U.S. Court of International Trade

Slip Op. 18–69

DANZE, INC., Plaintiff, v. THE UNITED STATES, DEFENDANT.

Before: Mark A. Barnett, Judge
Court No. 13–00381

[The court finds that U.S. Customs and Border Protection correctly classified the subject imports. Accordingly, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.]

Dated: June 19, 2018

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Edward F. Kenny, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Barnett, Judge:

This action addresses whether various models of vitreous china toilets and a particular toilet tank are "specially designed for the use or benefit of handicapped persons" and are therefore entitled to duty-free treatment under subsection 9817.00.96 of the Harmonized Tariff Schedule of the United States ("HTSUS").[1] Before the court are cross-motions for summary judgment. Pl.'s Mot. for Summ. J., ECF No. 34; Mem. in Supp. of Pl.'s Mot. for Summ. J ("Pl.'s Mem."), ECF No. 34–2; Def.'s Cross-Mot. for Summ. J. and Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Mem."), ECF No. 39. Plaintiff, Danze Inc. ("Plaintiff" or "Danze"), contends that the subject merchandise is classifiable under subheading 9817.00.96 because the products were specially designed to meet the requirements of the Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§

[1] All citations to the HTSUS are to the 2011 and 2012 versions, which are identical in all relevant respects, as determined by the date of importation of the merchandise. *See LeMans Corp. v. United States*, 660 F.3d 1311, 1314 n.2 (Fed. Cir. 2011). The subject merchandise entered on various dates between December 2011 and March 2012. Pl.'s Statement of Material Facts as to which No Genuine Issue Exists ("Pl.'s SOF") ¶¶ 1, 3, ECF No. 35; Def.'s Resp. to Pl.'s Statement of Material Facts Not in Issue ("Def.'s Resp. to Pl.'s SOF") ¶¶ 1, 3, ECF No. 40.

12101–12213). *See, e.g.*, Pl.'s Mem. at 1, 4–5.[2] The United States ("Defendant" or the "Government") maintains that mere compliance with ADA standards does not render the merchandise classifiable under subheading 9817.00.96. *See, e.g.*, Def.'s Mem. at 6. The Government asserts that U.S. Customs and Border Protection ("Customs") correctly classified the merchandise under subheading 6910.10.00, HTSUS. *Id.* at 21. For the reasons discussed below, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.

BACKGROUND

I. Material Facts Not in Dispute

The party moving for summary judgment must show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." United States Court of International Trade ("USCIT") Rule 56(a). Parties filed cross-motions for summary judgment and submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* Pl.'s SOF; Def.'s Resp. to Pl.'s SOF; Def.'s Statement of Undisputed Material Facts ("Def.'s SOF"), ECF No. 39–1; Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ("Pl.'s Resp. to Def.'s SOF"), ECF No. 44–1. Upon review of the parties' facts (and supporting exhibits), the court finds the following undisputed and material facts.[3]

Danze is a designer and distributor of kitchen and bath faucets and fixtures, and designed the subject merchandise. Def.'s SOF ¶¶ 6, 10; Pl.'s Resp. to Def.'s SOF ¶¶ 6, 10. The subject merchandise consists of four models of vitreous china[4] toilets[5] and one vitreous china toilet tank manufactured in the People's Republic of China and imported into the United States between December 2011 and March 2012. Pl.'s

[2] Four entries are at issue: Entry Numbers MR5–40440556, MR5–40454474, MR5–40448468, MR5–40461883. Pl.'s Am. Ex. A (Entry Documents), ECF No. 43.

[3] Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted.

[4] Vitreous china is "a hard-fired ceramic ware that has a dense, vitrified, but opaque body, and is used esp. for plumbing fixtures." Webster's Third New Int'l Dictionary of the English Language Unabridged (2002) ("Webster's") at 2559.

[5] The term "toilet" refers to both two-piece toilets, which consist of a separate tank and toilet bowl, and one-piece toilets, which includes the toilet tank and bowl designed as a single unit. *See* Pl.'s Exs. C-1—C-5 (product information for the subject merchandise), ECF No. 36–3. A "toilet bowl" is "the portion of the toilet that is round or oval and open at the top and can be flushed with water." Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17. A "toilet tank" is "the part of the toilet that is a cistern tank for storing water used to flush the toilet." Pl.'s SOF ¶ 17; Def.'s Resp. to Pl.'s SOF ¶ 17. Of the four toilets at issue, three models are one-piece, while one model is a two-piece toilet. *See* Pl.'s Ex. C-1—C-5.

SOF ¶¶ 1–3; Def.'s Resp. to Pl.'s SOF ¶¶ 1–3. The toilets at issue are the: 1) Orrington 1 Piece High Efficiency Toilet ("HET"), Model No. DC011323; 2) Cirtangular 2 Piece HET, Model No. DC023330-DC022321; 3) Cobalt 1 Piece HET, Model No. DC061421; and 4) Ziga Zaga 1 Piece HET, Model No. DC031221. Def.'s SOF ¶ 2; Pl.'s Resp. to Def.'s SOF ¶ 2. The toilet tank at issue is the Orrington Toilet Tank, Model No. DC012223. Def.'s SOF ¶ 3; Pl.'s Resp. to Def.'s SOF ¶ 3.

Danze intentionally designed the subject merchandise to have characteristics—such as specific dimensional properties and design, including the location and performance of operable parts—that contribute to merchandise functionality. Pl.'s SOF ¶ 11; Def.'s Resp. to Pl.'s SOF ¶ 11. According to the National Consensus Standards for Vitreous China Plumbing Fixtures, adult water closets must have a minimum toilet bowl "rim height" of 13 1/2 inches. Pl.'s SOF ¶ 12; Def.'s Resp. to Pl.'s SOF ¶ 12. The toilet bowls here have a "rim height" measuring at least 16 1/2 inches from the finished floor to the bowl rim after installation.[6] Pl.'s SOF ¶¶ 14–15; Def.'s Resp. to Pl.'s SOF ¶¶ 14–15. Specifically, the Cobalt measures 16 7/8 inches from the finished floor to the bowl rim; the remaining three toilets measure 16 1/2 inches for the same distance. Def.'s SOF ¶ 13; Pl.'s Resp. to Def.'s SOF ¶ 13.[7]

Danze's product information documents for each toilet state that the toilet package includes the toilet seat, which is to be installed separately. *See* Pl.'s Ex. C-1— C-5 at Bates 257, 235, 283, 303 ("Description") and Bates 237, 259–260, 285, 305–306 ("Before Installation"). The information documents setting forth the product dimensions do not specify the seat height.[8] *See*, *e.g.*, Pl.'s Ex. C-1 at Bates 235 (including measurements for overall height, length, and width; tank width and length; and rim height, but no measurement for seat height). While the specific toilet models were unavailable,[9] a measurement of two similar models revealed that after installation of the seat, the height from the finished floor to the top of the toilet seat was

[6] "The toilet bowl 'rim' refers to the top front edge of the toilet bowl, and 'rim height' refers to a measurement taken from the base floor to the toilet bowl's uppermost front edge." Pl.'s Mem. at 2 n.4. "The 'rim height' excludes the thickness of the toilet seat and toilet seat cover." Pl.'s SOF ¶ 14; Def.'s Resp. to Pl.'s SOF ¶ 14.

[7] Indeed, all of the toilets that Danze markets measure, at minimum, 16 1/2 inches from the finished floor to the bowl rim. Def.'s SOF ¶ 14; Pl.'s Resp. to Def.'s SOF ¶ 14.

[8] "Seat height" refers to the distance between the uppermost surface on which a user sits when using the toilet and the finished floor. Pl.'s SOF ¶ 19; Def.'s Resp. to Pl's SOF ¶ 19. The seat height excludes the "toilet seat cover" that may be installed to cover the toilet seat when it is not in use. Pl.'s SOF ¶ 19; Def.'s Resp. to Pl's SOF ¶ 19.

[9] Danze discontinued the subject merchandise and thus was unable to produce actual samples of any of the complete toilets nor their corresponding toilet seats or seat specifications. Pl.'s Ex. D ¶ 6; Def.'s SOF ¶ 24; Pl.'s Resp. to Def.'s SOF ¶ 24. Danze was only able to produce an identical sample of the toilet tank. Pl.'s Ex. D ¶ 7.

at least 17 inches. Pl.'s SOF ¶¶ 51, 55; Def.'s Resp. to Pl.'s SOF ¶¶ 51, 55; Pl.'s Ex. H (Dep. Tr. of Thomas Kevin McJoynt) at 86:18–87:18, ECF No. 36–9; Pl.'s Ex. D (Decl. of T. Kevin McJoynt) ¶¶ 7–8, 10, 13 & Exs. A-C (photographs), ECF No. 36–4. The subject toilets were imported into the United States with a seat included. Pl.'s Ex. H at 126:3–15. None of the imported toilets includes a toilet seat that springs to return to a lifted position. Pl.'s SOF ¶ 21; Def.'s Resp. to Pl.'s SOF ¶ 21; Pl.'s Ex. H at 126:3–15.

The toilets and tank have the flush control on the outside of the tank, connected to a lever arm on the inside of the tank, which is attached by a thin chain to a three-inch round rubber flapper valve at the bottom of the tank. Def.'s SOF ¶ 17; Pl.'s Resp. to Def.'s SOF ¶ 17. The flush controls are positioned less than 36 inches above the finished floor and can be operated by one hand with a force not exceeding five pounds. Pl.'s SOF ¶¶ 23–25, 27; Def.'s Resp. to Pl.'s SOF ¶¶ 23–25, 27. The flush controls do not require "a user to tightly grasp, pinch or twist their wrist" in order to flush. Pl.'s SOF ¶ 26; Def.'s Resp. to Pl.'s SOF ¶ 26. The flush control "for all of the toilets . . . are only available in left side mount configurations, as viewed from the perspective of a person facing the toilet tank." Def.'s SOF ¶ 16; Pl.'s Resp. to Def.'s SOF ¶ 16.

Toilet bowls usually possess either a round or elongated (oval) shape. Def.'s SOF ¶ 19; Pl.'s Resp. to Def.'s SOF ¶ 19. Toilets with a round bowl typically protrude a maximum of 28 inches from the finished wall, conserving space in a smaller bathroom. Def.'s SOF ¶ 20; Pl.'s Resp. to Def.'s SOF ¶ 20. Toilets with an elongated bowl typically protrude up to 31 inches from the finished wall, thus occupying more space than a round toilet bowl. Def.'s SOF ¶ 22; Pl.'s Resp. to Def.'s SOF ¶ 22. An elongated bowl, however, is more comfortable for users. Def.'s SOF ¶ 21; Pl.'s Resp. to Def.'s SOF ¶ 21. The subject toilets "feature an elongated oval bowl shape but have a more compact overall footprint." Def.'s SOF ¶ 11; Pl.'s Resp. to Def.'s SOF ¶ 11. A 2008 internal Danze memorandum states that the company's decision to develop a line of high efficiency compact elongated toilets arose from "[t]he demands . . . from geographic areas where the bathrooms are typically small. By reducing the foot print and maintaining the flushing performance, we are able to provide great aesthetic solutions to our customers." Pl.'s Ex. F-1 (Aug. 25, 2008 Danze Project Mem.) at Bates 667, ECF No. 36–7; Pl.'s Ex. H at 99. This same memorandum specifies that the products must be ADA-compliant. Pl.'s Ex. F-1 at 668.

Danze sells the subject merchandise "through national, regional, and local plumbing retailers and contractors." Def.'s SOF ¶ 8; Pl.'s

Resp. to Def.'s SOF ¶ 8. The product information on each model states that it meets the ADA Accessibility Guidelines for Buildings and Facilities. Pl.'s SOF ¶ 22; Def.'s Resp. to Pl.'s SOF ¶ 22. Moreover, Danze's website, the product packaging, and third-party sellers describe the subject toilets as ADA compliant. Pl.'s SOF ¶¶ 31–33; Def.'s Resp. to Pl.'s SOF ¶¶ 31–33; *see also* Pl.'s SOF ¶ 65; Def.'s Resp. to Pl.'s SOF ¶ 65. The toilet tank at issue may only be installed with a specific toilet bowl, which Danze's product information indicates is ADA compliant. Pl.'s SOF ¶¶ 62–63; Def.'s Resp. to Pl.'s SOF ¶¶ 62–63.[10]

Danze describes its toilets, including the subject toilets as "ergonomically designed at a level that makes sitting and standing more comfortable for any age group." Def.'s SOF ¶¶ 15, 23; Pl.'s Resp. to Def.'s SOF ¶¶ 15, 23; Pl. Ex. E-1 (Danze Catalog) at Bates 515, ECF No. 36–5. Its product catalog describes Danze's design philosophy "for all products as that of 'Universal Design.'" Def.'s SOF ¶ 27; Pl.'s Resp. to Def.'s SOF ¶ 27; Pl. Ex. E-1 at Bates 515. On its website, Danze states: "Our high efficiency toilets conform to universal design standards and give you all those little touches . . . whether it be great flushing power, a perfect height, elongated bowl or slow closed lids[.]" Def.'s SOF ¶ 28; Pl.'s Resp. to Def.'s SOF ¶ 28 (alteration omitted).

Danze does not maintain any data showing the percentage of end users, with or without physical handicaps, of the imported merchandise. Def.'s SOF ¶ 26; Pl.'s Resp. to Def.'s SOF ¶ 26.

II. Procedural History

Danze entered the merchandise pursuant to subheading 6910.10.00, HTSUS,[11] dutiable at 5.8 percent *ad valorem,* at the port of Chicago, Illinois. Pl.'s SOF ¶ 4; Def.'s Resp. to Pl.'s SOF ¶ 4. Thereafter, Danze timely and properly protested the liquidation of these entries, claiming that the merchandise is secondarily classifiable pursuant to subheading 9817.00.96. Pl.'s SOF ¶ 6; Def.'s Resp. to Pl.'s SOF ¶ 6. Customs denied Danze's protests in full, stating, "Per attached product specifications, all models contain a floor to rim height less than 17 inches, no specific information provided on seat size, and design, etc." Pl.'s Ex. A at Bates 004. Danze challenges the denial of its protests.

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[10] While the Defendant does not dispute this fact, it avers that the citation provided by Danze does not support the statement. Def.'s Resp. to Pl.'s SOF ¶¶ 62. It appears to the court that Danze mis-cited the supporting pages of the McJoynt deposition, citing pages 90–93 when they should have cited pages 80–83. *See* Pl.'s Ex. H at 80–83. In any case, Defendant acknowledges that any dispute with respect to this statement is not material.

[11] Subheading 6910.10.00 covers: "Ceramic sinks, washbasins, washbasin pedestals, baths, bidets, water closet bowls, flush tanks, urinals and similar sanitary fixtures: Of porcelain or china," and has a duty rate of 5.8 percent *ad valorem*.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). Jurisdiction is uncontroverted. Compl. ¶ 2, ECF No. 10; Answer ¶ 2, ECF No. 17.

The Court may grant summary judgment when "there is no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986); USCIT Rule 56(a).[12] The court's review of a classification decision involves two steps. First, it must determine the meaning of the relevant tariff provisions, which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). Second, it must determine whether the merchandise at issue falls within a particular tariff provision, as construed, which is a question of fact. *Id.* (citation omitted). When no factual dispute exists regarding the merchandise, resolution of the classification turns solely on the first step. *See id.* at 1365–66; *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999).

The court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a). While the court accords deference to Customs classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), it has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Jedwards Int'l, Inc. v. United States*, 40 CIT ___, ___, 161 F. Supp. 3d 1354, 1357 (2016) (quoting *WarnerLambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)). It is "the court's duty to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

I. Legal Framework

The General Rules of Interpretation ("GRIs") provide the analytical framework for the court's classification of goods. *See N. Am. Processing Co. v. United State* s, 236 F.3d 695, 698 (Fed. Cir. 2001). "The HTSUS is designed so that most classification questions can be answered by GRI 1." *Telebrands Corp. v. United States*, 36 CIT ___, ___,

[12] When parties have filed cross-motions for summary judgment, the court generally must evaluate each party's motion on its own merits, drawing all reasonable inferences against the party whose motion is under consideration. *JVC Co. of America, Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000); *Specialty Commodities Inc. v. United States*, 40 CIT ___, ___, 19 F. Supp. 3d 1277, 1282 (2016). Here, the material facts are undisputed.

865 F. Supp. 2d 1277, 1280 (2012), *aff'd* 522 F. App'x 915 (Fed. Cir. 2013). GRI 1 states that, "for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes." GRI 1, HTSUS. "The first four digits of an HTSUS provision constitute the heading, whereas the remaining digits reflect subheadings." *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 n.4 (Fed. Cir. 2017). Relevant here,[13] "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above [GRIs] on the understanding that only subheadings at the same level are comparable." GRI 6, HTSUS; *see also WWRD US, LLC*, 886 F.3d at 1232. For purposes of GRI 6, "the relative section, chapter, and subchapter notes also apply, unless the context otherwise requires." GRI 6, HTSUS.

The court considers chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *See Arko Foods Int'l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citations omitted); *see also Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 n.3 (Fed. Cir. 2003) (chapter and section notes are binding on the court). "Absent contrary legislative intent, HTSUS terms are to be 'construed [according] to their common and popular meaning.'" *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 533 (Fed. Cir. 1994)). Courts may rely upon their own understanding of terms or consult dictionaries, encyclopedias, scientific authorities, and other reliable information. *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States*, 35 CIT ___, ___, 798 F. Supp. 2d 1353, 1357 (2011).

II. Analysis of the Terms of HTSUS 9817.00.96

The court must first ascertain the proper meaning and scope of HTSUS 9817.00.96. *See Bausch*, 148 F.3d at 1365. Congress passed the Educational, Scientific, and Cultural Materials Importation Act of 1982, Pub. L. No. 97–446, 96 Stat. 2329, 2346 (1983), and the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102

[13] In the present case, the parties agree that the articles at issue were properly classified pursuant to subheading 6910.10.00, HTSUS. Pl.'s Mem. at 4; Def.'s Mem. at 8. The sole issue is whether the subject merchandise is secondarily classifiable in subheading 9817.00.96, HTSUS. Pl.'s Mem. at 4; Def.'s Mem. at 8. "Chapter 98 does not contain four-digit headings, but rather, is a collection of eight- or ten-digit subheadings covering a diverse array of articles." *WWRD U.S., LLC v. United States*, 41 CIT __, __, 211 F. Supp. 3d 1365, 1374 (2017), *aff'd sub nom. WWRD US, LLC v. United States*, 886 F.3d 1228 (Fed. Cir. 2018).

Stat. 1107 (1988), to implement the Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific and Cultural Materials ("Nairobi Protocol"), an international agreement intended to provide "duty free treatment to articles for the use or benefit of the physically or mentally handicapped persons, in addition to articles for the blind." *See U.S. Customs Serv. Implementation of the Duty-Free Provisions of the Nairobi Protocol, Annex E, to the Florence Agreement*, T.D. 9277, 26 Cust. B. & Dec. 240, 241 (1992) ("*Customs' Implementation of the Nairobi Protocol*").[14] This legislation eliminated duties for products covered by subheading 9817.00.96 of the HTSUS, which includes: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other."[15] Subheading 9817.00.96, HTSUS; *see also Sigvaris, Inc. v. United States*, 41 CIT ___, 227 F. Supp. 3d 1327, 1335 (2017). Subheading 9817.00.96 excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

As the language of this provision indicates, classification within subheading 9817.00.96 depends on whether the article in question is "specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons," and whether it falls within any of the enumerated exclusions. *See* subheading 9817.00.96, HTSUS; U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. Note 4(a) to Chapter 98 provides that the term "'physically or mentally handicapped persons' includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working." U.S. Note 4(a), Subchapter XVII,

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[14] The Nairobi Protocol, "which went into effect on January 2, 1982, 1259 U.N.T.S. 2, broadened the scope of the Florence Agreement on the Importation of Educational, Scientific and Cultural Materials, opened for signature November 22, 1950, T.I.A.S. No. 6129, 17 U.S.T. 1835, 131 U.N.T.S. 25, by embracing technologically-new articles and previously-uncovered works of art, films," and other articles that would benefit the physically or mentally handicapped persons, in addition to the blind. *Starkey Labs., Inc. v. United States*, 22 CIT 360, 361 n.1, 6 F. Supp. 2d 910, 911 n.1 (1998), *adhered to on recons.,* 24 CIT 504, 110 F. Supp. 2d 945 (2000) (emphasis removed); *Customs' Implementation of the Nairobi Protocol*, 26 Cust. B. & Dec. at 241.

[15] Pursuant to Note 1 to Chapter 98, subheading 9817.00.96 "[is] not subject to the rule of relative specificity in [GRI] 3(a). Any article which is described in any provision in this chapter is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met." Note 1, Chapter 98, HTSUS.

Chapter 98, HTSUS. This list of exemplar activities indicates that the term "handicapped persons" is to be liberally construed so as to encompass a wide range of conditions, provided the condition substantially interferes with a person's ability to perform an essential daily task.[16] *See Sigvaris,* 227 F. Supp. 3d at 1335. While the HTSUS and subchapter notes do not provide a proper definition of "substantial" limitation, "the inclusion of the word 'substantially' denotes that the limitation must be 'considerable in amount' or 'to a large degree.'" *Id.* at 1335 (citing Webster's at 2280).

The HTSUS does not establish a clear definition of what constitutes "specially designed or adapted for the use or benefit" of handicapped persons. In the absence of a clear definition, the court may rely upon its own understanding of the terms or consult dictionaries and other reliable information. *Brookside Veneers*, 847 F.2d at 789; *BASF Corp.*, 798 F. Supp. 2d at 1357. In analyzing this same provision in *Sigvaris*, the court construed these operative words as follows:

> The term "specially" is synonymous with "particularly," which is defined as "to an extent greater than in other cases or towards others." [Webster's] at 1647, 2186 . . . The dictionary definition for "designed" is something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." [Webster's] at 612. . . .

227 F. Supp. 3d at 1336. The legislative history further informs the court's analysis of these terms as used in subheading 9817.00.96, HTSUS. The legislative history of this subheading indicates that Congress did "not intend that an insignificant adaptation would result in duty-free treatment for an entire relatively expensive article." S. Rep. No. 97–564, at 19 (1982). Rather, "the modification or adaptation must be significant so as to clearly render the article for use by handicapped persons." *Id.* Fundamentally, this court "interpret[s] statutory language to carry out legislative intent." *Rubies Costume, Co. v. United States*, 337 F.3d1350, 1357 (Fed. Cir. 2003) (citing *Nippon Kogaku (USA), Inc. v. United State* s, 69 C.C.P.A. 89, 673 F.2d 380, 383 (1982)); *see also EOS of N. Am., Inc. v. United States*, 37 CIT ___, ___, 911 F. Supp. 2d 1311, 1318 (2013). The court's interpretation of the terms "specially" and "designed" in *Sigvaris* comports with the legislative intent behind subheading 9817.00.96, HTSUS, that any modification or adaptation be "significant." Accordingly, "articles specially designed for handicapped persons must be made with the specific purpose and intent to be used by or benefit handicapped persons

[16] Common sense dictates, and no party questions, that using the toilet constitutes an essential daily task.

rather than the general public." *Sigvaris,* 227 F. Supp. 3d at 1336 (citing *Marubeni Am. Corp.*, 35 F.3d at 534 ("construing a provision with similar language that covered 'motor vehicles principally designed for the transport of persons'")). Any adaptation or modification to an article to render it for use or benefit by handicapped persons must be significant.

Customs has recognized several factors to be utilized and weighed against each other on a case-by-case basis when determining whether a particular product is "specially designed or adapted" for the benefit or use of handicapped persons. *See Customs' Implementation of the Nairobi Protocol,* 26 Cust. Bull. & Dec. at 243–244. Those factors include: the physical properties of the product in question; "the probability of general public use"; the specific design of the particular product; and whether the product is sold in specialty stores that serve handicapped persons. *Id.*

III. Classification of the Subject Merchandise

a. Parties' Contentions

At the outset, Defendant does not contend that the merchandise falls within any of the enumerated exceptions to subheading 9817.00.96. *See* U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. According to Plaintiff, Danze specially designed the subject merchandise to meet the relevant minimum standards established by the U.S. Department of Justice ("DOJ") for ADA compliance,[17] and prominently advertises the merchandise as ADA compliant; therefore, it is "easy to conclude that the subject toilets are 'specially designed' for the use or benefit of handicapped persons." Pl.'s Mem. at 4–5. Specifically, the relevant DOJ Standards set forth the following requirements:

> § 604.4 Seats. The seat height of a water closet above the finish floor shall be 17 inches (430mm) minimum and 19 inches (485 mm) maximum measured to the top of the seat. Seats shall not be sprung to return to a lifted position.
>
> § 604.6 Flush Controls. Flush controls shall be hand operated or automatic. Hand operated flush controls shall comply with 309.

[17] In September 2010, the DOJ published ADA Standards for Accessible Design to provide minimum scoping and technical requirements for newly designed and constructed or altered government facilities, public accommodations, and commercial facilities so that individuals with disabilities can access and use those facilities. Pl.'s Ex. B. (2010 ADA Standards for Accessible Design) ("2010 Standards") at Bates 046, ECF No. 36–2.

> Flush controls shall be located on the open side of the water closet except in ambulatory accessible compartments complying with 604.8.2.
>
> § 309.4 Operation. Operable parts shall be operable with one hand and shall not require tight grasping, pinching, or twisting of the wrist. The force required to activate operable parts shall be 5 pounds (22.2 N) maximum.[18]

Id. at 9–10; 2010 Standards at Bates 126, 164, 165. Danze acknowledges that its toilets measure 16 1/2 inches from the floor to the rim, but contends that when the toilet seat is installed, the distance from the floor to the seat is at least 17 inches. Pl.'s Mem. at 10. In the alternative, Danze argues that even without the 2010 Standards, its toilets would merit duty-free treatment because their height is greater than a standard toilet, which measures 14 to 15 inches. Pl.'s Mem. at 11 & n.16 (citing Pl.'s Ex. G-1 (HQ 055815 (May 26, 2010), ECF No. 36–8); *see also* Resp. of Danze, Inc. in Opp'n to Def.'s Cross-Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 7, ECF No. 44 ("Whenever an ADA compliant product differs in design from its non-ADA compliant counterpart, the product is *ipso facto*'specially' designed.").

According to Danze, HTSUS subheading 9817.00.96 "is meant to be a low threshold" and the requirement that the product be "specially designed" for use or benefit of handicapped persons "is not an especially exacting requirement." *Id.* at 15. Danze asserts that the subject toilets meet the low threshold of subheading 9817.00.96 because

> they are designed for and capable of use by persons suffering from all manner of permanent and chronic impairments which may impair their mobility, confined them to a wheelchair, or make it difficult for them to lower themselves to, or raise themselves from, a regular height toilet. These could include paralysis, poliomyelitis, arthritis, and atrophy resulting from old age or disease.

Id. Danze relies on Customs Ruling HQ H055815 as an acknowledgment by Customs "that taller-than-average toilets are specially designed for the use or benefit of persons suffering from mobility handicaps, and qualify for secondary classification under subheading 9817.00.96, HTSUS." Pl.'s Reply at 2–4; *see also* Pl.'s Mem. at 10, 11–12, 17–18.

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[18] The 2010 Standard define an operable part as "[a] component of an element used to insert or withdraw objects, or to activate, deactivate, or adjust the element." Pl.'s Mem. at 10 n.13; 2010 Standards at Bates 070.

The Government does not dispute that the toilets, "if installed correctly and equipped with a seat of 1/2 inch in height would minimally meet ADA seat height requirements." Def.'s Reply Mem. in Supp. of its Cross-Mot. for Summ. J. ("Def.'s Reply") at 2, ECF No. 45. The Government maintains, however, that mere compliance with ADA standards does not render a good classifiable under subheading 9817.00.96. Def.'s Mem. at 6. It asserts that Danze has not designed the subject merchandise with any significant modification or adaptation so "as to clearly render the articles for the use or benefit of physically handicapped persons," nor does it market or sell them "in a manner that suggests they have been 'specially designed'" for that purpose. *Id.* According to Defendant, the evidence submitted by Plaintiff establishes that products were designed "to fill a general need for a more compact toilet featuring an elongated bowl in urban areas where space was at a premium and bathrooms were small," and advertised as ADA compliant and ergonomically comfortable "for any age group," and "universally designed." Def.'s Reply at 7.[19] Defendant asserts that Plaintiff has failed to provide any authority or legislative history to Chapter 98, HTSUS, that identifies any relationship between ADA compliance and subheading 9817.00.96. Def.'s Mem. at 20–21.

b. Analysis

The question for the court is whether the merchandise at issue, toilets designed and meeting ADA standards, qualify for duty-free treatment pursuant to HTSUS 9817.00.96. There is no genuine dispute as to the material facts – the toilets, with a seat installed, measure at least 17 inches from the floor to the top of the seat and meet the other relevant ADA standards. Nevertheless, for the reasons discussed below, the court finds that the subject toilets and toilet tank have not been "specially designed for the use or benefit of handicapped persons" and do not qualify for duty-free treatment pursuant to HTSUS 9817.00.17.

The court has considered a number of factors in making its determination, including the physical properties of the merchandise,

[19] The Government cites the Center for Inclusive Design and Environmental Access for the definitions of universal and accessible design:

> Universal design means products and buildings are accessible and usable by everyone, including people with disabilities. . . . Accessible design has a tendency to lead to separate facilities for people with disabilities, for example, a ramp set off to the side of a stairway at an entrance or a wheelchair accessible toilet stall. Universal design, on the other hand, provides one solution that can accommodate people with disabilities as well as the rest of the population.

Def.'s Reply at 7 n.4 (citation omitted).

whether the merchandise is solely used by the handicapped, the likelihood the merchandise is useful to the general public, and the specific design of the merchandise. *See Customs' Implementation of the Nairobi Protocol,* 26 Cust. Bull. & Dec. at 243–244. Each toilet has a rim height of at least 16 1/2 inches from the floor, Pl.'s SOF ¶¶ 14–15; Def.'s Resp. to Pl.'s SOF ¶¶ 14–15, which increases to at least 17 inches when the seat is installed, *see* Pl.'s SOF ¶¶ 51, 55; Def.'s Resp. to Pl.'s SOF ¶¶ 51, 55; Pl.'s Ex. H at 86:18–87:18; Pl.'s Ex. D ¶¶ 7–8, 10, 13 & Exs. A-C. An article from Consumer Reports suggests that toilets taller than standard toilets, referred to as "comfort toilets," and measuring 17 to 19 inches high to the seat top, "have become the most common choice." Def.'s Ex. 4 (Sept. 2016 Consumer Report, "Toilet Buying Guide") at 3, ECF No. 39–2. Indeed, all of the toilets that Danze markets have a minimum measurement of 16 1/2 inches from the finished floor to the bowl rim, Def.'s SOF ¶ 14; Pl.'s Resp. to Def.'s SOF ¶ 14, and Danze markets them as, "ergonomically designed at a level that makes sitting and standing more comfortable for any age group," Pl. Ex. E-1 at Bates 515. This suggests that the toilets were intended for the general public and not specifically for the benefit or use of handicapped persons.

The flush controls for the toilets and toilet tank indicate that flushing is accomplished in a manner that appears common in many standard toilets. The flush control connects to a lever arm on the inside of the tank, which is attached by a thin chain to a three-inch round rubber flapper valve at the bottom of the tank. Def.'s SOF ¶ 17; Pl.'s Resp. to Def.'s SOF ¶ 17. Diagrams for each of the toilets and the toilet tank depict that the pressing of the flush control raises the lever arm inside the tank, which in turn, raises the rubber flapper, releasing the water from the tank into the toilet bowl. Pl.'s Ex. C-1—C-5 at Bates 238, 260, 286, 306, 328. The flush control is positioned on the left side of the tank, less than 36 inches above the finished floor, and is operable by one hand with force not exceeding five pounds. Pl.'s SOF ¶¶ 23–25, 27; Def.'s Resp. to Pl.'s SOF ¶¶ 23–25, 27. Although Danze maintains that the flush handle is ADA compliant because it requires no more than five pounds to operate and is not positioned higher than 36 inches from the floor, *see* Pl.'s Mem. at 3, 5, 9–10, Danze has not suggested that these features distinguish the subject merchandise from standard toilets.

Each toilet has an elongated bowl and is ergonomically designed to make sitting and standing more comfortable for any user. Pl.'s Exs. C-1—C-5 at Bates 235, 257, 283, 303; Pl.'s Ex. E-1 at Bates 515; *see also* Def.'s SOF ¶ 21; Pl.'s Resp. to Def.'s SOF ¶ 21. Danze's product catalog advertises the ergonomic features of its toilets as follows:

"Ergonomics aren't just for luxury cars. We apply them to the most important seat in the house. That's why our toilets make sitting and standing easier than ever." Pl.'s Ex. E-1 at Bates 433.[20] The same laws of physics that led to the adoption of a 17–19 inch height standard for the ADA also make these higher toilets easier to use for much of the population at large. The higher seat alters the angle of the knees such that less force is required to lower oneself onto or rise off of the toilet, *see* HQ Ruling H055815, whether the user is transferring to a wheelchair or simply standing up.

Although the toilets feature an elongated bowl, which typically takes more space in the bathroom, they have a more compact overall footprint. Def.'s SOF ¶ 11; Pl.'s Resp. to Def.'s SOF ¶ 11. Danze's internal memorandum states that the company's decision to develop a line of high efficiency compact elongated toilets arose from "[t]he demands . . . from geographic areas where the bathrooms are typically small. Pl.'s Ex. F-1 at Bates 667; Pl.'s Ex. H at 99. While this same memorandum specifies that the products must be ADA-compliant, the memorandum does not indicate the degree of modification or adaptation, if any, that was required to ensure compliance with ADA standards, let alone suggest that the modification or adaptation was "significant." Pl.'s Ex. F-1 at 668.

Danze asserts that "[a] toilet can be designed for ADA compliance and for general comfort without frustrating the scope of subheading 9817.00.96." Pl.'s Reply at 16. However, the fact that Danze ensured its toilets comply with ADA standards, alone, is not sufficient to include its toilets within subheading 9817.00.96. Congress passed the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA prohibits discrimination against individuals with disabilities in the sectors of employment, public services, public accommodations, and other sectors of society. *See generally ADA.* Congress intended that the ADA be construed broadly.[21] While the court is mindful that the ADA is to be construed broadly in favor of individuals seeking protection under that law, this

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[20] Moreover, each toilet fits a 12-inch residential rough-in sewer line opening. Pl.'s Exs. C-1—C-5 at Bates 235, 257, 283, and 303. "A rough-in distance" is "the distance from the finished wall to the center of the sewer drain for the toilet." Def.'s Ex. 2 (HGTV.com Web-Article titled "Choose The Right Toilet For Your Bathroom") at 2, ECF No. 39–2. A measurement of 12 inches is standard "and the widest selection of toilets is available in this size." *Id.*

[21] This is confirmed by Congress' passage of the ADA Amendments Act of 2008, Pub. L. 110–325, 122 Stat. 3553 (2008), effective January 1, 2009, to abrogate certain U.S. Supreme Court precedent that improperly narrowed the scope of protection originally intended by Congress, and ensure that "[t]he definition of disability ... be construed in favor of broad coverage of individuals under [the ADA]." *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1110 (8th Cir. 2016) (citing 42 U.S.C. § 12102(4)(A); 29 C.F.R. Pt. 1630, App'x § 1630.1(c)).

is not the issue before the court. The issue before the court is whether the subject merchandise is entitled to duty-free treatment simply because it is ADA compliant. In this case, it would appear that the same dimensional standards that address a physical barrier to the physically handicapped—higher toilet seats—are also appreciated by the public at large, such that they have become "the most common choice." Def.'s Ex. 4 at 3. Nothing in the language of the subheading, corresponding tariff notes, or its legislative history indicates that subheading 9817.00.96, HTSUS is to be construed to provide duty-free treatment for an otherwise mass market product merely because it also meets the standards adopted to prevent discrimination against the physically handicapped.[22]

Plaintiff's reference to HQ Ruling H055815 does not persuade the court that a different outcome is warranted. In Ruling H055815, Customs determined that toilets measuring 17 inches from the floor to the top of the bowl rim qualified for duty-free treatment pursuant to subheading 9817.00.96, HTSUS while another toilet measuring 16 1/2 inches from floor to rim did not. Pl.'s Ex. G-1. In its analysis, Customs found it "unlikely that toilets that measure 17 inches from the floor to the top of the bowl rim would be acquired other than for the benefit or use of a handicapped individual who is likely to benefit when transferring from the wheelchair to the toilet." *Id.* at Bates 711. This statement, however, was unsupported by any citation and is contradicted by the evidence here. Moreover, Customs did not discuss the design issues addressed here and the correctness of HQ Ruling H055815 is not before the court.

Plaintiff does not address any of the factors cited by Customs, nor point to any evidence other than its ADA compliance to support its assertions that the products were specially designed for handicapped persons. In its reply, Danze seeks to clarify that it "does not contend that compliance [] ADA standard[s] *per se* deems the article eligible for duty-free treatment under subheading 9817.00.96, HTSUS." Pl.'s

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[22] Plaintiff cites certain classification rulings pertaining to articles that meet ADA standards in which Customs determined the articles in question qualify for duty-free treatment pursuant to subheading 9817.00.96, HTSUS. Pl.'s Mem. at 16–17. However, none of the cited rulings establish that mere compliance with ADA standards warrants duty-free treatment. For example, in Ruling N052323, safety bars that mount to wall studs, used predominantly in the bathroom, supporting a maximum weight of 500 pounds, and meeting ADA standards were determined to be different from ordinary bathroom towel racks because of the weight they could support and were determined to be specially designed or adapted for the use or benefit of the physically or mentally handicapped. Pl.'s Ex. G-2 (NYRL N052323 (March 3, 2009)), ECF No. 36–8. Customs made similar findings in Ruling N052324 regarding safety bars and shower seats meeting ADA standards. Pl.'s Ex. G-3 (NYRL N052324 (March 3, 2009)), ECF No. 36–8. With respect to the shower seat, Customs considered their design and determined that "the fact that they are mounted to the wall helps to distinguish them from items for those with temporary disabilities or who just prefer to shower while seated." *Id.*

Reply at 6 (emphasis omitted). It states that "*if it can be shown that the article is specially designed or adapted*, compliance with the [2010 Standards] constitutes powerful evidence that the 'specially designed or adapted' requirement necessary for Nairobi classification has been shown." *Id.* at 6–7 (emphasis added). Nevertheless, the only evidence that Plaintiff provides as proof that the subject merchandise was specially designed for the use or benefit of the handicapped is the merchandise's compliance with the 2010 Standards. *See id.* at 7–8 ("Plaintiff submits that meeting the [2010 Standards] water closet requirements evidences that instant goods are designed to benefit handicapped persons.") (emphasis omitted); *id.* at 10 ("[T]he goods were admittedly designed to meet the [2010 Standards]."); *id.* at 14 ("Because the designs are admittedly 'taller than standard toilets,' it must also be true that the toilets are 'specially designed for the use or benefit of' physically handicapped persons.") (internal citation omitted). This is insufficient to qualify the merchandise for classification in subheading 9817.00.96, HTSUS.[23]

CONCLUSION

For the foregoing reasons, the court holds that Customs correctly classified the subject imports. The court denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: June 19, 2018
New York, New York

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

[23] Plaintiff makes the assertion that courts have "*never*, until now, rejected an importer's claim to preferential treatment under the Nairobi Protocol" and cites four cases as support. Pl.'s Mem. at 15 (emphasis in original). Each of the cited cases is distinguishable and did not concern the legal issue in the present case. *In Starkey Labs*, 22 CIT 360, 360–61, 6 F. Supp. 2d 910, 910–11, the parties had stipulated that the merchandise in question, hearing aid components, was specifically designed or adapted for the use or benefit of persons suffering from a physical handicap. The sole issue was whether the components were "parts" that could not be categorized as articles. *Id.* at 362–63, 912–13. The remaining cases concerned the issue of whether the articles in question were "therapeutic" articles, and, therefore, excepted from duty-free treatment. *See Richards Med. Co. v. United States*, 13 CIT 519, 520, 720 F. Supp. 998, 1000 (1989), aff'd, 910 F.2d 828 (Fed. Cir. 1990); *Travenol Labs., Inc. v. United States*, 17 CIT 69, 73–74, 813 F. Supp. 840, 844 (1993); *Nobelpharma U.S.A. Inc. v. United States*, 21 CIT 47, 56, 955 F. Supp. 1491, 1499 (1997) (also considering whether the loss of natural teeth (edentulism) renders persons physically or mentally handicapped).

Slip Op. 18–70

XI'AN METALS & MINERALS IMPORT & EXPORT CO., LTD., Plaintiff, and THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. AND STANLEY BLACK AND DECKER, INC., Consolidated-Plaintiffs, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Intervenor-Defendant.

Consolidated
Court No. 15–00109

Thomas J. Aquilino, Jr., Senior Judge

Upon consideration of the results of remand filed by the defendant pursuant to the court's slip opinion 17–120, 41 CIT ___, 356 F.Supp.3d 1346 (2017), and of the comments thereon filed by the consolidated plaintiffs and the intervenor-defendant; and noting the absence of any comments from the plaintiff with particular respect to the first issue hereinafter described of which it, and not the consolidated-plaintiffs, complained; be it

ORDERED, ADJUDGED and DECREED that, with respect to the issue of the allocation of labor costs and the recalculation of the financial ratios on remand in accordance with the court's opinion, after consideration of the parties' comments and further consideration of *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092 (June 21, 2011), *Elkay Mfg. Co. v. United States*, 38 CIT ___, 34 F.Supp.3d 1369 (2014), *remand results sustained*, 40 CIT ___, 180 F.Supp.3d 1245 (2016), *aff'd sub nom. Guangdong Dongyuan Kitchenware Indus. Co. v. United States*, 702 Fed. Appx. 981 (Fed.Cir. 2017); and of the histories of *Clearon Corp. v. United States*, Slip Op. 14–88, 38 CIT ___ (July 14, 2014), *first remand results remanded*, Slip Op. 15–91, 39 CIT ___ (Aug. 20, 2015), *second remand results sustained*, Slip Op. 16–110, 40 CIT ___ (Nov. 23, 2016), *aff'd*, 711 Fed. Appx. 648 (Fed.Cir. 2018); and of *Hangzhou Yingqing Material Co. v. United States*, 40 CIT ___, 195 F.Supp.3d 1299 (2016), *remand results sustained*, 41 CIT ___, 222 F.Supp.3d 1292 (2017), the remand result on said issue be, and it hereby is, vacated in order to abide precedent; and it is further

ORDERED that the original final determination on the foregoing issue, as articulated in *Certain Steel Nails from the PRC*, 80 Fed.Reg. 18816 (April 8, 2015), PDoc 294, via the accompanying final issues and decision memorandum, PDoc 276, be, and it hereby is, reinstated; and it is further

ORDERED, ADJUDGED and DECREED that, with respect to the issue of the transcription error in consolidated-plaintiff's post-

verification factor-of-production database, in consideration of correction thereof in the results of remand and "Commerce's duty to determine margins as accurately as possible", *Lasko Metal Prod., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed.Cir. 1994), that correction be, and it hereby is, affirmed.

Dated: New York, New York
June 19, 2018

/s Thomas J. Aquilino, Jr.
Senior Judge

Slip Op. 18–71

MITSUBISHI POLYESTER FILM, INC. AND SKC INC., Plaintiffs, v. UNITED STATES, Defendant, and TERPHANE, INC. AND TERPHANE, LTDA, Defendant-Intervenors.

Judge Gary S. Katzmann
Court No. 13–00062

OPINION

[Commerce's Final Results of Redetermination pursuant to Court Remand Order are sustained.]

Dated: June 19, 2018

Patrick J. McLain, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, argued for plaintiffs. With him on the brief were *Ronald I. Meltzer* and *David M. Horn*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Sonia M. Orfield*, Trial Attorney. Of counsel on the brief was *Nanda Srikantaiah*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

J. Michael Taylor, King and Spalding LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief was *Stephen A. Jones*.

Katzmann, Judge:

In the college graduation party scene of an oft-referenced 1967 film, family friend Mr. McGuire famously offers "one word" to Benjamin Braddock, the 21-year old honoree: "Plastics."[1] "There's a great future in plastics," he insisted. "Think about it. Will you think about it?" The court in this opinion endeavors to do just that.

Before the court is the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand Order (Dep't Commerce Oct. 20, 2017) ("*Remand Results*"), ECF Nos. 108–09, which the court had ordered in *Mitsubishi Polyester Film, Inc. v. United States*, 41 CIT ___, 228 F. Supp. 3d 1359 (2017) ("*Mitsubishi I*"). Plaintiffs Mitsubishi Polyester Film, Inc. and SKC, Inc. (collectively, "Mitsubishi") contest the *Remand Results* and seek another remand. Mitsubishi's Comments ("Pl.'s Br."), Nov. 20, 2017, ECF No. 112. Defendant the United States, on behalf of Commerce, and Defendant-Intervenors Terphane, Inc. and Terphane, Ltda. (collectively, "Terphane") ask the court to sustain the *Remand Results* in their entirety. Government's Reply Comments ("Def.'s Br."), Dec. 15, 2017, ECF No. 113; Terphane's Reply Comments ("Def.-Inter.'s Br."),

[1] THE GRADUATE (Mike Nichols/Lawrence Turman Productions 1967).

Dec. 15, 2017, ECF No. 114. The court sustains the *Remand Results* in their entirety.

BACKGROUND

The full background of this case prior to the instant remand proceedings may be found in *Mitsubishi I*. That opinion explained the nature of polyethylene terephthalate ("PET") film, which is the family of the products at issue, and summarized its relevant production processes:

> Generally speaking, PET film production begins with the polymerization process, in which the combination of certain chemicals and additives, heated in multiple rounds and then cooled, forms PET pellets or "chips." The next phase is extrusion. The PET chips are melted and then squeezed through a die, cooled, heated, and manipulated to a specified length or width. "Co-extrusion" by contrast involves the simultaneous extrusion of polymer from multiple lines through a single die; in other words, extrusion involves only one stream of polymer, whereas co-extrusion involves multiple streams of polymer that may differ in their chemical makeup and physical properties. At the time of co-extrusion, these multiple outputs may be stacked or alternated to form a single, layered, co-extruded PET product. After extrusion or co-extrusion, the molten polymer substance is cooled, and then stretched to form a film. The PET product may still be altered or treated in some way, such as through the addition of another layer or coating to a side of the PET; this may occur "in-line," as part of the manufacturing process, or "off-line."

Mitsubishi I, 228 F. Supp. 3d at 1362–63.

I. *Initial Proceedings Before Commerce.*

On September 28, 2007, Mitsubishi, Dupont Teijin Films, and Toray Plastics (America), Inc. ("Petitioners"), filed an antidumping duty petition covering "all PET film imported into the United States from Brazil, China, Thailand and the UAE." Polyethylene Terephthalate Film, Sheet, and Strip From Brazil, People's Republic of China, Thailand and the United Arab Emirates, Antidumping Duty Petition ("Petition") at 9 (Sept. 28, 2007), in Terphane's Scope Ruling Request Letter ("Scope Ruling Request") at Ex. 23, PD 1–3, CD 1–4 (Feb. 22, 2012); Commerce's Ex Parte Memo Placing Petition on the Record (July 18, 2017), RPD 1–6; *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From Brazil, the People's Republic of China,*

Thailand, and the United Arab Emirates: Initiation of Antidumping Duty Investigations, 72 Fed. Reg. 60,801 (Dep't Commerce Oct. 26, 2007) (initiation of investigation). In proposing the domestic like product to be investigated, Petitioners suggested the definition used by the International Trade Commission ("ITC") in its investigations into PET products from India and Taiwan:

> [A]ll gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick.

Petition at 9; *Polyethylene Terephthalate Film, Sheet and Strip From India and Taiwan*, USITC Publication No. 3518, Inv. Nos. 701–TA–415 and 731–TA–933–934 (June 2002) (Final) ("*India and Taiwan ITC Final*") at 4, in Scope Ruling Request at Ex. 27. Terphane, a Brazilian producer of PET film, was a respondent in the ensuing investigation. *Mitsubishi I*, 228 F. Supp. 3d at 1365. Commerce made an affirmative determination of dumping of PET film from Brazil, issued Terphane a weighted-average dumping margin of 44.36%, and issued an antidumping duty order on PET Film from Brazil on November 10, 2008. *Id.*; *see Polyethylene Terephthalate Film, Sheet, and Strip From Brazil, the People's Republic of China and the United Arab Emirates: Antidumping Duty Orders and Amended Final Determination of Sales at Less Than Fair Value for the United Arab Emirates*, 73 Fed. Reg. 66,595 (Dep't Commerce Nov. 10, 2008) ("*Order*"). The scope of the *Order*, which identifies the merchandise covered, contained substantially the language proposed by Petitioners:

> *The products covered by each of these orders are all gauges of raw, pre-treated, or primed PET film, whether extruded or co-extruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick.* Also excluded is roller transport cleaning film which has at least one of its surfaces modified by application of 0.5 micrometers of SBR latex. Tracing and drafting film is also excluded. PET film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of these orders is dispositive.

Id. at 66,595–96 (emphasis added). The first two sentences of the *Order*'s scope are at the heart of subsequent administrative proceedings and ultimately this litigation. The second sentence, containing an exclusion for certain PET films, is referred to in this opinion as the Second Sentence Exclusion.

When a question arises as to whether a particular product is included in an antidumping duty order, an interested party may apply for a scope ruling from Commerce. 19 C.F.R. § 351.225(a), (c). While no specific statutory provision governs the interpretation of the scope of antidumping duty orders, Commerce has filled the statutory gap with a regulatory framework, which has been interpreted by the Federal Circuit and this Court as a multi-step process. *See Meridian Prod., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citing *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015)); 19 C.F.R. § 351.225. "Commerce's inquiry must begin with the order's scope to determine whether it contains an ambiguity and, thus, is susceptible to interpretation." *Meridian Prod.*, 851 F.3d at 1381; *see Fedmet Res. Corp. v. United States*, 755 F.3d 912, 920 (Fed. Cir. 2014).

If the language contains an ambiguity, Commerce must review it in light of "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." 19 C.F.R. § 351.225(k)(1) ("(k)(1) factors"); *Whirlpool Corp. v. United States*, No. 2017–1117, 2018 WL 2324462, at *3 (Fed. Cir. May 23, 2018). If these factors are dispositive, the analysis ends, and Commerce issues a final scope ruling. *See* 19 C.F.R. § 351.225(k). To be dispositive, the (k)(1) factors must be controlling of the scope inquiry in the sense that they definitively answer the scope question. *Meridian Prod.*, 851 F.3d at 1382 n.8 (citing *Sango Int'l, L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)).[2]

In February 2012, Terphane requested a scope ruling to determine whether four of the PET film products it manufactures in and imports from Brazil, and sells in the United States (collectively "Copolymer

[2] If Commerce's analysis under the (k)(1) factors is not dispositive, the agency may consider the factors set forth in 19 C.F.R. § 351.225(k)(2): (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed. *See Meridian Prod.*, 851 F.3d at 1382; *see generally Diversified Prod. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983) (enunciating the (k)(2) factors prior to their codification).

Surface Films"), are subject to the *Order*.[3] Scope Ruling Request; *see* 19 C.F.R. § 351.225(c). The thrust of Terphane's argument was, and still is, that its Copolymer Surface Films are not covered by the scope of the *Order* because they all "have a performance-enhancing resinous layer that exceeds the thickness requirement listed in the scope exclusion." *Mitsubishi I*, 228 F. Supp. 3d at 1366 (quoting Scope Ruling Request at 3). This resinous layer possesses chemical properties different from the core PET layer or layers to which it is conjoined through coextrusion.

Commerce issued a scope determination on January 7, 2013. *Antidumping Duty Order on PET Film, Sheet, and Strip from Brazil: Final Scope Ruling, Terphane, Inc. and Terphane Ltda.*, PD 35, CD 19 (Jan. 7, 2013) ("*Terphane Scope Ruling*"). The agency found that, pursuant to the Second Sentence Exclusion, Terphane's Copolymer Surface Films were outside the scope of the November 2008 antidumping duty order covering PET film, sheet, and strip from Brazil, provided Terphane could establish, to the satisfaction of United States Customs and Border Protection, that the performance-enhancing layer is greater than 0.00001 inches thick. *Id.*

Commerce relied on the factors in 19 C.F.R. § 351.225(k)(1), and found them dispositive with respect to the question of whether Terphane's Copolymer Surface Films come under the Second Sentence Exclusion. Of the scope language, Commerce reasoned that "even though a particular product may meet the requirements of the first sentence . . . it may also fall under one of the subsequent exclusions and be excluded from the scope of the order," which "is consistent [sic] Department's prior determinations." *Terphane Scope Ruling* at 11. Commerce determined that the phrase "extruded or co-extruded," in the first sentence of the scope encompasses PET products regardless of which extrusion method is used, and "does not indicate that all extruded and/or co-extruded films are covered, regardless of the subsequent exclusions." *Id.* at 12.

II. ***Proceedings Before this Court.***

Mitsubishi contested the *Terphane Scope Ruling* in this court on the following bases: that it contradicted the plain language of the *Order*, and was therefore contrary to law; that Commerce's determination that Terphane's films were not dispositively in-scope under 19 C.F.R. § 351.225(k)(1) was unsupported by substantial evidence; and that

[3] These film products are: (1) 10.21132, 10.21140, 10.21148, and 10.21192 (collectively "10.21 products"); (2) 10.81148 ("10.81 product"); (3) 10.91148 ("10.91 product"); and (4) 10.96/48 ("10.96 product"). Scope Ruling Request at 2; *see Mitsubishi I*, 228 F. Supp. 3d at 1366 & n.7.

Commerce's determination that Terphane's films are dispositively out-of-scope under 19 C.F.R. § 351.225(k)(1) was unsupported by substantial evidence.[4] *Mitsubishi I*, 228 F. Supp. 3d at 1370 (citing Pl.'s Compl. ¶¶ 11–27, Mar. 8, 2013, ECF No. 13).

Holding that the first two sentences of the scope language are subject to reasonable interpretation, the court agreed that Commerce had met the requisite low threshold to warrant finding ambiguity therein. *Mitsubishi I*, 228 F. Supp. 3d at 1371 (citing *Meridian Prod.*, 851 F.3d at 1381 n.6). The court thus sustained Commerce's determination to proceed to an analysis under 19 C.F.R. § 351.225(k)(1). *Id.* at 1374. However, the court found that Commerce's determination under § 351.225(k)(1) was not supported by substantial evidence, because Commerce did not sufficiently analyze all of the factors listed under that section. *Id.* at 1375. Noting that an administrative analysis under § 351.225(k)(1) involves "the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]," the court held that Commerce "did not come to a reasonable conclusion in consideration of the entire administrative record." *Id.* at 1375. Specifically, Commerce did not analyze the "descriptions of the merchandise contained in the petition, [and] the original investigation" on the record, including those that fairly detract from its determination, *see Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951), such that its entire analysis dispositively answered the scope question in accordance with the substantial evidence standard. *Mitsubishi I*, 228 F. Supp. 3d at 1377 (quoting 19 C.F.R. § 351.225(k)(1)). While Commerce had cited the Petition and original antidumping investigation at points in the *Terphane Scope Ruling*, it did so to the purpose of summarizing parties' arguments rather than interpreting the scope language. *Id.* Those cursory references to those materials ran counter to Commerce's duty to "utilize[] and abide[] by the statutory and regulatory provisions that authorize [it] to investigate [scope issues]" when making a scope determination. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 40 CIT ___, ___, 181 F. Supp. 3d 1348, 1356 n.15 (2016) (quoting *AMS Associates, Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013)).

[4] Mitsubishi additionally argued that the *Terphane Scope Ruling* was invalidated by delay, because Commerce issued the ruling 320 days after the receipt of Terphane's scope ruling request, rather than within 45 days as called for in 19 C.F.R. § 351.225(c)(2). *Mitsubishi I*, 228 F. Supp. 3d at 1381. The court disagreed with Mitsubishi and held that good cause existed for the delay, observing that courts are "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake," and noting the voluminous submissions Commerce received in the scope ruling proceeding, as well as Mitsubishi's failure to object to the extension. *Id.* at 1381–82 (quoting *Brock v. Pierce County*, 476 U.S. 253, 260 (1986)).

Moreover, the court found that "Commerce nowhere justified its avoidance of the Petition and original investigation under its (k)(1) analysis, despite that they contain 'descriptions of the merchandise' that Commerce is obligated to analyze thereunder." *Mitsubishi I*, 228 F. Supp. 3d. at 1378 (quoting 19 C.F.R. § 351.225(k)(1)). In remanding the *Terphane Scope Ruling* for further consideration of these (k)(1) factors, the court directed Commerce to explain how its findings were "reached by 'reasoned decision-making,' including . . . a reasoned explanation supported by a stated connection between the facts and the choice made." *Id.* at 1379 (quoting *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984)). In summary, the court concluded that "Commerce must provide further explanation for its decisions in regard to relevant (k)(1) materials in the record, including those in the Petition and original investigation which it did not analyze in the original determination, on remand." *Id.*

III. *Remand Proceedings Before Commerce.*

During the remand phase, on July 18, 2017, Commerce placed the complete public version of the Petition on the record and asked interested parties for comments, receiving none. *Remand Results* at 7; Commerce's Ex Parte Memo Placing Petition on the Record. On September 21, 2017, Commerce issued a draft remand redetermination. RPD 7. Terphane submitted comments on the draft on September 26, 2017. RPD 8. Petitioners filed their comments on October 10, 2017. RPD 14. As noted, on October 20, 2017, Commerce issued its final *Remand Results*, in which it continued to find that Terphane's films are out-of-scope of the *Order*.

In accordance with the court's instructions in *Mitsubishi I*, Commerce on remand considered in depth "the descriptions of the merchandise contained in the petition, [and] the initial investigation." *Remand Results* at 8–22. Commerce noted that it placed the complete original Petition on the record and solicited comments from interested parties. *Id.* at 10. Commerce quoted the Petition's general categorical description of "PET film," which included language from Commerce's antidumping investigation of PET film from India and Taiwan that would ultimately constitute the two scope sentences of the underlying antidumping duty *Order* at issue here. *Id.* (quoting Petition at 9). Commerce noted the Petition's statement that "PET film can be made as a single layer or can be coextruded with other polymers into a multilayer film." *Id.* (quoting *Petition* at 10). Further, Commerce included the Petition's explanation that

> PET film is "raw, pretreated, or primed" base film at the end of the production process. Additional treatment or processing may be done to the PET film before it reaches the customer (frequently by converters), although the film may also be sold direct to end-use customers or distributors.

Id. at 10–11 (quoting Petition at 10–11). Commerce stated that its "further analysis of the Petition indicates that the Petitioners' description of the subject merchandise in the Petition, besides restating the scope language used in each of the previous PET film proceedings, also places special emphasis on the thickness of any coating (*i.e.*, a performance-enhancing resinous or inorganic layer)." *Id.* at 11 (citation omitted).

Commerce also analyzed descriptions of the merchandise in the initial investigation. Commerce summarized numerous excerpts from Petitioners' March 23, 2012 Comments ("Pets' 2012 Comments"), PD 9, and May 7, 2012 Questionnaire Responses ("Pets' 2012 QR"), PD 21– 22, that contain details from the initial antidumping investigation. Those references included Petitioners' claim that the Copolymer Surface Films were considered in-scope at the time of the investigation, and Petitioners' supporting claim that they had suffered injury due to inroads made by Terphane into the packaging market with coextruded films. *Remand Results* at 12–13 (citing Pets' 2012 QR at 7–10, 16, nn.4, 55; Pets' 2012 Comments at 8, 13, 19, Exs. 2–3). Commerce recited Petitioners' complaint about Terphane's offer for sale of heat-sealable film, which they claimed was similar to a thermo-sealable 10.96/48 Copolymer Surface Product at issue, in the "Lost Sales" section of the Petition. *Id.* at 12 (citing Pets' 2012 QR at 8; Petition at 85). Commerce also noted Petitioners' claim that they intended for all of the Copolymer Surface Films to fall within the scope of the *Order*, and their claim that Commerce, Petitioners, and Terphane all considered those films to be subject merchandise during the investigation. *Id.* at 13 (citing Pets' 2012 QR at 8). Petitioners further claimed that they manufactured films that compete directly with the products at issue, including in-scope PET film sold by Mitsubishi and DuPont Tejin Films, which they asserted are commercially equivalent to Terphane's 10.21, 10.81, and 10.96 products. *Id.* (citing Pets' 2012 QR at 2, 16, nn.4, 55).

proceeding, "Petitioners, respondents, and [Commerce] [took] it for granted that co-extruded films that are commercially identical to Terphane's are covered by the scope of the order." *Id.* at 14 (quoting Pets' 2012 QR at 3, Ex. 7).

Next, Commerce referenced Petitioners' claim that "[i]n response to the Section B questionnaire" in the initial investigation, "Terphane

took it for granted that COEX films fell within the scope," as well as Petitioners' notation that Terphane's Section A questionnaire response indicated that Terphane's commercial product codes classified the products at issue as "thin, plain" films, not as "coated" films. *Remand Results* at 14 (citing Pets' 2012 QR at 13, Exs. 4 (Sec. A Questionnaire), 12).

Commerce also discussed Terphane's objections, in its May 17, 2012 Comments ("Terphane's 2012 Comments"), PD 23, CD 15, to Petitioners' claims that Commerce and parties considered the products at issue to be subject merchandise during the investigation. *Remand Results* at 15. Terphane asserted that Petitioners' references to the description of coextrusion in Terphane's Section A questionnaire response (from the investigation) were misleading because Terphane coextrudes other copolymer films, besides those at issue, and also coextrudes films without any copolymer or performance-enhancing layers. *Id.* at 15–16 (citing Terphane's 2012 Comments at 4–5). Commerce noted Terphane's argument that its application of the "thin, plain" films designation, rather than its "thin, coated" films designation, merely related to commercial product codes used for internal business purposes, and was unrelated to the context of an antidumping proceeding. *Id.* at 16 (citing Terphane's 2012 Comments at 6).

Analyzing these (k)(1) factors, Commerce concluded that "[t]he Petition and information from the investigation do not indicate that the Petitioners intended the products at issue or copolymer coextruded films which have performance-enhancing layers greater than 0.00001 inches in thickness to be covered by the scope of the *Order*." *Remand Results* at 16. Commerce determined that Petitioners "provided no explanation of why it [sic] believes the product they had mentioned in the Petition and which Terphane offered for sale, was similar to Terphane's 10.96/48 film. . . . [t]he only alleged similarity between these films which record evidence appears to speak to is their heat-sealability." *Id.* at 17 (citing Pets' 2017 Comments at 6, n. 20, Exs. 2–3). Thus, "[t]he fact that an allegedly in-scope product shares this one performance-enhancing characteristic does not serve to prove that the 10.96/48 product, Terphane's heat-sealable products as a whole, or any of the products at issue are covered by the scope." *Id.* Because Terphane demonstrated that it produces coextruded copolymer films and coextruded commodity films without copolymer or performance-enhancing layers, Commerce found unpersuasive Petitioners' argument that Terphane described its coextruded films and coextrusion manufacturing process in response to Commerce's questions about subject merchandise. *Id.* at 19 (citing Terphane's 2012 Comments at 5 n. 15, Exs. 1–2). Commerce also found insignificant

Petitioners' citation to Terphane's usage of commercial product codes classifying the products at issue as "thin, plain" films, because that classification context is not analogous to construction of the scope's phraseology. *Id.* Commerce further found inapposite Petitioners' reference to the PET film from the UAE proceeding, as those statements show only that the respondent there produced and sold coextruded films, not that Commerce, Petitioners, or respondents considered coextruded polymer films with the specific performance-enhancing, thickness, and other requisite characteristics of Terphane's products at issue to be covered by the scope. *Id.* at 20.

Moreover, Commerce disagreed with Petitioners' suggestion that films manufactured by Mitsubishi, which Petitioners considered to be subject merchandise, were relevantly similar or identical to the products at issue. *Id.* Commerce found that Petitioners failed to provide relevant details about those products --which they manufacture --or to explain why they were similar or identical to the products at issue. *Id.* Further, certain of the products mentioned by Petitioners were claimed to be "almost identical" to Terphane's 10.51 products,[5] which were not at issue in the scope inquiry. *Id.* at 20–21 (citing Terphane's 2012 Comments at 17, Ex. 2).

Also in accordance with the dictates of § 351.225(k)(1), and the court's instructions in *Mitsubishi I*, Commerce revisited the descriptions of the merchandise in prior determinations. It further considered two of its own prior decisions, *Garware*[6] and *Avery Dennison*.[7] *Remand Results* at 22–27. Additionally, Commerce considered the descriptions of the merchandise contained in multiple ITC determinations regarding PET film: *Japan and Korea ITC Final*;[8] *India and Taiwan ITC Final*; *India and Taiwan Staff Report*;[9] and *Brazil, Thai-*

[5] Commerce found that record evidence indicates the 10.51 products have a "thin surface treatment" and were reported by Terphane in the investigation to be covered by the scope of the *Order*. *Remand Results* at 21 (citing Pets' 2012 Comments at 6, Ex. 2; Pet's May 7, 2012 QR at 13, Ex. 4; Terphane's 2012 Comments at 17, Exs. 1–2; Pets' May 17, 2012 Comments at Ex. 1).

[6] *Antidumping and Countervailing Duty Orders on Polyethylene Terephthalate Film, Sheet, and Strip from India, Final Scope Ruling–Requested by International Packaging Films, Inc. Regarding Tracing and Drafting Film* (Aug. 25, 2013) in Scope Ruling Request at Ex. 31.

[7] *Memorandum from Michael J. Heaney to Stephen J. Claeys, Antidumping Duty Investigations on Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from Brazil, the People's Republic of China, Thailand, and the United Arab Emirates, A–351–841, A–570–924, A–549– 825, A–520–803* (investigations), Apr. 25, 2008 in Pets' Mar. 23 Comments at Ex. 9.

[8] *Polyethylene Terephthalate Film, Sheet, and Strip From Japan and the Republic of Korea*, USITC Pub. No. 2383, Inv. No. 731–TA–458 and 459 (May 1991) (Final) in Scope Ruling Request at Ex. 25.

[9] *PET Film from India and Taiwan, Staff Report to the Commission Inv. Nos. 701–TA–415 and 731–TA–933–934* (Final), (May 28, 2002) in Scope Ruling Request at Ex. 26.

land, and the UAE ITC Final[10] *Remand Results* at 27–37. Commerce explained that the ITC determinations give primary emphasis to the thickness of the performance-enhancing layer, rather than considerations such as the production process used to append that layer to other PET layers. *Id.* at 32–35. Accordingly, Commerce considered language that describes PET film as being manufactured on dedicated machinery, and determined that it originated in the *Japan and Korea ITC Final*, and was referenced in the subsequent investigations. *Remand Results* at 36. Commerce stated it found "that there is nothing in the written scope of the order or in [its] analysis of the (k)(1) factors which would lead to the conclusion that a particular production process is necessary for a product to be equivalent PET film." *Id.* at 35. The production processes that may have been used to produce DuPont Cronar and Kodak Estar --two examples of equivalent PET film,[11] *see Mitsubishi I*, 228 F. Supp. 3d at 1368 --thus were not central to Commerce's analysis. *Remand Results* at 35. "To be clear," Commerce wrote, "we find differences in production processes or methods that do not yield differences in physical characteristics to be an insufficient basis for treating products differently for purposes of applications of the dumping laws." *Id.* Rather, Commerce determined that the ITC referenced production processes used to manufacture equivalent PET film were considered technically necessary, at the time of the investigations, to produce the physical properties of equivalent PET film. *Id.* at 35–37. For that reason, Commerce found language from the ITC investigations regarding equivalent PET production processes to be "descriptive, not definitive or dispositive." *Id.* at 36. Accordingly, as it had in the original *Terphane Scope Ruling*, Commerce continued to find that the descriptions of the merchandise in its own and the ITC's prior determinations support the conclusion that Terphane's Copolymer Surface Films are not within the scope of the *Order*. *Id.* at 27, 37.

Mitsubishi filed its comments on the *Remand Results* on November 20, 2017. Pl.'s Br. The Government and Terphane each filed comments

[10] *Polyethylene Terephthalate Film, Sheet, & Strip From Brazil, China, Thailand, & the United Arab Emirates*, USITC Pub. No. 4040, Inv. No. 731–TA–1131–1134 (Oct. 2008) (Final) in Scope Ruling Request at Ex. 29.

[11] In response to the court's statement in *Mitsubishi I*, 228 F. Supp. 3d at 1380, that "Commerce should also clarify whether equivalent PET refers solely to those films excluded under the second sentence exclusion, or one that is a term of art in the industry," Commerce explained that "[a]ll available evidence points to the conclusion that the term 'equivalent PET film' is not an industry term of art." *Remand Results* at 39. Instead, that term was first deployed in the *Japan and Korea ITC Final*, where it was used to mean "other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick," including, as the paradigmatic examples, Cronar and Estar, as well as "other PET film equivalent to Cronar and Estar." *Id.* (quoting *Japan and Korea ITC Final* at 6–7).

in reply on December 15, 2017. Def.'s Br.; Def.-Inter.'s Br. Oral argument was held before the court on May 29, 2018. Oral Arg., ECF No. 123.

STANDARD OF REVIEW

The court reviews Commerce's remand redeterminations in accordance with the standard set forth in 19 U.S.C. § 1516a(b)(1)(B)(i), and thus "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."

DISCUSSION

Specific to the issues in this case, and as noted *supra*, § 351.225(k) requires that the (k)(1) factors be "dispositive" of the relevant scope ambiguity in order for Commerce's analysis to be valid. *Mitsubishi I*, 228 F. Supp. 3d at 1381 (citing *Meridian Prod.*, 851 F.3d at 1382 n.8); *Meridian Prod. v. United States*, No. 2016–2657, 2018 WL 2306281, at *4 (Fed. Cir. May 22, 2018). "'Dispositive' means . . . [that] the section 351.225(k)(1) criteria must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango*, 484 F.3d at 1379. The court shall uphold Commerce's scope ruling if it is supported by substantial evidence on the record and otherwise in accordance with law. *Whirlpool*, 2018 WL 2324462, at *3. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001)). Moreover, "the substantial evidence standard requires review of the entire administrative record" and asks, in light of that evidence, whether Commerce's determination was reasonable. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). Therefore, to sustain Commerce's *Remand Results*, the court must conclude that substantial evidence on the record supports Commerce's determination that the (k)(1) factors definitively resolve the ambiguity in the scope language.

Further, the court "afford[s] significant deference to Commerce's own interpretation of its orders, mindful that scope determinations are 'highly fact-intensive and case-specific.'" *Meridian Prod.*, 2018 WL 2306281 at *4 (quoting *King Supply Co. v. United States*, 674 F.3d 1343, 1345, 1348 (Fed. Cir. 2012)). Commerce "enjoys substantial freedom to interpret and clarify its antidumping duty orders . . . , [but] it may not change them." *Whirlpool*, 2018 WL 2324462 at *4 (quoting *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995), *as corrected on reh'g* (Sept. 1, 1995)). An order may not be interpreted "in a way contrary to its terms," nor in

a way "so as to change the scope of that order." *Id.* (citations omitted).

I. *Commerce's Determination that the (k)(1) Factors Dispositively Place Terphane's Copolymer Surface Products Outside of the Scope of the Order is Supported by Substantial Evidence.*

Mitsubishi first argues that Commerce fails to explain how the (k)(1) factors "dispositive[ly]" indicate that Terphane's films are out of scope. Pl.'s Br. at 3. Here, Mitsubishi states, "the relevant ambiguity is whether a coextruded film can, in virtue of coextrusion, qualify as an equivalent PET film that is out-of-scope," and more generally "whether the Second Sentence Exclusion can apply to a films [sic] that have no post-extrusion coating." *Id.* Mitsubishi argues that Commerce failed to address these questions on remand, and instead reiterated observations it had made in the original *Terphane Scope Ruling*. *Id.* at 4. Summarizing and challenging Commerce's findings under each of the categories of (k)(1) factors, Mitsubishi further asserts that Commerce did not find that any of the (k)(1) factors indicates dispositively that the Second Sentence Exclusion applies to films with no post-extrusion coatings. *Id.* at 5–6.

Mitsubishi is incorrect, and its arguments are unpersuasive. As an initial matter, the Second Sentence Exclusion does not require a "post-extrusion coating," as Mitsubishi presumes, but refers instead to a "performance-enhancing resinous or inorganic layer more than 0.00001 inches thick." *Order* at 66,595–96. To the extent that this characterization suggests a layer must have been added to a preexisting PET film product as a "coating," the court has already rejected that argument. In *Mitsubishi I*, 228 F. Supp. 3d at 1373, the court stated that "[n]o language in the scope commands that a 'finished film' *must*'have had' one of its 'surfaces' 'modified by the application of' a protective resinous or inorganic layer of sufficient thickness in a specific chronology, other than, necessarily, prior to import."

If Commerce wishes to identify a particular production process necessary for the exclusion of otherwise subject merchandise from an order's scope, then it may do so in the scope's plain language. *See Diffusion-Annealed, Nickel-Plated, Flat-Rolled Steel Products From Japan*, 82 Fed. Reg. 26,046, 26,046 (Dep't Commerce June 6, 2017) (preliminary administrative review) ("The diffusion-annealed, nickel-plated flat-rolled steel products included in this order are flat-rolled, cold-reduced steel products, regardless of chemistry; whether or not in coils; either plated or coated with nickel or nickel-based alloys and *subsequently annealed (i.e., "diffusion-annealed")*. . . .") (emphasis added); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) ("Scope orders may be interpreted as including subject

merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.”). Petitioners, for their part, may include phraseology to that effect when they suggest scope language to Commerce. Neither Commerce nor Petitioners did so here. *See Mitsubishi I*, 228 F. Supp. 3d at 1365 (quoting Petition at 9). The Second Sentence Exclusion, however, does not implicate any production processes, and, as the court has previously held, is subject to reasonable interpretation and analysis under § 351.225(k)(1). *Id.* at 1373; *see Duferco*, 296 F.3d at 1097 (“[R]eview of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself.”).

Working pursuant to the regulation, Commerce affirmatively resolved the interpretive question of whether the Second Sentence Exclusion covers films with performance-enhancing layer added through coextrusion. Commerce’s determination that the (k)(1) factors are dispositive with respect to the relevant ambiguity is supported by substantial evidence. “[T]o be ‘dispositive,’ the section 351.225(k)(1) criteria must be ‘controlling’ of the scope inquiry in the sense that they definitively answer the scope question.” *Sango*, 484 F.3d at 1379. As described *supra*, Commerce analyzed each of the (k)(1) factors and drew multiple conclusions about the scope language based on that record evidence. Notably, Commerce concluded that the descriptions of the merchandise contained in the (k)(1) factors consistently emphasized the “thickness of the requisite performance-enhancing layer as the definitive factor in differentiating between subject and non-subject films.” *Remand Results* at 14. Relatedly, Commerce explained that, per its analysis of the (k)(1) factors, the Second Sentence Exclusion does not take into account what production process was used to apply the performance-enhancing layer with requisite physical characteristics and thickness. *Id.* at 32. Therefore, Terphane’s Copolymer Surface Films, whose performance-enhancing layers of requisite thickness and physical characteristics are added through coextrusion, are covered by the Second Sentence Exclusion. Quite apart from the court’s provision of “significant deference to Commerce’s own interpretation of its orders,” *Meridian Prod.*, 2018 WL 2306281 at *4, a reasonable mind would accept as adequate Commerce’s conclusion that the (k)(1) factors are dispositive, or controlling, in that they definitively answer the relevant interpretive inquiry. *See Whirlpool*, 2018 WL 2324462 at *3. Mitsubishi does not demonstrate that Commerce’s findings are unreasonable or divorced from its analysis of the (k)(1) factors.

Mitsubishi also fails to articulate precisely how Commerce's analysis leaves doubt that the (k)(1) factors, as considered on remand, are dispositive of the relevant interpretive question. Mitsubishi essentially contends that Commerce failed to satisfy the regulation, having merely "reiterated observations that it had previously made in the *Terphane Scope Determination*. . . [and] weigh[ed] various categories of evidence and ma[d]e a judgment about the preponderance of the evidence." Pl.'s Br. at 4–5. But as explained, Commerce's analysis, and conclusion that the (k)(1) factors are controlling of the relevant inquiry, were drawn directly from, and based on, substantial record evidence. Altogether, Commerce "examine[d] the record and articulate[d] a satisfactory explanation for its actions." *CS Wind Vietnam, Co. Ltd. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (quoting *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)). Mitsubishi's dissection of Commerce's analysis of each (k)(1) factor, and its suggestion that none of them is individually dispositive, is similarly unpersuasive. Pl.'s Br. at 5–6. Mitsubishi offers no authority dictating that any (k)(1) factor must be dispositive of the relevant interpretive inquiry in order for Commerce's determination under that section to stand. *Id.* Rather, § 351.225(k)(2) activates "[w]hen the above criteria are not dispositive."

II. *Commerce's Interpretation of the (k)(1) Factors Does Not Dispositively Place Terphane's Copolymer Surface Films Within the Order's Scope.*

Mitsubishi next argues that Commerce's own review of the record as to the (k)(1) factors compels the conclusion that Terphane's films are in-scope. Pl.'s Br. at 7. Regarding the prior ITC investigations, Mitsubishi points to Commerce's statement that:

> The ITC's description of the evidence in the Japan and Korea Investigations strongly implies that this production process [for equivalent PET film] did involve either off-line processing or in-line processing on dedicated machinery at the time of the Japan and Korea investigations.

Pl.'s Br. at 7 (quoting *Remand Results* at 30). Mitsubishi asserts that Commerce interpreted other prior ITC determinations --including the *India and Taiwan ITC Final*, and the *Brazil, Thailand, and the UAE ITC Final* --to indicate that off-line coating or online dedicated machinery are technologically necessary for the production of equivalent PET film. *Id.* at 7–9 (citing *Remand Results* at 35).

Mitsubishi is incorrect. Commerce did not find that equivalent PET film --those films which come under the Second Sentence Exception

--need to be produced either on-line with dedicated machinery or off-line. To the contrary, Commerce clearly explained "that there is nothing in the written scope of the order or in [its] analysis of the (k)(1) factors which would lead to the conclusion that a particular production process is necessary for a product to be equivalent PET film." *Id.* at 35. As explained *supra*, the court agrees that the Second Sentence Exclusion does not implicate any particular production processes, and reiterates that Commerce could have included, and Petitioners could have suggested, language specifying production processes at the initial phases of the investigation had they considered those processes necessary. Commerce, "[t]o be clear," further explained in the *Remand Results* that it found "differences in production processes or methods that do not yield differences in physical characteristics to be an insufficient basis for treating products differently for purposes of applications of the dumping laws." *Remand Results* at 35. Rather, Commerce determined that the ITC referenced production processes used to manufacture equivalent PET film that were considered technically necessary, at the time of those investigations, to produce the physical properties of equivalent PET film. *Id.* at 35–37. Commerce's analysis of the scope language, which is owed significant deference, *Meridian Prod.*, 2018 WL 2306281 at *4, is reasonable, and does not at all run contrary to the terms of the scope. *See Whirlpool*, 2018 WL 2324462 at *3.

III. *Commerce's Consideration of the Petition is in Accordance with Law and Supported by Substantial Evidence.*

Finally, Mitsubishi argues that Commerce failed to provide "an informed and meaningful assessment of the Petition" as required under § 351.225(k)(1). Pl.'s Br. at 10 (quoting *Mitsubishi I*, 228 F. Supp. 3d at 1377). Mitsubishi highlights text from the Petition stating:

> PET film is "raw, pretreated, or primed" base film at the end of the production process. Additional treatment or processing may be done to the PET film before it reaches the customer (frequently by converters), although the film may also be sold direct to end-use customers or distributors.

Id. (quoting Petition at 10–11). This statement, Mitsubishi contends, distinguishes PET film "at the end of the production process," by which time coextrusion will already have occurred, from PET film at the time it reaches the customer. *Id.* Between those two phases, "[a]dditional treatment or processing" may occur. *Id.* Per Mitsubishi, this interstitial step corresponds to the scope language's reference to "finished films that have had at least one of their surfaces modified by

the application of a . . . layer," *i.e.* the Second Sentence Exclusion. *Id.* at 11. Mitsubishi argues that this description in the Petition indicates that the Second Sentence Exclusion can apply only to post-extruded coatings, and not to coextruded layers such as those on Terphane's Copolymer Surface Films. *Id.* Mitsubishi asserts that Commerce failed to reconcile this evidence from the Petition with the interpretive question of whether the Sentence Second Exclusion applies to films with no post-extrusion coating. *Id.* at 12.

Mitsubishi's singular citation to the Petition, and its corresponding argument, are not persuasive. Commerce performed "an informed and meaningful assessment of the Petition," described *supra*, in accordance with § 351.225(k)(1), and came to reasonable conclusions on the basis of that assessment. *Mitsubishi I*, 228 F. Supp. 3d at 1377 (quoting *Shenyang*, 181 F. Supp. 3d at 1356). Specifically, Commerce recited and analyzed multiple descriptions of the merchandise contained in the Petition, including the sentences quoted by Mitsubishi and others that fairly detract from its determination, *see Universal Camera*, 340 U.S. at 488, and concluded: "Our further analysis of the Petition indicates that the Petitioners' description of the subject merchandise in the Petition, besides re-stating the scope language used in each of the previous PET film proceedings, also places special emphasis on the thickness of any coating (*i.e.*, a performance-enhancing resinous or inorganic layer)[.]" *Remand Results* at 11 (citations omitted). Commerce further found that Petitioners' statements in the Petition did not speak to the interpretive issue of whether coextruded films are covered by the scope language. *Id.* at 18.

Moreover, Mitsubishi's quotation of the Petition does not state that PET film must undergo "additional treatment or processing" "at the end of the production process" and "before it reaches the consumer" in order to possess the performance-enhancing layer described in the Second Sentence Exclusion. Petition at 10–11. Commerce reasonably assessed the Petition and came to a different conclusion that is consistent with its appraisal of the other (k)(1) factors and with the terms of the scope. *See Whirlpool*, 2018 WL 2324462 at *3; *Mitsubishi I*, 228 F. Supp. 3d at 1373 (holding that the Second Sentence Exclusion language demands no "specific chronology, other than, necessarily, prior to import"). Indeed, as explained *supra*, upon review of the (k)(1) factors, in particular prior determinations of the ITC, Commerce found that the Second Sentence Exclusion does not dictate the production process used to imbue PET film with the performance-enhancing layer. *See Remand Results* at 35–36, 56–57.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are in accordance with the court's remand instructions in *Mitsubishi I* and are supported by substantial record evidence. The court thus sustains the *Remand Results* in their entirety. Judgment will enter accordingly.
SO ORDERED.
Dated: June 19, 2018
New York, New York

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

Slip Op. 18–72

JUANCHENG KANGTAI CHEMICAL CO., LTD, NAC GROUP LIMITED, Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 17–00257

[The court grants Defendant's motion to dismiss Plaintiffs' complaint.]

Dated: June 19, 2018

Gregory S. Menegaz, *Alexandra H. Salzman*, *J. Kevin Horgan*, and *John J. Kenkel*, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff.

Sonia M. Orfield, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Catherine D. Miller*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Plaintiffs Juancheng Kangtai Chemical Co. ("Kangtai") and NAC Group Limited ("NAC") (collectively referred to as "Kangtai"), purport to challenge the administration and enforcement by Customs and Border Protection ("CBP") of the final results issued by the U.S. Department of Commerce ("Commerce" or "the Department") in an antidumping duty investigation to which Kangtai is a party. Compl., ECF No. 2 (Oct. 26, 2017); *see also* Pls.' Resp. in Opp'n to Mot. to Dismiss 10, ECF No. 19 (Apr. 16, 2018) (citations omitted) ("Pls.' Resp."). The Government moves to dismiss Kangtai's complaint, invoking U.S. Court of International Trade Rules 12(b)(1) and 12(b)(6) to contest the court's subject matter jurisdiction and, in the alternative, contend that even if the court does have jurisdiction, the complaint should be dismissed for failure to state a claim. Def.'s Mot. to Dismiss, ECF No. 13 (Feb. 16, 2018). For the reasons stated below, the court grants the Government's motion to dismiss.

BACKGROUND

For several years, Commerce has maintained administrative reviews of the antidumping order for chlorinated isocyanurates from the People's Republic of China ("PRC"), under which Kangtai is a covered entity. On July 31, 2014, the Department initiated the ninth administrative review ("AR 9") for the period of review spanning June 1, 2013 to May 31, 2014 ("POR 9"). *Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 44,390 (Dep't Commerce July 31, 2014) (initiation). On August 3, 2015, Commerce initiated the tenth administrative review ("AR 10") covering the period of review

from June 1, 2014 through May 31, 2015 ("POR 10"). *Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 45,947 (Dep't Commerce Aug. 3, 2015) (initiation).

As part of its review, Commerce issued a questionnaire to Kangtai during AR 9 requesting that Kangtai "prepare a separate computer data file containing each sale made during the POR" and "[r]eport each U.S. sale of merchandise entered for consumption during the POR." Public App. to Pl.'s Resp., ECF No. 21 Tab 2, Kangtai Section C Resp. 1 (Dec. 15, 2014). Kangtai's response attached an exhibit identifying sales and the corresponding entry dates for those sales. *See id.* ex. C-1. The Department issued this same request to Kangtai during AR 10. *See Heze Huayi Chem. Co. and Juancheng Kangtai Chem. Co. v. United States*, Ct. No. 1700032 ("*Heze Huayi Chem. Co.*"), J.A. ECF No. 35, Kangtai Section C & D Resp. 1, P.D. 35 (Nov. 23, 2015). Similarly, Kantai's AR 10 response reported certain sales and entries, but did not report those entries it had already reported in AR 9.

For POR 9, Kangtai was assessed a weighted average dumping margin of zero because Commerce found there to be no countervailable export subsidies. *Chlorinated Isocyanurates from the People's Republic of China*, 81 Fed. Reg. 1,167, 1,168 (Dep't Commerce Jan. 11, 2016) (final results) ("AR 9 Final Results"). As to liquidation, Commerce stated:

> The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of these final results of this review. . . . For each individually examined respondent whose weighted-average dumping margin is above de minimis (i.e., 0.50 percent), the Department will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total entered value of sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate is above de minimis.

Id. For POR 10, Kangtai was assessed a weighted average dumping margin of 35.05%. *Chlorinated Isocyanurates from the People's Republic of China*, 82 Fed. Reg. 4,852, 4,852 (Dep't Commerce Jan. 17, 2017) (final results). In its preliminary results, Commerce indicated that it would instruct CBP "to assess duties on all appropriate entries

of subject merchandise during the POR," *Chlorinated Isocyanurates from the People's Republic of China*, 81 Fed. Reg. 45,128, 45,130 (Dep't Commerce July 12, 2016) (prelim. results) and accompanying Decision Mem., and it was Kangtai's failure to report certain entries *sold* during POR 9 but *entered* in POR 10 led to the imposition of the separate rate for these shipments. *See also* Def.'s Reply to Pls.' Resp. 15–19, ECF No. 25 (May 21, 2018) (discussing Commerce's practice of assessing duties based on the date of entry).

The first liquidation instructions at issue here were submitted to CBP on January 28, 2016. In those instructions, Commerce ordered that all shipments imported or sold to NAC and entered during POR 9 were to be assessed a rate of $0 per metric ton. Def.'s Confidential App., ECF No. 16, Liquidation Instrs. from Commerce to Customs, P.R. 2 (Jan. 28, 2016). "For all other shipments . . . entered" during the same period, Commerce directed CBP to impose the PRC rate of 285.63%, *id.*, the rate assigned to all other Chinese manufacturers not subject to a separate rate. The next set of instructions, issued February 2, 2017, followed a similar structure: setting certain rates for entries shipped to specific purchasers during POR 10 and the PRC rate for all others. Def.'s Confidential App., ECF No. 16, Liquidation Instrs. from Commerce to Customs, P.R. 4 (Feb. 2, 2017). Following these instructions, CBP liquidated eleven of the eighteen entries at issue. On March 6, 2017, as part of a separate lawsuit challenging the results of AR 10, Kangtai obtained an injunction preventing CBP from liquidating the remaining AR 10 entries. *See Heze Huayi Chem. Co.*, Order Granting Prelim. Inj., ECF No. 17 (Mar. 6, 2017). Thereafter, Commerce instructed CBP to suspend the liquidation of all other entries. Def.'s Confidential App., ECF No. 16, Liquidation Instrs. from Commerce to Customs, P.R. 5 (Mar. 9, 2017). As a result, seven entries remain unliquidated.

Kangtai filed the instant complaint, alleging four separate counts. Count I alleges that Commerce "acted contrary to law when it assessed individual sales an [antidumping] rate that was higher than the rate calculated upon individual review of the sales in the legal forum appropriate for such calculation, i.e., AR 9." Compl. ¶ 22, ECF No. 2 (Oct. 26, 2017). Kangtai also complains that "[t]he Department's apparent decision to treat the sales as if they were made by the PRC Entity is unsupported by substantial evidence as it had clear evidence that those sales were made by Kangtai" in Count II. *Id.* ¶ 24. Next, Count III sets forth the allegation that "[t]he Department's apparent decision that the NAC entries were not reviewed merely because they entered in the POR subsequent to the AR in which they were reviewed was unsupported by substantial evidence as well as arbitrary

and capricious." *Id.* ¶ 26. Last, Count IV challenges CBP's application of its 15-day liquidation policy. *Id.* ¶ 28.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). As part of its Rule 12 inquiry, the court is to undertake an examination of the "true nature" of the action in an effort to uncover whether the facts pled properly constitute a claim pursuant to Kangtai's proffered jurisdictional provision. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). And Kangtai bears the burden of establishing jurisdiction. *Id.*

DISCUSSION

At issue in this case "are a total of thirty-four sales with legal 'date of sale' between June 1, 2013 and May 31, 2014, that were fully and accurately reported in AR 9 and which were included in the antidumping calculation for that review. Among those thirty-four sales, eighteen entered in the United States after June 1, 2014," during AR 10. Pls.' Resp. at 9.

Commerce contests the court's jurisdiction and argues that Kangtai's complaint should be dismissed. As to Counts I–III, Commerce contends that "[b]ecause Kangtai has challenged the assessment rates established by [AR 10] pursuant to 28 U.S.C. § 1581(c), [] it could and should have sought relief pursuant to section 1581(c) . . . ." Def.'s Mot. to Dismiss 2, ECF No. 13 (Feb. 16, 2018). In support of this argument, the Government posits that "Kangtai attempts to rely on section 1581(i) instead because it failed to request an injunction covering its affected entries before 11 of its 18 entries subject to [AR 10] were liquidated." *Id.* at 6. Count IV, on the other hand, ought to be dismissed, in the Government's view, because Kangtai could have timely obtained an injunction as part of its Kangtai's section 1581(c) case, *Heze Huayi Chem. Co.*, thereby suspending liquidation of the contested entries. *See id.* at 2.

I. Counts I–III

In its complaint, Kangtai asserts three counts—Counts I–III—related to what it describes as "the Department['s] unlawful[] instruct[ion to] CBP to liquidate entries that should have been covered in AR 9 at a punitive rate assigned to entries made in AR 10." *See* Pls.' Resp. at 10. Kangtai asserts that these claims are properly brought under

28 U.S.C. § 1581(i) because they seek to challenge CBP's "administration and enforcement" of Commerce's antidumping duty administrative review, a claim rightfully brought under section 1581(i). *See id.* at 11; *see also Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003). Yet, for the reasons outlined below, it is clear that the true nature of Kangtai's complaint aims to challenge Commerce's evaluation of sales in AR 9 and entries in AR 10, a claim properly arising out of section 1581(c). As a result, the court lacks jurisdiction under section 1581(i) and Counts I–III are dismissed.

A. Jurisdiction Exists Under Section 1581(c)

The court is called upon to determine whether it has jurisdiction pursuant to 28 U.S.C. § 1581(i). Jurisdiction will arise under section 1581(i) when there exists a:

> [C]ivil action commenced against the United States, its agencies, or its officers that arises out of any law of the United States providing for —
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

In this instance, Kangtai asserts jurisdiction under 28 U.S.C. § 1581(i)(2) and (4). Compl. ¶ 4, ECF No. 2 (Oct. 26, 2017).

In order to determine if jurisdiction arises under section 1581(i), the court assesses whether another "subsection of [section 1581] 'is or could have been available'" and whether that other subsection would "provide[] no more than a manifestly inadequate remedy." *Consolidated Bearings Co.*, 348 F.3d at 1002. In so doing, the court is not necessarily bound to accept a plaintiff's characterization of its claims. *See Norsk Hydro Can., Inc.*, 472 F.3d at 1355.

In general, "[a] challenge to liquidation instructions contends that the instructions themselves do not accurately reflect the results of the underlying administrative proceeding." *Corus Staal BV v. United States*, 31 CIT 826, 835, 493 F. Supp. 2d 1276, 1285 (2007). Here, Kangtai's challenge is that the *sales* made during POR 9—and considered in AR 9—and then *entered* during POR 10, should have been assigned the AR 9 rate but were improperly liquidated at the AR 10

rate. *See* Pls.' Resp. at 9. But those eighteen *entries* went unreported in AR 10, even though they were entered during POR 10. *See* Pls.' Resp. at 3, 11 (stating that the entries at issue "absolutely were reported in AR 9" but "not reported as invoiced sales in AR 10."). This despite the fact that Kangtai was directed to report its AR 10 entries and, by its own admission, failed to do so.

This appeal arises not from the erroneous "administration and enforcement" of Commerce's antidumping duty determinations but rather from an allegation that Commerce imposed a liquidation rate that improperly considered already reported sales and entries. Such an action is properly brought under section 1581(c).

Commerce's regulations—namely 19 C.F.R. § 351.213(e)(1)(i)—grant the Department "the discretion to choose entries, exports, or sales in determining whether sales activity occurred during the POR." *Watanabe Group v. United States*, 34 CIT 1545, 1548, 2010 WL 5371606, at *2 (2010). Depending on the circumstances, Commerce may have certain justifications for using either sales or entries in its calculations. *See Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 934, 24 F. Supp. 2d 304, 310 (1998); *see also Corus Staal BV v. United States*, 29 CIT 777, 791, 387 F. Supp. 2d 1291, 1304 (2005) (upholding "Commerce's use of the date of entry to select [] pre-importation EP sales, and the date of sale to select [] CEP sales" within the same POR as reasonable). Due to the silence in the statute as to the use of either sales or entries, the promulgation of Commerce's regulations, and the reasonableness of the Department's interpretation, the court defers to Commerce's reasonable consideration of either sales or entries in a given POR. *See Helmerich & Payne, Inc.*, 22 CIT at 934, 24 F. Supp. 2d at 310.

Collectively, *Watanabe Group*, *Corus Staal BV*, and *Helmerich & Payne, Inc.* stand for the proposition that Commerce has the discretion to choose between sales or entries made during the POR when calculating antidumping duties. Additionally, each case invoked the court's section 1581(c) jurisdiction, the proper one for evaluating such claims. In other words, Commerce's decisions pursuant to 19 C.F.R. § 351.213(e)(1)(i) are made in the context of the Department's duty to make antidumping determinations, 19 U.S.C. § 1516a, not the "administration and enforcement" thereof, 28 U.S.C. § 1581(i).

At the end of the day, Kangtai cannot make out a section 1581(i) claim as the essence of its challenge remains directed at Commerce's use of sales and entries in its antidumping duty calculations. The Department requested both sales and entries during AR 10. When Kangtai failed to report its entries—choosing instead to rest on its prior reporting in AR 9 of the sales of those entries—Commerce

determined that only the entries identified in AR 10 would be subject to the lower rate. Accordingly, those entries that remained unidentified were assessed the higher PRC rate. The propriety of such a decision may be challenged, but under section 1581(c).

B. A Remedy Under Section 1581(c) Is Not Manifestly Inadequate

Because the court finds that Kangtai could have brought suit under section 1581(c), Kangtai's claim of jurisdiction under section 1581(i) can only survive if the section 1581(c) remedy would have been "manifestly inadequate." Because that remedial path was available to—but declined to be taken by—Kangtai, jurisdiction under section 1581(i) is defeated.

The party seeking to establish jurisdiction has the burden of showing that relief under a different subsection of section 1581 would be manifestly inadequate. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Where, as here, an exporter participates in the administrative review, "[t]o be manifestly inadequate, the protest must be an exercise in futility—i.e., incapable of producing any result." *Hutchinson Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1362 (Fed. Cir. 2016) (internal quotation marks omitted).

Kangtai has failed to demonstrate that a 1581(c) claim would be an "exercise in futility." Kangtai claims that it "dutifully reported its sales" and "[t]here was nothing to appeal" as it had no indication "that the Department's plan was to disregard its specific review of a subset of reported sales and assign an arbitrary antidumping margin to them, unmoored from *any* specific review of those sales." Pls.' Resp. at 11. Kangtai's naked assertion that it had no means by which to comprehend that Commerce would calculate the rate based on entries is a false one. Before Kangtai filed its complaint, it was certainly on notice that CBP would "assess[] antidumping duties on all appropriate *entries* covered by [the] review." AR 9 Final Results, 81 Fed. Reg. at 1,168 (emphasis added). Thus, a remedy under section 1581(c) was available in the form of a complaint challenging the results of AR 9 and any resulting remedy could have addressed Commerce's consideration of sales/entries. Kangtai's failure to file such a complaint does not grant it an opportunity to pursue its section 1581(c) claim under section 1581(i).

II. Count IV

Kangtai's final count, that CBP's 15-day policy is unlawful, stands on somewhat different footing. Whereas Kangtai's other arguments are properly grounded in section 1581(c), a challenge to the 15-day

policy is commonly brought under section 1581(i). *See, e.g.*, *Jinan Farmlady Trading Co. v. United States*, 41 CIT __, __, 228 F. Supp. 3d 1351, 1357 (2017). Nevertheless, Kangtai has not articulated an injury that has resulted from CBP's 15-day policy and, as a result, Count IV is also dismissed.

When a plaintiff files an action, it must establish not only that it has suffered injury in fact or the threat thereof, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), but also that the facts asserted give rise to an entitlement to relief. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (citing *Twombly*, 550 U.S. at 557). This court has stated that the 15-day policy "causes recurring injury in fact by repeatedly forcing plaintiffs to file the summons, complaint, and motion for a preliminary injunction within fifteen days of publication of the Final Results." *Jinan Farmlady Trading Co.*, 41 CIT at __, 228 F. Supp. 3d at 1357. Although a plaintiff can immunize itself from the effects of the 15-day policy by obtaining an injunction, that plaintiff may still be able plead an injury because the policy is capable of repetition yet evading judicial review. *See NTN Bearing Corp. of Am. v. United States*, 39 CIT __, __, 46 F. Supp. 3d 1375, 1387–88 (2015). But where a plaintiff cannot make out a claim that alleges such an injury, its challenge to CBP's 15-day policy shall not be maintained.

Because Kangtai cannot assert an injury, it has neither standing to bring its claim nor has it met the pleading requirements of Rule 12(b)(6). Simply put, the 15-day policy caused no injury in this instance and the court possesses no remedial powers to rectify the alleged impropriety of the policy as applied to Kangtai.

Kangtai to file this action in a rushed manner. Rather, Kangtai obtained its liquidation injunction as part of its separate section 1581(c) case and filed the instant action more than ten months after Commerce issued the Final Results. As a result, the injury previously recognized by this court in *Jinan Farmlady Trading Co.*, 41 CIT at __, 228 F. Supp. 3d at 1357, is not present here.

Moreover, this is not a case where "[i]t is the policy itself and the agency's intent . . . to follow that policy that [has] caused plaintiffs uncertainty as to how soon their entries would liquidate . . . ." *See SKF USA Inc. v. United States*, 33 CIT 370, 385, 611 F. Supp. 2d 1351, 1364 (2009). Rather, the true nature of the injury alleged arises from Commerce's assessment that some of Kangtai's entries should be liquidated at the PRC rate based on Kangtai's failure to report those

entries in AR 10.[1] Kangtai alleges not that the 15-day policy led to unlawful liquidation; rather, its challenge remains directed at the rate Commerce assigned certain entries based on the Department's distinction between sales and entries. Thus, the 15-day policy cannot be said to have imposed an injury on Kangtai.

Consequently, Count IV of Kangtai's complaint does not allege any injury whatsoever and is therefore dismissed.

CONCLUSION AND ORDER

Accordingly, for the reasons stated above, the Government's motion to dismiss all counts

in Kangtai's complaint under Rules 12(b)(1) and 12(b)(6) is granted. It is hereby: **ORDERED** that the Government's motion to dismiss is granted; it is further **ORDERED** that final judgment is entered for Defendant.

Dated: June 19, 2018
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
Senior Judge

[1] And unlike cases in which a party seeks to challenge a determination and claims that the 15-day policy unfairly rushes this challenge, Kangtai itself claims that it was only put on notice of the alleged issue by the act of liquidation itself. Whether subject merchandise was set to be liquidated on day 15 or day 115, Kangtai would presumably be making the same challenge. Therefore, the 15-day policy did not cause Kangtai any injury here.

Slip Op. 18–73

MID CONTINENT STEEL & WIRE, INC., Plaintiff, v. UNITED STATES, Defendant, and the STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD., et al., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 17–00051

[United States Department of Commerce's final results are sustained.]

Dated: June 19, 2018

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for plaintiff. With him on the brief was *Ping Gong*.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Lawrence J. Bogard, Neville Peterson LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief was *Peter J. Bogard*.

OPINION

Eaton, Judge:

This case involves the final results of the seventh administrative review of the antidumping duty order on steel nails from the People's Republic of China, covering the period of review August 1, 2014, through July 31, 2015 ("POR"). *Certain Steel Nails From the People's Rep. of China*, 82 Fed. Reg. 14,344 (Dep't Commerce Mar. 20, 2017) (final results), *as amended by* 82 Fed. Reg. 19,217 (Dep't Commerce Apr. 26, 2017), and accompanying Issues and Decision Memorandum, P.R. 289 at bar code 3551476–01 ("Final I&D Memo") (collectively, the "Final Results").

In the Final Results, the United States Department of Commerce ("Commerce" or the "Department") found that dumping of the subject nails occurred during the POR and calculated an antidumping duty rate of 5.78 percent for The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. (collectively, "Stanley"), a mandatory respondent in the review. *See* 82 Fed. Reg. at 19,218. Commerce also determined an "all-others" rate, pursuant to 19 U.S.C. § 1673d(c)(5)(A) (2012), equal to the 5.78 percent rate calculated for Stanley. Commerce applied the all-others rate to the seventeen companies that qualified for a separate rate, but were not individually examined (the "Separate Rate Companies"). *See* 82 Fed. Reg. at 19,218. The Department assigned the only other mandatory

respondent in the review, Tianjin Lianda Group Co., Ltd. ("Lianda"), the countrywide rate (the "PRC-wide rate") of 118.04 percent because it failed to establish independence from the Chinese government. *See* Final I&D Memo at 29; *see also* 82 Fed. Reg. at 19,219.

Mid Continent Steel & Wire, Inc. ("plaintiff" or "Mid Continent"), a U.S. fastener producer, was the petitioner in the underlying review, and commenced this action to challenge certain aspects of the Final Results. Mid Continent contends that: (1) Commerce's assignment of the 5.78 percent all-others rate to the Separate Rate Companies is neither in accordance with law nor supported by substantial evidence primarily because it does not reflect the companies' "economic reality"; (2) Commerce's valuation of Stanley's sealing tape input is not based on the best available information because the surrogate import data Commerce used to value the tape, although more specific as to the base material, does not account for its adhesiveness; and (3) Commerce's valuation of Stanley's plastic granules input is not based on the best available information primarily because the granules are finished products, *i.e.*, ready for their ultimate use, not unfinished products "in primary form," as Commerce found. *See* Pl.'s Br. Supp. Mot. J. Agency R., ECF No. 29–1 ("Pl.'s Br."); *see also* Pl.'s Reply Br., ECF 34. Mid Continent asks the court to remand this matter to Commerce with instructions to recalculate the all-others rate and to amend its valuation of Stanley's sealing tape and plastic granules.

The United States (the "Government"), on behalf of Commerce, maintains that the Final Results are supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Resp. Mot. J. Agency R., ECF No. 33 ("Def.'s Resp."). For its part, Stanley urges the court to find that the record supports Commerce's valuation of its sealing tape and plastic granules. *See* Stanley's Mem. Opp'n Mid Continent Mot. J. Admin. R., ECF No. 32 ("Stanley's Br.").

The court has jurisdiction under 28 U.S.C. § 1581(c) (2012), and, for the reasons below, sustains the Final Results.

BACKGROUND

On October 6, 2015, Commerce initiated the seventh administrative review of the subject order. *See Initiation of Antidumping and Countervailing Duty Admin. Rev.*, 80 Fed. Reg. 60,356 (Dep't Commerce Oct. 6, 2015). Commerce asserts that, because of the large number of exporters involved in the review (48), it limited the number of individually examined exporters to two companies. *See* Selection of Respondents for Individual Rev. (Dec. 16, 2015), P.R. 76 at 3, 5, bar code 3426396–01, ECF No. 30 at tab 8. Commerce selected Stanley and Lianda as mandatory respondents based on their volume of exports,

pursuant to 19 U.S.C. § 1677f–1(c)(2)(B). Stanley was the largest exporter, and Lianda was the fourth largest exporter, of steel nails from China during the POR. *See* Third Selection of Respondent for Individual Rev. (Feb. 29, 2016), P.R. 129 at bar code 3446401–01, ECF No. 30 at tab 12.

It is worth noting that, although two companies, Tianjin Zhonglian Metals Ware Co., Ltd. ("Zhonglian"), and Suzhou Xingya Nail Co., Ltd. ("Suzhou"), exported higher volumes of subject merchandise than Lianda during the POR, neither exporter participated as a mandatory respondent, or otherwise, because (1) Mid Continent withdrew its request for review of Zhonglian, and (2) Suzhou withdrew from the review early in the proceeding, refusing to cooperate with the Department. *See* Third Selection of Respondent for Individual Rev. at 2–3.

During the review, Commerce issued its nonmarket economy questionnaires to Stanley and Lianda. Based on Stanley's responses, Commerce determined that the company successfully rebutted the presumption of *de jure* and *de facto* control[1] by the Chinese government and was therefore eligible for a separate, company-specific rate. *See* Decision Mem. for the Prelim. Results (Sept. 6, 2016), P.R. 256 at 11, ECF No. 30 at tab 6 ("Prelim. Dec. Memo"). To calculate this rate, the Department determined the normal value of Stanley's exports using the nonmarket economy method provided for in 19 U.S.C. § 1677b(c). Specifically, Commerce valued Stanley's reported factors of production using import data from Thailand, the selected surrogate market economy country. Commerce determined surrogate values for Stanley's factors of production, including sealing tape and plastic granules, using publicly available Thai import prices, as reported in the Global Trade Atlas.[2]

In the preliminary determination, the Department calculated a rate for Stanley of 5.90 percent. *See Certain Steel Nails From the*

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[1] Commerce presumes that exporters and producers from nonmarket economy countries, such as China, are under foreign government control with respect to export activities and thus should receive a single countrywide dumping rate. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)). This presumption is rebuttable, however, if a company can demonstrate its independence from government control, both in law (*de jure*) and in fact (*de facto*). *Sigma*, 117 F.3d at 1405. If the company successfully rebuts the presumption of government control, it may be eligible for a separate antidumping duty rate. If not, it will be considered part of the countrywide entity and will receive the countrywide rate. *See* 19 C.F.R. § 351.107(d) (2015).

[2] The Global Trade Atlas is a secondary electronic source containing data reported by governments, including Thailand. *See* Prelim. Surrogate Values Mem. (Sept. 6, 2016), P.R. 257 at 2, bar code 3504509–01, ECF No. 30 at tab 15. Neither Commerce's selection of Thailand as the surrogate country, nor the use of GTA data to value factors of production is in dispute.

People's Rep. of China, 81 Fed. Reg. 62,710, 62,711 (Dep't Commerce Sept. 12, 2016) (prelim. results). Commerce also preliminarily assigned to the Separate Rate Companies the rate of 5.90 percent. *See* 81 Fed. Reg. at 62,711.

Commerce, however, found Lianda's questionnaire responses lacking in that the company failed to rebut the presumption of state control. Specifically, Lianda's responses to Commerce's Section A questionnaire and supplemental questionnaires failed to provide requested information regarding Lianda's and its parent company's corporate structure. *See* Final I&D Memo at 28–29. Therefore, Commerce found Lianda had not provided sufficient information to establish that it was eligible for a separate rate. Accordingly, Commerce treated Lianda as a part of the countrywide entity and preliminarily assigned Lianda the PRC-wide rate of 118.04 percent.[3] *See* Prelim. Dec. Memo at 11.

In the Final Results, Commerce assigned Stanley the amended calculated rate of 5.78 percent, and continued to apply the PRC-wide rate of 118.04 percent to Lianda. For the companies that qualified for a separate rate, Commerce determined an all-others rate by applying the method set out in the general rule in § 1673d(c)(5)(A).[4] Thus, in accordance with the statute, Commerce excluded Lianda's rate from the calculation because it was based on facts available with an adverse inference ("AFA") and assigned Stanley's 5.78 percent rate—the only margin assigned to an individually examined respondent that was not zero, *de minimis*, or based entirely on facts available or AFA—to the Separate Rate Companies. This appeal followed.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

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[3] The PRC-wide rate was based on a rate found in the petition that started the initial investigation in 2007. *See Certain Steel Nails From the People's Rep. of China*, 73 Fed. Reg. 3928, 3935 (Dep't Commerce Jan. 23, 2008) (prelim. determ.); *see also Certain Steel Nails From the People's Rep. of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) (notice of antidumping duty order).

[4] The general rule states:

> For purposes of this subsection . . . , the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [*i.e.*, based on facts available or AFA].

19 U.S.C. § 1673d(c)(5)(A).

LEGAL FRAMEWORK

When merchandise is sold in the United States at less than fair value, Commerce is authorized by statute to impose antidumping duties in an amount equal to a "dumping margin." *See* 19 U.S.C. §§ 1673, 1677(35)(A). This margin reflects the amount by which the price of the merchandise in the exporting country ("normal value") exceeds the price of the merchandise in the United States ("export price" or "U.S. price"). *See* 19 U.S.C. §§ 1673e(a)(1), 1677b(a)(1), 1677a(a).

When the merchandise is exported from a nonmarket economy country, Commerce determines its normal value by valuing the factors of production, using data from a surrogate market economy country or countries. 19 U.S.C. § 1677b(c)(1). Commerce must use "the best available information regarding the values of such factors" in the market economy country that Commerce considers to be appropriate. *Id.* When choosing the "best available" surrogate data on the record, Commerce selects, to the extent practicable, surrogate data that is "publicly available, . . . product-specific, reflect[s] a broad market average, and [is] contemporaneous with the period of review." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citations omitted).

Generally, Commerce is charged with determining individual dumping margins for each known exporter and producer. 19 U.S.C. § 1677f–1(c)(1). When it is "not practicable" to determine individual margins because of the large number of exporters involved in the review, however, the statute provides that Commerce may limit its examination to a "reasonable number of exporters or producers" (mandatory respondents) that either constitute a statistically representative sample of all known exporters or producers or account for the largest volume of the subject merchandise from the exporting country.[5] *Id.* § 1677f–1(c)(2); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103– 316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200–01 ("SAA").[6] In this way, Commerce may "reasonably approximate the margins of all known exporters," absent evidence that the examined

[5] "Non-selected parties can request individual examination pursuant to 19 U.S.C. § 1677m(a), but Commerce is not obligated to grant such requests." *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103– 316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 ("Commerce may decline to analyze voluntary responses because it would be unduly burdensome.").

[6] In 1994, Congress enacted the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), incorporating into U.S. law the Uruguay Round Agreements adopted by the World Trade Organization. At the same time, Congress approved the

exporters' data is not representative. *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1353 (Fed. Cir. 2016) ("The statute assumes that, absent [contrary] evidence, reviewing only a limited number of exporters will enable Commerce to reasonably approximate the margins of all known exporters."). Commerce has been criticized in the past for selecting too few exporters or producers to examine. *See, e.g.*, *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 1129, 637 F. Supp. 2d 1260, 1263–64 (2009); *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 1726–29, 662 F. Supp. 2d 1337, 1341–44 (2009). As shall be seen, it is possible that such criticism is warranted here.

In a nonmarket economy proceeding, Commerce presumes that respondents are state-controlled. State control results in respondents being assigned the countrywide dumping rate. 19 C.F.R. § 351.107(d). The presumption of state control is rebuttable, however, and an exporter that demonstrates sufficient independence (*de jure* and *de facto*) from state control may apply to Commerce for a separate rate—that is, a rate for exporters that were not individually examined, but not covered by the countrywide rate. *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997); *see also Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017). This separate rate is also known as the "all-others" rate. *Albemarle*, 821 F.3d at 1348. The all-others rate is assigned to cooperative, non-individually examined exporters. 19 U.S.C. § 1673d(c)(1)(B)(i)(II).

Subsection 1673d(c)(5) of title 19 governs Commerce's calculation of the all-others rate. Paragraph (A) provides:

> **(A) General rule**
>
> For purposes of this subsection . . . , the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [*i.e.*, based on facts available or AFA].

Statement of Administrative Action, 19 U.S.C. § 3511(a)(2), which is "an authoritative expression" when interpreting and applying the URAA. *See* 19 U.S.C. § 3512(d).

19 U.S.C. § 1673d(c)(5)(A).[7] In the event that all of the individually investigated exporters' margins are zero, *de minimis*,[8] or determined entirely on the basis of facts available or AFA (under 19 U.S.C. § 1677e), the exception to the general rule in paragraph (B) applies:

> **(B) Exception**
>
> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, [Commerce] may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d(c)(5)(B).[9] In other words, when calculating the all-others rate, Commerce will use the weighted average of all mandatory respondents' rates, excluding any *de minimis* rates, or rates based entirely on facts available or AFA. If all dumping margins are only either *de minimis*, or determined entirely based on facts available or AFA, Commerce applies the exception found in § 1673d(c)(5)(B). "In such cases, Commerce 'may use any reasonable method to establish the estimated all others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.'" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (quoting 19 U.S.C. § 1673d(c)(5)(B)).

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[7] *See* SAA at 4201 ("[T]he all others rate will be equal to the weighted-average of individual dumping margins calculated for those exporters and producers that are individually investigated, exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available. Currently, in determining the all others rate, Commerce includes margins determined on the basis of the facts available.").

[8] In administrative reviews, Commerce "will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5 percent *ad valorem*, or the equivalent specific rate." 19 C.F.R. § 351.106(c).

[9] The SAA provides the following guidance on the method Commerce may use when the exception to the general rule applies:

> [Title 19 U.S.C. § 1673d(c)(5)(B)] . . . provides an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis*. In such situations, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. *However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods*.

SAA at 4201 (emphasis added).

By its terms, § 1673d(c)(5) references investigations. Commerce, however, has an established, court-approved practice of applying this subsection in periodic reviews as well, both in market economy and nonmarket economy proceedings. *See Albemarle*, 821 F.3d at 1352 ("[T]he statutory framework contemplates that Commerce will employ the same methods for calculating a separate rate in periodic administrative reviews as it does in initial investigations."); *see also Navneet Publications (India) Ltd. v. United States*, 38 CIT __, __, 999 F. Supp. 2d 1354, 1359 (2014) ("Though § 1673d(c)(5) explicitly references investigations, nothing in that statute or in any other statute expressly or impliedly precludes application to administrative reviews.").

DISCUSSION

I. All-Others Rate Calculation

In the Final Results, Commerce calculated the all-others rate pursuant to the general rule set out in 19 U.S.C. § 1673d(c)(5)(A), and assigned the Separate Rate Companies a margin of 5.78 percent—a rate equal to the calculated rate of Stanley, the sole mandatory respondent with a rate that was not zero, *de minimis*, or based entirely on facts available or AFA. *See* Final I&D Memo at 21 ("When calculating a separate rate for non-individually reviewed respondents, the Department will base this rate on the estimated weighted-average dumping margins established for the individually examined respondents, excluding zero and *de minimis* margins or margins based entirely on AFA."). Mid Continent maintains that Commerce's calculation of the all-others rate is neither in accordance with law nor supported by the record.

As to Commerce's choice of method, Mid Continent takes the position that Commerce's decision to apply the general rule, and to exclude Lianda's AFA rate, was an unreasonable interpretation of the dumping statute because, in doing so, Commerce failed in its obligation to ensure that the all-others rate reflected the "economic reality" of the Separate Rate Companies. *See* Pl.'s Br. 12; *see also* SAA at 4201 (emphasis added) ("[Title 19 U.S.C. § 1673d(c)(5)(B)] . . . provides an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis*. In such situations, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that

volume data is available. *However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods*.").

First, Mid Continent observes that while Congress amended § 1673d(c)(5)(A) to require the exclusion of AFA rates from the all-others rate calculation *in investigations*, it did not state "the appropriate [method] to be used in administrative reviews." Pl.'s Br. 17. For Mid Continent, this "intentional omission" shows that Congress wished Commerce to continue its pre-URAA practice of including AFA rates in the calculation of the all-others rate in administrative reviews. *See* Pl.'s Br. 15–17; *see* SAA at 4201 (noting that before the enactment of the URAA, "in determining the all others rate, Commerce includes margins determined on the basis of the facts available"). Thus, Mid Continent insists that in the underlying review Commerce should have exercised its authority under the dumping laws to devise a method that included the AFA rates of Lianda (the mandatory respondent that failed to establish independence from government control) and Suzhou (the mandatory respondent that withdrew from the review) in the calculation of the all-others rate. In particular, Mid Continent asks the court to remand with instructions that Commerce calculate the all-others rate as a simple average of the rates received by Stanley (5.78 percent), Lianda (118.04 percent), and Suzhou (118.04 percent). *See* Pl.'s Br. 27. Therefore, Mid Continent argues for a rate of 80.62 percent for the Separate Rate Companies.

Notwithstanding Mid Continent's arguments, Commerce's decision to apply the general rule in § 1673d(c)(5)(A) is in accordance with law. There can be no serious dispute the weight of authority holds that "the statutory framework contemplates that Commerce will employ the same methods for calculating a separate rate in periodic administrative reviews as it does in initial investigations," *Albemarle*, 821 F.3d at 1352 (citing 19 U.S.C. § 1675(a) (Supp. IV 2016)), and that these methods are to be employed, not only in market economy cases, but in nonmarket economy proceedings as well. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1312 (Fed. Cir. 2017) (citing *Albemarle*, 821 F.3d at 1352 & n.6); *see also* Pl.'s Br. 14–15 (recognizing same). Moreover, as between the methods used to calculate the all-others rate, as stated in the general rule, and in the exception to that rule, the method set out in § 1673d(c)(5)(A) leaves little room for the exercise of discretion. *See* 19 U.S.C. § 1673d(c)(5)(A) ("[T]he estimated all-others rate *shall be* an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually [examined],

excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.") (emphasis added).

Applying the statutory method, Commerce excluded the PRC-wide rate assigned to Lianda and relied on the only other calculated rate, in this segment, that was not zero, *de minimis*, or based entirely on facts available or AFA—*i.e.*, Stanley's 5.78 percent rate. While it may be that Commerce should have examined more potential respondents,[10] its method comports with the statute (the general rule in § 1673d(c)(5)(A)) and the guidance set out in the SAA. *See* SAA at 4201 ("[T]he all others rate *will be* equal to the weighted-average of the individual dumping margins calculated for those exporters and producers that are individually [examined], exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available."). Resort to the exception in paragraph (B), which permits Commerce to use "any reasonable method," was not statutorily directed because the conditions for its application—*i.e.*, that all calculated margins were zero, *de minimis*, or determined entirely based on facts available or AFA—were not satisfied.[11] *See* SAA at 4201 ("[N]ew section 735(c)(5)(B) . . . provides an exception to the general rule *if the dumping margins for all of the exporters and producers that are individually [examined] are determined entirely on the basis of the facts available or are zero or* de minimis.") (emphasis added). Moreover, where the exception does apply, the SAA states that Commerce may use "any reasonable method" only if the "expected method" is not feasible:

> The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, *provided that volume data is available*. However, if this method is not feasible, or if it results in an

[10] Indeed, had it done so, this lawsuit might have been avoided.

[11] Mid Continent points out that the SAA permits the use of AFA rates in cases where the exception (*i.e.*, § 1673d(c)(5)(B)) to the general rule applies. *See* Pl.'s Br. 16–18. That is, Commerce may use "any reasonable method" where the mandatory respondents' margins are zero, *de minimis*, or based entirely on facts available or AFA, and weight-averaging those margins "results in an average that would not be reasonably reflective of potential dumping margins . . . ." SAA at 4201. Mid Continent cites two cases, *Bestpak* and *Navneet*, as examples of where Commerce applied § 1673d(c)(5)(B), although the facts did not fit neatly within the statute. Acknowledging that these cases are distinguishable on their facts from the one presented here, Mid Continent nonetheless argues that they stand for the proposition that "'rate determinations for nonmandatory, cooperating separate rate respondents must . . . bear some relationship to their actual dumping margin.'" Pl.'s Br. 22 (quoting *Bestpak*, 716 F.3d at 1380). *Bestpak* and *Navneet* are, as Mid Continent acknowledges, distinguishable. In both of these cases, Commerce did not apply the general rule, but rather employed the exception in § 1673d(c)(5)(B), because *all* individual dumping margins for the mandatory respondents were zero, *de minimis*, or based on AFA. By contrast here, Commerce could, indeed must, use the preferred, general rule to calculate an all-others rate based on Stanley's non-*de minimis*, non-AFA rate.

> average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

SAA at 4201 (emphasis added). Mid Continent, however, makes no argument that there is a lack of volume data available in the record or that the usual method was unfeasible. Accordingly, Commerce's decision to apply the general rule in the underlying review was in accordance with law.

Next, Mid Continent argues that even if the application of § 1673d(c)(5)(A) was lawful, it was unreasonable "as applied" because it resulted in a margin that does not accurately reflect the dumping rate of the Separate Rate Companies. *See* Pl.'s Br. 17–18; Pl.'s Reply Br. 8. Even if this were a reason to ignore the statute, the court does not agree that Stanley's 5.78 percent margin *necessarily* does not accurately reflect the Separate Rate Companies' dumping rate. The record shows that Stanley was the largest exporter of subject merchandise, by volume, during the POR and, for that reason, was selected for individual examination by Commerce pursuant to 19 U.S.C. § 1677f–1(c)(2). This "suggests an assumption that [Stanley's data] can be viewed as representative of all exporters." *Albemarle*, 821 F.3d at 1353. That is, "[t]he statute assumes that, absent . . . evidence [that the largest volume exporter's data is not representative], reviewing only a limited number of exporters will enable Commerce to reasonably approximate the margins of all known exporters." *Id.*

Mid Continent argues that record evidence demonstrates that Stanley's rate is not representative of the Separate Rate Companies' experience. In particular, it points to (1) the PRC-wide rate assigned to Lianda and Suzhou, and (2) the rates assigned to "non-Stanley" mandatory respondents in previous segments. *See* Pl.'s Br. 10–11 (table). For Mid Continent, these rates constitute substantial evidence that the all-others rate was untethered from the Separate Rate Companies' "economic reality and . . . experience." Pl.'s Br. 26 (arguing that because "all other individually-examined Chinese respondents . . . received much higher margins in previous reviews," this shows that the 5.78 percent all-others rate "fail[s] to reflect economic reality and the specific experience of the Separate Rate Companies."). Mid Continent's representativeness argument, however, is not convincing.

As an initial matter, it was reasonable for Commerce to exclude Lianda's and Suzhou's rates from the all-others rate calculation in accordance with the plain language of § 1673d(c)(5)(A). While Mid Continent argues that Stanley's rate does not tie to the Separate Rate

Companies, it is not clear that Mid Continent's proposed remedy would result in a more representative margin. The Separate Rate Companies are known, cooperative exporters that each established their eligibility for a separate rate. By contrast, Lianda failed to establish independence from government control, and Suzhou failed to cooperate with Commerce's requests for information. Thus, no actual rate was calculated for either company. Rather, they were assigned the PRC-wide rate—a rate that was derived from information found in the petition that commenced the 2007 investigation. It is difficult to credit the argument that inclusion of their 118.04 percent rates would result in an all-others rate that was "reflective" of the Separate Rate Companies' actual dumping margins where the commercial standing of these two companies is virtually unknown.

Second, the rates assigned to non-Stanley respondents in prior segments do not demonstrate that the general rule was unreasonable as applied. It is a commonplace that each "'administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record.'" *Albemarle*, 821 F.3d at 1357 (quoting *Qingdao*, 766 F.3d at 1387). Indeed, part of the idea behind periodic reviews is to test if respondents that previously dumped have mended their ways. While the Federal Circuit has identified circumstances where it may, nonetheless, be reasonable to use information from prior segments, those circumstances are not present here. For example, Mid Continent makes no argument that "the overall market and the dumping margins have not changed from period to period." *Id*. On the contrary, the fluctuation in margins over the last several segments suggests otherwise. Thus, "[t]his is not a situation in which there was any consistency with respect to the dumping margins of the individually examined respondents throughout the reviews." *Id*. Additionally, there has been no allegation that the Separate Rate Companies have failed to cooperate with Commerce such that the use of higher rates from a prior segment may be justified as AFA on deterrence grounds. *See id*.; *see also Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1378 (Fed. Cir. 2012) ("Deterrence is not relevant here, where the 'AFA rate' only impacts cooperating respondents.").

Finally, even if circumstances were such that it was reasonable to look to information from prior segments, it is difficult to see how the prior rates of non-Stanley mandatory respondents from the last six reviews and a new shipper review are probative of the Separate Rate Companies' dumping during the POR, when only two of those respondents are among the seventeen Separate Rate Companies chosen for

the underlying review: Tianjin Jinghai County Hongli Industry and Business Co., Ltd. (“Hongli”) and Tianjin Jinchi Metal Products Co., Ltd. (“Jinchi”). *See* 81 Fed. Reg. at 19,218. While it is true that Hongli and Jinchi have been individually examined before, these examinations took place in the second and third annual reviews, which covered the 2009 to 2010, and 2010 to 2011 periods, respectively—that is, several years prior to the POR of the underlying review. Thus, there is little to suggest that Hongli’s and Jinchi’s prior rates would be indicative of the “economic reality and actual dumping margins,” Pl.’s Br. 18, of the Separate Rate Companies during the POR, as Mid Continent suggests.

Accordingly, the 5.78 percent all-others rate is in accordance with law and supported by substantial evidence.

II. Sealing Tape Valuation

In its Section D response regarding its factors of production, Stanley stated:

> During the POR, Stanley . . . purchased sealing tape and consumed this material to seal the cartons in the packaging of subject nails. The sealing tape is basic packaging tape made from biaxially oriented polypropylene and adhesive. It is purchased in rolls 60cm wide and 50 meters long.

Stanley’s Sec. D Resp., P.R. 111 at 103, bar code 3442643–02, ECF No. 30 at tab 14.

Before Commerce, Mid Continent argued that the Department should value Stanley’s sealing tape under Thai Harmonized Tariff Schedule (“HTS”) subheading 3919.10, covering “Plates, Sheets, Film, Foil, *Tape*, And Other Flat Shapes Of Plastics, *Self-Adhesive*, In Roll Not Over 20 Cm. (8 in.) Wide.” Final I&D Memo at 31–32 (emphasis added). For its part, Stanley argued against using that subheading “because Thai HTS subheading 3919.10 is a general basket category that does not differentiate products based on the kind of plastic from which the tape is made.” Final I&D Memo at 32. Instead, Stanley argued in favor of Thai HTS subheading 3920.20.10, covering “Other plates, sheets, film, foil, and strip of plastics, non-cellular and not reinforced, laminated, supported, or similarly combined with other materials: of polymers of polypropylene: *biaxially oriented polypropylene film*.” Final I&D Memo at 32 (emphasis added).

In the Final Results, Commerce agreed with Stanley’s proposed HTS subheading, stating:

> In its Section D questionnaire response, Stanley describes its sealing tape as “basic packaging tape made from biaxially ori-

> ented polypropylene and adhesive." Based on the Thai description Thai GTA data under HTS 3920.20.10, we find that Stanley's sealing tape is included in this HTS category. Accordingly, for these final results, we will use Thai HTS 3920.20.10 to value Stanley's sealing tape.

Final I&D Memo at 32 (footnotes omitted); *see also* Final Surrogate Value Mem. (Mar. 13, 2017), P.R. 292 at 1, bar code 3553207–01, ECF No. 39 at tab 16.

Before the court, Mid Continent maintains that substantial evidence does not support Commerce's choice of Thai HTS subheading 3920.20.10. *See* Pl.'s Br. 28. For Mid Continent, this subheading does not cover the most important aspect of the sealing tape, *i.e.*, that it is adhesive. *See* Pl.'s Br. 28–29. Instead, Mid Continent again argues for Thai HTS subheading 3919.10, covering "Plates, Sheets, Film, Foil, Tape, And Other Flat Shapes Of Plastics, Self-Adhesive, In Roll Not Over 20 Cm. (8 in.) Wide," to value the sealing tape input. Pl.'s Br. 29. For Mid Continent, even though it is a basket provision, subheading 3919.10 covers self-adhesive plastic tape that, Mid Continent contends, more closely describes the sealing tape Stanley reported using. Accordingly, Mid Continent asks the court to remand with instructions to use Thai HTS subheading 3919.10. Pl.'s Br. 29.

The Government counters that Commerce's use of Thai HTS subheading 3920.20.10 is supported by the record and constitutes the "best available information" to value Stanley's sealing tape. Def.'s Resp. 22. As noted, this subheading covers "Other plates, sheets, film, foil, and strip of plastics, non-cellular and not reinforced, laminated, supported, or similarly combined with other materials: of polymers of polypropylene: biaxially oriented polypropylene film." According to the Government, "[t]he crux of Mid Continent's argument is that the *end use* of Stanley's sealing tape is a more important consideration than the *base material* when valuing the input." Def.'s Resp. 23 (emphasis added). The Government argues, however, that Commerce's choice of the more specific subheading (*i.e.*, not a basket provision) was reasonable: "Commerce determined that Thai HTS category 3920.20.10 is the most product specific because, [like] Stanley's sealing tape, the tape is made from biaxially oriented polypropylene film." Def.'s Resp. 23; *see also* Stanley's Br. 12, 14 ("The record evidence irrefutably established that Stanley's sealing tape was manufactured from biaxially oriented polypropylene. Commerce therefore reasonably based the surrogate value for this input on the Thai HTS subheading that expressly described products manufactured from biaxially oriented polypropylene," rather than "inputs

made of undifferentiated 'plastic.'"). Thus, the Government asks the court to sustain Commerce's valuation of Stanley's sealing tape.

Commerce is charged with the duty of choosing the "best available" surrogate data on the record to value inputs. 19 U.S.C. § 1677b(c)(1). Among the criteria that the Department considers when selecting from among the available surrogate data is product specificity. *See Qingdao*, 766 F.3d at 1386. In the Final Results, Commerce identified the base material of the sealing tape reportedly used by Stanley (biaxially oriented polypropylene), as expressly described in Thai HTS subheading 3920.20.10, whereas the basket provision proposed by Mid Continent generally covers "plastics." The Department, then, reasonably chose to use import data under the HTS subheading that more closely matched the description of the base material in Stanley's packing tape. *See SolarWorld Americas, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1254, 1270 (2017) (sustaining Commerce's selection of HTS categories to value respondents' backsheets input where "the primary material in each respondent's backsheets was reflected in the specific material of each category"). While Mid Continent's argument has some appeal, it does not carry the day over Commerce's choice of the subheading that is specific to the type of plastic from which Stanley's tape was actually made. Because there is no record evidence as to which component (plastic or adhesive) constitutes a greater proportion of the value of the tape, it cannot be said that Commerce did not fulfill its charge to choose the best available information. Therefore, substantial evidence supports Commerce's conclusion that the best available information to value Stanley's packing tape was the HTS subheading that best described the material from which Stanley's tape was made.

III. Plastic Granules Valuation

In its Section D response, Stanley stated that it "purchased plastic granules made of calcium carbonate reinforced polypropylene plastic from a non-market economy supplier and consumed this material in the production of plastic-collated nails." Stanley's Sec. D Resp., P.R. 110 at 36, bar code 3442643–01, ECF No. 30 at tab 14. The plastic granules are subjected to a heating process, and, when melted down, are used to bind loose nails together. In particular, "[p]lastic granules [move] from [a] pipe into [a] heater[,] become soft after heating, and [are] extruded onto nails surface . . . [and] then plastic will adhere onto nails." Stanley's Sec. D Resp., P.R. 113, Ex. D-15, ECF No. 30 at tab 14. A purpose of the collating is to permit the nails to be loaded into a nail gun.

Before Commerce, Mid Continent argued that Commerce should use Thai HTS subheading 3921.90.90, covering "Other plates, sheets, film, foil and strip, of plastics" to value the granules input. *See* Pl.'s Br. 30. According to Mid Continent:

> [t]he Department incorrectly valued plastic granules [in] the *Preliminary Results* using HTS 3902.10.90.090, "Other," which falls under HTS 3902.10, "Polypropylene, In Primary Forms." . . . Stanley reported that its plastic granules are made from "calcium carbonate reinforced polypropylene plastic" indicating that the granules contain more than just polypropylene. As a result, the Department should value Stanley's plastic granules input using the Thai HTS category 3921.90.90.

Final I&D Memo at 32. In other words, Mid Continent argued that Commerce's preferred subheading was not specific to the type of plastic Stanley used.

Stanley opposed Mid Continent's argument, saying:

> The Department should value plastic granules using the Thai HTS category[] 3902.10.90, which follows the Department's practice on this same issue in the three immediately preceding segments. The notes of HTS Chapter 39 clearly demonstrate that Stanley's plastic granules should not be classified under HTS 3921.90.90.

Final I&D Memo at 32. HTS Chapter Note 10, which pertains to subheading 3921.90.90, *i.e.*, the subheading proposed by Mid Continent, explains that

> In heading[] . . . 39.21, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film, foil and strip . . . and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

Explanatory Note 10, Chapter Notes to Chapter 39, *available at* http://www.wcoomd.org//media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature2012/hs-2012/0739_2012e.pdf?la=en ("Chapter Notes"). Stanley argues that the above note does not describe its plastic granules. Rather, Chapter Note 6, which pertains to HTS subheading 3902.10.90, expressly covers granules sold in bulk, like Stanley's: "[T]he expression 'primary forms' applies only to the following forms : . . . (b) Blocks of irregular shape, lumps, powders (including moulding powders), *gran-*

ules, flakes and similar bulk forms." *Id*., Chapter Note 6 (emphasis added). Thus, for Stanley, Mid Continent's preferred subheading was not the best available information because it did not describe the plastic granules Stanley consumed in the production of its nails. *See* Stanley Br. 9 ("Stanley's plastic granules are not plates, sheets, film, foil or strip, and, for that reason, they would not be classified under subheading 3921.90.90.").

In the Final Results, Commerce used Thai HTS subheading 3902.10.90, covering "Polymers of polypropylene . . . in primary forms: Polypropylene: Other," to value the plastic granules, and rejected Mid Continent's proposed HTS subheading 3921.90.90, covering "Other plates, sheets, film, foil and strip, of plastics." By way of explanation, Commerce stated:

> The Department addressed this issue in the three previous administrative reviews. There, we fully explained our rationale for using Thai HTS 3902.10.90, namely that Stanley's plastic beads more closely match the description under this HTS category. This HTS category more specifically covers Stanley's plastic beads because it covers polypropylene and not just "plastic." Additionally, there is no record evidence that Stanley's plastic beads lend themselves to being cut into regular shapes as per HTS 3921 categories. We find that these same reasons are supported by the record of this administrative review. Thus, for the final results, we will . . . value Stanley's plastic granules . . . using Thai HTS subheading 3902.10.90.

Final I&D Memo at 33 (footnotes omitted).

Before the court, Mid Continent argues that Commerce's determination to use Thai HTS subheading 3902.10.90 was not supported by substantial evidence. This is because, in Mid Continent's view, "Stanley's plastic granules are not polypropylene *in a primary form*." Pl.'s Br. 30 (emphasis added). "Rather, they are made from 'calcium carbonate reinforced polypropylene plastic,'" *i.e*., a product that contains "more than just polypropylene." Pl.'s Br. 30 (quoting Stanley's Sec. D Resp.). Mid Continent characterizes Stanley's granules as "finished products," not "bulk raw materials in a primary form." Pl.'s Br. 30. That they are melted down to collate nails, and require no further processing to use them, in Mid Continent's view, reinforces that the granules are not in "primary form." Pl.'s Br. 30–31. Moreover, Mid Continent disagrees with Commerce's assertion that "there is no record evidence that Stanley's plastic beads lend themselves to being cut into regular shapes as per HTS 3921 categories." Final I&D Memo at 33. To the contrary, Mid Continent points to a photograph attached

to Stanley's Section D questionnaire response, which "clearly shows that the granules are cut into regular shapes." Pl.'s Reply. Br. 15. Mid Continent asks the court to remand this issue with instructions that Commerce "value Stanley's plastic granules using Thai HTS number 3921.90.90," the subheading that covers "Other plates, sheets, film, foil and strip, of plastics," *i.e.*, "finished products containing more than just polypropylene in primary form." Pl.'s Br. 31, 32.

The Government and Stanley disagree with Mid Continent and ask the court to sustain Commerce's valuation of Stanley's plastic granules. First, the Government argues that the HTS subheading selected by Commerce is more specific to "polypropylene" (the kind of plastic Stanley represented using) than the subheading proposed by Mid Continent, which covers "plastics." Def.'s Resp. 24. Indeed, Stanley described its plastic granules as made of calcium carbonate reinforced *polypropylene plastic* in its Section D response.

Next, Stanley argues that Mid Continent's characterization of "primary form" reveals a misunderstanding of that term's meaning. *See* Stanley's Br. 8. Chapter Note 6 to Chapter 39 of the Thai HTS states that the term "primary form" as used in subheading 3902.10.90 "refers only to the *physical* form of the imported polypropylene," including, expressly, "granules . . . and similar bulk forms." Stanley's Br. 9–10 (quoting Chapter Notes, Note 6) (emphasis added). Therefore, according to Stanley, "Mid Continent's assertion that the mere presence of calcium carbonate precludes classification of Stanley's plastic granules as polypropylene in primary form has no merit" as a matter of law. Stanley's Br. 11. Moreover, as a factual matter, Stanley argues that the photographs on the record show "conclusively that the plastic granules were individually no larger than 4 millimeters and were sold in 25 kilogram bags," and therefore, "fit the physical description of 'primary form' in the Thai HTS and that they are sold in bulk." Stanley's Br. 11. Accordingly, Stanley and the Government argue that Commerce's use of Thai HTS subheading 3902.10.90, covering "Polymers of polypropylene . . . in primary forms: polypropylene: Other" to value Stanley's plastic granules was supported by the record and should be sustained.

Based on the record evidence, Commerce's choice of Thai HTS subheading to value Stanley's plastic granules is the best available information. In its questionnaire responses, Stanley described the granules as made from polypropylene plastic, which Commerce reasonably found was more specifically described in subheading 3902.10.90 ("polypropylene"), than in 3921.90.90 ("plastics"). *See Qingdao*, 766 F.3d at 1386.

Mid Continent's argument that the polypropylene is not "pure," and therefore is not "in primary form," seems to misstate the idea of what "in primary form" means as explained in the Chapter Notes. Rather than focusing on the chemical composition of the polypropylene, the notes indicate that "in primary form" refers to the polypropylene's physical shape (*e.g.*, blocks of irregular shapes, powders, flakes and granules) and whether it is sold in bulk form. That is, in primary form means not ready for its ultimate use but, for instance, as here, suitable to be melted down and further applied to a saleable product. Additionally, photographic evidence placed on the record by Stanley indicates that the plastic input at issue here is, indeed, polypropylene plastic pieces measuring no more than 4 millimeters each, and that are sold in bulk form (25 kilogram bags). *See* Stanley's Sec. D Resp., P.R. 113 at bar code 3442643–04.

Finally, starting in the fourth review Commerce rejected HTS subheading 3921.90.90 because Stanley's granules were not cut into regular shapes as a part of the manufacturing process. *See Certain Steel Nails From the People's Rep. of China*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) (final results of the fourth periodic review) and accompanying Issues and Dec. Mem., Cmt. 11[12]; *see also* Explanatory Note 10, Chapter Notes ("In heading[] . . . 39.21, the expression 'plates, sheets, film, foil and strip' applies only to plates, sheets, film, foil and strip . . . and to blocks *of regular geometric shape*, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use)."). Stanley's granules were melted down. Accordingly, there was no need for the granules to "lend themselves to being cut into regular shapes as per HTS 3921 categories," Final I&D Memo at 33, making subheading 3921.90.90 less specific. The record here supports the conclusion that Stanley's polypropylene granules are specifically covered by HTS subheading

[12] There, Commerce found that

> HTS categories under 3921 only apply to plates, sheets, film, foil, strips and to blocks of regular geometric shapes whether cut or uncut. In addition, information on the record for another HTS (3902.1090) indicates that it is for polymers of polypropylene in "primary form" (i.e., blocks of irregular shape, lumps, powders, granules, flakes, and similar bulk forms). We find that Stanley's plastic beads more closely match the description under HTS 3902.10.90 as: 1) this HTS is more specific because it relates to polypropylene and not just "plastic;" 2) there is no indication that Stanly's plastic beads were purchased in a form other than bulk; and, 3) there is no indication that Stanley's plastic beads lend themselves to be cut into regular shapes, as HTS categories under 3921 imply. Thus, for the final results we will use HTS 3902.10.90 to value Stanley's plastic beads.

Issues and Dec. Mem., Cmt. 11, accompanying *Certain Steel Nails From the People's Rep. of China*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014).

3902.10.90 and the Chapter Notes, and therefore, import information pertaining to that subheading was the best available surrogate data to value that input.

CONCLUSION

Commerce's application of the general rule in § 1673d(c)(5)(A) to calculate the all-others rate comported with the statute, and is supported by substantial evidence. Also, Commerce's surrogate value determinations on sealing tape and plastic granules are supported by substantial evidence and are, therefore, sustained. Judgment shall be entered accordingly.

Dated: June 18, 2018
New York, New York

/s/ Richard K. Eaton
Richard K. Eaton, Judge