

# U.S. Court of International Trade

Slip Op. 18–88

ATC TIRES PRIVATE LTD. and ALLIANCE TIRE AMERICAS, INC., Plaintiffs, v.  
UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge  
Court No. 17–00063  
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce’s amended final determination following an antidumping duty investigation of certain new pneumatic off-the-road tires from India.]

Dated: July 16, 2018

*Eric C. Emerson* and *Judith C. Schachter*, Steptoe & Johnson LLP, of Washington, D.C., argued for Plaintiffs ATC Tires Private Ltd. and Alliance Tire Americas, Inc. With them on the brief was *Christopher G. Falcone*.

*John J. Todor*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With him on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel were *Reza Karamloo* and *Brandon J. Custard*, Attorneys, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

## OPINION

### Choe-Groves, Judge:

This case reviews an amended final determination involving pneumatic off-the-road tires from India. Plaintiffs ATC Tires Private Ltd. (“ATC”) and Alliance Tire Americas, Inc. (collectively, “Plaintiffs”) bring this action contesting the amended final determination in an antidumping duty investigation, in which the U.S. Department of Commerce (“Commerce” or “Department”) found that certain new pneumatic off-the-road tires from India are being, or are likely to be, sold in the United States at less-than-fair value. *See Certain New Pneumatic Off-the-Road Tires From India*, 82 Fed. Reg. 9,056 (Dep’t Commerce Feb. 2, 2017) (affirmative amended final determination of sales at less than fair value and final negative determination of critical circumstances) (“*Amended Final Determination*”). This matter is before the court on Plaintiffs’ Rule 56.2 motion for judgment on the agency record challenging various aspects of the Department’s amended final determination. *See* Pls.’ Rule 56.2 Mot. J. Agency R.,

Sept. 12, 2017, ECF No. 34 (“Pls.’ Mot.”); *see also* ATC Tires Private Ltd.’s & Alliance Tire Americas, Inc.’s Mem. P. & A. Supp. Mot. J. Agency R., Sept. 12, 2017, ECF No. 34 (“Pls.’ Mem.”). Plaintiffs argue that Commerce’s decision to treat certain ATC home market sales as not outside the ordinary course of trade, and thus include them in its dumping margin calculations, was unsupported by substantial evidence. Plaintiffs also contend that Commerce’s decision to amend the final determination was not in accordance with the law. For the reasons discussed below, the court concludes that (1) Commerce’s decision to consider ATC’s sales as not outside the ordinary course of trade is supported by substantial evidence, and (2) Commerce’s decision to amend the final determination was in accordance with the law.

### PROCEDURAL HISTORY

Commerce commenced an investigation of certain new pneumatic off-the-road tires from India on February 4, 2016 at the request of Titan Tire Corporation and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (collectively, “Petitioners”). *See Certain New Pneumatic Off-the-Road Tires From India and the People’s Republic of China*, 81 Fed. Reg. 7,073 (Dep’t Commerce Feb. 10, 2016) (initiation of less-than-fair-value investigations) (“*Initiation Notice*”); *see also* Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Certain New Pneumatic Off-the-Road Tires from India at 1, A-533–869, (Aug. 11, 2016), *available at* <https://enforcement.trade.gov/frn/summary/india/2016-19867-1.pdf> (last visited July 9, 2018) (“Prelim. IDM”). The period of review was January 1, 2015 to December 31, 2015. *See Initiation Notice*, 81 Fed. Reg. at 7,074. Commerce found it impractical to examine all producers and exporters, and opted to examine companies accounting for the largest volume of subject merchandise from India during the investigation period. *See id.* at 7,078; *see also* Prelim. IDM at 2. Commerce chose ATC as one of the selected companies upon request. *See* Prelim. IDM at 2.

Commerce published its preliminary results on August 19, 2016. *See Certain New Pneumatic Off-the-Road Tires From India*, 81 Fed. Reg. 55,431 (Dep’t Commerce Aug. 19, 2016) (negative preliminary determination of sales at less than fair value and postponement of final determination). The Department determined preliminarily that certain new pneumatic off-the-road tires from India were not being, nor likely to be, sold at less-than-fair-value. *See id.* at 55,432; *see also* Prelim. IDM at 1. Commerce conducted subsequent cost and sales

verifications for ATC. *See* Certain New Pneumatic Off-the-Road Tires from India: Issues and Decision Memorandum for the Final Negative Determination of Sales at Less-Than-Fair-Value at 3, A533–869, (Jan. 3, 2017), *available at* <https://enforcement.trade.gov/frn/summary/india/201700869-1.pdf> (last visited July 9, 2018) (“Final IDM”). Petitioners and ATC submitted administrative case briefs in response to the preliminary determination, and Commerce held a closed hearing. *See id.*

Commerce issued its final determination on January 17, 2017, confirming a negative determination of sales at less-than-fair-value. *See Certain New Pneumatic Off-the-Road Tires From India*, 82 Fed. Reg. 4,848, 4,849 (Dep’t Commerce Jan. 17, 2017) (final negative determination of sales at less than fair value and final determination of critical circumstances); *see also* Final IDM at 1. Petitioners submitted ministerial error allegations on January 10, 2017. *See* Petitioners’ Ministerial Error Comments regarding ATC, PD 451, bar code 3535460–01 (Jan. 10, 2017). The allegations contested errors related to Commerce’s application of partial adverse facts available to ATC based on unreported U.S. sample sales. *See id.* at 1–2. Commerce found that Petitioners’ allegations challenged the Department’s methodological decisions and did not constitute ministerial errors. *See* Memorandum from Abdelali Elouaradia re Less-Than-Fair-Value Investigation on Certain New Pneumatic Off-the-Road Tires from India: Allegation of Ministerial Errors in the Final Determination at 1–2, 4, PD 454, bar code 3539435–01 (Jan. 26, 2017). While examining the alleged errors, Commerce discovered additional errors regarding ATC’s freight expenses, home market credit expenses, and U.S. indirect selling expenses. *See id.* at 2. Commerce issued a subsequent amended final determination, in which it made an affirmative determination of sales at less-than-fair-value and assigned ATC a final weighted-average dumping margin of 3.67 percent. *See Amended Final Determination*, 82 Fed. Reg. at 9,058.

ATC submitted ministerial error comments regarding the amended determination, taking issue with Commerce’s decision to address the additional alleged ministerial errors that were not raised by Petitioners. *See* ATC Tires Private Limited’s Ministerial Error Comments at 2, PD 458, bar code 3540887–01 (Feb. 3, 2017). Commerce stated that the comments did not contest ministerial errors, but rather alleged mistakes regarding the Department’s chosen methodology, and thus a correction was not proper. *See* Memorandum from Trisha Tran re Allegation of Ministerial Errors in the Affirmative Amended Final Determination at 3–4, PD 468, bar code 3548095–01 (Mar. 2, 2017).

Plaintiffs commenced this action contesting Commerce's amended final determination on April 5, 2017, ECF No. 1, and filed its complaint on May 5, 2017, ECF No. 10. Plaintiffs filed a Rule 56.2 motion for judgment on the agency record and supporting brief. *See* Pls.' Mot.; Pls.' Mem. Defendant submitted a response to Plaintiffs' motion, urging the court to uphold Commerce's determination. *See* Def.'s Resp. Pls.' Mot. J. Agency R., Dec. 12, 2017, ECF No. 37. Plaintiffs filed a timely reply. *See* Reply Br. Pls. ATC Tires Private Ltd. & Alliance Tire Americas, Inc., Feb. 12, 2018, ECF No. 40 ("Pls.' Reply"). The court held oral argument on June 6, 2018. *See* Closed Oral Argument, June 6, 2018, ECF No. 49.

### ISSUES PRESENTED

The court reviews the following two issues in this case:

1. Whether Commerce's consideration of certain home market sales as not outside the ordinary course of trade was unsupported by substantial evidence; and
2. Whether Commerce's decision to amend its final determination was contrary to law.

### JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an antidumping duty investigation. The court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

### ANALYSIS

#### **I. Commerce's Decision to Treat Certain of ATC's Home Market Sales as Not Outside the Ordinary Course of Trade**

The Tariff Act of 1930, as amended, directs Commerce to conduct antidumping duty investigations and determine whether goods are being, or are likely to be, sold at less-than-fair value in the United States. *See* 19 U.S.C. § 1673. If Commerce finds that subject merchandise is being, or likely to be, sold at less-than-fair value, and if the U.S. International Trade Commission finds that these less-than-

fair value imports materially injure or threaten to materially injure a domestic industry, Commerce issues an antidumping duty order imposing antidumping duties equivalent to “the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” *Id.* Normal value is “the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and *in the ordinary course of trade* and, to the extent practicable, at the same level of trade as the export price or constructed export price . . .” *Id.* § 1677b(a)(1)(B)(i) (emphasis added).

Commerce must exclude home market sales that fall outside the ordinary course of trade. *See id.* The statute’s purpose is to “avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.” *See* Statement of Administrative Action Accompanying Uruguay Round Agreements Act, H.R. Doc. 103–316, at 834 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4171 (1994) (“SAA”). “Ordinary course of trade” is defined as the “conditions and practices which, for a reasonable time prior to the exportation of subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” 19 U.S.C. § 1677(15). Commerce may deem sales outside the ordinary course of trade if they “have characteristics that are extraordinary for the market in question.” 19 C.F.R. § 351.102(b)(35); *see also NSK Ltd. v. United States*, 25 CIT 583, 599, 170 F. Supp. 2d 1280, 1296 (2001). Determining whether certain sales are outside the ordinary course of trade is a question of fact and must focus on the totality of the circumstances surrounding home market sales. *See NSK Ltd.*, 25 CIT at 600, 170 F. Supp. 2d at 1296. Such factors include, but are not limited to, aberrational prices, abnormally high profits, unusual terms of sale, or unusual product specifications. *See* 19 C.F.R. § 351.102(b)(35); SAA at 834.

Plaintiffs argue that Commerce’s repeated focus on how the products sold did not demonstrate unique characteristics and Commerce’s conclusion that the sales were not outside the ordinary course of trade were erroneous. *See* Pls.’ Mem. 12–13. Although Commerce found repeatedly that there was “no evidence suggesting that the specifications or physical characteristics of this particular merchandise is somehow unique from the other types of tires sold in India,” *see* Final IDM at 30, the administrative record demonstrates that Commerce also considered other factors in accordance with 19 C.F.R. § 351.102(b)(35). Commerce found, for example, that “quantities of ATC’s sales fall within the range of its home market customers and

were sold in commercial quantities.” Final IDM at 32 (footnote omitted). Commerce did not find unusual terms of sale because “[r]ecord evidence shows that ATC renegotiated the price of the tires when the sales shifted to India.” *Id.* at 33 (footnote omitted). Commerce found high levels of profitability, but explained that “high levels of profitability alone, for sales of merchandise in the home market, are not enough to establish that the sales are outside the ordinary course of trade.” *Id.* at 31 (footnote omitted). Despite high levels of profitability, the overall record evidence supports Commerce’s conclusion that ATC’s home market sales were within the ordinary course of trade.

Plaintiffs disagree with Commerce’s failure to find unusual terms of sale based on the record evidence, arguing that ATC did not renegotiate the prices when the point of delivery for the sales was changed from the [[ ]]. *See* Pls.’ Mem. 13–17. Although the price changed, Plaintiffs contend that the new price essentially represents [[ ]]. *See id.* at 14–15. Plaintiffs assert that Commerce acted contrary to its statutory obligation when it included these sales because Commerce compared United States sales to [[ ]], as opposed to sales to India, the market in question in the antidumping duty investigation. *See id.* at 15. The record demonstrates that Commerce reasonably relied on evidence that ATC and its customer [[ ]]. *See* Exhibit B-17, ATC Tires Private Limited’s Response to Sections B through D of the Department’s Questionnaire, CD 185, bar code 3462627–16 (Apr. 21, 2016); *see also* Memorandum from Trisha Tran re Analysis of the Final Negative Determination Margin Calculation for ATC Tires Private Limited at 6, CD 1019, bar code 3534456–01 (Jan. 3, 2017). It was reasonable for Commerce to determine that the shift of delivery locale from the [[ ]], and the ensuing change in price, constituted a renegotiation of sales terms. The court concludes that Commerce’s determination is supported by the record evidence.

Plaintiffs assert that the Department failed to give appropriate weight to the small quantity and limited nature of the sales. *See* Pls.’ Mem. 17–19. Commerce recognized that “it is not unusual *per se* for a respondent to make a small percentage of sales to a single customer.” Final IDM at 31. The Department determined that the limited quantity sold was not unusual, but rather fell “within the range of its home market customers and were sold in commercial quantities.” *Id.* at 32 (footnote omitted). Plaintiffs conceded in their briefing that the specifications of the products sold in these sales were similar to other tires sold by ATC, and continued to rely on the circumstances to contend that the sales were unique and outside the ordinary course

of trade. *See* Pls.' Mem. 18. The court determines that Commerce's characterization of the sales as not unusual is supported by substantial evidence.

The court concludes that Commerce sufficiently considered the record evidence and reasonably determined that ATC's sales were within the ordinary course of trade, and upholds Commerce's decision on this issue.

## II. Commerce's Decision to Amend the Final Determination

19 U.S.C. § 1675(h) requires that Commerce establish a process to address ministerial errors in antidumping and countervailing duty investigations. Commerce follows specific procedures to correct ministerial errors, as enumerated in its regulation. *See* 19 C.F.R. § 351.224(a). The definition of "ministerial error" is "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f). An alleged error that is the result of a methodological decision by the Department is not a ministerial error. *See QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1328 (Fed. Cir. 2011) (concluding that Plaintiff's argument was "methodological in nature" and thus did not meet the statutory definition of ministerial error).

Generally, "Commerce has an overriding obligation to calculate antidumping duty margins as accurately as possible." *Husteel Co. v. United States*, 39 CIT \_\_, \_\_, 77 F. Supp. 3d 1286, 1300 (2015); *see also Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The Court of Appeals for the Federal Circuit has recognized, furthermore, that "there is a strong interest in the finality of Commerce's decisions." *Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292 (Fed. Cir. 2003) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1998)). In directing Commerce to establish a procedure for ministerial errors by statute, "Congress established an exception to the general principle of finality." *Husteel Co.*, 39 CIT at \_\_, 77 F. Supp. 3d at 1300. "A tension may arise between finality and the correct result in some instances," contingent on the timing of the attempted correction. *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006). This Court has "a responsibility to 'exercise its discretion to prevent knowingly affirming a determination with errors.'" *Hyundai Elecs. Indus. Co., Ltd. v. United States*, 29 CIT 981, 993, 395 F. Supp. 2d 1231, 1243 (2005) (quoting *Torrington Co. v. United States*, 21 CIT 1079, 1082 (1997)).

Plaintiffs argue that the Department's decision to amend the final determination *sua sponte* goes against the principle of finality. See Pls.' Mem. 21–25. Plaintiffs attempt to distinguish a line of cases in which the courts have recognized Commerce's broad authority to correct ministerial errors by labeling the statements as dicta, and asks the court to limit the application of these cases to situations in which a party has previously identified ministerial errors to Commerce but did so in an untimely or procedurally-defective manner. See *id.* at 23–25. The court is not persuaded by Plaintiffs' argument. The Court of Appeals for the Federal Circuit has stated that both 19 U.S.C. § 1675(h) and 19 C.F.R. § 351.224 “clearly permit the *sua sponte* correction of a ministerial error by Commerce whether or not a party has requested correction within the period specified in the regulations.” *Am. Signature, Inc. v. United States*, 598 F.3d 816, 826 (Fed. Cir. 2010). The Department's authority to correct errors *sua sponte* is limited to the statutory timeframe for judicial review. “On its face the preamble to the regulation contemplates that corrections will be made before Commerce's final determination becomes final, i.e., before the time for judicial review has expired,” which is typically thirty days after the final determination is published in the Federal Register. *Id.* Here, Commerce published its final negative determination on January 17, 2017, and published an amended affirmative determination on February 2, 2017. Because less than thirty days elapsed between the publications of the two notices, the court need not consider the principle of finality. The court concludes that Commerce properly exercised its authority to correct ministerial errors *sua sponte* in the final determination and acted in accordance with the law.

Plaintiffs contend further that, even if Commerce has the authority to amend the final determination *sua sponte*, the Department's action here is arbitrary and capricious because it failed to offer sufficient reasons for treating similar situations differently. See Pls.' Mem. 25–27; Pls.' Reply 14 (“If Commerce is given discretion to pick and choose which errors to correct, any objective application of the law with respect to late-identified errors will be at an end and Commerce will be free to choose when to correct such errors based purely on political interests.”). The court finds Plaintiffs' allegations of *ex parte* communications, see Pls.' Mem. 20 n.8, or political interests with respect to the amended final determination to be baseless and merely speculative. See, e.g., *Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1103, 901 F. Supp. 353, 361 (1995) (concluding that

party's allegation that Commerce's correction of ministerial error was due to political pressure was "only speculation" and unsupported by evidence).

The record explains, furthermore, why Commerce decided to amend the final determination here. *See* Memorandum from Trisha Tran re Allegation of Ministerial Errors in the Affirmative Amended Final Determination at 3, PD 468, bar code 3548095-01 (Mar. 2, 2017) ("While analyzing Petitioners' ministerial comments, the Department discovered that it made other inadvertent errors in its calculations with respect to ATC."). When Commerce conducted its verification in this investigation, ATC submitted a revised sales database. *See* Memorandum from Abdelali Elouaradia re Less-Than-Fair-Value Investigation on Certain New Pneumatic Off-the-Road Tires from India: Allegation of Ministerial Errors in the Final Determination at 4, PD 454, bar code 3539435-01 (Jan. 26, 2017). Commerce "inadvertently omitted two additional freight expense fields" from this submission. *Id.* The omission of information from the revised sales database also affected Commerce's calculation of home market credit expenses. *See id.* at 4-5. The change to U.S. indirect selling expenses is related to Commerce's application of partial adverse facts available to ATC's unreported sample U.S. sales. *See id.* at 5. The court concludes that Commerce's decision to amend the final determination was in accordance with the law.

## CONCLUSION

For the aforementioned reasons, the court concludes that:

1. Commerce's consideration of certain home market sales as within the ordinary course of trade was supported by substantial evidence; and
2. Commerce's decision to amend its final determination was in accordance with the law.

The court affirms Commerce's determination in full. Plaintiffs' Rule 56.2 motion for judgment on the agency record is denied.

Judgment will be entered accordingly.

Dated: July 16, 2018

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 18–91

SWIMWAYS CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 13–00216

[Determining, upon cross motions for summary judgment, the tariff classification of certain swimming pool floats]

Dated: July 23, 2018

*James R. Cannon, Jr.*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for plaintiff Swimways Corporation. With him on the brief were *Jonathan M. Zielinski* and *Heather K. Pinnock*.

*Jamie L. Shookman*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.

**OPINION****Stanceu, Chief Judge:**

Plaintiff Swimways Corporation (“Swimways”) commenced this action to contest the denial of its administrative protests by U.S. Customs and Border Protection (“Customs”). Swimways claims that Customs erred in its determination of the tariff classification of merchandise it imported consisting of various models of “Spring Floats” and “Baby Spring Floats” designed for the flotation of users (adults, children, and infants) in swimming pools, lakes, and similar bodies of water.

Before the court are cross-motions for summary judgment. Concluding that there are no genuine issues of material fact, the court awards partial summary judgment in favor of Swimways.

**I. BACKGROUND**

Swimways made various entries of the merchandise at issue in this action between February 2009 and January 2012 at the port of Norfolk-Newport News in Virginia. Summons (June 3, 2013), ECF No. 1. In a series of five protests, Swimways contested the determination of tariff classification made upon liquidation by Customs for the merchandise in dispute.<sup>1</sup> *Id.*

Upon plaintiff’s application for further review, Customs issued a headquarters ruling and, on that basis, denied each of plaintiff’s

<sup>1</sup> The five protests involved in this action were filed with the port of Norfolk-Newport News during the period of June 8, 2010 through December 21, 2012. *See* Summons (June 3, 2013), ECF No. 1.

protests.<sup>2</sup> See HQ Ruling No. H145739 (Nov. 16, 2012), *available at* <https://rulings.cbp.gov/ruling/H145739> (last visited July 18, 2018) (“HQ Ruling”).

Swimways initiated this action to contest the denial of its administrative protests on June 3, 2013, Summons, and on June 20, 2013 filed its complaint, Compl. (June 20, 2013), ECF No. 6. Swimways moved for summary judgment on February 6, 2017. Pl.’s Mot. for Summ. J. (Feb. 6, 2017), ECF No. 47; *see also* Pl.’s Mem. in Supp. of Mot. for Summ. J. (Feb. 6, 2017), ECF No. 48 (“Pl.’s Mem.”). The United States cross-moved for summary judgment on May 12, 2017. Def.’s Cross Mot. for Summ. J. (May 12, 2017), ECF Nos. 57 (conf.), 58 (public); *see also* Mem. in Opp. to Pl.’s Mot. for Summ. J. and in Supp. of Def.’s Cross-Mot. for Summ. J. (May 12, 2017), ECF Nos. 57 (conf.), 58 (public) (“Def.’s Mem.”). On June 20, 2017,

Swimways filed a response to defendant’s cross-motion for summary judgment and its reply in support of its own motion. Pl.’s Mem. in Opp’n to Def.’s Cross-Mot. for Summ. J. and Reply Mem. in Supp. of Pl.’s Mot. for Summ. J. (June 20, 2017), ECF Nos. 60 (conf.), 61 (public) (“Pl.’s Resp.”). On July 24, 2017, defendant filed a reply in support of its cross-motion for summary judgment. Reply Mem. of Law in Further Supp. of Def.’s Mot. for Summ. J. (July 24, 2017), ECF Nos. 66 (conf.), 65 (public) (“Def.’s Resp.”).

## II. DISCUSSION

### A. Subject Matter Jurisdiction

The court exercises jurisdiction over this action according to 28 U.S.C. § 1581(a) (2006),<sup>3</sup> which provides that the Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest under section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515.<sup>4</sup>

<sup>2</sup> Protest numbers 1401–11–100257, 1401–12–100333, 1401–11–100410, and 1401–10–100160 were denied on December 7, 2012, while the remaining protest, protest number 1401–12–100522 was denied on January 15, 2013. *See* Summons.

<sup>3</sup> All citations to the United States Code herein are to the 2006 edition.

<sup>4</sup> The court is unable to exercise jurisdiction over all of the 143 entries involved in the five protests listed on the summons. The parties agree that the cause of action as to 67 entries should be dismissed. *See* Pl.’s Amendment to its June 19, 2017 Opp’n to Def.’s Cross-Mot. for Summ. J. 1–2 (July 18, 2017), ECF No. 64; Reply Mem. of Law in Further Supp. of Def.’s Mot. for Summ. J. 5–6 (July 24, 2017), ECF Nos. 66 (conf.), 65 (public). Specifically, the parties agree that 10 entries were protested more than 180 days after liquidation, *see* 19 U.S.C. § 1514(c)(3)(A) (requiring a protest be filed within 180 days after date of liquidation), and that 65 entries did not contain merchandise that is the subject of plaintiff’s tariff classification claims in the complaint. Eight of the ten entries that were protested more than 180 days after liquidation also did not contain any merchandise at issue. Therefore, the judgment issued by the court will effect dismissal as to these 67 entries (i.e., the 10 entries that were protested in an untimely manner plus the 65 entries that did not contain

### *B. Scope and Standard of Review*

Actions to contest the denial of a protest are adjudicated *de novo*. See 28 U.S.C. § 2640(a)(1) (directing the Court of International Trade to “make its determinations upon the basis of the record made before the court”).

### *C. Awards of Summary Judgment*

The court will award summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT Rule 56(a). In a tariff classification dispute, “summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Nissho Iwai Am. Corp. v. United States*, 143 F.3d 1470, 1472–73 (Fed. Cir. 1998)). In ruling on a motion for summary judgment, the court credits the non-moving party’s evidence and draws all inferences in that party’s favor. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). A genuine factual dispute is one potentially affecting the outcome under the governing law. *Anderson*, 477 U.S. at 248.

### *D. Description of the Merchandise at Issue*

The facts set forth below, as obtained from the submissions of the parties, are undisputed, except where otherwise noted. See Pl.’s Rule 56.3 Statement of Material Facts to Which There is no Genuine Dispute (Feb. 6, 2017), ECF No. 48–1; Def.’s Resp. to Pl.’s Rule 56.3 Statement of Material Facts to Which There is no Genuine Dispute (May 12, 2017), ECF Nos. 57–1 (conf.), 58–1 (public); see also Def.’s Statement of Additional Undisputed Material Facts (May 12, 2017), ECF Nos. 57–2 (conf.), 58–2 (public); Pl.’s Resp. to Def.’s Statement of Additional Undisputed Material Facts (June 20, 2017), ECF Nos. 60–1 (conf.), 61–1 (public). The court also has examined submitted physical samples of three models and printed images.<sup>5</sup>

The imported merchandise at issue consists of nine models from the Swimways “Spring Float” product line and three models from the Swimways “Baby Spring Float” product line.

merchandise at issue, less the eight entries that were both untimely protested and that contained no merchandise at issue). The court, therefore, adjudicates this case on the merits with respect to the remaining 76 entries.

<sup>5</sup> Two of the three physical samples were submitted in bags that, in addition to functioning as retail packaging, also aid in transporting and storing the float. These bags are made from clear plastic, net fabric, a zipper, and a fabric strap. The bags do not affect the classification determination and are classified along with the floats pursuant to General Rule of Interpretation (“GRI”) 5 of the Harmonized Tariff Schedule of the United States (“HTSUS”).

### *1. The “Spring Float” Product Line*

At issue are nine Spring Float models designed for adults and children. Three models of the Spring Float are oval-shaped in outer dimension and are 66 inches long and 40 inches wide. Each contains an inflatable, polyvinyl chloride (“PVC”) bladder that, when inflated with air, provides flotation for the article. The bladder is surrounded by a flexible steel rod (referred to as a “spring”) that has been encased in polypropylene tubing. The spring allows the deflated float to be folded neatly for storage and transportation and to ‘spring’ into position when unfolded. A second, smaller PVC bladder at one end of the float serves as a pillow for the user when inflated. The inflatable bladders and the polypropylene-encased spring, which form the oval-shaped perimeter of the float, are wrapped completely in woven polyester fabric. A woven elastomer mesh is stretched flat across the oval-shaped center of the float. The mesh supports the user during flotation while also allowing water to flow through the mesh and around the user. The three models (the basic “Spring Float,” the “Cool Hawaii Spring Float,” and the “Photo Prints Spring Float”) are identical in shape, composition, and construction, differing only in that the latter two models have designs printed onto the textile elements whereas the basic model is manufactured using textiles that are in solid colors.

The fourth model, the “Spring Float Beach Party with Canopy,” has the same shape, construction, and dimensions as the Spring Floats described above but also includes a detachable sunshade (also referred to as a “canopy”) that can be attached to the float near the pillow. The canopy is made primarily from woven polyester fabric and woven elastomer mesh.

Fifth, the Spring Float “Papasan” is roughly circular in shape and is approximately 36 inches in diameter. Like the models described previously, the Papasan has an inflatable PVC bladder and polypropylene-encased steel spring, both covered in woven polyester fabric. The Papasan also has a woven elastomer mesh center, but rather than being sewn taut to the polyester fabric that encases the bladder and spring, it is fitted loose to allow the user to sit inside the float rather than on top of it.

Sixth, the Spring Float “SunSeat” is 37 inches by 38 inches. It also contains an inflatable PVC bladder and a spring, both wrapped in woven polyester fabric. At one end of the SunSeat is a second inflatable PVC bladder, also wrapped in woven polyester fabric, which functions as a backrest allowing the user to sit in an upright position.

An elastomer mesh panel is stretched flat across the square-shaped center of the float. The bladder at the perimeter of the SunSeat features a built-in cupholder.

Seventh, the Spring Float “Recliner” resembles an elongated SunSeat. The Recliner is 55 inches long and 37 inches wide. Like the other Spring Float models, the bladder is surrounded at the perimeter by a steel spring. Unlike the other Spring Float models, the Recliner has a bisecting inflatable tube as part of the principal bladder. The Recliner has a second inflatable bladder that functions as a backrest, allowing the user to sit in an upright position. The bladders and steel spring are encased in woven polyester fabric. A woven elastomer mesh fabric panel stretches across one of the two openings formed by the main inflatable bladder and up the backrest. The mesh forms a seat for the user. An open area in front of the mesh seat allows space for the user’s legs to be in the water. Finally, a cupholder is built into the main bladder.

The eighth model in the Spring Float series, the “Recliner with Canopy,” is the same as the Recliner but with the addition of an attachable canopy made principally from woven polyester fabric and woven elastomer mesh.

Finally, the “Spring Float Kid’s Boat” is a smaller-scale version of the standard Spring Float, 43 inches long and 29 inches wide. Like the other Spring Float models, the Kid’s Boat is composed of an oval PVC bladder, a steel spring encased in polypropylene tubing, woven polyester fabric covering the bladder and spring, and woven elastomer mesh, which on this model is stretched across the opening in the center of the oval. The Kid’s Boat does not have a separate bladder that functions as a pillow. Instead, the tubing of the Kid’s Boat widens at one end to form a pillow or backrest.

## *2. The “Baby Spring Float” Product Line*

Before the court are three models of “Baby Spring Floats.” The standard Baby Spring Float is oval in shape and approximately 34 inches in length and 30 inches in width. It contains two separate, oval-shaped inflatable PVC bladders, the outermost of which is surrounded by a steel spring encased in polypropylene tubing. Both bladders are covered in a woven polyester fabric that encloses the bladders and the spring. The two bladders are connected with polyester fabric and elastomer mesh. Attached to the center of the inner bladder is a “seat” made of woven elastomer mesh in the shape of a half-sphere with two leg holes. The mesh seat allows an infant to sit in the Baby Spring Float with the infant’s torso at water level. The

packaging for the sample Baby Spring Float states that the float is for the use of infants between the ages of 9 and 24 months.

The “Baby Spring Float Sun Canopy” is a basic Baby Spring Float that features an attachable canopy made principally from woven polyester fabric and woven elastomer mesh.

The “Baby Spring Float Activity Center” is the same as the Baby Spring Float Sun Canopy except that it is packaged with an inflatable, four-armed “octopus” with arms that hold a rattle, three stacking rings, a teether, and a soft-touch star.

### *E. Claims of the Parties*

Upon liquidation, Customs classified all of the floats at issue in subheading 6307.90.98 (“Other made up articles, including dress patterns: Other: Other”) of the Harmonized Tariff Schedule of the United States (“HTSUS”), subject to duty at 7% *ad val.*<sup>6</sup> Before the court, defendant claims that the floats were liquidated under the correct tariff provision.

Swimways claims that the nine Spring Float models should be classified in subheading 3926.90.75, HTSUS (“Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included”), subject to duty at 4.2% *ad val.*

Swimways claims that the three Baby Spring Float models should be classified in subheading 9506.29.00, HTSUS (“Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter...: Water skis, surf boards, sailboards and other water-sport equipment...: Other”), free of duty. In the alternative, Swimways claims that the Baby Spring Floats should be classified in the same provision as the Spring Floats, subheading 3926.90.75, HTSUS.

### *F. Tariff Classification under the HTSUS*

Tariff classification under the HTSUS is governed by the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation, both of which are part of the legal text of the HTSUS. The GRIs are applied in numerical order, beginning with GRI 1, which provides that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1, HTSUS. GRIs 2 through 5 apply “provided such headings or

<sup>6</sup> The relevant tariff provisions and duty rates of the HTSUS cited throughout this Opinion were unchanged over the period that the entries at issue were made.

notes do not otherwise require.” *Id.* Determination of the applicable subheading is governed by GRI 6, HTSUS.

GRI 2 states that “[a]ny reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances.” GRI 2(b), HTSUS. Moreover, “[a]ny reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance.” *Id.* GRI 2 further provides that “[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.” *Id.*

GRI 3 states that:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods . . . those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3, HTSUS.

In cases involving a disputed tariff classification, the court first considers whether “the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Plaintiff has the burden of showing the government’s determined classification to be incorrect. *Id.* at 876. If 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.” *Id.* at 878 (footnote omitted).

“Absent 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) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). In interpreting the HTSUS, the court may consult the Explanatory Notes (“ENs”) for the Harmonized Commodity Description and Coding System maintained by the World Customs Organization, which, although not legally binding, “may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.”<sup>7</sup> *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citing *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)).

### *G. Tariff Classification of the Spring Floats*

The classification of the Spring Floats determined by Customs upon liquidation, subheading 6307.90.98, HTSUS, is not correct. The correct classification is that claimed by plaintiff, subheading 3926.90.75, HTSUS.

#### *1. Classification Cannot Be Determined According to GRI 1 Because the Terms of Neither Heading 6307 Nor Those of Heading 3926, when Interpreted According to the Relative Section and Chapter Notes, Describe the Spring Floats in the Entirety*

The parties identify as the two competing headings for the Spring Floats heading 6307, HTSUS (“Other made up articles, including dress patterns”) and heading 3926, HTSUS (“Other articles of plastics and articles of other materials of headings 3901 to 3914”).<sup>8</sup> In considering the government’s classification position, the court first considers whether, as defendant argues, the Spring Floats may be classified in heading 6307, HTSUS by application of GRI 1, HTSUS. Accordingly, the court must decide whether the terms of this heading describe the Spring Floats, when those terms are interpreted in accordance with “any relative section or chapter notes.” GRI 1, HT-

<sup>7</sup> Citations of the Explanatory Notes (“ENs”) in this Opinion are to the fourth edition. See World Customs Org., Harmonized Commodity Description and Coding System (4th ed. 2007).

<sup>8</sup> The court’s own review found no other possible candidate headings. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 874 (Fed. Cir. 1984) (holding that the Court of International Trade has an independent obligation to determine the proper tariff classification). For example, there are various headings applying to articles of steel, but the steel component of the Spring Float, according to the uncontested facts, is but one of several components.

SUS. As discussed below, the imported merchandise cannot be classified according to GRI 1 because neither competing heading describes the Spring Floats.

Heading 6307, HTSUS, which carries the description “[o]ther made up articles, including dress patterns,” is within subchapter 1 of chapter 63. Subchapter 1 is titled “Other made up textile articles.” According to note 1 to chapter 63, HTSUS, “[s]ubchapter 1 applies only to made up articles, of any textile fabric.”<sup>9</sup> Although the Spring Floats are articles with textile fabric components, they are not correctly described as articles of textile fabric. Although some of the components are made of polyester fabric and one component is made of elastomer mesh fabric, the Spring Floats contain significant components that are not made of a textile material. The bladder (or bladders)<sup>10</sup> consist entirely of PVC plastic. The tube that surrounds the spring is made of another plastic, polypropylene, and the spring itself is made of steel. The presence of these significant components causes the court to conclude that the term “made up articles, of any textile fabric” as used in note 1 to chapter 63, HTSUS does not correctly describe the entire assembly.<sup>11</sup>

In support of its GRI 1 argument, defendant maintains that “heading 6307, HTSUS is not limited to articles made up *entirely* of textile fabric” but rather includes items such as lifejackets and lifebelts that it claims are “similar to the goods at issue in this case.” Def.’s Mem. 11; *see* Def.’s Resp. 6–8. Defendant’s argument incorrectly relies upon the article description for subheading 6307.20, HTSUS (“Lifejackets and lifebelts”) in a way that impermissibly would broaden the scope of the terms of the heading. *See* GRI 1 (tariff classification must be effectuated by the “terms of the headings”); *see also R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014). Lifejackets and

<sup>9</sup> Chapters 50 through 63, HTSUS together make up Section XI (“Textiles and Textile Articles”). Chapter 63, HTSUS (“Other made up textile articles; . . .”) applies generally to articles of textiles that are not goods of Chapters 56 through 62 of Section XI. *See* Note 2 to ch. 63, HTSUS.

<sup>10</sup> As detailed earlier in this opinion, all but the Papasan and Kids Boat have two PVC bladders. *See* Section (II)(D)(1), *supra*.

<sup>11</sup> Explanatory Note 1 to chapter 63 supports the court’s conclusion that the Spring Floats are not articles of textile fabric, stating in relevant part that:

The classification of articles in this sub-Chapter [i.e., subchapter 1] is not affected by the presence of minor trimmings or accessories of furskin, metal (including precious metal), leather, plastics, etc.

Where, however, the presence of these other materials constitutes **more than** mere trimming or accessories, the articles are classified in accordance with the relative Section or Chapter Notes (General Interpretative Rule 1), or in accordance with the other General Interpretative Rules as the case may be.

EN 1 to Chapter 63. The bladder or bladders, polypropylene tube, and steel spring are not accurately described as “mere trimming or accessories.” *See id.*

lifebelts properly classified under subheading 6307.20, HTSUS by operation of GRI 1 can be only those that are within the scope of the terms of heading 6307, HTSUS. As the court has concluded, heading 6307 includes items that are not made up entirely of textile fabric, but it is not properly interpreted so broadly as to include goods such as the Spring Floats, which have significant non-textile components that are not merely trimming or accessories.

The second issue for the court to address is whether the Spring Floats can be classified in heading 3926, HTSUS (“Other articles of plastics and articles of other materials of headings 3901 to 3914”) by application of GRI 1.<sup>12</sup> Chapter 39 covers “Plastics and articles thereof.” Chapter 39 is divided into two subchapters. The first subchapter (“Primary forms,” headings 3901 through 3914) covers only plastics in primary forms,<sup>13</sup> while subchapter II includes articles of plastic (“Waste, parings and scrap; semimanufactures; articles”). The presence of significant components (i.e., the various polyester fabric components, the elastomer mesh fabric component, and the steel spring) that are not made of plastic and are not made of other materials classified in headings 3901 through 3914 compels the conclusion that the Spring Floats do not fall within the scope of the terms of heading 3926, HTSUS.

Headings 3926 and 6307, HTSUS each describe “part only” of the materials or substances in the Spring Floats. GRI 3(a), HTSUS. Because no single heading in the HTSUS describes the Spring Floats in the entirety, these articles cannot be classified in accordance with GRI 1. The inquiry, therefore, must proceed according to GRIs 2 and 3. GRI 3(a) is inapplicable in this situation because the competing headings must be regarded as equally specific, with classification effected according to GRI 3(b).

## *2. The Essential Character of the Spring Floats Is Not Imparted by Any Single Material or Class of Materials*

In the classification of composite goods consisting of different materials or made up of different components, GRI 3(b) directs that “classification shall be effected . . . as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” GRI 3(b), HTSUS. The Explanatory Notes provide helpful guidance for interpreting GRI 3(b), instructing

<sup>12</sup> Although no party contends that classification of the Spring Floats under heading 3926, HTSUS can be effectuated by GRI 1, HTSUS, the court has an independent obligation to consider whether classification under this heading may be appropriate. *See Jarvis Clark*, 733 F.2d at 874.

<sup>13</sup> “Primary forms” are liquids, pastes, irregular solids, and other bulk forms of plastics. Note 6 to ch. 39, HTSUS.

that “[t]he factor which determines essential character will vary as between different kinds of goods.” EN VIII to Rule 3(b) of the General Rules for the Interpretation of the Harmonized System (“GIRs”).

Essential character may be determined by the nature of the “material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.” *Id.* Determining the classification of the Spring Float according to GRI 3(b) requires the court to determine whether there is a “material or component” that imparts the essential character to the composite good. The court first considers the question of whether a *material* imparts the essential character to the whole.

According to the undisputed facts, Spring Floats consist of several different materials, i.e., they are assembled from various cut-to-shape pieces of polyester fabric, a cut-to-shape piece or pieces of mesh elastomer fabric, various cut-to-shape pieces of PVC, a PVC inflation valve, a polypropylene tube, and a steel spring. When considered together according to weight and according to value, the percentages representing the fabric components and those representing the plastic components (although varying somewhat according to the specific model), are such that neither clearly predominates (the steel material being relatively minor). *See* Exs. to Pl.’s Mem. in Supp. of Mot. for Summ. J. at Ex. 4, Bates 1530–31(b), 1540–50, 1571–72 (Feb. 7, 2017), ECF Nos. 51 (conf.), 67 (public) (“Pl.’s Exs.”) (affidavit of Edward Hayes and supporting attachments).

Defendant’s GRI 3(b) argument is that the textile materials impart the essential character to the Spring Floats. Def.’s Mem. 18–32. This argument does not succeed because no single material or class of material so predominates as to impart the essential character to the whole article. Each Spring Float contains significant amounts of plastic materials, both in the PVC bladder or bladders and in the polypropylene tube surrounding the steel spring. The parties disagree as to how the textile materials and plastic materials should be compared. *See* Pl.’s Mem. 17–19 (stating that plastic components have a higher value and weight than the textile components); Def.’s Mem. 29 (stating that the application of a different calculation methodology results in the conclusion that the textile components account for a greater percentage of the cost of the finished product). Neither argument as to materials content is persuasive because both the textile materials and the plastic materials are present in significant, but not clearly predominant, proportions. Defendant also argues that the textile materials that are incorporated into the “canopy or sunshade” should be considered when assessing essential character, but

this also is unpersuasive because there is significant plastic content even in those models that include a canopy as an accessory.

*3. The Court Determines Essential Character by  
Considering the Discrete Components of the Spring  
Floats*

Because the uncontested facts do not allow a conclusion that any single material or class of materials (i.e., the plastic materials or the fabric materials) imparts the essential character to these composite goods, the court next considers, as required by GRI 3(b), whether any single *component* imparts the essential character to the composite good.<sup>14</sup> As directed by GRI 3(b), the court is to effect classification according to the component that imparts the essential character, insofar as this criterion is applicable. The court concludes that this criterion is applicable because, according to facts that are not in dispute and as shown by the samples, the various discrete components contribute different functions to the whole. Therefore, the court next considers the respective functions of these discrete components as they contribute to the overall functioning of the finished article.

The spring assembly, consisting of the steel spring encased by the polypropylene tube, is one of the discrete components. Each PVC bladder is also a discrete component, made by electro-welding cut-to-shape pieces of PVC sheet and incorporating into the assembly the PVC inflation valve. For each Spring Float model, there is a PVC bladder that, when inflated with air, allows for flotation of the device and the user (whether or not a second bladder is also present). The woven elastomer mesh component, another discrete component, forms the inside portion of each Spring Float.<sup>15</sup> It provides essential support for the user in water and, because it is of a mesh composition, allows water to pass through. Each of these discrete components is complete prior to final assembly, i.e., before being surrounded by the polyester fabric components in a final assembly operation, in which the various cut-to-shape polyester pieces are sewn together to encase the bladders and spring assembly and attached to the elastomer

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<sup>14</sup> An Explanatory Note accompanying Rule 3(b) of the General Rules for the Interpretation of the Harmonized System ("GIRs") states that "[f]or the purpose of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts." EN IX to GIR 3(b).

<sup>15</sup> The elastomer mesh component consists of a single piece of elastomer mesh fabric on all Spring Float models except the Papasan, on which it is a sewn assembly of two pieces of this fabric.

mesh component. *See* Exs. to Def.'s Cross Mot. for Summ. J. at Ex. 3, 26:1–27:15 (May 12, 2017), ECF Nos. 57–3, 57–4 (conf.), 58–3 (public) (“Def.’s Exs.”) (portion of deposition of Edward Hayes describing manufacturing process); *see also* Pl.’s Exs. at Conf. Ex. 4 (video detailing production of a Spring Float). The polyester pieces also form a component (whether or not considered to be a discrete component) upon final assembly. At that point in the manufacturing process, these pieces are sewn together to surround the spring assembly and the PVC bladder or bladders and attach to the elastomer mesh component that forms the center of the float. The polyester pieces serve as the outer surface of the float except for the elastomer mesh portion at the center.

The four components described above (the spring assembly, the PVC bladder that enables flotation,<sup>16</sup> the elastomer mesh component, and the polyester assembly that surrounds the bladder(s) and spring assembly) perform separate functions, as is apparent from the samples and the descriptions provided by the parties.

The spring assembly allows for a type of folding of the float for purposes of handling and, as shown by examination of the samples, provides a firmer structure to the article. As the undisputed facts and the samples show, it does not provide flotation.

The polyester component, by enclosing the bladder or bladders and the spring assembly, and by attaching to the elastomer mesh at the center, is the means by which the entire float is held together as an assembly. Further, defendant points out that the woven polyester protects the bladder from puncture, “contributes to the Spring Floats’ comfortable design,” Def.’s Mem. 26, and “prevents consumers from burning themselves or sticking to the inflatable PVC bladder,” citing evidence that would establish that the advantage of the polyester outer material over floats made entirely from PVC is a main selling point for these products, *id.* (citing Def.’s Exs. at Conf. Ex. 6, Bates 1860 (market research on how consumers shop for pool floats)). While the evidence would show that the polyester textile component contributes desirable characteristics to the Spring Floats, it also would show that the polyester component does not impart support for the user, as does the elastomer mesh component or flotation, as does the principal bladder. Therefore, the evidence that would be introduced would preclude a finding that the assembled polyester component imparts functionality comparable to that of the principal PVC bladder or the mesh component.

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<sup>16</sup> The additional bladders perform functions secondary to the flotation characteristic of the larger bladders; specifically, they function as pillows or backrests.

Because they perform essential functions, the elastomer mesh component and the principal PVC bladder component merit further examination. The support function provided by the elastomer mesh component is indisputably important. As defendant asserts and plaintiff does not contest, and as the samples and illustrations show, the float would not function without the elastomer mesh component at the center, as the float would lack the necessary support for the user. The flotation characteristic imparted by the principal PVC bladder is fundamental to the functioning of the float and, therefore, at least equally important. Were there nothing more to be gleaned from the undisputed facts, the court might conclude from these two essential functions that neither component can be found to impart the essential character, requiring resort to GRI 3(c) (determining classification according to the heading that appears last in numerical order). However, there is more to consider.

The flotation function of the principal PVC bladder not only is essential to the functioning of the finished article, but it imparts a defining characteristic that is fundamental to the commercial identity. The court does not lose sight of the undisputed facts that this article is a “float” and that it is the function of the principal PVC bladder to enable the article to float in water (e.g., a swimming pool or lake). Moreover, the PVC bladder imparting flotation is a more complex component to manufacture than is the elastomer mesh component, which is of a single piece of textile material for all models except for the Papasan, for which it is a sewn assembly of two pieces of fabric. The bladder is assembled by welding together the cut-to-shape PVC pieces and the functional valve. Def.’s Exs. at Ex. 3, 26:11–27:1; *see* Pl.’s Exs. at Conf. Ex. 4 (video detailing production of float). The bladder must be airtight in order for the float to function. Moreover, through its two-way valve it must allow for inflation of the article prior to use and for deflation of the article for transport and storage. Finally, it contributes more to the value of the finished float than does the elastomer mesh component. *See* Pl.’s Exs. at Ex. 4, Bates 1540–50 (calculations performed using attachments to affidavit of Edward Hayes).

In addition to arguing that the textile materials impart the essential character, defendant argues that the uncontested evidence shows that the “user’s body is supported by the mesh panel” and that without this panel the user “would sink through the float’s hollow center.” Def.’s Mem. 20. This argument is correct as to the function of the elastomer mesh component, but that component not only is of a different material than the other textile component in the Spring Floats (which is of polyester fabric) but also performs a different

function than the polyester component. The court, therefore, considers it separately with respect to function.

The court concludes that on balance, and in consideration of all the undisputed facts, the essential character determination must be made in favor of the principal PVC bladder component with respect to each of the models of the Spring Float.

*4. Heading 3926 Is the Correct Heading for the Spring Floats, by Operation of GRI 3(b)*

The court is directed by GRI 3(b) to effect classification according to the heading applying to the material or component that imparts the essential character to the composite good. That component, the PVC bladder imparting flotation, consists entirely of welded-together panels and the valve, all made of PVC plastic. Were the PVC bladder imparting flotation to be classified as a separate article, it would be classified under heading 3926, HTSUS as an article of plastic. This heading, therefore, is the correct heading for the Spring Floats.

Defendant's second alternative argument, that the Spring Floats are to be classified under heading 6307, HTSUS by GRI 3(c), *see* Def.'s Mem. 32–37; Def.'s Resp. 19, is unpersuasive in asserting that no essential character determination can be made as to the Spring Floats. As the court has discussed, there is a discrete component that imparts an essential, indeed defining, characteristic to each float (i.e., flotation), is more complex, both in its construction and in its functioning, than the elastomer mesh component, and contributes more to the value of the article than does the mesh component. GRI 3(c), therefore, is not applicable.

The Customs Headquarters ruling classifies the Spring Floats according to GRI 3(c) using an analysis essentially parallel to defendant's second alternative classification argument. This ruling may be accorded a level of deference according to its "power to persuade" (even though defendant prioritizes two other arguments before it). *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In this case, the classification ruling is unpersuasive because it is incomplete: it fails to consider adequately whether any component, as opposed to material or class of material, imparts the essential character to the float. *See* HQ Ruling 7–8. In considering whether any component imparts the essential character, the ruling considered the polyester components and the elastomer mesh component to be a single component. *Id.* This approach was not analytically sound. As discussed above, the polyester component and the mesh component are made of different textiles and perform different functions. As the samples amply dem-

onstrate, the mesh component, not the sewn-together polyester panels, performs a critical function, supporting the user in the water. It is attached to the polyester panels (rather than directly affixed to the principal bladder), but together with the principal bladder it allows the assembled article to function. The ruling concluded that no component imparts the essential character to the good and then proceeded to Rule 3(c). The analysis invoking GRI 3(c), HTSUS ultimately is unpersuasive because of the essential and defining function of the bladder imparting flotation to the article and its user, because of the complexity inherent in the construction and functioning of that bladder, and because of the relatively greater value imparted by the flotation bladder than by the elastomer mesh component.<sup>17</sup>

#### *5. Subheading 3926.90.75 Is the Correct Subheading by Application of GRI 6*

Finally, the court examines heading 3926, HTSUS for the proper subheading. *See* GRI 6, HTSUS. Upon review of the subheadings under heading 3926, HTSUS, the court concludes that none of the specific subheadings in the group 3926.10 to 3926.40 describes the Spring Floats. Therefore, the proper six digit subheading is 3926.90, HTSUS (“Other:”) and the correct eight-digit subheading is 3926.90.75, HTSUS (“Pneumatic mattresses and other inflatable articles, not elsewhere specified or included”).

#### *H. Tariff Classification of the Baby Spring Floats*

The court concludes that plaintiff has met its burden of showing that the classification Customs determined upon liquidation for the Baby Spring Floats, subheading 6307.90.98, HTSUS, is not correct. The court concludes, further, that the Baby Spring Floats are correctly classified in subheading 3926.90.75, HTSUS.

The Baby Spring Floats are similar in construction to the Spring Floats, consisting of PVC bladders, textile components made of polyester fabric and elastomer mesh fabric, and a steel spring encased in a polypropylene tube. They are smaller in size than the Spring Floats, and they also differ in having two PVC bladders that provide the flotation function, instead of only one as do the Spring Floats. These

<sup>17</sup> In some respects, this case is similar to *Better Homes Plastics Corp. v. United States*, 119 F.3d 969 (Fed. Cir. 1997), in which the essential character of a shower curtain set consisting of a plastic inner liner, a textile outer curtain, and plastic hooks was held to have been imparted by the plastic inner liner, not the outer textile curtain, based on the functions performed by the plastic inner liner (which kept water inside the shower and also had privacy and decorative functions) and the relatively low cost of the set. The Court of Appeals for the Federal Circuit rejected the alternative argument of the United States that classification should be effected under GRI 3(c), HTSUS because essential character could not be determined. *Id.* at 971.

floats are designed to hold an infant (9 to 24 months in age) in an upright position in the water. Another difference is that the central elastomer mesh component (assembled by sewing together two pieces of elastomer mesh fabric) has two openings for the infant's legs. Unlike the Spring Floats, the Baby Spring Floats also have elastomer mesh panels that are located between the two inflatable bladders, each of which is surrounded by polyester fabric.

*1. Classification Cannot Be Determined According to GRI 1 Because There is No Heading that, when Interpreted According to the Relative Section and Chapter Notes, Describes the Baby Spring Floats*

The parties identify three candidate headings in which to classify the Baby Spring Floats. Defendant argues in favor of the classification determined by Customs upon liquidation, which was under heading 6307, HTSUS ("Other made up articles, including dress patterns"). Plaintiff's principal classification claim for the Baby Spring Floats is under heading 9506, HTSUS ("Articles and equipment for general physical exercise, gymnastics, athletics, other sports ...or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof"). In the alternative, plaintiff argues for classification under heading 3926, HTSUS ("Other articles of plastics and articles of other materials of heading 3901 to 3914").<sup>18</sup>

The court first must determine whether the government's classification is correct. *Jarvis Clark*, 733 F.3d at 878. In doing so, the first issue the court must address is whether, as defendant argues, the Baby Spring Floats should be classified in heading 6307, HTSUS by application of GRI 1. This requires the court to decide whether the terms of this heading describe the Baby Spring Floats, when those terms are interpreted in accordance with "any relative section or chapter notes." GRI 1, HTSUS.

The Baby Spring Floats are not described by the terms of heading 6307, HTSUS for the same reason that these heading terms do not describe the Spring Floats. Although the Baby Spring Floats contain textile components, these floats are not textile articles. They contain significant components that are of non-textile materials; specifically, they contain a steel spring, a polypropylene tube surrounding the steel spring, and two inflatable PVC bladders.

Similarly, the terms of heading 3926, HTSUS ("Other articles of plastics and articles of other materials of headings 3901 to 3914") do

<sup>18</sup> As with the Spring Floats, the court has also conducted its own review of the HTSUS and has found no other possible candidate headings. See *Jarvis Clark*, 733 F.3d at 874.

not describe the Baby Spring Floats. Like the Spring Floats, they contain significant components of materials that are not plastics: the steel spring, the polyester fabric that surrounds the inflatable bladders, and the elastomer mesh fabric components.

The heading plaintiff advocates in its primary claim, heading 9506, HTSUS, is within chapter 95.<sup>19</sup> Chapter 95 covers “toys, games and sports equipment; parts and accessories thereof.” The article description for heading 9506 contains several terms: “[a]rticles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof.”

Plaintiff directs the court’s attention to two of the heading terms: “articles and equipment for general physical exercise” and “articles and equipment for . . . other sports . . . .” Plaintiff argues that the Baby Spring Float is a “sports training device,” the sport being swimming, Pl.’s Mem. 23, and that “[t]he training and exercise function of the Baby Spring Float is evident in its design,” *id.* at 24. Plaintiff refers to its exhibits showing that the Baby Spring Float “positions the infant so that its legs are free to kick in the water and its upper body is held above the water” and that it “does not allow the infant to recline, but encourages physical activity and allows an infant to become accustomed to water.” *Id.* Further citing exhibits to its summary judgment motion, plaintiff states that the Baby Spring Float “is advertised as ‘Step 1’ in a product line developed by Swimways to train children how to swim” and that “Step 1 is water acclimation.” *Id.* at 23 (citing Pl.’s Exs. at Ex. 5, Dep. Ex. 12 (deposition of Anthony Vittone and accompanying exhibits)). “Subsequently, as the child progresses through Step 4, the various flotation products gradually reduce the amount of flotation, which assists the child in learning how to swim.” *Id.* “The Swim Steps product line was developed in consultation with swimming instructors and water safety experts.” *Id.* at 23–24 (citing Pl.’s Exs. at Ex. 5 (deposition of Anthony Vittone)).

The cardboard insert packaged with the basic Baby Spring Float, a sample of which was provided to the court as an exhibit, describes “the swim steps 3 level program” as consisting of: Step 1, “Water Introduction,” which “[h]elps your baby become comfortable in the water, keeping her supported and balanced[;]” Step 2, “Water Exploration,” which “[g]ives your child freedom of motion to develop confidence, supporting him as he learns to balance and paddle[;]” and Step 3, “Swim Training,” which “empower[s] your child with the Power

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<sup>19</sup> Chapter 95 is one of three chapters in Section XX. Section XX is titled “Miscellaneous Manufactured Articles.” Section XX, HTSUS.

Swimr™ and the Sea Squirts Swim Assist Vest™.” Pl.’s Exs. at Ex. 3 (physical sample of Baby Spring Float). The cardboard insert also states: “Learning to love the water! Swim Step 1 supports young children as they are introduced to the water, helping them stay comfortable and happy.” *Id.*

The court first considers whether, according to the undisputed facts, the Baby Swim Float can be described as an article or equipment for general physical exercise. Neither the HTSUS nor the Explanatory Notes define the heading terms “articles and equipment for general physical exercise,” but according to common and popular meaning, the term “exercise” can mean “[p]ractice for the sake of training or improvement, either bodily, mental, or spiritual.” 5 The Oxford English Dictionary 528 (2d ed. 1989). More specific to the term “physical exercise” is the definition of “exercise” as the

Exertion of the muscles, limbs, and bodily powers, regarded with reference to its effect on the subject; *esp.* such exertion undertaken with a view to the maintenance or improvement of health. Often with distinguishing words, as *carriage-, horse-, open air, walking, etc., exercise.*

*Id.*

It can be argued that the heading term “[a]rticles and equipment for general physical exercise” is a provision controlled by use and thereby governed by Additional U.S. Rule of Interpretation 1(a), HTSUS (“a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use”) such that classification would depend on a factual determination of the principal use as established under that rule. In considering plaintiff’s principal classification claim, the court does not reach the issue of whether to apply Additional U.S. Rule of Interpretation 1(a), HTSUS because, according to the information included in the packaging (specifically, the text on the cardboard insert), there can be no genuine factual dispute implicating that rule. The cardboard insert establishes that the Baby Spring Float was designed for a purpose *other than* general physical exercise, and plaintiff identifies no evidence that raises a genuine issue of material fact on this point. The intended purpose of the Baby Spring Float, according to all of the messaging on the packaging, is introducing infants to the water (i.e., acclimation) and “helping them stay comfortable and happy.” It is true that the infant’s legs are free to move in the water as the infant sits upright in the float, but the text of the

product labeling refutes any potential finding that the intended purpose of the Baby Spring Float is physical exercise of an infant's legs.

The undisputed facts also refute the contention that the Baby Spring Float is an article or equipment for the physical exercise consisting of swimming or for the sport of swimming. Plaintiff's submissions that would establish that the Baby Spring Float is marketed as an article for the first step in a three- or four-step program designed so that the child ultimately, after reduced levels of flotation, learns to swim do not suffice to place the article within the scope of heading 9506, HTSUS. The court must classify the article as it is entered, and the equipment associated with the other steps in the program is not before the court. Viewed by itself, the Baby Spring Float is designed and labeled as a product for introducing infants to water. That is not the same as swimming or learning to swim. The physical structure of the Baby Spring Float supports the court's reasoning, as it is undisputed that the article holds the infant upright, not in a swimming position. Pl.'s Exs. at Ex. 1, Bates 1518 (plaintiff's response to defendant's first interrogatories directed to plaintiff) ("The Baby Spring Float thus positions the infant so that its legs are free to kick in the water and its upper body is held above the water.").

*2. Classification Must Be Determined According to GRI 3(b) Because the Terms of Heading 6307 and Those of Heading 3926 Describe "Part Only" of the Baby Spring Float*

In summary, the court concludes that the Baby Spring Floats do not fall within the scope of the terms of heading 9506, HTSUS, and are not described in the entirety by the terms of either heading 6307 or heading 3926 of the HTSUS. Heading 6307, HTSUS describes "part only" of the Baby Spring Float (the textile materials or components therein), as does heading 3926 (which describes the plastic portions of the Baby Spring Float). Because no single heading describes the Baby Spring Floats in the entirety, and because headings 6307 and 3926, HTSUS describe parts of the entire article, the court's inquiry proceeds according to GRIs 2 and 3. From this point forward, the court's analysis is the same as that applying to the classification of the Spring Floats, discussed above. Accordingly, the court determines classification according to essential character, as governed by GRI 3(b).

Plaintiff's submissions in support of summary judgment demonstrate that neither the textile fabric materials nor the plastic materials of the Baby Spring Float clearly predominate by cost. See Pl.'s Exs. at Ex. 4, Bates 1549–50, 1571–72 (affidavit of Edward Hayes and

supporting attachments). Additionally, evidence demonstrating the percentage of the weight of the Baby Spring Float that is constituted by the textile materials does not show that the textile fabric materials clearly predominate over that of the other materials. *See id.* But here again, the analysis of materials is not the whole analysis the court must conduct according to GRI 3(b), HTSUS, which directs that classification is to be effected according to the material *or component* that imparts the essential character to the composite article, to the extent this criterion is applicable.

Like the Spring Float, the Baby Spring Float has an elastomer fabric component at the center that performs an essential function by supporting the infant in the float. But as to the Baby Spring Float, the support of the user is also performed in part by the inner PVC bladder (“tube”). Pl.’s Exs. at Ex. 1, Bates 1518 (plaintiff’s response to defendant’s first interrogatories directed to plaintiff) (“The inner tube hugs close to the baby’s torso, tucking under the armpits, keeping the baby upright.”). Both the inner and the outer PVC tube achieve the essential function of flotation, and in addition, “[t]he outer tube enhances security and stability, ensuring that the float does not tumble.” *Id.* The other components, the polypropylene-encased steel spring and the outer covering formed by the assembled (sewn) polyester panels, perform significant functions, but here again the sample of the merchandise demonstrates that these functions are not comparable to the essential, and defining, function performed by the PVC bladders. The two bladders also represent a larger share of the value of the finished article than does the elastomer mesh center component. *See* Pl.’s Exs. at Ex. 4, Bates 1549–50 (calculations based on vendor quotes for the Baby Spring Float).

*3. Heading 3926 Is the Correct Heading for Classification of the Baby Spring Floats, by Operation of GRI 3(b)*

The court is directed by GRI 3(b) to effect classification according to the heading that applies to the material or component that imparts the essential character to the composite good. The PVC bladders consist entirely of PVC plastic, including the valves. Were the PVC bladders to be classified separately, they would be classified under heading 3926, HTSUS as articles of plastic. This heading, therefore, is the correct heading for the Baby Spring Floats.

*4. Subheading 3926.90.75 Is the Correct Subheading for the Baby Spring Floats by Application of GRI 6*

The court next examines heading 3926, HTSUS for the proper subheading. *See* GRI 6. After review of the subheadings under heading 3926, HTSUS, the court concludes that none of the specific subheadings in the group 3926.10 to 3926.40 describes the Baby Spring Floats. Therefore, the proper six digit subheading for the basic Baby Spring Float is 3926.90, HTSUS (“Other:”) and the correct eight-digit subheading is 3926.90.75, HTSUS (“Pneumatic mattresses and other inflatable articles, not elsewhere specified or included”).

The “Baby Spring Float Sun Canopy,” which is a basic Baby Spring Float that features an attachable canopy, is also classified in subheading 3926.90.75, HTSUS, as the attachable canopy, which is not an essential component of the float, does not alter the essential character analysis.

The “Baby Spring Float Activity Center,” a Baby Spring Float with an attachable canopy that is packaged with an inflatable four-armed “octopus” designed to hold a squeaker, stacking rings, soft-touch star, and teether requires the court to perform additional analysis to determine the proper classification. The inflatable octopus, squeaker, stacking rings, soft touch star, and teether, although packaged with a Baby Spring Float, are separate items. The float (with canopy) and these separate articles do not make up a set put up for retail sale for purposes of GRI 3(b) because the octopus, squeaker, stacking rings, soft touch star, and teether serve needs or activities unrelated to that of the float (and canopy) and do not depend on the float for those activities. *See* EN X(b) to GIR 3 (instructing that goods put up as a set for retail sale are “put up together to meet a particular need or carry out a specific activity.”). Accordingly, these items are classified separately from the rest of the Baby Spring Float Activity Center. Because they are articles for amusement, the inflatable octopus, stacking rings, squeaker, and soft touch star are properly classified as toys under heading 9503, HTSUS (“Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls, *other toys*; reduced-scale (“scale”) models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof”) (emphasis added).

The teether raises a separate issue. Customs rulings, which are not binding on the court but may provide general guidance, address the tariff classification of teethers, explaining that teethers may have both an amusement function as well as a utilitarian function and in some cases are classified as toys and in others as utilitarian articles. *See, e.g.*, HQ Ruling No. H236278 (June 11, 2013), *available at* <https://rulings.cbp.gov/ruling/H236278> (last visited July 18, 2018) (discuss-

ing various classification rulings on teether). Based on the illustration submitted, the teether is designed to resemble a cartoon-like fish, which indicates an amusement function. Here, it is not necessary to determine whether the teether is a toy or a utilitarian article. If it is a toy, the octopus and the smaller parts constitute goods classified in the entirety as toys. If instead the teether is classified outside of heading 9503, HTSUS according to its utility, then it is part of a set put up for retail sale consisting of the octopus and the smaller parts. See EN X(a) to GIR 3 (instructing that a set put up for retail sale has articles *prima facie* classifiable under different headings). The inflatable octopus and the other toy articles packaged with it are used in the same activity, which includes the placing and removing of the toys (and the teether as well) on the four “arms” of the “octopus”; each of the smaller articles is designed specifically to fit on any of the four arms. Because the octopus and the smaller accessories, including the teether, if not itself classified as a toy, nevertheless are intended for use together as a play activity (even though the teether has an additional function), they must be classified as a set put up for retail sale. It is obvious from the illustration that the toys, including the octopus itself, not the single teether, would impart the essential character to the set, which is, therefore, classified under heading 9503, HTSUS. The subheading is 9503.00.00, HTSUS. The float (with the attachable canopy) is not part of this set and, according to the analysis above, remains classified in subheading 3926.90.75, HTSUS.

### III. CONCLUSION

For the reasons stated above, the court will grant in part, and deny in part, plaintiff's motion for summary judgment, concluding that the Spring Floats and Baby Spring Floats are classified in subheading 3926.90.75, HTSUS (“Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Pneumatic mattresses and other inflatable articles, not elsewhere specified or included”), subject to duty at 4.2% *ad val*. As discussed above, the inflatable “octopus” and related items packaged with the Baby Spring Float Activity Center are classified in subheading 9503.00.00, HTSUS.

Also as discussed earlier in this Opinion, certain entries are dismissed from this action. The court will grant defendant's motion in part, i.e., as to the dismissal of the entries not properly before the court, and deny it in part.

Judgment will enter accordingly.

Dated: July 23, 2018

New York, New York

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

## Slip Op. 18–92

NATURAL RESOURCES DEFENSE COUNCIL, INC., CENTER FOR BIOLOGICAL DIVERSITY, AND ANIMAL WELFARE INSTITUTE, Plaintiffs, v. WILBUR ROSS, in his official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, CHRIS OLIVER, in his official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, STEVEN MNUCHIN, in his official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Defendants.

Before: Gary S. Katzmman, Judge  
Court No. 18–00055

[Plaintiffs' motion for a preliminary injunction is granted and defendants' motion to dismiss is denied.]

Dated: July 26, 2018

*Giulia C.S. Good Stefani and Daniel N. Carpenter-Gold*, Natural Resources Defense Council, of Santa Monica, CA, argued for plaintiffs. With them on the brief were *Stephen Zak Smith* for plaintiff, Natural Resources Defense Council Inc. and *Sarah Uhlemann*, of Seattle, WA, for plaintiffs, Center for Biological Diversity, and Animal Welfare Institute.

*Agatha Koprowski*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief were *Jason Forman*, National Oceanic and Atmospheric Administration, of Silver Spring, MD; *Daniel J. Paisley*, Department of the Treasury, of Washington, DC; and *Glenn Kaminsky*, Department of Homeland Security, of New York, NY.

**OPINION****Katzmann, Judge:**

The vaquita, the world's smallest porpoise — only about five feet long and weighing one hundred pounds — is a critically endangered marine mammal endemic to the northern Gulf of California, in Mexican waters. Though the species has existed for millions of years, the population was first surveyed in the late 1990s. At that time, scientists estimated that there were 567 vaquita in the wild. The vaquita is now on the brink of extinction. Only about 15 vaquita remain today, and the population is declining at a rate of almost 50 percent each year. The status of the species is so precarious that even one mortality could increase the likelihood of extinction. The vaquita is an evolutionarily distinct animal with no close relatives, and its loss would represent a disproportionate loss of biodiversity, unique evolutionary history, and the potential for future evolution. The Zoological Society

of London has listed the vaquita as a top Evolutionarily Distinct and Globally Endangered species, a list reserved for those species that are especially “unique . . . [and] when they are gone there will be nothing like them left on earth.”

It is undisputed that the cause of the vaquita’s precipitous decline is its inadvertent tangling, strangulation, and drowning in gillnets, which are fishing nets hung in the water to entangle fish and shrimp. The Government of Mexico, which regulates fishing practices in the Gulf of California, has banned the usage of gillnets in certain fisheries within the vaquita’s range, though illegal gillnet fishing continues. In other fisheries, gillnet fishing remains legal. If current levels of gillnet fishing in the vaquita’s habitat continue, the species will likely be extinct by 2021.

Hoping to avert exactly this sort of catastrophe, Congress enacted the Marine Mammal Protection Act (“MMPA”) of 1972, Pub. L. No. 92–522, 86 Stat. 1027 (codified as amended in scattered sections of 16 U.S.C.). Invoking the conditional ban on imports of fish and fish products found in Section 101(a)(2) of the MMPA, 16 U.S.C. § 1371(a)(2) (2012),<sup>1</sup> also known as the Imports Provision, plaintiffs Natural Resources Defense Council (“NRDC”), Center for Biological Diversity, and Animal Welfare Institute brought this action in the United States Court of International Trade. To prevent the irreparable harm that would result from the extinction of the vaquita, plaintiffs now move for a preliminary injunction requiring defendants — several United States agencies and officials, and here collectively referred to as “the Government” — to ban the importation of fish or fish products from any Mexican commercial fishery that uses gillnets within the vaquita’s range. The Government, though opposing the motion, acknowledges that the vaquita may soon disappear from the planet forever, and “agree[s] that the primary threat to the vaquita is gillnet fishing within the vaquita’s range.” Def.’s Br. at 2–3. Upon consideration of the record and the MMPA, the court grants plaintiffs’ motion for a preliminary injunction.

## BACKGROUND

### *I. Legal Background*

Congress passed the MMPA in 1972. In doing so, Congress found that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). Congress also found that “such spe-

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<sup>1</sup> Subsequent references to sections of the MMPA are to the relevant portions of the official 2012 edition of the United States Code.

cies and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.” *Id.* § 1361(2). Congress noted that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic,” and found “that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.” *Id.* § 1361(6). Further, whenever consistent with the maintenance of the health and stability of the marine ecosystem, “it should be the goal to obtain an optimum sustainable [marine mammal] population keeping in mind the carrying capacity of the habitat.” *Id.* Congress’ findings clearly show that “[t]he Act was to be administered for the benefit of the protected species rather than for the benefit of commercial exploitation.” *Kokechik Fishermen’s Ass’n v. Sec’y of Commerce*, 839 F.2d 795, 800 (D.C. Cir. 1988) (quoting *Comm. for Humane Legis., Inc. v. Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976)). Primary responsibility for the implementation of the MMPA rests with the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (“NOAA Fisheries”), which is within the Department of Commerce. *See* 16 U.S.C. § 1362(12)(A)(i).<sup>2</sup>

The MMPA created a “moratorium on the taking and importation of marine mammals and marine mammal products,” with certain exceptions. 16 U.S.C. § 1371(a). “Congress decided to undertake this decisive action because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the ecosystems they inhabit.” *Kokechik*, 839 F.2d at 801. In overview, as set forth below, in the MMPA, Congress mandated an “immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1371(a)(2); *see also* 16 U.S.C. § 1387(b) (stating the “[z]ero mortality rate goal” that “[c]ommercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994”). To achieve this goal,

<sup>2</sup> The term “Secretary,” as used throughout the MMPA, and except where otherwise specified, means “the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this chapter with respect to [whales, dolphins, and porpoises] and members, other than walruses, of the order Pinnipedia.” 16 U.S.C. § 1362(12)(A)(i). Currently, that is the Department of Commerce. *See* 50 C.F.R. § 216.3 (“Secretary shall mean the Secretary of Commerce or his authorized representative.”).

the MMPA sets specific standards governing and restricting the incidental catch<sup>3</sup> of marine mammals, commonly referred to as “bycatch.” 16 U.S.C. §§ 1386–87.

The MMPA standards apply both to domestic commercial fisheries and to foreign fisheries that wish to export their products to the United States. At issue in this litigation is the Imports Provision, 16 U.S.C. § 1371(a)(2),<sup>4</sup> under which, “[m]arine mammals may be taken incidentally in the course of commercial fishing operations” pursuant to permits or authorizations issued under other MMPA provisions. Emphasizing the MMPA’s overarching purpose, the Imports Provision states:

In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. The Secretary of the Treasury<sup>5</sup> shall ban the importation of

<sup>3</sup> The regulatory definitions pertaining to the MMPA provide that:

Incidental catch means the taking of a marine mammal (1) because it is directly interfering with commercial fishing operations, or (2) as a consequence of the steps used to secure the fish in connection with commercial fishing operations: *Provided*, That a marine mammal so taken must immediately be returned to the sea with a minimum of injury and further, that the taking of a marine mammal, which otherwise meets the requirements of this definition shall not be considered an incidental catch of that mammal if it is used subsequently to assist in commercial fishing operations.

50 C.F.R. § 216.3.

<sup>4</sup> The Imports Provision provides in relevant part:

Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 of this title subject to regulations prescribed by the Secretary in accordance with section 1373 of this title, or in lieu of such permits, authorizations may be granted therefor under section 1387 of this title, subject to regulations prescribed under that section by the Secretary without regard to section 1373 of this title. . . . In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary—

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States[.]

16 U.S.C. § 1371(a)(2).

<sup>5</sup> NOAA Fisheries has interpreted this directive to apply to the Departments of the Treasury and Homeland Security, in cooperation with NOAA Fisheries. *See* Fish and Fish Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54,390, 54,394 (Aug. 15, 2016) (if NOAA Fisheries finds a foreign fishery does not meet MMPA standards, the agency, “in cooperation with the Secretaries of the Treasury and Homeland Security, will identify and prohibit the importation of fish and fish products” from the harvesting nation).

commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.

16 U.S.C. § 1371(a)(2). Apart from establishing the zero mortality and serious injury standard, the MMPA does not further define the phrase “United States standards.” *See id.* As discussed below, pp. 33–38, the statute does contain multiple provisions, including those which direct NOAA Fisheries to make stock assessments, and assess the potential biological removal (“PBR”) level, 16 U.S.C. § 1386(a)(6), *see below*, pp. 33–34, to effectuate “the immediate goal that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1387(a)(1). Subsection 1387(g)(1), meanwhile, states that the Secretary of Commerce “shall” undertake emergency rulemaking actions if he or she “finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species.” Before undertaking emergency rulemaking action, however, “the Secretary shall consult with the Marine Mammal Commission,” among other stakeholders. 16 U.S.C. § 1387(g)(2).

The Marine Mammal Commission (“MMC”) was established by the MMPA as an independent United States agency. 16 U.S.C. § 1401. The MMC is directed to “recommend to the Secretary [of Commerce] and to other Federal officials such steps as it deems necessary or desirable for the protection and conservation of marine mammals.” *Id.* § 1402(a)(4). In addition, “[a]ny recommendations which are not followed or adopted [by the Secretary of Commerce and other Federal Officials] shall be referred to the Commission together with a detailed explanation of the reasons why those recommendations were not followed or adopted.” *Id.* § 1402(d).

Plaintiff Center for Biological Diversity first petitioned for implementation of the Imports Provision in 2008. *See* Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54,390, 54,390 (Aug. 15, 2016). In response, NOAA Fisheries issued an advance notice of proposed rulemaking in 2010, *see* Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 75 Fed. Reg. 22,731 (Apr. 30, 2010), but did not proceed further. Four years later, plaintiffs, alleging administrative inaction, brought suit in the United States Court of International

Trade. See *Compl., Ctr. for Biological Diversity v. Pritzker*, No. 14–157-MAB (July 2, 2014). As a result of the ensuing settlement, in August 2016, NOAA Fisheries promulgated regulations guiding implementation of the Imports Provision. These regulations are codified at 50 C.F.R. Part 216, and are known here collectively as the Regulation. Paragraph (h)(1) of 50 C.F.R. § 216.24 calls for a “comparability finding”<sup>6</sup> to be made between the regulatory programs regarding fisheries in the United States and those of the foreign harvesting nation that seeks to import its fish and fish products into the United States.<sup>7</sup> See 50 C.F.R. §§ 216.24(h)(6)(iii), 216.3. Paragraph (h)(1) states in relevant part:

[T]he importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals *in excess of U.S. standards* or caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States are prohibited. For purposes of paragraph (h) of this section, a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals *in excess of U.S. standards* is any fish or fish product harvested in an exempt or export fishery for which *a valid comparability finding is not in effect*.

50 C.F.R. § 216.24(h)(1)(i) (emphases added). Accordingly, paragraph (h)(1) also declares it “unlawful for any person to import, or attempt to import, into the United States for commercial purposes any fish or fish product if such fish or fish product: [] Was caught or harvested in a fishery that does not have a valid comparability finding in effect at the time of import.” *Id.* § 216.24(h)(1)(ii)(A). However, “[t]he prohibitions of paragraph (h)(1) of this section do not apply during the exemption period,” which is “the one-time, five-year period that com-

<sup>6</sup> “Comparability finding means a finding by the Assistant Administrator that the harvesting nation for an export or exempt fishery has met the applicable conditions specified in § 216.24(h)(6)(iii) subject to the additional considerations for comparability determinations set out in § 216.24(h)(7).” 50 C.F.R. § 216.3.

<sup>7</sup> The Regulation provides:

For the purposes of paragraph (h) of this section, harvesting nation means the country under whose flag or jurisdiction one or more fishing vessels or other entity engaged in commercial fishing operations are documented, or which has by formal declaration or agreement asserted jurisdiction over one or more authorized or certified charter vessels, and from such vessel(s) or entity(ies) fish are caught or harvested that are a part of any cargo or shipment of fish or fish products to be imported into the United States, regardless of any intervening transshipments, exports or re-exports.

50 C.F.R. § 216.24(h)(2)(i)(A).

mences January 1, 2017.” *Id.* §§ 216.24(h)(2)(ii), 216.3. Accordingly, the exemption period will end on January 1, 2022.

In promulgating the Regulation, NOAA Fisheries allowed for “Emergency Rulemaking,” stating that, in the case of a “very small” marine mammal population “where any incidental mortality could result in increased risk of extinction,” it “may consider emergency rulemaking to ban imports of fish and fish products from an export or exempt fishery having or likely to have an immediate and significant adverse impact on a marine mammal stock.” 81 Fed. Reg. at 54,395.

## **II. *Factual Background***

The essential facts are not in dispute. The vaquita, one of seven species of porpoise worldwide, was listed as an endangered species in 1985. Endangered Fish or Wildlife; Cochito, 50 Fed. Reg. 1056 (Jan. 9, 1985) (codified at 50 C.F.R. § 17.11). The vaquita is an evolutionarily distinct animal with no close relatives, whose loss would represent a disproportionate loss of biodiversity, unique evolutionary history, and the potential for future evolution. Jefferson Decl. ¶ 5, Mar. 19, 2018, ECF No. 14–4. It has been listed by the Zoological Society of London as a top Evolutionarily Distinct and Globally Endangered species, a list reserved for those species that are especially “unique . . . [and] when they are gone there will be nothing like them left on earth.” *Id.* This little porpoise is endemic to the northern Gulf of California, Mexico. *Id.* ¶ 6; Pl.’s Amend. Compl. ¶ 35 (“Compl.”), Mar. 22, 2018, ECF No. 10. Its range is approximately 4,000 square kilometers in size, and as relevant to this case, overlaps with commercial fisheries that target shrimp, curvina, chano, and sierra, and with an illegal fishery targeting the endangered totoaba. Jefferson Decl. ¶ 6; Compl. ¶¶ 35, 43, 51. Curvina, chano, and sierra fishing occurs year-round in the northern Gulf of California, while shrimp fishing occurs from September to March. Good Stefani Decl.<sup>8</sup> Ex. 26, A Comparison of Fishing Activities Between Two Coastal Communities Within a Biosphere Reserve in the Upper Gulf of California (2015), at 260. Both plaintiffs and the Government agree that, though the vaquita is not a target of Mexican fishermen, it is threatened and inadvertently killed by gillnets deployed to capture these other species with which it shares its territory. The parties also agree that the vaquita is on the verge of extinction as a result.

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<sup>8</sup> The Good Stefani Declaration was executed and filed on April 16, 2018, and appears in the court’s docket at ECF No. 14–2. The exhibits to the declaration were also filed on April 16 and appear at ECF No. 14–3.

In 1996, the Mexican government created the Comité Internacional para la Recuperación de la Vaquita<sup>9</sup> (“CIRVA”), a collection of vaquita scientists which meets regularly to take stock of the species and make science-based recommendations to support the species’ survival. Good Stefani Decl. Ex. 35, Scientific Reports of the First Three CIRVA Meetings (Jan. 25–26, 1997, Feb. 7–11, 1999, and Jan. 18–24, 2004), at 1–3; Compl. ¶ 37. CIRVA’s findings and recommendations are published in a meeting report. Compl. ¶ 37. In 1997, a cooperative Mexican-American survey sampled the entire geographical range of the vaquita and estimated a population size of 567. Good Decl. Ex. 27, NOAA Fisheries: Vaquita Conservation and Abundance (updated Aug. 1, 2017), at 1; Compl. ¶ 36. CIRVA, in its eighth meeting report, published in February 2017, estimated that between 2011 and 2016, the vaquita suffered an average annual rate of decline of 39 percent, “corresponding to a population decline of 90% over this five-year period.” Good Stefani Decl. Ex. 40, CIRVA 8th Meeting Report (Nov. 29–30, 2016), at 3. CIRVA has attributed this precipitous decline to the vaquita’s “mortality in illegal gillnets.” *Id.* The annual decline rate increased to 49 percent in 2015 and 2016, resulting in a loss of almost half of the then-remaining vaquita population. *Id.* CIRVA estimated that, as of November 2016, approximately 30 vaquita remained, and that at the current rate of gillnet mortality, the vaquita would be extinct within a few years. *Id.* In light of these facts, CIRVA repeated “its previous recommendation that the Government of Mexico implement a permanent ban on all gillnets throughout the entire range of the vaquita.” *Id.* at 4. In its tenth meeting report, published in January 2018, CIRVA stated that despite Mexico’s regulatory efforts, “[h]igh levels of illegal fishing continue,” and determined that “[e]nforcement thus far has failed to prevent illegal fishing and the survival of vaquita depends on a gillnet-free habitat.” Good Stefani Decl. Ex. 42, CIRVA 10th Meeting Report (Dec. 11–12, 2017), at 1, 11. A net-removal campaign conducted in 2016 and 2017 found almost 400 illegal nets, including active curvina, shrimp, and totoaba gillnets, in just the small portion of the vaquita’s habitat that was searched. *Id.* at 1, 9–10, 15.

A gillnet is a wall of netting that fishermen hang vertically in the water column to catch target species. Jefferson Decl. ¶ 11. Gillnets come in various mesh sizes, and fishermen use them actively or set them with weights and buoys for later retrieval. Accordingly, gillnets kill species indiscriminately, except insofar as a given animal would not be of a size that would be caught in the webbing. *Id.* ¶ 12. In the United States, the use of gillnets is tightly regulated and banned in

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<sup>9</sup> Meaning the “International Committee for the Recovery of the Vaquita.”

many areas. Oppenheim Decl. ¶¶ 15–17, Mar. 29, 2018, ECF No. 14–6. The Mexican government declared a temporary ban on some gillnet use within the vaquita’s range in 2015. Good Stefani Decl. Exs. 1–2, 2015 Temporary Gillnet Ban and English Translation (Oct. 4, 2015).

On March 1, 2017, the MMC—which, as noted, is an independent agency of the United States tasked with recommending measures to NOAA Fisheries for the preservation of marine mammals, *see* 16 U.S.C. §§ 1401, 1402(a)(4)—submitted a letter to the latter stating that “[t]he gillnet fisheries of the upper Gulf of California [] continue to cause high levels of bycatch mortality for the vaquita.” Good Stefani Decl. Ex. 30, MMC Mar. 1, 2017 Letter to NOAA Fisheries (Mar. 1, 2017), at 1. The MMC found that “[w]e currently have sufficient information to indicate that all gillnet fisheries that incidentally catch vaquitas are employing a fishing technology that kills . . . marine mammals in excess of U.S. standards.” *Id.* at 2.

On June 30, 2017, the Mexican government announced a permanent ban on most gillnet fishing in the vaquita’s habitat, prohibited some night-time vessel activity, established a series of designated landing sites for boats, and required the use of tracking devices on small fishing boats. Good Stefani Decl. Exs. 3–4, 2017 Permanent Gillnet Ban and English Translation (June 30, 2017); Good Stefani Decl. Ex. 10, Gov’t of Mexico Sept. 21, 2017 Letter to NOAA Fisheries (Sept. 21, 2017), at 13; Compl. ¶ 46. However, the Mexican government exempted gillnet fishing of the curvina and sierra from the permanent gillnet ban, and so gillnet fishing for those species continues. Good Stefani Decl. Ex. 15, CONAPESCA<sup>10</sup> Dec. 6, 2017 Letter to NOAA Fisheries (Dec. 16, 2017), at 5–8; O’Connell Decl. ¶ 16, Apr. 11, 2018, ECF No. 14–5. Sierra are relatively high-value fish most commonly harvested with gillnets. O’Connell Decl. ¶ 13. Fishing for sierra within the vaquita’s range is well documented, and vaquita have been killed in sierra nets. Good Stefani Decl. Ex. 22, Vaquita Bycatch in Mexico’s Artisanal Gillnet Fisheries (Aug. 2000), at 1111. All curvina fisherman in the northern Gulf of California use gillnets. O’Connell Decl. ¶ 13. The Mexican government banned fishing for the endangered totoaba, regardless of equipment, in 1975. Gov’t of Mexico Sept. 21, 2017 Letter to NOAA Fisheries, at 2. Notwithstanding this ban, because of high demand for the fish’s swim bladder on the Chinese black market, poachers continue to illegally hunt for the fish, often with gillnets. CIRVA 10th Meeting Report, at 9–10. En-

<sup>10</sup> CONAPESCA is the Comisión Nacional de Acuacultura y Pesca, meaning the National Commission of Aquaculture and Fishing. It is the Mexican agency charged with enforcing the gillnet bans.

forcement of the total ban on totoaba fishing is complicated by the fact that the totoaba fishing season overlaps spatially with legal curvina fishing, which, as noted, permits the usage of gillnets. Good Stefani Decl. Ex. 17, NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA (Feb. 15, 2018), at 11, 13; Ragen Decl. ¶ 27, Mar. 19, 2018, ECF No. 14–7. The curvina and totoaba fisheries both peak in their levels of activity in March and April. O’Connell Decl. ¶ 29; Ragen Decl. ¶ 27.

Pursuant to the permanent ban on gillnet fishing of species other than the curvina and sierra, fishing for shrimp and chano with gillnets inside the vaquita’s range is illegal, but continues anyway. CIRVA 10th Meeting Report, at 9–10, 15 (noting availability of gillnet-caught shrimp and gear sweeps finding active shrimp gillnets). Chano fishing continues year-round, with peak season in April and May, and almost half of all chano fishermen illegally use gillnets. O’Connell Decl. ¶¶ 13, 29. Similarly, many shrimp fishermen in the northern Gulf of California illegally continue to use fine-mesh gillnets that are weighted at the bottom, which drags the gillnet low in the water column and increases shrimp yield. Jefferson Decl. ¶ 14; *see* O’Connell Decl. ¶ 13.

On September 21, 2017, the MMC submitted a second letter to NOAA Fisheries formally recommending that the latter “act immediately to invoke the emergency rulemaking provisions of the MMPA import rule to ban the import into the United States of all fish and fish products from fisheries that kill or seriously injure, or that have the potential to kill or seriously injure vaquitas.” Good Stefani Decl. Ex. 31, MMC Sept. 21, 2017 Letter to NOAA Fisheries (Sept. 21, 2017), at 3. The MMC noted that “[n]umerous fisheries in the upper Gulf of California that involve the use of gillnets, regardless of the target species, could contribute to mortality of vaquitas.” *Id.* Further, the MMC referenced the emergency rulemaking provisions found in 16 U.S.C. § 1387(g) of the MMPA, and recommended that NOAA Fisheries “use emergency rulemaking procedures to impose an immediate import ban on those fish or fish products.” *Id.* While NOAA Fisheries has responded to the issues raised in the MMC’s letters through ongoing interagency discussions in interagency consultations, no action has occurred as a result. Rauch Decl. ¶ 7, Apr. 19, 2018, ECF No. 15–1.

### **III. Procedural History**

Plaintiffs, all environmental nongovernmental organizations, brought this case on March 21, 2018, seeking an injunction requiring the Government to ban the import of fish or fish products from any Mexican commercial fishery that uses gillnets within the vaquita’s

range.<sup>11</sup> Orig. Compl., ECF No. 1; Summ., ECF No. 2; Compl. at 19. Plaintiffs named as defendants several United States agencies and officials charged with enforcing the MMPA. On April 16, 2018, plaintiffs filed a motion for a preliminary injunction and supporting memorandum of law. Mot. for Prelim. Inj. & Suppl. Mem. of Law (Pl.'s Br.), ECF No. 14. Plaintiffs also attached the declarations of several members of their organizations to their motion. Brit Rosso, a member of NRDC and the Center for Biological Diversity, regularly travels in the northern Gulf of California looking for vaquita and other wildlife and has plans to travel to the area to do so again in January or February 2019. Rosso Decl. ¶¶ 5–9, Mar. 13, 2018, ECF No. 14–12. Brett Hartl, a Center for Biological Diversity member, lives four hours away from the northern Gulf of California and has regularly traveled there to observe wildlife and to look for the vaquita. Hartl Decl. at ¶¶ 4, 7, 12, Feb. 16, 2018, ECF No. 14–10. Alejandro Olivera Bonilla, a Center for Biological Diversity member who lives on the Gulf of California, is involved with vaquita conservation work in the United States and Mexico and frequently visits its habitat. Olivera Decl. ¶¶ 3, 6–11, 13, Mar. 5, 2018, ECF No. 14–11. Courtney Vail, an Animal Welfare Institute member who lives five hours from the northern Gulf of California, works in marine conservation and regularly visits the northern Gulf of California to visit the vaquita. Vail Decl. ¶¶ 2, 5–9, Mar. 18, 2018, ECF No. 14–14. Plaintiffs argue that the Imports Provision of the MMPA, 16 U.S.C. § 1371(a)(2), imbues the selected agencies and officials with a duty to embargo imports of fish and

<sup>11</sup> In their first claim for relief, plaintiffs allege that the Government failed to ban fish and fish-product imports from northern Gulf of California Mexican commercial fisheries that use gillnets within the vaquita's range. In their second claim for relief, plaintiffs allege that the Government unlawfully withheld and unreasonably delayed a demand for reasonable proof of the effect on the vaquita of northern Gulf of California Mexican commercial gillnet fishing for export to the United States. Plaintiffs' request for relief reads as follows:

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Defendants unlawfully withheld and unreasonably delayed the banning of fish and fish-product imports from northern Gulf of California Mexican commercial fisheries that use gillnets within the vaquita's range;
2. Declare that Defendants unlawfully withheld and unreasonably delayed a demand for reasonable proof of the effect on the vaquita of northern Gulf of California Mexican commercial gillnet fishing for export to the United States;
3. Enter an injunction requiring Defendants to ban the import of fish or fish products from any Mexican commercial fishery that uses gillnets within the vaquita's range;
4. Enter an injunction requiring Defendants to insist on reasonable proof from the Mexican government of the effects of the use of gillnets by northern Gulf of California fisheries on vaquita and that they meet U.S. standards;
5. Award Plaintiffs the costs of this action, including reasonable attorneys' fees; and
6. Grant any other relief this Court finds just and proper.

Compl. at 19–20.

shrimp from gillnet fisheries in the northern Gulf of California. Pl.'s Br. at 1–2. Asserting the right of action found in the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), plaintiffs ask this court to “compel agency action unlawfully withheld or unreasonably delayed,” here, the embargo. *Id.* at 18, 25–26.

The Government responded to plaintiffs’ motion, and moved to dismiss this case, on May 7, 2018. Def.’s Resp. in Opp’n and Mot. to Dismiss (“Def.’s Br.”), ECF No. 15. Plaintiffs filed their reply in support of the motion for a preliminary injunction, and their response in opposition to the Government’s motion to dismiss, on June 11. Resp. in Opp’n to Def.’s Mot. to Dismiss and Reply in Supp. of Pl.’s Mot. for Prelim. Inj. (“Pl.’s Reply”), ECF No. 21. The Government filed its reply in support of its motion to dismiss on July 2. Def.’s Reply in Supp. of Mot. to Dismiss (“Def.’s Reply”), ECF No. 22. Oral argument was held before the court on July 10, 2018. ECF No. 24.

## DISCUSSION

The Government argues that plaintiffs’ action should be dismissed for two reasons: (1) this court lacks subject matter jurisdiction over the Government’s failure to impose an import ban on all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita’s range, and (2) plaintiffs lack standing. In the alternative, the Government urges that the court deny the motion for a preliminary injunction that would enjoin it to immediately impose the ban. Plaintiffs oppose the Government’s motion to dismiss, and further argue that they are entitled to the preliminary injunction. The court concludes that the court does have subject matter jurisdiction, that plaintiffs have established standing, and that a preliminary injunction is warranted. Below, the court discusses each issue in turn.

### ***I. This Court Has Subject Matter Jurisdiction.***

Plaintiffs must establish subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). When “a motion to dismiss for lack of subject matter jurisdiction . . . challenges the truth of the jurisdictional facts alleged in the complaint, the [] court may consider relevant evidence in order to resolve the factual dispute.” *Id.* at 747. Preponderance of the evidence “means the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it,” *Hale v. Dep’t of Transp., F.A.A.*, 772 F.2d 882, 885 (Fed. Cir. 1985); that is, plaintiffs must demonstrate that their allegations are “*more likely than not*” to be true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007) (emphasis in original).

Even when a motion to dismiss challenges some jurisdictional facts alleged in the complaint, the Court still must “accept[] as true” any “uncontroverted factual allegations in the complaint.” *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011); see *Gibbs v. Buck*, 307 U.S. 66, 72 (1939) (stating that facts “left unchallenged [are] for the court to accept as true without further proof”).

This Court has exclusive jurisdiction over any civil action arising out of any law of the United States providing for “embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety,” such as those prescribed by the MMPA. 28 U.S.C. § 1581(i)(3); see also *Earth Island Institute v. Brown*, 28 F.3d 76, 79 (9th Cir. 1994) (“[Plaintiffs’] suit under the MMPA is an action arising under a law providing for embargoes. As such, it is reserved to the exclusive jurisdiction of the CIT.”). The APA provides individuals like plaintiff organizations and their members a private right of action to challenge agency actions or inactions and gives courts the ability to provide relief such as an injunction. 5 U.S.C. §§ 702, 706(1). A “claim under § 706(1) can proceed . . . where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis omitted). For the purposes of obtaining relief pursuant to the APA, an “agency action” is defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). In short, the APA empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

Plaintiffs contend that the Imports Provision imposes on the Government a mandatory, discrete, immediate, and continuous duty to ban imports of foreign fish and fish products, if those fish were caught with gear that “results in the incidental kill” of marine mammals exceeding United States standards. 16 U.S.C. § 1371(a)(2). Consequently, they claim that pursuant to the APA, this court has subject matter jurisdiction and should order the requested preliminary injunction. The Government counters that this court does not have subject matter jurisdiction because the agency action requested by plaintiffs is neither mandatory nor discrete under the MMPA, and thus the court lacks the authority to issue an import ban. Def.’s Br. at 13–17. More specifically, the Government contends that the Regulation provides a five-year exemption for foreign fisheries and their governments and that several steps and a lengthy process are required in order to make a comparability finding necessary to impose the ban. *Id.* The Government’s arguments are not persuasive.

The import ban requested here is both discrete and mandatory for purposes of the APA. The parties at oral argument agreed that the Imports Provision imbues the Government with a duty to ban importation of commercial fish and fish products where the commercial fishing technology results in the incidental kill of marine mammals. Oral Arg.; see 16 U.S.C. § 1371(a)(2) (providing that the Government “shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards”). “Shall” is mandatory language, demonstrating that Congress left the Government with no discretion whether to act. See *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) (“[T]he word ‘shall’ usually creates a mandate, not a liberty.”); *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 975–76 (N.D. Cal. 1990) (holding embargo of yellowfin tuna was “required by the MMPA, in carrying out Congress’ will in protecting the marine mammals,” despite government contention that it needed several months to compile and analyze data), *aff’d*, *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991). That conclusion is buttressed by the use of “may” elsewhere in the MMPA. See *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (“When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.”); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (“[W]hen a statutory provision uses both ‘shall’ and ‘may,’ it is a fair inference that the writers intended the ordinary distinction.”). Furthermore, it is of note that the MMPA gives the Government discretion to waive the requirements of other provisions but does not do so for the Imports Provision, which supports the conclusion that imposition of the import ban is mandatory. See 16 U.S.C. § 1371(a)(3) (permitting the Secretary of Commerce to waive requirements relating to the intentional taking or importing of marine mammals, but not the ban on imports of foreign fish or fish products); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (alteration in original) (citation omitted)). Here, evidence shows that vaquita are killed by gillnet fishing and are on the verge of extinction: because the statutory duty to ban fish imports resulting in such excessive marine mammal bycatch is mandatory, the Government must comply with it.

The parties disagree over when the duty to impose an import ban activates, largely based on disputes regarding the meaning of the

phrase “United States standards,” and whether NOAA Fisheries must first make a regulatory determination, pursuant to the Regulation, that those standards have been exceeded. It is worth noting that agency regulations cannot negate mandatory language in a statute: “Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.” *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). The Government cannot give itself a five year exemption from compliance with the MMPA, which dictates that the Secretary of the Treasury “shall ban” offending imports in order to meet the “immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1371(a)(2). By its terms, the Regulation only exempts the foreign fisheries and their governments from the Regulation, and not the statute, for five years, and thus is not on its face inconsistent with the MMPA. See 50 C.F.R. § 216.24(h)(2)(ii) (“The prohibitions of paragraph (h)(1) of this section shall not apply during the exemption period.” (emphasis added)).

The agency action in question is also discrete: plaintiffs here demand the application of a single provision to a specific factual circumstance that could take the form of a rule or order, as distinguished from an impermissible broad programmatic attack on the Government’s overall implementation of the MMPA or a general challenge to compliance with a statutory mandate. See *Norton*, 542 U.S. at 62, 66–67 (contrasting “circumscribed, discrete agency actions,” including “agency rule, order, license, sanction [or] relief,” with “compliance with a broad statutory mandate” (quoting 5 U.S.C. § 551(13))); *S. Shrimp All. v. United States*, 33 CIT 560, 588, 617 F. Supp. 2d 1334, 1360–61 (2009) (challenging the efficacy of a program already in place); *Vill. of Bald Head Island v. U.S. Army Corps of Eng’rs*, 714 F.3d 186, 193–94 (4th Cir. 2013) (challenging defendant’s nonperformance of vague promise to “protect and nourish its beaches” during 10-year-long implementation of program). Although, as discussed above, the Regulation does not apply here, in any event it does not and cannot transmute the discrete action of issuing an import ban into something else. Nowhere does the APA or case law require a discrete action to be comprised of only one step; indeed, issuing a rule often entails multiple steps. For an agency action to be discrete,

Congress must “ha[ve] indicated an intent to circumscribe agency enforcement discretion, and ha[ve] provided meaningful standards for defining the limits of that discretion.” *Chaney*, 470 U.S. at 834. It has done so here, dictating that “[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.” 16 U.S.C. § 1371(a)(2). As this court has noted above, in the sentence preceding this directive, Congress gave content to the concept of “in excess of United States standards” when it provided in the statute that “it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” *Id.*

In the face of this “zero mortality and serious injury rate” language—which can be applied clearly to the vaquita, a species on the brink of extinction because of commercial gillnet fishing—the Government continues to argue that the phrase “United States standards” is not defined in the statute, is ambiguous, and does not clearly give direction to the agency as required to compel agency action. It points to the Regulation, which it interprets to require that the agencies must define United States standards and determine whether they are met in order to impose a ban under that Regulation. Hence, the Government argues that the action here is not discrete. As an initial matter, as discussed above, the Regulation, which by its own terms becomes effective at the earliest in January 2022, does not apply here. More fundamentally, the Government’s interpretation inverts the requirements of the statutory Imports Provision, 16 U.S.C. § 1371(a)(2), because even assuming arguendo ambiguity in the phrase “United States standards,” that term only affects the Secretary’s ability to exempt fisheries from the ban and consequently does not impede this court’s subject matter jurisdiction. *See* 16 U.S.C. § 1371(a)(2); *Kokechik*, 839 F.2d at 799 (“[A]lthough the Federation actively seeks to catch only salmon, marine mammals protected by the MMPA end up as unintentional victims of salmon gillnet fishing because of the nature of the fishing gear and techniques used. This result is absolutely prohibited by the MMPA unless, pursuant to the requirements of the Act, the Secretary of Commerce specifically grants permission for the taking of marine mammals incidental to commercial fishing.” (citing 16 U.S.C. § 1371(a)(2))).

The Government also argues that “the agency [must] engage in discussions with a foreign government and provid[e] an opportunity

for that government to provide evidence *before* making a determination of whether United States standards have been exceeded,” Def.’s Reply at 18, in order to comply with the statutory requirement that NOAA Fisheries “shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.” 16 U.S.C. § 1371(a)(2)(A). This argument is unpersuasive. For one thing, the Government has already made the statutorily mandated request and provided Mexico with the opportunity to offer evidence.<sup>12</sup> For another, the Government’s position again gets the requirements of the statute backwards: the statute only requires that the Government *request* information from foreign governments when determining whether to *exempt* fishery operations from a potential ban arising from bycatch in excess of United States standards.<sup>13</sup> In this case, it is undisputed that because of bycatch in the gillnet fishing technology, the vaquita is being killed and is on the verge of extinction—a result which perforce contravenes United States standards. Countenancing a regulations-imposed delay until 2022 for consultations with the Mexican government (a posture endorsed by the Government, Def.’s Reply at 18–19), while the vaquita goes extinct, would be inconsistent with the MMPA’s general moratorium on marine mammal takings and the Imports Provision’s direction that the Secretary of the Treasury “shall ban” offending imports in order to meet the “immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1371(a)(2).

<sup>12</sup> Although plaintiffs initially asked in their second claim for relief that this court require the Government to request reasonable proof from the Mexican government, Compl. at 19, ¶¶ 60–65, both parties now agree that the Government has already done so, and plaintiffs do not oppose the Government’s motion to dismiss that claim as moot. See Def.’s Br. at 17; Rauch Decl. ¶ 5; Pl.’s Reply at 26–27. Accordingly, the court dismisses plaintiffs’ second claim as moot.

<sup>13</sup> The legislative history of the MMPA further supports a conclusion that the import ban element of the Imports Provision functions as a limited exception to the absolute moratorium effected by 16 U.S.C. § 1371(a), allowing importation of fish and fish products harvested with commercial fishing technology which incidentally kills marine mammals only upon administrative review of information submitted by foreign governments for adherence to United States standards. See S. Rep. No. 92–863, at 10 (1972) (finding that “unilateral action by the United States . . . could be fruitless unless other nations involved in the taking of marine mammals work with the United States to preserve and protect these creatures”); H.R. Rep. No. 100–970 (Sept. 23, 1988), reprinted in 1988 U.S.C.C.A.N. 6154, 6155 (“The Act required the Secretary of Commerce to obtain reasonable proof from foreign governments in order to make a finding that foreign commercial fishing techniques were not resulting in kills or injuries in excess of U.S. standards.” (emphasis added)); see also 16 U.S.C. § 1371(a)(2)(A).

## II. *Plaintiffs Have Standing.*

The Government contends that plaintiffs lack standing because they have not demonstrated that they have a particularized injury which is traceable to the Government's nonaction or redressable through an import ban. Specifically, it alleges that plaintiffs have never seen vaquita, that no members have concrete and specific plans to view the vaquita in a timeframe affected by next fishing season, and that the Mexican government's and individual fishermen's comportment is responsible for the vaquita's decline rather than the Government's inaction.

"The essence of the standing question, in its constitutional dimension, is whether the plaintiff has alleged such a personal stake in the outcome of the controversy (as) to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260–61 (1977) (internal citations and quotations omitted). Specifically, a plaintiff must show: (1) "that it has suffered a concrete and particularized injury that is either actual or imminent," (2) "that the injury is fairly traceable to the defendant," and (3) "that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury may be indirect so long as it is fairly traceable to defendants' conduct. *Vill. of Arlington Heights*, 429 U.S. at 261. When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" other than the plaintiff, and causation and redressability hinge on the response of a third party, a plaintiff must show that the third party is likely to respond to the government's conduct in a way that causes the plaintiff's injury to be redressed. *Lujan*, 504 U.S. at 561–62 (emphasis in original). Plaintiffs bear the burden of establishing standing, and "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (alteration in original) (internal quotations and citation omitted).

### *A. Plaintiffs Have a Concrete and Particularized Injury that Is Actual or Imminent.*

Plaintiffs have demonstrated that their members have a recreational and aesthetic interest in viewing the vaquita that is harmed by the continual decrease in its population and its potential extinction. Several of plaintiffs' members have visited the vaquita's habitat

—some multiple times—to try to observe the porpoise, and at least one member has specific plans to return in the near future. Rosso Decl. ¶¶ 5–10; Hartl Decl. ¶¶ 7–8, 10; Olivera Decl. ¶¶ 8–13; Vail Decl. ¶ 9. Further, experts and advisory organizations agree that the ongoing gillnet fishing threatens the vaquita’s existence. *See, e.g.*, CIRVA 10th Meeting Report, at 1 (finding that “the vaquita will be extinct in a few years” absent elimination of human caused mortality); Good Stefani Decl. Ex. 41, CIRVA 9th Meeting Report (Apr. 25–26, 2017), at 4; Jefferson Decl. ¶¶ 11, 15. As “a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm [for purposes of standing], since some animals that might have been the subject of his interest will no longer exist,” plaintiffs have established injury. *See Lujan*, 504 U.S. at 566–67 (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986)).

The Government posits several reasons why plaintiffs have not sufficiently established injury, such as: plaintiffs have never actually seen a vaquita on their trips; that any lessening of their esthetic or recreational enjoyment is merely “subjective” rather than “objective”; the only relevant fishing season has passed before any plaintiff members plan to returned; and three of the plaintiff members have no specific plans to visit the vaquita habitat again in the future. All of these arguments are unavailing.

First, for purposes of the injury determination, it does not matter whether any of the plaintiff members have managed to view a vaquita yet, as “the *desire* to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” *Lujan* at 562–63 (emphasis added); *see also Japan Whaling Ass’n*, 478 U.S. at 230 n.4 (holding that the fact that “the whale watching and studying of [whale conservation groups] members will be adversely affected by continued whale harvesting” by Japan absent U.S. sanctions was sufficient injury for standing purposes). Second, the Government has provided no authority for the distinction it drew at oral argument between “subjective” and “objective” harms to recreational and esthetic enjoyment. Third, plaintiffs have provided evidence that, although gillnet fishing activities peak in particular months, gillnet fisheries operate throughout the year and that gillnet fishing causes vaquita deaths in the months leading up to Rosso’s visit. A Comparison of Fishing Activities, at 260 (showing that curvina, sierra, and chano fisheries in the Gulf of California operate year-round and the shrimp fishery operates September through March); Good Stefani Suppl. Decl. Ex. 1, Action Program for the

Conservation of the Species: Vaquita (Feb. 2008), at 20, ECF No. 21–1 (documenting vaquita bycatch from December through May). Finally, at least one plaintiff member—Rosso—has specific plans to visit the vaquita’s habitat to try to observe the porpoise in the future. Rosso Decl. ¶ 10 (stating plans to return in “January or February” of 2019); see *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000) (“An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”) (citing *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977))). Harm to one plaintiff member is enough to establish injury for purposes of standing. See *Vill. of Arlington Heights*, 429 U.S. at 264 & n.9; *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1008 (D.C. Cir. 1977) (“[I]t is well settled that standing does not depend on the size or quantum of harm to the party.”). Plaintiffs have thus established that their injury is concrete, particularized, and actual or imminent.

The Government also argues that, at the very least, the Animal Welfare Institute has not established injury because Rosso, the only declarant with specific future plans to visit the vaquita’s habitat, is not a member of the Animal Welfare Institute. See Rosso Decl. ¶ 2 (stating that he is a member of the NRDC and Center for Biological Diversity). However, each of the three other members had specific plans to visit the vaquita habitat at the time the case was filed, see Hartl Decl. ¶ 10 (“plans to return to the Upper Gulf in late March of 2018 to try . . . to view the vaquita”); Olivera Decl. ¶ 13 (“specific plans” to return “late this March [2018]”); Vail Decl. ¶ 9 (“specific plans to travel to Puerto Penasco in April [2018]”), and the “jurisdiction of the Court depends upon the state of things at the time of the action brought.” *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.)); see *Lujan*, 504 U.S. at 569 n.4 (“The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*” (emphasis added by *Lujan* court) (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989))); see also *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH*, 263 F.3d 513, 524–26 (6th Cir. 2001) (summarizing cases where the Supreme Court and Circuit Courts applied this principle). Thus, the Animal Welfare Institute has established injury as well.

*B. Plaintiffs' Injury Is Fairly Traceable to the Government's Inaction and Redressable by an Import Ban.*

The Government contends that plaintiffs' injury is not fairly traceable to the Government's inaction because the conduct of third parties — the Mexican government and Mexican fisheries — is the cause of the vaquita's decline and any resulting harm to plaintiffs' recreational and esthetic interests in the vaquita. In light of the various actions these third parties could undertake in response to an import ban — such as pursuing a World Trade Organization case against the United States, retaliating with trade sanctions of their own, or resorting to the lucrative and illicit totoaba fishery in response to tighter regulation of legal fisheries — the Government argues that plaintiffs have failed to demonstrate that an import ban would help save the vaquita and thus ameliorate harm to plaintiffs' recreational and esthetic interests. The Government also contends that, even if Mexico responds by banning gillnet use in all its fisheries, causation and redressability are not established because many vaquita deaths result from gillnets used in the already illegal totoaba fishing.

These arguments lack merit. Plaintiffs have shown that the third parties in question are likely to respond to a United States import ban in a way that reduces danger to the vaquita and consequently harm to plaintiffs' recreational and esthetic interests. First, plaintiffs have provided persuasive evidence demonstrating that the United States is a significant export market for the gillnet fisheries in question. O'Connell Decl. ¶¶ 25–28 (indicating that substantial amounts of curvina, sierra, shrimp, and chano are exported from Mexico to the United States); Good Stefani Decl. Ex. 28, Estimates of Illegal and Unreported Fish in Seafood Imports to the USA (Apr. 2014), at 105, 112 (finding in a study that the United States market “is one of the world's biggest seafood markets, whose purchasing power has a significant impact on patterns of fishing and trade” and that Mexico was one of the top ten exporters of studied wild-caught fisheries products to the United States); Good Stefani Decl. Ex. 39, CIRVA 7th Meeting Report (Nov. 29–30, 2016), at 25 (finding in a study that wild shrimp from the region “is one of the most important fisheries in Mexico” and has one of the highest values, employment numbers, and ships of Mexican fisheries); Pl.'s Br. Ex. 4, Fisheries in Mexico's Upper Gulf of California (June 2009), at 13, ECF No. 14–1 (finding in United States government report that “[a]bout 80% of Mexico's fish exports end up in the US”).<sup>14</sup>

<sup>14</sup> Although the Government claims that plaintiffs have not come forward with competent proof that the United States is a significant export market for shrimp, chano, sierra, and

Second, plaintiffs have demonstrated that Mexico has responded to past import bans imposed under similar circumstances by enacting and enforcing new environmental regulations, and that the Mexican government has actively negotiated in opposition to a potential embargo in this case, which shows that the Mexican government is concerned with preserving access to the United States market for its fisheries. O'Connell Decl. ¶¶ 44–54; Rauch Decl. ¶¶ 3–5 (describing negotiations); Good Stefani Decl. Exs. 8–18 (exhibiting communications between Mexican and United States governments regarding vaquita protection); *see also Kreps*, 561 F.2d at 1009 (citing the “extensive negotiations” undertaken by the South African government in response to a potential embargo as evidence of traceability). For example, a 1986 report suggests that Mexico made notable efforts to protect dolphins in response to a tuna embargo, Pl.'s Br. Ex. 5, Annual Report of the Inter-American Tropical Tuna Commission, 1985 (1986), at 52–53, ECF No. 14–1, and an attachment to the 1995 Panama Declaration explicitly discussed lifting an embargo of Mexican tuna products in exchange for better protections for dolphins. O'Connell Decl. Ex. 6, Declaration of Panama (Oct. 4, 1995), at 5. The Government's own report noted that dolphin deaths declined as a result of actions taken in response to the tuna embargo. Pl.'s Br. Ex. 6, Annual Report: Administration of the MMPA, 1999–2000 (2000), at 62, 67. Similarly, within a few years of Congress' enacting a ban on the importation of shrimp caught in a manner that kills sea turtles, the Government stated that Mexico, among other countries, “adopted a program to reduce the incidental capture of sea turtles . . . comparable to the U.S. program.” Certifications Pursuant to Section 609 of Public Law 101–162, 60 Fed. Reg. 24,962, 24,962 (May 10, 1995). When Mexico's turtle-safe practices declined, the United States again instituted a ban, and within a year Mexico's turtle protections were once more “comparable to that of the United States.” Certifications Pursuant to Public Law That 12 Nations Have Adopted Programs To Reduce the Incidental Capture of Sea Turtles in Their Shrimp Fisheries, 76 Fed. Reg. 32,010, 32,010 (June 2, 2011).

Moreover, although not dispositive, it is noteworthy that Congress chose embargoes as the most effective remedy for foreign threats to marine mammals. *See, e.g., Kreps*, 561 F.2d at 1010 (“Congress, in enacting the MMPA, established as a matter of law the requisite causal relationship between American importing practices and [foreign harvesting] practices.”); *Laidlaw*, 528 U.S. at 185 (deferring to Congress's determination that civil penalties would deter future vio-

curvina caught with gillnets from the Upper Gulf of California, Def.'s Reply at 4–5, the record does support a conclusion that the United States is a significant export market for those products.

lations); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989) (stating courts “credit . . . congressional determination[s]” in evaluating standing); *Dellums v. U.S. Nuclear Regulatory Comm’n*, 863 F.2d 968, 978 (D.C. Cir. 1988) (“Since . . . it is unseemly for a federal court to ignore . . . legislative opinion, . . . Congress can provide legislative assessments which courts can credit in making standing determinations . . . .” (internal quotation marks and citation omitted)).

Several cases, including some decided by this Court, found standing under similar circumstances. For example, in *Earth Island Inst. v. Christopher*, 19 CIT 1461, 913 F. Supp. 559 (1995), *appeal dismissed*, 86 F.3d 1178 (Fed. Cir. 1996), this Court held that environmental organizations had standing to challenge the government’s inaction regarding imports of shrimp harvested in a manner that harmed sea turtles covered by the Endangered Species Act. The Court reasoned that it was “safe to presume that the exporting countries do (and would) attempt to comply with U.S. law” due to the size of the United States seafood export market. *Id.* at 570. Likewise, in *Humane Soc’y of U.S. v. Brown*, 20 CIT 277, 311–12, 920 F. Supp. 178, 204 (1996), this Court found that environmental organizations had standing to seek a declaration that Italian fisheries used driftnets harmful to dolphins protected by the Driftnet Enforcement Act because plaintiffs had presented evidence that the threat of trade sanctions against Italy had been previously “effective in achieving adequate driftnet agreement and agreement compliance.” The D.C. Circuit came to the same conclusion in *Kreps* when evaluating whether harm to plaintiffs’ seal-watching interests was fairly traceable to the Government’s failure to enforce portions of the MMPA. Citing extensive negotiations with the South African government, South Africa’s previous attempts to comply with the MMPA, and Congress’ intention in enacting the MMPA, the D.C. Circuit determined that it was “impossible to conclude, as appellees urge us to, that the causal relationship is ‘purely speculative.’” *Kreps*, 561 F.2d at 1009–10.

The Government’s contention that an import ban on legal fisheries will not redress plaintiffs’ harms because illegal totoaba fishing is the primary source of vaquita deaths is also unpersuasive. As an initial matter, the evidence shows that legal gillnet fisheries have caused vaquita deaths, and even if a gillnet ban catalyzed by an embargo only reduced rather than eliminated gillnet use in the vaquita’s habitat, such a harm reduction would be sufficient to establish standing, particularly in light of the fact that every vaquita death increases the likelihood that the species will go extinct. *Massachusetts*, 549 U.S. at 524 (rejecting “the erroneous assumption that a small incremental

step . . . can never be attacked in a federal judicial forum”); *Humane Soc’y of U.S.*, 920 F. Supp. at 204 (finding standing was established because “enforcement of the Driftnet Act will diminish, if not eliminate, the harm to [the dolphins] and their plaintiff observers”). Moreover, plaintiffs have provided evidence showing that it is likely that a complete gillnet ban would reduce illegal totoaba fishing by making enforcement easier, including a report from CIRVA, CIRVA 9th Meeting Report, at 12, and the Government’s own statement that “[t]he curvina fishery provides cover for illegal [totoaba fishing and] . . . allows sale and possession of gillnets, which not only complicates enforcement but also is likely to slow transition to alternative fishing gears.” Good Stefani Decl. Ex. 8, NOAA Fisheries Apr. 25, 2017 Letter to Mexican Gov’t (Apr. 25, 2017), at 1.

### **III. A Preliminary Injunction is Warranted.**

The court now turns to plaintiffs’ motion for a preliminary injunction requiring the Government to ban the importation of fish and fish products from any Mexican commercial fishery that uses gillnets within the vaquita’s range. “A preliminary injunction ‘is an extraordinary remedy.’” *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)). When ruling on a motion for a preliminary injunction, the Court reviews four factors: (1) whether the plaintiffs are likely to prevail on the merits of their claims; (2) whether the plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of equities; and (4) whether a preliminary injunction is in the public interest. *Id.* at 1345; *Winter*, 555 U.S. at 20. Upon review of the record submissions accompanying the parties’ filings, the court determines that each of the four factors weighs in favor of a preliminary injunction, and thus grants plaintiffs’ motion.

#### *A. Plaintiffs Have a Fair Likelihood of Prevailing on the Merits.*

The party seeking a preliminary injunction must be able to “demonstrate that it has at least a fair chance of success on the merits for a preliminary injunction to be appropriate.” *Silfab Solar*, 892 F.3d at 1345 (quoting *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 96 (Fed. Cir. 2014)). Plaintiffs argue that they are likely to prevail on the merits of their claim because the Imports Provision of the MMPA, using the mandatory “shall,” imbues the Government with a duty to “ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results

in the incidental kill . . . of ocean mammals in excess of United States standards.” Pl.’s Br. at 18–19 (quoting 16 U.S.C. § 1371(a)(2)). Plaintiffs assert that gillnets used in northern Gulf fisheries are a “commercial fishing technology” that is killing vaquita at rates that far exceed “United States standards,” under two metrics. *Id.* at 19. First, plaintiffs argue that the MMPA requires United States fisheries to reduce their bycatch to below PBR, *see supra* p. 6, which NOAA Fisheries estimates for each marine mammal species. Pl.’s Br. at 19 (citing 16 U.S.C. §§ 1386(a), 1387(f)(4), (5)); *see* Marine Mammal Stock Assessment Reports, 82 Fed. Reg. 29,039 (June 27, 2017) (responding to public comments for revisions of 2016 marine mammal stock assessment reports). PBR is defined under § 1362(20) as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”<sup>15</sup> Here, plaintiffs contend that the Mexican government has failed to effectively manage its northern Gulf fisheries that deploy gillnets—legally in its curvina and sierra fisheries, and illegally in its chano and shrimp fisheries—and that operation of these gillnet fisheries causes vaquita bycatch in excess of the species’ PBR.

Second, plaintiffs argue that the Mexican government has failed to impose regulatory measures ensuring its fisheries meet the PBR, consonant with United States standards for domestic fisheries required by the MMPA. Pl.’s Br. at 21. Specifically, NOAA Fisheries must develop a “take reduction plan” for at-risk marine mammal stocks containing regulatory measures “expect[ed]” to reduce bycatch to below PBR. 16 U.S.C. §§ 1387(f)(1), (4)–(5), 1362(19). Plaintiffs contend that this requirement is part of the “United States standards” that other nations must meet in order to export fish to the United States pursuant to the Imports Provision, § 1371(a)(2). Pl.’s Br. at 21; *see* 50 C.F.R. § 216.24(h)(6)(iii)(C)(1), (3)–(4) (requiring foreign fisheries seeking to export to the United States to demonstrate the nation has adopted a regulatory program designed to reduce bycatch to below PBR). In addition, plaintiffs argue that extant Mexican regulations limiting gillnet usage have proven incomplete, ineffectual, and under-enforced. Pl.’s Br. at 22 (citing Ragen Decl. ¶ 22).

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<sup>15</sup> “The potential biological removal level is the product of the following factors:

- (A) The minimum population estimate of the stock.
- (B) One-half the maximum theoretical or estimated net productivity rate of the stock at a small population size.
- (C) A recovery factor of between 0.1 and 1.0.”

16 U.S.C. § 1362(20).

The Government responds that the ban under the Imports Provision activates only upon an affirmative finding by the Secretary of Commerce that marine mammals are being incidentally killed in excess of United States standards.<sup>16</sup> Oral Arg. NOAA Fisheries provided in the Regulation that “United States standards” refers to “any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect” following the exemption period that expires on January 1, 2022. 50 C.F.R. § 216.24(h)(1)(i), (2)(ii); see *id.* § 216.3. The Government asserts that the court must defer to this definition of “United States standards” pursuant to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 & n.11 (1984). Def.’s Br. at 20. The Government thus argues that the PBR is not equivalent to “United States standards” under either the MMPA or the Regulation, and therefore vaquita bycatch in excess of PBR does not activate the duty to ban imports under the Imports Provision. In addition, the Government asserts that the primary driver of vaquita bycatch is illegal gillnet fishing for totoaba in the vaquita’s range, which is unlikely to be reduced by a ban on importation of shrimp, chano, sierra, or curvina to the United States. Def.’s Br. at 21–22.

Upon review of the record submitted in support of plaintiffs’ motion for a preliminary injunction, the court concludes that plaintiffs have demonstrated that they have a fair likelihood of success on the merits of their claim. As explained above at pp. 17–22, the import ban requested here is both discrete and mandatory for the purposes of the APA. The text of the Imports Provision imposes on the Government an immediate and continuous duty to ban fish caught with fishing gear that kills marine mammals, such as the vaquita, in excess of United States standards. 16 U.S.C. § 1371(a)(2). By the terms of that statute, it is the immediate goal that bycatch be “reduced to insignificant levels approaching a zero mortality and serious injury rate.” *Id.*

Relatedly, there is a fair likelihood that quite apart from the “zero mortality and serious injury rate” goal set forth in the statute to protect against the incidental kill or incidental serious injury of ocean mammals caught by commercial fishing operations, 16 U.S.C. § 1371(a)(2), plaintiffs have established that PBR level is also a marker of “United States standards” for the purposes of the Imports Provision, and that United States standards for permissible incidental

<sup>16</sup> The Government also submits that plaintiffs are unlikely to succeed on the merits of their claim because they lack standing to bring it. Def.’s Br. at 20 (citing *U.S. Ass’n of Imp. of Textiles & Apparel v. U.S. Dep’t of Commerce*, 413 F.3d 1344, 1350 (Fed. Cir. 2005)). This argument is unpersuasive because, as explained above, plaintiffs possess standing to bring their claim, and the court possesses jurisdiction to adjudicate it.

kills of the vaquita have been exceeded in northern Gulf gillnet fisheries. The MMPA contains multiple provisions which direct NOAA Fisheries to limit marine mammal bycatch on the basis of PBR. Section 1386(a) directs NOAA Fisheries to “prepare a draft stock assessment for each marine mammal stock which occurs in waters under the jurisdiction of the United States,” which includes a description of “commercial fisheries that interact with the stock,” “an analysis stating whether such level is insignificant and is approaching a zero mortality and serious injury rate,” and an estimation of “the [PBR] level for the stock.” *Id.* § 1386(a)(4), (6). The MMPA instructs that marine mammals “should not be permitted to diminish below their optimum sustainable population,” and that “whenever consistent” with the primary objective of maintaining the health and stability of the marine ecosystem, “it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.” *Id.* § 1361(2), (6).

Section 1386(a)(5)(A)–(B) commands NOAA Fisheries to categorize the stock as one that either “has a level of human-caused mortality and serious injury that is not likely to cause the stock to be reduced below its optimum sustainable population” or “is a strategic stock.” A “strategic stock” is, in relevant part, a marine mammal stock “for which the level of direct human-caused mortality exceeds the potential biological removal level,” one which is declining and likely to be listed as a threatened species under the ESA, or one which is already listed as a threatened or endangered species under the ESA. Section 1387, “Taking of marine mammals incidental to commercial fishing operations,” directs NOAA Fisheries to “develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock.” *Id.* § 1387(f)(1). The take reduction plan’s immediate goal (as enacted in the MMPA’s 1994 amendments), shall be to reduce fishery-related mortality and serious injury “to levels less than the potential biological removal level established for that stock” within six months, and the long-term goal shall be to reduce bycatch levels “to insignificant levels approaching a zero mortality and serious injury rate” within five years. *Id.* § 1387(f)(2).

Quite apart from the established legal principle that a rule cannot supplant the statute under which it is promulgated, *see Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014), the Regulation does not function to forestall application of the statutory moratorium on imports effected by § 1371(a) and (a)(2) because, by its own terms, “[t]he prohibitions of paragraph (h)(1) of this section shall not apply during the exemption period.” 50 C.F.R. § 216.24(h)(2)(ii). This means that the comparability finding regime, *see supra* pp. 7–8, imposed by

the Regulation does not go into effect until January 1, 2022;<sup>17</sup> however, there is no statutory provision in the MMPA which delays its application until that regulatory exemption period expires.

In fact, as recited in this opinion, multiple provisions of the MMPA stress that the statute is undergirded and propelled by a sense of urgency that mammals like the vaquita not be killed and brought to extinction, even if unintentionally. For starters, as has been discussed, the Imports Provision itself states that “[i]n any event *it shall be the immediate goal* that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1371(a)(2) (emphasis added); see *Kokechik*, 839 F.2d at 801. As further noted above, the “moratorium on the taking and importation of marine mammals and marine mammal products” commenced “on the effective date of this chapter.” 16 U.S.C. § 1371(a).<sup>18</sup> The emergency rulemaking provision, § 1387(g)(1), too speaks to the act’s immediacy. As mentioned, under that provision, the Secretary of Commerce “shall” undertake emergency rulemaking actions if he or she “finds that the incidental mortality and serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species.”

Indeed, reflecting the urgency of the MMPA’s emergency rulemaking provision, 16 U.S.C. § 1387(g), the Federal Register entry implementing the Regulation, which, as the court has explained, becomes effective in January 2022, see 50 C.F.R. §§ 216.24(h)(2)(ii), 216.3, provides that during the five-year interim exemption, NOAA Fisheries “would likewise consider an emergency rulemaking for an export or exempt fishery having or likely to have *an immediate and significant adverse impact* on a marine mammal stock interacting with that

<sup>17</sup> Even so, the court notes that indicative of the statutory focus on PBR, the comparability finding regime implicated by the Regulation, 50 C.F.R. § 216.24(h)(1), commands NOAA Fisheries to determine whether a foreign harvesting nation maintains a regulatory program centered around a marine mammal species’ “bycatch limit.” 50 C.F.R. § 216.24(h)(6)(iii)(C). Specifically, the Regulation requires that a foreign fishery demonstrate that it does “not exceed the bycatch limit for that [marine mammal] stock or stocks” individually or cumulatively. *Id.* § 216.24(h)(6)(iii)(C)(6).

<sup>18</sup> As has been noted, among the Congressional findings animating the MMPA is a statement that marine mammal “species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.” *Id.* § 1361(2). Additionally, “measures should be immediately taken to replenish any species or population stock which has already diminished below that population.” *Id.*

fishery.” 81 Fed. Reg. at 54,395 (emphasis added) (citing 16 U.S.C. § 1387(g)). The proffered justification for this language bears restatement:

The emergency regulations or measures allow for timely treatment of cases where the usual process and timeframe could result in unacceptable risks to the affected marine mammal stock or species. Logically, such risks would result either from very small populations where any incidental mortality could result in increased risk of extinction or larger populations with substantial mortality that could become very small populations within the timeframe taken by the standard management process; in either situation these cases represent an unacceptable ecological risk.

*Id.*

Plaintiffs successfully argue that vaquita are being incidentally killed by gillnets in the northern Gulf fisheries in excess of their PBR. Plaintiffs present a letter sent to the Mexican government on February 15, 2018, wherein NOAA Fisheries — a defendant here — calculated the PBR for vaquita to be 0.032 animals a year based on the species’ estimated 2016 abundance, or 0.017 based on 2017 numbers; these values translate to one permissible mortality about every thirty-one or sixty-one years, respectively. NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 12. NOAA Fisheries stated that “[t]he risk to and decline of vaquita is primarily attributable to one factor: bycatch in gillnets. . . . [T]he use of gillnets by any fishery in the vaquita’s range is incompatible with the survival of the species.” *Id.* at 7. The letter also acknowledges that in 2016 and 2017, three vaquita per year were confirmed to be killed in gillnets, and that “three per year in gillnets is over . . . 180 times higher than the PBR for 2017.” *Id.* at 12; *see* CIRVA 7th Meeting Report, at 5, 16 (reporting three vaquita killed in gillnets in 2016); CIRVA 9th Meeting Report, at 13 (discussing the five vaquita found dead between March and April of 2017 and including the necropsy reports for each vaquita), 26–30 (listing the cause of death of the vaquita in their official necropsy reports as “Fisheries bycatch,” “Unknown,” “Unknown,” “Suspect fisheries bycatch,” and “Trauma, entanglement”). NOAA Fisheries concluded that “even one bycatch [of] vaquita presents a significant risk to the continued existence of the population.” NOAA

Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 12.<sup>19</sup> In addition, NOAA Fisheries' own scientists have stated that the vaquita's "extinction is . . . inevitable unless gillnets are completely removed from vaquita habitat." Good Stefani Decl. Ex. 21, *Extinction is Imminent for Mexico's Endemic Porpoise Unless Fishery Bycatch is Eliminated* (Oct. 24, 2016), at 6.

As the record evinces, vaquita have been observed to have been entangled in gillnets set by the shrimp, sierra, and chano fisheries. *Vaquita Bycatch in Mexico's Artisanal Gillnet Fisheries*, at 1118 (observing the direct mortality of three vaquita in shrimp, one vaquita in sierra, and four vaquita in chano gillnets from January 26, 1993 to January 25, 1994); NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 7. Regarding the fourth fishery, which targets curvina, NOAA Fisheries has concluded that the "likelihood of bycatch in the corvina fishery is more than remote, and the outcome of even one instance of vaquita bycatch presents a significant risk to the continued existence of the population." NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 7. More broadly, NOAA Fisheries has found that "vaquita are incidentally caught in . . . most, if not all, types of gillnets used" in the northern Gulf of California. NOAA Fisheries: *Vaquita Conservation and Abundance*, at 1. Acting pursuant to its statutorily mandated advisory capacity, the MMC — an independent U.S. agency created by the MMPA — submitted a letter to NOAA

<sup>19</sup> NOAA Fisheries' February 15, 2018 Letter to CONAPESCA states, in relevant part:

An assessment of risk includes, by U.S. standards and in the MMPA Import Rule, the calculation of a bycatch limit. In the United States, NMFS determines a fisheries bycatch limit by calculating the "potential biological removal" (PBR), which is the "maximum number of animals...that may be removed...while allowing that stock to reach or maintain its optimum sustainable population." Under the MMPA, PBR is calculated as  $0.5 * N_{min} * R_{max} * F_r$ , where  $N_{min}$  is the 20th percentile estimate for population size;  $R_{max}$  is the maximum net productivity estimate; and  $F_r$  is a recovery factor. For vaquita, the appropriate PBR parameters are:  $N_{min}$  of 16 animals (based on the 2016 population estimate) or 8 animals (based on the 2017 population estimate);  $R_{max}$  of 0.04 (default productivity rate for cetaceans, although the productivity rate for vaquita is expected to [sic] lower than 0.04); and a recovery factor of ( $F_r$ ) of 0.1 (the default value for endangered stocks. [sic] The PBR for 2016 and 2017 would be 0.032 and 0.017 respectively. At this rate, only one vaquita could be killed roughly every 31.25 or 61.5 years.

A total of 6 of 9 dead vaquitas killed in the past 2 years were confirmed to be killed in gillnets. The minimum known mortality of three per year in gillnets is over 90 times the PBR for 2016 and 180 times higher than the PBR for 2017. In comparison, the vaquita experienced a population decline of nearly 50 percent between 2015 and 2016, with only approximately 30 vaquita remaining as of November 2016. With gillnet bycatch the primary driver of vaquita decline, gillnet fisheries in and adjacent to their range are producing a mortality rate well in excess of PBR. In conclusion, based on the available information, the likelihood of bycatch in the corvina fishery is more than remote, and the outcome of even one bycatch vaquita presents a significant risk to the continued existence of the population.

NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 12 (citations omitted).

Fisheries in March 2017, advising it had “sufficient information to indicate that all gillnet fisheries that incidentally catch vaquitas are employing a fishing technology that kills . . . marine mammals in excess of U.S. standards.” MMC Mar. 1, 2017 Letter to NOAA Fisheries, at 2; 16 U.S.C. § 1401(a). In a follow-up letter sent to NOAA Fisheries on September 21, 2017, the MMC affirmed that “[n]umerous fisheries in the upper Gulf of California that involve the use of gillnets, regardless of the target species, could contribute to mortality of vaquitas.” MMC Sept. 21, 2017 Letter to NOAA Fisheries, at 3.

The court is unpersuaded that there is material legal relevance to the Government’s assertion that the primary driver behind incidental vaquita death in excess of PBR is gillnet usage in illegal totoaba fishing. The record does not indicate that vaquita bycatch is due solely to illegal totoaba fishing with gillnets, and, as noted *supra* pp. 9–14, vaquita deaths in the other Gulf fisheries at issue are documented, or reasonably likely to occur. The fact that illegal totoaba fishing also incidentally kills vaquita does not detract from the evidenced conclusion that gillnet fishing of all varieties in the northern Gulf of California threatens vaquita. If anything, the record demonstrates only that the curvina fishery, which entirely deploys legal gillnets, acts as a cover for illegal totoaba fishing with gillnets. MMC Mar. 1, 2017 Letter to NOAA Fisheries, at 1; NOAA Fisheries Apr. 25, 2017 Letter to Mexican Gov’t, at 2; NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 13 (noting that the curvina fishery “may facilitate the much more lucrative illegal fishing of totoaba”).

Plaintiffs also establish a fair likelihood that the United States standards protections mandated under the MMPA’s Imports Provision are significantly impacted by the foreign harvesting nation’s regulatory program. In a January 17, 2018 letter from NOAA Fisheries to the Government of Mexico, the agency listed regulatory measures that Mexico should take “to protect vaquita from gillnet entanglement” and avoid the “need for action under [the] MMPA.”<sup>20</sup> Good Stefani Decl. Ex. 16, NOAA Fisheries Jan. 17, 2018 Letter to CONAPESCA (Jan. 17, 2018), at 1. NOAA Fisheries in its February 15, 2018 letter asked Mexico to “commit to working closely with [experts] to develop a scientifically robust protocol for testing alter-

<sup>20</sup> These include, but are not limited to, a ban on all gillnets fisheries inside the vaquita’s range “including the curvina and sierra fisheries”; a prohibition on the sale or possession of gillnets in the area; a requirement that “all gillnets be surrendered or confiscated and destroyed”; a vessel inspection program “for each fishing trip at the point of departure and landing”; increased enforcement efforts combined with monthly reporting to NOAA Fisheries and CIRVA of the total “number of inspections, interdictions, arrests, sentences, and other enforcement actions”; and a plan to “incentivize the conversion of the [gillnet] fleet to gillnet-free operations.” Good Stefani Decl. Ex. 16, NOAA Fisheries Jan. 17, 2018 Letter to CONAPESCA (Jan. 17, 2018), at 1–2.

native gear, and that it develop an implementation plan to train fishermen and socialize the use of alternative gear throughout the upper Gulf” in order to achieve gillnet-free fisheries. NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 5. The record demonstrates that possible alternative gear including “traps, pots, trolling, fish trawls, fyke nets, and others” is available for usage in the Mexican fisheries, but no evidence suggests that Mexico has yet instituted an effective alternative gear program. CIRVA 8th Meeting Report, at 9; *see* CIRVA 10th Meeting Report, at 13; NOAA Fisheries Feb. 15, 2018 Letter to CONAPESCA, at 5. Further, NOAA Fisheries urged the Mexican Government to increase regulatory enforcement in the Gulf of California in order to prevent incidental vaquita deaths, and offered suggestions for doing so, in its April 2017 letter. NOAA Fisheries Apr. 25, 2017 Letter to Mexican Gov’t, at 2. NOAA Fisheries concluded that “the choice is simple and stark: either gillnetting in the Upper Gulf ends, or the vaquita becomes extinct within a very short time.” *Id.* In its September 2017 letter to NOAA Fisheries, the MMC stated that Mexico’s regulatory program “cannot be considered comparable in effectiveness to the U.S. regulatory program.” MMC Sept. 21, 2017 Letter to NOAA Fisheries, at 2. In support of its conclusion, the MMC detailed the inadequacy of Mexico’s regulatory efforts, which are unlikely “to prevent extinction, much less to provide for conservation and recovery of the species.” *Id.* Altogether, these communications strongly indicate an ongoing determination on part the of United States agencies that the Mexican regulatory regime permits incidental vaquita deaths in excess of United States standards.

*B. Plaintiffs are likely to Suffer Irreparable Harm Without a Preliminary Injunction.*

The court now considers whether plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction compelling the Government to embargo the imports at issue. *Silfab Solar*, 892 F.3d at 1345 (citing *Winter*, 555 U.S. at 20). A harm is irreparable when “no damages payment, however great,” could address it. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). “However, the injury complained of need not have been inflicted when the application is made, or be certain to occur.” *Sunprime Inc. v. United States*, 40 CIT \_\_\_, \_\_\_, 181 F. Supp. 3d 1322, 1330 (2016) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of

long duration, *i.e.*, irreparable.” *Fed’n of Japan Salmon Fisheries Co-op. Ass’n v. Baldridge*, 679 F. Supp. 37, 48 (D.D.C. 1987) (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987)), *aff’d and remanded sub nom. Kokechik*, 839 F.2d 795. The likely, imminent extinction of a species in the absence of statutorily mandated action constitutes irreparable harm. *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 821 (9th Cir. 2018) (affirming a preliminary injunction requiring increased dam spill to protect endangered salmon based, in part, on “the continued low abundance” of the species and the fact that salmon were “vulnerable to extinction” as a result); *see also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187–88 (1978) (enjoining multimillion-dollar dam to protect snail darter from extinction based on the public’s interest in the “incalculable” value of preserving endangered species). Here, plaintiffs have shown irreparable harm to their own interests by virtue of the likely irreparable harm to the vaquita. As explained *supra* pp. 25–26, plaintiffs adequately demonstrate an imminent injury for standing purposes partially because their enjoyment of the vaquita is directly implicated by the threat of gillnet fishing to the species’ survival. *See, e.g., All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (upholding a finding of irreparable harm where plaintiff organization asserted “that the Project will harm its members’ ability to ‘view, experience, and utilize’ the areas in their undisturbed state”). In 2016, the vaquita population plummeted to around thirty animals, representing a forty-nine percent population decline in a single year. Good Stefani Decl. Ex. 24, Last Call: Passive Acoustic Monitoring Shows Continued Rapid Decline of Critically Endangered Vaquita (Nov. 2017), at EL512; CIRVA 8th Meeting Report, at 4. CIRVA found that by November 2017, the population dropped further to a mere fifteen individuals. CIRVA 10th Meeting Report, at 2, 5. It is unknown, and the record does not illuminate, how many living vaquita are females, or how many are capable of reproducing. Even a single death would hamper the vaquita’s likelihood of recovery, and increase its risk of extinction. *See* Jefferson Decl. ¶ 15. As noted, NOAA Fisheries’ scientists have stated that the vaquita’s “extinction is . . . inevitable unless gillnets are completely removed from vaquita habitat.” Extinction is Imminent for Mexico’s Endemic Porpoise Unless Fishery Bycatch is Eliminated, at 6.

A determination of irreparable harm should also be guided by reference to the purposes of the statute being enforced. *Tennessee Valley Auth.*, 437 U.S. at 184–88; *Amoco Prod. Co.*, 480 U.S. at 544; *see also Nat’l Wildlife Fed’n*, 886 F.3d at 818; *Sierra Club v. Marsh*, 872 F.2d 497, 502–03 (1st Cir. 1989) (stating that the kinds of harms

that may be irreparable “will be different according to each statute’s structure and purpose”). Among the central purposes of the MMPA are the protection of marine mammals with sound policies and resource management, and the maintenance of marine mammals at their optimum sustainable population. 16 U.S.C. § 1361. In line with that reasoning, this Court has held that “one way to show irreparable injury would be for Plaintiffs to provide evidence that this number [of marine mammal mortalities allowed under the MMPA] would be exceeded.” *Def. of Wildlife v. Dalton*, 24 CIT 258, 260 n.6, 97 F. Supp. 2d 1197, 1200 n.6 (2000). As explained in the preceding section of the opinion, plaintiffs have provided evidence, and compellingly argued, that the number of permissible vaquita deaths under the MMPA is being exceeded, that an embargo is legally required, and that the species is at risk of extinction.

*C. The Balance of Equities Favors Granting a Preliminary Injunction.*

The court now “must balance the competing claims of injury and must consider the effect” that granting or denying a preliminary injunction will have on each party. *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co.*, 480 U.S. at 542). Plaintiffs assert that costs of implementing a preliminary injunction to the Government would be relatively light, consisting of routine administrative duties. Pl.’s Br. at 30. On the other hand, plaintiffs contend that the costs of declining to preliminarily enjoin the Government would increase the risk that the vaquita will go extinct, or irretrievably decline in population, by the conclusion of the litigation before this court. *Id.* The Government argues that granting the preliminary injunction would threaten high-level negotiations with Mexico regarding the vaquita and other species harmed by commercial fishing practices in the Gulf of California, which “are at a critical and sensitive time.” Def.’s Br. at 23 (citing Rauch Decl. ¶ 6). The Government posits that denying the application for preliminary relief, however, “could ultimately result in an import ban concerning one or more of the fisheries for which plaintiffs have requested an injunction.” *Id.* at 23–24.

The balance of equities weighs in favor of granting a preliminary injunction. As discussed, when weighing the factors for a preliminary injunction, the court should be guided by Congress’ purpose in enacting the underlying statute. *Tennessee Valley Auth.*, 437 U.S. at 184–88. The court has noted multiple times that the purpose of the MMPA is, in summary, the preservation of marine mammal species. 16 U.S.C. § 1361. As the evidence in the record before the court makes

clear, the vaquita's survival would be under a greater threat without the imposition of the embargo on the imports of fish and fish products from the gillnet fisheries at issue, which, as explained *supra* pp. 33–44, is legally required under the Imports Provision, § 1371(a)(2). Beyond the threat to plaintiffs' interests that derives directly from the threat to the vaquita's survival, established in prior sections, loss of the species prior to the end of this litigation would also moot the substantive legal contention under the Imports Provision, and thus foreclose plaintiffs' access to meaningful judicial review. *See Kwo Lee, Inc. v. United States*, 38 CIT \_\_\_, \_\_\_, 24 F. Supp. 3d 1322, 1327, 1331 (2014) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)). As noted above, in other cases, the Government has been ordered by this and other federal courts to institute embargos pursuant to environmental statutes. *See Earth Island Institute v. Christopher*, 913 F. Supp. at 579–80 (enjoining shrimp imports under the Endangered Species Act to protect sea turtles); *Earth Island Institute v. Mosbacher*, 929 F.2d 1449 (affirming grant of injunction on importation of yellowfin tuna from Mexico under the MMPA to protect dolphins).<sup>21</sup> The administrative inconvenience of administering an embargo can be characterized as routine. *See SSAB N. Am. Div. v. U.S. Bureau of Customs & Border Prot.*, 32 CIT 795, 801, 571 F. Supp. 2d 1347, 1353 (2008) (recognizing that an agency's "administrative inconvenience associated with" implementing preliminary injunction was routine because the agency "ha[d] some familiarity with such a task"). The Government's suggestion that the institution of an embargo on the products in question would undermine high-level negotiations between the United States and Mexico is unpersuasive. Negotiations

<sup>21</sup> The court is unpersuaded by the Government's claim that a preliminary injunction is not appropriate here because it would result in "an indefinite ban on imports," providing plaintiffs with "complete relief on the merits of their claim." Def.'s Br. at 19. "[A] preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier." *Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988) (citation omitted). Plaintiffs here seek a temporary ban on fish imports from the northern Gulf of California that are killing vaquita in excess of United States standards until the court resolves the case on the merits, at which point it can issue a permanent injunction, if appropriate. The preliminary injunction can be modified or lifted as the circumstances warrant; it does not provide complete relief. The Government's contention that a preliminary injunction here is inappropriate because it does not preserve the status quo is also without merit. That the preliminary injunction would require the Government to impose a ban such that it would thereby be in compliance with the MMPA does not render the preliminary injunction inappropriate. *See, e.g., Atlas Powder Co. v. Ireco Chems.*, 773 F.2d 1230, 1231 (Fed. Cir. 1985). The purpose of a preliminary injunction is "to preserve the trial court's power to provide an effective remedy on the merits." *Fundicao Tupy*, 841 F.2d at 1103. The temporary ban is consistent with that purpose. A "[preliminary] injunction is appropriate when the policy of preserving the court's power to decide the merits of a case outweighs the burden of imposing an interim restraint before it can do so." *Id.* That guidance informs the calculus here, where plaintiffs seek to preserve a species headed toward extinction.

between the two countries have been ongoing since at least 2015. *See* Gov't of Mexico Sept. 21, 2017 Letter to NOAA Fisheries, at 14. No evidence submitted by the Government affirmatively shows that the institution of an embargo under the Imports Provision, as required by United States law, would undermine international negotiations, and any outcome to that effect is speculative. *See* Rauch Decl. In any event, it is beyond the province of the court to engage in such prognostication or to ignore the Congressional directive reflected in the Imports Provision.

*D. A Preliminary Injunction is in the Public Interest.*

Finally, the court considers whether granting a preliminary injunction would benefit the public interest, *Silfab Solar*, 892 F.3d at 1345 (citing *Winter*, 555 U.S. at 20), and concludes that it would. As an initial matter, “[t]he public interest is served by ensuring that governmental bodies comply with the law.” *Am. Signature, Inc. v. United States*, 598 F. 3d 816, 830 (Fed. Cir. 2010); *accord N.M. Garlic Growers Coal. v. United States*, 41 CIT \_\_\_, \_\_\_, 256 F. Supp. 3d 1373, 1377 (2017); *see also Conservation Law Foundation v. Watt*, 560 F. Supp. 561, 563 (D. Mass. 1983) (holding that, in light of the “special consideration as to the preservation of endangered species,” “[i]t is plain that the public interest calls upon the courts to require strict compliance with environmental statutes”) (Mazzone, J), *aff’d sub nom. Mass. v. Watt*, 716 F.2d 946 (1st Cir. 1983). As noted above, citing negotiations with Mexico, albeit protracted, the Government urges that the court consider its views that in the context of those discussions, an embargo might not be the “best course of action for conserving the vaquita.” Def.’s Br. at 17. However, it is not for this court to consider those concerns. Here, Congress has determined the action to be taken. In this case, for the reasons detailed above, the law commands that under the Imports Provision, the Secretary of the Treasury shall ban imports of fish and fish products from northern Gulf fisheries that utilize gillnets and incidentally kill vaquita in excess of United States standards.

Like the irreparable harm inquiry and the balance of the equities, the public interest inquiry is guided by reference to “the underlying statutory purposes at issue.” *SSAB*, 571 F. Supp. 2d at 1353 (citing *Amoco Prod. Co.*, 480 U.S. at 544–46); *see Tennessee Valley Auth.*, 437 U.S. at 193–94. A preliminary injunction ordering an embargo on fish and fish products from the gillnet fisheries at issue would effectuate the MMPA’s purpose of preserving marine mammal populations, in this case, the vaquita, which the Government acknowledges is on the

verge of extinction. *See* 16 U.S.C. § 1361. While plaintiffs and the Government argue about remedy, what cannot be disputed is that the vaquita's plight is desperate, and that even one more bycatch death in the gillnets of fisheries in its range threatens the very existence of the species. In granting the preliminary injunction ordering the embargo set forth in the statute, the court is simply directing compliance with a Congressional mandate that an import ban be imposed where marine mammals are killed at unsustainable rates because of commercial fishing technology used to catch other species.<sup>22</sup>

### CONCLUSION

The court denies the Government's motion to dismiss, and grants plaintiffs' motion for a preliminary injunction requiring the Government, pending final adjudication of the merits, to ban the importation of all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range.

**SO ORDERED.**

Dated: July 26, 2018

New York, New York

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

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<sup>22</sup> Having considered the relatively small routine administrative costs associated with implementing the import ban and the interest in preserving plaintiffs' ability to obtain judicial review of the Government's conduct, the court, in its discretion, requires plaintiffs to post \$1.00 as security. *See* USCIT R. 65(c); *see generally Zenith Radio Corp. v. United States*, 2 CIT 8, 518 F. Supp. 1347 (1981) (discussing the court's discretion in setting security, particularly when granting a preliminary injunction to preserve plaintiff's access to judicial review); 11A Charles Allan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2954 (3d ed. Apr. 2018 Update).