

U.S. Court of International Trade

Slip Op. 15–49

OTTER PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 13–00269
Public Version

[Plaintiff’s motion for summary judgment is granted; Defendant’s cross-motion for summary judgment is denied.]

Dated: May 26, 2015

Louis S. Mastriani, Munford Page Hall, II, Beau A. Jackson, Dana L. Watts, Adduci, Mastriani & Schaumberg, LLP, of Washington, DC for plaintiff.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With her on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection of New York, NY.

OPINION

Kelly, Judge:

Before the court are Plaintiff’s, Otter Products, LLC, (“OtterBox”), and Defendant’s, United States, cross-motions for summary judgment in this classification dispute. OtterBox moves for summary judgment on the two counts in its complaint arguing that as to count one, Defendant improperly classified OtterBox’s Commuter and Defender Series cases under subheading 4202.99.9000 of the Harmonized Tariff Schedule of the United States (2012) (“HTSUS”), which carries an ad valorem rate of 20%, and should properly classify the cases under subheading 3926.90.9980, HTSUS, which carries an ad valorem rate of 5.3%. With respect to count two OtterBox claims that because the goods are properly classified under subheading 3926.90.9980, HTSUS, Defendant “[i]n addition to the refund of the duties paid by OtterBox upon the entry and liquidation of the subject merchandise, . . . should also refund to OtterBox all additional overpayments of duties paid on assists” Compl. ¶ 26, Aug. 2, 2013, ECF No. 4 (“Pl.’s Compl.”).

Defendant argues that the court should deny Plaintiff's motion and grant summary judgment in its favor because the Defender and Commuter series cases were properly classified under subheading 4202.99.9000, HTSUS. Defendant further argues that the court does not have jurisdiction over Plaintiff's second count, requesting repayment of post-importation overpaid duties, because they were voluntarily made (i.e. not a "charge or exaction") and, in any event, OtterBox did not protest these payments. For the reasons set forth below, the court has jurisdiction over OtterBox's claims and finds that the subject merchandise is properly classified under subheading 3926.90.9980, HTSUS, and that the ad valorem rate of 5.3% applies to the entire transaction value of OtterBox's entries, including the value of assists paid subsequent to importation. The court will address the Plaintiff's counts separately.

Background

OtterBox is the owner and importer of record of the Commuter and Defender Series cases. OtterBox's goods were entered between April 23, 2012 and July 11, 2012 through the Port of Memphis, Tennessee, under Entry Numbers 112-7334796-8, 1127391483-3, 112-7967525-5, 112-8546857-0 ("Subject Entries"). Pl.'s Ex. List Ex. C Att. 1 ("Pl.'s Protest"), Oct. 9, 2014, ECF No. 25-2; Def.'s Mem. Law Opp'n Pl.'s Mot. Summ. J. Supp. Def.'s Cross-Mot. Summ. J. 2, Dec. 17, 2014, ECF No. 37 ("Def.'s Opp'n & Cross-Mot."). OtterBox paid duties at the 20% ad valorem rate provided under subheading 4202.99.9000, HTSUS, and the goods were liquidated between March 8, 2013, and May 24, 2013, at that rate. *See* Def.'s Opp'n & Cross-Mot. 2; *see also* Pl.'s Protest. On July 2, 2013, Plaintiff timely filed Protest Number 2006-13-101283 covering all four entries and requested accelerated disposition pursuant to 19 U.S.C. § 1515(b). *See* Pl.'s Protest. The protest was deemed denied on August 1, 2013. Def.'s Opp'n & Cross-Mot. 3. On August 2, 2013, Plaintiff timely filed its summons contesting the denial of its protest. *See* Summons, Aug. 2, 2013, ECF No. 1.

Before importing the entries involved in this case, OtterBox learned that it had failed to disclose and pay duties on the value of assists it provided in connection with the manufacture of certain merchandise. As a result of that discovery OtterBox filed a prior disclosure on November 17, 2010 and eventually submitted the duties owed for the period preceding its prior disclosure. Pl.'s Compl. ¶ 8. Subsequently, OtterBox undertook to enter the Reconciliation Prototype so that going forward it could pay the value of assists on reconciliation en-

tries.¹ Pl.'s Mem. Supp. Mot. Summ. J. 26, Oct. 9, 2014, ECF No. 251

¹ Reconciliation is “an electronic process, initiated at the request of an importer, under which the elements of an entry (other than those elements related to the admissibility of the merchandise) that are undetermined at the time the importer files or transmits the docu-

(“Pl.’s Mot. Summ. J.”); 19 U.S.C. § 1484(b). Some of the assists for the Subject Entries were included in the reconciliation entries. Answers Questions Presented Teleconference April 2, 2015 6–8, April 17, 2015, ECF No. 50 (“Def.’s Answers Re Payment Assists”). Additionally, OtterBox made three “interim payments” for the assists supplied in connection with the Subject Entries between the time it submitted a prior disclosure and the time it was certified for the reconciliation program.² The payments were made on September 29, 2011, May 7, 2012, and July 30, 2012. Pl.’s Compl. ¶¶ 10–12. Plaintiff’s summons filed in this case does not list these reconciliation entries.³

Jurisdiction and Standard of Review

The court has “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515],” 28 U.S.C. § 1581(a) (2012)⁴, and reviews such actions de novo. 28 U.S.C. § 2640(a)(1). As will be more fully discussed below, the court exercises jurisdiction over OtterBox’s count I and II because the subject matter of this case is the properly protested classification decision made by CBP which applies to the entire transaction value of the Subject Entries. Moreover, OtterBox has paid all liquidated duties on the Subject Entries in accordance with 28 U.S.C. § 2637(a).

The court will grant summary judgment when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT Rule 56(a). A classification decision involves two steps. First, the court determines the proper meaning of the tariff provisions, a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise properly falls within the scope of the tariff provisions, a question of fact. *Id.* Where no genuine “dispute as to the nature of the merchandise [exists], then the two-step classification analysis collapses en-
mentation or information required by section 1484(a)(1)(B) of this title, or the import activity summary statement, are provided to the Customs Service at a later time.” 19 U.S.C. § 1401(s).

² While the interim payments covered assists on many different entries, here, OtterBox only seeks the refund of duties in connection with the assist payments on the Subject Entries. *See* Pl.’s Compl. ¶ 26; *see also* Pl.’s Mot. Summ. J. 27.

³ The assists paid in connection with the protested entries were paid through several payments in part because of the way OtterBox tracked these assists. OtterBox has explained that it tracks assists as “projects” which may consist of multiple stock keeping units (“SKU”) numbers. *See* Def.’s Answers Re Payment Assists 3. A consumption entry may have any number of projects or SKUs associated with it. *Id.* at 3–4. Therefore, the duty payment for assists for a particular consumption entry may have been made over one or more interim payments and/or one or more reconciliation entries.

⁴ Further citations to Title 28 of the U.S. Code are to the 2012 edition.

tirely into a question of law.” *Id.* at 965–66 (citation omitted). The court must determine “whether the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

Count I

While the Plaintiff and Defendant describe the merchandise differently, the material facts as to the nature of the subject merchandise are not disputed. Plaintiff describes the Commuter Series cases as “durable protective products comprised of two basic pieces: a silicone mid-layer and, most importantly, a rigid outer plastic shell.” Pl.’s Mot. Summ. J 1, (citing Pl.’s Ex. A. ¶ 5, Oct. 9, 2014, ECF No. 26 (“Pl.’s Ex. A”); Pl.’s Att. 1 ¶ 5). The Commuter Series cases “have a smooth exterior, designed to allow them to slide easily in and out of pockets.” *Id.* (citing Pl.’s Physical Exs. 1, 3, 6, and 8, Oct. 14, 2014, ECF No. 27 (“Pl.’s Physical Ex.”)). Moreover, the plastic components of these cases “do not cover or enclose the screen” of the device but do allow the consumer “the option of affixing to the screen of the electronic device a thin, plastic, self-adhesive film to protect the screen.” *Id.* at 1–2.

Plaintiff characterizes the Defender Series cases as consisting “of the following four pieces: a clear protective plastic membrane, a high-impact polycarbonate shell, a plastic belt clip holster, and a durable outer silicone cover.” *Id.* at 2 (citing Pl.’s Ex. A ¶ 6; Pl.’s Physical Exs. 2, 4, 5, and 9). Plaintiff further explains that the “hard plastic pieces” in both series of cases “are made of polycarbonate” and the “silicone’ component” in the cases “may consist of silicone, thermoplastic elastomer, or thermoset elastomer.” *Id.* (citing Pl.’s Ex. A ¶¶ 7–8). Finally, Plaintiff identifies the products with which the subject merchandise is used, including Defender Series cases for the Apple iPhone 4, 4S, and iPod Touch, the Nokia Lumia 900, and Commuter Series cases for the Blackberry Curve 9220, 9310, and 9320, the Samsung i500, and the HTC my Touch. *Id.*

Defendant emphasizes different facts when describing the merchandise. It describes the Commuter Series cases as “com[ing] with a screen assembly” which includes “an instructional packet that includes a self-adhesive, plastic screen protector, wiping cloth, instructions and a plastic squeegee to push the plastic screen protector to avoid bubbling.” Def.’s Opp’n & Cross-Mot. 4 (citing Def.’s Ex. 1 at 12:9–13:23). Defendant also states that OtterBox markets the Commuter Series as “[s]lim, multilayer protective cases delivers tough

protection;’ ‘2-layer protection withstands drops, bumps and shock;’ ‘[s]elf-adhesive screen protector guards against scratches;’ and ‘[s]lides easily in and out of pockets.’” *Id.* at 4 (citing Def.’s Ex. 2).

It describes the Defender Series cases as “hav[ing] a screen built into the top or front of the case,” and for Defender cases used in connection with products other than the iPod touch, the cases “come with a belt clip.” Def.’s Opp’n & Cross-Mot. 3 (citing Def.’s Ex. 1 at 13:23–24, 21:18–21). Moreover, Defendant states that “Otter markets the Defender® cases for active people,” Def.’s Opp’n & Cross-Mot. 3 (citing Def.’s Exs. 2–3), and describes Defender cases in connection with the iPhone 4 & 4S, “as ‘[a] unique multi-layer combination fit[] precisely to undoubtedly protect’ with an ‘inner polycarbonate layer [that] fully encloses the iPhone.’” *Id.* (citing Def.’s Ex. 4).

Defendant also explains that Defender Series cases differ from Commuter Series cases because “Defenders® have their flexible silicone component on the outside while the Commuters® have their flexible silicone skin on the inner portion of the case.” *Id.* at 3 (citing Def.’s Ex. 1 at 20:7–18).

The differences in the parties’ descriptions do not arise out of any genuine dispute of material fact, but rather stem from the parties’ legal dispute about which tariff heading should apply to the subject merchandise. *See e.g.*, Def.’s Reply 4 n.2. Each party emphasizes facts consistent with its position, but does not dispute the description of the merchandise given by the other. Defendant argues the goods are “similar containers” under heading 4202, HTSUS, using an *ejusdem generis* analysis which focuses on whether the merchandise shares the same essential characteristics or purposes that unite the exemplars preceding the general phrase. As there is no genuine dispute as to the nature of the goods, the court’s analysis focuses on the legal question of whether heading 4202, HTSUS, is the proper tariff heading for the subject merchandise, or if not, which other heading, including 3926, HTSUS, is the proper heading.

Classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and the Additional United States Rules of Interpretation. *See Roche Vitamins, Inc. v. United States*, 772 F.3d 728, 730 (Fed. Cir. 2014). The GRIs are applied in numerical order beginning with GRI 1 which provides, that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” *La Crosse Technology, Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013). Where “an imported article is described in whole by a single classification heading or subheading, then that single classifi-

cation applies, and” the GRIs other than GRI 1 are “inoperative.” *Id.* The terms of the HTSUS are construed in accordance with their common and commercial meaning, which are presumed to be the same. *Link Snacks*, 742 F.3d at 965.

Additionally, the court may look to the Explanatory Notes to help construe the relevant chapters where appropriate. *Roche Vitamins*, 772 F.3d at 731. While the “Explanatory Notes are not legally binding, [they] may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.” *Id.*

CBP liquidated Plaintiff’s merchandise under heading 4202, HTSUS, which provides:

4202	Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:
4202.99	Other: Of materials (other than leather, composition leather, sheeting of plastics, textile materials, vulcanized fiber or paperboard) wholly or mainly covered with paper:
4202.99.9000	Other20%

HTSUS 4202.99.9000. Plaintiff argues the subject merchandise should properly be classified under a heading which provides:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other
3926.90.99	Other5.3%
3926.90.9980	OtherX

HTSUS 3926.90.9980.

The Chapter Notes, which “have the same legal force as the text of the headings,” *Roche Vitamins*, 772 F.3d at 730, provide that, “[C]hapter [39] does not cover . . . trunks, suitcases, handbags or other containers of heading 4202.” Note 2(m) to ch. 39, HTSUS. Thus, the court’s analysis begins by determining whether the Commuter and Defender Series are classifiable in heading 4202, HTSUS.

A semicolon divides heading 4202, HTSUS, into two lists of exemplars followed by the phrase “and similar containers.” Unlike the “similar containers” following the first list of exemplars, the “similar containers” following the second list of exemplars must be made of

explicitly enumerated materials—“of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.” HTSUS 4202. *See* EN 42.02. It is undisputed that the Commuter and Defender Series cases are not made of any of these materials. Moreover, it is undisputed that none of the *eo nomine* articles listed in heading 4202 refer to the subject merchandise. Thus, the court’s inquiry is confined to determining whether the Commuter and Defender Series cases are “similar containers” to the exemplars listed before the semicolon. The court finds they are not.

Where subject merchandise arguably falls under the phrase “similar containers” the court uses an *ejusdem generis* analysis “to determine the scope of the general word or phrase.” *See Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1332 (Fed. Cir. 2005) (citing *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995)). In order for the Commuter and Defender Series cases to fall under the general phrase “similar containers,” “the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars preceding the general term or phrase.” *Id.* (citation omitted). The Court of Appeals has identified at least four characteristics of the relevant exemplars for the court to examine: organizing, storing, protecting, and carrying. *See e.g. Avenues In Leather*, 423 F.3d at 1331.

However, “the unifying characteristics may consist of both affirmative features and limitations.” *Victoria’s Secret Direct, LLC v. United States*, 769 F.3d 1102, 1107 (Fed. Cir. 2014). For example, where the subject merchandise “has a specific and primary purpose that is inconsistent with that of the listed exemplars in a particular heading,” a classification based on the *ejusdem generis* characteristics of heading 4202 may be inappropriate. *Avenues in Leather*, 423 F.3d at 1332–33 (citation omitted); *see also Victoria’s Secret Direct*, 769 F.3d at 1107–08.

The court’s analysis begins with the meaning of the phrase “similar container.” The Oxford English Dictionary defines the word “container” to mean “[h]e or who that which contains, esp. a receptacle designed to contain or store certain articles; . . .” *See* Container, n., *Oxford English Dictionary*, <http://www.oed.com/view/Entry/40046?rskey=edYinG&result=1#eid> (last visited May 18, 2015). It also defines “similar” as “1. Of the same substance or structure throughout; homogenous; esp. *similar parts*. 2.a. Having a marked resemblance or likeness; of a like nature or kind.” Similar, adj. and n.

Oxford English Dictionary, <http://www.oed.com/view/Entry/179873?redirectedFrom=similar#eid> (last visited May 18, 2015). Similarly, Merriam-Webster defines “container” to mean “an object (such as a box or can) that can hold something” See *Container*, *Merriam-Webster*, <http://www.merriam-webster.com/dictionary/container> (last visited May 4, 2015). Thus, in order to be a “similar container” the court finds that merchandise must be a receptacle or object, which resembles or is of a like nature or kind to the listed exemplars, and is designed or has the capability to contain, store, or hold certain articles. Moreover, as stated above and as the parties agree, four essential characteristics or purposes, organizing, storing, protecting, and carrying, unite the listed exemplars in heading 4202 and are relevant to the analysis of whether a good is a “similar container” to those exemplars. See Pl.’s Mot. Summ. J. 12; Def.’s Opp’n & Cross-Mot. 14. See also *Avenues in Leather*, 423 F.3d at 1332.

The court finds that the Commuter and Defender Series cases do not fall within the common or commercial meaning of the phrase “similar containers” as it is used in heading 4202, HTSUS. As a starting point heading 4202, HTSUS, requires a “container.”⁵ Admittedly discussing the meaning of the word “container” to determine the meaning of the phrase “similar container” in heading 4202, HTSUS, is only a starting point. However, some of the problems that arise from describing the electronic device cases as containers foreshadow the problems that will arise with trying to classify the cases as “similar containers” under heading 4202, HTSUS.

Even Defendant’s preferred definitions illustrate the problems with describing the subject cases as “containers.” Defendant’s preferred definitions for container are, “a thing in which material is held or carried; receptacle” and “a thing that contains or can contain something; box, crate, can, jar, etc.” Def.’s Opp’n & Cross-Mot. 10. Defendant also cites the definition of “contain,” meaning “to have within; enclose.” *Id.* The list of examples, *i.e.*, receptacle, box, crate, can, and jar, is not an exclusive list of items that are containers. However, it does illuminate the types of objects that are commonly thought of as containers. In general, each of these objects allow an article to be placed inside them and/or taken out without much effort by opening or closing the receptacle. As a related matter, the items listed in the definition cited by the Defendant all require some concurrent and relatively simple physical act to gain access to the receptacle (*i.e.*, twisting a lid, lifting a cover). In contrast, the cases at issue are specifically designed for and fit snugly over particular electronic

⁵ Defendant begins its analysis by examining the word “container” in isolation. See Def.’s Opp’n & Cross-Mot. 10.

devices and do not require an action to open or uncover the item. Johnson Decl. ¶¶ 11–16. It takes some effort to remove a case from an electronic device where the case generally remains on the device in a semi-permanent manner. See Pl.’s Mot. Summ. J. 5, 20 (citing Johnson Decl. ¶ 19). Although one might describe the action required to place an electronic device inside or outside the case as opening or closing, it is more common to think of the cases as an addition/accessory to the electronic device which can be added to or removed at the consumer’s liking.

As stated, determining the parameters of the word container is only a first step for the court’s analysis, which now turns to a discussion of whether the subject merchandise organize, store, protect, and/or carry. Of these four essential characteristics, only one, “protecting,” is clearly shared with the subject cases. Indeed, the parties do not dispute that the subject cases “protect.” See e.g., Pl.’s Mot. Summ. J. 12 (explaining that the subject merchandise do not share three of the four unifying characteristics or purposes); Def.’s Opp’n & Cross-Mot. 15 (pointing out that Plaintiff’s brief “is replete with statements” that the cases protect electronic devices and that “protection is a major marketing point.”).

The subject cases do not serve any organizational purpose. As Plaintiff points out, organizing generally assumes holding multiple items. See Pl.’s Mot. Summ. J. 12–14. Plaintiff’s point is supported by the common understanding of organize: “[t]o arrange into a structured whole; to systematize; to put into a state of order; to arrange in an orderly manner, put in a particular place or order, tidy.” Organize, v., *Oxford English Dictionary*, <http://www.oed.com/view/Entry/132456?redirectedFrom=organize#eid> (last visited May 18, 2015). The subject cases can and do only hold one electronic device. Even if it is possible to organize a single item without reference to another item, the electronic devices are not any more organized when they are in the cases. Rather, once the sole electronic device is placed inside the cases, it remains one article surrounded by the case that acts like a suit of armor. The electronic device is just as organized, tidy, arranged, or orderly before it is placed in the cases as it is after. The subject cases do not possess the essential characteristic or purpose of organizing.

The cases do not possess the essential characteristic or purpose of storing either. The common understanding of “store” implies setting something aside. It does not include present use but looks toward using whatever item is stored in the future. This understanding is supported by several definitions as well. See Store, *Merriam-Webster*, <http://www.merriam-webster.com/dictionary/store> (last visited May 4,

2015) (“to put (something that is not being used) in a place where it is available, where it can be kept safely, etc.; to collect and put (something) into one location for future use”); Store, v., *Oxford English Dictionary*, <http://www.oed.com/view/Entry/190929?rskey=VWVlwH&result=2#eid> (last visited May 4, 2015) (“4. a. To keep in store for future use; to collect and keep in reserve; to form a store, stock or supply of; to accumulate, hoard.”). However, an important characteristic of the subject cases is allowing the electronic device to remain fully functional, so that it may be used while inside the subject case. See, e.g., Johnson Decl. ¶¶ 11, 16.⁶ This characteristic is inconsistent with the common understanding of “storing.”

Finally, certain cases provide minimal carrying functionality for the electronic devices. The belt clips used for some of the Defender Series cases add some carrying functionality to the electronic devices, but not all the subject merchandise have belt clips. Moreover, while the cases themselves remain in use to protect the electronic devices at all times, the belt clips are removable and, even when connected, are only used or usable for brief periods where the user is in motion and has determined to place the electronic device in the belt clip, as opposed to a pocket.

Most problematic for the Defendant’s preferred classification is that the enclosed electronic device remains fully functional, which is inconsistent with objects enclosed by the exemplars listed in heading 4202, HTSUS. As explained above, the exemplars inform the court’s analysis regarding which characteristics merchandise do and do not have. See *Victoria’s Secret*, 769 F.3d at 1107. For example, where the subject merchandise “has a specific and primary purpose that is inconsistent with that of the listed exemplars in a particular heading,” a classification based on the *ejusdem generis* characteristics of heading 4202 may be inappropriate. *Avenues in Leather*, 423 F.3d at 1332–33 (citation omitted); see also *Victoria’s Secret Direct*, 769 F.3d at 1107–08. In *Victoria’s Secret*, the Court of Appeals discussed *ejusdem generis* in the context of a different HTSUS heading. Discussing *Avenues in Leather*, the Court of Appeals explained:

The reference to the merchandise’s “primary purpose” as inconsistent with a particular heading’s list recognizes that merchandise may well share affirmative features of the heading’s list but have *other* features that then defeat “similarity” —necessarily meaning that the unifying characteristics of the heading’s list include a limitation that excludes such other features (which

⁶ Defendant does not dispute as a factual matter that the electronic devices can be used while within the cases. Rather, it argues that this fact is not relevant to the *ejusdem generis* analysis. See Def.’s Opp’n & Cross-Mot. 18–20.

may depend on their prominence). And, indeed, in referring to a purpose of the merchandise that is “inconsistent with” a heading’s list, what the court in *Avenues in Leather* cited were cases that involved purposes that readily could be *added* to the affirmative functions of the listed items. The additional purpose of the merchandise at issue in those cases could be deemed “inconsistent” only because a limitation on function or purpose was among the heading’s unifying characteristics. *Id.* at 1244, citing *SGL, Inc. v. United States*, 122 F.3d 1468, 1472 (Fed.Cir.1997) (heading covering a variety of cases did not cover coolers for storing and carrying food or beverages); *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392–93 (Fed.Cir.1994) (similar for pre-HTSUS heading of Tariff Schedule of the United States (TSUS)). The court’s observation that the “analysis must consider the imported merchandise as a whole” reinforces the point: even if the merchandise at issue contains certain features shared by those listed in a heading, the presence of other features in the merchandise “as a whole” may negate similarity. *Avenues in Leather*, 178 F.3d at 1246.

Victoria’s Secret Direct, 769 F.3d at 1107–08.⁷ While the Court of Appeals agreed that the subject merchandise shared the unifying characteristic of the articles listed *eo nomine* in the heading, *i.e.*, body support, it found that the subject merchandise had an at least equally important function—the outerwear coverage function. None of the listed articles shared this outerwear coverage function and thus, the subject merchandise was not classifiable in the subheading as a “similar article.”

⁷ In *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1245 (Fed. Cir. 1999), the Court of Appeals explained that folios which shared the “organizing, storing, protecting, and carrying” purposes of heading 4202, were not removed from classification within that heading because of an additional “organizational aid” purpose. The court explained that these purposes and the physical characteristics of the internal binder and notepad were not inconsistent with the four essential characteristics and purposes uniting the heading 4202 exemplars. *Id.* In *SGL, Inc. v. United States*, 122 F.3d 1468, 1472 (Fed. Cir. 1997), the Court of Appeals explained that the coolers at issue were used for food or beverages were not classified in heading 4202, because the specific use for food and beverages was predominant over the general purposes uniting 4202. Further, the coolers classified in that case were not classifiable under heading 4202 because none of the exemplars in heading 4202 “involve[d] the containment of any food or beverage.” In *Totes, Inc. v. United States*, 69 F.3d 495, 498–99 (Fed. Cir. 1995) the Court of Appeals distinguished *Sports Graphics* (which classified coolers and was discussed in *SGL*) explaining that the subject case, used to organize and store items in an automobile trunk, were not taken out of classification in heading 4202 like the coolers because the more specific description of a “similar container” predominated over the more general description as an “accessory” of a motor vehicle. *Id.*

Here, Plaintiff identifies another characteristic shared by the heading 4202 exemplars which the Commuter and Defender series cases do not share—"the inability to use items when inside those containers." Pl.'s Mot. Summ. J. 18. The exemplars "trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters" are not ones which permit the use of the enclosed item. The electronic devices which are enclosed by the subject merchandise "retain their full, 100 percent functionality while inside an OtterBox case." *Id.* at 20 (citing Johnson Decl. ¶ 10). Not only has plaintiff identified an important characteristic and purpose of the subject merchandise, which is not shared by the heading 4202 exemplars, but the characteristic is inconsistent with one of the general purposes of heading 4202. As discussed above, the essential characteristic or purpose of "storing" implies some future use, as opposed to present use. Thus, "storing" is, by definition, inconsistent with use. The cases would be completely different products if they stored electronic devices by setting them aside for future use instead of allowing "100 percent functionality while inside an OtterBox case." Pl.'s Mot. Summ. J. 20 (citing Johnson Decl. ¶ 10).

Defendant's counterarguments fail to persuade the court. Defendant argues that the Commuter and Defender Series cases are containers "because each model is intended to enclose or hold within either a smartphone or an iPod touch®." Def.'s Opp'n & Cross-Mot. 10. As discussed above, whether or not the merchandise can be considered a container does not fully answer the question. The merchandise must be a similar container. The essential characteristics and purposes that unite the 4202, HTSUS, exemplars makes clear that the subject cases are not "similar containers" within the meaning of heading 4202, HTSUS.

The parties spend significant time arguing whether the subject merchandise must possess each of the purposes uniting the exemplars or merely one of them in order to be classified as "similar containers" under heading 4202, HTSUS. Plaintiff argues that "[i]t is well settled that the essential characteristics or purposes uniting the articles in the first clause of Heading 4202 are 'organizing, storing, protecting, and carrying various items.'" Pl.'s Mot. Summ. J. 12 (citing *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)). It further argues that the Commuter and Defender cases do not organize, store, or carry, and that each of these is an independent reason why the cases cannot be classified under heading 4202. *See id.* at 14–18. Defendant acknowledges that this is an un-

resolved issue, *see* Def.'s Reply 6, but argues that Court of Appeals cases point to a disjunctive test. Def.'s Opp'n & Cross-Mot. 11–14. The court finds it unnecessary to answer the question as presented by either party because, in this case, coverings which minimally resemble containers, serve a protective purpose, and may at times serve some carrying purpose, while allowing full functionality of the enclosed merchandise are not “similar containers.”

Likewise, Defendant's position that the subject cases organize or store cannot withstand scrutiny. First, the government's definitions for “organize,” and “store,” strain the meaning of those phrases. Defendant argues that the cases “organize” because “simply ‘containing’ items is at least a rudimentary form of organization,” and the cases contain electronic devices. Def.'s Opp'n & Cross-Mot. 16 (citation omitted). It argues that the cases “store” electronic devices when the electronic devices are “not actually being used,” and “are put aside and placed on a desk, or counter or nightstand.” *Id.* at 17.

The Defender and Commuter Series cases do not organize or store under the common meaning of those terms. The cases do not organize electronic devices in even a rudimentary fashion. The organizational capacity of the backpacks and beach bags in the case the government cites for this prospect, *Processed Plastics Co. v. United States*, 29 CIT 1129, 395 F. Supp. 2d 1296 (2005), cannot be equated to the cases at issue here. Further, Defendant's argument that the electronic devices are stored when they are set aside on a desk, not only demands a philosophical approach to the word “store,” but also fails to explain why the subject cases have any involvement in the storing. One could “store” in this way without a case at all.

Defendant's discussion of the cases ability to carry has some merit. Defendant argues that the cases “carry” because they “are designed to securely hold certain electronic devices while the user is mobile.” Def.'s Opp'n & Cross-Mot. 17. Moreover, Defendant points out that the Defender Cases are “equipped with a holster into which the case holding the electronic device is securely inserted and the holster has a clip attached to it so that it may be affixed to a belt.” *Id.* at 17–18 (citations omitted). Securing is not the same as carrying. Moreover, while it is true that the belt clip holsters add some carrying functionality to the electronic devices, not all the subject merchandise have holsters. Also, the belt clip holsters may be removed from the cases. The product here is not a holster, it is a protective case that can be attached to a belt clip holster. The protective function and the minimal carrying function is simply not enough to convince the court the cases are “similar containers.”

Defendant also rejects Plaintiff's argument that containers in heading 4202 have another characteristic that the Commuter and Defender series cases do not possess, which makes the cases not classifiable under 4202. Defendant explains that the court in *Citizen Watch Co. of America, Inc. v. United States*, 34 CIT __, 724 F. Supp. 2d 1316 (2010) (a case relied on by plaintiff), found that "suitability for long-term or prolonged use," was another essential characteristic based on a chapter note. Def.'s Opp'n & Cross-Mot. 19. Here, Defendant argues, there is no chapter note, or any other precedent, which discusses the inability to use items while contained by the exemplars, as an essential characteristic or purpose. *Id.* Further, Defendant points to certain camera and binocular cases, which it argues are specifically fitted for the articles they contain, as *eo nomine* articles which may allow the items to be used while contained. *Id.* at 19–20 (citing NY 184647 (Aug. 7, 2002) (finding a digital camera case which allowed the digital camera to be used underwater to be a "similar container"); HQ 962634 (Oct. 25, 2001) (finding a camera housing that allowed the camera to be used in hostile environments including underwater to be a "similar container")).

Defendant's arguments on this issue miss the point. As discussed above, an essential characteristic or purpose which limits the headings is also relevant to the *ejusdem generis* analysis. *Victoria's Secret*, 769 F.3d at 1107. Here, retaining 100 percent functionality, is inconsistent with "storing." Moreover, Defendant's reliance on a few Customs rulings has minimal relevance. "Customs rulings on merchandise are not binding on the court, and rulings such as those cited by plaintiff are not accorded deference, where, as here, they do not pertain to the merchandise under consideration." *Victoria's Secret Direct, LLC v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1332, 1357 (2013). Camera cases are *eo nomine* listed unlike electronic device cases and neither of these rulings discuss the four uniting essential characteristics or purposes of heading 4202, HTSUS. Thus, the court is not persuaded by Defendant's citation to two rulings for underwater cameras.

For the above stated reasons, the court finds that Plaintiff has satisfied its burden to establish that the Commuter and Defender Series cases are not classifiable in heading 4202. HTSUS Thus, the court must look elsewhere in the HTSUS to determine where the subject merchandise is properly classified.

The subject merchandise is properly classified under subheading 3926.90.9980, HTSUS. The Commuter Series cases consist of two basic components, the rigid outer plastic shell and the silicone mid-

layer. See Pl.'s Mot. Summ. J. 1; Pl.'s Att. 1 ¶ 5. The Commuter Series cases also include "an instructional packet that includes a self-adhesive, plastic screen protector, wiping cloth, instructions and a plastic squeegee . . ." Def.'s Opp'n & Cross-Mot. 3 (citing Def.'s Ex. 1 at 12:9–13:23).

The Defender Series cases consist of four pieces including "a clear protective plastic membrane, a high-impact polycarbonate shell, a plastic belt clip holster, and a durable outer silicone cover." Pl.'s Mot. Summ. J. 2 (citing Pl.'s Ex. A ¶ 6; Pl.'s Physical Exs. 2, 4, 5, and 9); Def.'s Opp'n & Cross-Mot. 3 (citing Def.'s Ex. 1 at 21:18–21).

The "silicone" component of the cases "may consist of silicone, thermoplastic elastomer, or thermoset elastomer" and the hard plastic component is made of "polycarbonate." Pl.'s Mot. Summ. J. 2 (citing Pl.'s Ex. A ¶¶ 7–8). All of these pieces, except the wiping cloth and instructions, are made of materials listed in chapter 39.

Headings 3901 to 3914 do not apply to the subject cases because the subject cases are not in the defined primary forms required for these headings. At first glance, several headings in Chapter 39 jump out as potential places to classify the subject merchandise. For example, heading 3907 provides for "Polyacetals, other polyethers and epoxide resins, in primary forms; polycarbonates, alkyd resins, polyallyl esters and other polyesters, in primary forms . . ." Heading 3910 provides for "[s]ilicones in primary forms . . ." and heading 3911 "[p]etroleum resins, coumarone-indene resins, polyterpenes, polysulfides, polysulfones and other products specified in note 3 to this chapter, not elsewhere specified or included, in primary forms . . ." However, Note 6 of Chapter 39 provides that "[i]n headings 3901 to 3914, the expression '*primary forms*' applies only to the following forms (a) [l]iquids and pastes, including dispersions (emulsions and suspensions) and solutions; (b) [b]locks of irregular shape, lumps, powders (including molding powders), granules, flakes and similar bulk forms." Note 6 to ch. 39, HTSUS. Because the various components of the subject cases are not "in primary forms" none of these headings apply under GRI 1, HTSUS.

The remaining headings in chapter 39, heading 3915 to heading 3925, refer to specific items made of plastic, none of which refer to the subject merchandise. Thus, pursuant to GRI 1, heading 3926, HTSUS, "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914," is the only heading under which the subject merchandise could be *prima facie* classified.

At the subheading level, subheadings 3926.10 to 3926.40, and, under 3926.90, subheadings 3926.90.10 to 3926.90.96, do not apply *prima facie* to the subject merchandise. Thus, pursuant to GRI 1,

HTSUS, subheading 3926.90.99 with the statistical suffix .80 (*i.e.*, 3926.90.99.80), the subheading for “[o]ther articles of plastics and articles of other materials of headings 3901 to 3914 . . . [o]ther . . . [o]ther . . . [o]ther” is the only subheading which applies.⁸ The subject merchandise is thus properly classified in heading 3926.90.9980, HTSUS, pursuant to GRI 1, HTSUS.

Plaintiff argues that the subject merchandise should be classified under 3926.90.99.80, HTSUS, because, under GRI 3(b), HTSUS, the rigid plastic component of the subject merchandise imparts the essential character. Plaintiff compares the Commuter and Defender Series cases to another line of cases it markets, the Impact Series, which consists of only molded silicone. As Plaintiff explains, the rigid plastic component of the Commuter and Defender Series cases, “makes the[] cases weigh more, cost more, and be more effective in protecting an electronic device.” Pl.’s Mot. Summ. J. 23 (citing Johnson Decl. ¶ 33).

Defendant does not dispute any of Plaintiff’s factual assertions regarding which material imparts the essential character of the cases. Rather, Defendant explains that under its theory, the material that imparts the essential character is irrelevant. Def.’s Reply 4 n.2. Defendant argues that because the cases are properly classified in heading 4202, HTSUS, Chapter 39 Note 2(m) removes the cases from classification in heading 3926, HTSUS. Moreover, Defendant takes issue with Plaintiff’s analysis. It argues that Plaintiff’s comparison of the cases to other goods classified in heading 3926, HTSUS, is not relevant to an essential character analysis and Chinese and European Community decisions relied on by Plaintiff are unpersuasive and do not bind that court.

The court agrees with Defendant that an “essential character” analysis under GRI 3(b) differs from an *ejusdem generis* analysis. *See e.g., Global Sourcing Group, Inc. v. United States*, 33 CIT 389, 398, 611 F. Supp. 2d 1367, 1376 (2009). However, the court has an independent obligation to determine the proper classification of the subject merchandise. *See Jarvis Clark*, 733 F.2d at 876–78. Further, as discussed above, the court finds that Plaintiff has met its burden of showing that CBP’s classification of the merchandise under heading 4202, HTSUS, is not correct. Even without the aid of Plaintiff’s comparison of articles classified under heading 3926 and its comparison to foreign custom agency determinations, the court finds that the Commuter and Defender Series cases are properly classified as

⁸ Classification of merchandise is not based on the wording of the statistical suffixes, which are not part of the legal text of the HTSUS. *See Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed. Cir. 1999).

“[o]ther articles of plastics and articles of other materials of headings 3901 to 3914 . . . [o]ther . . . [o]ther . . . [o]ther.”

Count II

Defendant argues the court lacks jurisdiction over Count II of OtterBox’s complaint seeking refund of duty overpayments made on the value assists. More specifically, Defendant argues that OtterBox’s tender of duties (i.e., interim payments) on assists were voluntary, not a “charge or exaction” under 19 U.S.C. § 1514(a) and thus, cannot be subject of a protest. Def.’s Opp’n & Cross-Mot. 22 (citing *Ford Motor Co. v. United States*, 463 F.3d 1286, 1296 (Fed. Cir. 2006); *Brother Int’l Corp. v. United States*, 27 CIT 1 (2003)). Finally, Defendant argues that even if the duties were a “charge or exaction” Plaintiff did not raise the issue in its protest, depriving the court of jurisdiction. *Id.* at 22–23.

The court has jurisdiction over the Plaintiff’s claim for a refund of duties paid in connection with the Subject Entries, including duties paid post-importation. Congress provided that

decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to . . . the classification and rate and amount of duties chargeable . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

19 U.S.C. § 1514(a). Plaintiff protested the classification of the subject merchandise, a decision of CBP listed under 19 U.S.C. § 1514(a)(2). Pl.’s Protest Att. A at 12 (claiming that “the articles are properly classified in subheading 3926.90.9980, HTSUS”). Plaintiff did not, as the Defendant notes, protest a charge or exaction. Thus, the subject matter of this case is the classification of subject merchandise.

CBP’s classification decision related to the duties assessed for the entire transaction value of the goods at the time of entry, which includes the value of any assists. CBP must make separate decisions regarding classification and value. 19 U.S.C. § 1514(a)(1)-(2). Once CBP determines the components that comprise the value, it applies the classification to the entire value. 19 U.S.C. § 1500(a)-(b). Here, CBP applied the classification’s rate of duty to the merchandise’s transaction value, which includes the value of any assists. 19 U.S.C.

§ 1401a(b)(1)(C). Thus, a protest as to classification and the associated rate of duty applies to all duties paid including those paid in the form of an assist. As Plaintiff protested, and subsequently filed a summons contesting the denial of its protest, the classification decision and liquidation of the Subject Entries is not yet final and conclusive on all parties.

Defendant argues that the court does not have subject matter jurisdiction over payments made on the value of assists because those payments were not charges or exactions. It cites 19 U.S.C. § 1514(c)(2), stating, “[f]urther, ‘protests may be filed . . . by . . . any person paying any charge or exaction.’” Def.’s Opp’n & Cross-Mot. 22.⁹ Of course this is true. However, the statute lists many other types of people who could file a protest, including “the importers or consignees shown on the entry papers . . .” 19 U.S.C. § 1514(c)(2)(A). OtterBox is the importer of record and thus was permitted to file a protest with respect to CBP’s classification decision and the liquidation of its entries.

Defendant also incorrectly attempts to cast Plaintiff’s payment as a voluntary tender. The cases involving the voluntary tender of duties made pursuant to the prior disclosure procedures under 19 U.S.C. § 1592(c)(4) are inapposite. First, Defendant quotes the Court of Appeals decision in *Ford Motor Co. v. United States*, 463 F.3d 1286, 1296 (Fed. Cir. 2006). The section Defendant cites is the Court of Appeals discussion of the trial court’s decision and was not the holding of the case. Moreover, the issue in that case centered on whether the trial court abused its discretion by not allowing Ford, the defendant in a penalty suit, to amend its answer to include a counterclaim. *Ford*, in fact, appears to support Plaintiff’s position that one can preserve its right to obtain a refund of an overpayment when one protests the classification of the entry at issue. Here, OtterBox protested the classification of its merchandise. It does not seek the return of monies voluntarily tendered, rather it seeks a refund resulting from an incorrect classification which is not yet final and conclusive because it is the subject of a valid protest.

The Defendant also cites *Brother International Corp. v. United States*, 27 CIT 1 (2003), however that case is also a Section 592 case where the importer claimed that it had overpaid and underpaid duties, filed a prior disclosure and sought to offset the overpayments and underpayments. Customs denied Brother’s attempt to offset and demanded a payment representing the duty owed without any offsets. The court found that the payment was a charge or exaction. The court

⁹ Defendant mistakenly cites this as 19 U.S.C. § 1514(b)(2), but there is no such section of the code.

finds it difficult to *see* why this case helps Defendant. While Defendant cites *Brother* for the proposition that a voluntary tender cannot be a charge or exaction, it appears that the payment in *Brother* was not voluntary and therefore was a charge or exaction. That fact sheds no light on the case before the court. Further, citation to *Brother* misses the point. OtterBox paid duties due in light of the classification of its merchandise. It protested classification.

The court notes that for jurisdictional purposes, Plaintiff's payment on the value of assists identified in the second count is superfluous, which may have created some confusion. In disputes brought to contest the denial of a protest, the court requires payment be made on "all liquidated duties, charges, or exactions . . . at the time the action is commenced." 28 U.S.C. § 2637(a); *see also DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1315 (Fed. Cir. 2006). Here, the Plaintiff's entries were liquidated at the value listed on the entry. *See* Pl.'s Protest. It is uncontested that Plaintiff has paid these duties. *See* Compl. ¶ 6, Aug. 2, 2013, ECF No. 4; Answer ¶ 6, Nov. 25, 2013, ECF No. 14. Thus, Plaintiff exhausted its administrative remedies with regards to the Subject Entries by paying "all liquidated duties" by August 2, 2013, "the time the action [was] commenced."¹⁰

CONCLUSION

For the aforementioned reasons, Plaintiff's motion for summary judgment is granted and Defendant's cross-motion is denied. Judgment will enter accordingly.

Dated: May 26, 2015

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

¹⁰ It is unclear if Plaintiff believes the court should exercise jurisdiction over two reconciliation entries but the court clearly cannot. Plaintiff explains that it paid at least some of the value of assists for its third and fourth entries on two reconciliation entries. A reconciliation entry "is treated as an entry for purposes of liquidation, reliquidation, recordkeeping, and protest." 19 U.S.C. § 1401(s); 19 U.S.C. §1514(a)(5). The Summons, which is the initial pleading in a suit challenging the denial of a protest, *see DaimlerChrysler Corp.*, 442 F.3d at 1317–18, lists only one protest, 2006–13–101283. This protest, which forms the subject matter of this lawsuit, was filed on July 2, 2013 and was deemed denied on August 1, 2013. *See* Summons, Aug. 2, 2013, ECF No. 1; *see also* Pl.'s Ex. C at Att. 1 ("Pl.'s Protest"). Reconciliation entry numbers 112–1776985–4 and 112–2136079–9 were entered on November 27, 2013 and March 4, 2014, well after OtterBox's protest was filed. *See* Pl.'s Ex. Q at OTRBX4–000122; Pl.'s Ex. R at OTRBX4000080. OtterBox's protest could not have challenged the relevant reconciliation entries as they were not yet filed and they are not the subject of this case. Thus, the court does not have jurisdiction over these reconciliation entries. The court notes however that the classification of the merchandise applies to the entire transaction value including the value of assists.

Slip Op. 15–51

JMC STEEL GROUP, Plaintiff, ALLIED TUBE AND CONDUIT, WHEATLAND TUBE, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, AL JAZEERA STEEL PRODUCTS Co. SOAG, VIETNAM HAIPHONG HONGYUAN MACHINERY MANUFACTORY Co., LTD., UNIVERSAL TUBE AND PLASTIC INDUSTRIES, LTD., KHK SCAFFOLDING & FORMWORK, LLC, UNIVERSAL TUBE AND PIPE INDUSTRIES, LLC, ZENITH BIRLA (INDIA) LIMITED, and CONARES METAL SUPPLY LIMITED, Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 13–00022

[The court sustains the International Trade Commission’s Redetermination.]

Dated: May 29, 2015

John R. Magnus, Tradewins LLC, of Washington, DC, for plaintiff.

Roger B. Schagrin and *John W. Bohn*, Schagrin Associates, of Washington, DC, for plaintiff-intervenor Allied Tube and Conduit.

Stephen P. Vaughn, *Robert E. Lighthizer*, and *James C. Hecht*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for plaintiff-intervenor United States Steel Corporation.

Gilbert B. Kaplan and *Brian E. McGill*, King & Spalding, LLP, of Washington, DC, for plaintiff-intervenor Wheatland Tube.

Karl von Schriltz, Attorney, Office of the General Counsel, *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation, U.S. International Trade Commission, of Washington, DC, for defendant.

David L. Simon, Law Offices of David L. Simon, of Washington, DC, for defendant-intervenor Al Jazeera Steel Products Co. SAOG.

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Sarah S. Sprinkle*, Morris, Manning & Martin LLP, of Washington, DC, for defendant-intervenors Universal Tube and Plastic Industries, Ltd., KHK Scaffolding & Formwork, LLC, and Universal Tube and Pipe Industries, LLC.

Max F. Schutzman, *Ned. H. Marshak*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP, of New York, NY, for defendant-intervenors Zenith Birla (India) Ltd. and Conares Metal Supply Ltd.

Robert F. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, DC, for defendant-intervenor Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd.

OPINION

Barnett, Judge:

This matter, which arises from the International Trade Commission’s (“ITC” or “Commission”) antidumping and countervailing duty investigations into certain circular welded carbon-quality steel pipe (“CWP”) from India, Oman, the United Arab Emirates, and Vietnam (“subject imports”), returns to the court following remand to the Commission in *JMC Steel Group v. United States*, 38 CIT __, 24 F.

Supp. 3d 1290 (2014) (“*JMC P*”).¹ In that decision, the court ordered the Commission to (1) “reconsider its findings with regard to lost sales and revenue, taking into account [the] argument that the structure of the domestic CWP market precludes Plaintiffs from providing the ITC the lost sales and revenue information in the form and manner in which it was sought,” and (2) “explain how it has evaluated the impact of subject imports on the domestic industry within the context of the business cycle.” *Id.* at __, 24 F. Supp. 3d at 1321. On February 9, 2015, the ITC filed its final negative injury remand results, in which it again found no material injury or threat thereof to the domestic industry. *See Views of the Commission*, USITC Pub. 4521, Inv. Nos. 701-TA482–484 and 731-TA-1191–1194 (Final) (Remand) (Feb. 2015) (“*Remand Views*”).² Plaintiff, JMC Steel Group, and Plaintiff-Intervenors, United States Steel Corporation and Wheatland Tube, (“Plaintiffs”) challenge the remand results.³ (*See generally* Confidential Comments of JMC Steel Group, Wheatland Tube, and United States Steel Corporation on the Commission’s Remand Determination (“Comments”) (ECF No. 152).) For the reasons stated below, the remand results are sustained.

BACKGROUND AND PROCEDURAL HISTORY

A. The Administrative Proceedings

On October 26, 2011, Plaintiffs filed a petition with the ITC, alleging material injury and threat of material injury by reason of the subject imports. *See Circular Welded Carbon-Quality Steel Pipe from India, Oman, United Arab Emirates, and Vietnam*, 76 Fed. Reg. 68,208 (ITC Nov. 3, 2011) (initiation of antidumping and countervailing duty investigations). In December 2012, the ITC published a final determination, *Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Vietnam*, 77 Fed. Reg. 73,674 (ITC Dec. 11, 2012) (“*Final Determination*”), and accompanying *Views of the Commission*, USCIT Pub. 4362, Inv. Nos. 701-TA-482–484 and 731-TA-1191–1194 (Final) (Dec. 2012) (“*Original Views*”), which examined a period of investigation (“POI”) of January 2009 through June 2012. The Commission determined that subject imports and the domestic like product are “generally fungible,” share the same channels of distribution, have a “reasonable overlap” of

¹ The court presumes familiarity with the background and procedural history of the case, although relevant portions are summarized below.

² All citations to the *Remand Views* and to the agency record are to their confidential versions.

³ Plaintiff-Intervenor Allied Tube and Conduit did not submit comments on the remand results.

competition, and that price is a significant factor in CWP purchasing decisions. It found a significant increase in the volume of subject imports during the POI, in absolute terms and relative to domestic consumption and production, but concluded that the increase did not have significant adverse effects on the domestic industry. Although the ITC observed that subject imports “pervasively undersold” the domestic like product by significant margins during the POI, it nevertheless found “no evidence” that subject imports significantly depressed or suppressed prices of the domestic like product. The ITC also found that the domestic industry’s performance improved in “almost every measure [during the POI] despite the weak recovery in CWP demand” following the 2008 economic crisis and that there was no correlation between subject import volume, market share, and underselling, on the one hand, and domestic industry performance, on the other. The Commission thus determined that the subject imports neither caused nor threatened to cause material injury to the domestic industry. *See generally Final Determination; Original Views.*

B. JMC I

Plaintiffs challenged the *Final Determination* on numerous grounds. (*See generally* ECF Nos. 71, 76, 77, 82, 85.) In *JMC I*, the court addressed Plaintiffs’ arguments and affirmed, in part, and remanded, in part, the determination. Of relevance to the present opinion, the court found that the ITC did not assume that negative volume effects alone cannot warrant an affirmative injury determination and also held that “the fact that the ITC found a significant increase in subject import volume and market share does not compel an affirmative injury determination.” *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1299. The court also affirmed the Commission’s findings that there was no correlation between increased subject import volume and negative price effects on the domestic like product, and between subject imports’ increased volume and the domestic industry’s performance during the POI. *Id.* at __, 24 F. Supp. 3d at 1302–03, 1306–10.

The court, however, remanded the *Final Determination* to the ITC on two grounds. First, the court questioned the Commission’s treatment of the domestic producers’ lost sales and revenue allegations in the price effects analysis. *Id.* at __, 24 F. Supp. 3d at 1304–05. Plaintiffs had averred that they could not provide lost sales and revenue information, in the form and manner requested by the Commission, due to the structure of the domestic CWP market. The court held that, in such circumstances, pursuant to 19 U.S.C. § 1677m(c), the Commission must “consider the ability of the party to submit the infor-

mation and may modify its requirements to avoid imposing an unreasonable burden on the party when certain additional requirements are met. In certain cases, the Commission also is required to provide such parties any assistance that is practicable.” *Id.* at __, 24 F. Supp. 3d at 1304–05 (citation omitted). The court found that “[t]he record is ambiguous as to whether domestic interested parties took the necessary steps to properly invoke these provisions and, if so, the extent to which the Commission considered modifying its information requests or otherwise assisting these parties in addressing the questions regarding lost sales and revenue.” *Id.* at __, 24 F. Supp. 3d at 1305. The court concluded that the ITC had, in effect, treated the domestic industry’s inability to provide this information, in the form and manner requested, as an adverse inference against it, without addressing the requirements of 19 U.S.C. § 1677e. *Id.* The court remanded the issue and instructed the ITC to reconsider its findings with regard to lost sales and revenue. *Id.* The court also ruled that “the Commission may collect additional evidence relevant to this issue and reconsider any aspect of the *Final Determination* which relied upon or took into consideration the Commission’s prior findings regarding lost sales and revenue.” *Id.*

Second, the court found that the ITC, in assessing the effects of subject imports on the domestic industry, did not “evaluate all relevant factors which have a bearing on the state of the [CWP] industry in the United States . . . within the context of the business cycle,” as required by 19 U.S.C. § 1677(7)(C)(iii). *Id.* at __, 24 F. Supp. 3d at 1307 (ellipses in original) (quoting 19 U.S.C. § 1677(7)(C)(iii)). Specifically, the court stated:

While the Commission referenced the dismal economic conditions that affected the industry at the beginning of the POI, it did not clearly address whether the improvements in nearly every measure of industry performance may appear significant because of the broader economic recovery, thereby masking the injurious impact of subject imports on the domestic industry. Without expressly discussing the effects of the economic recovery on the domestic industry and explicitly addressing those effects in contrast to the effects of subject imports, the court cannot assume that the Commission has evaluated all relevant factors having a bearing on the state of the industry within the context of the business cycle.

The court recognizes that certain other issues discussed in this opinion (e.g., the use of pre-POI data . . .) could be considered part of the Commission’s proper consideration of the business cycle; however, in light of the emphasis placed on the

distortive effect of the 2009 economic collapse, it was incumbent upon the Commission to be clear about how it evaluated all relevant factors, particularly in the aftermath of the economic collapse, in the context of the business cycle. The court therefore remands the Commission's determination so that the Commission may explain how it has evaluated the relevant economic factors bearing on the state of the domestic industry within the context of the business cycle. The Commission may make additional determinations, including reconsidering issues otherwise addressed and affirmed in this opinion, as are necessary to account for such explanations.

Id. at __, 24 F. Supp. 3d at 1308 (internal citations and quotation marks omitted).

C. Remand Results

On remand, the ITC declined to reopen the record. *Remand Views* at 6 (citation omitted). The Commission determined not to reconsider “those issues either affirmed by the Court or not subject to appeal, and therefore adopt[ed] its findings, analysis, and conclusions with respect to those issues in their entirety, including domestic like product, domestic industry, negligibility, cumulation, legal standards, and conditions of competition.” *Id.* at 6–7. It also adopted “those portions of the Original Views pertaining to the analysis of volume, price, impact, and threat that were affirmed by the Court . . . or not subject to appeal.” *Id.* at 7.

In its revised lost sales and revenue analysis, the ITC noted that the court had affirmed its finding that subject imports had no negative price effects on the domestic like product. *Id.* at 10. The ITC then determined that it “ha[d] no need to rely on the absence of confirmed lost sales and revenue allegations as further support for these findings.” *Id.* In response to the court's order that the Commission “tak[e] into account Plaintiffs' argument that the structure of the domestic CWP market precludes Plaintiffs from providing the ITC the lost sales and revenue information in the form and manner in which it was sought,” *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1321, the Commission reexamined the record and found “no evidence that the domestic interested parties invoked [19 U.S.C. § 1677m(c)], nor d[id] the domestic interested parties claim to have done so” during the remand proceedings. *Remand Views* at 8 n.29. The Commission clarified that it does not make adverse inferences against parties for failing to report lost sales and revenue allegations because, *inter alia*,

responses to lost sales and revenue questions are voluntary. *Id.* at 10–11 (“Because the reporting of lost sales and revenue allegations is voluntary, . . . the domestic interested parties’ alleged inability to report such allegations . . . would not have constituted a failure . . . to cooperate to the best of their ability . . . within the meaning of the statutory provision governing adverse inferences.”) (citing 19 U.S.C. § 1677e(a)). When a party cannot respond to the best of its ability to such a request, “the Commission’s practice has been to rely on the information available, rather than resorting to the use of adverse inferences.” *Id.* at 11–12.

With regard to the second remanded issue, the ITC reassessed the domestic industry’s performance in the context of the business cycle, and, in particular, whether the economic downturn in 2009 and subsequent recovery masked injury to the domestic industry by subject imports. *Id.* at 16–27. The ITC found that the domestic industry improved “markedly during the POI according to every measure except market share, capacity, and employment,” although the domestic industry faced weak CWP demand due to the lackluster economic recovery. *Id.* at 18 (citing *Original Views* at 34–37) (adopting full discussion of domestic industry’s performance in *Original Views*). Stated differently, the ITC concluded that the tepid economic recovery did not obscure injury to the domestic industry.

The ITC also contrasted the effects of the economic recovery with those of subject imports to discern whether subject imports had a significant adverse impact on the domestic industry that was distinguishable from the business cycle. The Commission concluded, for several reasons, that “the domestic industry’s recovery would not have been significantly stronger but for the increase in subject import volume and market share.” *Id.* at 23. First, the absence of a significant decline in the domestic industry’s performance, irrespective of trends in subject import volume, market share, and underselling, was “consistent with the weak recovery in CWP demand during the period.” *Id.* at 23–24 (noting increased U.S. shipments, stable market share compared to 2000–2008, increased prices in three of four pricing products and average value of U.S. shipments, reduced ratio of cost of goods sold (“COGS”) to net sales, and improved, though irregular, operating income and operating income margin). Second, there was no correlation between the performance of the domestic industry and subject import market share, underselling, or the size of the underselling margins. *Id.* at 25–26 (citing *Original Views* at 30–32, 38–39; *Staff Report* at Tables V-1–4, VI-1). Finally, “the significant presence of competitively-priced nonsubject imports in the U.S. mar-

ket throughout the POI further undermines any possible relationship between subject import competition and the domestic industry's performance during the period." *Id.* at 26 (citing *Staff Report* at Tables IV-3, IV-10, C-1, App. D).

After addressing these remand issues, the ITC concluded that it was unnecessary to "reconsider issues otherwise addressed and affirmed by the Court" in *JMC I*. *Id.* at 7. In a 4–2 vote, the ITC again determined that subject imports neither caused nor threatened to cause material injury to the domestic industry. *Id.* at 1.

Plaintiffs now challenge the remand results on three grounds. They contest, as unsupported by substantial evidence or not in accordance with law, (1) the ITC's alleged use of the absence of lost sales allegations to support its finding of no negative volume effects, (Comments at 11–13); (2) the ITC's alleged failure to explain why the domestic industry's loss of market share to subject imports did not lead to an affirmative injury determination, (Comments at 4–11); and (3) its finding of no correlation between subject import volume and the domestic industry's financial performance, (Comments at 13–25).

STANDARD OF REVIEW

The standard of review applicable to a challenge to a remand determination is the same as that applicable to an original agency determination: 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); *Spa v. E.I. Dupont de Nemours*, 26 CIT 1357, 1360–61 (2002), *aff'd*, *Ausimont SpA v. United States*, 90 F. App'x 399 (Fed. Cir. 2004). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). "[T]he court may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted).

DISCUSSION

As discussed above, in *JMC I*, the court remanded the ITC's determination with regard to two issues: (1) the ITC's treatment of the domestic producers' lost sales and revenue allegations in its price effects analysis and (2) its evaluation of the domestic industry in the context of the business cycle. The court affirmed all other aspects of the *Final Determination*. While the court authorized the Commission to reconsider any aspect of the *Final Determination* that relied upon or took into consideration its prior findings on the remanded issues,

the Commission determined to affirm its original findings in the price effects analysis, without considering lost sales and revenue allegations, and provided further explanation of the role of the business cycle in the domestic industry's performance. In making those findings, the Commission found it unnecessary to reconsider any other aspect of its Final Determination. Therefore, the Commission's findings, apart from the two issues remanded for further consideration, are effectively final.

A. Lost Sales and Revenue Allegations

In *JMC I*, the court ordered the ITC to reevaluate its treatment of the domestic producers' lost sales and revenue allegations in its price effects analysis to account for Plaintiffs' assertion that they could not provide lost sales and revenue information, in the form and manner requested by the Commission, due to the structure of the domestic CWP market. The court further concluded that the ITC had, in effect, treated the domestic industry's inability to provide this information as an adverse inference against it, without addressing the requirements of 19 U.S.C. § 1677e.

In the remand results, the ITC expressly abandoned the use of lost sales and revenue allegations in the price effects analysis. *Remand Views* at 10. It noted that the court had affirmed its finding that subject imports had no negative price effects on the domestic like product and, therefore, concluded that it "ha[d] no need to rely on the absence of confirmed lost sales and revenue allegations as further support for these findings." *Id.* (footnote omitted). The Commission also clarified that it does not make adverse inferences against parties for failing to report lost sales and revenue allegations; rather, when a party does not submit lost sales and revenue allegation reports, "the Commission's practice has been to rely on the information available, rather than resorting to the use of adverse inferences." *Id.* at 10–12.

Because the Commission expressly abandoned any reliance on the lack of verifiable lost sales and revenue allegations in making its remand determination, the Commission has addressed the court's concern that the agency improperly used the domestic producers' failure to provide lost sales and revenue allegations as a basis for an adverse inference against the domestic industry.

Plaintiffs now assert that the ITC unlawfully used the absence of lost sales allegations to support its finding of a lack of negative volume effects in the remand results. (Comments at 11–13.) They aver that the Commission should have treated the increase in subject import volume and market share between 2009 and 2011 as evidence

of lost sales. According to Plaintiffs, by using its longstanding methodology, the Commission repeated the error that the court found in the ITC's price effects analysis in *JMC I*, i.e. that it may have failed to account for Plaintiffs' assertions that they could not provide the lost sales information in the form and manner requested by the Commission due to the structure of the domestic CWP market and, therefore, made an unlawful adverse inference against them. (Comments at 12–13 (citing *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1304–05).)

In the *Remand Views*, the Commission explicitly adopted the volume arguments and findings in the *Original Views*. *Remand Views* at 7. The Commission did not take into account the absence of verifiable lost sales allegations when conducting those analyses. See *Original Views* at 28–29. In fact, in the *Remand Views*, the language that provides the basis for Plaintiffs' objection merely describes the methodology the ITC customarily employs when analyzing lost sales and revenue. *Remand Views* at 10 n.40. This explanation of standard practice does not indicate that the Commission used the absence of lost sales allegations in its evaluation of subject imports' volume effects as Plaintiffs allege.

In certain prior cases, the court has held that in markets with fungible goods, such as CWP, "volume rather than anecdotal evidence may be the best indicator of lost sales." *Granges Metallverken AB v. United States*, 13 CIT 471, 481, 716 F. Supp. 17, 26 (1989) (citations omitted). However, the court has never required the Commission to examine volume *in lieu* of anecdotal evidence for such purposes. See *Copperweld Corp. v. United States*, 12 CIT 148, 169–70, 682 F. Supp. 552, 572 (1988) (noting lack of any statutory provision requiring ITC to perform any particular type of analysis of lost sales or revenue allegations) (citing *Me. Potato Council v. United States*, 9 CIT 293, 302, 613 F. Supp. 1237, 1245 (1985)). It is not enough for Plaintiffs simply to proffer an alternate methodology to that relied upon by the agency, even if that alternate methodology is reasonable and not inconsistent with the statute.⁴ Plaintiffs must demonstrate that the ITC could not properly rely on its selected methodology, something they have failed to do. The court will not disturb the ITC's analysis of subject import volume and market share, notwithstanding the fun-

⁴ When evaluating challenges to the ITC's choice of methodology, the court will affirm the chosen methodology as long as it is reasonable. *Shandong TTCA Biochemistry Co. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1317, 1327 (2011) (citing *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996)); accord *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 1215, 431 F. Supp. 2d 1302, 1306, 1310–11 (2006). When presented with a challenge to the Commission's methodology, the court examines "not what methodology [Plaintiffs] would prefer, but . . . whether the methodology actually used by the Commission was reasonable." *Shandong TTCA Biochemistry Co.*, 35 CIT at __, 774 F. Supp. 2d at 1329 (citation and internal quotation marks omitted).

gible nature of CWP. See *JMC I*, 38 CIT at ___, 24 F. Supp. 3d at 1304.

The court therefore sustains the Commission's treatment of lost sales and revenue allegations.

B. The Business Cycle

In *JMC I*, the court ordered the ITC to explain how it evaluated the relevant economic factors bearing on the state of the domestic industry within the context of the business cycle, as required by 19 U.S.C. § 1677(7)(C)(iii). Specifically, the court ordered the Commission to address whether the improvements in nearly every measure of the domestic industry's performance during the POI may have appeared significant due to the economic collapse in 2009 and subsequent economic recovery, thereby masking the injurious impact of subject imports on the domestic industry.

In the remand results, the ITC undertook a two-part analysis of the business cycle and its effects on the domestic industry. It first examined the effects of the economic recovery on the performance of the domestic industry "in the context of the severe economic downturn in 2009 that depressed apparent U.S. consumption to a level 37.5 percent below that in 2008, and the weak demand recovery thereafter." *Remand Views* at 16–17 (footnote omitted) (citations omitted).

The Commission found that the domestic industry's performance improved in nearly every measure, except market share, capacity, and employment, during the POI, even though CWP demand remained weak. *Id.* at 18 (footnote and citations omitted). Growth in U.S. consumption led to increased production and U.S. shipments by the domestic industry. *Id.* (citing *Staff Report* at Tables III-3, IV-9, C-1). Although the domestic industry's market share fell during the POI, the ITC concluded that the disproportionate effect of the recession on imports had made the 2009 rate unusually high and, therefore, exaggerated the decline in market share. *Id.* (citing *Staff Report* at Table C-1).

Although the domestic industry's capacity fell during the POI, the Commission attributed the decline to the recession rather than subject imports. *Id.* at 19 (citing *Original Views* at 30). Moreover, the decline, in conjunction with increased production, boosted the capacity utilization rate, and capital investment remained stable. *Id.* (citing *Original Views* at 42–43; *Staff Report* at Tables III-3, C-1)).

Employment in the domestic industry fell between 2009 and 2011, but hours worked and wages paid rose due to increased production and shipments. *Id.* (citing *Staff Report* at Tables III-7, C-1). From interim 2011 to interim 2012, industry employment and wages rose,

and hours worked remained steady. *Id.* at 19–20 (citing *Staff Report* at Tables III-7, C-1). The domestic industry’s productivity was unchanged between 2009 and 2011, and peaked in interim 2012. *Id.* at 20 (citing *Staff Report* at Tables III-7, C-1).

The domestic prices for three of four pricing products increased during the POI, as did the average unit value of the domestic industry’s U.S. shipments, and the domestic industry’s COGS to net sales ratio declined. The ITC found these trends “[c]onsistent with recovering demand.” *Id.* (citing *Original Views* at 30–32).

The ITC found that the domestic industry’s recovering sales and prices directly led to improved financial performance. Operating income grew from a loss equivalent to negative 15.1 percent of net sales in 2009, to a positive 3.5 percent of net sales in 2010 and 2.3 percent of net sales in 2011. *Id.* (citing *Staff Report* at Tables VI-1, C-1). Although the domestic industry did not return to the performance levels that it had enjoyed prior to 2008, the Commission concluded that this tempered performance stemmed from “the anemic recovery in CWP demand during the POI,” and not subject imports. *Id.* at 21–22 (footnote and citation omitted).

In the second part of its business cycle analysis, the Commission compared the effects of the economic downturn and recovery on the domestic industry with those of subject imports on the domestic industry to discern “whether subject imports had a significant adverse impact on the domestic industry that [was] distinguishable from the ill effects of the economic downtown of 2009 and the weak recovery thereafter.” *Id.* at 23. The Commission first noted the absence of “a significant decline in domestic industry performance during the POI that could support a significant adverse impact finding.” *Id.* It then examined the domestic industry’s performance during the POI and reiterated that it improved by most measures, “irrespective of trends in subject import volume, market share, and underselling.” *Id.* Citing to increased U.S. shipments, market share levels “that compared favorably to th[ose] during the 2000–2008 period,” higher prices on three of four pricing products, rising average unit values of U.S. shipments, higher operating income and operating income margins, and lower COGS to net sales ratios, the ITC reaffirmed that “[t]hese improvements . . . were consistent with the weak recovery in CWP demand during the period.” *Id.* at 23–24 (footnotes and citations omitted).

Further analysis led the ITC to conclude that the presence of subject imports in the domestic market did not significantly affect the domestic industry’s performance. It found no correlation between domestic industry performance trends and subject import market

share or underselling.⁵ *Id.* at 24–26. Subject imports took significant market share from the domestic industry only between 2009 and 2010, a period which coincided with improvement in the domestic industry “by almost every measure,” including a swing in its operating income margin from negative 15.1 percent to a positive 3.5 percent. *Id.* at 24 (citing *Staff Report* at Tables IV-10, VI-1, C-1). Between 2010 and 2011, subject imports’ 1.4 percent gain in market share occurred “largely at the expense of nonsubject imports.” *Id.* Nevertheless, the domestic industry’s income and operating income margin fell. *Id.* at 25 (citing *Staff Report* at Tables IV-10, VI-1, C1). The domestic industry’s operating income and operating income margin peaked in interim 2011, when the market share of subject imports also peaked, and fell in interim 2012, although subject import volume and market share fell as well. *Id.* (citing *Staff Report* at Tables IV-10, VI-1, C-1).

The Commission also found that the significant underselling by subject imports, which occurred throughout the POI, did not significantly depress or suppress the prices of the domestic like product. *Id.* (citing *Original Views* at 30–32). During the POI, the domestic industry increased prices on three of four pricing products, increased the average unit value of U.S. shipments, improved the metal margin, and reduced its COGS to net sales ratio. *Id.* at 25–26 (citing *Original Views* at 30–32). This lack of correlation between domestic industry performance and subject import underselling continued even when accounting for the prevalence and degree of underselling. *Id.* at 26 (citing *Staff Report* at Tables V-1–4, VI-1). Between 2009 and 2010, the domestic industry’s performance improved “markedly by most measures,” even though the prevalence of subject import underselling rose, and the margin of underselling was at its highest point of the POI. *Id.* (citing *Staff Report* at Tables V-1–4, VI-1). Although the prevalence of underselling increased further in 2011, the domestic industry’s performance improved, with the exceptions of its operating income and operating income margin. *Id.* (citing *Staff Report* at Tables V-1–4, VI-1). The domestic industry’s operating income margin reached a peak in interim 2011, despite underselling by subject imports in all quarterly comparisons, and that operating income margin declined in interim 2012, even though the prevalence and margin of underselling by subject merchandise fell. *Id.* (citing *Staff Report* at Tables V-1–4, VI-1).

The Commission examined nonsubject imports and found that they held a higher market share, and had lower prices, than subject im-

⁵ The court affirmed these findings in *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1302–03, 1309–10.

ports and the domestic like product during the POI. *Id.* (citing *Staff Report* at Tables IV-3, IV-10, C-1, App. D). According to the ITC, this data demonstrated that “nonsubject import competition was no less a factor in the U.S. market than subject imports.” *Id.* at 27. For example, the only significant decrease in the domestic industry’s operating income and operating income margin occurred between interim 2011 and interim 2012, when subject imports lost market share to nonsubject imports, and not the domestic industry. *Id.* (citing *Staff Report* at Tables IV-10, V-I). The ITC thus concluded that the significant presence of competitive nonsubject imports in the U.S. market undermined the possibility of a link between subject imports and the domestic industry’s performance. *Id.* at 26.

On the basis of this analysis, the Commission determined that the domestic industry’s improved performance during the POI stemmed from the economic collapse in 2009 and the subsequent, albeit tepid, recovery. *Id.* at 27. The presence of subject imports, by contrast, “did not significantly impede the domestic industry’s progress.” *Id.*

In their comments on the *Remand Views*, Plaintiffs criticize the Commission’s business cycle analysis. They do not, however, articulate a challenge to the Commission’s methodology or contend, with any specificity, that the agency’s determination is not supported by substantial evidence. (See, e.g., Comments at 9–10, 16.) Rather, it appears that Plaintiffs simply do not like the result of the Commission’s analysis.

The court finds that the Commission satisfactorily accounted for the effects of the business cycle on the domestic industry’s performance. The ITC’s analysis cites to substantial evidence supporting its analysis of the effects of the business cycle as distinct from those of subject imports on the domestic industry. By doing so, the Commission “explain[ed] how it has evaluated the impact of subject imports on the domestic industry within the context of the business cycle,” as the court ordered in *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1321, and fulfilled the requirements of 19 U.S.C. § 1677(7)(C)(iii). See *Hynix Semiconductor, Inc.*, 30 CIT at 1226–27, 431 F. Supp. 2d at 1344 (noting that business cycle analysis aims to ensure that positive business cycle trends do not mask unfair trading practices). While Plaintiffs might prefer that the Commission had undertaken a different type of analysis with regard to the business cycle, the question is whether the Commission’s methodology was reasonable, not whether it was the preferred methodology of Plaintiffs. *Shandong TTCA Biochemistry Co.*, 35 CIT at __, 774 F. Supp. 2d at 1329. The Commission’s business cycle analysis complied with the court’s remand order and the statute; accordingly, the analysis is sustained.

C. Plaintiffs' Other Arguments

1. The Impact of Product Fungibility on the Commission's Volume Analysis

Plaintiffs maintain that the Commission has an obligation to explain "why the negative volume impact of subject imports alone was not sufficient to require an affirmative determination under the statutory definition of material injury." (Comments at 4, 9–10.) They argue that the fungibility of subject imports with the domestic like product ensures that an increase in subject import volumes "would likely be in substantial part" at the expense of the domestic industry, particularly its share of the U.S. market. (Comments at 6–8 & n.8.) Plaintiffs therefore aver that the increase in the volume of subject imports during the POI necessitates that the ITC "identif[y] the other evidence that nullifies the significance of fungibility so as to support a negative determination." (Comments at 6.)

Plaintiffs already have raised, (*see* ECF No. 71 at 13), and the court rejected, the argument that the fungibility of subject imports and the domestic like product, in conjunction with the increased volume of subject imports during the POI, necessitate a negative injury determination or further explanation by the Commission. *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1298–99. The court will not reconsider these issues here. *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir. 1985) ("The law of the case doctrine is that courts should generally refuse to reopen what has been decided.") (citation and quotation marks omitted). While the court provided that the ITC could have reconsidered this issue on remand to the extent that its prior consideration "relied upon or took into consideration [its] prior findings" on the business cycle or lost sales and revenue issues, *JMC I*, 38 CIT at __, 24 F. Supp. 3d at 1305, the Commission was not required to reconsider the issue and Plaintiffs' arguments do not suggest otherwise.

2. The Correlation Between Subject Imports and the Domestic Industry's Financial Performance

Plaintiffs argue that the Commission's correlation analyses of the effects of subject import volume and prices, and the financial performance of the domestic industry, are erroneous because the ITC ignored record evidence that indicated the contrary. (Comments at 13–25.)

In *JMC I*, the court affirmed the Commission's findings of no correlation between subject import volume and the domestic industry's financial performance, and subject import prices and the domestic industry's financial performance. 38 CIT at __, 24 F. Supp. 3d at

1302–03, 1309–11. Plaintiffs’ arguments do not suggest that the Commission was required to reconsider these findings on remand and, therefore, the court will not reconsider them. *Kori Corp.*, 761 F.2d at 657.

Conclusion

For the reasons provided above, the court sustains the ITC’s remand results. A judgment follows.

Dated: May 29, 2015

New York, New York

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



Slip Op. 15–52

US MAGNESIUM LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 14–00038

[Motion for judgment upon the agency record denied; final results of administrative review sustained.]

Dated: June 1, 2015

Stephen A. Jones and Jeffery B. Denning, King and Spalding of Washington, DC for Plaintiff US Magnesium LLC.

David A. Riggle and David J. Craven, Riggle and Craven of Chicago, Illinois for Plaintiff and Defendant-Intervenor Tianjin Magnesium Metal Co., Ltd.

Eric E. Laufgraben, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Aman Kakar*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

OPINION

Gordon, Judge:

This action involves an administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the antidumping duty order covering pure magnesium from the People’s Republic of China. See *Pure Magnesium From the People’s Republic of China*, 79 Fed. Reg. 94 (Dep’t of Commerce Jan. 2, 2014) (final results admin. review) (“*Final Results*”); see also Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Pure Magnesium from the People’s Republic of China, A-570–832

(Dep't of Commerce Dec. 26, 2013) ("*Decision Memorandum*"), available at <http://enforcement.trade.gov/frn/summary/prc/2013-31412-1.pdf> (last visited this date). Before the court is US Magnesium LLC's ("US Magnesium") motion for judgment on the agency record. See US Magnesium's R. 56.2 Br. in Support of Mot. for J. on the Agency R. (July 29, 2014), ECF No. 40 ("US Mag. Br."); see also Def.'s Opp. to Pl.'s and Def.-Intervenor's R. 56.2 Mots. for J. upon the Agency R. (Oct. 24, 2014), ECF No. 43; Resp. of Pl. Tianjin Magnesium Metal Co., Ltd., to the Mot. Pursuant to R. 56 of the Rs. of the U.S. Ct. of Int'l Trade by US Magnesium LLC (Nov. 14, 2014), ECF No. 47; US Magnesium's Reply to the Resps. of Def. and Def.-Intervenor (Dec. 15, 2014), ECF No. 55 ("US Mag. Reply").¹ 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),² and 28 U.S.C. § 1581(c) (2012).

US Magnesium challenges (1) Commerce's financial statement selection, (2) Commerce's refusal to apply adverse facts available to Tianjin Magnesium Metal Co. Ltd. ("TMM"), and (3) Commerce's surrogate valuation of magnesium scrap. US Mag. Br. at 5-39. For the reasons set forth below, the court sustains the *Final Results* on each of the issues challenged by US Magnesium.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of

¹ Tianjin Magnesium Metal Co. Ltd. raises several conditional arguments in its motion for judgment on the agency record, requesting judicial review if the court remands any of the issues raised by US Magnesium. Mem. in Support of the Mot. for J. on the Agency R. Submitted by Pl. Tianjin Magnesium Metal Co., Ltd., Pursuant to R. 56.2 of the Rs. of the U.S. Ct. of Int'l Trade 3-12 (July 10, 2014), ECF No. 33. Having not remanded any of US Magnesium's issues, the court does not address Tianjin Magnesium Metal Co. Ltd.'s motion.

² 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.

drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms, National Courts* § 3:6 (5th ed. 2015).

II. Discussion

A. Financial Statement Selection

Commerce calculates dumping margins by determining "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). In the non-market economy context, Commerce calculates normal value using data from surrogate countries to value the factors of production. *Id.* § 1677b(c)(1)(B). Commerce must use the "best available information" in selecting surrogate data from "one or more" surrogate market economy countries. *Id.* § 1677b(c)(1)(B), (4). The surrogate data must "to the extent possible" be from a market economy country or countries that are (1) "at a level of economic development comparable to that of the nonmarket economy country" and (2) "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Commerce has a stated regulatory preference to "normally . . . value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2) (2015). Commerce here chose the Philippines as the primary surrogate country. *Decision Memorandum* at 4–10.

Pursuant to its regulations, Commerce relies upon financial statements from surrogate producers of "identical or comparable merchandise" to determine surrogate values for manufacturing overhead, general expenses, and profit. 19 C.F.R. § 351.408(c)(4). Commerce's choice of financial statements is guided by a regulatory preference for publicly available information. *Id.* Beyond that, Commerce generally considers the quality, specificity, and contemporaneity of the available financial statements. Issues and Decision Memorandum for the Final Results in the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, A-570–924, at 4 (Dep't of Commerce Feb. 14, 2011), available at <http://enforcement.trade.gov/frn/summary/prc/2011-3909-1.pdf> (last visited this date).

In its preliminary determination Commerce used financial statements from two Philippine companies to calculate TMM's financial ratios: SOH Technologies Corp. and RU Foundry and Machine Shop Corporation ("RU Foundry"). Decision Memorandum for Preliminary Results of 2011–2012 Antidumping Administrative Review: Pure Magnesium from the People's Republic of China, A-570–832, at 20–21 (Dep't of Commerce May 31, 2013), *available at* <http://enforcement.trade.gov/frn/summary/prc/2013–13702–1.pdf> (last visited this date) ("*Prelim. Decision Memorandum*"). Commerce selected RU Foundry because US Magnesium "placed on the record a description of RU Foundry's line of work, which included production of aluminum, (considered to be a comparable production process to production of [the subject merchandise])." *Decision Memorandum at* 22.

TMM, however, argued in its administrative case brief that RU Foundry's financial statements indicated that RU Foundry did not in fact produce comparable merchandise. *Decision Memorandum at* 20–21. For the final results Commerce agreed, explaining that the revenue sources, raw material purchases, and accounts receivables section of the financial statement all suggest that RU Foundry manufactures beverages, and not metal as the "Foundry" in its name implies. *Id.* (noting that RU Foundry "derives its revenue from 'a range of beverage products'" and "selling fruits, juices, and copra products," that RU Foundry's purchases do not include "raw materials for metal production," and that RU Foundry's accounts receivables include companies like "Eco Agri,' Puro Organic,' and 'Fresh Start'"). Confronted with financial statements containing "irreconcilable contradictions as to what merchandise RU Foundry actually produces and sells," Commerce chose not to use the RU Foundry financial statements for the *Final Results*. *Decision Memorandum at* 22. It is hard to fault that choice.

US Magnesium, nevertheless, challenges this decision. US Mag. Br. at 33–37. The court is not persuaded by US Magnesium's argument. Even if the issue of RU Foundry's business were arguable, and the record unclear, US Magnesium could not prevail because the substantial evidence standard of review "contemplates [that] more than one reasonable outcome is possible on a given administrative record." *Globe Metallurgical, Inc. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1269, 1276 (2012). US Magnesium fails to demonstrate that there is one and only one reasonable conclusion to be drawn from RU Foundry's financial statement—that RU Foundry produces comparable merchandise. The court therefore agrees with TMM and Defen-

dant that Commerce's rejection of RU Foundry's financial statement is reasonable on this administrative record. Accordingly, the court sustains this aspect of the *Final Results*.

B. Facts Available

The statute mandates that Commerce use "facts otherwise available" when "necessary information is not available on the record" or when, among other things, an interested party "significantly impedes a proceeding." 19 U.S.C. § 1677e(a). If Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce may "use an inference that is adverse" when selecting among facts available. *Id.* § 1677e(b). The use of "facts otherwise available" and the application of an adverse inference are separate determinations. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) (citing *Nippon Steel v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

US Magnesium argues that Commerce did not consider whether TMM significantly impeded the proceeding by failing to include a complete and accurate translation of a Ukrainian financial statement. US Mag. Br. at 5–26. During the proceeding US Magnesium placed on the record an alternative English translation of the same Ukrainian financial statement. Commerce, in turn, concluded that US Magnesium's alternative translation did not warrant a finding that TMM significantly impeded the proceeding:

In this case, the information has been placed on the record, in the form of Petitioner's translation of the omitted paragraphs and, in any case, we do not consider the information at issue to qualify as "necessary information" given that the Department has selected the Philippines as the appropriate surrogate country. Because the information at issue is not necessary for the determination, *and there are no other allegations or information that raise question as to the reliability of any other information provided by TMM in this particular review, we do not find that the party significantly impeded the proceeding based upon the facts in this case.* Accordingly, we find no basis to apply facts available, and thus no basis to apply adverse inferences in this case.

Decision Memorandum at 26 (footnotes omitted) (emphasis added).

When US Magnesium argues that Commerce did not consider whether TMM significantly impeded the proceeding, *see*, US Magnesium Br. at 10; US Magnesium Reply at 2, US Magnesium appears to

have overlooked the underlined language above. And despite devoting almost its entire administrative case brief arguing TMM deserved a total AFA rate, US Magnesium could only identify three apparent discrepancies within a single exhibit among the many submitted by TMM. *See* Case Br. of US Magnesium, at 117 (Dep't of Commerce Aug. 8, 2013), PD 144.³ All US Magnesium submitted to support its argument was a *competing* translation of the same financial statement. *Id.*; *see Decision Memorandum* at 26 (“The record does not contain . . . information to contradict TMM’s assertion that it provided an acceptable translation of the words.”). Here, Commerce reasonably declined US Magnesium’s invitation to find that TMM significantly impeded the proceedings. The court therefore sustains this aspect of the *Final Results* as well.

C. Surrogate Value for Magnesium Scrap

For the preliminary results Commerce selected Philippine HTS 8104.20 (“Magnesium Waste and Scrap”) to value TMM’s scrap input. *Prelim. Decision Memorandum* at 18–19 (“Philippine data for imports of magnesium scrap under HTS subcategory 8104.20 represent the best, and only, information available to value the scrap inputs used by TMM’s supplier in the production of subject merchandise during the POR.”). In the final results, however, Commerce acknowledged that the selection of Philippine data was no longer a reasonable choice on the administrative record.

Commerce explained that TMM submitted “benchmark” data showing that the Philippine *scrap* surrogate data point exceeded the values of Indonesian, South African, Thai, and Colombian imports under HTS 8104.19, which covered the finished subject merchandise as well as the magnesium TMM used to produce its scrap. The Philippine *scrap* surrogate data point also exceeded the values of Indonesian, South African, and Thai imports for pure (99.8% or greater) unwrought magnesium under HTS 8104.11. *Id.* at 12–16. These “benchmark” prices rendered the Philippine scrap value unreasonable. According to Commerce, scrap should not be more valuable than both the subject merchandise and the material used to produce the scrap. *Id.* at 15. Without a usable surrogate value from the primary surrogate country (Philippines), Commerce applied its standard selection criteria (specificity, contemporaneity, public availability, representativeness, and whether prices exclude taxes and duties) to the other available secondary surrogate country data on the administrative record. *Id.* at 12–20; *see also* Surrogate Value Memorandum, at 2–4 (Dep’t of Commerce Dec. 26, 2013), PD 165.

³ “PD” refers to a document contained in the public administrative record.

The administrative record included data from various countries under three HTS subheadings: HTS 8104.20 (covering scrap magnesium); HTS 8104.19 (covering subject merchandise and input that created TMM's scrap); HTS 8104.11 (covering pure magnesium). Commerce easily settled on HTS 8104.20 as best covering TMM's "scrap." *Id.* at 20.

Among the available secondary surrogate country-specific HTS 8104.20 data, Commerce rejected Thai and South African data points as non-contemporaneous and unreliable. *Decision Memorandum* at 18–19. For the remaining Serbian, Ukrainian, and Bulgarian HTS 8104.20 data, Commerce explained that each were "publicly available, non-export, tax-exclusive, and obtained from the preferred GTA data-source," but that "the Serbian HTS 8104.20 import data provide the most robust dataset and, therefore, represent the best available information to value scrap magnesium." *Id.* at 20. Commerce's choice of Serbian HTS 8104.20 as the "best available" surrogate value on this administrative record represents a reasonable application of Commerce's surrogate value selection criteria.

US Magnesium does not challenge Commerce's rejection of the Philippine surrogate value as unreasonable when measured against the non-Philippine benchmark data. US Magnesium instead challenges Commerce's use of the Serbian HTS 8104.20 data point as an unreasonable departure from past practice. According to US Magnesium, once Commerce "established a benchmark" price, it should have also selected that benchmark price as the surrogate value, *i.e.*, "cap" the scrap value at the benchmark price. US Mag. Br. at 27–31. Thus, US Magnesium argues that Commerce should have selected the Indonesian, South African, Thai, and Colombian HTS 8104.19 data points, either individually or in some combination. US Mag. Reply at 18–19.

Commerce acknowledged that its recent practice "is to continue to utilize the scrap value in question as the [surrogate value], but to cap this value at the price of the primary product." *Decision Memorandum* at 15. Commerce has not always applied a cap. *See* Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Certain Steel Nails from the People's Republic of China, A-570-909, at 38 (Dep't of Commerce June 6, 2008), *available at* <http://enforcement.trade.gov/download/nme-separates/prc-nails/prc-nails-final-memo.pdf> (last visited this date). Where Commerce has applied a cap, it has not always selected the benchmark for use as a cap. *See* Issues and Decision Memorandum for the Final Results of the Antidumping Duty New Shipper Reviews on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,

A-552–801, at 35–37 (Dep’t of Commerce June 24, 2013), *available at* <http://enforcement.trade.gov/frn/summary/vietnam/2013–158821.pdf> (last visited this date) (using a benchmark to reject a proposed scrap surrogate value, but constructing a cap value using different record data) (“*Fish Filets*”).

If Commerce does “cap” a surrogate scrap value, Commerce uses the cap value in place of the unreasonable scrap surrogate value. *See* Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Multilayered Wood Flooring from the People’s Republic of China, A-570–970, at 89 (Dep’t of Commerce Oct. 11, 2011), *available at* <http://enforcement.trade.gov/frn/summary/prc/2011–26932–1.pdf> (last visited this date) (“valuing” respondent’s scrap using an average of the surrogate values for the inputs used to create the byproduct) (“*Wood Flooring*”); *Decision Memorandum* at 17 (describing the scrap value in *Wood Flooring* as “cap”). Most important, when Commerce has applied a cap, Commerce derived the cap value from the *primary surrogate country* price data for the input that created the scrap. *See Decision Memorandum* at 17 (explaining when Commerce has applied a cap).

Here, there was no reasonable surrogate value from the primary surrogate country from which Commerce could establish a cap. Commerce looked to the Philippine HTS provision covering the input that created TMM’s scrap (HTS 8104.19). During the period of review, however, the Philippines had no imports under HTS 8104.19 (the category covering the input that created the scrap), and there were no Philippine alternatives on the record. *Id.* at 15. As Commerce explained, “because the instant record lacks a value for finished unwrought magnesium from the Philippines from which an appropriate cap may be determined (*i.e.*, Philippine price data for imports of HTS 8104.19), we are unable to cap the SV in question and must instead look to the other available SV information on the record.” *Id.* This therefore is not a circumstance, as US Magnesium contends, in which Commerce unreasonably departed from past practice, but instead a circumstance in which Commerce attempted to identify the “best available information” for TMM’s scrap surrogate given a lack of available usable data from the primary surrogate country. 19 U.S.C. § 1677b(c)(1).

US Magnesium also argues that Commerce failed to explain why imports under Serbian HTS 8104.20 are specific to TMM’s scrap, which, according to US Magnesium, is a necessary finding because that provision is a basket category that may include imports of lower-quality and lower-priced scrap. US Mag. Br. at 31–33. Although everyone agrees that HTS 8104.20 covers TMM’s scrap, US Magne-

sium infers that perhaps the Serbian scrap provision, as a basket category, might also contain non-comparable scrap, rendering it a poor surrogate value choice. *Id.* Perhaps it does, but this remains just one of many possible inferences that could be drawn about this tariff heading. See *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (“The question is whether the record adequately supports the decision of [Commerce], not whether some other inference could reasonably have been drawn.”). If US Magnesium believed Serbian HTS 8104.20 was a poor choice, US Magnesium should have developed the administrative record with information substantiating its inference that the Serbian scrap provision contains lots of low-quality, non-comparable scrap. See *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (“[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.”).

As Commerce has provided a reasonable explanation for applying its standard selection criteria to the available secondary surrogate country data, as well as for declining to apply the benchmarks as a cap, the court sustains Commerce’s selection of Serbian HTS 8104.20 to value TMM’s scrap input.

III. Conclusion

For the foregoing reasons, US Magnesium's motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: June 1, 2015

New York, New York

/s/ Leo M. Gordon

JUDGE LEO M. GORDON