

U.S. Customs and Border Protection

Slip Op. 13–15

CORNING GILBERT INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00511

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

Dated: February 1, 2013

Joseph P. Lavelle and *Andrew N. Stein*, DLA Piper US LLP, of Washington, DC for Plaintiff Corning Gilbert Inc. Also with them of the brief was *Ralph L. Sheppard*, Meeks, Sheppard, Leo & Pillsbury LLP, of Fairfield, CT.

Amy M. Rubin, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for Defendant United States. With her on the brief were *Karen V. Goff* and *Marcella Powell*, Trial Attorneys. Also with them on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge. Of counsel were *Beth C. Brotman* and *Michael Heydrich*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Gordon, Judge:

This action arises from a decision by U.S. Customs and Border Protection (“Customs”) to exclude certain of Plaintiff’s merchandise from entry into the commerce of the United States. Customs refused entry to Plaintiff’s merchandise based on a General Exclusion Order (the “650 GEO”) issued by the U.S. International Trade Commission (“ITC”) in Investigation No. 337-TA-650 (the “650 Investigation”). The 650 GEO prohibits unlicensed entry of coaxial cable connectors that infringe claim 1 and/or claim 2 of U.S. Patent 6,558,194 (the “194 Patent”). Plaintiff Corning Gilbert Inc. (“Corning Gilbert”) timely protested the exclusion and, pursuant to 19 U.S.C. § 1515(a) and 19 C.F.R. §§ 174.24 and 177.2, applied for further review, and requested an administrative ruling from Customs Headquarters. Responding to the application for further review and request for a ruling, Customs issued HQ H194336 (“HQ Ruling”). In the HQ Ruling, Customs held,

inter alia, that Corning Gilbert’s UltraRange® and UltraShield™ coaxial cable connectors (the “Excluded Connectors”) were properly excluded from entry for consumption because they are covered by the 650 GEO. Customs accordingly instructed the Port Director to deny Corning Gilbert’s protest with respect to the Excluded Connectors. In this action, Corning Gilbert challenges the denial of its protest. Claiming no genuine issue as to any material facts, the parties have filed cross-motions for summary judgment. Corning Gilbert Inc.’s Mot. for Summ. J. of Non-Infringement and Mem. in Supp. of Mot., ECF No. 86 (“Pl.’s Br.”) and Mem. in Supp. of Def.’s Mot. for Summ. J., ECF No. 88 (“Def.’s Br.”). The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006)¹.

I. BACKGROUND

In 2008 the owner of the ‘194 Patent petitioned the ITC to investigate, pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2006)², the alleged unfair importation of merchandise infringing the ‘194 Patent. Am. Compl., ECF No. 16 ¶ 21 and Answer, ECF No. 27 ¶ 21; *In the Matter of Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA650 (Apr. 14, 2010) (“ITC Opinion”) at 2. Corning Gilbert was not a named respondent in this investigation. *See* ITC Opinion at 2–3. Moreover, all of the respondents that were alleged to have infringed the ‘194 Patent either defaulted in the 650 Investigation or were terminated from the investigation based on a consent order. *Id.* at 3. At an evidentiary hearing before the Administrative Law Judge (“ALJ”), the complainant’s expert witness testified that certain connectors of the defaulting respondents – including a connector referred to as the Fei Yu FY-037 – met all limitations of claims 1 and 2 of the ‘194 Patent. Def.’s Ex. D, ECF No. 85–1 (excerpt from ALJ Gildea’s initial determination in ITC Inv. No. 337-TA-650 (Oct. 13, 2009) (“ALJ Determination”)) at 52 and 55. No party contested this testimony, either during the hearing or in the post-hearing briefing. *Id.* at 52, 55 and nn. 18, 20. The ALJ found that the complainant’s undisputed evidence presented showed that the defaulting respondents’ connectors infringed claims 1 and 2 of the ‘194 Patent. *Id.* at 54 and 56. The ITC did not review the ALJ’s finding in this regard, and issued the 650 GEO prohibiting unlicensed entry of any coaxial cable connectors that infringe claims 1 or 2 of the ‘194 Patent. ITC Opinion

¹ Further citation to Title 28 of the U.S. Code is to the 2006 edition.

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

at 1–2 and 63; General Exclusion Order, Inv. No. 337-TA-650 (ITC Mar. 31, 2010), Def.’s Ex. A, ECF No. 85–1 (“650 GEO”).

Coaxial cable is a type of cable that has a central electrical conductor (usually a flexible wire), surrounded by a dielectric insulating layer and one or more outer conductors (typically a foil surrounded by woven metallic braid).



Joint Statement of Material Undisputed Facts, ECF No. 77 (“J. Stmt. of Facts”) ¶¶ 3, 1617; Decl. of Donald A. Burris, Pl.’s Ex. 2, ECF No. 86–3 (“Burris Decl.”) ¶¶ 4–5; Decl. of Dr. Michael Littman, Pl.’s Ex. 3, ECF No. 86–4 (“Littman Decl.”) ¶¶ 21–22. Coaxial cable has many uses, but a very common one today is to connect TVs, set-top boxes, computers, DVD players, and the like to sources of programming, such as satellite dishes and cable TV lines. *Id.*

To connect a coaxial cable to a device, such as a DVD player, the central (signal) and outer (ground) electrical conductors of the cable must be securely connected to the respective central and outer portions of the DVD receptacle. J. Stmt. of Facts ¶ 18; Burris Decl. ¶ 6; Littman Decl. ¶ 23. Poor electrical connections on either the signal or ground portion of the connector can result in radio frequency leakage or distortion, and can cause the DVD’s operation to be degraded. Littman Decl. ¶ 23. Coaxial cable connectors are designed to minimize that leakage or distortion. *See id.* Connectors also provide a seal to protect the exposed elements of the cable from moisture or other environmental effects. J. Stmt. of Facts ¶ 21; Burris Decl. ¶ 10. To attach a connector to the coaxial cable, the center conductor, insulating layer, and foil typically are inserted into a central post in the connector, while the outer braid is captured in a bore about the post. J. Stmt. of Facts ¶ 20; Burris Decl. ¶ 8; Littman Decl. ¶ 25.

The invention described in the ‘194 Patent involves a coaxial cable connector that connects to the cable by way of a two-step process. ‘194 Patent, Pl.’s Ex. 1, ECF No. 86–2, at 2:43–46. In the “first configuration,” as shown in Figure 1 of the ‘194 Patent, the cable is threaded

through a “fastener member”/ “compression ring” (28). *See id.* at 7:39–60. J. Stmt. of Facts ¶ 22.

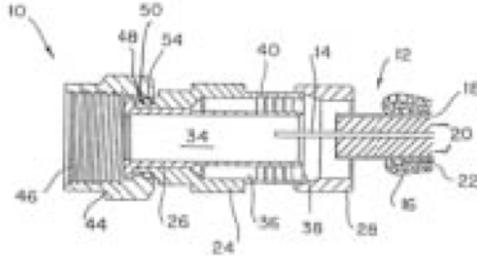


Fig. 1

Then, in the “second configuration,” as shown in Figure 5 of the ‘194 Patent, the fastener member/ compression ring (28) is moved over the “connector body” (24). J. Stmt. of Facts ¶ 23.

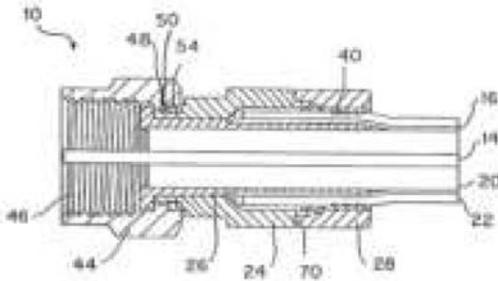
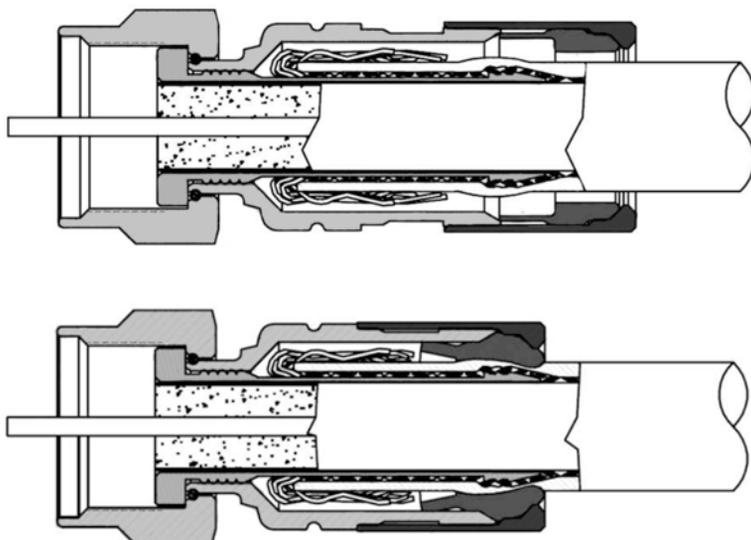


Fig. 5

The inner diameter of the fastener is smaller than the outer diameter of the body, so that when the fastener is moved over the body in the second configuration (using a special tool), the body is deformed beneath the fastener in order to grip the cable and create the desired seal. *See* ‘194 Patent at 8:38–50. One advantage of the ‘194 Patent over prior coaxial cable connectors was that its design “eliminate[d] the need for an O-ring or other seal between the connector body (24) and the fastener member (28).” *Id.* at 8:53–57. Both claims 1 and 2 of the ‘194 Patent contain the limitation that the connector body have a cylindrical sleeve at one end that deforms radially inward as the

fastener is advanced axially over the body. ‘194 Patent at 13:35–45 (element (c) of claim 1, requiring a cylindrical sleeve at one end of the connector’s cylindrical body that is deformable); 14:1–7 (element (e) of claim 1, requiring that the deformable cylindrical sleeve be deformed by advancing the fastener/compression ring axially over the cylindrical body member); 14:24–35 (element (c) of claim 2, identical to element (c) of claim 1) and 14:50–56 (element (e) of claim 2, identical to element (e) of claim 1).

Corning Gilbert’s Excluded Connectors are not materially different from one another, and may be described in relevant part without differentiating among them. *See* Burris Decl. ¶¶ 33–34. Like most conventional coaxial cable connectors, the Excluded Connectors contain an inner cylindrical post to receive the inner conductor (wire) and dielectric insulating layer of the cable; a connector body surrounding the post that creates a bore to receive the outer conductor (metallic braid) of the cable; and a fastener that moves over the body to create a seal. *See id.* ¶¶ 36–37; ‘194 Patent at 1:29–42 (describing typical composition of conventional coaxial cable connectors). In addition to these components, the Excluded Connectors also have a component which is referred to as a “deformable gripping ring.” *Id.* at ¶ 37 (quoting U.S. Pat. No. 7,182,639 at 14:33–40). This gripping ring is attached to the inside of the fastener using a press fit. *Id.* at ¶ 38. As the fastener is moved over the body using a special tool, the gripping ring is forced underneath the body, whereupon the gripping ring is deformed in order to grip the cable and create the seal. *Id.* at ¶ 44. The part of the connector which surrounds the tubular post to create the bore that receives the cable’s outer conductor is not deformed when the fastener is moved over the body to create the seal. *Id.* at ¶ 45. Only the gripping ring is deformed in this process. *Id.* Below are representative drawings of the Excluded Connectors in the first and second configurations, respectively:



Burris Decl. ¶¶ 42, 44; J. Stmt. of Facts ¶¶ 47, 81.

In support of its application for further review and request for a ruling, Corning Gilbert argued that the Excluded Connectors do not meet the claim limitations of claims 1 and 2 of the '194 Patent because the Excluded Connectors do not exhibit a cylindrical body member with a deformable cylindrical sleeve. HQ Ruling, Pl.'s Exs. 15A and 15B, ECF Nos. 86–20 and 86–21, at 17. In rejecting this argument, Customs concluded that the Excluded Connectors do in fact exhibit a cylindrical body member with a deformable cylindrical sleeve because the gripping ring is part of a composite cylindrical body that satisfies all of the limitations of the claims of the '194 Patent. *Id.* at 18. In reaching this conclusion, Customs relied on the fact that the Fei Yu FY-037 device, which had a body member that is part metal and part plastic, was found to infringe the '194 Patent in the 650 Investigation. *Id.* at 19 (citing to ITC record in the 650 Investigation). Based on the HQ Ruling, Customs instructed the Port Director to deny Corning Gilbert's protest.

II. STANDARD OF REVIEW

The court reviews Customs' denial of a protest *de novo*. 28 U.S.C. § 2640(a)(1); *Ford Motor Co. v. United States*, 35 CIT ___, ___, 800 F. Supp. 2d 1349, 1351 (2011). "A Customs decision does not enjoy a statutory presumption of correctness on questions of law, but may be

entitled to respect proportional to its power to persuade.” *Ford Motor Co.*, 35 CIT at ___, 800 F. Supp. 2d at 1351 (citing *Universal Elecs. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) and *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001)). In particular, Customs’ decision “may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.” *Mead*, 533 U.S. at 235.

Summary judgment is appropriate if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. USCIT R. 56(c).

III. DISCUSSION

The material facts of this case are uncontested and the parties have filed cross-motions for summary judgment, each claiming entitlement to a favorable judgment as a matter of law. *See* Pl.’s Br.; Def.’s Br.; J. Stmt. of Facts. The following issues are before the court: (1) whether the HQ Ruling, which is the basis for Customs’ denial of Corning Gilbert’s protest, warrants any deference; (2) the proper claim construction for contested terms found in the claims of the ‘194 Patent; and (3) application of the claims of the ‘194 Patent, properly construed, to the Excluded Connectors. The court addresses each issue in turn.

A. CUSTOMS’ DECISION DOES NOT WARRANT DEFERENCE.

The Government argues that the HQ Ruling is entitled to deference, pursuant to the Supreme Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), because the HQ Ruling is logical, persuasive, and thorough. Def.’s Br. at 10–12; *see Mead*, 533 U.S. at 235 (written agency decisions may warrant deference in accord with their “thoroughness, logic, and expertness, [and] fit with prior interpretations, and any other sources of weight”). Corning Gilbert argues the contrary – that the HQ Ruling was hastily reached and is contrary to both reason and to established principles of patent law. Pl.’s Br. at 31–33. The court is not persuaded that Customs undertook such a logical, thorough, and expert analysis that would warrant deference.

Both, Corning Gilbert and the Government, based their respective arguments on Customs’ reliance on the ITC finding that the Fei Yu FY-037 device infringed the ‘194 Patent (the “ITC Fei Yu finding”). *See* Pl.’s Br. at 31–33; Def.’s Br. at 23–26. Initially, the Government argues that Customs has a limited role with respect to Section 337 enforcement, and that it may only refuse entry to merchandise that

the ITC has “instructed” Customs to exclude. In performing this limited role as an enforcer, Defendant argues that the court should uphold Customs’ denial of Corning Gilbert’s protest because Customs merely applied the ITC’s finding regarding the Fei Yu FY-037 device to Corning Gilbert’s Excluded Connectors. Def.’s Br. at 12–28. In the Government’s view, Customs is simply required to determine whether the product encompassed by the GEO is excluded from entry by applying the ITC record without examining the underlying findings. According to the Government, the ITC’s findings are the law of the case. Consequently, Plaintiff is precluded from relitigating those findings in a 1581(a) action challenging the exclusion. The court disagrees.

Defendant is correct that ITC infringement findings are final and conclusive unless appealed to the U.S. Court of Appeals for the Federal Circuit. *See* 19 U.S.C. § 1337(c). However, since Corning Gilbert was not a respondent in the 650 Investigation, the ITC did not find that Corning Gilbert’s Excluded Connectors infringe the ‘194 Patent. Because Corning Gilbert has had no opportunity to litigate its position before the ITC, the ITC’s finding of infringement regarding the Fei Yu FY-037 device, though final and conclusive as to that product, has no preclusive effect with regard to the question of whether Corning Gilbert’s Excluded Connectors infringe the claims of the ‘194 Patent. *See Yingbin-Nature (Guangdong) Wood Indus. Co. v. United States*, 535 F.3d 1322, 1332–33 (Fed. Cir. 2008) (“*Yingbin-Nature*”) (noting that ITC findings of infringement are preclusive only as to parties who have had a full and fair opportunity to litigate the issues before the ITC) (citing *Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1537 (Fed. Cir. 1995)).

Additionally, Defendant misapprehends the contours of an exclusion order. Typically, an exclusion order binds only parties that the ITC has found are violating Section 337. *See* 19 U.S.C. § 1337(d)(2). However, under certain circumstances, the ITC may issue a GEO, which broadly prohibits entry of merchandise that infringes the relevant claims of a particular patent without regard to whether the person(s) importing the merchandise were parties to, or were related to parties to, the underlying Section 337 investigation. *See id.* The ITC may also require parties and non-parties alike, as a condition of entry, to certify that the imported merchandise is not excluded from entry and thereby shift to those importers the burden of establishing non-infringement. *See Am. Comp., Ex. A*; *see also Hyundai Elecs. Indus. Co. v. U.S. Int’l Trade Comm’n*, 899 F.2d 1204, 1210 (Fed. Cir. 1990).

In enforcing an exclusion order issued by the ITC, Customs may exercise its discretion and have the importer furnish records or analyses to substantiate the certification. *See id.* Customs may effectively become more than a mere enforcer of the GEO. Customs may have to go beyond the mechanical application of the ITC's Section 337. It may have to look at evidence and analyze whether the importer, particularly a non-party such as Corning Gilbert, has established non-infringement. Consequently, it is difficult to conclude, under these circumstances, that an infringement finding could not be subject to collateral attack in a proceeding that challenges the enforcement of a GEO. *See VastFame Camera, Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1108 (Fed. Cir. 2004) (allowing presentation of all legal and equitable defenses in a Section 337(b) enforcement proceeding).

Turning to the substance of Defendant's position, the Government essentially argues that the ITC Fei Yu finding necessitates a conclusion that the Excluded Connectors are within the scope of the 650 GEO. And therefore, Customs' application of the ITC Fei Yu finding to the Excluded Connectors was therefore logical and thorough. *See* Def.'s Br. 23–26. Corning Gilbert, on the other hand, contends that Custom's reliance on the ITC Fei Yu finding was legal error, and therefore weighs against according deference to the HQ Ruling. *See* Pl.'s Br. at 31–33.

The Government would have the court conclude that the ITC Fei Yu finding necessarily implies that the Excluded Connectors fall within the scope of the 650 GEO by infringing the claims of the '194 Patent. *See* Def.'s Br. 23–26. The only conclusions that can be drawn about the Fei Yu FY-037 ITC finding, however, are that (1) this product included a cylindrical body member that was part metal and part plastic and (2) the product was found to embody each and every claim limitation of the '194 Patent. *See* ALJ Determination; ITC Opinion; Def.'s Ex. C at 736 (claimant expert's testimony that the "cylindrical body" of the Fei Yu FY-037 product is "metal and then becomes plastic" (referencing photograph of product's cross section)). Thus, the Government's argument is essentially that, because the Fei Yu product was found to infringe the Court No. 11–00511 Page 14 claims of the '194 Patent and had a cylindrical body member that was part metal and part plastic, all coaxial cable connectors embodying any type of plastic component which comes into proximity with a metal cylindrical body member necessarily infringe the claims of the '194 Patent. *See* Def.'s Br. at 23–26; Def.'s Resp. to Pl.'s Mot. for Summ. J. at 6–11 ("Def.'s Resp."), ECF No. 106.

The Government's contentions regarding the ITC's findings in the 650 Investigation are misleading. *See, e.g.*, Def.'s Resp. at 6–11. Contrary to the Government's contention, for example, it is not "obvious" that the cylindrical body member of the Fei Yu FY-037 connector was comprised of two "separate" portions. *See id.* at 6. Although the complainant's expert described the cylindrical body member as part metal and part plastic, neither Customs nor this Court can say with any certainty whether the metal portion of this component within the Fei Yu FY-037 connector was "separate" from the plastic portion or somehow fused therewith, because the exhibits on record before the court provide no details or findings in this regard, and the Fei Yu FY037 product is not in evidence. *See* ALJ Determination; ITC Opinion; Def.'s Ex. C.

On the record before the court, there is no evidence to support the Government's contention that the ITC made findings requiring a conclusion that the Excluded Connectors infringe the claims of the '194 Patent. The ITC Fei Yu finding, while final and conclusive as to that product, does not require such a conclusion as to the Excluded Connectors because (1) no evidence has been presented to Customs or to this Court to suggest that the Excluded Connectors are materially identical to the Fei Yu FY-037 product; and (2) Corning Gilbert has had no opportunity to be heard with regard to the question of the Fei Yu FY-037 product's infringement of the '194 Patent. *See Yingbin-Nature*. As there is no evidence suggesting that Customs had any additional information regarding this matter, the HQ Ruling's reliance on the mere finding by the ITC that a different manufacturer's different product infringed the '194 Patent does not weigh in favor of deference based on the Ruling's thoroughness, logic, and persuasiveness. *See Mead*, 533 U.S. at 235.

Indeed, the ITC's infringement finding, bare as it is, does not speak directly to the question before the court, which is whether the Excluded Connectors were properly excluded pursuant to the 650 GEO for infringing the claims of the '194 Patent. *See Atlantic Thermoplastics Co. v. Faytex*, 970 F.2d 834, 846 (Fed. Cir. 1992) ("*Faytek*") (collecting cases holding that proper infringement analysis compares the accused device to the properly construed patent claims, not to other products). As noted, the ITC never examined the Excluded Connectors, nor made any infringement findings regarding the Excluded Connectors, nor allowed Corning Gilbert an opportunity to be heard on the question of whether the Excluded Connectors "infringe claim 1 or claim 2 of the '194 Patent," to quote the 650 GEO. Thus to support the exclusion of the Excluded Connectors pursuant to the 650 GEO, Customs had to make a substantive determination that the Excluded

Connectors infringe claim 1 or claim 2 of the '194 Patent. *Compare* 19 U.S.C. § 1337(d)(2) (providing that, in the absence of certain special circumstances – such as those found to apply in the 650 Investigation – ITC exclusion orders are usually “limited to persons determined by the Commission to be violating this section”). As a result, the exclusion of the Excluded Connectors is not, as the Government would have the court conclude, merely a ministerial application of the ITC’s findings in the 650 Investigation. *See* Def.’s Br. at 23–26.

To make a substantive determination that the Excluded Connectors infringed claim 1 or claim 2 of the '194 Patent, Customs engaged in traditional patent infringement analysis. HQ Ruling at 5 (“The issue presented is *whether the excluded connectors . . . are covered by claims 1 or 2 of the '194 Patent* and therefore fall within the scope of the 650 GEO.”) (emphasis added) and 7–11 (presenting the principles of traditional patent analysis as the governing legal framework). Nevertheless, the Government argues that Customs cannot be expected nor required to perform “a comprehensive patent infringement analysis for every potentially excludable product” because the applicable regulations provide only 30 days for Customs to act on a protest of exclusion. Def.’s Resp. at 5 (citing 19 C.F.R. § 174.21). This argument implies, however, that Customs undertakes no analysis whatsoever until a protest is filed, which is after Customs has already made the decision to exclude. To the contrary, Customs is to make reasoned and deliberate decisions regardless of whether or not such decisions are subsequently protested. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) (holding that agencies must engage in reasoned decision-making). The 30 days allowed by the regulation to act on a protest provide time for the agency to explain the analysis and reasoning underlying the protested decision, not to engage in thinking about this decision for the first time. Accordingly, the regulatory time limit for addressing a protest of exclusion does not excuse Customs from performing a proper analysis before deciding to exclude merchandise.

“Patent infringement is a two-step inquiry. First, the [infringement decision-maker] must construe the asserted claim. Second, the [infringement decision-maker] must determine whether the accused product or process contains each limitation of the properly construed claims.” *Tessera, Inc. v. Int’l Trade Comm’n*, 646 F.3d 1357, 1364 (Fed. Cir. 2011) (internal quotation and alteration marks and citation omitted). The scope of any contested claim terms must be determined “with a full understanding of what the inventors actually invented and intended to envelop with the claim.” *Phillips v. AWH Corp.*, 415

F.3d 1303, 1316 (Fed. Cir. 2005) (*en banc*). Here, the Government places much emphasis on the ALJ's conclusion during the '194 Patent investigation that, because the claim terms of the '194 Patent were not contested by any party to that proceeding, it was proper to give them their "ordinary meaning." *See, e.g.*, Def.'s Resp. at 12; ALJ Determination at 27. Pursuant to well-settled principles of patent law, however, the "ordinary meaning" of patent claim terms is the meaning they hold for a person of ordinary skill in the relevant art. *Phillips*, 415 F.3d at 1313. Because the "ordinary meaning" that terms may have for persons skilled in the relevant art may not always be readily apparent to persons not skilled in that art, contested claim terms must be construed by way of an "inquiry into how a person of ordinary skill in the art understands [such] term[s]." *Id.* (citations omitted). "The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation[,] [and] [t]hat starting point is based on the well-settled understanding that inventors are typically persons skilled in the field of the invention and that patents are addressed to and intended to be read by others of skill in the pertinent art." *Id.* (citations omitted); *see also Moba v. Diamond Automation, Inc.*, 325 F.3d 1306, 1315 (Fed. Cir. 2003) ("[T]he best indicator of claim meaning is its usage in context as understood by one of skill in the art at the time of the invention."); *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 862 (Fed. Cir. 1991) ("[Plaintiff]'s suggestion that lay jurors would be able to determine the scope of the terms in the [relevant] patent from their 'plain' meaning ignores the language of the disputed terms and the fact that claims are drafted to be read by those skilled in the art, rather than lay persons.").

In this case, although Corning Gilbert placed the claim term "cylindrical body member" squarely at issue, HQ Ruling at 17, Customs did not construe the term by reference to the meaning it carries for a person skilled in the art of coaxial cable connectors. *See id.* Indeed, Customs did not construe the term at all. *See id.* Nor did Customs explain why it rejected Corning Gilbert's proposed construction. *See id.* ; Am. Compl., Ex. D (Corning Gilbert's protest regarding the Excluded Connectors) at 13–17 (discussing claim construction and proposing a construction for "cylindrical body member"). The Government argues that Customs was precluded from engaging in claim construction because the ITC itself did not construe the claims of the '194 Patent, but the Government provides no legal support for this proposition. *See* Def.'s Br. at 25–26. The ITC did not construe the claims of the '194 Patent because no party contested the terms com-

prising those claims during the 650 Investigation. *See* ITC Opinion at 3 (noting that all of the respondents alleged to infringe the ‘194 Patent either defaulted or were terminated from the investigation based on a consent order); ALJ Determination at 27 (noting that the claim terms of the ‘194 Patent were not in issue). In protesting the exclusion of its merchandise, however, Corning Gilbert contested the implicit interpretation given by Customs to the term “cylindrical body member” when determining that the Excluded Connectors infringed the claims of the ‘194 Patent. Protest at 13–17. A proper analysis of whether the Excluded Connectors were properly excluded by necessity requires the court to examine whether those connectors infringe the claims of the ‘194 Patent, and must therefore begin with the construction of the claim term “cylindrical body member.” Because Customs did not engage in this claim construction, its decision is not so thorough, logical, nor expert as to warrant deference pursuant to *Mead*.

B. CLAIM CONSTRUCTION

Undertaking *de novo* the question of whether the Excluded Connectors infringe claims 1 and/or 2 of the ‘194 Patent, the court applies the two-step patent infringement analysis set forth by the Court of Appeals for the Federal Circuit. *See, e.g., Tessera*, 646 F.3d at 1364. Thus, the court must first construe the contested claim term “cylindrical body member.” *See id.*; Pl.’s Br. at 18 (proposing claim term construction); Def.’s Br. at 27 (contesting Plaintiff’s claim term construction). Corning Gilbert proposes that the term “cylindrical body member” should be construed as the “generally cylindrical shaped outer portion of the connector that surrounds the tubular post to define a central bore.” Pl.’s Br. at 18. The Government proposes the following construction: “[t]he generally cylindrical shaped portion of the connector that has a cylindrical sleeve on one end and that engages the tubular post on the other end.” J. Claim Construction Stmt., ECF No. 76, at 2.

The Government objects to the word “outer” in Corning Gilbert’s proposed construction for the claim term “cylindrical body member.” Def.’s Resp. at 12–14. The Government is correct that this word does not appear in the language of the claims of the ‘194 Patent. *See* ‘194 Patent. The emphasis in Corning Gilbert’s proposed construction, however, is on the limitation that the cylindrical body member must surround the tubular post to create a bore thereabout for accepting the cable jacket. *See, e.g.,* Pl.’s Resp. at 1, 4 (emphasizing the limitation that the cylindrical body member define a chamber or cavity about the post). As explained below, this limitation – which appears in

the plain language of both claims of the '194 Patent but is markedly absent from the Government's proposed construction – is dispositive of the issue before the court. Accordingly, the court need not rely on the word "outer" in Corning Gilbert's proposed construction. Moreover, the court does not have to delve into nor resolve the dispute about whether "outer" should be included when construing the term "cylindrical body member" in accordance with its ordinary meaning for a person skilled in the art of coaxial cable connectors.

The substantive difference between the parties' proposed constructions for the claim term "cylindrical body member" is Corning Gilbert's emphasis on, and the Government's omission of, the requirement that the body surround the post to create a bore to receive the cable jacket. The requirement that the body create a bore about the post features prominently in the claim language, which describes the cylindrical body member as "having a first end and a second end, the first end of said cylindrical body member including a cylindrical sleeve having an outer wall of a first diameter and an inner wall, the inner wall *bounding a first central bore extending about said tubular post . . .*" '194 Patent at 13:35–40 (element (c) of claim 1) and 14:24–30 (element (c) of claim 2) (emphasis added). A plain reading of the language of the claims thus supports Corning Gilbert's construction over that of the Government.

Corning Gilbert supports its proposed construction with reference to the remaining language of the claims, the remainder of the specification, and the prosecution history of the '194 Patent. Pl.'s Br. at 18–22; see *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1366 (Fed. Cir. 2012) ("The words of a claim are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art *when read in the context of the specification and prosecution history.*") (emphasis added). First, Corning Gilbert argues that its proposed construction comports with the claim language requiring that the body member be "cylindrical" and have an end that "engag[es]" the tubular post. *Id.* at 18 (citing J. Stmt. of Facts ¶ 38 (quoting claim 1 of the '194 Patent)). Next, Corning Gilbert contends that its proposed construction also comports with the remainder of the specification in the '194 Patent, which discusses "an outer component designed to coact with an inner post in securely and sealingly clamping the outer portion of the cable there between." *Id.* (citing J. Stmt. of Facts ¶ 26 (quoting the '194 Patent at 1:40–43)). Corning Gilbert also points out that "[n]owhere does the specification disclose a cylindrical body member to be anything other than the generally cylindrical shaped outer portion of the connector that surrounds the

tubular post to define a central bore . . .” *Id.* at 19. Finally, Corning Gilbert argues that the prosecution history of the ‘194 Patent reveals that the term “cylindrical body member” had a well-settled meaning in the art before the ‘194 Patent was issued, referring to the generally cylindrical shaped portion of the connector that surrounds the tubular post to define a central bore. *Id.* at 20–21 (citing U.S. Patent Nos. 5,073,129, 4,834,675, and 5,470,257).

In addition, Corning Gilbert supports its proposed construction with a sworn declaration from Dr. Michael Littman,³ an expert skilled in the art of coaxial cable connectors. *See* Littman Decl. ¶ 56. The Government does not contest that Dr. Littman is an expert skilled in the art of coaxial cable connectors. *See generally* Def.’s Br. (making no mention of Dr. Littman’s declaration). Based on Dr. Littman’s unopposed sworn declaration, the court concludes that, for purposes of constructing the claim terms of the ‘194 Patent, Dr. Michael Littman is an expert skilled in the art of coaxial cable connectors. *See* Littman Decl. at ¶ 20 (defining “person of ordinary skill in the art” as “someone with a physics background with working knowledge of the disciplines of electromagnetism and mechanics, or a mechanical engineer having knowledge of radio-frequency electronic instrumentation, or an electrical or communications engineer having knowledge of mechanical systems”). Dr. Littman’s declaration supports Corning Gilbert’s proposed construction for the claim term “cylindrical body member” in that Dr. Littman declares that one skilled in the art would understand that “the connector body is usually cylindrical in shape and surrounds the central post and partially defines a bore where the cable jacket and braided conductor are received.” Littman Decl. at ¶ 56.

The Government has not submitted any expert affidavits from persons skilled in the art of coaxial cable connectors in support of its alternative construction. *See generally* Def.’s Br. Corning Gilbert’s proposed construction for the claim term “cylindrical body member” in claims 1 and 2 of the ‘194 Patent accords with the remaining claim language, the specification, and prosecution history of the ‘194 Patent. Moreover, Corning Gilbert’s proposed construction is supported by an uncontroverted declaration from an expert skilled in the art of coaxial cable connectors. On this basis, the court construes the

³ Dr. Michael Littman is a Professor of Mechanical and Aerospace Engineering at Princeton University, where he has been a member of the faculty since 1979. Littman Decl. ¶ 3. Dr. Littman has 35 years of experience as a researcher and educator in the fields of mechanics, optics, lasers, electronics, control systems, and computer engineering. *Id.* at ¶ 5. Among the graduate-level courses that Dr. Littman teaches at Princeton University is a course covering, *inter alia*, the design and implementation of radio-frequency transmission systems, including coaxial cables. *Id.* at ¶ 7.

claim term “cylindrical body member” in claims 1 and 2 of the ‘194 Patent to mean the “generally cylindrical shaped portion of the connector that surrounds the tubular post to define a central bore.” See Pl.’s Br. at 18; Littman Decl. at ¶ 56.

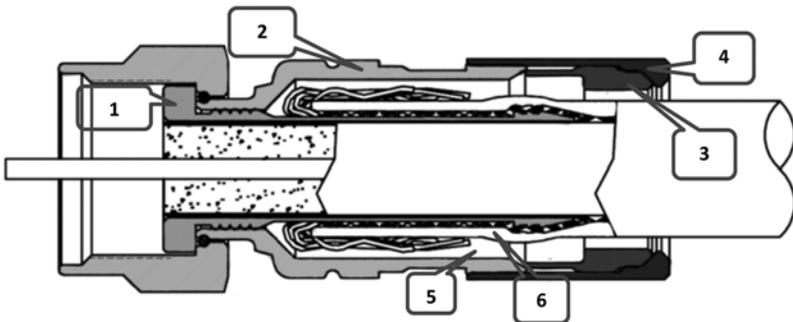
C. INFRINGEMENT ANALYSIS

Having construed the contested claim term, the court turns to whether the Excluded Connectors contain each limitation of the claims of the ‘194 Patent. See *Tessera*, 646 F.3d at 1364. To find that the Excluded Connectors infringe a claim of the ‘194 Patent, the court must find each and every limitation of the claim embodied in the Excluded Connectors. See, e.g., *V-Formation, Inc. v. Benetton Gr. SpA*, 401 F.3d 1307, 1312 (Fed. Cir. 2005) (“Literal infringement requires that each and every limitation set forth in a claim appear in an accused product.”); *Faytex Corp.*, 970 F.2d at 846 (“An accused infringer can avoid infringement by showing that the accused device lacks even a single claim limitation.”).

Corning Gilbert argues that the Excluded Connectors fail to meet the limitation included in both claims 1 and 2 of the ‘194 Patent that the connector’s cylindrical body member have a cylindrical sleeve that is deformable. Pl.’s Br. at 24–25; see ‘194 Patent at 13:35–45 (element (c) of claim 1, requiring a cylindrical sleeve at one end of the connector’s cylindrical body that is deformable); 14:1–7 (element (e) of claim 1, requiring that the deformable cylindrical sleeve be deformed by advancing the fastener/ compression ring axially over the cylindrical body member); 14:24–35 (element (c) of claim 2, identical to element (c) of claim 1) and 14:50–56 (element (e) of claim 2, identical to element (e) of claim 1).

It is both uncontested and clear from the representative diagrams of the Excluded Connectors that Corning Gilbert’s “gripping ring” is the only component that deforms when the fastener/compression ring is advanced axially over the remainder of the connector. See J. Stmt. of Facts ¶¶ 47–70. Corning Gilbert argues that the gripping ring is a separate component from the connector body, and that the Excluded Connectors therefore do not contain a necessary limitation of claims 1 and 2 of the ‘194 Patent, namely that the connector body have a deformable cylindrical sleeve at one of its two ends. Pl.’s Br. at 24–25. The Government contends, as Customs determined in the HQ Ruling, that the claim limitation of a deformable cylindrical sleeve at one end of the cylindrical body member is found in the Excluded Connectors if the gripping member is considered to be part of a composite cylindrical body member within these connectors. Def.’s Br. at 28–29; HQ Ruling at 18–19.

Based on the claim construction adopted above, as well as the plain language of element (c) of the two respective claims of the '194 Patent, the cylindrical body member must engage with the tubular post at one end and surround the tubular post to create a bore for the cable's outer jacket. '194 Patent at 13:35–45 (element (c) of claim 1) and 14:24–35 (element (c) of claim 2). In the Excluded Connectors, as seen in the representative diagram below, see J. Stmt of Fact at ¶ 47, the cylindrical component that engages with the tubular post (1) at one end and surrounds said post to create a bore (5) for the cable's outer jacket (6) is the component referred to as the body (2) by Corning Gilbert. See Littman Decl. at ¶ 75 ("The body in the Corning Gilbert connectors is nearly identical in shape and location to the cylindrical body member shown in the '194 Patent. It is attached to the tubular post on one end and has a cylindrical sleeve at the open end. Given the similarity in location, structure, and function of the Corning Gilbert body, it is straightforward to identify this part as the part that corresponds to the 'cylindrical body member' claimed in the '194 Patent.").



As the fastener (4) advances axially over the open end of this body component (2), however, the latter does not deform. Instead, as the fastener (4) advances axially over the open end of the body component (2), the gripping ring (3), which is located inside the fastener (4), is squeezed under the rigid body component (2) and is deformed radially to grip the cable. Although the gripping ring may be in close proximity to the connector body, it is not essential to the design and function of the Excluded Connectors for the body and the gripping ring to touch in the open position. Littman Decl. at ¶ 38; Burris Decl. at ¶ 39. Rather, the gripping ring is a separate component from the connector body, and has a separate function. Littman Decl. at ¶ 76. Specifically, while the connector body engages with the tubular post to define a bore about said post for the cable jacket, the gripping ring is squeezed

into that bore to grip the cable and create the desired seal. *Id.* This understanding is consistent with how persons skilled in the art of coaxial cable connectors would view the components of the Excluded Connectors. Littman Decl. at ¶ 76 (“[T]hose skilled in the art would *not* consider a gripper or compression sleeve that slides under the body to be part of the body.”) (emphasis added). Considering the gripping ring to be a separate component from the connector body is also consistent with the specification of the ‘194 Patent, which notes that the connectors covered by that patent are particularly advantageous over other models in that they eliminate the need for a separate seal between the connector body and the fastener member. *Id.* at 8:53–57. In the Excluded Connectors, the gripping ring is precisely such a separate seal between the connector body and the fastener member. *See* Littman Decl. at ¶ 63.

Moreover, as seen in the diagram, the gripping ring (3) is irregularly shaped, with at least three different diameters, so if it was considered part of the connector body, the connector body could not have a *cylindrical* sleeve at the end opposite to that attached to the post. *See, e.g., The Amer. Heritage Dictionary* 453 (4th ed. 2000) (defining “cylindrical”). In addition, the gripping ring (3) is located in the fastener (4) and extends beyond the tubular post (1). Therefore, the inner wall of the gripping ring does not form a bore about the tubular post as required by claim element (c) in both claims of the ‘194 Patent. Littman Decl. at ¶ 82; *see* ‘194 Patent at 13:35–45 (element (c) of claim 1) and 14:24–35 (element (c) of claim 2). Since the claims of the ‘194 Patent require that the connector body have a “cylindrical” sleeve and form a bore about the tubular post, ‘194 Patent at 13:35–45 and 14:24–35, the Excluded Connectors would not meet these claim limitations even if the court concluded (contrary to the understanding of those skilled in the art, *see* Littman Decl. at ¶ 76) that the gripping ring is part of the connector body.

Accordingly, the court finds that the Excluded Connectors do not infringe claim 1 nor claim 2 of the ‘194 Patent because the connector body components within the Excluded Connectors do not meet the claim limitations requiring that those components have a deformable cylindrical sleeve at one end. *See* ‘194 Patent at 13:35–45 and 14:24–35.

IV. CONCLUSION

For all of the foregoing reasons, the court finds that the Excluded Connectors do not infringe claim 1 or claim 2 of the ‘194 Patent. The Excluded Connectors therefore fall outside the scope of the 650 GEO

and were improperly excluded from entry. Judgment will issue ordering Customs to admit the Excluded Connectors into the United States.⁴

Dated: February 1, 2013
New York, New York

/s/ *Leo M. Gordon Judge*
LEO M. GORDON

Slip Op. 13–16

WUXI SEAMLESS OIL PIPE CO., LTD., Plaintiff, v. UNITED STATES,
Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 12–00410

[Dismissing action for lack of subject matter jurisdiction]

Dated: February 1, 2013

Rosa S. Jeong and *Philippe M. Bruno*, Greenberg Traurig, LLP, of Washington, DC, for plaintiff Wuxi Seamless Oil Pipe Co., Ltd.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Sapna Sharma*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Jeffrey David Gerrish, *Nathaniel B. Bolin*, *Robert E. Lighthizer*, and *Stephen John Narkin*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for proposed defendant-intervenor United States Steel Corporation.

OPINION

Stanceu, Judge:

Plaintiff Wuxi Seamless Oil Pipe Co., Ltd. (“WSP”) contests a decision of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) not to rescind, as to WSP, an ongoing periodic administrative review of a countervailing duty order on certain oil country tubular goods (“subject merchandise”) from the People’s Republic of China (“China” or “PRC”). Compl. ¶ 1 (Dec. 14, 2012), ECF No. 4; *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in*

⁴ To the extent that Plaintiff seeks prospective permanent injunctive relief, see Am. Compl. at 21–22, regarding entries that are not subject to the protest that is covered by this action, such request is beyond the scope of this action and the court’s jurisdiction under 28 U.S.C. § 1581(a).

Part, 77 Fed. Reg. 11,490 (Feb. 27, 2012) (“*Initiation Notice*”). WSP, a Chinese producer of subject merchandise, is currently a respondent in the review. *Id.* ¶ 6. Three motions are before the court. Plaintiff seeks injunctive relief to preclude Commerce from continuing the review with respect to WSP and also moves to advance and consolidate trial on the merits. Mot. for Prelim. Inj. and to Advance and Consolidate Trial on Merits (Dec. 14, 2012), ECF No. 5 (“Pl.’s Mot.”); Mem. of Points & Authorities in Supp. of Mot. for Prelim. Inj. and to Advance and Consolidate Trial on Merits (Dec. 14, 2012), ECF No. 6 (“Pl.’s Mem.”). Defendant moves to dismiss this action under USCIT Rule 12(b)(1) or, in the alternative, under Rule 12(b)(5). Def.’s Mot. to Dismiss and Opp’n to Pl.’s Mot. for Prelim. Inj. and Mot. to Advance and Consolidate Trial on the Merits (Jan. 16, 2013), ECF No. 19. (“Def.’s Mot.”). United States Steel Corporation (“U.S. Steel”), a domestic producer of oil country tubular goods, moves to intervene. Mot. to Intervene (Jan. 8, 2013), ECF No. 12. Concluding that it lacks subject matter jurisdiction, the court will dismiss this action pursuant to USCIT Rule 12(b)(1).

I. BACKGROUND

Pursuant to Section 702(c)(2) of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1671a(c)(2),¹ Commerce initiated a countervailing duty investigation on certain oil country tubular goods from China on May 5, 2009. *Certain Oil Country Tubular Goods from the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 74 Fed. Reg. 20,678 (May 5, 2009). On December 7, 2009, the Department published an affirmative final determination. *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 Fed. Reg. 64,045 (Dec. 7, 2009). The U.S. International Trade Commission notified Commerce of an affirmative final threat determination on January 13, 2010. *See Certain Oil Country Tubular Goods From China*, 75 Fed. Reg. 3248, 3249 (Jan. 20, 2010). On January 20, 2010, Commerce published an amendment to its affirmative final determination and a countervailing duty order (the “Order”), correcting certain ministerial errors and assigning a revised net subsidy rate of 14.95% to WSP and a rate of 13.41% to all others. *Certain Oil Country Tubular Goods From the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 3203, 3205.

¹ All statutory citations herein are to the 2006 edition of the United States Code. All citations to regulations are to the 2011 edition of the Code of Federal Regulations.

On January 3, 2012, Commerce published a notice of opportunity to request an administrative review of the Order (“Notice of Opportunity to Request Review”). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 77 Fed. Reg. 83 (“Notice of Opportunity to Request Review”). On February 27, 2012, based on requests for review submitted by WSP and another exporter of subject merchandise, Jiangsu Chengde Steel Tube Share Co., Ltd., Commerce initiated an administrative review of the Order for the period of January 1, 2011 through December 31, 2011 (“period of review” or “POR”).² *Initiation Notice*, 77 Fed. Reg. at 11,491. The initiation notice announced that Commerce intended to issue the preliminary results of the review on January 31, 2013. *Id.* at 11,491; Compl. ¶ 45. On March 7, 2012, the Department issued initial questionnaires to WSP and the Government of the People’s Republic of China; WSP submitted a questionnaire response on May 7, 2012. Compl. ¶ 10.

Seeking rescission, WSP submitted a withdrawal of its review request on July 17, 2012, 141 days after initiation and 51 days after the close of the time period provided in a Departmental regulation, 19 C.F.R. § 351.213(d)(1), for withdrawal of a review request, which is 90 days following publication of the notice initiating the review. WSP requested an extension of the 90-day time period as provided in § 351.213(d)(1). Compl. ¶¶ 7, 11, 36 (citation omitted). No party opposed or otherwise commented on WSP’s request. *Id.* ¶ 12.

On October 9, 2012, Commerce rejected WSP’s request for a time extension and, accordingly, did not rescind the administrative review as to WSP. *Id.* ¶¶ 13, 40. The Department’s Notice of Opportunity to Request Review had notified the public that “the Department does not intend to extend the 90-day deadline unless the requester demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.”³ *Id.* ¶ 32 (citing *Notice of Opportunity to Request Review*, 77 Fed. Reg. at 84). Commerce repeated this notification in the *Notice of Initiation*. *Id.* ¶ 31 (citing *Initiation Notice*, 77 Fed. Reg. at 11,490). In its submission withdrawing its request for review, WSP had objected that “by changing the regulatory standard for granting exten-

² The previous review—which would have been the first review of the subject order—had been rescinded. See *Certain Oil Country Tubular Goods From the People’s Republic of China: Rescission of Countervailing Duty Administrative Review*, 76 Fed. Reg. 39,071 (Jul. 5, 2011). Accordingly, the net subsidy rates determined during the investigation were in force when plaintiff brought this action.

³ In the preamble to the promulgation of regulatory amendments, including the current 19 C.F.R. § 351.213(d)(1), the Department stated that while the “90-day limitation may be too

sion from ‘reasonableness’ to ‘extraordinary circumstances,’ the Department in fact repealed and amended 19 C.F.R. § 351.213(d)(1) without the notice-and-comment process required by the [Administrative Procedure Act], 5 U.S.C. § 553.” Compl. ¶ 38. Notwithstanding, plaintiff explained that “there were, in fact, extraordinary circumstances that prevented WSP from filing its withdrawal within the 90-day deadline.” *Id.* ¶ 39. Rejecting WSP’s position, Commerce stated in its October 9, 2012 decision that “[t]he regulation has not been modified or changed” and that, instead, the new interpretation of the withdrawal regulation “represents a change in the agency’s practice” *id.* ¶¶38, 40. The Department also dismissed WSP’s assertion of “extraordinary circumstances,” *id.* ¶ 39, concluding that the circumstances WSP cited “are situations faced by many companies,” *id.* ¶ 41.

WSP submitted a letter on October 22, 2012 alleging additional facts and requesting that Commerce reconsider the October 9, 2012 decision and rescind the review. *Id.* ¶¶ 14, 42 (citation omitted). On November 13, 2012, the Department notified WSP that it was denying the reconsideration request. *Id.* ¶¶ 14, 43. Commerce reiterated that it did not find WSP’s circumstances to be “extraordinary,” adding that these circumstances “are not germane to the subject of the Department’s retrospective administrative review of Wuxi’s sales for the 2011 period of review” *Id.* ¶ 43.

In the review, the Department issued three supplemental questionnaires to WSP during the period of November 9 through December 6, 2012. *Id.* ¶ 15. WSP submitted full responses to these questionnaires. Pl.’s Mem. 12 n.4.

On December 14, 2012, WSP filed its summons and complaint to initiate this action. Summons, ECF No. 1; Compl. On the same day, WSP filed its motion for a preliminary injunction and to advance and consolidate trial on the merits. Pl.’s Mot. On January 8, 2012, U.S. Steel moved to intervene in this action as of right. Mot. to Intervene. On January 16, 2012, defendant moved to dismiss. Def.’s Mot. Defendant’s motion informed the court that the preliminary results of the review would issue on February 1, 2013. *Id.* at 6.

On January 17, 2013, the court held a telephonic conference with the parties to the action and proposed defendant-intervenor. During the conference, plaintiff stated that after it brought this action, WSP had received and submitted full responses to three additional supplemental questionnaires from Commerce. At the conference, plaintiff

rigid . . . the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review.” *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,317 (May 19, 1997).

expressly waived the opportunity to request oral argument and an evidentiary hearing on the issue of subject matter jurisdiction, informing the court that it chose to rest upon its response to the motion to dismiss and the existing case record. Order (Jan. 17, 2013), ECF No. 20. On January 25, 2013, plaintiff responded to defendant's motion, Pl.'s Opp'n to Def.'s Mot. to Dismiss, ECF No. 21 ("Pl.'s Opp'n"), and on January 28, 2013, plaintiff responded to U.S. Steel's motion to intervene, Pl.'s Opp'n to Mot. to Intervene, ECF No. 25.

II. DISCUSSION

The court has an independent responsibility to ascertain whether subject matter jurisdiction exists over an action. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). A plaintiff has the burden of establishing jurisdictional facts by a preponderance of the evidence. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The plaintiff must be given an opportunity to do so before dismissal is entered. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citations omitted). The "court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citation omitted). The court also may consider matters outside the pleadings to find jurisdictional facts. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); see also *Cedars-Sinai Med. Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993). When a court concludes that it lacks jurisdiction, its "only function remaining [is] that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

Plaintiff invokes the court's "residual" jurisdiction provided by section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(i). Compl. ¶¶ 2–5. Paragraph (2) of §1581(i) provides the Court of International Trade jurisdiction of "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2). Paragraph (4) of subsection (i) provides for jurisdiction of "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection . . ." 28 U.S.C. § 1581(i)(4).

This action would appear to fall within the literal terms of the jurisdictional grant of § 1581(i)(4), and plaintiff's complaint asserts jurisdiction thereunder. Compl. ¶¶ 2–4. But because claims brought under 28 U.S.C. § 1581(i)(4) require a waiver of sovereign immunity, the court must strictly construe the jurisdictional statute. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The limits of the waiver of sovereign immunity define a court's jurisdiction to entertain suit. *Hercules, Inc. v. United States*, 516 U.S. 417, 422–23 (1996).

The court may exercise § 1581(i) jurisdiction over this case only if two conditions are satisfied. First, the contested agency action must be a *final* agency action. See *Corus Group PLC v. International Trade Com'n.*, 352 F.3d 1351, 1358–59 (Fed. Cir. 2011); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1338 (Fed. Cir. 2010); *U.S. Ass'n of Importers of Textiles & Apparel v. U.S. Dept of Commerce*, 413 F.3d 1344, 1348–50 (Fed. Cir. 2005). Second, “[w]here another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate.” *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988) (citations omitted).

In support of its jurisdictional argument, plaintiff alleges that “[t]he relief sought by WSP is not available under 28 U.S.C. § 1581(a)—(h).” Compl. ¶ 4. The stated relief WSP seeks is a court order declaring the ongoing review of WSP unlawful and enjoining the Department from continuing that review.⁴ *Id.* ¶¶ 3–4, Prayer for Relief and Judgment. Characterizing its case as a challenge to the Department's decision “to continue an administrative review of WSP,” plaintiff describes the remedy available under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) as “manifestly inadequate . . . [,] for the review that WSP seeks to prevent will have already occurred and WSP will be deprived of meaningful relief.” *Id.* ¶¶ 3–4. Accordingly, plaintiff contends that its “only recourse is under 28 U.S.C. § 1581(i).” *Id.* ¶ 4.

Regardless of how a plaintiff characterizes its cause of action, the court must look to the true nature of the action when considering subject matter jurisdiction. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quotation and citation omitted). Plaintiff's complaint is expressed in four separate counts. Compl. ¶¶ 48–60. For the reasons discussed below, the court construes plaintiff's

⁴ If the review were terminated with respect to WSP, the review apparently would continue because another exporter of subject merchandise, Jiangsu Chengde Steel Tube Share Co., Ltd., had requested a review and, to the court's knowledge, has not withdrawn that request. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 11,490, 11,491 (Feb. 27, 2012).

complaint to present a single claim: that the Department unlawfully denied WSP's request for an extension of the 90-day deadline.⁵

In determining the true nature of plaintiff's claim, the court views the Department's administrative actions in the context of the regulatory provision under which these actions were taken. Subsection (d) of § 351.213 of the Department's regulations provides generally that the Secretary will rescind an administrative review if the party requesting the review withdraws its request "within 90 days of the date of publication of the notice of initiation of the requested review," but the regulatory provision Commerce applied is expressed in the last sentence in the subsection: "The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d). As plaintiff spells out at some length in its complaint, the Department's decision of October 9, 2012 was a decision to deny WSP's request to extend the 90-day deadline. Compl. ¶¶ 36–41. After WSP requested that Commerce reconsider the October 9, 2012 decision, Commerce, on November 13, 2012, issued another decision, this time denying WSP's request for reconsideration of the earlier decision. *Id.* ¶¶ 42–43. Although, as plaintiff pleads, Commerce took the *action* of continuing the review as to WSP, the continuation of the review was merely the inevitable consequence of the October 9 and November 13 decisions. According to the facts as pled in the complaint, when read in the context of 19 C.F.R. § 351.213(d), there was no *separate* decision by Commerce to continue the administrative review as to WSP. For this reason, the court determines the true nature of plaintiff's claim, when construed according to the governing regulatory provision, to be a challenge to an agency decision not to extend a regulatory deadline and not, as characterized by plaintiff, a challenge to the Department's continuation of the review.

It is at least arguable that the Department's decision denying WSP an extension of the 90-day deadline was a final agency action. If not final when Commerce first notified WSP of its decision on October 9, 2012, the decision arguably became final on November 13, 2012, when Commerce denied WSP's request for reconsideration of the October 9, 2012 decision. Language Commerce used in its November

⁵ Each of the four counts presents grounds in support of the single claim. Plaintiff's first count alleges that the review of WSP is being continued according to an "amendment" to 19 C.F.R. § 351.213(d)(1) effectuated in violation of the notice-and-comment rulemaking requirements of the APA. Compl. ¶¶ 48–52 (Dec. 14, 2012), ECF No. 4. As a second count, plaintiff alleges that the decision to not rescind WSP's review violates the preexisting "reasonableness" standard of 19 C.F.R. §351.213(d)(1). *Id.* ¶¶ 50, 53–56. Plaintiff's third and fourth counts allege that the "extraordinary circumstances" standard is "arbitrary and capricious" because it is "not based on reasoned analysis," *id.* ¶¶ 57–58, and because "the Department has never provided any guidelines as to what types of facts would constitute 'extraordinary circumstances,'" *id.* ¶¶ 59–60.

13, 2012 communication suggests that Commerce intended the decision denying the extension to be a final one. Compl. ¶ 43 (quoting Letter from Susan H. Kuhbach, Director, AD/CVD Operations, Office to WSP 1 (Nov.13, 2012) (“We find that it would not be practicable for the Department to reconsider its decisions to conduct reviews of companies, and reallocate it[s] scarce resources across cases, based upon such circumstances.”)). It also can be argued, as defendant does in moving to dismiss, that the responses Commerce issued to WSP on October 9 and November 13, 2012 were not absolutely final as Commerce had yet to issue final results of the administrative review. Def.’s Mot. 17–18. Under this argument, there was still the possibility, however remote, that Commerce would exercise its inherent discretion to rescind the review as to WSP at any time prior to completing the review.

In the circumstance this case presents, the court finds it unnecessary to decide the question of finality in order to reach a decision on the larger question of subject matter jurisdiction. The court concludes that WSP has not satisfied the second condition for obtaining jurisdiction under 28 U.S.C. § 1581(i) by demonstrating that another available remedy is inadequate. Specifically, plaintiff has not shown the inadequacy of the remedy available in an action brought under Section 516A of the Tariff Act, 19 U.S.C. § 1516a. Plaintiff could bring such an action upon publication of the final results of the administrative review. Exclusive jurisdiction would lie in the Court of International Trade according to 28 U.S.C. § 1581(c). If, as plaintiff contends, the Department’s decision denying WSP the benefit of an extension of the 90-day deadline was unlawful, the remedy available under Section 516A is a judicial decision setting aside the results of the review as applied to WSP and ordering an appropriate remand.⁶ As did the plaintiff in *Miller & Co.*, WSP seeks to challenge the Department’s alleged failure to comply with procedural rules in a specific administrative review. *See Miller & Co.*, 824 F.2d at 964 (“the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial review”).

Pointing out that the section 516A remedy would not include an injunction to halt the review, plaintiff argues that the remedy available under Section 516A is manifestly inadequate because WSP must “expend great expense and resources” to “participate fully in th[e] review given that the consequence of non-participation is inevitably a

⁶ Section 516A(a)(2)(A) of the Tariff Act of 1930 authorizes an interested party to bring an action within thirty days after Commerce publishes in the Federal Register the final determination in an administrative review issued under 19 U.S.C. § 1675, in which action the interested party may contest “any factual findings or legal conclusions upon which the determination is based.” 19 U.S.C. § 1516a(a)(2)(A) (2006).

highly punitive adverse facts available subsidy rate.” Compl. ¶ 46. As plaintiff asserts in its response to defendant’s motion to dismiss, “[s]ince refusal to rescind this review, the Department has pro-pounded, almost on a weekly basis, additional supplemental questionnaires to [WSP] with mere days to respond.” Pl.’s Opp’n 1. Plaintiff also submits that “after the preliminary results . . . the Department is likely to issue additional supplemental questionnaires and may conduct a verification.” *Id.* at 1–2. The court rejects this argument.

The court considers the adequacy of the section 516A remedy according to factual circumstances existing as of the date plaintiff commenced this action, December 14, 2012. *See Miller & Co.*, 824 F.2d at 963–64. By that date, plaintiff already had submitted to Commerce full responses to four questionnaires (one initial questionnaire and three supplemental questionnaires).⁷ Compl. ¶ 10; Pl.’s Mem. 12 n.4. From that point forward, if WSP desired to perform the absolute minimum needed to preserve its claim for judicial review in a Section 516A proceeding, it could limit its further participation to the filing of a case brief objecting to the Department’s refusal to extend the 90-day time limit. *See* 19 C.F.R. 351.309(c)(2) (“The case brief must present all arguments that continue in the submitter’s view to be relevant to the Secretary’s final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results.”). Plaintiff, understandably, indicates that it would not choose this minimal course because of the prospect of receiving a rate determined according to “facts otherwise available” and an “adverse inference,” *see* 19 U.S.C. § 1677e(a), (b); WSP would risk suffering the consequences of such a rate should it not prevail in court on its claim that Commerce unlawfully denied it the extension of the 90-day deadline. But WSP’s continuing its participation in the review from the point at which it brought this action, compared to the burden it had incurred up to that point, will be incremental. Although issuance of further questionnaires was a possibility as of the date this action was commenced, WSP already had completed four questionnaires by that time.⁸ Supplemental questionnaires typically require clarifying responses on matters already explored in the initial questionnaires. The preliminary results are

⁷ Although plaintiff’s statement regarding WSP’s full completion of the supplemental questionnaires is not found in its complaint, it was filed on the same day, and accordingly the court considers it contemporaneous with the complaint for purposes of ascertaining jurisdictional facts in existence at the time plaintiff brought this action.

⁸ The court was informed at the January 17, 2013 telephonic conference with the parties that WSP, since bringing its action, had received, and submitted full responses to, three additional supplemental questionnaires from Commerce. The court does not consider this

scheduled to issue on February 1, 2013, and the final phase of the review is, therefore, about to begin. Def.'s Mot. 6. Taken together, these jurisdictional facts show that WSP, upon commencing this action, already had performed approximately half, or more, of the procedural steps needed to complete its participation in the review and had already weathered the expense of completing four questionnaires. Seen from the perspective of WSP's situation on December 14, 2012, the incremental burden that WSP would incur from participating fully in the review is not a convincing reason why the court should find the Section 516A remedy inadequate.

To further support its assertion of jurisdiction, plaintiff cites several cases in which the Court of International Trade "invoked section 1581(i) jurisdiction to consider requests to enjoin the Department from continuing an unlawful proceeding." Pl.'s Mem. 12–13, 15 (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 717 F. Supp. 847 (1989), *aff'd on other grounds*, 903 F.2d 1555 (Fed. Cir. 1990); *Technsnabexport, Ltd. v. United States*, 16 CIT 420, 795 F. Supp. 428 (1992); *Jia Farn Mfg. v. United States*, 17 CIT 187, 817 F. Supp. 969 (1993); *Kemira Fibers Oy v. United States*, 18 CIT 687, 858 F. Supp. 229 (1994), *rev'd on other grounds*, 61 F.3d 866 (Fed. Cir. 1995); *Dofasco Inc. v. United States*, 28 CIT 263, 326 F. Supp. 2d 1340 (2004)). Plaintiff distinguishes these decisions from others in which the court did not find jurisdiction under section 1581(i), which according to plaintiff involved claims "related to methodology or procedure . . . [or] the timing of a review." *Id.* at 14 (citing *NSK Ltd. v. United States*, 28 CIT 1600, 350 F. Supp. 2d 1128 (2004); *Abitibi-Consolidated Inc. v. United States*, 30 CIT 714, 437 F. Supp. 2d 1352 (2006); *Tianjin Magnesium International Co. v. United States*, 32 CIT 1, 533 F. Supp. 2d 1327 (2008)). In this action, plaintiff submits, "the decision challenged . . . [is] a fundamental, dispositive decision . . . [as] WSP seeks to terminate the proceeding entirely." *Id.*

Each of the cases plaintiff cites is distinguishable from the case at bar. In none of the cases where jurisdiction was held to exist under 28 U.S.C. § 1581(i) had the trade remedy proceeding progressed as far as this one by the time the action was commenced. *See Asociacion Colombiana*, 13 CIT at 584, 717 F. Supp. at 848 (administrative review recently initiated); *Technsnabexport, Ltd.*, 16 CIT at 422, 795 F. Supp. at 432 (plaintiffs had not responded to questionnaires when action commenced); *Jia Farn Mfg.*, 17 CIT at 188, 817 F. Supp. at 970 (action

fact in support of any argument against the exercise of jurisdiction because the questionnaires and responses occurred after this action was commenced. The fact merely confirms a procedural circumstance favorable to plaintiff's position: that at the time the action was brought, the issuance of additional supplemental questionnaires was a possibility.

commenced shortly after initiation of administrative review); *Kemira Fibers Oy*, 18 CIT at 689, 858 F. Supp. at 231 (plaintiff submitted questionnaire response but withdrew response on same day plaintiff moved to enjoin administrative review); *Dofasco Inc.*, 28 CIT at 263, 326 F. Supp. 2d at 1341 (plaintiff had not responded to questionnaires when action commenced). And the court does not find meaningful plaintiff's distinction between a "fundamental, dispositive decision" and a "methodological," "procedural," or temporal one. Here, WSP seeks to bring an interlocutory challenge to an agency decision that will be subsumed within the final results of an administrative review.

Citing several decisions of this Court, plaintiff also argues that "[i]n some cases, the Court [has] found the legal merits of [plaintiff's] challenge relevant in considering [the] jurisdictional question." Pl.'s Mem. 16 (citing *Hylsa S.A. de C.V. v. United States*, 21 CIT 222, 960 F. Supp. 320 (1997), *aff'd* 135 F.3d 778, 1998 WL 56389 (Fed. Cir. 1998); *Government of the People's Republic of China v. United States*, 31 CIT 451, 460, 483 F. Supp. 2d 1274, 1282 (2007)). These cases are inapposite. To resolve the jurisdictional question this case presents, the court need not, and in the circumstance presented should not, consider the merits of plaintiff's claim.

In its response to defendant's motion to dismiss, WSP argues that the only remedy available upon the completion of the administrative review will be a "retroactive vacatur" which, according to WSP, is not an adequate remedy. Pl.'s Opp'n 3. Plaintiff argues, dramatically, that "a retroactive vacatur of the decision is not the same remedy as an immediate termination of the proceeding, just as a vacatur of a prison sentence already served is not the same remedy as an early prison release." *Id.* This is a false analogy. For the reasons the court has discussed, completing the administrative review is not so burdensome as to render inadequate the remedy that WSP may pursue by contesting the final results of the review.

Finally, plaintiff argues that because "WSP seeks to terminate the administrative review . . . [its] claim becomes entirely moot once the review is completed because there will be no review to terminate." *Id.* at 4. As a consequence, plaintiff believes "there is a real risk that WSP's appeal under section 1581(c) would be dismissed unless the Court decides to apply one of the two recognized exceptions to the mootness doctrine . . ." *Id.* The Supreme Court has instructed that "a case is moot when the issue[] presented [is] no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 497 (1969) (citation omitted). The question of whether WSP lawfully may be subjected to the outcome of the ongoing administrative review is not a moot question: it is a live issue

that, based on the allegations in the complaint, was of interest to WSP at the time this action was brought. Nothing that has happened since causes the court to conclude that the dispute between the parties no longer exists or that WSP no longer has an interest in it. Although WSP may not seek a remedy to resolve that dispute just yet, *see U.S. Ass'n of Importers of Textiles & Apparel*, 413 F.3d at 1348–50, it soon will have the opportunity to do so. In this circumstance, the case or controversy existing between the parties cannot be said to be moot.

III. CONCLUSION

Because plaintiff has not demonstrated factually that the remedy available under 19 U.S.C. § 1516a will be inadequate, this Court lacks jurisdiction under 28 U.S.C. § 1581(i)(4). The court therefore grants defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1). Plaintiff's motion for preliminary injunction and to advance and consolidate trial on the merits and proposed defendant-intervenor's motion to intervene are denied as moot. The court will enter judgment dismissing this action.

Dated: February 1, 2013

New York, New York

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

Slip Op. 13–17

LIFESTYLE ENTERPRISE, INC., TRADE MASTERS OF TEXAS, INC., EMERALD HOME FURNISHINGS, LLC, RON'S WAREHOUSE FURNITURE D/B/A VINEYARD FURNITURE INTERNATIONAL LLC, Plaintiffs, and DREAM ROOMS FURNITURE (SHANGHAI) CO., LTD., GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., Consolidated Plaintiffs, ORIENT INTERNATIONAL HOLDING SHANGHAI FOREIGN TRADE CO., LTD., Intervenor Plaintiff, v. UNITED STATES, UNITED STATES DEPARTMENT OF COMMERCE, Defendants, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00378

[Commerce's *Third Remand Results* are sustained.]

Dated: February 5, 2013

Kristin H. Mowry, Jeffrey S. Grimson, Jill A. Cramer, Keith F. Huffman, Sarah M. Wyss, and Susan L. Brooks, Mowry & Grimson, PLLC, of Washington, DC, and *John D. Greenwald*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for plaintiffs.¹

William E. Perry, Garvey Schubert Barer, of Washington, DC, for consolidated plaintiff Dream Rooms Furniture (Shanghai) Co., Ltd.

John D. Greenwald, Cassidy Levy Kent (USA) LLP, of Washington, DC, and *Patrick J. McLain*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for consolidated plaintiff Guangdong Yihua Timber Industry Co., Ltd.

Nancy A. Noonan, John M. Gurley, and Matthew L. Kanna, Arent Fox LLP, of Washington, DC, for intervenor plaintiff.

Stuart F. Delery, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendants. Of counsel on the brief was *Shana Hofstetter*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

J. Michael Taylor, Daniel L. Schneiderman, Joseph W. Dorn, and Prentiss L. Smith, King & Spalding, LLP, of Washington, DC, for intervenor defendants.

OPINION

RESTANI, Judge:

This matter is before the court following three previous remands. *See Lifestyle Enter., Inc. v. United States*, 865 F. Supp. 2d 1284 (CIT 2012) (“*Lifestyle III*”); *Lifestyle Enter., Inc. v. United States*, 844 F. Supp. 2d 1283 (CIT 2012) (“*Lifestyle II*”); *Lifestyle Enter., Inc. v. United States*, 768 F. Supp. 2d 1286 (CIT 2011) (“*Lifestyle I*”). These cases involve challenges to the final results of the administrative review of an antidumping (“AD”) order covering wooden bedroom furniture from the People’s Republic of China (“PRC”) by the U.S. Department of Commerce (“Commerce”). *See Wooden Bedroom Furniture from the People’s Republic of China: Final Results of Anti-dumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374 (Dep’t Commerce Aug. 17, 2009) (“*Final Results*”). The court ordered Commerce to reconsider a variety of issues in its first remand, resulting in Commerce issuing its *Final Results of Redetermination Pursuant to Remand* (Dep’t Commerce Aug. 26, 2011) (Docket No. 132) (“*First Remand Results*”). Because Commerce again failed to support part of its redetermination with substantial evidence, the court remanded two issues back to Commerce. *See Lifestyle II*, 844 F. Supp. 2d at 1298.

Although Commerce complied with the court’s directions in the second remand as to the valuation of wood inputs in its AD methodology, Commerce failed to provide substantial evidence to properly

¹ Mowrey & Grimson, PLLC withdrew as counsel for Ron’s Warehouse Furniture on January 6, 2011. The court gave Ron’s Warehouse Furniture thirty days to retain counsel. It has not done so as of the date of this opinion.

corroborate the adverse facts available (“AFA”) rate assigned to Orient International Holding Shanghai Foreign Trade Co., Ltd. (“Orient”). See *Lifestyle III*, 865 F. Supp. 2d at 1291–92, 1294; *Final Results of Redetermination Pursuant to Second Remand* (Dep’t Commerce June 11, 2012) (Docket No. 183) (“*Second Remand Results*”). As a result, the court again remanded this matter to Commerce so that the agency could comply with the court’s previous instructions that it select a corroborated AFA rate, which reflects Orient’s “commercial reality.” *Lifestyle III*, 865 F. Supp. 2d at 1289–90. On remand, Commerce selected a new rate of 83.55% for Orient using a significant sample of verified sales data from a comparable producer. See *Final Results of Redetermination Pursuant to Third Remand* (Dep’t Commerce Dec. 4, 2012) (Docket No. 208) (“*Third Remand Results*”) at 7. Because Commerce complied with the court’s remand instructions and the objections of the intervenor defendants are without merit, the court sustains Commerce’s redetermination.

BACKGROUND

The court previously has set out the facts of this case in three previous opinions. See *Lifestyle III*, 865 F. Supp. 2d at 1287–88; *Lifestyle II*, 844 F. Supp. 2d at 1286–87; *Lifestyle I*, 768 F. Supp. 2d at 1293–95. The court, however, summarizes below the facts relevant to this limited remand.

Lifestyle Enterprise, Inc. (“Lifestyle”), Orient, Guangdong Yihua Timber Industry Co., Ltd. (“Yihua Timber”), Dream Rooms Furniture (Shanghai) Co., Ltd., Ron’s Warehouse Furniture d/b/a Vineyard Furniture, Emerald Home Furnishings, LLC, and Trade Masters of Texas, Inc. (collectively “plaintiffs”) as well as intervenor defendants American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. (collectively “AFMC”) challenged the *Final Results*. All of these challenges were either dismissed or resolved in previous remands with the exception of the challenge to the weighted average dumping margin² assigned to

² A dumping margin is the difference between the normal value (“NV”) of merchandise and the price for sale in the United States. See 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless the nonmarket economy methodology is used, NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)–(b). Under the nonmarket economy AD methodology applied here, Commerce calculates NV “on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1). Surrogate values from market economy countries are used as a measure of these costs. 19 U.S.C. § 1677b(c)(4).

Orient. *See generally id.* In its *Final Results*, Commerce assigned an AFA rate to Orient of 216.01%, the same rate assigned to the PRC-wide entity. *Final Results*, 74 Fed. Reg. at 41,380. After the court determined that Commerce lacked substantial evidence to support the rate assigned to Orient and remanded the case, Commerce continued to apply the 216.01% rate to Orient, finding “that the information on the record corroborates the rate of 216.01 percent, as it relates to Orient” *First Remand Results* at 31. Commerce corroborated its determination based on sales data provided by Yihua Timber, which showed a small number of sales transactions at or above a 180% margin. *Id.* at 35–36. The court again found that Commerce failed to support with substantial evidence its selection of a 216.01% rate for Orient. *Lifestyle II*, 844 F. Supp. 2d at 1291.

During the second remand, Commerce calculated a new AFA rate for Orient of 130.81%, relying on a limited set of sales data from Yihua Timber, a cooperating party in the investigation. *Second Remand Results* at 17. On review, the court found that Commerce lacked substantial evidence to support the new rate in light of both the limited sales data used to corroborate the new rate and the discrepancy between Orient’s rate and the rates assigned to other separate-rate entities throughout several segments of the proceedings. *Lifestyle III*, 865 F. Supp. 2d at 1290–92. Accordingly, the court remanded the matter to Commerce again for it to comply with the court’s previous instruction “to start with the highest rate calculated for a comparable respondent or respondents and then add an additional amount to ensure compliance.” *Id.* at 1291 (quoting *Lifestyle II*, 844 F. Supp. 2d at 1291 n.13) (highlighting the need for additional corroboration where the AFA rate is in multiples of 100%).

In its third redetermination, Commerce assigned Orient an AFA rate of 83.55%. *Third Remand Results* at 7. AFMC challenges the new rate as too low to provide the deterrent effect intended by the AFA statute and continues to argue for the rate initially set by Commerce in its *Final Results*. *See* AFMC’s Comments Concerning Commerce’s Final Results of Redetermination Pursuant to Third Remand (“AFMC Comments”) at 2. Plaintiffs do not object to the new rate. *See* Comments of Lifestyle Enterprise, Inc. et al. on Department of Commerce December 6, 2012 Final Results of Redetermination Pursuant to Third Remand. Defendants respond that Commerce has complied with the court’s instructions in *Lifestyle III* and claim that AFMC’s proposed rates have either been previously rejected by this court or are no better supported than the rate selected by Commerce. *See* Def.’s Resp. to AFMC’s Remand Comments at 5–6.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's redetermination in an AD review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

AFMC claims that the new AFA rate selected by Commerce for Orient is "not sufficiently adverse and does not further the purpose of the statutory provision." AFMC Comments at 2. AFMC instead argues that Commerce should apply the original 216.01% AFA rate, which it contends is corroborated. *Id.* Even if the previous rate is not supported, AFMC argues that Commerce should have used the single highest non-aberrational transaction-specific margin.³ *Id.* at 3. AFMC's argument lacks merit.

Where a respondent to an AD investigation fails to cooperate by not providing valid data for Commerce to consider in calculating an AD rate, Commerce may use facts otherwise available to fill the information gap. 19 U.S.C. § 1677e(a). Additionally, if Commerce determines that "an interested party has failed to cooperate by not acting to the best of its ability . . .," Commerce is permitted to use inferences "adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). When adverse inferences are applied, Commerce may look to information contained in the petition, a final determination in the investigation, any previous review, or any other information placed on the record. *Id.* In doing so, Commerce may select a rate high enough to deter companies from refusing to cooperate, but the rate may not be so high so as to be punitive. *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010). Accordingly, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Id.* As with all of Commerce's determinations in an AD case, the final rate must be supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). The Federal Circuit has identified what seems to be the outer limits of how little data Commerce must look to in corroborating a high AFA rate, but it has not created a floor below which Commerce may not select an AFA rate. *See PAM, S.p.A. v.*

³ Before the agency, AFMC alternatively argued that Commerce should have used the highest 10% by margin of Yihua Timber's sales to calculate Orient's dumping margin, rather than the highest 15% Commerce opted to use in the *Third Remand Results*. *Third Remand Results* at 9. AFMC did not raise this argument in its latest remand comments before the court, and so the court limits its consideration of AFMC's challenge to the general claim that the rate is not sufficiently adverse in light of the purpose of the AFA statute.

United States, 582 F.3d 1336, 1340 (Fed. Cir. 2009); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002).

In the *Third Remand Results*, Commerce adopted a methodology in which it began with Yihua Timber's calculated AD margin, based on verified sales data, and then narrowed the selection of sales data to increase Orient's margin in a way which provided respondents with an incentive to cooperate without departing from "the mainstream of sales from this cooperating respondent." *Third Remand Results* at 6–7. Commerce opted to continue to rely on Yihua Timber's sales data because, like Orient, Yihua Timber was one of the two largest exporters of the subject merchandise, and the record contains sufficient sales and production data for Yihua Timber. *Id.* at 6. This allowed Commerce to undertake a detailed analysis of Orient's likely sales based on the sample invoice Orient provided earlier in the review. *Id.* Using the sample invoice, Commerce was able to match the products sold by Orient to those sold by Yihua Timber. *Id.* Commerce then ranked the product-matched Yihua Timber sales by the magnitude of the dumping margin. *Id.* at 7. Commerce decided to look at only the top 15% of these ranked Yihua Timber sales. *Id.* Commerce then took the simple average of these weighted-average dumping margins for each product type to arrive at an 83.55% margin for Orient. *Id.* This rate is more than double the margin assigned to Yihua Timber (40.74%), the most comparable cooperative respondent, but as indicated the margin is not challenged by Orient or those purchasing its products. *Id.* at 6–7.

AFMC's challenge lacks legal support based on either applicable statutes or case law. Although the statute permits Commerce to use adverse inferences in calculating an AFA rate for a non-cooperating respondent, it is silent as to how adverse these inferences must be. *See* 19 U.S.C. § 1677e(b). Additionally, as noted above, both this court and the Federal Circuit have repeatedly required Commerce to select rates which are not overly punitive or devoid of some grounding in the respondent's commercial reality. *See, e.g., Lifestyle III*, 865 F. Supp. 2d at Consol. Court No. 09–00378 Page 9 1289–90. Although AFMC points to cases where, based on the particular facts of those cases, the Federal Circuit has permitted minimal corroboration to support high AFA rates, it has not identified any case law requiring Commerce to impose a higher AFA rate because the rate was not sufficiently adverse. AFMC Comments at 3. So long as Commerce has selected an AFA rate properly corroborated by substantial evidence, it alone has discretion in deciding the magnitude of the "built-in increase in

tended as a deterrent to non-compliance.” See *Gallant*, 602 F.3d at 1323. As indicated, in this case, Commerce imposed a rate that is more than twice that of the other comparable respondent, Yihua Timber. *Third Remand Results* at 6–7. AFMC offered no basis on which the court could reject this margin as insufficiently adverse.

CONCLUSION

Orient’s AFA rate is supported by substantial evidence, and therefore Commerce’s *Third Remand Results* are SUSTAINED. Judgment will be entered accordingly.

Dated: February 5, 2013

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI

JUDGE



Slip Op. 13–18

NAN YA PLASTICS CORPORATION, LTD., Plaintiff, v. UNITED STATES,
Defendant.

Before: Leo M. Gordon, Judge

Court No. 11–00535

PUBLIC VERSION

[Final results of administrative review remanded.]

Dated: February 6, 2013

Peter J. Koenig, Squire Sanders (US) LLP, of Washington, DC, for Plaintiff Nan Ya Plastics Corporation, Ltd.

David F. D’Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was *George Kivork*, U.S. Department of Commerce, Office of the Chief Counsel for Import Administration, of Washington, DC.

Jeffrey I. Kessler, *David M. Horn*, *Patrick J. McLain*, and *Ronald I. Meltzer*, Wilmer, Cutler, Pickering, Hale and Dorr LLP, of Washington, DC for Defendant-Intervenor’s Mitsubishi Polyester Film, Inc., SKC Inc., and Toray Plastics (America), Inc.

OPINION AND ORDER

Gordon, Judge:

This action involves an administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the antidumping duty order covering polyethylene terephthalate film, sheet, and strip

from Taiwan. See *Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan*, 76 Fed. Reg. 76,941 (Dep't of Commerce Dec. 9, 2011) (final results admin. review) (“*Final Results*”); see also Issues and Decision Memorandum, A-583-837 (Dep't of Commerce Dec. 5, 2011), available at <http://ia.ita.doc.gov/frn/summary/taiwan/2011-31695-1.pdf> (last visited this date) (“*Decision Memorandum*”). Before the court is the motion for judgment on the agency record of Plaintiff Nan Ya Plastics Corporation, Ltd. (“Nan Ya”) challenging Commerce’s assignment of a total adverse facts available (“AFA”) rate of 74.34 percent to Nan Ya. See Pl.’s Rule 56.2 Mot. for J. upon the Agency R., ECF No. 38 (“Pl.’s Br.”). 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) (2006),¹ and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court remands this action to Commerce for further consideration.

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 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. 2012). 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

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

whole record.” Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West’s Fed. Forms, National Courts* § 13342 (2d ed. 2012).

II. Background

On August 31, 2010, Commerce initiated an administrative review of mandatory respondents Shinkong Materials Technology Co., Ltd. (“Shinkong”) and Nan Ya. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Initiation of Administrative Review*, 75 Fed. Reg. 53,274, 53,275 (Dep’t of Commerce Aug. 31, 2010). Nan Ya cooperated in the prior review, and Commerce calculated an antidumping duty rate of 18.30 percent based on Nan Ya’s sales and cost data. See *Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan*, 76 Fed. Reg. 18,519, 18,520 (Dep’t of Commerce Apr. 4, 2011) (amended final results). In the present administrative review Nan Ya chose not to cooperate, failing to respond to Commerce’s request for information. Commerce therefore preliminarily assigned Nan Ya a total AFA rate of 99.31 percent derived from two transaction-specific margins that were calculated for Nan Ya during the prior administrative review. See *Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan*, 76 Fed. Reg. 47,540 (Dep’t of Commerce Aug. 5, 2011) (preliminary results); *Decision Memorandum* at 5.

Before the agency, Nan Ya argued that Commerce did not adequately corroborate the total AFA rate, and that Commerce should instead select Nan Ya’s total AFA rate from data available on the current administrative review, and more specifically, the transaction-specific data of the cooperating respondent, Shinkong. Nan Ya Admin. Case Br. at 7, PD 23 (Oct. 4, 2011).² In the *Final Results* Commerce obliged, selecting the highest transaction-specific margin from among Shinkong’s data—74.34 percent—as Nan Ya’s total AFA rate. See Memorandum from Gene H. Calvert to Mark Hoadley, Final Results in the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Assignment of the Adverse Facts Available Rate for Nan Ya Plastics Corporation, Ltd. (Nan Ya), CD 27 (Dec. 5, 2011) (“*Final AFA Memo*”). Commerce corroborated the 74.34 percent rate against Nan Ya’s own transaction-specific margins from the prior review, and found multiple transactions at or above the 74.34 percent rate. *Id.* at 3. Nan Ya now challenges the total AFA rate of 74.34 percent as “an unlawful aberrant outlier” and not reflecting Nan Ya’s “commercial reality albeit with some built in increase to induce compliance.” Pl.’s Br. at 3.

² “PD” refers to a document contained in the public administrative record. “CD” refers to a document contained in the confidential record.

III. Discussion

In a total adverse facts available scenario like the one presented here, Commerce typically cannot calculate an antidumping rate for an uncooperative respondent because the information required for such a calculation (the respondent's sales and cost information for the subject merchandise during the period of review) has not been provided. As a substitute, Commerce relies on various "secondary" sources of information (the petition, the final determination from the investigation, prior administrative reviews, or any other information placed on the record), 19 U.S.C. § 1677e(b) & (c), to select a proxy that should be a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.LLI de Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*de Cecco*"). When selecting an appropriate total AFA proxy, "Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance . . ." *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004). The proxy's purpose "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *de Cecco*, 216 F.3d at 1032. Although a higher AFA rate creates a stronger incentive to cooperate, "Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (2010) (citing *de Cecco*). "Commerce must select secondary information that has some grounding in commercial reality." *Id.* 1323–24.

As *de Cecco* explained, these requirements are logical outgrowths of the statute's corroboration requirement, 19 U.S.C. § 1677e(c), which mandates that Commerce, to the extent practicable, corroborate secondary information. *See de Cecco*, 216 F.3d 1027, 1032. In practice "corroboration" involves confirming that secondary information has "probative value," 19 C.F.R. § 351.308(d), by examining its "reliability and relevance." *Mittal Steel Galati S.A. v. United States*, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007) (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,711, 54,712–13 (Sept. 16, 2005) (final results)). More simply, to corroborate the selection of a total AFA rate, Commerce must (to the extent practicable), "demonstrate that the rate is reliable and relevant to the particular respondent." *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT ___, 2012 WL 2930182, 15 (July 18, 2012).

Commerce has in the past demonstrated the reliability and relevance of an AFA rate for particular respondents by analyzing the uncooperative respondents' transaction-specific margins from prior proceedings, if available. *See, e.g., PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339–40 (Fed. Cir. 2002); *Fujian Lianfu Forestry Co. v. United States*, 34 CIT ___, 700 F. Supp. 2d 1361, 1363 (2010). Commerce did that here, analyzing Nan Ya's transaction-specific margins from the prior administrative review and finding multiple transactions above the 74.34 percent rate. *Final AFA Memo* at 3. Commerce therefore appeared to corroborate Nan Ya's AFA rate; Commerce demonstrated that the rate is reliable and relevant to Nan Ya by analyzing Nan Ya's own transaction-specific data (albeit without affording Nan Ya the opportunity to comment upon the prior review data that Commerce used).

That is not all Commerce did. Commerce also analyzed whether the rate was "unusual . . . or . . . aberrational" by analyzing Shinkong's sales data. *Decision Memorandum* at 6. Commerce examined Shinkong's [] transaction sales margins for this administrative review in ascending or descending order. It found that there were "no specific gaps between the transaction specific margins," and the 74.34 percent AFA rate was "within a range of margins." *Final AFA Memo* at 3; *Decision Memorandum* at 6. Moreover, Commerce analyzed the underlying U.S. sales transaction that resulted in the 74.34 percent margin and found the sale was neither aberrational nor an outlier because the sales quantity of [] kg was within [] percent of the average quantity of all of Shinkong's U.S. sales. *Final AFA Memo* at 3. Commerce, therefore, concluded the sale was "representative of the company's sales practice," because [] of Shinkong's [] transactions had quantities above [] kg and [] of the transactions had quantities below that amount. *Final AFA Memo* at 3. Based on these facts, Commerce determined the selected margin was not aberrational or an outlier.

Nan Ya contests Commerce's finding that the AFA rate is non-aberrational by presenting a robust statistical argument. First, Nan Ya explains that the 74.34 percent AFA rate reflects only [] percent of Shinkong's total sales and only [] of [] U.S. sales. Additionally, it explained that the underlying transaction for the rate involved a rare product, which was sold in only [] of Shinkong's [] U.S. sales. Pl.'s Br. at 6 (citations omitted). Nan Ya also argues that

Commerce when calculating the dumping margin on Shinkong's U.S. sales, on average the U.S. sales are each individually compared to [] home market sales, where the average total quantity

of the home market sales used in the dumping margin calculation of each particular U.S. sale was [] kg. In stark contrast, the Shinkong U.S. sale with the 74.34% dumping margin was based on a comparison to [] home market sale, whose total quantity is [] kg – i.e., []% of the average quantity of total home market sales used in dumping margin calculation as to the other Shinkong U.S. sales for which a dumping margin was calculated.

Id. at 7 (citations omitted).

In examining Shinkong's [] U.S. transaction sales margins, Nan Ya argues that the [] highest dumping margins are distinct from the rest of the margins in terms of their incremental increases in percentage. It compared the gap between the dumping margins of Shinkong's sales that exclude the [] highest margins with the gap between the [] highest margins themselves. Nan Ya found the [] highest margins to have an average (mean) gap of [] percent, a median gap of [] percent, and a highest observed gap of [] percent. Pl.'s Br. at 8 (citations omitted). In contrast, the sales that exclude the [] highest margins have an average gap of [] percent, a median gap of [] percent, and a highest observed gap of [] percent. *Id.* From this data, Nan Ya deduced that the average dumping margin gap for Shinkong's top [] U.S. sales is over [] times more than the gaps for the remaining sales. *Id.* at 9.

In addition, Nan Ya relies upon the U.S. Internal Revenue Service ("IRS") in making another statistical argument that the 74.34 percent AFA rate is aberrational. Nan Ya contends that the 74.34 percent AFA rate is an outlier by referencing the IRS' method of evaluating the interquartile range from a data set to determine a typical versus aberrational result. *Id.* at 8–9 (citing *Intercompany Transfer Pricing Regulations Under Section 482*, 59 Fed. Reg. 34, 971, 34,995 (Internal Revenue Service July 8, 1994) (Treas. Reg. 1.482–1 (e)(2)(iii)(B)&(C)). Nan Ya explains,

[t]he interquartile range comparison (applied here) is the average dumping margin for the 25% of sales with the lowest dumping margin compared to the average dumping margin for the 25% of sales with the highest dumping margin.

For Shinkong, those dumping margin figures are []% and []%, respectively. The 74.34% AFA rate is well outside the rate that this widely accepted statistical methodology used by the IRS as to what is non-aberrational (representative) and rather indicates that it is in fact aberrational. The Final Results' 74.34%

AFA rate is []% higher than the upper interquartile dumping margin range; []% percentage points higher.

Pl.'s Br. at 10 (citations omitted).

Finally, Nan Ya argues the 74.34 percent AFA rate is an outlier by analyzing Shinkong's data and the standard deviation of the [] sales, excluding the values that are more than one or two standard deviations from the average. *Id.* at 10–11. Nan Ya emphasizes that this method of statistical analysis is consistent with Commerce's standard deviation analysis in other contexts, such as determining whether there has been targeted dumping. *Id.* at 11 (citing *Certain Steel Nails from China*, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008) (final determ.), Issues and Decision Memorandum at Cmt 3; *Multi-layered Wood Flooring from China*, 76 Fed. Reg. 64,318 (Dep't of Commerce Oct. 18, 2011) (final determ.), Issues and Decision Memorandum at Cmt 4; *High Pressure Steel Cylinders from China*, 76 Fed. Reg. 77,964, 77,968 (Dep't of Commerce Dec. 15, 2011) (prelim. determ.); *Certain Steel Nails from UAE*, 76 Fed. Reg. 68,129, 68,133 (Dep't of Commerce Nov. 3, 2011) (prelim. determ.)). Nan Ya calculates Shinkong's mean dumping margin to be [] percent and the standard deviation to be []. Therefore, the dumping margins within one standard deviation of the mean dumping margin are [] percent, and the dumping margins within two standard deviations of the mean are [] percent. Pl.'s Br. at 11. Nan Ya further explains,

Statistics methodology supports that there is a 95% probability that actual dumping margins are within two standard deviations of the mean, which here means a dumping margin under []%. Even at the upper limit of the two (2) standard deviation range (i.e., []), the 74.34% AFA rate is over [] percentage points []. In fact, the AFA rate is [] standard deviations more than the mean.

Finally, Shinkong's weighted-average dumping margin for this POR is 6.98%. Shinkong's 74.34% highest dumping margin that Commerce used as AFA, which is almost eleven times more than 6.98% average, is again clearly an outlier (i.e., aberrant).

Pl.'s Br. at 12 (citations omitted).

Because Commerce changed the AFA rate from the preliminary results to the final, Nan Ya's first opportunity to challenge the total AFA rate was in its brief before the court. This means that the agency has not had the opportunity to consider these arguments in the first instance. Defendant's response presents the *post hoc* rationalizations

of agency counsel to which the court may not defer. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (“The courts may not accept . . . counsel’s *post hoc* rationalizations for agency action; . . . an agency’s discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself.”). The court believes a remand is appropriate for the agency to address these issues in the first instance. Nan Ya has presented what appear to be good and compelling statistical arguments that test the reasonableness of Commerce’s total AFA rate. Commerce needs to address them.

The case also presents an interesting issue about corroboration. Defendant explains Commerce’s view that because the 74.34 percent rate was “obtained in the course of . . . [the] review,” 19 U.S.C. § 1677e(c), it “is not secondary information” that Commerce must corroborate. Def.’s Resp. to Pl.’s R. 56.2 Mot. at 11, ECF No. 48. The statute provides that “when [Commerce] . . . relies on secondary information rather than on information obtained in the course of [a] . . . review, [Commerce] . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [Commerce’s] disposal.” 19 U.S.C. § 1677e(c). The AFA rate in this case was derived from the cooperative respondent’s data obtained in the course of the review, which, according to Commerce, discharges its need to corroborate.

This argument raises a number of issues. First, on a practical level, the court is left wondering why Commerce analyzed Nan Ya’s transaction-specific data from the prior review, effectively corroborating the rate. In other words, why corroborate if no corroboration is required? Second, and more important, Nan Ya’s entire case is predicated on AFA standards that emanate from the statute’s corroboration requirement. *See* Pl’s Br. at 3 (Commerce’s selected AFA rate does not reflect Nan Ya’s “commercial reality albeit with some built-in increase to induce compliance”); *see also de Cecco*, 216 F.3d 1027, 1032 (“It is clear from Congress’s imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.”). If corroboration is inapplicable, what happens to the *de Cecco* standard on which Nan Ya’s case depends, and on which the Court of International Trade and the Court of Appeals for the Federal Circuit currently evaluate the reasonableness of Commerce’s selection of AFA rates? Commerce and the parties need to address this.

IV. Conclusion

Accordingly, it is hereby

ORDERED that this action is remanded to Commerce to respond to Nan Ya's statistical arguments challenging the reasonableness of the total AFA rate, as well as to provide a further explanation of the supposed inapplicability of the corroboration requirement with a detailed explanation of what statutory standards govern Commerce's selection of a total AFA rate if the *de Cecco* corroboration standard does not apply; it is further

ORDERED that Commerce shall file its remand results on or before March 28, 2013; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: February 6, 2013

New York, New York

/s/ Leo M. Gordon Judge

LEO M. GORDON