U.S. Customs and Border Protection

Slip Op. 13–39

OTR WHEEL ENGINEERING, INC., Plaintiff, v. UNITED STATES, Defendant, BRIDGESTONE AMERICAS, INC. AND BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, Intervenor Defendants.

Before: Jane A. Restani, Judge
Court No. 11–00166

[Commerce's Remand Results regarding the scope of the AD/CVD orders are sustained.]

Dated: March 22, 2013

Arthur K. Purcell, *Donna L. Bade*, *Mark R. Ludwikowski*, and *Mark J. Segrist*, Sandler, Travis & Rosenberg, PA, of New York, NY, for Plaintiff.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief were *Daniel J. Calhoun* and *Matthew D. Walden*, Attorneys, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Christopher T. Cloutier, *Joseph W. Dorn*, *Prentiss L. Smith*, and *J. Michael Taylor*, King & Spalding, LLP, for Intervenor Defendants.

OPINION

Restani, Judge:

Previously, this matter was before the court on Plaintiff OTR Wheel Engineering, Inc.'s ("Plaintiff") motion for judgment on the agency record pursuant to USCIT Rule 56.2. *See OTR Wheel Eng'g, Inc. v. United States*, 853 F. Supp. 2d 1281, 1283 (CIT 2012). Plaintiff, an importer of pneumatic off-the-road ("OTR") tires from the People's Republic of China ("PRC"), challenged the U.S. Department of Commerce's ("Commerce") final scope ruling regarding an antidumping

duty ("AD") order[1] and a countervailing duty ("CVD") order[2] (collectively the "Tire Orders") covering certain pneumatic OTR tires from the PRC. *See Antidumping Duty and Countervailing Duty Orders on Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Scope Ruling OTR Wheel Engineering, Inc.*, (Apr. 26, 2011), Pl.'s Rule 56.2(C)(3) App. of Admin. R. ("Pl.'s App."), Ex. F ("*Final Scope Ruling*").

The court ruled that Commerce lacked substantial evidence for its finding in the *Final Scope Ruling* that Plaintiff's tires did not fall within a scope exclusion to the Tire Orders for tires designed for turf, lawn, and garden application. *OTR Wheel*, 853 F. Supp. 2d at 1290. The court further concluded that Plaintiff's request for the court to instruct Commerce to exclude the tires from the scope of the Tire Orders was not warranted. *Id.* Instead, the court remanded the matter to Commerce for a more in depth evaluation pursuant to the factors laid out in 19 C.F.R. § 351.225(k)(2).[3] *Id.*

Upon remand, Commerce employed the (k)(2) factors to conclude again that Plaintiff had not demonstrated that its tires fell within the scope exclusion. *Final Redetermination Pursuant to Court Remand*, (Nov. 9, 2010), App. of Docs Supporting Def.'s Resp. to Pl.'s Comments on Final Redetermination Pursuant to Ct. Remand, Tab 8 ("*Remand Results*"). Because Commerce complied with the court's remand instructions by providing a more thorough analysis under section 351.225(k)(2) and because Plaintiff's objections are without merit, the court sustains the *Remand Results*.

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[1] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Antidumping Duty Order: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Dep't Commerce Sept. 4, 2008) ("*AD Order*").

[2] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 51,627 (Dep't Commerce Sept. 4, 2008).

[3] 19 C.F.R. § 351.225(k)(1) states that: "in considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following: (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." When the criteria examined under section 351.225(k)(1) is not dispositive, section 351.225(k)(2) states that Commerce must then consider five factors: "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed."

BACKGROUND

In September 2008, Commerce imposed the Tire Orders on certain new pneumatic OTR tires from the PRC.[4] The identical scope language of the Tire Orders included:

> new pneumatic tires designed for off-the-road (OTR) and off-highway use, subject to exceptions identified below . . . . The vehicles and equipment for which certain OTR tires are designed for use include, but are not limited to: (1) Agricultural and forestry vehicles and equipment, including agricultural tractors, combine harvesters, agricultural high clearance sprayers, industrial tractors, log-skidders, agricultural implements, highway-towed implements, agricultural logging, and agricultural, industrial, skid-steers/mini-loaders; (2) construction vehicles and equipment, including earthmover articulated dump products, rigid frame haul trucks, front end loaders, dozers, lift trucks, straddle carriers, graders, mobile cranes, compactors; and (3) industrial vehicles and equipment, including smooth floor, industrial, mining, counterbalanced lift trucks, industrial and mining vehicles other than smooth floor, skid-steers/mini-loaders, and smooth floor off-the-road counterbalanced lift trucks. The foregoing list of vehicles and equipment generally have in common that they are used for hauling, towing, lifting, and/or loading a wide variety of equipment and materials in agricultural, construction and industrial settings. Such vehicles and equipment, and the descriptions contained in the footnotes are illustrative of the types of vehicles and equipment that use certain OTR tires, but are not necessarily all-inclusive. While the physical characteristics of certain OTR tires will vary depending on the specific applications and conditions for which the tires are designed (e.g., tread pattern and depth), all of the tires within the scope have in common that they are designed for off-road and off-highway use. Except as discussed below, OTR tires included in the scope of the order range in size (rim diameter) generally but not exclusively from 8 inches to 54 inches.

[4] "Generally, whenever domestic producers of a particular product believe that imports of certain competing goods are being sold in the United States at less than fair market value (i.e., being 'dumped'), they may petition Commerce to impose antidumping duties on the imports of the goods." *King Supply Co. v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012). After investigations by Commerce and the U.S. International Trade Commission ("ITC"), Commerce may issue "an AD order imposing antidumping duties on the appropriate imported merchandise." *Id.* (citing 19 U.S.C. § 1673d(c)(2)). "After an AD order is issued, Commerce is often called upon to issue 'scope rulings' to clarify the scope of the AD order and determine whether particular products are included within its scope." *Id.* CVD orders are subject to the same scope challenge.

AD Order, 73 Fed. Reg. at 51,624 25 (footnotes with definitions omitted). The Tire Orders also excluded certain tires from the scope including, "tires of a kind designed for use on . . . vehicles for turf, lawn and garden . . . applications." *Id.* at 51,625.

In February 2011, Plaintiff filed a scope ruling request, asking Commerce to find that Trac Master and Traction Master tires imported by Plaintiff fall within this exclusion. *Scope Ruling Request: OTR Wheel Engineering, Inc. Lawn & Garden Tires*, (Feb. 11, 2011) Pl.'s App., Ex. A, at 4. Plaintiff argued that the plain scope language was dispositive in excluding Plaintiff's Trac Master and Traction Master tires. *Id.* Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC (collectively "Bridgestone") filed comments Court No. 11–00166 Page 5 opposing Plaintiff's exclusion request.[5]

In April 2011, Commerce issued its *Final Scope Ruling*, finding that the tires were not excluded from the Tire Orders. *Final Scope Ruling* at 8. Pursuant to 19 C.F.R. § 351.225(k)(1), Commerce stated that it found the description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary of Commerce and the ITC to be dispositive. *Id.* at 6. Using data from the Tire and Rim Association ("TRA") and the ITC's injury determination, Commerce decided that tires with R-1 and R-4 type treads, like Plaintiff's, are used for farming, light industrial service, and highway mowing and therefore are not excluded from the scope of the Tire Orders. *Id.* at 7 8. As a result, Commerce found it unnecessary to conduct further analysis considering the additional factors contained in 19 C.F.R. § 351.225(k)(2). *Id.* at 5. Plaintiff did not argue that its tires fall outside the general scope of the Tire Orders, merely that they are within the exclusion for turf, lawn, and garden applications. *See OTR Wheel*, 853 F. Supp. 2d at 1285.

Pursuant to the court's remand in *OTR Wheel*, Commerce conducted a more expansive analysis under 19 C.F.R. § 351.225(k)(2). *See Remand Results* at 12 23. After agreeing with the court's opinion that the analysis under 19 C.F.R. § 351.225(k)(1) was not dispositive of whether the Trac Master and Traction Master tires were "designed for use" on vehicles for turf, lawn, and garden applications, Commerce undertook the five-factor (k)(2) test. *Remand Results* at 11. Guided by new record evidence regarding the physical characteristics of the tires and the way in which Plaintiff marketed its tires and consumers used the tires, Commerce concluded that the tires do not fall within the scope exclusion. *Id.* at 18.

[5] Although Bridgestone participated in the proceedings before Commerce and has intervened in this action, Bridgestone has chosen not to file briefs, appear at oral argument, or otherwise actively participate in the proceedings before the court.

Plaintiff again challenges Commerce's findings, citing errors in Commerce's 19 C.F.R § 351.225(k)(2) analysis and requesting re-evaluation under 19 C.F.R § 351.225(k)(1). *See* Comments on Final Results of Redetermination Pursuant to Court Remand ("OTR Comments") at 24. Defendant United States ("Defendant") responds that Commerce's determination was supported by substantial evidence, and the record fails to establish that Plaintiff's tires are "unambiguously designed for use on vehicles for turf, lawn, and garden appliances." Def.'s Resp. to Pl.'s Comments ("Def.'s Resp.") at 18. Defendant therefore requests that the court sustain Commerce's Remand Results. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final scope determination will be upheld unless it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Plaintiff submits that the scope question may be resolved under a (k)(1) analysis in light of the recent decision in *Legacy Classic Furniture, Inc. v United States*, 867 F. Supp. 2d 1321 (CIT 2012).[6] OTR Comments at 21 22. Plaintiff also argues that, should the court find that a (k)(2) analysis is necessary, Commerce's redetermination is not supported by substantial evidence. *Id.* In Plaintiff's opinion, "it appears that the Department has additional arbitrary and capricious distinctions in store with which to unlawfully enlarge the scope of the subject Tire Orders." *Id.* at 4.

I. Reconsideration of (k)(1) Criteria

Plaintiff argues that the court should revisit the (k)(1) analysis in light of *Legacy Classic*. OTR Comments at 20 24. Plaintiff claims that because the Tire Orders' exclusion of tires for "turf, lawn, and garden" applications is unqualified, the exclusion applies to all tires designed for such use, even if those tires may also be designed for other uses. *Id.* Defendant successfully counters this assertion on exhaustion

[6] *Legacy Classic* involved a scope review in which the court decided that a cedar-lined storage bench with a padded seat might fall within a scope exclusion under 19 C.F.R. § 351.225(k)(1). 867 F. Supp. 2d at 1331. The order in that case covered various bedroom "chests" but created an unqualified scope exclusion for "benches." *Id.* at 1330. The court previously had required Commerce to undertake a (k)(2) analysis on remand, yet subsequently it decided that a (k)(1) determination placing the bench within the scope exclusion might be sufficient because the unqualified exclusion should be read broadly. *Id.* at 1330 31. At any rate, *Legacy Classic* is not binding authority in this case. *See Algoma Steel Corp., Ltd. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989).

grounds. Def.'s Resp. at 6 8. *Legacy Classic* was issued in September 2012. Assuming arguendo *Legacy Classic* altered the legal landscape, Plaintiff was required to raise this claim during the remand proceedings. Congress has required that the court "shall, where appropriate, require the exhaustion of administrative remedies" in actions arising pursuant to Commerce's antidumping duty determinations. 28 U.S.C. § 2637(d). As Plaintiff concedes that this claim was not exhausted before the agency, the court will not consider it now.

Plaintiff also points to Customs' recent classification of OTR's tires under the Harmonized Tariff Schedule to support its characterization of the tires. OTR Comments at 4 5. Plaintiff asks the court to take judicial notice of the ruling, relying on *Win-Tex Prods. v. United States*, 829 F. Supp. 1349, 1351 52 (CIT 1993) (taking judicial notice of an unpublished scope order interpreting the same scope language as the one challenged in that case). OTR Comments at 6. The court declines to do so. The authority to clarify the scope of AD and CVD orders rests solely with Commerce, and Customs' rulings are not within the list of factors to be considered under 19 C.F.R. § 351.225(k). *See Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007). Additionally, *Win-Tex* involved judicial notice of a conflicting decision on essentially the same subject by the same agency. 829 F. Supp. at 1351 52. Classification decisions by Customs and scope rulings by Commerce may be in conflict without calling into question the reasonableness of either, even assuming both agencies apply the same legal standard.

II. Application of the (k)(2) Factors

In reviewing Commerce's analysis under 19 C.F.R. § 351.225(k)(2) the court will not "substitute [its] judgment for that of Commerce . . . nor [will] it allow the parties to retry factual issues . . . de novo." *See Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999) (applying the substantial evidence standard of review to factual determinations by Commerce in a trade remedy case). Under this standard, the court will not re-weigh the evidence presented to Commerce, and will uphold Commerce's determination provided it chooses from among the range of possible reasonable conclusions based on the record. Commerce conducted a thorough reconsideration of the scope of the Tire Orders pursuant to the five (k)(2) factors and weighed evidence that was in conflict or inconclusive. Nonetheless, Plaintiff asserts that Commerce erred and its decision must be overturned.

A. Physical Characteristics of the Product

The first of the (k)(2) factors instructs Commerce to review the physical characteristics of the product. 19 C.F.R. § 351.225(k)(2)(i). Commerce relied in particular on the R-1 and R-4 tread design of Plaintiff's tires, which cause turf disturbance because they are designed to dig into uneven or moist ground. *Remand Results* at 12 14. On the other hand, Commerce was not persuaded by the relatively small size of the tires[7] and the markings on them, the factors emphasized by Plaintiff. *Id.* at 13, 15. Plaintiff directed Commerce to a depiction of what it claims to be a "sub-compact tractor" designed for lawn and gardening applications. OTR Comments at 8 10. It also noted that this marking does not appear on its larger agricultural tires, supporting its interpretation of the image as reflecting lawn and garden usage. *Id.* at 9. Commerce found this evidence inconclusive, stating that the marking could "just as easily be a go-kart or a small tractor." *Remand Results* at 15. Before the court, Plaintiff again points to the product marking that Plaintiff claims depicts a "riding lawn mower." OTR Comments at 9 10.

Although the court is not persuaded by Commerce's far-fetched conclusion that the picture on the tires could be a go-cart, one not reiterated in Defendant's brief, the court agrees with Commerce's conclusion that the image is inconclusive. Commerce, therefore, was permitted to disregard the evidence as unhelpful, as it did. Similarly, although size is certainly one consideration in classifying the tires at issue in this case, Commerce's explanation that size is not determinative is reasonable given the acknowledged range of tire sizes covered by the scope of the Tire Orders and the decision to base scope, not on the size of the tire, but on its intended use at the time of design. *See AD Order*, 73 Fed. Reg. at 51,624 ("OTR tires included in the scope of the order range in size (rim diameter) *generally but not exclusively* from 8 inches to 54 inches") (emphasis added). Commerce's decision to rely more heavily on tread type, as opposed to size or the inconclusive tire markings, was not unreasonable.

B. Expectations of the Ultimate Purchaser

In terms of the expectations of the ultimate purchaser, Commerce addressed and discounted Plaintiff's marketing materials and its communications with its main customers during the design

[7] Plaintiff's tires range in size from 10 12 inches. While this size is within the size range of the Tire Orders, the tires subject to the Tire Orders may be as large as 54 inches in agricultural and industrial applications. *Remand Results* at 13 n.42.

process.[8] *Remand Results* at 15 17. Plaintiff asserts that Commerce did not focus enough on the marketing materials or correspondence and improperly discredited them, despite the clear evidence found in them that the tires were designed to meet Plaintiff's customers' needs for durable tires capable of handling uneven terrain. OTR Comments at 11 12.

Commerce concluded that the correspondence between Plaintiff and its customers did not reference necessarily the subject tires. This determination is dubious. Commerce also determined that Kubota's BX Series tractors, on which Plaintiff asserts its tires are standard features, are not the type of vehicles used solely for lawn, turf, and, garden applications. The court cannot say, however, that this further conclusion is unsupported. *See Remand Results* at 15. Commerce noted in particular that the Kubota BX series tractors are designed for "digging, earth-moving or loading, and log carrying" according to the marketing materials submitted by Plaintiff. *Id.* at 15. This fact rendered questions about the scope of the communications between Plaintiff and its customer less important. Accordingly, it was not unreasonable for Commerce to conclude that the type of vehicle, for which Plaintiff claims it designed the tires, falls outside the realm of the more traditional gardening applications seemingly the subject of the scope exclusion.

C. Ultimate Use of the Product

With respect to the ultimate use of the product, Commerce relied in part on the lack of clear evidence to support Plaintiff's claims that its tires are used as standard features on two sub-compact tractors. *Remand Results* at 17 18. Moreover, Commerce also found, as noted *supra*, that the tractors may be used for activities not traditionally associated with "gardening," including "agricultural and construction activities, such as heavy excavation." *Id.* at 18.

Although Plaintiff is correct that this scope exclusion is based on design rather than actual use, the ultimate use factor addressed by Commerce is relevant circumstantial evidence of the likely intent of Plaintiff at the time it designed the products. Because the parties agree that the tires are in fact used for a variety of purposes that go beyond turf, lawn, and garden applications, Commerce could conclude that Plaintiff's assertion that the tires were designed primarily for lawn, turf, and garden applications is undermined. *See Remand Results* at 18.

[8] Commerce addressed communications between Plaintiff's customer, Kubota, and Plaintiff within the context of the physical characteristics factor. *Remand Results* at 15. This evidence appears to relate more directly to the factor of the expectations of the ultimate purchaser. Thus, the court will address it here.

D. The Channels of Trade in Which the Product is Sold

Plaintiff essentially agrees with Commerce's remand determination that the channels of trade in this case "shed[] no light on the fundamental issue of whether OTR's Trac Master and Traction Master tires were 'designed for use' on vehicles with turf, land and garden applications." OTR Comments at 18; *see also Remand Results* at 19. Therefore, neither party believes that this factor is entitled to much weight in deciding the scope question.

E. Manner in Which the Product is Advertised and Displayed

Commerce acknowledged that the marketing materials submitted by OTR describe the subject tires as "OTR's premium Lawn and Garden Tire." *Remand Results* at 19. Nonetheless, Commerce gave substantial weight to Plaintiff's website that classified the subject tires within the "farm" and "utility"[9] section but not the "turf and garden" section. *Id.* at 19 20. Thus, according to Commerce, "the record does not demonstrate that the manner in which [the tires] are advertised or displayed indicates they were designed for turf, lawn and garden applications." *Id.* at 21. Plaintiff contends that its evidence of marketing materials and previous website classification of the tires as lawn and garden tires compels a finding that the tires were designed for lawn and garden applications. OTR Comments at 18 20. Plaintiff argues that Commerce relied to an unreasonable degree on its own independent research of Plaintiff's website, revealing the Plaintiff's "misclassification" of the subject tires. *Id.* Plaintiff also renews its arguments that this factor is irrelevant in considering the "designed for use" standard. *Id.* at 19.

The court finds that Commerce has discretion to allocate relative weight to each piece of evidence, and the court will not entertain the invitation to re-weigh the evidence itself. As explained, *supra*, marketing materials are relevant circumstantial evidence of the design standard set out in the scope exclusion clause. Although Commerce was presented with marketing materials that indicated the tires were advertised for lawn and garden use, the court cannot say that Commerce erred in determining that evidence largely was negated by Plaintiff's classification of the tires on its own website as only utility and farm tires, both falling outside Commerce's reasonable interpretation of lawn, turf, and garden applications.

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[9] Vehicles using utility tires are described on Plaintiff's website as: "Skid Steer/Backhoe/Utility Vehicles tend to operate best in all conditions and service a range of applications. This includes construction, landscaping, farming, mining, and ground support equipment." *Remand Results* at 20.

CONCLUSION

Commerce undertook the "further evaluation," pursuant to the factors set forth in 19 C.F.R. § 351.225(k)(2), as directed by *OTR Wheel*. The best that can be said for Plaintiff's case is that there is contradictory evidence. In such a case, Commerce may reach one supported conclusion or the other. Commerce has met its burden of making a full and complete inquiry and has undertaken a reasonable analysis. Commerce's determination that Plaintiff's tires do not fall within the scope exception is one that is supported by substantial evidence, and therefore, Commerce's *Remand Results* are SUSTAINED. Judgment will be entered accordingly.

Dated: March 22, 2013
New York, New York

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

Slip Op. 13–42

ADVANCED TECHNOLOGY & MATERIALS CO., LTD., BEIJING GANG YAN DIAMOND PRODUCTS COMPANY, and GANG YAN DIAMOND PRODUCTS, INC., Plaintiffs, BOSUN TOOLS GROUP CO. LTD, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS COALITION, WEIHAI XIANGGUANG MECHANICAL INDUSTRIAL CO., LTD., AND QINGDAO SHINHAN DIAMOND INDUSTRIAL. CO., LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 09–00511

[Entries of merchandise covered by less-than-fair-value determination enjoined from liquidation *pendente lite* ; temporary restraint against revocation of antidumping duty order dissolved.]

Dated: March 28, 2013

Jeffery S. Neeley and *Stephen W. Brophy*, Barnes, Richardson & Colburn, of Washington DC, for the plaintiffs.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Nathaniel J. Halvorson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, joined at the hearing by *Michele D. Lynch*, of that office.

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding LLP, of Washington DC, for the defendant-intervenor Diamond Sawblades Manufacturers Coalition.

OPINION

Musgrave, Senior Judge:

Familiarity with prior proceedings is presumed.[1] Recent notice from the United States Department of Commerce, International Trade Administration ("Commerce") of a final determination pursuant to section 129 of the Uruguay Round Agreements Act prompted the defendant-intervenor Diamond Sawblades Manufacturers Coalition ("DSMC") to move for a temporary restraining order and preliminary injunction in this court. *See* Mem. from Gary Taverman, Sr. Advisor for Antidumping and Countervailing DutyOperations, to Paul Piquado, Assistant Secretary for Import Administration, re: Final Results of the Proceeding under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Diamond Sawblades and Parts Thereof from the People's Republic of China (Mar. 4, 2013) ("final section 129 determination").

The underlying case is currently on second remand to Commerce for reconsideration of whether the "AT&M entity," a collapsed group of companies (including the plaintiffs) that are engaged in producing and/or exporting diamond sawblades and parts thereon from the PRC subject to the governing antidumping duty order, is entitled to a separate rate distinct from that of the PRC-wide rate. Commerce's final section 129 determination results from an adverse World Trade Organization panel decision that was filed on behalf of the AT&M entity by the Government of the PRC against the "zeroing" methodology employed in the U.S. diamond sawblades dumping investigation. *See United States -- Anti-Dumping Measures on Certain Shrimp and Diamond Saw Blades from China*, WT/DS422/R paras. 2.4, 2.6 & n.19 (June 8, 2012). The final section 129 recalculation of the AT&M entity's margin without zeroing methodology produced a *de minimis* dumping margin for the AT&M entity. The section 129 determination also indicates Commerce's final decision on revocation as to future entries once the determination is implemented upon instruction by the United States Trade Representative. With revocation, Commerce in the ordinary course of administration will also order U.S. Customs

[1] *See* Slip Ops. 11–122 (Oct. 12, 2011); 12–147 (Nov. 30, 2012). The litigation is a consolidation of challenges to the final less than fair value ("LTFV") determination in the antidumping duty investigation into imported diamond sawblades and parts thereof from the People's Republic of China ("PRC"). *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (May 22, 2006) (*inter alia* final LTFV determination); *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 35864 (June 22, 2006) (amended final LTFV determination); *see also Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea*, 74 Fed. Reg. 57145 (Nov. 4, 2009) (antidumping duty orders).

and Border Protection ("CBP") to liquidate or lift the suspension of liquidation on entries of AT&M-entity subject merchandise..

DSMC seeks (1) enjoinder against lifting the suspension of liquidation and (2) enjoinder of exclusion or revocation of the AT&M entity from the ambit of the antidumping duty order. Commerce and CBP being presently restrained via order of March 6, 2013, the question is what restraint is necessary *pendente lite* this action. Enjoinder requires weighing (1) the threat of immediate and irreparable harm if preliminary relief is not granted, (2) the movant's likelihood of success on the merits, (3) the balance of the hardships, and (4) the public interest. *See*, *e.g.*, *PPG Industries, Inc. v. United States*, 14 CIT 18, 729 F. Supp. 859 (1990). Any single factor may preclude injunction. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

Discussion

The circumstances here are similar to those relating to the preliminary injunction obtained in the litigation over imports of similar subject merchandise from Korea. *See Diamond Sawblades Mfrs. Coal. v. United States*, Slip Ops 11–117 (Sep. 22, 2011), 11–137 (Nov. 3, 2011), and 12–46 (Mar. 29, 2012). Here, only the AT&M entity is being excluded from the antidumping order, which is not being revoked in its entirety. The court finds the rationale of those decisions instructive in this instance.

A

An affirmative LTFV investigation normally has two effects: (1) to establish that subject merchandise is subject to, and will be subject to, an antidumping duty order for at least five years, and (2) to establish cash deposit rates that will prevail until an administrative review is completed or the deadline for review passes without a request therefor. It is with the first of these that DSMC is presently concerned. DSMC argues Commerce's and CBP's intended acts would moot the duration of the antidumping duty order and render the court unable to grant the relief to which it is entitled. Therefore, according to DSMC, injunction is necessary to prevent revocation of the antidumping duty order as applicable to the AT&M entity's exports or product and to prevent lifting the suspension of liquidation thereon so as to ensure that such merchandise does not escape assessment of antidumping duties should DSMC prevail in this action.

A final section 129 determination is a new and separate proceeding. It stands apart from the agency determination it would alter or amend, such as a LTFV determination. *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R.

Doc. No. 103–316, Vol. 1 at 1025, 1027 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4312–14. A section 129 determination is prospective only and does not affect entries made prior to it. *See* 19 U.S.C. § 3538(c)(1). Hence, as the government argues, the final section 129 determination does not moot DSMC's claims regarding entries made prior to that determination or affect the court's jurisdiction over those earlier entries. *See* Slip Op. 11–117 at 5.

As to the prospective entries affected by the final section 129 determination, the government argues DSMC's motion for preliminary injunction "does not arise from Commerce's final LTFV determination" but is "based solely upon" the yet-to-be-implemented final section 129 determination. Thus, the government argues, the court would not possess jurisdiction over those entries in the event it is implemented. It contends, rather, that the antidumping statute provides an adequate remedy to contest revocation and the final section 129 determination, *see* 19 U.S.C. § 1516a(a)(2)(B)(vii), and "nothing in the statute requires that a section 129 proceeding be held in abeyance pending the outcome of ongoing domestic litigation." Def's Br. at 13.

By the same token, however, nothing in the statute requires divestment of jurisdiction over which a court is *presently* possessed including relief affecting prospective entries that may be made moot by such revocation. DSMC's challenges to the LTFV results, if successful, would affect those entries. If DSMC prevails here, the antidumping duty order will continue to apply to the AT&M entity even in the absence of zeroing. That is the circumstance to which DSMC's motion for preliminary injunction is addressed, not the final section 129 determination itself.

The government argues that the court lacks the right to enjoin revocation and suspension of liquidation because Commerce's final section 129 determination has not been "implemented" and is therefore not ripe for judicial review, but the fact that DSMC may have a separate right to challenge revocation resulting from implementation of the section 129 determination is rather beside the point. Legal consequences clearly flow from the section 129 determination, *see* Slip Op. 11–137 at 3–4, and the court therefore finds it "final" in the sense contemplated by *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

Commerce's regulations indicate that a company that receives a zero margin in an LTFV investigation will be excluded from its antidumping duty order. *See* 19 C.F.R. § 351.204(e). Excluding the AT&M entity from this antidumping duty order would ordinarily lift the suspension of liquidation and permit future entries of the AT&M

entity's merchandise to liquidate free of antidumping duties. A final judgment in this action which determines that the AT&M entity was not entitled to a separate rate would be ineffective as to those entries in that circumstance. And yet this case is now on second remand to Commerce on the question of whether that entity is entitled to a separate rate. If the AT&M entity is actually part of the PRC-wide entity, as argued by DSMC, then the margin for the AT&M entity would rise to 164.09 percent without regard to zeroing methodology. This would effectively reverse any revocation made pursuant to the final section 129 determination.

B

The court finds that DSMC has met its burden under the four factors necessary for injunction. Regarding enjoinder against lifting the suspension of liquidation, the court finds DSMC will suffer irreparable harm if entries are liquidated without antidumping duties that may ultimately be determined owed as a result of this litigation. Liquidation by CBP prior to a final decision on the issue of whether the AT&M entity is entitled to a separate rate would deny a substantial portion of the relief that DSMC seeks. The court finds irreparable harm in that the statute would not be able to provide meaningful relief to DSMC in that circumstance. *See FMC Corp.*, *supra*, 3 F.3d at 431 ("although there may be prospective relief available as to future entries, there is no prospective relief -- or, otherwise stated, meaningful relief that can be applied retroactively subsequent to an appeal -to correct an improper liquidation"); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 811 (Fed. Cir. 1983) ("the inability of reviewing courts to meaningfully correct the review determination is irreparable injury that must be considered by the trial court"); *Qingdao Taifa Group Co. v. United States*, 32 CIT 1169, 1170 (2008) ("[i]t has long been established that liquidation of entries after a final determination of duties for a particular period, before the merits can be litigated, is sufficient harm"), *aff'd*, 581 F.3d 1375 (Fed. Cir. 2009); *accord NSK Corp. v. United States*, 31 CIT 1962, 1965 (2007) (liquidation prior to completion of review results and revocation of order would leave plaintiff without meaningful judicial remedy); *PPG Industries*, *supra*, 14 CIT at 21, 729 F. Supp. at 861 (liquidation prior to the court's final decision would constitute irreparable injury).

Regarding the DSMC's likelihood of success on the merits, the appellate court in *Qingdao Taifa* noted that it "takes very seriously the Supreme Court's recent emphasis on the importance of the likelihood of success in the preliminary injunction calculus" but it "also recognize[d] that 19 U.S.C. § 1516a(c)(2) envisions the use of prelimi-

nary injunctions in the antidumping context to preserve proper legal options and to allow for a full and fair review of duty determinations before liquidation." *Qingdao Taifa*, 581 F.3d at 1382. *Some* likelihood of success is required to be shown, albeit in light of the harm to be avoided. *See FMC Corp*., 3 F.3d at 430 ("[n]owhere in Zenith does it suggest that the harm suffered by [appellant] entitles [it] to an injunction absent a showing of likelihood of success on the merits"). DSMC has now twice persuaded the court on the validity of its claims pertaining to the AT&M entity's entitlement to a separate rate, and the matter is now on its second remand to that agency for reconsideration. Slip Op. 12–147. The court therefore finds that DSMC has satisfied its burden on the likelihood of success.

Regarding the balance of hardships, the court finds that any hardship to other parties that would be caused by an injunction against lifting the suspension of liquidation is outweighed by the irreparable harm to DSMC that would occur if an injunction were denied. The defendant will suffer no significant hardship as a result of this court granting the requested injunction against liquidation, because the main effect of the injunction would be to require the continued suspension of liquidation on incoming entries, and suspension of liquidation is at most an "inconvenience" to the government. *See Timken*, 6 CIT at 81, 569 F. Supp. at 70–71; *Target Corp.*, Slip Op. 10–141 at 6. Similarly, the delay in liquidation that would be occasioned by retaining the suspension of liquidation would no more than inconvenience any interested private party. By contrast, DSMC's right to obtain meaningful judicial review is at stake. If the current litigation were to result in a finding that the AT&M entity's LTFV margin is above *de minimis*, the harm to DSMC will be irreversible if the AT&M entity's entries were liquidated in the interim, as no relief will be available for such entries if they are already liquidated. As such, the court finds that the balance of hardships favors DSMC.

Considering the last factor, the court finds that the public interest is best served by effective enforcement of the trade laws, byensuring that accurate amounts of antidumping duties are assessed on entries covered by antidumping duty orders, and by ensuring that entities, to the extent that they continue to sell merchandise at less than fair value, remain subject to antidumping duty orders. *See*, *e.g.*, *Smith-Corona Group v. United States*, 1 CIT 89, 98, 507 F. Supp. 1015, 1023 (1980) ("the public interest is best served by preventing entries subject to assessment of antidumping duties from escaping the correct amount of such duties"), *aff'd*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). As the court held in *Qingdao Taifa*, "[t]here is also little doubt that the public interest is served by per-

mitting the court to reach a considered decision regarding the agency's determination as to whether, and in what amount, duties are owed, before precluding the parties from litigating the issue." 32 CIT at 1171. Here, as in that case, "[n]o harm comes to either side from preserving the *status quo*." *Id*. (italics added) Moreover, it is always in the public interest to allow the courts to conduct a full examination of the facts and the law in any given case, to ensure that justice will prevail. *See Target Corp.*, Slip Op. 10–141 at 6. Accordingly, the public interest would be best served "by the procedural safeguard of an injunction *pendente lite* to maintain the *status quo* of the unliquidated entries until a final resolution of the merits." *Smith-Corona Group*, 1 CIT at 98, 507 F. Supp. at 1023 (italics added). Liquidation of subject imports prior to the completion of the appellate process may prevent the recovery of lawfully owed antidumping duties and prevent the exercise of meaningful judicial review. Consequently, the court finds that granting the request for injunction against liquidation is in the public interest and would avoid these outcomes.

C

In its response to DSMC's motion for preliminary injunction, AT&M argues that DSMC's challenge to the LTFV results is protected by the process of administrative review of the antidumping duty order and entries of its merchandise that has been occurring. AT&M points out that DSMC has separately challenged and enjoined liquidation of entries covered by the period of the now-completed first administrative review (*see* Court No. 13–00078), that the final second administrative review results are due shortly, that the third administrative review has been initiated, that Commerce continues to require the suspension of liquidation for entries subject to the latter two reviews. DSMC may be protected with respect to entries prior to implementation of the final section 129 determination, but it is not with respect to entries occurring thereafter. *See supra*.

AT&M also makes the point that by enjoining lifting of the suspension of liquidation, the court is interfering with the operation of 19 U.S.C. § 1675(a)(1) and (3), which provide that if no appeal is taken entries are to be liquidated as entered or in accordance with the administrative review results by operation of law. Nowhere in the statutes, however, is it indicated that overlapping or complementary injunctive relief is impermissible. The court has broad authority to enjoin liquidation. 19 U.S.C. § 1516a(c)(2) provides that this court "may enjoin the liquidation of some or all entries of merchandise covered by a determination of . . . the administering authority . . .

upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." *See*, *e.g.*, *SKF USA Inc. v. United States*, 28 CIT 170, 181, 316 F. Supp. 2d 1322, 1333 (2004) (power of this court sitting in equity complements Commerce's administrative suspension), *vacated as moot*, 512 F.3d 1326 (Fed. Cir. 2008). The court is not here ruling on a motion to tailor an injunction to accord with the operation of law.

D

The government and AT&M argue that DSMC's claim for an injunction against revocation of the antidumping dutyorder is premature, and that the court lacks jurisdiction to provide the requested relief. The court agrees. The governing statute provides DSMC the opportunity to seek judicial review of any final section 129 determination and of the administrative notice of revocation to exclude the AT&M entity from the antidumping duty order. The necessary administration of U.S. trade laws requires interim action by Commerce. *See supra; see also Diamond Sawblades Mfrs. Coal. v. United States*, 33 CIT ___, 650 F. Supp. 2d 1331 (2009), *aff'd*, 612 F.3d 1348 (Fed. Cir. 2010) (requiring Commerce, consistent with its statutory responsibilities and its affirmative LTFV determination, to enter an antidumping duty order when the U.S. International Trade Commission issues its affirmative material injury determination). Previously, when faced with a similar question in the litigation over the Korean diamond sawblades dumping investigation, the court concluded that an "interlocutory" revocation of an antidumping duty order as a consequence of implementation of a final section 129 determination did not in that instance affect the legal predicate of the original affirmative LTFV determination. The same holds true here.

In support of enjoining revocation DSMC argues that the effects of the section 129 determination cannot be categorized as "ordinary consequences of antidumping duty procedures" which ordinarily "do not constitute irreparable harm." *See* Slip Op. 11–117 at 5; *see also*, *e.g.*, *Matsushita Elec. Indus. Co. v. United States*, 823 F.2d. 505, 509 (Fed. Cir. 1987) . Relying on *Hosiden Corp. v. United States*, 85 F.3d 589 (Fed. Cir. 1996), DSMC argues that unless Commerce is restrained from excluding the AT&M entity from the antidumping duty order, it may "be without recourse" if it ultimately prevails in this litigation because there are no "apparent" mechanisms for restoring a company to an antidumping duty order's ambit once the company is excluded in accordance with 19 C.F.R. § 351.204(e). DSMC's Mot. Br. at 8, 13. DSMC argues that the reason Commerce must be enjoined

from excluding the AT&M entity from the order is because unlike the action regarding the Korean antidumping duty order the exclusion of only one company is at issue.

That does not appear to be a meaningful distinction. In the parallel Korean antidumping matter, after liquidation was preliminarily enjoined the government filed a motion to lift the injunction in order to "fully" implement a section 129 determination that resulted in zero margins for all imports from Korea. The motion was denied, Slip Op. 12–46 at 13, and in their argument the domestic industry had taken the position that it did not need to separately challenge revocation because the injunction against lifting the suspension of liquidation adequately protected their interests. The court agreed, finding that the DSMC maintained a right of reinstatement, and also that Commerce's revocation was essentially interlocutory.

Here, exclusion of the AT&M entity from the antidumping duty order would constitute harm if the final result of this action is that the AT&M entity is ineligible for a separate rate. However, it does not appear that such action alone is "irreparable" or irreversible. Unlike the liquidation of entries of AT&M products or exports, the revocation of the order as to the AT&M entity is subject to a meaningful remedy, should this action determine that the AT&M entity did not qualify for a separate rate. Both Commerce and the court retain the power to undo any such interlocutory action as necessary to harmonize with a final decision on the merits of the underlying litigation. *Cf.* 19 U.S.C. § 1516a(c)(3); Slip Op. 11–137 at 13.

A separate order to the above effect is issued herewith.

Dated: March 28, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–43

UNITED STATES, Plaintiff, v. CALLANISH LTD., Defendant,

Before: Timothy C. Stanceu, Judge
Court No. 03–00658

[Awarding judgment by default on plaintiff's claim to recover civil penalty]

Dated: March 28, 2013

Domenique Kirchner, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief were *Kevin B. Marsh*, Assistant Chief Counsel, and

Karen R. Hiyama, Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION

Stanceu, Judge:

Plaintiff United States seeks to recover a civil penalty under section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592 (2006) ("section 592"), from Callanish Ltd. ("Callanish"), a British corporation with a business address in Scotland. Plaintiff alleges that Callanish, by means of fraud, unlawfully "introduced or aided or abetted another to enter or introduce, or attempt to enter or introduce" capsules of evening primrose oil ("EPO") into the commerce of the United States on fifty-two consumption entries made between September 1, 1988 and March 24, 1992. Second Am. Compl. ¶¶ 4, 18 (Dec. 22, 2010), ECF No. 25.

Before the court is plaintiff's renewed request for a judgment by default, in which plaintiff seeks a civil penalty of $9,943,249.12, an amount equal to the appraised domestic value of the merchandise, as determined by U.S. Customs and Border Protection ("Customs" or "CBP"), on the fifty-two merchandise entries. Pl.'s Notice of Filing of New Appraisal & Renewed Req. for Default J. as to Callanish Ltd. (May 1, 2012), ECF No. 34 ("Pl.'s Req."). For the reasons stated in this Opinion, the court will award a civil penalty in the amount sought by plaintiff, the statutory maximum permitted under section 592 for a violation occurring by fraud.

I. BACKGROUND

Background information on this case is included in the court's previous opinions. *See United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT __, __, Slip Op. 09–49, pp. 3–6 (May 20, 2009) ("*Scotia Pharamaceuticals*"), *United States v. Callanish Ltd.*, 34 CIT __, __, Slip Op. 10–124, pp. 2–5 (Nov. 2, 2010) ("*Callanish I*"), and *United States v. Callanish*, 36 CIT __, __, Slip Op. 12–15, pp. 2–5 (2012) ("*Callanish II*"). Supplementary background information is provided herein.

In *Scotia Pharmaceuticals*, the court denied plaintiff's initial request for a default judgment against Callanish because plaintiff's original complaint failed to allege any acts or omissions by Callanish that, if presumed true, would amount to a fraudulent violation of section 592. *Scotia Pharmaceuticals*, 33 CIT at __, Slip Op. 09–49, at 9. In *Callanish I*, the court declined to award a default judgment upon plaintiff's first amended complaint, ruling that this complaint, in alleging that the domestic value of the merchandise on the fifty-two entries was $17,734,926, "lacks any well-pled fact concerning the domestic value of the merchandise or how that value was deter-

mined." *Callanish I*, 34 CIT at __, Slip Op. 10–124, at 6–7. In *Callanish II*, the court noted that plaintiff's second amended complaint (the "Complaint"), although alleging that the merchandise had been appraised according to law, stated that the merchandise had been appraised simply by doubling the entered value of the merchandise, a method the court held not to satisfy the requirements of § 162.43(a) of the Customs regulations (19 C.F.R. § 162.43(a) (2011)). *Callanish II*, 36 CIT at __, Slip Op. 12–15, at 6. The court ordered Customs to conduct "a new appraisal to determine the domestic value of the merchandise on the fifty-two entries at issue in this case" and "[held] in abeyance any ruling on plaintiff's application for a default judgment pending resolution of the appraisement." *Id.* at __, Slip Op. 12–15, at 11. On May 1, 2012, plaintiff submitted an appraisal estimating the domestic value of the merchandise to be $9,943,249.12 and a renewed request for a default judgment awarding a civil penalty in that amount. Pl.'s Req. 1–2. In a letter dated August 10, 2012, the court requested that plaintiff file a copy of a Customs Directive, "Appraising Seized Property," CBP Directive No. 5240–001A § 5.11 (Nov. 13, 2005), to which plaintiff had directed the court for a description of the procedure it used in the new appraisement. Plaintiff filed the requested document on August 14, 2012. Pl.'s Not. of Filing of Redacted Doc. (Aug. 14, 2012), ECF No. 36.

II. DISCUSSION

The court has jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1) (2006). Under section 592, the court determines all issues *de novo,* including the amount of any penalty. 19 U.S.C. § 1592(e)(1). In evaluating an application for judgment by default, the court accepts as true all well-pled facts in the complaint but must reach its own legal conclusions. *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (quoting *Thomson v. Wooster*, 114 U.S. 104, 113 (1885) (internal quotations and other citations omitted)); 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2688, at 63 (3d ed. 1998).

Under section 592(a), 19 U.S.C. § 1592(a), it is unlawful for any person, by fraud, gross negligence, or negligence, to enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of material and false documents, statements, or acts or material omissions, or to aid or abet another to do so. 19 U.S.C. § 1592(a)(1)(A), (B). Penalty liability accrues "[w]ithout regard to whether the United States is or may be deprived" of

lawful revenue. *Id.* § 1592(a)(1). Accordingly, in ruling on plaintiff's application the court must determine whether the well-pled facts in the Complaint, if accepted as true, establish liability for a violation of section 592(a) and if so, the amount of the civil penalty to be awarded.

The entries giving rise to this case occurred during a period in which EPO could not be sold legally in the United States, the U.S. Food and Drug Administration ("FDA") having determined and having announced in a series of import alerts beginning in 1985 that EPO was not approved for use as a drug or food supplement. Second Am. Compl. ¶¶ 5, 12–13, 16, 19, 86. During that period, the FDA directed Customs to detain all shipments of EPO. *Id.* ¶ 5 (citing Admin. R. Doc. Nos. 70–75).

The Complaint contains a complex set of allegations involving numerous parties in addition to Callanish.[1] However, the court is able to find within the complaint, construed as a whole, sufficient factual allegations that, if presumed true, establish that Callanish has incurred civil penalty liability for aiding or abetting a fraudulent violation of section 592 as to each of the fifty-two entries identified in the complaint.

Callanish is alleged to have knowingly participated in a criminal scheme under which EPO capsules were clandestinely imported into the United States on the fifty-two consumption entries. The alleged scheme involved two importers of record, named in the complaint as Pine Lawn Farms ("PLF") and Genesis II of Mid-America ("Genesis II"). Second Am. Compl. ¶¶ 10, 12. Chester Lockhart, a resident of Missouri who served as the principal of Genesis II and agent of PLF, pleaded guilty to a violation of 18 U.S.C. § 542 for fraudulently importing EPO by means of those same fifty-two entries. *Id.* ¶ 14, App. A104–34. The criminal information, incorporated by reference into the complaint, sets forth additional details of the fraudulent scheme to conceal from Customs and the FDA the fact that the merchandise was EPO and that the actual U.S. buyer of the merchandise was Health Products International, Inc. ("HPI"), an entity known to the FDA and Customs as a marketer of EPO for sale in the

[1] Not all of the allegations of false statements made upon entry allege that the statements were made with fraudulent intent, and the court cannot conclude, absent additional allegations, that all of the alleged false statements were material within the meaning of section 592. *See*, *e.g.*, Second Am. Compl. ¶ 22 (Dec. 22, 2010), ECF No. 25 (alleging that the Netherlands was falsely declared as the country of origin on several entries without alleging that the statements were made to intentionally mislead Customs, without setting forth facts establishing materiality, and stating, inconsequentially, that "[i]t is necessary for Customs to determine the true country of origin as different countries receive different preferences."). Although the complaint does not so plead, and the court does not so conclude, the circumstances of the false country of origin designation may have had the potential to conceal an unlawful import scheme.

United States as a food supplement. *Id*.

On fifty of the fifty-two entries, entry documentation falsely and variously described the capsules as containing Vitamin E or as containing "Alpha-Tocopheryl" or "Alpha-Tocopherol," "Tocopherols," or "derivatives" of tocopherols, all of which terms refer to forms of Vitamin E or to names by which Vitamin E is known. *Id*. ¶¶ 26–46, 48–49, 51, 53–59, 60, 62–63, 65–84. For two entries, the court is not able to conclude that a false merchandise description was used. Documentation on one such entry described the merchandise as "Hard Gelatin Capsules containing Vegetable Seed Oil," *id.* ¶ 47, a description that the complaint characterizes as false but that is true in a technical sense. For another entry, the complaint does not provide a merchandise description but alleges that the merchandise was entered without being identified as EPO. *Id.* ¶ 60.

All the descriptions of the capsules as containing some form of Vitamin E were false and were material, as Customs would thereby be prevented from effectuating the FDA controls on EPO importations. For the remaining two entries, the fact that the merchandise consisted of capsules of EPO, a substance for which the FDA prohibited importation absent its approval, is a material fact. Entry documents submitted to Customs are required to have "[a] detailed description of the merchandise, including the commercial name by which each item is known." 19 U.S.C. § 1481(a)(3) (1988). Therefore, entry documentation that omitted or concealed the fact that the merchandise was EPO contained a "material omission" within the meaning of section 592(a). From the allegations set forth, the court concludes that the complaint pleads facts that, if presumed true, establish for all fifty-two entries of EPO that the importers of record named in the complaint violated section 592(a) by entering the merchandise by means of material false statements or material omissions.

The complaint pleads sufficient facts to establish that the two importers of record violated section 592 by means of fraud on all fifty-two entries of merchandise. With respect to all of the entries, Mr. Lockhart pleaded guilty to the criminal information, which recounts the intentional use of the descriptions of the merchandise as forms of Vitamin E and other intentional steps taken by Lockhart, HPI, and others to conceal from Customs and the FDA the true nature of the merchandise and the identity of the buyer. Compl. ¶ 14, App. A104–34.

When fraud is alleged under section 592, "liability for aiding or abetting [that fraud] requires . . . proof of knowledge of unlawfulness"

or "intent to violate the law." *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1338 (Fed. Cir. 1999). The complaint meets this standard. It alleges that from 1988 to 1992 Callanish was "the manufacturer and shipper of the EPO at all times relevant to this complaint." Compl. ¶ 8. It further alleges, for each of the fifty-two entries at issue, that "Callanish shipped the EPO with knowledge that the importation of EPO into the United States was illegal" and that the EPO "would be entered under cover of false documents." *Id.* ¶¶ 24–48, 53–57, 59, 61–63, 65–70, 72–84.

The civil penalty under section 592 cannot exceed the domestic value of the merchandise. 19 U.S.C. § 1592 (c)(1), (e). Pursuant to its own regulation, Customs is to determine the domestic value of merchandise according to the price at which that or similar merchandise was freely offered for sale in the ordinary course of trade. 19 C.F.R. § 162.43 (1988). Here, however, Customs informs the court that there was no available information on the price at which EPO would have sold in the relevant time period. Customs, therefore, appraised the merchandise based on landed cost, according to a presumption that the importer would not have sold the merchandise for less than what it cost to import the merchandise.[2] Decl. of Yvonne P. Williams ¶¶ 3–6, 10–11 (May 1, 2012), ECF No. 34–1; "Appraising Seized Property," CBP Directive No. 5240–001A § 5.11 (Nov. 13, 2005). The court considers this a reasonable presumption in the circumstance presented, in which there was no legitimate market because sale of EPO as a dietary supplement was unlawful at the time in question. The amount of the new appraisal was $9,943,249.12. *Id*. ¶ 11. This court determines this appraisal of domestic value to be reasonable, lawful, and sufficient to allow recovery of a civil penalty under section 592.

The amount of the penalty in a section 592 action is within the sound discretion of the court, 19 U.S.C. § 1592(e)(1), but by statute, *id.* § 1592(c)(1), cannot exceed the domestic value of the merchandise. *See United States v. Ford Motor Co.*, 463 F.3d 1268, 1285 (Fed. Cir. 2006) ("A trial court has considerable discretion to award civil penalties within the statutory range."). As an aggravating factor, the court notes that the defendant and importers of record resorted to a scheme to circumvent an import control imposed by the FDA—an agency charged with protecting public health and safety.[3] There are

[2] The appraising officer defined "landed cost" as "the cost of the merchandise when last purchased, plus all duties, fees, broker's charges, . . . unloading charges, and U.S. freight charges to bring the property to the importer's premises." Decl. of Yvonne P. Williams ¶ 5 (May 1, 2012), ECF No. 34–1 (citing "Appraising Seized Property," CBP Directive No. 5240001A § 5.11 (Nov. 13, 2005)).

[3] Since these entries occurred, U.S. Customs and Border Protection has recognized a public health and safety violation as an aggravating factor to consider when determining the

no apparent mitigating circumstances that convince the court to award a penalty in a lower amount. For these reasons, the court will award a penalty in the amount sought by plaintiff.

III. CONCLUSION

Based on the well-pled facts in plaintiff's Second Amended Complaint and plaintiff's revised appraisal of the domestic value of the merchandise, the court awards plaintiff a civil penalty of $9,943,249.12 against defendant Callanish. The court will enter a default judgment in this amount plus post-judgment interest as provided by law.

Dated: March 28, 2013
New York, New York

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

Slip Op. 13–44

WIND TOWER TRADE COALITION, v. UNITED STATES, DEFENDANT.

Plaintiff, Before: Leo M. Gordon, Judge
Court No. 13–00080
Court No. 13–00081
Court No. 13–00082

[Motions for preliminary injunction denied.]

Dated: March 29, 2013

Alan H. Price, *Daniel B. Pickard*, *Robert E. DeFrancesco, III*, *Lori E. Scheetz*, and *Derick Holt*, Wiley Rein LLP of Washington, DC for Plaintiff Wind Tower Trade Coalition.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel was *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce of Washington, DC.

Bruce M. Mitchell, *Ned H. Marshak*, *Mark E. Pardo*, *Andrew B. Schroth*, and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY for Defendant-Intervenors CS Wind China Co., Ltd., CS Wind Vietnam Co., Ltd., and CS Wind Corporation.

Bruce M. Mitchell, *Ned H. Marshak*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY for Defendant-Intervenor Titan Wind Energy (Suzhou) Co., Ltd.

amount of penalty for a violation of 19 U.S.C. § 1592. *See* 19 C.F.R. Part 171 App. B(F)(2)(a)(ii) (2001).

Mark D. Davis, Davis & Leiman P.C., of Washington, DC for Defendant-Intervenor Chengxi Shipyard Co., Ltd.

Elliot J. Feldman and *Michael S. Snarr*, BakerHostetler, of Washington, DC for Defendant-Intervenor Siemens Energy Inc.

OPINION AND ORDER

Gordon, Judge:

These actions involve the administration of trade remedy provisional measures (cash deposits) pursuant to Sections 706(b) and 736(b) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671e(b) & 1673e(b),[1] by the U.S. Department of Commerce ("Commerce") at the conclusion of the antidumping and countervailing duty investigations covering utility scale wind towers from the People's Republic of China ("China") and the antidumping investigation covering that same merchandise from the Socialist Republic of Vietnam ("Vietnam"). *Utility Scale Wind Towers from the People's Republic of China*, 78 Fed. Reg. 11,146 (Dep't of Commerce Feb. 15, 2013) (antidumping duty order); *Utility Scale Wind Towers from the People's Republic of China*, 78 Fed. Reg. 11,152 (Dep't of Commerce Feb. 15, 2013) (countervailing duty order); *Utility Scale Wind Towers from the Socialist Republic of Vietnam*, 78 Fed. Reg. 11,150 (Dep't of Commerce Feb. 15, 2013) (antidumping duty order) (collectively, "*Orders*"). In those investigations the U.S. International Trade Commission ("ITC") found injury to the domestic industry in an evenly divided vote (3–3). *Utility Scale Wind Towers from China and Vietnam*, 78 Fed. Reg. 10,210 (Int'l Trade Comm'n Feb. 13, 2013); *see also Utility Scale Wind Towers from China and Vietnam*, USITC Inv. Nos. 701-TA-486 and 731-TA-1196 (Final), USITC Pub. 4372 (Feb. 2013); *see also* 19 U.S.C. § 1677(11) (tie-breaking provision). Among the three affirmative votes, two Commissioners found material injury, with the third finding threat, but no material injury in the absence of provisional measures. 78 Fed. Reg. 10,210 at n.2. Commerce, in turn, has said that it will instruct U.S. Customs and Border Protection ("Customs") to release the cash deposits on subject merchandise entered before the date of the ITC's final determination in accordance with 19 U.S.C. §§ 1671e(b)(2) and 1673e(b)(2). *See Orders*.

Plaintiff seeks preliminary injunctions to (1) enjoin Commerce from terminating the suspension of liquidation and ordering the refund of cash deposits for entries of subject merchandise that were entered or withdrawn from warehouse for consumption prior to February 13, 2013; and (2) enjoin Customs during the pendency of this litigation

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2006 edition.

before this court, including any subsequent remands and subsequent appeals, from discontinuing the suspension of liquidation and refunding cash deposits on the subject merchandise. Pl.'s Amend. Mot for Temporary Restraining Order & Prelim. Inj. at 1, ECF No. 15 (Court No. 13–00080).

The court initially denied Plaintiff's applications for temporary restraining orders ("TRO") and preliminary injunctions because it believed Plaintiff had not made an adequate showing on the likelihood of success on the merits. Order Denying Temp. Restraining Order, Feb. 28, 2013, ECF No. 21 (Court No. 13–00080) ("Feb. 28 Order"). Plaintiff then submitted a supplemental response further explaining its position on its likelihood of success. Pl.'s Resp. to the Court's Mem. and Order, Mar. 1, 2013, ECF No. 22 (Court No. 13–00080) ("Pl.'s Supp. Br."). Although the court still harbored doubts about Plaintiff's showing on the likelihood of success, the court entered a TRO to allow the other interested parties an opportunity to respond to Plaintiff's motions. Second Mem. and Order on Pl.'s Application for a TRO and Prelim. Inj., Mar. 4, 2013, ECF No. 23 (Court No. 13–00080) ("Mar. 4 Order"). Defendant and Defendant-Intervenors, CS Wind Corporation, CS Wind China Co., Ltd., and CS Wind Vietnam Co., Ltd. (collectively "CS Wind"), have since expressed their opposition. Def.-Intervenors' Opp'n to Pl.'s Mot. for Prelim. Inj., Mar. 8, 2013, ECF No. 25; Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj., Mar. 15, 2013, ECF No. 38. For the reasons set forth below, the court will enter an order denying Plaintiff's motions.

I. STANDARD GOVERNING ISSUANCE OF PRELIMINARY INJUNCTION

To prevail on a motion for a preliminary injunction, the movant must establish that (1) the movant is likely to succeed on the merits, (2) the movant is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips movant's favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *American Signature, Inc. v. United States*, 598 F.3d 816, 823 (Fed. Cir. 2010).

In antidumping and countervailing duty cases preliminary injunctions against liquidation have become almost automatic due to the retrospective nature of U.S. trade remedies, *see* 19 C.F.R. § 351.212.(a), the length of the judicial review process, and the cruciality of unliquidated entries for judicial review, *see Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983); *SKF USA, Inc. v. United States*, 512 F.3d 1326, 1329 (Fed. Cir. 2008) ("The *Zenith* rule renders a court action moot once liquidation occurs."); *see also Qingdao Taifa Group Co. v. United States*, 581 F.3d 1375,

1381–82 (Fed. Cir. 2009) ("[T]he court . . . recognizes that 19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions in the antidumping context to preserve proper legal options and to allow for a full and fair review of duty determination before liquidation."). The court has managed the irreparability of liquidation by employing a sliding scale that requires a somewhat lower burden on the likelihood of success. *Id.* In most antidumping and countervailing duty cases, motions for preliminary injunctions are typically on consent. *Cf. Ugine & Alz Belgium v. United States*, 452 F.3d 1289, 1297 (Fed. Cir. 2006) (reversing denial of preliminary injunction despite all parties consenting "to entry of a preliminary injunction prior to the trial court's ruling"). The other parties in this action have not consented to Plaintiff's motions.

Notwithstanding the near automaticity of preliminary injunctions in antidumping and countervailing duty cases, they are not awarded as of right. *See Qingdao Taifa*, 581 F.3d at 1382 (acknowledging Supreme Court's "emphasis on the importance of the likelihood of success in the preliminary injunction calculus" in *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008)). The movant must still demonstrate at least a fair chance of success on the merits. *Id.* (quoting *U.S. Ass'n of Imps. of Textiles & Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005)); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) ("Absent a showing that a movant is likely to succeed on the merits, we question whether the movant can ever be entitled to a preliminary injunction unless some extraordinary injury or strong public interest is also shown.").

II. Discussion

A. Background

Following a preliminary affirmative determination by Commerce, provisional measures take effect pursuant to 19 U.S.C. §§ 1671b(d)(2), 1673b(d)(2), which suspend liquidation and require cash deposits for entries of merchandise covered by the investigation. These remedies are provisional because at that point in the investigation only half of the trade remedy equation has been satisfied; the other half is the ITC's final injury determination, *see* 19 U.S.C. §§ 1671(a)(2), 1673(2), which dictates whether the provisional cash deposits ripen into antidumping or countervailing duties, *see* 19 U.S.C. §§ 1671e(b) and 1673e(b).

An ITC final injury determination comprises the votes of the six individual Commissioners, each of whom chooses from among a menu of statutorily defined choices (no injury, material injury, threat of material injury, or material retardation of establishment of industry).

19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1), 1677(7); *see also U.S. Steel Group v. United States*, 96 F.3d 1352, 1360 (Fed. Cir. 1996) ("The Commission makes its determinations by tallying the votes of the six individual commissioners."). When a Commissioner votes for threat of material injury, that Commissioner must also make an additional finding about whether the domestic industry would have been materially injured in the absence of (or "but for") the provisional measures. 19 U.S.C. §§ 1671d(b)(4)(B), 1673d(b)(4)(B). This additional finding correlates with sections 1671e(b) and 1673e(b), and depending on the other Commissioners' votes, may affect whether the cash deposits provisionally in place are refunded under the "special rule" or retained under the "general rule" (and applied against any antidumping and countervailing duties imposed). The additional "but for" findings, when relevant, enable Commerce to identify whether the ITC has determined that a domestic industry was materially injured during the provisional measures period coincident with any sales at less than fair value or countervailable subsidies, thus completing the trade remedy equation for entries covered by provisional measures.

Plaintiff challenges Commerce's application of 19 U.S.C. §§ 1671e(b) and 1673e(b), which establish a "general" and "special" rule for handling any provisional measures in place when antidumping or countervailing duty orders issue. The "general rule" applies if the ITC finds material injury or threat with an affirmative "but for" finding, and duties are imposed on any provisionally suspended entries. 19 U.S.C. §§ 1671e(b)(1), 1673e(b)(1). Alternatively, the "special rule" applies if the ITC finds threat of material injury with a negative "but for" finding, or material retardation of the establishment of an industry, and any provisional cash deposits are refunded because Commerce's orders are effective from the publication date of the ITC's final determination. 19 U.S.C. §§ 1671e(b)(2), 1673e(b)(2).[2]

The general and special rules of sections 1671e(b) and 1673e(b) were enacted by the Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144, which implemented the United States' international commitments at the conclusion of the Tokyo Round of Multilateral Trade Negotiations, including the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade addressing antidumping duties, and the Agreement on Interpretation and Appli-

[2] Commerce has combined the two operative rules into one regulation, 19 C.F.R. § 351.211(b)(3). Although the regulation is somewhat more accessible and readable than sections 1671e(b) and 1673e(b), it essentially just paraphrases them, meaning that the issue here does not implicate Commerce's interpretation of its regulation, but its application and interpretation of the statutory provisions themselves. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("the existence of a parroting regulation does not change the fact that the question . . . is not the meaning of the regulation but the meaning of the statute.").

cation of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade addressing countervailing duties. The purpose of sections 1671e(b) and 1673e(b) was to implement the provisions of those agreements *prohibiting* the collection of duties during the provisional measures period "*unless* the final determination is that there is material injury or threat of material injury which, but for provisional measures, *e.g.*, suspension of liquidation, during the investigation, would have been material injury." S. Rep. No. 96–249, at 59, 77 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 463 (emphasis added). Both of those agreements recognize that, without a finding of material injury or threat with an affirmative "but for" finding, there is no affirmative injury determination to support the imposition of duties during the provisional measures period. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Apr. 12, 1979), GATT B.I.S.D. (26th Supp.) at 171, 181 (1980) ("Provisional measures may be taken only after a preliminary affirmative finding has been made that there is dumping and that there is sufficient evidence of injury, as provided for in (a) to (c) of paragraph 1 of Article 5."); Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Apr. 12, 1979), GATT B.I.S.D. (26th Supp.) at 56, 63 (1980) ("Provisional measures may be taken only after a preliminary affirmative finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2, paragraph 1 (a) to (c).").[3]

The statute does not explicitly address whether the general or special rule applies to the fragmented ITC voting pattern presented in these cases: an evenly divided affirmative determination comprising three negative votes and three affirmative votes, with two commissioners voting for material injury and one voting for threat with a "but for" negative material injury finding. It is, however, a voting

[3] The same restrictions on the imposition of duties during the provisional measures period carried forward into the current Agreement on Implementation of Article VI concerning antidumping duties and the Agreement on Subsidies and Countervailing Measures, both adopted at the conclusion of the Uruguay Round of Multilateral Trade Negotiations in 1994. "Article 10 provides several exceptions to this general principle that . . .{"antidumping duties, in the case of a final determination, will apply to imports entered after" the final determination is made} . . . that permit the national authorities to apply final duties to imports entered at an earlier stage of an investigation. First, as under current U.S. law, national authorities may apply definitive antidumping duties from the date of application of provisional measures if the final injury determination is based on present material injury. Second, as under current law, national authorities may apply definitive antidumping duties from the date of application of provisional measures if the final injury determination is based on threat of material injury if the authorities determine that but for the application of provisional measures injury would have occurred." Uruguay Round Amendments Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 816 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4158.

pattern that the court has addressed once before in *MBL (USA) Corp. v. United States*, 16 CIT 108, 787 F. Supp. 202 (1992) ("*MBL*").

In *MBL* the court reviewed Commerce's interpretation of 19 U.S.C. § 1673e following an ITC injury determination with the same fragmented voting pattern here. There were three negative votes and three affirmative votes, including two for material injury, and one for threat of material injury with a "but for" negative finding pursuant to 19 U.S.C. § 1673d(b)(4)(B). Commerce did not apply the special rule of section 1673e(b)(2) despite the 4 negative votes of material injury for the provisional measures period, and instead planned to apply the general rule of 19 U.S.C. § 1673e(b)(1) and impose duties on the suspended entries. The court reviewed Commerce's interpretation of 19 U.S.C. § 1673e(b) under the second prong of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), and determined that Commerce's interpretation was an unreasonable application of the statute to which the court could not defer.

The court noted Commerce's position of ignoring the three negative votes and focusing on the three affirmative votes: "Commerce first determines whether the Commission as a whole has made an affirmative or a negative determination. If Commerce determines that the Commission has made an affirmative determination, it then analyzes the affirmative votes of the Commissioners to determine the appropriate date for the imposition of antidumping duties." *MBL*, 16 CIT at 113–14, 787 F. Supp. at 207–08 (quoting government brief at 15–16). The court questioned the reasonableness of this approach:

> If this was the approach, whether based on agency practice or not, the court is not persuaded that it led to the proper adherence to 19 U.S.C. § 1673e(b). To be sure, subsection (2) thereof does not refer to a "negative" determination; it refers to a "final determination" of the Commission. And, while the final determinations in these cases were affirmative under section 1677(11), if two of the three commissioners reporting negative views had considered the facts as constituting instead threats of material injury and then made negative but-for findings, as Commissioner Rohr did, the special rule of subsection (2) would have been applied. Yet, although those three actually reached outright negative conclusions, the dictate of section 1673e(b)(1) was apparently followed by the ITA—in the face of the fact that a majority of the ITC members had found that the domestic industry was not being materially injured, and would not have been during the time in question in the absence of provisional relief. Inherent in such negative views is the realization that antidumping duties will not be imposed, just as affirmative

> views can signify imposition of such duties from the date of a preliminary less-than-fair-value determination rather than from the date of a final decision on material injury.

Id. The *MBL* court did some simple math and could not understand how two votes for and four votes against material injury during the provisional measures period could reasonably justify application of the general rule.

In this case respondents alerted Commerce to *MBL* and argued that Commerce should therefore apply the special rule. Plaintiff responded, arguing that there were conflicting precedents at the U.S. Court of International Trade and that Commerce had a practice of applying the general rule to the voting pattern in question. Commerce ultimately applied the special rule, expressly noting the holding of *MBL* in each of the Orders. *Utility Scale Wind Towers from the People's Republic of China*, 78 Fed. Reg. 11,146, 1147 n.8 (Dep't of Commerce Feb. 15, 2013) (antidumping duty order) (other footnotes omitted); *see also Utility Scale Wind Towers from the People's Republic of China*, 78 Fed. Reg. 11,152, 11,153 n.8 (Dep't of Commerce Feb. 15, 2013) (countervailing duty order); *Utility Scale Wind Towers from the Socialist Republic of Vietnam*, 78 Fed. Reg. 11,150, 11,151–52 n.11 (Dep't of Commerce Feb. 15, 2013) (antidumping duty order).

B. Likelihood of Success on the Merits

Plaintiff contends that Commerce erred in applying the special rule and must instead follow the general rule of sections 1671e(b)(1) and 1673e(b)(1). Given *MBL*, the court was initially skeptical of any likelihood of success on this issue. *See* Feb. 28 Order; Mar. 4 Order. Having since reviewed the responses of Defendant and CS Wind, the court is now even further persuaded that this issue is just not winnable. Beginning from the premise that Congress did not address the specific ITC voting pattern presented here, it is not difficult to sustain Commerce's interpretation of sections 1671e(b) and 1673e(b) as a reasonable construction of the statute to which the court must defer.

When the court examines the lawfulness of Commerce's statutory interpretations, it employs the two-pronged test established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). The court first examines "whether Congress has directly spoken to the precise question at issue," and if it has, the agency and the court must honor the clear intent of Congress. *Id.* at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's

answer is based on a permissible construction of the statute." *Id.* at 843. "Any reasonable construction of the statute is a permissible construction," *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (citation and quotation marks omitted), and Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous." *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (citation omitted). To determine whether Commerce's interpretation is reasonable, the court "may look to 'the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole.'" *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007) (quoting *NSK Ltd. v. United States*, 26 CIT 650, 654, 217 F. Supp. 2d 1291, 1297 (2002)).

Commerce's application of the special rule to the fragmented ITC voting pattern here (3 negative, 2 material injury, 1 threat plus "but for" negative) flows reasonably from the specific statutory provisions, their purposes, and the statute as a whole, as the court explained in *MBL*. The statute states that imposing an earlier effective date for the orders under the general rule is proper when the ITC "finds material injury or threat of material injury [with an affirmative "but for" determination.]" 19 U.S.C. §§ 1671e(b)(1), 1673e(b)(1). And here, although the Commission reached an affirmative injury determination, it was fragmented with a majority of four Commissioners finding that the domestic industry was not materially injured during the provisional measures period. This was the same circumstance analyzed and explained 20 years ago by the court in *MBL*. Commerce's decision to apply the special rule consistent with the analysis of *MBL* is reasonable.

Plaintiff insists that the special rule cannot apply because only one Commissioner voted for threat. Pl.'s Supp. Br. at 10. Plaintiff misunderstands the consequences of a fragmented ITC affirmative determination. The fragmented determination here necessarily involved a finding that the domestic industry was at least threatened with material injury because in addition to the one threat finding, the two broader material injury findings inherently entail the narrower finding of threat. *Cf. MBL*, 16 CIT at 113–14, 787 F. Supp. at 208 (explaining that three negative determinations inherently entailed negative "but for" determinations as well). And in trying to resolve the proper treatment of the provisional measures under the general or special rule, it was reasonable for Commerce to interpret the ITC's fragmented affirmative determination based upon the narrower ground of the one vote for threat plus the negative "but for" determination rather than the two Commissioners' material injury votes that

were outnumbered by the *four* Commissioners voting against material injury during the provisional measures period.

Plaintiff also contends that there are conflicting precedents at the Court of International Trade. Pl.'s Supp. Br. at 8–9. The court does not agree. There is one applicable precedent covering the ITC voting pattern presented in this case: *MBL*. The earlier case upon which Plaintiff relies, *Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 728 F. Supp. 730 (1989), did not involve the same ITC voting pattern, nor did it involve Commerce's interpretation of an ITC final determination, as Commerce was not a party to the action. The court in *MBL* examined the *Metallverken* decision and found it of limited persuasive weight on the question of the proper treatment of provisional measures. *MBL*, 16 CIT at 111–12, 787 F. Supp. at 206.

Finally, Plaintiff contends that Commerce's application of the special rule represents an unexplained departure from agency practice. Pl.'s Supp. Br. at 8, 12. Plaintiff attempts to identify an agency "practice" from *Silicomanganese from Brazil*, 59 Fed. Reg. 66,003 (Dep't of Commerce Dec. 22, 1994) (antidumping duty order), a single instance post-dating *MBL* in which Commerce appears to have treated the same ITC voting pattern as requiring imposition of duties from the date of suspension of liquidation following a preliminary affirmative determination by Commerce. Of note, the lone respondent in the investigation withdrew its participation. *See Silicomanganese from Brazil*, 59 Fed. Reg. 55,432, 55,433 (Dep't of Commerce Nov. 7, 1994) (final antidumping determination). Despite Commerce not explaining its reasoning, or mentioning *MBL*, *see Silicomanganese from Brazil*, 59 Fed. Reg. at 66,003–04, Plaintiff overstates this single, nearly 20-year-old post-*MBL* proceeding as Commerce "disagree[ing] with the [C]ourt's finding in *MBL*" and establishing or continuing an operative agency "practice" regarding provisional measures. Pl.'s Supp. Br. at 12.

More fundamentally though, Commerce's interpretation of the statute in *Silicomanganese from Brazil* does not preclude Commerce's interpretation here. To the extent *Silicomanganese from Brazil*, a single case from 19 years ago, can be said to establish any sort of post-*MBL* agency practice, Commerce provided an explanation in the *Orders* citing directly to *MBL* as to why interpreting the statute in a different manner is reasonable. Under the *Chevron* framework initial agency interpretations are not "instantly carved in stone" and may change so long as an agency provides a reasonable basis for doing so. *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991); *see also National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze

the agency's interpretation under the *Chevron* framework. . . . For if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" (internal citations omitted)). In issuing the *Orders* Commerce provided an interpretation of the statute that has already been validated by the court in *MBL*.

Given the reasonableness of Commerce's application of the special rule, the court cannot direct Commerce by affirmative injunction to apply the general rule, leaving Plaintiff without a fair chance of success in this action.

C. Irreparable Injury

As noted above, parties tend to establish irreparable injury fairly easily in trade cases because of the negative consequences of liquidation. Here, the court believes that Plaintiff has established such injury because once the entries covered by the provisional measures are liquidated, the court cannot provide any meaningful relief for Plaintiff. Both Defendant and CS Wind suggest that Plaintiff may not satisfy the *Zenith* standard of irreparable harm because the underlying proceeding was an investigation, not an administrative review. *See American Spring Wire Corp. v. United States*, 7 CIT 2, 5, 578 F. Supp. 1405, 1408 (1984) (if court is reviewing "a final agency determination under 19 U.S.C. §§ 1303, 1671d or 1673d, the party seeking injunctive relief must make some showing of immediate and irreparable injury beyond the mere invocation of *Zenith* ."). The court, though, does not *see* much merit in this contention and believes Plaintiff has easily satisfied the *Zenith* standard.

D. Balance of Equities

Although Plaintiff appears to have established irreparable injury in the absence of an injunction, and this usually is enough to tip the equities in the movant's favor in a trade case, here, in addition to the problem of Plaintiff failing to establish a likelihood of success on the merits, the unique aspects of provisional measures adds additional considerations to the balance of the equities. Provisional measures are accorded distinct treatment in the antidumping and countervailing duty laws. They take effect when Commerce issues a preliminary affirmative less than fair value or countervailing duty determination, and generally "may not remain in effect for more than 4 months." 19 U.S.C. §§ 1671b(d), 1673b(d). An injunction against liquidation for the pendency of the litigation would necessarily prolong the provisional measures well beyond their statutory limits. Another characteristic of provisional measures is that there is no interest on refunds

of provisional cash deposits under the special rule. *See* 19 U.S.C. §§ 1671e(b)(2), 1673e(b)(2), 1677(g); *see also Dynacraft Indus., Inc. v. United States*, 24 CIT 987, 118 F. Supp. 2d 1286 (2000). Therefore, the longer the entries covered by the provisional remedies remain unliquidated, the longer importers who have paid provisional cash deposits are denied access to their refunds without any possibility of obtaining interest.

Given the weakness of Plaintiff's arguments on the merits, the court is concerned that issuance of preliminary injunctions against liquidation here may be a misuse of the court's equitable power by keeping the provisional measures in place beyond their prescribed 4-month period and by depriving importers of the time value of their provisional cash deposits. The court therefore does not believe that the balance of the equities favors the movant.

E. Public Interest

A preliminary injunction is generally in the public interest in order "to maintain the status quo of the unliquidated entries until a final resolution of the merits." *Smith– Corona Group v. United States*, 1 CIT 89, 98, 507 F. Supp. 1015 (1980). Nevertheless, the court does not believe it is in the public interest to issue preliminary injunctions in actions where there is no likelihood of success on the merits.

III. Conclusion

For the foregoing reasons, the court does not believe that issuance of preliminary injunctions in these actions is appropriate. Accordingly, it is hereby

ORDERED that Plaintiff's motions for preliminary injunctions are denied; and it is further

ORDERED that the Temporary Restraining Orders issued March 4, 2013 are dissolved.

Dated: March 29, 2013
New York, New York

/s/ Leo M. Gordon Judge
LEO M. GORDON