

U.S. Court of International Trade

Slip Op. 20–21

ABB INC., Plaintiff, v. UNITED STATES, Defendant, and HYUNDAI HEAVY INDUSTRIES CO., LTD. and HYUNDAI CORPORATION USA, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 16–00054
Public Version

[Remanding the second redetermination upon remand with respect to the application of a circumstance of sale adjustment for delayed delivery charges.]

Dated: February 19, 2020

Melissa M. Brewer, Kelley Drye & Warren LLP, of Washington, DC, argued for Plaintiff. With her on the brief was *R. Alan Luberda* and *David C. Smith*.

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David E. Bond and *Ron Kendler*, White & Case LLP, of Washington, DC, argued for Defendant-Intervenors Hyundai Heavy Industries, Co., Ltd.¹ and Hyundai Corporation USA. With them on the brief was *William J. Moran*.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) second redetermination upon remand. *See Confidential Final Results of Redetermination Pursuant to Court Remand* (Apr. 26, 2019) (“Second Remand Results”), ECF No. 149 *see generally ABB Inc. v. United States* (“*ABB II*”), 42 CIT __, 355 F. Supp. 3d 1206 (2018), *recons. denied*, 43 CIT __, 375 F. Supp. 3d 1348 (2019). Commerce conducted this second administrative review of the antidumping duty order on large power transformers (“LPT”) from the Republic of Korea for the period of review August 1, 2013, to July 31, 2014. *Large Power Transformers From the Republic of Korea*, 81 Fed. Reg. 14,087 (Dep’t Commerce Mar. 16, 2016) (final results of antidumping duty admin. review 2013–2014)

¹ Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to Hyundai Heavy Industries, Co., Ltd. *See* Letter from David E. Bond, Attorney, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 120.

(“*Final Results*”), ECF No. 27–2 and accompanying Issues and Decision Mem., A-580–867 (Mar. 8, 2016), ECF No. 27–2.²

Defendant-Intervenor Hyosung Corporation (“Hyosung”)³ and Plaintiff ABB Inc. (“ABB”) filed separate motions for judgment on the agency record challenging certain aspects of the *Final Results*. See Confidential Rule 56.2 Mot. for J. Upon the Agency R. of Consol. Pl. Hyosung Corp., ECF No. 40–2 Confidential Pl.’s Mot. for J. on the Agency R., ECF No. 41 *see generally* ABB, Inc. v. United States (“ABB I”), 41 CIT __, 273 F. Supp. 3d 1200 (2017).⁴ In response, the Government requested a remand for Commerce to address issues raised by ABB—that is, to reconsider its treatment of certain U.S. commission expenses incurred by Hyosung and Defendant-Intervenors Hyundai Heavy Industries Co., Ltd (“HHI”), and Hyundai Corporation USA (“Hyundai USA”) (together, “Hyundai”) and Hyundai’s sales-related revenue. See Def.’s Resp. to Pls.’ Rule 56.2 Mot. For J. Upon the Agency R., ECF No. 50 ABB I, 273 F. Supp. 3d at 1205.

In ABB I, the court granted the Government’s request for remand and rejected Hyosung’s arguments. 273 F. Supp. 3d at 1205–06, 1208–12. Commerce filed the first remand results on February 9, 2018. See Confidential Final Results of Redetermination Pursuant to Court Remand (Feb. 9, 2018) (“First Remand Results”), ECF No. 96. Therein, Commerce determined that Hyundai received revenue for services provided to unaffiliated U.S. customers that exceeded the related expense of providing those services. *Id.* at 6–8, 23. As a result, Commerce found that Hyundai’s gross unit prices for those sales with service-related revenue were overstated. *Id.* at 20–24 (explaining Commerce’s rationale for capping service-related revenue). Thus, for those sales, Commerce capped the service-related revenue by the amount of the service-related expense (“the capping methodology”), thereby lowering the U.S. price used in the dumping margin calcu-

² The administrative record filed in connection with the *Final Results* is divided into a public administrative record (“PR”), ECF No. 27–3, and a confidential administrative record (“CR”), ECF No. 27–4. The administrative record associated with the Second Remand Results is contained in a Public Remand Record (“PR2R”), ECF No. 151–3, and a Confidential Remand Record (“CR2R”), ECF No. 151–2. Parties submitted joint appendices containing record documents cited in their remand comments. See Second Remand Proceeding J.A., ECF No. 166 Confidential Second Remand Proceeding J.A. (“CJA”), ECF No. 165. Citations are to the confidential joint appendices unless stated otherwise.

³ On August 29, 2019, the court granted Hyosung’s motion for partial final judgment and to amend the statutory injunction, thereby granting final judgment with respect to all of Hyosung’s counts and Count I of ABB’s Complaint as it relates to Hyosung. See Order (Aug. 29, 2019), ECF No. 169.

⁴ The court’s opinions in ABB I and ABB II present background information on this case, familiarity with which is presumed.

lation.⁵ *Id.* at 6–8, 19–25. Commerce also concluded that “Hyundai failed to cooperate to the best of its ability” in reporting its service-related revenue and applied partial facts available with an adverse inference (or “partial AFA”) in connection with service-related revenues. First Remand Results at 24.

On November 13, 2018, the court remanded the First Remand Results. *ABB II*, 355 F. Supp. at 1223. Relevant to this discussion, the court determined that Commerce’s application of the capping methodology “to those transactions or services for which Commerce relied only on internal communications among Hyundai employees or affiliates” was not supported by substantial evidence. *Id.* at 1221. The court found that the internal company communications did not, by themselves, serve as substantial evidence that the relevant services were separately negotiable⁶ with the unaffiliated customers. *Id.* at 1220. While the court sustained Commerce’s use of facts available, the court also remanded Commerce’s use of an adverse inference for further explanation or reconsideration.⁷ *Id.* at 1223.

On April 26, 2019, Commerce filed the Second Remand Results. For certain services provided for two transactions, identified as U.S. sales sequence numbers (“SEQU”) 14 and 27, Commerce determined that the record did not support a finding that the services were separately negotiable with the unaffiliated customer and, therefore, did not cap the revenue based on the service-related expense. Second Remand Results at 17–18, 20–22. Commerce also did not apply its capping methodology to the delayed delivery charges associated with two transactions, SEQUs 11 and 14, instead making circumstance of sale adjustments to normal value for those charges.⁸ *Id.* at 17–18 Draft Results of Redetermination Pursuant to Court Remand (Apr. 3, 2019)

⁵ In the First Remand Results, Commerce also revisited its methodology for making home market commission offsets for U.S. commissions incurred in the United States, which the court sustained. See *ABB II*, 355 F. Supp. 3d at 1211–15.

⁶ Commerce has been concerned with the possibility that export price (“EP”) or constructed export price (“CEP”) is overstated when Hyundai receives revenue for a service that exceeds its cost of providing that service. See, e.g., Second Remand Results at 16–18 First Remand Results at 20–24. As the court explained in *ABB II*, 19 U.S.C. § 1677a(c)(1) and (2) do not provide for an upward or downward adjustment to EP or CEP solely because the nominal revenue associated with the provision of a service exceeds the expense of providing that service. 355 F. Supp. 3d at 1220. As explained therein, when the record evidence does not support a finding that the cost of the service was separately negotiable from the price of the subject merchandise, Commerce is without legal authority to adjust EP or CEP except by the amount of the expense in question. *Id.* (citing 19 U.S.C. § 1677a(c)(2)(A)).

⁷ Hyundai also filed a motion for reconsideration, Confidential Def.-Ints.’ Mot. for Recons., ECF No. 133, which the court denied, see *ABB Inc. v. United States*, 43 CIT ___, 375 F. Supp. 3d 1348 (2019).

⁸ After Commerce issued the Second Remand Results, Hyundai filed ministerial comments alleging that Commerce’s use of the circumstance of sale adjustments for delayed delivery charges is a ministerial error. Min. Cmts. on the Dep’t’s Final Results of Redetermination

at 17, PR2R 5, CR2R 11, CJA Tab 10. Commerce confirmed, however, that in the case of three transactions for which it had documentation, Hyundai received service-related revenues for separately negotiable services that exceeded the associated expenses. Second Remand Results at 16–17. Commerce provided additional explanation of its decision to apply partial AFA, concluding that an adverse inference was warranted “[b]ecause Hyundai had the service-related revenue information and failed to provide it as requested by Commerce.” *Id.* at 15. Thus, Commerce found “Hyundai failed to cooperate to the best of its ability with regard to the reporting of service-related revenue.” *Id.*

Hyundai argues that the Second Remand Results should again be remanded to the agency for two reasons: (1) Commerce’s use of the circumstance of sale adjustment for the delayed delivery charges is not in accordance with law or supported by substantial evidence and (2) Commerce’s use of an adverse inference in its selection of facts available was not in accordance with law or supported by substantial evidence because Hyundai complied with Commerce’s requests to the best of its ability. Confidential Def.-Ints.’ Cmts. in Opp’n to the Final Results of Redetermination Pursuant to Court Remand (“Hyundai’s Opp’n Cmts.”), ECF No. 154.

ABB separately challenges Commerce’s Second Remand Results, arguing that (1) Commerce should have found all services associated with SEQUs 14 and 27 to have been separately negotiable with the unaffiliated customer such that the service-related revenue capping methodology applied and (2) Commerce should have treated the delayed delivery charges as service-related revenues and applied the capping methodology. Confidential Pl.’s Cmts. in Opp’n to Second Remand Results (“ABB’s Opp’n Cmts.”), ECF No. 156.

The Government filed a response to both Hyundai and ABB arguing that the Second Remand Results are supported by substantial evidence and in accordance with law. Confidential Def.’s Resp. to Cmts. on Second Remand Results (“Gov’t’s Resp.”), ECF No. 160. Additionally, ABB filed comments in support of Commerce’s use of an adverse inference, Pl.’s Cmts. in Supp. of Second Remand Results (“ABB’s Supp. Cmts.”), ECF No. 161, and Hyundai filed comments asserting that, except for the use of circumstance of sale adjustments for delayed delivery charges, Commerce’s application of the capping methodology with respect to the five transactions for which it did not draw an adverse inference was consistent with the court’s guidance, Def.-

Pursuant to Court Remand (May 3, 2019), CJA Tab 15. The parties included the Ministerial Error Comments in the Joint Appendix for the Second Remand Results, but it is not part of the administrative record for the remand determination and Commerce has not otherwise addressed the ministerial error allegation.

Ints.’ Cmts. in Supp. of the Final Results of Redetermination Pursuant to Court Remand (“Hyundai’s Supp. Cmts.”), ECF No. 162.

For the reasons discussed below, the court remands the Second Remand Results for Commerce to reconsider its circumstance of sale adjustments for the delayed delivery charges. The Second Remand Results are sustained in all other respects.

JURISDICTION

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),⁹ and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *SolarWorld Ams, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1314, 1317 (2017) (internal citation omitted).

DISCUSSION

I. Service-Related Revenue

A. Legal Authority

“When Commerce finds that a service is separately negotiable, its practice has been to cap the service-related revenue by the associated expenses when determining the U.S. price.” *Hyundai Heavy Indus., Co. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1340 (2018) *see also ABB II*, 355 F. Supp. 3d at 1219–20. The court has recognized this practice as a reasonable exercise of Commerce’s discretion in determining the price of the subject merchandise. *See ABB II*, 355 F. Supp. 3d at 1219–20 *Hyundai*, 322 F. Supp. 3d at 1340 *ABB I*, 273 F. Supp. 3d at 1208–09.

B. Background

In the First Remand Results, Commerce capped service-related revenue for certain services associated with SEQUs 14 and 27. First

⁹ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are generally to the 2012 edition. However, the Trade Preferences Extension Act (“TPEA”), Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015), made several amendments to the antidumping and countervailing duty laws. Section 502 of the TPEA amended 19 U.S.C. § 1677e. *See* TPEA § 502. The TPEA amendments affect all antidumping duty determinations made on or after August 6, 2015. *See* Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015, 80 Fed. Reg. 46,793 (Dep’t Commerce Aug. 6, 2015). Accordingly, all references to 19 U.S.C. § 1677e are to the amended version of the statute.

Remand Results at 17 n.56. For these two transactions, Commerce identified the services at issue based on certain Hyundai internal corporate communications. *Id.* at 22–24. The court remanded this determination, explaining that “[s]uch internal communications . . . do not provide substantial evidence to support a finding that Hyundai’s provision of the services in question was separately negotiable with the unaffiliated customer.” *ABB II*, 355 F. Supp. 3d at 1220.

In the Second Remand Results, Commerce determined that the internal communications did not demonstrate that the services were separately negotiable with respect to SEQUs 14¹⁰ and 27¹¹. *See* Second Remand Results at 17–18. After disregarding these communications, Commerce found that the record otherwise lacked evidence that the services at issue were separately negotiable and the agency did not apply the capping methodology to them. *See id.* at 20–22 *see also* Analysis of Data Submitted by Hyundai Heavy Indus. (HHI) in the Final Results of Second Remand of the Antidumping Duty Admin. Review of Large Power Transformers from the Republic of Korea 2013–2014 (Apr. 26, 2019) (“Final Analysis Mem.”) at 2–3, PR2R 11, CR2R 15, CJA Tab 14.

C. Parties’ Arguments

ABB contends that Commerce’s decision not to treat the adjustments for SEQUs 14 and 27 as service-related revenue subject to capping is not supported by substantial evidence because the agency “misunderstood or misapplied the [c]ourt’s instruction” in *ABB II*. ABB’s Opp’n Cmts. at 2 *see also id.* at 9–10. ABB asserts that the communications at issue are indicative of communication with the unaffiliated customers regarding the services. *See id.* at 2–8.

The Government argues that the “evidentiary standard set forth in” *ABB II* requires “not just evidence of communication but evidence that the *services at issue* were ‘separately negotiable.’”¹² Gov’t’s Resp. at 4 (quoting *ABB II*, 355 F. Supp. 3d at 1220). The Government asserts that Commerce appropriately found that the communications

¹⁰ With respect to SEQU 14, an HHI employee requested by email that HHI’s affiliated U.S. sales agent submit a price quote to a customer and, in that internal email, identified the costs associated with ocean freight and inland freight, which were included in the total price. Verification Exhibit SVE-14 (Pre-Selected Sample Sales-U.S. SEQU 14 (Verification Agenda VI) (July 31, 2015)) at 12, CR2R 221–225, CJA Tab 5 (Email dated September 2011 (“the SEQU 14 Email”)).

¹¹ The internal communication at issue for SEQU 27 is the contract between HHI and Hyundai USA (“the SEQU 27 Contract”) that itemizes services associated with the sale. Verification Exhibit SVE-15 (Surprise Sample Sales-U.S. SEQU 27 (Verification Agenda VI) (July 31, 2015)) at 20, CR2R 221–225, CJA Tab 6.

¹² Hyundai supports Commerce’s finding that the adjustments in question do not constitute service-related revenue subject to the capping methodology. Hyundai’s Supp. Cmts.

did not establish that the services were separately negotiable with the unaffiliated customers, and ABB's arguments to the contrary are based on speculation. *See id.* at 5–8.

D. Substantial Evidence Supports Commerce's Finding

ABB argues that Commerce's conclusion that certain services for SEQUs 14 and 27 were not separately negotiable is not supported by substantial evidence and Commerce "misunderstood or misapplied" the court's remand instructions because, in ABB's view, the record contains evidence of communication with the unaffiliated customers. ABB's Opp'n Cmts. at 2, 10. The court does not find ABB's arguments persuasive.

In *ABB II*, the court found that substantial evidence did not support Commerce's "application of its capping methodology to [SEQUs 14 and 27] for which Commerce relied only on internal communications among Hyundai employees or affiliates." 355 F. Supp. 3d at 1221 & n.23. Here, Commerce found that the services in question for SEQU 14 were not separately negotiable because the court "specifically ruled" that the SEQU 14 Email "does not contain evidence that the costs for ocean freight and inland freight were discussed with the unaffiliated customer." Second Remand Results at 20 & n. 75 (quoting *ABB II*, 355 F. Supp. at 1219 n.21). Commerce also found that the SEQU 27 Contract, a contract between HHI and Hyundai USA, did not indicate that the unaffiliated customer negotiated "items with Hyundai separately from the transformer price." *Id.* at 21. While ABB argues that HHI and Hyundai USA entered into the SEQU 27 Contract because of a request for a price quote issued by the unaffiliated customer to HHI, *see* ABB's Opp'n Cmts. at 8, Commerce explained that HHI's offer to the unaffiliated customer in response to the request does not indicate that the services were separately negotiable by the unaffiliated customer, Second Remand Results at 21 & n.83. Additionally, the purchase order and invoice for SEQU 27 did "not show separate line items for services other than a lump-sum price." *Id.* at 21. Thus, Commerce concluded that these communications did not provide "a basis for the service-related revenue capping" for SEQUs 14 and 27. *Id.* at 20.

Moreover, the Second Remand Results indicate that Commerce carefully considered ABB's arguments that the communications at issue could serve as a basis for finding that the services were separately negotiable by the customer. *See id.* at 19–22. The agency reviewed the record and expressly found that "none of the internal documents cited by ABB indicate the service-related revenue amounts were separately negotiated with the customer" after agree-

ing with ABB that “*if* Hyundai’s internal documentation had demonstrated that specific amounts of service-related revenue were separately negotiated with the customer, Commerce *could* rely on such information as the basis for . . . capping.” *Id.* at 20 (emphasis added). Commerce parsed various services associated with the transactions—declining to cap some and capping others when the evidence supported doing so. *See id.* at 20–22. ABB does not identify evidence Commerce did not consider rather ABB merely disagrees with Commerce’s conclusions. However, even the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s determination from being supported by substantial evidence. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006). Thus, the court finds no error in the agency’s reasoning or its review of record evidence in applying the capping methodology.

II. Circumstance of Sale Adjustment

A. Legal Framework

Among other price adjustments, Commerce adjusts normal value for differences between normal value and U.S. price that are not otherwise provided for in the statute and are due to “other differences in the circumstances of sale.” 19 U.S.C. § 1677b(a)(6)(C)(iii). With one exception, which is not relevant here, Commerce’s regulations limit circumstance of sale adjustments to “direct selling expenses and assumed expenses.” 19 C.F.R. § 351.410(b). Direct selling expenses are defined as “expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question.” *Id.* § 351.410(c). Assumed expenses are defined as “selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses.” *Id.* § 351.410(d).

B. Commerce’s Decision

Commerce found that Hyundai’s commercial invoices for SEQUs 11 and 14 indicate that Hyundai received revenue for delaying delivery and this revenue exceeded the expense it incurred for delaying the delivery however, Commerce also found that this charge was not service related.¹³ *See* Second Remand Results at 16–18. Because “Hyundai charged its customers due to the customer’s specific request to delay the delivery of subject merchandise in the context of its sale,”

¹³ As Hyundai explained, the delayed delivery charges were not inventory carrying costs or warehousing fees. *See* Cmts. on the Dep’t’s Draft Results of Redetermination Pursuant to Court Remand (Apr. 12, 2019) at 8, PR2R 9, CR2R 13, CJA Tab 12. “Hyundai does not produce LPTs for inventory or keep them in inventory “ rather it ships LPTs “immediately

Commerce found that the delayed delivery represents a change in the circumstance of the sales, which warranted a circumstance of sale adjustment. *Id.* at 22 *see also* Final Analysis Mem. at 3. Accordingly, Commerce increased normal value by the amount of the delayed delivery charge collected on the U.S. sales. Final Analysis Mem. at 3.

C. Parties' Arguments

ABB argues that the delayed delivery charges are revenues, not expenses, and thus, the agency's use of circumstance of sale adjustments for delayed delivery charges is not in accordance with statutory and regulatory authority. ABB's Opp'n Cmts. at 12 ABB asserts that Commerce should have treated the delayed delivery charges as service-related revenue. *Id.* at 13–14. Hyundai also argues that the delayed delivery charges are revenues, Hyundai's Opp'n Cmts. at 3–4, and requests that the court remand with instructions to remove the circumstance of sale adjustments for delayed delivery charges, *id.* at 6.

The Government argues that the regulations do not limit Commerce to making circumstance of sale adjustments only for "booked expenses." Gov't's Resp. at 9. According to the Government, "the regulatory term 'In general,' [] means that Commerce will 'generally'" but not exclusively, make circumstance of sale adjustments for "selling expenses and assumed selling expenses." *Id.* at 9 (quoting 19 C.F.R. § 351.410(b)).

D. Commerce's Circumstance of Sale Adjustment is Not in Accordance with Law

Commerce's use of circumstance of sale adjustments for delayed delivery charges is not in accordance with law. As noted above and relevant here, Commerce's regulations limit circumstance of sale adjustments to "direct selling expenses and assumed expenses." 19 C.F.R. § 351.410(b). "A 'direct selling expense' must be (1) an 'expense[]' that (2) 'result[s] from, and bear[s] a direct relationship to, the particular sale in question.'" *Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi, A.Ş. v. United States*, Slip Op. 19–130, 2019 WL 5270152, at *10 (CIT Oct. 17, 2019) (alterations in original) (quoting 19 C.F.R. § 351.410(c)). Commerce's regulation provides examples of "direct selling expenses," all of which involve an "an actual or imputed expenditure by the respondent." *Id.* (emphasis added) (citing 19 C.F.R. § 351.410(c)).

upon completion, testing, and disassembly of the LPT." *Id.* "Hyundai received the change orders for the delayed delivery charges during the construction process," and "the additional charge was for costs at the factory." *Id.* at 8–9.

Here, Commerce found that the delayed delivery charge was not an expenditure but, instead, yielded revenue. *See* Second Remand Results at 16–18, 22. Thus, Commerce’s use of a circumstance of sale adjustment for the delayed delivery charge is not in accordance with Commerce’s regulations. *See Habaş*, 2019 WL 5270152, at *9–10 (explaining that Commerce’s determination to make a circumstance of sale adjustment where the respondent did not incur any expense was owed no deference in accordance with *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)).

The Government’s argument that Commerce appropriately interpreted the regulatory term “in general” lacks merit. *See* Gov’t’s Resp. at 9–10. As the court has explained:

[T]he phrase “In general” is the heading to subsection (b), not part of the text. Rather than speaking to the scope of the permissible adjustments, it speaks to the scope of the regulation, which, with the exception of certain commissions, permits adjustments “only for direct selling expenses and assumed expenses.” [19 C.F.R. § 351.410(b)]. It is a well-settled interpretive rule that “the heading of a section . . . cannot undo or limit that which the text makes plain.” *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947) (construing a statute) *see also Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017) (principles of statutory interpretation apply likewise to regulations).

Habaş, 2019 WL 5270152, at *10 n.13. Here, as in *Habaş*, the Government “seeks to negate the explicit limitation the word ‘only’ places on the types of permissible adjustments, and is, therefore, misleading and erroneous.” *Id.* Because Commerce’s use of circumstance of sale adjustments for delayed delivery charges is not in accordance with law, the court remands this issue for reconsideration.¹⁴

III. Adverse Inference

A. Legal Framework

When “necessary information is not available on the record,” or an interested party “withholds information” requested by Commerce, “fails to provide” requested information by the submission deadlines, “significantly impedes a proceeding,” or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce “shall

¹⁴ ABB argues that Commerce should have treated the delayed delivery charges as service-related revenue subject to the capping methodology. ABB’s Opp’n Cmts. at 10–14. Commerce found that this fee was not service-related and has not otherwise found that it was separately negotiable.

... use the facts otherwise available.” *Id.* § 1677e(a). If Commerce determines that the party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” *Id.* § 1677e(b). “Compliance with the ‘best of its ability’ standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

B. Background and Commerce’s Decision¹⁵

In the initial antidumping questionnaire, Commerce asked Hyundai to “[r]eport the sale price, discounts, rebates and all other revenues” associated with the subject merchandise and to report separately “each type of billing adjustment.” Request for Information (Dec. 1, 2014) (“Initial Questionnaire”) at C-20, PR2R 25, CJA Tab 1. While Hyundai reported certain “services and related expenses in connection with various U.S. sales,” it “did not report separate revenue for these expenses.” Second Remand Results at 12–13.

Commerce issued a supplemental questionnaire seeking clarification of Hyundai’s reporting methodology with respect to service-related revenues and expenses. *Id.* at 13. Hyundai responded that, “[i]n accordance with Commerce’s decision in the Original Investigation, whe[n] the customer has issued a separate, additional purchase order for services related to, but not included in the purchase order for the sale, Hyundai has reported the value of the additional purchase order and related expenses separately.” *Id.* at 13 & n.43 (quoting Resp. to Suppl. Secs. B and C Questionnaires (June 3, 2015) at 15, CR2R 173–178, PR2R 132–133, CJA Tab 4). During verification, Commerce examined documentation for several sales and found invoices breaking out service-related revenues that had not been reported separately as Commerce had instructed.¹⁶ See Second Remand Results at 14 & nn.47–49.

In the First Remand Results, Commerce applied partial AFA because it determined that Hyundai’s failure to report separately these service-related revenues constituted a failure to act to the best of its ability “to provide [] necessary information for Commerce to apply its capping methodology.” First Remand Results at 24. The court sus-

¹⁵ For additional background regarding Commerce’s determination to apply partial AFA, see *ABB II*, 355 F. Supp. 3d at 1215–23.

¹⁶ These separately identified revenues “exceeded Hyundai’s expenses for the provision of those services,” and Commerce later concluded that, as a result, the “gross unit prices for those sales were overstated.” *ABB II*, 355 F. Supp. 3d at 1215 (citations omitted).

tained Commerce's decision to resort to facts available but remanded Commerce's decision to apply an adverse inference because Commerce "simply restate[d] the statutory standard" without the support of "any discussion linking the applicable standard to the particular facts." *ABB II*, 355 F. Supp. 3d at 1223.

In the Second Remand Results, Commerce continued to apply partial AFA based on Hyundai's failure to report its service-related revenues.¹⁷ Second Remand Results at 15. In so doing, Commerce explained that Hyundai failed to report separately these revenues despite the agency's multiple requests and record evidence demonstrating that Hyundai had the ability to do so. *Id.* at 12–14 *see also id.* at 27–29. Thus, Commerce concluded that Hyundai had not complied with Commerce's information requests to the best of its ability. *Id.* at 15.

C. Parties' Arguments

Hyundai argues that Commerce "could not have reasonably expected Hyundai to be more 'forthcoming'" because its reporting methodology is consistent with the methodology Commerce accepted in the initial investigation. Hyundai's Opp'n Cmts. at 7. Hyundai argues that any use of facts available should have been neutral with respect to service-related revenues. *Id.* at 9–10.

The Government responds that Commerce is not obligated to modify its reporting expectation in this segment of the proceeding based on its treatment of Hyundai's response in prior segments. *See Gov't's Resp.* at 12–13 *see also ABB's Supp. Cmts.* at 4–5. The Government avers that if a respondent typically maintains the data requested by Commerce but fails to report it, such failure "after a deficiency notice by Commerce or a discovery of the failure to properly report data at verification, constitutes a failure of the respondent to act to the best of its ability." *Gov't's Resp.* at 12 *see also ABB's Supp. Cmts.* at 3–4.

D. Commerce's Determination to Use an Adverse Inference is Supported by Substantial Evidence and in Accordance with Law

Substantial evidence supports Commerce's application of partial AFA. Hyundai did not accurately report service-related revenue as

¹⁷ For the transactions for which Commerce had actual revenue and expense information, the agency capped the service-related revenue by the service-related expense. *See* Second Remand Results at 10. For all other sales, the record contains no service-related revenue information and Commerce applied partial AFA. *Id.* at 15. As partial AFA, Commerce "used the highest percentage difference between service-related revenue and the service-related expenses from the SEQUs with usable service-related expenses." *Id.*

requested in the Initial Questionnaire. See Second Remand Results at 12. Commerce then sought clarification regarding Hyundai's reporting methodology, and Hyundai responded that its reporting "was based on its experience in the original investigation" but did not "alert[] Commerce to the existence of service-related revenue which appears in its invoices to certain unaffiliated customers." *Id.* at 15. Information collected at verification demonstrates that Hyundai had the ability to break out service-related revenue. *Id.* at 14. That information also indicates that, except as modified in the Second Remand Results, Commerce reasonably concluded that the services were separately negotiable. *Id.* Absent this information, "Commerce was not in a position to know that Hyundai's responses were incomplete or inaccurate." *ABB II*, 355 F. Supp. 3d at 1222.

Under these circumstances, Hyundai's "behavior cannot be considered maximum effort to provide Commerce with full and complete answers." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (citation and internal quotation marks omitted). Thus, the court finds that substantial evidence supports Commerce's determination that Hyundai failed to make "maximum and best efforts" to comply with its information requests. Second Remand Results at 28.

Moreover, the court is not persuaded by Hyundai's argument that Commerce could not have expected the company to be more forthcoming. Each administrative review is a separate exercise of Commerce's authority and allows for different conclusions based on different facts in the record. *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2014). Commerce's findings with respect to Hyundai's reporting methodology in prior segments of this proceeding do not relieve Hyundai of its burden to comply with Commerce's requests in this segment. See *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014) ("To avoid the risk of an adverse inference, respondents must take reasonable steps to maintain full and complete records and put forth maximum effort to investigate and obtain all requested information.") *Hyundai Heavy Indus.*, 332 F. Supp. 3d at 1342 ("HHI may not, however, rely on Commerce's factual conclusions from prior reviews in the instant review because each review is separate and based on the record developed before the agency in the review."). For these reasons, the court sustains Commerce's application of partial AFA with respect to Hyundai's reporting of service-related revenue.

CONCLUSION AND ORDER

For the reasons discussed herein, it is hereby:

ORDERED that Commerce's Second Remand Results are remanded in part and sustained in part; and it is further

ORDERED that, on remand, Commerce shall recalculate normal value without making circumstance of sale adjustments related to the delayed delivery charges, consistent with this opinion; and it is further

ORDERED that Commerce's Second Remand Results are sustained in all other respects; and it is further

ORDERED that Commerce shall file its remand redetermination on or before May 19, 2020; and it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 3,000 words.

Dated: February 19, 2020

New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE



Slip Op. 20–27

BEBITZ FLANGES WORKS PRIVATE LIMITED, Plaintiff, v. UNITED STATES, Defendant, and COALITION OF AMERICAN FLANGE PRODUCERS, Defendant-Intervenor.

Before: Judge Gary S. Katzmman
Court No. 18–00229

[The court sustains Commerce's Final Antidumping Duty Determination.]

Dated: March 3, 2020

Peter Koenig, Squire Patton Boggs (US) LLP, of Washington, DC, argued for plaintiff.

Geoffrey M. Long, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel *Daniel J. Calhoun* and *Kirrin Ashley Hough*, Office of the Chief Counsel for Trade Enforcement & Compliance, Office of the General Counsel, U.S. Department of Commerce, of Washington, DC. With them on the brief was *Caroline D. Bisk*.

Enbar Toledano, Wiley Rein LLP, of Washington, DC, argued for defendant-intervenor. With her on the brief were *Daniel B. Pickard*, *Stephanie M. Bell* and *Cynthia C. Galvez*.

OPINION

Katzmann, Judge:

This case presents the potential tension in the administrative process between the statutory obligation of an agency to render its

determinations within clear time deadlines and the ability of parties to participate in a meaningful fashion in that process. It involves the application of adverse inferences to a mandatory respondent in an antidumping (“AD”) investigation by the U.S. Department of Commerce (“Commerce”), where the respondent failed to provide timely and complete information in compliance with Commerce’s deadlines and guidelines. Plaintiff Bebitz Flanges Works Private Limited (“Bebitz”), a foreign producer and exporter of stainless steel flanges from India, brings this action against the United States (“the Government”) to challenge Commerce’s *Stainless Steel Flanges from India: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Critical Circumstance Determination*, 83 Fed. Reg. 40,745 (Dep’t Commerce Aug 16, 2018) (“*Final Determination*”), and accompanying issues and decision memorandum (Dep’t Commerce Aug. 10, 2018), P.R. 227 (“IDM”), in which Commerce used adverse inferences to set an AD duty rate for Bebitz and its affiliates. Bebitz requests that the court “remand Commerce’s decision for a decision in accordance with law and supported by substantial evidence.” Pl.’s Rule 56.2 Mot. for J. on the Agency Rec. and Opening Br. at 6, June 7, 2019, ECF No. 25 (“Pl.’s Br.”). The Government responds that the court should “reject Bebitz’s challenges and sustain Commerce’s determination.” Def.’s Resp. to Pl.’s Mot. for J. on the Agency Rec. at 1, Aug. 16, 2019, ECF No. 29 (“Def.’s Br.”). The court now sustains the *Final Determination* as supported by substantial evidence and otherwise in accordance with law.

BACKGROUND

I. Legal

To ameliorate trade distortions caused by unfair economic practices, Congress enacted the Tariff Act of 1930,¹ which empowers Commerce to investigate potential dumping or subsidies, and if appropriate, issue orders imposing duties on the subject merchandise. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012). These AD and countervailing duty (“CVD”) actions

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are not to the U.S. Code 2012 edition, but to the unofficial U.S. Code Annotated 2018 edition. The current U.S.C.A. reflects the amendments made to 19 U.S.C. § 1677e (2012) by the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015) (“TPEA”). The TPEA amendments apply to determinations made on or after August 6, 2015, and therefore, apply to this proceeding. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep’t Commerce Aug. 6, 2015).

are intended to be remedial, not punitive, in nature, *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990), and it is Commerce’s duty to determine margins as accurately as possible, *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Pursuant to 19 U.S.C. § 1673, Commerce imposes AD duties on foreign goods if they are being or are likely to be sold in the United States at less than fair value and the International Trade Commission (“ITC”) determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States. *See also Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018). “Sales at less than fair value are those sales for which the ‘normal value’ (the price a producer charges in its home market) exceeds the ‘export price’ (the price of the product in the United States).” *Apex Frozen Foods*, 862 F.3d 1322, 1326 (Fed. Cir. 2017) (quoting *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)). The amount of the AD duty is “the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” 19 U.S.C. § 1673. *See also Shandong Rongxin*, 331 F. Supp. 3d at 1394.

A. Reliance on Facts Otherwise Available and Adverse Facts Available

In investigating whether foreign goods are being sold in the United States at less than fair value, Commerce may select and issue questionnaires to mandatory respondents² to gather information for its determination. *See* 19 U.S.C. § 1677f-1(c)(2). Questionnaire responses are intended to give Commerce the information necessary to determine whether dumping is occurring. *See, e.g.*, Letter from Paul Walker, Program Manager AD/CVD Operations, to Peter Koenig, Squire Patton Boggs LLP (Oct. 3, 2017), P.R. 8 (“Original Questionnaire”). Where Commerce determines that dumping is occurring,

² In AD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
- (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Commerce uses the information collected to calculate the margin at which goods are being dumped into the United States and the corresponding AD duty rate to counter this dumping. *See, e.g., id.* Where an agency's request is clear and relevant to the investigation, 19 U.S.C. § 1677m requires a respondent to timely "prepare an accurate and complete record in response to questions plainly asked by Commerce." *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758, 23 ITDR 1775 (2001) (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571–72 (Fed. Cir. 1990)). If Commerce deems a response to its request deficient, then Commerce "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle." 19 U.S.C. § 1677m(d). Commerce provides this notice and the opportunity to remedy deficiencies through issuance of a supplemental questionnaire.

In order to meet its statutory deadlines, Commerce generally has discretion to create its own rules of procedure related to the development of record information. *PSC VSMPO–Avisma Corp. v. United States*, 688 F.3d 751, 760–61 (Fed. Cir. 2012) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543–44, 564 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.")). Commerce's exercise of its discretion, however, must be reasonable in light of its statutory obligations. *See Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (noting that the agency abuses its discretion when its decision is "clearly unreasonable, arbitrary, or fanciful"). In the context of AD proceedings, while Commerce clearly has the discretion to regulate administrative filings, that discretion is bounded at the outer limits by the obligation to carry out its statutory duty of "determin[ing] dumping margins 'as accurately as possible.'" *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (quoting *Rhone Poulenc*, 899 F.2d at 1191).

If a party fails to satisfactorily respond to Commerce's requests for "necessary information" to calculate a dumping margin by (1) withholding requested information, (2) failing to provide information by the submission deadlines or in the form or manner requested, (3) significantly impeding a proceeding, or (4) providing information that cannot be verified, Commerce shall use facts otherwise available to calculate the margin. 19 U.S.C. § 1677e(a)(2). "The use of facts oth-

erwise available . . . is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record.” *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

Furthermore, under 19 U.S.C. § 1677e(b)(1), Commerce may apply adverse facts available (“AFA”) when Commerce “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[.]” A respondent does not cooperate to the “best of its ability” when it fails to “put forth its maximum effort to provide Commerce with full and complete answers to all inquiries.” *Nippon Steel*, 337 F.3d at 1382. See also *Dillinger France S.A. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1349, 1356 (2018). The Federal Circuit in *Nippon Steel* explained that Commerce must make an objective and subjective determination regarding respondent’s efforts in assessing whether it acted to the best of its ability. 337 F.3d at 1382–83. The Federal Circuit clarified that this test applies “regardless of motivation or intent” on the part of the respondent, but that it simply “does not condone inattentiveness, carelessness, or inadequate record keeping.” *Id.*

The statute explicitly provides Commerce with the discretion to select among any dumping margins “under the applicable [AD] order,” including “the highest such rate or margin.” 19 U.S.C. § 1677e(d)(1)(B)–(2). “[W]here there is useable information of record but the record is incomplete,” Commerce applies partial AFA. *Wash. Int’l Ins. v. United States*, 33 CIT 1023, 1035 n.18, 31 ITRD 1803 (2009) (citing *Yantai Timken Co., Ltd. v. United States*, 31 CIT 1741, 1746–48, 521 F. Supp. 2d 1356, 1364–65 (2007), *aff’d* 300 Fed. Appx. 934 (Fed. Cir. 2008)). In contrast, when “none of the reported data is reliable or usable,” *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1305 (Fed. Cir. 2014), that is, when it “exhibit[s] pervasive and persistent deficiencies that cut across all aspects of the data,” *Zhejiang*, 652 F.3d at 1348 (citation omitted), Commerce applies total AFA.

II. Factual and Procedural History

Commerce initiated an AD investigation into imported steel flanges from India on September 11, 2017, based on a petition from the Coalition of American Flange Producers (“Coalition”), the defendant-intervenor in the present case. See *Stainless Steel Flanges from India and the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigations*, 82 Fed. Reg. 42,649, 42,649 (Dep’t Commerce Sept. 11, 2017), P.R. 1. Coalition alleged in its petition that U.S. domestic producers of steel flanges were threatened with material

injury based on less-than-fair-value imports from India. *Id.* The investigation covered the period of July 1, 2016 through June 30, 2017. *Id.* Commerce selected Bebitz as a mandatory respondent in its investigation. Memorandum from Courtney Canales, Int'l Trade Compliance Analyst, AD/CVD Operations, to Edward Yang, Senior Dir., AD/CVD Operations, (Oct. 3, 2017), P.R. 19. Commerce determined that it would treat Bebitz and its affiliates, Bebitz USA, Inc., Flanschen werk Bebitz GmbH ("FBG"), Viraj Profiles Limited ("Viraj"), and Viraj USA, Inc., as a single entity for purposes of the investigation.³ *See Stainless Steel Flanges From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 13,246, 13,247 n.7 (Dep't Commerce Mar. 28, 2018), P.R. 238.

A. Original Questionnaire and Responses

Bebitz and its affiliates were required to complete responses to a comprehensive questionnaire from Commerce. *See* Original Questionnaire. Commerce issued its questionnaire to Bebitz on October 3, 2017, the same day it selected Bebitz as a mandatory respondent. *See id.* The questionnaire contained four parts, labelled Sections A through D. *Id.* The response to Section A was due October 24, 2017, and the responses to Sections B through D were due November 17, 2017. *See id.*; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Nov. 16, 2017), P.R. 33 ("First Sec. B–D Extension Request"). After Commerce partially granted an extension of time, moving the deadline to October 31, 2017, Bebitz timely submitted the response to Section A. *See* Memorandum from Julia Hancock, Senior Int'l Trade Compliance Analyst, Enf't and Compliance, to The File (Oct. 20, 2017), P.R. 29; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Oct. 31, 2017), P.R. 31.

Commerce then fully or partially granted⁴ four extensions of time, at Bebitz's request, for responses to Sections B through D. Bebitz first requested an extension to December 1, 2017. First Sec. B–D Extension Request. Commerce partially granted the extension, moving the deadline to November 24, 2017. Memorandum from Julia Hancock, Senior Int'l Trade Compliance Analyst, Enf't and Compliance, to The File (Nov. 16, 2017), P.R. 35. ("First Sec. B–D Extension Grant"). Bebitz then requested another three extensions. Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Nov. 20, 2017), P.R. 37; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Nov. 29, 2017), P.R. 42; Letter from Peter Koenig,

³ References to Bebitz throughout this opinion encompass this single entity.

⁴ Where Commerce granted some, but less than the full, additional time requested the court refers to this as a "partial grant." Bebitz uses the term "denial" or "partial denial" when referring to the same result. *See, e.g.*, Pl.'s Br. at 3.

Squire Patton Boggs LLP, to Sec’y of Commerce (Nov. 30, 2017), P.R. 46. Commerce granted these additional extensions for responses to Sections B through D. Memorandum from Julia Hancock, Senior Int’l Trade Compliance Analyst, Enf’t and Compliance, to The File (Nov. 20, 2017), P.R. 40; Memorandum from Courtney Canales, Int’l Trade Compliance Analyst, AD/CVD Operations, to The File (Nov. 29, 2017), P.R. 44; Memorandum from Courtney Canales, Int’l Trade Compliance Analyst AD/CVD Operations, to The File (Dec. 1, 2017), P.R. 48. Thus, Bebitz timely submitted its response on December 1, 2017, the date of its first extension request. *See* Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec’y of Commerce (Dec. 1, 2017), P.R. 50. Upon granting Bebitz’s November 16, 2017 extension, Commerce notified Bebitz that it would likely issue supplemental questionnaires and that it “may not be able to grant additional extensions.” First Sec. B–D Extension Grant.

Throughout January 2018, Bebitz and Commerce repeatedly communicated about the submission of databases to Commerce containing Bebitz’s sales information, which were necessary to Commerce’s investigation. Bebitz requested four exemptions and/or extensions of time to submit information requested by Commerce in its original questionnaires. Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec’y of Commerce (Jan. 8, 2018), P.R. 66; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec’y of Commerce (Jan. 11, 2018), P.R. 68; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec’y of Commerce (Jan. 16, 2018), P.R. 72; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec’y of Commerce (Jan. 16, 2018), P.R. 76. Ultimately, Commerce exempted Bebitz from the usual database formatting requirements and allowed Bebitz to submit sales data in Excel spreadsheets. Letter from Julia Hancock, Senior Int’l Trade Compliance Analyst, Enf’t and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Jan. 16, 2018), P.R. 79 (“Database Accommodation Letter”). As explained below, the sales databases never made it into the record because Commerce rejected Bebitz’s final attempt to submit them as incomplete and untimely. *See* Memorandum from James Maeder, Senior Dir., AD/CVD Enf’t, to Gary Taverman, Associate Deputy Assistant Sec’y, AD/CVD Operations, re: Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Stainless Steel Flanges from India at 11–13 (Mar. 19, 2018), P.R. 222 (“Preliminary Decision Memo”).

B. Supplemental Questionnaires and Responses

Two weeks after receiving Bebitz’s final response to its original questionnaire, Commerce determined that additional information

was necessary and issued the first supplemental questionnaire. Letter from Paul Walker, Program Manager Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Dec. 15, 2017), P.R. 53 ("First Suppl. Questionnaire"). The letter accompanying the first supplemental questionnaire stated that Commerce had "identified deficiencies which require additional information." *Id.* at 1. This questionnaire provided a detailed list of formatting and informational deficiencies in Bebitz's original response. *See id.* at 3–6. In total, over the course of the investigation, Commerce issued eight supplemental questionnaires to Bebitz. First Suppl. Questionnaire; Letter from Commerce to Peter Koenig, Squire Patton Boggs LLP (Jan. 12, 2018), P.R. 70; Letter from Paul Walker, Program Manager, Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Jan. 26, 2018), P.R. 94; Letter from Paul Walker, Program Manager Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Feb. 5, 2018), P.R. 112 ("Suppl. Questionnaire C"); Letter from Michael Martin, Supervisory Accountant, Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Feb. 7, 2018), P.R. 143 ("Suppl. Questionnaire D"); Letter from Paul Walker, Program Manager, Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Feb. 8, 2018), P.R. 153; Letter from Michael Martin, Supervisory Accountant, Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Feb. 8, 2018), P.R. 171 ("Suppl. Questionnaire V"); Letter from Paul Walker, Program Manager, Enf't and Compliance, to Peter Koenig, Squire Patton Boggs LLP (Feb. 13, 2018), P.R. 185.⁵ Bebitz requested extensions on each. *See, e.g.*, Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Dec. 26, 2017), P.R. 60; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Jan. 17, 2018), P.R. 82; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Jan. 31, 2018), P.R. 108; Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Feb. 1, 2018), P.R. 110. Commerce issued Supplemental Questionnaire C regarding Section C of the original questionnaire on February 5, 2018. Suppl. Questionnaire C. On February 7–8, 2018, Commerce issued two additional questionnaires regarding Bebitz's responses to Section D of the original questionnaire: Supplemental Questionnaire D regarding Bebitz and Supplemental Questionnaire V regarding Bebitz's affiliate Viraj. *See* Suppl. Questionnaire D; Suppl. Questionnaire V.

Bebitz requested two extensions for Supplemental Questionnaire C. Commerce granted the first of Bebitz's extension requests, extend-

⁵ The court addresses only the supplemental questionnaires and subsequent responses at issue in the present case, namely those that were ultimately rejected by Commerce as untimely and incomplete.

ing the deadline four days to February 16, 2018 at 12:00 p.m. Memorandum from Julia Hancock, Senior Int'l Trade Compliance Analyst, Enf't and Compliance, to The File (Feb. 9, 2018), P.R. 182. Bebitz then requested a second extension. Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Feb. 15, 2018), P.R. 201. Commerce denied this second request because of: (1) its previous grant of an extension to Bebitz; (2) previous requests for the same information from Bebitz; (3) previous difficulties obtaining missing information from Bebitz; (4) and Bebitz's mischaracterization of itself as a first-time respondent. Memorandum from Julia Hancock, Senior Int'l Trade Compliance Analyst, Enf't and Compliance, to The File (Feb. 15, 2018), P.R. 204 ("Feb. 15 Extension Denial"). Bebitz submitted a response on February 16, 2018 at 4:40 p.m. Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Feb. 16, 2018), P.R. 207. Commerce rejected this response as incomplete and untimely because it was submitted more than four hours after the deadline. Letter from James Doyle, Dir. AD/CVD Operations, to Peter Koenig, Squire Patton Boggs LLP (Mar. 1, 2018), P.R. 211 (noting that Commerce previously warned Bebitz that untimely responses would be rejected). As Commerce later explained in its preliminary determination, "[s]hortly before the deadline of 12:00 p.m. on February 16, 2018, Bebitz and its affiliates submitted portions of their supplemental questionnaire response but did not submit the complete narrative response, nor sales databases with calculation worksheets by the deadline nor did Bebitz notify Commerce that it experienced filing issues until after the deadline." Preliminary Decision Memo at 13.

On February 14, 2018, Bebitz requested ten-day extensions to respond to Supplemental Questionnaire D and Supplemental Questionnaire V. Letter from Peter Koenig, Squire Patton Boggs LLP, to Sec'y of Commerce (Feb. 14, 2018), P.R. 192. Commerce denied the request as to Bebitz, citing its need for the requested information and noting that the investigation could be extended no further because of its statutory deadline of March 19, 2018 to issue a preliminary decision. *See* Memorandum from Julia Hancock, Senior Int'l Trade Compliance Analyst, Enf't and Compliance, to The File (Feb. 14, 2018), P.R. 195; Memorandum from Julia Hancock, Senior Int'l Trade Compliance Analyst, Enf't and Compliance, to The File (Feb. 14, 2018), P.R. 198 ("Feb. 14 Extension Resp."). Commerce partially granted the request as to Viraj, extending the deadline to February 20, 2018. Feb. 14 Extension Resp. Bebitz submitted responses to Supplemental Questionnaire D and Supplemental Questionnaire V on February 21, 2018 and February 20, 2018, respectively. *See* Letter from James Doyle, Dir., AD/CVD Operations, to Peter Koenig, Squire Patton Boggs LLP

(March 1, 2018), P.R. 214. Commerce rejected Bebitz's responses to Supplemental Questionnaire D and Supplemental Questionnaire V as untimely and incomplete because Bebitz submitted an incomplete response for each. *Id.* at 1. Bebitz's next day submissions of confidential versions of the responses included additional cost and sales information that was not included with its original public submissions. Commerce, therefore, deemed them untimely. *Id.* at 2–3.

C. Commerce's Determination

Commerce then published the preliminary results of its investigation and later affirmed those results in its *Final Determination* on August 16, 2018. *See Final Determination*. Commerce applied an AD duty rate of 145.25% to Bebitz, which it determined by applying total adverse inferences and facts available. *Id.* at 40,746. Commerce applied AFA because “the Bebitz/Viraj single entity failed to provide the following: (1) complete, reliable U.S. sales databases and reconciliations from Bebitz, Bebitz USA and FBG; (2) complete, reliable cost databases and reconciliations from Bebitz and Viraj; and (3) a complete sales reconciliation from Viraj and consistent responses regarding missing sales information from Viraj.” IDM at 10. In short, Commerce determined that Bebitz failed to provide complete or reliable information that Commerce could use to calculate Bebitz's AD duty rate.

On November 8, 2018, Bebitz filed this suit to challenge the *Final Determination*. Summons, ECF No. 1. Coalition moved to intervene in this case as a defendant-intervenor on December 19, 2018, ECF No. 11, and the court granted that motion on December 20, 2018, ECF No. 15. Before the court now is Bebitz's motion for judgment on the agency record. *See* Pl.'s Br. Bebitz alleges that Commerce failed to give it sufficient time to respond to questionnaires by delaying the issuance of supplemental questionnaires and not granting in full its requests for extensions. *Id.* at 1. Thus, Bebitz claims that Commerce's application of AFA to determine Bebitz's AD duty rate was unsupported by substantial evidence and not in accordance with law. *Id.* The Government and Coalition responded to this motion, arguing that the *Final Determination* should be sustained because record evidence fully supports Commerce's issuance of supplemental questionnaires, exercise of discretion in responding to Bebitz's extension requests, and application of AFA. Def.'s Br. at 7; Resp. Br. of Def.-Inter. The Coalition of American Flange Producers at 9, Aug. 16, 2019, ECF No. 30 (“Def.-Inter.'s Br.”). Bebitz filed its reply on Sep-

tember 23, 2019. Plaintiff Bebitz Resp. to Opp. Reply, Sept. 23, 2019, ECF No. 34 (“Pl.’s Reply”). The court held oral argument on February 5, 2020. ECF No. 47.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a. The court may review final affirmative determinations in CVD or AD duty proceedings under 19 U.S.C. § 1516a(a)(2)(B)(i) and will hold unlawful those agency determinations which are unsupported by substantial evidence on the record or otherwise not in accordance with law under 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Commerce’s application of adverse inferences in the calculation of Bebitz’s AD duty rate was supported by substantial evidence and in accordance with law. Bebitz unpersuasively argues that Commerce acted without substantial evidence and contrary to law by (1) failing to give Bebitz timely or sufficient notice of deficiencies in its original questionnaire; (2) failing to fully grant Bebitz’s extension requests to allow Bebitz to sufficiently respond to Commerce’s questionnaire and supplemental questionnaires; and (3) concluding that Bebitz did not act to the best of its ability in responding to Commerce’s questionnaires in order to justify the application of adverse inferences. Pl.’s Br. at 1.

The court agrees with the Government and Coalition that Commerce acted based on substantial evidence and otherwise in accordance with law in (1) issuing supplemental questionnaires; (2) responding to Bebitz’s requests for extensions of time; and (3) applying AFA to calculate Bebitz’s AD duty rate. *See* Def.’s Br. at 7; Def.-Inter.’s Br. at 7–25. Relevant to each of these conclusions is the fundamental tenet that respondents must timely “prepare an accurate and complete record in response to questions plainly asked by Commerce.” *Tung Mung Dev.*, 25 CIT at 758 (quotations omitted). Because Commerce lacks subpoena power over the foreign entities from which it seeks information during its investigations, *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012), Congress imbued Commerce with the ability to use AFA when respondents fail to provide necessary information in a timely manner. *See, e.g.*, 19 U.S.C. §§ 1677m(d), 1677e (allowing Commerce to disregard untimely submissions and use facts otherwise available and AFA); Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No.

103–316, vol. 1 at 868 (1994), *reprinted* in 1994 U.S.C.C.A.N. 4040, 4198 (facts available rules are “an essential investigative tool in [AD/CVD] proceedings.”). Thus, the court rejects Bebitz’s arguments and sustains Commerce’s *Final Determination*.

I. Commerce Provided Bebitz Prompt Notice of Deficiencies and Sufficient Opportunity to Respond to its Requests for Information.

Bebitz first claims that “Commerce failed its statutory duty to promptly notify a respondent of any deficiencies in its questionnaire response.” Pl.’s Br. at 1. In making this claim, Bebitz points to the applicable statutory requirements and Commerce’s own Antidumping Manual, *id.* at 2, which Commerce uses for “the internal training and guidance of Enforcement and Compliance (E&C) personnel,” U.S. Dept. of Commerce, Int’l Trade Admin., Antidumping Manual, Ch. 1 at 1 (2015) (“Antidumping Manual”). Pursuant to 19 U.S.C. § 1677m(d), Commerce “shall promptly inform the person submitting the response of the nature of the deficiency.” Commerce’s Antidumping Manual expands on this statutory requirement by stating that “[an] analyst should try to draft a supplemental questionnaire within one to two weeks after the receipt of the questionnaire response.” Ch. 4 at 17. Bebitz claims that “Commerce’s issuance of the supplement [sic] questionnaires here two months later is four to eight times longer than Commerce’s own standard of when they should be issued, violating Commerce practice.” Pl.’s Br. at 2. Further, Bebitz claims that the record supports its contention that:

up to two months passed before Commerce issued supplemental questionnaires following Bebitz/Viraj’s original questionnaire response . . . , Commerce issued six supplemental questionnaires . . . responses to which were all due within a six business day period . . . , [and] all of Bebitz/Viraj’s initial extension requests were filed well in advance of deadlines; however Commerce denied all extension requests, in full or in part.

Id. (citing IDM at 8).

The Government responds that Commerce promptly issued the supplemental questionnaires, which served as sufficient notice of deficiencies and provided an opportunity to correct those deficiencies. Def.’s Br. at 10. The Government notes that Commerce issued the first supplemental questionnaire fifteen days after Bebitz submitted its final original questionnaire response. *Id.* at 11–12. Contesting Bebitz’s characterization of the record, Commerce explained in the IDM that “the Bebitz/Viraj single entity ignores the events in this proceeding,” which instead include evidence of incomplete submissions, last-

minute extensions, and untimely submissions. IDM at 11–12. The Government also notes that the subsequently issued supplemental questionnaires “repeatedly referenced deficiencies with Bebitz’s prior submissions” and provided multiple opportunities for Bebitz to rectify those deficiencies. Def.’s Br. at 11. Coalition contends, “Bebitz misstates the record and otherwise fails to recognize how its own actions delayed the agency’s issuance of supplemental questionnaires.” Def.-Inter.’s Br. at 11.

The court finds that Commerce acted within its discretion in issuing supplemental questionnaires and rejecting the incomplete and untimely responses from Bebitz. First, the applicable statute, 19 U.S.C. § 1677m(d), merely requires that Commerce “promptly inform” respondent of deficiencies in its response, without dictating a specific timeline. The court concludes that Commerce may reasonably exercise its discretion to define the necessary amount of time in which the agency may identify a deficiency and then notify respondent thereof. *See PSC VSMPO–Avisma*, 688 F.3d at 760. Here, Commerce was in constant contact with Bebitz regarding its questionnaire responses, from the issuance of the first questionnaire to the issuance of the preliminary determination. The record details the protracted communications between Commerce and Bebitz regarding requested databases of sales information from Bebitz in the correct and usable format. *See Background, supra* Sec. B.i. The Government concedes that Commerce issued the first supplemental questionnaire over a month after Bebitz submitted its Section A response and fifteen days after Bebitz submitted its Sections B–D responses. Def.’s Br. at 11. *See also* First Suppl. Questionnaire. However, this delay resulted from Bebitz’s own requests for extensions of time to submit its responses to Commerce’s original questionnaire responses and failures to submit usable databases. *See Preliminary Decision Memo* at 12 n.71.

Further, the Government’s reliance on *Mukand*, 767 F.3d 1300, to support its assertion that Commerce provided Bebitz timely notice and adequate time to provide requested information is persuasive. *See* Def.’s Br. at 12–13. In *Mukand*, the Federal Circuit upheld the application of AFA to a respondent to whom Commerce had issued four supplemental questionnaires, in addition to an original questionnaire. 767 F.3d at 1306. There, Commerce “explained why it was unsatisfied with [respondent’s] response and reiterated both the type of information it needed and why it was important.” *Id.* Commerce also “warned [respondent] that its continued failure to provide the requested information may force Commerce to resort to facts otherwise available.” *Id.* The Federal Circuit’s decision is instructive

because it indicates that, where Commerce states that it (1) needs certain information (2) by a certain deadline, Commerce may infer a lack of cooperation from a respondent's failure to comply with either of those requests. In fact, here, Commerce provided more than the discrete opportunity to remedy a deficient response—it offered Bebitz multiple opportunities to provide the requested information in the format requested. *See, e.g.*, IDM at 11–14; Database Accommodation Letter. Therefore, the court concludes that Commerce provided sufficiently timely notice to Bebitz of the deficiencies in its responses and provided adequate time, including by granting multiple extension requests, to correct those deficiencies.

Finally, Commerce's Antidumping Manual is not dispositive of Bebitz's lack of notice or opportunity to respond here. First, the Antidumping Manual states that “[t]his manual is for the internal training and guidance of Enforcement and Compliance (E&C) personnel only . . . [and] [t]his manual cannot be cited to establish [Commerce] practice.” Ch. 1 at 1. Further, it states that Commerce “should try to draft a supplemental questionnaire one or two weeks after the receipt of the questionnaire response,” *id.* Ch. 4 at 17, and thus does not set a standard by which Commerce must operate in accordance with its own practice or by law. Bebitz cites to no authority stating otherwise and acknowledges that the Antidumping Manual “is not a binding legal document.” Pl.'s Br. at 2 (citing *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 165, 90 F. Supp. 2d 1284, 1292 n.13 (2000)). Thus, the court is unpersuaded that the Antidumping Manual requires the court to remand this issue to Commerce.

In sum, the court holds that Commerce's notice to Bebitz of deficiencies in its responses to the original questionnaires was supported by substantial evidence and otherwise in accordance with law.

II. Commerce Was Not Obligated to Grant in Full Each of Bebitz's Extension Requests.

Bebitz next claims that Commerce should have granted each of Bebitz's extension requests in full to provide it with sufficient time to respond to Commerce's requests for information. Pl.'s Br. at 3. Bebitz claims that Commerce failed to explain its denials of its full extension requests and therefore acted contrary to law when it applied AFA to calculate Bebitz's AD duty rate. *Id.* Bebitz supports its argument by citing to cases in which the court rejected Commerce's use of its discretion in connection with rejecting information from respondents. *See id.* at 3–4.⁶ Bebitz further argues that “Commerce's discretion as

⁶ Bebitz cites to the following cases, which the court find are inapposite: *Artisan Mfg. Corp. v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1334, 1338, 1344–45 (2014) (holding that

to deadlines must be done consistent with the statutory mandate to calculate the most accurate dumping margin possible.” *Id.* at 4–5 (citing *Wuhu Fenglian Co. v. United States*, 36 CIT 642, 648, 836 F. Supp. 2d 1398, 1403 (2012)). Finally, Bebitz contends that “Commerce had over eight months . . . to complete the investigation at the time . . . that Commerce first denied even one more day extension to Bebitz to answer the supplemental questionnaires in issue here.” Pl.’s Br. at 4 (citing IDM at 11 n.58).

The Government contends that Commerce did not abuse its discretion in granting, partially granting, and denying Bebitz’s numerous and varied extension requests. Def.’s Br. at 14. The Government relies on Commerce’s own regulation, 19 C.F.R. § 351.302(b), which states that “the Secretary may, for good cause, extend any time limit,” and caselaw which emphasizes Commerce’s discretion in making decisions regarding its procedures, including investigation deadlines. Def.’s Br. at 14.

The court concludes that Commerce permissibly exercised its discretion in responding to Bebitz’s various requests for extensions of time. Congress has imposed strict statutory deadlines upon Commerce in AD investigations. *See* 19 U.S.C. §§ 1673b(a), 1673d. The statute mandates that Commerce issue its preliminary determination within 140 days of the initiation of the investigation and its final determination within seventy-five days of the preliminary determination. 19 U.S.C. §§ 1673b(b), 1673d(a)(1). These deadlines may not be extended beyond an additional fifty days and an additional sixty days, respectively. *See* 19 U.S.C. §§ 1673b(c), 1673d(a)(2). Therefore, Commerce must make determinations in line with its statutory obligations and deadlines.

Accordingly, Commerce has significant discretion in determining the procedures by which it will gather and analyze information necessary to meet the statutory deadlines imposed for AD investigations.

Commerce abused its discretion “in the particular circumstances of this investigation” where a submission was filed shortly after the deadline); *Grobtest & I-Mei Indus. (Viet.) Co. v. United States*, 36 CIT 98, 118, 815 F. Supp. 2d 1342, 1362 (2012) (holding that Commerce’s rejection of voluntary responses was an abuse of discretion); *Hebei Metals and Minerals Imp. & Exp. Co. v. United States*, 28 CIT 1185, 1199, 26 ITRD 2058 (2004) (finding an abuse of Commerce’s discretion in including aberrational data when determining import value counter to its past practice); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207–08 (Fed. Cir. 1995) (holding that Commerce impermissibly rejected respondent’s clerical error correction); *Timken Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006) (holding that Commerce impermissibly rejected respondent’s clerical error correction); *Nippon Steel Corp. v. United States*, 25 CIT 377, 146 F. Supp. 2d 835, 841–42 (2001) (holding that Commerce impermissibly rejected respondent’s inadvertently omitted data, a holding which was later reversed by the Federal Circuit, 307 F.3d 1375); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103–04 (Fed. Cir. 1990) (reversing CIT decision to reject Commerce’s interpretation of CVD statute); *Usinor Sacilor v. United States*, 18 CIT 1155, 1164, 872 F. Supp. 2d 1000, 1008 (1994) (holding that Commerce abused its discretion in rejecting a clarification of record information by respondent).

See *PSC VSMPO–Avisma*, 688 F.3d at 760. Commerce’s regulation indicates that Commerce has the discretion, not the obligation, to grant extensions of time. See 19 C.F.R. § 351.302(b). The court upholds Commerce’s exercise of its discretion to set and enforce the timelines of its investigations unless that discretion has been abused. *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343, 1351 (Fed. Cir. 2015) (quoting *Yantai Timken*, 521 F. Supp. 2d at 1371).

In *Dongtai Peak Honey*, the Federal Circuit addressed the proper exercise of Commerce’s discretion in responding to extension requests. 777 F.3d 1343. In response to the plaintiff’s claim that Commerce had sufficient time to grant its extension before completing its investigation, the court stated that “Commerce should not be burdened by requiring acceptance of untimely filings closer to the final deadline for the administrative review.” *Dongtai Peak Honey*, 777 F.3d at 1352. Additionally, the court addressed the plaintiff’s fairness and accuracy arguments, holding that “Commerce’s rejection of untimely-filed factual information does not violate a respondent’s due process rights when the respondent had notice of the deadline and an opportunity to reply.” *Id.* at 1353.

These same principles apply here. As the Government notes, Commerce provided reasons for its partial grants and denials of Bebitz’s requests for extensions. Def.’s Br. at 14–15. The Government explains that Commerce “did not deem it prudent to grant the full requested extension for supplemental responses.” *Id.* at 15. Commerce also provided extensive reasons for its full denials of Bebitz’s final two extension requests, which included (1) previously requesting information on at least half of the questions; (2) multiple past extensions of deadlines; (3) Bebitz’s prior participation in AD/CVD investigations; and (4) Commerce’s need for the requested information in order to complete its investigation by the statutory deadline. Feb. 15 Extension Denial. See also Def.’s Br. at 15. In total, Commerce granted or partially granted Bebitz thirteen extensions during the investigation and denied in full only three of Bebitz’s extension requests. See, e.g., First Sec. B–D Extension Grant; Feb. 14 Extension Resp.; Feb. 15 Extension Denial; Feb. 16 Extension Grant. Often, Bebitz sought multiple extensions for the same response. See Background, *supra*-Section B.i. In at least one instance, multiple extension requests resulted in Commerce effectively granting Bebitz’s original request for an extension of time in full. See *id.* This is substantial evidence that Commerce provided Bebitz ample notice of the deficiencies in its responses and gave it multiple opportunities to remedy those deficiencies.

In challenging Commerce's decision to not fully grant each of Bebitz's extension requests, Bebitz misunderstands the nature of Commerce's discretion. As the Federal Circuit explained in *Dongtai Peak Honey*, "it is not for [respondent] to establish Commerce's deadlines or to dictate to Commerce whether and when Commerce actually needs the requested information." 777 F.3d at 1352 (quotations omitted). Here, this court concludes that Commerce struck the proper balance between finality and accuracy in rejecting Bebitz's untimely submissions and denying some of Bebitz's extension requests in full. Ultimately, Bebitz had nearly five months from the issuance of the original questionnaire to provide the information requested by Commerce, in part because of the numerous extensions that Commerce granted. Yet, Bebitz failed to provide information it was or should have been aware that Commerce required to complete its investigation and calculate an AD duty rate. Therefore, Commerce did not deny Bebitz a meaningful opportunity to provide information or remedy deficiencies in its original questionnaires. Given the statutory time constraints imposed upon Commerce and its discretion in imposing time limits for responses, the court thus agrees that Commerce was not obligated to grant Bebitz's full extension requests and did not abuse its discretion in enforcing its own deadlines.

III. Bebitz Failed To Provide the Requested Information Necessary for Commerce's Investigation and Failed To Act To the Best of its Ability in Responding to Commerce's Investigation Requests.

Finally, Bebitz claims that Commerce, without substantial evidence and contrary to law, applied AFA to determine Bebitz's AD duty rate. Pl.'s Br. at 5. Bebitz argues that, contrary to Commerce's determination, it did act to the best of its ability in responding to Commerce's questionnaires, and it was unreasonable to expect that Bebitz could answer all of Commerce's requests for information in the time provided. *Id.* See also IDM at 8 (summarizing Bebitz's position that "Commerce failed to demonstrate that Bebitz/Viraj did not work to the best of its ability to achieve the impossible under the circumstances. Bebitz/Viraj is a small company with no recent experience participating in AD cases."). Furthermore, Bebitz claims that merely failing to provide information is insufficient for Commerce to apply AFA. Pl.'s Br. at 5.

The Government responds that Commerce's decision was supported by substantial evidence "because Bebitz failed to provide necessary information to facilitate Commerce's calculation of an accurate [AD] duty rate, despite multiple opportunities to provide that information." Def.'s Br. at 15. The Government notes that Bebitz failed to

submit complete, verifiable databases to Commerce as requested through the original and numerous subsequent supplemental questionnaires and that these databases were therefore unusable by Commerce. *Id.* at 17. Commerce outlined the deficiencies in Bebitz's responses in the IDM, which the Government argues provided the requisite substantial evidence to justify Commerce's "resort to facts available to fill the gap in the record." *Id.* at 17–18. Further, the Government contends that Bebitz failed to act to the best of its ability in responding to Commerce's requests despite the multiple opportunities Commerce provided. *Id.* at 19. Commerce also challenged Bebitz's assertion that it did not have experience participating in Commerce investigations, stating "Viraj, in fact, requested to participate as a voluntary respondent and was subsequently selected as a mandatory respondent for individual examination in *Stainless Steel Bar*, [82 Fed. Reg. 48,483 (Dep't Commerce Oct. 18, 2017)], and Bebitz participated in *Finished Flanges*, [81 Fed. Reg. 85,928 (Dep't Commerce Nov. 29, 2016),] where Bebitz also requested to participate as a voluntary respondent." IDM at 10–11. Thus, the Government argues that the application of AFA to calculate Bebitz's AD duty rate was supported by substantial evidence and otherwise in accordance with law. *See* Def.'s Br. at 19.

The court sustains Commerce's application of AFA in this instance. When Commerce determines that either (1) the respondent failed to provide information requested or (2) the respondent failed to act to the best of its ability, then Commerce may disregard respondent's submissions and use information otherwise available, including the application of adverse inferences. *See* 19 U.S.C. § 1677e. The Federal Circuit expounded on these two requirements in *Nippon Steel*, 337 F.3d 1373.

A. Failure of Bebitz to Provide Requested Information

In *Nippon Steel*, the Federal Circuit explained that when Commerce determines that a respondent failed to provide requested information, "[t]he reason for the failure is of no moment. The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." 337 F.3d at 1381. Further, as the Federal Circuit upheld in *Dongtai Peak Honey*, Commerce is not required to provide good cause or justification for rejecting untimely submissions and proceeding as if respondent has not provided requested information. 777 F.3d at 1352.

After Commerce provided Bebitz several opportunities to correct deficiencies in its responses, Bebitz nevertheless failed to provide

sales databases, cost reconciliations, and sales information. IDM at 10. Commerce further rejected the Supplemental Questionnaire C, Supplemental Questionnaire D, Supplemental Questionnaire V responses as untimely.⁷ *Id.* at 12–14. Bebitz did not fail just once or even twice to fulfill these requests; rather, Bebitz failed to provide usable information to Commerce after more than eight questionnaires, each with extended deadlines, representing multiple opportunities for Bebitz to provide timely and accurate information. *See* Background, *supra* Sec. B. The failure to provide complete databases and sales information created gaps in information that rendered the databases unreliable and unusable by Commerce in the investigation. IDM at 10–14. The court holds that Commerce appropriately determined, based on substantial evidence, that Bebitz failed to provide timely and usable information.

B. Failure of Bebitz To Act to the Best of its Ability

As has been noted, in applying AFA based on a respondent's non-cooperation, *Nippon Steel* requires that Commerce conclude that the respondent failed both objectively and subjectively to act to the best of its ability. 337 F.3d at 1382–83. The objective determination requires that “a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations.” *Id.* at 1382. The subjective determination requires that “the respondent under investigation not only has failed to promptly produce the requested investigation, but further that the failure to fully respond is the result of the respondent's lack of cooperation . . . in failing to put forth its maximum efforts to investigate and obtain the requested information from its records.” *Id.* at 1382–83. “While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element.” *Id.* at 1383. Further, the Trade Preferences Extension Act of 2015 provided Commerce with wider discretion to use adverse inferences in proceedings before the agency to encourage full

⁷ Bebitz argues that “the *Final Determination* criticizes [Bebitz's] rejected questionnaire responses[,] [b]ut these questionnaire responses are not in the record.” Pl.'s Br. at 6. Bebitz claims that this denied it the “opportunity to defend its interests and to respond to such *Final Determination* criticism.” *Id.* However, Bebitz does not provide either binding or persuasive authority that would support this claim. *See id.*

Merely acknowledging the procedural history of Commerce's investigation does not equate to an unfair use of information to which Bebitz was unable to respond. Further, Commerce's own regulation requires it exclude untimely material from consideration in its investigation. 19 C.F.R. § 351.104(a)(2)(iii) (“In no case will the official record include any document that the Secretary rejects as untimely filed”). Therefore, the court rejects Bebitz's argument that merely referencing the rejection of these untimely and incomplete submissions was improper.

compliance with its requests. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793, 46,794 (Dep't Commerce Aug. 6, 2018).

First, the Government argues that “Bebitz demonstrated that it was able to provide accurate information, as evidenced by its submission of other parts of its database and that it was aware of the importance of the information to the investigation given Commerce’s multiple requests for the missing information,” and thus Commerce determined that Bebitz did not objectively act to the best of its ability. Def.’s Br. at 19. In the IDM, Commerce explained that, contrary to Bebitz’s claim, Bebitz and its affiliates had previously and recently participated in AD investigations. IDM at 10–11. Commerce also added that Bebitz was not a small company, as it claimed, but one of the largest exporters and producers of stainless steel flanges from India. *Id.* at 11. The court agrees that this evidence is sufficient to support Commerce’s objective determination that a reasonable exporter “would have known that the requested information was required to be kept and maintained.” *See Nippon Steel*, 337 F.3d at 1382.

Second, the Government contends that, in determining that Bebitz subjectively failed to act to the best of its ability, “Commerce offered Bebitz many opportunities to correct the data in the questionnaire responses and to provide additional necessary information.” Def.’s Br. at 19. Commerce explained that Bebitz’s responses contained repeated deficiencies in information and failures to comply with Commerce’s reporting requirements. IDM at 13. In fact, the number of questionnaires Commerce issued to Bebitz demonstrates Bebitz’s repeated failure to provide Commerce the information necessary to complete its investigation. Furthermore, Commerce made concessions to Bebitz in the information and format of data it requested that Bebitz provide. Database Accommodation Letter. Nevertheless, Bebitz still failed to provide Commerce the information in the format requested for Commerce to use in making an accurate AD determination and calculation. *See* IDM at 10. Ultimately, Commerce concluded that Bebitz provided information that was “inaccurate and unusable” and databases that were incomplete and unreliable. *Id.*

Additionally, Bebitz repeatedly requested extensions shortly before deadlines, including in one instance only four minutes before the deadline. *Id.* at 11–12. In another instance, Bebitz “failed to notify Commerce that it experienced filing issues until after the deadline.” *Id.* at 12. The court therefore rejects Bebitz’s claim that it was unable to survive Commerce’s unreasonable requests for information. *See*

Pl.'s Br. at 5. *Nippon Steel* does not require perfection in respondent's submissions, but merely their best efforts. See 337 F.3d at 1382. Under both the objective and subjective standards, Bebitz, quite simply, did not act to the best of its ability to provide Commerce timely and complete information.

Therefore, the court concludes that Commerce correctly determined that Bebitz failed to act to the best of its ability and failed to provide the information requested, and thus applied AFA based on substantial evidence and otherwise in accordance with law.

CONCLUSION

For the above stated reasons, the court sustains Commerce's *Final Determination* applying AFA to determine Bebitz's AD duty rate.

SO ORDERED.

Dated: March 3, 2020

New York, New York

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

Slip Op. 20–28

MIDWEST FASTENER CORP., Plaintiff, v. UNITED STATES, Defendant, and
MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00231

[Remanding the U.S. Department of Commerce's remand results.]

Dated: March 4, 2020

Robert Kevin Williams and *Mark Rett Ludwikowski*, Clark Hill PLC, of Chicago, IL, for plaintiff, Midwest Fastener Corp.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Patricia M. McCarthy*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel was *Vania Y. Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam Henry Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for defendant-intervenor, Mid Continent Steel & Wire, Inc.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand redetermination filed pursuant to the court's order in *Midwest Fastener Corp. v. United States*, 42 CIT __, __, 348 F. Supp.

3d 1297, 1306 (2018) (“*Midwest I*”). See Final Results of Redetermination Pursuant to Ct. Remand, Apr. 25, 2019, ECF No. 61 (“*Remand Results*”).

On August 2, 2017, Commerce issued the final scope ruling determining that Midwest Fastener Corp.’s (“Midwest” or “Plaintiff”) strike pin anchors were included within the scope of the antidumping duty (“ADD”) order covering certain steel nails from the People’s Republic of China (“PRC”). See [ADD] Order on Certain Steel Nails from the [PRC]: Final Ruling on Midwest Fastener Strike Pin Anchors, (Aug. 2, 2017), ECF No. 21–3 (“Final Scope Ruling”); see also *Certain Steel Nails from the [PRC]*, 73 Fed. Reg. 44,961 (Dep’t Commerce Aug. 1, 2008) (notice of [ADD] order) (“*PRC Nails Order*”). In *Midwest I*, the court explained that the phrase “nails . . . constructed of two or more pieces,” as it is used in the *PRC Nails Order*, is ambiguous and, therefore, Commerce’s conclusion that Midwest’s strike pin anchors were in scope was unsupported by substantial evidence. *Midwest I*, 42 CIT at __, 348 F. Supp. 3d at 1300–04, 1306. As a result, the court ordered Commerce to initiate a formal scope inquiry and conduct 19 C.F.R. § 351.225(k)(2) (2017)¹ analysis (“(k)(2) analysis”) on remand. *Id.*²

¹ Further citations to the Code of Federal Regulations are to the 2017 edition.

² The court, however, sustained Commerce’s liquidation instructions, effective as of August 2, 2017 (“original liquidation instructions”) on the basis of the U.S. Court of Appeals for the Federal Circuit’s (“Court of Appeals”) implicit recognition in *Sunprime Inc. v. United States*, 892 F.3d 1186, 1194 (Fed. Cir. 2018) (“*Ct. Appeals Sunprime 2018*”) that CBP can lawfully suspend liquidation of an article that it deems to be within the scope of a relevant duty order and that Commerce can issue instructions that CBP continue suspension of liquidation. *Midwest I*, 42 CIT at __, 348 F. Supp. 3d at 1304–06. Subsequently, this court’s decision regarding Commerce’s liquidation instructions in *Midwest I* was called into question by *Sunprime Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019), *rev’d in part on reh’g en banc*, 946 F.3d 1300 (Fed. Cir. 2020) (“*Ct. Appeals Sunprime 2019*”). Following *Ct. Appeals Sunprime 2019*, the court asked parties to file supplemental briefing addressing whether *Ct. Appeals Sunprime 2019* undermined the court’s decision in *Midwest I* to sustain Commerce’s original liquidation instructions—and whether the issue should be reconsidered. See Ct.’s Letter, July 9, 2019, ECF No. 70; see also *Midwest I*, 42 CIT at __, 348 F. Supp. 3d at 1304–06. The parties complied. See Def.’s Resp. Ct.’s Letter, Aug. 1, 2019, ECF No. 72; Pl.’s Resp. Ct.’s Letter, Aug. 9, 2019, ECF No. 75; Pl.’s Reply [Def.’s Suppl. Br.], Aug. 15, 2019, ECF No. 76; [Def.’s] Reply [Pl.’s Suppl. Br.], Aug. 23, 2019, ECF No. 77.

Thereafter, the parties in *Ct. Appeals Sunprime 2019* petitioned the Court of Appeals for rehearing on the matter. See Combined Pet. for Reh’g & Reh’g En Banc [of *Ct. Appeals Sunprime 2019*], [Ct. Appeals] Docket No. 2018–1116 (Fed. Cir. July 29, 2019), ECF No. 80. This court issued a stay in this proceeding, pending the Court of Appeals’s decision on the petition for rehearing in *Ct. Appeals Sunprime 2019*. See Order, Nov. 19, 2019, ECF No. 82. On January 7, the Court of Appeals rendered its decision in *Sunprime Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020) (*en banc*) (“*Ct. Appeals Sunprime 2020*”). The Court vacated its original panel opinion and reversed the portion of this court’s decision that relied upon it. *Id.* *Ct. Appeals Sunprime 2020* held CBP acts within its authority when it interprets the scope of an order, and therefore Commerce may order CBP to continue suspending the liquidation of goods entered or withdrawn prior to a formal scope inquiry. In light of the Court of Appeals’s holding in *Ct. Appeals Sunprime 2020*, *Midwest I*’s holding regarding liquidation stands.

On remand, Commerce continues to assert that the scope language covers Midwest's strike pin anchors. *Remand Results* at 7–11. Commerce also, under respectful protest, conducted a (k)(2) analysis and likewise concludes that Midwest's strike pin anchors are in scope. *Id.* at 11–19. Finally, Commerce states that in light of its determination on remand, it intends to instruct CBP that only the pin component of Midwest's strike pin anchor is dutiable under the *PRC Nails Order*. *Remand Results* at 25–26. For the reasons that follow, Commerce's determination on remand continues to be unsupported by substantial evidence.

BACKGROUND

The court assumes familiarity with the facts as set forth in the previous opinion and recounts the facts relevant to the issues currently before the court. *See Midwest I*, 42 CIT at __, 348 F. Supp. 3d at 1299–1300. On June 8, 2017, Midwest requested Commerce issue a scope ruling excluding its strike pin anchors from the scope of the *PRC Nails Order*. *See Midwest Fastener Scope Req.: Strike Pin Anchors* at 1–2, 4–12, PD 19, bar code 3579812–01 (June 8, 2017) (“Pl.’s Scope Ruling Req.”).³ Midwest is an importer of the strike pin anchors at issue. Midwest’s strike pin anchors have four components—a steel pin, a threaded body, a nut and a flat washer.⁴ Pl.’s Scope Ruling Req. at 2; *see also* Final Scope Ruling at 10; Def.’s Resp. Parties’ Cmts. on [Remand Results] at 3, June 27, 2019, ECF No. 67 (“Def.’s Reply to Cmts.”). Midwest avers that the pin component is not meant to be removed from the anchor and can only be removed with the aid of a claw hammer or pliers. Pl.’s Scope Ruling Req. at 3; *see also* Final Scope Ruling at 4; *Remand Results* at 4; Def.’s Reply to Cmts. at 3. The strike pin anchor is prepared for use by first drilling a hole through an object, and then drilling another hole into the masonry upon which the object is to be attached. *See* Pl.’s Scope Ruling Req. at 3, 9; *see also* Final Scope Ruling at 4–5; *Remand Results* at 4; Def.’s Reply to Cmts. at 3. After the two holes are aligned, the anchor is pushed through the hole in the object and into the hole in the masonry. *See* Pl.’s Scope Ruling Req. at 3, 9; *see also* Final Scope Ruling at 5; *Remand Results* at 4; Def.’s Reply to Cmts. at 3. The nut and

³ On October 11, 2017, Defendant filed the index to the administrative record underlying Commerce’s scope inquiry. *See* Administrative Record, Oct. 11, 2017, ECF No. 21–1. On May 9, 2019, Defendant filed indices to the public and confidential administrative records of the remand proceedings. *See* Public/Confidential Remand Record Index, May 9, 2019, ECF No. 62–2–3. All references to administrative record documents in this opinion will be to the numbers Commerce assigned to the documents in the relevant indices.

⁴ Defendant notes that the nut and washer are a one-piece unit. *See* Def.’s Reply to Cmts. at 3 (citing to Pl.’s Scope Ruling Req. at 2). Thus, the strike pin anchors may also be considered comprised of three components.

washer components are then tightened to orient and position the anchor, and the pin component is subsequently struck with a hammer. See Pl.'s Scope Ruling Req. at 3, 9; see also Final Scope Ruling at 5; *Remand Results* at 4; Def.'s Reply to Cmts. at 3. The action of striking the pin component expands the anchor body and results in the fastening of the desired item against the masonry. See Pl.'s Scope Ruling Req. at 3, 9; see also Final Scope Ruling at 5; *Remand Results* at 4; Def.'s Reply to Cmts. at 3.

In *Midwest I*, the court determined that Commerce's conclusion that Midwest's strike pin anchors are within the scope of the *PRC Nails Order* was unsupported by substantial evidence. See *Midwest I*, 42 CIT at __, 348 F. Supp. 3d at 1300–06. The court examined various dictionary definitions and concluded that although the definitions could identify the physical characteristics of a nail, “none of the definitions consulted by the court identify or define a nail that is constructed of two or more pieces.” *Id.* at __, 348 F. Supp. 3d at 1302. The court held that neither the plain language of the *PRC Nails Order* nor any sources identified under 19 C.F.R. § 351.225(k)(1) “explain what it means for a product to be a nail constructed of two or more pieces.” *Id.* at __, 348 F. Supp. 3d at 1302. The court concluded that Commerce could not support its determination that strike pin anchors are nails constructed of two or more pieces, unless it clarifies the ambiguous phrase, “constructed of two or more pieces,” and supported any subsequent determination with record evidence. See *id.* at __, 348 F. Supp. 3d at 1303–04. The Final Scope Ruling was remanded for Commerce to conduct a formal scope inquiry and (k)(2) analysis. See *id.* at __, 348 F. Supp. 3d at 1306.

On remand, Commerce reopened the administrative record and invited parties to submit new factual information clarifying the *PRC Nails Order*'s phrase “nails . . . constructed of two or more pieces[.]” and addressing the function of the anchor component in relation to the pin component. See *Remand Results* at 5–6; see also *PRC Nails Order*, 73 Fed. Reg. at 44,961; 19 C.F.R. § 351.225(e). Commerce further explicated its view of the scope language by interpreting the phrase “nail . . . constructed of two or more pieces,” as nails that match the physical characteristics enumerated in the *PRC Nails Order*, “plus some additional piece or pieces[.]” not limited by function or material. See *Remand Results* at 10. Commerce, also, under respectful protest, carried out a (k)(2) analysis, specifically considering the physical characteristics of the goods, the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold, and the manner in which the product is advertised and displayed, and restated its view that Mid-

west's strike pin anchors were in scope. *Remand Results* at 11–19. Commerce indicated that it intends to instruct CBP that only the pin component of Midwest's strike pin anchor is subject to duties under the *PRC Nails Order*. See *id.* at 10–11, 21.

Midwest challenges Commerce's definition of the relevant phrase as "illogical" and argues that Commerce has not complied with the court's remand order because the phrase remains ambiguous. See Pl.'s Cmts. on [*Remand Results*], May 28, 2019, ECF No. 64 ("Midwest's Cmts."). Mid Continent challenges Commerce's proposed instructions, but supports Commerce's conclusion that under a (k)(2) analysis Midwest's strike pin anchors are covered by the scope of the *PRC Nails Order*. See Def-Int.'s Cmts. on [*Remand Results*] at 2–5, May 28, 2019, ECF No. 63 ("Mid Continent's Cmts.").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012),⁵ which grant the court authority to review actions contesting scope determinations that find certain merchandise to be within the class or kind of merchandise described in an antidumping or countervailing duty order. See 19 U.S.C. § 1516a(a)(2)(B)(vi); 28 U.S.C. § 1581(c). The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Plaintiff argues that Commerce failed to comply with the court's instructions to clarify the ambiguous phrase "constructed of two or more pieces." See Midwest's Cmts. at 1–2. Plaintiff further argues that Commerce's (k)(2) analysis is unsupported by substantial evidence. See *id.* at 3–5. Defendant responds that Commerce's remand redetermination is supported by substantial evidence and complies with the court's remand order. See Def.'s Reply to Cmts. at 6–16. For the reasons that follow, Commerce's determination that Midwest's

⁵ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. Further citations to Title 28 of the United States Code are to the 2012 edition.

strike pin anchors are within the scope of the *PRC Nails Order* is unsupported by substantial evidence.

The language of an antidumping duty order dictates its scope. See *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995)). Commerce's regulations authorize it to issue scope rulings to clarify whether a particular product is within the scope of an order. See 19 C.F.R. § 351.225(a). To determine whether a product is within the scope of an antidumping order, Commerce looks at the plain language of that order. See *Duferco*, 269 F.3d at 1097. When considering the scope language, Commerce will take into account descriptions of the merchandise contained in: (1) the petition; (2) the initial investigation; and (3) past determinations by the Commission and by Commerce, including prior scope determinations (collectively "(k)(1) sources"). 19 C.F.R. § 351.225(k)(1); see 19 C.F.R. § 351.225(d). When the (k)(1) sources are not dispositive, Commerce will initiate a formal scope inquiry and further consider:

- (i) The physical characteristics of the product;
- (ii) The expectations of the ultimate purchasers;
- (iii) The ultimate use of the product;
- (iv) The channels of trade in which the product is sold; and
- (v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(2).

Commerce has broad authority "to interpret and clarify its antidumping duty orders." *Ericsson GE Mobile*, 60 F.3d at 782; see also *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (stating that "Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping orders."). However, Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)). Furthermore, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089. Although the petition and the investigation proceedings may aid in Commerce's interpretation of the final order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Id.* at 1096.

The relevant scope language of the *PRC Nails Order* provides that [t]he merchandise covered by this proceeding includes certain steel nails having a shaft length up to 12 inches . . . Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint.

PRC Nails Order, 73 Fed. Reg. at 44,961.

Commerce's remand determination that the phrase "nails . . . constructed of two or more pieces" unambiguously includes "a nail which would otherwise satisfy the definition of the scope, were it imported as a stand-alone single-piece nail, plus some additional piece or pieces[.]" *Remand Results* at 10, is unsupported by the record. On remand Commerce reopened the record and solicited information from the parties concerning the meaning of the phrase "nails . . . constructed of two or more pieces." *See id.* at 7.⁶ Midwest submitted "the ASTM Standard Specification for Driven Fasteners: Nails, Spikes, and Staples[.]" *Id.* (internal quotations omitted). Commerce did not address this standard in its analysis other than to list the types of nails listed in the standard.⁷ Mid Continent did not provide new evidence, *id.* at 7–8, though it did offer its own definition in its comments to the agency. *Id.* (quoting Letter from Mid Continent Resp. Scope Remand Req. Information at 3, RPD 6, bar code 3790351–01 (Feb. 6, 2019) ("Mid Continent's (k)(2) Cmts.")).⁸

⁶ In its remand Commerce did not rely upon any new evidence but rather returned to its citation to the ITC report and agreed with the Defendant-Intervenors' understanding of the meaning of nails constructed of two or more pieces as a very general phrase that "encompasses a wide variety of types of nails[.]" *See Remand Results* at 8. Commerce contends that record evidence demonstrates that the "additional pieces" are "not limited with respect to materials or function . . . in relation to the product as a whole." *Id.*

⁷ The Remand Results note the following examples given in the ASTM standards:

Umbrella Head Roofing Nails, which consist of a leak-resistant umbrella head atop a steel nail (Table 29); Cap Nail-Hand Driven Roofing Nails, which consist of a round or square steel cap atop a steel nail (Table 31); Cap Nail Power-Tool Driven Roofing Nails, which consist of a round or square steel cap atop a steel nail (Table 32); Washered-Aluminum Roofing Nail, which consist of an aluminum roofing nail with a neoprene washer (Table 33); and Washered-Steel Roofing Nails, which consist of a steel roofing nail with a elastomer washer (Table 34).

Remand Results at 7–8 n. 28 (citing Midwest's Cmts. on Draft Remand Results at Ex.1, Feb. 6, 2019, RPD 7, bar code 3790475–01 (Feb. 6, 2019)).

⁸ Mid Continent identified that:

A nail of two or more pieces, as the very name indicates, consists of a nail with a one or more components or "pieces." The additional components are joined, affixed or otherwise combined with the nail. A variety of nails are produced and sold in this manner. Some have plastic or metal washers affixed underneath the head of the nail. Others, like decorative upholstery nails, have a decorative cap attached to the top of the head of the

Although Commerce does not discuss any new evidence in the record, it contends the *PRC Nails Order* covers a wide variety of nail types. *PRC Nails Order*, 73 Fed. Reg. at 44,961.⁹ Commerce points to the phrasing as general and “used to cover all types of such nails,” *Remand Results* at 8, and reasons that nails may therefore have different physical characteristics. *See id.* Commerce also notes that the scope language has few exclusions and does not indicate that a “scope nail would be excluded from the scope based on it being constructed with an additional piece or pieces.” *Id.* at 9. Commerce also asserts that the “record provides numerous examples of nails which could be considered ‘nails . . . constructed of two or more pieces[,]’” which could aid in clarifying the phrase at issue. *Remand Results* at 9. Commerce does not provide these examples or a citation to them. Commerce does not explain how these examples support its interpretation. Ultimately, Commerce’s interpretation posits that any fastener that has a nail incorporated within it is within scope. *See Remand Results* at 11. Commerce’s clarification of the phrase “nails . . . constructed of two or more pieces” cannot withstand scrutiny.

First, the actual words of the scope do not support Commerce’s interpretation. The scope “includes certain steel nails. . . of one piece construction or constructed of two or more pieces.” *PRC Nails Order*, 73 Fed. Reg. at 44,961. The use of the phrase “constructed of two or more pieces” signifies a product which itself is a nail, rather than a nail with other parts. The word “constructed” means something that is built or put together with other parts. *See Construct*, The American Heritage Dictionary of the English Language 404 (3d ed. 1996); *Constructed*, Webster’s Third New International Dictionary 489 (Philip Babcock Gove, Ph.D. & Merriam-Webster Editorial Staff eds. 1993); *Construct*, oed.com, available at <https://www.oed.com/view/Entry/39894?rskey=d9ZITS&result=1&isAdvanced=false#eid> (last visited Feb. 28, 2020); *Construct*, Merriam-Webster.com, available at <https://www.merriam-webster.com/dictionary/constructed> (last visited Feb. 28, 2020).¹⁰ Commerce’s interpretation that such language includes a nail which would otherwise satisfy the definition of the scope, were it imported as a stand-alone single piece, plus some additional piece or

nail. Others have a felt washer underneath the head. Others have anchors made of steel, zinc, or plastic affixed to the nail. The phrase “of two or more pieces” is necessarily general and is used to cover all types of such nails.

Mid Continent’s (k)(2) Cmts. at 3.

⁹ Referring to language in the *PRC Nails Order* that in scope are nails up to 12 inches in length, round wire or cut nails, nails produced from any type of steel, nails with a variety of finishes, heads, shanks, point types, shaft lengths, and shaft diameters. *PRC Nails Order*, 73 Fed. Reg. at 44,961.

¹⁰ The American Heritage Dictionary of the English Language defines “construct” as “[t]o form by assembling or combining parts; build”; Webster’s Third New International Dictionary defines “construct” as “to form, make, or create by combining parts or elements”; the

pieces, ignores the word “constructed” in the scope language. The nail covered by the scope must be one that is constructed of pieces, not one where a nail is merely part of another object.

Second, Commerce asserts that the record provides numerous examples of nails which could be considered nails constructed of two or more pieces, yet Commerce does not provide those examples, nor any citation to where the court could find those examples. *See Remand Results* at 9, 12. Commerce does not explain how those examples might support its view other than to say that they do. *See Remand Results* at 9, 12. Indeed evidence in the record would appear to detract from Commerce’s conclusion. The ASTM Standard Specification for Driven Fasteners: Nails, Spikes and Staples provides the standard specifications for a large range of “nails, spikes, staples and other fasteners[.]” neither an anchor nor a strike pin anchor are among the variations of nail products that the ASTM recounts. *See Midwest’s Cmts. on Draft Remand Results* at 5–7, Feb. 6, 2019, RPD 7, bar code 3790475–01 (Feb. 6, 2019) (“Midwest’s (k)(2) Cmts.”). Moreover, the examples of nails given there would seem to support a narrower interpretation of the phrase than that proffered by Commerce. Specifically, the ASTM lists:

Umbrella Head Roofing Nails, which consist of a leak-resistant umbrella head atop a steel nail; Cap Nail-Hand Driven Roofing Nails, which consist of a round or square steel cap atop a steel nail; Cap Nail Power-Tool Driven Roofing Nails, which consist of a round or square steel cap atop a steel nail; Washered-Aluminum Roofing Nail, which consist of an aluminum roofing nail with a neoprene washer; and Washered-Steel Roofing Nails, which consist of a steel roofing nail with a elastomer washer

See Remand Results at 7–8 n. 28 (citing Midwest’s (k)(2) Cmts. at Ex. 1) (parentheticals omitted). In each, it would appear that the shank or pin component serves to secure the fastener. Commerce does not address these examples provided by the plaintiff. Commerce must address record evidence that detracts from its conclusion that the strike pin anchors are nails. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

Commerce, in recommitting to its original position that the scope unambiguously covers the strike pin anchors, lists key physical char-

Oxford English Dictionary defines “construct” as “[t]o make or form by fitting the parts together; to frame, build, erect”; Merriam-Webster defines “construct” as “to make or form by combining or arranging parts or elements[.]”

acteristics that “additional pieces”¹¹ may have, contending that these characteristics exemplify the wide variety of additional pieces covered by the *PRC Nails Order. Remand Results* at 10, 24–25. Commerce, however, fails to include a cite where in the record the characteristics are established.¹² The court, therefore, cannot assess whether or not the key characteristics Commerce identifies provide substantial evidence in support of Commerce’s interpretation of the relevant phrase.¹³

More importantly, Commerce’s contention that because the *PRC Nails Order* includes nails that have different physical characteris-

¹¹ Commerce asserts that the “two or more pieces” language from the *PRC Nails Order* refers to pieces with the following characteristics:

- The additional piece(s) is/are not limited to steel, but may be made of plastic, zinc, rubber, neoprene, or any other material;
- The additional piece(s) is/are not limited to any single part of a nail, including a nail head, but can consist of a cap, washer, an outer-body anchor, or any other piece;
- The additional piece(s) is/are joined, affixed, or otherwise combined with the nail; and
- The additional piece(s) may serve different functions. For example, the piece(s) may be decorative (as is the case with the head of an upholstery nail), be used to seal the nail-hole (as is the case with nails with washers), or assist in the overall function of the product as a whole.

Remand Results at 10.

¹² Commerce references the same “key characteristics” in its (k)(2) analysis and cites the U.S. International Trade Commission’s (“ITC”) final material injury determination (“ITC Report”) as a source from which the characteristics can be reasonably discerned. See *Remand Results* at 13–15; see also *Certain Steel Nails from the [PRC]* at I-9, Inv. No. 731-TA-1114, USITC Pub. No. 4022 (July 2008) available at https://www.usitc.gov/publications/701_731/pub4022.pdf (last visited Feb. 28, 2020) (“ITC Report”). It is not clear to the court, however, whether Commerce, when it interprets the plain language of the *PRC Nails Order* outside the (k)(2) analysis, is similarly relying on the ITC Report and if it is, which parts of the ITC Report are relevant to its analysis. Given the number of key characteristics Commerce invokes, the voluminous nature of the ITC Report, and Commerce’s lack of analysis, the court cannot reasonably discern the basis for Commerce’s interpretation. *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319–20, 1326 (Fed. Cir. 2009) (the court must be able to reasonably discern the path of an agency’s decision). Furthermore, to the extent that Commerce continues to rely on the fact that the ITC Report provides a masonry anchor as an example when discussing nails produced of two or more pieces, see *Remand Results* at 13, such reliance is not helpful because the words of the *PRC Nails Order* do not clarify which of the products listed in the ITC Report the order encompasses. See *Midwest Fastener Corp.*, 42 CIT at __, 348 F. Supp. 3d at 1302 n.5.

¹³ Commerce’s invocation of *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295 (Fed. Cir. 2013) (“*Mid Continent Nail*”) is unpersuasive. *Remand Results* at 9–10 (arguing that it must “examine the ‘literal terms’ of the order to determine whether a component of a ‘mixed-media’ product is within the scope of an order when it is combined with non-subject components.” (citing *Mid Continent Nail*, 725 F.3d at 1302, 1304)). The product at issue in *Mid Continent Nail* was unambiguously covered by the scope of the order and the scope inquiry resolved whether the product, when packaged with other non-subject merchandise in a tool kit, took it out of scope. See *Mid Continent Nail*, 725 F.3d at 1298. By contrast, a plain reading of the *PRC Nails Order* does not reveal which products qualify as nails “constructed of two or more pieces” and there is no suggestion, either from Commerce or the record, that Midwest’s strike pin anchors are part of a “mixed-media” product. See *Remand Results* at 20–21 (noting that a “‘mixed-media’ analysis is not necessary in this case”); see also *id.* at 14, 20 (noting that the “outer-body anchor is permanently affixed to the nail piece”).

tics, the phrase “nails . . . constructed of two or more pieces” must mean that the additional pieces can be physically different from the nail component, *see Remand Results* at 8–9, is unpersuasive. The fact that the *PRC Nails Order* broadly defines the properties of a nail provides no guidance on how the court is to evaluate whether a product is a nail “constructed of two or more pieces” or what properties the “additional pieces” can possess. Commerce’s contention, likewise, provides no meaningful explanation for why a multi-component product is within the scope of the *PRC Nails Order* if just one of its components is a nail. *See Remand Results* at 10.

Commerce’s (k)(2) analysis also fails to support its determination. Specifically, Commerce found that physical characteristics of the product were similar because the pin in the strike pin anchor would be considered a nail if it were imported by itself. *Remand Results* at 12; *see also* 19 C.F.R. § 351.225(k)(2)(i). Commerce therefore compares the physical characteristics of one part of the strike pin anchor to nails. *Remand Results* at 14–15. Commerce’s comparison ignores the language of 19 C.F.R. § 351.225(k)(2) which calls for the comparison of the physical characteristics of the product, not the physical characteristics of part of the product. If Commerce were to compare the physical characteristics of the product it must consider not only the pin, but also the anchor body, the hex nut and the flat washer. It should also consider how those physical characteristics function. Comparison of physical characteristics logically includes a comparison of the function of those characteristics. Commerce must address record evidence that demonstrates it is the anchor body of the strike pin anchor, not the pin, that provides the fastening function. *See Pl.’s Scope Ruling Req.* at 8.

As for the expectations of the ultimate purchasers, Commerce contends that those expectations vary. *Remand Results* at 15; *see also* 19 C.F.R. § 351.225(k)(2)(ii). Commerce emphasizes, however, that purchasers expect to hit a nail with a hammer to fasten one object to another. *Remand Results* at 16. Although purchasers will expect to hammer the strike pin anchor at some point, strike pin anchor purchasers must also expect to drill holes into masonry, align holes, insert anchors and tighten nuts. *See Pl.’s Scope Ruling Req.* at 3, 9; *see also* Final Scope Ruling at 5; *Remand Results* at 4; Def.’s Reply to Cmts. at 3. Commerce does not address these expectations. Commerce does not address record evidence that the ultimate product use for strike pin anchors at issue here is specific. *See Pl.’s Scope Ruling Req.* at 9. They are used to fasten objects to masonry. *Id.* (“Strike Pin Anchors are used to fasten an object to a masonry wall, floor or

ceiling.”); *see also* Midwest’s (k)(2) Cmts. at 2; Mid Continent’s (k)(2) Cmts. at 4, 7, 9. Also, the ultimate use involves the expansion of the anchor to fasten rather than the simple fastening of a nail. *Id.*

Commerce also appears to have ignored evidence that strike pin anchors are advertised and marketed differently than nails. *See Remand Results* at 18–19 (concluding that strike pin anchors and nails are advertised in a similar manner because record evidence demonstrates that both can be advertised online); *but see* Midwest’s (k)(2) Cmts. at 4–5, Exs. 3, 4 (demonstrating that although anchors and nails “fall within the general fastener category in the hardware section of retail outlets[,]” “anchors are typically treated as separate and distinct articles of commerce by fastener distributors and retailers.”).

Commerce’s proposal to instruct CBP that only the pin component of Midwest’s strike pin anchor, and no other components, is dutiable under the *PRC Nails Order*, *see Remand Results* at 10–11, highlights the flaw in Commerce’s reasoning. Commerce explains that it “may instruct CBP to assess duties on only a portion of a unitary, assembled article[.]” *See Remand Results* at 22–23 & n.77 (citing CBP Clarification – Correct Use of the ADD/CVD Special Value Fields, Multiple Entry Line and Set Provisions, CSMS #18–000379 (June 6, 2018) available at https://csms.cbp.gov/docs/23578_922344688/Special_Value_Memo_Attachment.pdf last visited Feb. 28, 2020) (“CBP Clarification”). The CBP Clarification, however, provides no support for the proposition that Commerce can identify a component in a distinct unitary article and apply an antidumping duty to that component. To the contrary, the CBP Clarification explains how to account for ADD on the entry summary when the scope of an order includes components of a product. CBP Clarification, Example 1. The scope of the order in this case does not reach nails included within other products. The scope reaches nails, whether one piece, or constructed of two or more pieces. Either the entire strike pin anchor is a nail, or it is not.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce’s remand redetermination is further remanded for reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days thereafter to file their replies to comments on the remand redetermination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

Dated: March 4, 2020

New York, New York

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

Slip Op. 20–29

WIRTGEN AMERICA, INC. Plaintiff, v. UNITED STATES, et al. Defendants.

Court No. 20–00027

Before: Timothy C. Stanceu, Chief Judge

[Denying defendants’ motion to dismiss for lack of subject matter jurisdiction and the U.S. International Trade Commission’s motion to intervene as a party defendant]

Dated: March 4, 2020

Daniel E. Yonan, Sterne, Kessler, Goldstein & Fox, PLLC, New York, New York, for plaintiff. With him on the brief were *Dallin Glenn*, *Donald R. Banowitz*, and *Kristina Caggiano Kelly*.

Guy R. Eddon, Trial Attorney and *Patricia M. McCarthy*, Assistant Director, U.S. Department of Justice, Commercial Litigation Branch, Civil Division, New York, New York, for the United States. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Assistant Director, and *Marcella Powell*, *Jason M. Kenner*, and *Edward F. Kenny*, Senior Trial Counsel.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Wirtgen America, Inc. (“Wirtgen”) brought this action on January 30, 2020 to contest the exclusion from entry of its merchandise, which consists of six road-milling machines that were imported on three recent entries. U.S. Customs and Border Protection (“Customs” or “CBP”), relying upon an exclusion order of the United States International Trade Commission (the “ITC” or the “Commission”), has excluded the six machines from entry for potential patent infringement. Compl. ¶¶ 93, 95, 99 (Jan. 30, 2020), ECF No. 7.

Before the court are two motions. Defendants move to dismiss this action for lack of subject matter jurisdiction. Defs.’ Mot. to Dismiss (Feb. 12, 2020), ECF No. 27 (“Defs.’ Mot.”). The ITC moves for defendant-intervenor status. Mot. of the U.S. Int’l Trade Comm’n for Leave to Intervene as a Party Def. (Feb. 5, 2020), ECF No. 19 (“ITC’s Mot.”). For the reasons set forth below, the court denies both motions.

I. BACKGROUND

The facts pertinent to the issue of subject matter jurisdiction, summarized below, are as set forth in the complaint and attachments thereto and have not been contested by defendants.

A. The Excluded Merchandise at Issue in this Litigation

Wirtgen is the importer and exclusive U.S. distributor for products manufactured by the Wirtgen Group companies of Germany. Among the products Wirtgen imports and distributes are Wirtgen-branded road-milling machines. Compl. ¶ 9. The six road-milling machines now being held by Customs following detention and exclusion from entry are the subject of this litigation. Five of the machines were imported at the port of Brunswick, Georgia on entries made on November 18 and 21, 2019. Summons (Jan. 30, 2020), ECF No. 1. A sixth machine was entered at the port of Baltimore, Maryland on December 3, 2019. Summons (Jan. 30, 2020), ECF No. 2. After detentions, Customs excluded the five machines entered at Brunswick on December 18, 2019 and excluded the machine entered at Baltimore on December 27, 2019. Compl. ¶¶ 105, 117.

B. The Section 337 Investigation

Three models of Wirtgen's road-milling machines (Model Nos. W 100 CFi, W 120 CFi and W 130 CFi; collectively, the "1810 Series" machines) were subject to an investigation conducted by the ITC under section 337 of the Tariff Act of 1930 ("section 337"), 19 U.S.C. § 1337, into alleged patent infringement. The investigation, initiated in November 2017 upon a complaint filed by Caterpillar, Inc. and Caterpillar Paving Products, Inc. (collectively, "Caterpillar"), culminated in the ITC's finding of a violation of section 337 and resulted in the issuance of a Limited Exclusion Order ("LEO") and certain cease and desist orders barring Wirtgen from importing the 1810 Series machines into the United States. *See Certain Road Construction Machines and Components Thereof; Notice of Commission Final Determination Finding a Section 337 Violation; Issuance of a Limited Exclusion Order and a Cease and Desist Order; Termination of the Investigation*, USITC Inv. No. 337-TA-1088 (June 27, 2019), available at 2019 WL 2724105 ("*ITC Final Determination*"). Wirtgen has appealed the ITC's final determination to the Court of Appeals for the Federal Circuit. Compl. ¶ 34.

In its section 337 investigation, the ITC determined that the 1810 Series machines infringed claim 19 of U.S. Patent No. 7,140,693 (the "693 patent"). *Id.* ¶¶ 30–33.

C. The Redesigned 1810 Series Machines

On February 14, 2019, the administrative law judge (“ALJ”) conducting the section 337 investigation issued a Final Initial Determination that found all asserted claims of the ’693 patent, other than claim 19, to be invalid and found a violation of section 337 based on a finding that the 1810 Series machines infringed claim 19 of that patent. *Id.* ¶¶ 29–30. “The Commission affirmed the administrative law judge’s determination in relevant part and issued the recommended remedies against Wirtgen’s 1810 Series machines.” *Id.* ¶ 33.

In the Final Initial Determination, the administrative law judge “found that the swing leg on these machines rotates by an actuator rotating a portion of the lifting column on which the swing leg is mounted, as recited in claim 19.” *Id.* ¶ 31. During the pendency of proceedings before the ITC, Wirtgen redesigned the “swing leg” mechanism of 1810 Series machines with the objective of avoiding infringement of claim 19 of the ’693 patent. *Id.* ¶¶ 36–40, 45–58. The administrative law judge declined to determine whether or not Wirtgen’s redesigned road-milling machines (the “Redesigned 1810 Series” machines) infringed the ’693 patent, concluding that these machines “are outside the scope of [the] investigation” and “not ripe.” *Id.* ¶¶ 42–43. “The Commission adopted this portion of the ALJ’s determination, making it final.” *Id.* ¶ 44.

Without mentioning the Redesigned 1810 Series machines, the Limited Exclusion Order excluded from entry “[r]oad construction machines . . . that infringe claim 19 of the ’693 patent . . .” Limited Exclusion Order ¶ 1, USITC Inv. No. 337-TA-1088 (June 27, 2019) (“LEO”), Statement of Undisputed Material Facts in Support of Wirtgen’s Mot. for Summ. J. Ex. 6 (Feb. 24, 2020), ECF No. 44.

Wirtgen imported several Redesigned 1810 Series machines between September 9, 2019 and December 13, 2019 that Customs permitted to enter the United States. Compl. ¶¶ 88, 91. Nevertheless, on November 18 and 21, 2019, Customs detained five Redesigned 1810 Series machines at the port of Brunswick, *id.* ¶ 95, and on December 3, 2019, detained one Redesigned 1810 Series machine at the port of Baltimore, Maryland. *Id.* ¶ 99. The exclusions from entry of all six Redesigned 1810 Series machines followed these detentions. *Id.* ¶¶ 105, 117.

D. Protests, Protest Denials, and Summonses

On December 24, 2019, Wirtgen filed with Customs a protest of the exclusions of the machines entered at Brunswick, Georgia (Entry Nos. SCS-73730948 and SCS-75549544). *Id.* ¶ 119. Customs denied

this protest on January 21, 2020. *Id.* ¶ 128. On December 31, 2019, Wirtgen filed a protest of the exclusion of the machine entered at Baltimore (Entry No. SCS-77482413). *Id.* ¶ 125. Customs denied this protest on January 27, 2020. *Id.* ¶ 129.

On a summons filed in this Court on January 30, 2020, Wirtgen contested the denial of the first protest. Summons (Jan. 30, 2020), ECF No. 1. A second summons, filed on the same day, contested the denial of the second protest. Summons (Jan. 30, 2020), ECF No. 2.

E. Related Litigation

On July 19, 2017, prior to the filing of Caterpillar’s complaint under section 337, Wirtgen filed a complaint with the Commission alleging violations of section 337 caused by the importation of certain of Caterpillar’s road construction machines. Defs.’ Mot. 5. The ITC initiated a section 337 investigation against Caterpillar, Inv. No. 337-TA-1067, that also resulted in a limited exclusion order. *Id.* Both limited exclusion orders are before the Court of Appeals for the Federal Circuit in a consolidated appeal, Case No. 19–2306. *Id.*

On December 13, 2019, the Patent Trial and Appeal Board (“PTAB”), in response to a petition by Wirtgen, issued a Final Written Decision determining that all challenged claims, including claim 19, of the ’693 patent are unpatentable as obvious. Compl. ¶ 35.

Before commencing this case with the filing of two summonses on January 30, 2020, Wirtgen sought dialogue with Customs to establish that the Redesigned 1810 Series machines did not violate claim 19 of the ’693 patent. Wirtgen’s Opp’n to Defs.’ Mot. to Dismiss 6–8 (Feb. 18, 2020), ECF No. 37. On January 16, 2020, the Commission initiated a “modification proceeding.” ITC Inv. No. 337-TA-1088M; *see* 85 Fed. Reg. 3944 (Int’l Trade Comm. Jan. 23, 2020). The proceeding is ongoing. Defs.’ Mot. 8.

Wirtgen commenced an action in the District Court for the District of Columbia, *Wirtgen Am., Inc. v. United States*, Case No. 20-cv-00195, alleging that the exclusions of the Redesigned 1810 Series machines by Customs violated the Administrative Procedure Act, the Appointments Clause of the U.S. Constitution, and the right to procedural due process. Compl. ¶ 7.

II. DISCUSSION

A. Subject Matter Jurisdiction

Plaintiff asserts jurisdiction according to 28 U.S.C. § 1581(a) and (i). *Id.* ¶ 6. Jurisdiction does not exist under subsection (i) when jurisdiction according to another subsection of § 1581 is available unless the remedy provided by that other subsection would be “mani-

festly inadequate.” *Int’l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1332 (Fed. Cir. 2015) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). The court, therefore, considers whether jurisdiction exists according to 28 U.S.C. § 1581(a), under which the Court of International Trade has exclusive jurisdiction of an action to contest the denial of a protest under section 515 of the Tariff Act, 19 U.S.C. § 1515. If the court determines jurisdiction exists according to 28 U.S.C. § 1581(a), that determination also resolves the issue of the Commission’s proposed intervention. As provided in the Customs Courts Act, 28 U.S.C. § 2631(j)(1)(A), “no person may intervene in a civil action under section 515 . . . of the Tariff Act of 1930.”

Jurisdiction under 28 U.S.C. § 1581(a) requires a timely protest of a decision of Customs that may be protested under 19 U.S.C. § 1514(a), a denial of that protest, *see* 19 U.S.C. § 1515, and the timely filing of a summons to commence an action to contest the denial of the protest. 19 U.S.C. § 1514(a); 28 U.S.C. §§ 2632(b), 2636(a). Based on the jurisdictional facts that are pled in the complaint and uncontested by defendants in moving to dismiss, the court concludes that subject matter jurisdiction of this action exists according to 28 U.S.C. § 1581(a). On that basis, the court denies both of the motions pending before it.

1. Wirtgen Protested a Decision of Customs to Exclude the Merchandise from Entry

As a general matter, the exclusion of merchandise from entry is a decision that may be protested. 19 U.S.C. §§ 1499, 1514(a)(4). But because protests may be filed only to contest “decisions of *the Customs Service*,” *id.* § 1514(a) (emphasis added), a decision may not be protested when Customs is merely taking action to effectuate a decision of another agency. *See Mitsubishi Elecs. America, Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994).

Defendants argue that “[t]his case should be dismissed because there is no right to review in this Court for challenges to CBP’s enforcement of exclusion orders that solely implement determinations of the ITC under section 1337.” Defs.’ Reply Mem. in Supp. of their Mot. to Dismiss 2 (Feb. 24, 2020), ECF No. 39 (“Defs.’ Reply”). Defendants add that “CBP’s actions were wholly derivative of the ITC and, therefore, Wirtgen’s grievance is with the Commission, not with Customs.” *Id.*

Defendants are correct that a Customs action that solely implements an ITC determination under 19 U.S.C. § 1337 may not be protested. But according to the uncontested facts as pled in the

complaint, the exclusions giving rise to this dispute do not fall into this category and, contrary to defendants' characterization, are not "wholly derivative of the ITC."

While ordering the exclusion from entry of "[r]oad construction machines . . . that infringe claim 19 of the '693 patent . . .," LEO ¶ 1, the Limited Exclusion Order does not on its face address the Redesigned 1810 Series machines.¹ Moreover, Wirtgen alleges in its complaint that the Commission adopted the portion of the decision of the administrative law judge that declined to decide the question of whether the Redesigned 1810 Series machines infringe claim 19, on the ground that the redesigned machines were not within the scope of the section 337 investigation. Compl. ¶¶ 42–44. Thus, according to the facts Wirtgen alleges, the ITC did not direct Customs to exclude the six Redesigned 1810 Series machines from entry, and, accordingly, the decision to exclude the six Redesigned 1810 Series machines was made by Customs. That decision, and not the Limited Exclusion Order, is contested in this litigation. *See* Compl. ¶ 172.

Relying on the notices of exclusion Customs sent to Wirtgen, defendants contend that in excluding the six redesigned machines from entry, "CBP merely effectuated the Commission's administrative practice in excluding Wirtgen's redesigned merchandise. This practice is reflected by the administrative documents in this case." Defs.' Reply 9. In the December 18, 2019 notice of exclusion, which defendants cite specifically, Customs interpreted the Limited Exclusion Order as "not limited to the specific products that were before the Commission during the investigation, but instead extends to all products, including any new or redesigned products . . . that infringe the relevant intellectual property." Compl. Ex. B at 2 (December 18, 2019 notice informing Wirtgen of the exclusion of the five machines entered at Brunswick, Georgia (citing *Certain Optical Disk Controller Chips and Chipsets*, Inv. No. 337-TA-506, Comm'n Op. at 56–57, USITC Pub. 3935 (July 2007))).

Defendants' argument is misguided. The reasoning by which Customs decided to exclude the merchandise from entry is not relevant to the question of whether subject matter jurisdiction exists in this case. Here, Wirtgen contests the decision by Customs to exclude that mer-

¹ The Limited Exclusion Order ("LEO") provided for Customs to allow importation of machines "potentially subject to this Order" upon satisfactory certification that such machines are not excluded by the LEO. Limited Exclusion Order ¶ 4, USITC Inv. No. 337-TA-1088 (June 27, 2019), Statement of Undisputed Material Facts in Support of Wirtgen's Mot. for Summ. J. Ex. 6 (Feb. 24, 2020), ECF No. 44. Customs noted for Wirtgen its practice of not accepting such a certification "absent a determination by CBP or the Commission that the article is not subject to the exclusion order." Compl., Ex. B at 5 (Jan. 30, 2020), ECF No. 7 (notice of exclusion).

chandise, an issue that will be adjudicated *de novo* by the court rather than according to the grounds upon which Customs made the exclusions. See 28 U.S.C. § 2640(a)(1). The question pertinent to subject matter jurisdiction is whether Customs acted on its own to exclude the merchandise or was directed by the ITC to do so. As discussed above, plaintiff has pled facts according to which Customs excluded the merchandise without being directed to do so by the Commission.

Concerning “administrative documents,” defendants also rely on a Customs headquarters ruling addressing Wirtgen’s protest, HQ H308232 (Jan. 21, 2020), Compl. Ex. G, and on a December 12, 2019 letter to Customs from the Commission’s Assistant General Counsel for Section 337, which responded to certain questions Customs had posed related to the protest proceeding, Defs.’ Reply Ex. 1 (Letter of Dec. 12, 2019 from Megan M. Valentine to Charles Steuart, Chief, IPR & Restricted Merchandise Branch, U.S. Customs and Border Protection). Defs.’ Reply 8–9. These documents also are irrelevant to the question of jurisdiction. The letter from the ITC’s Assistant General Counsel is not a decision of the Commission, and even if it were, it still would be irrelevant because it does not direct Customs to exclude the merchandise at issue. The January 21, 2020 headquarters ruling states the reasoning by which Customs denied the protest (concluding that the exclusion of the merchandise from entry was not a protestable decision). Just as the reasons why Customs excluded the merchandise are not relevant to the issue of jurisdiction, neither are the reasons why Customs denied the protest. Customs headquarters ruling HQ H308232, therefore, does not bear on the question of subject matter jurisdiction over this action.

2. The Exception in 19 U.S.C. § 1514(a)(4) Does Not Apply in this Case

The Tariff Act provides, in pertinent part, that a protest may be filed to contest “decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—. . . the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, *except a determination appealable under section 1337 of this title* [section 337, 19 U.S.C. § 1337].” 19 U.S.C. § 1514(a)(4) (emphasis added). The question as to jurisdiction, therefore, is whether the decisions made on December 17, 2019 (as to the five machines entered at Brunswick) and December 27, 2019 (as to the machine entered at Baltimore) to exclude the six Redesigned 1810 Series machines from entry were “determinations” that were “appealable” under section 337.

Congress made several categories of determinations appealable under section 337. All are appealable to the Court of Appeals for the Federal Circuit. Specifically, under 19 U.S.C. § 1337(c), “[a]ny person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g)” of § 1337 “may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review” The merchandise exclusions at issue in this litigation do not fall within any of those categories.

As is pertinent here, subsection (d) of § 1337 provides for a limited (in subparagraph (1)) or a general (in subparagraph (2)) order for the exclusion from entry into the United States of “the articles concerned” if the Commission “determines, as a result of an investigation under this section, that there is a violation of this section.” Wirtgen is not contesting the Limited Exclusion Order in this action. Rather, it claims that Customs excluded merchandise to which the LEO did not apply. Compl. ¶ 172 (“Customs’ exclusion of the Redesigned 1810 Series machines is wrongful because these products do not infringe claim 19 of the ’693 patent, and are therefore outside the scope of the LEO.”). It alleges facts in support of that claim. *See, e.g., id.* ¶¶ 36–40, 45–58 (alleging that Wirtgen redesigned the 1810 Series machines so that they would not infringe claim 19), ¶¶ 69–82 (alleging facts in support of claim of non-infringement of claim 19). Because a claim that Customs wrongfully excluded the merchandise giving rise to this dispute is not the same as a claim that the Limited Exclusion Order is unlawful, subsection (d) of 19 U.S.C. § 1337 is not a basis upon which the court may dismiss this action for lack of jurisdiction. Nor is subsection (e), (f) or (g) a basis for dismissal.²

Relying on 19 U.S.C. § 1514(a)(4), defendants argue that this Court lacks jurisdiction because “Congress expressly provided that an exclusion *based on* a section 337 determination is not protestable.” Defs.’ Mot. 11 (emphasis added). Similarly, defendants argue that the exception to protestability in 19 U.S.C. § 1514(a)(4) applies to “exclusions that were made *because of* a ‘determination appealable under’ 19 U.S.C. § 1337.” Defs.’ Reply 4 (emphasis added). They argue, similarly, that section 337 “explicitly divests this Court of jurisdiction by channeling *all* review of section 337 matters to the Commission and the [Court of Appeals for the] Federal Circuit.” Defs.’ Mot. 18.

² Subsection (e) is not pertinent here because it applies to preliminary exclusions of articles from entry during the pendency of a section 337 investigation. Subsection (f) applies to a cease and desist order, which is not being contested here. Finally, subsection (g) is inapplicable because it applies in the event of a default by a person against whom a complaint is filed under section 337.

These arguments misstate § 1514(a)(4). The provision makes protestable a “decision” by Customs to exclude merchandise “under any provision of the customs laws, except a *determination appealable* under section 1337” 19 U.S.C. § 1514(a)(4) (emphasis added). Defendants’ reading, which does not give full effect to the word “appealable,” impermissibly would enlarge the exception to encompass any determination that would not have been made *but for* a section 337 exclusion order. Had Congress intended to create a broader exception for any Customs determination on section 337 “matters,” or for any decision Customs makes “because of” a section 337 exclusion order, or concludes is “based on a section 337 determination,” Congress would have so provided. Moreover, it is a canon of statutory construction that exceptions to a generally-expressed principle are to be read narrowly. *See Comm’r v. Clark*, 489 U.S. 726, 739 (1989).

In further support of their position, defendants rely on certain legislative history of the Customs Courts Act of 1980, which enacted 19 U.S.C. § 1514(a)(4). Defendants point out that “[i]n technical comments made part of the Commission’s statement before Congress on the proposed legislation, the Commission proposed adding ‘except actions otherwise appealable under section 337 of the Tariff Act of 1930’ after the phrase ‘any provisions of the customs laws.’” Defs.’ Reply 6 (citing *Customs Courts Act of 1979: Hearing on S. 1654 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 96th Cong. 25 (1979) (technical comments of the U.S. International Trade Comm’n), reprinted in COMM. ON THE JUDICIARY, 96TH CONG., LEGISLATIVE HISTORY OF THE CUSTOMS COURTS ACT OF 1980, VOL. 2 at 25. Defendants add that “[t]he Commission specified the reason for this proposed change was that ‘[e]xclusion of merchandise from entry is a remedy under section 337. Section 337 determinations are reviewable exclusively by the U.S. Court of Customs and Patent Appeals.’”³ *Id.*

The technical amendment sought by the ITC, as reflected in the statute as enacted, does not establish the premise of the government’s argument that jurisdiction is lacking over this case. The exception Congress incorporated into 19 U.S.C. § 1514(a)(4) effectuates the

³ The pertinent text of the U.S. International Trade Commission’s technical comments was as follows:

2. Page 5, lines 5 and 6: After the phrase “any provisions of the customs laws” on line 6, add, “except actions otherwise appealable under section 337 of the Tariff Act of 1930.”

Reason for the Change.—Exclusion of merchandise from entry is a remedy under section 337. Section 337 determinations are reviewable exclusively by the U.S. Court of Customs and Patent Appeals.

Customs Courts Act of 1979: Hearing on S. 1654 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 96th Cong. 25 (1979) (technical comments of the U.S. International Trade Comm’n), reprinted in COMM. ON THE JUDICIARY, 96TH CONG., LEGISLATIVE HISTORY OF THE CUSTOMS COURTS ACT OF 1980, VOL. 2 at 25.

jurisdictional limitation for which the ITC identified a need in its comments, i.e., that “[s]ection 337 determinations,” including specifically exclusions from entry that are a remedy under section 337, “are reviewable exclusively by the U.S. Court of Customs and Patent Appeals.” According to facts pled in the complaint, which defendants do not contest, the exclusions from entry giving rise to this action were not a remedy effectuated under section 337 but instead were a remedy effectuated by Customs without an underlying directive from the Commission.

In summary, according to the uncontested facts, nothing in subsection (c) of § 1337 made appealable to the Court of Appeals for the Federal Circuit the decision by Customs to exclude from entry the six Redesigned 1810 Series machines. Therefore, the exception in 19 U.S.C. § 1514(a)(4) does not apply, and that decision was one that could be protested.

Arguing that “Congress has provided a specific path for importers to challenge the Commission’s exclusion orders and to establish that redesigned products no longer violate an exclusion order,” defendants characterize challenges to exclusions such as this action as “backdoor challenges to a Commission determination.” Defs.’ Mot. 15. This argument is flawed in two respects. First, as discussed above, Wirtgen is not raising before this Court a challenge to the Limited Exclusion Order or the findings upon which the LEO was issued. *See* Compl. ¶ 172. Second, in suggesting that Wirtgen has a path to establish before the Commission that its “redesigned products no longer violate an exclusion order” (an apparent reference to the “modification” procedures of 19 U.S.C. § 1337(k)(2)), defendants’ argument, by postulating that entry of the Redesigned 1810 Series machines would violate the Limited Exclusion Order, delves into the merits by presuming the answer to the issue in dispute.

Defendants maintain, further, that the Customs Regulations render the exclusions at issue non-protestable and that Wirtgen failed to challenge the lawfulness of those regulations. Defs.’ Mot. 17 (quoting 19 C.F.R. § 174.11). This argument misinterprets the Customs Regulations and presumes, invalidly, that those regulations somehow could alter this Court’s jurisdiction. Contrary to defendants’ interpretation, the Customs Regulations mirror the statute in making “subject to protest” exclusions of merchandise “under any provision of the customs laws except a determination that may be appealed under 19 U.S.C. 1337.” 19 C.F.R. § 174.11. Had these regulations attempted to broaden the exception in 19 U.S.C. § 1514(a)(4), they would be ruled invalid, as no agency regulation may enlarge or limit the jurisdiction

Congress grants to this or any Article III court. *See Carlyle Towers Condominium Ass'n v. F.D.I.C.*, 170 F.3d 301, 310 (2d Cir. 1999) (“*Carlyle Towers*”) (“[I]t is ‘axiomatic’ that agencies can neither grant nor curtail federal court jurisdiction.” (quoting *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995))).

3. This Action Involves Two Protests that Were “Denied” for Purposes of the Tariff Act

Wirtgen’s summonses and complaint indicate that Customs denied the protest relating to the Brunswick machines on January 21, 2020 and denied the protest relating to the Baltimore machine on January 27, 2020, each on the basis that “the protest does not raise a protestable issue.” Summonses; Compl. ¶¶ 128–130 (internal brackets omitted).⁴ The protest denials were followed by timely summonses.⁵

4. Congress Did Not “Channel” this Litigation to the Court of Appeals for the Federal Circuit or to the Commission

Defendants’ argument that review of exclusions such as those challenged here are “channeled” to the Commission is also unconvincing. The judicial review scheme established by 19 U.S.C. § 1514(a)(4), when read in conjunction with section 337, provides for judicial review of exclusions from entry related to section 337 in one of two Article III courts, the Court of Appeals for the Federal Circuit or this Court. Defendants’ interpretation of the mechanisms for review would place review of some exclusion determinations of one agency (Customs) in another non-judicial body, the ITC, contrary to the general intent of Congress that decisions Customs makes to exclude merchandise from entry would be reviewable in an Article III court.

⁴ As a general matter, it is possible for Customs to “return” a protest but also indicate that the act of returning it is not a “denial.” *See Zojirushi Am. Corp. v. United States*, 40 CIT ___, ___, 180 F. Supp. 3d 1354, 1365–67 (2016) (protest erroneously returned by Customs as non-protestable held not to be “denied” pursuant to 19 U.S.C. § 1515 but eligible for deemed denial following filing of a request for accelerated disposition under 19 U.S.C. § 1514(b)). In this case, Customs decided that the protests were to be “denied” *because* the decision involved was, according to Customs, not one that could be protested. Compl. Ex. G at 2. The factual situation giving rise to *Zojirushi America Corp.*, therefore, did not exist in this case.

Even if the January 21 and 27, 2020 actions by Customs had not qualified as protest denials, another provision of the Tariff Act would have effected a “deemed” denial of Wirtgen’s two protests. By operation of section 499(c)(5) of the Tariff Act, protests pending before Customs regarding decisions to exclude merchandise that are not allowed or denied (in whole or in part) “before the 30th day after the day on which the protest was filed shall be treated as having been denied on such 30th day.” 19 U.S.C. § 1499(c)(5) (emphasis added); *see* 19 C.F.R. § 174.21(b). If the Customs “denials” had not been actual denials, the protest as to the Brunswick entries would have been deemed denied as of 12:01 a.m. on January 23, 2020 by operation of 19 U.S.C. § 1499(c)(5), and, similarly, the protest regarding exclusion of the Baltimore machine would have been deemed denied as of 12:01 a.m. on January 30, 2020.

⁵ *See* 28 U.S.C. § 2636(a) (imposing 180-day time limit on commencement of an action to contest a protest denial).

In support of their “channeling” argument, defendants rely on *Elgin v. Dept. of Treasury*, 567 U.S. 1 (2012) and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Defs.’ Mot. 18. These cases, each of which held that the jurisdiction sought was not available in a U.S. district court, are not controlling on the jurisdictional issue presented here. *Elgin* held that the statutory scheme for judicial review in the Civil Service Reform Act of 1978, under which initial review of an adverse employment action is conducted by the Merit Systems Protection Board, with judicial review vested in the Court of Appeals for the Federal Circuit, precluded an action in a district court seeking judicial review of a constitutional claim. 567 U.S. at 23. *Thunder Basin Coal Co.* held that the statutory scheme for review Congress established for administrative actions taken under the Federal Mine Safety and Health Amendments Act of 1977, which provided for post-administrative judicial review in federal appellate courts, prevented a district court from exercising subject matter jurisdiction over a pre-enforcement challenge to the Act. 510 U.S. at 218. Both cases turned on whether congressional intent to place initial review in an administrative agency, with judicial review in a particular federal court or courts, was “fairly discernible in the statutory scheme.” *Id.* at 207 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

Here, it is not discernible from the statutory scheme that Congress intended to channel initial review of every section-337-related exclusion determination of Customs to the ITC, with appeal therefrom to the Court of Appeals for the Federal Circuit. Instead, Congress established a bifurcated system of judicial review in 19 U.S.C. §§ 1337(c) and 1514(a)(4). Only those determinations Congress, in section 337, made directly appealable from the Commission to the Court of Appeals for the Federal Circuit are ineligible for protest. Those made by Customs on its own initiative that do not fall within the categories of ITC actions eligible for direct review in the Court of Appeals for the Federal Circuit are to be first adjudicated in the Court of International Trade before review is available in the appellate court.

Defendants argue that adjudication of an action such as this one in the Court of International Trade is inappropriate because it does not allow for participation by the patent holder or the ITC, neither of whom may intervene. Defs.’ Mot. 22. At most, this is an argument for what Congress *could* have done, or what defendants believe Congress *should* have done, in crafting a scheme for judicial review. The court instead must decide the jurisdictional question on the basis of what Congress actually did. Moreover, defendants’ argument is counter to

the analysis of the Court of Appeals for the Federal Circuit in *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1357 (Fed. Cir. 2006) (abrogated on other grounds by *Impression Prods. v. Lexmark Int'l, Inc.*, 581 U.S., 137 S.Ct. 1523 (2017)), in which patent holder Fuji Photo Film Co., Ltd. (“Fuji”) argued that it should have been permitted to intervene or be joined as a necessary party and in which the Court of Appeals responded that “[i]n protests under section 515 [19 U.S.C. § 1515], Congress placed the responsibility of protecting Fuji’s patent rights upon the government.”

The Commission gives as a reason for intervention its desire to contest subject matter jurisdiction, ITC’s Mot. 1, and “to defend the scope and operation of its orders,” *id.* at 4. In its motion to intervene, the ITC presents arguments against subject matter jurisdiction that essentially are the same as those defendants raised. The court rejects them for the reasons stated above.

One of the Commission’s arguments, which is similar to the argument defendants advanced concerning Commission practice, maintains that “the Commission, and thereby Customs, has consistently interpreted exclusion orders for decades to cover redesigns of adjudged infringers” and that “[t]he mere fact that a product is new does not allow it to escape the exclusion order.” *Id.* at 3. According to the ITC, “Wirtgen’s interpretation of the scope of the LEO would allow adjudged infringers to easily circumvent the Commission’s remedial orders,” citing for support *Hyundai Elecs. Indus. Corp. v. Int’l Trade Comm’n*, 899 F.2d 1204, 1210 (Fed. Cir. 1990), *Eaton Corp. v. United States*, 29 CIT 1149, 1163–64, 395 F. Supp. 2d 1314, 1326 (2005), and “decades of Commission decisions.” *Id.* at 4. The Commission adds that “Wirtgen’s claims are premised on the wrong contention that its machines are outside the scope of the LEO because they were not adjudicated during the investigation and determined to be outside the scope of the investigation (due to lack of importation at the time of the investigation).” *Id.* The Commission summarizes its argument by stating that “Wirtgen’s interpretation of the scope of the LEO is inconsistent with decades of Commission practice and Federal Circuit precedent and would allow adjudged infringers to easily circumvent the Commission’s remedial orders” and that “[t]he scope of the Commission’s order is an issue that requires the Commission’s participation.” *Id.* at 11.

The Commission’s jurisdictional argument is, in essence, that subject matter jurisdiction is lacking under 28 U.S.C. § 1581(a) because the Limited Exclusion Order must be interpreted to apply to the Redesigned 1810 Series machines—not because the Commission determined that these redesigned machines infringe claim 19 of the ’693

patent but because the Commission did *not* find that they did *not* infringe. *See id.* (“There was no finding in the underlying investigation that the redesigned products do not infringe claim 19 of the ’693 patent . . .”). According to such an argument, the court is to presume from Commission practice that the ITC already had decided that the Redesigned 1810 Series machines must be excluded from entry as of the time Wirtgen commenced this action, and Customs was merely effectuating that decision.

The court sees no merit in the Commission’s argument that the Limited Exclusion Order must be interpreted to exclude the Redesigned 1810 Series machines, for two reasons. First, the underlying premise of this argument is contrary to section 337. Wirtgen alleges in its complaint that the Commission expressly decided that the Redesigned 1810 Series machines were not subject to the section 337 investigation. Comp. ¶¶ 43–44. This is an alleged fact the Commission does not dispute in arguing that jurisdiction is lacking. If the ITC expressly found that the Redesigned 1810 Series machines were outside the scope of the section 337 investigation, as Wirtgen alleges, then the redesigned machines could not have been the “articles concerned,” as that term is used in 19 U.S.C. § 1337(d), and therefore they could not have been the articles over which the Commission had authority to impose an exclusion order. *See* 19 U.S.C. § 1337(d) (providing that “[i]f the Commission determines, *as a result of an investigation under this section*, that there is a violation of this section, it shall direct” the exclusion “from entry into the United States” of “*the articles concerned*” (emphasis added)). Second, the judicial decisions upon which the Commission relies, *Hyundai Elecs. Indus. Corp.* and *Eaton Corp.*, do not resolve the jurisdictional question before the court.⁶ The ITC’s reliance on “decades” of Commission practice is similarly unavailing. The issue of subject matter jurisdiction must be

⁶ *Hyundai Elecs. Indus. Corp. v. Int’l Trade Comm.*, 899 F.2d 1204 (Fed. Cir. 1990) involved a challenge to an ITC remedy involving a certification procedure directed to secondary products. It was not a challenge to a determination that Customs itself made to exclude merchandise from entry. Defendants and the Commission rely on *Hyundai Elecs. Indus. Corp.* for the principle that once the ITC has found a violation of section 337, the burden shifts to the alleged infringer to demonstrate that redesigned articles do not infringe. *See, e.g.,* Defs.’ Reply Mem. in Supp. of their Mot. to Dismiss 10 (Feb. 24, 2020), ECF No. 39. Because it is indisputable that a party contesting an exclusion of merchandise before the Court of International Trade has the burden of establishing admissibility, this principle does not establish a lack of subject matter jurisdiction in this case.

In *Eaton Corp. v. United States*, 29 CIT 1149, 395 F. Supp. 2d 1314 (2005), this Court issued a preliminary injunction enjoining the government from permitting entry of certain merchandise “that has been or still is within the purview of the investigation of the United States International Trade Commission pursuant to 19 U.S.C. § 1337 . . .” *Id.* at 1167–68, 395 F. Supp. 2d at 1329. Concerning subject matter jurisdiction, the opinion states that “[a]t this stage of the proceedings, the court cannot, and therefore does not, conclude that it does not have jurisdiction pursuant to section 1581(i) of Title 28, U.S.C.” *Id.* at 1162, 395 F. Supp. 2d at 1325.

decided according to the correct interpretation of 19 U.S.C. § 1514(a)(4) as it relates to 19 U.S.C. § 1337(c). The Commission's practice cannot alter the jurisdiction of Article III courts. *See Carlyle Towers*, 170 F.3d at 310.

Nor is it correct for the Commission to suggest or imply that by bringing this action Wirtgen is attempting to circumvent a remedial order of the Commission. Instead, Wirtgen is pursuing an avenue of judicial review Congress expressly provided in 19 U.S.C. §§ 1499 and 1515, and 28 U.S.C. § 1581(a), with the objective of obtaining release of the merchandise that it alleges that Customs, not the Commission, excluded from entry.

Finally, the Commission argues that "Wirtgen failed to exhaust the available administrative remedies before seeking judicial review of the scope of the Commission's LEO." ITC's Mot. 12 (identifying various procedures that Wirtgen could have pursued administratively before the Commission and Customs). This argument is meritless because Wirtgen did not fail to exhaust its administrative remedies. Wirtgen did not fail to take the administrative steps that are required for purposes of obtaining jurisdiction according to 19 U.S.C. § 1515 and 28 U.S.C. § 1581(a). Those steps are the jurisdictional prerequisites the court has identified: the filing of a timely protest of a protestable decision and the obtaining of a protest denial by Customs.

One of the "administrative" remedies the Commission cites is the pursuing of a "modification" of the LEO through a proceeding conducted according to 19 U.S.C. § 1337(k), a proceeding that the Commission is now conducting. ITC's Mot. 12. The gist of the Commission's argument is that Wirtgen cannot now contest, before this Court, the specific merchandise exclusions at issue in this case and must await the results of the Commission's modification proceeding. This argument is unconvincing.

The mere existence of an ongoing administrative modification proceeding does not place this action within the section 337 exception to protestability that Congress placed in 19 U.S.C. § 1514(a)(4). An adverse decision in the modification proceeding potentially would be appealable to the Court of Appeals for the Federal Circuit. *See Allied Corp. v. U.S. Int'l Trade Comm'n*, 850 F.2d 1573, 1580 (Fed. Cir. 1988). But because jurisdictional facts are ascertained as of the time an action is commenced, *see Ford Motor Co. v. United States*, 688 F.3d 1319, 1324 (Fed. Cir. 2012), the possibility that Wirtgen might be in a position to appeal the outcome of an administrative proceeding at some time in the future does not defeat subject matter jurisdiction over this action. At the time Wirtgen commenced its action, there was

no final determination related to a modification proceeding at the ITC that was “appealable” according to 19 U.S.C. § 1514(a)(4).

Moreover, Congress intended that decisions by Customs to exclude merchandise would receive an expeditious remedy. *See* 19 U.S.C. §§ 1499(c)(5), 1514(a)(4). The notion that Wirtgen could not contest the exclusion prior to obtaining the result of a modification proceeding before the ITC is inconsistent with congressional intent that an importer be permitted to contest the merchandise exclusion in this Court immediately, once 30 days had elapsed from the time its protest was denied or deemed denied. Wirtgen is not required to forego judicial review of the adverse decision on the exclusion of its merchandise until such time as it has received a second decision by another administrative agency, one that is not directed to the specific machines that are the subject of this action. Defendants make essentially the same argument concerning 19 U.S.C. § 1337(k) (and also § 1337(c)), maintaining that “Congress has provided a specific path for importers to challenge the Commission’s exclusion orders and to establish that redesigned products no longer violate an exclusion order.” Defs.’ Mot. 12. This argument suffers from the same flaw as the Commission’s, and it is also misguided in presuming, at this pleading stage of the case, that Wirtgen’s Redesigned 1810 Series machines “violate an exclusion order.”

B. Plaintiff’s Second Claim

Plaintiff’s principal claim, that Customs unlawfully excluded the six machines from entry, as presented in Count I of its complaint, Compl. ¶¶ 164–85, is before the court according to the jurisdiction provided in 28 U.S.C. § 1581(a), for the reasons discussed above. Count II of plaintiff’s complaint alleges that the notices of detention Customs issued on the three entries “are unlawful for failing to provide the information required by 19 U.S.C. §1499(c)(2).” *Id.* ¶ 187. Plaintiff cites the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 and asserts jurisdiction under the court’s residual jurisdiction provision, 28 U.S.C. § 1581(i).

The principal claim in the complaint, which arises from the exclusion that Customs effectuated after detaining the merchandise, is to be adjudicated *de novo*, i.e., on the basis of the record made before the court, not the administrative record of the agency. 28 U.S.C. § 2640(a). Because the detentions ripened into exclusions, the court does not view Count II of the complaint as stating a separate claim over which jurisdiction could exist according to 28 U.S.C. § 1581(i). *See Miller & Co.*, 824 F.2d at 963.

C. The Commission's Motion to Intervene

For the reasons discussed previously, 28 U.S.C. § 1581(a) grants this Court subject matter jurisdiction of this action, which arises under section 515 of the Tariff Act. Intervention in an action to contest the denial of a protest is precluded by 28 U.S.C. § 2631(j)(1)(A) (providing that “no person may intervene in a civil action under section 515 . . . of the Tariff Act of 1930”). Therefore, the Commission's motion to intervene must be denied. *See Jazz Photo Corp.*, 439 F.3d at 1357.

III. CONCLUSION AND ORDER

For the reasons set forth above, the court concludes that it is provided subject matter jurisdiction of this action by 28 U.S.C. § 1581(a). Because intervention in this case is precluded by statute, the court must deny the ITC's motion. Upon consideration of defendants' and the Commission's motions and all papers submitted in this case, and upon due deliberation, it is hereby

ORDERED that defendants' motion to dismiss (Feb. 12, 2020), ECF No. 27, be, and hereby is, denied; and it is further

ORDERED that the motion to intervene of the U.S. International Trade Commission (Feb. 5, 2020), ECF No. 19, be, and hereby is, denied.

Dated: March 4, 2020

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

CHIEF JUDGE