

# U.S. Court of International Trade

Slip Op. 19–57

AERO RUBBER COMPANY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge  
Court No. 15–00174  
**PUBLIC VERSION**

[Granting in part and denying in part both Defendant’s motion for summary judgment and Plaintiff’s cross-motion for summary judgment.]

Dated: May 14, 2019

*William Dell Outman, II*, of Chevy Chase, Maryland argued for the Plaintiff, Aero Rubber Company, Inc.

*Edward Francis Kenny*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, argued for the Defendant, the United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of Counsel on the brief was *Yelena Slepak*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

## ***OPINION AND ORDER***

### **Kelly, Judge:**

This action concerns the classification of an assortment of molded silicone bands that are larger than wrist size and contain some form of printed wording or motif. Compl. ¶ 8, Sept. 15, 2015, ECF No. 8 (“Compl.”); Def.’s Statement of Undisputed Material Facts ¶¶ 2, 27, Dec. 26, 2017, ECF No. 52 (“Def.’s 56.3 Statement”).<sup>1</sup> Defendant, the United States, moves for summary judgment, requesting that the court find as a matter of law that Plaintiff’s imports were properly classified within subheading 3926.90.99, Harmonized Tariff Schedule

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<sup>1</sup> Plaintiff did not submit a statement of undisputed facts with its summary judgment motion pursuant to Rule 56.3 of the Rules of the United States Court of International Trade. Rather, in its response to Defendant’s summary judgment motion, Plaintiff stated that it “agree[s] generally” with the facts as represented by Defendant’s 56.3 Statement and submitted several clarifications and additions. See Pl.’s Statement of Undisputed Material Facts, Jan. 29, 2018, ECF No. 53 (“Pl.’s 56.3 Statement”). Unless otherwise specified, citations to Defendant’s 56.3 Statement are to facts on which the parties have agreed. Because both parties agree that summary judgment is proper and there are no disputed facts, the court treats Plaintiff’s clarifications and additions as undisputed, and notes where the court relies on them. See Oral Arg. at 01:15:25–01:16:12 (Defendant acknowledging that no facts are in dispute); see also Oral Arg. at 01:20:20–01:21:23 (Plaintiff arguing that summary judgment should be applied).

of the United States (2013) (“HTSUS”),<sup>2</sup> by U.S. Customs and Border Protection (“CBP”). Def.’s Mot. Summary J., Dec. 22, 2017, ECF No. 45; Mem. Supp. Def.’s Mot. Summary J. at 1, Dec. 22, 2017, ECF No. 45 (“Def.’s Br.”). Plaintiff, Aero Rubber Company, Inc., opposes the motion and cross-moves for summary judgment, requesting that the court find as a matter of law that the imports are properly classifiable within subheading 4911.99.80, HTSUS. *See* Compl. ¶ 8; Pl.’s Mot. Summary J., Jan. 29, 2019, ECF No. 53; Pl.’s Mem. Opp’n Def.’s Mot. Summary J. & Supp. Pl.’s Cross-Mot. Summary J. at 17, Jan. 29, 2018, ECF No. 53 (“Pl.’s Br.”). For the reasons that follow, both motions are granted in part and denied in part.

## BACKGROUND

Plaintiff designs and produces customized rubber products, including molded and rolled sheet rubber, extruded rubber products of various elasticities, rubber bands, “PromoStretch” silicone bands, and wristbands. Def.’s 56.3 Statement ¶ 1. At issue in this case is the proper classification of ten customized PromoStretch silicone bands, each larger than wristband size and containing some printed wording or motif. Def.’s Br. at 7–12; Def.’s 56.3 Statement ¶ 27.<sup>3</sup> The silicone bands are nearly as elastic as a natural rubber band, highly durable, and considered to be of a higher quality than natural rubber bands. Def.’s 56.3 Statement ¶¶ 16–17. The individual bands are discussed in greater detail below.

CBP classified and liquidated the subject entries under subheading 3926.90.99, HTSUS, which covers: “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other,” dutiable at 5.3 percent *ad valorem*. Def.’s 56.3 Statement ¶ 3. Plaintiff timely filed administrative protests<sup>4</sup> challenging CBP’s classification determination, asserting that the bands are properly classifiable

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<sup>2</sup> All references to the HTSUS refer to the 2014 edition, the most recent version of the HTSUS in effect at the time of the last entries of subject merchandise. *See* Def.’s 56.3 Statement ¶ 3. The 2013 edition of the HTSUS, in effect at the beginning of the period during which entries of subject merchandise were made, is the same in relevant part as the 2014 edition.

<sup>3</sup> Although the entries summonsed in this action include 41 different silicone bands, only ten bands remain subject to a classification dispute. Def.’s 56.3 Statement ¶¶ 18–27.

<sup>4</sup> Plaintiff filed protest numbers 3195–14–100229 and 2809–14–100802. CBP denied protest number 3195–14–100229 in full on December 22, 2014 and denied protest number 2809–14–100802 in part on March 6, 2015. *See* 3195–14–100229 Determination [attached as Def.’s Ex. 1] at 2, Dec. 22, 2014, ECF No. 49; 2809–14–100802 Determination [attached as Def.’s Ex. 1] at 48, Mar. 6, 2015, ECF No. 49. The aspect of protest number 2809–14–100802 that CBP approved is not relevant to the dispute at hand. *See id.* at 48 (stating that “[t]humb, finger and wristbands classification changed per HQ 236523”).

under subheading 4911.99.80, HTSUS.<sup>5</sup> Subheading 4911.99.80, HTSUS, covers “Other printed matter, including printed pictures and photographs: Other, Other.” CBP Plaintiff’s protests in relevant part. *See* Protest No. 3195–14–100229 Determination [attached as Def.’s Ex. 1 at 2], Dec. 22, 2014, ECF No. 49; Protest No. 2809–14–100802 Determination [attached as Def.’s Ex. 1 at 48], Mar. 6, 2015, ECF No. 49.

Plaintiff commenced this action to contest CBP’s denial of its protests.<sup>6</sup> *See* Summons, June 22, 2015, ECF No. 1; Compl. Plaintiff contends that the printed silicone bands in dispute were improperly classified under subheading 3926.90.99, HTSUS, and are instead properly classifiable as “Other Printed Matter” under subheading 4911.99.80, HTSUS. *See* Compl. ¶ 8. Plaintiff asserts that printed silicone bands in question “consist of articles of plastic,” “have been printed with motifs, characters, or pictorial representations,” and “have printed motifs, characters or pictorials representations that are not merely incidental to the primary use of the Printed Silicone Bands.” Compl. ¶ 9. Plaintiff maintains that the printing on the silicone bands is the reason the bands are produced in the first place. Compl. ¶ 13. Defendant responds that the printed silicone bands were properly classified under subheading 3926.90.99, HTSUS, because

<sup>5</sup> In Plaintiff’s protest, it asserted that the various silicone bands fall into three different categories for classification purposes, the second of which is relevant to the current action:

- (a) All thumb, finger and wrist bands, whether printed or plain, are properly classifiable under subheading 7117.90.75, HTSUS as imitation jewelry, or plastic.
- (b) All printed, etched and embossed silicone rubber bands, other than those suitable for wear on the wrist, thumb or finger, are properly classifiable as “Other printed matter” under subheading 4911.99.80, HTSUS[.]
- (c) All plain (i.e. not printed, etched or embossed) silicone rubber bands, other than those suitable for use as imitation jewelry, are classifiable as other articles of plastic under subheading 3926.90.99, HTSUS.

Schedule B to Protest No. 3195–14–100229 [attached as Def.’s Ex. 1] at 5, Dec. 16, 2014, ECF No. 49. The parties agree that silicone bands with a circumference suitable for wearing around the wrist or on a finger or thumb are properly classifiable under subheading 7117.90.75, HTSUS, as imitation jewelry, of plastic. Compl. ¶ 6. Further, the parties agree that the plain, unprinted silicone bands with circumferences not suitable for wearing on the wrist, thumb or finger are properly classifiable under subheading 3926.90.99 as other articles of plastic. Compl. ¶ 7. Of the 41 separate silicone bands, *see* Def.’s 56.3 Statement ¶ 21, ten are the subject of dispute in the current action: production orders Q2201, P9427, P9938, Q1320, Q1004, Q2372, Q2287, Q3712, Q3613, and Q3695. *Id.* ¶ 27. These entries have circumferences ranging from 215.5 millimeters to 609.6 millimeters, which constitute sizes larger than would be suitable to wear around the wrist. *See* Entry Diagrams [attached as Def.’s Ex. 3] at 10, 13, 17, 21, 25–27, 35, 37, and 40; Def.’s

<sup>6</sup> The present action was reassigned on January 9, 2019. *See* Order of Reassignment, Jan. 9, 2019, ECF No. 77. The court ruled on Defendant’s motion to strike on January 29, 2019, *see Aero Rubber Co., Inc. v. United States*, 43 CIT \_\_\_, Slip Op. 19–14 (Jan. 29, 2019), and held oral argument on March 12, 2019. *See* Appearance Sheet, Mar. 12, 2019, ECF No. 85.

the printing on these bands “is incidental to the bands’ essential nature and use in binding, bundling, securing, and gripping.” Def.’s Br. at 15.

## JURISDICTION AND STANDARD OF REVIEW

The court has “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930, [as amended, 19 U.S.C. § 1515 (2012)],” 28 U.S.C. § 1581(a) (2012), and reviews such actions de novo. 28 U.S.C. § 2640(a)(1) (2012). The court will grant summary judgment when “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 R. 56(a).

## DISCUSSION

Classification involves two steps. First, the court determines the proper meaning of the tariff provisions, which is a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise falls within the scope of the tariff provision, which is a question of fact. *Id.* Where there is no dispute regarding the nature of the merchandise, “the two-step classification analysis ‘collapses entirely into a question of law.’” *Id.* at 965–66 (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)). The court must determine “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).

### A. The Meaning of the Relevant Tariff Terms

Customs classification is governed by the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728, 730 (Fed. Cir. 2014). The court applies the GRIs in numerical order beginning with GRI 1, and the court will only reach subsequent GRIs if analysis under the preceding GRI does not yield proper classification of the subject merchandise. *See Link Snacks, Inc.*, 742 F.3d at 965; *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). GRI 1 provides that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” The chapter notes include the Additional U.S. Notes, which are part of the legal text of the HTSUS, and “are ‘considered to be statutory provisions of law for all purposes.’” *See* HTSUS, Preface at 1 n.2; *Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013) (quoting *What Every Member of the Trade Community Should Know About: Tariff Classification* 32 (U.S. Customs & Border Prot. May 2004)).

The terms of the HTSUS are “construed according to their common and commercial meanings, which are presumed to be the same.” *Carl Zeiss, Inc.*, 195 F.3d at 1379 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). The court defines HTSUS tariff terms by relying on its own understanding of the terms and “may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Carl Zeiss, Inc.*, 195 F.3d at 1379 (citation omitted). The court may also consult the Harmonized Commodity Description and Coding System’s Explanatory Notes (“Explanatory Notes”) to help construe the various HTSUS provisions. See *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011). Although the “Explanatory Notes are not legally binding, [they] may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.” *Roche Vitamins*, 772 F.3d at 731.

HTSUS subheading 3926.90.99, under which CBP classified and liquidated Plaintiff’s merchandise,<sup>7</sup> covers: “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.”<sup>8</sup> Note 2 to Section VII, which includes Chapter 39, HTSUS, provides that

Except for the goods of heading 3918 or 3919, plastics, rubber and articles thereof, printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall in chapter 49.

Here, proper classification of the merchandise turns on whether the printed motifs, characters, or pictorial representations on the silicone bands are “not merely incidental to the primary use of the goods.” If the printing is merely incidental to the primary use of the goods, then the goods are properly classifiable as other articles of plastic under subheading 3926.90.99, HTSUS. If, on the other hand, the printing is not merely incidental to the primary use of the goods, then the goods should be classified as “Other printed matter” under subheading 4911.99.80, HTSUS.

<sup>7</sup> Plaintiff agrees that its silicone bands that do not contain printing and are of a size unsuitable for wear on the wrist, thumb, or finger are classifiable under subheading 3926.90.99, HTSUS. Compl. ¶ 7; Def.’s 56.3 Statement ¶ 20.

<sup>8</sup> The Chapter Notes to Chapter 39, HTSUS, (Plastics and Articles Thereof) provide that: Throughout the tariff schedule the expression “*plastics*” means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Chapter Note 1 to Chapter 39. Plaintiff produces its silicone bands by using a molding process, during which heat and pressure are applied. Def.’s 56.3 Statement ¶¶ 7, 11.

The court first construes the words of the tariff to discern its meaning. The relevant language of Note 2 to Section VII presupposes that the subject goods will have a function, and that to fall under Chapter 49, the printing will be more than merely incidental in relation to that function. The words “to the primary use” in Note 2 link the “incidental” inquiry to the function of the goods. To fall under Chapter 49, HTSUS, the printing may be the primary function or use of the goods, or it may be something less than, or subordinate to, that primary use, but it cannot be merely incidental to that primary use. Thus, the court construes the tariff provisions in this context.

Printing that is “not merely incidental to the primary use of the goods” as referenced in Note 2 means any printing that is not of minor importance or not unimportant in relation to something else. Indeed, “incidental” means something of lesser or secondary importance, or a minor accompaniment. *See, e.g., The Oxford English Dictionary* 794 (J.A. Simpson & E.S.C. Weiner eds., 2nd Ed. 1989) (*Incidental: A. adj.* 1. a. Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual); *The American Heritage Dictionary of the English Language* 912 (Houghton Mifflin Co. 3rd Ed. 1996) (*Incidental: 1. Occurring or likely to occur as an unpredictable or minor accompaniment. 2. Of a minor, casual, or subordinate nature: incidental expenses.*); *Shorter Oxford English Dictionary* 1350 (Oxford University Press 6th Ed. 2007) (*Incidental: 1. Liable to happen to; naturally attaching to. 2. Occurring as something casual or of secondary importance; not directly relevant to; following (up)on as a subordinate circumstance.*) (emphasis in original); *Webster’s Third New Int’l Dictionary* 1142 (Philip Babcock Gove, Ph. D. & Merriam-Webster Editorial Staff eds., 2002) (*Incidental: subordinate, nonessential, or attendant in position or significance . . .*). These definitions convey both that an incidental happening is one that has a relationship to something else (“subordinate” or “in conjunction” or “attaching to”) and that, in comparison, its significance is minor (“minor” or “nonessential”).<sup>9</sup>

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<sup>9</sup> Plaintiff provides several definitions of incidental. First, “1. Occurring or likely to occur as an unpredictable or minor accompaniment. 2. Of a minor, casual, or subordinate nature: *incidental expenses*. *See* Pl.’s Br. at 20 (citing *American Heritage College Dictionary*, 4th Ed. 2002). Second, Plaintiff offers “1. Happening or likely to happen in an unplanned or subordinate conjunction with something else. 2. Incurred casually and in addition to the regular or main amount: *incidental expenses*.” *Id.* at 20 (citing *Webster’s Encyclopedic Unabridged Dictionary of the English Language*, 1996 Ed). Third, Plaintiff offers “1. being likely to ensue as a chance or minor consequence 2. Occurring merely by chance or without intention or calculation.” *Id.* at 20–21 (citing the *Merriam Webster Dictionary*, available at [www.merriamwebster.com/dictionary/incidental?src=search-dict-box](http://www.merriamwebster.com/dictionary/incidental?src=search-dict-box) (last visited May 9, 2019)). Finally, Plaintiff suggests “1 : occurring merely by chance or without intention or calculation 2: being likely to ensue as a chance or minor consequence.” *Id.* at 21 (citing

Printing in the context of Chapter 49 is of minor importance or unimportant when it does not relate to the essence of the product. Heading 4911, HTSUS encompasses “Other printed matter,” a phrase that is broad. Note 2, however, limits the heading by excluding printed matter where the printing is merely incidental (or of minor importance relative to something else). The General Explanatory Note to Chapter 49 clarifies what would be considered of minor importance relative to something, providing that, save for a few exceptions not relevant here, Chapter 49 “covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations.” Therefore, only printing that is non-essential in nature should be excluded from Chapter 49. Essential means relating to the essence of a product, necessary, something basic. *See Webster’s Third New International Dictionary* 777 (Philip Babcock Gove, Ph. D. & the Merriam-Webster Editorial Staff eds., Unabridged 2002) (*Essential*: 1: of or relating to an essence: as **a**: having or realizing in itself the essence of its kind: having or consisting of the basic, most fundamental nature, property, quality, or attribute peculiar to or necessary or indispensable to its kind. **b**: forming or constituting the essence of something: making up or being the constituent or intrinsic character or very nature of a thing); *Shorter Oxford English Dictionary* 865 (Oxford Univ. Press 6th Ed. 2007) (*Essential*: 1. That is such in absolute or highest sense. 2. Of or pertaining to a thing’s essence). Therefore, if the printing does not relate to the essence of the product, then the product cannot be classified under Chapter 49.

Where printing has a communicative purpose, the printing comprises part of the essence of the product. Indeed, where a product’s printing has a communicative purpose, one can reasonably surmise that the product as a whole is intended to carry out that communicative purpose. Logically, a communicative printed component is meant to transfer information. The product is the medium for the message, regardless of what other purpose it might have. Whatever the other functions of the product, the printed component becomes part of the essential nature of the product. The product not only serves whatever utilitarian function it may have, it also carries the message of the printing upon it to its recipient.

*Webster’s New Collegiate Dictionary*, 1976 Ed)). To the extent that Plaintiff’s proffered definitions indicate that “not merely incidental” includes situations where the printing component is of minor importance or unimportant in relation to something else, the court agrees with Plaintiff’s position. *See* Pl.’s Br. at 21. To the extent that these definitions also suggest incidental means “accidental” or “unplanned”, clearly such a definition could not apply in the context of Chapter 49. Chapter 49 pertains to printed articles. Surely Congress, by including the phrase “not merely incidental to” in Note 2 to Section VII, were not attempting to classify printing mishaps. Such an interpretation is overly restrictive and does not align with a reasonable interpretation of the tariff terms.

Conversely, printing that is merely decorative—and thus lacks a communicative purpose—would not form part of the essence of a product. The General Explanatory Note to Chapter 49 also uses the term “merely incidental” in describing Chapter 49’s exclusions, stating that

On the other hand, besides the goods of heading 48.14 or 48.21, paper, paperboard or cellulose wadding, or articles thereof, in which the printing is merely incidental to their primary use (e.g., printed wrapping paper and printed stationery) fall in Chapter 48.

General Explanatory Note Chapter 49. These examples describe printing that may be aesthetically pleasing, but not communicative. The printed wrapping paper and printed stationery examples make clear that a printed component that is merely decorative—and does not serve any purpose beyond aesthetics—should be considered incidental to the primary use. In the wrapping paper example, the primary use would be wrapping a gift, while in the stationery example, the primary use would be writing on the stationery.

Defendant argues that dictionary definitions for the word “incidental” support its view that for merchandise to be classified under Chapter 49, “the printing on the silicone bands has to be of greater importance than the functional uses of the bands.” Def.’s Br. at 19. The definitions Defendant invokes do not support this view; although they establish that something incidental is less important, they do not specify the extent to which something must carry less importance. *See* Def. Br. at 18–19 (citing *The Cambridge Academic Content Dictionary*, available at <https://dictionary.cambridge.org/us/dictionary/english/incidental> (last visited May 9, 2019) (“Happening by chance, or in connection with something of greater importance.”)), 19 (citing *The Collins COBUILD Advanced English Dictionary*, available at <https://collinsdictionary.com/us/dictionary/english/incidental> (last visited May 9, 2019) (“If one thing is incidental to another, it is less important than the other thing or is not a major part of it.”)), 19 (citing *The MacMillan Dictionary*, available at [https://www.macmillandictionary.com/us/dictionary/american/incidental\\_1](https://www.macmillandictionary.com/us/dictionary/american/incidental_1) (last visited May 9, 2019) (“Related to something but considered less important.”)). All the definitions cited by the Defendant explain “incidental” as less important, similar to the definitions proffered by Plaintiff and found by the court. Defendant’s suggestion that incidental includes anything the slightest bit less important than the primary use, however, is unfounded. *See* Def.’s Br. at 19. In fact, the definitions Defendant invokes include such language as “happening by chance” or “not a major part of it.” These words suggest

that incidental means not just less important, but minor. Certainly, nothing in these definitions suggests that incidental includes everything but the primary use.

Moreover, had Congress intended “merely incidental” to mean simply not the primary use, it could have said so expressly. Specifically, Note 2 could have read: “plastics, rubber and articles thereof, articles with motifs, characters or pictorial representations, which are not less important than the primary use of the goods, fall in chapter 49.” Congress did not draft Note 2 as such. Instead, Congress adopted the phrasing “not merely incidental to,” suggesting something more nuanced than a simple weighing of importance.

Defendant also seems to argue that where the merchandise serves a utilitarian function, that function constitutes the essential nature, regardless of what the printing conveys. *See* Def.’s Br. at 15. Defendant’s view of the General Explanatory Note to Chapter 49 is overly narrow. Where a product’s printing component has a communicative purpose—even concurrently with a utilitarian function—its essence is more complex than Defendant suggests. Moreover, Defendant’s interpretation of the General Explanatory Note would risk reading the Explanatory Notes in a manner that conflicts with the plain language of the tariff provision, a practice against which the Court of Appeals for the Federal Circuit has cautioned. *See StoreWALL, LLC*, 644 F. 3d at 1363 (citing *Airflow Tech., Inc. v. United States*, 524 F. 3d 1287, 1293 (Fed. Cir. 2008)). The General Explanatory Note merely states that the chapter covers printed matter “of which the essential nature and use is determined by the fact of its being printed.” It does not state that wherever a product also serves a utilitarian function, printing may not constitute part of that product’s essence, and the court will not read it as such. Defendant’s construction of the Explanatory Note is thus unavailing.<sup>10</sup>

The dispositive factor is therefore whether the printing component has a communicative purpose. Where the printing component is designed to communicate information, it cannot be considered merely incidental to the primary use of the goods and should therefore be classified under Chapter 49. Such a reading is consistent with the meaning of the tariff terms and the language of the General Explanatory Note to Chapter 49 and the examples provided. Unlike a printed component that is merely decorative, such as that of wrapping paper

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<sup>10</sup> If the essence of all bands with printing were merely binding, bundling, securing, and gripping, as Defendant suggests, *see* Def.’s Br. at 15, it is hard to see why purchasers would incur the additional costs over and above buying simple rubber bands.

or stationery, one that is designed to have a communicative purpose carries greater importance than something that could reasonably be considered merely incidental.

## **B. The Merchandise at Issue**

There is no dispute as to the nature of the subject merchandise. As described, the articles in dispute consist of ten different kinds of silicone bands, each larger than wristband size, and each containing some form of printed wording or motif. Compl. ¶ 8; Def.'s 56.3 Statement ¶ 27. The court considers each individual band in turn.

### **1. Production Order Q2201**

Production Order Q2201 consists of black silicone bands that are 279 millimeters (“mm”) in circumference, 15.24 mm wide. Def.'s 56.3 Statement ¶ 29. The bands were ordered by a furniture company to bind together a stack of two to six heavy cardstock cards without making the cards buckle under the tension of the bands, while also displaying the company's logo as large as possible on both sides of the band. Def.'s 56.3 Statement [as clarified by Pl.'s Statement of Undisputed Material Facts, Jan. 29, 2018, ECF No. 53 (“Pl.'s 56.3 Statement”)] ¶¶ 28, 30. The bands are imprinted with the company's logo, which consists of a square with the company's initials appearing inside the square, separated by a diagonal line.<sup>11</sup> See Entry Diagrams [attached as Def.'s Ex. 3] at 10, Dec. 23, 2017, ECF No. 49–1.

Here, the printing component is not merely incidental to the bands' primary use. The bands are customized such that the company's logo and initials appear twice on the outside of the cardstock cards. Further, the logo is printed as large as possible on the bands and spaced such that it may appear on both sides of the cards. See Entry Diagrams [attached as Ex. 3] at 10, Dec. 23, 2017, ECF No. 49–1. The printing has a communicative purpose because it alerts whomever sees the bands to the fact that the cards pertain to the relevant company. Although the bands have a dual purpose—to bind the cards and to communicate a message—the printing of the company's logo and initials is not merely incidental to the bands' primary use. The court need not decide which use is primary; it suffices that the printing component has a communicative purpose and is thus not merely incidental.

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<sup>11</sup> The company is [ ] and the bands contain a square with the initials [ ] and [ ] inside the square, separate by a diagonal line. See Entry Diagrams [attached as Def.'s Ex. 3] at 10, Dec. 23, 2017, ECF No. 49–1.

## 2. Production Order P9427

Production Order P9427 consists of red silicone bands that are 348 mm in circumference and 25.4 mm wide. Def.'s 56.3 Statement ¶¶ 31–32. The bands were ordered by a designer, manufacturer, and service provider of control solutions for the aerospace and industrial markets.<sup>12</sup> *Id.* ¶ 31. The bands are imprinted with the words “REMOVE BEFORE INSTALLATION” in white lettering, and the company uses the bands to cover and protect certain aspects of its product during shipment, prior to installation. *Id.* ¶ 33. The sizes were custom-ordered to ensure the bands would fit on the part to be protected during shipment, and the red color was designed to call the buyer's attention to the bands' placement. *Id.* ¶ 34.

The printing on these silicone bands is not merely incidental to the products' primary use. Again, the bands in question serve two purposes—to secure certain aspects of the product during shipment, and to convey information. Nevertheless, the printing component has a communicative purpose that cannot be ignored. The bands' red color—and contrasting white lettering—draw the user's attention to the bands' message, i.e., stop and remove prior to installing, thus underscoring the importance of the message being adequately conveyed. Def.'s 56.3 Statement [as clarified by Pl.'s 56.3 Statement] ¶ 34. Indeed, it is critical that the band be removed prior to installation. *See* Def.'s 56.3 Statement ¶¶ 33–34 (noting that the band covers and protects parts of the product prior to installation and that the red color assists in calling user's attention to the band's placement); *see also* Deposition Testimony of Paul G. Berlin, Sr. [attached as Def.'s Ex. 5] at 53, Aug. 2, 2017, ECF No. 49–2 (“Berlin Testimony”) (noting that the bands convey the critical information to the customer that the bands should be removed prior to installation). Accordingly, the printing component for Production Order P9427 is not merely incidental to the article's primary use.

## 3. Production Order P9938

Production Order P9938 consists of red silicone bands that are 609.6 mm in circumference and 25.4 mm wide. Def.'s 56.3 Statement ¶ 36. The bands were ordered by a video game accessory company to hold together a seasonal special-offer bundle containing gaming accessories and a game product sold through a gaming store.<sup>13</sup> *Id.* ¶ 38. The bands are imprinted with the store's name and slogan in black

<sup>12</sup> The company that ordered these bands is [[ ]]. Def.'s Br. at 8.

<sup>13</sup> These bands were ordered by [[ ]], a video game accessory company based in California. *See* Def.'s Ex. 13, Dec. 23, 2017, ECF No. 49–8; Def.'s 56.3 Statement ¶ 35.

and white lettering, and their red color was selected to match the store's logo.<sup>14</sup> *Id.* [as clarified by Pl.'s 56.3 Statement] ¶¶ 37–39.

Here, the printing component of the bands cannot be described as merely incidental to the bands' primary use. Although the bands serve the utilitarian purpose of bundling multiple items together to be sold in a package, the printing component has the communicative purpose of advertising for the gaming store. Indeed, the bands are imprinted with both the store's name and logo. The color of the bands matches that of the store's logo, and the contrast of the black and white lettering against the red aligns with the logo and draws attention to the bands' message, further illustrating the marketing—and thus communicative—purpose behind the bands. Such detail shows that the bands' printing component was designed not merely as a decorative feature but to communicate a very specific brand message. The printing therefore is not merely incidental to the primary use of the article.

#### 4. Production Order Q1320

Production Order Q1320 consists of maroon silicone bands that are 431.6 mm in circumference and 15.24 mm wide. *Id.* ¶ 41. The bands were ordered by an agricultural seed bank and seeding services company, which uses the bands to bind together its business brochures and documents in a neat and professional manner.<sup>15</sup> *Id.* ¶¶ 40–43. The bands are imprinted with the company's web address, and the wording "Growing For Over 100 Years" in white lettering. Entry Diagrams [attached as Def.'s Ex. 3] at 21, Dec. 23, 2017, ECF No. 49–1.

The printing component on these bands is not merely incidental to their primary use. The bands convey the purchasing company's web address and its slogan, which alert users to the nature of the company's business and provide advertising for the brand. The bands again serve a dual purpose—to bind together business brochures and documents in a professional way and to convey information. Nonetheless, the purchasing company chose to have the bands imprinted in a way that gave them a communicative purpose. Users of the bands would know the name of the company and where to go to inquire about the company's services because of the printing. The court cannot therefore say that the printing is merely incidental.

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<sup>14</sup> The store is [[ ]] and the bands are imprinted with the name [[ ]] and the phrase [[ ]] in black and white lettering. *See* Entry Diagrams [attached as Def.'s Ex. 3] at 17, Dec. 23, 2017, ECF No. 49–1.

<sup>15</sup> The agricultural seed bank and seeding services company is [[ ]] and is based in Idaho. *See* Def.'s Ex. 15, Dec. 23, 2017, ECF No. 49–10.

### 5. Production Order Q1004

Production Order Q1004 consists of translucent silicone bands that are 215.5 mm in circumference and 15.2 mm wide. *Id.* ¶ 45. The bands were ordered by a supplier of printed and embroidered garments for the souvenir industry, which uses the bands to bind together a sweatshirt and a hat that are sold together.<sup>16</sup> *Id.* [as clarified by Pl.'s 56.3 Statement] ¶¶ 44–46. The bands are imprinted with one of the following size abbreviations—XXL, XL, L, M, or S—indicating the size of the sweatshirt so that customers need not pull the hat and sweatshirt combination apart to identify the sweatshirt's size, an issue the purchasing company previously encountered. Berlin Testimony at 62–65; Def.'s 56.3 Statement [as clarified by Pl.'s 56.3 Statement] ¶ 46.

The printing component of these bands is not merely incidental to their primary use. The customized bands have a communicative purpose—the bands contain a description of the sweatshirt's size so that customers do not have to pull the sweatshirt and hat apart to identify the sweatshirt's size. Moreover, the information conveyed saves customers the hassle of taking apart the bundled products, saves employees the time they would have spent putting the sweatshirt and hat back together, and prevents confusion because the products remain bundled, thus reinforcing the message that the products are sold together. Accordingly, with a communicative purpose, the printing component of the bands in Production Order Q1004 is not merely incidental to the primary use.

### 6. Production Order Q2372

Production Order Q2372 consists of mustard-colored silicone bands that are 431.6 mm in circumference and 15.24 mm wide. Def.'s 56.3 Statement ¶ 48. The bands were ordered by a restaurant, which uses them to hold its paper menu sheets to its wooden menu boards, and to spruce up their menus generally.<sup>17</sup> *Id.* [as clarified by Pl.'s 56.3 Statement] ¶¶ 47–49. The bands are imprinted with the restaurant's name and logo, both in brown. *See* Entry Diagrams [attached as Def.'s Ex. 3] at 26, Dec. 23, 2017, ECF No. 49–1.

The printing component of these bands is not merely incidental. The printing on the bands serves the communicative purpose of advertising for the restaurant. The printing is customized to show the

<sup>16</sup> The purchasing company is [[ ]]. *See* Def.'s Ex. 17, Dec. 23, 2017, ECF No. 49–12.

<sup>17</sup> The purchasing company is [[ ]], a restaurant in Saskatchewan, Canada. *See* Def.'s Ex. 20, Dec. 23, 2017, ECF No. 49–14.

purchasing restaurant's name and logo in unique colors.<sup>18</sup> By including the restaurant's name and logo on the bands, the bands increase brand awareness for the restaurant. The branding component is bolstered by the fact that the bands are removable and easily taken by customers. The printing component is therefore not merely incidental to the primary use.

### 7. Production Order Q2287

Production Order Q2287 consists of purple silicone bands that are 403.9 mm in circumference and 19 mm wide. Def.'s 56.3 Statement ¶ 51. The bands were ordered by an exercise equipment company, which sells the bands as an accessory to its foam roller product, claiming that the bands add grip to the foam roller during exercises.<sup>19</sup> Def.'s 56.3 Statement ¶¶ 50, 52. The bands are imprinted with several names, descriptions, and logos relating to the product in white lettering, as well as "patent pending."<sup>20</sup> Def.'s 56.3 Statement [as clarified by Pl.'s 56.3 Statement] ¶ 51; Entry Diagrams [attached as Def.'s Ex. 3] at 27, Dec. 23, 2017, ECF No. 49–1. The bands help "reduce spinning out and slipping when you're doing exercise with a lot of rotational or sheer force." Def.'s 56.3 Statement ¶ 53.

The printing component of these bands is not merely incidental to the bands' primary use. The bands have a communicative purpose because they are imprinted with the product's unique name, as well as the words "patent pending." Including the product's name serves advertising purposes as it communicates the brand message intended by the producer. Further, "patent pending" serves a communicative purpose by conveying to the user and the public that the purchasing company is working to obtain a patent on the invention. Although the bands certainly serve a utilitarian purpose—adding grip during exercise—the bands also have a communicative purpose that makes

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<sup>18</sup> The bands in Production Order Q2372 likely have decorative and utilitarian purposes, in addition to a communicative purpose. The bands are decorative because they "spruce up" the menu board, and they are utilitarian because they hold the paper menu sheets to a wooden menu board. Def.'s 56.3 Statement [as clarified by Pl.'s 56.3 Statement] ¶ 49. The bands nevertheless have a communicative purpose for the reasons mentioned, as well as the fact that the restaurant deliberately selected bands that are easily removed from the boards. Indeed, the restaurant found it necessary to re-order 500 of the bands, suggesting that many customers removed the bands and took them from the restaurant. *See* Def.'s 56.3 Statement [as clarified by Pl.'s 56.3 Statement] ¶ 49; *see also* Berlin Testimony at 66 (noting that "[i]t's [the restaurant's] hope that people will take the band off the menu board and take it with them."). The bands thus serve an advertising objective for the restaurant.

<sup>19</sup> The purchasing company is [[ ]], an exercise equipment company based in [[ ]]. *See* Def.'s Ex. 23, Dec. 23, 2017, ECF No. 49–17.

<sup>20</sup> The bands are imprinted with the names "[[ ]]" and "[[ ]]" and the phrase "[[ ] patent pending." *See* Entry Diagrams [attached as Def.'s Ex. 3] at 27, Dec. 23, 2017, ECF No. 49–1.

up part of their essence. Accordingly, the printing component of the bands making up Production Order Q2287 is not merely incidental to the primary use of the goods.

### 8. Production Order Q3712

Production Order Q3712 consists of white silicon bands that are 596.9 mm in circumference and 31.75 mm wide. Def.'s 56.3 Statement ¶ 55. The bands were ordered by a luxury branding services company and used to bind together sales brochures, purchase information, and floor plan diagrams to aid in marketing a real estate client's luxury apartment tower.<sup>21</sup> Def.'s 56.3 Statement ¶¶ 54–56. The bands are imprinted with a number in debossed lettering signifying the address of the high-end apartment tower.<sup>22</sup> Berlin Testimony at 79–82.

The printing component of these bands is merely incidental to their primary use. The printing on the bands serves a decorative rather than communicative purpose. The bands merely contain a number, and without greater context, it is not immediately discernible what the number signifies. The bands do not alert holders of the bands to any brand, any event, any source for obtaining more information, or any instructions pertaining to a product. Rather, the printing on these bands is designed to present the company's documents in a neat and professional manner. Accordingly, the printing component is merely incidental to the primary use of the bands.

### 9. Production Order Q3613

Production Order Q3613 consists of olive-colored silicone bands that are 376 mm in circumference and 12.7 mm wide. Def.'s 56.3 Statement ¶ 59. The bands were ordered by a marketing and brand strategy firm and used to bind an 8.5" by 1/8" thick booklet.<sup>23</sup> *Id.* ¶¶ 58, 60. The bands are imprinted with a nine-word description of a service-provider in white lettering.<sup>24</sup> *See* Entry Diagrams [attached as Def.'s Ex. 3] at 37, Dec. 23, 2017, ECF No. 49–1. The company also sought out bands in terra cotta or moss green color to compliment the booklet's design. Def.'s 56.3 Statement ¶ 61.

The printing component of these bands is not merely incidental to the bands' primary use. The bands serve a communicative purpose by describing the type of service provided by the provider in question.

<sup>21</sup> The purchasing company is [[ ]], a luxury branding services company based in New York. Def.'s Ex. 25, Dec. 23, 2017, ECF No. 51.

<sup>22</sup> The bands are imprinted with the number "[ ]" in debossed lettering.

<sup>23</sup> The purchasing company is [[ ]], a marketing and brand strategy firm based in New Hampshire. Def.'s Ex. 27, Dec. 23, 2017, ECF No. 51–1.

<sup>24</sup> The bands read [[ ]]. Entry Diagrams [attached as Def.'s Ex. 3] at 37, Dec. 23, 2017, ECF No. 49–1.

Intuitively, the nine-word description of the service-provider is meant to be read. The printing component serves to convey information to viewers of the bands, thus forming part of the essence of the bands. Although the bands serve the utilitarian function of binding an informational booklet, they also serve a communicative purpose. Accordingly, the printing component of the bands in Production Order Q3613 is not merely incidental to the primary use.

### 10. Production Order Q3695

Production Order Q3695 consists of red silicone bands that are 508 mm in circumference and 15.2 mm wide. Def.'s 56.3 Statement ¶ 63. The bands were ordered by a company that facilitates web-based Q&A forums, and used to securely close a 9" by 12" folder of recruiting documents and brochures that the company distributes during recruiting trips.<sup>25</sup> *Id.* ¶¶ 62–64. The bands are imprinted with the web address of a related entity that assists companies in recruiting and hiring software programmers and developers. *See* Def.'s Ex. 29, Dec. 23, 2017, ECF No. 51–3.<sup>26</sup>

The printing component of these bands is not merely incidental to the bands' primary use. The bands serve a communicative purpose by conveying information in the form of the web address for the company's recruiting arm. By clearly displaying the company's web address, the bands further the company's marketing and recruiting objectives. The fact that the bands direct viewers where to find additional information underscores the bands' communicative purpose. Accordingly, the printing component of these bands is not merely incidental to the primary use of the bands.

### CONCLUSION

Defendant's motion for summary judgment and Plaintiff's cross-motion for summary judgment are each granted in part and denied in part. In accordance with the foregoing, it is

**ORDERED** that the products entered pursuant to production orders Q2201, P9427, P9938, Q1320, Q1004, Q2372, Q2287, Q3613, and Q3695 are properly classifiable under subheading 4911.99.80, HTSUS; and it is further

**ORDERED** that, with respect to the products entered pursuant to production orders Q2201, P9427, P9938, Q1320, Q1004, Q2372,

<sup>25</sup> The purchasing company is [[ ]], based in New York City. *See* Def.'s Ex. 28, Dec. 23, 2017, ECF No. 51–2.

<sup>26</sup> The bands are imprinted with the web address "[ ]" in white lettering. *See* Entry Diagrams [attached as Def.'s Ex. 3] at 40, Dec. 23, 2017, ECF No. 49–1.

Q2287, Q3613, and Q3695, Defendant's summary judgment motion is denied and Plaintiff's cross-motion for summary judgment is granted; and it is further

**ORDERED** that the products entered pursuant to Production Order Q3712 is properly classifiable under subheading 3926.90.99, HT-SUS; and it is further

**ORDERED** that, with respect to the products entered pursuant to Production Order Q3712, Defendant's summary judgment motion is granted and Plaintiff's cross-motion for summary judgment is denied.

Judgment will enter accordingly.

Dated: May 14, 2019

New York, New York

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

Slip Op. 19-60

ARLANXEO USA LLC and ARLANXEO BRASIL S.A., Plaintiffs, and INDUSTRIAS NEGROMEX, S.A. de C.V., INSA, LLC, KUMHO PETROCHEMICAL CO., LTD., and SYNTHOS S.A., Consolidated Plaintiffs, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, and LION ELASTOMERS LLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 17-00247

[Sustaining the U.S. International Trade Commission's final affirmative material injury determination in the antidumping duty investigation of emulsion styrene-butadiene rubber from Brazil, Mexico, the Republic of Korea, and Poland.]

Dated: May 17, 2019

*Kenneth G. Weigel*, Alston & Bird, LLP, of Washington, D.C., argued for Plaintiffs ArlanxEO USA LLC and ArlanxEO Brasil S.A. With him on the briefs was *Chunlian Yang*.

*William C. Sjoberg*, Porter, Wright, Morris & Arthur, LLP, of Washington, D.C., argued for Consolidated Plaintiffs Industrias Negromex, S.A. de C.V. and INSA, LLC.

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*Jill A. Cramer*, Mowry & Grimson, PLLC, of Washington, D.C., for Consolidated Plaintiff Synthos S.A. With her on the briefs were *Jeffrey S. Grimson* and *Yuzhe PengLing*. *Bryan P. Cenko*, *James C. Beaty*, *Kristin H. Mowry*, and *Sarah M. Wyss* also appeared.

*Jane C. Dempsey*, Attorney, Office of General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for Defendant U.S. International Trade Commission. With her on the brief were *Dominic Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

*Matthew T. McGrath*, Barnes, Richardson & Colburn, LLP, of Washington, D.C., argued for Defendant-Intervenor Lion Elastomers LLC.

## OPINION

### **Choe-Groves, Judge:**

This consolidated action challenges the final affirmative material injury determination issued by the U.S. International Trade Commission (“Defendant,” “ITC,” or “Commission”) in the antidumping duty investigation of emulsion styrene-butadiene rubber (“ESBR”) from Brazil, Mexico, the Republic of Korea (“Korea”), and Poland. *See Emulsion Styrene-Butadiene Rubber From Brazil, Korea, Mexico, and Poland*, 82 Fed. Reg. 43,402 (Int’l Trade Comm’n Sept. 15, 2017); *see also Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland*, USITC Pub. 4717, Inv. Nos. 731-TA-1334–1337 (Aug. 2017), *available at* [https://www.usitc.gov/publications/701\\_731/pub4717.pdf](https://www.usitc.gov/publications/701_731/pub4717.pdf) (last visited May 14, 2019) (“*Final ITC Determination*”). Before the court are two Rule 56.2 Motions for Judgment on the Agency Record filed by Arlanxeo USA LLC, Arlanxeo Brasil S.A., Industrias Negromex, S.A. de C.V., INSA, LLC, Kumho Petrochemical Co., Ltd., and Synthos S.A. *See* Joint Mot. J. Agency R. Pursuant USCIT Rule 56.2 Pls. Arlanxeo USA LLC & Arlanxeo Brasil S.A., & Consol. Pls. Industrias Negromex, S.A. de C.V., INSA, LLC, Kumho Petrochemical Co., Ltd., & Synthos S.A., Apr. 30, 2018, ECF No. 46; Mot. J. Agency R. Pursuant Rule 56.2 Consol. Pl. Synthos S.A. Issue Negligibility, Apr. 30, 2018, ECF No. 42. For the following reasons, the court sustains the Commission’s final affirmative material injury determination.

### **ISSUES PRESENTED**

The court reviews the following issues:

1. Whether the Commission’s finding regarding the volume of subject imports was supported by substantial evidence;
2. Whether the Commission’s finding regarding price effects was supported by substantial evidence and in accordance with the law;
3. Whether the Commission’s finding regarding the impact of subject imports was supported by substantial evidence and in accordance with the law; and
4. Whether the Commission’s determination that Poland was not a negligible source of subject imports was supported by substantial evidence and in accordance with the law.

### **PROCEDURAL HISTORY**

Lion Elastomers LLC (“Lion”) and East West Copolymer, LLC filed antidumping duty petitions with the U.S. Department of Commerce

(“Department” or “Commerce”) and the ITC on July 21, 2016, alleging that the domestic industry had been materially injured or threatened with material injury from imports of ESBR from Brazil, Korea, Mexico, and Poland. See *Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland*, USITC Pub. 4636 at I-1, Inv. Nos. 731-TA-1334–1337 (Preliminary) (Sept. 2016). Commerce and the ITC instituted antidumping duty investigations. See *id.*

Commerce completed its antidumping duty investigations of the four subject countries and published its final determinations on July 19, 2017. See *Emulsion Styrene-Butadiene Rubber From Brazil*, 82 Fed. Reg. 33,048 (Dep’t Commerce July 19, 2017) (final affirmative determination of sales at less than fair value and final negative determination of critical circumstances) (“*Brazil AD Final Determination*”); *Emulsion Styrene-Butadiene Rubber From the Republic of Korea*, 82 Fed. Reg. 33,045 (Dep’t Commerce July 19, 2017) (final affirmative determination of sales at less than fair value, and final affirmative determination of critical circumstances, in part) (“*Korea AD Final Determination*”); *Emulsion Styrene-Butadiene Rubber From Mexico*, 82 Fed. Reg. 33,062 (Dep’t Commerce July 19, 2017) (final affirmative determination of sales at less than fair value) (“*Mexico AD Final Determination*”); *Emulsion Styrene-Butadiene Rubber From Poland*, 82 Fed. Reg. 33,061 (Dep’t Commerce July 19, 2017) (final affirmative determination of sales at less than fair value) (“*Poland AD Final Determination*”). In the Brazil investigation, Commerce found that the subject imports of ESBR were being sold at less than fair value and calculated a final dumping margin of 19.61 percent. See *Brazil AD Final Determination*, 82 Fed. Reg. at 33,048. Commerce found also that the subject imports of ESBR were being sold at less than fair value in the Korea, Mexico, and Poland investigations and calculated final dumping margins of 9.66 percent to 44.30 percent, 19.52 percent, and 25.43 percent, respectively. See *Korea AD Final Determination*, 82 Fed. Reg. at 33,046; *Mexico AD Final Determination*, 82 Fed. Reg. at 33,063; *Poland AD Final Determination*, 82 Fed. Reg. at 33,062.

The ITC published its final affirmative material injury determination on August 3, 2017. See *Emulsion Styrene-Butadiene Rubber From Brazil, Mexico, Korea, and Poland*, 82 Fed. Reg. at 43,402. The ITC held a public hearing on June 29, 2017, see *Final ITC Determination* at I-1, and received pre-hearing and post-hearing briefs from the relevant parties. See *id.* at 3. The Commission received questionnaire data from 15 importers accounting for 100 percent of imports of subject ESBR from Brazil, 92.2 percent of imports of subject ESBR from Korea, 100 percent of imports of subject ESBR from Mexico, 99.9

percent of imports of subject ESBR from Poland, and 79.5 percent of imports of ESBR from non-subject countries during the final year of investigation. *See id.* at 4. The ITC held a public hearing on June 29, 2017, *see id.* at I-1, and received pre-hearing and post-hearing briefs from relevant parties. *See id.* at 3. The period of investigation spanned from January 2014 through March 2017. *See id.* at 24.

An evenly-divided Commission determined that an industry in the United States had been materially injured by reason of imports of ESBR from Brazil, Korea, Mexico, and Poland that Commerce found to be sold at less than fair value. *See id.* at 3, 12. As a result, Commerce published antidumping duty orders on subject imports from the four subject countries on September 12, 2017. *See Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico, and Poland: Antidumping Duty Orders*, 82 Fed. Reg. 42,790 (Dep't Commerce Sept. 12, 2017) (“*Antidumping Duty Orders*”).

The Commission commenced its injury analysis by defining the domestic product that is like or most similar to the imported ESBR and identifying the industry responsible for producing the domestic like product. *See Final ITC Determination* at 4–8. ESBR is predominantly used in the production of car and light truck tires, as well as in a variety of non-tire products, including conveyor belts, shoe soles, hoses, roller coverings, and flooring. *See id.* at 6. The Commission’s definition of the domestic like product was coterminous with the scope of the imported ESBR under investigation by Commerce. *See id.* at 7. “The scope of these investigations covers grades of ESBR included in the [International Institute of Synthetic Rubber Producers] 1500 and 1700 series of synthetic rubbers. . . . The Commission consequently defined a single domestic like product, consisting of the 1500 and 1700 series ESBR, a product category that was coextensive with the scope [set by Commerce].” *See id.* at 5–7. The Commission found that the domestic industry includes all U.S. producers of the domestic like product. *See id.* at 8.

The Commission assessed the market conditions of the domestic ESBR industry in its analysis of material injury by reason of subject imports. *See id.* at 12–31. The Commission found that apparent domestic consumption of ESBR declined over the period of investigation. *See id.* at 17. The Commission noted that demand for ESBR is “generally driven by the demand for tires, primarily demand for replacement tires and to a lesser degree for tires that original equipment manufacturers [ ] mount on new vehicles.” *Id.* A “reduced demand for end-use products, such as replacement tires, off-the-road tires, and conveyor belts” and an increase in the use of solution styrene-butadiene rubber (“SSBR”) in place of ESBR were provided

as reasons for the decline in demand. *Id.* The cost of raw materials used to produce ESBR, including styrene and butadiene, declined from January 2014 to December 2016, but increased from December 2016 to March 2017. *See id.* at 19–20. The domestic industry was the largest supplier of ESBR to the U.S. market during the period of investigation, and cumulated subject imports from the four subject countries were the second largest source of supply. *See id.* at 18. Cumulated subject imports held a market share of approximately 20 percent during the period of investigation. *See id.* at 20. The Commission determined that there was a moderate to high degree of substitutability between domestically produced ESBR and the subject imports. *See id.* at 19. “[T]he 1500 and 1700 series ESBR are manufactured according to [International Institute of Synthetic Rubber Producers] industry specifications. Moreover, a majority of responding U.S. producers and purchasers reported that ESBR imports from the subject countries are ‘always’ or ‘frequently’ interchangeable with each other and with the domestic like product.” *See id.*

The Commission then considered the volume of cumulated subject imports, price effects of cumulated subject imports, and the impact of cumulated subject imports on the domestic industry. *See id.* at 20–31. The Commission found that although the quantity and market share of cumulated subject imports decreased from 2014 to 2016, said imports remained at “elevated levels in the U.S. market in 2015 and 2016.” *See id.* at 21. “[E]ven though demand declined and [domestic production recovered from supply disruption], cumulated subject imports did not meaningfully retreat from the U.S. market during the period of investigation.” *See id.* The Commission found that the volume of cumulated subject imports was significant “on an absolute basis and relative to apparent U.S. consumption.” *See id.* Subject imports undersold the domestic like product and depressed U.S. producer prices to a significant degree. *See id.* at 22–24. The Commission recognized that while other factors contributed to the downward trend in prices, including a decline in cost for raw materials, “these cannot explain the magnitude of the declines in prices of the domestic like product.” *See id.* at 24. The Commission determined that the “significant volume of low-priced cumulated subject imports put pressure on the domestic industry to reduce prices.” *See id.* at 25. The Commission noted that cumulated subject imports from the four subject countries had a significant impact on the domestic industry, resulting in declines in production, capacity utilization, U.S. shipments, and net sales revenues as well as fluctuations in industry employment, wages, and productivity. *See id.* at 27–31.

The Commission concluded that the domestic industry was materially injured by reason of subject imports of ESBR from Brazil, Korea, Mexico, and Poland that were sold in the U.S. at less than fair value. *See id.* at 34. Accordingly, Commerce issued antidumping duty orders on ESBR from the four subject countries. *See Antidumping Duty Orders.*

Plaintiffs Arlanxeo USA LLC and Arlanxeo Brasil S.A. (collectively, “Plaintiffs”) and Consolidated Plaintiffs Industrias Negromex, S.A. de C.V. (“Industrias”), INSA, LLC, Kumho Petrochemical Co., Ltd., and Synthos S.A. (collectively, “Consolidated Plaintiffs”) initiated multiple actions challenging the ITC’s final affirmative determination of material injury, which the court consolidated. *See Order*, Feb. 9, 2018, ECF No. 35. The court denied Defendant’s motion to dismiss Industrias’ complaint and granted Industrias’ cross-motion for leave to construe the summons and complaint as concurrently-filed. *See Arlanxeo USA LLC v. United States*, 42 CIT \_\_, 337 F. Supp. 3d 1350 (2018). *Arlanxeo USA LLC v. United States*, 42 CIT \_\_, 337 F. Supp. 3d 1350 (2018).

Plaintiffs and Consolidated Plaintiffs filed a Rule 56.2 motion challenging various aspects of the *Final ITC Determination*. *See Joint Mot. J. Agency R. Pursuant USCIT Rule 56.2 Pls. Arlanxeo USA LLC & Arlanxeo Brasil S.A., & Consol. Pls. Industrias Negromex, S.A. de C.V., INSA, LLC, Kumho Petrochemical Co., Ltd., & Synthos S.A.*, Apr. 30, 2018, ECF No. 46; *see also Pls.’ & Consol. Pls.’ Mem. Supp. Joint Mot. J. Agency R. Under USCIT Rule 56.2*, Apr. 30, 2018, ECF No. 46 (“Pls. Br.”). Consolidated Plaintiff Synthos S.A. (“Synthos”) filed a Rule 56.2 motion challenging the ITC’s negligibility determination regarding Poland. *See Mot. J. Agency R. Pursuant Rule 56.2 Consol. Pl. Synthos S.A. Issue Negligibility*, Apr. 30, 2018, ECF No. 42; *see also Mem. P. & A. Supp. Mot. J. Agency R. Pursuant Rule 56.2 Pl. Synthos S.A. Issue Negligibility*, Apr. 30, 2018, ECF No. 45 (“Synthos Br.”). The court held oral argument on March 6, 2019. *See Closed Oral Argument*, Mar. 6, 2019, ECF No. 70.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and Section 516A(a)(2)(B)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(ii), which grant the court authority to review actions contesting the ITC’s final affirmative injury determination following an antidumping or countervailing duty investigation. The court will uphold the ITC’s determinations, findings, or conclusions unless they are unsupported by substantial evidence on the record, or otherwise not in accordance with the law. 19 U.S.C. §

1516a(b)(1)(B)(i); *see also* *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the Commission’s determinations, findings, or conclusions are supported by substantial evidence. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)); *see also* *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966).

## ANALYSIS

### I. Legal Framework

In order to make an affirmative material injury determination, the ITC must find that (1) material injury existed and (2) the material injury was caused by reason of the subject imports. *See Swift-Train Co. v. United States*, 793 F.3d 1355, 1359 (Fed. Cir. 2015) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997)). Material injury is defined by statute as harm that is not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A). To determine whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly subsidized or less than fair value imports, the Commission considers:

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
- (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States.

*Id.* § 1677(7)(B)(i). The Commission may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports. *Id.* § 1677(7)(B)(ii). No single factor is dispositive and the significance to be assigned to a particular factor is for the ITC to decide. *See* S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.

The statute neither defines the phrase “by reason of” nor provides the ITC with guidance on how to determine whether the material injury is by reason of subject imports. The Court of Appeals for the Federal Circuit has interpreted the “by reason of” statutory language to require the Commission to consider the volume of subject imports, their price effects, their impact on the domestic industry, and to establish whether there is a causal connection between the imported goods and the material injury to the domestic industry. *See Swift-*

*Train Co.*, 793 F.3d at 1361; *see also* S. Rep. No. 96–249, at 57–58, 74–75 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 443– 44, 460–61.

## II. The Parties’ Challenges to the Commission’s Final Affirmative Material Injury Determination

Plaintiffs dispute various findings made by the Commission that contributed to the final affirmative material injury determination. The court addresses each finding in turn.

### A. The Commission’s Volume Determination

The ITC is required to consider the volume of subject imports in determining whether a domestic industry has been materially injured. *See* 19 U.S.C. § 1677(7)(C)(i). When evaluating volume, the Commission must consider “whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” *Id.* § 1677(7)(C)(i); *see also Nucor Corp. v. United States*, 414 F.3d 1331, 1335 (Fed. Cir. 2005). The statute does not define what is considered “significant” because “[f]or one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.” *See* S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474. The court will uphold the Commission’s volume determination unless it is unsupported by substantial evidence in the record. *See Siemens Energy, Inc.*, 806 F.3d at 1369 (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

The Commission found that the volume of cumulated subject imports was significant on an absolute basis and relative to apparent U.S. consumption. *Final ITC Determination* at 21. The cumulated subject imports held a market share of approximately 20 percent during the period of investigation. *Id.* at 20. The volume of cumulated subject imports increased from 2013 to 2014, after Lion closed its Baton Rouge plant in December 2013, and decreased between 2014 and 2016. *See id.* at 21. The Commission noted that after the plant reopened in April 2014 and U.S. consumption declined, the cumulated subject imports remained at elevated levels in the U.S. market in 2015 and 2016. *See id.* The Commission stated that the oversupply of ESBR in the global market contributed to the attractiveness of the U.S. market for the subject imports. *See id.* The Commission found that the domestic industry had sufficient capacity to supply apparent U.S. consumption during the period of investigation. *Id.* at 21 n.115.

Plaintiffs contend that the Commission failed to consider “the context and conditions of competition here,” specifically that purchasers bought the subject imports in order to ensure an “available *i.e.* secure, and reliable supply during a chaotic period for the domestic industry”

due to supply disruptions after the Baton Rouge plant closed. *See* Pls. Br. 8–10. Plaintiffs’ argument fails because the Commission did consider the “context and conditions of competition here.” After the Baton Rouge plant closed, the volume of cumulated subject imports increased, and after the plant reopened, demand declined. *Final ITC Determination* at 21. The Commission observed that after the plant reopened, the “cumulated subject imports did not meaningfully retreat from the U.S. market.” *See id.* The Commission found also that the oversupply of ESBR in the global market contributed to the attractiveness of the U.S. market, thus the plant closure was not the sole reason for the increase in imports. *See id.* Because the Commission did consider the supply disruptions in its volume analysis and other conditions of competition such as the oversupply of ESBR in the global market, the court concludes that the Commission’s volume determination is supported by substantial evidence.

### **B. The Commission’s Price Effects Determination**

In evaluating the effect of imports on prices, the statute directs the Commission to consider whether:

- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
- (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

#### **1. Underselling**

The Commission found widespread underselling of the domestic like product by subject imports based on evidence that the subject imports undersold the domestic like product in 150 of 218 quarterly price comparisons and 85.6 percent of the quantity of subject imports covered by the pricing data was sold during quarters in which the average price of these imports was less than that of the comparable domestic product. *See Final ITC Determination* at 22–23. The Commission also addressed the argument that the pricing data for some products was skewed because of a “swap” agreement between Arlanxeo and Goodyear Tire & Rubber Company (“Goodyear”), in which Arlanxeo received U.S.-produced ESBR in exchange for its Brazil-

produced ESBR on a pound for pound basis at an artificial price. *See id.* at 23. The Commission found that the “swap” price was the result of a negotiation between two unrelated companies and thus declined to revise the pricing date. *See id.*

Plaintiffs contend that the Commission’s underselling analysis is flawed because the Commission based its analysis on the pricing trends between January 2014 and December 2016 and overlooked the fact that domestic prices increased over the period of investigation, including the first quarter of 2017. *See* Pls. Br. 14–15. Plaintiffs argue that the Commission did not properly analyze the causal nexus between subject imports and domestic prices because it failed to consider other factors on prices such as demand declines, raw material cost fluctuations, and the intensification of domestic competition. *See* Pls. Br. 19; Pls. Reply 10.<sup>1</sup> Plaintiffs argue also that the Commission improperly considered the artificial swap price between Arlanxeo and Goodyear rather than the market price of the ESBR in the Commission’s injury finding. *See* Pls. Br. 24.

Plaintiffs’ first two arguments conflate the Commission’s analysis of underselling and price depression. Section 1677(7)(C)(ii)(II) requires the Commission to undertake two distinct analyses. Underselling involves a comparison of the “price of domestic like products of the United States” and the “imported merchandise.” 19 U.S.C. § 1677(7)(C)(ii)(I). The Commission properly undertook its underselling analysis by comparing prices from January 2014 through March 2017. *See Final ITC Determination* at Table V-10. Plaintiffs’ first argument that the Commission overlooked pricing data from the first quarter of 2017 is related to the Commission’s price depression analysis. *See id.* at 24 (“Our analysis of price depression focuses on movements in quarterly prices for the domestic like product and subject imports between January 2014 and December 2016.”). Plaintiff’s second argument relates to the Commission’s price depression analysis rather than its underselling analysis because the “causal nexus” between subject imports and domestic prices is related to “the effect of imports of such merchandise” under 19 U.S.C. § 1677(7)(C)(ii). Because the Commission’s underselling analysis was distinct from its price depression analysis, the court concludes that the Commission’s underselling analysis is in accordance with the law.

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<sup>1</sup> At a closed oral argument, Plaintiffs raised a new, additional argument regarding price and underselling in support of their contention that the Commission improperly analyzed the causal nexus. *See* Closed Oral Argument, Mar. 6, 2019, ECF No. 70. Plaintiffs failed to raise this argument in their opening brief and the court thus deems the argument waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (“Our law is well established that arguments not raised in the opening brief are waived.”).

Plaintiffs' argument regarding the "swap" price is relevant to the Commission's underselling analysis. The Commission addressed the "swap" price in its analysis and declined to revise the pricing data as "the price of the swap sales was negotiated between two unrelated companies." See *Final ITC Determination* at 23. The Commission is required to compare the prices of subject imports to the domestic like product. See 19 U.S.C. § 1677(7)(ii)(II). The Commission is not required to compare the "market price" of subject imports to the domestic like product, nor is the Commission required to revise the pricing data because Goodyear and Arlanxeo negotiated a swap price "higher than the actual market price." See *Final ITC Determination* at 23. The Commission fulfilled its statutory obligation by using Goodyear's reported price for the swap transactions. Because the Commission did not have to revise the swap price, the court finds that the Commission's use of the swap price in its underselling analysis is in accordance with the law.

## 2. Price Depression

The Commission found that the subject imports depressed U.S. producers' prices to a significant degree. *Id.* at 24. The Commission's analysis focused on quarterly prices between January 2014 and December 2016 and acknowledged that prices for the domestic products "rose sharply during the first quarter of 2017." See *id.* at 24 n.132. The Commission did not include this data in its analysis because there were "anomalous conditions during this quarter, as it reflected a period when raw material costs spiked." See *id.* Prices, demand, and raw material costs declined from January 2014 to December 2016 for all products. See *id.* at 24. The Commission observed that "despite declining demand, the volume of cumulated subject imports remained at significant levels." *Id.* The Commission found that the significant volume of imports put pressure on the domestic industry to reduce prices by lowering the fixed conversion fee, which covers producers' other material costs, fixed overhead costs, and a profit margin in the contract pricing formulas. See *id.* at 20, 25. The Commission acknowledged the intra-industry competition between producers, but found that this argument failed because of the "price transparency in this market" and that it was the presence of the imports in the market that caused the price depression. See *id.* at 26.

Plaintiffs contend that the Commission's determination is unsupported by substantial evidence because it failed to consider the decline of subject import volume and market share in its price depression analysis. See *Pls. Br.* 24–26. Plaintiffs argue that the Commission's price depression analysis is based on an unreasonable

interpretation of record evidence because the tables and figures cited by the Commission do not illustrate a causal nexus between the prices of the subject imports and the prices of the domestic industry, and the Commission did not consider how the domestic supply shortage caused by the shutdown of the Baton Rouge plant in December 2013 affected downward pricing pressure. *Id.* at 26–29.

The statute directs the Commission to consider the effect of imports and whether the imports depress prices to a significant degree, and the imports need not be the sole cause of the price depression. *See* 19 U.S.C. § 1677(7)(C)(ii); *Hyundai Elecs. Indus. Co. v. United States*, 21 CIT 481, 486 (1997). Plaintiffs' arguments thus fail. First, the Commission addressed the decline of subject import volume and market share in its analysis, but found that the "volume of cumulated subject imports is significant on an absolute basis and relative to apparent U.S. consumption." *See Final ITC Determination* at 21. Second, the prices of the subject imports need not be the sole cause of the price depression but should depress prices or prevent price increases "to a significant degree." *See* 19 U.S.C. § 1677(7)(C)(ii). The Commission explained that although "other factors contributed to the downward trend in prices, these cannot explain the magnitude of the decline in prices of the domestic like product." *See Final ITC Determination* at 24. The Commission did not explicitly make a finding regarding any supply shortage caused by the plant closure in its price depression analysis, but it need not do so. *See Calabrian Corp. v. United States Int'l Trade Comm'n*, 16 CIT 342, 350, 794 F. Supp. 377, 385 (1992) (The Commission "is not required to make explicit findings with respect to all factors considered.") Because the Commission considered the volume and market share of the subject imports in its price depression analysis, the court concludes that this analysis is supported by substantial evidence.

Plaintiffs contend also that the Commission's conclusion that the subject imports depressed the conversion fee was contradicted by record evidence. *See* Pls. Br. 29–34. During the period of investigation, purchasers informed domestic suppliers their prices were higher than subject imports and requested that the suppliers meet the subject import prices and in order to do so, purchasers negotiated cuts in the fixed conversion fee. *See Final ITC Determination* at 25–26. Record evidence thus supports the Commission's conclusion. The court finds that the Commission's conclusion that the subject imports depressed the conversion fee is supported by substantial evidence.

### C. The Commission's Impact Determination

As part of its material injury analysis, the Commission must consider “the impact of [subject imports] on domestic producers of domestic like products, but only in the context of production operations within the United States.” 19 U.S.C. § 1677(7)(B)(i)(III). The statute specifies a number of factors that are relevant in determining whether subject imports have had an adverse impact on domestic producers:

- (I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,
- (II) factors affecting domestic prices,
- (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
- (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.

*Id.* § 1677(7)(C)(iii). The Commission is directed to “evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” *Id.* No single factor is dispositive and “the significance to be assigned to a particular factor is for the ITC to decide.” *See* S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.

Plaintiffs contest the Commission’s final determination that the subject imports had a significant impact on the domestic industry, and argue that the determination was not supported by substantial evidence and otherwise not in accordance with the law. *See* Pls. Br. 34. Plaintiffs’ chief complaint is that the Commission erred by failing to consider their cost-price squeeze argument, *i.e.*, that it was Lion’s own business decisions, not the subject imports, that caused the cost-price squeeze in the domestic market. *See id.* at 36–43. In other words, Plaintiffs contend that the underselling and alleged price depression associated with subject imports were not the sources of the domestic industry’s poor condition. *See id.* at 44.

The Commission “acknowledge[d] that intra-industry competition existed during the period of investigation,” but found that “such competition d[id] not explain the significant volume of cumulated subject imports, the significant underselling of the domestic like product by cumulated subject imports, and the significant price depression caused by the cumulated subject imports during this time period.” *Final ITC Determination* at 30. The Commission adequately addressed the intra-industry competition and its analysis is supported by substantial evidence. The Commission is not required to focus on one portion of the industry by making a disaggregated analysis of material injury and thus did not have to focus its intra-industry competition analysis at a granular level specific to the business data of Lion. *See Calabrian Corp.*, 16 CIT at 350, 794 F. Supp. at 385. The court concludes, therefore, that the Commission’s impact determination also is in accordance with the law.

### III. Negligibility

Imports are negligible “if such imports account for less than 3 percent of the volume of *all such merchandise* imported into the United States in the most recent 12-month period for which data are available that precedes the filing of the petition.” 19 U.S.C. § 1677(24)(A)(i)(I) (emphasis added). The Commission “may make reasonable estimates on the basis of available statistics” of the relevant import levels for purposes of deciding negligibility. *Id.* § 1677(24)(C). If the Commission determines that imports of the subject merchandise are negligible, the investigation terminates with respect to those imports. *See id.* § 1673d(b)(1).

Synthos contests the Commission’s determination that Poland was not a negligible source of ESBR imports and Poland’s inclusion in the Commission’s affirmative injury determination. *See Synthos Br. 2.* Synthos contends that the Commission’s determination was unsupported by substantial evidence and not in accordance with the law because the Commission did not retrieve import data from the proprietary Customs records for two of the four tariff classifications (HTS numbers 4002.19.0016 and 4002.60.0000) under which ESBR entered the United States, thus underestimating the total imports of ESBR and overinflating Poland’s share of imports. *See id.* at 7–8. The Commission explained its methodology, stating that U.S. import data “are based on importer questionnaire responses that have been supplemented with official Commerce import statistics on imports entering under HTS number 4002.19.0015 and, for Korea only, also under HTS 4002.19.0019.” *Final ITC Determination* at 9 n.38. The questionnaire data accounted for 100 percent of subject imports from Brazil in 2016,

92.2 percent of imports of subject merchandise from Korea, 100 percent of subject imports from Brazil in 2016, 92.2 percent of subject imports from Poland, and 79.5 percent of imports of ESBR from nonsubject countries. *Id.* The Commission reasoned that “[r]elying on such data supplemented with official import statistics provides a more accurate measure of total imports” because the merchandise imported under the two other classification headings (HTS numbers 4002.19.0016 and 4002.60.0000) was done in error. *Id.* The questionnaire responses included the misclassified ESBR. *See id.* at IV-1 n.3 (“Other than imports under HTS number 4002.19.0015, two firms reported importing under HTS number 4002.19.0019, one firm under 4002.19.0016, and one firm under 4002.60.0000.”). The Commission “rel[ie]d on [this] data.” *Id.* at 9 n.38. Because the Commission’s analysis included the misclassified ESBR that entered under the two tariff classifications at issue, it did not need to include *all* imports that entered under those classifications. The court finds that the Commission’s negligibility determination is supported by substantial evidence because it included the misclassified ESBR. The Commission did not need to retrieve the import data from the proprietary Customs records for all tariff headings at issue, and the court concludes that the Commission’s negligibility determination is in accordance with the law.

### CONCLUSION

For the foregoing reasons, the court concludes that: (1) the Commission’s findings regarding the volume of subject imports is supported by substantial evidence; (2) the Commission’s findings regarding price effects was supported by substantial evidence and in accordance with the law; (3) the Commission’s findings regarding the impact of subject imports was supported by substantial evidence and in accordance with the law; and (4) whether the Commission’s determination that Poland was not a negligible source of subject imports was supported by substantial evidence and in accordance with the law.

Judgment will be entered accordingly.

Dated: May 17, 2019

New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 19–61

POSCO, Plaintiff, NUCOR CORPORATION, Consolidated Plaintiff, ARCELORMITTAL USA LLC and SSAB ENTERPRISES LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SSAB ENTERPRISES LLC, NUCOR CORPORATION, ARCELORMITTAL USA LLC and POSCO, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge  
Consol. Court No. 17–00137

[Plaintiff’s motion for reconsideration is granted in part and Commerce’s *Final Results* are remanded consistent with this opinion.]

Dated: May 20, 2019

*Brady W. Mills, Donald B. Cameron, Julie C. Mendoza, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Eugene Degnan, and Ragan W. Updegraff*, Morris, Manning & Martin LLP, of Washington, DC, for plaintiff and defendant-intervenor POSCO.

*Christopher Weld, Alan H. Price, and Adam M. Teslik*, Wiley Rein, LLP, of Washington, DC, for consolidated plaintiff and defendant-intervenor *Nucor Corporation*.

*Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant *United States*. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Vito S. Solitro*, Attorney. Of counsel on the brief was *Reza Karamloo*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

### OPINION

#### **Katzmann, Judge:**

Before the court is Plaintiff POSCO’s motion for reconsideration of the court’s opinion in *POSCO v. United States*, 42 CIT \_\_, 353 F. Supp. 3d 1357 (2018). This court sustained in part the United States Department of Commerce’s (“Commerce”) final affirmative determination in the countervailing subsidy investigation of certain carbon and alloy steel cut-to-length plate from Korea. The court also remanded Commerce’s countervailability determination for POSCO M-Tech’s research and development grants and Commerce’s application of the highest adverse facts available (“AFA”) rate for reconsideration. *POSCO*, 353 F. Supp. 3d at 1363–64 (citing *Certain Carbon and Alloy Steel Cut-To-Length Plate From the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 82 Fed. Reg. 16,341 (Dep’t Commerce Apr. 4, 2017), P.R. 505 and accompanying Issues and Decision Memorandum (“IDM”) (Mar. 29, 2017), P.R. 497). The relevant legal and factual background of the underlying action is set forth in greater detail in *POSCO*, 353 F. Supp. 3d at 1363–69. POSCO now moves for the court to reconsider its affirmance of (1) Commerce’s application of the 1.05 percent AFA rate to POSCO M-Tech for unreported govern-

ment subsidies received by Ricco Metal and Nine-Digit, both companies acquired by POSCO M-Tech; and (2) Commerce's application of the 1.05 percent AFA rate to Hyundai and attribution of this rate to POSCO. The court addresses each in turn and issues additional remand instructions to Commerce.

### **I. Commerce's Application of the 1.05 Percent AFA Rate to POSCO**

In *POSCO*, the court concluded that Commerce failed to make factual findings on the specificity and benefit requirements of 19 U.S.C. § 1677(5) and remanded to Commerce for reconsideration its determination that the assistance received by Ricco Metal and Nine-Digit was countervailable. 353 F. Supp. 3d at 1376. *See also Changzou Trina Solar Energy Co., Ltd. v. United States*, 40 CIT \_\_, \_\_, 195 F. Supp. 3d 1334, 1350 (2016). The court did, however, uphold Commerce's decision to use the countervailing duty rate from a different investigation, *Washers from Korea. POSCO*, 353 F. Supp. 3d at 1377.

POSCO now revisits the AFA methodology Commerce used in determining that it would apply a 1.05 percent rate established for a tax credit program in *Washers from Korea*. Mot. of Pl. POSCO for Reh'g. and Recons. at 2–3, Dec. 21, 2018, ECF No. 83 (“POSCO's Mot.”). POSCO argues that under Commerce's hierarchal AFA methodology, Commerce needed to first determine whether there was an identical program with an above-zero rate within the same investigation before considering rates from other countervailing duty proceedings. *Id.* at 2–4. POSCO maintains that Ricco Metal and Nine-Digit received assistance under the Industrial Technology Innovation Promotion Act (“ITIPA”), and the .02 percent rate received by POSCO for another ITIPA grant from the same investigation should apply. *Id.* That is, POSCO argues that there is an identical program with an above-zero rate, and thus Commerce should have applied that rate.

Commerce set forth its AFA rate methodology in the *IDM*:

When selecting rates, we first determine if there is an identical program in the investigation and, if so, use the highest calculated rate for the identical program (excluding zero rates). If there is no identical program with a rate above zero in the investigation, we then determine if an identical program was examined in another CVD proceeding involving the same country, and apply the highest calculated rate for the identical program (excluding rates that are *de minimis*). If no identical program exists, we then determine if there is a similar/comparable program (based on the treatment of the benefit) in another CVD proceeding involving the same country, and apply the highest calculated rate for the similar/comparable program.

*IDM* at 11. *See also* 19 U.S.C. § 1677e(d)(1)(A). Commerce then applied this methodology to the assistance received by Ricco Metal and Nine-Digit, concluding that there was no identical program and instead using the rate for *Washers from Korea*. In its response brief in *POSCO*, the Government contended that, “[b]ecause Commerce must ‘verify all information relied upon in making . . . a final determination in an investigation,’ Commerce properly disregarded POSCO M-Tech’s statements regarding the nature of the subsidies at issue for purposes of selecting an adverse facts available rate.” Def.’s Br. at 35, Mar. 23, 2018, ECF No. 53 (*citing* 19 U.S.C. § 1677m(i)(1)). The Government now argues that “POSCO’s request for reconsideration ignores the [c]ourt’s affirmance of Commerce’s finding that POSCO had not identified an identical program.” Def.’s Resp. to POSCO’s Mot. (“Def.’s Resp.”) at 4–5, Mar. 23, 2018, ECF No. 89.

Upon further consideration of the pleadings and record, the court concludes that Commerce did not make the requisite factual findings to proceed to the second step of its AFA analysis. In the *IDM*, Commerce noted POSCO’s Rebuttal Comment: “Should the Department treat this program as unreported R&D grants, it should not use the 1.05 percent ad valorem rate that Nucor argues for, but rather, per Department practice, the 0.02 percent ad valorem rate calculated for POSCO’s ITIPA grants at the Preliminary Determination.” *IDM* at 41. Commerce then concluded that:

Consistent with the CVD AFA hierarchy, which directs us to seek the highest non-*de minimis* rate calculated for the same or similar program in another CVD proceeding involving Korea *if there is no identical program* in this proceeding, we determine that it is appropriate to apply, as AFA, a rate of 1.05 percent *ad valorem*, the subsidy rate calculated for an income tax program in *Washers from Korea*.

*Id.* at 44 (emphasis added). Commerce did not provide any additional explanation of how it determined that there was no identical program before moving to the second step of its AFA methodology -- using the rate in another investigation -- and thus did not make the requisite factual findings to address POSCO’s contention that the ITIPA grant was an identical program in the proceeding. “Commerce must . . . point to actual information on the record to make required factual determinations.” *Trina Solar*, 195 F. Supp. 3d at 1350 (*citing* 19 U.S.C. §§ 1677e(a)-(c)). The Government’s contention that there was no identical program because POSCO did not submit the requisite information prior to verification for Commerce to establish what type of assistance Ricco Metal and Nine-Digit may hold, but it must make the required factual determinations and explain its conclusion. The

court, therefore, remands the issue of whether an identical program existed to Commerce for further consideration.

## **II. Commerce’s Application of the 1.05 Percent AFA Rate to Hyundai and Attribution of the Rate to POSCO**

POSCO contends that the court overlooked an important argument it made “about attributing the Hyundai AFA rate to POSCO based on the ratio of Hyundai’s exports to the United States of subject merchandise that was produced by POSCO during the [period of investigation] (based on value).” POSCO’s Mot. at 6. The Government, however, argues “[t]hat the Court did not specifically address POSCO’s argument with regard to apportioning benefits does not mean that the Court overlooked it; it means that the Court was not persuaded by it.” Def.’s Resp. at 5. Defendant-Intervenor Nucor, likewise, argues that the opinion clearly indicates that the court “was not persuaded by the argument and did not feel that separate discussion was necessary to support its holding.” Nucor’s Resp. to POSCO’s Mot. at 5, Jan. 25, 2019, ECF No. 86. The court did consider POSCO’s argument and was not persuaded. *See Medtronic, Inc. v. Daig Corp.*, 789 F.2d 903, 906 (Fed. Cir. 1986) (noting that a court need not address every sub-argument so long as it articulates its reasoning). The court affirmed — and continues to affirm — the application of AFA to Hyundai and the attribution of that rate to POSCO, *POSCO*, 353 F. Supp. 3d at 1381–82, and denies POSCO’s motion to reconsider the court’s decision on this claim.

### **CONCLUSION**

The court remands to Commerce for further consideration the issue of whether, under the first step of the AFA methodology, a program identical to the assistance received by Nine-Digit and Ricco Metal existed and denies POSCO’s motion to reconsider the application of AFA to Hyundai and the attribution of that rate to POSCO. The court denies POSCO’s motion for a rehearing on both issues. Commerce shall file with this court and provide to the parties its remand results within 21 days of the date of this order; thereafter, the parties shall have 30 days to submit to the court briefs addressing the revised final determination and the parties shall have 15 days thereafter to file reply briefs with the court.

#### **SO ORDERED.**

Dated: May 20, 2019  
New York, New York

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

## Slip Op. 19–62

NEXTEEL CO., LTD., Plaintiff, HYUNDAI STEEL COMPANY, HUSTEEL CO., LTD., AJU BESTEEL CO., LTD., MAVERICK TUBE CORPORATION, and SEAH STEEL CORPORATION, Consolidated Plaintiffs, and ILJIN STEEL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and TMK IPSCO, VALLOUREC STAR, L.P., WELDED TUBE USA INC., and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 17–00091

[Denying both motions for reconsideration.]

Dated: May 21, 2019

*J. David Park, Henry D. Almond, Daniel R. Wilson, and Leslie C. Bailey*, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff NEXTEEL Co., Ltd. and Consolidated Plaintiff Hyundai Steel Company. *Michael T. Shor* and *Kang W. Lee* also appeared.

*Jeffrey M. Winton* and *Amrietha Nellan*, Law Office of Jeffrey M. Winton PLLC, of Washington, D.C., for Consolidated Plaintiff SeAH Steel Corporation.

*Gregory J. Spak, Frank J. Schweitzer, and Kristina Zissis*, White & Case, LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor Maverick Tube Corporation. Formerly on the brief were *Robert E. DeFrancesco, III, Alan H. Price*, and *Cynthia C. Galvez*, Wiley Rein, LLP, of Washington, D.C.

*Roger B. Schagrin, Christopher T. Cloutier, and Elizabeth J. Drake*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc. *Paul W. Jameson* also appeared.

*Thomas M. Beline* and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor United States Steel Corporation.

*Hardeep K. Josan*, Attorney, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Counsel, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

*Joel D. Kaufman* and *Richard O. Cunningham*, Steptoe & Johnson LLP, of Washington, D.C., for Plaintiff-Intervenor ILJIN Steel Corporation.

*Donald B. Cameron, Eugene Degnan, Brady W. Mills, Julie C. Mendoza, Mary S. Hodgins, and Rudi W. Planert*, Morris, Manning & Martin, LLP, of Washington, D.C., appeared for Consolidated Plaintiff Husteel Co., Ltd.

*Jarrod M. Goldfeder* and *Robert G. Gosselink*, Trade Pacific, PLLC, of Washington, D.C., appeared for Consolidated Plaintiff AJU Besteel Co., Ltd.

**OPINION AND ORDER****Choe-Groves, Judge:**

Before the court are two motions for reconsideration filed by Consolidated Plaintiff SeAH Steel Corporation (“SeAH”) and Defendant-Intervenors Maverick Tube Corporation, TMK IPSCO, Vallourec Star, L.P., Welded Tube USA, and United States Steel Corporation (collec-

tively, “Defendant-Intervenors”). *See* Mot. Pl. SeAH Steel Corporation Reconsideration Ct.’s Jan. 2, 2019 Order, Jan. 28, 2019, ECF No. 149 (“SeAH’s Mot.”); Rule 59 Mot. Reconsideration Ct.’s Remand Order, Feb. 1, 2019, ECF No. 150 (“Def.-Intervenors’ Mot.”). Both motions request that the court reconsider certain aspects of its decision in *NEXTEEL Co., Ltd. v. United States*, 43 CIT \_\_, 355 F. Supp. 3d 1336 (2019) (“*NEXTEEL I*”). SeAH’s motion addresses specifically the court’s decision to sustain (1) the U.S. Department of Commerce’s (“Commerce” or “Department”) decision to set SeAH’s ocean freight expenses of Canadian shipments equal to the weighted average for Canadian bulk shipments, and (2) its application of its differential pricing analysis in the first administrative review of oil country tubular goods from the Republic of Korea. *See* SeAH’s Mot. 5–6, 9. Defendant-Intervenors request that the court reconsider and alter or amend its instruction that Commerce “reverse the finding of a particular market situation and recalculate the dumping margin for the mandatory respondents and non-examined companies.” *See* Def.-Intervenors’ Mot. 1–2 (quoting *NEXTEEL I*, 43 CIT at \_\_, 355 F. Supp. 3d at 1351). For the following reasons, the court denies both motions for reconsideration.

### BACKGROUND

The court presumes familiarity with the facts of this case. *See NEXTEEL I*. In *NEXTEEL I*, the court considered seven Rule 56.2 motions for judgment on the agency record and fourteen issues presented by the Parties. *See id.* at \_\_, 355 F. Supp. 3d at 1343–44. Relevant here, the court held that: (1) Commerce’s determination to set SeAH’s ocean freight expenses of Canadian shipments equal to the weighted average for Canadian bulk shipments was supported by substantial evidence, (2) Commerce’s application of its differential pricing analysis was supported by substantial evidence and in accordance with the law, and (3) Commerce’s decision to apply a particular market situation adjustment to *NEXTEEL*’s reported costs of production was unsupported by substantial evidence. *See id.* at \_\_, 355 F. Supp. 3d at 1364. The court sustained the first two issues and remanded the third issue for Commerce to “reverse the finding of a particular market situation and recalculate the dumping margin for the mandatory respondents and non-examined companies.” *Id.* at \_\_, 355 F. Supp. 3d at 1351. No judgment has been issued in this case yet.

SeAH and Defendant-Intervenors each filed a motion for reconsideration. SeAH’s motion contests the court’s holdings regarding ocean

freight costs and differential pricing analysis, *see* SeAH's Mot. 2, 6, which are two aspects of Commerce's final results that the court sustained. Defendant-Intervenors challenge the court's conclusion regarding the particular market situation issue, *see* Def.-Intervenor's Mot. 1–2, which the court remanded for further proceedings.

Defendant-Intervenors filed a response in opposition to SeAH's motion for reconsideration. *See* Resp. Def.-Intervenors Pl. SeAH's Rule 59 Mot. Reconsideration Ct.'s Remand Order, Feb. 19, 2019, ECF No. 163 ("Def.-Intervenors' Resp."). Plaintiff NEXTEEL Co., Ltd., Consolidated Plaintiff Hyundai Steel Company, and Plaintiff-Intervenor ILJIN Steel Corporation submitted responses in opposition to Defendant-Intervenors' motion for reconsideration. *See* Resp. Pls. NEXTEEL & Hyundai Steel Opp'n Def.-Intervenors' Mot. Reconsideration, Mar. 21, 2019, ECF No. 166; Resp. Pl.-Intervenor Def.-Intervenors, Maverick Tube Corporation, TMK IPSCO, Vallourec Star, L.P., Welded Tube USA, & United States Steel Corporation's Rule 59 Mot. Reconsideration Ct.'s Remand Order, Mar. 21, 2019, ECF No. 164. Defendant United States ("Defendant" or "Government") filed a response opposing SeAH's motion and supporting Defendant-Intervenors' motion.<sup>1</sup> *See* Def.'s Resp. Def.-Intervenors' & SeAH Steel Corporation's Mots. Reconsideration Ct.'s Remand Order, Mar. 21, 2019, ECF No. 165 ("Def.'s Resp.").

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012)<sup>2</sup> and 28 U.S.C. § 1581(c), which grant the court the authority to review actions contesting the final results of an administrative review of an antidumping duty order.

SeAH cites Rule 59(e) of the Rules of this Court as supporting authority for the court to entertain its motion. *See* SeAH's Mot. 1–2. Defendant and Defendant-Intervenors submit that Rule 59(e) is the improper authority. *See* Def.'s Resp. 4 n.1; Def.-Intervenors' Resp. 2 n.1. Defendant-Intervenors direct the court instead to Rule 59(a), which Defendant-Intervenors cite for their own motion for reconsideration. *See* Def.-Intervenors' Resp. 2 n.1; Def.-Intervenors' Mot. 2. Rule 59(e) states that a "motion to alter or amend a judgment must be served no later than 30 days after the entry of the judgment." USCIT

<sup>1</sup> Defendant requested an extension of time to file its own motion for reconsideration, which the court denied. *See* Order, Mar. 28, 2019, ECF No. 168.

<sup>2</sup> All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code. All further citations to the U.S. Code are to the 2012 edition, with exceptions. All further citations to 19 U.S.C. § 1677b(e) are to the 2015 version, as amended pursuant to The Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015). All citations to the Code of Federal Regulations are to the 2017 edition.

R. 59(e). In contrast, Rule 59(a) allows the court, “on motion,” to “grant a new trial or rehearing on all or some of the issues — and to any party” after a nonjury trial. USCIT R. 59(a)(1)(B). Rule 59 applies when a judgment has been entered in a case, which has not occurred yet in this action because the court remanded Commerce’s determination. See *NEXTEEL I*, 43 CIT at \_\_, 355 F. Supp. 3d at 1364. The court finds that Rule 59 is not the proper avenue for bringing a motion for reconsideration under the current circumstances.

The court considers both SeAH’s and Defendant-Intervenors’ motions for reconsideration under Rule 54(b), which addresses actions that adjudicate multiple claims for relief. The rule reads, in relevant part:

[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time before the entry of a judgment* adjudicating all the claims and all the parties’ rights and liabilities.

USCIT R. 54(b) (emphasis added). Because active issues still exist in this action and because no judgment has been issued yet, the court may entertain the motions for reconsideration under Rule 54(b).

The court has discretion when deciding a motion for reconsideration “as justice requires.” *Irwin Indus. Tool Co. v. United States*, 41 CIT \_\_, \_\_, 269 F. Supp. 3d 1294, 1300 (2017), *aff’d*, 920 F.3d 1356 (Fed. Cir. 2019). Grounds for reconsideration include “an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice.” *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006); see also *Irwin Indus. Tool*, 41 CIT at \_\_, 269 F. Supp. 3d at 1301. A motion for reconsideration is not an opportunity for the losing party “to re-litigate the case or present arguments it previously raised.” *Totes-Isotoner Corp. v. United States*, 32 CIT 1172, 1173, 580 F. Supp. 2d 1371, 1374 (2008).

## ANALYSIS

### I. SeAH’s Motion for Reconsideration

SeAH’s motion for reconsideration contests the court’s decision in *NEXTEEL I* with respect to (1) Commerce’s decision to set SeAH’s ocean freight expenses of Canadian shipments equal to the weighted average for Canadian bulk shipments and (2) Commerce’s application of its differential pricing analysis. See SeAH’s Mot. 5–6, 9. SeAH contends that the court’s “decision contains a few manifest errors,” and asks the court to reconsider both findings. *Id.* at 2.

SeAH's shipments to one Canadian customer were made in containers, while shipments to other Canadian customers and United States customers were made in bulk. *NEXTEEL I*, 43 CIT at \_\_, 355 F. Supp. 3d at 1359. The per-unit international freight rates for the container shipments were higher than the per-unit rates for bulk shipments, and Commerce adjusted SeAH's Canadian ocean freight expenses "to account for the difference between the per-unit rates for containerized and bulk shipments." *Id.* The court held that Commerce's determination to set SeAH's ocean freight expenses for Canadian shipments equal to the weighted average for Canadian bulk shipments was supported by substantial evidence. *Id.* at \_\_, 355 F. Supp. 3d at 1360. SeAH argues that the court's conclusion is unsupported by law and contrary to the statutory scheme. *See* SeAH's Mot. 3. SeAH provides no new arguments in support of this contention but instead continues to dispute the amount of the adjustment, arguing that Commerce should have used the actual cost for ocean freight container sales. *See id.* at 4–5; *NEXTEEL I*, 43 CIT at \_\_, 355 F. Supp. 3d at 1359. Because the court evaluated SeAH's arguments already in *NEXTEEL I* and the holding regarding ocean freight was not manifestly erroneous, the court will not disturb its previous decision.

SeAH contends also that the court improperly upheld Commerce's application of its differential pricing analysis because the court "must engage in an analysis of the 'Differential Pricing Analysis' that is similar to the analysis required by this Court in the *Carlisle Tire* case and by the Federal Circuit in [the] *Washington Red Raspberry* case." SeAH's Mot. 9 (citing *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 CIT 301, 634 F. Supp. 419 (1986), and *Wash. Red Raspberry Comm'n v. United States*, 859 F.2d 898 (Fed. Cir. 1988)). SeAH made this exact argument in *NEXTEEL I*. *See NEXTEEL I*, 43 CIT at \_\_, 355 F. Supp. 3d at 1355–56. SeAH's motion constitutes an impermissible attempt to re-litigate the issue. *See Totes-Isotoner*, 32 CIT at 1173, 580 F. Supp. 2d at 1374. Because SeAH fails to demonstrate that there is manifest error with the court's reasoning and repeats the same arguments evaluated by the court previously, the court declines to reconsider its decision in *NEXTEEL I*.

## II. Defendant-Intervenors' Motion for Reconsideration

Defendant-Intervenors' motion for reconsideration asks the court to alter or amend its decision with respect to Commerce's finding of a particular market situation. *See* Def.-Intervenors' Mot. 1–2. During the initial administrative proceedings, Commerce did not find the existence of a particular market situation in its preliminary results,

but later relied on the same administrative record to reverse its position and conclude that a particular market situation existed in the final results. See *NEXTEEL I*, 43 CIT at \_\_\_, 355 F. Supp. 3d at 1345–46. The court concluded that Commerce’s determination was unsupported by substantial evidence and instructed Commerce on remand to remove its finding of a particular market situation from its antidumping duty calculations. See *id.* at \_\_\_, 355 F. Supp. 3d at 1349–51. Defendant-Intervenors argue that the court’s instruction exceeds the scope of the court’s authority to review administrative determinations under 19 U.S.C. § 1516a, and request that the court modify the language in the opinion to permit Commerce to “reconsider or further explain” its finding of a particular market situation on remand. See Def.-Intervenors’ Mot. 6. The Government supports Defendant-Intervenors’ argument and contends that Defendant-Intervenors have met the standard required for a motion for reconsideration. See Def.’s Resp. 5–7.

This Court’s standard of review under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) require the court to evaluate whether Commerce’s determinations are supported by substantial evidence and otherwise in accordance with the law. The court held that Commerce’s particular market situation finding was unsupported by substantial evidence. *NEXTEEL I*, 43 CIT at \_\_\_, 355 F. Supp. 3d at 1349–51. The record contained thousands of pages of information, and Commerce explained in a nineteen-page memorandum how its evaluation of the record showed that Maverick’s four particular market situation allegations were unfounded. *Id.* Without any intervening new factual information on the record between the preliminary results and the final results, the court concluded that Commerce failed to explain adequately how the same record supported both Commerce’s previous conclusion of no particular market situation and its subsequent finding of a single particular market situation. *Id.* Because of the lack of record evidence, the court directed Commerce to remove the particular market situation finding from the dumping margin calculations on remand. *Id.* The court applied its standard of review properly when analyzing Commerce’s determination, and it was not erroneous for the court to give Commerce specific remand instructions consistent with its opinion.<sup>3</sup>

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<sup>3</sup> The U.S. Court of Appeals for the Federal Circuit has rejected an argument similar to Defendant-Intervenors’:

It is true that, by ruling that Commerce’s decision . . . was not legally or factually supportable, the court limited Commerce’s options on remand. But that is frequently the result when a court overturns an agency’s factual finding for lack of substantial evidence, particularly if the factual issue is binary in nature. Even though a reviewing court’s decision that substantial evidence does not support a particular finding may have

Defendant-Intervenors' proposed revisions to the remand instructions essentially mirror the Government's previous broad request for a voluntary remand on the particular market situation issue, which the court rejected in *NEXTEEL I*. The court expressed concern that the Government's request amounted to a "do-over" and constituted an impermissible attempt to rationalize the agency's actions after the fact. See *NEXTEEL I*, 43 CIT at \_\_\_, 355 F. Supp. 3d at 1348; see also *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of such action solely by the grounds invoked by the agency."). The court was not persuaded by the Government's argument before and likewise will not grant Defendant-Intervenors' request here for similar reasons already considered by the court.

### CONCLUSION

Accordingly, upon consideration of the two motions for reconsideration, and all other papers and proceedings in this action, it is hereby **ORDERED** that SeAH's motion, ECF No. 149, is denied; and it is further

**ORDERED** that Defendant-Intervenors' motion, ECF No. 150, is denied.

Dated: May 21, 2019

New York, New York

*/s/ Jennifer Choe-Groves*  
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 19-63

SOLARWORLD AMERICAS, INC., Plaintiff, SINO-AMERICAN SILICON PRODUCTS INC. and SOLARTECH ENERGY CORP., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and MOTECH INDUSTRIES, INC., KYOCERA SOLAR, INC., and KYOCERA MEXICANA S.A. de C.V., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge  
Consol. Court No. 17-00208

[Sustaining the U.S. Department of Commerce's remand results on the administrative review of the antidumping duty order on certain crystalline silicon photovoltaic products from Taiwan.]

Dated: May 22, 2019

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the practical effect of dictating a particular outcome, that is not the same as the court's making its own factual finding.

*Nucor Corp. v. United States*, 371 Fed. Appx. 83, 90 (Fed. Cir. 2010).

*Timothy C. Brightbill, Adam M. Teslik, Cynthia C. Galvez, Laura El-Sabaawi, Maureen E. Thorson, Tessa V. Capeloto and Usha Neelakantan, Wiley Rein, LLP, of Washington, D.C., for Plaintiff SolarWorld Americas, Inc.*

*Robert G. Gosselink, Jarrod M. Goldfeder, and Jonathan M. Freed, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs and Defendant-Intervenors Sino-American Silicon Products Inc. and Solartech Energy Corp. and Defendant-Intervenor Motech Industries, Inc.*

*Reginal T. Blades, Jr., Assistant Director, and Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were Joseph H. Hunt, Assistant Attorney General, and Jeanne E. Davidson, Director. Of counsel on the brief was Reza Karamloo, Office of the Chief Counsel for Trade and Enforcement Compliance, U.S. Department of Commerce, of Washington, D.C.*

*James K. Horgan, Alexandra H. Salzman, Gregory S. Menegaz, and John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, D.C., for Defendant-Intervenors Kyocera Solar, Inc. and Kyocera Mexicana S.A. de C.V.*

## OPINION

### Choe-Groves, Judge:

This case involves crystalline silicon photovoltaic products (typically, solar cells) from Taiwan. The Department of Commerce (“Commerce”) conducted an administrative review of the antidumping duty order on crystalline silicon photovoltaic products, in which Commerce concluded that two producers, Sino-American Silicon Products Inc. (“SAS”) and its affiliated entity Solartech Energy Corp. (“Solartech”) (collectively, “SAS-Solartech”), and Motech Industries, Inc. (“Motech”) sold the subject merchandise at prices below the normal value during the period of review. *See Certain Crystalline Silicon Photovoltaic Products From Taiwan*, 82 Fed. Reg. 31,555 (Dep’t Commerce July 7, 2017) (final results of antidumping duty administrative review; 2014–2016) (“*Final Results*”).

Before the court are the Final Results of Redetermination Pursuant to Court Order, Feb. 15, 2019, ECF No. 81 (“*Remand Results*”), filed by Commerce as directed in the court’s prior opinion. *See SolarWorld Americas, Inc. v. United States*, 42 CIT \_\_\_, 353 F. Supp. 3d 1315 (2018) (“*SolarWorld I*”). For the reasons that follow, the court sustains Commerce’s *Remand Results*.

## PROCEDURAL HISTORY

In *SolarWorld I*, SAS-Solartech filed a Rule 56.2 motion for judgment on the agency record contesting Commerce’s decision to include in its margin calculation for the *Final Results* certain sales made via United States free trade zones (“FTZs”) to Mexico. *SolarWorld I*, 42 CIT at \_\_\_, 353 F. Supp. 3d at 1319. SAS-Solartech argued that Commerce unreasonably ignored evidence establishing that SAS knew at the time of sale that its merchandise entered United States FTZs in transit, but was destined for sale in Mexico. *Id.* at \_\_\_, 353 F. Supp. 3d

at 1322. The court concluded in *Solar World I* that Commerce's decision to include the sales at issue in its margin calculation was not supported by substantial evidence because SAS-Solartech cited four documents on the record that demonstrated that SAS knew at the time of sale that its merchandise was ultimately shipped to Mexico, including: (1) verbal instruction from its customers that the final destination of the merchandise was Mexico; (2) SAS' knowledge that its customers had manufacturing facilities in Mexico; (3) the sales documentation generated at the time of sale listed "Mexico as the ultimate 'ship to' destination and a Mexican entity as the 'notify' party, meaning that a Mexican entity was the intended recipient of the merchandise;" and (4) the United States addresses on the sales documentation were of "consignee freight forwarders that operated within approved" United States FTZs. *See id.* at \_\_\_, 353 F. Supp. 3d at 1322–23. The court remanded this matter for Commerce to reassess its inclusion of certain sales made by SAS in its dumping calculation. *Id.* at \_\_\_, 353 F. Supp. 3d at 1323.

On remand, Commerce excluded the sales at issue from its dumping calculation for SAS-Solartech. *See Remand Results* at 3. SAS-Solartech's dumping margin changed from 3.56% to 1.52%. *Id.* at 4. SAS-Solartech's dumping margin served as part of the basis for the rate for non-selected companies, and the rate for non-selected companies changed from 4.10% to 3.78%. *See id.*

Plaintiff SolarWorld Americas, Inc. ("Plaintiff") and Defendant-Intervenors Motech Industries, Inc., Kyocera Solar, Inc., and Kyocera Mexicana S.A. de C.V. (collectively, "Defendant-Intervenors") did not file any comments in response to the *Remand Results*. Consolidated Plaintiffs SAS-Solartech and Defendant United States request that the court sustain the *Remand Results*. *See Comments Consol. Pls., Sino-American Silicon Products Inc. and Solartech Energy Corp., Commerce's Remand Redetermination, Mar. 13, 2019, ECF No. 83; Def.'s Resp. Comments Regarding Remand Redetermination, Apr. 3, 2019, ECF No. 84.*

### **JURISDICTION AND STANDARD OF REVIEW**

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and Sections 516A(a)(2)(A)(i)(I) and (B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii). 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 the law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## ANALYSIS

The court found in *SolarWorld I* that substantial evidence did not support Commerce's decision to include certain SAS sales allegedly destined for Mexico via United States Free Trade Zones in Commerce's United States price calculations. See *SolarWorld I*, 42 CIT at \_\_\_, 353 F. Supp. 3d at 1323. Evidence on the record established sales to customers in Mexico and demonstrated that the merchandise was shipped to addresses of United States FTZs, with no actual United States customers identified and no evidence showing that merchandise entered the United States customs territory for sale. *Id.*

On remand, Commerce excluded the sales at issue from its dumping calculation for SAS-Solartech. See *Remand Results* at 3. The court must determine whether the evidence and reasonable inferences from the record support Commerce's findings. *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). Because evidence on the record established sales to customers in Mexico via United States FTZ addresses, with no actual United States customers identified and no evidence showing that merchandise entered the United States customs territory for sale, the court concludes that Commerce's exclusion of the sales at issue is reasonable.

SAS-Solartech does not challenge the *Remand Results*. Plaintiff and Defendant-Intervenors do not challenge the *Remand Results* and have waived any objections by declining to submit comments on the *Remand Results* to the court. See *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."). The court sustains Commerce's Remand Redetermination.

Judgment will be entered accordingly.

Dated: May 22, 2019

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE