

U.S. Court of International Trade

Slip Op. 16–109

BELL SUPPLY COMPANY, LLC, Plaintiff, v. UNITED STATES, Defendant,
and BOOMERANG TUBE LLC et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 14–00066
PUBLIC VERSION

[Second Remand Results sustained.]

Dated: November 23, 2016

Donald Bertrand Cameron, Julie Clark Mendoza, Rudi Will Planert, Brady Warfield Mills, Mary Shannon Hodgins, and Sarah Suzanne Sprinkle, Morris, Manning & Martin, LLP, of Washington, DC, for plaintiff.

Loren Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Claudia Burke, Assistant Director. Of counsel on the brief was Whitney Marie Rolig, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Roger Brian Schagrin, Christopher Todd Cloutier, John Winthrop Bohn, Jordan Charles Kahn, and Paul Wright Jameson, Schagrin Associates, of Washington, DC, for defendant-intervenors Boomerang Tube LLC, TMK IPSCO Tubulars, V&M Star L.P., and Wheatland Tube Company.

Robert Edward DeFrancesco, III and Alan Hayden Price, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor Maverick Tube Corporation. Debbie Leilani Shon, Jon David Corey, Jonathan Gordon Cooper, and Josef Teboho Ansoorge, Quinn Emanuel Urquhart & Sullivan, LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce” or “Department”) second remand redetermination filed pursuant to the court’s order in *Bell Supply Co. v. United States*, 40 CIT ___, Slip Op. 16–41 (Apr. 27, 2016) (“*Bell Supply II*”) for a remand to Commerce for further consideration of Commerce’s findings in Final Results of Redetermination Pursuant to Remand, Nov. 9, 2015, ECF No. 88–1 (“First Remand Results”). See Final Results of Second Redetermination Pursuant to Remand, Aug. 11, 2016, ECF No. 132–1 (“Second Remand Results”).

The court reviews Commerce’s determinations: (1) that unfinished green tubes¹ manufactured in China and subsequently finished in third countries into oil country tubular goods (“OCTG”) are not within the scope of the antidumping and countervailing duty orders covering certain OCTG from the People’s Republic of China (“PRC” or “China”); and (2) that OCTG finished in Indonesia from Chinese unfinished green tubes do not circumvent antidumping and countervailing duty orders covering OCTG from China. *See* Second Remand Results; *see also Certain Oil Country Tubular Goods From the People’s Republic of China*, 75 Fed. Reg. 3,203 (Dep’t Commerce Jan. 20, 2010) (amended final affirmative countervailing duty determination and countervailing duty order) (“*CVD Order*”); *Certain Oil Country Tubular Goods From the People’s Republic of China*, 75 Fed. Reg. 28,551 (Dep’t Commerce May 21, 2010) (amended final determination of sales at less than fair value and antidumping duty order) (“*ADD Order*”). The court sustains Commerce’s determinations because Commerce has complied with the court’s order in *Bell Supply II* and Commerce’s conclusions are supported by substantial evidence.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in its two previous opinions. *See Bell Supply Company, LLC v. United States*, 39 CIT __, 83 F. Supp. 3d 1311 (2015) (“*Bell Supply I*”); *Bell Supply II*, 40 CIT __, Slip Op. 16–41. Nonetheless, some facts directly relevant to reviewing Commerce’s Second Remand Results bear repeating.

On January 20, 2010 and May 21, 2010, respectively, Commerce published the countervailing and antidumping duty orders on OCTG from the PRC. *See CVD Order*, 75 Fed. Reg. at 3,203, *ADD Order*, 75 Fed. Reg. at 28,551. The CVD and ADD Orders (collectively “Orders”) define the subject merchandise as:

certain oil country tubular goods (“OCTG”), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (“API”) or non-API specifications, whether finished (in-

¹ In the Second Remand Results, Commerce refers to the unfinished product leaving China for Indonesia at issue in this case as “green tubes,” “unfinished green tubes,” “unfinished OCTG,” “unfinished OCTG (including green tubes),” and “unfinished OCTG (e.g., green tubes).” For ease of reference, the court adopts the term “unfinished green tubes” throughout this opinion to refer to the unfinished Chinese product imported to Indonesia for processing into finished OCTG.

cluding limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the order also covers OCTG coupling stock. Excluded from the scope of the order are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

CVD Order, 75 Fed. Reg. at 3,203–04; *ADD Order*, 75 Fed. Reg. at 28,553.

On June 20, 2012, Commerce initiated a scope inquiry regarding Plaintiff's merchandise following a request from Defendant-Intervenors United States Steel Corporation ("U.S. Steel"), TMK IPSCO, Wheatland Tube Company, Boomerang Tube LLC, and V&M Star L.P.² See Initiation of Scope Inquiry, PD 25, bar codes 3082712–01, 3082735–01 (June 21, 2012).³

On February 7, 2014, Commerce issued a final scope ruling determining that unfinished green tubes manufactured in China processed into finished OCTG in third countries are subject to the Orders because such merchandise is not substantially transformed during the finishing process. See Final Scope Ruling on Green Tubes Manufactured in the People's Republic of China and Finished in Countries Other than the United States and the People's Republic of China, May 14, 2014, ECF No. 31–1 ("Final Scope Ruling"); see also 19 C.F.R. § 351.225(e) (2013).⁴

Plaintiff challenged the Final Scope Ruling in this court, arguing that Commerce's determination unlawfully expanded the scope of the Orders and relied on a substantial transformation analysis unsupported by substantial evidence and otherwise not in accordance with law. Compl. ¶¶ 21, 25, Apr. 4, 2014, ECF No. 8; see *Bell Supply I*, 39 CIT at __, 83 F. Supp. 3d at 1313–14. The court held that Commerce failed to follow the interpretive framework established in its regulations and therefore unlawfully expanded the scope of the Orders to

² As explained in *Bell Supply II*, Defendant-Intervenors requested the scope ruling in response to a U.S. Customs and Border Protection ruling that green tubes and unfinished seamless steel pipes made in India, China, or Russia subsequently heat treated in certain third countries became products of that third country. See *Bell Supply II*, 40 CIT at __, Slip Op. 16–41 at 6.

³ On May 14, 2014, Commerce submitted indices to the confidential and public administrative records for its antidumping and countervailing duty scope proceedings. Those administrative records can be found at ECF Nos. 31–4 and 31–5, respectively. All further documents from the administrative records may be located in those appendices unless otherwise noted.

⁴ Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition.

include Plaintiff's merchandise. See *Bell Supply I*, 39 CIT at ___, 83 F. Supp. 3d at 1328–30. The court remanded Commerce's scope determination with instructions to "identify actual language from the scope of the Orders that could be reasonably interpreted to include OCTG finished in third countries in order to find that the merchandise is covered by the scope of the Orders," as required pursuant to the regulatory scheme. *Id.* at 1329.

On first remand,⁵ Commerce determined that the plain language of the Orders covered unfinished green tubes manufactured in China, regardless of whether the tubes are subsequently finished into OCTG in third countries. See First Remand Results at 2, 15, 20. After reviewing comments from Plaintiff and replies from Defendant and Defendant-Intervenors, the court determined that Commerce's First Remand Results did not comply with the court's remand order in *Bell Supply I* and that the results were not supported by substantial evidence or in accordance with law. *Bell Supply II*, 40 CIT at ___, Slip Op. 16–41 at 11, 13, 38–40. Specifically, the court held that Commerce did not comply with the court's instruction that it must identify language in the Orders that could be reasonably interpreted to include OCTG finished in third countries, prior to finding that OCTG finished in third countries is within the Orders' scope. *Id.* at 38 (citing *Bell Supply I*, 39 CIT at ___, 83 F. Supp. 3d at 1329). Although Commerce did identify actual language that appeared in the scope of the Orders, the court held the language was insufficient to permit Commerce to determine that the Orders unambiguously include OCTG finished in third countries. *Bell Supply II*, 40 CIT at ___, Slip Op. 16–41 at 38. The court further held that Commerce's interpretation of the scope language of the Orders was unsupported by substantial evidence because Commerce did not identify evidence from the 19 C.F.R. § 351.225(k)(1) sources to support its interpretation. *Id.*, 40 CIT at ___, Slip Op. 16–41 at 33. The court also held that, to the extent that the scope language remained ambiguous following consultation of the (k)(1) sources, Commerce did not evaluate the factors under 19 C.F.R. § 351.225(k)(2), as required by its regulation. *Id.*, 40 CIT at ___, Slip Op. 16–41 at 38–39. The court remanded Commerce's redetermination again for further consideration and instructed that, on second remand, Commerce

⁵ Commerce conducted the first remand redetermination under protest, noting that it "respectfully disagree[d] with the CIT that the Department improperly conducted a 'substantial transformation' test in this proceeding." First Remand Results at 14. By adopting a position "under protest," Commerce preserved its right to appeal; the Federal Circuit has held that Commerce preserves its right to appeal in instances where Commerce makes a determination under protest and the Court of International Trade sustains its decision after remand. See *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

must identify evidence from the descriptions of the merchandise in the (k)(1) sources to reasonably interpret the scope language of the Orders to cover Chinese green tubes finished in third countries. If the descriptions of the merchandise in the (k)(1) sources are not dispositive, then Commerce must proceed to evaluate the factors under 19 C.F.R. § 351.225(k)(2) as directed by its regulations. If Commerce is unable to find that the scope of the Orders cover the merchandise at issue under the (k)(2) factors, then the merchandise is not within the scope of the Orders. In the event Commerce determines that the merchandise at issue falls outside the scope of the Orders, Commerce is also free to employ a circumvention analysis pursuant to 19 C.F.R. § 351.225(h) and 19 U.S.C. § 1677j(b) to bring the merchandise within the reach of the Orders because the scope language does not expressly exclude Chinese green tubes that are finished in a foreign third country. Or, Commerce can forego a circumvention inquiry and determine that Chinese green tubes subsequently finished in countries other than the United States and China fall outside the scope of the Orders.

Id., 40 CIT at ___, Slip Op. 16–41 at 38–39 (internal citations omitted).

On August 11, 2016, Commerce issued the Second Remand Results, in which Commerce determined that the language of the Orders does not include unfinished green tubes manufactured in China and finished in third countries and that imports of finished OCTG from Indonesia processed from unfinished green tubes from China do not circumvent the Orders. *See* Second Remand Results at 1, 5, 19–20, 33–35. On September 19, 2016, Defendant-Intervenors U.S. Steel and Maverick filed comments to the Second Remand Results, *see* U.S. Steel Comments On Final Results of Second Redetermination, Sept. 19, 2016, ECF No. 147 (“U.S. Steel Comments”); Def.-Intervenor Maverick Comments On Final Results of Second Redetermination, Sept. 19, 2016, ECF No. 148 (“Maverick Comments”), to which Plaintiff replied. Pl. Rebuttal Comments on Second Redetermination, Sept. 26, 2016, ECF No. 149 (“Pl. Rebuttal”).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Plaintiff’s claim under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012)⁶ and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting scope determinations that find certain

⁶ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

merchandise to be within the class or kind of merchandise described in an antidumping or countervailing duty order. The court must “hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiaomei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

The court first reviews Commerce’s determination that the subject merchandise, which is produced in China and subsequently processed in third countries, is not covered by the Orders. The court then reviews Commerce’s negative anti-circumvention determination under 19 U.S.C. § 1677j(b). For the reasons that follow, Commerce has complied with the court’s remand instructions in *Bell Supply II* and both Commerce’s scope analysis and its anticircumvention determinations are supported by substantial evidence.

I. Commerce’s Scope Analysis Is Supported By Substantial Evidence

In the Second Remand Results, Commerce reexamined the language of the Orders and determined that neither the plain language nor the language read in conjunction with the sources outlined in 19 C.F.R. § 351.225(k)(1) indicates that unfinished green tubes manufactured in China and subsequently finished in Indonesia, a third country, are covered by the Orders. Second Remand Results at 14–15. After consulting the factors outlined in 19 C.F.R. § 351.225(k)(2), Commerce also determined that none of the (k)(2) factors indicates whether unfinished green tubes manufactured in China and subsequently finished in Indonesia are within the scope of the Orders. *Id.* at 19; *see* 19 C.F.R. § 351.225(k)(2). Accordingly, Commerce determined that the imported merchandise is not covered by the scope of the Orders. Second Remand Results at 19. The court finds this determination is supported by substantial evidence.

Commerce’s regulations permit it to conduct a scope inquiry when necessary to clarify the scope of an antidumping or countervailing duty order. *See* 19 C.F.R. § 351.225(b)–(c). Where Commerce conducts a scope inquiry, it looks to the words of the order to ascertain if the plain meaning of the scope language is unambiguous with respect to

the merchandise in question. 19 C.F.R. § 351.225(k)(1); see *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). Although Commerce enjoys broad discretion “to interpret and clarify its antidumping duty orders,” *Ericsson GE Mobile Commc’ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (internal citations omitted), Commerce must point to “language that specifically includes the subject merchandise or may be reasonably interpreted to include it.” *Duferco Steel, Inc.*, 296 F.3d at 1089. Merchandise is not within the scope of an order unless it is demonstrated to be unambiguously covered by that order. *Id.* at 1096. If the language is ambiguous as to the subject merchandise, Commerce may clarify the words of the order by analyzing the descriptions of the merchandise found in the petition, the investigation, and past scope rulings and injury determinations. See 19 C.F.R. § 351.225(k)(1). If the sources consulted pursuant to 19 C.F.R. § 351.225(k)(1) do not clarify the meaning of the scope language, Commerce analyzes the physical characteristics of the product, the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold, and the manner in which the product is advertised and displayed, to determine if the product is covered by the order. See 19 C.F.R. § 351.225(k)(2).

On second remand, Commerce determined that neither the plain language nor the language read in conjunction with the (k)(1) sources supports a finding that unfinished green tubes manufactured in China and subsequently finished in Indonesia are within the scope of the Orders. Second Remand Results at 14–15. Commerce thus analyzed the 19 C.F.R. § 351.225(k)(2) factors and concluded that none of the (k)(2) factors clarifies whether unfinished green tubes originating in China and processed in Indonesia into finished OCTG remain products of China.⁷ *Id.* at 15–19. As none of the factors squarely addresses the issue of third country production, Commerce reasonably found that nothing in the record unambiguously evidenced that the merchandise finished in Indonesia is within the scope of the

⁷ After a review of each (k)(2) factor, Commerce determined that the (k)(2) factors do not conclusively establish that unfinished green tubes imported from China and further processed in Indonesia are subject to the Orders. Second Remand Determination at 19. Commerce acknowledged that physical characteristics, expectations of the ultimate purchaser, ultimate use, and marketing and display of Chinese unfinished green tubes finished in Indonesia are identical or substantially similar to finished and unfinished OCTG produced entirely in China. *Id.* Commerce further noted that, while there may be different applications for finished, heat-treated tube and unfinished green tube, the applications for both products are variations on the extraction of oil and gas. *Id.* However, Commerce found that Chinese unfinished green tubes finished in Indonesia differ on one (k)(2) factor, channels of trade, “in that the unfinished OCTG manufactured in the PRC must first pass through a third country and undergo heat treatment prior to importation into the United States.” *Id.* at 19.

Orders. *Id.* at 19; see *Duferco Steel, Inc.*, 296 F.3d at 1096. Where the record does not include information to conclusively indicate that unfinished green tubes originating in China and further processed in Indonesia should be considered Chinese OCTG, Commerce reasonably determined such unfinished green tubes are not covered by the Orders.

Defendant-Intervenors Maverick and U.S. Steel argue that Commerce's scope determinations in the Final Scope Ruling and First Remand Results were supported by substantial evidence and in accordance with law.⁸ U.S. Steel Comments at 2–3; Maverick Comments at 3–4. Defendant-Intervenors' arguments were addressed by the court in its previous remand decisions.⁹ Accordingly, Defendant-Intervenors' arguments that Commerce's determinations in the Final Scope Ruling and First Remand Results were supported by substantial evidence and in accordance with law continue to fail.

II. Commerce's Circumvention Analysis Is Supported By Substantial Evidence

As Commerce was unable to determine under a scope analysis that Chinese unfinished green tubes finished in Indonesia are covered by the Orders, Commerce proceeded to conduct a circumvention analysis pursuant to 19 U.S.C. § 1677j(b) to determine whether merchandise otherwise not subject to the Orders should be considered subject merchandise. See 19 U.S.C. § 1677j(b)(1)–(3).

To find circumvention, Commerce must determine that:

⁸ Neither Maverick nor U.S. Steel contends that Commerce's analysis in the Second Remand Results were not supported by substantial evidence or contrary to law. Rather, both Maverick and U.S. Steel preserve for appeal their claims that Commerce's original final scope ruling and Commerce's First Remand Results were lawful and supported by substantial evidence. Maverick Comments at 3; U.S. Steel Comments at 2. Additionally, U.S. Steel incorporates by reference their previous arguments and those of other domestic producers that Commerce's substantial transformation analysis in the final determination and scope analysis in the First Remand Results were supported by substantial evidence. U.S. Steel Comments at 2.

⁹ In *Bell I*, the court held that Commerce failed to follow the interpretive framework established in its regulations on scope determinations or anticircumvention. *Bell Supply I*, 39 CIT at __, 83 F. Supp. 3d at 1328 ("It is unclear to the court why Commerce believed that the (k)(1) and (k)(2) factors provided for in its own regulations were not useful in answering the interpretive question before it. . . . Whatever reason Commerce had for abandoning an interpretive approach in conducting its scope inquiry, it acted contrary to law when it did so."). The court also held that Commerce improperly read the Orders' silence regarding OCTG finished in third countries as indicating that merchandise processed in third countries was included. *Id.*, 39 CIT at __, 83 F. Supp. 3d at 1328–29. In *Bell II*, the court held that Commerce, in its remand redetermination, failed to identify language in the Orders and identify sources that permitted it to reasonably interpret the Orders to reach Plaintiffs' merchandise. *Bell Supply II*, 40 CIT at __, Slip Op. 16–41 at 38–40. Finally, the court determined that, because the (k)(1) sources were not dispositive, Commerce should have proceeded to evaluate the factors under 19 C.F.R. § 351.225(k)(2). *Id.*, 40 CIT at __, Slip Op. 16–41 at 33, 38–39.

- (A) merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject of—
 - (i) antidumping duty order . . . ,
- (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which-
 - (i) is subject to such order or finding, or
 - (ii) is produced in the foreign country with respect to which such order or finding applies,
- (C) the process of assembly or completion in the foreign country referred to in subparagraph (B) is minor or insignificant,
- (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States, and
- (E) [Commerce] determines that action is appropriate under this paragraph to prevent evasion of such order or finding.

19 U.S.C. § 1677j(b)(1).

Whether the “process of assembly or completion in the foreign country . . . is minor or insignificant” is evaluated pursuant to factors provided in 19 U.S.C. § 1677j(b)(2).¹⁰ Specifically, Commerce considers the levels of investment and degree of research and development in the third country, the nature of the production processes and the extent of the production facilities in the third country, and the value added from the processing performed in the third country. 19 U.S.C. § 1677j(b)(2).

Finally, in making a determination whether to include merchandise assembled or completed in a third country within an order, Commerce considers the additional factors listed under 19 U.S.C. § 1677j(b)(3), which are

- (A) the pattern of trade, including sourcing patterns,
- (B) whether the manufacturer or exporter of the merchandise described in paragraph (1)(B) is affiliated with the person who uses the merchandise described in paragraph (1)(B) to

¹⁰ When Commerce assesses the 19 U.S.C. § 1677j(b)(2) factors, no one factor is controlling. 19 C.F.R. 351.225(h).

assemble or complete in the foreign country the merchandise that is subsequently imported into the United States, and

- (C) whether imports into the foreign country of the merchandise described in paragraph (1)(B) have increased after the initiation of the investigation which resulted in the issuance of such order or finding.

19 U.S.C. § 1677j(b)(3).

Here, after finding that the finished OCTG imported into the United States is of the same class or kind as the Chinese merchandise subject to the Orders, 19 U.S.C. § 1677j(b)(1)(A), and that it is “completed or assembled in another foreign country from merchandise . . . subject to such order” prior to importation into the United States, 19 U.S.C. § 1677j(b)(1)(B), Commerce considered whether the process of assembly or completion in Indonesia is minor or insignificant pursuant to § 1677j(b)(1)(C). Second Remand Results at 22–29. Commerce applied the 19 U.S.C. § 1677j(b)(2) factors. It found that the Indonesian processing operations comprise eight-steps, including heat treatment, proprietary threading, coupling, logistics, and warehousing, *id.* at 25, 28, and add a significant proportion of the value of the merchandise imported to the United States. *Id.* at 26. Commerce determined that significant quantitative value is added, based on Commerce’s finding that the weighted-average value added by the Indonesian heat treatment process is a certain percentage¹¹ of the final value of the finished OCTG. *Id.* at 26, 29. Commerce also determined that it was appropriate to consider the total value added to the merchandise by all of the finishing operations performed in Indonesia, and subsequently found that the total value added by the finishing processes in Indonesia is not small or insignificant.¹² *Id.* at 26, 29. Commerce found that the finishing operations also add qualitative value, as finishing renders unfinished green tubes “suitable for par-

¹¹ Commerce found that the Indonesian heat treatment process comprises approximately [] percent of the final value of the finished OCTG. Second Remand Results at 26, 29.

¹² Commerce considered the calculations provided by Plaintiff showing that the total value added by all of the finishing operations is approximately [] percent of the final value of the finished OCTG. Second Remand Results at 26, 29. Commerce noted that the value calculations provided by Plaintiff were not based on surrogate value estimates of Chinese unfinished green tubes as is Commerce’s usual practice in valuing merchandise in anticircumvention proceedings, but rather based on the average prices of unfinished green tubes purchased by the Indonesian entity from European mills as surrogate value information was not available on the record. *Id.* at 29. Ultimately, Commerce concluded that “the processing performed in Indonesia does not represent a small proportion of the value of the merchandise imported into the United States.” *Id.* at 34.

ticular applications.”¹³ *Id.* at 26. Based on these findings, Commerce concluded that the nature and extent of the finishing operations performed in Indonesia go beyond “mere finishing or assembly” and are therefore neither minor nor insignificant.¹⁴ *Id.* at 26–29.

No party challenges Commerce’s finding that the process of completion or assembly in Indonesia is neither minor nor insignificant. Commerce based its determination on sufficient record evidence regarding the nature and extent of the processing operations in Indonesia and the value added by those processing operations. Commerce identified record evidence regarding the Indonesian finishing processes that involve multiple steps, including the heat treatment process which contributes a certain percentage¹⁵ to the finished product’s value. *Id.* at 26, 29. Commerce also considered the significant additional value added to the product by the entire finishing process. *Id.* 26, 29. Processing that involves multiple steps and contributes a significant portion of the value to a final product is extensive and significant; such processes cannot simultaneously be minor or insignificant. Commerce’s determination that the assembly or completion in Indonesia was not minor or insignificant, and thus that 19 U.S.C. § 1677j(b)(1)(C) was not satisfied, is reasonable.¹⁶

¹³ Regarding each of the other (b)(2) factors, Commerce found that the levels of investment in Indonesia were relatively insignificant, as the total investment in the Indonesian processing facility is [[]] percent of the total investment required for a complete, fully integrated seamless pipe mill, “the existence of which is necessary in the production of OCTG.” Second Remand Results at 27. Although Commerce found that record evidence indicated the Indonesian entity “continues to research and develop proprietary threading processes,” Commerce determined it could not quantify the level of research and development in Indonesia so that factor did not indicate whether the processing operations in Indonesia were minor or insignificant. *Id.* at 27–28.

¹⁴ Commerce reached a different conclusion on the 19 U.S.C. § 1677j(b)(2) factors in the Draft Remand Redetermination, and found that the finishing processes in Indonesia are minor or insignificant and thus that circumvention was occurring. *See* Draft Results of Second Redetermination Pursuant to Remand, Nov. 3, 2016, ECF No. 153–1 at 13–19. Specifically, Commerce preliminarily found that the heat treatment performed in Indonesia constitutes “a small portion of the overall production process of OCTG” and is “essentially one step in a multi-step process of creating finished OCTG.” *Id.* at 18. Commerce also focused only on the value added by the heat treatment process, *id.* at 17–19, and preliminarily found that the quantitative value added by the Indonesian processing is “relatively small.” *Id.* at 17. Commerce thus preliminarily found that insignificant qualitative value was added by the finishing process. *Id.* 17–19.

In the final Second Remand Results, Commerce reached a different conclusion on the evidence because Commerce considered the finishing process to be a multi-step process that significantly alters the product, Second Remand Results at 25, 28, and took account of the value added by the finishing process in its entirety rather than only heat treatment, and determined that the total value added is significant. *Id.* at 26, 29.

¹⁵ Commerce found that the Indonesian heat treatment process comprises approximately [[]] percent of the final value of the finished OCTG. Second Remand Results at 26, 29.

¹⁶ Having found that processing in Indonesia was not minor or insignificant, Commerce evaluated whether the value of the merchandise produced in China is a significant portion

Commerce reasonably determined that the record did not support a finding of circumvention because the process of assembly in Indonesia was not minor or insignificant. Commerce determined that the merchandise should not be included in the Orders pursuant to the anti-circumvention statute as not all factors under 19 U.S.C. § 1677j(b)(1) suggested that circumvention was occurring as is required for an affirmative circumvention finding under the statute, and the 19 U.S.C. § 1677j(b)(3) factors did not indicate circumvention in the absence of a finding on 19 U.S.C. § 1677j(b)(1). *Id.* at 33–34; *see also* 19 U.S.C. §§ 1677j(b)(1), (b)(3). No party points to any record evidence undermining or detracting from Commerce’s conclusion. Nor does any party challenge Commerce’s circumvention analysis. Commerce reasonably determined that it could not affirmatively find that circumvention is occurring.

CONCLUSION

For the foregoing reasons, the results of Commerce’s second remand redetermination are found to comply with the court’s remand order in *Bell Supply II*, are supported by substantial evidence, and are in accordance with law. Therefore, the court sustains the Second Remand Results. Judgment will enter accordingly.

Dated: November 23, 2016
New York, New York

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

of the total value of the merchandise exported to the United States. *See* 19 U.S.C. § 1677j(b)(1)(D). Commerce found that unfinished green tubes produced in China contribute approximately [] percent of the total value of the merchandise exported to the United States, which Commerce determined was a significant portion. Second Remand Results at 29, 34. Commerce did not evaluate whether action is appropriate to prevent evasion of the Orders; reaching this question was unnecessary in light of Commerce’s determination that the process of assembly or completion in Indonesia is not minor or insignificant.

Although Commerce did not find circumvention under its 19 U.S.C. § 1677j(b)(1) analysis, Commerce proceeded to analyze the additional factors under 19 U.S.C. § 1677j(b)(3) as required by statute. Commerce found that evidence on the record demonstrates that: imports into Indonesia of Chinese unfinished green tubes increased from 47,000 metric tons in 2008 to over 76,000 metric tons in 2011; imports into the United States of all OCTG from China decreased from nearly two million metric tons in 2008 to over 11,000 metric tons in 2011; and imports into the United States of OCTG from Indonesia increased from zero in 2008 to over 41,000 metric tons in 2011. Second Remand Results at 31–33; *see also* 19 U.S.C. § 1677j(b)(3). Although Commerce found a change in patterns of trade and an increase of imports of Chinese unfinished green tubes into Indonesia after the investigation, Second Remand Results at 34, Commerce determined that the Indonesian entity performing the processing functions is not affiliated with any Chinese producer or supplier of unfinished green tubes. *Id.* at 32. Commerce emphasized that it generally considers circumvention more likely when such affiliation is present. *Id.* As such, Commerce determined that the (b)(3) factors could not, on their own, support a finding that circumvention is occurring. *See id.* at 34. Commerce’s logic is reasonable.

Slip Op. 16–111

NEO SOLAR POWER CORPORATION, v. UNITED STATES, Plaintiff,
Defendant.

Before: Jane A. Restani, Judge
Court No. 16–00088

[Plaintiff’s motion for judgment on the agency record in antidumping duty matter denied.]

Dated: December 1, 2016

Neil B. Mooney, The Mooney Law Firm, LLC, of Tallahassee, FL, argued for plaintiff.

Agatha Koprowski, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Scott D. McBride*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, Washington, DC.

OPINION

Restani, Judge:

This matter is before the court on plaintiff Neo Solar Power Corporation (“NSP”)’s motion for judgment on the agency record pursuant to U.S. Court of International Trade Rule 56.1. Pl.’s Mot. for J. upon the Agency R. Pursuant to Rule 56.1, ECF No. 30. For the reasons stated below, the motion is denied.

BACKGROUND

NSP is a producer and exporter of certain crystalline silicon photovoltaic (“CSPV”) products from the Republic of China (“Taiwan”). Decl. of Henry Chen in Supp. of Mot. for Prelim. Inj. ¶ 4, ECF No. 6 (“Chen Decl.”). On February 18, 2015, the U.S. Department of Commerce (“Commerce”) published an antidumping (“AD”) duty order covering such merchandise. *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Antidumping Duty Order*, 80 Fed. Reg. 8596, 8596 (Dep’t Commerce Feb. 18, 2015) (“AD Order”). NSP asserts that Commerce improperly excluded it from the administrative review of that AD order, which covered entries from July 31, 2014, through January 31, 2016, because its request for review was not submitted by February 29, 2016, the last day of the anniversary month of the order. Compl. ¶¶ 1, 5, 7–8 ECF No. 4.

Commerce must review annually the amount of AD duties “if a request for such a review has been received.” 19 U.S.C. § 1675(a)(1) (2012). Such requests are due during the anniversary month of Com-

merce's publication of the AD order. 19 C.F.R. § 351.213(b). On February 3, 2016, Commerce published a Notice of Opportunity to Request Administrative Review for the AD order on CSPV from Taiwan in the Federal Register indicating that requests for review were due "[n]ot later than the last day of February 2016," which was February 29th. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 81 Fed. Reg. 5712, 5713 ("Review Req. Notice"). Per Commerce's regulations, parties are to file their request for review via Commerce's Antidumping and Countervailing Duty Centralized Electronic Service System ("ACCESS"). 19 C.F.R. § 351.303(b)(2)(i); see *Review Req. Notice*, 81 Fed. Reg. at 5715.

NSP asserts that on February 29, 2016, it was unable to file its review request electronically because it experienced technical issues with ACCESS.¹ NSP Req. for Review at 1–2, PD 3 (Mar. 4, 2016) ("Req. for Review"). NSP asserts it then attempted to mail a hardcopy of its request by expedited DHL courier. *Id.* at 2; Chen Decl. ¶ 14. Because February 29, 2016, was a national holiday in Taiwan, however, DHL did not pick up the package until March 2, 2016, and did not deliver it until March 3, 2016. Chen Decl. ¶ 14. Meanwhile, NSP asserts that, on March 1, 2016, it asked a Washington, DC law firm to hand-deliver the review request, but the law firm declined to do so. Req. for Review at 2. On March 2, 2016, NSP's counsel in Florida contacted Brenda E. Waters, listed on Commerce's *Review Req. Notice* as the appropriate contact person, to notify Commerce of the situation. *Id.* On March 4, 2016, NSP successfully resubmitted its request for review via ACCESS. *Id.* at 1; see also NSP Req. for Recons. at 2, PD 6 (Mar. 11, 2016) ("Req. for Recons.").

On March 8, 2016, Commerce rejected NSP's request to be included in the review as untimely. Letter Rejecting Req. for Review at 1, PD 4 (Mar. 8, 2016). On March 11, 2016, NSP filed a request for reconsideration. Req. for Recons. at 1. On March 21, 2016, Commerce rejected NSP's request for reconsideration because it found there were no "extraordinary circumstance[s]" under 19 C.F.R. § 351.302(c) and no "good cause" under 19 C.F.R. § 351.302(b). See Letter Rejecting Req. for Recons., PD 7 (Mar. 21, 2016) ("Req. for Recons. Rejection").

¹ It is unclear whether NSP's technical issues were the fault of NSP or Commerce. NSP argues that Commerce is to blame, and alleges that NSP's counsel in Florida was unable to file documents on ACCESS from March 2–11, 2016, via its Comcast IP. See Email(s) 1–2, ECF No. 31–4 ("Email(s)") (stating on March 9th that "[Commerce] ha[s] been informed that Comcast users are not able to get connected to ACCESS, . . ."). This fact, however, does not necessarily mean that Commerce caused NSP's counsel in Taiwan to be unable to file an extension request electronically on February 29th as NSP was able to file on March 4th. Regardless, as discussed below, who was to blame for the technical issue is irrelevant.

On April 7, 2016, Commerce published a notice of initiation of an administrative review for CSPV from Taiwan that excluded NSP from the review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 20,324, 20,334 (Dep't Commerce Apr. 7, 2016).

NSP argues that Commerce unreasonably denied its extension request for a variety of reasons. Br. in Supp. of Pl.'s Rule 56.1 Mot. for J. upon the Agency R. 7–14, ECF No. 30–1 (“NSP Br.”). The government relies on exhaustion of administrative remedies defense and also defends the decision on the merits. Def.'s Resp. in Opp'n to Pl.'s Rule 56.1 Mot. for J. upon the Agency R. 7–28, ECF No. 36 (“Gov't Br.”).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2012). The court will hold unlawful an action by Commerce if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. § 2640(e) (directing the court to evaluate 28 U.S.C. § 1581(i) cases under the standards set forth in the Administrative Procedure Act). Moreover, Commerce abuses its discretion if its “decision (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; . . . or (4) follows from a record that contains no evidence on which [Commerce] could rationally base its decision.” *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1182 (Fed. Cir. 1994) (quoting *Gerritsen v. Shirai*, 979 F.2d 1524, 1529 (Fed. Cir. 1992)).

DISCUSSION

I. Administrative Remedies Were Exhausted

The government contends the court should not consider NSP's arguments regarding “extraordinary circumstance[s]” because NSP failed to raise the issue before Commerce. Gov't Br. at 12–13. NSP responds that “[a]lthough the magic word ‘extraordinary circumstances’ was not used in the [March 11th] letter, NSP did present the essential elements for what it claimed to be extraordinary circumstances: the day of attempted filing was a Taiwanese holiday and the ACCESS website [sic] not accessible to NSP.” Pl.'s Reply to Def.'s Resp. in Opp'n to Pl.'s Mot. for J. upon the Agency R. 9–10, ECF No. 38 (“NSP Reply Br.”).

The court generally requires the exhaustion of administrative remedies. 28 U.S.C. § 2637(d); *see Carpenter Tech. Corp. v. United States*, 30 CIT 1595, 1598, 464 F. Supp. 2d 1347, 1349 (2006) (requiring administrative exhaustion prevents the court from “having to sort

through *post hoc* rationalizations of agency counsel”). NSP did not fail to exhaust, however, the issue of whether “extraordinary circumstance[s]” prevented it from timely filing an extension request. Although NSP did not use the exact words “extraordinary circumstance” in explaining why it failed to timely make a review request, NSP provided its reasons for the failure to Commerce— technical issues with ACCESS and a holiday in Taiwan on February 29th. Req. for Review at 1–2. Even though NSP connected these claims of mitigating circumstances to its failure to timely submit a review request, rather than an extension request, Commerce understood that NSP intended these arguments to apply to both. *See* Req. for Recons. Rejection at 2 (“[W]e find that: (1) there were no extraordinary circumstances that prevented [NSP] or its representatives from filing a timely request for an administrative review or an extension request as required by 19 C.F.R. § 351.302(c)[.]” (emphasis added)). Because NSP raised the “extraordinary circumstance[s]” issue, NSP did not fail to exhaust its administrative remedies.

II. Commerce Properly Denied the Request for Extension of Time to File the Review Request

NSP argues Commerce abused its discretion by finding that NSP failed to comply with 19 C.F.R. § 351.303(b)(2)(i)(C)’s requirement of “promptly” notifying Commerce about technical issues and “suggest[ing] alternative forms in which to submit the information” because NSP contacted Commerce on March 2nd and filed by paper on March 3rd. *See* NSP Br. at 13. NSP also contends that Commerce abused its discretion by failing to find that “extraordinary circumstances” existed in “[t]he combination of the day of attempted filing being a Taiwanese holiday, the ACCESS website not being accessible to the NSP and the lack of instruction in the [Review Request Notice] regarding technical difficulty.” *Id.* at 14. NSP further argues that Commerce unreasonably concluded that “good cause” did not exist under 19 U.S.C. § 351.302(b) to accept NSP’s untimely review request. *See id.* at 10–12. NSP also submits that Commerce’s decision not to accept NSP’s late review request is an abuse of discretion because the interests of accuracy and fairness outweigh any burden on Commerce or finality concerns. *Id.* at 7–10.

The government responds that Commerce reasonably determined that NSP did not “promptly” notify Commerce of technical issues, and did not “suggest alternative forms” of filing as required by its regulation. Gov’t Br. at 9, 17, 21–22. The government also contends that Commerce reasonably determined that no “extraordinary circumstance[s]” prevented plaintiff from timely filing an extension request.

Id. at 10–12, 13–21. Lastly, the government argues that even if “extraordinary circumstance[s]” existed, there was no “good cause” to grant NSP’s extension request. *Id.* at 21–24.

Commerce may extend certain time limits “for good cause,” including time limits for requesting review. *See* 19 C.F.R. §§ 351.302(b), 351.213(b). Commerce may extend a time limit for “good cause” on its own. *Id.* § 351.302(b).² Otherwise, a party must request an extension of time “[b]efore the applicable time limit,” at which point Commerce determines if “good cause” exists to extend the time limit. *Id.* § 351.302(b), (c); *see Tri Union Frozen Prods., Inc. v. United States*, 163 F. Supp. 3d 1255, 1293 (CIT 2016) (“Commerce cannot be expected to extend its deadline . . . without a request from [the filer].”).

Extension requests must be filed electronically in accordance with 19 C.F.R. § 351.303. 19 C.F.R. § 351.302(c). Under 19 C.F.R. § 351.303(b)(2)(ii)(C), if a party cannot comply with the electronic filing requirement, the party must “promptly” notify Commerce of the reasons the party cannot comply, and “suggest alternative forms” to file.

If a party’s extension request is untimely, Commerce considers the extension request for “good cause” only if an “extraordinary circumstance” exists. 19 C.F.R. § 351.302(c)(1); *Maverick Tube Corp. v. United States*, 107 F. Supp. 3d 1318, 1330 (CIT 2015). “An extraordinary circumstance is an unexpected event that: (i) [c]ould not have been prevented if reasonable measures had been taken, and (ii) [p]recludes a party or its representative from timely filing an extension request through all reasonable means.” 19 C.F.R. § 351.302(c)(2).

“Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits.” *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370 (2007); *see also Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (“[i]t is always within the discretion of . . . 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.”). “Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision.” *Maverick Tube Corp.*, 107 F. Supp. at 1331.

First, NSP’s technical issues, by themselves, were not an “extraordinary circumstance.” NSP could have ameliorated harm caused by technical problems by taking “reasonable measures.” *See* 19 C.F.R. § 351.302(c)(2)(i). For instance, NSP could have contacted the ACCESS

² NSP does not argue that Commerce acted unreasonably in failing to sua sponte find “good cause.” *See* NSP Reply Br. at 13, 18. Thus, the court does not address this possibility.

Help Desk before the deadline expired to receive assistance with a response to the technical problem. Before Commerce, and here in arguing for good cause, NSP argues that inhouse counsel did not contact the Help Desk because it would have required NSP's Taiwan inhouse counsel to work at midnight. NSP Br. at 11–12. Although there is a time difference between Taiwan and Washington, DC, contacting the Help Desk would have been a “reasonable measure.” Because the Help Desk opened at 8:30 am in Washington, DC, NSP Br. at 11, NSP's in-house counsel could have called at 9:30 pm local time, a reasonable time, especially given the millions of dollars NSP says may be at stake, *id.* at 9.³

NSP also relies on Commerce's statements accompanying the adoption of 19 C.F.R. § 351.302 to argue that NSP's technical issues constituted an “extraordinary circumstance.” See *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,793 (Dep't Commerce Sep. 20, 2013). According to Commerce, “a technical failure of . . . ACCESS generally is not an extraordinary circumstance. . . . However, in certain, limited situations, [Commerce] may find that a technical failure of . . . ACCESS is an extraordinary circumstance if, for instance, the party and its representative are located outside of the DC metropolitan area and . . . ACCESS is continuously unavailable before the submission is due.” *Id.* NSP's Taiwan in-house counsel was outside of the Washington, DC metropolitan area and experiencing a technical issue—possibly an internal problem, but possibly a “technical failure of ACCESS” attributable to Commerce. See Email(s) 1–2. Even if NSP's technical issue were a “technical failure of ACCESS,” however, the exception likely does not apply here because NSP claims only that ACCESS was unavailable at some point on February 29th, not that it was “continuously unavailable.” The court declines NSP's invitation to assume, without evidentiary basis, that the “continuously unavailable” element was satisfied. Even if it were, NSP failed to comply with the requirements of 19 C.F.R. § 351.303(b)(2)(ii)(C), which require a party who cannot comply with the electronic filing requirement to “promptly” notify Commerce why and “suggest alternative forms” to file. NSP waited two days to contact Commerce, and did not timely file in an alternative form. Letter Rejecting Req. for Review at 1.

Second, that February 29th was a national holiday in Taiwan was not an “extraordinary circumstance” because it was not an “unexpected event,” as required by 19 C.F.R. § 351.302(c)(2), given that NSP is a Taiwanese corporation, with counsel located in Taiwan. Req.

³ The court takes judicial notice of the fact that Taiwan and Washington, DC are thirteen hours apart. See 28 U.S.C. § 2641(a) (“[T]he Federal Rules of Evidence shall apply to all civil actions in the Court of International Trade.”); Fed. R. Evid. 201 (providing for judicial notice).

for Review at 5; Chen Decl. ¶ 3. It was not reasonable to wait until a known national holiday to attempt to make submissions and assume all would go smoothly on such a day, and if not, that manual filing would be approved and feasible.

Third, “the lack of instruction in the [Review Request Notice] regarding technical difficulty” was not an “extraordinary circumstance.” See NSP Br. at 14. NSP did not make this argument before Commerce, thus, even if it were an “extraordinary circumstance,” the court would not set aside Commerce’s determination on this basis. See *Unemployment Comp. Comm’n of Territory of Alaska v. Aragan*, 329 U.S. 143, 155 (1946) (“A reviewing court usurps the agency’s function when it sets aside the administrative determination upon a ground not theretofore presented . . .”). Regardless, any “lack of instruction” is not an “extraordinary circumstance” because NSP could have prevented it by the “reasonable measure” of researching and reading the applicable regulations. See *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (“The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.”); *Review Req. Notice*, 81 Fed. Reg. at 5715 (“All requests must be filed electronically in Enforcement and Compliance’s [ACCESS] on Enforcement and Compliance’s ACCESS Web site at <http://access.trade.gov>”). Thus, Commerce reasonably concluded that no “extraordinary circumstance” justified NSP’s untimely filing of an extension request, and Commerce was not required to determine whether “good cause” existed for this failure. Commerce, however, acted reasonably in finding that “good cause” did not exist. NSP’s arguments for “good cause” are repetitive of NSP’s arguments for “extraordinary circumstances.” See NSP Br. at 10–13. For the reasons already stated, these arguments are unavailing.

Finally, the court has considered NSP’s argument that, even if “extraordinary circumstance[s]” and “good cause” did not exist, Commerce abused its discretion in not accepting NSP’s untimely review request because the interests of accuracy and fairness outweigh both the burden on Commerce and finality concerns. NSP Reply Br. at 18–20. A request for review is not a complicated filing. It requires no detailed facts and may be made anytime during the anniversary month. Further, there was no call to Commerce on the due day or the next day, work days in the United States. This does not resemble *Artisan Manufacturing Corp. v. United States*, 978 F. Supp. 2d 1334, 1345–47 (CIT 2014), where a filing was made in time for the beginning of the next work day after the due date. Also, plaintiff does not allege that Commerce enforces these rules differently at different

times. Apparently, Commerce is very strict and seldom, if ever, allows late requests for review, especially after a late extension request.⁴ Commerce does not allege any prejudice specific to this case, but it does allege the general prejudice stemming from late filings because of the strict statutory deadlines governing its determinations. The prejudice to plaintiff may end up being great⁵ as in *Artisan Manufacturing Corp.*, but plaintiff made not one slip-up but at least three errors, failure to plan for contingencies, failure to call for help on February 29th, and failure to call on March 1st. *See* 978 F. Supp. 2d at 1347. Given the facts of this case and Commerce's need to timely begin the process of respondent selection without waiting for late review requests, the claim of abuse of discretion fails. Commerce, therefore, reasonably declined to grant NSP's extension request and reasonably refused to accept NSP's review request.

CONCLUSION

For the foregoing reasons, the court denies NSP's motion for judgment on the agency record. Judgment will enter accordingly.

Dated: December 1, 2016

New York, New York

/s/ Jane A. Restani
JANE A. RESTANI JUDGE

Slip Op. 16–112

UNITED STATES, Plaintiff, v. INTERNATIONAL TRADING SERVICES, LLC AND JULIO LORZA, Defendants.

Before: Mark A. Barnett, Judge
Court No. 12–00135

[The Court denies Defendant's motion to dismiss pursuant to USCIT Rules 12(b)(1) and 12(b)(6).]

Dated: December 2, 2016

Mollie L. Finnan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for plaintiff. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Peter S. Herrick, Peter S. Herrick, P.A. of St. Petersburg, FL, for defendant.

⁴ What Commerce would have done in this case if plaintiff had contacted it in a timely manner to seek an extension is unknown, as plaintiff forewent such a means of potential relief.

⁵ Counsel speculates that NSP might have been a mandatory respondent, which Commerce would actually examine, but this is all the more reason to be diligent about a timely request.

OPINION AND ORDER

Barnett, Judge:

The United States of America (“United States” or “Plaintiff”) brings this enforcement action against International Trading Services, LLC (“ITS”) and Julio Lorza (“Lorza” or “Defendant”) (together, “Defendants”) to recover unpaid duties and penalties pursuant to 19 U.S.C. § 1592 (2012),¹ or, alternatively, unpaid duties and mandatory accrued interest pursuant to 19 U.S.C. § 1505. *See generally* Compl., ECF No. 2. Lorza moves to dismiss the complaint as to himself for lack of subject matter jurisdiction and failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(5) of the Rules of the United States Court of International Trade (“USCIT”).² Def. Julio Lorza’s Mot. to Dismiss Pursuant to USCIT Rules 12(b)(1) and 12(b)(6), ECF No. 46, and Def. Julio Lorza’s Mem. and P. & A. in Supp. of its Mot. to Dismiss (“Def.’s Mot.”), ECF No 46–1. Plaintiff timely opposed the motion. Pl.’s Resp. in Opp’n to Def. Lorza’s Mot. to Dismiss, (“Pl.’s Resp.”), ECF No. 49. For the following reasons, the Court denies the motion.

BACKGROUND

Lorza was the Managing Member and President/Chief Executive Officer (“CEO”) of ITS before its December 2009 dissolution by the Florida Department of State for failure to file an annual report. Compl. ¶¶ 3–4; Ans. ¶ 2, ECF No. 4. From May 18, 2007 to June 25, 2007, Defendants allegedly “attempted to enter or introduce, or caused to be entered or introduced,” falsely classified commercial shipments of sugar into the United States. Compl. ¶¶ 5–20.³ Lorza “was personally involved in introducing the [misclassified sugar] into commerce.” Pl.’s Ex. B, Pl.’s First Set of Reqs. for Admis. (“Pl.’s RFA”) ¶ 19, ECF No. 49–2; *see also* Pl.’s Ex. B, Def.’s Resp. to Pl.’s First. Req. for Admis. (“Def.’s Admis.”) ¶ A (admitting to paragraphs 1–6, 8–9,

¹ All references to the United States Code are to the 2012 edition, unless otherwise stated.

² Defendant moves for dismissal pursuant to USCIT Rules 12(b)(1) and 12(b)(5). Def.’s Mot. at 1. USCIT Rule 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction; USCIT Rule 12(b)(5) governs motions to dismiss for insufficient service of process. *See* USCIT R. 12(b)(1),(5). On July 1, 2015, USCIT Rules 12(b)(3)-(6) were designated as USCIT Rules 12(b)(4)-(7) to correspond with the Federal Rules of Civil Procedure. *See* USCIT R. 12 Practice Comment. Thus, USCIT Rule 12 (b)(5) became USCIT Rule 12(b)(6). *See id.* Because Defendant’s Rule 12(b)(5) argument implicates the sufficiency of Plaintiff’s factual allegations, *see* Def.’s Mot. at 3, 5–6, the Court construes the argument as one made pursuant to current USCIT Rule 12(b)(6), and will refer to the current numbering hereafter.

³ According to Plaintiff, Defendants misclassified eight entries of sugar under Harmonized Tariff Schedule (“HTSUS”) 1701.99.0500, instead of HTSUS 9904.17.15 and HTSUS 1701.99.5090. Compl., ¶¶ 5–20.

13–14, 19, 24–25, 31, 33–37), ECF No. 49–2.⁴ In August 2007, Lorza contacted United States Customs and Border Protection (“Customs” or “CBP”) about a “notice of action” he had received about misclassified merchandise. Def.’s Ex. D at CBP000131 (Aug. 10, 2007 email to Eric T. Buchanan), CBP000140 (email signature line stating that Mr. Buchanan was a CBP Supervisory Import Specialist). In the email, Lorza asked “what steps [he] should take [because his] company is not at fault here.” Def.’s Ex. D at CBP000131 (further stating that his customs broker had advised him on classifying the merchandise).

In October 2009, Customs served a pre-penalty notice on ITS, the importer of record, regarding the misclassified entries. *See* Pl.’s Ex. A at CBP000174–180, ECF No. 49–1; Pl.’s RFA ¶ 25; *see also* Def.’s Admis. ¶ A. In February 2010, Customs served the pre-penalty notice on Lorza. *See* Pl.’s Ex. A at CBP000194–199. The pre-penalty notice was addressed to ITS but mailed to Lorza’s residence. *See id.* at CBP000194, CBP000199; Pl.’s RFA ¶ 2; *see also* Def.’s Admis. ¶ A. The pre-penalty notice was signed for by “M. Lopez,” with whom Lorza was related or acquainted. Pl.’s Ex. A at CBP000199; Pl.’s RFA ¶ 5; Def.’s Admis. ¶ A.

Customs first issued a penalty notice in May 2010; in February 2011, Customs reissued and served the penalty notice, which named ITS only, on ITS through its registered agent, and on Lorza individually. *See* Pl.’s Ex. A at CBP000141–143 (May 18, 2010 cover letter and penalty notice); *id.* at CBP000145, CBP000158 (penalty statement for violation of 19 U.S.C. § 1592) (“Penalty Statement”); *id.* at CBP000154157 (Feb. 2011 cover letter and penalty notice) (“Feb. 2011 Penalty Notice”); *id.* at CBP000161–165 (delivery of the Feb. 2011 Penalty Notice and Penalty Statement to ITS and Lorza); *see also* Pl.’s RFA ¶ 3; Def.’s Admis. ¶ A (Defendant’s admission that he maintained an address where CBP had sent the Feb. 2011 Penalty Notice).

In April 2011, Customs sent a demand for payment (“Apr. 2011 Payment Demand”) to Defendants. *See* Pl.’s Ex. A at CBP000202–208; *see also* Pl.’s RFA ¶ 4; Def.’s Admis. ¶ A (Lorza’s admission that, in April 2011, he maintained an address where CBP had sent the Apr.

⁴ On March 21, 2016, the Court granted Plaintiff’s Motion to Deem Requests For Admission Admitted. *See* Order (Mar. 21, 2016), ECF No. 34. Thereafter, Defendant moved to oppose Plaintiff’s Motion to Deem Requests for Admissions Admitted, Out-of-Time. Def., Julio Lorza, Moves to Oppose Pl.’s Mot. to Deem Req.’s for Admis. Admitted, Out of Time, ECF No. 35. The Court stated that it will treat Defendant’s motion as a Motion to Withdraw and Substitute Admissions (“Mot. to Withdraw”) and defer ruling on the motion pending consideration of Plaintiff’s expected partial motion for summary judgment. *See* Order (May 18, 2016), ECF No. 41. The admissions cited in this opinion are those that Defendant wishes to substitute for the deemed admissions. *Compare* Def.’s Admis., *with* Mot. to Withdraw, Attach. A. The Court is citing those admissions solely for the purpose of resolving Defendant’s Motion to Dismiss and without prejudice to the Motion to Withdraw still pending before the court.

2011 Payment Demand). The Apr. 2011 Payment Demand was sent to ITS in care of Lorza. Pl.'s Ex. A at CBP000202.

That month, Lorza contacted CBP about the misclassified entries. See Pl.'s RFA ¶ 31; Def.'s Admis. ¶ A. On April 25, 2011, Lorza telephoned CBP explaining that his mother-in-law told him he had received a bill from CBP. Pl.'s Ex. C at 2, ECF No. 49–3. Lorza confirmed his current address and asked for the CBP officer's email address. *Id.*⁵ Also on April 25, 2011, Lorza emailed CBP asking for information about his case. *Id.* at 4. On April 26, 2011, CBP emailed Lorza the Feb. 2011 Penalty Notice and Apr. 2011 Payment Demand. *Id.* at 5–6. Lorza responded to that email, stating that he was “looking at [the documents] from [his] phone” and could see that they concerned “some incorrect entries” from when “we were importing sugar.” *Id.* at 7. Lorza promised to “print the file and review [it] in detail.” *Id.*; see also Pl.'s RFA ¶ 33; Def.'s Admis. ¶ A (Lorza's admission that he received the Feb. 2011 Penalty Notice by email).

In March 2012, Lorza received the Feb. 2011 Penalty Notice sent to him via JOMA Trading & Sales, LLC, at 14994 SW 21st Street, Miramar, Florida 33027. See Pl.'s Ex. A at CBP000225, CBP000230–231; Pl.'s RFA ¶¶ 34–36; Def.'s Admis. ¶ A. The cover letter appended to the notice stated that Lorza and ITS were jointly and severally liable for the penalty. See Pl.'s Ex. A at CBP000225.

The United States filed this lawsuit on May 17, 2012. See generally, Summons, ECF No. 1; Compl. Lorza answered the complaint on September 11, 2012. Ans., ECF No. 4. On July 18, 2016, Lorza moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. Def.'s Mot. Lorza argues that the court lacks subject matter jurisdiction because CBP failed to name him on the pre-penalty and penalty notices, and thereby failed to exhaust administrative remedies. *Id.* at 1, 3–5. Lorza further argues that CBP's failure to name him on the pre-penalty and penalty notices deprived him of due process, and Plaintiff has insufficiently alleged perfection of the administrative claim. *Id.* at 5–6. On August 22, 2016, the United States opposed the motion. Pl.'s Resp. Plaintiff argues that Defendant's challenges are untimely, improperly characterized, and lack merit. See generally *id.*

⁵ According to the written record of the telephone call, Lorza stated that his current address was 6330 NW 188th Main Street, Miami, Florida 33015, and that he had not received anything from CBP. Pl.'s Ex. C at 2. However, Lorza also admitted that he maintained an address at 6330 NW 188th Lane, Miami, Florida 33015, which is where CBP had sent the Feb. 2011 Penalty Notice and the Apr. 2011 Payment Demand. Pl.'s RFA ¶¶ 3–4; Def.'s Admis. ¶ A.

STANDARD OF REVIEW

I. Subject Matter Jurisdiction

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

A plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When reviewing a motion to dismiss for lack of subject matter jurisdiction, the court proceeds according to whether the motion “challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings.” *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006). When the motion challenges the sufficiency of the pleadings, the court assumes that the allegations within the complaint are true. *Id.* When, as here, “the motion controverts factual allegations supporting the [c]omplaint, ‘the allegations in the complaint are not controlling,’ and ‘are subject to fact-finding by the [trial] court.’” *Id.* at 692, 437 F. Supp. 2d at 1339 (quoting *Cedars–Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)) (alterations added). *Cf. Power-One Inc. v. United States*, 23 C.I.T. 959, 962, 83 F.Supp.2d 1300, 1303 n.9 (1999) (assertion of failure to exhaust administrative remedies in a suit filed pursuant to 28 U.S.C. § 1581(a) represented a “challenge[] [to] the actual existence of subject matter jurisdiction”; thus, “the allegations in Plaintiffs’ Complaint are not controlling, and only uncontroverted factual allegations are accepted as true”).⁶

II. Failure to State a Claim

When reviewing a motion to dismiss for failure to state a claim, “any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff.” *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000); *see generally* USCIT R. 12(b)(6). A court may properly dismiss a case under Rule 12(b)(6) only if the plaintiff’s allegations of fact are not “enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful

⁶ Defendant appears to contest Plaintiff’s factual allegation regarding exhaustion as a precondition to subject matter jurisdiction. *See* Def.’s Mot. at 3 (asserting that “CBP failed to satisfy [] administrative procedural requirements”); *see also* Compl. ¶ 27 (“The United States has issued penalty notices and duty demands to defendants regarding the entries described [in the preceding paragraphs].”).

in fact).” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (citations omitted). At the same time, a complaint’s “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679.

DISCUSSION

I. Parties’ Contentions

Defendant moves to dismiss for lack of subject matter jurisdiction and failure to state a claim. Def.’s Mot. at 1. Defendant contends that “CBP failed to satisfy [] administrative procedural requirements” because it never issued him a pre-penalty or penalty notice. *Id.* at 3–4. According to Defendant, CBP’s failure to perfect its claim against him during the administrative proceedings amounts to a failure to exhaust administrative remedies that deprives this court of subject matter jurisdiction, and deprived him of due process. *Id.* at 1, 4–5. Defendant further contends that Plaintiff’s failure to allege that CBP perfected its claim merits dismissal for failure to state a claim. *Id.* at 5–6.

Plaintiff contends that Defendant’s challenges to jurisdiction and the sufficiency of the complaint are untimely. Pl.’s Resp. at 1, 5–6, 14. Plaintiff further contends that Defendant’s “lack of [subject matter] jurisdiction argument is properly characterized as a challenge to personal jurisdiction pursuant to USCIT Rule 12(b)(2).” *Id.* at 4–5 (citing *United States v. Priority Products*, 793 F.2d 296, 300 (Fed. Cir. 1986)). On the merits, Plaintiff argues that (1) personal jurisdiction is not conditioned on CBP naming the Defendant in his individual capacity during the administrative proceedings, (2) Defendant was afforded due process because he had notice of the administrative proceedings and an opportunity to participate therein, (3) the court should waive exhaustion requirements because any failure to exhaust administrative remedies amounts to harmless error when, as here, Defendant had notice and an opportunity to be heard, and (4) Defendant’s personal liability and administrative exhaustion is adequately alleged. *See generally id.* at 6–16.

II. Analysis

A. Jurisdiction⁷

Defendant asserts, and Plaintiff disputes, that the court's subject matter jurisdiction hinges on administrative exhaustion. Plaintiff is correct.

The court has exclusive jurisdiction over actions by the United States to recover civil penalties pursuant to 19 U.S.C. § 1592. 28 U.S.C. § 1582(1). However, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Exhaustion of administrative remedies is a doctrine that holds "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (internal quotation marks and citation omitted).

Section 1592(b) states the procedures by which the United States must exhaust administrative remedies; to wit, "Customs must perfect its penalty claim in the administrative process . . . by issuing a pre-penalty notice and a notice of penalty." *United States v. Jean Roberts of CA, Inc.*, 30 CIT 2027, 2030 (2006) (citing 19 U.S.C. § 1592(b)(1)-(2)). The pre-penalty notice must include certain information. § 1592(b)(1).⁸ After considering representations made by the person to whom it was issued and upon finding a violation, Customs must issue "a written penalty claim" to that person. § 1592(b)(2). "Such person shall have a reasonable opportunity under section 1618⁹ of this title to make representations, both oral and written,

⁷ "Subject matter jurisdiction is a threshold inquiry," without which the Court may not reach the merits of Defendant's arguments for dismissal for failure to state a claim. See *United States v. Robert E. Landweer & Co.*, 36 CIT _____, 816 F. Supp. 2d 1364, 1367 (2012) ("*Landweer*") (citing *Steel Co.*, 523 U.S. at 94–95). Accordingly, the Court first addresses Defendant's jurisdictional arguments.

⁸ Pursuant to § 1592(b)(1)(A), the pre-penalty notice must:

- (i) describe the merchandise; (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction; (iii) specify all laws and regulations allegedly violated; (iv) disclose all the material facts which establish the alleged violation; (v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence; (vi) state the estimated loss of lawful duties, taxes, and fees, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

19 U.S.C. § 1592(b)(1).

⁹ Section 1618 provides for the remission or mitigation of incurred penalties. 19 U.S.C. § 1618.

seeking remission or mitigation of the monetary penalty.” *Id.* At the end of the proceeding, Customs must issue “a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.” *Id.*

It is well settled, however, that this court’s subject matter jurisdiction is not conditioned on administrative exhaustion generally, or strict compliance with § 1592(b) exhaustion requirements specifically. *See Priority Products*, 793 F.2d at 299–300 (“Exhaustion of administrative remedies is not strictly speaking a jurisdictional requirement”); *United States v. Nitek Electronics, Inc.*, 36 CIT ____, ____, 844 F. Supp. 2d 1298, 1302–04 (2012) (“[Section] 1592(b) exhaustion is nonjurisdictional.”) (citing, *inter alia*, *United States v. Rotek, Inc.*, 22 CIT 503, 508–09 (1998)). “[S]ubjectmatter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.” *Nitek*, 36 CIT at ____, 844 F. Supp. 2d at 1304 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). In contrast, administrative exhaustion pursuant to § 2637(d) may be waived. *See Agro Dutch Industries Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) (citations omitted); *Priority Products*, 793 F.2d at 300; *see also* 28 U.S.C. § 2637(d) (providing for administrative exhaustion “where appropriate”).

Moreover, the Court of Appeals for the Federal Circuit has held that subject matter jurisdiction over a § 1592 recovery action is not conditioned on whether the complaint names the same “parties expressly named in the administrative proceedings.” *Priority Products*, 793 F.2d at 299 (affirming court’s subject matter jurisdiction over recovery action against individual shareholders when the pre-penalty and penalty notices named only the corporation). The Federal Circuit explained:

Section 1592(e)(1) provides that “in any proceeding ... commenced for the recovery of any monetary penalty claimed under this section—(1) *all issues*, including the amount of the penalty, shall be tried *de novo*” (emphasis added). Thus it appears that so long as some “civil penalty exists” the Court of International Trade can assume jurisdiction over any complaint to recover that penalty, and the issue of who is ultimately responsible for payment of the penalty is subject to *de novo* consideration.

Priority Products, 793 F.2d at 299. Contrary to Defendant’s arguments, § 1592(b) administrative proceedings are “claim-processing rules,” not “jurisdictional prescriptions.” *Nitek*, 36 CIT at ____, 844 F. Supp. 2d at 1303–04 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)) (discussing the distinction between statutory

preconditions and subject matter jurisdiction; noting that “§1592(b) is neither clearly labeled jurisdictional nor located in the provision granting the Court jurisdiction over these penalty claims, [28 U.S.C.] § 1582(1)”. *Cf. Landweer*, 36 CIT at ____, 816 F. Supp. 2d at 1372 (jurisdiction is not conditioned on CBP perfecting penalty proceedings pursuant 19 U.S.C. § 1641). Accordingly, the Court exercises jurisdiction pursuant to 28 U.S.C. § 1582(1).

As to the merits of Defendant’s exhaustion argument, CBP’s failure to name Lorza in the administrative proceedings need not “constitute a failure to exhaust administrative proceedings.” *Priority Products*, 793 F.2d at 300 (noting under similar circumstances that, if it did, “the trial court would have been amply justified in excusing the Government’s failure”).¹⁰ Assuming, *arguendo*, that it did, “[w]aiver is appropriate when a procedural defect at the administrative level amounts to harmless error because the defendant has in fact had a reasonable opportunity to be heard.” *KAB Trade*, 21 CIT at 302 (citing *United States v. Obron Atlantic Corp.*, 18 CIT 771, 774–76, 862 F. Supp. 378, 382–83 (1994); *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 349–50, 821 F. Supp. 1514, 1516 (1993)). The Court thus turns to Defendant’s due process argument.

Lorza contends he was denied due process because he “never received a penalty notice” and, thus, never had an opportunity to present his objections. Def.’s Mot. at 5. Due process requires actual or constructive notice and an opportunity to be heard. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Priority Products*, 793 F.2d at 300–01; *KAB Trade*, 21 CIT at 300. A party may have constructive notice when he “was or should have been aware that under certain circumstances [he] could be held accountable” for the corporation’s liability. *Priority Products*, 793 F.2d at 301 (finding constructive notice on the narrow facts of that case when the defendant was one of three corporate officers and made “important decisions regarding the attempted importation”).

Record evidence shows that Lorza had constructive--if not actual--notice of the administrative proceedings and the potential for his personal liability. Section 1592 liability is not limited to the importer of record. *See* 19 U.S.C. § 1592(a) (applicable to “person[s]” generally);

¹⁰ This court has stated that “[t]he fact that Customs previously named only [the corporation and not the individuals at the administrative stage] [] does not constitute a failure to exhaust all administrative remedies.” *United States v. KAB Trade Co.*, 21 CIT 297, 302 (1997) (citing *Priority Products*, 793 F.2d at 299). The section of *Priority Products* cited, however, discusses whether § 1592 conditions subject matter jurisdiction on the filing of suits only against parties expressly named at the administrative level. Later in the opinion, the Federal Circuit declines to decide whether the failure to individually notify a subsequent defendant represented a failure to exhaust administrative remedies. *See Priority Products*, 793 F.2d at 300.

see also *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1297–98 (Fed. Cir. 2014) (sole shareholder of importer-of-record corporation liable when he engaged in conduct proscribed by § 1592(a)(1)).

Here, Lorza was the Managing Member and President/CEO of ITS, the importer of record, and was personally involved in introducing the misclassified sugar into the stream of commerce. Customs sent the pre-penalty notice, Feb. 2011 Penalty Notice, and Apr. 2011 Payment Demand to addresses maintained by Lorza, who, as early as August 2007, was aware of the misclassification. In April 2011, Lorza contacted CBP about the misclassified entries, and confirmed his receipt of the Feb. 2011 Penalty Notice and April 2011 Payment Demand via email. Lorza recognized that the misclassified entries involved sugar “we” had imported, and assumed responsibility for reviewing the file. In March 2012, Lorza again received a copy of the Feb. 2011 Penalty Notice; the cover letter appended to the notice informed Lorza that he was jointly and severally liable for the penalty. See *supra* pp. 2–5. Accordingly, at the very least, Lorza “should have been aware” of the potential for personal liability. See *Priority Products*, 793 F.2d at 301; *KAB Trade*, 21 CIT at 300 (corporate officer had actual and constructive notice when Customs addressed correspondence to her).

In addition to notice, Lorza had an opportunity to be heard. The pre-penalty notice gave Lorza thirty days to object to the imposition of a penalty. See Pl.’s Ex. A at CBP000174; see also 19 C.F.R. § 162.78(a) (recipient of pre-penalty notice generally has thirty days to “make a written and oral presentation”). The Feb. 2011 Penalty Notice gave Lorza sixty days from the date of the notice to request remission or mitigation pursuant to 19 U.S.C. § 1618. See Pl.’s Ex. A at CBP000157. Lorza failed to act within that timeframe, nor did he file a petition for relief after he received the Feb. 2011 Penalty Notice by email on April 26, 2011, or by mail in March 2012. Additionally, over two years elapsed from the time CBP issued the pre-penalty notice to the filing of this suit, providing Lorza “ample opportunity to participate at the administrative level.” *KAB Trade*, 21 CIT at 301 (defendant had an opportunity to be heard when more than two years passed between the issuance of the pre-penalty notice and the beginning of the recovery action).

In sum, because Lorza had notice and an opportunity to be heard, his due process argument lacks merit.¹¹ Accordingly, any failure by

¹¹ Because the Court concludes that Lorza received administrative due process, it need not consider whether opportunity for trial *de novo* accords him all the requisite due process pursuant to *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934). See *Priority Products*, 793 F.2d at 300 (declining to address *Nickey*); *KAB Trade*, 21 CIT at 302 (same); *United States v. Modes, Inc.*, 13 CIT 780, 786 n.3, 723 F. Supp. 811, 815 n.3 (1989) (same).

CBP to exhaust administrative remedies by not expressly naming Lorza during the administrative proceedings “amounts to harmless error” meriting waiver of the exhaustion requirement. *KAB Trade*, 21 CIT at 302; *see also Priority Products*, 793 F.2d at 300 (failure to provide notice and opportunity at the administrative level is “subject to harmless error analysis” and is “waivable”; moreover, “trial court would have been amply justified in excusing the failure”).¹² Furthermore, “[e]ven if [] personal jurisdiction were a prerequisite at the pre-penalty notice stage, constructive notice would suffice or could be waived.” *Priority Products*, 793 F.2d at 300. Thus, for the same reasons, any lack of personal jurisdiction over Lorza during the administrative proceedings does not bar this action.¹³

B. Sufficiency of the Complaint

Lorza contends that the Court should dismiss the action against him because the complaint lacks “factual allegations that CBP perfected its penalty proceedings against [him].” Def.’s Mot. at 5–6. The United States contends that Defendant’s motion is properly characterized as a motion for judgment on the pleadings. The United States further argues that the complaint adequately alleges Lorza’s negligence, there is no law requiring the pleading of administrative exhaustion, and, in any event, the complaint sufficiently alleged exhaustion. Pl.’s Resp. at 15.

Pursuant to USCIT Rules, a motion to dismiss for failure to state a claim must be filed before a responsive pleading. USCIT Rule 12(b). When, as here, an Answer has been filed, the movant may seek judgment on the pleadings. *See* USCIT Rule 12(c); Ans. Accordingly, the Court will construe Defendant’s motion as one made pursuant Rule 12(c). “A Rule 12(c) motion is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6).” *United States v. American Cas. Co. of Reading Pennsylvania*, 39 CIT ____, ____, 91 F. Supp. 3d 1324, 1327 (2015) (citation omitted).

¹² The Court notes that the United States filed this action on May 17, 2012, one day before the expiration of the applicable five-year statute of limitations. *See* 19 U.S.C. § 1621(1) (suits alleging §1592 violations must generally be brought within five years from the date of the alleged violation); Compl. ¶ 5 (alleging the first violation occurred on May 18, 2007). Because Defendants did not submit a waiver of the statute of limitations, *see* Def.’s Mot. at 2, Plaintiff had “no choice but to institute suit,” further meriting the waiver of “any ostensible failure by Customs to exhaust its administrative remedies.” *Modes*, 13 CIT at 786, 723 F. Supp. at 816 .

¹³ Because Defendant’s jurisdictional arguments are readily resolved on their merits, the Court declines to reach Plaintiff’s arguments regarding timeliness, and whether Defendant has waived his jurisdictional arguments or properly preserved them in his Answer. *See* Pl.’s Resp. at 5–6; Def.’s Mot. at 3; USCIT Rule 12(h) (governing waiving and preserving defenses).

Section 1592 provides, *inter alia*, that no person, (1) “by fraud, gross negligence, or negligence,” (2) “may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States” (3) “by means of [] any document or electronically transmitted data or information, written or oral statement, or act which is material and false,” or by “any omission which is material.” 19 U.S.C. § 1592(a)(1); *Rotek*, 22 CIT at 513.

Here, the complaint alleges that Lorza negligently made eight entries of merchandise by means of material false statements or omissions. *See generally* Compl. Nothing more is required. *See Rotek*, 22 CIT at 513. *Cf. United States v. Tip Top Pants, Inc.*, 34 CIT 17, 37 (2010) (*sua sponte* dismissing individual from § 1592 recovery action when complaint merely alleged his status as a corporate officer and omitted factual allegations of wrongdoing). Defendant’s unsupported contention that he should be dismissed from this suit because the complaint lacks factual allegations about CBP’s perfection of administrative proceedings against him lacks merit. As the Federal Circuit has observed, “the issue of who is ultimately responsible for payment of the penalty is subject to *de novo* consideration” by the CIT. *Priority Products*, 793 F.2d at 299. Lorza’s motion will be denied.

CONCLUSION AND ORDER

Upon consideration of Defendant’s Motion to Dismiss Pursuant to USCIT Rules 12(b)(1) and 12(b)(6), ECF No. 46, and the response thereto, ECF No. 49, and upon due deliberation, it is hereby

ORDERED that Defendant Julio Lorza’s Motion to Dismiss Pursuant to USCIT Rules 12(b)(1) and 12(b)(6), is **DENIED**.

Parties are advised that the Scheduling Order, as amended (ECF Nos. 19, 21, 23, and 41), and all dates established therein, remain in effect.

Dated: December 2, 2016
New York, New York

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

Slip Op. 16–113

QINGDAO BARRY FLOORING CO., LTD. Plaintiff, v. UNITED STATES,
Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 15–00056

[Dismissing the action for mootness]

Lizbeth R. Levinson, Ronald M. Wisla, and Brittney R. McClain, Kutak Rock LLP, of Washington, DC, argued for plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the briefs were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel for defendant was *Shelby M. Anderson*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Stanceu, Chief Judge:

Plaintiff Qingdao Barry Flooring Co., Ltd. (“Qingdao Barry”) commenced this action “to obtain a writ of mandamus compelling the U.S. Department of Commerce (“Commerce”) to conduct a new shipper’s review (“NSR”) of Qingdao Barry’s shipment of multilayered wood flooring (“MLWF”) from the People’s Republic of China.” Compl. ¶ 1 (Mar. 2, 2015), ECF No. 6. Due to administrative actions taken by Commerce, which occurred after the commencement of this action on March 2, 2015, *see id.*, the court concludes that the action is now moot and, accordingly, must be dismissed for lack of jurisdiction.

I. BACKGROUND

On October 26, 2015, the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) published a notice in the Federal Register announcing that it was initiating a new shipper review of an antidumping duty order on multilayered wood flooring from China according to Section 751(a)(2)(B) of the Tariff Act of 1930, 19 U.S.C. § 1675(a)(2)(B), and 19 C.F.R. § 351.214(b), in response to a request submitted to Commerce by Qingdao Barry on December 19, 2014 and supplemented thereafter.¹ *Multilayered Wood Flooring from the People’s Republic of China: Initiation of Antidumping Duty New Shipper Review; 2013–2014*, 80 Fed. Reg. 65,200 (Int’l Trade Admin. Oct. 26, 2015). Commerce designated December 1, 2013 through November 30, 2014 as the period of review for the new shipper review. *Id.*

Commerce published a second Federal Register notice on June 2, 2016 stating its preliminary determination to rescind the review on the ground that the single sale of exported multilayered wood flooring to the United States upon which Qingdao Barry relied for its entitlement to a new shipper review was not a “bona fide” sale. *Multilayered Wood Flooring from the People’s Republic of China: Preliminary Rescission of 2013–2014 New Shipper Review*, 81 Fed. Reg. 35,306 (Int’l

¹ Citations to the United States Code are to the 2012 edition, and citations to the Code of Federal Regulations are to the 2015 edition.

Trade Admin. June 2, 2016). Commerce gave the following as the reason for its preliminary decision as to the sale in question:

The Department reached this conclusion based on the totality of circumstances surrounding the reported sale, including, among other things, the price of the sale and Qingdao Barry's failure to provide evidence that the subject merchandise was resold at a profit. Because the non-bona fide sale was the only reported sale of subject merchandise during the POR, and thus there are no reviewable transactions on this record, we are preliminarily rescinding the instant NSR.

Id. at 35,307. On July 19, 2016, Commerce published a third Federal Register notice affirming its preliminary conclusion that the sale was not bona fide and reaching a final decision to rescind the new shipper review. *Multilayered Wood Flooring from the People's Republic of China: Rescission of New Shipper Review; 2013–2014*, 81 Fed. Reg. 46,906 (Int'l Trade Admin. July 19, 2016).

II. DISCUSSION

A federal court may exercise the judicial power granted by Article III of the Constitution only in the presence of an actual case or controversy. CONSTITUTION, Art. III, § 2. The court concludes that no live case or controversy remains such as to allow this action to proceed. The court rejects plaintiff's contentions to the contrary for the reasons discussed below.

At the time of commencing this suit, plaintiff Qingdao Barry had filed with Commerce and supplemented a request for initiation of a new shipper review under the relevant provision of the antidumping duty statute, 19 U.S.C. § 1675(a)(2)(B), but Commerce had taken no action. After this action was commenced, the parties entered into consultations, following which the parties informed the court "of their view that, this action having commenced, Commerce now may lack the authority to initiate and conduct the requested new shipper review unless first granted the leave of court to do so." *Order 1* (Oct. 14, 2015), ECF No. 23. In its Order of October 14, 2015, the court stated that "[w]ithout deciding this question, the court is entering this Order to clarify that Commerce has the necessary authority to initiate and conduct the review, so that the parties' efforts to resolve the issue in this case may proceed." *Id.* To this end, the court ordered that "Commerce be, and hereby is, granted the permission of the court, to the extent such permission is or may become necessary, to initiate and conduct the requested new shipper review." *Id.* at 2.

The Department's issuance of the three Federal Register notices discussed above, i.e., the notice initiating the new shipper review, the preliminary notice of intention to rescind, and the final notice of rescission, has not resulted in a settlement of this case. Plaintiff takes the position that Commerce "failed to comply with the Court's Order to 'initiate and conduct' the new shipper review." Status Report of Pl. Qingdao Barry Flooring Co., Ltd. and Req. for Relief 1 (July 18, 2016), ECF No. 25. According to plaintiff, "[a]lthough Commerce did initiate the new shipper review, Commerce failed to conduct the new shipper review in accordance with the statute and Commerce's own regulations." *Id.* In an effort to continue this litigation, plaintiff argues specifically that "Commerce improperly truncated the review so as to coincide with the deadline for the 2013–2014 regular administrative review" and "failed to conduct a public hearing in this matter" as required by regulation. *Id.* at 2; Joint Status Report and Proposed Briefing Schedule (Oct. 26, 2016), ECF No. 15, at 1–2. Defendant argues that this case should be dismissed, giving among its reasons that "Qingdao Barry has received the relief it sought in its complaint: Commerce has initiated and conducted a new shipper review." Def.'s Status Report 3 (July 22, 2016), ECF No. 26.

The court begins by considering the true nature of plaintiff's claim when viewed according to the only jurisdictional provision upon which it possibly could have been brought. Plaintiff asserted jurisdiction under 28 U.S.C. § 1581(c) and, as an alternative basis, 28 U.S.C. § 1581(i). Under § 1581(c), the court may hear actions commenced under Section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a, to contest certain final decisions reached in antidumping duty proceedings, including the final results of a new shipper review, but nothing in 19 U.S.C. § 1516a or 28 U.S.C. § 1581(c) grants the court subject matter jurisdiction of a claim that Commerce unlawfully has refused to initiate or refused to conduct a new shipper review. Under 28 U.S.C. § 1581(i), the "residual" jurisdiction provision, the court may take jurisdiction of various actions arising under the tariff laws; such actions may arise either under the Constitution or, as is relevant here, the Administrative Procedure Act (the "APA"). *See Motion Sys. v. Bush*, 437 F.3d 1356, 1370–71 (Fed. Cir. 2006). Plaintiff's claim arguably is of a type that would have arisen under the APA, over which the court might have exercised jurisdiction according to 28 U.S.C. § 1581(i), but the court need not resolve this issue because any action plaintiff could have brought thereunder is no longer based on a current case or controversy and, for this reason, beyond the Article III power of the court to adjudicate.

The claim as set forth in plaintiff's complaint and the subsequent actions by Commerce remove any doubt that this action is moot. The injury of which plaintiff complained was the Department's failure to initiate and conduct a new shipper review of Qingdao Barry. Compl. ¶ 1, Prayer for Relief. Plaintiff argues now that Commerce failed to adhere to the statutory and regulatory deadlines by which it was required to conduct the new shipper review and that Commerce unlawfully failed to hold a public hearing; based on these allegations plaintiff submits that Commerce did not conduct a *lawful* new shipper review. Status Report of Pl. Qingdao Barry Flooring Co., Ltd. and Req. for Relief at 1–2. However, these are objections as to *how* the review was conducted, not as to *whether* the review was conducted.² The Department's three Federal Register notices, of which the court takes judicial notice in ascertaining jurisdictional facts, demonstrate a fact about which there can be no controversy: a new shipper review of Qingdao Barry was initiated and conducted. Qingdao Barry's claim that the review was not conducted according to law could be asserted only in an action contesting the final results of the new shipper review, not in the instant case, which plaintiff brought *before* the Department conducted that review and published any of the three Federal Register notices.³

III. CONCLUSION

For the reasons discussed in the foregoing, the court will enter judgment dismissing this action for lack of jurisdiction.

Dated: December 2, 2016

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU CHIEF JUDGE

Slip Op. 16–114

SPECIALTY COMMODITIES INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge

Court No. 11–00091

[Determining the tariff classification for edible seeds of the *Pinus koraiensis*.]

² Plaintiff also is incorrect in arguing that Commerce “failed to comply with the Court’s Order to ‘initiate and conduct’ the new shipper review.” Status Report of Pl. Qingdao Barry Flooring Co., Ltd. and Req. for Relief 1 (July 18, 2016), ECF No. 25, at 1. The court’s order, as discussed above, merely clarified that Commerce had the authority to initiate and conduct the review; it did not order Commerce to take any administrative action.

³ Qingdao Barry has filed a second case, Court No. 16–00144, contesting the final results of the new shipper review.

Dated: December 2, 2016

J. Christopher Jensen, Cowan, Liebowitz & Latman, P.C., of New York, NY, argued for plaintiff. With him on the brief were *Clarence J. Erickson* and *Sara J. Herchenroder*.

Monica P. Triana, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

OPINION

EATON, Judge:

At issue is the proper classification of Specialty Commodities Inc.’s (“plaintiff”) merchandise, the seeds of the *Pinus koraiensis* tree. Before the court is plaintiff’s motion for summary judgment and the cross-motion for summary judgment of the United States on behalf of U.S. Customs and Border Protection (“the Government” or “defendant”). See Mem. of Law in Supp. of Pl.’s Mot. for Summ. J. (ECF Dkt. No. 39) (“Pl.’s Br.”); Def.’s Mem. of Law in Opp’n to Pl.’s Mot. for Summ. J. & in Supp. of Cross-Mot. for Summ. J. (ECF Dkt. No. 44) (“Def.’s Br.”). Plaintiff challenges Customs’ classification of its entries of seeds of the *Pinus koraiensis* tree under subheading 0802.90.97 of the Harmonized Tariff Schedule of the United States (“HTSUS”),¹ providing for classification of “Other nuts, fresh or dried, whether or not shelled or peeled: Other: Other: *Shelled: Other.*” Pl.’s Br. 3; HTSUS 0802.90.97 (2009) (emphasis added). Plaintiff asserts Customs misclassified the seeds because they are properly classified under

¹ All references to the HTSUS refer to the 2009 edition. The pertinent HTSUS subheading provides:

0802	Other nuts, fresh or dried, whether or not shelled or peeled:	
0802.90	Other:	
	Pecans:	
0802.90.10	In shell	kg 8.8¢/kg
0802.90.15	Shelled	kg 17.6¢/kg
	Pignolia:	
0802.90.20	In shell	kg 0.7¢/kg
0802.90.25	Shelled	kg 1¢/kg
	Other:	
0802.90.81	In shell	kg 1.3¢/kg
	Shelled:	
0802.90.94	Kola nuts	kg 5¢/kg
0802.90.97	Other	kg 5¢/kg

HTSUS subheading 0802.90.25, which provides for classification of “Other nuts, fresh or dried, whether or not shelled or peeled: Other: *Pignolia: Shelled.*” Pl.’s Br. 3; HTSUS 0802.90.25 (emphasis added). Plaintiff seeks a reliquidation of the merchandise under HTSUS 0802.90.25 and a refund with interest for overpayments of duties. Pl.’s Br. 1. The Government maintains that its classification was correct, and the seeds are properly classifiable under HTSUS 0802.90.97.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006). For the reasons discussed below, plaintiff’s motion for summary judgment is denied and defendant’s cross-motion for summary judgment is granted. The court finds that the proper classification for the seeds is HTSUS 0802.90.97.

BACKGROUND

Plaintiff is a U.S. importer of raw, shelled pine nuts, the edible seeds of the *Pinus koraiensis*, a pine tree indigenous to northeast Asia. Joint Statement of Undisputed Facts ¶¶ 1–6 (ECF Dkt. No. 33) (“Statement of Facts”). The seeds are processed in, and exported from, China. Statement of Facts ¶ 4. On June 28, 2009, and July 12, 2009, the subject merchandise entered the United States through the Port of Minneapolis as entry numbers BHV-0004055–6 and BHV-0004113–3. Statement of Facts ¶¶ 3, 9. Upon entry, the merchandise was described on plaintiff’s entry documents as “Chinese Pinenut Kernels” and classified by plaintiff under HTSUS 0802.90.25 (i.e., “Other nuts, fresh or dried, whether or not shelled or peeled: Other: *Pignolia: Shelled.*”), subject to a \$0.01 per kilogram duty rate. Statement of Facts ¶¶ 4, 7, 8.

On August 19, 2009, Customs rejected plaintiff’s claimed classification. Customs’ rejection relied on Explanatory Note 08.02, which reads: “[t]he principal nuts of this heading are almonds (sweet or bitter), hazelnuts or filberts, walnuts, chestnuts (*Castanea spp.*), pistachios, pecans and pignolia nuts (seeds of the *Pinus pinea*).”² Statement of Facts ¶ 9; See Explanatory Notes to the Harmonized Commodity Description & Coding Sys., 08.02 (1st ed. 1986) (“Explanatory Note”), Def.’s Br. Ex. A, at 9 (ECF Dkt. No. 44–1). Based on this Explanatory Note, and because plaintiff’s invoices stated the nuts were “Chinese Pinenut Kernels,” Customs concluded the merchandise did not fit within HTSUS 0802.90.25. Statement of Facts ¶ 9. Specifically, Customs found that “the explanatory notes define pigno-

² *Pinus pinea*, also known as the Italian Stone Pine, is “a species of pine tree indigenous to southern Europe, northern Africa and parts of the Mediterranean.” Statement of Facts ¶ 11.

lia as *Pinus pinea* [and plaintiff's] invoice doesn't indicate this information." Statement of Facts ¶ 9. Customs determined the merchandise was properly classified under HTSUS 0802.90.97, a basket provision that carries a \$0.05 per kilogram duty rate. Statement of Facts ¶¶ 13, 15; see HTSUS 0802.90.97. Thus, for Customs, only seeds of the *Pinus pinea* tree are properly classified under HTSUS subheading 0802.90.25. See Statement of Facts ¶ 9. Customs therefore concluded that seeds produced by the *Pinus koraiensis* species are properly classifiable as "Other" under HTSUS subheading 0802.90.97. Statement of Facts ¶ 15. As a result, the entries were liquidated under HTSUS subheading 0802.90.97 on October 30, 2009. Statement of Facts ¶ 15.

On April 22, 2010, plaintiff timely protested Customs' liquidation of the seeds. Statement of Facts ¶ 17. In its protest, plaintiff insisted that they were properly classified as "Pignolia." Statement of Facts ¶ 17. On October 15, 2010, Customs denied the protest in Headquarters Ruling Letter HQ H114758, concluding the seeds were properly classified under the basket provision, HTSUS 0802.90.97. Statement of Facts ¶ 19 & Ex. B (ECF Dkt. No. 33-2) ("Headquarters Ruling Letter HQ H114758"). This lawsuit followed.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT

R. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am., Div. of U.S. JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000).

This court employs a two-step analysis when reviewing Customs' classification determinations. First, it must ascertain "the proper meaning of the tariff provisions," a question of law reviewed de novo, and second, determine "whether merchandise falls within a particular heading," a question of fact reviewed for clear error. *LeMans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011) (citing *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)). In the context of a classification action, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). That is, where "the nature of the merchandise is undisputed, the inquiry collapses into a

question of law we review de novo.” *LeMans*, 660 F.3d at 1315.

As for agency deference, “[o]n questions of law, a classification decision of Customs may be accorded a ‘respect proportional to its ‘power to persuade.’”” *Lerner N.Y., Inc. v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1313, 1318 (2013), *aff’d sub nom. Victoria’s Secret Direct, LLC v. United States*, 769 F.3d 1102 (Fed. Cir. 2014) (quoting *United States v. Mead Corp.*, 533 U.S. 215, 235 (2001) (citation omitted)). Further, while Customs enjoys a statutory presumption of correctness as to its factual interpretations, the Federal Circuit has “squarely held that the statutory presumption of correctness under § 2639 is irrelevant where there is no factual dispute between the parties.” *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492–93 (Fed. Cir. 1997).

In addition, while the plaintiff “has the burden of establishing that the [G]overnment’s classification is wrong,” the court must determine whether Customs’ “classification is correct, both independently and in comparison with the importer’s alternative.” *G.G. Marck & Assocs., Inc. v. United States*, No. 08–00306, slip op. 15–62, at *8 (CIT June 17, 2015) (quoting *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)).

DISCUSSION

I. LEGAL FRAMEWORK

The tariff classification of imported merchandise is governed by the “General Rules of Interpretation” (“GRI”) and the “Additional United States Rules of Interpretation” (“ARI”), which are applied in numerical order. *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014). Accordingly, the classification analysis begins with GRI 1, under which “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” HTSUS GRI 1; *see R.T. Foods*, 757 F.3d at 1353 (“[A] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading.” (internal quotation marks and citation omitted)). Next, GRI 6 provides that “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable.” HTSUS GRI 6.

“The HTSUS is organized by headings and each of these headings

has one or more subheadings.” *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013). Some HTSUS headings and subheadings, such as the “Pignolia” subheading proposed by plaintiff, are *eo nomine* provisions, or those that “describe[] an article by a specific name.” *R.T. Foods*, 757 F.3d at 1354; *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). The HTSUS also includes basket provisions, such as that under which Customs classified the seeds, and classification into such headings or subheadings “is only appropriate if there is no tariff category that covers the merchandise more specifically.” *R.T. Foods*, 757 F.3d at 1354 (quoting *Rollerblade*, 24 CIT at 815, 116 F. Supp. 2d at 1251).

“Tariff acts are construed to carry out the intent of Congress, which is initially determined by looking at the language of the statute itself.” *Lerner*, 37 CIT at ___, 908 F. Supp. 2d at 1318. The heading and subheading language in the HTSUS, however, may have “broad and narrow interpretations,” and “the court must determine which definition best expresses the congressional intent.” *Id.* at ___, 908 F. Supp. 2d at 1319; *Nissho Iwai Am. Corp. v. United States*, 143 F.3d 1470, 1472 (Fed. Cir. 1998). “Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same,” unless a party can show a term “has a different commercial meaning that is definite, uniform, and general throughout the trade.” *Carl Zeiss*, 195 F.3d at 1379. In construing HTSUS headings and subheadings, the “court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Id.*

“[T]he Explanatory Notes are regularly used by this Court to determine the intent of the drafters with respect to the provisions of the HTSUS.” *Streetsurfing LLC v. United States*, 38 CIT ___, ___, 11 F. Supp. 3d 1287, 1300 (2014); *see Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). “Although ‘not legally binding,’” the Explanatory Notes to the Harmonized Commodity Description and Coding System (“Harmonized System”), “may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.” *Lerner*, 37 CIT at ___, 908 F. Supp. 2d at 1318–19 (quoting *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007)). Moreover, the Harmonized System, upon which the HTSUS is based, “is a multipurpose international product nomenclature developed by the World Customs Organization” (“WCO”). *Nomenclature and Classification of Goods*, World Customs Organization, <http://www.wcoomd.org> (last visited Nov. 9, 2016). The Explanatory Notes

constitute the international Harmonized System’s official interpretation. Omnibus Trade and Competitiveness Act, Pub. L. 100–418, H.R. Rep. No. 100–576, at 549 (Conf. Rep.), *as reprinted in* 1988 U.S.C.-C.A.N. 1547, 1582. As shall be seen, at least to the six-digit level, the Federal Circuit has found that the Explanatory Notes, accompanying each chapter of the Harmonized System, are “‘persuasive[]’ and are ‘generally indicative’ of the proper interpretation of the [HTSUS] tariff provision.” *R.T. Foods*, 757 F.3d at 1353 n.5 (citation omitted).

II. SUMMARY JUDGMENT IS APPROPRIATE

As noted, summary judgment is appropriate in a Customs classification case when “there is no factual dispute regarding what the merchandise is.” *Sony Elecs., Inc. v. United States*, No. 09–00043, slip op. 13–153, at *6 (CIT Dec. 23, 2013) (citing *Faus Grp., Inc. v. United States*, 581 F.3d 1369, 1372 (Fed. Cir. 2009)). In addition, “the proper meaning and scope of the relevant provisions and a determination of the preferred heading for classification purposes, [are] both questions of law.” *Carl Zeiss*, 195 F.3d at 1378.

Here, the parties agree that the subject merchandise is seeds of the *Pinus koraiensis*. Statement of Facts ¶ 5. Because “there is no factual dispute regarding what the merchandise is,” *Sony Elecs.*, slip op. 13–153, at *5, the remaining question is “the proper meaning of . . . the relevant tariff provision[],” which is a legal question, reviewed de novo, and appropriate for summary judgment. *Id.*; see *EOS of N. Am., Inc. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1311, 1317–18 (2013).

The parties also agree that the subject merchandise is properly classified under the HTSUS subheading 0802.90 (“Other nuts, fresh or dried, whether or not shelled or peeled: Other.”). Def.’s Br. 6; see Pl.’s Br. 1. This subheading, however, is further divided into other subheadings at the eight-digit level: “Pignolia” and “Other.” HTSUS 0802.90. Therefore, the dispute involves whether the subject merchandise, seeds of the *Pinus koraiensis* tree, is properly classified under the “Pignolia” subheading or the basket provision “Other.” HTSUS 0802.90.25 (“Pignolia”); HTSUS 0802.90.97 (“Other”).

III. PLAINTIFF HAS FAILED TO DEMONSTRATE THAT THE MEANING OF PIGNOLIA INCLUDES SEEDS OF THE *PINUS KORAIENSIS*

A. Lexicographic, Dictionary, and Industry Sources

If the HTSUS does not define a term, it is “construed according to [its] common and commercial meanings, which are presumed to be

the same.” *Carl Zeiss*, 195 F.3d at 1379. To determine this meaning, the “court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Id.*

Plaintiff contends that all pine nuts, including the seeds of the *Pinus koraiensis*, are commonly known as pignolia nuts. Pl.’s Br. 6. Specialty Commodities supports its claim by citing several dictionary definitions.³ See Pl.’s Br. 6–7; Decl. of J. Christopher Jensen in Supp. of Pl.’s Mot. for Summ. J. (ECF Dkt. No. 34) (“Jensen Decl.”); Jensen Decl. Ex. A (ECF Dkt. No. 34–1) (dictionary definitions). Plaintiff points to: (1) *Webster’s Third New International Dictionary*, which defines “pignolia” as “the edible seed of the nut pine”; (2) *Random House Unabridged Dictionary*, which provides “pine nut 1. Also, pignolia. the seed of any of several pine trees, as the piñon, eaten roasted or salted or used in making [food]”; (3) *Merriam-Webster*, states “Definition of PIGNOLI : PINE NUT”; (4) *Oxford Dictionaries*, stating “pignoli[,] [d]efinition of *pignoli* in English: plural noun Pine nuts”; and (5) *Webster’s New World College Dictionary* which defines pignolia as “the edible seed of *any various nut pines also pignoli.*” Jensen Decl. Ex. A (emphasis added). According to plaintiff, these definitions “support [its] position that the term refers to all pine nuts, regardless of species.” Pl.’s Br. 7.

Moreover, plaintiff seeks to demonstrate that the word pignolia has the same meaning when used in commerce “within the nut industry.” Pl.’s Br. 7. First, plaintiff relies on an August 2004 article *Pine Nuts (Pignolia): Species, Products, Markets and Potential for U.S. Production*. Pl.’s Br. 7. This article, written by an Associate Director at the University of Missouri Center for Agroforestry and his Research Assistant, describes the international pine nut market. Jensen Decl. Ex. B (ECF Dkt. No. 34–2) (Leonid Sharashkin & Michael Gold, *Pine Nuts (Pignolia): Species, Products, Markets and Potential for U.S. Production*, N. Nut Growers Ass’n 95th Annual Report (Aug. 2004)) (“Jensen Decl. Ex. B (Sharashkin & Gold)”). Plaintiff argues that “[t]hroughout this published work, the authors do not distinguish between pine nuts derived from the species *Pinus pinea* and those from other species,” but rather the article uses “pine nuts” interchangeably with “pignolia.” See Pl.’s Br. 7–8. Further, according to plaintiff, the authors address the interchangeability of pignolia nuts and pine nuts when they state “that consumers are usually not sophisticated enough to distinguish between nuts of different species, therefore the nuts are usually lumped together in the commerce and

³ The court notes that plaintiff also cites to and quotes Wikipedia. Pl.’s Br. 7 & n.7.

referred to as ‘pine nuts’, pinyon nuts, pignolia, etc.” Pl.’s Br. 8 (quoting Jensen Decl. Ex. B (Sharashkin & Gold)).

Plaintiff also cites two publications presented at a 1993 U.S. Department of Agriculture (“USDA”) Symposium entitled *Managing Piñon-Juniper Ecosystems for Sustainability and Social Needs*. Pl.’s Br. 8. The first article, *Pine Nuts (Pinus) Imported Into the United States*, written by Elbert L. Little, Jr., a retired dendrologist⁴ for the USDA Forest Service, discusses United States pine nut imports. Jensen Decl. Ex. C (ECF Dkt. No. 34–3) (Elbert L. Little, *Pine Nuts (Pinus) Imported Into the United States*) (“Jensen Decl. Ex. C (Little)”). According to plaintiff, this article uses the words pignolia and pine nuts interchangeably, and explains that all pine nut imports are referred to as pignolia by the U.S. Census Bureau data. Pl.’s Br. 8; Jensen Decl. Ex. C (Little) (“The term pignolia has been used throughout for all pine nuts imported, and scientific names have not been cited.”).

Plaintiff further asserts that another article presented at the USDA symposium, *U.S. Market for Imported Pignoli Nuts*, uses pine nuts and pignolia nuts interchangeably. Jensen Decl. Ex. C. (Steven Delco et al., *U.S. Market for Imported Pignoli Nuts*) (“Jensen Decl. Ex. C (Delco et al.)”). This article states “[t]he major suppliers to the U.S. during [1989–1992] were China, Portugal, Hong Kong, and Spain. China has maintained a dominate position in supplying Pignoli nuts to the U.S. market” Jensen Decl. Ex. C (Delco et al.). Additionally, this article contains graphs and figures that, rather than referring to pine nuts generally, are labeled “US Pignoli Nut Imports (in Pounds)” and “Major Pignoli Nut Suppliers to US Market,” and reflect imports of Chinese pine nuts. Jensen Decl. Ex. C. (Delco et al.).

In addition to the USDA symposium articles, plaintiff points to U.S. Census Bureau data reflecting imports of “pignolia nuts” from various countries. Pl.’s Reply Mem. in Further Supp. of Pl.’s Mot. for Summ. J and in Opp. to Def.’s Cross-Mot. for Summ. J. 6 (ECF Dkt. No. 47) (“Pl.’s Reply Br.”), Ex. B. (ECF Dkt. No. 47–2) (U.S. General Imps., Commodity by Country (Dep’t of Commerce Dec. 1978)) (“Pl.’s Reply Br. Ex. B. (U.S. Census Bureau Data)”). The U.S. Census Bureau’s chart, under the heading 0577840 “PIGNOLIA NUTS, SHELLED OR NOT SHELLED, BLANCHED OR OTHERWISE PREPARED OR PRESERVED,” reflects Spain, Portugal, Iran, China, and “OTH CTY” as the “Countr[ies] of Origin” for these imports. Pl.’s Reply Br. Ex. B. (U.S. Census Bureau Data). From this, plaintiff concludes “that pi-

⁴ Dendrology is “the study of trees.” Dendrology, Merriam-Webster, <http://www.merriam-webster.com/dictionary/dendrology>.

gnolia nuts have historically been imported into the United States from these and other countries,” and are “[c]learly . . . not limited to the *Pinus pinea* species.” Pl.’s Reply Br. 6.

Plaintiff further points to websites to support its claim that under both their common and commercial meaning, all pine nuts are pignolia nuts. See Pl.’s Br. 9–10. For example, the USDA’s website and wholesalepinenuts.com use pignolia and pine nuts interchangeably, and even go as far as stating they are the same.⁵ See Pl.’s Br. 9–10. Specifically, the USDA website posted an article stating: “[t]he many varieties of these pine seeds come under the broad name, ‘pignolias.’” Bernice K. McGeary & Malcolm E. Smith, *Nuts, a Shell Game that Pays Off in Good Eating*, <http://naldc.nal.usda.gov/download/CAIN709013222/PDF>. In addition, wholesalepinenuts.com states that “Shelled Pinoli and Shelled Pignoli are just another name for our shelled pine nuts and no shell pine nuts.” *Wholesalepinenuts.com*, <http://www.wholesalepinenuts.com/american-nevada-shelled-pinyon-pine-nuts-no-shellsale.html> (last visited Nov. 9, 2016). These sources, plaintiff maintains, clearly equate pignolia with pine nuts. See Pl.’s Br. 9–10.

In response, the Government first notes that none of the dictionary definitions offered by plaintiff specifically include its product, seeds of the *Pinus koraiensis*—the seeds at issue here. Def.’s Br. 12. To the contrary, defendant argues, the definitions supplied by plaintiff, when read in conjunction with the sources it cites, simply indicate that all pignolia are pine nuts, but not necessarily that all pine nuts are pignolia. Def.’s Br. 11. In other words, the Government agrees that plaintiff’s definitions are “accurate statement[s], as ‘pignolia’ is a type of pine nut; however, this does not support plaintiff’s contention that ‘pignolia’ covers all species of pine nuts.” Def.’s Br. 12.

To make its case, the Government counters with lexicographic and other sources of its own that define “pignolia” more narrowly. Def.’s Br. 8–9. The Government points to *Encyclopedia Britannica*, *The Columbia Encyclopedia*, *Cambridge World History of Food*, and *Oxford English Dictionary* to support its argument that the definition of pignolia is not equivalent to pine nut. Def.’s Br. Exs. C–F (ECF Dkt. No. 44–1). The sources offered by the Government define pignolia as either the seeds of the *Pinus pinea*, and no other type of pine tree, or as the seeds of only a few particular types of pine trees, but notably not the *Pinus koraiensis*. Specifically, *Encyclopedia Britannica*, in its definition of “pinenut,” states:

⁵ Plaintiff also cites the website thenutbox.com, stating: “Pine Nuts (Pignolia).” *Thenutbox.com*, <http://www.thenutbox.com/Pine-Nuts-Pignolia-p/318.htm> (last visited Nov. 9, 2016).

The pinenuts are seeds of a considerable number of species [native] to remote and often more or less arid parts of the earth . . . nuts are borne in the axils of the cone scales. The stone pine [of] Europe and Asia, the pinyon pines of North America, and [the] Araucarian pine of the Andean region of South America are most important. *With the exception of the Italian stone pine seeds of which are sold as “pignolia” and exported*, pinenuts [are] largely consumed in the general regions where they are produced.

Def.’s Br. Ex. C (Encyclopedia Britannica) (emphasis added). *The Columbia Encyclopedia* provides: Pine nuts, or Indian nuts, were an important food for some early Native Americans and are still harvested in quantity both for food and for trading. They are picked

from the ground, taken from squirrel caches, or extracted by hand from the cones. Some pine stands are in danger of depletion because insufficient seeds are left for reproduction. *Pignolia nuts are the seeds of P. pinea of S Europe, where they are cultivated and much used for food.*

Def.’s Br. Ex. E. (The Columbia Encyclopedia) (emphasis added). *The Cambridge World History of Food* states:

Also called pignoli, pignolia, pignons, piñon nuts, and Indian nuts, these ivory-toned seeds come from the pinecones of several trees of the genus *Pinus* and rank alongside macadamias and pistachios as the most expensive nuts on the market. The European term for pine nuts is *pignolia*, indicating that they come from the Italian stone pine, which grows in Italy, Iberia, and North Africa.

Def.’s Br. Ex. F. (Cambridge World History of Food) (emphasis added). *The Oxford English Dictionary* defines “pignolia” as “[t]he edible seed of the cones of certain pines, esp. the stone pine, *Pinus pinea*, of southern Europe; a pine nut.” Def.’s Br. Ex. D. (Oxford English Dictionary).

As to the industry sources offered by plaintiff, the Government counters that plaintiff overemphasizes the purported interchangeability of “pignolia” and “pine nut” in these articles. Def.’s Br. 12. With regard to the publications presented at the USDA symposium, the Government asserts that “even if *Pinus koraiensis* were viewed by a governmental agency as ‘pignolia’ in the past,” this “does not mean that any such determination was made by Customs, or that it was correct.” Def.’s Br. 14. Further, according to defendant, nothing in the

record indicated: (1) that the pine nuts discussed during the symposium were “imported from China, . . . produced in or indigenous to China,” (2) that “the data was pulled only from product[s] classified as ‘pignolia’ under 0802.90.25, HTSUS, ” or (3) “that the product being imported was *Pinus koraiensis*.” Def.’s Br. 13–14. Therefore, for the Government, because it is unclear what types of nuts were referenced in the USDA articles, plaintiff cannot say these articles demonstrate that all pine nuts, including seeds of the *Pinus koraiensis*, are also referred to as pignolia nuts.

Respecting the reference to the Sharashkin and Gold article from the University of Missouri, the Government asserts “pignolia” is only referenced once, and is simply used in passing to discuss unsophisticated consumers. Def.’s Br. 12 (“The term ‘pignolia’ appears in the text of the article exactly one time. Contrary to plaintiff’s assertion, the article uses the generic term ‘pine nut’ throughout; that is, the article discusses various *pine nuts* and their markets as well as *pine nut* production.” (emphasis in original)). The Government further argues that the most the article might be cited for, is that consumers may confuse the various seeds—not that it establishes plaintiff’s product is commonly and commercially known as pignolia. Def.’s Br. 12. That is, for defendant, the article does not demonstrate that pignolia has an established common or commercial meaning encompassing all pine nuts. See Def.’s Br. 12.

The Government offers its own industry sources, which it claims demonstrate that *Pinus koraiensis* is not commonly or commercially included within the meaning of pignolia. Def.’s Br. 9–10. For example, *The Book of Edible Nuts* states “the most common designation for the [pine] nuts in Europe is ‘pignolia,’ a term which refers to pine nuts of the Italian stone pine, *Pinus pinea*, grown for the most part in Spain, Portugal, Italy, and North Africa.” Def.’s Br. Ex. G (Frederic Rosengarten, Jr., *The Book of Edible Nuts* 309 (1984)) (“Def.’s Br. Ex. G (Rosengarten)”). Additionally, “in the United States nut trade, ‘pine nuts’ may refer to the European pignolia, the North American piñon or the Chinese pine nut.” *Id.* at 311. The source further provides that *Pinus koraiensis* has in recent years become “a commercially competitive nut,” but is “[c]heaper than the more delicate European pignolias.” *Id.* at 315; Def.’s Br. 10.

Defendant also points to *The Deluxe Food Lover’s Companion* which describes “pine nut” as a seed

from several varieties of pine trees. . . . Pine nuts grow in China, Italy, Mexico, North Africa and the southwestern United States. There are two main varieties. Both have a thin shell with an ivory-colored nutmeat that averages about ½ inch in length. The

Mediterranean or Italian Pine Nut is from the stone pine [*i.e.* pignolia]. It's torpedo-shaped, has a light, delicate flavor and is the more expensive of the two. The stronger-flavored Chinese pine nut is shaped like a squat triangle. Its pungent pine flavor can easily overpower some foods.

Def.'s Br. Ex. H (The Deluxe Food Lover's Companion); Def.'s Br. 10. For Customs, these sources support its contention that all species of pine nuts are not pignolia nuts.

The court finds that the various definitions and industry sources offered fail to establish that seeds of the *Pinus koraiensis* necessarily are included within the common or commercial meanings of pignolia. See Pl.'s Br. 8–10; Def.'s Br. 8–11. While plaintiff's dictionary definitions do tend to indicate that the word pignolia does encompass pine nuts other than the seeds of the *Pinus pinea*, Customs' sources do not. Specifically, plaintiff's sources define pignolia generally, as “the seed of any several pine trees,” whereas Customs' sources provide that “[p]ignolia nuts are the seeds of *P. pinea* of S Europe.” Jensen Decl. Ex. A; Def.'s Br. Exs. C–F. Importantly, no cited source equates pignolia with plaintiff's actual product, the seeds of the *Pinus koraiensis*. See *Sigma-Tau Healthscience, Inc. v. United States*, No. 16–1125, at *11 (Fed. Cir. Sept. 26, 2016) (“Whether a [good] is commonly referred to as [a term provided in the HTSUS] may be pertinent, but only if there is a consensus as to the use of that terminology.”); see also *Deckers Outdoor Corp.*, 714 F.3d at 1369 (“Because there are competing dictionary definitions of the term ‘slip-on’—and many of those definitions are not limited to shoes—the Trade Court correctly declined to limit the term ‘footwear of the slip-on type’ to shoes.”). As a result, it cannot be said that the word pignolia has a common meaning that embraces all pine nuts, or the seeds of the *Pinus koraiensis* in particular.

In like manner, the sources cited fail to establish that the commercial meaning of pignolia includes seeds of the *Pinus koraiensis*. Plaintiff first cites an article from the University of Missouri Center for Agroforestry stating that consumers cannot “distinguish between nuts of different species,” and as a result “the nuts are usually lumped together in the commerce and referred to as ‘pine nuts’, pinyon nuts, pignolia, etc.” Jensen Decl. Ex. B. (Sharashkin & Gold). This article, however, fails to cite any support for this assertion. To the court, the article's unsupported assertions are not helpful in determining pignolia's commercial meaning.

The court also finds the USDA symposium articles⁶ and U.S. Census Bureau data, which plaintiff asserts use pignolia and pine nuts interchangeably, do not clarify the common and commercial meaning of pignolia. Notably, Little's USDA article acknowledges that scientific names have not been cited, however, the classification based on scientific names is the precise issue before the court. In addition, the court notes that the Delco et al. article shows that Chinese pine nuts were imported during 1988 to 1992, however, it also provides that "[t]here are regional varieties of the pine nut throughout the world" and that "the Spanish and Italian pine nut [are] a different variety from the Chinese nut." Jensen Decl. Ex. C (Delco et al.).

The U.S. Census Bureau data presented by plaintiff, reflecting imports from foreign countries of pine nuts as pignolia nuts, is also not persuasive in establishing the common and commercial meaning.⁷ This is because the data collected reflected how importers had self-classified their entries, not the conscious decisions of Customs. Thus, the U.S. Census Bureau data does not reflect a decision on the part of Customs to classify all pine nuts as "Pignolia," but rather represents actions made "expeditiously and without examination or Customs officer review" to accept importers proposed tariff provision.⁸

⁶ It is worth noting that the USDA articles plaintiff presented, as if they were another agency's interpretation, do not necessarily reflect the USDA's understanding of the term pignolia. Importantly, the USDA included a disclaimer in the symposium materials, stating that "[t]he views expressed in each paper are those of the author and not necessarily those of the USDA Forest Service." *Managing Piñon-Juniper Ecosystems for Sustainability and Social Needs*, U.S. Dep't of Agriculture (Apr. 26–30 1993).

⁷ Specifically, the chart provides:

Table 2. Schedule A Commodity by Country of Origin, Customs, F.a.s., and C.i.f. Values—

...	
0577840	PIGNOLIA NUTS, SHELLED OR NOT SHELLED . . .
SPAIN	. . .
PORTUGAL	. . .
IRAN	. . .
CHINA P	. . .
OTH CTY	. . .
TOTAL	. . .

Pl.'s Reply Br. Ex. B. (U.S. Census Bureau Data).

⁸ It is important to note that plaintiff makes no argument that, because Customs has previously liquidated entries of seeds other than seeds of the *Pinus pinea* under the HTSUS subheading "Pignolia," its nuts should likewise be classified under this subheading. In other words, plaintiff does not argue that it is entitled to prevail on the theory that Customs' previous actions of liquidating entries of *Pinus* seeds constitutes prior "treatment," and that Customs' decision not to liquidate the seeds of the *Pinus koraiensis* under this subheading is a departure from such treatment. The Federal Circuit has held that "the admission of

See *Motorola, Inc. v. United States*, 436 F.3d 1357, 1367 (Fed. Cir. 2006) (citation omitted). That is, all the U.S. Census Bureau data reflects is that the importers self-classified the seeds of the *Pinus koraiensis* under “Pignolia,” not that Customs made a reasoned decision that this was the appropriate subheading.

For its part, defendant points to *The Deluxe Food Lover’s Companion* and *The Book of Edible Nuts*, both indicating that pignolia nuts are seeds of the *Pinus pinea*. Def.’s Br. Ex. G (Rosengarten); Def.’s Br. Ex. H (The Deluxe Food Lover’s Companion). For instance, *The Deluxe Food Lover’s Companion* provides “Pine nuts grow in China, Italy, Mexico, North Africa and southwestern United States. There are two main varieties. . . . The Mediterranean or Italian Pine Nut is from the stone pine [*i.e.* *pignolia*]. The stronger-flavored Chinese pine nut is shaped like a squat triangle.” Def.’s Br. Ex. H (The Deluxe Food Lover’s Companion). *The Book of Edible Nuts* also distinguishes pine nuts based on species and geographical location. Def.’s Br. Ex. G (Rosengarten).

A look at sources not cited by the parties sheds some light on the common meaning of “Pignolia.” Pinenut.com, run by a domestic organization “advocat[ing] and consult[ing] on sustainable forestry approaches” distinguishes domestic pine nuts from Korean pine nuts and Italian pine nuts. Know your pine nuts!, Pinenut.com, <http://www.pinenut.com/pine-nuts/pinonpinyon-nuts.shtml> (last visited Nov. 9, 2016). Discussing different species of pine nuts, the website states: “ITALIAN Stone pine (*Pinus pinea*) [m]any tout the Pine nuts from Italy (*pignolia*, *pinolia*), however[,] that species *Pinus pinea* is very common in the European market and grown throughout the Meditrainian [(sic)] region. The processing factors and distribution factors of *Pinus pinea* end up making it rather bland.” *Id.* This website shows that at least one U.S. organization, with an interest in pine nuts, distinguishes the Italian pignolia nut from other pine nuts, arguing there is a difference in quality. *Id.* (“Siberian Nuts are much smaller . . . [t]he nut meat looks nothing like the nut meats of New

entries ‘expeditiously and without examination or Customs officer review’ does not constitute ‘treatment’ within the meaning of section 1625(c)(2).” *Motorola, Inc. v. United States*, 436 F.3d 1357, 1367 (Fed. Cir. 2006). As a result, Customs’ previous liquidations of seeds other than the *Pinus pinea* under subheading 0802.90.25 is not “treatment” resulting in a change entitling plaintiff to relief. *Cf. Cal. Indus. Prods., Inc. v. United States*, 436 F.3d 1341, 1351 (Fed. Cir. 2006) (“Turning to the merits, section 1625(c)(2) mandates that Customs follow notice and comment procedures before issuing an ‘interpretive ruling or decision which would . . . have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions.’” (quoting 19 U.S.C. § 1625(c)(2)). In any event, since this argument was not made, it is waived. *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) (“It is well established that arguments that are not appropriately developed in a party’s briefing may be deemed waived.”).

Mexican or Nevada Pine nuts, [and]. . . they are not as ‘round and flat’ as pinons.”).

In sum, for the court, the sources fail to demonstrate that there is a commercial meaning for the word pignolia that covers plaintiff’s product. Therefore, the court finds that plaintiff has failed to establish the common or commercial meaning of pignolia to include pine nuts of all species, and in particular that plaintiff has failed to demonstrate that its seeds of the *Pinus koraiensis*, are encompassed within the meaning of the word.

B. Customs’ New York Ruling Letters Did Not Establish “Pignolia’s” Meaning

Plaintiff next asserts that Customs established pignolia’s meaning in two New York Customs Ruling letters classifying oil and vinegar sets. Pl.’s Br. 10. The first Customs Ruling Letter states: “[o]ne bottle contains ‘Rosemary & Pignoli Infused Oil’ a yellow liquid which is stated to be canola oil, rosemary, pine nuts (or pignoli) and black peppercorns. It has visible rosemary sprigs with some pine nuts and peppercorns floating within.” Jensen Decl. Ex. F (*Tariff classification of Oil and Vinegar from China*, NY F86911 (Customs & Border Prot. May 31, 2000)). Another Customs Ruling letter on oil and vinegar sets states: “‘rosemary and pignolia infused oil’ . . . [i]t has visible rosemary sprigs and some pine nuts, or pignoli, and black peppercorns floating within.” Jensen Decl. Ex. F (*The tariff classification of an Oil and Vinegar Set from China*, NYG89892 (Customs & Border Prot. May 7, 2001)). Plaintiff argues that these ruling letters establish that Customs acknowledged that “‘pignolia’ refer[s] to pine nuts generally, including those of the Asian origin,” and thus that all pine nuts are pignolia nuts. Pl.’s Br. 10; *Lonza, Inc. v. United States*, 46 F.3d 1098, 1106 (Fed. Cir. 1995) (per curiam) (“The common meaning of a tariff term, once established, remains controlling until a subsequent change in statute compels a revised construction of the term’s meaning.”).

The Government responds that these ruling letters are not persuasive in this case because agency determinations “are not binding on this court,” and more importantly that it is “unclear based on the facts available what types of pine nut was included” in the oil and vinegar sets.⁹ Def.’s Br. 14; cf. *Warner-Lambert Co. v. United States*, 425 F.3d 1381, 1384 (Fed. Cir. 2005).

The court finds that the two previous ruling letters are sufficiently unrelated to the subheading at issue in this case, so as to be unhelpful

⁹ In response, plaintiff asserts that because the oil and vinegar sets were from China, it is extremely likely that the pine nuts at issue in these ruling letters were also Chinese pine nuts. Pl.’s Reply Br. 7–8.

in establishing a meaning for pignolia. Here, the classification of the pine trees' seeds could not be said to have been on the minds of the authors of the letters classifying oil and vinegar sets. In addition, Customs' regulations provide that "[e]ach ruling letter setting forth the proper classification of an article under the provisions of the [HTSUS]" is applicable "only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." 19 C.F.R. § 177.9(b)(2). The Federal Circuit has interpreted 19 C.F.R. § 177.9(c) to permit a ruling letter to be "binding only on the party to whom it is issued, and may be revoked or cancelled at any time."¹⁰ *Jewelpak Corp. v. United States*, 297 F.3d 1326, 1335 (Fed. Cir. 2002).

Indeed, pursuant to the regulations, these two ruling letters apply only to Customs' interpretations with respect to those oil and vinegar sets, not Customs' interpretation of pignolia. 19 C.F.R. §§ 177.9(b)(2), (c). This being the case, the two ruling letters do not establish that Customs previously used the term pignolia interchangeably with pine nut. Last, Customs' rulings are entitled to deference only to the degree of their power to persuade, and this "degree of deference" turns on "the thoroughness evident in the classification ruling; the validity of the reasoning that led to the classification; . . . the formality with which the particular ruling was established; and other factors that supply a 'power to persuade.'" *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). As a result, because the ruling letters pertained to a different provision of the HTSUS and do not show that Customs has "thoroughly considered [the] particular classification," they are unpersuasive in establishing pignolia's meaning. *Sony Elecs.*, slip op. 13–153, at *11; see 19 C.F.R. § 177.9(b)(2).

C. There Was Not an Established Meaning for "Pignolia" Under the Tariff Schedules of the United States

Next, plaintiff argues that the meaning of pignolia was established under the Tariff Schedule of the United States ("TSUS")¹¹ and its

¹⁰ The regulation provides that:

Except when public notice and comment procedures apply under [section] 177.12, a ruling letter is subject to modification or revocation by [Customs] without notice to any person other than the person to whom the ruling letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

19 C.F.R. § 177.9(c).

¹¹ The TSUS was created by the Customs Simplification Act of 1954, which

predecessor tariff schedules, and this meaning carried forward into

directed the Tariff Commission to compile a revision of customs laws classifying imports for tariff purposes. The Commission submitted the *Tariff Classification Study* to Congress and the President on November 15, 1960; a supplemental report was submitted in January, 1962. The Commission's report, as amended, became the Tariff Classification Act of 1962. This act implemented the TSUS, which took effect on August 31, 1963.

Lonza, 46 F.3d at 1101. The TSUS included the term "Pignolia." Edible Nuts and Fruits, Animal and Vegetable Products, Tariff Schedules of the United States Annotated sch. 1 part 9 sec. 145.52 (1987). Under the TSUS of 1987, the last version before the implementation of the HTSUS, the pertinent subheadings read:

Item	Articles	Units of Quantity	Rates of Duty
	Other edible nuts, shelled or not shelled, blanched, or otherwise prepared or preserved:		
	. . .		
	Shelled, blanched or preserved:		
	Almonds:		
145.40	Shelled	Lb.	16.5¢ per lb.
145.41	Other	Lb.	18.5¢ per lb.
142.42	Brazil nuts	Lb.	Free
145.44	Cashews	Lb.	Free
145.46	Filberts	Lb.	8¢ per lb.
145.48	Peanuts 1/	. . .	3¢ per lb.
	Peanut butter	Lb.	
	Other:	Lb.	
	Not shelled	Lb.	
	Other	Lb.	
145.50	Pecans	Lb.	10¢ per lb.
145.52	Pignolia	Lb.	1 ¢ per lb. 2/
145.53	Pistache	Lb.	1 ¢ per lb.
145.54	Walnuts:		
	Pickled, immature walnuts	Lb.	5¢ per lb.
	Other	Lb.	15¢ per lb.
	Other edible nuts:		
	Shelled or blanched . . .		5¢ per lb
	Macadamia nuts	Lb.	[blank]
	Other	Lb.	[blank]

Edible Nuts and Fruits, Animal and Vegetable Products, Tariff Schedules of the United States Annotated sch. 1, part 9, p.1-54 (1987).

the current HTSUS,¹² because there is no evidence Congress intended to change this meaning in the HTSUS. Pl.’s Br. 12–13.

First, plaintiff cites the 1921 Summaries of Trade and Tariff Information (“SOTI”) Report¹³ as evidence that, from an early date, pignolia was “a term generally applicable to nuts of pine trees, regardless of species or place of origin.” Pl.’s Br. 11. The 1921 SOTI Report provides an explanation of the Tariff Act of 1922, a predecessor of the TSUS. *See* General Notes on Para., Summary of Tariff Information 757 (U.S. Tariff Comm’n 1921). Under the heading “Pignolia Nuts,” the 1921 SOTI Report provides:

Description, uses, and production.—*Pignolia or pine nuts are the seeds of a considerable number of both American and foreign pines. The nuts are marketed without the shell and in appearance somewhat resemble puffed rice. The kernels are very rich and form an important article of food in some countries. A few species of American pines yield edible nuts, but the domestic product is commercially not important. Southern Europe, Chile, and Mexico produce quantities of the nut.*

Imports.—Some pignolia nuts are imported; statistics of imports are, however, lacking.

Pignolia Nuts, Summary of Tariff Information 757 (U.S. Tariff Comm’n 1921) (emphasis added). For plaintiff, “[s]uch language indicates that the term ‘pignolia’ was understood [by the Tariff Commission] to be synonymous with ‘pine nuts.’” Pl.’s Br. 12. Further,

¹² The pertinent HTSUS subheading provides:

0802	Other nuts, fresh or dried, whether or not shelled or peeled:
0802.90	Other:
	Pecans:
0802.90.10	In shell kg 8.8¢/kg
0802.90.15	Shelled kg 17.6¢/kg
	Pignolia:
0802.90.20	In shell kg 0.7 ¢/kg
0802.90.25	Shelled kg 1¢/kg
	Other:
0802.90.81	In shell kg 1.3 ¢/kg
	Shelled:
0802.90.94	Kola nuts kg 5¢/kg
0802.90.97	Other kg 5¢/kg

¹³ The SOTI Reports are written by a “professional staff of commodity specialists, economists, lawyers, statisticians, and accountants,” and “reflect the most recent developments affecting U.S. foreign trade in the commodities included.” Foreword, Summary of Tariff Information (U.S. Tariff Comm’n 1968).

plaintiff asserts that the definition in the 1921 SOTI Report should be used to interpret “pignolia” in the Tariff Act of 1922. Pl.’s Br. 12. The Tariff Act of 1922 states: “Cream or Brazil nuts, 1 cent per pound; filberts, not shelled, 2½ cents per pound; shelled. 5 cents per pound; *pignolia nuts*, 1 cent per pound ; pistache nuts, 1 cent per pound.” Tariff Act of 1922, ch. 356, 42 Stat. 858, 895, *repealed by* Tariff Act of 1930, ch. 497, 46 Stat. 590 (emphasis added); Pl.’s Br. 12. According to plaintiff, the statements concerning pignolia nuts in the 1921 SOTI Report are persuasive as to the meaning of “pignolia” in the Tariff Act of 1922. Pl.’s Br. 12.

Next, plaintiff contends that the meaning of pignolia, accepted in the Tariff Act of 1922, carried forward to “the relevant provision of [the] Tariff Act of 1930, and then to section 145.52 of the [TSUS].” Pl.’s Br. 12 (citations omitted). In other words, plaintiff’s argument is that the 1921 SOTI Report establishes that the meaning of pignolia nuts includes all species of pine nuts in the Tariff Act of 1922, and that this meaning carried over to the Tariff Act of 1930 and, by extension, to the TSUS. Pl.’s Br. 12–13 (“Thus, under the TSUS, the legal definition of the tariff term ‘pignolia’ remained as it did under the SOTI.”). Finally, because, for plaintiff, pignolia’s meaning was established under the TSUS, it argues that the court should continue to apply this meaning when interpreting the HTSUS, unless there is “clear evidence’ of congressional intent to the contrary.” Pl.’s Br. 13 (quoting *Intercontinental Marble Corp. v. United States*, 27 CIT 654, 663, 264 F. Supp. 2d 1306, 1316 (2003)).

In response, the Government argues that neither 1921 SOTI Report nor the Tariff Act of 1922 establish a meaning for pignolia nuts that carried over to the HTSUS. Def.’s Br. 15–16. This is because, neither the Tariff Act of 1930, nor the 1946 revision, use the word pignolia.¹⁴ Def.’s Br. 17. According to defendant, even if the 1921 SOTI Report

¹⁴ Specifically, the Tariff Act of 1930 provides:

Par. 757. Cream or Brazil nuts, not shelled, 1½ cents per pound; shelled, 4½ cents per pound; filberts, not shelled, 5 cents per pound; shelled, 10 cents per pound; any of the foregoing, if blanched, shall be subject to the same rate of duty as it not blanched.

Par. 761. Edible nuts, not specially provided for, not shelled, 2½ cents per pound; shelled, 5 cents per pound.

Tariff Act of 1930, Pub. L. 71–361, 46 Stat. 590 (1930). In addition, the pertinent paragraphs in the 1946 revisions to the Tariff Act of 1930 remained unchanged:

Par. 757. Cream or Brazil nuts, not shelled, 1½ cents per pound; shelled, 4½ cents per pound; filberts, not shelled, 5 cents per pound; shelled, 10 cents per pound; any of the foregoing, if blanched, shall be subject to the same rate of duty as if not blanched.

Par. 761. Edible nuts, not specially provided for, not shelled, 2 ½ cents per pound; shelled, 5 cents per pound.

Def.’s Br. Ex. M (Revision of the Tariff Act of 1930, U.S. Tariff Comm’n 63 para. 757, 761 (June 1946)).

sheds light on the 1922 Tariff Act, because of the gap in the word's use in subsequent tariff schedules, the 1921 SOTI Report is not persuasive as to the court's interpretation of the term under the HTSUS. Thus, defendant argues that under the Tariff Act of 1930 and its revisions, all pine nuts were classified under a general category "Other," because there was no *pignolia* classification. Def.'s Br. 17. For defendant, this omission is important. Based on the absence of the word *pignolia* in the later Acts, it argues, it is impossible to say that the description found in the 1921 SOTI Report was carried over from the Tariff Act of 1922 to the TSUS when the word was not mentioned in the intervening Tariff Act or its revisions. *See* Def.'s Br. 17.

Importantly, the Government maintains that, if the court were to consider a SOTI Report, it should turn to the more recent 1968 SOTI Report, which "provides more specific information as to which foreign pine nuts would be considered 'pignolia'" under the TSUS. Def.'s Br. 16. The 1968 SOTI Report states

[t]he *pignolia nut* is gathered from certain species of pine trees. The nuts imported from Italy, Portugal, and Spain are slender nuts, about ½ inch long. These nuts enter almost entirely in the shelled form and are sold, after roasting and slating, for eating out of hand. They are also used as an ingredient in certain Mediterranean-style food dishes.

The domestic *pine nut* is short and stubby in contrast to the long, slender appearance of the imported nut. . . . The domestic pine nuts are not directly competitive with the imported nuts, as they differ in taste, shape, and the form in which marketed.

Brazil, Cashew and Certain Other Nuts, Summaries of Trade and Tariff Information 264 (U.S. Tariff Comm'n 1968) (emphasis added). Defendant argues that this language distinguishes *pignolia* nuts from other pine nuts because it provides that *pignolia* nuts are gathered from "certain" pine trees in Europe, whereas pine nuts, a more general term, refers to domestic nuts from the United States. Def.'s Br. 17. Moreover, the Government also notes that the listed geographic locations do not include China. *See* Def.'s Br. 16–17; Brazil, Cashew and Certain Other Nuts, Summaries of Trade and Tariff Information 264 (U.S. Tariff Comm'n 1968).

A SOTI Report can indeed help to establish the meaning of words found in earlier acts.¹⁵ Pl.'s Br. 11 ("Although not evidence of legisla-

¹⁵ The Federal Circuit concluded that the SOTI Reports are persuasive when interpreting the TSUS. *Rollerblade*, 112 F.3d at 485 n.2 ("Although not controlling, the Summaries are nonetheless instructive on the meaning of a tariff term."); *United States v. Standard*

tive intent, the SOTI is illustrative because it ‘may be employed by the court as a vehicle for ascertaining administrative practice or particular meanings of tariff terms.’” (quoting *Abitibi Price Sales Corp. v. United States*, 13 CIT 787, 796–97 (1989)). Here, however, the 1921 SOTI Report does not establish the meaning plaintiff asserts under the TSUS. See *Lonza*, 46 F.3d at 1106. Although the 1921 SOTI Report indicates that “Pignolia” or pine nuts meant “the seeds of a considerable number of both American and foreign pine” under the Tariff Act of 1922, the absence of the word pignolia in the Tariff Act of 1930 and subsequent revisions, suggests that this meaning was not transferred to the TSUS. Pignolia Nuts, Summary of Tariff Information 757 (U.S. Tariff Comm’n 1921).

Moreover, the court agrees with the Government that the 1968 SOTI Report is more persuasive when interpreting a term under the TSUS. As defendant points out, the later 1968 SOTI Report more specifically identifies distinctions between pignolia nuts and pine nuts. Thus, “[t]he *pignolia nut* is gathered from certain species of pine trees. The nuts imported from Italy, Portugal, and Spain . . . The domestic pine nut is short and stubby in contrast to the long, slender appearance of the imported nut.” Brazil, Cashew and Certain Other Nuts, Summaries of Trade and Tariff Information 264 (U.S. Tariff Comm’n 1968). The court finds that the 1968 SOTI Report is persuasive as to the meaning of the term pignolia under the TSUS, at least to the extent that it confirms the Government’s point that all pine nuts are not pignolia.

The conclusion here must be, then, that the meaning of the word pignolia was not established in the TSUS so as to include the seeds of the *Pinus koraiensis*. Because it concludes that the plaintiff’s asserted meaning was not established in the TSUS, the court does not address plaintiff’s remaining arguments regarding the absence of contrary congressional intent. Cf. *Intercontinental Marble*, 381 F.3d at 1173.

D. Consistent with the Relevant Explanatory Note, the Meaning of Pignolia Does Not Include Seeds of the *Pinus koraiensis*

The Government argues that, based on the Explanatory Notes, the proper interpretation of the term “Pignolia” is seeds of the *Pinus pinea*. See Def.’s Br. 5–6.

While not legally binding, Explanatory Notes, at least to the six-digit level, are persuasive authority that “clarify the scope of HTSUS subheadings and . . . offer guidance in interpreting” the HTSUS.

Surplus Sales, Inc., 667 F.2d 1011, 1015 & n.4 (C.C.P.A. 1981) (“Though not controlling, the Summaries have been employed as aids in ascertaining the meaning of a tariff term.”).

Streetsurfing, 38 CIT at __, 11 F. Supp. 3d at 1294 (quoting *Mita Copystar Am.*, 21 F.3d at 1082). The Federal Circuit has repeatedly “credited the unambiguous text of relevant [E]xplanatory [N]otes” to determine the meaning of a term in the HTSUS “absent persuasive reasons to disregard it.” *Drygel, Inc. v. United States*, 541 F.3d 1129, 1134 (Fed. Cir. 2008); see *LeMans*, 660 F.3d at 1321 (“Use of Explanatory Notes in this manner to interpret a heading of the HTSUS is entirely proper.”); *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1363 (Fed. Cir. 2011); *Agfa Corp. v. United States*, 520 F.3d 1326, 1330 (Fed. Cir. 2008) (holding that the Explanatory Notes “directly address the issue under consideration,” and that “while the Explanatory Notes are not binding, they are persuasive authority.”). It is important to note, however, that the cases citing the persuasiveness of the Explanatory Notes have largely been those construing a subheading’s terms to the six-digit level.

The HTSUS was implemented in accordance to the International Convention on the Harmonized Commodity Description and Coding System (“the Convention”), an international agreement¹⁶ that “requires that signatories, in effectuating the [Harmonized System] in their respective domestic laws, not alter the scope of a [Harmonized System] heading.”¹⁷ *Victoria’s Secret Direct, LLC v. United States*, 37 CIT __, __, 908 F. Supp. 2d 1332, 1348 (2013), *aff’d*, 769 F.3d 1102 (Fed. Cir. 2014). Thus while the Harmonized System classified merchandise only to the six-digit level, signatories to the agreement could add further to the subheadings (i.e., the eight-digit level) but could

¹⁶ “The World Customs Organization (WCO), established in 1952 as the Customs Cooperation Council (CCC) is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations. . . .” *Nomenclature and Classification of Goods*, World Customs Organization, <http://www.wcoomd.org/en/aboutus/what-is-the-wco.aspx> (last visited Nov. 9, 2016).

The system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98% of the merchandise in international trade is classified in terms of the [Harmonized System]. . . . The Harmonized System is governed by ‘The International Convention on the Harmonized Commodity Description and Coding System.’ The official interpretation of the [Harmonized System] is given in the Explanatory Notes (5 volumes in English and French) published by the WCO.

Nomenclature and Classification of Goods, World Customs Organization, <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (last visited Nov. 9, 2016).

¹⁷ In preparing the draft version of the HTSUS for congressional consideration, the U.S. International Trade Commission (“ITC”) explicitly recognized the obligation of the United States, as a signatory of the Convention on the Harmonized System, to maintain consistency with the HS nomenclature for the headings that were to be shared by all signatories to the Convention, i.e., the headings in chapters 1 through 97.

Victoria’s Secret Direct, LLC v. United States, 37 CIT __, __, 908 F. Supp. 2d 1332, 1348 (2013), *aff’d*, 769 F.3d 1102 (Fed. Cir. 2014).

not alter the scope of a heading. *Id.* (“[M]odifications of the scope of the various parts of the Harmonized System are not permitted; however, further detailed subdivisions for classifying goods (such as for tariff, quota, or statistical purposes) are permitted so long as they are added and coded at a level beyond the six-digit numerical code provided in the Harmonized System.” (citation omitted)). In other words, the contracting parties have agreed to conform their respective tariff schedules in accordance with the Harmonized System, although they may provide further specific detail.

This commitment is codified in 19 U.S.C. § 3005(a),¹⁸ by which Congress recognizes its “obligation to maintain consistency with the Harmonized System.” *Id.* at __, 908 F. Supp. 2d 1348–49. As a result, this Court has held that “in light of the recognized obligation to maintain HTSUS headings consistently with the [Harmonized System],” and “absent legislative intent” to differ from the Harmonized System, the court will not presume that Congress enacted a tariff heading with a different scope than that provided by the drafters of the Harmonized System. *Id.* at __, 908 F. Supp. 2d at 1349. Thus, while at the eight-digit level the Explanatory Notes cannot be said to reflect the intent of the drafters of the HTSUS, they can certainly be said to reflect the intent of the Harmonized System drafters.

This is particularly true in a case like this where the First Edition of the Explanatory Notes was available to those who drafted the eight-digit subheadings at issue. In 1986, the WCO issued the First Edition of the Explanatory Notes, which provided interpretive guidance for terms in the proposed Harmonized System. Introduction, Explanatory Notes (1 ed. 1986). Specifically, the 1986 First Edition Explanatory Notes included the term *pignolia* and limited it to seeds of the *Pinus pinea*. That is, in 1986, the First Edition Explanatory Note to the Harmonized System stated “*pignolia* nuts (seeds of the

¹⁸ The statute provides:

(a) In general

The Commission shall keep the [HTSUS] under continuous review and periodically, at such time as amendments to the Convention are recommended by the Customs Cooperation Council for adoption, and as other circumstances warrant, shall recommend to the President such modifications in the [HTSUS] as the Commission considers necessary or appropriate—

- (1) to conform the [HTSUS] with amendments made to the Convention;
- (2) to promote the uniform application of the Convention and particularly the Annex thereto;
- (3) to ensure that the [HTSUS] is kept up-to-date in light of changes in technology or in patterns of international trade;
- (4) to alleviate unnecessary administrative burdens; and
- (5) to make technical rectifications.

19 U.S.C. § 3005(a).

Pinus pinea.)” This language remained unchanged in the finalized 2007 Explanatory Note and its subsequent revisions. Explanatory Note 08.02 (2007).

The court therefore finds the Explanatory Note to be informative as to the meaning of the subheading’s words. See *Pima W., Inc. v. United States*, 20 CIT 110, 113 n.2, 915 F. Supp. 399, 402 n.2 (1996) (“The eight-digit level of classification is subsidiary to, not an expansion of, the six- and four-digit levels. If the Explanatory Notes offer guidance that a product should be excluded from a four-digit heading or six-digit subheading, one can properly infer that the product is excluded from the eight-digit subheading.”); *NEC Elecs., Inc. v. United States*, 144 F.3d 788, 791 (Fed. Cir. 1998) (“We cannot accept NEC’s argument that this Explanatory Note is only pertinent to the meaning of the six-digit subheading . . . but not the eight-digit subheading.”).

The Explanatory Note to the Harmonized System states that: “[t]he principal nuts of this heading are almonds (sweet or bitter), hazelnuts or filberts, walnuts, chestnuts (*Castanea spp.*), pistachios, pecans and pignolia nuts (seeds of the *Pinus pinea*).”¹⁹ Thus, at least to the

¹⁹ The Explanatory Note, in full, provides:

08.02- OTHER NUTS, FRESH OR DRIED, WHETHER OR NOT SHELLLED OR PEELED.

- Almonds:
- 0802.11 -- In Shell
- 0802.12 -- Shelled
- Hazelnuts or filberts (*Corylus spp.*):
- 0802.21 -- In shell
- 0802.22 -- Shelled
- Walnuts:
- 0802.31 -- In shell
- 0802.32 -- Shelled
- 0802.40 -- Chestnuts (*Castanea spp.*)
- 0802.50 -- Pistachios
- 0802.90 -- Other

The principal nuts of this heading are almonds (sweet or bitter), hazelnuts or filberts, walnuts, chestnuts (*Castanea spp.*), pistachios, pecans and pignolia nuts (seeds of the *Pinus pinea*).

This heading also covers areca (betel) nuts used chiefly as a masticatory, and cola (Kola) nuts used both as a masticatory and as a base in the manufacture of beverages.

The heading does not include:

- (a) Empty walnut or almond hills (heading 14.04).
- (b) Ground-nuts (heading 12.02), roasted ground-nuts or peanut butter (heading 20.08).
- (c) Horse chestnuts (*Aesculus hippocastanum*) (heading 23.08).

Explanatory Notes to the Harmonized System 08.02 (1986).

six-digit level, the Explanatory Note limits the words *pignolia nuts* to the seeds of the *Pinus pinea*. In other words, the Explanatory Note excludes plaintiff's seeds to the six-digit level and "one can properly infer that the product is excluded from the eight-digit subheading."²⁰ *Pima*, 20 CIT at 113 n.2, 915 F. Supp. at 402 n.2.

Moreover, the drafters of the eight-digit subheadings had available to them not only the First Edition Explanatory Notes, but also the 1968 SOTI Report when they did their work. The 1968 SOTI Report, as has been noted, is instructive as to the meaning of a term under the TSUS, and suggests that the term *pignolia* is limited to seeds of the Italian Stone pine (seeds of the *Pinus pinea*). *Rollerblade*, 112 F.3d at 485 n.2; Brazil, Cashew and Certain Other Nuts, Summaries of Trade and Tariff Information 264 (U.S. Tariff Comm'n 1968) ("[t]he *pignolia nut* is gathered from certain species of pine trees. The nuts imported from Italy, Portugal, and Spain are slender nuts about ½ inch long."). This "pignolia" subheading remained a part of the TSUS until its last version in 1987.²¹

Therefore, in 1988 the drafters of the HTSUS had before them the TSUS, the 1968 SOTI Report, and the 1986 First Edition of the Explanatory Notes.²² These sources all tend to define *pignolia*

²⁰ It is worth noting that the Federal Circuit's holding in *Sigma-Tau Healthscience*, is not inapposite. In that case, the disputed heading's Explanatory Note's definition of vitamin under heading 29.36 directly conflicted with the HTSUS's eight-digit country specific subheading 2936.29.50.20. *Sigma-Tau Healthscience*, No. 16–1125, at *14. The Federal Circuit concluded that, because "[t]his portion of the definition of 'vitamin' in [the Explanatory Note] contradicts the express inclusion of vitamin D under the HTSUS heading," and therefore "must be disregarded." *Id.* That is, the drafters of the HTSUS expressly included, at the eight-digit country specific level, a classification incompatible with the definition provided in the Explanatory Notes. Here, however, the meaning suggested by the Explanatory Note does not conflict with the HTSUS's eight-digit country specific heading, but instead is persuasive in clarifying the meaning of undefined tariff terms.

²¹ The progression of the TSUS subheading to the applicable HTSUS subheading is also significant. The TSUS, under the heading "Other edible nuts, shelled or not shelled, blanched, or otherwise prepared or preserved" provides for: almonds, Brazil nuts, cashews, filberts, peanuts, pecans, *pignolia*, pistache, walnuts, and macadamia nuts. Edible Nuts and Fruits, Animal and Vegetable Products, Tariff Schedules of the United States Annotated sch. 1, part 9, p.1–54 (1987). In comparison, the first version of the HTSUS subheading 0802 provides for: almonds, hazelnuts or filberts, walnuts, chestnuts, pistachios, and *pignolia nuts*. HTSUS 0802 (1989). The applicable 2009 HTSUS remains substantially the same as the 1989 version. HTSUS 0802 (2009).

²² After the Harmonized System and Explanatory Notes, Congress passed the Omnibus Trade and Competitiveness Act to incorporate the international agreement requirements into U.S. law. Omnibus Trade and Competitiveness Act, Pub. L. 100–418, H.R. Rep. No. 100–576, at 549 (Conf. Rep.), as reprinted in 1988 U.S.C.C.A.N. 1547, 1582. The legislative history to the Omnibus Trade and Competitiveness Act provides:

Status of Explanatory Notes

narrowly, as seeds of the *Pinus pinea*. Moreover, when drafting the HTSUS, the international agreement reached at the Convention, as well as domestic law, prevented the drafters from changing or departing from the headings and subheadings in the Harmonized System when further specifying the scope of the classifications at the eight-digit level. *Victoria's Secret Direct*, 37 CIT at ___, 908 F. Supp. 2d at 1348.

Based on foregoing, the court holds that term “Pignolia” in HTSUS subheading 0802.90.25 does not include “seeds of the *Pinus koraiensis*.”

E. This Case is Distinguishable from *Intercontinental Marble*

In *Intercontinental Marble*, the parties disagreed as to the proper interpretation of the term “marble” in HTSUS 6802. *See Intercontinental Marble*, 27 CIT at 658, 264 F. Supp. 2d at 1312. This Court, as well as the Court of Appeals, held that “marble” had an “established” meaning under the TSUS. *See id.* at 661, 264 F. Supp. 2d at 1314. Therefore, this Court concluded, because there was already an established meaning, the contradictory Explanatory Note was unpersuasive. *Id.* at 668, 264 F. Supp. 2d at 1320. Plaintiff urges the court to find that this case is analogous to *Intercontinental Marble*. Pl.’s Br. 16–18. In other words, plaintiff argues that the court should disregard the Explanatory Note because it conflicts with pignolia’s established meaning.

This case, however, is distinguishable from *Intercontinental Marble*. There, the Explanatory Note differed from an established meaning of the term. Here, by contrast, plaintiff failed to demonstrate an established meaning for “Pignolia” including its product, the seeds of the *Pinus koraiensis*. Accordingly, the Explanatory Note does “not contradict the common commercial meaning . . . but instead clarifies the scope of the term.” *StoreWALL*, 644 F.3d at 1363.

The Explanatory Notes constitute the Customs Cooperation Council’s official interpretation of the Harmonized System. They provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system.

The Explanatory Notes were drafted subsequent to the preparation of the Harmonized System nomenclature itself, and will be modified from time to time by the CCC’s Harmonized System Committee. Although generally indicative of proper interpretation of the various provisions of the Convention, the Explanatory Notes, like other similar publications of the Council, are not legally binding on contracting parties to the Convention. Thus, while they should be consulted for guidance, the Explanatory Notes should not be treated as dispositive.

Omnibus Trade and Competitiveness Act, Pub. L. 100–418, H.R. Rep. No. 100–576, at 549 (Conf. Rep.), as reprinted in 1988 U.S.C.C.A.N. 1547, 1582.

Finally, “[i]t is the court’s independent duty to arrive at ‘the *correct* result, by whatever procedure is best suited to the case at hand.’” *Lerner*, 37 CIT at ___, 908 F. Supp. 2d at 1318 (quoting *Jarvis Clark*, 733 F.2d at 878). After reviewing dictionary definitions, industry articles, SOTI Reports, the Explanatory Notes, and the HTSUS’s history, the court is persuaded that the HTSUS 0802.90.25 subheading “Pignolia” is limited to “seeds of the *Pinus pinea*” as indicated by the Explanatory Note 08.02. Therefore, the subject entries, seeds of the *Pinus koraiensis*, were properly classified under HTSUS 0802.90.97 for “Other nuts, fresh or dried, whether or not shelled or peeled: Other: Other: Shelled: Other.”

CONCLUSION

For the reasons stated above, plaintiff’s motion for summary judgment is DENIED, and defendant’s cross-motion for summary judgment is GRANTED. Judgment will be entered accordingly.

Dated: December 2, 2016

New York, New York

\s\ *Richard K. Eaton*
RICHARD K. EATON, JUDGE

Slip Op. 16–115

FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH, L.L.C., THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, INC., Plaintiffs, HEBEI GOLDEN BIRD TRADING CO. LTD., CHENGWU COUNTY YUANXIANG INDUSTRY & COMMERCE CO., LTD., QINGDAO XINTIANFENG FOODS CO., LTD., SHENZHEN BAINONG CO., LTD., YANTAI JINYAN TRADING, INC., JINING YIFA GARLIC PRODUCE CO., LTD., JINAN FARMLADY TRADING CO., LTD., AND WEIFANG HONGQIAO INTERNATIONAL LOGISTICS CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, SHENZHEN XINBODA INDUSTRIAL CO., LTD., JINXIANG MERRY VEGETABLE CO., LTD., AND CANGSHAN QINGSHUI VEGETABLE FOODS CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00180

[Petition for writ of mandamus in antidumping duty administrative review is denied.]

Dated: December 6, 2016

Michael J. Coursey, John M. Herrmann, II, and Joshua R. Morey, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiffs.

Robert T. Hume, Hume & Associates, LLC, of El Prado, NM, for consolidated plaintiffs Hebei Golden Bird Trading Co. Ltd., Qingdao Xintianfeng Foods Co., Ltd.,

Shenzhen Bainong Co., Ltd., Yantai Jinyan Trading, Inc., Jining Yifa Garlic Produce Co., Ltd., Jinan Farmlady Trading Co., Ltd., and Weifang Hongqiao International Logistics Co., Ltd.

Yingchao Xiao and *Jianquan Wu*, Lee & Xiao, of San Marino, CA, for consolidated plaintiff Chengwu County Yuanxiang Industry & Commerce Co., Ltd.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Khalil N. Gharbieh*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for defendant-intervenor Shenzhen Xinboda Industrial Co., Ltd.

John J. Kenkel, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenors Jinxiang Merry Vegetable Co., Ltd. and Cangshan Qingshui Vegetable Foods Co., Ltd.

OPINION

Restani, Judge:

This matter is before the court on Consolidated Plaintiff Shenzhen Xinboda Industrial Co., Ltd.'s ("Xinboda") Petition for Writ of Mandamus 1–2, ECF No. 107 ("Mandamus Petition"), requesting the court to order the U.S. Department of Commerce ("Commerce") to not reopen the administrative record in the underlying eighteenth annual administrative review of fresh garlic from the People's Republic of China ("PRC"). Also before the court is the Defendant's Partial Consent Motion for an Extension of Time to File Remand Results and for an Am. Scheduling Order 1, ECF No. 105 ("Extension of Time Motion"). For the reasons stated below, the Mandamus Petition is denied and the Extension of Time Motion is granted.

BACKGROUND

On November 16, 1994, Commerce published an antidumping ("AD") duty order covering fresh garlic from the PRC. *Antidumping Duty Order: Fresh Garlic from the People's Republic of China*, 59 Fed. Reg. 59,209, 59,209 (Dep't Commerce Nov. 16, 1994). On June 30, 2014, Commerce issued its final results for the eighteenth Antidumping Duty Administrative Review of the order, concerning the period of review from November 1, 2011 through October 31, 2012. *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 36,721, 36,721 (Dep't Commerce June 30, 2014) ("*Final Results*"). In the *Final Results*, Commerce selected the Philippines as the surrogate country for calculating the normal value of fresh garlic from the PRC. Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Fresh

Garlic from the People's Republic of China; 2011–2012 Administrative Review at 5–10, PD 361 (June 23, 2014). Among several challenges to the *Final Results*, Xinboda contested Commerce's selection of the Philippines as the surrogate country. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Mem. in Supp. of Mot. for J. on the Agency R. 3–41, ECF No. 44–2. The court concluded that Commerce's determination that the Philippines was an economically comparable significant producer, and thus an appropriate surrogate country, was not supported by substantial evidence, and remanded for reconsideration of the issue of surrogate country selection. *Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1340, 1342 (CIT 2015) (“*FGPA I*”).

On remand, Commerce once again selected the Philippines as the surrogate country. Final Results of Redetermination Pursuant to Remand 11–12, ECF No. 88–1 (“*Remand Results*”). Xinboda again challenged Commerce's use of the Philippines as the surrogate country. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Cmets. on U.S. Dep't of Commerce Remand Redetermination 2–15, ECF No. 92. The court again concluded that Commerce's selection of the Philippines as the surrogate country was not supported by substantial evidence, and remanded the matter to Commerce. *Fresh Garlic Producers Ass'n v. United States*, Consol. Ct. No. 14–00180, 2016 WL 3693715, at *5, *7 (July 7, 2016) (“*FGPA II*”).

On July 25, 2016, Commerce announced that it would reopen the administrative “record for the limited purpose of providing interested parties the opportunity to propose new and comment on existing surrogate country candidates and surrogate values for the above-referenced proceeding.” Mem. on Reopening Administrative R. at 1, bar code 3490396–01 (July 25, 2016). Commerce set a deadline of four days, or until July 29, 2016, for the parties to propose new surrogate country candidates and comment on the existing candidates. *Id.* Not all interested parties were initially notified of this opportunity, so Commerce extended the deadline to August 8, 2016. First Extension of the Deadline for Submissions Relating to Surrogate Country Selection and Surrogate Values at 1, bar code 3494650–01 (Aug. 3, 2016). On August 5, 2016, Xinboda objected to Commerce reopening the administrative record and requested an extension of time to submit surrogate country comments and information. Xinboda's Obj. to Reopening the R. and Req. for Extension of Time at 1, 5, bar code 3495017–01 (Aug. 5, 2016). Commerce declined to alter its decision to reopen the record, but extended the deadline for submissions to August 15, 2016. Second Extension of the Deadline for Submissions Relating to Surrogate Country Selection and Surrogate Values at 1,

bar code 3495189–01 (Aug. 5, 2016). Xinboda timely filed new factual information and reiterated its objection to Commerce reopening the administrative record. Xinboda’s New Factual Information at 1–2, bar code 3498074–01 (Aug. 15, 2016).

On August 25, 2016, the government filed a partial consent motion to extend the time to file remand results. Extension of Time Motion at 1. On August 29, 2016, Xinboda made the instant petition for writ of mandamus. Mandamus Petition at 1. On September 13, 2016, Xinboda filed its opposition to the government’s Extension of Time Motion on the grounds that Commerce cannot reopen the administrative record, the same grounds on which Xinboda based its Mandamus Petition. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Obj. to Gov’t’s Partial Consent Mot. for Extension of Time 1–2, ECF No. 108. On September 19, 2016, the court stayed consideration of the government’s Extension of Time Motion until its disposition of Xinboda’s Mandamus Petition. Order 2, ECF No. 109.

The parties disagree as to whether Xinboda has satisfied the requirements for mandamus relief. *See* Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Mem. in Supp. of Pet. for Writ of Mandamus 5–24, ECF No. 107–1 (“Xinboda Br.”); Def.’s Resp. in Opp’n to Consol. Pl. Xinboda’s Pet. for a Writ of Mandamus 8–18, ECF No. 110 (“Gov’t Br.”). In addition, the government argues that Xinboda cannot challenge Commerce’s decision to reopen the administrative record because that decision was not a “final agency action.” Gov’t Br. at 5–8.

JURISDICTION

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

DISCUSSION

The court has authority to issue a writ of mandamus under 28 U.S.C. §§ 1361, 1651(a). *See* 28 U.S.C. § 1585 (giving the court “powers in law and equity of, or as conferred by statute upon, a district court of the United States”). “The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *In re Procter & Gamble Co.*, 749 F.3d 1376, 1378 (Fed. Cir. 2014) (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976)). A party seeking mandamus must show a “clear and indisputable right to relief,”¹ and that it “lack[s] adequate alternative means to obtain the relief it seeks.” *Id.* (internal quotation marks omitted) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004); *Mallard v.*

¹ Xinboda addresses this element in terms of having a clear right to relief, and Commerce having a clear duty to act. Xinboda Br. at 6, 15. Because controlling case law analyzes this element in terms of right to relief, and because, in this case, right to relief and duty to act are two sides of the same coin, the court addresses them together.

U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 309 (1989)); see *In re Genetech, Inc.*, 566 F.3d 1338, 1341 (Fed. Cir. 2009). In addition, “the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *In re Procter & Gamble*, 749 F.3d at 1378 (quoting *Cheney*, 524 U.S. at 381).

I. Xinboda Has Not Shown That It Has a Clear and Indisputable Right to Relief

Xinboda argues that it has a clear and indisputable right to relief because Commerce has “a duty to conduct its second remand proceeding based on the existing agency record.” Xinboda Br. at 15. Xinboda relies on 19 U.S.C. § 1516a(a)(2), which provides that, inter alia, judicial review of Commerce’s final determination in an administrative review is to be made upon the administrative record. *Id.* at 6–8. Xinboda notes that the circumstances in which the court departs from this rule are limited and argues that no exception applies in this case. *Id.* at 8–15. The government responds that allowing Commerce to reopen the administrative record on remand is not inconsistent with conducting judicial review on the administrative record. Gov’t Br. at 11. The government further argues that Commerce has the discretion to reopen the administrative record unless the court forbids it and that the court has not done so here. *Id.* at 8–10.

Xinboda does not have a clear and indisputable right to a second remand proceeding to consider new surrogate country candidates, without a reopened record. The court may conduct any review of Commerce’s actions on the record even if Commerce reopens the record—the two principles are consistent. “The purpose of limiting [judicial] review to the record actually before the agency is to guard against courts using new evidence to ‘convert the . . . standard into effectively *de novo* review.’” *Ass’n of Am. Sch. Paper Suppliers v. United States*, 34 CIT 31, 34, 683 F. Supp. 2d 1317, 1321 (2010) (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000)). Because Commerce will have considered any evidence made part of the reopened administrative record in issuing its remand results, any judicial review of those results will not be *de novo*.

Furthermore, Commerce generally may reopen the administrative record on remand. See *NTN Bearing Corp. of Am. v. United States*, 25 CIT 118, 124, 132 F. Supp. 2d 1102, 1107 (CIT 2001) (“As long as the Court does not forbid Commerce from considering new information, it remains within Commerce’s discretion to request and evaluate new data” on remand.); cf. *Nippon Steel Corp. v. Int’l Trade Comm’n*, 345 F.3d 1379, 1382 (Fed. Cir. 2003) (“Whether on remand the Commission reopens the evidentiary record, while clearly within its authority,

is of course solely for the Commission itself to determine.”). The court here did not forbid Commerce from reopening the administrative record, thus, Commerce is permitted to do so. *See FGPA II*, 2016 WL 3693715, at *7 (“[T]he court remands this matter to Commerce to address surrogate country selection.”). Indeed, the court has previously considered the possibility that Commerce might reopen the record in this case. *See FGPA I*, 121 F. Supp. 3d at 1340 n.17 (“Upon remand, Commerce can decide to compile a second list of potential surrogate countries.”). Although the court’s permission is not required for Commerce to reopen the administrative record on remand, that the court explicitly considered the possibility further suggests that Commerce may do so now. Because Commerce is permitted to reopen the administrative record, Xinboda does not have a clear and indisputable right to a remand determination based on the prior record.² Thus, Xinboda’s petition for writ of mandamus does not meet the first required element. Even if Xinboda satisfied this element, Xinboda has not shown that it satisfies the second required element.

II. Xinboda Has an Adequate Alternative Remedy

Xinboda argues it has no adequate alternative remedy because reopening the administrative record will stretch out the remand proceedings, leading to increased burden and expenses for Xinboda, and a delayed date of final liquidation. Xinboda Br. at 16–17. Xinboda also argues that Commerce’s decision to reopen the record violates the due process clause of the Fourteenth Amendment of the U.S. Constitution. Consol. Pl. Shenzhen Xinboda Indus. Co., Ltd. Mandamus Reply Br. 11–12, ECF No. 113.³ The government responds that Xinboda can raise objections after Commerce issues its second remand results. Gov’t Br. at 13–14. In addition, the government contends that the burden and expense on Xinboda, and a delayed date of final liquidation, do not make the opportunity to raise objections after the second remand results an inadequate remedy. *Id.* at 14–15.

Xinboda has an adequate alternative remedy to the court issuing a writ of mandamus— to wait until Commerce issues its second remand results to make any challenges to Commerce’s decision. *See* 28 U.S.C. § 1581(c). Although Xinboda rightly notes that this may delay a final determination on the already lengthy eighteenth administra-

² Xinboda also argues that allowing Commerce to reopen the administrative record violates the rule of mandate, because doing so is outside the court’s decision in *FGPA II*. *See* Xinboda Br. at 12–15 (citing *Corus Staal BV v. U.S. Dep’t of Commerce*, 27 CIT 1180, 1184–85, 279 F. Supp. 2d 1363, 1367–68 (2003)). As noted, however, Commerce reopening the record is consistent with the court’s decision in *FGPA II*. Thus, Xinboda’s argument fails.

³ Because Xinboda raises this argument for the first time in its reply brief, Xinboda waived the argument and the court does not address it. *See Novosteel SA v. United States, Bethlehem Steel Corp.*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002).

tive review, the burden and expense on Xinboda, and a delayed date of final liquidation, do not make this alternative remedy inadequate.

First, the burden and expense of litigation generally does not render an alternative remedy inadequate. *See, e.g., In re Orange, S.A.*, 818 F.3d 956, 964 (9th Cir. 2016) (“While [petitioner] may incur litigation expenses in the interim, that reason alone is insufficient to conclude that, absent a writ of mandamus, it has no adequate means of relief. . . . [L]itigation costs are a factor weighing in favor mandamus relief only in the most extreme circumstances.”). Xinboda has not shown that the burden and expense it may incur in responding to new surrogate country candidates is particularly onerous. Thus, here, the court concludes that the burden and expense on Xinboda, which is simply part of the administrative process, does not render the alternative remedy inadequate.

Second, a delayed date of final liquidation does not make inadequate the alternative remedy of waiting to make challenges until Commerce issues the second remand results. Xinboda relies on *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357, 363, 366 427 F. Supp. 2d 1249, 1255, 1258 (2006), where the court concluded that the plaintiff’s receipt upon final liquidation of a refund plus interest for overpayment of cash deposits was not an adequate substitute for mandamus of Commerce to immediately adjust the plaintiff’s unlawful cash deposit rate from 198.08% to 6.65%. The court relied on the fact that the 198.08% cash deposit rate excluded plaintiff from the U.S. market entirely. *Id.* at 366, 427 F. Supp. 2d at 1258. Xinboda, however, has not shown that it currently faces such an extreme situation. Although Commerce’s potential selection of a surrogate country other than those originally considered in the record could negatively affect Xinboda, this negative effect is not relevant to the Mandamus Petition. Were Xinboda to successfully challenge Commerce’s decision to reopen the record after the issuance of the second remand results, Xinboda would not then have suffered any negative consequences other than the burden and expense of participating in the administrative proceedings. As discussed above, these are insufficient to make Xinboda’s alternative remedy inadequate. Given that Xinboda has an adequate alternative remedy, and no clear and indisputable right to relief, Xinboda’s Mandamus Petition fails.⁴

⁴ The government makes two other arguments for why Xinboda’s Mandamus Petition fails: (1) mandamus is not appropriate under the circumstances, Gov’t Br. at 16–18; and (2) Commerce’s decision to reopen the administrative record is not a “final agency action” subject to judicial review, *id.* at 5–8. Because the court concludes that Xinboda’s petition fails on the two independent grounds discussed above, the court does not address the government’s other arguments.

CONCLUSION

For the foregoing reasons, the court denies Xinboda's Mandamus Petition. In addition, because of the extra time required for the parties to respond to the enlarged administrative record, the court grants the government's Extension of Time Motion. Commerce shall have until February 6, 2017, to file its remand results. The parties shall have until March 8, 2017, to file objections, and the government shall have until March 22, 2017, to file its response.

Dated: December 6, 2016

New York, New York

/s/ Jane A. Restani

JANE A. RESTANI JUDGE

