U.S. Court of International Trade

Slip Op. 18–122

REBAR TRADE ACTION COALITION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00157

[*Final Results* sustained.]

Dated: September 20, 2018

John R. Shane, Wiley Rein LLP of Washington, DC argued for Plaintiff Rebar Trade Action Coalition. With him on the briefs were *Alan H. Price* and *Maureen E. Thorson*.

Margaret J. Jantzen, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC argued for Defendant, United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Reza Karamloo*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Leah N. Scarpelli, Arent Fox LLP of Washington, DC argued for Defendant-Intervenor Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. With her on the brief was *Matthew M. Nolan*.

OPINION

Gordon, Judge:

This action involves the final results of the U.S. Department of Commerce ("Commerce") in the first administrative review of the 2014 countervailing duty ("CVD") order on steel concrete reinforcing bar from the Republic of Turkey. *See Steel Concrete Reinforcing Bar from the Republic of Turkey*, 82 Fed. Reg. 26,907 (Dep't of Commerce June 12, 2017) (final results and partial rescission) ("*Final Results*"), and accompanying Issues and Decision Memorandum for the Final Results of the Countervailing Duty 2014 Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey, C-489–819 (Dep't of Commerce June 12, 2017), available at https://enforcement.trade.gov/frn/summary/turkey/2017–12108–1.pdf (last visited this date) ("*Decision Memorandum*"); *see also Steel Concrete Reinforcing Bar from the Republic of Turkey*, 79 Fed. Reg. 65,926 (Dep't of Commerce Nov. 6, 2014) (final countervailing duty order) ("*Order*"). Before the court is the motion for judgment on the agency record of Plaintiff Rebar Trade Action Coalition ("RTAC"). *See* RTAC's Mot. for J. on the Agency R., ECF No. 25 ("Pl.'s Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 31 ("Def.'s Resp."); Def.-Intervenor Icdas Celik Enerji Tersane Ve Ulasim A.S.

("Icdas") Resp. in Opp'n to Pl.'s R. 56.2 Mot. for J. on the Agency R., ECF No. 34 ("Icdas Resp."); RTAC's Reply Br., ECF No. 36 ("Pl.'s Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012)[1], and 28 U.S.C. § 1581(c) (2012).

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2018).

II. Discussion

A countervailable subsidy exists if "[a government or government-affiliated entity] — provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). Under the countervailing duty regime, purchasing goods for MTAR confers a benefit, and "the adequacy of remuneration is determined in relation to prevailing market conditions for the good or service being provided in the country which is subject to the investigation or review." 19

[1] 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.

U.S.C. § 1677(5)(E)(iv). As to prevailing market conditions, Commerce considers "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.*

RTAC challenges Commerce's findings: (1) that the Government of Turkey ("GOT") did not make purchases of energy on the grid (there was no "financial contribution" by the GOT for more than adequate remuneration ("MTAR")); (2) that the purchases of energy by "public buyers," *i.e.* government or government-affiliated entities, under the GOT's "free consumer" program did not confer a "benefit" as defined under § 1677(5); and (3) that zero percent margins were appropriate for the non-selected respondents. *See* Pl.'s Br. For the reasons set forth below, the court sustains the *Final Results*.

A. Purchase of Electricity for MTAR by the GOT through the Grid

RTAC contends that the GOT purchased electricity on the grid at above-market prices from private power producers, including Icdas and its affiliates. Plaintiff argues that the GOT's purchases were made through a state-owned enterprise—Turkish Electricity Transmission Corporation ("TEIAS"), and one of its units, the Market Financial Settlement Center ("MFSC")—that "operates as market clearance system for private sector electricity sales and purchases." *See Decision Memorandum* at 8, 11.

Commerce described the operation of the Turkish electricity markets as follows:

> As detailed on the record, power producers and suppliers sell electricity to unidentified third parties ... *via* the grid through the Day Ahead Market (DAM) and the Balancing Power Market (BPM) based on the rules and procedures outlined in the *Balancing Settlement Regulation (BSR)*. The DAM is a voluntary power exchange in which supply and demand are balanced by the bids and offers of suppliers and consumers, and the prices are determined according to the participants' bids and offers. Real-time balancing of the market occurs in the BPM based on bids to buy energy if the system is long and offers to sell energy if the system is short by generators.

Id. at 11–12 (relying on questionnaire responses of the GOT and respondents). Commerce observed that MFSC serves as the market operator, while TEIAS is the system operator for these markets. *Id.* at 12. Based on the record, as well as its own analysis of the laws governing the Turkish electricity markets, Commerce found "that neither TEIAS nor MFSC sets the price for electricity, but rather administers the system through which the market prices are deter-

mined." *Id.* Commerce explained that, because third parties buy and sell electricity from the pool, "none of the market participants know to whom they sold or from whom they purchased electricity." *Id.* at 13. Commerce found that TEIAS, as the system operator, "calculates the amount of receivables and payables to be accrued and prepares the related invoices," which are ultimately handled by "participating banks, which provide the cash exchange services." *Id.* Commerce further found that TEIAS "can neither make losses nor earn profits from its activities and does not have cash flow, other than the collection of transmission fees and system utilization charges." *Id.* Commerce thus determined that while TEIAS and MFSC were responsible for settling transactions and providing invoices of the payables and receivables for the market participants, neither was engaged in the purchase or sale of electricity. *Id.*

1. GOT's Questionnaire Responses

RTAC challenges Commerce's finding that the GOT and TEIAS did not purchase electricity on the grid. RTAC argues that Commerce failed "to adequately support its acceptance of the GOT's statement that the GOT does not pay for this electricity." Pl.'s Br. at 19. RTAC bases its argument on the GOT's questionnaire responses indicating that TEIAS "procure[s]" electricity from the grid to ensure balancing of the system and maintenance of adequate reserves. *Id.* at 19–20.

Commerce directly addressed and rejected RTAC's argument. *See Decision Memorandum* at 13–14. In rejecting RTAC's argument, Commerce relied on the GOT's explanation that the *BSR* authorized TEIAS to obtain electricity capacity reserves and use reserve balancing tools to maintain "reserve capacity in the power plants should the system need to be balanced." *Id.* at 14. Commerce found that the GOT's explanation was consistent with TEIAS' 2014 annual report, Icdas' submitted sales data, and other record evidence indicating that "while TEIAS does collect transmission and system utilization and usage fees, TEIAS has otherwise no inflow or outflow of money with regard to the electricity purchase transactions between the sellers and buyers." *Id.* at 13. Consequently, Commerce determined that, despite RTAC's argument to the contrary, the "GOT's description of TEIAS' ancillary responsibility ... did not serve as evidence that TEIAS pays for or sets the prices for electricity." *Id.* This strikes the court as reasonable fact finding on the administrative record. Commerce reasonably credited the GOT's explanations that TEIAS did not pay for or set the prices for electricity (direct record evidence) rather than indulge RTAC's hoped-for inferences (and lack of direct record evidence) that TEIAS did pay for or set prices for electricity.

See Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL–CIO, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("The question is whether the record adequately supports the decision of [Commerce], not whether some other inference could reasonably have been drawn.").

2. 2015 World Bank Study

RTAC contends that Commerce's determination is unsupported by substantial evidence because it is incompatible with information in the record indicating that the GOT purchases electricity on the grid. Pl.'s Br. at 19–20. RTAC points to statements from a 2015 World Bank study indicating that the GOT pays for energy and argues that Commerce failed to consider this information. *Id.* at 20. RTAC relies on the part of the study that states that "Ancillary Services may provide additional revenue for the generators. These services are used for a reliable power system operation and are provided through ancillary service agreement with TİEAŞ." *Id.* (quoting the 2015 World Bank study). Although RTAC concedes that this language does not provide *direct* evidence that the GOT purchases energy, it nevertheless argues that "[i]t is hard to conceive how the GOT would not be the buyer – and therefore the payor – in such situations." *Id.* RTAC's argument also ignores Turkish law, which, as expressly noted by Commerce, prohibits TEIAS from incurring "any loss or profit" for its operation of the wholesale electricity market. *See Decision Memorandum* at 13 (quoting Article 9(a) of the *BSR*). Here again RTAC is looking for Commerce to share its hoped-for inferences about the administrative record.

The primary problem for RTAC is that it failed to unearth direct record evidence that the GOT makes payments for TEIAS' procurement of energy reserves. Similarly, RTAC pointed to no information supporting its suggestion that TEIAS actually engaged in commercial activity on the Turkish electricity markets. *See* Pl.'s Br. at 20 (arguing that record did "not indicate that TEIAS is not permitted to buy or sell on those markets" but providing no affirmative evidence that TEIAS engaged in any commercial activity in energy markets). RTAC's argument requires Commerce to (1) rely on the 2015 World Bank study, (2) adopt RTAC's preferred inference that the GOT used the price equalization mechanism to make payments for electricity, and (3) ignore information on the record conflicting with that inference. *See Decision Memorandum* at 15 (noting that RTAC submitted conflicting studies as to whether the price equalization mechanism of the national tariff system is evidence that the GOT purchases electricity). Considering the entirety of the record, the court concludes

RTAC has failed to establish that a reasonable mind would have to credit RTAC's position as the one and only correct position on the administrative record. The record more than adequately supports Commerce's conclusion that "the price equalization mechanism of the national tariff system" does not mandate "that the government purchases electricity for MTAR from power producers." *See id.*; *see also Daewoo*, 6 F.3d at 1520. The court therefore sustains Commerce's finding that TEIAS did not pay for or set the prices for electricity.

3. 2011 Study & 2014 Study

RTAC next argues that Commerce's analysis of two Turkish electricity market studies is unreasonable. *See* Pl.'s Br. at 21–23. RTAC argued in its administrative case brief that an *International Energy Law Review* study ("2011 study") "indicated that the higher prices in the TEIAS-run wholesale markets led Turkish power producers to rely less heavily on bilateral contracts and more heavily on the TEIAS-run markets." *Id.* at 21. RTAC maintained that this study "indicates that sellers have favored the government-run wholesale markets over bilateral contracts." *Id.* RTAC also argues that Commerce failed to provide a "satisfactory explanation" for its rejection of the 2011 study's findings. *Id.* at 22 (quoting *Baroque Timber Indus. (Zongshan) Co. v. United States*, 35 CIT ___, ___, 971 F. Supp. 3d 1333, 1339–40 (2014) (internal citations omitted)). The court disagrees. Commerce considered RTAC's argument and rejected it.

Commerce found that RTAC's proffered study was published in 2011, and that it "relies on observations and conclusions obtained from other sources that were published in 2007 and 2010." *Decision Memorandum* at 14. Commerce further found that "the study evaluates the Turkish electricity market under the *Electricity Market Law* 2001; however, during the POR, the electricity market operated under the Electricity Market Law (Law No. 6446), which entered into force on March 30, 2013." *Id.* As a result, Commerce determined that "the descriptions and conclusions of the secondary market presented in the study published in the *International Energy Law Review* are not relevant to or contemporaneous with the 2014 POR." Commerce also found that "more recent studies placed on the record contradict the observations of the [2011] study." As an example, Commerce noted that "an article published in the *International Journal of Energy Economics and Policy* in 2014 [("2014 study")], states that 'The electricity market is based on bilateral agreements complemented with the balancing and settlement market.'" *Id.* at 14–15. Lastly, Commerce determined that the findings of the 2011 study cited by RTAC "are not substantiated by Icdas' electricity sales activity during the POR." *Id.* at 15.

RTAC contends that Commerce's findings as to the 2011 study are unsupported by substantial evidence because Commerce treated the study "in contradictory ways." *See* Pl.'s Br. at 18–19, 23–25. Commerce determined that the 2011 study did not warrant a conclusion that the GOT engaged in purchasing electricity from the grid, in part because the 2011 study reflected data not contemporaneous with the POR. *Decision Memorandum* at 14. RTAC takes issue with the fact that although Commerce appeared to reject any consideration of the 2011 study due to its lack of contemporaneity with the POR, Commerce nonetheless cited the 2011 study to explain why the GOT's adoption of a national tariff system supported by a price equalization mechanism for its electricity markets did not serve as evidence that the GOT purchased electricity from the grid at MTAR. *See* Pl.'s Br. at 23–25; *Decision Memorandum* at 15. RTAC's argument that Commerce treated the 2011 study inconsistently is without merit. Commerce only mentioned the 2011 study as "yet another article ... placed on the record by the petitioner" that demonstrated RTAC's reliance on contradictory and irrelevant sources. *See Decision Memorandum* at 15.

RTAC further contends that Commerce's reliance on the 2014 study as a basis for rejecting the findings of the 2011 study was unreasonable because "there is no apparent contradiction between the two sources." Pl.'s Br. at 21. RTAC suggests that Commerce misread the 2011 study by assuming that the 2011 study refers to the DAM as the "primary" market and the BPM as the "secondary" market. *Id.* at 22; *Decision Memorandum* at 14.

RTAC argues that the 2011 study's references to a "secondary" market were intended to describe both TEIAS-run wholesale markets (DAM & BPM), as compared to a "primary" market consisting of "bilateral contracts." *See* Pl.'s Br. at 22. RTAC, however, offers no basis for its "careful reading of the study." *Id.* Rather, RTAC merely notes that other documents in the record treat the DAM and BPM "as parts of a single balancing mechanism." *Id.* at 22 n.9. Beyond this vague statement, RTAC offers no support for its argument that Commerce unreasonably interpreted the "secondary" market described in the 2011 study to refer only to the BPM as opposed to both the DAM and BPM. Rather than demonstrate that its interpretation of the 2011 study is the one and only reasonable interpretation of the study (such that a reasonable mind would have to adopt it), RTAC can only suggest there may be some murkiness, which leaves RTAC once again peddling hoped-for inferences.

One final observation. Even assuming Commerce somehow misinterpreted the 2011 study, RTAC fails to address Commerce's rejection of the findings of the 2011 study as "not substantiated by Icdas' electricity sales activity during the POR." *See Decision Memorandum* at 15. Commerce's determination that Icdas' electricity sales activity during the POR did not corroborate the 2011 study's findings provides an independent basis for Commerce's rejection of the 2011 study. And RTAC does not address it.

The court therefore sustains Commerce's determination that there were no government purchases of electricity on the grid for MTAR.

B. Purchase of Electricity for MTAR by Public Buyers

RTAC challenges Commerce's finding that purchases of energy by public buyers from Icdas under the "free consumer" program were not at MTAR as unsupported by substantial evidence. Pl.'s Br. at 2–13. RTAC argues that this finding was unreasonable based on a three-point chain of logic: (1) the rates of the National Price Schedules ("NPS") used as the basis for the prices of electricity purchases by public buyers under the "free consumer" program were government-determined; (2) there was no evidence that these government-determined prices were market-based prices; and (3) Commerce's determination that Icdas did not receive MTAR from public buyers was unreasonable as a result of Commerce's failure to identify how the NPS-based prices were "market-based." Pl.'s Br. at 8–13 (citing *Decision Memorandum* at 16).

To better understand the Turkish "free consumer" program and Icdas' sales to public buyers, Commerce issued post-preliminary questionnaires to the GOT and Icdas. *See* Memorandum re: Administrative Review of the Countervailing Duty Order on Steel Concrete Reinforcing Bar from the Republic of Turkey (Dep't of Commerce Mar. 3, 2017), PD 291, CD 266[2] ("Post-Prelim Analysis"). "Both public and private end-users that consume an annual quantity above the ["Free Consumer Limit" set by the Energy Market Regulatory Authority ("EMRA")] are defined as 'free consumers' and can obtain their electricity from a supplier of their choice other than the local distribution company for their area." *Id.* at 2. Icdas reported that "in addition to selling electricity to wholesale companies under bilateral agreements and selling electricity through the grid, [Icdas also sells] electricity to

[2] "PD" refers to a document contained in the public administrative record, which is found in ECF No. 20–1, unless otherwise noted. "CD" refers to a document contained in the confidential administrative record, which is found in ECF No. 20–2, unless otherwise noted.

free consumers *via* contracts." *Id.* Commerce found that the prices for sales to "free consumers" were set by contract that provided discounts on the prices set out in the NPS applicable to standard end-user sales of energy. *Id.* at 3. Commerce found that Icdas' sales to public buyers were not at MTAR because they were priced according to contractually agreed-upon discounts from the reference prices in the NPS. *Id.*

In their briefs, Plaintiff, Defendant, and Defendant-Intervenor all look to Commerce's less than adequate remuneration ("LTAR") regulation, 19 C.F.R. § 351.511, to analyze whether energy purchases by public buyers under the "free consumer" program were at MTAR. *See* Pl.'s Br. at 2–3; Def.'s Resp. at 12–13; Icdas Resp. at 11. Commerce though did not mention § 351.511, *see Decision Memorandum*, apparently with good reason, because in its CVD rulemaking, Commerce acknowledged a lack of sufficient experience with procurement subsidies and would not issue "regulations concerning the government purchase of goods," *i.e.*, purchases for MTAR. *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,379 (Dep't of Commerce Nov. 25, 1998) (preamble to final rulemaking adopting 19 C.F.R § 351.512 as "reserved").

Leaving § 351.511 to the side, the court addresses the balance of the parties' arguments on the issue. RTAC argues that the GOT controls the market and sets the market rates, including the electricity prices published in the NPS. Pl.'s Br. at 9–10. Specifically, RTAC contends that EMRA, which sets the electricity prices, is a government agency. *Id.* at 9. Defendant responds that the record supports a finding that EMRA is independent of government control, citing to a 2015 World Bank Study as demonstrating that "EMRA is not simply an arm of the Turkish government but instead operates independently of government control, and on market principles." Def.'s Resp. at 11–12. RTAC counters that Commerce "did not cite this study, identify any information obtained from it, or explain how such information supported its conclusion.... Nor did [Commerce] claim that EMRA was not part of the Turkish Government, was otherwise 'independent' of the Turkish Government, or operated on 'market principles.' Thus, the United States' defense is post hoc." Pl.'s Reply at 3 (citing *Burlington Truck Lines, Inc.*, 371 U.S. at 168–69). RTAC is correct, and the court may not entertain Defendant's post hoc rationale. Nevertheless, the GOT's control of EMRA does not mean that NPS prices are not market-based, much less that the discounted-NPS prices determined and paid pursuant to contracts between respondent private power producers and public buyers are not market-based. *See Decision Memorandum* at 16 (citing Post-Prelim Analysis).

RTAC maintains that the record does not support a finding by Commerce that the prices of electricity purchases from Icdas, dis-

counted from those set forth in the NPS, were not at MTAR. Pl.'s Br. at 9, 12. RTAC contends that Commerce's finding rested on an unreasonable assumption that prices provided in the NPS were market-based. *Id.* RTAC argues that because EMRA is a government agency and maintains ultimate authority over setting the NPS, NPS rates are "government-determined" and cannot reasonably be described as "market-based." *Id.* at 9–11. RTAC's arguments, however, ignore the fact that the public buyers' purchases at issue were not priced solely according to the NPS, but rather they were priced pursuant to contracts negotiated by the public buyers with Icdas and other private power suppliers. *See* Post-Prelim Analysis at 2. Commerce explained that under the "free consumer" program the public buyers "obtain electricity from a supplier *of their choice* other than the local distribution company for their area." *Id.* (emphasis added). Commerce also noted that "the contracts between free consumers and supplier companies are not subject to the approval of EMRA." *Id.*

In its Post-Prelim Analysis, Commerce described how "free consumer" contracts are created: "a free consumer, which wants to select its electricity supplier, either makes a tender or requests proposals to evaluate offers of electricity in order to determine the lowest price provider." *Id.* at 3. Commerce further noted that "free consumers prefer to buy electricity from suppliers rather than their assigned local distributors because suppliers can provide a discount off of the rates posted in the [NPS], while the local distribution companies adhere to the [NPS]." *Id.* In summary, Commerce explained that the prices in "free consumer" contracts were reached through competitive market activity that resulted in lower prices for the consumers than were offered through the government-set NPS. After explaining how the Turkish "free consumer" market for electricity purchases operates, Commerce found that NPS-discounted prices in the "free consumer" contracts at issue resulted from competitive market activity. Because the public buyers purchased electricity from ICDAS at negotiated prices lower than government-determined prices set in the NPS, Commerce reasonably concluded that these prices did "not give rise to any benefit *per se* in terms of payment at MTAR." *Id.* While Commerce's ultimate determination is not a paragon of clarity, the court can reasonably discern that Commerce followed and adopted the reasoning of the Post-Prelim Analysis. *See Bowman Transp., Inc. v. Arkansas–Best Freight Sys. Inc.*, 419 U.S. 281, 285–86, (1974) (a court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998).

RTAC suggests that EMRA could have set the NPS prices so high that even the discounted prices reached in "free consumer" contracts nevertheless represented MTAR as compared to contract prices that would be reached in a truly free market context. *See* Pl.'s Br. at 12–13 (providing simplified example where hypothetical market situation could result in payments of MTAR). RTAC though fails to identify any record evidence "to indicate that the NPS electricity rates are not market-based prices," much less any evidence that would corroborate a finding that NPS prices were so high above market-based rates that the negotiated discounts in "free consumer" contracts nevertheless provided MTAR. *Decision Memorandum* at 16. Absent that evidence, Commerce reasonably found that public buyers' energy purchases were not at MTAR because they were priced according to contractually agreed upon discounts from the rates set in the NPS. Accordingly, the court sustains Commerce's determination that the "'Purchase of Electricity for MTAR – Sales to Public Buyers' does not constitute a countervailable subsidy."

C. Zero Percent Rates for Non-Selected Respondents

RTAC notes that "the agency's determination of the net subsidy rate applicable to non-selected respondents flowed directly from its determination of the net subsidy rates applicable to the mandatory respondents." Pl.'s Br. at 28. Accordingly, because the court sustains Commerce's determinations with respect to the net subsidy rates for the mandatory respondents, the court also sustains the derivative zero percent net subsidy rates for the non-selected respondents.

III. Conclusion

For the reasons set forth above, the court sustains the *Final Results*. Judgment will be entered accordingly.

Dated: September 20, 2018
New York, New York

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

Slip Op. 18–123

SIMPSON STRONG-TIE COMPANY, Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 17–00057

[Commerce's *Final Results* are remanded and plaintiff's motion for judgment on the agency record is granted in part.]

Dated: September 21, 2018

George R. Tuttle, III, and *Vickie Wu*, The Law Offices of George R. Tuttle, of Larkspur, CA, argued for plaintiff.

Stephen C. Tosini, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Sosun Bae*, Trial Attorney. Of counsel on the brief was *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for defendant-intervenor. With him on the brief was *Ping Gong*.

OPINION

Katzmann, Judge:

The court today reviews another installment in the continuing mystery series, "Is It Classified As A Nail?" *See OMG, Inc., v. United States*, 42 CIT __, Slip Op. 18–63 (May 29, 2018). Plaintiff Simpson Strong-Tie Company ("Simpson") challenges the Department of Commerce's ("Commerce") determination that zinc and nylon anchors imported by Simpson fall within the scope of the Antidumping Duty Orders on Certain Steel Nails from the People's Republic of China. *Antidumping and Countervailing Duty Order on Certain Steel Nails from the People's Republic of China: Final Scope Ruling on Simpson Strong-Tie Company's (Zinc and Nylon Nailon) Anchors*, 73 Fed. Reg. 44,961 (Dep't Commerce Mar. 20, 2017), P.R. 36 ("*Final Scope Ruling*"); *Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) and *Certain Steel Nails from the People's Republic of China*, 76 Fed. Reg. 30,101 (Dep't Commerce May 24, 2011) (Final Results of Changed Circumstances Review) (collectively "the *Orders*"). Simpson argues that its anchors are not steel nails and, therefore, do not fall within the scope of the *Orders* and that Commerce's scope determination is unsupported by substantial evidence on the record and is otherwise not in accordance with law. Compl., Apr. 12, 2017, ECF No. 10; Pl.'s Mot. For J. on the Agency R. and Br. in Supp., Aug. 22, 2017,

ECF No. 24 ("Pl.'s Br."); Pl.'s Reply, Jan. 30, 2018, ECF No. 30. The court concludes that Commerce's determination was not in accordance with law.

BACKGROUND

A. *Legal and Regulatory Framework of Scope Reviews Generally.*

Dumping occurs when a foreign company sells a product in the United States for less than fair value – that is, for a lower price than in its home market. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Similarly, a foreign country may provide a countervailable subsidy to a product and thus artificially lower its price. *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1355 n.1 (Fed. Cir. 1996). To empower Commerce to offset economic distortions caused by dumping and countervailable subsidies, Congress enacted the Tariff Act of 1930.[1] *Sioux Honey Ass'n*, 672 F.3d at 1046–47. Under the Tariff Act's framework, Commerce may — either upon petition by a domestic producer or of its own initiative — begin an investigation into potential dumping or subsidies and, if appropriate, issue orders imposing duties on the subject merchandise. *Id.*

In order to provide producers and importers with notice as to whether their products fall within the scope of an antidumping or countervailing duty order, Congress has authorized Commerce to issue scope rulings clarifying "whether a particular type of merchandise is within the class or kind of merchandise described in an existing . . . order." 19 U.S.C. § 1516a(a)(2)(B)(vi). As "no specific statutory provision govern[s] the interpretation of the scope of antidumping or countervailing orders," Commerce and the courts developed a three-step analysis. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015); *Polites v. United States*, 35 CIT __, __, 755 F. Supp. 2d 1352, 1354 (2011); 19 C.F.R. § 351.225(k).

Because "[t]he language of the order determines the scope of an antidumping duty order[,]" any scope ruling begins with an examination of the language of the order at issue. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)). If the terms of the order are unambiguous, then those terms govern. *Id.* at 1382–83.

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[1] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

However, if Commerce determines that the terms of the order are either ambiguous or reasonably subject to interpretation, then Commerce "will take into account . . . the descriptions of the merchandise contained in the petition, the initial investigation, and [prior] determinations [of Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1) ("(k)(1) sources"); *Polites*, 755 F. Supp. 2d at 1355; *Meridian Prod.*, 851 F.3d 1375, 1382 (Fed. Cir. 2017). To be dispositive, the (k)(1) sources "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Polites*, 755 F. Supp. 2d at 1355 (quoting *Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007)). If Commerce "can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of . . . section [351.225], whether a product is included within the scope of an order . . . [Commerce] will issue a final ruling[.]" 19 C.F.R. § 351.225(d).

If section 351.225(k)(1) analysis is not dispositive, Commerce will initiate a scope inquiry under § 351.225(e), and apply the five criteria from *Diversified Prods. Corp v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983) as codified in 19 C.F.R. § 351.225(k)(2).[2]

B. *The Petition and Nail Orders.*

On May 29, 2007, Mid Continent Steel & Wire ("Mid Continent") and other producers of steel nails petitioned Commerce to impose antidumping duties on certain steel nails from the United Arab Emirates and the People's Republic of China. Letter from Grunfeld Desiderio Lebowitz Silverman Klestadt, LLP to Sec'y of Commerce Pertaining to Fastenal Scope Comments, P.R. 17 (Nov. 15, 2016) at Ex. 11, *Petition for the Imposition of Antidumping Duties against Certain Steel Nails from the People's Republic of China and United Arab Emirates* (May 29, 2007) ("Petition"). Commerce later determined that dumping was occurring, but first advised Customs and Border Patrol ("CBP") in Commerce Message 8213213 — issued on July 31, 2008, a day prior to the issuance of the *Orders* — that articles classified under HTSUS 7907.00.6000 ("Other articles of zinc: other") were excluded from the scope of the *Orders* and advised CBP to liquidate entries on such products without the assessment of antidumping duties. Letter from Law Offices of George R. Tuttle to Sec'y of Commerce, P.R. 3–4 (July 21, 2016) ("*Scope Ruling Request*") at Attach. 3. Thereafter, on August 1, 2008, Commerce issued its anti-

[2] These criteria are: (1) the physical characteristics of the product, (2) the expectations of the ultimate purchasers, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2); *see Diversified Prods.*, 572 F. Supp. at 889.

dumping duty *Orders* covering certain steel nails from China. The scope of the *Orders* reads in full:

> The merchandise covered by this proceeding includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. *Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint*. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this proceeding are currently classified under the Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 7317.00.55, 7313.00.65 and 7317.00.75.
>
> Excluded from the scope of this proceeding are roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type 1, Style 20 nails. Also excluded from the scope are the following steel nails: 1) Non-collated (i.e., hand driven or bulk), two-piece steel nails having plastic or steel washers (caps) already assembled to the nail, having a bright or galvanized finish, a ring, fluted or spiral shank, an actual length of 0.500" to 8", inclusive; and an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual washer or cap diameter of 0.900" to 1.10", inclusive; 2) Non-collated (i.e., hand-driven or bulk), steel nails having a bright or galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 4", inclusive; an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive; 3) Wire collated steel nails, in coils, having a galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to

> 1.75", inclusive; an actual shank diameter of 0.116" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive; and 4) Non-collated (i.e., hand-driven or bulk), steel nails having a convex head (commonly known as an umbrella head), a smooth or spiral shank, a galvanized finish, an actual length of 1.75" to 3", inclusive; an actual shank diameter of 0.131" to 0.152", inclusive; and an actual head diameter of 0.450" to 0.813", inclusive.
>
> Also excluded from the scope of this order are corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side. Also excluded from the scope of this order are fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7313.00.30.
>
> Also excluded from the scope of this order are thumb tacks, which are currently classified under HTSUS 7317.00.10.00.
>
> Also excluded from the scope of this order are certain brads and finish nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a head seal adhesive.
>
> Also excluded from the scope of this order are fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.
>
> While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Orders (emphasis added).

On July 13, 2010, CBP reclassified zinc anchors previously classified under HTSUS 7317 as properly falling under HTSUS 7907.00.6000 ("Other articles of zinc: other") because "the anchor generally predominates by weight." *ACE Request 23031: Nail-In Anchors with Steel Nails*, A-570–909, P.R. 36 (Mar. 27, 2012) at Attach. 2.

C. *Factual and Procedural History of this Case.*

On July 21, 2016, Simpson, an importer of zinc and nylon anchors, filed a request with Commerce for a scope ruling that its zinc and nylon anchors should be excluded from the scope of the *Orders*. *Scope Ruling Request*. In its *Scope Ruling Request*, Simpson described its zinc and nylon anchors as follows:

> The Zinc Nailon™ Anchors consist of two components: (1) a zinc alloy body; and (2) a carbon and stainless steel (Type 304) drive pin. Simpson's zinc anchors are assembled at the time of importation, meaning that the steel pin has been inserted into the body of the zinc alloy anchor. Simpson's zinc Nailon™ anchors are classified under subheading 7907.00.6000 (footnote omitted) of the Harmonized Tariff Schedules of the United States (HTSUS).
>
> The Nylon Nailon™ Anchors also consist of two components. Rather than a zinc alloy body, however, they have a nylon shell or body, and likewise have a carbon and stainless steel (type 304) pin. The Nylon Nailon™ pin drive anchors are classified pursuant to GRI 3(b) and the "composite goods" rule under HTSUS heading 3926 as: Other articles of plastics and articles of other materials of headings 3901 to 3914, specifically 3926.90.9980 "other."

Id. at 4.

Following Simpson's *Scope Ruling Request*, Mid Continent submitted comments arguing that Simpson's zinc and nylon anchors were within the scope of the *Orders*. Letter from the Bristol Group PLLC to Sec'y Commerce, P.R. 18 (Nov. 15, 2016). Simpson filed timely rebuttal comments. Letter from Law Offices of George R. Tuttle to Sec'y Commerce, P.R. 22 (Nov. 23, 2016) ("Simpson Rebuttal Comments"). Midwest Fastener, Corp. and Fastenal Company Purchasing also submitted comments in support of Simpson's *Scope Ruling Request*. Letter from Clark Hill PLC to Sec'y Commerce, P.R. 21 (Nov. 23, 2016); Letter from Gunfeld Desiderio Lebowitz Silverman Klestadt, LLP to Sec'y Commerce, P.R. 26 (Nov. 25, 2016).

On March 20, 2017, Commerce issued its *Final Scope Ruling*, in which it determined that, although the language of the *Orders* did not expressly mention anchors, the unambiguous language of the *Orders* reasonably included anchors and the (k)(1) sources supported its conclusion; therefore, Simpson's zinc and nylon anchors were within the scope of the *Orders*. *Final Scope Ruling* at 12. Specifically, Commerce determined that the description of Simpson's anchors, the ITC Report description of the domestic like product under the heading

"The Product" — which described "a masonry anchor that comprises a zinc anchor and a steel wire nail" — and its prior scope determinations dispositively placed Simpson's anchors within the scope of the *Orders*. *Id.* at 11.

Simpson filed a complaint with this court contesting the *Final Scope Ruling* and on August 22, 2017, Simpson submitted its Motion for Judgment on the Agency Record and Brief in Support. Compl.; Pl.'s Br. Defendant the United States ("The Government") and defendant-intervenor Mid Continent submitted their briefs in opposition on November 30, 2017. Def.-Inter.'s Br., ECF No. 28; Def's. Br., ECF No. 29. Simpson replied on January 20, 2017. Pl.'s Reply., ECF No. 30. Oral argument was held before this court on September 6, 2018. ECF No. 45.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(vi). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(l)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

DISCUSSION

The Government argues that: (1) Commerce's determination that Simpson's zinc and nylon anchors fit within the plain language of the *Orders* is in accordance with law; (2) there is substantial evidence that the (k)(1) sources dispositively place Simpson's products within the scope of the *Orders*; (3) a formal scope inquiry was unnecessary and thus Commerce did not need to consider the (k)(2) sources; and (4) Commerce may instruct CBP to retroactively suspend liquidation on Simpson's shipments entered prior to the date of Commerce's ruling.

"[T]he question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that we review de novo." *Meridian*, 851 F.3d at 1382. The court concludes that the products at issue are not nails within the plain meaning of the word "nail" and, therefore, are outside the scope of the *Orders*.

As the Federal Circuit has held, the terms of an order govern its scope. *Duferco*, 296 F.3d at 1097; *see Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998). "Although the scope of a final order may be clarified, it can not be changed in a way

contrary to its terms." *Duferco*, 296 F.3d at 1097 (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). For that reason, "if [the scope of an order] is not ambiguous, the plain meaning of the language governs." *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012).

"In determining the common meaning of a term, courts may and do consult dictionaries, scientific authorities, and other reliable sources of information including testimony of record." *NEC Corp. v. Dep't of Commerce*, 23 CIT 727, 731, 74 F. Supp. 2d 1302, 1307 (1999) (quoting *Holford USA Ltd. v. United States*, 19 CIT 1486, 1493–94, 912 F. Supp. 555, 561 (1995)). Furthermore, antidumping duty orders "should not be interpreted in a vacuum devoid of any consideration of the way the language of the order is used in the relevant industry." *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014) (quoting *ArcelorMittal*, 694 F.3d at 88). Accordingly, "[b]ecause the primary purpose of an antidumping order is to place foreign exporters on notice of what merchandise is subject to duties, the terms of an order should be consistent, to the extent possible, with trade usage." *ArcelorMittal*, 694 F.3d at 88.

A nail, as defined by OXFORD'S ENGLISH DICTIONARY (3rd ed. 2003) is "a small metal spike with a sharpened end and a blunt head, which may be driven in to a surface with a hammer or other tool in order to fasten things together." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines a nail as "[a] slim, pointed piece of metal hammered into material as a fastener." Similarly, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) ("WEBSTER'S") (1993) defines a nail as "a slender and usually pointed and headed fastener designed for impact insertion." These definitions present a "single clearly defined or stated meaning": a slim, usually pointed object used as a fastener designed for impact insertion. *Unambiguous*, WEBSTER'S (1986), *quoted in Meridian*, 851 F.3d at 1381 n.7. Therefore, "nail" is an unambiguous term. *See OMG*,Slip Op. 18–63 at 9–10 (finding the meaning of the term "nail" used in scope order covering certain steel nails from Vietnam was unambiguous).

The merchandise at issue here does not fit into the above definitions. Simpson described its zinc anchor as: "(1) a zinc alloy body; and a (2) carbon and stainless steel (Type 304) drive pin." *Scope Ruling Request* at 4. Similarly, Simpson described its nylon anchor as: "(1) a nylon shell or body, and likewise have (2) a carbon and stainless steel (type 304) pin." *Id.* Commerce made its determination based upon the steel pin, arguing "an essential portion of the two-piece anchor is, in fact, made of steel, namely the steel drive nail." *Final Scope Ruling* at

13. However, as Commerce acknowledged in its *Final Scope Ruling*, Simpson's anchor nails are not reasonably separable; Simpson's anchors are unitary articles of commerce. *Id.* at 15; Def.'s Br. at 8, 14. As such, the entire product, not just a component part, must be defined as a nail to fall within the scope of the *Orders*. *See OMG*, Slip Op. 18–63 at 10.

The entire product is not a nail "constructed of two or more pieces." The definitions of a nail cited above define a nail as a fastener inserted by impact into the materials to be fastened. The merchandise at issue is not inserted by impact into the materials to be fastened in the same manner as a nail. Rather, Simpson's anchors "secure themselves to the wall using a mechanical wedging effect created by the expansion of the anchor against the side of a predrilled hole as a result of driving the pin in to the anchor." *Scope Ruling Request* at 3. Simpson describes the process as follows:

1. A hole is drilled in the base material using a carbide drill bit in the same diameter as the nominal diameter of the anchor to be installed.
2. The hole is drilled to the specified embedment depth.
3. The fixture (or item to be attached to the wall) is positioned and the Nailon™ anchor is inserted through the fixture and into the hole.
4. The Nailon™ anchor is tapped with a hammer until flush with the fixture and then the pin is driven until flush.

Scope Ruling Request at 4. Therefore, unlike two-piece nails, Simpson's anchors are not inserted by impact into the materials to be fastened and do not "grip by friction" in the same manner as a nail. *Id.*

Trade usage also does not support Commerce's determination. The examples of trade usage in the record demonstrate that the nail industry categorizes anchors with steel pins as anchors, not two-piece nails. Simpson Rebuttal Comments at Ex. 1 ("Metal hit anchors . . . consist of a cylindrical zinc alloy body and zinc plated steel pin expander"); Ex. 3 (describing in the Petition the merchandise intended to be covered by the scope order and excluding anchors from the list of steel wire nails); Ex. 4 (example of a "Two Piece Impact Nail" which did not include an anchor body); Ex. 5 (General Services Administration "commercial item description" of nail anchors as including an anchor body with a steel nail).[3] For example, when the

[3] The General Services Administration is a federal agency that provides centralized procurement for the federal government and its commercial item description is authorized for use by all federal agencies. Simpson Rebuttal Comments at Ex. 5; *see* GENERAL SERVICES ADMINISTRATION, https://www.gsa.gov/about-us/background-and-history (last visited Sept. 12, 2018).

word "nail" is used, it is done so to either explicitly or implicitly modify the noun "anchor" as in "Flat Head Nail Anchors," "Mushroom Head Nail Anchors," and "Hammer Nail Drive Concrete Anchors." *Id.* at Exs. 5, 12. These examples evidence that industry usage comports with the plain meaning of the word "nail" because of its recognized functionality in the overall product – an anchor. According to industry usage, the pin is a nail but the unitary article of commerce is an anchor.

The court's prior decision in *OMG* supports this conclusion.[4] In that case, this court addressed whether the OMG merchandise — a zinc anchor body with a steel pin — fell within the meaning of the term "nail" as utilized in antidumping and countervailing duty orders covering "certain steel nails . . . of two or more pieces" from Vietnam. *OMG*, Slip Op. 18–63 at 10–11; *Certain Steel Nails from the Socialist Republic of Vietnam: Countervailing Duty Order*, 80 Fed. Reg. 41,006 (Dep't Commerce July 14, 2015) and *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015) (collectively the "*Vietnam Orders*").[5] The court determined that the OMG zinc anchor was unambiguously excluded from the scope of the *Vietnam Orders* because: (1) the term "nail" was unambiguous and distinct from the term "anchor"; (2) trade usage regarding delivered products guides interpretation of the proper meaning of the terms of a scope order; (3) the OMG merchandise, as a unitary article of commerce, was an anchor; and (4) the record demonstrated that the nail industry categorized the OMG merchandise as an anchor, not a nail. *Id.*

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[4] At oral argument, the Government contended that the details contained in the ITC Report for the investigation at issue here distinguished this case from *OMG*. *See Certain Steel Nails from China*, Investigation No. 731-TA-1114 (Final), USITC Publication 4022 (July 2008). This argument is unpersuasive. The plain scope language unambiguously excludes the anchors, and so a (k)(1) analysis — in which the ITC Report would be relevant — is unnecessary.

[5] The *Vietnam Orders* do, however, differ from the *Orders* at issue here in some of the exclusions:

> (1) Certain steel nails packaged in combination with one or more non-subject articles, if the total number of nails . . . is less than 25; (2) Certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported assembled article falls into one of the following eight groupings: 1) builders' joinery and carpentry of wood that are classifiable as windows, French-windows, and their frames; 2) builders' joinery and carpentry of wood that are classifiable as doors and their frames and thresholds; 3) swivel seats with variable height adjustment; 4) seats that are convertible into beds . . . 5) seats of cane, osier, bamboo or similar materials ; 6) other seats with wooden frames . . . 7) furniture of wood . . . or 8) furniture of materials other than wood, metal, or plastics. The aforementioned imported unassembled articles are currently classified under the following HTSUS subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

Vietnam Orders.

Similarly, here, the Simpson merchandise consists of an anchor body attached to a steel pin. *Scope Ruling Request* at 4. Although the Simpson merchandise also includes a nylon anchor, the distinction from a zinc anchor is immaterial because neither product is reasonably separable. *Final Scope Ruling* at 15. Indeed, it is for precisely that reason that Commerce determined that Simpson's anchors should be treated as unitary articles of commerce. *Id.* ("This is not a situation where the subject merchandise may be readily segregated from other articles with which it is packaged and separately valued for duty assessment purposes."). In contrast to nails of any sort, which are objects inserted directly into the material to be fastened without need for a predrilled hole, Simpson's anchors instead "secure themselves into the wall using a mechanical wedging effect created by the expansion of the anchor against the side of a predrilled hole as a result of driving the pin in to the anchor." *Scope Ruling Request* at 3. In addition, as the record demonstrates, both products are categorized as anchors, and not as two-piece nails, by the nail industry. Simpson Rebuttal Comments at Exs. 1–5, 8, 12. Therefore, just like the *OMG* merchandise, Simpson's products are properly considered anchors and not two-piece nails. *See OMG*, Slip Op. 18–63 at 11.[6]

The Government asserts that "the (k)(1) sources are determinative as to whether the zinc and nylon anchors fall within the scope of the order" and, therefore, Commerce did not need to consider industry usage. Def.'s Br. at 16. However, neither Commerce in its *Final Scope Ruling* nor the Government in its brief furnished support for this proposition. Instead, the Government asserts that because Simpson's product "*is* a steel nail attached to a zinc or nylon body" and that "a product need not be explicitly listed in the scope to be included in the order," Commerce's determination was supported by substantial evidence. *Id.* at 17 (emphasis in original). This is a circular argument. Asserting something does not make it so, but that is precisely what Commerce did here. *See Duferco*, 296 F.3d at 1096 ("Commerce cannot find authority in an order based on the theory that the order does not deny authority."); *Bell Supply Co., LLC v. United States*, 42 CIT __, __, 179 F. Supp. 3d 1082, 1097 (2016) ("Supporting the inclusion of

[6] *Meridian Products v. United States*, 890 F.3d 1272 (2018), does not affect this conclusion. In that case, the Federal Circuit determined that the court had not afforded sufficient deference to Commerce's interpretation of the scope language because "Commerce's original scope ruling [wa]s reasonable and supported by substantial evidence" in that case. *Id.* at 1281 (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006) (holding that deference is due "[s]o long as there is adequate basis in support of the [agency's] choice of evidentiary weight")). In this case, however, Commerce's determination that anchors fit within the definition of nails, viewed within the context of the relevant industry, is not reasonable or adequately supported for the reasons already discussed. Thus, Commerce's interpretation of the scope language here is not entitled to deference.

merchandise based on the lack of any exclusionary language is tantamount to shifting the burden to exclude certain merchandise on the party arguing for its exclusion, which . . . is incompatible with *Duferco*.").

Accordingly, Simpson's anchors, taken as a unitary article of commerce, are not nails within the word's plain meaning and thus do not fall within the unambiguous scope of the *Orders*.

CONCLUSION

The court remands to Commerce for further consideration consistent with this opinion. Commerce shall issue appropriate instruction to U.S. Customs and Border Protection regarding the retroactive suspension of liquidation. Commerce shall file with this court and provide to the parties a revised scope determination within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised final determination to the court and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: September 21, 2018
New York, New York

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

Slip Op. 18–124

HOR LIANG INDUSTRIAL CORP. and ROMP COIL NAILS INDUSTRIES INC., Plaintiffs, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 18–00029

[Defendant's motion to dismiss for lack of subject matter jurisdiction is denied. Plaintiff's complaint is dismissed, in part, for failure to state a claim upon which relief can be granted. Proposed Plaintiff-Intervenor's motion to intervene is granted.]

Dated: September 24, 2018

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for Plaintiff. With him on the brief were *Max F. Schutzman*, and *Andrew T. Schutz*.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Natan P. L. Tubman*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Adam H. Gordon, The Bristol Group PLLC, of Washington, DC, argued for Defendant-Intervenor. With him on the brief were *Ping Gong* and *Lydia K. Childre*.

OPINION AND ORDER

Barnett, Judge:

Hor Liang Industrial Corp. ("Hor Liang") and Romp Coil Nails Industries Inc. ("Romp") (together, "Plaintiffs") seek to challenge the U.S. Department of Commerce's ("Commerce" or the "agency") final results in the first administrative review of the antidumping duty order covering certain steel nails from Taiwan. *See* Am. Compl., ECF No. 20; *Certain Steel Nails from Taiwan*, 83 Fed. Reg. 6,163 (Dep't Commerce Feb. 13, 2018) (final results of antidumping admin. review and partial rescission of admin. review; 2015–2016) ("*Final Results*"). Defendant United States ("Defendant" or the "Government") moves to dismiss Plaintiffs' amended complaint for lack of subject matter jurisdiction pursuant to United States Court of International Trade ("USCIT") Rule 12(b)(1). Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and to Dissolve Corresponding Statutory Inj. ("Def.'s Mot."), ECF No. 26. Plaintiffs oppose the motion. Resp. to Def.'s Mot. to Dismiss Pls.' Compl. for Lack of Subject Matter Jurisdiction ("Pls.' Opp'n"), ECF No. 35. Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Mid Continent") supports the motion. Def.-Int.'s Resp. in Supp. of Def.'s Mot. to Dismiss and to Dissolve Statutory Inj. ("Def.-Int.'s Resp."), ECF No. 28.

The questions before the court are whether (1) Plaintiffs were parties to the administrative proceeding with standing to challenge the *Final Results* pursuant to 28 U.S.C. § 1581(c) even though their sole submission consisted of ministerial error comments, which were rejected by Commerce and removed from the administrative record; (2) the court otherwise has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) to resolve Plaintiffs' challenges; and (3) if the court possesses subject matter jurisdiction, the doctrine of administrative exhaustion nevertheless precludes Plaintiffs from presenting their arguments to the court.

For the reasons discussed herein, the court finds that Plaintiffs have standing to invoke the court's jurisdiction pursuant to 28 U.S.C. § 1581(c); thus, jurisdiction pursuant to 28 U.S.C. § 1581(i), which was alleged in the alternative, is unavailable. Accordingly, Defendant's motion is denied. The court dismisses certain of Plaintiffs' claims, however, for failure to exhaust administrative remedies.

BACKGROUND

In September 2016, Commerce initiated the first administrative review of the antidumping duty order covering certain steel nails from Taiwan. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 62,720 (Dep't Commerce Sept. 12, 2016). Plaintiffs, Taiwanese producers and exporters of steel nails, were subject to the review but were not selected for individual examination. *Id.*, 81 Fed. Reg. at 62,726; Am. Compl. ¶¶ 3, 11. Three companies, PT Enterprise, Inc. ("PT Enterprise"), Bonuts Hardware Logistics Co., LLC ("Bonuts"), and Unicatch Industrial Co., Ltd. ("Unicatch") were individually examined. *See* Am. Compl. ¶ 14.

In June 2017, Mid Continent first urged Commerce to assign to Unicatch and PT Enterprise dumping margins based on the facts available with an adverse inference (referred to as "adverse facts available" or "AFA").[1] Def.-Int.'s Resp. at 3. Mid Continent also met with Commerce officials to discuss the matter. *See id.*

On August 7, 2017, Commerce published its preliminary results. *Certain Steel Nails from Taiwan*, 82 Fed. Reg. 36,744 (Dep't Commerce Aug. 7, 2017) (prelim. results of antidumping duty admin.

[1] When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce, "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified, Commerce fills the evidentiary gap with "the facts otherwise available." 19 U.S.C. § 1677e(a). Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b).

review and partial rescission of admin. review; 2015–2016) ("*Prelim. Results*"). Therein, Commerce determined that PT Enterprise and Bonuts had failed to cooperate to the best of their ability and assigned them weighted-average dumping margins equal to 78.17 percent based on adverse facts available. *Id.*, 82 Fed. Reg. at 36,744–45. Commerce preliminarily calculated a weighted-average dumping margin of 34.20 percent for Unicatch, based on the data it had submitted. *Id.*; *see also* Am. Compl. ¶ 12.

To calculate dumping margins for non-examined companies—such as Romp and Hor Liang—Commerce is guided by 19 U.S.C. § 1673d(c)(5).[2] *See Prelim. Results*, 82 Fed. Reg. at 36,744. Section 1673d(c)(5)(A) provides that the "all-others rate" assigned to non-examined companies is calculated as "the weighted average of the estimated weighted average dumping margins" assigned to individually-examined companies, "excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [i.e., on the basis of adverse facts available]." 19 U.S.C. § 1673d(c)(5)(A). If, however, the dumping margins assigned to all individually-examined companies are zero, de minimis, or based on adverse facts available, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.* § 1673d(c)(5)(B). Citing to 19 U.S.C. § 1673d(c)(5)(A), Commerce preliminarily assigned Unicatch's rate to Romp and Hor Liang. *Prelim. Results*, 82 Fed. Reg. at 36,744.

Plaintiffs did not file case or rebuttal briefs in response to the preliminary results. Def.'s Mot. at 2. Mid Continent filed a case brief again urging Commerce to reject Unicatch's data and, instead, assign to Unicatch a rate based on adverse facts available. Def.-Int.'s Resp. at 4.

On February 6, 2018, Commerce issued the *Final Results*. *See Final Results*, 83 Fed. Reg. at 6,165.[3] Therein, Commerce determined to use adverse facts available to determine the rate for Unicatch as well as for the other individually-examined respondents—PT Enterprise and Bonuts—resulting in all individually examined respondents receiving

[2] By its terms, 19 U.S.C. § 1673d applies to market economy investigations, not administrative reviews. As a general rule, however, Commerce looks to § 1673d(c)(5) for guidance when calculating the rate for non-examined companies in administrative reviews. *See* Issues and Decision Mem. for Certain Steel Nails from Taiwan, A-583–854 (Feb. 6, 2018) ("I&D Mem.") at 5, *available at* https://enforcement.trade.gov/frn/summary/taiwan/2018–02897–1.pdf (last visited Sept. 18, 2018).

[3] Commerce published the *Final Results* on February 13, 2018. *See Final Results*, 83 Fed. Reg. at 6,163.

final dumping margins of 78.17 percent. *Final Results*, 83 Fed. Reg. at 6,164; Am. Compl. ¶ 14. Commerce assigned Romp and Hor Liang weighted-average dumping margins of 78.17 percent; i.e., "the rate determined for all mandatory respondents." *Final Results*, 83 Fed. Reg. at 6,164 (citing 19 U.S.C. § 1673d(c)(5)(B)); Am. Compl. ¶¶ 14–15.[4]

Soon thereafter, Romp and Hor Liang filed notices of appearance and requests for an administrative protective order. *See* Am. Compl. ¶ 4. On February 20, 2018, Romp and Hor Liang filed ministerial error comments. *Id*. ¶ 19; *see also* Pls.' Opp'n, Attach. 1 ("Pls.' Ministerial Error Allegation"), ECF No. 35. Therein, Romp and Hor Liang argued that Commerce assigned them a rate based on adverse facts available without considering readily available evidence regarding alternative rates, and this failure constituted a clerical error that Commerce could correct pursuant to 19 U.S.C. § 1675(h)[5] and 19 C.F.R. § 351.224.[6] Pls.' Ministerial Error Allegation at 3–7; Am. Compl. ¶ 19.

On February 27, 2018, Commerce rejected (or otherwise denied) Romp and Hor Liang's ministerial error allegation. Rejection of Submission (Feb. 27, 2018) ("Commerce Feb. 27 Letter"), ECF No. 43–1; Am. Compl. ¶ 24. Commerce explained that it had not made a ministerial error as that term is defined by statute and regulation, and, "[b]ased upon [its] analysis of the comments received, [] will not amend [Romp's and Hor Liang's] margins." Commerce Feb. 27 Letter at 1; Am. Compl. ¶ 24. The following day, Commerce removed the ministerial error allegation from the record. Rejection of Submis-

[4] Commerce explained its determination by way of reference to the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *Albemarle Corp. v. United States*, 821 F.3d 1345 (Fed. Cir. 2016), and the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act. *See* I&D Mem. at 5 & nn.13–14 (citations omitted).

[5] Pursuant to § 1675(h),

> [Commerce] shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term "ministerial error" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

19 U.S.C. § 1675(h).

[6] Commerce's regulations provide certain procedures for the correction of ministerial errors. *See*19 C.F.R. § 351.224. Relevant here, "[a] party to the proceeding to whom the Secretary has disclosed calculations performed in connection with a final determination or the final results of a review may submit comments concerning any ministerial error in such calculations." *Id.* § 351.224(c)(1). A "ministerial error means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." *Id.* § 351.244(f).

sions: Romp and Hor Liang (Feb. 28, 2018) ("Commerce Feb. 28 Letter), ECF No. 43–3; Am. Compl. ¶¶ 25–26.

On March 2, 2018, Romp and Hor Liang requested Commerce to reinstate their ministerial error allegation on the administrative record. Pls.' Opp'n, Attach. 3, ECF No. 35. On March 15, 2018, Commerce denied the request. Rejection of Submission (March 15, 2018) ("Commerce March 15 Letter"), ECF No. 43–5. Commerce explained that it had "denied" and "rejected" Romp and Hor Liang's ministerial error allegation because they "[had] not raise[d] a good faith ministerial error argument, but instead raised arguments clearly pertaining to the substantive nature of Commerce's methodological decision to determine the rate for the separate rate companies." *Id.* at 1–2. Thus, Commerce reasoned, it had properly rejected the submission and removed it from the record. *Id.* at 2.

On February 22, 2018, Romp and Hor Liang initiated this action challenging the *Final Results*. Summons, ECF No. 1. Plaintiffs alleged jurisdiction pursuant to 28 U.S.C. § 1581(c) and (i) (hereinafter referred to as "(c) jurisdiction" and "(i) jurisdiction," respectively). Am. Compl. ¶ 2. Plaintiffs alleged that they were interested parties who were parties to the proceeding on the basis of their timely filed ministerial error allegation. *Id.* ¶¶ 3–4.

On March 26, 2018, S.T.O. Industries, Inc. ("STO Industries") moved to intervene in this action as a plaintiff-intervenor. *See* Proposed Pl.-Int.'s Second Am. Mot. to Intervene as a Matter of Right ("Mot. to Intervene"), ECF No. 25. The Government and Mid Continent each oppose STO Industries' motion on the basis that the company lacks standing. *See* Def.'s Resp. Opp'n to Second Am. Mot. to Intervene ("Def.'s Opp'n to Mot. to Intervene"), ECF No. 27; Def.-Int.'s Resp. in Opp'n to Proposed Pl.-Int.'s Second Am. Mot. to Intervene as a Matter of Right ("Def.-Int.'s Opp'n to Mot. to Intervene"), ECF No. 29. STO Industries is a U.S. importer of the subject merchandise. Mot. to Intervene at 3. STO Industries' participation in the underlying proceeding also consisted of entering an appearance and filing ministerial error comments on the *Final Results*. *See id.* Commerce rejected the submission and removed it from the record. Rejection of Submission: STO Industries, et al. (Feb. 27, 2018), ECF No. 43–2; Rejection of Submissions: STO Industries, et al (Feb. 28, 2018), ECF No. 43–4. Also on March 26, 2018, the Government moved to dismiss this action for lack of subject matter jurisdiction. *See* Def.'s Mot.

On July 2, 2018, the court, *sua sponte*, ordered additional briefing concerning Plaintiffs' exhaustion of administrative remedies and the propriety of dismissal pursuant to USCIT Rule 12(b)(6). Order (July 2, 2018), ECF No. 44. The Government initially argued that the court

should not dismiss the action for failure to exhaust administrative remedies, Def.'s Suppl. Br. in Resp. to Court's Order ("Def.'s Exh. Br."), ECF No. 45, but changed its position at oral argument and stated that it would not object to dismissal, Oral Arg Tr. at 77:20–21, ECF No. 52.[7] Mid Continent argues that the court should dismiss the action. Def.-Int.'s Add'l Br. in Resp. to the Court's July 2, 2018 Order ("Def.-Int.'s Exh. Br."), ECF No. 46. Plaintiffs and STO Industries argue against dismissal. Pls.' Resp. to Def.'s and Def.-Int.'s Suppl. Br. in Resp. to the Court's July 2, 2018 Order ("Pls.' Exh. Br."), ECF No. 48; Proposed Pl.-Int.'s Resp. to the Court's Order Dated July 2, 2018 ("Pl.-Int.'s Exh. Br."), ECF No. 47.

DISCUSSION

I. Subject Matter Jurisdiction

A. Legal Standard

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

A plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the "motion challenges a complaint's allegations of jurisdiction, the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true." *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).[8] To "resolv[e] these disputed predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings." *Id.* (internal quotation marks and citation omitted).

In this case, the Government challenges the existence of jurisdiction. *See* Def.'s Mot. Therefore, the court may consider extrinsic evidence. *Shoshone Indian Tribe*, 672 F.3d at 1030.

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[7] The court heard oral argument on July 24, 2018. Docket Entry, ECF No. 50.

[8] In contrast, when the motion challenges the sufficiency of the pleadings, the court assumes that the allegations within the complaint are true. *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006).

B. The Court has Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1581(c)

There are two requirements for a plaintiff (or plaintiff-intervenor) seeking to invoke the court's jurisdiction pursuant to 28 U.S.C. § 1581(c):[9] the plaintiff must (1) be an "interested party" and (2) have been a "party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(c); *see also* 19 U.S.C. § 1516a(a)(2)(A)(ii). With regard to the first criterion, the Government does not challenge Plaintiffs' status as interested parties. *See* Def.'s Mot. at 5; 19 U.S.C. § 1677(9)(A) (defining the term "interested party" to include, *inter alia*, "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise"). Congress did not statutorily define "party to the proceeding."[10] It is this jurisdictional predicate that is at issue in this case.

i. The Party to the Proceeding Requirement

The court has interpreted the "party to the proceeding" requirement as a form of participation that "reasonably convey[s] the separate status of a party, . . . and provide[s] Commerce with notice of a party's concerns." *Specialty Merch. Corp. v. United States*, 31 CIT 364, 365, 477 F. Supp. 2d 1359, 1361 (2007) (internal quotation marks and citations omitted). The requirement is not onerous, and is "intended only to bar action by someone who did not take the opportunity to further its interests on the administrative level." *Am. Grape Growers v. United States*, 9 CIT 103, 105–06, 604 F. Supp. 1245, 1249 (1985). Commerce's regulations more specifically define "party to the proceeding" for the agency's purposes as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(36).

Parties' briefing in this regard generally adopts or does not expressly challenge reliance on Commerce's definition for standing purposes. *See* Def.'s Mot. at 6; Pls.' Opp'n at 14–15; Def.-Int.'s Resp. at 6–7. At oral argument, the court invited Parties to comment on the degree to which the court should be guided by Commerce's regulatory definition when interpreting the same term for standing purposes. Letter to Counsel (July 18, 2018) ("Court's Letter") at 1, ECF No. 49.

[9] Section 1581(c) affords the USCIT "exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930." 28 U.S.C. § 1581(c).

[10] Legislative history accompanying the Trade Agreements Act of 1979 defines "party to the proceeding" as "any person who participated in the administrative proceeding." S. Rep. 96–249 at 247 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 633.

The court noted that *Chevron* deference does not apply to Commerce's regulatory definition because Commerce does not administer the standing statute, 28 U.S.C. § 2631. *Id.*; *see also Chevron, U.S.A., Inc. v. Nat'l Resources Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984). Parties generally agreed that the court should defer to Commerce's definition. Oral Arg. Tr. at 7:1–16; 27:5–13, 41:7–16.[11]

Commerce promulgated the regulation to heighten the requirements for obtaining administrative standing from the former standard that merely required the entry of a notice of appearance. *Antidumping Duties*, 54 Fed. Reg. 12,742, 12,744 (Dep't Commerce March 28, 1989) (final rule). In so doing, the agency appeared to recognize that the court's standing analysis is not constrained by the terms of 19 C.F.R. § 351.102(36). *Id.* (noting that although the court may "benefit from the agency's expertise as to the minimum participation in the administrative process that will make possible the party's exhaustion of its administrative remedies," the court "may disagree

[11] In particular, the Government pointed the court to *JCM, Ltd. v. United States*, 210 F.3d 1357, 1360 (Fed. Cir. 2000), where, it contends, the Federal Circuit accepted Commerce's definition for standing purposes. Oral Arg. Tr. at 7:15–8:5. The court is not persuaded that *JCM* stands for the proposition that the Federal Circuit has accepted Commerce's definition as stating the requirements to obtain standing to invoke the court's (c) jurisdiction. There, the Federal Circuit confronted the issue of whether the USCIT had (i) jurisdiction, and held that it did not. *JCM*, 210 F.3d at 1359–60. The plaintiff had argued that because it was not selected as a mandatory respondent, Commerce had "foreclosed its opportunity to participate" and, thus, its ability to invoke (c) jurisdiction. *Id.* at 1360. In rejecting that argument, the Federal Circuit noted that Commerce's statutory ability to limit the number of mandatory respondents does not "preclude an interested party, not chosen as a respondent, from participating through written submissions to the [agency]," and, thereby, becoming a party to the proceeding as Commerce has defined the term. *Id.* The Federal Circuit did not expressly apply (or otherwise examine the merits of applying) Commerce's regulatory definition to determine standing to invoke (c) jurisdiction.

The Government also pointed to *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121 (1997), as supporting the proposition that Commerce's definition should be afforded deference pursuant to *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). Oral Arg. Tr. at 9:6–8. Those cases, however, concern the deference due to an informal interpretation of a statute a particular entity administers. *Stevedore*, 521 U.S. at 123,136 (interpretation rendered by a Director to whom the Secretary had delegated administration of the Longshore and Harbor Workers' Compensation Act); *Skidmore*, 323 U.S. at 130, 137 (interpretation rendered by the Administrator of the Fair Labor Standards Act). As noted above, Commerce does not administer the standing statute.

Mid Continent pointed the court to *United States v. Williams*, 514 U.S. 527, 531 (1995), which states the general principle that ambiguities in a statutory waiver of sovereign immunity must be construed in favor of immunity. Oral Arg. Tr. at 41:16–19. In *Williams*, the U.S. Supreme Court addressed the extent to which 28 U.S.C. § 1346(a) places limits on who may invoke the district courts' jurisdiction to hear civil actions against the United States for the recovery of wrongfully assessed or collected taxes and penalties. 514 U.S. at 531–32. Here, however, Congress has stated who may invoke the court's (c) jurisdiction: interested parties that were parties to the underlying proceeding. *See* 28 U.S.C. § 2631(c). Accordingly, in this case, the court must decide whether Plaintiffs are among those for whom immunity has been waived.

in the circumstances of a particular case that adherence to the regulatory requirements was consistent with Congressional intent" regarding standing).

For purposes of resolving the pending motion to dismiss, the court need not decide whether to be guided by Commerce's regulation to determine Plaintiffs' judicial standing. Commerce's regulation is consistent with the view that judicial standing requires interested parties to have conveyed their separate status and notified Commerce of their concerns. *See, e.g.*, *Specialty Merch.*, 31 CIT at 365, 477 F. Supp. 2d at 1361. Resolving the pending motion requires more than the identification of a "written submission" of facts or legal argument in the underlying proceeding. Parties do not dispute that Plaintiffs submitted (or attempted to submit) written argument in the form of ministerial error comments documenting their concerns about the final all-others rate. Instead, the court must assess what impact—if any—Commerce's removal of the submission from the administrative record has on Plaintiffs' ability to seek judicial review.

ii. Plaintiffs were "Parties to the Proceeding" for Standing Purposes

The Government contends that Plaintiffs lack standing because their "sole written submission was an improper use of the ministerial error process to raise substantive legal arguments." Def.'s Mot. at 6–7; *see also* Def.'s Reply Br. in Supp. of Mot. to Dismiss ("Def.'s Reply") at 5–7, ECF No. 39. The Government further contends that Commerce properly removed Plaintiffs' ministerial error allegation from the record pursuant to 19 C.F.R. § 351.104(a)(2)(iii)[12] because it "constituted an untimely and unsolicited submission pursuant to 19 C.F.R. § 351.302(d)."[13] Def.'s Mot. at 7; *see also* Def.'s Reply at 7. Mid Continent agrees with the Government. Def.-Int.'s Resp. at 7. Plaintiffs contend that Commerce abused its discretion in relying on a "good faith" standard untethered to any authority to remove the ministerial error comments from the record. Pls.' Opp'n at 21–23. In any event, Plaintiffs contend, their submission constituted a good faith ministerial error allegation. *Id.* at 23–36.

The court disagrees with the Government's contention that resolving the standing issue turns on whether Plaintiffs properly relied on the ministerial error period to raise substantive matters. At a mini-

[12] Section 351.104(a)(2)(iii) provides that the official record will not include information Commerce rejects as untimely filed. 19 C.F.R. § 351.104(a)(2)(iii).

[13] Pursuant to § 351.302(d), Commerce "will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material that the [agency] rejects." *Id.* § 351.302(d)(1)(i).

mum, Plaintiffs' submission notified Commerce of their concerns about the agency's calculation of the all-others rate and sought to advance their interests on the administrative level. *See* Pls.' Ministerial Error Allegation. Plaintiffs presented their alleged ministerial errors within the context of agency rulings and case law discussing the nature of correctible clerical errors. *Id.* at 4–7. Plaintiffs noted that Commerce "has taken the position that its failure to consider available information constitutes a correctible clerical error," and argued that Commerce "failed to consider available evidence" when calculating the all-others rate. *Id.* at 6–7 & n.5 (collecting agency rulings). Plaintiffs argued that Commerce's failure to consider available evidence in the underlying proceeding and the resulting "restrict[ion] on [the agency's] ability to calculate fair and accurate dumping margins" could be remedied through the ministerial error process. *Id.* at 6–7 & n.6 (citing *Shandong Huarong Gen. Corp. v. United States,* 25 CIT 834, 159 F. Supp. 2d 714 (2001)). Plaintiffs explicitly avoided directly challenging Commerce's rationale for its all-others rate determination and assumed, for purposes of the ministerial error allegation, that Commerce correctly determined that it lacked the authority to assign Romp and Hor Liang a rate derived from the original investigation. *Id.* at 3–4.

The court also disagrees with the position asserted by the Government at oral argument that the court's standing analysis should be constrained by Commerce's discretionary management of the administrative record. Oral Arg. Tr. at 10:7–15 (referring to U.S. Supreme Court and Federal Circuit precedent regarding the court's deference to agencies' management of the administrative record). In *PSC VSMPO-Avisma Corp. v. United States*, the Federal Circuit indeed stated that, "[a]bsent constitutional constraints or extremely compelling circumstances . . . courts will defer to the judgment of an agency regarding the development of the agency record." 688 F.3d 751, 760 (Fed. Cir. 2012) (citations omitted). *Avisma*, however, speaks to Commerce's management of the administrative record for its purposes; it does not address the interplay between the development of the agency record and judicial standing. *See id.*

An examination of the regulations cited by the Government reveals the limitations of its argument. *See* Def.'s Mot. at 7 (citing 19 C.F.R. §§ 351.104(a)(2)(iii) and 351.302(d)). Section 351.302(d) permits Commerce to reject and remove from the record untimely written argument. 19 C.F.R. § 351.302(d)(1)(i). The regulation does not, however, appear to contemplate Commerce's rejection of a *timely filed* ministerial error submission on the basis of its view that the

submission contains untimely substantive legal argument. Rather, § 351.302(d)(1) contemplates the rejection of a document for which the proponent failed to secure an extension of time. *See id.* § 351.302(d)(1) (barring the retention of an untimely submission *unless* the agency has extended a time limit pursuant to section (b)); *id.* § 351.302(b) ("Unless expressly precluded by statute, the [agency] may, for good cause, extend any time limit established by this part.").

Section 351.104(a)(2)(iii) "defines what constitutes the official and public records of an antidumping . . . duty proceeding." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,312 (Dep't Commerce Feb. 27, 1996) (proposed rule). It states that "the official record" will not "include any document that [Commerce] rejects as *untimely filed*." 19 C.F.R. § 351.104(a)(2)(iii) (emphasis added). Likewise, the Preamble to § 351.104 refers to "submission[s] *rejected as untimely*." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7312 (emphasis added). Accordingly, Commerce's regulations address the agency's ability to reject documents that parties file after a given deadline; for example, a ministerial error allegation filed outside the time permitted pursuant to 19 C.F.R. § 351.224(c)(2).[14]

Here, Commerce did not reject the ministerial error allegation on the basis of the *submission's* untimeliness. Rather, Commerce rejected (or denied)[15] the ministerial error allegation based upon its analysis of the timeliness of its *content*. *See* Commerce Feb. 27 Letter at 1; Commerce March 15 Letter at 1–2 (explaining that Romp and Hor Liang's filing of "substantive legal arguments under the guise of a request to correct a 'ministerial error' does not make those arguments ministerial in nature, nor does it confer timeliness to those arguments"). The substance of Commerce's explanation reflects compliance with its regulatory obligation to "analyze any [ministerial error] comments received." 19 C.F.R. § 351.224(e); *see also* Commerce Feb. 27 Letter (referring to the agency's "analysis of the comments received"); Commerce March 15 Letter (providing further detail regarding the agency's analysis). The conclusion Commerce reaches from that analysis is, however, "subject to judicial review." *Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1291–92 (Fed. Cir. 2003) (citations omitted). As a general rule, therefore, "the 'comments received' by Commerce regarding alleged ministerial er-

[14] Section 351.224(c)(2) provides that ministerial error comments must be filed "within five days after the earlier of: (i) The date on which the [agency] released disclosure documents to that party; or (ii) The date on which the [agency] held a disclosure meeting with that party." 19 C.F.R. § 351.224(c)(2).

[15] *Compare* Commerce Feb. 27 Letter (titled "Rejection of Submission"), *with* Commerce March 15 Letter (referring both to the agency's denial and rejection of the ministerial error allegation).

rors must be part of the administrative record for review." *Id.* at 1292 (rejecting the Government's argument that the administrative record is limited to pre-final determination filings).

The Government also points to Commerce's discretion to decide "what constitutes a ministerial error," Def.'s Reply at 7 (citing *Fabrique de Fer de Charleroi, SA v. United States*, 25 CIT 567, 581, 166 F. Supp. 2d 593, 607 (2001); *Peer Bearing Co. v. United States*, 23 CIT 454, 458, 57 F. Supp. 2d 1200, 1205 (1999)), and asserts that because Plaintiffs' "submission [did] not fit the definition of a 'ministerial error,' Commerce properly declined to consider it and acted within its discretion in rejecting and removing it from the administrative record," *id.* Although the cited opinions support Commerce's discretion to determine when alleged errors are within the realm of inadvertent errors contemplated by the ministerial error regulation, *see Fabrique de Fer de Charleroi*, 25 CIT at 581, 166 F. Supp. 2d at 607; *Peer Bearing*, 23 CIT at 458, 57 F. Supp. 2d at 1205, as those cases demonstrate, Commerce's determinations thereto are subject to judicial review. The Government has not offered persuasive authority for the proposition that Commerce may rely upon its characterization of the arguments raised in a ministerial error allegation to remove the submission from the administrative record.[16] As Plaintiffs point out, Commerce routinely denies ministerial error allegations that raise methodological issues without removing the relevant submissions from the record. *See* Pls.' Opp'n at 21–22; Pls.' Attach. 4, ECF No. 35 (*Passenger Vehicle and Light Truck Tires from the People's Republic of China*, Analysis of Ministerial Error Allegation, A-570–016 (Apr. 16, 2018)); *cf., e.g.*, *ATC Tires Private Ltd. v. United States*, Slip Op. 18–88, 2018 WL 3585219, at *2 (CIT July 16, 2018) (citing to ministerial error submissions on the administrative record that Commerce denied because they raised methodological issues); *CS Wind Vietnam Co., Ltd. v. United States*, 38 CIT ___, ___, 971 F. Supp. 2d 1271, 1276 (2014) (same).[17]

[16] The Government asserts that "even if [it] does not always remove an improper ministerial error submission from the record, this does not mean that Commerce does not have the discretion to do so." Def.'s Reply at 5 (citing *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 11, 23, 955 F. Supp. 1466, 1475 (1997)). *Kerr-McGee* has minimal persuasive value because it addressed the removal of new factual information from the administrative record pursuant to a regulation that has since been superseded. *See Kerr-McGee*, 21 CIT at 23, 955 F. Supp. at 1475 (quoting 19 C.F.R. § 353.31(a)(3) (1994)); 19 C.F.R. Pt. 351, Annex V (noting that § 353.31(a)(3) has been superseded by § 351.104(a)(2)).

[17] At oral argument, the Government posited that Commerce's decision to remove ministerial error submissions from the record may turn on whether the proponent was already a party to the administrative proceeding when filing the submission. Oral Arg. Tr. at 12:19–13:9. Commerce did not, however, reject or remove Plaintiffs' submission on that

One final issue bears mentioning. There is a temporal aspect to the standing requirement embodied by the term "party to the *proceeding*." *See* 28 U.S.C. § 2631(c) (emphasis added); *cf.* 19 C.F.R. § 351.102(36) (requiring participation "in a segment of the proceeding"); 19 C.F.R. § 351.102(47) (defining "segment" as "a portion of the proceeding that is reviewable under section 516A of the Act[, 19 U.S.C. § 1516a]"). Plaintiffs contend that the ministerial error period is "part of the administrative proceeding." Pls.' Opp'n at 15.[18] Although the Government does not concede the point, *see* Def.'s Reply at 2 n.1; Def.'s Exh. Br. at 5 n.1, the Government failed to substantively argue that the ministerial error period is not part of the administrative proceeding (i.e., the relevant segment of the *Certain Steel Nails from Taiwan* proceeding), *see generally* Def.'s Mot. The Government has, thus, waived that argument. *See Novosteel SA*, 284 F.3d at 1274; *Home Prods. Int'l, Inc. v. United States,* 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1301 (2012) (quoting *United States v. Zannino,* 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")).[19] The court notes, however, that the Federal Circuit has

basis. *See* Commerce Feb. 27 Letter; Commerce Feb. 28 Letter; Commerce March 15 Letter. To the extent the Government seeks to rely on Commerce's ministerial error regulation, which potentially limits the filing of ministerial error comments to parties to the proceeding, *see* 19 C.F.R. § 351.224(c)(1)-(2); Oral Arg. Tr. at 11:17–22, the court notes that Congress contemplated a more permissive approach, *see* 19 U.S.C. § 1675(h) (directing Commerce to "establish procedures for the correction of ministerial errors" that will "ensure opportunity for *interested parties* to present their views regarding any such errors") (emphasis added). Without the benefit of briefing on whether Commerce's interpretation of its obligation to administer the ministerial error process is entitled to *Chevron* deference, and in light of the Government's waiver of any argument that the court should rely on 19 C.F.R. § 351.224(c)(1)-(2) to deny standing, the court does not further address these issues. *See Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("[A] party waives arguments based on what appears [or does not appear] in its brief.").

[18] Plaintiffs cite several cases for the proposition that a ministerial error allegation generally confers party to the proceeding status. Pls.' Opp'n at 18–19. In none, however, did the court address standing solely on the basis of a ministerial error filing. *See Neenah Foundry Co. v. United States*, 25 CIT 287, 287–88, 293–95, 142 F. Supp. 2d 1008, 1011, 1016–17 (2001) (affirming Commerce's consideration of ministerial error reply comments filed by an interested party that had waived participation in a sunset review but which was not a litigant in the ensuing case); *Zhejiang Native Produce and Animal By-Prods. Imp. & Exp. Group Corp. v. United States*, 29 CIT 1300, 1302, 400 F. Supp. 2d 1374, 1376 (2005) (addressing ministerial error comments filed by a respondent in the underlying proceeding whose subject matter jurisdiction was not challenged on standing grounds); *Timken Co. v. United States*, Slip Op. 14–51, 2014 WL 1760033, at *1–2 (CIT May 2, 2014) (same). The cited cases do, however, support the conclusion that the reviewability of ministerial error determinations renders the ministerial error period within the confines of the underlying administrative proceeding.

[19] At oral argument, the court invited Parties to comment on any timeliness aspect inherent in the court's interpretation of judicial standing as requiring interested parties to place Commerce on notice of their concerns. *See* Court's Letter at 1–2. The Government pointed to *Encon Indus. Inc. v. United States*, 18 CIT 867 (1994), and argued that, as in that case, Commerce lacked notice of Plaintiffs' concerns because they had not presented any facts or argument during the administrative proceeding. Oral Arg. Tr. at 49:1–11. *Encon*, however,

described as "untenable" the argument that "the antidumping statute limits the administrative record to filings that occur before the final determination," and opined that ministerial error comments on a final determination are submitted "during the course of the administrative proceeding." *Alloy Piping*, 334 F.3d at 1291–92.[20] Accordingly, the court finds that Plaintiffs' timely filed ministerial error allegation fulfills the "party to the proceeding" requirement for standing to invoke the court's (c) jurisdiction.[21] Because (c) jurisdiction is available to Plaintiffs, (i) jurisdiction, which was alleged in the alternative, is unavailable, and the court does not further address it.[22]

II. Administrative Exhaustion

A. Legal Standard

"[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d).[23] The statute "indicates a congressional intent that, absent a

is distinguishable. Although *Encon* discusses standing requirements, the court resolved the case on exhaustion grounds. 18 CIT at 868–69. Additionally, *Encon* is factually distinguishable because the *Encon* plaintiffs never submitted facts or legal argument before or after Commerce issued its final determination. *Id.* at 868. Finally, despite those differences, *Encon* does not support a strict interpretation of the notice requirement. The requirement for parties to have notified Commerce of their concerns was first formulated by the *Encon* court as its interpretation of the minimum participation necessary for judicial standing. *See Specialty Merch.*, 31 CIT at 365, 477 F. Supp. 2d at 1361(citing *Encon*, 18 CIT at 868); *Laclede Steel Co. v. United States*, 92 F.3d 1206 (Table), 1996 WL 384010, at *2 (Fed. Cir. 1996) (citing same). The *Encon* court's statement is derived from the *American Grape Growers* court's statement that interested parties must take steps to further their interests at the administrative level. *See Encon*, 18 CIT at 868 (citing *Am. Grape Growers*, 9 CIT at 105–06, 604 F. Supp. at 1249). As discussed *supra*, Plaintiffs did so by filing their ministerial error allegation. Further examination of the timeliness of the matters raised is properly addressed pursuant to the doctrine of administrative exhaustion, discussed *infra* Discussion Section II.

[20] This accords with the view that a "final determination" is not yet "final" until "the time for [seeking] judicial review has expired," and the Preamble to Commerce's ministerial error regulation contemplates that ministerial corrections will be made before a determination becomes final. *Am. Signature, Inc. v. United States*, 598 F.3d 816, 826 (Fed. Cir. 2010) (citing *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. at 7320).

[21] The Government suggested at oral argument that finding standing in the circumstances present here would permit interested parties to "swoop in" at the last minute, raise substantive concerns about a final determination, and thereby obtain judicial standing to challenge that determination. Oral Arg. Tr. at 50:7–13. However, as this case demonstrates, the doctrine of administrative exhaustion generally bars plaintiffs from litigating issues that were not included in administrative case and rebuttal briefs. *See Dorbest Ltd v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010); 19 C.F.R. § 351.309(c)–(d). Accordingly, the court does not believe that its resolution of the pending motion will affect any significant change on the need for interested parties to raise substantive concerns in a timely manner.

[22] "Section 1581(i) embodies a 'residual' grant of jurisdiction, and may not be invoked when jurisdiction under another subsection of § 1581 *is* or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (emphasis added).

[23] The court may, *sua sponte*, dismiss claims within a complaint pursuant to USCIT Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." *See, e.g.*, *Anaheim*

strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citation omitted). Administrative exhaustion generally requires a party to present all arguments in administrative case and rebuttal briefs before raising those issues before this court. *See Dorbest*, , 604 F.3d at 1375; 19 C.F.R. § 351.309(c)–(d). This permits the agency to address the issue in the first instance, prior to judicial review. *See Boomerang Tube*, 856 F.3d at 912–13.

There are exceptions to the exhaustion requirement. Previously enumerated exceptions include futility, an intervening court decision, pure questions of law, or when plaintiff had no reason to believe the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (collecting cases). A party may also be excused from exhausting its administrative remedies when it lacked the opportunity to bring the arguments to the agency. *See Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1374 (Fed. Cir. 2014).

B. Plaintiffs Failed to Exhaust Their Administrative Remedies

As discussed above, Plaintiffs first addressed the all-others rate to the agency in their ministerial error allegation; they did not file case or rebuttal briefs. The question, then, is whether an exception to the exhaustion doctrine applies that would permit Plaintiffs to pursue the claims alleged in counts one and three of their amended complaint regarding Commerce's calculation of the all-others rate in the *Final Results*.[24]

Gardens v. United States, 444 F.3d 1309, 1315 (Fed. Cir. 2006) ("The trial court may dismiss *sua sponte* under Rule 12(b)(6), provided that the pleadings sufficiently evince a basis for that action."); *Constant v. United States*, 929 F.2d 654, 657 (Fed. Cir. 1991); *cf. Cepero-Rivera v. Fagundo*, 414 F.3d 124, 130 (1st Cir. 2005) (noting the "general rule" that *sua sponte* dismissal may be appropriate when parties have notice and an opportunity to amend the complaint or otherwise respond). A claim that has not been exhausted may be subject to Rule 12(b)(6) dismissal. *Cf. Valley Fresh Seafood, Inc. v. United States*, 31 CIT 1989, 1994–96 (2007) (considering, but ultimately denying, a motion to dismiss for failure to state a claim based on the plaintiff's failure to exhaust administrative remedies). Here, Plaintiffs' complaint clearly indicates that they did not submit case or rebuttal briefs, thereby "evinc-[ing] a basis" for the court's inquiry into administrative exhaustion. *Anaheim Gardens*, 444 F.3d at 1315.

[24] Count two contains Plaintiffs' request for a recalculated rate in the event PT Enterprise or Unicatch succeed in obtaining a calculated rate in their companion actions. Am. Compl. ¶¶ 29–31. Counts four and five challenge Commerce's denial of Plaintiffs' ministerial error allegation and its striking of the ministerial error allegation from the administrative record. *Id.* ¶¶ 34–40. Those claims relate to matters that postdate the *Final Results*, and, thus, are not subject to the exhaustion doctrine. It bears mentioning that resolving the standing issue did not require the court to address the merits of Commerce's denial of Plaintiffs' ministerial error allegation (count four)—i.e, the basis for the agency's determination that Plaintiffs raised substantive arguments and not inadvertent errors— or

Plaintiffs contend that exhaustion should not be required because Commerce first made the contested all-others rate determination in the *Final Results*; the propriety of Commerce's determination raises a pure question of law; and Commerce's determination departs from agency practice. Pls.' Exh. Br. at 14–18; *see also* Pl.-Int.'s Exh. Br. at 1–2. Defendant and Defendant-Intervenor contend that the pure question of law exception does not apply, and exhaustion should be required. Def.-Int.'s Exh. Br. at 7; Oral Arg. Tr. at 77:15–21. As discussed below, Plaintiffs had the opportunity to raise their objections administratively, the pure question of law exception does not apply, and Commerce's all-others rate determination was consistent with the agency's recent practice.

Plaintiffs first assert that they lacked the opportunity to raise objections to Commerce's determination regarding the all-others rate in the absence of a calculated rate for a mandatory respondent because Commerce did not address that issue until the *Final Results*. Pls.' Exh. Br. at 14–15; *see also id.* at 12–13, 19–20 (discussing relevant cases). Plaintiffs further assert that although they had notice that Commerce might assign rates based on adverse facts available to all three mandatory respondents, "Mid Continent never argued that [Plaintiffs] . . . should be subjected to AFA." *Id.* at 14. Plaintiffs' argument overlooks the fact that Commerce's decision to assign a rate based on adverse facts available to all mandatory respondents *required* the agency to reassess the all-others rate because the basis for that rate, Unicatch's preliminary calculated rate, was no longer available. At a minimum, Plaintiffs had the opportunity to file a rebuttal brief presenting arguments to the agency as to how it should determine the all-others rate pursuant to 19 U.S.C. § 1673d(c)(5)(B) in the event such a determination became necessary. Such an argument would clearly be considered a "response" to the argument raised in Mid Continent's case brief. *See* 19 C.F.R. § 351.309(d)(2).[25]

decide whether Commerce's removal of the ministerial error allegation from the record constituted an abuse of discretion (count five).

[25] Plaintiffs cite several cases supporting their argument that they lacked the opportunity to raise objections. Pls.' Exh. Br. at 12–13, 19–20. Those cases are distinguishable, however, because each involves a situation in which Commerce's determination could not have been anticipated when parties filed their case and rebuttal briefs. *See CS Wind*, 971 F. Supp. 2d at 1285–86 & n.7 (Commerce's method of allocating certain expenses in a financial statement in its final determination differed from the preliminary determination and the method proposed by the statement's proponent); *Fine Furniture (Shanghai) Ltd. v. United States,* 36 CIT ___, ___, 865 F. Supp. 2d 1254, 1263 (2012) (Commerce's final determination included an electricity tariff in its calculation of the benefit provided by a countervailable subsidy that was not included in the calculation made for purposes of the preliminary determination and without notice to the parties); *Lifestyle Enter. Inc. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1286, 1300–01 & n.17 (2011) (Commerce changed its surrogate value source between the preliminary and final results in response to data appended to one party's

Plaintiffs further assert that Commerce failed to notify interested parties or the public that it would (1) no longer use prior calculated rates to determine the all-others rate when all mandatory respondents received rates based on adverse facts available in light of the Federal Circuit's *Albemarle* decision, or (2) assign Plaintiffs a rate based on adverse inferences. Pls.' Exh. Br. at 14–15. Plaintiffs' assertions lack merit. The Federal Circuit has stated that Commerce *need not* "expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations" when there is "relevant data in the record and the advancement of arguments related to that data before Commerce." *Boomerang*, 856 F.3d at 913. By placing Unicatch's preliminary calculated rate at issue in its case brief, Mid Continent effectively placed Plaintiffs' rate at issue as well. All arguments relevant to Plaintiffs' rate, therefore, should have been raised in an administrative rebuttal brief.

Additionally, Commerce had placed the "public" on notice about its post-*Albemarle* interpretation of what constitutes a "reasonable method" pursuant to 19 U.S.C. § 1673d(c)(5)(B) to determine the rate for non-examined companies when all mandatory respondents in market economy proceedings (or all mandatory respondents eligible for separate rates in nonmarket economy proceedings) receive rates based on adverse facts available: Commerce issued four preliminary determinations before rebuttal briefs were due in the underlying proceeding[26] applying the same reasoning and methodology it applied in this case.[27] Plaintiffs' failure to argue the issue appears to stem

rebuttal brief); *China Steel Corp. v. United States*, 28 CIT 38, 58–60, 306 F. Supp. 2d 1291, 1309–11 (2004) (Commerce's method of corroborating secondary information used as adverse facts available first announced in the final determination); *cf. Calgon Carbon Corp. v. United States*, Slip. Op. 11–21, 2011 WL 637605, at *11 & n.26 (CIT Feb. 17, 2011) (Commerce's decision regarding its use of combination rates did not arise until after it issued the final results). Plaintiffs also rely on purportedly favorable language from the court's decision in *Globe Metallurgical, Inc. v. United States*, 29 CIT 867 (2005). Pls. Exh. Br. at 14; *see also id.* at 12 (attributing the language quoted on page 14 to *Globe Metallurgical*). In that case, Commerce relied on the dumping margin assigned to one producer (Bratsk) to calculate an antidumping margin partially based on adverse facts available for another producer (Kremny). *Globe Metallurgical*, 29 CIT at 870–71. On remand, Commerce increased Bratsk's rate in response to errors identified in the draft remand results, but continued to assign Kremny the lower rate. *Id.* at 872. The court declined to require exhaustion of the argument that Commerce should have assigned Kremny the higher corrected rate because the opportunity to contest Commerce's continued use of Bratsk's lower rate did not arise until the final remand results were published. *Id.* at 873. Unlike the *Globe Metallurgical* plaintiff, who had no reason to suspect that any change to Bratsk's rate would not carry over into Kremny's rate, here, Plaintiffs had notice that Commerce's use of adverse facts available to calculate Unicatch's rate would require Commerce to recalculate their all-others rate.

[26] Mid Continent filed its rebuttal brief on September 27, 2017; thus, the court uses that date as a guide. *See* Def.-Int.'s Resp. at 4.

[27] They include: Prelim. Decision Mem. for Certain Small Diameter Carbon and Allow Seamless Standard, Line, and Pressure Pipe (Under 4 ½ Inches) from Japan at 7–8 &

from their belief that Commerce would follow its pre-*Albemarle* practice and assign them the investigation rate in the event none of the individually-examined respondents received calculated rates. *See* Pls.' Exh. Br. at 3. Plaintiffs' mistake, however, does not excuse them from failing to exhaust their administrative remedies.

Next, Plaintiffs assert that the "pure question of law" exception applies. Pls.' Exh. Br. at 15–16. The "pure question of law" exception "*might* apply for a clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of [*Chevron*, 467 U.S. at 842–45]." *Fuwei Films (Shandong) Co. v. United States*, 35 CIT ___, ___, 791 F. Supp. 2d 1381, 1384 (2011) (citing *Agro Dutch Indus. Ltd. v. United States,* 508 F.3d 1024, 1032 (Fed. Cir. 2007) (applying the exception to a *Chevron* prong one issue that did not require further factual development)).[28] The exception is less likely to apply to a *Chevron* prong two issue requiring the agency's interpretation of a statute it administers. *See id.* at 1384–85 (denying motion to amend a complaint to raise a *Chevron* prong two issue that had not been exhausted before the agency); *Consol. Bearings Co. v. United States*, 25 CIT 546, 553–54, 166 F. Supp. 2d 580, 587 (2001) (collecting cases and noting that, to apply the pure question of law exception, courts generally require no further "agency

nn.20–21, A-588–851 (July 5, 2016), *available at* https://enforcement.trade.gov/frn/summary/japan/2016–16473–1.pdf (last visited Sept. 18, 2018); Prelim. Decision Mem. for Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 ½ Inches) from Japan at 8 & nn.21–22, A-588–850 (July 5, 2016), *available at* https://enforcement.trade.gov/frn/summary/japan/2016–16474–1.pdf (last visited Sept. 18, 2018); Prelim. Decision Mem. for Polyethylene Retail Carrier Bags from Thailand at 8 & n.37, A-549–821 (June 2, 2017), *available at* https://enforcement.trade.gov/frn/ summary/thailand/2017–11914–1.pdf (last visited Sept. 18, 2018); Prelim. Decision Mem. for Certain Frozen Fish Fillets from the Socialist Republic of Vietnam at 9–10 & n.52, A-552–801 (Aug. 31, 2017), *available at* https://enforcement.trade.gov/frn/summary/vietnam/2017–19288–1.pdf (last visited Sept. 18, 2018). Commerce issued an additional preliminary determination applying this reasoning and methodology before it published the *Final Results. See* Prelim. Decision Mem. for Diamond Sawblades and Parts Thereof from the People's Republic of China at 8 & nn.35–38, A-570–900 (Nov. 30, 2017), available at https://enforcement. trade.gov/frn/summary/prc/2017–26297–1.pdf (last visited Sept. 18, 2018). Plaintiffs' assertion that preliminary determinations that are incorporated by reference into the final results do not serve to notify the public of a change in practice is misguided. The afore-mentioned decision memoranda are available on Commerce's public website and on the most common legal search engines.

[28] The court's review of Commerce's statutory interpretation is guided by the two-prong *Chevron* framework. *See Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1344 (Fed. Cir. 2017). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).

involvement" to resolve the inquiry or "undue delay" or expense of "scarce party time and resources").[29]

Here, Plaintiffs challenge Commerce's interpretation of what constitutes a "reasonable method" pursuant to 19 U.S.C. § 1673d(c)(5)(B) as informed by the agency's understanding of relevant language in the SAA and the Federal Circuit's *Albemarle* opinion. *See* I&D Mem. at 5 & nn.13–14. It is, therefore, a question of law, but one that raises a *Chevron* prong two issue.[30] Obtaining the agency's response to Plaintiffs' arguments would require further agency involvement, i.e., a remand, "an inefficiency occasioned solely by [Plaintiffs'] inaction." *See Fuwei Films*, 791 F. Supp. 2d at 1385; *Consol. Bearings*, 25 CIT at 553–54, 166 F. Supp. 2d at 587. Applying the exception would "undermine the very purposes the exhaustion requirement is designed to promote," *Fuwei Films*, 791 F. Supp. 2d at 1385, *to wit*, "protecting administrative agency authority and promoting judicial efficiency," *Vinh Hoan Corp. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1208, 1226 (2016), consume party resources, and ultimately delay resolution of this case, *see Consol. Bearings*, 25 CIT at 553–54, 166 F. Supp. 2d at 587. Accordingly, the court declines to apply this exception.

Finally, Plaintiffs assert that exhaustion should not be required because Commerce's method of calculating the all-others rate departed from its prior practice. Pls.' Exh. Br. at 16–17. This exception, however, contemplates Commerce's failure to follow "clearly applicable" judicial precedent, *Philipp Bros., Inc. v. United States*, 10 CIT 76, 79–80, 630 F. Supp. 1317, 1320–21 (1986), not agency practice, which is subject to change, *see Encon*, 18 CIT at 868 (observing that Commerce may change longstanding practices at any time "for good reason"). Further, as set forth above, Commerce's determination in this case was consistent with its post-*Albemarle* practice, of which

[29] Following several remands and opinions, the Federal Circuit reversed the *Consolidated* court's decision to apply the pure question of law exception on the basis that resolving the plaintiff's challenges required further factual development and "an assessment of Commerce's justifications for any departure from [its] past practice." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) ("Statutory construction alone is not sufficient to resolve this case.").

[30] Plaintiffs assert that the decisions underlying Commerce's all-others rate determination "reflect the [agency's] '*Chevron* I' construction as to the meaning of 19 U.S.C. § 1673d[(c)](5), as that statute has been construed by the Federal Circuit in multiple prior decisions." Pls.' Exh. Br. at 16. The court is unclear whether Plaintiffs seek to suggest that the all-others rate determination raises a *Chevron* prong one issue. Congress has, however, left the discernment of the "reasonable method" to be applied to Commerce's discretion, *see* 19 U.S.C. § 1673d(c)(5)(B); thus, the statute lacks the "clear direction" necessary to end the analysis at *Chevron* prong one, *see FAG Italia S.p.A. v. United States*, 291 F.3d 806, 815 (Fed. Cir. 2002).

Plaintiffs should have been aware.[31] *See supra* note 27 and accompanying text.

In sum, Plaintiffs failed to exhaust their administrative remedies. Accordingly, counts one and three of Plaintiffs' amended complaint are dismissed pursuant to USCIT Rule 12(b)(6).[32]

III. STO Industries' Motion to Intervene

STO Industries moves to intervene in this action as a matter of right. Mot. to Intervene at 1. Defendant and Defendant-Intervenor each oppose STO Industries' motion to intervene on the basis that STO Industries lacks standing for the same reasons they asserted that Plaintiffs lacked standing. *See* Def.'s Opp'n Mot. to Intervene; Def.-Int.'s Opp'n Mot. to Intervene. Because the court has resolved the standing issue in favor of Plaintiffs, so too the court resolves the motion to intervene in favor of STO Industries. Accordingly, the court grants STO Industries' motion to intervene in this (reduced) action.[33]

CONCLUSION AND ORDER

For the foregoing reasons, Defendant's motion to dismiss for lack of subject matter jurisdiction (ECF No. 26) is **DENIED**; counts one and three of Plaintiffs' amended complaint are **DISMISSED**; and STO Industries' motion to intervene (ECF No. 25) is **GRANTED**.

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[31] To the extent Plaintiffs seek to suggest that Commerce's determination ran counter to applicable judicial precedent barring the use of adverse facts available to calculate non-examined respondents' rates, *see* Pls.' Exh. Br. at 17–18, Plaintiffs fail to identify that precedent, *see id.* Plaintiffs do, however, point to portions of their opposition to Defendant's motion to dismiss. *See id.* at 16–17 (citing Pls.' Opp'n at 24–35). Therein, Plaintiffs cite, *inter alia*, *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013), and *Changzhou Wujin Fine Chemical Factory Co., Ltd. v. United States*, 701 F.3d 1367 (Fed. Cir. 2012). Pls.' Opp'n at 26–27. *Bestpak* and *Changzhou* are not directly on point. *Bestpak* held that, as a matter of law, Commerce could use the simple average of an AFA rate and a de minimis rate to calculate the separate rate for non-examined respondents in a nonmarket economy proceeding. 716 F.3d at 1378. The court further held, however, that, as applied, Commerce's determination was unreasonable and potentially punitive. *Id.* at 1378–80. *Changzhou* held that Commerce acted arbitrarily when it used the simple average of a *hypothetical* AFA rate and a de minimis rate to calculate a separate rate. 701 F.3d at 1375–79.

[32] Plaintiffs also appeal to judicial equity in an effort to persuade the court to decline to require exhaustion. According to Plaintiffs, requiring exhaustion "would inflict irreparable injury on [them] and their customers," and would "effectively sanction[]" Commerce's determination. Pls.' Exh. Br. at 20. The court declines this invitation to effectively create a new exception to the exhaustion doctrine. Barring an unexhausted argument may often result in a financial loss to the argument's proponent (or their customers), in the sense that success on the merits of the argument may have resulted in a financial win. Additionally, dismissal on exhaustion grounds does not represent the court's sanctioning or approval of Commerce's determination because the court is expressly declining to reach the merits of the issue.

[33] STO Industries indicated its intent to litigate counts one to five of Plaintiffs' amended complaint. Mot. to Intervene at 5. The court has reduced the number of claims at issue, however, for failure to exhaust administrative remedies. *See supra* Discussion Section II.

Dated: September 24, 2018
New York, New York

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

Slip Op. 18–125

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

Before: Mark A. Barnett, Judge
Court No. 18–00053

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.]

Dated: September 24, 2018

Adams C. Lee, Harris Bricken McVay LLP, of Seattle, WA, argued for Plaintiff.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David Campbell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon, The Bristol Group PLLC, of Washington DC, argued for Defendant-Intervenor. With him on the brief were *Ping Gong* and *Lydia K. Childre*.

OPINION AND ORDER

Barnett, Judge:

Plaintiff National Nail Corp. ("Plaintiff" or "National Nail") seeks to challenge the U.S. Department of Commerce's ("Commerce" or the "agency") final results in the first administrative review of the antidumping duty order covering certain steel nails from Taiwan. *See Certain Steel Nails from Taiwan*, 83 Fed. Reg. 6,163 (Dep't Commerce Feb. 13, 2018) (final results of antidumping admin. review and partial rescission of admin. review; 2015–2016) ("*Final Results*"); Compl., ECF No. 5. Defendant United States ("Defendant" or the "Government") moves to dismiss National Nail's complaint for lack of subject matter jurisdiction pursuant to United States Court of International Trade ("USCIT") Rule 12(b)(1). Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction ("Def.'s Mot."), ECF No. 18. National Nail opposes the motion. Pl.'s Resp. to Def.'s Mot. to Dismiss ("Pl.'s Opp'n"), ECF No. 29. Defendant-Intervenor Mid Continent Steel & Wire, Inc. ("Defendant-Intervenor" or "Mid Continent") supports the motion. Def.-Int.'s Resp. in Supp. of Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction ("Def.-Int.'s Resp."), ECF No. 21. For the following reasons, the court grants Defendant's motion.

BACKGROUND

In September 2016, Commerce initiated the first administrative review of the antidumping duty order covering certain steel nails from Taiwan. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 62,720 (Dep't Commerce Sept. 12,

2016). The review covered five companies: Romp Coil Nail Industries Inc. ("Romp"), Hor Liang Industrial Corp. ("Hor Liang"), PT Enterprise, Inc. ("PT Enterprise"), Bonuts Hardware Logistics Co., LLC ("Bonuts"), and Unicatch Industrial Co., Ltd. ("Unicatch"). Compl. ¶ 9. PT Enterprise, Bonuts, and Unicatch were subject to individual examination; Romp and Hor Liang were non-examined companies. *Id.* ¶¶ 7–11. National Nail is a U.S. importer of steel nails from Hor Liang in Taiwan. *Id*. ¶ 2.

On August 7, 2017, Commerce published its preliminary results. *See Certain Steel Nails from Taiwan*, 82 Fed. Reg. 36,744 (Dep't Commerce Aug. 7, 2017) (prelim. results of antidumping duty admin. review and partial rescission of admin. review; 2015–2016) ("*Prelim. Results*"). Therein, Commerce determined that PT Enterprise and Bonuts had failed to cooperate to the best of their ability and assigned them weighted-average dumping margins equal to 78.17 percent based on facts otherwise available with an adverse inference (referred to as "adverse facts available" or "AFA"). *Prelim. Results*, 82 Fed. Reg. at 36,744; *see also* 19 U.S.C. § 1677e(b) (governing Commerce's use of adverse facts available). Commerce preliminarily calculated a weighted-average dumping margin of 34.20 percent for Unicatch, based on the data it had submitted. *Prelim. Results*, 82 Fed. Reg. at 36,744. Citing to 19 U.S.C. § 1673d(c)(5)(A),[1] Commerce preliminarily assigned Unicatch's rate to Romp and Hor Liang. *Prelim. Results*, 82 Fed. Reg. at 36,744.

After Commerce issued the preliminary results, Mid Continent filed a case brief urging Commerce to reject Unicatch's data and, instead, assign to Unicatch a rate based on adverse facts available. Def.-Int.'s Resp. at 4.

On February 6, 2018, Commerce issued the *Final Results*. *Final Results*, 83 Fed. Reg. at 6,165.[2] Therein, Commerce determined to use adverse facts available to determine the rate for Unicatch as well as for the other individually-examined respondents—PT Enterprise and Bonuts—resulting in all individually examined respondents receiving

[1] Section 1673d(c)(5)(A) states that the "all-others rate" assigned to non-examined companies is calculated as "the weighted average of the estimated weighted average dumping margins" assigned to individually-examined companies, "excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title [i.e., on the basis of adverse facts available]." 19 U.S.C. § 1673d(c)(5)(A). While this statutory provision is specific to antidumping investigations, Commerce relies on this same methodology to establish an all-others rate in administrative reviews.

[2] Commerce published the *Final Results* on February 13, 2018. *See Final Results*, 83 Fed. Reg. at 6,163.

final dumping margins of 78.17 percent. *Final Results*, 83 Fed. Reg. at 6,164. Citing to 19 U.S.C. § 1673d(c)(5)(B),[3] Commerce assigned Romp and Hor Liang weighted-average dumping margins of 78.17 percent; i.e., "the rate determined for all mandatory respondents." *Final Results*, 83 Fed. Reg. at 6,164.[4]

National Nail did not enter an appearance or participate in any manner in the underlying proceeding. *See* Compl. ¶ 3. Nevertheless, on March 15, 2018, National Nail initiated the instant action challenging Commerce's calculation of the all-others rate assigned to Romp and Hor Liang in the *Final Results*. *See* Summons, ECF No. 1; Compl. ¶¶ 20–28. National Nail alleged jurisdiction pursuant to 28 U.S.C. § 1581(c) and (i) (hereinafter referred to as "(c) jurisdiction" and "(i) jurisdiction," respectively). Compl. ¶ 1.

On April 18, 2018, the Government moved to dismiss this action for lack of jurisdiction. *See* Def.'s Mot. In opposing the Government's motion, National Nail presented arguments regarding the court's (i) jurisdiction, but failed to support its allegation of (c) jurisdiction. *See* Pl.'s Opp'n at 1, 7, 11. At oral argument, which the court heard on July 24, 2018, National Nail abandoned its allegation of (c) jurisdiction.[5] *See* Docket Entry, ECF No. 32; Oral Arg. Tr. at 106:17–20, ECF No. 33.

SUBJECT MATTER JURISDICTION

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

A plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the "motion challenges a complaint's

[3] Section 1673d(c)(5)(B) provides that when the dumping margins assigned to all individually-examined companies are zero, de minimis, or based on adverse facts available, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(B). As with § 1673d(c)(5)(A), this provision is also specific to antidumping investigations; however, Commerce relies on this approach in administrative reviews.

[4] For additional explanation regarding Commerce's decision regarding the all-others rate, see Issues and Decision Mem. for Certain Steel Nails from Taiwan, A-583–854 (Feb. 6, 2018) at 5 & nn.13–14, *available at* https://enforcement.trade.gov/frn/summary/taiwan/2018–02897–1.pdf (last visited Sept. 18, 2018).

[5] Accordingly, the court does not further address this jurisdictional basis.

allegations of jurisdiction, the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true." *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).[6] To "resolv[e] these disputed predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings." *Id.* (internal quotation marks and citation omitted).

In this case, the Government challenges the existence of jurisdiction. *See* Def.'s Mot. Therefore, the court may consider extrinsic evidence. *Shoshone Indian Tribe*, 672 F.3d at 1030.

DISCUSSION

Pursuant to 28 U.S.C. § 1581(i), the court possesses jurisdiction to hear "any civil action commenced against the United States, its agencies, 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." 28 U.S.C. § 1581(i)(2). Nevertheless, § 1581(i) "shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable [] by the Court of International Trade under section 516A(a) of the Tariff Act of 1930[, as amended, 19 U.S.C. § 1516a(a)] . . . ." 28 U.S.C. § 1581(i). "Section 1581(i) embodies a 'residual' grant of jurisdiction, and may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018).

The Government and Mid Continent contend that because (c) jurisdiction could have been available to National Nail had it participated in the underlying proceeding, (i) jurisdiction is unavailable. Def.'s Mot. at 7; Def.-Int.'s Resp. at 8. National Nail contends that it had no opportunity to file written argument on the issues presented in its complaint (in particular, Commerce's calculation of the all-others rate) because that issue did not arise until Commerce issued the *Final Results*. Pl.'s Opp'n at 8. According to National Nail, because no party raised arguments regarding the calculation of the all-others rate in the administrative case briefs, National Nail "had no opportunity to rebut a non-existent argument on this issue." *Id.* at 9. National Nail further contends that because the challenged issue

[6] In contrast, when the motion challenges the sufficiency of the pleadings, the court assumes that the allegations within the complaint are true. *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006).

first arose in the *Final Results*, any remedy available pursuant to 28 U.S.C. § 1581(c) "would have been manifestly inadequate." *Id.* at 15. In reply, the Government contends that National Nail misunderstands the concept of manifest inadequacy and has not shown that the remedy provided by 28 U.S.C. § 1581(c) would have been manifestly inadequate. Def.'s Reply Br. in Supp. of Mot. to Dismiss ("Def.'s Reply") at 7, ECF No. 31.

In assessing the relevant jurisdictional basis, the court must "look to the true nature of the action." *Sunpreme*, 892 F.3d at 1193 (quoting *Norsk Hydro Can.*, 472 F.3d at 1355) (denying (i) jurisdiction when the complaint sought the type of relief associated with review of an adverse scope ruling under the court's (c) jurisdiction and the plaintiff had not obtained such a scope ruling).Here, National Nail urges the court to find that certain aspects of the *Final Results* are unsupported by substantial evidence and otherwise not in accordance with law, and remand with instructions for Commerce to reconsider the all-others rate. *See* Compl. at 8–9 (prayer for relief). This is precisely the type of relief associated with a challenge to a determination reviewable pursuant to 19 U.S.C. § 1516a(a)(B)(iii), which is provided for in the court's (c) jurisdiction. 28 U.S.C. § 1581(c). National Nail could have taken steps to avail itself of this remedy by seeking to protect its rights through participation in the underlying administrative proceeding. *See* Def.'s Reply at 3 n.1.

It is well-settled that (i) jurisdiction is generally unavailable when (c) jurisdiction could have been available. *See, e.g.*, *Sunpreme*, 892 F.3d at 1191. The only exception is when the party asserting (i) jurisdiction is able to demonstrate that the remedy afforded by (c) jurisdiction would be manifestly inadequate. *See, e.g.*, *id.* National Nail's jurisdictional arguments, therefore, turn on its asserted inability to have raised this issue during the underlying administrative proceeding. Pl.'s Opp'n at 12–14; *see id.* at 12 (asserting that National Nail "*could not* have addressed the issue of whether Commerce acted lawfully in calculating the all-others rate based on an AFA rate" because Commerce did not calculate the all-others rate in that manner until the *Final Results*) (emphasis added).

As set forth above, Mid Continent urged Commerce not to use Unicatch's data to calculate its final antidumping duty margin and, instead, to assign Unicatch a margin based on adverse facts available. In light of the fact that the rate preliminarily assigned to Hor Liang and Romp (and, thus, National Nail's imports) was based solely on Unicatch's rate, National Nail could, and should, have anticipated

the possibility that its assigned rate might change in the final results and taken steps to timely protect its interests and put the agency on notice of its status and concerns.

National Nail posits the possibility that success in appeals filed by Unicatch and PT Enterprise regarding Commerce's use of adverse facts available may result in Commerce recalculating those companies' rates, the benefits of which National Nail might not be able to avail itself of absent jurisdiction over the instant appeal. Pl.'s Opp'n at 14. Without opining on the scope of separate challenges to Commerce's *Final Results*, the requirements for jurisdiction cannot be waived on equitable grounds. *See NEC Corp. v. United States*, 806 F.2d 247, 249 (Fed. Cir. 1986); *Brecoflex Co., L.L.C. v. United States*, 23 CIT 84, 87, 44 F. Supp. 2d 225, 228 (1999). The Federal Circuit's "cases make clear that mere allegations of financial harm do not render a remedy established by Congress manifestly inadequate." *Sunpreme*, 892 F.3d at 1193 (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)); *see also Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987). Rather, the predicate steps "must be an 'exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'" *Sunpreme*, 892 F.3d at 1193–94 (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008)). National Nail has failed to demonstrate that (c) jurisdiction would have been manifestly inadequate. Accordingly, the court lacks (i) jurisdiction to hear this case.

CONCLUSION AND ORDER

For the foregoing reasons, Defendant's Rule 12(b)(1) motion to dismiss this action for lack of subject matter jurisdiction (ECF No. 18) is **GRANTED**. Judgment will enter accordingly.

Dated: September 24, 2018
New York, New York

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

Slip Op. 18–126

INDUSTRIAL CHEMICALS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00177

[Granting Defendant's Motion to Dismiss.]

Dated: September 24, 2018

Robert T. Givens, Givens & Johnston, PLLC, of Houston, TX, for Plaintiff Industrial Chemicals, Inc.

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

OPINION

Choe-Groves, Judge:

Plaintiff Industrial Chemicals, Inc. ("Industrial Chemicals") brings this action pursuant to 28 U.S.C. § 1581(a) (2012), contesting the denial of its protest by U.S. Customs and Border Protection ("Customs"). Plaintiff argues that Customs improperly denied its protest regarding retroactive duty-free treatment for its merchandise under the Generalized System of Preferences ("GSP").

Before the court is the Motion to Dismiss filed by Defendant United States. *See* Def.'s Mot. Dismiss, Jan. 19, 2018, ECF No. 12 ("Def.'s Mot."). Defendant requests that the court dismiss the action for lack of subject matter jurisdiction under USCIT Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(6). *See id.* at 1. For the following reasons, the court grants Defendant's motion.

PROCEDURAL HISTORY

GSP provides duty-free treatment for eligible articles from certain "beneficiary developing countr[ies]," including India. 19 U.S.C. § 2461; *see also* General Note 4(a), Harmonized Tariff Schedule of the United States (2013) (listing India as a designed beneficiary developing country for GSP purposes). GSP expired on July 31, 2013. *See* Pub. L. No. 112–40, § 1, 125 Stat. 401, 401 (2011). During the lapse of GSP, Industrial Chemicals imported several entries of organic chemicals under Subheadings 2917.34.0150 and 2917.32.000 of the Harmonized Tariff Schedule of the United States. *See* Compl. ¶ 6, Oct. 16, 2017, ECF No. 6. Plaintiff imported the sixty-five entries of chemicals

at issue from India between August 4, 2013 and October 22, 2014. *See* Summons, July 11, 2017, ECF No. 1; Compl. ¶ 9. If GSP had been in effect at the time of entry, Plaintiff's merchandise would have been eligible for duty-free treatment. *See* Compl. ¶ 6.

Congress renewed GSP on June 29, 2015. *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 201, 129 Stat. 362, 371 (2015). The statute states, in relevant part:

> SEC. 201. EXTENSION OF GENERALIZED SYSTEM OF PREFERENCES.
>
> . . . .
>
> (b) EFFECTIVE DATE.—
>
> . . . .
>
> (2) RETROACTIVE APPLICATION FOR CERTAIN LIQUIDATIONS AND RELIQUIDATIONS.—
>
> (A) IN GENERAL.—Notwithstanding section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) or any other provision of law and subject to subparagraph (B), any entry of a covered article to which duty-free treatment or other preferential treatment under title V of the Trade Act of 1974 (19 U.S.C. 2461 et seq.) would have applied if the entry had been made on July 31, 2013, that was made—
>
> (i) after July 31, 2013; and
>
> (ii) before the effective date specified in paragraph (1), shall be liquidated or reliquidated as though such entry occurred on the effective date specified in paragraph (1).
>
> (B) REQUESTS.—A liquidation or reliquidation may be made under subparagraph (A) with respect to an entry only if a request therefor is filed with U.S. Customs and Border Protection not later than 180 days after the date of the enactment of this Act that contains sufficient information to enable U.S. Customs and Border Protection—
>
> (i) to locate the entry; or
>
> (ii) to reconstruct the entry if it cannot be located.

Id. The renewing legislation allowed importers to request retroactive application of GSP within 180 days after the date of the statute's enactment, which was December 28, 2015. *Id.*

Due to a misunderstanding between Industrial Chemicals and its customs broker, World Commerce, Industrial Chemicals did not sub-

mit its request for retroactive GSP treatment by the deadline. *See* Compl. ¶¶ 12–19. World Commerce sent a letter to Customs requesting a refund on February 2, 2016. *See id.* at ¶ 20; *see also* Compl. Ex. E. Customs returned the letter with a handwritten note at the bottom, stating that the agency could not process the request because it was submitted past the December 28, 2015 deadline. *See* Compl. Ex. F. Industrial Chemicals filed a protest, which Customs denied as untimely because it was not filed within 180 days after the date of liquidation. *See* Compl. Ex. G. Plaintiff initiated this action. *See* Summons; Compl.

ANALYSIS

Defendant moves first to dismiss Plaintiff's complaint for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1). *See* Def.'s Mot. 1.

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be without jurisdiction unless the contrary appears affirmatively from the record." *Daimler-Chrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (internal quotations omitted). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). The court must draw all reasonable inferences in the non-movant's favor when deciding a motion to dismiss. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

Plaintiff pleads jurisdiction on the basis of 28 U.S.C. § 1581(a), *see* Compl. ¶ 3, which grants this Court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). The Tariff Act establishes a process for the administrative review of protests. A party may protest a decision made by Customs within 180 days after the date of liquidation or reliquidation of the merchandise. 19 U.S.C. § 1514(c)(3)(a). The statute directs Customs to assess the protest in a timely manner. 19 U.S.C. § 1515. If a party requests accelerated disposition of a protest, Customs has thirty days to render a final decision. *Id.*; *see also* 19 C.F.R. § 174.22. A party may protest specific actions taken by Customs, as enumerated in the statute. 19 U.S.C. § 1514(a).

The question of jurisdiction turns on whether Plaintiff challenges a protestable decision made by Customs. Defendant proffers two arguments to support its motion to dismiss for lack of subject matter jurisdiction. To the extent that Plaintiff contests the liquidation of its entries, its protest was untimely because it was not filed within 180 days of liquidation of its entries. The court does not have jurisdiction over the invalid protest. In the alternative, Plaintiff contests Customs' refusal to issue the refund, as indicated in the handwritten note. The handwritten note is not a protestable decision. Although Customs makes certain decisions related to the liquidation or reliquidation of merchandise, the plain language of the statute does not appear to give Customs discretion in administering refunds for this particular lapse in GSP. The statute clearly states that importers must submit requests for retroactive application of GSP over certain entries by December 28, 2015. Plaintiff missed this deadline. Because Customs' refusal to process Plaintiff's refund is not a protestable decision under 19 U.S.C. § 1514(a), the court does not have jurisdiction over this action under 28 U.S.C. 1581(a), and this action is dismissed. Defendant's argument that Plaintiff has failed to state a claim upon which relief can be granted under USCIT Rule 12(b)(6) is moot.

CONCLUSION

For the aforementioned reasons, the court concludes that it does not have subject matter jurisdiction over Plaintiff's action under 28 U.S.C. § 1581(a). This action is dismissed.

Dated: September 24, 2018
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–128

ARLANXEO USA LLC and ARLANXEO BRASIL S.A., Plaintiffs, and INDUSTRIAS NEGROMEX, S.A. de C.V., INSA, LLC, KUMHO PETROCHEMICAL CO., LTD., and SYNTHOS S.A., Consolidated Plaintiffs, v. UNITED STATES AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendant, and LION ELASTOMERS LLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00247

[Denying Defendant's Motion to Sever and Dismiss the Complaint and Granting Consolidated Plaintiffs' Cross-Motion for Leave to Construe the Complaint as a Concurrently-Filed Summons and Complaint.]

Dated: September 26, 2018

William C. Sjoberg, Porter, Wright, Morris & Arthur, LLP, of Washington, D.C., for Consolidated Plaintiffs Industrias Negromex, S.A. de C.V. and INSA, LLC.

Jane C. Dempsey, Attorney, Office of General Counsel, U.S. International Trade Commission, of Washington, D.C., for Defendant U.S. International Trade Commission. With her on the brief were *Dominic Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Matthew T. McGrath, Barnes, Richardson & Colburn, LLP, of Washington, D.C., for Defendant-Intervenor Lion Elastomers LLC.

OPINION AND ORDER

Choe-Groves, Judge:

This consolidated action challenges the final affirmative material injury determination issued by the U.S. International Trade Commission ("Defendant," "ITC," or "Commission") in the antidumping duty investigation of emulsion styrene-butadiene rubber ("ESBR") from Brazil, Mexico, the Republic of Korea ("Korea"), and Poland. *See Emulsion Styrene-Butadiene Rubber From Brazil, Mexico, Korea, and Poland*, 82 Fed. Reg. 43,402 (Int'l Trade Comm'n Sept. 15, 2017); *see also Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland*, USITC Pub. 4717, Inv. Nos. 731-TA-1334–1337 (Aug. 2017), *available at* https://www.usitc.gov/publications/701_731/pub4717.pdf (last visited Sept. 21, 2018) ("USITC Pub. 4717"). Before the court are two motions. Defendant filed a Motion to Sever and Dismiss the Complaint Filed by Industrias Negromex, S.A. de C.V. and INSA, LLC (collectively, "Consolidated Plaintiffs" or "Industrias"). *See* Def. United States International Trade Commission's Mot. Sever & Dismiss Compl. Filed by Industrias Negromex, S.A. de C.V. & INSA, LLC, May 7, 2018, ECF No. 47; *see also* Mem. P. & A. Supp. Def. United States International Trade Commission's Mot. Sever &

Dismiss Compl. Filed by Industrias Negromex, S.A. de C.V. & INSA, LLC, May 7, 2018, ECF No. 47 ("Def.'s Mot."). Consolidated Plaintiffs filed a cross-motion for leave to construe their complaint as a concurrently-filed summons and complaint, or, alternatively, to amend their complaint. *See* Cross-Mot. Leave Construe Pls.' November 7, 2017 Compl. Concurrently Filed Summons & Compl. & Deem Summons & Compl. Filed November 7, 2017, or, Alternatively, Cross-Mot. Leave Amend Pls.' November 7, 2017 Compl. & Deem Recaptioned Summons & Compl. Filed November 7, 2017 & Resp. Def.'s Mot. Sever & Dismiss, June 5, 2018, ECF No. 50 ("Pls.' Cross-Mot."). For the following reasons, the court denies Defendant's motion and grants Consolidated Plaintiffs' cross-motion.

PROCEDURAL HISTORY

After conducting an investigation, the ITC determined that an industry in the United States had been materially injured by reason of imports of ESBR from Brazil, Korea, Mexico, and Poland. *See* USITC Pub. 4717 at 1. The ITC's final material injury determination was published in the Federal Register on September 15, 2017. *See Emulsion Styrene-Butadiene Rubber From Brazil, Mexico, Korea, and Poland*, 82 Fed. Reg. at 43,402.

Industrias filed their summons on October 10, 2017 and filed their complaint on November 7, 2017. Industrias pled jurisdiction on the basis of 28 U.S.C. § 1581(c) (2012), which grants the court exclusive jurisdiction over any civil action commenced to contest a final determination made by the ITC. The court consolidated four cases challenging the ITC's final determination on February 9, 2018. *See* Order, Feb. 9, 2018, ECF No. 35.

Defendant filed a motion to dismiss on May 3, 2018, alleging that the court does not have jurisdiction because Industrias initiated their case prematurely, before the statutory filing deadline. *See* Def.'s Mot. 1. Industrias filed a cross-motion in response, requesting that the court construe their complaint as a concurrently-filed summons and complaint. *See* Pls.' Cross-Mot. 1. Defendant-Intervenor Lion Elastomers LLC supports Defendant's motion. *See* Def.-Intervenor Lion Elastomers LLC's Resp. Def.'s Mot. Sever & Dismiss Compl. Filed by Industrias Negromex, S.A. de C.V., INSA, LLC, & Resp. Cross-Mot. Filed by Industrias Negromex, S.A. de C.V., INSA, LLC 1–2, June 11, 2018, ECF No. 51; Mem. P. & A. Supp. Def.-Intervenor Lion Elastomers LLC's Supp. Def.'s Mot. Sever & Dismiss Compl. Filed by Industrias Negromex, S.A. de C.V. & INSA, LLC, & Deny Cross-Mot. Filed by Industrias Negromex, S.A. de C.V. & INSA, LLC 1–2, June 11, 2018, ECF No. 51 ("Def.-Intervenor's Br.").

ISSUES PRESENTED

The court reviews the following issues:

1. Whether the statutory time limits set forth in 19 U.S.C. § 1516a deprive the court of jurisdiction to hear the claims brought by Consolidated Plaintiffs; and
2. Whether equitable considerations favor allowing Consolidated Plaintiffs to construe their complaint as a concurrently-filed summons and complaint.

ANALYSIS

I. Defendant's Motion to Sever and Dismiss the Complaint

Defendant and Defendant-Intervenor contend that the statutory time limits set forth in 19 U.S.C. § 1516a(A)(5) are jurisdictional in nature, and that Consolidated Plaintiffs' premature initiation of their action divests the court of jurisdiction. *See* Def.'s Mot. 3–4; Def.-Intervenor's Br. 3–4. Publication in the Federal Register occurred on September 15, 2017. Industrias initiated their case twenty-five days afterwards, on October 10, 2017. By statute, the first possible day for Industrias to file their summons was thirty-one days after publication in the Federal Register, on October 16, 2017. Because Industrias filed too early, Defendant argues that the court did not have subject matter jurisdiction over the action at the time of filing, the United States has not waived its sovereign immunity, and therefore the court must dismiss the case. *See* Def.'s Mot. 6–7. Consolidated Plaintiffs argue that because the time limits at issue are not jurisdictional, but rather claim-processing rules, the court should construe the complaint as a concurrently-filed summons and complaint. *See* Pls.' Mot. 7–17.

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be without jurisdiction unless the contrary appears affirmatively from the record." *Daimler-Chrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (internal quotations omitted). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore bears the burden of establishing it. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The Court is empowered to hear civil actions brought against the United States pursuant to the specific grants of jurisdiction enumerated under 28 U.S.C. § 1581(a)–(i). The court must draw all reasonable inferences in the non-movant's favor when deciding a motion to dismiss. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

28 U.S.C. § 1581(c) grants the Court with jurisdiction to decide actions contesting a final determination in an antidumping or countervailing duty investigation, as described in 19 U.S.C. § 1516a(a)(2)(B). When a final determination involves merchandise imported from a North American Free Trade Agreement country, an action may not be commenced in the Court until the thirty-first day after which the notice of the determination is published in the Federal Register. *See* 19 U.S.C. § 1516a(a)(5)(A). The tolled time frame applies to merchandise imported from Mexico. *See id.* at § 1516a(a)(f)(10)(B). "A civil action contesting a reviewable determination listed in [19 U.S.C. § 1516a] is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section." 28 U.S.C. § 2636(c).

The Supreme Court of the United States has established a "readily administrable bright line" when analyzing whether a time limit is jurisdictional or nonjurisdictional:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Arbaugh v. Y&H Corp., 546 U.S. 500, 502 (2006) (citations and footnote omitted). This "clear-statement rule" continues to apply to cases "not involving the timebound transfer of adjudicatory authority from one Article III court to another," or, in other words, to an appeal. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 n.9 (2017).

> A rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional. . . . In determining whether Congress intended a particular provision to be jurisdictional, we consider context . . . as probative of Congress' intent. Even so, in applying the clear statement rule, we have made plain that most statutory time bars are nonjurisdictional.

Id. (internal citations and quotations omitted).

If a time limit rule is jurisdictional in nature, then "a litigant's failure to comply with the bar deprives a court of all authority to hear a case," and the court must dismiss the action. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015). "Given those harsh consequences," Defendant carries a high burden to show that the provision

at issue is jurisdictional. *Id.* at 1632. Defendant must prove that Congress clearly intended for the rule to be jurisdictional in nature through traditional tools of statutory construction, including consideration of the provision's text, context, and historical treatment. *Id.*; *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824–25 (2013). "[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional.'" *Auburn Reg'l*, 133 S. Ct. at 824 (quoting *Arbaugh*, 546 U.S. at 516).

The text of 19 U.S.C. § 1516a does not contain any explicit language construing the statute's time periods as jurisdictional. *See* 19 U.S.C. § 1516a; *see also Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1328, 1334 (2015) ("*Icdas*"); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1300, 1306 (2012). With regard to context, it is notable that the timing provision is contained within Title 19 of the U.S. Code, whereas the Court's grant of subject matter jurisdiction is specified in Title 28 of the U.S. Code. *Compare* 19 U.S.C. § 1516a *with* 28 U.S.C. § 1581. This separation indicates an intent to distinguish the time limits from the Court's authority to hear cases. *See Icdas*, 39 CIT at __, 106 F. Supp. 3d at 1334.

As for historical treatment of 19 U.S.C. § 1516a, Defendant relies on two cases from the U.S. Court of Appeals from the Federal Circuit to support its argument that the timing requirements listed in the statute are jurisdictional in nature. *See* Def.'s Mot. 6 (citing *Georgetown Steel Corp. v. United States*, 891 F.2d 1308, 1312–13 (Fed. Cir. 1986); *NEC Corp. v. United States*, 806 F.2d 247, 248 (Fed. Cir. 1986)). Defendant's position is untenable in light of the U.S. Supreme Court's recent decisions. The court in *Icdas* examined U.S. Supreme Court cases decided after *Georgetown Steel Corp.* and *NEC Corp.* and found that the U.S. Supreme Court's clear pronouncements undercut the holdings of those two cases. The court finds similarly with the court in *Icdas* and concludes that the time limits in 19 U.S.C. § 1516a are nonjurisdictional in nature based on an analysis of the text, context, and historical treatment of the statute.

II. Consolidated Plaintiffs' Cross-Motion for Leave to Construe the Complaint as a Concurrently-Filed Summons and Complaint

Because the time limits in 19 U.S.C. § 1516a do not divest the court of jurisdiction, the court now considers whether to grant Consolidated Plaintiffs' Cross-Motion for leave to construe the complaint as a concurrently-filed summons and complaint.

Under the Rules of the Court, if a plaintiff seeks to amend its complaint more than twenty-one days after service of the complaint,

the complaint may be amended only with the opposing party's written consent or the court's leave, and the court should freely give leave when justice so requires. USCIT R. 15(a)(2). Granting a litigant leave to amend a complaint lies within the discretion of the court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Supreme Court has provided the following guidance regarding the circumstances in which a plaintiff should not be afforded an opportunity to amend a complaint:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."[1]

Foman, 371 U.S. at 182.

USCIT Rule 3 allows for the amendment of a summons at any time on such terms as the court deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed. USCIT R. 3(e). The language present in USCIT Rule 3 is similar to the equitable and lenient standard applicable to amending a complaint under USCIT Rule 15. *See Icdas*, 39 CIT at __, 106 F. Supp. 3d at 1332. The Rules of the Court require pleadings to be construed so as to do justice. USCIT R. 8(f).

The interests of justice favor granting Industrias' motion. The court in *Icdas* held that early notice of an action is "something that is hard to characterize as prejudicial." *Icdas*, 39 CIT at __, 106 F. Supp. 3d at 1332. Similarly here, Industrias' early filing of their summons provided Defendant and interested parties with early notice of their challenge to the Commission's final determination. If Consolidated Plaintiffs are not permitted to amend their pleadings, then they are

[1] The Rules of the Court are, to the extent practicable, in conformity with the Federal Rules of Civil Procedure. The Rules of the Court at times deviate from the Federal Rules of Civil Procedure where required to tailor the rules to the actions ordinarily brought before the Court. *See, e.g.*, USCIT R. 56.2. Except for minor differences in USCIT Rule 15(c)(2), USCIT Rule 15 is identical to Rule 15 of the Federal Rules of Civil Procedure. *Compare* USCIT R. 15 *with* Fed. R. Civ. P. 15.

foreclosed from seeking judicial relief. The court concludes that Consolidated Plaintiffs have met the equitable standard to amend their complaint.

CONCLUSION

For the above-mentioned reasons, the court concludes that the time limits prescribed in 19 U.S.C. § 1516a are nonjurisdictional in nature and that the facts of this case justify allowing Consolidated Plaintiffs to amend their pleadings. Accordingly, upon consideration of Defendant's motion and Consolidated Plaintiffs' cross-motion, and all other papers and proceedings in this action, it is hereby

ORDERED that Defendant's motion is denied; and it is further

ORDERED that Consolidated Plaintiffs' motion is granted. The summons and complaint filed by Industrias shall be deemed concurrently filed.

Dated: September 26, 2018
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE