U.S. Customs and Border Protection

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ETHYLENE GLYCOL BIS M-TOLY

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of ethylene glycol bis m-toly

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning the tariff classification of ethylene glycol bis m-toly under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before June 16, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229-1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325-1826.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at Karen S. Greene at 202-325-0041.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of ethylene glycol bis m-toly. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N087996, dated January 11, 2010 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise after the effective date of the final decision on this notice.

In NY N087996, CBP classified ethylene glycol bis m-toly in subheading 2909.49.10, HTSUS, which provides for "Ethers, ether-alcohols, ether-phenols, ether-alcohol- phenols, alcohol peroxides, ether peroxides, acetal and hemiacetal peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives:Other; Other: Other: Products described in additional U.S. note 3 to section VI."

CBP has reviewed NY N087996 and has determined the ruling letter is in error. It is now CBP's position that ethylene glycol bis m-toly is classified in subheading 2909.30.40, HTSUS which provides for "Ethers, ether-alcohols, ether-phenols, ether-alcohol- phenols, alcohol peroxides, ether peroxides, acetal and hemiacetal peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives:Other: Products described in additional U.S. note 3 to section VI."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N087996 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H311551, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

N087996
January 11, 2010
CLA-2–29:OT:RR:NC:2:240
CATEGORY: Classification
TARIFF NO.: 2909.49.1000

MR. CHRISTOPHER COLFORD
MITSUI & CO. (USA), INC.
200 PARK AVENUE
NEW YORK, NY 10166

RE: The tariff classification of Ethylene glycol bis (m-tolyl ether), CAS No. 54914–85–1 from Japan

DEAR MR. COLFORD:

In your letter dated December 15, 2009, you requested a tariff classification ruling.

Ethylene glycol bis (m-tolyl ether), CAS No. 54914–85–1, also known as Benzene, 1,1'-[1,2-ethanediylbis(oxy)]bis[3-methyl-, is an aromatic ether-alcohol.

The applicable subheading for Ethylene glycol bis (m-tolyl ether), will be 2909.49.1000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Ethers, ether-alcohols, ether-phenols, ether-alcohol, phenols, alcohol peroxides, ether peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives: Ether-alcohols and their halogenated, sulfonated, nitrated or nitrosated derivatives: Other: Aromatic: Other: Products described in additional U.S. note 3 to section VI. The rate of duty will be 5.5 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at http://www.usitc.gov/tata/hts/.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stephanie Joseph at (646) 733–3268.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

HQ H311551
OT:RR:CTF:CPMMA H311551 KSG
CATEGORY: Classification
TARIFF NO.: 2909.30.40

CHRISTOPHER COLFORD
MITSUI & CO. (USA) INC.
2009 PARK AVENUE
NEW YORK, NY 10166

RE: Proposed revocation of NY N087996; tariff classification of ethylene glycol bis (m-toly ether) CAS No. 54914–85–1

DEAR MR. COLFORD:

This letter is in reference to New York Ruling Letter (NY) N087996, dated January 11, 2010, regarding the tariff classification of ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 under the Harmonized Tariff Schedule of the United States (HTSUS).

We have reviewed NY N087996 and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP is proposing to revoke NY N087996.

FACTS:

In NY N087996**,** ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 was classified in subheading 2909.49.1000, HTSUS, as an aromatic ether-alcohol.

ISSUE:

Whether ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 described above is properly classified in subheading 2909.30.40, HTSUS, or in subheading 2909.49.1000, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

GRI 6 provides that for legal purposes, 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. For the purposes of this Rule the relative Section and Chapter Notes also apply unless the context otherwise requires.

The HTSUS subheadings under consideration are the following:

2909	Ethers, ether-alcohols, ether-phenols, ether-alcohol- phenols, alcohol peroxides, ether peroxides, acetal and hemiacetal peroxides, ketone peroxides (whether or not chemically defined), and their halogenated, sulfonated, nitrated or nitrosated derivatives:

2909.30	Aromatic ethers and their halogenated, sulfonated, nitrated or nitrosated derivatives:
2909.30.40	Other:
	Products described in additional U.S. note 3 to section VI.
2909.49	Other:
2909.49.10	Other:
	Products described in additional U.S. note 3 to section V.

In NY N087996, ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 was classified in subheading 2909.49, HTSUS, which provides for ether-alcohols. Upon review and consultation with the Newark CBP Laboratory, it has been determined that there in not an intact alcohol function group present in the chemical structure. It is an aromatic ether, not an aromatic ether-alcohol. Accordingly, it is properly classified in subheading 2909.30.40, HTSUS.

HOLDING:

By application of GRI's 1 and 6, ethylene glycol bis (m-toly ether) CAS No. 54914–85–1 is classified in subheading 2909.30.40, HTSUS. The column one, general rate of duty is 5.5 percent ad valorum.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided for at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

NY N087996 is hereby revoked.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: NIS John Bobel and NIS Evan Thomas, NCSD

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF INFLATABLE OLAF FIGURE WITH HOLLY BERRY MOTIF

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of inflatable Olaf figure with holly berry motif.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning the tariff classification of an inflatable Olaf figure with holly berry motif under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before June 16, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at Karen.S.Greene@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of an inflatable Olaf figure with a holly berry motif. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N325599, dated April 27, 2022 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise after the effective date of the final decision on this notice.

In NY N325599, CBP classified an inflatable lawn ornament in the form of Olaf that has a stocking hat and a snowflake pattern scarf that has three holly leaves and three red berries on it in subheading 6307.90.98, HTSUS. The lawn ornament is marketed and used as a lawn decoration used for decoration for the Christmas holiday season.

CBP has reviewed NY N325599, and has determined the ruling letter is in error. CBP now proposes to classify the lawn ornament in NY N325599 in subheading 9505.10.40, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Other: Of plastics."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N325599, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H325364, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

N325599

April 27, 2022
CLA-2–63:OT:RR:NC:N3:351
CATEGORY: Classification
TARIFF NO.: 6307.90.9891; 9903.88.15

MS. ELIZABETH MCGUFFIN
DOLLAR GENERAL
100 MISSION RIDGE
GOODLETTSVILLE, TN 37072

RE: The tariff classification of an inflatable lawn decoration from China

DEAR MS. MCGUFFIN:

In your letter dated April 22, 2022, you requested a tariff classification ruling. A sample was provided to this office and will be destroyed per your request.

SKU# 32189201, described as “Olaf Inflatable Lawn Ornament,” is a three-dimensional Air-blown® inflatable decoration of a snowman “Olaf” from the Disney movie Frozen. The inflatable snowman is composed of 100 percent polyester woven fabric. The item is decorated with screen printed brown eyebrows, black pupils inside a round blue eye, three black buttons, and a 10 ½ inch long by 4 ½ inch wide blue smile. The snowman features three-dimensional brown twigs as arms and hair on its head, a carrot nose, and two snowball legs. The snowman also features a red scarf with white snowflakes, a semicircle of 100 percent polyester nonwoven fabric measuring 3 7/8 inches in length by 1 inch in width to provide the appearance of buck teeth when inflated, and two holly leaves with three acrylonitrile butadiene styrene (ABS) plastic red holly berries. Inside the snowman sewn to the bottom are three pouches, measuring 7 5/8 inches in length by 4 ½ inches in width, filled with crushed stone weighing 300 grams each, to help the snowman stand upright in a sitting pose when inflated and a LED light that is attached to a blower fan with a 120V AC/DC power adapter. When the power adapter is connected to an electrical outlet and the air intake is zippered closed, the item will inflate and illuminate. The inflatable lawn decoration does not provide practical illumination. The snowman measures 29 inches in length by 27 ½ inches in width by 48 inches in height when fully inflated. The item is imported with four iron stakes and two tethers that attach to four two-inch white polyester webbing side loops for securing it to the ground.

You have suggested that the Olaf inflatable lawn ornament should be classified under subheading 9505.10.2500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Christmas ornaments: Other: Other” with a duty rate of free. We disagree. The instant merchandise depicts an inflatable snowman. A snowman is considered to be a seasonal motif as are the appearance of red berries. Neither a snowman nor red berries are specially linked to any particular holiday.

The applicable subheading for the “Disney Olaf Inflatable Lawn Ornament” will be 6307.90.9891, HTSUS, which provides for “Other made up articles, including dress patterns: Other: Other: Other: Other: Other.” The rate of duty will be 7 percent ad valorem.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 6307.90.9891, HTSUS, unless specifically excluded, are subject to an additional 7.5 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.15, in addition to subheading 6307.90.9891, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at *https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions* and *https://www.cbp.gov/trade/remedies/301-certain-products-china*, respectively.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at *https://hts.usitc.gov/current*.

Importations of this product may be subject to the provisions of Section 133 of the Customs Regulations if they copy or simulate a registered trademark, trade name or copyright recorded with U.S. Customs and Border Protection. If you are an authorized importer of the product we recommend notifying your local Customs office prior to importation.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kristine Dodge at kristine.dodge@cbp.dhs.gov.

Sincerely,

Steven A. Mack
Director
National Commodity Specialist Division

HQ H325364
OT:RR:CTF:CPMMA:KSG H325364
CATEGORY: Classification
TARIFF NO.: 9505.10.25

Ms. Lindsay B. Meyer, Esq.
Venable LLP
600 Massachusetts Avenue, NW
Washington, D.C. 20001

RE: Proposed revocation of NY N325599, tariff classification of inflatable Olaf snowman with a sprig of holly leaves and red berries on its scarf

Dear Ms. Meyer:

This letter is in reference to your request for reconsideration on behalf of Gemmy Industries Co. of New York Ruling Letter (NY) N325599, dated April 27, 2022.

Upon review, we have reconsidered NY N325599, and find the ruling is in error.

FACTS:

In NY N325599, CBP classified an inflatable lawn ornament Olaf Snowman with a red scarf with snowflake pattern and a sprig of holly leaves and red berries on the scarf in subheading 6307.90, HTSUS. Olaf is a fictional Disney character that was in the animated movie "Frozen." "Frozen" is an animated movie about a mythical kingdom that is experiencing eternal Winter. The lawn ornament is made of polyester material. The Olaf Snowman inflatable lawn ornament described below is designed and marketed for the Christmas holiday and is sold as a seasonal item.

The inflatable lawn ornament was described in NY N325599 as follows:

> SKU# 32189201, described as "Olaf Inflatable Lawn Ornament," is a three-dimensional Air-blown® inflatable decoration of a snowman "Olaf" from the Disney movie Frozen. The inflatable snowman is composed of 100 percent polyester woven fabric. The item is decorated with screen printed brown eyebrows, black pupils inside a round blue eye, three black buttons, and a 10 ½ inch long by 4 ½ inch wide blue smile. The snowman features three-dimensional brown twigs as arms and hair on its head, a carrot nose, and two snowball legs. The snowman also features a red scarf with white snowflakes, a semicircle of 100 percent polyester nonwoven fabric measuring 3 7/8 inches in length by 1 inch in width to provide the appearance of buck teeth when inflated, and two holly leaves with three acrylonitrile butadiene styrene (ABS) plastic red holly berries. Inside the snowman sewn to the bottom are three pouches, measuring 7 5/8 inches in length by 4 ½ inches in width, filled with crushed stone weighing 300 grams each, to help the snowman stand upright in a sitting pose when inflated and a LED light that is attached to a blower fan with a 120V AC/DC power adapter. When the power adapter is connected to an electrical outlet and the air intake is zippered closed, the item will inflate and illuminate. The inflatable lawn decoration does not provide practical illumination. The snowman measures 29 inches in length by 27 ½ inches in width by 48 inches in height when fully inflated. The item is imported with four iron stakes and two tethers that attach to four two-inch white polyester webbing side loops for securing it to the ground.

ISSUE:

Whether the Olaf figure inflatable lawn ornament described above that has a sprig of holly leaves and red berries on the scarf is classifiable in heading 9505.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS headings under consideration are the following:

6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.98	Other
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:
9505.10	Articles for Christmas festivities and parts and accessories thereof:
	Christmas Ornaments:
9505.10.25	Other

In *Midwest of Cannon Falls, Inc. v. United States*, (Midwest) 122 F.3d 1423, 1429 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit (CAFC) held that classification as a "festive article" under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article must be used or displayed principally during that festive occasion. Additionally, the items must be "closely associated with a festive occasion" to the degree that "the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant." *Michael Simon Design, Inc. v. United States*, (Michael Simon) 452 F. Supp 2d. 1316, 1323 (Ct. Int'l Trade 2006 and *Park B. Smith, Ltd. v. United States*,(Park B. Smith) (347 F.3d 922 (Fed. Cir 2003)).

In *Michael Simon*, the Court of International Trade applied a two-prong test for determining whether a particular article is classifiable as a good of heading 9505, HTSUS: "[C]lassification as a 'festive article' under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article [be] used or displayed principally during that festive occasion." Additionally, the Court stated that the items must be "closely associated with a festive occasion" to the degree that "the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant." In *Park B. Smith*, the Court of International Trade ruled that articles "bearing 'festive symbols,' such as Christmas trees, Santas, holly, ghosts and bats, Easter eggs and bunnies," were prima facie classifiable as "festive articles" under heading 9505.

CBP has considered a feature such as a hat or scarf bearing holly leaves and red holly berries as a festive symbol closely associated with Christmas. For instance, see New York Ruling Letter (NY) N306252, dated September 20, 2019, in which CBP classified a water globe lantern with a snowman wearing a top hat decorated with holly leaves and berries as a festive article in heading 9505, NY N286040, dated May 16, 2017, in which a snowman with a stocking cap featuring holly leaves and berries was classified as a festive article in heading 9505.

While there is a connection between Olaf and snow and the season of Winter, the Olaf figure alone is not specifically associated with Christmas. An Olaf figure alone might be appropriate to display for instance at a children's event or an event associated with the movie "Frozen." It would not be aberrant to display an Olaf figure outside the Christmas season. However, this Olaf figure has a sprig of holly on its scarf. The holly leaves and red berries, are a motif traditionally closely associated with Christmas and used or displayed principally during the Christmas season. The Olaf figure with a sprig of holly leaves and red berries is closely associated with Christmas to the degree that its use during other time periods would be aberrant. It is not a general winter decoration; it is likely to be displayed only during the Christmas season because of the holly leaves and red berries motif. Further it is marketed as a Christmas decoration and sold during the Christmas season. Based on the above, we find that pursuant to GRI's 1 and 6, the Olaf inflatable lawn ornament is classified in subheading 9505.10.25, HTSUS.

HOLDING:

Pursuant to GRI's 1 and 6, the Olaf inflatable lawn ornament, as described above, is classified according to GRI 1 in heading 9505 and in accordance with GRI 6, in subheading 9505.10.25, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Christmas Ornaments: Other". The column one, general rate of duty is FREE.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided for at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N325599 is revoked in accordance with the above analysis.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

cc: NIS Sandra Carlson, NCSD

TRUSTED TRAVELER PROGRAMS AND U.S. APEC BUSINESS TRAVEL CARD

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; revision of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 30, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP _PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (87 FR 33178) on June 01, 2022, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Trusted Traveler Programs and U.S. APEC Business Travel Card.

OMB Number: 1651–0121.

Form Number: 823S (SENTRI) and 823F (FAST).

Current Actions: Revision of an existing information collection.

Type of Review: Revision.

Affected Public: Individuals and Businesses.

Abstract: This collection of information is for CBP's Trusted Traveler Programs including the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), which allows dedicated processing at specified southwest land border ports of entry; the Free and Secure Trade program (FAST), which provides dedicated processing for known, low-risk commercial drivers; and Global Entry (GE) which allows pre-approved, low-risk, air travelers dedicated processing clearance upon arrival into the United States.

The purpose of all of these programs is to provide prescreened travelers dedicated processing into the United States. The benefit to the traveler is less time spent in line waiting to be processed. These Trusted Traveler programs are provided for in 8 CFR 235.7 and 235.12.

This information collection also includes the U.S. APEC Business Travel Card (ABTC) Program, which is a voluntary program that allows U.S. citizens to use fast-track immigration lanes at airports in the 20 other Asia-Pacific Economic Cooperation (APEC) member countries. This program is mandated by the Asia-Pacific Economic

Cooperation Business Travel Cards Act of 2011, Public Law 112–54 and provided for by 8 CFR 235.13.

These collections of information include the data collected on the applications and kiosks for these programs. Applicants may apply to participate in these programs by using the Trusted Traveler Program Systems website (TTP) at *https://ttp.cbp.dhs.gov/* or at Trusted Traveler Enrollment Centers.

After arriving at the Federal Inspection Services area of the airport, participants in Global Entry can undergo a self-serve inspection process using a Global Entry kiosk, which are being transitioned to Global Entry (GE) Portals. During the self-service inspection, participants have their photograph and fingerprints taken, submit identifying information, and answer several questions about items they are bringing into the United States. When using the Global Entry kiosks, participants are required to declare all articles being brought into the United States pursuant to 19 CFR 148.11.

Proposed Changes

CBP will be updating the Trusted Travel Programs to align with the U.S. Department of State's Passport Options: CBP will modify the Trusted Traveler Program application by adding a third gender marker, "X" for applicants identifying as non-binary, intersex, and/or gender non-conforming (in addition to the existing "male and "female" gender markers). The "X" marker will be categorized as "Unspecified or Another Gender Identity", in the document sections of the electronic Trusted Traveler Programs application.

In addition, coinciding with agency wide efforts to reduce burden on the public, CBP's new Global Entry (GE) Portals are replacing legacy kiosks, enabling quicker, touchless processing for participants by the end of FY 23.

Type of Information Collection: SENTRI (823S).

Estimated Number of Respondents: 276,579.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 276,579.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 185,308.

Type of Information Collection: FAST (823F).

Estimated Number of Respondents: 20,805.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20,805.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 13,939.

Type of Information Collection: Global Entry.

Estimated Number of Respondents: 1,392,862.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,392,862.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 933,217.

Type of Information Collection: ABTC.

Estimated Number of Respondents: 9,858.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 9,858.

Estimated Time per Response: 10 minutes (0.17 hours).

Estimated Total Annual Burden Hours: 1,676.

Type of Information Collection: Global Entry (GE) Portals.

Estimated Number of Respondents: 10,275,367.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10,275,367.

Estimated Time per Response: 5 seconds (0.00138889 hours).

Estimated Total Annual Burden Hours: 14,271.

Dated: April 25, 2023.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, April 28, 2023 (88 FR 26235)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS
(NO. 04 2023)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in April 2023. A total of 155 recordation applications were approved, consisting of 6 copyrights and 149 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229–1177, or via email at *iprrquestions@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Zachary Ewing, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325–0295.

ALAINA VAN HORN
Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 23–00082	4/12/2023	4/12/2043	The Super Mario Bros. Movie	Nintendo Studios LLC	No
COP 23–00083	4/10/2023	4/10/2043	OPIA		No
COP 23–00084	4/10/2023	4/10/2043	ENCAUSTIC FLOWER		No
COP 23–00085	4/7/2023	4/7/2043	ALASKAN MARK IV CHAIN SAW MILL INSTRUCTIONS (G778 INSTRUCTIONS)	Granberg Pump and Meter Ltd d.b.a. Granberg International. Address: 1051 Los Medanos, Pittsburg, CA, 94565, United States.	No
COP 23–00086	4/7/2023	4/7/2043	ALASKAN SMALL LOG MILL INSTRUCTIONS (G777 INSTRUCTIONS)	Granberg Pump and Meter Ltd d.b.a. Granberg International. Address: 1051 Los Medanos, Pittsburg, CA, 94565, United States.	No
COP 23–00087	4/10/2023	4/10/2043	KATA		No
TMK 03–00252	4/4/2023	4/4/2033	HUBLOT AND DESIGN	HUBLOT SA	No
TMK 03–00520	4/20/2023	4/26/2033	FJ (STYLIZED)	ACUSHNET COMPANY	No
TMK 03–00636	4/25/2023	6/18/2033	SILHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES, INC.	No
TMK 03–00639	4/18/2023	4/28/2033	SILHOUETTED BATTER LOGO DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	No
TMK 03–00728	4/5/2023	4/7/2033	MARINERS AND DESIGN	THE BASEBALL CLUB OF SEATTLE, LP	No
TMK 04–00251	4/11/2023	4/28/2033	GG & DESIGN	GUCCI AMERICA, INC.	No
TMK 04–00433	4/18/2023	5/27/2033	CHRISTIAN DIOR	CHRISTIAN DIOR COUTURE, S.A.	No
TMK 04–00775	4/7/2023	4/9/2033	KINGSFORD & DESIGN	THE KINGSFORD PRODUCTS COMPANY	No
TMK 05–00282	4/12/2023	5/25/2033	HARDWOOD CLASSICS	NBA PROPERTIES, INC.	No
TMK 05–00446	4/18/2023	4/28/2033	SUBWAY SERIES	MAJOR LEAGUE BASEBALL PROPERTIES	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 05–00448	4/5/2023	4/14/2033	MLB AUTHENTIC COLLECTION	MAJOR LEAGUE BASEBALL PROPERTIES	No
TMK 05–00635	4/3/2023	7/13/2033	DESIGN OF TIGER	DETROIT TIGERS INC.	No
TMK 05–00819	4/25/2023	3/22/2033	GREEN MONSTER	BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP	No
TMK 05–00823	4/18/2023	4/26/2023	ASTROS AND DESIGN	HOUSTON ASTROS, LLC.	No
TMK 06–00010	4/18/2023	4/18/2033	NOTRE DAME	UNIVERSITY OF NOTRE DAME DU LAC, THE	No
TMK 06–00051	4/24/2023	11/25/2032	Q & DESIGN	THE CROSBY GROUP INC.	No
TMK 06–00533	4/5/2023	4/11/2033	SOX (STYLIZED)	CHICAGO WHITE SOX, LIMITED	No
TMK 07–00211	4/26/2023	3/17/2033	EUCERIN & DESIGN	Beiersdorf Aktiengesellschaft	No
TMK 09–00735	4/4/2023	4/5/2033	JUDITH LEIBER	JUDITH LIEBER IP LLC	No
TMK 11–00358	4/19/2023	1/15/2033	POM	POMWONDERFUL LLC	No
TMK 12–00695	4/3/2023	1/8/2033	ALTAGRACIA	KERWIN ESTATE LLC	No
TMK 12–01090	4/20/2023	12/17/2032	DUNLOP	DNA (Housemarks) Limited	No
TMK 13–00243	4/18/2023	2/19/2033	THREE STRIPE DESIGN	adidas International Marketing B.V. CORPORATION	No
TMK 13–00268	4/18/2023	2/19/2033	CLIMACOOL	Adidas International B.V. LLC	No
TMK 13–00385	4/6/2023	4/7/2033	DivX	DivX LLC	No
TMK 13–00656	4/5/2023	8/7/2033	NES	Nintendo of America Inc.	No
TMK 15–00499	4/7/2023	1/28/2025	NUFACE TRINITY	Carol Cole Company	No
TMK 15–00796	4/4/2023	4/5/2033	JONES NEW YORK	Jones Investment Co., Inc.	No
TMK 16–00095	4/4/2023	4/7/2033	TED BAKER	No Ordinary Designer Label Limited TA Ted Baker	No
TMK 16–00675	4/6/2023	1/23/2033	Winnipeg Jets “jet” logo	Winnipeg Jets Hockey Club Limited Partnership	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 17–00377	4/19/2023	7/30/2033	CLASH OF CLANS	Supercell Ltd	No
TMK 17–00430	4/21/2023	10/2/2033	PUR	HELEN OF TROY LIMITED	No
TMK 17–00452	4/12/2023	5/19/2033	RED V & DESIGN	VALENTINO S.P.A.	No
TMK 17–00662	4/4/2023	1/6/2033	FL-1A	FORD MOTOR COMPANY	No
TMK 17–00979	4/12/2023	1/16/2033	QUALCOMM SNAPDRAGON LOGO DESIGN	Qualcomm Incorporated	No
TMK 17–01099	4/18/2023	1/22/2033	TIFFANY	TIFFANY (NJ) LLC	No
TMK 18–00913	4/21/2023	1/23/2033	OXO TOT	Helen of Troy	No
TMK 19–00100	4/25/2023	6/19/2033	BLUE JAYS (Stylized)	Rogers Blue Jays Baseball Partnership	No
TMK 19–00101	4/3/2023	6/26/2033	DESIGN OF BLUE JAY HEAD & MAPLE LEAF	Rogers Blue Jays Baseball Partnership	No
TMK 20–00536	4/5/2023	4/8/2033	NATS	Washington Nationals Baseball Club, LLC	No
TMK 20–00589	4/4/2023	4/5/2033	KC CANDY and Design	K.C. CONFECTIONERY, LTD.	No
TMK 20–01128	4/3/2023	7/12/2033	A'S (STYLIZED)	ATHLETICS INVESTMENT GROUP LLC	No
TMK 20–01170	4/25/2023	7/30/2033	TORONTO BLUE JAYS & DESIGN	Rogers Blue Jays Baseball Partnership	No
TMK 20–01182	4/3/2023	7/2/2033	DESIGN OF BLUE JAY	Rogers Blue Jays Baseball Partnership	No
TMK 21–00026	4/25/2023	7/30/2033	TORONTO BLUE JAYS & DESIGN	Rogers Blue Jays Baseball Partnership	No
TMK 21–00032	4/25/2023	6/5/2033	A & DESIGN	ATLANTA NATIONAL LEAGUE BASEBALL CLUB, LLC	No
TMK 21–00998	4/21/2023	4/21/2033	CHEETOS (STYLIZED)	FRITO-LAY NORTH AMERICA, INC.	No
TMK 23–01547	3/31/2023	12/20/2032	Square Spark Logo Design	Intel Corporation	No
TMK 23–01548	4/3/2023	6/2/2031	VCN (STYLIZED)	HANGTEN ASIA CO. CHINA	No
TMK 23–01549	4/3/2023	8/26/2030	INTEL AGILEX	Intel Corporation	No
TMK 23–01550	3/31/2023	7/20/2030	Swirl Design	Intel Corporation	No
TMK 23–01551	3/31/2023	7/24/2031	INTEL	Intel Corporation	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01552	3/31/2023	2/10/2031	I (stylized)	INTEL CORPORATION	No
TMK 23–01553	4/4/2023	3/8/2030	BEPREVE	BAUSCH & LOMB INCORPORATED CORPORATION	No
TMK 23–01554	4/4/2023	10/27/2029	ALREX	BAUSCH & LOMB INCORPORATED	No
TMK 23–01555	4/4/2023	3/27/2033	Configuration of a Micropipette Puller	Sutter Instrument Corp.	No
TMK 23–01556	4/4/2023	2/8/2032	LGDR GIA KNOWLEDGE INTEGRITY EXCELLENCE 1931 & DESIGN	Gemological Institute of America, Inc.	No
TMK 23–01557	4/4/2023	3/22/2031	INFUSE	Bausch & Lomb Incorporated	No
TMK 23–01558	4/4/2023	12/17/2029	URBAN RELEAF & DESIGN	Urban ReLeaf Co	No
TMK 23–01559	4/4/2023	11/28/2028	LUMIFY	Bausch & Lomb Incorporated	No
TMK 23–01560	4/4/2023	3/11/2033	BIOTRUE	Bausch & Lomb Incorporated	No
TMK 23–01561	4/4/2023	3/4/2032	ENVISTA	BAUSCH & LOMB INCORPORATED	No
TMK 23–01562	4/4/2023	6/13/2032	BIOTRUE	BAUSCH & LOMB INCORPORATED	No
TMK 23–01563	4/4/2023	8/26/2029	AKREOS	BAUSCH & LOMB INCORPORATED	No
TMK 23–01564	4/4/2023	5/27/2027	ALAWAY	BAUSCH & LOMB INCORPORATED	No
TMK 23–01565	4/4/2023	6/11/2033	PRESERVISION	BAUSCH & LOMB INCORPORATED	No
TMK 23–01566	4/4/2023	11/18/2028	LOTEMAX	BAUSCH & LOMB INCORPORATED	No
TMK 23–01567	4/4/2023	12/24/2023	PROLENSA	BAUSCH & LOMB PHARMA HOLDINGS CORP.	No
TMK 23–01568	4/4/2023	3/6/2026	PUREVISION	BAUSCH & LOMB INCORPORATED	No
TMK 23–01569	4/4/2023	11/13/2026	OPCON-A	BAUSCH & LOMB INCORPORATED	No
TMK 23–01570	4/4/2023	12/19/2029	OCUVITE	BAUSCH & LOMB INCORPORATED	No
TMK 23–01571	4/4/2023	8/2/2029	RENU	BAUSCH & LOMB INCORPORATED	No
TMK 23–01572	4/4/2023	9/13/2028	RENU	BAUSCH & LOMB INCORPORATED	No
TMK 23–01573	4/4/2023	11/4/2027	RENU	BAUSCH & LOMB INCORPORATED	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01574	4/5/2023	12/7/2031	ZENLENS & DESIGN	BAUSCH + LOMB IRELAND LIMITED	No
TMK 23–01575	4/5/2023	10/24/2028	VYZULTA	Bausch & Lomb Incorporated	No
TMK 23–01576	4/5/2023	12/22/2025	PRESERVISION	Bausch & Lomb Incorporated	No
TMK 23–01577	4/5/2023	5/19/2028	STELLARIS	BAUSCH & LOMB INCORPORATED	No
TMK 23–01578	4/5/2023	12/27/2025	ZYLET	BAUSCH & LOMB INCORPORATED	No
TMK 23–01579	4/5/2023	3/27/2033	AMURADO	S & Y Bros, LLC	No
TMK 23–01580	4/5/2023	7/2/2029	BALLISTICBOARD	ShotStop Ballistics, LLC	No
TMK 23–01581	4/6/2023	6/14/2033	SUPER ACT’S	FB International Inc	No
TMK 23–01582	4/6/2023	7/14/2025	RAW	NEENAH, INC.	No
TMK 23–01583	4/6/2023	5/21/2032	BAUSCH + LOMB	Bausch & Lomb Incorporated	No
TMK 23–01584	4/6/2023	2/14/2026	AESTHE	Kelley Holdings Inc.	No
TMK 23–01585	4/6/2023	1/23/2031	TORONTO MAPLE LEAFS & DESIGN	Maple Leaf Sports & Entertainment Ltd.	No
TMK 23–01586	4/6/2023	10/27/2029	HOCKEY PLAYER DESIGN	IceArizona Hockey Co LLC	No
TMK 23–01587	4/6/2023	7/19/2028	BAUSCH & LOMB	BAUSCH & LOMB INCORPORATED	No
TMK 23–01588	4/6/2023	5/23/2028	BAUSCH & LOMB	BAUSCH & LOMB INCORPORATED	No
TMK 23–01589	4/6/2023	11/11/2027	BAUSCH & LOMB	BAUSCH & LOMB INCORPORATED	No
TMK 23–01590	4/7/2023	10/17/2028	PANTHERS & DESIGN	Florida Panthers Hockey Club, Ltd.	No
TMK 23–01591	4/7/2023	5/20/2028	TORONTO MAPLE LEAFS & DESIGN	Maple Leaf Sports & Entertainment Partnership CANADA	No
TMK 23–01592	4/7/2023	8/4/2029	DESIGN OF SENATOR	Capital Sports & Entertainment Inc.	No
TMK 23–01593	4/10/2023	9/15/2033	BREAD BUDDY	BUDDEEZ, INC.	No
TMK 23–01594	4/12/2023	5/1/2030	VALENTINO	VALENTINO S.P.A.	No
TMK 23–01595	4/12/2023	7/11/2033	ANTHONY L MARFIONE SIGNATURE DESIGN	Microtech Knives, Inc.	No
TMK 23–01597	4/12/2023	7/11/2033	GREATLAND LASER	GREATLAND LASER, LLC	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01598	4/13/2023	4/2/2027	XTREME	MD AUDIO ENGINEERING, INC.	No
TMK 23–01599	4/13/2023	7/24/2027	CERAVE	L'Oreal USA Creative, Inc.	No
TMK 23–01600	4/12/2023	12/1/2029	V VALENTINO GARAVANI & DESIGN	VALENTINO S.P.A.	No
TMK 23–01601	4/12/2023	5/16/2030	V & DESIGN	VALENTINO S.P.A.	No
TMK 23–01602	4/12/2023	6/30/2030	RED VALENTINO (STYLIZED)	VALENTINO S.P.A.	No
TMK 23–01603	4/14/2023	7/11/2033	USGINGER & DESIGN	Hwa-lin Cheng	No
TMK 23–01604	4/13/2023	4/25/2032	VTAMA	Dermavant Sciences GmbH SWITZERLAND	No
TMK 23–01605	4/14/2023	8/31/2032	V & DESIGN	Dermavant Sciences GmbH SWITZERLAND	No
TMK 23–01606	4/14/2023	11/9/2032	VALENTINO GARAVANI	VALENTINO S.P.A. Via Turati	No
TMK 23–01607	4/14/2023	4/28/2030	GIGO TRANSPORT	GIGO Transport, Inc.	No
TMK 23–01608	4/14/2023	12/13/2032	1UP FACTORY	NINTENDO OF AMERICA INC.	No
TMK 23–01609	4/18/2023	11/30/2032	WIND BACK	Mondy, Kertious	No
TMK 23–01610	4/18/2023	7/11/2033	ROADMAX	Express Imaging Systems, L.L.C.	No
TMK 23–01611	4/18/2023	4/10/2033	NVG NOVAVERA & DESIGN	NOVA VERA GIDA VE TARIM SANAYI TICARET ANONIM SIRKETI, TURKEY	No
TMK 23–01612	4/18/2023	3/18/2029	HOST DEFENSE (STYLIZED)	Stamets, Paul	No
TMK 23–01613	4/18/2023	2/13/2032	HOST DEFENSE	TURTLE BEAR HOLDINGS, LLC	No
TMK 23–01614	4/18/2023	7/13/2032	PLYMOUTH	CHRYSLER CORPORATION	No
TMK 23–01615	4/18/2023	11/20/2029	SCAT PACK	FCA US LLC	No
TMK 23–01616	4/18/2023	10/26/2025	RUMBLE BEE	FCA US LLC	No
TMK 23–01617	4/18/2023	8/11/2024	PATRIOT	DAIMLERCHRYSLER CORPORATION	No
TMK 23–01618	4/18/2023	10/16/2032	OVERLAND	FCA US LLC	No
TMK 23–01619	4/18/2023	4/25/2032	TI-MACHAN'N	Sunshine Spice, Corp	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01620	4/19/2023	9/18/2029	UDDERLY SMOOTH & DESIGN	Redex Industries, Inc.	No
TMK 23–01621	4/19/2023	4/10/2033	NYX PROFESSIONAL MAKEUP	L'Oreal USA Creative, Inc	No
TMK 23–01622	4/19/2023	3/20/2027	NYX PROFESSIONAL MAKEUP	L'OREAL USA CREATIVE, INC.	No
TMK 23–01623	4/19/2023	8/27/2024	VIMIZIM	Biomarin Pharmaceutical, Inc.	No
TMK 23–01624	4/19/2023	1/8/2034	NYX PROFESSIONAL MAKEUP & DESIGN	L'OREAL USA CREATIVE, INC.	No
TMK 23–01625	4/20/2023	10/19/2032	THE GOODEST	The Goodest LLC	No
TMK 23–01626	4/20/2023	6/14/2033	CHINESE CHARACTER DESIGN	Tingyi Holding Corp. CAYMAN ISLANDS	No
TMK 23–01627	4/20/2023	9/28/2032	CHEF DESIGN	Tingyi (Cayman Islands) Holding Corp. CAYMAN ISLANDS	No
TMK 23–01628	4/20/2023	12/27/2032	KANGSHIFU	Tingyi (Cayman Islands) Holding Corp. CAYMAN ISLANDS	No
TMK 23–01629	4/20/2023	8/24/2032	Q & DESIGN	ELECTRONIXIQ, Inc.	No
TMK 23–01630	4/20/2023	5/26/2029	FREEFALL	DQC International Corp.	No
TMK 23–01631	4/20/2023	10/20/2032	SUPER QUIET	SANDHILL WHOLESALE OF OHIO, INC.	No
TMK 23–01632	4/20/2023	11/11/2029	TOESOX & DESIGN	THIRTY THREE THREADS, INC.	No
TMK 23–01633	4/20/2023	4/3/2032	STICK TO YOUR PRACTICE	THIRTY THREE THREADS, INC.	No
TMK 23–01634	4/20/2023	11/11/2029	A FOOT REVOLUTION	THIRTY THREE THREADS, INC.	No
TMK 23–01635	4/21/2023	9/1/2030	BESIVANCE	BAUSCH & LOMB INCORPORATED	No
TMK 23–01636	4/21/2023	12/22/2029	GOOD GRIPS	Helen of Troy Limited	No
TMK 23–01637	4/21/2023	8/21/2032	OSPREY & BIRD DESIGN	Osprey Packs, Inc.	No
TMK 23–01638	4/21/2023	8/19/2032	HOT TOOLS	HELEN OF TROY LIMITED	No
TMK 23–01639	4/24/2023	5/21/2033	REAL FRUIT BODY	Minoru, Llc	No
TMK 23–01640	4/24/2023	11/11/2030	THERAGUN MINI	THERABODY, INC.	No
TMK 23–01641	4/24/2023	8/25/2031	THERABODY	THERABODY, INC.	No

CBP IPR RECORDATION — APRIL 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01642	4/24/2023	2/22/2033	SIP N' GO	Perez, Yasmine	No
TMK 23–01643	4/24/2023	11/25/2027	HEARTSTART	PHILIPS ELECTRONICS	No
TMK 23–01644	4/24/2023	8/24/2032	RESPIRONICS	Koninklijke Philips NETHERLANDS	No
TMK 23–01645	4/24/2023	2/9/2032	RG ROSE & GOLD (STYLIZED)	Rose and Gold, LLC	No
TMK 23–01646	4/25/2023	12/7/2030	CHOCOPERFECTION	Kringas, Mary Jo	No
TMK 23–01647	4/25/2023	3/29/2031	PET DREAMS & DESIGN	PET DREAMS INTERNATIONAL, INC.	No
TMK 23–01648	4/25/2023	11/19/2024	PET DREAMS	PET DREAMS INTERNATIONAL, INC.	No
TMK 23–01649	4/26/2023	1/26/2034	VIPER	DAIMLERCHRYSLER CORPORATION	No

U.S. Court of International Trade

Slip Op. 23–57

DALIAN MEISEN WOODWORKING CO., LTD., Plaintiff, and CABINETS TO GO, LLC, AND THE ANCIENTREE CABINET CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 20–00110
PUBLIC VERSION

[U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Remand are remanded.]

Dated: April 20, 2023

Stephen W. Brophy, Husch Blackwell, LLP, of Washington, D.C., argued for Plaintiff Dalian Meisen Woodworking Co., Ltd. With him on the brief was *Jeffrey S. Neeley*.

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. With her on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., argued for Plaintiff-Intervenor Cabinets to Go, LLC.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Ioana Cristei*, Trial Attorney. Of Counsel on the brief was *Elio Gonzalez*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor American Kitchen Cabinet Alliance. With him on the brief was *Luke A. Meisner*.

OPINION AND ORDER

Eaton, Judge:

Before the court are the U.S. Department of Commerce's ("Commerce" or the "Department") final results on redetermination pursuant to the court's remand order in *Dalian Meisen Woodworking Co. v. United States*, No. 20–00110, 2022 WL 1598896 (Ct. Int'l Trade May 12, 2022) (not reported in Federal Supplement) ("*Dalian I*"). *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 86 ("Remand Results").

Plaintiff Dalian Meisen Woodworking Co., Ltd. ("Meisen") and Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. ("Ancientree") (collectively, "Plaintiffs") have each filed comments contesting the

Remand Results.[1] *See* Meisen Cmts. Opp'n Remand Results, ECF No. 89 ("Meisen Cmts."); Ancientree Remand Cmts. ("Ancientree Cmts."), ECF No. 91. The United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenor American Kitchen Cabinet Alliance have responded to their comments. *See* Def.'s Resp., ECF No. 95; Def.-Int.'s Reply, ECF No. 94.

Commerce's Remand Results will be sustained unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2018). For the following reasons, the court sustains the Remand Results in part and remands this matter to Commerce for further action in accordance with this Opinion and Order.

BACKGROUND

This case involves Commerce's countervailing duty investigation of wooden cabinets and vanities from the People's Republic of China ("China"). *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 85 Fed. Reg. 11,962 (Dep't Commerce Feb. 28, 2020) (final determination) and accompanying Issues and Decision Mem. (Feb. 21, 2020) ("Final IDM"). Plaintiffs and mandatory respondents Meisen and Ancientree dispute Commerce's inclusion of a 10.54% subsidy rate[2] for China's Export Buyer's Credit Program, as adverse facts available,[3] in the calculation of their respective countervailing duty rates.

Commerce based its use of facts available on its finding that there were gaps in the factual record, in particular information that it

[1] Plaintiff-Intervenor Cabinets to Go, LLC did not file comments on the Remand Results.

[2] The 10.54% rate is the highest rate determined for, what Commerce found to be, a similar program in the *Coated Paper* proceeding. *See* Final IDM 37–38 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 70,201, 70,202 (Dep't Commerce Nov. 17, 2010) (amended final determination)).

[3] If, during the investigation or review of a countervailing duty order, Commerce determines that (1) "necessary information is not available on the record" or (2) "an interested party or any other person . . . withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines . . . or in the form and manner requested," "significantly impedes a proceeding," or "provides such information but the information cannot be verified," Commerce must use "facts otherwise available." 19 U.S.C. § 1677e(a). Where requested information is not made available on the record, regardless of the reason for the respondent's failure to provide it, the statute requires Commerce to use facts otherwise available to replace the missing information in order to complete the record. *See id.* ; *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination."). Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts only if it makes the requisite additional finding that that party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1).

requested from the government of China concerning the operation of the Export Buyer's Credit Program. During the course of the investigation, Commerce sought information on the revisions made to the Program in 2013 regarding the $2 million minimum contract amount, and the role of third-party banks in the disbursement of loans. China failed to provide this information, which Commerce insists was necessary to its investigation of the Program. In addition, for Commerce, the evidence that the respondents (Meisen and Ancientree) provided to support their claims that neither company used or benefitted[4] from the Program—specifically, their U.S. customers' declarations of non-use—could not be verified in the absence of the operational information that China failed to provide.

In *Dalian I*, familiarity with which is presumed, the court remanded Commerce's final affirmative countervailing duty determination with respect to its adverse facts available finding that Meisen and Ancientree used and benefitted from the Export Buyer's Credit Program.[5] *See Dalian I*, 2022 WL 1598896, at *8–9. Commerce made this finding, notwithstanding the companies' uncontroverted sworn U.S. customer declarations of non-use on the record. The court found that remand was required because Commerce's use of facts available was not supported by substantial evidence:

> Here, as in other cases, to justify the substitution of relevant evidence placed on the record by cooperating respondents with facts available, Commerce has constructed an argument that is difficult to credit—*i.e.*, that operational information was withheld by China and therefore there are gaps regarding the use of the program. The problem with this argument is that the withheld information is (at best) only indirectly related to alleged actual use of the program by Meisen's and Ancientree's U.S. customers. Moreover, Commerce's argument that the operational information is necessary to verify the accuracy of the non-use information because without it, verification is unreasonably burdensome using its typical procedure, rings hollow when Commerce fails to even try.

Id. at *8. The court thus directed that

> on remand, Commerce shall either (1) find a practical solution to verify the nonuse information on the record, such as the reopen-

[4] The benefit to the companies would result from their customers' cost of buying the subject wooden cabinets and vanities being reduced by the customers receiving preferential rates on loan proceeds used to buy the merchandise.

[5] In *Dalian I*, the court also sustained Commerce's plywood benchmarking determination. *See Dalian I*, 2022 WL 1598896, at *10–11.

> ing of the record to issue supplemental questionnaires to respondents and their U.S. customers; or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly.

Id. at *11.

In the Remand Results, Commerce stated that it had elected to "find a practical solution to verify the non-use information on the record." Remand Results at 1–2 ("[I]n this remand proceeding, Commerce reopened the record of the investigation and attempted to verify non-use of the program for Ancientree and Meisen."). Specifically, Commerce sent supplemental questionnaires to Meisen and Ancientree, asking them to report "all loans/financing to each of your U.S. importers/customers that were received and/or outstanding during the period of investigation . . . regardless of whether you consider the financing to have been provided under the Export Buyer's Credit program," including non-traditional loans. *See, e.g.*, Export Buyer's Credit Suppl. Questionnaire at 1 (May 19, 2022), PRR 1. Commerce asked that the parties "[s]ubmit the information requested in the ***Loan Template*** as an attachment to your response." *Id.* The loan template asked for: the names of lenders, the date of the loan agreement, the date of the loan receipt, the purpose of the loan, the initial loan amount, the currency of the loan, the life of the loan, the type of interest (i.e., fixed or variable rate), the interest rate specified in the agreement, the date of principal payments, amount of principal payments, dates of interest payment, amounts of interest paid, principal balance to which each interest payment applied, and the total number of days each payment covered, for each loan with interest payments during the period of investigation. *See* Remand Results at 18.

The loan information Commerce received from each of the respondents was incomplete. Meisen reported that all of its U.S. customers were affiliates, and most were small businesses with simple accounting systems. *See* Meisen Export Buyer's Credit Suppl. Questionnaire Resp. at 1, 34 (June 10, 2022), PRR 13. For Meisen, this meant that the customers were unable to provide the level of detail requested in the loan template. Additionally, Meisen deemed "irrelevant" most of the loan information that Commerce asked for, stating that most loans were shareholder loans or vehicle/property financing, apparently ignoring Commerce's request for non-traditional, as well as traditional, loan information. *Id.* at 1–2 ("None of these companies had any relevant loans/financing outstanding during the period of investigation.").

Additionally, in preparing its initial response to the questionnaire, Meisen did not use the loan template. Instead of providing all of the information that Commerce asked for, in the form requested, Meisen provided tax returns and trial balances, along with a description of the loans and interest payments. After Commerce issued a second supplemental questionnaire to Meisen, directing the use of the loan template and asking Meisen to provide documentation for the "five largest loans for each of U.S. importer/customer that are reported in the **Loan Template**," Meisen completed the loan template by simply stating "NA" or "0" in the lines under each item of requested information. *See* Meisen Resp. 2nd Export Buyer's Credit Suppl. Questionnaire Resp. (June 21, 2022) attach. 1, PRR 18.

For its part, Ancientree reported the requested information for fifteen of its twenty-seven unaffiliated U.S. customers, representing approximately 90% of its U.S. sales by volume and by value during the period of investigation. *See* Ancientree Export Buyer's Credit Suppl. Questionnaire Resp. (June 13, 2022) at 1, PRR 14. One of the twelve U.S. companies whose loan information Ancientree failed to report had gone out of business. *Id.* With respect to the remaining eleven companies, Ancientree stated that despite its efforts, it could not reach, or could not convince, those companies to provide the loan information that Commerce requested. *Id.* at 1–2.

In other words, Meisen provided incomplete information for numerous U.S. customers, and Ancientree provided complete information for some, but not all, of its U.S. customers. *See* Remand Results at 27 ("[W]e did not receive a complete response for all customers from Ancientree, and we received only a partial response from Meisen for numerous customers (despite Commerce's second requests to Meisen for the same information).").

In the Remand Results, Commerce found that it could not verify the respondents' claims of non-use because Meisen and Ancientree failed to provide complete responses for all of their U.S. customers:

> The fact that the respondents in this remand did not provide complete responses for all their U.S. customers guaranteed that the record would remain incomplete as to usage information, thus, rendering futile any efforts to verify non-usage. For this reason, Commerce took no further steps to verify non-use from respondents with respect to those U.S. customers that did provide complete responses, including the loan template, since Commerce could not reasonably expect that the incomplete information gathered would yield a meaningful basis for verification. Consequently, as noted above, the respondents' incomplete information would not, for purposes of verification and an ulti-

> mate determination, overcome the deficiencies in the program information due to [China]'s non-cooperation. Therefore, Commerce must continue to find usage of the program on an [adverse facts available] basis.

Id. at 21. Thus, Commerce did not attempt to verify any of the non-use information placed on the remand record, even that which was provided by Ancientree's U.S. customers in the form and manner requested, because neither Meisen nor Ancientree provided 100% of the loan information requested for 100% of its U.S. customers. Because it did not receive all of the information it asked for in the form directed, Commerce found that it "could not reasonably expect that the incomplete information gathered would yield a meaningful basis for verification." *Id.* at 21. Plaintiffs contest this finding.

DISCUSSION

Plaintiffs challenge the scope of the loan information Commerce asked for in its non-use questionnaire and the finding that Commerce could not verify any of the non-use information that Plaintiffs placed on the record. Verification procedures are reviewed for an abuse of discretion. *See Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) ("[W]e review verification procedures employed by Commerce in an investigation for abuse of discretion . . . ."). "The purpose of verification is 'to test information provided by a party for accuracy and completeness.'" *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343–44 (Fed. Cir. 2021) (quoting *Micron Tech.*, 117 F.3d at 1396).

For Meisen, the scope of the information Commerce requested—i.e., all of the loan information for its U.S. importers/customers during the period of investigation—was unreasonable and an abuse of discretion: "Commerce has now resorted to creating gaps in the record by crafting a supplemental questionnaire so onerous and burdensome that the vast majority of respondents will never be able to fill out the forms in the manner requested." Meisen Cmts. at 7. Instead, according to Meisen, Commerce could have modified its general verification procedure and used a "spot check" method, whereby Commerce asks for a sample of the requested information from a subset of U.S. customers. *Id.* at 9. Moreover, Meisen argues that the information it provided was more than adequate for Commerce to be able to verify non-use, and Commerce unreasonably rejected it because of its form, not its content. *Id.* at 11.

Ancientree similarly argues that Commerce failed to find a practical way to verify, which was an abuse of discretion. And, like Meisen, Ancientree "maintains that the record *does* contain sufficient information to verify non-use of [Export Buyer's Credits] by its customers." Ancientree Cmts. at 2. Reciting the court's finding in *Dalian I* that "the declarations placed on the record by Meisen and Ancientree show that their U.S. customers did not use the program to finance their purchases (*i.e.*, there can be no 'benefit' received under the program by Meisen or Ancientree), and there is no record evidence to the contrary," Ancientree argues that "[t]he additional information on this record, from customers representing over 90% of Ancientree's [period of investigation] sales, only constitutes additional evidence of non-use. It is still the case that nothing on the record suggests U.S. buyers['] use of the [Export Buyer's Credit] Program."[6] *Id.* at 3. Ancientree proposes that "[t]o comply with the Statute and the Court's order, for instance, as approximately 90% of Ancientree's buyers responded, the Department should at worst have applied an [Export Buyer's Credit] deposit rate of 10.54% x 0.1 = 1.054%." *Id.* at 8.

For its part, Defendant maintains that Commerce has wide latitude to design verification processes and procedures. *See* Def.'s Resp. at 9. Here, Commerce argues, the verification procedure, by which it required respondents to submit "all" U.S. customer loan information during the period of investigation to substantiate the declarations of non-use, was reasonable:

> To be able to verify non-use of the program, Commerce must review loan and financing information for the respondents and their customers to ensure that no loans were received either directly or indirectly from the China Ex-Im Bank. To those ends, Commerce issued supplemental questionnaires requesting respondents to report, in an attached loan template, all loans and financing (including nontraditional forms of financing) provided to each of their U.S. customers that were received or outstanding during the period of investigation. The loan information was requested regardless of whether the respondents considered the financing to have been provided under the Export Buyer's Credit Program.
>
> With this information, Commerce would be able to examine subledgers or bank statements containing the details of all individual loans and thus get "confirmation that a complete pic-

[6] Ancientree's confidential brief refers to a "Customer K," which had 68% of Ancientree's sales by value during the period of investigation, and no loans or outstanding financing during the period of investigation, and a "Customer H," described as its "next largest customer," which had loans, and provided all of the supporting documentation requested by Commerce. *See* Ancientree Remand Cmts. at 3, ECF No. 90.

> ture of relevant information is in front of the verifiers, by tying relevant books and records to audited financial statements or tax returns." By tying or tracing the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheets, Commerce could be assured that the subledgers were complete and that it had the entire universe of loan information available to further proceed with verification. Using this information, Commerce could then reasonably assess whether a particular financing instrument was provided under the Export Buyer's Credit Program.

Def.'s Resp. at 7–8 (quoting Remand Results at 19). For Commerce, the respondents' failure to provide the requested information prevented Commerce from proceeding with verification:

> If Commerce had received the requested information in full, Commerce would have been able to proceed with tracing the subledgers or bank statements to the total amount of outstanding lending derived in the balance sheets. This ability to trace the loans would have given Commerce the information it needed to determine whether in fact any loans had come from the China Ex-Im Bank. As Commerce explained, confirmation that a complete picture of relevant information is in front of verifiers, by tying relevant books and records to audited financial statements or tax returns, is critical to meaningfully conduct verification.

Def.'s Resp. at 10 (citing Remand Results at 18–19). Thus, Defendant argues, since Commerce was unable to verify the respondents' U.S. customers' non-use because of the failure of the respondents to provide all of the requested information, that record evidence was not a reliable basis to find non-use.

The court finds that Commerce has complied with the court's instruction in *Dalian I* to find a practical solution to verify Plaintiffs' U.S. customers' non-use declarations on the record. Indeed, Commerce followed the court's express suggestion when it "reopen[ed] . . . the record to issue supplemental questionnaires to respondents and their U.S. customers." *Dalian I*, 2022 WL 1598896, at *11. The court did not instruct Commerce on the *scope* of information to request by supplemental questionnaire, however, and that is where Plaintiffs' main challenge to the Remand Results lies.

Plaintiffs argue that the scope of information sought by Commerce was too broad, i.e., Commerce abused its discretion by asking for *all* of the loan information for the U.S. customers, including non-traditional financing, and requiring Plaintiffs to complete the loan template. Further, Plaintiffs question whether substantial evidence supports Commerce's finding that it could not verify *any* of the loan information placed on the remand record because it did not have *all* of the loan information it requested, i.e., they contest the "completeness" pre-requisite for verification.

It is worth noting that, although Commerce found that neither Meisen nor Ancientree submitted complete loan information and so it could not proceed to verify the loan information submitted by either company, each Plaintiff complied to a different degree with Commerce's requests for information. For its part, Meisen made unilateral decisions about what parts of the questionnaire were "relevant" and what information should suffice for Commerce's purposes. This Court has observed in other cases that respondents may not unilaterally employ "alternate methods" instead of follow Commerce's questionnaire instructions. *See, e.g.*, *Ghigi 1870 S.p.A. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1332, 1348 (2021) ("Rather than contact Commerce with a question about the meaning of the purportedly ambiguous reporting instructions when it received the initial questionnaire, or propose alternate methods of reporting protein content or shape, Ghigi/Zara responded to the questionnaires in its own special way, 'correcting' what it found to be flaws or ambiguities in the instructions, without alerting Commerce.").

But Ancientree, on the other hand, provided complete loan information for more than half of its U.S. customers. That number included its largest customers, representing approximately 90% of its U.S. sales (by volume and by value) during the period of investigation. Still, since the loan information for *all* U.S. customers was not provided, Commerce did not proceed to verify.

Bearing all of this in mind, the court sustains Commerce's finding that it could not verify Meisen's responses to the supplemental questionnaires. Meisen failed to provide the information Commerce asked for in the form and manner requested. Initially, the company did not even attempt to use the loan template to provide its responses, contrary to Commerce's instructions. Moreover, instead of providing the information Commerce asked for, which Meisen believed was irrelevant to its U.S. customers (all of which were affiliates), it provided other information. After Commerce sent Meisen a supplemental questionnaire again asking the company to use the loan template, Meisen indicated, in the template, that the information requested in each of the line items was "not applicable." Meisen argues that Commerce's request for all loan information for all U.S. customers was impractical. But there is no evidence that Meisen contacted Commerce when preparing its responses to offer a reasonable alternative. Thus, on this record, Commerce reasonably found that Meisen's responses to the questionnaires and claims of non-use of the Export Buyer's Credit Program could not be verified.

The court does not sustain, however, Commerce's finding that it could not verify any of Ancientree's questionnaire responses. Ancientree provided complete loan information in the loan template for more than half of its U.S. customers, which represented approximately 90% of its sales during the period of investigation. Apparently, Commerce could have verified those responses—i.e., the requested information for fifteen of Ancientree's twenty-seven customers was on the record in the form and manner requested—but did not do so.

The court is aware that, under the "completeness" requirement described in the Remand Results, even if Commerce had successfully verified Ancientree's responses for 90% of its U.S. sales, it likely still would find that the missing information—i.e., loan information for the balance of Ancientree's U.S. customers, representing roughly 10% of its U.S. sales—constituted a gap in the record. But this Court recently held in *Risen Energy Co. v. United States*, a case with similar facts, that it was "unreasonable for Commerce to require perfection," when the information supplied by a respondent in response to Commerce's non-use questionnaire "essentially eliminated any gap" left by China's non-compliance with Commerce's requests for information about the Export Buyer's Credit Program. *See Risen Energy Co. v. United States*, No. 20–03912, 2023 WL 2890019 47, at *5 (Ct. Int'l Tr. Apr. 11, 2023) (not reported in Federal Supplement).

In *Risen*, as in this case, Commerce issued non-use questionnaires to the respondents on remand. Respondent Risen had twelve U.S. customers during the relevant period. The company provided complete loan information for six of those twelve, representing roughly 95% of its U.S. sales during the relevant period. As to the other six U.S. customers, three did not respond to Risen's requests, one had gone out of business so could not provide the requested loan information, and the other two stated that its loans had "nothing to do" with the Program or Risen. *See id.* This information was in addition to the declarations of non-use that Risen had placed on the record previously for all of its U.S. customers. Risen proposed that Commerce should modify the subsidy rate for the Program to account for the fact that there is record evidence demonstrating that approximately 95% of sales were not benefited by the Program. *See id.* at *3.

Notwithstanding that Risen "substantially complied with Commerce's investigation efforts and provided near complete data for

Commerce to review even after [a] long passage of time" (the period of review was five years ago), Commerce still found that it could not verify non-use because it did not have the *complete* universe of Risen's U.S. customers' loan information, i.e., 100% of the requested loan information from all twelve customers. *Id.* at *5. Thus, for Commerce, Risen had failed to fill the gap on the record, and, based on adverse facts available, Commerce found that the company used and benefitted from the Export Buyer's Credit Program.

The *Risen* Court found that, based on the record in that case, Commerce's finding that Risen had failed to fill the gap on the record was unreasonable:

> Here, Risen has supplied information so that there is no relevant missing information about the [Export Buyer's Credit Program]. Not only has Risen provided sworn declarations from each of its customers stating that they did not use financing from the [Export Buyer's Credit Program], but, after remand, Risen supplied financial, loan, and record information regarding 6 of its 12 customers, representing roughly 95% of sales during the [period of review]. Commerce's refusal to verify the customer data and continued application of other facts available is not supported by substantial evidence on this record because the information necessary to the determination, assuming it is verified, is not lacking.

Id. at *4. The record information, though not perfectly complete, pointed toward non-use:

> Considering that the [period of review] was five years ago, that Commerce changed its policy, and that Risen complied to the best of its ability, the court concludes it is unreasonable for Commerce to require perfection. All of the record evidence points to nonuse of the program at issue. Commerce's concern about potentially hiding the use of [the Export Buyer's Credit Program] in the nonresponding companies is not reasonable when considering the collateral impact of [adverse facts available] on the fully cooperating Risen, the age of this case, and the still-relevant initial complete set of nonuse declarations, which has not been seriously undermined. Substantial evidence does not support Commerce's continued application of [adverse facts available] to Risen's detriment on this record.

Id. at *5. The *Risen* Court thus remanded the matter to Commerce to "attempt to verify Risen's submissions to the extent Commerce finds appropriate, and if that is successful, it should either accept the proposed *pro rata* adjustment or conclude [the Export Buyer's Credit Program] was not used at all." *Id.*

The court makes a similar holding based on the record here. It was not reasonable for Commerce to find that Ancientree failed to fill the gap on the record as to non-use because the record contains not only uncontroverted non-use declarations by all of its U.S. customers, but also complete loan information for 90% of Ancientree's U.S. sales (more than half of its customers). Of Ancientree's twenty-seven U.S. customers, fifteen provided complete loan information which Ancientree reported to Commerce, including Customer K, which represented a large majority of Ancientree's sales by value during the period of investigation and had no loans or outstanding financing during the period of investigation, and Customer H, described as its "next largest customer," which had loans and provided all of the supporting documentation requested by Commerce. *See supra* note 6; Ancientree Cmts. at 3. One of Ancientree's U.S. customers was no longer in business. With respect to the remaining eleven companies, Ancientree attempted, but could not reach, or could not convince, those companies to provide the loan information that Commerce requested. This is hardly surprising because, unlike Meisen's U.S. customers, Ancientree's U.S. customers were not affiliates; hence it had no control over their cooperation. Therefore, substantial evidence does not support the use of facts available for Ancientree with respect to the Export Buyer's Credit Program.

The court therefore remands this matter to Commerce. On remand the Department is instructed to attempt to verify Ancientree's submissions to the extent it finds appropriate, and if that is successful, it should either accept the *pro rata* adjustment proposed by Ancientree or conclude that the Export Buyer's Credit Program was not used at all, and recalculate the all-others rate accordingly.

In sum, the court finds that the use of facts available was supported by substantial evidence as to Meisen but not as to Ancientree. Because the court does not sustain Commerce's use of facts available with respect to Ancientree, it need not reach the issue of adverse inferences with respect to that company. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003), (emphasis added) ("[19 U.S.C. § 1677e(b)] permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' *only if* Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.'").

With respect to Meisen, the court sustains Commerce's use of adverse inferences to find that the company used and benefitted from the Export Buyer's Credit Program. *See* Remand Results at 5 ("[D]ue to the lack of cooperation from the [government of China], we continue to find, as [adverse facts available], that the program constitutes a financial contribution pursuant to [19 U.S.C. § 1677(5)(D)] and is specific pursuant to [19 U.S.C. § 1677(5A)(A) and (B)]."). Here, there is no serious dispute that China failed to act to "the best of its ability" to comply with Commerce's requests for information, specifically with respect to the operation of the Program. 19 U.S.C. § 1677e(b)(1). Commerce's use of adverse facts available to find that Meisen used and benefitted from the Export Buyer's Credit Program is therefore sustained.

CONCLUSION AND ORDER

Based on the foregoing reasons, the court sustains the Remand Results in part and remands this matter to Commerce. It is hereby

ORDERED that Commerce's finding that it could not verify Meisen's questionnaire responses is sustained; it is further

ORDERED that Commerce's use of facts available under 19 U.S.C. § 1677e(a) with respect to Meisen is sustained; it is further

ORDERED that Commerce's finding that China failed to cooperate to the best of its ability under 19 U.S.C. § 1677e(b), thereby justifying the use of an adverse inference to find that Meisen used and benefitted from the Export Buyer's Credit Program is sustained; and it is further

ORDERED that, on remand, Commerce attempt to verify Ancientree's submissions to the extent the Department finds appropriate, and if that is successful, either accept the *pro rata* adjustment proposed by Ancientree or conclude that the Export Buyer's Credit Program was not used at all, and recalculate Ancientree's rate and the all-others rate accordingly.

Dated: April 20, 2023
New York, NY

/s/ Richard K. Eaton
JUDGE

Slip Op. 23–61

AD HOC SHRIMP TRADE ENFORCEMENT COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and MINH PHU SEAFOOD JOINT STOCK COMPANY AND MSEAFOOD CORPORATION, Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 21–00129
PUBLIC VERSION

[Sustaining U.S. Customs and Border Protection's remand determination of non-evasion of antidumping duties on frozen warmwater shrimp from India.]

Dated: April 26, 2023

Nathaniel Maandig Rickard and *Zachary J. Walker*, Picard, Kentz & Rowe, LLP, of Washington, D.C., for plaintiff Ad Hoc Shrimp Trade Enforcement Committee.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Jennifer L. Petelle*, Attorney, Office of the Chief Counsel, Enforcement and Compliance, U.S. Customs and Border Protection.

Donald B. Cameron, *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, *Jordan L. Fleischer*, and *Nicholas C. Duffey*, Morris, Manning & Martin, LLP, of Washington, D.C., for defendant-intervenors Minh Phu Seafood Joint Stock Company and MSeafood Corporation. Also on the brief was *William H. Barringer*, IDVN Lawyers (Viet Nam), of Washington, D.C.

OPINION

Kelly, Judge:

Before the court is the U.S. Department of Customs and Border Protection's ("CBP")[1] remand determination pursuant to the court's remand order. *See* Remand Redetermination, Nov. 21, 2022, ECF No. 68 ("Remand Results"); *Ad Hoc Shrimp Trade Enf't Comm. v. United States*, 578 F. Supp. 3d 1310, 1322 (Ct. Int'l Trade 2022) ("*Ad Hoc Shrimp I*"). The Ad Hoc Shrimp Trade Enforcement Committee ("AHSTEC") challenged the administrative determination made by the CBP Office of Regulations and Rulings ("ORR") in an administrative proceeding conducted pursuant to the Enforce and Protect Act of 2015, 19 U.S.C. § 1517 ("EAPA"). Minh Phu Seafood Joint Stock Company and MSeafood Corporation (collectively "MSeafood") intervened in this action. Order, Apr. 2, 2021, ECF No. 12. For the following reasons, the court sustains the determinations of CBP's ORR on remand.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to CBP, *see Ad Hoc Shrimp I*, 578 F. Supp. 3d at 1314–17, and now recounts only those facts relevant to the court's review of the Remand Results. On February 1, 2005, Commerce imposed antidumping duty ("ADD") orders on cer-

[1] Two CBP entities are involved in EAPA determinations. 19 U.S.C. § 4371 creates the Trade Remedy Law Enforcement Division ("TRLED"), which directs enforcement activities concerning evasion. 19 U.S.C. § 4371(a)(3)(A)–(E). Customs regulations specify that CBP will make a determination based on substantial evidence as to whether covered merchandise was entered into the United States through evasion, 19 C.F.R. § 165.27, and that requests for administrative review of the initial determination of evasion shall be made to the Office of Regulations and Rulings ("ORR"), 19 C.F.R. § 165.41(a). The decision of ORR is final unless appealed. 19 C.F.R. § 165.46(a).

tain frozen warmwater shrimp from India and Vietnam. *Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5,147 (Dep't Commerce Feb. 1, 2005) (Notice of Amended Final Determination of Sales at Less Than Fair Value and [ADD] Order) ("*India Order*"); *Certain Frozen Warmwater Shrimp from [Vietnam]*, 70 Fed. Reg. 5,152 (Dep't Commerce Feb. 1, 2005) (Notice of Amended Final Determination of Sales at Less Than Fair Value and [ADD] Order) ("*Vietnam Order*"). In the less than fair value investigation of certain frozen warmwater shrimp from Vietnam, Minh Phu Seafood Corporation was a mandatory respondent. *See Vietnam Order*, 70 Fed. Reg. at 5,153–55. On July 22, 2016, Commerce revoked the *Vietnam Order* with respect to Minh Phu Seafood Corporation and its affiliates, allowing Minh Phu Group to enter certain frozen warmwater shrimp without ADDs provided the shrimp are "produced and exported by the Minh Phu Group."[2] *Certain Frozen Warmwater Shrimp from [Vietnam]*, 81 Fed Reg. 47,756, 47,757–58 (Dep't Commerce July 22, 2016) (partial revocation of ADD order) ("*Revocation Order*"). Minh Phu Group instituted a tracing system ensuring that all the shrimp it exports to the United States originate from Vietnam. *See* Minh Phu Seafood Corporation's Voluntary EAPA Submission at 4–7, CD 7, CR1056–59 (Jan. 31, 2020).[3] On July 17, 2019, AHSTEC alleged to CBP pursuant to 19 C.F.R. § 165.11 that MSeafood was evading the India Order. EAPA Allegation Re MSeafood Corporation at 3–6, PD 2, PR8–11 (July 17, 2019).

On July 17, 2019, AHSTEC filed its Enforce and Protect Act ("EAPA") allegation. AHSTEC's EAPA Allegation at 1, PD 2, PR2 (July 17, 2019). Between August and October 2019, AHSTEC supplemented its allegation. AHSTEC's Supplemental Information, PD 8 (Oct. 8, 2019); AHSTEC's Supplemental Information, PD 7 (Sept. 30, 2019); AHSTEC's Supplemental Information, PD 4 (Aug. 30, 2019). In September 2019, Minh Phu Seafood Joint Stock Company submitted a voluntary response to CBP. Minh Phu Seafood Corporation's Volun-

---

[2] "Minh Phu Group," as used in the *Revocation Order*, refers to 15 entities including Minh Phu Seafood Joint Stock Company. *See Revocation Order*, 81 Fed. Reg. at 47,756 n.9. MSeafood Corporation, also referred to as MSeafood US, is the importer of record and a party to this action. Remand Results at 1. Minh Phu Seafood Joint Stock Company is the parent company of MSeafood Corporation. Disclosure of Corp. Affiliations and Financial Interest, Apr. 1, 2021, ECF No. 10. MSeafood US is affiliated with Minh Phu Seafood Export Import Corporation and Minh Phu Seafood Corporation. Notice of Determination as to Evasion at 1 n.1, CD 217 (Oct. 13, 2020) ("TRLED Initial Determination"). MSeafood Corporation and its affiliated companies submitted the request for administrative review. Remand Results at 1 n.1. MSeafood Corporation and its affiliated companies are collectively referred to as the "Minh Phu Group".

[3] All citations to documents in the administrative record are to those in EAPA Case No. 7356. The Joint Appendix contains the referenced Public Documents ("PD") and Confidential Documents ("CD"). *See* ECF Nos. 83–86.

tary EAPA Submission, CD 7, CR1053 (Sept. 13, 2019). On October 9, 2019, TRLED initially determined AHSTEC submitted sufficient information to reasonably suggest MSeafood was evading the India Order and initiated an EAPA investigation. Initiation of Investigation of MSeafood Corp. at 4–5, PD 10, PR748–49 (Oct. 9, 2019).

On January 5, 2020, TRLED commenced a formal investigation into MSeafood and imposed interim measures against MSeafood's imports into the United States, including requiring MSeafood to pay cash deposits pursuant to the ADD order on frozen shrimp from India. Notice of Initiation of Investigation and Interim Measures at 1, 7, CD 6, CR1027, CR1033 (Jan. 5, 2020) ("Imposition of Interim Measures"). TRLED also suspended liquidation on all unliquidated entries for the period of investigation, i.e., those entries that had entered one year prior to the investigation and on any entry that had entered on or after October 9, 2019, the date of the investigation. *See id.* at 7, 7 n.45. TRLED preliminarily determined that a reasonable suspicion existed that Minh Phu Group had exported Indian-origin shrimp to the United States as Vietnam-origin shrimp, and thus had evaded ADDs. *See id.* at 4. TRLED based its determination upon Minh Phu Group's history of orders exceeding its capacity, data showing it imported large volumes of frozen shrimp from India, and its history of using a significant amount of Indian-origin shrimp in its raw material processing.[4] *Id.* at 6–7.

Between January and March 2020, TRLED issued requests for information to which both Minh Phu Seafood Joint Stock Company and MSeafood Corporation responded and on which ASHTEC commented. *See* Req. for Information to Minh Phu Seafood Joint Stock Co., CD 8 (Feb. 25, 2020); Req. for Information to Mseafood Corp., CD 9 (Feb. 25, 2020); Mseafood's RFI Resp., CD 229 (Mar. 19, 2020); Minh Phu Seafood Joint Stock's RFI Resp., CD 330 (Part 1) (Mar. 23, 2020); AHSTEC's Comments on Mseafood's Mar. 19, 2020 Resp., PD 18 (Mar. 25, 2020); AHSTEC's Comments on Minh Phu Seafood Joint Stock Co.'s Mar. 23, 2020 Resp., PD 19 (Mar. 31, 2020).

TRLED issued supplemental questionnaires to Minh Phu Joint Stock Company and Mseafood Corporation, and they responded. *See* Mseafood's RFI Resp. at 1, CD 213, CR33683 (June 11, 2020); Mseafood's RFI Resp. at 1, CD 62, CR29305 (June 3, 2020). In September 2020, Minh Phu Group explained that it discovered that one of its shipments sent to United States customs territory contained Indian-origin shrimp and explained how the error occurred. Minh Phu Group

[4] TRLED stated, "Minh Phu has a known history of using [[ ]] in its raw material processing" and the value of shipments for the period under consideration was worth $ [[ ]]. Imposition of Interim Measures at 6–7.

Written Arg. at 11 n.29, CD 214, CR36375 (Sept. 14, 2020). On October 13, 2020, TRLED issued a decision imposing an "adverse inference"[5] against MSeafood for failing to produce reports tracking Minh Phu Group's shipments of shrimp imported into Vietnam and therefore concluding that Mseafood entered Indian-origin shrimp into the United States, evading ADDs in violation of the India Order. Notice of Determination as to Evasion at 9–10, CD 217, CR36395–96 (Oct. 13, 2020) ("TRLED Initial Determination"). MSeafood appealed that decision to ORR on November 10, 2020. Minh Phu Req. for Administrative Review at 1, CD 218, CR36398 (Nov. 10, 2020). On February 11, 2021, ORR issued its decision, concluding that TRLED had erred in applying an adverse inference against MSeafood, and that there was insufficient information on the record to find that MSeafood had evaded the ADD order by entering Indian-origin shrimp into the United States. ORR Administrative Review at 8–10, CD 219, CR36443–45 (Feb. 11, 2021) ("ORR Initial Determination").

In *Ad Hoc Shrimp I*, AHSTEC challenged: (i) CBP's alleged failure to provide and require adequate public summaries of confidential information; (ii) ORR's alleged failure to review the entire administrative record in support of its decision; and (iii) ORR's determination of non-evasion as not based on the record. [AHSTEC]'s Mem. Supp. Mot. J. Agency R. at 31–40, Aug. 30, 2021, ECF No. 33 ("Pl. Original Br."); *see Ad Hoc Shrimp I*, 578 F. Supp. 3d at 1317. The court remanded CBP's final determinations, declining to consider ORR's substantive findings until the record was complete. *Ad Hoc Shrimp I*, 578 F. Supp. 3d at 1313–14, 1321–22. Specifically, the court remanded the TRLED and ORR decisions, directing CBP to: (i) review the entire administrative record, including documents collected during the investigation but not previously sent to the ORR prior to its initial review,[6] *id.* at 1317–19; (ii) further explain or reconsider why CBP

[5] If CBP finds a party has failed to cooperate, it may "use an inference that is adverse to the interests of that party or person in selecting from among the facts otherwise available to make the determination." 19 U.S.C. § 1517(c)(3)(A).

[6] Prior to remand, TRLED failed to forward approximately 17,000 pages of the record including Minh Phu Seafood Joint Stock Company and MSeafood Corporation's entire responses to TRLED's initial RFIs. *Id.* at 1318; *see* Supplemental Index of Administrative Record, June 30, 2021, ECF No. 30–1 (pertaining to CD 220–330). TRLED also inadvertently failed to send to ORR the following documents:

> (1) sales reports; (2) Requests for Information (CBP Forms 28) sent to importer MSeafood and to manufacturer Minh Phu Joint Seafood Joint Stock Company; (3) inventories of food for raising shrimp and for shrimp seed; (4) lists of employees, direct labor working hours, and payrolls; (5) AHSTEC Part 165 Investigation submission of new factual information (NFI); and (6) extension requests and responses from TRLED.

Remand Results at 5.

accepted MSeafood's assertions regarding confidential information or how CBP evaluated the sufficiency of public summarization, *id.* at 1319–21; and (iii) determine whether there was evasion based on a review of the entire administrative record, in compliance with CBP's EAPA regulations, *id.* at 1321. Given the deficiencies in the record, the court did not consider ORR's substantive findings. *Id.*

CBP filed the Remand Results on November 21, 2022. On remand, TRLED explains how it placed revised public versions, including summaries of confidential documents, on the administrative record after providing both parties the opportunity to comment during the remand proceeding, and it affirms its prior determination of evasion based on substantial evidence. *Id.* at 6–28, 32–34. ORR reviewed the previously omitted information and additional information placed on the record during the remand proceeding and determines that substantial evidence supports a finding of non-evasion on the part of MSeafood. Remand Results at 4–6, Addendum at 2–6.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 517(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g) (2018)[7] and 28 U.S.C. § 1581(c). Section 1581(c) grants the Court jurisdiction over actions contesting EAPA determinations made pursuant to 19 U.S.C. § 1517.

A party may seek judicial review of the determinations made under 19 U.S.C. § 1517(c) and (f) in the United States Court of International Trade. 19 U.S.C. § 1517(g)(1). Subsection (c) provides the "Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion." *Id.* § 1517(c)(1)(A). Subsection (f) allows a party to appeal a decision to the Commissioner for de novo review of its initial decision, meaning applying the same substantial evidence standard. *Id.* § 1517(f)(1).

Either party may appeal both determinations to this Court. Subsection (g) allows parties to "seek judicial review of the determination under subsection (c) and the review under subsection (f) in the United States Court of International Trade to determine whether the determination and review is conducted in accordance with subsections (c) and (f)." 19 U.S.C. § 1517(g)(1). However, this Court shall determine "(A) whether [CBP] fully complied with all procedures under [19 U.S.C. § 1517(c) and (f)]; and (B) whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(2)(A)–(B).

---

[7] Further citations to the Tariff Act of 1930 will be to the relevant sections of the U.S. Code, 2018 edition.

It is unclear why Congress chose to provide for review of a decision under subsection (c) even if the determination has been reversed pursuant to review under subsection (f). Where a determination under (c) is appealed and reversed under (f), § 1517(c) would appear to have no effect, and it is not clear why the decision would give rise to any case or controversy. If the appeal provided for under subsection (f) has any meaning, it supplants the decision made pursuant to subsection (c). No party has raised this issue. Although the lack of a case or controversy would deprive this Court of jurisdiction, there is a decision under subsection (f) which creates a case or controversy for the court to review. Therefore, the court will address both challenges, as directed by Congress.

Further, that the agency bases its decision on substantial evidence while the court reviews the agency's determinations to assess whether they are arbitrary and capricious is unusual. Nonetheless, both standards require an assessment based on a reasonableness standard. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) ("When the arbitrary or capricious standard is performing that function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial . . ." (emphasis in the original)).

DISCUSSION

In *Ad Hoc Shrimp I*, the court remanded to CBP to (i) allow for consideration of the entire administrative record; (ii) explain or reconsider its treatment of confidential information; and (iii) make a determination as to evasion based on the entire record and in compliance with its regulations. *Ad Hoc Shrimp I*, 578 F. Supp. 3d at 1318, 1320–21. CBP complied with the court's order by compiling the entire record on remand. Further, although the court finds CBP's explanation of its treatment of confidential information inadequate, this inadequacy is harmless given the judicial protective order issued in the case. Finally, the court concludes TRLED's determination of evasion is unreasonable and ORR's determination of non-evasion is reasonable on this record.

I. ORR's Review of the Administrative Record

On remand, AHSTEC challenges ORR's explanation of its redactions and summarizations as insufficient. [AHSTEC]'s Confidential Comments on [Remand Results] at 17–20, Jan. 3, 2023, ECF No. 76

("Pl. Br."). AHSTEC argues that ORR fails to provide a "reasoned explanation" for its treatment of confidential information or for the public summarization of the information deemed confidential. *Id.* at 20. Defendant and MSeafood argue that CBP complies with 19 C.F.R. § 165.4 and the court's order on remand. Def.'s Resp. to Comments Regarding the [Remand Results] at 19–20, Feb. 2, 2023, ECF No. 78 ("Def. Br."); Comments of [MSeafood] Opp. [Pl. Br.] at 13–17, Feb. 3, 2023, ECF No. 81 ("Def.-Int. Br.").

A. Compiling of the Record

Under EAPA when an interested party requests administrative review of a TRLED determination, ORR reviews the determination de novo. 19 U.S.C. § 1517(f)(1). It must "review the entire administrative record upon which the initial determination was made . . . ." 19 C.F.R. § 165.45. A determination not based on the whole record should be remanded for reconsideration. *See JSW Steel (USA) Inc. v. United States*, 466 F. Supp. 3d 1320, 1328–29 (Ct. Int'l Trade 2020) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)) (remanding for supplementation of the record in light of evidence that documents considered by the agency were not included in the record).

On remand, TRLED complied with the court's order by forwarding the full administrative record to ORR for review. TRLED forwarded to ORR the documents from the administrative record which had previously been omitted. Remand Results at 5. TRLED also sent the parties' additional submissions on remand to ORR. *Id.* No party challenges CBP's compliance with the court's remand order to consider the entire administrative record. *See* Pl. Br. at 4; Def. Br. at 9–10; Def.-Int. Br. at 5.

B. Treatment of Confidential Information

On remand, CBP's treatment of confidential information and explanations in response to the court's remand fall short of what the court ordered and expected. However, because the parties have been granted complete access to the record under a judicial protective order, CBP's actions do not affect the parties' ability to litigate their positions or the court's ability to review the determination. Therefore, CBP's failure to explain its treatment of submissions as confidential, while an error, is harmless.

CBP regulations contain procedures for the proper treatment of business confidential information from interested parties. *See* 19 C.F.R. § 165.4(a). Business confidential information includes "trade secrets and commercial or financial information." *Id.* A party must bracket any information it seeks to protect and explain why the party believes the information to be confidential. *Id.* § 165.4(a)(1) ("The submitting interested party must also provide with the claimed business confidential information an explanation of why each item of bracketed information is entitled to business confidential treatment"). The party must also submit a public version of the document containing a summary of the bracketed information. *Id.* § 165.4(a)(2). The summary of the bracketed information must contain "sufficient detail to permit a reasonable understanding of the substance of the information" or otherwise "a full explanation of the reasons supporting" a claim that the bracketed information cannot be publicly summarized. *Id.* CBP must reject a party's request for business confidential treatment if the information does not meet these requirements. *Id.* § 165.4(b).

In *Ad Hoc Shrimp I*, the court explained that:

> despite AHSTEC complaining in multiple submissions about the lack of public summarization and the inconsistent treatment of allegedly business confidential information, TRLED did not even mention the issue in the *TRLED Decision*, let alone explain how it complied with CBP's regulations. *See generally TRLED Decision*. AHSTEC repeatedly complained about inconsistent treatment of allegedly confidential information, claims that confidential information was not subject to public summarization when such information was summarized elsewhere in Minh Phu Group's submissions, and the terse, boilerplate explanations for why allegedly confidential information was not subject to public summarization. AHSTEC Resp. to MPG Voluntary Submission, 6–18; AHSTEC March 25th Resp., 4–12; AHSTEC March 31st Resp., 4–14; AHSTEC May 7th Rebuttal, 3–4; AHSTEC Written Arg., 4–7. Nowhere does TRLED or ORR address CBP's regulations governing public summarization, AHSTEC's specific complaints, or how CBP evaluated Minh Phu Group's treatment of purportedly confidential information, assertions that such information is not susceptible to public summarization, and explanations in support of those assertions. The court cannot evaluate CBP's action without any explanation of CBP's obligations with respect to allegedly confidential information or the reasons for CBP's decisions in this investigation. Therefore, the court remands the *CBP Decisions* for reconsideration or further explanation regarding confidential treatment and public summarization of allegedly condential information.

578 F. Supp. 3d at 1321.

CBP explains that, when it reopened the record on remand for the parties to revise their business confidential filings, it required the parties to justify their redactions and include public summaries consistent with 19 C.F.R. § 165.4. Remand Results at 8. CBP gave the parties an opportunity to submit written comments on whether the revised filings complied with 19 C.F.R. § 165.4. Remand Results at 8–9. Although AHSTEC challenged MSeafood's redactions, AHSTEC acknowledges MSeafood's public summaries were sufficient. *Id.* at 17. After allowing for comments and corrections, CBP determines that the parties' redactions and their public summaries are consistent with its regulation. *Id.* at 15–24, 33–34.

Although the parties agree the public summaries are adequate, nowhere does CBP explain how it determines the veracity of claimed confidentiality. Instead CBP simply states it concluded that MSeafood had provided an adequate basis for requesting confidentiality. Remand Results at 17. CBP does not share with the court the basis for that conclusion, though it does cite MSeafood's submissions, which assert confidentiality. Remand Results at 17 n.83. For example, CBP cites to MSeafood's August 4, 2022, submission which itself references, *inter alia*, its January 31, 2020, submission. *See id.* ; Letter Re MPG Re-Revised Confidential and Public Versions, Attachment 1, at 3, PD 276, REMPV-3950 (Aug. 4, 2022). In its August 4, 2022, submission, MSeafood explains that it reduced bracketing in its prior submission and that the justification for the remaining bracketed items can be found in that submission. Letter Re MPG Re-Revised Confidential and Public Versions at 2, PD 276, REMPV-3942 (Aug. 4, 2022). In that submission, MSeafood states that "it consists of trade secrets and commercial or financial information of MPG that is not available to the public in any form . . . ." *Id.* at 4. The January 31, 2020, cover letter and attachment describe "MPG's business, confidential and proprietary information relating to confidential production processes, confidential sales, import, export, and production data, confidential recordkeeping processes, confidential bank account information, confidential corporate structure of MPG, proprietary shareholder information, and/or proprietary affiliate information." Voluntary Submission of Information at 6, PD 13, PR1009 (Sept. 13, 2019); *see* Re-Filing of Sept. 13, 2019 Submission at 1, PD 13, PR1000 (Jan. 31, 2020).

CBP fails to explain its determination to provide business confidential treatment to (1) the location of MSeafood's sale of Indian-origin shrimp, (2) the amount of Indian-origin shrimp contained in that sale, and (3) the word "kilogram" in the context of the level of detail Minh

Phu Group used to trace its product. *See* Pl. Br. at 18–20. Specifically, ORR bracketed the word "kilogram" in the Remand Results, even though TRLED had written the same phrase without brackets in its draft remand determination. *See* Remand Results, Addendum at 5 n.25 (business proprietary information version); TRLED – Draft Remand Determination at 4 n.16, PD 281 (May 23, 2022); *see also Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) (once confidential information is made public, "it cannot again be made secret again").

Nonetheless, following *Ad Hoc Shrimp I*, the court issued an amended judicial protective order allowing the parties on remand to have complete access to confidential information in the remand. *See* Amended Protective Order, June 9, 2022, ECF No. 63; Order, June 9, 2022, ECF No. 62; *see also Ad Hoc Shrimp I*, 578 F. Supp. 3d at 1322. With this access, the parties had "a reasonable understanding of the substance of the information" as required by § 165.4(a)(2). Therefore, although TRLED's treatment of confidential information falls short of what the law requires, this failure is harmless error. *See Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 C.I.T. 85, 94 (2006) (declining to void administrative review for failure to timely notify party when that party admitted to full participation in review). Therefore, the court does not remand to CBP on this issue.

II. Determinations Regarding Evasion

AHSTEC contends that Minh Phu Group's internal control systems are insufficient to prevent evasion and TRLED correctly determined on remand that evasion had taken place. Pl. Br. at 28. ORR in its review on remand determines that substantial evidence on the record supports its initial finding of non-evasion. Remand Results, Addendum at 2. ORR also concludes that MSeafood acted to the best of its ability in its attempt to cooperate with the EAPA investigation; therefore, TRLED erred when applying adverse inferences in its initial determination. *Id.* Addendum at 3. Defendant and MSeafood argue that ORR's determination of non-evasion is supported by substantial evidence. Def. Br. at 26–29; Def.-Int. Br. at 17–31. For the reasons that follow, TRLED's determination is unreasonable while ORR's determination is reasonable.

A. The Legal Framework

The EAPA requires that CBP shall:

> make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.

19 U.S.C. § 1517(c)(1)(A). "Covered merchandise" is defined as merchandise which is subject to an antidumping or countervailing duty order.[8] 19 U.S.C. § 1517(a)(3). Evasion is statutorily defined as:

> entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

Id. § 1517(a)(5)(A). The statute makes an exception for clerical errors, 19 U.S.C. § 1517(a)(5)(B)(i), and provides for interim measures, *see id.* § 1517(e).

In making its determination, if CBP decides that a party has not cooperated by failing to act to the best of the party's ability regarding a request for information, CBP may use an inference, selected from the facts available, adverse to that party. 19 U.S.C. § 1517(c)(3)(A); *see also* 19 C.F.R. § 165.6 (if a party "fails to cooperate and comply to the best of its ability with a request for information made by CBP, CBP may apply an inference adverse to the interests of that party in selecting from among the facts otherwise available to make the determination as to evasion pursuant to § 165.27 and subpart D of this part"). Finally, where there is a determination of evasion, CBP "suspend[s] the liquidation of unliquidated entries of such covered merchandise," requires cash deposits, assesses duties on entries according to the applicable ADD assessment rate, and takes any additional enforcement measures CBP determines appropriate. 19 U.S.C. § 1517(d)(1).

B. TRLED's Determination

On remand, TRLED again concludes MSeafood entered covered merchandise into the United States through evasion. Remand Results at 2, 28. Specifically, TRLED continues to find that substantial evidence supports its determination of evasion because MSeafood failed to (i) offer any "persuasive and credible substantiation" that the

[8] "Entries that may be the subject of an allegation made under 19 C.F.R. § 165.11 or a request for an investigation under § 165.14 are those entries of allegedly covered merchandise made within one year before the receipt of an allegation under § 165.11 or of a request for an investigation under § 165.14." 19 C.F.R. § 165.2. "In addition, at its discretion, CBP may investigate other entries of such covered merchandise." *Id.*

use of brand names prevented the comingling of shrimp;[9] (ii) provide independent verification of its internal tracing system combined with its history of importing Indian-origin shrimp to Vietnam for processing, including during the period of investigation; and (iii) directly trace Indian-origin shrimp through the production process in light of the fact Indian-origin and Vietnamese-origin shrimp are stored and processed in the same location. Remand Results at 30. Notably, TRLED declines to apply adverse inferences on remand as it had in its initial determination. *Id.; see* TRLED Initial Determination at 9–10. Without explanation as to why it reverses itself, TRLED recognizes that MSeafood cooperated with the remand to the best of its abilities. Remand Results at 30.

TRLED's determination of evasion is not reasonable on this record. On remand TRLED "affirms its determination that MSeafood entered covered merchandise into the customs territory of the United States through evasion." Remand Results at 2. TRLED bases its decision on Minh Phu Group's "inability to directly trace imported shrimp throughout the production process" as well as Minh Phu Group's concession that one of its affiliates exported "comingled Indian-origin and Vietnamese-origin shrimp into the customs territory of the United States." *Id.* at 28. In making its determination, TRLED fails to confront record evidence that Minh Phu Group's tracing system is reliable, and arbitrarily transforms a single instance of evasion into a finding of evasion for an entire year of entries. *See id.*

TRLED does not address record evidence undermining its determination and demonstrating that Minh Phu Group's tracing system prevents ADD evasion. Minh Phu Group described a system in which, at no time before final processing, are domestic Vietnamese-origin shrimp and imported shrimp at risk of intermingling. Voluntary Submission of Supplemental Information at 15–17, PD 38, PR1970–72 (May 1, 2020). By the time the shrimp undergo final processing, only shrimp not slated for export to the United States are intermingled. *Id.* at 17. Minh Phu Group documentation reveals that Minh Phu Group either directly receives deliveries of shrimp from domestic Vietnamese farmers or personally procures shrimp from Vietnamese

---

[9] [[ ]] are included as part of the mark Minh Phu Group workers place on each basket of shrimp at the sizing stage of production. Minh Phu Seafood Corporation's Voluntary EAPA Submission, CD 7, CR1057 (Jan. 31, 2020). Brand names help the workers know to which markets final products will be exported. *Id.* Further, the marks workers place on the baskets of shrimp contain other information, including the source of shrimp—whether it was imported or sourced domestically. *Id.* If the mark on the shipment indicates that the shrimp were sourced from imports, workers are barred from writing brand names used by U.S. customers on the marks to avoid packing finished products from imported shrimp. *Id.*

farms and fish markets. *Id.* at 15. Shrimp arriving at Minh Phu Group factories from any domestic source is accompanied by an invoice specifying the supplier of the shrimp, tax information of the supplier, and the quantity of shrimp sold. *Id.* Minh Phu Group also obtains an "Origin Declaration" from the supplier that includes the name of the farm where the shrimp originated. *Id.* These domestic shrimp are then grouped into separate baskets identified with a trace code and the name of their suppliers. *Id.* at 16.

Meanwhile, imported shrimp are marked as imported with the designation "XH" and grouped into separate bins with trace codes. Voluntary Submission of Supplemental Information at 16, PD 38, PR1971 (May 1, 2020). Shrimp grouped in imported bins are kept separate from domestic shrimp. *Id.* Both domestic and imported shrimp are separately sorted into further sub-categories and tagged with information pertinent to final processing, including the source of the shrimp, its traceability code, the name of the finished product to designate to employees what kind of further processing the shrimp requires, and the brand name that will appear on the shrimp's final packaging. *Id.* All shrimp, domestic and imported, are then sent to a production line and processed in accordance with this information, as determined by specific orders for shrimp. *Id.* There, domestic and imported shrimp may be intermingled to fulfill orders not intended for export to the United States, while orders destined for the United States remain separate to ensure that only Vietnamese-origin shrimp are used to satisfy the orders. *Id.* at 16–17.

Minh Phu Group's origin tracing system has been audited four times by the U.S. National Oceanic and Atmospheric Administration ("NOAA"). MSeafood RFI Resp., Ex. 3, Sample NOAA Audit Reports, CD 229, CR37010–207 (Mar. 19, 2020). In each audit, the system was found to conform to the Seafood Import Monitoring Program ("SIMP") administered by NOAA. *See id.*, CR37045–46, 37100–01, 37132, 37207. A SIMP audit collects information on importers' harvesting locations, storage conditions, sales, and transportation of subject merchandise. *See, e.g.*, *id.*, CR37049.

Minh Phu Group was unable to provide specific bills of lading for all shrimp imported from India, as TRLED noted, *see* TRLED Initial Determination at 9, because imported shrimp are imported from multiple countries and intermingled collectively under the "XH" designation. *See* MSeafood's RFI Resp. at 13, CD 213, CR33699 (June 11, 2020) (Ming Phu Group "notes that it cannot trace specific imported shrimp from the import bill of lading through to specific "XH" marked shrimp in finished goods inventory"). It is unclear why TRLED thought this inability to delineate Indian-origin shrimp from non-

Indian-origin shrimp renders Minh Phu Group's tracing system inadequate to determine whether Indian-origin shrimp were intermingled with shrimp exported to the United States. Minh Phu Group does not need to demonstrate the origin of shrimp sold outside of the United States; it only needs to demonstrate that its tracing system does not permit any shrimp from India to be intermingled with shrimp for export to the United States. *See* Final Determination Mem. at 6, Appendix at 9–11, A-552–802, bar code 3488092–01 (July 18, 2016) (importer must certify that only shrimp produced by Minh Phu Group be exported to the United States); *Revocation Order*, 81 Fed. Reg. at 47,757–58. The record evidence supports the conclusion that no shrimp imported from outside Vietnam is subsequently exported to the United States, whether from India or some other origin, other than one instance of a minimal quantity of shrimp from India and from Vietnam being comingled. Remand Results, Addendum at 5.

TRLED and AHSTEC's argument that MSeafood concedes evasion, *see* Pl. Br. at 20; Remand Results at 28, fails to persuade the court that TRLED's decision is reasonable. AHSTEC argues, "Uncontested evidence on the record that covered merchandise was entered into the customs territory of the United States through evasion is sufficient to constitute substantial evidence justifying an affirmative determination of evasion."[10] Pl. Br. at 22. AHSTEC points out that MSeafood does not claim an exception for a clerical error,[11] and that TRLED therefore correctly concludes that MSeafood evaded the order.[12] The

[10] As will be discussed below, AHSTEC also argues that ORR commits a "clear error" by reading a requirement into 19 U.S.C. § 1517(a)(5)(B)(ii) that evidence on the record supports a finding of "substantial evasion." Pl. Br. at 22.

[11] The EAPA does not define clerical error. In the penalty context, a clerical error "is a mistake made by a clerk or other subordinate, upon whom devolves no duty to exercise judgment, in writing or copying the figures or in exercising his intention." *PPG Indus., Inc. v. United States*, 7 C.I.T. 118, 124 (1984); *see also Hynix Semiconductor Am., Inc. v. United States*, 30 C.I.T. 103, 120 (2006) ("Clerical errors are characterized by the absence of exercising judgment and intention, as when a mistake is made in copying or typing figures . . . ").

[12] AHSTEC points out that ORR references the pattern of negligent conduct exception to the clerical error exception, arguing that ORR's analysis "reflects a fundamental misunderstanding as to how evasion is defined in the statute . . . ." Pl. Br. at 21. ORR stated in a footnote, "Thus, we do not rely on the clerical error statutory exception in reaching our conclusion. Rather, in our view, a single [[ ]] error, by one production worker, does not amount to a pattern of negligent conduct as described in 19 U.S.C. § 1517(a)(5)(B), nor does it demonstrate substantial evidence of evasion." Remand Results, Addendum at 5 n.25. ASHTEC is correct that the statute provides that a "pattern of negligent" conduct is an exception to the clerical error exception to evasion. *See* 19 U.S.C. § 1517(a)(5)(B). However, it is reasonably discernible that ORR refers to this exception with reference to its earlier statement in its initial determination: "CBP cannot speak to whether this shipment qualifies as a clerical error under the EAPA." ORR Initial Determination at 9. Nonetheless, ORR in its analysis states that "one instance of a minimal quantity of Indian-origin product . . . does not constitute substantial evidence" of evasion. Remand Results, Addendum at 5. As explained above, ORR's determination is reasonable.

concession TRLED relies upon is insufficient to support the remedy it imposes.

The record only supports a finding of evasion for one shipment of "covered merchandise." TRLED and AHSTEC appear to believe the statute is broad enough for TRLED to find evasion, and impose a remedy for, over an entire year's worth of entries where MSeafood concedes it evaded ADDs for one shipment. However, § 1517(d)(1) provides for remedies for "such covered merchandise"—the merchandise that would have been subject to the order had the importer not evaded the order. 19 U.S.C. § 1517(a)(3), (d)(1). On this record, the only "covered merchandise," i.e., merchandise that would have been subject to the order, is the one shipment, not the entire year's worth of entries under investigation. Yet, TRLED ordered all entries under investigation to be designated as "03" entries, i.e., subject to ADDs and cash deposits. *See* TRLED Initial Determination at 10; Imposition of Interim Measures at 7. Thus, on the basis of one shipment, TRLED concludes MSeafood evaded ADDs for a year's worth of entries and subjects those entries to the ADD order on India. It would be unreasonable to rely upon one shipment to conclude that MSeafood had evaded ADDs for an entire year, when the record demonstrates both that Minh Phu Group has a system in place to ensure that shrimp are not comingled and also that the single instance of evasion was caused by human error.[13]

C. ORR's Determination

Using the new information made available by TRLED, ORR concludes that the sample traces and the SIMP audits included on the record constituted MSeafood's attempt to cooperate with the EAPA investigation and respond to the requests for information ("RFIs"), making the application of adverse inferences unwarranted. Remand Results, Addendum at 3. ORR further concludes that Minh Phu Group's tracing system was sufficient and that substantial evidence still supports a finding of non-evasion. *Id.* Addendum at 5. AHSTEC argues ORR applies the incorrect standard and that MSeafood concedes evasion. Pl. Br. at 20–28. For the reasons that follow, ORR's determination is reasonable.

On remand, ORR determines that substantial evidence on the record supports a finding of non-evasion by MSeafood. Remand Results, Addendum at 5. ORR explains how Minh Phu Group's submissions demonstrate its product tracing is reliable. First, ORR reviews eight

[13] Minh Phu Group's production team erroneously believed that [[ ]] was not a part of the customs territory of the United States, resulting in one shipment of shrimp marked "XH" being exported to [[ ]]. *See* MSeafood Suppl. RFI Resp., CD 213, CR33694 (June 11, 2020).

sample traces previously omitted from the record and determines that those samples demonstrate Minh Phu Group's provenance tracing of its product. *Id.* Addendum at 2–3. As discussed, ORR also found Minh Phu Group also uses its tracing system to comply with NOAA's SIMP. *Id.* Addendum at 3. SIMP requires Minh Phu Group to submit its chain of custody records tracking shrimp and prawns from harvest in Vietnam to the point of entry into the United States. *Id.* ORR analyzes four SIMP audits of Minh Phu Group's tracing system and determines the application of adverse inferences pursuant to 19 U.S.C. § 1517(c)(3) was unwarranted because Minh Phu Group's tracing system alone was enough to represent its cooperation with the EAPA investigation and the RFIs issued by TRLED.[14] Remand Results, Addendum at 3. ORR also considers Minh Phu Group's submissions of shrimp food and seed to support its assertion that it was able to procure enough shrimp and prawns in Vietnam to account for all its sales to the United States. *Id.*

In response to ASHTEC's request, ORR examines the use of brand names to assess whether Minh Phu Group comingled Indian-origin and Vietnamese-origin shrimp. ASHTEC argues that Minh Phu Group relies on identifying brand names in the production process to prevent intermingling Indian-origin shrimp and Vietnamese-origin shrimp in preparing orders intended for export to the United States and that Minh Phu Group's use of branding is insufficient to prevent the comingling of shrimp. Pl. Br. at 23–25. Minh Phu Group workers do rely on brand names to know to which market finished products will be exported. *See* Re-Filing of Sept. 13, 2019 Submission, Attachment, CD 7, CR1057 (Jan. 31, 2020). However, whether brand names are marked on bins is not dispositive of whether Minh Phu Group is able to keep Vietnamese-origin and imported shrimp segregated throughout the production process. The "XH" designation on bins is the single most important factor throughout the production process. Regardless, ORR compared brand names and found that particular brand names were destined for the United States while others were not.[15] Remand Results, Addendum at 4. Yet, ORR was unable to find

[14] ORR addresses the application of adverse inferences even though TRLED did not apply adverse inferences on remand. Remand Results, Addendum at 3. Both TRLED and ORR's remand determinations are signed and dated on the same day, with ORR's being signed by a supervisor 53 minutes and 5 seconds earlier than TRLED's.

[15] ORR determines that the brands [[ ]] and [[ ]] contain imported Indian-origin shrimp, which Minh Phu Group exports to non-U.S. markets. Remand Results, Addendum at 4. ORR also determines the [[ ]] brand contains Indian-origin shrimp, which Minh Phu Group exports to [[ ]]. *Id.* Addendum at 4–5. Therefore, ORR determines that Minh Phu Group's tracing system was sufficient to ensure Indian-origin shrimp was only exported to countries other than the United States. *Id.* Addendum at 5.

a discrepancy to support the argument that Minh Phu Group transships Indian-origin comingled shrimp to the United States. *Id.* Addendum at 4.

Finally, ORR confronts evidence that detracts from its determination. It acknowledges that some record evidence raised a reasonable suspicion and concern of comingling. Remand Results, Addendum at 5 (acknowledging that some evidence demonstrates that Minh Phu Group did import Indian-origin shrimp to Vietnam). In response to allegations by a U.S. Congressman that Minh Phu Group exported Indian-origin shrimp to the United States as Vietnamese-origin shrimp, Minh Phu Group stated that, although there are Indian-origin shrimp at its plant, it had not and does not export Indian-origin shrimp to the United States. Minh Phu Req. for Administrative Review at 4, CD 218, CR36408 (Nov. 10, 2020). Minh Phu Group explained that it has a specific tracing system to track imported shrimp, which are only used to fulfill orders to countries outside of the United States customs territory. Remand Results, Addendum at 4–5, 5 n.25. ORR concludes, in light of this explanation and after examining Minh Phu Group's tracing procedures, that the record does not support a finding that Minh Phu Group's method of tracing shrimp to avoid shipment of comingled shrimp to the United States was inadequate. *Id.* Addendum at 5. ORR determines that "one instance of a minimal quantity of Indian-origin product entering the United States, which was discovered and revealed by MPG itself, does not constitute substantial evidence [of evasion]." Remand Results, Addendum at 5. As discussed above, a Minh Phu Group employee made a factual mistake resulting in the export to the United States of shrimp destined for other countries. *Id.* at 5 n.25. Minh Phu Group discovered this error during the investigation and reported it to CBP. *Id.* at 5.

AHSTEC argues that ORR clearly errs when it implicitly reads a requirement into 19 U.S.C. § 1517(a)(5)(B)(ii) that the record must support a finding of "substantial" evasion. Pl. Br. at 22. Specifically, AHSTEC points to ORR's statement:

> The record must contain substantial evidence of evasion. When the record herein is considered as a whole, one instance of a minimal quantity of Indian-origin product entering the United States, which was discovered and revealed by MPG itself, does not constitute substantial evidence. As such, the totality of the evidence remains insufficient to support a determination of evasion.

Id. at 22 (citing Remand Results, Addendum at 5). AHSTEC argues that "ORR, however, appears to read a requirement into the statute that the evidence on the record support a finding of *substantial evasion*." *Id.* (emphasis in the original). Thus, AHSTEC argues, ORR improperly elevates the standard for evasion as applied to MSeafood, which constitutes an abuse of discretion. *Id.* at 22–23. The language cited by AHSTEC does not support the interpretation it attributes to ORR. Throughout its determination, ORR finds the record lacks "substantial evidence" of evasion and that the record must contain "substantial evidence of evasion." Remand Results, Addendum at 2, 4–5. Moreover, it is reasonably discernable that ORR determines substantial evidence supports a finding of non-evasion during the entire period of investigation, rather than for the single mistaken entry, as AHSTEC suggests. *Compare id.* Addendum at 5 (discussing shipments "during the period of investigation . . . when considered as a whole") *with* Pl. Br. at 22. Congress tasked CBP with finding whether there is evasion and that its determination must be supported by substantial evidence. *See* 19 U.S.C. § 1517(c)(1)(A). ORR's conclusion that the record lacks "substantial evidence of evasion" does not reinterpret this standard.

CONCLUSION

For the foregoing reasons, ORR's Remand Results are supported by substantial evidence, comply with the court's order in *Ad Hoc Shrimp I*, and, therefore, are sustained. Judgment will enter accordingly.

Dated: April 26, 2023
New York, New York

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

Slip Op. 23–64

NUCOR CORPORATION, Plaintiff v. UNITED STATES, Defendant, and GOVERNMENT OF THE REPUBLIC OF KOREA, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00070

[Sustaining the U.S. Department of Commerce's final results in the 2019 administrative review of the countervailing duty order on certain carbon and alloy steel cut-to-length plate from the Republic of Korea.]

Dated: April 28, 2023

Adam M. Teslik, Wiley Rein LLP, of Washington, DC, argued for Plaintiff Nucor Corporation. With him on the brief were *Alan H. Price*, *Christopher B. Weld*, and *Tessa V. Capeloto*.

Augustus Golden, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for Defendant United States.

With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel on the brief was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Sarah S. Sprinkle, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for Defendant-Intervenor Government of the Republic of Korea. With her on the brief were *Yujin K. McNamara*, *Daniel M. Witkowski*, *Devin S. Sikes*, *Sung Un K. Kim*, and *Sydney L. Stringer*.

OPINION

Barnett, Chief Judge:

Plaintiff Nucor Corporation ("Nucor") challenges the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the 2019 administrative review of the countervailing duty ("CVD") order on certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Republic of Korea ("Korea"). Compl., ECF No. 8; *see also Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 87 Fed. Reg. 6,842 (Dep't Commerce Feb. 7, 2022) (final results and partial rescission of [CVD] admin. review, 2019) ("*Final Results*"), ECF No. 19–4, and accompanying Issues and Decision Mem., C-580–888 (Jan. 31, 2022) ("I&D Mem."), ECF No. 19–5.[1] Nucor seeks judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2 and requests the court to remand Commerce's determination that the Government of the Republic of Korea ("Government of Korea" or "GOK") does not provide a countervailable subsidy to the Korean steel industry through the provision of electricity for less than adequate remuneration. *See* Confid. Pl. Nucor Corp.'s Rule 56.2 Mot. for J. on the Agency R. and accompanying Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Mem."), ECF No. 30; Confid. Pl. Nucor Corp.'s Reply Br. ("Pl.'s Reply"), ECF No. 35.

Defendant United States ("the Government") and Defendant-Intervenor the Government of Korea urge the court to sustain the *Final Results*. Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. ("Def.'s Resp."), ECF No. 32; Confid. Def.-Int. [Gov't of Korea's] Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def-Int.'s Resp."), ECF No. 33.

---

[1] The administrative record for the *Final Results* is contained in a Public Administrative Record ("PR"), ECF No. 19–1, and a Confidential Administrative Record ("CR"), ECF No. 19–2. Nucor submitted joint appendices containing record documents cited in Parties' briefs and requested by the court. *See* Confid. J.A. ("CJA"), ECF Nos. 37 (Tab 1–Tab 10 (Part 1)), 37–1 (Tab 10 (Part 2)), 37–2 (Tab 10 (Part 3)–Tab 17); Public J.A., ECF No. 38; First Suppl. Confid. J.A. ("1st Suppl. CJA"), ECF Nos. 44–44–4 (replacing Tabs 4 and 5 previously filed), First Suppl. Public J.A., ECF Nos. 45, 45–1; Second Suppl. Confid. J.A. ("2nd Suppl. CJA"), ECF No. 47 ; 2nd Suppl. Public J.A., ECF No. 48. The court references the confidential record documents unless otherwise specified.

For the following reasons, the court sustains the *Final Results*.

BACKGROUND

I. CVD Overview

A countervailable subsidy "exists when . . . a foreign government provides a financial contribution . . . to a specific industry" that confers "a benefit" on "a recipient within the industry." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)). A countervailable benefit includes the provision of goods or services "for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv) (2018).[2] The statute directs Commerce to determine the adequacy of remuneration "in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the [subject] country" and explains that "[p]revailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.*

Commerce's regulations prescribe a three-tiered approach for determining the adequacy of remuneration. *See* 19 C.F.R. § 351.511. When, as here, both an in-country market-based price and a world market price are unavailable, Commerce examines "whether the government price is consistent with market principles," referred to herein as a "Tier 3 analysis." *Id*. § 351.511(a)(2)(iii).[3] A Tier 3 analysis accounts for "such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998) ("*CVD Preamble*"). Those factors are not "in any hierarchy," and Commerce "may rely on one or more of these factors in any particular case." *Id.*

II. Agency Proceedings

On May 25, 2017, Commerce published the CVD order on CTL plate from Korea. *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 82 Fed. Reg. 24,103 (Dep't Commerce May 25, 2017) ([CVD] order) ("*Korea CTL Order*"). On July 10, 2020, Commerce initiated the third administrative review of the *Korea CTL Order* for the 2019 period of review ("POR"). *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 85 Fed. Reg. 41,540,

[2] Further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code. All references to the U.S. Code are to the 2018 edition unless otherwise specified.

[3] Commerce first seeks to compare the government price to a market-based price for the good or service under investigation in the country in question (a "Tier 1 analysis"). 19 C.F.R. § 351.511(a)(2)(i). When an in-country market-based price is unavailable, Commerce will compare the government price to a world market price when the world market price is available to purchasers in the country in question (a "Tier 2 analysis"). *Id.* § 351.511(a)(2)(ii).

41,548–49 (Dep't Commerce July 10, 2020), PR 20, CJA Tab 1. Commerce selected POSCO as the sole mandatory respondent for the review. *See* Decision Mem. on New Subsidy Allegations (Apr. 13, 2021) at 1 & n.2, PR 105, CJA Tab 3 (citation omitted).

On November 19, 2020, Nucor timely filed a new subsidy allegation asserting that the Government of Korea provided electricity to the steel industry for less than adequate remuneration. New Subsidy Allegations (Nov. 19, 2020), CR 177–93, PR 68–84, CJA Tab 2. On April 13, 2021, Commerce initiated a corresponding investigation. Decision Mem. on New Subsidy Allegations at 2. On August 5, 2021, Commerce published the preliminary results of the review. *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 86 Fed. Reg. 42,788 (Dep't Commerce Aug. 5, 2021) (prelim. results of [CVD] admin. review, and intent to rescind review, in part; 2019) ("*Prelim. Results*"), PR 183, CJA Tab 14, and accompanying Prelim. Decision Mem. ("Prelim. Mem."), PR 179, CJA Tab 12.

In the preliminary decision memorandum, Commerce summarized key aspects of the Korean electricity market. Commerce explained that "KEPCO[4] is the exclusive supplier of electricity in Korea" and is majority-owned by the Government of Korea. Prelim. Mem. at 27.[5] Commerce noted that the Government of Korea "regulates the rates that KEPCO charges for electricity by approving" changes to "the electricity tariff rates." *Id.* at 28. Electricity supplied by KEPCO is generated by "KEPCO's six wholly-owned subsidiary generators (GENCOs), independent power generation companies, and community energy systems." *Id.* at 26 (internal footnote omitted). However, Commerce explained, "all purchasing and selling of electricity is done through [the] KPX."[6] *Id.* The KPX sets the price KEPCO pays for electricity, *id.*, and is wholly owned by KEPCO, *id.* at 27.

Commerce described the "cost-based pool system" the Korean electricity market uses to allocate purchase orders. *Id.* at 26. That system has two components: the marginal price, which represents variable costs of generating electricity, and the capacity price, which represents the fixed costs. *See id.* The marginal price is based on hourly sales of electricity. *See id.* "For nuclear generators, coal-power generators, and GENCOs, an adjusted coefficient is also included in their KPX price . . . to prevent over-payment to generators with low fuel costs (e.g., nuclear and coal) and to maintain a differential between

[4] [KEPCO is the acronym for Korea Electric Power Corporation.]

[5] There is an exception to KEPCO's status as the exclusive electricity supplier for certain "customers serviced by community energy systems." Prelim. Mem. at 27. That exception is not relevant here.

[6] KPX is the acronym for Korea Power Exchange.

the expected rate of return between the GENCOs and KEPCO." *Id.* at 27.

For its preliminary determination, Commerce applied a Tier 3 analysis that examined whether the industrial tariff schedule in effect during the POR[7] allowed KEPCO to recover its costs and earn profit "sufficient to ensure future operations." *Id.* at 29. Commerce examined KEPCO's reported cost data for 2019 and detailed the steps through which KEPCO accounts for its "operating costs and return on investment." Prelim. Mem. at 31; *see also* Prelim. Results Calculation Mem. for POSCO (July 30, 2021) ("Prelim. Calc. Mem.") at 8–9, CR 323–24, PR 180–81, CJA Tab 13 (discussing, *inter alia*, Resp. to New Subsidy Allegation Questionnaire (Apr. 27, 2021) ("GOK's Resp. NSA"), Ex. E-18, CR 229–34, PR 115, CJA Tab 4, 1st Suppl. CJA Tab 4). Commerce explained that "POSCO provided electricity usage that included voltage, option, rates, and amount paid for the industrial classification." Prelim. Mem. at 31 & n.215 (citing POSCO's Electricity New Subsidy Allegation Questionnaire Resp. (Apr. 27, 2021) ("POSCO's Resp. NSA"), Ex. NSA-2, CR 235–44, PR 117, CJA Tab 5).[8] Commerce preliminarily found that "certain reported industrial rates recovered costs and a rate of return and certain rates did not," *id.* at 32 & n.216 (citing Prelim. Calc. Mem.). Commerce thus found that although KEPCO has "a pricing mechanism in place that is based on market principles, . . . the industrial rates did not always recover costs and a rate of return." *Id.*

Commerce also considered whether KPX's prices to KEPCO conferred a benefit. *Id.* at 30. Commerce referenced recent administrative reviews involving CVD orders on different Korean merchandise in which it considered upstream subsidy allegations and found no such benefit. *Id.* at 30 & n.200 (citations omitted). In the underlying review, Commerce preliminarily found that all six GENCOs recovered their costs; that "the system marginal price includes consideration of the GENCOs and KEPCO's rate of return"; and that "the price paid by KEPCO through KPX is inclusive of a rate of return." *Id.* at 30. Commerce thus found no benefit from KPX's prices to KEPCO. *See id.*

Regarding the sales for which KEPCO did not recover its costs and a rate of return, Commerce preliminarily calculated a *de minimis* net countervailable subsidy rate for POSCO and the non-examined companies subject to the review. *Prelim. Results*, 86 Fed. Reg. at 42,789.

---

[7] Commerce noted that the tariff schedule that applied "during the POR came into effect in November 2013." Prelim. Mem. at 29.

[8] Exhibit NSA-2 consists of POSCO's reporting of monthly electricity purchases for its various facilities during off-peak, mid-peak, and on-peak hours. *See* POSCO's NSA Resp. at 2, Ex. NSA-2.

On February 7, 2022, Commerce published the *Final Results* of the review. 87 Fed. Reg. at 6,842. For the *Final Results*, Commerce incorporated much of its preliminary analysis. *See* I&D Mem. at 21–26. Commerce continued to use a Tier 3 analysis that examined whether KEPCO's electricity prices covered KECPO's costs and an amount for profit. *Id.* at 22 & n.75 (citing Prelim. Mem. at 28–29). Commerce explained that when KEPCO's prices did not cover costs (and, thus, did not accord with "market principles"), Commerce determined a benchmark price "that cover[ed] costs plus a rate of recovery or profit[], with the difference between the price paid and the benchmark being the benefit conferred." *Id.* at 22 & n.78 (citing Prelim. Mem. at 29).[9] Using this methodology, Commerce calculated a *de minimis* net countervailable subsidy rate in the amount of 0.42 percent for POSCO and the non-examined companies. *Final Results*, 87 Fed. Reg. at 6,843.

In reaching its decision, the agency analyzed and rejected Nucor's argument that Commerce should instead "compare the electricity prices paid by [POSCO] to the cost plus profit rate of KEPCO to determine whether a benefit exists." I&D Mem. at 22; *see also id.* at 22–23. Commerce further explained that its "analysis is not based on KEPCO's total revenue," but on KEPCO's "financial performance" in relation to "each electricity consumption category." *Id.* at 24. Commerce explained that this method is appropriate because "POSCO paid electricity prices" in accordance with the "corresponding electricity consumption classifications" and, as such, its "analysis . . . account[s] for whether the prices POSCO paid were covering KEPCO's costs." *Id.* Referencing its preliminary analysis of the KPX, *id.* at 24–25, Commerce also rejected Nucor's argument that the cost information provided by the Government of Korea does "not reflect actual costs of electricity generation and supply," *id.* at 24. Lastly, Commerce disagreed with Nucor that "subsidization is masked" by the Government of Korea's charging of "higher prices to other customers." *Id.* at 26.

This appeal followed, and the court heard oral argument on March 22, 2023. Docket Entry, ECF No. 46.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii), and 28 U.S.C. § 1581(c).

[9] Commerce also noted that "POSCO reported paying electricity prices that are listed on KEPCO's electricity rate schedule, and . . . that POSCO's operations were classified under the correct electricity consumption categories." I&D Mem. at 22 & n.80 (citations omitted).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Nucor argues that Commerce applied an unlawful methodology and that Commerce's determination is not supported by substantial evidence. The court addresses each issue in turn.

I. Whether Commerce's Determination is in Accordance with Law

A. Parties' Contentions

Nucor contends that Commerce erred in examining KEPCO's cost recovery based on sales to all users within the relevant tariff classification. Pl.'s Mem. at 14–15. Instead, Nucor contends, Commerce was required to consider whether KEPCO recovered its costs in connection with the specific prices paid by POSCO. *Id.* at 15–17.

Nucor's argument turns on its interpretation of the phrase "government price" in the applicable regulatory provision. *See id.* at 16; Pl.'s Reply at 8–9 (citing, *inter alia*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)). Nucor contends that Commerce impermissibly based its benefit analysis on KEPCO's annual average unit sales price for the relevant industrial electricity groups and sub-groups, arguing that the sales price is "not a government price at all" but instead "reflects the [GOK's] total annual sales revenue." Pl.'s Mem. at 16; *see also* Pl.'s Reply at 11. Nucor further contends that its view on an appropriate Tier 3 analysis is supported by agency precedent, surrounding regulatory provisions, and Commerce's statutory obligations. Pl.'s Mem. at 12–14, 16–17; Pl.'s Reply at 4–10.

The Government contends that Commerce's Tier 3 analysis complied with precedent from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") through its examination of KEPCO's costs and the impact of the KPX on the Korean electricity market. Def.'s Resp. at 19–20.[10] The Government also contends that Commerce's

[10] The Government cites *Nucor Corp. v. United States*, 927 F.3d 1243, 1254–55 (Fed. Cir. 2019) ("*Nucor CAFC*"), and *POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020) ("*POSCO CAFC*"). *See* Def.'s Resp. at 19. In *Nucor CAFC*, the majority affirmed Commerce's determination that the sale of electricity was not for less than adequate remuneration in the investigation concerning certain corrosion-resistant steel products from Korea. 927 F.3d at 1249, 1256. The majority's affirmance was, however, based on the agency's finding that KEPCO had recovered its costs during the investigation period and Nucor's failure to exhaust its arguments regarding the KPX's costs and prices before the agency. *Id.* at 1255. In *POSCO CAFC*, the appellate court remanded Commerce's determination that electricity was not sold for less than adequate remuneration in the investigation concerning cold-rolled steel after finding that Commerce failed to adequately investigate the role of the KPX in the Korean electricity market. 977 F.3d at 1376–78.

analysis in this review "is consistent with" the methodology used in prior determinations involving the Korean electricity market. *Id.* at 21. The Government asserts that, in a Tier 3 analysis, there are no "'market-determined' or 'world-market' prices to which [Commerce] can compare the prices 'paid by the respondent,'" *id.* at 23, and, as such, Commerce permissibly considered whether KEPCO's tariff rates were "set 'in accordance with market principles'" and whether POSCO paid the applicable tariff rates, *id.* (quoting 19 C.F.R. § 351.511(a)(2)(iii)).

The Government of Korea contends that Commerce's determination was consistent with its statutory obligations and Commerce otherwise has discretion to develop a method for assessing the adequacy of remuneration. *See* Def.-Int.'s Resp. at 9, 11. The Government of Korea further contends that a Tier 3 analysis is "more complicated" than Tier 1 and Tier 2 analyses because Commerce is not simply comparing prices but must instead assess whether government price-setting accords with market principles. *Id.* at 10 (citation and emphasis omitted).

B. Analysis

The statute directs Commerce to consider whether a benefit has been conferred through the provision of a good or service "for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). While Congress directed Commerce to determine the adequacy of remuneration "in relation to prevailing market conditions" and provided a non-exhaustive list of conditions for Commerce consider, *id.*, Congress otherwise left the development of a suitable methodology for conducting this analysis to Commerce's discretion, *Nucor*, 927 F.3d at 1254 (stating that "the statutory standard of adequate remuneration . . . leaves a large range of potential implementation choices"). In the circumstances underlying this case, Commerce assesses "whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). Commerce adapts and applies this analysis on a case-by-case basis. *See Preamble*, 63 Fed. Reg. at 65,378 (declining to place relevant factors "in any hierarchy" and noting that "one or more of these factors" may be relevant "in any particular case").

Nucor does not dispute Commerce's discretion to develop a suitable methodology for carrying out a Tier 3 analysis. *See* Pl.'s Reply at 7–8. Instead, Nucor argues that the phrase "government price" has but one meaning here, namely, the price reflected in KEPCO's industrial tariff and POSCO's corresponding reported prices. *See* Pl.'s Mem. at 15 (citing GOK's Resp. NSA, Ex. E-10; POSCO's Resp. NSA, Ex. NSA-2); Pl.'s Reply at 9 ("Here, the regulation is unambiguous. Commerce's tier three rule may not lay out an explicit methodology, but it is quite clear with respect to what must be 'consistent with market principles.' That is the 'government price,' and not the government supplier's revenues on all sales to all customers.") (internal citation omitted).

Nucor is correct insofar as the regulation unambiguously uses the phrase "government price." As discussed below, however, Nucor fails to persuade the court that ascertaining whether the government price is consistent with market principles required Commerce to use KEPCO's tariff rates as a comparator for cost recovery purposes. Stated differently, Commerce was within its discretion to determine whether KEPCO's (i.e., the Government of Korea's) tariff rates were set in accordance with market principles through its evaluation of whether KEPCO's "income from prices charged for each electricity consumption category covers KEPCO's costs, plus profit" for those categories. I&D Mem. at 24.

In seeking to make its case, Nucor relies on Commerce's explanation of its methodology in the agency's remand results issued in connection with the investigation underlying the *Korea CTL Order*. *See* Pl.'s Mem. at 12; Pl.'s Reply at 5–6. Nucor emphasizes Commerce's statement that "if the tariff *charged to the respondent* does not cover 'cost of production' plus a 'profitable return on the investment,' . . . then *the respondent* has received a countervailable benefit," Pl.'s Mem. at 12 (quoting Final Results of Redetermination Pursuant to Ct. Remand at 30, *POSCO v. United States*, Consol. Court No. 17-cv-00137 (CIT July 6, 2021) ("*POSCO* Remand Results")),[11] to argue that Commerce has articulated—and should have applied—a cost recovery standard based on the POSCO's reported prices, Pl.'s Reply at 6–7. In the *POSCO* Remand Results, however, consistent with Commerce's determination here, Commerce considered cost recovery in view of KEPCO's industrial tariff classification schedule as a whole. *See POSCO* Remand Results at 10–11, 13; *cf.* I&D Mem. at 23 (noting consistency between Commerce's analysis in this review and the investigation).

Nucor next points to Commerce's statutory duties to consider whether "there is a benefit *to the recipient*," Pl.'s Mem. at 17 (quoting 19 U.S.C. § 1677(5)(E)), and to "determine *individual* countervailable subsidy rates," *id.* at 12 (quoting 19 U.S.C. § 1677f-1(e)); *see also* Pl.'s Reply at 10 (arguing that the statutory "provisions are necessary context for Commerce's rule" and relevant to its proper interpreta-

[11] Commerce issued the *POSCO* Remand Results pursuant to *POSCO CAFC*. *See POSCO* Remand Results at 1 & n.1 (citation omitted). The CIT sustained Commerce's redetermination. POSCO v. United States, 46 CIT __, 556 F. Supp. 3d 1364 (2022), *appeal filed*, Court No. 22–1525 (Fed. Cir. Nov. 23, 2022).

tion). Nucor does not dispute that Commerce complied with the statute insofar as Commerce calculated an individual subsidy rate for POSCO, though one resulting in a non-measurable benefit. *See Final Results*, 87 Fed. Reg. at 6,843. Nucor argues, however, that Commerce's analysis failed to measure the existence of a benefit to POSCO (i.e., the recipient) and instead measured whether KEPCO was "able to recoup losses on sales to some customers with excess returns on sales to *other* customers." Pl.'s Mem. at 17. Nucor appears to suggest that the GOK is "engag[ing] in harmful cross-subsidization" within the industrial tariff classification schedule. *Id.* POSCO, however, paid the same tariff rates as other industrial users that purchased electricity during off-peak, mid-peak, and on-peak hours. *See* POSCO's Resp. NSA, Ex. NSA-2.[12]

Nucor further contends that comparing the prices paid by the respondent directly to an underlying cost pursuant to a Tier 3 analysis is consistent with Commerce's approach in Tier 1 and Tier 2 analyses. *See* Pl.'s Mem. at 12.[13] Nucor argues that the phrase "government price" in the Tier 1 and Tier 2 provisions indisputably "refers to the government price actually paid by the respondent," and, thus, the phrase must carry the same meaning here. Pl.'s Reply at 5. It is not the meaning of the phrase that differs in a Tier 3 analysis, however. What differs is Commerce's method for determining the adequacy of remuneration based on the government price. Commerce's Tier 1 and Tier 2 analyses involve comparisons between the government price and either a market-based price, or, when available to purchasers in the subject country, a world market price, respectively. 19 C.F.R. § 351.511(a)(2)(i)–(ii). By contrast, Commerce conducts a Tier 3 analysis when such comparators are unavailable, and that analysis necessarily is directed at "whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii).

[12] To prove its point, Nucor relies on Commerce's benefit calculation for the industrial tariff rates that did not recover costs and a rate of return. *See* Pl.'s Mem. at 17–18. Nucor asserts that Commerce calculated benchmark prices that were "less than KEPCO's cost of supply for the industrial tariff class." *Id.* at 18 (emphasis omitted). Nucor, however, compared the lowest off-peak benchmark to the annual average unit cost of supply. *See id.* (citing GOK's Resp. NSA, Ex. E-18; Prelim. Calc. Mem., Attach. II, ECF p. 630). Nucor thus failed to account for the fact that KEPCO's annual average unit of supply includes the cost to supply electricity during mid-peak and on-peak time periods, for which Commerce calculated higher benchmarks. *See id.*

[13] Nucor also relies on 19 C.F.R. § 351.503, Commerce's regulation governing the benefit for programs not addressed elsewhere, which provides that Commerce "will consider a benefit to be conferred where *a firm pays* less for its inputs . . . than it otherwise would pay." Pl.'s Mem. at 12–13 (quoting 19 C.F.R. § 351.503(b)) (alteration in original); *see also* Pl.'s Reply at 5. In addition to its lack of application here in light of 19 C.F.R. § 351.511, section 351.503(b) does not explain *how* Commerce is to determine whether a firm has paid less for an input than it would have in the absence of a government program, and thus does not address the issues presented in this case.

For these reasons, decisions cited by Nucor involving benchmark comparisons *See* Pl.'s Mem. at 13–14.[14] Nucor's citations to other Tier 3 determinations are also misplaced. *See id.* (citing Issues and Decision Mem. for Coated Free Sheet Paper from Indonesia, C-560–821 (Oct. 17, 2007) ("Paper from Indonesia Mem.") at 23, https://access.trade.gov/Resources/frn/summary/indonesia/E7–21040–1.pdf (last visited Apr. 28, 2023); Issues and Decision Mem. for Certain Cold-Rolled Steel Flat Prods. from the Russian Federation, C-821–823 (July 20, 2016) ("CRS from Russia Mem.") at 19, https://access.trade.gov/Resources/frn /summary/russia/2016–17937–1.pdf (last visited Apr. 28, 2023); Issues and Decision Mem. for Supercalendered Paper from Canada, C-122–854 (Oct. 13, 2015) ("Paper from Canada Mem.") at 48, https://access.trade.gov/Resources/frn/summary/canada/201526634–1.pdf (last visited Apr. 28, 2023)). Nucor cites these determinations to support the view that a market principles analysis required Commerce to compare POSCO's rates to some other value. *See* Pl.'s Mem. at 13–14. In each case, however, Commerce first found that the government price was not demonstrably set in accordance with market principles and, in the pages cited by Nucor, derived a benchmark in order to calculate the benefit conferred, much as Commerce did here for certain electricity purchases. *See* Paper From Indonesia Mem. at 20, 23; CRS From Russia Mem. at 18–19, 67–68; Paper from Canada Mem. at 48; *cf.* Prelim. Calc. Mem. at 9.

While Nucor might prefer Commerce to have used a different approach, Nucor's disagreement is not a basis to remand Commerce's determination. "Commerce has considerable prima facie leeway to

[14] Citing *U.S. Steel Corp. v. United States*, 33 CIT 1935, 1944 n.10 (2009), Nucor argues that "the broader financial performance of the government supplier" is an impermissible method of determining the adequacy of remuneration. Pl.'s Mem. at 17. *U.S. Steel*, a Tier 1 case, does not foreclose Commerce's methodology in this Tier 3 case. In *U.S. Steel*, one plaintiff argued that Commerce should have used transaction prices between the government of India and Japanese customers as a Tier 1 benchmark. 33 CIT at 1943. Commerce instead used prices at which the plaintiff "purchased iron ore lumps from an unaffiliated private supplier outside of India as the benchmark" for transactions between the plaintiff and the government supplier. *Id.* The court sustained Commerce's decision, reasoning that the proffered alternative did not reflect "a market-determined price for the good resulting from actual transactions in India." *Id.* at 1944. The court also noted that the supplier, "as a government authority, is free from normal profit-maximization pressures, and it *may* make pricing decisions based on other, non-commercial criteria." *Id.* (emphasis added). It is in this context that the court rejected the argument that "overall profitability" of the government supplier alone demonstrated that its prices were market-based. 33 CIT at 1944 n.10. Here, however, in contrast to *U.S. Steel*, Commerce examined KEPCO's costs, *see* Prelim. Mem. at 31, and based its decision regarding the adequacy of remuneration on KEPCO's cost recovery for each relevant industrial classification, *see id.* at 32; I&D Mem. at 22. Thus, Nucor's reliance on *U.S. Steel* is misplaced.

make a reasonable choice within the permissible range," *Nucor CAFC*, 927 F.3d at 1255, and has done so here. Accordingly, the court will sustain Commerce's method of determining the adequacy of remuneration.

II. Whether Substantial Evidence Supports Commerce's Determination

A. Parties' Contentions

Nucor contends that substantial evidence does not support Commerce's determination that certain electricity prices were consistent with market principles. Pl.'s Mem. at 18. Nucor argues that Commerce should have rejected GOK pricing data based on governmental control over the electricity market and instead collected information directly from the GENCOs. *Id.* at 18–22. Nucor further contends that, even accepting KEPCO's reported cost of supply, record evidence demonstrates that "KEPCO subsidizes large industrial users that can operate primarily during off-peak hours" and recoups those losses on sales to users that "primarily operate during on-peak hours." *Id.* at 23; *see also* Pl.'s Reply at 15–16 (advancing similar arguments).

The Government contends that Commerce's determination is supported by substantial evidence. Def.'s Resp. at 11–14. The Government further contends that evidence cited by Nucor does "not undermine the substantiality of Commerce's factual findings." *Id.* at 17.

The Government of Korea contends that "[r]ecord evidence establishes that KEPCO and the GENCOs cover their costs plus a sufficient rate of return" and, thus, "Commerce's conclusion is supported by substantial evidence." Def.-Int.'s Resp. at 16–17. The GOK further contends that Nucor cherry picks data points in its attempt to demonstrate that prices paid by POSCO did not cover KEPCO's costs. *Id.* at 19–20 Lastly, the Government of Korea contends that Nucor has not shown that KEPCO's prices operate to subsidize large industrial users. *Id.* at 21–23.

B. Analysis

Nucor's characterization of the Korean electricity market as "a government-owned, -operated, and -directed monopoly," Pl.'s Mem. at 19, fails to carry the day. Commerce's Tier 3 analysis exists to address circumstances such as those present in the Korean electricity market. *See Preamble*, 63 Fed. Reg. at 65,348 (stating that, "in situations where *the government is clearly the only source available* to consumers in the country, we normally will assess whether the government price was established in accordance with market principles") (emphasis added). The key question is whether substantial record evidence supports Commerce's determination that the Korean government's electricity prices were consistent with market principles. Nucor's arguments fail to persuade the court to answer this question in the negative.

Nucor first asserts that the values that comprise the system marginal price are not determined "by the generators themselves" and, thus, Commerce should have requested relevant information from the GENCOs. Pl.'s Mem. at 21. Commerce found it unnecessary to do so, however, explaining that "KEPCO is obligated to pay the GENCOs for the total cost of generating electricity, including interest on loans, even if KEPCO is not profitable." I&D Mem. at 24 & n.93 (citing GOK's Resp. NSA at 34). Commerce further found that the GOK's electricity "pricing is based on price-setting methodologies that aim to ensure companies in the chain are able to cover their costs, as well as a rate of profit." *Id.* at 24–25 & n.95 (citing Prelim. Mem. at 27–32). Record evidence indicates that each of the GENCOs covered its cost of electricity sales for the POR. *See* GOK's Suppl. Questionnaire Resp. (June 22, 2021) ("GOK's 1SQR"), Ex. E-26, CR 282–90, 2nd Suppl. CJA Tab 2 (the GENCOs' unconsolidated financial statements); GOK's Second Suppl. Questionnaire Resp. (July 21, 2021) ("GOK's 2SQR"), Ex. E-41, CR 311–14, 316–20, PR 170–73, CJA Tab 10 (Parts 2 and 3) (the GENCOs' consolidated financial statements).[15]

Nucor next compares the annual average off-peak and mid-peak prices paid by POSCO to KEPCO's annual average cost of supply for the industrial rate classification. *See* Pl.'s Mem. at 22 (citing POSCO's NSA Resp., Ex. NSA-2; GOK's NSA Resp., Ex. E-18). Nucor seeks to support the validity of this comparison through the amount of electricity purchased during the respective time periods. *See id.* (citing POSCO's NSA Resp., Ex. NSA-2). From this information, Nucor infers that "KEPCO has structured its electricity prices to maintain subsidies to large industrial users like steel producers, while recouping losses on those sales through higher prices to *other users*." Pl.'s Mem. at 22–23 (emphasis added). That inference, however, is unsupported; KEPCO's annual average unit cost includes the cost of supplying electricity during on-peak hours, for which POSCO paid higher

[15] In the preliminary memorandum, Commerce cited to the GENCOs consolidated financial statements. *See* Prelim. Mem. at 30 & n.203 (citing GOK's 2SQR, Ex. E-41). A review of those statements shows that while the GENCOs each earned a gross profit for the POR, only three of six GENCOs were profitable overall. *See* GOK's 2SQR, Ex. E-41. Following the hearing, Nucor also placed the unconsolidated financial statements on the record. *See* GOK's 1SQR, Ex. E-26. Those statements likewise reflect a gross profit for the POR for all six GENCOs. *See id.* Nucor did not, however, raise arguments concerning any distinction between gross profit on sales and total profit either before Commerce or in its moving brief before the court; thus, any such arguments are waived. *See Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002); *see also* 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

prices. *See* POSCO's NSA Resp., Ex. NSA-2. Thus, to the extent Nucor argues that consumers of electricity during on-peak hours are subsidizing users during off-peak and mid-peak hours, Nucor must include POSCO within that group of on-peak consumers given POSCO's purchase of electricity during this time as well. *See id.*

Nucor also references news reports discussing analyses by the Korean National Assembly and the Korea Energy Economics Institute. Pl.'s Mem. at 23 (citing Cmts. and Rebuttal Factual Info. on New Subsidy Allegation Questionnaire Resps. (May 11, 2021) ("Nucor's Rebuttal Cmts."), Exs. 5–6, CR 256–65, PR 129–38, CJA Tab 6); *see also* Pl.'s Reply at 18.[16] Both reports claim that off-peak electricity prices should be raised to cover the costs of meeting the demand for electricity that is provided by higher-cost generators. *See* Nucor's Rebuttal Cmts., Ex. 5 at ECF p. 272, Ex. 6 at ECF pp. 282–83. The data underlying these assertions are not, however, on the record and the reports do not address the information KEPCO provided for the industrial classification as a whole, except to note that the "cost recovery rate of current industrial electricity rates is higher than that of other contract types." *Id.*, Ex. 6 at ECF p. 283; *see also* GOK's Resp. NSA, Ex. E-18 (listing cost recovery rates for different contract types). Additionally, Nucor's focus on the comparative cost of providing electricity during different time periods is another iteration of Nucor's argument that Commerce should have used a different benchmark to measure the adequacy of remuneration, an argument which the court has rejected. *See supra*, Discussion Section I.B.

CONCLUSION

For the reasons discussed above, the court will sustain Commerce's *Final Results*. Judgment will enter accordingly.

Dated: April 28, 2023
New York, New York

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

[16] Nucor raised similar arguments in its case brief and Commerce acknowledged those arguments. *See* Case Br. (Dec. 15, 2021) at 7–8 & nn.27, 30–31, CR 360, PR 221, CJA Tab 15; I&D Mem. at 16 & n.40. While Commerce did not respond specifically to the cited reports, they do not undermine Commerce's determination such that a remand is required for Commerce to address them explicitly.

Slip Op. 23–65

CORINTH PIPEWORKS PIPE INDUSTRY SA AND CPW AMERICA CO., Plaintiffs, v. UNITED STATES, Defendant, and the AMERICAN LINE PIPE PRODUCERS ASSOCIATION TRADE COMMITTEE, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 22–00063

[Commerce's *Final Results* sustained.]

Dated: April 28, 2023

Kristin H. Mowry and *Bryan P. Cenko*, Mowry & Grimson, PLLC of Washington, D.C., argued for Plaintiffs Corinth Pipeworks Pipe Industry S.A. and CPW America Co. With them on the briefs were *Jeffrey S. Grimson* and *Jill A. Cramer*.

Eric J. Singley, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C., argued for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director. Of counsel was *Christopher Kimura*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance of Washington, D.C.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein LLP of Washington, D.C., argued for Defendant-Intervenor American Line Pipe Producers Association Trade Committee.

OPINION

Gordon, Judge:

Plaintiffs Corinth Pipeworks Pipe Industry S.A. and CPW America Co. challenge the U.S. Department of Commerce's ("Commerce") final results of the first administrative review of the antidumping duty order covering large diameter welded pipe from Greece. *See Large Diameter Welded Pipe from Greece*, 87 Fed. Reg. 7,120 (Dep't of Commerce Feb. 8, 2022) ("*Final Results*"), and the accompanying Issues and Decision Memorandum (Dep't of Commerce Feb. 2, 2022), PR[1] 96 ("*Decision Memorandum*"); *see also Large Diameter Welded Pipe from Greece*, 84 Fed. Reg. 18,769 (Dep't of Commerce May 2, 2019).

Before the court is Plaintiffs' motion for judgment on the agency record under USCIT Rule 56.2. *See* Pls.' Am. Mot. for J. on the Agency R., ECF No. 48[2] ("Pls.' Br."); *see also* Def.'s Am. Resp. to Pls.' Mot. for J. on the Agency R., ECF No. 49; Def.-Intervenor Am. Line Pipe Producers Ass'n Trade Comm.'s Resp. Opp. Pls.' Mot. for J. on the Agency R., ECF No. 35; Pls.' Am. Reply in Supp. of Mot. for J. on the Agency R., ECF No. 50 ("Pls.' Reply"). The court has jurisdiction

[1] "PR" refers to a document contained in the public administrative record. *See* ECF No. 19–1.

[2] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[3] and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court sustains Commerce's *Final Results*.

I. Background

Plaintiff Corinth Pipeworks Pipe Industry S.A. ("Corinth") was the sole mandatory respondent, and indeed the sole producer and/or exporter of the subject merchandise, in the underlying administrative review.[4] *Final Results*, 87 Fed. Reg. at 7,121; *see also* Large Diameter Welded Pipe from Greece, 86 Fed. Reg. 43,172 (Dep't of Commerce Aug. 6, 2021) ("*Preliminary Results*"), and the accompanying Preliminary Decision Memorandum (Dep't of Commerce July 30, 2021), PR 73 ("*PDM*"). The period of review was April 19, 2019 through April 30, 2020. *PDM* at 1.

Commerce issued its initial antidumping questionnaire to Corinth in July 2020, followed by two supplemental questionnaires in May and July 2021 respectively regarding Corinth's cost of production ("COP") and constructed value ("CV") data (Section D). *Id.* at 2. Corinth timely responded to both, but because its response to the second supplemental questionnaire came shortly before the issuance of the *Preliminary Results*, Commerce stated in the *PDM* that it would consider that response in the *Final Results*. *Id.* at 2.

In the initial questionnaire, Commerce directed Corinth to report per-unit COP and CV figures based on the company's "actual costs incurred . . . during the period of review ["POR"], as recorded under [its] normal accounting system." Dep't of Commerce Questionnaire (July 17, 2020) at D-2, PR 11. Commerce emphasized that "[t]he CONNUM[5] specific COP and CV figures [provided] . . . *must reconcile to the actual costs reported in your company's normal cost accounting system and to the accounting records used by your company to prepare its financial statements*." *Id.* at D-10. To accomplish this goal, Commerce provided a sample reconciliation for Corinth to follow, directing Corinth to take "a 'top-down' approach (*e.g.*, financial statements to per-unit cost), starting with cost of sales from the financial state-

---

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

[4] Plaintiff CPW America Co. is Corinth's U.S. subsidiary and the U.S. importer of large diameter welded pipe who participated in the underlying proceeding. *See Summons*, ECF No. 1.

[5] [A "CONNUM" is a contraction of the term "control number," and is Commerce jargon for a unique product (defined in terms of a hierarchy of specified physical characteristics determined in each antidumping proceeding). All products whose product hierarchy characteristics are identical are deemed to be part of the same CONNUM and are regarded as "identical" merchandise for purposes of the price comparison.]

ments and proceeding step-by-step down through cost of manufacturing [("COM")] for the reporting period to the summation of the reported per-unit costs." *Id.* at D-12.

Corinth responded timely to the initial questionnaire, but Commerce found that the company's response regarding Section D contained deficiencies. *See* Corinth's Initial Sec. D Questionnaire Resp. (Sept. 21, 2020), PR 34–35; *Decision Memorandum* at 12 (noting that Corinth's reconciliation was not submitted as "one complete reconciliation" as requested, but rather, "two separate reconciliations for different parts of the POR," and determining that the reconciliation provided "did not reconcile the expenses per the audited income statement to its extended cost database," "relied on amounts that included the counting of product costs at both the semifinished stage and the finished product stage, resulting in 'double counted' costs from intermediate stages," and "did not show the total extended POR COM from the COP database").

Accordingly, Commerce issued its first supplemental questionnaire, directing Corinth, "*[a]s requested, [to] provide worksheets in the format shown below, reconciling the total POR COM to the total of the per-unit manufacturing costs submitted to Commerce*" and to "[i]dentify and quantify" various reconciling items. Dep't of Commerce Suppl. Sec. D Questionnaire (May 27, 2021) at 5, PR 55 (emphasis added); *see also Decision Memorandum* at 12–13. Corinth's first supplemental response again included two partial reconciliations instead of a single complete reconciliation, which still "failed to exclude the first quarter 2019 costs" and was also missing other reconciling items. *See* Corinth's First Suppl. Sec. D Questionnaire Resp. (June 22 & 25, 2021), PR 62–63; *Decision Memorandum* at 13.

Commerce then issued a second supplemental Section D questionnaire, warning Corinth that its "section D and the supplemental D responses lacked adequate descriptions of [its] response methodology." Dep't of Commerce Second Suppl. Sec. D Questionnaire ("Second Suppl. Quest.") (July 15, 2021) at 4, PR 65. Commerce further explained that "[the company's] extensive calculation worksheets and reconciliation are difficult to interpret because of the lack of adequate descriptions as to the methodology used in the normal records or in [its] reporting to Commerce." *Id.* Commerce asked Corinth to explain, *inter alia*, why Corinth found it necessary to include reported costs for months outside the POR and why the company was "unable to generate a single COM report from its system." *Id.* at 3–4. Commerce also requested explanations for certain steps, lines of data, and definitions contained in Corinth's submitted worksheets. *Id.* at 4.

In its second supplemental response, Corinth again insisted that it could not combine multiple years in its SAP (cost accounting system) reporting, and thus needed to submit separate reconciliations. Corinth's Second Suppl. Sec. D Questionnaire Resp. ("Corinth's Second Suppl. Quest. Resp.") (July 22, 2021) at 13, PR 69; *see also Decision Memorandum* at 13. Further, Corinth confirmed that it could not "generate a single COM report from its system because doing so would double or triple count costs when the product passed through multiple phases." Corinth's Second Suppl. Quest. Resp. at 2; *Decision Memorandum* at 14. Corinth stated, however, that "[t]o demonstrate that Commerce has complete cost data for this review which reconciles to [Corinth's] audited financial statements, [Corinth] prepared and submitted an annotated version of its cost reconciliation exhibit for 2019," ostensibly showing "a 'road map' for the worksheets and source data contained in the exhibit." Corinth's Second Suppl. Quest. Resp. at 14 ("On each sheet of the annotated version of [the exhibit, Corinth] inserted a brief explanation of what information the sheet presents, the source of the data, and how the sheet relates to the overall reconciliation.").

In the *Preliminary Results*, Commerce conducted the less than fair value ("LTFV") analysis by comparing the constructed export price of Corinth's U.S. sales to normal value based on CV. *PDM* at 7, 14 ("[19 U.S.C. § 1677b(e)] provides that CV shall be based [in part] on the sum of the cost of materials and fabrication for the imported merchandise . . . ."). Based on that analysis, Commerce "preliminarily determine[d] that sales of the subject merchandise [had] not been made at prices less than normal value," and that Corinth's estimated weighted-average dumping margin was 0.00 percent. *Id.* at 1; *Preliminary Results*, 86 Fed. Reg. at 43,172.

After issuing the *Preliminary Results* and reviewing Corinth's questionnaire responses in their entirety, Commerce attempted "to piece together a meaningful reconciliation" itself "[u]sing the voluminous worksheets, datafiles, and report downloads submitted by Corinth." *Decision Memorandum* at 14; *see* Cost of Production and Constructed Value Calculation Adjustments for Final Results (Feb. 2, 2022), PR 97 ("Final Results Calculation Memorandum"). From its analysis, Commerce identified four flaws in Corinth's cost responses: (1) that Corinth "failed to provide a proper cutoff of accounting periods and one complete POR cost reconciliation worksheet"; (2) that, even after the removal of amounts designated for exclusion, the total TOTCOM (total cost of manufacturing) costs "still include[d] 'double counted' costs in the COP/CV file reported by [Corinth] per their SAP [cost accounting] system"; (3) that, once the double counted costs were removed, "the amounts contained in the COP/CV file include costs and quantities that are not in accordance with [Corinth's] GAAP compliant audited financial statements"; and (4) that "significant differences in materials and conversion costs" existed between the audited financial statements and the SAP system report. Final Results Calculation Memorandum at 2–4.

Consequently, Commerce concluded that Corinth's cost data was unusable because the company "failed to provide a proper reconciliation of the extended cost file amounts to [cost of goods sold] per their audited income statement." *Decision Memorandum at 10*. Commerce further determined that Corinth had "not cooperate[d] to the best of its ability in responding to Commerce's requests for information concerning its cost of producing the merchandise under consideration [("MUC")]." *Id.* Accordingly, Commerce applied "total" adverse facts available ("AFA") and selected, as Corinth's dumping margin, "the highest dumping margin alleged in the petition," 41.04 percent. *Id.* at 7.

Now before the court, Plaintiffs challenge the *Final Results*. Specifically, Plaintiffs argue that Commerce unreasonably applied total AFA when determining Corinth's dumping margin because it did not permit an opportunity for comment by the parties on the use of AFA,[6] erroneously rejected Corinth's cost data, and ultimately selected a unreasonable rate. For the reasons that follow, the court sustains the *Final Results*.

II. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Substantial evidence has been described as "such relevant evidence as a reasonable mind

[6] Following the *Final Results*, Corinth filed comments purporting to identify ministerial errors in Commerce's Final Results Calculation Memorandum. *See* Corinth's Ministerial Error Comments (Feb. 9, 2022), PR 101. Commerce determined that Corinth's challenge raised substantive issues that were methodological rather than ministerial and declined to consider Corinth's arguments. *See* Dep't of Commerce Ministerial Error Memorandum (Mar. 3, 2022), PR 110. Before the court, Plaintiffs do not challenge Commerce's decision to reject the comments as methodological.

might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2023). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2022).

III. Discussion

A. 19 U.S.C. § 1677m(g)

During the course of an administrative review, but before making a final determination, Commerce "shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment." 19 U.S.C. § 1677m(g).

According to Plaintiffs, Commerce failed to satisfy the requirements of § 1677m(g) because it did not give Corinth an opportunity to comment on its changed dumping margin methodology—*i.e.*, its application of total AFA—in the *Final Results*. *See* Pls.' Br. 9 ("This provision requires Commerce to give parties an opportunity to comment on a post-preliminary change in methodology (*e.g.*, a different method of calculating the respondent's dumping margin) prior to its final determination/results.").

Importantly, Plaintiffs do not claim that Corinth lacked an opportunity to comment on *new information obtained* by Commerce; rather, they object to Commerce's failure to allow comment on its *interpretation* of information already on the record. *See*, *e.g.*, *id*. at 2 ("Because Commerce's *calculations and worksheets* were not disclosed to [Corinth] prior to the *Final Results*, [the company] had no opportunity to correct Commerce's fundamental misunderstandings or otherwise comment on the analysis and conclusions underlying Commerce's AFA findings.").

Based on their reading of § 1677m(g), Plaintiffs contend that Commerce's decision to apply total AFA in the *Final Results* was unreasonable, and that the matter should therefore be remanded so that Commerce can consider Corinth's arguments in the first instance. Pls. Br. 2–4, 8–13 ("[B]y failing to provide [Corinth] with the chance to comment on the change in methodology in the Final Results, Commerce deprived [Corinth] of the ability to demonstrate that the cost data were complete."). To support their position, Plaintiffs cite decisions where the court either discussed Commerce's obligations under § 1677m(g), or ordered remand to allow the parties to comment on new information obtained by Commerce, changes in Commerce's methodology, or other issues that were not raised at the administrative level. *See* Pls. Br. 9–10 (collecting cases). In particular, Plaintiffs rely on *Koyo Seiko Co. v. United States*, wherein the court noted that Commerce acted in accordance with § 1677m(g) when it provided the parties with an opportunity for comment on its introduction of a new methodology—albeit in the 15th administrative review—to determine which home market sales should be compared to sales made in the United States. 31 CIT 1512, 1513, 1520, 516 F. Supp. 2d 1323, 1328, 1333–34 (2007).

As a threshold matter, Plaintiffs misunderstand the requirements of § 1677m(g). While Plaintiffs assert that § 1677m(g) "requires Commerce to give parties an opportunity to comment on a post-preliminary change in methodology (*e.g.*, a different method of calculating the respondent's dumping margin) prior to its final determination/results," the provision's mandate is confined to *information obtained by Commerce* on which the parties have not yet had an opportunity to comment. The court has previously explained this distinction, observing that "[w]hen Commerce calculates margins 'it generates information; it *does not collect* information.'" *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT ___, ___, 163 F. Supp. 3d 1255, 1289 (2016) (citation omitted) ("[T]he statute requires Commerce to provide an opportunity to comment only on information it collects or obtains externally, not findings that it makes or generates internally. . . . Commerce's interpretation of factual information does not lead to the conclusion that its final determination is subject to comment."). Here, Commerce's review of the information already on the record led it to conclude that Corinth's margin should be calculated based on total AFA. *See Decision Memorandum* at 15 ("Although we relied on Corinth's cost data in the *Preliminary Results*, after further evaluating the information on the record of this proceeding and in light of parties' submissions, ... [w]e conclude that the necessary information for Corinth is not available on the record and that Corinth failed to provide such information in the form or manner requested and, thus, significantly impeded the proceeding.”).

Likewise, Plaintiffs’ reliance on what they view as the applicable caselaw is misplaced. The decisions cited by Plaintiffs either involve distinguishable circumstances warranting compliance with § 1677m(g), or do not invoke § 1677m(g) at all. *See Home Prods. Int’l, Inc. v. United States*, 32 CIT 337, 339, 556 F. Supp. 2d 1338, 1340 (2008) (granting Commerce’s voluntary remand request where interested parties had not had opportunity to comment on new *information* on record); *Bristol Metals, L.P. v. United States*, Court No. 09–00127, Order Dated Oct. 23, 2009, ECF No. 39 (granting Commerce’s voluntary remand request without discussing § 1677m(g)); *Nan Ya Plastics Corp. v. United States*, 37 CIT 188, 194, 905 F. Supp. 2d 1348, 1354 (2013) (remanding because court could not sustain Commerce’s determination based only on counsel’s *post hoc* rationalizations); *CC Metals & Alloys, LLC v. United States*, 40 CIT ___, ___, 145 F. Supp. 3d 1299, 1308 (2016) (same); *see also* Pls.’ Br. 9–10 (citing all the foregoing).

The case on which Plaintiffs primarily rely, *Koyo Seiko*, is likewise unavailing. *See* 31 CIT at 1520, 516 F. Supp. 2d at 1333–34; Pls.’ Br. 9. *Koyo Seiko* relied, as do Plaintiffs, on *Shikoku Chemicals Corp. v. United States* for the proposition that “[p]rinciples of fairness prevent Commerce from changing its methodology at this late stage [*i.e.*, the final results].” 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992); *see Koyo Seiko*, 31 CIT at 1520, 516 F. Supp. 2d at 1333; Pls.’ Br. 9.

The Court of Appeals for the Federal Circuit has recognized, however, that *Shikoku* turned on a showing of detrimental reliance. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381 (Fed. Cir. 2008). Beyond citing to *Koyo Seiko* and *Shikoku*, Plaintiffs’ argument based on detrimental reliance is lacking. *See generally* Pls.’ Br. (not discussing detrimental reliance); Pls.’ Reply 9 (“[Corinth] relied on the methodology verified and followed by Commerce in the initial investigation when reconciling its reported costs. . . . [Corinth] cannot be faulted for not clarifying a record that it believed was clear based on the methods that Commerce had previously accepted.”). Plaintiffs’ argument ignores that “each administrative review is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record.” *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016) (citation omitted). As the court has discussed, Commerce was entitled to generate calculations and conduct its analysis based on the information on the record before it. This remains true even if Commerce reached different conclusions than it did in the original investigation, or, as here, in the *Preliminary Results*. Further, Plaintiffs' assertion that Corinth reasonably believed that the record *in this review* was clear is undermined by the fact that Commerce indicated, by means of its supplemental questionnaires, that Corinth's cost responses needed clarification. *See, e.g.*, Second Suppl. Quest. at 4 ("[Corinth's] extensive calculation worksheets and reconciliation are difficult to interpret because of the lack of adequate descriptions as to the methodology used in the normal records or in [its] reporting to Commerce."). Thus, Plaintiffs "cannot properly analogize [their] situation to that in *Shikoku*, where '[t]he record contain[ed] evidence that plaintiffs adjusted their prices in accordance with methodology consistently applied by Commerce in an attempt to comply with United States antidumping law.'" *SKF USA*, 537 F.3d at 1381 (quoting *Shikoku*, 16 CIT at 386, 795 F. Supp. at 420).

In sum, Plaintiffs attempt to broaden the reach of § 1677m(g) to obligations that the statute was not intended to create.[7] Relatedly, Plaintiffs have failed to point to *any* statutory requirement outside of § 1677m(g) requiring Commerce to issue a "post-preliminary" decision other than the final results. Pls.' Br. 11–13 ("Commerce could have resolved any concerns surrounding the reconciliation of [Corinth's] reported data by issuing a post-preliminary decision, which Commerce often does when important issues remain undecided in its preliminary decision."). The court will not impose requirements on Commerce's administrative process that are not found in the statute, especially where it is well established that "Commerce may change its stance on issues decided preliminarily in its final determinations, so long as it explains the reasoning for the change and 'its decision is supported by substantial evidence and in accordance with law.'" *Gov't of Argentina v. United States*, 45 CIT ___, ___, 542 F. Supp. 3d 1380, 1391 (2021) (quoting *Hyundai Steel Co. v. United States*, 42 CIT ___, ___, 319 F. Supp. 3d 1327, 1343 (2018)); *see also*, *e.g.*, *JBF RAK LLC v. United States*, 38 CIT ___, ___, 991 F. Supp. 2d 1343, 1352 (2014) (holding, in context of post-preliminary determinations, that "Commerce enjoys considerable discretion in the conduct of its administrative proceedings").

[7] Indeed, Plaintiffs' argument urging the court to remand this matter "so that the Court does not have to do the agency's work in attempting to discern how Commerce may respond to the deficiencies raised by [Corinth] that must be raised for the first time here" might have been better made under § 1677m(d). Section 1677m(d) requires Commerce to "promptly inform" a person who has made a deficient submission "of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity remedy or explain the deficiency." Commerce proactively explained how its determination complied with that subsection. *Decision Memorandum* at 4.

Accordingly, the court rejects Plaintiffs' argument that Commerce unreasonably changed its methodology in the *Final Results* and turns to the issue of whether Commerce's decision to rely on total AFA in the *Final Results* was reasonable.

B. Application of Total AFA

Commerce may rely on "facts otherwise available" if, among other things, an interested party "withholds information" that Commerce has requested, fails "to provide such information . . . in the form and manner requested," or "significantly impedes a proceeding." 19 U.S.C. § 1677e(a). Additionally, if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1).

Here, Commerce determined that the use of facts otherwise available was warranted because Corinth failed to submit "a complete and usable cost reconciliation" in the form and manner requested, thus withholding "information necessary to demonstrate that all costs were either appropriately included or excluded from the reported cost database." *Decision Memorandum* at 4. For Commerce, "[b]y failing to correct deficiencies in its cost reconciliation, Corinth . . . significantly impeded the proceeding because reconciling items were unidentified and unsupported by the record." *Id.*

As for drawing an adverse inference in selecting from among the facts otherwise available, Commerce concluded that Corinth failed to cooperate because, "even after multiple requests, Corinth did not submit a complete cost reconciliation." *Id.* at 6. Corinth's failure to follow Commerce's requested reconciliation format, combined with the fact that the company "did not, for example, alert Commerce that it would have any difficulty" reconciling "its audited financial statement cost of manufacturing . . . to the reported cost database," led Commerce to find that "Corinth did not act to the best of its ability to comply with a request for information." *Id.*

Finally, Commerce used total rather than partial AFA because the absence of a complete and useable cost reconciliation rendered "the information that Corinth provided . . . too incomplete to serve as a reliable basis for reaching a determination," and cited the court's recognition that "cost information is a vital part of [Commerce's] dumping analysis." *Id.* at 5 (citing *Mukand, Ltd. v. United States*, 37 CIT 443, 454 (2013) (not reported in Fed. Supp.)) ("Additionally, Commerce has previously found that failure to provide a cost reconciliation warrants use of total AFA."). Commerce explained that, "[w]ithout the ability to reasonably establish that all costs were properly included or excluded, the entire cost response is called into question and leaves Commerce without the ability to use the per-unit costs in the cost database, as no adjustment to remedy the deficiency can be reasonably identified." *Decision Memorandum* at 5.

1. Facts Available

As an initial matter, Plaintiffs concede that Corinth's Section D responses—specifically, its cost reconciliation—were not submitted in the form and manner Commerce requested. Plaintiffs admit that Corinth submitted data for months outside the POR, and added a step to Commerce's reconciliation structure by adjusting for double-counted costs contained in its cost accounting system's data. Pls.' Br. 18 ("[Corinth] *did not isolate those costs* associated with the months prior to the POR as a separate step because [it] did not produce MUC in those three months. . . . The only other step in which [Corinth] *provided an alternate to Commerce's preferred reconciliation structure* was the last step where [Corinth] added the cost of consumption to the total costs reported in the financial accounting and then deducted the cost of production for merchandise not under consideration." (emphasis added)). While acknowledging these deviations from Commerce's instructions, Plaintiffs argue that Commerce should have accepted Corinth's data because it was "usable." *Id.*

Despite its belief that these changes were necessary to properly reconcile its costs, Corinth did not "notify Commerce that it was unable to submit [its cost] information in the form and manner requested in Commerce's supplemental questionnaires." *Decision Memorandum* at 4. Rather, according to Commerce, Corinth preferred "to provide a voluminous dump of different reports, worksheets, and tables." *Id*. Plaintiffs now contend that Corinth's cost reconciliation—deviations included—was "submitted . . . in the 'form and manner' requested by Commerce." Pls.' Br. 17. For Commerce, however, while Corinth's "data files (with tens of thousands of lines of data) and worksheets (showing significant amounts of costs repeatedly being swapped in and out of calculations) . . . [were] voluminous and complex," they were not "responsive to Commerce's specific requests," nor did "the files provide a clear reconciliation of the reported data." *Decision Memorandum* at 11 ("Merely providing a bulk of information does not constitute a response to inquiries requesting that a party clearly explain how its submitted cost data reconcile to their audited financial statement COM.").

When discussing Corinth's failure to respond in the "form and manner requested," Commerce explained its rationale for requesting a reliable reconciliation of respondents' cost data:

> Commerce must . . . ensure that the aggregate amount of the reported costs (*i.e.*, summation of the unit costs extended by the corresponding production quantities) captures all costs incurred by the respondent in producing the MUC during the period under consideration. A major point of the reconciliation is to establish that the reported unit costs and production quantities square with the financial accounting system, the cost accounting system, and the production records, as required by the statute.

Id.

Commerce noted that it could not reconstruct Corinth's submitted reconciliation, finding: (1) double-counted costs, (2) mismatches between cost categories that it believed should reconcile, and (3) inclusion of months of data outside the POR. Specifically,

> Commerce undertook a long and exhaustive analysis of [Corinth's] cost reconciliation exhibits. We analyzed the cost reconciliations given by [Corinth] to determine whether Commerce could reasonably rely on [Corinth's] cost information on the record. . . . Our analysis started with [Corinth's] 2019 audited financial statement COM amount and then grossed the amount up by adding the "double counting" reconciliation line items to reconcile to the total costs per SAP System (i.e., 2019 SAP cost report). Then we removed each identifiable overstated cost in order to get to a total reportable costs figure. Our analysis not only demonstrates that the total COM provided by [Corinth] does not reconcile to the cost of reportable merchandise under consideration (MUC) but brings to light certain other issues that might have been addressed if [Corinth] had been responsive to our multiple requests for a proper reconciliation.

Final Results Calculation Memorandum at 2.

Plaintiffs devote a significant portion of their briefing and their argument to challenging the findings Commerce reached in its Final Results Calculation Memorandum and identifying the errors Commerce made in reconstructing Corinth's cost reconciliation. *See* Pls.' Br. 18–36; Oral Argument at 01:00–25:20, ECF No. 51 (Apr. 19, 2023). According to Plaintiffs, Commerce mistakenly identified costs as "double-counted" when all double-counted costs were already removed; Commerce believed at key points of its analysis that it was comparing data from Corinth's cost *and* financial accounting systems, when it was in fact relying *only* on data from the cost accounting system; Commerce also failed to recognize when it was comparing data derived from different product pools; and Commerce assumed Corinth's submission of cost accounting system reports from months outside of the POR meant that Corinth had submitted data regarding the MUC for months outside of the POR. Pls.' Br. 18–36.

In Plaintiffs' view, had Commerce complied with Corinth's instructions as to how to read its submissions, a full reconciliation of the company's costs would have been possible. *Id.* at 17 ("[Corinth] presented a detailed step-by-step summary of its cost reconciliation with screenshots and narrative explanations in its second supplemental section D questionnaire response."); *see also id.* at 22 ("In Exhibit 1, [Corinth] demonstrates step-by-step using Commerce's own reconciliation from the Calculation Memorandum that [the company's] reported costs do reconcile with its SAP cost system and that the final step undertaken by Commerce in its attempted cost reconciliation was incorrect and resulted in Commerce's erroneous determination that [Corinth's] costs did not reconcile."). Plaintiffs also contend that Corinth could have corrected any deficiencies if Commerce had provided adequate notice thereof: "To the extent that [Corinth's] explanation [of its cost data] needed further clarification, [Corinth] could and would have resolved outstanding issues if it had notice that this explanation was not sufficient and not understood." *Id.* at 24.

Plaintiffs' focus on Commerce's alleged inability to understand and replicate Corinth's calculations is misplaced. "[T]he burden of creating an adequate record lies with interested parties and not with Commerce." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Further, "[t]he mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). Thus, Plaintiffs bear the burden of showing that Commerce acted *unreasonably* in rejecting Corinth's cost data.

Plaintiffs have failed to make such a demonstration. Their attempts to clarify the record by detailing Commerce's alleged errors only serve to support the finding that Corinth's submissions were inadequate. For example, Plaintiffs point to Commerce's allegedly erroneous "additional deduction from the fully reconciled costs" intended to account for double-counting, while later acknowledging—as the court has noted—that Corinth deviated from Commerce's "preferred reconciliation structure" to "eliminate double-counted costs recorded in SAP" itself. Pls.' Br. 5, 18. Likewise, Plaintiffs claim that Corinth's failure "to exclude costs from the first quarter of 2019 that fell outside the POR" did not justify the application of total AFA, placing the onus on Commerce to interpret the over-inclusive data and conclude that "no production of MUC took place" during those months. *See id.* at 5, 29–31. These arguments, and Plaintiffs' additional descriptions of Corinth's preferred reconciliation methods, at best, provide an *alternative* means of analyzing the submitted data—an alternative which, by Plaintiffs' own admission, was not wholly consistent with Commerce's instructions. *See id.* at 18. That Plaintiffs may have identified "another possible reasonable choice" for the form and manner of its submissions falls short of the mark, especially where, as here, Plaintiffs' preferred means of reconciliation is confusing and requires Commerce to sift through unrequested and irrelevant information. *See, e.g.*, *Uttam Galva Steels Ltd. v. United States*, 44 CIT ___, ___, 476 F. Supp. 3d 1387, 1393 (2020) (quoting *Tianjin Wanhua Co. v. United States*, 40 CIT ___, ___, 179 F. Supp. 3d 1062, 1071 (2016)). "[W]here two different, inconsistent conclusions may reasonably be drawn from the evidence in record, an agency's decision to favor one conclusion over the other is the epitome of a decision that must be sustained upon review." *Pokarna Engineered Stone Ltd. v. United States*, 56 F.4th 1345, 1349 (Fed. Cir. 2023) (quoting *In re Jolley*, 308 F.3d 1317, 1329 (Fed. Cir. 2002)).

Therefore, based on its description of its own attempts to reconcile Corinth's information, and its explanation as to why a cost reconciliation was a necessary component underpinning its LTFV analysis as a whole, Commerce's decision to rely on facts available when determining Corinth's dumping margin was reasonable. *See, e.g.*, *Macao Com. & Indus. Spring Mattress Mfr. v. United States*, 44 CIT ___, ___, 437 F. Supp. 3d 1324, 1332 (2020) (accepting cost reconciliation requirement where Commerce "fully described why the cost reconciliations it sought were vital for its . . . determinations and why [Commerce] could not accept Plaintiff's claimed inability to comply with Commerce's request for cost reconciliations").

2. Adverse Inferences

To justify the use of adverse inferences, Commerce must show that "a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations," and that the particular respondent has failed "to put forth its maximum efforts to investigate and obtain the requested information from its records." *Nippon Steel*, 337 F.3d at 1382–83 (citation omitted). Intent is irrelevant when determining whether a respondent has cooperated to the best of its ability. *Id.* at 1383 ("The statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."); *see also*, *e.g.*, *Ferrostaal Metals Gmbh v. United States*, 45 CIT ___, ___, 518 F. Supp. 3d 1357, 1375–76 (2021) (rejecting plaintiffs' argument that "timely, but noncompliant" responses demonstrate cooperation).

In the *Final Results*, Commerce concluded that, despite "multiple chances"—*i.e.*, supplemental questionnaires—"Corinth refused to provide the reconciliation in the format requested." *Decision Memorandum* at 7 ("In addition, based on our analysis of the record information, there is a large unreconciled difference between Corinth's audited financial statement COM and its reported costs."). As one example of Corinth's lack of cooperation, Commerce found that

> While Corinth may not have been able to generate a cost report for a period that spans two fiscal years, Corinth admits that it can extract an SAP costing report for a range of months in the same year. Thus, Corinth *could have generated data for the last nine months of 2019 as it did for the first four months of 2020*. . . . This exercise would have removed the costs incurred during the first three months of the POR.

Id. at 13–14 (emphasis added).

Corinth has failed to explain why it could not cooperate by generating cost reports for the ranges of months that Commerce requested. It is telling that, as proof of Corinth's cooperation, Plaintiffs point to the company's reliance on the approach it followed at the investigation stage, not on Commerce's instructions in the current review. *See* Pls.' Br. 38 ("[Corinth] followed the same general approach from the original investigation in responding to Commerce's cost questionnaires in the first administrative review. [Corinth's] cost responses were fully verified during an on-site verification in the original investigation and [it] believed it was acting to the best of its ability by following the same approach from the original investigation." (emphasis added)); *id.* at 6 n.3 ("The original investigation cost verification report is on the record of this administrative review in [Corinth's] Rebuttal Factual Information Submission."). Plaintiffs' arguments again fail to recognize that Commerce is entitled to reach different findings during separate segments of its administrative proceedings.

See, e.g., *Jiaxing*, 822 F.3d at 1299. Here, Commerce was not required to find that Corinth cooperated in the administrative review based on Commerce's findings about the company's information at the investigation stage.

Plaintiffs have failed to persuade the court that Commerce's decision to apply total AFA was unreasonable. In the *Decision Memorandum*, Commerce both explained the crucial nature of the information it deemed missing and incomplete—the cost reconciliation—and described Corinth's multiple instances of uncooperative behavior. *Decision Memorandum* at 6 ("Because Corinth failed to submit a complete cost reconciliation, we find that Corinth did not provide Commerce with full and complete answers to Commerce's inquiries in this proceeding. Furthermore, because Corinth did not provide the reconciliation in the format requested and, thus, did not reconcile its audited financial statement cost of manufacturing . . . to the reported cost database, and Corinth did not, for example, alert Commerce that it would have any difficulty doing so, we find that Corinth did not act to the best of its ability to comply with a request for information."). It was "reasonable for Commerce to expect . . . more forthcoming responses," and to use total AFA when it did not receive such responses. *Nippon Steel*, 337 F.3d at 1383. The court therefore sustains Commerce's use of total AFA based on Corinth's failure to submit, in the form and manner requested, the information necessary to reconcile its costs.

C. Dumping Margin

Plaintiffs lastly contend that, even if the court sustains Commerce's determination to apply AFA, the AFA rate selected by Commerce was unreasonable. Plaintiffs maintain that the 41.04 percent rate—the highest alleged in the Petition—was "excessive, punitive, and unjustified." Pls.' Br. 40 ("In selecting an AFA rate, Commerce must not 'impose punitive, aberrational, or uncorroborated margins' and an AFA rate should 'be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" (quoting *BMW of N. Am. LLC*, 926 F.3d 1291, 1297, 1300 (Fed. Cir. 2019))).

Under 19 U.S.C. § 1677e(b)(2), Commerce is empowered to rely on various sources of information for adverse inferences, including the petition. When Commerce relies on information derived from the petition, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.* § 1677e(c)(1). "Corroborate means that the Secretary will examine whether the secondary Information to be used has probative value."

19 C.F.R. § 351.308(d) (2022). The corroboration requirement captures Congress's intent for an AFA "rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); *see also Hubscher Ribbon Corp. v. United States*, 38 CIT ___, ___, 979 F. Supp. 2d 1360, 1366 (2014) ("[Corroboration is] a substantial evidence question in which the court reviews the reasonableness of Commerce's actions against a known legal standard given the facts and circumstances of the administrative record."). "An AFA rate is punitive if it is not 'based on facts' and 'has been discredited by the agency's own investigation.'" *Qingdao Taifa Grp. v. United States*, 35 CIT 820, 826, 780 F. Supp. 2d 1342, 1349 (2011) (quoting *De Cecco*, 216 F.3d at 1033).

Plaintiffs' arguments here fail to demonstrate that the selected AFA rate was unreasonable. Relying only on broad assertions that the selected rate was "drastically overstated, punitive and unjustified," as well as on their prior arguments opposing Commerce's application of total AFA, Plaintiffs fail to persuasively explain how Commerce's selection of the 41.04 percent rate was unsupported by the record. *See* Pls.' Br. 41 (arguing that Corinth was cooperative respondent, and citing timeliness of Corinth's responses, its adherence to "same approach from the original investigation," and Commerce's purported failure to issue additional questionnaires between the *Preliminary Results* and the *Final Results*, as proof that "Commerce erred" by selecting petition rate). Without more, Plaintiffs have failed to develop an argument as to what, if any, "mitigating circumstances" might call into question Commerce's choice of rate. *See* Pls.' Br. 41; *cf. BMW*, 926 F.3d at 1302 (noting "*unique factual circumstances* surrounding BMW's failure to return the quantity-and-value questionnaire" that warranted further explanation by Commerce to justify a change in rate from 1.43 percent to 126.44 percent (emphasis added)).

Plaintiffs suggest that Commerce should have adopted an alternative rate, namely Corinth's dumping margin of 10.26 percent from the original investigation, which "required no secondary confirmation but instead was a calculated rate." Pls.' Br. 42. For Plaintiffs, this rate is "sufficiently adverse given that [Corinth's] dumping margin in this administrative review would have been 0.00 percent had Commerce used [Corinth's] actual reported data." *Id*. Corinth is not entitled, however, to a rate that it *would have* received if it had fully cooperated in the review. 19 U.S.C. § 1677b(d)(3)(A). Nor is Plaintiff entitled to a calculated rate that does not require secondary confirmation. *See*, *e.g.*, *Hubscher Ribbon*, 38 CIT at ___, 979 F. Supp. 2d at 1369 (acknowledging that use of petition rates is authorized by statute).

Further, contrary to Plaintiffs' assertion that Commerce failed to link the petition rate to Corinth itself, Commerce specifically found that the 41.04 percent rate was "within the range of transaction-specific margins calculated for Corinth in the investigation, and, thus, the 41.04 percent rate is both reliable and relevant." *Decision Memorandum* at 8. While Commerce's explanation relies on a single link between the rate and the respondent, this can come as no surprise where there is only one respondent—and where that respondent has been uncooperative. "Under such circumstances, Commerce's corroboration may be less than ideal because the uncooperative acts of the respondent [have] deprived Commerce of the very information that it needs to link an AFA rate to [respondent's] commercial reality." *Hubscher Ribbon*, 38 CIT at ___, 979 F. Supp. 2d at 1369 (quoting *Qingdao Taifa*, 35 CIT at 826, 780 F. Supp. 2d at 1349). Accordingly, the court sustains as reasonable Commerce's selection of the petition rate as the AFA rate.

IV. Conclusion

For the foregoing reasons, the court concludes that Commerce reasonably applied total AFA in determining Corinth's antidumping duty margin in the *Final Results*. Therefore, the court sustains the *Final Results*. Judgment will enter accordingly.

Dated: April 28, 2023
New York, New York

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

Slip Op. 23–66

CARBON ACTIVATED TIANJIN CO., LTD., et al., Plaintiffs, v. UNITED STATES, Defendant, and CALGON CARBON CORPORATION AND CABOT NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Court No. 21–00131

[Sustaining the U.S. Department of Commerce's remand results in the twelfth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China.]

Dated: April 28, 2023

Francis J. Sailer, *Dharmendra N. Choudhary*, and *Jordan C. Kahn*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, for Plaintiffs.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

John M. Herrmann, *R. Alan Luberda*, *Melissa M. Brewer*, and *Julia A. Kuelzow*, Kelley Drye & Warren LLP, of Washington DC, for Defendant Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Ct. Remand ("Remand Results"), ECF No. 50–1. Plaintiffs[1] (referred to in the administrative proceeding as "Respondents") commenced this case challenging aspects of Commerce's final results in the twelfth administrative review ("AR12") of the antidumping duty order on certain activated carbon from the People's Republic of China ("China") for the period of review April 1, 2018, through March 31, 2019. *See Certain Activated Carbon From the People's Republic of China*, 86 Fed. Reg. 10,539 (Dep't Commerce Feb. 22, 2021) (final results of antidumping duty admin. review, final determination of no shipments, and final rescission of admin. review, in part; 2018-2019) ("*Final Results*"), ECF No. 32–3, and accompanying Issues and Decision Mem., A-570–904 (Feb. 12, 2021) ("I&D Mem."), ECF No. 32–2.[2] Plaintiffs challenged Commerce's selection of surrogate values for bituminous coal, anthracite coal, hydrochloric acid, carbonized materials, caustic soda, and steam, along with the selection of surrogate financial ratios. *See Carbon Activated Tianjin Co. v. United States* ("*Carbon Activated I*"), 46 CIT __, __, 586 F. Supp. 3d 1360, 1364 (2022).[3]

In *Carbon Activated I*, the court sustained in part and remanded in part the *Final Results*. *Id.* at 1381–82. The court remanded the *Final Results* to Commerce for reconsideration or further explanation of its

[1] The Plaintiffs are Carbon Activated Tianjin Co., Ltd., Carbon Activated Corporation, Datong Juqiang Activated Carbon Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Datong Municipal Yunguang Activated Carbon Co., Ltd., and Beijing Pacific Activated Carbon Products Co., Ltd.

[2] The administrative record filed in connection with the Remand Results is divided into a Public Remand Record ("PRR"), ECF No. 51–2, and a Confidential Remand Record ("CRR"), ECF No. 51–3. Parties filed joint appendices containing record documents cited in their briefs. *See* Public Remand J.A., ECF No. 58; Confid. Remand J.A. ("CRJA"), ECF No. 57. Citations are to the CRJA unless stated otherwise.

[3] The court's opinion in *Carbon Activated I* presents background information on this case, familiarity with which is presumed.

selection of the surrogate value for carbonized materials and its selection of financial statements for determining surrogate financial ratios. *Id.* at 1382. On November 17, 2022, Commerce filed its Remand Results. Therein, Commerce further explained its selection of a surrogate value for carbonized materials and selection of surrogate financial statements. *See* Remand Results at 3–12.

Plaintiffs filed comments opposing Commerce's selection of Malaysian import data under Harmonized System ("HS") subheading 4402.90.1000 as the surrogate value for carbonized materials and Commerce's calculation of surrogate financial ratios using the 2018 financial statements of the Malaysian company, Bravo Green Sdn. Bhd. ("Bravo Green"). *See* Pls.' Cmts. in Opp'n to Remand Redetermination ("Pls.' Opp'n Cmts."), ECF No. 54. Defendant United States ("the Government") and Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc. (together, "Calgon") filed comments in support of the Remand Results. *See* Def.'s Reply in Supp. of the Dep't of Commerce's Remand Redetermination ("Def.'s Supp. Cmts."), ECF No. 56; Def.-Ints.' Cmts. in Supp. of Remand Redetermination ("Calgon's Supp. Cmts."), ECF No. 55.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018)[4] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Legal Framework

An antidumping duty is "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise," 19 U.S.C. § 1673. As discussed in *Carbon Activated I*, 586 F. Supp. 3d at 1365–67, when an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production[5] in a surrogate country, *see* 19 U.S.C. § 1677b(c)(1), and those values are referred to as "surrogate values." In selecting surrogate values, Commerce must, "to the extent possible," use "the best available information" from a market economy country or countries that are economically comparable to

[4] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise specified.

[5] The factors of production include but are not limited to: "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

the nonmarket economy country and are "significant producers of comparable merchandise." *Id.* § 1677b(c)(1), (4).

Commerce generally values all factors of production in a single surrogate country, referred to as the "primary surrogate country." *See* 19 C.F.R. § 351.408(c)(2) (excepting labor); *Jiaxing Brother Fastener Co. v. United States* ("*Jiaxing II*"), 822 F.3d 1289, 1294 & n.3 (Fed. Cir. 2016). Commerce, in selecting surrogate values, "generally selects, to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Jiaxing II*, 822 F.3d at 1293 (citing *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)); *see also* 19 C.F.R. § 351.408(c)(1), (4). Commerce will "only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable." *Jiaxing Brother Fastener Co. v. United States*, 38 CIT 1404, 1412, 11 F. Supp. 3d 1326, 1332–33 (2014) (citations omitted), *aff'd*, *Jiaxing II*, 822 F.3d 1289.

II. Surrogate Value for Carbonized Materials

a. Background

For the *Final Results*, Commerce valued coal-based carbonized material using Malaysian import data under HS 4402.90.1000, which covers "coconut shell charcoal." I&D Mem. at 43. Commerce selected coconut shell charcoal after finding that Respondents' proposed surrogate, HS 4402.90, which covers "wood charcoal (including shell or nut charcoal), excluding that of bamboo," was not an appropriate surrogate. *Id.* Commerce explained that HS 4402.90, a basket category inclusive of both coconut shell charcoal and HS 4402.90.9000, covering "other wood charcoal," was not the best information available on the record to value carbonized material because "there [was] no evidence on the record indicating that [Respondents] produced subject merchandise from wood, nuts, or any other non-coal charcoal." *Id.*

In *Carbon Activated I*, the court remanded Commerce's selection because the record lacked evidence that Respondents used coconut shell charcoal in the manufacture of the subject merchandise and, thus, the agency's selection between two imperfect datasets was unsupported by substantial evidence. 586 F. Supp. 3d at 1379.

In the draft redetermination, Commerce valued carbonized materials using Malaysian imports under HS 4402.90, finding that the record contained no evidence that Respondents purchased or used coconut shell charcoal to produce activated carbon exported to the United States, and that the record did not demonstrate whether coconut shell charcoal or wood charcoal was more similar to coal-based carbonized material. Draft Results of Redetermination Pursuant to Ct. Remand (Sept. 29, 2022) at 3–5, PRR 1, CRJA Tab 1.

Commerce reversed course in the Remand Results, selecting HS 4402.90.1000 as the best available information to value coal-based carbonized material, as it had for the *Final Results*. Remand Results at 3, 14. Commerce explained that, in this administrative review, there was no evidence that wood-based carbonized materials had been used to produce activated carbon; however, historically, coconut shell charcoal had been used to manufacture activated carbon. *Id.* at 5. Commerce further explained that coconut shell charcoal shares similarities with coal-based carbonized material. *Id.* Commerce also noted that Respondents produced only steam activated carbon whereas wood charcoal is usually used to produce activated carbon through chemical activation. *Id.* at 6–7.

b. Parties' Contentions

Plaintiffs contend that Commerce's selection of coconut shell charcoal to value carbonized material is unsupported by substantial evidence. Pls.' Opp'n Cmts. at 1–5. Plaintiffs argue that the record does not support Commerce's finding that coconut shell charcoal has been used to produce activated carbon. *See id.* at 2–3. Plaintiffs argue there was no evidence demonstrating that coconut shell charcoal was more comparable to coal-based carbonized material than wood charcoal, *id.* at 3, and that precedent compels Commerce to select HS 4402.90 as the surrogate value, *id.* at 4–5. Plaintiffs also contend that wood charcoal can be used to manufacture activated carbon through steam activation. *Id.* at 5.[6]

Defendant contends that substantial evidence supports Commerce's selection of coconut shell charcoal as the surrogate value for carbonized material. *See* Def.'s Supp. Cmts. at 3–7. Defendant argues that because Respondents only reported the production of steam activated carbon, and because chemically activated carbon is generally made using wood, wood-based carbonized material was not the best information to use as a surrogate value. *Id.* at 4–6.

[6] Plaintiffs also contend that pricing information on the record indicates that using coconut shell charcoal alone to value carbonized material would be "unrepresentative" and "yield[] a distorted [surrogate value]." Pls.' Opp'n Cmts. at 4. In the Remand Results, Commerce explained that "it is unclear how this information supports the use of a wood-based [surrogate value] without further evidence or explanation." Remand Results at 15. Even if the price of coal-based activated carbon overlaps with coconut shell-based activated carbon and wood-based activated carbon, it does not detract from Commerce's selection of coconut shell charcoal based on the activation process Respondents use to produce the subject merchandise and Commerce's historical practice of using coconut shell charcoal as a surrogate value.

Calgon contends that the underlying record and Commerce's findings in prior reviews support Commerce's determination that coconut shell charcoal shares many similarities with coal-based carbonized material and is therefore an appropriate surrogate value. *See* Calgon's Supp. Cmts. at 2–7.

c. Analysis

The court finds that Commerce's selection of Malaysian data for HS 4402.90.1000 to value carbonized material is supported by substantial evidence. While a reasonable case might also be made for the use of Malaysian HS 4402.90, the basket category that includes other wood charcoal, the court is mindful of the standard of review with respect to challenges to Commerce's selection of surrogate values in cases involving nonmarket economy countries. In particular, Commerce has significant discretion to choose "the best available information" to value the factors of production, so long as it does so in conformity with the substantial evidence standard. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011). Commerce must articulate "a rational and reasonable relationship" between the surrogate value and "the factor of production it represents." *Globe Metallurgical, Inc. v. United States*, 28 CIT 1608, 1622, 350 F. Supp. 2d 1148, 1160 (2004) (citing *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998)). Consistent with the court's standard of review and the discretionary, fact-specific nature of Commerce's determination, the role of the court is not to determine "whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information." *Jiaxing II*, 822 F.3d at 1300–01.

On remand, Commerce selected between two alternative data points to value carbonized material—Malaysian HS 4402.90, the basket category that includes other wood charcoal, and Malaysian HS 4402.90.1000, a more precise category within the basket that is limited to coconut shell charcoal. Remand Results at 2–3. In evaluating those two categories, Commerce explained that chemically activated carbon is generally made using wood-based carbonized materials. *See id*. at 7. While this does not mean that steam activated carbon, the subject merchandise produced by Plaintiffs, is not or cannot be produced with wood-based charcoal, Commerce's analysis did not stop there.

In choosing between the two possible surrogate values, Commerce considered the history of this antidumping duty order. *Id*. at 5. Specifically, Commerce explained that there is "a long, demonstrable history in this proceeding of using coconut-shell carbmat[7] in the production of the subject merchandise, unlike wood carbmat, which has never been used to produce the subject merchandise." *Id.* (footnote with citations omitted).[8] While it is true that each review is separate and based on the record developed before the agency in that review, that legal truism does not prevent Commerce from acting in accord with prior reviews when the record of the present review does not contain new or additional facts warranting a departure from the agency's prior practice. To that end, Commerce concluded that Respondents "have not provided any new evidence in this review to warrant a departure from Commerce's practice of selecting coconut-shell charcoal to value [Respondents'] carbmat in this proceeding," *id.* at 7 (citing *Qingdao*, 766 F.3d at 1386), and Plaintiffs do not identify any such new evidence to the court.

Accordingly, Commerce has supported its surrogate value selection with substantial evidence such that a reasonable mind could find that the agency selected the best information available.

III. Surrogate Financial Statements

a. Background

For the *Final Results*, Commerce selected the 2018 financial statements of Bravo Green, a Malaysian producer of granulated carbon and steam activated carbon, to calculate the surrogate financial ratios. I&D Mem. at 31–33. In addition to the 2018 Bravo Green financial statements, the record contained seven other sets of financial statements, including the 2018 financial statements of Joint Stock Company Sorbent ("JSC Sorbent"), "a Russian producer of respiratory personal protective equipment, activated carbons, coagulants, and water treatment systems," and S.C. Romcarbon S.A. ("Romcarbon"), "a Romanian producer of filters, polyethylene packaging, charcoal and other chemical products." *Id.* at 32–33.

The court found Commerce's selection of Bravo Green's 2018 financial statements to be "conclusory" because the agency failed to explain why the selected financial statements were preferable to those of JSC

[7] ["Carbmat" is shorthand for "carbonized material."]

[8] In light of the different possible production processes, this finding is not inconsistent with Commerce's prior recognition that wood-based charcoal may be used to produce activated carbon. *See* Issues and Decision Mem. for Certain Activated Carbon from China, A-570–904, (Nov. 20, 2013), at 36 ("Petitioners correctly state that activated carbon may be manufactured from wood or nut charcoal in addition to coal."), https://access.trade.gov/Resources/frn/summary/prc/2013–28359–1.pdf (last visited April 28, 2023); *see also Jacobi Carbons AB v. United States*, 619 Fed. App'x. 992, 999 (Fed. Cir. 2015) ("Wood charcoal is also a type of charcoal and can also be used to create [activated carbon].").

Sorbent and Romcarbon, despite the agency's acknowledgement that the 2018 Bravo Green financial statements were "not as detailed as [the agency] prefer[ed]." *Carbon Activated I*, 586 F. Supp. 3d at 1381 (quoting I&D Mem. at 33). The court found that Commerce failed to "explain why [Bravo Green's] association with the primary surrogate country outweighed other considerations or criteria" and remanded to Commerce to "fairly weigh the available options [for financial statements] and explain its decision in light of its selection criteria, addressing any shortcomings." *Id.*

On remand, Commerce again selected the 2018 financial statements of Bravo Green to calculate the surrogate financial ratios. Remand Results at 9, 28. Commerce distinguished the business operations and production experiences of Bravo Green from those of JSC Sorbent and Romcarbon. *Id.* at 10–11. Commerce found that JSC Sorbent produces numerous other types of merchandise and Commerce explained it was unable to determine what proportion of the company's production activity was related to activated carbon. *Id.* For that reason, Commerce found that it was unable to determine whether JSC Sorbent's production experience was similar to that of Respondents or Bravo Green. *Id.* at 10–11, 21–22, 25–26.

With respect to Romcarbon, Commerce noted that the company's production of activated carbon was carried out exclusively in one discrete profit center accounting for only 1.34 percent of Romcarbon's 2018 sales. *Id.* at 11, 21, 26. Furthermore, that profit center produced protective equipment in addition to activated carbon, such that Commerce inferred that Romcarbon's sales of activated carbon represented an even smaller percentage of its total sales. *Id.* at 11. In contrast, Commerce noted, one hundred percent of Bravo Green's revenue was derived from the production and sale of activated carbon, similar to Respondents' operations and sales. *Id.*

Commerce noted that "there [was] no information indicating that [JSC Sorbent] is a producer of *steam* activated carbon" and that there was no information as to whether the production process for JSC Sorbent's coagulants was similar to that of steam activated carbon or whether those coagulants were comparable to steam activated carbon. *Id.* at 23–24. Commerce also noted that the record contained no information regarding the production process of Romcarbon's automotive and industrial filters or whether these products shared any similarities with steam activated carbon, nor did the record indicate any similarities between steam activated carbon and certain plastic products made by Romcarbon. *Id.* at 24–25.

Commerce found that the Bravo Green financial statements "provide[d] a cost of sales and depreciation expenses related to equipment and machinery from which to derive an overhead surrogate ratio, SG&A[9] expenses from which to derive a surrogate SG&A ratio, and a profit from which to calculate a profit ratio." *Id.* at 20. While Commerce again acknowledged that the financial statements were not as detailed as the agency preferred, it concluded they were detailed enough and the best choice to calculate surrogate financial ratios. *Id.*

b. Parties' Contentions

Plaintiffs contend that Commerce's selection of the Bravo Green financial statements is unsupported by substantial evidence. Pls.' Opp'n Cmts. at 5–10. Plaintiffs contend that Commerce's rejection of the JSC Sorbent and Romcarbon financial statements based on these entities' unknown or relatively low proportion of sales of activated carbon in relation to overall sales "replaces longstanding Commerce practice requiring that surrogate companies produce only some proportion of identical/comparable merchandise with a rigid formula requiring an unspecified production level of the identical merchandise." *Id.* at 7.

Defendant and Calgon contend that substantial evidence supports Commerce's selection of the Bravo Green financial statements to calculate the surrogate financial ratios. *See* Def.'s Supp. Cmts. at 7–14; Calgon's Supp. Cmts. at 7–11.

c. Analysis

In *Carbon Activated I*, the court found Commerce's selection of the 2018 Bravo Green financial statements over the financial statements of JSC Sorbent and Romcarbon to be "conclusory" because Commerce had failed to consider the potential merits of the non-Malaysian data or explain why Commerce's preference to select data from the primary surrogate country outweighed the shortcomings of the Bravo Green data. 586 F. Supp. 3d at 1381. In the Remand Results, Commerce has supported its selection of the 2018 Bravo Green financial statements with substantial evidence.

On remand, Commerce compared the relative shortcomings of the 2018 Bravo Green financial statements to those of the JSC Sorbent and Romcarbon financial statements. *See* Remand Results at 20–26. Specifically, Commerce explained that because Romcarbon's financial statements were not broken down by business units, and because activated carbon accounted for only a small or unknown percentage of Romcarbon's revenue, use of either of those financial statements

[9] [SG&A stands for "sales, general, and administrative."]

would result in surrogate financial ratios "largely unrelated to the production experience of [Respondents] and thus introduce distortions in the margin calculations." *Id.* at 21; *see also id.* at 21–22 (noting "similar deficiencies" in JSC Sorbent's financial statements). Furthermore, Commerce noted that the financial ratios submitted by Respondents based on JSC Sorbent's financial statements did not capture JSC Sorbent's administrative expenses and their use would thus be "inconsistent with Commerce's well-established methodology for calculating the [financial] ratio." *Id.* at 22; *see id.* at 21–22. Finally, Commerce explained that the Bravo Green financial statements represented the best available information because Romcarbon and JSC did not produce only identical or comparable merchandise. *Id.* at 23–25 (noting that the record did not contain evidence indicating that JSC Sorbent or Romcarbon produced *steam* activated carbon and that other products these entities produced were not comparable to activated carbon).

Plaintiffs rely on Commerce's determination in the investigation of certain steel nails from China ("*Steel Nails Investigation*") to argue that a potential surrogate's limited production of subject merchandise does not disqualify that surrogate from selection. *See* Pls.' Opp'n Cmts. at 8–9 (citing Issues and Decision Mem. for Certain Steel Nails from China ("Steel Nails Inv. I&D Mem.") at 36, A-570–909, (June 6, 2008), https://access.trade.gov/Resources/frn/summary/prc/E8–13474–1.pdf (last visited April 28, 2023)). While that may be true, in the *Steel Nails Investigation*, Commerce addressed the question of whether to combine the ratios of a producer of a small quantity of identical merchandise with the ratios of one or more producers of comparable merchandise. *See* Steel Nails Inv. I&D Mem. at 36. Commerce declined to do so on the basis that it would "dilute the extent to which the resulting ratios represent production of [subject merchandise]." *Id.* at 36. Here, the record indicates that Bravo Green manufactures only activated carbon, which is also true of Respondents. Remand Results at 26. Thus, selecting either JSC Sorbent's or Romcarbon's financial statements, or combining them with the Bravo Green financials, would dilute the extent to which the resulting financial ratios represent production of activated carbon. *See id.* at 26–27.[10]

[10] Plaintiffs also argue that Commerce misplaces reliance on *Chlorinated Isocyanurates from China*, and that this determination supports the use of JSC Sorbent's and Romcarbon's financial statements because both companies "produce some activated carbon." Pls.' Opp'n Cmts. at 9. In *Chlorinated Isocyanurates from China*, Commerce selected the financial statements of a surrogate company whose sales of subject merchandise accounted for less than ten percent of its overall revenue; however, in that review, there were no more comparable surrogate financials available on the record. Issues and Decision Mem. for Chlorinated Isocyanurates from China, A-570–898, (Nov. 10, 2010), ("Chlorinated Isocya

Plaintiffs further contend that Commerce misplaces reliance on the second administrative review of *Certain Steel Nails from China* ("*Steel Nails AR2*") to support its selection of Bravo Green's financial statements. See Pl.'s Opp'n Cmts. at 9–10. In the Remand Results, Commerce explained that, in cases where the record contained detailed evidence of the relative amount of merchandise produced by a surrogate company, the agency would "analyze a surrogate company's product mix to make a determination of whether it is more reasonable to consider the company an 'identical' producer . . . or a producer of comparable merchandise depending on the facts of the case." Remand Results at 23 (quoting Issues and Decision Mem. for Certain Steel Nails from China, A-570–909, (Feb. 23, 2012) ("Steel Nails AR2 I & D Mem."), at 13–14 https://access.trade.gov/Resources/frn/summary/prc/2012–4877–1.pdf (last visited April 28, 2023)). Plaintiffs argue that *Steel Nails AR2* precludes Commerce from rejecting the JSC Sorbent or Romcarbon financial statements "without comparing their data quality against" Bravo Green's financial statements. Pl.'s Opp'n Cmts. at 9.

Plaintiffs' argument is unavailing. In *Certain Steel Nails from China*, the only contemporaneous financial statements on the record came from surrogate companies of comparable, not identical, merchandise. *See* Steel Nails AR2 I&D Mem. at 12–14. Here, as Commerce explained, Bravo Green produced *only* identical merchandise, while the record indicated that activated carbon represented only a small or unknown percentage of all merchandise produced by JSC Sorbent or Romcarbon. Remand Results at 23–25. Contrary to Plaintiffs' claims, Commerce *did* compare the data quality of Bravo Green's financial statements with those placed on the record by Respondents. Although the Bravo Green financial statements were not as detailed as Romcarbon's or JSC Sorbent's financial statements, Commerce found that "any 'potential' distortions" caused by this lack of detail were not as significant as the distortions that would arise from the use of financial statements of companies whose production experience was largely unrelated to that of Respondents. *See id.* at 20–22.

nurates I&D Mem.") at 15–17, https://access.trade.gov/Resources/frn/summary/prc/2010–29020–1.pdf (last visited April 28, 2023). Moreover, Commerce ultimately selected one company over the other based on suspected subsidization of the other potential surrogate. *See id.* at 17. Thus, that determination does not stand for the proposition that Commerce must select the financial statements of a company that produces "some" subject merchandise, but instead reinforces that Commerce will select the best available information on each individual record. Commerce merely referenced the Chlorinated Isocyanurates Issues and Decision Memorandum to explain its continued practiced "of finding the best available information with respect to the valuation of surrogate financial ratios based on similarities between . . . respondents' operations and [ ] surrogate financial compan[ies'] operations." Remand Results at 26–27.

Nor does Plaintiffs' reliance on the tenth ("AR10") or eleventh ("AR11") administrative reviews of the antidumping duty order on certain activated carbon from China indicate that Commerce deviated from its prior selection of Romcarbon's financial statements "without explanation." *See* Pls.' Opp'n Cmts. at 9–10 (arguing that the underlying facts of AR10 and AR11 are "identical for Romcarbon and similar for [JSC Sorbent]," and thus, Commerce needed to "provide a 'reasonable explanation'" for its deviation from selecting Romcarbon's financial statements). In AR10, the court sustained Commerce's selection of Romcarbon's financial statements, noting that the petitioner had failed to "identify a standard for determining the reliability of financial statements based on the level of production of the same or comparable merchandise" and declined to "reweigh the evidence considered by Commerce." *Calgon Carbon Corp. v. United States*, 44 CIT __, __, 443 F. Supp. 3d 1334, 1352 (2020). In AR11, Commerce selected Romcarbon's financial statements because other financial statements on the record were either non-public, or "lack[ed] usable financial data" because the statements did not break down the cost of raw materials and energy into separate line items, Prelim. Decision Mem. for Certain Activated Carbon From China, A570–904 (June 10, 2019) at 16, https://access.trade.gov/Resources/frn/summary/prc/ 2019–12616–1.pdf (last visited April 28, 2023) (unchanged in final issues and decision memorandum), and the parties did not dispute Commerce's selection of Romcarbon's financial statements, *see* Issues and Decision Mem. for Certain Activated Carbon from China, A-570–904 (Dec. 11, 2019) at 20–21, https://access.trade.gov/Resources/frn/ summary/prc/2019–27134–1.pdf (last visited April 28, 2023).

Unlike in AR10 and AR11, the record here contained publicly available financial statements from a company in the primary surrogate country that produced identical merchandise, and which did not show evidence of countervailing subsidies. Remand Results at 20. Commerce found that the financial statements were "sufficiently detailed to calculate surrogate financial ratios" because they included "cost of sales and depreciation expenses . . . from which to derive an overhead surrogate ratio, SG&A expenses from which to derive a surrogate SG&A ratio, and a profit from which to calculate a profit ratio." *Id*. at 20. Furthermore, to the extent that Plaintiffs argue that Commerce must continue to select Romcarbon's financial statements because the agency has done so in past reviews, this argument is mistaken. "[E]ach administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record," *Jiaxing II,* 822 F.3d at 1299 (quoting *Qingdao*, 766 F.3d at 1387), and the financial statements placed on the record in this review were not identical to those in AR10 or AR 11.

In sum, although Commerce continues to acknowledge that the Bravo Green financial statements are not as detailed as the agency prefers, *id*. at 10, 20, Commerce's assessment of the financial statements shows that the agency sufficiently considered and explained its selection of Bravo Green's financial statements as the best available information on the record, *see Jiaxing II*, 822 F.3d at 1300–01. Plaintiffs have failed to show that the reasoning behind Commerce's selection was contrary to established agency practice or that Commerce otherwise failed to account for evidence that detracted from its choice. Thus, the court refuses Plaintiffs' invitation to reweigh the evidence considered by Commerce.

CONCLUSION

For the foregoing reasons, the court will sustain Commerce's *Final Results* as modified by the Remand Results. Judgment will enter accordingly.

Dated: April 28, 2023
New York, New York

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

Slip Op. 23–67

BIOPARQUES DE OCCIDENTE, S.A. DE C.V., AGRICOLA LA PRIMAVERA, S.A. DE C.V., AND KALIROY FRESH LLC, Plaintiffs, CONFEDERACION DE ASOCIACIONES AGRICOLAS DEL ESTADO DE SINALOA, A.C., CONSEJO AGRICOLA DE BAJA CALIFORNIA, A.C., ASOCIACION MEXICANA DE HORTICULTURA PROTEGIDA, A.C., ASOCIACION DE PRODUCTORES DE HORTALIZAS DEL YAQUI Y MAYO, AND SISTEMA PRODUCTO TOMATE, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and the FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19–00204

[Granting in part and denying in part Defendant's motion to dismiss and granting in part and denying in part Defendant-Intervenor's motion to dismiss.]

Dated: May 1, 2023

Jeffrey M. Winton, *Michael J. Chapman*, *Amrietha Nellan*, *Ruby Rodriguez*, and *Vi N. Mai*, Winton & Chapman PLLC, of Washington, D.C., for Plaintiffs Bioparques de Occidente, S.A. de C.V., Agricola La Primavera, S.A. de C.V., and Kaliroy Fresh LLC.

Bernd G. Janzen, *Devin S. Sikes*, *Paul Bettencourt*, and *Yujin K. McNamara*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, D.C., for Consolidated Plaintiffs Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C., Consejo Agricola de Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Asociacion de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate.

Douglas G. Edelschick, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Emma T. Hunter*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Robert C. Cassidy, Jr., *Charles S. Levy*, *Chase J. Dunn*, *James R. Cannon, Jr.*, *Mary Jane Alves*, *Jonathan M. Zielinski*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant-Intervenor The Florida Tomato Exchange.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiffs Bioparques de Occidente, S.A. de C.V., Agricola La Primavera, S.A. de C.V., and Kaliroy Fresh LLC (collectively, "Plaintiffs") filed three complaints challenging the final determination made in the antidumping duty investigation of fresh tomatoes from Mexico conducted by the U.S. Department of Commerce ("Commerce"), *Fresh Tomatoes from Mexico* ("*Final Determination*"), 84 Fed. Reg. 57,401 (Dep't of Commerce Oct. 25, 2019) (final determination of sales at less than fair value): (1) *Bioparques de Occidente, S.A. de C.V. v. United States*, Court No. 19–00204; (2) *Bioparques de Occidente, S.A. de C.V. v. United States*, Court No. 19–00210; and (3) *Bioparques de Occidente, S.A. de C.V. v. United States*, Court No. 20–00035. The Court consolidated these cases and the related case *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States*, Court No. 19–00203. Order (Sept. 1, 2022) ("Consolidation Order"), ECF No. 63.

Before the Court are Defendant's Motion to Dismiss filed by Defendant United States ("Defendant") and Defendant-Intervenor's Motion to Dismiss filed by Defendant-Intervenor The Florida Tomato Exchange ("Defendant-Intervenor"), both seeking dismissal under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction. Def.'s Mot.Dismiss ("Def.'s Br."), ECF No. 65; Def.-Interv.'s Mot. Dismiss ("Def.-Interv.'s Br."), ECF No. 66. Plaintiffs filed Plaintiffs' Response to Motion to Dismiss in opposition. Pls.' Resp. Mot. Dismiss ("Pls.' Resp."), ECF No. 67. Defendant filed Defendant's Reply in Support of Motion to Dismiss and Defendant-Intervenor filed Defendant-Intervenor's Reply in Support of its Motion to Dismiss. Def.'s Reply Supp. Mot. Dismiss ("Def.'s Reply"), ECF No. 68; Def.-Interv.'s Reply Supp. Mot. Dismiss ("Def.-Interv.'s Reply"), ECF No. 69.

Plaintiffs filed Plaintiffs' Sur-Reply to Defendant and Defendant-Intervenor's Replies in Support of Motion to Dismiss. Pls.' Sur-Reply Replies Supp. Mot. Dismiss ("Pls.' Sur-Reply"), ECF No. 72. Plaintiffs also filed Plaintiffs' Notice of Supplemental Authority following the Court's ruling in *Goodluck India, Ltd. v. United States*, 46 CIT __, 2022 Ct. Intl. Trade LEXIS 133 (Dec. 1, 2022). Pls.' Notice Supp. Auth., ECF No. 78. For the reasons that follow, Defendant's Motion to Dismiss and Defendant-Intervenor's Motion to Dismiss are granted in part and denied in part.

BACKGROUND

The Court presumes familiarity with the facts and procedural history set forth in its prior Order and Opinion and recounts the facts relevant to the Court's review of the pending motions to dismiss. *See Bioparques de Occidente, S.A. de C.V. v. United States*, 44 CIT __, __, 470 F. Supp. 3d 1366, 1368–70 (2020).

I. Antidumping Duty Investigation and Suspension Agreements

In April 1996, Commerce initiated an antidumping duty investigation to determine whether imports of fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't of Commerce Apr. 25, 1996) (initiation of antidumping duty investigation). After an affirmative preliminary injury determination from the International Trade Commission, Commerce made a preliminary determination that imports of fresh tomatoes from Mexico were being sold in the United States at less than fair value. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,608 (Dep't of Commerce Nov. 1, 1996) (notice of preliminary determination of sales at less than fair value and postponement of final determination). Concurrent with Commerce's preliminary determination, Commerce published a notice in the Federal Register announcing an agreement under 19 U.S.C. § 1673c(c) with certain producers and exporters who accounted for substantially all of the imports of fresh tomatoes from Mexico into the United States to suspend the antidumping duty investigation on fresh tomatoes from Mexico. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618 (Dep't of Commerce Nov. 1, 1996) (suspension of antidumping investigation). Between 1996 and 2013, Commerce and the producers and exporters of tomatoes from Mexico entered into three further suspension agreements. *See Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044 (Dep't of Commerce Dec. 16, 2002) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 73 Fed. Reg. 4831 (Dep't of Commerce Jan. 28, 2008) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico* ("2013 Suspension Agreement"), 78 Fed. Reg. 14,967 (Dep't of Commerce Mar. 8, 2013) (suspension of antidumping investigation).

Commerce gave notice to the signatory growers on February 6, 2019 of Commerce's intent to withdraw from the 2013 Suspension Agreement. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 7872 (Dep't of Commerce Mar. 5, 2019) (intent to terminate suspension agreement, rescind the sunset and administrative reviews, and resume the antidumping duty investigation); *Fresh Tomatoes from Mexico* ("*May 2019 Withdrawal Notice*"), 84 Fed. Reg. 20,858 (Dep't of Commerce May 13, 2019) (termination of suspension agreement, rescission of administrative review, and continuation of the antidumping duty investigation). Commerce withdrew from the 2013 Suspension Agreement on May 7, 2019 and resumed the underlying antidumping investigation. *May 2019 Withdrawal Notice*, 84 Fed. Reg. at 20,860.

Commerce published on September 24, 2019 a notice that a new Suspension Agreement had been reached between Commerce and the signatory parties and that the antidumping duty investigation had been suspended. *Fresh Tomatoes from Mexico* ("2019 Suspension Agreement"), 84 Fed. Reg. 49,987, 49,989 (Dep't of Commerce Sept. 24, 2019) (suspension of antidumping duty investigation). The International Trade Commission subsequently announced the suspension of its antidumping investigation. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 54,639 (Int'l Trade Comm'n Oct. 10, 2019) (suspension of antidumping investigation).

Commerce published its final determination in the continued investigation on October 25, 2019, determining that fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value. *Final Determination*, 84 Fed. Reg. at 57,402. The International Trade Commission issued an affirmative injury determination on December 12, 2019. *Fresh Tomatoes from Mexico*, 84 Fed. Reg. 67,958 (Int'l Trade Comm'n Dec. 12, 2019).

II. Litigation

Plaintiffs filed three separate actions challenging Commerce's continued investigation and the *Final Determination*, beginning with filing the Summons in Court Number 19–00204 on November 22, 2019 and in Court Number 19–00210 on December 3, 2019. Summons, ECF No. 1; Summons, Court No. 19–00210, ECF No. 1. Plaintiffs filed the Complaint in Court Number 19–00204 on December 20, 2019 and the Complaint in Court Number 19–00210 on December 23, 2019. Compl., ECF No. 9; Compl., Court No. 19–00210, ECF No. 9. Plaintiffs filed the Summons and Complaint concurrently in Court

Number 20–00035 on February 5, 2020. Summons, Court No. 20–00035, ECF No. 1; Compl., Court No. 20–00035, ECF No. 4.

Plaintiffs allege ten causes of action.[1] *See* Am. Compl. at 6–8; Am. Compl. at 6–8, Court No. 19–00210; Compl. at 6–7, Court No, 20–00035. Specifically, Plaintiffs challenge as unlawful Commerce's withdrawal from the 2013 Suspension Agreement (claim 1(a)); Commerce's resumption of the suspended antidumping duty investigation (claims 1(a) and 1(c)); Commerce's ending of the investigation into the respondents that were the subject of Commerce's 1996 preliminary determination and selection of new respondents for the continued investigation (claim 2); the procedures Commerce followed in the resumed investigation (claim 3); and the correctness of certain aspects of the *Final Determination* (claims 4–10). Am. Compl. at 6–8; Am. Compl. at 6–8, Court No. 19–00210; Compl. at 6–7, Court No, 20–00035. In all, Plaintiffs ask the Court to declare as unlawful and vacate Commerce's withdrawal from the 2013 Suspension Agreement and the subsequent *Final Determination*. Am. Compl. at 8; Am. Compl. at 8, Court No. 19–00210; Compl. at 7, Court No, 20–00035.

Defendant filed motions to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted in each of the cases. Def.'s Mot. Dismiss, ECF No. 30; Def.'s Mot. Dismiss, Court No. 19–00210, ECF No. 31; Def.'s Mot. Dismiss, Court No. 20–00035, ECF No. 20. The Court granted the motions and dismissed Plaintiffs' claims with prejudice. *Bioparques de Occidente, S.A. de C.V.*, 44 CIT at __, 470 F. Supp. 3d at 1373.

III. Appeal

Plaintiffs appealed the Court's judgment to the U.S. Court of Appeals for the Federal Circuit ("CAFC"). Pls.' Notice of Appeal, ECF No. 47. The CAFC affirmed in part and remanded in part. *Bioparques de Occidente, S.A. de C.V. v. United States*, 31 F.4th 1336, 1343–48 (Fed. Cir. 2022). The CAFC affirmed the dismissal of Plaintiffs' claims challenging the termination of the 2013 Suspension Agreement and the negotiation of the 2019 Suspension Agreement. *Id.* at 1343. The CAFC also held that because the *Final Determination* constituted as "an affirmative final determination in a continued investigation that

[1] Though otherwise identical to the claims asserted in Court Numbers 19–00204 and 19–00210, Plaintiffs' Complaint in Court Number 20–00035 does not include a count 10. *See* Compl. at 7, Court No. 20–00035.

involves exports from [a free trade agreement] country"[2] and is reviewable under 19 U.S.C. § 1516a(g)(3)(A)(i), the Court has jurisdiction to consider Plaintiffs' challenges to the *Final Determination* under 28 U.S.C. § 1581(c). *Id.* at 1346–48.

On remand, the Court consolidated Plaintiffs' three cases with the related case *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C.*, Court No. 19–00203. Consolidation Order. Plaintiffs filed Amended Complaints on September 1, 2022 in Court Numbers 19–00204 and 19–00210. Am. Compl., ECF No. 64; Am. Compl., Court No. 19–00210, ECF No. 69.

STANDARD OF REVIEW

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 complaint must be dismissed in its entirety." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); USCIT R. 12(h)(3). "[I]f the facts reveal any reasonable basis upon which the non-movant may prevail, dismissal is inappropriate." *Airport Road Ass., Ltd. v. United States*, 866 F.3d 1346, 1351 (Fed. Cir. 2017) (quoting *Pixton v. B & B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002)). The party asserting a claim bears the burden of establishing subject-matter jurisdiction, *see Wanxiang Am. Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021), and must allege sufficient facts to establish jurisdiction, *see DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006). In deciding a motion to dismiss for lack of jurisdiction, the Court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). For purposes of establishing jurisdiction, "[s]ubstance, not form, is controlling." *Williams v. Sec'y of the Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986).

---

[2] Mexico is a "free trade area country." At the time Plaintiffs filed their Complaint in January 2020, "free trade area country" included "Mexico for such time as the [North American Free Trade Agreement ("NAFTA")] is in force with respect to, and the United States applies the NAFTA to, Mexico." 19 U.S.C. § 1516a(f)(8), (10) (2006). The statute was amended following the replacement of the NAFTA with the United States-Mexico-Canada Agreement ("USMCA") to define "free trade area country" to include "Mexico for such time as the USMCA is in force with respect to, and the United States applies the USMCA to, Mexico." 19 U.S.C. § 1516a(f)(9) (2020).

DISCUSSION

I. Asserted Claims and Jurisdictional Grounds

Plaintiffs assert virtually identical claims in Court Numbers 19–00204, 19–00210, and 20–00035. *See* Am. Compl. at 6–8; Am. Compl. at 6–8, Court No. 19–00210; Compl. at 6–7, Court No, 20–00035. Each case asserts a different ground for the Court's jurisdiction. In Court Number 19–00204, Plaintiffs assert that the:

> action is commenced pursuant to Sections 516A(a)(2)(A) and (B)(iv) of the Tariff Act of 1930, as amended (the "Act"), 19 U.S.C. §§ 1516a(a)(2)(A) and (B)(iv). Consequently, this Court has jurisdiction over this matter by reason of 28 U.S.C. § 1581(c), which confers upon the Court exclusive jurisdiction over civil actions commenced under Section 516A of the Act.

Am. Compl. at 2. In Court Number 19–00210, Plaintiffs assert that the:

> action is commenced pursuant to Section 516A(g)(3)(A)(i) of the Act, 19 U.S.C. § 1516a(g)(3)(A)(i), which permits review of final determinations by Commerce in cases involving North American Free Trade Agreement ("NAFTA") countries when review by a binational panel has not been requested. Consequently, this Court has jurisdiction over this matter by reason of 28 U.S.C. § 1581(c), which confers upon the Court exclusive jurisdiction over civil actions commenced under Section 516A of the Act.

Am. Compl. at 2, Court No. 19–00210. In Court Number 20–00035, Plaintiffs assert that:

> Except to the extent that the Court has jurisdiction over the claims set forth in this Complaint in Plaintiffs' pending actions under 28 U.S.C. [§] 1581(c), the Court has subject matter jurisdiction under 28 U.S.C. § 1581(i), which confers upon this Court exclusive jurisdiction of a civil action arising under a law providing for the administration of tariffs and duties.

Compl. at 1–2, Court No. 20–00035.

28 U.S.C. § 1581(c) provides the Court with jurisdiction over civil actions commenced under 19 U.S.C. § 1516a(a) and 19 U.S.C. § 1516a(g). 28 U.S.C. § 1581(c). 19 U.S.C. § 1516a(a) makes reviewable by the U.S. Court of International Trade final administrative determinations by Commerce in antidumping duty and countervailing duty investigations. 19 U.S.C. § 1516a(a). 19 U.S.C. § 1516a(g) makes

reviewable by the U.S. Court of International Trade final administrative determinations by Commerce in antidumping duty and countervailing duty investigations involving free trade area countries when no country requests review by a binational panel. *Id.* § 1516a(g).

28 U.S.C. § 1581(i) provides the Court with residual jurisdiction over claims that are not covered by another subsection of 28 U.S.C. § 1581. 28 U.S.C. § 1581(i). The Court may not invoke jurisdiction under § 1581(i) "when jurisdiction under another subsection of § 1581 is or *could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate." *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1374–75 (Fed. Cir. 2019) (quoting *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012) (emphasis in original)). When jurisdiction is asserted under 28 U.S.C. § 1581(i), the party asserting the claim also "bears the burden of showing that another subsection is either unavailable or manifestly inadequate." *Id.* at 1375 (citing *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018)).

II. Claims 1(a) and 1(c)

Claims 1(a) and 1(c) in each of the cases assert that Commerce lacked authority to resume or continue its investigation because "the U.S. domestic industry had withdrawn the petition that led to the investigation and subsequent suspension agreements in 2012" and "the deadline for requesting the continuation of the suspended investigation expired in 1996, within 20 days after the publication of Commerce's notice of suspension of the agreement." Am. Compl. at 6–7; Am. Compl. at 6–7, Court No. 19–00210; Compl. at 6, Court No, 20–00035.

Among the types of determinations reviewable under § 1581(c) are determinations "to suspend an antidumping duty or a countervailing duty investigation." 19 U.S.C. § 1516a(A)(2)(B)(iv). Because claims 1(a) and 1(c) challenge Commerce's authority to continue or resume the antidumping duty investigation on fresh tomatoes from Mexico following the termination of the 2013 Suspension Agreement, the Court has jurisdiction to consider the claims under § 1581(c). The Court cannot simultaneously assert jurisdiction over § 1581(i) claims and therefore dismisses claims 1(a) and 1(c) in Court Number 20–00035.

Defendant contends that claims 1(a) and 1(c) are precluded by the CAFC's holding in *Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States* ("*CAADES*"), 32 F.4th 1130 (Fed. Cir. 2022). Def.'s Br. at 13–14 (citing *CAADES*, 32 F.4th at

1145). In *CAADES*, the CAFC considered a challenge to Commerce's continuation of the antidumping duty investigation under the 2013 Suspension Agreement. *CAADES*, 32 F.4th at 1145. The CAFC held that "[t]here is no independent jurisdiction" to consider challenges to "Commerce's resumption of the antidumping investigation following the 2013 agreement's termination." *Id.* Relying on its holding in *CAADES*, the CAFC clarified in the related case *Jem D International Michigan Inc. v. United States*, 2022 U.S. App. LEXIS 10044 (Fed. Cir. Apr. 14, 2022), that the Court "has no jurisdiction over such an interim challenge *except as part of a challenge to a final determination*." *Jem D Int'l Michigan Inc.*, 2022 U.S. App LEXIS 10044, at *4 (emphasis added).

Viewed in totality, Plaintiffs' Amended Complaints in Court Numbers 19–00204 and 19–00210 and Complaint in Court Number 20–00035 are challenges to the *Final Determination*. Am. Compl. at 6–8; Am. Compl. at 6–8, Court No. 19–00210; Compl. at 5–7, Court No. 20–00035. For example, claims 4 through 10 challenge Commerce's calculations and methodology in reaching the Final Determination. Am. Compl. at 7–8; Am. Compl. at 7–8, Court No. 19–00210; Compl. at 7, Court No. 20–00035. Because Plaintiffs are challenging Commerce's *Final Determination*, the Court may consider Plaintiffs' challenges to Commerce's interim decision to resume or continue the investigation under claims 1(a) and 1(c).

III. Claim 1(b)

Claim 1(b) in each of the cases asserts that:

> Commerce's purported withdrawal from the 2013 Suspension Agreement was legally invalid, because the statute and Commerce's own regulations require Commerce to make certain findings before it is authorized to withdraw from a suspension agreement, and Commerce did not make any of those findings in this case.

Am. Compl. at 6; Am. Compl. at 6–7, Court No. 19–00210; Compl. at 6, Court No. 20–00035.

On appeal, the CAFC ruled that because Commerce's determination to terminate a suspension agreement is not reviewable under 19 U.S.C. § 1516a(a) or (g), jurisdiction to consider challenges to Commerce's withdrawal from the 2013 Suspension Agreement exists under the residual jurisdiction provision of 28 U.S.C. § 1581(i). *CAADES*, 32 F.4th at 1138. Because the CAFC has held that the Court has jurisdiction over claim 1(b) under § 1581(i), jurisdiction cannot simultaneously exist under § 1581(c). Claims 1(b) in Court Numbers 19–00204 and 19–00210 are dismissed.

Though the Court has jurisdiction to consider claim 1(b) in Court Number 20–00035 under § 1581(i), the CAFC has already resolved the merits of the claim. In *CAADES*, the CAFC considered materially identical challenges to Commerce's ability to terminate the 2013 Suspension Agreement and to enter into the 2019 Suspension Agreement. *Id.* at 1138–43. The CAFC concluded "that there is no plausible claim upon which" relief could be granted. *Id.* at 1143. The CAFC held that the *CAADES* holding controlled in its consideration of this case and concluded that Plaintiffs' challenges to the termination of the 2013 Suspension Agreement and negotiation of the 2019 Suspension Agreement must be dismissed. *Bioparques de Occidente, S.A. de C.V*, 31 F.4th at 1343. Plaintiffs concede that the CAFC dismissed claim 1(b) on substantive grounds. Pls.' Resp. at 3–4. The Court, therefore, dismisses claim 1(b) in Court Number 20–00035.

IV. Claims 2 Through 10

The three consolidated cases before the Court raise multiple challenges to the methodology used by Commerce in the *Final Determination*. Am. Compl. at 7–8; Am. Compl. at 7–8, Court No. 19–00210; Compl. at 6–7, Court No. 20–00035. Count 2 argues that Commerce improperly ceased its investigation of the original respondents that were examined and were the subject of the 1996 preliminary determination and examined new respondents in the resumed investigation that had not participated in the preliminary phase of the investigation, including Plaintiffs. Am. Compl. at 7; Am. Compl. at 7, Court No. 19–00210; Compl. at 6, Court No. 20–00035. Count 3 alleges that Commerce failed to abide by applicable deadlines and procedures during the resumed investigation and denied the newly added respondents' due process rights. Am. Compl. at 7; Am. Compl. at 7, Court No. 19–00210; Compl. at 6, Court No. 20–00035. Counts 4 through 10 challenge aspects of the calculation methodology used by Commerce in the Final Determination. Am. Compl. at 7–8; Am. Compl. at 7–8, Court No. 19–00210; Compl. at 6–7, Court No. 20–00035.

In considering the facts of this case, the CAFC held that "an affirmative final determination in a continued investigation that involves exports from [a free trade agreement] country is reviewable under § 1516a(g)(3)(A)(i) as a determination under § 1516a(a)(2)(B)(i), which provides the Trade Court jurisdiction under 28 U.S.C. § 1581(c)." *Bioparques de Occidente, S.A. de C.V.*, 31 F.4th at 1346–48. The Court concludes that jurisdiction exists under § 1581(c) for claims 2 through

10 challenging the *Final Determination*. Because jurisdiction under § 1581(i) is improper, counts 2 through 9 in Court Number 20–00035 are dismissed.

CONCLUSION

In summary, the Court concludes that jurisdiction exists over claims 1(a), 1(c), and 2 through 10 under 28 U.S.C. § 1581(c). Jurisdiction exists over claim 1(b) under 28 U.S.C. § 1581(i). Because the CAFC affirmed the dismissal of claim 1(b) based on Plaintiffs' failure to state a claim on which relief could be granted, claim 1(b) is dismissed. For the foregoing reasons, it is hereby

ORDERED that Defendant's Motion to Dismiss, ECF No. 65, is granted in part (claims 1(b) in Court Numbers 19–00204 and 19–00210 and claims 1(a), 1(c), and 2 through 9 in Court Number 20–00035 are dismissed), and denied in part (claims 1(a) and 1(c) in Court Numbers 19–00204 and 19–00210 remain); and it is further

ORDERED that Defendant-Intervenor's Motion to Dismiss, ECF No. 66, is granted in part (claims 1(b) in Court Numbers 19–00204 and 19–00210 and claims 1(a), 1(c), and claims 2 through 9 in Court Number 20–00035 are dismissed), and is denied in part (claims 1(a) and 1(c) in Court Numbers 19–00204 and 19–00210 remain); and it is further

ORDERED that claim 1(b) in Court Number 20–00035 has been resolved on its merits by the CAFC and is dismissed; and it is further

ORDERED that because all claims in Court Number 20–00035 have been resolved by this Opinion, Court Number 20–00035 is dismissed and is removed from Consolidated Court Number 19–00204. Judgment will be entered accordingly; and it is further

ORDERED that this case shall proceed in accordance with the schedule set in the Court's March 30, 2023 Order, ECF No. 90, as follows:

1. Amended 56.2 motions, if any, shall be filed on or before May 30, 2023;
2. Response briefs to motions for judgment upon the agency record shall be filed on or before June 29, 2023;
3. Reply briefs shall be filed on or before August 14, 2023;
4. The joint appendix shall be filed on or before August 28, 2023; and
5. Motions for oral argument, if any, shall be filed on or before September 5, 2023.

Dated: May 1, 2023
New York, New York

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

Slip Op. 23–68

ME GLOBAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 19–00179

[On classification of heat-treated forged steel rods, plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted.]

Dated: May 2, 2023

John M. Peterson, Neville Peterson, LLP, of New York, NY, argued for Plaintiff ME Global, Inc. With him on the brief were *Richard F. O'Neill* and *Patrick B. Klein*.

Alexander J. Vanderweide, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of counsel on the brief was *Valerie Sorensen-Clark*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Eaton, Judge:

Before the court are the cross-motions for summary judgment of plaintiff ME Global, Inc.[1] ("Plaintiff") and defendant the United States, on behalf of the U.S. Customs and Border Protection ("Customs"). *See* Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s Br."), ECF No. 20–2; Pl.'s Reply Supp. Mot. Summ. J. Opp'n Def.'s Cross-Mot. Summ. J. ("Pl.'s Reply"), ECF No. 27; *see also* Def.'s Mem. Supp. Cross-Mot. Summ. J. and Resp. Opp'n Pl.'s Mot. Summ. J. ("Def.'s Br."), ECF No. 23; Def.'s Reply Pl.'s Opp'n Def.'s Cross-Mot. Summ. J. (Def.'s Reply"), ECF No. 30. At issue is the proper classification of heat-treated forged steel rods from the People's Republic of China ("China"), entered by Plaintiff on August 4, 2018. *See* Entry Summary, ECF No. 7–1.

For the reasons set forth below, Customs' cross-motion for summary judgment is granted, Plaintiff's motion for summary judgment is denied, and the court finds that Plaintiff's heat-treated forged steel rods are properly classified under the Harmonized Tariff Schedule of

[1] ME Global, Inc. is a U.S. subsidiary of Companía Electro Metalurgica S.A., a publicly traded company based in Chile. *See* Pl.'s Corp. Disclosure Statement, ECF No. 3.

the United States ("HTSUS") (2018)[2] subheading 7228.40.00 as "[o]ther bars and rods, not further worked than forged."

BACKGROUND

The facts described below have been taken from the admitted portions of the parties' USCIT Rule 56.3 statements and supporting exhibits, and findings based on record evidence on which no reasonable fact-finder could come to an opposite conclusion. *See* Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s SOF"), ECF No. 20–3; Pl.'s Resp. to Def.'s Statement of Material Facts Not in Dispute ("Pl.'s Resp. SOF"), ECF No. 27–1; Def.'s Statement of Material Facts Not in Dispute ("Def.'s SOF"), ECF No. 23; Def.'s Resp. to Pl.'s Statement of Material Facts Not in Dispute ("Def.'s Resp. SOF"), ECF No. 23.

At issue are heat-treated forged steel rods, which are used to crush ore in mining and mineral extraction operations. Pl.'s SOF ¶ 6. When in use, the subject rods lie in parallel alignment in a large rotating cylinder or "mill." *Id.* ¶ 21. Ore is fed into the mill and, as it rotates, the ore is crushed between the rods. *Id.* This pulverizes the ore into a finer composition, allowing for the recovery of metals such as gold, copper, silver, and iron. *Id.* ¶¶ 20–21.

The rods are produced in China by Plaintiff's joint venture called ME Global Long Teng Grinding Media (Changshu) Co. Ltd. ("ME Long Teng"). *Id.* ¶ 6. To manufacture the imported rods, steel blooms[3] are first heated, hot-rolled into bars, and then cooled. Def.'s SOF ¶ 2. The steel bars are then sent to ME Long Teng's plant where they are cut to the customer's desired length, heated in a series of Inductoforge[4] devices, and then processed by a series of forging dies and passed through a water quenching system. *Id.*

The result of this process is a steel rod comprised of a hard outer surface of martensite and a softer inner core of pearlite. Pl.'s SOF ¶ 16. The hardness of the outer martensite layer makes the rods suitable for breaking down ore and mineral structures, while the softness of the inner pearlite core provides ductility, which prevents the bars from breaking while being used in the mill. *Id.* ¶ 17.

The subject rods, as imported, have a chromium content between

---

[2] All citations to the HTSUS herein are to the 2018 version.

[3] The American Iron and Steel Institute defines a steel "bloom" as "[a] semi-finished steel form, with a rectangular cross-section that is more than 8 [inches]." *Glossary*, AM. IRON AND STEEL INST., https://www.steel.org/steel-technology/steel-production/glossary/ (last visited Apr. 10, 2023).

[4] An "Inductoforge" device refers to "a continuous casting boost heater used with steel, stainless steel, aluminum and other metals." Def.'s Br. Ex. B, ECF No. 23–2 (Pl.'s Resp. Def.'s 2d Interrogs.).

0.3% and 0.39% by weight. *See* Def.'s SOF ¶ 3; *see also* Pl.'s Resp. SOF ¶ 3.

Plaintiff ME Global, Inc., the importer of record of the rods, entered them as a single entry at the Port of Minneapolis, Minnesota on August 4, 2018, Entry No. 791–1880870–3. *See* Entry Summary. Customs classified the rods under HTSUS subheading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . Other"). Def.'s SOF ¶ 1.

When Plaintiff entered the rods, goods classified under HTSUS subheading 7228.30.80 were subject to a national security tariff of 25% *ad valorem* imposed under HTSUS subheading 9903.80.01 (establishing 25% *ad valorem* duties for, *inter alia*, Chinese products of iron or steel classified under HTSUS heading 7228), pursuant to Section 232 of the Trade Expansion Act of 1962.[5] *See* 19 U.S.C. § 1862 (2018); *see also* Subheading 9903.80.01, HTSUS (referencing HTSUS subheading 7228.30.80).

On March 22, 2019, Plaintiff filed a timely protest of Customs' classification of its steel rods. *See* Mem. Supp. Protest (Mar. 22, 2019), ECF No. 7–1; *see also* Compl. ¶ 31, ECF No. 9. On May 13, 2019, Customs denied Plaintiff's protest. Compl. ¶ 32. On May 21, 2020, Plaintiff then filed its timely complaint with the court contesting Customs' denial of its protest.

---

[5] Section 232 of the Trade Expansion Act of 1962, codified as amended at 19 U.S.C. § 1862, empowers the President to adjust the imports of articles that may threaten to impair national security. *See* 19 U.S.C. § 1862(c). On March 8, 2018, the President, pursuant to Section 232, issued Proclamation 9705 which imposed a 25% *ad valorem* tariff on steel articles imported from all countries except Canada and Mexico. *See* Proclamation 9705, 83 Fed. Reg. 11,625, 11,626, 11,629 (Mar. 8, 2018); *see also Universal Steel Prod., Inc. v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1336, 1338 (2021), *judgment entered sub nom. Universal Steel Prod. v. United States*, 497 F. Supp. 3d 1406 (2021), *and aff'd sub nom. USP Holdings, Inc. v. United States*, 36 F.4th 1359 (Fed. Cir. 2022), *cert. denied*, No. 22–565, 2023 WL 2634535 (U.S. Mar. 27, 2023) (concluding that "Proclamation 9705 and its subsequent modifications do not violate [19 U.S.C. § 1862]."). The President implemented the tariffs by modifying Subchapter III of Chapter 99 of the HTSUS to add a new note 16 and a new tariff provision under the subheading 9903.80.01. *Id.* at 11,629–30. Note 16 provided, in relevant part, that "[t]he rates of duty set forth in [sub]heading 9903.80.01 . . . apply to all imported products of iron or steel classifiable in the provisions enumerated in this subdivision: . . . bars and rods provided for in heading[] . . . 7228." Ch. 99, Subchapter III, Note 16(b)(ii), HTSUS.

Accordingly, merchandise imported into the United States from China classified under HTSUS subheading 7228.30.80 (i.e., the subheading Customs classified Plaintiff's rods under) became subject to the additional 25% *ad valorem* Section 232 tariffs on March 23, 2018, and remain subject thereto. Plaintiff's rods were dutiable at 25% *ad valorem* because they were (1) imported from China; (2) entered on August 4, 2018, after the Section 232 tariffs went into effect; and (3) classified under an HTSUS subheading (i.e., 7228.30.80) to which Section 232 tariffs applied (i.e., through application of HTSUS subheading 9903.80.01). Had the steel rods been classified under Plaintiff's preferred subheading, HTSUS 7326.11.00 ("Grinding balls and similar articles for mills"), they would not be subject to the 25% tariffs.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction under 28 U.S.C. § 1581(a) and reviews Customs' classification determination *de novo*. *See* 28 U.S.C. § 1581(a) (2018); *see also id.* § 2640(a)(1); *Telebrands Corp. v. United States*, 36 CIT 1231, 1234, 865 F. Supp. 2d 1277, 1279–80 (2012), *aff'd*, 522 F. App'x 915 (Fed. Cir. 2015).

Summary judgment is appropriate when "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); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (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. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000) (citing *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999)). In the context of a Customs classification case, summary judgment is appropriate when there is no factual dispute as to the nature of the merchandise in question. *See Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

LEGAL FRAMEWORK

The objective in a classification case is to determine the correct tariff provision for the subject merchandise. *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). While the court affords deference to Customs' classification rulings relative to their "power to persuade," it has "an independent responsibility to decide the legal issue of the proper meaning and scope of the HTSUS terms." *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). As such, it is "the court's duty to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark*, 733 F.2d at 878 (emphasis in original).

The court's review of a classification determination involves two steps. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citation omitted). First, it must construe the relevant classification headings—a question of law. *See id.* Second, it must determine which of the properly construed tariff provisions the merchandise at issue falls under—a question of fact. *See id.* When the nature of the merchandise is undisputed, as is the case here, the issue collapses entirely into a question of law ripe for summary judgment. *See Cummins Inc.*, 454 F.3d at 1363.

The General Rules of Interpretation ("GRI")[6] "govern classifications of imported goods under [the] HTSUS and [are] appl[ied] in numerical order." *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007)). Most classification disputes are resolved by the application of GRI 1. *See Telebrands Corp.*, 36 CIT at 1235, 865 F. Supp. 2d at 1280. If a good is not classifiable under GRI 1, and if the headings and notes do not require otherwise, then the other GRIs will be considered in numerical order. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017) (citation omitted) ("The GRI apply in numerical order, meaning that subsequent rules are inapplicable if a preceding rule provides proper classification."). Under GRI 1, the court determines the appropriate classification of merchandise "according to the terms of the headings[7] and any relative section or chapter notes." GRI 1, HTSUS.[8] The HTSUS section and chapter notes "are not optional interpretive rules," but instead have the force of statutory law. *Aves. in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (quoting *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 926 (Fed. Cir. 2003)).

"Only after determining that a product is classifiable under [a specific] heading should the court look to the subheadings . . . ." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Moreover, "the possible [tariff] headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings." *R.T. Foods, Inc. v.*

---

[6] Relevant here are GRI 1 and GRI 6. GRI 1 provides:

> The table of contents, alphabetical index, and titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the [subsequent GRIs].

GRI 1, HTSUS.

GRI 6 provides:

> For legal purposes, 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. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 6, HTSUS.

[7] "The first four digits of an HTSUS provision constitute the heading, whereas the remaining digits reflect subheadings." *Schlumberger Tech. Corp.*, 845 F.3d at 1163 n.4.

[8] "[T]he terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." GRI 1, Explanatory Note V(a), HTSUS.

United States, 757 F.3d 1349, 1353 (Fed. Cir. 2014) (citing *Orlando Food Corp.*, 140 F.3d at 1440).

"[T]he court also may consider the Explanatory Notes to the Harmonized Commodity Description and Coding System [(the "Explanatory Notes")], developed by the World Customs Organization." *See Rubies Costume Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1145, 1154 (2017) (citation omitted). The Explanatory Notes (unlike the section and chapter notes) are not legally binding or dispositive, but "may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *Aves. in Leather, Inc.*, 423 F.3d at 1334 (citation omitted). A court may rely on its own understanding of any terms undefined in the HTSUS or consult other reliable information sources to ascertain the common meaning of such terms. *See Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999).

DISCUSSION

While Customs classified, at entry, the subject rods under HTSUS subheading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . Other"), it now argues that the rods should be classified under HTSUS chapter 72, heading 7228, subheading 7228.40.00, as "[o]ther bars and rods, not further worked than forged."[9] *See* Def.'s Br. at 12–16. Customs maintains that under GRI 1 the imported rods are prima facie classifiable under HTSUS subheading 7228.40.00 because they are "[o]ther bars and rods" of "[o]ther alloy steel" and are not further worked than forged as defined in the chapter notes to chapter 72. *See* Ch. 72, Notes 1(f) ("Other alloy steel") & (m) ("Other bars and rods"), HTSUS. For Customs, the rods are classifiable *eo nomine*[10] under HTSUS subheading 7228.40.00 because this subheading describes the rods by name—and with

[9] HTSUS chapter 72 covers "iron and steel." The relevant portions of HTSUS chapter 72 read as follows:

7228 Other bars and rods of other alloy steel; angles, shapes, and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel:

. . . .

7228.40.00 Other bars and rods, not further worked than forged

[10] An *eo nomine* tariff provision is one that "describes an article by a specific name." *R.T. Foods, Inc.*, 757 F.3d at 1354 (quoting *CamelBak Prods.*, 649 F.3d at 1364). "[This] includes all forms of the named article, including improved forms." *Id.* (quoting *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 646 (Fed. Cir. 2013)). For example, in *Carl Zeiss, Inc. v. United States*, the Federal Circuit determined that HTSUS heading 9011—which covers "compound optical microscopes"—is an *eo nomine* classification provision because it is a provision that describes an article or good by a specific name, not by its use. *See* 195 F.3d 1375, 1379 (Fed. Cir. 1999).

greater specificity than HTSUS subheading 7228.30.80.[11] *See* Def.'s Br. at 19–21.

Plaintiff, on the other hand, argues that the subject rods do not fall within the scope of HTSUS heading 7228 because they have assumed the character of goods classified under HTSUS chapter 73, heading 7326, subheading 7326.11.00, covering "[o]ther articles of iron or steel: [f]orged or stamped, but not further worked: . . . [g]rinding balls and similar articles for mills."[12] *See* Pl.'s Br. at 14–21.

In making this claim, Plaintiff relies on Explanatory Note 72.28(A) (i.e., the Explanatory Note to Customs' preferred heading) which states that "[t]he provisions of the Explanatory Notes to headings [7214] to [7216] apply, *mutatis mutandis*, to the products of this heading [i.e., HTSUS heading 7228]." *See* Explanatory Note 72.28(A). Explanatory Note 72.28(A) thus incorporates, by reference, Explanatory Note 72.15(2).[13]

Explanatory Note 72.15(2) provides:

> The bars and rods of this heading may: . . . have been subjected to working (such as drilling or sizing, or to further surface treatments than are allowed for products of heading [7214], such as plating, coating, or cladding (see Part (IV) (C) of the General Explanatory Note to this Chapter), provided that they do not thereby *assume the character of articles or of products falling within other headings*.

Explanatory Note 72.15(2) (emphasis added).[14]

For Plaintiff, these two Explanatory Notes (Explanatory Note 72.28(A) and Explanatory Note 72.15(2)), taken together, stand for the proposition that merchandise otherwise classified under HTSUS heading 7228 will not be classified thereunder if subjected to "working" that causes it to "*assume the character of articles or products*

---

[11] As shall be seen, HTSUS subheading 7228.40.00 ("Other bars and rods, not further worked than forged") is more specific than HTSUS subheading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . Other") because it describes the subject rods in their final form.

[12] HTSUS chapter 73 covers "articles of iron or steel." The relevant portions of HTSUS chapter 73 read as follows:

7326 Other articles of iron or steel:

Forged or stamped, but not further worked:

7326.11.00 Grinding balls and similar articles for mills

[13] Although Explanatory Note 72.28(A) incorporates by reference Explanatory Notes 72.14, 72.15, and 72.16, only Explanatory Note 72.15 is relevant here.

[14] There is some question as to whether Explanatory Note 72.15 applies to this classification dispute because Explanatory Note 72.15 covers "non-alloy" steel whereas the subject rods are of "alloy" steel. *See* Explanatory Note 72.15, HTSUS. Plaintiff fails to make its case, however, regardless of whether HTSUS heading 7215 applies or not.

falling in [sic] *another* [sic] *heading* [sic].” Pl.’s Br. at 14–15 (quoting Explanatory Note 72.15(2)).

Relying on the language in Explanatory Note 72.15(2)—made applicable to HTSUS heading 7228 by reference—Plaintiff asserts that the heat treatments and other processing that occurred at ME Long Teng’s manufacturing plant, although not considered further “working,”[15] nevertheless caused the rods to be “processed out” of the scope of HTSUS heading 7228 (“Other bars and rods of other alloy steel”) because they assumed the character of articles under HTSUS subheading 7326.11.00 (“Grinding balls and similar articles for mills”). Pl.’s Br. at 15–16, 18.

According to Plaintiff, “[t]he processing by ME Long Teng causes [the rods] to be processed into a new and different article more properly classified in subheading 7326.11, HTSUS [because t]he resulting article is ‘similar to’ ‘grinding balls’ and which are also designed— exclusively—for use in mills.” Pl.’s Br. at 16.[16] Importantly, Plaintiff claims that the rods’ actual use as grinding rods dictates their classification under HTSUS subheading 7326.11.00. *See* Pl.’s Br. at 18 (“[T]he use of the grinding rods is determinative of their classification.”).

There are two problems with Plaintiff’s argument. First, the subject rods’ use is not an essential or even a material consideration in their classification because neither HTSUS heading 7228 nor 7326 is a use provision—either principal or actual—nor does either heading inherently suggest that products classified within its scope are for a particular use. *See, e.g., Apple Inc. v. United States*, 964 F.3d 1087, 1093 (Fed. Cir. 2020) (“A use provision describes an article by its principal or actual use.” (citing *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1313 (Fed. Cir. 2012))). Second, Plaintiff’s argument violates the principal that, under GRI 1, “the possible headings are to be evaluated without reference to their subheadings, which cannot be

[15] The two competing tariff provisions share a common requirement that, after the subject merchandise is “forged,” it cannot be further “worked.” HTSUS chapter 72 defines further working as “products subjected to any of the following surface treatments: polishing and burnishing; artificial oxidation; chemical surface treatments such as phosphatizing, oxalating and borating; coating with metal; coating with nonmetallic substances (e.g., enameling, varnishing, lacquering, painting, coating with plastics materials); or cladding.” Ch. 72, Additional U.S. Note 2, HTSUS. Plaintiff agrees that the heat treatments and other processing that occurs at ME Long Teng’s manufacturing plant does not constitute further working. *See* Pl.’s Br. at 12–14.

[16] Plaintiff also argues, in the alternative, that if the court concludes that the subject steel rods are prima facie classifiable under both HTSUS subheadings 7228.40.00 (“Other bars and rods, not further worked than forged”) and 7326.11.00 (“Grinding balls and similar articles for mills”), then an analysis under GRI 3 dictates their classification under HTSUS subheading 7326.11.00. As shall be seen, the court does not have to reach this issue because the subject steel rods are not prima facie classifiable under Plaintiff’s proposed HTSUS subheading 7326.11.00.

used to expand the scope of their respective headings." *R.T. Foods, Inc.*, 757 F.3d at 1353 (citing *Orlando Food Corp.*, 140 F.3d at 1440 ("[W]hen determining which heading is . . . more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings.")). And so, even though HTSUS subheading 7326.11.00 describes "[g]rinding balls and similar articles for mills," this subheading is not relevant when evaluating tariff provisions at the heading level.

I. The Court Will Not Consider the Use of the Subject Rods or the Terms of Subheadings in Evaluating the Parties' Competing Tariff Provisions Under GRI 1

A. The Subject Rods' Actual Use as Grinding Rods is Not a Material Consideration in Their Classification

Plaintiff contends that the subject rods' actual use as grinding rods is an essential consideration in determining their classification. *See* Pl.'s Br. at 18. But Plaintiff's argument that use should be elevated as a factor in resolving the present classification dispute is without merit.

Here, it is important to keep in mind that the discussion concerns headings—not subheadings. Neither HTSUS heading 7228[17] nor 7326[18] are use provisions because they do not describe an article by its principal or actual use. *See Schlumberger Tech. Corp.*, 845 F.3d at 1164 ("[A] use provision describes articles according to their principal or actual use." (citation omitted)). A principal use provision classifies a particular article according to its ordinary commercial use, even though that article may, at times, be put to some atypical use. *See Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999). While the HTSUS contains plenty of principal use provisions, HTSUS headings 7228 and 7326 are not among them. *Cf. Dependable Packaging Sols., Inc. v. United States*, 757 F.3d 1374, 1378 (Fed. Cir. 2014) (emphasis added) (concluding that an HTSUS provision covering "[g]lassware *of a kind used for* table, kitchen, toilet, office, indoor decoration or similar purposes" is a principal use provision).

On the other hand, "[a]ctual use provisions, which are rare in the HTSUS, are those in which classification is dependent upon the merchandise's actual use." *GRK Canada, Ltd. v. United States*, 40 CIT __, __180 F. Supp. 3d 1260, 1266 n.7 (2016). Neither HTSUS heading 7228 nor 7326, however, is one of the few actual use provi-

---

[17] HTSUS heading 7228 covers "[o]ther bars and rods of other alloy steel; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel."

[18] HTSUS heading 7326 covers "[o]ther articles of iron or steel."

sions found in the HTSUS. *Cf. Tradewind Farms, Inc. v. United States*, 31 CIT 664, 665, 667 (2007) (not reported in the Federal Supplement) (citation omitted) (concluding that an HTSUS provision covering "implements to be used for agricultural or horticultural purposes" "is an actual use provision, as it contains the phrase 'to be used for.'"). Rather, they are *eo nomine* tariff provisions.

An *eo nomine* tariff provision "is one which describes a commodity by a specific name, rather than by use, and absent limitation or contrary legislative intent . . . includes all forms of the named article, even improved forms." *Well Luck Co. v. United States*, 887 F.3d 1106, 1111 n.4 (Fed. Cir. 2018) (cleaned up). HTSUS heading 7228 ("Other bars and rods of other alloy steel") is an *eo nomine* provision because it describes articles by specific names (i.e., "bars" and "rods" of "alloy steel"). *See, e.g., Orlando Food Corp.*, 140 F.3d at 1441 ("HTSUS 2002, 'Tomatoes prepared or preserved,' is clearly *an eo nomine* provision, *i.e.*, 'it describes a commodity by a specific name, usually one common in commerce.'" (quoting *Nidec Corp. v. United States*, 68 F.3d 1333, 1336 (Fed. Cir. 1995))).

Likewise, HTSUS heading 7326 ("Other articles of iron or steel") is an *eo nomine* provision of the basket type[19] because it describes, by name, iron or steel articles that are not more specifically provided for elsewhere in the HTSUS. *See, e.g.*, *Travenol Labs., Inc. v. United States*, 83 Cust. Ct. 1, 2, 4, 476 F. Supp. 1075, 1076, 1077 (1979) (describing a tariff provision covering "[h]ose, pipe, and tubing, all the foregoing not specially provided for [elsewhere]" as an "[e]o nomine provision of the 'basket' type"); *see also, e.g., Janssen Ortho LLC v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1352, 1359 (2020) ("An *eo nomine* provision 'describes an article by a specific name.'" (quoting *Schlumberger Tech. Corp.*, 845 F.3d at 1164)); *ADC Telecommunications, Inc. v. United States*, 916 F.3d 1013, 1018 (Fed. Cir. 2019) (concluding that an HTSUS provision covering "[l]iquid crystal devices not constituting articles provided for more specifically in other headings . . . or included elsewhere in this chapter 'is unquestionably *eo nomine* because it describes the articles it covers by name'" (quoting *Schlumberger Tech. Corp.*, 845 F.3d at 1164)).

---

[19] In *Travenol Laboratories, Inc. v. United States*, the Customs Court described a tariff provision covering "[h]ose, pipe, and tubing . . . not specially provided for [elsewhere]" as an "[e]o nomine provision of the 'basket' type." 83 Cust. Ct. 1, 2, 4, 476 F. Supp. 1075, 1076, 1077 (1979). Here, like the tariff provision in *Travenol*, HTSUS heading 7326 ("Other articles of iron or steel") describes articles by name, not use. Additionally, Explanatory Note 73.26 provides: "This heading covers all iron or steel articles . . . **other than** articles . . . *more specifically covered elsewhere in the Nomenclature*." Explanatory Note 73.26 (emphasis added). Thus, like the tariff provision in *Travenol*, HTSUS heading 7326, too, describes articles by name (not use) and contains the "not specially provided for" elsewhere clause indicative of a basket provision.

Plaintiff maintains, however, that the subject rods' use is determinative of their classification regardless of HTSUS headings 7228's and 7326's status as *eo nomine* tariff provisions. *See* Pl.'s Br. at 18–21. In making its argument, Plaintiff attempts to fit the facts of this case into the framework of the Federal Circuit's decisions in *GRK Canada, Ltd. v. United States*, and *Ford Motor Co. v. United States. See* Pl.'s Br. at 19 ("The grinding rods fit precisely into the scenario described by the Appellate Court in *Ford* and *GRK Canada*."). These cases are inapposite.

GRK Canada, Ltd. v. United States considered whether a use limitation could be read into an *eo nomine* provision covering "other wood screws." *See* 761 F.3d 1354, 1359 (Fed. Cir. 2014). There, noting that "it [wa]s evident that the material with which the screw is intended to be used is inherent within the name of the *eo nomine* tariff classification 'other wood screw,'"—i.e., the wood screws were not made of wood but rather metal screws used to fasten wood—the Court determined that "[t]he use of goods may be an important aspect of the distinction of certain *eo nomine* provisions . . . where . . . the name of the provisions refers directly to the use of subject articles." *Id.* at 1359, 1361.

Similarly, *Ford Motor Co. v. United States* looked at whether a use limitation could be read into an *eo nomine* tariff provision covering "[m]otor cars and other motor vehicles principally designed for the transport of persons." *See* 926 F.3d 741, 750 (Fed. Cir. 2019). There, the Court concluded that the "appeal present[ed] one of the very limited circumstances where the relevant heading . . . is an *eo nomine* provision for which consideration of use is appropriate because [the] [h]eading . . . inherently suggest[ed] looking to intended use." *Id.* at 753. That is, "the 'principally designed for' portion [of the heading] inherently suggest[ed] a type of use, i.e., 'the transport of persons.'" *Id.* at 750.

Here, Plaintiff claims that use is essential to the court's classification determination because—like the tariff provisions for "other wood screws" in *GRK Canada* and "[m]otor cars and other motor vehicles principally designed for the transport of persons" in *Ford Motor Co.*—the "text of subheading 7326.11, HTSUS, inherently suggests that the products classified under its scope are for a particular type of use as a grinding ball or similar object." Pl.'s Br. at 19. Plaintiff's argument fails for two reasons. First, the language of HTSUS *subheading* 7326.11.00 is irrelevant under GRI 1 because the court is only concerned with a comparison of the competing *headings* (i.e., HTSUS heading 7228 and 7326). Plaintiff attempts to expand the scope of HTSUS heading 7326 to include the terms of its subheading 7326.11.00 and, for the reasons discussed in the next subsection, this is not allowed.

Second, unlike the *eo nomine* provisions at issue in *GRK Canada* and *Ford Motor Co.*, neither HTSUS heading 7228 ("Other bars and rods of other alloy steel") nor 7326 ("Other articles of iron or steel") inherently suggests a type of use. In fact, HTSUS headings 7228 and 7326 are unlike any provisions for which courts have previously considered use—principal or actual. *Cf. S.C. Johnson & Son, Inc. v. United States*, 42 CIT __, __, 335 F. Supp. 3d 1294, 1299 (2018) ("Because the terms of the heading contemplate a specific use (*i.e.*, 'conveyance or packing of goods'), this court regards HTSUS Heading 3923 as a principal use provision."); *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998) (citation omitted) ("The inclusion in this definition of the words 'to be used for' makes classification under the . . . subheading dependent upon the actual use of the merchandise, *i.e.*, the subheading is an actual use provision.").

Although the scope of each heading at issue here necessarily encompasses articles designed for various uses, nothing about the language of these headings explicitly or implicitly suggests that an article's principal or actual use is necessary to or determinative of its classification under either heading. Therefore, the court will not read a use limitation into either of the competing *eo nomine* tariff headings as part of its GRI 1 analysis. *See Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) ("[A] use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use." (citation omitted)).

B. Headings Are to Be Evaluated Without Reference to Their Subheadings

In a similar vein, Plaintiff argues that the subject steel rods are not classifiable under HTSUS *heading* 7228 because, as a result of the processing that occurred at ME Long Teng's manufacturing plant, the rods have assumed the character of articles in—and should therefore be classified under—HTSUS *subheading* 7326.11.00 ("Grinding balls and similar articles for mills"). By making this argument, Plaintiff attempts to bypass the initial step in a classification analysis (i.e., a comparison of *headings*) by expanding the scope of HTSUS heading 7326, for classification purposes, to include the terms of its subheading (i.e., HTSUS subheading 7326.11.00).

Plaintiff insists the subject rods have assumed the character of articles under HTSUS subheading 7326.11.00, by citing HTSUS General Note 3(h)(vi)[20] for the proposition that a reference to HTSUS heading 7326 ("Other articles of iron or steel") necessarily encompasses the terms of HTSUS subheading 7326.11.00 ("Grinding balls and similar articles for mills"). *See* Pl.'s Reply at 7 ("A reference to 'Grinding balls and similar articles for use in mills' need not appear in a four-digit Heading, but may appear in a six-digit subheading of the tariff.").

HTSUS General Note 3(h)(vi) provides:

> (h) Definitions. For the purposes of the tariff schedule, unless the context otherwise requires—
>
> . . . .
>
> (vi) the term "headings" refers to the article descriptions and tariff provisions appearing in the schedule at the first hierarchical level; the term "subheading" refers to any article description or tariff provision indented thereunder; a reference to "headings" encompasses subheadings indented thereunder.

General Note 3(h)(vi), HTSUS.

Plaintiff, in this way, misreads not only the intent, but also the express meaning, of General Note 3(h)(vi). Neither General Note 3(h)(vi) nor anything else in the HTSUS does what Plaintiff argues. That is, create a rule that a term of a subheading should be used to interpret the scope of a term of a heading, or the scope of a heading as determined according to its terms, when read in accordance with the relevant section and chapter notes. Rather, General Note 3(h)(vi) is merely a definitional provision describing what headings and subheadings are, not how they are to be applied for purposes of classification.[21]

Instead, "[t]he classification of merchandise is governed by the GRIs . . . which are applied in numerical order." *See R.T. Foods, Inc.*, 757 F.3d at 1353 (citation omitted). Thus, classification analysis begins with GRI 1, which provides that "classification shall be determined according to the terms of the *headings* and any relative section

[20] The court notes, solely for purposes of clarity and accuracy, that Plaintiff, in its brief, mischaracterizes HTSUS General Note 3(h)(vi) as an Additional U.S. Rule of Interpretation. Plaintiff's mischaracterization, however, has no impact on the outcome of this case.

[21] The court notes that all of the definitions provided for under HTSUS General Note 3(h) are preceded by the words "unless the context otherwise requires." *See* General Note 3(h), HTSUS. Here, Plaintiff asks the court to interpret and apply HTSUS General Note 3(h)(vi) in a manner that is contrary to GRI 1 and controlling precedent. Thus, even assuming *arguendo* that HTSUS General Note 3(h)(vi) is one of the sources that the court may look to when determining the classification of merchandise for legal purposes, it cannot do so in the context of this case.

or chapter notes." *Id.* (emphasis in original) (first quoting GRI 1, HTSUS; and then citing *Orlando Food Corp.*, 140 F.3d at 1440 ("[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.")).[22]

As mentioned above, the Federal Circuit has cautioned that, "[p]ursuant to GRI 1, the possible headings are to be evaluated without reference to their subheadings, which cannot be used to expand the scope of their respective headings." *Id.* (citing *Orlando Food Corp.*, 140 F.3d at 1440 ("Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. . . . [W]hen determining which heading is . . . more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings.")). In other words, the GRIs themselves direct that the terms of a subheading are to be considered only after the correct heading has been determined. *See, e.g.*, *Mondiv, Div. of Lassonde Specialties Inc. v. United States*, 42 CIT __, __, 329 F. Supp. 3d 1331, 1344 (2018) ("After the proper heading of the product is determined [under GRI 1], the court utilizes GRI 6 to determine the appropriate subheading.").

Thus, Plaintiff's attempt to expand the scope of its preferred HTSUS heading 7326 ("Other articles of iron or steel") to include the terms of its subheading 7326.11.00 ("Grinding balls and similar articles for mills") is impermissible under the GRIs. Therefore, the court will first evaluate the parties' competing tariff provisions at the heading level, without reference to their subheadings, as is provided for in GRI 1.

II. Classification of the Subject Rods Pursuant to GRI 1

Keeping in mind that the scope of HTSUS headings 7228 and 7326 cannot be expanded by reference to their respective subheadings, and that the subject rods' "use" as grinding rods is irrelevant to their classification, the court turns next to a comparison of the competing headings pursuant to GRI 1. For the following reasons, the court concludes that an evaluation of the parties' competing tariff headings under GRI 1 demonstrates that the subject rods are properly classified under HTSUS heading 7228, and not HTSUS heading 7326.

---

[22] Importantly, under GRI 1, the General Notes are not mentioned as one of the sources used to determine the classification of merchandise for legal purposes. *See* GRI 1, HTSUS ("[F]or legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes.").

A. The Subject Rods Are Properly Classified Under HTSUS Heading 7228 Pursuant to GRI 1

HTSUS heading 7228 covers "[o]ther bars and rods of other *alloy steel*; angles, shapes and sections, of other alloy steel; hollow drill bars and rods, of alloy or non-alloy steel." Heading 7228, HTSUS (emphasis added). HTSUS chapter 72 note 1(m) defines "other bars and rods" as

> Products which do not conform to any of the definitions at (ij)[23], (k)[24] or (l)[25] above or to the definition of wire, which have a uniform solid cross-section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles or other convex polygons (including "flattened circles" and "modified rectangles", of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel).

Ch. 72, Note 1(m), HTSUS.

It is undisputed that the subject rods do not conform to any of the

[23] Note (ij) covers "semifinished products" defined as: "Continuous cast products of solid section, whether or not subjected to primary hot-rolling; and [o]ther products of solid section, which have not been further worked than subjected to primary hot-rolling or roughly shaped by forging, including blanks for angles, shapes or sections. These products are not presented in coils." Ch. 72, Note (ij), HTSUS.

[24] Note (k) covers "flat-rolled products" defined as:

> Rolled products of solid rectangular (other than square) cross-section, which do not conform to the definition at (ij) above in the form of:
>
> - coils of successively superimposed layers, or
>
> - straight lengths, which if of a thickness less than 4.75 mm are of a width measuring at least 10 times the thickness or if of a thickness of 4.75 mm or more are of a width which exceeds 150 mm and measures at least twice the thickness.
>
> Flat-rolled products include those with patterns in relief derived directly from rolling (for example, grooves, ribs, checkers, tears, buttons, lozenges) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings.
>
> Flat-rolled products of a shape other than rectangular or square, of any size, are to be classified as products of a width of 600 mm or more, provided that they do not assume the character of articles or products of other headings.

Ch. 72, Note (k), HTSUS.

[25] Note (*l*) covers "bars and rods, hot-rolled, in irregularly wound coils" defined as:

> Hot-rolled products in irregularly wound coils, which have a solid cross-section in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles or other convex polygons (including "flattened circles" and "modified rectangles", of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). These products may have indentations, ribs, grooves or other deformations produced during the rolling process (reinforcing bars and rods).

Ch. 72, Note (*l*), HTSUS.

chapter 72 definitions in notes (ij), (k), or (*l*), or the chapter 72 definition of wire.[26] There appears to be some disagreement, however, as to whether the "uniform solid cross-section" runs along the "whole" length of the subject steel rods.

Plaintiff maintains that the subject steel rods "have a uniform cross section along *most* of their length, except at the ends, where they are notched to fit into a particular rod mill." Pl.'s Resp. SOF ¶ 4 (emphasis added). For its part, Customs "[d]enies that '{t}he ends of the grinding rods [are] notched' [and a]vers that photographs of the rods do not show the rods to have notched ends."[27] Def.'s Resp. SOF ¶ 12.

Whether the ends of the subject steel rods are "notched," however, is immaterial because HTSUS chapter 72 note 1(m) provides that "products may . . . have indentations, ribs, grooves or other deformations produced during the rolling process (reinforcing bars and rods) [or] be twisted after rolling," and still be considered "[o]ther bars and rods" for classification purposes. Ch. 72, Note 1(m), HTSUS.

The term "notch" is not defined in the HTSUS. A tariff term undefined by the HTSUS is construed in accordance with its common and commercial meaning. *See Baxter Healthcare Corp.*, 182 F.3d at 1337. The court, in ascertaining the common meaning of a tariff term undefined by the HTSUS, "may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information." *Id.* at 1338 (citation omitted). The Oxford English Dictionary defines a notch as

---

[26] Note (o) defines "wire" as: "Cold-formed products in coils, of any uniform solid cross-section along their whole length, which do not conform to the definition of flat-rolled products." Ch. 72, Note (o), HTSUS.

[27] As this Court and the U.S. Court of Appeals for the Federal Circuit have confirmed, "the merchandise itself is often a potent witness in classification cases." *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (citation omitted); *see Dependable Packaging Sols., Inc. v. United States*, 37 CIT 242, 254 (2013) (not reported in Federal Supplement) (citation omitted), *aff'd*, 757 F.3d 1374 (Fed. Cir. 2014). In this instance, while there are no physical samples of the subject rods for the court to examine, an examination of the official company documents describing the rods' specifications and manufacturing process, along with photographs of the rods themselves, suggests that they are not "notched" at their ends.

The only mention of the rods being "notched" is in Plaintiff's Rule 56.3 Statement of Facts. *See* Pl.'s SOF ¶ 12. There, Plaintiff claims that "[t]he ends of the grinding rods will be notched, so that they fit into a particular rod grinding mill within which they are intended to be used" and cites the declaration of Matthew Schlue, a Senior Account Manager at ME Global, Inc., as support. *See id.* (citing Schlue Decl. ¶¶ 3, 14 & Exs. A-C, ECF No. 20–4). While the portions of Mr. Schlue's declaration cited by Plaintiff state that the ends of the rods are "sized" and "cut" to a customer specific length, there is no mention of the rods being "notched." *See* Schlue Decl. ¶¶ 3, 14 & Exs. A, B, C. That is also true of the official company documents describing the specifications of the subject rods, which state that they are "[s]aw cut [on] both ends," but do not say anything about being notched. *Id.* Ex. B. Moreover, the record photographs depicting the subject rods show no signs of notching at their ends. *See id.* ¶ 21 & Ex. F.

"[a] groove, incision, or indentation (typically V-shaped in cross-section) in an edge, or across or through a surface." *Notch*, https://www.oed.com/view/Entry/128536?rskey=N0SF70&result=1#eid (last visited Apr. 11, 2023).

Thus, it follows that a "notch," as a type of "groove" or "indentation," is provided for under the relevant HTSUS chapter note. Therefore, that a steel bar or rod may contain notches, ribs, grooves, or indentations does not render it without a uniform solid cross-section along its whole length for purposes of classification under HTSUS heading 7228. Consequently, the subject rods satisfy the definition of "[o]ther bars and rods" under HTSUS heading 7228 regardless of whether they have notched ends or not.

"Other bars and rods" of HTSUS heading 7228 must also be of "other alloy steel" to be classifiable under this heading. The relevant portions of note 1(f) to HTSUS chapter 72 define "other alloy steel" as "[s]teels not complying with the definition of stainless steel[28] and containing by weight one or more of the following elements in the proportion shown . . . 0.3 percent or more of chromium." Ch. 72, Note 1(f), HTSUS.

The metallurgical testing performed by Plaintiff shows that the percentage of chromium contained in the subject steel rods, for the period in question, fluctuated between 0.3% to 0.39%, by weight. *See* Def.'s Br. Ex. B at 1–2, ECF No. 23–2 (Pl.'s Resp. Def.'s 2d Interrogs.). Therefore, because the subject steel rods do not comply with the definition of stainless steel (i.e., "containing, by weight 1.2 percent or less of carbon and 10.5 percent or more of chromium"), and their chromium content never dipped below the 0.3% threshold requirement, they satisfy the chapter 72 definition of "[o]ther alloy steel."

As Customs notes, HTSUS heading 7228 is an *eo nomine* provision covering "[o]ther bars and rods of other alloy steel." Heading 7228, HTSUS. As demonstrated above, the subject rods satisfy the controlling HTSUS chapter 72 notes that define "[o]ther bars and rods of other alloy steel." Thus, pursuant to a GRI 1 analysis, the rods are classifiable under HTSUS heading 7228 because they are specifically described by the terms of HTSUS heading 7228 as "[o]ther bars and rods of other alloy steel." Heading 7228, HTSUS.

[28] Note 1(e) to chapter 72 defines "stainless steel" as "[a]lloy steels containing, by weight 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements." Ch. 72, Note 1(e), HTSUS.

B. The Subject Steel Rods Are Not Properly Classified Under HTSUS Heading 7326 Pursuant to GRI 1

Plaintiff's proposed heading is HTSUS 7326—a "basket provision" covering "[o]ther articles of iron or steel."[29] Heading 7326, HTSUS. "A basket provision is not a specific provision." *R.T. Foods, Inc.*, 757 F.3d at 1354 (quoting *Int'l Bus. Machs. Corp. v. United States*, 152 F.3d 1332, 1338 (Fed. Cir. 1998)). "Therefore, '[c]lassification of imported merchandise in a basket provision is only appropriate if there is no tariff category that covers the merchandise more specifically.'" *Id.* (quoting *Rollerblade, Inc. v. United States*, 24 CIT 812, 814, 116 F. Supp. 2d 1247, 1251 (2000), *aff'd*, 282 F.3d 1349 (Fed. Cir. 2002)).

In other words, because Plaintiff's proposed HTSUS heading 7326 is a basket provision, the subject rods can only be classified under that heading if they are not more specifically covered elsewhere in the tariff schedule. Since the court has determined that the rods are specifically covered by HTSUS heading 7228 ("Other bars and rods of other alloy steel"), it follows that they cannot also be classified under HTSUS heading 7326—a basket provision covering "[o]ther articles of iron or steel." Put another way, "rods of other alloy steel" is more specific than "other articles of steel," and thus GRI 1 directs that the subject rods be classified under HTSUS heading 7228.

III. The Subject Rods Are Properly Classified Under HTSUS Subheading 7228.40.00 Pursuant to GRI 6

Having determined the subject rods are properly classified under HTSUS heading 7228, the court turns next to an analysis of the competing subheadings. While Customs originally classified the rods under HTSUS subheading 7228.30.80 ("Other bars and rods, not

---

[29] The General Explanatory Notes to HTSUS chapter 73 provide:

> This Chapter covers a certain number of specific articles in headings 73.01 to 73.24, and in headings 73.25 and 73.26 a group of articles not specified or included in Chapter 82 or 83 and *not falling in other Chapters of the Nomenclature*, of iron (including cast iron as defined in Note 1 to this Chapter) or steel.

Ch. 73, General Explanatory Notes, HTSUS (emphasis added).

The relevant portion of the Explanatory Note 73.26 states:

> This heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating **other than** articles included in the preceding headings of this Chapter or covered by Note 1 to Section XV or included in **Chapter 82** or **83** or *more specifically covered elsewhere in the Nomenclature*.
>
> . . .
>
> This heading **does not cover** forgings which are products falling in other headings of the Nomenclature (e.g., recognisable parts of machinery or mechanical appliances) or unfinished forgings which require further working but have the essential character of such finished products.

Explanatory Note 73.26 (emphasis added).

further worked than hot-rolled, hot-drawn or extruded . . . Other"), it now maintains that HTSUS subheading 7228.40.00 ("Other bars and rods, not further worked than forged") describes the rods with more specificity.[30] That is, for Customs, although both HTSUS subheadings 7228.30.80 and 7228.40.00 appear to describe the subject rods insofar as they are the product of hot-rolling and forging, HTSUS subheading 7228.40.00 ("Other bars and rods, not further worked than forged") is more specific than HTSUS subheading 7228.30.80 ("Other bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . Other") because it describes the rods in their final form.

The court looks to GRI 6 to determine whether HTSUS subheading 7228.30.80 or 7228.40.00 is the correct tariff designation for the subject rods. *See Well Luck Co.*, 887 F.3d at 1112. GRI 6 instructs that:

> For legal purposes, 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. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 6, HTSUS.

Here, the subject rods are first hot-rolled and then forged. *See* Pl.'s SOF ¶ 7. Therefore, because the rods are forged after being hot-rolled, HTSUS subheading 7228.30.80, which covers "[o]ther bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . [o]ther," only describes the subject steel rods at an intermediate stage of their production. On the other hand, HTSUS subheading 7228.40.00, which covers "[o]ther bars and rods, not further worked than forged," more specifically describes the subject steel rods as a finished product.

The term "further worked" is defined in Additional U.S. Note 2 to chapter 72, which provides:

> For the purposes of this chapter, unless the context provides otherwise, the term "*further worked*" refers to products subjected to any of the following surface treatments: polishing and burnishing; artificial oxidation; chemical surface treatments such as phosphatizing, oxalating and borating; coating with

[30] Both HTSUS subheadings 7228.30.80 and 7228.40.00 are subject to the same 25% *ad valorem* duty. Therefore, the subject steel rods will be assessed a 25% *ad valorem* duty rate regardless of whether they are classified under HTSUS subheading 7228.30.80 or HTSUS subheading 7228.40.00.

> metal; coating with nonmetallic substances (e.g., enameling, varnishing, lacquering, painting, coating with plastics materials); or cladding.

Ch. 72, Additional U.S. Note 2, HTSUS.

While "forging" is not explicitly referenced in Additional U.S. Note 2, the definition of "further worked" is not limited to the note's listed surface treatments. Additional U.S. Note 2 expressly states that the term "further worked" constitutes the listed surface treatments "unless the context provides otherwise." Ch. 72, Additional U.S. Note 2, HTSUS. Here, the context provides otherwise.

In this case, the subject rods were hot-rolled, then forged, and were not subject to any of the surface treatments listed under Additional U.S. Note 2 after being hot-rolled and forged. Thus, if the court were to read "further worked" as limited to surface treatments, it would render unnecessary the qualifying language (i.e., "than hot-rolled, hot-drawn or extruded" in HTSUS subheading 7228.30.80 and "than forged" in HTSUS subheading 7228.40.00) that distinguishes the two competing tariff provisions.

As with any statute, "[w]hen interpreting HTSUS provisions, [courts] must strive to give effect to every word in the statutory text." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013) (first citing *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); and then citing *Corley v. United States*, 556 U.S. 303, 314 (2009)). An interpretation of a tariff provision will be disfavored if it renders the terms of another HTSUS provision superfluous. *See id.* Thus, courts should construe the provisions of the tariff code in a way that avoids rendering terms redundant, meaningless, or inoperative. Therefore, in this context, the term "further worked" is more appropriately defined by its common meaning, i.e., "to form, fashion, or shape an existing product to a greater extent." *Cummins Inc.*, 454 F.3d at 1365.

"Forging" is defined under chapter 72 as "the hot deformation of the metal in the mass by means of drop hammers or on forging presses, to obtain pieces of any shape." Ch. 72, General Explanatory Note (IV)(2)(A)(2), HTSUS. The act of "forging" clearly falls within the common meaning of "further worked" as it is the process of shaping an existing product—in this case, the steel bars—to a greater extent.

Thus, applying GRI 6, the subject rods cannot be classified as "[o]ther bars and rods, not further worked than hot-rolled, hot-drawn or extruded . . . [o]ther" under HTSUS subheading 7228.30.80 because forging is a type of further working, and the rods were forged *after* being hot-rolled. Accordingly, the court concludes that the subject rods are properly classified under HTSUS subheading 7228.40.00 as "[o]ther bars and rods, not further worked than forged."

CONCLUSION

For the foregoing reasons, the court holds that the subject steel rods are classifiable under HTSUS subheading 7228.40.00 ("Other bars and rods, not further worked than forged"). The court denies Plaintiff's motion for summary judgment and grants Customs' cross-motion for summary judgment. Judgment will be entered accordingly.

Dated: May 2, 2023
New York, New York

/s/ Richard K. Eaton
JUDGE

Slip Op. 23–69

CEK GROUP LLC, Plaintiff, v. UNITED STATES Defendant, M&B METAL PRODUCTS COMPANY, INC., Defendant-Intervenor

Before: Jane A. Restani, Judge
Court No. 22–00082
PUBLIC VERSION

[The court sustains Customs' final determination and final administrative decision pursuant to the Enforce and Protect Act finding evasion of duties on steel wire hangers.]

Dated: May 2, 2023

David John Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiff CEK Group LLC.

Elisa S. Solomon, International Trade Field Office, U.S. Department of Justice, of New York, NY, for Defendant United States of America. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC. Of counsel on the brief was *Christopher Berridge*, Office of Chief Counsel, U.S. Customs and Border Protection, and *Jennifer L. Petelle*, Office of Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

Frederick P. Waite and *Kimberly R. Young*, Vorys, Sater, Seymour and Pease, LLP, of Washington, DC, for Defendant-Intervenor M&B Metal Products Company, Inc.

OPINION

Restani, Judge:

Importer of steel wire hangers CEK Group LLC ("CEK") challenges the final determination and final administrative decision made by the United States Customs and Border Protection ("CBP"). CEK asserts that the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517, investigation should not have been initiated, that CBP made procedural errors regarding the rejection of evidence and failure to provide adequate public summaries, that adverse inferences were improperly applied, and that the determination and decision by CBP are not supported by substantial evidence. The United States ("Government") refutes these claims and asks the court to sustain CBP's evasion determination.

BACKGROUND

On July 6, 2020, M&B Metal Products Company, Inc. ("M&B"), a domestic producer of steel wire garment hangers, filed an EAPA duty evasion allegation asserting that CEK participated in a scheme to transship wire hangers from China through Thailand into the United States. *EAPA Duty Evasion Allegation Concerning Steel Wire Garment Hangers Imported from Thailand—Importer: CEK Group LLC*, C.R. 5, P.R. 5 (July 6, 2020) ("*Allegation*"). M&B alleged that CEK and three other U.S. importers, working with Thai exporter and manufacturer NWH Manufacture Company Limited ("NWH"), evaded an antidumping order on steel wire hangers from China. *Allegation* at 2–3, Ex. 1; *see also Notice of Antidumping Duty Order: Steel Wire Garment Hangers from the People's Republic of China*, 73 Fed. Reg. 58,111 (Dep't Commerce Oct. 6, 2008) ("*AD Order*").

On September 14, 2020, CBP's Trade Remedy Law Enforcement Directorate ("TRLED") initiated the investigation of CEK for EAPA Case Number 7501. *Initiation of Investigation for EAPA Case Number 7501*, C.R. 17, P.R. 29 (Sep. 14, 2020) ("*Initiation Memo*"). In analyzing the allegation submitted by M&B, TRLED determined that the materials that M&B provided "reasonably suggest[] that covered merchandise has entered into the customs territory of the United States by means of evasion." *Initiation Memo* at 1.

On December 11, 2020, TRLED determined that reasonable suspicion existed that the hangers were in fact manufactured in China, and imposed interim measures upon CEK. *EAPA Consolidated Investigation 7501: Notice of Determination as to Evasion* at 2, C.R. 36 (Sept. 16, 2021) ("*Evasion Determination*"). One week later, TRLED issued the Notice of Initiation of Investigation. *Notice of Initiation of Investigation and Interim Measures: Consolidated EAPA Case 7501*, C.R. 25, P.R. 39 (Dec. 18, 2020). TRLED sent CEK a Request for Information ("RFI") on January 28, 2021, and a supplemental RFI one month later. *EAPA Consolidated Case 7501: Request for Informa-*

tion from CEK Group LLC at 1, C.R. 1, P.R. 1 (Jan. 28, 2021); *EAPA Consolidated Case 7501: Supplemental Request for Information from CEK Group LLC* at 1, C.R. 32, P.R. 51 (Feb. 26, 2021). CEK responded to the RFI but failed to respond to the supplemental RFI. *CEK – RFI Response*, C.R. 31, P.R. 49 (Feb. 25, 2021) ("*CEK RFI Resp.*"); *TRLED – CEK Non-Response to Supp RFI*, P.R. 54 (Mar. 10, 2021) ("*CEK Supp. RFI Non-Resp.*"). Additionally, TRLED sent an RFI to NWH on January 27, 2021, and, after two prior responses were rejected for deficiencies in the filing, TRLED accepted a response on March 10, 2021. *EAPA Consolidated Case 7501: Request for Information from the Foreign Producer* at 1, C.R. 26, P.R. 41 (Jan. 27, 2021) ("*NWH RFI Request*"); *NWH – RFI Response*, C.R. 33, P.R. 54 (Mar. 10, 2021) ("*NWH RFI Resp.*"); *see also Evasion Determination* at 3.

During March and April of 2021, M&B and NWH each voluntarily submitted factual information. *Evasion Determination* at 4. TRLED accepted both submissions and placed them on the record. *Id.* CEK sought to submit information rebutting M&B's submission, and after two previous submissions were rejected for failing to contain actual rebuttal information, TRLED accepted the rebuttal information. *Id.* Finally, TRLED rejected several submissions from NWH, including video evidence mailed to TRLED, for being untimely. *Id.* With the record complete, CEK and M&B each submitted written arguments and rebuttal arguments. *CEK Written Argument*, C.R. 35, P.R. 64 (May 10, 2021); *M&B Written Argument*, P.R. 65 (May 10, 2021); *CEK Rebuttal Argument*, C.R. 34, P.R. 66 (May 25, 2021); *M&B Rebuttal Argument*, P.R. 67 (May 25, 2021).

After reviewing the record evidence and relevant arguments, TRLED issued its notice of determination as to evasion on September 16, 2021. *Evasion Determination*. CEK submitted a timely request for review, and CBP's Office of Regulations and Rulings ("ORR"), after reviewing the determination *de novo*, issued a decision affirming TRLED's determination of evasion. *See Administrative Review Determination of Evasion Decision*, C.R. 69, P.R. 114 (Jan. 28, 2022) ("*Admin. Review*"). CEK filed this action in the court, challenging the TRLED determination and ORR decision. *See* Compl., ECF No. 2 (Mar. 11, 2022).

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1517(g). The EAPA requires that the court determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or a review pursuant to 19 U.S.C. § 1517(f) was conducted "in accordance with those subjections" by examining whether CBP "fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(2)(A)-(B). While the agency bases its determination and decision on substantial evidence and the court reviews the agency's actions to assess whether they are arbitrary and capricious, "both standards require an assessment based on a reasonableness standard." *Ad Hoc Shrimp Trade Enf't Comm. v. United States*, Slip Op. 23–61, at *11 (CIT Apr. 26, 2023) (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. Of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677 683–84 (D.C. Cir. 1984)). "The court's review of Customs' determination as to evasion may encompass interim decisions subsumed into the final determination." *Vietnam Firewood Co. Ltd. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1273, 1284 (2020).

DISCUSSION

I. Customs' Initiation of the Investigation

CEK contends that CBP improperly initiated the EAPA investigation. Pl. CEK Group LLC, Mem. in Supp of its R. 56.2 Mot. for J. on the Agency Record at 10–20, ECF Nos. 33–34 (Sept. 12, 2022) ("CEK Br."). CEK asserts that the allegation submitted by M&B did not contain "sufficient" information to reasonably suggest that CEK was importing covered merchandise through evasion. CEK Br. at 11. The United States argues that M&B's allegation presented "robust information" to suggest evasion in the importation of wire hangers. Def. United States, Resp. Oppo. To Pl.'s Mot. for J. on the Agency Record at 8, 13–23, ECF Nos. 38–39 (Jan. 13, 2022) ("Gov. Br."). The Government also contends that CEK cannot challenge the initiation of an investigation. Gov. Br. at 11–13.

Pursuant to 19 U.S.C. § 1517(b)(1), CBP "shall initiate an investigation if the Commissioner determines that the information provided" in an allegation by a domestic manufacturer "reasonably suggest that covered merchandise has been entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(b)(1). The necessary information should be "reasonably available to the interested party to support its allegation." 19 C.F.R. § 165.11(b)(6). "Reasonably suggest" is not further defined in the statute, however, it is a standard the Government must follow, and is therefore challengeable. 19 U.S.C. § 1517(b)(1); 5 U.S.C. § 702.

In *Leco Supply, Inc. v. United States*, the court found that CBP properly assessed the data presented in an allegation to reasonably suggest that Leco was importing merchandise through evasion. 46

CIT __, __, 2023 WL 1434182 at *5 (2023). The allegations in *Leco*, which are not entirely dissimilar to those asserted here, noted a lack of employees at the alleged manufacturing factory as well as significant changes in imports from Laos and Vietnam following an imposition of new AD/CVD Orders. *Id.* CBP determined that these factors reasonably suggested that the covered merchandise was entering the United States through evasion. *Id.* These facts were considered "adequate" by the court to demonstrate CBP's determination was not arbitrary, capricious, or an abuse of discretion. *Id.*

In its brief, the Government argues that although "reasonably suggest" is not defined in the statute, legislative and judicial sources show that the phrase implies a threshold, initial finding as opposed to a higher standard, such as substantial evidence. Gov. Br. at 12 n.5. The Government points to 21 U.S.C. § 360i, administered by the Food and Drug Administration, which requires a manufacturer or importer to report "information that reasonably suggests" that a device it markets may contribute to or has malfunctioned in such a way as to cause death or injury. *Id., see also* 21 U.S.C. § 360i(a)(1). The Government asserts that "reasonably suggests" in this context is used to indicate a threshold issue rather than a final determination, and that the language in § 1517(b)(1) should be read in the same way. Gov. Br. at 12 n.5. The Government also contends that *Terry v. Ohio*'s "reasonable suspicion" standard should inform the reading of § 1517(b)(1) and that *Terry* weighs in favor of reading the phrase to mean initial findings without the need for substantial evidence. *Id.*; *see also Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968).

CEK agrees that *Terry v. Ohio*'s specific and objective bases for reasonable suspicion should be used, but that these standards have not been met and cites the court's interpretation of 19 U.S.C. §1677b(b) in *AL Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 246–47, 575 F. Supp. 1277, 1280–81 (1983), CEK Reply Br. at 5–7. *AL Tech* interpreted § 1677b(b)'s phrase "reasonable grounds to believe or suspect" to hold that the government did not err in finding a generalized press release regarding European steel, previous antidumping and countervailing duty petitions, and the public summary of the alleged manufacturer's International Trade Administration's ("ITA") review questionnaire insufficiently specific and objective to compel the ITA to initiate an antidumping duty investigation. *AL Tech*, 575 F. Supp. at 1279–80.

Here, the court need not choose between the competing interpretations of "reasonably suggests," in § 1517(b)(1), if there is actually a meaningful difference between them, as the voluminous evidence provided by M&B's allegation meets both the Government's and

CEK's proposed standards of reasonable suggestion.[1] In determining that an investigation should be initiated, CBP assessed the totality of the circumstances and evidence that M&B provided in its allegation and found that the circumstances reasonably suggested that CEK was importing wire hangers from NWH through evasion. *Initiation Memo* at 5. Among the evidence considered were (1) NWH's standard industrial classification showing that NWH self-identified as a company that sells wholesale goods on a fee or contract basis, which was not likely the kind of company that would produce hangers, (2) a foreign market research report, which showed import data suggesting "trading relationships" between NWH and the alleged transshipping Indian company Kaylee and Chinese company Shaoxing Mahsheng, (3) evidence that CEK has the same address and owner as AB MA Distribution Corporation, which imported hangers from NWH and the alleged transshipping Indian company Kaylee, (4) a bill of lading that shows that NWH imported hangers from [[ ]] a company located in China,[2] and (5) an investigation into CEK's alleged manufacturing site with photos showing that there was little activity at the warehouse.[3] *Initiation Memo* at 2–4.

As CEK admits, "the standard for initiation [of an EAPA investigation] is low." CEK Group LLC, Reply to Resp. of Def. and Def-Intervenor at 3, ECF No. 41 (Feb. 15, 2023) ("CEK Reply Br."). The court need not assess the validity of every piece of evidence

[1] To be clear, the court does not necessarily endorse either party's approach. The Supreme Court has long held that the reasonable suspicion needed to initiate investigations, some of which are invasive enough as to potentially violate the Fourth Amendment, varies from statute to statute. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978) ("The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute."); *see also Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 539 (1967) ("[R]easonable legislative or administrative standards . . . will vary with the municipal program being enforced . . . . [R]easonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."). Here, there are no Fourth Amendment concerns as in *Terry v. Ohio* and its progeny, nor are there the significant factors of health and human safety present as with the Federal Food and Drug Administration statute. Instead, CBP is tasked with enforcing U.S. antidumping and countervailing duty laws to protect U.S. industry, and deference is given in accordance with this goal.

[2] CEK argues that the provided document is illegible, that the shipment is before the period of investigation, and that the quantity of product only totaled about [[ ]] of shipments to the United States. Though the document does have legibility issues, it is possible to make out that the document itemizes a shipment from a company named [[ ]] to NWH in Thailand. For the purposes of establishing a reasonable suggestion of evasion, the document establishes a relationship between the two companies and a shipment of wire hangers from China to NWH in Thailand. *Allegation*, Ex. 5; CEK Br. at 14–15. The date in question is illegible. *Allegation*, Ex. 5.

[3] CEK maintains that the photos do not establish little activity. However, giving due deference to Commerce's factual findings, such a conclusion appears neither arbitrary nor capricious. CEK Br. at 25–27; *Allegation*, Ex. 6.

provided.[4] Taken together, the evidence specified above, along with many other materials, more than meets the standard of reasonably suggesting evasion of antidumping and countervailing duties by CEK.

II. CEK's Procedural Challenges

CEK raises two procedural challenges before the court. First, CEK argues that TRLED improperly rejected NWH's video evidence. CEK Br. at 28. Second, CEK asserts that TRLED failed to provide adequate public summaries of the Attaché Report prepared by Homeland Security Investigations ("HSI")[5] and the allegations submitted by M&B—specifically the market research report. CEK Br. at 45. The Government responds that only improperly submitted video evidence was rejected, that the public version of the Attaché Report redacted only limited information without preventing a reasonable understanding of the substance of the document, and that CBP did not rely on the market research report in either its intermediate determination or its final decision. Gov. Br. at 37–43.

A. Rejected Video Evidence

19 C.F.R. § 165.23 governs the submission of factual information during an evasion investigation. Under the regulation, parties must make voluntary submissions of factual information "no later than 200 calendar days after CBP initiated the investigation." 19 C.F.R. § 165.23(c)(2). Voluntary submissions after the 200th calendar day are not considered or placed on the administrative record. *Id.* If factual information is placed on the record prior to the 200th calendar day, parties to the investigation may provide rebuttal information responding to that new information within ten calendar days. *Id.* All submissions, whether voluntary, in response to a CBP request for information, or in rebuttal, must be submitted via "an email message

[4] CEK contends that many pieces of material discussed by M&B and considered by Commerce were improper. For example, CEK refutes that NWH's failure to submit financial data to the Thai Government would be a reason to suggest evasion. CEK Br. at 15–16. This is unconvincing. Some of the connections made by Commerce and M&B's allegation may be more tenuous, for example, two companies having owners with the same family name who live in the same district. CEK Br. at 19–20; *Initiation Memo* at 4; *Allegation* at 8. The court need not speak to the reliability of such contentions, as other, more substantial evidence reasonably suggests evasion. Potentially bad evidence does not invalidate good evidence.

[5] After the initiation of the investigation CBP added a memorandum to the administrative record concerning a site visit of NWH's facilities conducted by HSI, a subcomponent of Immigration & Customs Enforcement within CBP. *See Memo Re: Adding Information to the Administrative Record of Consolidated EAPA Case 7501*, C.R. 61, P.R. 101 (Dec. 18, 2020) ("*Attaché Report*").

or through any other method approved or designated by CBP . . . ." *See id.* § 165.23(c)(1), (2). For good cause, a party may submit a request for extension. 19 C.F.R. § 165.5(c)(1).

NWH submitted video evidence throughout March 2021 via email, all of which TRLED accepted and placed on the record. *Evasion Determination* at 3–4. After April 2, 2021, which marked the final day parties were permitted to submit factual information, both NWH and CEK made several attempts to submit additional videos. *Id.* TRLED rejected these videos because they were submitted after the deadline and did not rebut factual information voluntarily submitted by M&B. *Consolidated EAPA Case 7501: New Factual Information Submitted by NWH* at 1, P.R. 56 (Apr. 15, 2021); *EAPA 7501: Rejection of Rebuttal NFI* at 1, P.R. 57 (Apr. 15, 2021); *EAPA 7501: Rejection of Rebuttal NFI Submissions* at 1, P.R. 60 (Apr. 22, 2021). On April 29, 2021, TRLED received a physical disk with additional video evidence that NWH had mailed on March 19, 2021. *EAPA 7501: Rejection of Video Files*, P.R. 63 (April 30, 2021). In the rejection, TRLED asserted that NWH had mailed the disk against the advice of CBP officials as CBP had advised NWH not to physically mail information because CBP's offices were closed, that central processing would delay the package, and that the RFI instructions stated that submissions must be submitted via email. *Id.*

Although CEK asserts the rejection of NWH's mailed disk was improper, CEK cites no authority to support its position. CEK Br. at 28–29. TRLED's actions are reasonable and clearly in accordance with its regulation, and without specific arguments as to why the regulation may be invalid, the court sees no reason to evaluate the regulation itself.

B. Adequacy of the Public Summaries

19 C.F.R. § 165.4(a) provides procedures for when parties request business confidential treatment for a document and any public summary of that document. The regulation requires any document containing business confidential information to file a public version of the submission that "contain[s] a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information." *Id.* § 165.4(a)(2). In *Royal Brush Manufacturing, Inc. v. United States*, the court found the lack of public summaries accompanying the Attaché Report "particularly concerning given CBP's reliance on those reports in its determination." 43 CIT __, __, 483 F. Supp. 3d 1294, 1307 (2020). The court in *Royal Brush* remanded the matter to CBP to address and remedy the lack

of public summaries and provide the plaintiff with an "opportunity to participate on the basis of information that it should have received during the underlying proceeding." *Id.* at 1308.

CEK argues that at the time the Attaché Report was drafted, CBP had not yet initiated an investigation pursuant to 19 U.S.C. § 1517(b)(1) and therefore lacked the authority to collect information. CEK Br. at 45. This argument fails because the site visit was conducted prior to the allegation by M&B and was independent of the EAPA investigation. *See Attaché Report* at 3. CEK further argues that CBP failed to provide an adequate public summary of the report but does not show how the lack of an adequate summary resulted in prejudice. *Id.* CBP's redaction of the Attaché Report complies with 19 C.F.R. § 165.4, which requires redaction of confidential information such as the names and phone numbers of employees, the number and weight of shipments, and photos and videos of the site. 19 C.F.R. § 165.4(a)(2). While CBP did not provide summaries detailed enough to determine a close approximation of the redacted information, the redacted report did retain enough context and did provide sufficient summaries to determine what type of information was redacted. *E.g.*, *Attaché Report* at 4 ("When asked how many wire hangers NWH manufactures per day/per month, Mr. Tu stated [ ] cartons per day average."); *Attaché Report* at 1, 15 ("Photographs from the site visit have been provided in Attachment 2." "Business Confidential in its entirety; Not susceptible to public summarization"). Additionally, neither TRLED nor ORR substantially rely on Attaché Report, distinguishing this case from *Royal Brush*. *See Evasion Determination* at 23; *see generally Admin. Review*. Absent specific arguments as to how the redaction and summarization resulted in prejudice, the court finds no reason to order any relief with regard to CBP's public summary of the Attaché Report.

Finally, CEK argues that M&B failed to provide an adequate public version of the allegations, including the market research report. CEK Br. at 45. While CBP did refer to the market research report in the *Initiation Memo*, it did not rely on the report in its evasion determination or the subsequent review. *Initiation Memo* at 3; *see generally Evasion Determination*; *Admin. Review*. CEK argues it was prejudiced by the lack of an adequate public version, as the absence prevented it and NWH from responding to the evidence presented. This argument fails. The only time CBP utilized the report was to initiate the investigation, a pre-investigatory step. The EAPA does not permit pre-investigation comments by the subjects of potential investigations. "Agency action will be 'set aside "only for substantial procedural or substantive reasons."'" *Leco Supply, Inc.*, 2023 WL

1434182 at *10 (quoting *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996)). Here, CEK was not prejudiced as CBP did not rely on the market research report in the investigation. Consequently, the court denies relief on this basis.

III. Customs' Evasion Determination

CEK argues that TRLED improperly took adverse inferences in the absence of any gap in the record, and that the record is devoid of substantial evidence of evasion. CEK Br. at 43. The Government counters that CEK and NWH failed to cooperate to the best of their abilities, creating a gap and justifying adverse inferences, and that substantial evidence supports a finding of evasion. Gov. Br. at 24, 31. The court finds that substantial evidence supports the finding of evasion, and the determination and review were not arbitrary and capricious.

A. The Gap in the Record and the Application of Adverse Inferences

It is undisputed that during the investigation CEK and NWH failed to respond to TRLED's RFIs in their entirety. CEK Br. at 44. CEK failed to respond to any of the sections in the Supplemental RFI titled "Accounting/Financial Practices" and "Sales Reconciliations" and only answered some of the questions in "corporate structure" and "Procurement and Sales Practices." *Evasion Determination* at 9; *CEK RFI Resp.* at 7–8, 10–11, 13–14, 16; *CEK Supp. RFI Non-Resp.* These questions, CBP contends, are standard in EAPA investigations and the other importers investigated received identical RFIs. *Evasion Determination* at 9; *see, e.g., EAPA Consolidated Case 7501: Request for Information from D&J Trading Inc.*, C.R. 2, P.R. 2 (Jan. 28, 2021). NWH similarly failed to fully respond to the RFI, answering only one of twenty-nine questions about its accounting practices, and few of the questions in the "Sales and Production Reconciliations" section. *Evasion Determination* at 10–22; *NWH RFI Resp.*[6]

CEK asserts that any questions not addressed were irrelevant and not necessary to the analysis, and thus TRLED was barred from applying adverse inferences. CEK Br. 43–45. According to CEK, it and NWH provided sufficient information to establish the capacity and production occurring at NWH's facility; therefore, there were no gaps in the record. *Id.* CEK makes two incorrect assumptions: first that adverse inferences as defined by § 1517(c)(3) can only be applied

[6] CBP gave NWH instructions on how to indicate that a question was not applicable. *NWH RFI Request* at 5. Nonetheless, NWH broadly failed to so indicate. *Evasion Determination* at 11–22; *see generally NWH RFI Resp.*

when there is a gap in the record; and second, that TRLED may only ask questions directly relating to production and capacity.

CEK contends that the term "adverse inferences" in 19 U.S.C. § 1517(c)(3) should be read *in pari materia* with the term "adverse inferences" in 19 U.S.C. § 1677e. CEK Br. at 43–44. While the two statutes are similar, they have key differences in wording and structure and must first and foremost be read for their plain meaning. Section 1517(c)(3) provides that CBP may utilize adverse inferences with respect to an interested party, importer, foreign producer or exporter, or foreign government where such party "has failed to cooperate by not acting to the best of [its] ability to comply with a request for information." 19 U.S.C. § 1517(c)(2)(A), (c)(3)(A). Additionally, adverse inferences may be used "without regard to whether another person involved in the same transaction or transactions under examination has provided the information sought." *See* 19 U.S.C. § 1517(c)(3)(B)); *see also All One God Faith, Inc. v. United States*, 45 CIT __, __, 589 F. Supp. 3d 1238, 1250–51 (2022). Ergo, whether a gap exists is not necessarily determinative.[7]

Further, CBP has the authority to collect and verify additional information that is "necessary to make the determination." 19 U.S.C. § 1517(c)(2). It is not for CEK or NWH to decide which information and questions are necessary to the investigation, nor may CEK or NWH communicate their objection by refusing to respond to TRLED. Similar questions were asked of the other parties to the investigation, and no information has been presented to show that the questions were an unreasonable investigatory method or were peculiar in any way.[8] Thus, the court concludes that TRLED was reasonable in determining that CEK and NWH were uncooperative and that adverse inferences were applied in accordance with the statute.

B. Evidence of Evasion and the TRLED Determination and ORR Decision

CEK contends that the administrative record supports a finding that NWH produced the steel wire hangers exported to the United States. CEK Br. at 32–33. In support of its contention, CEK points to

[7] Of course, if information provided by another party so undermines the determination that it is rendered arbitrary, the determination cannot stand. That is not the case here.

[8] For example, CEK provided no response to the question "[p]rovide a detailed narrative explaining the financial accounting practices used to account for assets, liabilities, equity, income, and expenses," nor to the question "[p]rovide the following financial records for the two most recently completed fiscal years plus the current fiscal year to date, preferably in electronic format such as Microsoft Excel." *CEK RFI Resp.* at 7. Similarly, NWH failed to answer the question "[p]rovide a detailed narrative explaining the cost accounting practices regarding raw materials inventories, work-in-progress, finished goods inventories, and cost of goods sold . . . ." *NWH RFI Resp.* at 16.

evidence such as documents establishing NWH's production during the period of investigation ("POI") and overall production capacity, as well as an analysis comparing the weight of raw materials imported to the weight of the completed wire hangers. CEK Br. at 31–39. The Government agrees that NWH has the capacity to produce wire hangers but asserts that CBP was unable to verify actual production from business records or theoretical production capacity, as NWH failed to answer numerous questions including the make and model numbers of the hanger making machines. *Evasion Determination* at 24; Gov. Br. at 36–37. Additionally, the Government asserts that any analysis comparing the weight of imports to exports from Thailand would not be probative, as "imports" may have included goods other than raw materials, such as hangers or semi-finished hangers from China, which are covered by the Antidumping ("AD") Order. Gov. Br. at 36;[9] *see also infra* n.10.

In the Evasion Determination, TRLED utilized several factors to determine that evasion may have occurred. Primarily, TRLED relied on information, corroborated by the Thai government and NWH itself, indicating that NWH purchased Chinese-origin hangers covered by the *AD Order*. Evasion Determination at 50. Additionally, the Thai government provided information that indicated NWH could not begin production in Thailand until November 2019, after the POI had begun. *Id.* Finally, TRLED determined that NWH's raw material purchase documents were falsified. *See Evasion Determination* at 25–29, 50.[10]

Similarly, in its *de novo* review of the *Evasion Determination*, ORR pointed to the dearth of information on the record regarding purchase

---

[9] In its RFI response, NWH indicated that it imported semi-finished hangers from China during the POI. *Evasion Determination* at 35 (citing *NWH RFI Resp.*, Exhibit 8.3); *see also NWH RFI Resp.* The Government argues these semi-finished hangers are covered by the *AD Order*, relying on a decision from the Department of Commerce ("Commerce") that found that semi-finished hangers made by two Vietnamese companies were subject to the *AD Order. See* Gov. Br. at 36; *see also Admin. Review* at 9 (citing *Steel Wire Garment Hangers from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 76 Fed. Reg. 66,895 (Dep't Commerce Oct. 28, 2011)). While it is unclear that the semi-finished hangers imported into Thailand by NWH are identical to those examined by Commerce in 2011, CEK does not argue that any semi-finished hangers imported into Thailand by NWH would not be covered by the *AD Order*. *See* CEK Br. at 37; *see also Evasion Determination* at 35–36.

[10] To support this conclusion, TRLED relies on the information from NWH's RFI. First, while record evidence indicates NWH had five suppliers of steel wire, three from China and two from Thailand, NWH omitted any mention of two Chinese and one Thai supplier in its RFI response. *Evasion Determination* at 25–27; *see NWH RFI Resp.*, Ex. 8.1, Ex. 8.3. Moreover, the Chinese supplier's invoices for steel wire have significant differences between invoices listing a [[ ]] address and those listing addresses in mainland China. *Evasion Determination* at 27. For example, the [[ ]] invoices are more detailed and comport with the public information on the supplier's website, whereas the mainland China invoices are less detailed, formatted differently, and have inconsistent width of the "shipping mark column." *Evasion Determination* at 27; *compare NWH RFI Resp.* at 274 ("*Invoice*

orders and translated production records, which resulted in CBP's inability to trace CEK's imports through the production process in Thailand. *Admin. Review* at 7–8. Unable to trace the production, ORR relied on invoices and packing lists from NWH demonstrating the importation of semi-finished wire hangers covered by the *AD Order*. *Id.* at 9.[11] Moreover, ORR found that although "the record indicates that some wire hanger production likely occurred at NWH, there is not enough to demonstrate that NWH produced any, let alone all, of the wire hangers exported to CEK in the United States." *Id.* at 10.[12] Finally, ORR decided that even though "the application of adverse inferences is unnecessary to [its] finding of substantial evidence of evasion, [TRLED]'s decision to utilize adverse inferences in the September 16 Determination was warranted." *Id.* at 11.

It is clear that CBP examined the relevant data and articulated a satisfactory explanation for its decision, irrespective of the application of adverse inferences. The court finds that CBP was reasonable in concluding that there was substantial evidence of evasion given that covered merchandise was imported into Thailand by NWH, and that there was a lack of evidence establishing sufficient production to meet the imports into the United States.

CONCLUSION

For the foregoing reasons, the court sustains CBP's final determination of evasion. Judgment will enter accordingly.

Dated: May 2, 2023
New York, New York

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

TC19014") and *NWH RFI Resp.* at 255 ("*Invoice TC19013*") *with NWH RFI Resp.* at 324 ("*Invoice CL191104*"). TRLED determined that it was "unusual for a company headquartered in [[ ]] to have these kinds of errors on their invoices, especially with respect to" its own information. *Evasion Determination* at 27. Additionally, TRLED noticed several errors that appeared on the invoices from two different Chinese suppliers that TRLED determined were "highly unlikely to be a coincidence." *Id.* at 28. One such error is a space missing after the sub-district name Thackham and Bangpakong being misspelled as Bankpakong. *Id.*; *see e.g.*, *Invoice TC19013*; *NWH RFI Resp.* at 231; *see also Invoice CL191104*. Given these examples and TRLED's experience interpreting these types of documents, the court finds TRLED's conclusion that the invoices were falsified to be reasonable.

[11] It appears undisputed that prior to the POI NWH imported millions of wire hangers from China. *Attache Report* at 48. CEK argues NWH imported only a small quantity of wire hangers from China during the POI. *Admin. Review* at 9; CEK Br. at 15. ORR, however, addressed this argument as "[t]here is sufficient evidence of NWK's [sic] sourcing Chinese-origin semi-finished hangers during the POI, and insufficient evidence to establish that the claimed Thai-origin entries were actually manufactured in Thailand (without the use of these Chinese-origin materials)." *Admin. Review* at 9.

[12] To make this decision, ORR relied heavily on NWH's RFI Response. *See Admin. Review* at 7–9.

Index

Customs Bulletin and Decisions
Vol. 57, No. 19, May 17, 2023

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2023—423-106/30024