U.S. Customs and Border Protection

ANNOUNCEMENT OF THE NATIONAL CUSTOMS AUTOMATION PROGRAM TEST CONCERNING THE SUBMISSION THROUGH THE AUTOMATED COMMERCIAL ENVIRONMENT OF CERTAIN UNIQUE ENTITY IDENTIFIERS FOR THE GLOBAL BUSINESS IDENTIFIER EVALUATIVE PROOF OF CONCEPT

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) will conduct a National Customs Automation Program test regarding the electronic transmission of certain unique entity identifiers through the Automated Commercial Environment (ACE). This test, which is referred to as the "Global Business Identifier Evaluative Proof of Concept" (GBI EPoC), is for participation by entry filers (*i.e.,* importers of record and licensed customs brokers) for merchandise imported into the United States. Test participants will voluntarily provide specific global business identifiers (GBIs) for the manufacturers, sellers, and shippers of merchandise covered by specified types of entries, which are limited for purposes of this test to certain commodities and countries of origin. Test participants may also, optionally, provide specific GBIs for exporters, distributors, and packagers associated with the covered entries. The test will permit CBP and certain Partner Government Agencies (PGAs) to access the underlying data associated with the GBIs (referred to as the "GBI data"), to determine whether the submission of GBIs at the time of entry filing will enable the enhanced tracing of the supply chains of certain commodities. This notice invites importers of record and licensed customs brokers to participate in the test, provides a description of the test, sets forth the criteria for participation, and invites public comments on all aspects of the test.

DATES: The GBI EPoC will commence on December 19, 2022, and will continue until July 21, 2023, subject to any extension, modification, or early termination as announced in the **Federal Register**. CBP will begin to accept requests from importers of

record and licensed customs brokers to participate in the test on December 2, 2022, and CBP will continue to accept such requests until the GBI EPoC concludes. Public comments on the test are invited and may be submitted to the address set forth below at any time during the test period.

ADDRESSES: Comments and questions concerning this notice, or any aspect of the test, may be submitted at any time before or during the test period via email to Trade Policy and Programs, Office of Trade, U.S. Customs and Border Protection, at *GBI@cbp.dhs.gov*, with the subject line reading "Comments/ Questions on GBI EPoC."

FOR FURTHER INFORMATION CONTACT: For policy-related questions, contact Julie L. Stoeber, Branch Chief, 1USG, Interagency Collaboration Division, Trade Policy and Programs Division, Office of Trade, U.S. Customs and Border Protection, at (202) 945–7064 or via email at *GBI@cbp.dhs.gov*, with a subject line reading "Global Business Identifier Test—GBI." For technical questions related to ACE or Automated Broker Interface (ABI) transmissions, importers of record and licensed customs brokers should contact their assigned ACE or ABI client representatives, respectively. Interested parties without an assigned client representative should direct their questions to Tonya Perez, Director, Client Services Division, Office of Trade, U.S. Customs and Border Protection, at (571) 421–7477 or via email at *clientrepoutreach@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. The National Customs Automation Program

The National Customs Automation Program (NCAP) was established by subtitle B of title VI—Customs Modernization in the North American Free Trade Agreement Implementation Act (Customs Modernization Act) (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411). Through NCAP, the thrust of customs modernization was focused on informed trade compliance and the development of ACE, the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing, intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while facilitating compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest. The ability to

meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions. CBP's modernization efforts are accomplished through phased releases of ACE component functionality, which update the system and add new functionality.

Sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414), as amended, define and list the existing and planned components of the NCAP (section 411), promulgate program goals (section 412), provide for the implementation and evaluation of the program (section 413), and provide for Remote Location Filing (section 414). Section 411(a)(1)(A) lists the electronic entry of merchandise, section 411(a)(1)(B) lists the electronic entry summary of required information, and section 411(a)(1)(D) lists the electronic transmission of manifest information, as existing NCAP components. Section 411(d)(2)(A) provides for the periodic review of data elements collected in order to update the standard set of data elements, as necessary.

B. Global Business Identifier Evaluative Proof of Concept (GBI EPoC)

ACE is the system through which the U.S. Government has implemented the "Single Window," the primary system for processing trade-related import and export data required by the PGAs that work alongside CBP in regulating specific commodities. The transition away from paper-based procedures has resulted in faster, more streamlined processes for both the U.S. Government and industry. To continue this progress, CBP began working with the Border Interagency Executive Council (BIEC) and the Commercial Customs Operations Advisory Committee (COAC) starting in 2017, to discuss the continuing viability of the data element known as the manufacturer or shipper identification code (MID).

Currently, importers of record provide the MID at the time of filing of the entry summary. *See generally* 19 CFR part 142. The 13-digit MID is derived from the name and address of the manufacturer or shipper, as specified on the commercial invoice, by applying a code constructed pursuant to instructions specified by CBP. *See* Customs Directive No. 3550–055, dated November 24, 1986 (available online at *https://www.cbp.gov/sites/default/files/documents/3550–055_3.pdf*). Although use of the MID has served CBP and the international trade community well in the past, it has become apparent that the MID is not always a consistent or unique number. For example, the MID is based upon the manufacturer or shipper name, address, and country of origin, and this data can change over time and/or result in the same MID for multiple entities. Also, while the MID provides

limited identifying information, other global unique identifiers capture a broader swath of pertinent information regarding the entities with which they are associated (*e.g.,* legal ownership of businesses, specific business and global locations, and supply chain roles and functions). Changes in international trade and technology for tracking the flow of commodities have presented an opportunity for CBP and PGAs to explore new processes and procedures for identifying the parties involved in the supply chains of imported goods.

CBP has thus engaged in regular outreach with stakeholders, including, but not limited to, importers of record, licensed customs brokers, trade associations, and PGAs, with a goal of obtaining meaningful feedback on their existing systems and operations in order to establish a mutually beneficial global entity identifier system. As a result of these discussions, CBP developed the Global Business Identifier Evaluative Proof of Concept (GBI EPoC), which is an interagency trade transformation project that aims to test and develop a single entity identifier solution for CBP and PGAs to achieve trade facilitation and trade security by obtaining deeper insight into the legal structure of "who is who" across the spectrum of trade entities, and to understand more clearly ownership, affiliation, and parent-subsidiary relationships.

For purposes of the GBI EPoC, ACE has been modified to permit test participants to provide the following entity identifiers (GBIs) associated with manufacturers, shippers, and sellers of merchandise covered by entries that meet the GBI EPoC criteria (commodity + country of origin): nine (9) digit Data Universal Numbering System (D–U–N–S®), thirteen (13) digit Global Location Number (GLN), and twenty (20) digit Legal Entity Identifier (LEI). These GBIs will be provided in addition to other required entry data (which may include the MID); any GBIs associated with the importer of record itself need not be provided as part of this test. The GBIs associated with the manufacturers, shippers and sellers will be provided with the CBP Form 3461 (Entry/ Immediate Delivery) data transmission via the ABI in ACE for formal entries for consumption ("entry type 01" in ACE) and informal entries ("entry type 11" in ACE). CBP will then access the underlying data (GBI data) associated with the D–U–N–S®, GLN, and LEI, as set forth in the agreements that CBP has entered into with Dun & Bradstreet (D&B), GS1, and the Global Legal Entity Identifier Foundation (GLEIF), respectively, in order to connect a specific entry and merchandise to a more complete picture of those entities' ownership, structure, and affiliations, among other information. D&B, GS1, and GLEIF are collectively referred to as the identity management companies (IMCs).

Through the GBI EPoC, CBP aims to leverage existing entity identifiers—the D–U–N–S®, GLN, and LEI—to develop a systematic, accurate, and efficient method for the trade to report, and the U.S. Government to uniquely identify, legal business entities, their different business locations and addresses, and their various functions and supply chain roles. CBP will consider whether these three GBI, singly, or in concert, ensure that CBP and PGAs receive standardized trade data in a universally compatible trade language. Moreover, CBP will examine whether the GBIs submitted to CBP can be easily verified, thus reducing uncertainties that may be associated with the information related to shipments of imported merchandise. CBP will also consider whether the GBI EPoC may ultimately prove to be a more far-reaching, interagency initiative, one that keeps with the vision and actualized promise of the "Single Window," by providing better visibility into the supply chain for CBP and PGAs, thereby further reducing paper processing, expediting cargo release, and enhancing the traceability of supply chains.

II. Authorization for the Test

The Customs Modernization Act authorizes the Commissioner of CBP to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. The GBI EPoC is authorized pursuant to 19 CFR 101.9(b), which provides for the testing of NCAP programs or procedures. *See* T.D. 95–21, 60 FR 14211 (March 16, 1995).

III. Conditions for the Test

The test is voluntary, and importers of record and licensed customs brokers who wish to participate in the test must comply with all of the conditions set forth below. The full effect of access to additional entity-related data based on submission of the GBIs will be a key evaluation metric of the test.

Participation in the test will provide test participants with the opportunity to test and give feedback to CBP on the GBI EPoC design and scope. Participation may also enable test participants to establish and test their digital fingerprints, such as more accurately identifying certain parties involved in their supply chains. In addition, participation may allow the trade community to better manage and validate their data and streamline their import data collection processes. Lastly, test participation may allow for the wider application of entity identifiers that are currently providing broad sector coverage and enhanced data analysis.

A. Obtaining Global Business Identifier (GBI) Numbers

Importers of record and licensed customs brokers who are interested in participating in the test must arrange to obtain the required D–U–N–S®, GLN, and LEI entity identifiers (the GBIs) from the manufacturers, shippers, and sellers of merchandise that are intended to be covered by future entries that will meet the conditions of the test (commodity + country of origin). For purposes of providing the information required for the test, the parties are defined as follows for each covered entry:

- Manufacturer (or supplier)—The party that last manufactures, assembles, produces, or grows the goods or the party supplying the finished goods in the country from which the goods are leaving for the United States.
- Shipper—The party that enters into a contract for carriage with, and arranges for delivery of the goods to, a carrier or transport intermediary for transportation to the United States.
- Seller—The last known party by whom the goods are sold or agreed to be sold. If the goods are to be imported otherwise than in pursuance of a purchase, the owner of the goods must be provided.

Optionally, test participants may also arrange to obtain the GBIs for exporters, distributors, and packagers that will be associated with these future entries and provide them to CBP on qualifying entries covered by this test.

A party may obtain its own GBI by contacting Dun and Bradstreet (D&B) at *https://www.dnb.com/duns-number.html,* regarding the D–U–N–S®; GS1 at *https://www.gs1.org/standards/id-keys/gln,* regarding the GLN; and Global Legal Entity Identifier Foundation (GLEIF) at *https://www.lei-identifier.com/lei-registration/,* regarding the LEI.

Once the manufacturers, shippers, and sellers (and, optionally, the exporters, distributors, and packagers) have obtained their own GBIs (the D–U– N–S®, GLN, and LEI), these parties should provide the resulting GBIs to the relevant importer of record or licensed customs broker participating in the test. If these parties experience any difficulty with obtaining any of the GBIs, the importer of record or licensed customs broker seeking to participate in the test should reach out to CBP by email at *GBI@cbp.dhs.gov.* The test participant is not required to obtain or submit GBIs pertaining to their own entity.

Importers of record and licensed customs brokers are reminded that they are responsible for obtaining any necessary permissions with respect to providing to CBP the GBIs for manufacturers, shippers, and sellers (and, optionally, for exporters, distributors, and packagers) in the supply chains of the imported merchandise for which they

file the specified types of entries subject to the conditions of the test (commodity + country of origin). Therefore, prior to submitting their request to participate in the test to CBP, as discussed below, importers of record and licensed customs brokers should consult with these parties to ensure that these parties are willing to grant any necessary permissions to share their GBIs (which will also result in CBP's access to the underlying GBI data associated with those GBIs, as described above) with CBP under the auspices of the test.

B. Submission of Request To Participate in the GBI EPoC

The test is open to all importers of record and licensed customs brokers provided that these parties have requested permission and are approved by CBP to participate in the test. Importers of record and licensed customs brokers seeking to participate in the test should email the GBI Inbox (*GBI@cbp.dhs.gov*) with the subject heading "Request to Participate in the GBI EPoC." As part of their request to participate, importers of record and licensed customs brokers must agree to provide available GBIs with entry filings for merchandise that is subject to the conditions of the test and state that they intend to participate in the test. The request must include the potential participant's filer code and evidence that they have obtained all three GBIs (D–U–N–S®, GLN, and LEI), or are in the process of obtaining them, from the manufacturers, shippers, and sellers (and, optionally, exporters, distributors, and packagers) of merchandise that is subject to the conditions of the test (commodity + country of origin). They must also advise that they intend to import commodities that are subject to the test from the countries of origin that are subject to the test.

Test participants who are importers of record and do not self-file must advise CBP in their request that they have authorized their licensed customs broker(s) to file qualifying entries under the test on their behalf. Test participants who are licensed customs brokers must advise CBP that they have been authorized to file qualifying entries on behalf of importers of record whose shipments meet the test criteria (commodity + country of origin), as set forth below.

CBP will begin to accept requests to participate in the test on December 19, 2022 and will continue to accept them until the test concludes. Anyone providing incomplete information, or otherwise not meeting the test requirements, will be notified by email, and given the opportunity to resubmit their request to participate in the test.

C. Approval of GBI EPoC Participants

A party who wishes to participate in this test is eligible to do so as long as it is an importer of record or licensed customs broker who files type 01 (formal) or type 11 (informal) entries of merchandise that meet the conditions of the test (commodity + country of origin), and that party obtains the required GBIs from their supply chain partners. After receipt of a request to participate in the test, CBP will notify, by email, the importers of record and licensed customs brokers who are approved for participation and inform them of the starting date of their participation (noting that test participants may have different starting dates). Test participants must provide the GBIs they have received to CBP prior to the starting date of their participation (participants will also provide the GBIs to CBP again with each qualified entry filing meeting the requirements of the test). Test participants are considered to be bound by the terms and conditions of this notice and any subsequent modifications published in the **Federal Register**.

D. Criteria for Qualifying Entries

1. Commodities Subject to the GBI EPoC

The test will be limited to type 01 and type 11 entries of certain commodities, specifically alcohol, toys, seafood, personal items and medical devices. Accordingly, CBP has limited the test to entries of merchandise classifiable in specific subheadings of chapters 3, 16, 22, 30, 33, 63, 90, and 95 of the Harmonized Tariff Schedule of the United States (HTSUS), as set forth below.

Chapter 3: 0306.16.0003; 0306.16.0006; 0306.16.0009; 0306.16.0012; 0306.16.0015; 0306.16.0018; 0306.16.0021; 0306.16.0024; 0306.16.0027; 0306.16.0040; 0306.17.0004; 0306.17.0005; 0306.17.0007; 0306.17.0008; 0306.17.0010; 0306.17.0011; 0306.17.0013; 0306.17.0014; 0306.17.0016; 0306.17.0017; 0306.17.0019; 0306.17.0020; 0306.17.0022; 0306.17.0023; 0306.17.0025; 0306.17.0026; 0306.17.0028; 0306.17.0029; 0306.17.0041; 0306.17.0042; 0306.35.0020; 0306.35.0040; 0306.36.0020; 0306.36.0040; 0306.95.0020; and 0306.95.0040.

Chapter 16: 1605.21.0500; 1605.21.1020; 1605.21.1030; 1605.21.1050; 1605.29.0500; 1605.29.1010; and 1605.29.1040.

Chapter 22: 2203.00.0030; 2203.00.0060; 2203.00.0090; 2204.10.0030; 2204.10.0065; 2204.10.0075; 2204.21.5005; 2204.21.5015; 2204.21.5025; 2204.21.5025; 2204.21.5028;

2204.21.5035; 2204.21.5040; 2204.21.5050; 2204.21.5055; 2204.21.5060; 2204.21.8030; 2204.21.8060; 2208.30.3030; 2208.30.3060; 2208.40.4000; and 2208.60.2000.

Chapter 30: 3005.90.5010; 3005.90.5090.

Chapter 33: 3304.99.5000.

Chapter 63: 6307.90.6800.

Chapter 90: 9018.39.0020; 9018.39.0040; 9018.39.0050; and 9018.90.8000.

Chapter 95: 9503.00.0011; 9503.00.0013; 9503.00.0071; 9503.00.0073; and 9503.00.0090.

Test participants are encouraged to submit GBIs with all qualified entry filings that meet the conditions of the test so that CBP has a fulsome data set to evaluate; however, entries will not be rejected if GBIs are not submitted. Additional commodities may be added as CBP refines the scope of the test. CBP will announce the HTSUS subheadings for any additional commodities as a modification to the test in a subsequent **Federal Register** notice.

2. Countries of Origin Subject to the GBI EPoC

CBP has limited the test to entries of imported merchandise with the following countries of origin, which have been identified as representing both countries with a high risk of non-compliance with U.S. import laws and those that are partner countries, while covering a diversity of jurisdictions: (1) Australia; (2) Canada; (3) China; (4) France; (5) Italy; (6) Mexico; (7) New Zealand; (8) Singapore; (9) United Kingdom; and (10) Vietnam. Additional countries of origin may be added as CBP refines the scope of the test. CBP will announce any additional countries of origin as a modification to the test in a subsequent **Federal Register** notice.

E. Filing Entries With GBIs (via ABI in ACE)

Test participants must coordinate with their software vendors or technical teams to ensure that their electronic systems are capable of transmitting the D–U–N–S®, GLN, and LEI entity identifiers to CBP. During this test, CBP will only accept electronic submissions of GBIs via ABI in ACE with CBP Form 3461 (Entry/Immediate Delivery) filings for type 01 and type 11 entries. Upon selection to participate in the test, the test participants will be provided with technical information and guidance regarding the transmission of the GBIs to CBP with the CBP Form 3461 filings. The assigned ABI client represen-

tatives of the test participants will provide additional technical support, as needed.

F. CBP Access to Underlying GBI Data Associated With GBIs

As part of the test, CBP has entered into agreements with D&B, GS1, and GLEIF (the IMCs) for limited access to the underlying data ("GBI data") that is associated with the GBIs for the duration of the test and for testing of CBP's automated systems.[1] The data elements for which CBP has entered into agreements with D&B, GS1, and GLEIF may include, but are not limited to: (1) entity identifier numbers, (2) official business titles; (3) names; (4) addresses; (5) financial data; (6) trade names; (7) payment history; (8) economic status; and (9) executive names. The data elements will be examined as part of the test.

Consistent with the agreements, CBP may access GBI data, combine it with CBP data, and evaluate the GBIs that the test participants provide with an entry filing. The GBI data will assist CBP and PGAs in determining the optimal combination of the three entity identifiers (the GBIs) that will provide the U.S. Government with sufficient entity data needed to support identification, monitoring, and enforcement procedures to better equip the U.S. Government to focus on high-risk shipments and bad actors.

CBP will process entries submitted pursuant to the test by analyzing the GBIs submitted via ABI in ACE and ensuring that the GBIs are submitted correctly. CBP will then evaluate the submitted entries to assess the ease and cost of obtaining each of the GBIs, evaluating each GBI to ensure that it is being submitted properly per the technical requirements that will be set forth in CBP and Trade Automated Interface Requirements (CATAIR), and ensuring that CBP is able to validate that each GBI is accurate using the underlying GBI data from the IMCs or otherwise known to CBP.

G. Partner Government Agencies (PGAs)

PGAs are important to the success of the test. Certain PGAs, which may receive GBIs and GBI data and are intended as core test beneficiaries, may use the GBIs and GBI data to improve risk management and import compliance. This may result in smarter, more efficient, and more effective compliance efforts. CBP will announce the PGAs who will receive GBIs and GBI data pursuant to the test in a notice to be published in the **Federal Register** at a later date.

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[1] As noted above, D&B, GS1, and GLEIF are IMCs. The GBI data consists of data provided by the relevant entity to the IMCs in order to generate a GBI—the D–U–N–S®, GLN, or LEI. GBIs allow CBP to link the underlying GBI data to specific entities and entries.

H. Duration of Test

The test will commence on December 19, 2022, and will run until July 21, 2023, subject to any extensions, modifications or early termination as announced by way of a notice to be published in the **Federal Register**.

I. Misconduct Under the Test

Misconduct under the test may include, but is not limited to, submitting false GBIs with an entry filing. Currently, CBP does not plan to assess penalties against GBI EPoC participants that fail to timely and accurately submit GBIs during the test. CBP also does not anticipate shipment delays due to the failure to file or the erroneous filing of GBIs. However, test participants are expected to follow all other applicable regulations and requirements associated with the entry process.

After an initial six-month period (or at such earlier time as CBP deems appropriate), a test participant may be subject to discontinuance from participation in this test for any of the following repeated actions:

- Failure to follow the terms and conditions of this test;
- Failure to exercise due diligence in the execution of participant obligations;
- Failure to abide by applicable laws and regulations that have not been waived; or
- Failure to deposit duties or fees in a timely manner.

If the Director, Interagency Collaboration Division (ICD), Trade Policy and Programs (TPP), Office of Trade (OT), finds that there is a basis to discontinue a participant's participation in the test, then CBP will provide written notice, via email, proposing the discontinuance with a description of the facts or conduct supporting the proposal. The test participant will be offered the opportunity to respond to the Director's proposal in writing within 10 business days of the date of the written notice. The response must be submitted to the ICD Director, TPP, OT, by emailing *GBI@cbp.dhs.gov,* with a subject line reading "Appeal—GBI Discontinuance."

The Director, ICD, will issue a final decision in writing on the proposed action within 30 business days after receiving a timely filed response from the test participant, unless such time is extended for good cause. If no timely response is received, the proposed notice becomes the final decision of CBP as of the date that the response period expires. A proposed discontinuance of a test participant's privileges will not take effect unless the response process under this

paragraph has been concluded with a written decision that is adverse to the test participant, which will be provided via email.

J. Confidentiality

Data submitted and entered into ACE may include confidential commercial or financial information which may be protected under the Trade Secrets Act (18 U.S.C. 1905), the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a). However, as stated in previous notices, participation in this or any of the previous ACE tests is not confidential and, therefore, upon receipt of a written Freedom of Information Act request, the name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

IV. Comments on the Test

All interested parties are invited to comment on any aspect of this test at any time. CBP requests comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter, expand, limit, continue, end, or fully implement this program. Comments should be submitted via email to *GBI@cbp.dhs.gov,* with the subject line reading "Comments/Questions on GBI EPoC."

V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB).

The new GBI collection of information gathered under this test has been approved by OMB in accordance with the requirements of the PRA and assigned OMB control number 1651–0141. In addition, the Entry/Immediate Delivery Application and ACE Cargo Release (CBP Form 3461 and 3461 ALT) has been updated to accommodate the GBI test, and approved by OMB under OMB control number 1651–0024.

VI. Evaluation Criteria

The test is intended to evaluate the feasibility of replacing the current manufacturer or shipper identification code (MID) with unique entity identifiers (GBIs) to more accurately identify legal business entities, their different business locations and addresses, as well as their various functions and supply chain roles, based upon

information derived from the unique D–U–N–S®, GLN, and LEI entity identifiers. The test will assist CBP in enforcing applicable laws and protecting the revenue, while fulfilling trade modernization efforts by assisting the agency in verifying the roles, functions and responsibilities that various entities play in a given participants' importation of merchandise. CBP's evaluation of the test, including the review of any comments submitted to CBP during the duration of the test, will be ongoing with a view to possible extension or expansion of the test.

CBP will evaluate whether the test: (1) improves foreign entity data for trade facilitation, risk management, and statistical integrity; (2) ensures U.S. Government access to foreign entity data; (3) institutionalizes a global, managed identification system; (4) implements a cost-effective solution; (5) obtains stakeholder buy-in; and (6) facilitates legal compliance across the U.S. Government. At the conclusion of the test, an evaluation will be conducted to assess the efficacy of the information received throughout the course of the test. The final results of the evaluation will be published in the **Federal Register** as required by section 101.9(b)(2) of the CBP regulations (19 CFR 101.9(b)(2)).

Should the GBI EPoC be successful and ultimately be codified under the CBP regulations, CBP anticipates that this data would greatly enhance ongoing trade entity identification and resolution, reduce risk, and improve compliance operations. CBP would also anticipate greater supply chain visibility and verified, validated information on legal entities, which will support better decision-making during customs clearance processes.

Dated: November 28, 2022.

ANNMARIE R. HIGHSMITH,
Executive Assistant Commissioner,
Office of Trade.

[Published in the Federal Register, December 21, 2022 (85 FR 74157)]

U.S. Court of International Trade

Slip Op. 22–130

SEA SHEPHERD NEW ZEALAND and SEA SHEPHERD CONSERVATION SOCIETY Plaintiffs, v. UNITED STATES, GINA M. RAIMONDO, in her official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, a United States government agency, JANET COIT, in her official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, a United States government agency, JANET YELLEN, in her official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, a United States government agency, ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a United States government agency, Defendants, and NEW ZEALAND GOVERNMENT, Defendant-Intervenor.[1]

Before: Gary S. Katzmann, Judge
Court No. 20–00112

[The court grants Defendants' Motion to Dismiss Plaintiffs' First Claim and grants Plaintiffs a preliminary injunction on the remaining second and third claims.]

Dated: November 28, 2022

Lia Comerford, Earthrise Law Center at Lewis & Clark Law, of Portland, OR, argued for Plaintiffs Sea Shepherd New Zealand and Sea Shepherd Conservation Society. With her on the briefs were *Allison LaPlante*, *Danielle Replogle*; and *Brett Sommermeyer* and *Catherine Pruett*, Sea Shepherd Legal, of Seattle, WA.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants United States, Gina M. Raimondo, United States Department of Commerce, National Marine Fisheries Service, Janet Yellen, United States Department of the Treasury, Alejandro Mayorkas, and United States Department of Homeland Security. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Jason S. Forman*, Office of the General Counsel, National Oceanic and Atmospheric Administration, of Silver Spring, MD.

Warren E. Connelly, of Trade Pacific PLLC, of Washington, D.C., argued for Defendant-Intervenor New Zealand Government. With him on the briefs were *Robert G. Gosselink* and *Kenneth N. Hammer*.

OPINION

Katzmann, Judge:

On Earth Day 2020, at the conclusion of litigation concerning the plight of the critically endangered vaquita — the world's smallest

[1] Per CIT Rule 25(d), named officials have been substituted to reflect the current office-holders.

porpoise, endemic to Mexico — this court took note of "the sobering words of Rachel Carson: 'So delicately interwoven are [ecological] relationships that when we disturb one thread of the community fabric, we alter it all — perhaps almost imperceptibly, perhaps so drastically that destruction follows.'"[2] Mindful that every case must be assessed on its own record and facts, the court returns today to the fate of a different critically endangered species, the Māui Dolphin — the world's smallest dolphin, endemic to New Zealand — which most recent estimates suggest consists of between only forty-eight to sixty-four remaining individuals.[3] The court last addressed the Māui dolphin in granting a voluntary remand to Defendants — several United States agencies and officials (collectively "the United States" or "the Government") — so that the U.S. Department of Commerce ("Commerce") could reconsider its rejection of Plaintiffs Sea Shepherd New Zealand Ltd. and Sea Shepherd Conservation Society's (collectively "Plaintiffs")[4] petition for emergency rulemaking to ban imports of fish and fish products from New Zealand caught using fishing technology that kills or seriously injures Māui dolphins in excess of U.S. standards under the Marine Mammal Protection Act ("MMPA"). *See Sea Shepherd N.Z. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1330, 1337–38 (2020) ("*Sea Shepherd I*"). That statute — the MMPA — aims to protect marine mammals by setting forth standards applicable to both domestic commercial fisheries and to foreign fisheries, like those in New Zealand, that wish to export their products to the United States. Upon voluntary remand, Commerce again rejected Plaintiffs' petition for emergency rulemaking and issued determinations to two New Zealand fisheries certifying their "comparability" with U.S. standards.

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[2] *See Nat. Res. Def. Council, Inc. v. Ross*, 44 CIT __, __, 456 F. Supp. 3d 1292, 1299 (2020) ("*NRDC V*") (quoting Rachel Carson, *Essay on Biological Sciences*, *in* Good Reading (Atwood Townshend & J. Sherwood Weber eds., 1958)). In the *NRDC* line of litigation, this court granted plaintiff environmentalists a preliminarily injunction enjoining imports of fish and fish products from certain Mexican commercial fisheries utilizing gillnets within the vaquita's range. *Id.* at 1294–95. Ultimately, the Defendant United States there chose to expand upon the resulting embargo, thus finally resolving that "tortuous" dispute. *See id.* at 1298–99; *see also infra* note 7.

[3] *See* Facts About Hector's & Māui Dolphin, *Dep't of Conservation*, www[.]doc[.]govt[.]nz/nature/native-animals/marine-mammals/dolphins/maui-dolphin/facts/ (last visited Nov. 22, 2022). [Please note, in order to disable links to outside websites, the court has removed the "http" designations and bracketed the periods within all hyperlinks. For archived copies of the webpages cited in this opinion, please consult the docket.]

[4] Sea Shepherd New Zealand Ltd. is a registered New Zealand charity whose purpose is to protect and preserve New Zealand's ocean environment, *see* First Suppl. Compl. ¶ 16, Nov. 24, 2020, ECF No. 46, and Sea Shepherd Conservation Society is a 501(c)(3) international nonprofit corporation incorporated in Oregon dedicated to safeguarding the biodiversity of the planet's ocean ecosystems, *see id.* ¶ 17.

Before the court, in a suit asserting three claims for relief, Plaintiffs maintain that New Zealand gillnet and trawl fisheries are killiing Māui dolphins in excess of U.S. standards. Accordingly, Plaintiffs allege in their first claim that the United States has unlawfully withheld agency action by failing to ban New Zealand's associated imports of fish and fish products; Plaintiffs further allege in their second and third claims, respectively, that the United States acted arbitrarily, capriciously, and otherwise not in accordance with law both by denying Plaintiffs' petition for emergency rulemaking and by granting findings of comparability to New Zealand. Pending final resolution on the merits, Plaintiffs ask the court to preliminarily enjoin New Zealand's implicated imports. By contrast, the United States and the Government of New Zealand — as Defendant-Intervenor — ask the court to dismiss Plaintiffs' claim of agency action unlawfully withheld and to otherwise deny Plaintiffs' Preliminary Injunction Motion.

The court grants Defendants' Motion to Dismiss Plaintiffs' First Claim of agency action unlawfully withheld because Commerce "acted" by denying Plaintiffs' petition for emergency rulemaking and by granting comparability findings to New Zealand; as to Plaintiffs' second and third claims alleging that such agency action was arbitrary, capricious, or otherwise not in accordance with law, the court grants Plaintiffs a preliminary injunction — the scope of which is defined herein — pending final resolution on the merits because the factors that guide the court's grant of injunctive relief favor Plaintiffs.

BACKGROUND

I. Legal Background

The court begins by setting out the overarching statutory and regulatory frameworks necessary to contextualize Plaintiffs' challenge; in the forthcoming discussion of specific issues, *infra* pp. 32–56, the court will expand upon certain legal provisions as relevant and necessary.

A. The Marine Mammal Protection Act

Congress enacted the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, to protect marine mammal species that "are, or may be, in danger of extinction or depletion as a result of man's activities," *id.* § 1361(1), from "diminish[ing] below their optimum sustainable population," *id.* § 1361(2).

Accordingly, Congress imposed — with limited exceptions — a "moratorium on the taking[5] and importation of marine mammals and marine mammal products," *id.* § 1371(a) (footnote not in original), so that "the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations [may] be reduced to insignificant levels approaching . . . zero," *id.* § 1371(a)(2) (hereinafter "the Zero Mortality Rate Goal"). As part of the Zero Mortality Rate Goal, paragraph 1371(a)(2) further instructs that "[t]he Secretary of the Treasury[6] shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." *Id.* § 1371(a)(2) (hereinafter "Import Provision") (footnote not in original).

The MMPA does not otherwise define the phrase "United States standards," 16 U.S.C. § 1371(a)(2), but this court has identified certain markers throughout the statute that illuminate the concept. *See Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, __, 331 F. Supp. 3d 1338, 1355, 1363 (2018) ("*NRDC I*").[7] One such marker of "United States standards" is the "Potential Biological Removal" level, or "PBR," which is the "maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." 16 U.S.C. §§ 1362(20), 1386(a)(6). Where

[5] "The term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13).

[6] The MMPA is found within Chapter 31 on Marine Mammal Protection of Title 16 of the U.S. Code. Subparagraph 1362(12)(A)(i) of 16 U.S.C. establishes, in relevant part, that "for the purposes of this chapter" "the term 'Secretary' means" "the Secretary of the department in which the National Oceanic and Atmospheric Administration ["NOAA"] is operating, . . . with respect to members of the order Cetacea." 16 U.S.C. § 1362(12)(A)(i). The "order Cetacea" includes "any member of an entirely aquatic group of mammals commonly known as whales, dolphins, and porpoises." *See Cetacean*, Encyc. Britannica Online, www[.]britannica[.]com/animal/cetacean (last visited Nov. 22, 2022).

Consistently, NOAA — which falls within the Department of Commerce — has interpreted § 1371(a)(2)'s directive that "[t]he Secretary of the Treasury shall ban importation of . . . fish or products from fish . . . caught . . . in excess of United States standards" to apply to it in cooperation with the Departments of the Treasury and Homeland Security. *See Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 75 Fed. Reg. 22,731, 22,731 (Dep't Commerce Apr. 30, 2010); *see also Fish and Fish Import Provisions of the Marine Mammal Protection Act*, 81 Fed. Reg. 54,390, 54,394 (Dep't Commerce Aug. 15, 2016).

[7] In proceeding under the MMPA and filing a motion for preliminary injunction to compel the Secretary of Commerce to implement an import ban, Plaintiffs here are building upon a legal theory first presented to this court in the aforementioned litigation involving Mexico's vaquita. *See NRDC I*, 331 F. Supp. 3d 1338; *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1381 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 348 F. Supp. 3d 1306 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 774 F. App'x. 646 (Fed. Cir. 2019); *NRDC V*, 456 F. Supp. 3d 1292.

commercial fishing causes mortality of a marine mammal population in excess of PBR, NOAA is required to develop a "Take Reduction Plan" with measures to reduce fishery-related mortalities to less than PBR within six months and to reduce mortality and/or serious injury of marine mammals incident to commercial fishing to insignificant levels approaching zero within five years. *Id.* §§ 1387(f)(1)–(2), (5), 1362(19).

In addition to the Zero Mortality Rate Goal, PBR, and Take Reduction Plans, further statutory markers of "United States standards" include, but are not necessarily limited to, monitoring of "incidental takes," also referred to as "bycatch," *id.* § 1387(d), as well as stock assessments — which document a marine mammal species' population abundance and the fisheries that interact with them, *see id.* § 1386. For purposes of assessing whether "United States standards" have been exceeded, the Secretary "shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial technology in use for such fish or fish products." *Id.* § 1371(a)(2)(A).

B. NOAA's Imports Regulation

NOAA supplemented the MMPA's markers of "United States standards" through the promulgation of agency regulations in August 2016. *See* 50 C.F.R. Part 216 (hereinafter "Imports Regulation"); *see also Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 81 Fed. Reg. 54,390 (Dep't Commerce Aug. 15, 2016).

For example, NOAA's Imports Regulation requires foreign harvesting nations to secure "comparability findings" for their fisheries importing fish and fish products into the United States, *see* 50 C.F.R. § 216.24(h)(1)(i), and establishes that any fish or fish product harvested in a fishery for which a valid comparability finding is not in effect is in excess of "U.S. standards," and thereby prohibited from import.[8,9]

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[8] 50 C.F.R. § 216.24(h)(1)(i) provides in relevant part:

> [T]he importation of commercial fish or fish products which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards or caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States are prohibited. For purposes of paragraph (h) of this section, a fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a valid comparability finding is not in effect.

[9] The Regulation further instructs that "[t]he prohibitions of paragraph (h)(1) . . . shall not apply during the exemption period," 50 C.F.R. § 216.24(h)(2)(ii), which is the one-time, seven-year period that commenced on January 1, 2017, *id.* § 216.3; *see also Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal*

Receipt of a comparability finding from NOAA signifies that a nation's fisheries satisfy the mandatory conditions set out in 50 C.F.R. § 216.24(h)(6)(iii) as well as "the additional considerations . . . in paragraph (h)(7) of th[at] section."[10] *Id.* § 216.3. A foreign harvesting nation seeking a comparability finding bears the burden to submit "reasonable proof" as to the effects of its fisheries on marine mammals. *See* 50 C.F.R. § 216.24(h)(6)(i).

C. Emergency Rulemaking

Where a fishery is having or is likely to have an immediate and significant adverse impact on a marine mammal stock interacting with that fishery, both the MMPA and NOAA's Imports Regulation provide for emergency rulemaking to curtail such effect. *See* 16 U.S.C. § 1387(g)(1) (emergency rulemaking provision covering U.S. domestic fisheries); *see also* 81 Fed. Reg. at 54,395 (proposal to extend the MMPA's emergency rulemaking provision to foreign fisheries); 50 C.F.R. § 216.24(h)(8)(vii)(A) (empowering NOAA — upon its own initiative or by request of third parties — to reconsider a comparability finding where evidence suggests the foreign fishery no longer satisfies the regulatory requirements).

II. Factual Background

This case concerns the plight of the Māui dolphin,[11] found only in the waters around New Zealand. *See* First Suppl. Compl. ¶ 51, Nov. 24, 2020, ECF No. 46 ("First Suppl. Compl."); *see also* N.Z. Gov't

Protection Act, 87 Fed. Reg. 63,955 (Dep't Commerce Oct. 21, 2022) ("*Deadline Modification*"). As such, in the ordinary case, the exemption period for securing a comparability finding will end on January 1, 2024, after which fish caught in a foreign fishery without a valid comparability finding will be in excess of "U.S. standards" and prohibited from import by operation of the Imports Regulation and the MMPA. *See* 50 C.F.R. § 216.24(h)(1)(i); *see also* 16 U.S.C. § 1371(a)(2).

However, "nothing prevents a nation from . . . seeking a comparability finding during the [seven]-year exemption period." *Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act-Notification of Rejection of Petition and Issuance of Comparability Findings*, 85 Fed. Reg. 71,297, 71,297 (Dep't Commerce Nov. 9, 2020), P.R. 1 ("*Comp. Finding Determ.*"). As established, *infra*, the Government of New Zealand requested early comparability findings for two fisheries, thereby rendering those fisheries "under the full effect of the [Imports Regulation]." *See* Mem. from A. Cole to C. Oliver, re: Decision Mem. for the Den. of Pet. for Rulemaking and Issuance of a Comparability Finding for the Gov't of N.Z. at 2, 8 (Dep't Commerce Oct. 27, 2020), P.R. 3104 ("Dec. Mem.").

[10] These regulatory conditions will be examined in greater detail, *infra* pp. 34–39.

[11] *Supra* note 3.

Answer to Compl. ¶ 39,[12] July 15, 2020, ECF No. 14 ("N.Z. Answer"); Mem. from A. Cole to C. Oliver, re: Decision Mem. for the Den. of Pet. for Rulemaking and Issuance of a Comparability Finding for the Gov't of N.Z. at 1 (Dep't Commerce Oct. 27, 2020), P.R. 3104[13] ("Dec. Mem."). The Māui Dolphin is a subspecies of and morphologically indistinguishable from the more populous Hector's dolphin, differentiable only by a DNA sequence. *See* First Suppl. Compl. ¶ 52; *see also* Dec. Mem. Attach. A at 25; N.Z. Dec. Letter re: Hector's and Māui Mgmt. Plan at 3 (N.Z. Gov't), P.R. 580 ("N.Z. TMP Letter").

In 1999, the New Zealand Minister of Conservation designated the Māui dolphin a "threatened species." First Suppl. Compl. ¶ 71; N.Z. Answer ¶ 58. The United States has, likewise, listed the Māui dolphin as "endangered" under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. *See Endangered and Threatened Wildlife and Plants: Final Rule to List the Māui Dolphin as Endangered and the South Island Hector's Dolphin as Threatened Under the Endangered Species Act*, 82 Fed. Reg. 43,701 (Dep't Commerce Sept. 19, 2017). And the International Union for Conservation of Nature ("IUCN") considers the Māui dolphin to be "critically endangered." *See* Dec. Mem. at 1–2; *see also The IUCN Red List of Threatened Species: Cephalorhynchus hectori ssp. Māui* (2013), P.R. 883.

Beyond its perilous state, remaining points of agreement regarding the Māui dolphin are few: Parties agree that Māui dolphins have a lifespan of approximately 25 years, low reproductivity, and late onset

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[12] The court notes that the paragraph numbers in the Government of New Zealand's Answer correspond to those in Plaintiffs' Original Complaint. While Plaintiffs amended their Complaint on several occasions, *see* Compl., May 21, 2020, ECF No. 5 ("Original Compl."); First Am. Compl., July 20, 2020, ECF No. 23; First Suppl. Compl., the Government of New Zealand did not likewise amend its Answer. As such, the court has cross-checked all factual admissions in New Zealand's Answer against both Plaintiffs' First Supplemental and Original Complaints. *Compare* First Suppl. Compl. 1 51 ("Māui dolphins, *found only in* the inshore *waters around New Zealand*'s North Island, are on the verge of extinction." (emphasis added)), *with* Original Compl. ¶ 39 ("The Māui dolphin is one of two imperiled subspecies of Hector's dolphin, *both subspecies being endemic to New Zealand's waters*." (emphasis added)), *with* N.Z. Answer ¶ 39 ("Admits that the [M]āui dolphin is endangered. Denies that the Hector's dolphin is imperiled. *Otherwise admits*." (emphasis added)).

Defendant United States has not likewise filed an answer because on January 27, 2021, the United States filed a Partial Motion to Dismiss in lieu of an answer. *See* U.S. Gov't Mot. to Dismiss Count I of Suppl. Compl., Jan. 27, 2021, ECF No. 58 ("Defs.' Mot. to Dismiss"). *See generally* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346 (3d ed. 2022) (collecting cases illuminating the majority view that filing a partial motion to dismiss stays the time for filing an answer as to other portions of the pleading). As there is no answer from the Defendant, the court derives the United States' position on factual matters from NOAA's decision memo denying Plaintiffs' petition for emergency rulemaking and granting comparability findings to New Zealand. *See, e.g.*, Dec. Mem.

[13] The court notes that unless otherwise specified, public record ("P.R.") page numbers reflect those listed in the Supplemental Administrative Record Index, Nov. 23, 2020, ECF No. 44–2, compiled following the August 13, 2020 remand.

sexual maturity, *see* First Suppl. Compl. ¶ 53; *see also* N.Z. Answer ¶ 40; however, parties hotly contest the population's current abundance, habitat range, and vulnerability to certain threats.

Concerning abundance, Plaintiffs submit that the estimated population of Māui dolphins has declined from 2,000 individuals in 1970 to fifty-seven dolphins in 2016, *see* First Suppl. Compl. ¶ 51, with only fourteen to seventeen breeding-age females remaining, *see* Pls.' Renewed Mot. for Prelim. Inj. at 3, Dec. 11, 2020, ECF No. 49 ("Pls.' Ren. PI Mot."). By contrast, NOAA and the Government of New Zealand assert a less dramatic decline — they maintain the Māui dolphin population has decreased from around 200 individuals in 1970 to sixty-three individuals today, with twenty to thirty-five adult females remaining, *see* Dec. Mem. Attach. A at 6; *see also* Māui Dolphins: Application for a Comparability Finding at 6, app. A at vi, app. B at vii–viii (N.Z. Gov't Sept. 2020), P.R. 94 ("N.Z. Comp. Finding App.").

Concerning the Māui dolphin's habitat range, NOAA and the Government of New Zealand submit that the Māui dolphin's "core range" is concentrated around the west coast of New Zealand's North Island within the 50-meter[14] contour line from the shore, *See* Dec. Mem. Attach. A at 7–8; N.Z. Comp. Finding App. at 8–9, 11, which they assess represents "approximately 83% (summer) and 76% (winter) of the dolphin distribution," *see* Dec. Mem. Attach. A at 7; N.Z. Comp. Finding App. at 11. Furthermore, both NOAA and the New Zealand Government maintain that the Māui dolphin's range extends to neither the interior of harbors, *see* Dec. Mem. Attach. A at 7; N.Z. Comp. Finding App. at 14, nor to the east coast of the North Island, *see* Dec. Mem. Attach. A at 11–13; N.Z. Comp. Finding App. at 12. For their part, Plaintiffs agree that the largest subpopulation of Māui dolphins exists along the west coast of the North Island, but they maintain that this includes harbors. Pls.' Ren. PI Mot. at 4. Moreover, Plaintiffs submit that "smaller subpopulation[s] of [Māui dolphins] exist[] along the northern coastline of the Cook Strait" — at the southern end of the North Island — "and along the east

[14] NOAA and the Government of New Zealand diverge in their assessments of dolphin presence beyond the 50-meter depth contour. *Compare* Dec. Mem. Attach. A at 8 ("Generally, according to population surveys, 59.2% of Māui dolphins are distributed between zero and 25 meters, 34.7% of Māui dolphins are distributed between 25 and 50 meters, and only 6.1% of Māui dolphins are distributed between 50 to 100 meters."), *with* N.Z. Comp. Finding App. at 14 ("References to the 100 m depth contour as a limit for the dolphin distribution are unsupported by evidence . . . [T]he outer limit of higher dolphin density would most closely follow the 30 m depth contour in summer, or the 50 m depth contour in winter."). Nevertheless, NOAA and the New Zealand Government agree that the Māui dolphin's "core range" falls within the 50-meter contour.

coast of the North Island," and that the Māui dolphins' "offshore range extends to at least the 100-meter depth contour." *Id.*

Finally, parties agree that commercial fishing poses a threat to Māui dolphins, particularly set net and trawl fishing,[15] *see* First Suppl. Compl. ¶ 56; *Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act-Notification of Rejection of Petition and Issuance of Comparability Findings*, 85 Fed. Reg. 71,297, 71,298 (Dep't Commerce Nov. 9, 2020), P.R. 1 ("*Comp. Finding Determ.*"); N.Z. Comp. Finding App. at 16; however, parties disagree as to the scope of the threat posed by commercial fishing, *compare* First Suppl. Compl. ¶ 99 ("Bycatch of Māui dolphins . . . is the primary threat to the dolphins' survival."), *with* N.Z. Answer ¶ 79 ("Denie[d]"), *and* Dec. Mem. at 2 (identifying "other non-fishing threats" to Māui dolphins).

Plaintiffs submit that the annual bycatch of Māui dolphins from fishing is between 1.5 to 2.4 animals per year. *See* First Suppl. Compl. ¶ 69. By contrast, NOAA and the Government of New Zealand maintain that there have been no documented Māui dolphin mortalities associated with commercial fishing since 2012 and that fishing has only been implicated in five Māui/Hector's dolphins deaths between 1921 and the present. *See* Dec. Mem. Attach. A at 22; N.Z. Comp. Finding App. app. F at i–iii. Although the cause of death is indeterminate, parties each report that a female Māui dolphin's carcass was found on a beach along the North Island's west coast on February 25, 2021. *See* Pls.' Resp. to Ct.'s Qs. at 1, June 29, 2021, ECF No. 73 ("Pls.' OA Subm.") (citing a pathology report from New Zealand's School of Veterinary Science);[16] U.S. Gov't Resp. to Ct.'s Qs. at 1, June 29, 2021,

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[15] Set nets, also known as gillnets, "are a type of non-selective fishing net that is hung vertically in the water for hours or . . . days . . . to harvest marine fish and other species," First Suppl. Compl. ¶ 56, and "[t]rawl fishing is another type of indiscriminate fishing method whereby . . . boats drag a large net through the water column, catching almost everything in the net's path," *id.* Parties disagree somewhat on whether set nets or trawls pose a greater threat to Māui dolphins. *Compare* Pls.' Ren. PI Mot. at 6 ("Significantly more trawling occurs than gillnetting, likely making total bycatch from trawling greater than bycatch from gillnets. . . . However, . . . a typical gillnet is estimated to be 20 to 30 times more likely to capture or kill a dolphin than a trawl."), *with* Dec. Mem. Attach. A at 29 ("Commercial set-net fisheries pose a much higher bycatch risk to Māui dolphins than do inshore trawl fisheries"), *and* N.Z. Comp. Finding App. app. G at v ("[D]olphin vulnerability (i.e. catchability . . .) is substantially higher in set nets than in trawls.").

[16] New Zealand's Department of Conservation posted the pathology report to its website, enabling this court to take judicial notice of it. *See Klamath Claims Comm. v. United States,* 541 F. App'x. 974, 979 n.8 (Fed. Cir. 2013) (explaining that government records may be "judicially noticed"); *see also Pathology Report for Māui Dolphin Found Beachcast at Muriwai on 25 February 2021*, Dep't of Conservation, www[.]doc[.]govt[.]nz/globalassets/documents/conservation/native-animals/marine-mammals/hectors-maui-incidents/h291[.]pdf (last visited Nov. 22, 2022).

ECF No. 71 ("Defs.' OA Subm.") (citing same); N.Z. Gov't Resp. to Ct.'s Qs. at 1, June 29, 2021, ECF No. 72 ("Def.-Inter.'s OA Subm.") (attaching same).

Precise mortality numbers and causes aside, because all parties agree that the Māui dolphin's situation is precarious, the Government of New Zealand began imposing certain restrictions on gillnet and trawl fishing to protect the Māui dolphin in 2003. *See* First Suppl. Compl. ¶ 60; N.Z. Answer ¶ 47. Moreover, in 2007, New Zealand introduced a Threat Management Plan ("TMP") "to effectively manage human-induced threats to Hector's dolphins (including Māui's dolphins)."[17] *See* Hector's and Māui's Dolphin Threat Mgmt. Plan Draft for Pub. Consult. at 8 (N.Z. Gov't Aug. 29, 2007), P.R. 4614[18] ("2007 Draft TMP"); First Suppl. Compl. ¶ 73; N.Z. Answer ¶ 60.

In 2017, a group of experts submitted a report to the International Whaling Commission ("IWC")[19] Scientific Committee calculating a PBR that only one Māui dolphin could be removed from the population roughly every 20 years to allow Māui dolphins to reach or maintain their optimum sustainable population. *See* First Suppl. Compl. ¶ 57; N.Z. Answer ¶ 44 (acknowledging the report). While the Government of New Zealand "[d]enies that the IWC correctly calculated the PBR for the [M]aui dolphin in 2017," N.Z. Answer 1 44, New Zealand initiated a process to revise its TMP for Hector's and Māui dolphins in 2018, *see* First Suppl. Compl. ¶ 80; N.Z. Answer ¶ 67.

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[17] New Zealand's TMP is not a statutory document. *See* First Suppl. Compl. ¶ 73; N.Z. Answer ¶ 60 (admitted). This stands in contrast to a Population Management Plan ("PMP"), which if enacted would require the New Zealand Government to facilitate the Māui dolphin's achievement of non-threatened status within twenty years. *See* Marine Mammals Protection Act 1978, s 3E–F (N.Z.) (instructing, in relevant part, that where a PMP is approved for "any threatened species," the Minister of Fisheries "shall determine a level of fishing-related mortality which should allow the species to achieve non-threatened status as soon as reasonably practicable, and in any event within a period not exceeding 20 years").

In the draft TMP for Hector's and Māui dolphins made available for public comment in August 2007, the New Zealand Government explained that "[the] Government has a general policy position that threatened species numbers should be increased to reach non-threatened status. However, in the absence of a Population Management Plan issued under the Marine Mammal Protection Act there is no obligation to require such a rebuild to occur." *See* Hector's and Māui's Dolphin Threat Mgmt. Plan Draft for Pub. Consult. at 11 (N.Z. Gov't Aug. 29, 2007), P.R. 4614 ("2007 Draft TMP"). [Please note, the P.R. number here reflects that listed in the Administrative Record Index, Nov. 23, 2020, ECF No. 44–1.]

[18] *See* Admin. R. Index, Nov. 23, 2020, ECF No. 44–1.

[19] "The IWC was established in 1946 as the global body responsible for management of whaling and conservation of whales. Today the IWC has 88 member countries," including the United States and New Zealand. *See The Int'l Whaling Comm'n – IWC*, Int'l Whaling Comm'n, iwc[.]int/en/ (last visited Nov. 22, 2022); *see also Membership & Cont. Gov'ts*, Int'l Whaling Comm'n, iwc[.]int/commission/members (last visited Nov. 22, 2022).

III. Procedural Background

Assessing that bycatch of Māui dolphins had exceeded the PBR calculated for the IWC Scientific Committee — and thereby contravened "United States standards" for purposes of the MMPA's Import Provision — on February 6, 2019, Plaintiffs submitted a formal petition to the United States Government asking it to utilize its rulemaking authority[20] to ban the import of fish and fish products originating from New Zealand fisheries in the Māui dolphin's range[21] that employ either gill nets or trawls. *See* Pls.' Feb. 6, 2019 Māui Dolphin Pet. at 3, 12 (Feb. 6, 2019), P.R. 1[22] ("Pls.' Feb. 2019 Pet.").

On July 10, 2019, NOAA rejected Plaintiffs' February 2019 petition. *See Notification of the Rejection of the Petition to Ban Imports of All Fish and Fish Products from New Zealand That Do Not Satisfy the Marine Mammal Protection Act*, 84 Fed. Reg. 32,853 (Dep't Commerce July 10, 2019), P.R. 5426.[23] In so rejecting, NOAA assessed that the Government of New Zealand's regulatory program was "comparable in effectiveness" to that of the United States because:

> 1. New Zealand has in place an existing regulatory program to reduce Māui dolphin bycatch.
>
> 2. Through its 2019 risk assessment, New Zealand evaluated the effectiveness of this regulatory program in meeting bycatch reduction targets . . . .
>
> 3. Based on the 2019 assessment, New Zealand is now proposing additional regulatory measures which, when fully implemented, will likely further reduce risk and Māui dolphin bycatch below Potential Biological Removal level (PBR).

Id. at 32,854.

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[20] Plaintiffs urged the Government to impose the requested ban pursuant to subsection 553(e) of the Administrative Procedure Act ("APA"), which provides: "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C.§ 553(e).

[21] In their original petition, Plaintiffs asked the Government to ban imports from fisheries along the *west coast* of New Zealand's North Island only. *See* Pls.' Feb. 2019 Pet. at 21. Plaintiffs identified species of fish caught by gill nets or trawls (or both) to be banned, which included: (1) snapper (trawl and set gillnet); (2) tarakihi (set gillnet and trawl); (3) spotted dogfish (set gillnet and trawl); (4) trevally (set gillnet and trawl); (5) warehou (trawl); (6) hoki (trawl); (7) barracouta (trawl); (8) flounder (trawl and set gillnet); (9) mullet (set net and inshore drift net); and (10) gurnard (set net and trawl). *See id.* at 21–25.

[22] *See* Admin. R. Index, Nov. 23, 2020, ECF No. 44–1.

[23] *Id*.

Plaintiffs responded to NOAA's denial by filing suit against the United States in this court on May 21, 2020. *See* Original Compl. In their Complaint, Plaintiffs asserted two claims: First, that NOAA unlawfully withheld or unreasonably delayed agency action in violation of section 706(1) of the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 706(1), by failing to ban the import of commercial fish and products from fish caught using gillnet and trawls in the Māui dolphin's range in excess of U.S. standards;[24] and second, that NOAA's denial of Plaintiffs' petition for emergency rulemaking was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under section 706(2)(A) of the APA, *see* 5 U.S.C. § 706(2)(A). *See* Original Compl. ¶¶ 84–88, 89–94.

Meanwhile, on June 24, 2020, the Government of New Zealand announced new fishing measures — derived from its review of the Hector's and Māui dolphins TMP begun in 2018 — to reduce Māui dolphin bycatch. *See* N.Z. TMP Letter at 1. The New Zealand Government represented that these new rules, effective October 1, 2020, would:

- extend existing, and create new, areas that prohibit the use of commercial and recreational set-nets in both the North Island and South Island, which will address the main fisheries risk to both Māui and Hector's dolphins;
- extend the closure to trawl fishing within the central Māui dolphin habitat zone;
- put in place a fishing-related mortality limit of one Māui or Hector's dolphin within the Māui dolphin habitat zone;[25]
- prohibit the use of drift nets in all New Zealand waters; and

[24] In their Complaint, Plaintiffs requested a trade ban covering a larger geographic area than the one specified in their original petition. *Compare* Pls.' Feb. 2019 Pet. at 21 ("[A]ny fishery using gillnets or trawls that interacts with Māui dolphins in its habitat *along the west coast of New Zealand's North Island* does not meet U.S. standards under the MMPA." (emphasis added)), *with* Original Compl. ¶¶ 41–42 (asserting "[t]he Māui dolphin's range extends *around the North Island coastline*" to "[t]he 100-meter depth contour" (emphasis added)). Plaintiffs maintain they based this range expansion on Māui dolphin'sighting information received under New Zealand's Official Information Act after Plaintiffs had submitted their original petition. *See* Pls.' Aug. 27, 2020 Suppl. Māui Dolphin Pet. at 4, 8 (Aug. 27, 2020), P.R. 5 ("Pls.' Suppl. Pet.").

[25] New Zealand codified this "mortality limit" in its Fisheries (Commercial Fishing) Regulations 2001, s 52D–E (N.Z.) and Fisheries (Amateur Fishing) Regulations 2013, s 155O–P (N.Z.). *See* N.Z. Comp. Finding App. at 31. In its analysis of New Zealand's regulatory program, NOAA refers to this "mortality limit" as New Zealand's "Management Review Trigger." *See* Dec. Mem. Attach. A at 34 n.142.

> • enable the use of commercial ring nets in existing set-net prohibition areas within west coast North Island harbours, as this is a fishing method that poses a low risk to these dolphins.

Id.

Plaintiffs moved for a preliminary injunction on their first claim for relief on July 1, 2020. *See* Pls.' Mot. for a Prelim. Inj. on First Cl. for Relief, July 1, 2020, ECF No. 11 ("Pls.' Original PI Mot.").[26] In said motion, Plaintiffs argued that New Zealand s approach to Māui dolphin conservation was not aligned with U.S. standards, and consequently, that the United States had "illegally failed" for purposes of section 706(1) of the APA "to carry out the[] discrete and mandatory duty to ban imports that threaten the continued existence of the Māui dolphin" under the MMPA's Import Provision, 16 U.S.C. § 1371(a)(2). *Id.* at 22–23. Plaintiffs further argued that New Zealand's newly announced measures only "incrementally extend[ed] gillnet and trawl restrictions along the west coast of the North Island" and "d[id] not go nearly far enough to protect Māui dolphins." *Id.* at 16.

By contrast, on belief that the revised TMP and attendant regulations were comparable to U.S standards under the MMPA, on July 15, 2020, the Government of New Zealand requested that NOAA perform a comparability assessment for two gear-based, multi-species fisheries — referred to as the "West Coast North Island inshore trawl fishery" and the "West Coast North Island inshore set net fishery"[27] — pursuant to NOAA's Imports Regulation. *See* N.Z. Letter re: Comparability Assessment of Hector's and Māui Dolphin Threat Mgmt. Plan (N.Z. Gov't July 15, 2020), P.R. 93; *see also* N.Z. Comp. Finding App. at 38–41.

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[26] Plaintiffs attached several declarations to their Preliminary Injunction Motion from scientific experts and members of their organizations. *See* Decl. of Brett Sommermeyer, July 1, 2020, ECF No. 11–1; Decl. of Prof. Elisabeth Slooten, July 1, 2020, ECF No. 11–2; Decl. of Dr. Glenn Simmons, July 1, 2020, ECF No. 11–3; Decl. of Dr. Timothy Ragen, July 1, 2020, ECF No. 11–4; Decl. of Michael Janisch-Lawry, July 1, 2020, ECF No. 11–5; Decl. of Paul Watson, July 1, 2020, ECF No. 11–6; Decl. James Boshier, July 1, 2020, ECF No. 11–7; Decl. of Sylvia Philcox, July 1, 2020, ECF No. 11–8; Decl. of Jennifer Matiu, July 1, 2020, ECF No. 11–9; Decl. of Richard Hay, July 1, 2020, ECF No. 11–10; Decl. of Aleisha Dockery, July 1, 2020, ECF No. 11–11. *See generally* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2949 (3d ed. 2022) ("Affidavits are appropriate on a preliminary-injunction motion and typically will be offered by both parties." (footnote omitted)).

[27] New Zealand's Application identified target fish species associated with each of these two fisheries, respectively. *See* N.Z. Comp. Finding App. at 40–41. The enumerated target fishes collectively covered all of the species identified in Plaintiffs' petition, *compare id.*, *with* Pls.' Feb. 2019 Pet. at 21–25, except for flounder, which NOAA associates with fisheries in the east coast of the North Island and South Island, *see* 2020 Final List of Foreign Fisheries at 163–68 (Dep't Commerce 2020), P.R. 2123.

In light of certain assessed differences between Plaintiffs' May 21, 2020 Complaint and the February 6, 2019 petition, *supra* note 24 and accompanying text, as well as New Zealand's June 24, 2020 issuance of new fisheries measures and July 15, 2020 request for a comparability assessment, on July 17, 2020, the United States asked this court for a voluntary remand to reconsider the denial of Plaintiffs' petition. *See* U.S. Gov't Partial Consent Mot. to Remand Case, July 17, 2020, ECF No. 17.[28,29] The court heard oral argument on the United States' Remand Motion on August 6, 2020, *see* Oral Arg. on Defs.' Remand Mot., Aug. 6, 2020, ECF No. 34, and granted the Government's request on August 13, 2020, *see* Ct. Order Granting Defs.' Mot. for Voluntary Remand, Aug. 13, 2020, ECF No. 39. In so granting, the court afforded Plaintiffs the opportunity to supplement their petition for emergency rulemaking on remand and ordered NOAA to file its redetermination results with the court by October 30, 2020. *See Sea Shepherd I*, 469 F. Supp. 3d at 1337–38.

Consistent with the court's order, on August 27, 2020, Plaintiffs submitted a supplemental petition to NOAA officially broadening its request that the United States "ban the import of all fish and fish products originating from fisheries in the entirety of the Māui dolphin's current and historical range, which includes the entire coastline of the North Island out to the 100m depth contour, that employ either set nets or trawls." *See* Pls.' Aug. 27, 2020 Suppl. Māui Dolphin Pet. at 5 (Aug. 27, 2020), P.R. 5 ("Pls.' Suppl. Pet.").[30] Plaintiffs argue that per the U.S. PBR approach — which they assess allows the loss of 1 animal every 20.6 years, *id.* at 15 — banning trawling and set netting *throughout* the Māui dolphin habitat is required to comport with "United States standards" under the MMPA, *id.* at 13. As New Zealand's revised TMP and attendant measures do not do

[28] Plaintiffs filed an Amended Complaint on July 20, 2020. *See* First Am. Compl.

[29] On July 21, 2020, the court granted the New Zealand Government's Motion to Intervene as Defendant-Intervenor, *see* N.Z. Unopp. Mot. to Intervene as Def.-Inter., July 15, 2020, ECF No. 13; Ct. Order Granting N.Z.'s Unopp. Mot. to Intervene as Def.-Inter., July 21, 2020, ECF No. 24. The court deemed New Zealand's earlier submitted Answer to Plaintiffs' Complaint filed that same day. *See* Ct. Order Deeming N.Z.'s Answer Filed, July 21, 2020, ECF No. 25.

[30] In their August 27, 2020 supplemental petition, Plaintiffs explicitly reincorporated the legal and factual grounds underpinning their February 6, 2019 petition. *See* Pls.' Suppl. Pet. at 5. Moreover, Plaintiffs enumerated and "incorporate[d] . . . in their entirety as support for the requested trade ban" the: (1) First Amended Complaint, ECF No. 23; (2) Original Motion for Preliminary Injunction, ECF No. 11; (3) Declaration of Professor Elisabeth Slooten, ECF No. 11–2; (4) Declaration of Dr. Glenn Simmons, ECF No. 11–3; (5) Declaration of Dr. Timothy Ragen, ECF No. 11–4; and (6) Declaration of Brett Sommermeyer, ECF No. 11–1. *Id.* at 6.

that, Plaintiffs maintain the United States must immediately ban imports from all implicated fisheries.[31] *Id.* at 3, 12–13.

After providing a ten-day opportunity for public comment on Plaintiffs' supplemental petition, *see Notification of Receipt of a Supplemental Petition To Ban Imports of All Fish and Fish Products From New Zealand That Do Not Satisfy the Marine Mammal Protection Act*, 85 Fed. Reg. 60,946, 60,946 (Dep't Commerce Sept. 29, 2020), P.R. 25, NOAA again declined to impose Plaintiffs' requested import ban and instead issued comparability findings to New Zealand's West Coast North Island inshore trawl and set net fisheries on November 9, 2020,[32] *see Comp. Finding Determ.* at 71,298. NOAA reasoned that the Government of New Zealand's "regulatory program, implemented on October 1, 2020, will in all likelihood reduce Māui dolphin bycatch below PBR," Dec. Mem. at 8 — which NOAA calculated to allow "1 death every 8 years," *id*. Attach. A at 18 — and is otherwise comparable in effectiveness to U.S. standards, *see Comp. Finding Determ.* at 71,298. In so assessing, NOAA rejected Plaintiffs' proposed delineation of the Māui dolphin's habitat. *See* Dec. Mem. Attach. A at 6 (describing the Māui dolphin as "endemic to the *west coast* of the North Island" (emphasis added)); *supra* pp. 10–11 (describing parties' disagreement regarding the Māui dolphin's habitat range). The issued comparability findings are to remain in effect through January 1, 2023, subject to revocation by NOAA before that date if warranted. *See Comp. Finding Determ.* at 71,297.[33]

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[31] To the point of implicated fisheries, Plaintiffs note that "since [the] issuance of their original petition, their analysis of New Zealand seafood trade data has identified a larger number of fish species and associated fish products that may originate in Māui dolphin habitat." Pls. Suppl. Pet. at 20. Plaintiffs elaborate that "at least 33 fish species are caught in water that Māui dolphins inhabit" and that "of those 33 fish species, at least 23 are exported to the U.S." *Id*. at 19 (internal citations omitted). However, Plaintiffs do not enumerate those twenty-three fish species. *Compare id. with*, Pls.' Feb. 2019 Pet. at 21–25 (identifying ten fish species caught by gill nets or trawls (or both) along the west coast of New Zealand's North Island).

[32] In accordance with the court's order in *Sea Shepherd I*, NOAA notified the court and Plaintiffs of its remand determination on October 30, 2020. *See* 469 F. Supp. 3d at 1333; *see also* Defs.' Remand Results, Oct. 30, 2020, ECF No. 40.

[33] On November 30, 2021, pursuant to the procedures set forth in 50 C.F.R. § 216.24(h)(6), the New Zealand Government submitted its Application to secure comparability findings for the period following January 1, 2023. *See* Joint Status Report in Resp. to Ct.'s Order, Jan. 7, 2022, ECF No. 90. As discussed, *infra*, NOAA originally anticipated issuing new comparability findings — to cover the period following January 1, 2023 — to New Zealand's fisheries on November 30, 2022. *See* Joint Status Report, Oct. 27, 2022, ECF No. 102; *see also* U.S. Gov't Resp. to Ct.'s Oct. 28, 2022 Suppl. Qs. at 1–2, Nov. 4, 2022, ECF No. 105 ("Defs.' Add'l Suppl. Qs. Resp."). However, on November 4, 2022, the United States informed the court that NOAA no longer expects to be able to issue new comparability findings to these fisheries prior to the January 1, 2023 expiration. *See* Defs.' Add'l Suppl. Qs. Resp. at 1–2; *see also Deadline Modification* (extending the deadline for foreign nations to secure comparability findings from December 31, 2022 to December 31, 2023).

With their petition denied for a second time, Plaintiffs filed a Supplemental Complaint with this court on November 24, 2020. *See* First Suppl. Compl. In addition to relodging the two claims from their Original Complaint,[34] Plaintiffs introduced a third claim in the Supplemental Complaint, namely that NOAA's grant of comparability findings to the two New Zealand fisheries was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under section 706(2)(A) of the APA, *see* 5 U.S.C. § 706(2)(A). *See* First Suppl. Compl. ¶¶ 117–121.[35]

Plaintiffs subsequently filed a Renewed Motion for Preliminary Injunction on December 11, 2020. *See* Pls.' Ren. PI Mot.[36] The United States and the Government of New Zealand responded in opposition to Plaintiffs' Renewed Motion on January 15, 2021. *See* U.S. Gov't Resp.in Opp. to Pls.' Renewed Mot. for Prelim. Inj., Jan. 15, 2021, ECF No. 57 ("Defs.' Resp. Br."); N.Z. Gov't Resp. in Opp. to Pls.' Renewed Mot. for Prelim. Inj., Jan. 15, 2021, ECF No. 55 ("Def.-Inter.'s Resp. Br."). In addition, the United States and the Government of New Zealand each moved to dismiss the first claim of Plaintiffs' Supplemental Complaint. *See* U.S. Gov't Mot. to Dismiss Count I of Suppl. Compl., Jan. 27, 2021, ECF No. 58 ("Defs.' Mot. to Dismiss"); N.Z. Gov't Mot. to Dismiss Count I of Suppl. Compl., Jan. 15,

[34] Recall that Plaintiffs' Original Complaint asserted that: (1) NOAA unlawfully withheld or unreasonably delayed agency action in violation of section 706(1) of the APA, *see* 5 U.S.C. § 706(1), by failing to ban the import of commercial fish and products from fish caught using gillnet and trawls in excess of U.S. standards in the Māui dolphin's range; and (2) that NOAA's denial of Plaintiffs' petition for emergency rulemaking was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under section 706(2)(A) of the APA, *see* 5 U.S.C. § 706(2)(A). *See* Original Compl. ¶¶ 84–88, 89–94.

[35] The court notes an apparent typographical error in the paragraph numbering in Plaintiffs' First Supplemental Complaint. *Compare* First Suppl. Compl. at 34–36, *with id.* at 37–38 (repeating paragraph numbers). The citations to paragraphs herein reflect numbering retabulated by the court.

[36] Along with the Renewed Motion for Preliminary Injunction, Plaintiffs again submitted declarations from scientific experts and members of their organizations. *See* Second Decl. of Brett Sommermeyer, Dec. 11, 2020, ECF No. 49–1; Second Decl. of Prof. Elisabeth Slooten, Dec. 11, 2020, ECF No. 49–2; Second Decl. of Dr. Glenn Simmons, Dec. 11, 2020, ECF No. 49–3; Second Decl. of Dr. Timothy Ragen, Dec. 11, 2020, ECF No. 49–4; Second Decl. of Michael Janisch-Lawry, Dec. 11, 2020, ECF No. 49–5; Second Decl. of Paul Watson, Dec. 11, 2020, ECF No. 49-6; Second Decl. James Boshier, Dec. 11, 2020, ECF No. 49–7; Second Decl. of Sylvia Philcox, Dec. 11, 2020, ECF No. 49–8; Second Decl. of Jennifer Matiu, Dec. 11, 2020, ECF No. 41–9; Second Decl. of Richard Hay, Dec. 11, 2020, ECF No. 49–10; Second Decl. of Aleisha Dockery, Dec. 11, 2020, ECF No. 49–11.

These expert declarations were updated to respond to various positions taken in NOAA's Decision Memorandum as well as to certain assertions made by the Government of New Zealand in its Application for Comparability Findings. Although NOAA relied on the Government of New Zealand's Application throughout its analysis, *see, e.g.*, Dec. Mem. at nn. 6, 9–10, 24–27; *see also* Dec. Mem. Attach A at nn. 29, 51, 54–55, 57, 61–63, 66–68, 73, 77–80, 90–92, 104–05, 114–119, 121–22, 125, 128–37, 139–41, 143–46, 149, Plaintiffs maintain that the Application was never made available for public comment, *see* First Suppl. Compl. ¶ 97.

2021, ECF No. 56 ("Def-Inter.'s Mot. to Dismiss"). On February 17, 2021, Plaintiffs filed a Consolidated Reply in Support of the Renewed Motion for a Preliminary Injunction and Response in Opposition to Defendants' and Defendant-Intervenor's Motion to Dismiss Plaintiffs' First Claim. *See* Pls.' Combined Reply Br. in Supp. of Renewed Mot. for Prelim. Inj. and Resp. Br. in Opp. to Fed. Defs.' and Def.-Inter.'s Mots. to Dismiss, Feb. 17, 2021, ECF No. 64 ("Pls.' Resp. Br."). The United States and New Zealand replied in support of their Motions to Dismiss on March 8, 2021 and March 10, 2021, respectively. *See* U.S. Gov't Reply in Supp. of Mot. to Dismiss Count I of Suppl. Compl., Mar. 8, 2021, ECF No. 65 ("Defs.' Reply"); N.Z. Gov't Reply in Supp. of Mot. to Dismiss Count I of Suppl. Compl., Mar. 10, 2021, ECF No. 66 ("Def.-Inter.'s Reply").

In preparation for oral argument, the court issued questions on June 21, 2021, *see* Ct.'s Qs. for Oral Arg., June 21, 2021, ECF No. 70, to which parties responded in writing on June 29, 2021, *see* Defs.' OA Subm.; Def.-Inter.'s OA Subm.; Pls.' OA Subm. Oral argument was held via Webex on July 1, 2021. *See* Oral Arg., July 1, 2021, ECF No. 75. Thereafter, on July 9, 2021, parties each submitted a post-argument brief. *See* U.S. Gov't Post Oral Arg. Subm., July 9, 2021, ECF No. 76 ("Defs.' Suppl. Br."); N.Z. Gov't Post Oral Arg. Subm., July 9, 2021, ECF No. 77 ("Def.-Inter.'s Suppl. Br."); Pls.' Post Oral Arg. Subm., July 9, 2021, ECF No. 78 ("Pls.' Suppl. Br.").

As the court was deliberating, on September 13, 2021, Plaintiffs filed a Motion for Leave to Supplement the Evidentiary Record upon which the Renewed Motion for Preliminary Injunction is based. *See* Pls.' Mot. for Leave to Suppl. Evid. R. on Renewed Mot. for Prelim. Inj., Sept. 13, 2021, ECF No. 81 ("Pls.' Mot. to Suppl."). In said motion, Plaintiffs asked the court to consider: (1) the results of the 2020–2021 Māui dolphin population survey completed by New Zealand's Department of Conservation finding that the updated abundance estimate of Māui dolphins aged one year or more is fifty-four individuals; (2) a Third Declaration of Professor Elisabeth Slooten, *supra* notes 26, 30, 36, interpreting those survey results; and (3) a draft measure published by the New Zealand Government ostensibly proposing to increase commercial set net and trawl fishing for snapper in the Māui dolphin's undisputed habitat range on the west coast of the North Island. *See id.* at 1, 5–6, 8. The United States and the Government of New Zealand each responded in opposition to Plaintiffs' Motion, *see* U.S. Gov't Resp. in Opp. to Pls.' Mot. to Suppl. the Evid. R., Oct. 1, 2021, ECF No. 83; N.Z. Gov't Resp. in Opp. to Pls.' Mot. to Suppl., Oct. 4, 2021, ECF No. 84, and Plaintiffs filed a Reply Brief after the court

granted Plaintiffs' unopposed motion for leave to do so, *see* Pls.' Unopp. Mot. for Leave to File a Reply to Pls.' Mot. to Suppl. Evid. R. on Renewed Mot. for a Prelim. Inj., Oct. 18, 2021, ECF No. 85; Ct. Order Granting Unopp. Mot. for Leave to File Reply, Oct. 21, 2021, ECF No. 86; Pls.' Reply in Supp. of Mot. for Leave to Suppl. Evid. R. on Renewed Mot. for Prelim. Inj., Oct. 21, 2021, ECF No. 87.

Upon consideration of the papers, the court granted Plaintiffs' Motion to Supplement the Evidentiary Record *de bene* — subject to future consideration and limitations, as appropriate — and ordered the Government of New Zealand to file a copy of the 2020–2021 Māui dolphin population survey and parties to submit a joint status report by January 7, 2022. *See* Ct.'s Order Granting Pls.' Mot. for Leave to Suppl. Evid. R. on Renewed Mot. for a Prelim. Inj., Dec. 16, 2021, ECF No. 88. Parties timely complied with the court's order, *see* N.Z. Gov't Resp. to Ct.'s Order, Jan. 6, 2022, ECF No. 89; Joint Status Report in Resp. to Ct.'s Order, Jan. 7, 2022, ECF No. 90, and the court issued questions to parties concerning these supplemental evidentiary materials, and other topics, on April 11, 2022, *see* Ct.'s April 11, 2022 Suppl. Qs., Apr. 11, 2022, ECF No. 92; *see also* U.S. Gov't Resp. to Ct.'s Apr. 11, 2022 Suppl. Qs., Apr. 30, 2022, ECF No. 95 ("Defs.' Suppl. Qs. Resp."); N.Z. Gov't Resp. to Ct.'s Apr. 11, 2022 Suppl. Qs., May 2, 2022, ECF No. 96 ("Def.- Inter.'s Suppl. Qs. Resp."); Pls.' Resp. to Ct.'s Apr. 11, 2022, Suppl. Qs., May 2, 2022, ECF No. 97 ("Pls.' Suppl. Qs. Resp.").

Finally, as the court was again deliberating, the United States submitted a Joint Status Report on October 27, 2022 stating that NOAA has extended the deadline from December 31, 2022 to December 21, 2023 for foreign nations to secure comparability findings. *See* Joint Status Report, Oct. 27, 2022, ECF No. 102; *see also Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act*, 87 Fed. Reg. 63,955 (Dep't Commerce Oct. 21, 2022) ("*Deadline Modification*"). In response to a supplemental question, *see* Ct.'s Oct. 28, 2022 Suppl. Qs., Oct. 28, 2022, ECF No. 103, the United States informed the court that NOAA no longer expects to be able to issue new comparability findings to New Zealand's multi-species set-net and trawl fisheries prior to the expiration of the current comparability findings on January 1, 2023, *see* U.S. Gov't Resp. to Ct.'s Oct. 28, 2022 Suppl. Qs. at 1–2, Nov. 4, 2022, ECF No. 105 ("Defs.' Add'l Suppl. Qs. Resp."). Accordingly, on November 8, 2022, the United States moved for a second voluntary remand to conform the expiration of New Zealand's comparability findings with the December 31, 2023 conclusion of the exemption

period for all foreign fisheries. *See* U.S. Gov't Partial Consent Mot. to Remand at 1, Nov. 8, 2022, ECF No. 106 ("Defs.' Second Remand Mot."). Plaintiffs responded in opposition to the United States' Second Remand Motion on November 23, 2022. *See* Pls.' Opp. Br. to Defs.' Mot. for Voluntary Remand, Nov. 23, 2022, ECF No. 107 ("Pls.' Opp. to Second Remand Mot.").

Because the court assesses that it would benefit from oral argument on the Government's Second Remand Motion, *see* Further Order on Pls.' Mot. for Prelim. Inj. (issued with this Opinion), and because the United States submits that its latest Motion "does not delay a final decision on the [other] pending motions, which may proceed on a separate track," Defs.' Second Remand Mot. at 6, the court now addresses only Plaintiffs' Renewed Motion for Preliminary Injunction and Defendants' and Defendant-Intervenor's Motions to Dismiss Plaintiffs' First Claim.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(1)(C). That provision endows the court with exclusive jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for" "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety," such as that provided for under the MMPA's Import Provision, 16 U.S.C. § 1371(a)(2); *see also Earth Island Inst. v. Brown*, 28 F.3d 76, 79 (9th Cir. 1994) ("[Plaintiffs'] suit under the MMPA is an action arising under a law providing for embargoes. As such it is reserved for the exclusive jurisdiction of the CIT."). For cases brought under subsection 1581(i), the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, provides the standard of review, *see* 28 U.S.C. § 2640(e),[37] which varies according to the nature of agency action challenged.

Where a plaintiff challenges final agency action, the court applies the "arbitrary and capricious" standard of review pursuant to section 706(2)(A) of the APA. *See* 5 U.S.C. § 706(2)(A) (instructing a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Under this standard, an agency acts "arbitrarily and capriciously" if it "relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation

[37] 28 U.S.C. § 2640(e) instructs that for any action brought under 28 U.S.C. § 1581(i), "the Court of International Trade shall review the matter as provided in section 706 of title 5."

for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court will limit its review of a section 706(2)(A) claim to the administrative record in existence at the time of the agency's decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

By contrast, where a plaintiff seeks to "compel agency action unlawfully withheld or unreasonably delayed," section 706(1) of the APA governs. 5 U.S.C. § 706(1). Under this provision, "[m]andatory injunctive relief . . . is appropriate, 'if the court's study of the statute and relevant legislative materials cause[s] it to conclude that the defendant official ha[s] failed to discharge,'" *Covelo Indian Cmty. v. Watt*, 551 F. Supp. 366, 381 (D.D.C. 1982) (quoting *Carpet, Linoleum & Resilient Tile v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)), "a *discrete* agency action that it is *required* to take," *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("*SUWA*") (emphasis in original). In making this determination, the court's review is not limited to the administrative record. *See, e.g.*, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (In APA section 706(1) cases, "review is not limited to the [administrative] record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record.").

DISCUSSION

Before the court,[38] Plaintiffs advance three claims: First, the U.S. Government unlawfully withheld agency action in violation of APA

[38] The court briefly notes that parties agree Plaintiffs have standing to pursue their claims. *See* Pls.' Resp. Br. at 20 n.9; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) ("[S]tanding is an essential . . . part of the case-or-controversy requirement of Article III," which requires Plaintiffs to show (1) injury in fact; (2) causation; and (3) redressability.). As this court held in *NRDC I*, where Plaintiffs have demonstrated that:

(1) Their members have a recreational and aesthetic interest in viewing Māui dolphins that would be harmed by the species' potential extinction, *see, e.g.*, Second Decl. James Boshier ¶¶ 8, 16; Second Decl. of Sylvia Philcox ¶¶ 9, 11; Second Decl. of Jennifer Matiu ¶¶ 6–7; Second Decl. of Richard Hay ¶¶ 6, 17; and Second Decl. of Aleisha Dockery ¶¶ 5–6;

(2) The United States is a significant market for New Zealand's implicated exports, *see, e.g.*, Second Decl. of Brett Sommermeyer at Ex. 4 (data establishing that the United States is the second largest importer of New Zealand seafood); and

(3) New Zealand is likely to respond to a United States import ban in a way that reduces danger to the Māui dolphin, *see, e.g.*, *id.* at Ex. 8 ¶ 6 (internal New Zealand Government memo discussing Plaintiffs' February 6, 2019 petition and proposing, inter alia, interim measures that "would enable NOAA to reject [Plaintiffs'] petition")

Plaintiffs have established the tripart requirements for Article III standing. *NRDC I*, 331 F. Supp. 3d at 1356–61.

section 706(1) by failing to ban imports of fish and fish products from New Zealand that exceed "U.S. standards" under the MMPA, *see* 16 U.S.C. §1371(a)(2); second, the U.S. Government acted arbitrarily and capriciously in violation of APA section 706(2)(A) by denying Plaintiffs' petition for emergency rulemaking to ban New Zealand's offending imports, *see* 16 U.S.C. § 1387(g)(1); 50 C.F.R. § 216.24(h)(8)(vii)(A); and third, the U.S. Government acted arbitrarily and capriciously in violation of APA section 706(2)(A) by granting comparability findings to two unsuitable New Zealand fisheries, *see* 50 C.F.R. §216.24(h)(6)–(7). *See* Pls.' First Suppl. Compl. ¶¶ 104–121.

Pending final adjudication on the merits of their claims, Plaintiffs ask the court to grant a preliminary injunction requiring the U.S. Government to ban the importation of all fish and fish products from New Zealand's commercial gillnet and trawl fisheries within the Māui dolphin's range. *See* Pls.' Ren. PI Mot. By contrast, the United States and the Government of New Zealand ask the court to dismiss Plaintiffs' first APA section 706(1) claim for lack of subject matter jurisdiction and to deny the Motion for a Preliminary Injunction with respect to Plaintiffs' second and third APA section 706(2)(A) claims. *See* Defs.' Mot. to Dismiss; Def-Inter.'s Mot. to Dismiss; *see also* Defs.' Resp. Br.; Def.-Inter.'s Resp. Br. For the reasons outlined below, the court dismisses Plaintiffs' first claim, but grants Plaintiffs a preliminary injunction pending final resolution on the merits of the second and third claims.

I. The Court Dismisses Plaintiffs' First Claim.

Defendants contend that Plaintiffs cannot lodge their APA section 706(1) claim that NOAA "unlawfully withheld" agency action because NOAA "acted" by denying Plaintiffs' emergency rulemaking petition and by granting two comparability findings to New Zealand such that the Supreme Court's holding in *SUWA* compels dismissal. *See* Defs.' Mot. to Dismiss at 10 (citing 542 U.S. at 64); Def.-Inter.'s Mot. to

Dismiss at 2 (same).[39,40] By contrast, Plaintiffs argue that because fisheries bycatch of Māui dolphins is occurring "in excess of United States standards," neither the agency's petition denials nor comparability findings can satisfy the Government's "discrete and mandatory duty" to issue an import ban under the MMPA. *See* Pls.' Resp. Br. at 4, 8. Defendants' position prevails.

Section 706(1) of the APA directs that a "reviewing court shall" "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The statute defines "[a]gency action" as "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). Given that "agency action" under APA section 706(1) is defined in part as a "failure to act," the Supreme Court undertook in *SUWA* to define this concept. The Court assessed that because the first five "agency actions" enumerated in section 551(13) — namely, "agency rule, order, license, sanction, [or] relief" — each shared a "characteristic of discreteness," 542 U.S. at 63, and because section 706(1) only empowers a court to "compel agency action *unlawfully* withheld," *id.* (emphasis in original), an APA section 706(1) claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*," *id.* at 64 (emphasis in original). In so ruling, the Court clarified that a "denial" — i.e., an "agency's act of saying no to a request" — is not a "failure to act" that is remediable under APA section 706(1). *Id.* at 63.

This point of clarification is dispositive in the case at bar. "Agency action" is defined in part as an "agency rule," 5 U.S.C. § 551(13), and

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[39] The United States moves to dismiss Plaintiffs' first claim for lack of subject matter jurisdiction, *see* USCIT R. 12(b)(1), as well as for failure to state a claim upon which relief can be granted, *see* USCIT R. 12(b)(6). *See* Defs.' Mot. to Dismiss at 1. Before the court, Plaintiffs submit that Defendants' arguments are controlled by Rule 12(b)(6) but concede that "[t]he case law is mixed." *See* Pls.' Resp. Br. at 4 n.1.

Because Plaintiffs have not supplied binding caselaw on this point, the court looks to the Supreme Court's determination in *SUWA* for guidance. 542 U.S. at 65–73. The lower court decisions on review in *SUWA* concerned Rule 12(b)(1) motions to dismiss plaintiff environmentalists' APA section 706(1) claims. *See* 2000 WL 33914094, at *2 (D. Utah 2000); 301 F.3d 1217, 1223 (10th Cir. 2002). Without referencing Rule 12(b) at all, the Supreme Court declared certain alleged agency "failures to act" irremediable under APA section 706(1). 542 U.S. at 61, 65–73. In the case at bar, the court grants Defendants' Motion to Dismiss on the basis of *SUWA*.

[40] Plaintiffs argue that the Government of New Zealand's Rule 12(b)(1) Motion is untimely because it was not raised before or in New Zealand's responsive pleading. *See* Pls.' Resp. Br. at 5 n.2 (citing Fed. R. Civ. P. 12(b) and N.Z. Answer). The Government of New Zealand counters that Plaintiffs' position "has no merit because [New Zealand] timely moved to dismiss the First Claim in [Plaintiffs'] First Supplemental Complaint" such that any "alleged failure to move to dismiss [the] original complaint is irrelevant." Def.-Inter.'s Reply at 2 n.4. Because the United States' and New Zealand's 12(b)(1) Motions to Dismiss are substantively similar — and Plaintiffs do not contest the United States' Motion as untimely — this line of argument is inconsequential.

an agency "rule" is further defined as "an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy," *id.* §551(4). Consistent with this definition, NOAA — "[u]nder the authority of the Marine Mammal Protection Act" — rejected Plaintiffs' petition for emergency rulemaking and issued comparability findings to New Zealand via notice and comment rulemaking in the Federal Register. *See Comp. Finding Determ.* at 71,297; *see also* 85 Fed. Reg. at 60,946. Quite the opposite of an "omission of an action without formally rejecting a request," NOAA "sa[id] no to [Plaintiffs'] request." 542 U.S. at 63. Thus, having taken "agency action" within the meaning of APA section 551(13), NOAA has not "unlawfully withheld or unreasonably delayed" agency action for the purposes of APA section § 706(1).

Plaintiffs' contrary argument — that neither NOAA's petition denials nor comparability findings can satisfy its duty to ban New Zealand's imports under the MMPA — amounts to nothing more than an assertion that the agency made a mistake in "saying no to [Plaintiffs'] request" for emergency rulemaking. *Id.* Plaintiffs are correct that where a nation's fisheries are causing incidental kill and/or serious injury of ocean mammals "in excess of United States standards," NOAA is required to ban the offending imports under the MMPA's Imports Provision. *See NRDC I*, 331 F. Supp. 3d at 1353–55 (explaining that 16 U.S.C. § 1371(a)(2) — which provides the Government "*shall* ban the importation of commercial fish or products from fish . . . in excess of United States standards" — implicates "the [mandatory] application of a single provision" rather than an "impermissible broad programmatic attack" (emphasis in *NRDC*)). However, here, NOAA found New Zealand's fisheries to be compliant with U.S. standards.[41] *See, e.g.*, Dec. Mem. at 10. Assessing Plaintiffs' challenge to NOAA's finding of compliance requires the court to undertake the kind of rationality analysis prototypical of arbitrary and capricious review under section 706(2)(A) of the APA. Thus, the court discerns

[41] Such a finding of compliance renders this case distinguishable from *NRDC I*. In *NRDC I*, NOAA calculated that the vaquita porpoise population could sustain only one fishery-related mortality every thirty-one to sixty-one years to comply with the MMPA's PBR standard; accordingly, where NOAA found that three vaquita had died in gillnets in 2016 and 2017 — in acknowledged excess of U.S. standards — and yet failed to take any action to ban the offending imports, this court assessed NOAA to have unlawfully withheld agency action under the MMPA for purposes of APA section 706(1). *See* 331 F. Supp. 3d at 1365, 1368.

By contrast, NOAA here has explicitly rejected Plaintiffs' arguments that New Zealand is killing and/or seriously injuring Māui dolphins in excess of U.S. standards. *See, e.g.*, Dec. Mem. Attach. A at 25 (rejecting Plaintiffs' argument that the best mortality estimates suggest New Zealand's fisheries are killing 1.5 to 2.4 Māui dolphin each year in contravention of Defendants' proffered PBR). Accordingly, the question is whether NOAA has somehow erred in assessing New Zealand to be compliant with U.S. standards.

that Plaintiffs' first claim is not truly a failure to act claim, but rather a claim that NOAA's action is inadequate.

Because *SUWA* instructs that such claims fall outside the purview of APA section 706(1), the court grants Defendants' Motion to Dismiss Plaintiffs' First Claim.

II. The Court Grants Plaintiffs a Preliminary Injunction Pending Final Resolution on the Merits of the Second and Third Claims.

Having dismissed Plaintiffs' first claim under APA section 706(1), the court now considers Plaintiffs' request for a preliminary injunction pending final adjudication on the merits of the remaining APA section 706(2)(A) claims. *See* Pls.' Ren. PI Mot. When considering a preliminary injunction motion, the court evaluates four factors: (1) whether the moving party is likely to prevail on the merits of the claims; (2) whether the moving party is likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of equities; and (4) whether a preliminary injunction is in the public interest. *See Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018). The court's examination of the first preliminary injunction factor is limited to the administrative record in existence at the time of the agency's decision, *see Overton Park*, 401 U.S. at 420, while, the court's examination of the remaining factors is not so limited, *see Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) (explaining that the court is not confined to the administrative record in assessing, inter alia, the irreparable harm prong).[42]

Before the court, Plaintiffs argue that each of the preliminary injunction factors weighs in their favor, *see* Pls.' Ren. PI Mot. at 24–46; Defendants argue the opposite, *see* Defs.' Resp. Br. at 28–43; Def.-Inter.'s Resp. Br. at 49–54. For the reasons outlined below, the court agrees with Plaintiffs and grants Plaintiffs a preliminary injunction.[43]

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[42] *See also* Steven Sark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Actions*, 36 Admin. L. Rev. 333, 345 (1984) (explaining that because the issue of injunctive relief is generally not raised in below administrative proceedings, "there usually will be no administrative record developed on these issues," such that "it will often be necessary for a court to take new evidence to fully evaluate" claims "of irreparable harm . . . and [claims] that the issuance of the injunction is in the public interest").

[43] The court articulates the scope of the granted preliminary injunction, *infra* pp. 64–66.

A. Plaintiffs Are Likely to Prevail on the Merits

The court evaluates Plaintiffs' likelihood of success with regard to each of the remaining APA section 706(2)(A) claims — namely, that NOAA acted arbitrarily and capriciously both in denying Plaintiffs' petition for emergency rulemaking and in issuing comparability findings to two New Zealand fisheries — and assesses that Plaintiffs are likely to prevail on both. Because NOAA's denial of Plaintiffs' petition for emergency rulemaking turned on the agency's grant of comparability findings to New Zealand, the court evaluates the latter claim first.

1. Third Claim: NOAA's Grant of Comparability Findings

Plaintiffs argue they have carried their burden to set aside NOAA's comparability findings as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under section 706(2)(A) of the APA because, among other issues, NOAA failed to undertake several mandatory considerations, draw rational conclusions, and insist on reasonable proof. *See* Pls.' Ren. PI Mot. at 35–41. In contrast, the Government and New Zealand maintain Plaintiffs "cannot reasonably contest that NOAA met the APA standard," *see* Defs.' Resp. Br. at 41; *see also* Def.- Inter.'s Resp. Br. at 50, where the court would have to "reweigh the evidence," "reject every element of the scientific findings," and "substitute its [own] judgment," to set aside the comparability findings as arbitrary and capricious, *see* Def.-Inter.'s Reply at 1–2; *see also* Defs.' Resp. Br. at 32, 38 (substantively similar). The court disagrees with Defendants' characterization.

As an overall proposition, Defendants are correct that "[w]hen examining [an agency's] scientific determination, . . . a reviewing court must generally be at its most deferential." *Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). However, this does not transform the court's review into a mere rubber stamp. The court "review[s] scientific judgments of the agency 'not as a chemist, biologist, or statistician that [the court is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality.'" *Shafer & Freeman Lakes Env't Conservation Corp. v. FERC*, 992 F.3d 1071, 1090 (D.C. Cir. 2021) (quoting *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997)). Accordingly, "the . . . question before [the court] is whether [NOAA] acted reasonably in its analysis" and "explained [its] assumptions and methodology." *Id.* at 1091, 1093 (internal citations omitted).

Plaintiffs advance myriad reasons as to why the court should answer this question in the negative, *see* Pls.' Ren. PI Mot. at 34–41, as underscored by the Government of New Zealand's rebuttal of twenty specific challenges in its response brief, *see* Def.-Inter.'s Resp. Br. at 16–47. The court reiterates that it will not attempt "to settle [any] scientific debate[s]," *Shafer*, 992 F.3d at 1093, but will "hold[] [the] agenc[y] to certain minimal standards of rationality," *id.* at 1090 (quoting *Troy Corp.*, 120 F.3d at 283). Moreover, at this phase in the proceedings — the preliminary injunction phase — the court need not resolve each and every point of contention surrounding NOAA's determination, but need only assess whether Plaintiffs have raised at least *some* challenge sufficient to undermine the legal sufficiency of the agency's deliberation. Because the court concludes that — at a minimum — NOAA failed, at various points, to: (1) consider all mandatory regulatory factors; (2) respond to all significant comments; and (3) articulate a rational connection between certain facts found and choices made, Plaintiffs are likely to succeed on their third claim that NOAA acted arbitrarily and capriciously in issuing comparability findings to New Zealand, such that the agency contravened section 706(2)(A) of the APA.

The court expands upon each of these assessed deficiencies in turn.

a. NOAA Failed to Consider All Mandatory Regulatory Factors in Issuing Comparability Findings to New Zealand.

NOAA's Imports Regulation establishes the requirements for a comparability finding. *See* 50 C.F.R. § 216.24(h)(6)(iii) and (h)(7) [Excerpted in full in Appendix A]. Paragraph 216.24(h)(6)(iii) of 50 C.F.R. provides "[t]he following are conditions for [NOAA] to issue a comparability finding for [a] fishery," and enumerates over ten criteria. *See* Dec. Mem. at 5 n.15. Paragraph 216.24(h)(6)(iii) is further "subject to the additional considerations set out in paragraph (h)(7) of this section;" paragraph (h)(7) — entitled "Additional considerations for comparability finding determinations" — instructs that "[w]hen determining whether to issue any comparability finding for a harvesting nation's export fishery [NOAA] shall also consider" the enumerated eight conditions, which include as just one example, "U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries," 50 C.F.R. § 216.24(h)(7)(i).

Before the court, Plaintiffs argue that NOAA "did not sufficiently consider several mandatory factors before issuing . . . comparability finding[s]" to New Zealand. Pls.' Ren. PI Mot. at 35. Specifically,

Plaintiffs assert that NOAA "did not consider how New Zealand's protective measures compare to the United States' implementation of its regulatory program for similarly imperiled marine mammals, as required by [50 C.F.R. § 216.24(h)(7)(i)]." *Id.* at 40. The Defendants disagree, with the United States maintaining that "NOAA evaluated [New Zealand's] Comparability Finding application in accordance with . . . 50 C.F.R. §§ 216.24(h)(6) and (7) as [it] does for all Comparability Finding applications," Defs.' OA Subm. at 6, and New Zealand arguing that "the Comp[arability] Finding expressly evaluated the applicable considerations in Section 216.24(h)(7)," including the U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries, but found them "irrelevant." Def.-Inter.'s OA Subm. at 6–7. Plaintiffs' position prevails.

As a threshold matter, by the Imports Regulation's plain language, NOAA is indeed required to "consider" the eight considerations enumerated in Paragraphs 216.24(h)(7)(i) to (viii) before issuing comparability findings. *See* 50 C.F.R. § 216.24(h)(7) ("When determining whether to issue any comparability finding for a harvesting nation's export fishery [NOAA] *shall* also consider . . .") (emphasis added); *see also K-Con, Inc. v. Sec'y of Army*, 908 F.3d 719, 725 (Fed. Cir. 2018) ("[T]he words 'must' and 'shall' in . . . regulatory language establish that the requirement . . . is mandatory." (citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171–72 (2016))). Thus, the question is whether NOAA sufficiently considered the mandatory factors in issuing comparability findings to New Zealand.

Using Plaintiffs' example, the court concludes that at a minimum, NOAA did not sufficiently consider U.S. regulatory programs for similarly imperiled marine mammals, as required by 50 C.F.R. § 216.24(h)(7)(i), before granting New Zealand's comparability findings. The only *explicit* mention of factor (h)(7)(i) identified by Defendants in the agency's analysis is found in NOAA's denial of Plaintiffs' original February 6, 2019 petition:

> 50 CFR 216.24(h)(7) outlines additional considerations for comparability finding determinations. Those considerations include the extent to which the harvesting nation has successfully implemented measures in the export fishery to reduce the incidental mortality and serious injury of marine mammals caused by the harvesting nation's export fisheries to levels below the bycatch limit; and whether the measures adopted by the harvesting nation for its export fishery have reduced or will likely reduce the cumulative incidental mortality and serious injury of each marine mammal stock below the bycatch limit, and the

> progress of the regulatory program toward achieving its objectives (50 CFR 216.24(h)(7)(i–ii)).

84 Fed. Reg. at 32,855; *see also* Def.-Inter.'s OA Subm. at 4 (identifying the above agency reference to factor (h)(7)(i)); Def.-Inter.'s Suppl. Br. at 4 (same); Def.-Inter.'s Suppl. Qs. Resp. at 13 (same). Quite apart from the fact that when NOAA rejected Plaintiffs' original petition on July 10, 2019, the Government of New Zealand had not yet finalized its revised TMP — announced on June 24, 2020 — that is the subject of New Zealand's July 15, 2020 comparability finding request,[44] the above excerpt makes no reference to the United States' regulatory approach towards similarly imperiled species.[45] "While incorporation by reference is not *per se* arbitrary and capricious," *Oceana, Inc. v. Ross*, 2020 WL 5995125, at *16 (D.D.C. 2020), "[c]onclusory statements [and citations] that do not explain how a determination was reached are . . . insufficient," *In re Section 301 Cases*, 46 CIT , , 570 F. Supp. 3d 1306, 1338 (2022) (citing *Int'l Union, United*

[44] For this reason, the court finds unpersuasive Defendants' and Defendant-Intervenor's contention that Plaintiffs failed to raise its (h)(7) allegations administratively and thus failed to exhaust. *See* Defs.' Resp. Br. at 40; Def.-Inter.'s OA Subm. at 6. Recall that the comparability finding requirement is a creation of regulation and that NOAA has made this regulatory requirement inapplicable until January 1, 2024. *Supra* note 9. Accordingly, the conditions to secure a comparability finding enumerated in 50 C.F.R. § 216.24(h)(6)(iii) and (h)(7) were not controlling until New Zealand requested early comparability findings on July 15, 2020.

Thus, when Plaintiffs submitted their supplemental petition for emergency rulemaking on August 27, 2020 — prior to NOAA's issuance of the comparability findings to New Zealand on November 9, 2020 — Plaintiffs had no reason to believe that NOAA would not consider each of the mandatory factors enumerated in 50 C.F.R. § 216.24(h)(7). And as the United States itself acknowledged in response to the court's question as to whether "Plaintiffs were required to proactively seek consideration of the factors outlined in 50 C.F.R. § 216.24(h)(7)," Ct.'s Qs. for Oral Arg. at 4, "NOAA did not require prompting by the plaintiffs to force such evaluations," Defs.' OA Subm. at 6. Accordingly, the court rejects this exhaustion argument.

[45] In fact, the statement comprises an unembellished recitation of factors (h)(7)(ii) and (iii), which require NOAA to consider: "(ii) [t]he extent to which the harvesting nation has successfully implemented measures in the export fishery to reduce the incidental mortality and serious injury of marine mammals caused by the harvesting nation's export fisheries to levels below the bycatch limit," and "(iii) [w]hether the measures adopted by the harvesting nation for its export fishery have reduced or will likely reduce the cumulative incidental mortality and serious injury of each marine mammal stock below the bycatch limit, and the progress of the regulatory program toward achieving its objectives." 50 C.F.R. § 216.24(h)(7)(ii)–(iii). As such, NOAA's citation to factor (h)(7)(i) in its initial denial of Plaintiffs' original petition seems to have been in error.

Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 94 (D.C. Cir. 2010)).[46]

In the alternative, Defendants appear to ask this court to construe NOAA's silence as an assessment by the agency that any undiscussed (h)(7) factors are irrelevant. *See, e.g.*, Defs.' Suppl. Qs. Resp. at 8 ("NOAA considered certain [(h)(7)] factors when relevant."); Def.-Inter.'s Suppl. Qs. Resp. at 13 ("For th[e] [(h)(7)(i)] consideration to be relevant, there would need to be evidence that similar U.S. mammal stocks and similar U.S. fisheries existed."). This the court cannot do. First, it is axiomatic that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50 (citing *SEC v. Chenery*, 332 U.S. 194, 196 (1947)). Second, the court declines to infer (h)(7)(i)'s irrelevance from agency silence where the administrative record contains evidence to the opposite effect. For

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[46] Defendants' additional arguments as to why the court should find NOAA to have *implicitly* considered (h)(7)(i) are likewise unavailing.

Defendants first note that NOAA assessed New Zealand's Management Review Trigger to be comparable in effectiveness to the United States' harbor porpoise consequence closure strategy. Defs.' Resp. Br. at 37–38 (citing Dec. Mem. Attach. A at 34–35); Def.-Inter.'s Suppl. Qs. Resp. at 13 (citing same). However, nowhere in the agency's analysis does NOAA connect its discussion of the U.S. harbor porpoise consequence closure to factor (h)(7)(i). *See* Dec. Mem. The court declines to read in such a connection in light of countervailing evidence suggesting that harbor porpoise and Māui dolphins are not "similar." *Compare* 50 C.F.R. § 216.24(h)(7)(i) (requiring NOAA to consider "U.S. implementation of its regulatory program for *similar* marine mammal stocks" (emphasis added)), *with* Pls.' Suppl. Qs. Resp. at 12, n.6 (citing *Harbor Porpoise (Phocoena phocoena phocoena): Gulf of Maine/Bay of Fundy Stock*, Dep't of Commerce, media[.]fisheries[.]noaa[.]gov/dam-migration/2019_sars_atlantic_harborporpoise[.]pdf (last visited Nov. 27, 2022) (a study by NOAA stating "[h]arbor porpoise . . . are not listed as threatened or endangered under the Endangered Species Act")). *See also Martinez-Bodon v. McDonough*, 28 F.4th 1241, 1246 (Fed. Cir. 2022) (It is the court's "'duty to give effect, if possible, to every clause and word' of [a] regulation[]." (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

The United States' further argument that factor (h)(7)(i) is satisfied because "NOAA considered the entire context of New Zealand's approach to marine mammal bycatch reduction and concluded that the process was similar to the United States take reduction team and [T]ake [R]eduction [P]lan process," Defs.' Suppl. Qs. Resp. at 8 (citing Dec. Mem. Attach. A at 37), likewise, runs the risk of eliding the word "similar" from factor (h)(7)(i). As just one example, the United States has implemented a Take Reduction Plan for the aforementioned harbor porpoise, *see* Dec. Mem. Attach. A at 35 n.147 (citing *Harbor Porpoise Take Reduction Plan Regulations*, 78 Fed. Reg. 61,821 (Dep't Commerce Oct. 4, 2013)), a marine mammal stock that Plaintiffs argue is dissimilar from that of the Māui dolphin, *see* Pls.' Suppl. Qs. Resp. at 12, n.6. Assuming arguendo that Plaintiffs are correct on this "similarity" point, comparing New Zealand's Māui dolphin approach to the United States' overall Take Reduction Plan process — which ostensibly can apply to similar and dissimilar marine mammal stock alike — sheds minimal comparative light on the United States' regulatory treatment of marine mammals *similar* to the Māui dolphin.

For the foregoing reasons, the court declines to read in implicit consideration by NOAA of factor (h)(7)(i). In so declining, the court does not conclusively hold that the harbor porpoise is dissimilar to the Māui dolphin or that the United States' overall Take Reduction Plan process is irrelevant to New Zealand's approach to the Māui dolphin; the court only holds that if NOAA seeks to satisfy factor (h)(7)(i) on such bases, the agency must explain in the first instance how these U.S. regulatory programs concern marine mammal stocks *similar* to the Māui dolphin.

example, Dr. Timothy Ragen — former Executive Director of the U.S. Marine Mammal Commission and lead analyst for NOAA's Hawaiian Monk Seal Recovery Program — submitted in a declaration before the agency:

> *Faced with a similar situation, the U.S. has implemented much stronger protective measures*. For example, in 1991 the Western Pacific Fishery Management Council and NMFS established a protected species zone extending 50 nautical miles around the Northwestern Hawaiian Islands and prohibited longline fishing within the zone. The intent was to "provide a protected species zone around the centers of activity of the endangered Hawaiian monk seal (*Monachus schauinslandi*), thereby eliminating the incidental take of monk seals in fishing operations." *That is the nature and scale of management response needed to save the Māui dolphin*.

Decl. of Dr. Timothy Ragen ¶¶ 2–3, 31, ECF No. 11–4 (first and third emphasis added) (footnote omitted).[47] Before the court, Defendants now argue that the U.S. approach to the Hawaiian monk seal is irrelevant to the Māui dolphin, *see* Def.-Inter.'s Resp. Br. at 46 (asserting "the setting of PBR to zero for the Hawaiian monk seal ha[s] no relevance to the calculation of PBR or the determination of likely mortality for the Māui dolphin."); *see also* Defs.' Resp. Br. at 40–41 (substantively similar). This may be true; however, it is for the agency to so explain in the first instance. *See, e.g.*, *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, an agency acts "arbitrarily and capriciously" where it "entirely fail[s] to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, and as established above, NOAA did not consider all mandatory regulatory factors when issuing comparability findings to New Zealand. As such, there is at least one basis upon which to find Plaintiffs are likely to succeed in their APA section 706(2)(A) challenge to NOAA's issuance of comparability findings under the third claim.

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[47] Recall that in their August 27, 2020 supplemental petition, Plaintiffs explicitly enumerated and "incorporate[d] . . . in their entirety as support for the requested trade ban" the expert declarations — including Dr. Ragen's declaration — attached to Plaintiffs' original Motion for a Preliminary Injunction. *See* Pls.' Suppl. Pet. at 5–6. As such, Dr. Ragen's declaration, ECF No. 11–4, was part of the administrative record before the agency.

b. NOAA Failed to Respond to All Significant Comments.

To secure a comparability finding, NOAA's Imports Regulation requires "harvesting nation[s] [to] maintain[] a regulatory program . . . that is comparable in effectiveness to the U.S. regulatory program with respect to incidental mortality and serious injury of marine mammals in the course of commercial fishing operations." 50 C.F.R. § 216.24(h)(6)(iii)(B). While many elements comprise the "U.S. program," an important feature is that the MMPA requires NOAA to enact a "Take Reduction Plan" for any marine mammal population incurring mortality in excess of PBR due to commercial fishing. *See* 16 U.S.C. §§ 1387(f)(1)–(2), (5), 1362(19); 50 C.F.R. §§229.30–229.37 (NOAA regulations implementing Take Reduction Plans for various marine mammals); *see also* Dec. Mem. Attach. A at 4 (asserting the Take Reduction Plan forms "the basis" of the U.S. regulatory program for marine mammals facing human-caused mortality and/or serious injury in excess of PBR). In granting comparability findings to New Zealand, Commerce assessed that New Zealand's regulatory "Management Review Trigger"[48] — which "allows for the immediate imposition of additional bycatch reduction measures in the event that a fishing-related incident [involving Māui dolphins] occur[s]" — is "similar to the U.S. Take Reduction process." *Comp. Finding Determ.* at 71,298.

Before the court, Plaintiffs contest the legal sufficiency of this conclusion on the grounds that in so finding, "[NOAA] ignored numerous objections from the scientific community warning [that] the . . . discretionary nature of New Zealand's regulatory program" renders it incomparable to that of the United States. *See* Pls' Ren. PI Mot. at 34. While an agency is "not require[d]...to address every argument raised by a party or explain every possible reason supporting its conclusion," *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1322 (Fed. Cir. 2016), *overruled on other grounds by Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1296 n.1 (Fed. Cir. 2017), it does "need to respond, in a reasoned manner, to any comments received . . . that raise significant issues with respect to a proposed rule," *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1379 n.11 (Fed. Cir. 2017) (quoting *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000)). The court concludes that given the weight NOAA afforded the Management Review Trigger in assessing comparable New Zealand's

[48] Recall that the Government of New Zealand announced its mortality limit — referred to by NOAA as the "Management Review Trigger" — as part of the package of regulatory revisions attending the latest TMP. *Supra* note 25.

regulatory program,[49] *see* Dec. Mem. at 4, 9–10; *see also* Dec. Mem. Attach. A at 1, 34–35, 37, the agency's failure to respond to countervailing comments "challenge[d] a fundamental premise" underlying NOAA's decision, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000). As such, Plaintiffs have established an additional basis upon which they are likely to succeed in their APA section 706(2)(A) challenge to the comparability findings.

The court proceeds by first laying out the legal frameworks implementing U.S. Take Reduction Plans and New Zealand's Management Review Trigger, then by surveying the relevant countervailing comments on the administrative record, and finally by analyzing the agency's failure to respond to these comments.

Concerning the U.S. approach to "incidental mortality and serious injury of marine mammals in the course of commercial fishing operations" for purposes of 50 C.F.R. § 216.24(h)(6)(iii)(B), subsection 1387(f) of the MMPA instructs, in relevant part:

> **(f) TAKE REDUCTION PLANS**
>
> **(1)** The Secretary shall develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock[50] which interacts with a commercial fishery . . .
>
> . . .
>
> **(5)**
>
> **(A)** For any stock in which incidental mortality and serious injury from commercial fisheries exceeds the potential biological removal level . . . , the plan shall include measures the Secretary expects will reduce, within 6 months of the plan's implementation, such mortality and serious injury to a level below the potential biological removal level.

16 U.S.C. § 1387(f)(1), (5) (footnote not in original). Thus, where commercial fishing causes mortality of a marine mammal population

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[49] The court assesses that NOAA afforded significant weight to New Zealand's Management Review Trigger in deeming 50 C.F.R. § 216.24(h)(6)(iii)(B) satisfied in light of NOAA's statement that "[i]n implementing the U.S. regulatory program for a marine mammal stock in which incidental mortality and serious injury from commercial fisheries exceeds the [PBR] level, the [T]ake [R]eduction [P]lan forms the basis for the regulatory program for that species," Dec. Mem. Attach. A at 4, as well as the agency's equation of New Zealand's Management Review Trigger to the U.S. Take Reduction Plan, *id.* at 35.

[50] "Strategic stock" is defined, in relevant part, as "a marine mammal stock" "for which the level of direct human-caused mortality exceeds the potential biological removal level." 16 U.S.C. § 1362(19).

in excess of PBR, NOAA is required to develop a "Take Reduction Plan" with measures designed to reduce fishery-related mortalities to less than PBR within six months. *Id.*

For its part, New Zealand's "Management Review Trigger" — which New Zealand refers to as a "mortality limit" — is codified in its Fisheries (Commercial Fishing) Regulations 2001:

Part 3A

Fishing-related mortality limit of Hector's and Māui Dolphin in defined area

52D Māui Dolphin habitat zone

In these regulations, the **Māui Dolphin habitat zone** means the waters within the area bounded by a line that—

(a) starts at the Cape Egmont lighthouse (at 39°16.575'S and 173°45.300'E); and

(b) then proceeds due west to the outer limit of the Territorial Sea (at 39°16.575'S and 173°29.583'E); and

(c) then proceeds in a generally northerly direction along the outer limit of the Territorial Sea to a point (at 34°13.193'S and 172°40.780'E); and

(d) then proceeds due south to Cape Reinga (at 34°25.210'S and 172°40.780'E); and

(e) then proceeds in a generally southerly direction along the mean high-water mark of the west coast of the North Island to the starting point at Cape Egmont lighthouse (at 39°16.575'S and 173°45.300'E).

52E Fishing-related mortality limit for Hector's or Māui Dolphin within Māui Dolphin habitat zone

(1) The fishing-related mortality limit for a Hector's or Māui Dolphin within the Māui Dolphin habitat zone is 1.

(2) In this regulation, a **Hector's or Māui Dolphin** means a dolphin of the subspecies *Cephalorhynchus hectori hectori* or *Cephalorhynchus hectori maui*.

Fisheries (Commercial Fishing) Regulations 2001, s 52D–E (N.Z.) (emphasis in original).[51] While New Zealand's regulations establish a "mortality limit" of one, by design, they do not dictate any subsequent

[51] This "mortality limit" applies in the same manner to amateur fishing in New Zealand. *See* Fisheries (Amateur Fishing) Regulations 2013, s 155O–P (N.Z.).

actions or deadlines that such an event would trigger. As the New Zealand Minister of Fisheries explained in his public announcement of the revised TMP:

> The action that will be taken in the event of a [Māui dolphin] capture will depend on the circumstances of the event. I will not predetermine what fishing methods may be impacted or across what spatial area. The intention of putting in place the fishing related mortality limit is so that action can be taken quickly if necessary.

N.Z. TMP Letter app. one at 2.

In submissions before the agency, various commentors[52] argued that the discretionary nature of New Zealand's regulatory program — particularly the lack of mandatory deadlines for remedial action following a take in excess of PBR — render it incomparable in effectiveness to U.S. Take Reduction Plans. As a few examples, in their original Motion for Preliminary Injunction, Plaintiffs argued:

> New Zealand has no equivalent to a [T]ake [R]eduction [P]lan. . . . The [T]ake [R]eduction [P]lan requirement forces policymakers to create actionable measures that can be implemented on immediate time frames. . . . [T]he time frames embedded in [T]ake [R]eduction [P]lans are essential.

Pls.' Original PI Mot. at 40, ECF No. 11. Dr. Timothy Ragen, *supra* p. 38, further asserted:

> New Zealand does not require anything remotely equivalent to the "[T]ake [R]eduction [P]lans" that must be developed under the U.S. MMPA for marine mammal populations with the same endangered status as the Māui dolphin. Instead, New Zealand has elected to follow a highly discretionary threat management planning process that, among other things, fails to include the timelines required for U.S. [T]ake [R]eduction [P]lans.

Decl. of Dr. Timothy Ragen ¶ 85, ECF No. 11–4. And finally, Professor Elisabeth Slooten — Professor of Zoology at the University of Otago in Dunedin, New Zealand — concurred:

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[52] For purposes of the below discussion, recall that in their August 27, 2020 supplemental petition, Plaintiffs explicitly enumerated and "incorporate[d] . . . in their entirety as support for the requested trade ban," inter alia, the Original Motion for Preliminary Injunction, ECF No. 11, Declaration of Professor Elisabeth Slooten, ECF No. 11–2, and Declaration of Dr. Timothy Ragen, ECF No. 11–4. *See* Pls.' Suppl. Pet. at 5–6. As such, each of the submissions herein discussed was properly before the agency.

> [T]here is currently no requirement for conservation management to ensure that Māui dolphin recover within . . . any . . . time period.

Decl. of Prof. Elisabeth Slooten ¶¶ 1, 44, ECF No. 11–2.[53]

Contrary to addressing commentors' concerns regarding the lack of mandatory action or deadlines associated with New Zealand's TMP — including the new Management Review Trigger — the agency's analysis merely highlights its discretionary nature. *See, e.g.*, Dec. Mem. at 9 (asserting that under the Management Review Trigger, New Zealand "*can* take protective management actions" and "*may* . . . prohibit all or any fishing or other fishing methods in the Māui dolphin habitat zone" in the event of interactions — lethal or otherwise — between fisheries and Māui dolphins (emphasis added)); *see also id.* ("The setting of a [M]anagement [R]eview [T]rigger *allows* [New Zealand] to quickly put in place (*e.g.*, within a week) additional measures and restrictions." (first emphasis added)). While NOAA's analysis focuses on the responsive measures New Zealand *could* take pursuant to its Management Review Trigger, the agency fails to account for the fact that this mechanism does not *require* New Zealand to do anything on any particular timeframe following a fishery-related interaction with a Māui dolphin in excess of PBR.[54]

As Plaintiffs note, such a discretionary approach contrasts with the MMPA's mandatory directive that where commercial fishing causes marine mammal mortality and/or serious injury in excess of PBR, NOAA "*shall* develop and implement a [T]ake [R]eduction [P]lan" with measures to reduce such mortality and/or serious injury to levels below PBR within six months of the Plan's implementation. *See* 16

[53] That these comments were submitted to the agency prior to New Zealand's finalization of its revised TMP on June 24, 2020 does not, in the court's view, alter the agency's obligation to respond to them. This is so, first, because Plaintiffs resubmitted these comments via incorporation with their August 27, 2020 supplemental petition, *see* Pls.' Suppl. Pet. at 5–6; and second, because, as explained above, the Government of New Zealand purposefully retained the TMP's discretionary quality with the new mortality limit, *see* N.Z. TMP Letter app. one at 2. Thus, New Zealand's revision of the TMP did not moot the commentors' relevant submissions to the agency.

[54] This remains true despite the agency's assertions that "[o]nce [a new] prohibition is in place" pursuant to New Zealand's Management Review Trigger, "within three months of the incident, the [New Zealand Government] will undertake a more detailed review of the bycatch incident and will determine what longer-term measures are required," *see* Dec. Mem. Attach. A at 35, or that any "prohibitions notified in the New Zealand Gazette would remain in place until the notice was amended [or] revoked," *id.* While these features would appear to impose some nondiscretionary elements in the event New Zealand chooses to impose new prohibitions following a Māui dolphin interaction under the Management Review Trigger, they do not address commentors' threshold concern that unlike the U.S. Take Reduction Plan, New Zealand's mortality limit does not actually require *any* actionable measures on *any* defined timeline.

U.S.C. § 1387(f)(1), (5) (emphasis added); *see also NRDC I*, 331 F. Supp. 3d at 1353 ("'Shall' is mandatory language, demonstrating that Congress left the Government with no discretion whether to act." (citing *Murphy v. Smith*, 138 S.Ct. 784, 787 (2018))).

The closest NOAA comes to addressing parties' concerns is the agency's general assertion that "[t]he MMPA Import Provisions do not require . . . a nation's approach [to] be identical to the U.S. regulatory program or standards, just comparable in effectiveness to [them]." Dec. Mem. Attach. A at 37. While true, the agency's statement does not clarify how New Zealand's regulatory program — under which New Zealand could conceivably do nothing (however unlikely NOAA may assess such a response by the New Zealand Government to be) following a taking in excess of PBR — is comparable in effectiveness to the U.S. program — under which doing nothing is decisively not an option. *Compare* Fisheries (Commercial Fishing) Regulations 2001, s 52D–E (N.Z.), *with* 16 U.S.C. § 1387(f)(1), (5). "It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered." *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2nd Cir. 1977).

In short, although — as NOAA notes — whether New Zealand "maintains a regulatory program . . . that is comparable in effectiveness to the U.S. regulatory program with respect to incidental mortality and serious injury of marine mammals" under 50 C.F.R. § 216.24(h)(6)(iii)(B) entails a multifactorial inquiry, *see* Dec. Mem. Attach. A at 3–4, NOAA afforded significant weight to the assessed comparability between New Zealand's Management Review Trigger and U.S. Take Reduction Plans in rendering an affirmative determination, *see* Dec. Mem. at 4, 9–10; *see also* Dec. Mem. Attach. A at 1, 34–35, 37. Accordingly, by failing to address the discretionary quality of New Zealand's TMP — including the new Management Review Trigger — the agency did not "respond, in a reasoned manner, to . . . comments . . . rais[ing] significant issues with respect to a proposed rule," *Disabled Am. Veterans*, 234 F.3d at 692, such that Plaintiffs have established an additional basis upon which they are likely to succeed in their challenge to the comparability findings under APA section 706(2)(A).

c. NOAA failed to articulate a rational connection between certain facts found and choices made.

Finally, as an additional condition for comparability findings, NOAA requires foreign nations to "[i]mplement[] . . . monitoring procedures in the[ir] export fisher[ies] designed to estimate incidental

mortality or serious injury . . . of marine mammal stocks in waters under [their] jurisdiction" and to provide "an indication of the statistical reliability of those estimates." 50 C.F.R. § 216.24(h)(6)(iii)(C)(4). NOAA concluded that where New Zealand has "100% . . . electronic monitoring" coverage of "fishing vessels currently operating in the core Māui dolphin habitat zone," Dec. Mem. Attach. A at 15, and where the percent of observed fishing days averaged ninety-five percent in the target set-net area and ninety percent in the target trawl area over the previous three years, New Zealand's onboard camera monitoring program exceeds U.S. standards and its broader observer monitoring program is otherwise comparable in effectiveness for purposes of 50 C.F.R. § 216.24(h)(6)(iii)(C)(4), *id.* at 17.

Before the court, Plaintiffs argue that New Zealand's figures are "nothing more than red herrings and statistical subterfuge," Pls.' Ren. PI Mot. at 32, because New Zealand claims "100% . . . electronic monitoring" coverage while excluding "vessels smaller than 8 meters" from its onboard camera requirement and reported the percentage of fishing days observed, without "provid[ing] data on the amount of net observed," Pls.' Resp. Br. at 47. Plaintiffs maintain these deficiencies render estimates of incidental mortality or serious injury of marine mammals generated under New Zealand's monitoring regime statistically unreliable for purposes of 50 C.F.R. § 216.24(h)(6)(iii)(C)(4). *See* Pls.' Ren. PI Mot. at 38. Because NOAA failed to account for these deficiencies in deeming satisfied 50 C.F.R. § 216.24(h)(6)(iii)(C)(4), the court concludes that the agency has not established the requisite "rational connection between [relevant] facts found and . . . choice[s] made." *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Thus, here too, Plaintiffs have alleged a basis upon which the court can find Plaintiffs likely to succeed in their APA section 706(2)(A) challenge to the comparability findings.

Beginning with New Zealand's onboard camera program, New Zealand requires electronic monitoring on any set net or trawl vessel (≥8 meters and ≤29 meters in registered length) operating around the West Coast North Island. *See* Fisheries (Electronic Monitoring on Vessels) Regulations 2017, sch 1, pt 1, cl 1 (N.Z.). Plaintiffs submitted to the agency that New Zealand's exclusion of vessels "smaller than eight meters, [wa]s a[] critical flaw in the observer coverage data," Pls.' Suppl. Qs. Resp. at 11, because "commercial gillnetters commonly use" "[s]maller craft (i.e., [those] less than six meters in length)" "in the larger harbors of the North Island's west coast [that]

Māui dolphins inhabit." Pls.' Feb. 2019 Pet. at 15.[55] Nowhere did NOAA account for this exclusion in endorsing New Zealand's representation of "100% . . . electronic monitoring" coverage. Dec. Mem. Attach. A at 15. As Plaintiffs persuasively argue, Commerce's failure to do so constituted legal error because:

> a city c[an]not use evidence of a lack of speeding tickets issued as proof that people are not speeding if the police department is not monitoring the roadways and enforcing the speed limit. Yet, the [Government of New Zealand] attempts to do . . . that by excluding . . . relevant vessels from coverage, which not only artificially inflates the observer coverage numbers purported[,] . . . but also suppresses the instances of bycatch that are observed and reported without actually reducing the real number of dolphins caught in nets.

Pls.' Suppl. Qs. Resp. at 11.[56] Accordingly, the court assesses NOAA needs to reconcile — in the first instance — New Zealand's exclusion of smaller vessels from its monitoring program with the agency's determination that New Zealand's estimates of incidental mortality

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[55] Because Plaintiffs explicitly reincorporated the legal and factual grounds underpinning their February 6, 2019 petition in their August 27, 2020 supplemental petition, *see* Pls.' Suppl. Pet. at 5–6, Plaintiffs' objection concerning the exclusion of smaller vessels from New Zealand's electronic monitoring regime was properly before the agency. Moreover, submissions in response to NOAA's solicitation of public comments on Plaintiffs' petition echoed this critique. *See, e.g.*, Sommermeyer Pub. Comment at 4 (Mar. 27, 2019), P.R. 3383 (objecting that "smaller craft have no [observer] coverage at all"). [Please note, this P.R. number reflects that listed in the Administrative Record Index, Nov. 23, 2020, ECF No. 44–1.]

[56] One might question the significance of a lack of electronic monitoring coverage on smaller vessels in light of NOAA's statement that "[n]o U.S. Take Reduction Plans currently require any fishery . . . to use on-board cameras as a monitoring device," but "only require observers onboard at pre-determined levels." Dec. Mem. Attach. A at 16. However, beyond just onboard cameras, commentors' critiques suggest that "[s]maller craft (i.e., [those] less than six meters in length) have *no* observer coverage *at all*." Pls.' Feb. 2019 Pet. at 15 (emphasis added); Sommermeyer Pub. Comment at 4 (same). This critique is confirmed, at least to some extent, by New Zealand's Comparability Finding Application. *See, e.g.*, N.Z. Comp. Finding App. at 47 ("Work is underway to explore alternative means of verifying protected species captures on small vessels that operate within harbours (e.g.[,] open dory boats) *that do not have the means to carry a fisheries observer* or the on-board camera system." (emphasis added)). Moreover, as discussed *infra*, the metric NOAA has accepted as a measure of New Zealand's broader observer coverage — namely, percentage of fishing days observed, *see* Dec. Mem. Attach. A at 17 — does not necessarily dispel Plaintiffs' objections to the lack of any observer coverage on smaller vessels.

or serious injury are statistically reliable for purposes of 50 C.F.R. § 216.24(h)(6)(iii)(C)(4).[57]

Beyond onboard cameras, Plaintiffs contest NOAA's broader determination that New Zealand's overall "fisheries observer . . . program

[57] For its part, the Government of New Zealand maintains that the exclusion of smaller craft from the electronic monitoring program is not impactful because "[v]essels smaller than 8 meters typically operate within harbors where Māui dolphin presence is low." Def.-Inter.'s Resp. Br. at 38 n.31. Even if the court could credit New Zealand's post-hoc rationalization in place of NOAA's silence — which it cannot, *see U.H.F.C. Co.*, 916 F.2d at 700 — doing so would not necessarily nullify Plaintiffs' objections.

For example, in granting a comparability finding to New Zealand's West Coast North Island set-net fishery, NOAA noted:

> [This] fishery comprises two main sub-fleets: coastal set-net vessels, and harbor set-net vessels. Coastal set-net vessels (≥ 6m registered length) operate within the deeper offshore waters and primarily target species such as common warehou, spotted estuary smooth-hound, and tope shark. The harbor set net vessels (predominantly < 6m registered length) primarily operate in the upper reaches of the West Coast North Island harbors (i.e.[,] Herekino, Whangape, Hokianga, Kaipara, Manukau, Raglan, and Kawhia) targeting species such as flatfishes nei, flathead grey mullet, and spotted estuary smooth-hound.

Dec. Mem. Attach. A at 22. Importantly, NOAA's description acknowledges that fishing vessels under six meters in registered length — which indisputably fall outside of New Zealand's size-based electronic monitoring requirements — operate in the upper reaches of the West Coast North Island harbors, including Kaipara, Manukau, and Raglan harbors. *Id.* NOAA elsewhere appears to describe the "upper reaches" of these harbors as within "the core Māui dolphin habitat." *See, e.g., id.* at 29 (describing "the entrances of the Kaipara, Manukau, and Raglan harbors (core distribution and part of the southern tail)" (footnote omitted)). And yet, NOAA still accepts New Zealand's claim of 100 percent electronic monitoring on all "fishing vessels currently operating *in the core Māui dolphin habitat zone*." *Id.* at 15 (emphasis added). While NOAA does elsewhere qualify that "[w]ithin this core area, Māui dolphins are only occasionally found in the outer portions of harbors such as Manukau, Kaipara, Raglan harbors" and only "occasionally enter the mouth of the Manukau and Kaipara harbors," *id.* at 7, the Māui dolphin presence is significant enough in these areas that New Zealand prohibits the use of set nets in the entrances of these harbors, *id.* at 29; *see also* Def.-Inter.'s Resp. Br. at 36 n.30 ("[S]et nets are banned in the entrances of the Kaipara, Manukau, and Raglan harbors (which are part of the Māui dolphin's core distribution)."). These countervailing factual findings undermine both New Zealand's claim of 100 percent electronic monitoring coverage in the Māui dolphin's core range as well as the statistical reliability of the incidental mortality or serious injury estimates generated under New Zealand's monitoring program for purposes of 50 C.F.R. § 216.24(h)(6)(iii)(C)(4).

Moreover, the court notes that New Zealand requires on-board cameras for qualifying fishing vessels in "the coastal area of the Māui dolphin habitat," Dec. Mem. Attach. A at 15, and NOAA describes New Zealand's West Coast North Island set-net fishery as having "[c]oastal set-net vessels (≥ 6m registered length) operat[ing] within the deeper offshore waters," *id.* at 22. This description begs the question as to whether the West Coast North Island set-net fishery has vessels greater than six meters, but less than eight meters — which, again, would fall outside of New Zealand's size-based onboard camera requirements — operating in coastal waters within "the core Māui dolphin habitat zone." *Id.* at 15. If yes, any such uncovered vessels would further undermine New Zealand's 100 percent electronic monitoring figure as well as the statistical reliability of New Zealand's mortality or serious injury estimates.

In short, even considered arguendo, New Zealand's proffered post-hoc rationalization does not necessarily supply the missing "rational connection" requisite to sustain NOAA's assessment of New Zealand's monitoring program under 50 C.F.R. § 216.24(h)(6)(iii)(C)(4). *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

is comparable in effectiveness to U.S standards." *See* Dec. Mem. Attach. A at 17. In submissions properly before the agency, Plaintiffs made clear their position that the percentage of observed set net and/or trawl vessels is the proper metric by which to measure the robustness of New Zealand's monitoring program. *See* Decl. of Prof. Elisabeth Slooten ¶ 31, ECF No. 11–2 (submitting Table 1, which lists fishing effort and observer coverage for the West Coast North Island; "[f]ishing effort is reported as km of gillnet per year, and number of trawls per year" and "[o]bserved effort is reported as the proportion of fishing effort with an independent observer on board"); *see also* Decl. of Dr. Timothy Ragen ¶ 57, ECF No. 11- 4 (same).[58] Nevertheless, in issuing comparability findings, NOAA assessed New Zealand's monitoring program to satisfy 50 C.F.R. § 216.24(h)(6)(iii)(C)(4) because the percent of *fishing days* observed averaged ninety-five percent in the target set net area and ninety percent in the target trawl area over the previous three years. *See* Dec. Mem. Attach. A at 17.[59]

Before the court, Plaintiffs contest the rationality of NOAA's determination on the grounds that "'fishing days' [are] not a reliable method of detecting bycatch," but rather "provide[] a biased picture of Māui dolphin catchability." Pls. Resp. Br. at 45–46. This is so, in Plaintiffs' estimation, because "nets are not deployed in equal amounts every day," thereby creating a potential "mismatch between seemingly high observer coverage as measured by fishing days and low coverage as to amount of net observed." *Id.* (citing Second Decl. of Dr. Timothy Ragen ¶ 115, ECF No. 49–4 (stating "[i]f a single vessel with an observer fished for two days, setting 1,000 meters of net on day one and 10,000 meters on day two, fishing effort and observer coverage would not be equal on those two days; the second day imposes a risk 10 times larger")).

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[58] *Supra* note 52 (explaining why the Declarations of Professor Elisabeth Slooten and Dr. Timothy Ragen are properly before the agency).

[59] NOAA did not include nor rely on fishing day-derived observer coverage figures in its rejection of Plaintiffs' original February 6, 2019 petition for emergency rulemaking. *See* 84 Fed. Reg. 32,853 (no mention of New Zealand's percentage of fishing-days observed); *see also* Mem. from A. Cole to C. Oliver, re: Decision Mem. for the Den. of Pet. for Rulemaking (Dep't Commerce June 13, 2019), P.R. 5432 (same) [Please note, the P.R. number here reflects that listed in the Administrative Record Index, Nov. 23, 2020, ECF No. 44–1.]. Rather, NOAA adopted these fishing day-derived observer coverage figures from the Government of New Zealand's Comparability Finding Application. *See* Dec. Mem. Attach. A at 17 (citing N.Z. Comp. Finding App. at 47, app. F). Plaintiffs maintain that NOAA never made New Zealand's Application available for public comment. *See* First Suppl. Compl. ¶ 97.

In such case, although Plaintiffs' submissions to NOAA put the agency on notice that Plaintiffs endorsed the percentage of set net/trawls observed as the proper metric of observer coverage, *supra* pp. 49–50, Plaintiffs' briefing before this court comprises their first opportunity to respond to New Zealand's submission of and NOAA's reliance on observer coverage figures derived from the percentage of fishing days observed.

In endorsing New Zealand's claimed ninety-five and ninety-percent set net and trawl observer coverage figures, respectively, NOAA did not explain its reliance on the percentage of observed fishing days metric over Plaintiffs advocated for percentage of set net/trawls observed metric. The court agrees that NOAA's failure to account for the potential "mismatch" between "high observer coverage as measured by fishing days and low coverage as to amount of net [and/or trawls] observed," *see* Pls.' Resp. Br. at 45–46, undermines the rationality of the agency's conclusion that New Zealand "has a sufficiently high level of observer coverage to detect interactions or bycatch and obtain an unbiased statistically-reliable bycatch estimate" for purposes of 50 C.F.R. § 216.24(h)(6)(iii)(C)(4), *see* Dec. Mem. Attach. A at 17.

Thus, the court holds that NOAA did not establish a rational connection between certain facts found and choices made in deeming comparable New Zealand's monitoring program, thereby creating another likely avenue for Plaintiffs' successful challenge to the comparability findings under section 706(2)(A) of the APA.

d. Conclusion

In light of the foregoing, the court concludes that Plaintiffs are likely to succeed on the merits of their third claim that NOAA acted arbitrarily and capriciously — in contravention of section 706(2)(A) of the APA — in issuing comparability findings to two New Zealand fisheries, because, at a minimum, NOAA failed to: (1) consider all mandatory regulatory factors; (2) respond to all significant comments; and (3) articulate a rational connection between certain facts found and choices made. In so holding, the court reiterates that the above identified deficiencies are not necessarily exhaustive, but merely that at this stage in the proceedings — the preliminary injunction stage — Plaintiffs have established a basis upon which the court can find they are likely to prevail on their third claim.

2. Second Claim: NOAA's Denial of Plaintiffs' Petition for Emergency Rulemaking

The court further assesses that Plaintiffs are likely to succeed on the merits of their second claim challenging NOAA's denial of the August 27, 2020 supplemental petition as arbitrary and capricious under section 706(2)(A) of the APA. This is so — most basically — because NOAA's rejection of Plaintiffs' petition for emergency rulemaking turned on the agency's grant of comparability findings to New Zealand. *See Comp. Finding Determ.* at 71,298 (announcing the rejection of Plaintiffs' petition and issuance of comparability findings and stating "[t]he rationale for the determination announced in this notice is articulated in an analysis of [New Zealand's] application for

a comparability finding"). Logically, where the court has determined that NOAA's grant of comparability findings to New Zealand was arbitrary and capricious, the court must correspondingly hold that NOAA's rejection of Plaintiffs' petition for emergency rulemaking on the basis of such comparability findings was likewise arbitrary and capricious. Thus, Plaintiffs are likely to succeed on the merits of their second claim.

Beyond this purely logic-based argument, Plaintiffs contend they are likely to succeed on the merits of their second claim by operation of NOAA's Imports Regulation and the Import Provision of the MMPA. This is so, in Plaintiffs' estimation, because "only a *valid* comparability finding can relieve [NOAA] of [its] duty to impose a ban," and comparability findings arbitrarily and capriciously granted do not suffice. *See* Pls.' Resp. Br. at 50 (emphasis in the original). The court agrees.

NOAA's Imports Regulation establishes that fish or fish products for which a valid comparability finding is not in effect are per se in excess of U.S. standards, with Paragraph (h)(1)(i) stating in relevant part:

> [A] fish or fish product caught with commercial fishing technology which results in the incidental mortality or incidental serious injury of marine mammals in excess of U.S. standards is any fish or fish product harvested in an exempt or export fishery for which a *valid* comparability finding is not in effect.

50 C.F.R. § 216.24(h)(1)(i) (emphases added). This Paragraph "prohibit[s]" fish imports "in excess of U.S. standards," *id.*, and (h)(1)(ii)(A) explicitly states that imports of fish or fish products for which a valid comparability finding is not in effect are "unlawful":

> (ii) Accordingly, it is unlawful for any person to import, or attempt to import, into the United States for commercial purposes any fish or fish product if such fish or fish product:
>
> (A) Was caught or harvested in a fishery that does not have a *valid* comparability finding in effect at the time of import;

50 C.F.R. § 216.24(h)(1)(ii)(A) (emphasis added).[60] Accordingly, if New Zealand's West Coast North Island multi-species set-net and trawl fisheries do not have valid comparability findings in effect, the importation of fish or fish products into the United States from them is per se in excess of U.S. standards under Paragraph (h)(1)(i), unlawful under (h)(1)(ii)(A), and thereby prohibited by operation of NOAA's Imports Regulation, 50 C.F.R. § 216.24(h)(1)(i)–(ii), and the Import Provision of the MMPA, 16 U.S.C. § 1371(a)(2).[61] Thus, the operative question is: what constitutes a *valid*[62] comparability finding?

Black's Law Dictionary defines "valid" as "legally sufficient." *Valid*, *Black's Law Dictionary (11th ed. 2019); see also Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 708 (D.C. Cir 2008) (defining "valid" as "[l]egally sufficient"); *In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007) (same). Courts have held that agency action that is arbitrary, capricious, or otherwise not in accordance with law is not "legally

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[60] Although NOAA's Imports Regulation instructs that "[t]he prohibitions of paragraph (h)(1) . . . shall not apply during the exemption period," *id.* § 216.24(h)(2)(ii), which "extends through December 31, 2023," *id.* § 216.3, "nothing prevents a nation from . . . seeking a comparability finding during the . . . exemption period," *Comp. Finding Determ.* at 71,297. Crucially, the Government of New Zealand did that for its West Coast North Island multi-species set-net and trawl fisheries, *id.* at 71,297–98, thereby waiving the Imports Regulation's grace period, *see* Defs.' Suppl. Br. at 2 ("[New Zealand] applied early for a comparability finding before the exemption period ends, waiving the regulation's [seven]-year grace period.").

Thus, having waived the benefit of the seven-year exemption period, *see id.*, the prohibitions of Paragraph (h)(1) now *do apply* to the two New Zealand fisheries, *see* 50 C.F.R. § 216.24(h)(2)(ii) — a reading which is supported by NOAA's own analysis, *see* Dec. Mem. at 2, 8 (stating that "[d]ue to [New Zealand]'s request for an early comparability finding, the fisheries identified above would be under the *full effect* of [the Imports Regulation]" (emphasis added)).

[61] Bringing all the pieces together, recall that the Import Provision of the MMPA instructs, in relevant part, that "[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals *in excess of United States standards*," 16 U.S.C. § 1371(a)(2) (emphasis added); and Paragraph (h)(1)(i) of NOAA's Imports Regulations instructs that "[a] fish or fish product . . . *in excess of U.S. standards* is any fish or fish product . . . for which a valid comparability finding is not in effect," 50 C.F.R. § 216.24(h)(1)(i) (emphasis added).

Accordingly, because New Zealand's West Coast North Island multi-species set-net and trawl fisheries are currently subject to the prohibitions of Paragraph (h)(1) of NOAA's Imports Regulation (by virtue of New Zealand's waiver of the seven-year exemption period), *supra* note 60 and accompanying text, if these fisheries do not have valid comparability findings in effect at the time of importation, imports of fish and/or fish products into the United States from them are per se in excess of U.S. standards under Paragraph (h)(1) of the Imports Regulation, and thereby prohibited under the MMPA's Import Provision.

[62] The court notes that Paragraph (h)(1) of the Imports Regulation does not merely require that fisheries have "comparability findings" in effect for their imports to be permissible, but rather requires that fisheries have *valid* comparability findings in effect. It is the court's "'duty to give effect, if possible, to every clause and word' of [a] regulation[]." *Martinez-Bodon*, 28 F.4th at 1246 (quoting *Duncan*, 533 U.S. at 174). As such, this court must imbue with significance the term "valid" in NOAA's Imports Regulation.

sufficient." *See, e.g.*, *Advanced Micro Devices v. C.A.B.*, 742 F.2d 1520, 1544–45 (D.C. Cir. 1984). Therefore, in order for a comparability finding to be "valid" — such that it can avoid implicating the agency's obligation to impose an import ban under the combination of NOAA's Imports Regulation and the MMPA's Import Provision — the agency must not have acted arbitrarily or capriciously in granting it.

As previously established, *supra* pp. 32–52, Plaintiffs are likely to succeed on the merits of their third claim that NOAA acted arbitrarily and capriciously — in contravention of section 706(2)(A) of the APA — in issuing comparability findings to New Zealand's West Coast North Island multi-species set-net and trawl fisheries. Accordingly, because New Zealand has waived the seven-year exemption period from the prohibitions of Paragraph (h)(1) of the Imports Regulation for these fisheries, Plaintiffs are likely to prove that these fisheries' lack of valid comparability findings renders any imports from them per se in excess of U.S. standards under (h)(1)(i), unlawful under (h)(1)(ii)(A), and thereby prohibited under both NOAA's Imports Regulation, 50 § C.F.R. 216.24(h)(1)(i)–(ii), and the Import Provision of the MMPA, 16 U.S.C. § 1371(a)(2).[63] Thus, Plaintiffs have persuasively alleged they

[63] The United States disagrees that a determination by this court that the issued comparability findings are legally insufficient — or not "valid" — would render the pertinent New Zealand fisheries per se in excess of U.S. standards under 50 C.F.R. § 216.24(h)(1)(i), such that any derivative imports would be prohibited by operation of the Imports Regulation, *id.* § 216.24(h)(1)(i)–(ii), and the MMPA's Import Provision, 16 U.S.C. § 1371(a)(2). *See* Defs.' Suppl. Qs. Resp. at 10–11. Defendants argue that "[a]n import ban would be required *only if* NOAA were to issue a negative comparability finding." Defs.' Suppl. Qs. Resp. at 10 (emphasis added). Such an argument misapprehends the scope of New Zealand's waiver of the grace period and constitutes an unreasonable interpretation of NOAA's Imports Regulation.

Concerning the scope of New Zealand's waiver, the United States argues that "[b]y applying for comparability findings, New Zealand . . . waived the benefit of the [seven]-year exemption period and risked subjecting its fisheries to an import ban *only in the event* that NOAA were *to deny* its application." *Id.* at 10–11 (emphasis added). It is unclear from where the United States derives any such parameters. For instance, in the Federal Register notice rejecting Plaintiffs' petition and issuing comparability findings to New Zealand, NOAA stated that "New Zealand . . . has requested an early Comparability Finding for several of its fisheries," and clarified that "[a]ll other exempt and export fisheries operating under the control of [New Zealand] are subject to the exemption period under 50 C.F.R. § 216.24(h)(2)(ii)," which provides "[t]he prohibitions of paragraph (h)(1)" — namely the valid comparability finding requirement — "shall not apply during the exemption period." *Comp. Finding Determ.* at 71,297–98. By specifying that "all other" New Zealand fisheries are still covered by the exemption period of (h)(2)(ii), the logical extension is that the two fisheries for which New Zealand sought early comparability findings *are not*, thereby rendering them presently subject to Paragraph (h)(1)'s valid comparability finding requirement. 50 C.F.R. § 216.24(h)(1)–(2)(ii). Again, this reading is supported by NOAA's own analysis. *See* Dec. Mem. at 2, 8 ("Due to [New Zealand]'s request for an early comparability finding, the fisheries identified above would be under the *full effect* of the [Imports Regulation]." (emphasis added)).

The United States further invokes Paragraph (h)(9)(i) to argue that NOAA's Imports Regulation requires a ban only where NOAA "has denied or terminated a comparability

are likely to succeed on the merits of their second claim that NOAA contravened section 706(2)(A) of the APA in denying their petition for emergency rulemaking.

B. Plaintiffs Are Likely to Suffer Irreparable Harm Absent a Preliminary Injunction

Having determined that Plaintiffs are likely to succeed on the merits of their remaining claims, the court now turns to the second preliminary injunction factor: whether Plaintiffs are likely to suffer irreparable harm in the absence of injunctive relief. *See Silfab Solar*, 892 F.3d at 1345. Plaintiffs argue that they are, *see* Pls.' Resp. Br. at 22–23, while Defendants maintain that Plaintiffs have failed to make the requisite showing, *see* Defs.' Resp. Br. at 41–42; Def.-Inter.'s Resp. Br. at 51. The seminal preliminary injunction case — *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008) — underscores that this second factor comprises two elements: (1) whether any harm arising in the absence of injunctive relief will be *irreparable*; and (2) whether any such irreparable harm is *likely*. The court easily concludes that Plaintiffs have proven the first element. Although the second element presents a more complicated question, the court ultimately deems it satisfied. As such, the court holds that the "likelihood of irreparable harm" factor weighs in Plaintiffs' favor.

Considering the first element — whether any harm arising in the absence of injunctive relief will be *irreparable* — this court explained

finding for a fishery," Defs.' Suppl. Qs. Resp. at 10 (citing 50 C.F.R. § 216.24(h)(9)(i)), but this constitutes an unreasonable interpretation of the regulation, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019). Paragraph (h)(1) of NOAA's Imports Regulation — entitled "Prohibitions" — sets out disjunctive conditions that render the importation of fish or fish product "unlawful." Specifically, (h)(1)(ii) declares "unlawful" the importation of fish from: (A) a fishery without a valid comparability finding *or* (B) an intermediary nation unaccompanied by a "Certification of Admissibility" or other documentation required to show that the imported fish/fish products did not derive from a fishery otherwise subject to an import ban. 50 C.F.R. § 216.24(h)(1)(ii)(A)–(B). The court cannot permit Defendants to eliminate the disjunctive "or" between (h)(1)(ii)(A) and (B), which critically illuminates that the lack of a valid comparability finding — standing alone — is sufficient to render the importation of fish or fish products "unlawful." *Id.* § 216.24(h)(1)(i)–(ii).

Nor is the United States correct that 50 C.F.R. § 216.24(h)(9)(i) establishes that affirmative denials and/or terminations of comparability findings are the only conditions that trigger an import ban. Defs.' Suppl. Qs. Resp. at 10. While (h)(9)(i) of the Imports Regulation — under Paragraph (h)(9) entitled "Imposition of import prohibitions" — does enumerate the procedures the agency must follow to embargo fish and fish products from a fishery in the event that said fishery's comparability finding is "denied or terminated," (h)(9)(i) does not supply an exhaustive list of conditions that necessitate an import ban. This point is illuminated by (h)(9)(ii)(B), which introduces a third condition that would portend an import prohibition — namely, the expiration of a comparability finding. *See* 50 C.F.R. § 216.24(h)(9)(ii)(B). As the United States' proposed construction would render the enumeration of "expiration" in (h)(9)(ii)(B) surplusage, *see Cammarano v. United States*, 358 U.S. 498, 505 (1959), the United States cannot be correct that *only* a denial or termination of a comparability finding would require the imposition of an import ban under the Imports Regulation.

in *NRDC I* that "harm is irreparable when 'no damages payment, however great,' could address it," 331 F. Supp. 3d at 1368 (quoting *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)), and that "by its nature," "[e]nvironmental injury . . . can seldom be adequately remedied by money damages," *id.* (internal quotation marks omitted) (quoting *Fed'n of Japan Salmon Fisheries Co-op. Ass'n v. Baldridge*, 679 F. Supp. 37, 48 (D.D.C. 1987) (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987))), *aff'd and remanded sub nom. Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 800 (D.C. Cir. 1988)). Here, parties appear to agree that fishing-induced deaths of Māui dolphins would give rise to irreparable harm. *See* Pls. Resp. Br. at 23 ("Bycatch of a single Māui dolphin will hamper the dolphin's likelihood of recovery and increase its risk of extinction."); *see also* Dec. Mem. Attach. A at 30 (describing potential consequences of fishing-related interactions with Māui dolphins as "very high"); N.Z. TMP Letter app. one at 2 ("Given the very small number of Māui dolphins that remain there is a high likelihood of extinction should the population decline further."). Because no amount of money could remedy the harm to Māui dolphins or Plaintiffs enjoyment of them should the species become extinct, the court agrees that fishing-induced deaths constitute irreparable harm.

The court next considers whether such irreparable harm is likely to arise absent preliminary injunctive relief. *See Winter*, 555 U.S. at 22 (reiterating that "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction" and rejecting a "possibility" of irreparable harm standard as "too lenient" (emphasis in original)). Plaintiffs argue such irreparable harm is likely because "bycatch [of Māui dolphins] is continuing to occur and poses an ongoing threat" where commercial gillnet and trawl fisheries are still allowed to operate in portions of even the Māui dolphin's undisputed range. Pls.' Resp. Br. at 21–22 (citing Dec. Mem. Attach A at 29–30 (stating proportion of Māui dolphin'spatial distribution in which set nets and trawls are still allowed)). By contrast, Defendants argue irreparable harm is not likely, because "the last fishing related mortality for Māui dolphin[s] was [in] 2012, and the last interaction between a commercial fishing vessel and a Māui dolphin was [also] in 2012." Defs.' Resp. Br. at 42; Def.-Inter.'s Resp. Br. at 52 n.35 (same). Plaintiffs' position prevails.

The court begins by noting that the rate of Māui dolphin bycatch is contested, *supra* pp. 11–13, and reiterating that it will not attempt to resolve this scientific debate, *see Shafer*, 992 F.3d at 1093. However, even accepting arguendo Defendants' representation that the last

fishing-related morality of a Māui dolphin occurred in 2012,[64] *see* Defs.' Resp. Br. at 42; Def.-Inter.'s Resp. Br. at 52 n.35, a finding of likely irreparable harm is not precluded by *Winter*. In *Winter*, despite accepting as a fact that the U.S. Navy's sonar training program — which plaintiff environmentalists sought to enjoin — "ha[d] been going on for 40 years with no documented episode of harm to a marine mammal," the Supreme Court proceeded on the assumption that plaintiffs faced a "near certainty" of irreparable harm. *See* 555 U.S. at 15, 21–23, 33 (nevertheless vacating the preliminary injunction on public interest grounds in light of national security imperatives).

In stark contrast, here, it is uncontested that there have been "documented episode[s] of harm to [Māui dolphins]" from commercial fishing over the years. *Id.* at 33. By Defendants' own account, "[b]etween 1921 and [the] present there have been five beachcast recovered carcasses of *Cephalorhynchus* spp. dolphins (Māui/Hector's dolphin) off the West Coast North Island where fishing was implicated via necropsy in the cause of death, the last in 2012." *See Comp. Finding Determ.* at 71,299. Moreover, it is undisputed that set net and trawl fishing are presently allowed to operate in at least portions of the Māui dolphin's range. *See, e.g.*, Dec. Mem. Attach A at 29– 30 (stating that New Zealand's current set net closures cover approximately 92.6% (summer) and 83.8% (winter) and trawl closures cover approximately 73.3% (summer) and 50% (winter) of the Māui dolphin's spatial distribution). Thus, where the *Winter* Court entertained as satisfied the "likelihood of irreparable harm" prong absent *any* documented evidence of harm to marine mammals, this court holds that — given the undisputed instances of Māui dolphin bycatch

[64] Although the court will not attempt to resolve the scientific debate regarding bycatch rates, in light of the preceding discussion on certain deficiencies attending New Zealand's monitoring program, *supra* pp. 46–51, the court is persuaded that the agency has not met "minimal standards of rationality" in maintaining that the 2012 incident was the last instance of Māui dolphin bycatch by a commercial fishing vessel. *Shafer*, 992 F.3d at 1090 (quoting *Troy Corp.*, 120 F.3d at 283). The court so assesses, because Defendants themselves recognize that "the level of monitoring coverage must be high enough to reliably detect any non-zero capture rate" of Māui dolphins. *See* Dec. Mem. Attach. A at 17; N.Z. Comp. Finding App. at 47 (same). It is not clear — absent further agency explanation — that New Zealand's monitoring coverage, which excludes vessels under 8 meters from certain requirements and relies on percentage of fishing days observed as a metric of robustness, is "high enough to reliably detect any non-zero capture rate." This uncertainty is compounded by the Government of New Zealand's acknowledgment that "most [Māui dolphin] carcasses are not recovered," Def.-Inter.'s OA Subm. at 1, and by the reality that even when carcasses are recovered, the cause of death may not be determinable, *see id.* (discussing a pathology report from New Zealand's School of Veterinary Science that declares indeterminate the cause of death of a female Māui dolphin found on February 25, 2021).

and the continued threat — there exists a likelihood of irreparable harm absent injunctive relief.[65]

The court notes that to hold otherwise would undermine the very purpose of the MMPA, which requires protection of marine mammals that "are, or may be, in danger of extinction or depletion as a result of man's activities," 16 U.S.C. § 1361(1), from "diminish[ing] below their optimum sustainable population," *id.* § 1361(2). *See NRDC I*, 331 F. Supp. 3d at 1369 ("A determination of irreparable harm should . . . be guided by reference to the purposes of the statute being enforced." (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184–88 (1978), among other cases)). As parties acknowledge, the Māui dolphin's scarcity makes interactions with commercial fishing vessels inherently unlikely, thereby complicating the "likelihood" inquiry. *See, e.g.*, Pls.' Resp. Br. at 47–48 ("The likelihood of interacting with a critically endangered species is always going to be lower than for a more populous species because there are so few individuals remaining."); N.Z. TMP Letter app. one at 2 ("[W]e know that given the very small number of Māui dolphins remaining that the likelihood of interactions with fishing [vessels] are estimated to be rare, not common."). But as Plaintiffs persuasively argue, where — as here — the probability "that a single fishery-induced mortality will push the population closer to . . . extinction" "is high," "the relatively low probability of" bycatch stemming from the species' meager numbers "must not foreclose . . . protections against fisheries threats." Pls.' Resp. Br. at 47–48. Indeed, to hold otherwise "would deny MMPA protections to marine mammal populations that need them most." *Id.* at 47.

The court, therefore, concludes that in a case such as this one — where there is "so little margin for error," *id.* at 47 — the "likelihood of irreparable harm" prong weighs in favor of injunctive relief.

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[65] In so holding, the court acknowledges that New Zealand implemented new restrictions — effective October 1, 2020 — that extended existing and created new prohibitions on set net and trawl fishing in the Māui dolphin's habitat zone. *See* N.Z. TMP Letter at 1. The court recognizes that these new restrictions are intended to reduce the risk of harm to Māui dolphins posed by commercial fishing. *Id. But see* Dec. Mem. Attach A at 29–30 (acknowledging that set nets and trawls are still allowed to operate in a proportion of the Māui dolphin's spatial distribution).

Nevertheless, until the aforementioned deficiencies attending New Zealand's monitoring program — which undermine the "rationality" of certain assessments and assertions by NOAA — are accounted for, *supra* pp. 46–51, the court deems unreliable Defendants' representations concerning the efficacy of these new restrictions. Pending further explanation by the agency, the court looks to documented instances of prior Māui dolphin bycatch and the continuation of set net and trawl fishing in portions of the Māui dolphin's undisputed habitat range to conclude that irreparable harm is likely.

C. The Balance of Equities Favors Granting a Preliminary Injunction

Turning to the third preliminary injunction factor, the court "'must balance the competing claims of injury and . . . consider the effect' that granting or denying [injunctive relief] will have on each party." *NRDC I*, 331 F. Supp. 3d at 1369 (quoting *Winter*, 555 U.S. at 24). Plaintiffs argue that "the impact to [their] members and the public more broadly from the death and possible extinction of a critically endangered dolphin is incredibly high," Pls.' Resp. Br. at 50, but that the United States Government "will suffer little to no hardship from imposing a preliminary ban," *id.* For its part, the United States argues that a preliminary injunction would do more harm than good because "[i]f New Zealand, a country with considerable resources and a strong conservation ethic, is held not to meet United States standards," then other exporting nations might be "discourag[ed] . . . from providing *any* protections due to perceived futility." Defs.' Resp. at 42–43 (emphasis in original). Plaintiffs' position prevails.

The court is again guided by the MMPA's purpose, which — at its base — is to preserve marine mammals. *NRDC I*, 331 F. Supp. 3d at 1369 (citing *Tenn. Valley Auth.*, 437 U.S. at 184– 88). Parties agree that extinction is likely should the Māui dolphin population decline much further. *See, e.g.*, N.Z. TMP Letter app. one at 2. Any such extinction poses a direct threat to Plaintiffs' interests. *See* Second Decl. James Boshier ¶¶ 8, 16 (describing the declarant's recreational and aesthetic interests in viewing Māui dolphins); *see also* Second Decl. of Sylvia Philcox ¶¶ 9, 11 (same); Second Decl. of Jennifer Matiu ¶¶ 6–7 (same); Second Decl. of Richard Hay ¶¶ 6, 17 (same); Second Decl. of Aleisha Dockery ¶¶ 5–6 (same). Moreover, "loss of the species prior to the end of this litigation would . . . moot [Plaintiffs'] substantive legal contention under the Imports Provision, and thus foreclose [their] access to meaningful judicial review." *NRDC I*, 331 F. Supp. 3d at 1370 (citing *Kwo Lee, Inc. v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1322, 1327, 1331 (2014)).

By contrast, although not without some burden, the administrative inconvenience of administering an embargo can be characterized as "routine." *Id.* And the court declines to engage in the kind of "prognostication" the Government invites with its speculative assertion

that enjoining certain imports from New Zealand will discourage other nations from protecting marine mammals.[66] *Id.* at 1371.

> Accordingly, the balance of equities favors granting a preliminary injunction.

D. A Preliminary Injunction is in the Public Interest

Finally, the court considers whether granting a preliminary injunction would benefit the public interest and concludes that it would. Plaintiffs argue that the Māui dolphin is "an undisputedly critically endangered species of significant cultural value," Pls.' Resp. Br. at 3, and that "the protection of a critically endangered species is in the public interest," *id.* at 18. The United States does not disagree but reiterates that a preliminary injunction "will not [in fact] foster the public interest or . . . protection of marine mammals," because such a prohibition would discourage "other countries [from] improv[ing] their marine mammal protections." Defs.' Resp. Br. at 42.[67] And the Government of New Zealand, along with certain U.S. industry commentors, posit that a preliminary injunction could negatively impact people's livelihoods, local communities, and consumers both at home and abroad. *See* N.Z. TMP Letter at 3; *see also* 84 Fed. Reg. at 32,855 (summarizing comments from the National Fisheries Institute on Plaintiffs' February 6, 2019 petition). Upon weighing these arguments, the court concludes a preliminary injunction will best further the public interest.

In so deciding, the court does not minimize the considerations raised by New Zealand or U.S. industry — consumer welfare, economic stability, and community impact indeed comprise important elements of the public interest. However, as with the irreparable harm and balance of equities prongs, "the public interest inquiry [must be] guided by reference to 'the underlying statutory purposes at issue.'" *NRDC I*, 331 F. Supp. 3d at 1371 (quoting *SSAB N. Am. Div. v. U.S. Bureau of Customs & Border Prot.*, 32 CIT 795, 801, 571 F. Supp. 2d 1347, 1353 (2008)). Here, Congress has been explicit that the MMPA is "to be administered for the benefit of the protected species rather than for the benefit of commercial exploitation." *Id.* at 1345 (quoting *Kokechik Fishermen's Ass'n*, 839 F.2d at 800); *see also* H.R. Rep. No. 92–707, at 4154 (1972) ("The primary objective of this

[66] The United States' "futility" argument is particularly unpersuasive in light of the fact that by NOAA's own account, as of October 21, 2022, the agency has "received applications for comparability findings from 132 nations and for 2,504 foreign fisheries" and is actively "consult[ing] with nations . . . regarding the marine mammal bycatch mitigation programs described in their submissions." *Deadline Modification* at 63,957.

[67] The court is unpersuaded by the Government's dual-purpose "futility" argument for the reasons detailed above. *Supra* note 66.

management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that the animals must be managed for their benefit and not for the benefit of commercial exploitation.").

Accordingly, because the MMPA is clear that "the wellbeing of marine mammals takes precedence," *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 216 (D.D.C. 2016), the court discerns that a preliminary injunction is in the public interest.

E. Scope of the Preliminary Injunction

Having determined that the weight of the balancing test favors Plaintiffs, the court deems preliminary injunctive relief appropriate pending final resolution of Plaintiffs' second and third claims. In closing, the court articulates the scope of the injunction granted. Plaintiffs ask the court to enjoin imports of all fish and fish products from New Zealand's commercial gillnet and trawl fisheries within the Māui dolphin's range, which Plaintiffs define as "the entire coastline of the North Island out to the 100m depth contour." *See* Pls.' Ren. PI Mot.; Pls.' Suppl. Pet. at 5. As previously noted, the Māui dolphin's habitat range is hotly contested. *Supra* pp. 10–11. To grant the injunction as envisioned by Plaintiffs would hew towards "settl[ing] the scientific debate" surrounding the Māui dolphin's range, which the court declines to do. *Shafer*, 992 F.3d at 1093.

Accordingly, as an exercise of its discretion, the court issues an injunction enjoining imports of (1) snapper; (2) tarakihi; (3) spotted dogfish; (4) trevally; (5) warehou; (6) hoki; (7) barracouta; (8) mullet; and (9) gurnard deriving from New Zealand's West Coast North Island multi-species set-net and trawl fisheries.[68] The court decides as such, because for the reasons previously articulated, *supra* pp. 52–56, Plaintiffs have established that they are likely to succeed in proving that these fisheries do not presently have valid comparability findings, such that by virtue of New Zealand's waiver of the seven-

[68] Recall that in their supplemental petition for emergency rulemaking, Plaintiffs asserted that "at least 33 fish species are caught in water that Māui dolphins inhabit" and that "of those 33 fish species, at least 23 are exported to the U.S." Pls.' Suppl. Pet. at 19. However, Plaintiffs did not enumerate those twenty-three fish species and the court does not have a clear sense of which — if any — of these fish New Zealand's West Coast North Island multi-species set-net and trawl fisheries export to the United States. *Id.*

In light of this paucity of information, the court enjoins imports of those fish species that overlap with the Māui dolphin's undisputed habitat and that New Zealand's West Coast North Island multi-species set-net and trawl fisheries acknowledge harvesting. *Compare* Pls.' Feb. 2019 Pet. at 21–24 (identifying ten fish species caught by gill nets or trawls (or both) along the west coast of New Zealand's North Island), *with* N.Z. Comp. Finding App. at 40, 41 (identifying target fish species associated with New Zealand's West Coast North Island multi-species set-net and trawl fisheries, which cover each of the species identified in Plaintiffs' original petition, except for flounder).

year exemption period,[69] their imports are per se in excess of U.S. standards under the Imports Regulation, 50 C.F.R. § 216.24(h)(1), and thereby prohibited under the MMPA's Import Provision, 16 U.S.C. § 1371(a)(2).

Absent intervening events,[70] this preliminary injunction will remain in place until the earlier of: (1) NOAA's issuance of valid comparability findings to New Zealand's West Coast North Island multi-species set-net and trawl fisheries; or (2) final resolution on the merits of Plaintiffs' remaining claims (at which point, the court may — but not necessarily will — issue a permanent injunction).[71]

In assessing that such injunctive relief is "just and proper," First Suppl. Compl., the court reiterates that it is attempting neither to displace the agency's scientific expertise nor to express a policy view. The court seeks only to interpret and apply the MMPA as enacted by Congress and to ensure that the agency adheres to certain minimal standards of rationality in doing the same.

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[69] *See* 50 C.F.R. §§ 216.24(h)(2)(ii), 216.3.

[70] The current comparability findings held by New Zealand's West Coast North Island multi-species set-net and trawl fisheries will expire on January 1, 2023. *See Comp. Finding Determ.* at 71,297. NOAA originally anticipated issuing new comparability findings — to cover the period following January 1, 2023 — to these fisheries on November 30, 2022. See Defs.' Add'l Suppl. Qs. Resp. at 1–2. However, on November 4, 2022, the United States informed the court that NOAA no longer expects to be able to issue new comparability findings to these fisheries prior to the January 1, 2023 expiration date. *See* Defs.' Add'l Suppl. Qs. Resp. at 1–2; *see also Deadline Modification* at 63,955 (extending the deadline for foreign nations to secure comparability findings from December 31, 2022 to December 31, 2023).

Before the court, the United States asserts that once the current comparability findings expire on January 1, 2023, New Zealand's West Coast North Island multi-species set-net and trawl fisheries will again be subject to the Imports Regulation's exemption period under 50 C.F.R. §§ 216.24(h)(2)(ii) and 216.3, thereby mooting this case; accordingly, on November 8, 2022, the United States submitted a Partial Consent Motion for Remand so that NOAA could conform the expiration of New Zealand's comparability findings with the expiration of the general exemption period on December 31, 2023. *See* Defs.' Second Remand Mot. For their part, in a November 23, 2022 filing, Plaintiffs opposed the United States' Second Remand Motion, arguing that "[i]t is premature to determine whether Sea Shepherd's Third Claim would become moot if the Comparability Findings expire at the end of this year." *See* Pls.' Opp. to Second Remand Mot at 4 n.2.

Because the court assesses that it would benefit from oral argument on the United States' Second Remand Motion, the court reserves judgment on this latest Motion. In so deferring, the court neither accepts nor rejects the United States' position that "upon expiration of [New Zealand's] Comparability Findings, the [latest] [e]xtension will toss the New Zealand fisheries back into the pool of all foreign fisheries" currently exempted from the Regulation's valid comparability finding requirement, thereby mooting this case. *See* Defs.' Add'l Remand Mot. at 6 (emphasis omitted).

[71] Given the routine administrative costs associated with implementing the import ban and the interest in preserving Plaintiffs' ability to obtain judicial review of the Government's conduct, the court, in its discretion, requires Plaintiffs to post $1.00 as security. See USCIT R. 65(c). *See generally Zenith Radio Corp. v. United States*, 2 CIT 8, 518 F. Supp. 1347 (1981) (discussing the court's discretion in setting security, particularly when granting a preliminary injunction to preserve plaintiff's access to judicial review); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2954 (3d ed. 2022).

CONCLUSION

For the foregoing reasons, the court grants Defendants' Motion to Dismiss Plaintiffs' First Claim and grants Plaintiffs a preliminary injunction on the remaining two claims.

SO ORDERED.

Dated: November 28, 2022
New York, New York

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

APPENDIX A

50 C.F.R. § 216.24(h)(6) and (7) reads in relevant part:

> **(h) Taking and related acts of marine mammals in foreign commercial fishing operations not governed by the provisions related to tuna purse seine vessels in the eastern tropical Pacific Ocean –**
>
> . . .
>
> **(6) Procedure and conditions for a comparability finding –**
>
> . . .
>
> **(iii) Conditions for a comparability finding.** The following are conditions for the Assistant Administrator to issue a comparability finding for the fishery, subject to the additional considerations set out in paragraph (h)(7) of this section:
>
> **(A)** For an exempt or export fishery, the harvesting nation:
>
> **(1)** Prohibits the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in the fishery unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self defense or to save the life of a person in immediate danger; or
>
> **(2)** Demonstrates that it has procedures to reliably certify that exports of fish and fish products to the United States are not the product of an intentional killing or serious injury of a marine mammal unless the intentional mortality or serious injury of a marine mammal is imminently necessary in self-defense or to save the life of a person in immediate danger; and
>
> **(B)** For an export fishery, the harvesting nation maintains a regulatory program with respect to the fishery that is comparable in effectiveness to the U.S. regulatory program with respect to incidental mortality and serious injury of marine mammals in the course of commercial fishing operations, in particular by maintaining a regulatory program that includes, or effectively achieves comparable results as, the conditions in paragraph (h)(6)(iii)(C), (D), or (E) of this section as applicable (including for transboundary stocks).

(C) ***Conditions for an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea.*** In making the finding in paragraph (h)(6)(ii) of this section, with respect to an export fishery operating under the jurisdiction of a harvesting nation within its EEZ (or the equivalent) or territorial sea, the Assistant Administrator shall determine whether the harvesting nation maintains a regulatory program that provides for, or effectively achieves comparable results as, the following:

(1) Marine mammal assessments that estimate population abundance for marine mammal stocks in waters under the harvesting nation's jurisdiction that are incidentally killed or seriously injured in the export fishery.

(2) An export fishery register containing a list of all fishing vessels participating in the export fishery, including information on the number of vessels participating, the time or season and area of operation, gear type and target species.

(3) Regulatory requirements that include:

(i) A requirement for the owner or operator of a vessel participating in the export fishery to report all intentional and incidental mortality and injury of marine mammals in the course of commercial fishing operations; and

(ii) A requirement to implement measures in the export fishery designed to reduce the total incidental mortality and serious injury of a marine mammal stock below the bycatch limit; and

(iii) with respect to any transboundary stock or any other marine mammal stocks interacting with the export fishery, measures to reduce the incidental mortality and serious injury of that stock that the United States requires its domestic fisheries to take with respect to that transboundary stock or marine mammal stock.

(4) Implementation of monitoring procedures in the export fishery designed to estimate incidental mortality or serious injury in the export fishery, and to estimate the cumulative incidental mortality and serious injury of marine mammal stocks in waters under its jurisdiction resulting from the export fishery and other export fisheries interacting with the same marine mammal stocks, including an indication of the statistical reliability of those estimates.

(5) Calculation of bycatch limits for marine mammal stocks in waters under its jurisdiction that are incidentally killed or seriously injured in the export fishery.

(6) Comparison of the incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery in relation to the bycatch limit for each stock; and comparison of the cumulative incidental mortality and serious injury of each marine mammal stock or stocks that interact with the export fishery and any other export fisheries of the harvesting nation showing that these export fisheries:

(i) Do not exceed the bycatch limit for that stock or stocks; or

(ii) Exceed the bycatch limit for that stock or stocks, but the portion of incidental marine mammal mortality or serious injury for which the export fishery is responsible is at a level that, if the other export fisheries interacting with the same marine mammal stock or stocks were at the same level, would not result in cumulative incidental mortality and serious injury in excess of the bycatch limit for that stock or stocks.

. . .

(7) ***Additional considerations for comparability finding determinations.*** When determining whether to issue any comparability finding for a harvesting nation's export fishery the Assistant Administrator shall also consider:

(i) U.S. implementation of its regulatory program for similar marine mammal stocks and similar fisheries (e.g., considering gear or target species), including transboundary stocks governed by regulations implementing a take reduction plan (§ 229.2 of this chapter), and any other relevant information received during consultations;

(ii) The extent to which the harvesting nation has successfully implemented measures in the export fishery to reduce the incidental mortality and serious injury of marine mammals caused by the harvesting nation's export fisheries to levels below the bycatch limit;

(iii) Whether the measures adopted by the harvesting nation for its export fishery have reduced or will likely reduce the cumulative incidental mortality and serious injury of each marine mammal stock below the by catch limit, and the progress of the regulatory program toward achieving its objectives;

(iv) Other relevant facts and circumstances, which may include the history and nature of interactions with marine mammals in this export fishery, whether the level of incidental mortality and serious injury resulting from the fishery or fisheries exceeds the bycatch limit for a marine mammal stock, the population size and trend of the marine mammal stock, and the population level impacts of the incidental mortality or serious injury of marine mammals in a harvesting nation's export fisheries and the conservation status of those marine mammal stocks where available;

(v) The record of consultations under paragraph (h)(5) of this section with the harvesting nation, results of these consultations, and actions taken by the harvesting nation and under any applicable intergovernmental agreement or regional fishery management organization to reduce the incidental mortality and serious injury of marine mammals in its export fisheries;

(vi) Information gathered during onsite inspection by U.S. government officials of a fishery's operations;

(vii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fishery management organization to which the United States is a party, the harvesting nation's record of implementation of or compliance with measures adopted by that regional fishery management organization or intergovernmental agreement for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals; whether the harvesting nation is a party or cooperating nonparty to such intergovernmental agreement or regional fishery management organization; the record of United States implementation of such measures; and whether the United States has imposed additional measures on its fleet not required by an intergovernmental agreement or regional fishery management organization; or

(viii) For export fisheries operating on the high seas under an applicable intergovernmental agreement or regional fisheries management organization to which the United States is not a party, the harvesting nation's implementation of and compliance with measures, adopted by that regional fisheries management organization or intergovernmental agreement, and any additional measures implemented by the harvesting nation for data collection, incidental mortality and serious injury mitigation or the conservation and management of marine mammals and the extent to which such measures are comparable in effectiveness to the U.S. regulatory program for similar fisheries.

Slip Op. 22–131

ASHLEY FURNITURE INDUSTRIES, LLC; ASHLEY FURNITURE TRADING COMPANY; WANEK FURNITURE CO., LTD.; MILLENNIUM FURNITURE CO., LTD.; and COMFORT BEDDING COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC; CORSICANA MATTRESS COMPANY; ELITE COMFORT SOLUTIONS; FXI, INC.; INNOCOR, INC.; KOLCRAFT ENTERPRISES INC.; LEGGETT & PLATT, INCORPORATED; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 21–00283
PUBLIC VERSION

[Sustaining in part and remanding in part Commerce's Final Determination in its antidumping duty investigation and order on mattresses from the Socialist Republic of Vietnam.]

Dated: November 28, 2022

Kristin H. Mowry and *Jeffrey S. Grimson*, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiffs Ashley Furniture Industries, LLC; Ashley Furniture Trading Company; Wanek Furniture Co., Ltd.; Millennium Furniture Co., Ltd.; and Comfort Bedding Company Limited. With them on the briefs were *Jill A. Cramer*, *Sarah M. Wyss* and *Jacob M. Reiskin*.

Kara M. Westercamp, 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*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Yohai Baisburd and *Chase J. Dunn*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., argued for defendant-intervenors Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; the International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO.

OPINION AND ORDER

* * *

Reif, Judge:

Ashley Furniture Industries, LLC ("AFI"), Ashley Furniture Trading Company ("AFTC"), Wanek Furniture Co., Ltd. ("Wanek"), Millennium Furniture Co., Ltd. ("Millennium"), and Comfort Bedding Company Limited ("Comfort Bedding") (collectively, "plaintiffs" or the "Ashley Respondents") challenge certain aspects of the final affirmative determination ("Final Determination") by the U.S. Department

of Commerce ("Commerce") in its antidumping duty ("AD") investigation and order on mattresses from the Socialist Republic of Vietnam ("Vietnam"). *See Mattresses from the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less than Fair Value* ("*Final Determination*"), 86 Fed. Reg. 15,889 (Dep't of Commerce Mar. 25, 2021) and accompanying Issues and Decision Memorandum ("IDM") (Dep't of Commerce Mar. 18, 2021), PR 505; *Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia* ("*Vietnam Mattresses Order*"), 86 Fed. Reg. 26,460 (Dep't of Commerce May 14, 2021).

Plaintiffs move for judgment on the agency record pursuant to Rule 56.2 of the U.S. Court of International Trade ("USCIT" or the "Court") and challenge Commerce's Final Determination with respect to four issues: (1) Commerce's selection of the financial statements of Emirates Sleep Systems Private Limited ("ES") to calculate surrogate financial ratios; (2) Commerce's selection of subheading 7320.90.90 of the Harmonized Tariff Schedule of the Republic of India ("Indian HTS") to calculate the surrogate value for pocket coil innerspring units ("PCIUs"); (3) Commerce's decision to exclude AFI and AFTC from the separate cash deposit rate assigned to Wanek, Millennium and Comfort Bedding; and (4) Commerce's use of the Cohen's *d* test in Commerce's differential pricing analysis. *See* USCIT R. 56.2; Pls.' Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. upon Agency R. ("Pls. Br.") at 2–4, ECF Nos. 39, 40; Pls.' Reply Br. in Supp. of R. 56.2 Mot. for J. upon Agency R. ("Pls. Reply Br."), ECF Nos. 49, 50; *see also* Pls.' Rule 56.2 Mot. for J. upon Agency R. at 2–3, ECF No. 38.

The United States ("defendant") and defendant-intervenors Brooklyn Bedding, LLC, Corsicana Mattress Company, Elite Comfort Solutions, FXI, Inc., Innocor, Inc., Kolcraft Enterprises Inc., Leggett & Platt, Incorporated, the International Brotherhood of Teamsters, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (collectively, "defendant-intervenors" or "petitioners") oppose plaintiffs' motion.[1] *See* Def.'s Mot. to Partially Dismiss and Resp. to Pls.' Mot. for J. upon Agency R. ("Def. Br."), ECF Nos. 45, 46; Mattress Pet'rs' Resp. Br. in Opp'n to Ashley's R. 56.2 Mot. for J. on Agency R.

[1] InStevec. is the sole entity listed as a petitioner in the underlying investigation that has not intervened in the instant case. *See Mattresses from the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures* ("*Preliminary Determination*"), 85 Fed. Reg. 69,591 (Dep't of Commerce Nov. 3, 2020) and accompanying Preliminary Decision Memorandum ("PDM") (Dep't of Commerce Oct. 27, 2020) at 1, PR 437; IDM at 2 n.6.

("Def.-Intervenors Br."), ECF Nos. 43, 44. In addition, defendant moves to dismiss plaintiffs' claim regarding Commerce's use of the Cohen's *d* test. *See* Def. Br. at 2.

For the reasons discussed below, the court sustains in part and remands in part the Final Determination. In addition, the court will reserve examination of plaintiffs' claim regarding Commerce's use of the Cohen's *d* test until after Commerce issues the remand redetermination.

BACKGROUND

AFI is a U.S. domestic producer and U.S. importer of mattresses, and AFTC also is a U.S. importer. Second Am. Compl. ¶ 5, ECF No. 24. Wanek, Millennium and Comfort Bedding are exporters of mattresses from Vietnam. *Id.*

On March 31, 2020, petitioners filed petitions with Commerce and the U.S. International Trade Commission ("Commission") to impose antidumping duties on imports of mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey ("Turkey") and Vietnam, and to impose countervailing duties ("CVD") on mattress imports from the People's Republic of China ("China"). *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations* ("*Initiation Notice*"), 85 Fed. Reg. 23,002 (Dep't of Commerce Apr. 24, 2020); *Mattresses from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 85 Fed. Reg. 22,998 (Dep't of Commerce Apr. 24, 2020) (initiation of CVD investigation).

On April 20, 2020, Commerce initiated AD investigations of mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, Turkey and Vietnam, as well as a CVD investigation of mattresses from China. PDM at 1. Commerce selected Wanek as a mandatory respondent in the AD investigation of mattresses from Vietnam. *Id.* at 2. The period of investigation ("POI") was from July 1, 2019, through December 31, 2019. *Preliminary Determination*, 85 Fed. Reg. at 69,591.

On June 11, 2020, Commerce solicited from interested parties surrogate country and surrogate value comments and information. PDM at 3. The Ashley Respondents and petitioners submitted comments and recommended the Republic of India ("India") as a suitable pri-

mary surrogate country.[2] *Id.* at 15–20. The Ashley Respondents presented the financial statements of Sheela Foam Limited ("SF"), an Indian company, for Commerce to use to calculate surrogate financial ratios. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Surrogate Value Comments (July 30, 2020) ("Respondents Surrogate Value Comments") at 3, Ex. SV-4, PR 278–281. In addition, the Ashley Respondents proposed the use of Indian HTS subheading 9404.29.90 to determine the surrogate value for PCIUs, an input of the subject merchandise. *Id.* at Ex. SV-1. Petitioners presented the financial statements of ES, another Indian company, for Commerce to use to calculate the surrogate financial ratios. *See* Letter from Cassidy Levy Kent (USA) LLP, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Petitioners' Surrogate Values Submission (July 30, 2020) ("Petitioners Surrogate Value Comments") at 3, Ex. 11, PR 276–277. In addition, petitioners proposed the use of Indian HTS subheading 7320.90.90 to determine the surrogate value for PCIUs. *Id.* at 2–3, Ex. 2.

On November 3, 2020, Commerce published its Preliminary Determination, in which Commerce assigned to Wanek, Millennium and Comfort Bedding an AD margin of 190.79%. *Preliminary Determination*, 85 Fed. Reg. at 69,592. Commerce calculated a Vietnam-wide entity margin of 989.90%. *Id.* On December 29, 2020, the Ashley Respondents filed a case brief challenging Commerce's Preliminary Determination. *See* IDM at 2. On January 5, 2021, petitioners filed a rebuttal brief, and Commerce held a public hearing on February 11, 2021. *Id.*; Public Hearing ("Public Hearing") (Feb. 11, 2021), PR 501.

On March 18, 2021, Commerce issued its Final Determination. *See Final Determination*, 86 Fed. Reg. at 15,890–91. Considering certain adjustments made in the Final Determination, Commerce assigned to Wanek, Millennium and Comfort Bedding an AD margin of 144.92%. *See id.* Commerce also calculated a Vietnam-wide entity margin of 668.38%. *Id.* at 15,891. Commerce: (1) maintained its selection of India as the primary surrogate country;[3] (2) selected ES' financial statements to calculate surrogate financial ratios; and (3) selected Indian HTS subheading 7320.90.90 to calculate the surrogate value for PCIUs. *See* PDM at 19; IDM at 28–36, 42–45.

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[2] The Ashley Respondents and Vietnam Glory, another respondent in the underlying investigation, commented also that Egypt would be a "suitable countr[y] to use as a surrogate country." PDM at 17.

[3] The parties in the instant case do not challenge Commerce's selection of India as the primary surrogate country. *See generally* Pls. Br.; Def. Br.; Def.-Intervenors Br.; *see also* PDM at 17.

On May 14, 2021, Commerce published the Vietnam Mattresses Order. *See Vietnam Mattresses Order*, 86 Fed. Reg. at 26,460. In addition, on May 14, 2021, the Commission published its final affirmative injury determination on mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey and Vietnam. *See Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, 86 Fed. Reg. 26,545 (ITC May 14, 2021).

On July 9, 2021, plaintiffs filed a complaint before the USCIT seeking judicial review of the Final Determination. *See* Compl., ECF No. 10. On March 28, 2022, the court granted in part and denied in part plaintiffs' motion for a statutory injunction on liquidation. *See Ashley Furniture Indus., LLC v. United States*, 46 CIT __, Slip Op. 2229 (Mar. 28, 2022), at 61. The court issued a statutory injunction "covering entries imported by AFI or AFTC, and produced and/or exported by Wanek, Millennium or Comfort Bedding, from November 3, 2020, through April 30, 2022, excluding any entries made from May 2, 2021, through May 13, 2021." *Id.* (footnote omitted).

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c). Plaintiffs bring this action pursuant to sections 516A(a)(2)(A)(i)(II) and (a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(i) (2018).[4] The court will sustain a final determination by Commerce in an AD investigation unless the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

The "substantial evidence" standard requires "more than a mere scintilla" of evidence, *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)), "but is satisfied by 'something less than the weight of the evidence.'" *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has stated that for a reviewing court to "fulfill [its] obligation" to evaluate whether a determination by Commerce is supported by substantial evidence and in accordance with law, Commerce is required to "examine the record and articulate a *satisfactory explanation* for its action." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (emphasis supplied) (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716

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

F.3d 1370, 1378 (Fed. Cir. 2013)); *see Husteel Co. v. United States*, 31 CIT 740, 748, 491 F. Supp. 2d 1283, 1291 (2007) ("An agency's determination is not supported by substantial evidence where the agency fails to adequately explain the basis on which the agency made its decision.") (citing *Viraj Forgings, Ltd. v. United States,* 28 CIT 2086, 2089, 350 F. Supp. 2d 1316, 1320 (2004)) (other citations omitted).

In addition, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.* 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). However, the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *see also NMB Sing. Ltd. v. United States,* 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("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."). Further, "when a party properly raises an argument before an agency, that agency is required to address the argument in its final decision." *Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1371 (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011)).

LEGAL FRAMEWORK

19 U.S.C. § 1677b(c)(1) provides that Commerce "shall determine the normal value of the subject merchandise" in an AD investigation that involves a non-market economy ("NME") country "on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *See Juancheng Kangtai Chem. Co. v. United States*, 39 CIT __, Slip Op. 15–93 (Aug. 21, 2015), at 5.

In administrative proceedings that involve an NME country such as Vietnam, Commerce calculates the "normal value" of the subject merchandise by selecting surrogate data from one or several market economy countries that Commerce determines constitute the "best available information" in the record. 19 U.S.C. § 1677b(c)(1); *Heze Huayi Chem. Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1301, 1309–10 (2021). 19 U.S.C. § 1677b(c)(1) does not define "best available information," which means that Commerce has "broad discretion" to determine the information in the record that meets this

standard. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011). In reviewing a determination by Commerce, the "court's duty is 'not to evaluate whether the information Commerce used was the best available, but rather whether a *reasonable mind* could conclude that Commerce chose the best available information.'" *Id.* (emphasis supplied) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

In determining the "best available information" in the record, Commerce selects, "to the extent practicable," data that meet Commerce's surrogate value selection criteria — *e.g.*, data that are complete, publicly available, "product-specific" and "contemporaneous with the period of [investigation]." *Nantong Uniphos Chems. Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1345, 1353–54 (2019) (alteration in original) (quoting *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)); *see CP Kelco US, Inc. v. United States*, Slip Op. 16–36, 2016 WL 1403657, at *3 (CIT Apr. 8, 2016) (citation omitted). Further, "[t]here is no hierarchy for applying the surrogate value selection criteria," *Carbon Activated Tianjin Co. v. United States*, 46 CIT __, __, 586 F. Supp. 3d 1360, 1366 (2022) (citing *United Steel & Fasteners, Inc. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1390, 1398–99 (2020); *Hangzhou Spring Washer Co. v. United States*, 29 CIT 657, 672, 387 F. Supp. 2d 1236, 1250–51 (2005)), and the weight "accorded to a factor varies depending on the facts of each case." *Xiamen Int'l Trade & Indus. v. United States*, 37 CIT 1724, 1728, 953 F. Supp. 2d 1307, 1313 (2013); *see Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1350, 1369 (2016).

DISCUSSION

I. Commerce's selection of financial statements to calculate surrogate financial ratios

A. Legal framework

In an AD investigation involving an NME country, and in accordance with 19 U.S.C. § 1677b(c)(1), Commerce calculates the "normal value" for factory overhead, selling, general and administrative expenses and profit with reference to "financial ratios derived from financial statements of producers of comparable merchandise in the surrogate country." *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1301, 1314–15 (2020) (quoting

Ad Hoc Shrimp Trade Action Comm. v. United States, 618 F.3d 1316, 1319–20 (Fed. Cir. 2010)). The "best available information" standard involves "a comparison of the competing data sources" in the record. *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1364–67 (Fed. Cir. 2019). Accordingly, "[w]hen presented with multiple imperfect potential" financial statements, Commerce is required to "faithfully compare the strengths and weaknesses of each before deciding which to use." *CP Kelco US, Inc. v. United States*, 39 CIT __, Slip Op. 15–27 (Mar. 31, 2015), at 13 (citing *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT 1619, 1635–40, 949 F. Supp. 2d 1311, 1328–31 (2013)).

B. Positions of the parties

Plaintiffs challenge Commerce's selection of ES' financial statements and rejection of SF's financial statements to calculate surrogate financial ratios in this investigation.[5] *See* Pls. Br. at 11. Defendant argues that Commerce's decision is supported by substantial evidence, as ES' financial statements constitute the "best available information" in the record. Def. Br. at 9–10. Defendant-intervenors raise arguments similar to those of defendant with respect to this issue. *See* Def.-Intervenors Br. at 9–25.

Plaintiffs advance five core arguments challenging Commerce's selection of financial statements. *See* Pls. Br. at 11–35. The first four arguments correspond to the surrogate value selection criteria that Commerce evaluated in selecting ES' financial statements: (1) contemporaneity; (2) completeness; (3) representativeness of business operations; and (4) public availability. *See id.* at 11–28. Plaintiffs' fifth argument is that Commerce rejected unreasonably SF's financial statements. *See id.* at 28–35. Defendant and defendant-intervenors respond to each of plaintiffs' five arguments. *See* Def. Br. at 9–27; Def.-Intervenors Br. at 9–25.

1. Non-contemporaneity of ES' financial statements

Plaintiffs argue first that Commerce selected unreasonably ES' financial statements notwithstanding Commerce's acknowledgement that these statements "were not contemporaneous with the POI." Pls. Br. at 13; *see* IDM at 30–31. According to plaintiff, the record indicates that ES' financial statements covered the financial year ending on March 31, 2019, and consequently did not overlap with the POI.[6] Pls.

[5] The financial statements of ES and SF are the only statements that interested parties presented for inclusion in the record. *See* PDM at 19.

[6] As discussed, the POI was from July 1, 2019, through December 31, 2019. PDM at 7.

Br. at 15; *see* Petitioners Surrogate Value Comments at Ex. 11. Plaintiffs contend that Commerce's practice is to "calculate surrogate financial ratios based on POI-contemporaneous financial statements." Pls. Br. at 13 (citing *Hardwood and Decorative Plywood from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 78 Fed. Reg. 58,273 (Dep't of Commerce Sept. 23, 2013) and accompanying IDM, A-570–986 (Dep't of Commerce Sept. 16, 2013) at 61; *Home Prods. Int'l, Inc. v. United States*, 32 CIT 337, 342, 556 F. Supp. 2d 1338, 1342 (2008)). As such, plaintiffs argue that "Commerce unreasonably failed to follow its past practice" in selecting ES' financial statements. *Id.* at 15.

In response, defendant and defendant-intervenors contend that while ES' financial statements were not contemporaneous with the POI, the statements nonetheless constitute the "best available information" in the record. Def. Br. at 14; Def.-Intervenors Br. at 21–22. Defendant notes that "[a]lthough contemporaneity is an important factor in Commerce's selection of surrogate value, Commerce will rely on less contemporaneous data" provided that those data are "more accurate or reliable than the available contemporaneous data." Def. Br. at 14 (citing *Qingdao*, 766 F.3d at 1386; *Home Meridian Int'l, Inc. v. United States*, 36 CIT 1279, 1287, 865 F. Supp. 2d 1311, 1319 (2012); *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1503–04, 460 F. Supp. 2d 1338, 1358–59 (2006)). Defendant argues that ES' financial statements were not contemporaneous with the POI by only one fiscal year, and that the statements nonetheless constitute the "best available information" in the record in view of the deficiencies that Commerce identified with respect to SF's financial statements. *Id.* at 11 (quoting IDM at 31), 14 (quoting IDM at 31); *see* Def.-Intervenors Br. at 21–22.

2. Whether ES' financial statements were complete

The parties address next whether ES' financial statements were complete. *See* Pls. Br. at 17–19; Def. Br. at 15–17; Def.-Intervenors Br. at 17–20. Plaintiffs assert that ES' financial statements were not complete and that Commerce's practice is "to disregard incomplete financial statements as a basis for calculating surrogate financial ratios where they are "missing key sections . . . that are vital to [Commerce's] analysis and calculations.'" Pls. Br. at 13, 17 (alteration in original) (quoting *Notice of Final Determination of Sales at Less than Fair Value: Steel Concrete Reinforcing Bars from Belarus*, 66 Fed. Reg. 33,528 (Dep't of Commerce June 22, 2001) and accompanying IDM, A-822–804 (Dep't of Commerce June 14, 2001) at cmt. 2)

(citing *Wooden Bedroom Furniture From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 Fed. Reg. 49,162 (Dep't of Commerce Aug. 20, 2008) and accompanying IDM (Dep't of Commerce Aug. 11, 2008) at cmt. 1.C).

In the instant case, the parties acknowledge that ES' financial statements were missing several annexures — *i.e.*, Annexures 1 through 5 ("Annexures"). *See id.* at 17; Def. Br. at 15–17; Def.-Intervenors Br. at 17–20; Petitioners Surrogate Value Comments at Ex. 11. Plaintiffs challenge Commerce's conclusion that the missing Annexures consisted of "supplemental details" and were "unnecessary" to calculate surrogate financial ratios. Pls. Br. at 17–18 (quoting IDM at cmt. 2); IDM at 29–30. Further, plaintiffs argue that the record indicates that Annexure 5 might have contained "key details" regarding ES' "[b]alances with government authorities." Pls. Br. at 18. Specifically, plaintiffs point to Note 13 of ES' statements, *see id.*, which is entitled "Short-term loans and advances" and includes a line item that refers to "Balances with government authorities (Refer Annexure – 5) — 7,518,007 Rupees." Petitioners Surrogate Value Comments at Ex. 11. According to plaintiffs, the comments in Note 13 support the conclusion that information that might have been contained in the missing Annexure 5 was key to determining whether ES had a "countervailable balance with government authorities [that] would disqualify" ES' statements. Pls. Br. at 18. On this basis, plaintiffs argue that ES' financial statements were incomplete. *See id.* at 19 (citing *Weishan Hongda*, 917 F.3d at 1356).

In response, defendant and defendant-intervenors argue that ES' financial statements were complete and sufficiently reliable to calculate surrogate financial ratios. Def. Br. at 15; *see* Def.-Intervenors Br. at 17–20. Defendant contends that the missing Annexures did not contain key information and that the omission of these Annexures did not render ES' financial statements "unusable or unreliable." *Id.* at 16 (citing IDM at 29). Defendant challenges also plaintiffs' argument that Annexure 5 might have been key on the basis that this Annexure might have contained information regarding ES' potential receipt of "countervailable subsidies." *Id.* (citing Pls. Br. at 18–19). Defendant contends that plaintiffs' argument is "not substantiated" and that "there is no record evidence" that the line item under Note 13 that refers to Annexure 5 was "a loan or distortive." *Id.* (quoting IDM at 30); *see* Revised Oral Arg. Tr. at 11:23–12:03, ECF No. 65; *see also* Def.-Intervenors Br. at 20–21.

3. Whether ES' financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding

The third surrogate value selection criterion that the parties address concerns whether ES' financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding in Vietnam. *See* Pls. Br. at 20–24; Def. Br. at 17–19; Def.-Intervenors Br. at 22–24. Plaintiffs contend that ES' financial statements were not representative in this regard. Pls. Br. at 20 (quoting *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1348, 1352 (2017)). Plaintiffs address two points with respect to this criterion: (1) difference in the *nature* of the business operations; and (2) difference in the *size* of the operations. *Id.* at 20–24.

Plaintiffs first asserted difference concerns the nature of ES' business operations and those of Wanek, Millennium and Comfort Bedding. *See id.* at 20. Plaintiffs argue that ES' business operations focus primarily on retail, whereas the operations of Wanek, Millennium and Comfort Bedding focus primarily on manufacturing. *Id.* To support this assertion, plaintiffs point to record evidence that, according to plaintiffs, demonstrates that ES' "primary business is retail and not manufacturing." *Id.* (emphasis omitted) (quoting Petitioners Surrogate Value Comments at Ex. 11). This evidence includes that ES' showroom rental expenses are "five times greater than [its] factory rent." *Id.* (alteration in original) (emphasis omitted) (citing Letter from Dep't of Commerce, to Cassidy Levy Kent (USA) LLP, re: Petition for the Imposition of Antidumping Duties on Imports of Mattresses from Vietnam: Supplemental Questions (Apr. 3, 2020) at 5, PR 19); *see* Letter from Cassidy Levy Kent (USA) LLP, to Sec'y of Commerce and Sec'y, Int'l Trade Comm'n, re: Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam: Responses to Petition Supplemental Questionnaires (Apr. 8, 2020) ("Petitioners Supplemental Questionnaires Responses") at Ex. I-Supp-5 at 8, PR 23–24. Further, plaintiffs contend that ES' financial statements indicate that ES' "revenue from operations did not include any revenue from its manufacturing activity." Pls. Br. at 20–21 (citing Petitioners Surrogate Value Comments at Ex. 11).

In contrast with ES' business operations, plaintiffs argue that the operations of Wanek, Millennium and Comfort Bedding are directed "primarily" toward manufacturing and not retail activities. *Id.* at 21–22. Plaintiffs challenge Commerce's finding that Wanek, Millennium and Comfort Bedding incur showroom expenses in Vietnam,

arguing instead that the financial statements of these entities do not indicate that they "incur[] any expenses related to retail operations in Vietnam." *Id.* at 22 (citing Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Section A Questionnaire Response (June 19, 2020) at Exs. A-I-3, A-II-3, A-III-4, CR 108–122); *see* IDM at 31.

Plaintiffs' second asserted difference concerns the difference in size between ES' business operations and those of Wanek, Millennium and Comfort Bedding. *See* Pls. Br. at 20–21. Plaintiffs argue that record evidence indicates that ES' reported revenue from the sale of products was 47.4 million rupees — approximately $600,000. *Id.* at 21 (citing Petitioners Surrogate Value Comments at Ex. 11; Respondents Surrogate Value Comments at Ex. SV-4). Wanek, however, reported [[ ]]. *Id.* (citing Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Separate Rate Application of Wanek Furniture Co., Ltd. (June 1, 2020) at Ex. 7, CR 87–90). This disparity, according to plaintiffs, is "yet another factor rendering [ES'] financial statements" deficient. Pls. Reply Br. at 10.

In response, defendant and defendant-intervenors contend that ES' business operations were representative of the operations of Wanek, Millennium and Comfort Bedding. *See* Def. Br. at 17–20; Def.-Intervenors Br. at 22–24. Defendant points to record evidence that states that ES is "a manufacturing company basically into the manufacturing of all types and kinds of mattresses, bases and other sleep related products and systems." Def. Br. at 17 (citing Petitioners Surrogate Value Comments at Ex. 11). In addition, defendant-intervenors state that notwithstanding plaintiffs' "cherry picking of line items" in ES' financial statements, the record indicates that 76.71% of the "total turnover of [ES]" involves the "manufacture of furniture." Def.-Intervenors Br. at 23–24 (citing Petitioners Surrogate Value Comments at Ex. 11).

Defendant and defendant-intervenors challenge also plaintiffs' argument that Wanek, Millennium and Comfort Bedding do not engage in retail operations in Vietnam. Def. Br. at 18 (citing Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from Vietnam: Response to Petitioners' Comments (Apr. 17, 2020), PR 41); Def.-Intervenors Br. at 24. According to defendant, Commerce relied reasonably upon record evidence in concluding that plaintiffs "incur showroom expenses" in Vietnam. Def. Br. at 18–19 (quoting IDM at 31; Petitioners Supplemental Questionnaires Responses at Ex. IX-Supp-9).

Further, defendant and defendant-intervenors contend that Commerce rejected reasonably the argument that the Ashley Respondents raised in the administrative proceedings regarding the alleged "disparity in revenue" between ES and Wanek. Def. Br. at 18 (citing IDM at 31); *see* Def.-Intervenors Br. at 23; *see* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Case Brief (Dec. 29, 2020) ("Ashley Respondents Case Br.") at 13, PR 488. Defendant argues that it is Commerce's well-established practice "to disregard the magnitude of a company's revenue when choosing the appropriate surrogate financial statements to calculate ratios." Def. Br. at 18 (citing IDM at 31; *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 Fed. Reg. 41,374 (Dep't of Commerce Aug. 17, 2009) and accompanying IDM, A-570–890 (Dep't of Commerce Aug. 10, 2009) at 39).

4. Whether ES' financial statements were publicly available

The fourth surrogate value selection criterion that the parties address concerns the public availability of ES' financial statements. *See* Pls. Br. at 24–27; Def. Br. at 2021; Def.-Intervenors Br. at 15–17. Plaintiffs contend that the statements were not "publicly available," which calls into question the "integrity and reliability" of the statements. Pls. Br. at 26 (citing *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT 803, 806, 911 F. Supp. 2d 1362, 1367 (2013)); 19 C.F.R. § 351.408(c)(1) (providing that "[t]he Secretary normally will use publicly available information to value factors"). Plaintiffs argue that ES' incomplete financial statements were available only through a fee-based "subscription database," and that Commerce declined unreasonably to "inquire" with petitioners or to "provide sufficient information" on how to obtain a complete version of the statements. Pls. Br. at 26; *see* Pls. Reply Br. at 13–14. Further, plaintiffs note that they were "unable to find [ES'] complete financial statements" notwithstanding a "good faith effort" to locate the statements, including through a search on the website of the Indian Ministry of Corporate Affairs ("MCA") as well as ES' website, and that Commerce did not address plaintiffs' argument with respect to this effort. Pls. Reply Br. at 13–14.

Plaintiffs challenge also Commerce's conclusion that the Ashley Respondents "acknowledg[ed]" in the administrative proceedings that ES' financial statements were "available in a subscription database." Pls. Br. at 26; IDM at 36. Rather, plaintiffs underscore that

they "acknowledged only that [ES'] *incomplete* financial statements . . . existed in a subscription database," and that Commerce did not address plaintiffs' argument with respect to whether the *complete* statements were accessible through such a database. Pls. Br. at 26 (emphasis supplied); *see* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Rebuttal Surrogate Value Comments (Aug. 17, 2020) ("Respondents Rebuttal Comments") at 41, PR 311–313.

In response, defendant and defendant-intervenors contend that ES' financial statements were publicly available. *See* Def. Br. at 20–22; Def.-Intervenors Br. at 15–17. Defendant challenges plaintiffs' articulation of Commerce's practice to determine whether information is "publicly available," arguing instead that the "bar for public availability is that interested parties may *independently access* the information." Def. Br. at 20 (quoting IDM at 35; *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT 478, 497 (2014)) (emphasis supplied). In the instant case, defendant points to Commerce's conclusion that ES' financial statements were available through a subscription database, noting that "the fact that information is from a subscription database does not mean that information is not publicly available." *Id.*; *see* IDM at 36 n.251 (citing *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 74 Fed. Reg. 10,545 (Dep't of Commerce Mar. 11, 2009) and accompanying IDM, A-570–934 (Dep't of Commerce Mar. 5, 2009) at cmt. 1; *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission in Part*, 76 Fed. Reg. 56,732 (Dep't of Commerce Sept. 14, 2011) and accompanying IDM, A570–851 (Dep't of Commerce Sept. 14, 2011) at cmt. 4). Defendant then argues that there is "evidence that the parties were able to independently access the information" in ES' statements through a subscription database. Def. Br. at 20; *see* IDM at 36 ("The petitioners noted Ashley Group's confirmation that [ES'] financial statement exists within a subscription database during the hearing."); Public Hearing. Defendant notes also that plaintiffs did not argue that the fee associated with this database "was too high." Def. Br. at 21 (citing IDM at 36).

5. Commerce's rejection of SF's financial statements

Last, the parties address the decision by Commerce to reject SF's financial statements in calculating surrogate financial ratios. *See* Pls. Br. at 28–35; Def. Br. at 2227; Def.-Intervenors Br. at 10–14. Plaintiffs

contend that Commerce rejected unreasonably SF's financial statements, which, according to plaintiffs, were contemporaneous with the POI, complete, representative of the business operations of Wanek, Millennium and Comfort Bedding, and publicly available. *See* Pls. Br. at 13, 28 35.

Commerce stated that it decided to reject SF's financial statements on the basis that the statements contained evidence of the receipt of countervailable subsidies. *See* IDM at 34–35. Specifically, Commerce concluded that: (1) "the names of the programs found in [SF's] financial statements" — "investment subsidy" and "duty drawback subsidy" — are "the same names Commerce previously found countervailable" in prior administrative proceedings; and (2) "each of these programs reflected money received during the POI." *Id.* at 35 nn. 240–241 (citing *Circular Welded Carbon-Quality Steel Pipe from India: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 64,468 (Dep't of Commerce Oct. 22, 2012) and accompanying IDM, C-533–853 (Dep't of Commerce Oct. 15, 2012) at cmt. 8; *Certain Quartz Surface Products from India: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, In Part*, 85 Fed. Reg. 25,398 (Dep't of Commerce May 1, 2020) and accompanying IDM, C-533–890 (Dep't of Commerce Apr. 27, 2020) at cmt. 6).

Plaintiffs contend that Commerce did not have a "reasonable basis" to reach this conclusion with respect to SF's financial statements. *See* Pls. Br. at 29. Plaintiffs argue that the "mere mention" in SF's financial statements of programs found previously to be countervailable is not sufficient for Commerce to conclude that there was "specific information in [SF's] financial statements that sufficiently described the nature of the programs." *Id.* at 29–31 (citing *Clearon Corp. v. United States*, 35 CIT 1685, 1688, 800 F. Supp. 2d 1355, 1359 (2011)). Separately, plaintiffs argue that even presuming that there is evidence of countervailable subsidies in SF's financial statements, the statements displayed "negligible or non-distortive evidence" of such subsidies. Pls. Br. at 13. Plaintiffs contend that the "investment subsidy" item equates to 0.001% of SF's revenue and the "duty drawback" item equates to only 0.000046% of SF's revenue. *Id.* at 32 (citing Respondents Surrogate Value Comments at Ex. SV-4). As such, plaintiffs argue that "[g]iven the miniscule quantum of alleged subsidies in [SF's] financial statements, no reasonable mind could find such a small amount of subsidization to be distortive." Pls. Reply Br. at 17.

In response, defendant and defendant-intervenors argue that Commerce rejected reasonably SF's financial statements on the basis that the statements "contained evidence of countervailable subsidies."

Def. Br. at 22; *see* Def.-Intervenors Br. at 10 14. According to defendant, "Commerce had reason to believe or suspect that [SF's] financial statements reflected countervailable subsidies," as the statements referred to "specific subsidy programs" that Commerce previously has found to be countervailable. Def. Br. at 24, 34–35; *see* Def.-Intervenors Br. at 14. In addition, defendant argues that in rejecting SF's financial statements, Commerce was not required to demonstrate that distortion resulted from the alleged subsidies, as countervailable subsidies are "presumed distortive under the law." Def. Br. at 25 (citing *Yantai Xinke*, 38 CIT at 503).

C. Analysis

The court remands the Final Determination with respect to Commerce's selection of financial statements to calculate surrogate financial ratios in this investigation. Specifically, the court concludes that a remand is required for Commerce to explain further or reconsider its conclusions that ES' financial statements were: (1) complete and (2) publicly available.

In remanding the Final Determination, "the court does not require Commerce to choose any particular financial statement or [to] reject" ES' statements. *Carbon Activated*, 46 CIT at __, 586 F. Supp. 3d at 1381. "Commerce must, however, fairly weigh the available options and explain its decision in light of its selection criteria, addressing any shortcomings." *Id.*

1. Whether ES' financial statements were complete

The court concludes that Commerce did not explain adequately its conclusion that ES' financial statements were complete within the meaning of Commerce's surrogate data selection practice. *See Husteel*, 31 CIT at 748, 491 F. Supp. 2d at 1291 (citing *Viraj Forgings,* 28 CIT at 2089, 350 F. Supp. 2d at 1320) (other citations omitted); *Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT 453, 499, 617 F. Supp. 2d 1281, 1321 (2009); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004–2005 Semi-Annual New Shipper Reviews*, 71 Fed. Reg. 70,739 (Dep't of Commerce Dec. 6, 2006) and accompanying IDM, A-570–890 (Dep't of Commerce Nov. 21, 2006) at cmt. 2. Accordingly, the court is not able to ascertain that Commerce's conclusion is supported by substantial evidence, and the court remands this conclusion for further explanation or reconsideration.

The Court previously has stated that Commerce "does not invariably reject incomplete financial statements, but instead looks to whether the missing information is 'vitally important'" or "key." *CP*

Kelco, 2016 WL 1403657, at *5 (citing *Ass'n of Am. Sch. Paper Suppliers v. United States*, 35 CIT 1046, 1054, 791 F. Supp. 2d 1292, 1301 (2011)); *see also Notice of Final Determination of Sales at Less than Fair Value: Steel Concrete Reinforcing Bars from Belarus*, 66 Fed. Reg. 33,528 (Dep't of Commerce June 22, 2001) and accompanying IDM, A-822–804 (Dep't of Commerce June 14, 2001) at cmt. 2 (stating that Commerce's practice is to reject financial statements in circumstances in which the statements are "missing key sections . . . that are vital to [Commerce's] analysis and calculations."). In the instant case, the parties do not dispute that the version of ES' financial statements in the record omitted Annexures 1 through 5. *See* Pls. Br. at 17–19; Def. Br. at 15–17; Def.-Intervenors Br. at 17–20. However, the parties dispute whether information that might have been contained in the missing Annexures might be key such that their omission rendered ES' financial statements incomplete. *See* Pls. Br. at 17–19; Def. Br. at 15–17; Def.-Intervenors Br. at 17–20.

In its IDM, Commerce concluded that "the missing annexures . . . [constitute] supplemental details not forming part of [ES'] financial statements and [are] unnecessary for Commerce purposes of calculating surrogate financial ratios." IDM at 30. In addition, Commerce explained that the line item under Note 13 of ES' financial statements that refers to Annexure 5 "has no bearing on [Commerce's] financial ratio calculations," as no record evidence indicates that this line item was "a loan or distortive." *Id.*

To start, Commerce explained adequately its conclusion that the omission of Annexures 1 through 4 did not render ES' financial statements incomplete. *See* IDM at 29–30; *cf. Husteel*, 31 CIT at 748, 491 F. Supp. 2d at 1291 (citing *Viraj Forgings,* 28 CIT at 2089, 350 F. Supp. 2d at 1320) (other citations omitted); *Zhengzhou Harmoni*, 33 CIT at 499, 617 F. Supp. 2d at 1321. With respect to Annexure 1, Note 6 of ES' financial statements refers to "Trade Payables . . . Sundry Creditors – Expenses (Refer Annexure – 1)." Petitioners Surrogate Value Comments at Ex. 11; *see* IDM at 29. Commerce explained that "[t]rade payables are typical balance sheet items reporting monies owed to vendors and historically do not enter into the calculation of surrogate financial ratios." IDM at 29. Based on the comments in Note 6, Commerce concluded that information that might have been contained in the referenced Annexure 1 was not key, as Note 6 did not indicate that any such information would "bear[] on [Commerce's] financial ratio calculations." *Id.*

With respect to Annexure 2, Note 8 of ES' financial statements refers to "Short Term Provisions . . . Other Provisions: Salaries Payable (Refer Annexure – 2)." Petitioners Surrogate Value Comments at

Ex. 11; *see* IDM at 29. Commerce noted that there was no balance associated with "Salaries Payable" under this Note. IDM at 29. On this basis, Commerce found that the reference in Note 8 to Annexure 2 does not support the conclusion that information that might have been contained in this Annexure was key, as the information in the line item under this Note would not "impact" Commerce's calculations. *Id.*

With respect to Annexures 3 and 4, one line item under Note 12 refers to "Cash and Bank balances . . . Cash in hand (Refer Annexure – 3)" and another item refers to "Fixed Deposits (Refer Annexure – 4)." Petitioners Surrogate Value Comments at Ex. 11); *see* IDM at 29–30. Commerce explained that these items constituted supplemental "part[s] of the balance sheet" of ES and were not "related to Commerce's financial ratio calculations." IDM at 30. Commerce noted also that ES' financial statements provided a "detailed explanation for the fixed assets" that correspond to each item. *Id.*; *see* Petitioners Surrogate Value Comments at Ex. 11. On this basis, Commerce found that the "explanatory notes" in these items do not support the conclusion that the omission of Annexures 3 and 4 rendered ES' statements incomplete. IDM at 30.

The Ashley Respondents argued in the administrative proceedings in regard to Annexures 1 through 4, that they "[were] referenced . . . as integrated parts of the audit report" included in ES' financial statements and, consequently, might have contained information that might be key to Commerce's calculations. Ashley Respondents Case Br. at 7–8; *see* IDM at 18. Specifically, the Ashley Respondents pointed to the references in Notes 6, 8 and 12 to Annexures 1 through 4 to support this conclusion. *See* Ashley Respondents Case Br. at 7–8; *see also* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Response to Petitioners' October 21, 2020 Submission (Oct. 22, 2020) ("Respondents Selection Resp.") at 8–10, PR 431.

Commerce addressed the arguments of the Ashley Respondents in concluding that ES' financial statements, "while missing certain annexures, [were] complete for purposes of calculating financial ratios." IDM at 29. Commerce explained that the record contained sufficient information — including the audited financial statements of ES as well as the independent auditor's report and notes — to "satisf[y] Commerce's requirements for sourcing surrogate financial statements." *Id.*

Moreover, Commerce addressed the arguments that the Ashley Respondents raised regarding the Notes that refer to Annexures 1

through 4. *See id.* at 29–30. Commerce found that the references in Notes 6 and 12 to Annexures 1, 3 and 4 "constitute[d] information related to the sub-parts of [the] line items" and, consequently, were "unnecessary for Commerce purposes of calculating surrogate financial ratios." *Id.* at 30. In addition, Commerce found that the line item under Note 8 that refers to Annexure 2 was not relevant to Commerce's calculations in view of the absence of a balance associated with this item. *See id.* at 29. On this basis, Commerce concluded that these Notes do not indicate that Annexures 1 through 4 each might have contained information that would render ES' statements incomplete. *See id.* at 30. In reaching this conclusion, Commerce addressed the arguments that the Ashley Respondents presented and provided an explanation that "reasonably tie[s]" Commerce's conclusion to "the governing statutory standard" and to "record evidence." *CS Wind*, 832 F.3d at 1377. Consequently, Commerce explained adequately its conclusion that the omission of Annexures 1 through 4 did not render ES' financial statements incomplete. *See Paper Suppliers*, 35 CIT at 1052, 791 F. Supp. 2d at 1299 (concluding that financial statements were "sufficiently complete" notwithstanding the "lack [of] any schedules or breakouts for line items on the balance sheet"); *cf. Husteel*, 31 CIT at 748, 491 F. Supp. 2d at 1291 (citing *Viraj Forgings,* 28 CIT at 2089, 350 F. Supp. 2d at 1320) (other citations omitted); *Zhengzhou Harmoni*, 33 CIT at 499, 617 F. Supp. 2d at 1321.

With respect to Annexure 5, however, Commerce did not explain adequately its conclusion. In its IDM, Commerce concluded overall that Annexure 5 did not contain information related to ES' potential receipt of subsides that would have distorted Commerce's surrogate financial ratio calculations. *See* IDM at 30.

Commerce made the following particular findings to support its conclusion. Commerce stated that Note 13 of ES' statements contains a line item that refers to "Balances with government authorities (Refer Annexure – 5)." *Id.* (citing Petitioners Surrogate Value Comments at Ex. 11). The record indicates that the balance associated with this item is 7,518,007 Rupees. Petitioners Surrogate Value Comments at Ex. 11. The Ashley Respondents noted — and petitioners did not dispute — that this sum represented a substantial amount, accounting for "more than 12 percent of [ES'] revenue." Ashley Respondents Case Br. at 8–9; Respondents Selection Resp. at 9; *see* Letter from Cassidy Levy Kent (USA) LLP, to Sec'y of Commerce, re: Mattresses from Vietnam: Mattress Petitioners' Rebuttal Brief (Jan. 5, 2021) at 4–10, PR 490.[7] Commerce found that "this line item [did] not

[7] Plaintiffs raise the same argument and figure before the court in the instant case. *See* Pls. Br. at 32 n.4.

reference government loans, only balances." IDM at 30. Moreover, Commerce stated that "only non-market based government loans would be distortive" with respect to Commerce's calculations and further stated that "there is no record evidence that the line item . . . [was] a loan or distortive." *Id.* Commerce then concluded that this line item — and the reference in this item to Annexure 5 — did not "bear[] on [Commerce's] financial ratio calculations." *Id.*

In the administrative proceedings, the Ashley Respondents argued that Note 13 supported the conclusion that Annexure 5 might have contained information that might have been "critical" to Commerce's calculations. *See* Ashley Respondents Case Br. at 8–9; Respondents Selection Resp. at 8–10. The Ashley Respondents noted that the line item that referred to Annexure 5 was listed under Note 13, which was entitled "Short-term loans and advances." Respondents Selection Resp. at 9. According to the Ashley Respondents, this item indicated that Annexure 5 might have contained information regarding whether ES "received an amount of government support that would be significantly distortive." Ashley Respondents Case Br. at 9.

Commerce's explanation is inadequate for three reasons. First, Commerce did not address in its IDM the fact that Note 13 was *entitled* "Short-term loans and advances." Petitioners Surrogate Value Comments at Ex. 11; *see* IDM at 29–30. Commerce stated only that the *line item* under Note 13 "does not reference government loans, only balances," and concluded on this basis that this item was not relevant to Commerce's calculations. IDM at 30. Commerce did not address the potential relevance of the title of Note 13 in ascertaining whether the line item under this Note — and, consequently, Annexure 5 — would "bear[] on [Commerce's] financial ratio calculations," nor did Commerce address the arguments that the Ashley Respondents raised with respect to this issue. *Id.*; *see* Ashley Respondents Case Br. at 8–10; Respondents Selection Resp. at 8–10. Accordingly, Commerce's explanation failed to "reasonably tie" the record evidence to Commerce's conclusion that Annexure 5 did not contain key information related to ES' potential receipt of distortive subsidies. *See CS Wind*, 832 F.3d at 1377.

The second reason that Commerce's explanation is inadequate is that Commerce did not address the relevance of the *size* of the balance associated with the line item under Note 13 in concluding that this item was not distortive. *See* IDM at 30. Based on record evidence, this balance amounted to more than 12% of ES' revenue. *See* Petitioners Surrogate Value Comments at Ex. 11; *see also* Ashley Respondents Case Br. at 8–9. The Ashley Respondents maintained in this regard that Annexure 5 might have been key to determining whether ES

received subsidies that would "significantly distort[]" Commerce's calculations. Ashley Respondents Case Br. at 9. Commerce's failure to address arguments related to the size of the balance renders Commerce's explanation inadequate. *See SKF USA*, 630 F.3d at 1374.

The third reason that Commerce's explanation is inadequate is that Commerce's statement that "only non-market based government loans would be distortive" is a non sequitur. IDM at 30. Since Commerce had no information about the item listed under Note 13 that referred to Annexure 5, Commerce did not have a basis to determine whether this item constituted a market-based loan. As such, Commerce did not substantiate its finding in this respect, nor did Commerce address how this finding is relevant to Commerce's evaluation as to whether Annexure 5 might have contained key information. For the foregoing reasons, the court concludes that Commerce failed to articulate an adequate explanation with respect to its conclusion on this issue.[8]

This conclusion is consistent with prior decisions of the Court. For example, in *Dongguan Sunrise*, Commerce selected financial statements that were "missing" information that the court concluded was relevant "to determin[ing] whether the entity received disqualifying subsidies." *Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 886, 865 F. Supp. 2d 1216, 1242 (2012). The court rejected Commerce's finding that the missing information was not "critical" and that the plaintiffs "[had] not cited to any evidence of subsidies received by [the entity]," concluding instead that the missing information constituted "a relevant consideration that must be explained by Commerce." *Id.*; *see also Home Meridian*, 36 CIT at 1296–97, 865 F. Supp. 2d at 132627.

Accordingly, the court remands to Commerce for further explanation or reconsideration the conclusion that ES' financial statements were complete.

[8] The court notes that at oral argument defendant-intervenors stated that the line item under Note 13 that refers to Annexure 5 cannot logically "refer to subsidies" to ES from governmental authorities, as this item refers to "balances" and consequently falls "on the asset side of [ES'] balances sheet." Revised Oral Arg. Tr. at 13:05–14. However, Commerce did not provide such an explanation in its IDM, and "a post-hoc explanation by [defendant-intervenors] at oral argument cannot cure the lack of explanation by Commerce." *Cooper (Kunshan) Tire Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1316, 1332 (2021); *see State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

2. Whether ES' financial statements were publicly available

The court concludes next that Commerce did not adequately explain its conclusion that ES' financial statements were publicly available within the meaning of Commerce's surrogate data selection practice. *See* 19 C.F.R. § 351.408(c)(1), (4) (directing Commerce to select "publicly available . . . non-proprietary information" to determine the surrogate values for factors of production and "manufacturing overhead, general expenses, and profit"); *Husteel*, 31 CIT at 748, 491 F. Supp. 2d at 1291 (citing *Viraj Forgings,* 28 CIT at 2089, 350 F. Supp. 2d at 1320) (other citations omitted); *Zhengzhou Harmoni*, 33 CIT at 499, 617 F. Supp. 2d 1281, 1321. Accordingly, the court is not able to ascertain that this conclusion is supported by substantial evidence, and the court remands the Final Determination to Commerce for further explanation or reconsideration.

Commerce's selection of financial statements is "guided by a general regulatory preference for publicly available, non-proprietary information." *Since Hardware*, 37 CIT at 805, 911 F. Supp. 2d at 1366 (citing 19 C.F.R. § 351.408(c)(1), (4)). The goal of this practice is to "ensure that interested parties are able to comment on the reliability and relevance of such information in the particular case." IDM at 35; *see Yantai Xinke*, 38 CIT at 497.

In the instant case, Commerce did not explain adequately its conclusion that ES' financial statements met the "bar" that Commerce has set for public availability. *See* IDM at 35; *Yantai Xinke*, 38 CIT at 497. To support this conclusion, Commerce stated that it previously has "found that a financial statement need not be free of charge for it to be publicly available." IDM at 35. Here, Commerce explained that certain record evidence — in particular, the Ashley Respondents' acknowledgment "that [ES'] financial statements [were] available in a subscription database" — demonstrated that ES' statements were publicly available. *See id.* at 36. However, the Ashley Respondents argued that they and Commerce had not been able to verify that the version of ES' statements "*provided by the Petitioners*" that existed "within subscription databases" was complete. Respondents Rebuttal Comments at 41 (emphasis supplied); *see also* Pls. Br. at 26 ("Commerce's conclusion elides the fact that the Ashley Respondents acknowledged only that the *incomplete* financial statements provided by Petitioners existed in a subscription database.") (emphasis supplied). The Ashley Respondents noted further that ES did not "maintain a website" through which to publish its financial statements and that the statements were "not available on the Indian [MCA] web-

site." Ashley Respondents Case Br. at 33; *see* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Factual Information Submission (Oct. 7, 2020) ("Respondents Factual Information Submission") at 32, PR 406–411. On this basis, the Ashley Respondents argued that Commerce and interested parties were unable to "fully verify [the] accuracy" of the version of ES' statements in the record. Ashley Respondents Case Br. at 33.

Commerce's explanation as to the public availability of ES' financial statements is inadequate for two reasons. First, Commerce failed to address whether the version of the statements that was available in the subscription database was complete. *See* IDM 35–36; *Itochu Bldg Prods. Co. v. United States*, 41 CIT __, Slip Op. 17–66 (June 5, 2017), at 14 (stating that a "financial statement [was] not fully publicly available" on the basis that the accessible version was "missing several of the statement's sections").

Second, Commerce did not address the record evidence to which the Ashley Respondents referred with respect to their alleged efforts to obtain ES' financial statements. Specifically, the Ashley Respondents argued that they were unable to confirm the availability of ES' statements through "a public source that can be verified based on the record," as the statements were available through neither the ES website nor "the Indian [MCA] website." Ashley Respondents Case Br. at 33 (citing Respondents Rebuttal Comments at 41); *see* Public Hearing at 54 (indicating that the Ashley Respondents "tried to find the financial statement[s]" of ES, but were "not . . . able to"). Notwithstanding Commerce's reference to prior determinations in which Commerce found that financial statements "need not be free of charge" to be publicly available, *see* IDM at 36 n.251, Commerce's conclusion that ES' statements were publicly available neither indicates that Commerce considered the foregoing evidence nor demonstrates that Commerce addressed the arguments that the Ashley Respondents "properly raise[d]" with respect to this evidence. *See SKF USA*, 630 F.3d at 1374; *Since Hardware (Guangzhou) Co. v. United States*, 2012 WL 11802604, at *2 (CIT Aug. 14, 2012) (remanding Commerce's selection of financial statements in view of "more than a fair amount of record information demonstrating that the [selected] statements may not have been publicly available," including evidence that interested parties "tried unsuccessfully to obtain" the statements). Consequently, Commerce did not provide an adequate explanation with respect to this issue.

3. Remaining arguments with respect to Commerce's selection of financial statements

The court remands the Final Determination with respect to Commerce's selection of financial statements to calculate surrogate financial ratios and directs Commerce to explain further or reconsider its conclusions with respect to whether ES' financial statements were complete and publicly available.

Accordingly, the court "does not consider it necessary at this time to rule on the other grounds" that the parties address with respect to Commerce's selection of financial statements. *Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1361. As discussed, the "other grounds" that the parties address concern the noncontemporaneity of ES' financial statements, whether ES' financial statements were representative of the business operations of Wanek, Millennium and Comfort Bedding, and whether SF's financial statements contained evidence of the receipt of countervailable subsidies. *See* Pls. Br. at 11–36; Def. Br. at 9–27; Def.-Intervenors Br. at 9–25. "Instead, the court will consider [Commerce's] new decision after reviewing the comments of the parties." *Fine Furniture*, 40 CIT at __, 182 F. Supp. 3d at 1361. It is possible that Commerce's reconsideration of whether ES' financial statements were complete and publicly available will lead Commerce to reevaluate the remaining selection criteria in selecting the financial statements with which to calculate surrogate financial ratios in this investigation.

II. Commerce's calculation of the surrogate value for pocket coil innerspring units

A. Legal framework

To determine the "best available" surrogate value for a factor of production of the subject merchandise, Commerce evaluates the data in the record to reach a product-specific and case-specific determination. *See SolarWorld Ams., Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1254, 1262 (2017); *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 75 Fed. Reg. 41,808 (Dep't of Commerce July 19, 2010) and accompanying IDM, A-570–952 (Dep't of Commerce July 12, 2010) at cmt. 2. The data that Commerce selects are required to "evidence[] a rational and reasonable relationship to the factor of production [they] represent[]." *Shandong Huarong General Corp. v. United States*, 25 CIT 834, 838, 159 F. Supp. 2d 714, 719 (2001). Further, in evaluating the record, Commerce "need not prove

that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a *reasonable* way." *Coal. for Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999) (emphasis supplied) (citation omitted).

"In calculating factors of production, Commerce typically employs data sets" as a basis to estimate factor values. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1675, 462 F. Supp. 2d 1262, 1268 (2006). In this investigation, the Ashley Respondents and petitioners presented for inclusion in the record data sets that each referenced a subheading of the Indian HTS with which to classify and calculate the surrogate value for PCIUs. *See* Respondents Surrogate Value Comments at Exs. SV-1, SV-3; Petitioners Surrogate Value Comments at 2–3, Ex. 2; *see also* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Second Supplemental Section D Questionnaire Response (Sept. 14, 2020) ("Respondents Supplemental Questionnaire Response") at Ex. SD2–3b, PR 352–354. Petitioners presented Indian HTS subheading 7320.90.90, which covers: "Springs and leaves for springs, of iron or steel; Other; Other." *See* Petitioners Surrogate Value Comments at 2–3, Ex. 2; Preliminary Determination of the Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Surrogate Value Memorandum (Oct. 27, 2020) ("Surrogate Value Memorandum") at 6–7, PR 449; Respondents Surrogate Value Comments at Ex. SV-3. The Ashley Respondents presented Indian HTS subheading 9404.29.90, which covers: "Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered; Mattresses; Of other materials; Other." *See* Surrogate Value Memorandum at 5–7; Respondents Surrogate Value Comments at Ex. SV-3. Commerce selected subheading 7320.90.90 as the "best available information" with which to value PCIUs. *See* Surrogate Value Memorandum at 5–8; IDM at 42.

B. Positions of the parties

Plaintiffs contend that Commerce's selection is not supported by substantial evidence. *See* Pls. Br. at 36. Plaintiffs argue that Commerce "improperly concluded that Indian HTS subheading 7320.90.90 'covers imports more specific to the [PCIUs] than HTS 9404.29.90.'" *Id.* (quoting IDM at 42).

Plaintiffs present two arguments in support of their position. Plaintiffs argue first that the record indicates that PCIUs are properly classified under Indian HTS subheading 9404.29.90, rather than subheading 7320.90.90. *Id.* at 36–39. Plaintiffs maintain that Commerce should have but did not apply the General Rules of Interpretation ("GRIs") in selecting the subheading with which to value PCIUs. *Id.* at 37 (citing *Jiangsu Senmao Bamboo and Wood Indus. Co. V. United States*, 42 CIT __, __, 322 F. Supp. 3d 1308, 1320 (2018)). Further, plaintiffs point to the description in the record of PCIUs as "[i]nnerspring assemblies unit made of steel wire, fabric and glue." *Id.* (citing Respondents Supplemental Questionnaire Response at Ex. SD2–3b). This description, according to plaintiffs, indicates that PCIUs are neither "exclusively made of springs" nor "articles of iron and steel" and, consequently, are not best classified under Indian HTS subheading 7320.90.90. *Id.* at 37–38. Rather, plaintiffs assert that this description indicates that PCIUs "are properly considered mattress supports classified under HTS heading 9404." *Id.* at 37.

Moreover, plaintiffs contend that Commerce "unreasonably ignored" six expert opinions that the Ashley Respondents presented and that were included in the record regarding the classification of PCIUs under the Indian HTS. *Id.* at 38–39 (citing Respondents Factual Information Submission at Exs. SV2–16, SV2–17; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Comments on Petitioners' Surrogate Value Comments (Oct. 16, 2020) ("Respondents Comments on Surrogate Value") at Exs. SV3–1, SV-2, SV-3, SV4, PR 420–421). Plaintiffs contend that the "professional opinions of Indian classification legal experts are highly relevant in ensuring that Commerce uses the correct HTS code to capture the specific material." *Id.* at 38. Here, plaintiffs argue that the analysis set forth in the opinions indicates that PCIUs are "best" classified under HTS subheading 9404.29.90 and, consequently, that Commerce's selection of subheading 7320.90.90 was unreasonable. *Id.* at 38–39.

Plaintiffs' second argument with respect to this issue is that Indian HTS subheading 7320.90.90 "cannot represent the best available information because reliance" on this subheading "yield[s] results so aberrational as to be unusable." *Id.* at 39. Plaintiffs contend that Commerce's selection results in a "distorted and inflated value that [is] 'greater than all other material inputs combined.'" *Id.* at 41 (quoting Ashley Respondents Case Br. at 53, Ex. 1). Specifically, plaintiffs note that when classified under Indian HTS subheading 7320.90.90, PCIUs represent [[ ]] of the total normal value of the subject merchandise, whereas the remaining inputs represent [[ ]] of

the total normal value. *Id.* (citing Ashley Respondents Case Br. at 53, Ex. 1)). Plaintiffs note also that when classified under Indian HTS subheading 7320.90.90, the value of PCIUs represents [[ ]] of the total net sales value of the subject merchandise. *Id.*

Defendant and defendant-intervenors argue that Commerce's selection is supported by substantial evidence. *See* Def. Br. at 27–31; Def.-Intervenors Br. at 25–36. Defendant and defendant-intervenors contend in response to plaintiffs' first argument that Commerce decided reasonably to select Indian HTS subheading 7320.90.90 and to reject Indian HTS subheading 9404.29.90. *See* Def. Br. at 27–29; Def.-Intervenors Br. at 26–34. To start, defendant notes that the Court previously has concluded that the GRIs "are not binding when Commerce use[s] [a foreign] HTS to approximate the cost of a factor of production" and, consequently, that Commerce was not required to apply the GRIs here. Def. Br. at 28 (citing *Gleason Indus. Prods., Inc. v. United States*, 32 CIT 382, 388, 559 F. Supp. 2d 1364, 1370 (2008)). Further, defendant contends that Commerce concluded reasonably that "HTS 7320.90.90 is a better category because it expressly covers springs of iron or steel of coil, other than coil spring for railways, tramways or spring pins, used by [Wanek, Millennium and Comfort Bedding], while HTS 9404.29.90 covers items that are dissimilar to" PCIUs. *Id.* at 27 (quoting IDM at 42). Defendant notes also that Commerce explained that subheading 9404.29.90 applies to mattresses of a material "other" than a "spring interior," whereas PCIUs are described as being composed of "spring coil." *Id.* at 27–28 (citing IDM at 42; Surrogate Value Memorandum at 7); *see also* Respondents Supplemental Questionnaire Response at Ex. SD2–3b. On this basis, defendant contends that Commerce concluded reasonably that "HTS 9404.29.90 does not provide the best valuation of [PCIUs] because [this subheading] does not contain springs." Def. Br. at 28 (quoting IDM at 42) (internal quotation marks omitted).

Defendant and defendant-intervenors argue also that Commerce considered and rejected reasonably the expert opinions that the Ashley Respondents presented for inclusion in the record. *See id.* at 28–29; Def.-Intervenors Br. at 31–34. Defendant contends that Commerce is not "bound" by these opinions, Def. Br. at 29 (citing *Samsung Intern. v. United States*, 36 CIT 1531, 1540 n.18, 887 F. Supp. 2d 1330, 1338 n.18 (2012)), and that Commerce explained adequately its disagreement with the analysis set forth in the opinions. *See id.* Defendant points to Commerce's explanation that while the "Indian classification opinions opine that innerspring coil units used to produce mattresses should be classified under [Indian HTS subheading] 9404.29.90," this subheading is in fact "an 'other' category covering

articles of mattresses that do not contain springs." *Id.* at 28–29 (quoting IDM at 43) (emphasis omitted). Defendant notes also that Commerce explained its disagreement with the analysis in the opinions that PCIUs have the "essential character" of a mattress. *Id.* at 29 (quoting IDM at 43). According to defendant, Commerce concluded reasonably that PCIUs do not have the "essential character" of a mattress, *see id.*, as Commerce explained that PCIUs "are an input for a completed mattress" and "comprise part of the core but are not sold or marketed to take the place of a mattress." IDM at 43.

Defendant and defendant-intervenors address next plaintiffs' second argument and contend that Commerce rejected reasonably the contention that Indian HTS subheading 7320.90.90 "yield[s] aberrational results." *See* Def. Br. at 29–31; Def.-Intervenors Br. at 34–36. According to defendant, Commerce concluded reasonably that the Ashley Respondents "provided insufficient evidence" that subheading 7320.90.90 is "aberrational." Def. Br. at 30 (quoting IDM at 45). Defendant notes that in determining whether data are "aberrational," Commerce found that "the existence of higher prices alone does not necessarily indicate that the price data are distorted or misrepresentative, and thus is not a sufficient basis upon which to exclude a particular" surrogate value. *Id.* (quoting IDM at 45). Here, defendant-intervenors note that in the administrative proceedings, the Ashley Respondents argued only that when classified under Indian HTS subheading 7320.90.90, PCIUs represent [[ ]] of the total normal value of the subject merchandise. *See* Def.-Intervenors Br. at 35. On this basis, defendant and defendant-intervenors contend that the Ashley Respondents did not provide sufficient evidence to buttress their argument. *See id.*; Def. Br. at 30.

In addition, defendant contends that plaintiffs did not exhaust administrative remedies with respect to the specific argument that when PCIUs are classified under subheading 7320.90.90, the value of PCIUs represents [[ ]] of the total net sales value of the subject merchandise. Def. Br. at 30 (citing Pls. Br. at 41). According to defendant, "although plaintiffs generally argued that the data are aberrational, they failed to present this specific argument in their case brief in the investigation and thus they failed to exhaust this argument." *Id.*

C. Analysis

The court concludes that Commerce's selection of data with which to calculate the surrogate value for PCIUs is supported by substantial evidence.

In its IDM, Commerce explained its selection of Indian HTS subheading 7320.90.90 as the "best available information" with which to value PCIUs — which are composed of "steel wire, fabric and glue" and described as "spring coil" — on the basis that this subheading covers springs of iron or steel "other" than "coil spring for railways, tramways or spring pins." IDM at 42; *see* Respondents Supplemental Questionnaire Response at Ex. SD2–3b; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Pre-Prelim Comments (Oct. 2, 2020) ("Respondents Pre-Preliminary Comments") at 6, PR 391. Further, Commerce concluded that subheading 9404.29.90 is not the "better category," as this subheading "covers items that are dissimilar to" PCIUs. IDM at 42. Commerce explained that subheading 9404.29.90 covers completed mattresses of a material "other" than a spring interior, whereas PCIUs are inputs that are composed of spring coil. *Id.*; *see* Respondents Surrogate Value Comments at Ex. SV-3.

To buttress its conclusion, Commerce addressed and explained its disagreement with the expert opinions that the Ashley Respondents presented to support the selection of subheading 9404.29.90. *See* IDM at 43–44 (citing Respondents Factual Information Submission at Exs. SV2–16, SV2–17; Respondents Comments on Surrogate Value at Exs. SV3–1, SV-2, SV-3, SV-4); *see also* Ashley Respondents Case Br. at 44–53; Respondents Factual Information Submission at 17–19. In addition, Commerce rejected the argument that the selection of subheading 7320.90.90 results in "aberrational" values, explaining that the Ashley Respondents provided "insufficient evidence" to support this argument.[9] IDM at 45.

Commerce's explanation of its selection of surrogate data demonstrates that Commerce addressed the arguments of the Ashley Respondents and "reasonably tie[d]" its decision to "the governing statutory standard" and to "record evidence." *CS Wind*, 832 F.3d at 1377. The parties raise two points in challenge to Commerce's selection. The court evaluates those points in sequence.

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[9] In the administrative proceedings, the Ashley Respondents noted that one of the petitioners, Leggett & Platt, Incorporated, as well as counsel to petitioners, previously argued in different proceedings before Commerce and the Commission that inputs "nearly identical" to PCIUs were properly classified under HTSUS 9404.29.90. *See* Respondents Factual Information Submission at 6–12; Ashley Respondents Case Br. at 40–43. Commerce explained, however, that the "best available information" standard requires a "product-specific and case-specific decision." IDM at 42. Moreover, it is Commerce's established practice to evaluate separately each administrative proceeding, as "each investigation and administrative review present[s] . . . a unique set of facts and circumstances." *Krupp Stahl A.G. v. United States*, 17 CIT 450, 457, 822 F. Supp. 789, 795 (1993); *see Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 38 CIT 1632–33, 1651, 28 F. Supp. 3d 1317, 1336 (2014).

1. Whether Commerce decided reasonably to select Indian HTS subheading 7320.90.90 and to reject subheading 9404.29.90

In evaluating Indian HTS subheadings 7320.90.90 and 9404.29.90, Commerce was not required to apply the GRIs to select the subheading with which to calculate the surrogate value for PCIUs. The Federal Circuit has stated that Commerce is not "required to engage in a classification analysis" and apply the GRIs in selecting a provision of a foreign Harmonized Tariff Schedule with which to value a particular factor of production. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1379 (Fed. Cir. 2015); *see Gleason*, 32 CIT at 389, 559 F. Supp. 2d at 1370 (stating that the plaintiffs' arguments "regarding the binding nature of the GRI[s] . . . in the antidumping context [we]re misplaced"). Rather, Commerce is required by statute "to determine which of the competing subheadings constitute[s] the *best available information*" in the record. *Downhole Pipe*, 776 F.3d at 1379 (emphasis supplied); *see* 19 U.S.C. § 1677b(c).

Commerce selected reasonably Indian HTS subheading 7320.90.90 as the "best available information" in the record. *See* 19 U.S.C. § 1677b(c); IDM at 42–45. The Court previously has stated that "Commerce may rely on the plain meaning of [foreign Harmonized Tariff Schedule] descriptions to determine the best available information to value a specific input." *Carbon Activated*, 46 CIT at __, 547 F. Supp. 3d at 1317. As discussed, PCIUs are "[i]nnerspring assemblies unit[s]" composed of "steel wire, fabric and glue" and described as "spring coil." Respondents Supplemental Questionnaire Response at Ex. SD2–3b; Respondents Pre-Preliminary Comments at 6. Indian HTS subheading 7320.90.90 refers to "[s]prings . . . of iron or steel" *other* than "coil spring for railways, tramways" or "spring pins." Respondents Surrogate Value Comments at Ex. SV-3. Commerce relied reasonably on this subheading to value PCIUs.

Plaintiffs argue also that PCIUs are not "exclusively made of springs." *See* Pls. Br. at 37–38. Commerce explained that the existence of "spring coil" and "steel wire" in PCIUs indicates that subheading 7320.90.90 — which "expressly covers springs of iron or steel of coil" — covers merchandise that corresponds reasonably to PCIUs. IDM at 42; *see* Respondents Supplemental Questionnaire Response at Ex. SD2–3b; Respondents Pre-Preliminary Comments at 6; *see also Mid Continent Steel & Wire, Inc. v. United States*, 42 CIT __, __, 321 F. Supp. 3d 1313, 1325 (2018) (sustaining Commerce's selection of an HTS category that "more closely matched the description" of the material contained in the factor of production).

Moreover, Commerce decided reasonably to reject Indian HTS subheading 9404.29.90. Relying upon a plain meaning of this subheading, *see Carbon Activated*, 46 CIT at __, 547 F. Supp. 3d at 1317, Commerce reached two conclusions. First, Commerce concluded that this subheading — which covers "[m]attresses" — is not the "best available information" with which to value PCIUs. IDM at 43; *see* Respondents Surrogate Value Comments at Ex. SV-3. Commerce explained that PCIUs do not "take the place of a mattress." IDM at 43. Commerce cited to record evidence that buttresses this conclusion, including a submission of the Ashley Respondents that indicates that PCIUs constitute only one of the factors of production comprising the subject merchandise. *See id.* at 42 (citing Mattresses from the Socialist Republic of Vietnam: Supplemental Section D Questionnaire Response (July 22, 2020) ("Respondents Supplemental Section D Questionnaire Response") at Ex. 1; Respondents Factual Information Submission at 4); *see also* Respondents Supplemental Questionnaire Response at Ex. SD2–3b. On this basis, Commerce explained that Indian HTS subheading 9404.29.90 is not a "better" choice than subheading 7320.90.90, as the former covers completed mattresses. *See* IDM at 4243.

The second conclusion that Commerce reached with respect to subheading 9404.29.90 is that this subheading covers mattresses of a material "*other*" than a "spring interior." *Id.* at 42 (emphasis supplied); *see* Respondents Surrogate Value Comments at Ex. SV-3. Notwithstanding that Heading 9404 of the Indian HTS covers, among other merchandise, "articles of bedding and similar furnishing . . . fitted with springs," *see* Respondents Surrogate Value Comments at Ex. SV-3, Commerce explained that the specific subheading in question is an "other" category that does *not* cover mattresses that contain a "spring interior." IDM at 42 (citing Surrogate Value Memorandum at 6–7). Consequently, relying upon the description in the record of PCIUs — which consist of "spring coil" — Commerce concluded that subheading 9404.29.90 is not the "better" selection, as this subheading "covers items that are dissimilar to" PCIUs. *Id.*; Respondents Pre-Preliminary Comments at 6.

The court concludes also that Commerce explained adequately its disagreement with the expert opinions that the Ashley Respondents presented and that were included in the record. As expert opinions are "merely advisory" in nature, *Samsung*, 36 CIT at 1540 n.18, 887 F. Supp. 2d at 1338 n.18, Commerce was not required to accept the analysis set forth in the opinions; rather, Commerce was required to evaluate and explain its decision whether to rely upon this evidence in selecting the "best available information" in the record. 19 U.S.C.

§ 1677b(c)(1)(B). In its IDM, Commerce explained that it "disagree[d] that [PCIUs] have the essential character of a mattress as determined by the six Indian classification opinions."[10] IDM at 43.

Based on the foregoing, the court concludes that Commerce explained adequately its decision not to rely upon the analysis set forth in the expert opinions regarding the applicability of subheading 9404.29.90.

2. Whether Commerce's selection of Indian HTS subheading 7320.90.90 results in "aberrational" values

The court concludes next that Commerce rejected reasonably the argument that Commerce's selection of Indian HTS subheading 7320.90.90 results in "aberrational" values. *See* Ashley Respondents Case Br. at 53–54, Ex. 1; Pls. Br. at 39–41. The Ashley Respondents stated in support of this argument that when classified under subheading 7320.90.90, PCIUs represent [[ ]] of the total normal value of the subject merchandise. *See* Ashley Respondents Case Br. at 53–54, Ex. 1. Consistent with its established practice, Commerce explained that "the existence of higher prices alone" is not sufficient to support the argument that subheading 7320.90.90 results in "aberrational" values. IDM at 45 (citing *Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 Fed. Reg. 71,005 (Dep't of Commerce Dec. 8, 2004) and accompanying IDM, A-552–802 (Dep't of Commerce Nov. 29, 2004) at 12; *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order*, 76 Fed. Reg. 77,772 (Dep't of Commerce Dec. 14, 2011) and accompanying IDM, A-570–937 (Dep't of Commerce Dec. 7, 2011) at cmt. 12). Moreover, Commerce determined that the Ashley Respondents did not include in the record any evidence other than the higher prices to support their argument. *See id.*

The court's conclusion that Commerce rejected reasonably this argument is consistent with prior decisions of the Court. For example,

[10] Commerce substantiated its explanation on the basis that PCIUs constitute only one of the factors of production comprising the subject merchandise. *See* IDM at 42–43 (citing Respondents Supplemental Section D Questionnaire Response at Ex. 1; Respondents Factual Information Submission at 4); *see also* Respondents Supplemental Questionnaire Response at Ex. SD2–3b; *Final Determination*, 86 Fed. Reg. at 15,891 ("The products covered by this investigation are all types of youth and adult mattresses . . . [that] may consist of innersprings, foam, other resilient filling, or a combination . . . . 'Innerspring mattresses' contain innersprings, a series of metal springs joined together in sizes that correspond to the dimensions of mattresses."). Moreover, Commerce explained that PCIUs are not sold or marketed in place of a completed mattress. IDM at 43.

in *Jacobi Carbons*, the court stated that the plaintiff's "observation that the [selected] surrogate" data resulted in a value "eight times higher" than other data was "no doubt, factually correct." *Jacobi Carbons AB v. United States*, 38 CIT 932, 950, 992 F. Supp. 2d 1360, 1375–76 (2014), *aff'd*, 619 F. App'x 992 (Fed. Cir. 2015). However, the court concluded that "without more [this observation] cannot be given much weight" and, consequently, sustained Commerce's selection. *Id.*; *see also Tr. Chem Co. v. United States*, 35 CIT 1012, 101819, 791 F. Supp. 2d 1257, 1264 (2011) (stating that notwithstanding the plaintiff's reference to a "large discrepancy in price" values, the plaintiff "did not place sufficient comparative data on the record . . . to support its challenge based on numerical differences alone").

Further, the court concludes that plaintiffs did not exhaust administrative remedies with respect to the specific argument that when PCIUs are classified under Indian HTS subheading 7320.90.90, the value of PCIUs represents [[ ]] of the total net sales value of the subject merchandise. *See* Pls. Br. at 41. "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). In the instant case, the Ashley Respondents did not raise this argument in the administrative proceedings. Rather, plaintiffs raise this argument and figure in the first instance before the court. *See* Pls. Br. at 41. Accordingly, plaintiffs did not exhaust administrative remedies with respect to this argument, and the court declines to consider the argument. *See Blue Field*, 37 CIT at 1631–32, 949 F. Supp. 2d at 1324–25.

* * *

In view of the "absence of a category" in the Indian HTS that applies "specifically" to PCIUs, Commerce was required to determine whether Indian HTS subheading 7320.90.90 or subheading 9404.29.90 constitutes the "best available information" in the record. *SolarWorld Ams.*, 41 CIT at __, 273 F. Supp. 3d at 1271 (sustaining Commerce's selection notwithstanding Commerce's "[a]cknowledg-[ment] that the HTS categories were imperfect" and that "a perfect fit was not available"). In accordance with its statutory mandate, Commerce selected Indian HTS subheading 7320.90.90 and explained adequately its conclusion that this subheading more closely applies to PCIUs than does subheading 9404.29.90. *See* 19 U.S.C. § 1677b(c)(1). Accordingly, the court concludes that Commerce's selection is supported by substantial evidence, and the court sustains the Final Determination with respect to this issue.

III. Commerce's decision to exclude AFI and AFTC from the separate rate assigned to Wanek, Millennium and Comfort Bedding

A. Legal framework

In an AD proceeding involving imports from an NME country, "'rates' may consist of a single dumping margin applicable to all exporters and producers." 19 C.F.R. § 351.107(d). In such a proceeding, Commerce will assign to an exporter or producer the calculated country-wide rate unless the entity rebuts the presumption of governmental control over its activities. *See Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1311–12 (Fed. Cir. 2017). Should an entity rebut this presumption, Commerce may assign to the entity a "separate" rate. *See id.*; *Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, Import Administration Policy Bulletin 05.1 (Apr. 5, 2005) ("Policy Bulletin 05.1"); *see also Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 1417, 647 F. Supp. 2d 1368, 1379 (2009) ("To determine the [AD] margin for non-mandatory respondents in NME cases (that is, to determine the 'separate rates' margin), Commerce normally relies on the 'all others rate' provision of 19 U.S.C. § 1673d(c)(5)). To facilitate its assessment in this regard, Commerce requires an entity that requests "separate-rate status" to submit a separate rate application. *See* Policy Bulletin 05.1, at 3–6. In this investigation, Wanek, Millennium and Comfort Bedding — each exporter of mattresses from Vietnam — submitted separate rate applications ("Separate Rate Applications") and were assigned a separate rate of 144.92%, rather than the Vietnam-wide entity rate of 668.38%. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Separate Rate Application of Millennium Furniture Co., Ltd. (June 1, 2020), PR 156–157; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Separate Rate Application of Wanek Furniture Co., Ltd. (June 1, 2020), PR 158; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Separate Rate Application of Comfort Bedding Company Limited (June 1, 2020), PR 159; *see also Final Determination*, 86 Fed. Reg. at 15,890. AFI and AFTC — neither of which is a foreign exporter or producer — did not submit separate rate applications and, consequently, were not assigned the separate

rate assigned to Wanek, Millennium and Comfort Bedding.[11] *See* Second Am. Compl. ¶ 5; IDM at 52–53. Commerce concluded in its Final Determination that "[t]he companies denied a separate rate will be treated as part of the Vietnam-wide entity" and assigned the corresponding rate of 668.38%. *Final Determination*, 86 Fed. Reg. at 15,890.

B. Positions of the parties

Plaintiffs contend that Commerce declined unreasonably to "list" AFI and AFTC in Commerce's cash deposit instructions to Customs as eligible for the rate assigned to Wanek, Millennium and Comfort Bedding. Pls. Br. at 42. Plaintiffs argue that AFI and AFTC are "reinvoicing entities" of the subject merchandise and, consequently, that the names of AFI and AFTC may "appear on certain entry documents presented to Customs." *Id.* As such, plaintiffs argue that "[b]ecause AFI or AFTC may appear as the seller or exporting party in the final invoice presented to Customs," Commerce's "instructions could incorrectly expose merchandise reinvoiced by AFI or AFTC to the Vietnam-wide rate." *Id.* at 3–4, 43.

Defendant argues that Commerce determined reasonably that AFI and AFTC should be excluded from the separate rate assigned to Wanek, Millennium and Comfort Bedding. *See* Def. Br. at 31–34; *see also* IDM at 52–53. Defendant argues that there is no record evidence that indicates that "either [AFI or AFTC] is a producer or exporter of subject merchandise from Vietnam, a criterion to receive a separate rate." Def. Br. at 33 (quoting IDM at 53).[12] Further, even presuming that AFI and AFTC, as reinvoicing entities, "may appear as the exporting party of subject merchandise," defendant contends that plaintiffs' claims "do not substitute nor allow for AFI nor AFTC to circumvent the proper procedures for obtaining a separate rate by submitting a separate rate application." *Id.* (citing Pls. Br. at 43; IDM at 52).

C. Analysis

Commerce's decision to exclude AFI and AFTC from the separate rate assigned to Wanek, Millennium and Comfort Bedding is supported by substantial evidence. Pursuant to regulation, there are two

[11] The record indicates that AFI and AFTC were involved in the reinvoicing of the subject merchandise. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Mattresses from the Socialist Republic of Vietnam: Section A Questionnaire Response (June 19, 2020), vol. I at A-31, vol. II at A-25, vol. III at A-27, CR 108–122.

[12] Defendant cites to page 53 of Commerce's IDM to substantiate this argument. *See* Def. Br. at 33. However, the statement to which defendant cites appears on page 52 of the IDM. *See* IDM at 52.

reasons that AFI and AFTC are not eligible for separate rate status and the corresponding cash deposit rate of 144.92% assigned to Wanek, Millennium and Comfort Bedding. *See* Policy Bulletin 05.1. First, neither AFI nor AFTC is a foreign exporter or producer of mattresses from Vietnam. *See* Second Am. Compl. ¶ 5; Policy Bulletin 05.1; *see also* 19 C.F.R. § 351.107(d); 19 U.S.C. § 1673d(c)(5). Further, neither the statute nor Commerce's regulation *requires* that Commerce assign to an entity a separate rate in a circumstance in which the entity *might* reinvoice certain entries of subject merchandise.[13] *See* 19 U.S.C. § 1673d(c)(1)(B), (5); 19 C.F.R. § 351.107(d). Second, the record indicates that neither AFI nor AFTC submitted a separate rate application to establish its eligibility for separate rate status. *See* IDM at 52; *Initiation Notice*, 85 Fed. Reg. at 23,007 ("In order to obtain separate-rate status in an NME investigation, exporters and producers must submit a separate-rate application.").

Moreover, AFI and AFTC are not eligible for separate rate status through their relationship with Wanek, Millennium and Comfort Bedding because Commerce decided to collapse only those three into a single entity; Commerce did not include AFI or AFTC because they are located in a different country and Commerce's practice is "not [to] collapse across country lines."[14] *Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29,310 (Dep't of Commerce May 22, 2006) and accompanying IDM, A-580–855 (Dep't of Commerce May 15, 2006) at cmt. 15; *see* IDM at 53; Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Ashley Furniture Industries, Inc., Ashley Furniture Trading Company, Wanek Furniture Co., Ltd., Millennium Furniture Co., Ltd., and Comfort Bedding Company Limited Preliminary Affiliation and Collapsing Memorandum (Oct. 27, 2020) ("Collapsing Memorandum") at 4–8, CR 619.; *see also* Less-Than-Fair-Value Investigation of Mattresses from the Socialist Republic of Vietnam: Allegation of Ministerial Error in the Preliminary Determination (Dec. 1, 2020) at 3, PR 478. The Ashley Respondents did not challenge this decision. *See* Collapsing Memorandum at 4–8; *see generally* IDM.

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[13] Contrary to plaintiffs' argument, the possibility that AFI and AFTC might "appear as the seller or exporting party in the final invoice presented to Customs" does not provide a legal basis to assign to AFI and AFTC a separate rate. Pls. Br. at 43; *see* Ashley Respondents Case Br. at 60–61.

[14] As discussed, Wanek, Millennium and Comfort Bedding are exporters of mattresses from Vietnam. *See supra* Background. AFI is a U.S. domestic producer and U.S. importer of mattresses, and AFTC also is a U.S. importer. *See id.*; *see also* Separate Rate Applications.

Accordingly, Commerce's exclusion of AFI and AFTC from the separate rate assigned to Wanek, Millennium and Comfort Bedding is consistent with 19 U.S.C. § 1673d(c)(1)(B)(ii) and is supported by substantial evidence, and the court sustains the Final Determination with respect to this issue.

IV. Commerce's use of the Cohen's *d* test

A. Legal framework

The Cohen's *d* test is a statistical measure that Commerce uses to conduct its "differential pricing" analysis. *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720, 26,722–23 (Dep't of Commerce May 9, 2014). Commerce conducts this analysis to determine "when it may be appropriate to use . . . the average-to-transaction comparison method," rather than the default average-to-average method, to calculate the margin (or margins) in an AD investigation. *Id.* at 26,720; *see* 19 C.F.R. § 351.414. In cases in which Commerce has selected the average-to-transaction method, the Federal Circuit has stated that Commerce's use of the Cohen's *d* test may "bias" the calculated AD margin. *See generally Stupp Corp. v. United States*, 5 F.4th 1341 (Fed. Cir. 2021); *Mid Continent Steel & Wire Co. v. United States*, 31 F.4th 1367 (Fed. Cir. 2022).

B. Positions of the parties

Plaintiffs argue that Commerce's use of the Cohen's *d* test in this investigation is not supported by substantial evidence and not in accordance with the law. *See* Pls. Br. at 44–47 (citing *Stupp*, 5 F.4th 1341); *see* Notice Supp. Authority, ECF No. 56. Plaintiffs do not dispute that Commerce's use of the Cohen's *d* test did not have a "margin effect," as Commerce selected the average-to-average method, *not* the average-to-transaction method, to calculate the AD margin. *See* Revised Oral Arg. Tr. at 45:0346:09; PDM at 28.

Defendant and defendant-intervenors challenge plaintiffs' claim regarding Commerce's use of the Cohen's *d* test on two grounds: (1) plaintiffs do not have standing, as plaintiffs have not suffered an injury resulting from Commerce's use of the Cohen's *d* test; and (2) plaintiffs have failed to exhaust administrative remedies with respect to this claim. *See* Def. Br. at 34–43; Def.-Intervenors Br. at 36–39. Defendant notes that Commerce did not select the average-to-transaction method to calculate the AD margin in this investigation. *See* Def. Br. at 38 (citing Final Determination in the Antidumping Duty Investigation of Mattresses from the Socialist Republic of Vietnam: Analysis Memorandum for Ashley Furniture Industries, Inc., Ashley Furniture Trading Company, Wanek Furniture Co., Ltd., Mil-

lennium Furniture Co., Ltd., and Comfort Bedding Company Limited (Collectively, Ashley Group) (Mar. 18, 2021) at 6, PR 511, CR 694). At oral argument, defendant conceded that "if something [with respect to Commerce's selected comparison method] were to change on remand, then that would be a different scenario" with respect to plaintiffs' claim. Revised Oral Arg. Tr. at 48:1314.

C. Analysis

The court will reserve examination of this issue and related arguments until Commerce reconsiders, consistent with this decision, the Final Determination. It is possible that Commerce will reconsider on remand its use of the Cohen's *d* test.

CONCLUSION

The fairy tale *Goldilocks and the Three Bears* is based on the 1837 story by Robert Southey, "The Story of the Three Bears."[15] In the tale, three bears — a Great Big Bear, a Middle-sized Bear and a Little Wee Bear — return home to quite a surprise: a young girl, Goldilocks, has broken in, eaten their porridge, sat in their chairs and made her way upstairs to their bedchamber. The bears head upstairs to confront Goldilocks, who is slumbering comfortably in the bed of the Little Wee Bear, which is "neither too high at the head nor at the foot, but just right."

Great Big Bear (noticing that his pillow is out of place): "SOMEBODY HAS BEEN LYING IN MY BED!"

Middle-sized Bear (noticing that the bolster is out of place): "SOMEBODY HAS BEEN LYING IN *MY* BED!"

Little Wee Bear (noticing that Goldilocks is asleep in his bed): "SOMEBODY HAS BEEN LYING IN MY BED — AND HERE SHE IS STILL!"

Goldilocks, awakened by the little wee voice of the Little Wee Bear, tumbles out of the bed with a startle. She flings herself out of the bedchamber window and runs into the woods, never to be seen again.

* * *

In conclusion, the court sustains in part and remands in part Commerce's Final Determination. The court remands the Final Determination with respect to Commerce's selection of financial statements to calculate surrogate financial ratios and directs Commerce to explain further or reconsider its conclusions that ES' financial statements were complete and publicly available. Upon receiving the remand redetermination, the court will address the remaining argu-

[15] Flora Annie Steel, "The Story of the Three Bears," *in English Fairytales* (1922) (commonly referred to as *Goldilocks and the Three Bears*); Robert Southey, "The Story of the Three Bears," *in The Doctor* (1837).

ments — to the extent that they remain relevant — presented by the parties challenging the Final Determination.

Accordingly, it is hereby

ORDERED that the Final Determination is remanded to Commerce for further explanation or reconsideration, consistent with this decision, of Commerce's determination that ES' financial statements were complete and publicly available with respect to Commerce's selection of financial statements to calculate surrogate financial ratios; it is further

ORDERED that Commerce is required on remand to explain further or reconsider its decision to select ES' financial statements and to reject SF's statements in view of the deficiencies identified in this decision with respect to ES' statements; it is further

ORDERED that the Final Determination is sustained with respect to Commerce's selection of data to calculate the surrogate value for PCIUs; it is further

ORDERED that the Final Determination is sustained with respect to Commerce's decision to exclude AFI and AFTC from the separate rate assigned to Wanek, Millennium and Comfort Bedding; it is further

ORDERED that the court reserves decision on plaintiffs' claim regarding Commerce's use of the Cohen's *d* test until the remand redetermination is before the court; it is further

ORDERED that Commerce shall file its remand redetermination within 90 days following the date of this Opinion and Order; it is further

ORDERED that within 14 days of the date of filing of Commerce's remand redetermination, Commerce shall file an index and copies of any new administrative record documents; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand redetermination no later than seven days after Commerce files its remand redetermination with the court.

Dated: November 28, 2022
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 22–132

ASPECTS FURNITURE INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 20–03824

[Remanding in part and sustaining in part U.S. Customs and Border Protection's evasion determination under the Enforce and Protect Act.]

Dated: November 28, 2022

Robert W. Snyder and *Laura A. Moya*, Law Offices of Robert W. Snyder, of Irvine, CA, for Plaintiff Aspects Furniture International, Inc.

Douglas G. Edelschick, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Tamari Lagvilava*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

OPINION

Choe-Groves, Judge:

Plaintiff Aspects Furniture International, Inc. ("Plaintiff" or "Aspects") filed this action challenging the final affirmative determination of evasion of the antidumping duty order on wooden bedroom furniture from the People's Republic of China ("China") by U.S. Customs and Border Protection ("Customs"), issued pursuant to Customs' authority under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517. *See* Compl. at 1, ECF No. 2; *see also* Trade Facilitation & Trade Enforcement Act of 2015, Pub. L. No. 114 125, § 421, 130 Stat. 122, 161 (2016). Before the Court is Aspects' Motion for Judgment on the Agency Record, ECF No. 20. *See also* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Br."), ECF No. 20. Defendant United States ("Defendant" or "the Government") opposes the motion. Def.'s Resp. Opp'n Pl.'s Mot. J. Agency R. ("Def.'s Resp."), ECF No. 23.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Customs may apply the EAPA statute and regulations retroactively to Aspects' entries made prior to the EAPA statute entering into force;

2. Whether Customs' consideration of hearsay evidence was in accordance with the law and whether Customs' decision to disregard Aspects' affidavits was arbitrary or capricious;

3. Whether Customs' evasion determination was supported by substantial evidence;

4. Whether the EAPA statute, its regulations, and Customs' administration of the EAPA statute denied Aspects' procedural due process protections; and

5. Whether Customs' combination of the EAPA investigation with a regulatory audit was in accordance with the law.

BACKGROUND

On January 4, 2005, the U.S. Department of Commerce ("Commerce") issued antidumping duty order A-570–890 covering wooden bedroom furniture from China. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China*("Order"), 70 Fed. Reg. 329 (Dep't of Commerce Jan. 4, 2005). The American Furniture Manufacturers Committee for Legal Trade ("AFMC") filed an allegation of evasion with Customs' Trade Remedy & Law Enforcement Directorate in April 2017 requesting that an investigation be initiated against Aspects. *See* Letter from J. Michael Taylor on behalf of AFMC (Apr. 6, 2017) ("AFMC's Allegation"), PR 13.[1] AFMC's Allegation claimed that Aspects was importing wooden bedroom furniture covered by the Order produced by two Chinese companies, Nantong Fuhuang Furniture Co., Ltd. ("Nantong Fuhuang") and Nantong Wangzhuang Furniture Co., Ltd., while claiming that the subject items were produced by two other Chinese companies, Shanghai Jian Pu Import & Export Co., Ltd. and Wuxi Yushea Furniture Co., Ltd. ("Wuxi Yushea"), which were subject to lower or no antidumping duty rates. *See id.* at 3, 5–15; Customs' Notice of Initiation of an Investigation and Interim Measures (Aug. 14, 2017) ("Notice of Investigation and Interim Measures"), PR 138, CR 113.

An investigation was initiated on May 9, 2017. *See* Customs' Mem. Initiation Investigation EAPA Case Number 7189 (May 9, 2017) ("Initiation Memo" or "Initiation Mem."), PR 100; Notice of Investigation and Interim Measures at 2. That same month, the investigation team conducted a teleconference with counsel for AFMC to "provide [AFMC] with an opportunity to brief the Enforce and Protect Act investigative team on its allegation and to answer any questions on the information presented therein." *See* Customs' Mem. AFMC's Meeting Discuss Allegations Evasion (May 31, 2017), PR 104. Aspects

[1] Citations to the administrative record reflect the public record ("PR") and confidential record ("CR") document numbers filed in this case, ECF Nos. 16, 17.

claims that it was not invited to participate in the call and was not provided with a transcript of the conversation. Pl.'s Br. at 5.

On August 14, 2017, Plaintiff was provided with notice of the EAPA investigation and was informed that Customs had imposed interim measures, including: (1) rate-adjustments were applied to subject merchandise; (2) "live entry" was required for future imports; (3) liquidation for entries made after May 9, 2017 was suspended and liquidation for all entries made before that date was extended; and (4) entries previously liquidated but still subject to Customs' reliquidation authority were reliquidated. *See* Notice of Investigation and Interim Measures at 4, 5. Customs also advised Aspects that it was already reviewing Aspects' entries for calendar year 2016 for potential evasion of duties and would extend the scope of its EAPA investigation to align with that review. *Id.* at 2.

Between October 2017 and March 2018, Customs sent requests for information to Aspects and to Chinese companies associated with Aspects' wooden bedroom furniture entries. Customs' Importer Questionnaire (Oct. 24, 2017), PR 146, CR 114; Customs' Manufacturer Questionnaire (Oct. 24, 2017), PR 147; Customs' Additional Manufacturer Request for Information (Jan. 25, 2018), PR 296–99, CR 237–40; Customs' Manufacturer Request for Information Nantong Fuhuang (Jan. 26, 2018), PR 300; Customs' Importer Request for Information (Mar. 9, 2018), PR 321, CR 253; Customs' Request for Information Aspects Nantong (Mar. 9, 2018), PR 322, CR 254; *see also* On-Site Verification Report Enforce and Protect Act (EAPA) Case 7189 (Dec. 13, 2019) ("Verification Report") at 2, PR 373, CR 295. Wuxi Yushea and Nantong Fuhuang provided replies. Wuxi Yushea's Resp. Request for Information (Feb. 6, 2018), PR 311–318, CR 242–52; Nantong Fuhuang's Resp. Request Information (Feb. 11, 2018), PR 319. In April 2018, Customs' verification team conducted site visits in China to Wuxi Yushea, Nantong Fuhuang, and Aspects' Nantong office. *See* Verification Report at 3. The site visits included: (1) interviews with company officials about company operations and record keeping; (2) tours of facilities; and (3) reviews of original records to verify the request for information responses. *See id.* at 3–4. The verification team identified instances in which Aspects "comingled merchandise," created "multiple versions of invoices," created "descriptions of merchandise on documentation" that differed from those provided by the manufacturers, and "manipulated per unit prices" on entry documents. *Id.* at 4–15. The verification team also observed two instances in which an Aspects employee deleted or destroyed records relating to container loading plans. *Id.* at 16–17. The verification team concluded that both Wuxi Yushea and Nantong Fuhuang "were able to produce

the [wooden bedroom furniture] at sufficient quantities as to account for the imported merchandise totals" associated with Aspects' entries. *See id.* at 4.

On December 22, 2017, Customs notified the parties to the investigation that deadlines in the investigation were stayed to allow Customs to request a referral scope determination from Commerce as to whether certain merchandise was covered by the Order. *See* Customs' Scope Referral Request Mem. (Dec. 22, 2017), PR 294, CR 235. Customs submitted a revised referral in July 2019 amending errors in the original submission. Commerce's Scope Ruling Antidumping Duty Order (Dec. 31, 2019) ("Final Scope Ruling") at 2, PR 387, CR 303. Commerce issued its Final Scope Ruling on December 31, 2019, concluding that four of the six considered items were not covered by the Order and two of the items were covered by the Order. *Id.* at 1.

Customs' Trade Remedy & Law Enforcement Directorate determined that substantial evidence demonstrated that Aspects entered covered merchandise into the United States through evasion of the Order. *See* Notice of Final Determination as to Evasion (May 18, 2020) ("May 18 Determination") at 9, PR 419, CR 310. Aspects requested *de novo* administrative review of the May 18 Determination. *See* Pl.'s Request Administrative Review (June 30, 2020) ("Pl.'s Request Admin. Rev."), PR 420, CR 311. On September 24, 2020, Customs' Office of Trademark, Regulations, and Rulings issued its Final Determination, affirming the May 18 Determination. *See* Customs' Final Determination Aspects Furniture International, Inc. Enforce and Protect Act (EAPA) Case No. 7189 (Sept. 24, 2020) ("Final Administrative Determination" or "Final Admin. Determination") at 11, PR 429. Aspects filed this action in a timely manner. *See* Summons, ECF No. 1; Compl.

LEGAL FRAMEWORK FOR EAPA INVESTIGATIONS

19 U.S.C. § 1517 requires Customs to investigate allegations that an importer has evaded antidumping and countervailing duty orders. 19 U.S.C. § 1517. Evasion is defined as:

> [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.

Id.§ 1517(a)(5)(A). "Covered merchandise" is merchandise that is subject to an antidumping duty or countervailing duty order issued pursuant to 19 U.S.C. § 1673e or § 1671e. *Id.*§ 1517(a)(3).

Customs must initiate an investigation within 15 days of receiving an allegation that "reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion." *Id.* § 1517(b)(1). Once an investigation is initiated, Customs has 90 days to decide "if there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion" and, if so, to impose interim measures. *Id.* § 1517(e). Interim measures include: (1) "suspend[ing] the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation;" (2) "extend[ing] the period for liquidating each unliquidated entry of such covered merchandise that entered before the date of the initiation of the investigation;" and (3) "tak[ing] such additional measures as [Customs] determines necessary to protect the revenue of the United States. . . ." Id.

Customs must make a final determination within 300 calendar days after the initiation of the investigation. *Id.* § 1517(c)(1)(A). Customs' evasion determination must be based on substantial evidence. *Id.* Within 30 days of Customs' evasion determination, the person alleging evasion, or the person found to have engaged in evasion, may file an administrative appeal seeking *de novo* review of Customs' determination. *Id.* § 1517(f)(1). Judicial review may be sought within 30 days of Customs' determination on appeal. *Id.* § 1517(g)(1).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to section 517 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g),[2] and 28 U.S.C. § 1581(c), which grant the Court jurisdiction over actions contesting determinations of evasion pursuant to the EAPA statute. The Court reviews Customs' evasion determination for compliance with all procedures under 19 U.S.C. §§ 1517(c) and (f) and will hold unlawful "any determination, finding, or conclusion [that] is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(c)(1)(A); *id.* § 1517(g)(2).

[2] Congress amended 28 U.S.C. § 1581(c) to encompass EAPA cases via § 421(b) of Title IV of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 154, 168 (2016). All statutory citations herein are to the 2018 edition of the United States Code and all citations to regulations are to the 2020 edition of the Code of Federal Regulations.

DISCUSSION

I. Retroactive Application of EAPA

This case presents an issue of first impression for the U.S. Court of International Trade with respect to whether Customs may retroactively apply 19 U.S.C. § 1517 and 19 C.F.R. § 165.2 to entries made prior to the EAPA statute coming into force. In its May 18 Determination, Customs noted that the "EAPA regulations state explicitly that the investigation is retrospective, covering entries 'made within one year before the receipt of an allegation under § 165.11 or of a request for an investigation under § 165.14.'" May 18 Determination at 3 n.7. Based on this reasoning that the EAPA regulations allow an investigation to cover entries made one year before the initiation of the investigation, Customs extended this logic to include in its EAPA investigation entries made before the entry into force of the EAPA statute.

Aspects argues that Customs' retroactive application of the EAPA statute and regulations is unlawful for two reasons. First, Aspects argues that 19 C.F.R. § 165.2 does not "explicitly" state that investigations under EAPA are retroactive but, at best, implies retroactivity. Pl.'s Br. at 12. Second, Aspects argues that Customs' interpretation of the regulations contradicts Congress' intent and the clear language of the statute. *Id.* In support of this position, Aspects notes that the Trade Facilitation and Enforcement Act of 2015, which contains the EAPA statute, was enacted on February 24, 2016. *See* Pub. L. 114–125, 130 Stat. 122 (Feb. 24, 2016). The Trade Facilitation and Enforcement Act of 2015 provides that amendments made under Section 421(c), including the EAPA statute, "shall take effect on the date that is 180 days after the date of the enactment of this Act." *Id.* § 421, 130 Stat. at 168; 19 U.S.C. § 1517 note. Aspects argues that Congress intended the EAPA statute to enter into force on August 22, 2016, 180 days after the February 24, 2016 date of enactment, and that Customs lacked authority to initiate or conduct EAPA investigations prior to August 22, 2016. Pl.'s Br. at 12–13.

Defendant argues that Aspects' retroactivity argument is moot because the Government contends that all of Aspects' pre-EAPA entries that were subject to the investigation were liquidated on or before February 16, 2018. Def.'s Resp. at 12. Defendant also notes that Customs stated in the Final Administrative Determination that Customs relied "only on entries made after the effective date of EAPA." *Id.* (citing Final Admin. Determination at 8). Defendant contends that because the relevant entries have been liquidated and were not

considered in the Final Administrative Determination, the issue is moot and a ruling by the Court on Aspects' retroactivity argument would be merely advisory. *Id.* at 12–13.

Aspects counters that the retroactivity issue is not moot because at least fifteen pre-EAPA entries (entered between January 1, 2016 and the date the EAPA statute came into force on August 22, 2016) were included in the EAPA investigation and for which liquidation is currently suspended or extended. Pl.'s Reply Further Supp. Mot. J. Agency R. ("Pl.'s Reply") at 5, ECF Nos. 26, 27.

A. Whether Aspects' Argument is Moot

The Court is limited to resolving actual disputes and cannot render legal opinions that are merely advisory or hypothetical. *See Star Pipe Prods. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1200, 1217 (2019). Defendant argues that any ruling by the Court on Aspects' retroactivity argument would be an impermissible advisory opinion because all of Aspects' pre-EAPA entries were finally liquidated on or before February 16, 2018. Def.'s Resp. at 12–13. In support of this argument, Defendant cites to a list of 43 entries identified in Aspects' written arguments to Customs as entered between January 1, 2016 and August 22, 2016 and considered by Customs in the EAPA investigation. *Id.* at 12 (citing Aspects' Submission Written Arguments EAPA Investigation 7189 (Feb. 10, 2020) ("Pl.'s Written Arguments") at 19–20, PR 404, CR 306). Aspects asserts in its written arguments that the list of entries from before the date of the EAPA statute's entry into force on August 22, 2016 was not exhaustive. *See* Pl.'s Written Arguments at 20 ("Aspects has identified that the following entries, *at a minimum*, were improperly included under this EAPA Investigation and reviewed by [Customs] in accordance." (emphasis in original)). Aspects contends that it has confirmed that liquidation of at least fifteen of its pre-EAPA entries remains suspended or extended. Pl.'s Reply at 5.

Because it appears that Customs included at least fifteen of Aspects' entries in the EAPA investigation that were entered before the date that the EAPA statute took effect, the Court observes that Customs will likely apply the Final Administrative Determination to some pre-EAPA entries for which liquidation is currently suspended or extended and some pre-EAPA entries that are subject to reliquidation. The Court concludes that Aspects' argument regarding retroactivity is not moot.

B. Retroactivity of EAPA Investigations

Customs' regulation 19 C.F.R. § 165.2 provides:

> Entries that may be the subject of an allegation made under § 165.11 or a request for an investigation under § 165.14 are those entries of allegedly covered merchandise made within one year before the receipt of an allegation under § 165.11 or of a request for an investigation under § 165.14. In addition, at its discretion, [Customs] may investigate other entries of such covered merchandise.

19 C.F.R. § 165.2. Customs received AFMC's Allegation on April 6, 2017 and formally initiated its EAPA investigation on May 9, 2017. *See* AFMC's Allegation; Initiation Mem. In its Notice of Investigation and Interim Measures, Customs advised Aspects that Customs was already reviewing Aspects' entries for the 2016 calendar year for potential evasion of antidumping duties before AFMC's Allegation was filed. Notice of Investigation and Interim Measures at 1–2. In the May 18 Determination, Customs stated that EAPA regulations "explicitly" provide that an EAPA investigation "is retrospective, covering entries 'made within one year before the receipt of an allegation under § 165.11 or of a request for an investigation under § 165.14.'" May 18 Determination at 3 n.7. Aspects argues that this interpretation is unlawful because it would potentially include Aspects' entries made before the EAPA statute entered into force. Pl.'s Br. at 11–13.

The Court disfavors reading statutes retroactively when such application would impair a party's rights, increase liability for prior conduct, or impose a new duty for a transaction already completed. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). It is a rule of general application that a statute will only be given retroactive effect if required by either (1) the express language of the statute or (2) necessary implication. *Id.*; *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1349 (Fed. Cir. 2015).

The Court applies a sequential analysis when considering the retroactive application of a statute. First, the Court considers "whether Congress has expressly prescribed the statute's proper reach." *Fernandez-Vargas*, 548 U.S. at 37 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). In the absence of clear language, the Court applies its normal rules of statutory interpretation to decipher the statute's temporal reach. *Id.* (citing *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). If the scope of the statute remains unclear, the Court considers "whether applying the statute to the person objecting

would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Id.* (quoting *Landgraf*, 511 U.S. at 278)).

In this case, the intent of Congress is clear from the express language of the Act. The Trade Facilitation and Enforcement Act of 2015, which contains the EAPA statute, was enacted on February 24, 2016. *See* Pub. L. 114–125, 130 Stat. 122 (Feb. 24, 2016). The EAPA statute states that "[t]he amendments made by this section shall take effect on the date that is 180 days after the date of the enactment of this Act." *Id.* § 421(c), 130 Stat. at 168; 19 U.S.C. § 1517 note. Pursuant to this provision, the statutory language makes it clear that Congress intended for the EAPA statute to take effect on August 22, 2016, 180 days after February 24, 2016 when the Trade Facilitation and Enforcement Act of 2015 was enacted.

Nothing in the language of the statute implies that Customs was authorized to take any investigatory action or affect entries prior to the EAPA statute coming into force. The statutory language concerning covered merchandise, entry, evasion, and investigations does not specify that merchandise entered prior to the EAPA statute taking effect may be included in an EAPA investigation. *See* 19 U.S.C. §§ 1517(a)(3)–(5), (b). The statutory provisions addressing interim measures and the "effect of determinations" language may provide Customs with the authority to extend the period for liquidating unliquidated entries that "entered before the date of the initiation of the *investigation*," *see id.* § 1517(d)(1)(B) (emphasis added); *id.* § 1517(e)(2), but there is nothing in the statute to suggest that Customs' investigative authority extends to entries made prior to the EAPA statute coming into force.

Furthermore, the Court is persuaded by the fact that permitting retroactive application of the EAPA statute to entries that pre-date the EAPA statute's taking effect would result in a disfavored consequence to the rights and liabilities of importers, who would be potentially liable for conduct that arose from entering merchandise prior to the EAPA statute's entry into force, without notice that such conduct could be violative of a law that had not yet taken effect. *See Fernandez-Vargas*, 548 U.S. at 37 (retroactive application of a statute is disfavored when the consequence affects substantive rights, liabilities, or duties on the basis of conduct arising before the statute's enactment). The Court recognizes that an importer's obligation to provide truthful information to Customs predates the EAPA statute, but the EAPA statute created new liabilities for pre-EAPA conduct through expressly defining the act of evasion, mandating that Cus-

toms investigate allegations of evasion, and imposing interim measures based on a reasonable suspicion prior to a final determination. *See* 19 U.S.C. §§ 1517(a)(5), (b), (e).

Because the language is clear that the EAPA statute entered into force on August 22, 2016, 180 days after the Trade Facilitation and Enforcement Act of 2015 was enacted, the Court concludes that Customs' interpretation of 19 C.F.R. § 165.2 is unlawful because the retroactive application of this regulation would effectively allow an EAPA investigation to affect conduct and entries made prior to the EAPA statute entering into force. The Court holds that an EAPA investigation may not include merchandise entered prior to the EAPA statute's date of entry into force on August 22, 2016. The Court remands this case for Customs to clarify its determination consistent with this opinion with respect to Aspects' entries made prior to the EAPA statute's entry into force.

II. Consideration of Evidence Related to Document Destruction

Aspects argues that Customs' May 18 Determination and Final Administrative Determination were based on impermissible hearsay evidence. Pl.'s Br. at 13–14. Aspects contends that in both the May 18 Determination and Final Administrative Determination, Customs relied on statements in the Verification Report alleging that Aspects' employees were observed deleting and destroying documents and correspondence.[3] *Id.* at 13; *see also* May 18 Determination at 7–8 (citing Verification Report at 16). Because the Verification Report was seemingly based on the observations of Customs' employees and was prepared after the verification visit, Aspects contends that the included statements constitute hearsay under the Federal Rules of Evidence. Pl.'s Br. at 13; *see also* Fed. R. Evid. 801, 802. Aspects argues that no established hearsay exception applies to the statements and that they should not have been relied on by Customs. Pl.'s Br. at 13.

[3] Although Aspects claims that Customs relied heavily on the Verification Report in both the May 18 Determination and Final Administrative Determination with regard to allegations that Aspects' employees destroyed evidence, the Final Administrative Determination does not emphasize this point. *See* Pl.'s Br. at 13. In fact, Customs noted:

> Aspects has only focused on one piece of evidence which arose during the verification—namely, the destruction of evidence by an employee during the visit to Aspects' Nantong satellite office—to discredit the finding of evasion. Even without this destruction of evidence, the administrative record *still* contains substantial evidence of actions taken by Aspects to underpay or avoid the payment of [antidumping] duties.

Final Admin. Determination at 8 (emphasis in original).

Aspects also argues that Customs abused its discretion in not considering affidavits offered by Aspects in support of its June 30, 2020 Request for Administrative Review that addressed the allegations of document destruction. *Id.* at 14; *see also* Pl.'s Request Admin. Rev. at Exs., 1, 2. Aspects contends that even if these documents were untimely, consideration would not have been burdensome, and the documents should have been considered in order to have a complete record. Pl.'s Br. at 14.

Defendant asserts that the Federal Rules of Evidence are not applicable in proceedings before Customs and that the Administrative Procedures Act ("APA") governs the admissibility of evidence in administrative proceedings. Def.'s Resp. at 13. Defendant contends that under the APA, hearsay evidence is admissible in administrative proceedings as long as it is not irrelevant, immaterial, or unduly repetitious and that evidence that meets the APA standard may be considered in light of its truthfulness, reasonableness, and credibility. *Id.*

Defendant also argues that Aspects' affidavits were properly excluded because they were untimely and not based on facts already in the record. *Id.* at 14–15. Defendant contends that the proposed affidavits do not actually deny the allegations of document destruction and that Aspects has failed to provide a compelling reason to permit the untimely submissions. *Id.* at 14, 16.

A. Hearsay

Aspects contends that statements relied on by Customs regarding Customs' officials observing instances of document destruction by Aspects' employees constituted inadmissible hearsay and should have been disregarded. Pl.'s Br. at 13–14. Defendant does not dispute that the statements made by Customs officials and offered to prove that Aspects' employees destroyed documents during the verification visit meet the definition of hearsay, an out of court statement made by a declarant that is offered as evidence to prove the truth of the matter asserted in the statement. *See* Fed. R. Evid. 801. Rather, Defendant contends that those statements are admissible under the APA. Def.'s Resp. at 13–14.

Unlike trials before a federal court that are governed by the Federal Rules of Evidence, evidence in proceedings before federal agencies is admitted in accordance with the APA. *Anderson v. United States*, 16 CIT 324, 327, 799 F. Supp. 1198, 1202 (1992); *Tarnove v. Bentsen*, 17 CIT 1324, 1326 (1993). Under the APA, "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repeti-

tious evidence." 5 U.S.C. § 556(d). The APA empowers those presiding over administrative hearings to "rule on offers of proof and receive relevant evidence." *Id.* § 556(c)(3). Hearsay evidence in administrative proceedings is "admissible up to the point of relevancy." *Richardson v. Perales*, 402 U.S. 389, 410 (1971). If evidence meets this standard, it may be considered "in light of its truthfulness, reasonableness, and credibility." *Anderson*, 16 CIT at 327, 799 F. Supp. at 1202 (internal quotation omitted). It is left to the agency to determine the reliability of evidence and the weight to which it should be assigned. *Tarnove*, 17 CIT at 1327.

Customs' verification team visited sites in China in April 2018. Verification Report at 3. Customs prepared and revised the Verification Report, which included a description of two instances of document destruction. *Id.* at 1, 16–17. In the first instance, Customs officials described a request made to an Aspects Nantong employee to demonstrate how he designed container loading plans. *Id.* at 16. While waiting to view samples, the verification team observed the employee deleting a chat record of conversations with a representative of Wuxi Yushea. *Id.* In the second instance, Customs officials described a member of the verification team observing the same Aspects employee deleting dozens of files from his computer. *Id.* at 17.

In the May 18 Determination, Customs noted "multiple instances in which one employee involved with the commingling process was observed deleting and destroying information when such commingling was under discussion." May 18 Determination at 4 (citing Verification Report at 16–17). Customs noted that:

> These multiple examples of destruction of information during attempted verification of merchandise from multiple suppliers being organized in the same individual containers relates [sic] to the issue of whether or not specific merchandise imported by Aspects could be linked to specific manufacturers, which is of critical importance with regard to the appropriate cash deposit rates.

Id. at 7–8.

Evidence in an administrative proceeding is "admissible up to the point of relevancy." *Richardson*, 402 U.S. at 410. Aspects does not argue that the challenged evidence is irrelevant. In its Request for Administrative Review, Aspects indicated that it "does not accept *any* part of [Customs'] accusation as accurately reflecting what transpired during the [v]erification [v]isit at Aspects Nantong" and characterized Customs' conclusions as careless. Pl.'s Request Admin. Rev. at 9 (emphasis in original). Aspects challenged the Verification Report's

failure to identify the official or officials who observed the alleged document destruction and the lack of evidentiary support from any other record documents, particularly evidence prepared contemporaneously with the alleged incident underlying the evasion determination. *Id.* at 9–10. Customs acknowledged Aspects' arguments in the Final Administrative Determination but did not address them substantively, stating only that "[e]ven without this destruction of evidence, the administrative record *still* contains substantial evidence of actions taken by Aspects to underpay or avoid the payment of [antidumping] duties." *See* Final Admin. Determination at 6, 8. The Court observes that Customs did not provide any analysis about the truthfulness, reasonableness, or credibility of the disputed evidence in weighing the accounts of the Verification Report, though Customs asserted that the evidence was not needed to establish substantial evidence of evasion. The Court concludes that Customs' decision to disregard Aspects' affidavits was not arbitrary or capricious, but because the Court remands this case on other issues, Customs may decide to provide further explanation regarding the truthfulness, reasonableness, or credibility of the evidence in dispute.

B. Disregarded Affidavits

Aspects submitted two affidavits with its June 30, 2020 Request for Administrative Review addressing the allegations of document destruction. Pl.'s Request Admin. Rev. at Exs. 1, 2. In the Final Administrative Determination, Customs' Office of Trade, Regulations & Rulings rejected the two affidavits as unrequested new evidence. Final Admin. Determination at 8 n.29. Aspects argues that Customs' determination to disregard the affidavits was an abuse of discretion because even if the documents were submitted untimely, consideration would not have been burdensome. Pl.'s Br. at 14. Defendant disagrees and asserts that the submissions were properly excluded as untimely and irrelevant. Def.'s Resp. at 14–16.

Part 165 of 19 C.F.R. sets forth the regulatory procedures that govern the investigation of claims of evasion of antidumping and countervailing duties. *See generally* 19 C.F.R. § 165. Customs stated in the Final Administrative Determination that Aspects' affidavits were rejected in part because parties may only submit new information in response to a request by Customs pursuant to 19 C.F.R. § 165.44. Final Admin. Determination at 8 n.29. A review of 19 C.F.R. § 165.44 does not support Customs' proposition that the only manner in which information may be submitted is in response to a request by Customs. Rather, 19 C.F.R. § 165.44 states that "[Customs] may request additional written information from the parties to the inves-

tigation at any time during the review process." 19 C.F.R. § 165.44. The section then describes a process by which the parties must comply with certain requirements, such as providing a public version in English and in writing. *See id.* §§ 165.4, 165.6, 165.44. The Government does not defend Customs' position that the only manner in which information may be submitted to Customs is upon request pursuant to 19 C.F.R. § 165.44. Defendant instead acknowledges that parties may submit voluntary information under the EAPA regulations within certain time limits, including a process by which to submit rebuttal information. Def.'s Resp. at 14–16; *see* 19 C.F.R. § 165.23. Defendant contends that Aspects' affidavits were submitted untimely after the 200 calendar days after which Customs initiated the investigation. Def.'s Resp. at 14–15; *see* 19 C.F.R. § 165.23(c)(2). 165.23(c)(2).

The affidavits submitted with Aspects' Request for Administrative Review describe the accounts and impressions of two Aspects employees who were present during the verification visit at which the alleged document destruction occurred. Pl.'s Request for Admin. Rev. at Exs. 1, 2. Aspects does not attempt to argue that the affidavits were submitted timely, contending in its brief only that "[e]ven if these declarations are found by this Court to have been submitted untimely under EAPA or its implementing regulation, it would not have been burdensome for [Customs] to incorporate such declarations. . . ." Pl.'s Br. at 14. Aspects does not dispute the Government's argument that the affidavits were submitted "more than 18 months too late," well after the 200-day deadline set forth in the relevant EAPA regulations. Def.'s Resp. at 15.

The EAPA statute and its regulations impose timelines for investigations. Parties must make voluntary submissions of factual information by "no later than 200 calendar days after [Customs] initiated the investigation." 19 C.F.R. § 165.23(c)(2). Voluntary submissions after the 200th calendar day are not considered or placed on the administrative record. *Id.* If new factual information is placed on the record, parties to the investigation may provide rebuttal information within ten calendar days of the new factual information being placed on the record or served. *Id.*

The Government argues that the deadline for voluntary submissions was December 7, 2018. Def.'s Br. at 15. In calculating the submission deadline, the Government used August 14, 2017 as the initiation date of the EAPA investigation. *Id.*; *cf.* Notice of Investigation and Interim Measures at 1, 2 (Customs sent a letter to Aspects dated August 14, 2017, which advised that the investigation was commenced on May 9, 2017). Assuming that Defendant's August 14,

2017 date for the initiation of the investigation is correct, the deadline for voluntary submission was December 7, 2018. Aspects submitted the two affidavits in dispute on June 20, 2020, which the Government notes "was more than 18 months too late." Def.'s Resp. at 15. Aspects has not alleged that new factual information was placed on the record triggering an additional opportunity to submit rebuttal information under 19 C.F.R. § 165.23(c)(2).

Aspects does not dispute that its affidavits were filed late. Aspects argues that even if the submissions were untimely, Customs had an obligation to consider the affidavits if doing so was not unduly burdensome. Pl.'s Br. at 14. In support of its argument, Aspects cites *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 36 CIT 98, 815 F. Supp. 2d 1342 (2012), and *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995), without additional analysis. Pl.'s Br. at 14.

Administrative agencies have discretion in establishing and enforcing deadlines, but such discretion is not absolute. *Grobest & I-Mei Indus. (Vietnam) Co.*, 36 CIT at 122–23, 815 F. Supp. 2d at 1365–67. When considering whether Customs abused its discretion in rejecting an untimely filing, the Court considers the goal of the relevant statute, weighs the burden placed on the agency by accepting the late submission, and weighs the finality at the final results stage. *Id.*

In considering the goals of the EAPA statute, the Court notes that the statute permits Customs only 60 days to complete its review of a determination. 19 U.S.C. § 1517(f)(2). The statute also imposes deadlines for Customs to initiate an investigation, issue its determination, and enact interim measures, while limiting the extension of the deadline for issuing a determination to 60 days under specific circumstances. *Id.* §§ 1517(b)(1), (c), (e). These deadlines suggest a Congressional intent that EAPA investigations should proceed in a timely manner.

Furthermore, the Court notes that the affidavits do not challenge the allegations of document destruction in a dispositive way. The first affidavit was prepared by an Aspects employee who was asked to provide documents during the verification visit. Pl.'s Request Admin Rev. at Ex. 1. The affidavit does not deny the allegations that files were deleted or destroyed, but the affidavit alleges that the Customs official observing the Aspects employee was "not satisfied" with the employee's "operation and speed of printing" and "said a few words of complaint." *Id.* The second affidavit was also prepared by an Aspects employee present during the verification visit. *Id.* at Ex. 2. The second affidavit does not expressly deny the allegation of document destruction, but poses the rhetorical question "[w]ould anyone be so stupid to

delete any data under the eyes of an investigator?" *Id.* The affidavit also opines that the Customs investigators concluded that documents were destroyed "based on their own assumption" and that the Aspects employees "don't know where this '[d]eleting documents' is coming from." *Id.* Based on the content alleged in the affidavits, the Court notes that the facts in the affidavits do not appear to be the type of information that, if considered, likely would have resulted in the agency reaching a different conclusion. *Grobest*, 36 CIT at 122–23, 815 F. Supp. 2d at 1365–67.

The Court observes that Aspects has not disputed the Government's contention that the affidavits were filed more than 18 months late. Because Customs followed the relevant EAPA time limits and Aspects does not present compelling reasons to justify deviation from the statutory and regulatory deadlines, other than vague assertions that it would not have been burdensome for Customs to consider the information or that the information would have completed the record before Customs, the Court concludes that Customs did not abuse its discretion in rejecting the untimely affidavits filed more than 18 months late. The Court sustains Customs' rejection of the two affidavits from the record.

III. Customs' Evasion Determination

Under the EAPA statute, Customs must support its determination of evasion with substantial evidence. 19 U.S.C. § 1517(c)(1)(A). For an affirmative evasion determination, three elements are required: (1) that the subject entries were covered merchandise at the time they entered the customs territory of the United States; (2) that the subject entries were made by a materially false statement or act or material omission; and (3) that the false statement or omission resulted in a reduction or avoidance of applicable cash deposits or other security. *Id.* § 1517(a)(5)(A); *Diamond Tools Tech. LLC v. United States* ("*Diamond Tools*"), 45 CIT __, __, 545 F. Supp. 3d 1324, 1347 (2021). Aspects does not contest the second factor that its entries were made by materially false statements or acts or material omissions. Aspects challenges only the first and third elements, arguing that Customs failed to establish with substantial evidence that the entries were covered merchandise and that any reporting misrepresentations or omissions resulted in an avoidance of applicable duties.

A. Party Positions Regarding Covered Merchandise

Aspects argues that Customs failed to establish with substantial evidence which of Aspects' entries were covered merchandise at the time of entry. Pl.'s Br. at 14–18. Specifically, Aspects alleges that Customs disregarded Commerce's scope ruling that certain merchan-

dise was not covered by the Order and that Customs included the uncovered merchandise improperly in Customs' Final Administrative Determination. *Id.* at 16–17. Aspects also argues that the scope determination should not have been applied retroactively and that those entries determined to be covered merchandise were not covered prior to the review being initiated. Id. at 17–18.

Defendant counters that Aspects waived its ability to challenge the inclusion of non-covered merchandise and covered merchandise that entered prior to the scope review by failing to raise the arguments in Aspects' Request for Administrative Review. Def.'s Resp. at 16–17. Defendant contends that if the arguments were not waived, because Aspects' entry documents were "replete" with misstatements about the nature of merchandise and a thorough cargo examination is no longer possible, Customs is not capable of determining whether each individual entry contained covered merchandise. *Id.* at 16–17. Defendant also argues that Aspects' entries of covered merchandise made prior to the scope referral were considered properly by Customs. *Id.* at 18–19.

B. Waiver of Aspects' Argument

Defendant contends that Aspects waived its ability to challenge in court Customs' failure to distinguish between covered and non-covered merchandise and consideration of covered merchandise that entered prior to Commerce's scope referral by not expressly raising the arguments in Aspects' Request for Administrative Review. Def.'s Resp. at 16–17. Aspects asserts that it raised these issues in its Written Arguments to Customs, in which it argued that entries of imported merchandise determined by Customs to not be covered by the Order—item G-200 (desk/console table with drawers), items G-208L and G-208R (TV cabinet with a minibar), item G-207 (trunk storage unit), and item GF-200 (bed bench base)—could not be considered for purposes of the EAPA investigation. Pl.'s Written Arguments at 25–26. Aspects identified seven entries that it attested did not contain covered merchandise and should have been disregarded by Customs in making the evasion determination. *Id.* at 26. Aspects also argued that entries of covered merchandise made prior to Commerce's scope referral should have been excluded because the Scope Ruling could only apply prospectively. *Id.* Aspects identified seven entries that should have been disregarded on this ground. *Id.* at 27.

In its Request for Administrative Review, Aspects attempted to incorporate by reference the arguments raised in its prior written submissions, stating: "because this Administrative Appeal must be

reviewed by [Customs] *de novo*, and due to space limitations applicable to it, we refer to and incorporate by reference, as if fully stated herein, Aspects' Written Argument and Response submissions." Pl.'s Request Admin. Rev. at 8. Aspects now argues that this effort was sufficient to preserve the argument before the Court. Pl.'s Reply at 8–9.

Parties are procedurally required to raise arguments before the administrative agency at the time the agency is considering the issue. *Dorbest Ltd. v.* United States, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (quoting *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)). When filing its Request for Administrative Review, Aspects was required to include a statement of "[t]he argument expressing clearly and accurately the points of fact and of law presented and citing the authorities and statutes relied on." 19 C.F.R. § 165.41(f)(5).

In its Written Arguments to Customs, Aspects articulated its factual and legal arguments regarding consideration of the merchandise included in the scope review. Pl.'s Written Arguments at 25–28. Aspects incorporated these previous written arguments into its subsequent Request for Administrative Review, although only satisfying the requirement minimally, by identifying the prior Written Arguments to Customs and incorporating the submission by reference "as if fully stated." Pl.'s Request Admin. Rev. at 8. Aspects' incorporation by reference was clear enough for Customs to note in the Final Administrative Determination that "Aspects incorporated those arguments made in its Written Argument submitted during the course of the EAPA investigation, which both expound upon arguments made in the Request for Administrative Review and include different arguments regarding the lawfulness of AFMC's allegation." Final Admin. Determination at 6 n.19. Despite this acknowledgement, Customs did not address Aspects' arguments regarding the inclusion of merchandise determined to be not covered by the Order or of merchandise determined to be covered by Commerce but entered prior to the scope referral. Rather, Customs stated incorrectly that, "[i]ndeed, Aspects has not disputed that the importations consist of covered merchandise." *Id.* at 8. Because Aspects sufficiently fulfilled the requirement under 19 C.F.R. § 165.41(f)(5) to include a statement of the argument expressing clearly and accurately the points of fact and of law presented and citing the authorities and statutes relied on when Aspects incorporated by reference its Written Arguments in its

Request for Administrative Review, the Court concludes that Aspects did not waive its right to raise those arguments before this Court.[4]

C. Commerce's Scope Ruling

Plaintiff argues that Customs erred by considering merchandise in the EAPA investigation that had been determined by Commerce in a referral scope ruling to not be covered by the Order. Pl.'s Br. at 16–17. Defendant contends that Customs was justified in considering entries of merchandise determined to not be covered by the Order because Customs determined that evidence demonstrated Aspects' misrepresentations and Customs was unable to perform a thorough examination of each entry. Def.'s Resp. at 17–18. In essence, Defendant argues that Customs should be permitted to disregard Commerce's scope referral determination because Aspects' entry documents were "replete" with misstatements about the nature of merchandise, a thorough cargo examination is no longer possible, Customs is not capable of determining whether each individual entry contained covered merchandise, and therefore Customs should be permitted to consider most of Aspects' entries as covered merchandise, notwithstanding Commerce's referral determination that certain product categories were outside the scope of the Order. *Id.* at 16–17.

The products covered by the relevant Order are wooden bedroom furniture. Final Scope Ruling at 2. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and same material and/or finish. *Id.* During the EAPA investigation, pursuant to 19 U.S.C. § 1517(b)(4), Customs referred to Commerce the question of whether certain of Aspects' merchandise was covered by the Order. *See* Customs' Scope Referral Request Mem. (seeking a covered merchandise referral because Customs was unable to determine from the scope language whether the following pieces of furniture are 'incorporated in' or 'attached to' subject merchandise, or are otherwise subject to the Order: (1) a desk/console table with drawers (G-200); (2) TV credenzas/dressers (G-206(1) and G-206(2)); (3) a TV cabinet with minibar (G-208L and G-208R); (4) trunk storage (G-207); (5) a console/custom dresser (GF-103L and GF-103R); and (6) a bed bench base (GF-200)). Customs' Scope Referral Request included a general

[4] Aspects explained that page limitations prompted its strategy of incorporating prior arguments by reference. Pl.'s Request Admin. Rev. at 8. A request for administrative review may not exceed 30 pages. 19 C.F.R. § 165.41(f). Aspects' request was only 21 pages excluding exhibits and 38 pages including exhibits. *See* Pl.'s Request Admin. Rev. Even though the Court concludes that Aspects sufficiently incorporated its prior arguments by reference, the Court cautions the Parties to articulate their administrative arguments clearly in order to avoid similar disputes of waiver in the future.

description of the investigation and requested a determination as to whether the identified items "are 'incorporated in' or 'attached to' subject merchandise, or are otherwise subject to the order." *Id.* at 1–2. The Scope Referral Request was accompanied by sample entry documents, photos, and diagrams. *See* Customs' Scope Referral Attachments A–F, PR 285–93, CR 226–34; Customs' Supp. Scope Referral Attachments, PR 374–79, CR 296–301. Customs also provided explanations for why it was unable to determine whether the items were within the scope of the Order. Customs' Scope Referral Request Mem. at 2–3. For some items, Customs acknowledged inconsistencies in Aspects' descriptions of the items in entry documents. For example, in describing one item, Customs noted:

> Although referred to as a desk on the entry documentation, [the item] is referred to as a console table with operable and decorative drawers on the invoices to [Aspects'] customer. According to [Aspects], it imports desks from China to be placed in a hospitality room/hotel room along with matching wooden bedroom furniture such as dressers, headboards and night stands. The desks are not always imported on the same entry with the wooden bedroom furniture. However, we note that the desks are the same material and finish as the bedroom furniture and are being sold to the same U.S. customer.

Id.; *see also* Customs' Supp. Scope Referral Request for certain wooden bedroom furniture under EAPA Investigation 7189, imported by Aspects (July 24, 2019) ("Customs' Supp. Scope Referral") at 1–2, PR 380, CR 302.

Commerce issued its Final Scope Ruling on December 31, 2019, which included analyses of each of the six categories of furniture in the context of the relevant scope language, photos of the subject merchandise that were provided in Customs' covered merchandise referral, summaries of comments from interested parties (including Aspects), and multiple attachments totaling over 600 pages. *See* Final Scope Ruling. In considering the intended purpose of the items under review, Commerce noted the inconsistent descriptions listed on entry documents, including purchase orders and invoices. *See id.* at 16, 18–19, 31–32. Commerce concluded that four of the products reviewed—G-200 (desk/console table with drawers), G-208L and G-208R (TV cabinet with a minibar), G-207 (trunk storage unit), and GF-200 (bed bench base)—were not within the scope of the Order. *See id.* at 1, 9, 24, 27, 33–34. Commerce concluded that two of the products reviewed—G-206(1) and G-206(2) (TV credenzas/dressers) and GF-103L and GF103R (console/custom dresser)—were within the

scope of the Order. *Id.* at 1, 16– 17, 19, 32, 34. In reaching its determination, Commerce found "an analysis of the scope language and information from the Petition, the [] investigation, and prior scope rulings, which are the types of information examined pursuant to 19 C.F.R. § 351.225(k)(1), [to be] dispositive with respect to the items covered in [Customs'] covered merchandise referral." Id. at 7. Commerce also noted that its determination relied on its "written description of the scope" and not HTSUS subheadings. *Id.* at 5.

In the May 18 Determination, Customs stated:

> [w]ith regard to products Commerce found outside of the scope based on product descriptions, in various instances during verification [Customs] found discrepancies in the identification of merchandise associated with actual entries, such "that the descriptions of merchandise on documentation submitted by Aspects often differed from those documents submitted by the manufacturers," as described above. Although Aspects may have correctly classified certain imported products as type 03, [Customs] found discrepancies, such as those relating to the identification of the producers of specific merchandise, supporting a conclusion that applicable antidumping duties were underpaid.

May 18 Determination at 8. The Final Administrative Determination did not directly address this point, stating only:

> A review of the administrative record shows that, to the extent they are not excluded pursuant to Commerce's Scope Ruling, the furniture items involved in these importations are covered merchandise, as they are pieces of [wooden bedroom furniture] from China, including, but not limited to, nightstands, dressers, armoires, and headboards. Indeed, Aspects has not disputed that the importations consist of covered merchandise.

Final Admin. Determination at 8. The Final Administrative Determination affirmed the May 18 Determination of evasion that applied to all merchandise entered by Aspects on or after May 9, 2017 (covering merchandise both within and outside the scope of the Order). *Id.* at 11.

An element of evasion is that merchandise entering the United States be covered by an antidumping or countervailing duty order. 19 U.S.C. §§ 1517(a)(3), (a)(5)(A). The EAPA statute in 19 U.S.C. § 1517(b)(4)(A) sets forth a process by which Customs shall make a referral to Commerce if Customs cannot determine whether the subject merchandise is covered by an antidumping order:

> If [Customs] receives an allegation under paragraph (2) and is unable to determine whether the merchandise at issue is covered merchandise, [Customs] shall –
> (i) refer the matter to the administering authority [Commerce] to determine whether the merchandise is covered merchandise pursuant to the authority of the administering authority [Commerce]. . . .

Id. § 1517(b)(4)(A)(i).

The EAPA statute in 19 U.S.C. § 1517(b)(4)(B) states that Commerce shall be the appropriate agency to make a covered merchandise determination, which is transmitted to Customs: "[a]fter receiving a referral under subparagraph (A)(i) with respect to merchandise, the administering authority [Commerce] shall determine whether the merchandise is covered merchandise and promptly transmit that determination to [Customs]." 19 U.S.C. § 1517(b)(4)(B).

19 U.S.C. § 1517(b)(4)(D) also states that parties may file a complaint in the U.S. Court of International Trade to contest a referral determination by Commerce: "[n]othing in this paragraph shall be construed to affect the authority of an interested party to commence an action in the United States Court of International Trade under section 1516a(a)(2) of this title with respect to a determination of the administering authority [Commerce] under this paragraph." *Id.* § 1517(b)(4)(D).

In this case, "[Customs] determined it was unable to determine whether several of the many products at issue are covered merchandise, and pursuant to 19 U.S.C. § 1517(b)(4) and 19 C.F.R. § 165.16, [Customs] referred this matter to the Commerce Department for a scope determination." May 18 Determination at 3. After receiving the referral request from Customs pursuant to 19 U.S.C. § 1517(b)(4)(A)(i), Commerce determined that four product categories imported by Aspects were not covered by the Order and two product categories were covered by the Order. Final Scope Ruling at 1, 34. Despite Commerce's Final Scope Ruling to the contrary, Customs decided to include the non-covered merchandise in its EAPA review because Customs concluded on its own that Aspects had provided unreliable product descriptions and had underpaid applicable antidumping duties. May 18 Determination at 8–9. Customs explained:

> With regard to products Commerce found outside of the scope based on product descriptions, in various instances during verification [Customs] found discrepancies in the identification of merchandise associated with actual entries, such "that the descriptions of merchandise on documentation submitted by As-

> pects often differed from those documents submitted by the manufacturers," .... Overall, the nature of the problems with the record responses in this investigation are broad enough to undermine the reliability of Aspects' reported entry information.

Id. at 8–10. In the Final Administrative Determination, Customs apparently continued to include merchandise in the EAPA investigation that Commerce had deemed to be outside the scope of the Order, when Customs affirmed the May 18 Determination and applied the EAPA evasion determination to all of Aspects' entries. Final Admin. Determination at 11–12 (notwithstanding contrary language in the Final Administrative Determination stating: "A review of the administrative record shows that, to the extent they are not excluded pursuant to Commerce's Scope Ruling, the furniture in these importations are covered merchandise"); *id.* at 8.

The Court concludes that Customs' inclusion of merchandise in the EAPA investigation that had been determined by Commerce to be outside the scope of the Order is contrary to law because the EAPA statute does not permit Customs to include merchandise that is not covered by the scope of the Order. 19 U.S.C. § 1517(c)(1)(A). The Court notes that the EAPA statute states clearly that Commerce, not Customs, is the appropriate administering authority to issue a referral determination of whether merchandise is covered or not. *Id.* § 1517(b)(4)(A)(i), (B). Allowing Customs to override and disregard a statutorily authorized Final Scope Ruling by the administering authority would be contrary to law because this would effectively substitute Customs as the administering authority rather than Commerce. *Id.* § 1517(b)(4)(A)(i).

In attempting to defend Customs' rejection of Commerce's Final Scope Ruling, Defendant cites to 19 U.S.C. § 1517(c)(3), which permits Customs to use adverse inferences when a party or person is determined to have "failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information." Def.'s Resp. at 18; 19 U.S.C. § 1517(c)(3). Customs did not indicate, however, that it was drawing an adverse inference pursuant to 19 U.S.C. § 1517(c)(3) based on Aspects' failure to cooperate with the EAPA investigation, so this argument is inapposite. Rather, Customs stated in the May 18 Determination that Customs included merchandise in the EAPA investigation that had been deemed to be outside the scope of the Order by Commerce because Customs found discrepancies in the documentation provided by Aspects.

For referrals to Commerce, 19 C.F.R. § 165.16 states that, "[t]he referral may contain any necessary information available to [Cus-

toms] regarding whether the merchandise described in an allegation is subject to the relevant [antidumping/countervailing duty] orders." 19 C.F.R. § 165.16(b). In this case, Customs defined the parameters of the scope referral to Commerce. *See* Customs' Supp. Scope Referral at 1–3 (referring to attached product descriptions, sample invoices, purchase orders, photographs, specification descriptions, sample sales, and entry documentation, among other information referenced in Customs' scope referral request to Commerce). According to Customs, information on the record included:

> copies of entry packages related to 2016 [and 2017] entries, to include the entry summary, commercial invoice, purchase order, proof of payment to the supplier, accounting records, broker bill, bill of lading, packing list, specification sheets, photos of the merchandise, and manufacturer name and address, as well as any evidence establishing that the identified manufacturer produced the goods (production records, purchase invoices, *etc*.). . . . Further, [Customs] conducted a site visit to Aspects' facility and met with company representatives....

May 18 Determination at 2.

Customs determined that the information provided by Aspects was allegedly inaccurate and that entries with documentation marked as merchandise outside the scope of the Order may have actually contained covered merchandise. *See*, *e.g.*, Final Admin. Determination at 7–10 ("The administrative record in this case is replete with examples of the different ways in which Aspects manipulated shipments of covered merchandise in ways that would affect the [antidumping] duties applied to each entry and would therefore indicate evasion."). Customs identified numerous examples of discrepancies in documentation and drew the general conclusion that, "[o]verall, the nature of the problems with the record responses in this investigation are broad enough to undermine the reliability of Aspects' reported entry information." May 18 Determination at 4–10. Based on its own observations, Customs decided to ignore Commerce's Final Scope Ruling and instead determined that Customs "will continue to suspend the liquidation for any entry imported by Aspects that has entered on or after May 9, 2017, the date of initiation." *Id.* at 10. Presumably any information regarding discrepancies in entry paperwork and actual entry merchandise were submitted to Commerce during the scope referral, however, so that Commerce could consider all relevant information about Aspects' entries in its scope ruling.

Despite the fact that Customs itself provided the information to Commerce in the scope referral request, Customs disregarded Com-

merce's Final Scope Ruling and included merchandise in the EAPA investigation that Commerce had determined to be outside the scope of the Order. The Court concludes that Customs cannot disregard Commerce's Final Scope Ruling that Customs requested pursuant to the EAPA statute, nor can Customs substitute itself as the administering authority contrary to statute, simply because Customs disagrees with Commerce's Final Scope Ruling. The EAPA statute is clear that Commerce is the administering authority to determine whether the subject merchandise is outside the scope of the antidumping order, and that disputes contesting the results of the Final Scope Ruling are within the jurisdiction of this Court. 19 U.S.C. §§ 1517(b)(4)(A)(i), (b)(4)(D).

The Court concludes that Customs' decisions in the May 18 Determination and the Final Administrative Determination to disregard Commerce's Final Scope Ruling and instead to include non-covered merchandise in the EAPA investigation are not in accordance with law. The EAPA statute is clear that only merchandise covered by an antidumping order may be included in an EAPA investigation. 19 U.S.C. §§ 1517(a)(3), (a)(5)(A).

Because Customs included both covered and non-covered merchandise in its EAPA investigation, the Court remands this matter for further consideration by Customs with instructions to only include merchandise within the scope of the Order in the EAPA investigation. The Court suggests that on remand Customs may choose to revisit the scope determination and consider whether to make a new scope referral to Commerce, or reconsider Customs' adverse inference determination; regardless which path Customs chooses on remand, it is clear to the Court that only merchandise within the scope of the Order may be included in the EAPA investigation. The Court defers its substantive analysis of Customs' evasion determination until after the Government provides its remand results, when there will presumably be more clarity as to what merchandise is properly included in the EAPA investigation according to the statutory requirements and in conformity with this opinion. The Court expects that the remand results will address the evasion analysis only for merchandise that is within the scope of the relevant antidumping duty order.

IV. Deprivations of Due Process

Aspects argues that Customs' administration of the EAPA investigation and the EAPA implementing regulations deprived Aspects of its due process rights to present a defense and be heard. Aspects asserts that it was deprived of protected interests by: (1) the lack of a mechanism for sharing business confidential information; (2) the lack

of access to the complete administrative record; and (3) the lack of a meaningful opportunity to be heard before interim measures were imposed. Pl.'s Br. at 25–28; Pl.'s Reply at 16–18.

Defendant argues that Aspects' constitutional arguments fail because Aspects was not deprived of a protected interest. Def.'s Resp. at 22–23. Aspects claims that it was deprived of a liberty interest in its professional reputation and a property interest in the duties that would be owed upon an affirmative finding of evasion. Pl.'s Br. at 25; Pl.'s Reply at 16–17. Defendant contends that neither of the asserted interests are protected interests. Def.'s Resp. at 22–23.

With regard to access to information, Aspects asserts that due process requires the sharing of unredacted business confidential information, at least through counsel. Pl.'s Br. at 25–26. Aspects contends that the sharing of business confidential information is common practice in antidumping and countervailing duty investigations and administrative reviews conducted by Commerce, but no mechanism exists for such sharing in EAPA investigations. *Id.* Aspects argues that permitting parties to view public redacted versions of confidential documents is not sufficient to allow a party to mount a defense. *Id.* at 26–27. Aspects cites an example of the Verification Report, which Aspects contends "contains entire sentences of redacted information, making it impossible for Aspects to fully understand the 'findings' that were being made against it and to meaningfully defend itself against such 'findings.'" Pl.'s Br. at 27. Aspects contends that the public documents that were provided during the investigation were overly redacted in excess of what is permitted under 19 C.F.R. § 165.4. *Id.*

Defendant argues that Aspects has failed to demonstrate how the procedures afforded by the EAPA statute and its regulations violated Aspects' due process rights. Def.'s Resp. at 24. Defendant notes specifically that despite now having access to confidential information under a protective order, Aspects has not identified any protected information that would have changed Aspects' arguments before Customs. *Id.*

With regard to the imposition of interim measures, Aspects argues that it was entitled to a meaningful opportunity to be heard when participating in a proceeding before Customs. Pl.'s Br. at 28 (citing *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012)). Aspects contends that it was not afforded an opportunity to be heard before the imposition of interim measures because the EAPA regulations require Customs to give notice of interim measures only after the interim measures are imposed. *Id.*; *see also* 19 C.F.R. § 165.24(c).

Defendant contends that if Aspects has a protected interest, it was provided with adequate opportunity to present its case before the administrative agency. Def.'s Resp. at 23–24. Defendant notes that the EAPA regulations allow for voluntary submissions of information, submissions of written arguments, and administrative review, and that Aspects took advantage of these procedures. *Id.* (citing 19 C.F.R. §§ 165.23, 165.26, 165.41, 165,42; 19 U.S.C. § 1517(f)).

A. Legal Framework

The Fifth Amendment prohibits deprivation of life, liberty, or property without due process of law. U.S. Const. amend V. The Court's analysis of due process claims begins by determining whether Plaintiff has a protected interest that has been deprived through an action of the Government. *Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015). If Plaintiff has a protected interest, the Court determines what process is due. *Nereida Trading Co. v. United States*, 34 CIT 241, 248, 683 F. Supp. 2d 1348, 1354 (2010).

B. Protected Interest

Aspects has alleged that both a liberty and property interest were denied during the EAPA investigation. Pl.'s Br. at 25. Aspects claims a liberty interest in its professional reputation, goodwill, and freedom to take advantage of business opportunities that might suffer harm through the stigmatization caused by publication of the Notice of Investigation and Interim Measures and May 18 Determination. *Id.*; Pl.'s Reply at 16–17. Aspects' assertion is incorrect. It is well-established that an importer's ability to "engag[e] in foreign commerce is not a fundamental right protected by notions of substantive due process." *NEC Corp. v.* United States, 151 F.3d 1361, 1369 (Fed. Cir. 1998) (citations omitted). The Court concludes that Aspects cannot claim a liberty interest to engage in foreign commerce based on speculative harm to future business opportunities.

Aspects claims a property interest in the duties owed upon an affirmative finding of evasion. Pl.'s Br. at 25. While importers do not have a protected interest in the future importation of goods at a particular rate, *see Nereida Trading Co.*, 34 CIT at 248, 683 F. Supp. 2d at 1355, importers may have a protected interest in the proper assessment of duties on goods already imported. *Diamond Tools*, 45 CIT at __, 545 F. Supp. 3d at 1341; *Royal Brush Mfg. v. United States* ("*Royal Brush I*"), 44 CIT __, __, 483 F. Supp. 3d 1294, 1305 (2020); *Nereida Trading Co.*, 34 CIT at 248, 683 F. Supp. 2d at 1355. The Court concludes that Aspects has statutory and regulatory rights to appropriate process under the EAPA statute and its regulations.

C. Access to Information Claims

Aspects argues that it was denied access to "essential evidence" considered by Customs during the EAPA investigation. Pl's Br. at 25–27. Aspects contends that the EAPA regulations, unlike the regulations relating to antidumping and countervailing duty investigations and reviews, do not provide a mechanism for the sharing of unredacted business confidential information, at least through counsel. *Id.* at 25–26. Aspects further contends that the regulations that allow for the sharing of redacted public versions of confidential documents are insufficient to allow a party to an EAPA investigation to present a robust defense. *Id.* at 25–27.

The Court has recognized recently that in an EAPA investigation, due process forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. *Royal Brush I*, 44 CIT at __, 483 F. Supp. 3d at 1306 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 289 n.4 (1974)). A party participating in an administrative proceeding has a procedural right to an opportunity to be heard. *PSC VSMPO-Avisma Corp.*, 688 F.3d at 761–62. In order to provide adequate due process, Customs' procedures must afford an opportunity for parties subject to an EAPA investigation to respond to opposing evidence. *Royal Brush I*, 44 CIT at __, 483 F. Supp. 3d at 1306.

Customs' regulations permit interested parties to an EAPA investigation to request confidential treatment for information that "consists of trade secrets and commercial or financial information obtained from any person, which is privileged or confidential in accordance with 5 U.S.C. § 552(b)(4)." 19 C.F.R. § 165.4(a). Confidential information placed on the administrative record by an interested party or Customs must be accompanied by a public summary that allows for a reasonable understanding of the redacted information. *Id.* §§ 165.4(a)(2), (e). Unlike antidumping and countervailing duty investigations and reviews conducted by Commerce, the EAPA statute does not include a mechanism for limited disclosure of confidential information through a protective order. *Compare* 19 U.S.C. § 1517 *with id.* § 1677f(c)(1)(A).

Requiring "a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information" balances the competing needs of protecting certain sensitive information from public disclosure and providing parties subject to an EAPA investigation with a meaningful opportunity to defend against allegations of evasion. *See* 19 C.F.R. § 165.4(a)(2); *see*

also Royal Brush Mfg. v. United States ("*Royal Brush II*"), 45 CIT __, __, 545 F. Supp. 3d. 1357, 1367 (2021). When provided with a summary of sufficient detail, parties have an adequate opportunity to respond to adverse evidence. *See Royal Brush II*, 45 CIT at __, 545 F. Supp. 3d at 1367 (citing *Royal Brush I*, 44 CIT at __, 483 F. Supp. 3d at 1306); *see also Diamond Tools*, 45 CIT at __, 545 F. Supp. 3d at 1343.

Aspects argues that Customs failed to comply with its regulation to provide a sufficient public summary of business confidential information and that due process requires more than what was afforded under the applicable regulations. Pl.'s Br. at 25–27. Aspects argues that Customs' application of 19 C.F.R. § 165.4(a) deprived Aspects of due process because public versions of documents provided in the investigation were overly redacted and did not allow for an understanding of relevant facts. *Id.* at 27. 19 C.F.R. § 165.4(a) provides that information will be treated as business confidential if it contains "trade secrets and commercial or financial information obtained from any person, which is privileged or confidential in accordance with 5 U.S.C. § 552(b)(4)." 19 C.F.R. § 165.4(a). Aspects provided an example of the alleged excessive redactions with a citation to pages 15 through 17 of the Verification Report, corresponding to the section captioned "Exporter's Role." Pl.'s Br. at 27; Pl.'s Reply at 17–18. The redactions in the identified section consist of the names of individuals, the general status and compensation details for employees, shipping details, and details of how information used in container loading plans was provided to Aspects. *See* Verification Report at 15–18.

19 C.F.R. § 165.4 requires that confidential information placed on the administrative record be accompanied by a public summary of the redacted information or an explanation of why a summary is not possible. 19 C.F.R. § 165.4. The administrative record in this case does not include a public summary of redacted information for the Verification Report, which is problematic because both the May 18 Determination and Final Administrative Determination rely heavily on the Verification Report and cite to the specific section of the Verification Report referenced by Aspects. *See* May 18 Determination at 4, 7; Final Admin. Determination at 10. Among the redactions on the pages identified by Aspects are references to sales terms that Aspects alleges are inaccurate. *See* Pl.'s Br. at 23; Verification Report at 16–18. The Court concludes that Customs' failure to comply with its regulations deprived Aspects of an opportunity to respond. *See Royal Brush I*, 44 CIT at __, 483 F. Supp. 3d at 1306–08; *Ad Hoc Shrimp Trade Enf't Comm. v. United States*, 46 CIT __, __, 578 F.

Supp. 3d 1310, 1320–21 (2022); *see also Kemira Fibres Oy v. United States*, 18 CIT 687, 695, 858 F. Supp. 229, 235–36 (1994). The Court remands the matter to Customs to address and remedy the lack of public summaries of redacted information and to provide Aspects with an opportunity to respond to the information that should have been made available during the administrative proceeding.

D. Interim Measures

Aspects argues that Customs' imposition of interim measures without first allowing Aspects an opportunity to be heard deprived Aspects of due process. Pl.'s Br. at 28. Under the EAPA statute, Customs is empowered to impose interim measures during the first 90 days of an investigation if there is a "reasonable suspicion" that evasion occurred. 19 U.S.C. § 1517(e). Customs must issue notification of its decision to the parties to the EAPA investigation within five days of interim measures taking effect. 19 C.F.R. § 165.24(c). If the EAPA investigation results in a final determination that evasion occurred, Customs may adopt the interim measures in the final determination. 19 U.S.C. § 1517(d). If the EAPA investigation results in a final determination that no evasion occurred, any imposed interim measures will be lifted and any additional duties or cash deposits collected will be returned with interest. 19 C.F.R. § 165.27(c) (providing for liquidation upon a determination that covered merchandise did not enter the customs territory of the United States through evasion); *id.* § 24.36. An importer subject to an EAPA investigation is able to offer voluntary submissions of information, *id.* § 165.23, and written arguments, *id.* § 165.26. An importer may also seek *de novo* review of Customs' determination of evasion. 19 U.S.C. § 1517(f).

Interim measures under the EAPA statute are temporary and extend only until the investigation results in a determination that evasion occurred or did not occur. *See id.* § 1517(d); 19 C.F.R. § 165.27(c). During the pendency of an EAPA investigation, parties under investigation have mechanisms through which to respond to the allegations of evasion. 19 C.F.R. §§ 165.23, 165.26.

Aspects has not alleged that Customs deviated from these procedures and the record includes examples of Aspects submitting written arguments during the administrative proceeding. *See* Pl.'s Written Argument; Pl.'s Resubmission Written Arguments (Mar. 10, 2020), PR 415, CR 308; Pl.'s Request Admin. Rev. Because Customs' regulations provided Aspects with an opportunity to contest the allegation of evasion and the imposition of interim measures, and Aspects was able to take advantage of the opportunity to provide several written

submissions, the Court concludes that Aspects has not demonstrated that it was deprived of due process by the imposition of interim measures.

V. EAPA Investigation and Regulatory Audit

The EAPA statute allows Customs when making a determination of evasion to "collect such additional information as is necessary to make the determination through such methods as [Customs] considers appropriate." 19 U.S.C. § 1517(c)(2). This broad statutory authority is clarified by regulation to include "obtain[ing] information from [Customs'] files, from other agencies of the United States Government, through questionnaires and correspondence, and through field work by its officials." 19 C.F.R. § 165.5.

Aspects argues that Customs unlawfully combined the EAPA investigation with a regulatory audit. Pl.'s Br. at 29. 19 C.F.R. § 165.47 authorizes Customs to "undertake additional investigations or enforcement actions" in EAPA cases. 19 C.F.R. § 165.47. Aspects contends that this authorization does not permit Customs to combine distinct types of investigations and that in combining an EAPA investigation with a regulatory audit, Customs deprived Aspects of certain protections and applied to the regulatory audit the increased discretionary powers provided under the EAPA statute. Pl.'s Br. at 29.

When the EAPA investigation was initiated, Customs was already conducting a review of Aspects' entries for calendar year 2016 for potential evasion of antidumping duties. Notice of Investigation and Interim Measures at 2. In its Reply, Aspects states that the on-site visit to China was conducted by an audit team and that "the Verification Report was issued by an audit team, following audit procedures, and making findings with an eye toward audit." Pl.'s Reply at 4. This characterization is not supported by the language of the Verification Report, which identifies the investigators as an "EAPA team" and states:

> The procedures that we performed to assist with the EAPA investigation do not constitute an audit performed in accordance with generally accepted government auditing standards. The EAPA investigation has been conducted in accordance with Title 19 C.F.R. § 165.2, Title IV, Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015, commonly referred to as EAPA. The EAPA investigation has been overseen by [Customs' Trade Remedy & Law Enforcement Directorate], and conducted in conjunction with Consumer Products Mass Merchandising Center, National Threat Analysis Centers, and [Regulatory Audit and Agency Advisory Services]. This memorandum was pre-

> pared by [Regulatory Audit and Agency Advisory Services] and includes the analysis of other [Customs] offices involved in the investigation.

Verification Report at 1, 2.

The EAPA statute grants to Customs broad discretion in how it can collect and verify information. 19 U.S.C. § 1517(c)(2). This includes the use of on-site verifications. *Id.* § 1517(c)(2)(B); 19 C.F.R. § 165.25. This Court has been presented with no evidence that the verification was conducted in a manner inconsistent with an EAPA investigation. Even if information was obtained through a separate audit or review, such information would be available to Customs in its evasion review. 19 U.S.C. § 1517(c)(2)(B); 19 C.F.R. § 165.5. Because no evidence has been presented to establish that Customs acted outside its statutory and regulatory authority, the Court concludes that Customs' collection and verification of information about Aspects' entries was in accordance with the law.

Conclusion

For the foregoing reasons, the Court concludes that:

(1) Customs' retroactive inclusion in its evasion determination of Aspects' entries made before the EAPA statute came into force on August 22, 2016 was not in accordance with the law;

(2) Customs did not abuse its discretion in disregarding Aspects' affidavits submitted with the June 30, 2020 Request for Administrative Review;

(3) Aspects did not waive its ability to challenge Customs' consideration of non-covered merchandise;

(4) Customs' inclusion in the EAPA investigation of merchandise determined by Commerce in the Final Scope Ruling to not be covered by the Order was not in accordance with the law;

(5) Customs' evasion determination is remanded for further consideration to the extent that the evasion investigation included merchandise determined by Commerce in the Final Scope Ruling to be not covered by the Order;

(6) Customs' failure to provide sufficient public summaries of confidential documents on the administrative record as required by 19 C.F.R. § 165.4 was not in accordance with the law;

(7) Customs did not deprive Aspects of due process protections by imposing interim measures before Aspects had an opportunity to respond to the allegations of evasion; and

(8) Customs did not unlawfully combine the EAPA investigation with a regulatory audit.

Customs' determination of evasion is remanded. Accordingly, it is hereby

ORDERED that Customs' evasion determination is remanded to Customs for further proceedings consistent with this opinion; it is further

ORDERED that this case shall proceed according to the following schedule:

(1) Customs shall file its remand redetermination on or before March 27, 2023;

(2) Customs shall file the administrative record on or before March 27, 2023;

(3) Comments in opposition to the remand determination shall be filed on or before April 24, 2023;

(4) Comments in support of the remand determination shall be filed on or before May 22, 2023; and

(5) The joint appendix shall be filed on or before May 22, 2023.

Dated: November 28, 2022
New York, New York

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

Slip Op. 22–133

GOODLUCK INDIA LIMITED, Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL TUBULAR PRODUCTS, MICHIGAN SEAMLESS TUBE, LLC, PTC ALLIANCE CORP., WEBCO INDUSTRIES, INC., ZEKELMAN INDUSTRIES, INC., and PLYMOUTH TUBE CO., USA, Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 22–00024

[Defendant's Partial Motion to Dismiss is denied.]

Dated: December 1, 2022

Jordan C. Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestdt, LLP, of New York, N.Y. and Washington, D.C., argued for Plaintiff Goodluck India Limited. With him on the briefs were *Ned H. Marshak* and *Michael S. Holton*.

Ioana Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of Counsel *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance.

David C. Smith, Jr., Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenors ArcelorMittal Tubular Products, Michigan Seamless Tube, LLC, PTC Alliance Corp., Webco Industries, Inc., Zekelman Industries, Inc., and Plymouth Tube Co., USA.

MEMORANDUM AND ORDER

Katzmann, Judge:

Before the court is Defendant United States' ("the Government") Motion to Partially Dismiss Plaintiff Goodluck India Limited's ("Goodluck") Complaint for lack of subject matter jurisdiction. That Complaint contests the final agency action by the Department of Commerce ("Commerce") concerning the assessment of antidumping duties ("ADD") on Goodluck's entries subject to the third administrative review ("AR3") of the ADD Order on certain cold-drawn mechanical tubing of carbon and alloy steel from India, with a period of review spanning June 1, 2020 through May 31, 2021. *See* Compl. at 1, Jan. 27, 2022, ECF No. 2 ("Compl."). Goodluck set forth two counts in its Complaint, challenging (1) Commerce's decision to issue instructions based on the automatic assessment policy of 19 C.F.R. § 351.212(c)

(2022)[1] to liquidate Goodluck's entries during AR3 at an ADD rate of 33.70 percent, and (2) Commerce's decision to designate September 10, 2021 as the effective date for this rate. *See* Compl. at 9–12. Goodluck pleaded two alternative grounds of jurisdiction supporting those claims, 28 U.S.C. § 1581(c) and § 1581(i). *Id.* at 89. Without seeking dismissal of the two counts, the Government's moves to "partially dismiss the [C]omplaint" to the "extent that [Goodluck's] [C]omplaint avers jurisdiction under 28 U.S.C. § 1581(c)," and argues that "the proper jurisdictional basis is 28 U.S.C. § 1581(i)." Def.'s Partial Mot. to Dismiss for Lack of 28 U.S.C. § 1581(c) Jurisdiction at 1, 9, Apr. 6, 2022, ECF No. 23 ("Def.'s Br."); *see also* Def.'s Resp. to Ct.'s Questions for Oral Arg. at 2, Sept. 13, 2022 , ECF No. 32 ("Def.'s OAQ Resp."). The question before the court is whether a party may move to dismiss one of the alternatively pleaded grounds of jurisdiction. Because the Government's Motion as styled is not the proper vehicle for the reasons set below, the Motion is denied.

STANDARD OF REVIEW

When a party has moved to dismiss for lack of subject matter jurisdiction, dismissal is inappropriate "if the facts reveal any reasonable basis upon which the non-movant may prevail." *Airport Rd. Assocs., Ltd. v. United States*, 866 F.3d 1346, 1351 (Fed. Cir. 2017) (internal citation omitted). A party invoking this court's jurisdiction "has the burden of establishing that jurisdiction," *Wanxiang America Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021), and thus it is "settled that [the] party invoking federal court jurisdiction must allege sufficient facts . . . to establish the court's jurisdiction." *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006). The jurisdictional allegations' "[s]ubstance, not form, is con-

[1] In 1984, Congress amended 19 U.S.C. § 1675 so that administrative reviews would be available only on request, replacing the prior practice of automatically reviewing all antidumping or countervailing orders. *See* Pub. L. No. 98–573, § 611, 98 Stat. 3031 (1984). Because administrative reviews under § 1675(a) are now granted only on request, not all entries of subject merchandise are necessarily subject to the requested review. Congress foresaw this possibility of a gap but delegated to Commerce the responsibility to regulate on this issue. *See* H.R.Rep. No. 98–1156, at 181 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 5220, 5298. Commerce therefore promulgated 19 C.F.R. § 353.53a(d) (1985), which was the precursor to the current automatic assessment regulation in 19 C.F.R. § 351.212(c) (2022). Under the current regulation that has not been substantially altered in content from 1985:

> (1) If the Secretary does not receive a timely request for an administrative review of an order . . . the Secretary, without additional notice, will instruct the Customs Service to:
>
> > (i) Assess antidumping duties or countervailing duties . . . at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption . . . .

19 C.F.R. § 351.212(c) (2022).

trolling." *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986).

DISCUSSION

Jurisdiction "is a word of many, too many, meanings." *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (unanimous opinion) (citations omitted). That said, the currently accepted definition of federal subject-matter jurisdiction is "the courts' statutory or constitutional *power* to adjudicate the case. *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis in original) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). The Government's Motion, however, does not focus on this central question of the court's power to adjudicate. At the end of the day, the Government concedes that the court has the power to hear both counts brought forth by Goodluck. *See* Def.'s OAQ Resp. at 2. Instead of seeking to dismiss one of the counts or any part thereof, the Government asks the court to determine the "proper jurisdictional basis." Def.'s Br. at 9; *see also* Def.'s OAQ Resp. at 2. The court thus questions whether such a motion can be properly construed as a partial motion to dismiss for lack of subject matter jurisdiction. Further, since Goodluck alternatively pleaded grounds of jurisdiction as permitted under Rule 8(e) of this court, the Complaint has met the court's liberal pleading requirements and the mere use of alternative pleading does not render the Complaint insufficient.[2]

Despite the procedural uncertainties surrounding the Government's Motion, the parties agree that subsection (i) jurisdiction pro-

[2] Rule 8 distinguishes between pleading requirements for grounds of jurisdiction and claims. *See* USCIT R. 8(a)(1)–(2). The rule further states that "[i]f a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." USCIT R. 8(e)(2). There appears to be no binding authority directly on the point of alternative pleadings on grounds of jurisdiction and partial motions to dismiss, and counsel have failed to identify such relevant authorities, *see generally* Def.'s OAQ Resp. *and* Pl.'s Post Arg. Submission, Sept. 27, 2022, ECF No. 36 ("Pl.'s Post Arg. Br.").

Nevertheless, in interpreting USCIT Rule 8, Rule 12(b)(1), and other rules, the court may refer to the Federal Rules of Civil Procedure, and relevant decisions of other courts, for guidance. *See* USCIT R. 1; *Zenith Radio Corp. v. United States ,* 823 F.2d 518, 521 (Fed. Cir. 1987). In a procedurally similar case, the Second Circuit held that "[e]ven assuming that one of the disjunctive allegations of jurisdiction was insufficient while the other was not, Rule 8(e)(2) of the Federal Rules . . . contemplates such alternative allegations, and provides that no dismissal is to be granted if one of them is sufficient." *Tech. Tape Corp. v. Minn. Min. & Mfg. Co.*, 200 F.2d 876, 877 (2nd Cir. 1952); *see also* 5 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1284 (4th ed.) ("[T]he Second Circuit noted that even if one of the disjunctive allegations were insufficient, dismissal would be improper if one of them was sufficient. This result is entirely consistent with the underlying policy of the federal rules to resolve disputes on the basis of their merits rather than upon mere procedural deficiencies."). Thus, if the party makes an allegation of fact that sufficiently invokes the court's subject matter jurisdiction, then the party has satisfied the liberal pleading requirements of USCIT Rule 8(a)(1) and a motion to dismiss is improper. *Cf. Milecrest Corp. v. United States*, 41 CIT __, __, 264 F. Supp. 3d 1353, 1368 (2017). Taken together with USCIT Rule 8(f) that requires pleadings to be construed "so as to do justice," Goodluck has satisfied its pleading requirement for jurisdiction and dismissal of the Complaint is unwarranted.

vides a proper ground of jurisdiction. *See* Def.'s OAQ Resp. 9; Pl.'s Post Arg. Br. at 34. After examining the parties' submissions, the court notes that it may permit subsection (i) jurisdiction to attach in this case. When assessing jurisdiction under the residual grant of 28 U.S.C. § 1581(i), the court considers (1) whether jurisdiction under a subsection other than § 1581(i) was available, and (2) if so available, whether the remedy provided under that subsection is "manifestly inadequate." *Wanxiang*, 12 F.4th at 1373. If the party seeking jurisdiction does not raise arguments on manifest inadequacy, the court only looks to whether another subsection "is or could have been available." *Id.*

At its core, Goodluck's action challenges Commerce's application of a standard policy as articulated in 19 C.F.R. § 351.212(c) (2022),[3] and the setting of an effective date for a duty rate determined through litigation. *See* Compl. at 8–9, 10–15; Pl.'s Post Arg. Br. at 3. As explained below, such decisions to apply a standard policy and set an effective date for a post-litigation rate do not constitute a 19 U.S.C. § 1516a determination, and thus subsection (c) jurisdiction will not attach. *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994); *Capella Sales & Servs. Ltd. v. United States*, 40 CIT __, __, 180 F. Supp. 3d 1293, 1300–01 (2016) ("*Capella I*"), *aff'd sub nom. Capella Sales & Servs. Ltd. v. United States, Aluminum Extrusions Fair Trade Comm.*, 878 F.3d 1329 (Fed. Cir. 2018) ("*Capella II*").

Despite Goodluck's arguments otherwise, Goodluck here does not challenge a section 1516a determination. Goodluck first challenges a portion of the *December 2021 Notice* expressing Commerce's intent to apply the reinstated duty rate to Goodluck's AR3 entries per its automatic assessment policy. *See* Compl. at 9–12. This decision is an application of standard Commerce policy contained in the regulations and not a separate administrative review determination. *Parkdale Int'l, Ltd. v. United States*, 31 CIT 720, 724, 491 F. Supp. 2d 1262,

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[3] The notice being challenged by Goodluck states that:

> Commerce *did not receive a request* for an administrative review of the antidumping duty order with respect to Goodluck for the period of June 1, 2020, through May 31, 2021, i.e., the third administrative review. *Therefore, in accordance with 19 CFR 351.212(c)*, we will instruct CBP to liquidate all entries for Goodluck and to assess antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption at 33.70 percent, the cash deposit rate that would have prevailed in the absence of the now-vacated CIT decision.

Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Notice of Second Amended Final Determination; Notice of Amended Order; Notice of Resumption of First and Reinitiation of Second Antidumping Duty Administrative Reviews; Notice of Opportunity for Withdrawal; and Notice of Assessment in Third Antidumping Duty Administrative Review, 86 Fed. Reg. 74069–01, 74070 (emphasis added) ("*December 2021 Notice*"); *see also* Compl. at 8.

1268 (2007) ("[M]ere inclusion of boilerplate language in the [f]inal [r]esults that repeats Commerce's standard . . . policy does not make application of that policy a [section] 1516a determination . . . ."); *Capella I*, 180 F. Supp. 3d at 1300 (2016) (holding that application of automatic assessment policy is not a section 1516a determination). Indeed, since Goodluck did not participate in the AR3 review, there is no administrative review that was conducted on Goodluck's AR3 entries, nor can there be any determination arising from a non-existent administrative review. Further, count two of Goodluck's claim disputing the setting of an effective date also does not challenge a section 1516a determination. *Capella I*, 180 F. Supp. 3d at 1300–01 (holding that Commerce's decision not to set an effective date retroactively is not section 1516a determination, but matter of administration and enforcement of duties).

Nevertheless, because the agency decision involves administration and enforcement of the antidumping laws, and because no other subsection of section 1581 is or could have been available, subsection (i) jurisdiction may attach in this case. *Mitsubishi*, 44 F.3d at 977 (holding that suit challenging application of automatic assessment policy, after there was no request for administrative review, was within subsection (i) jurisdiction because no other subsections were available); *Capella I*, 180 F. Supp. 3d at 1300–01 (same); *see also Parkdale*, 31 CIT at 724–25, 491 F. Supp. 2d at 1268 (holding that because no other subsection could have been available when challenging boilerplate language in Federal Register notice reciting Commerce policy, review was possible under subsection (i) jurisdiction).

CONCLUSION

In sum, upon consideration of the Government's Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction, and all other relevant papers and proceedings in this action, the court denies the Government's Partial Motion to Dismiss.

SO ORDERED.

Dated: December 1, 2022
New York, New York

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

Slip Op. 22–134

SAHA THAI STEEL PIPE PUBLIC CO., LTD, Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE CO., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge
Court No. 1:21–00049

[Granting Plaintiff's Motion for Judgment on the Agency Record and remanding to Commerce with instructions.]

Dated: December 2, 2022

Daniel L. Porter, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiff. With him on the brief was *James C. Beaty*.

Claudia Burke and *In K. Cho*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, and *Jon Zachary Forbes*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Luke A. Meisner, Schagrin Associates, of Washington, DC, for Defendant-Intervenor. With him on the brief were *Roger B. Schagrin* and *Kelsey M. Rule*.

OPINION

Vaden, Judge:

Saha Thai Steel Pipe Public Company, Ltd. (Saha Thai) filed this case under Section 516A of the Tariff Act of 1930, as amended. Saha Thai challenges the final determination issued by the U.S. Department of Commerce (Commerce) after Commerce conducted an administrative review of its 1986 antidumping duty order (Thailand Order) on circular welded carbon steel pipes and tubes (CWP) imported from Thailand (Case No. A-549–502). Saha Thai challenges Commerce's decision to apply adverse inferences drawn from facts otherwise available (AFA) and the resulting 37.55 percent dumping margin. *See* Compl. ¶¶ 15– 19, ECF No. 6; 19 U.S.C. § 1677e(b)(1)(A). Before the Court is Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record. Pl.'s Mot. for J. on the Agency R. (Pl.'s Mot.), ECF No. 22. For the reasons set forth below, the Court finds that Commerce's decision to apply adverse inferences drawn from facts otherwise available is not supported by substantial evidence, **GRANTS** the Plaintiff's Motion, and **REMANDS** the Final Determination to Commerce to render a redetermination consistent with the Court's opinion.

BACKGROUND

Saha Thai is a foreign producer and exporter of circular welded steel pipes and tubes. *See* Compl. ¶ 3, ECF No. 6. The facts in this case are intertwined with those in a recent scope inquiry case involv-

ing the same parties. *See Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 547 F. Supp. 3d 1278 (CIT 2021) (*Saha Thai I*); *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 592 F. Supp. 3d 1299 (CIT 2022) (*Saha Thai II)*. As noted in the Court's earlier opinion:

> Saha manufactured standard pipes, dual-stenciled pipes imported as line pipe, and line pipe, all produced in Thailand for importation into the United States. The International Trade Commission (ITC) has provided a concise and useful explanation of the differences between line pipe and standard pipe. The ITC's description, from its preliminary injury determination published before Commerce's antidumping order imposing duties on standard pipe imported from Thailand, is as follows:
>
> > We have addressed the like product question regarding standard pipes and tubes (standard pipe) and line pipes and tubes (line pipe) in prior investigations. In those investigations, the Commission recognized distinctions between standard pipe and line pipe. Standard pipe is manufactured to American Society of Testing and Materials (ASTM) specifications and line pipe is manufactured to American Petroleum Institute (API) specifications. Line pipe is made of higher grade steel and may have a higher carbon and manganese content than is permissible for standard pipe. Line pipe also requires additional testing. Wall thicknesses for standard and line pipes, although similar in the smaller diameters, differ in the larger diameters. Moreover, standard pipe (whether imported or domestic) is generally used for low-pressure conveyance of water, steam, air, or natural gas in plumbing, air-conditioning, automatic sprinkler and similar systems. Line pipe is generally used for the transportation of gas, oil, or water in utility pipeline distribution systems.
>
> *Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela,* Inv. Nos. 701-TA-242 and 731TA-252 and 253 (Preliminary), USITC Pub. 1680 (Apr. 1985), Joint Appendix (J.A.) at 1094–96, ECF No. 42. So-called dual-stenciled pipe has received both an American Society of Testing and Materials (ASTM) stencil and an American Petroleum Institute (API) stencil, indicating that it meets the minimum requirements for both standards. *See* J.A. at 1563 (providing a definition for dual-stenciled pipe).

Saha Thai I, 547 F. Supp. 3d at 1281–82. This description and the facts therein recounted remain the same in this case.

I. The Recent Scope Inquiry

It is important to note that, although many of the facts of the separate scope inquiry proceedings before the Court are relevant to this administrative review, each case rises and falls on its own merits; the legal issues are independent. Because many of the misunderstandings in this case are predicated on disagreements over the scope of the order, however, a brief summary of the recent scope inquiry is necessary.

On November 22, 2019, Commerce initiated a scope inquiry, examining whether dual-stenciled pipe imported as line pipe from Thailand was covered by the scope of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. Commerce Letter Rejecting Inquiry with Administrative Review (Commerce Rejection Letter) at 1 (Feb. 24, 2020), J.A. at 4,414, ECF No. 37 (noting the date the scope inquiry began). Commerce ultimately concluded that the scope of the order did include dual-stenciled pipe. It came to this determination despite the fact that, in each of the four prior sunset reviews of the order, dual-stenciled pipe imported as line pipe was not considered within the scope of the Thailand Order. *See Saha Thai I*, 547 F. Supp. 3d at 1282–86; *see also Saha Thai II*, 592 F. Supp. 3d at 1305. Commerce issued its final scope determination on June 30, 2020. *Saha Thai I*, 547 F. Supp. 3d at 1284; *Saha Thai II*, 592 F. Supp. 3d at 1302. Saha Thai challenged those results, initiating proceedings at the Court of International Trade on July 17, 2020. *Saha Thai I*, 547 F. Supp. 3d at 1287.

On October 6, 2021, this Court remanded Commerce's scope inquiry results. *Id.* at 1292. The Court found that "Commerce lack[ed] substantial evidence for its position that dual-stenciled pipe imported as line pipe is included within the Scope of the Thailand Order" and that Commerce "unlawfully sought to expand the scope of its original order." *Id.* As the Court explained,

> First, Thailand did not produce dual-stenciled pipe at the time of the original investigation and order, and the request was effectively withdrawn from consideration by the petitioners themselves. Second, the (k)(1) materials show that the ITC made no injury determination as to dual-stenciled or mono-stenciled line pipe from Thailand; therefore, antidumping duties cannot be imposed on those types of pipes when imported from Thailand. Third, Commerce and the ITC throughout the (k)(1) materials consistently treat dual-stenciled pipe as line pipe when imported into the United States.

Id. The Court remanded the case to Commerce to make a redetermination in compliance with the Court's opinion and order; Commerce filed those remand results on January 4, 2022. *Id.* at 1299. Commerce reconsidered the evidence in light of the Court's opinion and came to the conclusion that dual-stenciled line pipe is not included in the scope of the Thailand Order. This Court affirmed Commerce's remand results on August 25, 2022. *Saha Thai II*, 592 F. Supp. 3d at 1313. Whether or not Commerce's second determination in the scope inquiry is sustained after any appeal as being supported by substantial evidence is largely immaterial to this case, but the dispute about the scope is important context in the present investigation under review.

II. The Disputed Final Determination

The action challenged in this case is the final determination issued in the 2018–19 administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments, In Part; 2018–2019*, 86 Fed. Reg. 7,259 (Jan. 27, 2021) (Final Results). The original order was issued in January 1986, when Commerce determined that standard pipe from Thailand was "being, or [was] likely to be, sold in the United States at less than fair value." *Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 3,384 (Jan. 27, 1986). That original Final Determination described its scope as encompassing "certain circular welded carbon steel pipes and tubes, also known as '*standard pipe*' or 'structural tubing.'" *Saha Thai I*, 547 F. Supp. 3d at 1283 (emphasis in original).

Each year since 1998, the antidumping order has undergone an administrative review to "determine . . . the rate of any antidumping duty." 19 U.S.C. § 1675(a)(1)(B); *see* Pl.'s Mot. at 2–3 n.3, ECF No. 22 (listing each yearly administrative review). On March 5, 2019, Commerce published a notice of opportunity to request an administrative review for the period from March 1, 2018, through February 28, 2019. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 84 Fed. Reg. 7,877 (Mar. 5, 2019). Wheatland Tube, other domestic producers, and Saha Thai all requested an administrative review on March 29, 2019. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 24,743 (May 29, 2019). Commerce then published its notice initiating the review on May 29, 2019. *Id.* Two

months later, Commerce separately announced its intent to reconsider the scope of the Thailand Order regarding line pipe on July 29, 2019. *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Scope Inquiry on Line Pipe* (July 29, 2019), J.A. at 1,115, ECF No. 37.

Saha Thai was selected as the sole mandatory respondent for this administrative review on October 18, 2019, and Commerce issued its initial questionnaire a few days later. *See Administrative Review of the Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand: Respondent Selection* (Oct. 18, 2019), J.A. at 1,131, ECF No. 37; *Initial Antidumping Duty Questionnaire* (Oct. 21, 2019), J.A. at 1,140, ECF No. 37. In that initial questionnaire, Commerce told Saha Thai that "[t]his section of the questionnaire provides instructions for reporting your sales of the **subject merchandise**" and asked Saha Thai to report "each U.S. sale of merchandise entered for consumption during the POR."[1] *Initial Antidumping Duty Questionnaire* (Oct. 21, 2019) at C-2, J.A. at 1,200– 01, ECF No. 37 (emphasis in original). Commerce initiated the separate scope inquiry thirty-two days later on November 22, 2019. Commerce Rejection Letter at 1 (Feb. 24, 2020), J.A. at 4,414, ECF No. 37.

Over the course of the following month, Saha Thai timely submitted its initial questionnaire responses in the administrative review. J.A. at 1,305–1,903, 1,915–2,269, 2,280–2,458, ECF No. 36 (Saha Thai's Section A, Section B & C, and Section D Questionnaire Responses). In those responses, Saha Thai submitted what it asserted was a complete U.S. sales database for subject merchandise during the period of review based on its understanding that the order covered only standard pipe and not dual-stenciled line pipe. Saha Thai Responses to Questionnaire Section A (November 26, 2019), J.A. at 1,314, ECF No. 37. To clarify its submitted data, Saha Thai included an explanatory footnote where it outlined the approach it had taken given the ongoing scope inquiry. *Id.* at 3 n.3. Saha Thai explained that, during the period of review, it also sold pipes manufactured to API 5L specifications, or line pipe.[2] *Id.* However, based on past practice and its

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[1] Period of review.

[2] The full text of the relevant footnote is as follows: "Saha Thai has reported subject merchandise and foreign like product as standard pipe. During the POR, Saha Thai also sold API 5L pipes ("Line Pipe"). Based on the scope of this administrative review and the Department's practice, these products have not been reported as subject merchandise. Petitioner has claimed that Line Pipe is included within the scope of the Order on standard pipe from Thailand. The Department has initiated a scope inquiry to determine whether Line Pipe is subject merchandise. *See* Letter from the Department entitled, 'Circular Welded Carbon Steel Pipes and Tubes from Thailand: Scope Inquiry on Line Pipe,' dated July 29, 2019. However, as of the date of the filing of this response, the Department has not determined whether Line Pipe is included within the scope of this administrative review. Thus, Saha Thai has only reported standard pipe in its volume and value of subject merchandise and foreign like product." *Id.*

understanding of the scope in previous administrative reviews with Commerce, Saha Thai did not report the line pipe because Saha Thai did not consider those products to be subject merchandise. *Id.* Commerce had only requested sales of "subject merchandise" during the period of review. *See Initial Antidumping Duty Questionnaire* (Oct. 21, 2019) at C-2, J.A. at 1,200–01, ECF No. 37. There is no evidence on the record that Commerce ever sought to clarify the footnote or asked for additional details regarding the information Saha Thai did not submit in that questionnaire response.

On December 18, 2019, Wheatland Tube submitted a letter requesting that Commerce conjoin the administrative review and scope proceedings. Wheatland Tube Request to Conduct Scope Inquiry in Conjunction with Administrative Review (Dec. 18, 2019), J.A. at 2,270, ECF. No. 37. Saha Thai submitted its own letter objecting to the proposal on December 30, 2019. Its response noted that, because the November 2019 scope inquiry was initiated after the March 2018 to February 2019 period of review, "combining the two proceedings w[ould] have no practical effect on the consequences of the AD review" and that "it would be illogical and unreasonable to burden Saha Thai and the Department by including U.S. sales of line pipe in the ongoing AD review of CWP." Saha Thai Objection to Petitioner's Scope Inquiry Request at 2 (Dec. 30, 2019), J.A. at 2,453, ECF No. 37. Commerce agreed on February 24, 2020, explaining that because Commerce "initiated the scope inquiry on November 22, 2019 . . . any finding that we make regarding whether line pipe or dual[-]stenciled standard and line pipe is covered by the scope of the order would not be effective during the period of review (i.e., March 1, 2018 thorugh [*sic*] February 28, 2019) of the instant administrative review." Commerce Rejection Letter at 1 (Feb. 24, 2020), J.A. at 4,414, ECF No. 37. That same day, Commerce separately issued a preliminary ruling in the scope inquiry, finding that dual-stenciled pipe was included in the scope of the order. *Notice of Scope Rulings*, 85 Fed. Reg. 35,261–62 (June 9, 2020).

Commerce sent Saha Thai the First Supplemental Questionnaire for the administrative review on March 6, 2020, to which Saha Thai responded on March 20, 2020. First Supplemental Questionnaire (Mar. 6, 2020), J.A. at 4,465, ECF No. 37; Saha Thai First Supplemental Questionnaire Response (Mar. 20, 2020), J.A. at 4,502, ECF No. 37. Commerce sent Saha Thai a Second Supplemental Questionnaire on March 23, 2020. In that questionnaire, Commerce requested that Saha Thai send information listing "the sales of all merchandise (subject and non-subject) during the POR" to just two of its home market customers. Second Supplemental Questionnaire at 3–4 (Mar.

23, 2020), J.A. at 4,581–82, ECF No. 37. Commerce did not request in the Second Supplemental Questionnaire or at any point thereafter a complete revised U.S. sales database including *all* non-subject merchandise.

Commerce then issued its Preliminary Determination on April 2, 2020, relying on the data already submitted and preliminarily finding no indication of dumping. *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019*, 85 Fed. Reg. 18,552–01 ("Saha Thai Steel Pipe (Public) Co., Ltd. (collectively, Saha Thai), as well as 28 non-examined companies, did not make sales of subject merchandise at less than normal value during the period of review (POR) March 1, 2018 through February 28, 2019."). Later in April, Saha Thai submitted its Second Supplemental Questionnaire Response, including "a schedule of sales of all merchandise in the POR made to" the two requested customers that detailed "the date of sale, description of merchandise, indication of dual stenciling or line pipe sales, ultimate destination of merchandise, and invoice number." Saha Thai Second Supplemental Questionnaire Response at 2 (Apr. 20, 2020), J.A. at 804,092, ECF No. 36.[3] Commerce requested no further information, and the administrative record closed.

The separate scope inquiry concluded before Commerce announced the final determination of the administrative review. On June 30, 2020, Commerce issued its final scope ruling finding that the scope of the Thailand Order included dual-stenciled pipe on June 30, 2020. *2018–2019 Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand: Application of Adverse Facts Available* at 3 n.10 (Jan. 19, 2021) (AFA Memorandum), J.A. at 804,705, ECF No. 36 (referencing the Final Scope Ruling Memorandum). Saha Thai initiated proceedings objecting to the scope ruling results at the Court of International Trade on July 17, 2020. *Saha Thai I*, 547 F. Supp. 3d at 1287.

In an unexpected turn of events, Wheatland Tube submitted new factual information (NFI) on September 18, 2020, making fresh allegations. Circular Welded Carbon Steel Pipes and Tubes from Thailand: New Factual Information (Sept. 18, 2020) (Wheatland's NFI), J.A. at 10,574, ECF No. 37. Wheatland Tube advanced claims, based on a Customs and Border Protection (CBP) Enforce and Protect Act (EAPA) Report, that Saha Thai had colluded with Blue Pipe (an

[3] The confidential joint appendix in this case was mistakenly numbered by the parties beginning at 800,000.

unaffiliated entity) to evade antidumping duties.[4] *Id.* The findings in the report indicated that, from the start of the period of review in March 2018, until October 2018, Saha Thai sold standard pipe into the United States. AFA Memorandum at 4, J.A. at 804,703, ECF No. 36. It reported those sales to Commerce accordingly. *Id.* However, in October 2018, the cash deposit rate for standard pipe covered by the antidumping order increased substantially from 0.69 percent to 28 percent. *Id*. At that time, Saha Thai switched and began selling dual-stenciled pipe to a Thai buyer with those sales ultimately ending up in the United States. *Id*. Wheatland Tube asserted that Saha Thai remained aware of this alleged subterfuge. Wheatland's NFI at 2, J.A. at 10,576, ECF No. 37. Wheatland Tube supported its allegation of the transshipment scheme through Blue Pipe with evidence from testing Wheatland Tube had conducted. That testing allegedly found that the dual-stenciled pipes produced by Saha Thai did not meet line pipe specifications and were nothing more than standard pipes with a line pipe stencil applied. Wheatland Administrative Case Br. at 14–15, J.A. at 10,701– 02, ECF No. 37. Wheatland Tube argued that Saha Thai was deliberately mislabeling the pipe it sold into the United States in order to evade the antidumping duties that had recently increased. *Id.; cf. Saha Thai I*, 547 F. Supp. 3d at 1286–87 (describing Wheatland Tube's accusations during the scope inquiry that Saha Thai was selling "minorly-altered standard pipe" to avoid higher duties).

On September 25, 2020, seven days after Wheatland Tube's submission, Saha Thai responded to Wheatland Tube's allegations, requesting that Commerce reject Wheatland's submission of new factual information as untimely and irrelevant. Saha Thai's Request for Rejection of Petitioner's September 18, 2020 NFI and to Accept Rebuttal Factual Information (Sept. 25, 2020), J.A. at 10,591, ECF No. 37. If Commerce accepted Wheatland Tube's new factual information, however, Saha Thai requested that Commerce also accept rebuttal factual information from Saha Thai consisting of Saha Thai's appeal of the scope results to the CIT. *Id.* at 10,594. Instead, on November 25, 2020, Commerce decided to accept new factual information from both Wheatland Tube and Saha Thai, reopened the administrative record, and extended the administrative briefing schedule to allow

[4] The Court notes for the sake of thoroughness that Wheatland Tube had previously submitted new factual information making similar allegations on February 18, 2020, before Commerce's Preliminary Determination. Preliminary Decision Memorandum at 3–4, J.A. at 4,604–05, ECF No. 37. Commerce accepted that information on March 10, 2020. *Id.* Commerce did not fully analyze these allegations in its Preliminary Determination; however, in the Final Determination, it relied on Wheatland Tube's later-filed new factual information. Accordingly, the Court does not consider it necessary to further analyze the earlier-submitted information.

comment on the new information. *Circular Welded Carbon Steel Pipes and Tubes from Thailand – 2018–2019 Administrative Review: Acceptance of New Factual Information* (Nov. 25, 2020), J.A. at 10,642–43, ECF No. 37.

The parties debated the new factual information in the administrative case briefs a month after Commerce's decision to accept the information. Wheatland Tube submitted its administrative case brief on December 18, 2020, reemphasizing its allegations that Saha Thai had evaded the antidumping duties by engaging in a transshipment scheme with other Thai buyers, mislabeling its standard pipe products as dual-stenciled, and arguing that Commerce should therefore rely on facts otherwise available with an adverse inference. Wheatland Administrative Case Br. at 3–30, J.A. at 10,690–717, ECF No. 37. Saha Thai then submitted its rebuttal case brief on December 28, 2020, arguing that Wheatland Tube's new factual information was untimely and should not be the basis for Commerce to draw an adverse inference. Saha Thai Rebuttal Case Br. at 1–4, J.A. at 10,738–41, ECF No. 37. The extended administrative briefing was completed by the end of December 2020.

On January 19, 2021, Commerce issued a memorandum explaining its use of adverse inferences drawn from facts otherwise available. Commerce found "Saha Thai did not provide requested information with respect to a substantial portion of its U.S. sales" because it did not include dual-stenciled pipe sales in its initial U.S. database. AFA Memorandum at 2, J.A. at 804,703, ECF No. 36. Commerce published its Final Issues and Decision Memorandum and accompanying Final Results on January 21, 2021, and February 2, 2021, respectively, assigning a 37.55 percent dumping margin to Saha Thai. *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, In Part; 2018–2019 (Jan. 19, 2021), Issues and Decision Memorandum*, J.A. at 10,778, ECF No. 37; *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments, In Part; 2018–2019*, 86 Fed. Reg. 7,259, 7,260 (Jan. 27, 2021).

Despite Wheatland Tube and other domestic parties' arguments that Saha Thai intentionally mislabeled its pipe and that "all of Saha Thai's dual-stenciled pipe sales should have been classified as standard pipe subject to the Order when it entered the United States," Commerce concluded, based on CBP testing, that there was "insufficient information on the record to find that all of the dual[-]stenciled pipe produced by Saha Thai and sold by [another Thai buyer] to the

United States during the POR did not meet API 5L standards." AFA Memorandum at 6, J.A. at 804,708, ECF No. 36. Indeed, all the pipe CBP tested met the "requirements of ASTM A53 Grade A and API 5L PSL 1 Pipe Grade A," meaning it was truly dual-stenciled line pipe. *Id.* In short, no clear record evidence indicated deliberate product mislabeling by Saha Thai. Commerce found that the evidence did not support a conclusion the company was simply relabeling its standard pipe as "dual-stenciled" to avoid the higher cash deposits without making actual changes to the product. *Id.* Accordingly, Commerce based its decision to rely on facts otherwise available with an adverse inference solely on the missing dual-stenciled pipe sales information. *Id.* at 2–5.

Saha Thai filed suit on February 2, 2021, objecting to the assigned dumping margin as unlawful and unsupported by substantial evidence. *See* Compl. ¶¶ 15–19, ECF No. 6. Saha Thai articulated its claims more fully in its Motion for Judgment on the Agency Record on June 16, 2021. It argued that (1) its dual-stenciled pipe sales were not "necessary" information sufficient to trigger reliance on facts otherwise available, (2) Commerce failed to comply with its statutory obligation to notify Saha Thai of the deficiency, and (3) Commerce's reliance on the Customs and Border Protection report was unreasonable and unlawful. Pl.'s Mot. at 1–5, ECF No. 22. Commerce and Wheatland Tube filed their responses on September 16, 2021. Def.'s Resp. to Rule 56.2 Mot. for J. on the Agency R., ECF No. 29 (Def.'s Resp.); Def.-Int.'s Resp. to Rule 56.2 Mot. for J. on the Agency R., ECF No. 26 (Def.-Int.'s Resp.). Commerce countered that dual-stenciled line pipe sales were necessary information, that Commerce had properly notified Saha Thai of the deficiencies in its information, and that its determination was supported by substantial evidence and in accordance with law. Def.'s Resp. at 9–10, ECF No. 29. Wheatland Tube similarly argued that dual-stenciled line pipe sales were "necessary" information, that Saha Thai had been notified of the deficiencies in its data but that Saha Thai was not entitled to such notice because its withholding of information was intentional, and that Commerce was fully justified in relying on the CBP report. Def.-Int's Resp. at 1–3, ECF No. 26. On October 6, 2021, this Court entered a judgment in the separate scope inquiry case, remanding for Commerce to reconsider the inclusion of dual-stenciled pipe in the scope of the order. *Saha Thai I*, 547 F. Supp. 3d at 1281. Commerce returned its remand redetermination of the scope inquiry on January 4, 2022. The Court affirmed the remand redetermination on August 25, 2022. *Saha Thai II*, 592 F. Supp. 3d at 1301.

The Court held oral argument regarding the administrative review on January 11, 2022. ECF No. 44. There, the Court confirmed that Commerce's bases for applying "facts otherwise available" under 19 U.S.C. § 1677e(a)(1)–(2) were only (a)(1)—that necessary information was not on the record — and (a)(2)(c) — that Saha Thai significantly impeded the investigation — thus eliminating the other three statutory predicates on which Commerce could have relied. First Tr. 59:22–25, 60:1–13, ECF No. 46. Separately, Saha Thai argued that it did not submit a revised U.S. sales database after the February 24, 2020, preliminary scope ruling because the questions in the Second Supplemental Questionnaire were "company-specific" and therefore did not impose a duty on Saha Thai to submit a revised sales database. First Tr. 67:13– 16, 25, ECF No. 46.[5] Regarding the notice issue, the Court queried where, if anywhere, in its seven-page rebuttal Saha Thai had responded to Wheatland Tube's allegations at the administrative briefing stage by arguing that Commerce had not adequately notified it of its deficient submissions. First Tr. 78:10–24, ECF No. 46. Saha Thai responded that, because it could not know the basis on which Commerce would use alternative facts, it had no reason to raise the notice defense. First Tr. 80:17–24, 81:21–24, ECF No. 46 ("[W]ithout the specific basis for Commerce's finding about other facts available and adverse inference, Saha Thai couldn't make a very specific argument about the failure to meet 1677m because it hadn't occurred yet.").

Following oral argument, the Court issued a minute order requesting the parties file supplemental briefs. These briefs were to address "(1) the application of the Supreme Court's interpretation of the word 'necessary,' if any, to 19 U.S.C. § 1677e(a)(1) and/or to this case" and "(2) what remains on the record to support Commerce's determination given the Court's October 6, 2021 order (Slip Op. 21–135) in the related case, No. 20–133, in which the Court found that the scope of the relevant order did not include dual-stenciled line pipe." ECF No. 43.

Commerce responded that the scope remand outcome should not affect the outcome of this case and that Saha Thai's footnote was not transparent in signaling to Commerce that Saha Thai was omitting sales of dual-stenciled pipe. Def.'s Suppl. Br. at 8–9, ECF No. 47. Wheatland Tube concurred with Commerce and presented a timeline of events by which Saha Thai should have known to give a more forthcoming response. Def.-Int.'s Suppl. Br. at 4–5, ECF No. 49. Saha

[5] When Commerce was asked about question 5 in the Second Supplemental Questionnaire, Commerce incorrectly characterized it as "a general question" rather than "company-specific." First Tr. 48:17– 18, ECF No. 46.

Thai made several arguments regarding the definition of the word "necessary" and argued that the Court's decision on the scope of the Thailand Order was fatal to Commerce's decision in this review. *See* Pl.'s Suppl. Br., ECF No. 51.

The Court held a second oral argument on May 18, 2022. ECF No. 55. There, the Government characterized Saha Thai's assertion that its footnote had put Commerce on notice as "a little too cute," arguing that "they knew exactly what they were doing." Second Tr. 34:5, 34:12–13, ECF No. 57. Separately, in response to a question from the Court, Wheatland Tube acknowledged that Commerce had been somewhat terse in its explanation in its administrative review final determination: "I would agree with Your Honor that [Commerce] didn't elaborate on all the different ways that impeding behavior took place." Second Tr. 68:1–3, ECF No. 57. The Court now examines the merits of the parties' arguments.

JURISDICTION AND STANDARD OF REVIEW

19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) grant the Court authority to review actions contesting antidumping determinations described in an antidumping order. The Court must remand Commerce's "determinations, findings, or conclusions" when they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). This standard requires that Commerce thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *accord Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1328 (CIT 2010). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *New Am. Keg v. United States*, No. 20–00008, 2021 WL 1206153, at *6 (CIT Mar. 23, 2021).

When reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. Summary

Saha Thai's Motion for Judgment on the Agency Record presents one primary issue: Whether Commerce's use of adverse inferences drawn from facts otherwise available is supported by substantial evidence and otherwise in accordance with law. Pl.'s Mot. at 4, ECF No. 22. Saha Thai claims that Commerce failed to notify it of the deficiency in its submission. *Id.* at 5. Saha Thai also argues that Commerce lacked substantial evidence to support its claim that dual-stenciled line pipe sales data was necessary information for the antidumping margin calculation. *Id.* at 4–5.

Commerce responds that the application of adverse inferences drawn from facts otherwise available was supported by substantial evidence for several reasons. Def.'s Resp. at 9–10, ECF No. 29. First, it argues that the procedure was justified because dual-stenciled line pipe sales data was necessary information for calculating the margin. *Id.* at 12. Second, it argues that Saha Thai knew or should have known that dual-stenciled pipe was included in the scope of the term "subject merchandise" and that, by failing to provide the information, Saha Thai failed to cooperate to the best of its ability. *Id.* at 18. Third, Commerce asserts that it informed Saha Thai of the deficiencies in the databases Saha Thai submitted, a problem that Plaintiff failed to cure. *Id.* at 21. Finally, Commerce claims Saha Thai's failure to raise the lack-of notice argument during the administrative briefing precludes Saha Thai's arguing it here. *Id.*

In support of Commerce's determination, Defendant-Intervenor Wheatland Tube argues that (1) Saha Thai's participation in an evasion scheme justified the application of adverse inferences; (2) the omitted dual-stenciled pipe sales data was necessary information; and (3) Commerce's decision not to conjoin the scope ruling and administrative review affected only the liquidation of entries, not the historical scope of the order. Def.-Int.'s Resp. at 1–3, ECF No. 26.

The Court's consideration of this case is wholly independent of the results in the related scope inquiry case, *Saha Thai I*. Even if Commerce misunderstood the scope, a respondent has a duty to provide all necessary information Commerce requests. Thus, regardless of whether the scope of the Thailand Order includes dual-stenciled line pipe, Saha Thai may still have been obligated to give Commerce

dual-stenciled line pipe sales information *if* Commerce had requested it.

The legal test at issue here contains three steps. First, to rely on facts otherwise available, Commerce must identify why it is doing so. *See* 19 U.S.C. § 1677e(a). Then Commerce must "promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency . . . ." 19 U.S.C. § 1677m(d). Commerce may only apply an adverse inference if it finds that a respondent failed to cooperate to the best of its ability. 19 U.S.C. § 1677e(b)(1).

Commerce identified two reasons for its use of facts otherwise available: that necessary information is missing from the record and that Saha Thai significantly impeded the investigation. *See* 19 U.S.C. §§ 1677e(a)(1), 1677e(a)(2)(C). Having identified these claimed deficiencies, Commerce was immediately confronted with its statutory obligation under 19 U.S.C. § 1677m(d) to provide Saha Thai notice and an opportunity to cure. Because the Court holds that Commerce failed to meet this statutory obligation, it need not reach whether substantial evidence supports Commerce's decision to apply adverse inferences drawn from facts otherwise available.

II. Analysis

A. Facts Otherwise Available and Notice

Commerce conducts administrative reviews — if requested — once a year to set the duty rate for products covered by antidumping orders. 19 U.S.C. § 1675(a)(1)(B). These reviews determine "the normal value and export price (or constructed export price) of each entry of the *subject merchandise*, and (ii) the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(i)–(ii) (emphasis added). In antidumping reviews and determinations, "[t]he term 'subject merchandise' means the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, [or] an order." 19 U.S.C. § 1677(25).

Commerce collects information from respondents to calculate and support its antidumping determinations. However, when (1) "necessary information is not available on the record, or" an interested party (2) "withholds information that has been requested," (3) "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," (4) "significantly impedes a proceeding . . . or," (5) "provides such information but the information cannot be verified," then Commerce "shall, *subject to section 1677m(d) of this title*, use the facts otherwise available in

reaching the applicable determination." 19 U.S.C. § 1677e(a)(1)–(2) (emphasis added). When any one of those five preconditions is satisfied, the use of "facts otherwise available" is triggered. *Id.* Then Commerce must, pursuant to § 1677m(d), "promptly inform the person submitting the information of the nature of the deficiency" and "provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d). If further responses are also unsatisfactory or untimely, Commerce may disregard the information respondents have provided and shall "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. §§ 1677m(d), 1677e(a); *see also Diamond Sawblades Mfrs.' Coal. v. United States*, 986 F.3d 1351, 1362–64 (Fed. Cir. 2021) (analyzing the statutory framework).

To use adverse inferences drawn from facts otherwise available, Commerce must begin by identifying which of the five preconditions support its choice. On the record here, Commerce primarily identified § 1677e(a)(1), necessary information missing from the record, as the trigger: "Saha Thai did not provide requested information with respect to a substantial portion of its U.S. sales. Such information is necessary for Commerce to calculate an accurate weighted-average dumping margin for Saha Thai in this review." IDM at 4, J.A. at 10,781, ECF No. 37. Commerce also appears to rely on § 1677e(a)(2)(C), "significantly imped[ing] a proceeding." First Tr. 59:22–60:13, ECF No. 46; AFA Memorandum at 5, J.A. at 804,707, ECF No. 36 ("[B]y not reporting a substantial portion of its U.S. sales, Saha Thai has failed to cooperate to the best of its ability and impeded Commerce's ability to conduct this administrative review.").

Having identified preconditions, Commerce next must demonstrate it provided notice of and an opportunity to remedy any deficiencies in a respondent's submissions. In *Hitachi Energy*,[6] the Federal Circuit explained the role § 1677m(d) plays in the use of adverse inferences drawn from facts otherwise available. *Hitachi Energy USA Inc. v. United States,* 34 F.4th 1375, 1384 (Fed. Cir. 2022). *Hitachi Energy* concerned the second administrative review of an antidumping order and the actions of Hyundai, which had participated in both the original investigation and the first administrative review. *Id.* at 1379. As a respondent in the second review, Hyundai included service-related revenue in the gross unit price of its large power transformers, which was the methodology Commerce had asked Hyundai to use and had

[6] The Federal Circuit later amended its opinion. *See Hitachi Energy USA Inc. v. United States*, No. 20–2114, 2022 WL 17175134 (Fed. Cir. Nov. 23, 2022). That amendment does not impact the portions of the opinion quoted herein.

accepted during the original investigation and the first review. *Id.* at 1378–79. Hitachi objected to Hyundai's procedure, claiming that it overstated the prices of Hyundai's United States sales. *Id.* at 1379. Hitachi brought this claim to the Court of International Trade, which granted Commerce's request for a voluntary remand to reconsider its practice. *ABB, Inc. v. United States*, 273 F. Supp. 3d 1200, 1205 (CIT 2017).

On remand, Commerce changed its practice and began requiring data that separated service-related revenue from gross unit price to allow for further calculations. *Hitachi Energy*, 34 F.4th at 1380. With the change in practice, Commerce now considered Hyundai's submissions deficient because service-related revenue was not broken out from the gross unit price. *Id.* Hyundai immediately requested permission to provide additional information to cure the new deficiency, but Commerce refused to reopen the factual record to allow it to do so. *Id.* Hyundai appealed that decision, stating that "the Department's conclusions rest on the unreasonable assertion that Hyundai should have known that the Department would retroactively revise its test with respect to service-related revenue two years after it issued the Final Results." *Id.* at 1381.

The Federal Circuit held that Commerce had failed to comply with its statutory mandate under § 1677m(d). *Id.* at 1383–84. In doing so, it quoted extensively and approvingly from *SKF USA, Inc. v. United States*, 391 F. Supp. 2d 1327, 1336–37 (CIT 2005), to note two points of law. First, "[c]larity regarding what information is requested by Commerce is important, especially in cases such as this where there was confusion as to whether or not requests for data were made and whether or not these requests were refused." *Hitachi Energy*, 34 F.4th at 1384 (quoting *SKF USA*, 391 F. Supp. 2d at 1336). Commerce must clearly and definitively ask for what it wants. Second, "if the Department wished to place the burden of error on [the respondent], it had to make clear and give [the respondent] a chance to correct the error prior to the issuance of a final decision." *Id.* (quoting *SKF USA*, 391 F. Supp. 2d at 1336–37). When Commerce changes tack and decides that it will apply adverse inferences drawn from facts otherwise available, it must *then* provide the respondent with notice and an opportunity to remedy. Commerce may not simply proceed without providing an opportunity for remedy before the final decision. As the Federal Circuit summarized, "Commerce's failure to timely notify a party of deficiency 'is itself a violation of § 1677m(d).'" *Id.* (quoting *Hyundai Steel Co. v. United States*, 282 F. Supp. 3d 1332, 1349 (CIT 2018)).

Commerce makes three arguments with respect to notice. First, it argues that Saha Thai failed to raise this argument during the administrative proceedings and therefore failed to exhaust its administrative remedies. Def.'s Resp. at 21, ECF No. 29. Second, Commerce asserts that § 1677m(d) does not apply given Saha Thai's intentional failure to provide the information. *Id.* And third, it claims that it did notify Saha Thai of the deficiencies. *Id.* The Court will address each argument in turn.

1. Commerce's Failure to Provide Notice is Properly Before the Court

Commerce claims that Saha Thai failed to exhaust its administrative remedies because it did not raise the issue of notice in its administrative briefing. Def.'s Resp. at 21, ECF No. 29. Saha Thai responds that Commerce's Preliminary Results did not use adverse inferences drawn from facts otherwise available and so Saha Thai had no opportunity to respond to Commerce's first use of adverse inferences in the Final Results. Meanwhile, Saha Thai did respond directly to petitioner Wheatland Tube's argument that Commerce should apply adverse inferences drawn from facts otherwise available. Pl.'s Reply at 18–19, ECF No. 35. Saha Thai is correct that the question whether Commerce complied with § 1677m(d)'s notice requirement is properly preserved for review by the Court for three reasons. First, Saha Thai had no opportunity to raise objections to Commerce's failure to provide notice at the administrative level because Commerce's first use of adverse inferences drawn from facts otherwise available came in the Final Results. Second, the burden lies with Commerce to provide notice, not with Saha Thai to object to the lack of notice. *See Hitachi Energy*, 34 F.4th at 1384. Third, the issue before the Court here is a pure question of law, exempt from the administrative exhaustion requirement.

a. Saha Thai Had No Opportunity to Raise Objections to Commerce

Saha Thai had no opportunity to object to Commerce's failure to provide notice at the administrative level. Thus, Saha Thai properly brought its claim to this Court because it was its first opportunity to protest the violation. A party "may seek judicial review of an issue that it did not raise in a case brief if Commerce did not address the issue until its final decision, because in such a circumstance the party would not have had a full and fair opportunity to raise the issue at the administrative level." *Qingdao Taifa Group Co., Ltd. v. United States*, 637 F. Supp. 2d 1231, 1236 (CIT 2009), *aff'd without opinion*, 467 F.

App'x 887 (Fed. Cir. 2012) (citing *LTV Steel Co. v. United States*, 985 F. Supp. 95, 120 (CIT 1997)).

In *Qingdao Taifa*, Commerce's Preliminary Results assigned a relatively low duty rate of 3.82% to respondent Taifa and did not use adverse inferences drawn from facts otherwise available. 637 F. Supp. 2d at 1236. Taifa did not file a case brief or rebuttal brief following the preliminary results, as it was satisfied with the assigned duty rate. *Id.* But in the Final Results, Commerce decided to apply adverse inferences drawn from facts otherwise available to Taifa and assigned it the countrywide duty rate of 383.60%. *Id.* Taifa, having no opportunity remaining at the administrative level to object, appealed this decision to the CIT. *Id.* at 1234. The CIT held that the exhaustion requirement did not preclude Taifa's claim because (1) "Taifa did not have a fair opportunity to challenge these issues at the administrative level," and (2) "Taifa [was] not required to predict that Commerce would accept other parties' arguments and change its decision." *Id.* at 1237 (citing *Saha Thai Steel Pipe Co. v. United States*, 828 F. Supp. 57, 59–60 (CIT 1993)).

Qingdao Taifa mirrors the present case, as does its holding on exhaustion. Here, just as in *Qingdao Taifa*, Commerce's Preliminary Results did not apply adverse inferences drawn from facts otherwise available to Saha Thai. Wheatland Tube argued that Commerce should apply adverse inferences to Saha Thai, and Saha Thai — unlike Taifa — responded to Wheatland Tube's argument. *See* Saha Thai Rebuttal Case Br. at 1, J.A. at 10,738, ECF No. 37. Commerce then surprised Saha Thai by applying adverse inferences drawn from facts otherwise available in the Final Results with no warning given by Commerce and no opportunity to protest the decision. *Cf. Qingdao Taifa*, 637 F. Supp. 2d at 1237. Saha Thai "did not have a fair opportunity to challenge these issues at the administrative level." *Id.* Additionally, Saha Thai was "not required to predict that Commerce would accept [Wheatland Tube's] arguments and change its decision." *Id.* It would make little sense to find that a Plaintiff that did more than the minimum is somehow barred from seeking review when one like Taifa that literally did nothing in the same circumstance was afforded a chance to appeal. *Cf. id.* at 1236 (noting that Taifa failed to file any brief addressing potential alternative results). For these reasons, exhaustion doctrine does not preclude the Court from hearing Saha Thai's claim regarding lack of notice.

b. The Burden to Provide Notice Lies with Commerce

The burden to provide timely notice before issuance of the final results under § 1677m(d) lies with Commerce, and Commerce may

not shift that statutory burden to Saha Thai. With respect to notice under § 1677m(d), the Federal Circuit has said it is "impermissible for Commerce to delay reporting that a respondent has provided insufficient information until it is too late to correct." *Hitachi Energy*, 34 F.4th at 1384 (citing *SKF USA*, 391 F. Supp. 2d at 1336–37). "If the Department wished to place the burden of error on [the respondent], it had to make clear and give [the respondent] a chance to correct the error prior to the issuance of a final decision." *Id.* (quoting *SKF USA*, 391 F. Supp. 2d at 1336–37). "Commerce's failure to timely notify a party of deficiency 'is itself a violation of § 1677m(d).'" *Id.* (quoting *Hyundai Steel*, 282 F. Supp. 3d at 1349).

Commerce attempts to escape its statutory obligation by shifting the agency's burden to notify onto the Plaintiff. Commerce claims that, because Saha Thai failed to inform the agency of the agency's duty to provide notice of any deficiencies, the agency is absolved of its responsibility. Def.'s Resp. at 22, ECF No. 29. The Court is not persuaded by that line of reasoning. Under § 1677m(d), Commerce had an obligation to notify Saha Thai of the alleged deficiencies in its U.S. sales database and provide an opportunity to remedy. Commerce's reasoning would require a respondent to object that it did not have proper notice *before* Commerce has taken any action for which notice might be required. The law requires respondents to be diligent, not clairvoyant. *Sigma Corp. v. United States*, 841 F. Supp. 1255, 1267 (CIT 1993) ("Commerce cannot expect a respondent to be a mind-reader."). Commerce's proposal would also perversely have respondents assume the agency will act in violation of its legal obligations. *Cf. FCC v. Schreiber*, 381 U.S. 279, 296 (1965) (noting the presumption that agencies "will act properly and according to law"). The agency's failure to notify Saha Thai "is itself a violation of § 1677m(d)"; and, as in *Hitachi Energy*, Commerce delayed notifying Saha Thai that it "ha[d] provided insufficient information until after it [was] too late to correct." *Hitachi Energy*, 34 F.4th at 1384. Because the burden to provide notice here lies with Commerce, it may not shirk its burden by arguing that respondents must assume Commerce will act illegally and object to an error that has yet to occur.

c. Whether Commerce Followed § 1677m(d) Is a Pure Question of Law

Absent the circumstances noted above, it would still be proper for the Court to consider whether Commerce complied with § 1677m(d), as that is a pure question of law. The pure-question-of-law exception to administrative exhaustion applies "when (1) plaintiff raises a new argument; (2) this argument is of a purely legal nature; (3) the inquiry requires neither further agency involvement nor additional

fact finding or opening up the record; and (4) the inquiry neither creates undue delay nor causes expenditure of scarce party time and resources." *Zhongce Rubber Group Co. Ltd. v. United States*, 352 F. Supp. 3d 1276, 1279 (CIT 2018), *aff'd without opinion*, 787 F. App'x 756 (Fed. Cir. 2019) (citing *Consol. Bearings Co. v. United States*, 166 F. Supp. 2d 580, 587 (CIT 2001)).

All four requirements of the pure-question-of-law exception are met here. All parties agree that this is the first time Saha Thai has disputed whether notice was provided. Whether Commerce complied with the notice requirement is a purely legal question, and the facts relevant to that inquiry are present on the record. No further agency involvement is required for the Court to consider the question. And the Court's inquiry into the question — now fully briefed — neither unduly delays justice nor expends scarce party time and resources.

The three foregoing reasons are each independently sufficient for the Court to consider Saha Thai's objections. The Court is satisfied that hearing Saha Thai's objection is well within the discretion granted by statute to judges of the Court of International Trade in applying exhaustion principles to trade cases. 28 U.S.C. § 2637(d); *see Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007).

2. Saha Thai's Data Was Not Submitted Fraudulently So That Notice Was Required

Commerce claims that Saha Thai's data was intentionally incomplete; therefore, Commerce had no obligation to provide notice. Def.'s Resp. at 22–23, ECF No. 29. Saha Thai responds that it told Commerce in a footnote what data it was and was not providing, and any allegations of intentional incompleteness or fraud are baseless. *See* Pl.'s Reply at 16–18, ECF No. 35. Further, Saha Thai notes that it responded in full to every request Commerce made; and none of those requests asked for data about *all* dual-stenciled pipe sales during the relevant period. *Id.* Commerce may refuse to provide notice when it can demonstrate bad faith on the respondent's part, not merely when it alleges that some information it wanted was not provided. *See Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016). Because Commerce did not find Saha Thai acted fraudulently, Commerce violated § 1677m(d) when it did not provide notice and an opportunity to cure before applying an adverse inference to the facts available.

In *Papierfabrik*, a respondent admitted — after substantial delays and being confronted with an affidavit — that it had engaged in a pattern of fraudulent transshipment and misreporting. *Id.* at 1376–77. Commerce refused to accept the respondent's attempts to correct the error and instead used adverse inferences drawn from

facts otherwise available. *Id.* The Federal Circuit upheld Commerce's decision to deny the respondent an opportunity to remedy, holding that § 1677m(d) did not require Commerce "to treat intentionally incomplete data as a 'deficiency' and then to give a party that has intentionally submitted incomplete data an opportunity to 'remedy' as well as to 'explain.'" *Id.* at 1384. However, the Federal Circuit based its holding on the exact circumstances of the case: "Commerce 'emphasize[d]' that 'the "deficiency" at issue did not come about because [the respondent] inadvertently omitted a number of sales,' 'due to an unintentional computer programming error,' or '*because of a misunderstanding of the Department's questionnaire instructions*.'" *Id.* (emphasis added). "Rather, '[t]he "deficiency" in [the respondent's] questionnaire responses occurred because [the respondent] intended to submit deficient, incomplete, *and fraudulent* questionnaire responses to the Department.'" *Id.* (emphasis added). Thus, § 1677m(d) does not "permit respondents to submit *fraudulent data* with the knowledge that, should their misconduct come to light, they can demand an opportunity to remedy their intentionally deficient data and avoid the otherwise-authorized adverse inferences." *Id.* (emphasis added). It, however, does not give Commerce *carte blanche* to omit notice whenever a party fails to submit information because of a misunderstanding regarding what information Commerce requires. *See id.* (holding that notice *is* required when there is a "misunderstanding of the Department's questionnaire instructions").

Papierfabrik is distinct from the present case. Commerce does not allege that Saha Thai engaged in outright fraud. Rather, Commerce attempts to wedge this case into *Papierfabrik*'s framework through overreliance on the Federal Circuit's use of the phrase "intentionally incomplete." *See* Def.'s Resp. at 22, ECF No 29. The Federal Circuit was discussing outright and admitted fraud. *See Papierfabrik*, 843 F.3d at 1384 (declaring the data "fraudulent"). There is no finding of fraud in this case. Instead, what has happened could — most charitably to Commerce's position — be characterized as "a misunderstanding of the Department's questionnaire instructions." *Cf. id.* ("Accordingly, we find [Papierfabrik's] arguments that the Department 'unlawfully denied [it] an opportunity to remedy its deficiency . . .' to be disingenuous. [Papierfabrik] did not need the Department to 'promptly inform [it] of the nature of the deficiency'" because it was a result of knowing and purposeful fraud) (quoting Commerce). Indeed, it would be hard to call the omission of data on dual-stenciled pipe "fraudulent" when (1) the omission was transparently disclosed at the

time of the submission, *see supra* at 8 n.2; (2) Commerce asked for the missing data with regard to two specific customers — demonstrating it knew Saha Thai had not provided it — but never asked for the data for any other customers, *see supra* at 10; and (3) Saha Thai immediately provided the company-specific data for which Commerce asked, *see supra* at 11.

A more recent case, *Shelter Forest International Acquisition, Inc. v. United States*, is much more analogous than *Papierfabrik* to the case at bar. No. 2021–2281, 2022 WL 2155965 (Fed. Cir. June 15, 2022). There, Commerce issued a preliminary determination finding in part that a respondent did not provide documentation to support one of its claims. *Id.* at *3. When the respondent then attempted to submit additional information addressing Commerce's concern, Commerce rejected the new submission and denied the respondent's formal request that Commerce solicit that information. *Id.* In its final determination, however, Commerce faulted the respondent for not supplying that information "even though Commerce had never requested such information from Shelter Forest and refused to accept that information when Shelter Forest attempted to provide it." *Id.* The Federal Circuit concluded that Commerce "abused its discretion in the original proceeding by failing" to provide notice or an opportunity to remedy the deficiency "as required by 19 U.S.C. § 1677m(d)." *Id.* at *5. It distinguished *Papierfabrik* on the basis that, there, the respondent had knowingly submitted fraudulent data to Commerce. *Id.* at *6.

Commerce's own citations do it no favors. *Fengchi Import and Export Company* only serves to bolster Saha Thai's argument. *See* Def.'s Suppl. Br. at 5–8, ECF No. 47. During the administrative review at issue in *Fengchi*, Commerce conducted a separate scope inquiry, which resulted in the inclusion of a new product in the scope. *Fengchi Imp. & Exp. Co.*, 70 F. Supp. 3d 1255, 1258 (CIT 2015). At the conclusion of the scope inquiry, Commerce sent Fengchi a supplemental questionnaire that specifically asked it to confirm if it had reported the newly-included product and, if not, to now include it in its response to the questionnaire. *Id.* Fengchi refused to respond with the information Commerce requested and instead protested the request. *Id.* Despite multiple follow-ups from Commerce, Fengchi never answered the questionnaire, leaving Commerce no choice but to apply adverse inferences drawn from facts otherwise available. *Id.* When the Federal Circuit eventually overturned the scope inquiry, Fengchi argued that there was no longer any basis for Commerce to apply adverse inferences. *Id.* at 1260. The Court disagreed, holding Commerce could still do so. *Id.*

Fengchi thus is distinct from the present case both in how the respondent behaved and in how Commerce communicated its requests for information. The respondent in *Fengchi* refused to provide the information Commerce had repeatedly requested. *Id.* at 1258 (noting that Commerce specifically asked Fengchi to "confirm whether it had reported all sales of subject merchandise, *including [the newly included product]*, in its initial questionnaire response") (emphasis added). Saha Thai, on the other hand, complied with Commerce's requests. In *Fengchi*, Commerce asked the respondent to supplement the record after the scope review added a new product to the relevant "subject merchandise." Here, Commerce never asked for a completely new data set and limited its requests to data about sales of dual-stenciled pipe to two companies. *Compare id.*, *with* Second Supplemental Questionnaire at 3–4, J.A. at 4,579, ECF No. 37.

The other cases Commerce cites are similarly unhelpful. *See* Def.'s Suppl. Br. at 5–7, ECF No. 47. For example, in *Deacero S.A.P.I. de CV v. United States*, Deacero submitted a cost database that it stated was based on actual costs. 996 F.3d 1283, 1290 (Fed. Cir. 2021). Later, Deacero submitted an unsolicited and substantially revised database with little explanation provided. *Id.* Commerce sent a second supplemental questionnaire, which served as notice, asking that Deacero explain the revisions. *Id.* at 1298. Deacero did so, but Commerce found its explanation unsatisfactory and applied adverse inferences drawn from facts otherwise available. *Id.* In *Essar Steel Ltd. v. United States*, the Court finds much the same story. 721 F. Supp. 2d 1285 (CIT 2010). Commerce asked for subsidy benefit information about both unfulfilled and fulfilled export licenses. *Id.* at 1290. Essar provided only information about unfulfilled export licenses. *Id.* Commerce sent a new supplemental questionnaire asking again as notice, and Essar did not provide the requested information in response. *Id.* at 1298–99. Having provided notice, Commerce applied adverse inferences drawn from facts otherwise available. *Id.* Lastly, Commerce cites *Shandong Huarong Machinery Co. v. United States*, in which Commerce alleged that a respondent "continually misrepresented" its affiliation with another business. 435 F. Supp. 2d 1261, 1275 (CIT 2006). Despite that, Commerce issued the respondent *three* separate supplemental questionnaires that served as notice and requested further information. *Id.*

As the previous examples show, Commerce has consistently followed § 1677m(d) by providing notice and an opportunity to cure to parties who acted far less diligently than Saha Thai. *Cf., e.g.*, *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 536 (2009); *State Farm*, 463 U.S. at 42 ("[A]n agency changing its course . . . is obligated to supply a

reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). The Federal Circuit has provided Commerce a limited exception when dealing with outright fraud. *See Papierfabrik*, 843 F.3d at 1384. A mistake or misunderstanding still requires notice of the deficiency and an opportunity to cure. *See Shelter Forest*, 2022 WL 2155965, at *5–6. Commerce's final decision in this matter does not rely on allegations of fraud for its application of adverse inferences. *See* IDM, J.A. at 10,778–94; AFA Memorandum, J.A. at 10,795–803. Consequently, federal statute and Federal Circuit precedent require Commerce to have provided notice and an opportunity to cure to Saha Thai before it may act — the same notice and opportunity to cure it has routinely provided to less transparent and less cooperative entities in the past. 19 U.S.C. § 1677m(d); *see Deacero S.A.P.I.*, 996 F.3d at 1298; *Fengchi Imp. & Exp. Co.*, 70 F. Supp. 3d at 1258; *Essar Steel*, 721 F. Supp. 2d at 1299; *Shandong Huarong*, 435 F. Supp. 2d at 1275. It is to the question of whether Commerce gave notice to which the Court next turns.

3. Commerce Failed to Provide Notice

Although Commerce now claims it did provide Saha Thai with notice and an opportunity to remedy, that claim is contrary to the record evidence in this case. Commerce argues that it provided Saha Thai notice and an opportunity to remedy in its Second Supplemental Questionnaire issued on March 23, 2020. Def.'s Resp. at 23–24, ECF No. 29. Saha Thai replies that the referenced questionnaire does not provide notice that Commerce wanted the data for *all* sales of dual-stenciled pipe in the period of review and instead only asked for specific information about sales to a subset of Saha Thai's customers. Pl.'s Reply at 21–23, ECF No. 35. Because the record evidence does not support Commerce's claim that it asked for all dual-stenciled pipe sales, the Court concludes that Commerce did not provide notice.

To provide adequate notice under § 1677m(d), Commerce must give the respondent "[c]larity regarding what information is requested by Commerce . . . especially in cases such as this where there was confusion as to whether or not requests for data were made and whether or not these requests were refused." *Hitachi Energy*, 34 F.4th at 1384 (quoting *SKF USA*, 391 F. Supp. 2d at 1336). As discussed above, Commerce provided no indication that it intended to use adverse inferences drawn from facts otherwise available until the Final Results. The Preliminary Results did not use adverse inferences drawn from facts otherwise available. Thus, Commerce should have provided Saha Thai with clear notice that it required the data on all

sales of dual-stenciled pipe between the Preliminary Results and the Final Results when Commerce decided it would apply adverse inferences drawn from facts otherwise available.

Commerce alleges it did so via the Second Supplemental Questionnaire, issued to Saha Thai on March 23, 2020. Def.'s Resp. at 24, ECF No. 29. This cannot be correct. The contents of the Second Supplemental Questionnaire and Saha Thai's responses demonstrate that the questionnaire could not have provided the requisite notice.

The questionnaire asked Saha Thai to provide information about subject and non-subject merchandise sales to two specific customers. Commerce does not dispute Saha Thai did so satisfactorily. Second Supplemental Questionnaire at 3–4, J.A. at 4,581–82, ECF No. 37 (requesting Saha Thai "[p]rovide a schedule that lists the sales of all merchandise (subject and non-subject) during the POR to [Customer 1]," and, in a separate question, the same for "[Customer 2]"). Commerce did not request in the Second Supplemental Questionnaire or any point thereafter a revised U.S. sales database including all non-subject merchandise — much less inform Saha Thai that it believed it had previously asked for the information and not received it. Yet that information is what Commerce now claims Saha Thai failed to provide. The Second Supplemental Questionnaire demonstrates that Commerce knew how to ask for sales of both subject and non-subject merchandise; it simply chose not to do so regarding all of Saha Thai's sales. Saha Thai is left in much the same position as the appellant in *Hitachi Energy* — forced to have clairvoyance in order to avoid an adverse inference. *See Hitachi Energy*, 34 F.4th at 1381 (faulting Commerce for requiring the respondent to know "that the Department would retroactively revise its test" to avoid an adverse inference); *Sigma Corp.*, 841 F. Supp. at 1267 ("Commerce cannot expect a respondent to be a mind-reader.").

Recognizing this at oral argument, the Court asked Commerce to further clarify where in the record it had requested the information about dual-stenciled pipe earlier in the investigation: "[C]an you point to me a specific question in either the initial questionnaire, the first supplemental questionnaire, or the second supplemental questionnaire where you asked for some specific information regarding dual-stenciled pipe and they didn't give it to you?" First Tr. 47:7–12, ECF No. 46. Commerce responded by once again highlighting question five of the Second Supplemental Questionnaire. *Compare* First Tr. 48:17–19, ECF No. 46 (pointing to question five and describing it as "a general question . . . not specific to a particular client"), *with* Second Supplemental Questionnaire at 3, J.A. at 4,581, ECF No. 37 (contradicting statement at oral argument by requesting in question

five only that Saha Thai "[p]rovide a schedule that lists the sales of all merchandise (subject and non-subject) during the POR to" two specific customers). Further, Commerce acknowledged that it did not rely on Saha Thai's failure to respond to question five in that questionnaire in either the Issues and Decision Memorandum or the Adverse Facts Available Memorandum. First Tr. 47–49, ECF No. 46.[7] Thus, even were question five adequate notice — it is not — Commerce would have failed to explain its reasoning in the record. *Compare* First Tr. 48:25–50:4, ECF No. 46 (asking Government counsel directly where Commerce explained its reasoning and receiving no clear answer), *and* Second Tr. 68:1–3, ECF No. 57 (Counsel for Defendant-Intervenor Wheatland Tube: "I would agree with Your Honor that [Commerce] didn't elaborate on all the different ways that impeding behavior took place."), *with State Farm*, 463 U.S. at 50 ("[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). Either failure alone would be fatal to Commerce's decision. Combined, the procedural error of failing to give notice of the deficiency and the lack of an adequate explanation make remand inevitable.

CONCLUSION

Commerce failed to provide notice and an opportunity to remedy as § 1677m(d) requires. It also failed to explain adequately in the record the reason it chose to draw an adverse inference. Having failed at both prerequisites, its current decision is not supported by substantial evidence nor in accordance with the law. *Cf.* 19 U.S.C. § 1516a(b)(1)(B)(i). The Court states no position whether on remand Commerce may draw adverse inferences or use facts otherwise available. If it does so, Commerce must provide an adequate explanation in the record supported by substantial evidence and ensure that it properly complies with the notice requirement of § 1677m(d).

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[7] The Court asked government counsel on what Commerce relied in its written decision to apply adverse inferences drawn from facts otherwise available. Mr. Cho: "So what we relied on was the initial questionnaire." Court: "So you didn't rely on [question five in the second supplemental questionnaire]." Mr. Cho: "That's correct." First Tr. 47–49, ECF No. 46. Commerce did not further address or clarify its understanding of question five of the Second Supplemental Questionnaire during the second oral argument despite multiple invitations from the Court to do so. *See* Second Tr. 39:11–45:19, ECF No. 57.

Thus, on consideration of Plaintiff's Motion for Judgment on the Agency Record, all papers and proceedings had in relation to this matter, and on due deliberation, it is hereby:

ORDERED that Plaintiff's Motion for Judgment on the Agency Record is **GRANTED**;

ORDERED that Commerce, no later than 120 days from the date of issuance of a final mandate in *Saha Thai Steel Pipe Public Co. Ltd. v. United States*, No. 222181 (Fed. Cir.), shall submit a Remand Redetermination in compliance with this Opinion and Order. It is Commerce's option whether to wait for the mandate to issue before submitting its Remand Redetermination in this case; and it is further

ORDERED that, within 14 days of Commerce's filing the Remand Redetermination, Commerce shall supplement the administrative record and joint appendix with all documents not already included that Commerce considered in reaching its remand results;

ORDERED that Plaintiff shall have 28 days from the filing of the supplement to the administrative record to submit comments to the Court;

ORDERED that Defendant shall have 14 days from the date of Plaintiff's filing of comments to submit a reply; and

ORDERED that Defendant-Intervenor shall have 14 days from the date of Defendant's filing of comments to submit its reply.

Dated: December 2, 2022
New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 22–135

NEXTEEL CO., LTD. et al., Plaintiff and Consolidated Plaintiffs, and HUSTEEL CO., LTD. and HYUNDAI STEEL COMPANY, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and CALIFORNIA STEEL INDUSTRIES, INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 20–03898

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand redetermination and final results in the 2017–2018 antidumping administrative review of welded line pipe from the Republic of Korea.]

Dated: December 6, 2022

J. David Park, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for plaintiff NEXTEEL Co., Ltd. Also on the brief were, *Daniel R. Wilson*, *Henry D. Almond* and *Kang Woo Lee*.

Jeffrey M. Winton, Winton & Chapman PLLC, of Washington, D.C., for consolidated plaintiff SeAH Steel Corporation. Also on the brief were *Amrietha Nellan*, *Jooyoun-Jeong*, and *Ruby Rodriguez*.

Jarrod M. Goldfeder, Trade Pacific PLLC, of Washington, D.C., for consolidated plaintiff and plaintiff-intervenor Hyundai Steel Company. Also on the brief was *Robert G. Gosselink*.

Brady W. Mills, Morris, Manning, & Mart.in, LLP, of Washington, D.C., for plaintiff-intervenor Husteel Co., Ltd. Also on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, and *Eugene Degnan*.

Robert R. Kiepura, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Assistant Deputy Attorney General, *Patricia McCarthy*, Director, and *Franklin E. White Jr.*, Assistant Director. Of counsel was *Benjamin Juvelier*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, of Washington D.C.

Timothy C. Brightbill, Wiley Rein, LLP, of Washington, D.C., for defendant-intervenors American Cast Iron Pipe Company and Stupp Corporation. Also on the brief were *Laura El-Sabaawi* and *Elizabeth Lee*.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") redetermination on remand filed pursuant to the court's order in *NEXTEEL Co. v. United States*, 569 F. Supp. 3d 1354 (Ct. Int'l Trade 2022) ("*NEXTEEL I*") in connection with Commerce's 2017–2018 administrative review of the antidumping duty ("ADD") order covering welded line pipe ("WLP") from the Republic of Korea. On remand, Commerce: (1) found that there was insufficient evidence of a particular market situation ("PMS") in the Korean hot-rolled coil steel ("HRC") market; (2) recalculated Plaintiff NEXTEEL Co's ("NEXTEEL") costs without making an adjustment for non-prime

products; (3) further explained its classification of NEXTEEL's suspended production line costs ("suspension losses"), and (4) revised the non-examined companies' rate. Final Results of Redetermination Pursuant to Ct. Remand, April 19, 2022, ECF No. 96–1 ("Remand Results").

BACKGROUND

The court presumes familiarity with the facts of this case as set forth in its previous opinion remanding Commerce's determination for further consideration, and recounts only the facts necessary to consider the Remand Results. Commerce published the final results of its administrative review on November 30, 2020, determining that a PMS existed in the Korean HRC market based on the cumulative effects of subsidies provided by the Government of Korea, imports of low-priced HRC from the People's Republic of China, strategic alliances between Korean HRC suppliers and WLP producers, and government intervention in the electricity market. [WLP] from the Republic of Korea, 85 Fed. Reg. 76,517 (Dep't Commerce Nov. 30, 2020) (final results of [ADD] admin. review; 2017–2018) ("Final Results").

On April 19, 2022, the court sustained Commerce's determination to cap Consolidated Plaintiff SeAH Steel's ("SeAH") freight revenue, but remanded Commerce's PMS determination, application of a PMS adjustment to SeAH's home market sales for the purpose of the sales-below-cost test, denial of a constructed export price offset for SeAH, reallocation of NEXTEEL's suspension losses and non-prime product costs, and separate rate calculations. *NEXTEEL I*, 569 F. Supp 3d at 1376. On July 18, 2022, Commerce published the final results of its determination on remand. On remand, Commerce found insufficient evidence of a PMS and therefore recalculated SeAH's and NEXTEEL's margins without applying a PMS adjustment, recalculated NEXTEEL's costs without making an adjustment for non-prime products, further explained its classification of NEXTEEL's suspension losses as general and administrative ("G&A") expenses, and revised the rate for non-examined companies. Remand Results at 2.

NEXTEEL, SeAH, and Plaintiff-intervenors Husteel and Hyundai Steel all urge the court to affirm Commerce's determination on remand that there was insufficient evidence to show a PMS. *See* Pl. NEXTEEL's Cmts. on Remand, Aug. 17, 2022, ECF No. 105 ("Pl.'s Cmts."); Cmts. Consol. Pl. SeAH Steel Corp. on Commerce's Determ. on Remand., Aug. 17, 2022, ECF No. 104; Pl.-Int. Husteel's Cmts. on Redetermination, Aug. 17, 2022, ECF No. 103; Cmts. Consol. Pl. and Pl.-Int. Hyundai Steel on Commerce's Remand Redetermination, Aug. 17, 2022, ECF No. 107. Defendant-intervenors American Cast

Iron Pipe Company and Stupp Corporation ("Domestic Interested Parties") urge the court to reject the remand results, and find that Commerce supported its PMS finding in the HRC market with substantial evidence. *See* [Domestic Interested Parties'] Cmts. on Remand Redeterm., Aug. 17, 2022, ECF No. 106 ("Def.-Ints.' Cmts."). Defendant asks the court to affirm Commerce's PMS determination. *See* Def.'s Resp. to Cmts. on Remand Redetermination, Sept. 16, 2022, ECF No. 109 ("Def.'s Br.").

NEXTEEL contests Commerce's decision to continue treating its suspension losses as G&A expenses. *See* Pl.'s Cmts.; Pl. NEXTEEL's Reply Cmts. on Remand, Sept. 16, 2022, ECF No. 110 ("Pl.'s Br."). Defendant argues that Commerce's remand results with respect to NEXTEEL's suspension losses are supported by substantial evidence, and should be sustained. Def.'s Br. at 9–11. For the following reasons, the court sustains the Remand Results with respect to Commerce's PMS determination, NEXTEEL's non-prime product costs, and the separate rate calculation, and remands Commerce's decision with respect to NEXTEEL's suspension losses for reconsideration or additional explanation consistent with this opinion.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2018), which grants the court authority to review actions initiated under 19 U.S.C. § 1516a(a)(2)(B)(iii)[1] contesting the final determination in an administrative review of an ADD order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (citation omitted).

DISCUSSION

I. Particular Market Situation

In its remand redetermination, Commerce under respectful protest concludes there was no PMS affecting the costs of production for WLP in Korea during the period of review ("POR"). Remand Results at 16–17. NEXTEEL, SeAH, Husteel Co., and Hyundai Steel Co. support Commerce's determination, and urge the court to sustain the Remand Results with respect to this issue. Domestic Interested Par-

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

ties urge the court to reject the Remand Results, and find that Commerce's initial PMS determination was supported by substantial evidence. For the following reasons, Commerce's determination is sustained.

As the court explained in *NEXTEEL I*, a PMS exists when "the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade." 19 U.S.C. § 1677b(e). Neither the statute nor the legislative history defines what constitutes a PMS. The Trade Preferences Extension Act ("TPEA") added the phrase "particular market situation" to 19 U.S.C. § 1677b(e) in 2015, but the phrase existed prior to the TPEA, and appears in 19 U.S.C. § 1677b(a)(1)(B)(ii)(III) and (C)(iii). The Statement of Administrative Action to the Uruguay Round Agreements Act explains that:

> The Agreement does not define "particular market situation," but such a situation might exist where a single sale in the home market constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices to the United States.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 822 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4162.

If a PMS exists, Commerce may "use another calculation methodology under this part or any other calculation methodology," so long as the methodology comports with its statutory mandate and provides a reasoned explanation supported by substantial evidence. 19 U.S.C. § 1677b(e); *see Ceramica Regiomontana, S.A. v. United States*, 636 F.Supp. 961, 966 (1986) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)). The evidence must be sufficient such that a reasonable mind might accept the evidence as adequate to support its conclusion while considering contradictory evidence. *See Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S.

197, 229 (1938); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994).

Here, Commerce concludes that in light of the limitations of the record, it cannot adequately address all of the court's concerns in the Remand Results; therefore, Commerce concludes under respectful protest that it does not find a PMS affecting WLP. Remand Results at 5–6. Specifically, Commerce finds that it cannot show both a comparative and a causal connection between particular market phenomena, including subsidies, and their effects on WLP producers' costs of production.[2] *Id.* at 6. Domestic Interested Parties argue the record contains adequate information for Commerce to have further explained its finding of a PMS. Def.-Ints.' Cmts. at 5. They also argue Commerce should have reopened the record on remand, and point to four reasons showing why Commerce's PMS determination was supported by substantial evidence. *Id.* at 4–9.

Domestic Interested Parties urge Commerce to re-adopt its position from Final Results for the same reasons that the court already addressed. As Commerce points out, Domestic Interested Parties cite to the Final Results and accompanying Issues and Decision Memorandum to support their argument in favor of finding a PMS. Remand Results at 16; Def.-Ints.' Cmts. at 4–9. The court considered and rejected this reasoning in *NEXTEEL I*, and Commerce correctly reasons that adopting its prior position would be no more than a "recitation of explanation and argument already before the Court." Remand Results at 16. Commerce also adequately addressed Domestic Interested Parties' comment that Commerce could have reopened the record to supplement its PMS finding with more information explaining it was unclear what additional information Commerce could have requested. *Id.* at 17. Therefore, Commerce's determination on this issue is sustained.

II. Cost Adjustment for Non-Prime Products

In its remand determination, Commerce found NEXTEEL's reported costs reflected the actual costs of producing both its prime and non-prime goods, and therefore reversed its decision to apply an adjustment to NEXTEEL's constructed value for non-prime products. Remand Results at 7–8. No parties submitted comments on this issue.

As the court explained in *NEXTEEL I*, when determining the constructed value of subject merchandise, Commerce normally calculates

[2] Because it no longer applies a PMS adjustment, Commerce finds that the issues of the validity of its regression analysis, the application of the PMS adjustment to the sales-below-cost test, and the constructed export price offset for SeAH are moot, and does not discuss them in the Remand Results. Remand Results at 5, 6, 12.

cost "based on the records of the exporter or producer of the merchandise" if the records "are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A); *NEXTEEL I*, 569 F. Supp. 3d at 1370. Sometimes, Commerce finds that a portion of a respondent's reported costs relate to the production of "non-prime" products. *See, e.g.*, *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1381 (Fed. Cir. 2008). In those cases, Commerce applies an adjustment to the reported cost of production of the non-prime product, valuing it at its sale price, and allocates the difference between the production cost and sales price to the production cost of prime products. *Id.* at 1381–82. Commerce's adjustment must still comply with the Court of Appeals' decision in *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1321–24 (Fed. Cir. 2020), where the court held that Commerce's constructed value calculation must reasonably reflect a respondent's actual costs. *Id.* at 1324.

Here, Commerce found that in its normal books and records, NEXTEEL calculates the costs for both prime and non-prime products in the same manner. Remand Results at 7–8. In accordance with *Dillinger* and the court's instructions, Commerce reversed its decision to apply an adjustment to NEXTEEL's non-prime products. *Id.* at 7–8; *see Xinjiamei Furniture*, 968 F. Supp. 2d at 1259. No party objects to Commerce's decision to reverse the adjustment. Therefore, Commerce's determination on this issue is sustained.

III. Separate Rate Calculation

In its remand results, Commerce recalculated the separate rate applicable to non-examined respondents. Remand Results at 20. The separate rate is "the weighted average of the estimated weighed average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(a). Because the separate rate is based on the rate calculated for NEXTEEL and SeAH, and the court concluded that those rates were not supported by substantial evidence, Commerce properly recalculated the separate rate on remand. No party submitted comments on this issue. Commerce's decision on this issue therefore is sustained.

IV. NEXTEEL's Suspension Losses

In its remand determination, Commerce again classified NEXTEEL's costs associated with certain suspended production lines as G&A expenses, and provided further explanation for this determina-

tion. Remand Results at 2, 8–12. NEXTEEL argues that Commerce's explanation does not comply with the court's instructions to clarify whether production lines were suspended for part of or all of the POR, and how losses associated with those lines relate to G&A expenses. Pl.'s Cmts. at 2–6. For the following reasons, Commerce's determination on this issue is remanded for further explanation or reconsideration.

Commerce normally calculates costs based on the respondent's records if such records are kept in accordance with generally accepted accounting practices ("GAAP"). *See* 19 U.S.C. § 1677b(f)(1)(A); *see also NEXTEEL I*, 569 F. Supp. 3d at 1371–72. However, § 1677b(f)(1)(A) requires that constructed value reasonably reflect a respondent's actual costs. *Dillinger*, 981 F.3d at 1321–23. Thus, even if a respondent's normal books and records are GAAP-compliant, Commerce may deviate from the costs reflected in a respondent's books and records if it determines that such costs do not "reasonably reflect the costs associated with the production and sales of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

In *NEXTEEL I*, the court asked Commerce to (1) clarify whether NEXTEEL suspended production on the lines in question for all or only part of the POR, explaining that if merchandise was produced during the POR, suspension losses could be associated with the revenue generated from that merchandise. *NEXTEEL I*, 569 F. Supp. 3d at 1372 (citing *Husteel Co., Ltd. v. United States*, 520 F. Supp. 3d 1296 (Ct. Int'l Trade 2021)); and (2) further explain how losses associated with the suspension of NEXTEEL's production lines relate to the G&A expenses incurred in the production of subject merchandise, or else reconsider its determination. *Id.*

Here, based on a practice which distinguishes short-term and long-term shutdown expenses, Commerce again concludes NEXTEEL's reported costs do not reflect its actual costs. Remand Results at 9. Commerce explains it includes routine short-term shutdown expenses in a respondent's reported costs of goods, and attributes the long-term shutdown costs to G&A expenses because a suspended production line is like a depreciating asset. *Id.* Commerce views a routine or temporary shutdown as generating costs that relate to the products produced on that line, but considers a long-term shutdown as generating costs that must be borne by the business as a whole. Remand Results at 10, 19 ("when a production line is suspended, in contrast to a routine maintenance shutdown, there are no longer products produced on those production lines or current intentions to produce products on those lines that can bear the burden of the cost

associated with them"); *see also id.* at 19 ("The cost of holding idle assets is more appropriately considered to be a period cost related to the general operations of the company as a whole, not to the manufacture of specific products.")

Commerce does not explain whether there were any products produced during the POR on the suspended lines, and therefore fails to support its assumption that NEXTEEL's allocation is not reasonably reflective of actual costs. The statute directs Commerce to calculate costs based on a respondent's records if those records are GAAP-compliant and "reasonably reflective of the cost associated with the production and sale of merchandise." 19 U.S.C. § 1677b(f)(1)(A). Commerce may deviate from a respondent's allocation in its GAAP-complaint books and records when it concludes that the respondent's allocation is not reasonably reflective of the actual costs. *Id.* Although Commerce's long-term/short-term construct may be a useful tool for Commerce when it establishes that a respondent's cost allocation is unreasonable, here it does not establish that allocating suspension losses to cost of goods is unreasonable when NEXTEEL produced goods during the POR. *See* 19 U.S.C. § 1677b(f)(1)(A); *Dillinger*, 981 F.3d at 1321–23. Where there are products to bear costs, and the producer assigns those costs to those products, consistent with GAAP, it is unclear to the court how Commerce can conclude a respondent's books and records do not accurately reflect the cost of the merchandise.

In the Remand Results, Commerce, instead of answering the court's inquiry as to whether there were products produced during the POR on suspended lines, states:

> While products may have been produced during the period of review [] on those lines that were later shut down, such production occurred prior to the shutdown. Revenues from products produced prior to the shutdown should not be associated with the suspended losses incurred during the shutdown periods, as those products already carry the full operating costs related to producing products on those lines.

Remand Results at 11. Commerce seems to conclude the court's nquiry is irrelevant, because post-suspension costs cannot be attributed to the cost of goods sold for products produced during the POR. *Id.* Commerce's own statements about its practice undermine its view that NEXTEEL's allocation is not reasonably reflective of actual costs. In the Final Results, Commerce focused on whether certain lines produced products with which costs could be associated. Issues and Decision Memo., A-580–876, Nov. 20, 2020, ECF No. 52–4 at 49

("Regardless of the reason for the extended suspension of production activity . . . products are not produced on those production lines to recover the costs associated with those production lines.") Thus, the Final Results indicated that the relevant question was whether any products were produced on suspended lines during the relevant period. *See Husteel Co., Ltd. v. United States*, 520 F. Supp. 3d 1296, 1307 (Ct. Int'l Trade 2021) (noting Commerce's position that because "[n]o revenue from any products normally produced on [the suspended] lines was generated for the period . . . the costs associated with the suspended production lines were necessarily covered by all the other products NEXTEEL produced"). Commerce's explanation is therefore not reasonable and conflicts with its stated practice.

Commerce does address the court's second question, as to why it would be reasonable to allocate costs from suspended lines to G&A expenses. Commerce makes clear that it views losses from suspended lines as G&A costs, akin to depreciating assets, the losses from which are normally attributable to the entire company in the form of a G&A expense. Remand Results at 9. Commerce notes that, in accordance with Korean International Financial Reporting Standards, NEXTEEL assigned its suspension losses directly to the cost of goods sold, rather than to individual products. *Id.* Commerce explains that attributing suspension losses to the cost of goods sold generally spreads the costs across all products, akin to spreading the costs throughout the company by attributing them to G&A expenses. *Id.* at 19. Thus, Commerce's view is that NEXTEEL is already distributing the costs of the suspended lines across the company—just to costs of goods sold, instead of as G&A expenses. However, Commerce views long-term shutdown costs as more appropriately allocated to G&A because Commerce views them as a cost of the general business of the company. *Id.* at 18–19. Commerce's explanation of how long-term suspension of product lines are considered akin to depreciating assets is helpful. But Commerce's practice regarding the treatment of costs for long-term shutdowns does not lead to the conclusion that allocating expenses to the cost of goods sold, in cases where goods were produced during the POR on suspended lines, would not be reflective of the actual cost of the goods. *See* 19 U.S.C. § 1677b(f)(1)(A). Thus, because Commerce fails to explain how NEXTEEL's allocation of costs was not reasonably reflective of the actual costs, Commerce's determination is remanded for further explanation or reconsideration. On remand, Commerce should clarify whether NEXTEEL suspended production on the lines in question for all or only part of the POR, and if NEXTEEL suspended production for only part of the POR, Commerce should explain why NEXTEEL's costs as reported for those lines

would not be "reasonably reflective of the cost associated with the production and sale of merchandise." 19 U.S.C. § 1677b(f)(1)(A).[3]

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determinations regarding the (1) PMS for WLP, (2) adjustment for NEXTEEL's non-prime product costs, and (3) separate rate calculation. Commerce's determination regarding NEXTEEL's suspension losses is remanded.

In accordance with the foregoing, it is

ORDERED that Commerce's Remand Results are remanded for further explanation or reconsideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to the comments on the remand redetermination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing its remand redetermination.

Dated: December 6, 2022
New York, New York

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

[3] Commerce indicates that some production lines may have been suspended for the entirety of the POR. *See* Remand Results at 18.

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Z.A. SEA FOODS PRIVATE LIMITED, B-ONE BUSINESS HOUSE PVT. LTD., HARI MARINE PRIVATE LIMITED, MAGNUM EXPORT, MEGAA MODA PVT. LTD., MILSHA AGRO EXPORTS PRIVATE LTD., SEA FOODS PRIVATE LIMITED, SHIMPO EXPORTS PRIVATE LIMITED, FIVE STAR MARINE EXPORTS PVT. LTD., HN INDIGOS PRIVATE LIMITED, RSA MARINES, and ZEAL AQUA LTD., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00031

[The court sustains Commerce's Remand Redetermination.]

Dated: December 6, 2022

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington, D.C., for Plaintiffs Z.A. Sea Foods Private Limited, B-One Business House Pvt. Ltd., Hari Marine Private Limited, Magnum Export, Megaa Moda Pvt. Ltd., Milsha Agro Exports Private Limited, Sea Foods Private Limited, Shimpo Exports Private Limited, Five Star Marine Exports Private Limited, HN Indigos Private Limited, RSA Marines, and Zeal Aqua Limited.

Kara M. Westercamp, 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*, Principal Deputy Assistant Attorney General and *Patricia M. McCarthy*, Director. Of Counsel *Spencer Neff*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance.

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

OPINION AND ORDER

Katzmann, Judge:

This case returns to the docket in the wake of the court's remand order in *Z.A. Sea Foods Priv. Ltd. v. United States* ("*ZASF I*"), 46 CIT __, 569 F. Supp. 3d 1338 (2022). Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee ("Domestic Shrimp" or "AHSTAC"), an ad hoc coalition of domestic producers, floats new arguments built upon the flotsam and jetsam of the original determination.

The question presented in *ZASF I* was whether the United States Department of Commerce ("Commerce") was permitted to reject third country sales based on the evidence presented before it and use "constructed value as the basis of normal value ("NV") calculation in its administrative review of the antidumping duty ("AD") order covering certain frozen warmwater shrimp that had been into the United States at less than fair value in derogation of fair competition with

domestic producers." 569 F. Supp. 3d at 1341. Plaintiffs,[1] all foreign producers and exporters in India of the subject merchandise, argued that Commerce failed to support its determination with substantial evidence. *Id.* at 1353. The court remanded, finding that substantial evidence did not support Commerce's decision to reject the third country sales based on the evasion scheme evidence and the trade pattern evidence. *Id.* at 1348–51. On remand, Commerce found insufficient evidence that ZA Sea Foods' third country sales were unrepresentative and unsuitable for use in the calculation, and thus recalculated normal value by relying on the previously rejected third country sales data. *See* Final Results of Remand Redetermination at 17, July 18, 2022, ECF No. 60–1 ("*Remand Redetermination*"). Commerce also found that there was no evidence on the record to support Domestic Shrimp's assertion that ZA Sea Foods' sales were not for consumption in Vietnam. *Id.*

Tempest-tossed but undeterred, Domestic Shrimp now asserts challenges to the *Remand Redetermination* based on (1) the separate requirement set forth in the statutory language "for consumption" in 19 U.S.C. § 1677b(a); (2) Commerce's purported obligation to make separate findings on the issue of consumption; and (3) the shifting of burdens when presumptions are rebutted. *See generally* Def.-Inter.'s Cmts. on Remand Redetermination, Aug. 18, 2022, ECF No. 63 ("Def.-Inter.'s Br."). Defendant United States ("the Government") and ZA Sea Foods request that the court sustain the *Remand Redetermination*. For the reasons set forth below, due to the lack of adequate argument, those challenges are deemed waived and the court sustains the *Remand Redetermination*.

BACKGROUND

The court laid out in depth the legal and factual background of the proceedings in its previous opinion. The details pertinent to the *Remand Redetermination* are set forth below.

I. Legal and Regulatory Framework

As noted in *ZASF I*, in investigating whether goods are being "dumped," that is, sold by a foreign company in the United States at less than fair value ("LTFV"), Commerce in its antidumping investigation first determines whether the goods is being sold at LTFV. 569

[1] Plaintiffs Z.A. Sea Foods Private Limited, B-One Business House Private Limited, Hari Marine Private Limited, Magnum Export, Megaa Moda Private Limited, Milsha Agro Exports Private Limited, Sea Foods Private Limited, Shimpo Exports Private Limited, Five Star Marine Exports Private Limited, HN Indigos Private Limited, RSA Marines and Zeal Aqua Limited will be referred to as "ZA Sea Foods" or "ZASF" throughout for ease of reference.

F. Supp. 3d at 1342; *see also* 19 U.S.C. § 1677b(a). Normal value provides the basis for this calculation, serving as a comparison point with the sales price in the United States (defined as export price or constructed export price) to determine whether dumping has occurred. 19 U.S.C. § 1677b(a); *see also* 19 C.F.R. § 351.404(a) (2022). Section 1677b(a)(1) states that:

> (A) In general
>
> The normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title.
>
> (B) Price
>
> The price referred to in subparagraph (A) is—
>
> (i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or
>
> (ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) *for consumption* in a country other than the exporting country or the United States, if—
>
> (I) such price is representative,
>
> (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and
>
> (III) the administering authority does not determine that the particular market situation prevents a proper comparison with the export price or constructed export price.
>
> (C) Third country sales
>
> This subparagraph applies when—

> (i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),
>
> (ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or
>
> (iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.
>
> For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

19 U.S.C. § 1677b (emphasis added). Thus, the default method under the current statutory scheme, as first introduced by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), is to use home market sales value. 19 U.S.C. § 1677b(a)(1)(B)(i). However, the statute also provides two alternative bases of calculation. The first method, as described in section 1677b(a)(1)(B)(ii) and (1)(C), allows for the use of third country sales as a replacement figure for the exporter's home market sales. The second method allows for the use of constructed value as a proxy. *See id.* § 1677b(e). Although the URAA did not specify a preference order for the two alternative methods, *see id.* § 1677b(a)(4), it has been Commerce's practice, as specified in 19 C.F.R. § 351.404(f), to use sales to a third country rather than constructed value when possible. *See Alloy Piping Prod., Inc. v. United States* ("*Alloy I*"), 26 CIT 330, 338 n.4, 201 F. Supp. 2d 1267, 1274 n.4 (2002), *aff'd sub nom. Alloy Piping Prod., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284 (Fed. Cir. 2003).

Commerce's regulations interpreting section 773 of the Tariff Act of 1930, as amended by the URAA and codified in 19 U.S.C. § 1677b, provide a standard procedure for normal value calculation.[2] It first

[2] The relevant provisions in 19 C.F.R. § 351.404 are as follows:

> (b) Determination of viable market—
>
> (1) In general. The Secretary will consider the exporting country or a *third country as constituting a viable market* if the Secretary is satisfied that *sales of the foreign*

engages in what is known as "market viability" analysis in Commerce practice, *see* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1, 656, 821 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4161. Market viability inquiry focuses only on the sale volume, and if the sales in the market meet the threshold quantity or value ("sufficient quantity") of five percent or more of the aggregate quantity or value, then that market is deemed a viable market. 19 C.F.R. § 351.404(b); *see also Alloy I*, 26 CIT at 339, 201 F. Supp. 2d at 1276 ("[T]he regulation does limit the inquiry of market viability to one criterion: the sufficiency of sales in the third country."). Once a third country market is found to be viable, Commerce generally uses the viable market data as the basis for its normal value calculation. 19 C.F.R. § 351.404(c)(1)(ii), (f); *see also Antidumping Duties, Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,357 (Dep't Commerce May 19, 1997) ("*Preamble*") ("[T]he Department provided that decisions concerning the calculation of a price-based normal value *generally* will be governed by the Secretary's determination as to whether the market in a particular country is 'viable.'" (emphasis added)). "Once Commerce is satisfied that the

---

like product in that country are of sufficient quantity to form the basis of normal-value.

(2) Sufficient quantity. "Sufficient quantity" normally means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States.

(c) Calculation of price-based normal value in viable market—

(1) In general. Subject to paragraph (c)(2) of this section:

(i) If the exporting country constitutes a viable market, the Secretary will calculate normal value on the basis of price in the exporting country (see section 773(a)(1)(B)(i) of the Act (price used for determining normal value)); or

(ii) If the exporting country does not constitute a viable market, but *a third country does constitute a viable market*, the Secretary may *calculate normal value on the basis of price to a third country* (see section 773(a)(1)(B)(ii) of the Act (use of third country prices in determining normal value)).

(2) Exception. The Secretary *may decline* to calculate normal value in a particular market under paragraph (c)(1) of this section if it is established to the satisfaction of the Secretary that:

(i) In the case of the exporting country or a third country, a particular market situation exists that does not permit a proper comparison with the export price or constructed export price (see section 773(a)(1)(B)(ii)(III) or section 773(a)(1)(C)(iii) of the Act); or

(ii) In the case of a third country, the price is not representative (see section 773(a)(1)(B)(ii)(I) of the Act).

(d) Allegations concerning market viability and the basis for determining a price-based normal value. In an antidumping investigation or review, allegations regarding market viability or the exceptions in paragraph (c)(2) of this section, must be filed, with all supporting factual information, in accordance with § 351.301(d)(1).

19 C.F.R. § 351.404 (2022) (emphasis added).

third country market is viable, the party alleging that the prices are not representative or otherwise should not be used . . . . bears the burden of establishing this fact." *Itochu Bldg. Prod., Co. v. United States*, 41 CIT __, __, 208 F. Supp. 3d 1377, 1386 (2017) (citing *Alloy I*, 26 CIT at 339, 201 F. Supp. 2d at 1276).

II. Procedural History

On March 6, 2020, Commerce issued the preliminary results of its administrative review. *Certain Frozen Warmwater Shrimp From India: Prelim. Results of AD Admin. Rev.; 2018–2019*, 85 Fed. Reg. 13,131 (Dep't Commerce Mar. 6, 2020), P.R. 169. Commerce preliminarily found that while Vietnam satisfied the regulatory criteria for third country market selection under 19 C.F.R. § 351.404(e)(1) and (2), ZA Sea Foods' sales to Vietnam were not appropriate for consideration due to the trade patterns of ZA Sea Foods' customers in Vietnam. *Id.* (citing Comments on Z.A. Sea Foods Private Limited's Section A Response and Request for Verification at 2–3 (Sept. 26, 2019), P.R. 94). In the *Final Results*, Commerce continued to use constructed value, and cited the U.S. Customs and Border Protection's Enforce and Protect Act ("EAPA") determination of an evasion scheme as additional information supporting the use of constructed value. *See Certain Frozen Warmwater Shrimp From India: Final Results of AD Administrative Review and Final Determination of No Shipments; 2018–2019*, 85 Fed. Reg. 85,580 (Dep't Commerce Dec. 29, 2020), P.R. 199 ("*Final Results*"); *see also* Mem. from J. Maeder to J. Kessler re: Issues and Decision Mem. for the Final Results of the 2018–2019 AD Admin. Rev. of Certain Frozen Warmwater Shrimp from India at 16 (Dep't Commerce Dec. 21, 2020), P.R. 194 ("IDM"). Specifically, Commerce reasoned that:

> The prices to Vietnam are *not truly prices for consumption* in Vietnam as the shrimp is exported without further processing. Further, in some cases, the prices to Vietnam are in fact prices for sales that eventually become U.S. sales, meaning that they cannot be representative of prices for sales in the third-country market because they are ultimately U.S. sales. Thus, the sales to the [customer in Vietnam] *do not represent prices of sales made for consumption* in Vietnam nor do they represent a third country given that they are resold to other countries including the United States. *Therefore*, under the criteria of section 773(a)(1)(B)(ii)(I) of the Act and 19 CFR 351.404(c)(2)(ii), *ZA Sea Foods' prices to Vietnam are not representative*.

IDM at 19 (emphasis added).

ZA Sea Foods challenged the *Final Results* in this court, arguing that Commerce's decision to employ constructed value and not the Vietnamese third country market prices as the basis for the subject merchandise's normal value was unsupported by substantial evidence and not accordance with law. *ZASF I*, 569 F. Supp. 3d at 1346. As had been noted, in *ZASF I*, the court held that neither the EAPA evasion scheme evidence nor the use of trade patterns constitutes substantial evidence to support Commerce's decision to reject third country sales, and thus remanded to Commerce for redetermination consistent with its opinion. *Id.* at 1348–51. On June 23, 2022, Commerce issued a Draft Remand Redetermination in which it found that the record evidence does not support a finding that ZA Sea Foods' subject merchandise were not consumed in Vietnam. *Remand Redetermination* at 12. Domestic Shrimp and ZA Sea Foods submitted timely comments, *see id.*, and Domestic Shrimp raised, inter alia, the following arguments:

- Commerce should continue to determine the NV of ZASF's sales using CV.
- Section 773 of the Act requires that, to determine NV on the basis of third country sales, such sales must be "for consumption" in that third country market.
- Information on the record of the administrative review demonstrates that ZASF's sales to Vietnam were to companies that were exporters of frozen warmwater shrimp products. Further, there is no evidence on the record to demonstrate that these Vietnamese shrimp companies consumed the merchandise they purchased rather that exporting the shrimp to other markets for consumption there.
- ZASF acknowledged that its sales were to Vietnamese exporters but maintained that it did not have specific knowledge of the disposition of the goods sold during the POR. Thus, according to ZASF, in the absence of definitive proof that merchandise was not consumed in a third country market, Commerce must presume that consumption occurred.
- The Draft Remand Results fail to address whether the Act requires Commerce to presume that sales to a third country market are for consumption. Nonetheless, any presumption is rebuttable, and AHSTAC submitted substantial evidence rebutting that presumption.

- While the Court's remand placed the burden on Commerce to demonstrate through substantial evidence that ZA Sea Foods' sales to Vietnam were not "representative" in order to invoke the exception set forth in section 773(a)(1)(B)(ii)(I) of the Act and 19 CFR 351.404(c)(2)(ii), this exception is only implicated if an exporter can first demonstrate that it has a sufficient quantity of sales "for consumption" in the third country market.

Id. at 13 (citations omitted). *See generally* AHSTAC Comments on Draft Results of Redetermination Pursuant to Court Remand (June 30, 2022), R.P.R. 5.[3] On July 18, 2022, Commerce issued its Final Results of Redetermination containing the following finding:

> Section 773(a)(1)(B)(ii)(I) of the Act states that when NV is based on third country sales, NV shall be based on the price at which the foreign like product is sold for consumption if such price is representative. The preamble to Commerce's regulations provides that a determination of whether or not third country prices are representative is not one that Commerce will regularly consider. Further, third country sales are presumptively representative where aggregate sales quantities are at a sufficient level, and the party seeking to show that third country sales are not representative bears the burden of making such a showing. Finally, the Court has held that any determination by Commerce that third country prices are not representative must be supported by substantial evidence.
>
> We agree that the evidence on the record shows that ZA Sea Foods sold shrimp to certain Vietnamese customers that were exporters or resellers. However, there is no evidence on the record to support AHSTAC's assertion that, simply because these companies were exporters, ZA Sea Foods' sales were not for consumption in Vietnam. Thus, we find that the record lacks sufficient evidence to support a finding that ZA Sea Foods' third country sales were not for consumption in Vietnam.

Remand Redetermination at 16. ZA Sea Foods and Domestic Shrimp submitted comments on the *Remand Redetermination* to this court on August 18, 2022. *See* Pls.' Cmts. on Final Results of Remand Redetermination, Aug. 18, 2022, ECF No. 64; *see also* Def.-Inter.'s Br. The Government submitted its Reply to the comments on September 16, 2022. *See* Def.'s Resp. to Cmts. Regarding the Remand Redetermination, Sept. 16, 2022, ECF No. 65. ZA Sea Foods filed its Reply to

[3] R.P.R. refers to the *Remand Redetermination* public record. *See* Joint Remand App., Sept. 30, 2022, ECF No. 67.

Domestic Shrimp's comments on the same day. *See* Pls.' Resp. to Cmts. on Remand Results of AHSTAC, Sept. 16, 2022, ECF No. 66.

STANDARD OF REVIEW

The court sustains Commerce's determinations, findings, and conclusions on remand unless they are unsupported by substantial evidence, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B); *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020). In conducting its review, the court's function is not to reweigh the evidence but rather to ascertain whether Commerce's determinations are supported by substantial evidence on the record. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). The possibility of drawing two inconsistent conclusions from the record evidence does not, in itself, prevent Commerce's determinations from being supported by substantial evidence. *SeAH Steel VINA*, 950 F.3d at 843 (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). In addition, the court reviews redeterminations after remand for compliance with the court's remand order. *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1402 (2018), *aff'd*, 779 F. App'x 744 (Fed. Cir. 2019).

DISCUSSION

Domestic Shrimp submits that the *Remand Redetermination* is contrary to law, and that it is unsupported by substantial evidence. Def.-Inter.'s Br. at 15–16. Domestic Shrimp does not explicitly dispute compliance with the court's remand order. *See id.*

As a preliminary matter, the court addresses the adequacy of Domestic Shrimp's arguments. In essence, Domestic Shrimp's arguments are anchored around two words contained in the statute, "for consumption." *Id.* at 1, 5–15. The central premise of Domestic Shrimp's argument is that in calculating normal value, Commerce should not default to a presumption that the merchandise was consumed in the third country market because the "statutory framework" requires Commerce to make specific findings on this statutory criterion. *Id.* at 6–10. Domestic Shrimp further argues that the court's remand order did not address this issue and thus did not preclude Commerce from addressing it. *Id.* at 6. According to Domestic Shrimp, the evidence before Commerce refutes any presumption Commerce may make contrary to Domestic Shrimp's position, and the burden of proof shifts to ZA Sea Foods because Domestic Shrimp has rebutted the presumption. *Id.* at 10–11.

Yet regarding the central issue, that is, the statutory language "for consumption" and the statutory framework on Commerce's ability to make presumptions and allocate the burden of proof, Domestic Shrimp has not provided adequate argument. *See id.* at 6–16. It does not discuss the relevant case law or Commerce practice interpreting the phrase "for consumption" in the specific context of third country determinations and Commerce's ability to make presumptions in market viability analysis. *Id.* Nor does Domestic Shrimp offer any other authority, such as the textual meaning and legislative history relevant to its position. *Id.* In essence, Domestic Shrimp's argument and briefing consist of no more than repeated assertions that the statute should be interpreted and applied in a certain way, without identifying the relevant authorities supporting those bare assertions.[4]

It is "well established that arguments . . . not appropriately developed in a party's briefing may be deemed waived." *United States v. Great Am. Ins. Co. of New York,* 738 F.3d 1320, 1328 (Fed. Cir. 2013) (citations omitted); *see also SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[M]ere statements of disagreement with the district court's determination . . . do not amount to a developed argument."). Issues that are "adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Baley v. United States*, 942 F.3d 1312, 1331 (Fed. Cir. 2019) (citing *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Where the issue involves statutory interpretation, if the party does not present adequate argumentation on the rules of statutory interpretation, "that misstep warrants a finding of waiver." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1347

[4] Although Domestic Shrimp cites *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990) and *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010), these cases are not relevant to the question before the court. Def.-Inter.'s Br. at 10–11. So-called "*Rhone Poulenc* presumptions" are "common sense inferences" that can be drawn from the highest prior margin when Commerce relies on adverse facts available ("AFA") due to a respondent's failure to provide information. *KYD*, 605 F.3d at 767. Thus, the applicability of a *Rhone Poulenc* presumption is limited to situations involving AFA determinations due to the party failing to cooperate with the investigation. *See id.*; *see also Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 38 CIT __, __, 991 F. Supp. 2d 1322, 1331 (2014). This is distinguishable from the current case that does not involve any such AFA determinations.

Moreover, *Rhone Poulenc* was a pre-URAA case that reflected the state of the law prior to the substantial modification of the statutory provisions in Chapter 19 of the United States Code. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 35 CIT 1, 13–14, 752 F. Supp. 2d 1336, 1347–48 (2011) (citing *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 947, 491 F. Supp. 2d 1326, 1351 (2007)). Thus, *Rhone Poulenc* offers little guidance for the presumption at issue here, which involves interpretation of a term introduced in section 1677b by the URAA. *See* Pub. L. No. 103–465, § 224, 108 Stat. 4809, 4878–79; *see also infra* note 5.

(Fed. Cir. 2016); *see also Zhejiang Sanhua Co. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1350, 1358 (2015) (holding that a party before the CIT waived its arguments when relevant authorities and analytical framework had not been presented).

Even though Domestic Shrimp cites to the statute and repeatedly asserts a certain theory of the statutory framework, the citations and assertions alone do not constitute adequate argument. *See Trading Techs. Int'l, Inc. v. IBG LLC*, 921 F.3d 1378, 1385 (Fed. Cir. 2019) (holding that a conclusory assertion citing the Seventh Amendment, separation of powers under Article III, the Due Process Clause, and the Taking Clause, without analysis, is insufficient to preserve the issue); *Baley*, 942 F.3d at 1331 n.20 (Fed. Cir. 2019) ("[C]ursory mention of [congressionally-approved interstate Compact between California and Oregon] is insufficient to preserve any separate arguments pertaining to the Compact." (internal citation omitted)); *Zhejiang Sanhua*, 61 F. Supp. 3d at 1357–58 (holding that "naked citation" to statute and two CIT cases, while failing to address several other decisions interpreting statute, warrants waiver). Therefore, Domestic Shrimp's arguments flounder in light of its undeveloped analysis on the underlying question of statutory interpretation.[5]

CONCLUSION

For the foregoing reason, the court sustains Commerce's *Remand Redetermination*. Judgment will enter accordingly.

SO ORDERED

Dated: December 6, 2022
New York, New York

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

[5] Today's decision does not resolve whether third market consumption is among "the category of issues that the Department need not, and should not, routinely consider" in market viability analysis. *Preamble*, 62 Fed. Reg. at 27,357. It is unclear whether third market consumption should be analyzed independently, as Domestic Shrimp now argues, or whether the consumption issue is a subcategory or precondition of the "representativeness" test as stated in the pre-remand *Final Results*, to which Domestic Shrimp originally agreed. *See* IDM at 19; Def.-Inter.'s Resp. to Pls.' Mot. for J. at 16, Sept. 2, 2021, ECF No. 30 (quoting IDM at 19). Also unresolved is the meaning of "for consumption," which is undefined in the statute, and whether Commerce's interpretation of the term merits deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

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