify as a prevailing party.[8] A contrary outcome would mean that any time Customs reverses an evasion determination based solely on Commerce's reversal of any covered merchandise determination and without any judicial consideration of the merits *relative to Customs'* findings, a plaintiff could be considered to be the prevailing party and would potentially be entitled to attorney fees and costs *from Customs*. *See* 28 U.S.C. § 2412(d)(4) (explaining that the agency involved in the litigation is responsible for any award of fees and other expenses). As discussed further below in the context of substantial justification, such an outcome would be contrary to the purpose of fee shifting pursuant to the EAJA, which holds agencies accountable for their own litigation decisions. Accordingly, the court concludes that, in this litigation, IGF was not the prevailing party for the purpose of an EAJA award.

IV. Substantial Justification

The second contested element is whether the Government's position was substantially justified. Regardless of whether IGF is the prevailing party, an award of attorney fees is not warranted because the Government's position was substantially justified. Whether the government's position is substantially justified is a matter of judicial discretion. *Pierce v. Underwood*, 487 U.S. 552, 558–59 (1988). While a plaintiff must allege that the government's position was not substantially justified, the government bears the burden of showing that its position was substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 414–15 (2004).

IGF alleges that the Government cannot establish that its position was substantially justified because the Government failed to offer "substantial credible evidence" in support of its determination. IGF Mem. at 8. IGF further points to "governmental bad acts," *id.* at 10, to establish that the Government's position was not substantially justified, *id.* at 10–12. IGF avers that: TRLED relied on weak evidence to initiate the investigation; TRLED failed to provide constitutional notice for the investigation; Customs liquidated entries despite a pending scope referral; TRLED failed to distinguish between prod-

[8] This case is distinct from *Robinson* and *Winters* in which the attorney fees were sought based solely on a remand (not an additional judgment after remand, as followed here). In both those cases, unlike this case, the Veterans Court did not retain jurisdiction. *Robinson*, 891 F.3d at 978; *Winters*, 898 F.3d at 1379. Nonetheless, the court concludes that the court's remand did not provide the *judicial imprimatur* to qualify IGF as the prevailing party.

ucts that did or did not incorporate two-ply wood as an input; TRLED issued multiple rounds of requests for information; Customs failed to issue its determination by September 16, 2019, and instead submitted a covered merchandise referral; Commerce "unreasonably and unjustifiably found" the merchandise was not substantially transformed as part of the covered merchandise referral; TRLED issued an affirmative evasion determination against IGF; and OR&R affirmed the evasion determination. *Id.*

The Government responds that its position was substantially justified. Gov't Resp. at 17–26. First, the Government argues that Customs' initial finding of evasion was reasonable based on Commerce's affirmative scope determination in the referral from Customs. *Id.* at 18. The Government further contends that the lack of precedent and the novelty of EAPA litigation substantially justify the Government's positions in the EAPA litigation. *Id.* at 21–23. Finally, the Government argues that IGF's recitation of "bad acts" is meritless because no authority establishes that any purported bad acts entitle a party to an award of attorney fees. *Id.* at 23–25.[9]

A position is substantially justified if it is "justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565. That the agency's position was incorrect is not sufficient to establish that their position was not substantially justified. *Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) ("The government can establish that its position was substantially justified if it demonstrates that it adopted a reasonable, albeit incorrect, interpretation of a particular statute or regulation."). More specifically, a conclusion that the agency's decision was unsupported by substantial evidence does not establish that the agency's position was not substantially justified. *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988). Rather, in assessing substantial justification, the court considers "the clarity of the governing law," whether the law is unsettled, and "whether the legal issue was novel or difficult." *Norris v. SEC*, 695 F.3d 1261, 1265 (Fed. Cir. 2012). The "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D).

The court finds that the Government's position, which includes both Customs' evasion determination and the ensuing litigation in support

[9] In the alternative, the Government argues that the special circumstances of this case make any attorney fee award unjust. Gov't Resp. at 25–26 (citing 28 U.S.C. § 2412(d)(1)(A)). The Government cites to the novelty of the circumstances of this case, noting that "there was virtually no precedent" regarding how Customs should exercise its authority in an evasion case. *Id.* at 26.

of that determination, was substantially justified based on the novel nature of EAPA investigations as well as Customs' justifiable reliance on an administrative determination made by another agency. The unfair trade laws often involve related determinations by more than one agency, whether it be Commerce, the U.S. International Trade Commission, or Customs. EAPA investigations have added yet another legal remedy which may depend upon distinct determinations by Customs and Commerce. 19 U.S.C. § 1517 (detailing Customs' role in evasion investigations and Commerce's role determining whether merchandise is covered merchandise); *see also Sunpreme Inc. v. United States*, 892 F.3d 1186, 1188–89 (Fed. Cir. 2018) (describing generally the different roles of Customs and Commerce). The Tariff Act, as amended, carves out a role for Commerce by directing that if Customs receives an allegation of evasion and is unable to determine whether the merchandise is covered, the agency "shall" refer the matter to Commerce to determine if the merchandise is covered by the antidumping or countervailing duty order. 19 U.S.C. § 1517(b)(4)(A). Indeed, the statute further recognizes that the distinct determinations of the two agencies lead to separate court challenges. *See Royal Brush*, 675 F. Supp. 3d at 1293 (citing 19 U.S.C. § 1517(b)(4)(D)). Nothing in the statute suggests that Customs was empowered to ignore or second-guess Commerce's scope determination. Commerce's scope determination was a necessary part of Customs' evasion determination, evidenced by the fact that Customs reversed its evasion determination when Commerce reversed its scope determination. To conclude that Customs' position on the issue of evasion was not substantially justified would hold Customs responsible for Commerce's ultimately erroneous decision. *See* 28 U.S.C. § 2412(d)(4) (explaining that the agency involved in the litigation is responsible for any award of fees and other expenses).

IGF appears to suggest, in some of its proposed "bad acts," that the lack of evasion was so obvious that Customs never should have initiated the investigation, let alone made the covered merchandise referral to Commerce. IGF Mem. at 10–12. While IGF advances these arguments in an effort to claim that Customs' position was not substantially justified, these particular arguments only reinforce the court's conclusion that IGF is not the prevailing party because these claims were not fully briefed to, or adjudicated by, the court. An application for attorney fees is not an opportunity to litigate those claims now. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

Other purported "bad acts" IGF identified likewise fail to suggest the Government's position lacked substantial justification.[10] Certain of the purported "bad acts" were not performed by Customs, but by Commerce, and are outside the parameters of this evasion litigation. IGF points to Commerce's determination that two-ply panels were covered by the scope, but that Commerce determination was challenged in a separate litigation in which IGF did not seek attorney fees. Similarly, IGF points to liquidation instructions and liquidation as "bad acts," but, again, the liquidation of entries was the subject of other court action, which was ultimately dismissed. Each of these alleged "bad acts" were the subject of litigation separate from this evasion litigation. Still other purported "bad acts" are unpersuasive as evidence of a lack of substantial justification for Customs' position. Agency actions such as issuing requests for information (even if numerous), referring a covered merchandise inquiry to Commerce, and reviewing the determination *de novo* may cause a participant to incur additional costs. Such additional costs, however, do not establish a lack of substantial justification because they do not speak to the reasonableness of the position taken by the agency. *See Pierce*, 487 U.S. at 565 (describing the standard).

CONCLUSION

For the reasons stated above, the court **DENIES** IGF's application for attorney fees.[11]

Dated: October 7, 2024
New York, New York

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

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[10] As the Government points out, IGF offers no explanation for how "governmental bad acts" relate to whether a position is substantially justified. IGF simply avers that these actions "significantly increased" its attorney fees. IGF Mem. at 10. But whether attorney fees were affected does not speak to whether a position is reasonable such that it is also substantially justified. To the extent IGF attempts to use these "bad acts" as support for its request for a special factor to increase any award of attorney fees, that argument also is unpersuasive. *See Starry Assocs. v. United States*, 892 F.3d 1372, 1377 (Fed. Cir. 2018) ("[E]gregious agency misconduct is not a 'special factor' under [section] 2412(d)(2)(A).").

[11] Because the court denies IGF's application, it need not consider arguments about the application of a special factor to determine the amount of the award or the reasonableness of the award sought.

Slip Op. 24–110

PRINTING TEXTILES, LLC DBA BERGER TEXTILES, Plaintiff, v. UNITED STATES, Defendant, and ECKER TEXTILES, LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 23–00192

[Denying plaintiff's motion for judgment on the agency record in an action contesting a ruling that a product is within the scope of an antidumping duty order]

Dated: October 8, 2024

Kyl J. Kirby, Kyl J. Kirby, Attorney and Counselor at Law, P.C., of Fort Worth, Texas, for plaintiff Printing Textiles, LLC d/b/a Berger Textiles.

Christopher A. Berridge, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Franklin E. White, Jr.*, Assistant Director, and *Joseph Grossman-Trawick*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

George W. Thompson, Thompson & Associates, PLLC, of Washington, D.C., for defendant-intervenor Ecker Textiles, LLC.

OPINION

Stanceu, Judge:

Plaintiff Printing Textiles, LLC, d/b/a Berger Textiles ("Printing Textiles" or "Berger Textiles"), contests a determination by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), that plaintiff's imports of "Canvas Banner Matisse" ("CBM") are within the scope of an antidumping duty order on certain artist canvas from the People's Republic of China ("China").

Before the court is plaintiff's motion for judgment on the agency record under USCIT Rule 56.2 (Feb. 26, 2024), ECF No. 19 ("Pl.'s Mot."). The court will deny plaintiff's motion and enter judgment in favor of defendant.

I. BACKGROUND

A. The Contested Determination

Following an administrative proceeding (the "scope inquiry"), Commerce issued the contested determination as "Final Scope Ruling on the Antidumping Duty Order on Certain Artist Canvas from the People's Republic of China: Berger Textiles' Canvas Banner Matisse"

(Aug. 15, 2023), P.R. 23 ("*Final Scope Ruling*").[1] Commerce issued the Final Scope Ruling in response to a "Scope Ruling Application" (or "Scope Request") (Dec. 15, 2022) (P.R. 1–3) submitted by Printing Textiles ("*Scope Ruling Application*").

B. The Antidumping Duty Order

Commerce published the antidumping duty order involved in this litigation (the "Order") as *Notice of Antidumping Duty Order: Certain Artist Canvas from the People's Republic of China*, 71 Fed. Reg. 31,154 (Int'l Trade Admin. June 1, 2006) (the "*Order*").

C. Proceedings in the Court of International Trade

Plaintiff commenced this action in September 2023. Summons (Sept. 14, 2023), ECF No. 1; Compl. (Sept. 15, 2023), ECF No. 5. Plaintiff filed its Rule 56.2 motion on Feb. 26, 2024. Pl.'s Mot. Defendant opposed plaintiff's motion (Apr. 25, 2024), ECF No. 20, as did defendant-intervenor (Apr. 25, 2024), ECF No. 21, and plaintiff filed a reply (June 24, 2024), ECF No. 22.

The court asked the parties whether a document—the petition in response to which Commerce initiated the antidumping duty investigation culminating in the Order—had been placed on the administrative record that is now before the court. Court's Inquiry (Sept. 12, 2024), ECF No. 28. Defendant responded, informing the court that only two pages of the petition (pages 1 and 8), submitted by plaintiff as an attachment to the Scope Ruling Application, were on the administrative record and that no party had requested that any other portions of the petition be included. Def.'s Resp. to the Court's Sept. 12, 2024 Letter (Sept. 20, 2024), ECF No. 29 ("*Def.'s Response to Court's Inquiry*"); Ecker Textiles, LLC's Resp. to the Court's Sept. 12, 2024 Letter (Sept. 20, 2024), ECF No. 30 (concurring that only pages 1 and 8 of the petition were on the record).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a.[2] Among the decisions that may be contested according to Section 516A is a determination of

[1] Documents in the Joint Appendix (July 8, 2024), ECF Nos. 23 (public), 26 (conf.) are cited herein as "P.R. Doc. __." All citations to record documents are to the public versions.

[2] Citations to the United States Code are to the 2018 edition. Citations to the Code of Federal Regulations are to the 2023 edition.

"whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id.* § 1516a(a)(2)(B)(vi).

In reviewing the Scope Ruling, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

B. Scope Language in the Order

In pertinent part, the scope language in the Order reads as follows:

> The products covered by this order are artist canvases regardless of dimensions and/or size, whether assembled or unassembled, that have been primed/coated, whether or not made from cotton, whether or not archival, whether bleached or unbleached, and whether or not containing an ink receptive top coat. Priming/coating includes the application of a solution, designed to promote the adherence of artist materials, such as paint or ink, to the fabric. Artist canvases (*i.e.*, pre-stretched canvases, canvas panels, canvas pads, canvas rolls (including bulk rolls that have been primed), printable canvases, floor cloths, and placemats) are tightly woven prepared painting and/or printing surfaces.

Order, 71 Fed. Reg. at 31,155.

C. Description of the Merchandise at Issue in this Proceeding

The Scope Ruling Application provided this general description of the merchandise for which Printing Textiles sought a scope ruling:

> The Canvas Banner Matisse ("CBM") of the scope ruling request is 600 denier 100% polyester fabric woven (i.e., warp and weft) filament fiber, weighing approximately 270 GSM [grams per square meter], that has been coated with polyvinyl acetate / acrylate type polymers. One side of the fabric has been coated and is visible to the naked eye. The coated side has hydrophobic sealing and fireproof agents. The bottom priming/coating does not promote the adherence of artistic materials. The fabrics are imported as rolls in various lengths with no designs.

Scope Ruling Application at Cover Sheet. The Scope Ruling Application stated that the product is produced in and exported from China, *id.* at 3, and that "[w]idely, publicly known uses include, canvas (art reproduction/stretched), roll-up display system, banner product, display x-kite system, wall covering, décor applications, and tenting," *id.* at 4.

D. The Final Scope Ruling

Commerce concluded in the Final Scope Ruling that the Canvas Banner Matisse at issue "is within the scope of the *Order*." *Final Scope Ruling* at 20. Commerce summarized its reasoning as follows:

> [W]e began by examining the CBM described in Berger Textiles' Scope Request in the context of the language of the scope of the *Order* and find that the description of the subject merchandise in the scope of the *Order*, coupled with the sources listed under 19 CFR 351.225(k)(1), are dispositive as to whether Berger Textiles' CBM products are within the scope of the *Order*. In particular, we find that the CBM products are within the scope of the *Order* and, thus, no further analysis under 19 CFR 351.225(k)(2) is necessary.

Id. at 14.

E. Plaintiff's Claims

In its Rule 56.2 motion, Printing Textiles raises, essentially, two claims. In one claim, plaintiff attacks the Final Scope Ruling as unlawful on various grounds. It argues that in the Final Scope Ruling Commerce: (1) "fail[ed] to consider" and "misapplied" the "(k)(1)" criteria of 19 C.F.R. § 351.225(k)(1), "thereby expanding the scope of the *Order*," Pl.'s Mot. 7–25; (2) reached a result that is unsupported by substantial evidence, *id.* at 30–35, 38, as well as "unreasonable, arbitrary," and "capricious," *id.* at 38; (3) wrongly determined that the scope language "includes, or 'may be reasonably interpreted to include'" Canvas Banner Matisse, *id.*; and (4) failed to apply the "(k)(2)" factors of 19 C.F.R. § 351.225(k)(2), which, plaintiff argues, require that its product be ruled to be outside the scope of the Order, *id.* at 38–39.

Plaintiff's second claim is directed not only at the Final Scope Ruling, *per se*, but also at the Order itself. According to Printing Textiles, the unconstitutional vagueness of the Order, as applied to Printing Textiles by the Final Scope Ruling, denied it "adequate notice" and "due process." *Id.* at 25–28.

F. Claim Directed to the Final Scope Ruling

The court does not find merit in plaintiff's arguments that the Final Scope Ruling must be set aside as an unreasonable interpretation of the scope language, as contrary to the Department's regulation, as unsupported by substantial record evidence, or as "unreasonable, arbitrary," and "capricious."

1. The Department's Interpretation of the Scope Language Was Not *Per Se* Unreasonable

The court begins by considering the scope language of the Order. The Order applies to "artist canvases," a term for which the scope language contains a general definition: "Artist canvases . . . are tightly woven prepared painting and/or printing surfaces." *Order*, 71 Fed. Reg. at 31,155. By denoting that the term "artist canvases" includes products in various forms, the parenthetical following the term "[a]rtist canvases"—"(*i.e.*, pre-stretched canvases, canvas panels, canvas pads, canvas rolls (including bulk rolls that have been primed), printable canvases, floor cloths, and placemats)," *id.*—indicates that the term was intended to have a broad meaning.

Of particular relevance to this case is the mention of "prepared . . . *printing* surfaces" in the definition of "artist canvases" and the express inclusion of "*printable* canvases" within the scope of the Order. *Id.* (emphases added). Plaintiff described "art reproduction" as one of the "[w]idely, publicly known uses" of Canvas Banner Matisse. *Scope Ruling Application* at 4. Using terms contained in the scope language, Commerce stated as findings that Canvas Banner Matisse "is a woven prepared painting and/or printing surface" and "is a canvas roll and/or printable canvas." *Final Scope Ruling* at 15. Commerce summarized its conclusion as follows: "Information placed on the record demonstrates that CBM is an artist canvas, as defined by the language of the scope." *Id.* at 14.

The Order states that it applies to "artist canvases . . . that have been primed/coated." *Order*, 71 Fed. Reg. at 31,155. In the next sentence, the scope language states that "[p]riming/coating includes the application of a solution, designed to promote the adherence of artist materials, such as paint or ink, to the fabric." *Id.* The gist of plaintiff's "scope language" argument is that "CBM has a priming/coating and a top coating, neither of which 'promote[s] the adherence of artist materials.'" Pl.'s Mot. 36. In support of this argument, Printing Textiles cites results of various independent tests conducted on its product by "Dr. Ray Work and 20 | 10 Labs." *Id.* at 33 ("Both experts found that CBM's priming/coating does not 'promote the adherence of artist materials' as detailed in Berger's Scope Request.") (citations omitted). Plaintiff argues that testing demonstrated that the coated side performed the same or worse than the uncoated side with respect to adherence. *Id.* at 33–34 (citation omitted).

The court does not agree with plaintiff's argument that Commerce unreasonably interpreted the scope language. This argument rests on a single sentence in that language: "Priming/coating *includes* the application of a solution, designed to promote the adherence of artist materials, such as paint or ink, to the fabric." *Order*, 71 Fed. Reg. at 31,155 (emphasis added). While this sentence can be interpreted as limiting the scope to canvases with priming/coating designed to promote the adherence of artist materials, it uses the term "includes." Because "includes," particularly in the context of other scope language, also may be interpreted to mean "includes, but is not limited to . . . ," the word "includes" introduces ambiguity as to whether "priming/coating" *must* be designed to promote the adherence of artist materials for a canvas to be included within the scope as an "artist canvas." The use of the word "includes" makes it uncertain whether the sentence is intended as a definition of the term "primed/coated" as used in the previous sentence. Moreover, the words "designed to promote the adherence of artist materials," if not ambiguous, are also susceptible to varied interpretations.

Plaintiff maintains that "the reference 'designed to promote the adherence of artist materials' in the scope language compels a narrow interpretation of the words 'priming/coating'" that, in plaintiff's view, requires the exclusion of its product from the scope of the Order. Pl.'s Mot. 11, 24–25. The scope language requires for inclusion in the Order that the material "have been primed/coated" but does not rigidly or unambiguously require that the priming/coating function to "promote" adherence of artist materials by increasing the "adherence" to a level beyond that of untreated material. It was sufficient, in the Department's view, that the priming/coating applied to Canvas Banner Matisse imparted characteristics to the fabric that brought it within the definition the scope language set forth for an "artist canvas." "Specifically, Berger Textiles' submission states that CBM is a 'polyester fabric woven (*i.e.*, wrap [sic] and weft) filament fiber . . . that has been coated with polyvinyl acetate/acrylate type polymers.'" *Final Scope Ruling* at 14. Relying on a declaration by Ray A. Work, III, Ph.D. ("Work Declaration"), which Printing Textiles provided in the Scope Ruling Application, Commerce found that "CBM is primed/coated 'for the purpose of converting a fabric into a canvas'" and that "[t]he priming/coating 'is required to stiffen the fabric{,} giving it the stiffness properties of a canvas' and 'provides whiteness and higher opacity to the translucent polyester fabric.'" *Id*. at 14–15 (citing *Scope Ruling Application* at Attachment 7 (Decl. of Ray A. Work, III, Ph.D. ("*Work Decl.*"))). Plaintiff does not demonstrate that the stiffening, whitening, and opacity do not relate to the use of the product as a surface designed for, and suitable for, the printing of images using paint or ink, and the Work Declaration provided substantial evidence to support the Department's findings.[3]

In summary, the Department's interpretation of the scope language, one sentence of which is ambiguous and otherwise susceptible to more than one interpretation, was not *per se* unreasonable. As discussed below, Commerce resolved ambiguity by interpreting sources of information identified in 19 C.F.R. § 351.225(k)(1).

2. Commerce Did Not Fail to Consider, or Misapply, the "(k)(1)" Sources to "Expand" the Scope of the Order

The Department's regulation provides that "[i]n determining whether a product is covered by the scope of the order at issue, the Secretary [of Commerce] will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive." 19 C.F.R. § 351.225(k)(1). The regulation provides, further, that:

> The following primary interpretive sources may be taken into account under paragraph (k)(1) introductory text of this section, at the discretion of the Secretary:
>
> (A) The descriptions of the merchandise contained in the petition pertaining to the order at issue;
>
> (B) The descriptions of the merchandise contained in the initial investigation pertaining to the order at issue;
>
> (C) Previous or concurrent determinations of the Secretary, including prior scope rulings, memoranda, or clarifications

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[3] The Work Declaration provided, in relevant part:

> These canvases are made by first priming (bottom coat) for the purpose of converting a fabric into a canvas. The priming (bottom coating) is required to stiffen the fabric giving it the stiffness properties of a canvas verses [sic] those of a flexible fabric. In addition it provides whiteness and higher opacity to the translucent polyester fabric. The priming layers (bottom coatings) also absorb the water and glycol which makes up 95% of the water based ink jet ink. Ink jet printing deposits extremely small ink droplets on the surface of any material through the air. It is received independent of coatings or the nature of the substrate (whatever material falls on). This occurs whether printing on the coated side or the uncoated side. The primer (bottom coat) remains on the surface of the fabric with very little or no penetration to the back (uncoated) side. Aqueous ink jet inks are used widely today for printing directly onto fabrics without primers (bottom coatings) like T-shirt printers using aqueous pigmented inks. The purpose of the top coat added to the primed (bottom coated) side is to hold the pigments up on the surface thereby optimizing print quality, color, and to enhance water resistance.

Work Decl. at 2–3.

> pertaining to both the order at issue, as well as other orders with same or similar language as that of the order at issue; and
>
> (D) Determinations of the [U.S. International Trade] Commission pertaining to the order at issue, including reports issued pursuant to the Commission's initial investigation.

Id. § 351.225(k)(1)(i)(A)–(D). In addition to the above-described "primary interpretive sources," the regulation provides that "[t]he Secretary may also consider secondary interpretive sources under paragraph (k)(1) introductory text of this section, such as any other determinations of the Secretary or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, and any other relevant record evidence." *Id.* § 351.225(k)(1)(ii).

The regulation provides, further, that "[i]f the Secretary determines that the sources under paragraph (k)(1) of this section are not dispositive, the Secretary will then further consider the following factors: (A) The physical characteristics (including chemical, dimensional, and technical characteristics) of the product; (B) The expectations of the ultimate users; (C) The ultimate use of the product; (D) The channels of trade in which the product is sold; and (E) The manner in which the product is advertised and displayed." *Id.* § 351.225(k)(2)(i).

According to Printing Textiles, Commerce "fail[ed] to consider" and "misapplied" the "(k)(1)" criteria of 19 C.F.R. § 351.225(k)(1), "thereby expanding the scope of the *Order*." Pl.'s Mot. 7–25. Plaintiff characterizes prior scope rulings with which it disagrees as evidence of its claimed expansion of the scope of the Order, *id.* at 15–25, which it describes as "scope creep," *id.* at 22.

The court sees no merit in plaintiff's argument that Commerce "failed to consider" (k)(1) sources in reaching its conclusion. In addition to the scope language itself, the Final Scope Ruling cited two "primary interpretive sources" identified in 19 C.F.R. § 351.225(k)(1): the report of the U.S. International Trade Commission ("ITC") from the antidumping duty investigation, *Artists' Canvas from China, Inv. No. 731-TA-1091 (Final)*, USITC Pub. 3853 (May 2006) ("*ITC Report*"), *id.* at 16, and its own prior scope rulings, *id.* at 16–20. Commerce was not required by its regulation to consider *all* (k)(1) sources specified in the regulation: the primary interpretive sources are to be considered "at the discretion of the Secretary." 19 C.F.R. § 351.225(k)(1)(i).

In making its argument, plaintiff alludes to the petition as a (k)(1) source, arguing that "'Commerce should give consideration to petitioners' intended meaning,'" Pl.'s Mot. 9 (quoting *Mitsubishi Polyester Film, Inc. v. United States*, 41 CIT __, 228 F. Supp. 3d 1359, 1378 (2017)), implying that Commerce failed to do so in the Final Scope Ruling. Plaintiff attached pages 1 and 8 of the petition to the Scope Ruling Application, but nothing on page 1 supports plaintiff's argument while page 8, under a heading titled "Production Process," provides: "Artist canvas is produced as follows . . . The raw canvas is coated with a specific coating formula on the coating line. These formulas are mixed using various chemical compounds utilized in making specialized latex paint that is receptive to specific artist paints or printing inks." *Scope Ruling Application* at Attachment 20. Printing Textiles asserts the petitioner intended that a "specific acrylic latex 'gesso' bottom 'adherence' priming/coating formula is a prerequisite to artist canvas under the *Order*," arguing that Canvas Banner Matisse, which uses a different formula, does not fit this description. Pl.'s Mot. 30.

In responding to the court's September 26, 2024 inquiry, defendant informed the court as follows:

> After consulting with the U.S. Department of Commerce, defendant confirmed that, other than pages 1 and 8 of the petition which were included in plaintiff's scope ruling application, no other portions of the petition were placed on the administrative record. No party requested that the entire petition be placed on the record during the administrative process and Commerce did not place the petition on the record on its own. Beyond the two pages included in the scope ruling application, Commerce did not consider or rely on the petition in making its scope ruling in this case.

Def.'s Response to Court's Inquiry at 1–2.

It is not clear what effect the language on page 8 of the petition may have had on the Department's determination in the Final Scope Ruling. Nevertheless, plaintiff has not demonstrated that Commerce acted contrary to its regulation with respect to the petition as a primary interpretive source identified in 19 C.F.R. § 351.225(k)(1)(i)(A). The scope language Commerce developed during the investigation and chose to include in the Order does not impose a specific formulation by which a canvas must be "primed/coated" and further provides that a canvas is included within the Order "whether or not containing an ink receptive top coat." *Order*, 71 Fed. Reg. at 31,155. Thus, Commerce ultimately adopted, and incorporated in the language of the Order, a scope broader than that which plaintiff advocates based on page 8 of the petition. Excerpts from the petition other than page 8 may have been relevant to a consideration of plaintiff's argument, but plaintiff chose not to place any such material on the record during the scope inquiry.

Nor can the court agree with plaintiff's argument that Commerce "misapplied" the (k)(1) sources. Plaintiff's "(k)(1)" arguments and its related "scope creep" arguments can be viewed as variations on its argument, rejected above, that the scope language has been unreasonably interpreted. The premise of these arguments is that in certain of its past scope rulings interpreting the scope of the Order, Commerce "unlawfully expanded the scope of the *Order*" such that "Commerce's unlawful interpretations render the language, priming/coating includes the application of a solution, designed to promote the adherence of artist materials, to mere surplusage." Pl.'s Mot. 24. But treating the ambiguous sentence as other than "mere surplusage" would not cure the defect in plaintiff's argument. As the court has explained, the sentence does not compel the exclusion of Canvas Banner Matisse from the scope of the Order, either when read in isolation or, in particular, when read in context with other scope language. Commerce was not required to interpret this ambiguous sentence in the narrow way that Printing Textiles advocates and permissibly resorted to the (k)(1) sources in interpreting the scope language as a whole.

Beyond its unconvincing "unreasonable interpretation" argument directed to the scope language, *id.* at 24–25, Printing Textiles does not make a prima facie case that the (k)(1) sources were somehow "misapplied," *id.* at 7. Plaintiff disagrees with several of the prior scope rulings Commerce cited, *see Final Scope Ruling* at 4–7, but its disagreement does not, by itself, invalidate those rulings as (k)(1) sources. In the Final Scope Ruling, Commerce found, with respect to Canvas Banner Matisse, that "the record evidence indicates that the primed/coated side of the fabric is *receptive* to artist materials, consistent with our prior scope rulings." *Id.* at 15 (emphasis added).

As Commerce recognized in the Final Scope Ruling, Printing Textiles did not contend, and declined to state, that users of Canvas Banner Matisse use only the uncoated side of the fabric for the printing of images. *Id.* at 18. Commerce concluded that materials identified in 19 C.F.R. § 351.225(k)(1) "demonstrate that Commerce and the ITC have defined 'promote the adherence' of artist materials to mean 'allow for the acceptance of,' 'improve{ } the receptivity of canvas to,' or 'increase{ } the canvas' receptivity to' artist materials." *Id.* at 17. Noting that Berger Textiles submitted results of third-party testing in an effort to show that the priming/coating did not promote the adherence of ink, Commerce reasonably concluded that "the ITC and our prior scope rulings have not interpreted 'adherence' so narrowly." *Id*. at 16 (citing *ITC Report* at 3; Final Scope Ruling: RV Print Factory LLC's Coated Fabrics (Sept. 29, 2022) at 14).

In summary, Commerce did not fail to consider, or misapply, the (k)(1) sources in interpreting "artist canvases," *Order*, 71 Fed. Reg. at 31,155, to include Canvas Banner Matisse.

3. The Final Scope Ruling Is Supported by Substantial Evidence

Printing Textiles argues that the court must invalidate the Final Scope Ruling on the ground that it is unsupported by substantial evidence on the record of the administrative proceeding. Pl.'s Mot. 38–39. The court disagrees.

Among the record information Commerce cited in support of its conclusion were numerous disclosures in the Scope Ruling Application, including its attachments. Commerce noted that "Berger Textiles states that CBM enters the United States 'as rolls of coated fabric' and identifies several '{w}idely, publicly known uses,' including 'canvas (art reproduction/stretching), roll-up display system, banner product, display x-kite system, wall covering, décor applications, and tenting.'" *Final Scope Ruling* at 15 & n.57 (citing *Scope Ruling Application* at 4, 29, 32, 34, and Attachment 10 ("Data Sheet for Canvas Banner Matisse" ("Remarks: Topseller! Matt economy canvas for art reproduction, roll-ups, banners etc. / Important for Latex-print: glossy print with high color brilliance, water- & scratch-resistance . . .")))). Commerce mentioned that "[i]n fact, Berger Textiles identifies CBM as the 'top-seller for' latex, UV, and solvent ink application to canvas." *Id*. (citing *Scope Ruling Application* at Attachment 10).

Plaintiff fails to confront the significance of the evidence in its own Scope Ruling Application that Canvas Banner Matisse is suitable for use, and is used, as a canvas to which printed images, including "art reproduction," are applied. The record also contains substantial evidence that Canvas Banner Matisse is "primed and coated" and that the priming/coating contributes to characteristics of the product allowing it to be used as artist canvas (by providing, for example, stiffness, whiteness, and opacity). *Id*.

In conclusion, the evidence considered on the whole is sufficient to support the various critical findings, and the ultimate determination, by Commerce that Canvas Banner Matisse is described by the term "artist canvases" as used in the Order.

4. The Final Scope Ruling Is Not Unreasonable, Arbitrary, or Capricious

In support of its motion, Printing Textiles includes a make-weight argument that the Final Scope Ruling is “unreasonable,” “arbitrary,” and “capricious.” Pl.’s Mot. 28–39. Plaintiff fails to explain how the court plausibly could apply such a standard to set aside the Final Scope Ruling. Commerce based this determination on an interpretation of the scope language of the Order that was not unreasonable, on findings grounded in the Scope Ruling Application itself that were supported by substantial record evidence, and on a consideration of the sources identified in 19 C.F.R. § 351.225(k)(1).

5. Commerce Was Not Required to Address the “(k)(2)” Factors Separately or Individually

Plaintiff argues that Commerce erred in failing to consider the factors identified in 19 C.F.R. § 351.225(k)(2), under which, it maintains, Commerce would have been required to conclude that Canvas Banner Matisse is not subject to the Order. Pl.’s Mot. 38–39. Specifically, Printing Textiles argues that “Commerce did not examine any of the (k)(2) factors” and that its failure to do so “renders its *Scope Ruling* as unsupported by substantial evidence.” *Id.* at 39. Plaintiff misinterprets the Department’s regulation and fails to recognize that Commerce, when examining record evidence described in the (k)(1) sources, considered certain factors identified in § 351.225(k)(2).

The “sources” identified in § 351.225(k)(1) and the “factors” identified in § 351.225(k)(2) are not mutually exclusive. In reaching a decision on Canvas Banner Matisse, Commerce, based on information that Printing Textiles itself provided in seeking a scope ruling, considered “physical characteristics,” “ultimate” uses, and marketing material (*see* Data Sheet for Canvas Banner Matisse). These are factors specifically identified in subsection (k)(2) but also within the ambit of the “sources” specified in subparagraph (k)(1). Nothing in the regulation precluded Commerce from doing so. The regulation provides that the Secretary, in applying subsection (k)(1), “may also consider secondary interpretive sources . . . such as any other determinations of the Secretary or the Commission not identified above, Customs rulings or determinations, industry usage, dictionaries, and *any other relevant record evidence*.” *Id.* § 351.225(k)(1)(ii) (emphasis added).

Relevant record evidence necessarily would include the evidence provided in the Scope Ruling Application itself. In this instance, such evidence supported various critical findings, including findings that Canvas Banner Matisse is a “canvas,” that it has “priming/coating” that imparts stiffness, whiteness, and opacity, and that "art reproduction" is among the "[w]idely, publicly known uses" of the product. Based on the record evidence considered as a whole, which was obtained from "sources" described in § 351.225(k)(1) and which also pertained to "factors" described in § 351.225(k)(2), Commerce concluded that this product is a "printable" canvas and permissibly reached the ultimate conclusion that it is an artist canvas within the scope of the Order. Contrary to plaintiff's interpretation, the regulation did not require Commerce to address the (k)(2) factors separately or individually.

G. Claim that the Order Is Unconstitutionally Vague and, as Applied to Plaintiff by the Final Scope Ruling, a Due Process Violation

Printing Textiles urges the court to set the Final Scope Ruling aside as unlawful because, in its view, the Order is unconstitutionally vague and, as applied to plaintiff by the Final Scope Ruling, "raise[s] serious due process concerns." Pl.'s Mot. 25–28. Plaintiff attempts to support its claim with citations to various judicial decisions, *id.* at 25–27, none of which establishes a rule of law upon which the court could invalidate the decision contested in this litigation.

Viewed in light of the terms in the scope language, Canvas Banner Matisse is a "printable canvas" widely used for art reproduction, as the disclosures in plaintiff's own Scope Ruling Application aptly demonstrate. The court has identified an ambiguous sentence in the scope language of the Order, but that sentence, when considered in light of the scope language on the whole, is insufficient to render the entire scope language unconstitutionally vague and, on that ground, a denial of due process. While the sentence could have been drafted to be more precise, the scope language on the whole is sufficiently detailed and descriptive that anyone importing Canvas Banner Matisse, or a similar product, was on notice that such a product reasonably could be considered to be subject merchandise.

To the extent Printing Textiles, after considering the scope language, was still in doubt as to whether its product was within the scope of the Order, it had resort to the scope ruling procedure in Department's regulations, of which it availed itself.

In summary, the court finds no merit in plaintiff's due process claim.

III. CONCLUSION

For the reasons stated above, the court concludes that both of the claims Printing Textiles asserts in contesting the Final Scope Ruling are meritless.

The court will deny plaintiff's motion for judgment on the agency record and, in accordance with USCIT Rule 56.2(b), enter judgment in favor of the United States.

Dated: October 8, 2024
New York, New York

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

Slip Op. 24–111

UNITED STATES, Plaintiff, v. KOEHLER OBERKIRCH GMBH, f/k/a PAPIERFABRIK AUGUST KOEHLER SE, f/k/a PAPIERFABRIK AUGUST KOEHLER AG; and KOEHLER PAPER SE, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 24–00014

[The court denies Defendants' Amended Motion to Certify Order for Immediate Appeal and Motion to Stay.]

Dated: October 10, 2024

Luke Mathers, Trial Attorney, U.S. Department of Justice, New York, N.Y, for Plaintiff United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Edward F. Kenny*, Senior Trial Counsel. Of counsel were *Sasha Khrebtukova*, Attorney, and *Brandon T. Rogers*, Senior Attorney, Offices of the Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y. and Indianapolis, IN.

John F. Wood, Holland & Knight LLP, of Washington, D.C., for Defendants Koehler Oberkirch GmbH and Koehler Paper SE. With him on the brief were *Andrew McAllister*, *Anna P. Hayes*, and *Stuart G. Nash*.

OPINION AND ORDER

Katzmann, Judge:

The prologue to this litigation has so far unfolded in two parts. In the first part, the court issued an interlocutory order permitting service on foreign defendants through their U.S.-based counsel. Now, in the second, the court addresses whether that order is appealable without the entry of final judgment.

Plaintiff the United States ("the Government") initiated this action on January 24, 2024 in an effort to recover about $200 million in unpaid antidumping duties, including statutory interest, from Defendants Koehler Oberkirch GmbH ("Koehler GmbH") and Koehler Paper SE ("Koehler SE") (collectively, "Koehler" or "Defendants"), which comprise a German manufacturer of lightweight thermal paper.[1] *See* Am. Compl., Feb 8, 2024, ECF No. 4; *see also* 28 U.S.C. § 1582(3). In an Opinion and Order issued on August 21, 2024, the court granted the Government's motion for leave to effect alternative service on Koehler pursuant to USCIT Rule 4(e)(3). *See United States v. Koehler Oberkirch GmbH*, 48 CIT __, Slip Op. No. 24–97 (Aug. 21, 2024)

[1] Thermal paper is paper that "form[s] an image when heat is applied," and is "typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts." *Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China*, 73 Fed. Reg. 70959, 70960 (Dep't Com. Nov. 24, 2008).

("Alternative Service Order"). As authorized by that order, the Government served Koehler by delivering the Summons and Amended Complaint to Koehler's counsel in Washington, DC on August 22, 2024. *See* Proof of Service, Aug. 27, 2024, ECF No. 27.

Koehler now moves to certify the Alternative Service Order for appeal to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") pursuant to 28 U.S.C. § 1292(d)(1). *See* Defs.' Mot to Certify Order for Immediate Appeal, Aug. 30, 2024, ECF No. 28; *see also* Defs.' Am. Mot to Certify Order for Immediate Appeal, Sept. 5, 2024, ECF No. 33 ("Mot. to Certify"). Koehler also moves to stay this case pending the outcome of the Motion to Certify and of any appeal that might ensue. *See* Defs.' Mot. to Stay, Aug. 30, 2024, ECF No. 29. The Government opposes Koehler's Motion to Certify. *See* Pl.'s Resp. in Opp. to Defs.' Mot. to Certify, Sept. 10, 2024, ECF No. 34 ("Pl.'s Resp.").

Koehler moved to file a permissive reply in further support of its Motion to Certify on September 24, 2024. *See* Defs.' Mot. for Leave to File Reply, Sept. 24, 2024, ECF No. 35. The court granted that motion, *see* Order, Sept. 26, 2024, ECF No. 36, and Koehler's reply—a "proposed" copy of which was appended to the motion for leave to file it—was deemed filed. *See* Defs.' Reply in Support of Mot. to Certify, Sept. 26, 2024, ECF No. 37 ("Defs.' Reply").

The court denies Koehler's Motion to Certify and Motion to Stay for the reasons explained below.

BACKGROUND

The court assumes familiarity with the procedural history of this case as recounted in the Alternative Service Order.

The narrow issue now before the court is whether 28 U.S.C. § 1292(d)(1) permits certification of Koehler's appeal from the interlocutory Alternative Service Order. If it does not, a default rule applies which limits appellate review to final judgments of this court. *See* 28 U.S.C. §§ 1291, 1295(a)(5).

As relevant here, interlocutory appeal from an order of this court to the Federal Circuit is permitted in the following circumstance:

> [W]hen any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its

> discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

28 U.S.C. § 1292(d)(1). To be certified for interlocutory appeal, then, the Alternative Service Order must meet a pair of criteria. It must involve a "controlling question of law . . . with respect to which there is a substantial ground for difference of opinion," and it must be that immediate appeal from the order "may materially advance the ultimate termination of the litigation." *Id.*; *see also United States v. Kingshead Corp.*, 13 CIT 961, 962 (1989) ("Where a controlling question of law on which there is a substantial ground for difference of opinion is absent, or an interlocutory appeal will not materially advance the ultimate termination of litigation, the motion for certification must be denied."). In assessing the Alternative Service Order against these criteria,[2] the court bears in mind the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon*, 418 U.S. 683, 690 (1974).[3] Interlocutory appeal under 28 U.S.C. § 1292(d)(1) is warranted only in "exceptional cases where [it] may avoid protracted and expensive litigation." *United States v. Dantzler Lumber & Exp. Co.*, 17 CIT 178, 180 (1993) (quoting *Milbert v. Bison Lab'ys, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958)). As another court has observed, "[c]ommon sense teaches that, if employed in a casual or desultory fashion, interlocutory appeal may not only fail materially to advance the termination of a case but may

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[2] The wording of 28 U.S.C. § 1292(d)(1) is similar to that of the more frequently litigated subsection (b) of the same section, which provides for Court of Appeals review of an interlocutory order by a U.S. District Court:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id. § 1292(b). In conducting the present analysis of § 1292(d)(1), the court looks to other courts' analyses of § 1292(b) as persuasive but non-binding authority. *Cf. United States v. Zatkova*, 35 CIT 1059, 1061 n.1, 791 F. Supp. 2d 1305, 1308 n.1 (2011) (analogously looking to "decisions and commentary" on the Federal Rules of Civil Procedure for "guidance" on the interpretation of identically-worded provisions of the Rules of the U.S. Court of International Trade).

[3] Two years earlier, the Supreme Court noted that "the expeditious termination of litigation in the district courts" is "the express purpose of [section] 1292(b)." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 172 (1972).

prolong it. The cure prescribed by an overeager petitioner may well produce symptomatology far more virulent than any which would otherwise infect the record." *Bank of New York v. Hoyt*, 108 F.R.D. 184, 189 (D.R.I. 1985).

DISCUSSION

Certification is not warranted here because interlocutory appeal from the Alternative Service Order would not "materially advance," and indeed would delay, "the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(1). Because this is a necessary criterion, the court need not address the separate question of whether "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion." *Id.*

As a starting point, the court accepts *arguendo*[4] the premise that Koehler "[has] not evaded service." Mot. to Certify at 1. If this is true, then reversal of the Alternative Service Order on appeal would not advance the litigation's termination. Koehler's assertion of non-evasion is an implicit concession that upon reversal, the Government would nevertheless eventually succeed in serving Koehler in some other way.[5] This in turns means that the Government's inability to serve Koehler specifically through its U.S. counsel would not terminate the litigation—it would instead delay that termination by requiring the Government to serve a non-evasive Koehler through more time-consuming means. And as the court "must consider the extent to which time and expense will be saved by an interlocutory appeal if the order appealed is found to be in error," *Kingshead*, 13 CIT at 962, that consideration weighs heavily against appealability here.

Koehler cites *Johnson v. Burken*, 930 F.2d 1202, 1204 (7th Cir. 1991), for the proposition that denying certification of appealability would cause the court and the parties to "risk a greater loss of time and resources were the issue to be resolved in Koehler's favor on a post-judgment appeal." Mot. to Certify at 12. This citation is on-theme but does not support Koehler's position. Unlike the order at issue in *Johnson*, the Alternative Service Order here is not a denial of a (Federal) Rule 12(b)(5) motion to dismiss for insufficient service of process. *See Johnson v. Burken*, 727 F. Supp. 398, 398 (N.D. Ill. 1989), *vacated*, 930 F.2d 1202. Reversing such a denial of a motion to dismiss

[4] The question of whether this premise is correct is not before the court.

[5] Koehler has also represented to the court that "[u]nder these circumstances, service on Defendants' U.S. counsel is unnecessary." Defs.' Resp. in Opp'n to Mot. for Alternative Service at 6, May 13, 2024, ECF No. 11. Such service could be "unnecessary" only on account of Koehler's acknowledgment of the Government's ability to eventually effect service through other means.

ends the case. *See Johnson*, 930 F.2d at 1206 ("If we don't decide the validity of the first service, the case may go through to judgment, followed by an appeal that will result (as we are about to see) in throwing the case out for want of proper service . . . ."). Hypothetical appellate reversal here, by contrast, would simply result in the Government's further attempts to serve Koehler—whether through email, letters rogatory, or some other means. This would necessarily entail delay. Any future service, taking place as it would in the future, would be more time-consuming than what the Government has already completed pursuant to the Alternative Service Order.

And that would not be all: any delay inherent in the Government's further attempts to serve Koehler would follow a potentially lengthy appeal process. The court finds compelling the articulation of the same consideration by a different session of the U.S. Court of International Trade, which stated the following in denying a motion for certification of appealability:

> [L]itigating an interlocutory appeal may well delay the ultimate disposition of this action. Certifying . . . questions for interlocutory appeal creates the potential for multiple rounds of briefing and argument at the U.S. Court of Appeals for the Federal Circuit. Even if the Court of Appeals accepts the interlocutory appeal and reverses this Court's decision, many months, and perhaps more than a year would pass before the ultimate termination of the litigation. The court can envision a scenario where resolution on the substance of Plaintiff's complaint actually *precedes* the appellate decision on jurisdiction.

Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States, 39 CIT 1648, 1649, 113 F. Supp. 3d 1316, 1318 (2015) (internal quotation marks, alterations, and citations omitted).[6]

Koehler also cites *Tidewater*, 409 U.S. at 171–72, for the proposition that "section 1292 review is suitable for threshold issues that do not require extensive record analysis." Defs.' Reply at 5. But *Tidewater*, too, is unavailing. The Supreme Court observed in that case that "questions that would be presented to the courts of appeals under [Section] 1292(b) would often involve threshold procedural issues not requiring extensive analysis of the record." 409 U.S. at 171–72. That observation does not establish a sufficient condition for appealability under section 1292(b) or (d)(1). Nor could it. Section 1292(d)(1), as

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[6] Expressions of this concern are not confined to recent history. *See, e.g., McLish v. Roff*, 141 U.S. 661, 665–66 (1891) ("From the very foundation of our judicial system the object and policy of the acts of congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.").

explained above, lays out two necessary conditions for appealability that the judicial branch is powerless to relax: the interlocutory order from which the appeal is sought must involve a "controlling question of law . . . with respect to which there is a substantial ground for difference of opinion," and it must be that appeal from it "may materially advance the ultimate termination of the litigation." *Id.* In describing a characteristic typical of interlocutory orders that satisfy the standard for certification, the Court did not replace the standard itself with a general-purpose "suitability" metric. *See Tidewater*, 409 U.S. at 171–72.

Koehler finally contends that "because service (and, in turn, personal jurisdiction) is a threshold issue, it is prudent to have the Federal Circuit resolve the question now." Mot. to Certify at 12. "[T]he error at issue," Koehler adds in its reply, "concerns fundamental rights." Defs.' Reply at 4.[7] But while is true in a general sense that "service" is a threshold issue, *see generally* USCIT R. 4, "service" as such is not the issue that the Federal Circuit would address in a hypothetical interlocutory appeal from the Alternative Service Order. The issue would be a humbler one: the proper selection of a means of service from a menu of conceivable options.[8] Its resolution in Koehler's favor on appeal, moreover, would not halt the Government at the threshold of litigation. It would merely require the Government to step over it in a different way. All told, this case does not involve "the ingredients reasonably necessary to catalyze the special alchemy of intermediate review." *Hoyt*, 108 F.R.D. at 190.

Finally, because certification for immediate appeal is unwarranted, Defendants' request for a stay pending such an appeal is moot.

CONCLUSION

For the foregoing reasons, it is hereby

[7] Although this statement seems like a direct attribution of error, the court takes it to refer to a hypothetical finding of error by the Federal Circuit.

[8] Koehler points to the non-precedential case of *Cardiac Pacemakers, Inc. v. St. Jude Med. Inc.*, 144 F. App'x 106 (Fed. Cir. 2005) as an example of an interlocutory appeal under 28 U.S.C. § 1292(b) that the Federal Circuit took to resolve an issue that "did not involve constitutional or jurisdictional concerns," and whose resolution would not "result in an end to the case." Defs.' Reply at 4. But while the resolution of the issue in *Cardiac Pacemakers*— the proper assignment of a case to a district court judge on remand—of course did not directly end the litigation, it is easy to see how it could have at least "materially advance[d]" its "ultimate termination". 28 U.S.C. § 1292(d)(1). The Federal Circuit explained that "[i]n view of the familiarity of the district court with this eight-year old, multi-patent case and no allegation of bias by any party, we conclude that the case should not be assigned to another judge." *Cardiac Pacemakers*, 144 F. App'x at 107. Assignment to a judge who is familiar with a years-long case at the very least "may" result in more expeditious litigation than assignment to a different judge who must endeavor to familiarize herself. 28 U.S.C. § 1292(d)(1). But the same cannot be said of a hypothetical appellate order in this case that would require the Government to re-complete service in a more time-consuming fashion.

ORDERED that Defendants' Amended Motion to Certify Order for Immediate Appeal, Sept. 5, 2024, ECF No. 33, is **DENIED** with prejudice; and it is further

ORDERED that Defendants' Motion to Stay, Aug. 30, 2024, ECF No. 29, is **DENIED** as moot.

Dated: October 10, 2024
New York, New York

/s/ *Gary S. Katzmann*
GARY S. KATZMANN, JUDGE

Slip Op. 24–112

NIPPON STEEL CORPORATION, Plaintiff, and JFE SHOJI CORPORATION and JFE SHOJI AMERICA, LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and NUCOR CORPORATION, STEEL DYNAMICS, INC., and SSAB ENTERPRISES, LLC, Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Court Nos. 1:21-cv-00533, 1:22-cv00183, 1:23-cv-00112 (SAV)

[Granting in Part and Denying in Part Plaintiff's Motion for Judgment on the Agency Record in the case arising from the third administrative review; sustaining Commerce's Remand Results in the case arising from the third administrative review; sustaining Commerce's Final Determinations in the cases arising from the fourth and fifth administrative reviews.]

Dated: October 10, 2024

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Brenda A. Jacobs, Jacobs Global Trade & Compliance LLC, of McLean, VA, for Plaintiff-Intervenors JFE Shoji Corporation and JFE Shoji America, LLC.

Stephen C. Tosini, Senior Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Tara K. Hogan*, Assistant Director, and *Kyle S. Beckrich*, Trial Attorney, and *David W. Richardson*, Of Counsel, Department of Commerce, Office of Chief Counsel for Trade Enforcement & Compliance.

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Maureen E. Thorson, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation. With her on the brief was *Alan H. Price*, *Christopher B. Weld*, *Jeffrey O. Frank*, and *Enbar Toledano*.

OPINION

Vaden, Judge:

These three cases address consecutive administrative reviews of the same antidumping duty order. Nippon Steel Corporation (Nippon Steel), a Japanese steel importer, was a mandatory respondent in each of the reviews. In the third administrative review, Nippon Steel failed to provide downstream sales data from one of its affiliated resellers despite the Department of Commerce's (Commerce) repeated requests. Commerce applied a partial adverse inference to fill the gap left in the record by the missing data, and Nippon Steel now protests that Commerce did not support its determination with substantial evidence. Nippon Steel also challenged Commerce's calculation of its U.S price in the third administrative review for failing to include certain revenue. Commerce requested a voluntary remand on that issue, and no party contests its Remand Results. Finally, Nippon Steel claims that Commerce improperly deducted Section 232 duties from its U.S. prices to calculate the dumping margins in all three cases. Nippon Steel's Motion for Judgment on the Agency Record challenging the application of a partial adverse inference is **GRANTED**. All others are **DENIED**. Commerce's determinations in the fourth and fifth administrative reviews are **SUSTAINED** in full.

BACKGROUND

Before the Court are three lawsuits brought by Nippon Steel against the United States. The suits arise from three consecutive administrative reviews of Commerce's antidumping duty order on certain hot-rolled steel flat products from Japan (the Order). *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 Fed. Reg. 67,962 (Dep't of Com. Oct. 3, 2016).

The first lawsuit arises from the third administrative review of the Order. Nucor Corporation (Nucor); Steel Dynamics, Inc.; and SSAB Enterprises, LLC intervened as Defendant-Intervenors. Order Granting Nucor's Mot. to Intervene (Nov. 5, 2021), Case No. 21–533, ECF No. 18; Order Granting Steel Dynamics and SSAB's Mot. to Intervene (Nov. 9, 2021), Case No. 21–533, ECF No. 23. In the second suit arising from the fourth administrative review, Nucor again intervened as Defendant-Intervenor; and JFE Shoji Corporation and JFE Shoji America, LLC intervened as Plaintiff-Intervenors. Minute Order (Aug. 12, 2022), No. 22–183, ECF No. 26; Order Granting JFE Shoji Corp. and JFE Shoji Am., LLC's Mot. to Intervene (Aug. 5, 2022), No. 22–183, ECF No. 20. In the third suit arising from the fifth administrative review, Nucor alone intervened as Defendant-Intervenor. Order Granting Nucor's Mot. to Intervene (July 27, 2023), No. 23–112, ECF No. 20.

These three unconsolidated cases raise two issues. First, in all three cases, Nippon Steel claims that Commerce improperly deducted Section 232 duties from Nippon Steel's U.S. prices. Second, solely in the case arising from the third administrative review, Nippon Steel claims Commerce erred by drawing an adverse inference from facts available to fill a gap left by missing downstream sales data.

Section 232 Duties

Section 232 of the Trade Expansion Act of 1962 allows for the imposition of tariffs to remedy national security threats. 19 U.S.C. §

1862. The statute permits Commerce to conduct investigations "to determine the effects" imported articles have on the national security of the United States. *Id.* § 1862(b)(1)(A). Commerce must "submit ... a report" of its findings and recommendations to the President, including recommended actions to address threats posed by the investigated imports. *Id.* § 1862(b)(3)(A). Following receipt of the report, the President may "adjust ... imports" to remedy the threat. *Id.* § 1862(c)(1)(A)(ii).

In 2018, Commerce submitted a report to President Trump detailing its investigation into the effects of imported steel articles on the United States' national security. Off. of Tech. Evaluation, U.S. Dep't of Com., THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (2018). It found that a large volume of imports threatened to impair national security and noted the domestic industry's "shrinking ability to meet national security production requirements in a national emergency." *Id.* at 6, 49. To "remove the threatened impairment," Commerce recommended the President impose a global tariff of twenty-four percent on imports of steel articles. *Id.* at 59–60.

President Trump concurred with Commerce's finding. Proclamation 9705 Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018). In Proclamation 9705, the President imposed a twenty-five percent *ad valorem* tariff on steel articles from all countries except Canada and Mexico, which entered the United States on or after March 23, 2018. *Id.* at 11,626–27. The Proclamation directed that the tariff be imposed "in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles." *Id.* at 11,627.

Nippon Steel imported steel articles into the United States after this tariff went into effect. Accordingly, it reported paying Section 232 duties on its U.S. sales in each of the administrative reviews at issue. *See* Ex. C-1, Nippon Steel Section C Questionnaire Resp. (June 30, 2020), No. 21–533, J.A. at 3,050–113, ECF No. 41; Ex. C-1, Nippon Steel Section C Questionnaire Resp. (Aug. 20, 2021), No. 22–183, J.A. at 82,524–46, ECF No. 46; Ex. C-1, Nippon Steel Section C Questionnaire Resp. (Apr. 27, 2022), No. 23–112, J.A. at 83,752–805, ECF No. 21. To calculate Nippon Steel's dumping margin in each review, Commerce deducted Section 232 duty payments from the U.S. price of the subject merchandise. *See* Issues and Decision Mem. (Aug. 23, 2021) at 10–11, No. 21–533, J.A. at 2,470–71, ECF No. 41; Issues and Decision Mem. (May 19, 2022) at 8, No. 22–183, J.A. at 3,711, ECF No. 47; Issues and Decision Mem. (May 1, 2023) at 10, No. 23–112, J.A. at

3,286, ECF No. 22. Dumping margins are determined by comparing the sales price in the United States to the sales price in Nippon Steel's Japanese home market. *See* 19 U.S.C. § 1675(a)(2)(A). Anything that reduces U.S. price makes the dumping margin rise. Therefore, Commerce's decision to deduct the Section 232 duties increased Nippon Steel's dumping margin by reducing the U.S. price.

Under 19 U.S.C. § 1677a(c)(2)(A), "[U.S. price] shall be ... reduced by ... the amount, if any, included in such price, attributable to any . . . United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States[.]" This helps ensure an "apples [to] apples" comparison between merchandise sold in the home market and the U.S. market by deducting costs associated with transporting merchandise to the United States before the comparison between prices occurs. *Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983).

The Federal Circuit considered a challenge to Commerce's deduction of Section 232 duties in *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023). It held that duties imposed under Section 232 were deductible from U.S. price as "United States import duties." *Borusan*, 63 F.4th at 37 (quoting 19 U.S.C. § 1677a(c)(2)(A)). Proclamation 9705 requires that "the duty newly being imposed was to add to, and not partly or wholly offset, the antidumping duties that would be due without the new duty." *Id.* at 34. The duties are to be imposed "in addition to any other duties," and "[a]ll anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed." Proclamation 9705, 83 Fed. Reg. at 11,627, 11,629. Combining the statutory directive on calculating the U.S. price with the Proclamation's terms, the Federal Circuit instructed:

> [W]hen applied to an article covered by antidumping duties, the Proclamation 9705 and antidumping duties must together result in a full imposition of both duties .... *i.e.*, by subtraction of the Proclamation 9705 duty from the U.S. price if the Proclamation 9705 duty is built into it. Otherwise, the Proclamation 9705 duty would be offset substantially or completely by a reduction in the antidumping duty itself (through an increase in the U.S. price and therefore a decrease in the dumping margin), defeating the evident "in addition to" prescription of Proclamation 9705.

Borusan, 63 F.4th at 35.

Nippon Steel argues that *Borusan* does not control the outcome of its three cases. First it argues that, even under *Borusan*, Commerce's decision to deduct the Section 232 duties was not supported by substantial evidence. Pl.'s Suppl. Opening Br. (Pl.'s Suppl. Br.) at 11, No. 21–533, ECF No. 64; Pl.'s Suppl. Reply Br. (Pl.'s Suppl. Reply) at 3, No. 21–533, ECF No. 68. Nippon Steel points to 19 U.S.C. § 1677a(c)(2)(A), which directs Commerce to deduct from a respondent's U.S. price any "United States import duties" the respondent "included in" the price it ultimately charged to its first unaffiliated customer. The company claims Commerce failed in all three administrative reviews to make record-supported findings that the Section 232 duties Nippon Steel paid were actually "included in" the price Nippon Steel charged its first unaffiliated customer. *Compare* 19 U.S.C. § 1677a(c)(2)(A), *with* Pl.'s Suppl. Br. at 11–14, ECF No. 64, *and* Pl.'s Suppl. Reply at 7–9, ECF No. 68. The Government and Nucor respond that Nippon Steel forfeited this argument by failing to raise it during the administrative reviews. Def.'s Resp. to Pl.'s Suppl. Br. (Def.'s Suppl. Resp.) at 16–20, ECF No. 65; Def.-Int. Nucor's Suppl. Resp. Br. (Nucor's Suppl. Resp.) at 3–6, ECF No. 66. Nippon Steel counters that it preserved the argument by making a "broad" claim that Commerce "improperly deducted the Section 232 steel duties from [Nippon Steel's] U.S. price" in its case briefs in all three administrative proceedings and its filings in this Court. Pl.'s Suppl. Reply at 3, 6–7, ECF No. 68. Alternatively, Nippon Steel says the Court could exercise its discretion to address the issue. *Id.* at 4.

Second, Nippon Steel claims Commerce's determination is inconsistent with the United States' treaty obligations — an issue *Borusan* did not address. Pl.'s Suppl. Br. at 20, ECF No. 64. The United States is a signatory to the General Agreement on Tariffs and Trade (GATT), which sets tariff rates on imports of certain goods, including steel articles. *See* General Agreement on Tariffs and Trade art. II:1(a)–(b), Oct. 30, 1947, 61 Stat. A-14, 55 U.N.T.S. 200 [hereinafter GATT] (incorporating the updated Schedules of Concessions incorporated into the GATT, Marrakesh Agreement, Apr. 15, 1994, 1867 U.N.T.S. 243). When it deducts the Section 232 duties from Nippon Steel's U.S. prices, Commerce increases Nippon Steel's dumping margin. That increased dumping margin imposes duties on Japanese steel imports greater than the GATT's approved rates. *See* Pl.'s Mem. in Supp. of Mot. for J. on Agency R. (Pl.'s Br.) at 31–32, No. 21–533, ECF No. 32; Pl.'s Reply in Supp. of Mot. for J. on Agency R. (Pl.'s Reply) at 16, No. 21–533, ECF No. 39; Pl.'s Suppl. Br. at 22, ECF No. 64. Nippon Steel argues this result is improper under the *Charming Betsy* canon, which provides that a statute "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The Government and Nucor argue that the deduction does not violate the United States' treaty obligations; or if it does, it is not a matter for this Court to remedy. Def.'s Suppl. Resp. at 21–22, ECF No. 65;[1] Def-Int. Nucor's Resp. Br. (Nucor's Resp.) at 28–30, No. 21–533, ECF No. 36; Nucor's Suppl. Resp. at 6–7, ECF No. 66. The Government explains that any conflict between a statute and the GATT is a matter for Congress — not the judiciary. Def.'s Suppl. Resp. at 21–22, ECF No. 65. Furthermore, the Government argues that a national security exception to the GATT applies, making Nippon Steel's claims irrelevant. *Id.* at 21–22 (citing GATT art. XXI(b)). Nucor adds that only the U.S. Government is statutorily permitted to challenge such an action for being "inconsistent with" the GATT. Nucor's Suppl. Resp. at 7, ECF No. 66 (quoting 19 U.S.C. § 3512(c)(1)(B)).

Nippon Steel disputes that the GATT's national security exception applies. *See* Pl.'s Suppl. Br. at 23–25, ECF No. 64. It relies on World Trade Organization (WTO) panel reports to support its argument that the exception only applies in times of "armed conflict" or "general instability." *Id.* at 23–24, ECF No. 64 (quoting Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019)). Because the Federal Circuit did not consider how the *Charming Betsy* canon might apply, Nippon Steel asserts that this Court is free to address it. *See id.* at 21, ECF No. 64; Pl.'s Suppl. Reply at 10, ECF No. 68.

Third, Nippon Steel argues that *Borusan* was wrongly decided. *See* Pl.'s Suppl. Br. at 25, ECF No. 64; Pl.'s Suppl. Reply at 12, ECF No. 68. It believes the Federal Circuit's decision conflicts with case precedent, principles of statutory interpretation, and administrative law by focusing on the President's intent instead of Congress' intent. Pl.'s Suppl. Br. at 25–36, ECF No. 64; Pl.'s Suppl. Reply at 12–17, ECF No. 68. Nippon Steel also claims it raises several distinct arguments that the parties in *Borusan* did not present to the Federal Circuit. *See* Pl.'s Br. at 9–33, ECF No. 32 (arguing that a complete analysis of 19 U.S.C. § 1677a(c)(2)(A) requires a different result, the temporary nature of Section 232 duties warrants treating them like special duties, and Commerce imposes an impermissible double remedy by deducting the Section 232 duties from U.S. prices); Pl.'s Suppl. Br. at 35, ECF No. 64

[1] Fellow Defendant-Intervenors Steel Dynamics, Inc. and SSAB Enterprises, LLC "endorse and adopt the arguments raised by" the Government and Nucor. Steel Dynamics and SSAB's Suppl. Resp. Br., No. 21–533, ECF No. 67; *see also* Steel Dynamics and SSAB's Letter Supp. Nucor's Resp., No. 21–533, ECF No. 38.

(incorporating arguments from opening brief by reference). The Government and Nucor similarly reject this claim, noting that the Federal Circuit's decision binds this Court regardless of its correctness. *See* Def.'s Suppl. Resp. at 23, ECF No. 65; Nucor's Suppl. Resp. at 7, ECF No. 66. They also dispute that any of Nippon Steel's "additional arguments" were left unaddressed by the appellate court. *See* Def.'s Suppl. Resp. at 28–30, ECF No. 65; Nucor's Suppl. Resp. at 10–11, ECF No. 66.

Downstream Sales Data

The third administrative review of the Order brings one additional issue to the table. To calculate the dumping margin, the agency compares the U.S. price and the normal value of the subject merchandise. 19 U.S.C. § 1675(a)(2)(A). Normal value is the sale price of the foreign like product sold "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). In other words, Commerce must determine if the company under investigation sells the same product in its home country for more than its selling price in the United States.

Nippon Steel reported selling hot-rolled steel in the Japanese market to affiliated companies who then resold it to unaffiliated customers. Nippon Steel Section B Questionnaire Resp. (June 30, 2020) at B-5, No. 21–533, J.A. at 80,011, ECF No. 40. The affiliates' sales to unaffiliated customers are known as downstream sales. "Sales to affiliated companies raise the question of whether the transactions reflect true market price." *Saha Thai Steel Pipe Pub. Co. v. United States*, 47 CIT __, 663 F. Supp. 3d 1356, 1370 (2023). Commerce may only consider a company's sales to affiliates if Commerce is "satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c).

When examining sales to affiliated parties, Commerce applies an arm's-length test to determine whether the transactions were truly made in the ordinary course of trade. *See Timken Co. v. United States*, 26 CIT 1072, 1079 (2002) (describing the arm's-length test). When transactions with affiliated customers are found to be not at arm's length, Commerce excludes them from the calculation of normal value, *id.*, and may instead use the affiliates' downstream sales to calculate normal value. 19 C.F.R. § 351.403(d).

In its initial questionnaire, Commerce asked Nippon Steel to report the downstream sales its affiliates made in the Japanese domestic market during the period of review. Initial Questionnaire (May 4, 2020) at B-2, No. 21–533, J.A. at 1,041, ECF No. 41. Nippon Steel responded by sending sales data for several affiliates but not all.[2] Nippon Steel Section B Questionnaire Resp. (June 30, 2020) at B-7, No. 21–533, J.A. at 80,013, ECF No. 40. It claimed it made "multiple written requests and numerous telephone calls to each of the affiliates" to track down the data. *Id.* at B-6, J.A. at 80,012. It even "hired local Japanese counsel for the sole purpose of managing the data collection efforts." *Id.*

Nippon Steel stated that it "intend[ed] to continue to act to the best of its ability to collect" the missing data but claimed Japanese law limited its actions. *Id.* at B-7, J.A. at 80,013. It asserted that the Japanese Antimonopoly Act prohibited it from (1) "threat[ening] ... to cease selling to or doing business with its affiliated customers if they did not provide downstream sales data" or (2) "[c]easing sales to affiliated customers if they do not provide downstream sales data." *Id.* Nippon Steel submitted a legal memorandum prepared by a Japanese law firm to support its position. Ex. B-23, Nippon Steel Section B Questionnaire Resp. (June 30, 2020) (Japanese Legal Mem.) at 1, No. 21–533, J.A. at 80,634, ECF No. 40. The memorandum assumed Nippon Steel is in a superior bargaining position relative to its affiliated resellers. *Id.* at 5, J.A. at 80,638. It concluded that Nippon Steel would unlawfully "abuse ... [its] superior bargaining position" if it threatened to stop doing business with its resellers unless they provided the data. *Id.* at 4–5, J.A. at 80,637–38. The memorandum further found that any refusal by Nippon Steel to sell to resellers because of their failure to provide the data would constitute an "unjust refusal to trade" under the Act. *Id.* at 5–6, J.A. at 80,638–39 (capitalization altered).

Commerce sent Nippon Steel a supplemental questionnaire asking for more information about the missing data. Suppl. Questionnaire (Jan. 14, 2021) at 1, No. 21–533, J.A. at 1,174, ECF No. 41. Nippon Steel again failed to submit the information. Nippon Steel Suppl. Questionnaire Resp. (Feb. 2, 2021) at 1–2, No. 21–533, J.A. at 81,416–17, ECF No. 40. Instead, it provided a communications log describing the "numerous written requests and telephone calls" it made to one of the affiliates and attached copies of emails they exchanged. *Id.* at 2, J.A. at 81,417; Ex. SB-1, Nippon Steel Suppl. Questionnaire Resp. (Feb. 2, 2021) (Commc'n Log), No. 21–533, J.A. at 81,703–40, ECF No. 40. The exchange consisted of eighteen communications, including twelve emails, exchanged over a nearly one-

[2] Nippon Steel did not submit downstream sales data for three of its affiliates. Nippon Steel Suppl. Questionnaire Resp. (Feb. 2, 2021) at 1–2, No. 21–533, J.A. at 81,416–17, ECF No. 40. However, Nippon Steel only disputes Commerce's determination regarding one affiliate's downstream sales, Pl.'s Br. at 33, ECF No. 32; thus, the Court limits its discussion to the information Nippon Steel put on the record for that affiliate.

year period. *Id.* In the emails, Nippon Steel repeatedly asked its affiliate for updates on when it would submit the sales data Commerce requested. *Id.* The affiliate often failed to respond; and when it did, it asked for more time to comply with Nippon Steel's request. *Id.* at 81,735.

In its Final Results, Commerce found that Nippon Steel sold its products to affiliated resellers at non-arm's-length prices so that it was necessary to use downstream sales to calculate normal value. Issues and Decision Mem. (Aug. 23, 2021) at 13, No. 21–533, J.A. at 2,473, ECF No. 41. The agency also determined that Nippon Steel failed to cooperate to the best of its ability in providing downstream sales data. *Id.* Commerce therefore applied facts available with an adverse inference to fill the gap left by the missing data. *Id.* at 14–15, J.A. at 2,474–75. It assigned the highest unaffiliated home market price on the record to the unreported downstream sales. *Id.* Assigning a higher home market price made it more likely Commerce would find Nippon Steel was selling merchandise at higher prices in Japan than in the United States.

Commerce reasoned that Nippon Steel's decision to makes sales at non-arm's-length prices gave Nippon Steel its choice of resellers, and it was therefore free to pick between "affiliates which would cooperate and those that will not." *Id.* at 13, J.A. at 2,473. Selling to a noncooperative affiliate could be beneficial to Nippon Steel. *Id.* It could "manipulate the dumping calculations by shielding high priced home market sales behind a wall of uncooperative affiliates." *Id.* Put another way, Nippon Steel could make sales to an affiliate at Price A, a lower price. The affiliate could then resell the good to an unaffiliated customer at Price B, a higher price. Despite not making the sale itself, Nippon Steel benefits from the profit off the higher price as a partial owner of the affiliate. Thus, Commerce seeks to use the affiliate's downstream sale at the higher Price B to calculate Nippon Steel's normal value and ensure an "apples [to] apples" comparison occurs. *Smith-Corona Grp.*, 713 F.2d at 1578. The agency dismissed Nippon Steel's argument that coercing its affiliate to provide the requested data would violate Japanese law. Issues and Decision Mem. (Aug. 23, 2021) at 14, No. 21–533, J.A. at 2,474, ECF No. 41. It found that Nippon Steel "provided an insufficient explanation as to if and how this law would apply." *Id.* Commerce claimed it was simply applying U.S. antidumping law, "not directing [Nippon Steel] to violate Japanese law." *Id.*

Nippon Steel argues that neither the record nor Commerce's reasoning in its memorandum support finding that it failed to cooperate to the best of its ability as required by statute. *See* 19 U.S.C. 1677e(b); Pl.'s Br. at 38–41, ECF No. 32. It claims the record shows it made extensive efforts to obtain the missing data, including numerous communications with its affiliate. Pl.'s Br. at 40, ECF No. 32. The company also points to its legal analysis of how Japanese law limits its course of action and evidence showing its "limited ownership of and lack of control over [its affiliate]." *Id.* at 39–40; Pl.'s Reply at 22, ECF No. 39. Commerce wrote that Nippon Steel chose to sell to an uncooperative affiliate, but Nippon Steel claims it could not have anticipated its affiliate's noncooperation because the affiliate "indicated multiple times it would try to cooperate." Pl.'s Br. at 39, ECF No. 32.

The Government and Nucor respond that Commerce's determination was lawful because Nippon Steel knew Commerce would request information regarding its affiliates' downstream sales. Def.'s Resp. to Mot. for J. on Agency R. (Def.'s Br.) at 28–29, No. 21–533, ECF No. 33; Nucor's Br. at 32, ECF No. 36. Commerce had requested similar information in past administrative reviews, and Nippon Steel similarly was unable to provide it. *See, e.g.*, *Nippon Steel & Sumitomo Metal Corp. v. United States*, 44 CIT __, 483 F. Supp. 3d 1214, 1224–25 (2020). Nucor and Commerce suggest Nippon Steel had other options for obtaining the data that it did not explore, such as adding a clause to its contract with affiliates requiring them to provide the data Commerce requests. *See* Def.'s Br. at 29, ECF No. 33; Nucor's Br. at 34, ECF No. 36.

Procedural History

As noted above, these issues span three separate administrative reviews of the same Order — the third, fourth, and fifth reviews. The third administrative review has a period of review of October 1, 2018, through September 30, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 67,712, 67,715 (Dep't of Com. Dec. 11, 2019). It contains both issues. *See* Compl. ¶¶ 14–20, No. 21–533, ECF No. 9. The fourth administrative review has a period of review of October 1, 2019, through September 30, 2020. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 78,990, 78,992–93 (Dep't of Com. Dec. 8, 2020). The fifth administrative review has a period of review of October 1, 2020, through September 30, 2021. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 67,685, 67,687 (Dep't of Com. Nov. 29, 2021). Both involve only the Section 232 duties issue. *See* Compl. ¶¶ 13–14, No. 22–183, ECF No. 9; Compl. ¶¶ 13–18, No. 23–112, ECF No. 9. Following USCIT Rule 1's directive to "secure the just, speedy, and inexpensive determination of every action," the Court joined the three cases for hearing and decision. Scheduling Order (July 18, 2023), No. 21–553, ECF No. 62. This opinion dispenses with the pending motions in all three matters and allows for the immediate appeal of the cases involving the fourth and fifth administrative reviews.

There is one final procedural wrinkle. In the case arising from the third administrative review, Nippon Steel complains that Commerce miscalculated its net U.S. price by failing to include certain revenue sources. Pl.'s Br. at 41–46, ECF No. 32. In the Issues and Decision Memorandum, Commerce stated its Final Results were based on "the total revenue" Nippon Steel reported. Issues and Decision Mem. (Aug. 23, 2021) at 21, No. 21–533, J.A. at 2,481, ECF No. 41. Commerce calculated Nippon Steel's total revenue by adding together two values: gross revenue and billing adjustments. Margin Program, J.A. at 82,532–82,730, ECF 40. Nippon Steel argued that this calculation is — likely inadvertently — incorrect. It is too low because it overlooks revenue for extra services that Nippon Steel reported separately. Pl.'s Br. at 42–46, ECF No. 32. Nippon Steel explains that one of its U.S. affiliates issued separate invoices to customers for extra embossing, slitting, and cutting services. *Id.* at 42, ECF No. 32. Though Nippon Steel reported its revenue from each of these extra services in separate, corresponding revenue fields, Commerce ignored them when making its total revenue calculation. *Id.* at 42–44.

Commerce requested a partial voluntary remand to reconsider the revenue for these extra services. *See* Def.'s Br. at 31–32, ECF No. 33. The Court granted the request, Order Granting Remand (July 1, 2022), No. 21–533, ECF No. 42, and Commerce filed its Remand Results a month later. Remand Results (Aug. 1, 2022), No. 21–533, ECF No. 43. This time, it added the revenue Nippon Steel reported for extra services to calculate the net U.S. price. *Id.* at 5. No party contests the Remand Results. *See* Pl.'s Comments (Aug. 15, 2022) at 2, No. 21–533, ECF No. 48 (asking the Court to sustain the Remand Results).

Oral Argument

The Court held oral argument on May 10, 2024, and questioned the parties about both the Section 232 and downstream sales issues. *See generally* Oral Arg. Tr., No. 21–533, ECF No. 79. Regarding Section 232 duties, the Court first turned to Nippon Steel's argument that Commerce failed to find Nippon Steel included the duties in its U.S. prices. *See id.* at 29:6–20, ECF No. 79. Nippon Steel's counsel was unable to point to anything in the record showing that it raised this objection during the agency proceedings and instead claimed "[t]here was really nothing ... for [it] to address" at the agency-level because Commerce did not make an explicit finding in its preliminary decision memorandum. *Id.* at 31:11–12. The Court then asked if it was "bound by [*Borusan*]" and whether "that's the end of the matter," to which Nippon Steel's counsel responded, "Right." *Id.* at 42:10–11. Nippon Steel's counsel added, "[W]e recognize that we're in a difficult position with this Court, and certainly if the Court believes that its hands are tied, ... we are ... prepared to take this up *en banc* with the Federal Circuit." *Id.* at 42:11–15.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c), which grants the Court exclusive jurisdiction over final antidumping duty determinations. The Court must set aside any of Commerce's "determination[s], finding[s], or conclusion[s]" 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). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New Am. Keg v. United States*, No. 20–00008, 45 CIT __, 2021 Ct. Intl. Trade LEXIS 34, at *15 (Mar. 23, 2021). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

When reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); s*ee also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

The parties raise two issues. First, in the third administrative review, they ask the Court to answer whether Commerce lawfully applied facts available with a partial adverse inference to fill in missing information about the affiliates' downstream sales. Second, they ask the Court to answer whether Commerce properly deducted Section 232 duties from Nippon Steel's U.S. prices. The Court finds Commerce failed to support its determination regarding the downstream sales with substantial evidence and remands the issue to Commerce. The Court sustains Commerce's deduction of the Section 232 duties as "United States import duties."

I. Application of Facts Available with a Partial Adverse Inference

When a respondent fails to provide necessary information, Commerce may draw an adverse inference from the facts available. But Commerce must support its decision with substantial evidence. The Government and Nucor argue that Commerce's determination was lawful because Nippon Steel has repeatedly failed to provide information from its resellers despite knowing Commerce would request the information. *See* Def.'s Br. at 28, ECF No. 33; Nucor's Br. at 32, ECF No. 36. They suggest Nippon Steel could have ensured its affiliate's compliance by making the provision of the data a contractual obligation or otherwise refused to do business with noncooperative affiliates. *See* Def.'s Br. at 29, ECF No. 33; Nucor's Br. at 34, ECF No. 36. Nippon Steel argues that Commerce failed to properly support its decision on the record, and all Commerce's contrary arguments are *post hoc* rationalizations. *See* Pl.'s Br. at 38–41, ECF No. 32; Pl.'s Reply at 20, ECF No. 39. The Court agrees with Nippon Steel.

A.

When foreign merchandise is sold in the United States at less than its fair value — thereby injuring a domestic industry — the law allows Commerce to impose antidumping duties on the merchandise. Antidumping duties equal the amount by which the foreign market value, known as the "normal value," of the merchandise exceeds the U.S. price of the merchandise. 19 U.S.C. § 1677b(a). When Commerce is missing data necessary to calculate the normal value of merchandise, the antidumping statute provides a two-part process to fill the gap. *See* 19 U.S.C. § 1677e(a)–(b). The statute enables Commerce to use "facts otherwise available" in place of the missing information if:

> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person —
>
> (A) withholds information that has been requested by [Commerce],

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, ...

(C) significantly impedes a proceeding under this title, or

(D) provides such information but the information cannot be verified ....

Id. § 1677e(a).

Separately, Commerce may apply an adverse inference when selecting from the facts available if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] ...." *Id.* § 1677e(b)(1)(A). "Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers ...." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.* Commerce may not draw an adverse inference merely because a respondent "fail[ed] to respond." *Id.* at 1383. Instead, it must have been "reasonable for Commerce to expect ... more forthcoming responses." *Id.*

B.

There is no question here that necessary information was missing. Commerce asked Nippon Steel for all its downstream sales data so that it could calculate the merchandise's normal value, and Nippon Steel failed to provide data from an affiliate. *See* Nippon Steel Section B Questionnaire Resp. (June 30, 2020) at B-7, No. 21–533, J.A. at 80,013, ECF No. 40. Commerce was therefore free to select from facts otherwise available to fill the gap. *See* 19 U.S.C. § 1677e(a). But the agency went further and applied an adverse inference; therefore, it also must show that Nippon Steel did not "put forth its maximum effort" to obtain the missing data. *Nippon Steel*, 337 F.3d at 1382. This Commerce did not do.

Nippon Steel went to some lengths attempting to obtain the missing data from its reseller. It hired outside counsel for assistance and sent its affiliate numerous communications requesting the data or updates on when it could expect the data. *See* Nippon Steel Suppl. Questionnaire Resp. (Feb. 2, 2021) at 2, No. 21–553, J.A. at 81,417, ECF No. 40; Commc'n Log, J.A. at 81,703–40, ECF No. 40. Then it submitted a legal memorandum explaining to Commerce why it believed Japanese law prohibited it from taking more action to collect the data. *See* Japanese Legal Mem., J.A. at 80,634–40, ECF No. 40. These additional steps went beyond the efforts Nippon Steel made in the past. *See Nippon Steel & Sumitomo Metal*, 44 CIT __, 483 F. Supp. 3d at 1225 (describing an earlier administrative review when Nippon Steel sent only one letter to its affiliates). Commerce cannot ignore these increased efforts.

Instead, its final decision failed to discuss the communications log Nippon Steel provided. Regarding the legal memorandum, Commerce merely asserted it was not asking Nippon Steel to violate Japanese law. Issues and Decision Mem. (Aug. 23, 2021) at 14, No. 21–533, J.A. at 2,474, ECF No. 41. This conclusory statement fails to engage with Nippon Steel's six pages of legal analysis in any meaningful way. It may be the case that the memorandum from Nippon Steel's counsel is flawed. But the Court does not have the benefit of Commerce's view on what Japanese law may require of Nippon Steel because the agency's decision elides the issue. When the facts change, Commerce cannot rest on its laurels and repeat the answers of yesterday. It must instead explain how the new facts did or did not affect its analysis. *See Nippon Steel*, 337 F.3d at 1383; *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014) ("[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record."). Because no such explanation is found in the Issues and Decision Memorandum, the Court may not sustain Commerce's determination.

C.

Commerce's lack of an adequate explanation is confirmed by the Government and Nucor's having to introduce arguments not found in the Issues and Decision Memorandum to justify the agency's conclusions. Both argue Nippon Steel should have been prepared to provide the data during the third administrative review because Commerce had requested the same data in previous reviews. *See* Def.'s Br. at 28, ECF No. 33; Nucor's Br. at 32–33, ECF No. 36. But Commerce cannot rely on what it said in past administrative reviews to fill in gaps it left here. *See Shenzhen Xinboda Indus. Co. v. United States*, 44 CIT __, 456 F. Supp. 3d 1272, 1285 n.22 (2020) ("[E]ach administrative review is a separate segment of an antidumping proceeding and each with its own, unique administrative record ...."). If Commerce believes Nippon

Steel's repeated failures over multiple administrative reviews prove it has not put forth its maximum effort to comply, it should have said so in its decision here.

One *post hoc* rationalization is just as useless as another. The Government and Nucor additionally argue Nippon Steel could have restructured its contract to require its affiliate to provide sales data to Commerce or simply refused to do business with the affiliate. *See* Def.'s Br. at 29, ECF No. 33; Nucor's Br. at 34, ECF No. 36. Nowhere in the Issues and Decision Memorandum did Commerce make this point or respond to Nippon Steel's counterpoint that Japanese antitrust law would prohibit it from doing so. The Government and Nucor cannot now retroactively write a response into the agency's decision. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action[.]"). The Court therefore **REMANDS** this issue to Commerce to reconsider or further explain its decision to apply an adverse inference to Nippon Steel's downstream sales. As part of any explanation, Commerce should respond to Nippon Steel's arguments regarding (1) Japanese antitrust law and (2) any increased efforts to engender affiliate compliance by Nippon Steel compared to past administrative reviews.

II. Deduction of Section 232 Duties

In all three cases, Nippon Steel claims Commerce improperly deducted Section 232 duties from Nippon Steel's U.S. prices. It raises three arguments: (1) Commerce failed to properly support a finding that Nippon Steel included the cost of its Section 232 duties in its U.S. prices; (2) Commerce's treatment of the Section 232 duties as "United States import duties" is inconsistent with the United States' treaty obligations and therefore improper; and (3) the Federal Circuit's *Borusan* opinion was wrongly decided. As explained below, all three of these arguments necessarily fail.

A. Forfeiture

Nippon Steel forfeited its argument that Commerce insufficiently supported its finding that Nippon Steel included the cost of Section 232 duties in its prices. Nippon Steel's argument is premised on the language of 19 U.S.C. § 1677a(c)(2)(A), which states that the respondent's U.S. price "shall be ... reduced by ... the amount, if any, *included in* such price, attributable to ... United States import duties" (emphasis added). In other words, Commerce should only deduct the duties if the respondent included the cost of them in the prices it ultimately charged its U.S. customers. In theory, a respondent could absorb the cost of the duties and not pass them on to its customers. Commerce would not deduct the duties from the respondent's U.S. price in that case, which in turn would result in a decreased dumping margin for the respondent.

The Government and Nucor argue Nippon Steel forfeited the argument by waiting to raise it for the first time in its supplemental brief to this Court. *See* Def.'s Suppl. Resp. at 16–20, ECF No. 65; Nucor's Suppl. Resp. at 3–6, ECF No. 66. Nippon Steel disagrees. It claims it could not have made the argument earlier because Commerce failed to make explicit findings in its preliminary decision memorandums that the duties were included in Nippon Steel's prices. *But compare* Pl.'s Suppl. Reply at 6, ECF No. 68, *with* Issues and Decision Mem. (Aug. 23, 2021) at 8, No. 21–533, J.A. at 2,468, ECF No. 41 (*final* decision concluding that "[Nippon Steel] included section 232 duties in the price of subject merchandise sold to unaffiliated customers in the United States ...."), Issues and Decision Mem. (May 19, 2022) at 8, No. 22–183, J.A. at 3,711, ECF No. 47 (same), *and* Issues and Decision Mem. (May 1, 2023) at 7, No. 23–112, J.A. at 3,283, ECF No. 22 (same). Furthermore, it says the issues it raised during the administrative proceedings were broad enough to include the specific argument it now presents. *See* Pl.'s Suppl. Reply at 3–4, ECF No. 68. Nippon Steel finally notes that the Court can exercise its discretion to reach the argument even if it would otherwise be forfeited. *Id.* at 4–6.

The Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). An interested party challenging the final results of an administrative review "must present all arguments" it considers "relevant" in its case brief at the agency-level. 19 C.F.R. § 351.309(c)(2). The purpose of this requirement is threefold. First, the rule "recognizes that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Ellwood City Forge Co. v. United States*, 46 CIT __, 582 F. Supp. 3d 1259, 1272 (2022) (internal quotations omitted). Second, exhaustion "promotes judicial efficiency because it requires parties to make arguments first before the agency that the agency may then moot before they reach court." *Id.* Third, where the issue is not resolved at the administrative level, "exhaustion still produces a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* (internal quotations omitted).

The Court asked Nippon Steel's counsel to point to where in the record it raised the argument it now presents. *See* Oral Arg. Tr. at 29:14–15, No. 21–533, ECF No. 79. Nippon Steel's counsel failed to do so. *Id.* at 30:8–38:24. Indeed, the record contains no such argument. Nippon Steel attempts to shift the burden by claiming it had "nothing

... to address," *id.* at 31:11–12, but its attempt is unavailing. It ignores the plain text of the regulation, which requires that "all arguments" be presented to Commerce in a party's brief. *See* 19 C.F.R. § 351.309(c)(2); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) ("Commerce regulations require the presentation of all ... arguments in a party's administrative case brief."). The statute's text is similarly plain that Commerce must find that Nippon Steel included Section 232 duties in its U.S. prices before Commerce may deduct the duties. As this is a statutorily required finding, any lack of evidence on point would be a fatal error on Commerce's part: The agency would have failed to meet its required burden of proof. It is hardly unreasonable to require a party to timely claim that Commerce has failed to meet the minimum evidentiary burden. *See Boomerang Tube LLC v. United States*, 856 F.3d 908, 913 (Fed. Cir. 2017) (holding that the CIT abused its discretion by not requiring exhaustion when the parties knew what data was "in the record prior to Commerce's preliminary determination" but failed to object in their agency brief). Therefore, it is "appropriate" to require Nippon Steel to raise its objection first before the agency. *See* 28 U.S.C. § 2637(d).

This is not a new legal requirement. *See* 19 U.S.C. § 1677a(c)(2)(A) ("The price ... shall be ... reduced by ... the amount ... included in such price, attributable to ... United States import duties ....") (1994). Indeed, the Federal Circuit recognized this requirement in *Borusan*. Borusan raised many arguments about why Section 232 duties should not be deducted from its U.S. price, but the Federal Circuit noted that Borusan did not contest whether the duties were "included in" its prices. *Borusan*, 63 F.4th at 31 ("There is no properly preserved dispute before us about Commerce's determination ... that the duty imposed by Proclamation 9705 was in fact included in Borusan's U.S. prices."); *id.* n.3 ("Borusan did not challenge that determination before the [CIT] .... Nor did Borusan challenge the determination in this court until its reply brief, ... which was too late."). Just as in *Borusan*, it was Nippon Steel's burden to object if it believed the record evidence did not support a finding that it included the duties in its prices. *See* 19 C.F.R. § 351.309(c)(2). Waiting until its supplemental brief to this Court is too late. *Compare* Pl.'s Suppl. Reply at 6, ECF No. 68, *with Borusan*, 63 F.4th at 31 n.3.

Nippon Steel cannot save itself by retroactively discovering its new argument among the claims it did make to Commerce. To preserve an argument, a litigant's brief must "alert[] the agency to the argument with reasonable clarity and avail[] the agency with an opportunity to address it." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 761

(2004); *see also Navneet Educ. Ltd. v. United States*, 47 CIT __, No. 1:22-cv-00132, 2023 Ct. Intl. Trade LEXIS 194, at *41–43 (Dec. 29, 2023) (citing *Qingdao SeaLine Trading Co. v. United States*, 36 CIT 451, 470–71 (2012)) ("An undeveloped claim made before an agency ... is forfeited."). "[V]ague, unsupported allegations do not serve to preserve a later hyper-specific, technical claim ...." *Navneet*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 194, at *41–43 (rejecting respondent's attempt to turn "a three-sentence argument before Commerce into a multi-page attack in court"); *see also Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (rejecting argument as forfeited for failure to raise it before the agency despite claim that the argument was "simply another angle to an *issue* which it did raise").

Nippon Steel challenged the preliminary results in each administrative review because "[Commerce] improperly deducted Section 232 duties from [Nippon Steel's] U.S. prices." Nippon Steel's Admin. Br. at 5, No. 21–533, J.A. at 83,005, ECF No. 40 (capitalization altered); Nippon Steel's Admin. Br. at 5, No. 22–183, J.A. at 85,203, ECF No. 46 (same); Nippon Steel's Admin. Br. at 5, No. 23–112, J.A. at 85,854, ECF No. 21 (same). This statement is too vague for Nippon Steel's current purposes. It does not "alert[] [Commerce] ... with reasonable clarity" to Nippon Steel's new challenge — that Commerce made insufficient factual findings about whether Nippon Steel included the Section 232 duties in its prices. *Luoyang Bearing*, 28 CIT at 761. Like the Federal Circuit held in *Borusan*, the challenge is not "properly preserved" by Plaintiff's broad arguments. *Borusan*, 63 F.4th at 31.

To conclude otherwise would open a Pandora's box of permissible arguments a litigant could raise for the first time in court. Such a result would be unfair to agencies, which cannot be blamed for failing to reply to arguments parties never raised. *See Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946). As this Court has previously observed, "Congress does not 'hide elephants in mouseholes[]'" so that "[l]itigants should not either." *Navneet*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 194, at *43 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Nippon Steel's argument is forfeited, and the Court declines to exercise its discretion to consider it.[3]

B. Application of International Law

Nippon Steel's arguments concerning international law also fall short. To obtain relief, Nippon Steel would have the Court step beyond its proper role and interfere in a foreign policy matter on which Congress has spoken. The Court declines to do so.

The *Charming Betsy* canon provides that a statute "ought never to be construed to violate the law of nations if any other possible construction remains." *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118. In other words, a court engaged in statutory construction should presume Congress did not intend to violate international law unless Congress says otherwise. The *Charming Betsy* canon is a canon of statutory interpretation — not a matter of constitutional law — and therefore it is "not [a] mandatory rule[]." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *see also* Antonin Scalia & Bryan A. Garner, READING LAW 59 (2012) ("No canon of interpretation is absolute."). Congress is free to override the canon via legislation. *Cf. Chickasaw Nation*, 534 U.S. at 94 (noting that "other circumstances evidencing congressional intent can overcome their force").

Nippon Steel asks the Court to apply the *Charming Betsy* canon to find that Commerce's determination is inconsistent with the United

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[3] No exception to the exhaustion doctrine applies. Nippon Steel first claims that the intervening judicial decision exception applies because the Federal Circuit issued *Borusan* while these cases were pending. Pl.'s Supp. Reply at 5, ECF No. 68. This argument is unavailing. The statutory requirement that U.S. price be reduced by the amount of "United States import duties" that was "included in such price" is not new, *see* 19 U.S.C. § 1677a(c)(2)(A) (1994), and *Borusan* did not reinterpret this language. Nippon Steel was not "'surprised' by a twist of the law that [wa]s impossible to predict." *Risen Energy Co. v. United States*, 47 CIT __, No. 23–00153, 2023 Ct. Intl. Trade LEXIS 170, at *5 (Nov. 30, 2023) (citation omitted) (declining to apply the intervening judicial decision exception).

Second, Nippon Steel claims it could not have raised the issue during the agency proceedings because Commerce waited until publishing its final Issues and Decision Memorandums to find that Nippon Steel included the cost of Section 232 duties in its U.S. prices. Pl.'s Suppl. Reply at 5–6, ECF No. 68; *see also Jiaxing Brother Fastener Co. v. United States*, 34 CIT 1455, 1466 (2010) (stating that the Court "will decide an unexhausted issue on the merits when the party raising the issue had no opportunity to do so before the agency"). But as the Court has already explained, Commerce necessarily found that Nippon Steel included Section 232 duties in its U.S. prices when Commerce stated in its preliminary decision memorandums that Nippon Steel's Section 232 duties should be treated as "United States import duties" under the statute and deducted from U.S. price. *See, e.g.*, Prelim. Decision Mem. (Feb. 18, 2021) at 17, No. 21–533, J.A. at 2,449, ECF No. 41. If Nippon Steel believed there was a dearth of evidence to support this mandatory finding, the time to object was then. *See Boomerang Tube*, 856 F.3d at 913 (holding that, because the parties knew what data was "in the record prior to Commerce's preliminary determination," at "that point" the parties knew what evidence Commerce could use and thus should have made their objection in their brief to the agency); *see also* 19 C.F.R. § 351.309(c)(2).

States' treaty obligations under the GATT. *See* Pl.'s Br. at 30–33, ECF No. 32; Pl.'s Reply at 16, ECF No. 39; Pl.'s Suppl. Br. at 20–23, ECF No. 64. It explains that GATT Articles II:1(a) and (b) require members to comply with the GATT's bound tariff schedule. Pl.'s Br. at 23, ECF No. 32; Pl.'s Reply at 16, ECF No. 39; Pl.'s Suppl. Br. at 23, ECF No. 64; *see also* GATT art. II:1(a)–(b). This schedule sets a limit on the tariffs the United States can apply to steel imports from Japan. *See Schedule of Concessions and Commitments*, WTO Doc. No. WT/Let/493 (May 17, 2005) (current Schedule). By reading 19 U.S.C. § 1677a(c)(2)(A) to allow for the deduction of Section 232 duties from a respondent's U.S. prices, Commerce increases a respondent's dumping margin; and that increased dumping margin imposes duties on Japanese steel imports greater than the GATT's bound tariff rates. According to the Plaintiff, that renders the Federal Circuit's reading of the statute improper under the *Charming Betsy* canon because it conflicts with international law. *See* Pl.'s Br. at 30–33, ECF No. 32; Pl.'s Reply at 16, ECF No. 39; Pl.'s Suppl. Br. at 22–23, ECF No. 64. Nippon Steel adds in support that WTO panels have narrowly construed the GATT's national security exception, *see* GATT art. XXI-(b)(iii), so that it cannot apply to save the Section 232 duties. *See* Pl.'s Reply at 16–18, ECF No. 39.

The Government and Nucor respond that a conflict between a statute and the GATT is not a matter for the courts to decide. *See*-Nucor's Resp. at 28–30, ECF No. 36; Def.'s Suppl. Resp. at 21–22, ECF No. 65; Nucor's Suppl. Resp. at 6–7, ECF No. 66. Additionally, Nucor claims that companies like Nippon Steel are statutorily prohibited from challenging a government agency for taking actions inconsistent with the GATT. *See* Nucor's Suppl. Resp. at 7, ECF No. 66 (citing 19 U.S.C. § 3512(c)(1)(B)). Even if this Court could address Nippon Steel's challenge, the Government argues that the GATT's national security exception nonetheless applies. *See* Def.'s Suppl. Resp. at 21–22, ECF No. 65.

Nippon Steel's arguments fail because Congress has spoken. The *Charming Betsy* canon is merely an interpretive aide that Congress is free to override. Congress has done so here in two separate ways, leaving the *Charming Betsy* canon foundered at sea. First, Congress passed 19 U.S.C. § 3512(c)(1)(B), which prohibits Nippon Steel from challenging Commerce's determination on the ground that it does not comply with the United States' treaty obligations. The statute provides:

> No person other than the United States ... may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the

> United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. § 3512(c)(1)(B). One "such agreement" is the GATT. *See* 19 U.S.C. § 3511(d)(1) (identifying "The General Agreement on Tariffs and Trade 1994" as a trade agreement under the same part). Thus, Congress has determined that the question of whether the United States is in compliance with the GATT is not judicially cognizable unless the United States is the plaintiff. As Nippon Steel is not the federal government, it cannot raise this argument in court.

Second, Congress has passed another statute confirming Nippon Steel's challenge fails. 19 U.S.C. § 2504(a) provides, "No provision of any trade agreement ..., nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States." Thus, Congress determined what happens when a federal statute and the GATT conflict — the statute wins. In the legal hierarchy, treaties and federal statutes are of equal authority. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."). But in the United States, treaties are not self-executing unless their text explicitly provides otherwise, nor are they given special status in federal law. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)) ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'"). A treaty receives "the Advice and Consent of the Senate" to be ratified; and it typically becomes operative American law when both houses of Congress enact legislation implementing the treaty. U.S. Const. art. II, § 2; *see also Foster*, 27 U.S. (2 Pet.) at 314 ("[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, ... the legislature must execute the contract before it can become a rule for the Court."). How a treaty is implemented is Congress's prerogative. Here, Congress has directed that, when the GATT and a federal statute collide, the statute governs, sinking the *Charming Betsy* canon in the process. No precept of international law permits the Court to ignore the legislated directives of Congress.

Nippon Steel's reliance on WTO panel decisions is unavailing for the same reason. If the text of a treaty cannot countermand a Congressional statute, neither can the opinions of international arbitrators. *See* 19 U.S.C. § 2504(a); *Corus Staal BV v. Dep't of Com.*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (quoting *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004)) ("WTO decisions are 'not binding on the United States, much less this court.'"). Past practice confirms that it is Congress — not the courts — that determines whether and how to bring United States trade laws into accord with the nation's treaty obligations.

Most items imported into the United States must disclose the item's country of origin to its "ultimate purchaser" — the last person in the United States to receive the product in the same form in which it was imported. 19 U.S.C. § 1304(a); 19 C.F.R. § 134.1(d). In 2009, the U.S. Department of Agriculture (USDA) finalized a rule making it more difficult for importers to label certain imported meats as originating from the United States. *See Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*, 74 Fed. Reg. 2,658 (USDA Jan. 15, 2009) (codified at 7 C.F.R. § 65.260). Meat that was packaged in the United States but came from animals that were born or raised elsewhere could no longer be labeled as originating from the United States. 7 C.F.R. § 65.260(a)(1).

This change started a chain reaction. Canada and Mexico initiated proceedings at the WTO, claiming that the country-of-origin labeling regulations violated the United States' treaty obligations. *See* Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements,* ¶¶ 1.4, 3.1–3.4, WTO Doc. WT/DS384/R, WT/DS386/R (adopted July 23, 2012). A WTO dispute settlement panel agreed and found that the COOL regulations improperly treated domestic products more favorably than imports. *Id.* ¶ 8.3. The United States appealed to the then-extant WTO Appellate Body, and the Appellate Body also found in favor of Canada and Mexico. *See* Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 496, WTO Doc. WT/DS384/AB/R, WT/DS386/AB/R (adopted July 23, 2012). The Dispute Settlement Body allowed Canada and Mexico to compel the United States' compliance by authorizing them to impose over $1 billion in retaliatory tariffs annually against the United States. Arbitration Decision, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.1, WTO Doc. WT/DS384/R, WT/DS386/R (Dec. 7, 2015). Congress reacted. Days later, it repealed all COOL requirements on certain meat products. *See* Consolidated Appropriations Act, Pub. L. No. 114–113, 129 Stat. 2285 (2016). Years later, the USDA appears to have reignited the fight. In March 2024, it finalized a new rule amending the country-of-origin labeling regulations to approximate the language it adopted in 2009. *Voluntary Labeling of FSIS-Regulated Products with U.S.-Origin Claims*, 89 Fed. Reg. 19,470 (USDA Mar. 18, 2024). Canada and Mexico have once again threatened to retaliate against the United States. Tobias Burns, *"Made in the USA" Meat Rule Sparks Trade Battle*, The Hill (Mar. 15, 2024), bit.ly/4dyKKCW (last visited Oct. 4, 2024).

Notably, at no point in this sequence did a federal court intervene. Nor should it have. *Cf. Hernandez v. Mesa*, 589 U.S. 93, 113 (2020) ("Foreign policy and national security decisions are 'delicate, complex, and involve large elements of prophecy' for which 'the Judiciary has neither aptitude, facilities[,] nor responsibility.'") (quoting *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 284 (2018) (Gorsuch, J., concurring)). Congress has spoken clearly. When federal statutes and U.S. treaty obligations under the GATT collide, federal statutes win. 19 U.S.C. § 2504(a). Parties aggrieved by the collision must bring their cases to Congress, not to the courts. *See* 19 U.S.C. § 3512(c)(1)(B). Exercising power expressly granted it by the Constitution, Congress has made its statutes supreme and reserved to itself the ability to settle any international conflict of laws. *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power ... To regulate Commerce with foreign Nations[.]"). Accordingly, this Court rejects Nippon Steel's invitation to interfere with a dispute whose resolution is committed to the political branches.

C. The Effect of *Borusan*

Nippon Steel's arguments also fail because the Court is bound by the Federal Circuit's recent decision in *Borusan*. While this case was pending, the Federal Circuit held in *Borusan* that Section 232 duties should be considered "United States import duties" under 19 U.S.C. § 1677a(c)(2)(A) and accordingly deducted from U.S. price. *Borusan*, 63 F.4th at 37. Nippon Steel now argues that *Borsusan* does not apply because it was wrongly decided. *See* Pl.'s Br. at 9–30, ECF No. 32; Pl.'s Reply at 2–16, ECF No. 39; Pl.'s Suppl. Br. at 35, ECF No. 64. The Government and Nucor respond that this Court is bound by the Federal Circuit's precedent, which addressed all of Nippon Steel's arguments. Def.'s Suppl. Resp. at 28–30, ECF No. 65; Nucor's Suppl. Resp. at 10–11, ECF No. 66. The Court agrees.

This Court cannot disregard Federal Circuit precedent no matter how much Nippon Steel may disagree with the Federal Circuit's reasoning. *See Nature's Touch Frozen Foods (West) Inc. v. United States*, 47 CIT __, 639 F. Supp. 3d 1287, 1311 (2023). Even Nippon Steel acknowledges that the Court's hands are tied. *See* Oral Arg. Tr. at 42:10–11, No. 21–533, ECF No. 79 (The Court: "I'm bound by [*Borusan*], and that's the end of the matter?" Nippon Steel's Counsel: "Right."). Nippon Steel can therefore make its argument that the Federal Circuit is wrong to one of two courts in the country that has the power to agree with it.

CONCLUSION

Nippon Steel is correct that Commerce did not adequately respond on the record to its argument that its efforts to gain the cooperation of its affiliate were enough to avoid Commerce's drawing an adverse inference against it. The Court therefore **GRANTS** Nippon Steel's Motion for Judgment on the Agency Record on that issue in Case Number 21–533 covering the third administrative review. This Court does not, however, have the power to review decisions of the Federal Circuit or to adjudicate alleged conflicts between federal law and the General Agreement on Tariffs and Trade. Nippon Steel's remaining Motions are therefore **DENIED**, and the Court **SUSTAINS** Commerce's determinations in the fourth and fifth administrative reviews as well as the remaining portions of the third administrative review. Accordingly, it is hereby:

ORDERED that Commerce shall file its Remand Determination in Case Number 21–533 with the Court within 90 days of today's date; and it is further

ORDERED that Defendant shall supplement the administrative record with all additional documents considered by Commerce in reaching its decision in the Remand Determination;

ORDERED that Plaintiff shall have 30 days from the filing of the Remand Determination to submit comments to the Court;

ORDERED that Defendant shall have 30 days from the date of Plaintiff's filing of comments to submit a response;

ORDERED that Defendant-Intervenors shall have 21 days from the date of Defendant's filing to submit their responses; and

ORDERED that Plaintiff shall have 14 days from the date of Defendant-Intervenors' filings to submit an optional reply.

SO ORDERED.

Dated: October 10, 2024
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

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