U.S. Court of International Trade

Slip Op. 18–7

NUCOR CORPORATION, Plaintiff, and ARCELORMITTAL USA LLC et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and DONGKUK STEEL MILL CO., LTD. et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 16–00164
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's final determination in the investigation of certain corrosion-resistant steel products from the Republic of Korea.]

Dated: February 6, 2018

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Brady Warfield Mills, Morris, Manning & Martin, LLP, of Washington, DC, argued, for defendant-intervenors Dongkuk Steel Mill Co., Ltd., Union Steel Manufacturing Co. Ltd., and the Government of Korea. With him on the brief were *Donald Bertrand Cameron, Julie Clark Mendoza, Rudi Will Planert, Mary Shannon Hodgins, Eugene Degnan, Sarah Suzanne Sprinkle*, and *Henry Nelson La Salle Smith*.

OPINION

Kelly, Judge:

This action is before the court on a United States Court of International Trade Rule 56.2 motion for judgment on the agency record challenging certain aspects of the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the countervailing duty ("CVD") investigation of certain corrosion-resistant steel

("CORE") products from the Republic of Korea ("Korea"), which resulted in a CVD order. *See* Pl. Nucor Corp. & Pl.-Intervenors ArcelorMittal USA LLC, AK Steel Corp., & United States Steel Corp. Rule 56.2 Mot. J. Agency R. at 1, Feb. 16, 2017, ECF No. 57 ("Pl. & Pl.-Intervenors' Mot."); *see also [CVD] Investigation of Certain Corrosion-Resistant Steel Products From the Republic of Korea*, 81 Fed. Reg. 35,310 (Dep't Commerce June 2, 2016) (final affirmative determination, and final affirmative critical circumstances determination, in part) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Determination in the [CVD] Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea, C-580–879, (May 24, 2016), ECF No. 31–5 ("Final Decision Memo"); *see also Certain Corrosion-Resistant Steel Products From India, Italy, Republic of Korea and the People's Republic of China*, 81 Fed. Reg. 48,387 (Dep't Commerce July 25, 2016) ([CVD] order). Plaintiff, Nucor Corporation ("Nucor" or "Plaintiff"), commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2012).[1] *See* Summons, Aug. 24, 2016, ECF No. 1; Compl. at ¶¶ 2, 14–21, Sept. 8, 2016, ECF No. 8. Plaintiff-Intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation (collectively "Plaintiff-Intervenors") join in Plaintiff's motion for judgment on the agency record. *See* Pl. & Pl.-Intervenors' Mot. at 1. Nucor and Plaintiff-Intervenors challenge as contrary to law, arbitrary and capricious, and unsupported by substantial evidence Commerce's determinations: (1) that the Government of Korea's ("GOK") price-setting method or standard pricing mechanism for electricity did not confer a benefit; and (2) not to apply an adverse inference that state intervention by the GOK results in electricity prices that are inconsistent with market principles.[2] *See* Mem. Pl. Nucor Corp. & Pl.-Intervenors ArcelorMittal USA LLC, AK Steel Corp., & United States Steel Corp. Supp. Mot. J. Agency R. at 2–3, Feb. 17, 2017, ECF No. 60 ("Pl. & Pl.-Intervenors' Br."); Pl. & Pl.-Intervenors' Mot at 2. Further, in the event the court concludes that Commerce's determination is contrary to law, arbitrary and capricious, or unsupported by substantial evidence, Nucor and Plaintiff-Intervenors request that the court remand this action for

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

[2] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) (2014) each separately provide for the use of facts otherwise available and the subsequent application of adverse inferences to those facts, Commerce uses the shorthand "adverse facts available" or "AFA" to refer to its use of such facts otherwise available with an adverse inference. *See, e.g.*, Final Decision Memo at 12.

Commerce to consider whether the provision of electricity for less than adequate remuneration ("LTAR") provides a specific benefit to the CORE industry in Korea. *See* Pl. & Pl.-Intervenors' Br. at 3, 39; *see also* Pl. & Pl.-Intervenors' Mot. at 2.[3]

The court sustains Commerce's determinations that the GOK's standard pricing mechanism for electricity does not confer a benefit and that an adverse inference is not warranted concerning government intervention in electricity pricing. Accordingly, the court denies Plaintiff's request for a remand and need not reach the issue of whether the GOK's standard pricing mechanism provides a specific benefit.

BACKGROUND

On June 23, 2015, Commerce initiated a CVD investigation of certain corrosion-resistant steel products from Korea. *See Certain Corrosion-Resistant Steel Products From the People's Republic of China, India, Italy, the Republic of Korea, and Taiwan*, 80 Fed. Reg. 37,223 (Dep't Commerce June 30, 2015) (initiation of CVD investigations). Commerce selected Union Steel Manufacturing Co. Ltd./ Dongkuk Steel Mill Co., Ltd. ("Union") and Dongbu Steel Co., Ltd./ Dongbu Incheon Steel Co., Ltd. (collectively "Dongbu") as mandatory respondents. Final Decision Memo at 2; *see* Decision Memorandum for the Preliminary Affirmative Determination: [CVD] Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea at 2, C-580–879, PD 413, bar code 3413232–01 (Nov. 2, 2015) ("Prelim. Decision Memo")[4] (citing Respondent Selection Memo, PD

[3] On November 6, 2017, Defendant filed on the docket, as supplemental authority, the recent decision in *Maverick Tube Corp. v. United States*, 41 CIT __, Slip Op. 17–146 (October 27, 2017). Def.'s Notice of Recent Ct. Op. at 3, Nov. 6, 2017, ECF No. 83. Plaintiff Nucor Corporation filed a Motion for Leave to Respond to Defendant's Notice of Supplemental Authority, Nov. 29, 2017, ECF No. 84 ("Nucor's Motion"), to which it attached Petitioners' Response to Defendant's Notice of Supplemental Authority, Nov. 29, 2017, ECF No. 84 ("Pl. & Pl.-Intervenors' Resp. Suppl. Auth."). Defendant and Defendant-Intervenors, individually, submitted responses to Nucor's Motion. Def.'s Resp. Pl.'s Request Leave File Resp. to Def.'s Notice Recent Ct. Op., Dec. 1, 2017, ECF No. 85; Def.-Intervenors' Mot. Leave Reply Pl.'s Resp. to Def.'s Notice Recent Ct. Op., Dec. 1, 2017, ECF No. 86. The court granted Nucor's Motion and allowed Defendant and Defendant-Intervenors to file substantive briefs addressing the arguments raised in Plaintiff and Plaintiff-Intervenors' response to the *Maverick* court's opinion. *See* Order, Dec. 1, 2017, ECF No. 87; *see also* Pl. & Pl.-Intervenors' Resp. Suppl. Auth.; *Maverick*, 41 CIT __, Slip Op. 17–146. Such responses were filed. *See* Def.-Intervenors' Reply Pl.'s Resp. to Def.'s Notice Recent Ct. Op., Dec. 18, 2017, ECF No. 89; Def.'s Reply Pls.' Resp. to Def.'s Notice Recent Ct. Op., Dec. 19, 2017, ECF No. 90.

[4] There is an insignificant discrepancy in the names of the mandatory respondents identified in the preliminary determination and the final determination. *Compare* Prelim. Decision Memo at 2 *with* Final Decision Memo at 2. In the preliminary determination, the Department identifies Union Steel Manufacturing Co. Ltd. and Dongbu Steel Co., Ltd. as

79, bar code 3293311–01 (July 23, 2015) ("Resp't Selection Mem.")); [5] *see also* Resp't Selection Mem. at 4, 6–7, 9–10; Section 777A(e)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1(e)(2); 19 C.F.R. §351.204(c)(2) (2015). [6]

In its petition, Nucor alleged that the GOK, through the Korea Electric and Power Corporation ("KEPCO"), a state-owned electricity provider, provides CORE producers with electricity for LTAR. [7] *See* Pl. & Pl.-Intervenors' Br. at 4 (citing Petitioners' Petition Part 3 at 4–15, PD 4, bar code 3280986–03 (June 3, 2015)); *see also* Petitioners' Petition Parts 4–5, PD 2–3, bar codes 3280986–04–05 (June 3, 2015); Petitioners' Petition Parts 6–16, PD 6–14, bar codes 3280986–06–14 (June 3, 2015) (reproducing excerpts from petitioners' petitions to Commerce and the International Trade Commission alleging material injury to the domestic industry)). To evaluate the adequacy of remuneration for the provision of electricity by KEPCO, Commerce preliminarily determined that a tier three benchmark [8] (i.e., consistent with market principles) was appropriate because neither a tier one benchmark (i.e., in-country market determined price) nor a tier

the mandatory respondents, *see* Prelim. Decision Memo at 2 (citation omitted), but notes that Dongkuk Steel Mill Co., Ltd. is Union Steel Manufacturing Co. Ltd.'s former parent company and successor-in-interest after a 2015 merger, *id.*, and that Dongbu Incheon is a wholly owned subsidiary of Dongbu Steel Co., Ltd. *Id.* at 8. In the final determination, the Department more clearly indicates the relationships between these entities by identifying the mandatory respondents as "Union Steel Manufacturing Co. Ltd./Dongkuk Steel Mill Co., Ltd." and "Dongbu Steel Co., Ltd./Dongbu Incheon Steel Co., Ltd." *See* Final Decision Memo at 2; *see also* [CVD] Investigation of *Certain Corrosion-Resistant Steel Products From the Republic of Korea*, 81 Fed. Reg. 35,310, 35,311 n.6 (Dep't Commerce June 2, 2016) (final affirmative determination, and final affirmative critical circumstances determination, in part) (citation omitted).

[5] On October 18, 2016, Defendant submitted indices to the public and confidential administrative records for this CVD investigation, which identify the documents that comprise the records to Commerce's final determination. These indices are located on the docket at ECF Nos. 31–2 and 31–3, respectively. *See* Administrative Record Index, Oct. 18, 2016, ECF No. 31–2–3. All further references to the documents from the administrative record are identified by the numbers assigned by Commerce in these indices.

[6] Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

[7] Commerce found that "KEPCO is an integrated electric utility company engaged in the transmission and distribution of substantially all of the electricity in Korea." Prelim. Decision Memo at 18 (citations omitted). Commerce also preliminarily found that the GOK is an "authority" for purposes of 19 U.S.C. § 1677(5)(B) which provides a good or service through its ownership interest in KEPCO, and by the GOK's regulation and approval of electricity tariffs charged by KEPCO. *See id.* at 18–19; *see also* 19 U.S.C. § 1677(5)(B).

[8] Under 19 CFR § 351.511(a)(2), the Department determines whether electricity is provided for LTAR by comparing, in order of preference: (i) the government price to a market determined price for actual transactions within the country such as electricity tariffs from private parties (referred to as a tier one benchmark); (ii) the government price to a world market price where it would be reasonable to conclude that such a world market price is available to electricity consumers in the country in question (referred to as a tier two benchmark); or (iii) if no world market price is available then the Department will measure the adequacy of remuneration by assessing whether the government price is consistent with market principles (referred to as a tier three benchmark).

two benchmark (i.e., world market price) were available. *See* Prelim. Decision Memo at 19–20; *see also* 19 C.F.R § 351.511(a)(2)(i)–(iii) (providing how Commerce will measure the adequacy of remuneration). To determine whether KEPCO's prices were set in accordance with market principles, Commerce analyzed KEPCO's price-setting method. Prelim. Decision Memo at 21. Commerce preliminarily found that KEPCO's price-setting method was consistent with market principles because the electricity tariff schedules in effect during the period of investigation ("POI") were

> calculated by (1) distributing the overall cost according to the stages of providing electricity (generation, transmission, distribution, and sales); (2) dividing each cost into a fixed cost, variable cost, and the consumer management fee; and (3) then calculating the cost by applying the electricity load level, peak level, and the patterns of consuming electricity. Each cost was then distributed into the fixed charge and the variable charge. KEPCO then divided each cost taking into consideration the electricity load level, the usage pattern of electricity, and the volume of the electricity consumed. Costs were then distributed according to the number of consumers of each classification of electricity.

Prelim. Decision Memo at 21 (citing Questionnaire for the [GOK], Section II at 13–14, CD 110, bar code 3304996–02 (Sept. 14, 2015) ("GOK Questionnaire Section II"); 2nd Suppl. Questionnaire for the [GOK] at 6–9, CD 498, bar code 3406269–02 (Oct. 15, 2015) ("GOK Second Suppl. Questionnaire")). Commerce preliminarily determined that KEPCO applied the same price-setting mechanism throughout the POI, and that the prices charged to the respondents pursuant to the tariff schedule applicable to industry users, "were consistent with KEPCO's standard pricing mechanism." *Id.* at 22. Accordingly, Commerce concluded that KEPCO's electricity program did not constitute LTAR so did not confer a benefit and, thus, could not be considered a countervailable subsidy. *See id.*

Commerce preliminarily assigned Dongbu a CVD cash deposit rate of 1.37 percent and did not assign Union a CVD cash deposit rate, as only a de minimis rate had been calculated for that respondent. *See [CVD] Investigation of Certain Corrosion-Resistant Steel Products From Korea*, 80 Fed. Reg. 68,842 (Dep't Commerce Nov. 6, 2015) (preliminary affirmative determination); *see also* 19 C.F.R. § 351.205(d) (providing instructions for assignment of cash deposits); 19 U.S.C. § 1671b(b)(4)(A) (providing that the agency "shall disregard any de minimis countervailable subsidy"). Additionally, Commerce preliminarily assigned Dongbu's rate as the "all-others" rate because

it was the only calculated non-de minimis rate. *Id.; see also* 19 U.S.C. § 1671d(c)(5)(A)(i) (providing that the all-others rate may not include zero and de minimis countervailable subsidy rates, or rates based entirely on facts otherwise available pursuant to 19 U.S.C. § 1677e). Commerce subsequently verified the data submitted by the GOK and the respondents. *See* Final Decision Memo at 2 (citations omitted).

In its final determination, Commerce continued to find that KEPCO did not provide electricity to CORE manufacturers in Korea for LTAR. *See* Final Decision Memo at 18–19, 23; Prelim. Decision Memo at 19, 21–22. Commerce also further analyzed the standard pricing mechanism based upon information placed on the record by the GOK, and determined that KEPCO covered its costs for the industry tariff in effect during the POI. *See* Final Decision Memo at 23. Commerce also declined to apply adverse facts available ("AFA") to conclude that the GOK's provision of electricity does not conform to market principles. *See id.* at 12.

As a result of changes not at issue here between Commerce's preliminary and final determinations, Commerce calculated a CVD rate for Dongbu of 1.19 percent and continued to calculate a de minimis CVD rate for Union. *Final Results*, 81 Fed. Reg. at 35,311–12. Commerce altered the all others rate accordingly to 1.19 percent. *See id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation of a CVD order. *See* 19 U.S.C. § 1516a(a)(2)(B)(i); 28 U.S.C. § 1581(c). The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Determination that the Korean Government Does Not Provide Electricity for LTAR

Nucor and Plaintiff-Intervenors assert three challenges to Commerce's determination that the GOK's provision of electricity did not provide a benefit to CORE manufacturers. *See* Pl. & Pl.-Intervenors' Br. at 2–3. First, they argue that Commerce's analysis of whether KEPCO's standard pricing mechanism measures the adequacy of remuneration is contrary to law because it fails to give effect to the adequacy of remuneration standard contained in the statute. *See id.* at 15–24. Second, they claim that Commerce's determination is arbitrary and capricious because Commerce's explanation fails to articu-

late a rational connection between its findings and the record evidence, and fails to consider the most important aspects of the problem identified by petitioners below.[9] *See* Pl. & Pl.-Intervenors' Br. at 24–29. Third, they contend that Commerce's determination that KEPCO's electricity prices are consistent with market principles is unsupported by substantial evidence. *See id.* at 29–34. The court addresses each challenge in turn.

A. Commerce's Methodology

Nucor and Plaintiff-Intervenors argue that Commerce's methodology for determining the adequacy of remuneration is contrary to law. *See* Pl. & Pl.-Intervenors' Br. at 15–24. Defendant responds that Commerce applied the tier three benchmark to measure the adequacy of remuneration, as dictated by 19 C.F.R. § 351.511(a)(2)(iii), which incorporates an evaluation of the government's price-setting philosophy as a factor to be considered in assessing whether a government price is consistent with market principles. *See* Def.'s Resp. Pls.' Mot. J. Upon Agency R. at 20–23, June 5, 2017, ECF No. 63 ("Def.'s Resp. Br.").

For a subsidy to be countervailable, Commerce must determine that an authority provides a subsidy that is specific and constitutes a financial contribution, by which a benefit is conferred. *See* 19 U.S.C. § 1677(5), (5A). Pursuant to the statute, an authority is "a government of a country or any public entity within the territory of the country." 19 U.S.C. § 1677(5)(B). A financial contribution includes, among other things, "providing goods or services, other than general infrastructure[.]" 19 U.S.C. § 1677(5)(D)(iii). Relevant here, a benefit is conferred "where goods or services are provided, if such goods or services are provided for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv).

Commerce has discretion to establish what constitutes "adequate remuneration" for the purpose of determining whether a benefit was conferred to the recipient of a subsidy. The statute does not define the phrase "adequate remuneration," nor does it provide a methodology for measuring the adequacy of remuneration. Congress granted Commerce considerable discretion to construct a methodology "to identify and measure the benefit of a subsidy." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol.

[9] The petitioners below were United States Steel Corporation, Nucor Corporation, Steel Dynamics, Inc., ArcelorMittal USA, LLC, AK Steel Corporation, and California Steel Industries. Prelim. Decision Memo at 1.

1, at 927 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4241 ("SAA"). Furthermore, the court affords Commerce significant deference in "[a]ntidumping and [CVD] determinations involv[ing] complex economic and accounting decisions of a technical nature[.]" *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (citation omitted). However, despite Commerce's wide discretion, the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) (citations omitted). To be afforded deference, Commerce's methodological approach must be a "reasonable means of effectuating the statutory purpose" and its conclusions must be supported by substantial evidence. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 810 F.2d 1137, 1138–39 (Fed. Cir. 1987).

Commerce's regulations provide that the agency shall measure the adequacy of remuneration by comparing the government price to a multi-tiered series of benchmark prices. *See* 19 C.F.R. § 351.511(a)(2)(i)–(iii). Generally, Commerce "will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question," (i.e., a tier one benchmark). 19 C.F.R. § 351.511(a)(2)(i). In the absence of a "useable market-determined price with which to make the [tier one] comparison," Commerce will "compar[e] the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." (i.e., a tier two benchmark). 19 C.F.R. § 351.511(a)(2)(ii). In the absence of both an in-country market-determined price and an available world market price, Commerce "will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles," (i.e., a tier three benchmark). 19 C.F.R. § 351.511(a)(2)(iii). The regulation does not define the term "market principles." However, Commerce has, in its discretion, provided a methodology for determining whether a government price is set in accordance with market principles. *See Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377–79 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*").[10] Where a tier three benchmark is used, Commerce's practice is to "assess whether the government price was

[10] The *CVD Preamble* explains the purpose of the CVD regulations that Commerce promulgated to conform to the Uruguay Round Agreements Act. *See CVD Preamble*, 63 Fed. Reg. at 65,348. One of these regulations is 19 C.F.R. § 351.511(a)(2), which addresses Commerce's methodology for analyzing whether a good or service is provided for LTAR. *See* 19 C.F.R. § 351.511(a)(2).

set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination."[11] *Id.*, 63 Fed. Reg. at 65,378. However, Commerce does not prioritize any one factor and "may rely on one or more of these factors in any particular case." *Id.*

Here, Commerce chose to examine the government's price-setting philosophy by looking at whether KEPCO had a standard pricing mechanism and whether the prices it charged were consistent with that mechanism. Final Decision Memo at 18–23. The court cannot say that Commerce's reliance on a price-setting mechanism, which is a government price-setting philosophy, is unreasonable. As recently explained in *Maverick Tube Corp. v. United States*,

> the statute directs Commerce to determine if a benefit is present by determining whether a good or service is provided "for less than adequate remuneration." Adequate remuneration is to be measured by "prevailing market conditions . . . in the country which is subject to the investigation or review." 19 U.S.C. § 1677(5)(E). The statute does not direct Commerce to create a fictional model market . . . . The statute directs Commerce to judge the adequacy of remuneration based on market conditions that actually exist in Korea. That the Korean electricity market is controlled by a state run monopoly does not change the statute.

Maverick Tube Corp. v. United States, 41 CIT __, __, Slip Op. 17–146 at 20–21 (October 27, 2017). The court agrees with the analysis in *Maverick*.

Nucor and Plaintiff-Intervenors argue that Commerce's approach contradicts the statutory framework. *See* Petitioners' Response to Defendant's Notice of Supplemental Authority at 8–9, Nov. 29, 2017, ECF No. 84 ("Pl. & Pl.-Intervenors' Resp. Suppl. Auth."); *see also* 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.511. Nucor and Plaintiff-Intervenors argue that Commerce fails to give "identical words and phrases within the same statute" the same meaning, because adequate remuneration is measured differently within the subsections of the regulation. Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 6 (quoting *FCC v. AT&T Inc.*, 562 U.S. 397, 408 (2011)); *see also* 19 C.F.R. § 351.511(a)(2)(i)–(iii). Commerce has not given identical words different meanings here. The phrase "adequate remuneration" is capacious enough to be viewed as a standard to be applied to given contexts. In

[11] Nucor and Plaintiff-Intervenors do not challenge Commerce's decision to apply a tier three benchmark analysis to determine whether the provision of electricity was for adequate remuneration.

a tier three benchmark analysis, Commerce specifically looks at market principles to assess adequate remuneration. 19 C.F.R. § 351.511(a)(2)(iii).

Nucor and Plaintiff-Intervenors also argue that Commerce may not, in evaluating whether the government price provides "adequate remuneration," rely on a market where government control is "so pervasive and complete that 'market principles' have ceased to exist entirely." Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 9. In 19 C.F.R. § 351.511. Commerce created a hierarchal approach to implement the "adequate remuneration" standard. *See CVD Preamble*, 63 Fed. Reg. at 65,377–78; 19 C.F.R. § 351.511. In doing so, Commerce recognized "what constitutes adequate remuneration depends on the nature of the marketplace, and where the marketplace is a government-controlled monopoly, there is a role for a preferentiality based test." *See Maverick*, 41 CIT at __, Slip Op. 17–146 at 16; *id.* at 19–21; *see also CVD Preamble*, 63 Fed. Reg. at 65,378.[12] Given the statutory and regulatory language, Commerce's interpretation is reasonable. The statute sets a standard of adequate remuneration, 19 U.S.C. § 1677(5)(E), and the regulation explicates that standard in a variety of contexts. 19 C.F.R § 351.511(a)(2)(i)– (iii). Under the tier one benchmark analysis, Commerce is specifically asked to compare the "government price" to a price resulting from actual in-country transactions. 19 C.F.R. § 351.511(a)(2)(i). In the tier two benchmark analysis, Commerce compares the "government price" to a world market price, "where it is reasonable to conclude that such price would be available

[12] Nucor and Plaintiff-Intervenors challenge the *Maverick* court's statement that "under the tier three benchmark analysis Commerce takes the market as it finds it, even if it is, for all practical purposes, a monopoly." Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 6 (quoting *Maverick*, 41 CIT at __, Slip Op. 17–146 at 23); *id.* at 8–9. They argue that Commerce has never taken the market as it found it, "[r]ather, it measures the adequacy of remuneration by comparing the price paid by a particular respondent to an adjusted benchmark figure representative of the market price for the good at issue." Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 8 (citing *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, 52 F. Supp. 3d 1351, 1365 (2015); *see also* Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 8–9 (citing Issues and Decision Memorandum for the Final Determination in the [CVD] Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea at 31, C-580–888, (Mar. 29, 2017), *available at* https://enforcement.trade.gov/frn/summary/korea-south/2017–06632–1.pdf (last visited Feb. 1, 2018) ("Certain Carbon & Alloy Steel")); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (finding that where the same phrase is used in various sections of the statute, the agency cannot give it different meanings, especially when the phrase is directed at the same calculation). The authority cited for the proposition put forth by Nucor and Plaintiff-Intervenors are either inapposite or unhelpful. *See Beijing Tianhai,* 52 F. Supp. 3d at 1365 (averaging benchmark prices for three other countries under a tier two benchmark analysis); Certain Carbon & Alloy Steel at 31 (explaining that "the Department clarified [in the *CVD Preamble*] that a price discrimination analysis may still be appropriate under the new law [i.e., LTAR standard] because, in the context of a tier three benchmark analysis, 'there may be instances where government prices are the most reasonable surrogate for market-determined prices.'"); *SKF*, 263 F.3d at 1382 (discussing the meaning of foreign like product).

to" in-country purchasers. 19 C.F.R. § 351.511(a)(2)(ii). In comparison, the tier three benchmark analysis specifically directs Commerce to determine "whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). Commerce only resorts to the tier three benchmark analysis when market prices outside of the government-controlled market are not available. Therefore, the very existence of the tier three benchmark analysis supports the view that the relevant market principles are those operating within the government-controlled market.[13]

Nucor and Plaintiff-Intervenors argue that Commerce's use of the standard pricing mechanism is contrary to law because it reflects the earlier preferentiality standard and fails to give effect to the current LTAR standard.[14] Pl. & Pl.-Intervenors' Br. at 17–22; Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 2–10. However, Nucor and Plaintiff-Intervenors' argument ignores the language of the *CVD Preamble*, which explains the continuing role of the preferentiality analysis in the LTAR standard. *See CVD Preamble*, 63 Fed. Reg. at 65,377–78. Commerce promulgated 19 C.F.R. § 351.511 following the change from the preferentiality standard to the LTAR standard and

[13] Nucor and Plaintiff-Intervenors' invocation of Laminated Woven Sacks IDM is also unavailing. *See* Pl. & Pl. Intervenors' Resp. Suppl. Auth. at 13; *see generally* Issues and Decision Memorandum for the Final Affirmative [CVD] Determination: Laminated Woven Sacks from the [PRC] at 15–16, C-570–917, (June 16, 2008), *available at* http://ia.ita.doc.gov/frn/summary/prc/E8–14256–1.pdf (last visited Feb. 1, 2018) ("Laminated Woven Sacks IDM"). In Laminated Woven Sacks IDM, under a tier three benchmark analysis, Commerce found that "the purchase of land-use rights in China is not conducted in accordance with market principles" because of "widespread and documented deviation from the authorized methods of pricing and allocating land." *Id.* at 16. The other determinations cited by Nucor and Plaintiff-Intervenors are distinguishable for the same reason. *See* Pl. & Pl.-Intervenors' Resp. Suppl. Auth. at 12–13; *see generally* Issues and Decision Memorandum for the Final Determination in the [CVD] Investigation of Citric Acid and Certain Citrate Salts from the People's Republic of China [("PRC")] at 23–24, 96, C-570–938, (Apr. 6, 2009), *available at* http://ia.ita.doc.gov/frn/summary/prc/E9–8358–1.pdf (last visited Feb. 1, 2018) (finding, under a tier three benchmark analysis, that the prices in the land-use rights market are not set "in accordance with market principles," as previously determined in Laminated Woven Sacks IDM); [CVD] of Certain Uncoated Paper from Indonesia: Issues and Decision Memorandum for the Final Affirmative Determination at 13–16, 31–32, C-560–829 (Jan. 8, 2016), *available at* https://enforcement.trade.gov/frn/summary/indonesia/2016–01026–1.pdf (last visited Feb. 1, 2018) (finding, under a tier three benchmark analysis, that prices were not set in accordance with the market principles operating in the given home market).

[14] Nucor and Plaintiff-Intervenors note that Commerce described the preferentiality standard as "a measure of price discrimination, i.e., whether a government is favoring some buyers over others with lower prices," and not a measure of adequate remuneration. Pl. & Pl-Intervenors' Br. at 19 (emphasis omitted) (quoting *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43,186, 43,196 (Dep't Commerce Aug 17, 2001) (notice of preliminary affirmative CVD determination, preliminary affirmative critical circumstances determination, and alignment of final [CVD] determination with final antidumping duty determination)). However, as explained in this opinion, Commerce is not prohibited from looking at preferentiality as part of its methodology under the current LTAR standard.

incorporated into the regulation, as part of its tier three benchmark analysis, a consideration of factors such as the government's price-setting philosophy, costs or possible price discrimination.[15] *See CVD Preamble* at 65,378; *see also* 19 C.F.R. § 351.511. By including these factors in the tier three benchmark analysis, Commerce relegated the preferentiality standard to situations where neither an in-country market price, i.e., a tier one benchmark, nor a world market price, i.e., a tier two benchmark, is available. *See CVD Preamble*, 63 Fed. Reg. at 65,378. Therefore, the tier three benchmark analysis preserves a place for the preferentiality test in the absence of either an in-country or a world market price. *See Maverick*, 41 CIT at __, Slip Op. 17–146 at 16; *see also CVD Preamble*, 63 Fed. Reg. at 65,377–78; 19 C.F.R. § 351.511(a)(2)(iii).

Further, Nucor and Plaintiff-Intervenors argue that Commerce's methodology does not meaningfully evaluate whether a benefit is conferred because it compares KEPCO's electricity rates to themselves rather than to benchmark, market-determined electricity rates. *See* Pl. & Pl.-Intervenors' Br. at 20–21. Therefore, they argue that Commerce's methodology of evaluating whether KEPCO's prices are set in accordance with a standard pricing mechanism is contrary to law because Commerce cannot reasonably "base its benefit determination on a methodology that simply compares one market-distorted price to another to determine whether mandatory respondents are receiving disparate treatment." *Id.* at 22. However, as explained above, Nucor and Plaintiff-Intervenors' argument is based on a misunderstanding of what may serve as a "market" for the purpose of evaluating whether a government price is consistent with market principles pursuant to 19 C.F.R. § 351.511(a)(2)(iii). The relevant market principles can be those operating within the

[15] Nucor and Plaintiff-Intervenors claim that Commerce erroneously relied on *Magnesium from Canada Final Results* as support for the standard pricing mechanism, as that determination preceded the codification of 19 C.F.R. § 351.511 and the shift from the preferentiality standard to the LTAR standard. *See* Pl. & Pl.-Intervenors' Br. at 17–19 (citing *Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30,946 (Dept. Commerce July 13, 1992) (final affirmative [CVD] determinations) ("*Magnesium from Canada Final Results*")); *see also* 19 C.F.R. § 351.511(a)(2)(i)–(iii) (providing how Commerce will measure the adequacy of remuneration following the shift to the LTAR standard); 19 U.S.C. § 1677(5)(E)(iv) (directing Commerce to find that a benefit was conferred when a good or service is provided for LTAR); 19 U.S.C. § 1677(5)(A)(ii)(II) (1988) (providing the prior statutory framework defining a benefit as "[t]he provision of goods or services at preferential rates"). However, Commerce did not rely upon *Magnesium from Canada Final Results* to support the appropriateness of its methodology, but rather cited it as an example of a case where it might be appropriate to analyze whether the government provider applied a standard pricing mechanism. *See* Final Decision Memo at 20. Moreover, Commerce incorporated an evaluation of factors such as the government's price-setting philosophy into its tier three benchmark evaluation of whether government prices are set in accordance with market principles following the shift to the LTAR standard. *See CVD Preamble*, 63 Fed. Reg. at 65,378.

government-controlled market. Here, Commerce determined that KEPCO is the relevant authority. Prelim. Decision Memo at 18–19. Therefore, Commerce evaluated the adequacy of remuneration by analyzing the extent to which the price-setting methodology used by KEPCO provides a uniform pricing mechanism for all users.[16] *See* Final Decision Memo at 18–19. It is reasonably discernible that Commerce looked at the standard pricing mechanism as a proxy for conformity with market principles by acknowledging that, under a tier three analysis, the government prices may be the most reasonable surrogate for market principles. *See id.* at 21.[17]

Nucor and Plaintiff-Intervenors also argue that Commerce's methodology is inconsistent with the statute because Commerce's analysis fails to consider whether a seller covers its costs. Pl. & Pl.-Intervenors' Br. at 22–24. Consequently, they claim that Commerce failed to incorporate cost recovery into its analysis of the adequacy of remuneration for respondents' electricity costs. *See id*. at 23. However, a review of Commerce's regulation makes clear that "adequate remuneration" is defined by reference to the benchmark hierarchy. *See* 19 C.F.R. § 351.511(a)(2)(i)–(iii). Where Commerce lacks an actual market-determined price and a world market price for the good in question, the tier three benchmark analysis directs Commerce to measure the adequacy of remuneration by assessing whether the government price is consistent with market principles. *See* 19 C.F.R. § 351.511(a)(2)(iii). Here, Commerce specifically determined that the relevant price for KEPCO's industrial tariff schedule is the price KEPCO pays for electricity through the Korea Power Exchange ("KPX"). *See* Final Decision Memo at 23. Commerce then explained how KEPCO is able to recover its costs. *Id.* Commerce's methodology is in accordance with law.

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[16] Specifically, Commerce found that "[t]he GOK reported that a single tariff rate table applied [to the respondents] throughout the POI[.]" Final Decision Memo at 18 (citations omitted). Further, Commerce found that there was no information to undermine the GOK's statement that KEPCO applied the same price-setting method to determine electricity tariffs. *Id.* at 18–19.

[17] In any event, Commerce did not base its determination that electricity was not provided to respondents for LTAR exclusively on the uniformity of KEPCO's standard pricing mechanism. Commerce also determined that the standard pricing mechanism KEPCO used to develop the tariff schedule applicable to sales of electricity to respondents was based on KEPCO's costs. Final Decision Memo at 23. Commerce looked at cost recovery as a measure of KEPCO's ability of being adequately remunerated. *Id.* at 21–23. To analyze whether KEPCO's tariff schedule allowed KEPCO to recover its costs, Commerce analyzed the tariff schedule provided by KEPCO. *Id.* at 23. Commerce outlined the specific means by which costs are taken into consideration in generating electricity tariffs for consumers, and found that KEPCO's tariff schedule incorporated costs. *Id.* Commerce then determined that, during the POI, KEPCO was able to recover its costs. *Id.*

B. Commerce's LTAR Determination Is Not Arbitrary and Capricious

Nucor and Plaintiff-Intervenors argue that Commerce's determination that electricity was not provided by the GOK at LTAR is arbitrary and capricious because Commerce failed to consider the manner in which the pricing system fails to accurately reflect the underlying costs of energy generated by certain types of electricity producers. *See* Pl. & Pl.-Intervenors' Br. at 24–29.[18] Defendant responds that Commerce considered all relevant costs in evaluating the adequacy of remuneration, including, the prices KEPCO paid for electricity to the KPX. Def.'s Resp. Br. at 26.

In the final determination, when addressing cost recovery, Commerce explained that it chose to focus on the prices KEPCO paid for electricity on the KPX, rather than on the costs of the electricity generators, because KEPCO develops its industrial tariff schedule based upon the purchase price of electricity on the KPX.[19] Final Decision Memo at 23. Nucor and Plaintiff-Intervenors, however, claim that KEPCOs prices do not reflect the prices the KPX actually pays.[20] *See* Pl. & Pl.-Intervenors' Br. at 26 (arguing that "[t]he KPX electricity price that KEPCO pays, and on which it bases its cost accounting, thus systematically understates generation costs and undercompensates high-fixed-cost generators like nuclear generators."); *id.* at 24–26, 28–29. Nothing in the statute requires Commerce to consider how the authority acquired the good or service that was later provided to respondents.

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[18] Specifically, Nucor and Plaintiff-Intervenors contend that the KPX pricing mechanism inadequately compensates electricity generators with higher fixed costs. Pl. & Pl.-Intervenors' Br. at 25–27. They argue that the component of the pricing mechanism that compensates producers for fixed costs of generating electricity provides a uniform fixed compensation that systematically undercompensates higher fixed-cost generators, like KEPCO's nuclear generation subsidiaries. Id. at 25–26.

[19] Commerce may find that a benefit was conferred when an authority provides goods or services at less than adequate remuneration. *See* 19 U.S.C. § 1677(5). An authority is defined as "a government of a country or any public entity within the territory of the country." 19 U.S.C. § 1677(5)(B). Commerce found KEPCO was an "authority" pursuant to 19 U.S.C. § 1677(5)(B). *See* Prelim. Decision Memo at 18–19; 19 U.S.C. § 1677(5)(B).

[20] Commerce recounts that

> Petitioners also argue that electricity tariffs do not include the full cost of generation, including electricity from nuclear generators, because steel producers purchase electricity predominantly during off-hours where electricity is primarily generated from nuclear generation units. However, Petitioners have failed to provide any evidence that the prevailing market conditions for the provision of electricity in Korea are that utility companies have separate tariff rates that are differentiated based upon the manner in which the electricity is generated. The tariff schedule on the record of our investigation does not support this proposition. Petitioners have also failed to adequately support a claim that KEPCO's costs of electricity used in developing its tariff schedule do not fully reflect its actual costs of the electricity that it transmits and distributes to its customers in Korea.

Final Decision Memo at 23.

Commerce justified its decision not to request information on the costs of the generators, including the nuclear generators,

> because the costs of electricity to KEPCO [(i.e., the relevant authority)] are determined by the KPX. Electricity generators sell electricity to the KPX, and KEPCO purchases the electricity it distributes to its customers through the KPX. Thus, the costs for electricity are based upon the purchase price of electricity from the KPX, and this is the cost that is relevant for KEPCO's industrial tariff schedule.

Final Decision Memo at 23 (citation omitted). Where, as here, Nucor and Plaintiff-Intervenors' allegation is that electricity is provided by KEPCO to respondent CORE producers at LTAR, *see* Pl. & Pl.-Intervenors' Br. at 24–25, it is reasonable for Commerce to focus its inquiry on the price charged by KEPCO to the respondent producers, and not on the price KEPCO pays the KPX.[21] *See* Final Decision Memo at 18–19, 23; Prelim. Decision Memo at 18.

Nucor and Plaintiff-Intervenors argue that Commerce arbitrarily disregarded the prices paid by KEPCO to the KPX for electricity because "the KPX is wholly owned by KEPCO and its generating subsidiaries," and is therefore part of the relevant authority for purposes of Commerce's LTAR analysis. Reply Br. Pl. Nucor Corp. & Pl.-Intervenors ArcelorMittal USA LLC, AK Steel Corp., & United States Steel Corp. at 12, July 24, 2017, ECF No. 70 ("Reply Br.") (citing GOK [Response to Questionnaire] Exhibit E-3 (KEPCO Form 20-F SEC April 30, 2015 (ENG)) at 31, PD 203, bar code 3305223–07

[21] Similarly, Nucor and Plaintiff-Intervenors object to Commerce's finding that petitioners below failed to demonstrate that the costs KEPCO uses to develop its tariff schedule fully reflect KEPCO's costs for electricity. Pl. & Pl.-Intervenors' Br. at 28–29; Final Decision Memo at 23. Nucor and Plaintiff-Intervenors argue that in their brief to the agency below, they provided sufficient evidence to demonstrate,

> (i) KPX pays the same "capacity price" [(i.e., the fixed cost of generating electricity, as in the costs of building and maintaining the generators)] to all generators to compensate for fixed costs, regardless of actual fixed costs, (ii) the fixed costs of nuclear generators are substantially higher than the fixed costs of other generators, and (iii) the GOK justifies lower industrial electricity prices because nuclear generators supply more electricity during the hours when industrial users consume larger amounts of electricity.

Pl. & Pl.-Intervenors' Br. at 28 (citing Case Brief of the Nucor Corporation at 26–30, PD 502, bar code 3459696–01 (Apr. 14, 2016) ("Nucor Agency Br."); *see also* GOK [Response to Questionnaire] Exhibit E-3 (KEPCO Form 20-F SEC April 30, 2015 (ENG)) at 31, PD 203, bar code 3305223–07 (Sept. 14, 2015) (providing KEPCO's explanation of the pricing factors in the pricing of electricity in the Korean market). Nucor and Plaintiff-Intervenors' argument focuses on the electricity generators' costs and whether the generators' costs are recouped, instead of addressing whether KEPCO's costs (i.e., the price KEPCO pays for electricity on the KPX) are recouped through electricity sales. *See* Pl. & Pl.-Intervenors' Br. at 25–29; *see also* Nucor Agency Br. at 25–30. Nucor and Plaintiff-Intervenors' arguments address the sufficiency of the prices paid by KEPCO to electricity generators on the KPX, and not whether the prices paid by the respondents represent adequate remuneration to KEPCO. It is the latter, and not the former that Commerce reasonably determined is the relevant "authority" for purposes of the LTAR inquiry. Prelim. Decision Memo at 18–19.

(Sept. 14, 2015)). Defendant's counsel argued that Nucor and Plaintiff-Intervenors failed to exhaust this argument below. Oral Argument at 00:20:35–00:21:24, Oct. 20, 2027, ECF No. 81. Specifically, Defendant argued that Nucor and Plaintiff-Intervenors did not raise at the agency level the argument that, because the KPX was owned by KEPCO, the KPX should be considered part of the relevant authority. *Id.* If a party fails to exhaust available administrative remedies before the agency, "judicial review of Commerce's actions is inappropriate." *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (quoting *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988)). This Court has "generally take[n] a 'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." *Corus Staal BV v. United States*, 502 F. 3d 1370, 1379 (Fed. Cir. 2007) (citations omitted). Absent exceptional circumstances, *see Hormel v. Helvering*, 312 U.S. 552, 557 (1941), it would be inconsistent with the purposes of the exhaustion doctrine to require Commerce to explain a challenge to its findings that was not raised at the administrative level. Nucor did not make this argument to Commerce; in its brief to the agency, Nucor simply describes, in a parenthetical, the KPX as being "100% owned by KEPCO and its subsidiaries." *See* Case Brief of the Nucor Corporation at 27, PD 502, bar code 345969601 (Apr. 14, 2016) ("Nucor Agency Br."). Nucor did not argue at the agency level that, as a result of the corporate ownership structure, KPX should be treated as part of the relevant authority, i.e., as part of KEPCO. Therefore, the court will not address this argument here.

C. Commerce's Determination is Supported by Substantial Evidence

Nucor and Plaintiff-Intervenors claim that "Commerce's final determination that KEPCO's electricity prices are consistent with market principles is not supported by substantial evidence[.]" Pl. & Pl.-Intervenors' Br. at 29. Specifically, Nucor and Plaintiff-Intervenors claim that Commerce left unanswered record evidence demonstrating government intervention and subsidization in the electricity market and KEPCO's failure to recover costs. *See id.* at 29–34. For the reasons that follow, Commerce's determination is supported by substantial evidence.

Here, to determine that KEPCO's price-setting mechanism is consistent with market principles, Commerce reviewed the parameters used by KEPCO to determine electricity prices for consumers in the Korean market and the extent to which those pricing parameters

allowed KEPCO to recoup its costs through electricity sales. *See* Final Decision Memo at 18–21, 23. In analyzing KEPCO under the tier three benchmark, Commerce examined KEPCO's price setting mechanism as a government price-setting philosophy. *Id.* at 19–23. Commerce relied upon "GOK's report[ing] that a single tariff rate table applied throughout the POI . . . and was applicable to the respondents in this investigation." *Id.* at 18 (citing GOK [Response to Questionnaire] Exhibit E-13 (Electricity Tariff Table (ENG)) at Ex. E-13, PD 210, bar code 3305223–17 (Sept. 14, 2015); GOK Questionnaire Section II at 10; GOK Second Suppl. Questionnaire at 10). Commerce further found that there "is no information on the record that [respondents] are treated differently from other industrial users of electricity that purchase comparable amounts of electricity" from KEPCO. *Id.* at 19. Commerce found that the tariff schedule placed on the record does not support the proposition that utility companies in Korea have separate tariff rates that reflect different pricing based upon the manner in which the electricity is generated. *Id.* at 23. In addition, Commerce analyzed electricity costs and explained that KEPCO purchases electricity from the KPX, which it later distributes to its customers, including the respondents. *Id.* at 18–19, 23. Commerce compared KEPCO's calculated costs (i.e., the prices paid on the KPX according to the methodology provided by the GOK) to the industry tariff applicable to respondents, and determined that "KEPCO more than fully covered its cost for the industry tariff applicable to [the] respondents." Final Decision Memo at 23 (citing GOK Second Suppl. Questionnaire at 11). Nucor and Plaintiff-Intervenors do not point to any problems with KEPCO's calculations of its costs, nor do they argue that KEPCO's costs, based upon what KEPCO paid to the KPX during the POI, were higher than the prices placed on the record in KEPCO's tariff schedule. Therefore, Commerce's determination that KEPCO's electricity prices are consistent with market principles is supported by substantial evidence.

Nucor and Plaintiff-Intervenors allege that documents and statements from third parties, including those from the United States government and the GOK, all support the conclusion "that KEPCO uses subsidized electricity prices to support industrial competitiveness." Pl. & Pl.-Intervenors' Br. at 30; *see also* Petitioners' Petition Part 5 at Ex. V-9, PD 3, bar code 3280986–05 (June 3, 2015) (reproducing a copy of a paper titled "Electricity in Korea," presented to a Symposium on APEC's New Strategy for Structural Reform); Petitioners' Petition Part 6 at Exs. V-11, V-15, PD 9, bar code 3280986–06

(June 3, 2015) (reproducing copies of two news articles);[22] Petitioners' Petition Part 4 at Ex. V2, PD 2, bar code 3280986–04 (June 3, 2015) ("Petition, Part 4") (reproducing a copy of a report published by the U.S. Energy Information Administration). However, it is reasonably discernable that Commerce considered these sources and simply found them irrelevant to KEPCO's cost recovery.[23] Final Decision Memo at 23 (discussing the relevancy of the price paid to KEPCO). A review of these sources reveals that they do not speak specifically to whether KEPCO's electricity tariff pricing system, as applied across various electricity consumer classifications, allows KEPCO to recover its costs.[24]

Nucor and Plaintiff-Intervenors also argue that record evidence, demonstrating that the GOK intervened to suppress tariff increases for political reasons, undermines Commerce's conclusion that electricity prices are set consistently with market principles. Pl. & Pl.-Intervenors' Br. at 31–33. However, it is reasonably discernible that Commerce believes its methodology accounts for the political dynamic within Korea. Commerce's methodology for assessing the extent to which a government authority prices a good or service consistently with market-principles (i.e., a tiered benchmark analysis) includes assessing the government's price-setting philosophy, costs, or price

[22] Although the full content of Ex. V-11 appears in the citation provided, the cover page identifying the exhibit as "Exhibit V-11" appears in Petitioners' Petition Part 5, PD 3, bar code 328–0986–05 (June 3, 2015).

[23] In addressing the National Assembly Report which does specifically speak to KEPCO's ability to recover its costs, Commerce explained that the methodology used to produce the data in the National Assembly report, (i.e., comparing company-specific revenue to aggregated cost) was flawed, predated the POI, and was therefore unpersuasive. *See* Final Decision Memo at 23–24; *see also* Petitioners' Petition Part 7 at Ex. E-4, CD 10, bar code 3280961–07 (June 3, 2015) (reproducing a copy of the 2013 National Assembly Report (English and Korean translations)).

[24] Specifically, Nucor and Plaintiff-Intervenors state that Commerce, in Korean Welded Line Pipe IDM, "acknowledged 'cross-subsidization' in the Korean electricity market and found that 'cheap power significantly helped the export-led growth of the Korean economy, while nurturing an industry structure which consumes too much power and which cannot survive with a price that would recover costs.'" Pl. & Pl.-Intervenors' Br. at 30 (quoting [CVD] Investigation of Welded Line Pipe from the Republic of Korea: Issues and Decision Memorandum for the Final Negative Determination at 14, C-580–877, (Oct. 5, 2015), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/2015–25967–1.pdf (last visited Feb. 1, 2018) ("Korean Welded Line Pipe IDM")). However, the language Nucor and Plaintiff-Intervenors quote is not specific to whether KEPCO recovered its costs. In fact, in Korean Welded Line Pipe IDM, Commerce was able to "verif[y] that the electricity tariff for KEPCO is developed based upon the utility company's [own] annual cost data" because KEPCO uses "an independent accounting firm to audit its cost and calculate the annual cost of electricity." *Id.* at 17. Commerce made this finding although there was record evidence showing the GOK's intervention in the electricity market. *Id.* at 14. Nucor and Plaintiff-Intervenors also cite a U.S. Energy Information Administration report, which they claim "conclude[s] that KEPCO's electricity tariff pricing system . . . historically has not reflected the true costs of [electricity] generation and distribution[.]" Pl. & Pl.-Intervenors' Br. at 30 (quoting Petition, Part 4 at Ex. V-2). This proposition, likewise, fails because it is not addressing whether KEPCO is able to recover its own costs.

discrimination. *See CVD Preamble*, 63 Fed. Reg. at 65,378; 19 C.F.R. § 351.511(a)(2)(iii). A tier three benchmark anticipates situations where the government intervenes, such that it is the only source available to consumers in that country. *See CVD Preamble*, 63 Fed. Reg. at 65,378. Commerce recognized that government intervention alone is not a basis for determining that a government price is inconsistent with market principles. *See id.* (recognizing that under a tier three benchmark analysis there may be a situation "[w]here the government is the sole provider of a good . . . [and explaining that, nevertheless, Commerce may still] assess whether the government price was set in accordance with market principles").

Nucor and Plaintiff-Intervenors also argue that Commerce's determination that KEPCO's price-setting mechanism permitted KEPCO to recover its costs is unsupported by substantial evidence. Pl. & Pl.-Intervenors' Br. at 29–30, 33–34. Nucor and Plaintiff-Intervenors present alternative calculations that they purport undermine the agency's reliance on data from the GOK.[25] *Id.* at 33–34; Nucor Agency Br. at 26–31. Commerce adequately explained why the alternative calculations did not detract from its determination that KEPCO's price-setting mechanism reflects market principles by identifying two flaws in Nucor and the Plaintiff-Intervenors' cited data. Final Decision Memo at 23–24. First, Commerce found the methodology used to produce the data Nucor and Plaintiff-Intervenors used for their alternative calculations compares company-specific revenue to aggregated cost. *Id.* at 24. Second, Commerce noted that the data predated the POI by two years and that KEPCO had increased industrial tariffs on three separate occasions since then. *See id.* It is apparent that Commerce weighed the evidence, and the court declines to reweigh it.

II. Commerce's Determination Not to Apply AFA

Nucor and Plaintiff-Intervenors challenge, as an abuse of discretion, arbitrary, and unsupported by the record, Commerce's decision not to apply AFA to infer that state intervention by the GOK resulted in electricity prices that are inconsistent with market principles. Pl. & Pl.-Intervenors' Br. at 34–39. Defendant argues that Commerce's determination was reasonable because the GOK did not withhold information requested of it, provide unverifiable information, or fail

[25] Specifically, Nucor and Plaintiff-Intervenors claim that their calculation taking [[ ]], Pl. & Pl.-Intervenors' Br. at 34 (citing Nucor Agency Br. at 31), demonstrates that [[ ]]. Id. at 33–34.

to meet deadlines or impede the proceeding. Def.'s Resp. Br. at 28–33. For the reasons that follow, Commerce's decision not to apply AFA is reasonable in light of the record.

As already discussed, a benefit may be conferred "in the case where goods or services are provided, if such goods or services are provided for [LTAR][.]" 19 U.S.C. § 1677(5)(E)(iv). As already discussed, Commerce has ample deference to select a methodology for determining whether a good or service is provided at LTAR. *See Fujitsu*, 88 F.3d at 1039; Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 927 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4241. Pursuant to 19 U.S.C. § 1677e(a), Commerce shall generally apply facts otherwise available if: (1) information necessary to Commerce's administrative determination is not available on the record; (2) an interested party withholds information requested or fails to provide the information in a timely fashion or in the form and manner requested; (3) significantly impedes a proceeding; or (4) provides the information requested, but the information cannot be verified. 19 U.S.C. § 1677e(a). Furthermore, if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," the statute permits Commerce to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]" 19 U.S.C. § 1677e(b)(1)(A).

Here, Commerce determined that applying AFA is unwarranted because the GOK submitted timely and complete responses to all of Commerce's questionnaires. *See* Final Decision Memo at 12–13. Specifically, the GOK provided complete and extensive responses with respect to "KEPCO's rate setting methodology, cost recovery rates, investment return, and profit information." *See id.* at 13. Moreover, it "provided usage data on all electricity users, including the top 100 industrial users of electricity[,]" and "adequate translations of the large and complicated [record] documents[.]" *Id.* At verification, Commerce was able to verify KEPCO's standard pricing mechanism, and "its application in the setting of electricity tariffs." *Id.*

Nucor and Plaintiff-Intervenors argue that Commerce's decision not to apply AFA is arbitrary because Commerce regularly applies adverse inferences in similar circumstances. Pl. & Pl.-Intervenors' Br. at 36 (citing Issues and Decision Memorandum for the Final Determination in the [CVD] Investigation of High Pressure Steel Cylinders from the People's Republic of China [("PRC")] at 9, C-570–978, (Apr. 30, 2012), *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–10954–1.pdf (last visited Feb. 1, 2018) ("High Pressure Steel Cylinders IDM"); Issues and Decision Memorandum for the Final

Determination in the [CVD] Investigation of Narrow Woven Ribbons with Woven Selvedge from the [PRC] at 17, C-570–953, (July 12, 2010), *available at* http://ia.ita.doc.gov/frn/summary/prc/2010–17541–1.pdf (last visited Feb. 1, 2018) ("Narrow Ribbons with Woven Selvedge IDM"); Issues and Decision Memorandum for the Final Affirmative [CVD] Determination: Laminated Woven Sacks from the [PRC] at 81–82, C-570–917, (June 16, 2008), *available at* http://ia.ita.doc.gov/frn/summary/prc/E8–14256–1.pdf (last visited Feb. 1, 2018) ("Laminated Woven Sacks IDM")); *see id.* at 36–39. However, unlike in the determinations cited by Nucor and Plaintiff-Intervenors, here, Commerce determined that the GOK complied with Commerce's requests for information and that all the information provided was verifiable.[26] *See* Final Decision Memo at 13. In addition, Nucor and Plaintiff-Intervenors point to deficiencies in the GOK's responses, which they argue detract from the reasonableness of Commerce's determination that the GOK responded fully and completely. Pl. & Pl.-Intervenors' Br. at 37–39. Specifically, Nucor and Plaintiff-Intervenors highlight the GOK's failure to provide sufficient information regarding informal consultations between KEPCO and other government bodies, claiming these consultations would reveal KEPCO's inability to raise electricity tariffs in a commercially meaningful way. *See* Pl. & Pl.-Intervenors' Br. at 37–38; GOK Questionnaire Section II at 22. However, Commerce determined that it was

[26] All the determinations cited by Nucor and Plaintiff-Intervenors can be distinguished. In High Pressure Steel Cylinders IDM, Commerce applied AFA because the Chinese government failed to respond to Commerce's request for particular records that were necessary to verify information provided by other Chinese government agencies. *See* High Pressure Steel Cylinders IDM at 9–10. Commerce declined to entertain the Chinese government's proffered explanation that the records could not be produced because they were maintained by a separate government agency. *Id.* at 9. Further, the Chinese government would not provide the alternative comparable information requested by Commerce, explaining that they did not consider it relevant. *Id.* at 9–10. Therefore, Commerce could not verify the original documents, and applied AFA. *Id.* at 10.

In Narrow Ribbons with Woven Selvedge IDM, Commerce identified specific documents and requested the Chinese government produce them. *See* Narrow Ribbons with Woven Selvedge IDM at 17. The Chinese government refused to provide the identified documents, claiming they did not "routinely maintain such information." *Id.* Commerce provided an alternative way for the Chinese government to satisfy the request, however, again, the Chinese government refused, stating that the firms were not required to provide the information sought, and that it too would not provide the information. *See id.* Therefore, Commerce applied AFA, because nothing in the record substantiated an inference that the Chinese government attempted to review the requested documents or reproduce them in some alternate form. *See id.*

In Laminated Woven Sacks IDM, Commerce applied AFA because although some documents were produced, verification of the documents would have been futile, as other information necessary for verification was within the control of the Chinese government and was not provided. *See* Laminated Woven Sacks IDM at 81. Commerce determined that the information withheld was highly relevant for Commerce to conduct its investigation, and that by withholding the information, the Chinese government was impeding Commerce's investigation. *See* id. at 81–82.

able to fully analyze and "verify KEPCO's standard pricing mechanism and its application in the setting of industrial electricity tariffs." Final Decision Memo at 13. As explained above, the relevant data for assessing adequacy of remuneration is the cost at which KEPCO purchased electricity from the KPX. *Id.* at 23. It is reasonably discernible that Commerce concluded that the informal consultations were not relevant to determining whether the prices in KEPCO's industrial tariff schedule were set in accordance with market principles. Commerce sufficiently explained that it had adequate information on the record to determine that: KEPCO recovered its costs in sales to electricity consumers; KEPCO's tariffs were the same for all industrial consumers using similar quantities of electricity during the POI; and KEPCO applied a uniform price-setting philosophy throughout the POI. *See id.* at 13, 20, 23. Here, Commerce adhered to its methodology and supported its determination. Therefore, Commerce's decision not to apply AFA was reasonable.

CONCLUSION

For the reasons discussed, Commerce's *Final Results* are in accordance with law and supported by substantial evidence. Therefore, the *Final Results* are sustained. Judgment will enter accordingly.

Dated: February 6, 2018
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 18–8

MAQUILACERO S.A. de C.V., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 15–00287

[United States Department of Commerce's Final Results of Redetermination Pursuant to Court Remand are sustained.]

Dated: February 9, 2018

John M. Gurley and *Diana Dimitriuc-Quaia*, Arent Fox LLP of Washington, DC, for plaintiff.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Lydia C. Pardini*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jordan C. Kahn and *Roger B. Schagrin*, Schagrin Associates of Washington, DC, for defendant-intervenor.

MEMORANDUM OPINION

Eaton, Judge:

Before the court are the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand (Dep't Commerce Nov. 27, 2017), ECF No. 51–1 ("Remand Results"). The Remand Results carry out the court's direction in *Maquilacero S.A. de C.V. v. United States*, 41 CIT __, 256 F. Supp. 3d 1294 (2017) that "Commerce . . . find that stenciling is not required for Maquilacero's products to be excluded from the scope of the Order and that, based on Prolamsa's Final Scope Ruling, the analysis found on pages 6–9 of the Final Scope Ruling, and this opinion, Maquilacero's pipe [be] excluded from the Order." *Maquilacero*, 41 CIT at __, 256 F. Supp. 3d at 1314. Commerce complied and found that Maquilacero's pipe was excluded from the Order. *See* Remand Results at 12. Both plaintiff and defendant agree that Commerce's Remand Results complied with the court's direction in *Maquilacero*, and defendant-intervenor did not file comments regarding the Remand Results. *See* Pl.'s Comments on Remand Results, ECF No. 53; Def.'s Resp. Comments Regarding Remand Results, ECF No. 54. Therefore, in accordance with the forgoing, and upon consideration of the papers and proceedings had herein, it is hereby

ORDERED that Commerce's Remand Results are sustained.

Judgment shall be entered accordingly.

Dated: February 9, 2018
New York, New York

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

Slip Op. 18–9

QUAKER PET GROUP, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 13–00393

[Plaintiff's motion for judgment on the pleadings is granted in part and denied in part.]

Dated: February 12, 2018

Alan Goggins, Barnes, Richardson & Colburn, LLP, of New York, NY, argued for plaintiff. With him on the Plaintiff's Second Supplemental Reply Memorandum was *Helena D. Sullivan*.

Monica P. Triana, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Katzmann, Judge:

Catching sight of three tiny orphaned kittens wandering in a battlefield tent, President Abraham Lincoln directed Colonel Bowers of General Grant's staff: "Colonel, I hope you will *see* that these poor little motherless waifs are given plenty of milk and treated kindly."[1] Some eighty years later, President Harry Truman is famously said to have remarked, "[i]f you want a friend in Washington, get a dog."[2] It would certainly have been beyond the contemplation of the 16th or 33rd Presidents that their animals might be categorized as items or personal effects. Yet, the determination of that categorization under the domestic tariff scheme is central to the question presented by the

[1] CARL SANDBURG,ABRAHAM LINCOLN: THE WAR YEARS, Vol. IV (1939), p. 146. Sandburg recounts that Lincoln picked up one of the three kittens and asked, "'Where is your mother?' Someone answered, 'The mother is dead.' And as he petted the little one: 'Then she can't grieve as many a poor mother is grieving for a son lost in battle.'" *Id*. General Porter observed Lincoln fondling the kittens. "He would wipe their eyes tenderly with his handkerchief, stroke their smooth coats, and listen to them purring their gratitude to him." *Id*.

[2] In a variant of the phrase, Nancy Kassebaum, then Senator from Kansas, wrote in a 1987 letter to the New York Times: "I'll close with some words from Harry Truman: 'If you want a friend in Washington, buy a dog.'" *Prospects*, N.Y. TIMES, June 7, 1987. In fact, there is some debate as to the authenticity of the Truman quote. *See* RALPH KEYES, THE QUOTE VERIFIER 47 (New York: St. Martin's Griffin, New York, 2006). However, the sentiment's durability is unquestionable. *See, e.g.*, CATHERINE SINCLAIR, MODERN FLIRTATIONS: OR, A MONTH AT HARROWGATE (1841) ("As Lord Byron said, 'nobody need want a friend who can get a dog.'"); LORD BYRON, EPITAPH TO A DOG (1808) ("But the poor Dog, in life the firmest friend / The first to welcome, foremost to defend[.]").

case before this court: how should cloth pet carriers be classified for the purposes of determining what tariff rate should apply to their importation?

In this action, Plaintiff Quaker Pet Group, LLC ("Quaker Pet") contests the denials of its administrative protests by U.S. Customs and Border Protection ("Customs") and disputes the tariff classification under the Harmonized Tariff Schedule of the United States (2012) ("HTSUS")[3] which Customs determined for five of its pet carrier products. Specifically, Quaker Pet contends that pets are not "personal effects" and therefore the pet carriers — cloth and mesh carrying bags used for transporting pets — are classifiable under the residual provision for textile articles, HTSUS heading 6307, carrying a duty rate of seven percent. The United States ("the Government") argues that Customs correctly classified the pet carriers under the HTSUS heading 4202, which covers travel, sports, and similar bags, and carries a 17.6 percent duty rate. Pl.'s Statement of Undisputed Facts ¶¶ 12–13, Sept. 18, 2015, ECF No. 21 ("Pl.'s Fact Statement"); Answer to Pl.'s Amended Compl. ¶ 10, Apr. 27, 2015, ECF. No. 13 ("Def.'s Answer"). Before the court is Quaker Pet's Motion for Judgment on the Pleadings as to Count I of its Amended Complaint, and its memorandum in support of the motion ("Pl.'s Br."). The court concludes that the pet carriers are not, as a matter of law, classifiable under heading 4202. However, the relevant record is not sufficiently developed yet for the court to determine whether the products are classifiable under heading 6307. Thus, Quaker Pet's motion for judgment on the pleadings is granted in part and denied in part, and the parties are directed to file a proposed schedule for future proceedings.

BACKGROUND

I. The Merchandise at Issue[4]

The imported merchandise consist of five styles of pet carriers. Amended Compl. ¶ 5, Feb. 12, 2015, ECF No. 7; Def.'s Answer ¶ 5. Pet carrier style numbers 55234, 55534, 97009, and 98791 were imported into Newark, NJ, and style number 94279 was imported into Long Beach, CA from China. Amended Compl. ¶¶ 6–7; Def.'s Answer ¶¶

[3] All references to section notes, chapter notes, headings or subheadings contained herein are to 2012 HTSUS.

[4] Plaintiff also submitted, pursuant to mandatory disclosures and attached as Exhibits A and B to its motion here, a physical sample and third party marketing materials. However, in the context of this motion for judgment on the pleadings, the court is not considering those materials in reaching its decision. *See* USCIT Rule 12(c), (d) ("If, on a motion [for judgment on the pleadings] under Rule . . . 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

6–7. These pet carriers are used to carry cats, dogs, or other pets. Amended Compl. ¶ 8; Def.'s Answer ¶ 8. Subsequent to the commencement of this action, Quaker Pet, the importer of record, was sold to Worldwise, Inc. Letter from Plaintiff's Counsel, ECF No. 61. Worldwise has continued to import the same pet carriers, typically under the Sherpa™ brand trademark. *Id.*

II. Procedural History

Quaker Pet challenges the classification and liquidation of the subject pet carriers under subheading 4202.92.30[5] of the HTSUS, the provision covering traveling bags and similar containers of textile material. Amended Compl. ¶ 10; Def.'s Answer ¶ 10. As noted, this classification carries a 17.6 percent duty rate. HTSUS 4202.92.30. Quaker Pet — believing the pet carriers are classifiable under HTSUS subheading 6307.90.98, 'Other made up articles, including dress patterns:...Other:...Other,"[6] which carries a duty rate of seven percent — contested the liquidations by filing a protest on April 25, 2013. Summons, Dec. 9, 2013, ECF No. 1. Customs denied the protest on June 21, 2013, and this action followed. *Id.* Initial disclosures were served on January 21, 2015 and supplemented on July 17, 2015. Def.'s Br. at Exhibits 1–2. Quaker Pet moved for judgment on the pleadings as to Count I of its Amended Complaint on September 18, 2015, and the Government filed its response on October 30, 2015. Pl.'s Br.; Def.'s Br. Quaker Pet filed its reply on November 12, 2015, and the first oral argument was held on February 11, 2016. Pl.'s Reply Br., ECF No. 29; Oral Argument, ECF No. 35. Supplemental briefs were filed in June, July, October, and November 2016. Pl.'s Suppl. Br. 1, June 17, 2016, ECF No. 38; Def.'s Suppl. Resp. Br. 1, June 17, 2016, ECF No. 39; Pl.'s Second Suppl. Br. 2, July 20, 2016, ECF No. 42; Def.'s Second Suppl. Resp. Br. 2, July 20, 2016, ECF No. 43; Pl.'s

[5] HTSUS 4202.92.30 covers:

> Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:...
>
> With outer surface of sheeting of plastic or of textile materials:...
>
> Other...

[6] This argument constitutes Quaker Pet's first Count. *See* Amended Compl. ¶ 11. In Count II, Quaker Pet argues that "[i]n the alternative, the imported pet carriers are properly classified under subheading 4201.00.30, HTSUS, dutiable at the rate of 2.4% ad valorem, as: 'Saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment.'" *Id.* ¶13.

Suppl. Br. 3, Oct. 21, 2016, ECF No. 46; Def.'s Suppl. Resp. Br. 3, Oct. 21, 2016, ECF No. 47; Pl.'s Suppl. Br. 4, Nov. 4, 2016, ECF No. 49; Def.'s Suppl. Resp. Br. 4, Nov. 4, 2016, ECF No. 50.

On November 29, 2017, the case was reassigned to a new judge. Reassignment Order, ECF No. 52. Quaker Pet filed a motion to withdraw Count II of the amended complaint on December 14, 2017, and the Government filed its response on January 2, 2018. Motion to Withdraw Count 2, ECF. No. 57; Resp. to Motion to Withdraw Count 2, ECF No. 59. Oral argument was held anew on January 17, 2018. Oral Argument, ECF No. 60.

APPLICABLE LAW

I. Jurisdiction and Standard of Review

The Court has jurisdiction over this action under 28 U.S.C. § 1581(a) (2012), according to which the court has jurisdiction over an action brought under section 515 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1515 (2012) to contest a denial of a protest by Customs.[7]

In a tariff classification case, the Court proceeds de novo. *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003); *see* Customs Courts Act of 1980 § 301, 28 U.S.C. § 2640(a)(1)(2012) (directing the Court of International Trade to review classification rulings on "the basis of the record made before the court"). The Court first considers whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Value Vinyls, Inc. v. United States*, 568 F.3d 1374, 1377, 1380 (Fed. Cir. 2009); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The plaintiff has the burden of showing the government's determined classification to be incorrect. *Park B. Smith,* 347 F.3d at 925; *Jarvis*, 733 F.2d at 876. If the plaintiff meets that burden, the Court has an independent duty to arrive at "the *correct* result, by whatever procedure is best suited to the case at hand." *Value Vinyls*, 568 F.3d at 1377 (citing *Jarvis*, 733 F.2d at 878) (emphasis in original).

While the Court accords respect to Customs' classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the Court also has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Wilton Indus., Inc. v. United States*, 741 F.3d 1263, 1265 (Fed.

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

Cir. 2013) (citing *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)).

II. Judgment on the Pleadings under Rule 12

A party may move for judgment on the pleadings "after the pleadings are closed—but early enough not to delay trial." USCIT Rule 12(c). A Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *See Forest Labs., Inc. v. United States,* 29 CIT 1401, 1402–03, 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, 476 F.3d 877 (Fed. Cir. 2007). USCIT Rule 12(b)(6) parallels Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Compare* USCIT R. 12(b)(6) with Fed. R. Civ. P. 12(b)(6). In deciding such a motion, the court assumes all factual allegations to be true and draws all reasonable inferences in favor of the non-moving party. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Cedars–Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). A plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The court may not rely on matters outside the pleadings unless it also treats the motion as one for summary judgment under USCIT Rule 56. *See* USCIT Rule 7(a), 12(d), 56.

III. Tariff Classification under the General Rules of Interpretation HTSUS

"In a classification case, the court construes the relevant (competing) classification headings, a question of law; determines what the merchandise at issue is, a question of fact; and then determines 'the proper classification under which [the merchandise] falls, the ultimate question in every classification case and one that has always been treated as a question of law.'" *Bausch & Lomb*, 148 F.3d at 1366; *see Wilton Indus.*, 741 F.3d at 1266. When there is no factual dispute regarding the merchandise, the resolution of the classification issue turns on the first step, determining the proper meaning and scope of the relevant tariff provisions. *See Wilton Indus.*, 741 F.3d at 1266–67; *Carl Zeiss*, 195 F.3d at 1378; *Bausch & Lomb*, 148 F.3d at 1365–66.

"The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category." *Alcan Food Packaging (Shelbyville) v. United States*, 773 F.3d 1364, 1366 (Fed. Cir. 2014) (quoting *Wilton Indus.*, 741 F.3d at 1266). The Court considers chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretative rules. *See Arko Foods Intern., Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011) (citations omitted). As such, they are binding on the Court. *See Park B. Smith, Ltd.*, 347 F.3d at 929.

Tariff classification is determined according to the General Rules of Interpretation ("GRIs"), and, if applicable, the Additional U.S. Rules of Interpretation ("ARIs"). The "General Rules of Interpretation govern classification of merchandise under the HTSUS, and are applied in numerical order." *Honda of Am. Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010) (internal quotations and citations omitted).

Under GRI 1, "classification shall be determined according to the terms of the headings and any relative section or chapter notes."[8] *See Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009) (citing *Orlando Food Corp. v. United States,* 140 F.3d 1437, 1440 (Fed. Cir. 1998)). Unless there is evidence of "contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013); *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). In ascertaining a term's common meaning, the court may "consult lexicographic and scientific authorities, dictionaries, and other reliable information" or may rely on its "own understanding of the terms used." *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999); *see Millennium Lumber Distrib., Ltd. v. United States*, 558 F.3d 1326, 1328–29 (Fed. Cir. 2009); *Carl Zeiss*, 195 F.3d at 1379. "Where a tariff term has various definitions or meanings and has broad and narrow interpretations, the court must determine which definition best expresses the congressional intent." *Richards Med. Co. v. United States*, 910 F.2d 828, 830 (Fed. Cir. 1990).

"The HTSUS is designed so that most classification questions can be answered by GRI 1." *Telebrands Corp. v. United States*, 36 CIT___,

[8] GRI 1 provides that:

> The table of contents, alphabetical index, and titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following [GRI] provisions.

___, 865 F. Supp. 2d 1277, 1280 (2012), *aff'd*, 522 Fed. App'x 915 (Fed. Cir. 2013). "What is clear from the legislative history of the World Customs Organization and case law is that GRI 1 is paramount. . . . The HTSUS is designed so that most classification questions can be answered by GRI 1, so that there would be no need to delve into the less precise inquiries presented by GRI 3." *Id.*[9] A product is classifiable under GRI 1 if it "is described in whole by a single classification heading or subheading" of the HTSUS; however, "[w]hen goods are in character or function something other than as described by a specific statutory provision --either more limited or more diversified --and the difference is significant, then the goods cannot be classified" pursuant to GRI 1. *La Crosse Tech.*, 723 F.3d at 1358 (quoting *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)).

DISCUSSION

Quaker Pet argues that its pet carriers are properly classifiable under heading 6307 because (1) Chapter 42, Additional U.S. Note 1 excludes pet carriers from Chapter 42; (2) the Federal Circuit's test for whether a product belongs in Chapter 42 excludes pet carriers; and (3) the pet carriers consist of man-made fabric and thus belong in heading 6307. Although the court is unpersuaded that Chapter 42, Additional U.S. Note 1 necessarily excludes Quaker Pet's products from Chapter 42, the court concludes as a matter of law that the products are not properly classifiable under heading 4202 according to Federal Circuit precedent. However, the relevant record is not sufficiently developed yet for the court to determine whether the products are classifiable under heading 6307.

I. Chapter 42, Additional U.S. Note 1 Does Not Automatically Exclude Quaker Pet's Products from Chapter 42.

Applying GRI 1, the court first considers the language of the relevant headings and any applicable chapter or section notes. *See Faus Grp.*, 581 at 1372 (citing *Orlando Food Corp.,* 140 F.3d at 1440). By its terms, heading 4202 covers:

> Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery

[9] This case need not proceed beyond GRI 1, as discussed below, and so further discussion of GRI 2 and GRI 3 is unnecessary.

> cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:...

HTSUS 4202. HTSUS Chapter 42, Additional U.S. Note 1, further provides that "the expression 'travel, sports and similar bags' means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers." HTSUS Chapter 42, Additional U.S. Note 1. Pets are not clothing, and thus whether pet carriers fall within "travel, sport and similar bags" depends on whether pets are "personal effects."

HTSUS does not define "personal effects." To ascertain the meaning of "personal effects," the court may "consult lexicographic and scientific authorities, dictionaries, and other reliable information" or may rely on its "own understanding of the terms used." *Baxter Healthcare Corp.*, 182 F.3d at 1337–38; *see Millennium Lumber*, 558 F.3d at 1328–29 (citation omitted); *Carl Zeiss*, 195 F.3d at 1379 (citation omitted). The *American Heritage Dictionary of the English Language*, (3rd Ed., 1992 at page 1351) defines personal effects as "[p]rivately owned items, such as keys, an identification card, or a wallet or watch, that are regularly worn or carried on one's person." Other dictionaries provide nearly identical definitions. *See Random House Dictionary of the English Language*, (2nd Ed. unabridged at page 1445) ("privately owned articles consisting chiefly of clothing, toilet items, etc., for intimate use by an individual"); *Webster's Ninth New Collegiate Dictionary*, (1986 at page 877) ("privately owned items (as clothing and toilet articles) normally worn or carried on the person"). Dogs and cats are not normally worn or carried on the person, nor are they similar inanimate objects "such as keys, an identification card, or a wallet or watch."

The Government argues that Chapter 42, Additional U.S. Note 1, is irrelevant to the court's classification decision, because "[w]hether or not a product may fit within particular subheadings or heading 4202 is not dispositive of whether it could fall anywhere within the heading" and that "[o]nly after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise." Def.'s Br. at 15 (citing *Orlando Food Corp.*, 140 F.3d at 1440).

The court is required to "first construe[] the nature of the heading, and any section or chapter notes in question, to determine whether

the product at issue is classifiable under the heading." *Orlando Food Corp.*, 140 F.3d at 1440. Although Chapter 42, Additional U.S. Note 1 mentions some specific subheadings, that fact does not preclude the court from considering the definition this chapter note provides at the GRI 1 stage.[10]

The Government also argues that pets are personal property or "effects" of their owners and thus are "personal effects" for the purposes of HTSUS classification, and cites several cases in support of this contention. Def.'s Br. at 15 (citing *Maldonado v. Fontanes*, 568 F.3d 263, 270 (1st Cir. 2009) (discussing dogs as property or "effects" for purposes of the Fourth and Fourteenth Amendments); *Altman v. City of High Point*, 330 F.3d 194, 203–05 (4th Cir. 2003) (holding that dogs are considered personal property or "effects" under the Fourth Amendment); *Schrage v. Hatzlacha Cab Corp.*, 13 A.D.3d 150, *1 (1st Dep't N.Y.S. 2004) (discussing dogs as personal property for the purposes of New York state law)). The Government further cites Social Security Administration ("SSA") documents explicitly including pets in the definition of personal effects for the purposes of determining Supplemental Security Income benefits. Def.'s Br. at 15 (citing SSA: Program Operations Manual System, SI 01130.430, *available at* https://secure.ssa.gov/poms.nsf/lnx/0501130430).

The court finds this argument unpersuasive. First, the court notes that none of these sources assess the definition of personal effects under the HTSUS or relate to the HTSUS at all. Further, the cases do not address whether dogs are personal effects, but instead whether they are personal property or effects. "Personal property" and "effects"[11] cover a much broader range of property than "personal effects," which is limited to property normally worn or carried on the person, as discussed above. Thus, the cases do not provide any guidance on the common or commercial meaning of the term "personal effects" in the context of HTSUS heading 4202. Additionally, although the SSA documents do define "personal effects," the definitions cited therein are regulatory definitions in the context of personal property, and are not relevant to the common or commercial meaning of the term "personal effects" for purposes of HTSUS heading 4202.

[10] Further, the Government presents no authority that supports ignoring a chapter note because it mentions specific subheadings. Indeed, the subheadings mentioned in Chapter 42, Additional U.S. Note 1, simply do not contain the term "travel, sports and similar bags" defined by that Note. *See* HTSUS 4202.11–.39.

[11] The definitions of "personal property" and "effects" are property "consisting in general of things temporary or movable including intangible property" and "movable property," respectively. *Webster's Third New International Dictionary* at 724, 1687.

Even though a pet is not a personal effect — and therefore, the pet carriers are not similar to a travel or sport bag — that does not automatically exclude the pet carriers from heading 4202, as the pet carriers could be similar to another type of bag explicitly listed, such as a suitcase.

II. The *Avenues In Leather* Test Does Exclude Quaker Pet's Products from Chapter 42.

The court next turns to the Federal Circuit's *Avenues In Leather* test for determining whether something is classifiable under heading 4202:[12] "the common characteristic or unifying purpose of the goods in heading 4202 consist[s] of *organizing, storing, protecting, and carrying various items." Avenues In Leather, Inc. v. United States*, 423 F.3d 1326, 1332 (Fed. Cir. 2005) (emphasis added) (citations omitted).

As a threshold question, the court considers whether pets are items. An "item" is defined as "an individual thing (as an article of household goods, an article of apparel, an object in an art collection, a book in a library) singled out from an aggregate of individual things (as those being enumerated in a bill or inventory or similar list)." *Webster's Third New International Dictionary* at 1203. A "thing" is defined as "an inanimate object as distinguished from a living being." *Id.* at 2376. Pets are living beings, and thus not things or items. Therefore, the pet carriers in question do not fulfill the criteria propounded in the *Avenues In Leather* case for classification under heading 4202.

At oral argument, the Government contended that the common characteristic or unifying purpose of the goods in heading 4202 was only to organize, store, protect, and carry; that "items" was merely a placeholder word for whatever heading 4202 containers organized, stored, protected, and carried; and that to consider "items" part of the common characteristic of the goods in heading 4202 would impose a distinction between animate and inanimate objects that the Federal Circuit did not intend and that had no basis in the tariff heading. Oral Argument. The court finds this reasoning unpersuasive. The Government offers no compelling reason to conclude that the Federal Cir-

[12] Although not binding law, courts also look to the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, maintained by the World Customs Organization, as persuasive authority on how to interpret and apply HTSUS provisions. *See Home Depot*, 491 F.3d at 1336 ("Although the Explanatory Notes 'do not constitute controlling legislative history,' they are nonetheless intended to offer guidance in clarifying the scope of HTSUS subheadings." (citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994))); *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1367 n.1 (Fed. Cir. 2013); *see generally Alcan Food Packaging (Shelbyville) v. United States*, 37 CIT ___, 929 F. Supp. 2d 1338 (2013) (relying extensively on the guidance provided by the ENs to resolve the case under GRI 1), *aff'd*, 771 F.3d 1364 (Fed. Cir. 2014). The ENs to HTSUS Chapter 42, however, do not provide guidance relevant to the issue at hand, and so do not factor into the court's analysis here.

cuit's choice of the word "items" was any less deliberate than its choice of "organizing, storing, protecting, and carrying" when articulating the common characteristic or unifying purpose of the goods in heading 4202. Further, the distinction between animate and inanimate objects is supported by the tariff heading itself: all exemplar goods listed in heading 4202 are designed to contain inanimate objects and not living beings. HTSUS 4202; *see also Firstrax*, 2011 WL 5024271, at *9 ("On their face, exemplars listed in heading 4202 store and/or contain inanimate objects of personal property, not living, breathing animals.").

The Government also contends that, although the pet carriers do indeed carry pets, other objects could be placed in the side pockets of Quaker Pet's products, and thus it is still proper to classify the pet carriers under heading 4202. Def.'s Br. at 9–11. However,

> It is well settled that when a list of items is followed by a general word or phrase, the rule of *ejusdem generis*[13] is used to determine the scope of the general word or phrase. In classification cases, *ejusdem generis* requires that, for any imported merchandise to fall within the scope of the general term or phrase, the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase. However, a classification under the *ejusdem generis* principle is inappropriate when an imported article has a specific and primary purpose that is inconsistent with that of the listed exemplars in a particular heading.

Avenues In Leather, 423 F.3d at 1332 (internal citations omitted). Here, the pet carriers' primary purpose is to carry living beings — pets. Amended Compl. ¶ 8; Def.'s Answer ¶ 8. As discussed above, this primary purpose is inconsistent with the purpose of the exemplars in heading 4202, which is to organize, store, protect, and carry various inanimate objects. *Avenues In Leather*, 423 F.3d at 1332; *see also* HTSUS 4202 (listing containers only designed for use holding inanimate objects). Thus, the possibility of placing some objects in the side pockets does not entail that the pet carriers are properly classifiable under heading 4202.

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[13] *Ejusdem generis* is a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." BLACK'S LAW DICTIONARY (10th ed. 2014).

III. The Record Is Not Yet Sufficiently Developed for the Court to Determine the Proper Heading for the Products.

Continuing the GRI 1 analysis, the court turns to whether the pet carriers are classifiable under heading 6307, which covers "Other made up articles, including dress patterns" of textile. HTSUS 6307. Specifically, heading 6307 includes "made up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.) which are *not* more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature." Chapter 63, Explanatory Notes (emphasis in original). "Made up" is defined by the HTSUS as "[a]ssembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded)." HTSUS Section XI, Note 7(e). Under the HTSUS, textiles include fabrics made from man-made fibers and filaments, including polyethylene. *See* HTSUS Chapter 54.

The Government contends that Quaker Pet has not established that the pet carriers can be classified under heading 6307 because "there is no evidence in the record as to the 'predominant material' for the five styles of pet carriers at issue, nor any legal analysis as to the relevance of the 'predominant material.'" Def.'s Br. at 16. The court notes that Quaker Pet is not required to establish the correct classification heading: the plaintiff only has the burden of showing the government's determined classification to be incorrect. *Park B. Smith,* 347 F.3d at 925; *Jarvis*, 733 F.2d at 876. If the plaintiff meets that burden, the Court has an independent duty to arrive at "the *correct* result, by whatever procedure is best suited to the case at hand." *Value Vinyls*, 568 F.3d at 1377 (citing *Jarvis*, 733 F.2d at 878) (emphasis in original). However, the undisputed facts contained in the pleadings do not provide sufficient information — for example, the materials comprising each style of pet carrier or any procedure through which the products were assembled or otherwise made up — for the court to determine whether the pet carriers are properly classifiable under HTSUS heading 6307 or another heading.[14]

[14] Quaker Pet contends that the materials it provided as part of mandatory disclosures — which include third party marketing materials for each of the pet carrier styles and a sample of one of the styles of pet carrier — establish that the pet carriers belong in heading 6307. Pl.'s Br. at Exhibit A, Exhibit B. However, as previously noted *supra* n.4, the court does not consider the mandatory disclosures as part of ruling on a motion for judgment on the pleadings. Quaker Pet further suggests that, under USCIT Rule 12, the court could convert this motion into a motion for summary judgment. USCIT Rule 12 ("If, on a motion [for judgment on the pleadings] under Rule . . . 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary

IV. The Court Grants the Pending Motion to Withdraw Count II

In addition to the motion for the judgment on the pleadings, Quaker Pet also filed a Motion to Withdraw Count II of the Amended Complaint. ECF No. 57. In Count II, *see supra* n.6, Quaker Pet claimed, in the alternative, that if the court did not find that the pet carriers were classifiable under HTSUS heading 6307, they would be classifiable under heading 4201.00.30 ("Harness and saddlery for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats, and the like) of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment."). Amended Compl. ¶¶ 12–13. The Government does not consent to this motion "because this case is designated as a test case, and we believe that all classification claims should be address in this action in order to promote efficient adjudication of the suspended cases." Resp. to Motion to Withdraw Count II of the Amended Compl., 1–2, ECF No. 59. However, the court has an independent duty to evaluate all potential HTSUS classifications, and so withdrawing Count II will not prevent the court from considering heading 4201 and any other potentially relevant headings when ruling on Count I. *Value Vinyls*, 568 F.3d at 1377 (citing *Jarvis*, 733 F.2d at 878). The court thus grants Quaker Pet's Motion to Withdraw Count II.

CONCLUSION

Given that the pet carriers' primary purpose is to carry pets and not items, they are excluded as a matter of law from heading 4202. However, the undisputed facts contained in the pleadings do not provide enough information for the court to determine the proper classification for the products.

Accordingly, it is hereby

ORDERED that Quaker Pet's motion for judgment on the pleadings be granted in part and denied in part; and it is further

ORDERED that within two weeks of the date of this Opinion, the parties shall file a proposed schedule for further proceedings consistent with this opinion;

ORDERED that Quaker Pet's motion to withdraw count II of the amended complaint be granted; and it is further

judgment under Rule 56."). The court declines to use its discretion to convert this motion on the pleadings into a motion for summary judgment, as the Government has not been given sufficient opportunity to present material pertinent to a summary judgment motion. *See* USCIT Rule 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). All briefing and oral argument up to this stage have addressed only Quaker Pet's motion for judgment on the pleadings, and thus the Government has not had an adequate opportunity to develop the record and present arguments related to a motion for summary judgment.

ORDERED that count II of the amended complaint shall be withdrawn.

Dated: February 12, 2018
New York, New York

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