U.S. Customs and Border Protection

ALMOND BROS. LUMBER CO. et al. Plaintiffs, UNITED STATES AND RON KIRK, UNITED STATES TRADE REPRESENTATIVE Defendants.

Judge: Richard K. Eaton
Court No. 08–00036

[Defendants' motion to dismiss granted.]

Dated: April 19, 2012

Saltman & Stevens, P.C. (Alan I. Saltman, Ruth G. Tiger, and Marisol Rojo) for plaintiffs.

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OPINION

Eaton, Judge:

Before the court, following remand from the United States Court of Appeals for the Federal Circuit, is the motion to dismiss of defendants the United States and the United States Trade Representative (the "USTR") (collectively, "defendants" or the "Government").

Plaintiffs' claims arise out of the 2006 Softwood Lumber Agreement between the governments of the United States and Canada, which was executed to settle ongoing disputes over the cross-border softwood lumber trade. *See* Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., Sept. 12, 2006, *available at* http://www.ustr.gov/webfm_send/3254 (last visited April 2, 2012) ("SLA" or the "Agreement"). Plaintiffs, members of the domestic softwood lumber industry, challenge a term in the SLA that requires the Canadian Government to distribute $500 million only to those U.S. lumber producers that were members of the Coalition for Fair Lumber Imports (the "Coalition"). Plaintiffs are not members of the Coalition.

In *Almond Bros. Lumber Co. et al. v. United States*, 33 CIT __, Slip Op. 09–48 (May 30, 2009) ("*Almond Bros. I*"), in response to the defendants' motion, the court determined that it lacked jurisdiction to

hear plaintiffs' claims under 28 U.S.C. § 1581(i) (2006), and dismissed this action. On appeal, the Federal Circuit reversed and held that plaintiffs' claims were within this Court's jurisdiction under section 1581(i), and remanded the case. *Almond Bros. Lumber Co. v. United States,* 651 F.3d 1343 (Fed. Cir. 2011). The court now considers the remaining grounds in defendants' motion to dismiss. In doing so, it holds that: (1) Count II of the Second Amended Complaint (the "Complaint") raises a non-justiciable political question; (2) the Complaint as a whole fails to state claims for which relief can be granted; and (3) defendants' motion to dismiss is granted.

BACKGROUND

The United States and Canada have been engaged in a dispute over the export practices of the Canadian softwood lumber industry for nearly three decades. The background of that conflict is set forth in this court's opinion in *Almond Bros. I*, as well as in the Federal Circuit's opinion in this case. *See Almond Bros. I*, 33 CIT at __, Slip. Op. 09–48 at 2–6; *Almond Bros.*, 651 F.3d at 1344–48. The 2006 Softwood Lumber Agreement, the third such agreement between the United States and Canada since 1986,[1] is eighty-eight pages long and contains a number of provisions intended to settle the dispute and end litigation then pending in multiple forums, including this Court, North American Free Trade Agreement tribunals, and the World Trade Organization.

The litigation settled by the SLA arose from the Department of Commerce's determinations, in May 2002, that Canadian softwood lumber was (1) unlawfully subsidized and (2) being sold in the United States at less than fair value. *See* Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,070 (Dep't of Commerce May 22, 2002) (notice of amended final determination and notice of countervailing duty order); Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,068 (Dep't of Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order).

The SLA was negotiated on behalf of the United States by the Office of the USTR,[2] which is primarily responsible for developing

[1] In 1986, the countries entered into a Memorandum of Understanding ("MOU") to settle a countervailing duty investigation initiated in response to complaints by the Coalition. In 1996, a softwood lumber agreement was executed, settling extensive litigation that followed the termination of the MOU.

[2] The USTR at the time of the negotiation and entry into force of the SLA was Susan Schwab.

international trade policy and negotiating international trade agreements.[3] *See* 19 U.S.C. §§ 2171, 2411 (2006). The Agreement generally resolved the softwood lumber conflict and its attendant lawsuits by requiring the United States to refund nearly $5 billion in antidumping and countervailing duty deposits collected on Canadian softwood lumber imports on or after May 22, 2002, and to refrain from imposing any further import measures on Canadian softwood lumber during the period that the SLA remained in force. SLA, arts. III-V. In addition, the Government and the private litigants, including the Executive Committee of the Coalition, consented to dismissal of all pending lawsuits and proceedings resulting from the softwood lumber trade dispute. SLA, annex 2A.

In exchange, Canada's primary commitment was to impose certain "Export Measures" on its softwood lumber products to correct the trade practices that the United States found unfair. These measures limit the volume of lumber exports from certain Canadian regions on a monthly basis and/or impose a charge on those exports. *See* SLA, art. VII. Specifically, pursuant to article VII of the Agreement, each softwood lumber producing Region[4] in Canada has the option of imposing a charge or a combination of a charge and quota on softwood lumber products produced in the Region. SLA, art. VII, ¶ 1. Under "Option A," Canadian producers are required to pay Canada an "Export Charge," which is calculated as a percentage of the export price of the product. SLA art. VII, ¶ 3. The charge percentage increases as the export price decreases and, thus, is designed to discourage the exportation of softwood lumber into the United States at low prices. "Option B" is a hybrid of export quotas and charges. Exporters are subject to a monthly quota limiting the number of units that can be exported to the United States to a percentage of "Expected U.S. Consumption" during each month. SLA, annex 7D. The quota percentage decreases as export price decreases, thereby limiting low-priced Canadian exports capable of competing with U.S. products. In addition, these exports are also subject to an "Export Charge" tied to the export price of the merchandise, albeit at lower rates than those charged under Option A. SLA, art. VII, ¶ 4.

Canada further agreed to distribute $1 billion from the returned cash deposits "in the following amounts: $US 500 million to the

[3] Pursuant to 19 U.S.C. § 2171, the USTR was established within the Executive Office of the President and has "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy, . . . and shall be the chief representative of the United States for . . .international trade negotiations." 19 U.S.C. § 2171(c)(1)(A), (C).

[4] "Region" is defined as "one of the following: Alberta, the B.C. interior, the B.C. Coast, Manitoba, Ontario, Saskatchewan, or Quebec." SLA art. XXI, ¶45.

members of the Coalition for Fair Lumber Imports, $US 50 million to the binational industry council, and $US 450 million for meritorious initiatives." SLA, annex 2C, ¶ 5. The binational council was to be formed of "interested Persons in Canada and the United States," and its objectives include "strengthening the North American lumber industry by increasing the market for its products" and "building stronger cross-border partnerships and trust at all levels of the industry." SLA, annex 13. The "meritorious initiatives" include expenditures to promote undertakings in the United States related to, among other things, "educational and charitable causes in timber-reliant communities," "low income housing and disaster relief," and "educational and public interest projects addressing . . . forest management." *See* SLA art. XIII(A), ¶ 2.

Plaintiffs do not object to the SLA terms providing for Export Measures or the payment of funds to finance the meritorious initiatives or the binational council. Their claims arise, instead, solely from the requirement that Canada pay $500 million to the Coalition members, rather than to all members of the domestic softwood lumber industry (the "Distribution Term"). *See* SLA, annex 2C. According to plaintiffs, "[d]efendants' actions improperly singled out some companies within the domestic softwood lumber industry for preferential treatment and provided little or no benefit to the majority of domestic softwood lumber companies that were adversely affected by illegal dumping and subsidies of Canadian softwood lumber." Complaint ¶ 83.

DISCUSSION

In the Complaint, plaintiffs assert three claims[5] arising from the Distribution Term of the SLA: (1) Count II alleges that defendants acted arbitrarily and contrary to law, in violation of the Administrative Procedures Act (the "APA"), 5 U.S.C. § 706(2) (2006), by negotiating a provision in the SLA that obligates Canada to make payment to members of the Coalition to the exclusion of other domestic softwood lumber producers; (2) Count III alleges that defendants violated the equal protection guarantee of the Fifth Amendment Due Process Clause by not requiring Canada to make payments to all members of

[5] There were originally four Counts in the Complaint. On October 14, 2008, pursuant to a stipulation, the Court dismissed Count I of the Complaint, which sought relief under the Continued Dumping Subsidy Offset Act, 19 U.S.C. § 1671 *et seq.* (the "Byrd Amendment"). The Byrd Amendment, which required the U.S. government to distribute the duties collected on dumped or illegally-subsidized merchandise to members of the affected domestic industry, did not apply to imports covered by NAFTA. *See Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319 (Fed. Cir. 2008). This Byrd Amendment was repealed by the Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(b), 120 Stat. 4, 154 (Feb. 8, 2006).

the domestic softwood lumber industry; and (3) Count IV alleges that defendants impermissibly delegated to the Coalition their authority to determine how Canada's payments would be disbursed.

Defendants move to dismiss these claims for lack of subject matter jurisdiction, pursuant to USCIT R. 12(b)(1), on the grounds that they present non-justiciable political questions. Alternatively, defendants move to dismiss the Complaint in its entirety, pursuant to USCIT R. 12(b)(5), contending that, with respect to each count, the Complaint fails to state a claim for which relief can be granted.

I. Whether Plaintiffs' Claims Are Barred By the Political Question Doctrine

A. Political Question Doctrine

The political question doctrine is a product of the constitutional separation of powers, and bars the courts from reviewing the substance of policy decisions that the Constitution commits to the discretion of the legislative or executive branches of government. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, . . . which gives rise to the 'political question' [doctrine]."); *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1352 (Fed. Cir. 2010) ("The political question doctrine excludes certain disputes from judicial determination where the subject matter of the dispute is exclusively assigned to the political branches or where such branches are better-suited than the judicial branch to resolve the matter.").

The doctrine is one of justiciability, which recognizes that "[t]he Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Assoc. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (citations omitted). The justiciability of plaintiffs' claims concerns the court's subject matter jurisdiction. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215–16 (1974).

In *Baker v. Carr*, the Supreme Court identified six criteria to be considered in determining whether a case presents a non-justiciable political question.

> Prominent on the surface of any case held to involve a political question is found [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially discoverable and manageable standards for resolving it; or [3.] the impossibility of deciding without an

> initial policy determination of a kind clearly for nonjudicial discretion; or [4.] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5.] an unusual need for unquestioning adherence to a political decision already made; or [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Importantly, satisfaction of any one of these criterion is sufficient to preclude judicial review. *Id.* ; *Samish Indian Nation v. United States*, 419 F.3d 1355, 1372 (Fed. Cir. 2005) ("Under the political question doctrine any one criterion is both necessary and sufficient."). When deciding whether a political question is presented, courts must make a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, because application of the doctrine must be determined by a "case-by-case inquiry." *Id.* at 211; *see also Kwan v. United States*, 272 F.3d 1360, 1364 (Fed. Cir. 2001) ("The [political question] doctrine requires careful case-by-case analysis.").

"Not every matter touching on politics," however, "is a political question." *Japan Whaling*, 478 U.S. at 229. In fulfilling its constitutional role, the Judiciary has the authority to interpret legal texts, such as statutes and treaties, and to determine if the coordinate branches have complied with constitutional and statutory procedures, or have otherwise acted within their constitutional or statutory authority. *Id.* at 231 ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."); *Imm. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 943 (1983) ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress. . . . '[C]ourts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.'").

In keeping with their responsibility to interpret statutes, challenges to the procedures followed by the political branches in arriving at otherwise discretionary decisions "are within the proper supervision of the federal courts." *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396, 402 (2d Cir. 1977) ("It is important to recognize, however, that [Plaintiff] does not . . . challenge the substance of the trade agreements. Were it to do so, we would be unable to consider the case on its

merits, for it would then be nonjusticiable . . . . [Plaintiff], rather, challenges the procedures employed by the Executive in concluding these agreements . . . ."); *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2007) (noting that "a challenge to an agency's implementation of a policy statement was justiciable, as the plaintiffs did 'not seek to litigate the political and social wisdom' of the policy") (citations omitted).

B. Count II Presents a Political Question

In Count II of the Complaint, plaintiffs' claim that defendants' actions in negotiating the Distribution Term were "arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law, in excess of statutory jurisdiction, authority or limitations or short of statutory right" in violation of the APA. Complaint ¶ 84; *see also* 5 U.S.C § 706(2). In support of this claim, plaintiffs maintain that defendants' failure to "require the Government of Canada to distribute any of the money in question on a pro-rata basis to all 240+ members of the domestic softwood lumber industry that were adversely affected by illegal dumping and subsidies" was contrary to their "substantial responsibility to protect domestic industries from the adverse effects of unfair trade practices such as the dumping of goods on U.S. markets . . . and the subsidization of industries by foreign governments." Complaint ¶¶ 81, 79.

Plaintiffs do not identify in their Complaint the statutory provisions containing the "substantial responsibilities" they allege defendants contravened in negotiating the SLA. In their briefing, however, they contend that the USTR failed to comply with 19 U.S.C. § 2411(c)(4),[6] which provides, in relevant part, that "[a]ny trade agreement [addressing unfair trade practices] shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act." Plaintiffs contend that section 2411(c)(4) requires that

> where, as here, the USTR is aware of any act, policy or practice of a foreign country that is unreasonable or discriminatory and burdens or restricts United States commerce . . . [the USTR] is authorized, if not mandated, to enter into a binding agreement (like the SLA) with the offending foreign government wherein that government agrees to (i) stop or phase out the practice or policy, (ii) eliminate the burden on United States commerce created by the practice and (iii) provide compensatory trade

[6] In *Almond Bros.*, 651 F.3d 1343, the Federal Circuit held that the USTR negotiated and executed the SLA pursuant to 19 U.S.C. § 2411.

> benefits to the entire economic sector (including the adversely affected industry) that would benefit from the elimination of the practice.

Pls.' Opp. to Defs.' Mot. to Dismiss, dated June 13, 2008 ("Pls.' June 2008 Opp.") 24–25.

Specifically, plaintiffs maintain that the Distribution Term's requirement that Canada disburse funds "only to those domestic softwood lumber producers that were also members of [the Coalition] rather than to all adversely affected domestic softwood lumber producers, let alone to 'the entire economic sector' that would benefit from eliminating the dumping and subsidization of Canadian softwood lumber, was not in accordance with 19 U.S.C. § 2411(c)." Pls.' June 2008 Opp. 25. In making their case, plaintiffs contend that the statutory phrase "benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice" requires that all domestic softwood lumber producers receive "pro rata" compensation under the Distribution Term. Pls.' June 2008 Opp. 24. That is, plaintiffs assert that under section 2411(c) it was unlawful for the USTR to require "Canada to distribute $500 million of the refunded money to only the approximately 100 domestic softwood lumber producers who were also members of a particular private organization rather than prorata to all affected softwood lumber producers." Pls.' Dec. 2008 Opp. 6.

> Plaintiffs insist that Count II does not present a political question because they do not challenge the propriety of defendants requiring Canada to pay $500 million in compensation to adversely affected domestic softwood lumber producers. Rather, plaintiffs challenge the legality of the establishment by defendants of a requirement that an adversely affected domestic softwood lumber producer also be a member of a particular private organization in order to be eligible to receive any portion of those funds.

Pls.' June 2008 Opp. 9. Plaintiffs, therefore, argue that the political question doctrine does not bar the court from determining that the USTR unlawfully negotiated a term in the SLA that left them out of the distribution of funds. Thus, for plaintiffs, their claims merely challenge the "manner in which defendants chose to achieve a remedial purpose related to unfair international trade practices, *i.e.*, by requiring Canada to pay $500 million to only the adversely affected domestic softwood lumber producers that were members of a particu-

lar private organization." Pls.' Opp. to Defs.' Mot. to Dismiss, dated December 19, 2008 ("Pls.' Dec. 2008 Opp.") 19.

Defendants move to dismiss Count II, arguing that because the Constitution commits matters of foreign trade to Congress and the President, and because the SLA was the result of negotiations with Canada, plaintiffs' challenge to the terms of that Agreement presents a non-justiciable political question. The Government asserts that plaintiffs' insistence that they are only objecting to the procedure by which the SLA was entered into mischaracterizes their claim. Rather, defendants insist that plaintiffs' claim does not merely "involve issues of procedure, application, or interpretation . . . , but raises broader issues that go to the *substance* of the SLA." Defs.' Mem. in Supp. Mot. to Dismiss, dated October 26, 2008 ("Defs.' Oct. 2008 Mem.") 9. According to defendants, although plaintiffs maintain that they only challenge the implementation of the SLA, they are "essentially asking the Court to rule upon the legality of Canada's agreement to disburse $500 million to certain recipients. Such a judgment would effectively rule upon the legality of the Government's foreign policy." Defs.' Rep. Mem. in Supp. of Mot. to Dismiss, dated July 18, 2008 4–5.

1. The USTR Was Not Prohibited from Negotiating the Distribution Term of the SLA

In order to succeed in their efforts to place Count II outside of an analysis under the political question doctrine, plaintiffs must demonstrate that the USTR was statutorily barred from negotiating the Distribution Term. *Sneaker Circus,* 566 F.2d at 402. In attempting to satisfy this burden, plaintiffs' primary argument is that Count II challenges the procedures used by the USTR in negotiating the SLA, not the substantive terms of the agreement itself. Thus, Count II is premised on plaintiffs' argument that 19 U.S.C. § 2411(c)(4) prohibited the USTR from negotiating the Distribution Term because it did not provide for pro rata distribution of the Canadian payments to the entire domestic industry.

Section 2411 authorizes the USTR to take measures to "eliminate, or phase out" any "act, policy, or practice of a foreign country [that] (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce." 19 U.S.C. §2411(a), (c). Subsection (c)(1)(D) further authorizes the USTR to enter into agreements that "eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice" and "provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from

the elimination of the act, policy, or practice." 19 U.S.C. § 2411(c)(1)(D), (c)(4). An agreement need not benefit the economic sector that includes the affected industry, however, if "(A) the provision of such trade benefits is not feasible, or (B) trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits." 19 U.S.C. § 2411(c)(4).

Despite plaintiffs' arguments to the contrary, section 2411 does not prohibit the USTR from negotiating a provision such as the Distribution Term. As an initial matter, the language of section 2411(c)(4) does not require that all members of an affected domestic industry profit proportionately from each compensatory trade benefit bargained for in an international agreement such as the SLA. In fact, this subsection does not appear to require that the softwood lumber industry receive any benefit at all from the SLA. Rather, the benefit is to be directed to the much more encompassing "economic sector" that includes the affected industry.[7] That is, a clear reading of the language on which plaintiffs rely is that the words "shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act" is to identify the economic sector to which the benefit should be directed. Plaintiffs' reading would require that the statute be reworded, as they have done in their papers, to "provide compensatory trade benefits to the entire economic sector (including the adversely affected industry)." Pls.' June 2008 Opp. 24–25. Yet, even if the statute were reworded as set forth in plaintiffs' papers, it would still be silent with respect to how any such benefit should be allocated to recipients within a particular economic sector, or to members of the affected domestic industry within such sector. Put another way, despite plaintiffs' arguments to the contrary, the notion of pro-rata sharing is absent from the statute.

In addition, no argument can be made that section 2411(c)(4) requires that every term in the SLA must benefit all of the softwood lumber producers in a particular way, let alone on a pro rata basis. Indeed, plaintiffs do not object to the allocation of the benefits from the Export Measures, or the payments for meritorious initiatives, or

[7] Plaintiffs do not supply a definition for "economic sector" as used in section 2411(c). The statutory language "the economic sector which includes the domestic industry" indicates, however, that the "economic sector" is necessarily broader than the affected "domestic industry." 19 U.S.C. § 2411(c)(4). Accordingly, at the very least, the economic sector encompassing the domestic softwood lumber industry would include, not only lumber producers such as plaintiffs, but all other participants throughout the supply and distribution chain, such as independent loggers and truckers. Under plaintiffs' construction of the statute, the USTR would have been required to negotiate an agreement that obligated the Canadian Government to proportionately compensate those other members of the economic sector, as well as plaintiffs.

to the binational council. In order for plaintiffs' claim that the USTR was prohibited from negotiating the Distribution Term to be credited, though, the court would have to find that section 2411(c)(4) requires the pro-rata distribution of benefits under the Distribution Term, but not under the SLA's other provisions. No reading of section 2411 demands this result.

Further, the requirement that an international agreement benefit the economic sector that includes the affected industry is not absolute. Rather, pursuant to section 2411(c)(4), an international agreement need not benefit the sector encompassing the affected industry at all if "the provision of such trade benefits is not *feasible*, or . . . trade benefits that benefit any other economic sector would be more *satisfactory* than such trade benefits." 19 U.S.C. § 2411(c)(4) (emphasis added). The terms "feasible" and "satisfactory" are not defined by the statute. Nor does the statute provide any objective criteria for determining whether it is "feasible" or "satisfactory" to benefit a particular economic sector. Accordingly, the "manner in which defendants chose to achieve a remedial purpose," Pls.' Dec. 2008 Opp. 19, was intended by Congress to leave considerable discretion in the hands of the USTR.

Based on the foregoing, the court finds that section 2411(c)(4) did not, in fact, prohibit the USTR from negotiating the Distribution Term. Accordingly, because there is no valid statutory challenge to the procedure by which the SLA was negotiated, Count II necessarily challenges the Agreement's substance. Thus, plaintiffs' contention that Count II is not subject to the political question doctrine fails.

2. Count II Presents a Political Question Because It Involves Matters for Which There is a Textually Demonstrable Commitment to the Political Branches

Because Count II implicates the substance of the SLA, an examination of how it may be affected by the political question doctrine is warranted. Plaintiffs' claim in Count II is that the Distribution Term is unlawful because it does not provide for the pro rata distribution of the Canadian payments to all members of the softwood lumber industry. The court finds that, applying the *Baker v. Carr* criteria, judicial consideration of Count II is barred by the political question doctrine because there is a "textually demonstrable constitutional commitment" of issues relating to international trade to the Congress and the Executive Branch. *See Baker,* 369 U.S. at 217. It is well established that the Constitution confers great power in the area of foreign affairs, and foreign commerce and trade in particular, to the political branches. *See, e.g.,* U.S. Const. art. II, § 1, cl. 1, 2; § 3; art. I,

§ 8, cl. 3; *Ojeten v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) ("The Constitution confers a vast amount of power on the political branches of the federal government in the area of foreign policy—particularly foreign commerce."); *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) ("Trade policy is an increasingly important aspect of foreign policy, an area in which the executive branch is traditionally accorded considerable deference.").[8] Plaintiffs do not dispute that this is the case, acknowledging that "the Constitution commits the power to conduct foreign policy to the Executive Branch and the power to regulate foreign commerce to the Legislative Branch." *See* Pls.' June 2008 Mem. 15.

Pursuant to 19 U.S.C. § 2171(c)(1)(A), the USTR has, inter alia, "primary responsibility for developing, and for coordinating the implementation of, United States international trade policy." "[T]he USTR, a member of the Executive Office of the President, acts at the direction of the President as his negotiating arm in international trade matters." *See Gilda Indus. v. United States,* 28 CIT 2001, 2006, 353 F. Supp. 2d 1364, 1369 (2004). In conformity with this presidential delegation, Congress has authorized the USTR to "enter into binding agreements . . . that commit . . . foreign countr[ies]" to cease any harmful and unfair trade activities, "subject to the specific direction, if any, of the President . . . to obtain the elimination of such act, policy, or practice." 19 U.S.C. § 2411(a), (c)(1)(D).

As plaintiffs recognize, taken together, sections 2171 and 2411 constitute a conferral of discretionary authority to the USTR to identify and eliminate harmful foreign trade practices through the negotiation and consummation of agreements such as the SLA. Pls.' June 2008 Opp. 24 (acknowledging that "negotiating and entering into the SLA and, in doing so, requiring Canada to make a compensatory payment to the adversely affected domestic industry was within the

[8] The President's preeminent role in formulating foreign policy is further demonstrated by the power to "make Treaties" (with the advice and consent of the Senate) and "appoint Ambassadors, other public Ministers and Consuls," U.S. Const. art. II, § 2, cl. 2, as well as the role of "receiv[ing] Ambassadors and other public Ministers." U.S. Const. art. II, § 3. Congress' authority in the area of foreign policy is further embodied in its power to "declare War," "to raise and support Armies," and "to provide and maintain a Navy," U.S. Const., art. I, § 8, cl. 11–13. In addition, the Senate's advice and consent role in the treaty making process demonstrates the Legislature's role in formulating foreign policy. U.S. Const. art. II, § 2, cl. 2.

scope of the USTR's authority"). Considering the constitutional commitment of trade policy formulation to the political branches, and the delegation of this authority to the USTR, the substance of the specific provisions of the SLA at issue here, as negotiated by the USTR, present a political question that lies beyond judicial scrutiny. That is, the USTR's determination to agree to terms that (1) restricted exports of softwood lumber from Canada, and (2) provided for various payments including payment to members of the Coalition, concerned policy decisions for which there is "a textually demonstrative constitutional commitment" to the Executive Branch. For this reason alone, Count II falls within the political question doctrine and is nonjusticiable. *See Samish Indian Nation*, 419 F.3d at 1370.

3. Count II Presents a Political Question Because There Are No Judicially Manageable Standards for Resolving This Claim

In addition, Count II presents a political question because there is "a lack of judicially discoverable and manageable standards for resolving" this claim as it concerns questions of trade policy that "would require the court to make an initial policy determination of the kind clearly for nonjudicial discretion." *Baker,* 369 U.S. at 217. In reaching this finding, the court again turns to 19 U.S.C. § 2411(c)(4).

First, as previously discussed, the subsection's only instruction with respect to trade benefits negotiated under the SLA is that, if feasible, they be directed to "the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice." 19 U.S.C. § 2411(c)(4). The fact that section 2411(c)(4) contains no other instruction as to how benefits are to be distributed demonstrates that this decision is left to the USTR's discretion. *See Heckler v. Chaney*, 470 U.S. 821, 835–36 (1985); *Ctr. for Policy Analysis on Trade & Health v. U.S. Trade Rep.*, 540 F.3d 940, 945 (9th Cir. 2008). Reference to section 2411(a)(1) confirms this conclusion, as it grants the USTR authority to take all "[a]ctions . . . that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country." As discussed *supra*, under the Constitution, the Executive Branch is accorded "considerable deference" in formulating foreign trade policy. *See Fed. Mogul Corp.*, 63 F.3d at 1581.

Second, as has been seen, there is no provision in the statute that requires every term of an international agreement negotiated under its authority benefit all parts of an economic sector, or that the benefits be distributed on a pro rata basis. That is, even if plaintiffs'

contention that section 2411 requires that the SLA benefit the softwood lumber industry were accepted, there is nothing in the statute to indicate that every provision of the Agreement must proportionately benefit every participant in the industry. Rather, the determination of what benefits should be conferred, and how to allocate them under an international agreement, is committed by the President and Congress to the discretion of the USTR, subject only to further direction from the President.[9] *See* 19 U.S.C. § 2411(a).

Next, as discussed, the requirement that an agreement negotiated pursuant to section 2411 benefit the economic sector that includes the affected industry is not absolute. Rather, the USTR may enter into an agreement that does not benefit such sector if he determines that such a term is "not feasible," or a different term would be "more satisfactory." *See* 19 U.S.C. § 2411(c)(4). Whether one of these conditions has been met is not susceptible to objective examination, but rather is dependent upon the value judgments of the USTR. *See Keita v. United States SBA*, No. 07-cv-4958, 2010 U.S. Dist. LEXIS 9110, at *11 (E.D.N.Y. Feb. 3, 2010) ("Here, the Court lacks guidance to adjudge the SBA's exercise of its discretion because Keita seeks review of the individual economic judgments that comprised the SBA's decision that his loans were not 'necessary or appropriate.'"). Accordingly, "the vagueness of the term[s themselves] indicate[s] to us that Congress did not intend traditional judicial review of the Executive's action taken pursuant to this statute." *Flynn v. Schultz*, 748 F.2d 1186, 1193 (7th Cir. 1984). Thus, Count II presents "a political question arising out of a statute that provides us with no meaningful standards to apply." *Ctr. for Policy Analysis on Trade & Health*, 540 F.3d at 945.

[9] The legislative history of 19 U.S.C. § 2411 supports this conclusion. The original House Bill would have required the USTR to "give preference in all cases to action on the *same goods or sector* and, in any compensation agreement, to seek benefits from the foreign country in the *same goods or sector*." H.R. Rep. No. 100–576, at 560 (1988) (emphasis added). The Senate amendment, on the other hand, required only "that any compensation agreement provide trade benefits in the economic sector of which the U.S. domestic industry is a part, or in the economic sector as closely related as possible to such economic sector." *Id.* Ultimately, a conference agreement was reached whereby "[t]he House recede[d], with an amendment that require[d] compensation agreements to provide trade benefits in the *same or a closely related economic sector, unless such benefits are not feasible or benefits would be more satisfactory in another sector.* " H.R. Conf. Rep. 100–576, at 560–61 (emphasis added). Accordingly, the resulting legislation provided great discretion to the USTR in determining the ultimate beneficiaries of trade agreements remedying foreign unfair trade practices.

4. Count II Presents a Political Question Because Prudential Considerations Counsel Against Judicial Intervention in This Case.

Finally, prudential considerations counsel against judicial intervention of the type urged by plaintiffs because of "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *See Baker*, 369 U.S. at 217. Here, plaintiffs ask the court to alter the obligations of the Canadian Government under the SLA. To do so might well undermine the confidence that Canada, and presumably other foreign trading partners, have in the United States' adherence to trade agreements executed by those with authority to act on its behalf.

International trade agreements are often the product of delicate negotiations, leading to a quid pro quo exchange, in which both sides agree to make concessions. Judicial interference would disturb the balance struck through these negotiations, undermining their value as a mutually-satisfactory means of achieving the ends of the foreign trade policy. *See Footwear Distribs. & Retailers of Am. v. United States*, 18 CIT 391, 414, 852 F. Supp. 1078, 1096 (1994) ("[C]ourts traditionally refrain from disturbing 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations.'" (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936))); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("'[N]uances' of the 'foreign policy of the United States . . . are much more in the province of the Executive Branch and Congress than of this Court.'" (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983))); *Antolok v. United States*, 873 F.2d 369, 381 (D.C. Cir. 1989) ("[N]owhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary, in any fashion in the making of international agreements.").

The importance of international trade agreements to the implementation of the nation's trade policy, and the concomitant need to adhere to the terms of such agreements to protect the reasonable expectations of our foreign trading partners, present "an unusual need for unquestioning adherence to a political decision already made," *Baker*, 369 U.S. at 217. *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 914 (3d Cir. 1990) (noting that "a judicial redirection of established foreign trade policy" would be "a quite inappropriate exercise of the judicial power"); *Made in the U.S.A.*, 242 F.3d at 1317 ("The [Supreme] Court has further observed that 'federal uniformity is essential' in the area of foreign commerce, and that 'the Federal Government must speak with one voice when regulating commercial

relations with foreign governments.'" (quoting *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 448 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)) (internal citations omitted)). As noted, satisfaction of any one of the *Baker v. Carr* criteria is sufficient to warrant dismissal. *See Samish*, 419 F.3d at 1372. Accordingly, prudential considerations further demonstrate that Count II presents a non-justiciable political question and, thus, must be dismissed.

II. Whether the Complaint Fails to State a Claim for Which Relief May Be Granted

Defendants further contend that Counts II, III, and IV should be dismissed because each fails to state a claim for which relief can be granted under USCIT R. 12(b)(5). For the reasons stated below, the court agrees that, even if Count II did not present a non-justiciable political question, along with Counts III and IV, it does not present claims for which relief can be granted.

A. Standard of Review Under USCIT R. 12(b)(5)

Pursuant to USCIT R. 12(b)(5), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." In evaluating a motion to dismiss under USCIT R. 12(b)(5), the Court "must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party." *United States v. Ford Motor Co.*, 497 F.3d 1331, 1336 (Fed. Cir. 2007). The plaintiff's burden at this stage is not great as it need only plead the requisite facts needed to present a valid claim for relief. USCIT R. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.").

Nevertheless, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 233–234 (3d ed. 2004)). Where a plaintiff has failed to put forth a "cognizable legal theory" under which it is entitled to relief, its complaint must be dismissed. *See Vasu v. Tremont Advisors*, 129 F. Supp. 2d 113 (D. Conn. 2001) ("'Under Rule 12(b)(6), a court may dismiss a claim for either (1) the lack of a cognizable legal theory; or (2) the absence of factual assertions to support a claim.'") (citations omitted). That is, if the claimed

source of a plaintiff's right to recover does not actually confer such a right, a complaint fails to state a claim for which relief may be granted.

B. Count II Fails to State a Claim for Which Relief Can Be Granted Under the APA

As noted, the court has found that Count II is non-justiciable under the political question doctrine. Were this not the case, Count II would still be dismissed. In Count II, plaintiffs assert that the USTR's negotiation of the Distribution Term was contrary to 19 U.S.C. § 2411(c) because it did not provide for pro rata distribution of Canadian payments among all domestic producers. *See* Pls.' June 2008 Opp. 3–4; Pls.' Dec. 2008 Opp. 6. Based on the proper interpretation of section 2411(c), *see supra*, Count II fails to state a claim for which relief may be granted under the APA.

Pursuant to 5 U.S.C. § 701(a)(2), judicial review of agency action that is "committed to agency discretion by law" is precluded. As the Supreme Court explained, pursuant to section 701(a)(2), "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Heckler,* 470 U.S. at 830. As explained above, rather than setting forth any discernible standard against which to measure whether the Distribution Term's failure to provide for a pro-rata distribution of benefits was lawful, section 2411 commits the negotiation of the manner in which the benefits were to be distributed under the SLA to the discretion of the USTR. *See Webster v. Doe*, 486 U.S. 592, 596 (1988) ("We thus find that the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion, and that § 701(a)(2) accordingly precludes judicial review of these decisions under the APA.").

Therefore, plaintiffs' claim that the USTR violated section 2411(c)(4) by negotiating the Distribution Term must be dismissed. That subsection, as noted above, does not prohibit the USTR from negotiating a term that directs payments to members of the Coalition. Indeed, all that section 2411 requires is that international agreements benefit, to the extent "feasible" or "satisfactory," the "economic sector" that includes an affected industry. As has been seen, the statute does not impose an obligation on the USTR to ensure that benefits under international trade agreements are conferred on any particular industry, let alone that they be distributed proportionately among all members of a particular industry. Because section 2411

leaves to the discretion of the USTR the method of directing the distribution of trade benefits, the exact provisions of the Distribution Term were "committed to agency discretion by law." 5 U.S.C. § 702(a)(2); *Webster*, 486 U.S. at 596. Hence, Count II does not set forth a cognizable legal theory under which plaintiffs could recover. *See Heckler*, 470 U.S. at 837.

For these reasons, Count II of the Complaint fails to state a claim upon which relief may be granted. *See* USCIT R. 12(b)(5).

C. Count III Fails to State a Claim for Which Relief Can be Granted

1. Plaintiffs' Equal Protection Claim (Count III) Does Not Present a Political Question

In Count III, plaintiffs challenge the constitutionality of the SLA under the equal protection guarantee of the Fifth Amendment to the United States Constitution. Plaintiffs claim that, by obligating Canada to disburse money to only some of the members of the domestic softwood lumber industry, i.e., the Coalition members, the USTR deprived plaintiffs of their right to equal protection of the law.[10] Complaint ¶ 86. Specifically, plaintiffs contend that "[d]efendants' actions in requiring Canada to make distributions to only those adversely affected domestic producers who were also members of the Coalition and not to all affected domestic producers on its face violates" the constitutional requirement of equal protection of the laws "by impermissibly discriminating between similarly situated producers and denying a benefit to certain of those producers." Complaint ¶ 88. For plaintiffs, "[t]here existed no legitimate governmental purpose for defendants having discriminated among affected domestic producers and denying plaintiffs a pro-rata portion of the amount that defendants required the Government of Canada to distribute." Complaint ¶ 89.

As noted, plaintiffs challenges in Count II to the Distribution Term of the SLA present political questions. When actions taken to negotiate the terms of an international agreement are challenged as inconsistent with the Constitution, however, the political question

[10] There is no express "equal protection" guarantee in the Fifth Amendment. Nevertheless, as the Supreme Court has explained, the Due Process requirement of the Fifth Amendment protects against unjustifiable legislative classifications. "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

doctrine is inapplicable. *See Japan Whaling*, 478 U.S. at 230. This is because it is the judiciary's role to determine whether the coordinate branches have acted in accordance with the Constitution. *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). Thus, it is well-established that "'foreign commitments' cannot relieve the government of the obligation to 'operate within the bounds laid down by the Constitution,' and that 'the prohibition of the Constitution . . . cannot be nullified by the Executive or by the Executive and Senate combined.'" *Totes-Isotoner Corp.*, 594 F.3d at 1353 (quoting *Made in the U.S.A.*, 242 F.3d at 1314). Hence, there is "little doubt that courts have the authority—indeed, the duty—to invalidate international agreements which violate the express terms of the Constitution." *Id.*

2. Legal Framework for Equal Protection Claims

Although not barred by the political question doctrine, plaintiffs' equal protection claims nonetheless fail to state a claim upon which relief can be granted. The equal protection of the laws of the United States is guaranteed by the Fifth Amendment's Due Process requirement, *Bolling v. Sharpe*, 347 U.S. at 499, which prohibits the government from unjustifiably treating similarly situated persons differently. If an administrative classification, however, "neither burdens a fundamental right nor targets a suspect class," it will be upheld "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Thus, "[i]n areas of social and economic policy," an executive classification "that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fed. Commc'n. Comm'n. v. Beach Commc'n. Inc.,* 508 U.S. 307, 314 (1993) (*FCC*).

"On rational-basis review, a classification . . . bear[s] a strong presumption of validity, and those attacking the rationality of the . . . classification have the burden 'to negative every conceivable basis which might support it.'" *FCC*, 508 U.S. at 314–15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 364 (1973)) (internal citation omitted); *see Radio Ass'n on Defending Airwave Rights v. U.S. Dep't of Transp.,* 47 F.3d 794, 808–09 (1995) (noting that equal protection challenges to administrative action are subject to the same standard). Furthermore, "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citations omitted). Rather, if there exists any plausible

circumstance under which the classification would further a legitimate government objective, it will satisfy the rational basis standard. *Id*.

Plaintiffs do not argue that their equal protection claim is based on a suspect classification or infringement of a fundamental right, but rather concede that their claim is subject to rational basis scrutiny. Pls.' June 2008 Opp. 35 ("Defendants, while asserting generally that there was a rational basis for 'negotiating the terms of the SLA,' and settling various legal disputes, fail to explain in any way how finding adversely affected softwood lumber producers eligible to receive a portion of the $500 million on the basis of their membership in a particular private organization bears any relationship with a legitimate public purpose.") (internal citations omitted)); Pls.' December 2008 Opp. 27 ("No governmental goal or objective was served by the method defendants used to distinguish between injured companies that were entitled to compensation and those injured companies that were not.").

3. The Distribution Term Was Rationally Related to a Legitimate Government Interest

Any reading of the SLA demonstrates that requiring the disbursement of funds to the members of the Coalition under the Distribution Term was rationally related to the legitimate government purpose of ending the undesirable trade practices of the Canadian softwood lumber industry, and to settle the ongoing litigation concerning the U.S.-Canadian softwood lumber trade. SLA, annex 2A; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

To accomplish its purpose, the Government reasonably took the Coalition into account. The Coalition was the primary representative of the domestic industry in the various proceedings that were ongoing when the SLA was negotiated. *See* SLA, annex 2A; *Almond Bros.*, 651 F.3d at 1352; Pls.' June 2008 Opp. 30 n.13 (noting that the Coalition's Executive Committee was the petitioner in the underlying antidumping and countervailing duty disputes, and a party to "various disputes concerning duties on Canadian softwood lumber products"). In exchange for the disbursement of $500 million, counsel for the Coalition agreed to the dismissal of more than twenty lawsuits and proceedings

pending as of the date the SLA was signed.[11] SLA, annex 2B. Because of the agreement to end that litigation, among other reasons, the Canadian Government agreed to take measures to address the domestic industry's complaints concerning Canadian softwood lumber exports. SLA, Art. VI, VII.

Thus, the USTR's determination that a reasonable means of securing an agreement to terminate the pending lawsuits and proceedings was to compensate members of the Coalition was rationally related to the legitimate objective of curbing trade practices that were harming the domestic industry, and obtaining other concessions and compensatory payments. *See* SLA, art. VI, VII, annex 2C. As has been noted, plaintiffs were not parties to these lawsuits and proceedings. Obtaining the consent of the Coalition by compensating its members for agreeing to the dismissal provides a rational basis for preferring some domestic producers over others. In other words, the reason why the members of the Coalition received the disbursement to the exclusion of plaintiffs was because the Coalition relinquished its pending claims.

Moreover, the SLA was, at least in part, the result of the Coalition's efforts to protect the rights of the domestic industry as a whole. The Coalition bore the time and expense of extensive legal battles to address the practices of the Canadian industry, providing a sufficient rationale for compensating its members to the exclusion of more passive members of the domestic lumber industry, such as plaintiffs. As defendants note, "the [SLA] terminated at least 20 legal disputes in various fora . . . . [T]he dismissal of many of these actions required the agreement of various private interests, including all parties to the pending lawsuits. Thus, in order to resolve all of the litigation and preserve order in the market, a comprehensive settlement was negotiated. All parties in interest to the domestic litigation and intervenors as of right in the NAFTA disputes were necessarily involved." Defs.' April 2008 Mem. 32 (internal citations omitted); SLA, annex 2A.

In addition, the Distribution Term is but one provision of the SLA. Canada's agreement under the SLA to curb its own industry's practices by imposing the Export Measures, and agreeing to fund the

[11] Under its express terms, before the SLA could "enter into force," at least 60% of the domestic softwood lumber producers and at least one industry union, regardless of their membership in the Coalition, were required to submit "no injury" letters certifying that the "SLA 2006 removes any alleged material injury or threat of material injury [under the United States unfair trade laws] to the U.S. softwood lumber industry from imports of Softwood Lumber Products from Canada." *See* SLA art. II, annex 5A. Accordingly, more than a nominal majority of the domestic producers concluded that the benefits conferred upon the industry by the SLA were sufficient to induce them to relinquish their rights to invoke the U.S. trade laws against Canadian producers.

meritorious initiatives and the binational council, were negotiated to benefit the entire domestic softwood lumber industry, including plaintiffs. Plaintiffs make no claim that their equal protection rights were violated by the inclusion of these terms in the SLA.[12] Here, again, plaintiffs ask the court to dismember the SLA so that they can attack one part of the agreement. Taken as a whole, however, the SLA appears to have been negotiated to benefit the entire domestic softwood lumber industry.

The court finds that the USTR's actions in negotiating the Distribution Term do not violate plaintiffs' equal protection rights because they satisfy the rational basis test. That is, the Coalition's members received an additional benefit under the SLA because they agreed to relinquish their rights under pending lawsuits, while the remainder of the benefits conferred by Canada under the agreement were designed to benefit the entire domestic industry, including plaintiffs. Where, as here, there are "'plausible reasons'" for the alleged unequal treatment, "'our inquiry is at an end.'" *FCC*, 508 U.S. at 313–14 (citations omitted). Thus, Count III must be dismissed. *See* USCIT R. 12(b)(5).

D. Count IV Fails to State a Claim for Which Relief May be Granted

In Count IV, plaintiffs allege that the "determination of exactly how this [$500 million] compensatory payment by Canada should be divided among all adversely affected domestic softwood lumber producers was a governmental function which could not legally be delegated to non-governmental entities such as the members of the coalition." Complaint ¶ 92. In their brief, plaintiffs maintain that, "[t]he governmental function which defendants wrongly delegated was the determination of exactly how the compensatory $500 million payment [the SLA] required Canada to provide should be divided among adversely affected domestic softwood lumber producers." Pls.' Dec. 2008 Opp. 27. Plaintiffs, thus, insist that the decision to favor Coalition members over other softwood lumber producers was a government function because "19 U.S.C. § 2411 obligates the USTR to protect domestic industries from unfair foreign trade practices and includes the obligation to . . . provide compensatory trade benefits to the economic sector which includes the affected domestic industry." Pls.' Dec. 2008 Opp. 27–28.

Defendants move to dismiss Count IV by stating that plaintiffs' "complaint does not provide any factual or legal basis for its claim of

[12] In fact, plaintiffs acknowledge that these terms benefit the entire domestic softwood lumber industry. *See* Pls.' June 2008 Opp. 38 n.22.

wrongful delegation of a Government function." Defs.' Oct. 2008 Mem. 10. For defendants, the fact that plaintiffs "concede[] that 'by negotiating and entering into the SLA . . . defendants were acting in accordance with 19 U.S.C. §§ 2171(c) & (d)'"[13] demonstrates that they "cannot point to any provision of law which creates a Government duty to distribute the money at issue and, thus, there can be no Government duty to determine how much money should be distributed to whom." Defs.' Oct. 2008 Mem. 10 (quoting Pls.' June 2008 Opp. 23). Thus, defendants argue that they were statutorily authorized to enter into an agreement requiring Canada to make payments to Coalition members, and once they lawfully imposed that obligation on Canada, there was no residual duty on the part of the USTR to determine how much each Coalition member should receive.

Although it is well established that "[d]elegations of administrative authority are suspect when they are made to private parties, particularly to entities whose objectivity may be questioned on grounds of conflict of interest," in order to state a claim based on an impermissible delegation, plaintiffs must identify an administrative authority that has been delegated.[14] *Pistachio Grp. of Ass'n of Food Indus., Inc. v. United States*, 11 CIT 668, 672, 671 F. Supp. 31, 35 (1987). Here, however, plaintiffs have failed to identify a governmental function that was impermissibly delegated. Indeed, it is clear from the terms of the SLA that there was no such delegation. *Peer Bearing Co.-Changshan v. United States*, 35 CIT __, __, Slip. Op. 11–125 at 4 (noting that in deciding a motion under USCIT R. 12(b)(5), the court "may consider documents incorporated into the complaint, exhibits attached to the complaint, or matters of which the court may take judicial notice").

The determination that the members of the Coalition alone should receive the $500 million in payments from Canada was reflected in the terms of the SLA. The USTR negotiated the Distribution Term with Canada, and annex 2C of the SLA requires that the payment be made to the members of the Coalition, to the exclusion of plaintiffs. Thus, the determination that some domestic softwood lumber producers (i.e., Coalition members) were to receive payments from Canada to the exclusion of others was not delegated because the Distribution Term was negotiated and agreed to by the USTR herself. Accordingly, to the extent that Count IV is read as an objection to the determina-

[13] As noted above, plaintiffs concede that, in addition to complying with section 2171, defendants also complied with section "2411, and other sections of the United States Code to protect the domestic softwood lumber industry." Pls.' June 2008 Opp. 23.

[14] An agency's impermissible delegation is unlawful and will be set aside under the APA. 5 U.S.C. § 706(a)(2).

tion that the Coalition members should benefit under the SLA and other producers should not, plaintiffs' claim of an unlawful delegation is unconvincing.

It is also possible, however, to read plaintiffs' claim as alleging that defendants impermissibly delegated to the Coalition the governmental function of allocating payments made among the members of the Coalition. Thus, Count IV may be considered an allegation that, by requiring the Canadian Government to disburse funds to the Coalition members without directing how those funds were to be allocated among them, the SLA delegated a governmental function to the Coalition.

Because, as discussed *supra*, plaintiffs are not entitled to share in this distribution, they lack standing to challenge the allocation of those funds among members of the Coalition. Put another way, having lawfully been excluded from the list of beneficiaries by the terms of the SLA, plaintiffs cannot be injured by the putative wrongful delegation of authority to determine just how the $500 million should be distributed among the Coalition members. Even assuming, for the sake of argument, that the function of allocating payments among Coalition members was a governmental function that was unlawfully delegated, such a finding would not provide plaintiffs the right to receive payments under the Distribution Term. *See Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1283–84 (Fed. Cir. 2010) (finding that plaintiffs lacked standing to challenge the distribution of trust funds because "at the time [the Department of the Interior] distributed the remainder [of the funds] to the Yorka Tribe, the [plaintiff] was not a beneficiary of, and had no legally protected interest in" the trust). Even under this reading then, Count IV fails.

Accordingly, Count IV of the Complaint fails to state a claim for which relief can be granted. *See* USCIT R. 12(b)(5).

CONCLUSION

Because Count II of the Complaint is non-justiciable under the political question doctrine, and because Counts II, III, and IV further fail to state claims for which relief may be granted, plaintiffs' Complaint is dismissed.

Dated: April 19, 2012
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 12–52

UNITED SYNTHETICS, INCORPORATED, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES CUSTOMS AND BORDER PROTECTION, DAVID V. AGUILAR (ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION), UNITED STATES INTERNATIONAL TRADE COMMISSION, AND DEANNA T. OKUN (CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION), Defendants.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Court No. 08–00139

[Dismissing all claims for failure to state a claim upon which relief can be granted; dismissing the action.]

Dated: April 20, 2012

Gregory S. Menegaz and *J. Kevin Horgan*, deKieffer & Horgan, of Washington, DC for Plaintiff United Synthetics, Incorporated.

Jessica R. Toplin, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendants United States, U.S. Customs and Border Protection, and David V. Aguilar, Acting Commissioner of U.S. Customs and Border Protection. With her on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, and David S. Silverbrand and Courtney S. McNamara, Trial Attorneys. Of counsel on the briefs were *Andrew G. Jones* and *Joseph Barbato*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

Patrick V. Gallagher, Jr., Attorney Advisor, Office of General Counsel, U.S. International Trade Commission, of Washington, DC for Defendants U.S. International Trade Commission and Deanna T. Okun, Chairman, U.S. International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel and *Neal J. Reynolds*, Assistant General Counsel.

OPINION

Gordon, Judge:

This case arose from the actions of two agencies, the U.S. International Trade Commission (the "ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP"), that denied Plaintiff United Synthetics, Incorporated ("USI") certain monetary benefits under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). The ITC did not include Plaintiff on its list of parties potentially eligible for "affected domestic producer" ("ADP") status, which would have qualified USI for distributions of antidumping duties collected under antidumping orders on imports of certain polyester staple fiber ("PSF") from Korea

and Taiwan. *Certain Polyester Staple Fiber from Korea and Taiwan*, Inv. No. 731-TA-825826 (Final), USITC Pub. 3300 (May 2000) ("*Final Injury Determination*"); *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea and Antidumping Duty Orders: Certain Polyester Staple Fiber From the Republic of Korea and Taiwan*, 65 Fed. Reg. 33,807 (Dep't of Commerce May 25, 2000) ("*Final LTFV Determination and Antidumping Duty Orders*"). Because Plaintiff was not on the ITC's list of potential ADPs, Customs made no CDSOA distributions to USI.

Plaintiff claims that Defendants' actions are inconsistent with the CDSOA, not supported by substantial evidence, and otherwise not in accordance with law. Plaintiff also brings facial and as-applied constitutional challenges to the CDSOA under the First Amendment and under the equal protection and due process guarantees of the Fifth Amendment.

Before the court are motions under USCIT Rule 12(b)(5) to dismiss for failure to state a claim upon which relief can be granted filed by the ITC (Def. U.S. Int'l Trade Comm'n's Mem. in Supp. of Its Mot. to Dismiss for Failure to State a Claim, ECF No. 44 ("ITC's Mot.")) and Customs (Defs. the United States and U.S. Customs and Border Protection's Mem. in Support of Their Mot. to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted, ECF No. 47 ("Customs' Mot.")). The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2006). *See Furniture Brands Int'l, Inc. v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1301, 1307–10 (2011). For the reasons set forth below, we conclude that Plaintiff has failed to state a claim upon which relief can be granted. The court will grant Defendants' USCIT Rule 12(b)(5) motions and dismiss this action.

I. Background

Following a 1999 petition filed by a group of domestic manufacturers, the U.S. Department of Commerce ("Commerce") initiated an antidumping investigation of PSF from Korea and Taiwan. *Initiation of Antidumping Duty Investigations: Certain Polyester Staple Fiber From the Republic of Korea and Taiwan*, 64 Fed. Reg. 23,053 (Dep't of Commerce Apr. 29, 1999); Am. Compl. ¶ 22, ECF No. 17. Contemporaneously, the ITC conducted an injury investigation. *Certain Polyester Staple Fibers from Korea and Taiwan*, 64 Fed. Reg. 17,414 (ITC Apr. 9, 1999); Am. Compl. ¶ 22.

Following an affirmative injury determination by the ITC in May 2000, Commerce, on May 25, 2000, published its amended final determinations of sales at less than fair value and issued the antidump-

ing duty orders covering the subject merchandise. *Final LTFV Determination and Antidumping Duty Orders*, 65 Fed. Reg. 33,807; Am. Compl. ¶ 26. The antidumping duty orders remain in effect. Am. Compl. ¶ 26. Plaintiff alleges that "USI did not exist at the time that the petition was filed or during the original investigation," and that "USI was incorporated September 1, 1999 and began operations as a U.S. manufacturer of subject polyester staple fiber May 30, 2000," five days after publication of the antidumping duty orders. *Id.* ¶ 23.

Plaintiff commenced this action on April 18, 2008, contesting the denial of CDSOA distributions to Plaintiff for Fiscal Years 2006 and 2007. Compl., ECF No. 4. Shortly thereafter, the court stayed this action pending a final resolution of other litigation raising the same or similar issues. Order, May 28, 2008, ECF No. 12 (action stayed "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States*, Consol. Ct. No. 06–0290, that is, when all appeals have been exhausted.").

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009), *cert. denied*, 130 S. Ct. 3273 (2010) ("*SKF II*"), which addressed questions also present in this action, the court issued an order directing Plaintiff to show cause why this action should not be dismissed. Order to Show Cause, Jan. 3, 2011, ECF No. 16. On February 1, 2011, Court No. 08–00139 Page 5 Plaintiff filed its Amended Complaint.[1] Am. Compl. After receiving Plaintiff's response to the Order to Show Cause, the court lifted the stay on this action for all purposes. Order Lifting Stay, Feb. 9, 2011, ECF No. 20. Defendants filed motions to dismiss for failure to state a claim upon which relief can be granted on May 2, 2011 (ITC's Mot.) and May 6, 2011 (Customs' Mot.).

II. Standard of Review

In deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in

[1] The filing of the amendment as a matter of course was untimely under Rule 15(a). USCIT R. 15(a) ("[A] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."). The amendments would not have been untimely under Rule 15(a) as in effect prior to January 1, 2011, which rule allowed a party to amend its pleading once as a matter of course before being served with a responsive pleading. Because the other parties to this action have addressed in their Rule 12(b)(5) motions the complaint in amended form, the court exercises its discretion under USCIT Rule 89 to accept Plaintiffs' First Amended Complaint. USCIT R. 89 ("These rules and any amendments take effect at the time specified by the court. They govern . . . proceedings after that date in a case then pending unless: (A) the court specifies otherwise . . . .").

plaintiff's favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 & n.13 (Fed. Cir. 1993).

A plaintiff's factual allegations must be "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and footnote omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

In 2000, Congress amended the Tariff Act of 1930 to add section 754, the CDSOA, which provides distributions of assessed antidumping and countervailing duties to ADPs on a fiscal year basis. 19 U.S.C. § 1675c(d)(1).[2] To be an ADP, a party must meet several criteria, including the requirement that it have been a petitioner, or an interested party in support of a petition with respect to which an antidumping duty or countervailing duty order was entered. *Id.* § 1675c(b)(1) ("petition support requirement"). The CDSOA directed the ITC to forward to Customs, within sixty days of the issuance of an antidumping or countervailing duty order, lists of persons potentially eligible for ADP status, *i.e.*, "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id.* § 1675c(d)(1). The CDSOA further directed that:

> [i]n those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority [Commerce] to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.

[2] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

19 U.S.C. § 1675c(d)(1) ("consultation provision"). Customs then publishes the lists of potential ADPs in the Federal Register annually, prior to each distribution. *Id.* § 1675c(d)(2). Customs distributes assessed duties to parties on the list of potential ADPs that certify that they met the remaining eligibility criteria. *Id.* § 1675c(d)(2).

The ITC compiled lists of potential ADPs with respect to the antidumping duty orders on PSF and provided those lists to Customs. Am. Compl. ¶ 33. Customs published the lists of potential ADPs for Fiscal Year 2006 on June 1, 2006, *id.*, and for Fiscal Year 2007 on May 29, 2007, *id.* ¶ 34. Plaintiff did not appear on either list. *Id.* ¶¶ 33–34. Nevertheless, Plaintiff certified to Customs its eligibility for both fiscal years. *Id.* ¶ 35. Customs responded by indicating that USI was allocated CDSOA funds for Fiscal Year 2007 on the subject antidumping duty orders but that the disbursement of those funds was being withheld pending the disposition of pending litigation over the Byrd Amendment. *Id.* ¶¶ 18, 37. Plaintiff also sought certification from the Commission based on the decisions in *PS Chez Sidney v. International Trade Commission*, 30 CIT 858, 442 F. Supp. 2d 1329 (2006) and *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006) (*"SKF I")*.[3] Am. Compl. ¶¶ 19, 36. Stating that Plaintiff "did not qualify as an ADP because it did not support the original petitions," the ITC denied USI's request for certification. *Id.* ¶ 38.

Plaintiff challenges the validity and constitutionality of the Commission's and CBP's application of the CDSOA to USI. In Count 1 of its Amended Complaint, Plaintiff claims that the ITC's determination not to include USI on the list of potential ADPs was inconsistent with the CDSOA, not supported by substantial evidence, and otherwise not in accordance with the law. Am. Compl. ¶ 41. In Counts 2 and 3, Plaintiff challenges on First Amendment grounds the CDSOA's petition support requirement, both facially and as applied to USI. *Id.* ¶¶ 43–44, 46–48. In Counts 4 and 5, Plaintiff challenges the petition support requirement, both facially and as applied to USI, on Fifth Amendment equal protection grounds. *Id.* ¶¶ 50–51, 53–54. In Count 6, Plaintiff challenges the petition support requirement as impermissibly retroactive in violation of the Fifth Amendment Due Process Clause because Defendants based eligibility for ADP status, and thus eligibility for disbursements, on past conduct. *Id.* ¶ 56.

[3] *PS Chez Sidney* held the petition support requirement unconstitutional on First Amendment freedom of expression grounds, and *SKF I* held the petition support requirement unconstitutional on Fifth Amendment equal protection grounds.

A. *Plaintiff's Statutory Challenges to the Actions of the Two Agencies Must Be Dismissed*

In Count 1 of the Amended Complaint, Plaintiff challenges on statutory grounds the actions of the ITC and Customs denying it CDSOA distributions for Fiscal Years 2006 and 2007. Plaintiff challenges as unlawful under the CDSOA the ITC's determination not to place USI on the list of potential ADPs and the failure of Customs to provide USI distributions. Am. Compl. ¶ 41. Plaintiff claims that these agency actions "were inconsistent with the CDSOA, not supported by substantial evidence, and were otherwise not in accordance with law." *Id.*

Plaintiff states that the ITC "has never included USI in its list of eligible ADPs." *Id.* ¶ 28. However, we do not find within the complaint alleged facts that would have qualified Plaintiff for inclusion on the ITC's list. According to the CDSOA, a domestic producer may qualify as an ADP only if it "was a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." 19 U.S.C. § 1675c(b)(1). The ITC is directed to prepare "a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). The Amended Complaint states that Plaintiff was not a petitioner with respect to the petition resulting in the antidumping duty orders on PSF from Korea and Taiwan, Am. Compl. ¶ 23, and fails to allege facts according to which we could conclude that USI obtained ADP status as a party who was in support of that petition.

The Amended Complaint alleges that "USI completed the Commission's initial U.S. producer questionnaire and multiple supplemental questionnaires" in the five-year review ("Sunset Review") of the antidumping duty orders that the Commission instituted on March 31, 2005. Am. Compl. ¶ 32. The Amended Complaint further alleges that "USI was certified as an ADP under the 2007 antidumping duty order covering PSF from China and has received CDSOA disbursements from that order hence." *Id.* ¶ 39. With respect to the orders on PSF from Korea and Taiwan, Plaintiff argues that, in denying it ADP status, "the Commission failed to consider USI's participation in a Sunset Review under 19 U.S.C. § 1675(c) (2005) as a basis for determining [USI's] support for the petition." USI's Mem. in Opp'n to Mot. of U.S. Int'l Trade Comm'n to Dismiss for Failure to State a Claim at 6, ECF No. 50 ("Pl.'s Opp'n to ITC's Mot."). According to USI, "[t]he Commission's interpretation of the CDSOA in this regard is plainly at

odds with the language of the statute and its underlying purpose." *Id.* at 7. Plaintiff argues that the consultation provision requires the Commission, in certain circumstances, to consult with Commerce on the identity of parties in support of the petition. *Id.* (citing 19 U.S.C. § 1675c(d)(1)). According to USI, the reference in the consultation provision to administrative reviews signifies congressional intent that the Commission must consider evidence of support for the petition found in the record of those reviews, including sunset reviews. In effect, Plaintiff posits that a domestic producer such as USI, who was not presented with a questionnaire during the ITC's injury investigation, still may satisfy the CDSOA's definition of "affected domestic producer" by entering an appearance in a sunset review and expressing support for the continued existence of the order. Thus, Plaintiff would have us construe the CDSOA to mean that an interested party's expression of support for an existing antidumping duty order, at least in the circumstance presented by this case, is the equivalent of expressing support for the petition.

We are unable to accept Plaintiff's proffered construction. In drafting the CDSOA, Congress was explicit in requiring support for the *petition* rather than support for a resulting *order*. Under the antidumping statute, a petition is filed on behalf of a U.S. industry seeking initiation of an investigation to determine whether an antidumping duty should be imposed on imports of a class or kind of merchandise that is alleged to be, or be likely to be, sold at less than fair value. 19 U.S.C. §§ 1673, 1673a(b). A petition that ultimately is successful results typically in the issuance of an antidumping duty order.[4] 19 U.S.C. § 1673d(c)(2). A periodic administrative review or sunset review conducted under section 1675 may be described generally as a proceeding conducted upon an antidumping duty order rather than a proceeding conducted upon the original petition. *See* 19 U.S.C. § 1675(a), (c). Thus, a construction of the CDSOA that equates support for an order, as expressed during a review, with support for a petition, as expressed during the investigation conducted upon that petition, is at odds with the plain meaning of section 1675c(b)(1) when read in the larger context of the antidumping statute. Moreover, Plaintiff's construction of the term "interested party in support of the petition," as used in section 1675c(b)(1), would have the effect of broadening considerably the class of domestic producers eligible for CDSOA distributions beyond the plain meaning of that term. Had Congress intended to provide CDSOA distributions to parties who supported the continued existence of antidumping duty orders in

[4] In certain cases, a petition may result in other forms of relief from unfairly traded imports. *See* 19 U.S.C. § 1673c (providing for suspension agreements).

sunset reviews, or to parties who otherwise participated as domestic producers in administrative reviews in ways that supported positions favorable to the domestic industry, it would not have conditioned ADP status on an expression of support for the petition.

Plaintiff argues that support for its construction of the statute is found in the legislative findings of the CDSOA. Plaintiff points to the specific findings that demonstrate that "creating jobs and promoting investment in affected domestic industries are among the primary purposes of the antidumping law and in particular the CDSOA." Pl.'s Opp'n to ITC's Mot. at 8 (citing Pub. L. 106–387, § 1(a) [Title X, § 1002], Oct. 28, 2000, 114 Stat. 1549, 1549A–72). Plaintiff maintains that

> [t]he fact that the record of the Commission's original investigation may not contain evidence of USI's support for the petition against Korea and Taiwan should not preclude a finding that USI is an ADP with respect to the AD [antidumping] order on PSF from Korea and Taiwan, particularly where the statutory language explicitly provides that post-order review proceedings are relevant to the determination of ADPs who are eligible for CDSOA distributions.

Id. at 8–9. The legislative findings cited by Plaintiff, however, speak only in general terms. We do not discern in these findings a specific intent to provide distributions to domestic interested parties who were not petitioners and who did not express support for a petition during an investigation.

Plaintiff maintains, further, that the Commission's interpretation of the CDSOA would render the consultation provision meaningless and thereby violate the canon of construction requiring that effect be given to all provisions in the statute. Pl.'s Opp'n to ITC's Mot at 7. We disagree. The consultation provision appears in the statute immediately following a sentence directing that "the Commission shall forward to the Commissioner [of Customs] . . . within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). Under Plaintiff's construction, the two sentences, when read together and applied to the facts of this case, compelled a finding that the Commission's records, which may have permitted an identification of some of those domestic interested parties who actually were in support of the petition that sought the imposition of antidumping duties on imports of PSF from Korea and Taiwan, were insufficient to de-

termine all such supporters. Acceptance of Plaintiff's argument would result in our holding that the ITC was required to consult with Commerce to identify domestic producers, such as USI, who entered appearances in administrative reviews associated with that petition. Positing that "USI might have participated in the original investigation by responding to a questionnaire from the Commission if USI had received one," Plaintiff argues that "the fact that USI was not asked to respond to a Commission questionnaire should not be used as the basis for denying it eligibility for CDSOA distributions." Pl.'s Opp'n to ITC's Mot. at 9.

The flaw in Plaintiff's argument is that the ITC's construction of the CDSOA did not render meaningless or superfluous the consultation provision. To the contrary, the provision could have application in situations other than the one presented by this case. For example, a party who expressed support for a petition during the ITC's injury investigation might not be identifiable from the Commission's records if it subsequently underwent a change in name. The fact of the name change might well be known to Commerce as a result of section 1675 reviews in which the party entered one or more appearances.

In summary, the Amended Complaint fails to allege facts from which we could conclude that the ITC erred in omitting USI from any list prepared under 19 U.S.C. § 1675c(d)(1). For this reason, we also must dismiss the statutory claims Plaintiff brings against Customs. We do not find within the Amended Complaint facts by which we could conclude that Customs lawfully could have made distributions to Plaintiff. *See* 19 U.S.C. § 1675c(d)(2) (requiring Customs to base its "list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under paragraph (1)"). We conclude, therefore, that the claims in Count 1 must be dismissed for failure to state a claim upon which relief can be granted.[5]

B. *Plaintiff's Constitutional Challenges Must be Dismissed*

In Counts 2, 3, 4, and 5, Plaintiff brings facial and as-applied challenges to the petition support requirement of the CDSOA under the First Amendment and the Fifth Amendment equal protection guarantee. Am. Compl. ¶¶ 42–54. In Count 6, Plaintiff challenges the petition support requirement as impermissibly retroactive under the Fifth Amendment due process guarantee. *Id.* ¶ 56. We conclude that the First Amendment and equal protection claims must be dismissed

[5] Because Plaintiff's statutory claim is dismissed for failure to state a claim on which relief can be granted, the court will deny as moot Plaintiff's motion to complete the administrative record (ECF No. 40).

as foreclosed by binding precedent. The retroactivity claim must be dismissed for failure to state a claim on which relief can be granted.

1. *Plaintiff's First Amendment and Equal Protection Facial Challenges to the Petition Support Requirement Are Foreclosed by Binding Precedent*

In Count 3, Plaintiff claims that the petition support requirement of the CDSOA violates the First Amendment on its face because it compels speech. *Id.* ¶ 48. Plaintiff further claims that the CDSOA engages in impermissible viewpoint discrimination by conditioning receipt of a government benefit on a private speaker's expressing a specific viewpoint, *i.e.*, expression of support for an antidumping duty petition, and, therefore, is an unconstitutional restriction on speech. *Id.* ¶ 47.

In Count 5, Plaintiff claims that the petition support requirement facially violates the equal protection guarantee of the Fifth Amendment. *Id.* ¶ 53. Plaintiff contends that the CDSOA creates a classification infringing on USI's fundamental right to free speech that is a denial of equal protection because it is not narrowly tailored to a compelling government objective. *Id.* Plaintiff further claims that the CDSOA impermissibly discriminates between USI and other domestic producers who expressed support for the petition. *Id.* ¶ 54. Lastly, in Count 5, in what apparently is a restatement of the claims in Count 1, Plaintiff asserts that "[i]f not facially invalid, then Defendants' application of the law to distinguish USI as not supporting the enforcement of the antidumping laws is not supported by substantial evidence." *Id.*

The Court of Appeals rejected analogous claims challenging the petition support requirement in *SKF II*, in which it upheld the petition support requirement under the First Amendment and under the Fifth Amendment's equal protection guarantee. *SKF II*, 556 F.3d at 1360 (the "Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing trade laws, and is not overly broad."); *id.* at 1360 n.38 ("For the same reason, the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech."); *id.* at 1360 ("Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard."). Plaintiff's facial constitutional challenges to the CDSOA are indistinguishable from those claims rejected by the Court of Appeals in *SKF II* and, therefore, are

foreclosed by the holding in *SKF II*. Accordingly, those challenges must be dismissed for failure to state a claim on which relief can be granted.

Plaintiff argues that *SKF II* is no longer good law because the decision of the Court of Appeals in *SKF II* to uphold the petition support requirement using an intermediate level of scrutiny, the "*Central Hudson*" test, was implicitly overturned by the U.S. Supreme Court in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Pl.'s Opp'n to ITC's Mot. at 14–15 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). Plaintiff construes *Snyder* to hold that all speech on matters of public concern is "entitled to maximum First Amendment protection" and views responses to the ITC's questionnaires as speech on a matter of public concern. *Id. Snyder*, however, does not support a conclusion that *SKF II* incorrectly applied only an intermediate level of First Amendment scrutiny. *Snyder* set aside as contrary to the First Amendment a jury verdict imposing substantial state law tort liability on persons who picketed at a military funeral. *Snyder*, 131 S. Ct. at 1220. The case does not hold that *all* speech addressing matters of public concern, such as a position taken in antidumping duty litigation, must receive a level of judicial scrutiny higher than that applied in *SKF II*. *See Standard Furniture Mfg. Co. v. United States*, 36 CIT ___, ___, Slip. Op. 12–21, at 16–17 (2012) (finding that *Snyder* did not compel a First Amendment analysis differing from that which was applied in *SKF II*).

2. *Plaintiff's First Amendment As-Applied Challenge Must be Dismissed*

Plaintiff also asserts, in Count 2, an as-applied constitutional challenge under the First Amendment, claiming specifically that the CDSOA unconstitutionally restricts speech by discriminating against those, such as USI, who did not express a specific viewpoint, *i.e.*, support for the antidumping petition. Am. Compl. ¶¶ 43–44. Plaintiff views the holding in *SKF II* that the petition support requirement did not violate the First Amendment as confined to situations in which parties actively opposed the petition and as signifying that the ITC may consider only a party's actions, and not a party's expressed viewpoints, in determining whether a party supported the petition. Pl.'s Opp'n to ITC's Mot. at 10, 13–14. USI maintains that it satisfied the participation requirement of *SKF II* through its actions, *i.e.*, its completion of the ITC's initial domestic producer questionnaire and multiple supplemental questionnaires in the Sunset Reviews. *Id.* at 11. Plaintiff argues that the ITC's application of the CDSOA, there-

fore, violated the First Amendment to the extent the ITC based its disqualification of USI as a potential ADP on USI's failure to indicate support of the petition by questionnaire response. *Id.*

Plaintiff's argument misinterprets *SKF II*, which does not hold that the CDSOA would violate the First Amendment if applied to deny CDSOA benefits based solely on a party's failing to indicate support for the petition by letter or questionnaire response. *SKF II* holds the opposite. The Court of Appeals determined that the appropriate First Amendment legal standard was the standard applying to regulation of commercial speech. It then concluded that the CDSOA, which requires a non-petitioner such as SKF USA, Inc. to express support for the petition in order to acquire ADP status, met that standard. *SKF II*, 556 F.3d at 1359–60. The Court of Appeals did state, as Plaintiff highlights, that "[t]he language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views" and that "a limiting construction of the statute is necessary to cabin its scope so that it does not reward a mere abstract expression of support." *Id.* at 1353; Pl.'s Opp'n to ITC's Mot. at 10. However, those statements were in the context of a discussion of statutory language as an alternative to a previous discussion in the opinion addressing the question of congressional purpose. They were part of the analysis by which the Court of Appeals subjected the CDSOA to First Amendment standards for the regulation of commercial speech. They do not signify a holding that the First Amendment prohibits a government agency implementing the CDSOA from conditioning ADP status on the expression of support for a petition. *See Furniture Brands*, 35 CIT at __, 807 F. Supp. 2d at 1311–12 (rejecting the argument that *SKF II* adopted a limiting construction of the CDSOA that modified the petition support requirement).

Plaintiff also argues that, on these facts, Defendants applied the petition support requirement in a way that was overbroad, thereby violating the First Amendment according to the test applied by the Court of Appeals in *SKF II*, the *Central Hudson* test. Pl.'s Opp'n to ITC's Mot. at 12–13 (citing *SKF*, 556 F.3d at 1357). Positing *SKF II* to hold that "domestic producers who are not petitioners but nevertheless respond to Commission questionnaires have done enough to be regarded as supporting the petition," Plaintiff argues that denying it CDSOA distributions served no governmental interest. *Id.* at 13. This argument is misguided. The Court of Appeals concluded in *SKF II* that the CDSOA's providing benefits only to those who supported the petition, and not to those who opposed or took no position on the

petition, served a substantial governmental interest, directly advanced that interest, and was not more extensive than necessary in advancing that interest. *SKF II*, 556 F.3d at 1355–59.

For the aforementioned reasons, we conclude that Plaintiff's First Amendment as-applied challenge is foreclosed by the holding in *SKF II*. The claims stated in Count 2 of the complaint, therefore, must be dismissed.

3. *Plaintiff's Fifth Amendment Equal Protection As-Applied Challenge Must Be Dismissed*

In Count 4, Plaintiff claims that the CDSOA impermissibly discriminates between Plaintiff and other domestic producers who expressed support for the underlying antidumping duty petition in that the petition support requirement, as applied to USI, was not narrowly tailored to a compelling government objective, and thereby contravened the equal protection guarantee of the Fifth Amendment. Am. Compl. ¶ 51; *see also* Pl.'s Opp'n to ITC's Mot. at 16.

Plaintiff has alleged no facts that distinguish its equal protection claim from the equal protection claim addressed and rejected in *SKF II*. The Court of Appeals held that the petition support requirement of the CDSOA does not violate the equal protection guarantee, holding that the petition support requirement is rationally related to the government's legitimate purpose of rewarding parties who promote the government's policy against dumping. *SKF II*, 556 F.3d at 1360. *SKF II* reasoned that it was "rational for Congress to conclude that those who did not support the petition should not be rewarded." *Id.* at 1359. For these reasons, relief cannot be granted on Plaintiff's as-applied equal protection claims, which must be dismissed.

4. *Plaintiff's Retroactivity Claims Must Be Dismissed*

Plaintiff claims in Count 6 that the petition support requirement is impermissibly retroactive in violation of the Fifth Amendment due process guarantee because Defendants based eligibility for ADP status, and thus eligibility for disbursements, on past conduct. Am. Compl. ¶ 56. The Amended Complaint states that "[t]he Due Process clause disfavors retroactive legislation, *i.e.*, imposition of a requirement that USI could not have met because it was not yet operating during the original investigation, and Defendants' disbursements only to those companies that express support for a petition are not rationally related to a legitimate governmental purpose." *Id.*[6]

[6] The court notes that Plaintiff states that it "does not oppose dismissal of Count 6 of its complaint which relates to a possible violation of the Due Process Clause of the Constitution based on the retroactive nature of the CDSOA." Pl.'s Opp'n to ITC's Mot. at 16.

The petition support requirement was applied retroactively to USI, the antidumping duty orders on PSF from Korea and Taiwan having been published on May 25, 2000. *Final LTFV Determination and Antidumping Duty Orders*, 65 Fed. Reg. 33,807. Publication of the orders thus occurred prior to October 28, 2000, the effective date of the CDSOA. 19 U.S.C. § 1675c. Only by having expressed support for the petition that resulted in a pre-enactment antidumping duty order may a domestic producer qualify as an ADP to receive distributions of duties assessed under such an order. *Id.* § 1675c(d)(1).

In *New Hampshire Ball Bearing, Inc. v. United States*, 36 CIT ___, 815 F. Supp. 2d 1301 (2012), we rejected a claim challenging on due process grounds the retroactive reach Congress attached to the petition support requirement. The plaintiff in *New Hampshire Ball Bearing* had made a decision, long before enactment of the CDSOA, not to express to the ITC support for an antidumping duty petition. 36 CIT at ___, 815 F. Supp. 2d at 1307. Due to the retroactive reach Congress applied to the petition support requirement, the plaintiff in that case could not have known the adverse consequence that Congress, nearly twelve years later, would attach to its decision. Although we recognized that the CDSOA, in its retroactive petition support provision, "adjusts 'rights and burdens' of 'economic life' and 'upsets otherwise settled expectations,'" 36 CIT at ___, 815 F. Supp. 2d at 1308 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15–16 (1976)), we nevertheless concluded that Congress did not act arbitrarily and irrationally in attaching a retroactive reach to the petition support requirement. 36 CIT at ___, 815 F. Supp. 2d at 1309. We concluded instead that the "'retroactive application of the legislation is itself justified by a rational legislative purpose'" and, therefore, permissible on due process grounds. 36 CIT at ___, 815 F. Supp. 2d at 1309 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729 (1984)). We reasoned that "[i]t was not arbitrary or irrational for Congress to conclude that the legislative purpose of rewarding domestic producers who supported antidumping petitions . . . would be 'more fully effectuated' if the petition support requirement were applied both prospectively and retroactively. 36 CIT at ___, 815 F. Supp. 2d at 1309 (quoting *Pension Benefit*, 467 U.S. at 730–31). By applying the petition support requirement retroactively, Congress expanded the group of rewarded domestic producers to include those who expressed support for petitions in antidumping duty investigations completed prior to enactment of the CDSOA. In this way, Congress furthered the purpose of remedying unfairly traded imports. 36 CIT at ___, 815 F. Supp. 2d at 1309.

USI grounds its due process retroactivity claim in alleged facts differing from those in *New Hampshire Ball Bearing*. Unlike the plaintiff in that case, USI asserts that it had no opportunity to express support for the petition seeking the imposition of antidumping duties on imports of PSF from Korea and Taiwan, having begun operations as a U.S. manufacturer of the subject PSF on May 30, 2000, five days after the publication of the antidumping duty orders, and having received no ITC questionnaires during the injury investigation. Am. Compl. ¶¶ 23, 56. Presuming this allegation to be true, we nevertheless conclude that USI's retroactivity claim lacks merit.

Congress chose in the CDSOA to make disbursements potentially available to domestic producers who expressed support for petitions that, as of the effective date of the statute, already had ripened into antidumping duty orders. 19 U.S.C. § 1675c(d)(1) (requiring the ITC to forward its list to Customs "within 60 days after the effective date of this section in the case of orders . . . in effect on January 1, 1999, or thereafter . . ."). As discussed above, and as we concluded in *New Hampshire Ball Bearing*, Congress did so to fulfill a rational legislative purpose. *New Hampshire Ball Bearing*, 36 CIT at ___, 815 F. Supp. 2d at 1308. That purpose does not depend on the reason *why* a given domestic producer did not express support for a petition: under the CDSOA's benefit scheme (as applied either retroactively or prospectively), it makes no difference whether a producer chose not to express its support to the ITC or, having yet to acquire interested party status, had no opportunity to respond. As we recognized in *New Hampshire Ball Bearing*, it is understandable that domestic producers who had the opportunity to support a petition but declined to do so prior to enactment, such as the plaintiff in *New Hampshire Ball Bearing*, would object to the retroactive reach of the support provision. 36 CIT at ___, 815 F. Supp. 2d at 1309. Those producers lacked notice of the consequence Congress later would attach to their choice. Domestic producers who had no opportunity to express support for a petition resulting in a pre-enactment antidumping duty order are similarly disadvantaged and justifiably could object to their lack of an opportunity to obtain distributions of duties assessed under that order. In enacting the CDSOA, Congress could have avoided the retroactivity problem for both classes of disadvantaged producers by allowing them to qualify as ADPs by some other means, such as, for example, by recognizing post-enactment expressions of support for an antidumping duty order that existed at the time of enactment. Of course, doing so would have enlarged the group of domestic producers who could benefit from the CDSOA reimbursement scheme. Alterna-

tively, Congress could have avoided the retroactivity problem by making the CDSOA entirely prospective, thus narrowing the group of beneficiaries.

In short, Congress could have chosen to dispense with any retroactive application of the petition support requirement, and it could have done so either by broadening or by narrowing the class of domestic producers that it chose to benefit in the CDSOA. That Congress chose not to do so does not, in our view, make the CDSOA vulnerable to constitutional attack on due process grounds. As the Supreme Court stated in *Turner Elkhorn*: "[i]t is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. In furthering a purpose of rewarding domestic producers who expressed support for petitions, including those who expressed support for petitions associated with pre-enactment orders, Congress acted neither arbitrarily nor irrationally. And as the Supreme Court instructed in *Pension Benefit*: "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." 467 U.S. at 729. We conclude, therefore, that Count 6 must be dismissed for failure to state a claim on which relief can be granted.

IV. Conclusion

Count 1 must be dismissed because Plaintiff fails to state facts sufficient to qualify Plaintiff for distributions under the CDSOA. Plaintiff's First Amendment and equal protection claims are foreclosed by binding precedent, and Plaintiff's retroactivity claims must be dismissed for failure to state a claim on which relief can be granted. USI already has availed itself of the opportunity to amend its complaint and has not indicated that it desires to seek leave to amend its complaint further. Therefore, we conclude that it is appropriate to enter judgment dismissing this action.

Dated: April 20, 2012
New York, New York

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

Slip Op. 12–53

DECKERS OUTDOOR CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 08–00410

[Granting Defendant's motion for summary judgment]

Dated: April 24, 2012

Patrick D. Gill and *William J. Maloney*, of counsel, Rode & Qualey, of New York, NY, for Plaintiff.

Marcella Powell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Tony West*, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, and *Yelena Slepak*, Office of Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of counsel.

OPINION

CARMAN, JUDGE:

At issue in this case is the proper tariff classification of boots imported by Plaintiff in 2006 and 2007. United States Customs and Border Protection ("Customs") classified the boots in subheading 6404.19.35, HTSUS as "footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners." Plaintiff claims the boots should instead be classified in basket provision 6404.19.90 as other footwear valued at more than $12 per pair.

Defendant moves for summary judgment pursuant to USCIT Rule 56. For the reasons given below, the motion will be granted and judgment will issue for Defendant.

Background

Plaintiff Deckers Outdoor Corporation ("Deckers") imported the merchandise at issue, which consists of the UGG Classic Crochet model boot ("Classic Crochet"). (Def.'s Statement of Undisputed Material Facts ("Def.'s Facts") ¶¶ 1–2, ECF No. 29.) Both parties agree that the Classic Crochet is footwear intended to be worn on the foot; more specifically, they agree that it is a boot with a rubber sole and knit upper that has no laces, buckles, or other fasteners to hold it to the foot. (Def.'s Facts ¶¶ 3–13.) To don the boots, a wearer must grip the top of the woven textile upper with two hands, insert the foot into the opening, and pull the boot up forcefully while adjusting the foot until the foot and calf are securely ensconced in the boot with the heel properly set. (Pl.'s Am. Statement of Genuine Material Facts Which

Are at Issue ¶¶ 3, 5 ("Pl.'s Facts"), ECF No. 40–2; Def.'s Resps. to Pl.'s Am. Statement of Genuine Material Facts Which Are at Issue ¶¶ 3, 5, ECF No. 49.)

Customs classified the entries under 6404.19.35, HTSUS:

6404	Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:
	Footwear with outer soles of rubber or plastics:
6404.19	Other:
	Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20[1] and except footwear having a foxing[2] or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper:
6404.19.35	Other

(Compl. ¶ 6, ECF No. 5; Ans. ¶ 6, ECF No. 8.) Merchandise in 6404.19.35, HTSUS was dutiable at 37.5% *ad valorem*. Plaintiff had requested that the Classic Crochet boot be categorized instead under subheading 6404.19.90, which differed from the subheading above as follows:

	Other:
6404.19.90	Valued over $12/pair
6404.19	Other:

Merchandise in 6404.19.90 was dutiable at 9% *ad valorem*.

[1] Subheading 6404.19.20 covers "[f]ootwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather" and does not apply to the Classic Crochet style UGG boots.

[2] A "foxing" is "a strip of material, separate from the sole and upper, that secures the joint where the upper and sole meet, usually attached by a vulcanization process or by cementing or stitching" that "must be applied or molded at the sole and overlap the upper and substantially encircle the entire shoe." *What Every Member of the Trade Community Should Know About: Footwear; An Informed Compliance Publication*, U.S. Customs and Border Protection, April 2010, Mem. in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Mem."), Ex. H at 13–14. The Court's examination of Def.'s Mot., Ex. A (a pair of the boots at issue) establishes, and the parties do not contest, that the foxing or foxing-like band on the Classic Crochet UGG boots is not "wholly or almost wholly of rubber or plastics" and therefore this exception does not apply to the Classic Crochet boots.

Plaintiff, as importer of record, timely protested liquidation under 6404.19.35 pursuant to section 514 of the Tariff Act of 1930, 19 U.S.C. § 1514; Customs denied the protests, Plaintiff paid all liquidated duties, and then commenced this lawsuit. (Compl. ¶¶ 1–5; Answer ¶¶ 1–5.)

The Court faces two overarching issues: whether there is any question of material fact that would preclude summary judgment; and, if not, in which subheading of the Harmonized Tariff Schedule of the United States Plaintiff's merchandise should be categorized. Concluding that no material facts are in issue and that the case is therefore appropriately resolved on summary judgment, the Court affirms Customs' classification of the Classic Crochet boots under 6404.19.35 for the reasons set forth below.

ANALYSIS

I. *Jurisdiction and Standard of Review*

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court of International Trade will grant summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." USCIT Rule 56(c). In deciding a summary judgment motion, the Court reviews all evidence submitted and draws all inferences against the moving party. *See Matsushita Elecs. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant must demonstrate that there is no issue of material fact; otherwise, a trial to resolve factual questions is warranted. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In a Customs classification case, regardless of the classifications advocated by the parties, the CIT has the responsibility of determining "the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original). In finding the correct classification result, the Court rules *de novo* "upon the basis of the record made before the court." 28 U.S.C. § 2640(a)(1); *Universal Electronics*, 112 F.3d at 493.[3]

[3] Although classification decisions by Customs are statutorily presumed to be correct, this has no effect when the court decides pure issues of law in a summary judgment determination. *See* 28 U.S.C. § 2639(a)(1), *Universal Electronics v. United States*, 112 F.3d 488, 492–93 (Fed. Cir. 1997); *see also Container Store v. United States*, 35 CIT ___, ___, 800 F. Supp. 2d 1329, 1333–1334 (2011).

II. *Contentions of the Parties*

A. Whether Issues of Material Fact Exist

As an initial matter, the parties disagree as to whether any issues of material fact are in contention. This dispute is easily resolved in Defendant's favor.

The government insists that there is no dispute as to the physical characteristics of the Classic Crochet boots, and explicitly concedes Deckers' factual assertions: that the merchandise is "sold as boots, that the boots can be pulled on with the hands, and that the boots extend above the ankle[.]" (Def.'s Reply at 5–6.) Therefore, in Defendant's view, no factual issues require trial and the case is ripe for the Court to decide, as a matter of law, into which tariff subheading the merchandise properly falls. (Def.'s Reply at 7.) Instead of arguing that there are material issues of fact as to the physical characteristics of the Classic Crochet boots, Deckers contends that the differences between the parties over the meaning of the phrase "footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners" in 6404.19.35 constitutes an issue of material fact that must be resolved at a trial. (Pl.'s Brief in Opp'n to Def.'s Mot. for Summary J. ("Pl.'s Opp.") 12–13.) Deckers claims it "should be afforded the opportunity to present evidence to contradict the government's utterly unsupported conclusions with respect to the application of the term [slip-on] to the boots in issue." (*Id.* at 13.)

Plaintiff is mistaken. Determining the correct classification of merchandise requires the Court to first "construe the relevant classification headings," which is a purely legal question, and then to determine "under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Where the nature of the merchandise is not at issue, the question "collapses entirely into a question of law" ripe for disposition on summary judgment. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) (citations omitted). As *Jarvis Clark* instructs, the Court bears the obligation to determine the correct classification of the merchandise. 733 F.2d at 878. The Court has a sample of the Classic Crochet boots and has examined that sample. (Def.'s Mem. at Ex. A.) The parties do not dispute any relevant characteristic of the boots, but dispute only the proper construal of the terms in 6404.19.35. There being no dispute as to the nature of the merchandise, the question before the Court has collapsed into a pure question of law and is appropriately decided on

summary judgment, as per *Cummins*, *supra*. The Court therefore holds that Plaintiff is not entitled "to present evidence to contradict the government's . . . conclusions with respect to the application of the term [slip-on] to the boots in issue." (*See* Pl.'s Opp. at 13.)

B. The Meaning of the Phrase "Footwear of the Slip-on Type, That Is Held to the Foot Without the Use of Laces or Buckles or Other Fasteners"

The parties dispute the proper construal of the phrase "footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners" in the tariff provision. (Def.'s Mem. at 7; Pl.'s Opp. at 13.) While Defendant urges the Court to affirm its decision that the phrase applies to the boots, Plaintiff insists that "footwear of the slip-on type" only denotes footwear that does not extend above the ankle and cannot include Plaintiff's merchandise, which extends above the ankle. (*See* Pl.'s Opp. at 4.)

1. *Defendant's Construal of the Relevant Language*

Defendant asserts that "[t]he phrase 'that is held to the foot without the use of laces or buckles or fasteners' qualifies the phrase 'slip-on type,' and the phrase 'slip-on type' qualifies the term 'footwear.'" (Def.'s Mem. at 8.)

The government correctly notes that the term "footwear" is not defined in the HTSUS or Explanatory Notes. (*Id.*) The government quotes dictionaries that define the word footwear as "wearing apparel (as shoes or boots) for the feet," and "[a]ny foot covering in the form of shoes, boots, slippers, or hose used for utility and/or dresswear" but "[n]ot necessarily synonymous with shoes, which are simply one category of footwear." (*Id.* at 9 (*citing Merriam Webster*, http://merriam-webster.com/dictionary/ footwear *and The Complete Footwear Dictionary* (2d Ed. 2000) (excerpted at Def. Mem., Ex. I)).)

Defendant also points to *Footwear Definitions*, a document consisting of originally internal "footwear definitions used by Customs import specialists in classifying footwear," which Customs released to the public in 1993 with the goal of helping importers "in better understanding classification requirements." *Footwear Definitions*, 27 Cust. B. & Dec. 312, 312 (Oct. 25, 1993) (provided at Def. Mem., Ex. B) ("*Footwear Definitions*"). In the entry for "Slip-On," *Footwear Definitions* states: A "slip-on" includes:

> (1) A boot which must be pulled on.
>
> (2) Footwear with elastic gores which must be stretched to get it on or with elastic sewn into the top edge of the fabric of the upper.

(3) Footwear with a shoe lace around the top of the upper which is clearly not functional, i.e., the lace will not be tied or untied when putting it on or taking it off.

It does not include any boot or shoe with any laces, buckles, straps, snaps, or other closure, which are probably closed, i.e. tied, buckled, snapped, etc., after the wearer puts it on.

Id. at 320. Defendant admits that *Footwear Definitions* is not binding authority, but claims it has persuasive power because it "is consistent with the language of [6404.19.35], has been applied for many years, and [because] it comports with industry usage[.]" (Def.'s Mem. at 12.)

To show that *Footwear Definitions* is consistent with "the footwear industry's and footwear retailers' concept of 'footwear of the slip-on type,'" Defendant provides examples from online shopping websites in which boots are described as "slip-on." (*Id.* at 11 and Ex. D.) These examples include Shopzilla, which lists a boot called an "Orvis UGG Slip-On"; the Orvis website, which describes "UGG Slip-On Sheepskin Boots" as "Ugg's best-selling winter boots"; Zappos, which lists the UGG Newbreak as "a traditional, yet masculine boot" with a "leather upper in an easy slip-on silhouette"; the official UGG Australia website, where a search for the term "slip-on" returns results including over-the-ankle footwear[4] such as the Men's Brockman, Men's Leighton, Women's Sundance II, and Women's Classic Mini; and Robert Frost Fine Footwear, which lists the UGG Australia Ayer Slip-On Boot in Stout as a "classic pull-on boot" with a gore that "lets you take this boot on and off with ease." (*Id.* at Ex. D.)

From this, the government argues that the drafters of 6404.19.35 "understood the term 'slip-on type' applies to all types of footwear, including boots." (Def.'s Mem. at 10.) In the government's view, construing the statute to include slip-on boots "gives effect to every term in the statute and does not render any portion of the statute surplusage." (*Id.*)

Finally, in reply to Plaintiff's opposition, the government points out that Plaintiff interprets the subheading at issue in such a way as to place import solely on the word "slip-on"—reading the term "footwear" out of the statute by narrowing it to only signify shoes, and rendering the phrase "held to the foot without the use of laces or buckles or other fasteners" superfluous because "Decker's definition of 'slip-on' already requires shoes to be held to the foot without fasteners." (Reply Mem. in Further Supp. of Def.'s Mot. for Summ. J. ("Def.'s Reply") at 8, ECF No. 39.) The government also attacks

[4] Based on the Court's interpretations of the thumbnail photographs included in Defendant's exhibit.

Deckers' contention that the term "slip-on" can only apply to shoes which can be donned without the use of the hands, pointing out that the definitions cited by Deckers encompass garments that must be pulled on over the head with the use of the hands. (*Id.* at 13.)

2. *Plaintiff's Construal of the Relevant Language*

Deckers' key contention is that the term "footwear," restricted by the term "slipon," cannot include boots. (Pl.'s Opp. at 14.) Plaintiff states that "as a prerequisite for classification in 6404.19.35, HTSUS, the footwear must be of the slip-on type, which is a well known and well defined category of footwear that does not include boots." (*Id.*)

So while Deckers concedes that "there is no dispute that the subject boots are 'footwear'," Deckers cites several dictionary definitions of "slip-on" in which the only type of footwear mentioned is a "shoe." (*Id.* at 15, 17–18.) Plaintiff then quotes definitions of "shoe" and "boot" that tend to indicate that a shoe is a type of footwear reaching only as high as the ankle, in contrast to a boot, which reaches above the ankle. (*Id.* at 18–19.) Having argued that slip-ons are a subcategory of shoes, and that the category of shoes excludes all boots, Deckers presses the conclusion that the common and commercial meaning of the phrase "footwear of the slip-on type" cannot include the Classic Crochet boots because they are not shoes. (*Id.*) Finally, Plaintiff cites a report to the Senate Finance Committee on the Multilateral Trade Negotiations of 1979, which stated that the "final U.S. position provides separate categories for boots and slip-on footwear . . . ." (*Id.* at 19 (*quoting* Committee Print 98–27, Senate Committee on Finance, 96th Congress, 1st Session, at 125–26 (Aug. 1979), attached to Pl.'s Opp. as Ex. 4).) Plaintiff asserts that this Congressional report "recognized" that boots were distinct from "slip-on footwear." (Id.)

III. *Customs Properly Classified the Merchandise Under 6404.19.35, HTSUS*

Because the Court concludes that the Classic Crochet boot is properly classified under 6404.19.35, HTSUS, Customs' classification is upheld and judgment will issue for Defendant.

In determining the correct classification of Plaintiff's merchandise, the Court will construe the statute in a manner that will carry out legislative intent and "give effect, if possible, to every word Congress used." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Terms contained in the tariff subheadings will be construed "in accordance with their common and popular meaning, in the absence of a contrary legislative intent." *E.M. Chemicals v. United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). The Court may look to "dictionaries, scientific authorities, and other reliable information sources" in determining the

common meaning of a term. *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002).

The Court must also follow the Harmonized Tariff Schedule's General Rules of Interpretation (GRIs), which govern classification of goods. *Id*. The Court applies the GRIs in numerical order until the proper heading for classification is reached. *Arko Foods Int'l, Inc. v. United States*, 654 F.3d 1361, 1364 (Fed. Cir. 2011). The GRIs relevant in this case are GRI 1 and GRI 6. To determine within which heading merchandise falls, the Court begins with GRI 1, which provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. Determinations as to the appropriate subheading within a heading to apply to merchandise are subject to GRI 6, which states that "classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related notes and, *mutatis mutandis*, to the [other GRIs.]" GRI 6, HTSUS.

A. Proper Heading Is 6404, HTSUS

Applying GRI 1 and examining the headings within the Harmonized Tariff Schedule, the Court determines that only heading 6404 of Chapter 64, covering "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials," applies to the Classic Crochet.[5] The Classic Crochet boots are therefore appropriately classified heading 6404, and the Court turns to determining the appropriate subheading for classification.

B. Proper Six-Digit Subheading is 6404.19

The first level of subheadings within heading 6404 divides the heading into two categories: "Footwear with outer soles of rubber or plastics" and "Footwear with outer soles of leather or composition leather." The record is clear that the outer soles of the footwear at issue consists of rubber, so the choice falls to which subheading of rubber-soled footwear the Classic Crochet boots should be assigned. The choice is between "Sports footwear; tennis shoes, basketball shoes, training shoes and the like," or "Other." The Classic Crochet

[5] The other headings do not apply. *See* Chapter 64, HTSUS generally, including 6401, for waterproof footwear; 6402, for footwear with uppers of rubber or plastic; 6403, for footwear with uppers of leather; and 6406, for parts of footwear. Heading 6405, for other footwear, does not apply because basket, or residual, provisions are only intended to encompass the classification of articles for which there is not a more specifically applicable subheading. *Rollerblade*, 282 F.3d at 1354.

boots are unquestionably not sports footwear, and therefore the Court determines that they fall with the basket provision "Other" subheading numbered 6404.19.

C. Proper Eight-Digit Subheading is 6404.19.35

1. *Subheadings within 6404.19, HTSUS*

Within 6404.19, HTSUS are found four potential subheadings at the next level. The first two are easily dispensed with: "Footwear having upper of which over 50 percent of the external surface area . . . is leather" does not apply here, and "Footwear designed to be worn over, or in lieu of, other footwear as a protection against [various conditions]" is also inapplicable. The two potentially-applicable subheadings within 6404.19, upon which the parties focus their arguments, are "Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners [except protective footwear and except footwear having foxing of rubber or plastics]" and the "Other" basket provision.

When choosing between a specific subheading and a basket provision, the basket provision may only be employed if the merchandise is not covered by the more specific subheading's terms. *See Rollerblade*, 282 F.3d at 1354. So the Classic Crochet boots can only be classified under the "Other" subheading if the subheading for "footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners" is inapplicable.

2. *"Footwear of the Slip-on Type, That Is Held to the Foot without the Use of Laces or Buckles or Other Fasteners" Is Defined by the Lack of Fasteners, Which Allows Items to Be Easily Put on or Taken off*

Upon consulting dictionaries and other sources, the Court concludes that the subheading in 6404.19.35, HTSUS, includes footwear that falls under 6404.19 and which can be easily and quickly donned due to the fact that one need not use a fastener of any type to secure the footwear to the foot after putting it on.

Congress's language in the subheading leads to this construal in a straightforward manner. The Court concludes that the relative clause "that is held to the foot without the use of [fasteners]" serves to explain and elaborate upon the phrase "footwear of the slip-on type." The words "that is" which introduce the relative clause are directly equivalent to the phrase *id est*, commonly abbreviated as "i.e.," and may be rephrased as "in other words" with no change in meaning. The Court thus finds that the tariff subheading at issue indicates that

"footwear of the slip-on type" is, in other words, footwear "held to the foot without the use of laces or buckles or other fasteners."

The numerous dictionary definitions of "slip-on" provided by the parties, and located by the Court, corroborate this construal in their articulations of the essential characteristics of a slip-on. *The Dictionary of Shoe Industry Terminology* (excerpted at Pl.'s Opp., Ex. 1) defines a slip-on as "[a]ny shoe into which the wearer merely slips the foot, held without benefit of lacing, buckles or other fastening." *The Complete Footwear Dictionary* (excerpted at Pl.'s Opp., Ex. 2) defines a slip-on as a "pump without lacings or other fastenings" or "[a]ny shoe without fastenings." The adjective "slip-on" is used "esp[ecially] of shoes or clothes" and means "having no (or few) fasteners and therefore able to be put on and taken off quickly." *New Oxford American Dictionary* 1597 (2d Ed. 2005). It describes an item that can be "easily put on or taken off, as shoes without laces, or a garment to be slipped on or off over the head." *Webster's New World Dictionary of the American Language* 1340 (2d Coll. Ed. 1974). A slip-on is "an article of clothing that is easily slipped on or off," and can include "a glove or shoe without fastenings" or "a garment (as a girdle) that one steps into and pulls up"; one synonym is the word "pullover." *Webster's Third New Int'l Dictionary* at 2144.

The lack of laces or fasteners is the essential characteristic uniting each dictionary definition for "slip-on." While the definitions vary as to the type of items that may be slip-ons—garments, girdles, gloves, and shoes—the absence of fasteners is determinative in each instance in whether an item is or is not a slip-on. The definitions, as a whole, indicate that it is this lack of any kind of fasteners that allows for the characteristic ease with which slip-ons can be put on and taken off.

The Court also finds that the definition of "slip-on" in the Customs publication *Footwear Definitions* is persuasive and warrants deference. That definition is centered around the characterization of slip-ons as footwear that lacks functional fasteners. This corresponds with the construal of the term slip-on suggested by the statute and in dictionaries. Given this, the Court sees no reason to upset Customs' considered and long-held definition (published specifically to assist the importing community in achieving correct classifications) of a slip-on as including a "boot which must be pulled on" and excluding "any boot or shoe with any laces, buckles, straps, snaps, or other closure." *Footwear Definitions*, 27 Cust. B & Dec. at 320.

Plaintiff's arguments counter to this analysis are unpersuasive. Plaintiff contends that "slip-on" can only refer to shoes. From this premise, Plaintiff argues that the Classic Crochet boot cannot be a

slip-on because shoes and boots are mutually-exclusive categories of footwear. Each step in this argument is flawed.

First, as already discussed above, the term "slip-on" is not defined solely as a kind of shoe, but can refer to garments, gloves, and girdles as well. This argument is also undermined by the evidence in the record showing that a number of boots manufactured and sold by Plaintiff are commonly referred to as "slip-ons" on shopping websites, including Plaintiff's website. (*See* Def.'s Mem, Ex. D.) From this, it is clear that the term "slip-on" is commonly used to refer to both shoes and boots.

Second, shoes and boots are not necessarily mutually-exclusive categories. Even the definitions given by Plaintiff in its brief undercut this part of its argument. For example, *The Dictionary of Shoe Industry Terminology* defines "shoe" as "[a]n outer covering for the foot." (Pl.'s Opp. at 4 and Ex. 1.) And *The Complete Footwear Dictionary* defines a shoe as "[a] protective and/or decorative foot covering." (*Id.*) While both of these dictionaries note that "shoe" **usually** refers to low-cut footwear as opposed to boots (*see id.*), Plaintiff incorrectly seeks to turn this note about ordinary usage into an inviolable part of the definition of "shoe." In common use, "shoe" is often a generic term for footwear, without regard to whether that footwear extends above the ankle. *See Webster's New Collegiate Dictionary* 1063 (1st Ed. 1981) (defining "shoe" as "an outer covering for the human foot usu[ally] made of leather with a thick or stiff sole and an attached heel."). To give some examples, "congress shoe," "congress gaiter," "gaiter," and "romeo" all denote shoes that cover the ankle. *See Webster's Third New Int'l Dictionary* at 479 (congress gaiter, congress shoe), 929 (gaiter), 1970–71 (romeo). Because the Court rejects Plaintiff's contentions that slip-ons must be shoes and that shoes cannot cover the ankles, the Court also rejects Plaintiff's erroneous conclusion from these premises that the Classic Crochet boots cannot be slip-ons. Plaintiff's narrow reading of the term "slip-on" is unjustifiably cramped.

Plaintiff also seems to suggest that an item cannot be a "slip-on" if the wearer uses his or her hands to assist in donning or doffing it. For example, Plaintiff's Opposition, at page 5, describes the Classic Crochet boots by stating that they "cannot be slipped-on, . . . they must be pulled on with both hands[.]" On page 6 of Plaintiff's Opposition, Plaintiff cites page 72 of Defendant's deposition of Peter Young, Senior Footwear Developer for Deckers (in the record as Exhibit E to Defendant's Memorandum), in which Mr. Young expressed the view that the terms "slip on" and "pull on" are contradictory. But this assertion runs counter to the examples of "slipons" that appear in

dictionaries. The definition given in *Webster's Third New Int'l Dictionary*, for example, includes garments such as gloves and girdles which must be pulled onto the body using the hands. It would be contrary to common sense and meaning to limit the term "slip-on" to footwear able to be put on or taken off without using the hands, but to apply the term "slip-on" to other garments requiring use of the hands.

3. *Classic Crochet Boots, Lacking Fasteners and Containing More Than 10% by Weight of Rubber, Are Properly Classified Under 6404.19.35, HTSUS*

The parties agree that the UGG Classic Crochet boot is held to the foot without laces or buckles or other fasteners. Given that lacking any kind of fasteners is definitive of "footwear of the slip-on type," the Classic Crochet boots must be classified within the subheading for "footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners" rather than the basket provision Other within which lies Plaintiff's proposed classification, 6404.19.90. *See* GRI 6; *see also Rollerblade*, 282 F.3d at 1354.

As a final matter, the Court notes that the parties do not dispute that the Classic Crochet boots contain more than 10 percent by weight of rubber.[6] Thus, when properly categorized under the "footwear of the slip-on type" subheading, the Classic Crochet boots must fall within the eight-digit level subheading at 6404.19.35. The Court therefore finds that Customs correctly classified the merchandise in 6404.19.35.

Conclusion

For the foregoing reasons, the Court determines that no issue of material fact exists regarding the correct classification of the Classic Crochet boots, and Customs is entitled to summary judgment affirming proper classification of the merchandise under 6404.19.35, HTSUS. Accordingly, judgment will issue for Defendant.

Dated: April 24, 2012
New York, New York

/*s*/*Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

[6] This is consistent with the Court's own examination of the representative sample of the merchandise at issue, submitted as Exhibit A to Plaintiff's Memorandum.

Slip Op. 12–54

TIANJIN MAGNESIUM INTERNATIONAL CO., LTD. Plaintiff, UNITED STATES, Defendant, and US MAGNESIUM, LLC, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Consol. Court No.: 09–00012

Held: The Final Results of Redetermination Pursuant to Voluntary Remand issued by the Department of Commerce is affirmed.

Dated: April 25, 2012

Riggle & Craven, (*David A. Riggle*) for Tianjin Magnesium International Co., Ltd., Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Renee Gerber*); *Thomas M. Beline*, Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for the United States, Defendant.

King & Spalding, LLP, (*Stephen A. Jones* and *Jeffrey B. Denning*) for US Magnesium, LLC, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge:

This matter comes before the Court upon the Final Results of Redetermination Pursuant to Voluntary Remand: Pure Magnesium from the People's Republic of China ("Second Redetermination") issued by the Department of Commerce ("Commerce") on October 31, 2011. Plaintiff, Tianjin Magnesium International Co., Ltd. ("Tianjin") filed Comments asserting that the Second Redetermination was without support and requesting that the Court remand this matter to Commerce for further proceedings. Defendant-Intervenor, US Magnesium, LLC ("US Magnesium") filed Comments stating that Commerce's decision was well supported, and urging the Court to affirm the Second Redetermination without modification. For the reasons set forth below, the Court concludes that the Second Redetermination is supported by substantial evidence and otherwise in accord with the law and affirms Commerce's decision.

Background

This case involves an administrative review of the antidumping order on pure magnesium from the People's Republic of China for the period from May 1, 2006, through April 30, 2007. *See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 76,336 (Dec. 16, 2008)

("*2006–2007 Final Results*"). At the conclusion of the administrative review, Tianjin, a seller of pure magnesium for export, was assigned a rate of 0.63%, and appeals were filed by both Tianjin and US Magnesium. On August 9, 2010, the Court remanded the case for further proceedings after concluding that not all of the surrogate values relied on in the *2006–2007 Final Results* were supported. *See Tianjin Magnesium Int'l Co., Ltd. v. United States*, 34 CIT __, 722 F. Supp. 2d 1322 (2010) ("Tianjin I"). On February 11, 2011, Commerce issued its Final Results of Redetermination Pursuant to Court Remand Pure Magnesium from the People's Republic of China ("First Redetermination"). While this Court's review of that First Redetermination was pending, Commerce requested that the matter again be remanded so it could determine whether to reopen the 2006–2007 administrative review based on the factors announced by the United States Court of Appeals for the Federal Circuit in *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369 (Fed. Cir. 2011). The Court granted Commerce's request.

To best understand the issues weighed by Commerce in this most recent remand, attention must be given to events that occurred during the first remand. The Court first remanded this case, in part, based on its conclusion that the record contained inadequate support for the valuation given to waste magnesium, a manufacturing process byproduct the sale of which could offset the normal value. *Tianjin I*, 34 CIT at __, 722 F. Supp. 2d at 1336. Whether Tianjin was entitled to the offset was not in question when this matter was first remanded.

Following the Court's remand in August, 2010, Commerce concluded that there was not adequate evidence in the record to properly value the waste magnesium, and it issued to Tianjin a supplemental questionnaire. Second Redetermination at 4. In its response to that supplemental questionnaire, Tianjin continued to claim entitlement to the waste magnesium byproduct offset, and it provided documentation supporting that claim such as sales invoices, sales ledger entries, and other accounting records. *See* Response to the Supplemental By-product Questionnaire by Tianjin Magnesium International, Co., Ltd. (Oct. 19, 2010), Public Rec. 6, Confidential Rec. 2 ("Supplemental Response").[1]

On November 2, 2010, US Magnesium filed its Rebuttal Factual Information and Petitioner's Comments On TMI's Supplemental

[1] Hereinafter all documents in the public record will be designated "PR" and all documents in the confidential record designated "CR.

Byproduct Response (Nov. 2, 2010), PR 10 ("Rebuttal"). US Magnesium's Rebuttal included a copy of Commerce's verification report from the administrative review for the 2007–2008 period of review. *See* Verification of the Sales and Factors Responses of Tianjin Magnesium International, Ltd. in the 2007–2008 Administrative Review of the Antidumping Duty Order on Pure Magnesium from the People's Republic of China (Nov. 4, 2009), Rebuttal, Exhibit 1 ("2007–2008 Verification Report"). In the 2007–2008 Verification Report, Commerce stated that it was notified by Tianjin's suppliers that there had been no byproduct sales prior to April 2007. In other words, there were no byproduct sales during the 2006–2007 period of review at issue in this case. Commerce stated that this disclosure was made in Tianjin's presence. Second Redetermination at 14.

Based on this information, US Magnesium argued that Tianjin was not entitled to the byproduct offset. In support, US Magnesium pointed out that Tianjin's Supplemental Response, in which it asserted its entitlement to a byproduct offset, was filed more than a year after the 2007–2008 Verification Report was issued, and therefore Tianjin must have been aware that there were no sales entitling it to an offset. *See* Rebuttal at 9. Commerce decided, however, that it could not consider the 2007–2008 Verification Report, because it did not exist at the time Commerce made its initial determination in the *2006–2007 Final Results*. First Redetermination at 17. In the First Redetermination, Commerce still considered Tianjin eligible for the byproduct offset.

Review of this First Redetermination was pending when Commerce sought another remand to consider reopening the 2006–2007 administrative review pursuant to the factors in *Home Products*, which is the remand currently at issue. On remand, Commerce determined that there existed clear and convincing evidence sufficient to make a prima facie case that the 2006–2007 administrative review was tainted by fraud. Commerce specifically relied on the information set forth above that there had, in fact, been no byproduct sales during the 2006–2007 period, as well as evidence that the vouchers submitted to show such sales were fabricated. Second Redetermination at 9–10. This evidence led Commerce to conclude that Tianjin intentionally misrepresented its entitlement to a byproduct offset, and that it did so to lower its margin. *Id.* at 10. Commerce also stated that although it normally considers its administrative reviews final and conclusive, this case presented circumstances weighing in favor of reopening the review. Commerce noted that Tianjin's misrepresentations were material because when relied on by Commerce, they resulted in a lower

margin for Tianjin. *Id.* at 14–15. Commerce also concluded that Tianjin's fraud was discovered within a reasonable time, and noted that Tianjin's entries from the 2006–2007 period of review remained unliquidated because of an injunction. *Id.* at 15–16.

Based on this evidence, Commerce determined that it was appropriate to reopen the record of the 2006–2007 administrative review. Commerce prepared draft results wherein it concluded that Tianjin was not entitled to the byproduct offset and calculated Tianjin's margin to be 21.24%. *Id.* at 18. However, after receiving comments from the parties, Commerce revised its determination and concluded that Tianjin's behavior significantly impeded the review pursuant to Section 766(a)(2)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e(a)(2)(C) (2006).[2] Second Redetermination at 27. Pursuant to 19 U.S.C. § 1677e(b), Commerce further concluded that Tianjin failed to cooperate to the best of its ability, and applied an adverse facts available rate of 111.73%, which rate had already been calculated for a respondent other than Tianjin in the 2006–2007 review.

Standard of Review

As stated in *Tianjin I*, the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. §1516a(a)(2)(B)(iii). Additionally, the Court will uphold Commerce's determinations in administrative reviews 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).

Analysis

Whether Commerce was justified in reopening the 2006–2007 review turns on an interpretation of the *Home Products* decision. In that decision, the Court of Appeals dealt with the question of whether remand is required when evidence is presented that the proceedings below were tainted by material fraud. Stating that the Court of International Trade's discretion on whether to remand is not unlimited, the Court of Appeals held that

> where a party brings to light clear and convincing new evidence sufficient to make a prima facie case that the agency proceedings under review were tainted by material fraud, the Trade Court abuses its discretion when it declines to order a remand to require the agency to reconsider its decision in light of the new evidence.

[2] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition.

Home Prods., 633 F.3d at 1378. The Court of Appeals clarified that Commerce need not reopen the administrative proceedings just because evidence of fraud existed, and stated that in making the decision to reopen or not, Commerce can consider "the interests in finality, the extent of the inaccuracies in the . . . administrative review, whether fraud existed in the . . . administrative review, the strength of the evidence of fraud, the level of materiality, and other appropriate factors." *Id.* at 1381.

The posture of this case is different than *Home Products* in that here, the evidence of Tianjin's fraud was raised before Commerce at the administrative level instead of before the court as it was in *Home Products*. *See id.* at 1375. Tianjin argues that Commerce erred in two primary ways when it made the threshold fraud finding and reopened the review: (1) Commerce did not conduct an analysis of the elements of fraud, and (2) Tianjin's conduct did not rise to the level of fraud.

Taking up Tianjin's first argument, the Court concludes that there is nothing in the *Home Products* decision that requires a threshold analysis and finding regarding each of the elements of fraud. First, *Home Products* itself does not engage in such a rigorous analysis. Furtermore, the Court of Appeals did not require remand only when evidence is presented that a participant in the administrative proceedings committed fraud, either at common law as proposed by Tianjin, or otherwise. *Home Products* sets forth a less rigorous standard, requiring remand when "evidence sufficient to make a prima facie case that the agency proceedings under review were tainted by material fraud" is presented. *Id.* at 1378. The "prima facie case" prescribed by *Home Products* is not whether a party has committed common law fraud, but rather whether the proceedings themselves were "tainted by material fraud."[3] This inquiry is broader, and less exacting, than a determination regarding whether the conduct of a party has met the legal elements of fraud.

Given this conclusion regarding the *Home Products* standard, the Court concludes that Commerce's determination that the proceedings below were "tainted by material fraud" is well supported by substantial evidence in the record. Throughout these proceedings, Tianjin attempted to insulate itself from the lack of by product sales by stating that it was Tianjin's suppliers who sold byproduct and kept the requisite paperwork. *See, e.g.*, Pl.'s Comments on the Second Redetermination of October 31, 2011 at 6. However, by the time Tianjin submitted its Supplemental Response in October 2010, it was

[3] "Taint" is defined as "(1) To imbue with a noxious quality or principle. (2) To contaminate or corrupt. (3) To tinge or affect slightly for the worse." *Black's Law Dictionary* 1466 (7th ed. 1999).

undoubtedly aware that there had been no by product sales during the 2006–2007 administrative review period. Only Tianjin claimed entitlement to a byproduct offset in its October 2010 Supplemental Response, and only Tianjin filed the paperwork with Commerce purporting to justify that claim. Furthermore, as can be seen by the disparity in 0.63% margin imposed on Tianjin in the *2006–2007 Final Results*, and the 21.24% margin Commerce was going to impose before deciding to apply adverse facts available, Tianjin's claimed offset was material in that it stood to benefit from a greatly reduced margin if Commerce applied the byproduct offset.

Finally, the Court concludes that Tianjin's conduct was egregious enough to warrant Commerce's determinations that Tianjin had impeded its investigation and failed to act to the best of its ability. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("While the ['best of its ability'] standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.").[4]

Based on the foregoing, and the Court's review of the Second Redetermination and all other pleadings and papers filed herein, it is hereby

ORDERED that the Final Results of Redetermination Pursuant to Voluntary Remand issued by the Department of Commerce is affirmed without modification, and this matter is dismissed.

Dated: April 25, 2012
New York, New York

/*s*/ *NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS SENIOR JUDGE

[4] The Court notes that in addition to its arguments against Commerce's interpretation of *Home Products*, Tianjin also argues that Commerce erroneously applied zeroing in the Second Redetermination. Given Commerce's application of adverse facts available, and the Court's conclusion that this determination was supported by substantial evidence, the Court need not reach the issue of zeroing.

Slip Op. 12–55

UNITED STATES STEEL CORPORATION, Plaintiff, and NUCOR CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNION STEEL, POHANG IRON & STEEL CO., LTD., POHANG COATED STEEL CO., LTD., AND HYUNDAI HYSCO, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 09–00156

[Affirming a remand redetermination in an administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products from the Republic of Korea]

Dated: April 25, 2012

Jeffrey D. Gerrish, *Ellen J. Schneider*, and *Robert E. Lighthizer*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for plaintiff United States Steel Corporation.

Alan H. Price and *Timothy C. Brightbill*, Wiley Rein LLP, of Washington, DC, for plaintiff-intervenor Nucor Corporation.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, and *Mary S. Hodgins*, Morris, Manning & Martin LLP, of Washington, DC, for defendant-intervenor Union Steel.

Jaehong D. Park, *Bryce V. Bittner*, *Jarrod M. Goldfeder*, *Lisa-Marie W. Ross*, and *Natalya D. Dobrowolsky*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, for defendant-intervenors Pohang Iron & Steel Co., Ltd. and Pohang Coated Steel Co., Ltd.

Jaehong D. Park, *Bryce V. Bittner*, *Jarrod M. Goldfeder*, *Lisa-Marie W. Ross*, and *Natalya D. Dobrowolsky*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC for defendant-intervenor Hyundai Hysco.

OPINION

Stanceu, Judge:

Plaintiff United States Steel Corporation ("U.S. Steel"), a domestic manufacturer of corrosion-resistant carbon steel flat products ("CORE"), contests a published decision that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in an antidumping duty proceeding. U.S. Steel brought this action under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a (2006), to challenge various decisions Commerce made in the final results of the fourteenth periodic administrative review of an antidumping duty order on imports of certain

CORE from the Republic of Korea ("Final Results") between August 1, 2006 and July 31, 2007 (the "period of review" or "POR"). Compl. ¶¶ 1, 3 (May 15, 2009), ECF No. 11; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) ("*Final Results*"). Nucor Corporation ("Nucor"), another domestic manufacturer of CORE, also contested the Final Results, and the court has consolidated the two actions. Compl. (May 15, 2009), ECF No. 9 (Court No. 09–00152).

Before the court is the determination ("Remand Redetermination") Commerce issued in response to the court's order in *United States Steel Corporation v. United States*, 35 CIT __, __, 759 F. Supp. 2d 1349, 1360 (2011) ("*U.S. Steel Corp.* "). *Final Results of Redetermination Pursuant to Remand* (July 15, 2011), ECF No. 105 ("*Remand Redetermination*"). Only one issue remains contested in this case. The court affirms the Department's decision addressing that issue and the decisions addressing the various other issues raised in this litigation, as stated in the Remand Redetermination.

I. Background

Background on this litigation is set forth in the court's prior opinion and order and supplemented herein. *U.S. Steel Corp.*, 35 CIT at __, 759 F. Supp. 2d at 1352.

In *U.S. Steel Corp*., the court ordered that Commerce: (1) reconsider the decision to disregard as negligible certain potential adjustments to the costs incurred by Union Steel Manufacturing Co., Ltd. ("Union"), a respondent in the administrative review and defendant-intervenor before the court, for purchases from affiliated suppliers of "steel substrate," which is carbon steel coil used to produce CORE; (2) reconsider the decision not to apply the "major input rule" to Union's purchases of steel substrate from two other parties that were respondents in the administrative review and are defendant-intervenors before the court, Pohang Iron & Steel Co., Ltd. ("POSCO") and Pohang Coated Steel Co., Ltd. ("POCOS") (collectively, the "POSCO Group"); (3) reconsider and explain its method of applying the major input rule to value the steel substrate that Union obtained from a certain supplier (JFE Steel) through purchases from a trading company; and (4) reconsider the decision not to "collapse" Union and the POSCO Group, *i.e.*, the decision not to treat these two companies as a single entity for purposes of the fourteenth administrative review. *Id.* at __, 759 F. Supp. 2d at 1360. The court set forth a remand schedule so that the Remand Redetermination could "take into account any other adjustments to redetermined dumping margins re-

sulting from the court's remand order in *Union*, which pertains to the same administrative review that is the subject of this litigation." *Id.* at __, 759 F. Supp. 2d at 1360 n.4. (citing *Union Steel v. United States*, 35 CIT __, 755 F. Supp. 2d 1304 (2011)). In *U.S. Steel Corp.*, the court rejected a claim, brought by Nucor, that Commerce had acted contrary to law in declining to apply the major input rule to Union's affiliated suppliers other than the POSCO Group and a related trading company. *Id.* at __, 759 F. Supp. 2d at 1357.

Commerce filed the Remand Redetermination on July 15, 2011. *Remand Redetermination.* Union and U.S. Steel filed comments on August 15, 2011, and Nucor filed comments the following day. Def.-Intervenor Union Steel's Comments on the U.S. Department of Commerce's July 15, 2011 Final Results of Redetermination Pursuant to Ct. Remand (Aug. 15, 2011), ECF No. 109; United States Steel Corp.'s Comments on the Final Results of Redetermination Pursuant to Remand Issued by the Department of Commerce (Aug. 15, 2011), ECF No. 108; Comments on Final Results of Redetermination Pursuant to Ct. Order (Aug. 16, 2011), ECF No. 117 ("Nucor's Comments"). Defendant replied to Nucor's comments on September 1, 2011. Def.'s Resp. to Pl-Intervenor's Comments on the Department of Commerce's Remand Results (Sept. 1, 2011), ECF No. 123.

II. *Discussion*

The court exercises jurisdiction pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), which grants the Court of International Trade exclusive jurisdiction over any civil action commenced under 19 U.S.C. § 1516a. The court reviews the Final Results based on the agency record. *See* Customs Courts Act of 1980, § 301, 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b)(1)(B)(i). The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

In the Remand Redetermination, Commerce: (1) did not disregard as negligible the adjustments to Union's costs for purchases of substrate from affiliated parties, *Remand Redetermination* 14; (2) applied the major input rule to Union's purchases of steel substrate from the POSCO Group; *id.* at 10–14; (3) applied the major input rule to Union's purchases of steel substrate from JFE Steel through a trading company using a methodology differing from that used in the Final Results and provided an explanation for that methodology, *id.* at 5–10; and (4) determined, as it had in the Final Results, that Union and the POSCO Group should not be "collapsed," *i.e.*, treated as a

single entity for purposes of this administrative review, *id.* at 15–21. Commerce also stated that, pursuant to the court's remand order in *Union Steel*, it had "recalculated Union's margin to account for revising the Department's physical characteristics classifications and subsequent model-match results to create a separate category for laminated CORE products . . . ." *Id.* at 2. In the Remand Redetermination, Commerce decreased Union's weighted-average dumping margin from 7.56% to 7.45%. *Id.* at 22.

Only Nucor opposes the Remand Redetermination. Nucor's sole claim in this litigation challenges the Department's decision not to treat Union and the POSCO Group as a single entity for purposes of conducting the fourteenth administrative review. *See* Nucor's Comments.

In the absence of opposition from any party, the court affirms the Department's decisions (1) adjusting Union's costs for purchasing steel substrate from affiliates, (2) applying the major input rule to Union's purchases of substrate from the POSCO Group, and (3) applying the major input rule to Union's purchases of steel substrate from a supplier through a trading company using a revised methodology. On the remaining contested issue in this litigation, the court upholds the Department's decision not to collapse Union and the POSCO Group in conducting the fourteenth review, for the reasons discussed in this opinion. However, the court will defer the entry of judgment affirming the 7.45% weighted-average dumping margin the Remand Redetermination assigned to Union until the completion of proceedings in another case involving the fourteenth administrative review, *Union Steel v. United States*, Court No. 09–00130, as a result of which proceedings the determination of a weighted-average dumping margin for Union remains an open issue.

Under its regulations, Commerce "will treat two or more affiliated producers as a single entity" when two conditions are met. 19 C.F.R. § 351.401(f)(1) (2008). The first condition is that the affiliated producers "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities." *Id*. The second condition is that "the Secretary concludes that there is a significant potential for the manipulation of price or production." *Id*. The regulations specify that in evaluating the second condition Commerce "may consider" the following factors:

> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Id. § 351.401(f)(2).

In the Issues and Decision Memorandum Commerce incorporated into the Final Results ("Decision Memorandum"), Commerce decided that neither condition for "collapsing" Union and the POSCO Group was satisfied, stating first that "the POSCO Group and Union did not fit the criteria of 19 CFR 351.401(f), where two or more producers have production facilities for similar or identical products that would not require substantial retooling of either facility to restructure manufacturing priorities." Issues & Decisions Mem., A-580–816, ARP 7–07, at 22 (Mar. 9, 2009) (Admin. R. Doc. No. 4868) ("*Decision Mem.*"). Regarding the second condition, Commerce concluded that there was "no significant potential for the POSCO Group and Union to manipulate the price or cost of CORE exported to the U.S." *Id.* at 23. As part of its justification for this conclusion, Commerce found that "[t]here is no evidence on the record of this proceeding which indicates that the POSCO Group and Union are engaged in any significant transactions during the POR." *Id.* at 22.

In *U.S. Steel Corp.*, the court concluded (and defendant conceded) that Commerce erred in finding Union's purchases of steel substrate from the POSCO Group to be an insignificant percentage of Union's total steel substrate purchases. 35 CIT at __, 759 F. Supp. 2d at 1359 (noting that defendant characterized the Department's finding as "inadvertent error"). The court ordered Commerce to reconsider the decision not to collapse the two companies, also questioning the Department's finding that Union and the POSCO Group lacked production facilities for manufacturing subject merchandise that would not require substantial retooling to restructure manufacturing priorities. *Id.* at __, 759 F. Supp. 2d at 1359. The court was unable to find substantial record evidence to support the latter finding, which appeared inconsistent with a pre-decisional memorandum Commerce had prepared. *Id.* at __, 759 F. Supp. 2d at 1358 (citing *Mem. to Dir., AD/CVD Operations, Office 3*, at 4 (Sept. 2, 2008) (Admin. R. Doc. No. 4732)).

In the Remand Redetermination, Commerce acknowledges that the first condition under § 351.401(f)(1) is satisfied because "substantial retooling of facilities would not be needed to restructure manufacturing priorities," both Union and the POSCO Group being "large pro-

ducers of subject merchandise." *Remand Redetermination* 16. Still, Commerce declines to collapse Union and the POSCO Group, considering the second condition unsatisfied. Commerce analyzed the "structure of the firms and their operations" and the "transactions between parties during the POR" to reach a conclusion that there is not a "significant" potential for price or production manipulation. *Id.* at 16–21.

On the first of the three factors in 19 C.F.R. § 351.401(f)(2), the level of common ownership, the Remand Redetermination finds only a "minimal" level of common ownership, referring to the purchase by Union's parent company, Dongkuk Steel Mills ("DSM"), of 9.8% of the shares of POCOS on April 27, 2007 and the May 2, 2007 purchase by the POSCO Group of a 9.8% interest in Union. *Id.* at 15, 17. Commerce concludes that "the POSCO Group and Union are large independent producers of CORE and other steel products and a 'minimal' level of common ownership does not change the essential business of the companies." *Id.* at 17. Commerce also concludes that, ownership transfer aside, "there have been no other significant material changes in the business relationship between the POSCO Group and Union during this POR to warrant reconsideration of collapsing the two entities." *Id*. On the second factor, "[t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm," 19 C.F.R. § 351.401(f)(2)(ii), Commerce finds "there is no evidence indicating any overlap of individuals in management or corporate governance roles . . . ." *Remand Redetermination* 18. On the third factor, § 351.402(f)(2)(iii), Commerce does not consider the operations of Union and the POSCO Group to be "intertwined." *Id.* at 20–21.

Regarding the third factor, Commerce acknowledges that it was "inaccurate when it explained in the *Final Results* that the POSCO Group accounted for an insignificant portion of Union's material purchases," referring to purchases by Union of substrate from the POSCO Group. *Id.* at 18. Commerce, however, does not consider these purchases sufficient to cause it to alter its previous decision not to collapse the two entities, stating that "in considering the POSCO Group as an affiliated party with Union, we note that the acquisition of ownership interests took place in May 2007, which means that the parties were only affiliated for the last quarter of the POR and the parties were unaffiliated for three quarters of the POR." *Id.* Commerce finds no indication of a change in the existing supply relationship between the parties following the acquisition, *id.* at 19, and also finds that "[t]he majority of the POSCO Group's transactions were arm's-length, market-based, and with unaffiliated parties," *id.*

With respect to the two conditions § 351.402(f)(1) identifies for collapsing, the Remand Redetermination concludes that record evidence is sufficient to satisfy only the first condition, *i.e.*, production facilities that would not require substantial retooling. For the second condition, *i.e.*, a significant potential for manipulation of price or production, Commerce applies the first two factors of § 351.402(f)(2) to find a minimal level of common ownership and no managers or board members in common. From its review of the record, the court concludes that substantial evidence supports the finding of minimal common ownership. The POSCO Group owned only 9.8% of Union; DSM retained 65%. *Remand Redetermination* 15; *Mem. from the CORE Team to Office Dir., AD/CVD Enforcement 3*, at 1 (July 15, 2011) (Admin. R. Doc. No. 5875) ("*Remand Analysis Mem.*"). Although DSM owned a 9.8% interest in the POSCO Group's affiliate POCOS, Union did not own any interest in the POSCO Group. *Remand Redetermination* 14. On the second factor, the court does not *see* in the record evidence of individuals having served in either a managerial role or corporate governance role at both companies.[1]

On the third factor, the record supports the Department's finding that the business operations of Union and the POSCO Group were not intertwined. Commerce finds significant transactions between the affiliates but also finds, based on other evidence as discussed above (including evidence that the acquisition did not alter the substrate purchasing practices in question), that these transactions, considered alone, do not establish a significant potential for the manipulation of price or production. Commerce views the transactions to represent "nothing more than a continuation of a prior commercial relationship rather than a vehicle for manipulation in regards to dumping." *Id.* at 21. The record evidence in support of the Department's finding includes statements by both Union and the POSCO Group that the commercial relationship between the two entities remained unchanged after the share purchases. *Letter from Union to the Sec'y of Commerce* 1 (Apr. 19, 2011) (Admin. R. Doc. No. 5785) ("POSCO's pricing policies with respect to Union did not change in any way as a result of its purchase of Union's shares."); *Letter from the POSCO Group to the Sec'y of Commerce* 1 (Apr. 19, 2011) (Admin. R. Doc. No. 5783) ("All transactions between POSCO and Union are

[1] The court's review of the record evidence included comparing the individuals listed as the directors of Pohang Iron & Steel Co., Ltd. ("POSCO") as of December 31, 2006 with the individuals listed as "Board Members and Senior Managers" of Dongkuk Steel Mills, Union Steel Manufacturing Co., Ltd., and other related companies, as of December 31, 2006. *Compare Letter from POSCO to the Sec'y of Commerce* exhibit A-6 (Feb. 4, 2008) (Admin. R. Doc. No. 4532) *with Letter from Union to the Sec'y of Commerce* exhibit A-10 (Jan. 22, 2008) (Admin. R. Doc. No. 4504). The record appears to lack documentation of the directors and officers of these companies after the share acquisition agreement.

commercial and at arm's-length."). Additionally, the Department's analysis showed that the POSCO Group's sales to Union both before and after the two companies became affiliated were, on average, at prices significantly above the POSCO Group's cost of production. *Remand Analysis Mem.* 2.

The court concludes that the record supports the Department's findings addressing the three factors of 19 C.F.R. § 351.401(f)(2) and that Commerce was not required on this record to find a significant potential for price or production manipulation. In summary, the record evidence supports a finding of a low level of common ownership, a finding that there were no managerial employees or board members in common, and a finding that the operations of the two entities were not intertwined. Union's substrate purchases from the POSCO Group predated the acquisition, and the record lacks evidence that the acquisition altered the pattern of these purchases. The record evidence considered as a whole does not compel a conclusion that there was a significant potential for the parties to manipulate the price or production of the subject merchandise.

In commenting on a draft version of the Remand Redetermination, Nucor argued that Commerce acted unlawfully in deciding not to collapse Union and the POSCO Group by failing to consider "several key factors weighing against its conclusion that there is no evidence indicating any intertwining of business operations." *Letter from Nucor to the Sec'y of Commerce* 5 (June 22, 2011) (Admin. R. Doc. No. 5855) (internal quotation omitted); *Remand Redetermination* 20. Nucor makes essentially the same argument before the court, arguing that the decision not to collapse the two entities "is flawed and not supported by substantial record evidence." Nucor's Comments 3. According to Nucor, "the Department rejected compelling evidence on the record indicating a significant *potential* for price and/or production manipulation without providing a sound basis for doing so." *Id.* at 4.

In claiming that Commerce "rejected compelling evidence," Nucor points to the common ownership and to the aforementioned purchases by Union of substrate from the POSCO Group. Nucor's Comments 4–6. It also points to a "Memorandum of Understanding" ("MOU") between DSM and the POSCO Group addressing DSM's acquisition of a share in POCOS and the POSCO Group's acquisition of a share in Union, *Letter from Union to the Sec'y of Commerce* exhibit A-36 (July 16, 2008) (Admin. R. Doc. No. 4675) ("*Union's July 16, 2006 Questionnaire Resp.*"), and to press releases and news reports discussing the MOU, *Letter from U.S. Steel to the Sec'y of Commerce* exhibits A-B (vol. II) (Mar. 18, 2008) (Admin. R. Doc. No.

4579) ("*MOU Media Reports*"). Nucor's Comments 4–6.

The court's review of the record causes it to reject Nucor's argument. The record evidence to which Nucor directs the court's attention, when considered according to the criteria and factors in the Department's regulation, 19 C.F.R. § 351.401(f), was insufficient to compel Commerce to collapse Union and the POSCO Group. The second criterion in § 351.401(f)(1) calls for Commerce to determine whether there is a "significant" potential for manipulation of price or production. In the preamble accompanying promulgation of the regulation, Commerce described the determination as "very much fact-specific in nature, requiring a case-by-case analysis . . . ." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,345–46 (May 19, 1997) ("*Preamble*"). The three factors the regulation applies to this case-by-case analysis are permissive and non-exhaustive. *See* 19 C.F.R. § 351.401(f)(2)(i)-(iii) ("[T]he factors the Secretary may consider include . . .").

With respect to the first factor, Nucor takes issue with the Department's characterization of the common ownership as minimal. Nucor's Comments 5. This objection ignores the record facts that the POSCO Group owned 9.8% of Union and that DSM retained 65%.

Nucor does not address the second factor (*i.e.*, the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm). On the third factor, intertwined operations, Nucor's reliance on the substrate purchases to support its position is also unavailing. The substrate purchases are not very probative on the question of a significant potential for the manipulation of price or production when considered in the context of other record evidence. As Commerce found, and the record supported, the purchasing pattern was not altered by the acquisition. In connection with its argument, Nucor mentions the fact that Commerce acknowledges its erroneous finding that the purchases accounted for an insignificant portion of Union's material purchases. Nucor's Comments 5. That erroneous finding was made in the Final Results and corrected in the Remand Redetermination; on remand Commerce fully considered the implications of the purchases in making its decision regarding collapsing.

Nucor argues that the MOU "suggest[s] current and future sharing of sales, production, pricing, and technological information and the potential for one entity to shift production to the other in order to avoid a high antidumping duty rate." *Id.* at 4–5. The Remand Redetermination concludes, to the contrary, that the MOU and the media reports do not establish a significant potential for manipulation of price or production because they "articulate only very general goals

consistent with" a share acquisition transaction. *Remand Redetermination* 21. Commerce characterized as "merely speculative" Nucor's reliance on the MOU "to extrapolate a potential risk that the POSCO Group and Union could, sometime in the future, manipulate price and production." *Id.*

The court has examined the MOU, the text of which is proprietary. As Commerce did, the court concludes that Nucor's argument directed to the MOU is based on speculation, not probative evidence. *See Union's July 16, 2008 Questionnaire Resp.* exhibit A-36. On the subject of the press releases and press reports about the parties to the MOU, Nucor argues that "[p]ublic releases and reports noted that 'the exchange is aimed at strengthening their long-time cooperation in the cold-rolled steel business;' that "[t]his alliance is intended to strengthen the price competitiveness of the coated sheet products;' and that the firms 'will cooperate in technology and operation know-how and joint marketing in China and [the] American market.'" Nucor's Comments 5 (quoting *MOU Media Reports*) (alterations in original). Both media reports cited by Nucor identify a rationale for the MOU other than price or production manipulation: protection from hostile merger and acquisition attempts. *MOU Media Reports* exhibit A ("Posco Builds Takeover Defense with Share Swaps"); *id.* exhibit B ("[B]oth firms will cooperate in . . . protection from Arcelor Mittal's hostile M&A."). Nucor is unconvincing in ascribing to the MOU a potential for a production shift to avoid a high antidumping duty rate.

Nucor argues, further, that the Department's analysis under 19 C.F.R. § 351.401(f)(2) was unlawful because the Department required evidence of actual manipulation of price or production rather than evidence of the potential for such manipulation in the future as required by the regulation. Nucor's Comments 3. Nucor argues that the Department improperly ignored that the MOU and related media reports showed the potential for future manipulations, citing the Department's statement that "Nucor's reliance upon certain language from the MOU to extrapolate a potential risk that the POSCO Group and Union could, sometime in the future, manipulate price and produce is merely speculative . . . ." *Id.* at 4–5 (citing *Remand Redetermination* 21). Nucor posits that "the Department's finding that Nucor's evidence does not provide *actual* evidence of price and production manipulation does not support the Department's conclusion that the record contains no evidence of a significant *potential* for such manipulation." *Id.* at 6. This argument is not persuasive.

Although Nucor correctly describes the analysis required by 19 C.F.R. § 351.401(f)(2) as "forward-looking," *id.* at 6 (quoting *Preamble*, 62 Fed. Reg. at 27,345–46), the analysis in the Remand Redetermination does not depart from the regulation. Under § 351.401(f)(2), Commerce assesses the potential for future manipulations based on current evidence, such as current common ownership, current overlapping employees and directors, current intertwined business operations, and significant transactions in the recent past. In this case, Commerce assessed each factor in § 351.401(f)(2)(i)-(iii), reaching a finding as to the potential for future manipulation that is supported by substantial evidence. The Remand Redetermination did not, as Nucor implies, limit its inquiry to ascertaining whether Union and the POSCO Group had already manipulated price and production. Although Commerce rejected Nucor's arguments pertaining to the MOU as "speculative," it does not follow that Commerce ignored a significant potential for manipulations of price or production in the future. It is apparent to the court that Commerce used the term "speculative" in explaining why it did not consider the MOU and media reports, when viewed in the context of the other record evidence, to compel a conclusion that the second criterion of § 351.401(f)(1) was satisfied.

III. *Conclusion*

Upon review of the Remand Redetermination, Nucor's comments thereon, and all other papers and proceedings, the court concludes that the decision in the Remand Redetermination not to collapse the POSCO Group and Union is in accordance with law. The remaining decisions set forth in the Remand Redetermination are affirmed as uncontested between the parties. The court affirms the Remand Redetermination except with respect to the 7.45% redetermined weighted-average dumping margin for Union. The exact margin amount is an open issue as a result of the remand on the zeroing issue in *Union Steel v. United States*, Court No. 0900130.

Dated: April 25, 2012
New York, New York

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

Slip Op. 12–56

UNION STEEL, Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION AND NUCOR CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 09–00130

[Affirming agency decision on model-match methodology, reconsidering a prior decision of the court, and ordering a second remand, in action contesting final results of an administrative review of an antidumping duty order]

Dated: April 25, 2012

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Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Daniel J. Calhoun*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

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Timothy C. Brightbill and *Alan H. Price*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Union Steel Manufacturing Co., Ltd. ("Union") brought this action in 2009 to contest the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), that concluded the Department's fourteenth periodic administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products ("CORE") from the Republic of Korea ("Korea"). Compl. (Mar. 24, 2009), ECF No. 5; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) ("*Final Results*"). The Final Results assigned Union, a Korean producer and exporter of CORE subject to the order, a weighted-average dumping margin of 7.56%. *Final Results*, 74 Fed. Reg. at 11,083.

In its first opinion and order in this case, *Union Steel v. United States*, 33 CIT __, Slip Op. 09–47 (May 19, 2009) ("*Union Steel I*"), the court ruled that Whirlpool Corporation had plaintiff-intervenor status as of right and enjoined the liquidation of entries of Whirlpool's merchandise pending judicial review. In its second opinion and order, *Union Steel v. United States*, 35 CIT __, 755 F. Supp. 2d 1304 (2011) ("*Union Steel II*"), the court held that Commerce acted lawfully in basing Union's general and administrative ("G&A") expenses and interest expense on financial statements that pertained to seven of the twelve months of the period of review and in using the "zeroing" methodology in determining Union's weighted-average dumping margin for the Final Results. *Id.* at __, 755 F. Supp. 2d at 1315–16. Further, in response to defendant's request for a voluntary remand, the court ordered that Commerce reconsider its denial of Union's request for a revision to the model-match methodology Commerce applied in the fourteenth review. *Id.* at __, 755 F. Supp. 2d at 1315–16.

Before the court is the determination ("Remand Redetermination") Commerce issued in response to the remand order in *Union Steel II*. *Final Results of Redetermination Pursuant to Remand* (July 15, 2011), ECF No. 115 ("*Remand Redetermination*"). In the Remand Redetermination, Commerce altered its model-match methodology with respect to the treatment of "laminated" CORE, which is CORE that is coated with a plastic film. In the Final Results, Commerce considered laminated CORE products to be products identical in physical characteristics with subject CORE that was painted but not laminated. Under the altered methodology, Commerce no longer compared subject non-laminated, painted CORE products with laminated CORE products as products identical in physical characteristics. *Id.* at 2. The Remand Redetermination lowered Union's weighted-average dumping margin from 7.56% to 7.45%. *Id.* at 18.

Also before the court is Union's motion requesting that the court reconsider its decision in *Union Steel II* affirming the Department's use of zeroing in the fourteenth administrative review. Union bases its motion for reconsideration on an intervening judicial decision, *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) ("*Dongbu*"), in which the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") declined to affirm a judgment of the Court of International Trade sustaining the Department's use of zeroing in an administrative review of an antidumping duty order.

The court affirms the Department's decision on remand to apply a revised model-match methodology, which plaintiff supports and defendant-intervenors oppose. The court issues a second remand or-

der so that Commerce may provide an explanation of its decision to apply zeroing that addresses the issues identified by the Court of Appeals in *Dongbu*.

I. *Background*

Background on this litigation is set forth in the court's prior opinions and orders and supplemented herein. *Union Steel I*, 33 CIT at __, Slip Op. 09–47, at 3–7; *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1306–07.

Union brought three claims in this action. In Count I of its complaint, plaintiff challenged the Department's construction of section 771(35) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1677(35) (2006), according to which the Department applied its practice of "zeroing," *i.e.*, the deeming of the sales a respondent makes in the United States at prices above normal value to have individual dumping margins of zero rather than negative margins. Compl. ¶¶ 8–15. In Count II, Union challenged the Department's "model match" methodology as applied in the fourteenth review, claiming that Commerce unlawfully compared Union's U.S. sales of non-laminated, painted CORE products to Union's home market sales of both painted CORE products and laminated CORE products. *Id.* ¶¶ 16–17. In Count III, Union challenged the Department's decisions to use Union's 2007 financial statement, prepared for a fiscal year corresponding to the 2007 calendar year, to determine a G&A expense ratio and the decision to use the fiscal-year 2007 financial statement (also based on the calendar year) of Union's parent, Dongkuk Steel Mill ("DSM"), to determine Union's interest expense ratio. *Id.* ¶¶ 18–19. Union claimed that Commerce should have used the fiscal-year 2006 statements and that, in failing to do so, impermissibly departed from its practice, established during previous reviews of Union, of calculating Union's G&A expense and interest expense ratios using financial statements applying to the first, five-month portion of the POR (August through December) rather than financial statements pertaining to the second, seven-month portion of the POR (January through July). *Id.*

Addressing Count I of the complaint, the court in *Union Steel II* sustained the Department's use of the zeroing methodology in determining Union's weighted-average dumping margin in the fourteenth review. *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1314–15. Responding to defendant's request for a voluntary remand on the claim in Count II, the court ordered Commerce to "review and reconsider its 'model match' methodology" and alter that methodology "if substantial record evidence does not support a finding that only

minor and commercially insignificant physical differences distinguish Union's laminated products from the non-laminated products to which the Department compared Union's laminated products." *Id.* at __, 755 F. Supp. 2d at 1316. With respect to the claim in Count III, the court sustained the Department's decisions to use the 2007, rather than the 2006, financial statements. *Id.* at __, 755 F. Supp. 2d at 1307–12.

Plaintiff filed its motion for reconsideration on April 5, 2011, relying on the decision of the Court of Appeals in *Dongbu*. Pl. Union Steel's Mot. for Reconsideration (April 5, 2011), ECF No. 106. On May 9, 2011, defendant and defendant-intervenors Nucor Corporation ("Nucor") and United States Steel Corporation ("U.S. Steel") opposed this motion. Def.'s Resp. in Opp'n to Pl. Union Steel's Mot. for Reconsideration (May 9, 2011), ECF No. 114 ("Def.'s Opp'n"); Def.-Intervenor's Opp'n to Union Steel's Mot. for Reconsideration (May 9, 2011), ECF No. 112 ("Nucor's Opp'n"); Mem. of Def.-Intervenor United States Steel Corporation in Opp'n to Pl. Union Steel's Mot. for Reconsideration (May 9, 2011), ECF No. 113 ("U.S. Steel's Opp'n").

Commerce filed the Remand Redetermination on July 15, 2011. *Remand Redetermination*. Plaintiff commented in support of the Remand Redetermination on August 15, 2011. Pl. Union Steel's Comments on the U.S. Department of Commerce's July 15, 2011 Final Results of Redetermination Pursuant to Ct. Remand (Aug. 15, 2011), ECF No. 120. On the same day, defendant-intervenors filed comments opposing the Remand Redetermination. Comments on Final Results of Redetermination Pursuant to Ct. Order (Aug. 15, 2011), ECF No. 118 ("Nucor's Comments"); United States Steel Corporation's Comments on the Final Results of Redetermination Pursuant to Remand Issued by the Department of Commerce (Aug. 15, 2011), ECF No. 119 ("U.S. Steel's Comments"). On August 26, 2011, defendant replied to the comments of defendant-intervenors. Def.'s Resp. to Def.-Intervenors' Comments on the Department of Commerce's Remand Results (Aug. 26, 2011), ECF No. 123.

Finally, on February 15, 2012, Union notified the court of a notice published by Commerce indicating that going forward Commerce no longer will employ the zeroing methodology in administrative reviews of antidumping duty orders. Notice of Supplemental Authority (Feb. 15, 2012), ECF No. 129 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin & Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012)). Defendant moved for leave to reply to this notification on March 6, 2012. Def.'s Mot. for Leave to File Resp. to Pl.'s Notice of Supplemental Authority (Mar. 6, 2012), ECF No. 130.

II. Discussion

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

The Remand Redetermination altered the model-match methodology as applied in the fourteenth review so that U.S. sales of Union's painted CORE products are no longer compared with home-market sales of products in a category including both painted CORE products and products that were laminated with plastic. In the Remand Redetermination, Commerce also "adjusted the cost of production to account for purchases of steel substrate from affiliated parties in Union's margin calculation," citing a remand redetermination Commerce prepared in another case. *Remand Redetermination* 2 (citing *United States Steel Corp. v. United States*, 35 CIT __, 759 F. Supp. 2d 1349 (2011) ("*US Steel*")). The court previously ordered that Commerce, in preparing the remand redetermination at issue in this case, "take into account any other adjustments to redetermined dumping margins resulting from the court's remand order in *US Steel*, which pertains to the same administrative review that is the subject of this litigation." *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1314 n.6. The court now has affirmed the Department's decisions set forth in the remand redetermination responding to the court's order in *US Steel. United States Steel Corp. v. United States*, 36 CIT __, Slip Op. 12–55 (April 25, 2012).

A. The Remand Redetermination Lawfully Determined that the Non-Laminated, Painted CORE May Not Be Compared to the Laminated Core as Products "Identical in Physical Characteristics"

In an administrative review, Commerce determines, for each entry of the subject merchandise, the normal value, the export price or constructed export price, and the dumping margin. 19 U.S.C. § 1675(a)(2). Determining a dumping margin requires Commerce to compare the export price or constructed export price with the normal value, which typically is based on the price at which the foreign like product is sold for consumption in the exporting country (the "home market"). *Id.* § 1677b(a)(1)(B). The statute directs in § 1677(16)(A) that Commerce, in determining the foreign like product, first seek to

compare a U.S. sale of subject merchandise with a home-market sale of merchandise "which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise." If no such comparison can be satisfactorily made, Commerce, in accordance with § 1677(16)(B), seeks to match the subject merchandise with merchandise produced in the same country, produced by the same person, that is "like that merchandise in component material or materials and in the purposes for which used," and "approximately equal in commercial value to that merchandise." If the latter comparison cannot be satisfactorily made under § 1677(16)(B), Commerce is to seek to match the subject merchandise under § 1677(16)(C) with merchandise produced in the same country and by the same person that is "of the same general class or kind as the subject merchandise . . . like that merchandise in the purposes for which used, and . . . may reasonably be compared with that merchandise."

To determine the sales in the home market that matched the sales of subject merchandise, a process to which Commerce refers as "model matching," Commerce requested information from respondents on "Product Characteristics," including, as is relevant here, "Type." *See Letter from Commerce to Dongbu Steel Co., Ltd.* 34 (Dec. 6, 2007) (Admin. R. Doc. No. 4454).[1] The questionnaire directed respondents to classify each of their CORE products within one of four type categories: (1) "Clad (metals bonded by the hot-rolling process), less than 3/16″ in thickness"; (2) "Coated/plated with metal: Painted, or coated with organic silicate, Polyvinylidene Fluoride ('PVDF')"; (3) "Coated/plated with metal: Painted, or coated with organic silicate, All Other (*i.e.*, other than PVDF)"; and (4) "Not painted, and not coated with organic silicate." *Id.* In response, Union proposed reporting its sales of laminated CORE using an additional type category described as "Coated/plated with metal: Laminated with film." *Letter from Union to the Sec'y of Commerce* B-5-B-6 (Feb. 4, 2008) (Admin. R. Doc. No. 4530) ("*Union's Feb. 4, 2008 Questionnaire Resp.*").

In the Final Results, Commerce rejected Union's proposal that laminated CORE comprise a separate type category for model-matching purposes and accordingly included laminated CORE within the "other painted" type category. Issues & Decisions Mem., A-580–816, ARP 7–07, at 7–8 (Mar. 9, 2009) (Admin. R. Doc. No. 4868)

[1] The administrative record includes the cover letter that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") sent to each respondent with the initial information requests in this review but includes the full information request only for another respondent in the review, Dongbu Steel Co., Ltd. The court presumes that the information requests were identical.

("*Decision Mem.*"). As a result, Commerce compared, as merchandise "identical in physical characteristics" for purposes of § 1677(16)(A), subject merchandise consisting of non-laminated, painted CORE with not only home-market, non-laminated, painted CORE but also with Union's home-market sales of laminated CORE products, which Union did not sell in the U.S. market during the POR. *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1312. Commerce explained its rejecting Union's proposed change to the model-match criteria by stating that Union had "not provided substantial evidence that 1) the model-match criteria are not reflective of the subject merchandise in question, 2) there have been industry-wide changes to the product that merit a modification, or 3) there is some other compelling reason." *Decision Mem.* 7. Commerce noted that Union had shown certain differences in costs between laminated and non-laminated, painted CORE products, but called these differences "overstat[ed]" and rejected Union's proposed change as "the same methodology that the Department considered in the previous review and found to be without merit." *Id.*[2]

In response to Union's challenging before the court the Department's decision to reject Union's proposed change to the model-match methodology, Compl. ¶¶ 16–17, defendant requested a voluntary remand. *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1312–13. The court's remand order on the model-match issue was "in essentially the form proposed in defendant's draft order, but updated to reflect the significant development" since the voluntary remand request. *Id.* at __, 755 F. Supp. 2d at 1313. The development to which the court referred was the court's decision in litigation challenging the final results of the previous (thirteenth) administrative review of the order, in which the court held the Department's model-match methodology "unlawful absent a finding of fact, supported by record evidence, that laminated CORE and painted, nonlaminated CORE are 'identical in physical characteristics' within the meaning of that statutory provision [*i.e.*, 19 U.S.C. § 1677(16)(A)]." *Id.* at __, 755 F. Supp. 2d at 1314 (citing *Union Steel v. United States*, 35 CIT __, __, 753 F. Supp. 2d 1317, 1322–23 (2011) ("*Union Steel III*")). The court's remand order allowed the Department to "reopen the record to investigate whether only minor and commercially insignificant physical differences dis-

[2] Commerce also considered and rejected the argument that "laminated products were not considered when the model-match methodology was developed" and the argument that a Commerce memorandum from a previous review indicated that "certain laminated products were outside the scope." Issues & Decisions Mem., A-580–816, ARP 7–07, at 7 (Mar. 9, 2009) (Admin. R. Doc. No. 4868) ("*Decision Mem.*").

tinguish Union's laminated products from the non-laminated products to which the Department compared Union's laminated products" and ordered that:

> if substantial record evidence does not support a finding that only minor and commercially insignificant physical differences distinguish Union's laminated products from the non-laminated products to which the Department compared Union's laminated products, the Department must alter the model match methodology that was applied in the Final Results so that laminated and nonlaminated CORE products are not compared according to 19 U.S.C. § 1677(16)(A) . . . .

Id. at __, 755 F. Supp. 2d at 1316.

In the Remand Redetermination, Commerce concluded that reopening the record was not necessary. *Remand Redetermination* 5. Noting that the record contained evidence pertaining to the cost of manufacture, sales price, production processes, and marketing of both laminated and non-laminated, painted CORE, the Department stated that "sufficient factual information already exists on the record for the Department to determine whether the physical differences distinguishing laminated CORE products and non-laminated, painted CORE products are minor and not commercially significant." *Id.* Upon considering the record evidence, Commerce determined that the two groups of products were not identical in physical characteristics when considered under 19 U.S.C. § 1677(16)(A). *Id.* Commerce based this determination on four findings: (1) the two product groups are distinguished by significant physical differences, *id.* at 7 ("[L]aminated CORE products by their very nature are not painted products" and "are coated by attaching a plastic film to a CORE substrate"); (2) "the cost of production for laminated CORE products is higher than other non-laminated, painted CORE products," *id.* ; (3) "the unit price for laminated CORE products is considerably higher than the unit price of non-laminated, painted CORE products," *id.* at 8; and (4) laminated and non-laminated products are marketed differently, the record evidence having demonstrated that "Union and Unico (Union's affiliate) both differentiate between laminated CORE products and non-laminated, painted CORE products in their brochures," *id.*

The Department's determination on remand not to compare laminated and non-laminated, painted CORE as products "identical in physical characteristics," 19 U.S.C. § 1677(16)(A), rests on essential factual findings that are supported by substantial record evidence. Specifically, the evidence justified the Department's findings that the two groups of products differed physically (because of the presence of

laminate as opposed to paint) and also differed as to cost of manufacture, sales price, and marketing. The record evidence, considered on the whole, supported the finding that the physical differences had commercial significance.

Substantial evidence supports the Department's finding that the products are physically different, with a Union questionnaire response indicating that, unlike non-laminated, painted CORE, laminated CORE has "either a coating of PET ('Polyethylene Telephthalate')[3] film that is thermally-sealed onto heated, primer-coated CORE substrate after it passes through a drying oven or a colored PVC ('Polyvinyl Chloride') film attached to the CORE substrate using an adhesive." *Union's Feb. 4, 2008 Questionnaire Resp.* B-5-B-6; *see also Letter from Union to the Sec'y of Commerce* 28 (July 16, 2008) (Admin. R. Doc. No. 4675) ("*Union's July 16, 2008 Questionnaire Resp.*") ("The only substantive difference between laminated products and other painted CORE products is that a laminated CORE product is one that is coated with a film, typically either a PET film or a PVC film, instead of being coated with paint.").

Substantial evidence also supports the Department's findings that "the cost of production for laminated CORE products is higher than other non-laminated, painted CORE products" and that "the unit price for laminated CORE products is considerably higher than the unit price of non-laminated, painted CORE products." *Remand Redetermination* 7–8. In its February 2008 questionnaire response, Union reported that "[l]aminating the steel increases production costs . . . and the sales price" by a substantial percentage. *Union's Feb. 4, 2008 Questionnaire Resp*. B-6. Union also expressed, in a supplemental questionnaire response in July 2008, that "[b]ecause PET film and PVC are more expensive than the various paints used for other color coated products, including PVDF, and require more complicated know-how, the production cost and sales price are higher than other painted products." *Union's July 16, 2008 Questionnaire Resp.* 30. These statements are supported by an exhibit to the July 2008 supplemental questionnaire response showing, first, that the cost to manufacture a unit of laminated CORE significantly exceeded the cost to manufacture a unit of non-laminated, painted CORE. *Id.* exhibit B-20. Second, this exhibit shows that Union's per-unit sale price for laminated CORE significantly exceeded the per-unit sale price for the "all other" type of painted CORE. *Id.*

Next, substantial evidence supports the Department's finding that laminated and non-laminated, painted CORE are marketed differ-

[3] This document, as well as certain others, refers to "Telephthalate," as opposed to the more commonly recognized term "terephthalate."

ently. *Remand Redetermination* 8. As part of a January 2008 questionnaire response, Union submitted a document labeled "Union's and UNICO's Product Brochures" listing laminated and non-laminated, painted CORE under different headings on different pages. *Letter from Union to the Sec'y of Commerce* exhibit A-28 (Jan. 22, 2008) (Admin. R. Doc. No. 4504). One page referred to "High-tech Steel" and described three brand names of products that appear to be laminated CORE: (1) "Unipet," which features "[t]hermally laminated PET film"; (2) "Unilux," which is described as "[t]hermally laminated silver-or-aluminum-deposited high-lux reflection film on the surface of electrogalvanized steel"; and (3) "White Board," which is described as "[t]hermally laminated solid white PET film on the steel surface." *Id.* exhibit A-28, at 570.[4] Another page referred to "Pre-painted Steel" and listed several "Available Products," none of which was advertized as laminated or as coated in PET or PVC film. *Id.* exhibit A-28, at 569. Also supporting the finding that these types of CORE are marketed separately is an exhibit to the July 2008 supplemental questionnaire response that includes a brochures for Unipet labeled "PET Film-laminated Steel Sheets" and printouts from the website of Unico referring to CORE products marketed with reference to their laminated quality. *Union's July 16, 2008 Questionnaire Resp.* exhibit B-21.

In summary, Commerce permissibly reached an ultimate determination that laminated CORE products and non-laminated ("other painted") CORE products were distinguished by physical differences that were not minor and were commercially significant. Each of the factual findings that were essential to the Department's decision was supported by substantial record evidence.

Defendant-intervenors offer several reasons why they believe the court is required by law to reject the Department's decision on the model-match issue as set forth in the Remand Redetermination. The court rejects these arguments.

Nucor argues that the Department's decision is arbitrary and not supported by substantial evidence, alleging that "the Department has failed to explain why the record evidence that it previously found unconvincing or inconclusive now provides a sufficient basis to make a model-match change." Nucor's Comments 2. In support of this argument, Nucor cites the Issues and Decision Memorandum incorporated into the Final Results ("Decision Memorandum") in asserting

[4] The brochure describes a fourth brand, "Univure," which the brochure does not identify clearly as either laminated or painted CORE. *Letter from Union to the Sec'y of Commerce* exhibit A-28, at 570 (Jan. 22, 2008) (Admin. R. Doc. No. 4504) (describing Univure as "Layer of patterns printed on the steel surface by removing the laminated printed film with various patterns.").

that Commerce previously found that "any differences in physical characteristics, production processes, and marketing between laminated and painted CORE are minor." *Id.* at 3 (citing *Decision Mem.* 7–8). Nucor also argues that "the Department previously determined that cost and price data on the record supported maintaining the current model-match criteria." *Id*. at 4. Further, Nucor argues that the Department's findings in the Remand Redetermination were not consistent with the Department's findings in certain proceedings of the thirteenth administrative review of the order. Nucor's Comments 3 (citing "an initial remand determination related to the previous administrative review"). U.S. Steel makes a similar argument, maintaining that the Remand Redetermination is inconsistent with the Department's statements in certain proceedings in the thirteenth administrative review ("13AR"). U.S. Steel's Comments 6–10. U.S. Steel argues, specifically, that the Department's statements were "inconsistent with specific assessments made by Commerce in the 13AR," *id.* at 7, such as statements regarding the significance of physical differences, *id.*, differences in production processes, *id.* at 8, and differences in production costs, *id.* at 9.

These arguments are unpersuasive. Commerce reached new findings of fact in determining whether the physical differences between laminated and non-laminated, "other painted" CORE products were minor and not commercially significant. It did so to comply with the court's previous opinion and order, in which the court held that comparing laminated CORE with painted, non-laminated CORE as identical merchandise is unlawful absent a valid finding of fact that these two groups of products are "identical in physical characteristics" within the meaning of 19 U.S.C. § 1677(16)(A). *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1315–16. The order directed that Commerce review and reconsider its model-match methodology, including, specifically, the decision to deny Union's request that the methodology be changed with respect to the treatment of laminated CORE. *Id.* at __, 755 F. Supp. 2d at 1315–16. The order gave Commerce the option of reaching these factual determinations on the existing record or reopening the record "to investigate whether only minor and commercially insignificant physical differences distinguish Union's laminated products from the non-laminated products to which the Department compared Union's laminated products." *Id.* at __, 755 F. Supp. 2d at 1316. Commerce determined that it did not need to reopen the record to make the factual determinations necessary for compliance with the court's remand order. For the reasons the court discussed previously in this opinion and order, the findings on which Commerce based its ultimate model-match determination

are supported by substantial record evidence and, accordingly, must be upheld on judicial review. Any contrary factual determinations that the Department may have reached in deciding the model-match issue in the Final Results, or in a previous administrative review are, therefore, of no moment.

Moreover, it appears that the premise of Nucor's argument as to the Final Results is misguided. Although finding broadly that "the current model match methodology regarding laminated products is reflective of subject merchandise in the instant review," *Decision Mem.* 7, Commerce, in preparing the Final Results, did not set forth clear and specific findings regarding differences in physical characteristics, production processes, marketing, or price between the laminated and the non-laminated, painted CORE products that were the subject of the fourteenth administrative review.[5] As a general matter, the Decision Memorandum analyzed whether Union had shown that the model-match criteria were not reflective of the subject merchandise in question, whether there had been industry-wide changes to the product that merited a modification, or whether there was some other compelling reason to change the model-match criteria. In contrast, the Remand Redetermination, as directed by the court, expressly addressed the question of whether the physical differences between laminated and non-laminated, painted CORE products were minor and not commercially significant.

Nucor is also incorrect in arguing that the Remand Redetermination is deficient for lack of a satisfactory explanation for the Department's change in position. As the Remand Redetermination explains, Commerce changed its position upon applying the legal standard that Congress established in 19 U.S.C. § 1677(16)(A), as judicially construed.

Nucor objects, further, that Commerce is reversing its position "based on the data and views of one CORE producer" who "only began

[5] The Issues and Decision Memorandum stated as follows:

> Although Union cites to certain cost information based on its questionnaire responses submitted in this review, it is the same methodology that the Department considered in the previous review and found to be without merit. Union's cost information showed a comparatively large cost difference when Union isolated the raw material used solely for lamination, compared with raw material used for some other painted products. This analysis overstates the differences between laminated and other painted products because it does not account for the numerous aspects of total production cost which are the same for painted and laminated products.
>
> Thus, consistent with the previous reviews of CORE form Korea, the Department finds that the current model match methodology regarding laminated products is reflective of subject merchandise in the instant review. Further, neither changes in industry standards nor other compelling reasons have been presented. Therefore, we have not changed our model-match methodology in this respect.

Decision Mem. 7–8.

challenging the Department's model-match before the Court of International Trade after the 13th administrative review," and that "there is no evidence on the record that the model-match hierarchy proposed by Union is representative of the Korean CORE industry, let alone the CORE industry as a whole." Nucor's Comments 5. Nucor submits that approval of Union's proposal "has the potential to encourage future manipulation of the model-match criteria by respondents." *Id.* The court finds no merit in this wide-ranging objection. Union unquestionably had the right under section 516A of the Tariff Act, 19 U.S.C. § 1516a, to challenge as contrary to 19 U.S.C. § 1677(16)(A) the Department's model-match methodology as applied to its own products in the fourteenth review. Upon judicial review, the court was required to adjudicate Union's claim according to the applicable standard of review, under which the court must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

U.S. Steel argues that Commerce failed to apply the correct legal standard in determining that the physical differences are commercially significant. U.S. Steel's Comments 4–6. According to U.S. Steel, the correct legal standard, as sustained by the Court of Appeals in *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1385 (Fed. Cir. 2001), is an "industry-wide" standard under which the physical differences must be recognized as commercially significant by an industry as a whole rather than by only an individual producer. Steel's Comments 5. U.S. Steel argues that Commerce erred in the Remand Redetermination when it "did not apply the industry-wide standard" and instead "based its analysis solely on Union's cost of production, prices and product brochures." *Id.* at 6. U.S. Steel argues that "[l]ike the case in *Pesquera*, here there was absolutely no evidence of industry-wide acceptance of the difference between paints and laminates as a commercially meaningful difference." *Id.* This was legal error, U.S. Steel maintains, because Commerce was obliged to supply a reasoned analysis upon changing its prior policies and standards. *Id.*

U.S. Steel's argument misconstrues the holding in *Pesquera*. The case does not hold that Commerce must find a basis in commercially-established, industry-wide product standards before concluding that *any* two groups of products are not "identical in physical characteristics" for purposes of 19 U.S.C. § 1677(16)(A). In *Pesquera*, the Court of Appeals cited approvingly the Department's relying on industry-wide standards for concluding that there was no commercially significant difference between "premium" salmon and "super-premium"

salmon. *Pequera*, 266 F.3d at 1385. The Court of Appeals opined on the advantage of industry-wide standards in the context of the issue before it, which arose because the two grades of salmon were shown by record evidence to differ in only minor, commercially insignificant respects, such as the presence of certain minor aesthetic flaws. *Id.* at 1383–85. *Pesquera* upheld the Department's comparing as identical sales of salmon meeting a quality grade of "super premium" with sales of salmon meeting only the quality grade of "premium" because Commerce found, based on substantial record evidence, that most industry participants did not distinguish between the two grades. *Id.* This case presents facts distinctly different from *Pesquera.* Here, the two groups of products compared in the Final Results were not shown by substantial record evidence to be "identical in physical characteristics" within the meaning of the statutory provision.

U.S. Steel also contends, inaccurately, that Commerce improperly construed evidence that laminated and non-laminated, painted CORE go through separate production processes as establishing that these products had commercially significant physical differences. U.S. Steel's Comments 8–9. Commerce did not base its conclusion of commercial significance solely on the "the fact that different production processes happen to be used." *Id.* at 8. Instead, Commerce determined that different production processes resulted in the physical differences that, for various reasons grounded in record evidence, were commercially significant. *Remand Redetermination* 9 ("Union's questionnaire responses, and Union's price and cost data, demonstrate that the physical differences between laminated CORE products and non-laminated, painted CORE products are neither minor nor commercially insignificant.").

For the reasons discussed in the foregoing, the court must affirm the decision in the Remand Redetermination not to compare the subject non-laminated, painted CORE with home-market laminated CORE as merchandise identical in physical characteristics under 19 U.S.C. § 1677(16)(A). Based on the Department's valid findings and the reasoning set forth in the Remand Redetermination, the court affirms the Department's decision to classify the laminated CORE products as a separate type category and thereby exclude Union's home-market sales of this laminated CORE from the respective comparisons.

B. The Court Reconsiders its Prior Decision Upholding the Use of Zeroing in the Fourteenth Review and Orders an Appropriate Remand

Plaintiff seeks reconsideration of the court's decision in *Union Steel II* affirming the Department's use of the zeroing methodology. Plaintiff argues that after *Union Steel II* was issued, *Dongbu Steel Co. v. United States*, 635 F.3d 1363, established that the court's decision affirming zeroing was incorrect. Pl.'s Mot. 1–2. In *Union Steel II*, the court relied on various decisions of the Court of Appeals, issued prior to *Dongbu*, which had upheld the Department's use of zeroing in administrative reviews despite the Department's having ceased applying the zeroing methodology in original investigations. *Union Steel II*, 35 CIT at __, 755 F. Supp. 2d at 1315. Plaintiff argues that the prior decisions of the Court of Appeals are not precedents supporting the use of zeroing in this case, citing language in *Dongbu* in which the Court of Appeals stated that it had "never considered" the precise question of whether Commerce permissibly could interpret the language of 19 U.S.C. § 1677(35) one way with respect to investigations and another way with respect to reviews. Pl.'s Mot. 3–4; *Dongbu*, 635 F.3d at 1370.

The court first addresses the question of the authority under which it may reconsider its prior order. The authority under which plaintiff moves, USCIT Rule 59(a)(2), does not apply here. *See Union Steel v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1356, 1366–67 (2011) ("*Union Steel IV*"). USCIT Rule 59(a)(2) applies "[a]fter a nonjury trial" and allows the court to reconsider prior decisions when a party moves for a new trial or rehearing "not later than 30 days after the entry of the judgment or order." USCIT R. 59(b). Although the Court of International Trade previously has concluded that the concept of a "nonjury trial" encompasses matters, such as this case, decided on the agency record, *see NSK Corp. v. United States*, 32 CIT 1497, 1502, 593 F. Supp. 2d 1355, 1362 (2008), Rule 59(a)(2) does not authorize the court to hear plaintiff's motion because that motion, filed on April 5, 2011, came more than thirty days after the court's February 15, 2011 decision in this case. *See* USCIT R. 6(b)(2) ("The court must not extend the time to act under . . . 59(b)"). Nothing in the court's rules, however, provides that USCIT Rule 59 is the only method by which the court may reconsider a prior order. *See Timken Co. v. United States*, 6 CIT 76, 78, 569 F. Supp. 65, 68 (1983); *Union Steel IV*, 35 CIT at __, 804 F. Supp. 2d at 1367.

The alternative authority cited by plaintiff, USCIT Rule 60(b)(6), also is inapplicable to plaintiff's motion because it applies only to a

final judgment, which has not yet been entered in this case. *See* USCIT Rule 60(b)(6) (stating that "the court may relieve a party . . . from a final judgment, order or proceeding for . . . any other reason that justifies relief."). As the advisory notes to the Federal Rules of Civil Procedure clarify, Rule 60(b) applies only to final decisions. Fed. R. Civ. P. 60(b), advisory notes ("[I]nterlocutory judgments are not brought within the restrictions of the rule.").

Instead, the court may reconsider its decision in *Union Steel II* pursuant to its general authority, which is recognized by USCIT Rule 54, to reconsider a non-final order prior to entering final judgment. Rule 54 states that "any order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action . . . and may be revised at any time before the entry of judgment." USCIT R. 54(b). As has been observed with respect to Fed. R. Civ. P. 60(b), motions for reconsideration not subject to Rule 60(b) "are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." *See* Fed. R. Civ. P. 60(b), advisory notes. The court previously relied on this general authority in its decision reconsidering the order upholding the use of zeroing in the thirteenth administrative review of this order. *Union Steel IV*, 35 CIT at __, 804 F. Supp. 2d at 1367 (citing *Timken*, 6 CIT at 78, 569 F. Supp. at 68 ("[T]he court retains the plenary power to modify or alter its prior non-final rulings, particularly where the equitable powers of the court are invoked.")).[6]

The court concludes that reconsideration of its prior decision affirming the use of zeroing is warranted. In two decisions issued in 2011, *JTEKT Corp. v. United States*, 642 F.3d 1378, 1383–85 (Fed. Cir. 2011) and *Dongbu*, the Court of Appeals held that the final results of administrative reviews in which zeroing was used must be remanded so that Commerce may explain its interpreting the language of § 1677(35) inconsistently with respect to the use of zeroing in investigations and the use of zeroing in administrative reviews. Following the decisions of the Court of Appeals in *JTEKT Corp.* and *Dongbu*, remands to Commerce for such an explanation have been ordered in previous cases before this Court. *See*, *e.g.*, *SKF USA Inc. v. United States*, 35 CIT __, __, 800 F. Supp. 2d 1316, 1326 (2011); *SKF USA Inc. v. United States*, 35 CIT __, __, Slip Op. 11–94, at 10–13 (Aug. 2, 2011); *JTEKT Corp. v. United States*, 35 CIT __, __, 780 F. Supp. 2d 1357, 1363–64 (2011).

[6] Although this Court in a prior case "declin[ed] to find the authority to rehear interlocutory orders under USCIT Rule 54(b)," it did so when reconsideration under USCIT Rule 59(a)(2) remained available, and thus that case did not involve the issue before the court in this case, in which the time for a motion under USCIT Rule 59 has lapsed. *NSK Corp. v. United States*, 32 CIT 1497, 1502 n.7, 593 F. Supp. 2d 1355, 1362 n.7 (2008).

The court does not have before it a statutory construction by the Department that is satisfactory under the reasoning of *Dongbu* and *JTEKT Corp.* Therefore, the court will set aside its previous affirmance of the use of zeroing in *Union Steel II* and will direct Commerce to provide the explanation contemplated by the Court of Appeals in *Dongbu* and *JTEKT Corp.*, each of which questioned the Department's construction of § 1677(35) and declined to affirm the judgment of the Court of International Trade upholding the use of zeroing in an administrative review of an antidumping duty order. *See Dongbu*, 635 F.3d at 1371–73; *JTEKT Corp.*, 642 F.3d at 1383–85. The Decision Memorandum attempts to explain the inconsistent interpretation of § 1677(35) using a rationale essentially the same as the one the Court of Appeals rejected in *JTEKT Corp. Decision Mem.* 10–11. After providing a list of distictions between investigations and administrative reviews, the Decision Memorandum summarily concludes that "[b]ecause of these distinctions," the Department's inconsistent interpretation of § 1677(35) was not "improper." *Id.*[7] Missing is reasoning adequate to link the identified distinctions to the Department's varying constructions of the words of the statute in the two contexts. The Court of Appeals concluded in *JTEKT Corp.* that providing this list of distinctions "failed to address the relevant question—why is it a reasonable interpretation of the statute to zero

[7] The entire discussion on the statutory construction issue reads as follows:
The Federal Circuit (Federal Circuit) has found the language and congressional intent behind section 771(35) of the Act to be ambiguous. Furthermore, antidumping investigations and administrative reviews are different proceedings with different purposes. Specifically, in antidumping investigations, the Act specifies particular types of comparisons that may be used to calculate dumping margins and the conditions under which those types of comparisons may be used. The Act discusses the types of comparisons used in administrative reviews. [The] Department's regulations further clarify the types of comparisons that will be used in each type of proceeding. In antidumping investigations, the Department generally uses average-to-average comparisons, whereas in administrative reviews the Department generally uses average-to-transaction comparisons. The purpose of the dumping margin calculation also varies significantly between antidumping investigations and reviews. In antidumping investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports. In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of merchandise subject to the antidumping duty order. Because of these distinctions, the Department's limiting of the Final Modification to antidumping investigations involving average-to-average comparisons does not render its interpretation of section 771(35) of the Act in administrative reviews improper. Therefore, because section 771(35) of the Act is ambiguous, the Department may interpret that provision differently in the context of antidumping investigations involving average-to-average comparisons than in the context of administrative reviews.
Decision Mem. 10–11.

in administrative reviews, but not in investigations?" *JTEKT Corp.*, 642 F.3d at 1384.[8]

The arguments other parties to this case advance in opposition to reconsideration are not persuasive. Defendant argues that *Dongbu* does not justify reconsideration because *Dongbu* was limited to its unique procedural setting, in which Commerce lacked opportunity to respond to the plaintiff's statutory interpretation argument. Def.'s Opp'n 4–5. The court does not read the opinion in *Dongbu* so narrowly as to consider the reasoning of *Dongbu* inapplicable here. To do so would miss the more general point that in *Dongbu*, as well as in *JTEKT Corp.*, the Court of Appeals refused to affirm a judgment of the Court of International Trade upholding the use of zeroing in an administrative review. Moreover, *JTEKT Corp.* vacated a judgment upholding the Department's use of zeroing when the Department not only had an opportunity to explain such use but did so using essentially the same rationale offered here.

U.S. Steel argues that the court should not reconsider its decision upholding zeroing because *Dongbu* did not hold the Department's inconsistent interpretations of § 1677(35) to be unlawful but merely held these interpretations to be insufficiently explained and, therefore, did not change the controlling law. U.S. Steel's Opp'n 5–6. Although U.S. Steel is correct that the Court of Appeals has not held the Department's interpretations unlawful, it does not follow that reconsideration is inappropriate. *JTEKT Corp.* and *Dongbu* signify that the Department's interpretation of § 1677(35) is unsustainable absent an explanation different from the one the Department put forth in the fourteenth review. *See JTEKT Corp.*, 642 F.3d at 1383–85; *Dongbu*, 635 F.3d at 1371–73.

Nucor's objections are similarly unpersuasive. Nucor cites the fact that Union's motion for reconsideration was filed more than thirty days after the court's decision in *Union Steel II*, thus making reconsideration under USCIT Rule 59(a) unavailable, and also cites the inapplicability of USCIT Rule 60(b) to the non-final order issued in *Union Steel II*. Nucor's Opp'n 2–4. Nucor's arguments err in failing to recognize the court's general authority to reconsider non-final orders.

In summary, remand in this case is appropriate so that Commerce may alter its decision to apply zeroing with respect to Union in the fourteenth review or, alternatively, provide an explanation as contem-

[8] In litigation arising from the sixteenth administrative review of the order at issue in this case, the Court of International Trade upheld an explanation by Commerce addressing the statutory construction issue identified in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011). *Union Steel v. United States*, 36 CIT __, Slip Op. 12–24 (Feb. 27, 2012). Neither that explanation nor one similar to it is before the court in this proceeding.

plated in *JTEKT Corp*. and *Dongbu*, *i.e.*, an explanation of how the language of 19 U.S.C. § 1677(35) as applied to the use of zeroing permissibly may be construedin one way with respect to investigations and the opposite way with respect to administrative reviews.

III. Conclusion and Order

Upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

ORDERED that the *Final Results of Redetermination Pursuant to Remand* (July 15, 2011), ECF No. 115 ("Remand Redetermination") be, and hereby are, AFFIRMED with respect to the decision stated therein to modify the model-match methodology of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"); it is further

ORDERED that Defendant's Motion for Leave to File Response to Plaintiff's Notice of Supplemental Authority, as filed on March 6, 2012, be, and hereby is, GRANTED, and that Defendant's Response to Plaintiff's Notice of Supplemental Authority be, and hereby is, accepted as filed on March 6, 2012; it is further

ORDERED that plaintiff's Motion for Reconsideration, filed on April 5, 2011, be, and hereby is, GRANTED; it is further

ORDERED that the court's previous affirmance of the Department's decision in *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Admin. Review & Partial Rescission*, 74 Fed. Reg. 11,082 (Mar. 16, 2009) ("Final Results") to apply the zeroing methodology be, and hereby is, set aside; it is further

ORDERED that, on remand, Commerce must reconsider its decision in the Final Results to apply the zeroing methodology and must either alter that decision or explain how the language of 19 U.S.C. § 1677(35) permissibly may be construed in one way with respect to the use of the zeroing methodology in antidumping investigations and the opposite way with respect to the use of that methodology in antidumping administrative reviews, and shall recalculate any antidumping duty margin applied to plaintiff that is affected by an alteration of that decision; it is further

ORDERED that Commerce shall file the second remand redetermination with the court not later than sixty (60) days from the date of this Opinion and Order, and that plaintiff and defendant-intervenors shall have thirty (30) days from the date on which Commerce files the second remand redetermination to file any comments thereon; and it is further

ORDERED that defendant shall be allowed fifteen (15) days from the last filing of any comments by plaintiff or defendant-intervenors in which to file a rebuttal or other response to the comments of plaintiff or defendant-intervenors.

Dated: April 25, 2012
New York, New York

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

Slip Op. 12–57

WUHU FENGLIAN CO., LTD., AND SUZHOU SHANDING HONEY PRODUCT CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, - and - AMERICAN HONEY PRODUCERS ASSOCIATION, AND SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 11–00045

[Remanding the Department of Commerce's Final Results and Rescission of Antidumping Duty New Shipper Reviews to accept certain excluded evidence; denying Plaintiffs' motion to supplement administrative record]

Dated: April 25, 2012

Yingchao Xiao, Lee & Xiao, of San Marino, CA for Plaintiffs.

Courtney S. McNamara, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Sapna Sharma*, Attorney, United States Department of Commerce, of Counsel.

Michael J. Coursey and *R. Alan Luberda*, Kelley Drye & Warren LLP, of Washington, DC for Defendant-Intervenors.

OPINION & ORDER

CARMAN, JUDGE:

Plaintiffs Wuhu Fenglian Co., Ltd. ("Fenglian") and Suzhou Shanding Honey Product Co., Ltd ("Suzhou") (collectively, "Plaintiffs") challenge a decision rendered by the U.S. Department of Commerce ("Commerce") rescinding antidumping duty new shipper reviews requested by Plaintiffs. (Brief in Supp. of Pls.' R. 56.2 Mot. for J. Upon the Agency R. ("Pls.' Mot.") 1–2.) For the reasons set forth below, Commerce's determination is remanded for Commerce to accept and consider certain excluded evidence.

Background

On February 4, 2010, Plaintiffs requested new shipper reviews on honey from the People's Republic of China. (Pls.' Mot. 3.) Commerce issued questionnaires and supplemental questionnaires to which Plaintiffs timely responded, and decided on July 7, 2010 that because

of the "extraordinarily complicated" nature of this review, the deadline for a preliminary determination would be extended to November 2, 2010. (*Id.* (*citing Honey From the People's Republic of China: Extension of Time Limit for the Preliminary Results for New Shipper Review*, 75 Fed. Reg. 38,980 (July 7, 2010)).) Commerce published its Preliminary Determination on September 10, 2010, rescinding the new shipper reviews on the grounds that the sales made by Fenglian and Suzhou did not appear to be bona fide. *Honey From the People's Republic of China: Preliminary Intent to Rescind New Shipper Reviews*, 75 Fed. Reg. 55,307, 55,308 (Sep. 10, 2010) ("Preliminary Determination"). Commerce's Final Determination, which Plaintiffs challenge by this lawsuit, "made no changes to [the] preliminary decision to rescind the [new shipper reviews] of Suzhou and Fenglian." *Honey From the People's Republic of China: Final Results and Rescission of Antidumping Duty New Shipper Reviews*, 76 Fed. Reg. 4,289, 4,290 (Jan. 25, 2011) ("Final Determination").

As a threshold matter, Plaintiffs dispute Commerce's decision to reject as untimely two of Plaintiffs' submissions made during the course of the administrative proceeding. The first was Plaintiffs' September 18, 2010 submission consisting of rebuttal comments to an August 24, 2010 submission from Petitioners (Defendant-Intervenors in this action). (Pls.' Mot. 4.) The second was Plaintiffs' September 22, 2010 submission consisting of factual information aiming to rebut certain U.S. Customs and Border Protection data ("CBP data") that Commerce had placed on the record on September 2, 2010. (*Id.*) In rejecting each of these submissions from Plaintiffs, Commerce cited 19 C.F.R. § 351.301(c), which regulates the time within which interested parties may rebut certain types of information placed on the record. 19 C.F.R. § 351.301(c)(1), *see also* Def.'s Confid. App'x in Supp. of Its Resp. in Opp. to Pls.' Mot. for J. Upon the Agency R. ("Def.'s App'x") Exs. M, N (letters from Commerce rejecting Plaintiffs' September 18 submissions), *and* Confid. Exs. for Brief in Supp. of Pls.' Rule 56.2 Mot. for J. Upon the Agency R. ("Pls.' App'x") Ex. 4 (letter from Commerce rejecting Suzhou's September 22 submission).[1]

Plaintiffs also assert that Commerce failed to issue enough questionnaires to obtain all essential data before rendering the Final Determination. In addition to the initial and supplemental questionnaires that Commerce did issue, Plaintiffs asked Commerce to issue two further supplemental questionnaires. On September 4, 2010, Plaintiffs requested and received a supplemental questionnaire, but

[1] Commerce also issued, on September 27, 2010, a letter rejecting a joint September 22 submission by Fenglian and Suzhou for being untimely submitted, although this rejection did not specifically cite 19 C.F.R. § 351.301(c). (*See* Def.'s App'x, Ex. P.)

it was not addressed to the issues Plaintiffs had wanted. (Pls.' Mot. 4.) On September 30, 2010, Plaintiffs made one final request for a supplemental questionnaire, which Commerce refused. (*Id.* at 5; Def.'s App'x Ex. R.)

Plaintiffs now also move the Court to compel supplementation of the administrative record to include certain factual information not previously presented to Commerce (Mot. to Supp. Admin. R. ("Mot. to Supp."), ECF No. 73), a motion which Commerce opposes (Resp. in Opp. to Pls.' Mot. to Supp. Admin. R., ECF No. 76).

Jurisdiction / Standard of Review

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c), and 19 U.S.C. §§ 1516a(1), (2)(B)(iii). In reviewing Commerce's final determination in a new shipper review, the Court is required to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1), (B)(i).

Analysis

While Plaintiffs dispute Commerce's conclusion that their sales were not bona fide (Pls.' Mot. 19–47), and ultimately seek reversal of Commerce's decision to rescind the new shipper reviews (*id.* 48), the threshold issues presented in this case are whether it was proper for Commerce (1) to reject certain factual submissions Plaintiffs made during the administrative proceeding (*id.* 12–17), and (2) to decline to issue supplemental questionnaires at Plaintiffs' behest (*id.* 9–10). Because the Court finds that Commerce had no lawful basis for rejecting one of Plaintiffs' factual submissions, the Final Determination was based on an incomplete record. Accordingly, until this error has been corrected on remand, the Court will not decide the ultimate question of whether Commerce's decision to rescind the new shipper reviews is supported by substantial evidence on the record and otherwise in accordance with law.

Regulations issued by Commerce specify time limits within which factual information may be placed on the record in various proceedings before the agency. 19 C.F.R. § 351.301. Generally, in the case of a new shipper review, "a submission of factual information is due no later than . . . 100 days after the date of publication of notice of initiation of the review," which in this case would have been May 15, 2010. *Id.* § 351.301(b)(4). This regulation also specifies time limits for interested parties to "submit factual information to rebut, clarify, or correct factual information **submitted by any other interested**

party [,]" and sets the time limit for such rebuttals at 10 days. *Id.* § 351.301(c)(1) (emphasis added). This particular subpart is the one Commerce cited in rejecting both Plaintiffs' September 18 and September 22 submissions.

Plaintiffs' September 18 submission was offered to rebut factual information submitted by an interested party (namely, Petitioners), so 19 C.F.R. § 351.301(c)(1) governed the time within which that submission had to be made. Because the September 18 submission was filed more than 10 days after the factual information it sought to rebut, Commerce's rejection of this submission was lawful under this regulation.

Plaintiffs' September 22 submission, however, is different. This was not a submission offered to rebut factual information submitted by an interested party; rather, it was an effort to rebut the CBP Data, which had been placed on the record by Commerce. Because Commerce is not an interested party within the meaning of the antidumping statute or regulations[2], 19 C.F.R. § 351.301(c)(1) cannot limit the time forresponding to a factual submission made by Commerce. Accordingly, although Plaintiffs' September 22 submission was made more than 10 days after the CBP Data were placed on the record, 19 C.F.R. § 351.301(c)(1) does not provide Commerce with a legal basis for rejecting Plaintiffs' September 22 submission.

Defendant advances several arguments to justify its rejection Plaintiffs' September 22 submission, all of which the Court finds unpersuasive.[3] First, while conceding that the first sentence of 19 C.F.R. § 351.301(c)(1) authorizes rebuttal of factual information submitted by an interested party, Defendant argues that both the subsection's title and its second sentence refer to rebuttal of "any factual information placed on the record," without regard to who placed it there. (Def.'s Resp. in Opp. to Pls.' Mot. for J. Upon the Agency R. ("Def.'s Resp.") 17–18.) Thus, the 10-day time limit, found in the second sentence, would apply to Plaintiffs' response to the CBP data. Defendant would have the Court accord "substantial deference" to this interpretation of Commerce's regulation. (*Id.* at 18 (*citing Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005)).) Second, Defendant argues that if 19 C.F.R. § 351.301(c)(1) does not apply to information placed on the record by Commerce, "there would be no regulation that would allow an interested party to respond to factual information placed on the record by

[2] The definitions of "interested party" found at 19 U.S.C. § 1677(9) and 19 C.F.R. § 351.102(b)(29) does not include the agency itself.

[3] Defendant-Intervenors' arguments with respect to the September 22 submission are entirely duplicative of Defendants' arguments, and are similarly unavailing. (Def.-Intervs.' Resp. Br. in Opp. to Pls.' Mot. for J. Upon the Agency R. 13–18.)

Commerce." (*Id.* at 19.) Defendant claims that this court has rejected that view, and held that 19 C.F.R. § 351.301(c)(1) permits interested parties to respond to data placed on the record by the agency. (*Id.* (*citing Crawfish Processors Alliance v. United States*, 28 CIT __, __, 343 F. Supp. 2d 1242, 1261 (2004)).) Third, citing the agency's interest in finalizing the record, Defendant insists that there is no rationale for permitting a response time of any longer than 10 days to rebut information placed on the record by a non-interested party. (*Id.* at 18–19.) Additionally, Defendant contends that Plaintiffs did not provide a compelling justification for why they could not respond to the CBP data within a 10-day period, and faults Plaintiffs for failing to request an extension of the 10-day period pursuant to 19 C.F.R. § 351.302(c). (*Id.* at 20.) The Court will deal with each of these arguments in turn.

First, the Court cannot accept Defendant's construal of 19 C.F.R. § 351.301(c)(1) as applying to rebuttals of information placed on the record by Commerce, because such a view is contradicted by the plain language of the regulation. While an agency's interpretation of its own regulation is, indeed, entitled to substantial deference, the Court cannot defer to an agency's regulatory interpretation when it is plainly erroneous, or inconsistent with the regulation itself. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009) (*quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In its entirety, 19 C.F.R. § 351.301(c)(1) states

> (c) *Time limits for certain submissions*— (1) *Rebuttal, clarification, or correction of factual information.* **Any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party** at any time prior to the deadline provided in this section for submission of such factual information. If factual information is submitted less than 10 days before, on, or after (**normally only with the Department's permission**) the applicable deadline for submission of such factual information, **an interested party may submit factual information to rebut, clarify, or correct the factual information no later than 10 days after the date such factual information is served on the interested party** or, if appropriate, made available under APO to the authorized applicant.

19 C.F.R. § 351.301(c)(1) (italics in original, bold emphasis added). This subsection accomplishes two goals. The first sentence authorizes any interested party to rebut, clarify or correct factual information submitted by another interested party (which clearly does not include

Commerce), provided that it does so within normally applicable time limits (for instance, those set out in § 351.301(b)). The second sentence ensures that the chance to make these rebuttals, clarifications or corrections will not be unfairly cut short (or barred altogether) by the normally applicable time limits, guaranteeing interested parties at least 10 days in which to rebut, clarify or correct.

The Court rejects Defendant's assertion that the second sentence should be read, literally, out of context. The "submitted" "factual information" referred to at the start of the second sentence clearly invokes the "factual information submitted by any other interested party" from the first sentence. Moreover, information placed on the record *sua sponte* by Commerce is not, technically, "submitted." Submitted information denotes that which has been "present[ed] or propos[ed] to another for review, consideration, or decision," which is how information from an interested party makes its way to the record. *See Merriam Webster Online Dictionary*, http://www.merriamwebster.com/dictionary/submit (last visited April 23, 2012). By contrast, the CBP data is factual information that has been "obtained by" Commerce, and which the agency is required to "include" in the official and public records. *See* 19 C.F.R. § 351.104(a), (b). If Commerce had intended for 19 C.F.R. § 351.301(c)(1) to regulate the time for rebutting, clarifying or correcting all factual information included in the record, regardless of source, rather than just factual information submitted by an interested party, it would have been easy enough to do so. Absent that, however, the Court cannot interpret the regulation contrary to its plain meaning, nor uphold Commerce's interpretation doing the same. Consequently, the Court holds that Commerce's rejection of Plaintiffs' September 22 submission pursuant to 19 C.F.R. § 351.301(c)(1) was unlawful, as that regulation does not control the time for an interested party to rebut factual information placed on the record by Commerce.

Defendant's second argument—that *if* 19 C.F.R. § 351.301(c)(1) is inapplicable to information Commerce places on the record, Plaintiffs would be *unable* to rebut it—is based on the misguided assumption that Commerce is at liberty to reject every interested party submission made without explicit regulatory authorization. While Commerce clearly has the discretion to regulate administrative filings, that discretion is bounded at the outer limits by the obligation to carry out its statutory duty of "determin[ing] dumping margins 'as accurately as possible.'" *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (*quoting Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed Cir. 1990)). This means that on

occasion, the courts have compelled Commerce to accept interested party submissions that were made without conformity to Commerce's regulations. *See id.* Moreover, Commerce's own regulations acknowledge that the agency "obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding." 19 C.F.R. § 351.301(a). Consequently, if Commerce refused to permit rebuttal of information that it had placed on the record, for no reason other than the absence of a regulation expressly permitting such rebuttal, Commerce would be abusing its discretion, to the extent such refusal unduly hampered its ability to accurately determine dumping margins. In other words, interested parties are not uniformly prohibited from rebutting factual information Commerce places on the record simply because 19 C.F.R. § 351.301(c)(1) does not explicitly authorize them to do so.

Contrary to Defendant's argument, *Crawfish* did not hold that 19 C.F.R. § 351.301(c)(1) authorizes rebuttals to information placed on the record by Commerce. *Crawfish*, 343 F. Supp. 2d 1261–62. The holdings in *Crawfish* and this case are harmonious. In *Crawfish*, Commerce had placed new factual information on the record roughly three weeks after the initial deadline for submitting factual information (set out in 19 C.F.R. § 351.301(b)) had passed. *Id.* at 1261. An interested party then attempted to rebut and clarify Commerce's factual information via two submissions, made seven and eight days later, respectively. Commerce rejected these submissions, on the grounds that they did "not clarify or rebut factual information submitted by an interested party since Commerce" had placed the information on the record, reasoning that the interested party rebuttal submissions were not authorized submissions under 19 C.F.R. § 351.301(c)(1). *Id.* The court held that "Commerce improperly rejected" these submissions, noting that if it credited the government's argument, Commerce would be free to "place erroneous factual information on the record [that] interested parties would not be afforded the opportunity to rebut or clarify." *Id.* The court in *Crawfish* did *not* hold that 19 C.F.R. § 351.301(c)(1) authorized the rebuttals filed in that case, but rather simply held that Commerce's rejection of the rebuttal submissions had been improper. *See id.* at 1261–62. This Court reaches a similar result in the case at hand.

Defendant's third argument—that Plaintiffs have provided no reason why the time to rebut non-interested party information should be longer than the time to rebut interested party information—misses the point. It is not incumbent on Plaintiffs to explain why a different time frame should apply, because the Court is not evaluating a deci-

sion by the agency to adopt a 10-day window for rebuttals to non-interested party information going forward. Instead, the issue is whether it was lawful for Commerce to reject Plaintiffs' September 22 submission, when at the time the submission was made there existed no statute, regulation or well established agency practice limiting the time for making such rebuttals. The answer to that question warrants careful consideration of the specific facts of this case, and calls for the Court to strike a balance between the interests of finality and accuracy. *NTN Bearing Corp.*, 74 F.3d at 1208 (*quoting Civil Aeronautics Bd. v. Delta Airlines, Inc.*, 367 U.S. 316, 321 (1961) ("Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.")).

In this instance, where there was no applicable statute or regulation, nor even any well known agency practice establishing a shorter window for Plaintiffs to rebut factual information placed on the record by a non-interested party, a rebuttal submitted 20 days after the non-interested party data was placed on the record and almost four months prior to the issuance of the final results was sufficiently timely to warrant acceptance and consideration from Commerce.[4] Thus, in rejecting this submission Commerce struck an unlawful balance between finality and accuracy, which the Court is compelled to set aside. *See* 19 U.S.C. § 1516a(b)(1), (B)(i) (requiring the court to "hold unlawful" any determination found to be "not in accordance with law.") The Court of Appeals for the Federal Circuit (the "Court of Appeals") has noted that "preliminary determinations are 'preliminary' precisely because they are subject to change," and that at the preliminary results stage, "the tension between finality and correctness simply [does] not exist." *NTN Bearing Corp.*, 74 F.3d at 1208; *see also Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006) (concluding that because the plaintiff made a submission of corrections "after Commerce issued the preliminary results, but before it issued the final results," this court did not err in requiring the agency to consider that submission). Moreover, the Court of Appeals has also held "that Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that

[4] Plaintiffs were not required to seek an extension of time under 19 C.F.R. § 351.302(c) because, as explained *supra*, 19 C.F.R. § 351.301 was inapplicable. Moreover, Defendant does not identify, and the Court is unaware of any authority requiring Plaintiffs to provide a compelling excuse for taking as much time to file as they did. (*See* Def.'s Resp. 20.)

the importer seeks correction before Commerce issues the final results and adequately proves the need for the requested corrections." *Timken*, 434 F.3d at 1353. In the wake of this precedent, it becomes an easy call: the Court holds that not only was Commerce's rejection of Plaintiffs' September 22 submission not compelled by any legal authority, it unlawfully favored finality over accuracy at the preliminary results stage, and therefore must be set aside. On remand, Commerce is directed to accept Plaintiffs' September 22 submission, and issue a redetermination accordingly.

Plaintiffs' remaining argument that Commerce abused its discretion in declining to issue each and every supplemental questionnaire that Plaintiffs had requested is without merit. Plaintiffs identify no legal authority for their contention that Commerce acted unlawfully in declining to issue additional post-preliminary questionnaires, and the Court sees no reason why the agency may have abused its discretion. *See Emerson Power Transmission Corp. v. United States*, 19 CIT 1154, 1160, 903 F. Supp. 48, 54 (1995) ("While [plaintiff] is correct to assert that Commerce may request additional information, . . . [plaintiff's] argument that Commerce should have requested the information is inconsistent with Commerce's broad discretion under the antidumping laws.").

Finally, the Court declines to grant Plaintiffs' April 2, 2012 motion to compel supplementation of the administrative record to include certain information not previously presented to the agency. While Plaintiffs assert that under certain conditions "[t]he Court has discretion to consider matters outside the administrative record," (Mot. to Supp. 3), the Court declines to do so here. Instead, the Court will evaluate the determinations, findings and conclusions of Commerce on the basis of the record that was assembled before the agency. 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b)(1)(B)(i). Similarly, at this time, the Court is disinclined to obligate Commerce to accept or consider factual information that was not presented during the underlying administrative proceeding. Plaintiffs are, of course, free to seek Commerce's leave to supplement the administrative record while this case is on remand, and the Court will evaluate Commerce's treatment of such a request under the standard set out in 19 U.S.C. § 1516a(b)(1)(B)(i) in due course.

Conclusion

For the foregoing reasons, the Court remands this case to Commerce for action consistent with this opinion, and it is hereby

ORDERED that Commerce shall file the results of its redetermination on remand no later than **Monday, June 25, 2012**, and it is further

ORDERED that Plaintiffs' comments on Commerce's remand results shall be no more than 30 pages, and shall be filed no later than **Wednesday, July 25, 2012**, and it is further

ORDERED that Defendant and Defendant-Intervenors may file responses to Plaintiffs' comments of no more than 30 pages each, and such responses shall be filed no later than **Friday, August 24, 2012**, and it is further

ORDERED that Plaintiffs may file a reply to Defendant's and Defendant-Intervenors' responses of no more than 10 pages total, and such reply shall be filed no later than **Monday, September 10, 2012**, and it is hereby

ORDERED that Plaintiffs' Motion to Supplement the Administrative Record is DENIED.

Dated: April 25, 2012
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE