U.S. Court of International Trade

Slip Op. 16–108

AK STEEL CORPORATION, ALLEGHENY LUDLUM, LLC D/B/A ATI FLAT ROLLED PRODUCTS, AND UNITED STEELWORKERS, Plaintiffs, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, -AND- THYSSENKRUPP ELECTRICAL STEEL GMBH, ABB INC., NIPPON STEEL & SUMITOMO METAL CORPORATION, AND JFE STEEL CORPORATION, -AND- BAOSHAN IRON & STEEL CO., LTD., BAOSTEEL AMERICA, INC., AND NOVOLIPETSK STEEL, Intervenor-Defendants.

Consolidated
Court No. 14–00220
PUBLIC VERSION

[Plaintiffs' motion for judgment on agency record, contesting negative material-injury determinations based thereon, denied; action dismissed.]

Dated: November 23, 2016

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John D. Greenwald and *Ulrika K. Swanson, Cassidy Levy Kent (USA) LLP,* Washington, D.C., for intervenor-defendant ABB Inc.

Donald Harrison, Gibson, Dunn & Crutcher LLP, Washington, D.C. , for intervenor-defendant Nippon Steel & Sumitomo Metal Corporation.

Robert Huey, Gregory Husisian, David Hickerson, and *Morgan J.West, Foley Lardner LLP,* Washington, D. C., for intervenor-defendant JFE Steel Corporation.

Philippe M. Bruno and *Rosa S. Jeong,* Greenberg Traurig, LLP, Washington, D.C., for intervenor-defendants Baoshan Iron & Steel Co., Ltd. and Baosteel America, Inc."

OPINION & ORDER

AQUILINO, Senior Judge:

This consolidated action challenges the final negative determinations of the United States International Trade Commission ("ITC" or "Commission") that imported grain oriented electrical steel ("GOES") did not materially injure, or threaten material injury to, the U.S. domestic industry. *See GOES From Germany, Japan, and Poland,* Inv. Nos. 731-TA-1233, -1234, -1236 (USITC Pub. 4491, Sept. 2014),

and *GOES From China, Czech Republic, South Korea, and Russia,* Inv. Nos. 701-TA-505 and 731-TA-1231, -1232, -1235, -1237 (USITC Pub. 4500, Nov. 2014), published respectively at 79 Fed.Reg. 54744 (Sept. 12, 2014) and 79 Fed.Reg. 66739 (Nov. 10, 2014), as further articulated in *Confidential Views of the Commission* (*"Views"*) and *ITC Final Proprietary Staff Report* dated August 14, 2014 (incorporating revisions of Aug. 20, 2014) (*"Staff Report"*).

According to the agency record developed, that domestic industry is comprised of two manufacturers, AK Steel Corporation and Allegheny Ludlum, LLC, which have filed complaints in this consolidated action pursuant to 19 U.S. C. §1516a (a) (2) (A) (i) (I) and (B) (ii) and 28 U.S.C. §1581(c) along with the United Steelworkers. Together as parties plaintiff, they have interposed a motion for judgment on that record in accordance with USCIT Rule 56.2.

I

The papers filed in support of that motion (and in opposition thereto) show that GOES is a flat-rolled alloy steel product with a chemistry that facilitates the formation of large grains during production that align uniformly in the rolling direction (lengthwise) of steel sheet. Such grains enable the steel to conduct a magnetic field with a high degree of efficiency, relative to other steels.

GOES is particularly suitable for the manufacture of cores for transformers used in connection with the generation and transmission of electricity. It is produced with different levels of "permeability", *i.e.*, the degree of efficiency with which the steel can conduct a magnetic field.

"Conventional" grades of GOES have smaller, but less precisely oriented, grains. They are typically referred to by grades established by the American Iron and Steel Institute that range from M-2 to M-6, with M-2 being the thinnest gauge (0.007 inches or 0.18 millimeters ("mm")) and most efficient material, and M-6 being the thickest gauge (0.0138 inches or 0.35 mm) and least efficient.

"High-permeability" GOES has larger, more precisely oriented, grains that result in greater efficiencies (lower operating losses) relative to conventional grades. High-permeability GOES may also be subjected to certain surface treatments (known as domain refining) that further enhance efficiency.

AK Steel produces both conventional and high-permeability grades. Allegheny Ludlum produces conventional grades and was working in 2013 to develop the capacity to produce high-permeability GOES in commercial quantities. They concurrently filed antidumping-and countervailing-duty petitions with the International Trade Adminis-

tration, U.S. Department of Commerce ("ITA") and the Commission, alleging that (1) imports of GOES from China, the Czech Republic, Germany, Japan, Korea, Poland and Russia were being sold in the United States at less than fair value; (2) manufacturers, producers or exporters of GOES in China were receiving countervailable subsidies; and (3) such imports were materially injuring and threatening to injure the domestic GOES industry.[1]

Preliminarily, the Commission determined that there was a reasonable indication that the U.S. industry was materially injured by reason of imports of GOES from the seven subject countries. *See* GOES from China, Czech Republic, Germany, Japan, Korea, Poland, and Russia, Inv. Nos. 701-TA-505 and 731-TA-1231–1237 (Prelim.), USITC Pub. 4439 (Nov. 2013), PDoc 91. Concurrently, ITA determined that imports of GOES from each of those countries were being sold at "less than fair value" ("LTFV")[2] within the meaning of section 733(b) of the Tariff Act of 1930, as amended, 19 U.S.C. §1673b(b).

For the final phase, ITC determined that there had been price underselling of subject merchandise in the United States during the period of investigation ("POI"), which the parties do not dispute, but the Commission's final determination, by a vote of 5 to 1, was that underselling did not have significant adverse price effects during the POI. *See Views* at 35.

That is, after consideration and analysis of the statutory factors of volume of GOES, domestic and imported, and the price effects of the

[1] Upon receipt of such petition (s), ITC' s role is to determine whether material injury or threat of such injury to the domestic industry is indeed the case by reason of imported sales of subject merchandise or the likelihood of such sales. 19 U.S.C. §1673d(b) (1). *See, e.g., Gerald Metals, Inc. v. United States,* 132 F.3d 716, 719 (Fed.Cir. 1997). "[B]y reason of" subject imports means "not by reason of a minimal or tangential contribution to material harm caused by" such imports. *Mittal Steel Point Lisas Ltd. v. United States,* 542 F.3d 867, 873 (Fed.Cir. 2008), quoting *id.* The Commission evaluates the volume of subject imports, their effect upon prices in the U.S. market for the domestic like product, and their impact on domestic producers' "production operations" in the context of the U.S. market. 19 U.S.C. §1677(7)(B)(i).

[2] Plaintiffs' papers emphasize that ITA's final LTFV margins ranged from 3.68% for subject merchandise from the Republic of Korea to 241.91% for such merchandise from Germany. *See GOES From the People's Republic of China: Final Determination of Sales at LTFV,* 79 Fed.Reg. 59226, 59227 (Dep't Commerce Oct. 1, 2014); *GOES From the Republic of Korea: Final Determination of Sales at LTFV,* 79 Fed.Reg. 59224, 59225 (Dep't Commerce Oct. 1, 2014); *GOES From the Russian Federation: Final Determination of Sales at LTFV and Final Affirmative Determination of Critical Circumstances*, 79 Fed.Reg. 59223, 59223 (Dep't Commerce Oct. 1, 2014); *GOES From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 79 Fed.Reg. 59221, 59222 (Dep't Commerce Oct. 1, 2014); *GOES From the Czech Republic: Final Determination of Sales at LTFV and Final Affirmative Determination of Critical Circumstances,* 79 Fed.Reg. 58324, 58325 (Dep't Commerce Sept. 29, 2014); *GOES From Germany, Japan, and Poland: Final Determinations of Sales at LTFV and Certain Final Affirmative Determination of Critical Circumstances*, 79 Fed. Reg. 42501, 42502 (Dep't Commerce July 22, 2014).

subject imports, as set forth in their *Views,* pp. 26–41, the majority of commissioners found that most of the industry's trade, employment, and financial indicators deteriorated over the POI due to a combination of output-related (*e.g*, loss of export shipments, higher unit costs due to less production) and adverse revenue effects (*i.e.*, reduced prices due to lower raw materials costs, unused capacity, and intra-industry competition). *See Views* at 42–43. They concluded, however, that those conditions were due to the decline in exports, resulting in underutilized capacity and more intense competition over market share, and that subject imports "did not take significant market share away from the domestic industry and also did not have significant price effects". *Id.* at 42. Because the domestic industry's total capacity remained the same throughout the POI and also because its market share remained essentially stable while domestic shipments increased, ITC did not find the domestic industry to have been materially injured by reason of the subject imports. *See id.*

Recognizing the existence of potential differences between the industries in the subject countries (especially between Japan and the others), ITC found reasonable overlap of competition among subject imports from all seven, and between subject imports from each country and the domestic like product; therefore, it exercised its discretion to cumulate subject imports from all of them. *See id.* at 47. Based thereon, it found no threat of material injury by reason of subject imports, as it found no record evidence that the trending increase in subject import volume and market share (and the reasons therefor) would change in the imminent future. It also found no evidence on the record that any increase in subject imports would likely affect the domestic industry adversely in the imminent future, inasmuch as increasing imports had not adversely affected the domestic industry, and that the increasing demand over the POI and the conditions of competition in the U.S. market were unlikely to change appreciably (from the perspective of the time of ITC's investigation). *See id.* at 48–49.

ITC also found that capacity in the cumulated subject countries, although high both absolutely and relative to apparent U.S. consumption, increased over the POI and was projected to increase further. Unused capacity was greater in interim 2013 than in interim 2014, and was projected to decline further in 2014 and further still in 2015. Production increased over the period and was expected to increase in 2014 and 2015. *See id.* at 49. The Commission noted that a rather high portion of the aggregate production of GOES in the subject countries was used to meet their respective home markets' demand. Shipments to the home markets increased over the period, which ITC

expected to continue to increase. Exports to other markets increased between 2011 and 2013, and were projected to increase in the future as well. The ratio of subject export shipments to the United States as a share of total shipments was steady throughout the period and was projected to remain so in the future.

ITC found that the data indicated the United States is not a principal export market for the cumulated subject industries. In view of the subject industries' projection of increasing shipments to the home markets and exports to other countries and their very limited reliance on the U.S. export market, the Commission found that significantly increased imports of the subject merchandise into the United States were not likely in the then-imminent future. Although ITC recognized that U.S. prices for GOES have been and will likely continue to be higher than prices in other markets, it indicated that this is not a factor that led the subject industries to direct an appreciably larger share of their export shipments to the United States from 2011 to 2013, and there was, at the time, no indication in the record that this is likely to change, *i.e.*, even if subject imports from the cumulated subject countries were to increase, ITC did not find that any such increase would likely threaten material injury to the domestic industry given that the significance of the volume of subject imports did not cause material injury to the domestic industry over the POI. *See Views* at 49–50.

The Commission recognized that China ("PRC") imposed antidumping duties on GOES from Russia that became effective in 2010, but it emphasized that those duties were already in effect throughout the POI. Also, while the Indian Steel Ministry was reported to have effectively banned imports of low-grade electrical steel in June 2011, the record did not indicate that such restriction resulted in diverting a volume of subject imports to the United States that materially injured the domestic industry during the period, nor was there any indication that this would change in the imminent future. *See id.* at 51. U.S. importers' inventories also fell over the POI, and although inventories of the subject merchandise held in the subject countries increased from 2011 to 2013, they were also projected to decline in the future. *See id.*

With regard to likely price effects, ITC found that, notwithstanding prevalent underselling, the subject imports did not have a significant adverse effect on prices for the domestic like product and that the domestic industry was therefore not materially injured by reason thereof. *See id.* at 52. ITC also found that, while some continued increase in subject import volume might occur in the imminent future, any such increase would likely not be significant nor be suffi-

cient to have any adverse effects on the domestic industry because imports of the subject merchandise were unlikely to enter at prices that would be likely to have a significant depressing or suppressing effect on domestic prices or to increase demand for more imports. *See id.* Moreover, having found no significant causal relationship between the subject imports and the domestic industry's performance during the POI, notwithstanding the domestic industry's declines in performance and operating income levels, the Commission had little reason to believe that any further deterioration of the condition of the domestic industry would be "by reason of" the subject imports in the imminent future. *See id.* ITC also found that subject imports had not had significant actual or potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product. *See id.* at 53.

II

The court necessarily has perused plaintiffs' submissions contesting ITC' s determinations as well as those filed by the intervenor-defendants in support thereof. The content quality of all the papers is such as to obviate the burdening of the parties with oral argument, and the motion therefor can be, and it hereby is, denied. Moreover, the papers contain business confidential information that need not be recited or referred to herein, save two "dramatic" events that occurred during the period of investigation. *See* Opposition of intervenor-defendants JFE Steel Corporation and Nippon Steel & Sumitomo Metal Corporation ("JFE/NS&SM") at 3–4.

A

Judicial review examines whether a determination is supported by substantial evidence on the administrative record and is in accordance with law, which necessarily frames the issues. *See* 19 U.S.C. §1516a (b) (1) (B) (i). If the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"[3], taking into account the entire record, including whatever "fairly detracts", then the determination must be sustained. *E.g., Atlantic Sugar, Ltd. v. United States,*744 F.2d 1556, 1562 (Fed.Cir. 1984). If an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made"[4], that is

[3] *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)

[4] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks deleted).

sufficient, for "two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966).

ITC is also presumed to have considered all of the information in the administrative record. *E.g., Granges Metallverken AB v. United States,* 13 CIT 471, 479, 716 F.Supp. 17, 24 (1989) . In other words, even if the record contains some evidence to which a complainant can point that tends to detract from an administrative conclusion, that does not, necessarily, render the conclusion unreasonable. *E.g., Atlantic Sugar,* 744 F.2d at 1563.

(i)

The plaintiffs first contend ITC' s price effects analysis is not supported by substantial evidence on the record. The relevant statute requires consideration of whether (1) "there has been significant price underselling by the imported merchandise relative to the price of products manufactured in the United States" and (2) whether "the effects of subject imports have depressed prices, or prevented price increases that otherwise would have occurred, to a significant degree". 19 U.S.C. §1677 (7) (C) (ii) . The plaintiffs argue that the price effects analysis is undermined by the fact that ITC merely acknowledged the "direct importer" data but otherwise ignored them and relied only upon the "traditional" pricing data. *Compare* Plaintiffs' Memorandum of Law at 21–23 *with Views* at 35–37. They claim it was erroneous for the agency not to have considered the direct importer data "in tandem" with the "traditional" data, and they tabulate those record data on page 23 of their brief, referencing *Staff Report,* V-9 to V-16 & Appx. D at D-6 to D-15, CDoc 254. *See also* Plaintiffs' Reply, p. 7.

The *Views* indicate that, while those data do indicate that subject imports were priced lower than the domestic like product in 17 of 30 comparisons for imports from Japan, 25 of 28 comparisons for imports from Poland, and seven of eight comparisons for imports from Russia, ConfRec at D-3 to D-4, PubRec at D-3, they already acknowledged that lower prices are prevalent in the price comparisons. Moreover, for the highest volume of shipments of U.S.-produced product, *4b*, the incidence of higher and lower prices is mixed. *See* CR/PR, Table D-5. The volumes of imports involved in these comparisons are quite small. When compared to the subject imports that are not directly imported by end users, those few direct purchases could not have led the prices of the domestic like product downward. *Views* at 40 n. 150, referencing Appendix D to the *Staff Report.*

The plaintiffs contend that the percent of total subject imports represented by the direct importer data volume can hardly be characterized as "quite small" given that ITC acknowledged the "significance" of the percentages as compared with shipments of subject merchandise from the U.S. producers and from Japan, Poland and Russia; that the direct importer data account for a sizeable percent of the total volume of pricing data on the subject imports[5]; that ITC has found significant injurious effects in several recent investigations involving even lower U.S. shipments of imports[6]; and that "quite small" is "directly at odds" with ITC's findings that the direct importer data accounted for sizeable percentages of total reported subject imports from Japan, Poland, and Russia during the POI. Plaintiffs' Memorandum of Law at 31, referencing *Views* at 32 n. 116. Furthermore, the plaintiffs contend their tabulation confirms that the volume of the direct importer data exceeds the comparable "traditional" data for six out of ten pricing products and that the volume of imports from Japan, Poland and Russia covered by the direct importer data likewise exceeds the comparable traditional pricing data.

The defendant maintains that the plaintiffs are improperly asking the court to substitute judgment for it on such matters. *E.g.*, Defendant U.S. International Trade Commission's Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Defendant's Response") at 21, referencing *Co-Steel Raritan, Inc. v. Int' 1 Trade Comm'n*, 357 F.3d 1294, 1309 (Fed.Cir. 2004) (the "court is not empowered to substitute its judgment for that of the agency"), and *Nippon Steel Corp. v. Int'l Trade Comm'n,* 345 F.3d 1379, 1381 (Fed.Cir. 2003) ("[u]nder the statute, only [ITC] may find the facts and determine causation and ultimately material injury"). Indeed, the appellate court has recognized that it is neither "surprising nor persuasive" that parties plaintiff are able to point to "evidence of record which detracts from the evidence which supports [ITC]'s decision" or can "hypothesize a reasonable basis for a contrary determination", *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed.Cir. 1984), and the Commission here maintains that it "properly relied on

[5] *I.e.*, total subject import volume in Appendix D plus total subject import volume reported in Section V. *See* Plaintiffs' Memorandum of Law at 30 & n. 32.

[6] *See id.* at 31, referencing *Calcium Hypochlorite From the PRC,* Inv. Nos. 701-TA-510 and 731-TA-1245 (Final), USITC Pub. 4515 (Jan. 2015) p. 17 ("[t]he pricing data accounted for approximately ... 21.3 percent of subject imports in 2013, with lower coverage for subject imports in other years of the POI"); *Multilayered Wood Flooring From the PRC,* Inv. Nos. 701-TA-476 and 731-TA-U79 (Final), USITC Pub. 4278 (Nov. 2011) p. 27 ("[p]ricing data reported by these firms accounted for approximately . . 14 percent of U.S. shipments of imports from subject producers in [the PRC] in 2010"); *Aluminum Extrusions From the PRC*, Inv. Nos. 701-TA-475 and 731-TA-1177 (Final), USITC Pub. 4229 (May 2011), p. 22 ("[p]ricing data reported by these firms accounted for approximately four percent of 2010 U.S. shipments of subject imports from [the PRC]").

price comparisons that reflected equivalent stages of trade" as the "best information of record", that the traditional data included end-user overage, and that "inclusion" of the importer data in accordance with plaintiffs' arguments merely increases the amount of subject import pricing data in percentage terms but does not render unreasonable ITC's "reliance on data showing head-to-head competition between domestic and imported products." Defendant's Response at 4, 25.

It has long been the rule that ITC's determinations must take "into account the entire record, including whatever fairly detracts from the substantiality of the evidence"[7], and plaintiffs' arguments do not, to this point, precisely show what it is about the direct importer data that "fairly detracts" from ITC's reliance upon the traditional importer data in making its determination. The plaintiffs have recast the record to their liking, but it can not be concluded therefrom that the agency has not taken into account the entire record or that its apparent assignment of less weight to the direct importer data was unreasonable. As the defendant points out, the traditional pricing data encompass the majority of pricing data from four subject countries and at least some of the data from all countries, and plaintiffs' own calculations show that the subject import volumes for pricing products *1a*, *1b*, and *2b* remain "relatively" low even when the direct import pricing data are included. It points out there are no product *1a* direct imports, product *1b* would show relatively few short tons among the aggregated direct import and traditional pricing data as compared to the short tons of domestically produced product, and similarly for pricing product *2b*, *i.e.*, imported versus domestically produced short tons, respectively. *Compare* Plaintiffs' Memorandum of Law at 23 *with Staff Report,* Tables V-2, V-3, V-5.

Having acknowledged "lower prices are prevalent in the price comparisons", ITC concluded that the "few" direct purchases by end users as compared with their traditional pricing data counterparts could not have led the prices of the domestic like product downward. This court is not positioned, by law, to overturn valid Commission factual findings or its reasonable conclusions based thereon. *See* 19 U.S.C. §1516a(b) (1) (B) (I). For that matter, contrary to plaintiffs' argument, the significant underselling that the direct importer data further reveal (in addition to that already indicated by the traditional pricing

[7] *Atlantic Sugar, supra,* 744 F.2d at 1562 (footnote omitted). For example, the direct importer data, covering approximately [[ ]] percent of U.S. producers' shipments, would also seem to have resulted from a form of "head-to-head" competition. Nonetheless, ITC's "presumptive awareness" is of ABB Inc.'s position of paying "premium" prices for domestic sources, which appears to be indication of willingness to engage in less "vigorous" competition.

data) does not "readily explain the pricing declines experienced by domestic producers for those products."[8]

(ii)

The plaintiffs stress that ITC did not discuss product *3a* at all[9], a product that accounted for the second highest volume of the ten pricing products and a greater volume than any of the three products identified in the *Views* as reflecting "a significant amount of competition between the domestic like product and the subject imports" but which price declines ITC found to have been "comparable to the decrease in raw material costs." *Views* at 37. The plaintiffs point out that the decline in domestic industry prices for product *3a* was nearly [[ ]] times larger than those declines for products *2a*, *4b*, and *5b* and that the absolute volume of subject imports under product *3a* was nearly ([ ]] as great as the volume for *2a* and approximately three times as high as the volumes of products *4b* and *5b* reflected in the traditional importer pricing data.

The defendant responds that it did not ignore detracting evidence; the Commission's discussion, verbatim, of price declines is as follows:

> *Some* of the pricing comparisons, *such as* for pricing products *2a*, *4b*, and *5b*, involve volumes of subject imports that compete directly with the most comparable domestic like product. Other pricing comparisons, *such as* for pricing products *1a*, *1b*, and *2b*, involve far smaller volumes of subject imports.

Id. at 35–36 (emphasis added). In other words, it

> did not state that these particular correlations applied to all 10 pricing products. What is evident from what it did state is that it examined all the pricing products and found certain correlations and trends with regard to specific products that indicated that subject imports were not the cause of the domestic industry's declining prices. Given that the evidence pertaining to most of the pricing products demonstrated these trends and correlations, [it] was not obligated to explain away a correlation with respect to one pricing product out of 10.

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[8] Plaintiffs' Memorandum of Law at 26. To support their argument, the plaintiffs also tabulate the degrees of underselling reflected in the direct importer data. *See id.* at 27, referencing *Staff Report,* Appx. D. ITC is presumed, however, to have taken such information into account.

[9] The plaintiffs also complain of a lack of discussion of pricing product *3b*, but they focus their discussion on pricing product *3a*.

The defendant draws attention to the fact that the volumes for *3b* are " quite small", and "the margins of overselling significantly outweighed the margins of underselling." Defendant's Response at 36 n. 30, referencing *Staff Report,* Table V-7.

Defendant's Response at 35–36.

The plaintiffs reply that product *3a* is precisely the "one pricing product out of 10" that contradicts the majority's conclusion that the pricing products with the highest volumes of subject imports had the smallest price declines.[10] They aver that the price declines they suffered on product *3a* were highly significant between the first quarter of 2011 and the first quarter of 2014,[11] and that the pricing information therefor "directly contradicts" ITC's analysis of products *2a*, *4b* and *5b*, on which it also found "there was a significant amount of competition between the domestic like product and subject imports" and upon which ITC relied "so heavily" in concluding there was no connection between the price declines suffered by the domestic industry and the subject imports.[12] The plaintiffs argue the absence of any discussion of import volumes and pricing trends for product *3a* in the *Views* majority opinion amounts to "a grievous oversight indicative of an unwillingness to consider evidence detracting from its finding that the subject imports were not a cause of the price depression suffered by the domestic industry." Plaintiffs' Reply at 11–12.

The plaintiffs further contend that, for the defendant to respond that it "did not state that these particular correlations applied to all 10 pricing products" but that it nevertheless "examined all the pricing products and found certain correlations and trends with regard to specific products that indicated that subject imports were not the cause of the domestic industry's" declining prices amounts to *post hoc* rationalization. *See Usinor Industeel S.A. v. United States,* 26 CIT 467, 478 (2002) ("'[w]here an explanation is lacking on the record, *post hoc* rationalization for [the Commission's] actions is insufficient' and remand may be appropriate for further explanation") (quoting *The*

[10] The plaintiffs contend product *3a* reflected the highest volume of subject imports in direct competition with the comparable domestic industry product of any of the products in the traditional importer pricing database on which the ITC majority based its pricing analysis. Subject imports of this product accounted for fully [[ ]] percent of the total volume of all cumulated subject imports. *See* Plaintiffs' Memorandum of Law at 23. In their opinion, subject import volumes of product *3a* were significant in absolute volume and in relation to domestic consumption thereof, with a total subject import volume of [[ ]]short tons as compared to total domestic producer shipments of [[ ]] short tons, *i.e.*, [[ ]] percent of domestic consumption of the product. *See Staff Report* at V-10. Further, they argue underselling by the subject imports of pricing product *3a* was predominant, occurring in a majority of possible comparisons. *See id.* at V-13.

[11] *See Staff Report* at V-13 and V-27.

[12] *I.e.*, because price declines for products *2a*, *4b* and *5b* were "comparable to the decrease in raw material costs." *Views* at 37. *See* Plaintiffs' Reply at 11. They emphasize that the decline in the domestic industry's prices for product *3a* was nearly two times larger than those for products *2a*, *4b* and *5b*, and the absolute volume of product *3a* imports was nearly twice as great as the volume for product *2a*, and approximately three times as high as the volumes for *4b* and *5b* in the traditional importer pricing data. Plaintiffs' Memorandum of Law at 23, referencing *Staff Report,*V-27.

Timken Co. v. United States, 20 CIT 1115, 1118, 937 F.Supp. 953, 955 (1995)). They claim the defendant discusses only the pricing products that fit within ITC' s conclusions and fails to address the pricing products that do not.

This court cannot concur that the defendant goes beyond clarification into the realm of new rationale, and plaintiffs' overall presentation on this point does not demonstrate or persuade that the Commission's determination is either unsupported by substantial evidence or not in accordance with law. It did not conclude that all pricing products with the highest volumes of subject imports had the smallest price declines and *vice versa,* it identified three products with the most substantial price declines and three products in which there had been a significant amount of competition, with price declines that ITC further found comparable to the percentage decrease(s) in raw materials costs. It therefore concluded there was a lack of correlation among all such data between price declines and imports.

ITC' s conclusion is not unreasonable, and plaintiffs' arguments on this issue do not persuade that the Commission has "entirely failed to consider an important aspect of the problem" within the meaning of *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That is, ITC's presumptive interpretation of the record *as a whole* does not appear inaccurate or unsupported by the substantial evidence of record even in the absence of explication on the subject of product *3a* in isolation. Here again, plaintiffs' argument is essentially for the court to substitute its judgment for that of the agency on the matter, which cannot occur in accordance with the standard of its judicial review. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("as to matters . . . requiring expertise a court may [not] displace the [agency]' s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

Because the Commission "'is presumed to have considered all of the evidence on the record,'" it is "'not required to explicitly address every piece of evidence presented by the parties'" during an investigation. *Nucor Corp. v. United States,* 28 CIT 188, 234, 318 F. Supp. 2d 1207, 1247 (2004) (quoting *USEC Inc. v. United States,* 34 Fed. Appx. 725, 730–31 (Fed. Cir. 2002)). Instead, it need only address the "issues material to [its] determination" so that the "path of the agency may reasonably be discerned." Statement of Administrative Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, vol. I, at 892 (1994). On the particular point raised here, the plaintiffs do not persuade that expanded discussion addressing the data for product

3a is "material" to ITC's overall price effects analysis.

(iii)

The plaintiffs next contest ITC's position on underselling, namely that it "reasonably found the significance of [the] underselling to be mitigated by the lack of significant impact on the domestic industry's market share, as the domestic industry lost only [[ ]] percentage points of market share during the [POI]". Defendant's Response at 2. They argue that nowhere in its analysis does ITC consider the domestic industry's statements concerning its strategy of holding market share and lowering its prices to meet lower-priced competition from subject imports, and that what reasoning ITC does offer is circular, essentially writing the price effects analysis requirement out of the statute:

> If Congress had wanted ITC never to reach an affirmative injury determination unless the subject imports demonstrated a *significant* market share impact, it would have written the law to make the market share impact a necessary prerequisite to proceed to a price effects analysis. The statute, however, is not written in this manner. Rather, the volume and price impact analyses are equal and coextensive elements of the law, and require ITC to take into account such circumstances, as demonstrated by the record, where domestic producers lowered prices rather than cede market share.

Plaintiffs' Reply at 12–13 (emphasis in original), referencing *Sioux Honey Ass' n v. Hartford Ins. Co.* , 672 F. 3d 1041, 1052 (Fed.Cir. 2012) ("'[i]t is a long-held tenet of statutory interpretation that one section of a law should not be interpreted so as to render another section meaningless'") (quoting *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1362 (Fed.Cir. 2000)) Similarly, the plaintiffs contend defendant's assertion that ITC' s "analysis of lost sales and revenues responses was likewise reasonable, particularly given that there were no shifts in market share"[13] implies that a decline in domestic industry market share is a necessary precursor to any assessment of the price effects of the subject imports. This reasoning, the plaintiffs argue, once again effectively writes out the price effect section of the statute, as it reflects an assumption that market share impact is a threshold issue. And, ironically, the plaintiffs further point out, ITC did find the volume of subject imports "significant in absolute terms and relative to consumption in the United States"[14], but found that

[13] Defendant's Response at 5.

[14] *Id.* at 15.

the lack of a shift in market share away from the domestic industry indicated that no price impact was evident. The plaintiffs argue ITC must explain why a lack of market share shift is evidence of no negative price effects where domestic producers lowered prices to protect market share.

From this court's perspective, the main problem with such argument is that, notwithstanding the *Views'* regard of relatively stable market share as indicating "mitigation", the *Views* do not unequivocally indicate treatment of market share as a prerequisite or precursor to determining material injury. Market share is, of course, but one of many factors the Commission evaluates in order to determine "impact", 19 U.S.C. §1677(7) (C) (iii), and it is, of course, also further directed to consider in its evaluation of "price" whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree"[15], but finding the existence of domestic industry price reduction(s), in order to maintain market share, is not, *ipso facto*, necessarily indicative of material injury "harm" within the meaning of the statute, as there may be "such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports" that bear on the analysis of a given situation. 19 U.S.C. §1677(7) (B) (ii). The *Views'* reference to "mitigation" and a lack of market share shift must be regarded in the context of the other economic factors ITC considered as present in the investigation, in particular the decreases in capacity utilization from the "systemic" shocks that both plaintiffs experienced during the POI, and not solely with regard to subject imports. *See Views* at 37–40.

(iv)

The plaintiffs devote much of their briefs arguing against ITC' s reasoning on the products' price declines. *See, e.g., id.* at 44 ("[t]he price declines ... were a result of lower raw materials prices, unused capacity and intra-industry competition"). The phrase "intra-industry competition" is found only once, but, as a matter of the record and ITC's conclusions, it dominates the *Views.*

The plaintiffs advance numerous lines of attack thereon, none of which prove availing. They acknowledge that, if high-permeability GOES is priced low enough, it may be used in place of conventional product in certain applications. However, they argue, the reverse is not true, at least for certain applications[16], and given that demand for

[15] 19 U.S.C. §1677 (7) (C) (ii)(II) .

[16] See *Views* at 29 n. 105.

high-permeability GOES increased significantly during the POI, largely due to higher efficiencies mandated by the U.S. government for power transformers, they contend that "one would [have] expect[ed] to *see* prices obtained by the sole domestic producer to be increasing", which was not the case.

Considering the record as a whole, ITC concluded *why* that was not true. *See Views* at 37 ("[t]he change in these prices was comparable to the decrease in raw material costs" and "[d]ecreasing capacity utilization[ ] contributed to the declines in prices for domestically produced products") (footnote omitted). Contesting that conclusion, the plaintiffs here contend that the *Views* glide over the fact that only AK Steel produced the high-permeability products *4b* and *5b* and that intra-industry competition was therefore not a factor in the declines in the prices for those products[17], and that pricing information thereon demonstrates that subject imports had significant price effects.

Critical of defendant's response, p. 36, that "[r]esting the pricing analysis on a product manufactured by only half of the domestic industry when the record contains pricing data pertaining to the industry as a whole would run counter to this mandate", the plaintiffs argue such reasoning is "confounding" because ITC has never limited its pricing analysis to those products that are made by all members of the domestic industry, and it is those exact products (*4b* and *5b*) on which it rests "so much" of its pricing analysis and its conclusion that the pricing products with relatively high import levels showed relatively low price declines.

ITC's defense (as paraphrased by the plaintiffs) is that, despite increased demand for products *4b* and *5b*, and despite falling prices therefor, and also absent "intra-industry" competition therefor, ITC recognized that prices declined during the POI "for all domestically produced pricing products"[18] (which obviously included products *4b* and *5b*), and that such declines were due to (1) the domestic industry's declining exports of GOES; (2) knowledge by U.S. purchasers of excess U.S. industry capacity; (3) Allegheny Ludlum's loss of a contract with a large purchaser; and (4) decreased raw materials costs. *See* Defendant's Response at 37, quoting *Views* at 35.

The plaintiffs argue "each"[19] of the above explanations is not sup-

[17] During the POI, Allegheny Ludlum had only made substantial investments in research and development of high-permeability GOES but not in comercial-quantity production thereof. *See* Transcript of ITC Hearing on July 24, 2014 (hereinafter "Tr."), PDoc 184, at 28.

[18] Plaintiffs' Reply at 15, quoting Defendant's Response at 31 (court's limitation of quoted passage).

[19] Noteworthy here is that plaintiffs' briefing does not address the domestic industry's declining exports of GOES during the POI.

ported by substantial evidence. *See, e.g.* Plaintiffs' Memorandum of Law at 42–49. They begin by contending ITC "determined" that competition between Allegheny Ludlum and AK Steel for the business of Howard Industries "resulted" in the significant declines in prices at which the domestic industry was able to sell GOES in the U.S. market during the POI. They claim "intra-industry competition" could not have been the sole or even a primary cause of U.S. price depression because Allegheny Ludlum did not produce high-permeability GOES during the POI, and because AK Steel, the only domestic producer of such GOES, would have had every motivation to negotiate for the highest price possible for that product, such that the only price competition that would have motivated AK Steel to reduce its prices for high-permeability GOES must have resulted from the other sources that produced these products, namely, imports of high-permeability GOES from Japan, Korea, and the PRC. They charge the *Views* with glossing over the information on the record of the prices at which Howard Industries purchased GOES during the POI as well as the circumstances of the expiration of its contractual arrangement with Allegheny Ludlum at the end of 2012, which involved Howard Industries countering a price offer from AK Steel for purchases in 2013 with lower priced subject imports, all of which demonstrates that the prices at which Howard Industries purchased GOES was not and could not have been affected by competition between Allegheny Ludlum and AK Steel.

The plaintiffs also contend defendant's response raises a number of points that are incorrect. First, in reply to its response that they seem to "question the notion that there was intra-industry competition between the two domestic producers", the plaintiffs contend their argument is not that there was no intra-industry competition in general, but that the facts of record do not establish that there was any significant intra-industry competition between them for Howard Industries' business.[20] They further contend defendant's response is ironic, given that the only example in the *Views* of intra-industry competition cited is over the Howard Industries account.

[20] In a footnote, the plaintiffs further complain of ITC's response quoting the testimony of an Allegheny Ludlum official for the proposition that his company and AK Steel "compete vigorously", but without quoting testimony by this same official and by his counterpart at AK Steel that identified unfairly traded subject imports as the cause of significant price declines in the U.S. market. *See, e.g.*, Tr. at 30, PDoc 184 (stating that Allegheny Ludlum was "confronted with very low priced imports as early as 2011, well before our loss of Howard Industries' business in 2013" and that the company was "able to earn a reasonable return . . . until the low-priced imports entered the market and caused devastating declines in pricing") (testimony of Mr. Polinski); *id.* at 24–25 ("[w]hile our company competes aggressively with Allegheny Ludlum, our sales staff has been told repeatedly by customers that we must lower our prices in order to retain their business, or they will purchase lower-priced imported GOES from the subject countries") (testimony of Mr. Petersen of AK Steel).

Second, the plaintiffs contend that defendant's response, as with ITC analysis in its administrative proceedings, errs in attributing any of the declining prices at which Howard Industries purchased GOES to competition between Allegheny Ludlum and AK Steel. *See* Defendant's Response at 39 (quoting *Views* at 38–39). *See also* Response Brief of intervenor-defendant ABB Inc. ("ABB' s Response") at 13; JFE/NS&SM Opposition at 31–34; and Response Memorandum of intervenor-defendant ThyssenKrupp Electrical Steel GmbH at 6. Defendant's response attributes declines in prices paid by Howard Industries for GOES purchased from Allegheny Ludlum between 2011 and 2012 to intra-industry competition.[21] The plaintiffs state that Allegheny Ludlum's pricing during that period was set by a long-term contract and, thus, Allegheny Ludlum had no reason to (and did not) negotiate lower prices with Howard Industries *in response to* purported competition from AK Steel. *See* Plaintiffs' Memorandum of Law at 43–45 (emphasis added). Accordingly, they contend record evidence does not support ITC's determination that the declines in prices at which Howard Industries purchased GOES between 2011 and 2013 were due to competition between Allegheny Ludlum and AK Steel for that account. Further, the plaintiffs point out, ITC's *Views* do not identify a single other instance of intra-industry competition that purportedly drove down prices in the U.S. market.

Summarizing, the plaintiffs maintain that while Howard Industries is a significant purchaser of conventional GOES, ITC's "failure" to identify "any other evidence in support of the intense intra-industry competition that purportedly drove down market prices demonstrates its finding is not supported by substantial evidence." Plaintiffs' Reply at 18–19 & n. 27.

Third, in regard to defendant's response that "whether or not the two companies believed they were competing with one another for Howard Industries' business is beside the point," because ITC "was focused on what transpired with respect to prices", the plaintiffs reply that this statement significantly departs from the analysis in ITC's *Views,* which attributes the declining prices for GOES over the period of the competition between the two domestic producers. *See Views* at 39 (attributing the decline in prices that Howard Industries paid for GOES over the POI to "increased competition between domestic pro-

[21] The plaintiffs also complain of ITC's attribution of price declines to "widespread knowledge" among U.S. purchasers of the domestic industry's excess capacity, which it concluded allowed the purchasers to negotiate lower prices. *See Views* at 39. The plaintiffs contend the only credible record evidence cited by ITC in support of "widespread" knowledge is the testimony of a single industry witness. Thus, they argue that, while ITC also cites the testimony of a consultant retained by a Japanese producer for ITC's investigation, his testimony "makes clear" it is based on speculation and not personal knowledge. *See* Plaintiffs' Memorandum of Law at 53–54.

ducers"). They argue this amounts to a "retreat" from ITC's findings during the underlying administrative proceedings and reflects the lack of substantial evidence supporting that finding.

Fourth, the plaintiffs contend that, in seeking to identify some record evidence to support ITC' s conclusion that intra-industry competition was the cause of the declining prices at which Howard Industries purchased GOES during the period, the defendant states that the plaintiffs do not contend that AK Steel had no reason to lower its prices. Defendant's Response at 40. To the contrary, the plaintiffs contend, they explained to ITC that AK Steel lowered the prices it offered to Howard Industries in 2013 in response to lower priced imports. *See* Plaintiffs' Memorandum of Law at 46, discussing the declaration of one [[ ]] of AK Steel, who was personally responsible for negotiating the contract under which AK Steel sold GOES to Howard Industries in 2013, and citing the petitioners' July 31, 2014 Post-Hearing Brief, Ex. 7 at 16, CDoc 218, PDoc 200. The defendant asserts the information in that declaration is inconsequential. The plaintiffs disagree, claiming it is the only information on the record that specifically addresses why AK Steel lowered the prices at which it sold GOES to Howard Industries in 2013. *See* Petitioners' July 31, 2014 Post-Hearing Brief, Ex. 7 at 16, CDoc 218, PDoc 200. As such, they contend, "there is no record information to support a conclusion that the decline in prices in 2013 at which AK Steel sold GOES to Howard Industries was due to anything other than subject imports", leaving unsupported by substantial evidence the Commission majority's conclusion that the decline was due to intra-industry competition.

Fifth, the plaintiffs argue that the explanation in defendant's response for why ITC accorded little weight to the [[ ]] declaration mischaracterizes its analysis. In particular, defendant's response asserts that it "explained that there was contradictory evidence in the record" and that it "found other evidence to outweigh the declaration, which was reasonable, and is supported by substantial evidence." Defendant's Response at 41 n. 36. The plaintiffs argue these statements are inconsistent with the *Views.* In its entirety, the plaintiffs point out the discussion therein of the [[ ]] declaration states:

> *[S]ee also* Petitioners' Posthearing Brief, Exh. 1 at 48 (petitioners claim Howard Industries used its knowledge of low import pricing to leverage down AK Steel's contractual prices). This claim was based on a confidential declaration. As such, it cannot be verified as Commission staff attempts to do with "lost revenue" allegations.

Views at 40 n. 148. Thus, the plaintiffs argue, contrary to the representations in defendant's response, the *Views* do not state that other record evidence outweighs the [[ ]] declaration, much less cite to or even reference any such record evidence. They contend, as argued above, that ITC could not have cited any such record information because there is none that contradicts that declaration's explanation of the circumstances that resulted in AK Steel's decision to lower the prices at which it sold GOES to Howard Industries in 2013.

Sixth, the plaintiffs contend that the defendant also mischaracterizes ITC's finding regarding U.S. purchasers identifying AK Steel and Allegheny Ludlum as "price leaders". They argue that ITC misinterpreted the purchasers' responses in concluding that the domestic industry was "responsible" for leading prices down for GOES in the U.S. market. *See* Plaintiffs' Memorandum of Law at 49–52. The defendant counters that "ITC did not presume that prices moved in any particular direction — up, down, or remained stable when it summarized the questionnaire responses as indicating the domestic producers were the price leaders". Defendant's Response at 43. *See also* JFE/NS&SM Opposition at 28–29. The plaintiffs claim that the Commission *Views* contradict this statement: "We find such widespread knowledge of existing domestic unused capacity enabled purchasers to obtain lower prices. *These observations are consistent with evidence in the record that the domestic producers are the price leaders in the industry."* Plaintiffs' Reply at 21, quoting *Views* at 39–40 (plaintiffs' emphasis). Thus, they claim, contrary to the suggestion in defendant's response, the *Views* make clear the agency's conclusion that the domestic industry — as purported price leaders — was responsible for leading prices for GOES in the U.S. market downward. To the contrary, the plaintiffs continue, ITC's questionnaire makes clear that a "price leader" is not necessarily the lower-priced supplier, and other statements made by purchasers demonstrate that they identified the domestic producers as "price leaders" based on their efforts to increase the prices at which GOES was sold in the U.S. market.

Seventh, the plaintiffs emphasize that the price declines on products *4b* and *5b* during the POI far exceeded the declines in raw materials costs therefor. Indeed, they stress that ITC stated that those products showed "a significant amount of competition between the domestic like product and the subject imports", *Views* at 37, and they object to ITC's conclusion that the declines in the pricing products (at least for *2a*, *4b*, and *5b*) were attributable to declines in raw material prices rather than subject imports. *See* Plaintiffs' Memorandum of Law at 36–37.

Here, assuming that delving further into this point might assist the reader's understanding, it should be recalled that ITC observed that prices for products *2a*, *4b*, and *5b* declined, while the cost of raw materials used to produce one ton of GOES decreased on average by a comparable percentage. *See Views* at 37. The plaintiffs argue that, while the percentage declines in product pricing may have been similar to the decline in raw materials costs, examination of the record shows that the absolute price declines far exceed the decline in raw materials costs. Raw material costs declined by [[ ]] per ton between 2011 and 2013, while U.S. prices for the three pricing products fell between [[ ]] per ton and [[ ]] per ton during the same period, and the average unit value of U.S. shipments declined by [[ ]] per short ton. *See* Plaintiffs' Memorandum of Law at 37; *Staff Report* at C-4, V-15, V-16, and V-27. The plaintiffs point out that the decline in domestic producer prices for products *4b* and *5b* was greater than was justified by the decline in raw materials costs, and they claim the "causal connection" to subject imports is demonstrated by the underselling data itself, which show underselling in comparisons for product *4b* and for product *5b* in the traditional pricing data, as well as in 6 of 13 comparisons for product 4b and 11 of 15 comparisons for product 5b in the direct importer data. *See Staff Report,* V-15, V-16, and Appx. D, D-13 and D-15. And, noting defendant's response that the plaintiffs cannot "choose" which methodology (*e.g.*, absolute basis) ITC uses in its analysis and that it is free to choose its own methodology so long as it is reasonable[22], the plaintiffs counter in their reply that the [[ ]] decline in raw material costs accounts for just 13 to 17 percent of the price declines for the products under review.

Eighth, the plaintiffs argue that, although defendant's response relies on ABB's assertions that it "negotiates its sales with U.S. producers well before it negotiates sales with its foreign suppliers" in support of ITC' s conclusion that "subject imports of pricing products *4b* and *5b* did not lead domestic prices downward," it is clear from the record that ABB purchased subject imports of products *4b* and *5b* that undersold the prices it paid to the domestic industry in 16 of 26 comparisons. They contend that, even though the Japanese respondents asserted that their heat proof, high-permeability products *4a* and *5a* are superior to the high-permeability products offered by AK Steel (and should thus have commanded a premium) , the prices paid by ABB for those products were less than the prices ABB paid for

[22] Defendant's Response at 34 (maintaining that the plaintiffs "simply assert that [ITC] should choose calculations for its analysis that are more favorable to the outcome they would like").

domestic non-heat-proof GOES products *4b* and *5b* in every single comparison during the POI. *See Staff Report*, D-12 to D-15.

Considering the foregoing, it is plain from the *Views* and *Staff Report* that ITC found various factors apart from import underselling that were behind the domestic industry's product pricing. It fairly recognized that "[p]rices declined during the [POI] for all domestically produced pricing products", *Views* at 35, and determined that the factors behind the decline(s) were (1) the large decline in the domestic industry's exports, (2) the widespread knowledge of the resulting unused capacity, (3) Allegheny Ludlum's loss of a contract with a large purchaser, and (4) decreased raw material costs, *id.* at 35–40. It also examined the traditional pricing data to observe that prices for Japanese product *4a* are higher than domestic prices for product *4b*, *Staff Report,* Table V-8; it observed that ABB negotiates its purchases with U.S. producers well before it negotiates with foreign suppliers; and it noted that the vast majority of direct imports for products *4b* and *5b*, *see id.*, Tables D-2 to D-7, indicated to ITC that subject imports of those products did not lead domestic prices downward. ITC pointed to purchaser response to explain its conclusions on price leadership, *Views* at 40 n. 149, and the breadth of knowledge it imputed to purchasers regarding the domestic industry's unused capacity, *id.* at 39 *(see also* Transcript of ITC Preliminary Hearing on Oct. 25, 2013, PDoc 67, at 120–21: "everyone in the industry knows the two reasons why domestic prices are falling" *et cetera),* and ITC is, as it states, "required to assess the domestic industry as a whole", Defendant's Response at 36, referencing *Committee for Fair Coke Trade v. United States*, 28 CIT 1140, 1167 (2004). Plaintiffs' arguments raised on the apparent issue(s) here do not persuade that ITC has not done so, or that its analysis thereof can be held unreasonable, or that the record does not substantiate its four conclusions above. Thus, notwithstanding plaintiffs' attempt to focus "intra-industry competition" on Howard Industry's purchases over the POI and/or the pricing of products *4b* and *5b*, it cannot be concluded that the *Views'* overall assessment of domestic competition during the POI is unreasonable or unsupported by substantial evidence on the record.

(v)

Lastly, with respect to their contention that ITC's price effects analysis is unsupported by substantial evidence, the plaintiffs argue that the record does not support its findings regarding lost sales and revenues and that the Commission failed to address substantial issues they raised.

In making its price effects finding, ITC stated that, "[w]hile there are confirmed lost sales and revenues, they are of minor magnitude and do not outweigh other data in the record showing the lack of significant price effects. "*Views* at 41 (footnote omitted). ITC counted as confirmed only those lost sales and revenues allegations that purchasers explicitly admitted. *See Staff Report,* Table V-12. "The confirmed lost sales do not detract from our analysis, as there were no shifts in market share as discussed above." *Id.* at 41 n. 15 (finding two confirmed lost sales allegations totaling [[$]] and three confirmed lost revenue allegations totaling [[$]]).

The plaintiffs argue ITC failed to analyze reasonably the responses to the domestic industry's lost sales and revenue allegations. Plaintiffs' Memorandum of Law at 55–67. They contend it could not simply examine whether responding purchasers "agreed" or "disagreed" with the allegation, because certain purchasers only "denied" lost sales and lost revenue allegations on "technical" grounds, based for example on a minor factual dispute, but the record contains numerous instances of purchasers otherwise conceding having purchased a lower-priced imported product or using a lower price offer for subject imports to force domestic producers to lower their price to secure a sale. *See id.* at 56, citing Petitioners' Pre-Hearing Brief at 39–45, CDoc 203, PDoc 175; Tr. at 47, 133–34, PDoc 184; Petitioners' Post-Hearing Brief, Ex. 1 at 9–14, 44–49, CDoc 218, PDoc 200.

As exemplar, the plaintiffs point to ABB's response brief where it "unequivocally denied Plaintiffs' lost sales allegations." ABB's Response at 9. They reply that, although ABB claims to have "disagreed" with the lost sales allegations, [[ ]] . *See* Plaintiffs' Memorandum of Law at 58–60.

All told, the plaintiffs argue the record evidence demonstrates that [[ ]] percent (by value) of the domestic industry's lost sales allegations that received a response should be considered confirmed, and that [[ ]] percent (by value) of its lost revenue allegations that received a response should be considered confirmed, on the assumption (or presumption) that a purchaser would make the strategic decision not to support the domestic industry's case by confirming such allegations. *See id.* at 65. Based on this analysis, the plaintiffs contend the confirmed lost sales allegations should total [[$]] and the confirmed lost revenue allegations should total [[$]] *Id.* They add that these figures do not include a significant number of allegations where the purchasers did not respond to ITC's request for information, which, if included, would increase the total lost sales figure to [[$]] and the total lost revenues figure to [[$]]

- or a total of [[$]]. *Id.* at 65–66.

The plaintiffs further add that a certain footnote to the lost sales and revenue summary table in ITC's *Staff Report* confirms an administrative failure to meaningfully evaluate the responses received to ITC's lost sales and lost revenue questionnaires because it states: "[t]his column is not a staff assessment of whether the purchaser comments agree or disagree; rather, it is only reporting whether the purchaser wrote agree or disagree and comments on the allegations." *Staff Report* at V-38.

Defendant's response, the plaintiffs further contend, does not in any manner address the substance of their arguments but asserts they are merely seeking to have the court "reweigh" the evidence on lost sales and revenues[23]. To the contrary, the plaintiffs claim, they seek the court's requiring ITC "for the first time" to consider extensive argumentation made by the domestic industry on three separate occasions in ITC's final phase investigation but that remained completely unaddressed in its *Views.* Although the plaintiffs interpret defendant's response as "belittl[ing]" the significance of the domestic industry's allegations, they point out that the [[$]] in lost revenues over the period would have more than offset the operating loss of [[$]] suffered by the domestic industry in 2013. The plaintiffs insist that the reduced prices that resulted from those lost sales and revenues forced U.S. producers to accept even lower benchmarks for price negotiations on future sales, resulting in an additional negative impact on the domestic industry's financial condition.

The crux of the problem with regard to plaintiffs' arguments, however, is that they ask the court to interfere in ITC's decision to count only "confirmed" lost sales and revenues allegations. It targets what weight the agency assigns to the evidence, a matter within its discretion. While it might have been equally reasonable for ITC to presume the allegations confirmed in the absence of explicit denial as well, the court cannot conclude that ITC's requirement of explicit agreement in order to count an allegation "confirmed" was unreasonable in accordance with *Consolo, supra,* 383 U.S. at 620 ("two inconsistent conclusions from the evidence does not prevent an adminis-

[23] The plaintiffs claim defendant's response minimizes the significance of the domestic industry's lost sales and lost revenue allegations, stating that even if all of the allegations were accepted as true, they would amount to just [[ ]] percent of the domestic industry's total shipments of GOES during the period, and that "[t]hese totals hardly outweigh the other evidence in the record that ITC considered and explained. Defendant's Response at 48. *See also id.* at 49 ("[t]hus, even if all lost sales and revenue allegations were confirmed, substantial evidence supports ITC's findings based on the evidence to which ITC gave the most weight"). Here again, the plaintiffs charge the defendant with *post hoc* rationalization, as they claim the Commission did not complete such an analysis in the underlying investigation.

trative agency's finding from being supported by substantial evidence"). The remainder of plaintiffs' arguments on this issue, therefore, are unavailing.

B

The plaintiffs challenge ITC' s impact analysis, which found that, because the subject imports did not take significant market share away from the domestic industry and did not have significant price effects, the domestic industry was not materially injured by reason of the subject imports:

> The domestic industry's unfavorable trends in operating performance were a combination of adverse output-related effects and adverse revenue effects. These, in turn, were caused by the loss of export shipments, higher unit costs resulting from less production, and reduced prices. However, none of these factors were a function of the subject imports.

Views at 44.

The plaintiffs contend the Commission majority improperly applied the statute's causation standard in not finding subject imports a cause of material injury[24], and they argue it erred in attributing the domestic industry's deteriorating condition entirely to factors other than subject imports. In addition to their arguments over alleged errors in ITC's price effect analysis, they contend it improperly attributed the domestic industry's declining performance to "higher unit costs resulting from less production" and not — at least in part — to subject imports. *See* Plaintiffs' Memorandum of Law at 70–71, quoting *Views* at 44.

[24] They latch onto ITC's statement that the law requires it to determine whether subject imports are "the" cause of material injury to the domestic industry, and they argue the "by reason of" standard(s) in 19 U.S.C. §§ 167ld(b) (l) and 1673d(b) (l) do(es) not require unfairly traded imports to be the "sole" or "principal" cause of injury. Plaintiffs' Reply at 26, referencing *Nippon Steel Co. v. USITC,* 345 F.3d 1379, 1381 (Fed.Cir. 2003) ("an affirmative material-injury determination under the statute requires no more than a substantial-factor showing [t]hat is, the 'dumping' need not be the sole or principal cause of injury" and the "by reason of" standard is satisfied so long as subject imports are more than a minimal or tangential cause of injury; the existence of factors other than subject imports that may have been a greater cause of injury does not prevent an affirmative injury determination). *See also Mittal Steel Point Lisas, Ltd. v. United States*, 542 F.3d 867, 873 (Fed.Cir. 2008).

This court does not regard defendant's use of "the" when describing "cause of *material* injury" (emphasis in original) in its response brief as amounting to a misstatement of the law, since the subheading under which that statement directly appears also states that subject imports were not "a" cause of material injury. In any event, it is the *Views'* statement on the subject that controls, and therein is specifically stated that "the 'by reason of' standard is satisfied if subject imports are more than a minimal or tangential cause of injury." *Views* at 20 n. 71. *See also* JFE/NS&SM Opposition at 5–6.

More precisely, contrary to defendant's and intervenor-defendants' arguments[25], the plaintiffs contend that "higher unit costs resulting from less production" were not a significant factor in the domestic industry's declining financial performance. They argue that, although the domestic industry's unit costs increased between 2011 and 2013, the record data show no direct correlation between declining production and increasing unit costs. In particular, the plaintiffs emphasize that, while domestic production declined from 2011 to 2012 and from 2012 to 2013, U.S. producers' unit costs increased from 2011 to 2012 but declined from 2012 to 2013. *See Staff Report,* C-4. Thus, they argue, the record does not support ITC's finding that the declines in the domestic industry's export shipments and domestic production resulted in significant cost increases that caused the industry's declining performance.

Judicial review of these types of matters, however, is ill-positioned to consider the "significance" of the data to which the plaintiffs would here point; all that may be reviewed is whether substantial evidence of record supports the determination reached. Nonetheless, they argue it is significant that ITC's *Staff Report* attributes the domestic industry's declining performance to the reduced prices at which it was able to sell GOES in the United States. In particular, they point to its variance analysis, which shows that of the [[$]] decline in the domestic industry's operating income between 2011 and 2013, [[$]] - or [[ ]] percent - was directly attributable to the negative effect of decreased prices. *Staff Report,* VI-13. The plaintiffs argue that because ITC's *Views* do not address the variance analysis contained in the *Staff Report*[26], defendant's response now, asserting that the agency "gave less weight to the variance analysis than to the evidence regarding the decline in export sales and Allegheny Ludlum's loss of the Howard Industries contract"[27], is nothing more than *post hoc* rationalization unsupported by the record. Equally unsupported, the plaintiffs continue, is defendant's assertion, *post hoc,* that the variance analysis was not compelling[28] because price was a more dominant factor between 2012 to 2013. The plaintiffs contend that the record shows that price variance had a greater negative impact on the domestic industry's operating income in each year of the POI than either the cost or volume variances. *Cf. Staff Report*, VI-13 and VI-14. The

[25] *See* Defendant's Response at 52–53; JFE/NS&SM Opposition at 41–42; Opposition of intervenor-defendants Baoshan Iron & Steel Co., Ltd. and Baosteel America, Inc. at 39.

[26] *See Views* at 33–44.

[27] Defendant's Response at 53. *See also* JFE/NS&SM Opposition at 43–44.

[28] See Defendant's Response at 52.

plaintiffs thus claim that ITC' s failure to address the *Staff Report's* variance analysis, which establishes that the decline in pricing — not increasing costs — was the primary reason for the U.S. producers' financial deterioration during the POI, represents another instance in which the Commission failed to address record information that is contrary to its findings and that requires a remand to the agency for further deliberation.

This court cannot concur with such reasoning. ITC acknowledged the price declines, and it found that the reasons therefor were a result of lower raw materials costs, unused capacity, and intra-industry competition. Regardless of why it did not rely on the variance analysis in its *Views,* the use or non-use was matter within its discretion. *See AWP Industries v. United States*, 35 CIT 783 F.Supp.2d 1266, 1280 n. 35 (2011) ("[v]ariance analysis is a tool that the Commission *may* use during an investigation") (emphasis added); *Altx, Inc. v. United States,* 26 CIT 1425, 1433 (2002) (ITC need not rely on theoretical model if "less helpful" than other data in the record), *aff'd,* 370 F.3d 1108 (Fed.Cir. 2004). And plaintiffs' arguments do not persuade that, or explain why, reliance upon the variance analysis would have altered ITC's *Views* on the price declines in any event.

III

In conclusion, and in view of the foregoing, the court can only observe that there is no bright line between fair and unfair competition — each situation must be, and necessarily is, evaluated on its own merits, *ad hoc.*[29] Here, the standard of judicial review precludes *de novo* review. And the plaintiffs do not persuade that ITC' s *Views* are either unsupported by substantial evidence on the record or not in accordance with law. Accordingly, their motion for judgment on that record must be denied, with judgment entered dismissing their complaint.

So ordered.

Dated: New York, New York
November 23, 2016

/s/ Thomas J. Aquilino, Jr.
SENIOR JUDGE

[29] *See, e.g.*, Fed. Trade Comm'n, *Antidumping Legislation and Other Import Regulations in the United States and Foreign Countries*, S. Doc. No. 73–112 (1934) ("[d]umping has been repeatedly recognized as unfair competition in national legislation and in international conferences and agreements, although it is sometimes very difficult to draw the line between what is fair and what is unfair in foreign-trade development"); Susan Bierman, *Fair and Unfair Trade in an Interventionist Era*, 77 Am. Soc'y Int'l L. Proc. 114, 114–15 (1983) (Remarks of Seymour J. Rubin, Chairman) ("[i]t may well be that the realities of relief against injury from foreign competition blur the often indistinct line between fair and unfair trade").

Slip Op. 16–118

HANGZHOU YINGQING MATERIAL CO. AND HANGZHOU QINGQING MECHANICAL CO., Plaintiffs, v. UNITED STATES, Defendant.

PUBLIC VERSION

Before: Leo M. Gordon, Judge
Court No. 14–00133

[Commerce's final results sustained in part and remanded in part.]

Dated: December 21, 2016

Gregory S. Menegaz, deKieffer & Horgan of Washington, DC, for Plaintiffs Hangzhou Yingqing Material Co. and Hangzhou Qingqing Mechanical Co. With him on the brief were *J. Kevin Horgan* and *John J. Kenkel*.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Frederick P. Waite, Vorys Sater Seymour and Pease, LLP of Washington, DC, for Defendant-Intervenor M&B Metal Products Company, Inc. With him on the brief were *Kimberly R. Young* and *William M. R. Barrett*.

OPINION AND ORDER

Gordon, Judge:

This action involves the fourth administrative review (and aligned new shipper review) conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering steel wire garment hangers from the People's Republic of China ("PRC"). *See Steel Wire Garment Hangers from the PRC*, 73 Fed. Reg. 58,111 (Dep't Commerce Oct. 6, 2008) (antidumping order) ("Order"); *Steel Wire Garment Hangers from the PRC*, 78 Fed. Reg. 70,271 (Dep't Commerce Nov. 25, 2013) (prelim. results admin. rev. and new shipper rev.) ("*Preliminary Results*") and accompanying *Decision Mem. for the Prelim. Results of the 2011–2012 Antidumping Duty Admin. Rev. and New Shipper Rev.*, A–570–918, (Nov. 18, 2013), PD 71[1] at bar code 3164295–01, ECF No. 22 ("*Preliminary Decision Memo*"); *Steel Wire Garment Hangers from the PRC*, 79 Fed. Reg. 31,298 (Dep't Commerce June 2, 2014) (final results admin. rev. and new shipper rev.) ("*Final Results*") and accompanying *Issues and Decision Mem. for Steel Wire Garment Hangers from the PRC*, A–570–918, (May 27, 2014), PD 129 at bar code 3204635–01, ECF No. 22 ("*Final Decision Memo*").

[1] "PD" refers to a document contained in the public administrative record, and "CD" refers to a document in the confidential administrative record.

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record of Plaintiffs Hangzhou Yingqing Material Co. and Hangzhou Qingqing Mechanical Co. ("Plaintiffs" or "Yingqing"). *See* Pls. Hangzhou Yingqing Material Co. and Hangzhou Qingqing Mechanical Co.'s Rule 56.2 Mem. Supp. Mot. J. Agency R., ECF No. 27 ("Yingqing Br."); *see also* Def.'s Opp'n Pls.' Mot. J. Admin. R., ECF No. 32; Def.-Intervenor M&B Metal Prods. Co.'s Opp'n Pls.' Mot. J. Admin. R., ECF No. 35; Pls.' Reply Br. Supp. Mot. J. Agency R., ECF No. 38 ("Yingqing Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

Plaintiffs challenge (1) Commerce's selection of Thailand as the primary surrogate country, (2) Commerce's valuation of several of Yingqing's factors of production ("FOPs"), *i.e.*, paint, thinner, and corrugated paperboard, (3) Commerce's rejection, as untimely, of factual information submitted by Yingqing, (4) Commerce's allocation of labor costs in determining surrogate financial ratios, and (5) Commerce's valuation of Yingqing's brokerage and handling ("B&H") costs. For the reasons that follow, the court sustains Commerce's determinations with respect to the first three issues but remands Commerce's allocation of labor costs and its valuation of Yingqing's B&H costs.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing

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

two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2016). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2016).

II. Discussion

(A) Primary Surrogate Country Selection

In an antidumping duty administrative review, Commerce determines whether subject merchandise is being, or is likely to be, sold at less than fair value in the United States by comparing the export price and the normal value of the merchandise. 19 U.S.C. §§ 1675(a)(2)(A), 1677b(a). In the non-market economy ("NME") context, Commerce calculates normal value using data from surrogate countries to value the FOPs. 19 U.S.C. § 1677b(c)(1)(B). Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. 19 U.S.C. § 1677b(c)(1)(B), (4). The surrogate data must "to the extent possible" be from a market economy country or countries that are (1) "at a level of economic development comparable to that of the [NME] country" and (2) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce has a stated regulatory preference to "normally . . . value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2013). Commerce utilizes a four-step process to select a surrogate country:

> (1) the Office of Policy . . . assembles a list of potential surrogate countries that are at a comparable level of economic development to the NME country; (2) Commerce identifies countries from the list with producers of comparable merchandise; (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and (4) if more than one country satisfies steps (1)–(3), Commerce will select the country with the best factors data.

Vinh Hoan Corp. v. United States , 39 CIT ___, ___, 49 F. Supp. 3d 1285, 1292 (2015) (internal quotation marks omitted) (quoting Import Admin., U.S. Dep't of Commerce, Non-Market Economy Surrogate

Country Selection Process, Policy Bulletin 04.1 (2004) ("*Policy Bulletin*"), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited this date)).

When multiple countries are at a level of economic development comparable to the NME country and are significant producers of comparable merchandise, Commerce evaluates the reliability and completeness of the data in the potential surrogate countries. Commerce generally selects the country with the best data as the primary surrogate. *See* 19 C.F.R. § 351.408(c)(2); *see also Policy Bulletin* at 4 ("[D]ata quality is a critical consideration affecting surrogate country selection."). When choosing the "best available" surrogate data on the record, Commerce selects, to the extent practicable, surrogate data that "are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Qingdao Sea–Line Trading Co. v. United States ,* 766 F.3d 1378, 1386 (Fed. Cir. 2014).

In accordance with the four-step process in the *Policy Bulletin*, Commerce's Import Administration Office of Policy issued a non-exhaustive list of potential surrogate countries ("OP's List"). The OP's List contained six countries, including Thailand and the Philippines, but not Ukraine. *See* Surrogate Country and Values Letter, PD 27 at bar code 3118518–01 (Feb. 8, 2013), ECF No. 33. In the *Final Results*, Commerce selected Thailand as the primary surrogate country because Thailand was (1) "at a level of economic development comparable to that of the PRC"; (2) "a significant exporter of comparable merchandise"; and (3) "Thailand provide[d] the best opportunity to use quality, publicly available data to value [Plaintiffs'] FOPs . . . ." *Final Decision Memo* at 6.

Plaintiffs do not challenge the selection process itself, nor do they take issue with Commerce's findings that Thailand is at a level of economic development comparable to the PRC and is a significant exporter of comparable merchandise. Rather, Plaintiffs question the reasonableness of Commerce's finding that Thailand is a source of best available data. In particular Plaintiffs argue that Commerce's selection of Thailand was unreasonable because Ukraine or, alternatively the Philippines, offered data that are more specific to Plaintiffs' experience than Thai import data and because import data from Thailand are unreliable. *See* Yingqing Br. 8–20. For the reasons that follow, the court sustains Commerce's selection of Thailand as the primary surrogate country.

In making its primary surrogate country selection, Commerce emphasized the specificity of data regarding the carbon content of steel wire rod—the main input for the subject merchandise. The rod's

carbon content was critical for Commerce because it was relevant to the rod's malleability and the ease with which the rod could be formed into hangers. Commerce determined that "by using a [Harmonized System ("HS")] code with a carbon [content] most specific to that consumed by Respondents, [Commerce] more accurately captures the experience of the respondents in calculating [surrogate values]." *Final Decision Memo* at 7.

Plaintiffs reported that they consumed wire rod with a certain carbon content.[3] *Id.* (citing Yingqing Section C & D Quest. Resp., Ex. C-1, CD 11 at bar code 3115665–01, PD 21 at bar code 3115677–01 (Jan. 18, 2013), ECF Nos. 28, 29). More particularly, Plaintiffs placed a steel mill certificate on the record ("Mill Certificate") regarding the carbon content of the wire rod.[4] *See id.* at 15; *see also* Yingqing's Section A Supplemental Quest. Resp. at 1 & Ex. SQ2–1, CD 23 at bar code 3120917–01, PD 30 at bar code 3120920–01 (Feb. 26, 2013), ECF Nos. 28, 29 (noting, in response to Commerce's inquiry regarding how Plaintiffs determined the carbon content of their steel input, that "[t]he carbon content for the steel used to produce hangers is determined from the mill certificate . . . provided by the supplier.").

In determining which potential surrogate country's data best reflected the carbon content of Plaintiffs' wire rod, Commerce compared certain Thai, Ukrainian, and Philippine HS subheadings and industry data sources:

- Thailand:
  - 7213.91.00.010 (< 0.08 percent carbon)
  - 7313.91.90.010 (< 0.06 percent carbon)
  - 7213.91.00.020 (between 0.08 percent and 0.10 percent carbon)
  - 7213.91.90.011 (between 0.06 percent and 0.10 percent carbon)
- Ukraine:
  - "Metal Expert" carbon content of less than 0.22 percent
  - Global Trade Atlas import statistics for HS subheading 7213.91.41.00 (with carbon content of 0.06 percent or less) and 7213.91.49 (with carbon content over 0.06% but less than 0.25%)
- Philippines:
  - 7213.91.99.01 (< 0.60 percent carbon).

[3] Plaintiffs reported consuming [[ ]].

[4] The Mill Certificate [[ ]] during the POR.

See Final Decision Memo at 15. Commerce determined that the Thai HS subheadings provided the best available data because they more specifically corresponded to the carbon content of the wire rod used by Plaintiffs, at least according to the Mill Certificate. The import data derived from the Thai HS subheadings covered wire rod with a carbon content of less 0.10%, whereas import data derived from the Ukrainian subheadings covered a broader range, *i.e.*, wire rod with less than 0.25% carbon content, and data derived from the Philippine subheading covered an even broader range, *i.e.*, less than 0.60% carbon content. *See id.* at 15–16.

Plaintiffs filed the Mill Certificate noting that "[t]he carbon content for the steel used to produce hangers is determined from the mill certificate . . . provided by the supplier." Yingqing's Section A Supplemental Quest. Resp. at 1 & Ex. SQ2–1, CD 23 at bar code 3120917–01, PD 30 at bar code 3120920–01 (Feb. 26, 2013), ECF Nos. 28, 29. Despite that, Plaintiffs now contend Commerce unreasonably found the wire rod described in the Mill Certificate was not representative of the wire rod consumed. Yingqing Br. 11. Instead, Plaintiffs maintain they consumed a variety of wire rod, and therefore, Commerce should have selected the Ukrainian information. *See id.* 12–13. Alternatively, Plaintiffs argue (somewhat inconsistently) that Commerce should have selected the Philippine information not because the Philippines has more specific data on carbon content, but because it has better quality information regarding financial ratios. *See id.* 20 (arguing that Philippine financial statements on the record pertain to companies that produce comparable merchandise using inputs and production processes similar to those of Plaintiffs).

Problematically for Plaintiffs, the administrative record does reasonably support Commerce's finding that Thai HS subheadings are more specific to the steel wire rod used by Plaintiffs. The Thai data simply covered Plaintiffs' wire rod reflected in its Mill Certificate more particularly than either the Ukraine or Philippine data. Although Plaintiffs "claim[ed] to use wire rod with a broader range of carbon content," Commerce reasonably found that they had not "demonstrated such consumption beyond what is demonstrated in the [Mill Certificate]." *Final Decision Memo* at 15.

Turning to Plaintiffs' proposed alternative surrogate countries, Plaintiffs' arguments in favor of Ukraine are unpersuasive. Thailand, unlike Ukraine, was on the OP's List. "Although the OP's list is not exhaustive and parties may request that Commerce select a country not on the list, Commerce generally selects a surrogate country from the OP list unless all of the listed countries lack sufficient data." *Jiaxing Bro. Fastener Co. v. United States*, 38 CIT ___, ___, 961 F.

Supp. 2d 1323, 1328 (2014); *see also Final Decision Memo* at 6 ("Regarding Ukraine as a potential surrogate country, [Commerce] fulfills the statutory requirement to value FOPs using data from a non-exhaustive list of 'one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country.'"). Here, Commerce reasonably found that Thailand provided sufficient data regarding the FOPs, and Thai data regarding the main input were more specific to Plaintiffs' experience during the POR than either Ukrainian or Philippine data.

On the issue of the reliability of Thai import data, Plaintiffs challenge the adequacy of Commerce's consideration of certain government and industry reports in the record expressing concern about Thai Customs Department practices. *See* Yingqing Br. 6 ("In the last three published [Office of the U.S. Trade Representative or "USTR"] Trade Barriers Report, the USTR has stated the United States' government continual 'serious concern' of the 'significant discretionary authority' exercised by the Thai Customs Department to 'arbitrarily increase the customs value of imports.'"); *see also id.*, Attach. 1 (Yingqing Admin. Case Br.) at 20–23. In particular, Plaintiffs question the reasonableness of Commerce's reliance on two prior cases in which Commerce considered the same or similar reports and declined to reject Thai import data as unreliable. In the *Final Results*, Commerce explained its reliability determination as follows:

> We disagree with Yingqing's . . . concerns over the reliability of the Thai import data, as outlined in the USTR reports. In two recent cases, *Xanthan Gum* and *Certain Steel Threaded Rod from the PRC* . . . [Commerce] determined that the USTR reports do not make Thai import data unreliable or inferior to Philippine data, and we declined to conclude that all Thai import data should be rejected due to the reports. Additionally, while the European Community and Philippines requested consultations with Thailand at the World Trade Organization regarding how Thailand values its imports, we note that these are only requests for consultations and not adverse findings or determinations. Therefore, we continue to find in this case that the USTR reports do not provide sufficient evidence to reject all Thai import data as unreliable.

Final Decision Memo at 6.

It is worth noting that *Elkay Manufacturing Co. v. United States*, 40 CIT ___, 180 F. Supp. 3d 1245 (2016) recently addressed challenges to the reliability of Thai import data based on similar arguments and information, including government and industry reports. The court

observed that although "[t]he evidence of manipulation was relevant to the question of reliability of the Thai data," the court accepted Commerce's finding that the reports "[did] not establish that Thai Customs import values are affected generally, and significantly, by the practice the [USTR] identified." *Id.*, 40 CIT at ___, 180 F. Supp. 3d at 1254–55 (quoting Commerce's conclusion on remand that the "reports of manipulation of customs values by the Thai government did not 'address any of the raw material inputs that are consumed by the respondents.'"). According to *Elkay*, "[t]he record evidence of manipulation of customs values does not rise to such a level that Commerce was left with no choice but to foreclose *any* use of Thai import data to determine a surrogate value for a production input." *Id.* 40 CIT at ___, 180 F. Supp. 3d at 1255 (emphasis in original). Plaintiffs have not pointed to any evidence in this administrative record that would require a different conclusion than reached in *Elkay*.

Here, Commerce reasonably found the import data based on Thai HS subheadings were more specific to Plaintiffs' reported experience than Ukrainian and Philippine data. *See Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1300–01 (Fed. Cir. 2016) (affirming Commerce's choice of data which "matche[d] more closely to the main input of the subject merchandise than the data that [Appellant] propose[d]."). Accordingly, Commerce's selection of Thailand as the primary surrogate country is sustained.

(B) Valuation of Plaintiffs' FOPs

Commerce used import data derived from Thai HS subheadings to value Plaintiffs' paint, thinner, and corrugated paperboard FOPs. *See Final Decision Memo* at 22–23. Plaintiffs challenge Commerce's choice of subheading to classify each of these inputs. *See* Yingqing Br. 25–29; Yingqing Reply 11–14.

(i) Paint

Commerce valued Plaintiffs' paint using Thai HS subheading 3208.90.90.000, a basket provision covering "paints and varnishes, other, not otherwise described." *See Final Decision Memo* at 23. Plaintiffs argue this was unreasonable. *See* Yingqing Br.27–28. The court sees no merit in this issue. Plaintiffs proposed multiple, conflicting possibilities to value its paint. Confronted with this fog of confusion, Commerce reasonably selected a broader basket provision that covered Plaintiffs' paint. Plaintiffs themselves did not know which surrogate value was appropriate for their paint. On the one hand, Plaintiffs proposed Thai HS subheading 3209.10 covering paint in an aqueous medium, but Plaintiffs contradicted themselves by reporting

that it used paint dissolved in a "non-aqueous medium." *Final Decision Memo* at 23 (citing Yingqing Section D Quest. Resp. at 2, PD 21 at bar code 3115677–01 (Jan. 18, 2013), ECF No. 29). Plaintiffs also proposed subheading 3208.90.19.000, covering "varnishes (including lacquers) *exceeding* 100ºC heat resistance," and subheading 3208.90.29.00, covering "varnishes (including lacquers) *not exceeding* 100ºC heat resistance," but did not substantiate which of the two subheadings should apply by providing information about the heat resistance of their paint. Yingqing Br. 27 (emphasis added). Commerce reasonably determined that "[r]ecord evidence [did] not demonstrate Yingqing used the paints classified under the more specific [subheadings]." *Final Decision Memo* at 23. The court is having a hard time understanding what Plaintiffs expect from the court on this issue. Suffice it to say, Commerce's choice of an HS basket provision that covers Plaintiffs' paint seems like a reasonable, if not correct, choice given the confusing alternatives proposed by Plaintiffs. Commerce's choice of the surrogate value for paint is therefore sustained.

(ii) Thinner

Commerce valued thinner using Thai HS subheading 3814.00.00.090, a basket provision covering "organic composite solvents and thinners, other." *See Final Decision Memo* at 22. As with the paint input, Plaintiffs again proposed multiple alternatives to value their thinner: (1) Thai HS subheading 3814.00, covering "organic composite solvents and thinners, not elsewhere specified or included: prepared paint or varnish removers," or (2) Thai HS subheading 3814.00.00.001, covering "organic composites solvents and thinners, not elsewhere specified or included: containing methyl ethyl ketone more than 50% w/w [by mass]." Yingqing Br. 37–38. Plaintiffs fault Commerce for using a basket provision instead of the categories they prefer.

Here again though, Plaintiffs failed to establish on the record the composition of their thinner. Given the absence of information in the record to support the selection of a specific subheading, Commerce's selection of a basket provision to value Plaintiffs' thinner was reasonable, if not correct. Plaintiffs advocated for two different subheadings, apparently unsure of which HS provision most closely described their own thinner, and failed to place information on the record that would support either of their proposed subheadings. *See Final Decision Memo* at 22 ("[T]here is no evidence on the record that suggests Yingqing's thinner contains methyl ethyl ketone."). By positing multiple potential alternative surrogate data sets (HS provisions), Plaintiffs implicitly concede that one clear correct choice is unavailable for

the thinner. This makes it challenging for the court to invalidate Commerce's selection of a basket provision as unreasonable. To order Commerce to use another subheading, the court would have to rely on Plaintiffs' preferred inferences about its thinner composition, rather than direct information on the administrative record. This asks too much of the court. Given the murky indeterminacy of the record, the court must sustain Commerce's reasonable selection of the basket provision to value Plaintiffs' thinner.

(iii) Corrugated Paperboard

Commerce valued Plaintiffs' corrugated paperboard under Thai HS subheading 4819.10, covering "cartons, boxes and cases, corrugated paper and paperboard." *See Final Decision Memo* at 24. Plaintiffs argue that Commerce should have used subheading 4808.10, covering "corrugated paper and paperboard, whether or not perforated, in rolls or sheets," as it did for the mandatory respondent. Yingqing Reply 14. Plaintiffs' argument assumes that the record supports a finding that Plaintiffs consumed paperboard "in rolls or sheets." Commerce reasonably found, however, that "[u]nlike for [the mandatory respondent], the record does not indicate whether Yingqing's input is in rolls or sheets . . . . Yingqing reported that it purchased its corrugated packing material ready for use." *Final Decision Memo* at 24. Based on Plaintiffs' description of the input and their "statement that its paperboard was ready to use," Commerce concluded that subheading 4819.10 "better matche[d] Yingqing's reported input description." *Id.* Given the absence of information that Plaintiffs' paperboard came in rolls or sheets and Plaintiffs' statement that its paperboard was ready to use, Commerce reasonably chose a subheading that covered corrugated paperboard and ready to use packing materials, including "cartons, boxes or cases." Therefore, Commerce's valuation of Plaintiffs' corrugated paperboard is sustained.

(C) Commerce's Rejection of Plaintiffs' Submission

On December 2, 2013, Plaintiffs submitted factual information to Commerce to "clarify[] and rebut[] the *Preliminary Results*." Commerce Mem. Rejecting Yingqing New Factual Information, PD 77 at bar code 3166938–01 (Dec. 5, 2013), ECF No. 29. Commerce rejected this information as untimely and removed it from the record pursuant to 19 C.F.R. § 351.302(d). *See id.*

Commerce's regulations provide time limits for the parties' factual submissions. *See* 19 C.F.R. § 351.301(a). In general, for final results of administrative reviews, factual information is due "140 days after the last day of the anniversary month." 19 C.F.R. § 351.301(b)(2). "Factual information" means "(i) [i]nitial and supplemental questionnaire

responses; (ii) [d]ata or statements of fact in support of allegations; (iii) [o]ther data or statements of facts; and (iv) [d]ocumentary evidence." 19 C.F.R. § 351.102(b)(21). Commerce's regulations provide that Commerce "will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material that the Secretary rejects," except where Commerce extends a time limit for good cause under 19 C.F.R. § 351.302(b).

Plaintiffs do not dispute that their submission contained "factual information," nor do they argue that they submitted that information on a timely basis. Rather, Plaintiffs argue that Commerce abused its discretion in rejecting their untimely submission because there was "good cause" to accept the factual information, *i.e.*, Commerce had never before selected Thailand as the surrogate country in an annual review under the Order, and the *Preliminary Results* were the first time Commerce set forth the Thai HS classifications used to value Plaintiffs' FOPs. *See* Yingqing Br. 23. Alternatively, Plaintiffs argue that their own submissions must have been deficient on the issue of the proper classification of Plaintiffs' FOPs for Commerce to have selected the Thai HS subheadings it chose. Plaintiffs argue that, therefore, Commerce was obligated to issue a supplemental questionnaire pursuant to 19 U.S.C. § 1677m(d), and acted contrary to law by failing to do so. *See id.* 24–25.

Plaintiffs' arguments are unavailing. The deadline for submitting factual information was March 20, 2013—140 days after the last day of the anniversary month of the underlying Order. *See* Commerce Mem. Rejecting Yingqing New Factual Information (citing 19 C.F.R. § 351.301(b)(2)). Plaintiffs' submission, however, was made approximately eight months after the regulatory deadline. Plaintiffs cite no authority to support their argument that good cause existed for Commerce to accept Plaintiffs' late filing because in previous reviews Thailand was not selected as the surrogate country to value FOPs. It is well established that "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Qingdao Sea–Line Trading Co.,* 766 F.3d at 1387; *see also Jiaxing Bro. Fastener Co.*, 822 F.3d at 1299 ("Commerce is required to base surrogate country selection on the facts presented in each case, and not on grounds of perceived tradition."). Based on the record, Commerce acted in accordance with its regulations and did not abuse its discretion in rejecting Plaintiffs' untimely submission.

As to Plaintiffs' alternative argument that Commerce was obligated to issue a supplemental questionnaire pursuant to 19 U.S.C. §

1677m(d), Plaintiffs' own subsequent regrets about the robustness and quality of its earlier advocacy do not trigger an obligation on Commerce to issue supplemental questionnaires. Accordingly, Commerce's rejection of Plaintiffs' untimely submission is sustained.

(D) Commerce's Allocation of Labor Cost in Determining Surrogate Financial Ratios

In calculating surrogate financial ratios, Commerce treats labor costs as selling, general, and administrative ("SG&A") expenses. It is Commerce's practice "'to avoid double-counting [labor] costs where the requisite data are available to do so.'" *Final Decision Memo* at 20 (quoting *Certain Frozen Warmwater Shrimp From the Socialist Rep. of Vietnam*, 67 Fed. Reg. 56,158 (Dep't Commerce Sept. 12, 2011) (final results) and accompanying Issues and Decision Mem. at cmt. 5.B). To avoid double-counting, Commerce "will adjust the surrogate financial ratios when the available record information, in the form of itemized indirect labor costs, demonstrates that labor costs are overstated." *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,094 (Dep't Commerce June 21, 2011) ("*Labor Methodologies*"). More particularly, Commerce looks to the surrogate financial statements on the record and if those statements "include disaggregated overhead and [SG&A] expense items that are already included in the [record data used to value labor], [Commerce] will remove these identifiable costs items." *Id.*

In the *Preliminary Results*, Commerce valued labor using 2007 Industrial Census data published by Thailand's National Statistics Office ("2007 NSO Data"). *Preliminary Decision Memo* at 26; *see also Prelim. Surrogate Value Mem.* at 6–7, PD 72 at bar code 3164312–01 (Nov. 18, 2013). Commerce found that the 2007 NSO Data "reflect[ed] all costs related to manufacturing labor, including wages, benefits, housing, training, *etc.*" *Preliminary Decision Memo* at 26. To calculate preliminary surrogate financial ratios, Commerce used Philippine financial statements that included itemized details of indirect labor costs. *Id.* at 20. Accordingly, Commerce adjusted the preliminary financial ratios. *Id.* at 26.

In the *Final Results*, Commerce continued to value labor using the 2007 NSO Data. To calculate final surrogate ratios, however, Commerce used the 2012 financial statements of a Thai company, LS Industry Co., Ltd. ("LS Industry"), instead of the Philippine financial statements. *Final Decision Memo* at 20. Finding that "there [was] nothing on the record to suggest that labor costs [were] overstated," Commerce declined to adjust the financial ratios in the *Final Results*. *Id.* (citation omitted).

Plaintiffs do not challenge Commerce's use of the 2007 NSO Data to value labor costs, nor do they contest the use of LS Industry's financial statements. Rather, Plaintiffs contend that Commerce should have adjusted surrogate financial ratios in the *Final Results* as it did in the *Preliminary Results* to avoid double counting the labor cost: "[A]ccording to [Commerce's] labor methodologies, all itemized labor costs in a financial statement are covered by the labor rate and must be allocated to the labor column in the financial ratios to avoid double-counting." Yingqing Br. 30. Plaintiffs argue that LS Industry's financial statements itemized labor costs, and that this "means *de facto* under [the *Labor Methodologies*] policy, that labor will be double-counted if allocated to SG&A in the financial ratios." *Id.* Plaintiffs maintain that Commerce acted unreasonably by failing to adjust surrogate financial ratios in accordance with its prior practice. *Id.* 30–31 (citing *Certain Steel Nails from the PRC*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) (final results) ("*Nails*") and *Drawn Stainless Steel Sinks from the PRC*, 78 Fed. Reg. 13,019 (Dep't Commerce Feb. 26, 2013) (final determ.)).

Commerce's finding that "there [was] nothing on the record to suggest that labor costs are overstated" is unreasonable. LS Industry's financial statements identify, among other things, "Employee welfare cost" and "Subsidy of Social Security Fund and Workmen Compensation Fund" as a part of administrative cost. *See* Fabriclean Supply Inc.'s Post-Prelim. Results Surrogate Value Information — Part 7, Attach. 4 (LS Industry 2012 Financial Statement (Eng. trans.)), PD 106–118 at bar code 3178557–07 (Jan. 6, 2014). In *Nails*, Commerce identified these expenses in LS Industry's 2012 financial statements and treated them as indirect labor expenses, acknowledging that the 2007 NSO Data encompassed "employers' contribution to social security, e.g., 'social security fund, workmen's compensation fund . . . .'". *See Certain Steel Nails from the PRC*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) (final results) and accompanying Issues and Decision Mem. at cmt. 2, A-570–909, (Mar. 31, 2014), *available at* http://enforcement.trade.gov/frn/summary/prc/2014–07829–1.pdf (last visited this date) (citing *Drawn Stainless Steel Sinks From the PRC*, 78 Fed. Reg. 13,019 (Dep't Commerce Feb. 26, 2013) (final determ.) and accompanying Issues and Decision Mem. at Cmt. 4). Accordingly, in *Nails*, Commerce adjusted the surrogate financial ratios to avoid double counting the labor cost. Here, Commerce has not adequately explained why it departed from its prior practice in *Nails* and failed to adjust the financial ratios based on the same or similar record information. Consequently, the court remands this issue for further consideration.

(E) Commerce's Valuation of B&H Costs

In the *Final Results*, Commerce used the World Bank's Doing Business survey for Thailand (2013) to value B&H costs. *See Final Decision Memo* at 18. Plaintiffs argue that Commerce unreasonably used the World Bank report because it is based on cost data exclusively from one city, Bangkok. Plaintiffs also argue that the identities of many of the report's contributors are not known, and the costs reflected in the report are not representative. As an alternative, Plaintiffs proposed that Commerce use the B&H costs incurred by a Thai exporter of warmwater shrimp, Pakfood Company Limited, to value Plaintiffs' B&H costs. *See* Yingqing Br. 31–34.

The court previously has affirmed Commerce's use of World Bank data as a reliable and accurate source to value B&H, and does so again here. *See, e.g., Since Hardware (Guangzhou) Co. v. United States*, 37 CIT ___, ___, 911 F. Supp. 2d 1362, 1377 (2013) (affirming Commerce's reliance on World Bank Doing Business report and noting report is a "reliable and accurate source"); *Foshun Shunde Yongjian Housewares & Hardwares Co. v. United States*, 40 CIT ___, 172 F. Supp. 3d 1353 (2016) (affirming Commerce's use of World Bank Doing Business report to value B&H). Commerce found that "the Doing Business survey . . . reflect[s] a broad market average, as Bangkok is the largest and most industrial city in Thailand, and the survey was done by a trusted source, the World Bank." *Id.* Commerce also noted that "Doing Business . . . [is] based on multiple sources and companies' actual experience." *Id.* Commerce therefore reasonably favored the World Bank data over Plaintiffs' proposed alternative data source—the B&H costs of a single exporter of warmwater shrimp—as a suitable surrogate data source for steel wire garment hangers.

However, Commerce's refusal to deduct the cost of obtaining a letter of credit from Plaintiffs' B&H costs was unreasonable. In the *Final Results*, Commerce based this refusal on a lack of record evidence from which it could accurately determine the cost of a letter of credit in Thailand. Commerce stated that it

> normally makes adjustments to data when we can determine whether an item's amount is clearly identified. Here, the Doing Business survey methodology shows that [letter of credit] costs are one potential cost. However, it is not clearly identified in the summary data, which are an aggregate of data points that are not broken down below the survey summary description, i.e., documents preparation.

Final Decision Memo at 18–19. Plaintiffs argue that the record shows

"*all Doing Business* reports include the cost of the time and expense for procuring an export letter of credit embedded in the [B&H] fees and . . . the cost for . . . Thailand is $60." Yingqing Br. 34–35 (emphasis in original). In particular, the record contains email correspondence with the World Bank's Doing Business Unit, International Finance Corporation, "confirm[ing] that the cost of a letter of credit has always been and continues to be included in the reported figures for [B&H] under the subdivision for 'document preparation' fees," and that "[t]he cost to obtain the export letter of credit for . . . Thailand 2013 = $60." Yingqing's Surrogate Values for Final Results – Part 11, Ex. 38, PD 87–98 at bar code 3172207–11 (Jan. 6, 2014), ECF No. 29. This information identifies the cost to obtain an export letter of credit for Thailand and fairly detracts from Commerce's finding that it could not identify the cost of the letter of credit. Accordingly, the court remands this matter for Commerce to reconsider its refusal to deduct the expense of obtaining a letter of credit in light of the information on the record from the World Bank.

III. Conclusion

For the foregoing reasons, it hereby

ORDERED that Commerce's *Final Results* are sustained with respect to the selection of Thailand as the primary surrogate country; the valuation of Yingqing's factors of production as to paint, thinner, and corrugated paperboard; and the rejection, as untimely, of certain factual information submitted by Yingqing; it is further

ORDERED that this matter is remanded to Commerce to reconsider its allocation of labor costs and its valuation of Yingqing's B&H costs; it is further

ORDERED that Commerce shall file its remand results on or before February 22, 2017; and it is further

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

Dated: December 21, 2016
New York, New York

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

Slip Op. 16–119

UNITED STATES, Plaintiff, v. UNIVAR USA, INC., Defendant.

Before: Mark A. Barnett, Judge
Court No. 15–00215

[Defendant's Motion for Partial Summary Judgment is denied; Plaintiff's Cross-Motion for Partial Summary Judgment is denied. Defendant's motions for leave to file supplemental briefs are denied as moot.]

Dated: December 22, 2016

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for plaintiff. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Lucius B. Lau, White & Case LLP, of Washington, DC, argued for defendant. With him on the brief were *Gregory J. Spak* and *Dean A. Barclay*, of Washington, DC, and *Fernando L. Aenlle-Rocha*, of Los Angeles, CA.

MEMORANDUM AND ORDER

Barnett, Judge:

The case is before the court on cross-motions for partial summary judgment. Univar's Mot. for Partial Summ. J. ("Def.'s PMSJ"), ECF No. 18; Confidential Pl.'s Opp'n to Univar's Mot. for Partial Summ. J. and Cross-Mot. for Partial Summ. J. ("Pl.'s Opp'n and XMSJ"), ECF No. 30. In this case, Plaintiff, United States, seeks to recover unpaid antidumping duties and a monetary penalty pursuant to 19 U.S.C. § 1592,[1] stemming from 36 entries of saccharin,[2] allegedly transshipped from China through Taiwan, which Defendant, Univar USA, Inc. ("Defendant" or "Univar"),[3] entered into the commerce of the United States between 2007 and 2012. Compl ¶ 1, ECF No. 2. Defendant seeks partial summary judgment in its favor with respect to the 23 entries that occurred prior to March 2010, while Plaintiff seeks partial summary judgment in its favor with regard to the 13 entries

[1] All references to the United States Code are to the 2012 edition, unless otherwise stated.

[2] The relevant antidumping duty order covers "all types of saccharin imported under . . . [Harmonized Tariff Schedule of the United States 2925.11.00]," and the scope of the order defines saccharin as a "non-nutritive sweetener" that has "four primary chemical compositions," namely (1) sodium saccharin, (2) calcium saccharin, (3) acid (or insoluble) saccharin, and (4) research grade saccharin. *Saccharin from the People's Republic of China*, 68 Fed. Reg. 40,906, 40,907 (Dep't Commerce July 9, 2003) (notice of antidumping duty order) ("AD Order").

[3] Univar USA, Inc. is the defendant in this case. Univar USA, Inc. is a wholly-owned subsidiary of Univar, Inc. Univar USA, Inc.'s Resp. to Pl.'s Rule 56.3 Statement ("Def.'s Resp. to Pl.'s SOF") ¶ 95, ECF No. 36–1. Defendant objects that Plaintiff refers to both Univar USA, Inc. and Univar, Inc. as "Univar." Def.'s Resp. to Pl.'s SOF ¶ 96; Answer ¶ 8 note 1, ECF No. 8. The court will refer to Univar USA, Inc. as Univar.

that occurred during or after March 2010. *See generally* Def.'s PMSJ; Pl.'s Opp'n and XMSJ. For the reasons discussed below, the court denies both motions for partial summary judgment.

BACKGROUND

Between July 9, 2007, and April 3, 2012, Univar made 36 entries of saccharin into the United States at various ports around the country. Compl. ¶ 7; Answer ¶ 7, ECF No. 8.[4] Prior to 2003, Univar imported saccharin from the People's Republic of China ("PRC"). Compl. ¶ 8; Answer ¶ 8. Following investigations by both the Department of Commerce and the International Trade Commission, on July 2, 2003, the Department of Commerce issued an antidumping duty order on imports of saccharin from the PRC. AD Order, 68 Fed. Reg. 40,906. That order imposed cash deposits of estimated antidumping duties at the rate of 329.94 percent on imports of saccharin from the PRC. *Id.* at 40,907. Thereafter, Univar sought other sources of saccharin and, as of 2004, was importing saccharin from Taiwan. Compl. ¶¶ 8, 13; Answer ¶¶ 8, 13. For each of the 36 entries at issue, Univar declared the country of origin of its saccharin imports to be Taiwan. Am. Penalty Notice at 5.

CBP, through U.S. Immigration and Customs Enforcement, Homeland Security Investigations, began investigating Univar's imports of saccharin from Taiwan in 2009. Univar's Rule 56.3 Statement in Supp. of its Mot. for Partial Summ. J. ("Def.'s SOF") ¶¶ 5, 7, ECF No. 18–3; Confidential Pl.'s Rule 56.3 Statement in Supp. of its Opp'n to Univar's Mot. for Partial Summ. J. and Cross-Mot. for Partial Summ. J. ("Pl.'s SOF") ¶¶ 5, 7, ECF No. 30–1; *see also* Compl. ¶ 20; Answer ¶ 20. In July 2011, Kinetic Industries, Inc. ("Kinetic") brought a *qui tam* action pursuant to the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, alleging that Univar was misstating the country of origin of its imports of saccharin. Def.'s SOF ¶ 8; Pl.'s SOF ¶ 8. In 2013, the government declined to intervene in that case and, in 2014, Kinetic terminated the action. Def.'s SOF ¶¶ 1920; Pl.'s SOF ¶¶ 19–20. CBP continued its own investigation into Univar's imports of saccharin. Among other things, as a result of their investigation, CBP determined[5] that:

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[4] Customs and Border Protection's ("CBP") penalty notices cover the period May 10, 2004 through May, 2012 and also state that 36 entries were made. Def.'s PMSJ, Ex. 10 ("Am. Penalty Notice"), ECF No. 18–14; *see also* Def.'s PMSJ, Ex. 16 ("Pre- Penalty Notice"), ECF No. 18–20; Def.'s PMSJ, Ex. 22 ("Penalty Notice"), ECF No. 18–26.

[5] The court recognizes that some of CBP's findings are inconsistent with other findings and that Defendant has raised evidentiary objections to the CBP reports and the affidavits submitted by Plaintiff in its filings. For purposes of these cross motions for summary judgment, the court will not address the evidentiary objections because summary judgment

- Lung Huang,[6] Univar's supplier in Taiwan, was not licensed to manufacture sodium saccharin in Taiwan. Am. Penalty Notice at 5.
- High Trans Corp. ("HTC") was the only licensed manufacturer of saccharin in Taiwan. Confidential Aff. of Special Agent Wally Tsui in Supp. of Pl.'s Opp'n. to Univar's Mot. for Partial Summ. J. ("Tsui Aff."), ECF No. 30–11, Ex. 1 ("Department of Homeland Security ("DHS") ROI No. 18") at 34, ECF No. 30–12.
- HTC, a company producing saccharin in Kaohsiung City, Taiwan, made a limited number of sales to Lung Huang in 2005, for export to the United States. DHS ROI No. 18 at 63; *see also* Def.'s SOF ¶ 64; Pl.'s SOF ¶ 64.
- As of August 29, 2010, HTC's only U.S. customer for saccharin was Rit-Chem. DHS ROI No. 18 at 63.
- The Lung Huang factory address provided by William Huang was a residential building. DHS ROI No. 18 at 73; Am. Penalty Notice at 5.

CBP concluded that there was a sufficient correlation between imports into Taiwan from China and exports from Taiwan to Univar to indicate that Univar's imports were simply being transshipped from China, through Taiwan, to the United States. Am. Penalty Notice at 5.

CBP issued a pre-penalty notice on July 21, 2014, followed by a penalty notice on October 1, 2014, and a revised penalty notice on February 10, 2015 (collectively, "penalty notices"). Pre-Penalty Notice; Penalty Notice; Am. Penalty Notice. Univar filed a petition for relief on October 31, 2014 and an amended petition on March 23, 2015 and CBP issued a final decision responding to both petitions on June 15, 2015. Def.'s PMSJ, Ex. 30 ("CBP Decision Letter"), ECF No. 18–34.

Plaintiff, United States, filed a Summons and Complaint in this action on August 6, 2015. Summons, ECF No. 1; Compl. Parties have filed cross-motions for partial summary judgment and the motions are fully briefed. Def.'s PMSJ; Pl.'s Opp'n and XMSJ. Both parties have also filed U.S. Court of International Trade ("USCIT") Rule 56(d)

is premature in any case. To the extent that the court makes reference to the CBP reports or affidavits by government investigators, it is without prejudice to any objections Defendant may have to them.

[6] There are two different entities, Lung Huang Trading Co. and Long Hwang Chemical LTD (both owned by William Huang) and the penalty notice makes reference to both. Am. Penalty Notice at 5–6; Compl. ¶ 9; *see also* Answer ¶ 14 note 2. For ease of reference the court will refer to the two collectively as Lung Huang.

declarations asking the court to defer or deny the other party's partial motion for summary judgment because relevant discovery is ongoing. *See* Pl.'s Suppl. Br., Decl. of Stephen C. Tosini ("Pl.'s 56(d) Decl."), ECF No. 75–1; Univar USA Inc.'s Reply in Supp. of its Mot. for Partial Summ. J. ("Def.'s Reply"), ECF No. 36., Decl. of Lucius B. Lau in Supp. of Univar USA Inc.'s Rule 56(d) Request ("Def.'s 56(d) Decl."), ECF No. 36–6. After the conclusion of briefing and with leave from the court, Plaintiff filed a supplemental brief, to which Defendant provided a response. Pl.'s Suppl. Br., ECF No. 75; Univar USA Inc.'s Resp. to Pl.'s Suppl. Br. ("Def.'s Resp. to Pl.'s Suppl. Br."), ECF No. 76. The court heard oral argument on October 12, 2016. Docket Entry, ECF No. 77.

After oral argument, Defendant filed two separate motions for leave to file supplemental briefs and both motions are fully briefed. Univar USA Inc.'s Mot. for Leave to File Suppl. Br. ("Def.'s First Req."), ECF No. 79; Pl.'s Opp'n to Def.'s Mot. for Leave to File Suppl. Br. ("Pl.'s Opp'n to Def.'s First Req."), ECF No. 80; Confidential Univar USA Inc.'s Second Mot. for Leave to File a Suppl. Br. ("Def.'s Second Req."), ECF No. 82; Pl.'s Opp'n to Def.'s Second Mot. for Leave to File Suppl. Br., ECF No. 86.

JURISDICTION AND STANDARD OF REVIEW

This case is brought by the United States against Univar to recover unpaid antidumping duties and a monetary penalty owing from allegedly transshipped saccharin from China through Taiwan pursuant to 19 U.S.C. § 1592. As such, the court possesses jurisdiction to hear this action pursuant to 28 U.S.C. § 1582.

The Court of International Trade reviews all issues in actions brought for the recovery of a monetary penalty pursuant to section 1592 *de novo* and on the basis of the record made before the court. 19 U.S.C. § 1592(e)(1); 28 U.S.C. § 2640(a); *see also United States v. ITT Indus., Inc.*, 28 CIT 1028, 1035, 343 F. Supp. 2d 1322, 1329 (2004), *aff'd*, 168 Fed. App'x 942 (Fed. Cir. 2006).

Summary judgment is appropriate upon motion "after adequate time for discovery" has elapsed and "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); USCIT Rule 56(c). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense

and, therefore, affect the outcome of the action. *See Gill v. District of Columbia*, 751 F. Supp. 2d 104, 107 (D.D.C. 2010) (citing *Anderson*, 477 U.S. at 248, *Celotex*, 477 U.S. at 322). The burden of establishing the absence of a genuine issue of material fact lies with the moving party. *See Celotex Corp.*, 477 U.S. at 323. This burden may be discharged by showing that the nonmovant "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," or by pointing to "an absence of evidence to support the nonmoving party's case." *Id.* at 322, 325; *see also Exigent Tech. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1307–1308 (Fed. Cir. 2006) (discussing *Celotex Corp.*).

The court must view the evidence in the light most favorable to the nonmovant and may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See Anderson*, 477 U.S. at 249, 255; *Netscape Comm.'s Corp. v. Konrad*, 295 F.3d 1315, 1319 (Fed. Cir. 2002) ("When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited and all justifiable inferences are to be drawn in the nonmovant's favor.") (citations omitted). In a case such as this, when discovery is ongoing, courts must also evaluate whether "adequate time for discovery" has elapsed so that the nonmovant is not "railroaded by a premature motion for summary judgment." *Celotex Corp.*, 477 U.S. at 322, 326 (internal quotation marks omitted).

A party opposing summary judgment because "it cannot present facts essential to justify its opposition" may ask the court to defer consideration of or deny the motion while it continues discovery. USCIT Rule 56(d) (allowing the court to defer or deny the motion, grant further time for discovery, or issue any other appropriate order); *see also Celotex Corp.,* 477 U.S. at 326; *Baron Servs., Inc., v. Media Weather Innovations LLC*, 717 F.3d 907 (Fed. Cir. 2013) (addressing Federal Rule of Civil Procedure 56(d) and noting that the rule applies when party opposing summary judgment has been unable to obtain responses to discovery requests and discovery sought would be relevant to issues presented for summary judgment). Rule 56(d) may not be used to aid a party that has been "lazy or dilatory" or has "failed to make use of the various discovery mechanisms" at its disposal. *Exigent Tech. v. Atrana Solutions, Inc.*, 442 F. 3d 1301, 1311 (Fed. Cir. 2006) (addressing analogous rule in Federal Rules of Civil Procedure and citing *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 833 F. 2d 1545 (11th Cir. 1987)). Additionally, the party requesting relief pursuant to Rule 56(d) must "state with some precision the

materials [it] hopes to obtain with further discovery, and exactly how [it] expects those materials would help [it] in opposing summary judgment." *Simmons Oil Corp. v. Tesoro Petroleum Corp.,* 86 F.3d 1138, 1144 (Fed. Cir. 1996) (addressing analogous rule in Federal Rules of Civil Procedure and citing *Krim v. BancTexas Group*, Inc., 989 F. 2d 1435, 1143 (5th Cir. 1993)). While the cited cases address Federal Rule of Civil Procedure 56(d), USCIT Rule 56(d) is identical and the court may refer for guidance to the rules of other courts. USCIT Rule 1.

DISCUSSION

I. Plaintiff may develop additional evidence during discovery beyond that upon which the administrative proceeding was based

The premise underlying Defendant's motion for partial summary judgment is that, in an action commenced pursuant to 19 U.S.C. § 1592 to recover a monetary penalty,[7] the United States is limited to the material facts and evidence disclosed in CBP's penalty notices.[8] Def.'s PMSJ at 21; Def.'s Reply at 13–16. Plaintiff responds that the court's *de novo* scope of review allows the government to introduce facts and evidence not previously set forth during the administrative proceeding. Pl.'s Opp'n and XMSJ at 22–23.

A penalty proceeding before the court is conducted *de novo*, with the burden of proof based upon the level of culpability alleged in the penalty claim. 19 U.S.C. §§ 1592(b), 1592(e).[9] The "level of culpability forms the core around which the government must construct each

[7] Section 1592 notes, in relevant part:

> (a) Prohibition
> (1) General rule
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence--
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of--
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
> (ii) any omission which is material, or
> (B) may aid or abet any other person to violate subparagraph (A).

19 U.S.C. § 1592.

[8] Defendant refers to CBP's "pre-penalty notice" issued on July 21, 2014, to its "penalty notice" issued on October 1, 2014, and to its "revised penalty notice" issued on February 10, 2015. Def.'s XMSJ at 5–8. The court notes that pursuant to Section 1592, CBP issues a pre-penalty *notice* to indicate its intent to seek a monetary penalty, followed by a penalty *claim* if it determines that a violation has occurred. *See* 19 U.S.C. § 1592(b) (emphasis added). However, in common parlance, references made to penalty notices frequently encompass pre-penalty notices and penalty claims.

[9] Section 1592(e) reads:

penalty claim it wishes to bring." *United States v. Optrex America, Inc.*, 29 CIT 1494, 1498 (2005). In *United States v. Nitek Electronics, Inc.*, the Federal Circuit held that "penalty claims based on fraud, gross negligence, or negligence are separate claims and the Department of Justice cannot independently enforce a penalty claim in court for a culpability level that was not pursued administratively by Customs." 806 F.3d 1376, 1380 (Fed Cir. 2015).

Defendant asserts that the government cannot enforce claims before the court that were not administratively exhausted before CBP. Def.'s PMSJ at 19–23. However, Defendant's argument conflates the prohibition against pursuing a claim based on a different level of culpability with the government's ability to bring forth new or admissible evidence in support of a claim already set forth in the penalty notice during the administrative proceeding. *See, e.g., id*. at 20–23; Def.'s Resp. at 5; Def.'s Reply at 9–11. Defendant cites to *Nitek* and *Optrex*, but these cases do not support its position. In both *Nitek* and *Optrex,* the issue was whether the government could make a claim for a different culpability level than that previously set forth in CBP's penalty notices; the Federal Circuit held that it could not. *Nitek*, 860 F.3d at 1380 ("*de novo* review does not give the Government independent power to bring a claim that Customs did not allege") (italicization added); *Optrex*, 29 CIT at 1498–1500 ("the *de novo* standard refers to the issues in the context of a specific claim based on one of three types of section 1592 violations and does not allow the court to review entirely new penalty claims").[10] In none of the cases cited by Defendant does the court consider whether either party to the proceeding is prohibited from introducing new evidence in support of a claim and culpability level that have already been set forth in the penalty notice.

Section 1592 penalty proceedings are tried *de novo* on the basis of the record developed before the court; they are not record reviews of

> Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section--
>
> (1) all issues, including the amount of the penalty, shall be tried de novo;
>
> (2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;
>
> (3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and
>
> (4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

19 U.S.C. § 1592(e).

[10] Defendant also cites to *United States v. Ford Motor Co.*, 463 F. 3d 1286 (Fed. Cir. 2006), but the issue there was Ford's ability to attach an unrelated counterclaim to its pleadings, not whether either party could introduce new evidence related to existing claims before the court. *See id*. at 1296–98.

an administrative proceeding, but rather litigation on a claim made by the agency. 19 U.S.C. § 1592(e); 28 U.S.C. 2640(a)(6) ("The Court of International Trade shall make its determinations upon the basis of the record made before the court in . . . . [c]ivil actions commenced pursuant to section 1582 of this title.") While the government, as already discussed, is not permitted to pursue claims based on culpability levels not asserted in the penalty claim, Univar's argument that the government is limited to the particular facts set forth in the penalty notice and the evidentiary record compiled by CBP during its investigation is without merit. A penalty notice is adequate when it "provides [the liable party] with . . . enough information for it to form a response in defense." *United States v. Obron Atl. Corp.*, 18 CIT 771, 774–75, 862 F. Supp. 378, 381 (1994) (CBP had provided sufficient material facts when CBP described the merchandise entered and explained the manner in which it was mis-described, leading to the alleged improper entry); *see also United States v. American Casualty Corp. of Reading Pa.*, 39 CIT ___, ___, 91 F. Supp. 3d 1324, 1338 (2015) (CBP had disclosed all material facts and importer was adequately apprised when pre-penalty notice indicated that merchandise was purchased from a fishery in China but importer had declared country of origin as Thailand, thus breaching its duty of reasonable care); *Nitek*, 806 F. 3d at 1380 ("the court can consider all issues *de novo* that are alleged in Customs' final penalty claim"). Thus, contrary to Univar's claim, Plaintiff is not barred from introducing evidence developed during discovery solely because it was not before CBP during the administrative proceeding and specifically disclosed in the penalty notice.

II. Defendant's motion for partial summary judgment is denied

Defendant argues that the material facts disclosed by CBP in its penalty notices fail to establish gross negligence or negligence with respect to the 23 entries that predate March 2010. Def.'s PMSJ at 23–25. Defendant asserts that the Taiwanese customs documentation relied on by CBP to support its allegation of transshipment only concerns entries beginning in March 2010. *See id.*; *see also* Def.'s PMSJ, Ex. 26 ("Taiwan Customs Data"), ECF No. 18–30. Plaintiff responds that the Taiwanese customs data is sufficient evidence to establish that Lung Huang had a habit or routine practice of importing Chinese saccharin and then exporting it to the United States, as permitted by Federal Rule of Evidence 406 ("FRE 406"). Pl.'s Opp'n and XMSJ at 15–16. Plaintiff contends that, at a minimum, the Taiwanese customs data raises a triable issue of fact regarding the

origin of the subject merchandise. *Id.* at 18. Further, Plaintiff argues that Lung Huang lacked saccharin production facilities during the 2007–2012 time period and could not have produced the saccharin imported by Univar. *Id.* at 17–18. Moreover, because HTC was the only saccharin producer in Taiwan during this time period, and it did not sell any saccharin to Univar or Lung Huang during this period, Univar's imports could not have been of Taiwanese origin. *Id.* at 18.

To support its position, Plaintiff filed a series of exhibits with the court, including affidavits and reports prepared by DHS personnel responsible for the underlying investigation. *See generally*, Confidential Aff. of Special Agent Patrick Deas in Supp. of Opp'n. to Def.'s Mot. for Summ. J. ("Deas Aff."), ECF No. 30–2 (and accompanying exhibits); Confidential Aff. of Special Agent Kyle Maher in Supp. of Opp'n. to Def.'s Mot. for Summ. J. ("Maher Aff."), ECF No. 30–9 (and accompanying exhibits); Tsui Aff. (and accompanying exhibits); Confidential Decl. of Stephen C. Tosini ("Tosini Decl."), ECF No. 30–20 (and accompanying exhibits). Defendant contests the admissibility of Plaintiff's evidence. Def.'s Reply at 4–6. Plaintiff has not had an opportunity to respond to Defendant's objections to its affidavits, declarations and reports with respect to the 23 entries because the objections were raised in Defendant's reply. *See* Def.'s Reply at 4–6.

As the moving party, Defendant has the burden to show that there are no material facts in dispute related to its claim. *See Celotex Corp.*, 477 U.S. at 323. In this case, Defendant may discharge this burden by showing that there is an absence of evidence supporting Plaintiff's case. *See id.* at 325. However, when discovery is ongoing, the court must consider whether adequate time for discovery has elapsed so that the non-movant is not unfairly disadvantaged by a premature summary judgment motion. *See id.* at 322, 326.

Defendant contends that Plaintiff is unable to produce any evidence showing entries of allegedly transshipped saccharin prior to March 2010 (as set forth in the Taiwanese customs data). Discovery, however, is not complete. Both parties are continuing to depose witnesses. *See, e.g.* Pl.'s Suppl. Br.; Def.'s Resp. to Pl.'s Suppl. Br.; Univar USA's Mot. for Leave to file Suppl. Br.; Pl.'s Opp'n to Def.'s Mot. for Leave to file Suppl. Br. Additionally, the court issued letters rogatory seeking admissible testimony from William Huang and Guan-fu Lai (a representative of HTC) in Taiwan and responses to those letters remain outstanding. Confidential Request for Int'l Judicial Assistance (June 21, 2016), ECF No. 50; Request for Int'l Judicial Assistance (June 21, 2016), ECF No. 51; *see also* Pl.'s Suppl. Br. at 2 (the letters rogatory have been received by the relevant Taiwanese district courts and remain pending). Further, Plaintiff has represented that it is in the

process of procuring certified statements from Taiwanese authorities pertaining to saccharin production, manufacture or repackaging in Taiwan during the relevant period, data on saccharin imports into Taiwan during the relevant period, and import/export data relating to Lung Huang during the relevant period. Pl.'s Suppl. Br. at 3. Fact discovery does not close until January 25, 2017. *See* Order (Nov. 25, 2015) ("Scheduling Order"), ECF No. 16. While Plaintiff asserts that it has sufficient evidence to establish that the subject entries were of Chinese origin, Plaintiff also requests, in the alternative, that the court defer or deny consideration of Defendant's motion while relevant discovery is pending. Pl.'s Opp'n and XMSJ at 2425; Pl.'s Suppl. Br.; Pl.'s R. 56(d) Decl. at 2.

As the movant, Defendant has the burden to show that there is an absence of evidence supporting Plaintiff's case. However, when that alleged absence may be the result of incomplete, ongoing discovery, the court may properly deny the partial summary judgment motion on the basis of an affidavit or declaration from the nonmoving party showing that, for specified reasons, it cannot present facts to justify its opposition. USCIT Rule 56(d). In this case, the United States has, in the alternative, made such a declaration and, as discussed above, discovery is ongoing.

Defendant also raises evidentiary issues with the Taiwanese customs data and the affidavits and declarations submitted as part of Plaintiff's response. Def.'s Reply at 4–9; *see also* Univar USA Inc.'s Resp. to Pl.'s Rule 56.3 Statement, ECF No. 36–1. Defendant argues that, contrary to Plaintiff's position, the Taiwanese customs data does not constitute habit evidence and that, even if it met the requirements of "habit" pursuant to FRE 406, it could not be used to infer that Lung Huang transshipped Chinese saccharin prior to 2010 because habit evidence is customarily used to infer prospective conduct and the Taiwanese customs data only provides information for the period 20102012. Def.'s Reply at 6–9. Defendant claims that the affidavits and declarations put forth by Plaintiff in support of its position are inadmissible hearsay and therefore do not meet the requirements of USCIT R. 56(c)(1) that a party asserting that a material fact is in dispute cite to particular parts of the record and admissible evidence to support its claim. Def.'s Reply at 4–6; *see also* USCIT R. 56(c)(1). The court need not resolve these evidentiary issues at this time. Material facts remain in dispute and discovery is ongoing. Whether Plaintiff will obtain sufficient admissible evidence with respect to the 23 pre-March 2010 entries to make its case is to be determined at some future date. In the interim, discovery is ongoing and Defendant's motion for partial summary judgment is denied.

III. Plaintiff's motion for partial summary judgment is denied

Plaintiff argues that it has established Defendant's liability pursuant to section 1592(a) with respect to the 13 entries of saccharin that occurred after March 2010 and liability for antidumping duties and statutory interest on those entries. Pl.'s Opp'n and XMSJ at 26–30. Plaintiff references the Taiwanese customs data in conjunction with its evidence that Lung Huang could not have produced the subject merchandise to argue that the post-March 2010 entries were of Chinese origin. *See id*. at 3–6, 26. Plaintiff then argues that Univar was negligent and breached its duty of reasonable care when, "in light of repeated warnings," Univar "took no action other than to ask the alleged transshipper whether its merchandise was manufactured in Taiwan," and "further discarded its own policy of conducting regular audits of and site visits to foreign plants." *Id*. at 26, 27–29. Defendant responds that Plaintiff's affidavits and declarations submitted in support of its argument are based upon inadmissible hearsay and that, in any event, material facts remain in dispute because Plaintiff has failed to demonstrate that the country of origin declared by Univar was false or that Univar acted with negligence or gross negligence. Def.'s Resp. at 4–7. As such, Defendant argues that summary judgment with respect to the post-March 2010 entries should be denied, or in the alternative, deferred until Univar has had time to complete discovery. *Id*. at 4–14; Def.'s R. 56(d) Decl.

As the moving party for partial summary judgment with respect to these entries, Plaintiff has the burden to show that there are no disputed material facts and further, that it is entitled to judgment as a matter of law. Plaintiff has failed to carry that burden.

In support of its claim, Plaintiff relies on the arguments it made in response to Defendant's partial motion for summary judgment, and offers the court nothing further. *Compare* Pl.'s Opp'n and XMSJ at 26 ("as shown above, those 13 entries are all of Chinese origin saccharin" referring to 13 post-March 2010 entries) *with* Pl.'s Opp'n and XMSJ at 15–18 (discussing evidence establishing Chinese origin of 23 pre-March 2010 entries). To wit, Plaintiff contends that the combination of the Taiwanese customs data, together with CBP's finding that the only authorized Taiwanese manufacturer of saccharin, HTC, did not sell to Univar, demonstrates the Chinese origin of the 13 post-March 2010 entries. *See*Pl.'s Opp'n and XMSJ at 15–18, 26. In response, Defendant questions the relevance of Taiwanese customs data, noting that the saccharin Lung Huang imported from China is a different size than the saccharin Lung Huang exported to Univar and that it is

not possible to correlate all of the Chinese imports into Taiwan with all of the exports from Lung Huang to the United States. Def.'s Resp. at 5–6.

Plaintiff's argument regarding the Taiwanese customs data rests on correlating Lung Huang's saccharin imports into Taiwan from China with its saccharin exports from Taiwan to Univar in the United States. According to Plaintiff, the shipments are correlated by weight and date of import. Pl.'s Opp'n and XMSJ at 5–6, 16–17. The Taiwanese customs data also includes information on the mesh or size of the sodium saccharin grain imports and exports. Taiwan Customs Data at 3–4; *see* Def.'s Reply at 7 (noting that mesh connotes size). Defendant argues that Plaintiff cannot tie each export to the United States with a correlated prior import from China because the total weight and size of the preceding imports from China did not always correspond with the weight and size of the exports to the United States. Def.'s Resp. 6–7.

As indicated above, Plaintiff also argues that Univar's saccharin entries from 2007 to 2012 could not have been of Taiwanese origin because Lung Huang was not licensed to manufacture saccharin in Taiwan during this time, because Lung Huang allegedly lacked a manufacturing facility during this time, and because HTC was the only licensed manufacturer of saccharin in Taiwan during this period and it did not sell saccharin to Univar. Pl.'s Opp'n and XMSJ at 17–18; Pl.'s Reply at 5. Defendant asserts that Plaintiff has not put forth any Taiwanese regulation that required licensing of saccharin manufacturing facilities and that Lung Huang's alleged lack of such license does not mean it did not manufacture saccharin in Taiwan. Def.'s Resp. at 7. Further, Defendant argues that Plaintiff's evidence regarding HTC is inadmissible because it contains hearsay and, in any event, HTC's statement regarding its only U.S. customer cannot be used to demonstrate that the statement remained true any time after it was made. *Id*. at 7.

Both Plaintiff and Defendant are continuing to conduct discovery on this and other relevant issues. For example, in its supplemental brief, Plaintiff stated that it is waiting for certified statements from Taiwanese authorities that will address which, if any, entities were formally authorized to manufacture or repackage saccharin in Taiwan. Pl.'s Suppl. Br. at 3. Defendant, for its part, has filed a USCIT R. 56(d) affidavit with the court asking the court to defer or deny Plaintiff's motion, and in its response notes that "Univar needs to conduct additional discovery in order to fairly respond to the government's claims." Def.'s Resp. at 12; Def.'s R. 56(d) Decl.

Plaintiff has failed to demonstrate a lack of disputed material facts with regard to the claims on which it seeks partial summary judgment. As is the case with Defendant's motion for partial summary judgment, discovery is ongoing and Defendant has adequately established that this motion must be denied to allow this discovery to continue.[11]

Plaintiff also argues that Univar is liable for antidumping duties and statutory interest on the 13 post-March 2010 entries because of "uncontroverted proof of Univar's violation with respect to these 13 entries, all of even *[sic]* which post-date the target letter." Pl.'s Opp'n and XMSJ at 29. Because questions of fact remain regarding the country of origin of Univar's entries, and, in light of the outstanding discovery, partial summary judgment with regard to antidumping duty liability is similarly inappropriate at this time and is, therefore, denied.

IV. Defendant's motions for leave to file supplemental briefs are denied as moot

Confirming the premature nature of both summary judgment motions, parties have continued to supply the court with briefs and allegedly undisputed facts on the basis of ongoing discovery. *See*Def.'s First Req.; Pl.'s Opp'n to Def.'s First Req.; Def.'s Second Req.; *see also* Pl.'s Suppl. Br.; Def.'s Resp. to Pl.'s Suppl. Br. In light of the denial of the cross motions for partial summary judgment, the Defendant's pending motions for leave to file supplemental briefs are denied as moot. Def.'s First Req.; Def.'s Second Req.

CONCLUSION

For the reasons stated above, the court DENIES Defendant's motion for partial summary judgment with regard to the 23 entries of saccharin that entered prior to March 2010 (ECF No. 18) and DENIES Plaintiff's motion for partial summary judgment with regard to the 13 entries of saccharin that entered during or after March 2010 (ECF No. 30).

The court DENIES Univar's motion for leave to file a supplemental brief (ECF No. 79) and DENIES Univar's second motion for leave to file a supplemental brief (ECF No. 82).

Parties are to proceed in accordance with the Scheduling Order, dated November 25, 2015 (ECF No. 16).

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[11] In addition to clearly relevant discovery that is still ongoing, Defendant has raised a number of evidentiary issues with respect to the Taiwanese customs data and Plaintiff's evidence from the CBP investigation. Def.'s Resp. at 4–5. Because material facts remain in dispute and summary judgment is premature, the court does not reach these evidentiary issues. *See supra* pp. 14–16.

Dated: December 22, 2016
New York, New York

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

Slip Op. 16–120

FINE FURNITURE (SHANGHAI) LIMITED, Plaintiff, AND ARMSTRONG WOOD PRODUCTS (KUNSHAN) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., OLD MASTER PRODUCTS, INC., LUMBER LIQUIDATORS SERVICES, LLC, SHANGHAI LAIRUNDE WOOD CO., LTD., CHANGZHOU HAWD FLOORING CO., LTD., DALIAN HUILONG WOODEN PRODUCTS CO., LTD., DUNHUA CITY JISEN WOOD INDUSTRY CO., LTD., DUNHUA CITY DEXIN WOOD INDUSTRY CO., LTD., DUNHUA CITY HONGYUAN WOOD INDUSTRY CO., LTD., JIAXING HENGTONG WOOD CO., LTD., KARLY WOOD PRODUCT LIMITED, YINGYI-NATURE (KUNSHAN) WOOD INDUSTRY CO., LTD., XIAMEN YUNG DE ORNAMENT CO., LTD., ZHEJIANG SHUIMOJIANGNAN NEW MATERIAL TECHNOLOGY CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 16–00145

[Plaintiff-intervenor's motion for a preliminary injunction is granted.]

Dated: December 28, 2016

Harold Deen Kaplan and *Craig Anderson Lewis*, Hogan Lovells US LLP, of Washington, DC, were on the brief for plaintiff-intervenor.

Benjamin C. Mizer, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, International Trade Field Office, *Patricia M. McCarthy*, Assistant Director, and *Tara K. Hogan*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, were on the brief for defendant. *Mercedes C. Morno*, Office of Trade Enforcement & Compliance, Department of Commerce, was of counsel on the brief.

MEMORANDUM OPINION AND ORDER[1]

EATON, Judge:

Before the court is plaintiff-intervenor Armstrong Wood Products (Kunshan) Co., Ltd.'s ("plaintiff-intervenor" or "Armstrong") partial consent[2] motion for a preliminary injunction to enjoin defendant, the United States ("defendant" or "the Government"), from liquidating its

[1] The following cases are consolidated under lead court number 16–00145: 16–00146, 16–00147, 16–00148, 16–00155, and 16–00156.

[2] Plaintiff Fine Furniture (Shanghai) Limited ("plaintiff" or "Fine Furniture") consented to plaintiff-intervenor's motion for a preliminary injunction. Pl.-Int.'s Mot. for Prelim. Inj. 1 (ECF Dkt. No. 16) ("Pl.-Int.'s Br.").

entries of multilayered wood flooring from the People's Republic of China ("PRC") during the pendency of this action. Pl.-Int.'s Mot. for Prelim. Inj. 1 (ECF Dkt. No. 16) ("Pl.-Int.'s Br."). Specifically, Armstrong, as a plaintiff-intervenor, asks that liquidation be enjoined for all of its unliquidated entries of multilayered wood flooring from the PRC that "were entered, or withdrawn from warehouse, for consumption during the period December 1, 2013 through November 30, 2014, inclusive;" and are subject to the Department of Commerce's ("the Department" or "Commerce") multilayered wood flooring from the PRC December 1, 2013 through November 30, 2014 administrative review of the corresponding antidumping duty order. Pl.-Int.'s Br. 1–2; *Multilayered Wood Flooring From the PRC*, 81 Fed. Reg. 46,899, 46,901–02 (Dep't of Commerce July 19, 2016) (final results of antidumping duty administrative review; 2013–2014) ("Final Results") (determining that the weighted-average dumping margins for the POR from December 1, 2013 through November 30, 2014 are 17.37 percent); *Multilayered Wood Flooring From the PRC*, 76 Fed. Reg. 64,318, 64,318 (Dep't of Commerce Oct. 18, 2011) (final determination of sales at less than fair value).

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(c)(2) (2012). For the reasons set forth below, plaintiff-intervenor's motion for a preliminary injunction is granted.

BACKGROUND

On July 19, 2016, the Department published the Final Results of its third administrative review of multilayered wood flooring from the PRC. *Final Results*, 81 Fed. Reg. at 46,899. The plaintiff in this case, Fine Furniture (Shanghai) Limited ("plaintiff" or "Fine Furniture"), a selected mandatory respondent, filed a summons on August 9, 2016, and its Complaint on September 1, 2016, contesting Commerce's Final Results. Summons (ECF Dkt. No. 1) (Aug. 9, 2016); Compl. ¶ 13 (ECF Dkt. No. 9) (Sept. 1, 2016). Plaintiff's Complaint challenged: (1) Commerce's determination to select Romania as the surrogate country, and not Thailand; (2) Commerce's use of certain financial statements in its financial ratios calculations; and (3) Commerce's surrogate value determination for plaintiff's face veneer inputs. Compl. ¶¶ 19, 21, 23.

Plaintiff-intervenor, whose motion is now before the court, is a separate rate respondent and an exporter of multilayered wood flooring from the PRC whose merchandise is also subject to the Department's determination. *See* Pl.-Int.'s Br. 3. On September 2, 2016, the court granted plaintiff-intervenor's consent motion to intervene because the company participated in the underlying administrative

proceedings and timely filed its motion.[3] Order (ECF Dkt. No. 19) (Sept. 2, 2016) (granting plaintiff-intervenor's motion to intervene); 28 U.S.C. § 2631(j)(1).

Along with its motion to intervene, Armstrong also filed motions for a preliminary injunction and a temporary restraining order, which the Government opposed. Pl.-Int.'s Consent Mot. to Intervene (ECF Dkt. No. 10) (Sept. 1, 2016) ("Mot. to Intervene"); Pl.-Int.'s Mot. for TRO (ECF Dkt. No. 17) (Sept. 1, 2016). Also, on September 2, 2016, the court granted plaintiff-intervenor's request for a TRO. TRO (ECF Dkt. No. 20) (Sept. 2, 2016) (ordering that "this injunction shall expire on the later of fourteen days from the date of this order or the date upon which this Court rules upon Armstrong Wood Products (Kunshan) Co., Ltd.'s Motion for a Preliminary Injunction (ECF Dkt. No. 16)." (citing *Tianjin Wanhua Co., Ltd. v. United States*, 38 CIT __, 11 F. Supp. 3d 1283 (2014); *Union Steel v. United States*, 33 CIT 614, 617 F. Supp. 2d 1373 (2009))).

On September 20, 2016, plaintiff Fine Furniture filed a motion, consented to by the Government, for a preliminary injunction to prevent liquidation of its entries. Pl.'s Mot. for Prelim. Inj. (ECF Dkt. No. 43). The court granted the motion on the same day. Prelim. Inj. Order (ECF Dkt. No. 44) (Sept. 20, 2016); TRO (ECF Dkt. No. 45) (Sept. 20, 2016).

Now before the court is plaintiff-intervenor's partial consent motion to enjoin the Government from liquidating its entries of multilayered wood flooring from the PRC. Pl.-Int.'s Br. 1. The Government opposes this motion arguing that plaintiff-intervenor (1) "seeks to enlarge the issues" in the Complaint, and (2) is untimely requesting an injunction for its entries. Def.'s Resp. in Opp'n to Pl.-Int.'s Mot. for a Prelim. Inj. & TRO 2, 5 (ECF Dkt. No. 18) ("Def.'s Br.").

DISCUSSION

I. Legal Considerations

"In international trade cases, the CIT has authority to grant preliminary injunctions barring liquidation in order to preserve a party's right to challenge the assessed duties." *Qingdao Taifa Grp. Co., Ltd. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009). "To prevail on its motion for a preliminary injunction, [plaintiff-intervenor] must show (1) that it will be immediately and irreparably injured; (2) that

[3] It is worth noting that Armstrong did not bring its own action in this Court challenging Commerce's administrative determination. *See* Def.'s Resp. in Opp'n to Pl.-Int.'s Mot. for a Prelim. Inj. & TRO (ECF Dkt. No. 18) ("Def.'s Br."). In addition, at the time Armstrong filed its motion to intervene in this action and sought injunctive relief, the time period to file its own action in this Court had already expired. Def.'s Br. 5.

there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the [plaintiff-intervenor]." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *Union Steel v. United States*, 33 CIT 614, 621–22, 617 F. Supp. 2d 1373, 1381 (2009).

Additionally, a qualified interested person may join a previously commenced action as an intervenor.[4] 28 U.S.C. § 2631(j)(1); USCIT R. 24 (2016). An intervenor may also preserve its unliquidated entries for eventual liquidation at the rates finally determined by the litigation by moving for a preliminary injunction to bar the liquidation of those entries. USCIT R. 56.2(a). For injunctive relief, an "intervenor must file a motion for a preliminary injunction no earlier than the date of filing of its motion to intervene and no later than 30 days after the date of service of the order granting intervention, or at such later time, but only for good cause shown." USCIT R. 56.2(a).

II. Plaintiff-Intervenor May Seek a Preliminary Injunction

A. Enjoining the Government From Liquidating Plaintiff-Intervenor's Entries Is Not an Enlargement of the Action

The Government first opposes Armstrong's motion because it asserts that plaintiff-intervenor seeks to enlarge the issues in the Complaint by requesting an injunction for entries not listed in the Complaint. Def.'s Br. 3; *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944) ("[A]n intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.").

[4] Rule 24 provides:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(3) In an action described in 28 U.S.C. § 1581(c), a timely motion must be made no later than 30 days after the date of service of the complaint as provided for in Rule 3(f), unless for good cause shown at such later time for the following reasons:

(i) mistake, inadvertence, surprise or excusable neglect; or

(ii) under circumstances in which by due diligence a motion to intervene under this subsection could not have been made within the 30-day period. Also, in an action described in 28 U.S.C. § 1581(c), at the time a party's motion for intervention is made, attorneys for that party are required to comply with the procedures set forth in Rule 73.2 (c) by filing of a Business Proprietary Information Certification where appropriate.

USCIT R. 24 (2016).

The Government argues that an intervenor's role "is limited to supporting the plaintiff[] in asserting [its] own claim[] for relief." Def.'s Br. 3; *Laizhou Auto Break Equip. Co. v. United States*, 31 CIT 212, 214, 477 F. Supp. 2d 1298, 1300–01 (2007). For the Government, the plaintiff-intervenor may "support Fine Furniture's case against the United States," but cannot "expand the case to include its own separate entries affected by Commerce's decision." Def.'s Br. 2–3. Defendant maintains that plaintiff-intervenor is impermissibly attempting to enlarge the issues in this case, by seeking to have its, now suspended, entries liquidated in accordance with the ultimate judicial decision in this case.

Plaintiff-intervenor maintains that it is not enlarging the case set out in plaintiff's Complaint by introducing new substantive issues or theories. Pl.-Int.'s Br. 4. Rather, plaintiff-intervenor insists it merely hopes to obtain the same benefit plaintiff would receive, if plaintiff succeeds in obtaining a lower duty rate, for its entries that come into the United States prior to the conclusion of the litigation. Pl.-Int.'s Br. 4. According to plaintiff-intervenor, were its entries to be liquidated before the case's conclusion, it could lose the relief that plaintiff would get for its entries. Pl.-Int.'s Br. 4; *see* 19 C.F.R. § 159.1 ("Liquidation means the final computation or ascertainment of duties on entries for consumption or drawback entries."); *Qingdao*, 581 F.3d at 1380 ("[O]nce the entries [are] liquidated the law provide[s] no viable method to recover any additional money even if the liquidation rate [is] later deemed incorrect."). Plaintiff-intervenor further argues that "because this Court has already found that plaintiff['s] action satisfies the criteria for a preliminary injunction, it should find that proposed plaintiff-intervenor has also satisfied those criteria." Pl.-Int.'s Br. 4 (citation omitted).

Plaintiff-intervenor cites to earlier cases in this Court that have found that guarding its entries to obtain future relief does not expand the case. Pl.-Int.'s Br. 4. Where a plaintiff-intervenor "is not introducing any new issues or legal theories into the litigation," but rather "seek[s] to simply obtain for its entries the benefit of any affirmative relief that may inure to [plaintiff]" the court may properly enjoin the Government from liquidating its entries. *Tianjin Wanhua*, 38 CIT at __, 11 F. Supp. 3d at 1285–86; *NSK Corp. v. United States*, 32 CIT 161, 166, 547 F. Supp. 2d 1312, 1318 (2008) ("[T]he fact that an intervenor brings additional entries to the litigation carries no weight with regard to enlargement."); *see also Union Steel*, 33 CIT at 623–24, 617 F. Supp. 2d at 1382.

The court is persuaded by plaintiff-intervenor's arguments and the case law. A plaintiff-intervenor's motion for a preliminary injunction,

which does not raise additional substantive issues, does not enlarge the Complaint since it simply requires that the "final judicial determination resulting from this litigation . . . govern entries that already were the subject of the administrative review and the Final Results," and does "not, in any meaningful sense, 'compel an alteration of the nature of the proceeding.'" *Union Steel*, 33 CIT at 624, 617 F. Supp. 2d at 1382 (quoting *Vinson*, 321 U.S. at 498).

Indeed, the facts and arguments in this case are almost identical to those raised in the earlier case of *Union Steel*. *See Union Steel*, 33 CIT at 614, 617 F. Supp. 2d at 1374. There, plaintiff-intervenor moved for a temporary restraining order and preliminary injunction to keep U.S. Customs and Border Protection ("Customs") from liquidating its entries during the pending litigation. *Id.* at 614, 617 F. Supp. 2d at 1375. Moreover, as is the case here, the plaintiff in *Union Steel* was granted a preliminary injunction preventing liquidation of its entries under the challenged administrative review. *Id.* at 622, 617 F. Supp. 2d at 1381. The Government in *Union Steel* likewise opposed the plaintiff-intervenor's motion by arguing that granting a preliminary injunction would impermissibly "enlarge [the] issues" by covering entries not listed in the Complaint. *Id.* at 623, 617 F. Supp. 2d at 1382; Def.'s Br. 4–5.

Relying on *Vinson*, the Government in *Union Steel* asserted that "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Union Steel*, 33 CIT at 623, 617 F. Supp. 2d at 1382 (citation omitted). Distinguishing its facts from *Vinson*, the *Union Steel* Court found that

> [b]ecause it need do no more than allow the final judicial determination resulting from this litigation to govern entries that already were the subject of the administrative review and the Final Results, the grant of the injunction Whirlpool seeks would not, in any meaningful sense, "compel an alteration of the nature of the proceeding[s]."

Id. at 624, 617 F. Supp. 2d at 1382–83 (citations omitted). Moreover, unlike in *Vinson*, the plaintiff-intervenor in *Union Steel* did not "raise before the court any substantive issues that [were] not raised by plaintiff's complaint." *Id.* at 624, 617 F. Supp. 2d at 1382.

As in *Union Steel*, the court, here, granted plaintiff's consent motion for a preliminary injunction enjoining the liquidation of its entries pending the outcome of the judicial proceeding related to the contested administrative review. Prelim. Inj. Order 1. In addition, as in

Union Steel, plaintiff-intervenor here also seeks to have the Government enjoined from liquidating its entries that are subject to the same administrative review as plaintiff's. Pl.-Int.'s Br. 3. The Government makes no claim that plaintiff-intervenor is attempting to enlarge the issues in the case by raising new substantive arguments. Rather, the Government merely claims that plaintiff-intervenor is trying to unlawfully enlarge the case by seeking to protect its entries from being liquidated.

The court agrees with the reasoning in *Union Steel* and the other earlier cases and finds that plaintiff-intervenor's motion for a preliminary injunction does not enlarge the Complaint because "bring-[ing] additional entries [into] the litigation carries no weight with regard to enlargement," *NSK*, 32 CIT at 166, 547 F. Supp. 2d at 1318, and denying the motion on this ground "would be tantamount to providing [p]laintiff–[i]ntervenors (as interested parties to the underlying administrative proceeding) with a statutory right to participate in the litigation (via intervention under 28 U.S.C. § 2631(j)) without any chance for relief." *Tianjin Wanhau*, 38 CIT at __, 11 F. Supp. 3d at 1286.

Accordingly, Armstrong's position in this litigation as a plaintiff-intervenor does not foreclose its request for a preliminary injunction preventing defendant from liquidating its entries while this case is pending.

B. Plaintiff-Intervenor's Motion for a Preliminary Injunction Was Timely

The Government next asserts that the court should not enjoin liquidation, because plaintiff-intervenor's time to file its own action contesting the Final Results has lapsed. Def.'s Br. 5. That is, the Government contends that Armstrong cannot now "piggyback on the original timely filed complaint" by successfully moving to enjoin liquidation of its entries when it would be out of time in suing, and moving for an injunction, on its own behalf. Def.'s Br. 4. The Government further argues that, despite USCIT Rule 24(a)(3) permitting plaintiff-intervenor's intervention as of right, granting the preliminary injunction extends the jurisdiction of the court by providing relief to a party that failed to timely bring its own action in this Court. Def.'s Br. 5 ("Permitting Armstrong to do so would be to open a loophole to expand the time limit Congress has set forth for an aggrieved party to seek review of a final determination by Commerce."). Thus, according to defendant, "Armstrong seeks relief, *via* intervention, that it was untimely to seek through the normal course of filing a complaint within statutory deadlines." Def.'s Br. 5.

The court finds that because plaintiff-intervenor timely intervened, granting a preliminary injunction to prevent liquidation of its entries is proper. *See* Order (ECF Dkt. No. 19). The Government appears to argue that Armstrong should be estopped from seeking a preliminary injunction in this action because it is too late for it to seek the same relief by bringing its own action in this Court. Def.'s Br. 4–5. That is, according to defendant, because a complaint filed by plaintiff-intervenor at this juncture would be untimely, plaintiff-intervenor should not receive relief by way of an injunction through its intervention, even if the intervention is timely. *See* Def.'s Br. 5.

This argument is hard to credit. Armstrong timely intervened in this action in accordance with USCIT Rule 24, by filing its Motion to Intervene on September 1, 2016, the same day that plaintiff Fine Furniture filed its Complaint. Order (ECF Dkt. No. 19); Compl. ¶ 13; USCIT R. 24(a)(3) ("In an action described in 28 U.S.C. § 1581(c), a timely motion must be made no later than 30 days after the date of service of the compliant as provided for in Rule 3(f), unless for good cause shown . . . ."). By intervening, plaintiff-intervenor receives the same status to apply for an injunction as any other party in the action. *See, e.g., Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Qingdao*, 581 F.3d at 1378 ("[T]he CIT has authority to grant preliminary injunctions barring liquidation in order to preserve *a party's right* to challenge the assessed duties.") (emphasis added).

Defendant's argument that granting plaintiff-intervenor's motion "would expand the time limit Congress has set forth for an aggrieved party *to seek review of a final determination*," however, seems to be aimed at allowing Armstrong to gain any benefit by intervention, not at its motion for a preliminary injunction. *See* Def.'s Br. 5 (emphasis added). The defendant, though, cites no law, and the court could find none, to support the proposition that, as a result of not filing its own timely summons and complaint, Armstrong could not (1) intervene; (2) move for a preliminary injunction; or (3) have the status of a full party to the action.[5] In fact, the Rules of this Court clearly anticipate

[5] The Court of International Trade's procedure statute, which permits intervention in the circumstances such as those before the court, does not include a time limit by which a party must intervene or move for a preliminary injunction. 28 U.S.C. § 2631(j)(1) (stating that where the movant was "an interested party who was a party to the proceeding in connection with which the matter arose," and "would be adversely affected or aggrieved by an adverse decision in a civil action pending in the Court of International Trade," then it may intervene in a civil action pending before the Court). The statute, instead, defers to the Court of International Trade's own Rules for jurisdictional time limits. *See, e.g.*, 28 U.S.C. § 2633(b) ("The Court of International Trade shall prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters."); 28 U.S.C. § 2632 ("[A]s prescribed in such section, with the content and in the form, manner, and style prescribed by the rules

that a participant in the underlying administrative review may intervene; and that a timely intervenor may seek an injunction. USCIT R. 56.2(a). In other words, this Court's Rules contemplate that a plaintiff-intervenor may seek a preliminary injunction to protect its entries where it timely intervenes in an action before this Court; and these Rules contain no suggestion that any motion be made within the time the intervenor could have sued as a plaintiff. *See* USCIT R. 56.2(a) ("[A]n intervenor must file a motion for a *preliminary injunction* no earlier than the date of filing of its motion to intervene and *no later than 30 days after the date of service of the order granting intervention*, or at such later time, but only for good cause shown.") (emphasis added); USCIT R. 24(a).

Thus, Commerce's jurisdictional argument is unconvincing, as there is simply nothing to suggest that, after lawfully intervening, a plaintiff-intervenor is untimely in seeking an injunction and unable to preserve its means to obtain any future relief.

The Government made a similar argument in *Union Steel*, where the Court observed:

> In opposition to the grant of an injunction, defendant also relies on the language of USCIT Rule 56.2(a), which provides that "[a]ny motion for a preliminary injunction to enjoin the liquidation of entries that are the subject of the action must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown." Defendant's argument reads too much into the language of the Rule, which addresses generally the time at which a party must file its motion for the injunction and is not specifically directed to the intervention-related issue before the court. Moreover, defendant's overly broad construction of the language of the Rule would disregard considerations that were important to Congress in enacting the statutory scheme that the Rule, in part, is intended to effectuate. Congress considered an injunction against liquidation to be so significant to the judicial review of a determination in an antidumping proceeding that it expressly provided the opportunity for such an injunction in 19 U.S.C. § 1516a(c)(2). Congress also attached importance to a party's opportunity to intervene in an action brought under 19 U.S.C. § 1516a, as demonstrated by its providing that the intervention of an interested party who was a party to the underlying administrative proceeding is an intervention as a matter of right. By seeking to deny the availability of an injunction in the general

of the court."); 28 U.S.C. § 2636(c) ("[C]ommenced in accordance with the rules of the Court of International Trade within the time specified in such section.").

> circumstances posed by Whirlpool's motion, defendant's litigation position, if adopted by the court, would diminish the significance of the intervention procedure established by those statutory provisions.

Union Steel, 33 CIT at 624–25, 617 F. Supp. 2d at 1383 (citations omitted).

Thus, the court finds that plaintiff-intervenor's timely motion to intervene preserved its right to seek a preliminary injunction against liquidation in this action.

C. Plaintiff-Intervenor Satisfied the Requirements for a Preliminary Injunction

Plaintiff-intervenor argues that it has established the requirements for a preliminary injunction. Specifically, Armstrong argues that: (1) it will suffer irreparable injury if its entries are liquidated in accordance with Commerce's determination before a decision by this Court or the Federal Circuit, Pl.-Int.'s Br. 5; (2) it established that it has a likelihood of success on the merits because it raises "serious questions as to Commerce's methodology," Pl.-Int.'s Br. 7; (3) the public interest is served by ensuring Commerce accurately calculates antidumping duties, Pl.-Int.'s Br. 8; and (4) the balance of hardships weighs in its favor because, although the preliminary injunction will postpone liquidation, Customs holds cash deposits securing the duties' value and would not otherwise be prejudiced, Pl.-Int.'s Br. 9. As a result, according to plaintiff-intervenor, the court should enjoin the Government from liquidating its entries of subject merchandise through the pendency of the litigation, including all appeals. Pl.-Int.'s Br. 9–10.

The Government does not contend that plaintiff-intervenor has failed to meet the equitable requirements for a preliminary injunction. Indeed, defendant does not mention the requirements necessary for the granting of a preliminary injunction in its papers. Instead, the defendant's opposition rests solely on its assertions that plaintiff-intervenor cannot seek an injunction that expands the issues raised in the Complaint and that its request for an injunction is untimely. Def.'s Br. 2, 5. Also, the Government consented to plaintiff's motion for a preliminary injunction, only preserving its arguments as to the plaintiff's "likelihood of the success on the merits." Pl.'s Mot. for Prelim. Inj. 7 (ECF Dkt. No. 43).

i. Irreparable Injury

As to immediate and irreparable injury, Armstrong has demonstrated that if its entries were to be liquidated in accordance with 19 U.S.C. § 1516a(c)(1),[6] it would be unable to benefit from relief obtained by plaintiff. Pl.-Int.'s Br. 6–7; *Qingdao*, 581 F.3d at 1380 ("[O]nce the entries were liquidated the law provided no viable method to recover any additional money even if the liquidation rate was later deemed incorrect."); *Zhejiang Native Produce & Animal By-Prod. Imp. & Exp. Corp. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1358, 1368 (2015) ("[I]t is apparent that irreparable harm can be shown irrespective of whether the results of an investigation are negative or affirmative, find sales at [less than fair value], or whether the injunction is sought by foreign producers or exporters, or by domestic producers. In each of these cases, without injunctive relief, the parties face the prospect of losing the only remedy they have with respect to [entries of] merchandise liquidated prior to a court ruling.").

ii. Likelihood of Success on the Merits

Next, the court previously granted plaintiff Fine Furniture's motion for a preliminary injunction, and because plaintiff-intervenor's "success on the merits is intrinsically tied to that of [p]laintiff[]," the court finds Armstrong similarly has demonstrated a likelihood of "success on the merits." *Tianjin Wanhau*, 38 CIT at __, 11 F. Supp. 3d at 1286; Prelim. Inj. Order.

iii. The Public Interest Will Be Served

With regard to the public interest, "it is well-settled that 'an overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible." *Union Steel*, 33 CIT at 622, 617 F. Supp. 2d at 1381 (quoting *Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007)). Should the

[6] The statute provides in full:

> Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1516a(c)(1).

injunction be granted, the result of having the dumping margins accurately calculated will be that plaintiff-intervenor's entries will be liquidated in accordance with those margins. *Union Steel*, 33 CIT at 622, 617 F. Supp. 2d at 1381. Thus, the public interest will be served by the liquidation of plaintiff-intervenor's entries at the margins determined by this litigation.

iv. The Balance of Hardships Weighs in Favor of Plaintiff-Intervenor

Last, the balance of the hardships weighs in favor of plaintiff-intervenor because the plaintiff-intervenor might suffer great hardship if its entries were liquidated before the conclusion of this case, and the Government is unlikely to suffer any hardship because it has obtained cash deposits securing the payment of duties for these entries. *Union Steel*, 33 CIT at 622, 617 F. Supp. 2d at 1381 ("Should the final rate determined after judicial review exceed the cash deposit, the United States will be entitled to collect the duties owed, with interest. Contrastingly, the absence of an injunction would result in liquidations of [plaintiff-intervenor's] entries at the amounts of antidumping duty set forth in the entry documentation, which liquidation would preclude any revision of the assessment rate.").

As a result, the court concludes that Armstrong may seek a preliminary injunction as a matter of law and fact and has demonstrated irreparable harm, a likelihood of success on the merits, that it is in the public interest to grant the preliminary injunction, and that the balance of hardships weigh in favor of granting injunctive relief. Therefore, liquidation of plaintiff-intervenor's entries shall be enjoined in accordance with 19 U.S.C. § 1516a(c)(2).

CONCLUSION

The court grants plaintiff-intervenor's motion for a preliminary injunction and directs the plaintiff-intervenor to confer with the Government and file a proposed preliminary injunction with the court.

Dated: December 28, 2016
New York, New York

\s\ *Richard K. Eaton*
RICHARD K. EATON, JUDGE