

# U.S. Court of International Trade

Slip Op. 18–14

UNITED STATES, Plaintiff, v. UNIVAR USA INC., Defendant.

Before: Mark A. Barnett, Judge  
Court No. 15–00215

## **MEMORANDUM AND ORDER**

Pending before the court are three motions *in limine*. Two of the motions were filed by Defendant Univar USA Inc. (“Defendant” or “Univar”), both of which the United States (“Plaintiff” or “the Government”) opposes. Def. Univar USA Inc.’s Mot. *in Limine* No. 1 (Tables Provided by Taiwan Customs) (“Def.’s First Mot. *in Limine*”), ECF No. 142; Def. Univar USA Inc.’s Motion *in Limine* No. 2 (Dr. Henry McFarland) (“Def.’s Second Mot. *in Limine*”), ECF No. 163; Pl.’s Resp. to Def.’s Mot. *in Limine* to Exclude Taiwan’s Records Showing Transshipment from China through Taiwan to the United States (“Pl.’s Resp. to Def.’s First Mot. *in Limine*”), ECF No. 150; Pl.’s Resp. to Def.’s Mot. *in Limine* to Exclude Henry McFarland, Ph.D. from Testifying as an Expert Economist (“Pl.’s Resp. to Def.’s Second Mot. *in Limine*”), ECF No. 167. The third motion *in limine* was filed by the Government, to which Univar has filed a response in opposition. The United States’ Mot. *in Limine* to Preclude a Lawyer from Testifying Regarding his Legal Interpretation of “Reasonable Care,” and Applying his Interpretation of the Facts of this Case (“Pl.’s Mot. *in Limine*”), ECF No. 152; Univar USA Inc.’s Resp. to Gov’t’s Mot. *in Limine* Concerning Michael O’Rourke (“Def.’s Resp.”), ECF No. 159. The court heard oral argument on these motions on December 19, 2017. Hr’g Tr., ECF No. 173.<sup>1</sup> For the reasons that follow, the court denies Defendant’s first motion *in limine*, grants, in part, Defendant’s

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<sup>1</sup> Following the hearing, Defendant’s counsel filed a letter titled “Factual Correction of Argument Made by Counsel for Government at December 19, 2017 Oral Argument.” Letter from Lucius B. Lau, counsel for Defendant, White & Case, LLP to the court (Dec. 21, 2017), ECF No. 171. The Government filed a response asking the court to “reject the supplemental brief because Univar did not seek the Court’s leave to file it.” Pl.’s Resp. to Def.’s Letter Mot. for Leave to File a Suppl. Br. in Support of its Motion *in Limine* to Exclude Taiwan’s Records Showing Transshipment From China Through Taiwan to The United States (“Pl.’s Suppl. Br.”) at 1, ECF No. ECF No. 172. The Government’s response, however, also contains a supplemental brief. *Id.* at 2–3. Although the court does not condone supplemental filings without the court’s consent, it has considered both for purposes of these motions.

second motion *in limine*, and grants the Government's motion *in limine*.

### I. Background

The Government filed this action against Univar seeking to recover unpaid antidumping duties and a monetary penalty pursuant to 19 U.S.C. § 1592, stemming from 36 entries of saccharin, allegedly transhipped from the People's Republic of China ("China" or the "PRC") through the Republic of China (Taiwan) ("Taiwan"), and entered into the commerce of the United States between 2007 and 2012. Compl. ¶ 1, ECF No. 2. The Government alleges that Univar's actions were grossly negligent or negligent when it misrepresented the country of origin of the subject saccharin on U.S. Customs and Border Patrol ("CBP") entry documents as Taiwan when, in fact, the saccharin originated from China. *Id.* ¶¶ 28, 32. The Government seeks recovery of \$36,088,718.03 in unpaid antidumping duties pursuant to 19 U.S.C. § 1592(d), and a civil penalty in the amount of \$47,888,851.00 pursuant to 19 U.S.C. § 1592(c)(3). *Id.* ¶¶ 33–34. Discovery has closed and Univar has filed a motion for summary judgment. *See* Order (Nov. 25, 2015), ECF No. 16, *as amended by* Memorandum and Order (July 3, 2017), ECF No. 134, *as amended by* Memorandum and Order (Aug. 29, 2017), ECF No. 151; Univar's Mot. for Summ. J., ECF No. 143. The court will address the summary judgment motion after ruling on the motions *in limine*.

Univar, in its first motion *in limine*, seeks to exclude certain import and export data provided to the United States by Taiwan's Department of Investigation, Customs Administration, Ministry of Finance ("Taiwan Customs") that the Government has characterized as the "wedge pin fact" that shows the saccharin in question originated from China. Def.'s First Mot. *in Limine* at 1; *id.* Ex. 12 (Deposition of Patrick Deas) at 119:1–12, 120:13–25. The Government seeks to admit this data under exceptions to the rule against hearsay or, alternatively, through its proposed expert witness, Dr. Henry McFarland. *See generally* Pl.'s Resp. to Def.'s First Mot. *in Limine*. Univar challenges the admissibility of this data under any of the hearsay exceptions and through Dr. McFarland's testimony. Def.'s First Mot. *in Limine* at 18–22; Hr'g Tr. at 15–17, 19–29. Moreover, in its second motion *in limine*, Univar seeks to exclude Dr. McFarland from testifying altogether, on the bases that his testimony is neither helpful nor reliable. Def.'s Second Mot. *in Limine* at 2 (citing Fed. R. Evid. 702(a),(c)).

The monetary penalty in this matter is based on the alternatively alleged culpability of negligence; therefore, the Government bears the

initial burden of proving the act or omission constituting the violation; the burden then shifts to Univar to “affirmatively demonstrate that it exercised reasonable care under the circumstances.” *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006) (citing 19 U.S.C. § 1592(e)(4)). In that vein, Univar has offered an expert witness, attorney Michael O’Rourke, Esq., to provide his opinion on the standard of “reasonable care” within the confines of 19 U.S.C. § 1592 and whether Univar “acted reasonably in its efforts to determine the country of origin of the saccharin it imported.” See Pl.’s Mot. *in Limine*, Ex. 1 (Expert Report of Michael S. O’Rourke) (“O’Rourke Report”), ECF No. 152–1. The Government seeks to exclude Mr. O’Rourke from testifying on the grounds that his testimony impermissibly draws legal conclusions and usurps the functions of both the judge and jury, both contentions with which Univar disagrees. See generally Pl.’s Mot. *in Limine*; Def.’s Resp. to Pl.’s Mot. *in Limine*.

## II. Discussion

A decision on these evidentiary matters lies within the sound discretion of the court. *N. Am. Processing Co. v. United States*, 22 CIT 701, 703, 15 F. Supp. 2d 934, 936 (1998). “Generally speaking, *in limine* rulings are preliminary in character because they determine the admissibility of evidence before the context of trial has actually been developed.” *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 479 F.3d 1330, 1338 (Fed. Cir. 2007). All relevant evidence is admissible unless the U.S. Constitution, a federal statute, the rules of evidence, or other rules prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 402; see also 28 U.S.C. § 2641 (stating that the Federal Rules of Evidence apply to all civil actions in the U.S. Court of International Trade (“CIT”), with certain exceptions not relevant here). Relevant evidence is that which “has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action.” Fed. R. Evid. 401. Against that general backdrop, the court turns to the specific issues raised in each motion *in limine*.

### a. Defendant’s First Motion *in Limine* is Denied

Univar seeks to exclude certain import and export data that Taiwan Customs provided to the United States. Def.’s First Mot. *in Limine* at 1. The data is in the form of three distinct spreadsheets. Def.’s First Mot. *in Limine*, Ex. 1 (spreadsheets provided by Taiwan customs on January 13, 2017), ECF No. 142–1; see also Pl.’s Resp. to Def.’s First

Mot. *in Limine*, Ex. 1 (spreadsheets provided by Taiwan Customs on August 1, 2017) (“Taiwan Customs Tables”), ECF No. 150–1.<sup>2</sup> One table purports to show 20 shipments of saccharin imported into Taiwan from China by Long Hwang Chemical Co. (“LH Chemical”) from 2009 to 2011. *See* Taiwan Customs Tables. A second table purports to show 16 shipments of saccharin exported from Taiwan to the United States by Lung Huang Trading Co., Ltd. (“LH Trading”) from 2009 to 2012.<sup>3</sup> Taiwan Customs Tables. A third table purports to show Taiwan’s annual statistics relating to the country of origin of its saccharin imports from 2007 to 2012. Taiwan Customs Tables. The Government proffers that it intends to introduce the Taiwan Customs Tables to “show that the amount of saccharin imported into Taiwan from China by Univar’s supplier was nearly identical to, and contemporaneous with, the amount of saccharin exported to Univar.” Pl.’s Resp. to Def.’s First Mot. *in Limine* at 1.

Univar argues that the court should exclude the tables because they are inadmissible hearsay pursuant to Rule 801(c) of the Federal Rules of Evidence. Def.’s First Mot. *in Limine* at 2. Alternatively, Univar argues that the tables are not original data, thereby violating rule Rule 1002, and are inadmissible summaries that must be excluded because the Government has not complied with Rule 1006. *Id.* Lastly, Univar asserts that even if all the evidentiary requirements have been met, the court should exclude the tables because they are unfairly prejudicial and will mislead the jury. *Id.* at 2.<sup>4</sup>

The Government does not dispute that the tables are hearsay. *See, e.g.*, Pl.’s Resp. to Def.’s First Mot. *in Limine* at 5 (“Taiwan’s records are admissible hearsay.”) (capitalization omitted). Instead, the Government counters that the Taiwan Customs Tables are admissible pursuant to Rules 803(8) and 803(6) of the Federal Rules of Evidence. *Id.* at 7–12. Additionally, the Government argues that it may introduce the tables through its expert witness, Dr. Henry McFarland,

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<sup>2</sup> In its motion, Univar seeks to exclude the January 13, 2017 spreadsheets, “or any other versions” of the spreadsheets. Def.’s First Mot. *in Limine* at 1. Since the filing of Univar’s motion, the Government obtained the August 1, 2017 version of the spreadsheets, which version includes additional categories of information. *See* Taiwan Customs Tables. Because the Government has provided updated spreadsheets, the court considers Univar’s request as addressing the January 13, 2017 spreadsheets as amended by the August 1, 2017 spreadsheets. For ease of reference, the court will refer to the August 1, 2017 version of the spreadsheets collectively as “Taiwan Customs Tables,” or, simply, “the tables.”

<sup>3</sup> The Government contends that the two companies are the same. *See* Confidential Pl.’s Rule 56.3 Counterstatement of Fact ¶ 186, ECF No. 154–1. Univar disputes this contention. Univar USA Inc.’s Rebuttal to Pl.’s Rule 56.3 Counterstatement ¶ 186, ECF No. 161–1.

<sup>4</sup> Univar does not argue that the tables are irrelevant. Indeed, the tables are relevant because the import and export information that the tables contain would tend to make the alleged transshipment of saccharin more probable than it would be without this evidence. Fed. R. Evid. 401.

pursuant to Rule 703. *Id.* at 12–14. Lastly, the Government challenges Defendant’s assertions that the tables do not satisfy the best evidence rule, are inadmissible summaries, and would lead to unfair prejudice and mislead the jury. *Id.* at 14–19.

Hearsay is an out of court statement offered “to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). Hearsay is inadmissible at trial unless a federal statute, Federal Rule of Evidence, or other rule prescribed by the Supreme Court provides otherwise. Fed. R. Evid. 802. Rule 803 of the Federal Rules of Evidence establishes certain exceptions to the hearsay rule, regardless of whether a declarant is available to testify. Fed. R. Evid. 803. Pursuant to 803(8), “[a] record<sup>5</sup> or statement of a public office” that “sets out . . . a matter observed while under a legal duty to report” is not excluded as hearsay, provided “the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” Fed. R. Evid. 803(8)(A)(ii), (B). This exception applies to records or statements of foreign public offices. *See F.A.A. v. Landy*, 705 F.2d 624, 633 (2d Cir. 1983); *United States v. Regner*, 677 F.2d 754, 762 (9th Cir. 1982). Justification for this exception lies in “the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.” Fed. R. Evid. 803(8) advisory committee’s note to the 1972 proposed rules. “The relevant inquiry under Rule 803(8) is whether the information was recorded by a public official as part of a routine procedure in a non-adversarial setting.” *United States v. Puente*, 826 F.2d 1415, 1418 (5th Cir. 1987) (emphasis omitted).

If the proponent establishes the facial requirements of Rule 803(8), the burden shifts to the opponent to show that the tables lack the requisite indicia of reliability. *See* Fed. R. Evid. 803(8) advisory committee’s note to the 2014 amendment. In so doing, the opponent “is not necessarily required to introduce affirmative evidence of untrustworthiness”; the court’s determination of untrustworthiness “necessarily depends on the circumstances.” *Id.* (stating, “[f]or example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point.”). In other contexts, the U.S. Court of Appeals for the Federal Circuit (“CAFC”) has recognized a presumption that government officials carry out their duties in good faith; “[u]nsubstantiated suspicions and allegations [to overcome that presumption] are not enough.” *Spezzaferro v. F.A.A.*, 807 F.2d 169, 173 (Fed. Cir. 1986). Rather, the proof to overcome that presumption

<sup>5</sup> A “record” includes a memorandum, report, or data compilation.” Fed. R. Evid. 101(b)(4).

“must be almost ‘irrefragable.’” *Id.* (citations omitted). This presumption is no less applicable because the government officials involved here are with the Taiwanese government. *See, e.g., State of Israel v. Motor Vessel Nili*, 318 F. Supp. 1196, 1200 & n.17 (S.D. Fla. 1968), *aff’d*, 435 F.2d 242 (5th Cir. 1970) (citing, *inter alia*, *United States v. King*, 44 U.S. 773, 785–786 (1845)) (recognizing a presumption that foreign officials properly discharge their official duties).

The court finds that the tables meet the facial requirements of Rule 803(8)(A)(ii). The tables are accompanied by an affidavit and two letters from Shih-Feng Chen, the Director of Taiwan Customs Administration, Department of Investigation. *See* Aff. of Shih-Feng Chen; Letter from Shih-Feng Chen, Director, Department of Investigation, Taiwan Customs Administration, to Michael Pignatello, Acting Chief, Economic Section, American Institute in Taiwan (August 1, 2017); and Letter from Shih-Feng Chen to Christopher Q. Pater, Attaché for Hong Kong, Macau, and Taiwan, Department of Homeland Security, Immigration and Customs Enforcement (August 1, 2017), accompanying the Taiwan Customs Tables (“Chen Aff. & Letters”), ECF No. 150–1. Mr. Chen states that “[t]he data provided are within the offices [sic] lawful activities,” and that “[t]he tables show those two companies’ import and export records, retrieved from our database from 2009 to 2012, under tariff classification 29251100.” *Id.* Mr. Chen further explains that the database “keeps all electronic declaration[s] and relevant files for five years following the data [sic] on which the cargoes concerned are released, and those files may be destroyed after this period has passed.” *Id.* Mr. Chen’s explanation that the tables were “retrieved from [the Taiwan Customs] database” pertaining to the period of 2009 to 2012 and “under tariff classification 29251100” and that the database keeps “relevant files for five years,” after which they “may be destroyed,” shows that the electronic database was created as part of a routine procedure as shipments were imported and exported from Taiwan and the information and statistics were collected. Therefore, the tables meet the facial requirements of the public records exception. *See* Fed. R. Evid. 803(8)(A)(ii); 101(b)(4).

Defendant’s challenge to admission of the tables pursuant to Rule 803(8) rests on the trustworthiness of the tables. Def.’s First Mot. *in Limine* at 19 (“These tables, however, do not meet the standard set forth in Rule 803(8). Specifically, the tables suffer from a ‘lack of trustworthiness.’”). Defendant argues that the tables are “untrustworthy because the manner in which they were created is unknown.” *Id.* at 21–22. Defendant posits that “[a]lthough Taiwan Customs requires extensive information” before merchandise can be imported

into and exported from that country, the tables “only provide a fraction of the information” that should be in Taiwan Customs’ possession. *Id.* at 14. Defendant avers that documents required for shipments to and from Taiwan include a commercial invoice, bill of lading or air waybill, and customs import and export declarations. *Id.* at 11 (citing *id.*, Exs. 26–27 (sample declaration forms)). Combined, these documents yield 54 separate types of information for imports and 48 separate types of information for exports. *Id.* at 22. Yet, a comparison of the types of information from these documents and the tables shows that the tables reflect only select information.<sup>6</sup> *Id.* at 22. Accordingly, Defendant asserts that the tables “are not an accurate printout of the Taiwan Customs database from which the summarized tables apparently derived.” *Id.* at 1. Univar’s complaints that the tables are allegedly incomplete go to the weight, not the admissibility, of the tables. See *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1307 (5th Cir. 1991). “In making the trustworthiness determination required by Rule 803(8), courts should not focus on questions regarding the accuracy or completeness of the document’s conclusions.” *Id.* The court, therefore, does not find the lack of additional categories of information renders the tables untrustworthy.

Next, citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 n.11 (1988),<sup>7</sup> Univar argues that Taiwan Customs is biased because it cooperated with the U.S. Government over the span of several years with respect to producing the tables and whatever information the Government requested, but refused to produce a witness for deposition when Univar requested one. Def.’s First Mot. *in Limine* at 19–21. Univar cites *In re Vitamin C Antitrust Litig.*, No. 05-CV-0453, 2012 WL 4511308 (E.D.N.Y. Oct. 1, 2012) as analogous to this case. In short, it classifies the tables as “litigation-created documents designed to aid the government in its case against Univar.” Def.’s First.

<sup>6</sup> For instance, Univar asserts that the import table reflects only 13 out of the 54 types of information Taiwan Customs would typically collect and the export table reflects only 14 out of the 48 types of information. Def.’s First Mot. *in Limine* at 22. By way of example, the August 1, 2017, import table includes, for each shipment record of LH Chemical, the date of import declaration, the import declaration number, the country of origin, the shipping vessel and voyage number, the buyer, the seller of the saccharin, the commodity description, the quantity, units, and weight of each shipment, the port of departure, the port of entry, and the entered value of each shipment. Taiwan Customs Tables. Defendant lists examples of information typically collected by Taiwan Customs, but not included in the tables, including type of declaration, vessel registration number, date of exportation, date of importation, and so forth. Def.’s First Mot. *in Limine* at 15–17.

<sup>7</sup> In the context of public investigatory reports, which fall under Rule 803(8)(A)(iii), “possible bias when reports are prepared with a view to possible litigation” is a factor to consider in the trustworthiness inquiry. *Beech*, 488 U.S. at 167 n.11.

Mot. *in Limine* at 22. At oral argument, it similarly argued that the tables were not created for Taiwan's own use, but to help the Government. Hr'g Tr. at 27.

*In re Vitamin C Antitrust Litig.*, 2012 WL 4511308 is not analogous to this case. In that case, the Ministry of Commerce of the PRC submitted several written statements to the court in the nature of *amicus* submissions. 2012 WL 4511308, at \*1. The court found that the Ministry shared a common interest with the defendants in seeking a dismissal of the lawsuit; in light of that common interest, the Ministry had an agreement with the defendants to "share litigation related information with each other"; the Ministry and defendants worked in "close coordination" in defending the lawsuit; and the Ministry was actively involved in coordinating and approving the defendants' legal strategy. *Id.* at \*3. Moreover, the same law firm that represented the Ministry as an *amicus* had provided legal advice to the defendants. *Id.* The court also had previously determined that one of the Ministry's statements read more like a "carefully crafted and phrased litigation position." *Id.* In light of those circumstances, the court found the *amicus* submissions untrustworthy and, therefore, not covered by the hearsay exception provided in Rule 803(8). *Id.* at \*4. None of these circumstances exist here.

In January 2001, the United States executed a customs mutual assistance agreement with Taiwan that was aimed at ensuring cooperation among the signatories in "matters related to the administration and enforcement of the customs laws of their respective customs territories." See Def's First Mot. *in Limine*, Ex. 5 (Agreement Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Regarding Mutual Assistance Between their Designated Representatives, the United States Customs Administration and the Taiwan Customs Administration) ("US – Taiwan CMAA") at US008607, ECF 142–4. The signatories agreed that "[u]pon request, a Customs Administration shall provide assistance in the form of information necessary to ensure the enforcement of the customs laws and accurate assessment of customs duties and other taxes by the [other] Customs Administration." *Id.*, Art. 3 ¶ 1. Mr. Chen's letter explains that the tables were provided pursuant to the US-Taiwan CMAA after the Government requested that information. Chen Aff. & Letters. That Taiwan responded to the Government's requests to provide the tables pursuant to the US-Taiwan CMAA does not suggest any bias on the part of Taiwan Customs. Likewise, that the previous version of the tables contained fewer categories of information does not suggest bias by Taiwan Customs. Instead, these facts merely show that Taiwan



sought to be responsive to the Government's requests in the spirit of cooperation reflected in the US-Taiwan CMAA. Therefore, as the party opposing the introduction of these tables, Univar has failed to point to negative factors sufficient to cause the court to conclude that the tables are untrustworthy, and the court has no reason to believe that they are untrustworthy so as to preclude their admission under Rule 803(8)(A)(ii).

Defendant's next challenge to the tables' admissibility is premised on Rule 1002, which states that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002; *see also* Def.'s First Mot. *in Limine* at 23–24. "For electronically stored information, 'original' means any printout—or other output readable by sight—if it accurately reflects the information." Fed. R. Evid. 1001(d). Defendant states that the export table does not accurately reflect the information contained in Taiwan Customs' database because the commodity description column is missing the "mesh size" information and other data, which the Government had produced on a previous occasion. Def.'s First Mot. *in Limine* at 23; Hr'g Tr. at 30. Although the court is not persuaded by this argument, a recent filing by the Government indicates that the Government has since provided Univar with an electronic version of the tables with access to the full contents of each data field, including the "mesh size" in the commodity description column, so that this particular issue is moot. *See* Pl.'s Suppl. Br., Ex. A (E-mail from Stephen Tosini, Senior Trial Counsel, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, to Sadie Gardner and Lucius B. Lau, counsel for Defendant, White & Case, LLP (Dec. 22, 2017 9:39:00)), ECF No. 172–1. Otherwise, the court agrees with the Government that Taiwan's production of the tables "with different categories of information at different times does not render either set of information 'inaccurate.'" *See* Pl.'s Resp. to Def.'s First Mot. *in Limine* at 15.

Univar next argues that the tables are inadmissible under Rule 1006 because they are "summaries of 'electronic declarations' and 'relevant files' that largely have not been provided in discovery." Def.'s First Mot. *in Limine* at 25. Having concluded that the tables are public records, within the meaning of Rule 803(8)(A)(ii), the court finds that the tables do not fit within the ambit of Rule 1006. Rule 1006 permits the use of "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court," provided that the "proponent [] make[s] the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place."

Fed. R. Evid. 1006. Based on Mr. Chen's letters and affidavit, the records list "20 shipments imported from China by [LH Chemical] and 16 shipments exported to the U.S.A. by [LH Trading]." Chen Aff. & Letters. Mr. Chen's letters and affidavit do not indicate that Taiwan Customs' tables were created as a summary of "voluminous writings, recordings, or photographs that cannot be conveniently examined in court." See Fed. R. Evid. 1006. Therefore, Rule 1006 is inapplicable here. Similarly, the court finds *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387 (Fed. Cir. 1996), *as amended on reh'g in part* (Jan. 2, 1997), on which Plaintiff relies, inapposite for it concerned the admission of "purchase schedules," which consisted of actual summaries prepared, long after the events, by three oil companies, for which the underlying documentation had not been provided and that the district court admitted under the residual hearsay exception of then-Rule 803(24).<sup>8</sup> See 99 F.3d at 392; Def.'s First Mot. *in Limine* at 25–26, 27.

Univar's related argument that the tables must be excluded because they contain hearsay provided to Taiwan Customs from private parties is also unpersuasive. Hr'g Tr. at 5, 18–19 (citing, *inter alia*, Fed. R. Evid. 805); see also Def.'s First Mot. *in Limine* at 26–27 (arguing that the documents that underlie the Taiwan Customs Tables must themselves be admissible). Univar relies on *United States v. Doyle*, 130 F.3d 523 (2nd Cir. 1997) to support its proposition that a separate showing of admissibility must be made for the underlying documents and relevant files from which the tables were created. *Id.* at 25. But *Doyle* is distinguishable from the instant case. In *Doyle*, the Second Circuit questioned the district court's decision to admit "documents collected by, but not generated by, the government of Malta," 130 F.3d at 544, because there was no showing that the documents were reliable, *id.* at 546.<sup>9</sup> The disputed documents were filed with the Customs Department of Malta "by private companies, including shipping agencies." *Id.* Unlike in *Doyle*, the evidence at issue concerns tables generated by Taiwan Customs. Mr. Chen's affidavit and letters explain that the information provided was retrieved from the Taiwan Customs database that was created and maintained under Taiwan Customs' legal obligation to process and track imports and exports. See Chen Aff. & Letters. That some information used to populate that database may have come from third parties does not

<sup>8</sup> In 1997, the contents of Rule 803(24) and 804(b)(5) were combined and transferred to Rule 807. Fed. R. Evid. 807 advisory committee's note to 1997 amendment.

<sup>9</sup> The court found that the admission of the disputed records "would in all probability be an abuse of the discretion by the trial court," but stopped short of holding that it was. 130 F.3d at 546. Because the court was remanding the case on other issues, it called the issue to the district court's attention. *Id.*

persuade the court that the tables are inadmissible. *See, e.g., Moss*, 933 F.2d at 1309–10 (“[M]any government reports, as with many expert witnesses, have to rely in part on hearsay evidence, and the reports are not generally excluded for this reason.”).

Moreover, contrary to Univar’s averment, the court finds that the tables are highly probative, and their probative value is not substantially outweighed by unfair prejudice or potential to mislead the jury. *See Fed. R. Evid. 403*; Def.’s First Mot. *in Limine* at 28–31. Evidence is prejudicial if it “involves some adverse effect . . . beyond tending to prove the fact or issue that justified its admission into evidence.” *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176–77 (S.D.N.Y. 2008) (quoting *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995)). Unfair prejudice would invite “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Fed. R. Evid. 403* advisory committee’s note on 1972 proposed rules.

Univar argues that a decision to admit the tables will result in unfair prejudice to Univar because it did not have the opportunity to depose or cross-examine a Taiwan Customs official regarding the tables. Def.’s First Mot. *in Limine* at 30. Univar contends that the tables will mislead the jury “because there is a danger that the jury will interpret the imports on the tables as ‘matching’ the exports only because of the selective nature of the tables.” Def.’s First Mot. *in Limine* at 28. Univar complains of the following “key” information that is missing from the tables that, if disclosed, could discredit the government’s theory: date of importation; date of exportation; unit price; net weight; exchange rate; description of packaging; and the total number of packages per unit. Def.’s First Mot. *in Limine* at 29. The court finds that to the extent that the absence of any of this information has the potential to mislead the jury, Univar should be able to alert the jury to the perceived flaws in the tables and advocate its theory of the case. Moreover, that Univar did not have the opportunity to depose or cross-examine a Taiwan Customs official does not substantially outweigh the tables’ probative value. Any challenges that Univar has which relate to the weight of the tables can be addressed in its case in chief or closing arguments but are not grounds to exclude the tables from the jury’s consideration.

Because the court finds that the Taiwan Customs Tables are admissible as public records pursuant to Rule 803(8), it need not discuss whether the tables are admissible under Rule 803(6) or Rule 703. Accordingly, for the foregoing reasons, Univar’s first motion *in limine* is denied.

**b. Defendant's Second Motion *in Limine* is Granted in Part**

Defendant seeks to preclude Dr. Henry B. McFarland, the Government's proposed expert witness, an economist, from testifying at trial. Def.'s Second Mot. *in Limine* at 1. Dr. McFarland issued an expert report, a rebuttal report, and a supplemental report in this case. Def.'s Second Mot. *in Limine*, Exs. 1 (Expert Report of Henry B. McFarland, Ph.D, March 29, 2017) ("McFarland Report"), 2 (Rebuttal Report of Henry B. McFarland, Ph.D., May 8, 2017) ("McFarland Rebuttal Report"), 3 (Suppl. Report of Henry B. McFarland, Ph.D., Jul. 25, 2017) ("McFarland Suppl. Report."), ECF Nos. 163–2, 163–3, 163–4. In his expert report, Dr. McFarland opined that "[t]he saccharin imports whose country of origin is in question were much more likely to have been brought into Taiwan from China than to have been brought in from a third country or produced in Taiwan," and "the saccharin in question likely was in fact produced in China." McFarland Report at 2. In his rebuttal report, Dr. McFarland offers the following additional opinions: (1) "While Taiwan may have underground (or shadow) economic activity, there is no evidence that sector includes a saccharin manufacturing plant that could have supplied the saccharin imports at issue in this litigation"; (2) based on the description of Professor Jane K. Winn, Defendant's rebuttal expert witness, "of changes in Taiwan's economy[, ] it seem[s] less likely that saccharin was manufactured in the shadow economy"; and (3) "William Huang and the companies with which he is associated may have operated as trading companies in Taiwan's shadow economy, but there is no evidence they manufactured saccharin in Taiwan." McFarland Rebuttal Report at 1–2. In his supplemental report, Dr. McFarland offers the following opinions: "[LH Chemical's] saccharin imports almost all went through the Taiwanese port of Kaohsiung, the same port used by all of [LH Trading's] saccharin exports"; and "[d]ata on the value of imports and exports indicate that importing this material from China and then exporting it to the United States would have been profitable for the Huang companies." McFarland Suppl. Report at 1–2. Defendant's motion seeking to exclude Dr. McFarland's opinions rests on two primary challenges; first, that Dr. McFarland does not possess "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue"; second, that Dr. McFarland's testimony is not based on "reliable methods and principles." Def.'s Second Mot. *in Limine* at 2 (citing Fed. R. Evid. 702(a),(c)), 14–25.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. As relevant here, a witness must be "qualified as

an expert by knowledge, skill, experience, training, or education,” and his testimony must be “the product of reliable principles and methods.” Fed. R. Evid. 702; *see also Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 807 F.3d 1283, 1302–03 (Fed. Cir. 2015). Trial judges are charged with the responsibility of acting as gatekeepers to ensure that expert testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (extending the trial court’s “basic gatekeeping obligation” to all expert testimony). “Whether a witness is qualified” as an expert “can only be determined by the nature of the opinion he offers,” *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984), as compared to his “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. If the court finds a witness is not qualified to testify on a particular field or on a given subject, the court will preclude that witness from testifying on that field or subject. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999) (citing *Holbrook v. Lykes Bros. Steamship Co., Inc.*, 80 F.3d 777, 781 (3d Cir.1996)).<sup>10</sup>

The Supreme Court in *Daubert* identified several factors that the court may consider in determining whether testimony is reliable: (1) whether a theory or scientific technique can or has been tested; (2) whether it “has been subjected to peer review and publication”; (3) whether the specific scientific technique has a “known or potential rate of error”; and (4) whether the theory or technique is generally accepted in the “relevant scientific community.” 509 U.S. at 593–94; *see also Kumho Tire*, 526 U.S. at 149–150. This list of factors, however, “neither necessarily nor exclusively applies to all experts or in every case.” *Kumho Tire*, 526 U.S. at 141. Indeed, “[t]he inquiry envisioned by Rule 702 is . . . a flexible one,” *Daubert*, 509 U.S. at 594, and the trial judge has broad latitude when deciding how to determine reliability, *Kumho Tire*, 526 U.S. at 152. “Because it is usually impossible to subject nonscientific theories to experimentation,” the court “should concentrate on the expert’s experience, rather than methodology.” *Amco Ukrservice & Prompriladamco v. Am. Meter Co.*, No. CIV.A.00–2638, 2005 WL 1541029, at \*2 (E.D. Pa. June 29, 2005) (citing *Kumho Tire*, 526 U.S. at 152).

Dr. McFarland’s curriculum vitae indicates that he obtained a Ph.D. in Economics from Northwestern University in 1978. McFarland Report, Ex. 1, ECF No. 163–2. His previous experience includes working as an economist with the Antitrust Division of the U.S.

<sup>10</sup> As the proponent of expert testimony, the Government must establish the admissibility of Dr. McFarland’s reports by a preponderance of evidence. Fed. R. Evid. 702, advisory committee’s note on the 2000 amendments (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

Department of Justice for over eight years and with the U.S. International Trade Commission (“ITC”) for over three years. McFarland Report at 1. Since 1989 he has been employed as an economic consultant with the firm of Economists Incorporated. *Id.*

Dr. McFarland testified that his expertise is in economics, which he defined as “the study of the production and distribution of goods, services, and wealth,” and that his sub-specialties are industrial organization and international trade. Def.’s Second Mot. *in Limine*, Ex. 4 (Dr. Henry McFarland Dep. Tr.) (“McFarland Dep.”) at 78:25–79:18, ECF No. 163–5. He explained that industrial organization “looks at the functioning of industries and markets to, essentially, *see* how the activities of production — and to some extent, consumption — are structured.” *Id.* at 79:22–80:1. He utilized this expertise while working at the Department of Justice. *Id.* at 80:2–8. He further explained that his subspecialty in international trade led to him conducting “research studies [while employed at the ITC] concerning transportation costs of imports and how they have behaved.” *Id.* at 80:17–25. He also testified that he has “dealt quite a bit with transportation issues[, a]nd transshipment, obviously, is one of those.” *Id.* at 107:16–18. Additionally, his report states he has “also worked on matters involving the chemical industry,” and “involving the laws affecting U.S. international trade, including the antidumping laws.” McFarland Report at 1. Based on his report and deposition testimony, the court finds that Dr. McFarland is qualified to give the opinions mentioned above.<sup>11</sup>

Defendant argues that Dr. McFarland has no specialized knowledge of saccharin production to provide an opinion in this case and attacks Dr. McFarland’s reliance on “descriptions of others to assess what factories in Taiwan would look like and require.” Def.’s Second Mot. *in Limine* at 19. Dr. McFarland testified that he has experience in exploring various production techniques in the chemical industry from a background perspective, although admittedly, he does not consider himself a chemist. McFarland Dep. at 108:20–109:9. However, that Dr. McFarland is not a chemist, lacks specialized knowledge on saccharin production, and lacks personal knowledge of the size of factories in Taiwan does not render his testimony inadmissible. Experts may rely on opinions of other experts on areas outside their expertise. *See Carnegie Mellon Univ.*, 807 F.3d at 1303. It is not necessary that the basis for their opinions be obtained from personal perception. *See Monsanto Co. v. David*, 516 F.3d 1009, 1015 (Fed. Cir. 2008). Here, Dr. McFarland explained in his report that he relied, in

<sup>11</sup> The court finds one aspect of Dr. McFarland’s testimony problematic, which the court discusses below.

part, on information regarding saccharin production provided by Dr. Ronald Pearson — who has a Ph.D. in organic chemistry and previously was the research and development director of PMC Specialties, a saccharin producer — in forming his opinion. McFarland Report at 4 n.14, 8 n.27. Dr. McFarland was permitted to do so. *See Carnegie Mellon Univ.*, 807 F.3d at 1303.

Defendant also argues that Dr. McFarland has no specialized training or knowledge of transshipment necessary to offer an expert opinion in this case. Def.'s Second Mot. *in Limine* at 19. As Dr. McFarland explained, however, his experience with transportation issues involved transshipment. Dr. McFarland Dep. at 107:16–18. As an economist whose sub-specialties include international trade and transportation, among other things, Dr. McFarland is qualified to opine on the likelihood of transshipment. Even more importantly, Dr. McFarland relied on his experience and expertise as an economist in analyzing numerous economic data in forming his opinions. For example, Dr. McFarland's report is based on a review of publicly available data from Taiwan's Ministry of Finance on the origin of all of Taiwan's imports of saccharin, McFarland Report at 3–6; Japanese export data as compared to Taiwan's import data, *id.* at 4–6;<sup>12</sup> U.S. trade statistics on the unit values of Japanese imports into the United States compared to unit value of all imports as well as the percentage share of imports from Japan from 2002 to 2012, *id.* at 9–10 & Charts 4–5; and data from Taiwan Customs related to timing of saccharin imports from China by LH Chemical and exports to the United States and LH Trading from 2009 to 2012, i.e., the Taiwan Customs Tables discussed above, *id.* at 11–12.

Defendant also argues that Dr. McFarland's experience, which involved reliance on "country-level data," does not render him an expert to analyze statistics on specific shipments, as he did here. Def.'s Second Mot. *in Limine* at 19–20. Defendant, thus, argues that Dr. McFarland's general training in interpreting aggregate data is insufficient to qualify him as an expert in analyzing shipment-specific data. *Id.* Defendant also compares Dr. McFarland to the experts in *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966 (C.D. Cal. 2012) and *In re Worldcom, Inc.*, 371 B.R. 33, 40 (Bankr. S.D.N.Y. 2007), and avers that, like the experts in those cases, Dr. McFarland's background and training as an economist "provides no basis for the specific opinion he would render." *Id.* at 19. The court disagrees.

*In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, and *In re Worldcom, Inc.*, 371 B.R. 33, are not as analogous as Defendant

<sup>12</sup> Dr. McFarland collected Japanese export data because Univar identified Japan as a possible source of the subject saccharin. McFarland Report at 4.

suggests. The court in *In re Live Concert Antitrust Litig.* excluded an economist from testifying on whether a performer qualified as a “rock” artist for the purpose of determining whether concerts are “rock’ concerts” because the witness “ha[d] no expertise in this area.” 863 F. Supp. 2d at 994–95. The witness “was not relying on his experience and expertise as an economist,” but rather was “doing the work of a ‘music analyst’ (or perhaps a lay juror).” *Id.* at 995. The court in *In re Worldcom, Inc.*, excluded an economist from testifying on the appropriate measure of unjust enrichment damages in a lawsuit filed against a telecommunications company because the witness’s “education as an economist and his work as a researcher and in litigation support have never given rise to an opportunity to study or know the telecommunications industry or the sales practices therein.” 371 B.R. at 41–42. The court found “no nexus between his credentials and the subject matter of his testimony.” *Id.* at 42. In contrast to the witness in *In re Live Concert Antitrust Litig.*, Dr. McFarland relied on his experience and expertise in analyzing the various economic data, including the shipment-specific data, as outlined above, in rendering his opinion. For the same reasons, the court finds that there is a nexus between his credentials and the subject matter of his testimony.

Defendant also argues that Dr. McFarland has no specialized knowledge on informal economies, either generally or specific to Taiwan’s informal economy, to give an opinion that while Taiwan may have an “underground (or shadow) economy,” the saccharin in question was not likely produced in Taiwan. Def.’s Second Mot. *in Limine* at 20; *see also* McFarland Rebuttal Report at 2. Defendant further argues that Dr. McFarland’s “good deal of work” in industrial organization and international trade do not provide him with the specialized knowledge to render an opinion on profitability. *Id.* at 20–21. Defendant posits there is no indication in Dr. McFarland’s report that he has ever calculated profits in a like manner, suggesting that his opinions were created specifically for the purpose of litigation. *Id.* at 20. These arguments are unavailing. Dr. McFarland’s rebuttal opinion regarding the likelihood of saccharin production in Taiwan’s shadow economy was rendered on the basis of the information supplied by Professor Winn regarding the declining nature of the shadow economy. *See* McFarland Rebuttal Report. He is qualified to provide a rebuttal report based on his analysis of the information supplied by Dr. Winn.

Defendant’s challenge to one aspect of Dr. McFarland’s testimony has merit. In his supplemental report, Dr. McFarland stated that it takes approximately four hours to “drive from the inner harbor at



Keelung to Kaohsiung Harbor . . . , which indicates that the imports that arrived at Keelung could easily have reached the port of export before the time of the export shipment.” McFarland Suppl. Report at 2. By his own admission, Dr. McFarland only has “general knowledge about the size of the island and how fast trucks go.” McFarland Dep. at 158:16–21. In the absence of any other basis for his testimony, the court will preclude Dr. McFarland from providing expert testimony on the length of time it takes to travel from Keelung to Kaohsiung Harbor.

The court also finds that Dr. McFarland’s testimony is reliable. Dr. McFarland gave a detailed explanation for how he reached his opinion. He testified that as an economist, he would (1) look at trade data; (2) follow methods used by those who typically study underground economies; and (3) look at the various costs and benefits and the incentives of the economic actors. McFarland Dep. at 71:2–20. A review of his reports shows he employed that methodology. First, Dr. McFarland reviewed publicly available data from Taiwan’s Ministry of Finance on the origin of all of Taiwan’s imports of saccharin, including unfinished acid saccharin and sodium saccharin, from 2003 to 2012, which showed that 98.8 percent of the saccharin imports were from China. McFarland Report at 3–4, 6. Because Univar identified Japan as a possible source of the saccharin, Dr. McFarland collected Japanese export data and compared that with Taiwan’s import data. McFarland Report at 4–6. This comparison showed that Taiwan’s imports from Japan amounted to less than the volume of Univar’s entries at issue. *Id.* at 5 & Chart 2. Dr. McFarland also analyzed the data on the value of those imports from Japan and determined that they had a “substantially higher value per kilogram than the Chinese imports,” making it unlikely that the imported saccharin was in unfinished form that was later converted and shipped to the United States. *Id.* at 6. He considered the potential profitability of a company importing unfinished saccharin from Japan, converting it, and then shipping it to the United States. *Id.* at 8. In so doing, he relied, in part, on information regarding the conversion process of saccharin provided by Dr. Pearson, an expert in saccharin production. *Id.* at 4 n.14, 8 n.27. He concluded that the conversion process would necessitate selling the saccharin in the United States for a higher price than the unfinished saccharin from Japan if the company were to make a profit. *Id.* at 8. Yet, his data comparison showed that in most instances, saccharin imported into Taiwan from Japan cost more per kilogram than saccharin exported to the United States. *Id.* at 8–9. He also considered the fact that Japan was not very

competitive in world saccharin trade. *Id.* at 9–10. For instance, he looked at the U.S. trade statistics on the unit values of imports from Japan, which Univar identified as a possible source of the subject saccharin, into the United States compared to unit value of all imports as well as the percentage share of imports from Japan from 2002 to 2012. *Id.* at 10 & Charts 4–5.

Dr. McFarland tied the data to the facts of this case, for example, concluding that “[t]he relatively high price of the Japanese product makes it less likely that Japan was a source of the saccharin at issue in this case,” and that the United States imported no saccharin from Japan in 2010 and 2012. *Id.* at 9–10. He contrasted Japanese trade data with those from China, which showed that from 2003 to 2012, the subject merchandise exported from Taiwan to the United States had a higher value per kilogram than the merchandise imported into Taiwan from China. *Id.* at 11. Next, he looked at the timing of shipments, which included the Taiwan Customs Tables. *Id.* at 11–13. Further, he considered the possibility of Taiwan’s production of the saccharin at issue. *Id.* at 13. Reviewing publicly available data from Taiwan’s Ministry of Finance, Dr. McFarland gathered that this data indicates that from 2003 to 2012, Taiwan imported more than twice as much saccharin as it exported. *Id.* Next, considering the possibility that there could have been an unlicensed, thus illegal, producer, Dr. McFarland considered the cost disadvantages of doing so. *Id.* at 16–18. His rebuttal report is based, in part, on the interpretation of studies and data cited by Dr. Winn. *See* McFarland Rebuttal Report.

The court further finds that Dr. McFarland’s analysis of these various sources will assist the trier of fact to assimilate this economic data. Although Defendant complains of Dr. McFarland “interpret[ing] certain documents,” such as certain email correspondence, which the jury is able to interpret on its own, Def.’s Second Mot. *in Limine* at 8–10 (internal quotation marks omitted), the court finds that the primary function of Dr. McFarland’s testimony is to analyze and interpret the various economic data, which will be helpful to the jury. Any disagreements on his reliance, in part, on certain documents produced in evidence go to the weight rather than admissibility of his testimony, and Defendant will have the opportunity to cross-examine Dr. McFarland with respect to his reliance on certain pieces of evidence with which Univar disagrees. *See i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir. 2010), *aff’d*, 564 U.S. 91 (2011) (“When [an expert’s] methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony’s weight, but not its admissibility.”) (citations

omitted). “[I]t is not the [] court’s role under *Daubert* to evaluate the correctness of facts underlying an expert’s testimony.” *Id.* at 856.

To attack Dr. McFarland’s methodology, Defendant first argues that Dr. McFarland’s proposed testimony does not grow “naturally and directly” out of his work and research outside of this litigation as he “has no ‘real world’ experience in transshipment.” Def.’s Second Mot. *in Limine* at 22. Second, Univar argues that Dr. McFarland “unjustifiably extrapolated from an accepted premise to an unfounded conclusion . . . in several ways.” *Id.* It asserts that Dr. McFarland accepts the Taiwan Customs data “at face value and believes that those tables reflect transshipment.” *Id.* Next, it asserts that Dr. McFarland rejects sworn witness testimony in favor of inadmissible evidence. *Id.* (citing Def.’s Second Mot. *in Limine*, Exs. 5, 6, ECF Nos. 163–6, 163–7); *see also* McFarland Dep. at 46:1–48:20; 61:7–23. Third, it argues that Dr. McFarland failed to account for obvious alternative explanations, such as “swapping,”<sup>13</sup> when he relied on the timing of the imports and exports reflected in the Taiwan Customs Tables, to support his view that transshipment occurred. Def.’s Second Mot. *in Limine* at 23. Fourth, Univar classifies Dr. McFarland’s principles and methods as inherently suspect and conclusory. *Id.* at 24. Fifth, it argues “there is no field of ‘transshipment’ and, thus, there is no field known to reach reliable results for the opinion that Dr. McFarland would give.” *Id.*

Notably, Defendant does not cite any authority that outlines best practices for economic analysis to challenge the methods used by Dr. McFarland. Indeed, the court has broad discretion in deciding how to determine reliability. *See Kumho Tire*, 526 U.S. at 152. As noted, because it is usually impossible to subject nonscientific theories, such as the economic theories relevant here, to experimentation, the court may concentrate on the expert’s experience, rather than methodology. *See, e.g., Amco Ukrservice*, 2005 WL 1541029, at \*2 (citing *Kumho Tire*, 526 U.S. at 152). Here, the court finds that Dr. McFarland’s experience and his detailed explanation of how he analyzed the various economic data sources render his testimony reliable. The court has determined that Dr. McFarland is qualified to give an opinion on transshipment; thus, Defendant’s first and fifth challenges are unavailing. Defendant’s remaining challenges go to the weight rather than admissibility of Dr. McFarland’s testimony. *See i4i Ltd. P’ship.*, 598 F.3d at 852. In *Daubert*, the court explained that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Id.* (quoting

<sup>13</sup> According to Dr. McFarland, “‘swapping’ generally means . . . trad[ing] one shipment for another.” McFarland Dep. 161:5–8.

*Daubert*, 509 U.S. at 596). Accordingly, for the foregoing reasons, Defendant's second motion *in limine* is granted in part in that the court will preclude Dr. McFarland from providing expert testimony on the length of time it takes to travel from Keelung to Kaohsiung Harbor. In all other respects, Defendant's second motion *in limine* is denied.

### ***c. The Government's Motion in Limine is granted***

The Government seeks to exclude the testimony of Mr. O'Rourke<sup>14</sup> concerning his legal interpretation of the standard of "reasonable care" under 19 U.S.C. § 1592, his "purported application of his interpretation of the standard of 'reasonable care' to select facts of this case," and his conclusion that Univar acted with reasonable care in this case. Pl.'s Mot. *in Limine* at 1. Mr. O'Rourke's report is divided into two sections: (1) a discussion of "what a reasonable importer of record would do during the 2007–2012 time period to ascertain the country of origin of the merchandise it was importing"; and (2) "whether [Univar] acted reasonably in its efforts to determine the country of origin of the saccharin it imported." See O'Rourke Report at 4, 31 (capitalization omitted). In the first portion of his report, Mr. O'Rourke explains that his opinion on the appropriate standard for reasonable care derives from his review of CIT decisions, CBP informed compliance publications, CBP rulings, and his personal interaction with importers and CBP employees. *Id.* ¶¶ 12–69.

Based on a review of those sources, Mr. O'Rourke offers the following opinions on the reasonable care standard: "no one single act . . . equates to the existence or the absence of reasonable care"; "[t]here is no bright line test for reasonable care"; "when considering the presence or absence of reasonable care, it is the totality of circumstances that control the determination if an importer has, in fact, exercised reasonable care"; and "perhaps the best way to answer the question is, has the importer acted in a reasonable manner?" *Id.* ¶ 124.2–5. Mr. O'Rourke concludes his report by opining that "[g]iven the full set of circumstances . . . and after reviewing Univar's practices, actions,

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<sup>14</sup> Mr. O'Rourke is an attorney who, from 1972 to 1974, worked as a trial attorney in the Customs Section of the Civil Division of the U.S. Department of Justice. O'Rourke Report ¶ 6. Thereafter, through 2014, he was a partner at Rode & Qualey, where he represented "a broad range of clients, particularly focusing on toys, wearing apparel and footwear" in customs matters. *Id.* ¶ 3. Mr. O'Rourke's practice at Rode & Qualey brought him "in contact on a daily basis with" import specialists, supervisory import specialists, and port directors, among others. *Id.* Mr. O'Rourke explained that "[t]his exposure provided and continues to provide, a constant insight into how Customs/CBP operates and interprets issues." *Id.* Currently, he is a member of Sandler, Travis & Rosenberg, P.A., where his practice includes customs issues such as, *inter alia*, country of origin criteria. *Id.* ¶ 7. The Government primarily challenges Mr. O'Rourke's testimony rather than his credentials.

deposition testimony and Exhibits, and CBP publications, Court Decisions and CBP rulings cited above, it is my opinion that Univar acted as a reasonable importer.” *Id.* ¶ 130.

As noted above, Rule 702 of the Federal Rules of Evidence governs admissibility of expert testimony, and it provides in full:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *see also Monsanto*, 516 F.3d at 1015. In short, “for an expert witness’s testimony to be admissible, it must be reliable, relevant, and helpful to the trier of fact.” *G.G. Marck & Assocs., Inc. v. United States*, Slip Op. 15–62, 2015 WL 3757040, \*9 (CIT June 17, 2015).

An expert testifying on what the law is or directing the finder of fact how to apply the law to facts is not helpful to the trier of fact in the manner that Rule 702 contemplates. *See, e.g., Stobie Creek Inv. LLC v. United States*, 608 F.3d 1366, 1383 (Fed. Cir. 2010) (holding that because expert testimony must “assist the trier of fact to understand the evidence or to determine a *fact* in issue,” the trial court did not abuse its discretion in excluding expert testimony relating to proper interpretation of tax laws) (quoting Fed. R. Evid. 702); *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1379 n.6 (Fed. Cir. 2008) (affording no weight to a witness’s affidavit interpreting thrift regulations because the proper interpretation of the regulations concerned an issue of law). Moreover, “expert testimony that amounts to an opinion of law is especially disfavored.” *Stobie Creek Invs., LLC v. United States*, 81 Fed. Cl. 358, 360 (2008) (citing *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988)). The court in *Specht* aptly explained the reasoning behind the rationale for excluding legal opinions:

While other experts may aid a jury by rendering opinions on ultimate issues, our system reserves to the trial judge the role of adjudicating the law for the benefit of the jury. When an attorney is allowed to usurp that function, harm is manifest in at least two ways. First, . . . the jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title “expert,” is more knowledgeable than the judge in a given area of the law. . . . Second, testimony on

ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process. If one side is allowed the right to call an attorney to define and apply the law, one can reasonably expect the other side to do the same. . . . The potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court.

*Specht*, 853 F.2d at 808–09 (internal citations omitted). The trial court “in its role as gatekeeper, must exclude expert testimony that . . . invades the province of the jury to find facts and that of the court to make ultimate legal conclusions.” *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1364 (Fed. Cir. 2008).<sup>15</sup>

Mr. O’Rourke’s report states that its purpose is “to provide the [c]ourt with [Mr. O’Rourke’s] opinion of the concept of reasonable care and how it applies to Univar’s transactions.” O’Rourke Report ¶ 122. Mr. O’Rourke’s opinion on the meaning of reasonable care is based in part on his analysis of the legislative history of the Customs Modernization and Informed Compliance Act, CIT decisions that have considered whether an importer exercised reasonable care, and CBP compliance publications and rulings. *Id.* ¶¶ 2, 12–40. He cites excerpts from these sources and explains their legal significance. *Id.* ¶¶ 12–40. His ultimate opinion on the appropriate standard derives from his analysis of these sources combined with his personal experience interacting with CBP employees. Because it is the role of the court to determine the law and instruct the jury as to the appropriate standard, Mr. O’Rourke’s report exceeds the scope of permissible expert testimony under Rule 702 and must be excluded. *See, e.g., Stobie Creek Investments*, 608 F.3d at 1383–84. Moreover, Mr. O’Rourke’s opinion that Univar acted with reasonable care must also be excluded because it invades the province of the jury’s fact-finding function.

Defendant’s argument that there is no “specialized legal meaning” that attaches to the concept of reasonable care, thereby rendering Mr. O’Rourke’s opinion permissible is undermined by Mr. O’Rourke’s own report analyzing the statute and legal opinions to come to his determination on the appropriate standard. Def.’s Resp. at 7–14 (citing, *inter alia*, *United States v. Barile*, 286 F.3d 749, 760 (4th Cir. 2002) (“To determine when a question posed to an expert witness calls for an improper legal conclusion, the district court should consider first

<sup>15</sup> Although *Sundance, Inc.* involved the issue of whether a patent attorney who lacked the appropriate technical qualifications could offer an expert opinion on the issues of patent infringement and validity, 550 F.3d at 1359–65, an issue related to the witness’s expertise, the court’s instruction on the gatekeeping role of the trial courts and the provinces of the judge and jury is pertinent here.

whether the question tracks the language of the legal principle at issue or of the applicable statute, and second, whether any terms employed have specialized legal meaning.”)). The court is well equipped to undertake the task of determining the applicable legal standard on reasonable care and instructing the jury on that standard without the help of an expert. *See, e.g., Stobie Creek Investments*, 608 F.3d at 1384 (holding that a proposed expert’s opinion would not have assisted the trial court “because [the witness’s] proposed testimony consisted of a lengthy legal analysis of past precedent and assumed key factual representations . . . were accurate, when in actuality they were false . . .”).

Defendant argues Mr. O’Rourke’s opinion is necessary to help the jury because “[w]hat typical importers do to verify the country of origin of merchandise they are importing is not a ‘matter of common knowledge.’” Def.’s Resp. at 7. However, Mr. O’Rourke’s opinion does not speak to the actions of typical importers, nor does it explain that it derives from what is customary practice for importers in the trade industry. Rather, his opinion is based in large part on his examination of the statute, court rulings, and CBP rulings and compliance publications. In so doing, Mr. O’Rourke operates outside the proper scope of an expert witness. Because proper interpretation of the reasonable care standard is an issue of law, Mr. O’Rourke’s opinion relating to this issue will be excluded.

Defendant’s other arguments in support of admitting Mr. O’Rourke’s testimony are not persuasive. Defendant argues that Mr. O’Rourke’s testimony is analogous to the expert testimony of lawyers in legal malpractice cases, which is regularly permitted. Def.’s Resp. at 5 (citing *Floyd v. Hefner*, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008); *Huddleston v. Herman & MacLean*, 640 F. 2d 534 (5th Cir. 1981) *aff’d in part, rev’d in part on other grounds*, 459 U.S. 375 (1983)). The cases that Univar cites do not stand for the proposition that a lawyer may testify as to purely legal matters. In *Floyd*, which involved legal malpractice and breach of fiduciary duty claims, the court permitted an experienced lawyer with significant background in professional ethics, 556 F. Supp. 2d at 642, to testify as to the “standard of care of a reasonably prudent attorney” and allowed the witness to “apply[] his legal understanding to the factual matters at issue,” *id.* at 643–44 (citing *Waco Int’l, Inc. v. KHK Scaffolding Houston Inc.*, 278 F.3d 523, 533 (5th Cir. 2002)). In *Huddleston*, which involved claims of securities fraud, the court held that it was proper to permit a lawyer to testify that a statement in a prospectus was standard language used in connection with the issuance of a new security because that information related to the factual issue of defendants’ scienter. 640 F.2d at

552. In the latter case, the lawyer's testimony was appropriate to help the jury understand the fact in evidence — the meaning of prospectus boilerplate language in the securities industry — that was relevant to determining defendants' culpability. *See id.* What these cases demonstrate is that a witness may testify as to legal matters that involve a question of fact; they do not establish, however, that expert testimony is appropriate when it attempts to define the legal parameters within which the jury must exercise its fact-finding function, which is what Mr. O'Rourke attempts to do. The case to which *Floyd* cites supports this proposition. *See* 556 F. Supp. 2d 643–44 (citing *Waco Int'l Inc.*, 278 F.3d at 533 (“Although a lawyer may not testify as to purely legal matters, he or she may testify as to legal matters that involve questions of fact.”)).

Additionally, citing Rule 704, Defendant also argues that Mr. O'Rourke's opinion is not objectionable “just because it embraces an ultimate issue.” Def.'s Resp. at 14 (quoting Fed. R. Evid. 704 advisory committee's note to the 1972 proposed rules). While expert testimony may embrace an ultimate issue, such testimony does not go unchecked. The advisory committee's note to Rule 704 plainly states

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.

Fed. R. Evid. 704 advisory committee's note to the 1972 proposed rules. Simply put, under Rule 702, the judge determines the law — in this case, the standard for reasonable care — and instructs the jury as to that applicable law; the question of whether Univar acted with reasonable care is a question reserved for the jury. Mr. O'Rourke's opinion on the standard of reasonable care usurps the court's role and his conclusion that Univar acted with reasonable care is, in effect, telling the jury what result to reach.

Consequently, because Mr. O'Rourke's testimony would invade the province of the court and the jury, it exceeds the scope of permissible expert testimony under Rule 702, and will be excluded. Therefore, the Government's motion *in limine* is granted.



### CONCLUSION AND ORDER

For the foregoing reasons, the court **DENIES** Defendant's first motion *in limine* (ECF No. 142), **GRANTS**, in part, and **DENIES**, in part, Defendant's second motion *in limine* (ECF No. 163), and **GRANTS** the Government's motion *in limine* (ECF No. 152). Parties are to consult and are hereby **ORDERED** to file a joint status report or joint proposed order for amending and/or supplementing their summary judgment papers no later than April 3, 2018.

Dated: March 2, 2018

New York, New York

*/s/ Mark A. Barnett*

JUDGE

## Slip Op. 18–15

SILFAB SOLAR, INC., et al., Plaintiffs, v. UNITED STATES, et al.,  
Defendants, and SOLARWORLD AMERICAS, INC., et al., Defendant-  
Intervenors.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 18–00023

[Denying plaintiffs’ motion for a temporary restraining order and a preliminary injunction]

Dated: March 5, 2018

*Jonathan T. Stoel and Mitchell P. Reich*, Hogan Lovells US, LLP, of Washington, D.C., argued for plaintiffs. With them on the brief were *Craig A. Lewis, Michael G. Jacobson*, and *Robert B. Wolinsky*.

*Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director, and *Joshua E. Kurland*, Trial Attorney.

*John D. Henderson*, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant U.S. International Trade Commission. With him on the brief was *Andrea C. Casson*, Assistant General Counsel for Litigation.

*Timothy C. Brightbill*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor SolarWorld Americas, Inc. With him on the brief were *Laura El-Sabaawi* and *Usha Neelakantan*.

*Matthew J. McConkey*, Mayer Brown LLP, of Washington, D.C., for defendant-intervenor Suniva Inc.

### **OPINION AND ORDER**

#### **Stanceu, Chief Judge:**

Plaintiffs Silfab Solar, Inc., Heliene, Inc., Canadian Solar (USA), Inc., and Canadian Solar Solutions, Inc. move for a temporary restraining order and preliminary injunction to prohibit defendants from subjecting plaintiffs’ products to “safeguard” measures, in the form of temporary import duties, that the United States recently imposed on imports of certain crystalline silicon photovoltaic (“CSPV”) cells and certain products (including “modules”) that contain such cells.

Because plaintiffs have failed to demonstrate a likelihood that they will succeed on the merits of their claims, and because they have not demonstrated that the imposition of the equitable relief they seek would be in the public interest, the court denies their motion.

## I. BACKGROUND

### A. *The Parties to this Litigation*

Plaintiffs Silfab Solar, Inc., Heliene, Inc., and Canadian Solar Solutions, Inc. are Canadian producers and exporters of CSPV modules, which are products that incorporate CSPV cells and that are intended for use in the residential, commercial, and industrial generation of solar electricity. Compl. ¶¶ 8, 9, 11 (Feb. 7, 2018), ECF Nos. 2 (public), 16 (conf.). Plaintiff Canadian Solar (USA), Inc. is a U.S. importer of solar cells and modules, including products from Canadian Solar Solutions, Inc. *Id.* ¶ 10.

Plaintiffs have named as defendants in this action the United States, U.S. Customs and Border Protection (“CBP”) and its acting Commissioner, the U.S. International Trade Commission (the “Commission” or the “ITC”) and its Chairman, and the Office of the United States Trade Representative and the U.S. Trade Representative (collectively, the “USTR”). *Id.* ¶¶ 12–18. Defendant-intervenors Suniva Inc. (“Suniva”) and SolarWorld Americas, Inc. (“SolarWorld”) are U.S. manufacturers of CSPV cells and modules.

### B. *The President’s Proclamation*

President Trump issued Proclamation 9693 of January 23, 2018, “To Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes” (the “Proclamation”), which went into effect on February 7, 2018. Proclamation No. 9693, 83 Fed. Reg. 3541 (Jan. 25, 2018) (the “*Proclamation*”). The Proclamation, issued under section 203 of the Trade Act of 1974 (the “Trade Act”), 19 U.S.C. § 2253,<sup>1</sup> imposed (with certain exceptions not applicable here) temporary “safeguard” duties on import entries of “CSPV cells (whether or not partially or fully assembled into other products),” to which the Proclamation refers as “CSPV products.” *Id.*

The temporary duties are to remain in effect for a four-year period beginning on the effective date (i.e., February 7, 2018). *Id.* at 3549. The duties are imposed in the *ad valorem* rates of 30%, if entered from February 7, 2018 through February 6, 2019, 25%, if entered from February 7, 2019 through February 6, 2020, 20%, if entered from February 7, 2020 through February 6, 2021, and 15%, if entered

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<sup>1</sup> All citations to the United States Code herein are to the 2012 edition except where otherwise indicated.

from February 7, 2021 through February 6, 2022. *Id.* Under a “tariff-rate quota,” the Proclamation exempts from the safeguard duties an annual aggregate quantity of 2.5 gigawatts of CSPV cells, but not cells assembled into modules or other products. *Id.*

### C. *Administrative Actions Preceding the Issuance of the Proclamation*

Effective May 17, 2017, the Commission initiated an investigation, Investigation No. TA-201–75, in response to a petition filed by Suniva pursuant to which an entity representing a U.S. industry may request a “safeguard” action under sections 201 to 203 of the Trade Act “for the purpose of facilitating positive adjustment to import competition.” 19 U.S.C. § 2252(a)(1). *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products); Institution and Scheduling of Safeguard Investigation and Determination That the Investigation Is Extraordinarily Complicated*, 82 Fed. Reg. 25,331 (June 1, 2017). The petition was later joined by Solar-World.

On November 17, 2017, the Commission transmitted to the President its report on the investigation, in which it reached an affirmative determination under section 202(b) of the Trade Act, 19 U.S.C. § 2252(b), that CSPV products “are being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article.” *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, USITC Pub. No. 4739, Inv. No. TA-201–75 at 1 (Nov. 2017), available at [https://www.usitc.gov/publications/safeguards/pub4739-vol\\_i.pdf](https://www.usitc.gov/publications/safeguards/pub4739-vol_i.pdf) (last visited Mar. 5, 2018) (“*Views of the Commission*”). On November 27, 2017, the USTR requested additional information from the Commission under section 203(a)(5) of the Trade Act, 19 U.S.C. § 2253(a)(5). The ITC responded in a “supplemental report” on December 27, 2017, “that identified unforeseen developments that led to the importation of CSPV products into the United States in such increased quantities as to be a substantial cause of serious injury.” *Proclamation* ¶ 4.

### D. *Commencement of this Action and the Filing of the Motion*

Plaintiffs filed their complaint in redacted form on February 7, 2018 and, on the same day, filed their redacted motion for a temporary restraining order and preliminary injunction. Compl.; Pls.’ Mot. for TRO and Prelim. Inj. (Feb. 7, 2018), ECF No. 10. On February 9, 2018, following the court entering a protective order, plaintiffs filed

unredacted versions of the complaint and their motion, which contained business-related information for which they claim confidential treatment. Pls.' Mot. for TRO and Prelim. Inj. (Feb. 9, 2018), ECF No. 17 (conf.). Plaintiffs seek a declaratory judgment that the Proclamation as applied to them is contrary to law and an order enjoining the United States from taking any action to impose or enforce the Proclamation on products from Canada covered by the Proclamation and from collecting any tariffs from plaintiffs pursuant to it. Proposed Prelim. Inj. Order (Feb. 7, 2018), ECF No. 10–16 (“Proposed Order”).

The court held a telephone conference with the parties on February 12, 2018. With the agreement of the parties, the court scheduled an oral argument for February 26, 2018 on the issues of whether plaintiffs have shown a likelihood of success on the merits and whether a temporary restraining order or preliminary injunction would be in the public interest. Order (Feb. 12, 2018), ECF No. 22. The court held oral argument on February 26, 2018.

## II. DISCUSSION

### A. *Subject Matter Jurisdiction*

This action arises out of sections 201–203 of the Trade Act, which provide for the imposition by the President of safeguard measures, including temporary import duties, to facilitate the adjustment of a domestic industry to import competition. Sections 201–203 provide for tariffs and duties for a reason other than the raising of revenue, i.e., to facilitate that adjustment. The court, therefore, exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), under which the Court of International Trade is empowered to review a “civil action commenced against the United States . . . or its officers . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.”

### B. *Factors to Be Considered for a Temporary Restraining Order and Preliminary Injunction*

A party may obtain a temporary restraining order or preliminary injunction if it demonstrates that it will incur irreparable harm in the absence of such order or injunction, that it is likely to succeed on the merits of the action, that the balance of hardships favors the imposition of temporary equitable relief, and that the temporary restraining order or injunction is in the public interest. *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014) (factors for considering motion for preliminary injunction); *Qingdao Taifa Group*

*Co. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009) (same); see 13 James Wm. Moore, et al., *Moore's Federal Practice* § 65.36 (3d ed. 2015) (factors for considering application for temporary restraining order). In analyzing a request for injunctive relief under these factors, “[n]o one factor, taken individually, is necessarily dispositive, because the weakness of the showing regarding one factor may be overborne by the strength of the others.” *Belgium v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (internal quotation marks and citations omitted). Rather, the Court of Appeals for the Federal Circuit (the “Court of Appeals”) has identified a “sliding scale” under which, for example, a greater showing of potential irreparable harm results in a lesser burden on plaintiffs to show a likelihood of success on the merits. *Id.* at 1293 (citing, *inter alia*, *Corus Group PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1353–54 (2002)). However, even if a party can show that it will be irreparably harmed, “the party must . . . demonstrate that it has at least a fair chance of success on the merits for a preliminary injunction to be appropriate.” *Wind Tower Trade Coal.*, 741 F.3d at 96 (citing *Qingdao Taifa*, 581 F.3d at 1381) (internal quotation marks and citation omitted).

For the reasons discussed in this Opinion and Order, the court concludes that plaintiffs have not demonstrated that they have a fair chance to succeed on the merits of any of their three claims. The court further concludes that they have failed to show that the equitable relief they seek would be in the public interest. Therefore, even were the court to presume, without deciding, that plaintiffs would be able to demonstrate that they will incur irreparable harm absent the relief they seek, and that the balance of hardships is in their favor, they still would not qualify for this relief. In this case, there are no facts in dispute as to the merits of their claims, and the court is able to assess their likelihood of success by considering pure questions of law stemming from the interpretation of the applicable statutes. While arguing that their showing of likelihood of success on the merits should be viewed on a sliding scale based on a strong showing of irreparable harm, they have failed to show that the statutory interpretations on which they have based their claims are plausible.

### C. *Plaintiffs' Claims in this Litigation*

Plaintiffs assert three claims in their complaint. The claims have in common a contention that the President acted without congressional authority in issuing the Proclamation. The first claim identifies a flaw in the proceedings leading up to the issuance of the Proclamation, and the other two pertain to an aspect of the President's determination

itself. Plaintiffs maintain that the court must declare the Proclamation unlawful, and prohibit the implementation of the Proclamation, in response to each of these claims.

First, plaintiffs claim, in Count 1 of their complaint, that the President and the U.S. Trade Representative violated sections 201 and 203 of the Trade Act by adopting a safeguard measure upon a report of the ITC that did not comply with subsection (e) of section 202 of the Trade Act. Compl. ¶ 54. Section 202(e)(1) directs that the Commission, if making an affirmative determination that imports were a substantial cause of serious injury to a domestic industry, as it did in the proceeding resulting in the issuance of the Proclamation, “shall also recommend the action that would address the serious injury, or threat thereof, to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition.” 19 U.S.C. § 2252(e)(1). Plaintiffs point out that the ITC’s report did not provide, on behalf of the Commission as a whole, a recommended action to address the serious injury to the domestic industry. *See Proclamation* ¶ 5 (“The ITC did not recommend an action within the meaning of section 202(e) of the Trade Act (19 U.S.C. 2252(e)).”).

Second, plaintiffs claim (in Count 2) that the Proclamation, by including the tariff-rate quota on CSPV cells not assembled into modules or other products, violated section 312(d) of the North American Free Trade Agreement Implementation Act (the “NAFTA Implementation Act”), North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301–3473), under which a global safeguard action taken under the Trade Act affecting imports of an article of Canada or Mexico “proclaiming a quantitative restriction shall permit the importation of a quantity or value of the article which is not less than the quantity or value of such article imported into the United States during the most recent period that is representative of imports of such article, with allowance for reasonable growth.” 19 U.S.C. § 3372(d). Maintaining that the tariff-rate quota is a “quantitative restriction” within the meaning of § 3372(d), Compl. ¶ 57, plaintiffs claim that the adoption and implementation of the Proclamation is contrary to the NAFTA Implementation Act, *id.* ¶ 60.

Third, in Count 3 of their complaint, citing section 311(a) of the NAFTA Implementation Act, 19 U.S.C. § 3371(a), and section 312(a) and (b) of the NAFTA Implementation Act, 19 U.S.C. § 3372(a)-(b), plaintiffs claim that the President lacked authority to impose a restriction on CSPV products from Canada because the ITC found that imports from Canada did not account for a substantial share of total

imports and did not contribute importantly to the serious injury, or threat thereof, caused by imports. Compl. ¶¶ 62–67. In support of this claim, they submit that section 203(a) of the Trade Act, 19 U.S.C. § 2253(a), provides that the President may impose a safeguard measure only after receiving from the Commission an affirmative finding of serious injury. *Id.* ¶ 62.

*D. Plaintiffs Have Not Shown a Likelihood of Success on the Merits for their Claims*

*1. Plaintiffs Have Not Shown a Likelihood of Success for the Claim Asserted in Count 1*

In the report of its investigation, the four Commissioners of the ITC were unanimous in finding that CSPV products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. *Views of the Commission* at 5 n.2 (“The Commission’s affirmative serious injury determination is unanimous, reflecting the views of Chairman Rhonda K. Schmidlein, Vice Chairman David S. Johanson, and Commissioners Irving A. Williamson and Meredith M. Broadbent.”). In a section entitled “Remedy Recommendations,” the Commission’s report states that “[i]n order to address the serious injury to the domestic industry producing CSPV products and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition, the Commission recommended a series of actions.” *Id.* at 2.

The report described the recommendation of Chairman Schmidlein as consisting of a tariff-rate quota on CSPV cells, with a 10% in-quota rate the first year, 9.5% in year two, 9% in year three, and 8.5% in year four. *Id.* She recommended an in-quota volume level of 0.5 gigawatts in the first year, 0.6 in year two, 0.7 in year three, and 0.8 in year four. *Id.* For cells, the out-of-quota rate would be 30% for the first year, 29% in year two, 28% in year three, and 27% in year four. *Id.* For CSPV modules, she recommended a tariff of 35% for the first year, 34% for year two, 33% for year three, and 32% for year four. *Id.*

Vice Chairman Johanson and Commissioner Williamson joined in a recommendation that also consisted of a tariff-rate quota on cells and a tariff on modules. *Id.* Their recommended tariff-rate quota on cells would not increase tariffs for in-quota entries but would impose an out-of-quota tariff of 30% for the first year and decrease by five percentage points each subsequent year. *Id.* The in-quota volume would be 1 gigawatt, increasing to 1.2 in year two, 1.4 in year three,



and 1.6 in year four. *Id.* For CSPV modules, they recommended a tariff of 30% for the first year, 25% for year two, 20% for year three, and 15% for year four. *Id.*

Commissioner Broadbent did not recommend a tariff-rate quota or a tariff, recommending instead a quantitative restriction of imports of CSPV products, including cells and modules, set at 8.9 gigawatts for the first year and increasing by 1.4 gigawatts per year in each of the subsequent three years. *Id.* at 3. She recommended that the quantitative restriction be administered by the sale of import licenses at public auction, with the proceeds, as permitted by law, going to provide development assistance to domestic CSPV producers, and she also recommended trade adjustment assistance to the U.S. companies and workers. *Id.*

In Count 1, plaintiffs seek judicial invalidation of the Proclamation based on a claim of a procedural flaw in the ITC report on which the President based his action. Plaintiffs rely on various provisions in the Trade Act, including in particular section 202(e)(1), 19 U.S.C. § 2252(e)(1) (“If the Commission makes an affirmative determination under subsection (b)(1) of this section, the Commission shall also recommend the action that would address the serious injury, or threat thereof, to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition.”).

Two decisions of the Court of Appeals have considered similar challenges in cases involving presidential proclamations issued under the “escape clause” provisions, sections 201–203, of the Trade Act. *Maple Leaf Fish Co. v. United States*, 762 F.2d 86 (Fed. Cir. 1985) involved a claim that an escape clause presidential proclamation on imported “mushrooms, prepared or preserved” was based on an ITC injury finding that did not apply to frozen mushrooms, the product plaintiff imported. The Court of Appeals affirmed the judgment of this Court, which was based on a conclusion that the ITC’s injury determination did in fact apply to frozen mushrooms. *Corus Group PLC v. International Trade Commission*, 352 F.3d 1351 (Fed. Cir. 2003) involved a similar claim, which was that the President’s escape clause proclamation on imported steel products was invalid as to tin mill steel products because the ITC’s injury determination as to those products was not supported by three votes and therefore was a negative determination, not an affirmative injury determination as required for a valid safeguard measure under the Trade Act. The Court of Appeals affirmed, in relevant part, the judgment of this Court, which was based on a conclusion that three commissioners had in fact voted in favor of an affirmative injury finding as to the tin mill

products. *Id.* at 1361–64. The Court of Appeals also concluded that, contrary to the plaintiffs’ claim, the Commission’s determination was adequately explained. *Id.* at 1364.

While having similarities to *Maple Leaf Fish* and *Corus Group*, this case differs from those cases in a significant respect: the claimed procedural flaw here does not pertain to the ITC’s affirmative injury finding but instead to the ITC’s failure to reach a remedy recommendation that was on behalf of the Commission as a whole. The ITC’s report to the President contained three different, and alternative, recommended actions. The issue the Count 1 claim presents is whether the ITC’s failure to reach agreement on, and report to the President, a recommended remedy that was on behalf of the Commission confined the discretion of the President to order the safeguard measure. If it did, then the action of the Commission and, thereby, plaintiffs’ Count 1 claim, are judicially reviewable. *See Corus Group*, 352 F.3d at 1359. If it did not, then plaintiffs’ Count 1 claim is not judicially reviewable because it is thereby reduced to a challenge to a decision Congress committed to the President’s discretion. *Id.* at 1358 (“The Supreme Court has established that where the President has complete discretion whether to take an action in the first place, courts are without authority to review the validity of an agency recommendation to the President regarding such action” (quoting *Dalton v. Specter*, 511 U.S. 462, 469–70 (1994)).). It is well established that a court, when presented a claim that the President exceeded delegated authority, may not review a decision by the President that Congress has committed to the President’s discretion. *See United States v. George S. Bush & Co.*, 310 U.S. 371 (1940); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1338 (Fed. Cir. 2010) (citing *Dalton*, 511 U.S. at 469–70); *Motion Systems Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006).

In section 330(d)(2) of the Tariff Act of 1930, 19 U.S.C. § 1330(d)(2), Congress addressed the situation in which the Commission reaches an affirmative injury determination under 19 U.S.C. § 2252(b) “and a majority of the commissioners voting are unable to agree on a finding or recommendation described in section 2252(e)(1) of this title . . . (hereafter in this subsection referred to as a ‘remedy finding’).” 19 U.S.C. § 1330(d)(2). Congress provided that in such a situation, a remedy finding supported by fewer than a majority of commissioners shall be treated as the “remedy finding of the Commission” for purposes of 19 U.S.C. § 2253 if there is one remedy finding supported by a plurality of three commissioners, *id.* § 1330(d)(2)(A) or, if there are two remedy findings, each supported by a group of at least three

commissioners, *id.* § 1330(d)(2)(B), the “remedy finding of the Commission” will be one of those two remedy findings, as determined according to provisions thereunder, *id.* § 1330(d)(2)(B)(i) and (ii). In this way, the statute distinguishes between a “remedy finding” supported by one or more commissioners and a “remedy finding of the Commission” for purposes of 19 U.S.C. § 2253.

The remedy finding of Vice Chairman Johanson and Commissioner Williamson was one vote short of qualifying as a “remedy finding of the Commission,” and the other two remedy findings each fell short by two votes. The court, therefore, presumes plaintiffs are correct in asserting, Compl. ¶ 53, that “[t]he ITC did not recommend an action within the meaning of section 202(e) of the Trade Act [19 U.S.C. § 2252(e)] before the President issued the Proclamation,” as required by that provision, *id.* ¶ 54. The question, then, is whether plaintiffs are likely to succeed on the merits of their Count 1 claim, which is that “[b]y adopting a safeguard measure in the absence of a recommendation by the Commission, the President . . . violated the express requirements of sections 201 and 203 of the Trade Act,” and that “[a]ny actions taken by CBP to implement or enforce the Proclamation against Plaintiffs are *ultra vires* and unlawful,” *id.* Plaintiffs argue that “[t]he Act’s text, its structure, its purpose, and decades of historical practice all make clear that a Commission recommendation is an essential precondition for the President to impose safeguard measures under section 201 of the Trade Act.” Mem. in Supp. of Pls.’ Mot. for TRO and Prelim. Inj. 23 (Feb. 7, 2018), ECF Nos. 10–1 (public), 17–1 (conf.) (“Pls.’ Br.”). Below, the court considers whether plaintiffs are likely to succeed on their arguments grounded in the Act’s “text” and “structure,” its “purpose,” and “historical practice.”

On “text” and “structure,” sections 201(a) and 203(a) of the Trade Act, which contain similar language, are informative on the question presented by the claim in Count 1. Section 201(a) provides:

If the United States International Trade Commission . . . determines under section 2252(b) of this title that an article *is being imported into the United States in such increased quantities as to be a substantial cause of serious injury*, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, *shall* take all appropriate and feasible action within his power which the President *determines* will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2251(a) (emphasis added). Similarly, section 203(a)(1)(A) provides as follows:

After receiving a report under section 2252(f) of this title [i.e., the report of the Commission] *containing an affirmative finding regarding serious injury*, or the threat thereof, to a domestic industry, the President *shall* take all appropriate and feasible action within his power which the President *determines* will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2253(a)(1)(A) (emphasis added). A condition precedent to the President's taking "all appropriate and feasible action within his power" is an affirmative injury or threat determination of the ITC under section 202 of the Trade Act. Thus, in both sections 201(a) and 203(a)(1)(A), the exercise of the President's discretion is expressly conditioned on an affirmative injury or threat finding by the ITC. But in neither section 201(a) nor section 203(a)(1)(A) did Congress expressly condition the President's authority to act on the President's being provided a "remedy finding of the Commission" within the meaning of 19 U.S.C. § 1330(d)(2). While both sections expressly condition presidential action on an affirmative injury or threat finding, any conclusion that the President could not act in the absence of a "remedy finding of the Commission," 19 U.S.C. § 1330(d)(2), can be reached only by implication. This contrast, by itself, casts some doubt on the plaintiffs' statutory interpretation. Plaintiffs interpret sections 201(a) and 203(a)(1)(A) of the Trade Act in a way that permits their interpretation, despite the specific reference to an affirmative finding of injury or threat. They submit that the statute, in various places, limits the President's discretion in the way they posit. Among the provisions to which they direct the court's attention are paragraph (e)(1) of section 202 of the Trade Act, 19 U.S.C. § 2252(e)(1) (which directs the ITC to recommend "the action that would address the serious injury, or threat thereof, to the domestic industry"), paragraph (e)(6) of that section (mentioning "the recommendation required to be made" by the ITC), and section 203(a)(2)(A), 19 U.S.C. § 2253(a)(2)(A) (directing the President, "[i]n determining what action to take," to "take into account," *inter alia*, "the recommendation and report of the Commission.").

Plaintiffs argue that the words "report under section 2252(f) of this title" as they appear in section 203(a)(1)(A), 19 U.S.C. § 2253(a)(1)(A), must be read to mean a report that complies in every respect with 19 U.S.C. § 2252(f), which in turn must be read to mean an ITC report that contains a remedy finding qualifying as a remedy finding of the

Commission, and not merely multiple remedy findings by one or more commissioners that do not so qualify. Reply in Supp. of Pls.’ Mot. for TRO and Prelim. Inj. 8 (Feb. 27, 2018), ECF No. 46 (“Pls.’ Reply Br.”). Plaintiffs’ interpretation places too much weight on the word “under,” the ordinary meaning of which connotes “pursuant to,” or similar such words, but does not connote “in full compliance with.” See e.g., *Michael Simon Design*, 609 F.3d at 1341 (finding that “[a] recommendation does not cease to be made ‘under’ section 3005 simply because the recommendation is assertedly contrary to the substantive requirements of that provision,” as “Congress frequently provides for review of a decision made ‘under’ a statute; in such cases, it would be nonsensical to say that the jurisdiction of the reviewing body is limited to instances in which the underlying decision construes and applies the statute correctly.”). The word “under” also appears in § 2252(f)(2)(B), which provides that “[t]he Commission shall include in the report . . . the following: . . . If the determination under subsection (b) of this section [the injury or threat finding] is affirmative, the recommendations for action made *under* subsection (e) of this section and an explanation of the basis for each recommendation.”<sup>2</sup> 19 U.S.C. § 2252(f)(2) (emphasis added). Even though the Commission’s recommendations did not constitute, as specified in subsection (e)(1), a recommendation by the Commission of “*the* action that would address the serious injury, or threat thereof, to the domestic industry,” it does not necessarily follow that the three alternative recommendations were not made “under subsection (e).” In contrast to plaintiffs’ strained interpretation of 19 U.S.C. § 2253(a)(1)(A), the ordinary meaning of the words “[a]fter receiving a report under section 2252(f) of this title containing an affirmative finding regarding serious injury” connotes a report that contains, necessarily, an affirmative injury or threat finding, but not necessarily one that also contains a recommendation qualifying as a “remedy finding of the Commission” for purposes of § 1330(d)(2) and qualifying as a recommendation of “*the* action that would address the serious injury, or threat thereof, to the domestic industry” as required by § 2252(e)(1).

Plaintiffs rely on *Corus Group* in concluding that “the President cannot act under section 201 if he receives a report that lacks the elements—including a recommendation—that section 202(f) states that ‘the Commission report must contain.’” Pls.’ Reply Br. 8 (quoting *Corus Group*, 352 F.3d at 1362). They argue that “*Corus* held that a court may ‘set aside’ the President’s action under section 201 if the

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<sup>2</sup> The use of the plural term “recommendations” in 19 U.S.C. § 2252(f)(2)(B) is not inconsistent with plaintiffs’ construction. When providing a single remedy recommendation under 19 U.S.C. § 2252(e)(1), the Commission may make an additional recommendation. See *id.* § 2252(e)(4).

Commission's report lacks an 'explanation for the conclusions reached,' as 'require(d)' by section 202(f)(2)(A); indeed, the court scrutinized whether that explanation was 'internally consistent' before upholding the President's action." *Id.* (citing *Corus Group*, 352 F.3d at 1361–64). Plaintiffs surmise that "[i]f the absence of an 'internally consistent' explanation required by section 202(f)(2)(A) was grounds for 'set[ting] aside' the President's action in *Corus*, then *a fortiori* the absence of *any* 'recommendation' required by section 202(f)(2)(B) is grounds for invalidating the President's action here." *Id.* This argument is unconvincing. The Court of Appeals in *Corus Group* was addressing a claim that a defect affecting the Commission's affirmative injury determination, specifically, the lack of an adequate explanation, invalidated the President's proclamation. Plaintiffs' Count 1 claim is not analogous to the one considered (and rejected) in *Corus Group*. The Trade Act unquestionably makes an affirmative injury or threat determination a condition for presidential action under the escape clause provisions, and the Court of Appeals considered an internally consistent explanation for that determination (on the part of each commissioner voting in the affirmative) to be a requirement of the statute and principles of administrative law. *Corus Group*, 352 F.3d at 1362–63. Because it did not involve the issue of whether an ITC report containing a remedy recommendation qualifying as a "remedy finding of the Commission," 19 U.S.C. § 1330(d)(2), is accorded status in the Trade Act equivalent to that of an affirmative injury or threat determination, *Corus Group* does not address the central question posed by plaintiffs' Count 1 claim.

With respect to section 201(a) of the Trade Act, 19 U.S.C. § 2251(a), plaintiffs argue that in providing that "the President, *in accordance with this part*, shall take all appropriate and feasible action," this provision must be read to mean that a presidential action issued without a remedy finding of the Commission is not action taken "in accordance with this part."<sup>3</sup> Pointing to the President's obligation under section 203(a)(2)(A) of the Trade Act, 19 U.S.C. § 2253(a)(2)(A), to consider "the recommendation and report of the Commission," they submit that the President's issuing the Proclamation absent a remedy finding of the Commission was not an action "in accordance with this part." This argument, while a possible reading of section 201(a), presumes the very principle plaintiffs seek to establish, i.e., that under the escape clause provisions of the Trade Act a remedy finding

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<sup>3</sup> The reference to "this part" is to "Part 1-Positive Adjustment by Industries Injured by Imports" of "Subchapter II-Relief from Injury Caused by Import Competition." Part 1 consists of sections 201–205 of the Trade Act of 1974, 19 U.S.C. §§ 2251–2255.

of the Commission is essential to the exercise of the President's discretion in imposing a safeguard remedy.

Plaintiffs' argument that "the Act's purpose" compels an interpretation under which a remedy finding of the Commission is needed for presidential action is likely to fare no better than their argument on plain meaning. Stated in fundamental terms, the Act's purpose is to authorize the President to take "all appropriate and feasible action," 19 U.S.C. § 2253(a)(1)(A), in response to the ITC's determining that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article," *id.* § 2252(b)(1)(A). The President is to take the action that "the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs." *Id.* § 2253(a)(1)(A). Under plaintiffs' interpretation, the Commission's inability to reach agreement on a remedy finding supported by at least three commissioners would preclude the President from acting at all, despite the ITC's finding of "serious injury, or the threat thereof," *id.*, to the domestic industry, which is the very problem the statute was enacted to address. The practical effect of plaintiffs' interpretation is that the lack of an ITC remedy recommendation would negate the ITC's affirmative injury or threat determination. In other words, the President, even though presented with a situation in which a domestic industry is incurring serious injury, would be powerless to respond. For the sole reason that the ITC could not agree on a remedy, that industry would receive *no* remedy. In this way, plaintiffs' interpretation would interfere with, rather than further, the statutory purpose.

Of course, the President, once presented with an ITC finding that a domestic industry is incurring serious injury or threat, retains the discretion either to take the action that is "appropriate and feasible," *id.* § 2253(a)(1)(A), or to take no action. But in the latter case, the President must decide, and report to Congress on his reasons for deciding, that "there is no appropriate and feasible action to take under subsection (a)(1) of this section [*id.* § 2253(a)(1)] with respect to a domestic industry." *Id.* § 2253(b)(2). The President has discretion, therefore, to decide that there is no appropriate and feasible action that will facilitate the domestic industry's efforts to adjust positively to import competition and provide greater economic and social benefits than costs. The Commission's failure to obtain three votes for a single remedy recommendation is not the equivalent of a presidential determination that no such remedy exists. The investigation of CSPV

products is a case in point: the four Commissioners voted unanimously that serious injury was occurring to the domestic industry making these products, and they offered three different recommendations to address that injury. Notably, in enacting 19 U.S.C. § 2253(a)(1)(A) and (b)(2), Congress did not specify the lack of a single recommended remedy on the part of the Commission as a reason why the President may exercise the discretion not to take action.

Plaintiffs argue that a remedy finding on behalf of the Commission is essential to the operation of other provisions of the Trade Act. Specifically, they argue that subparagraph (2)(A) of § 2253(a), by directing that “[i]n determining what action to take under paragraph (1), the President shall take into account . . . the *recommendation* and report of the Commission,” imposes on the President a duty that is “impossible for” the President “to fulfill in the absence of such a recommendation.” Pls.’ Br. 24. According to plaintiffs, the lack of a remedy finding on behalf of the Commission also makes impossible the President’s compliance with a provision in 19 U.S.C. § 2253(b)(1), which directs the President, on the day of taking action under § 2253(a)(1), to transmit a report to Congress describing the action being taken and the reasons therefor. Specifically, they submit that the ITC’s failure to provide a remedy finding on behalf of the Commission made it impossible for the President to comply with the following directive of § 2253(b)(1): “If the action taken by the President differs from the action required to be recommended by the Commission under section 2252(e)(1) of this title, the President shall state in detail the reasons for the difference.” *Id.*

Plaintiffs also note that the absence of a remedy finding on behalf of the Commission renders inoperative the congressional override procedure of 19 U.S.C. § 2253(c). Under that procedure, Congress, within 90 days of submission of the report to Congress, may enact a joint resolution (as specified in 19 U.S.C. § 2192(a)(1)(A)) setting aside any remedy the President imposes that differs from the ITC’s recommendation under § 2252(e)(1), or the decision not to impose a remedy, and imposing the ITC’s recommendation instead. Pls.’ Br. 25–27.

Plaintiffs correctly point out that the Commission’s failure to provide, in the words of 19 U.S.C. § 1330(d)(2), a “remedy finding of the Commission” frustrated or defeated certain of the functions of the statute. The President is not in a position to consider a remedy recommendation provided on behalf of the Commission when the Commission did not provide one (although, in this case, the President was free to consider the three alternative remedies offered by



commissioners and adopted one similar to that supported by the plurality). Nor could the President explain to Congress, “in detail,” *id.* § 2253(b)(1), his reasons for imposing a remedy differing from the one the Commission offered, when none was offered. Nevertheless, from the standpoint of an analysis conducted according to *Corus Group*, 352 F.3d at 1359, of the availability of judicial review over the ITC’s and the President’s actions, the court must conclude that the Commission’s failure to provide a “remedy finding of the Commission” did not confine the President’s discretion in any way.

As to the congressional override provision in particular, the absence from the ITC’s report of a remedy finding of the Commission, rather than confining the President’s discretion, confined the discretion of Congress to invoke its override authority. Plaintiffs argue that without resort to the override provision of 19 U.S.C. § 2253(c), Congress would be impaired in exercising its constitutionally-vested authority to regulate foreign commerce. Pls.’ Br. 28–31; Pls.’ Reply Br. 11 (citing U.S. Const. art. 1, § 8, cl. 3). The disabling of the override mechanism is not insignificant. But to attach to it the significance plaintiffs advocate, the court must conclude that Congress intended to preclude the President from acting to remedy the injury or threat when the ITC report lacked a qualifying remedy recommendation of the Commission, despite the anomalous result the court has identified, in which serious injury is found to exist but the President, paradoxically, is powerless to act. As the court discussed previously, the textual indications in the statute are to the contrary. Moreover, the legislative history confirms that Congress did not intend to foreclose presidential action in the absence of a qualifying ITC recommendation.

As enacted in 1974, the escape clause provisions of the Trade Act also contained a congressional override provision. Congress enacted the current section 330(d)(2) of the Tariff Act of 1930, 19 U.S.C. § 1330(d)(2), in the Tax Reform Act of 1976, Pub. L. No. 94–455, § 1801(a), (b), 90 Stat. 1520, 1762–63 (1976). The Conference Report for that legislation explained that under then-current § 1330(d),

if a majority of the Commissioners on the International Trade Commission voting on an escape clause or market disruption case under section 201 or 406 of the Trade Act of 1974, respectively, cannot agree on an injury determination or a remedy finding or recommendation, then the President may consider the “findings” agreed upon by one-half the number of Commissioners voting to be the “findings” of the Commission. If the Commission is equally divided into two groups, the President may consider the finding of either group to be the finding of the Commission.

H.R. Rep. No. 94-1515, at 530-31 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 4118, 4228-29 ("*Conference Report*"). Prior to the 1976 amendment, Congress could override an escape clause determination of the President only when the President declined to adopt a remedy finding supported by a majority of voting commissioners. If the Commission was equally divided into two groups, each supported by one-half the number of commissioners voting, and the President chose the remedy finding of one of those two groups, chose a different remedy, or chose to deny relief, there could be no congressional override.

The Senate Report for the Tax Reform Act explained the reason for amending section 330(d). Because it is instructive as to the reason for the amendment, the court quotes it at length. After summarizing the congressional override provision in the Trade Act of 1974, the Senate Report stated that:

Under the Trade Act of 1974, if the Congress prefers the remedy recommended by the Commission rather than the relief proposed by the President, or if the President declines to grant relief, a majority of those present and voting of both Houses may pass a resolution within 90 Congressional working days requiring the President to implement the remedy recommended by the Commission.

This was the manner in which the Trade Act was intended to work. However, in two of the six escape clause cases under the Trade Act in which the Commission found by a majority vote that injury existed, the Commission was unable to reach majority agreement with respect to a remedy. In such cases, even though a majority of the Commission agree that an industry is being injured, because the Commission cannot agree as to what kind of relief is appropriate, the Congressional override mechanism of the Trade Act fails to function. When the Commissioners are unable to reach, through compromise, a common position with respect to remedy, the Congress is deprived of its opportunity to override the decision of the President and to reinstate the recommendation of the Commission. In such a situation, the President is free to deny import relief—for reasons which may be rooted in foreign policy without adequate regard to sound economics—without fear of being overridden by the Congress. The result is that an industry which may be found by the Commission to be entitled to import relief has been deprived of that relief, without good reason.

S. Rep. No. 94-938, pt. 2, at 57-58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4030, 4083 (“*Senate Report*”). Having explained in this way the problem being addressed, the Senate Report then discussed the solution to the problem as set forth in the Senate bill, as follows:

The Committee’s amendment would increase the probability that if there is a majority vote for injury, there would be a majority finding on a remedy. The Committee’s amendment would:

- (1) Change the number of Commissioners from six to seven (see section 2403);
- (2) Permit only those Commissioners who vote for injury to vote for a remedy;
- (3) Require that a recommendation by a plurality of the number of Commissioners voting for remedy be considered the Commission’s recommendation for import relief;
- (4) Require that a recommendation by any group of Commissioners voting for remedy be considered the Commission’s recommendation for import relief if the Commissioners are divided into two or more equal groups; and
- (5) Provide that a Commissioner whose term has expired may continue in office until his successor has been nominated by the President and confirmed by the Senate (see section 2403).

*Id.* The conferees considered the Senate bill in the absence of a provision in the House bill. The final bill as agreed to in conference adopted only the change in paragraph (5) (although the change in paragraph (2) would be adopted in an amendment to section 202 of the Trade Act in 1988). The final Tax Reform Act of 1976 included a modified version of the measures in paragraphs (3) and (4), as the Conference Report explained:

*Conference agreement.*—Under the conference agreement, if a majority of the Commissioners voting on an escape clause or market disruption case cannot agree on a remedy finding, then the remedy finding agreed upon by a plurality of not less than 3 Commissioners shall be treated as the remedy finding of the Commission for the purposes of the Congressional override in sections 202 and 203 of the Trade Act of 1974. If the Commission is tied on the remedy vote, and each voting group includes not less than 3 Commissioners, then (1) if the President takes the action recommended by one of those groups, the remedy finding

agreed upon by the other group shall, for purposes of the Congressional override, be treated as the remedy finding of the Commission, or (2) if the President takes action which differs from the action agreed upon by both such groups, the remedy finding agreed upon by either such group may be considered by the Congress as the remedy finding of the Commission for purposes of the Congressional override. It is the intention of the conferees that this apply only for purposes of implementing the Congressional override in sections 202 and 203 of the Trade Act of 1974. It is not intended that this provision affect in any way the rules of procedure of the International Trade Commission.

Further, the conferees strongly urge the Commissioners to reach majority agreement on all determinations, findings, and recommendations in all cases.

*Conference Report at 530–31.*

The Senate and Conference Reports show that Congress was aware that in some cases under then-current law the Commission might agree that a domestic industry is undergoing serious injury or threat but might not reach majority agreement on a remedy finding and that the congressional override provision of section 203(c) of the Trade Act would not function in that instance. The solution agreed upon at conference allowed the congressional override mechanism to function in some instances in which the Commission did *not* reach majority agreement on a remedy finding. For example, under the prior law the override was not available in the case of an evenly-divided Commission, with one half of voting commissioners supporting one remedy finding and the other half supporting another. That was because the *President*, not Congress, could choose which of the two would be regarded as the remedy finding of the Commission. Under the 1976 amendment, in the event that three commissioners support a remedy finding not imposed by the President (whether the President grants relief or not), that remedy finding is available for adoption by the Congress. Where two groups of three commissioners support different remedy findings, and the President chooses to adopt the remedy finding of one group, Congress may impose the remedy the President did not choose, and it may impose either one should the President choose to impose a different remedy or none at all.

Still, the solution adopted in the 1976 amendment did not ensure that a remedy finding of the Commission would be available in *every* escape clause proceeding: the override provision required that at least one remedy finding be supported by a group of three commissioners. The Senate and Conference reports did not state or suggest

that the President could not act to remedy the serious injury or threat in those cases in which the congressional override provision was not available. Notably, the Congress, in amending section 330(d) of the Tariff Act, did not intend that its changes would confine the discretion of the President under the escape clause provisions of the Trade Act of 1974. The Senate Report made this point explicitly:

This section amends section 330(d) of the Tariff Act of 1930, relating to the voting procedures of the Commissioners in import relief cases. The committee states that nothing contained in this section, or in any other provision of the amendment, is intended to alter the eligibility criteria for import relief under the Trade Act of 1974. . . . In addition, the committee states that *nothing contained in this section, or in any other provision of the amendment, is intended to change the legal authority of the President under present law to select the type and level of import relief to be provided to an industry, be it the form of relief recommended by the Commission, a modification of the Commission's recommendation, or a denial of relief altogether.*

*Senate Report* at 57 (emphasis added).

In their brief and in their reply brief, plaintiffs point to other language in the Senate Report, as follows:

*International Trade Commission (Title XXIV)*

The voting procedures of The International Trade Commission in import relief cases are changed to insure that the Congress will have an opportunity to override import relief decisions of the President under sections 201 and 406 of the Trade Act of 1974. The Commission membership is to be increased from six to seven members, and certain other procedural and organizational changes are to be made with respect to the Commission.

*Senate Report* at 4–5; see Pls.' Br. 29; Pls.' Reply Br. 13. This language appears in the "Summary" at the beginning of the Senate Report, which summarizes all the changes in the Senate bill. The more specific, and far more detailed, discussion in the body of the Senate Report, which clarifies that the changes in the Senate bill were intended to "increase the probability that if there is a majority vote for injury, there would be a majority finding on a remedy," *id.* at 58, is more instructive as to what the Senate bill was trying to achieve. Also instructive to the interpretation of the Senate Report is the nature of the changes the Senate bill actually would have made. None of the changes would do what plaintiffs argue Congress intended: to prohibit presidential action, or to continue to prohibit presidential action, in the absence of remedy finding of the Commission.

Plaintiffs also cite a statement by Senator Ribicoff, the sponsor of the 1976 amendment, that the change was intended to “correct the serious problems that have developed in connection with ‘escape clause’ actions under the Trade Act of 1974’ and ‘make sure that the escape clause works in the future the way Congress originally intended it to.” Pls.’ Br. 29 (quoting 122 Cong. Rec. 24,725 (1976) (statement of Sen. Ribicoff)) (emphasis omitted). This language sheds no light on whether Congress ever intended to deny the President authority to impose a safeguard action in the absence of a remedy finding of the Commission.

According to plaintiffs, legislative history of the Customs Courts Act of 1980 confirms their interpretation of the escape clause statute. They argue that “the drafters wrote that the Trade Act ‘specif[ies] that the President may not act *until he has received advice from the International Trade Commission (ITC) or the U.S. Trade Representative.*” Pls.’ Reply Br. 13 (quoting H.R. Rep. No. 96–1235, at 31 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3743). The quoted language is from the report of the House Judiciary Committee on the legislation that established the Court of International Trade and is on the topic of the jurisdiction the new court should have. An examination of the quoted sentence in the context in which it appears in the House report reveals that plaintiffs have misinterpreted the word “advice” in the quoted sentence. It was not a specific reference to a remedy finding of the Commission in an escape clause action. Nor was the intended meaning of the word “advice” one confined to “recommendations.” In the report, the House Judiciary Committee was referring generally to statutes authorizing the President to take actions to protect the United States and American manufacturers against injury due to the importation of foreign goods and not in particular to sections 201–203 of the Trade Act.<sup>4</sup> The context of the discussion was an explanation of the reasons for deleting certain jurisdictional provisions in the original version of the House bill, H.R. 6394. H.R. Rep. No. 96–1235 at 31–32. One of the jurisdictional provisions being deleted, section 1581(d), would have granted the new court jurisdiction to review, following publication of a final presidential decision,

<sup>4</sup> The paragraph reads as follows:

Pursuant to his statutory authority, the President may take certain actions to protect the United States and American manufacturers against injury due to the importation of foreign goods. These *statutes* specify that the President may not act until he has received advice from the International Trade Commission (ITC) or the U.S. Trade Representative (USTR). Current law does not provide for the judicial review of the substantive advice rendered by the ITC or the U.S. Trade Representative.

H.R. Rep. No. 96–1235, at 31 (1980) (emphasis added), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3743.

“the *advice, findings, recommendations, and determinations* of the International Trade Commission under section[s] 131, 201, 202, 203, 304, 406, and 503 of the Trade Act of 1974, section[s] 336 and 338 of the Tariff Act of 1930, and section 22 of the Agricultural Adjustment Act, solely for the purpose of determining the procedural regularity of such actions.” *Id.* at 31 n.9 (emphasis added).

Plaintiffs argue, further, that the 1988 amendments to the escape clause provisions in the Trade Act, made as part of the Omnibus Trade and Competitiveness Act of 1988, confirm that Congress intended to foreclose presidential discretion to impose a safeguard measure in the absence of a qualifying ITC recommendation. Pls.’ Br. 29; Pls.’ Reply Br. 13. As alluded to previously, Congress amended section 202, adding the limitation in current paragraph (e)(6), which provides that only the commissioners who agreed to the affirmative injury or threat determination “are eligible to vote on the recommendation required to be made under paragraph (1) [the recommendation of ‘the action that would address the serious injury or threat thereof’] or that may be made under paragraph (3) [directing the ITC to specify the ‘type, amount, and duration of the action’ it recommends].” 19 U.S.C. § 2252(e)(6). In paragraph (6), Congress referred to the remedy finding of the Commission as a requirement, but under the pre-1988 statute it already was treated as a requirement.<sup>5</sup> Nothing in the 1988 amendment or its legislative history<sup>6</sup> indicates that Congress intended to make a qualifying remedy finding of the ITC a prerequisite to presidential action to address the serious injury or threat.

Plaintiffs’ argument that their statutory interpretation is supported by “decades of historical practice” is also unconvincing. Pls.’ Br. 23. Plaintiffs argue that the Proclamation is “unprecedented” in acting in the absence of a remedy finding of the Commission, positing that past practice has guided the Supreme Court in determining questions of

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<sup>5</sup> The escape clause provisions in the 1974 version of the Trade Act (which renamed the “U.S. Tariff Commission” the “U.S. International Trade Commission”) directed that the Commission, if reaching an affirmative injury finding, “*shall . . . find the amount of the increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury.*” 19 U.S.C. § 2251(d)(1)(A) (1976) (emphasis added). The President had discretion to impose a different remedy, or no remedy. *Id.* § 2252(a), (b).

<sup>6</sup> The report of the Senate Finance Committee explains that the new limitation on voting procedures, which restored a prior ITC practice that had not recently been followed, would, first, prevent commissioners who disagreed with the affirmative injury or threat finding from skewing the recommendation to make it less effective. “Second, the provision improves the likelihood that the ITC will make a unified recommendation to the President regarding actions to be taken.” S. Rep. No. 100–71, at 56 (1987). The Finance Committee stated that it “believes that it is important to have a consensus from the ITC on the actions recommended.” *Id.* Nothing in the Senate report indicates that Congress ever intended to deprive the President of authority to impose a remedy to address the serious injury or threat in the *absence* of such consensus.

presidential authority. Pls.' Br. 30 (citing *Medellin v. Texas*, 552 U.S. 491, 531 (2008)).<sup>7</sup> In support of their argument, plaintiffs indicate their disagreement with the ITC's contention that this action is not unprecedented.<sup>8</sup> The court need not decide this question. In this case, the question of past practice has no bearing on whether plaintiffs have shown a likelihood of success on the merits of their Count 1 claim, which presents an issue of statutory interpretation. Moreover, the President was under no obligation to explain in the Proclamation why his decision either did or did not accord with past practice.

In summary, plaintiffs' statutory interpretation encounters serious difficulties when considered according to the plain meaning, purpose, and legislative history of the escape clause provisions. The likely outcome is a conclusion that the ITC's decision was not judicially reviewable because the absence of a remedy finding of the Commission in the ITC's report did not confine the President's discretion to issue the Proclamation. Therefore, plaintiffs have failed to show a likelihood of success for the claim they assert in Count 1 of their complaint.

2. *On their Count 2 Claim, Plaintiffs Are Unlikely to Demonstrate that the Tariff-Rate Quota on CSPV Cells Violated the NAFTA Implementation Act*

In Count 2, plaintiffs claim that the Proclamation cannot lawfully be applied to them because it imposes a safeguard action including a tariff-rate quota that fails to comply with the NAFTA Implementation Act. Compl. ¶¶ 55–60. Section 312(d) of the NAFTA Implementation Act provides as follows:

Any action taken under this section proclaiming a quantitative restriction shall permit the importation of a quantity or value of the article which is not less than the quantity or value of such article imported into the United States during the most recent

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<sup>7</sup> *Medellin* is inapposite. In that case, the Supreme Court considered an “unprecedented” exercise of purported presidential power undertaken *absent congressional authorization*, finding that Congress had never “acquiesced” to the President’s authority to unilaterally direct state courts to implement non-self-executing treaty obligations. *Medellin v. Texas*, 552 U.S. 491, 531–32 (2008). In this case, the President acted pursuant to an express mandate from Congress, which directed that “the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.” 19 U.S.C. § 2253(a)(1)(A).

<sup>8</sup> The Commission filed a brief in support of a motion to dismiss the Commission as a defendant in this case. See Mot. to Dismiss and Mem. in Supp. of Mot. to Dismiss of Def. U.S. Int’l Trade Commission (Feb. 20, 2018), ECF No. 33. Because plaintiffs have not had the opportunity to respond to this motion, the court does not consider the ITC’s motion at this time.



period that is representative of imports of such article, with allowance for reasonable growth.

19 U.S.C. § 3372(d).

As a threshold consideration, plaintiffs are faced with an issue of standing on which they may not be able to prevail. They do not allege that they produce or export CSPV cells, which is the “article” that is the subject of the tariff-rate quota in the Proclamation. *See* Compl. ¶¶ 8, 9, 11. Three of the four plaintiffs—Silfab Solar, Inc., Heliene, Inc., and Canadian Solar Solutions, Inc.—are Canadian producers of CSPV modules. *Id.* Regarding cells, the only fact they allege that relates to the production, exportation, or importation of cells is that plaintiff Canadian Solar (USA), Inc. is a U.S. importer of solar cells, but they do not allege that these are Canadian cells. *Id.* ¶ 10. The complaint further alleges, however, that “no Canadian company . . . produces CSPV cells that are not assembled into other products.” *Id.* ¶ 4. Plaintiffs argue, unpersuasively, that the “entire safeguard constitutes a tariff-rate quota” as it “imposes a 30% tariff on solar products and then exempts a quota of certain solar products from that tariff.” *See* Pls.’ Reply Br. 14–15 (emphasis in original) (citations omitted).

Even were plaintiffs able to establish standing to assert their Count 2 claim, they still would be unlikely to prevail because they have not demonstrated that their interpretation of 19 U.S.C. § 3372(d) to encompass the tariff-rate quota in the Proclamation is correct. To be inconsistent with § 3372(d), a safeguard measure must be a “quantitative restriction” and it must fail to “permit the importation” of the specified quantity or value of the affected article.

The individual subsections of section 312 of the NAFTA Implementation Act, 19 U.S.C. § 3372, all pertain to presidential actions “under chapter 1 of title II of the Trade Act of 1974 [19 U.S.C. § 2251 et seq.],” i.e., under the escape clause provisions of sections 201–205 of the Trade Act. 19 U.S.C. § 3372(a), (b), (c), (d) (referring to “[a]ny action taken under this section.”). In section 203(a)(3) of the Trade Act, Congress identified “tariff-rate quota[s]” and “quantitative restriction[s]” as separate remedies. 19 U.S.C. § 2253(a)(3)(B), (C). Specifically, Congress plainly authorized the President to proclaim a tariff-rate quota in § 2253(a)(3)(B) and to proclaim *any* quantitative restriction in § 2253(a)(3)(C). Even if, theoretically, some forms of tariff-rate quotas may be described as “quantitative restrictions,” plaintiffs are unlikely to make the case that Congress, in 19 U.S.C. § 3372(d), intended to preclude actions such as the tariff-rate quota in question, which places no “restriction” on the quantity or value of solar cells that may be imported. And contrary to plaintiffs’ argument

that the entire safeguard measure is a quantitative restriction, the Proclamation places no restriction on the quantity or value of any solar cell product that may be imported, be it cell or module.

Plaintiffs argue that section 312(d) must be read in concert with NAFTA article 802.5(b), which provides that “[n]o Party may impose restrictions . . . that would have the effect of reducing imports of such good from a Party below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth.” See North American Free Trade Agreement, Can.-Mex.-U.S., art. 802.5(b), Dec. 8–17, 1992, 32 I.L.M. 289 (1993), available at <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/NorthAmerican-Free-Trade-Agreement?mvid=2> (last visited Mar. 5, 2018) (the “NAFTA”). Plaintiffs also argue that a tariff-rate quota is a “textbook example of a quantitative restriction,” citing the General Agreement on Tariffs and Trade 1947 (“GATT”) and a U.S. submission to a World Trade Organization panel in a dispute with the European Communities on banana importations. Pls.’ Br. 32. (citing Second Written Submission of the United States, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 82–85, WTO Doc. WT/DS27 (Sept. 27, 2007), available at [https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute\\_settlement/ds27/asset\\_upload\\_file841\\_13273.pdf](https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute_settlement/ds27/asset_upload_file841_13273.pdf) (last visited Mar. 5, 2018)). Plaintiffs argue that “the Proclamation ‘permit{s} the importation’ of a dramatically reduced . . . ‘quantity {and} value of’ Canadian CSPV products” because “[t]he Proclamation’s duties will make it prohibitively expensive for Plaintiffs to continue selling CSPV products in the United States.” *Id.* at 33. According to plaintiffs, “[t]he word ‘permit’ means not only ‘to consent to expressly or formally’ but also ‘to make possible’ as a practical matter,” so “measures that do not formally prohibit importation, but effectively make importation impossible, are widely understood as prohibitions in international trade law.” Pls.’ Reply Br. 16–17. These arguments suffer from the same flaws. They interpret 19 U.S.C. § 3372(d) contrary to plain meaning and to the different treatment of tariff-rate quotas and quantitative restrictions in 19 U.S.C. § 2253(a)(3). Again, 19 U.S.C. § 3372(d) requires measures to “permit” importation of a specified quantity or value of an article. Neither the duties on modules nor the out-of-quota duties on cells fail to “permit” importation.

3. *Plaintiffs Are Unlikely to Demonstrate that the Proclamation Is Ultra Vires for Failing to Exempt CSPV Products from Canada from the Safeguard Measure*

Plaintiffs' Count 3 claim is that defendants violated section 312(b) of the NAFTA Implementation Act because the Proclamation failed to exclude Canadian imports of CSPV products from the global safeguard. *See* Compl. ¶¶ 61–67 (citing, *inter alia*, 19 U.S.C. §§ 3371(a), 3372(a)-(b)). Plaintiffs make three supporting arguments: (1) that the President was required to exempt Canada from the global safeguard because the ITC found that imports from Canada did not “account for a substantial share of total imports” and did not “contribute importantly to the serious injury, or threat thereof, caused by imports,” Pls.’ Br. 34 (citing 19 U.S.C. §§ 3371(a), 3372(a)-(b); NAFTA art. 802.1); (2) that where the “contribute importantly” determination of the ITC is negative, section 203(a) of the Trade Act, 19 U.S.C. § 2253(a), which requires an affirmative injury or threat finding by the ITC before the President may act, “forbids the President from taking action against a NAFTA country to redress such injury,” Pls.’ Br. 35 (citing 19 U.S.C. § 2253(a)); and (3) that because “Canadian imports plainly do not constitute a ‘substantial share’ within the meaning of” 19 U.S.C. § 3372(a)(1), the President could not have concluded otherwise without violating § 3372(a), Pls.’ Br. 35 (citing 19 U.S.C. § 3372(a)(1)). Because these arguments are flawed, plaintiffs are unlikely to succeed on the merits of their Count 3 claim.

a. *The NAFTA Implementation Act Permits, But Does Not Require, the President to Exempt Imports from a NAFTA Country from a Global Safeguard*

Plaintiffs argue that “a NAFTA country must be excluded from a global safeguard action unless imports from that country ‘account for a substantial share of total imports’ and ‘contribute importantly to the serious injury, or threat thereof, caused by imports.’” Pls.’ Br. 34 (citing 19 U.S.C. §§ 3371(a), 3372(a)-(b); NAFTA art. 802.1). Plaintiffs misinterpret the NAFTA Implementation Act. When certain conditions are present, the President *may* exclude imports of a NAFTA country from a global safeguard action under the Trade Act. But the statute does not provide that the President *must* do so. Instead, the statute provides that the President “shall exclude” the imports from a NAFTA country if the President determines either that (1) imports from the NAFTA country do not account for a substantial share of total imports, or (2) imports from a NAFTA country, considered individually, or in exceptional circumstances imports from NAFTA countries considered collectively, do not contribute importantly to the

serious injury, or threat thereof, found by the Commission. 19 U.S.C. § 3372(a)-(b). The President did not reach either of those negative determinations and stated in the Proclamation that he reached affirmative determinations on each. *Proclamation* ¶ 7. The ITC found under section 311(a) of the NAFTA Implementation Act, 19 U.S.C. § 3371(a), that imports of CSPV products from Canada do not account for a substantial share of total imports and do not contribute importantly to the serious injury caused by the imports. *Views of the Commission* at 67.<sup>9</sup> But under section 312(b) of the NAFTA Implementation Act, those findings did not bind the President. *See* 19 U.S.C. § 3372(b). The plain language of the NAFTA Implementation Act, therefore, is contrary to plaintiffs' statutory interpretation. The Statement of Administrative Action accompanying the NAFTA Implementation Act confirms this conclusion:

Sections 311 and 312 of the bill implement the global action provisions of [NAFTA] Article 802. They authorize the President, in the case of a global action under sections 201–204 of the Trade Act of 1974, to exclude imports of a Canadian or Mexican good when certain conditions are met.

\* \* \*

Under section 312, the President must exclude NAFTA imports from a global safeguard action if he makes a negative determination that imports from a NAFTA country account for a substantial share of total imports or imports from a NAFTA country or countries contribute importantly to the serious injury or threat of serious injury.

H.R. Doc. No. 103–59 at 564–65 (1993).

Plaintiffs argue that the Proclamation violates the NAFTA. Pls.' Br. 35–36. International agreements may aid in the interpretation of the ambiguous statutes implementing them, but there is no ambiguity in section 312(b). *See* 19 U.S.C. § 3372(b) (“the President shall exclude from such action imports from a NAFTA country if *the President* makes a negative determination under subsection (a)(1) or (2) of this section with respect to imports from such country” (emphasis added)).

Plaintiffs also argue that the use of the word “find” in section 311(a) demonstrates that Congress “wished to authorize the Commission to make a conclusive judgment” because when Congress “wished the Commission’s judgment to be merely advisory, it used the word ‘recommend.’” Pls.' Br. 36. This argument fails to explain why Congress

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<sup>9</sup> Chairman Schmidlein dissented. “She finds that under section 311(a) . . . U.S. imports of CSPV products from Canada account for a substantial share of total imports and contribute importantly to the serious injury caused by imports.” *Views of the Commission* at 67 n.387.

would require the President to make the same “substantial share of total imports” and “contribute importantly to the serious injury” determinations, *see* 19 U.S.C. § 3372(a), that it required the Commission to make, *see* 19 U.S.C. § 3371(a). Were the Commission’s findings binding on the President, Congress would not have done so, yet section 312(b) requires the President to exclude from a global safeguard remedy “imports from a NAFTA country if *the President* makes a negative determination under subsection (a)(1) or (2) of this section.” 19 U.S.C. § 3372(b).

Finally, plaintiffs argue that past presidential safeguard proclamations have established a practice of excluding imports from NAFTA countries from the global safeguard when the Commission makes negative “substantial share of total imports” and “contribute importantly to the serious injury” findings. Pls.’ Br. 37–38. If such a practice exists, it is not relevant to the statutory interpretation issue presented by plaintiffs’ Count 3 claim.

*b. The Requirement for an Affirmative Injury Determination in the Trade Act Did Not Require the President to Exempt Canadian CSPV Products from the Scope of the Proclamation*

Plaintiffs argue that the report of the ITC, which found that imports of CSPV products from Canada do not “contribute importantly” to the serious injury the ITC found to exist, did not contain “an affirmative finding regarding serious injury” within the meaning of section 203(a)(1)(A) of the Trade Act, 19 U.S.C. § 2253(a)(1)(A), and accordingly “forbids the President from taking action against a NAFTA country to redress such injury.” Pls.’ Br. 35. This argument misinterprets the relationship between the two statutes. It presumes, incorrectly, that a negative finding by the ITC under section 311(a)(2) of the NAFTA Implementation Act, 19 U.S.C. § 3371(a)(2) (the “contribute importantly” finding), is equivalent to a negative injury determination under section 202(b)(1) of the Trade Act, 19 U.S.C. § 2252(b)(1). It is not.

In an investigation under section 202 of the Trade Act, the Commission is required to “determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry.” 19 U.S.C. § 2252(b)(1)(A). *If* the Commission makes an affirmative injury or threat determination, *then* section 311(a) of the NAFTA Implementation Act requires the Commission to also find whether “(1) imports of the article from a NAFTA country . . . account for a substantial share of total imports; and (2) imports of the article

from a NAFTA country . . . contribute importantly to the serious injury, or threat thereof, caused by imports.” 19 U.S.C. § 3371(a). These “substantial share” and “contribute importantly” findings are distinct from, and subsequent to, the Commission’s injury or threat determination. That is, the Commission’s section 311(a) findings are made only *if*, and *after*, the Commission makes an affirmative determination of injury or threat under section 202(b)(1) of the Trade Act. *See* 19 U.S.C. § 3371(a). If the Commission makes a negative injury or threat determination under section 202(b)(1) of the Trade Act, then the occasion of making the “substantial share” and “contribute importantly” findings under the NAFTA Implementation Act never arises. *See id.* A negative ITC determination under 19 U.S.C. § 2252(b)(1) binds the President, but a negative ITC finding under 19 U.S.C. § 3371(a)(2) does not. It does not negate the affirmative injury determination as it applies to the NAFTA country such that the President must exclude the NAFTA country from a global safeguard action.

*c. The President’s Determinations under Section 312(a) are Not Subject to Judicial Review*

Plaintiffs’ third argument in support of its Count 3 claim is that the President could not conclude on this record that Canadian imports constitute a substantial share of total imports without violating § 3372(a). Pls.’ Br. 35, 38–42. This argument is also unlikely to succeed. Determinations of the President that Congress has committed to the President’s discretion are not subject to judicial review. *Dalton*, 511 U.S. at 477; *George S. Bush & Co.*, 310 U.S. at 380.

Plaintiffs argue that “where Congress has imposed discernible statutory *limits* on the President’s authority, the courts have time and again made clear it is the courts’ obligation to determine whether the President has ‘clear[ly] misconstrue[ed]’ the statutory language or ‘act[ed] outside delegated authority.’” Pls.’ Br. 38 (quoting *Corus Group*, 352 F.3d at 1361 (quoting *Maple Leaf Fish*, 762 F.2d at 89)). They argue, further, that the President misconstrued the meaning of the term “substantial share” as used in the NAFTA Implementation Act, Pls.’ Reply Br. 18, asserting that “a country that supplies only 2% of imports and is the ninth-largest supplier of an article does not account for a ‘substantial share’ of imports as those words are used in the NAFTA Implementation Act,” *id.* at 17–18 (citations omitted). The NAFTA Implementation Act, in the section applying to the *Commission’s* determinations (19 U.S.C. § 3371), provides that “[i]n determining whether imports from a NAFTA country, considered individually, account for a substantial share of total imports, such imports

normally shall not be considered to account for a substantial share of total imports if that country is not among the top 5 suppliers of the article subject to the investigation, measured in terms of import share during the most recent 3-year period.” 19 U.S.C. § 3371(b)(1). By using the word “normally,” Congress indicated that this criterion was not a specific limitation that was binding even on the ITC. At its essence, plaintiffs’ argument is directed at the fact-related determination that the President made under § 3372(a)(1). Plaintiffs do not present a colorable claim that the President misconstrued the NAFTA Implementation Act or acted outside delegated authority.

The determination the President made under § 3372(a)(1) was one of two determinations, pursuant to § 3372(a)(1) and (a)(2) respectively, that call for the President to exercise judgment on matters Congress confined to the President’s discretion. The exercise of the President’s judgment in making those determinations is not subject to review by the court. *See George S. Bush & Co.*, 310 U.S. at 377–80 (holding that a statute requiring the President to find that the rates of duty and changes are “necessary to equalize such differences in costs of production” before taking action afforded the President discretion such that the exercise of the President’s judgment was beyond judicial review); *Motion Systems*, 437 F.3d at 1361–62 (holding unreviewable a presidential decision to deny import relief under section 421 of the Trade Act of 1974 despite also concluding that the Trade Act placed some restriction on the President’s discretion to grant or deny import relief). Here, as courts have held in similar situations, “the President’s findings of fact and the motivations for his action are not subject to review.” *Corus Group*, 352 F.3d at 1361 (quoting *Maple Leaf Fish*, 762 F.2d at 89).

#### *E. The Public Interest Does Not Weigh In Favor of an Injunction*

To obtain a temporary restraining order or preliminary injunction, plaintiffs must demonstrate that the equitable relief requested would be in the public interest. *Wind Tower Trade Coal.*, 741 F.3d at 95; *see also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.4 (3d ed. 2013) (noting that “preliminary relief will be denied if the court finds that the public interest would be injured were an injunction to be issued”). Plaintiffs have not met that burden.

Plaintiffs argue that the public interest is “served by ensuring that the [Executive] complies with the law.” Pls.’ Br. 42 (quoting *SKF USA Inc. v. United States*, 28 CIT 170, 176, 316 F. Supp. 2d 1322, 1329

(2004)). *SKF* is inapposite. That case involved a statutory injunction against liquidation of entries subject to an antidumping duty order, issued under 19 U.S.C. § 1516a(c)(2). Duties on such entries are secured by cash deposits of estimated antidumping duties. *See SKF*, 28 CIT at 173, 316 F. Supp. 2d at 1326. The issue in that case was whether the injunction remained in effect through appeals. *See SKF*, 28 CIT at 174–87, 316 F. Supp. 2d at 1327–38. Here, plaintiffs ask the court to enjoin defendants immediately from “taking any action to impose or enforce” the Proclamation and to enjoin CBP from the “collection of any tariff from the Plaintiffs” pursuant to the Proclamation. *See Proposed Order*. Plaintiffs ask the court to enter such an injunction with “only a nominal bond” or reliance “on plaintiffs’ existing continuous bonds.” Pls.’ Reply Br. 22–23. This could expose the government to the risk of being unable to collect safeguard duties owed once the entries are liquidated should it ultimately prevail in this litigation.

Plaintiffs also argue that the public has an interest in “enforcing ‘compli{ance} with this country’s treaty obligation.’” Pls.’ Br. 42 (quoting *Robles Antonio v. Barrios Bello*, No. 04–12794-GG, 2004 WL 1895123 at \*3 (11th Cir. Jun. 10, 2004) (per curiam)). Similarly, plaintiffs contend that the issuance of the injunction they seek would “protect the public’s interest in Congress’s oversight role under the Trade Act.” *Id.* But as discussed earlier in this Opinion and Order, plaintiffs cannot demonstrate a likelihood of success on the merits of the claims underlying these assertions.

Plaintiffs argue, further, that the public interest would be served by an injunction because the Proclamation “harms workers, industries, and consumers in the United States” as “Canadian CSPV products support jobs in the U.S. solar sector.” *Id.* at 43 (directing the court’s attention to letters written by various governmental officials). This argument invites the court to consider matters of public policy that are beyond the scope of the judicial review of this action. These are matters the President was tasked with considering when determining whether a contemplated action “provide[s] greater economic and social benefits than costs,” 19 U.S.C. § 2253(a)(1)(A), a determination Congress confined to the President’s discretion.

### III. CONCLUSION AND ORDER

Plaintiffs have failed to show that they are likely to succeed on the merits for any of their claims and that the equitable relief they seek would be in the public interest. Having failed to meet two essential requirements for the issuance of a temporary restraining order or preliminary injunction, the court must deny their motion. Therefore,



upon consideration of their motion, upon all papers and proceedings had herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiffs' motion for a temporary restraining order and a preliminary injunction be, and hereby is, denied; and it is further

**ORDERED** that the caption shall be amended to the form in which it appears on this Opinion and Order.

Dated: March 5, 2018

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, CHIEF JUDGE

## Slip Op. 18–16

UNITED STATES, Plaintiff, v. MAVERICK MARKETING, LLC et al.,  
Defendants.

Before: Claire R. Kelly, Judge  
Court No. 17–00174

[Denying the motions to dismiss filed by Defendants Maverick Marketing, LLC and Good Times USA, LLC.]

Dated: March 7, 2018

*Stephen Carl Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

*Barry Marc Boren*, Law Offices of Barry Boren, of Miami, FL, and *Gerson M. Joseph*, Gerson M. Joseph, P.A., of Weston, FL, for defendants Maverick Marketing, LLC and Good Times USA, LLC.

*Thomas Randolph Ferguson*, Sandler, Travis & Rosenberg, PA, of San Francisco, CA, for defendant American Alternative Insurance Company.

**OPINION AND ORDER****Kelly, Judge:**

This matter is before the court on Maverick Marketing, LLC’s (“Maverick”) and Good Times USA, LLC’s (“Good Times”) motions to dismiss Plaintiff’s complaint pursuant to USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *See* Def., Maverick Marketing, LLC’s Rule 12(b)(6) Mot. Dismiss & Mem. Law 1–3, Nov. 13, 2017, ECF No. 29 (“Maverick Mot. Dismiss”); Def., Good Times USA, LLC’s Rule 12(b)(6) Mot. Dismiss & Mem. Law 1–3, Nov. 13, 2017, ECF No. 30 (“Good Times Mot. Dismiss”). Plaintiff, the United States (“Plaintiff”), on behalf of United States Customs and Border Protection (“CBP” or “Customs”), seeks to recover unpaid Federal Excise Tax (“FET”), in various amounts, and prejudgment interest from Defendants, Maverick, Good Times, and American Alternative Insurance Company (“AAIC”) (collectively, “Defendants”), pursuant to section 592 of the Tariff Act of 1930, as amended 19 U.S.C. § 1592 (2012).<sup>1</sup> *See* Summons, July 10, 2017, ECF No. 1; Compl. at ¶¶ 1, 26–27, 32–33, July 10, 2017, ECF No. 2. From AAIC, Plaintiff also seeks mandatory statutory interest pursuant to 19 U.S.C. § 580. Compl. at ¶ 31. Plaintiff is also seeking attorney fees and any further interest, as provided by law, that the court deems just

<sup>1</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

and appropriate. *Id.* at 6. For the reasons that follow, Maverick and Good Times' motions to dismiss are denied.

### **BACKGROUND**

Maverick and Good Times move to dismiss on the grounds that Plaintiff's complaint merely recites the elements of a cause of action and alleges no "factual enhancement sufficient to withstand dismissal." Maverick Mot. Dismiss at 2; Good Times Mot. Dismiss at 2; *see also* Defs., [Maverick] & [Good Times]'s Reply to Pl.'s Resp. to Defs.' Mots. Dismiss & Mem. Law at 5–7, 12–19, Jan. 29, 2018, ECF No. 39 ("Joint Reply"). Maverick and Good Times also argue that Plaintiff fails to plead with particularity a claim of fraud or mistake, Maverick Mot. Dismiss at 4–5, 7–8; Good Times Mot. Dismiss at 4–5, 8; Joint Reply at 4, and improperly attempts to amend its complaint by adding a previously unpled basis for liability. *See* Joint Reply at 7–12. Further, Good Times argues that Plaintiff fails to plead sufficient facts demonstrating that Good Times had the requisite control over the customs entry process of the subject merchandise, or even participated in the process at all. *See* Good Times Mot. Dismiss at 9–14. Plaintiff responds that its complaint has sufficiently alleged that Maverick and Good Times made material false statements and/or omissions when entering the subject merchandise into United States commerce.<sup>2</sup> *See* Pl.'s Resp. Defs.' Mot. Dismiss at 7–15, Dec. 18, 2017, ECF No. 36 ("Pl.'s Resp."). Further, Plaintiff contends that the false statements and/or omissions came as a result of a scheme between Maverick and Good Times to underpay the FET on the subject merchandise.<sup>3</sup> *See id.* at 1–2, 7–15. As a result, Plaintiff alleges that Maverick and Good Times violated 19 U.S.C. § 1592(a) and are liable for unpaid taxes under 19 U.S.C. § 1592(d).<sup>4</sup> *See id.*

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

This Court possesses exclusive jurisdiction over claims brought under 19 U.S.C. § 1592 pursuant to 28 U.S.C. § 1582(1) (2012).

<sup>2</sup> AAIC has not submitted any filings in relation to the motions to dismiss filed by Maverick and Good Times. However, AAIC has filed cross-claims against both Maverick and Good Times. *See* Answer to Compl. & Cross Claims, Oct. 26, 2017, ECF No. 23.

<sup>3</sup> Plaintiff alleges that "Maverick as principal, and AAIC as surety, executed three Continuous Basic Importation and Entry Bonds" for various sums, Compl. at ¶ 6, and that pursuant to the terms of these three bonds AAIC is jointly and severally liable for "payment of all duties, taxes and charges, not in excess of the coverage amount per bond year, due as a result of the entry of merchandise into the United States during each yearly period covered by each bond." *Id.* at ¶ 7.

<sup>4</sup> Plaintiff's complaint does not seek, as part of its request for relief, civil penalties under 19 U.S.C. § 1592(a), (c). Pursuant to 19 U.S.C. § 1592(d), the United States is entitled to recover the full amount of lawfully owed "duties, taxes, or fees . . . whether or not a monetary penalty is assessed."

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). However, the “[f]actual 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 Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [will] not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 556 U.S. at 679 (citation omitted).

### DISCUSSION

Plaintiff claims that Maverick and Good Times are liable for \$3,339,011.08 worth of unpaid FET pursuant to 19 U.S.C. § 1592(d), stemming from the companies’ violations of 19 U.S.C. § 1592(a).<sup>5</sup> Compl. at ¶ 27; *see also* 19 U.S.C. § 1592(a), (d). For the reasons that follow, the court denies Maverick and Good Times’ motions to dismiss.

The United States may recover an unpaid tax under 19 U.S.C. § 1592(d) for violations of 19 U.S.C. § 1592(a). *See* 19 U.S.C. § 1592(a), (d). To allege a violation under 19 U.S.C. § 1592(a), Plaintiff must plead sufficient facts to show that a person entered or introduced, or attempted to enter or introduce, merchandise into United States commerce by means of either (i) a material and false statement, document or act, or (ii) a material omission. 19 U.S.C. § 1592(a)(1)(A)(i)–(ii). Persons who are not the importer of record may be held liable under 19 U.S.C. § 1592(a) if they introduce or attempt to introduce merchandise into United States commerce. *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1296–1299 (Fed. Cir. 2014); *see also* 19 U.S.C. § 1592(a). Merchandise is “introduced” into United States commerce when a person takes “actions that bring goods to the

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<sup>5</sup> Plaintiff makes three other claims that are derivative of its main allegation that Maverick and Good Times violated 19 U.S.C. § 1592(a) and, as a result, must pay the full value of the unpaid FETs under 19 U.S.C. § 1592(d). *See* Compl. at ¶¶ 22–33; *see also* 19 U.S.C. § 1592(a), (d). Plaintiff also claims that AAIC is liable for \$1,945,343.64 worth of unpaid FET “[b]ased on Maverick’s violations of 19 U.S.C. § 1592(a) and AAIC’s agreement to pay any duties, taxes, or fees owed upon entries of merchandise subject to Maverick’s continuous entry bonds[.]” Compl. at ¶ 29. Plaintiff seeks to recover mandatory statutory interest from AAIC pursuant to 19 U.S.C. § 580. *Id.* at ¶ 31. Further, Plaintiff claims that it is owed “prejudgment interest running from the date of entry,” from the Defendants. *Id.* at ¶ 33. Neither Maverick nor Good Times have raised any independent reasons for why Plaintiff is not entitled to the relief encapsulated by these three claims.

threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents” to the relevant officials. *Trek Leather*, 767 F.3d at 1299. A statement, document, or act is “material” if it has the “tendency to influence [Customs]’ decision in assessing duties.” *United States v. Thorson Chemical Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190, 1196 (1992) (citations omitted). The allegations cannot merely recite the elements of the claim under 19 U.S.C. § 1592(a), but must demonstrate an entitlement to relief “above the speculative level[.]” *Twombly*, 550 U.S. at 555 (citation omitted). Pursuant to the statutory framework, the FET on the subject merchandise at issue here is calculated based on the “price for which [the subject merchandise] sold[.]” 26 U.S.C. § 5701(a)(2) (2012).<sup>6</sup> However, when there is no arm’s-length transaction between the importer and domestic producer, the price on which the FET is calculated will be based “on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary [of the Treasury].” *See* 26 U.S.C. § 4216(b)(1)(C). A sale is not arm’s length if it is “made pursuant to special arrangements between a manufacturer and a purchaser.” 26 C.F.R. § 48.4216(b)-2(e)(2) (2012).<sup>7</sup>

Plaintiff alleges that the contract between Maverick and Good Times allowed Maverick to act as a “pass-through” entity, while Good Times financed all the transactions underlying the importation of the subject merchandise. Compl. at ¶¶ 15–19; *see also* Compl. at Agreement to [I]mport Tobacco Products, July 10, 2017, ECF No. 2–2 (referred to as “Exhibit B” in Plaintiff’s complaint) (“Agreement”). Plaintiff alleges that the Agreement allowed Maverick and Good Times to calculate the FET based on a “purported price,” i.e., the sales price from Rolida Investments, Inc. (“Rolida”),<sup>8</sup> the exporter of the subject merchandise, to Maverick, plus one dollar per carton. Compl. at ¶ 15. Plaintiff alleges that, as a result, the sales price was not based on the first sale of the subject merchandise domestically at an

<sup>6</sup> Further citations to Title 26 of the U.S. Code are to the 2012 edition.

<sup>7</sup> Further citations to Chapter 26 of the Code of Federal Regulations are to the 2014 edition, the most recent version in effect at the time of the last entries of the subject merchandise. The entries at issue in this action were imported between the years 2012 and 2015. *See* Compl. at ¶ 1; Maverick Mot. Dismiss at 1; Good Times Mot. Dismiss at 1. The 2012 and 2013 editions of the Code of Federal Regulations are the same in relevant part as the 2014 version.

<sup>8</sup> The complaint refers to this corporate entity as “Rolida Investments.” *See* Compl. at ¶ 13. However, other submissions filed by the parties provide the company’s complete name, “Rolida Investments, Inc.” *See* Joint Reply at 2; Attachments [to Pl.’s Resp.]: #1 Exhibit A – Sample entry and invoices, Dec. 18, 2017, ECF No. 36–1 (providing an invoice from Rolida Investments, Inc. and identifying Rolida Investments, Inc. as the “Shipper/Exporter/Remitente” on the Bill of Lading).

arm's-length transaction, *see id.* at ¶¶ 15–19, but instead was the result of a “special arrangement” or scheme between Maverick and Good Times. *Id.* at ¶ 21; *see also* 26 U.S.C. § 4216(b)(1)(C); 26 C.F.R. § 48.4216(b)-2(e)(2). Plaintiff alleges that the Agreement, its terms, and the resulting “special arrangement” between Maverick and Good Times was not disclosed when the subject merchandise was entered, and claims that these failed disclosures constitute “false statements and/or omissions[.]”<sup>9</sup> Compl. at ¶ 21. Plaintiff further alleges that the “false statements and/or omissions identified in [its complaint at ¶¶ 12–22] were material because they had the potential to affect determinations made by CBP concerning [Maverick and Good Times’] liability for FET.” *Id.* at ¶ 23.

Plaintiff has alleged sufficient facts from which a trier of fact could conclude that the purported sales price of the subject merchandise upon which the FET was calculated was not the result of an arm's-length transaction.<sup>10</sup> As support, Plaintiff provides a copy of the Agreement between Maverick and Good Times, *see* Agreement, and a summary of the payment structure underlying the importation of the subject merchandise into the United States. Compl. at ¶¶ 15–19.

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<sup>9</sup> Maverick and Good Times also argue that Plaintiff's complaint makes contradictory allegations as to why the sales price used to calculate the FET was incorrect. *See* Joint Reply at 2–4. Maverick and Good Times contend that such contradictions demonstrate that Plaintiff's complaint fails to state a claim upon which relief can be granted. *Id.* However, in arguing that Plaintiff makes contradictory statements as to price, Maverick and Good Times point to statements made by Plaintiff in its response, not its complaint. *See id.* at 2 (contrasting two statements made by Plaintiff within its response to Maverick and Good Times' motions to dismiss). In its complaint, Plaintiff clearly indicates that a scheme between Maverick and Good Times, *see* Compl. at ¶¶ 15–19, allowed the two companies to use a “purported sales price” not based on an arm's-length transaction, but instead on the pre-importation price, to calculate each entry's FET. *See id.* at ¶ 15. Moreover, Maverick and Good Times selectively isolate different parts of Plaintiff's response to argue that Plaintiff is contradicting itself. *See* Joint Reply at 2. Read as a whole, however, Plaintiff in its complaint and response clearly argues that Maverick and Good Times set up a scheme to avoid paying the proper amount of FET. *See* Compl. at ¶¶ 12–23; Pl.'s Resp. at 7–15. Therefore, Maverick and Good Times' argument is unpersuasive. Further, Maverick and Good Times' argument that Plaintiff wrongfully focuses on adequacy of profit derived by Maverick under the terms of the Agreement, *see* Joint Reply at 6–7, fails for similar reasons. Plaintiff's complaint relies on the profit structure to support its allegation that “Maverick acted as a pass-through entity for Good Times's purchases of [the subject merchandise] from Rolida[.]” *see* Compl. at ¶ 16, and that the Agreement between Maverick and Good Times allowed the two companies to set up a scheme that allowed for manipulation of the price upon which the FET would be calculated. *See id.* at ¶¶ 15–19.

<sup>10</sup> Here, Plaintiff alleges that Maverick is the importer of record. Compl. at ¶¶ 12, 24. Neither Good Times nor Maverick disagree. *See* Joint Reply at 5, 6; Maverick Mot. Dismiss at 4; Good Times Mot. Dismiss at 4. The statute imposes liability for violations of 19 U.S.C. § 1592(a)(1) on a “person.” 19 U.S.C. § 1592(a)(1). An importer of record qualifies is a “person.” *See Trek Leather*, 767 F.3d at 1296 (explaining that the term “person” covers importers and consignees); 19 U.S.C. § 1401(d); *see also* 26 U.S.C. § 5703(a)(1) (imposing liability on the importer of tobacco products for the payment of taxes pursuant to 26 U.S.C. § 5701).

Plaintiff alleges that even though, as per the Agreement, Maverick paid Rolida and, in turn, Maverick would sell the merchandise to Good Times, at all relevant times Good Times controlled the transactions. *Id.* Plaintiff provides several examples of Good Times' control over the transactions. *See id.* at ¶¶ 18–20. First, Plaintiff alleges that, per the Agreement, Maverick would generate two invoices—one, itemizing the subject merchandise and the costs incurred from Rolida, plus one dollar per carton commission for Maverick, and the second, “includ[ing] FET, USDA [“United States Department of Agriculture”] tobacco buyout payments, customs broker’s fees, and harbor maintenance fees, among other fees incident to entry.” *Id.* at ¶ 18. However, Good Times would only pay the balance of the second invoice once it received proof that the funds from the first invoice had been wired to Rolida. *Id.* Plaintiff alleges that Good Times financed both transactions, and therefore had paid for the subject merchandise before it was entered. *Id.* ¶¶ 18–19 (citing, in support, the payment arrangement set up by Maverick and Good Times in the Agreement). Second, Plaintiff alleges that Maverick would only collect one dollar per carton as commission. *Id.* at ¶¶ 15, 18. Third, Plaintiff alleges that, at all relevant times, “Good Times owned the trademarks for all imported products and thus controlled all United States importations of the imported merchandise.”<sup>11</sup> *Id.* at ¶ 20 (citation omitted). Plaintiff alleges that neither Maverick nor Good Times disclosed the relationship between them, nor the financial structure created to import the subject merchandise into the United States. Compl. at ¶ 22.<sup>12</sup>

Plaintiff’s complaint points to specific facts that cumulatively provide sufficient grounds for a “court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). A trier of fact could find that Maverick

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<sup>11</sup> Maverick and Good Times argue that trademark ownership is not enough to demonstrate control over importation transactions. *See* *Maverick Mot. Dismiss* at 6; *Good Times Mot. Dismiss* at 6–7. Maverick and Good Times mischaracterize Plaintiff’s reliance on trademark ownership. In its complaint, Plaintiff relies on Good Times’ ownership of the trademark right for the imported subject merchandise as indicia of control. *See* Compl. at ¶ 20. It is part of Plaintiff’s theory that Good Times was the entity in control of the transactions involving importation of the subject merchandise, that there was no arm’s-length relationship between the two companies, that Good Times was indeed the consignee at the time the subject merchandise was imported, and that these omissions were material. *See id.* at ¶¶ 15–21.

<sup>12</sup> Maverick and Good Times also challenge Plaintiff’s allegation that there was fraud in the reporting of the sales price. *See* *Maverick Mot. Dismiss* at 4–5; *Good Times Mot. Dismiss* at 4–5. Specifically, both argue that Plaintiff has pled no facts demonstrating that the sales prices was not the price Good Times paid Maverick for the subject merchandise, or why use of that price was incorrect. *See* *Maverick Mot. Dismiss* at 4; *Good Times Mot. Dismiss* at 4. However, Plaintiff’s complaint sufficiently establishes that Plaintiff’s argument as to “purported price,” *see* Compl. at ¶¶ 15–19, is related to its argument that Maverick and Good Times had a special arrangement or scheme that resulted in the declaration of a false price for the subject merchandise for FET purposes. *Id.* at ¶ 21.

and Good Times' failure to disclose the terms of the Agreement as material for determining whether the transactions were conducted on an arm's-length basis and whether the values declared on the entry paperwork adhered to the statutory and regulatory requirements. Therefore, Plaintiff's complaint contains sufficient allegations to plausibly support the claim that Maverick and Good Times entered into a scheme that, furthered by false and material statements and/or omissions, led to Maverick and Good Times violating 19 U.S.C. § 1592(a).<sup>13</sup>

Good Times specifically challenges Plaintiff's allegation that Good Times violated 19 U.S.C. § 1592(a), as it was neither the importer nor consignee for the subject merchandise at the time of importation, Good Times Mot. Dismiss at 9–11, nor the alter ego of Maverick. *Id.* at 11–14; *see also* Joint Reply at 12–17. Good Times argues that all the relevant transactions were done at Maverick's direction:

Maverick was the importer; Maverick filed the entry documents; Maverick was the consignee on each import document; Maverick's custom broker filed the entry documents with Customs pursuant to a Power of Attorney executed by Maverick; Maverick paid the Customs duties and fees; and Maverick paid the FET's at the time of importation based on its sales price to Good Times (the first sale in the United States) "as required by law".

Joint Reply at 5.<sup>14</sup> However, here, Plaintiff has alleged sufficient facts for a trier of fact to determine that Good Times retained sufficient control of the importation process and, therefore, introduced the subject merchandise into United States commerce. Specifically, Plaintiff alleges: that Good Times financed all the transactions connected with the entry of the subject merchandise, Compl. at ¶ 19; that, upon the release of the subject merchandise from the warehouse, it was sent directly to Good Times, *id.* at ¶ 14; and that the two invoices Maverick generated for the subject merchandise were paid for by Good Times, with the second invoice only being paid upon Good

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<sup>13</sup> Maverick and Good Times also challenge Plaintiff's allegation that the companies undervalued the subject merchandise by using the "transaction value," and therefore violated 19 U.S.C. § 1401a. *See* Maverick Mot. Dismiss at 7–8; Good Times Mot. Dismiss at 8; Joint Reply at 19–20. Maverick and Good Times contend that "[t]he FET's [sic] calculated and paid by Maverick were [properly] based on a post-importation price determined according to Title 26—not Title 19 [of the United States Code,]" Joint Reply at 20 (emphasis omitted), and that Plaintiff confuses value declared for valuation purposes with value used to calculate FET. *See* Maverick Mot. Dismiss at 8; Good Times Mot. Dismiss at 8. Pursuant to 19 U.S.C. § 1401a(a), imported merchandise may be appraised based on its "transaction value." *See* 19 U.S.C. § 1401a(a). Plaintiff alleges that this violation had the potential to affect CBP determinations regarding the FET. It is possible for a trier of fact to conclude that use of an incorrect method of appraisement could cause CBP to not properly evaluate Maverick and Good Times' statements regarding the FET owed.

<sup>14</sup> Maverick and Good Times do not identify the source from which they are quoting the phrase, "as required by law."



Times' receipt of proof that Rolida had been paid. *Id.* at ¶ 18. Further, Plaintiff also alleges that "Good Times owned the trademarks for all imported products and thus controlled all United States importations of the imported merchandise." *Id.* at ¶ 20 (citation omitted).<sup>15</sup> Therefore, Plaintiff's complaint did not rest on "naked assertions" absent factual support, *see Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557), and instead sufficiently alleged that Good Times "introduced" the subject merchandise into United States commerce.<sup>16</sup>

## CONCLUSION

For the reasons provided above, Maverick and Good Times' motions to dismiss are denied. In accordance with this opinion, it is

**ORDERED** that Maverick and Good Times' motions to dismiss are denied; and it is further

**ORDERED** that Maverick and Good Times shall file their respective answers to Plaintiff's complaint on or before Monday, April 2, 2018; and it is further

**ORDERED** that the parties shall file a joint proposed scheduling order that will achieve the purposes of USCIT Rule 16(b) on or before Wednesday, May 2, 2018.

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<sup>15</sup> Maverick and Good Times also argue that Plaintiff, in its response to Maverick's and Good Times' motions to dismiss, attempts to improperly amend the complaint and insert an allegation that, during all relevant times, Maverick acted as Good Times' agent. *See* Joint Reply at 7–12. To support this argument, Maverick and Good Times quote an excerpt from Plaintiff's response that "Maverick acted as Good Times' agent . . ." and cite to page six of Plaintiff's response as support. *Id.* at 7 (citing Pl.'s Resp. at 6). However, on page six of its response, Plaintiff outlines the standards of review that the court is to apply in deciding a motion to dismiss and in deciding whether a violation has occurred pursuant to 19 U.S.C. § 1592(a). *See* Pl.'s Resp. at 6. The court assumes that Maverick and Good Times meant to cite to the following statement in Plaintiff's response:

The amount of FET owed is calculated based on the first arm's length sale price after importation, but under their sham transactions, Maverick acted as Good Times's agent for the purpose of reporting an artificially low value to United States authorities for FET purposes.

Pl.'s Resp. at 1. In its complaint, Plaintiff alleges: that "Maverick acted as a pass-through entity for Good Times's purchases of [the subject merchandise] from Rolida[.]" Compl. at ¶ 16; that "the business relationship between Maverick and Good Times was not that of a buyer and seller in an arm's length transaction[.]" *id.* at ¶ 17; and that Good Times financed all transactions relating to the importation of the subject merchandise. *Id.* at ¶¶ 18–19. Therefore, Plaintiff's allegations sufficiently support a theory that the relationship between Maverick and Good Times was that of agent and principal.

<sup>16</sup> In the joint reply, Maverick and Good Times also argue that this case should be dismissed with prejudice as to Good Times because Plaintiff fails to allege sufficient facts demonstrating that FET tax liability transferred from Maverick to Good Times. *See* Joint Reply at 5–6. Maverick and Good Times argue that transfer of FET liability occurs only pursuant to 26 U.S.C. § 5704. *Id.* at 6; *see also* 26 U.S.C. § 5704. These arguments are not persuasive. Plaintiff's claim arises under 19 U.S.C. § 1592(a), (d), which allows the United States to recover any tax owed from any person who entered or introduced merchandise into United States commerce. *See* 19 U.S.C. § 1592(a), (d). Here, Plaintiff's allegations are sufficient such that a trier of fact could find Good Times introduced the subject merchandise into United States commerce by means of a material misstatement and/or omission, and thus that Good Times can be held liable for lost FETs under 19 U.S.C. § 1592(d).

Dated: March 7, 2018  
New York, New York

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

## Slip Op. 18–17

MOEN INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge  
Court No. 15–00145

[Granting Plaintiff's motion for summary judgment and denying Defendant's cross-motion for summary judgment with respect to the classification of certain models of toilet paper holders.]

Dated: March 7, 2018

*William Randolph Rucker* and *Mollie D. Sithowski*, Drinker Biddle & Reath, LLP, of Chicago, IL, argued for Plaintiff Moen Inc.

*Jamie L. Shookman*, Trial Attorney, Commercial Litigation Branch, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

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

This case addresses the proper classification of various models of toilet paper holders under the Harmonized Tariff Schedule of the United States (“HTSUS”).<sup>1</sup> Before the court are cross-motions for summary judgment. *See* Pl.’s Mot. Summ. J., July 27, 2017, ECF No. 25; Mem. L. Supp. Pl.’s Mot. Summ. J., July 27, 2017, ECF No. 25 (“Pl.’s Br.”); Def.’s Cross-Mot. Summ. J., Aug. 28, 2017, ECF No. 28; Mem. Opp’n Pl.’s Mot. Summ. J. & Supp. Def.’s Cross-Mot. Summ. J., Aug. 28, 2017, ECF No. 28 (“Def.’s Br.”). Both parties filed timely responses. *See* Pl.’s Resp. Def.’s Cross-Mot. Summ. J., Sept. 27, 2017, ECF No. 31; Mem. L. Further Supp. Def.’s Cross-Mot. Summ. J., Oct. 11, 2017, ECF No. 32. The court held oral argument in this matter on December 13, 2017. *See* Oral Argument, Dec. 13, 2017, ECF No. 40.

Moen Inc. (“Plaintiff” or “Moen”) argues that U.S. Customs and Border Protection (“Customs”) improperly denied its protests challenging the classification of its subject merchandise. *See* Pl.’s Br. 1. Plaintiff contends that all of its toilet paper holders are entitled to duty-free treatment because the products are classifiable under HTSUS subheading 8302.50.00, which encompasses “[b]ase metal mountings,” including “hat-racks, hat pegs, brackets and similar fix-

<sup>1</sup> Although Plaintiff imported its entries between 2013 and 2014, all citations to the HTSUS are to the 2013 version. The relevant provisions and accompanying notes are identical to the 2014 version.

tures, and parts thereof.” *See id.* at 2. The United States (“Defendant” or “Government”) maintains that Customs properly classified the imported toilet paper holders under HTSUS subheading 7907.00.10, which covers “[o]ther articles of zinc” including “[t]oilet and sanitary wares.” *See* Def.’s Br. 1. The Government argues, in the alternative, that Moen’s “Sienna” product should be classified under HTSUS subheading 7324.90.00, which encompasses other products, including parts, of “[s]anitary ware and parts thereof, of iron or steel.” *See id.* at 1–2.

For the reasons discussed below, the court grants Plaintiff’s motion for summary judgment and denies Defendant’s cross-motion for summary judgment with respect to the classification of the subject imports of toilet paper holders, which are classifiable under HTSUS subheading 8302.50.00 and will receive duty-free treatment.

### UNDISPUTED FACTS

As required by USCIT Rule 56.3, Plaintiff and Defendant submitted separate statements of material facts and responses thereto. *See* Pl.’s Statement of Material Facts Not in Issue, July 27, 2017, ECF No. 25 (“Pl.’s Facts”); Def.’s Resp. to Pl.’s Statement of Material Facts Not in Issue, Aug. 28, 2017, ECF No. 28–1 (“Def.’s Facts Resp.”); Def.’s Statement of Additional Undisputed Material Facts, Aug. 28, 2017, ECF No. 28–2 (“Def.’s Facts”); Pl.’s Resp. to Def.’s Statement of Undisputed Material Facts, Sept. 27, 2017, ECF No. 31 (“Pl.’s Facts Resp.”). The following facts are not in dispute.

#### A. Jurisdictional and Procedural Facts

Plaintiff imported the subject toilet paper holders into the United States at the Port of Los Angeles in California between December 2013 and March 2014. Pl.’s Facts ¶ 2; Def.’s Facts Resp. ¶ 2. The entries were liquidated by Customs. Pl.’s Facts ¶ 3; Def.’s Facts Resp. ¶ 3. Customs classified the merchandise under HTSUS subheading 7907.00.10, dutiable at 3% *ad valorem*. Pl.’s Facts ¶ 7; Def.’s Facts Resp. ¶ 7.

Plaintiff filed timely protests contesting the classification of its imports and seeking duty-free treatment of its merchandise, which Customs denied. Pl.’s Facts ¶ 3; Def.’s Facts Resp. ¶ 3. Plaintiff paid all liquidated duties and fees according to Customs’ classification of the merchandise. Pl.’s Facts ¶ 4; Def.’s Facts Resp. ¶ 4. Thereafter, Plaintiff commenced this action. *See* Summons, May 13, 2015, ECF No. 1; Compl., July 31, 2015, ECF No. 7.

## **B. Facts Regarding the Imported Toilet Paper Holders**

There are twenty-three different product models at issue with the following stock keeping unit (“SKU”) numbers and names:

- YB8808BN 90 degree brushed nickel pivoting paper holder;
- YB0408BN Align brushed nickel paper holder;
- YB0408CH Align brushed chrome paper holder;
- YB0409BN Align brushed nickel paper holder;
- YB0409CH Align chrome paper holder;
- DN7908BN Ashville brushed nickel pivoting paper holder;
- YB2208BN Brantford brushed nickel spring loaded paper holder;
- YB2208CH Brantford chrome spring loaded paper holder;
- YB2208ORB Brantford oil rubbed bronze spring loaded paper holder;
- YB2808BN Eva brushed nickel European paper holder;
- YB2808CH Eva chrome European paper holder;
- YB2808ORB Eva oil rubbed bronze European paper holder;
- YB9208BN Fina brushed nickel pivoting paper holder;
- YB5408BN Kingsley brushed nickel pivoting paper holder;
- YB5408CH Kingsley chrome pivoting paper holder;
- YB5408ORB Kingsley oil rubbed bronze pivoting paper holder;
- DN8308BN Retreat brushed nickel pivoting paper holder;
- DN8308CH Retreat chrome pivoting paper holder;
- DN4408CH Vale chrome pivoting paper holder;
- DN4408ORB Vale oil rubbed bronze pivoting paper holder;
- DN4908BK Sienna matte black European paper holder;
- DN6808BN Sage brushed nickel spring loaded paper holder; and
- DN6808ORB Sage oil rubbed bronze spring loaded paper holder.

Pl.’s Facts ¶ 8; Def.’s Facts Resp. ¶ 8. The paper holders come in various styles and finishes. Pl.’s Facts ¶ 11; Def.’s Facts Resp. ¶ 11. Most of the products are made primarily of zinc. Pl.’s Facts ¶ 24; Def.’s

Facts Resp. ¶ 24. One product, the Sienna matte black European paper holder, SKU DN4908BK, is made primarily of steel.<sup>2</sup> Pl.'s Facts ¶ 25; Def.'s Facts Resp. ¶ 25. Zinc and steel are both base metals. Pl.'s Facts ¶ 27; Def.'s Facts Resp. ¶ 27.

All of the subject paper holders are designed to be mounted on a wall and used to hang a roll of toilet paper. Pl.'s Facts ¶¶ 10, 22; Def.'s Facts Resp. ¶¶ 10, 22. Moen distinguishes the models into three types: pivoting, European ("Euro"), and spring-loaded. Pl.'s Facts ¶ 11; Def.'s Facts Resp. ¶ 11. The pivoting paper holders have an arm that holds a toilet paper roll and a post that either pivots for ease of changing out the roll, or has an attached pivoting head that performs this role. Def.'s Facts ¶ 4; Pl.'s Facts Resp. ¶ 4. The Euro paper holders have an arm that holds a toilet paper roll, which may swivel for ease of use. Def.'s Facts ¶ 5; Pl.'s Facts Resp. ¶ 5. The spring-loaded paper holders have a spring-loaded tube that fits between two mounted posts. Def.'s Facts ¶ 6; Pl.'s Facts Resp. ¶ 6.

### JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012)<sup>3</sup> and 19 U.S.C. § 1515 (2012).<sup>4</sup> The court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

A two-step process guides the court in determining the correct classification of merchandise. First, the court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing

<sup>2</sup> Defendant avers that some cited testimony in the record indicates that Moen's Sienna model is made primarily of steel, while other evidence states that the product is made of wrought iron. Def.'s Facts Resp. ¶ 25. Defendant correctly notes that whether the Sienna model is made of steel or iron is not material to this dispute because HTSUS subheading 7324.90.00 encompasses both metals. *Id.* Plaintiff clarified at oral argument that its Sienna product is made primarily of steel. *See* Oral Argument at 0:46:55–0:47:27, Dec. 13, 2017, ECF No. 40.

<sup>3</sup> Further citations to Title 28 of the U.S. Code are to the 2012 edition.

<sup>4</sup> Further citations to Title 19 of the U.S. Code are to the 2012 edition.

*Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the court determines whether the merchandise at issue falls within the parameters of the tariff provision. *See id.* The former is a question of law and the latter is a question of fact. *See id.* “[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis ‘collapses entirely into a question of law.’” *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The court reviews classification cases *de novo*. *See* 28 U.S.C. § 2640(a)(1). Customs is afforded a statutory presumption of correctness in classifying merchandise under the HTSUS, *see* 28 U.S.C. § 2639(a)(1), but this presumption does not apply to pure questions of law. *See Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). The court has “an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms,” *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)), and therefore must determine “whether the government’s classification is correct, both independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

## DISCUSSION

### A. Legal Framework

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (“GRIs”) and, if applicable, the Additional U.S. Rules of Interpretation, which are both applied in numerical order. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011) (citing *N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001)). GRI 1 instructs that, “for legal purposes, classification shall be determined according to the terms of the headings and any [relevant] section or chapter notes.” GRI 1. “Absent contrary legislative intent, HTSUS terms are to be ‘construed [according] to their common and popular meaning.’” *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 533 (Fed. Cir. 1994)).

In construing the terms of the headings, “[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed.

Cir. 1999) (citing *Baxter Healthcare Corp. of P.R.*, 182 F.3d at 1337). The court may also consult the Harmonized Commodity Description and Coding System’s Explanatory Notes (“Explanatory Notes”), which “are not legally binding or dispositive,” *Kahrs Intern., Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but “provide a commentary on the scope of each heading of the Harmonized System . . . and are generally indicative of proper interpretation of the various provisions.”<sup>5</sup> H.R. Rep. No. 100–576, 549 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582; see also *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003)). Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

**B. Analysis of the Terms Under HTSUS 8302.50.00**

The court must first ascertain the proper meaning and scope of the terms under HTSUS subheading 8302.50.00 before determining whether Plaintiff’s products are classified under that provision. See *Schlumberger Tech. Corp.*, 845 F.3d at 1162 (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276). HTSUS subheading 8302.50.00 reads as follows:

8302: Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat-racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof:

8302.50.00 Hat-racks, hat pegs, brackets and similar fixtures, and parts thereof ..... Free

Subheading 8302.50.00, HTSUS.

The court must assess whether HTSUS heading 8302 is an *eo nomine* provision or a use provision at the outset, as that distinction guides the analysis. See *Schlumberger Tech Corp.*, 845 F.3d at 1164. An *eo nomine* provision describes articles by specific names, while a use provision characterizes products based on their principal or actual use. See *id.*; see also *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1354 (Fed. Cir. 2014). Heading 8302 is an *eo nomine* classification provision because it names specific products. Because the provision is *eo nomine*, the court’s analysis begins with the heading’s

<sup>5</sup> All citations to the Explanatory Notes are to the 2013 version. The relevant portions are identical to the 2014 version.



terms. See *Schlumberger Tech Corp.*, 757 F.3d at 1164 (citation omitted). Pursuant to Plaintiff's proposed classification, the court's analysis will focus on the phrase "base metal hat-racks, hat-pegs, brackets and similar fixtures" within HTSUS heading 8302.

First, the court looks to the term "base metal." Chapter 82 is titled "miscellaneous articles of base metals." Chapter 82, HTSUS. All chapters at issue in this case—Chapters 73, 79, and 82—fall under Section XV of the HTSUS. Note 3 of Section XV clearly states that "base metals," as used throughout the section, include steel and zinc. Note 3 to Section XV, HTSUS. Because the controlling section note provides an unambiguous definition, the court concludes that the base metal fixtures referred to in HTSUS heading 8302 encompass products made of steel and zinc.

The phrase "similar fixtures" within HTSUS heading 8302 requires, however, a deeper analysis. It evokes the interpretive principle of *ejusdem generis*, which necessitates a "common-sense assessment of the particular list and what unifies the items in that list." *Victoria's Secret Direct, LLC v. United States*, 769 F.3d 1102, 1107 (Fed. Cir. 2014). The unifying principle "may be the presence of certain properties and the absence of others." *Id.* In other words, the shared characteristics may either be "affirmative features or limitations." *Id.* When analyzing whether a particular import falls within the scope of a list, "[t]he first step is to consider the common characteristics or unifying purpose of the listed exemplars in a heading." *Id.* (citing *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999)) (internal quotations omitted). The second step "is to consider the merchandise at issue with the identified unifying characteristics (or purpose) in mind." *Id.* Classification is appropriate "only if the merchandise shares the heading's unifying characteristics." *Id.* If the product has "a more specific primary purpose that is inconsistent with the listed exemplars," then the classification fails. *Id.*

Plaintiff proffers multiple definitions of "hat rack," "hat-peg," and "bracket" in its briefing, see Pl.'s Br. 15, which Defendant does not dispute. See Def.'s Br. 14. A "hat rack" is defined as "a wooden framework with several projecting pegs that hangs against a wall and is used to hold hats and other articles of clothing." *Hat Rack, Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/hat%20rack> (last visited Mar. 2, 2018). A "hat-peg" is "a peg on which to hang a hat." *Hat-Peg, Collins Dictionary*, available at <https://www.collinsdictionary.com/us/dictionary/english/hatpeg> (last visited Mar. 2, 2018). A "bracket" is defined as either "an overhanging

member that projects from a structure (such as a wall) and is usually designed to support a vertical load or to straighten an angle” or “a fixture (as for holding a lamp) projecting from a wall or column.” *Bracket*, *Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/bracket> (last visited Mar. 2, 2018). The dictionary definitions imply that all of the listed exemplars in HTSUS heading 8302 are affixed to a wall and are used to hang, hold, or support another article.

Subsection (G) of the Explanatory Note for HTSUS heading 8302 provides further guidance for determining the unifying characteristics. It defines “similar fixtures” by listing exemplars “such as coat racks, towel racks, dish-cloth racks, brush racks, [and] key racks.” Explanatory Note to Heading 8302, HTSUS. Based on this note, it is reasonable to conclude that the phrase “similar fixtures” references various types of racks. *Merriam-Webster Dictionary* defines “rack” as “a framework, stand, or grating on or in which articles are placed.” *Rack*, *Merriam-Webster Dictionary*, available at <https://www.merriam-webster.com/dictionary/rack> (last visited Mar. 2, 2018). *Oxford Dictionary* similarly defines the word as “[a] framework, typically with rails, bars, hooks, or pegs, for holding or storing things.” *Rack*, *Oxford Dictionary*, available at <https://en.oxforddictionaries.com/definition/us/rack> (last visited Mar. 2, 2018). Based on these definitions, “similar fixtures” refers to items that are mounted on a wall and hold other articles. The unifying characteristics of the listed products in HTSUS heading 8302 are, therefore, that they (1) are affixed to a wall and (2) hang, hold, or support other items.

HTSUS heading 8302, in sum, encompasses objects made of base metal that are affixed to a wall and are used to hang, hold, or support other items. The subject entries should share these three features to be classifiable within the scope of this heading.

### **C. Classification of Plaintiff’s Toilet Paper Holders**

After the court ascertains the proper meaning of the terms in the tariff provision, the court must determine next whether Plaintiff’s toilet paper holders fall within the parameters of the tariff provision. *See Schlumberger Tech. Corp.*, 845 F.3d at 1162 (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276).

Plaintiff argues that its toilet paper holders fall clearly within the scope of HTSUS heading 8302 because the products are made of base metal, are designed to be affixed to a wall, and are used to hold or

hang an item. *See* Pl.’s Br. 18. The Government disagrees, contending that the toilet paper holders at issue are distinguishable from the other items encompassed by HTSUS heading 8302 based on the manner in which the products support other articles. *See* Def.’s Br. 15–16. The Government asserts that the imported toilet paper holders “do not support articles in the same way” as the listed exemplars in HTSUS heading 8302 and Explanatory Note. *Id.* at 15. In the Government’s view, the enumerated products “are used to hold discrete items that are not secured to the ‘rack’ and may be easily removed.” *Id.* at 17. For instance, “hats are removed by simply grabbing the hat and pulling it away.” *Id.* at 15. The subject holders contain, in contrast, a movable piece “that pivots, swivels, or springs open and shut” to secure a roll of toilet paper. *Id.* Defendant avers further that the listed items “hold articles that are removed and returned as an entirety,” whereas the subject holders support a good that is dispensed sheet-by-sheet and then discarded. *Id.* at 15–16. The court treats Defendant’s argument as a distinction that is not dispositive. Not all of Moen’s products contain moveable pieces, as demonstrated by Plaintiff at oral argument. *See* Oral Argument, Dec. 13, 2017, ECF No. 40. The chrome Align paper holder (SKU YB0409CH) and the black Sienna paper holder (SKU DN4908BK), for example, do not have moveable pieces. They are simply affixed to the wall, and customers can easily secure a roll of toilet paper on them by sliding the roll onto the bar. Subsection (G) of the Explanatory Note for HTSUS heading 8302 does not distinguish between reusable and disposable goods. *See* Explanatory Note to Heading 8302, HTSUS. “Towel racks” could reasonably be a reference to both cloth towels and paper towels, which are dispensed sheet-by-sheet and discarded in a similar manner to toilet paper. The court finds unpersuasive the Government’s attempt to distinguish the paper holders from the listed exemplars in HTSUS 8302.

Plaintiff has placed on the record undisputed material facts. The subject paper holders are made of base metal. *See* Pl.’s Facts ¶¶ 24–25, 27; Def.’s Facts Resp. ¶¶ 24–25, 27. The products are also designed to be mounted on a wall and are used to hold, hang, or support an object, such as toilet paper. *See* Pl.’s Facts ¶ 22; Def.’s Facts Resp. ¶ 22. These facts establish that the subject paper holders fall under the scope of HTSUS heading 8302, and thus are classifiable under HTSUS subheading 8302.50.00.

**D. Defendant’s Cross-Motion for Summary Judgment**

The court now turns to Defendant’s cross-motion for summary judgment. Defendant claims that the subject toilet paper holders are properly classified under HTSUS subheadings 7907.00.10 and 7324.90.00, depending on their constituent material. *See* Def.’s Br. 1–2. The full text of HTSUS subheading 7907.00.10 reads:

7907: Other articles of zinc:

7907.00.10 Articles of a type used for household, table or kitchen use; toilet and sanitary wares; all of the foregoing and parts thereof of zinc ..... 3%

Subheading 7907.00.10, HTSUS.

The Government concedes that one model of toilet paper holder, the Sienna, “was entered and liquidated incorrectly, as it is not an article of zinc.” Def.’s Br. 2. Defendant asserts that the Sienna is classified properly under HTSUS subheading 7324.90.00 because it is made of iron or steel, and thus merits duty-free treatment.<sup>6</sup> *See id.* The full text of HTSUS subheading 7324.90.00 reads:

7324: Sanitary ware and parts thereof, of iron or steel:

7324.90.00 Other, including parts ..... Free

Subheading 7324.90.00, HTSUS.

As stated before, Section XV of the HTSUS encompasses Chapters 79 and 73. The Notes for Section XV provide authoritative guidance, therefore, when interpreting the heading terms contained therein. Note 2 explains, in relevant part, that “the articles of chapter 82 or 83 are excluded from chapters 72 to 76 and 78 to 81.” Note 2 to Section XV, HTSUS. The Explanatory Notes for the Government’s preferred classifications build further on this sentiment. The Explanatory Note for HTSUS heading 7907 states, “This heading covers all articles of zinc **other than** those . . . articles specified or included in Chapter 82 or 83 or more specifically covered elsewhere in this Nomenclature.” Explanatory Note to Heading 7907, HTSUS. The Explanatory Note for HTSUS heading 7324 reads, “This heading comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for sanitary purposes.” Explanatory Note to Heading 7324, HTSUS. In sum, if the subject merchandise is classifiable within other categories of the tariff schedule, then it is excluded from HTSUS headings 7907 and 7324.

<sup>6</sup> The practical outcome of the Government’s position is that Moen’s Sienna model will receive duty-free treatment regardless of classification under HTSUS subheading 8302.50.00 or HTSUS subheading 7324.90.00. The court will consider the Government’s legal arguments nevertheless with respect to HTSUS heading 7324.

Because the court finds that Plaintiff's subject toilet paper holders fall under another tariff provision, HTSUS heading 8302, the merchandise cannot be classified under Defendant's preferred provisions, HTSUS headings 7907 and 7324.

### CONCLUSION

For the foregoing reasons, the court concludes that all twenty-three models of toilet paper holders are classifiable under HTSUS subheading 8302.50.00. Customs erred in classifying the entries under HTSUS subheading 7907.00.10. Plaintiff's motion for summary judgment is granted and Defendant's cross-motion for summary judgment is denied.

Judgment will be entered accordingly.

Dated: March 7, 2018

New York, New York

*/s/ Jennifer Choe-Groves*

JENNIFER CHOE-GROVES, JUDGE