# U.S. Customs and Border Protection

## PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF UNIVERSAL BILL STACKER SUB-ASSEMBLY

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

**ACTION:** Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of universal bill stacker sub-assembly.

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

**DATE:** Comments must be received on or before September 30, 2022.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**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), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of universal bill stacker. Although in this notice, CBP is specifically referring to NY I86148, dated September 26, 2002 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY I86148, CBP classified the universal bill stacker subassembly in heading 9504, HTSUS, specifically in subheading 9504.30.0060, HTSUSA (Annotated), which provides for "Video game consoles and machines, table or parlor games, including pinball ma-

chines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment: Other games, operated by coins, banknotes, bank cards, tokens or by any other means of payment, other than automatic bowling alley equipment; parts and accessories thereof: Other: Parts and accessories". CBP has reviewed NY I86148 and has determined the ruling letter to be in error. It is now CBP's position that the universal bill stacker subassembly is properly classified, in heading 9031, HTSUS, specifically in subheading 9031.49.90, HTSUS, which provides for "Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: Other optical instruments and appliances: Other: Other".

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY I86148 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H318180, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

ALLYSON MATTANAH
*for*
YULIYA A. GULIS,
*Acting Director*
*Commercial and Trade Facilitation Division*

Attachment

NY I86148
September 26, 2002
CLA-2–95:RR:NC:2:224 I86148
CATEGORY: Classification
TARIFF NO.: 9504.30.0060

THOMAS J. O'DONNELL
RODRIGUEZ O'DONNELL ROSS -
FUERST GONZALEZ & WILLIAMS, P.C.
*20 NORTH WACKER DRIVE - SUITE 1416*
*CHICAGO IL 60606*

RE: The tariff classification of a universal stacker sub-assembly from China.

DEAR MR. O'DONNELL:

In your letter dated June 18, 2002, on behalf of Igarashi Motor Sales, LLC, you requested a tariff classification ruling on a universal stacker sub-assembly.

The merchandise, also referred to as a cash box, is designed to receive and store paper currency in casino gaming machines. A separate validator unit mounted to the universal stacker accepts a paper bill into the stacker machine. You relate that "[a]s the bill enters the machine, the validator sensor reads the denomination to determine the value of the bill. The casino gaming machine then converts the cash into game credits....the validator then pushes the bill into the cash box where the money stays until the cash box is removed from the gaming machine." The sample of the stacker submitted with your inquiry will be returned at your request.

You state that the universal stacker sub-assembly subject of this inquiry, although capable of use in vending machines, is used primarily as a storage mechanism in casino gaming machines such as slot machines and video poker. You assert that the substantial construction of the stacker cash box housing and the fact that all units to be imported by your client will be equipped with locks or will be designed to accommodate locks is indicative of the primary or most common end use of this type of stacker in gaming machines.

Classification of merchandise under the Harmonized Tariff Schedule of the United States (HTSUS) is in accordance with the General Rules of Interpretation (GRIs), taken in order. GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

Casino gaming machines are classifiable in subheading 9504.30.00, HTSUS, the provision for other games, operated by coins, banknotes (paper currency), discs or other similar articles.... Chapter 95, Note 3, HTSUS, states that:

> [s]ubject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.

Customs defines "principal use" as that use which exceeds each other single use of the article. Although universal stackers of the type here can apparently used in general vending machines, it is our understanding from counsel for the importer that this subject stacker is principally used with casino gaming machines. Consequently, under chapter 95, note 3 of the HTSUS, the subject

universal stacker sub-assembly is to be classified with the game machines of heading 9504 as parts under subheading 9504.30.0060, HTSUS.

The applicable subheading for the universal stacker sub-assembly will be 9504.30.0060, HTSUS, which provides for parts and accessories of other games, operated by coins, banknotes, (paper currency), discs or other similar articles. The rate of duty will be free.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Tom McKenna at 646–733–3025.

*Sincerely,*

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity Specialist Division*

HQ H318180
OT:RR:CTF:CPMMA H318180 AJK
CATEGORY: Classification
TARIFF NO: 9031.49.9000

MR. THOMAS J. O'DONNELL
RODRIGUEZ O'DONNELL ROSS -
FUERST GONZALEZ & WILLIAMS, P.C.
*20 NORTH WACKER DRIVE - SUITE 1416*
*CHICAGO IL 60606*

RE: Revocation of NY I86148; Classification of Universal Bill Stacker Sub-Assembly

DEAR MR. O'DONNELL:

This letter is in reference to New York Ruling Letter (NY) I86148, dated September 26, 2002, concerning the tariff classification of a universal bill stacker sub-assembly. In NY I86148, U.S. Customs and Border Protection (CBP) classified the merchandise in heading 9504, Harmonized Tariff Schedule of the United States (HTSUS), as a part of casino gaming machines. We have reviewed NY I86148 and have determined that the classification of the merchandise in heading 9504, HTSUS, was incorrect.

**FACTS:**

The subject merchandise was described in NY I86148 as follows:

> The merchandise, also referred to as a cash box, is designed to receive and store paper currency in casino gaming machines. A separate validator unit mounted to the universal stacker accepts a paper bill into the stacker machine. You relate that "[a]s the bill enters the machine, the validator sensor reads the denomination to determine the value of the bill. The casino gaming machine then converts the cash into game credits....the validator then pushes the bill into the cash box where the money stays until the cash box is removed from the gaming machine." ....
>
> You state that the universal stacker sub-assembly subject of this inquiry, although capable of use in vending machines, is used primarily as a storage mechanism in casino gaming machines such as slot machines and video poker. You assert that the substantial construction of the stacker cash box housing and the fact that all units to be imported by your client will be equipped with locks or will be designed to accommodate locks is indicative of the primary or most common end use of this type of stacker in gaming machines.

**ISSUE:**

Whether the universal bill stacker sub-assembly is classified in heading 9031, HTSUS, as a banknote measuring machine, or heading 9504, HTSUS, as a part of a gaming machine operated by banknotes.

**LAW AND ANALYSIS:**

Classification of goods under HTSUS is governed by the General Rules of Interpretation (GRI), and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARI). 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 ARI 1(a), which applies to principal use provisions, provides as follows:

> In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use ....

* * * * * *

The HTSUS provisions at issue are as follows:

| | |
|---|---|
| 9031 | Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: |
| | Other optical instruments and appliances: |
| 9031.49 | Other: |
| 9031.49.90 | Other |
| 9504 | Video game consoles and machines, table or parlor games, including pinball machines, billiards, special tables for casino games and automatic bowling equipment, amusement machines operated by coins, banknotes, bank cards, tokens or by any other means of payment: |
| 9504.30.00 | Other games, operated by coins, banknotes, bank cards, tokens or by any other means of payment, other than automatic bowling alley equipment; parts and accessories thereof |
| | Other: |
| 9504.30.0060 | Parts and accessories |

* * * * * *

Note 1 to chapter 90, HTSUS, provides, in pertinent part:

> 1. This chapter does not cover:
>
> ...
>
> (k) Articles of chapter 95 ....

Note 3 to chapter 95, HTSUS, provides, as follows:

> 3. Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.

Subheading note to chapter 95, HTSUS, provides, in pertinent part:

> [Subheading 9504.50] does not cover video game consoles or machines operated by coins, banknotes, bank cards, tokens or by any other means of payment (subheading 9504.30).

* * * * * *

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).

The General EN to chapter 95, HTSUS, provides, in pertinent part:

> Each of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and provided they are not articles excluded by Note 1 to this Chapter.

EN 90.31, HTSUS, provides, in pertinent part:

> [T]his heading covers measuring or checking instruments, appliances and machines, whether or not optical.

The Subheading EN for subheading 9031.49, HTSUS, provides as follows:

> This subheading covers not only instruments and appliances which provide a direct aid or enhancement to human vision, but also other instruments and apparatus which function through the use of optical elements or processes.

EN 95.04, HTSUS, provides, in pertinent part:

> This heading includes:
>
> ...
>
> (6) Machines, operated by coins, banknotes, bank cards, tokens or by other means of payment, of the kind used in amusement arcades, cafés, funfairs, etc., for games of skill or chance (e.g., machines for revolver practice, pintables of various types)....

The Subheading EN for subheading 9504.50, HTSUS, provides as follows:

> This subheading does not cover video game consoles or machines operated by coins, banknotes, bank cards, tokens or by any other means of payment; these are to be classified in subheading 9504.30.

* * * * * *

The legal note 3 to chapter 95 provides that "parts and accessories which are suitable for use solely or principally with articles of [chapter 95] are to be classified with those articles." The EN to subheading 9504.50 provides that "video game consoles or machines operated by ... banknotes" are classified in subheading 9504.30. *See also* Subheading Note to Chapter 95. Accordingly, subheading 9504.30.00, HTSUS, which provides for parts of video game machines operated by banknotes, is a principal use provision subject to ARI 1(a). To classify an article under a principal use provision, ARI 1(a) requires that the classification is controlled by the principal use of "goods of that class or kind to which the imported goods belong". In *United States v. Carborundum Co.*, the U.S. Court of Customs and Patent Appeals held that to determine whether an article is included in a particular class or kind of merchandise, the court must consider a variety of factors, including: (1) the general physical characteristics of the merchandise; (2) the channels, class or kind of trade in which the merchandise moves (*i.e.*, where the merchandise is sold); (3) the expectation of the ultimate purchasers; (4) the environment of the sale (*i.e.*, accompanying accessories and marketing); (5) usage, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use. 536

F.2d 373, 377 (C.C.P.A. 1976). While these factors were developed under the Tariff Schedule of the United States (predecessor to the HTSUS), the courts have also applied them under the HTSUS. *See e.g.*, *Minnetonka Brands v. United States*, 24 C.I.T. 645, 651–2 (2000); *Aromont USA, Inc. v. United States*, 671 F.3d 1310 (Fed. Cir. 2012); *Essex Manufacturing, Inc. v. United States*, 30 C.I.T. 1 (2006).

In NY I86148, CBP held that the universal bill stacker sub-assembly was classified in subheading 9504.30.0060, HTSUSA (Annotated), as a part of gaming machines operated by banknotes, because you contended that the subject merchandise is principally used with casino gaming machines. CBP, however, neglected to fully analyze the meaning of "principal use" within heading 9504, HTSUS. In the instant case, the universal bill stacker sub-assembly cannot be classified under heading 9504, HTSUS, because it is not a class or kind of machine that is principally used with casino gaming machines. In NY I86148, CBP found that the substantial construction of the stacker cash box housing and the locks used with the stacker are indicative of the primary or most common end use of this type of stacker in casino gaming machines. This finding, however, is incorrect because those physical characteristics do not prevent the subject merchandise from being used in general vending machines; thus, the universal bill stack sub-assembly has uses beyond casino gaming machines. Accordingly, since the merchandise can be used with other machines, in addition to casino gaming machines, we find that the subject merchandise is not principally used with casino gaming machines. Although we recognize the universal bill stacker sub-assembly's gaming-specific design and features, the evidence of a single importer's design for or sale to the gaming industry does not demonstrate the actual principal use of the merchandise. *See Carborundum Co.*, 536 F.2d at 377 ("Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling.").

Moreover, the universal bill stacker sub-assembly is not an essential part of casino gaming machines as it does not enable the gaming function or facilitate the operation; instead, it performs a distinct function—to authenticate, accept and store banknotes. It is not limited in its ability to be used with other kinds of machines, including, but not limited to, banking, dispensing and vending, as long as they require a part—such as the universal stacker sub-assembly—to authenticate and store banknotes. In HQ 958781, dated April 30, 1996, CBP held that color picture tubes used exclusively in the video game industry were not classifiable in heading 9504, HTSUS, because they lacked the features which dedicated the tubes for sole or principal use with video game monitors.[1] Similar to the subject universal bill stacker sub-assembly that can be used with non-casino gaming machines, the tubes were capable of being used with non-video game appliances and thus, CBP held that the tubes did not meet the requirements of the legal note 3 to chapter 95. Accordingly, the universal bill stacker sub-assembly, which is not exclusively used in the gaming industry, is not solely or principally used as a part of casino gaming machines. The primary function of the merchandise is to validate the legitimacy of the banknotes being input. Thus, the universal bill

[1] *Cf.* NY L81419, dated September 26, 2002 (classifying a display reader assembly that was specifically designed to be incorporated into casino gaming machines only under heading 9504, HTSUS, as a part of a gaming machine operated by banknotes).

stacker sub-assembly is not classifiable under heading 9504, HTSUS, as a part of gaming machines operated by banknotes.

Accordingly, as a machine that authenticates banknotes by using validator sensors, the universal stacker sub-assembly is a distinct commercial entity that is covered in heading 9031, HTSUS, which provides for "measuring or checking instruments, appliances and machines, whether or not optical". *See* EN 90.31. In HQ 964467, dated December 1, 2000, CBP classified bill acceptors under subheading 9031.49.9000, HTSUSA. Similar to the subject universal bill stacker sub-assembly, the bill acceptors, which were placed inside of vending machines, scanned, accepted and rejected banknotes by using optical and magnetic sensors to verify them. In determining the correct heading, CBP found that the bill acceptors constitute optical checking instruments within the scope of heading 9031, HTSUS, due to their optical and magnetic sensors to verify currency and their primary function to validate banknotes. Similarly, in NY N009267, dated April 10, 2007, CBP classified optical bill acceptors, which were used as internal components of various machines to validate banknotes, under subheading 9031.49.9000, HTSUSA. Although you stated in your ruling request that the universal stacker sub-assembly "is used primarily as a storage mechanism in casino gaming machines[,] such as slot machines and video poker", we find that it is substantially similar to the products described in HQ 964467 and NY N009267 as they all share the primary function of verifying the legitimacy of, accepting or rejecting, and storing banknotes—a function that is universal to any machine that takes bills. The universal stacker sub-assembly, therefore, is classified in heading 9031, HTSUS, as a banknote measuring machine. This conclusion is consistent with prior CBP rulings classifying other banknote acceptors and similar articles under heading 9031, HTSUS.

**HOLDING:**

By application of GRI 1, the universal stacker sub-assembly is classified in heading 9031, HTSUS, specifically subheading 9031.49.9000, HTSUSA, which provides for "Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: Other optical instruments and appliances: Other: Other". The 2022 column one, general rate of duty is free.

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

**EFFECT ON OTHER RULINGS:**

NY I86148, dated September 26, 2002, is hereby revoked.

*Sincerely,*
*for*

CRAIG T. CLARK,
*Director*
*Commercial and Trade Facilitation Division*

# U.S. Court of International Trade

Slip Op. 22–94

CONTINENTAL AUTOMOTIVE SYSTEMS, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 18–00026

[In Customs classification matter, Defendant's cross-motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied.]

Dated: August 12, 2022

*Anastasia P. Cordova*, McGuireWoods, LLP, of Washington, D.C. for Plaintiff, Continental Automotive Systems, Inc.

*Guy R. Eddon*, U.S. Department of Justice, International Trade Field Office, and *Brandon A. Kennedy*, U.S. Department of Justice, International Trade Field Office, of Washington, D.C., for the Defendant.

## *OPINION*

**Restani, Judge:**

Plaintiff Continental Automotive Systems, Inc. ("Continental") brought this action contesting U.S. Customs and Border Protection's ("Customs") tariff classification of the subject merchandise. The merchandise at issue is the probe elements of a nitric oxide ("NOx") sensor ("NOx Sensor Probe"). The NOx Sensor Probe determines the concentration of NOx in the exhaust gases of passenger vehicles and trucks. In cross-motions for summary judgment, Plaintiff argues that the NOx Sensor Probes are properly classified under Heading 9026 of the Harmonized Tariff Schedule of the United States ("HTSUS") and the government argues that Customs properly classified the NOx Sensor Probes under Heading 9027, HTSUS. For the reasons stated below, the government's cross-motion for summary judgment is granted and the Plaintiff's motion is denied.

## I. BACKGROUND

### A. Procedural Background

This case involves NOx Sensor Probes imported in January and February 2017 into the Houston Airport port of entry. Summons, ECF No. 1 (Feb. 22, 2022) ("Summons"). At liquidation, Customs classified

the subject merchandise under subheading 9027.10.20, HTSUS,[1] which covers "[i]nstruments and apparatus for physical or chemical analysis (for example, ... gas or smoke analysis apparatus) ...: Gas or smoke analysis apparatus: ...: Electrical." 9027.10.20, HTSUS; Pl.'s Statement of Material Facts Not in Dispute ¶ 2, ECF No. 54 (Oct. 13, 2021) ("Pl. Facts"); Def.'s Resp. to Pl.'s Statement of Material Facts ¶ 2, ECF No. 63–2 (Dec. 22, 2021) ("Def. Resp. Facts"). Continental timely protested on February 8, 2018, averring that the NOx Sensor Probes were properly classified under subheading 9026.80.20, HTSUS, as "[i]nstruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases ...: Other instruments and apparatus: Electrical." 9026.80.20, HTSUS; Summons at 1–2. Customs relied on the reasoning from a previously issued ruling, HQ H262310,[2] and held that the NOx Sensor Probe was classifiable under subheading 9027.10.20, HTSUS—denying Continental's 2017 protest. Summons at 1; Pl. Facts ¶¶ 4, 21; Def. Resp. Facts ¶¶ 2, 4, 21. Continental filed a complaint challenging Customs' classification. *See* Am. Compl., ECF No. 30–1 (Oct. 19, 2021). Continental moved for summary judgment with accompanying brief. *See* Pl.'s Memo. of L. in Supp. of its Mot. for Summ. J., ECF No. 55 (Oct. 13, 2021) ("Pl. Br."); Pl.'s Mot. for Summ. J., ECF No. 51 (Oct. 13, 2021). The Defendant filed a cross-motion for summary judgment and accompanying brief. Def.'s Mem. of L. in Opp'n to Pl.'s Mot. For Summ. J. and in Supp. Of Def.'s Cross-Mot. for Summ. J., ECF No. 64 (Dec. 22, 2021) ("Def. Br.").

**B. Description of Subject Merchandise**

The following facts are undisputed. The subject merchandise of this action consists of the probe elements for the NOx sensor. Def.'s Statement of Material Facts ¶ 1, ECF No. 63–1 (Dec. 22, 2021) ("Def. Facts"); Pl.'s Resp. to Def.'s Statement of Material Facts ¶ 1, ECF No. 66 (Jan. 31, 2022) ("Pl. Resp. Facts"). The NOx sensor consists of three elements: the probe, a wiring harness, and a sensor control unit

[1] The court notes that the merchandise at issue is subject to the 2017 version of the HTSUS; citations herein to the Harmonized Tariff Schedule of the United States ("HTSUS") are to the 2017 version unless otherwise noted.

[2] Prior to the time of the importations at issue in this case, Continental imported NOx sensors under subheading 9027.10.20, HTSUS, in accordance with Customs ruling NYJ88011, dated September 11, 2003. Def. Ex. 1, ECF No. 63–3 (Dec. 22, 2021) (classifying various types of sensors, including NOx sensors, under subheading 9027.10.20, HTSUS). On August 1, 2014, Continental made a request for internal advice related to the classification of its NOx Sensor. Def. Ex. 2 at 2, ECF No. 64–1 (Dec. 22, 2021). Continental contended that the NOx Sensor was properly classified under subheading 9026.80.20, HTSUS. On July 11, 2016, Customs published HQ H262310, holding that Continental's NOx Sensor was properly classified under subheading 9027.10.20, HTSUS. Pl. Addendum Tab 5, ECF No. 56–5 (Oct. 13, 2021).

("SCU"). Def. Facts ¶¶ 1, 3; Pl. Resp. Facts ¶¶ 1, 3. The most common application for the NOx sensor is in a selective catalytic reduction system, which conditions a vehicle's exhaust gas to remove pollutants before it is emitted. Pl. Facts ¶ 4; Def. Resp. Facts ¶ 4.

Exhaust gas contains many elements including O2, NOx, nitrogen, water vapor, carbon dioxide, carbon monoxide and hydrocarbons. Def. Facts. ¶¶ 10, 12. The NOx Sensor Probe determines the concentration of NOx in exhaust gas by means of a cermet electrode. Def. Resp. Facts ¶ 10; Pl. Facts ¶ 10. When the electrode comes in contact with NOx, an electrochemical reaction occurs which disassociates oxygen from nitrogen and generates an electrical signal that correlates to the concentration of NOx present in the exhaust. Pl. Facts ¶ 10; Def. Resp. Facts. ¶ 10. The electrical signal from the NOx Sensor Probe is then sent to the SCU, translated, enhanced, and sent to the Engine Control Unit ("ECU"). Pl. Resp. Facts ¶ 14; Def. Facts ¶ 14. The ECU uses the information from the NOx sensors, in conjunction with information from other components, to calculate the amount of ammonia that must be injected, in the form of a urea solution, into the selective catalyst reduction system. Pl. Facts ¶ 13; Def. Resp. Facts ¶ 13. The ammonia reacts chemically with NOx molecules to create water and carbon dioxide, thus reducing the concentration of pollutant NOx in the exhaust gas. Pl. Facts ¶ 13; Def. Resp. Facts ¶ 13.

The selective catalyst reduction system requires two NOx sensors to operate properly. Def. Facts ¶ 5; Pl. Resp. Facts ¶ 5. One NOx sensor is placed at the entrance of the system to determine the initial NOx concentration in the exhaust gas, and a second NOx sensor is placed at the exit to ensure that the NOx concentration has been reduced and that the selective catalyst reduction system is operating properly. Def. Facts ¶ 5; Pl. Resp. Facts ¶ 5.

## II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(a). The court will grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Summary judgment is appropriate in tariff classification cases where "there is no genuine dispute as to the nature of the merchandise and the classification turns on the proper meaning and scope of the relevant tariff provisions." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013). The court decides classification *de novo*. *See* 28 U.S.C. § 2640(a)(1); *Telebrands Corp. v. United States*, 865 F. Supp. 2d 1277, 1279–80 (CIT 2012).

## III. DISCUSSION

### A. Legal Framework

The Plaintiff has the burden of demonstrating that the government's classification is incorrect but does not bear the burden of establishing the correct classification; instead the court has an independent duty to determine the "*correct* result, by whatever procedure is best suited to the case at hand." *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original). The meaning of a tariff term is a question of law and whether subject merchandise falls under a given tariff term is a question of fact. *Wilton Indus. v. United States*, 741 F.3d 1263, 1265–6 (Fed. Cir. 2013) (citations omitted). The General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation, guide classification decisions under the HTSUS. *Id.* at 1266. The court applies the GRIs in numerical order and only continues to a subsequent GRI if "proper classification of the imported goods cannot be accomplished by reference to a preceding GRI." *Id.* GRI 1 requires classification to "be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS.[3] The HTSUS chapter and section notes are considered binding statutory law. *See BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). Unlike the section and chapter notes, the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System are not legally binding or dispositive, but they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions. *Id.* Once the correct heading is identified, the court determines which subheading correctly identifies the merchandise in question. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (citing GRI 1). The primary dispute here is at the heading (GRI 1) level.

### B. Competing Tariff Provisions

Customs classified the NOx Sensor Probe under subheading 9027.10.20, HTSUS. The relevant portions of Chapter 90 of the HTSUS read:

[3] Generally, headings do not overlap. They are intended to cover different articles, and most conflicts can be resolved under GRI 1. *See Telebrands Corp.*, 865 F. Supp. 2d at 1279–80.

| | |
|---|---|
| Heading 9027 | Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof: |
| 9027.10 | Gas or smoke analysis apparatus: |
| 9027.10.20 | Electrical |

Continental contends that the NOx Sensor Probe should enter free of charge under subheading 9026.80.20, HTSUS, as:

| | |
|---|---|
| Heading 9026 | Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032; parts and accessories thereof: |
| 9026.80 | Other instruments and apparatus: |
| 9026.80.20 | Electrical |

## C. Tariff Classification of the NOx Sensor Probe

### 1. *Application of GRI, HTSUS to determine the correct heading*

The controlling issue in this case is whether the NOx Sensor Probe is properly classified under Heading 9027, HTSUS, as "[i]nstruments and apparatus for physical or chemical analysis" or under Heading 9026, HTSUS, as "instruments and apparatus for measuring or checking."[4] The government asserts that the NOx Sensor Probe was properly classified under Heading 9027, HTSUS, because the subject merchandise is an instrument or apparatus that performs the functions of "chemical analysis." Def. Br. at 23. The parties argue that explanatory notes EN 90.26 and EN 90.27 should guide the court's analysis here. First, the government argues that the NOx Sensor Probe cannot be classified under Heading 9026 because EN 90.26,[5]

[4] The court's own review found no other possible candidate headings. *See Jarvis Clark*, 733 F.2d at 874 (holding that this court has an independent obligation to determine the proper tariff classification).

[5] *Apart from instruments or apparatus more specifically covered by other headings of the Nomenclature, such as*:

(a) Pressure-reducing valves and thermostatically controlled valves (heading 84.81)
(b) Anemometers (wind gauges) and hydrological level gauges (heading 90.15)
(c) Thermometers, pyrometers, barometers, hygrometers and psychrometers (heading 90.25)
(d) *Instruments and apparatus for physical or chemical analysis, etc. (90.27)*,
this heading covers instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other process variables of liquids or gases.

EN 90.26, HTSUS (emphasis added).

consistent with the statute, counsels an exclusion for "instruments or apparatus for physical or chemical analysis, etc." EN 90.26, HTSUS.[6] Second, the government argues that the NOx Sensor Probe was properly classified under Heading 9027, HTSUS, because the design and function of the NOx Sensor Probe mirrors the language of EN 90.27(8)(viii) by performing "chemical analysis" through an "[e]lectrochemical reaction in cells with solid (especially zirconium oxide for oxygen analysis) or liquid electrolytes." EN 90.27, HTSUS. Continental denies that the NOx Sensor Probe performs "chemical analysis" and asserts instead that the subject merchandise is an instrument for "measuring or checking." Pl. Br. at 8–9. Thus, if the NOx Sensor Probe conducts "chemical analysis," then the subject merchandise was properly classified under Heading 9027 and not Heading 9026, as claimed by the Plaintiff.

2. *Common meaning of "chemical analysis"*

Unless there is evidence of "contrary legislative intent, HTSUS terms are construed according to their common and commercial meanings." *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). The common meaning of a tariff term is a question of law to be decided by the court, while the determination of whether a particular item fits within that meaning is a question of fact. *E.M. Chems. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990) (citation omitted).

The HTSUS includes no defined term for "chemical analysis" or "analysis" in Headings 9027 and 9026. When a tariff term is not clearly defined by either the HTSUS or legislative history, as here, the court "may consult lexicographic and scientific authorities, dictionaries, and other reliable information" or may rely on its "own understanding." *See Quaker Pet Grp, LLC v. United States*, 43 CIT ___, ___, 374 F. Supp. 3d 1375, 1378 (2019) (citation omitted). Where a tariff term has various definitions or meanings and has broad and narrow interpretations, the court must determine which definition best expresses the congressional intent. *See Richards Med. Co. v. United States*, 910 F.2d 828, 830 (Fed. Cir. 1990).

Common dictionary definitions divide the term "analysis" into two categories. The first is qualitative analysis. *See* Robert Denton Braun, *Qualitative Chemical Analysis*, Encyc. Britannica (Aug. 8, 2022), https://www.britannica.com/science/qualitative-chemical-analysis

[6] The Plaintiff does not address the exclusionary language of EN 90.26. *See* Pl. Br. at 8–9.

(defining "qualitative chemical analysis" as "the *identification* of elements or groping of elements present in a sample" (emphasis added)). The second is quantitative analysis. *See Qualitative Analysis*, Merriam-Webster Online Dictionary, https://www.merriamwebster.com/dictionary/qualitative%20analysis (last visited Aug. 9, 2022) (defining "quantitative analysis" as "chemical analysis designed to *determine the amounts or portions* of the components of a substance" (emphasis added)); *see also* Robert Denton Braun, *Quantitative Chemical Analysis*, Encyc. Britannica (Aug. 1, 2022), https://www.britannica.com/science/quantitiativechemical-analysis (defining "quantitative chemical analysis" as "the determination of the amount or percentage of one or more constituents of a sample.").

Additional common dictionary definitions of "chemical analysis" contain elements of either one or both categorical approaches. *See* Robert Denton Braun, *Chemical Analysis*, Encyc. Britannica (Aug. 1, 2022), https://www.britannica.com/science/chemical-analysis (defining "chemical analysis" as a pure qualitative "determination of the physical properties or chemical composition of samples of matter"); *see also Analysis*, Oxford Eng. Dictionary (June 2022), https://www.oed.com/view/Entry/7046? (defining analysis under the specialized use for chemistry as mixed qualitative and quantitative "*identification and measurement* (by chemical or instrumental means) of the constituents of a substance, specimen, etc., or of a particular component (e.g. a contaminant) within it" (emphasis added)). Continental does not proffer a definition of "chemical analysis" but instead asks the court to consider the definition of "analyze" as: "a detailed examination of anything complex in order to understand its nature or to determine its essential features: a thorough study." Pl. Br. at 14; *see Analyze*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/analyze (last visited Aug. 9, 2022) (further defining "analyze" to mean "to study or determine the nature and relationship of the parts of (something) by analysis").

The predecessor to the U.S. Court of International Trade, the U.S. Customs Court, endorsed elements of such a multi-categorical approach to define "chemical analysis." Customs Court decisions have instructive value to the extent that they are not inconsistent with later statutory law. Relevant to our inquiry here the Customs Court determined that the common meaning of the term "chemical analysis" applies to an instrument or analysis if it:

> Determines one or more ingredients of a substance either as to *kind or amount*; or if it performs a detailed examination of a complex chemical substance for the purpose of enabling one to

> understand its nature or to determine an essential feature; or if it determines what elements are present in a chemical substance.

*Burrows Equip. Co. v. United States*, 300 F. Supp. 455, 458 (Cust. Ct. 1969) (emphasis added).[7] Where an instrument or apparatus' function meets elements of both quantitative chemical analysis and qualitative chemical analysis by determining both the kind *and* amount of one or more ingredients of a substance—it falls squarely within the common meaning of the term "chemical analysis." *See id.*

Here, the subject merchandise meets both categorical prongs of chemical analysis. First, the NOx Sensor Probe can determine one of more kind of ingredients of a substance by identifying NOx within the exhaust gas. The exhaust gas is comprised of many different chemical substances: O2, NOx, nitrogen, water vapor, carbon dioxide, carbon monoxide and hydrocarbons. Def. Facts. ¶ 12. The NOx Sensor Probe's ability to separate and identify NOx molecules from within a mixed gaseous substance demonstrates its qualitative chemical analytical capabilities. Continental argues that the NOx Sensor Probe is not an analytical instrument because it can sense only a combined concentration of NOx, and that it cannot accurately determine the individual components of nitric oxide ("NO"), nitrogen dioxide ("NO2"), or ammonia. Pl. Reply Br. at 7. The determination of every individual component of a substance, however, is not necessary to meet the common definition of an instrument or apparatus for chemical analysis. The identification of one or more ingredients in a mixed chemical substance is sufficient. *See Burrows Equip. Co.*, 300 F. Supp. at 458. The NOx Sensor Probe's ability to separate NOx from the combined elements of the exhaust gas meets the qualitative definition of chemical analysis.

Second, the NOx Sensor Probe can quantify the amount of NOx in the exhaust gas, thereby producing an electrical signal proportionate to the concentration. The primary purpose of the NOx Sensor Probe is to detect and determine the concentration of NOx in the exhaust gas to ensure that the selective catalytic reduction system operates prop-

[7] The *Burrows* Court found that the vitascope, an instrument for determining the germinating capacity of seeds, was properly classified as an instrument or apparatus for "chemical analysis" under Tariff Schedule of the United States ("TSUS") item 711.88. *Burrows Equip. Co.*, 300 F. Supp. at 455–56. Schedule 7, Part 2, Subpart D: Item 711.88 of the TSUS examined in *Burrows* contained similar language to Subheading 9027.10.20 of the HTSUS. *Compare* Item 711.88, TSUS ("Polarimeters, refractometers, spectrometers, gas analysis apparatus and other instruments or apparatus for physical or chemical analysis . . . all the foregoing, and parts thereof: 711.88 Other."), *with* 9027.10.20, HTSUS ("Instruments and apparatus for physical or chemical analysis (for example, ... gas or smoke analysis apparatus) ...: Gas or smoke analysis apparatus ...: Electrical.").

erly. *See* Pl. Resp. Facts ¶¶ 12, 14. Specifically, after the NOx Sensor Probe identifies the presence of NOx molecules, it disassociates the oxygen atoms to calculate the concentration of NOx in the exhaust gas and sends a corresponding electrical signal. *See* Pl. Facts ¶ 10. The NOx Sensor Probe accordingly meets the quantitative definition of "chemical analysis" because through an electrochemical process it generates information on the concentration or amount of NOx within the exhaust gas. *See Burrows Equip. Co.*, 300 F. Supp. at 458.

Continental argues that the NOx Sensor Probe is a measurement device, and that the concentration of NOx is the measurement of a "process variable." Pl. Reply Br. at 15. Further, Continental argues that according to EN 90.26, Heading 9026 "covers instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other process variables of liquids and gases." EN 90.26, HTSUS; Pl. Reply Br. at 11. The HTSUS includes no defined term for "process variable." Continental, however, asks the court to consider the definition of a "process" variable to include a substance's "chemical composition" or concentration. *See McGraw-Hill Dictionary of Scientific and Technical Terms*, 1677 (6th ed. 2003). Continental's interpretation, however, fails because it does not address the language of the explanatory notes which excludes "[i]nstruments and apparatus for physical or chemical analysis, etc. (heading 90.27)" from Heading 9026. EN 90.26, HTSUS. Supported by EN 90.26 and consistent with Heading 9027, the NOx Sensor Probe is appropriately classified as an instrument for chemical analysis because of its ability to identify NOx and determine its concentration from within exhaust gas through an electrochemical reaction. Further, whatever the dictionary definition of process variable, if it is determined via a chemical analysis, it does not fit within Heading 9026. Thus, Continental's argument fails, and the court finds that the NOx Sensor Probe conducts chemical analysis under both categorical approaches to the common understanding of the term.

3. *Application of Explanatory Note 90.27*

For its final argument Continental attempts to rebut the government's assertion that EN 90.27(8) requires the subject merchandise to be classified under Heading 9027. *See* Pl. Reply Br. at 16. The relevant language of EN 90.27(8) states:

> (8) Gas or smoke analysis apparatus. These are used to analyze combustible gases or combustion by-products (burnt gases) in coke ovens, gas producers, blast furnaces, *etc., in particular*, for determining their content of carbon dioxide, carbon monoxide, oxygen, hydrogen, nitrogen or hydrocarbons. Electrical gas or

> smoke analysis apparatus are mainly for determining and measuring the content of the following gases: carbon dioxide, carbon monoxide and hydrogen, oxygen, hydrogen, sulphur dioxide, ammonia.

(emphasis added).

Continental contends that the list of combustible gases under EN 90.27(8) is exhaustive because the EN language does not include the conjunction "or." Pl. Reply Br. at 16. Continental argues that because NOx is not included on the list of combustible gases, the NOx Sensor Probes must be excluded from Heading 9027. *Id.* Continental's position fails for two reasons.

First, Continental misunderstands the role of the ENs. They are explanatory in nature and while they are not legally binding, they are "persuasive" and are "generally indicative" of the proper interpretation of the tariff provision. *Lemans Corp. v. United States*, 66 F.3d 1311, 1316 (Fed. Cir. 2011). Generally, definitions in the ENs are more persuasive than dictionary definitions, but absent a definition of "analysis" in the relevant ENs the court's reliance on dictionary definitions here is appropriate. *See Schlumberger Tech. Corp. v. United States*, 91 F. Supp. 3d 1304, 1312 (Fed. Cir. 2015); *supra* Part C, 2. Explanatory Note 90.27(8) lists numerous examples of the types of gases that a "gas or smoke analysis apparatus" may analyze. Absent limiting language in Heading 9027 or EN 90.27, Continental's assertion that this list is exhaustive fails.

Here, Continental ignores the expansive language of EN 90.27(8) "etc.," and "in particular" which describe the list combustible gases. This language indicates that the list of gases is not a closed or enumerated list, but rather several examples of combustible gases. Heading 9027 further contains no restriction as to the type of gases that a "gas or smoke analysis apparatus" can analyze. Thus, the court concludes that the gases listed under EN 90.27(8) are merely examples of the most common types of gases that gas analysis apparatus could analyze at the time the EN was drafted.

Second, Continental fails to address the language of EN 90.27(8)(viii). EN 90.27(8)(viii) explains that Heading 9027 includes instruments and apparatus for gas and smoke analysis that conduct an "[e]lectrochemical reaction in cells with solid (especially zirconium oxide for oxygen analysis) or liquid electrolytes." EN 90.27(8)(viii), HTSUS. Here, the NOx Sensor Probe conducts chemical analysis by determining the concentration of NOx in the exhaust gas. In particular, the NOx Sensor Probe generates an electrical signal proportional to the concentration of NOx in the exhaust gas. Similar to oxygen

analysis using zirconium oxide, the NOx Sensor Probe determines the concentration through an electrochemical reaction by heating up oxygen molecules to produce electrically charged oxygen ions and pumping those ions through a solid zirconia electrolyte. *See* Pl. Resp. Facts ¶¶ 8–12. The description of instruments and apparatus covered under EN 90.27(8)(viii) closely aligns with the design and function of the NOx Sensor Probe.

Accordingly, the court finds that Customs properly classified the NOx Sensor Probes under Heading 9027, HTSUS, because they perform chemical analysis.

4. *Application of GRI 6, HTSUS to determine the correct subheading*

Having determined that NOx Sensor Probe is properly classified under Heading 9027, HTSUS, the court next addresses which subheading best encompasses the merchandise. "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheadings notes and, mutatis mutandis, to the [GRIs], on the understanding that only subheadings at the same level are comparable." GRI 6, HTSUS. Within Heading 9027, HTSUS, the government's proffered subheading 9027.10.20 describes "[g]as or smoke analysis apparatus ...: Electrical." This subheading most appropriately describes the subject merchandise.

## IV. CONCLUSION

For the foregoing reasons, the court grants the government's cross-motion for summary judgment, denies Plaintiff's motion for summary judgment, and holds that the government properly classified the subject merchandise under subheading 9027.10.20, HTSUS. Judgment will be entered accordingly.

Dated: August 12, 2022
New York, New York

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

Slip Op. 22–95

SUZANO S.A., Plaintiff, v. UNITED STATES, Defendant, and DOMTAR CORPORATION, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00069
***PUBLIC VERSION***

[The court grants Plaintiff's motion for judgment on the agency record and remands to Commerce for further proceedings consistent with this opinion.]

Dated: August 16, 2022

*Craig A. Lewis*, Hogan Lovells US LLP, of Washington, D.C., argued for Plaintiff Suzano S.A., Ltd. With him on the briefs was *Nicholas W. Laneville*.

*Antonia R. Soares*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Kirrin Hough*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Daniel L. Schneiderman*, King & Spalding, LLP, of Washington, D.C., argued for Defendant-Intervenor Domtar Corporation. With him on the brief were *Stephen J. Orava*.

## *OPINION AND ORDER*

**Katzmann, Judge:**

To what extent does 19 U.S.C. § 1677b(f)(1)(A) give the U.S. Department of Commerce ("Commerce") license to rely upon (or not) the records of a producer or exporter where those records comply with one but not both of the statutory requirements for costs calculation? Does reliance on an audited source preclude reliance on the producer or exporter's unaudited records? What evidence is sufficient basis to conclude that an expense is not extraordinary? These are some of the questions raised by Suzano S.A.'s (formerly known as Suzano Papel e Celulose S.A.) ("Suzano") appeal of the final results of Commerce's 2018–2019 administrative review of the antidumping duty order on uncoated paper from Brazil. Certain Uncoated Paper From Brazil: Final Results of Antidumping Duty Administrative Review; 2018–2019, 86 Fed. Reg. 7,254 (Dep't Commerce, Jan. 27, 2021) (P.R. 170) ("Final Results").

Suzano, a fully-integrated paper manufacturer located in Brazil, brings this action against the United States ("the Government") to challenge Commerce's calculation of its cost of production. Specifically, Suzano argues that Commerce erred by failing to exclude certain of its derivative expenses from the cost of production calculation as both (1) investment-related and (2) extraordinary. The court con-

cludes that Commerce's decision to include the derivative expenses in Suzano's cost of production is unsupported by substantial evidence and remands for further proceedings consistent with this opinion.

## BACKGROUND

### *I. Statutory Framework*

Under the Tariff Act of 1930, Commerce is authorized to levy antidumping duties ("ADs") on foreign goods sold in the United States for less than their fair market value. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012). A product is sold at less than its fair market value when its export price is lower than its normal value. *Saha Thai Steel Pipe (Pub.) Co., Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011); 19 U.S.C. § 1677b(a). Where such sales are identified, Commerce imposes ADs equal to "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018) (quoting 19 U.S.C. § 1673), aff'd, 779 F. App'x 744 (Fed. Cir. 2019); *see* 19 U.S.C. § 1677(35)(A). Normal value is, broadly speaking, the price at which the subject merchandise is sold in the exporting country. 19 U.S.C. § 1677b(a)(1)(B)(i).

The calculation of a product's normal value is governed by 19 U.S.C. § 1677b, which sets out various mandatory and permissible conditional adjustments. One such adjustment is described in 19 U.S.C. § 1677b(b)(1), which provides that:

> If the administering authority determines that sales made at less than the cost of production—
>
> (A) have been made within an extended period of time in substantial quantities, and
>
> (B) were not at prices which permit recovery of all costs within a reasonable period of time,
>
> such sales may be disregarded in the determination of normal value. Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.

Cost of production ("COP") is in turn described by 19 U.S.C. § 1677b(b)(3), which provides that COP is equal to the sum of (1) the cost of "materials and . . . fabrication or other processing," (2) "selling,

general, and administrative expenses," and (3) "the cost of all containers and coverings" required for sale and shipment. 19 U.S.C. § 1677b(b)(3)(A)–(C).

Relevant here, the statute provides the following additional rules for Commerce's calculation of COP:

> Costs 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. The administering authority shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

19 U.S.C. § 1677b(f)(1)(A).

### *II. Past Practice*

Beyond the specific requirements of the statute, Commerce's practice has been to exclude both "investment-related" and "extraordinary" expenses from its calculation of COP. With respect to investment-related expenses, Commerce has stated that its practice is "to exclude . . . investment-related gains or losses from the calculation of COP" while nevertheless "includ[ing] gains and losses attributable to derivative transactions related to a company's overall cash management in the calculation of financial expenses." Mem. from J. Maeder to J. Kessler re Phosphor Copper from the Republic of Korea: Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Rev.; 2016–2018 at 23 (Dep't Commerce Dec. 13, 2019) (on file with the Int'l Trade Admin.) (citations omitted) ("*Phosphor Copper from Korea*"); *see also AG der Dillinger Hüttenwerke v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1338, 1344 (2021) (noting Commerce's "practice [is] to exclude investment-related gains and losses from the calculation of the cost of production because it considers them a separate profit-making activity unrelated to a company's normal operations") (citation omitted).

With respect to extraordinary expenses, Commerce has stated that it "will exclude expenses deemed 'extraordinary' if they pertain to an event which is 'unusual in nature and infrequent in occurrence.'"

Mem. from J. Maeder to G. Taverman re Issues and Decision Mem. for the Final Aff. Determ. in the Less-Than-Fair-Value Investigation of Carbon and Alloy Steel Wire Rod from Spain at 16 (Dep't Commerce Mar. 19, 2018) (on file with the Int'l Trade Admin.) (citations omitted) ("*Wire Rod from Spain*"); *see also Hornos Electricos de Venezuela v. United States*, 27 CIT 1522, 1534 (2003) ("To be considered an 'extraordinary' event giving rise to extraordinary treatment . . . the event must be unusual in nature and infrequent in occurrence.") (quoting *Floral Trade Council v. United States*, 16 CIT 1014, 1016 (1992)). An event is "unusual in nature" if it is "highly abnormal, and unrelated or incidentally related to the ordinary and typical activities of the entity, in light of the entity's environment." *Wire Rod from Spain* at 16. Separately, "an event is 'infrequent in occurrence' if it is not reasonably expected to recur in the foreseeable future." *Id.*

### *III. Factual Background*

On March 3, 2016, Commerce issued an AD order covering certain uncoated paper from Brazil. *Certain Uncoated Paper from Australia, Brazil, Indonesia, the People's Republic of China, and Portugal: Am. Final Aff. Antidumping Determ. for Brazil and Indonesia and Antidumping Duty Orders*, 81 Fed. Reg. 11,174 (Dep't Commerce Mar. 3, 2016) ("AD Order"). Suzano was one of two Brazilian producers specifically identified in the order. *Id.*; Pl.'s Corrected Mem. of Pts. and Auths. in Supp. of Rule 56.2 Mot. for J. on the Agency R. at 5, Nov. 12, 2021, ECF No. 36 ("Pl.'s Br."). On May 29, 2019, Commerce initiated its third administrative review of the AD Order covering the period from March 1, 2018, through February 28, 2019. *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 84 Fed. Reg. 24,747 (Dep't Commerce May 29, 2019) (P.R. 12).

In March 2018, the first month of the review period, Suzano announced its intention to acquire Fibria Celulose S.A. ("Fibria"), the "world's largest producer of eucalyptus pulp." Pl.'s Br. at 2; *see* Letter from Steptoe & Johnson to the U.S. Dep't of Commerce re Antidumping Duty Investigation of Certain Uncoated Paper from Brazil: Suzano's Resp. to Questionnaire for Section A at Ex. A-17 p.1 (July 26, 2019) (P.R. 28, 35–38; C.R. 2, 31–34) ("*Initial Section A Resp.*"). In January 2019, shortly before the close of the review period, Suzano acquired a 100% ownership stake in Fibria, and in April 2019, after the close of the review period, the acquisition received formal shareholder approval and the two companies merged. *Id.* Throughout 2018, Suzano secured numerous loans and credit facilities in anticipation of its acquisition of Fibria. *Id.* at 8. Relevant here, Suzano also acquired numerous derivatives in the months leading up to the acquisition to

protect itself against adverse exchange rate fluctuations. *See* Letter from Steptoe & Johnson LLP to Sec'y Commerce, re Antidumping Duty Investigation of Certain Uncoated Paper from Brazil: Suzano's Resp. to Questionnaire for Section D at D-31, D-38–39, and Exs. D-19 & D-19a (Aug. 21, 2019) (P.R. 79–80; C.R. 154–156) ("*Initial Section D Resp.*").

On July 1, 2019, Commerce issued an initial questionnaire to Suzano in which it requested that Suzano calculate its financial expense ratio and submit its supporting financial records. Letter from Matthew Renkey, Acting Program Manager, Off. V, AD/CVD Operations, to Steptoe & Johnson LLP at D-15 (Dep't Commerce July 1, 2019) (P.R. 13) ("*Initial Questionnaire*"). A producer's financial expense ratio is calculated by dividing the producer's full-year net financial expenses by the producer's full-year cost of goods sold. *See Union Steel Mfg. Co. v. United States*, 36 CIT 717, 722 n.2 (2012). Commerce then uses the producer's financial expense ratio to calculate its COP, which in turn allows Commerce to accurately determine an antidumping margin. *Initial Questionnaire* at D-15.

On August 21, 2019, Suzano calculated its combined financial expense ratio based on consolidated 2018 financial statements for both Suzano and Fibria. *Initial Section D Resp.* at D–30–31. Suzano's calculation included its derivative losses in the numerator of the financial expense ratio, and combined the cost of sales of both companies in the denominator, resulting in a financial expense ratio of [[ ]] percent. *Id.* at Ex. D-19 p.3.

On February 14, 2020, Commerce instructed Suzano to recalculate its financial expense ratio based on the audited 2018 consolidated financial statements of Suzano alone, in order to reflect the required highest level of consolidation. Letter from Robert Galantucci, Program Manager, Off. V, Enforcement & Compliance, to Steptoe & Johnson LLP re Suppl. Questionnaire for Section D at 3 (Dep't Commerce Feb. 14, 2020) (P.R. 117; C.R. 199) ("*Suppl. Section D Questionnaire*"). In response, on February 26, 2020, Suzano submitted two revised calculations of its financial expense ratio and requested that Commerce adopt the latter calculation. Letter from Steptoe & Johnson LLP to Sec'y Commerce, re Antidumping Duty Investigation of Certain Uncoated Paper from Brazil: Suzano's Suppl. Section D Questionnaire Resp. at Ex. SD-2 (Feb. 26, 2020) (P.R. 121; C.R. 221) ("*Suppl. Section D Resp.*"). The first calculation relied solely on the audited 2018 consolidated financial statements, resulting in a financial expense ratio of [[ ]] percent. *Suppl. Section D Resp.* at Ex. SD-2. The second calculation relied on both the audited 2018 consolidated financial statements and Suzano's unaudited quarterly reports. *Id.*;

*see also Initial Section D Resp.* at Exs. 19, 19a. Since the unaudited quarterly reports explicitly associate Suzano's derivative losses with the Fibria acquisition, thus excluding the losses from normal operations, this second calculation resulted in a financial expense ratio of [[ ]] percent. *Suppl. Section D Resp.* at Ex. SD-2.

On March 27, 2020, Commerce published the preliminary results of its review. *Certain Uncoated Paper from Brazil*, 85 Fed. Reg. 18,550 (Dep't Commerce, April 2, 2020) ("*Preliminary Results*"). In the *Preliminary Results*, Commerce relied upon the first of Suzano's proposed financial expense ratio calculations from its revised February 26, 2020 response. Mem. from J. Maeder to J. Kessler re Decision Mem. for the Prelim. Results of the Admin. Review of the Antidumping Duty Order: Certain Uncoated Paper from Brazil; 2018–2019 at 2 (Dep't Commerce Mar. 27, 2020) (P.R. 131) ("PDM"). On January 27, 2021, Commerce published the final results of its administrative review. Final Results. In its Final Results, Commerce again relied upon Suzano's first revised expense ratio, noting that it was obligated to "rely on the findings of Suzano's auditors and not exclude a portion of Suzano's financial expenses from [its] calculations." Mem. from J. Maeder to J. Kessler re Issues and Decision Mem. for the Final Results of the 2018–2019 Admin. Rev. of the Antidumping Order on Certain Uncoated Paper from Brazil at 5 (Dep't Commerce Jan. 19, 2021) (P.R. 167) ("IDM"). Commerce thus declined to use of Suzano's second revised expense ratio calculated using both the audited 2018 consolidated financial statements and Suzano's unaudited quarterly reports. *Id.* Commerce similarly declined to exclude the derivative losses, or to include Fibria's cost of sales in the ratio's denominator. *Id.* Consequently, Commerce held Suzano to a financial expense ratio of [[ ]] percent and calculated a weighted-average dumping margin of 32.31%. *Id.*; Final Results at 7,254.

### *IV. Procedural History*

On February 24, 2021, Suzano initiated this appeal to contest Commerce's Final Results. Summons, ECF No. 1; Compl., Mar. 3, 2021, ECF No. 9. On March 23, 2021, Domtar Corporation ("Domtar"), a domestic producer of products similar to the subject merchandise, joined the action as a defendant-intervenor. Consent Mot. to Intervene as a Matter of Right, Mar. 22, 2021, ECF No. 14; Order, ECF No. 18. On July 16, 2021, Suzano filed a motion for judgment on the agency record, arguing that Commerce's failure to exclude certain of its derivative losses from its calculation of the financial expense ratio was unsupported by substantial evidence and otherwise not in accordance with law. Pl.'s Br. at 1, 8–10. On Septem-

ber 16, 2021, the Government filed its response in opposition to Suzano's motion. Def.'s Resp. in Opp. to Pl.'s Mot. for J. on the Agency R., ECF No. 26 ("Def.'s Br."). On September 29, 2021, Domtar likewise submitted a response in opposition. Def.-Inter.'s Resp. in Opp. to Pl.'s Mot. For J. on the Agency R., Sept. 29, 2021, ECF No. 27 ("Def.-Inter.'s Br."). Suzano replied on November 1, 2021. Reply of Suzano S.A. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 31. Oral argument was held on April 26, 2022, in advance of which the parties submitted written responses to questions issued by the court. Oral Arg., ECF No. 52; Pl.'s Resps. to Ct.'s Qs. in Adv. of Oral Arg., Apr. 21, 2022, ECF No. 48 ("Pl.'s OAQ Resps."); Def.-Inter.'s As. to Qs., Apr. 21, 2022, ECF No. 49 ("Def. Inter.'s OAQ Resps."); Def.'s Resps. to the Ct.'s Oral Arg. Qs., Apr. 21, 2022, ECF No. 50 ("Def.'s OAQ Resps."). Following argument, on May 3, 2022, the parties each submitted a supplemental brief. Def.-Inter.'s Post. Arg. Submission, ECF No. 53; Pl.'s Post-Oral Arg. Suppl. Submission, ECF No. 54; Def.'s Post-Arg. Br., ECF No. 55.

## JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over any "final determination . . . by the administering authority or the Commission under [19 U.S.C. § 1675]" pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). As has been noted, at issue here is the appeal of Commerce's final determination in the third administrative review of the AD order on certain uncoated paper from Brazil, issued under 19 U.S.C. § 1675(a)(1). Final Results. Such appeal is within the jurisdiction of the court.

In assessing appeals of final AD determinations, the Court shall hold unlawful any determination by Commerce that is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). A reasonable mind requires a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). If a determination is not supported by substantial evidence, the court will hold the determination unlawful. *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984).

To support its determination by substantial evidence, Commerce "must take into account whatever in the record fairly detracts from" the weight of the evidence. *CS Wind Vietnam Co. v. United States*, 832

F.3d 1367, 1373 (Fed. Cir. 2016) (quoting *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997)). This includes "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera*, 340 U.S. at 487. A determination will be upheld if it is "reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion," so long as that evidence is adequately considered. *Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 333 (2002) (citation omitted). Conversely, "[a]n administrative determination is inadequate when the agency 'entirely failed to consider an important aspect of the problem.'" *Diamond Sawblades Mfrs.' Coal. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1368, 1375 (2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Although Commerce is not required to address all the evidence submitted, the court has previously held that Commerce must address any arguments made by the parties that are material to Commerce's determination. *Itochu Bldg. Prods., Co., Inc. v. United States*, 40 CIT__, __, 163 F. Supp. 3d 1330, 1337 (2016). An argument is material if it is a "focal point" of a party's argument or if a final determination cannot be "sufficiently reviewed without specific discussion of the issue." *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177 (1988).

## DISCUSSION

The primary question raised by this case is whether Suzano's audited 2018 consolidated financial statements constitute substantial evidence that Suzano's derivative expenses were neither investment-related nor extraordinary. Suzano claims that they do not, arguing first that its unaudited quarterly reports provide substantial evidence that the derivative expenses were investment-related, and second that Commerce's failure to consider evidence of the derivative expenses' extraordinary nature rendered its administrative review determination unsupported. The court concludes that by failing to adequately address the record evidence, Commerce did not support its determination with substantial evidence. Accordingly, the Final Results are remanded.

### *I. Commerce's Determination that the Derivative Expenses were Not Investment-Related was Unsupported by Substantial Evidence.*

In its Final Results, Commerce treated Suzano's derivative losses as financial expenses rather than investment-related expenses incurred due to the Fibria acquisition. IDM at 4–5. In so doing, Com-

merce "rel[ied] on the findings of Suzano's auditors," whom it concluded categorized the derivative losses as financial expenses broadly. *Id.* at 5 (citing *Initial Section A Resp.* at Ex. A17). While Commerce acknowledged its practice of "exclud[ing] . . . investment-related gains or losses from the calculation of [COP]," it described Suzano's derivative expenses as "capital management mechanisms" distinct from the separate profit-making investment activity at issue in *Phosphor Copper* and similar investigations. *Id.*

Suzano argues that Commerce erred by concluding the contested derivative expenses were "part of the 'overall cash management' and 'normal business' of Suzano" rather than excludable investment-related expenses. Pl.'s Br. at 15. In particular, Suzano contends that Commerce impermissibly disregarded record evidence "demonstrating the investment-related nature of the expenses." *Id.* The Government and Domtar disagree, alleging that Commerce properly included the expenses in Suzano's financial expense ratio upon adopting the auditors' characterization in Suzano's GAAP-compliant audited financial statements. Def.'s Br. at 2; Def.-Inter.'s Br. at 7.

Because Commerce failed to adequately consider Suzano's unaudited quarterly reports, its determination that Suzano's derivative losses were not investment-related is unsupported by substantial evidence. As noted above, Commerce is obligated to consider anything in the record that reasonably detracts from the substantiality of the evidence supporting its determination. *CS Wind Vietnam*, 832 F.3d at 1373. Failure to do so renders Commerce's final determination unsupported by substantial evidence. *Id.*, *see also Diamond Sawblades*, 219 F. Supp. 3d at 1375. In this case, Suzano's quarterly reports explicitly separated the incurred expenses related to the Fibria acquisition, including derivative losses. *See Initial Section D. Resp.* at D-31, Ex. D-19a. Commerce's consideration of these reports, however, was limited to the following two sentences:

> . . . Suzano bases its arguments on its own quarterly earnings releases to show that certain derivatives were related to the cash requirements of the acquisition of Fibria. We agree with the petitioners that we should rely on the findings of Suzano's auditors and not exclude a portion of Suzano's financial expenses from our calculations.

IDM at 5. This brief dismissal does not amount to "consideration" of the record evidence suggesting that the contested derivative losses were incurred in the course of the Fibria acquisition and were therefore investment-related.

While "there is no statutory requirement that . . . [Commerce] explicitly discuss every piece of record evidence that is put before it," Def.'s Br. at 19 (quoting *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479 (2000)), Commerce is nevertheless required to discuss "issues material to [its] determination," *Itochu*, 164 F. Supp. 3d at 1338 (quoting *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005)). This obligation ensures, in part, that Commerce's treatment of material issues is reviewable. *See, e.g.*, *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 43) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). Here, Commerce's decision to rely on Suzano's audited financial statements while disregarding its unaudited quarterly reports materially affected Suzano's calculated COP, and thus the applicable AD margin, by altering the applicable financial expense ratio. IDM at 6. Commerce was therefore obligated to explicitly discuss that decision, and failed to satisfy its obligation.

Although the Government contends that Commerce "considered the quarterly earnings reports, [but] determined that section 1677b(f)(1)(A) required it to 'rely on the findings of Suzano's auditors'" because only the latter documents were GAAP-compliant, such a determination is not present in the text of the IDM and therefore cannot be reviewed. Def.'s Br. at 18; IDM at 5; *see Itochu*, 163 F. Supp. 3d at 1337 ("Further, the Court may not accept 'post hoc rationalizations for agency action' and may only sustain the agency's decision 'on the same basis articulated in the order by the agency itself.'") (quoting *Burlington Truck Lines*, 371 U.S. at 168–69). Even if it were, it misconstrues the statutory requirements. "[S]tatute requires [a producer's] records be used if they are kept in accordance with [GAAP] *and* reasonably reflect the costs associated with the production and sale of the merchandise," not if they are GAAP-compliant alone. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1380 (Fed. Cir. 2001) (emphasis added). Indeed, even if a specific set of records are GAAP-compliant, Commerce may still "reject the records if accepting them would distort the company's true costs." *Id.* at 1377 (citation omitted). Here, Commerce made no determination as to the representativeness (or not) of the audited financial statements when choosing to rely on them to the exclusion of Suzano's quarterly reports. Thus, to the extent Commerce did attempt to explain its exclusive reliance on Suzano's audited financial statements by their compliance with Brazilian GAAP, such explanation is insufficient.

Furthermore, as Suzano notes, there is no indication that Commerce's reliance on the "findings of Suzano's auditors" precluded Commerce from also considering the unaudited quarterly reports. Pl.'s Reply at 12–13. In fact, 19 U.S.C. § 1677b(f)(1)(A) requires Commerce to "consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer." Here, the evidence "made available by the exporter or producer" includes the quarterly reports — documents that were prepared by Suzano in the course of the review period and directly address the allocation of costs. Nor are the two documents in opposition such that consideration of both would be impossible: rather, the audited financial statements include an explanatory note indicating that over half of Suzano's derivative expenses were directly associated with the Fibria acquisition, and not Suzano's cash management. *Compare Initial Section A Resp.* at Ex. A-17 p.61 *with Initial Section D Resp.* at Ex. D-19a p.11.

Accordingly, because Commerce did not explain its material decision to rely on Suzano's audited financial statements while disregarding its quarterly reports, and because any explanation given fails to satisfy Commerce's statutory obligations, Commerce's determination that the contested derivative losses were not investment related must be remanded for further explanation and consideration of the record evidence.

### *II. Commerce's Determination that the Derivative Expenses were Not Extraordinary was Unsupported by Substantial Evidence.*

Addressing Suzano's argument that its derivative losses were extraordinary and thus excludable from the financial ratio calculation, Commerce stated:

> [W]e disagree with Suzano's claim that these derivative expenses are extraordinary and stem from an isolated event. In [the AD administrative review of Certain Orange Juice from Brazil] Commerce did not exclude similar expenses as extraordinary because the respondent's financial statements did not classify the expenses as extraordinary. Here, the auditors who issued an unqualified opinion on Suzano's financial statements did not classify the derivative expenses as extraordinary.

IDM at 5 (citing Mem. from E. Yang to R. Lorentzen re Issues and Decision Mem. for the Antidumping Duty Admin. Rev. on Certain Orange Juice from Brazil – March 1, 2008 through February 28, 2009 at 31–33 (Dep't Commerce Aug. 11, 2010) (on file with the Int'l Trade

Admin.) ("*OJ from Brazil*"). Accordingly, Commerce did not exclude the derivative losses as extraordinary.

Suzano now contends that Commerce erred by concluding the contested derivative expenses were not extraordinary. Pl.'s Br. at 26–27. Suzano argues specifically that (1) the fact that the audited financial statements did not classify the derivative expenses as extraordinary is not dispositive, and (2) the record evidence clearly demonstrates that Suzano's acquisition of Fibria was unusual and would not recur. *Id.* at 29–30. The Government and Domtar disagree, contending that Commerce properly included the expenses in Suzano's financial expense ratio because the audited financial statements do not classify the expenses as extraordinary. Def.'s Br. at 20–23; Def.-Inter.'s Br. at 4.

The court concludes that Commerce has not supported its inclusion of the derivative losses by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. As Suzano notes, "costs that are not categorized as extraordinary on the financial statements are not precluded from being considered unforeseen and extraordinary by [Commerce] in its analysis of costs for exclusion or inclusion in the COP." Pl.'s Br. at 27–28 (quoting Mem. from S. Claeys to D. Spooner re Issues and Decision Mem. for the Antidumping Duty Admin. Rev. on Certain Frozen Warmwater Shrimp from Brazil – Aug. 4, 2004 through Jan. 31, 2006 at 14 (Dep't Commerce Sept. 5, 2007) (on file with the Int'l Trade Admin.) ("*Frozen Shrimp from Brazil*"). Rather, Commerce's determination of whether certain costs must be excluded as extraordinary remains subject to its statutory obligation to employ "a method that reasonably reflects and accurately captures all of the actual costs incurred in producing and selling the product under investigation or review." *Am. Silicon Techs.*, 261 F.3d at 1377 (citing Agreement on Implementation of Article VI of the GATT, 834–35, reprinted in 1994 U.S.C.C.A.N. at 4172); *see also* 19 U.S.C. § 3511(a). Applying this principle, the court has previously upheld findings of extraordinary costs, even where the exporters' financial statements failed to categorize the costs accordingly, where "[b]lind adherence to the accounting methods chosen by respondents would not yield a result properly reflective of costs." *See, e.g., Floral Trade Council of Davis, Cal. v. United States*, 16 CIT 1014, 1017 (1992) (finding that expenses incurred by Colombian flower farmers following unusual and infrequently-occurring floods and viral attacks were properly categorized as extraordinary). Taken alone, the fact that "the auditors who issued an unqualified opinion on Suzano's financial statements did not classify the derivative expenses as extraordinary" is therefore

not a reasonable basis for Commerce's conclusion that the expenses were indeed not extraordinary. IDM at 5.

Nor is the determination relied upon by Commerce, *Certain OJ from Brazil*, analogous to the facts of this case. There, Brazilian exporter Fischer argued that its exchange variation expenses resulting from fluctuations in the exchange rate following the 2008 financial crisis—an event which "both was unforeseen and . . . not reasonably expected to recur"—should properly be categorized as extraordinary. *Certain OJ from Brazil* at 30. Contrary to Commerce's characterization in the Suzano IDM, Commerce rejected Fischer's argument in *Certain OJ from Brazil* because (1) Fischer's exchange variation expenses "occur annually," (2) the expenses were not classified as extraordinary in Fischer's audited financial statements, and (3) "the absolute amount of exchange variation . . . is substantially smaller in this review than in the prior segment." *Id.* at 32. This approach does not amount to Commerce's inclusion of allegedly extraordinary expenses solely "because the respondent's financial statements did not classify the expenses as extraordinary." IDM at 5. Furthermore, while Suzano's derivative losses were not explicitly deemed extraordinary by its audited financial statements, and while Suzano may regularly incur some derivative losses, the losses allegedly tied to the Fibria acquisition are undisputedly *much* larger than previously reported annual losses. *See Initial Section A Resp.* at Ex. A-17. In fact, the derivative expenses allegedly related to the Fibria acquisition were more than one and a half times the sum of Suzano and Fibria's total expenses for the preceding year. *Initial Section D Resp.* at Ex. D-19. *Certain OJ from Brazil* is thus inapposite and does not adequately support Commerce's conclusion that Suzano's derivative losses are unextraordinary.

Furthermore, Commerce failed to address the record evidence supporting Suzano's argument that the derivative losses constitute an extraordinary expense. As previously discussed, Commerce is obligated to discuss "issues material to [its] determination," *Itochu*, 164 F. Supp. 3d at 1338 (quoting *Timken*, 421 F.3d at 1355), and must "must take into account whatever in the record fairly detracts from" its conclusion, *CS Wind Vietnam*, 832 F.3d at 1373 (quoting *Gerald Metals*, 132 F.3d at 720). Here, the record contains evidence linking the derivative expenses to the Fibria acquisition, including the quarterly reports addressed above. *Initial Section D Resp.* Ex. D-19a at p.11. Furthermore, even the audited financial reports relied upon by Commerce note that "the year 2018 was an atypical one for Suzano, given the start of the process that led to the integration with Fibria"

and state that Suzano's "net financial expense[s] stood at R$1.0 billion," for 2018, "up 14.0% from 2017, driv[en] by all the expenses [of] financing the business combination with Fibria." *Id.* at 7, 10, *see also* Pl.'s Br. at 29–30.

Because Commerce did not support its categorization of the contested derivative losses by "such relevant evidence as a reasonable mind might accept as adequate," *Universal Camera*, 340 U.S. at 477, and because it failed to consider the record evidence which reasonably detracted from its conclusion, Commerce's determination that the derivative losses were unextraordinary must be remanded for further explanation and review.

## CONCLUSION

For the reasons stated, it is hereby

**ORDERED** that Suzano's motion for judgment on the agency record is granted; and it is further

**ORDERED** that Commerce's inclusion of Suzano's derivative expenses in its cost of production calculation is remanded to Commerce for further explanation and consideration of the record evidence, and if appropriate, reconsideration of the costs analysis pursuant to 19 U.S.C. § 1677b(f)(1)(A); and it is further

**ORDERED** that Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; and it is further

**ORDERED** that the deadlines provided by USCIT Rule 56.2(h) shall govern thereafter.

Dated: August 16, 2022
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

Slip Op. 22–96

ALL ONE GOD FAITH, INC., D/B/A DR. BRONNER'S MAGIC SOAPS, et al., Plaintiffs, v. UNITED STATES, Defendant, and CP KELCO U.S., INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 20–00164
***PUBLIC VERSION***

[The court grants the United States' motion to dismiss Dr. Bronner's complaint for lack of subject-matter jurisdiction, dismisses GLōB's complaint for lack of subject-matter jurisdiction, and denies plaintiffs' remaining motions for judgment on the agency record.]

Dated: August 18, 2022

*Laura A. Moya* and *Robert Snyder*, Law Offices of Robert W. Snyder, of Irvine, CA, for Plaintiff All One God Faith, Inc., d/b/a Dr. Bronner's Magic Soaps.

*Kyl J. Kirby*, Kyl J. Kirby, Attorney and Counselor at Law, P.C., of Fort Worth, TX, for Consolidated Plaintiffs Ascension Chemicals LLC, UMD Solutions LLC, GLōB Energy Corporation, and Crude Chem Technology LLC.

*Kelly A. Krystyniak*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Tamari J. Lagvilava*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y.

*Matthew J. Clark*, ArentFox Schiff LLP, of Washington, D.C., for Defendant-Intervenor CP Kelco U.S., Inc.

## *OPINION*

**Katzmann, Judge:**

Xanthan gum is a fermented polysaccharide gum used in a variety of industries as a thickening, stabilizing, or emulsifying agent: for example, to increase viscosity and stickiness in doughs and sauces, to prevent separation and ensure uniform texture in industrial liquids, soaps, and cosmetics, and to preserve or enhance a variety of foods. It now comes before the court as a result of a determination of evasion by U.S. Customs and Border Protection ("CBP"), which has occasioned an appeal that presents a number of sticky jurisdictional, procedural, and substantive issues for the court's review.

This litigation arises from the determination that xanthan gum from the People's Republic of China ("PRC") was being transshipped though India in an effort to evade antidumping duties imposed by the U.S. Department of Commerce's ("Commerce") antidumping duty order, namely the Chinawide entity rate applied to xanthan gum from

PRC.[1] Claiming that the entries should be subject to a 0.00% duty rate, importers Plaintiff All One God Faith, Inc. d/b/a Dr. Bronner's Magic Soaps ("Dr. Bronner's") and Consolidated Plaintiffs GLōB Energy Corporation ("GLōB"), Ascension Chemicals LLC ("Ascension"), UMD Solutions LLC ("UMD"), and Crude Chem Technology LLC ("Crude") each challenge CBP's determination as arbitrary, capricious, and an abuse of discretion. Thickening the plot further, Defendant the United States ("the Government") contends that Dr. Bronner's claims must be dismissed because its time to appeal the liquidation of its merchandise to this court has expired without action. The court concludes that it lacks jurisdiction over GLōB and Dr. Bronner's challenges to CBP's liquidation of the disputed merchandise because the relevant entries have been finally liquidated. As to Ascension, UMD, and Crude, whose entries have not been finally liquidated, the court concludes that CBP's determination was not arbitrary and capricious, and was supported by substantial evidence. Accordingly, Defendant's motion to dismiss is granted and Plaintiff's and Consolidated Plaintiffs' motions for judgment on the agency record are denied.

## BACKGROUND

### *I. Legal Framework*

To level the playing field for domestic industries, the Enforce and Protect Act of 2015 ("EAPA"), codified at 19 U.S.C. § 1517, empowers CBP to investigate allegations that an importer has evaded antidumping or countervailing duties. *See generally* CBP, *Trade Facilitation and Trade Enforcement Act of 2015—Overview*, CBP.gov (Oct. 2016) https://www.cbp.gov/sites/default/files/assets/documents/2016Oct/Trade%20Facilitation%20and%20Trade%20Enforcement%20Act%20of%202015%20-%20Overview.pdf. Specifically, the statute provides that CBP must, within fifteen days of receiving an allegation of evasion, determine whether the information provided in that allegation "reasonably suggests that covered merchandise has been entered into ...United States through evasion." 19 U.S.C. § 1517(b)(1). If so, CBP must initiate an investigation and, within 300 days of initiation, "make a determination, based on substantial evidence, with respect to whether such covered merchandise" was indeed entered through evasion. 19 U.S.C. § 1517(c)(1)(a). For EAPA purposes, "evasion" is defined as:

[1] *See Xanthan Gum from the People's Republic of China: Am. Final Determ. of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 Fed. Reg. 43,143 (Dep't Commerce Jul. 19, 2013) ("AD Order").

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

19 U.S.C. § 1517(a)(5)(A). In essence, "evasion" can be broken down into three distinct components: (1) merchandise subject to an antidumping or countervailing duty order must be entered into the United States (2) by means of falsified or incomplete documentation such that (3) the applicable duties or deposits owed on that merchandise are either foregone or reduced.

## *II. Factual Background*

Plaintiffs and Consolidated Plaintiffs are manufacturers and distributors of personal care products, pharmaceutical and research chemicals, and oilfield products, including drilling fluid additives. Compl. at 3, Aug. 26, 2020, ECF No. 2; *About*, GLōB Energy Corp., https://www.globenergy.net/about (last visited Aug. 17, 2022); *About Us*, Ascension Chemical, https://ascensionchemical.com/pages/about-us (last visited Aug. 17, 2022); *About Us*, UMD Solutions, http://umdsolutions.com/about-us/ (last visited Aug. 17, 2022); *About Us*, Crude Chem Technology, https://crudechem.com/about-us/ (last visited Aug. 17, 2022). They are also all importers of xanthan gum.[2] Compl. at 3, GLōB Energy Corp. v. United States, No. 20-cv-00161 (CIT Aug. 26, 2020), ECF No. 4 ("GLōB Compl."); Compl. at 3, Ascension Chems. LLC v. United States, No. 20–00160 (CIT Aug. 26, 2020), ECF No. 4 ("Ascension Compl."); Compl. at 3, UMD Sols. LLC v. United States, No. 20–00162 (CIT Aug. 26, 2020), ECF No. 4 ("UMD Compl."); Compl. at 3, Crude Chem Tech. LLC v. United States, No. 20–00163 (CIT Aug. 26, 2020), ECF No. 4 ("Crude Compl."); see 21 C.F.R. § 172.695 (setting out the nature and uses of xanthan gum).

### *A. The EAPA Investigation*

The dispute now before the court originated in a letter submitted to CBP by CP Kelco U.S., Inc. ("CP Kelco") on December 17, 2018. *See generally*, EAPA Allegation (Dr. Bronner's) (Dec. 17, 2018), P.D. 2. The letter alleged that Dr. Bronner's had been importing "significant volumes of xanthan gum from . . . India" which was in reality of

[2] Defendant-Intervenor CP Kelco U.S., Inc. is not an active participant in this litigation, but is similarly a domestic manufacturer of xanthan gum. Mot. to Intervene at 1, Sept. 25, 2020, ECF No. 11.

Chinese origin, as evident from the fact that "xanthan gum is only manufactured in four countries worldwide: Austria, France, China, and the United States." *Id*. at 4. Accordingly, CP Kelco requested that CBP investigate Dr. Bronner's for potential evasion of the antidumping duty order on xanthan gum from PRC through illegal transshipment.[3] *Id*. at 5; *see also* AD Order. On March 8, 2019, CP Kelco revised and expanded its allegations against Dr. Bronner's and filed additional allegations of xanthan gum transshipment against GLōB, Ascension, UMD, and Crude. Revised EAPA Allegation (Dr. Bronner's), P.D. 27–28; EAPA Allegation (GLōB), P.D. 23; EAPA Allegation (Ascension), P.D. 25; EAPA Allegation (UMD), P.D. 31; EAPA Allegation (Crude), P.D. 21. On August 12, 2019, CBP, through its Trade Remedy and Law Enforcement Division ("TRLED") initiated an EAPA investigation of all five importers. Notice of Investigation (CBP Aug. 12, 2019), P.D. 92, C.D. 40.

On March 9, 2020, TRLED issued a final determination in which it concluded that there was "substantial evidence that [the importers] entered into the customs territory of the United States through evasion merchandise covered by the antidumping duty ("AD") order . . . on xanthan gum from the People's Republic of China." Notice of Final Determination as to Evasion at 1–2 (CBP Mar. 9, 2020), P.D. 288, C.D. 113 ("Initial EAPA Determination"). In reaching its determination, CBP relied upon (1) "[e]ach importer's failure to submit any information to CBP demonstrating that the merchandise was produced in India," and (2) "the information provided by [CP Kelco] and available from other sources (e.g. Panjiva, Indian supplier websites, etc.) regarding xanthan gum import trends and the lack of xanthan gum

[3] The AD Order assigned weighted-average dumping margins as follows:

| Exporter | Producer | Weighted-average dumping margin (percent) |
|---|---|---|
| Neimenggu Fufeng Biotechnologies Co., Ltd (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) / Shandong Fufeng Fermentation Co., Ltd. | Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) / Shandong Fufeng Fermentation Co., Ltd. | 12.90 |
| Deosen Biochemical Ltd. | Deosen Biochemical Ltd. / Deosen Biochemical (Ordos) Ltd. | 128.32 |
| A.H.A. International Co., Ltd. | Shandong Fufeng Fermentation Co., Ltd. | 70.61 |
| A.H.A. International Co., Ltd. | Deosen Biochemical Ltd. | 70.61 |
| CP Kelco (Shandong) Biological Company Limited | Kelco (Shandong) Biological Company Limited | 70.61 |
| Hebei Xinhe Biochemical Co. Ltd. | Hebei Xinhe Biochemical Co. Ltd. | 70.61 |
| Shanghai Smart Chemicals Co. Ltd. | Deosen Biochemical Ltd. | 70.61 |
| PRC-Wide Entity* | | 154.07 |

* The PRC-wide entity includes Shandong Yi Lian Cosmetics Co., Ltd., Shanghai Echem Fine Chemicals Co., Ltd., Sinotrans Xiamen Logistics Co., Ltd., and Zibo Cargill HuangHelong Bioengineering Co., Ltd.

production in India," in addition to the following importer-specific factors. Initial EAPA Determination at 2–3.

***1. Dr. Bronner's***

With respect to Dr. Bronner's, TRLED rejected Dr. Bronner's argument that there was no evasion because the xanthan gum in question (1) was not "covered merchandise" for purposes of an evasion determination, and (2) was properly subject to a 0.00% cash deposit rate such that there was no reduction in duties paid.[4] Specifically, Dr. Bronner's argued that because the imported xanthan gum was manufactured and exported by excluded Chinese exporter [[ ]], and because the Indian exporter [[ ]] was not included in the AD Order and thus lacked an express cash deposit rate of its own, the xanthan gum in question would properly be subject to the 0.00% cash deposit rate applicable to the excluded exporter. *Id*. at 7. TRLED concluded that this argument was unconvincing because (1) [[ ]], having expressly admitted it exported Chinese-origin xanthan gum to Dr. Bronner's, was not an excluded exporter for purposes of the AD Order, and (2) neither [[ ]] nor Dr. Bronner's had provided any production information indicating that the *specific* xanthan gum imported into the United States was manufactured by [[ ]] or another excluded entity. *Id*. at 7–8. TRLED also rejected the documentary evidence allegedly showing [[ ]] involvement after concluding that none of the digital records provided by Dr. Bronner's clearly originated with [[ ]], and that the photographic records submitted were both contradictory (insofar as they indicate the merchandise was not imported by [[ ]]) and unreliable (because they were not relied upon by Dr. Bronner's in the course of its initial import of the xanthan gum in question). *Id*. at 9–11. Ultimately, TRLED concluded that the lack of reliable information on the record and lack of cooperation from Dr. Bronner's and [[ ]] supported a finding of evasion. *Id*. at 11.

***2. GLōB, Ascension, UMD, Crude***

With respect to each of the Consolidated Plaintiffs, TRLED likewise rejected the argument that there was no evasion because the xanthan

[4] Dr. Bronner's did not dispute that the merchandise was entered by means of a material misstatement (namely, as Indian- rather than Chinese-origin xanthan gum). *See* Letter from R. Snyder to D. Augustin re: Submission of Written Arg. Pursuant to 19 C.F.R. § 165.26 at 3 (Jan. 6, 2020) P.D. 264 (noting that "Dr. Bronner's fully acknowledges and regrets its inadvertent reporting of an incorrect country of origin for the xanthan gum imported under the entries subject to the EAPA Investigation" by CBP).

gum in question (1) was not "covered merchandise" for purposes of an evasion determination, and (2) was properly subject to a 0.00% cash deposit rate such that there was no reduction in duties paid.[5] *Id*. at 5–6, 13–16. Although Consolidated Plaintiffs, like Dr. Bronner's, claimed that a [[ ]] entity was the original producer of the imported xanthan gum, TRLED explained that the third-party Import Genius database information submitted in support of this claim was inadequate. *Id*. at 6, 13, 15, 17. Specifically, TRLED noted that "guesses derived from shipment information of a third party source" are no substitute for "documentation demonstrating the actual manufacturer and exporter of the specific merchandise in question." *Id*. TRLED also explained that the Import Genius data only identifies a "shipper" for given entries, with no reference to manufacturers, producers, or exporters. *Id*. Ultimately, TRLED concluded that the lack of information provided and lack of cooperation from Consolidated Plaintiffs and their Indian exporter Chem Fert supported a finding of evasion. *Id*. Separately, TRLED also rejected Consolidated Plaintiffs' argument that the misidentification of the subject merchandise was clerical error rather than a material misstatement because "it [was] evident that [Consolidated Plaintiffs] intended to report the entries as Entry Type 01 ('Consumption – Free and Dutiable') entries of merchandise of Indian origin." *Id*. at 7 n.18, 13 n.45, 16 n.53, 18 n.60.

### *B. The Administrative Review*

All five importers sought administrative review of TRLED's decision, and on July 16, 2020, CBP's Office of Regulations and Rulings ("ORR") issued a de novo ruling affirming the Initial EAPA Determination. Administrative Review Determination re: Enforce and Protect Act Case Number 7281 (CBP Jul. 16, 2020), P.D. 305, C.D. 115–116 ("EAPA Review Determination").

With respect to Dr. Bronner's, ORR reiterated TRLED's conclusions that [[ ]] was not the producer of Dr. Bronner's xanthan gum imports, which in fact were likely produced by "a single Chinese entity." EAPA Review Determination at 10. As neither [[ ]] nor Dr. Bronner's provided evidence that the Chinese producer was excluded from the AD Order (as a [[ ]] entity or otherwise) ORR likewise joined TRLED in finding that the disputed xanthan gum imports were covered merchandise. *Id*. at 10. ORR went on to note that Dr. Bronner's entered the covered merchandise by means of "material and false documents or statements," including "false certificates of

[5] Like Dr. Bronner's, GLōB, Ascension, UMD, and Crude do not contest that the entry of the subject merchandise as Indian- rather than Chinese-origin xanthan gum was a material misstatement.

origin" and identifications. *Id*. at 11. Because "there [was] not enough evidence in the record to demonstrate the identity of the specific Chinese producer/exporter of the subject merchandise," ORR concluded there was "insufficient evidence to show that the entries were in fact subject to a 0.00% cash deposit rate." *Id*. at 11. As the falsified documentation resulted in "no cash deposits [being] applied to the merchandise" with no evidence that a 0.00% rate was appropriate, ORR therefore found that Dr. Bronner's indeed "entered covered merchandise by means of material and false documents or statements that resulted in the avoidance of applicable [antidumping duty] cash deposits being collected on such merchandise." Id. Finally, ORR rejected Dr. Bronner's argument that TRLED incorrectly applied adverse inferences pursuant to 19 C.F.R. § 165.6. *Id*. at 13. ORR instead concluded both that adverse inferences were properly applied to fill "evidentiary gaps" resulting from Dr. Bronner's failure to submit evidence indicating that the xanthan gum was produced in PRC by an entity subject to a 0.00% cash deposit rate, and that even without such inferences a determination of evasion would be proper. *Id*. at 14.

With respect to Consolidated Plaintiffs, ORR also affirmed the conclusions of TRLED. First, ORR noted that "substantial record evidence indicates that the actual country of origin of the xanthan gum entered" by Consolidated Plaintiffs was China, not India. *Id*. at 15. In support of this conclusion, ORR pointed to statements by Consolidated Plaintiffs' shared importer, Chem Fert. *Id*. In relevant part, Chem Fert reported to CBP that "it imports the xanthan gum into India and then repacks [it]" for export, and that Consolidated Plaintiffs "knew this fact very well" and had expressly requested that Chem Fert "import [xanthan gum] from China and thereafter repack it into India and export it to the United States." *Id*. Next, ORR concluded that Consolidated Plaintiffs had indeed engaged in illegal evasion of the AD Order. *Id*. at 15. Specifically, ORR determined that Consolidated Plaintiffs "engaged in evasion because the Chinese-origin xanthan gum was identified as Type '01' with India as the country of origin at the time of entry, and no cash deposits were applied to the merchandise" resulting in the "avoidance of applicable AD cash deposits." *Id*. at 15–16. In so doing, ORR again rejected Consolidated Plaintiffs' argument that the misidentification of the subject merchandise was clerical error rather than a material misstatement, noting that they "consciously declared the merchandise as of Indian origin and Entry Type 01 ('Consumption – Free and Dutiable')" and "that the declarations were (even if unwittingly) based on false facts, does not make them the result of clerical error." *Id*. at 18.

### *C. The Instant Appeal*

Dr. Bronner's, GLōB, Ascension, UMD and Crude separately sought the court's review of CBP's determinations on August 26, 2020. *See* Compl.; Ascension Compl.[6] In their complaints, Dr. Bronner's and the Consolidated Plaintiffs each asserted jurisdiction pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c) and challenged CBP's determination of evasion with respect to their entries of xanthan gum between April 16, 2018, and the conclusion of CBP's investigation on March 9, 2020 (the "Subject Entries"). *Id*. On October 5, 2020, the five cases were consolidated under the present action. Order, ECF No. 20. Thereafter, Dr. Bronner's and the Consolidated Plaintiffs each filed motions for judgment on the agency record. Pl. All One God Faith, Inc.'s Mot. for J. on the Agency R., Feb. 16, 2021, ECF No. 26 ("Pl.'s Br."); Pl.'s Mot. For J. Upon the Agency R. Pursuant to Rule 56.2, Feb. 16, 2021, ECF No. 29 ("Consol. Pls.' Br."). On August 2, 2021, the Government responded in opposition. Def.'s Partial Mot. to Dismiss and Resp. to Pls.' Mots. for J. Upon the Admin. R., ECF No. 40. Simultaneously, the Government moved to dismiss Dr. Bronner's complaint on the basis that Dr. Bronner's protested CBP's liquidation of its entries but had "failed to timely appeal the denial of those protests" to the court. Def.'s Partial Mot. to Dismiss and Resp. to Pls' Mots. for J. Upon the Agency R., Aug. 2, 2021, ECF No. 40 ("Def.'s Resp."). All parties replied in support of their motions. Pl. All One God Faith, Inc.'s Resp. in Opp. to Def.'s Partial Mot. to Dismiss and Reply in Further Supp. of its Mot for J. on the Agency R., Sept. 1, 2021, ECF No. 46 ("Pl.'s Reply"); Pl.'s Reply to Def.'s Opp. to Pl.'s R. 56.2 Mot. for J. Upon the Agency R., Sept. 1, 2021, ECF No. 42 ("Consol. Pls.' Reply"); Def.'s Reply in Supp. of its Partial Mot. to Dismiss, Sept. 22, 2021, ECF No. 51 ("Def.'s Reply").

In response to questions from the court, the parties each filed a supplemental brief in anticipation of oral argument. Pl. All One God Faith Inc.'s Resps. to Ct.'s Qs. for Oral Arg. Issued Feb. 2, 2022, Feb. 11, 2022, ECF No. 62 ("Pl.'s OAQ Resps."); Consol. Pls.' Resp. to Qs. for Oral Arg., Feb. 11, 2022, ECF No. 61 ("Consol. Pls.' OAQ Resps."); Def.'s Resp. to the Ct.'s Qs., Feb. 11, 2022, ECF No. 60 ("Def.'s OAQ Resps."). Oral argument on both motions was held on February 15, 2022. Oral Argument, ECF No. 63. Thereafter, on February 22, 2022, the parties each submitted a post-argument brief. Pl. All One God Faith, Inc.'s Post-Oral Arg. Submission, ECF No. 66 ("Pl.'s Suppl.

[6] As the Consolidated Plaintiffs' filings are substantively identical, the court will cite to Ascension's filings throughout, except where a specific party's arguments or entries are addressed.

Br."); Consol. Pls.' Post.-Arg. Submission For Oral Arg., ECF No. 64 ("Consol. Pls.' Suppl. Br."); Def.'s Post-Arg. Submission, ECF No. 65 ("Def.'s Suppl. Br.").

### *D. The Subject Entries*

Ultimately, the following entries subject to CBP's Initial EAPA Determination and EAPA Review Determination (together, "EAPA Determinations") are currently before the court:

| Importer | Entry No. | Date Entered | Date Liquidated | Date Protested | Status |
|---|---|---|---|---|---|
| Dr. Bronner's | ERW-10387009 | 05/21/2018 | 04/19/2019 | 9/12/2019 | Denied 4/09/2020 |
| Dr. Bronner's | ERW-10398428 | 07/19/2018 | 04/24/2020 | 11/21/2019 | Denied 4/21/2020 |
| Dr. Bronner's | ERW-10420743 | 11/15/2018 | 04/24/2020 | 11/21/2019 | Denied 4/21/2020 |
| GLōB | 51084554024 | 01/06/2019 | 10/04/2019 | 03/02/2020 | Denied 7/08/2021 |
| GLōB | 51084335622 | 03/06/2019 | 10/04/2019 | 03/02/2020 | Denied 7/08/2021 |
| Ascension | CFL00044009 | 11/29/2018 | 10/04/2019 | 03/02/2020 | Suspended |
| Ascension | CFL00044652 | 12/20/2018 | 10/04/2019 | 03/02/2020 | Suspended |
| Ascension | CFL00045105 | 01/19/2019 | 10/04/2019 | 03/02/2020 | Suspended |
| Ascension | CFL00045113 | 01/19/2019 | 10/04/2019 | 03/02/2020 | Suspended |
| Ascension | CFL00045287 | 01/30/2019 | 10/04/2019 | 03/02/2020 | Suspended |
| Ascension | CFL00046368 | 03/14/2019 | 10/04/2019 | 03/02/2020 | Suspended |
| Ascension | CFL00042953 | 10/17/2018 | 10/04/2019 | 03/02/2020 | Suspended |
| UMD | KM635180961 | 08/16/2018 | 10/04/2019 | 03/02/2020 | Suspended |
| UMD | KM635214364 | 11/28/2018 | 10/04/2019 | 03/02/2020 | Suspended |
| UMD | KM635217094 | 12/20/2018 | 10/04/2019 | 03/02/2020 | Suspended |
| Crude | 30046931531 | 03/06/2019 | 10/11/2019 | 04/08/2020 | Suspended |
| Crude | 30046922605 | 01/06/2019 | 10/11/2019 | 04/08/2020 | Suspended |

*See* Consol. Pls.' OAQ Resps. at Ex. 1; Def.'s Suppl. Br. at 2; Def.'s Resp. at Ex. 1.

## JURISDICTION AND STANDARD OF REVIEW

In general, the court has jurisdiction over a determination of evasion pursuant to 28 U.S.C. § 1581(c), which grants exclusive jurisdiction over "any civil action commenced under [19 U.S.C. § 1516A or 1517]," and pursuant to 19 U.S.C. § 1517(g), which provides that an importer "determined to have entered . . . covered merchandise through evasion . . . may seek judicial review" of the determination and CBP's review thereof. The latter section also sets out the standard of review, stating that for a determination of evasion under

subsection (c) or an administrative review of such determination under subsection (f), "the United States Court of International Trade shall examine . . . 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).

To survive review under the arbitrary and capricious standard, a determination of evasion must have "examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (agencies must provide adequate reasons for their decisions). Similarly, "[a]n abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005) (citation omitted). The court's review of CBP's "determination as to evasion may encompass interim decisions subsumed into the final determination." *Diamond Tools Tech. LLC v. United States*, 45 CIT __, __, 545 F. Supp. 3d 1324, 1331 (2021) (quoting *Vietnam Firewood Co. Ltd. v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1273, 1284 (2020)).

The jurisdictional grant over CBP's determination of evasion effectuated by 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c) does not, however, encompass the contestation of liquidation (erroneous or otherwise) of an entry subject to such determination. The only mentions of liquidation in 19 U.S.C. § 1517 broadly are in 19 U.S.C. § 1517(e)(1), which provides for suspension of liquidation during CBP's EAPA investigation, and 19 U.S.C. § 1517(d)(1)(A)(i), which provides that upon determination of evasion CBP shall likewise "suspend the liquidation of unliquidated entries of such covered merchandise that are subject to the determination and that enter on or after the date of the initiation of the [EAPA] investigation." This is manifestly not a grant of authority to the courts.

Accordingly, to the extent an importer wishes to appeal the liquidation of its merchandise either before or after a determination of evasion, that appeal must traverse the typical channels. Where erroneous liquidation has occurred — including where CBP has failed to comply with 19 U.S.C. § 1517(d)(1)(A)(i)'s requirement that it sus-

pend the liquidation of subject merchandise — the aggrieved importer must first file a protest specifying CBP's error as set out in 19 U.S.C. § 1514(c). Only upon the denial of such protest, or upon the denial of an application for further administrative review of a denied protest, may an importer then appeal the liquidation to this court. 19 U.S.C. §§ 1515(a), 1515(c); 28 U.S.C. § 1581(a). If no protest is filed, or if a protest is filed and denied but not appealed, even erroneous liquidation "shall be final and conclusive upon all persons (including the United States and any officer thereof)." 19 U.S.C. § 1514(a). The court thus has jurisdiction over timely appealed protests, but lacks jurisdiction over finally liquidated entries, pursuant to 19 U.S.C. §§ 1514(a) and 1515(a), and 28 U.S.C. § 1581(a).

## DISCUSSION

As has been noted, Dr. Bronner's and the Consolidated Plaintiffs now contest the EAPA Determinations as arbitrary, capricious, and an abuse of discretion. The Government responds that (1) the court lacks jurisdiction over Dr. Bronner's and GLōB's entries such that they must be dismissed, and (2) with respect to the entries within the jurisdiction of the court, CBP did not act arbitrarily and capriciously or abuse its discretion in declining to refer a changed circumstances review to Commerce, or in applying adverse inferences against the alleged foreign manufacturers of the Subject Entries. Def.'s Br. at 23–29.

### *I. The Liquidated Entries*

To adjudicate a case, the court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety." *Arbaugh v. Y & H Corp*., 546 U.S. 500, 514 (2006). Furthermore, where subject-matter jurisdiction is challenged, the "party invoking the [Court of International Trade's] jurisdiction has the burden of establishing that jurisdiction." *Wangxiang Am. Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021) (citing *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)).

Here, liquidation of twelve of the seventeen entries before the court has been suspended by CBP. *See* Consol. Pls.' OAQ Resps. at Ex. 1; Def.'s Suppl. Br. at 2; Def.'s Resp. at Ex. 1. The remaining five entries, belonging to Dr. Bronner's and GLōB, have been finally liquidated. *Id*.; *see also* Def.'s Reply at 1–2. The Government acknowledges that its liquidation of the entries was "evidently in error" but notes that 19 U.S.C. § 1514(a) provides a statutory remedy for such error. Def.'s

Reply at 1–2; Def.'s Opp. to Pl.'s Mot. for Prelim. Inj. at 1–2, Sept. 30, 2021, ECF No. 53 ("Def.'s PI Resp."). Specifically, the statute provides that "any clerical error, mistake of fact, or other advertence . . . adverse to the importer" regarding

> the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade.

19 U.S.C. § 1514(a). Although both Dr. Bronner's and GLōB protested the liquidation of their entries, that protest was denied in light of the issuance of the Initial EAPA Determination on March 9, 2020, and neither Dr. Bronner's nor GLōB timely appealed. Consol. Pls.' OAQ Resps. at Ex. 1; Def.'s Suppl. Br. at 2; Def.'s Resp. at Ex. 1; *see* 28 U.S.C. § 2636(a)(1) (providing 180-day deadline for appeal). Instead, both parties initiated the instant action on August 26, 2020, requesting the court's review of the EAPA Determinations under 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c).[7] Compl.; Ascension Compl.

The court lacks subject-matter jurisdiction over Dr. Bronner's and GLōB's claims because the liquidation of the relevant entries is final and conclusive. As stated above, the court's jurisdiction over a determination of evasion — effectuated by 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c) — does not independently permit review of the erroneous liquidation of merchandise subject to that determination. Rather, the court may only review a claim of erroneous liquidation where that liquidation has been timely protested and the denial of such protest appealed. *See* 19 U.S.C. §§ 1514(a), 1514(c); 28 U.S.C. § 1581(a). Here, while both Dr. Bronner's and GLōB protested the liquidation of the Subject Entries, neither timely contested the denial of those protests before the court. *See* Consol. Pls.' OAQ Resps. at Ex. 1; Def.'s Suppl. Br. at 2; Def.'s Resp. at Ex. 1. Indeed, neither party even mentions those protests in its complaint or motion for judgment on the agency record. *See generally* Compl.; GLōB Compl.; Pl.'s Br.;

[7] As the court noted in its order of September 30, 2021, time did not elapse for GLōB's appeal until well after the filing of this case. *See Order*, ECF No. 54 (explaining that "the court does not possess subject matter jurisdiction to review entries that have already been liquidated except upon commencement of an action challenging denial of protest" but noting that "GLōB may yet timely file an action under 28 U.S.C. § 1581(a) contesting the denial of its protest"). By now, however, the clock has run out on both Dr. Bronner's and GLōB's opportunities to timely appeal CBP's denials.

Consol. Pls.' Br.; *see also* Def.'s Br. at 17 (noting Dr. Bronner's failure to address the denied protests). "[F]ailure to challenge" CBP's liquidations before the court "result[s] in those liquidations becoming final and conclusive." *United States v. Am. Home Assur. Co.*, 789 F.3d 1313, 1323 (Fed. Cir. 2015); *see also United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1557 (Fed. Cir. 1997) ("The language of [19 U.S.C. § ]1514, that a liquidation will be 'final and conclusive' unless protested, is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit.") Accordingly, as the time to contest CBP's denial of protests has expired, the liquidation of both Dr. Bronner's and GLōB's entries is final. As a result, the court lacks subject-matter jurisdiction over those five entries, and must dismiss the associated complaints.[8]

## *II. The Unliquidated Entries*

With respect to the twelve remaining entries, Consolidated Plaintiffs challenge two aspects of the EAPA Determinations: CBP's failure to consider whether there was a "change in circumstances affecting the domestic industry" such that the entries were not covered merchandise, and CPB's application of adverse inferences. As neither challenge identifies an abuse of discretion, or arbitrary and capricious action, on the part of CBP, the court denies Consolidated Plaintiffs' motions for judgment on the agency record.[9]

### *A. Changed Circumstances*

First, Consolidated Plaintiffs argue that CBP's failure to consider CP Kelco's "corporate strategy shift" rendered its determination that the Subject Entries were covered merchandise "arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with 19 U.S.C. § 1517(g)(2)(B)." Consol. Pls.' Br. at 10. More specifically, Consolidated Plaintiffs contend that because evidence on the record demonstrated that "it is possible or even likely that CP Kelco is not subject to material injury by oilfield xanthan produced in China," CBP was thus "required to refer the matter to [Commerce]" for a

[8] The court therefore does not reach Dr. Bronner's arguments that CBP did not establish by substantial evidence the origin of the Subject Entries, and that CBP's final determination was unlawfully delayed. Pl.'s Br. at 10, 24.

[9] To the extent the court had, as GLōB argues, jurisdiction over GLōB's finally liquidated entries, its motion for judgment on the agency record would also be denied for the reasons stated herein.

changed circumstances review.[10] *Id*. at 11. Consolidated Plaintiffs conclude that, by failing to provide such referral, CBP failed to consider "the interests and accuracy and fairness" such that it abused its discretion. *Id*. at 13 (quoting *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 123 (2012)).

Consolidated Plaintiffs are incorrect. Their argument relies upon a single email chain between CP Kelco and GLōB in which CP Kelco first states (in 2018) that "[r]egrettably, there is presently no ZANFLO [oilfield xanthan gum] in stock and the plant has just advised us that there will be no ZANFLO for the foreseeable future, due to a corporate strategy shift for the plant," and a year later indicates that it has "resumed production of ZANFLO oilfield xanthan gum and [has] large quantities available in two package sizes" but that "[a]s in the past, ZANFLO manufacturing at the Oklahoma plant is inconsistent and not guaranteed. ZANFLO is presently available but it is impossible to guess if that will continue." Email from K. Norman to O. Zelaya re Glob Energy PO01995 Kelco Invoice 91253561 (Jun. 6, 2018), P.D. 231; Emails from K. Norman to O. Zelaya re ZANFLO Oilfield Xanthan Gum from KELCO (Jun. 5–19, 2019), P.D. 232. Consolidated Plaintiffs evidently conclude from this exchange that CP Kelco is no longer producing oilfield xanthan gum in the United States, and is therefore not at risk of injury from low-cost imports of oilfield xanthan gum from China. Consol. Pls.' Br. at 10–11. However, there is no indication in the text of the emails that ZANFLO oilfield xanthan gum has been permanently discontinued — rather, CP Kelco expressly states that it is manufacturing substantial quantities of ZANFLO. P.D. 232. It thus cannot be discerned how Consolidated Plaintiffs concluded that CP Kelco would suffer no ill effects if the AD Order were amended to reduce or eliminate duties on oilfield xanthan gum. It likewise cannot be discerned on what basis Consolidated Plaintiffs conclude that the alleged changes in CP Kelco's production volume would necessitate a changed circumstances review for the AD Order covering "dry xanthan gum, whether or not coated or blended with other products [and] regardless of physical form, including but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber." 78 Fed. Reg. at 43,143. Consolidated Plaintiffs have

[10] Commerce will initiate a review where "changed circumstances sufficient to warrant a review exist." 19 U.S.C. § 1675(b)(1)(C). Commerce, not CBP, conducts changed circumstances review. 19 U.S.C. § 1675(b)(1) (stating under the heading "Reviews Based on Changed Circumstances" that "[w]henever the *administering authority* or the [U.S. International Trade Commission] receives information . . . which shows changed circumstances sufficient to warrant a review," it "shall conduct a review of the determination or agreement") (emphasis added); *see also* 19 U.S.C. § 1677(1) ("The term 'administering authority' means the Secretary of Commerce. . . .")

thus identified no record evidence which plausibly supports their contention that changed circumstances review would be appropriate.

Even if such review were appropriate, Consolidated Plaintiffs do not plausibly allege that CBP was obligated to refer the matter to Commerce such that its failure to do so was an abuse of discretion. Although they contend that CBP should have referred such review under 19 U.S.C. § 1517(b)(4), there is no indication that CBP was, as that section requires, "unable to determine whether the merchandise at issue is covered merchandise." 19 U.S.C. § 1517(b)(4)(A). Indeed, Consolidated Plaintiffs themselves argue that the merchandise *should not* have been covered merchandise given changed circumstances, not that it *was not* covered merchandise under the AD Order in its current form. *See* Consol. Pls.' Br. at 10. Nor do Consolidated Plaintiffs make any argument that a determination of changed circumstances would retroactively apply to the Subject Entries. Rather, as ORR correctly stated, "[w]hether there may be a change in circumstances affecting the domestic industry such that the [AD] Order's scope may be modified by Commerce at a later date does not change the fact that, at the time of entry, the xantha[n] gum was covered merchandise." EAPA Review Determination at 18. Accordingly, CBP did not abuse its discretion by declining to refer Consolidated Plaintiffs' request for a changed circumstances review to Commerce where such review was not essential to its determination of evasion.

### *A. Adverse Inferences*

Statute provides that CBP may apply adverse inferences with respect to an interested party, importer, foreign producer or exporter, or foreign government where such party "has failed to cooperate by not acting to the best of [its] ability to comply with a request for information." 19 U.S.C. §§ 1517(c)(2)(A), 1517(c)(3)(A). Such inferences may be used with respect to such interested, party, importer, foreign producer or exporter, or foreign government "without regard to whether another person involved in the same transaction or transactions under examination has provided the information sought." 19 U.S.C. § 1517(c)(3)(B).

Consolidated Plaintiffs argue that CBP acted arbitrarily and capriciously in determining that they failed to comply with the EAPA investigation and thus in applying adverse inferences with respect to the alleged manufacturers of the Subject Entries. Consol. Pls.' Br. at 15. Specifically, Consolidated Plaintiffs allege that they "cooperated with all of CBP's requests of information" and acted to the best of their ability, including by initiating "a legal investigation in India as

to the validity of the certificates of origin and to determine the manufacturer(s) of the [Subject Entries]" such that adverse inferences were not appropriate. *Id*. at 5, 6, 16.

In the EAPA Determination, CBP applied adverse inferences upon determining that "the claimed manufactures either did not respond to CBP's [requests for information], or failed to provide most of the information requested in the [request for information]." EAPA Determination at 18. "As a result, CBP [applied] adverse inferences and infer[red] that the claimed foreign manufacturers did not manufacture the imported xanthan gum," instead determining that the alleged Indian-origin xanthan gum was transshipped Chinese-origin xanthan gum. *Id*. at 18–19. Importantly, these adverse inferences were not applied to Consolidated Plaintiffs, but rather to the alleged foreign manufacturers — the same manufacturers that the Consolidated Plaintiffs state they were forced to sue in order to "obtain documentation" relevant to the EAPA investigation. Consol. Pls.' Br. at 15. As it is thus uncontroverted that the manufacturers were uncooperative with CBP's review, CBP's application of adverse inferences was not arbitrary, capricious, or an abuse of discretion.

To the extent Consolidated Plaintiffs argue that CBP should have delayed the application of adverse inferences until more accurate information could be obtained through Consolidated Plaintiffs' suit of the alleged foreign manufacturers, such argument is unavailing. Consol. Pls.' Reply at 10. As noted above, adverse inferences may be used against an uncooperative party "without regard to whether another person involved in the same transaction or transactions under examination has provided the information sought." 19 U.S.C. § 1517(c)(3)(B). Thus, CBP could apply adverse inferences in response to the alleged manufacturers' failure to cooperate even if Consolidated Plaintiffs obtained accurate information regarding the original manufacturer and exporter of the Subject Entries.

Finally, as the Government correctly notes, CBP's inference that the xanthan gum was produced in China rather than India is independently supported by the record. Def.'s Br. at 27–28. As the EAPA Review Determination highlighted, Chem Fert reported to CBP that "it imports the xanthan gum into India and then repacks [it]" for export, and that Consolidated Plaintiffs "knew this fact very well" and had expressly requested that Chem Fert "import [xanthan gum] from China and thereafter repack it into India and export it to the United States." EAPA Review Determination at 15 (citing Chem Fert Chems. Resp. to CBP's Request for Information at ¶ 05 (Aug. 27, 2019), P.D. 133, C.D. 50). Indeed, the EAPA Review Determination relies on this

record evidence without reference to any adverse inferences. *Id*. As a result, even if the court were to conclude that the application of adverse inferences was an abuse of discretion, CBP nevertheless "examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision" in relying on the record evidence to conclude that the Subject Entries consisted of xanthan gum from PRC. *Dep't of Com. v. New York*, 139 S. Ct. at 2569 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

## CONCLUSION

For the foregoing reasons, the court grants the Government's motion to dismiss Dr. Bronner's claims, and likewise dismisses GLōB's claims, for lack of subject-matter jurisdiction. The court further concludes that CBP's EAPA Determinations were not arbitrary, capricious, or an abuse of discretion with respect to Consolidated Plaintiffs Ascension, UMD, and Crude, and therefore denies the Consolidated Plaintiffs' motions for judgment on the agency record. CBP's EAPA Determinations are therefore affirmed.

**SO ORDERED.**

Dated: August 18, 2022
New York, New York

*/s/ Gary S. Katzmann*
JUDGE

Slip Op. 22–97

DILLINGER FRANCE S.A., Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION AND SSAB ENTERPRISES LLC, Defendant-Intervenor.

Before: Judge Gary S. Katzmann
Court No. 17–00159
***PUBLIC VERSION***

[The court remands Commerce's *Second Remand Results*.]

Dated: August 18, 2022

*Marc E. Montalbine*, DeKieffer & Horgan PLCC, of Washington, D.C., argued for Plaintiff Dillinger France S.A. With him on the brief were *Gregory S. Menegaz* and *Alexandra H. Salzman*.

*Kelly A. Krystyniak*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Stephanie M. Bell*, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Nucor Corporation. With her on the brief were *Alan H. Price* and *Christopher B. Weld*.

*Roger B. Schagrin*, Schagrin Associates, of Washington D.C., for Defendant-Intervenor, SSAB Enterprises LLC.

## *OPINION*

**Katzmann, Judge:**

Before the court is the U.S. Department of Commerce ("Commerce")'s second remand redetermination in the less-than-fair-value ("LTFV") investigation of certain carbon and alloy steel cut-to-length plate from France filed pursuant to this court's order. *See* Final Results of Redetermination Pursuant to Ct. Remand, Aug. 25, 2021, ECF No. 85–1 ("*Second Remand Results*"); *see also* Remand Order, Feb. 18, 2021, ECF No. 73. The sole issue on remand is whether Commerce's allocation of production costs between Respondent Dillinger France S.A. ("Dillinger")'s non-prime and prime plates comports with the Federal Circuit's directive in *Dillinger France S.A. v. United States*, 981 F.3d 1318 (Fed. Cir. 2020) ("*Dillinger III*"). For the reasons outlined below, the court remands to Commerce for further consideration consistent with this opinion.

## BACKGROUND

The court presumes familiarity with the facts and legal frameworks of this case, as set out in the previous opinions ordering remands to Commerce, and now recounts only that which is relevant to the

court's review of the *Second Remand Results*. *See Dillinger France S.A. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1349 (2018) ("*Dillinger I*"); *Dillinger France S.A. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1225 (2019) ("*Dillinger II*"); *Dillinger III*, 981 F.3d 1318.

On May 25, 2017, Commerce imposed an antidumping margin of 6.15 percent on Dillinger's cut-to-length plate products. *See Certain Carbon and Alloy Steel Cut-to-Length Plate from France: Final Determination of Sales at Less Than Fair Value*, 82 Fed. Reg. 16,363 (Dep't Commerce Apr. 4, 2017), P.R. 451, and Mem. from J. Maeder to G. Taverman, re: Issues and Decision Mem. for the Final Affirmative Antidumping Duty Determination and Determination of Sales at Less Than Fair Value (Dep't Commerce Mar. 29, 2017), P.R. 445 ("IDM"); *see also Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan*, 82 Fed. Reg. 24,096 (Dep't Commerce May 25, 2017), P.R. 456 ("*Final Determination*"). Dillinger sells plates designated as prime and non-prime, with non-prime plates comprising plates that are rejected after the production process for failing to meet the standards for prime plate. *See Dillinger III*, 981 F.3d at 1321. In *Dillinger I*, Dillinger challenged several aspects of Commerce's *Final Determination* before this court, including Commerce's allocation of production costs between its prime and non-prime plates. *See* 350 F. Supp. 3d at 1374–77.

The parties agree that both types of plate undergo the same production process and use the same materials. *See, e.g.,* Pl.'s Cmts. in Opp. to Second Remand Results at 9, Sept. 24, 2021, ECF No. 89 ("Pl.'s Br."); IDM at 58–60. Because non-prime plate is sold without certification as to grade, type, or chemistry and cannot be used in applications that require such certifications, it attracts a lower market value than prime plate. *See* IDM at 60. Accordingly, in its normal books and records, Dillinger values non-prime products at the likely selling price. *See Second Remand Results* at 2; IDM at 59. However, for the purposes of responding to Commerce's questionnaires in the LTFV investigation, Dillinger reported its costs of production for non-prime plates as the average cost of production for all prime plate sold during the period of investigation ("POI") — a higher figure than the likely selling price. *Second Remand Results* at 2; IDM at 59.

In rendering its *Final Determination*, Commerce adjusted the reported costs for non-prime products back to the value recorded in Dillinger's normal books and records — i.e., the lower estimated sales

price — and then allocated the difference between the reported and adjusted figure for non-prime products to the cost of production for prime products, pursuant to section 773(f)(1)(A) of the Tariff Act of 1930 ("the Act") on calculating normal value.[1] IDM at 59. This court sustained Commerce's cost adjustments in *Dillinger I*. *See* 350 F. Supp. 3d at 1374–77.

The Federal Circuit disagreed in *Dillinger III*, finding that Commerce's determination was erroneous because Dillinger's normal books and records reflect the estimated *selling price* of non-prime plates rather than *costs of production*, and thus failed to satisfy the requirement of section 1677b that an exporter's records "reasonably reflect the costs associated with the production and sale of the merchandise." *See* 981 F.3d at 1321–24 (discussing 19 U.S.C. § 1677b(f)(1)(A)). Accordingly, the Federal Circuit remanded to Commerce "to determine the actual costs of prime and non-prime plate." *Id.* at 1324.

To comply with the Federal Circuit's directive, on remand, Commerce reopened the administrative record and sent Dillinger a supplemental questionnaire requesting information on the physical characteristics and actual product-specific — also known as CONNUM[2]-specific — production costs of its non-prime plates. *See* Remand Questionnaire (Dep't Commerce Mar. 17, 2021), P.R.R. 9.[3] Dillinger responded to the agency that it was unable to identify all of the physical characteristics of its non-prime products and, consequently, Dillinger resubmitted approximate production costs for its non-prime products derived from the average cost of producing all prime plates sold during the POI. *See* Dillinger Remand Redetermination Supplemental Questionnaire Resp. (June 23, 2021), P.R.R. 16; C.R.R. 5.

Commerce determined that Dillinger's response was insufficient to calculate actual costs of production and that it was, thus, necessary to

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[1] Section 773(f)(1)(A) of the Tariff Act of 1930, as codified at 19 U.S.C. § 1677b(f)(1)(A), instructs in relevant part:

> Costs 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.

[2] In LTFV investigations, products with identical physical characteristics are categorized by the same control number, or "CONNUM."

[3] P.R.R. refers to the Remand Redetermination public record; C.R.R. refers to the Remand Redetermination confidential record.

invoke facts otherwise available under section 776(a)(1) of the Act.[4] *Second Remand Results* at 6–7. Because Commerce assessed that "not knowing the actual cost of producing the non-prime merchandise directly impacts the amount of costs assigned to the production of the prime products," Commerce relied upon the costs of non-prime *and* prime products as recorded in Dillinger's normal books and records — to which the Federal Circuit previously objected — as facts otherwise available to fill in the missing information. *Id.* at 6. As a result, Commerce continues to assess a weighted-average dumping margin of 6.15 percent against Dillinger's subject merchandise. *Id.* at 22.

Defendant the United States ("the Government") and Defendant-Intervenor Nucor Corporation ("Nucor") now ask this court to sustain the *Second Remand Results* as supported by substantial evidence and in accordance with law. *See* Def.'s Resp. to Cmts. in Opp. to Second Remand Results at 1, Nov. 8, 2021, ECF No. 96 ("Def.'s Br."); Def.-Inter.'s Resp. to Cmts. in Opp. to Second Remand Results at 1, Nov. 8, 2021, ECF No. 95 ("Def.-Inter.'s Br."). By contrast, Dillinger argues that the *Second Remand Results* contravene the Federal Circuit's order, necessitating further remand. *See* Pl.'s Br. at 1–2, 12.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii). This court "will uphold [Commerce's] redetermination pursuant to the [c]ourt's remand unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Consolidated Bearings Co. v. United States*, 28 CIT 106, 106, 346 F. Supp. 2d 1343, 1344 (2004), *aff'd* 412 F.3d 1266, 1267 (Fed. Cir. 2005).

## DISCUSSION

Before this court, Dillinger lodges two overarching challenges to Commerce's *Second Remand Results*: Dillinger challenges (1) Commerce's invocation of facts available — in general — to supply Dillinger's costs of prime and non-prime plate production; as well as (2) Commerce's reliance on Dillinger's normal books and records — in particular — as facts available. The court finds Dillinger's latter

[4] Section 776(a)(1) of the Act, as codified at 19 U.S.C. § 1677e(a)(1), instructs in relevant part:

> (a) IN GENERAL
>
> If—
>
> (1) necessary information is not available on the record,
>
> . . .
>
> the administering authority and the Commission shall, subject to section [1677m](d) of this title, use the facts otherwise available in reaching the applicable determination under this [sub]title.

argument availing and remands to Commerce for further consideration consistent with this opinion.

### *I. Commerce's General Invocation of Facts Available Accords with Law.*

On remand, because Commerce assessed that "necessary information" was missing from the record, the agency relied on Dillinger's normal books and records as facts available to derive costs of production for prime and non-prime merchandise pursuant to 19 U.S.C. § 1677e(a)(1).[5] *Second Remand Results* at 6–7. All parties agree that Dillinger did not supply at least some information requested by Commerce — namely, the physical characteristics and product-specific costs of producing the non-prime products. *See Second Remand Results* at 2; Pl.'s Br. at 5; Def.-Inter.'s Br. at 2. However, the parties disagree as to the scope of the missing information to be filled via facts available and whether any such missing information was "necessary."

Specifically, Dillinger argues that there is no missing information with respect to the costs of prime plate, such that any adjustments Commerce makes on the basis of facts available must be limited to non-prime plate and cannot alter the properly reported costs of prime plate. Pl.'s Br. at 10. Moreover, Dillinger argues that because no non-prime plate was sold to the United States during the POI, the missing non-prime product-specific cost information is not "necessary," as required by 19 U.S.C. § 1677e(a)(1). *Id.* By contrast, Commerce argues that because "not knowing the actual cost of producing the non-prime merchandise directly impacts the amount of costs assigned to the production of the prime products" — and thereby affects the margin calculation — it is appropriate to use facts available to determine the cost of production for both non-prime *and* prime products. *See Second Remand Results* at 6, 16. The Defendant's position prevails.

Oral argument illuminated that all parties agree Dillinger knows the *total* production costs it incurred over the POI to produce prime and non-prime products, however, Dillinger does not know the actual division of these total costs *among* prime and non-prime products. *See* Oral Arg., Mar. 22, 2022, ECF No. 112. For instance, at oral argument, Dillinger's counsel explained: "You never know the actual cost of a specific plate. What you do know is . . . the total actual cost of making plate for that period. That's what you do know." Oral Arg. at 10:32–10:48; *see also* Pl.'s Post Oral Arg. Subm. at 1–2, Mar. 29, 2022, ECF No. 113. Dillinger further explained that it tracks actual total

[5] *Supra* p. 5 n.4.

costs of producing two different types of plate — line-pipe plate and regular plate — which when added together equal the total actual production costs for the period. However, both prime and non-prime plate are produced within these two groups. *See* Oral Arg. at 10:50–11:35; Pl.'s Br. at 2. Accordingly, Dillinger estimated that around [[ ]] percent of the costs in each group were attributable to prime plate, and the remaining [[ ]] percent of the costs for each group were attributable to non-prime plate. *See* Oral Arg. at 12:09–12:48; Pl.'s Br. at 2, 9; Pl.'s Post Oral Arg. Subm. at 3–4. While Dillinger maintains that these "yield rates were very specific, rounded to the fourth decimal place," Pl.'s Br. at 3, and comprised a "very reasonable assumption," *see* Oral Arg. at 12:48–12:53, nevertheless, Dillinger's counsel acknowledged that this method was "just an allocation; it's just an estimate," *see id.* at 16:03–16:18.

Section 1677e(a)(1) of 19 U.S.C. instructs that if "necessary information is not available on the record," Commerce "shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." *See* 19 U.S.C. § 1677e(a)(1). The Federal Circuit has interpreted this provision to mean that "[t]he mere failure of a respondent to furnish requested information -- for any reason -- requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The focus of [1677e(a)(1)] is respondent's *failure to provide information*. The reason for the failure is of no moment." (emphasis in original)).

Dillinger's description of its allocation process illuminates that there is indeed an informational gap in the record. As Defendant-Intervenor persuasively summarized, under either Dillinger's proposed method or Commerce's adopted one, "no matter what, we're in a world where we have total costs, and we don't know how to allocate [them]." *See* Oral Arg. at 1:01:14–1:01:18; *see also* Def.'s Post Oral Arg. Subm. at 3, Mar. 29, 2022, ECF No. 115 ("Dillinger France is *also* shifting costs." (emphasis in original)). And this missing information is "necessary." This is so because "however you allocate [the total costs], it is necessarily going to require taking some costs from prime and moving [them] to non-prime," *see* Oral Arg. at 1:01:18–1:01:25, which "affects the results of the sales-below-cost test and calculation of constructed value profit regardless of whether non-prime products were sold in the United States," *Second Remand Results* at 16.[6] Thus, Commerce's determination that necessary cost information for prime

[6] The court clarified its conceptual understanding of this point at oral argument through the use of a hypothetical Excel spreadsheet — reproduced below — in which the court assumed

and non-prime plate is missing is consistent with 19 U.S.C. § 1677e(a)(1) and record evidence.

Dillinger, nevertheless, maintains that Commerce misapplied facts available in light of certain qualifications imposed by subsections

that 60 percent of plate produced during the POI was prime plate and 40 percent of the plate produced was non-prime. (The court notes that these numbers are purely hypothetical and do not reflect Dillinger's true production quantities or costs):

| | Plate No. | Prime vs. Non-Prime | Cost | | |
|---|---|---|---|---|---|
| | 1 | Prime | $2.00 | | |
| | 2 | Prime | $4.00 | | |
| | 3 | Prime | $6.00 | | |
| | 4 | Prime | $8.00 | | |
| | 5 | Prime | $10.00 | | |
| | 6 | Prime | $12.00 | | |
| | 7 | Non-Prime | $2.00 | | |
| | 8 | Non-Prime | $4.00 | | |
| | 9 | Non-Prime | $6.00 | | |
| | 10 | Non-Prime | $8.00 | | |
| | | | | | |
| | | **Total Cost** | $62.00 | | |
| | | | | | |
| | | **Non-Prime Costs** | **Prime Costs** | | **Total Cost** |
| **Percentage Yield Approach** (Assigning 60% of total costs ($62) to prime plate and assigning 40% of total costs ($62) to non-prime plate) | | $24.80 | $37.20 | | $62.00 |
| **Actual Cost Approach** (Adding together actual costs of producing non-prime plate and adding together actual costs of producing prime plate) | | $20.00 | $42.00 | | $62.00 |

*See* Suppl. Qs. for Oral Arg. at 1–2, Mar. 21, 2022, ECF No. 111. Responding to the court's hypothetical chart at oral argument, Dillinger's counsel explained:

> So basically in your example, Dillinger reported the $62.00. Everybody is happy with the $62.00. The $62.00 was verified. So the only question is how to split up the $62.00 between prime and non-prime. Because the $62.00 is in a group and they don't know specifically how to split it up between the two, so what Dillinger did was they said ok, from each of these groups — the line-pipe and the regular — how much in quantity was non-prime? So they figured out — you'll see in the record it's a very exact number, it goes to four decimal places, but for each of them it's roughly [[ ]] percent . . . so they said that much of . . . the line-pipe group is non-prime and then a similar thing for the regular group. So they said we will then say [[ ]] percent of the costs go to prime and [[ ]] percent go to non-prime. So at that point, it's a very reasonable assumption because . . . the prime and the non-prime have exactly the same costs. You don't know until the end of the . . . assembly line what's prime and non-prime.

Oral Arg. at 11:45–13:05 (cleaned up). In short, the discussion of the above chart illuminated that costs for prime and non-prime plate calculated under a "percentage yield approach" — as advocated by Dillinger — potentially differ from those calculated under an "actual cost approach" — which Commerce cannot undertake here for lack of complete data. *See* Def.-Inter.'s Post Oral Arg. Subm. at 2, Mar. 29, 2022, ECF No. 114 ("[A]n allocation based on quantity does not necessarily result in an accurate calculation of costs."). In addition, how one chooses to allocate the costs does matter, as it necessarily impacts the costs of prime plate. Because Dillinger's percentage yield approach is concededly "just an estimate," *see* Oral Arg. at 16:16–16:18 — even if a precise one — Commerce permissibly determined that there was an informational gap to be filled with facts available under 19 U.S.C. § 1677e(a)(1). *See Nippon Steel*, 337 F.3d at 1381 (Fed. Cir. 2003) ("The focus of [1677e(a)(1)] is respondent's *failure to provide information*. The reason for the failure is of no moment." (emphasis in original)).

1677m(c)[7] and (e)[8] of 19 U.S.C. *See* Pl.'s Br. at 7–8. These arguments are unavailing.

Concerning subsection 1677m(c), parties agree that Dillinger notified Commerce within fourteen days of receiving the agency's original questionnaire of its difficulties in reporting the requested non-prime information and suggested an alternative reporting method. *See* Pl.'s Br. at 5 (citing *Notification of Difficulties in Responding to the Questionnaire* at 1–2 (June 8, 2016), P.R. 96); *see also* Remand Results at 11. For their part, the Government and Nucor argue that irrespective of this notification, Commerce's ability to apply facts available under 19 U.S.C. § 1677e(a)(1) is not constrained by *id.* § 1677m(c), as it is

[7] Subsection 1677m(c) of 19 U.S.C. provides in relevant part:

> **(1) Notification by interested party**
> If an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

[8] Subsection 1677m(e) of 19 U.S.C. instructs:

> **(e) Use of certain information**
> In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—
>
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties.

under *id.* § 1677e(a)(2)(B).[9] *See* Def.-Inter.'s Br. at 7; Def.'s Br. at 8–9. The court need not here resolve whether subsection 1677m(c) is a "stand-alone provision" of the statute. *See* Pl.'s Resp. to Ct.'s Oral Arg. Qs. at 5, Mar. 16, 2022, ECF No. 106. This is so because even assuming arguendo that 1677m(c)(1) applies, Commerce was not required to modify its information request. *See* 19 U.S.C. § 1677m(c)(1) (instructing merely that Commerce "shall consider the ability of the interested party"[10] and "*may* modify such requirements" (emphasis added)).

Dillinger's additional argument that Commerce was required to accept its proposed cost allocations on the basis of subsection 1677m(e) is likewise unavailing. *See* Pl.'s Br. at 8. Subsection 1677m(e) instructs in part that "the administering authority . . . shall not decline to consider information that is submitted by an interested party" where "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." *See* 19 U.S.C. § 1677m(e)(3). Here, the Federal Circuit remanded to Commerce "to determine the *actual* costs of prime and non-prime products." *Dillinger III*, 981 F.3d at 1324 (emphasis added). As established above, Dillinger's proposed cost allocations were "just an estimate." *Supra* p. 9–10 n.6. Accordingly, Commerce permissibly determined that Dillinger's submitted information could not "serve as a reliable basis for reaching the applicable determination." *See Second Remand Results* at 7 ("The use of an 'average cost' would not, by definition, comply with the Federal Circuit's order to determine the

[9] *Compare* 19 U.S.C. § 1677e(a)(1) *with id.* § 1677e(a)(2)(B):

> **(a) In general**
> If—
>
> (1) necessary information is not available on the record, or
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority or the Commission 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,
>
> the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(emphasis added).

[10] Record evidence suggests that Commerce considered Dillinger's ability to submit the requested information. *See Telecon with Dillinger Counsel on Questionnaire Reporting* (June 20, 2016), P.R. 129; *see also Second Remand Results* at 19 (asserting "[i]f Dillinger had wanted to present evidence of the specific non-prime products produced, it could have relied on production reports or finished goods inventory excerpts to show which production runs resulted in the production of non-prime plates. Dillinger chose not to do so.").

'actual costs of prime and non-prime products.'"); *see also id.* at 10 ("[T]he use of the overall average cost of all products as a proxy for the actual product-specific cost of production of the non-prime products cannot serve as a reliable basis for calculating an antidumping margin within the meaning of section 782(e)(3) of the Act.").[11]

In sum, the court sustains as supported by substantial evidence and in accordance with law Commerce's general invocation of facts available to supply the costs of production for Dillinger's prime and non-prime products. The court next considers whether Commerce's reliance on the costs recorded in Dillinger's normal books and records — in particular — as facts available is likewise permissible.

### *II. Commerce's Particular Selection of Facts Available Does Not Accord with Law.*

As has been noted, on remand, the Federal Circuit directed Commerce "to determine the actual costs of prime and non-prime products." *Dillinger III*, 981 F.3d at 1324. In so ruling, Dillinger maintains the Federal Circuit prohibited Commerce from replacing reported costs with sales value, such that the agency's reliance on Dillinger's normal books and records as facts otherwise available was impermissible. *See* Pl.'s Br. at 1–2.[12] By contrast, the Government maintains that the Federal Circuit did not "prohibit" Commerce from relying on this data or order Commerce to rely on Dillinger's proposed cost allocation. *See* Def.'s Br. at 7. Rather the Government argues Commerce permissibly found that Dillinger's proposed methodology could not serve as a reliable basis for calculating the antidumping margin. *See id.* at 9 (citing *Second Remand Results* at 19). The court concludes that although the Federal Circuit did not strictly prohibit Commerce from relying on Dillinger's normal books and records as facts otherwise available, Commerce did not adequately explain its basis for doing so, necessitating remand.

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[11] The court notes that whether Commerce was obligated to accept Dillinger's proposed cost allocation under 19 U.S.C. § 1677m(e) and whether Commerce permissibly relied upon the costs recorded in Dillinger's normal books and records as facts otherwise available under *id.* § 1677e(a)(1) are two separate inquiries. The court addresses the latter inquiry *infra*.

[12] The court finds unpersuasive Dillinger's additional argument that Commerce waived the opportunity to invoke Dillinger's normal books and records as facts otherwise available. Pl.'s Br. at 6. "The Department is allowed to 'change its conclusions from one review to the next based on new information and arguments.'" *Evonik Rexim (Nanning) Pharm. Co. Ltd. v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1364, 1367 (2018) (sustaining Commerce's changed selection of surrogate values after the court directed it to consider a Respondent's brief on remand). Here, Commerce changed its conclusions following a court directive and articulated its basis for doing so — namely, that upon reopening the administrative record, Dillinger failed to provide the actual cost information necessary to comply with the Federal Circuit's mandate. *See* Def.'s Br. at 12 n.2.

First, the court does not interpret the Federal Circuit's holding to prohibit Commerce from relying on Dillinger's normal books and records as facts otherwise available. In vacating and remanding, the Federal Circuit explained that "[b]ecause Dillinger's books and records were based on 'likely selling price' rather than cost of production, Commerce erred in relying on them" in calculating normal value under 19 U.S.C. § 1677b(f)(1)(A). *Dillinger III*, 981 F.3d at 1324. While the Federal Circuit directed Commerce to "determine the actual costs of prime and non-prime products" to calculate normal value, *id.*, this directive does not necessarily identify — or cabin — what information Commerce may or may not rely upon as facts otherwise available under 19 U.S.C. §1677e(a)(1), *supra* p. 11 n.9, once the agency concludes that it cannot "determine the actual costs of prime and non-prime products." *See NEXTEEL Co., Ltd. v. United States*, 46 CIT __, __, 569 F. Supp. 3d 1354, 1371 (2022) (declaring Commerce's "explanation [to be] inadequate in light of the Court of Appeals' precedent" in *Dillinger III* where Commerce used likely market value of non-prime product rather than actual costs of production to calculate constructed value and remanding for further explanation or reconsideration).

Here, Commerce inadequately explained why it relied on Dillinger's normal books and records as facts available. In the *Second Remand Results*, Commerce asserts that it "has an obligation to ensure that the reported costs of production reasonably reflect the cost of producing the merchandise under consideration." *Second Remand Results* at 13. In light of this obligation, Commerce determined that "it was not appropriate to rely on the overall average cost of producing all prime products as a surrogate for the actual cost of producing the specific non-prime products produced," *id.* at 3–4 — as advocated by Dillinger — because doing so "assigns the same cost to products with varying physical characteristics," *id*. at 7. Commerce then selected the estimated selling price of the non-prime products as facts otherwise available, while acknowledging "that the use of the non-prime cost information recorded in Dillinger's normal books and records (*i.e.*, the estimated sales prices) does not vary by CONNUM and does not reflect cost differences attributable to the physical characteristics." *Id.* at 20. Commerce maintains that its selected information is "preferrable because it is based on the actual costs Dillinger assigns to the non-prime products produced in its normal books and records." *Id.*

This statement does nothing to illuminate why relying on Dillinger's normal books and records — which reflect the likely *selling* price of non-prime pipe rather than the costs of production — better accords with Commerce's "obligation to ensure that the reported costs

of production reasonably reflect the *cost of producing the merchandise* under consideration." *Id.* at 3 (emphasis added). The analytic deficiency is particularly apparent given that both data sets under consideration exhibit the same Commerce-identified flaw of assigning costs without variance for physical characteristics. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]gency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently."); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) (An agency acts contrary to law if its decision-making is arbitrary or unreasoned).

At oral argument and in its post oral argument submission to the court, the Government advanced a theory as to why adjusting the reported costs for non-prime products to the value recorded in Dillinger's normal books and records and then allocating the excess costs to prime products better reflects actual production costs; namely, the Government contends that where Dillinger cannot produce [[ ]] perfect plate without producing [[ ]] "off-spec" plate, the lost value of those [[ ]] imperfect plate is actually a cost of producing the [[ ]] perfect ones and should be accounted for as such. *See* Oral Arg. at 31:15–33:36; *see also* Def.'s Post Oral Arg. Subm. at 3. While this theory may have merit, the agency itself did not articulate such reasoning in the *Second Remand Results* and the court cannot credit post-hoc rationalizations. *See U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990) ("Post-hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination.").

In short, Commerce inadequately explained its reliance on Dillinger's normal books and records as facts otherwise available to supply missing cost information. The court, therefore, remands to Commerce for further explanation or reconsideration consistent with this opinion.[13]

## CONCLUSION

For the foregoing reasons, the court remands Commerce's *Second Remand Results*. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; thereafter, the parties shall have 30 days to submit briefs addressing the revised remand determination with the court, and the parties shall have 30 days thereafter to file reply briefs with the court.

[13] Because Commerce might reconsider its selection of facts available on remand — though the court currently takes no view on this point — the court need not reach Dillinger's contention that "[b]y using the likely selling price of non-prime plate . . . Commerce . . . imposed an impermissible adverse inference." Pl.'s Br. at 8.

**SO ORDERED.**
Dated: August 18, 2022
New York, New York

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

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