U.S. Customs and Border Protection

Slip Op. 11–65

PASTIFICIO LUCIO GAROFALO, S.P.A., Plaintiff, –v– THE UNITED STATES, Defendant, –and– AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, and NEW WORLD PASTA COMPANY, Defendant-Intervenors.

Before: Pogue, Chief Judge
Consol.[1] Court No. 10–00095
Public version

[Affirming Department of Commerce's final results ofadministrative review of antidumping duty order]

Dated: June 8, 2011

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Kelley Drye & Warren LLC (*Paul C. Rosenthal* and *David C. Smith*) for Plaintiffs and Defendant-Intervenors American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey* and *Carrie A. Dunsmore*), and, of counsel, *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant United States.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This consolidated action challenges four determinations made by the United States Department of Commerce ("Commerce" or the "Department") in the final results of the twelfth administrative review of an antidumping ("AD") duty order on pasta from Italy.[2]

[1] This action is consolidated with Court No. 10–00097.

[2] *See Certain Pasta from Italy*, 75 Fed. Reg. 6,352 (Dep't Commerce Feb. 9, 2010) (notice of final results of the twelfth administrative review) ("*Final Results* ") and accompanying Issues & Decision Mem., A-475–818, ARP 07–08 (Feb. 2, 2010), Admin. R. Pub. Doc. 189 ("*I & D Mem.* "). The period of review ("POR") was July 1, 2007, through June 30, 2008. *Final Results*, 75 Fed. Reg. at 6,352.

Plaintiff Pastificio Lucio Garofalo, S.p.A. ("Garofalo"), a mandatory respondent in this review,[3] challenges Commerce's use of quarterly cost averaging periods in evaluating whether certain of Garofalo's home market sales were made below the cost of production, and the Department's decision to compare Garofalo's U.S. sales solely to home market sales made within the same quarterly period.

Plaintiffs American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company (collectively the "Petitioner Plaintiffs"), the petitioners,[4] challenge Commerce's intention, expressed in the *Final Results* of this review, to employ new industry-wide model match criteria when making foreign like product determinations in future reviews of this AD duty order. The Petitioner Plaintiffs also challenge the Department's acceptance, in this review, of company-specific model match criteria for each mandatory respondent.

The court has jurisdiction pursuant to Section 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (2006)[5] and 28 U.S.C. § 1581(c).

As explained in detail below, the court rejects both of Garofalo's challenges, concluding that the Department reasonably interpreted its statutory authority to measure costs of production and select appropriate time frames for sales comparisons, and that the agency decisions in this regard were supported by substantial evidence on the record of this review.

With regard to the challenges brought by the Petitioner Plaintiffs, the court concludes that Commerce's intention to apply new model match criteria in future administrative reviews is not ripe for judicial review, and that Commerce's determinations regarding the model match criteria used in this review were based on a permissible interpretation of the statute and supported by substantial evidence.

Accordingly, the Department's *Final Results* in this review are affirmed.

STANDARD OF REVIEW

The court shall uphold the determinations challenged in this case unless they are found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

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[3] *Final Results*, 75 Fed. Reg. at 6,352.

[4] *Id.* at 6,352 n.2.

[5] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Though reasonable minds may differ, if a reasonable mind could accept the connection presented between the facts found and the conclusion reached, an alternative judgment may not be substituted for that of the agency. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) ("[A] court is not to substitute its judgment for that of the agency . . . ." (quotation marks and citation omitted)); *Siderca S.A.I.C. v. United States*, 29 CIT 1030, 1048, 391 F. Supp. 2d 1353, 1369 (2005) ("Reasonable minds may differ, but a determination does not fail for lack of substantial evidence on that account.").

An agency acts contrary to law when it acts arbitrarily or based on an impermissible construction of its statutory authority. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (an agency acts contrary to law if it acts based on an impermissible construction of its statutory authority); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) (agencies act contrary to law if decision-making is not adequately reasoned).

The court will discuss, in turn, each challenge to the Department's determinations in this review.

DISCUSSION

I. Garofalo's Challenges

A. Cost of Production

1. Background

In order to calculate a dumping margin for the pasta at issue here, Commerce calculates the normal value for which that pasta is sold in Italy.[6] In calculating normal value, the Department considers only those sales in the comparison market that were made in the "ordinary

[6] Goods are considered "dumped" under the AD statute when they are sold at less than fair value ("LTFV"), 19 U.S.C. § 1677(34) – that is, when "the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). "Normal value" is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price . . ., at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A) & (B)(i). "Export price" is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under [19 U.S.C. § 1677a(c)]." *Id.* at § 1677a(a). Constructed export price is not applicable here.

course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). The "ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to the merchandise of the same class or kind," *id.* at § 1677(15), disregarding sales that the Department "has reasonable grounds to believe or suspect . . . have been made at prices which represent less than the cost of production of that product." *Id.* at § 1677b(b)(1).[7]

Garofalo challenges the time periods used by the Department to average Garofalo's costs of production in order to make the requisite comparison under Section 1677b(b). (Mem. Supp. Pl.'s Mot. for J. on Agency R. under Rule 56.2 ("Garofalo's Br.") 816.)

The statute does not define the time period over which cost of production is to be calculated, *see* 19 U.S.C. at § 1677b(b), and over which a respondent's various costs must therefor be averaged. Consequently, Commerce must select an appropriate time period for averaging the costs involved.

Commerce avers that it has "adopted a consistent and predictable approach in using [ ] POR-average costs – the result being a normalized, average production cost to be compared to sales prices covering the same extended period of time." *I & D Mem.* Cmt. 5 at 13.[8] The Department also contends, however, that it "has articulated in several past proceedings that the use of an alternative cost averaging period may be appropriate in situations where a reliance on [its] normal annual weighted average cost method would distort the

As explained below, sales at prices below the cost of production are excluded from the calculation of normal value as being outside the ordinary course of trade. *Id.* at §§ 1677(15)(A)& 1677b(b)(1).

[7] *See also id.* at §§ 1677(15)(A) (defining "ordinary course of trade" as, *inter alia*, excluding "[s]ales disregarded under section 1677b(b)(1)"). The "cost of production" is defined as "an amount equal to the sum of [ ] (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business; (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment." *Id.* at § 1677b(b)(3).

[8] (citing *Color Television Receivers from the Republic of Korea*, 55 Fed. Reg. 26,225, 26,228 (Dep't Commerce June 27, 1990) (final results of AD duty administrative review) (stating that use of quarterly data would cause aberrations due to short-term cost fluctuations); *Gray Portland Cement and Clinker from Mexico*, 58 Fed. Reg. 47,253, 47,257 (Dep't Commerce Sept. 8, 1993) (final results of AD duty administrative review) (explaining that the annual period used for calculating costs accounts for any seasonal fluctuation that may occur, because it accounts for a full operation cycle)).

dumping analysis due to significant cost changes." *Id.* at 14.[9] Commerce explains that its practice in such cases is to use quarterly cost averages, provided that the average quarterly cost changes can be linked with changes in concurrent average quarterly sales prices. *Id.* at 19.

The Department used this alternative quarterly averaging approach in this case. Accordingly,[10] having found that significant cost changes throughout the POR made POR-wide cost averaging inappropriate, Commerce verified that quarterly comparisons would fairly reflect actual pricing behavior by finding "linkage within each quarter between sales prices and changes in [costs]." *Id.* at 18.[11]

Garofalo does not challenge Commerce's determination that the use of shorter-than-POR cost-averaging periods was justified in this case.[12] Rather, Garofalo challenges the Department's use of quarterly

[9] (noting that "[t]hese situations include high inflation and raw material cost volatility") (citing *Certain Steel Concrete Reinforcing Bars from Turkey*, 66 Fed. Reg. 56,274 (Dep't Commerce Nov. 7, 2001) (final results of AD duty administrative review); *Brass Sheet and Strip from Netherlands*, 65 Fed. Reg. 742 (Dep't its practice in such cases is to use quarterly cost averages, Commerce Jan. 6, 2000) (notice of final results of AD duty administrative review and determination not to revoke the AD duty order)).

[10] *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the [POI/POR] that May Require Using Shorter Cost Averaging Periods*, 73 Fed. Reg. 26,364, 26,366 (Dep't Commerce May 9, 2008) (request for comment) ("*May 2008 Notice*") (explaining that, to support the use of quarterly cost averaging periods, the record must contain evidence of a direct linkage between quarterly costs and prices, in addition to evidence of significant cost changes during the POR, to assure that using quarterly periods results in analysis that is reasonably reflective of respondents' actual pricing behavior); *Certain Welded Stainless Steel Pipes from the Republic of Korea*, Issues & Decision Mem., A-580–810, ARP 06–07 (June 22,2009) (adopted in 74 Fed. Reg. 31,242, 31,243 (Dep't Commerce June 30, 2009) (final results)) ("*Pipes from Korea I & D Mem.*") Cmt. 1 at 6 (noting that "relying on shorter cost reporting periods can result in an average cost that does not relate to the sales that occurred during the same shorter period," and explaining that, to avoid this potential distortion, the Department inquires "whether sales during the shorter cost averaging period could be accurately linked with the COP during the same averaging period").

[11] (citing *Certain Pasta from Italy*, Mem. Re Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – [Garofalo], A-475–818, ARP 07–08 (July 31, 2009), Admin. R. Con. Doc. 42 [Pub. Doc. 140] ("*Garofalo Prelim. Cost Calc. Mem.*") [3 & Attachs. 2 & 4] (showing that quarterly costs and quarterly average sales prices moved consistently together) & *Certain Pasta from Italy*, Mem. Re Cost of Production and Constructed Value Calculation Adjustments for the Final Results – [Garofalo], A-475–818, ARP 07–08 (Feb. 2, 2010), Admin. R. Con. Doc. 66 [Pub. Doc. 192] ("*Garofalo Final Cost Calc. Mem.*") Attach. 1 (calculation showing Garofalo's average inventory period to be within an annual quarter)).

[12] (Garofalo's Br. 8 ("Garofalo believes that Commerce correctly determined that conditions during the [POR] warranted the use of shorter cost-averaging periods, rather than Commerce's consistent past practice of utilizing one POR-wide cost. Evidence on the record supports Commerce's finding that there was a significant change in costs during the POR.").)

periods as the alternative cost-averaging period. (Garofalo's Br. 9 (arguing that Commerce should have used semi annual rather than quarterly periods).)

2. Analysis

The Department's use of quarterly comparison periods when determining whether a given sale should be excluded from the normal value calculation under Section 1677b(b)(1) in this case was a reasonable interpretation of the statute, and it was supported by substantial evidence on the record.

As the Department correctly observes, *see I & D Mem.* Cmt. 5 at 13, the statute does not prescribe a specific time period over which cost of production must be calculated. *See* 19 U.S.C. § 1677b(b)(1); *SeAH Steel Corp. v. United States*, __ CIT __, 704 F. Supp. 2d 1353, 1363 (2010) ("The statute does not dictate the method by which Commerce may calculate costs of production, nor define the [time period over which the calculation is to be made], and Commerce is afforded considerable discretion in formulating its practices in this regard." (internal quotation and alteration marks and citation omitted)). Because Commerce's gap-filling methodology - that POR-wide cost averaging is the preferred norm, but where significant cost changes are evident, quarterly cost averages may be used if sales can be accurately linked with the concurrent quarterly costs - is not unreasonable, it is therefore not contrary to law. *See Chevron*, 467 U.S. at 843 (an agency acts contrary to law if it acts based on an unreasonable construction of its statutory authority); *Burlington Truck Lines*, 371 U.S. at 167–68 (agencies act contrary to law if decision-making is not reasoned); *SeAH Steel*, __ CIT at __, 704 F. Supp. 2d at 1364 (holding that using quarterly comparisons in cases of significant cost changes comports with a reasonable interpretation of the AD statute).

In accordance with this methodology, Commerce determined that using quarterly cost averages was appropriate in this review because significant cost changes made POR-wide averaging distortive, and evidence on the record established a linkage between Garofalo's quarterly costs and its quarterly pricing behavior. *I & D Mem.* Cmt. 5 at 15–19. Garofalo does not contest that there is evidence on the record of this review of cost changes between every quarter of the POR, *see* Garofalo's Br. 15 (discussing the magnitude of the quarter-to-quarter cost increases between each quarter of the POR), or that these cost changes can be linked to changes in its quarterly average prices, *see*

generally id.[13] Accordingly, because the evidence linking Garofalo's cost changes in every quarter of the POR with changes in Garofalo's average quarterly prices[14] reasonably supports the conclusion that using quarterly cost comparison periods in this case yields results that are reasonably reflective of Garofalo's pricing behavior, Commerce's conclusion in this regard is supported by substantial evidence.

At oral argument, counsel for Garofalo suggested that, by resorting to quarterly comparisons without specifically asking parties for a showing of evidence countering the reasonableness of doing so, Commerce acted without providing parties with sufficient opportunity to comment prior to final agency action. *See* Oral Arg. Tr. 17–18. Counsel argued that Garofalo did not receive sufficient notice of the approach Commerce planned to apply in this case, and so was neither able to comment nor avail itself of the opportunity to submit relevant evidence. *Id.*

The court does not agree. The Department did not fail to provide sufficient notice of its intent to use quarterly cost averaging as the

[13] Instead, Garofalo argues that using quarterly cost comparison periods is inherently distortive. *See* [Garofalo's] Reply Br. in Supp. of its Mot. for J. on Agency R. Under Rule 56.2 ("Garofalo's Reply") 4 (arguing that "Commerce has previously expressed a preference for longer cost-averaging periods rather than shorter cost-averaging periods because, in the longer cost-averaging periods, the cost fluctuations are sustained for a more reasonable time than shorter cost averaging periods" (internal quotation marks and citations omitted)) & 9 ("[T]here is always a distortion created by subdividing cost averaging periods (because of the diminished ability to smooth out random and temporary cost fluctuations)."). At oral argument, counsel for Garofalo reiterated that Garofalo's objection to the use of quarterly comparison periods in this case is purely methodological, *see* Transcript of Oral Argument (ECF No. 89) ("Oral Arg. Tr.") 16 ("The administrative record is full of [Garofalo's] briefs talking about why [using quarterly cost averaging periods] is incorrect as a matter of theory.") & 20 ("[Garofalo's] argument is that [it] did provide evidence that [using quarterly cost averaging periods in this case is] distortive in that it is inherently distortive when you chop it up and do so unnecessarily.").

The court does not agree that Commerce may never use quarterly cost comparison periods because doing so is inherently distortive. As pointed out by counsel for Defendant at oral argument, in changing markets, quarterly comparison periods may capture greater accuracy than longer periods. Oral Arg. Tr. 13. In this case, Commerce confirmed the accuracy of using quarterly periods by confirming a link between quarterly changes in costs and quarterly changes in prices, *I & D Mem.* Cmt. 5 at 18; *see May 2008 Notice*, 73 Fed. Reg. at 26,366 (explaining that distortive fluctuations within shorter periods "can create uncertainty as to how accurately the average costs during the shorter period relate to the sales that occurred during that same shorter period," unless there is evidence of linkage between them), and Garofalo does not point to any evidence in the record to counter this conclusion.

[14] *See I & D Mem.* Cmt. 5 at 18 (citing *Garofalo Prelim. Cost Calc. Mem.*, Admin. R. Con. Doc. 42 [Pub. Doc. 140] [3 & Attachs. 2 & 4] (showing that quarterly costs and quarterly average sales prices moved consistently together) & *Garofalo Final Cost Calc. Mem.*, Admin. R. Con. Doc. 66 [Pub. Doc. 192] Attach. 1 (showing average inventory period calculation)).

preferred alternative period of comparison where POR-wide averaging is inappropriate. The Department's May 2008 request for comment on methodologies for dealing with situations where significant cost changes throughout the POR may require using shorter cost averaging periods repeatedly and exclusively relies on quarterly periods when providing examples of shorter-than-POR averaging periods.[15] And in multiple cases following the May 2008 announcement, the Department used quarterly periods as the alternative cost averaging periods where POR-wide averaging was determined to be inappropriate.[16] In addition, Garofalo had adequate notice of the kind of evidence that the Department would find relevant in determining whether or not the use of quarterly periods is appropriate in a given case.[17]

The court therefore concludes that Commerce's reasonable interpretation of its statutory authority to calculate Garofalo's costs of production – using quarterly cost averaging periods – was reasonably applied in this case, and that the Department's determinations in this

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[15] 73 Fed. Reg. at 26,364–65 ("The Department now seeks comments from the public on the factors to consider, the tests to apply, and the thresholds to adhere to in determining whether or not shorter cost averaging periods (e.g., quarterly) are more appropriate."); *id.* at 26,365 (providing examples of cases where Commerce had previously resorted to shorter cost averaging periods and noting in explanatory parentheticals for each citation that the shorter periods used were quarterly periods); *id.* at 26,366 (discussing the procedure applied in recent proceedings where a "shorter period average cost method (e.g., quarterly cost averaging period)" was suggested); *id.* ("In considering whether a shorter cost averaging period reflects a more accurate measure of dumping, we also explained in [prior] proceedings that sales during the shorter averaging period must be closely linked with the COP of the shorter period. […] In the above-mentioned recent proceedings, in assessing whether sales can be accurately linked with the concurrent quarterly average costs, we analyzed the relationship of the cost and price trends throughout the POI/POR.").

[16] *Pipes from Korea I & D Mem.* Cmt. 1 (defending the use of quarterly comparison periods as the alternative to POR-wide averaging, and referring to the May 2008 notice as the "Quarterly Request for Comment"); *Stainless Steel Sheet and Strip in Coils from Mexico*, 73 Fed. Reg. 45,708, 45,709 (Dep't Commerce Aug. 6,2008) (preliminary results of AD duty administrative review) (using quarterly periods as alternative to POR-wide averaging) (unchanged in final results, 74 Fed. Reg. 6,365 (Dep't Commerce Feb. 9, 2009) (final results of AD duty administrative review)); *Stainless Steel Plate in Coils from Belgium*, 73 Fed. Reg. 75,398, 75,399 (Dep't Commerce Dec. 11, 2008) (final results of AD duty administrative review) (same).

[17] *May 2008 Notice*, 73 Fed. Reg. at 26,365 ("Factors such as erratic production levels, the extent to which and how accurately monthly accruals are made, periodic maintenance, inventory valuation methods, etc. all impact the timing and accuracy of per-unit costing over short periods of time.") (citing *Color Television Receivers from Korea*, 55 Fed. Reg. at 26,228 (finding that use of quarterly data would cause aberrations due to short-term cost fluctuations)); *see also id.* at 26,366 & n.4 ("In certain cases, there are various factors which may affect the timing relationship between the purchase of the raw materials, the production of a product, and its subsequent sale." (noting seven such factors by way of example)).

regard were supported by substantial s determinations in this regard were supported by substantial evidence.

B. Period of Sales Comparison

1. Background

When comparing export prices to home market sales, Commerce is limited in its averaging of home market prices "to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale." 19 U.S.C. § 1677f-1(d)(2). Thus the statute imposes a contemporaneous comparison requirement.

Commerce's regulation implementing this contemporaneous comparison requirement is known as the '90/60 window': "Normally, [Commerce] will select as the contemporaneous month the first of the following which applies: (i) The month during which the particular U.S. sale under consideration was made; (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product; (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product." 19 C.F.R. § 351.414(e)(2).

However, where, as here, Commerce applies its alternative cost averaging methodology, due to significantly changing costs, the Department avers that its practice is not to use the '90/60 window,' but rather to "limit[] comparisons of U.S. price to home market sales made during the same month or quarter in which the U.S. sale occurred," *I & D Mem.* Cmt. 5 at 19 – i.e., to modify the sales contemporaneity period to conform with the shortened cost averaging period. *Id.*[18]

Accordingly, because Commerce determined in this case that the changes in Garofalo's costs were significant enough, and sufficiently linked to prices, to require departure from the Department's normal annual cost averaging methodology, and instead called for the use of quarterly averaging periods, the agency contends that it was therefore "appropriate in this case to match [Garofalo's U.S.] sales only [to normal value sales] within the same quarter." *I & D Mem.* Cmt. 5 at 20. The agency explains that "[c]omparing U.S. sales to [normal values] outside the quarter would result in comparisons with [normal

[18] (citing, *inter alia*, *Certain Porcelain-on-Steel Cookware from Mexico*, 62 Fed. Reg. 42,946, 42,505–06 (Dep't Commerce Aug. 7, 1997) (final results of AD duty administrative review); *Certain Welded Carbon Steel Pipe and Tube from Turkey*, 61 Fed. Reg. 69,067 (Dep't Commerce Dec. 31, 1996) (notice of final results of AD duty administrative review)).

values] that do not reflect market conditions at the time of the U.S. sale in that the [normal values] would not reflect the increasing or decreasing prices due to the significant changes in costs." *Id.*

Garofalo challenges Commerce's decision not to follow its normal '90/60 window' matching methodology when making sales comparisons of Garofalo's home market and U.S. export sales in this review. (Garofalo's Br. 16–19.)

2. Analysis

Commerce's interpretation of its authority under 19 U.S.C. § 1677f-1(d)(2) and 19 C.F.R. § 351.414(e)(2) is reasonable, and the decisions made in the exercise of that authority in this review were supported by substantial evidence.

The Department's regulation defines "contemporaneous month" in order to clarify the phrase "the calendar month that corresponds most closely to the calendar month of the individual export sale" in Section 1677f-1(d)(2) of the AD statute. The regulation, however, explicitly states that it will apply under "normal" circumstances. 19 C.F.R. § 351.414(e)(2). As discussed above, in this review, Commerce determined – and Garofalo does not contest – that significant changes in Garofalo's costs of production during the POR removed this case from the realm of "normal" circumstances. *I & D Mem.* Cmt. 5. (Garofalo's Br. 8.)

The Department explains that, "[w]hen significant cost changes have occurred during the POR, these same conditions are accompanied by changes in prices," *I & D Mem.* Cmt. 5 at 20, and that, in this situation, "to lessen the margin distortions caused by changes in sales price which result from significantly changing costs[,] . . . it is appropriate to compare U.S. sales with contemporaneous [normal values] which were made in the ordinary course of trade as established in the sales-below-cost test." *Id.* This is a reasonable explanation for Commerce's decision to limit comparison of Garofalo's U.S. and home market sales to contemporary quarterly periods in this review. The agency's reasoning in this regard is therefore neither contrary to statute nor to the Department's regulation.

Garofalo appears to argue that, even if Commerce's explanation is a reasonable interpretation of its statutory authority, its application in this case was not supported by substantial evidence because the cost changes, although significant across semi-annual periods, were not sufficiently significant across all quarters to prevent a fair comparison. (*See* Garofalo's Reply 13 (arguing that limiting price comparisons to quarters "denied Garofalo contemporaneous home market

matches" because cost changes were not sufficiently significant across quarters to prevent fair comparison).)

But the Department concluded in this review that "record evidence show[ed] that Garofalo's [costs] increased in each quarter of the POR for all wheat codes except for one wheat code in one quarter, and not just at the six month mark as Garofalo claims." *I & D Mem.* Cmt. 5 at 19. Moreover, as discussed above, record evidence supported the conclusion that these quarterly changes in market conditions resulted in concurrent quarterly changes in Garofalo's prices. *Id.* at 18. In line with the Department's reasonable methodology, therefore, limiting sales comparisons to contemporaneous annual quarters in this case appropriately "lessen[s] the margin distortions caused by changes in sales price which result from significantly changing costs." *Id.* at 20.

Garofalo argues that the cost change between the first and second quarters (a change of "under 25 percent" (Garofalo's Br. 15)), and that between the third and fourth quarters (a change of "about [ ] one percent" for four of five models and "under five percent" for the remaining model (*id.*)), should not have been interpreted by Commerce as significant. (*Id.*)

The question before the court in this respect is whether a reasonable mind might accept the evidence as adequate to support Commerce's conclusion. *Consol. Edison*, 305 U.S. at 229. It is Commerce's duty to weigh the evidence on the record before it and reach a reasonable decision. Where, as here, the overall cost change exceeded twenty-five percent over the course of the POR, and quarterly changes in costs were reflected in concurrent quarterly prices, a reasonable mind could accept the evidence of the cost changes between every quarter as adequate to support the conclusion that these cost changes were significant. It follows that Commerce's decision is supported by substantial evidence on the record of this review.

The court therefore concludes that Commerce's decision to limit comparison of Garofalo's U.S. and home market sales to contemporaneous annual quarters was neither contrary to law nor unsupported by substantial evidence.

II. Petitioner Plaintiffs' Challenges

As noted above, the Petitioner Plaintiffs challenge Commerce's intention to employ new model match criteria in future reviews of this AD duty order. These Plaintiffs also challenge the Department's acceptance, in this review, of company-specific model match criteria for each mandatory respondent – Garofalo and P.A.M. S.p.A. ("PAM"). (Domestic Industry's Rule 56.2 Br. in Supp. of its Mot. for J. on Agency R. ("Pet'r Pls.' Br.").)

A. New Model Match Criteria to Apply in Future Reviews

1. Background

When comparing export and home market sales in the course of conducting its dumping analysis, Commerce must identify the foreign like product that will serve as the basis for comparison. *See* 19 U.S.C. § 1677b(a)(1)(B); *id.* at § 1677(16). *See also Fag Kugelfischer Georg Schafer Ag v. United States*, 332 F.3d 1370, 1372 (Fed. Cir. 2003) ("'Foreign like product' is the merchandise offered for sale in the producing and exporting country that is most like, and may be reasonably compared to, the allegedly dumped subject merchandise here in the United States." (citing 19 U.S.C. § 1677(16))).

When respondents' subject merchandise consists of two or more significantly diverse product models, Commerce will match U.S. and home-market products using model match criteria to assure accurate price comparisons within but not across relevant product categories. *See, e.g.*, *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008) ("[A] methodology [for model matching in the determination of "foreign like product" under Section 1677(16)] yields more accurate results [when] it matches the most similar product rather than merely pooling several models that matched as to [a number of] characteristics but could vary significantly in price or cost, due to differences in materials for certain components or added features."); *JTEKT Corp. v. United States*, __ CIT __, 717 F. Supp. 2d 1322, 1329 & n.4 (2010) (affirming as "a reasonable construction of the antidumping statute" a model match methodology which sought to "reflect[ ] more accurately the intent of 19 U.S.C. § 1677(16), including the statute's preference for identifying the foreign like product by selecting the single most-similar product" (internal quotation and alteration marks and citation omitted)).

In this review and in some previous administrative proceedings under this AD duty order, Commerce has accepted respondent-specific claims for model match criteria. *I & D Mem.* Cmt. 3 at 10 & Cmt. 6 at 21. In the administrative review immediately preceding the review at issue in this case, however, Commerce recognized "the need [for its model match criteria] to be consistent" and endeavored to "articulate a clear and comprehensive standard based on industry-wide commercial standards." *Certain Pasta from Italy*, Issues & Decision Mem., A475–818, ARP 06–07 (Dec. 4, 2008) (incorporated in *Certain Pasta from Italy*, 73 Fed. Reg. 75,400, 75,401 (Dep't Commerce Dec. 11, 2008) (notice of final results of the eleventh administrative review and partial rescission review)) ("*11th I & D Mem.* ") Cmt. 9. To that end, "in order to allow interested parties to comment

on this general issue," *id.*, Commerce proposed to solicit comments in the course of the next administrative review (i.e., the review at issue in this case), and stated that "[b]ased on such comments, [the Department] will make any necessary changes and/or clarifications to the model match criteria for pasta to apply to all future respondents." *Id.*

As promised, in the instant review, Commerce solicited and received comments from interested parties regarding the physical characteristics of, and the industry standards, measurement of material cost differences, and definitions of commercial significance applicable to the subject merchandise, with the goal of developing objective model match criteria to apply to all respondents in future reviews of this AD duty order. *Certain Pasta from Italy*, 74 Fed. Reg. 39,285, 39,286 (Dep't Commerce, Aug. 6, 2009) (notice of preliminary results of twelfth AD duty administrative review). "Based on [the agency's] analysis of these comments, and [its] review of prior determinations," *id.*, Commerce proposed, in the *Preliminary Results* for the instant review, new model match criteria, "[to] be applicable in the 2008–2009 and subsequent administrative reviews of pasta from Italy." *Id.* ; *see Certain Pasta from Italy*, Prelim. Model Match Clarification on Pasta Wheat Code Classifications, A-475–818, ARP 07–08 (July 31, 2009), Admin. R. Pub. Doc. 138 ("*Prelim. Model Match Mem.*").

In its *Final Results* for the instant review, Commerce "concluded that no changes from the [new model match criteria] proposed in the preliminary results [were] warranted." *Final Results*, 75 Fed. Reg. at 6,353. Accordingly, Commerce announced that, in future reviews, the agency intends to apply to all respondents the objective, industry-wide model match criteria laid out in the *Preliminary Model Match Memorandum*. *See Final Results*, 75 Fed. Reg. at 6,353; *Prelim. Model Match Mem.*, Admin R. Pub. Doc. 138 at 8–9.

The Petitioner Plaintiffs challenge the legality of, and the evidentiary support for, this proposed new methodology. (*See* Pet'r Pls.' Br. 25–40.)

2. Analysis

Because Commerce's stated intention to apply new model match criteria in future reviews does not constitute final agency action, and because the parties have presented no evidence that withholding court consideration of this matter – until such time as final agency action has effected its legal consequences on the rights and obligations of interested parties – would result in undue hardship to the parties, Commerce's proposed new model match criteria are not ripe

for judicial review. *See Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed. Cir. 2008) ("In determining whether an appeal from an administrative determination is ripe for judicial review, [courts] look to (1) 'the fitness of the issue for judicial decision' and (2) 'the hardship to the parties of withholding court consideration.'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967))); *id.* at 1364 ("Because Commerce's stated intention . . . is not final, and thus not fit for judicial decision, and because withholding court consideration of the issue presents no undue hardship to the parties, we conclude that it is not ripe for judicial review."); *Sioux Honey Ass'n v. United States*, __ CIT __, 722 F. Supp. 2d 1342, 1361–62 (2010) ("A mere intention to act . . ., absent extraordinary circumstances calling for emergency equitable relief (not alleged here), is not agency action ripe for judicial review." (citing *U.S. Ass'n of Imps. of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1349–50 (Fed. Cir. 2005))).

B. Respondent-Specific Model Match Criteria in This Review

1. Background

Notwithstanding the Department's intent to apply new model match criteria in all *future* reviews, in this review Commerce continued to apply the old model match criteria, and accepted respondent-specific wheat code categories from both Garofalo and PAM. *See I & D Mem.* Cmts. 3 & 6.[19]

Specifically, for both PAM and Garofalo, Commerce accepted company-specific distinctions within subject merchandise based on whether the finished pasta was made primarily with standard or 'superior'/'excellent' semolina, where physical differences in the semolina primarily used were determined to be commercially significant. *Id.* For Garofalo, Commerce based its decision "on the evidence placed on the record by Garofalo with respect to cost differences attributable to significant differences in physical characteristics (i.e., gluten (protein) content) for 'excellent' quality semolina." *I & D Mem.* Cmt. 3 at 11. For PAM, Commerce based its decision "on the evidence placed on the record by PAM with respect to cost differences attributable to significant differences in physical characteristics (i.e., ash and gluten (protein) content) for 'semolina superior' and on the sales price

[19] Specifically, the Department's 'Field Number 3.2' provided the following categories for respondents' reporting of the wheat types primarily used to produce their products: 1 = 100 percent durum semolina; 2 = 100 percent whole wheat; 3 - n = "specify additional categories as required." *E.g.*, *Certain Pasta from Italy*,[Garofalo] Section B Questionnaire Resp., A-475–818, ARP 07–08 (Nov. 24, 2008), Admin. R. Con. Doc. 6 [Pub. Doc. 52] ("*Garofalo Sec. B Resp.* ") at B-6.

differences in finished pasta that resulted from PAM's use of semolina superior." *Id.* at Cmt. 6 at 22.

The Petitioner Plaintiffs object, on both legal and evidentiary grounds, to Commerce's decision to accept PAM and Garofalo's company-specific modifications to the model match criteria in this review. These Plaintiffs argue that Commerce's decisions in this regard were contrary to law because (a) the AD statute requires that "foreign like product" determinations be based on objective industry-wide criteria, whereas Commerce applied different criteria for each respondent (Pet'r Pls.' Br. 12); and (b) the AD statute requires that "foreign like product" determinations be based on the physical characteristics of finished products, rather than the physical characteristics of the inputs relied on in this case (*id.* at 10–14). The Petitioner Plaintiffs also argue that (c) in any case, the Department's conclusions regarding the commercial significance of physical differences in PAM and Garofalo's inputs and/or finished products were not supported with substantial evidence on the record of this review (*see id.*).

2. Analysis

a. Respondent-Specific Model Match Modifications

Commerce defends its acceptance of respondent-specific model match criteria with reasoning dating back to the investigation of sales at LTFV underlying this AD duty order. *I & D Mem.* Cmt. 3 at 10–11 & Cmt. 6 at 21–22 (quoting *Certain Pasta from Italy*, 61 Fed. Reg. 30,326, 30,346 (Dep't Commerce June 14, 1996) (notice of final determination of sales at LTFV) ("*LTFV Final Results* ")).

In the *LTFV Final Results*, Commerce interpreted Section 1677(16) to mean that "[f]oreign like products . . . are specific to each responding company." 61 Fed. Reg. at 30,346 (quoting 19 U.S.C. § 1677(16)[20]). This interpretation of Section 1677(16) has been previously upheld by this Court, *New World Pasta Co. v. United States*, 28 CIT 290, 316 F. Supp. 2d 1338, 1340 (2004) (denying a challenge to "Commerce's decision to add a [particular] product-matching criterion [ ] in defin-

[20] 19 U.S.C. § 1677(16) ("The term 'foreign like product' means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made: (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was *produced* in the same country *by the same person* as, that merchandise. (B) Merchandise – (i) *produced* in the same country and *by the same person* as the subject merchandise, (ii) like that merchandise in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to that merchandise. (C) Merchandise – (i) *produced* in the same country and *by the same person* and of the same general class or kind as the subject merchandise, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority determines may reasonably be compared with that merchandise." (emphasis added by the court)).

ing the 'foreign like product' for [a certain respondent], but not for other companies in the same review" (footnote omitted))[21], and the court sees no reason to revisit this legal issue.[22]

b. Matching Based on Physical Characteristics of Inputs

The Department also defends its acceptance of company-specific model match criteria based on differences in the physical characteristics of the type of semolina used to make the final pasta product. In doing so, Commerce again relies on reasoning dating back to the *LTFV Final Results*. *I & D Mem.* Cmt. 3 at 10–11 & Cmt. 6 at 21–22 (quoting *LTFV Final Results*, 61 Fed. Reg. at 30,346). In that proceeding, "respondents [who] reported wheat quality as a physical characteristic [that] would result in more appropriate product matches . . . established that different wheat (i.e. semolina) qualities existed and that these were measured by ash and gluten content." *LTFV Final Results*, 61 Fed. Reg. at 30,346. Commerce "verified that [these] physical differences exist," *id.*, and "found these quality differences reflected in semolina costs and pasta prices." *Id.* The Department determined these physical differences in semolina type to be "commercially significant and an appropriate criterion for product matching." *Id.*

In this case, the Department applied Subsection (C) of Section 1677(16) in defining 'foreign like product' for both PAM and Garofalo. *I & D Mem.* Cmt. 3 at 11 & Cmt. 6 at 22. This Subsection defines 'foreign like product' as merchandise that is "(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority determines may reasonably be compared with that merchandise." 19 U.S.C. § 1677(16)(C). There is nothing in this language to render the Department's reading of it – that products may be categorized into separate models on the basis of significant physical differences in the types of materials from which the finished subject merchandise is produced – unreasonable. To the contrary, the statute's emphasis, in the preceding Subsection (B), on likeness of merchandise in terms of "component material or materials," 19 U.S.C. § 1677(16)(B)(ii), sup-

[21] *See id.* at 1356–57 ("The Court's review of the applicable statutes and regulations does not reveal any reason why Commerce should be barred from using a product-matching criterion solely in relation to the one company under review to which it has application.").

[22] Counsel for Garofalo conceded at oral argument that *New World Pasta* accurately resolved this issue. Oral Arg. Tr. 24–25.

ports the reasonableness of the Department's interpretation. *See also SKF*, 537 F.3d at 1379 (affirming model match methodology that sought to separate out models that "could vary significantly in price or cost, *due to differences in materials for certain components* or added features" (emphasis added)).

Moreover, the final criterion of Subsection (C) – that the relevant home market comparison merchandise be that "which [Commerce] determines may reasonably be compared with [the U.S.] merchandise," 19 U.S.C. § 1677(16)(C)(iii) – appears to provide the Department with wide latitude in defining 'foreign like products' under this Subsection. *See, e.g.*, *SKF USA Inc. v. United States*, 263 F.3d 1369, 1381 (Fed. Cir. 2001) ("Commerce certainly has . . . considerable discretion in defining 'foreign like product' . . . ."); *AL Tech Specialty Steel Corp. v. United States*, 20 CIT 1344, 1349, 947 F. Supp. 510, 516 (1996) ("This Court has frequently acknowledged Commerce's broad discretion in devising a methodology for determining what constitutes similar merchandise pursuant to 19 U.S.C. § 1677(16)(1988)[[23]]." (citations omitted)).

Accordingly, the court concludes that the Department's interpretation of Subsection 1677(16)(C)[24] to allow for separate product categorization on the basis of significant physical differences in the types of semolina used to produce respondents' finished pasta is reasonable, and is therefore not contrary to law. *See Chevron*, 467 U.S. at 843; *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1381 (Fed. Cir. 2008) ("The court must defer to Commerce's permissible construction of the statute and permissible choice of matching methodology." (citing *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1210–11 (Fed. Cir. 1995) (citing *Chevron*, 467 U.S. at 843 (1984)));

[23] The term 'foreign like product' appeared in the statute as 'such or similar merchandise' prior to the statute's amendment by the Uruguay Round Agreements Act. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1383–84 & n.8 (Fed. Cir. 2001) (noting the change in language while relying on earlier judicial interpretation of 'similar merchandise' to interpret 'foreign like product' within current statutory language).

[24] The court notes that, although Commerce explicitly stated that it relied on Subsection (C) in this case, it provided no explanation for why Subsections (A) or (B) could not be used in this case, *see* 19 U.S.C. § 1677(16) (defining 'foreign like product' under the first of Subsections (A), (B) or (C) in respect of which a determination can satisfactorily be made). At oral argument, counsel for Garofalo argued that Subsection (A) should have been used in this case. Oral Arg. Tr. 26.

The Department, however, acted reasonably regardless of which subsection controls here. By linking the physical differences verified in respondents' different semolina types to correlative physical and price differences in respondents' finished pasta, *I & D Mem.* Cmt. 3 at 11 & Cmt. 6 at 22; *see also* Prelim. Model Match Mem., Admin. R. Pub. Doc. 138 at 7, Commerce ensured that categorizing different product models based on physical differences in the types of semolina used would result in comparisons that match only physically and commercially identical pasta. *See* 19 U.S.C. § 1677(16)(A).

SKF, 537 F.3d at 1379 ("[The AD] statute 'is silent with respect to the methodology that Commerce must use to match a U.S. product with a suitable home-market product[,]' . . . [and] we have previously held that Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes 'foreign like product' under the statute." (quoting *Koyo Seiko*, 66 F.3d at 1209 and citing *Pesquera*, 266 F.3d at 1384))).

c. Substantial Evidence

Commerce has established a practice of matching U.S. merchandise to relevant 'foreign like products' by discerning significant differences, determined on a case-by-case basis, in the physical characteristics of finished products or their material components. *See, e.g.*, *New World Pasta*, 28 CIT at __, 316 F. Supp. 2d at 1354; *Pesquera Mares Australes Ltda. v. United States*, 24 CIT 443, 447 (2000), *aff'd*, 266 F.3d 1372 (Fed. Cir. 2001). The Department's decisions regarding whether physical differences are sufficiently significant or meaningful to warrant the separation of products into different categories for model matching purposes is reviewed by the court to determine whether they are supported by substantial evidence. *See Pesquera*, 266 F.3d at 1384.

In this review, Commerce based its conclusions that "substantial evidence supports finding that wheat codes reported by [PAM and Garofalo] result in reasonable comparisons," *I & D Mem.*, Cmt. 3 at 11 (relying on 19 U.S.C. § 1677(16)(C)) & Cmt. 6 at 22 (same), on the following factual determinations with respect to the products of each respondent: "1) that [Garofalo and PAM's respective 'excellent' and 'superior' semolina] has a higher protein (gluten) content than other types of semolina used to produce pasta; 2) [Garofalo and PAM's respective 'excellent' and 'superior' semolina] is more expensive than other types of semolina used to produce pasta; and 3) pasta produced using [Garofalo and PAM's respective 'excellent' and 'superior'] quality semolina is priced separately from, and higher than, [their respective] pasta[s] produced from other types of semolina." *Id.* The court concludes that, contrary to the Petitioner Plaintiffs' contentions, Commerce has adequately pointed to "such relevant evidence [on the record of this review] as a reasonable mind might accept as adequate to support [each of the Department's] conclusion[s]"[25] in this regard.

First, there is substantial evidence regarding the physical differences between Garofalo and PAM's respective 'excellent' or 'superior' and their respective standard semolina. With respect to Garofalo, in the absence of evidence of changed circumstances, the Department

[25] *Consol. Edison*, 305 U.S. at 229.

appropriately relied on its prior evidentiary determination that the semolina types used by Garofalo are readily distinguishable by differences in their physical characteristics, such as gluten content.[26] Although interested parties were provided with opportunity to argue that circumstances have so changed that reliance on previous evidentiary determinations with respect to Garofalo was no longer reasonable, the Petitioner Plaintiffs do not point to any such evidence. Accordingly, the Department reasonably relied on the continued accuracy of its prior evidentiary determinations that the separate wheat types reported by Garofalo significantly differed in physical characteristics such as gluten content. *See Pakfood Pub. Co. v. United States*, __ CIT __, 753 F. Supp. 2d 1347–48 (2011) (holding that it is reasonable for Commerce to rely on relevant evidentiary findings from prior administrative segments, provided that interested parties are given the opportunity to challenge their continued accuracy, and that parties have not pointed to evidence suggesting that such chal-

[26] *See I & D Mem.* Cmt. 3 at 11 (noting that, in the *Preliminary Results*, the Department "found that there were no differences . . . with respect to Garofalo's model match" between this and prior reviews); *Certain Pasta from Italy*, Issues & Decision Mem., A-475–818, ARP 00–01 (Feb. 3, 2003) (adopted in *Certain Pasta from Italy*, 68 Fed. Reg. 6,882, 6,883 (Dep't Commerce Feb. 11, 2003) (notice of final results of AD duty administrative review and determination not to revoke in part)) ("*5th Rev. I & D Mem.* ") Cmt. 8 at 12 (accepting Garofalo's separate model match categorization for pasta made with superior and standard quality semolina because "[t]he additional expense of an input in the creation of a unique product does justify a separate classification," and "[t]here [was] adequate information on th[e] record which attest[ed] to the quality of the different types of semolina used"); *Certain Pasta from Italy*, Issues & Decision Mem., A-475–818, ARP 01–02 (Feb. 3, 2004) (adopted in *Certain Pasta from Italy*, 69 Fed. Reg. 6,255, 6,256 (Dep't Commerce Feb. 10, 2004) (notice of final results of the sixth administrative review of the AD duty order and determination not to revoke in part)) ("*6th Rev. I & D Mem.* ") Cmt. 26 at 37(accepting Garofalo's separate model match categorization for pasta made with superior and standard quality semolina, based on "the wheat [that] makes up the largest percentage of the blended wheat type" used to make a particular finished pasta product, and noting that "the most important factor in this determination [was] the physical differences between the types of wheat").

While Commerce specifically points to the seventh review, *I & D Mem.* Cmt. 3 at 11, and Garofalo was not a respondent in the seventh review, *see Certain Pasta from Italy*, 70 Fed. Reg. 6,832, 6,832 (Dep't Commerce Feb. 9, 2005) (notice of final results of the seventh administrative review of the AD duty order and determination to revoke in part) ("*7th Rev. Final Results* ") (noting that review of, *inter alia*, Garofalo was rescinded), it is reasonable to conclude that Commerce was relying on a lack of evidence controverting its evidentiary determinations regarding Garofalo's wheat types in those prior reviews where such determinations were actually made. *See I & D Mem.*, Cmt. 3 at 11 (citing sixth review when discussing the Department's prior application of its standard allowing for company-specific separate treatment of semolina inputs with significant physical and price differences); *id.* (citing *Certain Pasta from Italy*, [Garofalo's] Rebuttal Comments on Wheat Code Classifications, A–475–818, ARP 07–08 (Mar. 10, 2009), Admin. R. Pub. Doc. 73 ("*Garofalo's Rebuttal Cmts.* ") 3 (relying on *6th Rev. I & D Mem.* Cmt. 26 at 37 (noting that "in the absence of new facts or new arguments, the Department does not revisit previous determinations," and relying on *5th Rev. I & D Mem.* Cmt. 8 at 12))).

lenge should have been successful); *6th Rev. I & D Mem.* Cmt. 26 at 37 (noting that "in the absence of new facts or new arguments, the Department does not revisit previous determinations").

With respect to PAM, the Department adequately supported its determination that PAM's superior semolina physically differs from its standard semolina, in terms of gluten content, with relevant evidence on the record of this review. *I & D Mem.* Cmt. 6 at 22 (citing *Certain Pasta from Italy*, PAM's Response to Section D and Sections A-C Second Supplemental Questionnaires, A-475–818, ARP 07–08 (May 4, 2009), Admin. R. Con. Doc. 31 [Pub. Doc. 103] ("*PAM's A-D Supp. Resp.* ") 10 (providing gluten values for types of semolina used by PAM, ranging from [[ ]]% for normal semolina to [[ ]]% for superior semolina (citing *Certain Pasta from Italy*, PAM's Comments on Wheat Codes, A-475–811, ARP 07–08 (Feb. 9, 2009), Admin. R. Con. Doc. 14 ("*PAM Wheat Comments* ") Ex. 1 (PAM Proprietary Semolina Standards) at 8))).[27]

Second, the Department also provides sufficient evidentiary support for its conclusions that Garofalo and PAM generally paid higher prices for their respective superior semolina than those for their respective standard semolina. *See I & D Mem.* Cmt. 3 at 11 (citing *Certain Pasta from Italy*, [Garofalo's] Comments on Wheat Code Classifications, A-475–818, ARP 07–08 (Feb. 23, 2009), Admin. R. Con. Doc. 16 [Pub. Doc. 68] ("*Garofalo's Feb. 23 Cmts.* ") 5 (relying on *id.* at Ex. 8 (contracts for Garofalo's purchase of standard and excellent quality semolina, showing a price of [[[28]]] for excellent quality semolina contracted for on [[ ]], and a price of [[ ]] for normal semolina contracted for on

[27] Unlike Garofalo, PAM was previously denied the use of a separate wheat code for pasta made primarily from its superior semolina. *Certain Pasta from Italy*, Issues & Decision Mem., A–475–818, ARP 02–03 (Feb. 2, 2005) (adopted in *7th Rev. Final Results*, 70 Fed. Reg. at 6,833) ("*7th Rev. I & D Mem.* ") Cmt. 21 at 24 (reasoning that additional wheat codes are not warranted absent evidence of accompanying physical differences in the types of semolina primarily used). In this review, however, the Department found that PAM presented sufficient evidence of such physical differences, and concluded that there were significant differences in this regard between the evidence presented in this segment and that before the agency in the seventh review. *I & D Mem.* Cmt. 6 at 22 (citing, *inter alia*, *PAM's A-D Supp. Resp.*, Admin. R. Con. Doc. 31, at 10 & *Certain Pasta from Italy*, PAM Request to Augment Record, A-475–818, ARP 07–08 (Aug. 14, 2009), Admin. R. Con. Doc. 45 [Pub. Doc. 146], Ex. 1 (proprietary version of the preliminary results calculation memorandum for PAM from the seventh review, containing PAM's semolina gluten content from that review)).

[28] Garofalo notes that, while "[b]oth contracts mistakenly refer to the unit price as 'KG'[,] [i]n fact . . . the contract prices are in Euros per MT." *Garofalo's Feb. 23 Cmts.*, Admin. R. Con. Doc. 16 [Pub. Doc. 68] at 5 n.3.

[[ ]]))) [29] & Cmt. 6 at 22 (citing *Certain Pasta from Italy*, PAM's Section B-D Questionnaire Response, A-475–818, ARP 07–08 (Dec. 10, 2008), Admin. R. Con. Doc. 9 [Pub. Doc. 55] ("*PAM's B-D Resp.* ") 77 & Ex. 5 (listing types and prices for semolina purchased by PAM)).

Finally, the Department provides sufficient evidentiary support for its conclusions that "[Garofalo and PAM's] pasta produced using [their respective 'excellent' and 'superior'] quality semolina is priced separately from, and higher than, [their respective] pasta[s] produced from other types of semolina." *I & D Mem.* Cmt. 3 at 11 & Cmt. 6 at 22. *See id.* at Cmt. 3 at 11 (citing *Garofalo's Feb. 23 Cmts.*, Admin. R. Con. Doc. 16 [Pub. Doc. 68] at 5 (arguing that Garofalo's "products made with superior semolina [command] a significant price premium" over Garofalo's products made with standard semolina (citing *id.* at Ex. 9 (price lists for Garofalo's [[ ]], showing a price of [[ ]] and a price of [[[30]]]))) & Cmt. 6 at 22 (citing *PAM's B-D Resp.*, Admin. R. Con. Doc. 9 [Pub. Doc. 55] & *PAM's A-D Supp. Resp.*, Admin. R. Con. Doc. 31 [Pub. Doc. 103]).[31]

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[29] *See also Certain Pasta from Italy*, Garofalo's Supp. Cost Quest. Resp., A-475–818, ARP 07–08 (May 14, 2009), Admin R. Con. Doc. 33 [Pub. Doc. 109] ("*Garofalo's May 14 Supp. Resp.* ") Ex. SD–24 (Garofalo's weighted average semolina cost by wheat code, [[ ]]). While the Petitioner Plaintiffs interpret this evidence to show "that Garofalo's reported costs for 'excellent' quality semolina (product code '1') were [[ ]] lower than its reported costs for 'standard' semolina" (Dom. Pls.' Br. 38 (citing *Garofalo's May 14 Supp. Resp.*, Admin R. Con. Doc. 33 [Pub. Doc. 109] Ex. SD24)), the evidence is clearly to the contrary. *See Garofalo's May 14 Supp. Resp.*, Admin R. Con. Doc. 33 [Pub. Doc. 109] Ex. SD-24; *Garofalo Sec. B Resp.*, Admin. R. Con. Doc. 6 [Pub. Doc. 52] at B–6 (explaining that Garofalo's wheat code 1 applies to "pasta made with [[ ]]," and that Garofalo's wheat code 4 applies to "pasta made with [[ ]]").

[30] In response to the court's concern that this price ishard to read in the document cited, counsel for Defendant pointed to *Garofalo's Feb. 23 Cmts.*, Admin. R. Con. Doc. 16 [Pub. Doc. 68] at Ex. 10 (graph showing prices for pasta made with standard semolina within the range of [[ ]] as of February 2008), to verify this number. Oral Arg. Tr. 34–36.

[31] Although Commerce does not pin cite either of these citations, counsel for Defendant pointed to *PAM's A-D Supp.Resp.*, Admin. R. Con. Doc. 31 [Pub. Doc. 103] at 32–33 (replying to a request for price lists that "PAM has given examples of its price lists in A QR Exh. 4 at PDF-122–24 and §AC Supp. QR Exh. 8 at PDF-147ff," and arguing that "[t]he Department, of course, has PAM's sales databases, and so it can readily confirm that there is a very significant difference in price between WHEAT=1 and WHEAT=2 pasta in the home market, as tabulated at PAM's wheat comments (February 9, 2009) at 3 Table 1") & *Certain Pasta from Italy*, Calculation Mem. For PAM, A-475–818, ARP 07–08 (Mar. 3, 2010), Admin. R. Con. Doc. 72 [Pub. Doc. 198] Attach. 2 (sample of PAM's weighted average net prices). Oral Arg. Tr. 36–37.

Accordingly, because substantial evidence supports the Department's conclusions that Garofalo and PAM's respective separate wheat codes apply to pasta made primarily from semolina of significantly different physical characteristics and price, resulting in a price difference in the respective finished products, the court agrees with the Department that "substantial evidence supports [Commerce's] finding that wheat codes reported by [Garofalo and PAM] result in reasonable comparisons." *I & D Mem.* Cmt. 3 at 11 & Cmt. 6 at 22 (relying on 19 U.S.C. § 1677(16)(C)).

CONCLUSION

For all of the foregoing reasons, the Department's *Final Results* are AFFIRMED. Judgment will be entered accordingly.

It is **SO ORDERED**.

Dated: June 8, 2011
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 11–78

THE POMEROY COLLECTION, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Chief Judge
Consol. Court No. 04–00290[1]

[Plaintiff's motion for summary judgment is granted; Defendant's cross-motion for summary judgment is denied.]

Dated: July 6, 2011

Fitch, King, LLC (*Peter J. Fitch*) for Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Beverly A. Farrell* and *Mikki Cottet*) for Defendant.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This action is about the correct tariff classification of two items of glass merchandise that Plaintiff, The Pomeroy Collection, Ltd. ("Pomeroy" or "Plaintiff"), imported from Mexico. The United States

[1] This action is consolidated with Court Nos. 05–00105 and 0500512.

Customs and Border Protection ("Customs") classified both items of merchandise, under Heading 7013 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as "[g]lassware of a kind used for . . . indoor decoration or similar purposes," with a 5, 10, or 12% *ad valorem* duty. Plaintiff claims that the merchandise is properly classified, under Heading 9405, as parts of lamps, which Plaintiff also imports. Parts of lamps, classified under Heading 9405, are duty free when imported from Mexico.

Before the court are cross-motions for summary judgment.[2] The court has jurisdiction pursuant to 28 U.S.C. § 1581(a)(2006).

As explained below, because there is no genuine dispute as to any material fact, and because Plaintiff's lamps could not function in their intended manner without the glass merchandise at issue, that merchandise is appropriately classified as parts of Plaintiff's lamps. Accordingly, the court grants Plaintiff's motion.

BACKGROUND

At issue are 25 entries of Pomeroy's glass merchandise, identified as sku 804427, and two entries of another Pomeroy glass product, identified as sku 807329.[3] Sku 804427, an example of which is the glass component of Plaintiff's Exhibit 2, is a tall, somewhat cylindrical, vase-shaped glass structure, open at the top and enclosed at its bottom. Sku 807329, an example of which is Plaintiff's Exhibit 3, is a similar glass structure that is slightly shorter than sku 804427.[4] Customs classified each of these entries under HTSUS Subheading 7013.99.50.[5]

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[2] *See* USCIT Rule 56.

[3] The merchandise was imported through the port of Laredo, Texas. The entry numbers, and corresponding protest numbers, for the contested entries are listed within a schedule attached to Plaintiff's Motion for Summary Judgment, the contested entries appearing in bold. Pl.'s Mot. for Summ. J. Schedule [1].

[4] Attached to this opinion are black and white photocopies of two of Plaintiff's exhibits, depicting, respectively, sku 804427, as it appears on the retail packaging of Pomeroy's "Gondola Hurricane" merchandise, Plaintiff's Exhibit 2, and sku 807329, as it appears on the retail packaging of Pomeroy's "Cabernet Pillar Holders" merchandise, Plaintiff's Exhibit 4. The coloring of these exhibits is not relevant to this case.

[5] HTSUS Heading 7013 applies to "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes. . . ." Subheading 99.50 of HTSUS heading 7013 applies to merchandise other than that listed in prior subheadings under HTSUS Heading 7013, that is "[v]alued over $0.30 but not over $3 each."

Pomeroy protested Customs' classifications, but its protests were denied.[6] After paying all required duties, charges and exactions on the entries,[7] Pomeroy brought this action, challenging the denial of its protests.

As noted above, Plaintiff claims that both sku 804427 and sku 807329 are properly classified as parts of lamps, under HTSUS 9405.91.60.[8] Plaintiff accordingly requests that the court direct Customs to re-liquidate the contested entries, and refund the excess duties collected, with lawful interest. Am. Compl. 6.

STANDARD OF REVIEW

Customs classification decisions are reviewed *de novo*. *See* 28 U.S.C. § 2640(a)(1); *BASF Corp. v. United States*, 30 CIT 227, 236, 427 F. Supp. 2d 1200, 1208 (2006), *aff'd*, 497 F.3d 1309 (Fed. Cir. 2007). Following the familiar two-step analysis, *see Pillowtex Corp. v. Unites States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999) (citing *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed Cir. 1998)), the court first ascertains the correct meaning of the relevant tariff provisions and then determines the proper classification for the merchandise at issue. *Id.* The first step presents a question of law, *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002), while the second concerns issues of fact. *Pillowtex Corp.*, 171 F.3d at 1373.

The court's analysis of tariff classification provisions in the HTSUS is governed by the General Rules of Interpretation ("GRI"), which are applied in numerical order. *Honda of Am. Mfs., Inc. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010). In accordance with GRI 1,

> [The] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise.

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[6] Customs denied Pomeroy's protests on February 17, 2004, March 16, 2004, August 23, 2004, and March 23, 2005. *See* Summons, *Pomeroy Collection, Ltd. v. United States*, No. 04–00290 (filed July 14, 2004); Summons, *Pomeroy Collection, Ltd. v. United States*, No. 05–00105 (filed Feb. 10, 2005); Summons, *Pomeroy Collection, Ltd. v. United States*, No. 05–00512 (filed Sept. 13, 2005).

[7] *See* Am. Compl. ¶ 2; Answer ¶ 2.

[8] HTSUS Heading 9405 applies to "[l]amps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included." Subheading 91.60 of HTSUS Heading 9405 applies to parts of glass other than globes and shades or chimneys.

Orlando Food Corp. v. United States, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (citing GRI 1).

Summary judgment is then appropriate where there are no genuine issues of material fact with respect to the nature of the merchandise in question, *i.e.*, where determination of the proper classification is a matter solely of correctly construing the meaning and scope of particular tariff provisions. *Intercontinental Marble Corp. v. United States*, 381 F.3d 1169, 1173 (Fed. Cir. 2004).

DISCUSSION

If, as Plaintiff contends, sku 804427 and sku 807329 are classifiable as parts of articles properly classified under Heading 9405, then this merchandise was incorrectly classified under Chapter 70 of the HTSUS, which includes Heading 7013. This is true because Note 1(e) to Chapter 70 specifically exempts from all headings in that Chapter any articles classifiable as parts of articles classified under Heading 9405.[9] For both sku 804427 and sku 807329, therefore, the question before the court is whether each is classifiable as a part of an article which is properly classified under Heading 9405 of the HTSUS.

I. Legal Framework for Proper Classification as 'Part' of Another Article

The appellate court has adopted two tests for determining whether merchandise may be classified as a part of an article. The first is when the article of which the merchandise in question is claimed to be a part "could not function as such article" without the claimed part. *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (emphasis and citations omitted)[10]; *see also Bauerhin Techs. Ltd. P'ship v. United States*, 110 F.3d 774, 778 (Fed. Cir. 1997) (relying on this "oft-quoted passage" of *Willoughby*). Thus, for example, a lens that allows a camera to take colored photos is properly a part of such cameras – without such lens, "cameras could not perform one of their proper functions - the taking of colored pictures," *Willoughby*, 21 C.C.P.A. at 326–27.

The second test by which a piece of merchandise may qualify as a part of another article is if, when imported, the claimed part is "dedicated solely for use" in such article and, "when applied to that

[9] HTSUS, Chapter 70, Note 1(e) ("[Chapter 70] does not cover: (e)Lamps or lighting fittings, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof[,] of heading 9405.").

[10] *See also id.* at 326 (merchandise is legally a part of another article if that article is "not capable of the use for which it was intended" without the merchandise in question).

use," the claimed part meets the *Willoughby* test. *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955).[11] The example here is a supercharger that may be installed in a car engine – although both the car engine and the supercharger are complete in themselves, the supercharger is dedicated solely for supercharging the car engine, and, when applied to that use – i.e., when the article being considered is not just a car engine, but a *supercharged* car engine – the supercharged car engine cannot function without the supercharger, and so the *Willoughby* test is met. *See id.* at 13–14.

With this legal framework in mind, the court will consider each of the items at issue here.

II. Sku 804427

Plaintiff argues that sku 804427 should be classified as part of an article which is properly classified under Heading 9405 because sku 804427 was specifically designed to serve as the container for Pomeroy's Gondola Botanical Hurricane, Pl.'s Ex. 2, and the latter could not function as intended without sku 804427. Pl.'s Br. in Supp. of Mot. for Summ. J. 8–10 (relying on, *inter alia*, Pl.'s Ex. 1 (Pomeroy Aff.) and Pl.'s Ex. 2 (the Gondola Botanical Hurricane product)).

The specific question before the court is whether the *Willoughby* or *Pompeo* tests are satisfied with regard to the relationship between sku 804427 and the Gondola Botanical Hurricane. This is because Customs does not contest that Pomeroy's Gondola Botanical Hurricane, when assembled, is properly classified as under Heading 9405. *See* Answer to Am. Compl. ¶ 14; *see also Pomeroy Collection, Ltd. v. United States*, 32 CIT __, 559 F. Supp. 2d 1374, 1386–87 (2008) ("*Pomeroy I* ") (holding certain Pomeroy merchandise, functionally identical to the Gondola Botanical Hurricane,[12] to be properly classified under Heading 9405); Pl.'s Ex. 8 (HQ 964842 (June 25, 2002)) (classifying Pomeroy's "'Gondola' Hurricane Candleholder" under Heading 9405).

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[11] *See also Bauerhin*, 110 F.3d at 779 ("[*Willoughby* and *Pompeo*] must be read together. [. . .] *Willoughby* [ ] does not address the situation where an imported item is dedicated solely for use with an article. *Pompeo* addresses that scenario and states that such an item can also be classified as a part.").

[12] The difference between the Gondola Botanical Hurricane and the product at issue in *Pomeroy I* consists only in the shape of the outer glass vessel – bell-shaped in *Pomeroy I* and hurricane-shaped in the Gondola Botanical Hurricane – and the material to be placed within the glass beneath the candle – sand and stones in *Pomeroy I* and potpourri in the Gondola Botanical Hurricane. *Compare* Pl.'s Ex. 2 (Pomeroy's Gondola Botanical Hurricane) *with Pomeroy I*, __CIT at __, 559 F. Supp.2d at 1378–79.

Plaintiff is correct that sku 804427 should be classified as part of Pomeroy's Gondola Botanical Hurricane, because the relationship between the sku 804427 glass and the Gondola Botanical Hurricane satisfies the *Willoughby* test. The Gondola Botanical Hurricane clearly could not function without the sku 804427 glass, which constitutes its external structure. *See* Pl.'s Ex. 2.[13] Without the glass part, the metal candleholder, meant to hang over the enclosed potpourri, as depicted on the retail packaging, would have nothing to hang from. Accordingly, because sku 804427 is appropriately part of an article that is properly classified under Heading 9405, *see Pomeroy I*, 559 F. Supp. 2d at 1386–87, and is therefore itself classifiable under such heading, *see* HTSUS, 9405.91, this merchandise was improperly classified under Heading 7013. *See* HTSUS Chapter 70, Note 1(e).

III. SKU 807329

Next, Plaintiff avers that sku 807329, exemplified by Plaintiff's Exhibit 3, was specifically designed to serve exclusively as the candle holder in a number of Pomeroy products. Pl.'s Stmt. of Material Facts as to Which There Are No Genuine Issues to be Tried ¶¶ 10–11 (citing

[13] Customs does not agree that the sku 804427 glass is designed to and does fit with the remaining components of the Gondola Botanical Hurricane, and therefore argues that the sku 804427 glass cannot in fact serve as the external structure of the Gondola Hurricane, as depicted on the cover of its packaging. *See* Def.'s Resp. to Pl.'s Stmt. of Material Facts as to Which No Genuine Issue Exists ("Def.'s Resp. to Pl.'s Stmt. of Facts") ¶¶ 6, 8 ("Mr. Thomas Campanelli, National Import Specialist for lamps and lighting fittings line, examined Plaintiff's Exhibit 2 [the Gondola Botanical Hurricane] and attempted to assemble the item in the manner reflected by the photographs on the box containing Plaintiff's Exhibit 2. In attempting to assemble the item, Mr. Campanelli determined that it was not possible to balance the arms of the metal candle holder on the rim of the subject glassware as depicted on the retail picture box. Thus, [Customs claims that] it is reasonable to conclude that sku 804427 was not specifically designed for the purpose reflected by the photographs on Plaintiff's Exhibit 2 since the design of sku 804427 does not lend itself to assembly as illustrated by Plaintiff's [Exhibit] 2." (citing Def.'s Ex. A (Campanelli Decl.) ¶ 6)).

The parties have stipulated that the court will decide this factual issue while ruling on the parties' cross-motions for summary judgment. Tr. of Tel. Conference (June 21, 2011), ECF No. 61, at 3–8. Accordingly, the court finds that the sku 804427 glass, which is uncontestedly included within the retail packaging of Pomeroy's Gondola Botanical Hurricane, as exemplified by Plaintiff's Exhibit 2, does usually combine with the remaining components included in such packaging in order to assemble the Gondola Hurricane. The depiction of the assembled Gondola Hurricane on the cover of the retail packaging of Plaintiff's Exhibit 2 shows the metal insert fitting on the rim of the glass, and the possible malfunction of one likely defective part, *see* Pl.'s Ex. 9 (2d Pomeroy Aff.) ¶¶ 5–6, does not negate the item's normal design and function.

Pl.'s Ex. 1 (Pomeroy Aff.) ¶¶ 8–9[14]). Plaintiff contends that these articles could not function in their intended manner without the sku 807329 glass. *Id.* at ¶ 15 (citing Pl.'s Ex. 1 (Pomeroy Aff.) ¶ 16[15]).

The relationship between the sku 807329 glass and the products exemplified by Plaintiff's Exhibit 4 – and depicted in Plaintiff's Exhibits 5, 6, and 7 – satisfies the *Pompeo* test, such that sku 807329 is properly a 'part' of such articles. Sku 807329 is "dedicated solely for use" as the wind-breaking and protective structure of these products,[16] and, "when applied to that use," the *Willoughby* test is satisfied, as these products cannot function as protected flames without sku 807329. *See Pompeo*, 43 C.C.P.A. at 14. Accordingly, because sku 807329 is appropriately part of an article that is properly classified under Heading 9405, *see Pomeroy I*, 559 F. Supp. 2d at 1386–87,[17]

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[14] *See* Pl.'s Ex. 1 (Pomeroy Aff.) ¶ 9 (affirming that sku 807329 was designed to be used in Pomeroy's Cabernet Pillar Holder, exemplified by Pl.'s Ex. 4; the Chardonnay Pillar Holder, depicted in Pl.'s Ex. 5; the Portofino Pillar Holder, depicted in Pl.'s Ex. 6; and the Troubador Wall Sconce, depicted in Pl.'s Ex. 7). The products depicted in Plaintiff's Exhibits 5, 6, and 7, and the product constituting Plaintiff's Exhibit 4, each consist of a metal base supported on a metal stand, with the sku 807329 glass sitting on top and containing a candle. These products all appear functionally identical to one another, differing only in the color of the candle, and the aesthetic details and color of the metal stand supporting the base into which the sku 807329 glass is inserted.

[15] ("[. . .] While one could place an open candle on the metal frames [of these articles], the safety and capabilities of the articles would be severely compromised, especially when used in outdoor settings, and the appearance of the articles would be lessened substantially.").

[16] *See* Pl.'s Ex. 1 (Pomeroy Aff.) ¶ 15 (affirming that, for each article, sku 807329 was designed to "serve[ ] to hold the pillar candles; to contain the flame; to enable the candles to remain lit in light breezes or air currents; and to prevent possible burns, or the ignition of flammable materials, from what would otherwise be open flames").

Although Customs does not concede that sku 807329 was designed to serve, and is in fact amenable to serving, these purposes, Def.'s Resp. to Pl.'s Stmt. of Facts ¶ 11 (arguing that sku 807329 "does not contain physical characteristics associated with candleholders in that [it] has a domed or convex bottom that would make it unsuitable for holding a candle which should, at a minimum, have a flat surface upon which to stabilize a candle" (citing Def.'s Ex. A (Campanelli Decl.) ¶¶ 7–8), the dispute does not rise to the level of a genuine dispute of material fact. As exemplified by Plaintiff's Exhibit 4, the sku 807329 glass clearly fits with the rest of the components included within the retail packaging for these products, so as to serve as the assembled product's wind-breaking and protective structure. Any slight curvature in the bottom is immaterial. Accordingly, Customs does not present, or claim the presence of, a genuine dispute regarding an issue of material fact. *See* Def's Stmnt. of Material Facts as to Which No Genuine Issue Exists ("[T]here are no material facts as to which there exists a genuine issue to be tried and the issues are amenable to resolution through dispositive motions.").

[17] *See also* World Customs Organization, Harmonized Commodity Description and Coding System: Explanatory Note 94.05 ("Lamps and lighting fittings [classified under Heading 9405] can . . . use any source of light [including] candles . . . . This heading covers in particular . . . [p]ortable lamps [ ], e.g.,[ ] hurricane lamps . . . ."); *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001) ("Although the Explanatory Notes are not legally binding or dispositive, they may be consulted for guidance and are generally

and is therefore itself classifiable under such heading, *see* HTSUS, 9405.91, this merchandise was also improperly classified under Heading 7013. *See* HTSUS Chapter 70, Note 1(e).

CONCLUSION

For all of the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED, and Defendant's cross-motion for summary judgment is DENIED. The parties are directed to prepare and submit to the court, by July 27, 2011, a judgment, in accordance with this opinion, to be entered by the court.

It is **SO ORDERED**.

Dated: July 6, 2011
New York, N.Y.

/*s*/ *Donald C. Pogue*
DONALD C. POGUE, CHIEF JUDGE

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indicative of the proper interpretation of the various HTSUS provisions." (citation omitted)). Customs does not contest that the products exemplified by Plaintiff's Exhibit 4 and depicted in Plaintiff's Exhibits 5, 6, and 7 are properly classified under Heading 9405. *See* Answer to Am. Compl. ¶ 22; *see generally* Def.'s Mem. L. in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J.


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Slip Op. 11–79

WUXI SEAMLESS OIL PIPE CO., LTD., Plaintiff, and JIANGSU CHANGBAO STEEL TUBE CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, DEFENDANT, AND UNITED STATES STEEL CORPORATION, et al., DEFENDANT-INTERVENORS.

Before: WALLACH, Judge
Court No.: 10–00181

[Defendant-Intervenors' Joint Motion to Dismiss is DENIED without prejudice.]

Dated: July 6, 2011

Greenberg Traurig LLP (*Rosa S. Jeong* and *Philippe M. Bruno*) for Plaintiff Wuxi Seamless Oil Pipe Co., Ltd.

Drinker Biddle & Reath, LLP (*Richard Preston Ferrin*) for Plaintiff-Intervenors Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Tube Co., Ltd.; *Hogan Lovells US LLP* (*Mark Steven McConnell*) for Plaintiff-Intervenor Bureau of Fair Trade for Imports & Exports, Ministry of Commerce, People's Republic of China.[1]

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*L. Misha Preheim*); *Jonathan M. Zielinski*, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Skadden Arps Slate Meagher & Flom, LLP (*Robert E. Lighthizer*, *Jeffrey D. Gerrish*, and *Soo-Mi Rhee*) for Defendant-Intervenor United States Steel Corporation; *Schagrin Associates* (*Roger B. Schagrin*) for Defendant-Intervenors TMK IPSCO, V&M Star L.P., Wheatland Tube Corp., Evraz Rocky Mountain Steel, and United Steelworkers; *Wiley Rein, LLP* (*Alan H. Price*, *Robert E. DeFrancesco*, and *Tessa Capeloto*) for Defendant-Intervenor Maverick Tube Corporation.

OPINION

Wallach, Judge:

I
Introduction

On July 19, 2010, Plaintiff Wuxi Seamless Oil Pipe Co., Ltd. ("Plaintiff" or "Wuxi") filed a complaint with the court contesting legal and factual findings made by the U.S. Department of Commerce ("Commerce") in Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Final Affirmative Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 Fed. Reg. 20,335 (April 19, 2010), as amended by Certain Oil Country Tubular Goods From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 75 Fed. Reg. 28,551 (May 21, 2010) ("Final Determination").

[1] Plaintiff-Intervenors did not respond to Plaintiff's motion. *See* Docket for Court No. 10–00181.

Complaint, Docket No. 10, ¶ 1. In their Joint Motion to Dismiss, Defendant-Intervenors Maverick Tube Corporation, United States Steel Corporation, TMK IPSCO, V&M Star L.P., Wheatland Tube Corporation, Evraz Rocky Mountain Steel, and United Steelworkers ("Defendant-Intervenors") "request that the Court dismiss the complaint filed by Plaintiff . . . for failure to state a claim upon which relief can be granted or, alternatively, for lack of subject matter jurisdiction." Defendant-Intervenors' Joint Motion to Dismiss ("Defendant-Intervenors' Motion"), Docket No. 73 at 1–2. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons stated below, Defendant-Intervenors' Motion is DENIED.

II
Standard of Review

In deciding a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). "In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the court considers only 'facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.'" *Asahi Seiko Co. v. United States*, Slip Op. 09–131, 2009 Ct. Intl. Trade LEXIS 137 at *12 (CIT 2009) (quoting *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2nd Cir. 1991)).

III
Discussion

Defendant-Intervenors "request that the Court dismiss the complaint filed by Plaintiff . . . for failure to state a claim upon which relief can be granted or, alternatively, for lack of subject matter jurisdiction." Defendant-Intervenors' Motion at 1–2. Defendant-Intervenors argue that because Plaintiff failed to present its arguments before Commerce and is currently presenting its arguments for the first time before this court, Plaintiff failed to exhaust its administrative remedies and therefore fails to state a claim upon which relief can be granted. Id. at 3–9.[2] Defendant-Intervenors also argue that where "failure to exhaust administrative remedies results in a case not being viable under any of the provisions of 28 U.S.C. § 1581,

[2] The exhaustion doctrine holds "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). This "court generally

this Court will dismiss for lack of subject matter jurisdiction." *Id.* at 10 (citing *Miller & Co. v. United States*, 824 F. 2d 961, 964 (Fed. Cir. 1987)). Finally, Defendant-Intervenors argue at length that Plaintiff's "participation was minimal at best" and that the court is establishing "dangerous precedent" and undermining the purpose behind the exhaustion doctrine by not requiring Plaintiff to have submitted briefs in the underlying proceedings regarding all issues currently contained in Plaintiff's complaint. Defendant-Intervenors' Reply to Plaintiff's and Defendant's Opposition to Motion to Dismiss ("Defendant-Intervenors' Reply"), Docket No. 76 at 3–6.[3]

Plaintiff responds with two arguments: If the exhaustion doctrine did apply, it would "not divest the Court of its subject matter jurisdiction," Plaintiff's Opposition to Defendant-Intervenors' Joint Motion to Dismiss ("Plaintiff's Opposition"), Docket No. 74 at 4; however, the exhaustion doctrine does not apply because Plaintiff qualifies for exceptions to that doctrine, *id.* at 5–9.[4]

Defendant summarizes its position as follows:

> [Commerce] addressed the claims raised in Wuxi's complaint in the final results of the investigation. Moreover, Wuxi did participate in the proceeding below, so its standing to bring this

takes a strict view of the need to exhaust remedies by raising all arguments," *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792 (1999); however, this court recognizes limited exceptions to the requirement that litigants must have exhausted their administrative remedies, *see Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp 1549 (1991) (listing examples). "This court will require exhaustion where the plaintiff both fails to raise an issue at the administrative level on which 'Commerce could have conducted further analysis' and does 'not show[ ] that any exception to the exhaustion doctrine applies.'" *China Processed Food Imp. & Exp. Co. v. United States*, 614 F. Supp. 2d 1337, 1346–1347 (CIT 2009) (quoting *China First Pencil Co. v. United States*, 427 F. Supp. 2d 1236, 1244, 30 CIT 1200 (2006)). However, "[w]hile enforcing exhaustion requirements as jurisdictional prerequisites, the Court of International Trade also enjoys discretion to identify circumstances where exhaustion of administrative remedies does not apply." *Consol. Bearings*, 348 F.3d at 1003 (citing *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998)). "For example, in some circumstances a court may excuse a party's failure to raise an argument before the administrative agency if the agency nevertheless considered the issue." *Union Steel v. United States*, 617 F. Supp. 2d 1373, 1380 (CIT 2009) (citing *Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1104 (1992); *N.Y. State Broadcasters Ass'n v. United States*, 414 F.2d 990, 994) (2nd Cir. 1969).

[3] During the below investigation, Plaintiff submitted "a request to participate as a mandatory respondent, a quantity and value questionnaire response, comments on quantity and value data, and a separate rate application" but did not file a "case brief or rebuttal brief with the Department." Defendant-Intervenors' Reply at 3, 6; *see also* Plaintiff's Opposition to Defendant-Intervenors' Joint Motion to Dismiss ("Plaintiff's Opposition"), Docket No. 74 at 2.

[4] Plaintiff asserts two exceptions: With regards to counts three through fifteen of its complaint, an exception to the exhaustion doctrine applies in that "the substantive claims . . . have been raised and fully litigated before the agency," Plaintiff's Opposition at 5, while counts one and two qualify for "the futility exception to the exhaustion doctrine," *id.* at 8.

> action should not be an issue. To the extent that Wuxi does not raise new arguments to support these claims in its brief to this Court, the purpose for the exhaustion doctrine would not be present. However, to the extent Wuxi raises new arguments in support of its claims that were not presented to Commerce, the exhaustion doctrine may apply and Wuxi's complaint could be subject to dismissal for failure to state a claim. Thus, the current motion to dismiss should be denied as premature, and we reserve our right to move to dismiss for failure to state a claim should Wuxi raise issues in its brief to this Court that were not raised by parties before Commerce.

Defendant's Response to Defendant-Intervenors' Motion to Dismiss ("Defendant's Response"), Docket No. 75 at 2.

Defendant is correct that the current motion should be denied as premature. *See id.* At this time, the court need not determine whether the exhaustion doctrine or any exceptions to the exhaustion doctrine exist. If Plaintiff raises new arguments that were not presented to Commerce, the exhaustion doctrine could apply; however, before parties have submitted briefs, the court will not speculate which arguments Plaintiff may make. *Cf. Asahi Seiko*, 2009 Ct. Intl. Trade LEXIS 137 at *14 ("The court will decide issues relating to exhaustion when adjudicating Asahi's remaining claim on the merits, based on a full consideration of the administrative record and briefing by the parties.").[5] Defendant-Intervenors' related argument that Plaintiff did not sufficiently participate in the below proceedings is also premature.[6]

IV
Conclusion

For the reasons stated above, Defendant-Intervenors' Joint Motion to Dismiss is DENIED without prejudice.

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[5] Defendant-Intervenors also assert that the court lacks subject matter jurisdiction. Defendant-Intervenors' Motion at 8. However, "[t]he requirement of exhaustion of administrative remedies for judicial review of antidumping determinations is not jurisdictional, but discretionary pursuant to 28 U.S.C. § 2637(d) (2000). *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) (noting that the Court of International Trade has discretion to excuse failure to exhaust administrative remedies for actions covered by 28 U.S.C. § 2637(d) (2000)); *see also Avocados Plus Inc. v. Veneman*, 361 U.S. App. D.C. 519, 370 F.3d 1243, 1247–50 (D.C. Cir. 2004) (explaining the difference between jurisdictional and non-jurisdictional exhaustion of administrative remedies)." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374 (2006); *see* Plaintiff's Opposition at 4–5.

[6] Although addressed by Defendant, Defendant's Response at 2, Defendant-Intervenors do not allege, and therefore this court does not address, whether Plaintiff lacks standing in this case due to its level of participation in the below proceedings, *see* Defendant-Intervenors' Motion; Defendant-Intervenors' Reply.

Dated: July 6, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 11–80

MCC EUROCHEM, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 10–00260

[Vacating opinion and order that dismissed "zeroing" claim of Plaintiff's complaint, and reinstating claim.]

Dated: July 8, 2011

Squire Sanders & Dempsey, LLP (*Peter J. Koenig* and *Christine J. Sohar Henter*) for Plaintiff MCC Eurochem.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*); and Office of Chief Counsel, Department of Commerce (*Shana Hofstetter*), of counsel, for Defendant United States.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Valerie A. Slater*, *Margaret C. Marsh*) for Defendant-Intervenor Ad Hoc Committee of Domestic Nitrogen Producers.

MEMORANDUM AND ORDER

Gordon, Judge:

The court previously granted Defendant's motion to dismiss Count 2 of Plaintiff's complaint (Compl. ¶ 11), which challenged the U.S. Department of Commerce's "zeroing" methodology. *MCC Eurochem v. United States*, 35 CIT __, 753 F. Supp. 2d 1369 (2011) ("Opinion and Order"). The U.S. Court of Appeals for the Federal Circuit has subsequently issued two decisions, *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, ___ F.3d ___, 2011 WL 2557640 (Fed. Cir. June 29, 2011), which indicate that Plaintiff's zeroing claim has merit. The court is therefore *sua sponte* vacating its prior Opinion and Order, and reinstating Count 2 of Plaintiff's complaint.

Accordingly, it is hereby

ORDERED that this Court's Opinion and Order dismissing Count 2 of Plaintiff's complaint, *MCC Eurochem v. United States*, 35 CIT __, 753 F. Supp. 2d 1369 (2011), is vacated; and it is further

ORDERED that Count 2 (¶ 11) of Eurochem's complaint is reinstated.

Dated: July 8, 2011
New York, New York

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

Slip-Op 11–82

ARCELORMITTAL STAINLESS BELGIUM N.V., Plaintiff, v. UNITED STATES, Defendant, and ALLEGHENY LUDLUM Def.-Int.

Court No. 08–00434
Before: Richard K. Eaton, Judge

[The Department of Commerce's results of redetermination pursuant to remand are sustained.]

Dated: July 12, 2011

Shearman & Sterling LLP (*Robert LaRussa and Bryan Dayton*), for plaintiff ArcelorMittal Stainless Belgium N.V.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce, *Daniel J. Calhoun*, of counsel, for defendant.

Kelley Drye & Warren, LLC (*David Hartquist and Jeffrey S. Beckington*), for defendant-intervenor Allegheny Ludlum Corporation.

OPINION

Eaton, Judge:

Introduction

Before the court is plaintiff ArcelorMittal Stainless Belgium's ("ASB" or "plaintiff") challenge to the Department of Commerce's (the "Department" or "Commerce") Final Results of Redetermination Pursuant to Remand, dated July 29, 2010 (the "Remand Results"). This matter originally came before the court on plaintiff's challenge to Commerce's final scope ruling issued on December 3, 2008 concerning stainless steel plate in coils ("SSPC") from Belgium. *See* SSPC from Belgium: Final Scope Ruling, A-423–808 (Dep't of Commerce Dec. 3, 2008) (the "Final Scope Ruling"). It was remanded by order dated March 30, 2010, with instructions to Commerce to follow the three-step methodology established by the Court of Appeals for the Federal Circuit (the "Federal Circuit") and the Department's regulations, for deciding scope inquiries. *Arcelormittal Stainless Belgium N.V. v. United States*, Court No. 08–00434, Order (March 30, 2010). For the reasons stated below, the Remand Results are sustained.

Background

Commerce's antidumping and countervailing duty orders on SSPC from Belgium[1] cover:

> [C]ertain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and *4.75 mm or more in thickness*, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. . . .

(emphasis added). SSPC from Belgium, Italy, and South Africa, 64 Fed. Reg. 25,288, 25,288 (Dep't of Commerce May 11, 1999) (notice of amended final determination of countervailing duties); *See also* Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 Fed. Reg. 27,756 (Dep't of Commerce May 21, 1999) (antidumping duty orders); Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 11,520 (Dep't of Commerce March 11, 2003) (notice of amended antidumping duty orders); Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 11,524 (Dep't of Commerce March 11, 2003) (notice of amended countervailing duty orders) (collectively, the "Orders").

On May 11, 2007, ASB filed a scope inquiry request with the Department seeking a determination as to whether the Orders' language covers SSPC with a nominal thickness of "4.75 mm or more," but an actual thickness of less than 4.75 mm. *See* Final Scope Ruling at 2. In the Final Scope Ruling, Commerce determined that "4.75 mm or more in thickness" means "a nominal thickness of 4.75 mm, that is within the dimensional tolerances of stainless steel plate as indicated in the [American Society for Testing Materials ("ASTM")] standards, regardless of the actual thickness, is within the scope of these *Orders*." See Final Scope Ruling at 13. Thus, Commerce determined that SSPC with an actual thickness of less than 4.75 mm could fall within the Orders.

On July 2, 2009, ASB filed a motion for judgment on the agency record pursuant to USCIT R. 56.2 challenging the Department's scope determination. In response to ASB's motion, defendant the United States, on behalf of Commerce, sought a voluntary remand, acknowledging that the Department failed to follow the required

[1] Pursuant to 19 C.F.R. § 351.225(m) (2010), Commerce has determined that the Remand Results will govern the scope of all of the SSPC antidumping and countervailing duty orders. Remand Results at 1 n.1.

methodology in interpreting the scope of the Orders. Remand Results at 3. The court agreed, and the matter was remanded to Commerce to further develop the agency record in a manner consistent with the Federal Circuit's decisions in *Duferco Steel Inc. v. United States*, 296 F.3d 1087 (Fed. Cir. 2002) and *Tak Fat Trading Co. v. United States*, 396 F.3d 1378 (Fed. Cir. 2005), and 19 C.F.R. § 351.225(k) (2010). *See Arcelormittal Stainless Belgium N.V. v. United States*, Court No. 08–00434, Order (March 12, 2010); *Arcelormittal Stainless Belgium N.V. v. United States*, Court No. 08–00434, Order, (March 30, 2010).

On remand, the Department again determined that the scope of the Orders included merchandise with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm. Remand Results at 25. Oral argument was held on March 3, 2011. *See* Tr. of Oral Argument (March 3, 2011) ("Oral Arg. Tr.").

Standard of Review

This Court must sustain a scope determination unless it is "unsupported by substantial evidence and otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006); *see Eckstrom Indus., Inc. v. United States*, 254 F. 3d 1068, 1071 (Fed. Cir. 2001).

Discussion

I. Legal Framework

Pursuant to 19 C.F.R. § 351.225, Commerce may initiate, either, on its own, or upon the application of an interested party, an inquiry into whether the scope of an antidumping or countervailing duty order covers particular merchandise. It is "well established" that, in resolving scope inquiries, Commerce's interpretation of its own antidumping and countervailing duty orders is accorded "significant deference." *See Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002). Nevertheless, "Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *See Eckstrom Indus.*, 254 F.3d at 1072.

> The language of the order determines the scope of an antidumping duty order. Scope orders are interpreted under 19 C.F.R. § 351.225(k) with the aid of the antidumping petition, investigation and preliminary order. But the petition and investigation 'cannot substitute for the language in the order itself.' The Federal Circuit has said that 'it is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders. Thus, a predicate for the interpretive process is language in the order that is subject to interpre-

> tation.' The scope of the order can be clarified but it cannot be changed by the interpretive process.

Tak Fat, 396 F.3d at 1382–83 (internal citations omitted). In accordance with these principles, Commerce is required to follow the three-step methodology set out by the Federal Circuit in *Duferco* and *Tak Fat*, in resolving scope inquires. *See Duferco*, 296 F.3d at 1096–97; *Tak Fat*, 396 F.3d at 1382–83; 19 C.F.R. § 351.25(k).

Under this regime, Commerce must first analyze the language of the order at issue to determine if it is ambiguous and, therefore, subject to interpretation. Second, if Commerce determines that the language is ambiguous, it must, in accordance with 19 C.F.R. § 351.225(k)(1),[2] then consider the history of the proceedings, including the "descriptions of the merchandise contained in the petition, the initial investigations, and determinations of [Commerce] (including prior scope determinations) and the [International Trade Commission]." Third, if the orders are ambiguous and the factors found in § 351.225(k)(1) are "not dispositive," then Commerce is to consider the so-called *Diversified Products* factors set forth in 19 C.F.R. § 351.225(k)(2), including "(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 also Diversified Products Corp. v. United States,* 6 CIT 155, 572 F. Supp. 883 (1983).[3]

II. Commerce's Remand Results

In an effort to apply the three-step methodology outlined above, Commerce first concluded that the language in the Orders was ambiguous as it did not specify whether "4.75 mm or more" referred to "nominal" or "actual" thickness. The Department found that this

[2] 19 C.F.R. § 351.25(k)(1) provides, in relevant part:

> [I]n considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:
> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

[3] In *Diversified Products*, the plaintiff argued that in clarifying the scope of an antidumping duty order, Commerce was bound by the Customs Service's product classifications. The Court disagreed, holding that the Department "is responsible for clarifying, where necessary, the scope of . . . antidumping duty orders. . . . [I]t is equally clear that the [Department] is in no wise obligated to follow nor is it bound by the classification determinations of Customs when it does clarify the scope of a dumping finding." *Diversified Products*, 6 CIT at 160, 572 F.Supp. at 887.

omission rendered the Orders ambiguous because it is the industry practice to define SSPC thickness nominally. According to the Department:

> [O]ur experience administering the SSPC orders is that the application of scope dimension measurements is largely based upon the underlying industry practice. Stainless steel plate thickness cannot be maintained precisely in the steel forming process. For this product, the limitation of the machinery producing it, or further processing it, affects the accuracy of the dimensions. Thus, . . . the ASTM standard lists specific thicknesses and permitted variations for acceptable tolerance ranges in thickness. Hence, even if a customer orders SSPC with a nominal thickness of 4.75 mm or more, the customer will accept SSPC with an actual thickness that is less than 4.75 mm provided it is within the thickness tolerance range, which is consistent with the meaning of the term "nominal" which means "in name only". . . . Thus, based upon the language of the scope, which does not include the terms "actual" or "nominal" and whose understanding is informed by Department practice of taking into account product definitions and industry practice to interpret scope language, we are unable to make a definitive finding based on the language of the scope.

Remand Results at 7–8 (internal citations omitted).

Having determined that the language of the Orders was ambiguous, Commerce next considered each of the factors set forth in § 351.225(k)(1). Ultimately, the Department concluded that none of the factors under this subsection were dispositive. In reaching its conclusions, Commerce first found that the petitions were not conclusive "[b]ecause the scope description in the petition and the notice of initiation does not indicate whether thickness is to be measured on a nominal or actual basis." Remand Results at 9.

The Department next found that its determinations during the initial investigation and subsequent administrative reviews were not dispositive because "[t]he Department has never made an explicit finding in its prior determinations that the scope of its proceedings included nominal measurements. However, the Department has generally, but not consistently, acted as though nominal measurements were included within the scope." Remand Results at 9. In keeping with this observation, the Department conceded that it "has not consistently treated all SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness as within the scope in its prior determinations." *Id.* at 11.

Thus, although its questionnaires throughout the course of the investigation and subsequent administrative reviews required respondents to report sales data for SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, the Department did not always enforce this requirement. *Id.* at 10. For instance, during the second and fourth administrative reviews, covering the periods from 2000–2001 and 2002–2003, respectively, the Department permitted ASB[4] to exclude nominal SSPC sales from its home and United States market databases. During those reviews, the company reported, and the Department accepted, only sales of SSPC with an actual thickness of 4.75 mm or more. Subsequently, however, Commerce applied facts available[5] when ASB failed to provide information on nominal SSPC sales in the fifth administrative review. For the Department, the very fact of its inconsistent treatment of the 4.75 mm measurement in its initial investigation and in subsequent reviews demonstrates that the § 351.225(k)(1) factors do not resolve the scope inquiry.

Accordingly, in the Remand Results, Commerce found:

> The Department has never made an explicit finding in its prior determinations that the scope of its proceedings included nominal measurements. However, the Department has generally, but not consistently, acted as though nominal measurements were included within the scope. . . . [I]n a variety of instances, the Department indicated to interested parties that the scope included nominal measurements; however, in making these indications, the Department did not explain the basis for its determinations or cite record evidence upon which these finding were based. . . . [B]ecause the basis for these indications was not

[4] ASB's predecessor, Ugine & ALZ Belgium N.V. ("Ugine"), was a respondent to the initial investigation, and participated in some of the earlier proceedings discussed herein. Because this succession of ownership has no bearing on the outcome of this case, the court will include Ugine in its reference to ASB.

[5] Pursuant to 19 U.S.C. § 1677e(a), Commerce will use "facts otherwise available" in reaching its determinations with respect to "necessary information" that is unavailable or otherwise withheld or not timely provided by a respondent in an antidumping investigation. In other words, if Commerce requests, but does not receive, information it deems necessary to carrying out its investigation or review it will use information otherwise available from other sources, usually the petitioners. In connection with the fifth administrative review of the antidumping order on SSPC, Commerce applied facts available in determining ASB's sales of SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, because ASB did not report its nominal sales, and Commerce deemed this information necessary to calculate ASB's dumping margin. *See* Remand Results at 11. Accordingly, the Department's determination that information on sales of nominal SSPC was necessary in that review is an example of the Department's treatment of "4.75 mm" as a nominal measurement.

> explained, it is difficult for these indications to serve as a reliable basis for an affirmative finding under 19 CFR 351.225(k)(1).

Remand Results at 9.

Finally, with respect to the proceedings before the International Trade Commission ("ITC"), Commerce noted that the ITC referred to the ASTM[6] standards in distinguishing the subject merchandise, SSPC, from similar products, such as stainless steel sheet and strip ("SSSS"). Commerce found, however, that the ITC made no specific findings regarding whether SSPC dimensions were nominal or actual. Remand Results at 11–12. Therefore, the Department concluded that "[b]ased on the ITC Report, we are unable to draw any conclusions that would clarify whether SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm, is subject to the *Orders*." Remand Results at 12.

Having found, in accordance with the court's Remand Order, that neither the scope language itself nor the § 351.225(k)(1) factors were dispositive as to the meaning of the language, Commerce turned to the *Diversified Products* factors codified in § 351.225(k)(2), and determined that the scope language included SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm. In reaching its determination, the Department found that

> SSPC is ordered to a nominal thickness, with a tolerance range for each nominal thickness. The [ASTM] A480 Standard lists thicknesses (*i.e*, nominal thicknesses) and shows the permitted variations in thickness (*i.e.*, actual thicknesses). . . . These industry standards mean that plate ordered to a nominal thickness of 0.1875 inches (4.75 mm), subject to standard ASTM tolerances, can be delivered with an actual thickness that ranges from 4.50 mm . . . to 5.25 mm . . . and still be within the nominal thickness of 4.75 mm.

Remand Results at 6–7. Therefore, Commerce determined that "the [antidumping duty] orders on SSPC from Belgium . . . and [countervailing duty] orders from Belgium . . . include stainless steel products with a nominal thickness of 4.75 mm, regardless of actual thickness." Remand Results at 25.

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[6] The American Society for Testing and Materials, now known as ASTM International, is an organization that, among other things, develops and publishes industry standards for a variety of products, including SSPC.

III. Analysis

ASB challenges Commerce's finding that the scope language itself and the § 351.225(k)(1) factors were not dispositive of the scope inquiry. In other words, ASB insists that either (1) the language of the Orders is unambiguous, and that SSPC with an actual thickness of less than 4.75 mm should be excluded from the scope of the Orders; or (2) the § 351.225(k)(1) factors are dispositive of the words' meaning, and that merchandise of less than 4.75 mm should be excluded. Under either theory, according to ASB, reference to the *Diversified Products* analysis under § 351.225(k)(2) is unwarranted for purposes of determining the scope of the Orders.

A. Commerce's Determination that the Scope Language is Ambiguous

1. ASB Contends that the Scope Language Unambiguously Defines "4.75 mm" as an Actual Number

ASB first argues that Commerce's determination that the Orders are ambiguous is contrary to law because it failed to interpret "4.75 mm" in accordance with its common meaning. According to plaintiff, "4.75 mm" has a commonly understood meaning, and if the Orders were intended to give it a less common "industry meaning" they would have stated so explicitly. ASB asserts, therefore, that because qualifying language is absent from the Orders, "4.75 mm" can only refer to an actual measurement, and Commerce may not now change the Orders by injecting ambiguity where none exists. Pl.'s Cmnts. on the Dep't of Commerce's Rem. Res. ("Pl.'s Cmnts.") 7–8.

Second, ASB claims that Commerce violated its own regulations by considering "customers' expectations" and "industry practice" in reaching its finding that the language of the Orders is ambiguous. According to ASB, Commerce's actions violated § 351.225(k) because the Department considered the *Diversified Products* factors listed in subsection (k)(2) *before* finding that the factors listed in subsection (k)(1) were not dispositive. In other words, plaintiff contends that the *Diversified Products* factors may only be used to interpret ambiguous language, not to demonstrate that the language at issue is ambiguous. For ASB, "[t]he consideration of the *Diversified Products* factors as part of its analysis of the plain language of the Orders turns the language of 19 C.F.R. § 351.225(k) on its head . . . ." Pl.'s Cmnts. 10.

Third, ASB argues that, even if Commerce were permitted to look to industry meanings to determine if the scope language is ambiguous, there is no industry meaning for "4.75 mm." Rather, ASB maintains, the ASTM standards define SSPC as products that are "'4.76 mm'

and/or '5 mm' or more in thickness," and "[b]ecause 4.75 mm does not equate to 4.76 mm or 5 mm, the Orders' use of '4.75 mm' dispositively shows that Commerce, when adopting the scope language, did not address the Orders to an industry standard." Pl.'s Cmnts. 11. Therefore, plaintiff asserts that the use of a non-industry standard thickness demonstrates that the Orders unambiguously defined SSPC based on actual thickness.

Fourth, ASB submits that Commerce's ambiguity determination is contrary to law because it fails to follow the Department's prior usage regarding nominal versus actual measurements. ASB cites to Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 Fed. Reg. 61,731 (Dep't of Commerce Nov. 19, 1997) ("Carbon Steel Plate"), in which Commerce found that the term "4.75 mm or more in thickness" did not include merchandise with an actual thickness of less than 4.75 mm. Pl.'s Cmnts. 15–16. ASB maintains that "*Commerce specifically denied the request in Carbon [Steel] Plate to amend the scope to include nominal material* because 'the original scope of the investigations did not include the products in question' and that the 'clarity of the original scope' was sufficient." Pl.'s Cmnts. 18. ASB contends that there is no meaningful distinction between the Carbon Steel Plate orders and the SSPC Orders at issue here, and "in no way does Commerce's reasoning and decision in Carbon [Steel] Plate imply that the language '4.75 mm or more in thickness' has an industry-or product-specific meaning." Pl.'s Cmnts. 19.

Fifth, ASB insists that the Orders are unambiguous because where Commerce has intended to include nominal measurements in the scope of an order, it has expressly done so. ASB cites a number of examples in which Commerce has specified dimensions in scope language as either "nominal" or "nominal or actual." Pl.'s Cmnts. 20; *see, e.g., Stainless Steel Butt-Weld Pipe Fittings from the Phillipines*, 65 Fed. Reg. 81,823, 81,823–824 (Dep't of Commerce Dec. 27, 2000) (notice of final determination of sales at less than fair value). According to plaintiff, Commerce has never identified measurements as "actual," because "the word 'thickness,' unless otherwise modified, means 'actual thickness.'" Pl.'s Cmnts. 20.

Moreover, ASB claims that, in the past, Commerce has been explicit when it intended to refer to the ASTM standards in defining the scope of an investigation or order. To bolster this contention, ASB cites a number of orders that purportedly support this proposition. Pl.'s Cmnts. 20; *see, e.g., Circular Welded Carbon quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't of Commerce July 22, 2008) (notice of antidumping duty order). For ASB, "clearly Commerce knows how to invoke the ASTM when it intends to

define subject merchandise using that criteria. Its failure to invoke the ASTM standards in the language of the scopes at issue here can lead to only one conclusion – that Commerce did not intend to include the products in question." Pl.'s Cmnts. 21.

Sixth, ASB maintains that Commerce's finding that "4.75 mm" is ambiguous conflicts with the remainder of the scope language. In describing the merchandise that is within the scope, the Orders provide that the merchandise may be further processed and remain within the scope so long as it retains the specified dimension of 4.75 mm in thickness. Pl.'s Cmnts. 21; *see*, *e.g.*, SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 Fed. Reg. 27,756 (Dep't of Commerce May 21, 1999) (antidumping duty orders) ("[t]he subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing . . . .") (the "further processing clause").

Plaintiff argues that the reference to "specified dimensions" in the further processing clause demonstrates that "4.75 mm" must refer to actual thickness. According to plaintiff, a "specified dimension" clearly refers to an actual number and, therefore, the requirement that further processed merchandise meet a "specified dimension" demonstrates that the Orders define SSPC based on actual thickness. Pl.'s Cmnts. 21–22. Put another way, ASB believes that nominal thickness cannot be a "specified dimension" and, thus, the further processing clause compels the conclusion that 4.75 mm unambiguously refers to actual thickness.

Seventh, ASB contends that a comparison of Commerce's SSPC and SSSS orders demonstrates that "4.75 mm" refers to actual thickness. Pl.'s Cmnts. 23–24. According to ASB, the language in these orders mirror each other, as SSSS includes products that are "less than 4.75 mm in thickness," and the Orders explicitly exclude SSSS from their scope. Pl.'s Cmnts. 23–24. ASB maintains that "4.75 mm" in the SSPC Orders cannot refer to nominal thickness because the Orders would then include products with an actual thickness of less than 4.75 mm and, therefore, impermissibly conflict with the SSSS orders. Pl.'s Cmnts. 23–24. For ASB, "[a]s such, the products in question clearly fall within the Orders' exclusion of 'sheet and strip' products and cannot be covered on [sic] the SSPC Orders." Pl.'s Cmnts. 24.

Finally, ASB contends that Commerce's determination that the language is ambiguous is wrong because "4.75 mm" has an established meaning pursuant to the Harmonized Tariff Schedule (the "HTS") definition of SSPC. According to ASB, that definition is based on actual measurements, and Commerce adopted the HTS definition

in formulating the scope of the Orders. In keeping with this argument, plaintiff maintains that "4.75 mm or more in thickness" "was not pulled out of the ether, it must have come from somewhere. . . . [T]he source is the HTS." Pl.'s Cmnts. 12.

2. Defendant Argues that the Scope Language is Ambiguous Because it is Unclear Whether "4.75mm" is an Actual or Nominal Number

In disputing plaintiff's claims with respect to the threshold question of ambiguity, defendant[7] first counters that it is customary in the SSPC industry to define product thickness on a nominal basis and, therefore, the failure of the Orders to specify whether they refer to nominal or actual thickness renders them ambiguous. Def.'s Resp. to Pl.'s Cmnts. Upon the Rem. Res. ("Def.'s Resp.") 7. For defendant, ASB's argument that "4.75 mm″ is clearly an actual dimension fails to take into account that nominal measurements may also be considered common in particular industries. According to defendant, "Commerce did not deprive the number '4.75' of its common meaning, but instead recognizes that '4.75' could be subject to different meanings, all of which can be considered 'common,' depending upon the product and industry in question." Def.'s Resp. 8.

Second, defendant asserts that ASB's argument that Commerce unlawfully used the *Diversified Products* factors to find ambiguity is misplaced because nothing in the regulations or judicial precedent precludes the Department from considering those factors in determining whether an ambiguity exists in the first instance. Def.'s Resp. 9–10. Defendant insists that it was reasonable for the Department to look at the language in context and, thus, it was entirely proper for Commerce to consider industry standards and practice when doing so. Further, the Department contends, that it was reasonable to consider matters such as purchaser expectations and the inability to measure SSPC thickness precisely in making its finding as to ambiguity, notwithstanding that they are included among the *Diversified Products* factors considered under § 351.225(k)(2) in interpreting ambiguous language. Def.'s Resp. 7–8.

Third, defendant argues that ASB's contention that the measurement "4.75 mm" is not itself a standard measurement under the ASTM is irrelevant to the issue at hand. For defendant, the ASTM

[7] The positions of defendant and defendant-intervenor Allegheny Ludlum ("Allegheny") are generally consistent and they will be treated together here under the label "defendant." Although Allegheny believes that Commerce's Remand Results should be affirmed in their entirety, it notes that Commerce could have determined that the scope language referred to nominal thickness based on its consideration of the § 351.225(k)(1) factors and, therefore, resort to the § 351.225(k)(2) factors was unnecessary.

standards guided its analysis, not because 4.75 mm is a standard measurement, but because they demonstrate that the industry measures "thickness″ in nominal terms. Def.'s Resp. 10.

Fourth, defendant maintains that ASB's argument that Commerce's decision in Carbon Steel Plate is controlling of the meaning of "4.75 mm or more in thickness" in this case is wrong. Defendant notes that the issue in Carbon Steel Plate was whether the order in that determination included products with a nominal thickness of 4.7625 mm. According to defendant, "Commerce made a distinct finding that the scope included certain products with an actual thickness between 4.75 mm and 4.7625 mm. Thus certain products made to a nominal thickness of 3/16″ but produced to slightly below 3/16″ in thickness would already be included under the language of that case." Def.'s Resp. 11 (citations omitted). For defendant, Carbon Steel Plate does not control here because it was "silent as to merchandise with a nominal thickness of 4.75 mm." Def.'s Resp. 11.

Fifth, Defendant claims that ASB's contention that it is Commerce's practice to expressly identify when the scope of an order includes nominal terms misses the point. Rather, Defendant maintains that "[a]lthough Commerce has not been as precise and consistent as it could have been in specifying whether measurements should be considered as 'actual' or 'nominal,' those examples do not resolve the ambiguity created in this case by absence of either the word 'actual' or 'nominal.'" Def.'s Resp. 11 (citations omitted).

Sixth, defendant responds that ASB's attempt to show that Commerce's interpretation is internally inconsistent because it ignores the further processing clause is without merit. According to defendant, the further processing clause is not inconsistent with its interpretation of the scope language because both pertain to nominal thickness of 4.75 mm and, therefore, the term "specified dimensions″ merely refers to the nominal dimensions specified in the order. Def.'s Resp. 11–12.

Seventh, defendant argues that ASB's reliance on an alleged inconsistency between Commerce's interpretation of the Orders and the SSSS orders is meritless because "both SSPC and SSSS adhere to the same industry standards which recognize tolerance ranges and which also recognize the limited interchangeability between SSPC and SSSS due to inherent differences in thickness and appearance.″ Def.'s Resp. 12. In other words, defendant maintains that, although the SSSS and SSPC orders are mutually exclusive, these products are mutually exclusive based on nominal, rather than actual, thickness.

Finally, defendant insists that ASB's argument that the HTS definition should control is unconvincing because the Orders indicate

that "HTS categories are provided only for 'convenience and Customs purposes,' whereas 'the written description of the scope of [the] order is dispositive' for its meaning." Def.'s Resp. 10.

3. Commerce's Ambiguity Determination is Sustained

Commerce's determination that the scope language is ambiguous is sustained. "Commerce need only meet a low threshold to show that it justifiably found an ambiguity in scope language, but it is not justifiable to identify an ambiguity where none exists." *Allegheny Bradford Corp. v. United States,* 28 CIT 830, 843, 342 F. Supp. 2d 1172, 1184 (2004) (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1272 (Fed. Cir. 2002)) (internal citations omitted). This threshold is met whenever there is language in the orders that "specifically includes the subject merchandise *or may be reasonably interpreted to include it." Duferco,* 296 F.3d at 1089 (emphasis added). Here, Commerce has met this threshold because the language of the Orders can reasonably be interpreted to include SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm.

At the outset, it should be noted that antidumping and countervailing duty orders are specific to a particular kind or class of merchandise and, therefore, unless otherwise specified, they must necessarily be interpreted in the context of the industry[8] in which the merchandise at issue is manufactured, bought and sold. This being the case, ASB's argument that "4.75 mm" is unambiguous because it has but one common and ordinary meaning must be rejected. In everyday parlance, "4.75 mm" may have an established meaning. In the context of the SSPC industry, however, thickness of slightly more or slightly less than 4.75 mm is routinely acceptable to a purchaser who has specified product that is 4.75 mm thick. *See* Remand Results at 7–8. This is true for several reasons, the first being that "stainless steel plate thickness cannot be maintained precisely in the steel forming

[8] Courts have long recognized the importance of considering context, including industry custom, in interpreting written language. *See, e.g., Hurst v. Lake & Co., Inc.*, 16 P.2d 627, 629 (Ore. 1932) ("[O]ne is justified in saying that the language of the dictionaries is not the only language spoken in America. . . . [T]he different sciences and trades, in addition to coining words of their own, appropriate common words and assign to them new meanings. Thus it must be evident that one cannot understand accurately the language of such sciences and trades without knowing the peculiar meaning attached to the words which they use."); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.1945) (Hand, J.) ("Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."); *Johnson v. United States*, 163 F. 30, 32 (1stCir. 1908) (Holmes, J.).

process." Remand Results at 7. Indeed, no roll of SSPC is of uniform thickness throughout and, thus, Customs and Border Protection measures the thinnest part of a roll in order to classify such merchandise. Oral Arg. Tr. at 26:15–19.

Moreover, slight variations in thickness do not prevent SSPC coils from being suitable for their intended purposes. Thus, in practice, if certain rolls of SSPC are slightly more or less than 4.75 mm in thickness, but within a tolerance range acceptable in the industry, a purchaser of SSPC would accept it even if the contract or purchase order called for SSPC with a thickness of 4.75 mm. *See* Remand Results at 7–8. Therefore, to the extent that SSPC that actually measures something less than 4.75 mm may nonetheless be deemed to be nominally 4.75 mm, it could reasonably be covered by the Orders. Because the express terms of the Orders do not state whether this is the case, the Orders are ambiguous.

Further, plaintiff's contention that Commerce's Remand Results were contrary to law because the Department violated its own regulations by considering certain *Diversified Products* factors, such as "customer expectations" and "industry practice," in determining if an ambiguity existed in the scope language is unconvincing. Section 351.225(k) provides for the steps Commerce is to take in "considering whether a particular product is included within the scope of an order . . . ." In other words, in the context of § 351.225(k), the *Diversified Products* factors are applied by Commerce to resolve an ambiguity. Nothing in § 351.225(k), however, prevents Commerce from considering any factors in either subsection in determining whether an ambiguity exists.

Indeed, as noted above, it is reasonable for the Department to consider industry context to determine whether the scope of its orders are ambiguous. Commerce's use of the *Diversified Products* factors as a means of determining commercial usage when evaluating whether the language was ambiguous does not cause the Department's determination to be unlawful. This is because the factors are merely a tool for making a reasonable finding. Accordingly, Commerce did not act contrary to law by considering factors such as industry practice or customer expectations to determine if the language in the Orders was ambiguous.

ASB's contention that the industry practice of measuring SSPC in nominal terms could not render the language ambiguous because "4.75 mm" does not have an industry meaning is also without merit. It is true that the ASTM lists 0.1875 inches (or 3/16") as a standard thickness for SSPC, and recognizes that this converts to the metric measurement of 4.7625 mm. However, the record also reflects that,

although the exact metric conversion of the standard 0.1875 inch thickness is 4.7625 mm, it is industry custom to label the conversion as 4.75 mm. *See* Letter from Collier, Shannon, Rill & Scott, PLLC to Sec'y of Commerce, dated April 14, 1998, attached as Ex. 3 to plaintiff's Rule 56.2 Mot. J. Agency R., dated July 1, 2009 ("Pl.'s July 2009 Br."). If anything, this further supports Commerce's conclusion that the industry practice is to define the thickness of SSPC in nominal terms. In addition, Commerce's purpose in citing to the ASTM standards was to illustrate that the custom in the trade is for SSPC to be sold with a small range of thickness, not to identify 4.75 mm as an industry standard.

Commerce's findings in the Carbon Steel Plate[9] proceedings also do not compel a different result. The Carbon Steel Plate determination rejected the domestic manufacturers' *request to amend* the scope of Commerce's order to include merchandise with an actual thickness of less than 4.75 mm. As part of its reasoning for not amending the order, Commerce found that there was "no information on the record indicat[ing] that respondents or other parties have been attempting to circumvent these proceedings by shifting sales of the products in question. Consequently, given the clarity of the original scope, [among other things,] we recommend that petitioners' requested modifications to the scope not be made." Carbon Steel Plate Memo at 3.

Although, at least by implication, the Department in Carbon Steel Plate found that "4.75 mm in thickness" was an actual measurement that excluded merchandise with an actual thickness of less than 4.75 mm from its scope, that finding is not a determination that plaintiff can rely upon in this case. It is true, as ASB notes, that well-established principles of administrative law prohibit Commerce from acting in an arbitrary or capricious manner and, therefore, "[w]here . . . Commerce adopts a practice that substantially deviates from precedent, it must at least acknowledge the change and show that

[9] In Carbon Steel Plate, the petitioners sought to amend the scope of the order to include, among other things, cut-to length carbon steel plate with a nominal thickness of 4.7625 mm, but an actual thickness of less than 4.75 mm. The Carbon Steel Plate order covered merchandise that was, inter alia, "4.75 mm or more in thickness." Carbon Steel Plate, 62 Fed. Reg. 61731,61,731–32 (Dep't of Commerce Nov. 19, 1997). The Department ultimately concluded that it would not amend the scope of these orders because "[n]o information on the record indicates that respondents or other parties have been attempting to circumvent these proceedings by shifting to sales of the products in question. Consequently, given the clarity of the original scope [among other things] we recommend that petitioners' requested modifications to the scope not be made." Carbon Steel Plate Memo at 3. In so finding, Commerce determined that the order only included carbon steel plate with a nominal thickness of 4.7625 mm to the extent that the actual thickness of that merchandise was 4.75 mm or more. The court understands ASB's argument to be that Commerce's determination in Carbon Steel Plate was tantamount to a finding that "4.75 mm in thickness" meant actual thickness and, thus, the Department cannot now find that "4.75 mm" refers to nominal thickness in the SSPC Orders.

there are good reasons for the new policy . . . ." *See Pakfood Pub. Co. Ltd. v. United States*, 35 CIT __, __, Slip Op. 11–6 at 14 (Jan. 18, 2011). Commerce's determination in Carbon Steel Plate, however, was not based on any long standing methodology from which the Department has substantially deviated in finding that the Orders in this proceeding are ambiguous. Rather, the determination in Carbon Steel Plate was a factual finding conditioned on the questions presented and based on the administrative record before the Department.

Carbon Steel Plate did not squarely address the question before the court in this case. That is, no argument was made that the scope language was ambiguous because of the absence of the words "actual" or "nominal." Indeed, Carbon Steel Plate did not involve a dispute over the meaning of the scope language in the order at issue at all. To the contrary, that determination involved the petitioners' request to amend the scope of the order. Furthermore, the determination was based, at least in part, on the finding that no amendment to the order was needed because there was no evidence anyone was trying to circumvent the order. *See* Carbon Steel Plate Memo at 3.

Here, Commerce has made an independent determination concerning the scope of its Orders on SSPC, based on the record before it in this proceeding, and upon the precise question of whether ambiguity arises from the presence or absence of the words "nominal" and "actual." So long as that conclusion is supported by substantial evidence in the record, rulings in other proceedings do not dictate a contrary result. "The primary source in making a scope ruling is the antidumping order being applied (and the prior scope determinations applying that order), not necessarily the scope rulings made in unrelated antidumping orders." *Walgreen Co. Of Deerfield, Il. v. United States*, 620 F.3d 1350, 1356 (Fed. Cir. 2010). That the Department's result in this case may not be consistent with its conclusions in Carbon Steel Plate, which resolved a different issue based on a different administrative record, is not a sufficient basis to find that its decision here is unreasonable. *See Nakornthai Strip Mill Pub. Co. Ltd. v. United States*, 32 CIT __, __, 587 F. Supp. 2d 1303, 1307 (2008) ("Commerce . . . may adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record.").

Nor is the court persuaded by ASB's contentions that the Orders must refer to actual thickness because they do not include the term "nominal" or expressly refer to the ASTM standards. For ASB, it is significant that previously Commerce has used the term "nominal" and expressly invoked those standards when it intended to incorpo-

rate them into orders. Neither the Department's use of the term "nominal" nor its reference to the ASTM standards, however, prevent the Orders from being found to be ambiguous. The ambiguity here arises precisely because there is no reference to the ASTM standards, inclusion of the word "nominal," or any other indication of whether the scope of the Orders is defined in terms of nominal or actual product thickness, even though the product is commonly identified nominally in the industry. Had the Orders used the term "nominal" or expressly referred to the ASTM standards, no ambiguity would exist.

ASB's contention that the "specified dimensions" language in the further processing clause must refer to actual measurements, including the "4.75 mm" in thickness, is also unavailing. There is no reason why "specified dimensions" cannot refer to nominal dimensions. Thus, if merchandise maintains a nominal thickness of 4.75 mm following further processing then it is within the scope of the Orders. If further processing alters the dimensions of the merchandise such that it can no longer be considered nominally 4.75 mm, it is not within the scope of the Orders. Accordingly, the wording of the further processing clause does not demonstrate that the Orders unambiguously refer to actual, as opposed to nominal, dimensions.

Similarly, ASB's argument regarding the SSSS antidumping order is unpersuasive. According to ASB, the Orders must refer to actual thickness because the SSSS order defines SSSS as certain steel products with a thickness of less than 4.75 mm, and both the SSSS and SSPC orders explicitly exclude the other from their scope. That nominal rather than actual dimensions are used in both orders does not mean that they are no longer mutually exclusive. A product that is nominally 4.75 mm thick excludes a product with a nominal thickness of less than 4.75 mm. Accordingly, there is no reason why the dividing line between SSPC and SSSS cannot be a nominal, as distinct from an actual, measure of thickness.

Finally, the court is not persuaded by ASB's argument that the Orders incorporate the definition of SSPC found in the HTS. The Orders expressly provide that "[a]lthough the HTS subheadings are provided for convenience and Customs purposes, the written description of the merchandise subject to these orders is dispositive." *See, e.g.*, Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 68 Fed. Reg. 11,520, 11,521 (Mar. 11, 2003) (notice of amended antidumping duty orders). Accordingly, contrary to ASB's contention, the Orders plainly indicate that reference to the HTS was for convenience, and was not intended to incorporate the HTS definition of SSPC. *See Novosteel*, 284 F.3d at 1270.

Based on the foregoing, Commerce's determination that the Orders are ambiguous is supported by substantial evidence and otherwise in accordance with law. As noted, the Orders themselves do not specify whether thickness is to be measured in actual or nominal terms. The administrative record before the Department supports its finding that no roll of SSPC is manufactured to a uniform thickness and that it is common in the SSPC industry to refer to product thickness in nominal terms. This industry practice supports Commerce's finding of ambiguity because it casts a reasonable doubt upon the intended meaning of the scope language in the Orders. It was within the discretion of the Department to consider that industry practice in interpreting the scope of the Orders, as the definition of "4.75 mm or more in thickness" cannot be divorced from the context of the relevant industry. Therefore, where, as here, the relevant industry generally defines product thickness in nominal terms, it is reasonable for Commerce to conclude that the Department's failure to specify whether "4.75 mm in thickness" was a nominal or actual measurement rendered the Orders ambiguous. Accordingly, Commerce's determination that the scope language in the Orders is ambiguous is sustained.

B. Commerce's Finding that the § 351.225(k)(1) Factors Were Not Dispositive of the Scope Inquiry

1. Plaintiff Argues that the § 351.225(k)(1) Factors Dispositively Demonstrate that "4.75 mm" Refers to an Actual Measurement

ASB asserts that, even if the language of the Orders is ambiguous, the § 351.225(k)(1) factors are dispositive of the scope inquiry because they conclusively demonstrate that "4.75 mm" was intended as an actual measurement. Therefore, plaintiff argues, the Department's use of the *Diversified Products* factors in § 351.225(k)(2) to find that "4.75 mm" was a nominal measurement was unlawful because the § 351.225(k)(1) factors conclusively demonstrate that it was intended to be an actual measurement. In other words, plaintiff contends that Commerce failed to follow its own regulations by going to the third step of the prescribed methodology, and considering the § 351.225(k)(2) factors when the ambiguity in the Orders could be resolved by the § 351.225(k)(1) factors. According to ASB, Commerce's conclusion that the § 351.225(k)(1) factors[10] did not dispositively

[10] The factors considered under 19 C.F.R. § 351.225(k)(1) are (1) the descriptions of merchandise contained in the petition, (2) the initial investigation, (3) Commerce's determinations, and (4) the ITC determinations.

show that the scope of the Orders was limited to merchandise that is actually 4.75 mm in thickness or more is unsupported by substantial evidence for four reasons.

First, plaintiff argues that the petitioners in the investigation were clear that they intended the scope of the Orders to be defined in terms of actual thickness because they "rejected the use of tolerance ranges" in the proceedings leading to the formulation of the Orders' scope description. *See* Pl.'s Cmnts. 27–28. In other words, ASB argues that by declining to include tolerance ranges in the definition of SSPC in the investigation, the petitioners sought to include only SSPC with an actual thickness of 4.75 mm or more within the scope of the Orders. According to ASB, "[g]iven the necessity of defining the subject merchandise according to tolerance ranges [in order to describe the merchandise in nominal terms], such an omission clearly shows that Petitioners did not intend to cover nominal merchandise." Pl.'s Cmnts. 28. For plaintiff, given the petitioners' intentions, allowing Commerce to revisit its initial decision not to include tolerance ranges "would be tantamount to permitting Commerce to amend the Orders years after they were issued." Pl.'s Cmnts. 27.

Second, ASB argues that the petitioners' statement to the Department regarding the further processing clause demonstrates that the scope of the Orders was intended to be defined based on actual thickness. ASB relies on a letter from petitioners' counsel in May 1998: "the scope of the investigation defines the dimensions of the subject coiled plate products to be 254 mm or over in width and 4.75 mm or more in thickness, without exception or exclusion." Pl.'s Cmnts. 28 (citing Letter from Collier, Shannon, Rill & Scott, PLLC to Secretary of Commerce, dated May 8, 1998 (attached as Ex. 4 to Pl.'s July 2009 Br)). Thus, according to plaintiff, the petitioners clarified that "coiled plate meeting *these minimum dimensions is included within the scope* . . . . " " Pl.'s Cmnts. 28 (citing Letter from Collier, Shannon, Rill & Scott, PLLC to Secretary of Commerce, dated May 8, 1998 (attached as Ex. 4 to Pl.'s July 2009 Br)). For ASB, this statement "clearly reveal[s] that the products could be further processed and fall within the Orders so long as they 'maintain[ed] *dimensions* specified in the *Department's scope language* ' - not unspecified dimensions (such as the ASTM standards)." Pl.'s Cmnts. 29 (citations omitted). Plaintiff, therefore, concludes that "Petitioners' comments at the time the scope was adopted are clearly inconsistent with interpreting 'thickness' to mean 'nominal thickness.'" Pl.'s Cmnts. 29.

Third, plaintiff contends that Commerce's request that ASB and other respondents report data based on nominal thickness does not alter the conclusion that nominal merchandise is not within the scope

of the Orders. As noted, in its questionnaires, Commerce required respondents to report data concerning merchandise that was nominally 4.75 mm in thickness, but with an actual thickness of less than 4.75 mm. According to plaintiff, Commerce can request data from parties either to include the data collected in its calculation of the dumping margin, or to ensure that Commerce "understands the data that it will use in its calculations and that respondents have fully and accurately reported their data." Pl.'s Cmnts. 30. For plaintiff, the record demonstrates that Commerce's purpose in requiring nominal reporting was the latter. Specifically, ASB points to a verification report[11] for one respondent issued in connection with the second administrative review of the Orders. In that report, according to ASB, "[f]or products with 'an actual thickness of less than [4.75 mm]' Commerce 'verified' that the 'thickness noted on the invoices were not subject to this review.'" Pl.'s Cmnts. 30 (citing Memorandum from Case Analysts to File re: Sales Verification of TrefilARBED, Inc., dated May 30, 2002, at 4, attached as Ex. 8 to Pl.'s July 2009 Br.).

Finally, ASB argues that the ITC's injury determination demonstrates that the Orders were only intended to cover merchandise with an actual thickness of 4.75 mm or more because "[t]he ITC Report described the different 'conditions' and 'finishes' covered by its investigation and concluded that '[a]ll plate imported in this condition or after further processing is subject to these investigations *so long as it is not further reduced below 4.75 mm in thickness.* " Pl.'s Cmnts. 31. For plaintiff, the ITC determination demonstrates that the scope language includes only actual thickness because it described the phrase "maintains the specified dimensions" in the further processing clause as "not further reduced below 4.75 mm." Pl.'s Cmnts. 31.

2. Defendant Argues that the § 351.225(k)(1) Factors Do Not Resolve the Ambiguity in the Scope Language

Defendant responds that its determination that the § 351.225(k)(1) factors did not resolve the ambiguity in the scope language of the Orders is supported by substantial evidence, notwithstanding the arguments raised by ASB.

Defendant first contends that the petitioners' arguments against the use of tolerance ranges in the scope language is not tantamount to a rejection of nominal measurements. According to defendant, the excerpt from the petitioners' correspondence cited by ASB "makes no mention of 'actual' or 'nominal' measurements, and clearly identifies petitioners' position that opposition to the express inclusion of toler-

[11] Plaintiff cites this evidence even though the report wasnot contemporaneous with the investigation.

ance ranges as part of the scope language is a 'separate' issue [from the question of] whether the orders should be interpreted as meaning 'actual' or 'nominal' measurements." Def.'s Resp. 14. In other words, for defendant, the fact that the petitioners sought to exclude tolerance ranges from the scope description is hardly the same as petitioners seeking an order that relies on actual rather than nominal terms.

According to defendant, petitioners' arguments against the inclusion of tolerance ranges in the scope language was based entirely on the difficulty entailed in deciding which set of tolerances would be used. After noting the variety of tolerances that might be employed, *i.e.*, the ASTM standards, specific customer standards, etc., the petitioners commented that "[i]ndeed identifying all tolerance uses arguably would have been difficult if not impossible. Rather than go down this path, Petitioners (and the Department) reasonably declined such an approach." Def.'s Resp. 27 (quoting Letter from Kelley, Drye, Collier, Shannon to Secretary of Commerce, at 13–14 (Oct. 9, 2007), attached as Ex. 14 to July 2009 Br.).

Second, defendant counters that the petitioners' correspondence regarding the further processing clause does not establish their intent to include only actual measurement because "the letter referenced by [ASB] regarding 'further processing,'. . . merely discusses SSPC that was 'further processed,' but still within scope, so long as it met the specified dimensions. Again, nothing [in petitioners' correspondence] refers to 'nominal' or 'actual' measurements." Def.'s Resp. 14 (citations omitted). Put another way, for defendant, the requirement that merchandise subject to further processing maintain a "specified dimension" after processing does not indicate whether that "specified dimension" is defined in nominal or actual terms.

Third, defendant maintains that ASB's contention that the Department's requirement that data be reported on a nominal basis was merely for purposes of "ensur[ing] that [Commerce] fully underst[ood] the data that it will use in its calculation" does not comport with the facts. According to defendant, "[ASB] downplays the reporting requirements for nominal SSPC established in the antidumping duty investigation, . . . misstates Commerce's intent and ignores [ASB's] own contemporaneous impression that the 'scope . . . include[s] material with a nominal thickness of 4.75 mm or greater.'" *See* Def.'s Resp. 14–15 (citations omitted). According to defendant, "[i]f anything, Commerce's reporting requirements support a conclusion under 19 C.F.R. § 351.225(k)(1) that Commerce understood the scope to include [nominal SSPC]." Def.'s Resp. 15. Defendant asserts that "[a]t the very least, however, Commerce's statement and the reporting practice initiated in the investigation viewed in light of its acceptance

of sales data in two reviews that excluded nominal SSPC call into question whether the section 251.225(k)(1) criteria are dispositive." Def.'s Resp. 15. Stated differently, for defendant, while its nominal reporting requirements may not conclusively demonstrate that the Orders cover nominal SSPC, at the very least Commerce's requirement of reporting in nominal terms does not settle the question one way or the other. For defendant, this is demonstrated by plaintiff's own uncertainty as to whether these reporting requirements meant that the Orders referred to thickness in nominal or actual terms .

Finally, defendant argues that the ITC's report contains no indication as to whether the Orders included SSPC with a nominal or actual thickness of 4.75 mm or more. Def.'s Resp. 15. For defendant, because the ITC did not specifically address whether the Orders included nominal SSPC, when addressing the further processing clause or otherwise, the ITC's report was not dispositive of the ambiguity found in the Orders.

3. Commerce's Conclusion Regarding the § 351.225(k)(1) Factors is Supported by Substantial Evidence

The § 351.225(k)(1) factors are only dispositive if they are "'controlling' of the scope inquiry in the sense that they definitively answer the scope question". *See Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007). That being the case, where, as here, Commerce reaches fact-intensive conclusions drawn from the record, its decision will only be overturned if it is unsupported by substantial evidence. *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1357 (Fed. Cir. 2006) ("Commerce's determinations of fact must be sustained unless unsupported by substantial evidence in the record. . . .")

Based on the record before it, the Department's determination that the § 351.225(k)(1) factors were not dispositive of the scope issue was reasonable. The court reaches this conclusion after considering the four objections to Commerce's determination posed by ASB. First, ASB's argument that, by declining to include specific tolerance ranges in the scope language, the petitioners must have intended actual measurements to control is not convincing. The evidence demonstrates that the petitioners' decided not to propose specific tolerance ranges because they believed that there were such a variety of ranges in use in the industry that specified ranges would result in confusion.

Thus, while it is clear that the petitioners wished to exclude particular tolerance ranges, it is equally clear that this preference does not demonstrate that they sought Orders expressed in actual, rather than nominal terms. On the other hand, petitioners' correspondence does tend to prove that nominal thickness was the standard in the

industry, and it provides some justification for Commerce's conclusion that the Orders covered SSPC with a nominal thickness of 4.75 mm or more in thickness, regardless of its actual thickness.

Second, ASB's claim that the petitioners' statements, during the initial investigation, that the further processing clause includes SSPC that is 4.75 mm or more in thickness "without exception or exclusion" demonstrates that the Orders were intended to cover only actual SSPC is also unconvincing. This declaration did no more than restate the scope language, and, because of the absence of the words actual or nominal, it sheds no light on the language's meaning. Indeed, as noted *supra*, the further processing clause does not state whether the required thickness, that further processed merchandise must maintain, is actual or nominal.

Third, ASB's argues that Commerce's requirement that SSPC sales be reported in nominal terms does not cast doubt on whether the Orders solely included SSPC with an actual thickness of 4.75 mm. This argument is not credible. To support its contention, ASB identifies one verification report for one respondent in a review, in which Commerce allegedly indicated that the Orders did not cover SSPC with a nominal thickness of 4.75 mm, but an actual thickness of less than 4.75 mm. Even if ASB's construction of this particular verification report is accepted, Commerce's determination that the § 351.225(k)(1) factors did not resolve the ambiguity in the Orders is reasonable. This is because the Department, during the investigation and subsequent reviews, was inconsistent in its treatment of the scope language as being in terms of actual or nominal thickness.

For instance, in 1998, during the course of the investigation, the Department sent letters to respondents instructing them to report sales of products with a nominal thickness of 4.75 mm or more. Remand Results at 9. In addition, in the appendix to the questionnaires issued in the investigation the Department indicated that it interpreted the scope measurements to be nominal. *Id.* Thus, the Department's conduct in its investigation indicates that it was treating the measurements as nominal.

In later reviews, however, Commerce seemed to lack a clear understanding of the scope of the Orders. The verification report cited by ASB is one instance in which Commerce made a finding, contrary to its prior indications, suggesting that the scope included only actual SSPC. But the Department treated the Orders as covering nominal SSPC in other instances. For example, "in the July 1, 2002 through June 30, 2003, antidumping duty review of *SSPC from Taiwan*, the Department asked that respondents code the thickness variables

according to actual thickness and to also include in their responses all sales of products for which the nominal thickness is greater than or equal to 4.75 mm." *Id.* at 9. In addition, Commerce applied facts available to arrive at ASB's dumping margin during the fifth administrative review because the company had failed to report sales of nominal SSPC. *See* Remand Results at 11. The Department, however, declined to apply adverse facts available[12] to ASB's failure to report nominal sales, acknowledging that it had accepted ASB's exclusion of nominal sales in prior reviews. *See* Issues and Decision Memorandum for the Final Results of the Fifth Administrative Review of the Antidumping duty Order on SSSP from Belgium ("Fifth Administrative Review Issues & Dec. Mem.") at 23.

Indeed, it is not at all clear that ASB itself was not of the view that the scope language was expressed in nominal terms. *See* Fifth Administrative Review Issues & Dec. Mem. at 18 ("In the Department's October 8, 1998 scope clarification letter, we instructed Respondent to report all sales of 'products for which the nominal thickness is greater than or equal to 4.75 mm.' . . . The record shows that on October 14, 1998, Respondent protested the Department's instructions to report sales of nominal SSPC. In that letter, Respondent also acknowledged that the Department has now redefined the 'scope to include material with a nominal thickness of 4.75 mm or greater.' As such, Respondent was clearly aware of the Department's clarification of the scope to include nominal SSPC, as well as the Department's requirement that Respondent report sales of nominal SSPC. Indeed, as Respondent acknowledges, it complied with the Department's instructions and reported sales of nominal SSPC in the investigation."). Thus, as least as early as 1998, ASB was aware that it was the Department's view that the Orders were expressed in nominal terms.

It was this type of inconsistent treatment that led the Department to find that its own determinations were not dispositive of the scope inquiry under § 351.225(k)(1). As the Department found, it "has not consistently treated all SSPC with a nominal thickness greater than or equal to 4.75 mm regardless of the actual thickness as within the scope in its prior determinations." Remand Results at 11. Accordingly, the Department's requirement that sales be reported for nominal SSPC, together with its conduct of the investigation and the reviews does not tend to definitively resolve the ambiguity in the Orders.

Finally, contrary to ASB's contention, the ITC's statement, relative to the further processing clause, that "[a]ll plate imported in this

[12] Pursuant to 19 U.S.C. § 1677e(b), in applying facts available, the Department may use an inference adverse to a respondent who it finds has failed to cooperate to the best of its ability in responding to requests for information.

condition or after further processing is subject to these investigations so long as it is not further reduced below 4.75 mm in thickness" does not undermine the reasonableness of Commerce's determination that the § 351.225(k)(1) factors do not resolve the ambiguity. As the Department found, the ITC's report provides no indication as to whether the scope of the Orders included nominal merchandise because the ITC did not specify either nominal or actual thickness. There is nothing in the language cited by plaintiff that suggests the ITC only considered actual measurements.

Based on the foregoing, the court finds that the evidence considered in accordance with § 351.225(k)(1), particularly that having to do with Commerce's understanding of the meaning of the scope language during the conduct of the investigation and the various administrative proceedings, does not dispositively decide the meaning of the scope language.

Conclusion

Because an ambiguity in the scope language remained following application of the first two steps of the methodology set forth in *Duferco* and *Tak Fat*, resort to the methodology's third step was in accordance with law. As noted, plaintiff does not dispute the Department's analysis under step three. Therefore, the court finds that Commerce properly applied the three-step methodology for resolving scope inquiries in the Remand Results. The Remand Results are sustained, and judgment will be entered accordingly.

Dated: July 12, 2011
New York, New York

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

Slip Op. 11–83

QINGDAO TAIFA GROUP CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and GLEASON INDUSTRIAL PRODUCTS, INC. and PRECISION PRODUCTS, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Court No. 08–00245
Public Version

[Judgment sustaining third remand results setting a separate entity AFA antidumping duty rate will be entered.]

Dated: July 12, 2011

Adduci, Mastriani & Schaumberg, LLP (*Louis S. Mastriani* and *William C. Sjoberg*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Thomas M. Beline*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Crowell & Moring LLP (*Matthew P. Jaffe* and *Alexander H. Schaefer*) for the intervenor defendants.

OPINION

Restani, Judge:

Introduction

This matter comes before the court following its decision in *Qingdao Taifa Grp. Co. v. United States*, 760 F. Supp. 2d 1379, 1380 (CIT 2010) ("*Taifa III*"), in which the court remanded the *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce July 27, 2010) (Docket No. 118) ("*Second Remand Results*") on *Hand Trucks and Certain Parts Thereof from the People's Republic of China; Final Results of 2005–2006 Administrative Review*, 73 Fed. Reg. 43,684 (Dep't Commerce July 28, 2008) ("*Final Results*") to the United States Department of Commerce ("Commerce"). For the reasons stated below, the court sustains Commerce's third remand results.

Background

The facts of this case have been well documented in the court's previous three opinions. *See Taifa III*, 760 F. Supp. 2d at 1381–82; *Qingdao Taifa Grp. Co. v. United States*, 710 F. Supp. 2d 1352, 1353–55 (CIT 2010) ("*Taifa II*"); *Qingdao Taifa Grp. Co. v. United States*, 637 F. Supp. 2d 1231, 1234–36 (CIT 2009) ("*Taifa I*"). The court presumes familiarity with those decisions, but briefly summarizes the facts relevant to this opinion.

Plaintiff Qingdao Taifa Group Co., Ltd. ("Taifa") challenged the final results of an administrative review of the antidumping ("AD") duty order on hand trucks and certain parts thereof from the People's Republic of China ("PRC"), which assigned Taifa the PRC-wide dumping margin[1] of 383.60% based on total adverse facts available ("AFA").

[1] A dumping margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless nonmarket economy ("NME") methodology is used, an NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). In an NME case, NV is calculated using information from comparable surrogate market economies. 19 U.S.C. § 1677b(c)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)-(b).

See Final Results, 73 Fed. Reg. at 43,687. The court, granting Taifa's motion for judgment on the agency record in part and denying it in part, remanded the matter to Commerce to determine whether a government entity exercised nonmarket control over Taifa sufficient to link the PRC-wide rate to Taifa and to calculate a separate, substitute AFA rate if the PRC-wide was not warranted. *Taifa I*, 637 F. Supp. 2d at 1244.

In its first remand results, *Final Results of Redetermination Pursuant to Court Remand* (Dep't Commerce Jan. 22, 2010) (Docket No. 100), Commerce assigned Taifa a separate AFA rate of 227.73% stating that it could not affirmatively demonstrate that a government entity exercised control over the company. *Id.* at 3. The court, however, held that Commerce "did not comply with [its] remand instructions to make a determination based on a proper analysis of nonmarket control" because it "still ha[d] not made a final finding about the presence or absence of de jure and de facto government control over Taifa, including a finding and explanation which substantiates or rejects a sufficient link to a country-wide PRC rate." *Taifa II*, 710 F. Supp. 2d at 1357. The court, therefore, remanded to Commerce, instructing it "to determine, after proper investigation and analysis, whether a government entity exercised nonmarket control over Taifa sufficient to link the PRC-wide rate to Taifa." *Id.*

In its *Second Remand Results*, "Commerce found that Taifa had not established a legitimate separation from the town government and applied a 'presumption' that a respondent in a nonmarket economy ('NME') country such as the PRC is state-controlled." *Taifa III*, 760 F. Supp. 2d at 1381–82; *Second Remand Results*, at 13–19. Nevertheless, the court held that the factual "presumption" made in this case was not supported by record substantial evidence. *Taifa III*, 760 F. Supp. 2d at 1384–85. As a result, the court remanded to Commerce for a third time with instructions to either "explain why substantial record evidence supports a finding of central government control that justified imposition of the PRC-wide entity rate" or to give Taifa "the rate its own lack of verifiable production evidence warrants, without resort to an unconnected country-wide rate." *Id.* at 1385.

On remand, Commerce concluded that "there [was] not substantial record evidence to conclude that the central government controlled Taifa's business decisions" and therefore, "assign[ed] Taifa a separated antidumping duty rate of 145.90 percent." *Final Results of Redetermination Pursuant to Court Remand*, 1–2 (Dep't Commerce

Mar. 17, 2011) (Docket No. 145) ("*Third Remand Results* ").[2] Taifa now challenges the 145.90% AFA rate as uncorroborated, punitive, aberrational, and an unexplained departure from Commerce's ordinary practice. *See* Taifa Cmts., 6, 16. In addition, intervenor defendants Gleason Industrial Products, Inc. ("Gleason") and Precision Products, Inc. ask the court to reconsider *Taifa III*, and in the alternative, affirm the *Third Remand Results*. *See* Gleason Cmts. 2, 5.

Jurisdiction And Standard Of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will not uphold Commerce's final determination in an AD review if 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).

Discussion

I. Commerce's Finding of No Central Government Control

In its last opinion, the court remanded this case to Commerce with instructions to support its finding as to whether Taifa was state-controlled with substantial evidence. *See Taifa III*, 760 F. Supp. 2d at 1385. Upon reconsideration of the record evidence, Commerce concluded that "[a]lthough there is record evidence to demonstrate that Taifa is actually owned by the town government and there is reason to doubt the identity of an independent board of directors directing Taifa's activities in contradiction to how Taifa originally reported its ownership and management to the Department . . . there is insufficient record evidence to support a conclusion that Taifa operated under central government control." *Third Remand Results*, at 6. Although Gleason now asks the court to reconsider its earlier ruling on

[2] In footnote one of the *Third Remand Results*, Commerce states it makes its determination under protest, but it does not indicate there as to which issue it believes it is compelled to act in a way it would not choose. *See Third Remand Results*, at 2 n.1. The court has not compelled a specific determination. It has ordered Commerce to explain its legal conclusions, support its factual conclusions and add evidence to the record or conduct further investigation, if necessary. *See Taifa I*, 637 F. Supp. 2d at 1244; *Taifa II*, 710 F. Supp. 2d at 1357; *Taifa III*, 760 F. Supp. 2d at 1385. Commerce appears to have made little effort to support its decision to calculate a separate rate for plaintiff and no effort to support a link to a PRC-wide rate. *See Third Remand Results*, at 6. It has devoted considerable effort, however, to its choice of a specific rate. *See id.* at 7–13. Whether substantial evidence supports that rate is the issue that the parties have substantively briefed and it is the issue that the court addresses here. *See* Qingdao Taifa Grp. Co., Ltd. Cmts. on the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Remand Qingdao Taifa Grp. Co., Ltd v. United States Court No. 08–00245; Slip Op. 10–126 (CIT Nov. 12, 2010), 6–37 (Apr. 8, 2011) ("Taifa Cmts."); Cmts. on Final Results of Redetermination Pursuant to Court Third Remand, 5–9 (Apr. 8, 2011) ("Gleason Cmts.").

lack of evidence supporting central government control, no parties challenge Commerce's current determination on this issue as unsupported. *See* Gleason Cmts., at 2–4; Taifa Cmts., at 4.

There is no statutory compulsion of a country-wide rate, and in this case the record shows no necessity for using such a rate. *But cf. Watanabe Grp. v. United States*, Slip Op. 10–139, 2010 WL 5371606, *4–5 (CIT Dec. 22, 2010) (holding that Commerce may select the PRC-wide rate when it received no information, whatsoever, from respondent). Whether or not Commerce may in some cases choose this avenue as a permissible convenience or perhaps as an added deterrent does not give a petitioner a right to demand such a rate. A substantially supported rate is all the competitor may demand. *See* 19 U.S.C. § 1677e(b)-(c). Thus, as the court has not been presented a sufficient basis to revisit its holding in *Taifa III*, its discussion will be limited to the lawfulness of Taifa's separate rate.

II. Taifa's Separate Rate

In the case of such lack of connection to central government control, the court instructed Commerce to give Taifa its own separate rate. *Taifa III*, 760 F. Supp. 2d at 1385–86. In its *Third Remand Results*, Commerce calculated a separate AFA rate of 145.90% using a portion of Taifa's verified sales from the initial investigation. *Third Remand Results*, at 9. To calculate this margin, Commerce first generated a list of the hand truck models sold by Taifa, ranking them in order of highest to lowest model-specific margin. *Id.* at 9, 21. Commerce then used the quantity of each model sold to calculate the cumulative percentage each model represented of Taifa's total sales from the top down. *Id.* at 9. Finally, Commerce calculated the weighted-average margin of 145.90% using data from the sales of the three models with the highest margins, which accounted for 36% of Taifa's total sales by quantity. *Id.*

During an AD review, when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Under these circumstances, the AD duty rate is known as an AFA rate and may be based on information obtained from: "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 U.S.C. § 1675] . . . or determination under [19 U.S.C. § 1675b] . . ., or (4) any other information placed on the record." *Id.* Nevertheless, "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorrobo-

rated margins." *F.lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Thus, Commerce's broad discretion under the statute is not without limitations. *See PAM S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009).

Taifa now challenges this AFA rate as uncorroborated, punitive, and aberrational. *See* Taifa Cmts., at 16. In addition, Taifa contends that Commerce's methodology unlawfully departed from its normal practice. *Id.* at 6. These claims lack merit.

A. Commerce Corroborated Taifa's AFA Rate

Pursuant to 19 U.S.C. § 1677e(c), "[w]hen the administering authority . . . relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c). Commerce, therefore, must corroborate Taifa's AFA rate because it was calculated using secondary information, namely, sales data from the previous investigation. *See KYD, Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) (providing that "[s]econdary information includes [i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise" (internal quotation marks omitted)).

In order to corroborate an AFA rate, Commerce must show that it used "reliable facts" that had "some grounding in commercial reality." *Gallant Ocean (Thai.) Co., Ltd. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (internal quotation marks omitted). On remand, Commerce reasoned that the 145.90% AFA rate was representative of Taifa's commercial reality because it was calculated using 36% of Taifa's verified sales data from the last time it was found to be cooperative, approximately two years earlier.[3] *Third Remand Results*, at 9. Commerce also concluded that this rate was corroborated because discredited margins calculated for the preliminary results exceeded this amount.[4] *Id.* at 13.

[3] For the purposes of the *Final Results*, the period of review was December 1, 2005, through November 30, 2006. 73 Fed. Reg. at 43,685. The verified data used to make this calculation was from sales made during the period of investigation, April 1, 2003 through September 30, 2003. *Amended Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof From the People's Republic of China*, 69 Fed. Reg. 65,410, 65,411 (Dep't Commerce Nov. 12, 2004) ("*Amended Final Determination* ").

[4] [[ ]] sales from the period of review, constituting [[ ]]% of total sales, were found to be dumped at transaction-specific margins exceeding 145.90%. *Third Remand Results*, at 13. The court notes that if this sales data had been verified, it likely would not be enough

The court recognizes that there is no verified sales data on the record for the relevant period of review, as Taifa was the only respondent and it failed to cooperate. *See Taifa III*, 760 F. Supp. 2d at 1386; *Third Remand Results*, at 11. Under such circumstances, Commerce's corroboration may be less than ideal because the uncooperative acts of the respondent has deprived Commerce of the very information that it needs to link an AFA rate to commercial reality. *See* 19 U.S.C. § 1677e(c) (stating that Commerce must corroborate "to the extent practicable"); *Gallant*, 602 F.3d at 1324. Thus, Taifa's sales data from April 1, 2003 through September 30, 2003, may be used because it is the only verified sales data on record for this company and is not so outdated so as to compel its rejection on grounds of lack of relevance. *Third Remand Results*, at 9. Furthermore, 36% of sales by quantity from the previous investigation is a large enough proportion to demonstrate some form of a commercial reality when the record is otherwise barren.[5] *Cf. Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (CIT 2010) (providing that, in the context of targeted dumping, 33% is considered reasonable for establishing a pattern of activity). Commerce, therefore, in this difficult circumstance has corroborated the selected AFA rate of 145.90% "to the extent practicable."[6] 19 U.S.C. § 1677e(c).

to corroborate an AFA rate so large. *See Taifa III*, 760 F. Supp. 2d at 1386 n.7 ("When rates are in multiples of 100%, one might assume that a bit more corroboration or record support is warranted."). Nevertheless, as Commerce points out, "Taifa withheld data and otherwise failed verification and the rates are likely significantly lower than they would be if Taifa had cooperated." *Third Remand Results*, at 13. The court has already found that Taifa failed to cooperate fully and its data was therefore unreliable. *See Taifa III*, 760 F. Supp. 2d at 1386. Thus, the current sales data provides little, if any, evidence of Taifa's actual commercial reality.

Confidential Data Deleted

[5] Taifa argues that Commerce's use of 33% in other contexts is distinguishable. *See* Taifa's Cmts., at 21. The history of such a threshold does not determine whether or not there is evidence to establish Taifa's commercial reality in this context.

[6] The selected AFA rate of 145.90%, much like the previously proposed rate of 227.73%, is not an actual rate, but rather is calculated using a portion of Taifa's sales. *Third Remand Results*, at 9; *see Taifa III*, 760 F. Supp. 2d at 1386. This fact, however, does not automatically render the 145.90% unusable. Although some sources are generally better than others, there is no statutory provision that requires Commerce to select a preexisting rate. *See PSC VSMPOAVISMA Corp. v. United States*, 755 F. Supp. 2d 1330, 1337 n.7 (CIT 2011). Rather, Commerce must be fair and reasonable. *See F.lli De Cecco*, 216 F.3d at 1032. If it has a viable rate that achieves statutory ends it should use it. *See Taifa III*, 760 F. Supp. 2d at 1386. If not, it will be forced to construct a rate. *See PSC VSMPO-AVISMA*, 755 F. Supp. 2d at 1337 n.7. Commerce has broad discretion when selecting an AFA rate, including the ability to calculate a new percentage based on substantial evidence, so long as it is not "punitive, aberrational, or uncorroborated." *F.lii De Cecco*, 216 F.3d at 1032; *see PAM S.p.A.*, 582 F.3d at 1340.

B. The Selected AFA Rate is Not Punitive

Commerce cannot apply an AFA rate if it is punitive. *F.lli De Cecco*, 216 F.3d at 1032. An AFA rate is punitive if it is not "based on facts" and "has been discredited by the agency's own investigation." *Id.* at 1033. Taifa claims that the AFA rate of 145.90% is punitive because it is much higher than all other calculated company-specific rates in previous segments of the proceedings.[7] *See* Taifa Cmts., at 17. As the court has previously explained, however, except in some very odd situations not present here, "[i]f [a] rate is sufficiently corroborated as a reliable rate it will not be found to be punitive." *PSC VSMPO-AVISMA*, 755 F. Supp. 2d at 1337; *see also Lifestyle Enter. v. United States*, Slip Op. 11–16, 2011 Ct. Intl. Trade LEXIS 17, *20 n.13 (CIT Feb. 11, 2011) ("Although clearly distinct standards[,] under Federal Circuit precedent, corroboration and reliability seem to collapse together in that they require demonstration of the same facts and legal conclusions.") Thus, the court does not find the AFA rate of 145.90% punitive for essentially the same reasons that it finds it is not uncorroborated.

C. The Selected AFA Rate is Not Aberrational

Similarly, Taifa claims that the selected AFA rate is aberrational because it is rebutted by the calculated company-specific rates in other segments of this proceeding. *See* Taifa's Cmts., at 25. In addition, Taifa claims that Commerce's methodology, which calculated the AFA rate using the 36% of Taifa's sales by quantity with the highest model-specific margins, impermissibly skews the result. *Id.* at 24. This is not a case, however, where Commerce is attempting to corroborate an AFA rate based on the existence of one irregular sale. *See PSC VSMPO-AVISMA*, 755 F. Supp. 2d at 1338. The fact that 36% of Taifa's sales by quantity yield this rate demonstrates that it is not so out of touch with Taifa's behavior as to render it aberrational.[8] The

[7] The highest calculated company-specific rate from a previous segment of this proceeding is 46.48%. *See Amended Final Determination*, 69 Fed. Reg. at 65,411. The only calculated rate for Taifa is 26.49%. *Id.* The highest calculated company-specific rate from the immediately prior review is 17.59%. *Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review*, 72 Fed. Reg. 27,287, 27,290 (Dep't Commerce May 15, 2007).

[8] Taifa's attempt to analogize the facts of this case with those of *Gallant* in order to achieve a similar result is misplaced. *See* Taifa Cmts., at 23. In *Gallant*, Commerce selected a petition rate that was later discredited by its own investigation. *Gallant*, 602 F.3d at 1323. Here, Commerce lacks the type of verified data that it had in *Gallant*. *See supra* note 4. For this reason, whatever rate Commerce calculated for Taifa in the preliminary results is irrelevant. Furthermore, the interpretation of *Gallant* that Taifa proposes, that a court can determine whether a rate is aberrational or not by simply comparing it to other calculated

AFA rate of 145.90%, therefore, is not aberrational for essentially the same reasons that it is not uncorroborated.

D. Commerce's Methodology

Finally, Taifa contends that there was no justifiable basis for Commerce to depart from its normal practice of adopting the highest weighted-average margin calculated for any respondent in any previous segment of the proceeding. *See* Taifa Cmts., at 6–16. When making a discretionary determination, however, Commerce can use a case-by-case analysis, so long as it is "consistent with its statutory authority." *See Allied-Signal Aerospace Co. v. United States*, 28 F.3d 1188, 1191 (Fed. Cir. 1994). Under such circumstances, Commerce is not required to justify its determination in terms of past alternatives. *See id.* Of course, Commerce must always act reasonably. *See id.* Here, the reasoning of Commerce's methodology is clear and simple: Commerce lacked credible data for sales made during the period of review. *See Third Remand Results*, at 13. Commerce then used a substantial portion of Taifa's sales from the original investigation, Taifa's only verified data, to calculate a rate. *Third Remand Results*, at 9. This methodology is reasonable considering Taifa's lack of verified sales data, the percentage of sales used, and the relatively recent nature of the sales when compared to the time period of the review. Commerce's methodology, therefore, is reasonable and not contrary to law.

Conclusion

For the foregoing reasons, Commerce's determinations are supported by substantial evidence and are in accordance with the law. Accordingly, the *Third Remand Results* are sustained.

Dated: This 12th day of July, 2011.
New York, New York.

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

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rates, is an oversimplification of that case. *See Gallant*, 602 F.3d at 1324 (reasoning that "[b]ecause Commerce did not identify any relationship between the small number of unusually high dumping transactions with Gallant's actual rate, those transactions cannot corroborate the adjusted petition rate").