U.S. Court of International Trade

Slip Op. 17–132

ARISTOCRAFT OF AMERICA, LLC, SHANGHAI WELLS HANGER CO., LTD, HONG KONG WELLS LTD., HONG KONG) WELLS LTD. (USA), BEST for LESS DRY CLEANERS SUPPLY LLC, IDEAL CHEMICAL & SUPPLY COMPANY, LAUNDRY & CLEANERS SUPPLY INC., ROCKY MOUNTAIN HANGER MFG CO., ROSENBERG SUPPLY CO., LTD., and ZTN MANAGEMENT COMPANY, LLC, Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 15–00307

[Final results sustained in part, and remanded in part to Commerce.]

Dated: September 28, 2017

Douglas J. Heffner and *Richard P. Ferrin*, Drinker Biddle & Reath LLP of Washington, DC for Plaintiff Aristocraft of America LLC.

Jonathan M. Freed, Trade Pacific PLLC of Washington, DC argued for Consolidated Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger MFG Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC. With him on the briefs were *Robert G. Gosselink* and *Jarrod M. Goldfeder*.

Courtney D. Enlow, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC argued for Defendant United States. With her on the briefs were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Henry J. Loyer*, on the brief, and *Jessica R. DiPietro*, Attorneys, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION AND ORDER

Gordon, Judge:

This action involves the sixth administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering steel wire garment hangers from the People's Republic of China ("PRC"). *See Steel Wire Garment Hangers from the PRC*, 80 Fed. Reg. 69,942 (Dep't of Commerce Nov. 12, 2015) (final results admin. rev.) ("*Final Results"); see also* Issues & Decision Memorandum for Steel Wire Garment Hangers from the PRC, A–570–918 (Dep't of Commerce Mar. 6, 2015), *available at* http://enforcement.trade.gov/frn/2015/1511frn/2015–28757.txt (last visited this date) ("*Decision Memorandum*").

Before the court are the USCIT Rule 56.2 motions for judgment on the agency record of Plaintiffs Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., and Hong Kong Wells Ltd. (USA), (collectively "Shanghai Wells"); Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger MFG Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC (collectively, "U.S. Distributors"); and Aristocraft of America LLC ("Aristocraft"), (together with Shanghai Wells and U.S. Distributors, "Plaintiffs"). *See* Rule 56.2 Mem. Supp. Mot. J. Agency R. of Pls. Shanghai Wells Hanger Co., Ltd., Hong Kong Wells Ltd., Hong Kong Wells Ltd. (USA), Best For Less Dry Cleaners Supply LLC, Ideal Chemical & Supply Company, Laundry & Cleaners Supply Inc., Rocky Mountain Hanger MFG Co., Rosenberg Supply Co., Ltd., and ZTN Management Company, LLC, ECF No. 30 ("Shanghai Wells' Br."); *see also* Rule 56.2 Mem. Supp. Mot. J. Agency R. of Pl. Aristocraft of America LLC, ECF No. 32 ("Aristocraft's Br."); Def.'s Mem. Opp'n Pls.' Rule 56.2 Mot. J. Agency R., ECF No. 42 ("Def.'s Opp'n"); Pl. Aristocraft's Reply Br., ECF No. 51 ("Aristocraft's Reply"); Shanghai Wells' Reply Br., ECF No. 53 ("Shanghai Wells' Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[1] and 28 U.S.C. § 1581(c) (2012).

Plaintiffs challenge (1) Commerce's deductions of Chinese unrefunded value-added tax ("VAT") as "export tax" from the starting prices used to establish the export price and constructed export price of Shanghai Wells' subject merchandise; (2) Commerce's valuation of Shanghai Wells' corrugated paperboard input; (3) Commerce's valuation of Shanghai Wells' brokerage and handling costs; and (4) Commerce's calculation of surrogate financial ratios. The court remands the *Final Results* to Commerce with respect to its VAT deductions and calculation of surrogate financial ratios, and sustains the *Final Results* on Plaintiffs' other challenges.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel*

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

Corp. v. United States, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2017). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, National Courts § 3.6 (5th ed. 2017).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the Tariff Act. *See United States v. Eurodif S.A.,* 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."); *see generally* Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* 137–161 (2007).

II. Discussion

A. Value Added Tax

Plaintiffs contend that Commerce erred in calculating Shanghai Wells' export price ("EP") and constructed export price ("CEP"). The statute directs Commerce to reduce EP or CEP by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States . . . ." 19 U.S.C. § 1677a(c)(2)(B). Plaintiffs argue that the plain language of the term "export tax" leaves no room for agency interpretation under *Chevron. See* Aristocraft's Br. 2–8. Defendant responds that Commerce properly interpreted this statutory language to allow for deductions from Shanghai Wells' EP and CEP for Chinese un-refunded value-added tax ("irrecoverable VAT") incurred on the subject wire hangers exported to the

United States. Def.'s Opp'n 39–46. Plaintiffs alternatively argue that Commerce's application of its methodology was unreasonable given the administrative record (unsupported by substantial evidence). *See* Aristocraft's Br. 8–13.

As noted above, the court reviews Commerce's interpretation of the antidumping statute "within the framework established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Maverick Tube Corp. v. United States*, 861 F.3d 1269, 1272 (Fed. Cir. 2017) (quoting *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1029–30 (Fed. Cir. 2007)). Pursuant to this framework, the court must first determine if the statute, 19 U.S.C. § 1677a(c)(2)(B), unambiguously addresses whether partially un-refunded VAT may be deducted from a respondent's EP or CEP as a "tax, duty, or other charge" that is imposed on the exportation of the subject merchandise. Congress has not expressed an unambiguous intent on how Commerce should resolve this issue.

Several recent cases in the U.S. Court of International Trade have addressed the issue of this particular Chinese VAT within the *Chevron* framework: *Juancheng Kangtai Chem. Co. v. United States*, 41 CIT ___, ___, 2017 WL 218910, at *11–13 (Jan. 19, 2017) ("*Juancheng*"); *China Mfrs. Alliance, LLC v. United States*, 41 CIT ___, ___, 205 F. Supp. 3d 1325, 1344–51 (2017) ("*China Mfrs. Alliance*"); and *Jacobi Carbons AB v. United States*, 41 CIT ___, ___, 222 F. Supp. 3d 1159, 1186–94 (2017) ("*Jacobi Carbons*"). This Court is persuaded by the *Chevron* analysis of *Jacobi Carbons* and *Juancheng*. The court also finds persuasive *Jacobi Carbons*' questioning of the reasonableness of Commerce's methodology applied to the facts in that case, and believes those same misgivings are applicable here.

To explain in more detail, *Juancheng* reviewed Commerce's deduction, pursuant to § 1677a(c)(2)(B), for Chinese "irrecoverable VAT" as a "charge imposed by" China "on the exportation of the subject merchandise to the United States." *Juancheng*, 41 CIT at ___, 2017 WL 218910, at *11. *Juancheng* observed that the statute does not define the phrase "export tax, duty, or other charge imposed" and concluded that because Congress had not spoken to the precise question at issue, *Chevron* step one was inapplicable. *Id.* Under the second prong of *Chevron* the court analyzed whether the statutory language "'export tax, duty, or other charges' [could permissibly include] 'a cost that arises as the result of export sales.'" *Id.* (citing Final Results of Redetermination Pursuant to Court Remand, Consol. Court No. 14–00056, ECF No. 81–1 (Apr. 15, 2016) regarding Chlorinated Iso-

cyanurates from the PRC, 79 Fed. Reg. 4875 (Dep't of Commerce Jan. 30, 2014), and accompanying issues and decision memorandum (Jan. 22, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–01898–1.pdf ("*Juancheng Remand Results*")).

Specifically, the court in *Juancheng* noted that the statute included the broad catchall term "other charges" that could reasonably include an irrecoverable VAT, and further explained that Commerce's interpretation was in accord with precedent from the U.S. Court of Appeals for the Federal Circuit interpreting the term "charges." *Juancheng*, 41 CIT at ___, 2017 WL 218910, at *11 (citing *Shell Oil Co. v. United States*, 751 F.3d 1282, 1291–92 (Fed. Cir. 2014)). The court also observed that when Commerce found irrecoverable VAT to "arise as the result of export sales, Commerce also reasonably interpreted the requirement that the cost be 'imposed . . . on the exportation of the subject merchandise to the United States,' [such that the cost] 'arises solely from, and is specific to, exports.'" *Id.* (citing *Juancheng Remand Results* as well as § 1677a(c)(2)(B) (internal citations omitted)). Having determined that Commerce reasonably interpreted § 1677a(c)(2)(B) to deduct an amount for irrecoverable VAT as a "charge imposed by the exporting country on the exportation of the subject merchandise to the United States," the court in *Juancheng* ultimately concluded that Commerce had not, on that administrative record, unreasonably overstated the amount of irrecoverable VAT given its calculation of a fixed eight percent rate for the subject merchandise. *Juancheng* therefore sustained Commerce's remand determination for the deduction of irrecoverable VAT. *Id.*, 41 CIT at ___, 2017 WL 218910, at *13–14.

In *China Manufacturers Alliance* the court reviewed Commerce's deduction pursuant to § 1677a(c)(2)(B) for respondent Guizhou Tyre Co., Ltd. ("GTC") "for what it considered to be Chinese un-refunded value-added tax ('VAT') incurred on the subject tires that GTC exported to the United States." *China Mfrs. Alliance*, 41 CIT at ___, 205 F. Supp. 3d at 1344. Commerce characterized the irrecoverable VAT as "'a net VAT burden that arises solely from, and is specific to, exports' and 'is VAT paid on inputs and raw materials (used in the production of exports) that is nonrefundable and, therefore, a cost.'" *Id.* (quoting Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, A–570–912 (Dep't of Commerce Apr. 8, 2015), at 28).

China Manufacturers Alliance held that Commerce's determination was unlawful under *Chevron* step one because Commerce failed to find that a specific "amount" of an "export tax, duty, or other charge"

was "imposed" by China. *China Mfrs. Alliance*, 41 CIT at ___, 205 F. Supp. 3d at 1346. The court explained:

> Instead of finding as a fact that the PRC imposed a tax, duty, or charge—of whatever character—in an amount equivalent to 8% of the FOB value of GTC's subject merchandise, Commerce applied a presumption that goods exported from China are subject to "irrecoverable VAT" in the amount of 8% of the FOB value of the exported good.

Id. The court further explained that "Commerce substituted a presumption—whether rebuttable or irrebuttable—for an actual finding" and in so doing violated § 1677a(c)(2)(B). *Id.*, 41 CIT at ___, 205 F. Supp. 3d at 1351. The court opined that "[g]eneralized conclusions about China's VAT scheme do not suffice. Commerce may not reduce the starting price by a fixed percentage—no matter how derived—that is not the actual amount of a tax, duty, or other charge that the exporting country is found in fact to have imposed." *Id.*

The court, in effect, read § 1677a(c)(2)(B) as forbidding approximations derived from percentages, and requiring Commerce to make a distinct finding of a specific "amount" in each case in which Commerce assesses irrecoverable VAT as a deductible export tax. This differed from *Juancheng*, as well as an earlier decision, *Fushun Jinly Petrochemical Carbon Co. v. United States*, 40 CIT ___, 2016 WL 1170876 (Mar. 23, 2016), which did not interpret the statute to require such an express obligation. *Fushun Jinly* and *Juancheng* instead held that § 1677a(c)(2)(B) broadly affords Commerce discretion to calculate deductions for an "export tax, duty, or other charge," and sustained Commerce's deductions for irrecoverable VAT.

In *Jacobi Carbons* the court reviewed Commerce's adjustments for irrevocable VAT pursuant to § 1677a(c)(2)(B) for respondents Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi"). *See Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1186–88. The court in *Jacobi Carbons* meticulously explained Commerce's formula for calculating irrecoverable VAT and addressed Jacobi's arguments that irrecoverable VAT could not be interpreted as an "export tax or other charge" under the statute. *Id. Jacobi Carbons* followed *Fushun Jinly*'s legal analysis (offering a somewhat more expansive explanation of § 1677a(c)(2)(B) than *Juancheng*), and concluded that Commerce reasonably interpreted the vague language of § 1677a(c)(2)(B) to deduct irrecoverable VAT from respondents' CEP as a charge "imposed by the exporting country on the exportation of merchandise." *Id.*

To provide some additional context and background, the court notes that Commerce announced it would begin making § 1677a(c)(2)(B)

deductions from EP or CEP for goods exported from non-market economy countries in its Methodological Change for Implementation of Section 772(c)(2)(B)[2] of the Tariff Act of 1930, as amended, In Certain Non–Market Economy Antidumping Proceedings, 77 Fed. Reg. 36,481, 36,482–83 (Dep't of Commerce June 19, 2012) ("*Methodological Change*"). The *Decision Memorandum* states that "[w]here the irrecoverable VAT is a fixed percentage of U.S. price, the Department explained [in the *Methodological Change*] that the final step in arriving at a tax-neutral dumping comparison is to reduce the U.S. price downward by this same percentage." *Decision Memorandum* at 12. *Jacobi Carbons* explained how this methodology reasonably interpreted vague language in § 1677a(c)(2)(B), including the requirement that such taxes or other charges be "imposed" by the exporting country. *See Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1187–88 (determining that Commerce's interpretation as implemented through the *Methodological Change* was reasonable given the plain meaning of the term "imposed" used in the statute).

Aristocraft challenges Commerce's interpretation of the statutory language by arguing that Commerce's definition of "irrecoverable VAT" is simply a tautology to meet the statutory requirements for a price deduction and not a real cost imposed under Chinese law. *See* Aristocraft's Br. 6–8. Aristocraft argues that Commerce invented the term "irrecoverable VAT" that is found nowhere in Chinese law. Aristocraft does, however, acknowledge that Shanghai Wells "pays [VAT] for its domestic purchases of inputs used to produce the hangers" on export sales, and this VAT would ordinarily be refunded if the same subject merchandise was sold in a domestic sale. *Id.* at 8. Aristocraft recognizes that this is a cost, but characterizes it as an "internal tax" that cannot reasonably be described as being "imposed" on exportation. *Id.*

The court disagrees. It is reasonable to describe an input VAT not fully recouped on export sales as a cost imposed on the exportation of the subject merchandise. *See Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1186–88. Commerce identified this cost-in-fact resulting from the operation of Chinese law under the term "irrecoverable VAT." *See Decision Memorandum* at 12–13. Commerce defines irrecoverable VAT as "a cost that arises as the result of export sales." *Id.* at 13. "Because the Chinese VAT is refunded in the context of domestic sales but not exports, it constitutes a 'penalty' that is 'applied,' and with which [respondent] is forever 'burdened,' at the time of exportation." *See Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1188. Commerce reasonably concluded that the phrase "export tax, duty, or

[2] 19 U.S.C. § 1677a(c)(2)(B).

other charge imposed by the exporting country on the exportation," 19 U.S.C. § 1677a(c)(2)(B), could be read to include such a cost.

There remains the issue of whether Commerce's calculation of the amount of irrecoverable VAT to deduct is reasonable given the administrative record (supported by substantial evidence). *See* Aristocraft's Br. 8–12. The court concludes that here, as in *Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1188–94, Commerce has failed to demonstrate that its calculation of an eight percent irrecoverable VAT deduction from the Shanghai Wells' EP and CEP was reasonable (supported by substantial evidence).

Commerce prefaces its analysis by explaining that under Chinese law irrecoverable VAT is comprised of "some portion of the input VAT that a company pays on purchases of inputs used in the production of exports [that] is not refunded." *Decision Memorandum* at 12; *see also id.* at 13 (irrecoverable VAT "is VAT paid on inputs and raw materials (used in the production of exports)"). Commerce also concludes that under Chinese law "the standard VAT levy is 17 percent and the rebate rate for subject merchandise is nine percent." *Id.* at 14. Commerce though fails to explain how in light of its definition of "irrecoverable VAT" a reasonable mind could find that Shanghai Wells incurred an irrecoverable VAT charge in the amount of eight percent of the value of the subject exports.

A simplified example illustrates the problem. Starting with Commerce's two conclusions about Chinese VAT, a subject wire hanger exported from China to the United States with an FOB export value of $1 (to take a round number) would contain "inputs and raw materials" that were subject to VAT at the rate of 17% applicable to those inputs and raw materials, and the exportation of the hanger would have qualified Shanghai Wells for a VAT rebate of $0.09. For Shanghai Wells to have incurred a "tax, duty, or other charge," of unrefunded VAT, of $0.08 (in accordance with Commerce's conclusion that the irrecoverable VAT was eight percent of export value), the actual VAT imposed on the "inputs and raw materials" used in the production of the hanger would have to have been $0.17, *i.e.*, the $0.09 in refunded VAT plus the $0.08 in un-refunded VAT. But for the VAT on the inputs and raw materials to have been $0.17, those VAT-subject inputs and raw materials would have had to have been valued at $1, which was the entire FOB value of the exported hanger. The FOB export values could have included no other costs (for example, no cost of labor, no factory overhead, no selling, general,

administrative, or any other expenses), and no profit. *See generally* Aristocraft's Br. 10–11 (citing a similar simplified example provided in its administrative case brief that Commerce did not directly address).

Commerce's conclusion that Shanghai Wells incurred a net VAT charge of eight percent on the value of its subject exported hangers implies that the 17% standard VAT levy was applied to the entire FOB export value of the hanger, and not to the VAT-subject inputs and raw materials used in production. *Cf.* Def.'s Opp'n 44–45 (arguing, for what appears to be the first time, that the 17 percent VAT rate used in Commerce's calculation was applied to the "total export sales value"). This breakdown of the formula contradicts Commerce's conclusion that the VAT was "paid on inputs and raw materials (used in the production of exports)." *Decision Memorandum* at 13.

As in *Jacobi Carbons*, the *Decision Memorandum* in this case offers no explanation to resolve the apparent contradiction, and the court cannot understand how a reasonable mind could follow Commerce's stated methodology and arrive at the net VAT charge of eight percent. *See Jacobi Carbons*, 41 CIT at ___, 222 F. Supp. 3d at 1193–94 (noting that Commerce could not explain its reasoning for the same contradiction, and remanding for further explanation). The court therefore remands this issue to Commerce for further explanation and, if appropriate, reconsideration.

B. Corrugated Paper

Plaintiffs challenge Commerce's surrogate valuation of Shanghai Wells' corrugated paper input, arguing that Commerce's use of average unit values ("AUV") from Global Trade Atlas ("GTA") Thai import statistics for HTS code 4808.10 ("Corrugated Paper and Paperboard, Whether or Not Perforated") for the period of review resulted in the selection of an aberrationally high surrogate value that significantly distorted the final antidumping duty margin calculated for Plaintiffs. *See* Shanghai Wells' Br. 18–19. For the reasons explained below, the court sustains Commerce's use of this surrogate dataset.

The statute "directs Commerce to value the factors of production 'based on the *best available information* regarding the values of such factors in a market economy country.' 19 U.S.C. § 1677b(c)(1)(B) (emphasis added)." *Downhole Pipe & Equipment, L.P. v. United States*, 776 F.3d 1369, 1375 (Fed. Cir. 2015). "The term 'best available' is one of comparison, *i.e.,* the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. . . . This 'best' choice is ascertained by examining and comparing the advantages and disadvantages of using

certain data as opposed to other data." *Dorbest Ltd. v. United States*, 30 CIT 1671, 1675, 462 F. Supp. 2d 1262, 1268 (2006). The "burden of creating an adequate record lies with [interested parties] and not with Commerce." *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011); *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016) (same); *Jacobi Carbons AB v. United States*, 619 F. App'x 992, 996 (Fed. Cir. 2015) (same).

During the administrative proceeding Plaintiffs argued that the Thai AUV were aberrational. Commerce, in turn, explained that it analyzes whether surrogate data are aberrational by comparing "the GTA import data at issue [with] GTA data from the other potential surrogate countries at a comparable level of economic development to that of the NME for a given case." *Decision Memorandum* at 16. Commerce also noted that neither Plaintiffs nor any other party "placed GTA import data for comparable countries on the record of this review." *Id.* As a consequence, Commerce did not evaluate whether the Thai dataset might be aberrational in some other sense. Importantly, Plaintiffs do not challenge Commerce's practice of measuring possible aberrations in a dataset only against other surrogate data from economically comparable countries. Plaintiffs instead lodge a facial attack on the quality of the Thai dataset Commerce used, arguing to the court that Commerce should have independently sought out better data. *See* Shanghai Wells' Br. 20–21. This is a risky litigation position because, as noted, although Commerce *may* help develop the administrative record, the *burden* to develop it ultimately rests with interested parties like Plaintiffs. *See QVD Food Co.*, 658 F.3d at 1324 ("Although Commerce has authority to place documents in the administrative record that it deems relevant, the burden of creating an adequate record lies with [interested parties] and not with Commerce." (internal quotations omitted)). Also, when an interested party had the opportunity during the administrative proceeding to develop the record and submit data, the court may not subsequently order Commerce to open the record to allow that interested party a second chance to submit data. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) (explaining that it is plaintiffs' burden to timely submit relevant information to the record and holding that the courts may not order Commerce to reopen the record to admit evidence that plaintiffs failed to submit during the administrative proceeding). When Plaintiffs argue that Commerce should have done more, they unwittingly concede that they did too little. It is too easy to sit back and criticize the quality of a particular surrogate dataset in isolation; it is more difficult to have to defend the

merits of one's own proffered surrogate dataset as the only dataset that a reasonable mind would choose as the best available on the record.

The problem here is that Plaintiffs did too little, and their arguments to the court facially attacking the Thai surrogate dataset in an absolute, as opposed to relative, sense, misunderstand the "best available" statutory requirement. The court does not evaluate whether the information Commerce used was the best available in some absolute sense, "'but rather whether a reasonable mind could conclude that Commerce *chose* the best available information.'" *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (emphasis added)).

Plaintiffs below argued that Commerce should have used fourth administrative review Thai data with a multiplier to account for inflation. *See* U.S. Distributors' Case Brief at 17–19, 28–29, PD 166 at bar code 3300332–01 (Aug. 24, 2015) (suggesting Commerce inflate the surrogate value for corrugated paper from the fourth review for the sixth review); Shanghai Wells' Br. 17–27 (challenging Commerce's selected Thai AUV for corrugated paper without suggesting any reasonable alternatives, arguing that Commerce should have provided comparable GTA import data on the record or used benchmark data from the U.S. to "corroborate" the aberrational nature of the selected data). Now before the court Plaintiffs have abandoned their proffered dataset, choosing not to argue *at all* about the relative merits of their proffered alternative against the dataset Commerce used. What they do instead is attempt a simple facial attack on the Thai data Commerce used, coupled with a request that the court order Commerce to obtain better data. That argument is ultimately not responsive to the "best available" statutory standard, and accordingly the court sustains Commerce's use of the Thai surrogate dataset to value the corrugated paper input.

C. Brokerage & Handling

Plaintiffs challenge Commerce's surrogate value determination of Shanghai Wells' brokerage and handling ("B&H") costs, asserting that Commerce inappropriately relied upon the World Bank's "*Doing Business 2015: Thailand*" publication ("*Doing Business*") instead of using allegedly more specific and accurate brokerage rate information from two global shipping companies that Shanghai Wells placed on the record. *See* Shanghai Wells' Br. at 17. Separately, Plaintiffs contend that Commerce overstated the numerator and understated the denominator in its calculation of the B&H surrogate value. *Id.*

The court has repeatedly affirmed Commerce's use of World Bank data as a reliable and accurate source to value B&H, and does so again here. *See, e.g., Yingqing v. United States,* 40 CIT ___, ___, 195 F. Supp. 3d 1299, 1311–12 (2016) (detailing prior affirmations of Commerce's use of the World Bank Doing Business report, and again affirming its use as a more "suitable surrogate data source for steel wire garment hangers" than the alternative posed by plaintiffs); *Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 40 CIT ___, 172 F. Supp. 3d 1353 (2016) (affirming Commerce's use of World Bank Doing Business report to value B & H); *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT ___, ___, 911 F. Supp. 2d 1362, 1377 (2013) (affirming Commerce's reliance on World Bank Doing Business report and noting that the report is a "reliable and accurate source").

Plaintiffs argue that instead of relying on the broad and unspecific information in the *Doing Business* report, Commerce should have used the average of actual export brokerage rates from two Thai shipping container lines that were placed on the record. *See Decision Memorandum* at 18; Shanghai Wells' Br. 31–33. Commerce rejected these alternative sources, finding that they provided only price quotes instead of actual expenses. *Decision Memorandum* at 19–20. Moreover, Commerce noted its express preference for using "broad market averages" over such individualized price quotes, reasonably explaining that reliance on limited data from only two Thai shipping companies would be inferior to using the "broad market averages" provided by the wealth of data relating to various Thai businesses' B&H information available in the *Doing Business* report. *Id.* at 20. Commerce's explanation and determination are reasonable given its stated preference to use "broad market averages" for B&H surrogate value calculations. *Decision Memorandum* at 20. The court therefore sustains Commerce's selection of the *Doing Business* data as the "best available information" on the record to value Shanghai Wells' B&H costs. 19 U.S.C. § 1677b(c).

Commerce calculated surrogate B&H costs from the *Doing Business* report as follows:

Documents preparation	US	$175
+Customs clearance and technical control	US	$50
+Ports and terminal handling	US	$160
-Letter of credit fee (excluded)	(US	$60)
TOTAL	US	$325

See Shanghai Wells' Br. 28. During the administrative proceeding, Shanghai Wells placed on the record information to confirm that the specific amount ($60) of the costs of obtaining a letter of credit in Thailand assumed in the 2015 *Doing Business* report. *See* D*ecision Memorandum* at 21 & n.155 (citing Ningbo Dasheng's Surrogate Value Submission, Ex. SV-9, PD[3] 115 at barcode 3274160–02 (May 4, 2015)). Commerce accordingly deducted out this fee upon Shanghai Wells' provision of proof that it did not incur such expenses. *Id.* Plaintiffs argue that Commerce should have made further adjustments to the total surrogate B&H calculation to include deductions for other expenses not incurred by Shanghai Wells that remain in the "Documents preparation" category of the *Doing Business* report. *See* Shanghai Wells' Br. 28–31. Plaintiffs note that Shanghai Wells provided record evidence that it did not incur the full amount of fees included in the "Documents preparation," and thus should have had this amount reduced for expenses relating to the creation of commercial invoices, bills of lading, or certificates of origin. *Id.* Commerce does not dispute this information, but maintains that it properly assessed B&H expenses in the full amount (minus the letter of credit fee previously addressed) because the *Doing Business* report did not clearly identify or break-down which costs were associated with which documents in the "Documents preparation" category. *See* Def.'s Resp. 35. Commerce maintains that it may reasonably rely on the *Doing Business* reported B&H values without "going behind the data" unless Shanghai Wells can establish a precise breakdown of which costs they did not incur and what segment of the $115 document preparation cost is attributable to those specific costs. *Id.* at 35–36. The court agrees.

As explained in *Foshan Shunde Yongjian Housewares & Hardwares Co.*, "[t]he document preparation component of the *Doing Business* data point is an aggregate figure that includes costs for the preparation of numerous documents." 40 CIT at ___, 172 F. Supp. 3d at 1360. Where Plaintiffs fail to identify an "exact breakdown of the data included in the World Bank report, and how the business practices of this broad pool of companies relate to the business practices of [Plaintiffs], [Commerce] can no more deduct a letter of credit expense, or remove elements of document and preparation charges, than it can add extra expenses which [Plaintiffs] incurred but which are not reflected by the World Bank data." *Id.* (citation omitted). Given that Plaintiffs in this action did not make such specific identifications (other than the $60 value for the letter of credit fee), the court will sustain as reasonable Commerce's refusal to make further adjust-

[3] "PD ___" refers to a document contained in the public administrative record.

ments to the B&H "documents preparation" line item from the *Doing Business* report.

Beyond challenging the source of the surrogate value figures Commerce used to calculate B&H, Plaintiffs also maintain that Commerce improperly applied a methodology that assumed that B&H charges would vary depending on the weight of the shipments of the subject merchandise. *See* Shanghai Wells' Br. 33–35. In calculating Shanghai Wells' B&H surrogate value, Commerce divided the B&H of $325 costs per shipment by an assumed denominator of 10,000 kg for a 20-foot container to obtain a per kilogram value for surrogate B&H costs. *See Decision Memorandum* at 17–21 (discussing comments on Commerce's B&H calculation). Plaintiffs assert that Commerce failed to reasonably explain its assumed denominator, specifically, why B&H expenses would change depending on shipment weight. *See* Shanghai Wells' Br. 33–35. Plaintiffs contend that Commerce's adjustments to Shanghai Wells' calculated B&H costs based upon assumed shipment weights inappropriately overstated the calculated surrogate value for B&H, using an assumed shipment weight of 10,000 kg per container rather than Shanghai Wells' actual average weight of shipments on the record. *Id.*

Plaintiffs' argument has some superficial appeal given that the *Doing Business* report does contain language suggesting that B&H costs are not directly tied to container weight. Plaintiffs, nevertheless, undercut their argument by failing to propose a reasonable alternative calculation that does not depend on container weight. They propose only that Commerce use more specific weight figures in the existing B&H calculation methodology. *See id.* The court surmises that this may be because the record evidence indicates that Shanghai Wells did in fact ship single 20-foot containers, which both the *Doing Business* publication and Commerce's methodology presume. *See, e.g.*, U.S. Distributors' Case Brief at 34, PD 166 at bar code 3300332–01 (Aug. 24, 2015). This fact (that Plaintiffs ship in 20 foot containers) distinguishes the cases Plaintiffs rely upon because those cases involved challenges to Commerce's underlying assumptions about how the respondents shipped their goods. *See, e.g., DuPont Teijin Films China Ltd. v. United States*, 38 CIT ___, ___, 7 F. Supp. 3d 1338, 1351–52 (2014) (remanding B&H issue to Commerce where plaintiff's method of shipping multiple containers per shipment rendered illogical Commerce's assumption that B&H costs increased proportionally to shipment weight or size); *CS Wind Vietnam Co. v. United States*, 38 CIT ___, ___, 971 F. Supp. 2d 1271, 1294 (2014) (remanding same issue where record indicated that plaintiff shipped its goods in segments in a "pyramid fashion" on the ship, without containers).

Commerce reasonably explained that it selected the denominator of 10,000 kg per container to preserve the internal consistency of a surrogate B&H calculation using *Doing Business* figures that were calculated using 10,000 kg as the assumed container weight. *See Decision Memorandum* at 20. Rather than argue that Commerce's practice of harmonizing its surrogate B&H calculation with the assumptions underlying the *Doing Business* figures was unreasonable, Plaintiffs challenge the more fundamental assumption that B&H costs and container weight have any connection. As noted, however, Plaintiffs provide no explanation as to why such an assumption is unreasonable nor do they propose any reasonable alternative. Nor do Plaintiffs argue that Shanghai Wells' shipments involve anything other than the shipment of single 20-foot containers, weighing in excess of 10 tons, upon which B&H costs are assessed. As Commerce has reasonably explained its methodology for assessing a surrogate value for B&H costs from the best available record data, and Plaintiffs have failed to demonstrate that Commerce's methodology was unreasonable as applied to its shipping practices, the court sustains Commerce's determinations with respect to the surrogate value for B&H.

D. Surrogate Financial Ratios

In the sixth administrative review, Commerce selected financial statements for calculating surrogate financial ratios from three Thai companies: LS Industries Co. ("LS"), Sahasilp Rivet Industrial Co. Ltd. ("Sahasilp"), and Thai Mongkol Fasteners Co., Ltd. ("Mongkol"). *See Decision Memorandum* at 7–10. Commerce uses financial ratios in non-market economy antidumping cases to calculate a respondent's factory overhead, selling, general and administrative expenses, and profit, which represent some of the respondent's factors of production. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1715 462 F. Supp. 2d 1262, 1300 (2006). Commerce must value the factors of production on "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c)(1). Commerce calculates surrogate financial ratios under 19 C.F.R. § 351.408(c)(4), using "nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country." Plaintiffs challenge Commerce's selection on various grounds. *See* Shanghai Wells' Br. 3–17.

Plaintiffs argue: (1) Commerce erred in using Mongkol's financial statement as it included an alleged distortive and improperly translated line cost item; (2) Commerce should have additionally used financial statements from Bangkok Fastening Co., Ltd. ("Bangkok

Fastening") in place of, or at least in addition to, the other financial data; and (3) Commerce erred in using financial data from Sahasilp and Mongkol, as these companies did not produce "identical or comparable merchandise." *See id.*

Plaintiffs challenge Commerce's use of Mongkol's financial statement for calculation of the surrogate financial ratio because the Mongkol financial statement included a line-item, translated in petitioner's submission as "Article making cost" that Plaintiffs contend improperly inflated the company's overhead costs and distorted Commerce's financial ratio calculation. *See* Shanghai Wells' Br. 13–15. Plaintiffs assert that Commerce should have accepted their alternative translation of the line-item as "hire of work," according to an unnamed Thai consultant and an online Thai-to-English dictionary. *Id.* at 14.

Commerce explained its practice with respect to translated documents in the *Decision Memorandum*:

> . . . when the Department receives a translated document, it assumes it is correct unless there is a discrepancy or alternate translation. Here, respondents provided another translation for what was originally translated as "Article making cost." U.S. Distributors and Aristocraft argued that the proper translation is "Hire of work" and therefore the item should not be classified as overhead. U.S. Distributors did not provide the name or the qualifications of the person providing the translation or an affidavit from the person providing the alternate translation. U.S. Distributors stated a "local consultant" used a website to produce the translation of "Hire of work." It is not known who the local consultant is, whether that person speaks Thai, the person's qualifications, or the reliability of the website used. Therefore, because we do not have enough information to consider the alternate translation and because the other costs of sales were fully enumerated, we determine that the "Article making cost" line item is not ambiguous, and find it appropriate to continue to classify the entire line item of "Article making cost" as MOH in the surrogate financial ratio calculation.

See Decision Memorandum at 10. This is reasonable. Plaintiffs have not challenged Commerce's practice of assuming the correctness of a translated document unless a party provides an alternate translation. And here, Plaintiffs could have better substantiated their claimed translation superiority. For example, Plaintiffs could have obtained the opinion of a Thai language expert, who could have prepared an affidavit, with authoritative Thai to English translations. The court could then more readily throw its weight behind such

a translation as the only reasonable translation on the record. More likely though, Commerce would have simply acknowledged the alternate translation as correct. The court is somewhat confused that Plaintiffs believed there was any merit to this issue, after all, they are requesting the court to trust an unnamed "consultant" and random online dictionary to override the original translation. As explained, there is a better way to establish that the proffered translation is the one and only reasonable translation of the disputed term. Commerce's determination is therefore sustained.

Plaintiffs also challenge Commerce's refusal to select Bangkok Fastening's financial statement for use in calculating surrogate financial ratios. *See* Shanghai Wells' Br. 15–17. Commerce found that Bangkok Fastening's financial statement was insufficiently detailed to use for reliable calculation of surrogate financial ratios. *See Decision Memorandum* at 9. A comparison of Bangkok Fastening's financial statement with that of Sahasilp, the latter of which Commerce found sufficiently detailed for use in the surrogate financial ratio calculations, demonstrates the reasonableness of Commerce's conclusion. *Compare* M&B's Surrogate Value Submission at Exhibit 4 at p.2, PD 121 at bar code 3275954–03 (May 13, 2015), *with* FabriClean's Surrogate Value Submission at Exhibit SV-12 at p. 34, PD 124 at bar code 3275968–02 (May 13, 2015). The Sahasilp statement provides detailed breakdowns of the components of energy, labor, and material costs, whereas the Bangkok Fastening statement provides no such comparable specificity. *Id.* Accordingly, the court sustains Commerce's decision to reject the Bangkok Fastening financial statement.

Plaintiffs' most persuasive argument challenges Commerce's selection of financial data from Sahasilp and Mongkol as unreasonable. Plaintiffs argue that Commerce has, in prior reviews, equated production of "comparable merchandise" with drawing wire from wire rod. *Id.* at 3–13. Defendant disagrees with Plaintiffs' assertion that an agency practice of relying only on data from surrogate companies that draw wire rod as part of their production practice exists. Alternatively, Defendant contends that even if such a practice existed Commerce was either not bound to follow such a practice, or that departure from such a practice occurred in the fourth administrative review and should not be reviewed in this challenge to the sixth administrative review. *See* Def.'s Resp. 4–16. The court agrees with Plaintiffs that Commerce failed to reasonably explain in this review its change in emphasis for a criterion it previously determined to be critical—that surrogate companies must have drawn wire from wire rod in the production process. Accordingly, the court remands the issue of surrogate financial ratio calculation to Commerce.

During the investigation Commerce concluded that "only those companies which clearly identify wire rod as a raw material can be considered adequate surrogates to calculate the surrogate financial ratios because any of these more accurately reflect the production experience of the respondents." *See Steel Wire Garment Hangers from the People's Republic of China*, 73 Fed. Reg. 47,587 (Dep't of Commerce Aug. 14, 2008) ("*Final Results-Investigation*"), and accompanying Issues and Decision Memorandum, A-570–918 (Aug. 7, 2008) ("*Decision Mem.-Investigation*"), at cmt. 3, *available at* http://enforcement.trade.gov/frn/summary/PRC/E8–18851–1.pdf (last visited on this date). That is a clear and direct statement of the importance of drawing wire rod in analyzing potential surrogate companies. And in the following three administrative reviews, Commerce solidified its stance that potential surrogate companies use wire rod in their production process. *See* Shanghai Wells' Br. 4–7 (citing the final results of Commerce's first three administrative reviews of the antidumping duty order covering steel wire garment hangers).

The fourth administrative review was different, with more limited options for surrogate financial statement selection, with several financial statements unusable. *See Steel Wire Garment Hangers from the People's Republic of China*, 79 Fed. Reg. 31,298 (Dep't of Commerce June 2, 2014) ("*Final Results-AR4*"), and accompanying Issues and Decision Memorandum, A-570–918 (May 27, 2014) ("*Decision Mem.-AR4*"), at cmt. 2, *available at* http://enforcement.trade.gov/frn/summary/prc/2014–12730–1.pdf (last visited on this date). As a result, Commerce selected the financial statements of one company, LS, which were the only statements with enough detailed information for Commerce to calculate financial ratios. *Id.* Notably, Commerce acknowledged that the record did not indicate whether LS drew wire rod or what inputs it used in its production process of nails. *Id.* Commerce explained that "where information as to inputs and production is on the record for a producer of comparable merchandise, such information may be useful in determining whether it is appropriate to use. However, the absence of such information does not exclude a producer of comparable merchandise from consideration." *Id.* The fourth review, therefore, appears not to have afforded an "available" surrogate company that drew wire from wire rod in its production process.

In the fifth administrative review, Commerce appears to have selectively quoted its rationale from the fourth administrative review to justify selecting financial statements without regard to whether they

drew wire from wire rod.[4] In the sixth administrative review here, Commerce mimicked its approach in the fifth administrative review, selecting financial statements from LS, Sahasilp, and Mongkol despite the fact that the record indicates that Sahasilp and Mongkol do not draw wire from wire rod in their production processes. *See Decision Memorandum* at 8–9. Unlike the fourth administrative review, however, here the record demonstrates that LS draws wire from wire rod in its production process, and like the fourth administrative review, Commerce could have simply used that one company to calculate its financial ratios. *See* U.S. Distributors' Case Brief at 15, PD 166 at bar code 3300332–01 (Aug. 24, 2015) (citing undisputed record evidence that LS draws wire rod in its production process as support for argument that LS's financial statement was the "best information on the record to calculate surrogate financial ratios"). Commerce, therefore, acted unreasonably by failing to adhere to its announced selection criterion without explaining why that criterion suddenly has no relevance. Commerce is in a tight spot. That important criterion underpinned surrogate value selections in prior proceedings.

Defendant has great difficulty grappling with Commerce's unmistakable, consistent emphasis of the importance of wire drawing in its surrogate data selection in prior proceedings under this Antidumping Duty Order. *See* Def.'s Resp. 13–16. None of Defendant's arguments is persuasive. Defendant argues that Commerce was not obligated to continue emphasizing the importance of drawing wire from wire rod. *Id.* at 14. Defendant is correct in the abstract that Commerce may change its mind, and adopt a new practice or policy, but Commerce must provide a reasonable basis for the change. In *F.C.C. v. Fox Television Stations, Inc.*, 1556 U.S. 502, 515–16 (2009), Justice Scalia explained:

> [T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* . . . the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy *rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests*

[4] The court notes that the fifth administrative review is pending before the court, and also includes a challenge to Commerce's financial statement selection of the same companies chosen in the sixth administrative review. *See Shanghai Wells Hanger Co. v. United States*, 41 CIT ___, 211 F. Supp. 3d 1377 (2017) (remanding final results of fifth administrative review on surrogate country selection, and reserving decision on Plaintiffs' remaining arguments, including surrogate financial statement selection).

> *that must be taken into account*. . . . It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but *that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy*.

Id. (emphasis added).

In the fourth administrative review Commerce adhered to its selection criterion, and noted and explained that it could not satisfy that criterion in that particular review because of the limits of the administrative record. *See Decision Mem.-AR4*, at cmt. 2. Commerce did not all of a sudden abandon the criterion as incorrect or wrong. *Id.* Commerce has yet to explain in the sixth administrative review why that selection criterion established in the investigation and three subsequent administrative reviews was incorrect or wrong. Suffice it to say that Commerce has yet to provide a reasonable basis for its change in emphasis in the selection criterion, and its reliance on the fourth administrative review is inapplicable to the sixth administrative review, given the noted factual differences in the administrative records. *See Final Results-AR4*, and *Decision Mem.-AR4*, at cmt. 2.

Defendant also argues that even if Commerce unreasonably departed from its criterion that a surrogate company draw wire from wire rod, any such departure was harmless error as Commerce reasonably found that Sahasilp and Mongkol produced comparable merchandise given other record information. *See* Def.'s Resp. 14–16. Defendant fashions a weak circular argument predicated on Commerce's conclusions in previous reviews that fasteners, which are produced by Sahasilp and Mongkol, are comparable merchandise to wire hangers. *Id.* This circular argument fails for the very reason that underpins Plaintiffs' challenge on this issue: it was the process of creating fasteners by *drawing wire from wire rod* that reasonably led Commerce to conclude that fasteners and wire hangers are *comparable merchandise. See, e.g., Final Results-Investigation* and *Decision Mem.-Investigation* at cmt. 3, (discussing why wire fasteners are comparable merchandise to wire hangers primarily because both products require the drawing of wire from wire rod in their production process); *Steel Wire Garment Hangers from the People's Republic of China*, 76 Fed. Reg. 27,994 (Dep't of Commerce May 13, 2011), and accompanying Issues and Decision Memorandum, A-570–918 (May 9, 2011), at cmt. 2, *available at* http://enforcement.trade.gov/frn/summary/PRC/2011–11871–1.pdf (last visited on this date) (explaining rejection of potential surrogate countries that produced fasteners where record did not include evidence that these companies

consumed wire rod in their production process); *Steel Wire Garment Hangers from the People's Republic of China*, 77 Fed. Reg. 12,553 (Dep't of Commerce Mar. 1, 2012), and accompanying Issues and Decision Memorandum, A-570–918 (Feb. 23, 2012), at cmt. 4, *available at* http://enforcement.trade.gov/frn/summary/PRC/2012–4875–1.pdf (last visited on this date) ("We find that the various fasteners produced by the surrogate companies are comparable to steel wire garment hangers, the subject merchandise, *because fasteners, like steel wire garment hangers, are a downstream product of wire requiring additional manufacturing processes*." (emphasis added)); *Steel Wire Garment Hangers from the People's Republic of China*, 78 Fed. Reg. 28,803 (Dep't of Commerce May 16, 2013), and accompanying Issues and Decision Memorandum, A-570–918 (May 7, 2013), at cmt. I.D, *available at* http://enforcement.trade.gov/frn/summary/prc/2013–11682–1.pdf (last visited on this date) (supporting selection of financial statements from companies in the Philippines, noting that the companies produced comparable merchandise of nails and hangers because each company "produces its products by drawing its own steel wire rods").

The court remands this issue to Commerce to address reasonably the importance of drawing wire from wire rod as a surrogate company selection criterion. The most direct and efficient way forward would appear to simply use the one company's statements (LS) that drew wire from wire rod, as Commerce did in the fourth administrative review.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the *Final Results* are sustained, with the exception of Commerce's value-added tax deductions and calculation of surrogate financial ratios; it is further

ORDERED that the *Final Results* are remanded to Commerce to reconsider its value-added tax deductions and calculation of surrogate financial ratios; it is further

ORDERED the Commerce shall file its remand results on or before November 28, 2017; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files it remand results with the court.

Dated: September 28, 2017
New York, New York

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

Slip Op. 17–134

UNITED STATES, Plaintiff, v. UPS SUPPLY CHAIN SOLUTIONS, INC., GREAT AMERICAN ALLIANCE INSURANCE CO., AMERICAN SERVICE INSURANCE CO., and 4174925 CANADA INC., Defendants.

Before: Leo M. Gordon, Judge
Court No. 16–00010

[Defendant Majestic Mills' motion to dismiss co-Defendant UPS's cross-claim granted in part and denied in part.]

Dated: September 29, 2017

Erin K. Murdock-Park, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Plaintiff United States. With her on the pleadings were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Lars-Erik A. Hjelm and *Casey K. Richter*, Akin Gump Strauss Hauer & Feld, of Washington, DC for Defendants UPS Supply Chain Solutions, Inc. and Great American Alliance Insurance Company.

John B. Brew and *Frances P. Hadfield*, Crowell & Moring LLP, of New York, NY for Defendant 4174925 Canada Inc.

T. Randolph Ferguson, Sandler, Travis & Rosenberg, P.A., of San Francisco, CA for Defendant American Service Insurance Company.

OPINION AND ORDER

Gordon, Judge:

Before the court is the motion of Defendant 4174925 Canada, Inc. d/b/a Majestic Mills ("Majestic Mills") to dismiss the cross-claims brought by co-Defendant UPS Supply Chain Solutions, Inc. ("UPS"), pursuant to USCIT Rule 12(b)(1) for lack of subject-matter jurisdiction and USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *See* Def. Majestic Mills' Mem. Supp. Mot. to Dismiss UPS's Cross-Claim, ECF No. 55 ("Majestic Mills' Mot."); *see also* UPS's Answer & Cross-Claim, ECF No. 39 ("UPS's Cross-Claim"); Majestic Mills' Answer to Cross-Claim, ECF No. 50 ("Majestic Mills' Cross-Claim Answer"); UPS's Resp. in Opp'n to Majestic Mills' Mot. to Dismiss, ECF No. 61 ("UPS's Resp."); Majestic Mills' Reply in Supp. of Mot. to Dismiss, ECF No. 66 ("Majestic Mills' Reply"). As discussed further below, the court has subject-matter jurisdiction over UPS's cross-claim pursuant to 28 U.S.C. § 1583(1). The court, though, does grant in part Majestic Mills' motion to dismiss pursuant to USCIT Rule 12(b)(6) for failure to state a claim.

I. Background

In the underlying action, Plaintiff United States, on behalf of U.S. Customs and Border Protection ("Customs"), brought claims against Majestic Mills, UPS, American Service Insurance Co. ("ASI"), and Great American Alliance Insurance Co. ("Great American") (collectively, "Defendants") for unpaid duties and civil penalties under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592(a) and (d) (2012).[1] *See* Am. Compl. ¶¶ 1, 3, ECF No. 15. Majestic Mills is a Canadian manufacturer of women's apparel and UPS is the customs broker and nominal importer of record of approximately 272 entries of wearing apparel and fabrics ("subject merchandise") on behalf of Majestic Mills. *See* UPS's Cross-Claim at 6; Majestic Mills' Mot. at 2–3; UPS's Resp. at 1–2. Great American and ASI served as sureties on bonds guaranteeing payment of all duties, taxes, and fees due to the United States on Majestic Mills' entries of the subject merchandise. *See* Am. Compl. ¶¶ 8–13. Relying on information provided by Majestic Mills, UPS claimed preferential tariff treatment to Customs on these imports under NAFTA Rules of Origin. *See* Am. Compl. ¶¶ 15–17; UPS's Cross-Claim at 2–3. After Majestic Mills filed an attempted prior disclosure with Customs pursuant to 19 U.S.C. § 1592(c)(5) to correct the classification of its imports, Customs demanded payment from Defendants for unpaid duties and fees. Am. Compl. ¶¶ 20–39. UPS, ASI, and Great American have all settled with the United States, and so the only claims presently remaining before the court are Plaintiff's claim against Majestic Mills, Majestic Mills' counterclaim against Plaintiff, and UPS's cross-claim against Majestic Mills. *See* Pl.'s Resp. to Mot. to Extend Proceedings (Sept. 9, 2016), ECF No. 45 (explaining settlement with ASI); Order Pursuant to R. 41(a) Dismissing Claims Against ASI (Oct. 5, 2016), ECF No. 48; Joint Motion to Dismiss Claims Against UPS & Great American (Aug. 8, 2017), ECF No. 67 (noting settlement with UPS & Great American); Order Pursuant to R. 41(a)(2) Dismissing Claims Against UPS and Great American (Aug. 9, 2017), ECF No. 70.

In its cross-claim, UPS alleges four causes of action against Majestic Mills. *See* UPS's Cross-Claim. The first cause of action is for indemnification, as UPS alleges that Majestic Mills agreed to indemnify UPS from any liabilities arising from the importation of the subject merchandise through a series of contractual agreements between the two parties. *Id.* at 8–10. The other three causes of action—breach of contract, fraud, and negligent misrepresentation—stem from Majestic Mills' provision of inaccurate information to UPS upon

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

which UPS relied to make tariff classifications to Customs. *Id.* at 10–13. Majestic Mills moves to dismiss UPS's cross-claim on various grounds, including lack of subject-matter jurisdiction, failure to state a claim upon which relief can be granted, inadequate pleading of UPS's claims, and for filing suit outside the applicable statute of limitations. *See* Majestic Mills' Mot.

II. Standard of Review

The claimant carries "the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action. USCIT Rule 12(h)(3). In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations and a USCIT Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can granted, the court assumes all factual allegations to be true and draws all reasonable inferences in the claimant's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject-matter jurisdiction); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993) (failure to state a claim).

For Rule 12(b)(6) motions, a claimant's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

A. Subject-Matter Jurisdiction

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the [claim] in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Majestic Mills argues that the court lacks jurisdiction over UPS's cross-claim on two distinct grounds. First, Majestic Mills contends the court cannot exercise jurisdiction over UPS's cross-claim due to the parties' inclusion of a forum selection provision in their contract that purports to place sole jurisdiction over the relevant claims in the

federal and state courts of Georgia. *See* Majestic Mills' Mot. at 10; Majestic Mills' Reply at 6–9. Alternatively, Majestic Mills contends that the subject of UPS's cross-claim is outside the narrow jurisdiction over cross-claims granted to this Court by 28 U.S.C. § 1583. *See* Majestic Mills' Reply at 9–13.[2]

1. Forum Selection Clause

Majestic Mills argues that the contractual basis for UPS's cross-claim, as evidenced by the 2012 UPS SCS Terms and Conditions produced by UPS, contains a forum selection clause that allegedly places jurisdiction over the parties' disputes relating to this contract solely within the federal and state courts of Georgia. Majestic Mills contends that UPS's reliance on the terms and conditions language and acceptance of those terms as binding necessitates the conclusion that the exclusive federal jurisdiction over cross-claims for actions initiated in this Court granted by § 1583 should yield to the jurisdictional limits imposed by the forum selection clause. As a result, Majestic Mills argues UPS is unable to bring its cross-claim, and this Court lacks jurisdiction to adjudicate that cross-claim. *See* Majestic Mills' Mot. at 10. Specifically, the terms and conditions language provides: "Customer and Company (a) irrevocably consent to the jurisdiction of the United States District Court and the State courts of Georgia; (b) agree that any action relating to the services performed by Company, shall only be brought in said courts." *Id.* Although this wording is taken from the 2012 version of the UPS SCS Terms and Conditions and not an earlier edition, which allegedly binds the parties (a copy of which has yet to be produced before the court), UPS concedes the forum selection provision exists and applies in the relevant Terms and Conditions. *See* UPS's Resp. at 8.

Despite acknowledging the existence of the forum selection provision, UPS argues that the court is not precluded from ruling on its cross-claim and that jurisdiction is still proper under § 1583, which states that "in any civil action in the Court of International Trade, the court shall have *exclusive* jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party." *Id.* (quoting 28 U.S.C. § 1583) (emphasis added). While UPS may not have had the right to *initiate* a lawsuit in this Court under the forum selection clause, UPS argues that once the primary action was initiated by the United States, it had a right to defend itself and bring its

[2] The court notes that while it typically considers arguments not raised until a party's reply brief to be waived, arguments as to the court's subject-matter jurisdiction must be considered, as "federal courts are duty-bound to examine the basis of subject-matter jurisdiction sua sponte." *See Union Planters Bank Nat. Ass'n v. Salih*, 369 F.3d 457, 460 (5th Cir. 2004); 13 Charles A. Wright et al., *Federal Practice & Procedure* § 3522 (3d ed. 2017).

cross-claim against Majestic Mills. *Id.*

As Majestic Mills notes, the Supreme Court has upheld the validity of forum selection clauses unless the enforcement would be "unreasonable, unfair, or unjust." *See M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 8–20 (1972). But in cases where the subject matter involves issues of exclusive federal subject-matter jurisdiction, such as bankruptcy under 28 U.S.C. § 1334(a) or patent under 28 U.S.C. § 1338(a), courts have declined to enforce forum selection clauses. *See, e.g., In re Icenhower*, 757 F.3d 1044, 1051 (9th Cir. 2014) (affirming decision not to enforce forum selection clause where matter at issue was "core proceeding" properly centralized and handled in federal bankruptcy court); *Highland Supply Co. v. Klerk's Flexible Packaging, B.V.*, No. 05-CV-482-DRH, 2005 WL 3534211, at *2, *4 (S.D. Ill. Dec. 21, 2005) (explaining that "because federal courts have exclusive jurisdiction over patent claims, the Agreement's forum-selection clause is of no consequence").

The statutory language is unambiguous: the U.S. Court of International Trade is granted *exclusive* jurisdiction over cross-claims if they involve the imported merchandise at issue in the main civil action. 28 U.S.C. § 1583. This grant of jurisdiction is for good reason: to promote judicial expediency and to reduce costs for both parties by allowing a single court to hear all facts and circumstances related to the cross-claim as well as the underlying action. If UPS had commenced its own lawsuit outside of the main pleadings, it would be required to do so under the terms of the forum selection clause; however, as a cross-claim emanating from a civil action launched by the United States naming both UPS and Majestic Mills as defendants, UPS has a right to bring its cross-claim against Majestic Mills and have that claim heard by this Court so long as it falls within the scope of jurisdiction granted by 28 U.S.C. § 1583.

2. Scope of § 1583

28 U.S.C. § 1583 grants the court the ability to render judgment on a cross-claim when "(1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise." 28 U.S.C. § 1583. Majestic Mills argues in its reply that even if the court does not find an exercise of jurisdiction prevented by the parties' forum selection clause, § 1583(1) is not applicable to provide the court with subject-matter jurisdiction because UPS's cross-claim does not "involve the imported merchandise" that is the subject of the underlying action. Majestic Mills' Reply at

9–13. Majestic Mills argues that UPS's cross-claim addresses issues wholly separate from the imported merchandise and should be litigated outside the Court of International Trade. *Id.*

The court interprets § 1583 broadly. *Cormorant Shipholding Corp. v. United States*, 33 CIT 440, 446, 617 F. Supp. 2d 1270, 1276 (2009) (citing *United States v. Mecca Export Corp.*, 10 CIT 644, 645–47, 647 F. Supp. 924, 925–27 (1986); *M & M/Mars Snackmaster, Div. of Mars, Inc. v. United States*, 5 CIT 43, 44 (1983)). The court has dismissed counterclaims or cross-claims when the subject matter involves entries outside the underlying action, but this cross-claim only asks the court to consider the same 272 entries that are subject of the underlying action. *Cf. United States v. Lun May Co., Inc.*, 11 CIT 18, 652 F. Supp. 721 (1987) (holding that claims permitted under § 1583 are limited to those relating to entries subject to underlying action). UPS asks the court to render judgment on which party is liable to pay the duties and fees sought by Plaintiff United States involving those entries. The only relief sought by UPS in its cross-claim is reimbursement of the amount Plaintiff obtains from UPS in the underlying action plus legal expenses. UPS's Cross-Claim at 14. Given the related scope and remedies between the cross-claim and the underlying action, the court holds that UPS's cross-claim "involves the imported merchandise" and falls under § 1583(1).

The legislative history further supports the court's conclusion that the scope of § 1583 covers cross-claims such as the one in this action. Majestic Mills points to language from a committee report discussing the passage of the Customs Courts Act of 1980 ("Act"), which included § 1583 and empowered the Court of International Trade to hear cross-claims. *See* Majestic Mills' Reply at 11. Majestic Mills contends that this grant of authority to the court was to allow only the Government to file counterclaims against importers and for bond sureties and principals to cross-claim against each other. *Id.* However, Majestic Mills' proposed narrow interpretation of § 1583 is at odds with other language from the same report that clarifies that the intention of the Act was to allow the court "to fully adjudicate the rights of *all* interested parties." Customs Courts Act of 1980, H.R. Rep. No. 96–1235, 96th Cong., 2d Sess. at 37 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3749 (emphasis added). Further, the report noted that "the inclusion of cross-claims and third party actions will permit the Court of International Trade to adjudicate the rights of all affected parties to an international trade civil action. In this way, the committee is promoting judicial economy and assuring uniformity in the judicial decision-making process." *Id.* at 50, 1980 U.S.C.C.A.N. at 3761. The report speaks of adjudicating the rights of all interested

parties in the action and does not limit the ability to hear cross-claims to those solely posed by the Government or between sureties and principals. Accordingly, a cross-claim that has the same entries as the underlying action and seeks relief from liability in the underlying action is properly before the court under the grant of authority within § 1583(1).

Majestic Mills also relies on a decision from the U.S. Court of Appeals for the Fifth Circuit in *Int'l Fidelity Ins. v. Sweet Little Mexico Corp.*, 665 F.3d 671 (5th Cir. 2011) to argue that this Court does not always have exclusive jurisdiction over permissive cross-claims emanating from a civil action before it. *See* Majestic Mills' Reply at 12–13. In the underlying action of that case, International Fidelity Insurance Corp. ("IFIC"), a surety, brought suit against the United States in the Court of International Trade to challenge a denied protest. IFIC subsequently filed a separate suit in the District Court for the Southern District of Texas against the bond's principal, Sweet Little Mexico Corp. ("SLM"), seeking indemnification for and reimbursement of amounts paid to Customs. SLM moved to dismiss the case by arguing that venue for hearing the claim was only proper as a counterclaim, cross-claim, or third-party action before the Court of International Trade under § 1583. The district court upheld its own jurisdiction and the Fifth Circuit affirmed. *Sweet Little Mexico Corp.*, 665 F.3d at 673. While it is true that, in that case, a claim emanating from a civil action before the Court of International Trade was allowed to proceed outside of this Court, examination of the Fifth Circuit's reasoning shows why the procedural posture of that case is inapposite:

> In the action initiated in the CIT by IFIC, the only other party is the United States. IFIC, even were it inclined to do so, could not bring a "counterclaim" or a "cross-claim" against SLM because SLM is not a party to the contest of Customs' denial of IFIC's protest. Nor could IFIC bring a third-party action against SLM in that proceeding. The commonly understood meaning of a third-party action is that it is one brought by a defendant against a third party. Technically speaking, the United States is the defendant in the action that IFIC initiated in the CIT. The CIT's rules of procedure provide that a defendant may bring in a third party "who is or may be liable to it for all or part of the claim against it." The United States has not joined SLM as a third-party defendant, so there is no basis on which IFIC could assert a third-party action against SLM under Rule 14(a)(3) of the CIT's rules of procedure.

Id. at 675. In other words, the Fifth Circuit allowed IFIC's claim against SLM to proceed outside of this Court because SLM was not a party in the original case heard before the Court of International Trade. IFIC did not have the procedural ability as a plaintiff in the action before this Court to file suit against SLM in a counterclaim, cross-claim, or third-party action as allowed under § 1583. In contrast, UPS and Majestic Mills are both defendants in the main action brought by the United States. Accordingly, UPS's cross-claim is properly before the court, and the court affirms its jurisdiction to adjudicate the cross-claim under § 1583.

B. Procedural Posture of Motion to Dismiss

As a preliminary matter, UPS contends that Majestic Mills' motion to dismiss is procedurally improper and should only be considered as a motion for summary judgment under USCIT Rule 56. *See* UPS's Resp. at 4–5. Specifically, UPS argues that because Majestic Mills filed a responsive pleading to UPS's cross-claim, *see* Majestic Mills' Cross-Claim Answer, Majestic Mills has forfeited its right to file a motion to dismiss and its present motion must be treated as a motion for summary judgment. UPS fails to mention, however, that Majestic Mills filed its motion to dismiss in accordance with a scheduling order entered by this Court on consent motion by all of the parties, *including UPS*. *See* Majestic Mills' Reply at 1–2; Consent Mot. For Scheduling Order (Jan. 4, 2017), ECF No. 53; Order Granting Consent Mot. & Entering Scheduling Order (Jan. 6, 2017), ECF No. 54 (ordering that the parties "may file any motions regarding the pleadings or other preliminary matters and *4174925 Canada Inc. shall file its motion to dismiss UPS's counterclaims on or before March 10, 2017*." (emphasis added)). The parties consented to a schedule that expressly provided for Majestic Mills to make a motion to dismiss UPS's cross-claim by March 10, 2017, and requested an order from the court adopting this schedule over two months after Majestic Mills had filed its answer to UPS's cross-claim.

Therefore, UPS cannot now contend that Majestic Mills' motion to dismiss is procedurally improper given that it is timely filed in accordance with the scheduling order entered by the court that was expressly consented to by UPS and all other parties. The court deems waived UPS's objection to the procedural posture of Majestic Mills' motion to dismiss, and will consider Majestic Mills' motion under USCIT Rule 12.

C. Count I

Majestic Mills challenges UPS's cross-claim for indemnification ("Count I") as inadequately pled, arguing that UPS's allegations are conclusory and lack sufficient factual foundation to justify consideration on the merits. *See* Majestic Mills' Mot. at 10–13. Majestic Mills contends that UPS failed to adequately plead the elements of a contractual indemnity claim, noting UPS's failure to specifically plead facts regarding the specific elements of enforceable contracts, such as adequate consideration and the parties' mutual assent to the terms of the contract, especially Majestic Mills' consent to indemnify UPS. *See* Majestic Mills' Mot. at 11. Further, Majestic Mills objects to UPS's failure to attach copies of the various written agreements that UPS alleges Majestic Mills entered into as a condition of accepting services from UPS. *See id.* at 11–12; UPS's Cross-Claim at 8. UPS responds that it reasonably and sufficiently pled factual allegations that, if taken as true, would establish that Majestic Mills validly contracted with UPS for services under terms and conditions that included an enforceable indemnification provision. UPS's Resp. at 9–10. In arguing about the factual deficiencies in UPS's claim for indemnification as pled, Majestic Mills ignores the proper standard of review for its motion to dismiss. As the non-movant, UPS's factual allegations in its cross-claim are presumed to be true. *See Cedars-Sinai Med. Ctr.*, 11 F.3d at 1583–84 & n.13. Taking all of the factual allegations in UPS's cross-claim as true, the court agrees with UPS that it has sufficiently pled a cause of action for indemnification against Majestic Mills.

UPS alleges in its cross-claim that Majestic Mills accepted services from UPS, and in the course of entering into this business arrangement agreed to the terms and conditions of five specified written contracts with UPS. *See* UPS's Cross-Claim at 11–12. Contrary to Majestic Mills' contention in its motion, UPS expressly pleads that Majestic Mills agreed in the course of obtaining UPS's services to accept these contracts and that these contracts contain indemnification provisions supporting UPS's claim for indemnification against Majestic Mills. *Id.* In so pleading, UPS has plausibly alleged all of the elements that Majestic Mills argues are wanting.

Majestic Mills' objections to UPS's claim essentially argue that UPS has failed to produce adequate proof of factual support for its claims. At the motion to dismiss stage, UPS has no burden to produce the specified contracts, nor must UPS provide proof that Majestic Mills maintained copies of those contracts beyond plausibly alleging that Majestic Mills accepted their terms in the course of acquiring services

from UPS. *See, e.g., Fox v. Idea Sphere, Inc.,* No. 12-CV-1342, 2013 WL 3832869, at *2 (S.D.N.Y. July 22, 2013) (plaintiff's allegation that he had enforceable written contracts with defendants was sufficient to survive motion to dismiss, despite inability to produce those contracts); 5A Charles A. Wright et al., *Federal Practice & Procedure* § 1327 (3d ed. 2017) (explaining how Fed. R. Civ. P. 10(c), which is identical to USCIT Rule 10(c), is permissive and contains no requirement that pleader attach copy of writing on which claim for relief or defense is based). During the discovery process, UPS may produce proof of its claims and copies of the specified contracts that Majestic Mills contends are wanting, and if that evidence does not exist, Majestic Mills may properly dispose of UPS's claim through a motion for summary judgment. *See* USCIT R. 12; USCIT R. 56; *see also Fox*, No. 12-CV-1342, 2013 WL 3832869 at *2 (noting that failure to produce relevant contracts "may well be resolved on a motion for summary judgment" but could not justify dismissal on motion to dismiss). At this stage in the proceeding, however, the court will deny Majestic Mills' motion to dismiss in part, and hold that UPS has adequately pled Count I so as to maintain a claim for indemnification.

Apart from its attack on the adequacy of the pleading of Count I generally, Majestic Mills contends that, as pled, UPS's indemnification claim against Majestic Mills must be limited to entries or conduct that occurred after Majestic Mills executed a Power of Attorney appointing UPS as its customs broker for the subject merchandise in October 21, 2009. *See* Majestic Mills' Mot. at 8–9; UPS's Cross-Claim at 7. Majestic Mills misreads the plain language of UPS's cross-claim. UPS pled that "[u]pon accepting services from UPS SCS and its affiliates, Majestic Mills also agreed to the terms and conditions of the UPS Tariff, the UPS Canada Terms and Conditions of Service, the UPS Technology Agreement, and the UPS Invoicing Agreement," and pled that these agreements and terms included indemnification provisions. *See* UPS's Resp. at 7 (quoting UPS's Cross-Claim at 7); *see also* UPS's Cross-Claim at 8–9. As UPS's claim for indemnification does not solely depend on the October 21, 2009 Power of Attorney, the court will not limit UPS's claim to conduct post-dating that agreement.

D. Count II

Majestic Mills argues that UPS's cross-claim for breach of contract ("Count II") is time-barred under Georgia's applicable statute of limitations. *See* Majestic Mills' Mot. at 16 (arguing that four-year statute of limitations under Official Code of Georgia Annotated ("O.C.G.A.") § 9–3-26 applies to breach of contract claim at issue, rather than six-

year statute of limitations under O.C.G.A. § 9–3-24, but noting that UPS's claim is time-barred under either provision).[3] UPS responds that Count II did not accrue when Majestic Mills first provided false NAFTA statements, but rather that Majestic Mills engaged in repeated and continuous breaches by "failing to update or cure the information included in its entries."[4] *See* UPS's Resp. at 14. UPS provides no citation for its theory that the statute of limitations does not run from the initial breach where a party breaches a contract repeatedly and continuously by failing to cure or notify the aggrieved party. Majestic Mills, however, cites express Georgia law that a claim for breach of contract accrues when the first breach occurs, regardless of subsequent breaches. *See* Majestic Mills' Mot. at 16 (citing *Baker v. Brannen/Goddard Co.*, 559 S.E.2d 450, 454 (Ga. 2002) (holding that claim under breach of contract accrued "when the first breach of the [contract] occurred")).

UPS also suggests that the statute of limitations could not have run against Count II after Majestic Mills' initial breach because UPS "did not know and should not have known of its claims until well after Majestic Mills provided UPS SCS with false NAFTA Certificates of Origin." UPS's Resp. at 14. Unfortunately for UPS, Georgia law evaluating the statute of limitations for breach of contract claims does not consider whether the aggrieved party is aware of damages from the breach. "The discovery rule is not applicable to a cause of action based on breach of contract; with respect to a breach of contract claim, the statute of limitation runs from the time the contract is broken rather than from the time the actual damage results or is ascertained." *Hamburger v. PFM Capital Mgmt., Inc.*, 649 S.E.2d 779, 782, 286 Ga. App. 382, 385 (2007) (citation omitted). Accordingly, UPS's argument that it "did not know and should not have known of its claims until well after Majestic Mills provided UPS SCS with false NAFTA Certificates of Origin" is irrelevant. As Majestic Mills demonstrates, and UPS does not refute, Majestic Mills breached its contract obligations by providing false NAFTA certificates to UPS no later than January 2010, more than six years prior to the filing of UPS's cross-claim in August 2016. *See* Majestic Mills' Mot. at 16; UPS's Resp. at 14.

Because the court holds that UPS's breach of contract claim accrued over six years prior to the filing of its cross-claim and is thus time-

[3] O.C.G.A. § 9–3-24 applies to "simple contracts in writing," while O.C.G.A. § 9–3-26 applies to "all other actions upon contracts express or implied."

[4] UPS also insists that the six-year statute of limitations under O.C.G.A. § 9–3-24 is the governing law for analysis of this issue. UPS' Resp. at 13.

barred under either provision, *see* O.C.G.A. § 9–3-24, the court does not reach the question of whether Georgia's four-year or six-year statute of limitations for breach of contract claims is applicable. Similarly, the court does not reach Majestic Mills' alternative argument as to the inadequacy of pleading for Count II. *See* Majestic Mills' Mot. at 13–15. Accordingly, the court grants Majestic Mills' motion to dismiss as to Count II.

E. Counts III & IV

Majestic Mills submits, and UPS does not dispute, that UPS's cross-claim based on fraud and negligent misrepresentation ("Count III" and "Count IV" respectively) under Georgia law are subject to a two-year statute of limitations running from the date the action accrues. *See* Majestic Mills' Mot. at 20, 22 (citing O.C.G.A. § 9–3-33 (2010)); *see also*, UPS's Resp. at 14–15 (agreeing that the two-year statute of limitations is applicable and clarifying that the action accrues when the claimant incurs "actual damages"). Majestic Mills takes the position that UPS was aware of the alleged fraudulent conduct no later than May or July 2010 after Majestic Mills filed its NAFTA correction with Customs and requested documents from UPS to facilitate that correction. *See* Majestic Mills' Mot. at 20. Alternatively, Majestic Mills contends that even assuming UPS lacked clear notice of harm from Majestic Mills' alleged fraud in 2010, Customs' demand for payment from UPS in 2011 and again in 2013 clearly provided notice and injury to UPS sufficient to accrue the causes of action for fraud and negligent misrepresentation and trigger the running of the applicable statute of limitations. *Id* ; *see also* Majestic Mills' Reply at 14–15.

As Majestic Mills demonstrates, UPS had clear information by November 2013 at the latest, if not earlier, that Majestic Mills had provided false information relating to the NAFTA certificates and that UPS would be held liable by Customs for its submissions relying upon those certificates. *See* Majestic Mills' Mot. at 20. Moreover, UPS, through its counsel, was aware of the availability of its legal claims as it threatened Majestic Mills with legal action in April 2014 if Majestic Mills did not provide a written stipulation indemnifying UPS from the damages and duties demanded by Customs. *See id.* at Ex. N (email from UPS's counsel to Majestic Mills stating that absent written indemnification, UPS "will also bill [Majestic Mills] for the $158,580.89 and, as assessed by CBP, any additional amounts demanded under the case. If [Majestic Mills] does not promptly pay, UPS SCS will aggressively pursue payment and may initiate legal proceedings and file a law suit.").

UPS maintains that it did not incur "actual and certain economic losses until Plaintiff initiated this action on January 12, 2016 and UPS SCS was injured by having to defend against it." UPS's Resp. at 15. UPS, however, provides no response to the fact that it was served with clear demands for payment by Customs well before the initiation of this action, and considered those demands as certain and injurious enough to merit a threat of legal action against Majestic Mills in April 2014. Moreover, as Majestic Mills points out, despite UPS's recognition of the availability of legal claims against Majestic Mills based on the facts known in 2014, "UPS never requested, and Majestic Mills never signed, a statute of limitations waiver for UPS." Majestic Mills' Mot. at 5–6. Based on the unrefuted information presented in Majestic Mills' motion that UPS recognized injury from Majestic Mills' provision of false NAFTA certificates by April 2014, at the very latest, the court holds that UPS's Counts III and IV for fraud and negligent misrepresentation are time-barred under Georgia's applicable two-year statute of limitations. *See* O.C.G.A. § 9–3-33. Because the court finds Counts III and IV to be time-barred, it does not reach Majestic Mills' alternative arguments as to the inadequacy of pleading or the duplicative nature of these claims. *See* Majestic Mills' Mot. at 17–22. Accordingly, the court grants Majestic Mills' motion to dismiss as to Counts III and IV.

IV. Conclusion

Based on the foregoing reasons, it is hereby

ORDERED that Majestic Mills' motion to dismiss UPS's Cross-Claim pursuant to USCIT Rule 12(b)(1) is denied; it is further

ORDERED that Majestic Mills' motion to dismiss Count I of UPS's Cross-Claim pursuant to USCIT Rule 12(b)(6) is denied; it is further

ORDERED that Majestic Mills' motion to dismiss Counts II, III, and IV of UPS's Cross-Claim as time barred pursuant to USCIT Rule 12(b)(6) is granted; and it is further

ORDERED that UPS and Majestic Mills shall file, on or before October 12, 2017, a proposed schedule for further proceedings regarding UPS's Cross-Claim against Majestic Mills giving due consideration to the Scheduling Order, ECF No. 72, governing Plaintiff's claims for duties and civil penalties against Majestic Mills.

Dated: September 29, 2017
New York, New York

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