

U.S. Customs and Border Protection

Slip Op. 13–113

PAPIERFABRIK AUGUST KOEHLER SE, Plaintiff, v. UNITED STATES,
Defendant and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 13–00163

Held: Plaintiff’s motion to reconsider motion to stay is denied.

Dated: August 29, 2013

Drinker Biddle & Reath LLP (Richard P. Ferrin and William Silverman) for Papierfabrik August Koehler SE, Plaintiff.

Stuart F. Delery, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Joshua E. Kurland*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Jessica M. Forton*, Of Counsel, for the United States, Defendant.

King & Spalding LLP (Gilbert B. Kaplan and Daniel L. Schneiderman) for Appleton Papers Inc., Defendant-Intervenor.

OPINION AND ORDER

Tsoucalas, Senior Judge:

Plaintiff Papierfabrik August Koehler SE (“Koehler”) moves for reconsideration of its motion to stay proceedings pending the outcome of *Papierfabrik August Koehler AG v. United States*, Consol. Ct. No. 12–00091 (“Ct. No. 12–00091”). See Pl.’s Mot. Reconsider Mot. Stay, Ct. No. 13–00163, ECF No. 34 at 1 (“Pl.’s Mot.”). Koehler requests that the court reconsider its motion to stay because corroboration of the adverse facts available (“AFA”) rate defendant United States Department of Commerce (“Commerce”) assigned Koehler is dependent on transaction-specific margins from an earlier review that may be revised on remand in Ct. No. 12–00091. *Id.* at 1–10. Commerce and defendant intervenor Appvion, Inc.¹ oppose Koehler’s motion. For the reasons stated below, Koehler’s motion is denied.

¹ On May 13, 2013, Appleton Papers Inc. changed its name to Appvion, Inc. See Letter to The Hon. Tina Kimble, Clerk of the Court, re: Papierfabrik August Koehler SE v. United States, Ct. No. 13–00163, ECF No. 25 (June 21, 2013).

The instant case concerns the final results of the third administrative review of lightweight thermal paper (“LWTP”) from Germany (“AR3”). Compl., Ct. No. 13–00163, ECF No. 6 at 1. During AR3, Koehler admitted that it failed to report certain home market sales that were “transshipped from Koehler to a third country and then back into Germany.” See Pl.’s Mot. Stay, Ct. No. 13–00163, ECF No. 30 at 3 (July 24, 2013). In the final results of AR3, Commerce assigned Koehler a margin based on AFA. See *LWTP From Germany: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 23,220, 23,221 (Apr. 18, 2013) (“AR3 Final”).

A portion of the unreported transshipped sales occurred during the period of review covered by the second administrative review of LWTP from Germany (“AR2”). See Pl.’s Mot. Stay at 3. The final results of AR2 are before Judge Stanceu in Ct. No. 12–00091. Following publication of *AR3 Final*, Commerce moved for a voluntary remand in Ct. No. 12–00091 to address the effect of the unreported transshipped sales on the final results of AR2. See Def.’s Partial Consent Mot. Voluntary Remand, Ct. No. 12–00091, ECF No. 43 (May 30, 2013). That motion is currently pending.

In the interim, Koehler moved to stay the instant case pending consideration of the transshipped sales issue in Ct. No. 12–00091. See Pl.’s Mot. Stay at 3. This court denied that motion, and Koehler now moves for reconsideration. See Pl.’s Mot. at 1.

The decision to grant or deny a motion for reconsideration “rests within the discretion of the court.” See *Home Meridian Int’l, Inc. v. United States*, 37 CIT __, __, Slip Op. 13–101 at 4 (Aug. 7, 2013). “A motion for reconsideration will be granted ‘only in limited circumstances,’ including “(1) an error or irregularity, (2) a serious evidentiary flaw, (3) the discovery of new evidence which even a diligent party could not have discovered in time, or (4) an accident, unpredictable surprise or unavoidable mistake which impaired a party’s ability to adequately present its case.” *Id.* at __, Slip Op. 13–101 at 3–4 (quoting *Target Stores v. United States*, 31 CIT 154, 156, 471 F. Supp. 2d 1344, 1347 (2007)). However, “[a] motion for reconsideration will not be granted ‘merely to give a losing party another chance to re-litigate the case.’” *Id.* at __, Slip Op. 13–101 at 4 (quoting *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008)).

Koehler argues that “[i]n all fairness, and in light of several important facts that were not presented to the Court in the original motion or the responses thereto, . . . the Court should reconsider its decision, and should stay this proceeding.” Pl.’s Mot. at 1. According to Koehler, corroboration of the AFA rate from *AR3 Final* is dependant on certain

transaction-specific margins Commerce calculated in AR2. *Id.* at 2. Koehler insists that the transaction-specific margins from AR2 are erroneous and Commerce may revise them if the record of AR2 is reopened on remand in Ct. No. 12–00091. *See id.* at 3–10. Because revision of the transaction-specific margins in AR2 could impact corroboration of the AFA rate in *AR3 Final*, Koehler asks the court to stay the instant case. *Id.* at 9.

The court must deny the motion to reconsider because Koehler is simply trying to re-litigate its motion to stay on new grounds. *See Home Meridian*, 37 CIT at __, Slip Op. 13–101 at 4. In its initial motion, Koehler argued that a stay in this case was warranted because Ct. No. 12–00091 also involved the unreported transshipped sales. *See Pl.’s Mot. Stay* at 3. Now, in its motion to reconsider, Koehler argues that a stay is warranted because Commerce may reopen the record and may revise certain margins on remand in Ct. No. 12–00091. *Pl.’s Mot.* at 9–10. Koehler simply puts forth a new argument in favor of staying this case that it failed to raise in its original motion. Moreover, Koehler does not allege any facts indicating that the limited circumstances under which the court will grant a motion for reconsideration apply in the instant case. *See id.* at 1–10; *Home Meridian*, 37 CIT at __, Slip Op. 13–101 at 3–4. Accordingly, Koehler’s motion is denied.

ORDER

Upon consideration of the plaintiff’s motion to reconsider motion to stay and the responses thereto, and in accordance with the above, it is hereby

ORDERED that plaintiff’s motion to reconsider motion to stay is **DENIED**; and it is further

ORDERED that the briefing schedule established by this court’s July 18, 2013 order (ECF No. 29) shall run from August 5, 2013, the date on which this court denied the plaintiff’s original motion to stay.

Dated: August 29, 2013

New York, New York

/s/ Nicholas Tsoucalas

NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 13–114

U.K. CARBON AND GRAPHITE CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and SGL CARBON, LLC AND SUPERIOR GRAPHITE CO., Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 12–00242

[Commerce’s Circumvention Final Determination is sustained.]

Dated: August 29, 2013

Jeffrey S. Neeley, Michael S. Holton, and Stephen W. Brophy, Barnes, Richardson & Colburn, of Washington, DC, for Plaintiff.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce.

Mary T. Staley, David A. Hartquist, Katherine E. Wang and *R. Alan Luberda*, Kelley Drye & Warren, LLP, of Washington, DC, for Defendant-Intervenors.

OPINION & ORDER

CARMAN, JUDGE:

Plaintiff U.K. Carbon and Graphite Company, Ltd. (“Plaintiff” or “UKCG”) contests the final determination by Defendant United States Department of Commerce (“Defendant” or “Commerce”) regarding the circumvention¹ inquiry related to the antidumping duty order covering small diameter graphite electrodes from the People’s Republic of China (“China”). See *Small Diameter Graphite Electrodes From the People’s Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 47,596 (Aug. 9, 2012) (“*Final Determination*”), Part 2, P.R.² 76, and accompanying *Issues and Decision Memorandum for the Final Determination of the Anticircumvention Inquiry* (July 31, 2013) (“*I&D Memo*”), Part 2, P.R. 73. The Court denies Plaintiff’s motion for judgment on the agency record and sustains Defendant’s *Final Determination*.

¹ “Circumvention” and “anticircumvention” are used interchangeably throughout the administrative record and this opinion.

² “P.R.” refers to the public administrative record and “C.R.” refers to the confidential administrative record. The public and confidential record each appear in two parts on separate compact discs.

BACKGROUND

A. Antidumping Duty Order

The product at issue is small diameter graphite electrodes (“SDGE”). In 2009, Commerce imposed an antidumping duty order upon imports of SDGE from China. *Antidumping Duty Order: Small Diameter Graphite Electrodes from the People’s Republic of China*, 74 Fed. Reg. 8,775 (Feb. 26, 2009) (“AD Order” or “SDGE Order”). The scope of the AD Order covers:

all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. The merchandise covered by this order also includes graphite pin joining systems for small diameter graphite electrodes, of any length, whether or not finished, of a kind used in furnaces, and whether or not the graphite pin joining system is attached to, sold with, or sold separately from, the small diameter graphite electrode. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes and graphite pin joining systems for small diameter graphite electrodes that are subject to this order are currently classified under the Harmonized Tariff Schedule of the United States (“HTSUS”) subheading 8545.11.0000. The HTSUS number is provided for convenience and customs purposes, but the written description of the scope is dispositive.

Id. at 8,775.

B. Circumvention Inquiry

On October 12, 2010, domestic producers of SDGE—SGL Carbon LLC and Superior Graphite Company, Defendant-Intervenors in the instant case (collectively referred to as “Defendant-Intervenors” or “Petitioners”)—requested that Commerce conduct a scope or an anticircumvention inquiry on SDGE produced by UKCG from Chinese manufactured artificial/synthetic graphite forms. *See Petitioners’ Request for Scope Review or Anticircumvention Inquiry* (Oct. 12, 2010) (“Initiation Request”), Part 1, P.R. 1. Petitioners alleged that UKCG was part of “an ongoing scheme to evade payment of antidumping

duties under the *SDGE Order*” with Chinese producers. *Id.* at 1–2. Petitioners alleged that UKCG was first importing unfinished SDGE from China to the U.K. “for minor completion or assembly” then exporting to the U.S., thereby circumventing the *AD Order* duty assessment by improperly claiming the U.K. as the country of origin on entry papers. *Id.* at 2.

Petitioners asserted the SDGE that UKCG imported was “for every relevant purpose an unfinished graphite electrode subject to the antidumping duty order when it leaves China,” because “[a]ll of the physical, chemical and performance characteristics of an electrode have been given to the product in China.” *Id.* at 14. Petitioners explained that

[i]t is an electrode in unfinished form at that point, regardless of whether it is called a rod or an electrode. The rod or unfinished electrode needs only final finishing (sizing, threading, fitting ends of electrode with a graphite pin joining system, etc.) [which] are merely machining operations and do not impart the essential performance characteristics of the product.

Id. at 14 (emphasis added). Commerce acknowledged that there was “substantial record evidence which may support the initiation of either” a scope inquiry or an anticircumvention inquiry. *Small Diameter Graphite Electrodes From the People’s Republic of China: Initiation of Anti-Circumvention Inquiry*, 76 Fed. Reg. 14,910, 14,912 (Mar. 18, 2011) (“*Initiation Notice*”). Commerce decided that an anticircumvention inquiry was the more appropriate avenue given the “specificity” of the allegation to a single company and “certain record information as to the timing of the pattern of trade.” *Id.*

UKCG provided timely responses to Commerce’s information requests, and all parties submitted timely comments regarding surrogate country and surrogate value selection. Def.’s Mem. in Opp’n to Pl.’s R. 56.2 Mot. for J. upon the Agency Record (“Def.’s Opp’n”) at 5. Commerce also conducted a verification of UKCG’s questionnaire responses at two of its U.K. facilities during February 16–17, 2012. Pl. UKCG’s Mem. of Law in Supp. of Their R. 56.2 Mot. for J. on the Agency Record (“Pl.’s Mot.”) at 6, 38; Def.’s Opp’n at 5.

C. Preliminary Determination

In June 2012, Commerce subsequently issued a preliminary affirmative determination of circumvention. See *Small Diameter Graphite Electrodes From the People’s Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order and Extension of Final Determination*, 77 Fed. Reg. 33,405 (June 6,

2012) (“*Preliminary Determination*”). In its *Preliminary Determination*, Commerce first found that the products exported by UKCG to the U.S. were completed or assembled in the U.K. from “unfinished” Chinese-origin inputs “subject to” the *AD Order*, based upon the scope language and product descriptions from the petition and the report of the International Trade Commission (“ITC”). *Id.* at 33,410–11; *Small Diameter Graphite Electrodes from China*, Inv. No. 731-TA-1143 (Final), ITC Pub. 4062 (Feb. 2009) (“ITC Report”). Commerce therefore determined that it was appropriate to use the surrogate value methodology from antidumping proceedings for non-market economy (“NME”) countries. *Id.* at 33,407–08.

Second, Commerce determined to use surrogate values from the Ukraine to analyze whether the value of the merchandise produced in China constituted a “significant portion” of the value of the merchandise exported to the United States. *Id.* at 33,407–08, 33,415. Third, Commerce determined that the value of UKCG’s processing in the U.K. was “minor and insignificant.” *Id.* at 33,417. Commerce therefore preliminarily determined that UKCG had circumvented the antidumping duty order. *Id.*

D. Final Determination

A couple months after issuing its *Preliminary Determination*, Commerce issued its *Final Determination*. See 77 Fed. Reg. 47,596. The significant changes in the *Final Determination* from the *Preliminary Determination* are summarized as follows. First, regarding the product covered by the scope language, Commerce “specifically refuted UKCG’s allegation that the agency manipulated language from the petition to supplement its textual analysis,” and after taking into account evidence submitted by UKCG, Commerce “determined that this evidence ‘d[id] not overcome [the] explicit inclusion’ of unfinished [SDGE] in the order.” Def.’s Opp’n at 7 (*quoting I&D Memo* at 6). Second, Commerce added HTSUS 3801.10 to the description of the *AD Order*’s scope for “convenience and customs purposes.” *Id.* at 8.

Third, with respect to surrogate values, Commerce noted the circumvention provisions of the antidumping statute do not “prescribe a specific method to determine whether the value of the merchandise produced in China is a significant portion of the value of the merchandise exported to the United States.” *Id.* Noting that the antidumping statute “elsewhere presumes that costs and prices” from a NME are “inherently unreliable,” Commerce, “consistent with its past practice, found it reasonable to use surrogate values” from the Ukraine. *Id.* However, Commerce also noted that its circumvention analysis showed the Chinese inputs made up a significant portion of

the value UKCG's U.S. exports, "regardless of whether it used Ukrainian surrogate values or UKCG's purchase price," and that the choice to use surrogate values was therefore not essential to the outcome. *Id.* (citing *I&D Memo* at 7).

Fourth, Commerce rejected UKCG's complaints about its value-added calculation under 19 U.S.C. § 1677j(b)(2)(E) (2006)³ for three reasons: (1) the other statutory factors in 19 U.S.C. § 1677j(b)(2)(A)-(D), which were not challenged by UKCG, supported Commerce's analysis and (b)(2)(E) was therefore not dispositive; (2) Commerce's "qualitative finding as to value-added was sufficient;" and (3) Commerce's "use of UKCG's processing costs, rather than UKCG's actual costs of Chinese-origin inputs, when calculating quantitative value-added was proper." *Id.* at 8-9 (citing *I&D Memo* at 8-12).

Fifth, relating to the cash deposit requirements, Commerce explained that it is "appropriate and consistent with past practice to assign UKCG's exports of SDGE to the United States the rate applicable to the relevant [Chinese]-producer of the subject input" since 19 U.S.C. § 1677j(b)(1)(E) requires Commerce to prevent evasion of antidumping duties "irrespective of the exporter" of the subject merchandise being entered into the U.S. *Id.* at 9 (citing *I&D Memo* at 14-15).

STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The Court sustains circumvention determinations, findings or conclusions by Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (internal quotation omitted). Courts "look for a reasoned analysis or explanation for an agency's decision as a way to determine whether a particular decision is arbitrary, capricious, or an abuse of discretion." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

DISCUSSION

Commerce has two types of inquiries available when examining allegations that a particular product should be covered by an existing antidumping order: scope inquiry or circumvention inquiry. Petitioners requested an examination of UKCG's product through both of

³ All references to the United States Code refer to the 2006 edition, unless otherwise stated.

these avenues, in the alternative. *See* Def.'s Opp'n at 4; *accord Initiation Request*. In a scope inquiry, Commerce analyzes "whether a particular product is included within the scope of an order" pursuant to regulatory criteria set forth in 19 C.F.R. § 351.225(k). In a circumvention inquiry, Commerce analyzes whether a product outside an order's literal scope should nevertheless be included within the scope to prevent circumvention of antidumping and countervailing duty orders pursuant to statutory criteria set forth in 19 U.S.C. § 1677j⁴ and regulatory criteria in 19 C.F.R. § 351.225(g)-(j).

Based on these particular facts, Commerce decided that the issues raised by the parties are "better addressed in the context of an anticircumvention proceeding" rather than a scope inquiry. *Initiation Notice*, 76 Red. Reg. at 14,912. Commerce explained that "due to the specificity of Petitioners' request as it pertains to a particular company (*i.e.*, UKCG) and certain record information as to the timing of the pattern of trade. . . , [Commerce] has determined that a decision to initiate an anti-circumvention inquiry is the most appropriate course of action to address Petitioners' concerns at present." *Id.*

An anticircumvention inquiry is similar to the more frequently invoked scope inquiry because they are both subsets of a scope ruling. The criteria for circumvention and scope inquiries differ, however:

[A]nticircumvention inquiries are not like traditional scope inquiries conducted pursuant to 19 C.F.R. § 351.225(k). Instead, anticircumvention determinations are a special subset of scope rulings as recognized by 19 C.F.R. § 351.225[(g)-(j)], and they are the only types of scope rulings governed by a specific statutory scheme. *See generally* 19 U.S.C. § 1677(j). . . . [Therefore,] subsection (k) factors do not apply to circumvention scope inquiries.

Def.'s Opp'n at 27–28. The Court may only review the underlying proceeding that Commerce chose to conduct, which is the anticircumvention inquiry in this case, and therefore any discussion relating to the scope factors pursuant to 19 C.F.R. § 351.225(k) is extraneous and will be disregarded for this review.

A. Statutory Framework for Circumvention Inquiries

Circumvention cases are governed by 19 U.S.C. § 1677j. *See* Pl.'s Mot. at 27; Def.'s Opp'n at 14. When merchandise is completed or assembled in a third country other than the country named in the

⁴ There are four types of circumvention inquires: (a) merchandise completed/assembled in the United States; (b) merchandise completed/assembled in a third country; (c) minor alterations of merchandise; and (d) later-developed merchandise. *See* 19 U.S.C. § 1677j(a)-(d). This instant action triggers subsection (b), merchandise completed in a third country.

antidumping order, as is the case here, the relevant provision is 19 U.S.C. § 1677j(b), which provides, in pertinent part:

(b) Merchandise completed or assembled in other foreign countries

(1) In general

If—

(A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of—

(i) an antidumping duty order issued under section 1673e of this title, . . .

(B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which—

(i) is subject to such order or finding, or

(ii) is produced in the foreign country with respect to which such order or finding applies,

(C) the process of assembly or completion in the foreign country referred to in subparagraph (B) is minor or insignificant,

(D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States, and

(E) the administering authority determines that action is appropriate under this paragraph to prevent evasion of such order or finding,

the administering authority, after taking into account any advice provided by the Commission under subsection (e) of this section, may include such imported merchandise within the scope of such order or finding at any time such order or finding is in effect.

(2) Determination of whether process is minor or insignificant

In determining whether the process of assembly or completion is minor or insignificant under paragraph (1)(C), the administering authority shall take into account—

(A) the level of investment in the foreign country,

(B) the level of research and development in the foreign country,

(C) the nature of the production process in the foreign country,

(D) the extent of production facilities in the foreign country, and

(E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.

(3) Factors to consider

In determining whether to include merchandise assembled or completed in a foreign country in . . . an antidumping duty order. . . , the administering authority shall take into account such factors as—

- (A) the pattern of trade, including sourcing patterns,
- (B) whether the manufacturer or exporter of the merchandise described in paragraph (1)(B) is affiliated with the person who uses the merchandise described in paragraph (1)(B) to assemble or complete in the foreign country the merchandise that is subsequently imported into the United States, and
- (C) whether imports into the foreign country of the merchandise described in paragraph (1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

19 U.S.C. § 1677j(b). Commerce considers whether the criteria listed under 19 U.S.C. § 1677j(b)(1) are satisfied by considering the factors listed in 19 U.S.C. § 1677j(b)(2) and (3). However, none of the factors listed under 19 U.S.C. § 1677j(b)(2) or (3) is controlling.⁵ Commerce’s authority to apply subsection (b) requires that “there must be some processing taking place in the third-country,” in this case the U.K., for Commerce “to determine whether the merchandise is subject to the order.” *Globe Metallurgical Inc. v. U.S.*, 34 CIT __, 722 F. Supp. 2d 1372, 1379 (2010). Therefore, a breakdown and understanding of UKCG’s SDGE production process is essential to Commerce’s analysis and to the Court’s review.

B. Production of SDGE

Defendant-Intervenors provided the following description of the production process for SDGE, which was taken from the Chinese respondents’ Section D questionnaire responses in the antidumping duty investigation:

⁵ The only regulatory instruction for 19 U.S.C. § 1677j(b) inquiries is that no “single factor” will “be controlling.” 19 C.F.R. § 351.225(h).

Stage 1: Calcining:⁶ In this production process, petroleum coke becomes calcined petroleum coke by heating the petroleum coke at extreme temperatures over [a period of time].⁷

Stage 2: Crushing: In this stage, calcined petroleum coke or imported needle coke are crushed in a series of roller mills into fine grains for about half an hour.

Stage 3: Screening: The crushed and ground calcined petroleum coke or imported needle coke are divided into different sizes of grains or powders with the use of a vibrating sift over approximately a half an hour of processing.

Stage 4: Burdening: The screened coke grains or powders are mixed and prepared in accordance with a recipe, which takes approximately a half hour.

Stage 5: Preparing Coal Tar Pitch: Raw coal tar pitch is melted for [a number of] hours to remove the moisture and certain residues.

Stage 6: Kneading: The coke stock from the burdening stage and the prepared coal tar pitch are blended and mixed together for [a period of time] to create a mixture that is used in the next stage, forming.

Stage 7: Forming: The paste from the kneading stage is cooled and then put through an extrusion press to shape the cylindrical column form of the electrode. This process takes [a period of time].

Stage 8: Baking: The cylindrical column form is moved into a baking oven where they [sic] will remain for [a period of time].

Stage 9: Impregnation: The baked electrode will be preheated and then placed into an impregnation tank that is filled with melted pitch. The pitch will be impregnated into the electrode to fill the pores and increase the strength of the electrode. This process takes [a period of time].

⁶ To calcine, in general, is “to heat (as inorganic materials) to a high temperature but without fusing in order to effect useful physical and chemical changes.” *Webster’s Third New International Dictionary* 315 (1981). In the case at hand, according to a producer of SDGE in China, calcining is when “petroleum coke burns in a spinning kiln heated by burning volatile elements to 1,380 degree Celsius. During the burning, the petroleum coke becomes calcined petroleum coke and the high temperature tail gas, a by-product from burning volatile elements, is used to generate steam which will be used in the subsequent coal tar pitch preparing stage.” *Initiation Request*, Exhibit DA-2, at 240, Part 1, P.R. 1.

⁷ Some amounts of time for the various stages are protected as business proprietary information so general amounts of time have been given in brackets in these instances.

Stage 10: Re-Baking: The impregnated electrode will be put into a baking oven and heated to coke the pitch in the impregnated electrode, by passing the electrode from a tunnel kiln, inverse-flame calciners, and open calciners for [a period of time].

Stage 11: Graphitization: In this stage, the electrode undergoes graphitization, where the carbon electrode is transformed into a graphitized electrode. It takes [a period of time] to complete graphitization.

Stage 12: Machining: After the graphitized electrode is cooled, it will go through two additional minor processes: shaping of the surface and ends of the electrode to exact size and dimensions; and, tooling and fitting of the ends of the electrode with a threaded graphite connecting pin (a hole is bore [sic] into the ends of the electrode, which is then threaded). In addition, threads are added to the connecting pin. In total, this process takes about [a period of] minutes to complete an electrode.

Stage 13: Packaging: In this process, the electrode is placed in a wooden crate with foam end caps placed over the ends of the electrode to protect the threading.

When summed together, the production process takes [a substantial number of] days.

Def.-Intervenors' Resp. Br. ("Def.-Ints.' Opp'n") at 4–6 (citations omitted). These thirteen stages of production take place over a substantial number of days, and the first eleven stages are done in China. *Id.* at 13. The record shows that only the finishing is done by UKCG in the U.K., and Commerce determined at verification that finishing "takes approximately *five minutes* per electrode." *Verification of Responses of U.K. Carbon & Graphite Co. Ltd. in the Anti-Circumvention Inquiry of Small Diameter Graphite Electrodes From the People's Republic of China* at 15 (May 30, 2012) ("*Verification*"), Part 2, P.R. 53; Part 4, C.R. 46.

C. Analysis

1. Parties' Issues

Commerce claims that only subsections 19 U.S.C. § 1677j(b)(1)(B) and (C) of the circumvention statute are at issue in this case, requiring only determinations of whether the imports of SDGE are completed abroad from Chinese subject merchandise and, if so, whether the process of assembly or completion in the U.K. is minor or insignificant. Def.'s Opp'n at 15. But Plaintiff lists eight issues in its

motion, including “plain language” issues relevant to a scope inquiry, and concerns about use of surrogate value for UKCG’s production inputs. Pl.’s Mot. at 1–2. Upon review of all parties’ briefs, the Court boils down the arguments to four main issues:

1. Whether Commerce’s finding that the artificial graphite rods used as inputs in UKCG’s production are subject to the scope of the *AD Order* is supported by substantial evidence on the record or otherwise in accordance with law.
2. Whether Commerce’s finding that UKCG’s process of completion performed in the U.K. is minor or insignificant pursuant to the factors listed under 19 U.S.C. § 1677j(b)(2) is supported by substantial evidence on the record or otherwise in accordance with law.
3. Whether Commerce’s use of surrogate values from the Ukraine to value Chinese origin inputs of artificial graphite rods used by UKCG to produce its finished SDGE is supported by substantial evidence on the record or otherwise in accordance with law.
4. Whether Commerce’s requirement that UKCG pay a China-wide rate cash deposit is supported by substantial evidence on the record or otherwise in accordance with law.

See Pl.’s Mot. at 1–2; Def.’s Opp’n at 2–3; Def.-Ints.’ Opp’n at 2–3. The Court will address these four issues within the statutory scheme by reviewing the record for substantial evidence to support each statutory criterion.⁸

2. General Criteria

a. Same Class or Kind

The first statutory consideration is whether the merchandise imported to the U.S. is of the “same class or kind” as merchandise subject to the *AD Order*. 19 U.S.C. § 1677j(b)(1)(A). Plaintiff contends that its product—artificial graphite rod—differs from merchandise subject to the *AD Order*—small diameter graphite electrodes. Pl.’s Mot. at 4–5. Plaintiff makes much ado about the term “unfinished” and advances that Commerce misapplied the “plain meaning” prin-

⁸ Defendant’s contention that only subsections (B) and (C) are at issue in this case is incorrect. Plaintiff expounds throughout its briefs that its rods should have been excluded “*ab initio*” from the scope of the order, which triggers subsection (A), and voices various concerns about Commerce’s valuation conclusions, which trigger subsection (D). Pl.’s Mot. at 9, 12. Therefore, the Court reviews each of the statutory criteria under subsection (b).

ciple. *Id.* at 9–10, 15–22. Finally, Plaintiff relies on the fact that artificial graphite falls under HTSUS 3801.10, which was originally not included as part of the scope description but was subsequently added in the *Final Determination*.⁹ Plaintiff asserts that the merchandise subject to the *AD Order* includes graphite electrodes under HTSUS 8545.11 and ergo contends that “items under HTS 3801 were classified and known as something other than an electrode.” *Id.* at 5. Plaintiff offered as support for its contention a U.S. classification ruling (“CBP ruling”) and a European Union classification ruling (“U.K. ruling” or “BOI ruling”) stating that “rods” were artificial graphite rather than electrodes. *Id.*

Defendant-Intervenors advise that Plaintiff’s product, artificial graphite rod, is of the same class or kind of merchandise subject to the *AD Order*. They explain that artificial graphite rod is “*an electrode in unfinished form. . . , regardless of whether it is called a rod or an electrode.*” Def.-Ints.’ Opp’n at 3 (*citing Initiation Request* at 14) (emphasis added). Defendant-Intervenors counter Plaintiff’s objection to the term “unfinished” as ambiguous and instead offer that the term is “quite common in antidumping lexicon and has been included in the scope language of dozens of antidumping cases,” citing numerous examples. *Id.* at 15. Defendant-Intervenors support Commerce’s definition of unfinished SDGE as those which have “gone through all the steps of production, including graphitization, except for machining or ‘finishing.’” *Id.* at 16.

The Court finds that Commerce’s affirmative determination regarding class or kind is supported by the record. For clarification’s sake, while the parties use various terminology throughout their briefs and on the record—Petitioners characterize the inputs as “unfinished SDGE” while Plaintiff characterizes the inputs as “artificial graphite

⁹ Commerce stated that it was

adding this HTS subheading [3801.10] to the scope language of the *SDGE Order* to aid U.S. Customs and Border Protection (“CBP”) by clarifying that products categorized under the HTSUS 3801.10 category, as imported, which otherwise fit the narrative description of unfinished products covered by the *SDGE Order* should be considered merchandise subject to the order.

77 Fed. Reg. at 47,598; *see also* Def.-Ints.’ Opp’n at 18 (“Petitioners’ request to include HTSUS 3801 within the scope language makes clear that they always intended to include both unfinished and finished small diameter graphite electrodes within the scope of the antidumping duty order.”). Plaintiff does not challenge Commerce’s authority to alter the scope to add another HTSUS category but asseverates that Commerce’s alteration to include HTSUS 3801 is an admission of a “knowing and intentional” omission from the original scope, and thus products classified under HTSUS 3801 should be considered *ab initio* excluded from the scope. Pl.’s Mot. at 12, 26. This argument is neither persuasive nor supported by the record.

rods”—they are actually one and the same. *See, e.g., Final Determination*, 77 Fed. Reg. at 47,597 n.2 (“For ease of reference, these materials are referred to as ‘unfinished SDGE components’ or ‘artificial graphite rods’ throughout this notice.”) Next, regarding the meaning of the term “unfinished,” Plaintiff admits that “there is no evidence on the record that ‘unfinished’ has any meaning whatsoever in the trade.” Pl.’s Mot. at 16. Commerce considered carefully the scope language “whether or not finished,” and determined that “unfinished SDGE” meant “an SDGE product that has completed the graphitization stage and needs only finishing to be used as a finished SDGE in a furnace.” Def.’s Opp’n at 19 (*citing I&D Memo* at 5).

Plaintiff admits that it has never argued that “the HTS categories are controlling,” but asserts that Petitioners “treatment of such categories is *relevant* in determining what the Petition meant by the vague term ‘unfinished.’” Pl.’s Mot. at 20. The Court declines to adopt Plaintiff’s position. It is well-settled that “a reference to an HTSUS number is not dispositive about the scope” of an antidumping order. *Novosteel SA v. United States*, 284 F.3d 1261, 1270 (Fed. Cir. 2002) (internal citations omitted); *see also Preliminary Determination*, 77 Fed. Reg. at 33,411.) Consequently, Plaintiff’s HTSUS arguments are vitiated by settled case law regarding scope determinations. Despite Plaintiff’s quibbling over the meaning of “unfinished,” the Court cannot say that Commerce’s consideration and decision to use Petitioners’ definition of “unfinished” is unreasonable, arbitrary or capricious.

The Court also finds that Plaintiff’s argument regarding Commerce’s lack of consideration of the classification rulings is not supported by the record. Pl.’s Mot. at 24 (contending that it is “flatly false” that Commerce “ever addressed, considered, or took into account” the U.K. and U.S. classification rulings). Commerce stressed that it considered the classification rulings, both foreign and domestic, and then explained throughout the record why it did not rely on these rulings. *See, e.g., Initiation Notice*, 76 Fed. Reg. at 14,917 (“neither the BOI nor the [CBP] ruling are legally binding for the purposes of antidumping proceedings in the United States”); *Preliminary Determination*, 77 Fed. Reg. at 33,410 (“U.S. and E.U. customs rulings are not controlling” in anticircumvention proceedings, “as the two determinations are made for different reasons and under different laws”); *I&D Memo* at 6 (“Contrary to UKCG’s assertion, [Commerce] has indeed considered this information and taken the various rulings and actions into account in the instant determination.”) Commerce has provided ample reasoned explanations for its decision to not rely on the classification rulings.

Accordingly, the Court finds that Commerce’s determination that Plaintiff’s artificial graphite rods are “of the same class or kind” as the subject merchandise of the *AD Order*, satisfying 19 U.S.C. § 1677j(b)(1)(A), is supported by substantial evidence on the record and otherwise in accordance with law.

b. Completed in a Third Country

The second statutory consideration is whether imported merchandise is completed or assembled in a third country from merchandise which is either subject to the order or is produced in the country to which the order applies. 19 U.S.C. § 1677j(b)(1)(B). Commerce “made an affirmative determination as to both” of the statutory criteria—(i) being subject to an order¹⁰ or (ii) being produced in the foreign country with respect to which such order of finding applies—even though only one needs to be satisfied. Def.’s Opp’n at 17; *see also* 19 U.S.C. § 1677j(b)(1)(B); *Final Determination*, 77 Fed. Reg. at 47,598.

Plaintiff asserts that subsection (ii) was not considered in the underlying administrative proceeding. Pl.’s Reply Br. in Supp. of Its Mot. for J. on the Agency Record (“Pl.’s Reply”) at 5 (“Commerce is not compelled to utilize both (i) and (ii) but instead may utilize either provision. . . . [it] did so here by analyzing (i). . . . [n]ever once did it analyze or mention (ii).”)

A review of the record does not support Plaintiff’s assertion. In the *I&D Memo*, Commerce stated:

the fact that UKCG’s artificial graphite rod/unfinished SDGE component inputs—the sole input utilized by UKCG in the production of finished SDGE subject to this inquiry—are produced in [China] has never been contested on the record of this proceeding nor is this fact disputed for this final determination. . . . in this case, there is no dispute that the input

in question is produced in the country subject to the AD order. *I&D Memo* at 7. Commerce’s conclusion is supported on the record. It is sufficient that Commerce reached a conclusion pursuant to subsection (ii), that UKCG’s inputs were produced in China, a country to which the AD Order applied. Commerce, however, went further and analyzed the scope language of the *AD Order*, the petition and the ITC Report to determine if Plaintiff’s inputs were subject to order

¹⁰ Even though “Commerce rarely conducts a scope analysis [under] subsection (b)(1)(B)(i) in anticircumvention proceedings,” in this case, Commerce “concluded also that the China-sourced artificial graphite rods are ‘subject to’, *i.e.*, ‘specifically covered’ under the scope of the *SDGE Order*.” Def.’s Opp’n at 18 (*citing I&D Memo* at 3–7).

pursuant to subsection (i). *I&D Memo* at 6–7. Commerce found that the plain language of the scope order includes UKCG’s inputs where it indicates “small diameter graphite electrodes, whether or not finished.” *AD Order*, 74 Fed. Reg. at 8,775; ITC Report at I-9; *I&D Memo* at 5.

Thus, the Court finds that both of Commerce’s determinations—that Plaintiff’s artificial graphite rods are produced from input materials covered under the scope of the *AD Order* and that Plaintiff’s exports are finished from inputs produced in China—satisfy 19 U.S.C. § 1677j(b)(1)(B), are supported by substantial evidence on the record, and are otherwise in accordance with law.

c. Minor or Insignificant Completion

The third statutory consideration is whether the process of “assembly or completion” in the foreign country, in this case the U.K., is “minor or insignificant.” 19 U.S.C. § 1677j(b)(1)(C). The statute provides five factors to consider when conducting a “minor or insignificant” analysis:

- (A) the level of investment in the foreign country,**
- (B) the level of research and development in the foreign country,**
- (C) the nature of the production process in the foreign country,**
- (D) the extent of production facilities in the foreign country, and**
- (E) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States.**

19 U.S.C. § 1677j(b)(2). None of the five factors is dispositive. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, at 893 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4216 (“SAA”). Commerce is to evaluate the factors “depending on the particular circumvention scenario” on a case-by-case basis. *Id.*

In its underlying determination, Commerce compared in each country the level of investment, “both in initial capital and equipment,” the production facilities, the processes performed, and the number of production employees in each country (China and the U.K.). *Preliminary Determination*, 77 Fed. Reg. at 33,412. Commerce found that research and development (“R&D”) is not a significant factor in this case, because Plaintiff did not provide “any substantial evidence of R&D programs or expenditures.” *Id.*

Regarding the value-added factor, Commerce found that “aside from the cost of labor and energy, UKCG did not consume or impart

any additional direct material inputs to produce the finished SDGE” and found that “the value of the energy and labor consumed by UKCG in the production of the finished SDGE” is insignificant. *Id.* at 33,313. Commerce weighed all the factors and found that “the nature of the production process and extent of the production facilities in the U.K. are minor in comparison to those utilized in [China] for the production of the unfinished [SDGE] components sourced from [China],” explaining that Chinese producers “have invested extensively in the SDGE industry, which includes significant investment in both manufacturing facilities and production equipment worth millions of dollars, the bulk of which goes to the heavy industrial processes required for the production of SDGE. . . . which occur[s] prior to the final machining stage.” *Id.*

In the instant action Plaintiff only challenges subsection (E), the value-added factor. Pl.’s Mot. at 32–38; Pl.’s Reply at 20. The Court notes that the five factors are to be separately taken into consideration, as appropriate, and their totality weighed. Commerce “performed a qualitative and quantitative value-added analysis” pursuant to 19 U.S.C. § 1677j(b) and “found that they both supported the conclusion that the value of the processing performed in the U.K. represents a ‘small proportion’ of the value of the merchandise imported into the United States.” Def.’s Opp’n at 33 (*citing I&D Memo* at 10, *Preliminary Determination*, 77 Fed. Reg. at 33,413); *see also* SAA at 894.

Examining the breakdown of the production process for SDGE placed on the record by Defendant-Intervenors, all but five minutes of the production process that takes a substantial number of days is done in China. *Verification* at 15. Given the information on the record—breakdown of the production process, facility and employee number comparison, and relative gross value amounts—the Court cannot say that Commerce’s conclusion that UKCG’s finishing touches are minor or insignificant is unreasonable, arbitrary or capricious.

Upon review of the SDGE manufacturing process, the detailed information presented by Petitioners, and Commerce’s weighing of all the factors with the information placed on the record, the Court finds that Commerce’s determination that the manufacturing completed in the U.K.—five minutes of finishing—is minor or insignificant, satisfying 19 U.S.C. § 1677j(b)(1)(C) and § 1677j(b)(2), is supported by substantial evidence on the record and otherwise in accordance with law.

d. Value of Merchandise

The fourth statutory consideration is whether the value of the merchandise produced in the foreign country to which the antidumping duty order applies—here, China—is a significant portion of the total value of the merchandise exported to the U.S. 19 U.S.C. § 1677j(b)(1)(D). The statute is silent, however, about the definition of “value” in the context of a NME in the circumvention provisions. *See* 19 U.S.C. § 1677j; Def.’s Opp’n at 38. It is well-established that where a statute is silent, an agency may fill in the gap and courts must defer to that interpretation as long as it is “based upon a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

Commerce, faced with the need to evaluate value in a NME, chose to apply the surrogate value methodology used in other antidumping proceedings to arrive at an accurate valuation of UKCG’s inputs, explaining that “the same concerns about the reliability of NME prices that underlie its normal valuation calculation also underlie its analysis of circumvention of an order imposed upon NME-origin merchandise.” Def.’s Opp’n at 39 (*citing I&D Memo* at 8). Determining that “the actual prices that UKCG paid for its Chinese-sourced artificial graphite rods are ‘inherently unreliable’” as products of a NME, Commerce chose to use surrogate values from the Ukraine. Def.’s Opp’n at 37 (*citing I&D Memo* at 8). Commerce used Ukrainian surrogate values for artificial graphite rods in calculating “the value of the merchandise produced in [China] to which the [*SDGE Order*] applies.” *Id.* In doing so, Commerce rejected Plaintiff’s contention that the proper method for a value-added analysis was to examine the difference between the input price and the U.S. sales price. *Id.* at 35–36.

The Court defers to Commerce’s decision to use a surrogate value methodology in determining the value of inputs from a NME country in an anticircumvention inquiry, because it is a reasonable construction of the statute. Upon review, the Court finds that Commerce’s determination that the value of the merchandise produced in China was a significant portion of the total value of the merchandise exported to the U.S., satisfying 19 U.S.C. § 1677j(b)(1)(D), is supported by substantial evidence on the record and otherwise in accordance with law.

e. Other Factors

The circumvention statute also lists other factors to consider in determining whether to include merchandise assembled or completed

in a foreign country in an antidumping duty order. 19 U.S.C. § 1677j(b)(3). These factors include pattern of trade, company affiliations, and import increases. *Id.* These (b)(3) factors are not at issue in this case, because UKCG does not challenge Commerce’s consideration of them. *See* Def.’s Opp’n at 16 n.5; *see generally* Pl.’s Mot.

3. Other Issues

a. Deposit Rate

Plaintiff challenges Commerce’s decision to apply the China-wide cash-deposit rate to its exports to the U.S., claiming this decision is simultaneously punitive and erroneous, and requests relief in the form of a separate rate. *See* Pl.’s Mot. at 38–40. Because it is “not under the control of any governmental entity of China,” Plaintiff urges that if a rate is to be applied at all, it is “entitled to the current separate rate.” *Id.* at 38. Further, Plaintiff argues that it “has done everything in its power to provide information to [Commerce] to avoid being placed in the punitive China-wide category.” *Id.* at 39. Plaintiff explains that it already attempted to obtain a separate rate but its “application became moot when [Commerce] determined that UKCG did not have reviewable entries for that review.” *Id.* Commerce points out that Plaintiff may “request an administrative review of its exports” so that Commerce may “determine the final dumping liability through the standard administrative process.” Def.’s Opp’n at 48 (*quoting I&D Memo* at 15).

In the meantime, in accordance with its past practice in circumvention cases, Commerce found it “appropriate to instruct [CBP] to collect a cash deposit at the [China]-wide rate, consistent with [Commerce’s] standard practice to assign the [China] wide rate to non-reviewed exporters.” *I&D Memo* at 15. Commerce also notes that it has “made no final determination of dumping with respect to UKCG.” Def.’s Opp’n at 48 (*citing I&D Memo* at 15, *Final Determination*, 77 Fed. Reg. at 47,600).

The Court finds that Commerce’s determination to apply a China-wide rate as a cash deposit to UKCG is supported by substantial evidence on the record and otherwise in accordance with law. To the extent that UKCG seeks a remedy regarding the cash deposit rate that it has not yet sought through normal administrative channels, the Court declines to grant relief due to the failure to exhaust administrative remedies. *See* 28 U.S.C. § 2637(d).

b. Remaining Issues

The Court has considered the remaining arguments and found them to be either subsumed into the analysis above or without merit.

CONCLUSION

As a result of the considerations detailed above, the Court holds that Commerce based its circumvention determination on substantial evidence on the administrative record and acted in accordance with law. Consequently, it is hereby

ORDERED that *Small Diameter Graphite Electrodes From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 77 Fed. Reg. 47,596 (Aug. 9, 2012) is sustained; and it is further

ORDERED that Plaintiff's motion for judgment on the agency record is denied; and it is further

ORDERED that the stay entered by the Court on Plaintiff's motion for oral

argument (ECF No. 51) is hereby lifted; and it is further

ORDERED that Plaintiff's motion for oral argument (ECF No. 50) is hereby denied. Judgment to enter accordingly.

Dated: August 29, 2013

New York, New York

/s/ Gregory W. Carman

GREGORY W. CARMAN, JUDGE