U.S. Court of International Trade

Slip Op. 18–29

UNITED STATES, Plaintiff, v. AEGIS SECURITY INSURANCE COMPANY, Defendant, and TRICOTS LIESSE 1983, INC., Third-Party Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 11–00388

[Tricots Liesse 1983, Inc.'s motion for summary judgment is granted in part.]

Dated: March 26, 2018

Chad A. Readler, Acting Assistant Attorney General, for plaintiff. With him on the brief were *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Counsel, Department of Justice, Civil Division, Commercial Litigation Branch, of Washington, DC. Of counsel on the brief was *Matthew C. Landreth*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of Buffalo, NY.

Frances Hadfield and *John Brew*, Crowell & Moring LLP, of New York, NY, for third-party defendant.

OPINION

Eaton, Judge:

One case, in this consolidated action, was brought by plaintiff the United States ("plaintiff" or the "Government") against Tricots Liesse 1983, Inc. ("third-party defendant" or "Tricots") to recover civil penalties and unpaid duties pursuant to 19 U.S.C. § 1592(c) and 19 U.S.C. § 1592(d) (2012).[1] *See* Compl., Court No. 16–00066, ECF No. 2 ("Court No. 16–00066 Compl."). Plaintiff commenced this case as Court No. 16–00066 on April 25, 2016. Court No. 1600066 Compl. On August 3, 2016, it was consolidated with another case brought by plaintiff against Aegis Security Insurance Company ("Aegis") (Court No. 11–00388) that contests similar issues.[2] *See* Order dated Aug. 3, 2016, ECF No. 68.

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

[2] The case against Aegis is also for the recovery of unpaid duties pursuant to 19 U.S.C. § 1592(d) for alleged violations of 19 U.S.C. § 1592(a). *See* Compl., Court No. 11–00388, ECF No. 2 ("Court No. 11–00388 Compl.") ¶ 3. Aegis is a surety company that issued a bond to third-party defendant Tricots to secure duties owed on entries of imported fabric. In its answer, Aegis asserted, *inter alia*, a third-party claim against Tricots. *See* Answer, Court No. 11–00388, ECF No. 13 ("Aegis Answer") ¶ 4.

Before the court is Tricots' motion to dismiss plaintiff's complaint in Court No. 16–00066, pursuant to USCIT Rules 12(b)(1) and 12(b)(6), on the grounds that (1) the court lacks subject matter jurisdiction because United States Customs and Border Protection ("Customs") failed to exhaust its administrative remedies that, the company argues, are prerequisites for the initiation of penalty claims under 19 U.S.C. § 1592(e) and duty claims under § 1592(d); or (2) for the same reasons, plaintiff has failed to state a claim upon which relief can be granted. *See* Tricots' Mem. Supp. Mot. Dismiss, ECF No. 77 ("Tricots' Br."); Tricots' Reply Pl.'s Resp. Mot. Dismiss, ECF No. 84 ("Tricots' Reply"). Plaintiff opposes the motion. *See* Pl.'s Opp'n Tricots' Mot. Dismiss and Cross Mot. Partial Summ. J., ECF No. 89 ("Pl.'s Br."). Aegis has not filed a response to Tricots' motion to dismiss.

Since both Tricots and the Government have presented, and the court has relied on, extra-pleading material to support their claims with respect to the exhaustion of administrative remedies issue, Tricots' motion has been converted into one for summary judgment. USCIT R. 12(d). Because Customs failed to exhaust its administrative remedies and thus failed to perfect its penalty claim, Tricots' motion for summary judgment is granted in part, and the court awards summary judgment in favor of Tricots on plaintiff's penalty claim.

BACKGROUND

Tricots is a manufacturer and exporter of circular knitted fabric that is located in Montreal, Quebec, Canada. Tricots' Br. Ex. B, at 1, 2. Tricots purchases yarn and other raw materials from both North American Free Trade Agreement ("NAFTA")[3] territory suppliers, and non-NAFTA territory suppliers. All of Tricots' knit fabrics are manufactured in its plant in Montreal. Fabrics produced by Tricots are then shipped to U.S. apparel manufacturers. Tricots' Br. Ex. J, at 1, 4. Between November 9, 2005 and December 23, 2008, Tricots claimed, on its entry papers, that the yarn used to produce certain entries of its fabric originated from NAFTA territories, and therefore, that they were eligible for duty-free treatment under NAFTA Rules of Origin. Court No. 16–00066 Compl. ¶¶ 3, 4; Tricots' Br. Ex. A, B, D. As a

[3] NAFTA was enacted into U.S. law on December 8, 1993, for the purpose of further promoting the free flow of goods between the United States, Canada, and Mexico. *See* 19 U.S.C. § 3312 (1994); *Corrpro Companies, Inc. v. United States*, 433 F.3d 1360, 1362 (Fed. Cir. 2006). To accomplish this goal, the agreement provides for the elimination of most tariffs collected on goods originating from the three countries. *Corrpro Companies*, 433 F.3d at 1362. Preferential tariff treatment is not automatic, however, and an importer must make a written declaration that the goods qualify for NAFTA treatment based on a "complete and properly executed original Certificate of Origin . . . ." 19 C.F.R. § 181.21(a) (2008).

result, approximately eight hundred seventy-five of the entries were liquidated duty free and free of the merchandise processing fee ("MPF")[4] on May 5, 2010. Johnson Decl., ECF No. 89–10, ¶ 18.

Following liquidation, on May 28, 2010, Tricots sought prior disclosure treatment under 19 U.S.C. § 1592(c)(4) or (c)(5),[5] and notified Customs that several entries of knitted fabric were incorrectly declared as eligible for duty-free treatment as NAFTA-originating goods. Tricots' Br. Ex. B, at 2; *see also* Tricots' Br. Ex. I. Tricots stated, however, that the entries, nonetheless, qualified for duty-free treatment under the NAFTA Tariff Preference Level ("TPL") Quota Program.[6] Tricots' Br. Ex. B, at 1.

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[4] MPFs are administrative fees owed on most imports into the United States. Under 19 C.F.R. § 24.23(b), "merchandise that is formally entered or released is subject to the payment to [Customs] of an *ad valorem* fee." 19 C.F.R. § 24.23(b)(1)(i). The fee "is due and payable to [Customs] by the importer of record of the merchandise at the time of presentation of the entry summary and is based on the value of the merchandise as determined under 19 U.S.C. 1401a" and "shall not exceed $425 and shall not be less than $25." 19 C.F.R. § 24.23(b)(1)(i)-(ii). Entries originating in a NAFTA country are not charged this fee, but entries that qualify for duty-free treatment under the Tariff Preference Level Quota Program are assessed an MPF.

[5] Title 19 U.S.C. § 1592(c)(4) provides an opportunity for self-reporting of errors on the importation of goods into the United States, and reads, in pertinent part:

> If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed . . . if such violation resulted from negligence . . . the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of title 26) on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of disclosure, or within 30 days (or such longer period as the Customs Service may provide) after notice by the Customs Service of its calculation of such unpaid amount.

19 U.S.C. § 1592(c)(4). Under 19 U.S.C. § 1592(c)(5):

> [a]n importer shall not be subject to penalties under subsection (a) of this section for making an incorrect claim for preferential tariff treatment under section 3332 of this title if the importer—
>
> (A) has reason to believe that the NAFTA Certificate of Origin (as defined in section 1508(b)(1) of this title) on which the claim was based contains incorrect information; and
>
> (B) in accordance with regulations issued by the Secretary, voluntarily and promptly makes a corrected declaration and pays any duties owing.

19 U.S.C. § 1592(c)(5).

[6] According to Tricots:

> NAFTA TPL rules allow duty free treatment on knitted fabrics produced in Canada from non-NAFTA yarns that do not meet the NAFTA [Rules of Origin], up to a certain quantity per year. TPL limits for the subject imports have never been met and for the subject period were between only 27 and 54 percent filled (including Tricots' TPLs). The Government of Canada, Department of Foreign Affairs and International Trade, has the sole authority to issue certificates of eligibility for TPL for both imports into Canada and exports to the U.S. TPL provisions are provided for in Additional U.S. Notes 3–6 and Statistical Note 5 to Section XI of the HTS. [MPF] are owed on NAFTA TPL imports, which [at] a minimum is $25.00 and at a maximum is $485.00 per shipment.

Tricots' Br. 3 n.2 (citations omitted).

On December 1, 2010, for the purpose of "complet[ing] the prior disclosure" and "provid[ing] information concerning the amount of [MPF] which would have been due had the entry been made correctly," Tricots supplemented its May 28, 2010 letter with a second letter that calculated the fees owed on its imports under the TPL program as being $44,683.35. Tricots' Br. Ex. D, at 2. Following this letter, Customs notified Tricots' counsel that it had reviewed the company's submission, and although Tricots had accounted for the MPF that was due, the company had "not accounted for the Duty due," and, moreover, that "[Customs'] policy is that if a company has failed to present Certificates of Eligibility by the time of final liquidation, this precludes that company from receiving the duty preference under TPL."[7] Tricots' Br. Ex. F, at 2. Following a subsequent telephone conversation[8] between a Customs official and Tricots' counsel concerning "Customs' interpretation of the statute requiring the payment of duties," both parties determined that Tricots should submit a "written position paper" on the issue to Customs, which it did on January 5, 2011.[9] Tricots' Br. Ex. F, at 2. No further action was taken by either party until May 23, 2011, when Customs sent a letter to Tricots notifying the company that after "carefully review[ing Tricots'] correspondence, the information [Tricots'] office provided, and each of the entries at issue," Customs had concluded that Tricots owed $2,249,196.04 in lost revenue, representing $2,206,596.05 in unpaid duties and $42,599.99 in unpaid fees. Tricots' Br. Ex. E. No explanation regarding Tricots' arguments in the written position paper was given. *See* Tricots' Br. Ex. E. The letter also notified Tricots that, following its deposit of the full amount owed, the company could seek review of Customs' calculations pursuant to 19 C.F.R. §

[7] Although this response to the December 1, 2010 letter is referred to in Tricots' subsequent administrative submissions, there is no mention of the date or the nature of this response (*e.g.*, whether it was a written response) in the record.

[8] While this telephone conversation is referred to in Tricots' subsequent submissions, there is no date for the conversation in the record.

[9] Specifically, Tricots' January 5, 2011 "written position paper" argued that "Customs Directive 3550–085 covers claims under TPL and supports Customs' position" that TPL Certificates of Eligibility must be submitted before final liquidation, but that the issue in this case "does not revolve around a claim by the importer for treatment under TPL but revolves around the specific wording of the statute which provides that the United States will require any lawful duties, taxes, and fees of which it was deprived to be restored. This then becomes the critical issue in the analysis." Johnson Decl. Ex. 6, at 3. Moreover, Tricots argued that "[t]he problem with Customs' position in this matter is that the issue of [§ 1592(d)] duties is separate and distinct from an issue of the final liquidation of an entry. Under [§ 1592(d)], Customs is attempting to recoup those lawful duties, taxes, and fees for which it was deprived. It has no nexus to the issue of a claim for TPL treatment. In fact, 1592(d) operates outside of the constraints of 19 U.S.C. § 1514." Johnson Decl. Ex. 6, at 3. Therefore, Tricots took the position that "the government must prove that [it] would have collected the duties but for the false statements or omissions," which Tricots maintained Customs could not do. Johnson Decl. Ex. 6, at 5.

162.74(c). Tricots was given until June 24, 2011 to tender the amount, which for Customs, would perfect the prior disclosure.[10] Tricots' Br. Ex. E; 19 U.S.C. § 1592(c)(4), (5).

As Customs had previously notified Tricots' counsel, Customs decided that the subject entries were not eligible for duty-free treatment under the TPL program because, pursuant to Customs Directive 3550–085, Tricots was required to submit its TPL Certificates of Eligibility prior to the May 5, 2010 final liquidation of the entries. According to Customs, Tricots did not submit the Certificates of Eligibility prior to the May 5, 2010 final liquidation or take other steps to preserve eligibility.[11] Tricots' Br. Ex E, at 2; *see also* Johnson Decl. Ex. 9 ("Thus, an importer whose entries are eligible for TPL treatment but does not file the certificates at entry may 1) submit the certificates any time before final liquidation; 2) file a protest within 90 days of liquidation; 3) request extension of liquidation.").

On June 22, 2011, Tricots submitted its first offer in compromise pursuant to 19 U.S.C. § 1617 and tendered $85,199.98, representing twice the amount of the unpaid MPFs it claimed were due on the entries. Tricots' Br. Ex. F, at 8.[12] In response, on December 7, 2011, Customs sent a letter stating that Tricots' entries did not qualify for prior disclosure treatment under 19 U.S.C. § 1592(c)(4) or (5) because the company "did not tender the total amount owed by [June 24, 2011]" and therefore did not "perfect its prior disclosure." Tricots' Br. Ex. I.

Subsequently, on February 16, 2012, pursuant to § 1592(b)(1)(A), Customs issued a pre-penalty notice to Tricots (the "Pre-Penalty Notice"), alleging that Tricots negligently entered goods into the United States without paying duties, and notified Tricots that Customs was "contemplating" a $2,249,196.04 monetary penalty. Tricots'

[10] Under 19 C.F.R. § 162.74(c) (2011), in order to perfect a prior disclosure, "[a] person who discloses the circumstances of the violation shall tender any actual loss of duties, taxes and fees or actual loss of revenue. The disclosing party may choose to make the tender either at the time of the claimed prior disclosure, or within 30 days after [Customs] notifies the person in writing of [Customs'] calculation of the actual loss of duties, taxes and fees or actual loss of revenue."

[11] According to Customs Ruling HQ 229504, "an importer ha[s] until liquidation to supply the Certificates of Eligibility, and the opportunity to request delay of liquidation if necessary." Johnson Decl. Ex. 9, at 5.

[12] Meanwhile, on May 18, 2011, May 31, 2011, and June 9, 2011, Customs issued duty demands to Tricots' surety, Aegis. Court No. 11–00388 Compl. ¶ 21; Aegis Answer ¶ 21. Aegis did not respond to any of those demands. Court No. 11–00388 Compl. ¶ 21; Aegis Answer ¶ 21. On September 27, 2011, Customs filed suit to recover duties against Aegis pursuant to 19 U.S.C. § 1592(d). *See* Court No. 11–00388 Compl. Aegis later impleaded Tricots. Tricots executed a number of waivers, and thus, Customs did not sue Tricots itself until April 25, 2016. Tricots' Br. Ex. C; *see also* Court No. 16–00066 Compl.

Br. Ex. G; *see* 19 U.S.C. § 1592(b)(1)(A). The Pre-Penalty Notice also included a demand for the outstanding duties and MPFs, totaling another $2,249,196.04, resulting in a total demand of $4,498,392.08. Tricots' Br. Ex. G; *see* 19 U.S.C. § 1592(d).

On April 16, 2012, Tricots submitted a written response to Customs' Pre-Penalty Notice claiming that, because a "valid prior disclosure was filed," Tricots was only responsible for $42,599.99 in unpaid MPFs. Tricots' Br. Ex. H, at 12. Notwithstanding the Pre-Penalty Notice's statement that Tricots "ha[s] the right to make an oral . . . presentation within 30 days of the date of this notice as to why a claim for monetary penalty should not be issued in the amount proposed or that the loss of duties is less than the amount demanded," the record does not contain any evidence that Tricots requested a face-to-face meeting with Customs prior to the issuance of the written penalty claim. *See* Tricots' Br. Ex. G, H.

On May 3, 2013, a representative[13] of Tricots participated in a telephone conversation with Customs' Acting Director for Trade Policy and Programs. Leonard Decl., ECF No. 89–15 ¶ 8; Labuda Decl., ECF No. 88 ¶ 12. During the telephone call, the Tricots representative explained that Customs "should accept [Tricots'] offer in compromise because there was no loss of revenue." Labuda Decl. ¶ 12; *see also* Leonard Decl. ¶ 10 ("During the course of our communications and conversations, [the Tricots representative], on behalf of Tricots, sought to inform and influence senior [Customs] staff . . . about the penalty that [Customs] initially proposed against Tricots, and the penalty that [Customs] later issued to Tricots . . . .").

Thereafter, Customs sent a letter dated May 9, 2013, to Tricots that (1) again informed the company that, notwithstanding its April letter, Tricots still did not qualify for prior disclosure treatment; (2) rejected Tricots' June 22, 2011 offer in compromise; and (3) issued Tricots a written penalty claim (the "Notice of Penalty") for $4,498,392.08 (*i.e.*, a $2,249,196.04 monetary penalty plus $2,249,196.04 in lost revenue). Tricots' Br. Ex. I ("As previously notified by letter dated December 7, 2011, [Tricots] does not qualify for prior disclosure treatment under 19 U.S.C. § 1592(c)(4) or (c)(5)."); *see* 19 U.S.C. § 1592(b)(2).

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[13] According to the record, the representative involved in the May 3, 2013, and August 3, 2013, telephone calls is not an attorney and is not licensed to practice law in any jurisdiction, nor is the representative a licensed Customs broker. Rather, the representative was "retained . . . as a consultant to assist [Tricots] regarding [Customs'] claims" by "determin-[ing] who within [Customs] might be best positioned to gauge [Customs'] willingness to accept [Tricots'] offer in compromise." Labuda Decl., ECF No. 88 ¶¶ 8–10.

On July 15, 2013, Tricots submitted a written response to Customs' Notice of Penalty in the form of a petition and second offer in compromise (the "Petition").[14] Tricots' Br. Ex. J. The Petition once again stated Tricots' position that "a valid prior disclosure was filed" and therefore, that the company owed no duties and was only responsible for $42,599.99 in unpaid MPFs. Tricots' Br. Ex. J, at 15. In addition, Tricots' second offer in compromise increased the amount of its first, tendering $160,000 to Customs "in order to settle th[e] matter in a manner acceptable to all parties." Tricots' Br. Ex. J, at 15.

On August 3, 2013, the same Tricots representative made another telephone call to Customs and spoke with Customs' Assistant Commissioner of Trade and Customs' Acting Director for Trade Policy and Programs. Labuda Decl. ¶ 13. During this conversation, the Tricots representative "explained that [Customs] should accept [Tricots'] second offer in compromise ($160,000) as a policy matter because there was no loss of revenue and the goods qualified for NAFTA under the existing TPL." Labuda Decl. ¶ 13. The Customs agents "indicated that [Customs] would get back to [the Tricots representative] on whether or not the second offer in compromise was acceptable." Labuda Decl. ¶ 13. On June 13, 2014, Customs rejected Tricots' second offer in compromise by letter. Tricots' Br. Ex. K.

Following this second rejection by Customs, Tricots' counsel sent a letter, on September 15, 2014, asking for a face-to-face meeting with Customs as provided for by statute. Tricots' Br. Ex. L ("September 15, 2014 Letter"); *see* 19 U.S.C. § 1592(b)(2) ("Such person [(*i.e.*, a person Customs has determined violated § 1592(a))] shall have a reasonable opportunity under section 1618 of this title to make representations, both oral and written, seeking remission or mitigation of the monetary penalty."). On October 30, 2014, Tricots' counsel sent a follow-up email to a senior attorney for Customs, asking if the September 15, 2014 Letter had been received and if there would be a meeting before a final penalty determination[15] was issued. Tricots' Br. Ex. M. In response, the senior attorney, on behalf of Customs, noted that he had

[14] Under 19 U.S.C. § 1592(b)(2), following the issuance of a pre-penalty notice and any representations made by the importer regarding the propriety of such a penalty, "[i]f the Customs Service determines that there was a violation, it shall issue a [Notice of Penalty] to such a person," and the importer "shall have a reasonable opportunity under [19 U.S.C. § 1618] to make representations, both oral and written, seeking remission or mitigation of the monetary penalty." Section 1618 provides, in pertinent part, that any person who has incurred or is alleged to have incurred any penalty may file "a petition for the remission or mitigation of such . . . penalty." 19 U.S.C. § 1618.

[15] Under § 1592(b)(2), following the issuance of the Notice of Penalty, and after considering any representations made by the importer concerned regarding mitigation or remission of the monetary penalty, Customs shall "provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based" (*i.e.*, a "final penalty determination").

not seen the September 15, 2014 Letter, but that "any meeting at this time would be premature" because the Government was currently litigating a case with Tricots' surety, Aegis,[16] on the issue of retroactive TPL. Tricots' Br. Ex. M. On or about November 21, 2014, an attorney representing Tricots spoke with the same senior attorney on the telephone regarding the status of the case and again asked for a meeting with Customs to review the Notice of Penalty. Tricots' Br. Ex. Q ("Brew Aff.") ¶ 7. Customs, however, did not agree to meet with Tricots. Brew Aff. ¶ 7 ("[A Customs senior attorney] indicated to [Tricots' representative] during that telephone conversation [on or about November 21, 2014] that because of the pending case with the surety, Aegis, that involved similar issues, Customs was holding the administrative proceeding against Tricots and did not agree to meet with Tricots.").

On November 24, 2015, Customs issued a final penalty determination, denying Tricots' July 15, 2013 petition for relief from the penalty. Tricots' Br. Ex. N (the "Final Penalty Determination"). In its Final Penalty Determination, Customs found that Tricots owed $4,498,392.08, representing $2,249,196.04 in unpaid duties and $2,249,196.04 in penalties. Final Penalty Determination at 11.

On April 25, 2016, plaintiff filed its complaint in Court No. 16–00066. The complaint increased the amount Customs sought by demanding $4,498,392.08 in monetary penalties under 19 U.S.C. § 1592(c) for negligence, representing two times the amount of lost revenue, which is the statutory maximum under 19 U.S.C. § 1592(c)(3) (and double the amount Customs assessed in its Final Penalty Determination) and $2,249,196.04 in lost duties pursuant to 19 U.S.C. § 1592(d), for a total demand of $6,747,588.12. *See* Court No. 16–00066 Compl. ¶ 1. On August 3, 2016, the court granted the parties' consent motion to consolidate the case against Tricots (Court No. 16–00066) and the Government's case against Aegis (Court No. 11–00388). *See* Order dated Aug. 3, 2016, ECF No. 68.

LEGAL FRAMEWORK

Under 19 U.S.C. § 1592(a), "no person, by fraud, gross negligence, or negligence . . . may enter, introduce, or attempt to enter or introduce any merchandise into commerce of the United States by means of" material and false documents, information, acts or by any

[16] Prior to the consolidation of Court Nos. 11–00388 and 16–00066, Aegis asserted in its answer that "the NAFTA treaty sets forth no cut-off date for the tender and a signatory's acceptance of a TPL certificate to qualify an entry for TPL duty relief," and that "[t]here is no United States Statute" or "[Customs] regulation that sets forth a cut-off date for the tender and signatory's acceptance of a TPL certificate," and therefore, if Customs had accepted the required certificates of eligibility, "the claim for loss of revenue in this civil action would be extinguished." Aegis Answer ¶¶ 3–5, 9.

omission which is "material." If Customs has reason to believe that a violation of § 1592(a) has occurred, "and determines that further proceedings are warranted," it must first issue a written pre-penalty notice to any person concerned, stating "its intention to issue a claim for a monetary penalty." 19 U.S.C. § 1592(b)(1)(A). The notice must contain several pieces of information provided for in § 1592(b), including "whether the alleged violation occurred as a result of fraud, gross negligence, or negligence," "the estimated loss of lawful duties, . . . the amount of the proposed monetary penalty," and must also "inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated." 19 U.S.C. § 1592(b)(1)(A)(v)-(vii).

Following the issuance of the pre-penalty notice, and after considering any oral and written representations made by persons concerned regarding the monetary penalty, if Customs still finds that a § 1592(a) violation occurred, it "shall issue a [notice of penalty] to such person," which, among other things, must "specify all changes in the information provided" in the pre-penalty notice. 19 U.S.C. § 1592(b)(2). After the issuance of a notice of penalty, the persons concerned again "shall have a reasonable opportunity . . . to make representations, both oral and written, seeking remission or mitigation of the monetary penalty." *Id.*

The inclusion of the statutorily required material, and the provision of an opportunity to be heard, are not trivial matters. As this Court explained in *United States v. International Trading Services*:

> Section 1592(b) states the procedures by which the United States must exhaust administrative remedies; to wit, "Customs must perfect its penalty claim in the administrative process . . . by issuing a pre-penalty notice and a notice of penalty." The pre-penalty notice must include certain information. After considering representations made by the person to whom it was issued and upon finding a violation, Customs must issue "a written penalty claim" to that person. "Such person shall have a reasonable opportunity . . . to make representations, both oral and written, seeking remission or mitigation of the monetary penalty." At the end of the proceeding, Customs must issue "a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based."

40 CIT __, __, 190 F. Supp. 3d 1263, 1269–70 (2016) (quoting *United States v. Jean Roberts of Cal., Inc.*, 30 CIT 2027, 2030 (2006)) (citations omitted).

Following the issuance of a notice of penalty, and "[a]t the conclusion of any proceeding under [19 U.S.C. § 1618]," Customs "shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based" (*i.e.*, a "final penalty determination"). 19 U.S.C. § 1592(b)(2). If Customs does not receive the penalties and duties assessed following its final determination, the Department of Justice may file suit in this Court under § 1592(e) "for the recovery of any monetary penalty claimed under [§ 1592]" as well as the restoration of lawfully owed duties under § 1592(d). 19 U.S.C. § 1592(e), (d).

DISCUSSION

Tricots contends that "[b]ecause Customs must perfect a valid penalty claim at the administrative level before seeking recovery of that penalty before this Court, this action must be dismissed for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6)." Tricots' Br. 23. In support of its position, Tricots cites evidence that, it argues, demonstrates "the uncontested facts are that [p]laintiff did not provide Tricots with an opportunity for an oral penalty hearing, which is a statutory requirement for exhaustion," and thus, the case must be dismissed. Tricots' Reply 9.

Plaintiff, however, maintains that because Tricots' representative conferred with Customs officials over the telephone, the Government "should prevail as a matter of fact on this issue" and Tricots' Rule 12(b)(6) motion must fail. Pl.'s Br. 11.

As an initial matter, because information outside the pleadings regarding exhaustion is presented by both parties (*i.e.*, Tricots and the Government), and because both parties have had reasonable notice and opportunity to present pertinent material, the motion to dismiss under USCIT Rule 12(b)(6) will be treated as one for summary judgment and disposed of as provided in USCIT Rule 56.[17] *See*

[17] Specifically, the court put all parties on notice that it might convert Tricots' motion to dismiss into one for summary judgment in its May 5, 2017 Order: "The parties should keep in mind that the court may convert third-party defendant's motion into a motion for partial summary judgment." Order dated May 5, 2017, ECF No. 86 at 2. Moreover, both Tricots' motion to dismiss and plaintiff's response in opposition to the motion rely on material outside of the pleadings in support of their respective positions regarding exhaustion. *See Collier v. City of Chicopee*, 158 F.3d 601, 603 (1st Cir. 1998). In addition, following the May 5, 2017 Order, the court gave Tricots an opportunity to submit extra-pleading material similar to that submitted by plaintiff that first stated the content of the telephone conversations between representatives of Customs and Tricots during the pre-penalty and penalty phases. Tricots had not previously submitted its own affidavit regarding the substance of those telephone calls, but did so on January 19, 2018. *See* Order dated January 12, 2018, ECF No. 87; *see also* Labuda Decl.

USCIT R. 12(d); *see also Groden v. Random House, Inc.*, 61 F.3d 1045, 1052–53 (2d Cir. 1995). In particular, the parties have presented all of the material facts surrounding (1) Tricots' request for a face-to-face meeting after the Notice of Penalty and (2) Customs' refusal to provide such a meeting. Thus, the court is in a position to grant summary judgment as "the movant [has shown] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

As to the merits, the court finds that the doctrine of exhaustion of administrative remedies should be applied in this case, and that it is undisputed that Customs has failed to perfect its claim for a monetary penalty. *See* 28 U.S.C. § 2637(d) (providing for requiring administrative exhaustion "where appropriate"). The doctrine of exhaustion provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014). Moreover, "[t]here is no doubt that the doctrine of exhaustion of administrative remedies applies to an agency seeking enforcement of administrative action prior to the completion of the administrative process." *United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) (citing *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 767–68 (1947)). With regard to § 1592, this Court has held that "[b]efore seeking to recover a penalty in the Court of International Trade, Customs must perfect its penalty claim in the administrative process required by [§ 1592(b)]." *United States v. Jean Roberts of Cal., Inc.*, 30 CIT, 2027, 2030 (2006). As shall be seen, the facts demonstrate that, despite Tricots' efforts, Customs did not follow the statutory injunction to provide the company with a "reasonable opportunity" to make oral representations "seeking remission or mitigation of the monetary penalty" following issuance of the Notice of Penalty, and thus did not provide Tricots with the statutorily required opportunity to be heard. *See* 19 U.S.C. § 1592(b)(2). Accordingly, Customs failed to perfect its penalty claim and thus is barred from bringing it.

According to the timeline established by the evidence attached to the parties' papers, Customs issued its Pre-Penalty Notice on February 16, 2012, and Tricots submitted a written response to that notice on April 16, 2012. Tricots' Br. Ex. G, H. On May 3, 2013, a telephone call took place between a Tricots representative and a Customs official regarding Tricots' case. Customs states that during the telephone call, the Tricots representative "sought to inform and influence senior [Customs] staff about the penalty that [Customs] initially proposed . . . ." Leonard Decl. ¶ 10; Leonard Decl. Ex. B. Tricots' affidavit fleshes

out this characterization. Labuda Decl. ¶¶ 12–14 ("During the telephone conversation[s], [Customs representatives did not] raise[] issues from the pre-penalty and penalty notices or petitions. . . . During my calls with [Customs] officials I provided a high level policy overview of the matter. I am not an attorney and I did not raise legal arguments or factual details related to the administrative documents (*e.g.*, [the Pre-Penalty Notice] or [the Notice of Penalty])."). It does not appear that Tricots sought a face-to-face meeting following issuance of the Pre-Penalty Notice.

Thereafter, on May 9, 2013, Customs issued its Notice of Penalty. Tricots' Br. Ex. I. Following the Notice of Penalty, on July 15, 2013, Tricots submitted another written response, and on August 3, 2013, a Tricots representative again participated in a teleconference with Customs officials regarding the Tricots case. Leonard Decl. ¶¶ 9, 10; According to Customs, Tricots' representative "provided a copy of the petition submitted by Tricots to [Customs] and presented arguments designed to convince [Customs] to mitigate the penalty . . . and attempted to convince us that Tricots' false claims did not result in lost revenue to the United States." Leonard Decl. ¶ 11. Tricots' affidavit sheds additional light on the extent to which issues regarding the Notice of Penalty were discussed. *See* Labuda Decl. ¶ 13 ("On August 3, 2013, . . . I spoke with [Customs officials]. . . . This call lasted between 5 and 10 minutes. I explained that [Customs] should accept [Tricots'] second offer in compromise ($160,000) as a policy matter because there was no loss of revenue and the goods qualified for NAFTA under the existing TPL. . . . During the telephone conversation, [the Customs officials did not] raise[] issues from the pre-penalty and penalty notices or petitions.").

The record evidence demonstrates that this post Notice of Penalty telephone call was not conducted in the usual, more formal, manner in which Customs proceeds with penalty cases, and no officials from Customs' Fines, Penalties & Forfeitures Office (the office generally charged with conducting any requested oral hearings during the pre-penalty and penalty phases of § 1592 claims) participated in the telephone call. *See* Labuda Decl. ¶ 16; *see also* Leonard Decl. ¶¶ 8–9. In addition, it is undisputed that following the issuance of the Notice of Penalty, the August 3, 2013 telephone conversation, and Customs' June 13, 2014 rejection of Tricots' second offer in compromise, Tricots made requests for a § 1592(b) oral presentation on September 15, 2014, October 30, 2014, and November 21, 2014, more than one year before Customs issued its November 24, 2015 Final Penalty Determination. *See* Brew Aff. ¶¶ 4–8. Moreover, Tricots signed waivers of the statute of limitations, "in order that [it] might obtain the benefit

of the orderly continuation and conclusion of an administrative proceeding," which effectively waived the statute of limitations through August 18, 2016. *See* Tricots' Br. Ex. C. Notwithstanding Tricots' requests and concerns, and a lack of urgency for Customs to make its Final Penalty Determination, Tricots was told that "any meeting at this time would be premature." Tricots' Br. Ex. M.

The purpose of the opportunities for interested parties to make their case pursuant to 19 U.S.C § 1592(b) can be found in the legislative history and in this Court's case law. *See* S. Rep. No. 95–778, at 1–4 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2211–14; S. Rep. No. 95–778, at 18–19, *as reprinted in* 1978 U.S.C.C.A.N. at 2230–31 ("The procedural provisions adopted by the House are patterned after procedures in current Customs' regulations and guidelines. . . . If the customs officer issues a penalty claim and the importer petitions for mitigation under [19 U.S.C. § 1618], then the importer would have the opportunity to make written and oral representations to the [Customs]. . . . This provision would enact into law existing practice with several changes: . . . *the importer would have the right to make representations in a mitigation proceeding before any decision on mitigation is made*. . . .") (emphasis added); *see also United States v. Optrex Am., Inc.,* 29 CIT 1494, 1500 (2005) ("Finally, a meaningful interpretation of a statute must take into account the statute's basic purpose. The statute [(§ 1592)] was designed to give an importer *an opportunity to fully resolve a penalty proceeding before Customs, before any action in this Court*.") (citation omitted) (emphasis added).

The requirement that an oral opportunity be provided means a face-to-face meeting between representatives of the party charged with a violation and Customs. This is what exporters and importers have come to expect, and Customs has established procedures to fulfill its responsibilities. Labuda Decl. ¶ 16 ("During my over 30 years of employment with [Customs], I did not work for a [Customs] Fines, Penalties & Forfeitures (FPF) Office of Regulations and Rulings, Penalties Branch. However, I am familiar with pre-penalty and penalty petitions and procedures from my employment at [Customs]. There is a formal process for oral *hearings* for pre-penalty and penalty cases, which are conducted by FPF Officials and attorneys from the Penalties Branch.") (emphasis added).

As to plaintiff's assertion that a defendant is required to prove substantial prejudice for this Court to dismiss a penalty claim because of Customs' failure to perfect under § 1592(b), the court is not convinced. *See United States v. Nitek Elec., Inc.*, Slip-Op. 12–105, 2012 WL 3195084 (CIT Aug. 7, 2012) ("[T]he [§ 1592(b)] prerequisite at issue was not one of Customs' own procedural rules, . . . but a

statutory mandate that Customs perfect claims for the applicable level(s) of culpability prior to seeking recovery. Accordingly, a showing of prejudice was not required for the court to dismiss on exhaustion grounds."); *see also id. ("PAM, S.p.A.* and *Dixon Ticonderoga* [are] not applicable to exhaustion requirements in § 1592.").

Moreover, this Court has held that, although the requirements of § 1592(b) may not be jurisdictional, they are nevertheless requirements that must be satisfied as elements of the Government's § 1582 cause of action. *See, e.g., United States v. Nitek Elec., Inc.*, 36 CIT __, __, 844 F. Supp. 2d 1298, 1307–08 (2012) (*"Nitek I"); cf. United States v. Robert E. Landweer & Co.*, 36 CIT __, __, 816 F. Supp. 2d 1364, 1375 (2012) ("[T]he Government is required to demonstrate in a collection action that Customs met 'all other formal requirements of the [section 1641] procedure.'"[18] (quoting *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT 96, 103, 686 F. Supp. 2d 1337, 1346 (2010)) (alterations in original)). "Given th[e] framework and the process (including mitigation) that Congress has built into [the statute], the issues of a potential violation of the statute and the determination of liability for a civil penalty for a . . . violation of [the statute] must first be addressed and resolved administratively." *Landweer*, 36 CIT at __, 816 F. Supp. 2d at 1373 (citing *Optrex*, 29 CIT at 1500); *see also United States v. Nitek Elec., Inc.*, 806 F.3d 1376, 1382 (Fed. Cir. 2015) ("[R]equiring exhaustion in penalty recovery cases is consistent with the statutory scheme set up in § 1592."); *Nitek I*, 36 CIT at __, 844 F. Supp. 2d at 1306 ("Section 1592 mandates that Customs perfect a penalty claim prior to seeking recovery in this Court . . . .").

Here, the facts material to the court's discussion are (1) whether Tricots asked for a face to-face meeting after the final penalty determination, and (2) if Customs granted the request for such a meeting. Since there is no dispute that the meeting was requested and the request was denied, summary judgment is appropriate. *See All Channel Prods. v. United States*, 16 CIT 169, 173–74, 787 F. Supp. 1457, 1460–61 (1992).

While Customs must perfect penalty claims administratively before bringing suit, cases have held that a § 1592(d) claim seeking to recover lost duties creates an independent cause of action. At least one case has held that a § 1592(d) claim may proceed even if the penalty portion of the action is dismissed due to Customs' failure to exhaust its administrative remedies. *See Nitek I*, 36 CIT at __, 844 F. Supp. 2d at 1309. Here, however, the entries have been liquidated,

[18] Although *Landweer* involved a violation of 19 U.S.C. § 1641, as the *Landweer* Court noted, "the penalty assessment procedures for a violation of section 1641 mirror those for a section 1592 violation," and therefore, the Court's analysis is relevant here. *Landweer*, 36 CIT at __, 816 F. Supp. 2d at 1374.

and the issues are so tangled up, that allowing the § 1592(d) cause of action to proceed before questions having to do with the monetary penalty are resolved has the prospect of wasting both the parties' and the court's resources. Therefore, the Government's § 1592(d) claim against Tricots for unpaid duties shall be stayed until such time as the issues relating to the monetary penalty have been finally resolved.

CONCLUSION

Accordingly, under the facts of this case, the court finds that applying the doctrine of exhaustion in this case is consistent with § 1592's statutory scheme and 28 U.S.C. § 2637(d)'s mandate that the court require the exhaustion of administrative remedies "where appropriate" before enforcing an administrative action. *See* 28 U.S.C. § 2637(d). By not exhausting its administrative remedies, Customs did not perfect a valid penalty claim, and thus, the court grants partial summary judgment in favor of Tricots on the plaintiff's penalty claim. In addition, the remainder of Court No. 16–00066 shall be stayed.

Dated: March 26, 2018
New York, New York

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

Slip Op. 18–30

SILFAB SOLAR, INC., et al., Plaintiffs, v. UNITED STATES, et al., Defendants, and SOLARWORLD AMERICAS, INC., et al., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Court No. 18–00023

[Granting plaintiffs' motion for expedited consideration and denying plaintiffs' motion for an injunction, and for a stay, pending appeal]

Dated: March 26, 2018

Jonathan T. Stoel, Hogan Lovells US, LLP, of Washington, D.C., for plaintiffs. With him on the motions were *Craig A. Lewis, Mitchell P. Reich, Michael G. Jacobson*, and *Robert B. Wolinksky*.

OPINION AND ORDER

Stanceu, Chief Judge:

On March 5, 2018, the court denied the motion of plaintiffs Silfab Solar, Inc., Heliene, Inc., Canadian Solar (USA), Inc., and Canadian Solar Solutions, Inc. for a temporary restraining order and a preliminary injunction. *Silfab Solar, Inc. v. United States*, Slip Op. 18–15, 2018 WL 1176619 (Mar. 5, 2018), ECF No. 47 ("*Silfab I*"). In their motion for this equitable relief, plaintiffs sought to enjoin defendants from subjecting plaintiffs' products to "safeguard" measures, in the form of temporary import duties, that the United States imposed, beginning February 7, 2018, on imports of certain crystalline silicon photovoltaic ("CSPV") cells and certain products (including "modules") that contain such cells. The United States imposed the safeguard measures by means of a presidential proclamation (the "Proclamation"), issued January 23, 2018 pursuant to section 203 of the Trade Act of 1974, 19 U.S.C. and certain products (including "modules") that contain such cells. The United States imposed the safeguard measures by means of a presidential proclamation (the "Proclamation"), issued January 23, 2018 pursuant to section 203 of the Trade Act of 1974, 19 U.S.C. and certain products (including "modules") that contain such cells. The United States imposed the safeguard measures by means of a presidential proclamation (the "Proclamation"), issued January 23, 2018 pursuant to section 203 of the Trade Act of 1974, 19 U.S.C. § 2253.[1] Proclamation No. 9693, 83 Fed. Reg. 3541 (Jan. 25, 2018) (the "*Proclamation*").

[1] All citations to the United States Code herein are to the 2012 edition.

Plaintiffs have appealed the court's order denying their motion for equitable relief. Notice of Appeal (Mar. 21, 2018), ECF No. 49. Before the court are two motions plaintiffs make pursuant to their interlocutory appeal of that order.

Plaintiffs' first motion seeks an injunction preventing defendants from taking any action to impose or enforce the Proclamation with respect to their products, and a stay of proceedings in this Court, pending the appeal. Pls.' Mot. For Inj. Pending Appeal and Stay of Dist. Ct. Proceedings During Appeal of Prelim. Inj. Ruling (Mar. 21, 2018), ECF No. 50 ("Inj. and Stay Mot."). All defendants oppose this motion, with respect to both an injunction and a stay. *Id.* at 3, 5.

In the second motion, plaintiffs seek an expedited ruling on their first motion. Pls.' Mot. For Expedited Consideration of Mot. For Inj. Pending Appeal and Stay of Dist. Ct. Proceedings (Mar. 21, 2018), ECF No. 51. Plaintiffs' second motion seeks, in the alternative, an extension of time to respond to a motion to dismiss, which was filed on February 20, 2018 by defendant U.S. International Trade Commission (the "ITC"), until their first motion is resolved. *Id.* at 2; *see* Mot. to Dismiss and Mem. in Supp. of Mot. to Dismiss of Def. U.S. Int'l Trade Commission (Feb. 20, 2018), ECF No. 33.

The court grants the motion to expedite and, accordingly, now rules on plaintiffs' first motion. The court concludes that plaintiffs have not met the requirements for an injunction pending appeal. The court also decides against a stay of this litigation. Because the only action now required of plaintiffs is a response to the ITC's motion to dismiss, plaintiffs have not convinced the court that a stay of proceedings is needed at this time.

I. BACKGROUND

Background on this litigation is presented in the court's previous opinion and order, *Silfab I* at 2–5, familiarity with which is presumed. The court issued that opinion and order on March 5, 2018, denying plaintiffs' motion for a temporary restraining order and a preliminary injunction. That motion, like the instant motion, sought to prevent the United States from taking any action to impose or enforce the Proclamation on plaintiffs' products covered by the Proclamation and from collecting any tariffs from plaintiffs pursuant to it. *Compare* Proposed Prelim. Inj. Order (Feb. 7, 2018), ECF No. 10–16, *with* Proposed Inj. Pending Appeal Order (Mar. 21, 2018), ECF No. 50–1 ("Proposed Inj. Order").

II. DISCUSSION

A. Injunction Pending Appeal

Rule 62(c) of the Rules of this Court provides, in pertinent part, that "[w]hile an appeal is pending from an interlocutory order . . . that . . . denies an injunction, the court may . . . grant an injunction on terms for bond or other terms that secure the opposing party's rights." USCIT R. 62(c). In considering motions for injunctions pending appeal, courts have examined (1) whether the movant has made a strong showing that he is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether issuance of the injunction will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See generally* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2904 (3d ed. 2013). These are essentially the same standards that apply to a grant or denial of a preliminary injunction in the first instance. The burden on the proponent of an injunction to show a likelihood of success on the merits is understood to be at least as high as, if not higher than, the original burden on the proponent of the injunction. *See Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970).

In ruling on plaintiffs' motion for an injunction pending appeal, the court has reconsidered the conclusions it reached in denying plaintiffs' previous motion, which sought a temporary restraining order and a preliminary injunction at the outset of this litigation. Upon reviewing the relevant issues again, the court concludes that plaintiffs have not met their burden for obtaining an injunction pending appeal.

1. Likelihood of Success on the Merits

In support of their motion for an injunction pending appeal, plaintiffs argue that "[a]t minimum, Plaintiffs have raised 'serious' and 'difficult' questions of law in their motion for temporary restraining order and preliminary injunction" and that "[s]pecifically, because the United States International Trade Commission ["ITC"] did not issue a remedy 'recommendation' . . . the President lacked authority to impose the remedies imposed by the Proclamation." Inj. and Stay Mot. 3 ("Plaintiffs' [*sic*] recognize that this Court did not agree with their position, but that is immaterial to whether an injunction pending appeal should be granted. It is enough that the questions of law are 'serious' and 'difficult.'").

In pointing to the ITC's not having issued a remedy recommendation, plaintiffs refer to their first claim in this litigation ("Count 1" in

their complaint). They claim that the President and the U.S. Trade Representative violated sections 201 and 203 of the Trade Act of 1974, 19 U.S.C. §§ 2251 and § 2253, by adopting a safeguard measure upon a report of the ITC that did not comply with subsection (e) of section 202 of the Trade Act, 19 U.S.C. § 2252(e), in that it did not include a remedy recommendation that was on behalf of the Commission. Compl. ¶ 54 (Feb. 7, 2018), ECF Nos. 2 (public), 16 (conf.). The court concluded previously that plaintiffs have not shown a likelihood of success on the merits of this claim. *Silfab I* at 9–30. The court reaches the same conclusion again, for precisely the reasons the court stated in its previous opinion and order. Noting the ITC's affirmative finding that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry, the court concluded that plaintiffs' statutory interpretation did not accord with the plain language, purpose, or legislative history of the statute. *See id*. Regarding the statutory purpose, the court opined that "[t]he practical effect of plaintiffs' interpretation is that the lack of an ITC remedy recommendation would negate the ITC's affirmative injury or threat determination," preventing the President from acting in response to the ITC's finding of serious injury, "which is the very problem the statute was enacted to address." *Id*. at 19.

Upon reconsideration of the merits of plaintiffs' other two claims, the court again concludes that plaintiffs are unlikely to succeed on the merits of either of them. Here also, the court reaches this conclusion for the reasons it stated in its previous opinion and order.

Plaintiffs claim, in Count 2 of their complaint, that the Proclamation violated section 312 of the North American Free Trade Agreement Implementation Act (the "NAFTA Implementation Act"), 19 U.S.C. § 3372(d), by imposing a quantitative restriction that did not permit the importation of a specified quantity or value of an article of Canada. Compl. ¶¶ 55–60. They direct this claim to the inclusion in the Proclamation of a tariff-rate quota on CSPV cells. The court questioned whether plaintiffs will be able to establish standing to assert this claim, noting that plaintiffs did not allege that they produced or imported CSPV cells from Canada. *Silfab I* at 31. The court also mentioned that the Trade Act of 1974 regards tariff-rate quotas and quantitative restrictions as distinct remedies. *Id*. at 31–32. Moreover, the court cast doubt on plaintiffs' argument that the tariff-rate quota at issue can be said not to "permit" the importation of a specified quantity or value of CSPV cells from Canada. *Id*. at 32–33. In considering again plaintiffs' second claim, the court once more concludes that even were plaintiffs to establish standing, they would be

unlikely to show that the tariff-rate quota at issue is a "quantitative restriction" within the meaning of 19 U.S.C. § 3372(d) or that it failed to permit the importation of a specified quantity or value of CSPV cells from Canada.

Plaintiffs' third claim, expressed in Count 3 of their complaint, is that the President lacked authority to impose a restriction on CSPV products from Canada because the ITC found that imports from Canada did not account for a substantial share of total imports and did not contribute importantly to the serious injury, or threat thereof, caused by imports. Compl. ¶¶ 61–67. The court concluded that plaintiffs were unlikely to be successful on this claim because the NAFTA Implementation Act permits, but does not require, the President to exempt imports from a NAFTA country from a global safeguard imposed under section 203 of the Trade Act of 1974. *Silfab I* at 34. Under the NAFTA Implementation Act, the two findings of the ITC, i.e., that imports from Canada did not account for a substantial share of total imports and did not contribute importantly to the serious injury, or threat thereof, caused by imports, were not binding on the President, who is directed to make his own findings on these same two issues. *Id*. at 35–36. The President's findings of fact and exercise of judgment are not subject to judicial review. *Id*. at 37–39. Considering again the third claim asserted in the complaint, the court concludes, as it did previously, that plaintiffs are not likely to succeed on the merits of this claim.

2. Irreparable Harm in the Absence of an Injunction Pending Appeal

Plaintiffs assert that the Proclamation "has struck a crushing blow to Plaintiffs' respective businesses, and each one has been forced to undergo significant operational changes, including terminating dozens of employees, closing manufacturing facilities, and losing key customer contracts." Inj. and Stay Mot. 3. They add that "[a]bsent an injunction pending appeal, Plaintiffs will continue to face debilitating harm, and there is a substantial likelihood that their claims would be mooted by the time the appeal is resolved." *Id*. (citation omitted).

The court, for purposes of ruling on their motion for injunctive relief, presumes, without finding, that plaintiffs have met the requirement of showing irreparable harm in the absence of an injunction pending appeal.

3. Whether the Injunction Will Substantially Injure the Other Parties Interested in the Proceeding

The injunction pending appeal that plaintiffs seek would enjoin U.S. officials, during the pendency of the appeal, from "taking any action to impose or enforce against the Plaintiffs the Presidential Proclamation No. 9693" and enjoin U.S. Customs and Border Protection "from the collection of any tariff on Plaintiffs' imports of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, from Canada pursuant to the Presidential Proclamation during the pendency of the Appeal." Proposed Inj. Order 1–2. The court has not conducted a hearing to make its own findings of fact as to whether this proposed injunction would substantially injure the defendant or the defendant-intervenors, who oppose the injunction. For the reasons discussed below, such a hearing is not necessary, at least at this time.

4. Whether an Injunction Pending Appeal Is in the Public Interest

Previously, the court concluded that plaintiffs did not meet their burden of showing that the public interest weighed in favor of an injunction. *Silfab I* at 39–41. In their current motion, plaintiffs do not address this factor, making no argument as to why an injunction pending appeal would be in the public interest. In any event, the injunction plaintiffs seek would halt the implementation of the Proclamation with respect to the Canadian CSPV products that plaintiffs export and import, interfering with the administration of the safeguard measure the President imposed to facilitate efforts by the domestic industry to make a positive adjustment to import competition. The public interest arguments plaintiffs made earlier were not persuasive, for the reasons the court discussed previously. *Id*. The court cannot conclude that the injunction pending appeal sought by plaintiffs would be in the public interest.

5. On Balance, the Court Concludes that an Injunction Pending Appeal Is Not Warranted

Upon reconsidering each of their claims, the court again concludes that plaintiffs have not met their burden of showing a likelihood of success on the merits. They have made no argument as to why such an injunction would be in the public interest, and the court has reason to conclude to the contrary. Even upon presuming, *arguendo*, that the other two factors are in plaintiffs' favor, the court concludes that the showing they have made is not sufficient for the court to order the injunction pending appeal that they seek.

B. Stay of Proceedings Pending Appeal

Plaintiffs argue that a stay of the proceedings in this Court pending their appeal would serve the interests of judicial economy and efficiency, submitting that the results of their appeal "almost certainly will alter the scope or the course of the litigation." Inj. and Stay Mot. 4. The court is not persuaded by this argument. The only action now required of plaintiffs is to respond to the motion to dismiss filed by the ITC. The court sees no convincing reason why litigation on that motion should be stayed.

As an alternative to a stay, plaintiffs request that the court set a consolidated response date of May 31, 2018 for the motion to dismiss filed by the ITC and any other motions to dismiss that are filed. Inj. and Stay Mot. 5 n.1. This request is not a proper motion for an enlargement of time and, moreover, seeks an enlargement that appears excessive in length. A motion for an enlargement of time would entail requesting the consent of the other parties to the case. USCIT R. 7(f). Plaintiff is advised to consult with the other parties to this case and file any such motion expeditiously.

III. CONCLUSION AND ORDER

Upon consideration of plaintiffs' motion for an injunction and a stay pending appeal and their motion for expedited consideration, upon all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Plaintiffs' Motion For Expedited Consideration of Motion For Injunction Pending Appeal and Stay of District Court Proceedings (Mar. 21, 2018), ECF No. 51 be, and hereby is, granted; it is further

ORDERED that Plaintiffs' Motion For Injunction Pending Appeal and Stay of District Court Proceedings During Appeal of Preliminary Injunction Ruling (Mar. 21, 2018), ECF No. 50 be, and hereby is, denied in the entirety; and it is further

ORDERED that plaintiffs' request for an enlargement of time to May 31, 2018 to respond to the motion to dismiss filed by the U.S. International Trade Commission be, and hereby is, denied.

Dated: March 26, 2018
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, CHIEF JUDGE

Slip Op. 18–31

CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Plaintiff, SOLARWORLD AMERICAS, INC., Consolidated Plaintiff, .v. UNITED STATES, Defendant. SOLARWORLD AMERICAS, INC., and CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 16–00157
PUBLIC VERSION

[Commerce's remand results in countervailing duty administrative review of crystalline silicon photovoltaic cells from the People's Republic of China sustained.]

Dated: March 27, 2018

Robert Gosselink, Jarrod Goldfeder, and *Jonathan Freed*, Trade Pacific, PLLC, of Washington, DC, for Plaintiff and Defendant-Intervenor Changzhou Trina Solar Energy Co., Ltd.

Timothy Brightbill and *Usha Neelakantan*, Wiley Rein, LLP, of Washington, DC, for Consolidated Plaintiff and Defendant-Intervenor SolarWorld Americas, Inc.

Justin Miller, International Trade Field Office, U.S. Department of Justice, of New York, NY, for defendant. Of counsel on the brief was *Lydia Pardini*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Restani, Judge:

Before the court are the U.S. Department of Commerce ("Commerce")'s *Final Results of Redetermination Pursuant to Court Remand* from Commerce's second administrative review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells") from the People's Republic of China ("PRC"). ECF No. 49 (confidential version) ("*Remand Results"). See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2013*, 81 Fed. Reg. 46,904 (Dep't Commerce July 19, 2016) ("*Final AR Results*"). This court having previously remanded the *Final AR Results* for Commerce to reassess its decision to average certain data sets in calculating a benchmark for solar glass, *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312 (CIT 2017) ("*Changzhou*"), SolarWorld Americas, Inc. ("SolarWorld") now contends that Commerce's decision to continue averaging those data sets is unsupported by substantial evidence or otherwise not in accordance with law. The court sustains Commerce's *Remand Results* for the reasons which follow.

BACKGROUND

The court presumes familiarity with the facts of the case as discussed in *Changzhou*, 255 F. Supp. 3d at 1314–16; however, the facts relevant to the *Remand Results* are summarized below for ease of reference.

Commerce's *Final AR Results* determined a countervailable subsidy rate of 19.20 percent *ad valorem* for subject solar cells produced by both named respondents and other companies not individually examined. *Final AR Results*, 81 Fed. Reg. at 46,905. Of this, 12.97 percent was meant to countervail the provision of solar glass for less than adequate remuneration ("LTAR"). *Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2013*, C-570–980, POR 01/01/2013–12/31/2013, at 8 (Dep't Commerce July 12, 2016) ("*Final I&D Memo*"). Pursuant to 19 U.S.C. § 1677e(a)(1), Commerce based part of its countervailability determination regarding the PRC's provision of solar glass on "facts otherwise available," and employed a tier-two benchmark in calculating respondent's benefit from the program. *Final I&D Memo* at 18–20. *See also* 19 C.F.R. § 351.511(a)(2)(ii).

This tier-two benchmark was established by averaging data from Information Handling Services Technology ("IHS"), submitted by respondent JA Solar, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Benchmark Submission*, C-570–980, POR 01/01/2013–12/31/2013, at Ex. 3A (Dep't Commerce Nov. 2, 2015) ("2014 IHS Report"), with data from the Global Trade Atlas ("GTA"), submitted by petitioner SolarWorld, *Certain Crystalline Silicon Photovoltaic Products, Whether or Not Assembled Into Modules, from the People's Republic of China: Submission of Factual Information - Benchmark Data*, C-570–980, POR 01/01/2013–12/31/2013, at Ex. 7 (Dep't Commerce Nov. 2, 2015) ("GTA Data"). *Final I&D Memo* at 22. In the decision below, SolarWorld challenged Commerce's decision to average both datasets for its *Final AR Results*, contending that Commerce should have instead relied exclusively upon GTA data. *Changzhou*, 255 F. Supp. 3d at 1320. Although the court sustained the *Final AR Results* in other respects, it remanded the results for Commerce to "reconsider its choice [to calculate its average using IHS data,] and if it chooses to adhere to it explain why a data set that may include taxes, may not be representative of the entire POR, and is only slightly more product specific, should be averaged with a [GTA] data set that generally lacks cause for concern." *Id.* at 1321.

On remand, Commerce recalculated its countervailing subsidy rate, increasing it to 24.66 percent *ad valorem*, with 18.43 percent meant to countervail the PRC's provision of solar glass for LTAR. *Remand Results* at 6. Commerce continued to average IHS and GTA data. *Id.* at 16. The change in rate was the result of Commerce's *sua sponte* adjustment of its calculation method "to conform with [Commerce's] standard monthly benchmark calculation methodology." *Id.* at 5, 24. No party has challenged this aspect of Commerce's recalculation, Consolidated Plaintiff SolarWorld Americas, Inc.'s Comments on the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Remand, ECF No. 53, at 7 (confidential version) ("SolarWorld Cmts."), which appears to be a reasonable adjustment.[1] The only issue before the court is thus whether Commerce's decision to continue using IHS data in its benchmark calculations is supported by substantial evidence and in accordance with law.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Commerce's final results in a countervailing duty investigation are upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Before assessing a countervailing duty, Commerce must establish, *inter alia*,[2] that a benefit was conferred. 19 U.S.C. § 1677(5)(A)–(B). A

[1] Commerce stated that:

> while the Department [of Commerce] used the monthly GTA data in its original benchmark calculation, we used that data to calculate a single average value for the entire POR (essentially converting the monthly data into an annual data point), averaged the resulting single value with the single IHS annual value, and then added monthly delivery charges. Thus, the original benchmark calculation eliminated the monthly variation in the GTA data, such that the variation among the calculated monthly benchmark values was solely the result of the monthly delivery charges. Such a calculation is inconsistent with the Department's stated practice to calculate separate monthly averages when possible. Therefore, we recalculated the solar glass benchmark by calculating monthly averages of the GTA data, averaging the result for each month with the single IHS value for the year, and then adding monthly delivery charges. That is, we calculated a monthly average of the GTA data for January 2013, averaged that value with the single IHS value for 2013, and then added monthly delivery charges for January 2013 to reach a January 2013 benchmark; we repeated this calculation for each month of 2013. When calculated in this manner, the monthly benchmark values varied as a result of monthly fluctuations in the GTA data, as well as monthly fluctuations in the delivery charges.

Remand Results at 24. *See Remand of 2nd (2013) Administrative Review of the Countervailing Duty Order on Solar Cells from the PRC: Revised Calculation of Solar Glass Benchmark*, C-570–980, POR 01/01/2013–12/31/2013, at Attach. II, pages 55–56 (Dep't Commerce October 20, 2017).

[2] On remand, the concept of a "benefit" is the only element of the countervailable subsidy definition at issue.

foreign government's provision of goods to a respondent for LTAR constitutes a benefit. 19 U.S.C. § 1677(5)(E)(iv). Here, the good in question is solar glass, provided by the PRC. The adequacy of remuneration is calculated by comparing the price paid by respondent to a market-determined price. 19 C.F.R. § 351.511(a)(2).[3] Where, as here, a market price "resulting from actual transactions in the country in question," i.e., the PRC, is unavailable, Commerce turns to a "world market price." *Id.* § 351.511(a)(2)(i)–(ii). The parties submitted two datasets for Commerce to consider in calculating a world market price for solar glass: IHS from JA Solar and GTA from SolarWorld. Commerce's regulations provide that, "[w]here there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability." *Id.* § 351.511(a)(2)(ii).

In assessing the utility of each dataset, Commerce weighed four factors: (1) specificity to the input, solar glass; (2) contemporaneity with the period of review ("POR"); (3) units of measure; and (4) exclusivity of taxes and PRC prices. *Final I&D Memo* at 20–22. In the opinion below, the court found Commerce's analysis deficient, particularly as concerned IHS data, and directed Commerce to address the following on remand: "the possible inclusion of taxes in the IHS data . . . Commerce must explicitly weigh this possible flaw and the IHS data's other potential inaccuracy of reporting a single annual price, against the GTA data's defect of being slightly less specific than the IHS data." *Changzhou*, 255 F. Supp. 3d at 1326.[4]

Commerce's Remand Results accordingly reassessed the IHS data's tax exclusivity, the contemporaneity of both IHS and GTA data with the POR, and the relative product specificity of both IHS and GTA data. *Remand Results* at 6–14. Commerce concluded that the IHS data is tax-exclusive. *Id.* at 15. It furthermore conceded that IHS data is deficient in providing only annual figures, but noted that GTA data

[3] Commerce first attempts to identify a tier-one market price, or "benchmark," which is one "resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). If a price from actual transactions is unavailable, Commerce turns to a tier-two benchmark, in which Commerce "compar[es] the government price to a world market price." *Id.* § 351.511(a)(2)(ii). For both tier-one and tier-two benchmarks, "[Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." *Id.* § 351.511(a)(2)(iv). No party challenges Commerce's recourse to a tier-two benchmark for solar glass. *Remand Results* at 7. Parties likewise do not contest that Commerce properly adjusted the comparison price to reflect the price the firm would have paid had it imported the product. 19 C.F.R. § 351.511(a)(2)(iv). *See Changzhou*, 255 F. Supp. 3d at 1316.

[4] As used by Commerce, both sets were exclusive of PRC prices. *Changzhou*, 255 F. Supp. 3d at 1321 n.4 (citing *Final I&D Memo* at 22 (stating that Commerce adjusted IHS data to account for PRC prices)).

is deficient in incorporating price data for non-solar glass, and concluded that each deficiency would be mitigated by averaging both datasets. *Id.* at 15–16. For the following reasons, the court concludes that Commerce's determinations are supported by substantial evidence and its approach is in accordance with the law.

A. Tax Exclusivity of IHS Data

Commerce used IHS data from 2013 in calculating an average world market price. 2014 IHS Report at 1; *Final I&D Memo* at 19–22. On remand, Commerce reopened the record, introduced a 2017 IHS report containing data from 2016, and allowed parties the opportunity to "rebut, clarify, or correct" the 2017 report. *Remand of 2nd (2013) Administrative Review of the Countervailing Duty Order on Solar Cells from the PRC*, C-570–980, POR 01/01/2013-12/31/2013, at 2 (Dep't Commerce Aug. 24, 2017) ("2017 IHS Report"). Neither party submitted responsive factual information. *Remand Results* at 5. Commerce relied on the following statement in the 2017 report to conclude that IHS data for 2013 is tax-exclusive: "*All*. . . pricing data presented in this report are calculated using a [[ ]] methodology [[ ]]. As such, . . . prices . . . are those generated by the manufacturer [[ ]]." 2017 IHS Report at 3 (emphasis added).

SolarWorld does not dispute that the above passage suggests that prices in the 2017 IHS Report are tax-exclusive. Furthermore, as observed by Commerce, [[ ]] prices listed for 2013 are identical in the 2014 and 2017 reports. *Compare* 2017 IHS Report at 10, 16, *with* 2014 IHS Report at 1, 18. The 2017 IHS Report unequivocally indicates that "[a]ll . . . pricing data presented in this report" reflect manufacturing costs. 2017 IHS Report at 3. If *all* pricing data in the 2017 IHS Report are pre-tax figures, the historical pricing data therein must be tax-free. As the historical pricing data for 2013 is identical in both IHS reports, it logically follows that the 2013 pricing data in the 2014 IHS Report reflects tax-free figures. This alone supplies substantial evidence for Commerce's conclusion.

SolarWorld's arguments against reliance on the 2017 IHS Report are unpersuasive. First, SolarWorld challenges the reasonableness of relying on a report outside the POR. SolarWorld Cmts. at 5. The court finds no reason to preclude all recourse to post-POR reports to clarify matters of methodology, where indicia of year-to-year consistency exist. In addition to the numerical consistencies noted above, a number of pages from the 2014 and 2017 editions are identical, i.e.,

[[ ]] *Compare* 2017 IHS Report at 6–9; *with* 2014 IHS Report at 4–5, 9–10. The pages for "Solar Glass–Price Analysis" are similarly structured, with updated numbers for 2014 and beyond.[5] *Compare* 2017 IHS Report at 10; *with* 2014 IHS Report at 18.

The purpose of these reports is to forecast and identify trends over time, specifically the 2010–2018 period in the case of the 2017 IHS Report. 2017 IHS Report at 3. SolarWorld conjectures, without evidence, that IHS may have adjusted its methodology in the intervening 2015 or 2016 reports. SolarWorld Cmts. at 8. In addition to the lack of evidence, the court considers that the trend-identifying purpose of the 2017 IHS Report suggests a likelihood that changes or updates to historical data would be indicated. The IHS reports' identical figures for the year 2013, for example, further suggest that the same method was applied in both reports on record. Accordingly, the court concludes that Commerce acted reasonably and in accordance with law in drawing its conclusions regarding the figures contained in the 2014 IHS Report based on the 2017 IHS Report.

B. Contemporaneity: Annual IHS Figures vs. Monthly GTA Figures

On remand, Commerce challenged the court's earlier statement that the price of solar glass fluctuates from month-to-month, but Commerce did not directly answer the court's question of whether or not the "annual" prices in the 2014 IHS Report are averages of monthly values, or a narrower data point. *Remand Results* at 10–13, 16–20. *See also Final I&D Memo* at 21. Rather, Commerce concluded that, considering the methods by which the IHS report was prepared, which suggest some broader data collection, the greater product specificity of the IHS data, and the use of the IHS Report by [[ ]] industry subscribers, the single annual price does not require excluding the IHS dataset altogether. *Remand Results* at 12–13.

Commerce argues that because GTA factored an indeterminate quantity of non-solar glass into its monthly price calculations, monthly changes in the GTA price were not necessarily due to changes in the price of solar glass. *Remand Results* at 10–11. Even if GTA price fluctuations do not necessarily correlate with proportional changes in solar glass prices, however, the significant annual changes in solar glass prices suggest some degree of sub-annual fluctuation.

[5] The above-cited passage of the 2017 IHS Report comes from that report's "Introduction" section. The record excerpt of the 2014 IHS Report does not include the "Introduction" section. *Compare* 2017 IHS Report at 3; *with* 2014 IHS Report at 1–17.

[[

]] Both parties agree that Commerce's usual practice is to prefer monthly datasets where available. SolarWorld Cmts. at 6; *Remand Results* at 16–20.

Despite this, Commerce utilized the "annual" prices from the IHS dataset in calculating its benchmark average. On remand, however, SolarWorld has failed to substantiate the existence of a uniform practice prohibiting the use of annual datasets. *See* SolarWorld Cmts. at 8–9; *Remand Results* at 16–20. Most cases cited by SolarWorld are easily distinguishable from the instant situation,[6] but *Citric Acid from the PRC* warrants further discussion. *Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 79 Fed. Reg. 108 (Dep't Commerce January 2, 2014) ("*Citric Acid from the PRC*"). There, without addressing petitioner's suggestion that the annual dataset was the only dataset specific to the input in question,[7] Commerce concluded that monthly data from the same HTS chapter was preferable. *Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Citric Acid and Certain Citrate Salts; 2011*, C-570–938, POR 01/01/2011–12/31/2011, at VII.I.G n.150 and Comment 13.D (Dep't Commerce Dec. 26, 2013) ("Citric Acid I&D Memo."). Beyond recounting its general preference for monthly figures, however, Commerce did not indicate that annual datasets were per se unusable. Citric Acid I&D Memo. at Comment 13.D. That Commerce, in *2017 Rebar from Turkey*, relied entirely on

[6] *2014 Turkey Rebar* involved Commerce's selection of a monthly dataset over a quarterly dataset where no issues were identified with regard to the product specificity of the monthly data set. *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Affirmative Critical Circumstances Determination*, 79 Fed. Reg. 54,963 (Dep't Commerce Sept. 15, 2014) ("*2014 Turkey Rebar*"); *Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination in the Countervailing Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey*, C-489–819, POI 01/01/2012-12/31/2012, at VII.A.1 (Dep't Commerce Sept. 8, 2014). This is simply an example of Commerce exercising its recognized preference for monthly datasets, all else being equal. *2010 Kitchen Shelving from the PRC* does not feature significant discussion of the relative merits of annual and monthly data. *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010*, 78 Fed. Reg. 21,594 (Dep't Commerce Apr. 11, 2013) ("*2010 Kitchen Shelving from the PRC*"); *Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*, C 570–942, POR 01/01/2010–12/31/2010, at VI.A.6 (Dep't Commerce Apr. 5, 2013).

[7] From the petitioner's comments: "In this case, the annual India data are the only benchmark specific to limestone flux and would represent the most accurate information on which to calculate the LTAR for limestone flux." Citric Acid I&D Memo. at Comment 13.D.

an annual dataset in lieu of a monthly dataset, due to, *inter alia*, specificity problems with the latter, indicates Commerce has made case-by-case, contextual determinations.

> [T]he Department continues to use the IEA annual data for purposes of calculating a benefit for this program. Although the Department has an established preference for monthly benchmark information, the GTIS data on the record of this investigation is reported in several different units . . . and, furthermore, implies widely variable natural gas conversion factors . . . Additionally, the specific facts on the record of this investigation demonstrate that the GTIS data includes shipments of compressed natural gas (CNG).

Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey, C-489–830, POI , at VII.A.1 and VIII.Comment.4 (Dep't Commerce May 15, 2017). *See also Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 23,188 (Dep't Commerce May 22, 2017) ("*2017 Rebar from Turkey*"). Commerce's use of IHS data fits within this pattern. The GTA data appears less flawed than the monthly dataset at issue in *2017 Rebar from Turkey*, but instead of ignoring the GTA data entirely, as it did with the monthly data in *2017 Rebar from Turkey*, Commerce has here chosen to average monthly GTA data with annual IHS data.

Commerce determined that the following suggested the IHS Report's annual figures were reliable: (1) the report was prepared by "[[ ]]"; (2) it incorporates "[[ ]]"; (3) and its "main targeted audience [[ ]]. *Remand Results* at 11–12 (quoting 2017 IHS Report at 3–4). The foregoing suggests product specificity and professionalism in the report's preparation, but offers no indication of exactly how IHS calculated its annual figures. The report further indicates that all research and analysis of 2016 price data took place "[[ ]]," but that "[[ ]]." 2017 IHS Report at 4 (emphasis added). This suggests that these annual solar glass prices reflect some sort of averaging, although IHS' input data was imperfect for Commerce's purposes.

Commerce's dual conclusions that the IHS dataset's reliance on annual figures constitutes a deficiency, but that this flaw does not, by itself, make the IHS data unusable are, in these circumstances, supported by substantial evidence.

C. Relative Product Specificity of the IHS and GTA Datasets

On remand, Commerce continued to find that GTA data exhibited insufficient product specificity, "contrary to Commerce's stated preference to utilize the narrowest category of products encompassing the input product (i.e., solar glass)." Defendant's Response to Comments Regarding the Remand Redetermination, ECF No. 60, at 7. The GTA data on record covered Harmonized Tariff Schedule ("HTS") Subheading 7007.19: Safety glass, consisting of toughened (tempered) or laminated glass: Other.[8] *See, e.g.*, GTA Data at 5.

The 2014 IHS Report, on the other hand, isolates price figures for solar glass, and distinguishes toughened (tempered) glass from solar glass as follows: [[

]] 2014 IHS Report at 4. This bolsters Commerce's earlier observation that solar glass is a more specialized category by virtue of its physical characteristics, including solar glass' low iron content and thickness. *See Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2013*, C-570–980, POR: 01/01/13–12/31/13, at 32 (Dep't Commerce Dec. 31, 2015).[9]

SolarWorld argues that the vast majority of solar glass nevertheless falls under HTS Subheading 7007.19, SolarWorld Cmts. at 10; as Commerce notes, however, the relevant question for determining the product specificity of data tied to HTS Subheading 7007.19 is whether solar glass constitutes a significant percentage of all products entered under HTS Subheading 7007.19.[10] *Remand Results* at 22. Absent such information, and considering the unique physical characteristics of solar glass, Commerce's determination that the monthly GTA data is deficient as concerns product specificity, is therefore supported by

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[8] The GTA data covers HTS Subheading 7007.19. For the relevant period, HTS Heading 7007 was divided as follows:

7007 Safety glass, consisting of toughened (tempered) or laminated glass
  7007.11.00 Of size and shape suitable for incorporation in vehicles, aircraft, spacecraft or vessels
    10 For motor vehicles of chapter 87
    90 Other
  7007.19.00 Other

U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2013), Section 70, at 7.

[9] [[ ]]

[10] [[

]] though Commerce previously described tempered glass as a "relatively limited category." *Remand Results* at 8.

substantial evidence.[11] Nevertheless, no party argues, and the record does not suggest, that this deficiency precludes all usage of the GTA dataset.

In sum, the IHS and GTA datasets each have one significant, albeit nonfatal flaw. Neither is unusable, but neither satisfies all of Commerce's factors. Absent a dataset which satisfies all four factors, the court concludes that Commerce's decision to average two imperfect datasets was in accordance with law. *See* 19 C.F.R. § 351.511(a)(2)(ii).

CONCLUSION

For the foregoing reasons, the court sustains Commerce's *Remand Results*. Judgment will enter accordingly.

Dated: March 27, 2018
New York, New York

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

[11] U.S. Customs rulings further suggest the breadth of products covered by HTSUS Subheading 7007.19, which had been held to include, for example, glass table tops and lamp parts by the time the GTA data on record was being compiled. Re: The tariff classification of two glass table tops from Indonesia, No. NY J87742 (Customs), 2003 WL 22357214 (U.S. Customs Service Sept. 9, 2003); Re: Clear soda lime tempered cover glass lenses; Lamp parts; chapter 70; heading 8539; EN 70.07; Additional U.S. Rule of Interpretation 1(c), No. HQ 956914 (Customs), 1995 WL 908516 (U.S. Customs Service, Mar. 15, 1995) (importer sought classification under subheading 8539.90.00, but the subject lamp parts were instead classified under subheading 7007.19.00).