U.S. Customs and Border Protection

Slip Op. 13–144

BELIMO AUTOMATION A.G., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 10–00113

[The court finds that the subject imports were properly classified as "electric motors" under HTSUS 8501.10.40 and that they are not classified under HTSUS 9032.89.60. Accordingly, the court denies Plaintiff's motion for summary judgment and grants Defendant's cross motion for summary judgment.]

Dated: November 26, 2013

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OPINION

Barnett, Judge:

The case is before the court on cross-motions for summary judgment. Belimo Automation A.G. ("Belimo") contests the denial of its protest in which U.S. Customs and Border Protection ("Customs") classified the subject imports under subheading 8501.10.40 of the Harmonized Tariff Schedule of the United States ("HTSUS") (2007) as electric motors. Belimo contends in its motion for summary judgment that Customs should have classified the subject imports under HTSUS 9032.89.60 as automatic regulating or controlling apparatuses because each incorporates an application specific integrated circuit (ASIC). Defendant United States asserts in its cross-motion that Customs correctly classified the subject imports under HTSUS 8501.

No genuine issues of material fact exist regarding properties of the subject imports and how they operate. Thus, the sole issue before the

court is whether, as a matter of law, the subject imports were properly classified under HTSUS 8501 as "electric motors" or whether they should be classified under HTSUS 9032 as "automatic regulating and controlling instruments and apparatus."[1] For the reasons below, the court holds that Customs correctly classified the subject imports as "electric motors" subject to HTSUS 8501 and, therefore, denies Belimo's motion for summary judgment and grants Defendant's cross-motion for summary judgment.

BACKGROUND AND PROCEDURAL HISTORY

A. *Overview of the Subject Imports*

The subject imports are principally used in HVAC systems, which heat and cool spaces within buildings. (Def.'s Cross Mot. Summ. J. (hereinafter "Def.'s Cross Mot.") 2–3; Pl.'s Statement of Material Facts Not in Issue (hereinafter "Pl.'s Statement of Facts") ¶¶ 12–13.) Each consists of an electric motor, gears, and two printed circuit boards (PCBs), one of which is an ASIC, within a plastic or metal housing unit.[2] (Def.'s Cross Mot. 2; Pl.'s Statement of Facts ¶ 9.) The ASIC connects to and monitors the electric motor. (Def.'s Cross Mot. 5–6; Pl.'s Statement of Facts ¶¶ 31–32.) The motor, in turn, connects to and moves the gears. (Def.'s Cross Mot. 7; Pl.'s Statement of Facts ¶ 27.) The gears link the subject imports to an external mechanism that opens or closes a damper or a valve when the gears turn. (Def.'s Cross Mot. 1, 3, 7; Pl.'s Statement of Facts ¶¶ 26, 36, 41; Fairfax Dep. 30:14–25, June 5, 2012; Martinelli Dep. 83:17–22, 84:10–22, June 5, 2012.)

B. *Operation of an HVAC System*

An HVAC system typically includes sensors that measure the ambient air temperature of spaces in a building. (Def.'s Cross Mot. 3; Pl.'s Statement of Facts ¶ 15; Martinelli Dep. 24:1524:23.) A central

[1] If the court determines that neither proposed heading applies to the subject imports, the court must identify the appropriate heading. *EOS of N. Am., Inc. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1311, 1317 (2013) (quoting *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)); *see also Latitudes Int'l Fragrance, Inc. v. United States*, 37 CIT __, __, 931 F. Supp. 2d 1247, 1252 (2013).

[2] Certain models of the subject imports also incorporate a spring mechanism. (Def.'s Cross Mot. 1 (accepting Plaintiff's Statement of Facts unless otherwise noted); Pl.'s Statement of Facts ¶ 10.) This fact is not material to the analysis. In addition, Belimo claims that the subject imports contain a hollow shaft connecting it to an external damper or valve, while Defendant claims the hollow shaft is a gear. (Def.'s Cross Mot. 1; Pl.'s Statement of Facts ¶ 27 n.1.) This difference is also not material to resolution of this case.

controller[3] receives and processes signals from temperature sensors and compares those signals to a pre-set, desired temperature for a given space. (Def.'s Cross Mot. 3; Pl.'s Statement of Facts ¶¶ 14(a)-(f), 16; Fairfax Dep. 108:19–109:2; Martinelli Dep. 24:15–26:4, 29:23–30:5.) The central controller then signals to a motor[4] to reposition an attached valve to change the amount of heated or cooled water that can flow through a water handling unit that serves that space. (Def.'s Cross Mot. 1–3; Pl.'s Mot. Summ. J. (hereinafter "Pl.'s Mot.") 1–4; Pl.'s Statement of Facts ¶¶ 16–17, 21–23, Fairfax Dep. 30:15–25, 62:18–63:17; Martinelli Dep. 20:4–23:21, 25:20–26:8, 40:3–18.) The temperature of the water in the water handling units affects the air temperature within air handling units that also serve that space. (Def.'s Cross Mot. 1–3; Pl.'s Mot. 1–4; Pl.'s Statement of Facts ¶¶ 14b and c, 17–20; Martinelli Dep. 20:4–23:21, 25:20–27:7, 40:3–18.) Meanwhile, the central controller signals to a motor to reposition an attached damper to change the amount of heated or cooled air that can flow through the ductwork into the space that the air handling units serve. (Def.'s Cross Mot. 1–4; Pl.'s Mot. 1–4; Fairfax Dep. 62:7–63:17; Martinelli Dep. 26:25–27:18, 29:23–30:23.)

C. *Operation of a Traditional HVAC System as Compared to One that Incorporates the Subject Imports*

Compared to traditional HVAC systems, an HVAC system that incorporates the subject imports can more precisely and consistently control the motor used to position dampers or valves. (Def.'s Cross Mot. 4; Fairfax Dep. 30:14–25, 113:2–9.) In a traditional HVAC system, the central controller conveys the position signal directly to the motor, which turns until it triggers a switch that indicates the requested position has been reached. (Def.'s Cross Mot. 5; Martinelli Dep. 32:2–8.) In a system incorporating the subject imports, the central controller sends the position signal to the ASIC, which serves as a sophisticated version of the switch in the traditional HVAC system. (Def.'s Cross Mot. 5; Pl.'s Statement of Facts ¶¶ 29–32; *see* Martinelli Dep. 29:23–30:23.) The ASIC connects to and monitors the

[3] An HVAC system typically has multiple central controllers, usually one per floor. (*See* Def.'s Cross Mot. 1–3; Pl.'s Statement of Facts ¶ 14(a)-(f); Fairfax Dep. 61:10–62:15; Martinelli Dep. 25:8–15; 94:18–95:9, 96:4–7.)

[4] A single central controller often controls multiple motors. (*See* Def.'s Cross Mot. 1–3; Pl.'s Statement of Facts ¶¶ 14(e)-(f), 16, 31–32; Fairfax Dep. 61:16–22; Martinelli Dep. 25:8–15; 94:18–95:9, 96:4–7.) In an HVAC system that incorporates the subject imports, the subject imports take the place of the simple electric motors and receive the central controller's signals. (Def.'s Cross Mot. 5; Pl.'s Statement of Facts ¶¶ 32, 39–40.)

position of the motor.[5] (Def.'s Cross Mot. 5–6; Pl.'s Statement of Facts ¶¶ 31–32; Pl's Mot. 9.) By monitoring the motor's position, the ASIC can calculate the position of the gears in the subject merchandise, which corresponds to the position of the attached valve or damper. (Def.'s Cross Mot. 7; Pl.'s Statement of Facts ¶¶ 37–38; Martinelli Dep. 29:15–23; Martinelli Affirm ¶¶ 7–8, July 9, 2012 (correcting statements in deposition testimony).) The ASIC compares the calculated gear position with the desired position that it received from the central controller. (Def.'s Cross Mot. 5–6; Pl.'s Statement of Facts ¶ 39; Martinelli Dep. 62:11–63:10; Martinelli Affirm ¶¶ 7–8.) It then calculates the motor operation required to rotate the gears so that the damper or valve will move to the desired position. (Def.'s Cross Mot. 7; Pl.'s Statement of Facts ¶¶ 39–40.) The ASIC then activates the motor, thereby turning the gears in the subject imports and repositioning the damper or valve until it reaches the desired position. (Def.'s Cross Mot. 5–7; Pl.'s Statement of Facts ¶¶ 32–33, 38–40; *see* Martinelli Dep. 30:6–30:14.)

D. *The ASIC's Independent Control Functions*

The ASIC also performs certain functions independently. For example, it monitors the subject imports' motor periodically and continuously, even absent a signal from the central controller. (Def.'s Cross Mot. 5–6; Pl.'s Statement of Facts ¶¶ 37, 42; Martinelli Dep. 51:6–19; Martinelli Affirm ¶¶ 5, 7, 10.) Using the inputs from this monitoring, the ASIC can independently prevent and reverse unintended movement from the desired position. (Def.'s Cross Mot. 5–7; Pl.'s Statement of Facts ¶¶ 42, 45.) Additional examples of the ASIC's independent functions include its ability to adapt to receive an AC or DC signal from the controller, filter out unintended electric signals, and use stored energy to prevent the motor from spinning out of control when the power fails. (Def.'s Cross Mot. 1 (accepting statements of fact in Pl.'s Mot. 8–15 unless otherwise noted); Pl.'s Mot. 12–15.)

[5] Different models of the subject imports employ different methods to monitor the electric motor. (Def.'s Cross Mot. 1 (accepting statements of fact on pages 8–15 of Belimo's motion for summary judgment unless otherwise noted); Pl.'s Mot. 9; Fairfax Dep. 45:7–46:10; 58:18–60:9; 86:13–87:22; 101:6–115:15.) The ASIC in most models detects "back electromotive force," which enables it to count the motor's electrical signals. Other models of the subject merchandise use a potentiometer, a position sensor located outside the ASIC that measures electrical resistance as a function of motor rotation and sends that measurement to the ASIC. Other models incorporate a "Hall Sensor" that monitors the motor's magnetic field. (Def.'s Cross Mot. 1; Pl.'s Mot. 8–9.) In all models, the ASIC translates a measurement of the motor into the "percent opening" of the attached damper or valve. (Def.'s Cross Mot. 1; Pl.'s Mot. 8–9, n.12.) The differences in the subject imports' motor monitoring methods are not material to the court's analysis.

E. *The Subject Imports Do Not Measure or Calculate External Variables*

Despite these independent control functions, the subject imports can only monitor the position of the motor and calculate the position of the incorporated gears. (Def.'s Cross Mot. 7; Pl.'s Statement of Facts ¶¶ 31–32, 36–39; Fairfax Dep. 67:2–8, 93:12–25.) The subject imports do not incorporate a temperature sensor, measure temperature or any variable of airflow or of a liquid, or compare such an external measurement to a predetermined value. (Def.'s Cross Mot. 7; Fairfax Dep. 51:6–14, 55:11–56:4; Martinelli Dep. 52:20–53:13, 77:21–78:3.) Instead, the subject imports position their incorporated motor and gears in response to a signal received from the central controller, thereby affecting the position of an attached damper or valve. (Def.'s Cross Mot. 13; Martinelli Dep. 84:10–22, 86:4–87:22.)

F. *Procedural History*

The subject imports entered the United States between February 9, 2007 and February 26, 2007. Customs liquidated them between December 21, 2007 and January 11, 2008 under HTSUS 8501. Belimo timely filed a protest of this classification decision on June 17, 2008. On September 18, 2009, Customs confirmed that the subject imports fall under HTSUS 8501 as electric motors. HQ H044560 (Sept. 18, 2009). Belimo now challenges the denial of its protest. The parties have fully briefed the issues, and the court now rules on their respective motions for summary judgment.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1581(a). The court may grant summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(a); *see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The court's review of a classification decision involves two steps. First, it must determine the meaning of the relevant tariff provisions,

which is a question of law. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). Second, it must determine whether the merchandise at issue falls within a particular tariff provision as construed, which is a question of fact. *Id.* When no factual dispute exists regarding the import, resolution of the classification turns solely on the first step. *See id.* ; *see also Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999).

While the court accords deference to Customs classification rulings relative to their "power to persuade," *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)).

DISCUSSION

The General Rules of Interpretation ("GRIs") provide the analytical framework for the court's classification of goods. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). "The HTSUS is designed so that most classification questions can be answered by GRI 1 . . . ." *Telebrands Corp. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1277, 1280 (2012). GRI 1 states that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." HTSUS, GRI 1. The court must consider chapter and section notes of the HTSUS in resolving classification disputes because they are statutory law, not interpretive rules. *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999).

"Absent contrary legislative intent, HTSUS terms are to be 'construed (according) to their common and popular meaning.'" *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999). "Courts may rely upon their own understanding of terms and/or consult dictionaries, encyclopedias, scientific authorities, and other reliable information." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988); *BASF Corp. v. United States*, 35 CIT __, __, 798 F. Supp. 2d 1353, 1357 (2011). For additional guidance on the scope and meaning of tariff headings and notes, the court also may consider the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization. *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992). Although ENs do not bind the court's analysis, they are "indicative of proper interpretation" of the tariff schedule. *Id.*

(quoting H.R. Rep. No. 100–576, at 549 (1988) (Conf. Rep.), *reprinted in*, 1988 U.S.C.C.A.N. 1547, 1582) (internal quotation marks omitted); *see also E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003)).

A. *Competing Tariff Headings*

Customs determined that the subject imports fall under HTSUS 8501.10.40 while Belimo asserts that they fall under HTSUS 9032.89.60. These provisions state as follows:

8501	Electric motors and generators (excluding generating sets):	
	8501.10	Motors of an output not exceeding 37.5 W:
		Of under 18.65 W:
	8501.10.40	Other
9032	Automatic regulating and controlling instruments and apparatus; parts and accessories thereof:	
	9032.89	Other:
	9032.89.60	Other

Belimo alleges that the subject imports are not "simple motors" of the type covered by HTSUS 8501. (Pl.'s Mot. 1.) Rather, Belimo argues that the subject imports should be categorized under HTSUS 9032 because each incorporates an ASIC, which allows the subject imports to automatically control air flow by controlling motor operation and thus the opening and closing of attached dampers and valves. (Pl.'s Mot. 1.) Defendant responds that the subject imports are classified under HTSUS 8501 because they are electric motors. (Def.'s Cross Mot. 11.) Defendant further argues that the ASIC does not remove the subject imports from this provision because HTSUS 8501 covers electric motors that incorporate additional components and because the principal function of the subject imports is to serve as electric motors. (Def.'s Cross Mot. 11.)

B. *HTSUS 9032.89.60*

HTSUS 9032 covers "(a)utomatic regulating and controlling instruments and apparatus." According to Chapter 90 Note 7(a), Heading 9032 applies to:

> Instruments and apparatus for automatically controlling the flow, level, pressure or other variables of liquids or gases, or for automatically controlling temperature, whether or not their operation depends on an electrical phenomenon which varies ac-

> cording to the factor to be automatically controlled, which are designed to bring this factor to, and maintain it at, a desired value, stabilized against disturbances, by constantly or periodically measuring actual value . . . .

Belimo interprets this Note as requiring an apparatus to control two distinct things, a "variable" of liquids, gases, or temperature, and a "factor" that impacts that variable. Belimo argues that the "factor" cannot refer to flow, temperature, or another variable of liquid or gas because a variable of liquid or gas cannot vary in direct relation to an electrical phenomena, as the Note requires. (Pl.'s Mot. 21–22.) In contrast, the subject imports can automatically control the position of an attached damper or valve through an "electrical phenomenon," which it identifies as the operation of the electric motor and the corresponding rotation of the gears. (Pl.'s Mot. 22.) Belimo further urges that the definition of "factor" is "a fact or situation that influences a result," not the result itself.[6] (Pl.'s Mot. 22 (citing Cambridge Dictionary, *available at* www.dictionary.cambridge.org/dictionary/american-english (last visited Oct. 30, 2013).) It reasons that the subject imports' control over the position of a damper or valve influences the flow of liquid or gas, thereby satisfying the terms of the Note. Thus, under Belimo's interpretation, the subject imports satisfy the Note's terms by automatically controlling air flow (the "variable") through their automatic control of an attached damper or valve (the "factor"). (Pl.'s Mot. 21–22.)

Defendant responds that "the factor to be automatically controlled" is simply shorthand for "flow, level, pressure or other variables of liquids or gases, or . . . temperature." (Def.'s Cross Mot. 18–19.) Because "factor" and "variable" refer to the same thing, Defendant contends that the subject imports cannot satisfy HTSUS 9032 because they do not automatically control a variable of liquids, gases, or temperature. (Def.'s Cross Mot. 18–19.)

The plain language of the Note conforms to Defendant's interpretation – that the terms "variable" and "factor" are synonymous. The word "factor" is modified by a definite article, which indicates that

[6] Belimo also offers expert testimony that "factor" cannot be synonymous with "variable" in scientific usage. (*See, e.g.*, Fairfax Dep. 70:15–71:22, 73:13–20; 77:15–20.) However, the definitions of "factor" and "variable" in the context of this Note speak to statutory interpretation, which is a question of law for the court, and the court is not persuaded by the expert's technical view of this statutory language. *Goldhofer Trailers USA, Inc. v. United States*, 7 CIT 141, 142 (1984) (citing *Am. Express Co. v. United States*, 39 C.C.P.A. 8, 10 (1951)); *EOS*, 37 CIT at __, 911 F. Supp. 2d at 1322.

"factor" refers to something identified earlier in the passage. *Warner-Lambert*, 316 F.3d at 1356 ("[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'") (internal quotation marks omitted); Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary (defining "the" as "used to indicate a person or thing that has already been mentioned or seen or is clearly understood from the situation"). In this case, the only syntactically plausible antecedent for "factor" is "variable."

Further, identical language modifies the two terms. The instrument is "for automatically controlling the . . . variables," and the "factor" is "automatically controlled." The language surrounding the terms thus suggests that the drafters intended "factor" to be shorthand for the previously specified variables. Indeed, the definitions of "variable" and "factor" overlap. The American Heritage Science Dictionary defines "variable" as a "*factor* or condition that is subject to change." American Heritage Science Dictionary, The American Heritage® Science Dictionary (2010), *available at* http://science.yourdictionary.com (last visited Oct. 30, 2013) (emphasis added). Similarly, a non-science dictionary defines "variable" as "something that may or does vary; a variable feature or *factor*." Dictionary.com, *available at* http://dictionary.com (last visited Oct. 30, 2013) (emphasis added). While Belimo offers definitions in which "factor" does not define "variable," the range of definitions demonstrates that the terms may be used synonymously or, as in this case, one may be used as a shorthand for the other, when that other is extensively modified. Thus, the court finds that "factor," as used in Chapter 90, Note 7(a), necessarily refers to a variable of liquid, gas, or temperature, not to damper or valve position, as Belimo contends.

The cases that Belimo cites do not support its interpretation of Note 7(a). Neither case discusses the definitions of "variable" or "factor." In *Applied Biosystems v. United States*, the court evaluated whether HTSUS 9032 fully described a product that combined equipment that heated and cooled, a sensor for measuring temperature, and a controller that directed heating and cooling. 34 CIT __, __, 715 F. Supp. 2d 1327, 1330 (2010). The court concluded that HTSUS 9032 does not cover the equipment that heated and cooled. *Id.* at __, 715 F. Supp. 2d at 1334–36. Likewise, in *Whirlpool Corp. v. United States*, the court considered whether the presence of a defrost timer removed a refrigerator subassembly that also included a thermometer from HTSUS 9032. 31 C.I.T. 1147, 1150–51 (2007). The court never discussed

whether there is a distinction between a "variable" and a "factor." *See generally id.* It simply concluded that the subassembly automatically regulated temperature because it included a thermometer to measure temperature and a defrost timer that powered a heater when a compressor had run for a predetermined time. *Id.* at 1151–53.

The EN accompanying HTSUS 9032 reinforces the conclusion that the subject imports do not fall under HTSUS 9032 because they do not measure any variable of air flow, a liquid, or temperature. EN 9032(1) states that a product falling under HTSUS 9032 should consist of:

> (a) A device for measuring the variable to be controlled (pressure or level in a tank, temperature in a room, etc.); in some cases, a simple device which is sensitive to changes in the variable (metal or bi-metal rod) may be used instead of a measuring device.
>
> (b) A control device which compares the measured value with the desired value and actuates the device in (c) below accordingly.
>
> (c) A starting, stopping or operating device.

Explanatory Note to 9032, HTSUS. Belimo argues that the subject imports satisfy all three criteria. However, the subject imports do not include a device for measuring temperature or any other variable of liquid or gas. (Def.'s Cross Mot. 7; Fairfax Dep. 51:6–14, 55:11–56:4; Martinelli Dep. 77:21–25, 78:2–3.)

The error in Belimo's reasoning is most clear when considering EN 9032(1) subsection (a) in conjunction with subsection (b), which requires an import to include a control device that compares the measured value with the desired value. Together, the language of these subsections indicates that a product meeting the criteria of HTSUS 9032 must measure the value of the temperature or the flow, level, pressure, or other variable of a liquid or gas. Here, however, the subject imports do not measure one of these variables. (Def.'s Cross Mot. 7; Fairfax Dep. 51:6–14, 55:11–56:4; Martinelli Dep. 77:21–78:3.) Instead, they receive a signal which they interpret to determine a setting for the damper or valve, control a motor to move the damper or valve to that setting, and monitor the motor to ensure that the damper or valve remains at that setting. (Def.'s Cross Mot. 4–7; Pl.'s Statement of Facts ¶¶ 29–33, 37–40, 42, 45; Pl's Mot. 9; Fairfax Dep. 92:23–93:8, 113:2–9; Martinelli Dep. 29:15–30:23, 51:6–19, 62:11–63:10; Martinelli Affirm ¶¶ 5, 7–8, 10.) While the internal

monitoring of the motor position may ensure more reliable positioning of the damper or valve being controlled by the subject imports, at no point do the subject imports measure the variable (i.e., the temperature, flow, pressure or otherwise) sought to be controlled and make adjustments as a result of comparing such external measurements to the desired temperature, flow, pressure or otherwise. (Def.'s Cross Mot. 5–7, 13–14; Pl.'s Statement of Facts ¶¶ 37–39, 42; Martinelli Dep. 77:21–78:3; Fairfax Dep. 51:6–14, 55:11–56:4.)[7] Accordingly, the subject imports are not classifiable as "automatic regulating and controlling instruments and apparatus" under HTSUS 9032.

C. *HTSUS 8501.10.40*

In contrast, the subject imports are properly classified under HTSUS 8501, covering "electric motors." According to the related EN, "electric motors" are "machines for transforming electrical energy into mechanical power."[8] Explanatory Note to 8501, HTSUS. Here, the subject imports receive an electronic signal from the central controller and use the mechanical power from the incorporated motor and gears to move an attached damper or valve. (Def.'s Cross Mot. 1, 3, 5–7; Pl.'s Statement of Facts ¶¶ 26–27, 29–33, 36, 38–41; Fairfax Dep. 30:14–25; Martinelli Dep. 29:23–30:14, 83:17–22, 84:10–22.) The subject imports thus satisfy the definition of an "electric motor" to be classified under Heading 8501.

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[7] Because the subject imports fail to meet the criteria of EN 9032(1)(a) and (b), the court need not determine whether they satisfy the requirement in EN 9032(1)(c) that they include a starting, stopping, or operating device.

Belimo also asserts that the subject imports are also known as HVAC "draft regulators" or "oven draught regulators" when they are used to regulate or control the operation of a furnace or boiler by automatically measuring and regulating the position of the moveable mechanism of a valve or damper that affects the flow of air or fluid (e.g., water or liquid fuel to the boiler) "by reference to the temperature, pressure, etc." (Pl.'s Statement of Facts ¶ 46; Pl.'s Mot. 27–28 (citing EN 9032(1)(F).) The EN to HTSUS 9032 indicates that oven draft regulators are an example of an automatic control instrument that satisfies Note 7(a) and thus fall under Heading 9032. Explanatory Note to 9032, HTSUS ("This group includes . . . (F) Oven-draught regulators are used, for example, in central heating or air conditioning plants to control automatically the air intake by reference to the temperature, pressure, etc."). However, the subject imports do not meet the criteria for EN 9032(a) or (b) and do not qualify as "oven draft regulators."

[8] The parties agree that the subject imports would be classified as electric motors under HTSUS 8501 if each did not include an ASIC (Def.'s Cross Mot. 26; *see* Pl.'s Mot. 29–31 (stating that ASIC removes subject imports from HTSUS 8501 covering electric motors); *see also* Belimo's Legal Basis of Protest and Application for Further Review, Martinelli Dep. Ex. C at 16 (conceding that "without the ASIC electronics [the subject imports] likely would be classifiable as electric motors under HTSUS heading 8501").)

The fact that the subject imports incorporate an ASIC does not remove them from the provision. Heading 8501 is an *eo nomine* provision, meaning that it includes "all forms" of "electric motors," even those equipped with additional components, absent limiting language or contrary legislative intent. *Nidec Corp. v. United States*, 68 F.3d 1333, 1336–37 (Fed. Cir. 1995); *see also Nat'l Advanced Sys. v. United States*, 26 F.3d 1107, 1111 (Fed. Cir. 1994). As discussed below, an electric motor remains classifiable under HTSUS 8501 even if it incorporates additional parts and components. For example, an EN to Heading 8501 indicates that "(m)otors remain classified here even where they are equipped with pulleys, with gear boxes, or with a flexible shaft for operating hand tools" and specifically mentions that the heading encompasses "'outboard motors,' for the propulsion of boats, in the form of a unit comprising an electric motor, shaft, propeller and a rudder." Explanatory Note to 8501, HTSUS.

The relevant chapter and section Notes reinforce that an import remains classifiable as an electric motor even when it includes additional functionalities, like those that the ASIC provides to the electric motor in the subject imports, so long as the principal function remains the same. Note 3 to Section XVI, which encompasses Heading 8501, states that "[u]nless the context otherwise requires . . . machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as . . . that machine which performs the *principal function*." Note 3, Section XVI HTSUS (emphasis added); *see also* Explanatory Note to Section XVI, Part (VI) Multi-Function Machines and Composite Machines, HTSUS ("Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions, which are generally complimentary and are described in different headings of Section XVI, are also classified according to the *principal function* of the composite machine . . . .") (emphasis added).

The subject imports include two types of machines: an electric motor and two printed circuit boards, including the ASIC.[9] Certainly,

[9] A "machine" includes "any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85." Note 5 to Section XVI, HTSUS. On its own, the electric motor in the subject imports would likely be classified under HTSUS 8501. (Def.'s Cross Mot. 26; *see* Pl.'s Mot. 29–31 (stating that ASIC removes subject imports from HTSUS 8501 covering electric motors); *see also* Belimo's Legal Basis of Protest and Application for Further Review, Martinelli Dep. Ex. C at 16 (conceding that "without the ASIC electronics [the subject imports] likely would be classifiable as electric motors under HTSUS heading 8501"); Fairfax Dep. 111:17113:9.) If imported separately, the printed circuit boards would likely fall under HTSUS 8537 covering "boards and panels . . . equipped with two or more

the ASIC contributes additional functionalities beyond those that a basic electric motor offers, including continuous monitoring of the motor absent a signal from the central controller, adapting to AC or DC electrical signals, and storing energy for use in the event of a power failure. (Def.'s Cross Mot. 1, 4, 7, 32; Pl.'s Statement of Facts ¶¶ 11, 29, 37–40, 42, 45; Pl.'s Mot. 8–15.) However, these functions are complementary to the functions of the electric motor such that, even with the ASIC, the subject imports serve the same principal function of using mechanical power to position an attached damper or valve as a traditional electric motor would in an HVAC system. (Def.'s Cross Mot. 4–5; Pl.'s Statement of Facts ¶¶ 12, 23, 25, 28, 31–33; Martinelli Dep. 29:10–15, 37:20–38:9; Fairfax Dep. 47:4–16.) The additional functionalities that the ASIC provides all relate to improving the precision and reliability of the motor's operation so that the motor can better do its job of positioning the attached dampers and valves in accordance with the signal received from the central controller. Thus, the ASIC does not change the principal function of the subject imports as electric motors. *See Nidec*, 68 F.3d at 1337 (affirming that import remained classifiable as electric motor even though it incorporated a "precision spindle and other components" because "(t)he basic character of (the) product as an electric motor is not changed because it is custom designed . . . or because it includes the precision spindle") (internal citations omitted). Customs therefore correctly classified the subject imports under HTSUS 8501 based on their principal function as electric motors.

CONCLUSION

For the reasons stated above, the subject imports are properly classified in subheading 8501.10.40 HTSUS, subject to duty at 4.4 percent *ad valorem*. The court thus denies Plaintiff's motion for summary judgment and grants Defendant's cross motion for summary judgment. Judgment will be entered accordingly.

Dated: November 26, 2013
New York, New York

/*s*/ *Mark A. Barnett*
JUDGE

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apparatus of heading 8535 or 8536, for electric control or the distribution of electricity." (Def.'s Cross Mot. 30; Pollichino Decl. ¶ 8, Apr. 18, 2013 (citing Chapter 85, HTSUS 8537).)

Slip Op. 13–145

BEST KEY TEXTILES CO., LTD., Plaintiff, v. UNITED STATES, Defendant,

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00367

[Denying plaintiff's motion for unredacted versions of defendant's confidential third and final supplement to the administrative record.]

Dated: December 4, 2013

John M. Peterson, *Maria E. Celis*, *Richard F. O'Neill*, *George W. Thompson*, and *Russell A. Semmel*, Neville Peterson LLP of New York, NY, for the plaintiff.

Amy M. Rubin, Acting Assistant Director, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, for the defendant.

OPINION

Musgrave, Senior Judge:

The plaintiff, Best Key Textile, Inc., invoked the court's jurisdiction under 28 U.S.C. §1581(h), or alternatively 28 U.S.C. § 1581(i)(4), to seek pre-importation judicial review of U.S. Customs and Border Protection's ("Customs") Headquarters Ruling Letter HQ H202560, 47 Cust. Bull. & Dec. 41 (Sep. 17, 2013) ("Revocation Ruling") revoking New York Customs Ruling N187601 (Oct. 25, 2011) (the "Yarn Ruling"). Certain procedural background leading up to the filing of this matter is set forth in *Best Key Textiles, Inc. v. United States*, Slip Op. 13–135 (Nov. 4, 2013) (holding the Revocation Ruling, which becomes effective 60 days after publication, deemed published October 17, 2013), familiarity with which is presumed. As in that case, this matter is attempting to adhere to an expedited litigation schedule. *See* ECF No. 23 (Nov. 6, 2013).

This opinion addresses only the plaintiff's motion to compel the defendant to provide the plaintiff with un-redacted versions of the defendant's confidential third and final supplement to the administrative record. *See* ECF No. 44 (motion for leave to file public version of final supplement to the administrative record); ECF No. 46 (granting motion for leave); ECF No. 49 (confidential version of final supplement). The precise motion was raised during the in-person emergency status conference convened yesterday, also upon motion therefor from the plaintiff.

At the conclusion of the conference, the court agreed to inspection and evaluation, *in camera*, of the un-redacted portions of the administrative record documents over which the defendant asserted privi-

lege of attorney-client or pursuant to the inter-agency exemption of 5 U.S.C. §552(b)(5). The court has done so and also considered the law upon which the plaintiff claims entitlement. *See Brennan Center for Justice at New York University School of Law v. U.S. Department of Justice*, 697 F.3d 184 (2nd Cir. 2012); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191 (D.D.C. 2005); *see also NLRB v. Sears, Roebuck & Co*., 421 U.S. 132 (1975); *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2nd Cir. 2005); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2nd Cir. 1999); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980); 81 *Am. Jur. 2d*, Witnesses §517; Charles Alan Wright, Kenneth W. Graham, Jr., Victor James Gold, Michael H. Graham, 26A *Fed. Prac. & Proc. Evid*. §5680 (1st ed.). The court has also considered the plaintiff's brief filed in opposition to the defendant's claim of privilege.

The plaintiff argues that the government has "sought to designate" the contested redactions "as the basis of its decision to revoke *NY N187601*, and as the reasons why it will no doubt claim its revocation was not arbitrary, capricious or contrary to law." Pl's Br. in Opposition at 3. The plaintiff's argument rests on its reading of *Brennan*'s mention of "referencing a protected document as authoritative". *See* 697 F.3d at 205. However, the defendant has not "referenced" or mentioned any of the contested redacted content as "authoritative" publically, as yet; it has only filed as part of "the" administrative record non-redacted portions of certain documents.

The court's *in camera* inspection of the redacted portions complies with USCIT Rule 26(b)(5)(A)(ii), and it finds that all of the claimed redactions are predecisional and deliberative, and that none may fairly be characterized as "final" in the sense of having been adopted formally or informally within the contours of the Revocation Ruling or as having expressed the "working law" of Customs. *See Sears*, 421 U.S. at 153; *La Raza*, 411 F. 3d at 356–57. Some documents also express communications over which the attorney-client privilege attaches. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Elkem Metals Co. v. United States*, 24 CIT 1395, 126 F. Supp. 2d 567 (2000). Customs has not abused its discretion in redacting parts of the final supplement to the administrative record from public scrutiny.

The parties will proceed accordingly.

So ordered.

Dated: December 4, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–146

WHEATLAND TUBE COMPANY, Plaintiff, and UNITED STATES STEEL CORPORATION Intervenor-Plaintiff, v. UNITED STATES, Defendant, and SEAH STEEL CORP., AND HYUNDAI HYSCO, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00189

[Remanding antidumping duty administrative review "major input rule" determination.]

Dated: December 4, 2013

Gilbert B. Kaplan, *Daniel L. Schneiderman*, and *P. Lee Smith*, King & Spaulding LLP, of Washington DC, for the plaintiff.

Jeffrey D. Gerrish, *Robert E. Lighthizer,* and *Ying Lin*, Skadden Arps Slate Meagher & Flom, LLP, of Washington DC, for the intervenor-plaintiff.

Ryan M. Majerus, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel was *David Richardson*, Attorney-International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Jeffrey M. Winton and *Sung Eun Chang*, Law Office of Jeffrey M. Winton PLLC, of Washington DC, for defendant-intervenor SeAH Steel Corporation.

J. David Park, *Phyllis L. Derrick*, *Jarrod M. Goldfeder*, and *Sally S. Laing*, Akin, Gump, Strauss, Hauer, & Feld, LLP, of Washington DC, for defendant-intervenor Hyundai HYSCO.

OPINION AND ORDER

Musgrave, Senior Judge:

The plaintiff Wheatland Tube Company challenges two determinations in *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 77 Fed. Reg. 34344 (June 11, 2012) ("*Final Results*"), *see* IAPDoc[1] 117, as articulated in the accompanying issues and decision memorandum dated June 4, 2012 ("I&D Memo"), IAPDoc 118. Conducted by the International Trade Administration, U.S. Department of Commerce ("Commerce"), the *Final Results* are the eighteenth in the sequence of administrative reviews of entries of circular welded non-alloy steel pipe ("CWP") into the commerce of these United States ("U.S.") subject to the antidumping duty order thereon, and they

[1] The defendant explains that the administrative record consists of four parts, two public and two proprietary, because the review took place when Commerce was converting from a paper filing system to an electronic filing system. The designation "IA" herein preceding the court's conventional citations to the public or confidential administrative record documents (PDoc or CDoc) are to those documents filed with IA Access, the Import Administration Antidumping and Countervailing Duty Centralized Electronic Service System.

address the period November 1, 2009 through October 31, 2010 ("POR"). The specific challenges are to the agency's decision not to seek additional information relating to the application of the major input rule with respect to SeAH Steel Corporation's ("SeAH") affiliate-supplier carbon steel input and the agency's decision to use shipment date as the date of the U.S. sales of Hyundai HYSCO ("HYSCO"). The major input rule determination requires remand but not the date of shipment determination.

Jurisdiction and Standard of Review

Jurisdiction is proper pursuant to 19 U.S.C. §1516a(a)(2)(B)(iii) and 28 U.S.C. §1581(c). Antidumping duty administrative review determinations, findings or conclusions are unlawful if "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i).

Discussion

I. Collection of "Major Input Rule" Information

A. Background

In order to evaluate U.S. sales against comparison market sales, Commerce uses model match criteria established at the initial investigation to quantify the commercially significant properties of the product(s) under consideration. For the product at issue, CWP, the model match criteria encompassed (1) grade of pipe, (2) actual pipe size, (3) wall thickness, (4) surface finish, and (5) end finish. The criteria are intended to ensure proper price comparisons of comparable products. The defendant calls attention to the fact that the grade of carbon steel is not one of the criteria and avers that the investigation's model match criteria are adequate for matching CWP sold in the U.S. with sales of CWP in the Korean home market, and that it has used these criteria in all reviews subsequent to the investigation.

In the preceding administrative review, Commerce had found that the respondent SeAH had below-cost home market sales and thus excluded them from the dumping calculations, so for the instant review Commerce initiated a below-cost sales analysis consistent with its standard practice. *See* Preliminary Results (Dec. 5, 2011), IAPDoc 66, at 15. Being thus required to respond to Commerce's cost questionnaire, which directed SeAH to report its cost of production ("COP"), including all raw material inputs consumed, in a manner

conforming with the model match criteria,[2] SeAH reported its carbon steel input costs on a CWP model-specific basis.[3]

Commerce's "major input rule" practice, *see* 19 U.S.C. §1677b(f)(2) and (3), values affiliate-transferred major inputs at the higher of (1) the transfer price between the respondent and its affiliated supplier, (2) the market price between unaffiliated parties, or (3) the affiliated supplier's cost to produce the major input. In this instance, Commerce preliminarily examined SeAH's reported costs for inputs obtained via affiliation through separate major input rule applications to galvanized and non-galvanized carbon steel inputs, since these inputs have demonstrated differences in physical characteristics that carry over to the CWP products produced from each. *See* Preliminary COP Memo (Dec. 2, 2011), IAPDoc 63. For the galvanized carbon steel input, Commerce compared the average reported transfer price, SeAH's average purchase price for the input from unaffiliated suppliers, and SeAH's affiliate-supplier's cost to produce the input, and determined the affiliate transfer price to be highest. Commerce thus used the average affiliate transfer price for galvanized carbon steel in calculating the COP for SeAH's CWP. For the non-galvanized carbon steel input, Commerce utilized the same process and arrived at a similar result. *See id*.

Following the preliminary results, Wheatland argued in its administrative case brief that Commerce should have required SeAH to report its carbon steel costs by grade of carbon steel. Wheatland's Administrative Case Brief (Mar. 15, 2012), IAPDoc 96, at 4–7. It also argued that Commerce had, without explanation, violated a practice of requesting steel costs on a grade-specific basis. *Id*. at 6–7. In addition, Wheatland alleged that an inventory report showed sufficient differences in the costs of carbon steel by grade to justify requesting the information. *Id*. at 4.

For the *Final Results*, Commerce explained that its major input rule practice does not include automatic request of information on steel cost by grade, and that it did not find the cases to which Wheatland cited established a practice of always requesting steel cost by grade:

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[2] *See* Commerce Ques. (Feb. 9, 2011), PDoc 22, Sec. D at D-1(I)(A) (Cost of Production), D-2(C) (Reporting Period of Cost of Production and Constructed Value) & (D) (Weighted Average Cost of Production and Constructed Value), frs. 101–102; D-2 through D-5 (II. General Information 5–8), frs. 102–105; D-10 through D-12 (III. Reporting Methodology), frs. 110–112; and D-16 through D-17 (Field Number 3.0 Direct Materials) frs. 116–117.

[3] *See*, *e.g.*, SeAH's Ques. Resp. (Apr. 18, 2011), PDoc 39, Sec. D, at 9, and App'x D-4-D, PDoc 39, CDoc 6, frs. 480–481.

> The facts in the instant case are distinguishable from those in the [*Stainless Steel*] case remand cited by Wheatland.[4] In this case, the major input is hot-rolled carbon-steel coils. We note that differences in grades for stainless steels are entirely different than for carbon steel. Stainless steels are alloy products of which the principal alloying element is chromium. However, a number of additional alloying elements can be added to obtain an assortment of performance characteristics. These additional alloying elements (nickel, molybdenum, *etc*.), in combination with chromium, can significantly affect cost. Carbon steels, which are used to make subject merchandise, do not contain alloy levels of elements and their performance is driven primarily by the level of carbon in the steel. For the subject pipe, there are slight differences in certain elements such as carbon for the different grades of the hot-rolled inputs. However, these differences are inconsequential, and there is a great level of interchangeability of hot-rolled inputs used to produce the different grades of pipe. Furthermore, although the CONNUM characteristics for circular welded non-alloy steel pipe include grade, this grade characteristic does not refer to the grade of the HRC, but rather the grade of the finished pipe (*i.e.*, pressure, ordinary standard, structural, or conduit).
>
> We also find Wheatland's reliance on *Coated Free Sheet Paper from Indonesia*[5] to be misplaced. In that case, the evidence on the record demonstrated that the pulp purchased from the respondents' unaffiliated suppliers was not comparable to the pulp purchased from the affiliated suppliers. However, in this case, as noted above, the differences between hot-rolled inputs are inconsequential, and there is a great level of interchangeability of hot-rolled inputs used to produce the different grades of pipe. The petitioner also cites to the current review of circular welded carbon steel pipes and tubes from Thailand (A-549–502), for which the final results have not been published since it is still ongoing. In the Thai pipe case, the respondent demonstrated that cost differences between different grades of hot-rolled in-

[4] *See Final Results of Redetermination Pursuant to Court Remand, SeAH Steel v. United States*, Ct. No. 09–00248, ECF No. 63 (Sep. 17, 2010) ("*Remand Redetermination*"), at 27–28 (describing SeAH's June 11 and June 25, 2010 supplemental submissions). *Cf. SeAH Steel Corp. v. United States,* 35 CIT __, 764 F. Supp. 2d 1322 (2011) ("[i]n the *Remand Redetermination*, Commerce determined, based on additional information provided by Plaintiff, to consider steel specification as well as steel grade in applying the major input analysis").

[5] *Coated Free Sheet Paper from Indonesia*, 72 Fed. Reg. 60636 (Oct. 25, 2007) (final determ. of sales at less than fair value) ("*Paper from India*") and accompanying issues and dec. mem. at cmt. 4.

puts were so small as to be immaterial in terms of price, which supports the Department's position in this case.

I&D Memo at cmt. 8 (footnote omitted).

B. Analysis

As indicated, Commerce does not have a practice of automatically separating inputs by grades of steel. It will, however, separate by grade upon a demonstration of significant physical or chemical differences justifying separate treatment, which involves "a fact-based analysis focused on whether there are physical [or chemical] differences in the major input that would justify subdividing that input into more than one category for analysis." *See* Def's Resp. at 29–30.[6] The plaintiff points out that in the aforementioned *Stainless Steel* case, for example, Commerce issued two rounds of supplemental questions to SeAH specifically geared to determining whether difference between stainless steel specifications warranted individualized treatment in the major input context. Commerce requested no similar level of specificity regarding carbon steel grades in the instant appeal,[7] justifying its decision not to collect further information relative to SeAH's inputs by reasoning "there are slight differences" and "a great level of interchangeability" among the hot-rolled inputs for

[6] The defendant contends there is no dispute that the reference standard for conducting the major input analysis at the grade-specific level is whether "there are demonstrated differences in physical characteristics that may impact COP and final sales prices." *E.g.*, Def's Br. at 29, citing *Remand Redetermination*, as referenced in Pl's Br. at 8.

[7] The parties also present arguments over interpreting *Circular Welded Carbon Steel Pipes and Tubes From Thailand* (A-549–502) ("*CWP from Thailand*"), in which Commerce had solicited grade-specific carbon steel purchase information from respondent Saha Thai. *See*, *e.g.*, Pl's Br. at 10 and Ex. 1; Def's Resp. at 30–31. The defendant argues that the request for grade-specific information in that instance was not for application of the major input rule but because Saha Thai had claimed there was virtually no difference in the cost of the carbon steel consumed to produce all of its merchandise (subject and non-subject), and that the information requested was for settling how to allocate steel costs between subject and non-subject merchandise. The plaintiff points out that of the questions issued to Saha Thai, one solicited information regarding cost allocations, and the other solicited separate purchasing data for each grade of carbon steel Saha Thai obtained from its affiliated and unaffiliated suppliers, *see* Pl's Br. at Ex. 1, p. 16, and that the only purpose for requesting the latter information would be for examination of the major input rule on a grade-specific basis. The court need not address these contentions, because even if the government's understanding of *CWP from Thailand* were correct, it does not prove that the differences among the carbon grades at issue here are "inconsequential." Commerce did not solicit the information that would be necessary to such a determination from SeAH, but it did with respect to Saha Thai.

producing CWP. Context does not indicate whether these are findings or opinions, but either instance must be supported by substantial evidence of record.

Wheatland argues that when comparing input prices from affiliated and unaffiliated suppliers, it is critical to ensure that the input purchases being compared are for the same product, and that whether differences among carbon steel grades are likely to be "less pronounced" than differences among stainless steel grades does not prove that carbon steel grade differences are not sufficiently large enough to "impact COP and final sales prices." Wheatland posits that the analysis can be distorted if purchases of a high-grade input from an affiliated supplier are compared to purchases of a low-grade input from an unaffiliated supplier: in that instance, any below-market transfer pricing for high grade material would be masked by the presence (and to that degree) of any lower grade material used in the comparison as the market benchmark. The proposition is logical, but given Commerce's "practice" and the burdens it allocates, whether further examination of it was required is to be evaluated upon the substantiality of the evidence of record supporting the argument.

In the underlying proceeding, Wheatland pointed to a sample inventory ledger for a single month to argue that it showed relevant variations in inventory values among SeAH's carbon steel grades.[8] Wheatland claims the reference was to show the need for soliciting more complete data. *See* Pl's Reply at 5. The government and SeAH dispute the sample's significance, claiming it is insufficient to demonstrate "significant" differences among carbon steel grades, *see* Def's Br. at 32 and SeAH's Br. at 19–21, but it was not commented upon in the *Final Results* and cannot at this stage, *post facto*, justify rejection of Wheatland's argument for collecting the data "necessary to evaluating" SeAH's purchases of carbon steel on a grade-specific basis. *See* Pl's Reply at 6.

Although the inventory report is only for a single month, Wheatland claims it cited it because it was the only document on the record with any detail on the different grades purchased by SeAH. The report shows that at least for one month SeAH paid different prices (of arguable significance) for different steel grades. The government contends "Wheatland does not argue that these differences in the

[8] *See* Comments on SeAH Second Supp. Sec. D Ques. Resp. (Oct. 21, 2011), IAPDoc 41, IACDoc 36, at 3–4, and Pre-Preliminary Comments Regarding SeAH Steel Corporation (Nov. 14, 2011), IAPDoc 57, IACDoc 69, at 4–6, citing SeAH's Supp. Sec. D Ques. Resp., PDoc 64, CDoc 17(July 25, 2011) at App. SD-6, p. 2.

costs of steel inputs listed in the inventory report are attributable to any significant differences in physical characteristics among the inputs", Def's Br. at 32, but a fair reading of Wheatland's claim is that the inventory report does in fact indicate that different steel grades show significant cost differentials and therefore fairly detracts from Commerce's finding that "differences" (physical or otherwise) among grades are "inconsequential." Wheatland argues the inventory ledger at least should have led to more complete collection of information from SeAH regarding its purchases of specific steel grades from affiliated and unaffiliated suppliers.

In its reply brief, Wheatland points to examples of carbon steel grade comparisons of price-difference relevance[9] in the inventory ledger that are non-galvanized and were purchased in the same month (*i.e.*, November 2009), *see* Pl's Reply at 7, referencing SeAH's Supp. Sec. D Resp. (July 25, 2011), PDoc 64, CDoc 17, at App. SD-6, p. 2, and it argues that such price differences among hot-rolled coil grades may have had a not-insignificant impact upon the COP and price of the finished pipe products sold during the POR and obscured below-market transfer pricing. That remains to be seen, but this court, at least, is persuaded that Wheatland had raised a legitimate argument that has not been adequately examined or addressed in the *Final Results*. Being substantial evidence of record, the inventory ledger appears to detract from Commerce's conclusion and thus calls into question the finding that differences among grades are "inconsequential." Because Commerce did not collect information regarding SeAH's purchases of individual carbon steel grades, the record does not reflect the full extent of any price differences among those grades upon which an "inconsequential" finding could be based.

Additionally stated in the *Final Results* in response to Wheatland's citation to *Paper from Indonesia* is that the grade of carbon steel is not a model match characteristic and thus is not reflected in the "CONNUM" for the finished pipe. I&D Memo at cmt 8 ("although the CONNUM characteristics for circular welded non-alloy steel pipe include grade, this grade characteristic does not refer to the grade of the HRC, but rather the grade of the finished pipe (*i.e.*, pressure, ordinary standard, structural, or conduit"). The CONNUM character-

[9] The primary objection raised by both the government and SeAH appears to be that the price differences between the two grades discussed in footnote 2 of the plaintiff's opening brief reflects differences between galvanized and non-galvanized products rather than differences among non-coated carbon steel grades, and SeAH further points out that the price difference in that example could reflect the possibility that the products may have been purchased at different times. *See* Def's Br. at 32; SeAH's Br. at 20–21. The court, however, regards that example as illustrative, not definitive.

istic of the finished product, however, appears irrelevant on this issue. Wheatland explains, and the court understands, that its citation to *Paper from Indonesia* was intended as a counter-example, *i.e.*, a case where Commerce applied the major input analysis at a grade-specific level even though such grades were not reflected in the model match for the finished product. Wheatland contends that the major-input and transactions-disregarded analyses are "routinely" conducted for inputs that have no impact on the physical characteristics of the finished product, and it describes the example of a steelmaker who might obtain coal used as fuel from an affiliated supplier. The type of coal purchased would not directly affect the "physical" characteristics of the finished steel, but in order to determine whether and to what extent the steelmaker's reported costs are understated due to any non-arm's length pricing for the coal, it would be appropriate, assuming there are multiple grades of coal used in steel production, to compare transfer and market prices for the particular grade supplied by the affiliate, since the grade of coal can have a significant impact on its price,[10] and comparing the price of coking coal from an affiliated supplier to the price of steam coal from an unaffiliated supplier could distort the analysis and conceal non-arm's length pricing.

The point may be gilding the lily, but Wheatland has persuaded as to substantial evidence of record, to which it called Commerce's attention, that, unaddressed, in turn calls into question Commerce's finding that differences among SeAH's grades "are inconsequential," a decision that also appears to have been based upon the irrelevant factor of the way in which finished pipe CONNUMs are defined. Accordingly, the *Final Results* will be remanded for reconsideration. Upon remand, if Commerce deems it necessary to do so, Commerce may reopen the record and collect information needed to conduct the major input analysis at the grade-specific level for SeAH's purchases of carbon steel from its affiliated supplier, so long as its redetermination is reasonable.

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[10] *Cf. Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 77 Fed. Reg. 14495 (Mar. 12, 2012) (final administrative review results) and accompanying issues and dec. mem. at cmt. 4 (discussing the high degree of variability in values for different types of coal) *with Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 Fed. Reg. 38756 (July 19, 1999) (final determination of sales at less than fair value) at cmt. 50 (applying the major input rule to coal input).

II. *Use of Shipment Date as the Date of HYSCO'S U.S. Sales*

A. Background

The "date of sale" is defined not by statute but by the Statement of Administrative Action ("*SAA*") accompanying the Uruguay Round Agreements Act, *i.e.*, the "date when the material terms of sale are established." *SAA*, 103d Cong., H.R. Doc. 103–316 at 810 (1994), as reported in 1994 *U.S.C.C.A.N.* 4040, 4153. *See* 19 U.S.C. §1677b(a)(1)(A). The date the material terms of sale are "established" is normally the invoice date unless Commerce is "satisfied" that a different date better reflects the date on which those terms are established. *See* 19 C.F.R. § 351.401(i); *see also Nucor Corp. v. United States*, 33 CIT 207, 254, 612 F. Supp. 2d 1264, 1304 (2009) (invoice date is "only a 'rebuttable presumption'"). Commerce's practice is also to use the shipment date if it precedes the invoice date. *See*, *e.g.*, *Stainless Steel Bar From Japan*, 65 Fed. Reg. 13717 (Mar. 14, 2000) (final antidumping duty administrative review results) and accompanying issues and dec. mem. at cmt 1.

In its questionnaire responses HYSCO reported "date of shipment" from its factory as the date on which the material terms for its U.S. sales were established, claiming, *inter alia*, that quantity, as a material term, can change up until the date of shipment from its factory. HYSCO Ques. Resp. Sec's B-D (Apr. 18, 2011), PDoc 40, at C-10, fr. 213; *see also* HYSCO Ques. Resp. Sec. A (Mar. 23, 2011), PDoc 33, at A-23, fr. 29. In supplemental questionnaire responses, HYSCO repeated that "material terms of sale can and do change after the initial agreement with the customer" in part because "quantity can change up until shipment from HYSCO's factory" and because "price can change up until HYSCO issues its tax and commercial invoices, which are typically issued" at the end of the month in which the merchandise is shipped, HYSCO Supp. Ques. Resp. (Sep. 9, 2011), IAPDoc 18, at S-4, fr.10, and S-26, fr. 32. HYSCO averred that the price does not change after the shipment date and that with each of its orders there is a quantity tolerance of plus or minus 10 percent, or up to 20 percent depending upon the contract, that is enforced on a "line-item basis" such that quantity is not "established" until the date of shipment.

Commerce relied on this claim for the preliminary review results, *i.e.*, the date of shipment is the date of HYSCO's U.S. sales. In response to a supplemental questionnaire requesting explanation and documentation on the transactions for which the material terms of sale had changed after the purchase order date, HYSCO elaborated that "[e]ach line item represents a unique product of which HYSCO's customer has ordered multiple pieces" and that "[t]hese individual

line items are [the] individual orders in and of themselves"[11], and it provided a list of all sales on a line-item basis that had changed in quantity above or below the contractual tolerances. HYSCO Third Supp. Ques. Resp. (Feb. 22, 2012), IAPDoc 88, IACDocs 93–101. It also included supporting sales documentation as well as a list of all sales on a line-item basis that were within the contractual tolerances. *Id*. at Ex. 7A (list), IACDoc 95, fr. 37; IACDocs 93–99, Ex. 7B (supporting sales documentation). HYSCO explained that its order system "would not permit" shipping merchandise quantities of less than or in excess of the 10 percent quantity tolerance -- considered on a line-item basis -- without first contacting the customer. IACDoc 95, at 1–4, fr. 7–10. HYSCO also submitted customer and sales personnel declarations that the quantity tolerance was on a line-item basis. *Id*. at 1–10, fr's 7–16. HYSCO explained that if the tolerances were applied on a total order basis, rather than a line-item basis, customers could contractually end up with excess quantities on some line items and insufficient quantities of other line items, which could hinder their ability to meet project needs. *Id*. at 2, fr. 8.

In their administrative case briefs, Wheatland and U.S. Steel Corporation argued that the record did not support a finding that HYSCO applied quantity tolerances on a line-item basis. Specifically, they argued that the material terms of HYSCO's sales were set on, and did not change after, the purchase order date, because language in the offer sheets pertains to "total amount and quantity," which is a "total order" basis, not a "line-item basis," because HYSCO failed to provide a single negotiation document that references a "line-item quantity tolerance change," and because, although HYSCO provided "examples" demonstrating sales quantities for certain for certain transactions, the "outside line item quantity tolerance" changes were infrequent and HYSCO failed to provide a single correspondence granting permission to make these material changes to sales in any event. Rather, the petitioners contended, the total quantity ordered and the total quantity actually shipped were well within the contractually specified quantity tolerance listed in HYSCO's written order and contract documents. *See* IAPDoc 96, at 1–22; *see also* U.S. Steel's Administrative Case Brief (Mar. 15, 2012), IAPDoc 95, at 1–11. HYSCO's rebuttal brief argued that record evidence demonstrated that the quantity of the sales did change on a line-item basis in excess of the contractual tolerances. In support of this position, HYSCO dis-

[11] HYSCO Third Supp. Ques, Resp. (Feb. 22, 2012), IAPDoc 88, at 1, fr. 7.

cussed the terms and conditions of HYSCO's sales, the nature of its order system, and various declarations provided by customers and sales personnel. *See* HYSCO's Rebuttal Brief (Mar. 22, 2012), IAPDoc 109, at 13–33.

For the *Final Results*, Commerce continued to use HYSCO's shipment date as the date of sale for HYSCO's U.S. sales. Commerce found that the orders with the unaffiliated customers did not show whether the 10 percent quality tolerance was on a line-item or total order basis, and it recognized that the quantity tolerance identified in certain sales documents refer to the total quantity and amount, but it determined that "the company intends that to mean total quantity of each line item." Additional record evidence Commerce found demonstrating that HYSCO applied the 10 percent tolerance via its accounting system on a line-item basis and that HYSCO can and does change that tolerance on a line-item basis, and Commerce accepted that HYSCO had provided examples of the changes to quantities on a line-item basis and had also provided relevant internal communications between HYSCO and its affiliate seeking approval of a change in excess of the tolerances on a line-item basis. Addressing the petitioners' argument that in prior reviews the purchase order date had been used rather than the shipment date, Commerce stated that the date of sale determination depends on the specific facts before it in each review, and it disposed of the argument that the infrequent number of sales affected by changes in quantity made the changes immaterial on the basis that the argument was "outdated." *See* I&D Memo at cmt. 2.

B. Analysis

The date the material terms of sale are "established" is determined based on the record as a whole as reasonably construed. *See*, *e.g.*, *Sahaviriya Steel Indus. Pub. Co. v. United States*, 34 CIT ___, ___, 714 F. Supp. 2d 1263, 1281 (2010). As Commerce implied above, a single sale with a subsequently-changed material term may, depending upon the record as a whole, be deemed sufficient for determining the date of sale as other than the date of invoice. *See Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 27, 132 F. Supp. 2d 1087, 1092 (2001).

Wheatland points out the defendant and HYSCO point to only three pieces on the record to justify Commerce's determination, but none of these, Wheatland contends, amounts to "substantial" evidence: (1) the single referenced e-mail does not relate to any specific POR transaction, (2) HYSCO's internal accounting system does not dem-

onstrate contractual agreement to line-item tolerances, and (3) the certain declarations of sales personnel and unaffiliated customers are not referenced in the *Final Results*. Pl's Reply at 10–13, referencing *Hoogovens Staal BV v. United States*, 24 CIT 44, 60, 86 F. Supp. 2d 1317, 1331 (2000) (the court "must evaluate the validity of an agency decision on the basis of the reasoning presented in the decision itself").

The problem with Wheatland's argument is that it does not, in fact, address the "totality" of information Commerce mustered in support of its determination. Wheatland effectively asks the court to reweigh or reinterpret select aspects of the record, but given the standard of judicial review, the court must decline, as those are matters within Commerce's discretion. Commerce had to interpret the record as a whole to determine when the material terms of sale were established, and it concluded thhat the issue resolved to whether the quantity tolerances were on a total-order or line-item basis. Commerce was "satisfied", *see* 19 C.F.R. § 351.401(i), that the evidence of record demonstrated the latter:

> The record evidence shows the material terms of sale can and do change up until shipment date. . . . [W]e have examined other information on the record regarding the delivery tolerance. Specifically, HYSCO has shown that when it codes each sale into its accounting system, it codes the quantity tolerance next to each line item. HYSCO has shown how it can and does change the tolerance for specific line items within the order. In addition, HYSCO has claimed that even though the internal offer sheets refer to total quantity, the company intends that to mean total quantity of each line item. Indeed, HYSCO has provided us with communications between it and its affiliate seeking approval to ship more than the tolerance amount for a specific line item on a specific invoice.

I&D Memo at cmt 2.

On this record, the court cannot conclude such articulated "satisfaction" unreasonable.

Conclusion

The first issue is hereby is remanded for reconsideration in accordance with the foregoing, and the results thereof shall be due March 7, 2014, comments thereon by April 7, 2014, and rebuttal by April 30, 2014.

So ordered.

Dated: December 4, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–147

SUNTEC INDUSTRIES CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT NAIL CORP., Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00157

[Denying motion to dismiss for lack of subject matter jurisdiction under 28 U.S.C. § 1581(i) and denying motion to dismiss for failure to state a claim for which relief can be granted.]

Dated: December 6, 2013

Mark B. Lehnardt, Attorney, Lehnardt & Lehnardt LLC, of Liberty, MO, and Brian R. Soiset, Attorney, of Shanghai, PRC, for the plaintiff.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Tara K. Hogan*, Senior Trial Counsel. Of counsel on the brief was *Nathaniel J. Halvorson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington DC.

Adam H. Gordon, *Jordan C. Kahn*, and *Nathan W. Cunningham*, Attorneys, Picard, Kentz & Rowe, LLP, of Washington DC, for the defendant-intervenor.

OPINION AND ORDER

Musgrave, Senior Judge:

The complaint claims jurisdiction under 28 U.S.C. § 1581(i) challenging the initiation of *Certain Steel Nails from the People's Republic of China; Final Results of Third Antidumping Administrative Review*; 2010–2011, 78 Fed. Reg. 16651 (Mar. 18, 2013) ("*AR3 Final*"), on the ground of improper notice to the plaintiff. The defendant moves to dismiss for lack of subject-matter jurisdiction under USCIT Rule 12(b)(1) or alternatively for failure to state a claim upon which relief may be granted under Rule 12(b)(5). The court denies both motions.

Background

Prior to *AR3 Final*, the plaintiff, Suntec Industries Co., Ltd. ("Suntec"), participated in the antidumping investigation and filed a separate rate application therein. The domestic petitioner Mid Continent Nail Corporation requested administrative review of Suntec (and

others) for the first and second periods but subsequently withdrew those requests after Suntec filed separate rate certifications in each review. Compl. ¶¶ 6, 9–10.

On August 1, 2011, Commerce published a notice in the Federal Register of the opportunity to request review of companies subject to antidumping duty orders with anniversary dates of that month. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 76 Fed. Reg. 45773 (Aug. 1, 2011) ("Not later than the last day of August 2011, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in August for the following periods: . . . Steel Nails, A-570–909 8/1/10–7/31/11"). The petitioner again requested review of numerous companies for *AR3 Final*, including Suntec. Compl. ¶¶ 11–22. Suntec did not file a separate rate certification, and the petitioner did not withdraw its request for review of Suntec.

On October 3, 2011, Commerce published a notice of initiation in the Federal Register. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 76 Fed. Reg. 61076 (Oct. 3, 2011) (*"AR3 Initiation"*). Commerce announced as follows: "we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings" including "*Certain Steel Nails*, A-570–909" from the People's Republic of China ("PRC"), 76 Fed. Reg. at 61076–77. Among the companies listed in the initiation notice, Commerce included "Suntec Industries Co., Ltd." *Id.* at 61077. Commerce advised:

> All firms listed below that wish to qualify for separate-rate status in the administrative reviews involving [nonmarket economy] countries must complete, as appropriate, either a separate-rate application or certification . . . For these administrative reviews, in order to demonstrate separate-rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate.

76 Fed. Reg. at 61077. Although it was assigned a separate rate in the second segment of the antidumping duty proceeding, Suntec did not submit a certification in the instant review to demonstrate that it continued to satisfy the criteria for obtaining a separate rate. Compl. ¶¶ 6–11, 22–23.

Commerce published its preliminary results on September 4, 2012 in the Federal Register, listing Suntec under the heading "Companies that did not apply for separate rates and are considered to be part of the PRC-wide entity" and assigning the PRC-wide rate of 118.04% to Suntec as part of the PRC-wide entity. *See Certain Steel Nails from the People's Republic of China*, 77 Fed. Reg. 53845, app. IV (Sep. 4, 2012) (admin. review prelim. results). Commerce also invited parties to submit case briefs and written comments within thirty days of publication of the preliminary results.

Commerce published the final results of *AR3 Final* on March 18, 2013. 78 Fed. Reg. 16651 (March 18, 2013). Several other respondents brought challenges within 30 days of publication of the final results pursuant to 28 U.S.C. § 1581(c), but Suntec was not among them. On April 18, 2013 (31 days after publication of *AR3 Final*), it filed its complaint here.

Standard of Review

On a motion to dismiss for lack of jurisdiction, the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). In deciding such a motion, a court may review evidence extrinsic to the pleadings. *Id*. If a defendant challenges jurisdiction, the plaintiff cannot rely merely upon allegations in the complaint, but must bring forth relevant, competent proof to establish jurisdiction. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936). A court also has an independent duty to assure that jurisdiction is proper. *See Yang v. I.N.S.*, 109 F.3d 1185,1192 (7th Cir. 1997) (a court has jurisdiction to determine whether it has jurisdiction).

On a motion to dismiss for failure to state a claim, the court must decide whether the complaint raises factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint has "facial plausibility" when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the complaint contains well-pled factual allegations, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 679. That task is "context-specific" and "requires the reviewing court to draw on its judicial experience and common sense." *Id.* In the process, the court may also

consider matters of public record. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

28 U.S.C. § 1581 provides a waiver of sovereign immunity over the specified classes of cases. *Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001). Waivers of sovereign immunity are strictly construed, and any ambiguities must be resolved in favor of immunity. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980). Claims brought under 28 U.S.C. § 1581(i) are reviewed as provided in section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, *see* 28 U.S.C. § 2640(e), pursuant to which the court examines whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . without observance of procedure required by law". 5 U.S.C. § 706(2)(A)-(D). The scope of review under that standard is narrow. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where the agency whose action is under review shows a "rational connection between the facts found and the choice made," the court will not substitute its own judgment for that of the agency. *See id.*, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Further, an agency's decision "of less than ideal clarity" will be upheld if a court can reasonably discern how the agency arrived at that decision, *Bowman Trans., Inc., v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (internal citation omitted), but even if the decision is not arbitrary or capricious, it must still be "in accordance with law." *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003), referencing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971). This means all law. *Id.*

Discussion

I. Rule 12 (b)(1)

Suntec alleges that it never received notice from the petitioner of its request for the *AR3 Final* review as required by 19 C.F.R. § 351.303(f)(3)(ii), and that it first learned of *AR3 Final* (and being subjected to it) when one of its importers sent Suntec an email on March 8, 2013. Compl. ¶¶ 11–23. Suntec's complaint asserts jurisdiction pursuant to 28 U.S.C. § 1581(i) and states that "[t]his action is based upon the implication of a complete failure of notice," and that "[t]he legal issue is whether Commerce is required not to initiate an administrative review and not apply the final results of an adminis-

trative review if the additional notice requirement of 19 C.F.R. § 351.303(f)(3)(ii) has not been satisfied [ ] and the affected exporter otherwise does not receive constructive or actual notice of the review request." Compl. ¶ 33 (emphasis omitted). The defendant attempts to recast Suntec's claim into one that seeks to challenge the results of *AR3 Final* itself, but the attempt fails.

Residual jurisdiction in 28 U.S.C. § 1581(i) may not be invoked if jurisdiction under another section of section 1581 "is or could have been available" or the remedy provided under another 1581 subsection would be "manifestly inadequate." *E.g., Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (citation omitted). Section 1581 confers jurisdiction based upon the type of administrative decision that is being challenged and not based upon the ultimate relief sought.[1] *See*, *e.g.*, *Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011) (section 1581 "gives the court 'exclusive jurisdiction' to review eight different types of 'civil action[s]' listed in subsections (a) thorough (h)"). The jurisdictional inquiry is controlled by the legal conclusion that is actually being challenged in the pleadings. *See*, *e.g.*, *Shinyei Corp. of America v. United States*, 355 F.3d 1297, 1309 (Fed. Cir. 2004) ("a challenge to Commerce instructions on the ground that they do not correctly implement the published, amended administrative review results, is not an action defined under [19 U.S.C. § 1516a]"). A claim challenging the lawfulness of the decision to initiate an administration review including a particular respondent falls within the "administration and enforcement" provision of section 1581(i). *See, e.g.*, *Ass'n Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 717 F. Supp. 847 (1989); *see also Nissan Motor Corp. v. United States*, 10 CIT 820, 651 F. Supp. 1450 (1986).

The defendant's reply distinguishes *Associacion and Nissan* on the basis that the challenges were brought before the administrative review at issue had been made final and that postponing adjudication until the final results would have been unfair to the complaining party. The defendant further contends that for the parties in *Asso-*

[1] On a motion to dismiss for lack of subject matter jurisdiction under subsection (i), therefore, it is incorrect to focus on the relief sought and not the avenue of the remedy. *Cf.* Def.'s Mot. at 1 (italics added) ("[b]ecause Suntec could have sought *relief* pursuant to 28 U.S.C. § 1581(c) within 30 days of the publication of the final results, this court should dismiss the complaint"), at 4–5 ("[s]ection 1581(i) may only be invoked when adequate *relief* cannot be obtained pursuant to another subsection of section 1581"), at 5 ("Suntec could have sought *relief* pursuant to 28 U.S.C. § 1581(c), under which provision it would have had an adequate remedy"), at 7 ("[t]he ultimate *relief* that Suntec seeks is a reversal of Commerce's determination of the antidumping duty rate assigned to Suntec in the final results"), and at 11 ("Suntec fails to indicate what, if any, *relief* would be available to it under section 1581(i) that would not have been available under 1581(c)").

ciacion and Nissan "the *future* availability of jurisdiction pursuant to section 1581(c) resulted in a manifest inadequacy because such jurisdiction was, at the time of litigation, unavailable to address ongoing reviews." Def.'s Reply at 3 (italics in original). Here, however, the defendant contests that "[S]untec seeks a second opportunity to participate in, and alter the results of, the administrative review, despite its lack of participation in the first instance." *Id.* at 4.

The argument raises a hypothetical that is not the subject of this litigation. The plaintiff does not seek to alter the results of the administrative review but to rescind it altogether with respect to Suntec. The government relies on *JCM v. United States*, 210 F.3d 1357 (Fed. Cir. 2000) for its proposition, but that case involved a challenge to receive refund of provisional antidumping duties that could only have been received through participation in a proceeding over which section 1581(c) governed the proper remedy therefor; consequently, the plaintiff's challenge in that case, which invoked jurisdiction under section 1581(i), was dismissed for lack of subject matter jurisdiction.

Regarding the alternatively alleged failure to state a claim for which relief can be granted, the defendant also argues that because jurisdiction pursuant to 28 U.S.C. § 1581(c) to challenge the final results of *AR3 Final* itself "could have been available" if Suntec had participated in proceedings and challenged the final determination within 30 days of publication of the final results,[2] Suntec has failed to state a claim for which relief can be granted. Again, however, that hypothetical pertains to a section 1581(c) challenge, not a section 1581(i) challenge, and is therefore irrelevant in this case.

For the reason discussed *supra*, and to the extent Suntec is here only challenging Commerce's decision to initiate review of it in spite of noncompliance with its notice regulation, the court concludes it possesses jurisdiction to hear Suntec's challenge under section 1581(i).

II. Rule 12 (b)(5)

The defendant also argues that Suntec fails to state a claim because it received adequate notice when Commerce published notice of the *AR3 Initiation* in the Federal Register, and as a matter of law Suntec is charged with knowledge of the constructive notice provided by this publication. Def.'s Mot. at 13 The argument does not directly address

[2] *See, e.g.*, *Shinyei Corp. of Am. v. United States*, 355 F.3d at 1304–05; *see also* 28 U.S.C. § 1581(i) (providing that "[t]his subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable by the Court of International Trade under [19 U.S.C. § 1516a]").

Suntec's contention that it had no actual notice of the *AR3 Final* request for review because the petitioners did not personally serve Suntec as required under 19 C.F.R. § 351.303(f)(3)(ii), and that as a result, publication of the initiation in the Federal Register did not suffice as constructive notice of the *AR3 Initiation*. The plaintiff alleges that Commerce failed to ensure that Suntec was provided due process of law by initiating the review notwithstanding petitioners' deficient service. *See* Compl. ¶¶ 28, 32, 45.

A. Initiation of *AR3 Final* Without 19 C.F.R. § 351.303(f)(3)(ii) Personal Service Requirements

A request for administrative review, and a notice of initiation of such a review, are two distinct processes. 19 U.S.C. § 1675(a) states that Commerce will initiate a review, "*if a request for such a review has been received and after publication of notice of such review in the Federal Register*" (italics added) and requires that Commerce ensure both processes are "lawfully" completed prior to commencing a review. The notice required for a "lawful" review request is not addressed in 19 U.S.C. § 1675(a), and this ambiguity indicates that Congress delegated the determination of notice methods for review requests to Commerce. *Cf. Carl v. U.S. Sec'y of Agric.*, 36 CIT __, 839 F. Supp. 2d 1351, 1354 (2012) ("[t]he TAA notice provision lacks specificity about the type and manner of notice required, meaning that Congress left gaps for the agencies to fill").

In promulgating 19 C.F.R. § 351.303(f)(3)(ii), Commerce set the procedural rules and service of process mechanisms for requests for review, and Commerce must abide by its constraints. *Cf. Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part) (recognizing a "judicially evolved rule of administrative law" that "he who takes the procedural sword shall perish with that sword"), referenced by *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 85, 90 414 F. Supp. 2d 1300, 1306 (2006). The regulation requires that a petitioner who files a request for an administrative review of an antidumping order with Commerce "*must* serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request . . . by the end of the anniversary month or within ten days of filing the request for review, whichever is later." (italics added). If the petitioner is "unable to locate a particular exporter or producer . . . the Secretary *may* accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on

such person." A petitioner that files a review request also "*must* include a certificate of service listing each person served (including agents), the type of document served, and the date and method of service on each person" to Commerce, and "[t]he Secretary *may* refuse to accept any document that is not accompanied by a certificate of service." 19 C.F.R. § 351.303(f)(2) (italics added).

When a regulation is at issue, the plain meaning of a regulation governs, unless the language is ambiguous, and courts may then defer to an agency's reasonable interpretation thereof. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000), cited by *Wards Cove Packing v. Nat'l Marine Fisheries*, 307 F.3d 1214, 1219 (9th Cir. 2002). The court determines that the language of the regulation is unambiguous and entitles Suntec, an exporter specified in the antidumping review, to receive "actual notice" of review requests by petitioner, through personal service of notice mechanisms.[3] The regulation mandates that a petitioner who files a request for review with Commerce also serve a copy of the request on the exporter or producer itself,[4] and comply with clearservice delivery requirements. It further requires that the petitioner provide Commerce with a certificate of service listing each person served when it files a review request. Commerce has discretion to accept a request that admits deficient service and initiate a review in response to the request if the exporter or producer cannot be located and the Secretary is satisfied that petitioners made a "reasonable attempt to serve a copy" of the review request. If the petitioner can locate the exporter or producer but fails to serve it, and provides no indication to Commerce in the certificate of service or by other means that a reasonable attempt to serve the exporter or producer was made, Commerce cannot "lawfully" accept a request for review or initiate a review in response to a request under 19 U.S.C. § 1675(a).

Taking the well-pled allegations of the complaint as true, Suntec was not provided the actual notice to which it was entitled under 19 C.F.R. § 351.303(f)(3)(ii), and Commerce's initiation of *AR3 Final* as to Suntec was unlawful. It is uncontested that petitioners knew of Sun-

[3] "Actual notice" is a legal term of art which refers to "notice given directly to, or received personally by, a party" and for a request for review in the case before us it must be achieved through personal service by the petitioner. *See Dusenbery v. United States*, 534 U.S. 161, 169 n. 5 (2002), referencing *Black's Law Dictionary 1087* (7th ed.1999).

[4] *Compare* 19 C.F.R. § 351.303(f)(3)(ii) (requiring parties to serve a copy of the request "on each exporter or producer specified in the request".), *with* 19 C.F.R. § 351.303(f)(3)(i) (service requirements for serving a brief, where serving on an agent is explicitly listed as a service option for petitioners); *see also* 19 C.F.R. § 351.303(g) (discussing certifications and referring specifically to "legal counsel or another representative" when addressing certification requirements.).

tec's location as a result of the public record of prior proceedings in the review, but still did not serve Suntec in compliance with the regulation. Compl. ¶¶ 3–24, Pl.'s Resp. at 17–18. *See Guangdong Chems. Imp.*, 30 CIT at 88–89, 414 F. Supp. 2d at 1304–05. The facts pled concern a review initiated in response to request, not a self-initiated review by Commerce, and there is no indication that after requesting the review the petitioners notified Commerce they could not locate Suntec, or that a reasonable attempt was made to serve a copy of the review request directly on Suntec.[5] Instead, petitioners submitted a facially deficient certificate of service to Commerce claiming service on "Behalf of Suntec" and 13 other exporters was made on an attorney in the PRC who was no longer representing Suntec. Compl. ¶ 13, Pl.'s Resp. at 7–8. In this instance, the conditions precedent to validly initiating *AR3 Final* as to Suntec were lacking, and Commerce violated the regulation it promulgated by initiating a review of Suntec after it received a certificate of service indicating petitioners did not comply with the service requirements of 19 C.F.R. § 351.303(f)(3)(ii).

B. Relief Available re Constructive Notice of Review Initiation

1. Suntec Received Sufficient Constructive Notice of the Initiation

Suntec requests that as a result of Commerce's unlawful initiation of *AR3 Final* the court invalidate the *AR3 Final* results as to Suntec, and it is to that relief this court now turns. Compl. ¶¶ 42–45, referencing 5 U.S.C. §§ 702, 706. Suntec argues that as a result of the petitioners' defective service of notice upon it, the constructive notice provision of 44 U.S.C. § 1507 did not become operable when Commerce published the *AR3 Initiation* in the Federal Register, as such publication could not remedy a failure to enforce the actual notice requirements of 19 C.F.R. § 351.303(f)(3)(ii). *See* Compl. ¶ 29, referencing 44 U.S.C. § 1507 (publication in the Federal Register is ineffective notice if "service by publication is insufficient in law"). The plaintiff alleges that as a result it had no notice of *AR3 Final*, and Commerce failed to ensure that Suntec was provided due process of law when it unlawfully initiated *AR3 Final*. Compl. ¶¶ 28–33, 45.

[5] The *Transcom* case, upon which Commerce relies on for its contention that a review may be initiated after receipt of a request therefor regardless of any imperfect service, was decided under the prior version of the regulation, which did not require actual service of individuals requesting review. *See Transcom, Inc. v. United States*, 294 F.3d 1371, 1379 (Fed. Cir. 2002), referencing 19 C.F.R. § 353.22(a)(c)); *see also* Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7308, 7326 (Feb. 26, 1996) ("Paragraph (f)(3)(ii) is new, and clarifies the requirements for service of requests for review.").

The problem with Suntec's argument is that it commingles two separate notices: the notice of a request for review, and the notice of the initiation of the review. 19 C.F.R. § 351.303(f)(3)(ii) requires the petitioner to provide Suntec with actual notice of a request for review, and 19 U.S.C. § 1675(a) requires that Commerce provide notice of the initiation of the review through publication. For the latter, "Congress has directly spoken to the precise question" and unambiguously provided the mechanism of constructive notice through publication in the Federal Register to notify an interested party a review is being initiated. 19 U.S.C. § 1675(a) ("if a request for such a review has been received and after publication of notice of such review in the Federal Register," Commerce "shall . . . review"). *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 ("[i]f the intent of Congress is clear, that is the end of the matter"). Publication in the Federal Register is a familiar method of providing notice to parties of actions in antidumping proceedings.[6] As a participant who filed a separate rate certification in the two previous annual review periods concerning the same subject merchandise, Suntec has a continuing obligation to monitor the Federal Register for actions that affect its interests.[7] Compl. ¶¶ 3–10. The publication of the *AR3 Initiation* in the Federal Register provided sufficient constructive notice to Suntec that its entries may be affected by the third administrative review, and Suntec cannot choose to disclaim such constructive notice provided through publication. *See Royal United Corp. v. United States*, 34 CIT__, 714 F. Supp. 2d 1307, 1318 (2010) (an experienced importer had "more than sufficient constructive notice" by published Federal Register statement concerning all unnamed exporters conditionally covered by potentially revised antidumping rate that its entries could be affected by the administrative review); *see also Transcom, Inc. v. United States*, 24 CIT 1253, 1263, 121 F. Supp. 2d 690, 701 (Nov. 07,

[6] *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1275–76 (Fed. Cir. 2002) (listing the applicable antidumping statute sections that provide for notice through Federal Register publication). *See Huaiyang Hongda Dehydrated Vegetable Co. v. United States*, 28 CIT 1944, 1949 (2004) ("[a]ll industries or businesses availed of the 'substantial privilege' of doing business within the United States are chargeable with knowledge of its laws and the manner of their execution to maintain public order") (citations omitted); *see also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT 1541, 1549 n.10, 285 F. Supp. 2d 1371, 1378 n.10 (2003) ("[i]t is well established by both statutes and cases that the publication of an item in the Federal Register constitutes constructive notice of anything within that item") (citations omitted).

[7] *See Huaiyang Hongda Dehydrated Vegetable Co.*, 28 CIT at 1949 ("prior involvement in antidumping duty proceedings concerning the same subject merchandise gives rise, *a fortiori*, to an interest in monitoring for publication of the annual notice of opportunity to request review.") (italics in original) (citation omitted).

2000) ("[a]s a prominent member of the industry, Transcom was aware and was expected to make itself aware of publications in the Federal Register"; publication put Transcom on notice as well as provided it with the information necessary to determine if the "particular entries in which it has an interest *may* be affected by the administrative review") (quoting *Transcom, Inc. v. United States*, 182 F.3d 876, 882–83 (Fed. Cir. 1999) and adding italics), *aff'd*, 294 F.3d 1371 (Fed. Cir. 2002).

Suntec argues *Camp v. U.S. Bureau of Land Mgmt.*, 183 F.3d 1141, 1145 (9th Cir. 1999), supports its contention that Commerce's failure to enforce the personal service provisions of 19 C.F.R. § 351.303(f)(3)(ii) makes publication of the *AR3 Initiation* "insufficient in law" under 44 U.S.C. § 1507. This case is not on point, however. *Camp* held that the "contents of documents" published in the Federal Register are "insufficient in law" when the agency involved had "*any* independent legal duty to give notice by a means other than publication."[8] *Id.* (italics added). Neither the regulation nor the statute at issue in this case places an independent legal duty on Commerce to provide notice of the contents of a notice of initiation to Suntec by any other means than through publication in the Federal Register. Thus, the petitioners' failure to provide actual notice of the review request did not render the constructive notice of the *AR3 Initiation* provided by Commerce to Suntec "insufficient in law" under 44 U.S.C. § 1507.

This court must also reject Suntec's argument that the notice it received was inadequate to satisfy the requirements of the Due Process Clause of the Fifth Amendment. *See* Compl. ¶¶ 28, 32, 45. Commerce provided sufficient constructive notice of the *AR3 Initiation* through publication in the Federal Register, and the petitioner, as a private party, was not bound to provide constitutional due process protections for notice of a review request to another private party.[9]

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[8] In *Camp* the government agency, BLM, was charged with an undisputed legal duty by the applicable regulation to send actual notice of the "proposed land transaction" to the plaintiffs and provide notice through publication in the Federal Register. BLM's failure to provide actual notice for the same document's "contents" rendered notice in the Federal Register of the land transaction "insufficient in law."

[9] *See*, *e.g.*, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 527 (1987) (affirming lower court's ruling that a non-state actor cannot be "bound by the constraints of the Constitution"). *See also Transcom, Inc.*, 294 F.3d at 1380 (constructive notice of initiation was sufficient to give reasonable notice of review and accordingly constitutional due process requirements were satisfied), referencing *Mullane v. Cent. Hanover Bank &Trust Co.*, 339 U.S. 306, 314 (1950) (notice is constitutionally sufficient if it is "[r]easonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (citations omitted).

2. Commerce's Discretion to Waive Regulatory Procedural Requirements

As a result of receiving sufficient constructive notice of the *AR3 Intitation*, Suntec was not "completely barred" from participating in the *AR3 Final* administrative review. On the other hand, as discussed *supra*, Commerce must receive a legally sufficient request for review that meets the personal service requirements under 19 C.F.R. § 351.303(f)(3)(ii) prior to initiating a review. If Suntec did not receive actual notice of a review request as required by regulation, and the petitioner provided Commerce with a certificate of service that properly reflected this deficient notice and offered no explanation of reasonable efforts or attempts to serve, and Commerce nonetheless initiated the administrative review, Suntec could, as it has in this case, allege it was injured as a result of administrative action that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(A)&(D).

But, Commerce's violation of 19 C.F.R. § 351.303(f)(3)(ii) does not, necessarily, render its choice to initiate the review undertaken pursuant thereto, or the subsequent results of the review, voidable. *See Huaiyang Hongda Dehydrated Vegetable Co.*, 28 CIT at 1949–50, referencing *Brock v. Pierce County*, 476 U.S. 253 (1986); *see also Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996); *see also Kemira Fibres Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995). As a general principle, an agency may modify or relax its procedural rules, and subsequent agency action thereby is only voidable upon a "showing of substantial prejudice by the complaining party."[10] To determine if Commerce's choice to unlawfully initiate *AR3 Final* should result in the recision of the *AR3 Final* results with respect to Suntec, a three-part inquiry derived from *Guangdong Chems. Imp.*, 30 CIT at 90–95, 414 F. Supp. 2d at 1305–10 and the Court of Appeals for the Federal Circuit in *PAM S.p.A. v. United States*, 463 F.3d at 1347–49 will be applied.[11] First asked is whether

[10] It is well-established that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *Natl. Labor Relations Bd. v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953) (citations omitted), quoted by *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *PAM S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006).

[11] *Guangdong Chems. Imp.*, 30 CIT at 90–95, 414 F. Supp. 2d at 1305–10, provides an extensive and thorough analysis of the contrasting judicial approaches that were considered and reconciled when developing steps of the test via the following: *Am. Farm Lines*, 397 U.S. at 532; *Port of Jacksonville Maritime Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788

the relevant statute or implementing regulation states a remedy for failure to comply. If there is no stated remedy, the second question is whether the rule provides an important procedural benefit. If so, the third question is whether substantial prejudice can be demonstrated. *See Guangdong Chems. Imp.*, 30 CIT at 90, 414 F. Supp. 2d at 1305, referencing *Dixon Ticonderoga Co.*, 29 CIT at 411–12, 366 F. Supp. 2d at 1357.

The regulation at issue, 19 C.F.R. § 351.303(f)(3)(ii), and its authorizing statute, 19 U.S.C. § 1675(a), do not state consequences for Commerce's failure to comply. *See Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310, referencing *NSK, Ltd. v. United States*, 28 CIT 1535, 1547–49, 346 F. Supp. 2d 1312, 1325 (2004) *aff'd* 481 F.3d 1355 (Fed. Cir. 2007). The regulation, a service of notice provision, is intended to provide important procedural benefits to participants in an administrative review and is not in place merely to provide a "courtesy" to respondents as argued by the defendant. Rather, it confers greater regularity and predictability through distinct filing requirements and rules, and it affords respondents the opportunity to prepare for participation in an antidumping duty proceeding before it begins. *PAM, S.p.A. v. United States*, 29 CIT 1194, 1200–01, 395 F. Supp. 2d 1337, 1343–44 (2005), *rev'd and remanded on other grounds*, 463 F.3d 1345 (Fed. Cir. 2006), referenced by *Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310 ("[s]ervice of notice provisions generally provide predictability in the administrative review process, and time for respondents to prepare a response.").[12]

F.2d 705, 708 (11th Cir.1986)*; Alamo Express, Inc. v. United States*, 613 F.2d 96, 97–98 (5th Cir.1980); *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir.1979); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir.1993); *Chong v. INS*, 264 F.3d 378, 390 (3d Cir.2001) (following *Waldron*); *Belton Indus., Inc. v. United States* ; *Wilson v. Comm'r Soc. Sec*., 378 F.3d 541, 547 (6th Cir.2004); *Kemira Fibres Oy*, 61 F.3d at 866; *Intercargo Ins. Co.*, 83 F.3d at 394; *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir.2003); *Atteberry v. United States*, 27 CIT 1070, 1085–94 (2003) *vacated*, 31 CIT 133 (2007); *Cummins Engine Co. v. United States*, 23 CIT 1019, 1032–35, 83 F. Supp. 2d 1366, 1378–79 (1999); *Taiyuan Heavy Mach. Imp. & Exp. Corp. v. United States*, 23 CIT 701, 703 (1999); *Dixon Ticonderoga Co. v. U.S. Customs & Border Prot.*, 29 CIT 406, 411–12, 366 F. Supp. 2d 1352, 135658 (2005).

[12] *See Antidumping Duties-- Countervailing Duties*, 62 Fed. Reg. 27296, 27306 (May 19, 1997) (final rule) (expressing that the purpose of revising the antidumping regulations and later noting that the purpose of amending 19 C.F.R. § 351.202(c) with the words "other filing requirements are set forth in § 351.303" was to "put petitioners on notice as to the existence and location of distinct filing requirements"); *see also Antidumping Duties-- Countervailing Duties,* 61 Fed. Reg. 7308, 7326 (Feb. 27, 1996) (notice of proposed rulemaking and request for public comments) ("[s]ection 351.303 is new, and contains the procedural rules regarding filing, format, service, translation, and certification of documents" and "[p]aragraph (f)(3)(ii) is new, and clarifies the requirements for service of requests for review").

As an interpretive exemplar, Commerce stated in a letter sent to a requesting party for a previous review that it "[w]ill decline to initiate a review of a company which has not been served a copy of the review request, or if you [the requesting party] fail to explain to the Department why a company was not served a copy."[13] Commerce also indicated in the heading *AR3 Initiation* that it was being initiated "[i]n accordance with the Department's regulations", which include those for requests for reviews and the personal service requirements of 19 C.F.R. § 351.303(f)(3)(ii). *AR3 Initiation Notice*, 76 Fed. Reg. 61076 (Oct. 3, 2011). Commerce itself thus highlights the importance of the procedural benefits conferred by its administrative practices.

Having determined the regulation provides important procedural benefits, the next question to be examined is if Suntec was substantially prejudiced by petitioners lack of service, and "[p]rejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310, referencing *Intercargo Ins. Co.*, 83 F.3d at 396 (citations omitted). On this question, the court previously observed that "[r]espondents . . . rely on service of notice provisions, such as § 351.303(f)(3)(ii), to provide greater regularity in the administrative process and an opportunity to prepare for participation in an investigation before it begins." *Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310. To prove substantial prejudice, Suntec, as an intended beneficiary of the procedural protections of 19 C.F.R. § 351.303(f)(3)(ii), must indicate that petitioners' failed service, and Commerce's failure to comply with the regulation thereof, in some way impeded its ability to prepare for

[13] Pl.'s Resp. at Att. 1 (Letter from Acting Program Manager, AD/CVD Operations, Office 8, to petitioner's counsel re: "Administrative Review of the Countervailing Duty (CVD) Order on Aluminum Extrusions from the People's Republic of China; 2012" (June 18, 2013)), stating in relevant part as follows:

> Upon review of your request, we noted that, pursuant to 19 C.F.R. 351.303(f)(3)(ii), you did not serve a copy of the review request on [a certain PRC exporter or producer] but rather, on behalf of the companies, served a copy of the request to the Embassy of the [PRC].
>
> We are providing you until [a time and date certain] . . . to file a revised certificate of service showing that you served a copy of the [petitioner]'s request for review on the above-listed companies or, if you are unable to locate the companies, to demonstrate you made a reasonable attempt to serve a copy of the request on such companies.
>
> Please understand that we will decline to initiate a review of a company which has not been served a copy of the review request, or if you fail to explain to the Department why a company was not served a copy.

and present its case, *i.e.*, respond to and defend its interests in the administrative review.[14]

Suntec's alleged prejudice of loss of customers who refused to pay amounts owed and loss of current and future business is not prejudice of the pertinent kind, because it does not stem from deficient notice of the review request, but instead from Suntec's choice not to respond to the *AR3 Intiation* despite receiving sufficient constructive notice. *See* Compl. ¶¶ 18, 32, 39. However, Suntec's claim that it experienced substantial prejudice by an "inability to participate in the administrative review" as a result of not receiving actual notice that any party had requested a review of its entries indicates that Commerce's unlawful initiation of *AR3 Final* inhibited Suntec's ability to defend its interests and prepare for and present its case in the administrative review.[15] Compl. ¶ 32, Pl.'s Resp. at 8–9. To determine if the *AR3 Final* results are voidable requires further consideration of the substantial prejudice Suntec alleges it actually suffered as a result of not receiving actual notice of the review request, which ventures into the merits. The plaintiff will have its day in court for further exploration of the claim as a matter of fact. The court will therefore deny defendant's Rule 12(b)(5) motion to dismiss, without prejudice, and will instruct the parties to proceed to the merits.

Conclusion

In accordance with the foregoing, the defendant's motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim is denied. The parties will therefore submit a joint proposed scheduling order covering further proceeding of this matter by January 6, 2014.

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[14] *See*, *e.g.*, *PAM S.p.A*, 463 F.3d at 1349 (harm caused by a few weeks' delay in notification remedied by subsequent extensions of time for filing deadlines did not amount to substantial prejudice, and noting plaintiff did not claim its ability to respond to and defend its interests were impeded.); *see also Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310 ("[t]here must instead be some indication that failure to comply with the regulation in some way inhibited Guangdong's presentation of its case.").

[15] *Cf. Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310 (Guangdong affirmatively stated that it suffered no prejudice except that the administrative review took place); *see also Intercargo Ins. Co.*, 83 F.3d at 396 (plaintiff did not suffer prejudice because the omission of the requisite language from the extension notices had no effect on Intercargo's right to challenge the extensions, and wrongfully imposing a customs duty is not what is meant by prejudice in this instance.); *see also PAM S.p.A.*. 29 CIT at 1200, 395 F. Supp. 2d at 1343 n.2, distinguishing *NSK Ltd.,* 28 CIT at 1547–49, 346 F. Supp. 2d at 1324–26 (treating *NSK's* discussion of *Am. Farm Lines* and findings that the regulation did not confer a procedural benefit and *NSK* did not suffer substantial prejudice by a 9-day delay in preparation, as *dicta*, because a "reasonable attempt" at service was made as a result of Commerce "curing" the service defect upon discovery), referenced by *Guangdong Chems. Imp.*, 30 CIT at 95, 414 F. Supp. 2d at 1310 n. 4.

So ordered.
Dated: December 6, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE