U.S. Customs and Border Protection

Slip Op. 13–47

FOSHAN SHUNDE YONGJIAN HOUSEWARES & HARDWARE CO., LTD., and POLDER, INC. Plaintiffs, v. UNITED STATES, Defendant, and HOME PRODUCTS INTERNATIONAL, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 10–00059
PUBLIC VERSION

[Plaintiffs' motion for judgment on the agency record is granted, and the matter is remanded to the Department of Commerce.]

Dated: April 8, 2013

William E. Perry, Dorsey & Whitney LLP, of Seattle, WA, argued for plaintiffs. With him on the brief were *Emily Lawson* and *Derek A. Bishop*.

Michael D. Snyder, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for the defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rachael Wenthold Nimmo*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington D.C.

Frederick L. Ikenson, Blank Rome LLP, of Washington D.C., argued for defendant-intervenor. With him on the brief was *Larry Hampel*.

OPINION AND ORDER

Eaton, Judge:

Before the court is the Department of Commerce's (the "Department" or "Commerce") Final Results of Redetermination Pursuant to Remand, dated June 11, 2012 (ECF Dkt. No. 71) ("Remand Results"). On remand, Commerce was instructed to reconsider whether Foshan Shunde Yongjian Housewares and Hardware Co., Ltd. ("Foshan Shunde", "the company", or, collectively with jointly-represented plaintiff/importer Polder, Inc.,[1] "plaintiffs") qualified for separate-rate status in connection with the antidumping duty order on Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China ("PRC") and, if eligible, to determine

[1] Polder, Inc. is the importer of the subject merchandise.

the appropriate rate. *Foshan Shunde Yongjian Housewares & Hardware Co., Ltd. v. United States*, 35 CIT ___, ___, Slip Op. 11–123, at 41–42 (2011) ("*Foshan Shunde I*").

In the Remand Results, Commerce determined that (1) Foshan Shunde was entitled to separate-rate status on the basis of newly submitted information, and (2) assigned a rate of 157.68%, applying adverse facts available ("AFA"). Plaintiffs and defendant-intervenor, Home Products International, Inc. ("HPI" or "defendant-intervenor"), filed comments to the Remand Results.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

DISCUSSION

I. Background

This matter is before the court on plaintiffs' challenge to the Department's final results of the fourth administrative review of the antidumping duty order on floor-standing metal-top ironing tables and certain parts thereof from the PRC for the period of review ("POR") August 1, 2007 through July 31, 2008. *See* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 75 Fed. Reg. 3,201 (Dep't of Commerce Jan. 20, 2010), and the accompanying Issues & Decision Memorandum ("Issues & Dec. Mem.") (collectively, the "Final Results"). In the Final Results, Commerce "found that Foshun Shunde's 'unreliable and inconsistent' responses to questionnaires concerning the company's factors of production and sales data warranted the application of adverse facts available . . . to all of the company's questionnaire responses when determining its dumping margin." *Foshan Shunde I,* 35 CIT at ___, Slip Op. 11–123, at 3–4. Based on this finding, Commerce applied AFA to Foshan Shunde's questionnaire responses regarding the company's production and sales information, as well as to its submissions regarding independence from the PRC government. Commerce then determined that Foshan Shunde could not demonstrate an entitlement to separate-rate status and assigned the PRC-wide rate of 157.68%. *Id.* at ___, Slip Op. 11–123, at 4–5.

The court sustained Commerce's determination to apply AFA to Foshan Shunde's factors of production and sales data, noting the "'pervasiveness of the inaccuracies' in Foshan Shunde's questionnaire

responses." *Id.* at ___, Slip Op. 11–123, at 33 (citation omitted). The court also held, however, that because the Department made "no finding that Foshan Shunde failed to act to the best of its ability in responding to the . . . separate-rate questionnaires" and "Commerce did not notify" the company of deficiencies in its separate-rate questionnaire responses in accordance with 19 U.S.C. § 1677m(d), "Commerce's reliance on AFA to deny Foshan Shunde separate-rate status" was unsupported by substantial evidence and contrary to law. *Id.* at 40–41.

On remand the court instructed the Department to: (1) consider the record evidence regarding Foshan Shunde's entitlement to a separate rate, including opening the record if it contained insufficient information to make a determination as to Foshan Shunde's entitlement to separate-rate status; and, (2) if the company is found to be entitled to a separate rate, to "determine an appropriate dumping margin specific to Foshan Shunde, taking into consideration the Department's determination, sustained here, to apply AFA to Foshan Shunde's factors of production and sales data." *Id.* at ___, Slip Op. 11–123, at 42.

II. The Remand Results

Commerce made two determinations in the Remand Results, which was conducted under protest. Remand Results at 3 n.1. The first, made solely on the basis of information solicited from Foshan Shunde on remand, is that the company "is entitled to a separate rate." Remand Results at 3–5. No party challenges this determination and it is sustained.[2]

Commerce then assigned Foshan Shunde an individual rate of 157.68%. Remand Results at 1. Commerce justified its use of AFA by reference to the court's holding in *Foshan Shunde I* that "the application of AFA to all of Foshan Shunde's factors of production and sales information is supported by substantial evidence and otherwise in accordance with law." Remand Results at 5 (quoting *Foshan Shunde I*, 36 CIT at ___, Slip Op. 11–123, at 31).

In finding that a rate of 157.68% was "both reliable and relevant," the Department first argues that the rate was reliable because it was "an individually calculated rate for a cooperative respondent in the investigation." Remand Results at 8. The Department continued that the selected rate was corroborated as required by 19 U.S.C. § 1677e(c), because it "has been used repeatedly as the rate assigned to

[2] Defendant and defendant-intervenor, however, reserved their objections to *Foshan Shunde I*'s ruling that AFA could not be applied to determine whether Foshan Shunde is entitled to a separate rate.

the China-wide entity representing the rate for the industry [and] nothing on the record . . . indicate[s] that the [rate] is uncharacteristic of the industry, or is otherwise inappropriate." Remand Results at 9. In other words, the Department concluded that the selected rate was corroborated based on its previous use and because there was no record evidence indicating that the rate was aberrant.

Commerce further claimed to corroborate the selected rate by pointing to data derived from imports of the subject merchandise into the United States during the POR ("Customs Data") which "indicate that importers are paying this rate . . . and exporters subject to this rate are able to sell ironing tables in substantial quantities to the United States." Remand Results at 9. Put another way, Commerce argued that because the Customs Data showed that some market participants were importing subject merchandise while being subject to the 157.68% rate, the selected rate reflected Foshan Shunde's commercial reality. *See, e.g.*, *Lifestyle Enter., Inc., v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1284, 1290 (2012) (*Lifestyle II*) ("An AFA rate . . . should bear a rational relationship to respondent's commercial reality.").

As part of its findings, Commerce rejected plaintiffs' argument that the Customs Data contained too small a quantity of imports to reflect Foshan Shunde's commercial reality or the commercial reality of the industry as a whole. In doing so, the Department concluded that the "quantity of exports at the selected AFA rate is [not] relevant for corroboration purposes." Remand Results 15–16. [3]

III. Discussion

Plaintiffs object to the Remand Results, arguing that (1) by assigning Foshan Shunde a rate that had originally been calculated for another respondent in a prior review the Department failed to follow the court's instructions, and (2) that the 157.68% rate selected by Commerce is not sufficiently corroborated.

a. Calculation of a Rate "Specific" to Foshan Shunde

As an initial matter, plaintiffs' position that Commerce was required to undertake the calculation of a rate 'anew' for Foshan Shunde stems from a misreading of the court's remand order. For plaintiffs, the court's instruction that Commerce "determine an appropriate dumping margin *specific* to Foshan Shunde" required the Department to calculate a unique rate, specific to Foshan Shunde,

[3] It is worth noting that Commerce makes no reference in the Remand Results to the fact that the Customs Data contains information which appears to be specific to the export of subject goods produced by Foshan Shunde during the POR.

and "precluded the use of a dumping margin that was calculated for another entity." Pls.' Objections to Dep't of Commerce's Remand Redetermination 5 (ECF Dkt. No. 75) ("Pls.' Br."). Thus, according to plaintiffs, Commerce was required to use the 2.37% rate calculated for Foshan Shunde in the first administrative review or to create a rate using some unspecified methodology.

This argument cannot be credited. On remand, the court expressly instructed Commerce to "take[] into consideration the Department's determination, sustained here, to apply AFA to Foshan Shunde's factors of production and sales data." *Foshan Shunde I*, 36 CIT at ___, Slip Op. 11–123, at 42. Therefore, the court anticipated the use of a reasonable AFA methodology by Commerce when determining the company's rate. Nothing in the order indicated that when applying AFA, the Department was required to calculate a rate for Foshan Shunde or that it was prohibited from using any reasonable method for determining the company's rate.

In addition, contrary to plaintiffs' suggestion, there is nothing in the order that required Commerce to open the record and allow Foshan Shunde to submit additional information as to its inputs. The company had the chance to place information on the record during the underlying review. Foshan Shunde's decision not to fully cooperate with the Department during the review foreclosed that opportunity.

b. Corroboration

On remand, Commerce selected a rate calculated for a cooperating competitor of Foshan Shunde during the initial investigation. A rate calculated in the final determination of an investigation may be appropriate "secondary information" which Commerce may use in assigning an AFA rate. *See* Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 870, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4199 (1994) ("Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.") ("SAA"); *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) (describing secondary information as information not obtained in the course of the subject investigation or review); *see, e.g.*, *Tianjin Magnesium Int'l Co. v. United States*, 35 CIT ___, ___, Slip. Op. 11–100, at 7–8 (2011) ("Here, the AFA rate of 111.73% was a weighted-average margin calculated for a cooperating respondent during the previous administrative re-

view and thus, is secondary information."); *Washington Int'l Ins. Co. v. United States*, 33 CIT __, __, Slip. Op. 09–78, at 21–24 (2009) (observing that an AFA rate selected from the PRC-wide rate was secondary information); *Chia Far Indus. Factory Co. v. United States*, 28 CIT 1336, 1358–59, 343 F. Supp. 2d 1344, 1365–66 (2004) (noting that a rate calculated for another party in the initial investigation was secondary information); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 682 (2000) (treating a margin assigned to an individual respondent in the initial investigation as secondary information).

When Commerce relies on secondary information to select an AFA rate, it must, "to the extent practicable," corroborate that rate using "information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). To support its selection, "Commerce must therefore demonstrate that the rate is reliable and relevant to the particular respondent" and "show that it used reliable facts that had some grounding in commercial reality." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 36 CIT ___, ____, Slip. Op. 12–83, at 6–7 (2012) (citations and internal quotation marks omitted) (*Tianjin II*); *see also KYD*, 607 F.3d at 765 ("Before Commerce can rely on secondary information, it must establish that the 'secondary information to be used has probative value.'" (citation omitted)); *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d, 1319, 1323 (Fed. Cir. 2010) ("Substantial evidence requires Commerce to show some relationship between the AFA rate and the actual dumping margin."); *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("Congress[] . . . intended for an [AFA] rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance.").

Commerce's attempt to corroborate the rate self-referentially by indicating that the rate was selected from a prior review and has been used as the all-China rate, however, is not supported by substantial evidence. Absent a lack of other reasonably available information "at their disposal," Commerce is required to use independent sources to corroborate its secondary information. 19 U.S.C. § 1677e(c). Calculated dumping margins are not "independent sources" as contemplated by the statute and the Department's regulations. 19 U.S.C. § 1677e(c); 19 C.F.R. § 351.308(d) (2008) ("Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review."). Although

the data that underlies a calculated rate may constitute an independent source, calculated rates themselves are creations of the Department and, thus, are not independent sources. *See* SAA at 870 ("Independent sources may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review."); *KYD*, 607 F.3d at 765.

As noted, Commerce need only corroborate its selected rate "to the extent practicable." When doing so is not practicable, however, Commerce must explain why. *See Essar Steel Ltd. v. United States*, 36 CIT ___, ___, 880 F. Supp. 2d 1327, 1332 (2012); *e.g., Shandong Mach. Imp. & Exp. Co. v. United States*, 33 CIT ___, ____, Slip. Op. 09–64, at 13–20 (2009) (quoting Commerce's explanation, accepting it as to one determination, and rejecting it as to another determination); *Washington Int'l Ins*, 33 CIT at __, Slip. Op. 09–78, at 21–24 (quoting but rejecting Commerce's explanation); *Shandong Huarong Gen. Grp. Corp. v. United States*, 31 CIT 42, 46 (2007) (quoting Commerce's explanation). Commerce has made no representation that corroboration by independent sources is impracticable in this case. Indeed, the Department has relied on an independent source to corroborate its chosen rate, namely the Customs Data. Thus, it is clearly "practicable" for the Department to have used independent sources to corroborate the underlying rate.

Further, that the Department has calculated a rate for another respondent in a prior segment of the proceeding is not, standing alone, evidence supporting the selection of that rate for a different respondent in a later review.[4] A rate assigned for a different respondent several years earlier, without more, is simply not probative of whether a selected rate is a "'reasonably accurate estimate of [a] respondent's actual rate'" in the current review. *Gallant Ocean*, 602 F.3d at 1323 (quoting *De Cecco*, 216 F.3d at 1032). Moreover, where the Department selects a rate identical to the entity-wide rate for a respondent entitled to a separate-rate, more is required than the mere assertion that the rate is corroborated because it has been used as the entity-wide rate. *See* Remand Results at 9 ("As the selected AFA rate has been used repeatedly as the rate assigned to the China-

[4] This is not a case where the *Rhone Poulenc* presumption that the highest prior margin is probative applies. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990). Not only does that presumption not necessarily "replace actual corroboration . . . . [T]he Federal Circuit appears to restrict its use to situations where a respondent has not answered Commerce's questionnaire at all, rather than when the questionnaire responses were found wanting for one reason or another." *Tianjin Mach. Imp. & Exp. Co. v. United States*, 35 CIT ___, ____, 752 F. Supp. 2d 1336, 1348 (2011). Here, Foshan Shunde responded to the Department's questionnaires.

wide entity representing the rate for the industry, there is nothing on the record of this review to indicate the selected AFA rate is uncharacteristic of the industry, or is otherwise inappropriate."). Normally, a lack of evidence does not constitute substantial evidence that a rate is relevant to a particular respondent.

Although Commerce's blanket assertion that the relevance of a rate can be corroborated by the rate's use in a prior review, or that it was employed as the China-wide rate, is flawed, the Department also sought to corroborate the selected rate based on the Customs Data. Here, the Department is on firmer ground. 19 C.F.R. § 351.308(d) (defining "official import statistics and customs data" as exemplars of "independent sources"). The Department's reliance on this data, however, requires additional explanation. First, during the review, plaintiff objected that the number of entries underlying the Customs Data was too small to corroborate a rate of 157.68%.

Here, the Customs Data consisted of a limited number of entries, typically of small value, from a limited number of producers.[5] Commerce's only reply to plaintiff's objection was that the size of the sample is irrelevant for corroboration purposes. Remand Results at 15–16 ("We disagree that the quantity of exports at the selected AFA rate is relevant for corroboration purposes, as there is no requirement that the selected source of AFA must be based upon a specified sales volume."). In other words, the Remand Results do not meaningfully address whether the quantity of imports that underlie the Customs Data can adequately corroborate an AFA rate based on secondary information. Second, plaintiff is correct that the Customs Data does not contain a field identifying the tariff provision under which the entries represented therein were imported, despite the indication in the Remand Results that the data reflects entries of subject merchandise. *See* Remand Results at 9.

Contrary to the Department's position, the size of the data set relied upon may be relevant to whether an AFA rate is sufficiently corroborated and supported by substantial evidence. *Dongguan Sunrise Furniture, Co. v. United States*, Slip Op. 13–46, at 6 (2013) ("Here Commerce has based [respondent's] rates on an impermissibly small percentage of sales."); *Lifestyle II*, 37 CIT at ___, 865 F. Supp. 2d at 1289 ("Selection of an AFA rate based on miniscule data will not suffice."); *Lifestyle Enter., Inc., v. United States*, 37 CIT ___, ___, 844 F. Supp. 2d 1283, 1289 (2012) (*Lifestyle I*) ("Facts specific to a particular case may make transactions representing a small percentage of sales inadequate corroboration."); *Tianjin Mach. Imp. & Exp. Co. v.*

[5] The Customs Data covers [[ ]] entries made by [[ ]] producers. Of those entries, [[ ]] appear to be for a value greater than [[ ]].

United States, 35 CIT ___, ____, 752 F. Supp. 2d 1336, 1352 (*Tianjin I*) (rejecting the use of a small number of third party transactions as corroboration); *cf. Gallant Ocean*, 602 F.3d at 1324 ("Because Commerce did not identify any relationship between the small number of unusually high dumping transactions with [petitioner's] actual rate, those transactions cannot corroborate the adjusted petition rate."). Moreover, where the Department relies on Customs Data to support a rate, in order to demonstrate relevance it must point to some record evidence indicating that the Customs Data reflects imports under the subject merchandise's tariff heading.

Commerce's determinations "must include 'an explanation of the basis for its determination that addresses relevant arguments[] made by interested parties.'" *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1320 (Fed. Cir. 2009) (citing 19 U.S.C. 1677f(i)(3)(A)). Where the Department has reached important conclusions that are not fully explained with reference to record evidence, its conclusions are "not supported by substantial evidence" and remand is appropriate for Commerce to "'explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations.'" *Clearon Corp. v. United States*, 35 CIT __, __, Slip Op. 11–142, at 27–28 (2011) (quoting *Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 168, 358 F. Supp. 2d 1334, 1344 (2005)). Accordingly, because the Department has not explained why the size of the Customs Data is sufficient to corroborate the selected rate or pointed to any record evidence demonstrating that the Customs Data covered entries of the subject merchandise, its determination that the selected rate is corroborated, and that the requirements of 19 U.S.C. § 1677e(c) have been met, is not supported by substantial evidence and must be remanded for further explanation. On remand, the Department must explain why the quantity of imports underlying the Customs Data is sufficient to corroborate the selected rate or, if it determines that the quantity is not sufficient standing alone, identify whether there are "additional facts that make the small [quantity] less troubling." *Lifestyle II*, 37 CIT at ___, 865 F. Supp. 2d at 1290. The Department must also identify what record evidence, if any, indicates that the Customs Data represents entries of the subject merchandise.

Finally, Commerce's decision also fails to indicate whether it is relying on the Customs Data only generally or particularly on some specific entries contained in the data.[6] If relied upon directly and

[6] [[ ]] entries are identified as sales of products manufactured by Foshan Shunde. Non-Public Doc. 3. Those entries have an aggregate value exceeding [[ ]]. It is worth

identified to the appropriate tariff provision, some entries might provide the necessary "additional facts" required to corroborate a high AFA rate. *Id.* at ___, 865 F. Supp. 2d at 1290; *see Gallant Ocean*, 602 F.3d at 1324 (noting that a high AFA rate based on a small number of petitioner's own sales during the POR may be supported by substantial evidence); *but see Dongguan*, Slip Op. 13–46, at 7 (noting that additional corroboration may be required to support very high rates). The Remand Results themselves, however, make no mention of any particular entries as a basis for the Department's reliance on the Customs Data for corroboration. Accordingly, the court cannot determine whether the Department relied on that information in reaching its conclusion and, thus, cannot sustain the results on that basis. *See Nan Ya Plastics Corp. v. United States*, 37 CIT ___, ___, Slip Op. 13–18, at 10–11 (2013) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept . . . counsel's *post hoc* rationalizations for agency action; . . . an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.")).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for judgment on the agency record is GRANTED, and Commerce's Final Results are REMANDED; it is further

ORDERED that, on remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that the Department shall clarify its position as to why the Customs Data represents a sufficiently large number of entries to corroborate the selected rate or otherwise corroborate its selected rate in a manner supported by substantial evidence and in accordance with law; it is further

ORDERED that should the Department continue to rely upon the Customs Data, it shall explain with specificity why the Customs Data demonstrates that the selected rate is relevant to Foshan Shunde and either identify record evidence indicating that the Customs Data represents entries of the subject merchandise or reopen the record to place such additional evidence thereon; it is further

ORDERED that the remand results shall be due on July 8, 2013; comments to the remand results shall be due thirty (30) days follow-

noting that, if those entries are relied upon specifically, that reliance would entirely rebut plaintiffs' argument that it is impossible for Foshan Shunde to import the subject merchandise at the selected rate.

ing filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: April 8, 2013
New York, New York

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

Slip Op. 13–65

NUCOR FASTENER DIVISION, Plaintiff, v. UNITED STATES, Defendant, and PORTEOUS FASTENER CO., HEADS & THREADS INTERNATIONAL, LLC, SOULE, BLAKE & WECHSLER, INC., INDENT METALS LLC, XL SCREW CORPORATION, BOSSARD NORTH AMERICA, HILLMAN GROUP, FASTENAL CO., FASTENERS AND AUTOMOTIVE PRODUCTS, BRIGHTON-BEST INTERNATIONAL, INC., and BRIGHTON-BEST INTERNATIONAL (TAIWAN) INC., Defendant-Intervenors.

Before: Richard W. Goldberg,
United States Judge
Court No. 09–00531
PUBLIC VERSION

[Defendant's remand redetermination is sustained and plaintiff's request for a final investigation is denied.]

Dated: May 24, 2013

Daniel B. Pickard, Wiley Rein LLP, of Washington, DC, argued for plaintiff. With him on the brief were *Alan H. Price* and *Maureen E. Thorston*.

Mary J. Alves, United States International Trade Commission, of Washington, DC, argued for defendant. With her on the brief were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Matthew T. McGrath, Barnes Richardson & Colburn LLP, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Stephen T. Brophy*.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Nucor Fastener Division ("Nucor"), a domestic producer of nuts, bolts, and other fasteners, seeks judicial review of the International Trade Commission's ("the ITC" or "the Commission") remand redetermination from its preliminary antidumping and countervailing duties investigations into *Certain Standard Steel Fasteners from China and Taiwan*, USITC Pub. 4109, Inv. Nos. 701-TA-472 and 731-TA-1171–1172 (Nov. 2009) ("ITC Pub. 4109"). On remand, Nucor argues that the ITC did not properly address the concerns of the Court of International Trade when it reaffirmed its findings that the data it used to determine that Chinese and Taiwanese importers were

not dumping was comprehensive and that Producer A was properly included into its analysis because it was, indeed, a domestic producer.

For the reasons discussed below, the ITC's remand redetermination is sustained and Nucor's request for a final investigation is denied.

BACKGROUND

On September 23, 2009, petitioner Nucor Fastener Division of St. Joseph, Indiana, filed a petition with the ITC alleging that U.S. producers of certain standard steel fasteners ("CSSF") were materially injured and threatened with material injury by reason of sales at less than fair value ("LTFV") and subsidized imports of CSSF from China and sales at LTFV of CSSF imported from Taiwan. The ITC initiated both a countervailing duty investigation and an antidumping duty investigation.

In preliminary antidumping and countervailing duty determinations, the ITC determines whether there is a reasonable indication that a domestic industry is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports. 19 U.S.C. §§ 1671(b)(a), 1673b(a) (2006). To reach that determination, the ITC weighs the evidence before it and determines whether: "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986).

In determining whether the domestic industry has suffered material injury or faces the threat of such injury, the ITC considers factors such as the volume of subject imports, the subject imports' effect on prices for the domestic like product, and the subject imports' impact on domestic producers of the domestic like product in the context of U.S. operations. 19 U.S.C. § 1677(7)(B)(i). The ITC considers all relevant economic factors that impact the U.S. industry, with no single factor being dispositive. *Id.* § 1677(7)(C)(iii). All factors are considered within the context of the business cycle and competitiveness of the affected industry. *Id.*

On November 9, 2009, after conducting a preliminary investigation, the ITC found: (1) the record as a whole contained no reasonable indication of material injury by reason of cumulated subject imports from China and Taiwan; and (2) the record as a whole contained no reasonable indication of a threat of material injury by reason of cumulated subject imports. *See generally* ITC Pub. 4109. The ITC based its determination on the following factors: the conditions of competition and the business cycle (including demand conditions,

supply conditions, raw material costs, and interchangeability), the volume of cumulated subject imports from China and Taiwan, the price effects of the cumulated subject imports, and the impact of the cumulated imports. *Id.* at 38–45. The ITC's determination that no threat of material injury existed was based on its consideration of likely subject import volumes, likely price effects, and likely impact. *Id.* at 41–50.

Although the ITC found that the cumulated volume of subject imports from China and Taiwan was significant in absolute terms and that subject imports were pervasively undersold, the ITC determined that there was no overall correlation between the large and steady volume of subject imports and the changes in the domestic industry's conditions and prices. *Id.* at 36–45. First, between 2006 and 2008, as demand somewhat declined, the ITC did not observe any significant changes that would indicate that subject imports were impinging upon the domestic industry's market share. *Id.* at 36–38. Rather, market share across the domestic industry, subject imports, and imports from countries outside of China and Taiwan remained stable. *Id.* Second, the ITC did not observe any negative price effects, as domestic industry prices tended to remain at or above their initial-period prices. *Id.* at 38–41. Moreover, the domestic industry's "cost of goods sold as a share of net sales," the ratio the ITC commonly uses to analyze price suppression, was relatively low and stable between 2006 and 2008. *Id.* at 40–41. Notwithstanding small declines in demand, a significant subject-import market share, and significant underselling from 2006 to 2008, the ITC found increased profitability and solid performance. *Id.* at 36–45.

Even during the 2009 economic downturn, which saw noticeable declines in demand by consumers of CSSF, the ITC determined that slight declines in domestic market share (24.5 percent in 2008 to 23.3 percent in 2009) were the result of an increase in market share by non-subject imports as opposed to those from China and Taiwan. *Id.* at 38. With respect to price effects, the cost of goods to net sales ratio was higher in 2009 as a result of price declines in response to the recession, not as a result of the volume of subject imports. *Id.* at 41. Underselling was not any more pervasive in 2009 than in any prior years. *Id.* Although lower sales and profitability ensued, as expected, from the recession, the domestic industry managed to earn $3.8 million in operating income ($11.4 million in 2008) and maintained a positive 5.8 percent operating margin (12.2 percent in 2008). *Id.* at 24–45. Thus, the ITC found that the record as a whole contained clear and convincing evidence of no reasonable indication of material in-

jury by reason of cumulated subject imports of CSSF from China and Taiwan and no likelihood that contrary evidence would be discovered in any final investigation. *Id.* at 9, 36–45.

In considering whether there was any reasonable indication of a threat of material injury to the domestic producers, the ITC did not find a likelihood of substantially increased imports from China and Taiwan. *Id.* at 47. Although the Chinese and Taiwanese producers of CSSF had excess capacity, were export-oriented, and undersold CSSF in the U.S. market, the record data showed that their market share remained relatively stable. *Id.* at 47–48. The ITC also found that the industries in China and Taiwan were unlikely to change very much in the near future. *Id.* at 48–49. These factors, along with the fact that subject import pricing did not stimulate demand for significant additional subject imports during the investigation period, led the ITC to determine that subject imports were unlikely to constitute a threat of material injury to domestic producers. *Id.* at 49.

On May 14, 2010, Nucor moved for judgment on the agency record pursuant to USCIT Rule 56.2, challenging the ITC's preliminary determination results. Br. in Support of Nucor Fastener Division's Rule 56.2 Mot., D.E. 32, at 1 ("Pl.'s Mem."). On August 11, 2011, this court granted in part and denied in part Nucor's motion. *Nucor Fastener Div. v. United States*, 35 CIT __, 791 F. Supp. 2d 1269 (2011). The court reversed and remanded back to the ITC the following two issues: (1) the ITC's treatment of its import data as comprehensive; and (2) the ITC's unqualified reliance on Producer A's (which identified itself as a U.S. producer of domestic like product) questionnaire response. *Id.* at __, 791 F. Supp. 2d at 1292.

The court agreed with Nucor's challenge of the ITC's description of the importer questionnaire data as comprehensive. It identified "three potential explanations" for the ITC's conclusion and argued that each was illogical. Pl.'s Mem. at 26. First, Nucor questioned the ITC's assertion that the "responses ultimately received from [the thirty importers] represented the large majority of known CSSF imports from January 2006 and June 2009." *Id.* The ITC explained that it compared the importers responsible for the thirty responses "to its initial list of 78 firms that appeared to be the major importers of all types of steel fasteners covered by these [Customs] subheadings." Mem. of Def. U.S. ITC in Opp'n to Pl.'s Mot. for J. on the Agency R., D.E. 45, at 30–31 ("Def.'s Mem."). The ITC was thus able to "determine that they had received data from the large majority of significant known imports of fasteners from China and Taiwan" during the period of interest, which indicated that they had proper

coverage for importers who likely imported CSSF. *Id.* at 31. The court called the ITC's contention "entirely post hoc," pointing out that the ITC "cite[d] no record evidence of any such comparison." *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1281. Moreover, the ITC's argument was undermined by its assertion that five of the six relevant Customs subheadings "contain[] large amounts of fasteners not subject to these investigations." *Id.* The court also questioned whether the ITC meant "significant known *importers*" as opposed to "significant known imports," but noted that the ITC's response was unclear. *Id.*

Second, Nucor questioned how the thirty questionnaire responses demonstrated that a small number of firms accounted for a significant share of CSSF imports, asserting that the data merely showed that a small number of firms accounted for a large share of "*reported*" imports. Pl.'s Mem. at 27. The ITC defended its views with staff conference testimony that "this industry involved a limited number of large importers." Def.'s Mem. at 31. However, the court questioned the ITC's response because it had not provided any record evidence even suggesting an overlap between large importers that responded to the questionnaire and the large reporters referenced at the staff conference. *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1281–82. Moreover, the ITC did not explain how the sample of responding importers was demonstrative of the "universe of relevant importers." *Id.* at __, 791 F. Supp. 2d at 1282.

Third, Nucor questioned the ITC's use of importer data as comprehensive, considering that a comparison of U.S. importer responses to foreign producer responses indicated that reported exporter volume exceeded the reported importer volume by a significant percentage. Pl.'s Mem. at 27–30. The ITC cited a rough equivalence in the values because, although reported imports were more inclusive than reported exports in Taiwan, the opposite was true in China, thus resulting in "reported exports of subject merchandise to the United States in collective quantities that are relatively similar to the quantities of subject merchandise imports collectively reported by [domestic importers]." ITC Pub. 4109 at 7. The court rejected this reasoning because the ITC offered "no explanation for how undercounting the exports of one can remedy undercounting the imports of the other." *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1282. Moreover, the ITC did not provide any methodologies to support its assertion that it would arrive at the same conclusion regardless of which combination of data sets it examined. *Id.*

In sum, the court concluded that the ITC had failed to provide a "reasoned basis" for treating and relying on incomplete data as com-

prehensive, calling the ITC's approach a "casual conflation of a limited sample with the larger population from which that sample is drawn." *Id.* The basis upon which the ITC was required to draw its conclusion "must include at least a candid recognition of and response to inherent limitations." *Id.* at __, 791 F. Supp. 2d at 1285. Therefore, the ITC's treatment of the data amounted to a "complete failure 'to consider an important aspect of the problem.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The court also remanded on the issue of the ITC's reliance on Producer A's response and inclusion as a domestic CSSF importer. Nucor had challenged the ITC's inclusion of four firms that reported producing CSSF and argued that one of these firms (Producer A) did not produce the domestic like product (CSSF) and should not be included as a member of the domestic industry. Nucor claimed that Producer A's response was unreliable because the response suggested significant confusion. Pl.'s Mem. at 12–15, 17. For example, Producer A classified the same fasteners as standard and nonstandard. Moreover, when asked whether it "produce[d] other products on the same equipment and machinery used in the production of CSSF," Producer A answered affirmatively but responded that CSSF accounted for 100 percent of its products. *Id.* Subsequent correspondence between the ITC and Producer A showing that Producer A staff were not familiar with the ITC's definitions of CSSF and other fastener products also suggested that the staff's knowledge and ability to respond to the questionnaires was limited. Although the ITC had asserted that it was "authorized to weigh evidence and resolve conflicts in the data," Def.'s Mem. at 18, the court found that the ITC did not demonstrate that it even considered any discrepancies. *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1287. Therefore, there was no rational basis for the unqualified inclusion of Producer A in the ITC's analysis. *Id.*

On December 7, 2011, on remand, the ITC reaffirmed all of the findings from its original negative preliminary determinations because neither of these remanded issues played more than a small role in its overall analysis and determinations. Certain Standard Steel Fasteners from China and Taiwan, USITC Pub. 4297, Inv. Nos. 701-TA-472 and 731-TA-1171 (Preliminary) (Remand) (Dec. 2011), D.E. 91, at 11 ("Remand Results").[1] It again concluded that there is no

[1] The Remand Results are also available online at http://www.usitc.gov/publications/701_731/pub4297.pdf. However, because the Remand Results published online have different pagination from those filed with the court, the court notes that all page numbers cited by the court refer to the Remand Results filed with the court. They are available as part of the public record, docket entry number 91.

reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of subject CSSF imports from China and Taiwan. *Id.*

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516(b)(1)(B)(i) (2000)).

DISCUSSION

I. The record supports the ITC's using its import questionnaire data as "comprehensive"

The court concluded that the ITC had failed to provide a "reasoned basis" for treating and relying on incomplete data as comprehensive, calling the ITC's approach a "casual conflation of a limited sample with the large population from which the sample is drawn." *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1283. The court noted that the ITC's conclusion "must include at least a candid recognition of and response to inherent limitations" in its data and methodology. *Id.* at __, 791 F. Supp. 2d at 1285. Therefore, the ITC's treatment of the data amounted to a "complete failure 'to consider an important aspect of the problem.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n*, 462 U.S. at 43 (1983)).

On remand, after comparing the importer questionnaire data to Customs's import data, other record data concerning the relative size and number of importers in the industry, and foreign producer questionnaire data, the ITC again deemed importer questionnaire data comprehensive and reliable. For the reasons stated below, the court sustains the Commission's remand determinations.

A. The Record Supports Using Questionnaire Data on CSSF Imports from Subject and Non-Subject Countries

The ITC argues that its use of importer questionnaire data is preferred over Customs's import data because the merchandise covered by the investigations could be classified under any one of six statistical reporting numbers under the Harmonized Tariff Schedule of the United States ("HTSUS"), with five out of the six numbers representing "basket" categories containing numerous fasteners not subject to the investigations. Remand Results at 22–25. Moreover, using only the sixth number would underestimate the volume of

subject imports. *Id.* at 24. The ITC states that Nucor itself has also counseled against using Customs's import data, urging the ITC to use importer questionnaire responses instead. *Id.* at 23. Additionally, the ITC emphasizes that the Federal Circuit has given it broad discretion in making methodological choices, and has routinely upheld the ITC's use of importer questionnaire data, that need not be complete. *Id.* at 22 (citing *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357, 1361–62 (Fed. Cir. 1996); *Comm. for Fair Coke Trade v. United States*, 28 CIT 1140, 1163 (2004); *Sensient Techs. Corp. v. United States*, 28 CIT 1513, 1520–22 (2004).

Second, the ITC defends the process it used to collect the importer questionnaire data. After obtaining Commerce's official statistics (from its "Interactive Tariff and Trade DataWeb") on imports under the six HTSUS statistical reporting numbers that Nucor identified, the ITC obtained specific import entry information for U.S. imports from subject and non-subject countries for the six statistical reporting numbers (from Customs Net Import File CL202) and issued importer (and foreign producer) questionnaires to firms that accounted for a significant portion of imports (or exports) of all fastener types to the United States. Remand Results at 25– 26. Using the data it obtained from the file, ITC staff separated the importers into three groups ("Groups A, B, and C"). *Id.* at 27. Group A consisted of firms representing greater than one percent of total imports of fasteners from China and Taiwan under statistical reporting number 7318.15.2030, which Nucor identified as most closely resembling CSSF, in 2008 or January through June 2009. *Id.* at 26–27. Group B included firms representing greater than one percent of total imports of fasteners from China and Taiwan under the combined statistical reporting numbers (7318.15.2030, 7318.15.2055, 7318.15.2065, 7318.15.8065, 7318.15.8085, and 7318.16.0085), which covered subject and non-subject CSSF, during the same time period. *Id.* at 28. Group C was comprised of firms that imported greater than one percent of the total imports of the combined statistical reporting numbers from non-subject countries during the same period. *Id.*

Although the ITC acknowledges that it never obtains perfect data on imports, foreign producers, or the domestic industry in any investigation, it states that it routinely relies on this data to make injury determinations because the statute, 19 U.S.C. §§ 1671b(a)(1)–(2), 1671b(f), 1673b(a)(1)–(2), 1673b(f), requires decisions to be made within a relatively short forty-five day period based on information available at the time. Remand Results at 26–27. Moreover, the ITC emphasizes that each of the steps taken is consistent with its regular practice in preliminary injury investigations. *Id.* at 25–27.

Nucor argues that "the record did not bear out the [ITC's] description of its methodology," pointing out that individual importers responsible for certain goods from China and Taiwan during the relevant time periods were not included in the ITC's questionnaire mailing list, while importers responsible for minimal or no imports from China and Taiwan were included. Nucor Fastener Div.'s Remand Comments, D.E. 102, at 16–19 ("Pl.'s Remand Comments"). Moreover, Nucor points out "the still greater oddity of questionnaires being sent to companies that *did not* meet the criteria." *Id.* at 19. In response, the ITC refers back to its extensive explanations regarding its methodologies for sending out the questionnaires in its Remand Results, pointing out that it does not ordinarily specify whether and why it sent questionnaires to specific firms. Def. U.S. ITC's Reply to Nucor's Response, D.E. 115, at 11 ("Def.'s Reply to Remand Comments"). Moreover, the ITC notes that Nucor did not inquire about any of these specific firms at the remand proceedings and therefore failed to exhaust its administrative remedies on this issue. *Id.* at 12. Accordingly, there is no need for another remand for the ITC to explain the status of additional firms.

Although the ITC acknowledged that the data is not complete and that some discrepancies existed, *id.* at 43, the court agrees with the ITC that the data was sufficiently adequate to rely upon for purposes of the investigation.

B. There Is No Need to Proceed to a Final Investigation on the Import Data Issue

In its Remand Comments, Nucor continues to assert that because the importer questionnaire data was "spotty and unreliable," additional import volumes and pricing data might lead to a finding of greater underselling and import penetration than originally found. Pl.'s Remand Comments at 39–40. Defendant-Intervenors respond that, although the import data may not be comprehensive, the ITC has collected enough import data to reach a negative injury determination and there is no need to proceed with a final investigation. Def.-Ints.' Comments on the Remand Det. of the U.S. ITC, D.E. 100, at 5 ("Def.-Ints.' Remand Comments"). The ITC correctly maintains that in preliminary investigations, the standard is not whether any *additional* data could be collected in any final investigations, but instead whether the record as a whole indicates a likelihood that contrary evidence leading to a different outcome could be obtained. Remand Results at 44 (citing *Co-Steel Raritan, Inc. v. United States*, 357 F.3d at 1294, 1311, 1314–17) (Fed. Cir. 2004) (emphasis in original).

In its original views, the ITC found that regardless of which data sets it reviewed, it still arrived at the same conclusion. *Id.* at 44. On remand, the ITC again asserts that it would reach a negative injury determination even if it relied on the data set that showed the greatest number of cumulated subject imports. *Id.* at 45. Moreover, the ITC's findings regarding large but steady subject import market share, steady domestic industry market share, no significant price depression or suppression, and a profitable domestic industry despite significant underselling would also remain the same. *Id.* Therefore, absent a reasonable indication of material injury or threat thereof, there is no need to proceed with a final investigation to gather more comprehensive data that will yield the same results. *Id.* at 46.

Nucor's arguments are unavailing. The court remanded the issue of whether the record supported the ITC's import questionnaire data as comprehensive because the ITC had failed to acknowledge the inherent limitations in its methodology and thus had failed to consider a critical aspect of the problem. In its remand results, the ITC provided a detailed explanation of its methodology, including why it chose to use importer questionnaire data over Customs data, how it collected the data, and how it analyzed the data. Vitally, the ITC admitted that it never obtains perfect data on imports, foreign producers, or the domestic industry in any investigation, given the constraints of the statute (19 U.S.C. §§ 1671b(a)(1)–(2), 1671b(f), 1673b(a)(1)–(2), 1673b(f)) and its forty-five day limitation.

Nucor's assertions regarding the ITC's failure to include certain firms in its analysis and the ITC's failure to obtain perfect coverage in its samples miss the point of the court's remand instructions—to acknowledge that the ITC's investigatory methods were imperfect. The ITC has gone above and beyond in that regard, thereby nullifying any need to proceed with a final investigation. The court therefore sustains the ITC's remand redetermination that the record supports using questionnaire data on imports into the United States of CSSF from subject and non-subject countries.

II. The ITC's Reliance on Producer A's Questionnaire Response and Inclusion of Producer A as a Domestic Producer Was Not Unreasonable

Although the ITC had asserted that it was "authorized to weigh evidence and resolve conflicts in the data," the court pointed out that the ITC did not properly show that it even considered any discrepancies. *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1287. Therefore, there was no rational basis for the unqualified inclusion of Producer A in the ITC's analysis. *Id.*

The ITC again affirmed its findings that Producer A was properly included as a producer of domestic like product. For the reasons stated below, the court sustains the ITC's remand redetermination.

A. The Record Supports Inclusion of Producer A as a Domestic Producer of CSSF

The ITC argues that the record supports the inclusion of Producer A as a domestic producer for the following reasons. First, Producer A certified in its questionnaire response that it is a producer of the domestic like product CSSF. Remand Results at 11. Although the court concluded that Producer A appeared confused about the scope of the investigations, the ITC argues that confusion as to scope is unlikely because Producer A's officials candidly admitted that they had not read the instructions at the time they filed the initial questionnaire response and later submitted an amended questionnaire response with revised answers to several questions pertaining to numerical data. *Id.* at 13–17. Second, the statute defines the domestic industry as "the producers as a whole of a domestic like product or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." *Id.* at 11 (quoting 19 U.S.C. § 1677(4)(1)).

Nucor argues that Producer A makes only "Product X" (note: the remand comments have redacted the name of the product), which falls outside of the scope of the investigations. Pl.'s Remand Comments at 37–38. Moreover, the court faulted Producer A for classifying the same fasteners as both standard and nonstandard (within scope and outside of scope). *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1286. In response, the ITC argues that Producer A's statement that it produces fasteners used for a certain purpose (outside of scope) does not indicate that it is not a producer of CSSF because Producer A reported revised allocations for U.S. shipments of CSSF and non-CSSF producers upon clarification with the ITC and its previous responses were given at a point when Producer A's officials had not read the instructions or coordinated with one another. Remand Results at 15–16.

Finally, the ITC argues that it is entitled to rely on a firm's certified statements about its own internal operations and to weigh evidence and resolve conflicts in the data. *Id.* at 11, 17. Despite Nucor's different readings of the scope language and its showing that Producer A did not revise its answer to every question in its amended response, the ITC found that the record as a whole warrants relying on Producer A's certified statements that it produced at least some CSSF and therefore including it as a domestic producer. *Id.* at 17.

B. Producer A accounts for such a small portion of domestic CSSF that its inclusion will not meaningfully affect the data, data trends, or the ITC's causation analysis

On remand, the ITC explains that because Producer A accounts for such a small fraction of domestic CSSF production, inclusion (or exclusion) would not change the outcome of the negative injury determination. *Id.* at 18. It points out that even the court acknowledged that the market share and operating margin data may suggest that the ITC might have reached the same negative preliminary injury determinations had the agency excluded, qualified, or questioned all of Producer A's data. *Id.* (referring to *Nucor*, 35 CIT at __, 791 F. Supp. 2d at 1287, n.30). Nucor argues that including Producer A in the domestic industry would "meaningfully alter[] the picture of the U.S. industry." Pl.'s Remand Comments at 39. After considering the record data with and without Producer A in the domestic industry, the ITC found that Producer A's presence or absence had no meaningful impact on the data or trends (e.g., domestic industry production, shipments, operating income, operating margins) or causation analysis (e.g., stable market shares, no effect on underselling or lack of significant price depression). Remand Results at 18. Therefore, the ITC concluded that there is no need to proceed with a final investigation.

Nucor's arguments are unconvincing. The court remanded this issue because the ITC did not properly show that it even considered any discrepancies in its questionnaire responses. Nucor points specifically to the fact that Producer A submitted a response that contained conflicting answers. In its remand results, the ITC addressed Producer A's original response, explaining that it was completed prior to Producer A's officials having read the directions or conferred with one another. Moreover, having noted the inconsistencies in Producer A's response, the ITC requested that Producer A submit an amended questionnaire response with revised answers to several questions containing numerical data. Because the ITC has demonstrated that it did indeed consider discrepancies in Producer A's original questionnaire response, the ITC has adequately addressed the court's remand instructions. There is no need for any further investigation on this issue. The court therefore sustains the ITC's redetermination on remand that Producer A was properly included in its import data as a domestic producer of CSSF.

CONCLUSION AND ORDER

Upon consideration of the remand redetermination filed by the ITC, the comments filed by Plaintiff and the Defendant-Intervenors, the reply filed by the Defendant, all other pertinent papers, and oral argument, it is hereby

ORDERED that the ITC's remand redetermination is SUSTAINED; it is further

ORDERED that judgment is entered for the United States.

Dated: May 24, 2013
New York, N.Y.

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
UNITED STATES JUDGE

Slip Op. 13–71

SINCE HARDWARE (GUANGZHOU) CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and HOME PRODUCTS INTERNATIONAL, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 09–00123
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record is granted, and the matter is remanded to the Department of Commerce.]

Dated: May 31, 2013

William E. Perry, Dorsey & Whitney LLP, of Seattle, WA, argued for plaintiff. With him on the brief were *Emily Lawson* and *Derek A. Bishop*.

Michael D. Snyder, Trial Attorney, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Rachael Wenthold Nimmo*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington D.C.

Frederick L. Ikenson, Blank Rome LLP, of Washington D.C., argued for defendant-intervenor. With him on the brief was *Larry Hampel*.

OPINION AND ORDER

Eaton, Judge:

Before the court is the Department of Commerce's (the "Department" or "Commerce") Second Final Results of Redetermination Pursuant to Remand, dated May 29, 2012 (ECF Dkt. No. 133) ("Second Remand Results"). On remand, Commerce was instructed to recon-

sider whether Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware" or "plaintiff") qualified for separate-rate status in connection with the antidumping duty order on floor-standing, metal-top ironing tables and certain parts thereof from the People's Republic of China ("PRC") and, if eligible, to determine the appropriate rate.

In the Second Remand Results, Commerce (1) determined that Since Hardware was entitled to separate-rate status, and (2) assigned a rate of 157.68%, applying adverse facts available ("AFA").[1] Plaintiff and defendant-intervenor, Home Products International, Inc. ("defendant-intervenor"), filed comments to the Second Remand Results.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

DISCUSSION

I. Background

This matter is before the court on plaintiff's challenge to the Department's final results of the third administrative review of the antidumping duty order on floor-standing, metal-top ironing tables and certain parts thereof from the PRC for the period of review ("POR") August 1, 2006 through July 31, 2007. *See* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 74 Fed. Reg. 11,085 (Dep't of Commerce March 16, 2009) (final results of antidumping administrative review) and the accompanying Issues & Decision Memorandum (collectively, the "Final Results").

In the Final Results, Commerce found that Since Hardware's reporting of the cost and origin of its production inputs was fraudulent in several respects, that the fraud significantly impeded the Department's investigation, and that Since Hardware, by providing that fraudulent information, failed to cooperate in the review to the best of

[1] The Department generally makes its antidumping determinations based on the information it solicits and receives from interested parties concerning the normal value and export price of the subject merchandise. Commerce may, however, rest its determinations on "facts otherwise available . . . to fill in the gaps when [it] has received less than the full and complete facts needed to make a determination." *Gerber Food (Yunnan) Co., Ltd. v. United States,* 29 CIT 753, 767, 387 F. Supp. 2d 1270, 1283 (2005) (quoting *Nippon Steel Corp. v. United States,* 337 F.3d 1373, 1381 (Fed. Cir. 2003)). Having determined that the use of facts otherwise available is warranted, if the Department further finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

its ability. Based on these findings, the Department determined it was appropriate to apply AFA. Commerce applied AFA both to Since Hardware's cost and origin information and to the information that the company provided relating to its independence from the PRC government. In so doing, Commerce determined that Since Hardware could not demonstrate its entitlement to separate-rate status and assigned the PRC-wide antidumping duty rate of 157.68%. In *Since Hardware I*, the court sustained Commerce's determination not to rely on the input data, but also found that the input data was not "relevant to the question of government control" and remanded with instructions to "reexamine the record" and redetermine whether Since Hardware was entitled to a separate rate. *Since Hardware (Guangzhou) Co. v. United States*, 34 CIT __, __, Slip Op. 10–108, at 15, 22 (2010) (*Since Hardware I*).

In the First Remand Results the Department again determined that application of AFA to Since Hardware's separate rate submissions was warranted and continued to apply the PRC-wide rate to its products. Remand Results (ECF Dkt. No. 108) (Dep't of Commerce Feb. 17, 2011) ("First Remand Results"). The Department found that "a critical nexus between certain statements made by Since Hardware and the company's books and records" made it impossible for Commerce to verify two de facto independence criteria.[2] First Remand Results at 6. Therefore, the Department applied AFA to Since Hardware's responses concerning its de facto independence from government control. First Remand Results at 6. The court found the Department's independence determination contrary to law and unsupported by substantial evidence and again remanded the case, instructing Commerce to "reexamine its conclusion . . . [as to] de facto independence" and Since Hardware's entitlement to a separate rate. *Since Hardware (Guangzhou) Co., Ltd. v. United States,* 35 CIT __, __, Slip. Op. 11–146, at 29 (2011) (*Since Hardware II*). It further ordered that if Commerce determined that plaintiff was entitled to a separate rate, Commerce must determine that rate. *Id.* at __, Slip. Op. 11–146, at 30.

II. The Second Remand Results

The Department made two determinations in the Second Remand Results, which was conducted under protest. Second Remand Results at 4 n.1. The first is that Since Hardware is "entitled to a separate

[2] In particular, the Department found that it could not verify "whether export prices are set by or are subject to the approval of a government agency" and "whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses." *See* First Remand Results at 6–11.

rate." Second Remand Results at 1–2, 4–5. No party challenges this determination and it is sustained.

Commerce then assigned Since Hardware a rate of 157.68% based on the application of AFA. Second Remand Results at 2. The Department justified its use of AFA by reference to the court's holding in *Since Hardware I* that "'Commerce acted reasonably in determining it could not rely on any of the company's financial information.'" Second Remand Results at 5 (quoting *Since Hardware I*, 34 CIT at __, Slip Op. 10–108, at 22).

To support its finding that a rate of 157.68% was "both reliable and relevant" the Department first argues that the selected rate was reliable because it "was calculated for another cooperative respondent in the investigation." Second Remand Results at 7–8 (citation omitted). Commerce thus contends that because the selected rate was calculated for a respondent from verified information in the investigation, and "no information has been presented that calls into question the reliability of the selected rate," that "it is not necessary to question the reliability of the margin." Second Remand Results at 8.

Commerce further claims that the rate is relevant because (1) it was a calculated rate from another respondent during the investigation and thus reflects the commercial reality of another respondent in the same industry, and (2) it was corroborated by data derived from imports of the subject merchandise into the United States during the POR ("Customs Data") which "indicate that importers are paying this rate . . . and exporters subject to this rate are nevertheless able to sell ironing tables to the United States at this rate." Second Remand Results at 9. In reaching its finding, Commerce rejected plaintiff's claim that the data used to corroborate the rate contained an insufficient number of data points. In doing so, the Department stated "that the quantity of exports at the selected AFA rate is [ir]relevant for corroboration purposes." Second Remand Results at 14.

In addition, the Department expressly declined to use a rate calculated for Since Hardware in a prior proceeding because, as in this review, "Since Hardware's submissions in those proceedings were subsequently determined to be tainted by material fraud." Second Remand Results at 10. The Department also rejected the suggested use of the margins calculated for Since Hardware in two subsequent reviews because "the information provided during those reviews . . . was unavailable to the Department at the time it conducted the underlying proceeding." Second Remand Results at 15. According to Commerce, considering margins calculated in subsequent reviews would depart from its practices of "limit[ing] its examination on remand to the original administrative record" and where more infor-

mation is necessary "limit[ing] consideration to information that was available at the time the original decision was made." Second Remand Results at 15.

Commerce also expressly declined to reopen the record to gather more information from Since Hardware from which it could calculate a rate specific to the company. The Department interpreted the court's order as not providing "Since Hardware [with] a second opportunity to provide data that it failed to produce in a timely manner during the underlying proceeding." Second Remand Results at 13. Thus, for Commerce, permitting plaintiff to place additional data on the record here "would set an untenable precedent of allowing a respondent that submitted fraudulent information during the administrative review a second opportunity to alter its responses *post hoc*." Second Remand Results at 13.

III. Analysis

Plaintiff objects to the Remand Results, arguing that (1) by declining to reopen the record to allow Since Hardware to submit additional information for use in calculating the company's rate, the Department failed to follow the court's instructions, and (2) the 157.68% rate selected by Commerce is not relevant to Since Hardware and unsupported by substantial evidence on the record.

a. Opening the Record

First, plaintiff's position that Commerce was required to open the record to permit Since Hardware to submit additional information from which the Department should have calculated the company's rate stems from a misreading of the court's remand order. Plaintiff points to the court's instructions that "in the event the Department finds that Since Hardware is entitled to a separate rate, it determine that rate . . . [and] that the Department may reopen the record to solicit any information it determines to be necessary to make its determination." *Since Hardware II*, 35 CIT at __, Slip. Op. 11–146, at 30. According to Since Hardware, this language required Commerce to calculate an individual rate for the company and, if sufficient information was not on the record to do so, to reopen the record to obtain that information. Pl.'s Objections to Dep't of Commerce's Second Remand Redetermination 5 (ECF Dkt. No. 137) ("Pl.'s Br.").

In *Since Hardware I* the court held that Commerce was entitled to "use . . . AFA to assign a dumping rate" to the company as a consequence of the absence of useable evidence on the record resulting from Since Hardware's "forged and altered" submissions. *Since Hardware I*, 34 CIT at __, Slip Op. 10–108, at 20. Therefore, the court antici-

pated the use of AFA by Commerce when determining the company's rate and nothing in the order indicated that, when applying AFA, the Department was prohibited from using any reasonable method for determining the company's rate. Moreover, the language in the remand order expressly gave Commerce discretion as to whether or not to reopen the record and as to what information it might do so for. *Since Hardware II*, 35 CIT at __, Slip. Op. 11–146, at 30 ("[T]he Department *may* reopen the record to solicit any information *it determines to be necessary* to make its determination." (emphasis added)). Since Hardware had the chance to place truthful information on the record during the underlying review. The company's decision to provide fraudulent information, and thus not to cooperate fully with the Department during the review, ended that opportunity.

Plaintiff's papers before the court incorporate by reference the arguments presented in its comments to the Department's draft remand results. There, plaintiff also argues that "Commerce should look to the data provided by Since Hardware in the other most recent segment in which it participated . . . the 2007–2008 and 2008–2009 reviews where there is no allegation" of fraud. Pl.'s Br., Ex. 2, at 9 (ECF Dkt. No. 137–1). Because "the most recent segment" took place after the review at issue here, that data is not on the record and the Department could not have considered it when it made its determination; And, as noted, nothing in this court's order directed that the Department must reopen the record. *See Yama Ribbons & Bows Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1294, 1298 (2012) ("Commerce must base its decisions on the record before it in each individual investigation."); *Zhejiang Native Produce and Animal By-Products Imp. & Exp. Grp. Corp. v. United States*, 32 C.I.T. 673, 687 (2008) ("Commerce's determination must be based on record evidence."). Accordingly, this argument fails.

b. Corroboration

On remand, Commerce selected a rate calculated for a cooperating competitor of Since Hardware during the initial investigation, which took place from October 1, 2002 to March 31, 2003. A rate calculated in the final determination of an investigation may be appropriate "secondary information" which Commerce may use in assigning an AFA rate. *See* Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. No. 103–316 Court No. 09–00123 Page 9 at 870, *reprinted* in 1994 U.S.C.C.A.N. 4040, 4199 (1994) ("Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review

under section 751 concerning the subject merchandise."); *KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) (describing secondary information as information not obtained in the course of the subject investigation or review); *see, e.g.*, *Tianjin Magnesium Int'l Co. v. United States*, 35 CIT ___, ___, Slip. Op. 11–100, at 7–8 (2011); *Washington Int'l Ins. Co. v. United States*, 33 CIT __, __, Slip. Op. 09–78, at 21–24 (2009); *Chia Far Indus. Factory Co. v. United States*, 28 CIT 1336, 1358–59, 343 F. Supp. 2d 1344, 1365–66 (2004) (noting that a rate calculated for another party in the initial investigation is secondary information); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 682 (2000) (treating a margin assigned to an individual respondent in the initial investigation as secondary information).

To support its selection of a particular rate, "Commerce must . . . demonstrate that the rate is reliable and relevant to the particular respondent" and "show that it used reliable facts that had some grounding in commercial reality." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 36 CIT ___, ____, Slip. Op. 12–83, at 6–7 (2012) (citations and internal quotation marks omitted) (*Tianjin II*); *see also KYD*, 607 F.3d at 765 ("Before Commerce can rely on secondary information, it must establish that the 'secondary information to be used has probative value.'" (citation omitted)). When Commerce "relies on secondary information" to select an AFA rate, it must, "to the extent practicable," corroborate that rate using "information from independent sources[3] that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). Put another way, when selecting an AFA rate based on secondary information, the Department must, to the extent practicable, use independent sources to demonstrate both the reliability of the selected rate and the relevance of the selected rate to the respondent currently under review.

To demonstrate relevance, the Department must show that the selected rate is "a reasonably accurate estimate of the respondent's actual rate" by "show[ing] some relationship between the AFA rate and the actual dumping margin." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010). Thus, the selected rate "should bear a rational relationship to [the] respondent's commercial reality." *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT ___, ___, Slip Op. 13–46, at 6 (2013) (citation omitted); *see Gallant Ocean*, 602 F.3d at 1323.

[3] The "independent sources" requirement should not be conflated with the use of "secondary information." Secondary information is information not obtained during the course of the instant review and from which a selected rate is derived. Independent sources are the information that must be used to show that a selected rate based on secondary information is both reliable and relevant.

As an initial matter, the Department has sufficiently demonstrated the reliability of the rate. An AFA rate selected from a prior review will be found sufficiently reliable where it is for the "same categor[y] of merchandise," it is "based on verified information taken from similar companies," it has "not been found either unsupported by substantial evidence nor contrary to law by any court," and where it is not "challenged by any record evidence." *Shandong Mach. Imp. & Exp. Co. v. United States*, 33 CIT ___, ____, Slip. Op. 09–64, at 17 (2009). The selected rate, initially assigned to Shunde Yongjian Housewares Co., Ltd., was calculated from verified information for the same type of merchandise during the investigation stage of the current proceedings. *See* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the PRC, 69 Fed. Reg. 35,296, 35,297, 35,312 (Dep't of Commerce June 24, 2004) (notice of final determination of sales at less than fair value); Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the PRC, 69 Fed. Reg. 47,868 (Dep't of Commerce Aug. 6, 2004) (notice of amended final determination of sales at less than fair value and antidumping duty order). Plaintiff has neither placed evidence on the record to challenge the reliability of the selected rate, nor pointed to any court's holding declaring the selected rate to be unreliable. Thus, Commerce has sufficiently demonstrated reliability.

The Department, however, has failed to demonstrate relevance. As noted, when the Department relies on "calculated rates from previous reviews, rather than information obtained in the course of a current investigation or review, the Department must, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Shandong Mach.*, 33 CIT at ___, Slip. Op. 09–64, at 11–12 (citations and internal quotation marks omitted). In doing so, the Department must demonstrate some rational relationship between the selected rate and Since Hardware's own commercial reality. *Dongguan Sunrise Furniture*, 37 CIT at __, Slip Op. 13–46, at 6. That the Department has calculated a rate for another respondent in a prior segment of the proceeding is not, standing alone, evidence sufficient to support a finding of relevance of that rate to a different respondent in a later review. [4] *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 37 CIT ___, ___, Slip Op. 13–47, at ___ (2013). A rate assigned for a different respondent several years earlier, without more, is simply not probative of whether a selected rate is "'a *reasonably accurate estimate* of [a]

[4] This is not a case where the *Rhone Poulenc* presumption that the highest prior margin is probative applies. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990). Not only does that presumption not "replace actual corroboration . . . . [T]he Federal Circuit

respondent's actual rate'" in the current review. *Gallant Ocean*, 602 F.3d at 1323 (quoting *De Cecco*, 216 F.3d at 1032). Thus, despite defendant's claims to the contrary, the rate calculated for another company in the investigation some three years earlier does not necessarily reflect the commercial reality of plaintiff in this review.

Moreover, this is not an instance where the Department maintains that it was impracticable to refer to independent sources to demonstrate the relevance of the selected rate. It is clear that there were independent sources available to the Department from which it could practicably corroborate a selected rate. Indeed, the Department has attempted to rely on an independent source to corroborate its chosen rate, namely the Customs Data. This type of data may serve as a means of corroboration. 19 C.F.R. § 351.308(d) (2009) (defining "official import statistics and customs data" as exemplars of "independent sources"). The Department thus argues that, because the Customs Data contained some entries of subject merchandise imported at the selected rate, the Customs Data provided "some corroboration" of the rate's relevance.

The Customs Data, however, contains a very small number of arguably relevant entries. In addition, taken as a whole, it is unclear how the Customs Data supports the Department's conclusions.[5] In reply to Since Hardware's objection that the Customs Data reflected too few entries to corroborate the selected rate, Commerce found that the size of the sample to be irrelevant for corroboration purposes. Second Remand Results at 14 ("We disagree that the quantity of exports at the selected AFA rate is relevant for corroboration purposes, as there is no requirement that the selected source of AFA must be based upon a specified amount of sales volume."). In other words, the Second Remand Results do not meaningfully address whether the number of entries underlying the Customs Data adequately demonstrates the relevance to Since Hardware of an AFA rate of 157.68%.

appears to restrict its use to situations where a respondent has not answered Commerce's questionnaire at all, rather than when the questionnaire responses were found wanting for one reason or another." *Tianjin Mach. Imp. & Exp. Co. v. United States*, 35 CIT __, __, 752 F. Supp. 2d 1336, 1348 (2011). Here, Since Hardware responded to the Department's questionnaires, if fraudulently.

[5] The quantity of the exports represented by the Customs Data is truly miniscule. The data reflects only [[ ]] importations of goods at the selected rate under the tariff headings covered by the order: 9403.20.0011 and 9403.90.8041. Those imports had [[ ]] which is not specifically defined in the data but presumably represents the value of the cash-deposit.

The other entries in the Customs Data at the selected rate are [[ ]]. The court is at a loss as to how the antidumping rates applied to the importation of articles such as [[ ]] can demonstrate that the selected rate is relevant to respondent's commercial reality [[ ]]. The Customs Data also contains numerous [[ ]].

Contrary to the Department's position, however, the size of the data set relied upon may be relevant to whether an AFA rate is sufficiently corroborated. *Dongguan Sunrise Furniture*, 37 CIT at __, Slip Op. 13–46, at 6 ("Here Commerce has based [respondent's] rates on an impermissibly small percentage of sales."); *Lifestyle Enter., Inc., v. United States*, 36 CIT __, at__, 865 F. Supp. 2d 1284, at 1289 (2012) (*Lifestyle II*) ("Selection of an AFA rate based on miniscule data will not suffice."); *Lifestyle Enter., Inc., v. United States*, 36 CIT ___, ___, 844 F. Supp. 2d 1283, 1289 (2012) (*Lifestyle I*) ("Facts specific to a particular case may make transactions representing a small percentage of sales inadequate corroboration."); *Tianjin Mach. Imp. & Exp. Co. v. United States*, 35 CIT __, at__,752 F. Supp. 2d 1336, at 1352 (2011) (*Tianjin I*) (rejecting the use of a small number of third party transactions as corroboration); *cf. Gallant Ocean*, 602 F.3d at 1324 ("Because Commerce did not identify any relationship between the small number of unusually high dumping transactions with [petitioner's] actual rate, those transactions cannot corroborate the adjusted petition rate."); *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, Appeal No. 2012–1312, at 17 (Fed. Cir. May 20, 2013) ("What could have been a coincidental correlation of the three data points is not enough to be substantial supporting evidence of commercial reality."). Thus, the probative value of the Customs Data can clearly be influenced by the sample size.

Further, the Customs Data reveals more than simply a handful of entries of subject merchandise imported at the selected rate. It also contains a number of entries of subject merchandise liquidated at less than Commerce's selected rate. More, the data also covers a mix of other clearly non-subject products, some of which were imported at the selected rate. The Department provides no meaningful explanation of either the rate discrepancies, or why the rates applied to these other non-subject products were probative of Since Hardware's commercial reality. Instead, it ignores them, stating only that they "reveal a number of entries [that] were liquidated at 157.68 percent, and that these entries included subject merchandise." Second Remand Results at 14; *see also* Remand Analysis Memo of Final Remand Results, Pl.'s Br., Conf. Ex. 3, at 1–2. Importantly, this explanation fails to give any significance to the fact that only [[ ]] listed entries are for merchandise covered by the order and that the majority of entries at the chosen rate were for non-subject merchandise.

In order to meet its burden of corroboration, the Department must use probative data "that indicates what [a respondent's] individually calculated margin might be." *Yangzhou Bestpak*, Appeal No.

2012–1312, at 17; *Lifestyle I*, 36 CIT at ___, 844 F. Supp. 2d at 1288 ("Commerce corroborated the rate with data that were not probative and therefore the rate is not supported by substantial evidence."). Where the Department relies on Customs import information to corroborate a rate, in order to demonstrate relevance it must point to some record evidence indicating either that the data reflects a commercially meaningful quantity of the subject merchandise or that there are "additional facts that make the small [quantity] less troubling." *Lifestyle II*, 36 CIT at ___, 865 F. Supp. 2d at 1290 (citations omitted).

In addition, Commerce's determinations "must include 'an explanation of the basis for its determination.'" *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1320 (Fed. Cir. 2009) (citing 19 U.S.C. 1677f(i)(3)(A)). Surely, questions relating to (1) the significance of subject merchandise entered at rates much lower than the selected rate, and (2) the partial reliance on rates applied to clearly non-subject merchandise require an explanation. Where the Department has reached important conclusions that are not fully explained with reference to record evidence, remand is appropriate for Commerce to "'explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations.'" *Clearon Corp. v. United States*, 35 CIT __, __, Slip Op. 11–142, at 27–28 (2011) (quoting *Allegheny Ludlum Corp. v. United States*, 29 CIT 157, 168, 358 F. Supp. 2d 1334, 1344 (2005)). Here, Commerce has failed to explain its rationale for not taking into account the entries of subject merchandise liquidated at rates less than the selected rate or for relying on liquidation rates for entries of non-subject merchandise.

Accordingly, because the Department has not explained why the size of the Customs Data is sufficient to demonstrate the relevance of the selected rate to Since Hardware, its determination that the selected rate is corroborated and that the requirements of 19 U.S.C. § 1677e(c) have been met, is not supported by substantial evidence and must be remanded for further explanation. Also, remand is warranted because Commerce has failed to provide a convincing explanation as to why the evidence it has presented is sufficient to corroborate its selected rate.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for judgment on the agency record is GRANTED, and Commerce's Final Results are REMANDED; it is further

ORDERED that, on remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

ORDERED that the Department shall explain why the Customs Data represents a sufficiently large number of entries to demonstrate the relevance of the selected rate or shall otherwise corroborate its selected rate in a manner supported by substantial evidence and in accordance with law; it is further

ORDERED that the Department shall explain with specificity why the rates for products other than subject merchandise tend to corroborate the selected rate and the significance, if any, of the subject merchandise being entered at rates below the selected rate; it is further

ORDERED that should the Department continue to rely upon the Customs Data, it shall explain with specificity why the Customs Data demonstrates that the selected rate is relevant to Since Hardware, and either identify record evidence indicating that the Customs Data represents a relevant quantity of exports of the subject merchandise or reopen the record to place such additional evidence thereon; it is further

ORDERED that Department may reopen the record to solicit any information it finds to be necessary to make its determination; it is further

ORDERED that the remand results shall be due on September 30, 2013; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

Dated: May 31, 2013
New York, New York

/*s*
RICHARD K. EATON

Slip Op. 13–78

TYCO FIRE PRODUCTS L.P., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 08–00190

[Plaintiff's and Defendant's cross-motions for summary judgment are denied in Customs classification matter.]

Dated: June 21, 2013

Michael E. Roll, Pisani & Roll, of Los Angeles, CA, argued for the Plaintiff.

Amy M. Rubin, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for the Defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Restani, Judge:

Tyco Fire Products L.P. ("Tyco") appeals a U.S. Customs and Border Protection ("Customs") ruling that Tyco's products — filled bulbs[1] it uses in firesprinklers and water heaters — are classified under Chapter 70 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as articles of glass.[2] Tyco contends in its motion for summary judgment that the goods should be classified within Chapter 84, as parts of certain machines. Tyco asserts that its goods are properly classified under Heading 8419 or 8424[3] because the liquid compound inside the glass, not the glass itself, imparts the products with their essential character. Defendant United States asserts in its cross-motion for summary judgment that Customs' determination was correct. Alternatively, Defendant argues that Tyco has not proven that the filled bulbs are principally or solely used in particular machines, and therefore the court may not classify them as parts of such machines, at least not on summary judgment.

BACKGROUND

This matter involves entries made through the Port of Dallas-Fort Worth, Texas, from July 2004 until July 2006. Case File Entry Docs, Dkt. No. 1. Tyco was the importer of record on the entries at issue. *See* Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s Facts") ¶ 1; Def.'s Resp. to Pl.'s Statement of Material Facts as to Which There Are No Genuine Issues to be Tried ("Def.'s Resp.") ¶ 1. Each imported product consists of a sealed glass bulb with an inner cavity that is filled with colored liquid. *See* Pl.'s Facts ¶ 21; Def.'s Resp. ¶ 21. The filled bulbs come in a variety of sizes in terms of length, diameter, and

[1] The filled bulbs also are referred to as frangible glass bulbs, thermal bulbs, thermal triggers, and thermal activation devices, among other terms.

[2] Tyco challenges Customs' classification decisions in two separate cases that have not been consolidated, Ct. Nos. 08–00190 and 08–00194. The cases generally cover the same products, and therefore, this opinion addresses the claims in both cases for which the parties filed identical briefs. An order is issued simultaneously in Ct. No. 08–00194 adopting the decision contained herein.

[3] All citations to the HTSUS refer to the HTSUS at the time of importation, i.e., the 2004–2006 versions. There were no material changes to the relevant subheadings during this period of time.

thickness. Pl.'s Facts ¶¶ 61–63, 65–69; Def.'s Resp. ¶¶ 61–63, 65–69. When a filled bulb is exposed to heat, the temperature of the glass increases, and the heat is transferred through the glass to the liquid. *See* Pl.'s Facts ¶¶ 25–26; Def.'s Resp. ¶¶ 25–26. As the liquid also heats, it expands in volume, and a bubble that is present in the filled bulb's cavity shrinks. Pl.'s Facts ¶ 27; Def.'s Resp. ¶ 27. Eventually, the bubble disappears, and the bulb's cavity is completely filled with liquid. Pl.'s Facts ¶ 27; Def.'s Resp. ¶ 27. Because the liquid no longer has space to expand within the cavity, pressure on the glass builds. Pl.'s Facts ¶ 27; Def.'s Resp. ¶ 27. Over time, the pressure increases to the point where the glass can no longer sustain the pressure on it, and the filled bulb explodes or fractures. Pl.'s Facts ¶ 27; Def.'s Resp. ¶ 27. Based on this mechanism, all of the filled bulbs at issue operate as thermal activation devices within some type of system.[4] Pl.'s Facts ¶ 14; Def.'s Resp. ¶ 14.

In the case of a water-based fire sprinkler, the filled bulbs are mounted within the metal sprinkler head such that they hold closed a valve, preventing water from spraying out of the opening. Pl.'s Facts ¶¶ 11–12; Def.'s Resp. ¶¶ 11–12. When a certain temperature is reached, the glass breaks, releasing the valve and allowing water to be dispersed.[5] Pl.'s Facts ¶ 28; Def.'s Resp. ¶ 28. In the case of filled bulbs used in water heater systems, the filled bulbs are situated within the device in a manner that holds open a door. Pl.'s Facts ¶ 28; Def.'s Resp. ¶ 28. The breaking of the glass allows the door within the system to close, cutting off the air supply to the combustion chamber, thereby preventing an explosion. Pl.'s Facts ¶ 28; Def.'s Resp. ¶ 28. Thirty-nine models of the filled bulbs are used by Tyco in fire sprinkler systems.[6] Pl.'s Facts ¶ 10; Def.'s Resp. ¶ 10. The other three

[4] This case involves two general types of filled bulbs, as used by Tyco — those used in fire sprinkler systems and those used in water heater systems. Pl.'s Facts ¶ 28; Def.'s Resp. ¶ 28.

[5] The filled bulbs are all designed to shatter at a predetermined temperature, determined by the amount of liquid placed in each bulb in comparison to the capacity of the cavity, i.e., the larger the bubble of air left in the cavity, the higher the activation temperature. Pl.'s Facts ¶¶ 48–49; Def.'s Resp. ¶¶ 48–49. Because the melting point for glass is quite high, Tyco's expert opined that without the liquid inside the bulb, the sprinkler system would likely melt before the empty glass bulb melted or exploded. Dep. of Manual Silva ("Pl.'s Dep."), Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem."), Ex. A at 127–28, 183–84.

[6] Tyco's complaint in Ct. No. 08–00194 initially did not list HTSUS subheading 8419.90.10 as a possible classification. Compl. ¶¶ 7–10, Dkt. No. 5, Ct. No. 08–00194. Tyco, however, filed a motion to amend concurrent with its motion for summary judgment, and the court granted the amendment on February 9, 2012. Ct. No. 08–00194, Dkt. No. 41. Tyco now argues that the three models of filled bulbs used in water heater systems should be classified under HTSUS subheading 8419.90.10, and the remaining thirty-nine models of filled bulbs used in fire sprinkler systems should be classified under HTSUS subheading 8424.90.90. Am. Compl. ¶¶ 1–17, Dkt. No. 35–1, Ct. No. 08–00194. Alternatively Tyco argues that all forty-two models of filled bulbs should be classified under HTSUS

models are used by Tyco exclusively as thermal release devices for water heaters. Pl.'s Facts ¶ 79; Def.'s Resp. ¶ 79. According to Tyco's Rule 30(b)(6) agent, [7] whether used in fire sprinkler systems or water heaters, the function of the filled bulb is "[v]ery similar." Pl.'s Dep. at 44.

Tyco purchases its filled bulbs from two different German producers — Job GmbH ("Job") and Geissler Glasinstrumente GmbH ("Geissler"). Pl.'s Facts ¶ 57; Def.'s Resp. ¶ 57. The same type of liquid, triethylene glycol, is used in all filled bulbs produced by Geissler. *See* Pl.'s Facts ¶ 72; Def.'s Resp. ¶ 72. Tyco, which is related to only Geissler, is unable to identify the composition of the liquid in the Job filled bulbs at issue, but it believes that the liquid component in at least some of Job's filled bulbs is triethylene glycol. Pl.'s Facts ¶¶ 73–74.

Tyco's entries were liquidated by Customs under subheading 7020.00.60, which provides for "[o]ther articles of glass:[o]ther." [8] Pl.'s Mem. 2; Case File Entry Docs, Dkt. No. 1. Tyco claimed the filled bulbs were classifiable under subheading 8424.90.90, which provides for "other" "parts" of goods of Heading 8424, free of duty. Pl.'s Mem. 1–2. Tyco filed a timely protest and application for further review, challenging the classification of the merchandise at issue. *See id.* In response, Customs' headquarters issued a ruling, HQ 5116 (Nov. 20, 2007), *available at*, 2007 WL 4901407, confirming that the filled bulbs were properly classified in Heading 7020 as articles of glass. *Id.* at 2–3. Customs based its position on statutory Note 1(c) of Chapter 84 which excludes from Chapter 84 parts of machinery or appliances "of glass." HQ 5116 at 2. Tyco contends, however, that Note 1(c) does not apply to the filled bulbs at issue because they are not articles "of glass." *Id.* at 16.

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subheading 8424.90.90. *Id.* ¶¶ 18–20. Both subheadings currently share the same tariff rate, free of duty.

[7] USCIT Rule 30(b)(6) permits designation by, inter alia, a private corporation of one or more "officers, directors, or managing agents" to testify on its behalf. The designated individual must then "testify about information known or reasonably available to the organization." USCIT R. 30(b)(6).

[8] After the subject goods were entered, Tyco successfully lobbied Congress to amend the tariff schedule to provide a new tariff line for its products, 9902.24.26: "Liquid-filled glass bulbs designed for sprinkler systems and other release devices (provided for in subheading 7020.00.60)." *See* Pub. L. No. 109–432, § 1331, 120 Stat. 3124 (2006); Mem. on Proposed Tariff Legislation of the 109th Cong., Def.'s Ex. K. This temporary subheading expired on December 31, 2012 and has not been renewed. *See* Pub. L. No. 111–227, § 3001(b)(10), 124 Stat. 2409, 2476 (2010) (extending the duty suspension through 2012 but modifying the rate to 0.9%). The new tariff line is not retroactive, and therefore it does not govern the resolution of the present case.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction in this case pursuant to 28 U.S.C. § 1581(a) (2006). Although Customs' decisions ordinarily are entitled to a presumption of correctness pursuant to 28 § 2639(a)(1), the court makes its determinations based upon the record before it, not upon the record developed by Customs. *See United States v. Mead Corp.*, 533 U.S. 218, 233 n.16 (2001). Accordingly, the court makes findings of fact and conclusions of law de novo. *See* 28 § 2640(a). Summary judgment is appropriate when the parties' submissions "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Where tariff classification is at issue, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

Plaintiff has the burden of establishing that the government's classification of the product was incorrect, but it does not bear the burden of establishing the correct tariff classification; instead, the correct tariff classification will be determined by the court. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). In determining the correct tariff classification, the court first must "ascertain[] the proper meaning of specific terms in the tariff provision." *David W. Shenk & Co. v. United States*, 960 F. Supp. 363, 365 (CIT 1997). That meaning is a question of law. *See Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). Second, the court must determine the tariff provision under which the subject merchandise is properly classified based upon the factual description of the goods. *See Bausch & Lomb*, 148 F.3d at 1365. This ultimate determination is also a question of law. *Id.* at 1365–66. The statutory presumption of correctness given Customs' classification decisions by § 2639(a)(1) does not apply if the court is presented solely with a question of law by a proper motion for summary judgment. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997).

DISCUSSION

The General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs") of the HTSUS provide the analytical framework for the court's classification of goods. *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). For additional guidance as to the scope and meaning of tariff headings and notes, the court also may consider the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding

System, developed by the World Customs Organization. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992). Although the ENs are not part of U.S. law and therefore not binding on the court, they are "indicative of proper interpretation" of the tariff schedule. *Id.* (quoting H.R. Rep. No. 100–576, at 549 (1988) (Conf. Rep.), *reprinted in*, 1988 U.S.C.C.A.N. 1547, 1582) (internal quotation marks omitted).

GRI 1 instructs that tariff classification is to "be determined according to the terms of the headings and any relative section or chapter notes." The chapter and section notes of the HTSUS are not interpretive rules; rather, they are statutory law, and therefore, they must be considered in resolving classification disputes. *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (recognizing the controlling authority of chapter notes). Goods that cannot be classified solely by reference to GRI 1 must be classified by reference to the subsequent GRIs in numerical order. *See N. Am. Processing*, 236 F.3d at 698. "The HTSUS is designed so that most classification questions can be answered by GRI 1 . . . ." *Telebrands Corp. v. United States*, 865 F. Supp. 2d 1277, 1280 (CIT 2012) (citing Edward D. Re, Bernard J. Babb & Susan M. Koplin, 8 West's Fed. Forms, *National Courts* § 13343 (2d ed. 2012)).

A. *Competing Tariff Headings*

Defendant has proffered Heading 7020 as the proper classification for Tyco's filled bulbs. Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. & in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Mem.") 8. This basket heading for other articles of glass includes articles of glass not classified elsewhere in the chapter or in the HTSUS. The ENs to Chapter 70 confirm this interpretation, explaining that articles containing glass are to be classified in Chapter 70 provided they are not more specifically covered by other headings of the HTSUS. EN Ch. 70 at 1155 (2002).[9] In turn, Heading 7020 is designed to cover glass articles not otherwise classified in Chapter 70.[10] EN Heading 7020 at 1178. The ENs further explain that articles remain in Heading 7020 "even if combined with materials other than glass, provided they retain the essential character of glass articles." *Id.* Accordingly, if Tyco's filled bulbs retain the essential character of glass and are not more specifically described elsewhere in the HTSUS, they are to be classified in Heading 7020.

[9] All citations to the ENs are to the 2002 version, the most recently promulgated edition at the time of importation.

[10] Neither party contends that another part of Chapter 70 more specifically covers the goods, and the court has not found any other heading of the chapter that does so.

The heading under which Tyco believes the goods are more specifically described is Heading 8424,[11] as parts of sprinkler systems, or Heading 8419,[12] as parts of water heaters. The goods prima facie appear to be described by each claimed heading in Chapter 84, at least based on Tyco's use of the goods. Pursuant to GRI 1, however, the court must evaluate whether the goods are excluded from Chapter 84 based on any relevant statutory notes. As Defendant points out, Note 1(c) to Chapter 84 excludes "[l]aboratory glassware (heading 7017); machinery, appliances or other articles for technical uses or parts thereof, of glass (heading 7019 or 7020)."[13]

The exclusionary note is further described by the EN to Chapter 84. The EN explains that Note 1(c) is intended to exclude an article if "it has the character of an article . . . of glass." EN Ch. 84 at 1393. Furthermore, the ENs provide an illustrative list of articles "of glass" that incorporate a component of minor importance, such as "stoppers, joints, taps, etc., clamping or tightening bands or collars or other fixing or supporting devices (stands, tripods, etc.)." *Id.* On the other hand, an article loses its character as being "of glass" when it is combined with a high proportion of other materials or the glass acts as a static component of an article that incorporates a dynamic com-

[11] Heading 8424 of HTSUS encompasses:

> Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof;

[12] Heading 8419 of the HTSUS covers:

> Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514) for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof;

[13] Defendant argues that the court's analysis may end here based on GRI 2(b). Def.'s Reply to Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. ("Def.'s Reply") 1. That GRI explains:

> Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.

The GRIs are applicable to headings and, by virtue of GRI 6, subheadings, but not to statutory notes. *See Ciba-Geigy Corp. v. United States*, 223 F.3d 1367, 1372–73 (Fed. Cir. 2000) (explaining that before the court may resort to GRI 3, the good must be classifiable within at least two competing headings, in light of the chapter notes). Even assuming GRI 2(b) was applicable here, Defendant fails to appreciate the final sentence of GRI 2(b): "The classification of goods consisting of more than one material or substance shall be according to principles of rule 3." This in turn directs the court to apply the heading that most specifically describes the good, and where the classification is still uncertain as between two headings or subheadings, to classify the goods according to their essential character. GRI 3(a), (b). Therefore, even applying Defendant's flawed interpretative methodology, the court's analysis would not end without an examination of the essential character of the goods.

ponent, such as a motor. *See id.*

Accordingly, an analysis under either EN directs the court to undertake an essential character test. If the filled bulbs retain the essential character of glass, they must be classified under Heading 7020. If they are not articles "of glass," they may be classifiable in Chapter 84.[14]

B. *Essential Character*

In evaluating essential character in the analogous context of GRI 3(b), courts often consider a variety of factors, including those laid out in the relevant EN to that GRI:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value,[15] or by the role of a constituent material in relation to the use of the goods.

EN GRI 3(b), (VIII) (footnote added). Importantly, while this list of factors is instructive, it is not exhaustive. *See Home Depot, U.S.A., Inc. v. United States*, 427 F. Supp. 2d 1278, 1293 (CIT 2006), *aff'd*, 491 F.3d 1334 (Fed. Cir. 2007). A court may further consider the article's name, other recognized names, invoice and catalogue descriptions, size, primary function, uses, and ordinary common sense. *Id.* at 1293. In applying this test in *Pillowtex*, the Federal Circuit affirmed the CIT's decision that a comforter shell made of cotton and stuffed with down filling derived its essential character from the down filling, which provided an insulating quality and made the product useful as a bed covering. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1376 (Fed. Cir. 1999). Similarly, the court looked to function in *Better Home* in which it decided that a plastic lining imparted a shower curtain with its essential character based on its function. *Better Home Plastics Corp. v. United States*, 119 F.3d 969, 970–71 (Fed. Cir. 1997).

Relying on this line of cases deciding essential character primarily based on the article's function, the parties contest the relative impor-

[14] Another potential classification of the filled bulbs could be under the appropriate heading for the liquid component. Neither party has addressed this possibility in its briefs, and the content of the liquid in at least some of the filled bulbs remains unknown. Because the court denies both cross-motions for summary judgment, the lack of evidence on the contents of the filled bulbs is not important at this stage.

[15] The parties appear to be unaware of the relative weights or values of the glass and liquid components of the filled bulbs. *See* Pl.'s Mem. 19 n.7. Tyco's expert provided information on the cost of each part of the filled bulb in a per kilogram format. Decl. of Manuel Silva, Pl.'s Mem. Ex. C at 2. Without specific weight information, however, the court effectively is unable to use this data in considering these factors. Defendant also decided not to conduct its own analysis of the filled bulbs to permit the court to consider these factors.

tance of the glass and the liquid components of the filled bulbs with respect to the product's function. They largely agree that this should be the key factor in deciding the filled bulbs' essential character. *Compare* Pl.'s Facts ¶¶ 33–37, *with* Def.'s Resp. ¶¶ 33–37. Tyco asserts that the liquid aspect of the device is "more influential" than the glass component because it is the liquid's response to heat that causes the glass to shatter. Pl.'s Facts ¶¶ 33, 35 (describing the fluid as the "'brains' behind the operation of a bulb"). Tyco argues that the specific type and amount of fluid used influences when and how quickly the filled bulb responds, and it ensures that the filled bulb can perform adequately over the life of the machine. *Id.* at ¶¶ 30–31. The glass, Tyco maintains, does nothing other than "just 'sit[] there'" and heat up. *Id.* at ¶ 36. By contrast, Defendant asserts that the glass is "critical because there is no bulb without it." Def.'s Resp. ¶ 36. Furthermore, Defendant argues that the glass component alone is responsible for the devices' load factor. Def.'s Mem. 4 (citing Pl.'s Dep. at 71). Defendant also asserts that the glass component is "working" constantly, from the moment the filled bulb is installed into a release device until the moment the device is triggered, which is a brief moment that ideally never comes to pass. *Id.*

There are various considerations consumers take into account when selecting a filled bulb for a particular application: the reaction time it takes the device to reach the temperature at which the filled bulb will shatter, the load to which the device will be subjected, the environmental conditions in which it is used, and the temperature at which the glass will shatter. Pl.'s Facts ¶ 92; Def.'s Resp. ¶ 92. With the exception of load factor, both the glass and liquid components of the filled bulb play some role in determining each characteristic, albeit to varying degrees. Pl.'s Facts ¶¶ 78, 92; Def.'s Resp. ¶¶ 78, 92.

The court concludes that based on the evidence put forward by both parties in their cross-motions for summary judgment, questions of material fact exist that preclude summary judgment in favor of either party at this juncture. The parties have focused extensively on the relative functional importance of the glass and liquid components of the filled bulbs. As it stands, the court recognizes that obviously both components play a critical role in the function of the device. The filled bulbs would not function properly as commercial products without some shattering mechanism, such as the expandable liquid inside of them. They are not simply glass stoppers that happen to be filled with liquid. On the other hand, it is the presence of the glass component of the filled bulb within a machine that holds a valve closed or a door open. In turn, the sudden absence of the filled bulb in the event of a fire allows the sprinkler to operate. No evidence has been put forward

regarding other important factors that courts have considered when deciding essential character, such as the weight and value of the components. This evidence is particularly important where, as here, the question of the relative importance of each component to the product's function is far from clear. Because of this factual uncertainty, summary judgment is inappropriate.

C. *Sole or Principal Use*

Another dispute of material fact exists as to the filled bulbs' sole or principal use, also precluding summary judgment. Tyco alleges that it uses all but three models of filled bulbs solely in fire sprinkler systems, classified under Heading 8424. Pl.'s Facts ¶¶ 10, 79. It also claims that the other three models of filled bulbs are used solely in water heaters, classified under 8419. Pl.'s Facts ¶¶ 10, 79. Defendant does not dispute these statements of fact with respect to Tyco's use. Def.'s Resp. ¶¶ 10, 79. Defendant claims, however, that Tyco has not put forward evidence that these are the sole or principal uses of the filled bulbs in the overall U.S. market. Def.'s Mem. 26–27. Defendant also has put forward evidence of several other uses of filled bulbs, both from Job and another U.S. company, Kidde Fire Systems. *See* Def.'s Ex. H, N, O, P, Q (showing uses of the filled bulbs in kitchen hoods and fire doors, among others); Pl.'s Dep. at 46 (identifying other possible uses to include door and ventilation links).

Under ARI 1(c), to be classified as a part of a particular device, the article must be principally or solely used as a part in that device, and it "must not have substantial other independent commercial uses." *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1338–39 (Fed. Cir. 1999) (citing *Bauerhin Techs. Ltd. P'ship v. United States*, 110 F.3d 774, 779 (Fed. Cir. 1997)). Because ARI 1(c) renders all parts subheadings use provisions, the court must also apply ARI 1(a):

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Principal use has been defined as "the use 'which exceeds any other *single* use.'" *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (emphasis in original) (quoting Conversion of the Tariff Schedules of the United States Annotated into the Nomenclature Structure of the Harmonized System: Submitting Report 34–35 (USITC Pub. No. 1400) (June 1983)). "The principal use of the class or kind of goods to which an import belongs is controlling, not the

principal use of the specific import." *E.M. Chems. v. United States*, 923 F. Supp. 202, 208 (CIT 1996). In considering whether a product falls within a particular class or kind of goods, courts have considered a variety of factors including:

> (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (e.g. the manner in which the merchandise is advertised and displayed); (5) the usage of the merchandise; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use.

Id. (citing *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976)).

Accordingly, the first question before the court is whether all forty-two bulbs are part of a single class or kind of goods. Tyco has submitted uncontradicted evidence that its water heater bulbs were designed for use specifically in water heaters. These filled bulbs have a distinct shape and size and were made for a particular customer. There is no evidence on the record that indicates these goods are interchangeable with the other filled bulbs and appear to be directly sold only for use in particular water heaters. Accordingly, these filled bulbs appear to be a separate class or kind of filled bulb from the other thirty-nine models at issue. No evidence has been submitted by Defendant demonstrating alternative uses for this particular class of filled bulbs, and therefore, Tyco has met its burden in demonstrating the principal use of these filled Court No. 08–00190 Page 15 bulbs as parts of water heaters.[16]

Turning to the other thirty-nine bulbs at issue, the court finds that a genuine dispute of a material fact exists regarding the principal use of this class of bulbs. The parties have submitted conflicting evidence on use, rendering summary judgment inappropriate as to this issue as well. Tyco's patent and marketing materials, while not conclusive, provide some evidence to support its claim that the use "which exceeds any other single use" is fire sprinklers. Defendant's marketing and patent evidence, while far from conclusive, however, demonstrates that the manufacturer of some of the filled bulbs, Job, advertises the filled bulbs for other commercial uses. Additionally, the Kidde literature demonstrates that the same mechanisms advertised

[16] The government also argues that the filled bulbs may not be considered parts because they function as thermal triggers even when not installed within a machine. Def.'s Mem. 25–26. This function, however, serves no commercial purpose if the filled bulb is not installed within some type of trigger mechanism.

by Job are made and/or sold in the United States, incorporating similar bulbs.[17] Taken together this is sufficient to at least call into question the principal use of the class of bulbs in the U.S. at the time of importation. All that the evidence has shown conclusively at this point is that the bulbs serve no commercial purpose without being incorporated into some type of device. It does not demonstrate as a matter of law the principal use of the goods.

The court notes that the question of principal use is material not just to determine whether the filled bulbs are excluded from Chapter 84 but also to decide where in Chapter 84 the filled bulbs could be classified. For example, the filled bulbs may be classified under different headings as parts of particular machines or as parts of goods classified in basket subheading 8485.90[18] if they may be used interchangeably in multiple machines. *See* HTSUS, Section XVI, Note 2. As demonstrated, in part, by Tyco's alternative argument that all filled bulbs should be classifiable as parts under Heading 8424, the record does not settle fully the question of whether the filled bulbs were used in a variety of settings.

Although Tyco has not produced sufficient, undisputed evidence to demonstrate that it is entitled to judgment as a matter of law at this juncture, the government also has not put forward sufficient evidence to show that undisputed facts require classification under Customs' selected heading. Although summary judgment is often an important, frequently-used tool in classification cases, failure of either party to succeed on its summary judgment does not automatically result in summary judgment for the other party, even in light of the statutory burden placed on Tyco. Where factual disputes persist, a trial may be needed to permit the court to find the requisite facts in order to make the legal determination of selecting the appropriate tariff provision.

CONCLUSION

For the foregoing reasons, the court denies both Plaintiff's and Defendant's cross-motions for summary judgment. The parties are to file a new scheduling order within 30 days of this opinion.

Dated: June 21, 2013
New York, New York

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

[17] The Kidde marketing material does not describe the exact types of filled bulbs used within the company's systems. The drawings, however, appear similar to the devices displayed in Job's advertising, and the bulbs appear similar in design. *Compare* Def.'s Mem. Ex. H *with* Def.'s Mem. Exs. O, P.

[18] As of 2007, this subheading was renumbered as 8487.90.

Slip Op. 13–79

TYCO FIRE PRODUCTS L.P., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 08–00194

[Plaintiff's and Defendant's cross-motions for summary judgment are denied in Customs classification matter.]

Dated: June 21, 2013

Michael E. Roll, Pisani & Roll, of Los Angeles, CA, argued for the Plaintiff.

Amy M. Rubin, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for the Defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection

ORDER

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; Now therefore, in conformity with the decision issued in Court No. 08–00190, Slip Op. 13–78, it is hereby

ORDERED that Plaintiff Tyco Fire Products L.P.'s and Defendant United States' cross-motions for summary judgment are DENIED.

Dated: June 21, 2013
New York, New York

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