U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SILDENAFIL CITRATE IN BULK FORM

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

ACTION: Notice of revocation of two ruling letters and of revocation of treatment relating to the tariff classification of Sildenafil Citrate in bulk form.

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) is revoking two ruling letters concerning tariff classification of Sildenafil Citrate in bulk form under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 34, on September 20, 2023. No comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 26, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

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), a notice was published in the *Customs Bulletin*, Vol. 57, No. 34, on September 20, 2023, proposing to revoke two ruling letters pertaining to the tariff classification of Sildenafil Citrate in bulk form. 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 have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the 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 subsequent to the effective date of this notice.

In NY H83763 and NY B87488, CBP classified Sildenafil Citrate in bulk form in heading 2933, HTSUS, specifically in subheading 2933.59.53, HTSUS, which provides for "Heterocyclic compounds with nitrogen hetero-atom(s) only: Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure: Other: Drugs: Aromatic or modified aromatic: Other." CBP has reviewed NY H83763 and NY B87488 and has determined the ruling letters to be in error. It is now CBP's position that Sildenafil Citrate in bulk form is properly classified in heading 2935, HTSUS, specifically in subheading 2935.90.60, HTSUS, which provides for "Sulfonamides: Other: Other: Drugs: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY H83763 and NY B87488, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H261406, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H261406

June 10, 2024
OT:RR:CTF:CPMMA H261406 AJK
CATEGORY: Classification
TARIFF NO: 2935.90.6000

MS. LISA M. CONZO
INTERCHEM CORPORATION
120 ROUTE 17 NORTH
P.O. BOX 1579
PARAMUS, NJ 07653–1579

RE: Revocation of NY H83763 and NY B87488; Classification of Sildenafil Citrate in Bulk Form (CAS No. 171599–83–0)

DEAR MS. CONZO:

This letter is in reference to New York Ruling Letter (NY) H83763, dated July 19, 2001, concerning the tariff classification of Sildenafil Citrate (CAS No. 171599–83–0) under the Harmonized Tariff Schedule of the United States (HTSUS). In NY H83763, U.S. Customs and Broder Protection (CBP) classified the subject merchandise in heading 2933, HTSUS, as a heterocyclic compound with nitrogen heteroatoms only. We have reviewed NY H83763 and have determined that the classification of the subject merchandise was incorrect.

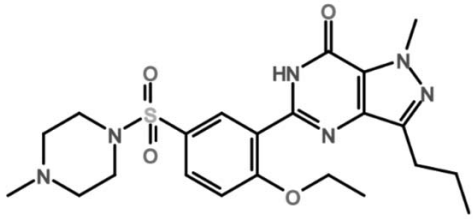
We have also reviewed NY B87488, dated August 18, 1997, concerning the tariff classification of substantially similar Sildenafil Citrate that is imported in bulk, and have determined that the ruling letter was incorrect. For the reasons set forth below, we are revoking both of these rulings.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 34, on September 20, 2023. No comment was received in response to this notice.

FACTS:

Sildenafil Citrate (CAS No. 171599–83–0) is a drug that produces vasodilation (*i.e.*, the dilatation of blood vessels) and it is used to treat erectile dysfunction and pulmonary arterial hypertension (*i.e.*, high blood pressure in the lungs). The International Union of Pure and Applied Chemistry (IUPAC) name of Sildenafil Citrate is 5-[2-ethoxy-5-(4-methylpiperazin-1-yl)sulfonylphenyl]-1-methyl-3-propyl-6*H*-pyrazolo[4,3-d]pyrimidin-7-one;2-hydroxypropane-1,2,3-tricarboxylic acid.[1] Its molecular formula is $C_{28}H_{38}N_6O_{11}S$. Sildenafil Citrate has the following chemical structure where the SO_2 group is directly attached to organic chemical compounds with carbon atoms, and other atoms:

[1] NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, PUBCHEM COMPOUND SUMMARY FOR CID 135413523, SILDENAFIL CITRATE (2023), https://pubchem.ncbi.nlm.nih.gov/compound/Sildenafil-Citrate (last visited August 8, 2023).



ISSUE:

Whether Sildenafil Citrate is classified in heading 2933, HTSUS, as a heterocyclic compound with nitrogen heteroatoms only, or heading 2935, HTSUS, as a sulfonamide.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification 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 2024 HTSUS provisions at issue are as follows:

2933	Heterocyclic compounds with nitrogen hetero-atom(s) only:
	Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure:
2933.59	Other:
	Drugs:
	Aromatic or modified aromatic
2933.59.5300	Other
2935	Sulfonamides:
2935.90	Other:
	Other:
	Drugs:
2935.90.6000	Other

Note 3 to chapter 29 states, in pertinent part, as follows:

> Goods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

* * * * * *

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally

indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

Prior to 2007, EN 29.35 provided that "[s]ulphonamides have the general formula ($R.SO_2.NH_2$) where R is an organic radical of varying complexity" and did not explicitly list sildenafil citrate as an example. In 2007, however, the Harmonized System Committee to the World Customs Organization changed EN 29.35 to the following:

> Sulphonamides have the general formula ($R^1SO_2NR^2R^3$) where R^1 is organic radical of varying complexity having a carbon atom directly attached to the SO_2 group and R^2 and R^3 are either: hydrogen, another atom or an inorganic or organic radical of varying complexity (including double bonds or rings). Many are used in medicine as powerful bactericides. They include, *inter alia:* ...
>
> (6) Sildenafil citrate ....

* * * * * *

Pursuant to the change in EN 29.35, Sildenafil Citrate in bulk form is now classifiable in heading 2935, HTSUS, because it has the structure of a sulfonamide containing an SO_2 group directly attached to a carbon atom and the other requisite functional groups. As the instant pharmaceutical product is classifiable in both headings of 2933 and 2935, HTSUS, we find that it is properly classified in heading 2935, HTSUS, which is the heading that appears last in numerical order, according to note 3 to chapter 29.

HOLDING:

By application of GRI 1, Sildenafil Citrate is classified in heading 2935, HTSUS, and, by application of GRI 6, is specifically classified in subheading 2935.90.60, HTSUS, which provides for "Sulfonamides: Other: Other: Drugs: Other." The 2024 column one general rate of duty is 6.5 percent *ad valorem*. However, Sildenafil and Citrate are enumerated in Tables 1 and 2, respectively, of the Pharmaceutical Appendix to the Tariff Schedule and the column one special rate of duty for subheading 2935.90.60, HTSUS, contains the symbol "K" in parentheses. Pursuant to General Note 13 of the HTSUS, therefore, the subject merchandise is duty free.

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 at https://hts.usitc.gov/.

EFFECT ON OTHER RULINGS:

NY B87488, dated August 18, 1997, and NY H83763, dated July 19, 2001, are hereby revoked.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

CC: Ms. Kathleen Goulding
Pfizer Inc.
100 Jefferson Road
Parsippany, NJ 07054

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

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

ACTION: Committee management; notice of open Federal advisory committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, June 26, 2024, in Long Beach, CA. The meeting will be open for the public to attend in person or via webinar. The in-person capacity is limited to 50 persons for public attendees.

DATES: The COAC will meet on Wednesday, June 26, 2024, from 1 p.m. to 5 p.m. Pacific daylight time (PDT). Please note that the meeting may close early if the committee has completed its business. Registration to attend in-person and comments must be submitted no later than June 21, 2024.

ADDRESSES: The meeting will be held at the Hilton Long Beach, 701 West Ocean Boulevard, Long Beach, CA 90831 in the Gallerie One room. For virtual participants, the webinar information will be posted by 5 p.m. EDT on June 25, 2024, at *https://www.cbp.gov/trade/stakeholder-engagement/coac.* For information or to request special assistance for the meeting, contact Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440, as soon as possible.

Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for Docket Number USCBP–2024–0008. To submit a comment, click the "Comment" button located on the top left-hand side of the docket page.
- *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2024–0008 in the subject line of the message.

Comments must be submitted in writing no later than June 21, 2024, and must be identified by Docket No. USCBP–2024–0008. All submissions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov.* Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice, which is available via a link on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection,

1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, title 5 U.S.C., ch. 10. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of the Department of Homeland Security, the Secretary of the Department of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

Pre-Registration: Meeting participants may attend either in person or via webinar. All participants who plan to participate in person must register using the method indicated below.

For members of the public who plan to participate in person, please register online at *https://cbptradeevents.certain.com/profile/16835* by 5 p.m. EDT on June 21, 2024. For members of the public who are pre-registered to attend the meeting in person and later need to cancel, please do so by 5 p.m. EDT on June 21, 2024, utilizing the following link: *https://cbptradeevents.certain.com/profile/16835.*

For members of the public who plan to participate via webinar, the webinar information will be posted by 5 p.m. EDT on June 25, 2024, at *https://www.cbp.gov/trade/stakeholder-engagement/coac.* Registration is not required to participate virtually.

The COAC is committed to ensuring that all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Mrs. Latoria Martin at (202) 344–1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the Agenda section below.

There will be a public comment period after each subcommittee update during the meeting on June 26, 2024. Speakers are requested to limit their comments to two minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

Agenda

The COAC will hear from the current subcommittees on the topics listed below:

1. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups as well as present proposed recommendations for the COAC's consideration. The Antidumping/Countervailing Duty (AD/CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. The Intellectual Property Rights (IPR) Process Modernization Working Group anticipates providing proposed recommendations for the committee's consideration regarding the Trade Seminars Mailbox and enhancements to the CBP Petitions Portal specific to IPR enforcement. The Forced Labor Working Group (FLWG) will provide updates regarding its updated Statement of Work that aims to enhance focus on technology best practices, stakeholder training and guidance, increased transparency on the Uyghur Forced Labor Prevention Act (UFLPA) applicability reviews, and enforcement of cotton imports under the UFLPA. Additionally, the FLWG will continue to monitor progress of the implementation of prior recommendations made by the COAC.

2. The Next Generation Facilitation Subcommittee will provide updates on all its existing working goups. The Broker Modernization Working Group (BMWG) plans to present proposed recommendations which aim to improve the end user experience and re-envision the Customs Broker Licensing Exam (CBLE). The Modernized Entry Processes Working Group (MEPWG) will report on the work done in the area of Cyber Incident Guidance for Brokers. The remaining working groups, the Automated Commercial Environment (ACE) 2.0 Working Group, the Passenger Air Operations Working Group, and the Customs Interagency Industry Working Group (CIIWG), were not active this past quarter but will provide a report on topics that each working group will focus on in the coming quarter.

3. The Secure Trade Lanes Subcommittee will provide updates on its seven active working groups: the Centers Working Group, the Cross-Border Recognition Working Group, the De Minimis Working Group, the Export Modernization Working Group, the FTZ/Warehouse Working Group, the Pipeline Working Group, and the Trade Partnership and Engagement Working Group. The Centers Working Group has continued to have robust discussions around the interactions between the Centers of Excellence and Expertise (Centers) and the trade community, including opportunities for improved communications and for providing the trade community with a better understanding of the Centers' internal organization. The Cross-

Border Recognition Working Group has continued to discuss best practices at ports of entry on the southern border that facilitate legitimate trade. The De Minimis Working Group has continued discussions on the revised timeframe for submitting Type 86 entries and on potential compliance measurements for de minimis shipments that CBP can communicate to the trade community. The Export Modernization Working Group has continued its work on the Electronic Export Manifest Pilot Program. The Export Modernization Working Group is specifically focused on the effects of progressive filing by the shipper to continuously update export information on successive dates, rather than on a specific date. The Drawback Task Force under the Export Modernization Working Group has continued discussions around recommendations from last quarter, conducting an analysis of program statistics and examining areas to maximize resources. The FTZ/ Warehouse Working Group continues to review previous recommendations along with 19 CFR part 146 and anticipates presenting proposed recommendations at the June public meeting. The Pipeline Working Group has continued discussing the most appropriate commodities and potential users of Distributed Ledger Technology to engage once the pilot for tracking pipeline-borne goods deploys. The Trade Partnership and Engagement Working Group has continued its work on the elements of the Customs Trade Partnership Against Terrorism (CTPAT) security program and the validation process.

4. The Rapid Response Subcommittee was inactive this quarter. It will not provide any status updates.

Meeting materials will be available on June 17, 2024, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

FELICIA M. PULLAM,
Executive Director,
Office of Trade Relations.

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING TRIMBLE GNSS R12I RECEIVER

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of the Trimble GNSS R12i Receiver. Based upon the facts presented, CBP has concluded that the GNSS R12i Receiver is a product of the United States for purposes of U.S. Government procurement and does not undergo a substantial transformation during its final assembly in Thailand.

DATES: The final determination was issued on June 4, 2024. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than July 10, 2024.

FOR FURTHER INFORMATION CONTACT: Mitchell Emery, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325– 0321.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 4, 2024, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of Trimble GNSS R12i Receivers for purposes of title III of the Trade Agreements Act of 1979. This final determination, HQ H338116, was issued at the request of Trimble, Inc. under procedures set forth at 19 CFR part 177, subpart B, which implements title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination CBP has concluded that the GNSS R12i Receiver is a product of the United States and does not undergo a substantial transformation during its final assembly in Thailand. The final determination also finds that the GNSS R12i Receiver is exempt from the country of origin marking requirements of 19 CFR 134.32(m).

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H338116
June 4, 2024
OT:RR:CTF:VS H338116 ME
Category: Origin

JOHN MCKENZIE
BAKER & MCKENZIE LLP
TWO EMBARCADERO CENTER, 11TH FLOOR
SAN FRANCISCO, CA 94111–3802

Re: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of Global Navigation Satellite System R12i Receivers; Country of Origin Marking 134.32(d); 19 CFR 134.32(m).

DEAR MR. MCKENZIE,

This is in response to your March 1, 2024 request, on behalf of Trimble, Inc. ("Trimble"), for a final determination concerning the country of origin of certain Global Navigation Satellite System ("GNSS") R12i Receivers, pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). Trimble is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination. You also requested a determination on whether the product is exempt from country of origin marking requirements under Section 134.32(m) of the CBP Regulations (19 CFR 134.32(m)).

FACTS

Trimble is a Delaware corporation based in Colorado, specializing in the production and design of industrial technology for the agricultural, construction, and geospatial transportation industries. At issue in this case is the GNSS R12i Receiver, which you describe as designed for "surveying and mapping in challenging environments."

You state that the GNSS R12i Receiver consists of seven primary components, which undergo final assembly into a chassis in Thailand:

- Main Board Assembly
- Power Supply and Communications Board Assembly
- Antenna Element Assembly
- Radio Interface
- Antenna Low Noise Amplifier
- Battery SIM
- 450MHz Radio

Four of these components, the main board assembly, the power supply and communications board assembly, the antenna element assembly, and the radio interface are manufactured in the United States. Notably, you characterize three of these U.S.-origin components as Printed Circuit Board Assemblies ("PCBAs"). You state that the main board assembly is the primary PCBA, which provides the "essential character" of the GNSS R12i Receiver,

including the central processing unit ("CPU"), random access memory ("RAM"), Flash memory module, RF processor, baseband processer, and Global Positioning System ("GPS") Components. These components are assembled onto the board using Surface Mount Technology ("SMT") in the United States. You additionally state that the Radio Interface is a separate PCBA with 74 components assembled onto the bare circuit board with SMT. You also state that the power supply and communications board assembly is a PCBA with 526 components assembled onto a circuit board using SMT and includes all communications functions of the GNSS R12i Receiver.

Two of the main components, the antenna low noise amplifier and battery SIM, are produced in Thailand. You state that these "perform subsidiary roles with respect to the GNSS R12i device." You describe the antenna low noise amplifier as a PCBA with 142 components assembled onto a bare printed circuit board using SMT, which is then shipped to the United States and built into the Antenna Element Assembly. Additionally, you describe the battery SIM as a PCBA produced by assembling five components onto a bare printed circuit board.

The final main component is a 450MHz Radio, which is produced in China. This component is optional; however, you have included it for the purpose of determining the country of origin of the GNSS R12i Receiver. You provide no details about the production process of this component.

You describe the final assembly operations in Thailand as "simple assembly," consisting "primarily of inserting and fastening [PCBAs] into a chassis." The final assembly includes the following steps:

1. The primary PCBA, radio interface PCBA, and communications and power supply PCBA are screwed onto a "hot box" subassembly by fastening with two to three screws. They are then subject to a series of sensor tests.
2. The antenna assembly is fastened to the "hot box" with two screws, the radio module is installed onto the "hot box" with four screws, and then the "hot box" assembly is subject to a series of signal tests.
3. The keypad is installed onto the chassis with glue and two screws.
4. The battery compartment floor, and battery compartment are assembled and affixed to the chassis with two and four screws respectively.
5. The battery SIM is attached to the chassis with four screws.
6. The "hot box" subassembly with the PCBAs and antenna element are affixed to the chassis with four screws.
7. The battery compartment door is installed to the outside of the chassis with two screws.
8. Various mechanical parts are installed into the chassis.
9. Four compliance labels, overlays and serial number labels are attached to the exterior of the chassis.
10. A series of functional tests are conducted (Leak Test; Calibration Confirmation; Unit input/output Testing; Unit Gyroscope Testing).

On top of this, you state that various subcomponents are used at all stages to produce the main components of the GNSS R12i Receiver. You also state that small mechanical parts and additional subcomponents are added to the product during final assembly. For all these subcomponents, you provide charts showing that the parts originate from over 20 different countries, and you state that no "single country predominates as the source country." We note that several of these "subcomponents" cost more than items which you have designated as "primary components." However, the most expensive

subcomponents largely relate to GNSS R12i Receiver's outer shell and are not central to the device's functionality.

Furthermore, you state that the GNSS R12i Receiver would not be functional without Trimble's proprietary software. You estimate that software development "involved more than 1 million developer hours," and that 67 percent of the code was written by developers in the United States and 33 percent by developers in Germany. You state that this proprietary software has further undergone "software build" in the United States, where it was compiled from its constituent source code into machine readable binaries. You state that this software will be flashed onto a memory component in the United States and assembled onto the primary PCBA as part of the manufacturing process. In total, you estimate that 70 percent of the GNSS R12i Receiver's value is the result of this proprietary software.

ISSUES

1. What is the country of origin of the GNSS R12i Receiver for the purposes of U.S. Government procurement?
2. Is the GNSS R12i Receiver excepted from country of origin marking requirements under 19 CFR 134.32(m)?

LAW AND ANALYSIS

Country of Origin Determination

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21–177.31, which implements Title III of the TAA, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

> For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, *an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title* (Emphasis added).

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28,322 (May 23, 2003).

The rule of origin set forth under 19 U.S.C. 2518(4)(B) states:

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

The FAR, 48 CFR 25.003, defines "U.S.-made end product" as:

> . . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Section 25.003 defines "designated country end product" as:

> a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Thailand is not a "designated country," and products of Thailand are not eligible for U.S. Government procurement.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

You argue that because the key components of the GNSS R12i Receiver are manufactured in the United States, it is a product of the United States. You further argue that the final production in Thailand is "simple assembly" and does not result in a substantial transformation. In support of this, you cite the U.S. Court of International Trade's opinion in *Energizer Battery, Inc.* v. *United States,* 190 F. Supp. 3d 1308 (2016). *Energizer* involved the manufacture of a flashlight, where all of the components of the flashlight were of Chinese origin, except for a white LED and a hydrogen getter. The components were imported into the United States and assembled into the finished

Generation II flashlight. *The Energizer Battery* court reviewed the "name, character and use" test utilized in determining whether a substantial transformation had occurred and noted, citing *Uniroyal, Inc. v United States,* 542 F. Supp. 1026, 1031 (Ct. Int'l Trade 1982), that when "the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change." *Energizer Battery* at 1318. In addition, the court noted that "when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." *Energizer Battery* at 1319, citing as an example, *National Hand Tool Corp.* v. *United States,* 16 C.I.T. 308, 312 (1992), *aff'd,* 989 F.2d 1201 (Fed. Cir. 1993). Furthermore, courts have considered the nature of the assembly, *i.e.,* whether it is a simple assembly or more complex, such that individual parts lose their separate identities and become integral parts of a new article.

With regards to electronic equipment, CBP has found that circuit boards undergo a substantial transformation into PCBAs when various components are assembled onto the board via SMT. *See* C.S.D. 85–25, 19 Cust. Bull. 844 (1985) (determining that the assembly of the PCBA involved a very large number of components and a significant number of different operations, required a relatively significant period of time as well as skill, attention to detail, and quality control, and resulted in significant economic benefit to the beneficiary developing country from the standpoint of both value added to the PCBA and the overall employment generated thereby). Additionally, CBP has found that the mere attachment of wires to a PCBA and installation into a case, along with minor tuning processes, does not result in a substantial transformation. *See* Headquarters Ruling ("HQ") 561232, dated April 20, 2004.

As you further highlight, the programing of a device may also affect its country of origin. In *Data General* v. *United States,* 4 C.I.T. 182 (1982), the court determined that the programming of a foreign PROM ("Programmable Read-Only Memory" chip) in the United States substantially transformed the PROM into a U.S. article. In the United States, the programming bestowed upon each integrated circuit its electronic function, that is, its "memory" which could be retrieved. A distinct physical change was affected in the PROM by the opening or closing of the fuses, depending on the method of programming. The essence of the article, its interconnections or stored memory, was established by programming. *Texas Instruments* v. *United States,* 681 F.2d 778, 782 (CCPA 1982) (stating the substantial transformation issue is a "mixed question of technology and customs law").

Accordingly, the programming of a device that defines its use generally constitutes substantial transformation. *See* HQ 735027, dated September 7, 1993 (programming blank media (EEPROM) with instructions that allow it to perform certain functions that prevent piracy of software constitutes a substantial transformation); *but see* HQ 734518, dated June 28, 1993 (motherboards are not substantially transformed by the implanting of the central processing unit on the board because, whereas in *Data General* use was being assigned to the PROM, the use of the motherboard had already been determined when the importer imported it).

CBP has elaborated that mere downloading of software onto a device alone is typically not enough to show a substantial transformation, as "[p]rogramming involves writing, testing and implementing code necessary to make a

computer function in a certain way." *See* HQ H241177, dated December 3, 2013 (holding that the downloading of U.S.-origin software in Singapore did not constitute a substantial transformation in Singapore or the United States, and therefore the country of origin was Malaysia where the final assembly of the hardware took place); *see also* HQ H240199, dated March 10, 2015 (holding that the notebook computer was not substantially transformed when the computer was assembled in Country A, imported into Country F, and Country D-origin BIOS was downloaded). However, in cases where the downloading of software onto a PCBA is combined with more complex operations to its firmware and hardware, which are essential to the device's operation, CBP has determined that a substantial transformation has occurred. *See* HQ 563012, dated May 4, 2004 (holding that the PCBA and casing that were manufactured for a switch in China, were substantially transformed in the United States or Hong Kong, where U.S.-origin software was loaded, and the PCBA was further assembled with a power supply, fans, and an A/C filter of various origins to form the final fabric switch, as the switch was transformed into a functional device).

You also argue that the main PCBA, once fully assembled and programmed, contains the "essential character" of the GNSS R12i Receiver. CBP has issued multiple opinions addressing this issue. For instance, in HQ H301910, dated August 5, 2019, which concerned mailing machine engines, CBP determined that the main PCBA, the print control firmware, and the print head constituted the primary and fundamental essence of the mailing machine engine because these components controlled the engine's function, operations, and enabled the printing of the correct postage. In particular, the main PCBA was composed of components essential to the fundamental function and primary purpose of the engine, including the CPU, the memory, and the Field-Programmable Gate Array, which combined to form the "brain" of the device. CBP held that, inasmuch as the main PCBA, the print control firmware, and the print head were all produced in Japan, the country of origin of the mailing engine machine was Japan.

In HQ H302801, dated October 3, 2019, CBP considered the country of origin of certain "Fitbit" smart watches. The case involved multiple PCBAs from Taiwan or the Philippines, which were assembled together into a final product in China by installing PCBAs into a housing with a vibration motor, battery, display, and wristband. The assembly did not alter the PCBAs' functional or physical attributes, and the PCBAs had a predetermined end-use as the electronic "brain" of the device. Additionally, the final assembly in China was neither complex nor time intensive, whereas the assembly of the PCBAs required complex equipment for SMT, a high level of expertise, and involved more components and subassemblies than the final assembly in China. Therefore, the country of origin was where the PCBAs were manufactured, in Taiwan or the Philippines.

However, in HQ H304677, dated April 21, 2023, CBP found that the country of origin of laser printers was China, even though the main PCBAs were manufactured and installed into the final product in Mexico. In that case, the printer transports which included all the mechanical components of the device, such as the housing, scanner, power supply, and fuser, were manufactured in China. The PCBAs were manufactured in Mexico, where components were added to the board with SMT, and U.S. and Philippine-origin firmware was downloaded onto the PCBA. The PCBAs were then installed into the printers and the devices underwent a series of tests. CBP determined

that the PCBAs were not the only fundamental functioning component of the printer, as the Chinese printer transports also provided character to the final article. Furthermore, since all of the mechanical printing functions were imparted by the Chinese transports, the country of origin was China.

In the instant case, based on the totality of the circumstances and consistent with the pertinent authorities, we find that the country of origin of the GNSS R12i Receiver is the United States. We agree that the U.S.-origin primary PCBA contains the "essential character" of the GNSS R12i Receiver. Like in HQ H302801, the PCBA originates from the United States, where most of the required production took place. This production process included assembling hundreds electronic of components onto the PCBA using SMT, including the CPU, RAM, GPS components, and communications components, which are central to the device's operation. Furthermore, it involved programing and configuring the primary PCBA with Trimble's proprietary U.S.-origin software, which is required in order for the device to function and defines it use. This case is unlike HQ H304677, which involved U.S.-origin software programmed onto a Mexican-origin PCBA, because here both the software and the primary PCBA originate from the same country. Additionally, in that case all other fundamental functional components of the printer were produced in China, whereas in this instance, most of the primary components of the GNSS R12i Receiver were assembled in the United States. Furthermore, once they are fully assembled, all U.S.-origin components have a predetermined end-use in the GNSS R12i Receiver when exported to Thailand and installed into the device.

Furthermore, we agree that the assembly in Thailand is simple assembly that does not result in a substantial transformation. It primarily involves placing the PCBAs into a "hot box" subassembly and then affixing the "hot box," antenna, battery, and keypad to the chassis, in contrast to the complex SMT performed in the United States. While the two Thai-origin main components are also PCBAs and are produced using complex SMT, they play a subsidiary role within the device. They do not undergo any programming, or process any communications or navigational information, which is required for the GNSS R12i Receiver to function. The U.S.-origin components are notably more complex, which is why more worker hours are required to produce the U.S.-origin components than all Thailand operations combined. Therefore, based on the totality of the circumstances, we determine that the final assembly in Thailand does not result in a substantial transformation.

Accordingly, we find that the country of origin of the finished GNSS R12i Receiver for the purpose of U.S. Government procurement is the United States.

Country of Origin Marking

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to an ultimate purchaser in the United States, the English name of the country of origin of the article. *See also* 19 CFR 134.11. Section 134.32(m) of the CBP Regulations provides several exceptions to the marking requirement. Specifically, "products of the United States exported and returned" are exempt from the country of origin marking requirement. 19 CFR 134.32(m).

For the purposes of the marking requirement, the term "country of origin" is defined under 19 CFR 134.1(b), which adopts the same "substantial transformation" rule as the TAA and the FAR. *See* 19 U.S.C. 2518(4)(B); FAR, 48 CFR 25.003. Specifically, Section 134.1(b) of the CBP Regulations states that:

> "Country of origin" means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part;

As a discussed above, for the purposes of Section 308(4)(B) of the TAA, the GNSS R12i Receiver is a product of the United States, where the PCBAs are produced, and it does not undergo a substantial transformation during the final assembly in Thailand. Having already reached this determination, we also find that the GNSS R12i Receiver is a product of the United States for the purpose of country of origin marking. Furthermore, the GNSS R12i Receiver is "exported and returned" within the meaning of 19 CFR 134.32(m) and is therefore excepted from the country of origin marking requirement.

HOLDING

Based on the information outlined above, for the purposes of U.S. Government procurement and country of origin marking, the GNSS R12i Receiver is a product of the United States and is not substantially transformed by its final assembly in Thailand. Furthermore, as a product of the United States, it is excepted from the country of origin marking requirement when exported and returned to the United States, under 19 CFR 134.32(m).

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

Slip Op. 24–64

APIÁRIO DIAMANTE COMERCIAL EXPORTADORA LTDA. AND APIÁRIO DIAMANTE PRODUÇÃO E COMERCIAL DE MEL LTDA., Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 22–00185

[Remanding an affirmative agency determination concluding an antidumping duty investigation of raw honey]

Dated: June 5, 2024

Pierce J. Lee and *Daniel J. Cannistra*, Crowell & Moring LLP, of Washington, D.C., for plaintiffs Apiário Diamante Comercial Exportadora Ltda. and Apiário Diamante Produção e Comercial de Mel Ltda.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. 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. Of counsel on the brief was *Benjamin Juvelier*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

R. Alan Luberda, Elizabeth C. Johnson, and Maliha Khan, Kelley Drye & Warren LLP, of Washington D.C., for defendant-intervenors American Honey Producers Association and the Sioux Honey Association.

AMENDED OPINION AND ORDER[1]

Stanceu, Judge:

Plaintiffs contest an affirmative "less-than-fair-value" determination ("Final Determination") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued to conclude an antidumping duty investigation on imported raw honey from several countries. *Raw Honey From Brazil: Final Determination of Sales at Less Than Fair Value,* 87 Fed. Reg.

[1] This Amended Opinion and Order is issued to correct the erroneous omission of a comment period for the defendant-intervenors in this case. No other changes were made from the original opinion and order issued on May 30, 2024. All due dates are now based on the date of this Amended Opinion and Order.

22,182 (Int'l Trade Admin. April 14, 2022) P.R. 358 ("*Final Determination*").[2]

In the Final Determination, Commerce assigned plaintiffs an estimated dumping margin of 83.72% *ad valorem*. Concluding that Commerce based this rate on findings unsupported by substantial evidence on the record of the investigation, the court remands the decision to Commerce for reconsideration.

I. BACKGROUND

A. The Parties

Plaintiffs Apiário Diamante Comercial Exportadora Ltda. ("Apiário Export") and Apiário Diamante Produção E Comercial De Mel Ltda. ("Apiário Produção") (collectively, "Apiário," operating jointly under the trade name "Supermel") were treated as a single entity in the investigation. *Memorandum Re Less-Than-Fair-Value Investigation of Raw Honey from Brazil: Preliminary Affiliation and Single Entity Memorandum for Apiário Diamante Comercial Exportadora Ltda and Apiário Diamante Produção e Comercial de Mel Ltda* (Int'l Trade Admin. Nov. 17, 2021), P.R. 285. Apiário Export primarily exported honey to foreign markets and Apiário Produção sold exclusively into the domestic Brazilian market. Defendant is the United States. Defendant-intervenors, domestic producers of raw honey and the petitioners in the investigation, are the American Honey Producers Association and the Sioux Honey Association ("Petitioners").

B. Administrative Proceedings

The Final Determination resulted from an antidumping duty petition ("the Petition") filed in April of 2021. *Petition for the Imposition of Antidumping Duties Against Imports of Raw Honey from Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam* (Apr. 20, 2021), P.R. 1–17.

On May 18, 2021, Commerce initiated the antidumping duty investigation, which applied to imports of raw honey (the "subject merchandise") from several countries over a time period (the "period of investigation" or "POI") of April 1, 2020 through March 31, 2021. *Raw Honey from Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 86 Fed. Reg. 26,897 (Int'l Trade Admin. May 18, 2021), P.R. 53. Commerce selected Supermel and another Brazilian company, Mel-

[2] Citations to documents from the Joint Appendix (Apr. 18, 2023), ECF Nos. 30 (conf.), 31 (public) (supplemented by ECF Nos. 33 (conf.), 34 (public) filed on Nov. 16, 2023) are referenced herein as "P.R. __" for public versions. All information disclosed in this Amended Opinion and Order is public information.

bras lmportadora E Exportadora Agroindustrial Ltda. ("Melbras") (not a party to this case), as the two "mandatory respondents" from Brazil, i.e., the respondents Commerce would investigate individually and assign individual estimated dumping margins. *Department Memorandum to James Maeder re: Less-Than-Fair-Value Investigation of Raw Honey From Brazil: Respondent Selection* (Int'l Trade Admin. June 7, 2021), P.R. 64.

In its preliminary less-than-fair-value determination, which incorporated by reference a preliminary issues and decision memorandum ("Preliminary I&D Memorandum"), Commerce used Supermel's reported data to calculate a preliminary estimated dumping margin of 29.61%. *Raw Honey From Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 86 Fed. Reg. 66,533, 66,534 (Int'l Trade Admin. Nov. 23, 2021), P.R. 292; *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* at 21, 17 (Int'l Trade Admin. Nov. 17, 2021), P.R. 288 ("*Prelim. I&D Mem*.").

Shortly after issuing its preliminary determination, Commerce determined that it had made ministerial errors within the meaning of 19 CFR 351.224(f) in its preliminary margin calculation and issued an amended preliminary determination that reduced Supermel's estimated dumping margin to 10.52%. *Raw Honey From Brazil: Amended Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 86 Fed. Reg. 71,614 (Int'l Trade Admin. Dec. 17, 2021).

On April 14, 2022, Commerce issued the Final Determination, which incorporated by reference a "Final Issues and Decision Memorandum" ("Final I&D Memorandum"). *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* (Int'l Trade Admin. Apr. 7, 2022), P.R. 354 ("*Final I&D Mem*."). Concluding that Supermel withheld information and impeded the investigation by failing to respond to various questionnaires with information necessary to allow it to verify "cost-of-production" ("COP") data that Commerce used to calculate the 10.52% amended preliminary estimated dumping margin, Commerce assigned Supermel an estimated dumping margin of 83.72% in the Final Determination. *Final I&D Mem.* at 12; *Final Determination* at 22,183. Commerce assigned Melbras an estimated dumping margin of 7.89%. *Final Determination* at 22,183.

Following an affirmative injury determination by the U.S. International Trade Commission, Commerce issued an antidumping order on raw honey from Argentina, Brazil, India, and the Socialist Republic of

Vietnam. *Raw Honey From Argentina, Brazil, India, and the Socialist Republic of Vietnam: Antidumping Duty Orders,* 87 Fed. Reg. 35,501 (Int'l Trade Admin. June 10, 2022) P.R. 362.[3]

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court exclusive jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"), *as amended*, 19 U.S.C. § 1516a, and 28 U.S.C. § 1581(c).[4] Among the decisions that may be contested according to Section 516A are final affirmative determinations of sales at less than fair value. *Id*. §§ 1516a(a)(2)(B)(i), 1673d.

In reviewing an agency determination, the court must set aside any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Antidumping Duties under the Tariff Act

The Tariff Act provides for an "antidumping duty" to be assessed on imported merchandise if Commerce determines that the merchandise is being sold at less than fair value and the International Trade Commission determines that an industry in the United States is materially injured or is threatened with material injury by reason of that merchandise or by reason of sales (or likelihood of sales) of that merchandise for importation. 19 U.S.C. § 1673. The statute provides

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[3] The scope of the antidumping duty order is as follows:

> The product covered by these orders is raw honey. Raw honey is honey as it exists in the beehive or as obtained by extraction, settling and skimming, or coarse straining. Raw honey has not been filtered to a level that results in the removal of most or all of the pollen, e.g., a level that removes pollen to below 25 microns. The subject products include all grades, floral sources and colors of raw honey and also include organic raw honey.
>
> Excluded from the scope is any honey that is packaged for retail sale (e.g., in bottles or other retail containers of five (5) lbs. or less).

Raw Honey From Argentina, Brazil, India, and the Socialist Republic of Vietnam: Antidumping Duty Orders, 87 Fed. Reg. 35,501, 35,504 (Int'l Trade Admin. June 10, 2022) P.R. 362.

[4] Citations to the United States Code are to the 2018 edition.

that the antidumping duty shall equal the "amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id*. In the ordinary instance, "[t]he normal value of the subject merchandise shall be the price . . . at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." *Id*. §§ 1677b(a)(1)(A), (B)(i). *See id*. § 1677(16) (defining "foreign like product" in terms related to comparability to the subject merchandise).

If Commerce determines that sales of the foreign like product in the market of the exporting country are "insufficient to permit a proper comparison with the sales of the subject merchandise to the United States," Commerce may compare the U.S. sales of the subject merchandise to sales of the foreign like product in a third country. *Id*. § 1677b(a)(1)(B), (C). A small portion of the honey produced by Apiário Export and all of that produced by Apiário Produção was sold into the domestic Brazilian market. *Supermel's Section D Second Supplemental Questionnaire Response* at 4 (Nov. 4, 2021), P.R. 265 *("Second Supplemental Questionnaire Response*"). Commerce considered those combined sales to be insufficient to use the Brazilian market as the "comparison" market. *Prelim I&D Mem.* at 13. Therefore, in the investigation at issue, Commerce chose Australia as the third country comparison market. *Id.*

C. "Cost of Production" in the Normal Value Calculation

"In determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). When determining normal value, Commerce may disregard sales that are not made in the "ordinary course of trade." *Id*. § 1677b(a)(1)(B)(i). The statute defines "ordinary course of trade" to exclude sales made below the cost of production. *Id*. §§ 1677(15)(A), 1677b(b)(1)(B) (referring to sales at prices that do not permit recovery of all costs within a reasonable period of time). Cost of production includes an exporter's or producer's material costs, amounts for selling and general expenses, and the cost of containers. *Id*. § 1677b(b)(3). The statute provides that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." *Id*. § 1677b(f)(1)(A).

D. Verification

Information submitted during an antidumping duty investigation is subject to verification by Commerce. 19 U.S.C. § 1677m(i)(1). The Department's regulations describe verification as a procedure "to verify the accuracy and completeness of submitted factual information." 19 C.F.R. § 351.307(d). During verification, "the Department will request access to all files, records, and personnel which the Secretary [of Commerce] considers relevant to factual information submitted of . . . [p]roducers, exporters, or importers." *Id*.

Commerce ordinarily conducts on-site verifications of submitted information. Due to the constraints posed by the COVID-19 pandemic that was ongoing throughout the investigation at issue in this case, Commerce did not follow its ordinary procedure. After the preliminary phase of the investigation, Commerce sent Supermel an "In Lieu of Verification Questionnaire" that addressed information placed on the record by Supermel's questionnaire responses. *Letter from the Department to Supermel re: Questionnaire in Lieu of Verification* (Int'l Trade Admin. Dec. 10, 2021), P.R. 299 (*"In Lieu of Verification Questionnaire*"). In its response to this questionnaire, Supermel clarified some of its responses to previous questionnaires and provided additional supporting documentation. *Letter from Supermel to the Department re: Antidumping Duty Investigation of Raw Honey from Brazil: Supermel's In Lieu of Verification Questionnaire Response* (Dec. 20, 2021) (P.R. 325–331) ("*In Lieu of Verification Questionnaire Response*").

E. Supermel's Claim in this Litigation

The estimated rate ultimately assigned to Supermel in the Final Determination was not a weighted average estimated dumping margin calculated from Supermel's sales during the POI. The 83.72% estimated dumping rate Commerce applied to Supermel in the Final Determination, after calculating a 10.52% preliminary estimated rate in the Amended Preliminary Determination, resulted from the Department's invoking the "facts otherwise available" provision of section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), and the "adverse inference" provision of section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b).[5] The Department's principal rationale in doing so was that Supermel impeded the investigation by withholding information necessary to allow it to verify Supermel's reported data on the cost of production of the raw honey it exported to the comparison market (i.e., Australia).

[5] The term "adverse facts available" ("AFA") is sometimes used to refer to the combined use of these two provisions.

Before the court is Supermel's motion for judgment on the agency record, brought according to USCIT Rule 56.2. Supermel claims that Commerce unlawfully invoked 19 U.S.C. § 1677e(a) ("facts otherwise available") and (b) ("adverse inference") in assigning Supermel the 83.72% estimated dumping margin. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 3 (Dec. 7, 2022), ECF Nos. 22 (conf.), 23 (public) ("Pl.'s Br."). Supermel argues that the factual determinations upon which Commerce invoked these provisions are not supported by substantial evidence on the administrative record of the investigation. Specifically, Supermel argues that it "submitted verifiable honey purchase data." *Id*. at 32 (citing its responses to the Department's questionnaires). Supermel also asserts that to the extent its submissions were deficient, Commerce failed to provide "an opportunity to remedy or explain the deficiency" as required by 19 U.S.C. § 1677m(d). *Id*. at 21.[6]

F. The Derivation of the 10.52% Rate in the Preliminary Determination

Supermel reported in its questionnaire responses that it purchased raw honey from more than a thousand individual, unaffiliated beekeepers in Brazil and performed further processing on that honey to produce raw honey products for its export sales. The processing included "1–6 hours of heat treatment, homogenization (involving additional heat treatment), filtration, organic certification, and inspection." Pl.'s Br. 16, 6 (citing *Supermel's Response to the Initial Request for Information* (June 17, 2021), P.R. 79).

At the onset of the investigation, considering "the numerous nonaffiliated middlemen and beekeepers involved in the cost of producing raw honey," Commerce sought input from the parties on methods of determining the cost of raw honey production. *Letter from the Department to All Interested Parties Re: Antidumping Duty Investigations of Raw Honey from India, Argentina, Brazil, and Ukraine: Request for Comments on the Raw Honey Cost of Production Reporting Methodology* at 1 (July 22, 2021), P.R. 108; *Prelim. I&D Mem.* at 16—17. After receiving comments from the parties, Commerce "selected and requested cost information from two direct beekeeper suppliers to

[6] Additionally, Supermel contests the Department's decision to treat the beekeeper suppliers, rather than Supermel, as the producers of the subject merchandise, arguing that this formed the basis for the application of facts otherwise available with an adverse inference under 19 U.S.C. § 1677e to Supermel. Pl.'s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 41—42 (Dec. 7, 2022), ECF Nos. 22 (conf.), 23 (public). Because the court concludes that certain of the Department's findings for applying 19 U.S.C. § 1677e lacked required support in the record evidence, the court does not reach the question of whether Commerce improperly designated the beekeepers as the "producers."

Supermel with the aim of determining whether reliance on Melbras[']s and Supermel's acquisition costs as a proxy for the actual COP of the raw honey purchased was reasonable." *Prelim. I&D Mem.* at 17.

Between June and October of 2021, Commerce issued a series of questionnaires to Supermel and two beekeepers that Supermel identified as its largest suppliers, referred to in the submissions as "Beekeeper 1 and Beekeeper 2" (collectively, "the beekeeper suppliers") for whose identity Supermel claims business proprietary treatment. Supermel and both beekeeper suppliers timely responded to those questionnaires. As did Supermel, the beekeepers reported their sales prices and their costs of production.

Commerce explained in the Final I&D Memorandum that "[i]n the Preliminary Determination, we relied on the respondents' honey acquisition costs as a proxy for the cost of producing raw honey. We relied on Supermel's reported cost information and applied its acquisition costs plus Supermel's own processing costs as a reasonable proxy for the total cost of production (COP) because the acquisition prices Supermel paid were higher than the honey producers' reported COP." *Final I&D Mem.* at 4.

In arriving at the amended preliminary margin of 10.54% for Supermel, Commerce removed from Supermel's comparison market sales database certain sales it determined to have been made below the cost of production. *Prelim. I&D Mem.* at 19 ("We found that, for certain products, more than 20 percent of Melbras[']s and Supermel's comparison sales during the POI were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time.").

G. The Department's Application of 19 U.S.C. § 1677e on Findings that Supermel Withheld Information, Impeded the Investigation, and Provided Cost-of-Production Data that Could Not Be Verified

Commerce decided that it could not use any of Supermel's reported data on the cost of production of the foreign like product as sold in the third country market of Australia, finding as a fact that it lacked the information necessary to verify the cost of production data that Supermel submitted.[7] Substituting "facts otherwise available" for Supermel's entire comparison market sales database, Commerce further concluded that Supermel withheld information, impeded the investigation, and failed to cooperate by not acting to the best of its ability

[7] Commerce is directed to use "the facts otherwise available" if a party provides requested information "but the information cannot be verified as provided in section 1677m(i) of this title." 19 U.S.C. § 1677e(a)(2)(D).

in responding to certain of its questionnaires. Commerce assigned Supermel a rate of 83.72% as an adverse inference, using a rate it determined from the Petition. *Final Determination* at 22,183.

This case presents, first, the issue of whether substantial record evidence supported the findings that the record lacked sufficient information for verification of some or all of Supermel's reported cost of production data, that Supermel withheld information, and that Supermel impeded the Department's investigation. If it did not, then Commerce was not authorized by the Tariff Act to substitute facts otherwise available for that cost information. If, on the other hand, one or more of these findings are valid, the issue is whether Commerce permissibly applied an adverse inference in selecting from among facts otherwise available.

1. Misplaced Reliance on Differences between the Information Submitted by Supermel and its Two Largest Beekeeper Suppliers

Commerce based its application of 19 U.S.C. § 1677e(a) in part on a factual finding that there were "unexplained and unreconciled differences between the information submitted by Supermel and its beekeeper suppliers." *Final I&D Mem.* at 18. As discussed below, the Department's finding of "unexplained and unreconciled differences" lends no support to the use of facts otherwise available under § 1677e(a).

Commerce found that "both Supermel and the beekeepers provided conflicting information regarding the quantity and value of honey reported, which further supports our finding that Supermel's reported costs cannot be verified." *Id.* at 16—17. This finding is contradicted by the record evidence in two respects. First, the discrepancies were insignificant in the context of the cost of production data Supermel provided and, therefore, could not have precluded verification of those data. Second, these discrepancies, which pertained to the quantities and values of purchases from the two largest beekeepers who supplied Supermel raw honey, must be viewed along with the record evidence consisting of the two beekeepers' own admissions that their "labor is almost entirely dedicated to production activities and virtually no time is spent on administrative activities."[8] *Antidumping Duty Investigation of Raw Honey From Brazil: Beekeeper Question-*

[8] Both beekeepers invoked 19 U.S.C. § 1677m(c), requesting that their difficulties be "taken into account, particularly as a small company." *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 1]* at 2 (Oct. 26, 2021), P.R. 241 *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 2]* at 2 (Oct. 26, 2021), P.R. 242.

naire for [Beekeeper 1] at 14 (Sept. 9, 2021), P.R. 198 ("*Beekeeper 1 Initial Questionnaire Response").* Accordingly, the record does not support a finding that the beekeepers' records, which understandably may have been less than perfect, called Supermel's reported costs into question. The beekeepers' questionnaire responses, considered in the context of the evidence about the nature of the beekeepers' businesses, did not support a finding or inference that Supermel underreported its own honey acquisition costs.

Commerce collected information from Supermel's two largest beekeeper suppliers, Beekeeper 1 and Beekeeper 2, with the stated aim of determining whether reliance on "Supermel's acquisition costs as a proxy for the actual COP of the raw honey purchased was reasonable." *Prelim. I&D Mem.* at 17. Beekeepers 1 and 2 provided 2.5% and 2% of Supermel's total honey, respectively. Pl.'s Br. 9 (citing *Supermel's Section D Questionnaire Response* at Ex. D-5a (Aug. 3, 2021), P.R. 133—152 ("*Supermel's Initial Questionnaire Response*")).

In his response, Beekeeper 1 (Supermel's largest supplier of honey) noted that while he operates under a trade name, "there is no incorporated company. All the operations are conducted by me and my family." *Beekeeper 1 Initial Questionnaire Response* at 2. Because Beekeeper 1's business was not incorporated, he did not file a corporate tax return. *Id.* at 9. Instead, Beekeeper 1 provided tax returns for himself, his wife, and his child. Beekeeper 2 informed Commerce that he operated with no formal accounting or inventory system and noted that "I have no incorporated company. All the operations are conducted by me and my wife." *Antidumping Duty Investigation of Raw Honey From Brazil: Beekeeper Questionnaire for [Beekeeper 2]* at 2 (Sept. 9, 2021), P.R. 201 (*"Beekeeper 2 Initial Questionnaire Response")*. Like Beekeeper 1, Beekeeper 2 was able to provide detailed information about the physical processes by which he harvests honey but was unable to answer the Department's questions that required a formal inventory or accounting system.

In his initial questionnaire response, responding to the Department's request for "a schedule for FY 2020 listing major honey customers with quantity and value by types of honey sold[,]" Beekeeper 1 provided his records of the total quantity and value of his sales to Supermel during the POI. *Beekeeper 1 Initial Questionnaire Response* at 10. The total quantity was within 1% of the total quantity reported by Supermel for purchases made from Beekeeper 1 during the POI, and the total value was 3% less than the total value reported by Supermel. Pl.'s Br. 10 (citing *Beekeeper 1 Initial Questionnaire Response* at 10). Beekeeper 2 did not provide quantity or value figures in response to the same question, instead reiterating that he does not

keep detailed business records. *Beekeeper 2 Initial Questionnaire Response* at 10.

Tax invoices provided by Beekeeper 1 in response to the supplemental questionnaire showed the same minor discrepancies as to the quantity and value of the sales to Supermel. *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 1]* at Ex. SUP-1 (Oct. 26, 2021), P.R. 241 ("*Beekeeper 1 Supplemental Questionnaire Response*"). Tax invoices provided by Beekeeper 2 showed that the total quantity reported matched Supermel's reported data within 0.02%, but they listed values that were 6% less than the total value reported by Supermel for purchases made from him during the POI. *Antidumping Duty Investigation of Raw Honey From Brazil: Section D Supplemental Questionnaire for [Beekeeper 2]* at SUP-1 (Oct. 26, 2021), P.R. 242. ("*Beekeeper 2 Supplemental Questionnaire Response*"). Viewed cumulatively, these discrepancies were less than 5% as to the total transactions between Supermel and the two parties and were spread over multiple transactions.

In blaming Supermel for what it described as "discrepancies" between the beekeepers' and Supermel's data pertaining to Supermel's acquisition costs, Commerce did *not* find as a fact that Supermel failed to maintain COP data in accordance with Brazilian accounting requirements. *See* 19 U.S.C. § 1677b(f)(1)(A) (directing that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."). Although Supermel operated under the Brazilian tax regime for "micro and small businesses," (and, like the beekeepers, invoked 19 U.S.C. § 1677m(c)), it was incorporated as a business and operated during the POI under tax and accounting requirements provided for under Brazilian law. *Id.*, Pl.'s Br. 13. Supermel 's responses to Commerce were based, necessarily, on its production costs as shown in the business records it kept in the ordinary course of business. Commerce attached unwarranted significance to the fact that the values of the purchases from the two sampled beekeepers as shown in records or tax returns of those beekeepers did not agree exactly with the records of acquisition costs maintained by Supermel.

Supermel suggested that one source of the discrepancy may be that the "issue dates" on the tax invoices provided by the Beekeepers came before the date on which the beekeepers signed the invoices provided

by Supermel, which could indicate that negotiation occurred and shifted prices in the days immediately preceding the finalization of the transactions. Pl.'s Br. at 26 (citing *Beekeeper 1 Supplemental Questionnaire Response* at SUP-1) Commerce rejected an explanation provided by Supermel that "third-party freight charges" account for the difference by pointing out that that explanation merely raises another discrepancy between information provided by Supermel and the beekeepers as to which party pays the freight charges. *Final I&D Mem.* at 13—14. Commerce found that "this explanation still does not address the differences in Supermel's reported quantities of honey purchased from the unaffiliated beekeepers compared to the beekeeper reported quantities sold to Supermel[,]" an apparent reference to the discrepancy of reported quantity of less than 1% for Beekeeper 1 and .02% for Beekeeper 2. *Id.* at 14.

The court need not dwell on the possible reasons for the minor discrepancies between the data reported by Supermel and by its suppliers, who admit to spending "virtually no time" on administration and recordkeeping. *Beekeeper 1 Initial Questionnaire Response* at 14. Only in the most literal and technical sense was Commerce correct in finding that "the information provided by both beekeepers contradicted Supermel's reporting." *Final I&D Mem.* at 14; *see also Final I&D Mem.* at 13 ("We agree with the petitioners that Supermel's reported unprocessed honey purchases do not agree with the unaffiliated beekeeper suppliers' sales invoices."). Contrary to the Department's finding and inference, the record evidence showed that Supermel's data and the data of Beekeepers 1 and 2 were relatively consistent.

In conclusion, the evidence on the administrative record, viewed as a whole, does not support the Department's reliance on what it termed "unexplained and unreconciled differences between the information submitted by Supermel and its beekeeper suppliers," *Final I&D Mem.* at 18, for invoking 19 U.S.C. § 1677e(a)(2)(D) and setting aside Supermel's cost-of-production data and, ultimately, its entire comparison market database, as unverifiable.

2. Failure to Identify Deficient Responses to Question 25 of the Second Supplemental Questionnaire as Required by 19 U.S.C. § 1677m(d)

Supermel argues that Commerce failed to identify alleged deficiencies in questionnaire responses and failed to provide an opportunity to remedy or explain those deficiencies, as required by 19 U.S.C. §

1677m(d).[9] Pl.'s Br. 20—21. With respect to a question in the Second Supplemental Questionnaire, "Question 25," the court agrees. *Second Supplemental Questionnaire Response* at 13—14.

For its application of 19 U.S.C. § 1677e, Commerce relied in part on Supermel's response to Question 25. *Final I&D Mem.* at 13. Commerce found that despite its request for such documentation, "Supermel did not provide copies of correspondence with the beekeepers that would corroborate the quantity and value Supermel reported, copies or screenshots of any journal entries used to record the transactions in Supermel's accounting system, or proof of payment confirming the amount Supermel paid to the beekeepers" and that Supermel failed to "state why it had not submitted or could not submit the required documentation." *Id.* The question was as follows:

> Commerce selected two beekeepers ([Beekeeper 1] and [Beekeeper 2]) whom you have purchased honey from during the POI. Based on the information provided by the beekeepers there is a discrepancy between the quantity and value of unprocessed honey you have reported as procured from the beekeepers. Confirm that you have purchased [quantity] kg and R$ [value] of honey from [Beekeeper 1] and [quantity] kg and R$ [value] from [Beekeeper 2]. Provide all relevant supporting documentation including correspondence with the beekeepers that corroborate the quantity and value you have reported, copies or screenshots of any journal entries you have prepared to record the transactions and proof of payment confirming the amount you have paid.

Letter from the Department to Supermel re: Less Than Fair Value Investigation of Raw Honey From Brazil at 8—9 (Oct. 20, 2021), P.R. 236 ("*Second Supplemental Questionnaire*"). This question solicited four things from Supermel. The first was a confirmation of the quantities and values of purchases from Beekeepers 1 and 2. The latter three were subcategories of the request for "all relevant supporting

[9] 19 U.S.C. § 1677m(d) provides in relevant part that:

> If the administering authority or the Commission (as the case may be) determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such a deficiency and either—(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

documentation," which included (1) "correspondence with the beekeepers that corroborate the quantity and value you have reported;" (2) "copies or screenshots of any journal entries you have prepared to record the transactions"; and (3) "proof of payment confirming the amount you have paid." *Id.*

In response to Question 25, Supermel provided a table representing the quantities and values it purchased from the beekeepers, thereby responding only to the "confirmation of the quantities and values" part of the question. Because Supermel did not provide the supporting documentation in its response to Question 25, that response was deficient.

Supermel argues that "Commerce only described the discrepancies for the first time in the Final Determination" and thereby failed to notify Supermel of the deficiency and afford an opportunity to cure as required by 19 U.S.C. § 1677m(d). Pl.'s Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. 23 (April 4, 2023), ECF No. 29. Defendant argues that "Commerce's obligations under § 1677m(d) can be satisfied when it issues a supplemental questionnaire 'specifically pointing out and requesting clarification' of a respondent's deficient responses." Def.'s Resp. In Opp'n to Pls.' Mot. for J. Upon the Admin. R. 26 (Feb. 10, 2023), ECF No. 24 ("Def.'s Resp.") (quoting *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007)). Defendant points to the "*two* supplemental questionnaires on the topic of verifying its cost information with respect to purchases from the beekeepers, including specific reference to acceptable types of documentation that Commerce deemed appropriate to remedy the missing information." Def.'s Resp. 26 (citing *Final I&D Mem.* at 14—16).

The government's argument is unavailing. Defendant is correct that one or more supplemental questionnaires can fulfill the Department's obligation to provide an opportunity to remedy deficient submissions pursuant to 19 U.S.C. § 1677m(d). Def.'s Resp. 26 (quoting *NSK Ltd. v. United States*, 481 F.3d 1355, 1360 n.1 (Fed. Cir. 2007)). But this requires that a subsequent questionnaire have given the submitter actual notice of the deficiency or reiterated the initial request. The Department's In Lieu of Verification Questionnaire, the only questionnaire Commerce issued following the Second Supplemental Questionnaire, did not notify Supermel that Commerce had determined that Supermel's response to Question 25 of the Second Supplemental Questionnaire was deficient. Commerce had the opportunity to do so in the In Lieu of Verification Questionnaire but in fact did not bring the deficiency to Supermel's attention prior to identifying it in the Final Issues and Decision Memorandum. Nor did Com-

merce issue a second request for the "correspondence with the beekeepers" or "proof of payment" it requested in Question 25.

Defendant cites a large portion of the Final I&D Memorandum in arguing that Commerce met its obligations under § 1677m(d) by issuing multiple supplemental questionnaires referring to "acceptable types of documentation." Def.'s Resp. 26 (citing *Final I&D Mem.* at 14—16). The cited portion of the Final I&D Memorandum does not support defendant's argument because none of the questions it identifies from the In Lieu of Verification Questionnaire actually reiterated the requests it made in Question 25 for correspondence with Beekeepers 1 and 2 and proof of payment.

The court notes that, as an incidental matter, Supermel later provided, in response to a request by Commerce, "screenshots of any journal entries" that corroborated, *inter alia*, the purchases of raw honey from Beekeepers 1 and 2. This question appeared in the In Lieu of Verification Questionnaire cited in the Final I&D Memorandum, question 5.a., but did not relate specifically to Beekeepers 1 and 2. *In Lieu of Verification Questionnaire* at 12, Ex. VC-4.1. Instead, it pertained to "inventory movement schedules," which were documents provided by Supermel relating to honey inventory. A portion of that question included a request for "copies of spreadsheets, handwritten journals and screen prints from your accounting system as support." Commerce further requested that Supermel "[d]emonstrate how the POI . . . inventory values reflected on the inventory movement schedules at exhibit 2SD-14 of the 2SDQR tie to Apiario Diamante Comercial Exportadora Ltda's (Apiario Export.) and Apiario Diamante Producao's (Apiario Prod.) POI trial balances." *In Lieu of Verification Questionnaire* at 6. In responding, Supermel provided Commerce a complete set of its journal entries for raw material purchases during the POI, including all of the journal entries that recorded transactions between Supermel and Beekeepers 1 and 2. *In Lieu of Verification Questionnaire Response* at 12, VC-4.1.

In conclusion, the deficiencies in Supermel's responses to Question 25, viewed according to the record evidence on the whole, did not provide an adequate basis for the Department's invoking 19 U.S.C. §1677e.

3. Question 3(a)(iii) of the First Supplemental Questionnaire

Question 3(a)(iii) of the First Supplemental Questionnaire ("Question 3.a.iii") directed Supermel to:

> Provide excerpts from your accounting system that shows [*sic*] how you have recorded the purchases of the honey from the independent beekeepers, the transfer of the unprocessed honey

> from Apiário Export. to Apiário Prod. and the transfer of the processed honey from Apiário Prod. back to Apiário Export. (e.g., journal entries corroborating the purchases and transfer of the unprocessed honey, invoices etc.).

Letter from the Department to Supermel re: Less Than Fair Value Investigation of Raw Honey From Brazil at 4 (Sept. 1, 2021), P.R. 195 ("*First Supplemental Questionnaire*"). Supermel provided this narrative response:

> Apiário Export records its purchases of honey from beekeepers as debit entries in the raw material stock account (41). Apiário Export does not sell the unprocessed honey to Apiário Producao. There has not been any transfer of unprocessed honey from Apiário Export to Apiário Prod. and the processed honey from Apiário Prod. back to Apiário Export.

Supermel's Section A- D Supplemental Questionnaire Response at 4 (Sept. 15, 2021), P.R. 205 ("*First Supplemental Questionnaire Response*"). Thus, Supermel described how it recorded the purchases from beekeepers in its accounting system and clarified for Commerce that the supposed transfers of honey between the companies did not occur. But it did not provide, in response to Question 3.a.iii, "excerpts" from its accounting system.

Commerce found as facts that "Supermel did not provide the requested journal entries or any other supporting documents, nor did Supermel explain why it did not submit the requested documentation" and "Supermel ignored Commerce's request." *Final I&D Mem.* at 15. These findings are correct when viewed solely as to the response to Question 3.a.iii, but they are unsupported by the record considered on the whole. On the previous page of the questionnaire, in subpart a.i. of the same question and in response to a request that it "[d]iscuss how the honey purchased from the independent beekeepers are recorded in your normal books and records," Supermel referred to, and provided as exhibits, excerpts from its accounting system as it listed the steps it took after it "manually record[ed] its honey purchases" from the beekeepers:

> Honey purchased for international sales is recorded as debit entries in the "stock: raw materials" account (41) in Apiario Export's books. Honey purchased for domestic sales is recorded in entries in the "stock: raw materials" account (41) in Apiario Producao's books. *The reconciliation of the raw material purchase cost is provided as Exhibit SD-12*. As shown in the reconciliation, Supermel's raw material accounts also capture pur-

> chases of pollen, propolis and beeswax.[10] Pollen and propolis are used as the raw materials for the domestic products sold by Apiario Producao. Beeswax is provided to beekeepers to support their production activities . . . In the *revised COP data provided as Exhibits SD-1a (monthly), Exhibit SD-1b (quarterly) and Exhibit 1c (POI)*, Supermel included the cost of beeswax in the reported [variable overhead costs]. *The revised processing cost calculation is provided as Exhibit SD-3*.

First Supplemental Questionnaire Response at 3 (emphasis added). Supermel did not write "see response in previous subpart," or words to that effect or otherwise indicate that it already had provided responsive documentation. Nevertheless, its answer to subpart a.i directed Commerce to the exhibits responsive to the request for documentation that Commerce included in subpart a.iii, which Supermel provided voluntarily in addition to the information specifically requested in subpart a.i. The record, therefore, is inconsistent with the Department's findings that it had not been provided the requested information and that its request that Supermel "demonstrate how the purchase database ties to Supermel's accounting system" had been "ignored." Supermel reasonably could have presumed the Department's familiarity with its response to subpart a.i. Moreover, as discussed later in this Amended Opinion and Order, Supermel informed Commerce repeatedly during the investigation that all raw honey purchases, recorded on a complete set of documents that Supermel provided Commerce in screenshots, were entered in a specific cost account in Apiario Export's accounting system.

4. Question 18 of the First Supplemental Questionnaire

After discussing Question 3.a.iii, Commerce stated in its Final I&D Memorandum that it "also requested in the same First Supplemental Section D Questionnaire that Supermel demonstrate how the purchase database ties to Supermel's accounting system. Supermel ignored Commerce's request." *Final I&D Mem* at 15. For this finding, Commerce cited page 18 of the First Supplemental Section D Questionnaire.

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[10] The raw material purchases that Apiário Export made during the POI were of honey and beeswax. Honey was processed and sold whereas the beeswax was "provided to beekeepers to support their production activities." Both categories of raw material purchases were recorded in the "stock: raw materials account (41)" of Apiário Export's accounting system. Supermel considered the beeswax purchased during the POI to be a variable overhead cost. *Supermel's Section A- D Supplemental Questionnaire Response* at 3 (Sept. 15, 2021), P.R. 205 ("*First Supplemental Questionnaire Response*").

The only question on page 18 pertinent to this issue was question 18(c) of that Questionnaire ("Question 18(c)").[11] That question asked Supermel to provide the following:

> a. Discuss how Supermel's accounting system normally captures production costs by product.
>
> b. Explain how the product-specific costs recorded in your accounting system compare to the weighted-average CONNUM specific costs reported for COP and CV.
>
> c. Supermel stated on page 10 that the honey purchase database is sufficiently detailed to track all production characteristics identified in this investigation. Provide sample copies of the honey purchase database which shows all the production characteristics normally captured in your ordinary course of business and demonstrate how the database ties to your accounting system.

First Supplemental Questionnaire at 8. In response to this three-part question, Supermel stated that its "accounting system does not capture production costs by product. Since there is no difference in production process for honey based on product characteristics, Supermel allocated its total processing cost over all of its production quantity during the POR [*sic*]. Supermel reported the same per-unit processing costs for all of its CONNUMs." *First Supplemental Questionnaire Response* at 18.

Question 18 is redundant with other requests in the same questionnaire, for which Commerce requested and received such a description and sample documentation from Supermel's purchase database. One such instance was on the previous page, in response to the preceding question, question 17, and others occurred in questions 3.a.i and 3.a.iii, discussed above. *First Supplemental Questionnaire Response* at 3—4, 17, 22, 25, Ex. SD-15. Contrary to the Department's finding, *Final I&D Mem.* at 18, that such information was "withheld," the record contains complete purchase databases covering all purchases of honey and beeswax made by Apiário Export during the POI. *See Second Supplemental Questionnaire* at 2SD-11c; *In Lieu of Verification Questionnaire Response* at Ex. VC-4.1.

[11] This document was not initially included in the Joint Appendix for this case, requiring the court to request additional record documentation from the parties. The incomplete status of the Joint Appendix delayed the court's review of the relevant record evidence.

5. Question 10 of the Second Supplemental Questionnaire

Commerce identified Supermel's response to question 10 of the Second Supplemental Questionnaire ("Question 10") as part of its basis for applying facts otherwise available with an adverse inference. Question 10, which referred to question 3.a.iii of the First Supplemental Questionnaire, was as follows:

> As requested at question 3.a.iii of SDQ, provide excerpts from your accounting system that shows [*sic*] how you have recorded the purchases of the honey from the independent beekeepers, the transfer of the unprocessed honey from Apiário Export to Apiário Producao and the transfer of the processed honey from Apiário Producao back to Apiário Export (e.g., journal entries corroborating the purchases and transfer of the unprocessed honey, invoices etc.). In addition, provide copies of the accounting entries for Apiário Producao purchases of unprocessed honey.

Second Supplemental Questionnaire at 6—7. In response, Supermel stated as follows:

> The screenshots of the journal entries used to record honey purchases made by Apiario Export and Apiario Producao are provided as Exhibit 2SD-13a and Exhibit 2SD-13b. Because this is a tolling operation. [*sic*] the transfer of the unprocessed honey for toll processing is not recorded as a sale. Once the processing is finished, Apiario Producao issues an invoice for processing fees to Apiario Export. The sample invoices for toll processing fees are provided at Exhibit 2SD-17c.

Second Supplemental Questionnaire at 7. Throughout its analysis, Commerce characterized as deficient the documents provided by Supermel in response to requests for "journal entries." *Final I&D Mem.* 14—16. Commerce described in this way its objections to the screenshots of documents Supermel identified as "journal entries" in the submissions:

> As noted by the petitioners, the screenshots do not reflect any accounting data. Instead, the screenshots simply show a list of honey purchases by date, name of supplier, address of supplier, weight, value and per-unit price. The screenshots do not show the name or number of Supermel's "stock: raw materials" account nor do they reflect debits and credits or account balances.

Final I&D Mem. at 15. The "screenshots" to which Commerce referred contained individual information for each of more than two thousand purchases of unprocessed honey that Supermel made during the POI. Supermel explained repeatedly in the investigation that each of its raw honey and beeswax purchases reflected in those journal entries is recorded as a debit in the "stock: raw materials (41)" account in the accounting records maintained by Apiário Export, *First Supplemental Questionnaire Response* at 2—4, Ex. SD-6; *Second Supplemental Questionnaire* at 4, and provided a visual aid in the form of a flowchart on that process. *Initial Questionnaire Response* at Ex. D-3. The record evidence refutes the Department's finding that the screenshots "do not reflect any accounting data." The amounts paid for the individual raw honey purchases are the very data that were recorded in "stock: raw materials (41)," which refers to a specific cost account in Supermel's accounting system.

The Department's finding that the "screenshots do not show the name or number of Supermel's "stock: raw materials" account is true with respect to the individual screenshots, but Supermel provided these screenshots of records that were in the form in which Supermel maintained them. At the urging of the petitioners, Commerce objected that these individual records of purchase transactions did not reference the "stock: raw materials" account, but that objection is meritless in light of Supermel's informing Commerce that *all* of these purchases were recorded as "debits" in the same account, i.e., the "stock: raw materials (41)" account of Apiário Export.

In accordance with instructions from Commerce, Supermel provided a "trial balance" that contained accounting information pertaining to the POI. *First Supplemental Questionnaire Response* at Ex. 2SA-5. Supermel described the trial balance as "exactly the same as the financial statements but more detailed." *Initial Questionnaire Response* at 22. Also at the Department's request, Supermel provided "a worksheet reconciling all items on the fiscal year income statement (e.g., revenues, cost of sales, selling and administrative expenses, and non-operating expenses) in the audited financial statements to the total costs in the financial accounting system (i.e., the summary trial balance)." *Initial Questionnaire Response* at 20—21, Ex. D-11. Contrary to the Department's objections, the record shows that the trial balance presented information from Supermel's "financial accounting system" that related directly to the individual purchases from the beekeepers. *Id*., *First Supplemental Questionnaire Response* at Ex. 2SA-5.

The court has examined the evidence consisting of the trial balance and compared it to the evidence consisting of screenshots of indi-

vidual records of the more than two thousand individual raw honey purchases Supermel made during the POI. The court notes that these records are essentially in agreement. When the total value of the beeswax transactions provided at exhibit 2SD-11c to the Second Supplemental Questionnaire and the total value of the honey transactions provided at exhibit VC-4.1 to the In Lieu of Verification Questionnaire are combined, the total figure is within 99.9999% of the total for line 41, "stock: raw materials" in Apiário Export's trial balance provided at Ex. 2SA-5 to the First Supplemental Questionnaire. Thus, the cost data on the "journal entries" provided by Supermel substantially equal the cost data on the "stock: raw materials" line on Supermel's trial balance.

Like the government, defendant-intervenor characterizes the "journal entries" as inadequate, arguing that they "contain no accounting information" and are not responsive to a request for "journal entries for honey purchases." Def.-Int.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. 14, 16 (Mar. 6, 2023), ECF Nos. 26 (conf.), 27 (public). Neither defendant-intervenor nor the government explained how writing "debit stock: raw materials account" atop the journal entries would have converted what they maintain are deficient submissions into responsive ones. Nor do they explain the purported inadequacy of Supermel's narrative description of how the transactions listed in the "journal entries" tie to its accounting records, i.e., that they are all recorded as debit entries in the "stock: raw materials" account of Apiário Export's trial balance. This narrative description is supported by the record evidence that the total of the values Supermel recorded for each transaction is nearly identical to the value reported in the debit "stock: raw materials" account of Apiario Export's accounting records. The record shows that Commerce, at the instigation of the petitioners, based its use of 19 U.S.C. § 1677e in part on business records that were submitted in the form in which they were maintained.

The Department's characterization of the journal entries provided by Supermel as inadequate appears to have developed at some point after it issued the In Lieu of Verification Questionnaire but before the promulgation of the Final Determination. During the investigation, Commerce did not identify the journal entries as inadequate for recording Supermel's purchase data or unresponsive to a request for journal entries. Commerce never defined or described "journal entries" in its requests for them. Absent such a definition, Supermel apparently presumed, quite reasonably, that its journal entry screenshots, coupled with its descriptions of how those entries were recorded into a specific cost account within its accounting records, were

responsive to the Department's request for journal entries or demonstrations of how the purchase data they reflect "tie" to their accounting records. See, *inter alia* : *First Supplemental Questionnaire* at 4, 7, 10; *Second Supplemental Questionnaire* at 5, 6, 8, 9. For this reason as well, the Department's *ex post facto* finding of "deficiencies" in Supermel's journal entries is unsupported by the record evidence.[12]

6. Question 7(b) in the Second Supplemental Questionnaire

Commerce stated in the Final I&D Memorandum that it "asked Supermel to select any honey purchase transaction from its purchase database spreadsheet submitted in Exhibit D-5a to demonstrate how Supermel prepared and recorded the raw honey purchases in the stock raw materials general ledger account." *Final I&D Mem.* at 15. Commerce further stated that "[i]n response, Supermel provided screenshots similar to the ones described above that only list Supermel's unprocessed honey purchases." *Id.* Here also, Commerce found these screenshots deficient because they "do not show the name or number of Supermel's 'stock: raw materials' account, nor do they reflect debits and credits or account balances." *Id*.

The Department's analysis of this question and response presents two unsupported findings, one relating the Department's question and the other related to Supermel's response. Question 7(b) in the Second Supplemental Questionnaire was as follows:

> Using one of the honey purchase transactions you have provided at exhibit D-5a of the [Initial Questionnaire Response], provide a sample of the journal entries you have prepared and recorded in the "stock: raw materials" account for honey procured for domestic sales.

Second Supplemental Questionnaire Response at 4. Contrary to the Department's characterization of question 7(b) in the Final I&D

[12] Commerce characterized the journal entries provided in response to requests for Supermel's sales information as responsive while rejecting the journal entries provided for cost information, stating that "Supermel provided screenshots of supporting general ledger accounts and journal entries from its accounting system in response to the sales verification questions. However, Supermel failed to provide similarly requested support related to selected raw honey purchase transactions." *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Raw Honey from Brazil* at 16 (Int'l Trade Admin. Apr. 7, 2022), P.R. 354 ("*Final I&D Mem.")* (citing *Supermel's In Lieu of Verification Questionnaire Response* at Exs. VE-3.9—VE-8.9 (Dec. 20, 2021), P.R. 325–331 ("*In Lieu of Verification Questionnaire Response*")). The sales journal entries provided by Supermel and cited favorably by Commerce match the form of the cost journal entries that Commerce rejected. *In Lieu of Verification Questionnaire Response* at Ex. VE-3.10, VE-4.11, VE-5.11. The record does support a finding that the sales information provided by Supermel was more detailed than the purchase information. Regardless, that finding does not establish that the purchase information was not tied to the accounting system.

Memorandum, the question does not ask Supermel to "demonstrate how [it] prepared and recorded the raw honey purchases in the stock raw materials general ledger account." *Final I&D Mem.* at 15. The information solicited by the question is a "sample of the journal entries you have prepared and recorded" drawn from "one of the honey purchase transactions you have provided as exhibit D-5a of the [Initial Questionnaire Response]," related to domestic sales.[13]

The second unsupported finding in the Department's discussion of Question 7(b) in the second supplemental questionnaire was that Supermel failed to respond adequately. In response to this question, Supermel provided sample journal entries from both Apiário Export and Apiário Produção. The deficiency that Commerce identifies in Supermel's response to this question is the same that it identified in Question 10, discussed above: "The screenshots do not show the name or number of Supermel's 'stock: raw materials' account, nor do they reflect debits and credits or account balances." *Final I&D Mem.* at 15. The finding that Supermel's journal entry screenshots were unresponsive to the Department's request for "journal entries" is equally unsupported in each of Supermel's responses that Commerce identified as deficient in that regard.[14]

7. The Department's Finding that It Could Not Rely on the CONNUM-Specific Costs Reported by Supermel

Commerce requested data on Supermel's U.S. sales and comparison market sales that were organized according to "CONNUM" (or "control number"), an identifier for a product, or a group of products, with

[13] As the court has pointed out, the "verification" issue Commerce raised in this case pertained only to cost-of-production information relating to sales made in the comparison market of Australia, Commerce having concluded that the domestic Brazilian market sales were insufficient for use as a comparison market. It is not clear why Commerce based its resort to 19 U.S.C. § 1677e in part on information relating to domestic sales in Brazil. Regardless, the substantive basis for Department's objection to Supermel's response to its request pertaining to records of domestic sales is not apparent to the court. Supermel told Commerce that "Apiário Export and Apiário Producao have separate accounting systems. They do not share the same books or records" and that "[h]oney purchased for international sales is recorded as debit entries in the 'stock: raw materials' account (41) in Apiario Export's books. Honey purchased for domestic sales is recorded in entries in the 'stock: raw materials' account (41) in Apiario Producao's books." *First Supplemental Questionnaire Response* at 3, 5. Supermel's questionnaire response related the raw honey purchases for honey produced for the domestic market, and the purchases for honey produced for the comparison market, to the respective, separate accounting systems of the two companies.

[14] In addition to the questions discussed here, Commerce based its application of facts otherwise available and an adverse inference on the same journal entries Supermel provided in response to question 21 of the Second Supplemental Questionnaire and question 5 of the In Lieu of Verification Questionnaire, which Commerce, without evidentiary foundation, characterized as "deficient." *Final I&D Mem.* at 15—16 (citing *Supermel's Section D Second Supplemental Questionnaire Response* at 12 (Nov. 4, 2021), P.R. 265; *In Lieu of Verification Questionnaire Response* at 10—16.

a unique and specifically-defined set of physical characteristics. Here, "Commerce identified five criteria for the physical characteristics of the subject merchandise: (1) color; (2) organic versus non-organic; (3) homogenization; (4) straining/filtering; and (5) honey source." *Prelim. I&D Mem.* at 11. Using information from its purchase database and processing details, Supermel reported "CONNUM-specific" costs for different types of honey it had sold to the U.S. and comparison markets based on those physical characteristics. *Initial Questionnaire Response* at 17, Ex. D-5a.

Commerce found that "because we find that Supermel failed to tie its purchases to its accounting system, we find that Commerce cannot rely on Supermel's purchase information as support for its CONNUM-specific costs." *Final I&D Mem*. at 17. Because the Department's finding that Supermel "failed to tie its purchases to its accounting system" is invalidated by the evidentiary record when viewed as a whole, so too is the finding that Commerce "cannot rely on Supermel's purchase information as support for its CONNUM-specific costs." *Id*.

8. The Department's Unsupported Findings for Applying 19 U.S.C. § 1677e(a)

As the court noted, rather than assign Supermel a weighted average dumping margin calculated from Supermel's sales during the POI as it did in the preliminary stage of the investigation, Commerce ultimately applied subsections (a) and (b) of 19 U.S.C. § 1677e. This statutory provision directs Commerce to invoke "facts otherwise available" when "necessary information is not available on the record" or when any of four conditions specified in subparagraph (a)(2) is met. The four conditions apply to situations where an interested party:

> (A) withholds information that has been requested by the administering authority . . . under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title.

19 U.S.C. § 1677e(a)(2). Where a respondent meets any of these four conditions, the statute provides that Commerce shall, subject to §

1677m(d), "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a).

In the Final Determination, Commerce concluded that condition (A) of 19 U.S.C. § 1677e(a), regarding the withholding of information, had been satisfied because Supermel "withheld information in its ILVQ [In Lieu of Verification Questionnaire] Response (i.e., screenshots showing that its purchases tie to its accounting system);" as well as (C), concerning significantly impeding a proceeding, which Commerce claims Supermel did "by not substantiating its reported costs, an integral part of Commerce's margin analysis;" and (D), with respect to information that was provided but cannot be verified because "Supermel's purchase information as reflected in its accounting system could not be verified because Supermel failed to provide that information in its ILVQ Response." *Final I&D Mem.* at 18.

Though ostensibly based upon three separate subsections of 19 U.S.C. § 1677e(a), each of the reasons Commerce states for its application of that statutory provision rests upon the Department's rejection of Supermel's reported cost information for its raw honey acquisitions from the numerous beekeepers. Commerce based each of these determinations principally on its finding that Supermel failed to "tie" these data on raw honey acquisitions to its accounting system.

Commerce made no finding that it could not rely upon Supermel's cost data for the processing it performed on the raw honey it purchased. To combine with those data on processing costs for the calculation of cost of production, Commerce had been provided: (1) a complete database of all purchases of raw honey and beeswax Supermel made from its many unaffiliated beekeepers during the POI, (2) total values for those two categories of purchases that when added together were substantially equal to the total value recorded in Supermel's accounting system, and (3) a breakdown of costs by CONNUM and an explanation that "Supermel reported the same per-unit processing costs for all of its CONNUMs." *First Supplemental Questionnaire Response* at 18. Still, Commerce relied upon a finding that Supermel "failed to tie" its raw honey acquisition costs to its accounting system in developing its CONNUM-specific costs of production and thus (1) withheld information, (2) impeded the investigation, and (3) provided information that could not be verified. Based on its own examination of the questionnaire responses and included exhibits, the court concludes that these findings are not supported by substantial evidence on the record of the antidumping duty investigation.

As the court has explained, the principal information that Commerce found Supermel to have withheld was provided in full by the complete set of journal entries for raw honey purchases from the

beekeepers and the related responses disclosing the placement of all of the recorded costs in the "stock: raw materials (41)" cost account maintained in the accounting system of Apiário Export. *See Initial Questionnaire Response* at Ex. D-3; *First Supplemental Questionnaire Response* at 2—4, Exs. SD-6, 2SA-5, *Second Supplemental Questionnaire Response* at 4, 2SD-11c; *In Lieu of Verification Questionnaire Response* at VC-4.1. The only requested information Supermel did not provide, which was the "correspondence" with the beekeepers related to raw honey purchases from Beekeepers 1 and 2 and proof of payment to those beekeepers, was not again requested or identified as deficient, as required by 19 U.S.C. § 1677m(d). Thus, the record viewed in the entirety does not contain substantial evidence to support the finding that resort to 19 U.S.C. § 1677e was warranted by Supermel's having withheld requested information. The ancillary findings that "Supermel significantly impeded the proceeding by not substantiating its reported costs" and that "Supermel's purchase information as reflected in its accounting system could not be verified because Supermel failed to provide that information in its ILVQ Response," *Final I&D Mem.* at 18, are, for the same reason, lacking evidentiary support in the administrative record.

H. The Department's Potential Application of 19 U.S.C. § 1677e in Future Proceedings

Supermel claims that Commerce acted unlawfully when it stated in the Preliminary Issues & Decision Memorandum that "all beekeepers are now 'on notice that they will be required to submit accurate cost information that is fully supported by documentary evidence and is verifiable by Commerce officials' and '[f]ailure to provide such information [in the future administrative reviews] could result in the application of AFA.'" Pl.'s Br. 45 (quoting *Prelim. I&D Mem.* at 18). Supermel asks the Court to disallow Commerce "in the future administrative reviews to rely on this statement from the investigation to apply AFA to an otherwise cooperative processor-respondent based on an unaffiliated beekeeper supplier's failure to provide requested cost information." *Id*. (citing *Tianjin Magnesium Intern. Co., Ltd. v. United States*, 35 CIT 187 (2011)).

Supermel understandably objects to the Department's threatened future application of an adverse inference against it for the future actions of an unaffiliated party. Nevertheless, this claim is not directed to an alleged injury resulting from the determination contested in this litigation but to a potential finding in a future determination. *See Lujan v. Defs. of Wildlife*, 504 U.S. 2130, 2134 (1992). In seeking a remedy for future harm, Supermel in effect is asking the

court for an advisory opinion that the court cannot provide. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) (stating that "the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts").

III. CONCLUSION

The court must remand the Final Determination to Commerce for reconsideration of the determination to apply 19 U.S.C. § 1677e, which was based on multiple findings of fact for which the record does not contain substantial evidence, and for determination of a new estimated dumping margin for Supermel.

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

ORDERED that plaintiff's motion for judgment on the agency record (Dec. 7, 2022), ECF Nos. 22 (Conf.), 23 (Public) be, and hereby is, granted in part and denied in part; it is further

ORDERED that Commerce shall submit to the court a redetermination upon remand ("Remand Redetermination") that reconsiders, based on the existing record, the Department's determination on the application of 19 U.S.C. § 1677e to Supermel; that determines a new estimated dumping margin for Supermel; and that is in accordance with this Amended Opinion and Order; it is further

ORDERED that Commerce shall submit the Remand Redetermination to the court within 60 days of the date of this Amended Opinion and Order; it is further

ORDERED that plaintiffs and defendant-intervenors shall have 30 days from the date of submission of the Remand Redetermination to submit to the court comments thereon; and it is further

ORDERED that defendant may submit a response to the comments of plaintiffs and defendant-intervenors within 15 days of the date of the last comment submission.

Dated: June 5, 2024
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Judge

Slip Op. 24–68

PHOENIX METAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and CAST IRON SOIL PIPE INSTITUTE, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 23–00048

[The court sustains Customs' final determination and final administrative decision pursuant to the Enforce and Protect Act finding evasion of duties on Cast Iron Soil Pipe.]

Dated: June 10, 2024

Gregory S. Menegaz and *Vivien Jinghui Wang*, deKieffer & Horgan, PLLC, of Washington, DC, argued for the plaintiff, Phoenix Metal Co., LTD. With them on the brief were *Alexandra H. Salzman* and *Judith L. Holdsworth*.

Liridona Sinani, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for the defendant. With her 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 on the brief were *Nicolas A. Morales* and *Chelsea A. Reyes*, Office of Chief Counsel, U.S. Customs and Border Protection.

Nicholas J. Birch, Schagrin Associates, of Washington, DC, argued for the Defendant-Intervenor, the Cast Iron Soil Pipe Institute. With him on the brief was *Roger B. Schagrin.*

OPINION

Restani, Judge:

Importer of cast iron soil pipe ("CISP") Phoenix Metal Co., LTD. ("Phoenix") challenges the final determination and final administrative decision made by the United States Customs and Border Protection ("CBP"). Phoenix asserts that CBP's evasion determination was not supported by substantial evidence, that CBP's verification procedures were arbitrary and capricious, that CBP's application of adverse inferences to Phoenix was arbitrary and capricious, and that CBP violated Phoenix's due process rights at several stages of the investigation. Pl.'s Rule 56.2 Mem. in Supp. of Mot. J. Upon the Agency R. at 1–2, ECF No. 31 (Aug. 9, 2023) ("Phoenix MSJ Brief"); Compl. at 9, 14–15, ECF No. 5 (Mar. 2, 2023) ("Compl.").[1] The United States ("Government") refutes these claims and asks the court to

[1] In the Complaint, Phoenix additionally alleges that CBP failed to comply with EAPA when it did not notify the Department of Commerce of its determination of evasion and did not request that Commerce calculate an anti-dumping or countervailing duty rate for Phoenix's goods, and asserts that TRLED's initiation of an investigation in this case was unlawful. Compl. at 9, 18. In briefing, Phoenix offered no argument in support of either of these claims, and indicated to the court that it considers these claims to have been waived. Pl.'s Reply Br. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. at 19–20, ECF No. 48 (Mar. 15, 2024) ("Phoenix Reply Brief"). Accordingly, the court will not specifically address either of these claims and considers them waived.

sustain CBP's evasion determination. Def.'s Resp. in Opp. to Pl.'s Mot. for J. on the Agency R. at 1, ECF No. 44 (Feb. 20, 2024) ("Gov. Brief").

I. *Background*

On February 15, 2022, the Cast Iron Soil Pipe Institute ("CISPI"), a trade association of domestic producers of soil pipe, filed an Enforce and Protect Act ("EAPA")[2] duty evasion allegation asserting that Phoenix was transshipping CISP from China through Cambodia to the United States. *Notice of Investigation and Interim Measures re Phoenix Metals* at 2, C.R. 57, P.R. 73 (Mar. 28, 2022) ("*NOI*"). On February 28, 2022, CBP initiated a formal EAPA investigation of Phoenix. *EAPA Consolidated Case: 7621, Re: Notice of Determination as to Evasion* at 5, C.R. 129, P.R. 155 (Sept. 6, 2022) ("*TRLED Determination*"). On March 28, 2022, CBP followed this initiation with a formal notice of investigation of Phoenix. *NOI* at 1. This notice informed Phoenix that, based on the information on the record, CBP had determined that reasonable suspicion existed that Phoenix was transshipping CISP and therefore CBP was instituting interim measures against Phoenix. *NOI* at 1. CBP instituted the following interim measures against Phoenix: it suspended liquidation for all entries of covered merchandise entered on or after February 28, 2022, extended the period for liquidating any unliquidated entry entered before that date, required that Phoenix refile any entry summaries submitted within the summary rejection period,[3] required live entries,[4] and required cash deposits of antidumping ("AD") and countervailing ("CVD") duties amounting to 250.62 percent *ad valorem*. Phoenix MSJ Brief at 6; *NOI* at 9; *TRLED Determination* at 35 n. 300. CBP also notified Phoenix that it was combining Phoenix's case with a case already initiated against another company owned by Ms. Li, the

[2] *See* 19 U.S.C. § 1517(e) (2018).

[3] The summary rejection period could be a period of up to 300 days. U.S. Customs and Border Protection, Directive 3550–067A, Subject: Entry Summary Acceptance and Rejection Policy (2011), https://www.cbp.gov/sites/default/files/documents/3550–067_3.pdf (last modified Feb. 28, 2020); *see also* U.S. Customs and Border Protection, Article Number 000001260, CBP – Entry Summary Rejection Process, (2023), https://www.help.cbp.gov/s/article/Article-1114?language=en_US (last modified Jun. 21, 2023).

[4] A "live entry" means that an importer must supply all entry documents and associated duties prior to the release of its cargo from Customs into the United States. *See Vietnam Finewood Co. Ltd. v. United States*, 466 F. Supp. 3d 1273, 1279 (Ct. Int'l Trade 2020); 19 C.F.R. § 142.13; see *NOI* at 9. Normally, an importer may file Customs Form (CF) 7501 with estimated duties attached up to 10 days after goods are entered into the economy. *See* U.S. Customs and Border Protection, EO13891-OT-036, What Every Member of the Trade Community Should Know About: Entry at 10–11 (2004), https://www.cbp.gov/sites/default/files/assets/documents/2020- Feb/icp 073_3_0.pdf (last modified Feb. 26, 2020).

owner of Phoenix, that had also been accused of transshipping CISP. *NOI* at 9. The other company is not party to this case.

After the notice of investigation, Phoenix received and responded to a request for additional information from CBP's Trade Remedy Law Enforcement Directorate ("TRLED"). *TRLED Determination* at 6. After a supplemental request for information, with which Phoenix also complied, TRLED informed Phoenix that it would visit Phoenix's Cambodian facilities to do in-person verification of the information submitted. *Phoenix Metal Engagement Letter*, C.R. 109, P.R. 124 (June 3, 2022) ("*Phoenix Metal Engagement Letter*"). The notice of verification informed Phoenix that it should be prepared to provide copies of production records during the visit, and should expect up to eight CBP officials. *Id.* At verification, Ms. Li informed CBP that the production they were witnessing was set-up only for verification purposes, accused the agents of being spies, shouted at them, refused to turn over requested paperwork, and tried to interfere with CBP's interviews of employees. *EAPA Case 7621 On-Site Verification Report* at 4–6, C.R. 125, P.R. 145 (Jul. 22, 2022) ("*Verification Report*"). Phoenix does not substantially dispute these facts, but asserts that Ms. Li's behavior occurred because she was overwhelmed by an abnormal number of agents, including one agent who was listed as a member of the Homeland Security Investigative Services. Phoenix MSJ Brief at 26–30. Regardless, the verification team left without a number of production related documents that it had requested. *TRLED Determination* at 31–32. Phoenix later tried to place those documents on the record. *Regulations and Rulings, Office of Trade, Re: Enforce and Protect Act ("EAPA") Consolidated Case Number 7621* at 12, C.R. 132, P.R. 165 (Jan. 18, 2023) ("*ORR Final Decision*"). CBP rejected them as untimely. *Id.*

On September 6, 2022, TRLED concluded that substantial evidence demonstrated that Phoenix had transshipped Chinese-origin CISP into the United States. *TRLED Determination* at 35. In doing so, TRLED drew adverse inferences against Phoenix because of Ms. Li's noncooperation during verification, but noted that it believed substantial evidence supported its determination even without the adverse inferences. *TRLED Determination* at 32. Phoenix requested administrative review on October 19, 2022. *ORR Final Decision* at 3. On January 18, 2023, the Office of Trade, Regulations and Rulings Directorate ("ORR") reviewed TRLED's decision *de novo* and determined that substantial evidence reasonably supported the determination that Phoenix had evaded AD/CVD duties. *ORR Final Decision* at 1, 17. ORR also affirmed TRLED's decision to draw adverse infer-

ences, while explaining that it did not find it necessary to draw adverse inferences in order to support the evasion determination as a whole. *ORR Final Decision* at 15–16. Phoenix then filed an action requesting review in this court. Compl. at 1.

II. *Jurisdiction and Standard of Review*

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1517(g). 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 subsections" 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, 632 F. Supp. 3d 1369, 1374 (CIT 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, 466 F. Supp. 3d 1273, 1284 (CIT 2020) (citations omitted).*

III. *Discussion*

A. When considered as a whole, both the TRLED and ORR decisions are reasonable and substantially supported (Counts II, III, IV, VI)

Phoenix alleges that both TRLED and ORR's decisions are unreasonable and not supported by substantial evidence. Compl. at 10–14. Phoenix argues that CBP relied too heavily on the ownership structure of Phoenix in determining that evasion occurred in this case,[5] failed to properly consider the full production of pipe,[6] and generally

[5] Compl. at 13–14.

[6] Specifically, Phoenix alleged in the Complaint that TRLED ignored that the factory production it observed was set up only for verification purposes, that the process was producing pipe, and that some factory equipment was "moved to a new location set up by Phoenix." Compl. at 10.

cherry picked the evidence.[7] Phoenix further alleges that TRLED and ORR over relied on Phoenix's refusal to turn over production records. Compl. at 11–12. Government counters that both the TRLED and the ORR decisions are reasonably supported by substantial evidence. Gov. Brief at 1.

Substantial evidence is "more than a mere scintilla." *Biestek v. Berryhill*, 587 U.S. __, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). "It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.*

As the court touched on briefly in the background for this case, this particular determination is one in a series of allegations of transshipping that have all involved Phoenix's owner, Ms. Li. *TRLED Determination* at 2–8. Specifically, Ms. Li is suspected of running what TRLED designates as "the Lino group," a series of companies that are connected to Ms. Li either by her own ownership or control or by relatives or other business relationships. *TRLED Determination* at 8. In a previous EAPA case, TRLED found that two of the companies which Ms. Li founded, DLNL Trading Inc. ("DLNL") and Lino had engaged in transshipment of Chinese-origin soil pipe. *TRLED Determination* at 5. Lino had previously imported through a company called HiCreek, which was shut down as a result of an EAPA investigation that found that it was transshipping Chinese-origin soil pipe. *TRLED Determination* at 8. All of these allegations and determinations predate the current EAPA case. *Id.* Other companies mentioned below are related to Ms. Li as follows: Ms. Li is the owner of Phoenix, Ms. Li's employee Mr. Zhang owns Little Fireflies International Co. ("Little Fireflies"),[8] and Camellia Casting, LLC ("Camellia Casting") was founded by Ms. Li's relative and former intern.

[7] Additionally, Phoenix alleges that TRLED and ORR improperly discounted evidence from the Ministry of Cambodia. Compl. at 11–12. Phoenix characterizes this evidence as evidence of a Ministry of Cambodia visit to Phoenix and certain certificates of origin provided by Cambodia to the verification team. Compl. at 12; Phoenix MSJ at 33. Government's response focuses on CBP's visit to the Ministry of Cambodia and on the paperwork that Cambodia supplied. Gov. Brief at 11; *Verification Report* at 16. TRLED cites to documentation that Phoenix supplied to the Ministry of Cambodia throughout its Determination. *TRLED Determination* at 7, 20–22, 27, 29–30, 32. ORR explained that the Ministry of Cambodia did not provide enough details on how it reached its conclusions for CBP to assess its conclusions, and noted that some information contained within the document supplied by the Ministry of Cambodia actually created additional concerns for the verification team as it revealed information regarding shipments that Ms. Li had reported to Cambodia but had not reported to CBP. *ORR Final Decision* at 11. Given the above, it is clear that CBP considered this evidence, and simply did not come to the conclusion that Phoenix desired. Specifically, CBP came to the conclusion that Phoenix had likely lied to the Cambodian government. *See TRLED Determination* at 30–31.

[8] Mr. Zhang is employed by Ms. Li through Dalian Metal, which Ms. Li owns and which is an exporter of Chinese-origin soil pipe. *TRLED Determination* at 8.

On July 14, 2021, previous to this investigation, the CISPI submitted an allegation to CBP that two companies called Granite Plumbing Products LLC ("Granite Plumbing") and Little Fireflies were transshipping Chinese-origin soil pipe into the United States. *TRLED Determination* at 2. Both companies were issued CBP Form 28 ("CF-28") questionnaires requesting additional information on the imports that CISPI alleged were evading AD/CVD duties. *Id.* After some back and forth between CBP and the two companies, CBP issued a notice of initiation of investigation and interim measures to both. *Id.* at 4. A few months after the notice of investigation was issued, CISPI submitted another allegation to CBP, asserting that Phoenix was transshipping Chinese-origin soil pipe through Cambodia. *Id.* Because Phoenix listed another company's Cambodian facility as its shipping address and CBP had previously determined that this other company, HiCreek, utilized that exact facility to transship in the earlier EAPA case, and because Ms. Li was listed as Phoenix's owner, CBP determined that reasonable suspicion of evasion existed and issued a notice of investigation and interim measures in this case without issuing a CF-28 seeking additional information first. *Id.* at 5. In the Notice of Investigation and Interim Measures, CBP additionally combined Phoenix's case with the already ongoing investigation into Granite Plumbing and Little Fireflies. *Id.* CBP followed this consolidation by issuing requests for information to Granite Plumbing, Little Fireflies, Phoenix, Lino, HiCreek, and several other related individuals and companies. *Id.* at 6.

The results of these requests demonstrated that these companies were within the so-called "Lino Group" and were interrelated. *Id.* at 8–9. The information received further highlighted and expanded on HiCreek's role as a vehicle for transshipment of Chinese-origin soil pipe. *Id.* Narrowing in on the details of these relationships that are most relevant to this case, records indicated that Ms. Li's DLNL company transshipped through HiCreek but was then replaced as importer of record by Little Fireflies, most likely in order to avoid interim measures that CBP had implemented against DLNL.[9] *Id.* at 9–14. Prior to this, DLNL had replaced Lino as importer, presumably to evade interim measures placed on Lino's imports. *Id.* at 9–14, 17. TRLED determined that Phoenix similarly replaced Little Fireflies in this scheme, taking over for Little Fireflies imports in order to evade the interim measures against Little Fireflies. *Id.* at 18–19. Little

[9] Unlike Phoenix, Little Fireflies has not appealed this determination to this court, and no contrary facts have been presented, so the court accepts as fact TRLED's determinations of evasion by Little Fireflies.

Fireflies made this change after it was issued a CF-28. *Id.* at 19. Continuing this pattern, after CBP issued the Notice of Investigation and Interim Measures to Phoenix, Phoenix's imports were passed on to yet another company, Camellia Casting. *Id.* at 19–21. Phoenix concealed its relationship to Camellia Casting entirely in its responses to CBP's requests for additional information on its business affiliates. *Id.* at 21.

Phoenix does not point to any evidence to counter any facts set forth earlier.[10] *See* Compl.; Phoenix MSJ Brief; Phoenix Reply Brief. Rather, it argues, among other things; that CBP has failed to supply any evidence connecting the above to the allegation of transshipping, and has committed a number of procedural errors. Compl. at 13; Phoenix MSJ Brief at 11–43. In her own communications with CBP, Ms. Li implicitly admitted to at least some part of the scheme that CBP describes, stating that:

> CBP claims that Ms. Li's actions were intended to evade CBP revenue collection measures. Yet, CBP had no right to such revenue because its measures to collect AD/CVD duties violated basic principles of due process. If CBP had given Ms. Li and her companies proper and timely notice of its EAPA investigations, Ms. Li would have had time to protect her business interests before Phoenix shipped further CISP produced in Cambodia to the United States.

Re: EAPA Case No. 7621 – Phoenix Request for Administrative Review at 9, C.R. 130, P.R. 156 (Oct. 19, 2022). The court reads Ms. Li's basic argument as this: she may be "evading" AD/CVD duties, but is only doing so because CBP keeps determining that she is transshipping, and the transshipping determinations are wrong. *Id.* Her evasion actions are therefore justified, because they are an attempt to avoid incorrect legal determinations. *Id.* But Ms. Li has not, as far as this court has been able to determine, ever contested an evasion determination outside of this case. *See* Phoenix MSJ Brief; *see* Phoenix Reply Brief; *see TRLED Determination*; *see ORR Final Decision*; *see* Public Administrative Record, ECF No. 19 (Apr. 11, 2023). The evasion determinations made outside of this particular case are settled; the earlier companies were found to be transshipping. Thus, if Ms. Li is, as CBP alleges and Ms. Li appears to concede, moving shipments

[10] Phoenix does assert, of course, that it produced pipes, and claims that it utilized HiCreek's facilities to do so because Ms. Li thought that the closed factory represented a good business opportunity. Phoenix MSJ Brief at 4–7; Phoenix Reply Brief at 13–14. This assertion, however, does not counter the interrelated owner structure described above, nor the paper records indicating that some imports left Cambodia assigned to one company and entered the United States assigned to a different exporter. *See e.g. TRLED Determination* at 19 n. 160.

from the earlier companies to the later ones—including the one company whose imports are contested here—then those later companies may also be found to be engaged in transshipping in violation of law.

The question properly before the court is whether TRLED and ORR were arbitrary or capricious in finding that substantial evidence supported that Phoenix was engaged in transshipping. In its arguments to the court, Phoenix picks out a series of facts that it asserts TRLED and ORR ignored or, alternatively, overly relied on.[11] Compl. at 10–11; Phoenix Reply Brief at 13–16. But Phoenix does not undercut either TRLED or ORR's overarching assessment of Phoenix's operations, outlined above, and none of the evidentiary pieces that Phoenix complains of are the sole basis of either TRLED or ORR's determination or decision in this case. Predominately, Phoenix's arguments focus on the Verification Report and the conduct of the verification team, arguing that because the report demonstrated some ability to produce pipe, the rest of TRLED's Determination and ORR's Final Decision are unreasonable, and that the verification team generally ignored Phoenix's production capacity. Phoenix MSJ Brief at 44–45.

But, as both TRLED and ORR note, a demonstration of some production capacity, particularly during a period of production set up solely for the purposes of verification,[12] does not prove that transshipment did not occur. *See ORR Final Decision* at 17; *TRLED Determination* at 25–27. In deciding that Phoenix did engage in evasion, both TRLED and ORR relied on the record as a whole, drawing upon the facts Phoenix cites, and a host of information that Phoenix ignores.

The Verification Report for this case described discrepancies in Phoenix's ledgers,[13] missing bills of lading,[14] missing records of electricity use,[15] mingling between Phoenix's accounts and Ms. Li's per-

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[11] The Complaint cites to a few specific pieces of evidence, including ORR and TRLED's alleged overreliance on a single bill of lading, and ORR and TRLED's alleged failure to give enough weight to evidence from the Ministry of Cambodia. Compl. at 11–12. ORR and TRLED both support their decision to rely on the bill of lading that appears to show import of "finished soil pipe" from China into Cambodia by Phoenix. *ORR Final Decision* at 10; *TRLED Determination* at 24, 27. Further, in assessing the bill of lading, TRLED cites to documentation that Phoenix supplied to the Ministry of Cambodia. *TRLED Determination* at 27, 29. TRLED and ORR both concluded that the evidence from the Ministry of Cambodia supports that Phoenix likely transshipped Chinese-origin pipe. *See supra* note 7.

[12] *See Verification Report* at 5 ("Ms. Li told us on separate occasions that the production process was set up just 'for us.'").

[13] *See Verification Report* at 15; *TRLED Determination* at 29; *ORR Final Decision* at 12.

[14] *See Verification Report* at 14.

[15] *See Verification Report* at 9.

sonal banking,[16] and material omissions in Ms. Li's communications with the verifiers.[17] In its Notice of Determination as to Evasion, TRLED does discuss Phoenix's ownership structure and it does highlight the timing of Phoenix's activation as an exporter to the United States.[18] In addition to that, however, TRLED indicates that it relied on the fact that Phoenix has no domestic sales,[19] on Phoenix's omissions in communicating with CBP,[20] on the absence of records of financial transactions,[21] on a materially false statement Ms. Li made to CBP,[22] and on Ms. Li's non-cooperation at verification. [23] TRLED also highlights that it relied on Phoenix's refusal to provide bank statements to verify its transactions,[24] Phoenix's inability to provide evidence of transactions for raw materials purchases,[25] and, finally, adverse inferences drawn because of Phoenix's noncooperation during the verification process.[26]

In *ORR's Final Decision*, while ORR does discuss specific connections between Phoenix, Camelia Casting, and HiCreek, the "Lino Group" is never mentioned and the overall structure of Ms. Li's business activities is not heavily relied on.[27] Instead, ORR highlighted that, at verification, Phoenix lacked the machinery necessary to produce the kind of pipe it shipped into the United States.[28] ORR additionally noted the existence of bills of lading that appear to show the import of Chinese steel pipe into Cambodia,[29] and that Ms. Li's refusal to supply the verifiers with either her production records or

[16] *See Verification Report* at 8.

[17] *See Verification Report* at 2.

[18] *TRLED Determination* at 19–22.

[19] *TRLED Determination* at 18.

[20] *TRLED Determination* at 23, 26.

[21] *TRLED Determination* at 26–27, 29–30.

[22] *TRLED Determination* at 22, 28, 33, 35.

[23] *TRLED Determination* at 32–33.

[24] *TRLED Determination* at 26–27.

[25] *TRLED Determination* at 26–29.

[26] *TRLED Determination* at 33–34.

[27] Lino is referred to throughout summaries of Phoenix's arguments and the CISPI's arguments. *See ORR Final Decision* at 5–8. Ms. Li's connection to Dalian Metal is noted because it is a company that Ms. Li owned which produced Chinese-origin soil pipe. *Id.* at 15. Little Fireflies decision not to appeal the Notice of Determination is mentioned. *Id.* at note 15. Because Phoenix's verification proceedings took place at HiCreek's facilities and utilizing some machinery that Phoenix alleges came from HiCreek, it is mentioned somewhat more extensively. *Id.* at 5, 9, 14.

[28] *ORR Final Decision* at 9–10.

[29] *ORR Final Decision* at 10. Phoenix disputes ORR's characterization of this import as "finished pipe;" in reviewing the *ORR Final Decision*, however, the court finds that ORR's explanation (that importing scraps under "steel pipe" does not make sense) is reasonable and addresses Phoenix's arguments on this issue.

electric bills led to their inability to verify the company's production capacity.[30] ORR further highlighted the unreliability of Phoenix's general ledgers,[31] the fact that Phoenix refused to hand over any bank statements that the verifiers could have used in verification,[32] Phoenix's relationship with and failure to disclose its relationship with Camelia Casting,[33] and Ms. Li's connections to and ownership of companies that produce Chinese-origin soil pipe.[34] Based on all the above, ORR decided that, while it was possible Phoenix might have made some of the pipe it shipped, it was likely predominantly engaged in transshipping Chinese-origin pipe.

Phoenix has not refuted or disputed the vast majority of evidence in this case. Rather, it has noted a few bits of the evidence that TRLED and ORR relied on, and argued that that evidence should be given a different meaning. Both TRLED and ORR have addressed Phoenix's arguments.[35] Neither TRLED nor ORR were arbitrary and capricious in deciding that substantial evidence supports evasion in this case.

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[30] *ORR Final Decision* at 11. Phoenix alleges that at least some of the documents that Ms. Li refused to supply verifiers Phoenix later tried to supply to TRLED as part of a post-verification submission and they were rejected as untimely. *ORR Final Decision* at 12. The Government argues that Phoenix failed to challenge this rejection and the basis thereof at the administrative level. Gov. Brief at 34. Phoenix fails to adequately respond to this argument and does not offer any exception to general exhaustion requirements. *See* Phoenix MSJ Brief at 36–37; Phoenix Reply Brief at 16–19. Failure to exhaust, therefore, may be sufficient to settle this issue. Nonetheless assuming arguendo that there is any need to address the merits of TRLED's decision to reject these documents, ORR explains that the documents were rejected because Phoenix missed TRLED's deadline to submit additional information. *ORR Final Decision* at 12. Given that the only reason that Phoenix needed to supplement the record out of time was its own noncooperation, TRLED's enforcement of that deadline was reasonable. Further, additionally reviewing the original written arguments that Phoenix asserts should have been accepted in full, it is clear to the court that none of the new information TRLED requested Phoenix redact would have affected the substantial evidence analysis. *See supra* Part A; *see* Gov. Brief, Ex. B. The court is unable to review the production records that Ms. Li claims to have offered, but given the agency's commentary about the unreliability of Phoenix's record keeping, it also appears highly unlikely that, even if accepted, these documents would have changed any of either TRLED or ORR's analysis of this case.

[31] *ORR Final Decision* at 13. ORR notes that the record indicates Ms. Li is in control of what information is entered into Phoenix's records, and that that in itself makes Phoenix's records less reliable. *Id.* Given that the record in this case is replete with evidence of prevarication, this conclusion seems reasonable.

[32] *ORR Final Decision* at 13.

[33] *ORR Final Decision* at 14.

[34] *ORR Final Decision* at 15.

[35] As indicated, in the Complaint, Phoenix alleged that TRLED ignored that the factory was producing pipe, and that some equipment was "moved to a new location set up by Phoenix." Compl. at 10. Phoenix further alleged that TRLED and ORR overly relied on a translation of a single bill of lading as evidence that Phoenix imported soil pipe into Cambodia. Compl. at 11. Phoenix alleges that TRLED and ORR over rely on Phoenix's refusal to turn over production records and that both TRLED and ORR discount the Ministry of Cambodia's visit to the factory. Compl. at 11–12.

B. *Phoenix raises several other objections that do not change the outcome of this case*

Phoenix argues that its due process rights were violated and that adverse inferences were improperly drawn. Compl. at 14–18. The Government denies both. Gov. Brief at 13–14, 16, 42.

i. *Phoenix's claim that CBP violated due process when it did not supply it with unredacted copies of certain business confidential filings is moot (Counts IX and XI of the Complaint)*

Phoenix originally asserted that CBP violated its due process rights when CBP failed to provide it with unredacted versions of all information used in the decision making process. Compl. at 16–18. Since this case was initiated, the Federal Circuit issued its opinion in *Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250 (Fed. Cir. 2023), which clarified that due process requires the release under a protective order of any confidential business information that is utilized in the decision making process. *Id.* at 1259–60. After this decision was issued, the Government submitted a request for remand in this case, so that it could comply with this new guidance and could supply Phoenix with all confidential business information utilized in this case. Def.'s Partial Consent Mot. for a Voluntary Remand at 3, ECF No. 32 (Oct. 31, 2023). Phoenix opposed that request, stating, in part, that remand was unnecessary as "parties to this litigation have already gained access to the confidential information under the Judicial Protective Order." Pl.'s Resp. to Def.'s Mot. for a Voluntary Remand at 2, ECF No. 35 (Nov. 21, 2023). While *Royal Brush* makes clear that parties are entitled to this information, as Phoenix concedes that it no longer suffers any harm from this error, this issue is no longer appropriate for review. Counts IX and XI of the Complaint are moot.

ii. *Phoenix's claim that CBP's verification process was an abuse of discretion fails (Count V)*

In its Complaint, Phoenix argues that CBP's decision to send seven agents to conduct verification represents an abuse of the agency's discretion. Compl. at 12–13. In briefing, Phoenix covers in detail why it argues that this decision produced "chaos" and "overwhelmed and frustrated" Ms. Li. Phoenix MSJ Brief at 9, 29. It does not, however, cite to any law restricting the number of investigators or employees that CBP may send to conduct verification. *See* Phoenix MSJ Brief; Phoenix Reply Brief at 18–20. Even reviewing the record before the court in the light most favorable to Phoenix, the evidence indicates

that CBP gave notice to Phoenix to expect eight agents,[36] CBP sent seven,[37] and the seven agents appear to have engaged in the normal actions of a verification team.[38] If there is a circumstance in which the number of verifiers or means of verification represents an arbitrary and capricious decision, abuse of discretion, or other violation of a party's rights, this case is not that case. Count V of Phoenix's Complaint fails.

iii. *Phoenix's claim that adverse inferences were improperly drawn in this case also fails (Count VII)*

Phoenix argues that TRLED and ORR's decision to draw adverse inferences as to Phoenix was arbitrary and capricious. Compl. at 14. The Government argues that, given Phoenix's noncooperation, drawing adverse inferences was appropriate in this case. Gov. Brief at 42. At the outset, the court observes that while ORR affirmed TRLED's drawing of adverse inferences, ORR itself noted that it was unnecessary to use adverse inferences and therefore did not use them to support its decision. *ORR Final Decision* at 9, 15–16. Additionally, while TRLED drew adverse inferences in its determination, it also found that substantial evidence supported evasion even without the use of adverse inferences. *TRLED Determination* at 32. Therefore, whether adverse inferences were properly or improperly drawn at the TRLED level makes no difference to the outcome of this case, as both TRLED and ORR found they could base their decisions on substantial evidence alone and the court has already determined that neither TRLED nor ORR's determination that substantial evidence supports evasion here was arbitrary or capricious. *See supra* Part A.

Assuming arguendo that use of adverse inferences was necessary to find evasion in this case, adverse inferences may be used wherever a party "has failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information . . . ." 19 U.S.C. § 1517(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 id.* § 1517(c)(3)(B); *see also All One God Faith, Inc. v. United States*, 589 F. Supp. 3d 1238, 1250–51 (CIT 2022), *appeal docketed*, No. 23–1081 (Fed. Cir. Oct. 25, 2022). Whether a gap in the record exists is not determinative to whether adverse infer-

[36] *Phoenix Metal Engagement Letter*.

[37] *Verification Report* at Attachment 1.

[38] *See Verification Report*.

ences may be applied in the EAPA context. *CEK Grp. LLC v. United States*, 633 F. Supp. 3d 1369, 1379 (CIT 2023).[39]

Phoenix was noncooperative. TRLED relied upon Phoenix's material omission of its relationship to Camellia Casting and false declaration of certain Phoenix imports as Camellia Casting imports in finding that Phoenix failed to cooperate to the best of its ability in the investigative process. *TRLED Determination* at 32. ORR, in affirming TRLED's decision to use adverse inferences, highlighted that Phoenix refused to provide requested production and bank documents, as well as reiterating its failure to disclose its relationship to Camellia Casting.[40] *ORR Final Decision* at 15. Therefore, to the extent it is relevant, the drawing of adverse inferences here was reasonable and Count VII of the Complaint fails.

iv. *Phoenix's claim that it has a 5th Amendment due process right to notice and an opportunity to be heard prior to the imposition of interim measures fails (Counts VIII and X)*[41]

Phoenix argues that it has a 5th amendment right to notice of an evasion allegation and "an opportunity to be heard at a meaningful time before CBP imposed punitive measures." Phoenix Reply Brief at 9–10. The Government contends that this claim fails because "Phoenix does not establish that a legitimate property interest exists in the context of interim measures." Gov. Brief at 16.

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[39] Of course, as stated in *CEK Grp. LLC*, if other information in the record so undermines the adverse inference that the determination is rendered arbitrary, the determination cannot stand. *CEK Grp. LLC v. United States*, 633 F. Supp. 3d 1369, 1379 (CIT 2023). There is no such contradictory evidence here.

[40] ORR additionally found that Phoenix's claim that the metal it imported as "finished soil pipe" was not the same product it imported into the United States was a false statement supporting adverse inferences. *ORR Final Decision* at 15. While the court agrees that in this case substantial evidence supports evasion and the inference that this statement was likely a lie, it is also conscious that affirming Phoenix's denial of the transshipment charge as a reason in itself to apply adverse inference risks encouraging the agency to punish importers simply for the act of denying that they are guilty of violating the law. This reasoning could become extremely circular—adverse inferences support a finding of evasion because the importer has denied evasion. As substantial evidence supports evasion here without the use of adverse inferences the risk here is low, but the court nonetheless notes that absent highly unusual circumstances, the mere denial of a charge of transshipping is not in itself a reasonable basis for adverse inferences.

[41] Phoenix additionally alleges that the EAPA regulations themselves violate 5 U.S.C. § 553 ("the APA") because CBP issued them without a proper notice and comment period. Phoenix MSJ Brief at 19–22. The substance of the interim measure provision of the regulations is the same as the statute. Thus what particular aspects of the regulation required notice and comment under the APA has not been made clear. Phoenix's real claim seems to be that the statute itself is deficient because it does not require notice and an opportunity to be heard prior to the imposition of interim remedies. This aspect of the Complaint is a constitutional lack of due process claim addressed *infra*.

EAPA generally allows for the imposition of interim measures prior to notice and opportunity to rebut an allegation.[42] 19 U.S.C. § 1517(b)(1), (e); 19 U.S.C. § 1517(c)(4). The statute provides for an extremely efficient timeline: at 15 days after allegation, an investigation will be initiated; within 90 days, if there is "a reasonable suspicion" that evasion has occurred, CBP will impose interim measures. 19 U.S.C. § 1517(b)(1), (e). Interim measures "shall" minimally involve suspended liquidation and extension of liquidation deadlines, but may involve "such additional measures as the Commissioner determines necessary to protect the revenue of the United States . . . ." 19 U.S.C. § 1517(e)(3). Notice is required by statute "not later than 5 business days after making a determination under paragraph (1) . . . ." 19 U.S.C. § 157(c)(4). A "determination" under paragraph (1) may occur up to 300 days after initiation of investigation,[43] and it is considered a final determination. 19 U.S.C. § (c)(1)(A). Earlier notice is only required when the Commissioner is "unable to determine whether the merchandise at issue is covered merchandise." *Id.*

CBP notifies parties when interim measures are imposed. *See, e.g., NOI*. Frequently, however, it issues a CF-28 prior to notice of investigation and imposition of interim measures. 19 C.F.R. § 151.11. CBP utilizes this form to gather additional information from the importer prior to deciding whether "reasonable suspicion" exists and imposing interim measures. *Id.* There is no statutory requirement for this form. *See* EAPA; *see also* 19 C.F.R. § 151.11. This form was, however, issued in the other evasion cases to which Ms. Li was connected. *See TRLED Determination* at 19. Although plaintiff agrees that this form does not always provide notice of an EAPA investigation as other issues may be of concern to CBP, it appears that the absence of this form in advance of interim measures may have triggered Phoenix's complaint here. In any case, plaintiff alleges that proper notice did not occur before the measures were imposed.

The Federal Circuit has previously held that importers are entitled to due process rights in an evasion proceeding, specifically the right to know what evidence is being used against one. *Royal Brush*, 75 F.4th at 1258. One "relatively immutable" principle of due process is that "where governmental action seriously injures an individual, and the

[42] Phoenix challenges the constitutionality of EAPA because EAPA does not require CBP to give importers the kind of notice it argues for in this case. Compl. at 16–17. The interim measures CBP imposed here, apparently of most concern to plaintiff, were not required by statute but rather were discretionary. *See* 19 U.S.C. § 1517(e)(3). The statute's silence on what procedures apply to measures that Customs might take does not seem to give rise to a facial challenge to the statute. Accordingly, the court reads Phoenix's claim to be to the statute as applied.

[43] Although this is the default, the statute additionally allows for some extension of this deadline. 19 U.S.C. § 1517(c)(1)(B).

reasonableness of the action depends on fact findings, the evidence used to prove the [g]overnment's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474 (1959). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Broadly, determining whether administrative procedures are constitutionally sufficient requires "analysis of the governmental and private interests that are affected." *Mathews v. Eldridge*, 424 U.S. at 334 (citations omitted).[44] Consideration of due process first requires a determination that some "private interest" is at issue. *Mathews v. Eldridge*, 424 U.S. at 334–35. Without a constitutionally cognizable interest in either "liberty" or "property," the due process inquiry ends. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

A protected interest is more than a "unilateral expectation." *Am. Ass'n of Exp. & Imp. Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972)). While there is not a protected interest that attaches to future imports, importers may have a protected interest in the proper assessment of duties on goods already imported.[45] *See Diamond Tools Tech. LLC v. United States*, 545 F. Supp. 3d 1324, 1340–41 (CIT 2021) (citing *Noreida Trading Co., Inc. v. United States*, 34 CIT 241, 248, 683 F. Supp. 2d 1348, 1355 (2010)); *Am. Pac. Plywood, Inc. v. United States*, Slip. Op. 23–93, 2023 WL 4288346, at *7 (CIT June 22, 2023); *Aspects Furniture Int'l, Inc. v. United States*, 607 F. Supp. 3d 1246, 1271 (CIT 2022). "The mere subjective expectation of a future business transaction does not rise to the level of an interest worthy of constitutional protection," and "[n]o one has a protectable interest to engage in international trade." *Am. Ass'n of Exp. & Imp.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) (citations omitted).

While an importer may have a property interest in the actual import duties due, the duties from these goods are no longer at issue

[44] The Supreme Court recently decided a case involving civil forfeiture in which it determined that Petitioners had incorrectly argued the *Mathews v. Eldridge* standard. *See Culley v. Marshall*, 601 U.S. __, 144 S.Ct. 1142 (2024). This specific issue, as the Supreme Court pointed out, had already led to the establishment of appropriate tests. *Id.* Here, no court, including this one, has determined what proper constitutional due process might be at this stage within the kind of statutory scheme that EAPA presents. Addressing this question properly would require facts more specific than those Phoenix has alleged. *See infra* p. 22–23. Absent these facts, the court need not answer this hypothetical. *See United States v. Von Neumann*, 474 U.S. 242, 250 (1986).

[45] Where in the importing process goods are considered "imported" for these purposes is not resolved here because Phoenix fails to point the court to sufficient facts to support review of this question. *See* Phoenix MSJ Brief 14–15; Phoenix Reply Brief at 10–12.

here, as the evasion determination has been upheld and so Phoenix owes the duties that CBP sought. Nonetheless, the court is mindful that if Phoenix suffered business harm stemming directly from the lack of notice and opportunity to be heard prior to the sudden imposition of interim measures on goods already imported, that might also be an interest that could trigger due process rights. *See NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998) ("[T]he case is not moot if other consequences of the defendants' actions remain.").[46] It is feasible that a plaintiff could present facts that show that the kind of interim measures imposed here have caused it lasting economic harm. The combination of cash deposits for AD/CVD duties with the live entry requirement requires the importer to suddenly deposit a large amount of cash with CBP before it can even complete the sale for which it is importing the goods. Live entries are so onerous that they have previously been compared to sanctions. *See Ford Motor Co. v. United States*, 44 F. Supp. 3d 1330, n.16 (CIT 2015). It is possible to imagine a scenario under which a plaintiff might allege specific enough harm coming from this economic burden for a serious due process issue to be raised.

Here, in contrast, Phoenix vaguely asserts that because it lacked notice it was "unable to mitigate its injury," rendered liable for breach of contract damages, and, crucially, that it was "forced to fundamentally alter [its] business operations."[47] Phoenix Reply Brief at 10–12; Phoenix MSJ Brief 14–15. Phoenix, however, does not explain what cognizable injury it suffered from its asserted inability to negotiate

[46] In *Aspects Furniture Int'l, Inc. v. United States*, 607 F. Supp. 3d 1246, 1273 (CIT 2022), the court found no deprivation of due process in the imposition of interim measures. As immediate harm to the importer was not discussed, this opinion does not provide much guidance for the case at hand.

[47] Phoenix makes these assertions in briefing; in the Complaint for standing Phoenix merely alleges that it "has been adversely affected and aggrieved by TRLED's affirmative evasion . . . and ORR's affirmation of TRLED's determination." Compl. at 2. Although it does mention interim measures in Count VIII, without linking them to specific harm, given Phoenix's vague description of alleged harm in this case, assuming standing is established, the due process claim of the Complaint is likely insufficiently plead to survive analysis under *Bell Atl. Corp. v. Twombly* or *Ashcroft v. Iqbal*. *See Iqbal*, 556 U.S. 662, 678 (2009) ("[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.")(internal quotation marks omitted); *see also Twombly*, 550 U.S. 544, 555, (2007)("Factual allegations must be enough to raise a right to relief above the speculative level."). An amended complaint here would be futile, however, as this claim fails on other grounds.

better loans or renegotiate contracts,[48] does not allege any actual damages stemming from a breach of contract or other source of liability, and certainly does not tie any of this alleged harm to the imports already entered into the country as opposed to those that Phoenix had yet to ship.[49] Phoenix primarily argues that it was "forced to fundamentally alter [its] business operations in order to comply with CBP's demands,"[50] and was denied the ability to mitigate its future losses by "cancelling orders" and "immediately halt-[ing] all shipments."[51] Phoenix MSJ Brief at 13–16; Phoenix Reply Brief at 11.

Because Phoenix has failed to show that there was a sufficient cognizable property interest and redressable harm present at the interim stage to trigger the kind of due process right it requests, the court need not decide whether due process was or was not provided. *See Diamond Tools Tech. LLC v. United States*, 545 F. Supp. 3d 1324, 1341 (CIT 2021) ("The court does not exclude the possibility that a protected interest may exist; rather, DTT USA has failed to establish what any such interest may be in this specific context . . . ." (citing *Home Prods. Int'l, Inc. v. United States*, 36 CIT 665, 673, 837 F. Supp. 2d 1294, 1301 (2012))). Assuming arguendo, however, that 1) a property interest does exist, 2) sufficient harm is alleged, and 3) the issue

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[48] Further, in briefing, Phoenix's only response to CISPI's argument that there is no evidence that Phoenix would have taken any of these additional steps, and therefore no evidence it suffered any real injury, is to assert whether or not it would have actually mitigated its damages is irrelevant to its claim. Resp. Br. of Def.-Intervenor Cast Iron Soil Pipe Institute at 28–31, ECF No. 46 (Feb. 20, 2024) ("CISPI Brief"); *see* Phoenix MSJ Brief 14–15; *see* Phoenix Reply Brief at 12, 14, 16. As far as Phoenix asserts it would have mitigated damages by ceasing shipping, the evidence on the record does not support this claim. *See supra* Part A.

[49] If entries made between the imposition interim measures and notice thereof resulted in a particular harm, apart from duties owed and not yet paid, it has not been set forth with specificity. Tying alleged economic harm to the imports already entered is particularly crucial when an importer alleges that the harm it suffered comes from the effect of the interim measures, rather than the measures themselves, because without specific facts that illustrate the connection, the harm alleged looks a good deal like an assertion of a right "to engage in international trade," which, as the court has already addressed, does not exist. *See Am. Ass'n of Exp. & Imp.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985) (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933)).

[50] To some extent, of course, forcing a business to alter its business operations might be said to be the point of EAPA. Given the existence of regulatory law in the United States, it is hard to see how forcing a private party to alter its behavior alone is sufficient harm to give rise to a due process violation. Further, given the full facts of this case, the court is not even sure that business operations on the whole were altered very much here. *See supra* Part A.

[51] Of course, as both the Government and CISPI point out, Phoenix did not immediately halt all shipments. Gov. Brief at 23; CISPI Brief at 29–30; *TRLED Determination* at 20. Rather, it transferred shipments to Camellia Casting. *TRLED Determination* at 20; *see supra* Part A.

is not mooted by the final decision, here, due process has been met. Due process is concerned with lowering the "risk of an erroneous deprivation." *See Mathews*, 424 U.S. at 335.[52] In this case, that risk was extremely low. Phoenix's owner, Ms. Li, was on notice of all of the information CBP used to reach its conclusion, except for the fact that a new allegation had been made against this particular named company.[53] Further, all of the information on the record that CBP relied on, save the fact that a new allegation existed, constituted information that Phoenix's owner, Ms. Li, had already had an opportunity to rebut through the earlier EAPA processes. Given the particular facts of this case—that all of the information on the record was information that Phoenix would have had access to, that Phoenix's owner, Ms. Li, had already had multiple companies go through EAPA investigations, and that evidence indicated that Ms. Li was actively evading Government's determinations in the earlier cases and potentially utilizing the CF-28s as a warning system—the risk of error here was low. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334. In this situation, due process required no more than what occurred.

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[52] As discussed *supra* note 44, the Supreme Court recently declined to rely heavily on *Mathews*, pointing instead toward the court's decisions in *United States v. Von Neumann* and *U.S. v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*. *See Culley v. Marshall*, 601 U.S. __ 144 S.Ct. 1142 (2024); *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 562 (1983); *United States v. Von Neumann*, 474 U.S. 242, 250 (1986). Given that all of these cases dealt with civil forfeiture, the court declines to narrow its due process discussion to only that test here as it is uncertain that the civil forfeiture case law would be the right line of due process related case law to apply if there were some protectable right at issue at the interim measures stage. Nonetheless, the court notes that if, as in *$8,850*, the court determined that the due process interests at issue here were most like the right to a speedy resolution, and decided to apply the *Barker* test as in *$8,850*, that test would further support the court's assessment that due process was met here. *See $8,850*, 461 U.S. 555, 564 (1983) (discussing the *Barker* test); *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972). The *$8,850* test focuses on the length of the delay, the harm caused by the delay, and the "reason the Government assigns to justify the delay." *$8,850*, 461 U.S. at 565. Here, it could be argued that Ms. Li had the relevant information prior to the imposition of interim measures due to her connection to the other companies. Thus, the length of the delay in this case could be zero. Additionally, *$8,850* noted that the government could seize the property at issue without any notice or hearing at all, and held that, in that case, an 18-month delay between the seizure and civil forfeiture proceedings was not unconstitutional. *See $8,850*, 461 U.S. 555, 564 (1983).

[53] EAPA allows CBP to delay notifying an importer of the existence of allegation. *See supra* p. 18–19. Given Ms. Li's alleged history of new company creation following the issuance of a CF-28, if there were ever a case that presented the facts under which CBP might wish to delay notification of an allegation, it is this one. CBP's concern is, as Government points out, born out by the fact that, as soon as Ms. Li was notified of the investigation of Phoenix, Camellia Casting took over as importer of record for the imports that had previously been assigned to Phoenix. *TRLED Determination* at 19; *ORR Final Decision* at 14.

CONCLUSION

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

Dated: June 10, 2024
New York, New York

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

Slip Op. 24–70

WILMAR TRADING PTE LTD., PT WILMAR BIOENERGI INDONESIA, and WILMAR OLEO NORTH AMERICA LLC, Plaintiffs, and P.T. MUSIM MAS and GOVERNMENT OF THE REPUBLIC OF INDONESIA, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and NATIONAL BIODIESEL BOARD FAIR TRADE COALITION, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 18–00121

[U.S. Department of Commerce's remand results are sustained.]

Dated: June 11, 2024

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OPINION

Eaton, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce" or the "Department") second remand redetermination pursuant to the court's order in *Wilmar Trading Pte Ltd. v. United States*, 47 CIT __, 675 F. Supp. 3d 1215 (2023) ("*Wilmar II*").[1] *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 125.

In *Wilmar II*, the court remanded one issue to Commerce: "On remand, Commerce must either reconsider its decision to disregard Indonesian crude palm oil prices when constructing normal value for Wilmar or explain why doing so does not impose a double remedy." *Wilmar II*, 47 CIT __, 675 F. Supp. 3d at 1263.

[1] This case involves Commerce's final determination in the antidumping investigation of biodiesel from Indonesia. *Biodiesel From Indon.*, 83 Fed. Reg. 8,835 (Dep't of Commerce Mar. 1, 2018) and accompanying Issues and Decision Mem. (Feb. 20, 2018), PR 303.

On March 12, 2024, Commerce issued the Remand Results. The deadline for comments was April 12, 2024. Defendant-Intervenor National Biodiesel Board Fair Trade Coalition filed comments asking the court to sustain the Remand Results. *See* Def.-Int.'s Cmts., ECF No. 128. No comments have been filed by Plaintiffs Wilmar Trading Pte Ltd., PT Wilmar Bioenergi Indonesia, and Wilmar Oleo North America LLC, or any other party. *See* Letter to Court from Akin, Gump, Strauss, Hauer & Feld, LLP (Mar. 29, 2024), ECF No. 127 (notifying the court that "Plaintiffs will not submit comments in opposition to the U.S. Department of Commerce's Second Final Results of Redetermination Pursuant to Court Remand"). There being no further dispute for the court to decide, and for the reasons discussed herein, the court sustains the Remand Results.

BACKGROUND

The court presumes familiarity with its prior opinions in this case. *See Wilmar Trading Pte Ltd. v. United States*, 46 CIT __, 582 F. Supp. 3d 1243 (2022) ("*Wilmar I*"); *Wilmar II*, 47 CIT __, 675 F. Supp. 3d 1215.

Briefly, the facts relevant here are that the Government of Indonesia's "2015 Export Levy" imposed a $50 per metric ton tax on all exports of crude palm oil, the primary input of biodiesel. *See Wilmar I*, 46 CIT at __, 582 F. Supp. 3d at 1247 (citing *Wilmar Trading Pte Ltd. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1334, 1339 (2020) ("*Wilmar CVD*")). In *Wilmar CVD*, a companion countervailing duty case, Commerce found that the 2015 Export Levy was a countervailable program that provided crude palm oil for less than adequate remuneration, a finding that this Court upheld.[2] *Wilmar CVD*, 44 CIT at __, 466 F. Supp. 3d at 1350.

In *Wilmar II*, the court sustained Commerce's finding that the 2015 Export Levy created a particular market situation that "distorted the costs of domestic crude palm oil in Indonesia and rendered Wilmar's home market sales values useless for determining normal value." *Wilmar II*, 47 CIT at __, 675 F. Supp. 3d at 1236 (citing *Wilmar CVD*, 44 CIT at __, 466 F. Supp. 3d at 1348–57). The court also found that "it [was] unclear why the effects of such distortion were not remedied by the imposition of countervailing duties in the companion countervailing duty investigation." *Id.* at __, 675 F. Supp. 3d at 1236.

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[2] In *Wilmar CVD*, Commerce imposed countervailing duties based on, inter alia, the 2015 Export Levy. The Department calculated an individual subsidy rate for Wilmar of 34.45%, of which 9.47% ad valorem was attributed to the 2015 Export Levy and the 1994 Export Tariff (not at issue here). *See Wilmar CVD*, 44 CIT at __, 466 F. Supp. 3d at 1341.

The court thus remanded the Department's "decision to disregard Indonesian crude palm oil prices—based on the 2015 Export Levy particular market situation—[as] unsupported by substantial evidence." *Id.* at __, 675 F. Supp. 3d at 1263. The court directed that, "[o]n remand, Commerce must either reconsider its decision to disregard Indonesian crude palm oil prices when constructing normal value for Wilmar or explain why doing so does not impose a double remedy." *Id.*

DISCUSSION

In the Remand Results, Commerce explained why disregarding Indonesian crude palm oil prices when constructing normal value for Wilmar did not impose a double remedy. It did so under protest[3] :

> To comply with the Court's order, under respectful protest, we have performed the analysis below to further explain why disregarding Indonesian crude palm oil prices when calculating constructed value does not impose a double-remedy. If the subsidy's effect on the [less than fair value] equation is limited to lowering U.S. price (as would be the case if the subsidy's influence on normal value is removed through the use of a world market value[4]), some portion of the differential determined by the [less than fair value] equation is the result of the countervailed subsidy. If, however, the countervailed subsidy affects neither U.S. price nor normal value, the evenhandedness of the countervailed subsidy's effects is maintained and no portion of the [less than fair value] differential can be attributed to the subsidy.
>
> The key finding in this context (i.e., when normal value is unaffected by the countervailed subsidy), therefore, is whether the countervailed subsidy has affected U.S. price. In other words, Commerce must determine whether the countervailed subsidy has "passed through" to U.S. price. In administering [19 U.S.C. § 1677f-1(f)(1)], the only section of the Act requiring and delineating a pass-through analysis, Commerce has required

[3] The basis of Commerce's protest appears to be the agency's belief that the court's remand order placed upon the Department an evidentiary burden that is not required by the antidumping statute. In reality, however, the court's order simply required additional explanation of Commerce's double remedy finding.

[4] [Here, "Commerce relied on the world market prices for crude palm oil instead of domestic Indonesian crude palm oil prices when constructing normal value for Wilmar." *Wilmar II*, 47 CIT at __, 675 F. Supp. 3d at 1226–27. Commerce did so based on its finding that "the 2015 Export Levy created a cost-based particular market situation that caused Wilmar's crude palm oil costs to inaccurately reflect the cost of production of biodiesel in the ordinary course of trade and therefore unusable for determining constructed value." *Id.* at __, 675 F. Supp. 3d at 1226.]

the producer or exporter under examination to demonstrate: a "subsidies-to-cost link," e.g., the subsidy's effect on cost of manufacture; and a "cost-to-price link," e.g., the producer or exporter's prices changed as a result of changes in cost of manufacture. Commerce also examines whether countervailable subsidies have been demonstrated to have reduced the average price of imports during the period under examination.

As an initial matter, Indonesian prices for U.S. shipments were higher in the fourth quarter of 2016 than the first quarter of 2016. Thus, the countervailed subsidy has not reduced the average price of imports of the class or kind of merchandise during the January 1, 2016, through December 31, 2016 period of investigation (POI), as required by [19 U.S.C. § 1677f-1(f)(1)]. This fact is an indication that the domestic subsidy at issue has not been passed through to the U.S. price.

Moreover, the record demonstrates that there is no cost-to-price link, i.e., the producer's or exporter's prices do not change as a result of changes in cost of manufacture. Rather, the record shows that U.S. and foreign producers base the price of biodiesel sold in the United States on the price of Ultra Low Sulfur Diesel (ULSD) futures contracts traded on the New York Mercantile Exchange (NYMEX). Moreover, the record demonstrates that Wilmar prices its biodiesel sold in the United States based on the price of ULSD futures contracts traded on the NYMEX. Commerce verified that Wilmar prices its U.S. sales based on these NYMEX heating oil futures plus or minus a specified premium.

In addition, the [International Trade Commission] Preliminary Report provides a description of the industry in general that confirms the explanation provided by Wilmar. The report finds that, "{b}iodiesel has traditionally been marketed primarily as an additive or alternative to petroleum-based diesel fuel, and, as a result, biodiesel prices have been influenced by the price of petroleum-based diesel fuel, adjusted for government incentives supporting renewable fuels, rather than biomass based diesel production costs."

Finally, information published by the U.S. Department of Agriculture and the U.S. Census Bureau indicates a correlation between U.S., Argentine, and Indonesian prices in the United States during each quarter from 2014 through 2016. Pricing information demonstrates that Indonesian prices for U.S. ship-

> ments appear to correspond to the overall U.S. market (including imports from Argentina, Canada, and all other countries) and not to the cost of crude palm oil in Indonesia.
>
> As the record demonstrates that Wilmar prices its U.S. shipments in a manner designed to compete with (or undercut) U.S. prices for petro-diesel and biodiesel, and are not based on production costs affected by the domestic subsidy, Commerce concludes there is no significant link between the subsidy and U.S. prices. Therefore, as both sides of the [less than fair value] equation in this instance are unaffected by the export tax on crude palm oil [i.e., the 2015 Export Levy], the differential between U.S. prices and normal value (i.e., the dumping margin) is not partially the result of the countervailed subsidy, and thus the [particular market situation] adjustment to fair value does not remedy the subsidy.

Remand Results at 7–10.

In other words, Commerce found that there was no double remedy here because neither side of the dumping equation was affected by the 2015 Export Levy. The normal value side was not affected because Commerce used a world market price as constructed value, i.e., a price unaffected by the levy, a domestic Indonesian subsidy. Remand Results at 7; *see also Wilmar II*, 47 CIT at __, 675 F. Supp. 3d at 1226–27 ("Commerce relied on the world market prices for crude palm oil instead of domestic Indonesian crude palm oil prices when constructing normal value for Wilmar."). And the U.S. price side was not affected because, as the record shows, the price of biodiesel sold in the United States by both U.S. and foreign producers (such as Wilmar) is based on heating oil (Ultra Low Sulfur Diesel) futures traded on the New York Mercantile Exchange. Remand Results at 7–8. Indeed, as Commerce verified, "Wilmar prices its U.S. sales based on . . . NYMEX heating oil futures plus or minus a specified premium." *Id.*

Thus, the court finds that Commerce has adequately explained, and supported with substantial record evidence, its finding that disregarding Indonesian crude palm oil prices when constructing normal value for Wilmar, based on the finding that the 2015 Export Levy resulted in a cost-based particular market situation, did not impose a double remedy—that is, "the differential between U.S. prices and normal value (i.e., the dumping margin) is not partially the result of the countervailed subsidy, and thus the [particular market situation] adjustment to fair value does not remedy the subsidy." *Id.* at 10.

The court finds that the Remand Results comply with the court's order and are supported by substantial evidence. As they are uncontested, entry of judgment is appropriate, because there are no further issues for the court to adjudicate.

CONCLUSION

There being no substantive challenge to the Remand Results, and that decision being otherwise in compliance with the court's remand order and supported by substantial evidence, it is sustained. Judgment will be entered accordingly.

Dated: June 11, 2024
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

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