U.S. Customs and Border Protection

8 CFR PART 217

CBP DEC. 22–08

ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION (ESTA) FEE INCREASE

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

ACTION: Final rule.

SUMMARY: This document amends Department of Homeland Security (DHS) regulations pertaining to the Electronic System for Travel Authorization (ESTA). ESTA is the online system through which nonimmigrant visitors intending to enter the United States under the Visa Waiver Program (VWP) at air or sea ports of entry must obtain an electronic travel authorization in advance of travel to the United States. Pursuant to updates in Congressional mandates, the ESTA travel promotion fee (also referred to as the "authorization charge") was increased from $10 to $17 and extended to 2027. As a result of the increase in the travel promotion fee, the fee for an approved ESTA (which includes the travel promotion fee and a $4 operational fee) is $21. CBP will begin collecting the new fee following the effective date of this rule.

DATES: The final rule is effective May 20, 2022.

FOR FURTHER INFORMATION CONTACT: Sikina S. Hasham, Director, Electronic System for Travel Authorization (ESTA), Office of Field Operations, 202–325–8000, *sikina.hasham@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Visa Waiver Program

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security, in consultation with the Secretary of State, may designate countries for par-

ticipation in the Visa Waiver Program (VWP) if certain requirements are met. Eligible citizens and nationals of VWP countries[1] may apply for admission to the United States at a U.S. port of entry as nonimmigrant visitors for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. Other nonimmigrant visitors must obtain a visa from a U.S. embassy or consulate and generally must undergo an interview by consular officials overseas in advance of travel to the United States.

B. The Electronic System for Travel Authorization (ESTA)

On August 3, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Public Law 110–53. Section 711 of the 9/11 Act required the Secretary of Homeland Security, in consultation with the Secretary of State, to develop and implement a fully automated electronic travel authorization system to collect biographical and other information as the Secretary of Homeland Security determines necessary to evaluate, in advance of travel, the eligibility of the applicant to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk.[2]

On June 9, 2008, DHS published an interim final rule in the **Federal Register** (73 FR 32440) announcing the creation of the ESTA program for nonimmigrant visitors traveling to the United States by air or sea under the VWP, and regulations have since been codified in the Code of Federal Regulations (CFR), at 8 CFR 217.5. ESTA provided for an automated collection of the information required on the Form I–94W, Nonimmigrant Visa Waiver Arrival/Departure paper form (Form I–94W), in advance of travel. ESTA is intended to fulfill the statutory requirements described in section 711 of the 9/11 Act.

On November 13, 2008, DHS published a notice in the **Federal Register** (73 FR 67354) announcing that the use of ESTA would be mandatory for all VWP travelers traveling to the United States seeking admission at air and sea ports of entry beginning January 12, 2009. Since that date, VWP travelers have been required to receive travel authorization through ESTA prior to boarding a conveyance destined for an air or sea port of entry in the United States. Travelers unable to receive authorization through ESTA to travel under the VWP may still apply for a visa to travel to the United States.[3]

---

[1] The current list of designated VWP countries is set forth in 8 CFR 217.2(a).

[2] 8 U.S.C. 1187(h)(3)(A).

[3] 8 CFR 217.5(f)(2). More information can be found in the "Frequently Asked Questions" section of the Official ESTA Application website, *https://esta.cbp.dhs.gov/* (last accessed Apr. 27, 2022).

C. The Fee for the Use of ESTA and the Travel Promotion Act Fee

There have been several laws enacted that include provisions regarding ESTA fees, which have been incorporated into the DHS regulations. The relevant statutes and prior DHS rules are described below. However, some recent statutory changes have not yet been incorporated into the DHS regulations. This rule incorporates those changes.

On March 4, 2010, the United States Capitol Police Administrative Technical Corrections Act of 2009, Public Law 111–145, was enacted. Section 9 of this law, the Travel Promotion Act of 2009 (TPA), mandated that the Secretary of Homeland Security establish a fee for the use of ESTA and begin assessing and collecting the fee no later than six months after enactment.[4] The TPA provided that the initial fee consists of the sum of "$10 per travel authorization" (travel promotion fee) to fund the newly authorized Corporation for Travel Promotion plus "an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary" (known as the "operational fee" or the "processing charge").[5] The TPA authorized collection of the $10 travel promotion fee through September 30, 2014. On July 2, 2010, the Homebuyer Assistance and Improvement Act of 2010, Public Law 111–198 at § 5, amended the TPA by extending the sunset provision of the travel promotion fee and authorizing the Secretary to collect this fee through September 30, 2015.

On August 9, 2010, DHS published an interim final rule in the **Federal Register** (75 FR 47701) announcing that, beginning September 8, 2010, a $4 operational fee would be charged to each ESTA applicant to ensure recovery of the full costs of providing and administering the system in addition to the $10 travel promotion fee that would be charged to each applicant receiving a travel authorization through September 30, 2015. Accordingly, the regulations at 8 CFR 217.5(h) were amended to provide that until September 30, 2015, the fee for an approved ESTA was $14, the sum of the $10 travel promotion fee and the $4 operational fee, and that beginning October 1, 2015, and after the sunset of the travel promotion fee, the fee for using ESTA would be just the operational fee of $4.

On December 16, 2014, section 605 of the Travel Promotion, Enhancement, and Modernization Act of 2014, Public Law 113–235, further extended the sunset provision of the travel promotion fee through September 30, 2020. It did not make any changes to the operational fee and CBP continues to collect that fee. In contrast to

[4] 8 U.S.C. 1187(h)(3)(B).

[5] Public Law 111–145 at sec. 9.

the travel promotion fee, which is set by Congress, the operational fee does not include a sunset provision or a statutory amount. The Secretary of Homeland Security has discretion to determine the operational fee amount pursuant to the TPA. CBP will reassess the $4 operational fee on a regular basis to ensure that it is set at a level to fully recover ESTA operating costs. Any changes to this operational fee with be done through a subsequent rulemaking.

On June 8, 2015, DHS published a final rule in the **Federal Register** (80 FR 32267) finalizing the June 9, 2008 interim final rule regarding the ESTA program and the August 9, 2010 interim final rule regarding the ESTA fee for nonimmigrant visitors traveling to the United States by air or sea under the VWP. Due to oversight, 8 CFR 217.5(h)(1) was not appropriately amended to provide the sunset date of September 30, 2020. Nonetheless, in accordance with section 217(h)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1187(h)(3)(B), CBP continued to collect the $10 travel promotion fee.

On February 9, 2018, section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115–123, extended the sunset provision of the travel promotion fee through September 30, 2027.

On December 20, 2019, section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116–94, increased the travel promotion fee from $10 to $17. As a result of this provision, the ESTA fee, which includes both the travel promotion fee and the $4 operational fee, was increased to $21. CBP will begin collecting the new fee following the effective date of this rule. Pursuant to the Bipartisan Budget Act of 2018, this is the ESTA fee through September 30, 2027. Beginning on October 1, 2027, the ESTA fee will be $4. Pursuant to the TPA, the Secretary of Homeland Security has discretion to determine the operational fee amount. CBP will reassess the $4 operational fee on a regular basis to ensure that it is set at a level to fully recover ESTA operating costs. Any changes to this operational fee will be done through a separate rulemaking.

II. Discussion of Regulatory Changes

This rule updates the ESTA fee regulations to incorporate the most recent statutory provisions. To incorporate the new sunset provision for the travel promotion fee contained in section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115–123, this document amends 8 CFR 217.5(h)(1) by replacing “September 30, 2015” with “September 30, 2027”. To reflect the fact that, after September 30, 2027, the only ESTA fee will be the operational fee, this document amends 8 CFR 217.5(h)(2) by replacing “October 1, 2020” with “October 1, 2027”.

To implement the new travel promotion fee amount as set forth in section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116–94, this document amends 8 CFR 217.5(h)(1) by replacing the amount "$14.00" with "$21" and replacing the amount "$10" with "$17". Additionally, this document removes extraneous decimal points and zeros after the references to "$4" throughout section 217.5(h).

III. Inapplicability of Notice and Delayed Effective Date

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirements, when an agency for good cause finds that such procedures are "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. 553(b)(3)(B), (d)(3). Prior notice and comment is "unnecessary" when, "so far as the public is concerned," the regulatory change is minor or merely technical.[6] Prior notice and comment has also been deemed "unnecessary" when there is no need to allow "affected parties an opportunity to participate in agency decision making early in the process, when the agency is more likely to consider alternative ideas,"[7] and where Congress requires an agency to perform a non-discretionary act, and where no extent of notice or commentary could have altered the obligation of the agency.[8] Additionally, courts have held that when there is a Congressionally approved extension to a program, further delay in implementing that program contravenes the program's purpose.[9]

In this case, CBP finds that good cause exists for dispensing with prior notice and public procedure as unnecessary because the amendments to the regulations are simply conforming amendments to reflect statutory changes and a non-substantive administrative change regarding how the $4 fee is referenced in the regulations. Specifically, the amendments in this document are necessary to reflect the changes to the sunset provision regarding the travel promotion fee in the Bipartisan Budget Act of 2018 and to reflect the change to the

---

[6] *Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741, 751 (10th Cir. 1987).

[7] *Id.*

[8] *McChesney v. Peterson,* 275 F. Supp. 3d. 1123, 1136 (Neb. 2016).

[9] *Id.* (citing *Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n,* 795 F.3d 151, 154 (D.C. Cir. 2015).

travel promotion fee amount in the Further Consolidated Appropriations Act of 2020. CBP has no discretion in raising the fee.

For the same reasons, CBP finds that good cause exists for dispensing with the requirement for a delayed effective date as provided in 5 U.S.C. 553(d)(3).

IV. Statutory and Regulatory Requirements

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" that is economically significant under section 3(f)(1) of Executive Order 12866 as it results in transfers of over $100 million in a given year. Accordingly, OMB has reviewed this regulation.

The ESTA program pertains to nonimmigrant visitors traveling to the United States by air or sea under the Visa Waiver Program. ESTA provides for an automated collection of information from these travelers in advance of travel. Under the current regulations, the ESTA fee is $14 for an approved ESTA and consists of both a $10 travel promotion fee and a $4 operational fee. The Bipartisan Budget Act of 2018 extended the sunset provision for the travel promotion fee to 2027, and the Further Consolidated Appropriations Act of 2020 increased the travel promotion fee from $10 to $17. As a result of these statutory changes, the total fee for an approved ESTA has increased from $14 to $21. This final rule makes conforming amendments to DHS regulations to reflect the increase and extension of the travel promotion fee. CBP will begin collecting the new fee following the effective date of this rule. In accordance with the statutory changes, CBP could collect the new $17 fee even if this regulation were not promulgated. This rule is being promulgated for consistency between the statute and the regulations and to minimize the confusion any inconsistency would cause. Although the effects of the fee increase are not a result of this rule, but rather a result of the statutory changes, we analyze the effects here to inform the public of the effect of this fee increase.

The travel promotion fee is collected by CBP, but the fee revenue is not kept by CBP or DHS. Instead, up to $100 million of fee revenue

goes to the Travel Promotion Fund, which is made available to the Corporation for Travel Promotion (subject to a matching requirement) to carry out its functions. Any remaining fee revenue is retained by the general fund of the Treasury. As annual collections are already over $100 million before the increase in the fee, all of the additional revenue generated by this fee increase will be retained by the general fund of the Treasury. As the $7 fee increase is relatively small compared to costs involved to travel to the United States, CBP anticipates that the fee increase will not adversely affect travel to the United States.

Table 1 shows the number of approved ESTA applications from fiscal year (FY) 2016 to 2021. Prior to the COVID pandemic, the average annual number of approved ESTA applications was approximately 15 million. After FY 2019, travel decreased substantially, and we expect that travel will remain lower through FY 2022, though forecasting travel coming out of a pandemic is difficult. For the purposes of this analysis, we project travel returning to normal in FY 2022. To the extent that it takes longer than that, the effects of the fee change will be lower.

TABLE 1—TOTAL ANNUAL APPROVED ESTA APPLICATIONS

Fiscal year	Total approved ESTA applications
FY 2016	14,601,471
FY 2017	14,894,749
FY 2018	15,115,878
FY 2019	15,184,970
FY 2020	6,312,562
FY 2021	1,259,440
Total	67,369,070

In the absence of any publicly available forecast for post-pandemic travel, CBP uses an ordinary least squares (OLS) linear trend based on pre-pandemic data to forecast future approved ESTA applications once ESTA travel returns to pre-pandemic levels. Table 2 shows the forecasted future approved applications until FY 2027.[10]

[10] The linear trend (ESTA applications = 14,456,360 + 197,163*(time), time = 1, 2, 3, 4 where year 1 is FY 2016, 2 is FY 2017, 3 is FY 2018, 4 is FY2019, 5 is FY 2022, 6 is FY 2023, etc.) was determined based on FY 2016 to 2019 data. Data from FY 2020 and 2021 were not used to generate the forecasted amounts since travel data from those years were severely affected by the COVID–19 pandemic, including the strict restrictions governments imposed on nonessential travel. Accordingly, CBP estimates the linear trend for the growth in applications for the forecasted period (FY 2022–2027) beginning from FY 2019 levels. Note that projected FY 2022 applications are what we expect FY 2020 would have been without the COVID–19 pandemic. ESTA is only used for leisure and business travel.

TABLE 2—FUTURE APPROVED ESTA APPLICATIONS

[Forecast]

Fiscal year	Future approved ESTA applications (forecast)
FY 2022	15,442,174
FY 2023	15,639,336
FY 2024	15,836,499
FY 2025	16,033,661
FY 2026	16,230,824
FY 2027	16,427,987

Using the forecast and applying the proposed $7 increase would result in the following forecast of additional revenue from the travel promotion fee. As shown in Table 3, the corresponding revenue forecasted is $108 million in FY 2022 to approximately $115 million in FY 2027. As this fee is not tied to the costs of the services provided by ESTA, this effect is not a cost but rather a transfer[11] of funds from one party to another within society. In this case, it is a transfer from ESTA travelers to the U.S. Government.

TABLE 3—ANTICIPATED ADDITIONAL FEE REVENUE

[Forecast]

Fiscal year	Future approved ESTA applications	Fee increase amount	Anticipated additional fee revenue
FY 2022	15,442,174	$7	$108,095,215
FY 2023	15,639,336	7	109,475,353
FY 2024	15,836,499	7	110,855,491
FY 2025	16,033,661	7	112,235,629
FY 2026	16,230,824	7	113,615,767
FY 2027	16,427,987	7	114,995,906

Table 4 presents the estimated discounted future revenue that would result from the fee increase of $7. The estimated travel promotion fee revenue is discounted at both 3-percent and 7-percent. The total revenue generated from the fee increase over the six-year period of analysis from fiscal year 2022 to 2027 is expected to be $603,619,432 after applying a 3-percent discount rate, and $539,391,804 using a 7-percent discount rate. The annualized

[11] *See* OMB Circular A–4. (This analysis is performed from a global perspective, and includes those individuals who travel to the United States. Please note that individuals paying the fee are not U.S. citizens or permanent residents.)

amount using a 3-percent discount rate is $111,426,638, and $111,273,973 using a 7-percent discount rate.

TABLE 4—DISCOUNTED ADDITIONAL TRAVEL PROMOTION FEE REVENUE
[Forecast]

Fiscal year (forecast)	Additional travel promotion fee revenue (discounted at 3%)	Additional travel promotion fee revenue (discounted at 7%)
FY 2022	$104,946,811	$101,023,565
FY 2023	103,191,020	95,620,013
FY 2024	101,448,478	90,491,102
FY 2025	99,719,903	85,624,024
FY 2026	98,005,959	81,006,472
FY 2027	96,307,261	76,626,628
Total	603,619,432	530,391,804
Annualized	111,426,638	111,273,973

Aside from the increase in fee revenue collection, the final rule is not expected to increase costs or benefits to the Government or any other entity.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act. 5 U.S.C. 601 *et seq.*

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. The collection of information in this final rule is approved in accordance with the requirements of the Paperwork Reduction Act under control number 1651–0111. There are no changes being made to the information collection as a result of this final rule.

List of Subjects in 8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

Amendments to the Regulations

For the reasons set forth above, 8 CFR part 217 is amended as set forth below.

PART 217—VISA WAIVER PROGRAM

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

■ 2. In § 217.5, revise paragraph (h) to read as follows:

§ 217.5 Electronic System for Travel Authorization.

* * * * *

(h) *Fee.* (1) Through September 30, 2027, the fee for an approved ESTA is $21, which is the sum of two amounts: A $17 travel promotion fee to fund the Corporation for Travel Promotion and a $4 operational fee to at least ensure recovery of the full costs of providing and

administering the system. In the event the ESTA application is denied, the fee is $4 to cover the operational costs.

(2) Beginning October 1, 2027, the fee for using ESTA is an operational fee of $4 to at least ensure recovery of the full costs of providing and administering the system.

ALEJANDRO N. MAYORKAS
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, May 20, 2022 (85 FR 30769)]

PROPOSED REVOCATION OF FIVE RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF OUTDOOR FURNITURE SETS

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

ACTION: Notice of proposed revocation of five ruling letters and proposed revocation of treatment relating to the tariff classification of outdoor furniture sets.

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

DATES: Comments must be received on or before July 8, 2022.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: *1625Comments@cbp.dhs.gov*. All comments should reference the title of the proposed notice at issue and the Customs Bulletin volume, number and date of publication. Due to the relevant

COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke five ruling letters pertaining to the tariff classification of outdoor furniture sets. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N085595, dated November 25, 2009 (Attachment A), NY N028531, dated May 20, 2008 (Attachment B), NY N004954, dated January 19, 2007 (Attachment C), NY N125879, dated October 29, 2010 (Attachment D), and NY N255629, dated August 26, 2014 (Attachment E), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An

importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

NY N255629, NY N004954, NY N085595, NY N028531, and NY N125879, CBP classified certain outdoor furniture chairs that were part of an outdoor furniture set in heading 9401, HTSUS, based on their constituent material. CBP has reviewed NY N085595, NY N028531, NY N004954, NY N125879, and NY N255629, and has determined the ruling letters are in error.

It is now CBP's position that these outdoor chairs that are packaged together with a table and other outdoor furniture items and imported together are properly classified as a set and are classified in heading 9403, HTSUS. The outdoor furniture sets that are the subject of NY N085595, NY N028531, NY N004954, and NY N255629 are classified in subheading 9403.89.60, HTSUS. The wooden outdoor furniture set that is the subject of NY N125879 is classified in subheading 9403.60.80, HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N085595, NY N028531, NY N004954, NY N125879, and NY N255629 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H271649, set forth as Attachment F to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: April 7, 2022

ALLYSON MATTANAH
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N085595
November 25, 2009
CLA-2–94:OT:RR:NC:N4:433
CATEGORY: Classification
TARIFF NO.: 9403.89.6010; 9401.71.0010

JOHN WHITSON
CUSTOMS COMPLIANCE SPECIALIST
COSTCO WHOLESALE
999 LAKE DRIVE
ISSAQUAH, WASHINGTON 98027

RE: The tariff classification of a patio table and chairs from China.

DEAR MR. WHITSON:

This letter replaces the ruling letter we sent you on September 28, 2009, under file number N074518. Taking into account that the dining set is shipped and imported in three boxes, the table and chairs will have to be separately classified. A corrected letter follows.

Item number 441465 was described as a seven piece aluminum frame patio dining set. The table featured a natural slate table top supported by aluminum legs. Six aluminum frame chairs with textile cushions of polyester fabric are sold with the dining set. A fabric, table cover, for storage and protection was also included with the dining set. It is stated that the cover is made of 100% polyester, 300D fabric coated with polyurethane on one side, making the cover water resistant.

You have provided a product description of the 7-piece patio dining set, which further indicates that item number 441465 is shipped and imported in a total of three boxes. The Harmonized Tariff Schedule of the United States (HTSUS), Explanatory Notes, General Rules For The Interpretation Of The Harmonized System, Rule 3 (b), Note (X) (c), indicates that goods put up in sets for retail sale are packaged together. Accordingly, the dining table and its chairs are classified in their own provisions within the tariff schedule – see New York Ruling PD E88653 dated November 3, 1999 and (emphasis) New York Ruling, NY L80593 dated November 1, 2004.

The applicable subheading for the patio dining table and cover, if packaged together, will be 9403.89.6010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Furniture of other materials....: Other; Other; Household." The rate of duty will be free.

The applicable subheading for the six aluminum frame chairs with textile cushions, will be 9401.71.0010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Other seats, with metal frames: Upholstered; Household." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is

imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733–3036.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

N028531
May 20, 2008
CLA-2–94:OT:RR:E:NC:SP:233
CATEGORY: Classification
TARIFF NO.: 9401.71.0010; 9403.89.6010

MR. JOHN WHITSON
COSTCO WHOLESALE
999 LAKE DRIVE
ISSAQUAH, WA 98027

RE: The tariff classification of an outdoor dining set from China.

DEAR MR. WHITSON:

In your letter dated May 15, 2008, you requested a tariff classification ruling.

You have submitted a value and weight breakdown plus a photograph for a 5 piece outdoor dining set, Costco item number 257350. The set consists of four chairs with textile cushions and one granite top table. They will be packaged in three boxes.

The chairs have an aluminum frame covered with an all weather resin wicker. Each chair includes a textile covered cushion. The table is constructed with a natural granite top with the base made of an aluminum frame covered with an all weather resin wicker. Based on the value and weight breakdowns, the granite top imparts the essential character of the table.

The applicable subheading for the four chairs will be 9401.71.0010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other seats with metal frames: Upholstered: Household". The rate of duty will be free.

The applicable subheading for the table will be 9403.89.6010, HTSUS, which provides for 'Furniture of other materials: Other: Other: Household". The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 646–733–3036.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

N028531

May 20, 2008
CLA-2–94:OT:RR:E:NC:SP:233
CATEGORY: Classification
TARIFF NO.: 9401.71.0010; 9403.89.6010

MR. JOHN WHITSON
COSTCO WHOLESALE
999 LAKE DRIVE
ISSAQUAH, WA 98027

RE: The tariff classification of an outdoor dining set from China.

DEAR MR. WHITSON:

In your letter dated May 15, 2008, you requested a tariff classification ruling.

You have submitted a value and weight breakdown plus a photograph for a 5 piece outdoor dining set, Costco item number 257350. The set consists of four chairs with textile cushions and one granite top table. They will be packaged in three boxes.

The chairs have an aluminum frame covered with an all weather resin wicker. Each chair includes a textile covered cushion. The table is constructed with a natural granite top with the base made of an aluminum frame covered with an all weather resin wicker. Based on the value and weight breakdowns, the granite top imparts the essential character of the table.

The applicable subheading for the four chairs will be 9401.71.0010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other seats with metal frames: Upholstered: Household". The rate of duty will be free.

The applicable subheading for the table will be 9403.89.6010, HTSUS, which provides for 'Furniture of other materials: Other: Other: Household". The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 646–733–3036.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

N125879
October 29, 2010
CLA-2–94:OT:RR:NC:N4:433
CATEGORY: Classification
TARIFF NO.: 9401.79.0005; 9403.20.0015

AMY MORGAN
CUSTOMS COMPLIANCE MANAGER
COSTCO WHOLESALE
999 LAKE DRIVE
ISSAQUAH, WA 98027

RE: The tariff classification of patio furniture from China.

DEAR MS. MORGAN:

In your letter dated October 1, 2010, you requested a tariff classification ruling.

Item number 538109 is described as a metal frame resin "wicker" furniture patio set. The set includes (A) two chairs, (B) two ottomans, (C) a sofa and (D) a table. The merchandise is described as follows:

(A) The chairs have an aluminum frame with only the arms and legs exposed. The seat and the back rest are wrapped with a plastic resin material designed to look like actual wicker. There is nothing between the aluminum frame and the resin wicker; no wadding, padding or furniture foam of any kind. There are textile seat and back cushions that are to be used with the chair, but the cushions are removable.

(B) The ottomans have an aluminum frame with only the legs exposed. The seat is wrapped with a resin wicker. There is nothing between the aluminum frame and the resin wicker; no wadding, padding or sheeting of any kind. There is a cushion to be used with the ottoman, but the cushion is removable and the ottoman is able to be sat upon or used without the cushion.

(C) The sofa has an aluminum frame with only the arms and legs exposed. The seat and back rest are wrapped with a resin wicker. There is nothing between the aluminum frame and the resin wicker; no wadding, padding or sheeting of any kind. There are cushions that are to be used with the sofa, but the cushions are removable and the sofa is able to be sat upon without the cushions.

(D) The table is made of 100% aluminum. The table top has aluminum slats which alternate angles in quarter sections for decorative purposes.

You suggest that because there is no wadding or padding between the frame and the resin wicker that the items should not be classified as upholstered seats under heading 9401 of the Harmonized Tariff Schedule of the United States (HTSUS). Provided manufacturer's data indicates that the tolerance and weight capacity for each seat without the cushions is 400 pounds, while the cushions provide an uplift of +3% to 412 pounds.

Relative to the issue, of whether or not a "seat" is considered upholstered for tariff purposes, are the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to heading 9401, HTSUS. The ENs constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The ENs to heading 9401, HTSUS: Parts, Subheading Explanatory Notes, Subheadings 9401.61 (wooden frames) and 9401.71 (metal frames) state:

"Upholstered seats" are those having a soft layer of, for example, wadding, tow, animal hair, cellular plastics or rubber, shaped (whether or not fixed) to the seat and covered with a material such as woven fabric, leather or sheeting of plastics. Also classified as upholstered seats are seats the upholstering materials of which are not covered or have only a white fabric cover which is itself intended to be covered (known as upholstered seats " in muslin "), seats which are presented with detachable seat or back cushions and which could not be used without such cushions, and seats with helical springs (for upholstery). On the other hand, the presence of horizontally-acting tension springs, designed to attach to the frame a steel wire lattice, taut woven fabric, etc., is not sufficient to cause the seats to be classified as upholstered. Similarly, seats covered directly with materials such as woven fabric, leather, sheeting of plastics, without the interposition of upholstering materials or springs, and seats to which a single woven fabric backed with a thin layer of cellular plastics has been applied, are not regarded as upholstered seats.

According to the manufacturer's specifications, the detachable seats and back cushions are not necessary for the functioning and use of the seats, ottomans and sofa. The seats are fully functional and can be used up to 400 pounds without cushions and 412 pounds with cushions. The difference of twelve pounds between cushioned seats and un-cushioned seats is negligible, and therefore the seats can be used without their cushions. In accordance with the ENs, at Subheading Note 9401.71, the two chairs, two ottomans and sofa, constructed with metal frames, are not considered upholstered for tariff purposes.

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

GRI 3 (b) provides for: mixtures, composite goods consisting or different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

At GRI 3 (b) (VIII), ENs to the HTSUS, it states that the factor which determines essential character will vary between different kinds of goods. It may for example, be determined by the nature of the materials or components, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. Further delineated under GRI 3 (b) (X), ENs, the term "goods put up in sets for retail sale" means goods which: (a) consist of at least two different articles which are prima facie, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking.

The combination of items presented do not meet the tariff provision for sets, as defined by the ENs at GRI 3 (b) X in that the chairs, ottomans and sofa are all classified in the same tariff provision at subheading 9401.79.0005; the aluminum table is not designed to be used with the chairs, ottomans or sofa, and therefore does not contribute to the gathering and entertaining of

family and/or guest members; and due to the size of the items, the furniture pieces are not put up together for sale directly to users, but rather, are packaged in multiple boxes. Consequently, each individual item is separately classifiable.

Accordingly, the chairs, ottomans and sofa having aluminum frames covered largely in resin wicker are composite goods. When the essential character of a composite good can be determined, the whole product is classified as if it consisted only of the material or component that imparts the essential character to the composite good. In this case, the resin wicker component imparts the essential character to the chairs, ottomans and sofa, in that the synthetic wicker is the most prominent feature of the pieces giving the appearance of wicker-like furniture with aluminum accents. See Headquarters Ruling HQ 952032 dated July 6, 1992.

The applicable subheading for the chairs, ottomans, and sofa, covered largely in resin wicker, will be 9401.79.0005, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Seats....: Other seats, with metal frames; Other: Outdoor: With textile covered cushions or textile seating or back materials." The rate of duty will be free.

The applicable subheading for the aluminum table, will be 9403.20.0015, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Other metal furniture: Household: Other." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at (646) 733–3036.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

N255629
August 26, 2014
CLA-2–94:OT:RR:NC:N4:433
CATEGORY: Classification
TARIFF NO.: 9403.60.8040; 9401.61.4011

ANDREA K. SWANGER
IMPORT DOCUMENTS AND BILLING
INTERCON, INC.
635 N. BILLY MITCHELL ROAD
SALT LAKE CITY, UT 84106

RE: The country of origin of a dining table and chairs, and the tariff classification of a dining table and chairs, from Vietnam.

DEAR MS. SWANGER:

In your letter dated July 28, 2014, you requested, on behalf of Costco Wholesale, a ruling. Since the nature of the ruling was not specified, this ruling will address the country of origin of the dining table and chairs, and the tariff classification of the dining table and chairs. Illustrative literature was provided.

Item number SO-TA-C4290-RAI-SET is identified as the "Sonoma 9 Pc Dining Set." The item consists of one, solid mango wood dining table and eight, X-back style chairs. The table comes with an 18-inch extension leaf. None of the chairs have arms and the seats of the chairs are upholstered. Company provided information indicates the following: (1) the table top, apron and table legs are made from solid mango wood with country of origin for each piece being Vietnam, and (2) the chair backs/2pcs are made of rubberwood and bentwood with country of origin being Cambodia/Vietnam, the chair covers are made from bonded leather with country of origin being China, the seat pads are made from foam with country of origin being Vietnam, and the chair legs are made from rubberwood with country of origin being Cambodia. Illustrative literature indicates that the manufacturing or assembling of the table and chairs is performed in a factory located in Vietnam.

In *Carlson Furniture Industries v. United States*, 65 Cust. Ct. 474 (1970), the U.S. Customs Court ruled that U.S. operations on imported chair parts constituted a substantial transformation, resulting in the creation of a new article of commerce. After importation, the importer assembled, fitted, and glued the wooden parts together, inserted steel pins into the key joints, cut the legs to length and leveled them, and in some instances, upholstered the chairs and fitted the legs with glides and casters. The court determined that the importer had to perform additional work on the imported chair parts and add materials to create a functional article of commerce. The court found that the operations were substantial in nature, and more than the mere assembly of the parts together.

Based on company provided information, for the table, made from all solid mango wood materials being of Vietnamese origin, the county of origin for the table is Vietnam. Consistent with *Carlson Furniture Industries v. United States*, we are of the opinion that the chairs consisting of four main components (chair backs, chair covers, foam seat pads and chair legs) assembled in Vietnam are more than simple assembly of the components together, in that the foam pads of Vietnamese origin and some of the chair backs of Vietnam-

ese origin are added to the components of Cambodian and Chinese origin. As such, the chairs assembled in Vietnam, from Vietnamese and foreign components, are country of origin Vietnam.

The Explanatory Notes (ENs) which constitute the official interpretation of the Harmonized Tariff Schedule of the United States (HTSUS) at the international level, state in Note X to Rule 3 (b) of the General Rules of Interpretation (GRIs), that the term "goods put up in sets for retail sale" means goods which: (a) consist of at least two different articles which are, prima facie, classifiable in different headings; (b) consist of products or articles put up together to meet a particular need and carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking. Centered on the description and photos you provided, the "Sonoma 9 Pc Dining Set" does not appear to be packaged together for retail sale in one box, and therefore does not qualify as a set for tariff purposes. Consequently, the dining table and chairs must be classified separately.

The applicable subheading for the dining table, not used in the kitchen but rather placed in the dining room, will be 9403.60.8040, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other furniture and parts thereof: Other wooden furniture: Other; Dining tables." The rate of duty will be free.

The applicable subheading for the chairs, with wood frames and leather upholstered seats, will be 9401.61.4011, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Other seats, with wooden frames: Upholstered: Chairs: Other; Other household." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Neil H. Levy at E-mail address: neil.h.levy@cbp.gov.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

HQ H271649
OT:RR:CTF:CPMM:KSG H271649
CATEGORY: Classification
TARIFF NO.: 9403.89.60, 9403.60.80

ANDREA K. SWANGER
IMPORT DOCUMENTS & BILLING INTERCON, INC.
635 N. BILLY MITCHELL ROAD
SALT LAKE CITY, UT 84106

RE: Proposed Revocation of NY N255629, NY N004954, NY N085595, NY N028531, and NY N125879; tariff classification of outdoor patio dining sets and dining room furniture sets

DEAR MS. SWANGER:

This letter is in reference to New York Ruling Letter ("NY") N255629, dated August 26, 2014, issued to you on behalf of Import Documents & Billing Intercon, Inc.

Upon review, we have also reconsidered NY N085595, dated November 25, 2009, NY N028531, dated May 20, 2008, NY N004954, dated January 19, 2007, and NY N125879, dated October 29, 2010.

In NY NO85595, NY N028531 and NY N004954, four outdoor dining chairs and a table were separately classified under the Harmonized Tariff System of the United States (HTSUS), with the chairs being classified in heading 9401, HTSUS, and the table classified in heading 9403, HTSUS. In NY N255629, there are eight wooden chairs and a wooden table. In NY N125879, CBP classified two outdoor chairs, two outdoor ottomans, and a sofa, covered largely in resin wicker, in heading 9401, HTSUS, and the aluminum table in heading 9403, HTSUS.

We have reviewed NY 255629, NY N004954, NY N085595, NY N028531, and NY N125879; and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP proposes to revoke NY N255629, NY N004954, NY N085595, NY N028531, and NY N125879.

FACTS:

In NY N004954, the outdoor patio furniture was described as follows: Five (5) piece patio set consisting of four (4) chairs with removable cushions and one (1) table . In NY N255629, the dining room furniture was described as follows: nine (9) piece dining set consisting of one wooden dining table and eight (8) wooden chairs.

Like the furniture in both NY N004954 and NY N255629, in each of the ruling letters at issue, the merchandise consisted of some variation of the following pieces: one table and a defined number of chairs, and in the case of NY N125879, ottomans and a sofa. The furniture is imported either fully assembled or partially unassembled and shipped in one combined shipment, in separate boxes.

ISSUE:

Whether the subject outdoor patio furniture and the dining room furniture are properly classifiable in heading 9401, HTSUS, which provides for "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof", or in heading 9403, HTSUS, as "Other furniture and parts thereof".

LAW AND ANALYSIS:

Classification determinations under the Harmonized Tariff Schedule of the United States ("HTSUS") are made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

9401	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:
	* * *
9403	Other furniture and parts thereof:
	* * *
9403.20.00	Other metal furniture.....
	Household:
9403.40	Wooden furniture of a kind used in the kitchen:
	* * *
9403.40.90	Other.....
9403.40.90.40	Dining tables.....
	* * *
9403.60	Other wooden furniture:

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The EN to 94.03 states, in pertinent part:

> This heading covers furniture and parts thereof, **not covered** by the previous headings. It includes furniture for general use (e.g., cupboards, showcases, tables...., etc.) and also furniture for special uses.

The EN to 94.01 states, in pertinent part:

> Subject to the exclusions mentioned below, this heading covers all seats (including those for vehicles, provided they comply with the conditioned prescribed in Note 2 to this Chapter)...[.]
>
> Separately presented cushions and mattresses ..... are **excluded (heading 94.04)** ...[.]
>
> When these articles are combined with other parts of seats, however, they remain classified in this heading. They also remain in this heading when presented with the seats of which they form part.

In NY N085595, NY N028531, NY N255629, NY N004954, and NY N125879 the patio furniture (dining room furniture in the case of NY N255629) were classified separately and not as a retail set under GRI 3(b). In all the rulings except N125879, it was stated that the goods were not a set because they were packed in separate boxes.

It is well settled that imported merchandise that consist of at least two different articles, which are prima facie classifiable in different headings and are goods put up together to meet a particular need, wherein the items are clearly intended for use together or in conjunction with one another to meet a specific activity – that said merchandise constitutes a retail set for purposes of tariff classification. *Dell Products LP v. United States*, 714 F. Supp. 2d 1252, 1260 (CIT 2010); 34 C.I.T. 688; aff'd, *Dell Prods. LP v. United States*, 642 F.3d 1055 (Fed. Cir. 2011). Additionally, where the separate items are imported together as part of the same shipment and which are, at the time of importation, suitable for sale without addition re-packaging; such items meet the threshold criteria for classification as a retail set.

GRI 3(b) provides, in relevant part, that sets are classified by the component that imparts the essential character of the set. If the essential character cannot be determined, in accordance with GRI 3(c), the set will be classified in the heading that occurs last in numerical order among those which equally merit consideration. GRI 3(c) applies when goods cannot be classified by GRI 3(a) or (b).

Explanatory Note X to GRI 3(b) provides, in part, that:

> [t]he term "goods put up in sets for retail sale" shall be taken to mean goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; ... (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or in boards).

Based upon the description and circumstances of importation of the patio furniture of NY N125879 and NY N004954 and of the dining room furniture of NY N085595, NY N028531, and NY N255629, the merchandise is classifiable as retail sets. The combination of a table and a defined number of chairs (sofa and ottomans in NY N125879) under these facts presented, are put up together to meet a particular need and which are intended for use in conjunction with one another to carry out a specific activity (i.e., dining, eating, drinking and socializing) and therefore, satisfy the criteria for a retail set.

In NY N004954, CBP incorrectly concluded that "[a]though the table and chairs are sold as a set...they are considered as a set only if they are packaged together." Similarly, CBP erred when it stated in NY N085595 that "[t]aking into account that the dining set is imported in three boxes, the table and chairs will have to be separately classified." In our view, the individualized manner of retail packaging for articles of this size, imported with several large sized components, cannot be removed from the construct of retail sets simply because the table and chairs do not fit into one retail package. Instead, the question of whether the table and chairs constitute a retail set must be determined by the rule set forth in *Dell Products* and the criteria outlined in GRI 3(b).

Therefore, although the component pieces of furniture are packaged separately, because they are shipped together in the same shipment and otherwise fulfill the criteria of GRI 3(b) for retail sets, it is our conclusion that they constitute a GRI 3(b) set. The patio set will therefore be classified as according to the element of the set which confers the essential character. In the case of NY N004954, NY N028531, and NY N125897, the table provides the essential character to each set.

HOLDING:

Under the authority of GRIs 3(b) and 6, the 5-piece patio dining sets of NY N004954, NY N028531, and NY N125897, are classified in heading 9403, HTSUS, specifically in subheading 9403.89.60, HTSUS, which provides for "Other furniture and parts thereof: Furniture of other materials including cane, osier, bamboo or similar materials: Other, Other, Other." The 2017 column one, general rate of duty is Free.

Additionally, under the authority of GRIs 1 and 6, the 9-piece dining sets of NY N255629 and NY N085595 are classified in heading 9403, HTSUS, specifically in subheading 9403.60.80, HTSUS, which provides for "Other furniture and parts thereof: Other wooden furniture: Other, Dining tables." The 2017 column one, general rate of duty is Free.

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

EFFECT ON OTHER RULINGS:

NY N085595, dated November 25, 2009, NY N028531, dated May 20, 2008, NY N004954, dated January 19, 2007, and NY N125879, dated October 29, 2010, are hereby revoked.

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

Sincerely,

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

cc: NIS Dharmendra Lilia and NIS Seth Mazze, NCSD

APPLICATION-PERMIT-SPECIAL LICENSE UNLADING-LADING-OVERTIME SERVICES

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

ACTION: 60-Day notice and request for comments; revision of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than July 22, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0005 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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

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

Overview of This Information Collection

Title: Application-Permit-Special License Unlading-Lading-Overtime Services.

OMB Number: 1651–0005.

Form Number: CBP Form 3171.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: The Application-Permit-Special License Unlading-Lading-Overtime Services (U.S. Customs and Border Protection (CBP) Form 3171) is used by commercial carriers and importers as a request for permission to unlade imported merchandise, baggage, or passengers. It is also used to request overtime services from CBP officers in connection with lading or unlading of merchandise, or the entry or clearance of a vessel, including the boarding of a vessel for preliminary supplies, ship's stores, sea stores, or equipment not to be re-laden. CBP Form 3171 is provided for by 19 CFR 4.10, 4.30, 4.39, 4.91, 10.60, 24.16, 122.38, 123.8, 146.32 and 146.34.

This form is accessible at: *http://www.cbp.gov/newsroom/publications/forms?title=3171.*

This form is anticipated to be submitted electronically as part of the maritime forms automation project through the Vessel Entrance and Clearance System (VECS), which will eliminate the need for any paper submission of any vessel entrance or clearance requirements under the above referenced statutes and regulations. VECS will still collect and maintain the same data but will automate the capture of data to reduce or eliminate redundancy with other data collected by CBP.

Type of Information Collection: Form 3171.

Estimated Number of Respondents: 2,624.

Estimated Number of Annual Responses per Respondent: 72.

Estimated Number of Total Annual Responses: 188,928.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 25,190 hours.

Dated: May 18, 2022.

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

[Published in the Federal Register, May 23, 2022 (85 FR 31252)]

U.S. Court of Appeals for the Federal Circuit

HITACHI ENERGY USA INC., Plaintiff-Appellee v. UNITED STATES, Defendant-Appellee HYUNDAI HEAVY INDUSTRIES CO., LTD., HYUNDAI CORPORATION, USA, Defendants-Appellants

Appeal No. 2020–2114

Appeal from the United States Court of International Trade in No. 1:16-cv-00054-MAB, Judge Mark A. Barnett.

Decided: May 24, 2022

MELISSA M. BREWER, Kelley Drye & Warren, LLP, Washington, DC, argued for plaintiff-appellee. Also represented by ROBERT ALAN LUBERDA, DAVID C. SMITH, JR.

JOHN JACOB TODOR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by JEFFREY B. CLARK, JEANNE DAVIDSON, FRANKLIN E. WHITE, JR.; DAVID W. RICHARDSON, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

RON KENDLER, White & Case LLP, Washington, DC, argued for defendants-appellants. Also represented by DAVID EDWARD BOND.

Before NEWMAN, LOURIE, and DYK, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

Appellants Hyundai Heavy Industries Co. and Hyundai Corporation, USA (collectively, "Hyundai") seek review of an antidumping duty determination for large power transformers imported from the Republic of Korea. This is the second administrative review ("POR2"). The results of the Original Investigation ("OI") are reported at *Large Power Transformers from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 40857 (July 11, 2012) ("Issues and Decision Memorandum").

When an administrative review is requested, the antidumping duty is redetermined. 19 U.S.C. § 1675(a)(1)(b). The first administrative review ("POR1") is reported at *Large Power Transformers from the Republic of Korea: Final Results of Antidumping Administrative Review; 2012–2013*, 80 Fed. Reg. 17034 (Mar. 31, 2015).

The second administrative review was initiated in August 2014, and the results are reported at *Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 Fed. Reg. 14087 (Mar. 16, 2016). This determination was subject to four appeals to the Court of International Trade, with three remands to the Department of Commerce ("Com-

merce"). The court's final decision, reported at *ABB, Inc., v. United States*, 443 F. Supp. 3d 1354, 1357 (Ct. Int'l Trade 2020), is the subject of this appeal.[1]

This appeal of the second review concerns the application of 19 U.S.C. § 1677m(d), which requires Commerce to notify and permit a party to remedy or explain any deficiency in information provided during an investigation. Commerce asserts that this statute did not apply to the circumstances herein; thus Commerce did not permit Hyundai to provide additional information relevant to Commerce's change of methodology concerning normal value and sales price of service-related revenue. Commerce then applied an adverse inference and partial facts available to increase the dumping margin.

We conclude that Commerce erred in its statutory compliance as a matter of law, and we remand for redetermination of the antidumping duty applied to Hyundai's imports, based on the calculation of service-related revenue. Hyundai has the statutory right to correct the deficiencies that led to the application of adverse inferences and partial facts available.

BACKGROUND

An antidumping duty may be levied on imported products that are sold or likely to be sold in the United States at less than fair value, when such sales threaten or cause material injury to a domestic industry. 19 U.S.C. § 1673. To determine whether an imported product is sold at less than fair value, Commerce determines the normal value of the product in the home market, and the export (sales) price in the United States. 19 U.S.C. §§ 1675(a)(2)(A), 1677(b)(a). "Normal value" is "the price at which the foreign like product is first sold . . . for consumption in the exporting country." 19 U.S.C. § 1677b(a)(1)(B)(i).

This appeal concerns methodology for valuation of service-related revenue associated with Korean large power transformers, in determining normal value and sales price. In POR2, on a first appeal of Commerce's decision, the Court of International Trade remanded this issue to Commerce, at the Government's request. In response, Commerce changed its methodology for determination of service-related revenue.

Hyundai then asked Commerce for permission to provide additional data and information. Hyundai wrote: "With respect to the factual

[1] There have been third, fourth, and fifth administrative reviews, and appeals of the third and fifth administrative reviews previously reached the Federal Circuit. The subject matter of those appeals is unrelated to the issue now before us. *See Hyundai Heavy Indus. Co., Ltd. v. United States*, 819 Fed. Appx. 937 (Fed Cir. 2020) (third review); *Hyundai Elec. & Energy Sys. Co., Ltd. v. United States*, 15 F.4th 1078 (Fed. Cir. 2021) (fifth review).

flaws discussed above, the Department should reopen the record and issue a supplemental questionnaire to collect information regarding the New Test for service-related revenue." Appx10067. Hyundai proposed "If the Department continues to apply the New Test, it must provide Hyundai with an opportunity to place relevant information on the record, by issuing a supplemental questionnaire." *Id.* at 10069. Commerce denied the request, and calculated the antidumping margin based on the original information.

Hyundai reported service-related revenue in accordance with the Commerce questionnaire. *Antidumping Duty Questionnaire – Hyundai Heavy Industries*, C18 (Nov. 18, 2014) *see Response to Supplemental Sections B and C Questionnaire* (Jun. 3, 2015) ("Where the terms of sale require Hyundai to perform such services, the gross unit price includes the value of services required.").

In the second administrative review, Hyundai followed the same procedure as previously accepted by Commerce during the original investigation and the first administrative review. *See POR1 Final Results*, 80 Fed. Reg. at 17035. ABB Enterprise Software, Inc. (now Hitachi Energy USA, Inc., herein, "ABB") objected to this methodology, stating that it overstated the prices of Hyundai's United States sales. Commerce rejected the objection, stating that it had reviewed Hyundai's invoices and purchase orders and that Hyundai had properly responded to the questionnaire. Commerce stated:

> Based on our review of the record evidence at verification and comments by interested parties, we have determined to rely upon Hyundai's reported [gross unit price] for purposes of calculating net U.S. price for its sales . . . We find that there is no evidence, based on the invoices and purchase orders examined at verification, to indicate that Hyundai has separate revenues which it has failed to report to Commerce.

Original Investigation, *Issues & Decision Memorandum*, Comment 4 (July 2, 2012) (summarized at 77 Fed. Reg. 40857 July 11, 2012).

ABB appealed to the Court of International Trade, objecting to several aspects of the Commerce procedure, including service-related revenues. Commerce requested a voluntary remand "to reconsider its application of its revenue-capping practice in this case, in light of this practice . . . [and to] evaluate whether its application of this practice is consistent with respect to both respondents." *Def.'s Suppl. Mem. Addressing Standard for Voluntary Remand*, *ABB, Inc. v. United States,* No. 1:16-cv-00054 (Ct. Int'l Trade May 19, 2017), ECF No. 79; Appx 9945. The court stated that "Commerce's concerns are substantial and legitimate" and remanded for consideration. *ABB, Inc. v. United States*, 273 F. Supp. 3d 1200, 1205 (Ct. Int'l Trade 2017).

On remand, Commerce revised its methodology for determining service-related revenue:

> Commerce's capping methodology is not dependent upon whether a respondent must provide the service under the terms of sale as Hyundai contends, but whether such services were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services. Neither is Commerce's capping methodology dependent upon whether the service-related expenses and revenues are separate line-items on an invoice to the unrelated customer . . . Commerce's capping methodology, generally, may nevertheless be applied notwithstanding whether the amounts are specified in sales contracts with, or invoices to, the customer. If a respondent collects, as a portion of the final price to the customer, a portion of revenue which is dedicated to covering a service-related expense, and that service-related expense is less than the revenue set aside to cover the expense, then this is service-related revenue which is part of the material terms of sale and must be capped.

Final Results of Redetermination Pursuant To Court Remand, *ABB, Inc. v. United States*, No. 1:16-cv-00054 (Ct. Int'l Trade Feb. 7, 2018), ECF No. 95; Appx105–06. Commerce stated:

> Hyundai cannot prevent the application of Commerce's capping methodology based on a technicality concerning whether a respondent chooses to separately itemize service-related charges in sales contracts or invoices. Commerce's determination in this remand redetermination is not a change in methodology, but is instead an appropriate application of our capping methodology pursuant to the statute and past practice.

Appx106.

Commerce changed the way it was evaluating the data, for these changes required identification of which services were provided, and cost and price information regardless of whether they were separately negotiated or part of the sales price. Since Commerce found Hyundai's original submissions inadequate to determine the service-related revenue in this adjusted manner, Hyundai requested permission to provide additional information in conformity with 19 U.S.C. § 1677m(d). *See Letter from Hyundai Heavy Indus. Co. to Wilbur L. Ross, Jr., Secretary of Commerce,* Case No. A-580–867 (Dep't of Commerce Jan. 16, 2018) (*Requesting Reopening of the Record in Order to Submit New Information*); Appx10064–100102. The statute provides:

(d) **Deficient submissions**.

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d)

In its first remand Commerce applied a new test. As described by Hyundai, "Under the New Test, which the Department now seeks to apply in the Draft Remand, service-related revenue exists if certain sales documents identified revenue for the service, regardless of whether Hyundai was required to provide the service under the terms of sale." Appx10069. Commerce applied its new method of determining whether service-related revenue existed for Hyundai, and then "the Department immediately states that 'information is missing from the record due to Hyundai's failure to report service-related revenues' and that this justifies the application of partial facts available." *Id.*

In its request to submit additional information, Hyundai stated that "the Department appears to view its Original Test for service-related revenue to be incorrect. Reopening the factual record is therefore not only within the Department's discretion, it is necessary." *Id*. at 10085. Denying Hyundai's request to provide additional information, Commerce stated that its "determination in this remand redetermination is not a change in methodology, but is instead an appropriate application of our capping methodology pursuant to the statute and past practice." *Id.* at 106. Commerce characterizes Hyundai's responses as "avoidance," stating that "Hyundai cannot prevent the application of Commerce's capping methodology based on a technicality concerning whether a respondent chooses to separately itemize service-related charges in sales contracts or invoices." *Id.*

Commerce found that "Hyundai failed to cooperate to the best of its ability by not providing the information requested. Therefore, partial adverse facts available is warranted." *Id.* at 108. Commerce then determined the normal value and sales price for service-related revenue, on adverse inference and partial facts available, and increased Hyundai's dumping margin to 25.51 percent. *Id.* at 116. Commerce acknowledged Hyundai's request to reopen the investigation and allow the submission of information related to the new methodology but

did not respond, stating only that Hyundai failed to cooperate. *Id.* at 108.

Hyundai appealed, 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." *Defendant-Intervenors' Comments in Opposition to the Final Results of Redetermination Pursuant to Court Remand, ABB Inc. v. United States*, No. 1:16-cv-00054 (Ct. Int'l Trade Mar. 20, 2018), ECF No. 106. It is not disputed that Hyundai responded fully to Commerce's questionnaire.

Hyundai also argued that the additional information Commerce was requesting was contained in previously submitted "invoices listing separate line items for services[.]" Final *Results of Redetermination Pursuant to Court Remand, ABB Inc. v. United States*, No. 1:16-cv-00054 (Ct. Int'l Trade Apr. 26, 2019), ECF No. 150; Appx 41–42. However, Commerce refused to consider information from this source, stating that Hyundai "did not alert" Commerce to "invoices listing separate line items for services" and therefore "failed to cooperate to the best of its ability." *Id.* at 41–42.

The Court of International Trade observed that § 1677m(d) requires Commerce to notify and permit remedy of any deficiency: "The Government further argues that Commerce did not have an obligation to comply with § 1677m(d) because the agency was not aware of the deficiencies in Hyundai's reporting until it discovered the underlying information evincing Hyundai's misreporting for the first time at verification."[2] *ABB Inc. v. United States*, 355 F. Supp. 3d 1206, 1216 (Ct. Int'l Trade 2018). The court stated: "When a respondent provides seemingly complete, albeit completely inaccurate, information, § 1677m(d) does not require Commerce to issue a supplemental questionnaire seeking assurances that the initial response was complete and accurate." *Id.* at 1222.

However, the court found: "It was not until Commerce sorted through Hyundai's sales documentation that the agency recognized that Hyundai's documentation was inconsistent with its reporting." *Id.* The court concluded, "under these circumstances, Commerce was not statutorily mandated to provide Hyundai a subsequent opportunity to remedy the deficiency." *Id*. at 1223.

[2] "Verification" is conducted, 19 U.S.C. § 1677m(i)(3), by visiting the foreign company's facilities to review "all files, records and personnel" relevant to the inquiry. *See* 19 C.F.R. § 351.307(d). Commerce conducted on site verification at Seoul and Ulsan, Korea from July 16 through July 24, 2015. Mem. from Dep't of Commerce to File, Case No. A-580–867 (Dep't of Commerce Aug. 31, 2015) (on file with author). Appx9264.

The court remanded for redetermination, explaining that Commerce had impermissibly relied on internal Hyundai communications as evidence of service-related revenue. *Id*. The remand included instructions "that the agency may not apply its capping methodology to those transactions or services for which Commerce relied only on internal communications among Hyundai employees or affiliates" to determine service-related revenue. *Id.*

In response to this second remand, Commerce applied the court's ruling that Hyundai's internal communications were not evidence of service-related revenue. *Final Results of Redetermination Pursuant to Court Remand ABB Inc. v. United States,* No. 1:16-cv-00054 (Ct. Int'l Trade Apr. 26, 2016), ECF No. 150; Appx 46. Commerce accepted Hyundai's argument that certain revenues were not service related, and Commerce did not apply the "capping" methodology to these revenues. "The documentation for SEQU 1 does not contain any service-related revenue." *Id.* at 42. However, Commerce did not accept Hyundai's renewed request for permission to provide additional information on service-related revenue to comport with Commerce's new procedures.

Based on the continued application of adverse facts available, and applying changes to other factors, Commerce assessed a dumping margin of 16.58 %. *Id.* at 57. On Hyundai's appeal, the court again remanded to Commerce on issues not challenged on this appeal. On this remand, Commerce addressed those issues and set the dumping margin at 16.13%. *Final Results of Redetermination Pursuant to Court Remand*, *ABB Inc. v. United States,* No. 1:16-cv-00054 (Ct. Int'l Trade Apr. 14, 2020), ECF No. 182; Appx4–14. Hyundai appealed a fourth time, and the court sustained Commerce's Third Remand Results. *ABB, Inc. v. United States*, 437 F. Supp.3d 1289 (Ct. Int'l Trade 2020).

Now, before us, Hyundai presses its objection to Commerce's refusal to allow correction of any deficiencies in the information previously submitted, as required by 19 U.S.C.§ 1677m(d). We conclude that Hyundai is correct that the statute requires the opportunity to remedy any deficiencies in the information of record.

DISCUSSION

Standard of Review

On appeal of a decision of the Court of International Trade concerning an antidumping duty determination of the Department of Commerce, we review the decision of Commerce on the same standard that is applied by the Court of International Trade. "Commerce's

determination should therefore be upheld unless it is unsupported by substantial evidence on the record or is not in accordance with law." *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005); *see also SNR Roulements v. United States*, 402 F.3d 1358, 1361 (Fed. Cir. 2005).

"[T]his court must review the entire record for substantial evidence and compliance with the law. Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Am. Silicon Techs. v. United States, 334 F.3d 1033, 1036–37* (Fed Cir. 2003) (citing *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 477 (1951)). "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

The Issues on Appeal

Hyundai appeals three rulings of Commerce that were sustained by the Court of International Trade: (1) Commerce's refusal to permit Hyundai to remedy the announced deficiency in reported information about service-related revenue, as required by 19 U.S.C. § 1677m(d); (2) Commerce's ruling that Hyundai had not cooperated to the best of its ability, thereby supporting use of adverse inferences, 19 U.S.C. § 1677e(b); and (3) Commerce's use of adverse facts available in these circumstances.

A

Hyundai's Request to Supplement the Record

Hyundai's request to supplement the record is in accordance with law. After Commerce modified its methodology for determination of service-related revenue after the first remand, Hyundai sought to provide data and information related to the new methodology. *See Final Results of Redetermination Pursuant to Court Remand*, *ABB Inc. v. United States*, No. 1:16-cv-00054 (Ct. Int'l Trade Apr. 26, 2019), ECF No. 150; Appx28–57.

Hyundai states that its record documents already showed the break-out information now required by Commerce. In response to Commerce's original questionnaire and "consistent with prior segments of this proceeding," Hyundai separately reported service-related revenue where there existed "a separate purchase order for . . . the transformer (*e.g.*, supervision) but that related to the transformer." *Letter from Hyundai to Commerce Re: Anti-dumping Administrative Review of Large Power Transformers from Korea - Response to Sections B and C Questionnaires* (Jan. 26, 2015); Appx2408. Hyun-

dai explained that the relevant service-related revenue was provided in separate fields as Commerce had requested. "ADDPOPRU is sales amount under a separate purchase order for services that were not included in the purchase order for the transformer (*e.g.*, supervision), but that are related to the transformer. ADDPOEXPU is the expense associated with the additional services." *Id.*

In response to Hyundai's submission, Commerce sent a supplemental questionnaire directed to several items. *U.S. Department of Commerce, Supplemental Questionnaire for Sections B and C of Hyundai Heavy Industries and Hyundai Corporation USA's Responses to the Antidumping Duty Questionnaire* (May 22, 2015); Appx6140. Hyundai responded to each question. Concerning service-related revenue, Hyundai explained, "Where the terms of sale require Hyundai to perform such services, the gross unit price includes the value of services required." *Hyundai Heavy Industries Co, Ltd., Antidumping Administrative Review of Large Power Transformers from South Korea-Response to Supplemental Sections B and C Questionnaires* (Jun. 3, 2015); Appx6162.

Commerce had previously rejected ABB's objections to Hyundai's responses in Commerce's initial action on the second administrative review:

> We cannot conclude that necessary information is not available on the record, nor can we find that Hyundai withheld information requested by the Department, that it failed to provide such information in the form or manner requested, that it acted to significantly impede the proceeding, or that it provided requested information that could not be verified.

Issues and Decision Memorandum for Final Results of Anti-dumping Duty Administrative Review: Large Power Transformers from the Republic of Korea: 2013–2014, Comment 15 (Mar. 8, 2016); Appx9649. Commerce stated that Hyundai's documentation "show[s] no indication that Hyundai improperly reported its sales data." *Id.*

These findings cannot be reconciled with Commerce's later ruling that Hyundai had "not cooperate[d] to the best of its ability." Commerce supported its refusal to permit Hyundai to provide additional information, by stating that Hyundai had not previously provided information to the best of its ability: "We have determined not to allow Hyundai to submit such information because Hyundai had [ample] opportunity to submit the factual information during the course of the original proceeding, pursuant to 19 CFR 351.301." *Letter from Dep't of Commerce to Hyundai Heavy Industries Co., Ltd. & Hyundai Corporation USA, Re: Remand Order of the U.S. Court of*

International Trade for ABB Inc. v. United States concerning *Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea; 2013–2014: Request to Submit Service-Related Revenue Data from Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA*, No. 1:16-cv00054, Slip Op. 18–156 (Mar. 22, 2019); Appx10368.

After the first remand, Commerce determined that service-related revenue would no longer be defined by the terms of the sale as it was in the original investigation, the first review, and the initial findings of the second review.

> "Commerce's capping methodology is not dependent upon whether a respondent must provide the service under the terms of sale as Hyundai contends, but whether such services were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services. Neither is Commerce's capping methodology dependent upon whether the service-related expenses and revenues are separate line-items on an invoice to the unrelated customer."

Final Results of Redetermination Pursuant To Court Remand, ABB Inc. v. United States, No. 1:16-cv-00054 (Ct. Int'l Trade Feb. 7, 2018), ECF No. 95; Appx105–106. Thus documentation of the line-item breakouts became a factor in the administrative review.

Commerce's denial of Hyundai's request to provide any necessary information was contrary to the statute, which states in relevant part that Commerce "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." 19 U.S.C. § 1677m(d). The Court of International Trade has previously interpreted the statute to permit supplementation. *See SKF USA Inc. v. United States*, 391 F. Supp. 2d 1327, 1336 (Ct. Int'l Trade 2005) ("Clarity 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."). In *SKF* the court admonished that it is impermissible for Commerce to delay reporting that a respondent has provided insufficient information until after it is too late to correct. "Pursuant to 19 U.S.C. § 1677m(d), if the Department wished to place the burden of error on SKF, it had to make clear and give SKF a chance to correct the error prior to the issuance of a final decision." *Id.* at 1336–37.

In a separate proceeding on a later administrative review and a different issue, *Hyundai Steel Co. v. United States*, 282 F. Supp. 3d 1332, 1349 (Ct. Int'l Trade 2018), the court held that Commerce's

failure to timely notify a party of deficiency "is itself a violation of § 1677m(d)." It is undisputed that no such notification was given. The government states in its brief that Commerce was not required to permit Hyundai to provide additional information because the deficiency in question was not determined until "verification." Gov't Br. 31. However, the statutory entitlement to notice and opportunity to remedy any deficiency is unqualified. Hyundai also observes that data with the breakouts of revenue in separate line items were already in Commerce's possession, although it was not required by Commerce's questionnaire. Commerce erred, in denying the opportunity to remedy the asserted deficiency.

B

Adverse Inferences and Applied Partial Facts Available

Commerce drew adverse inferences and applied partial facts. When necessary information is missing or unavailable, Commerce is authorized to consider whatever facts are available, 19 U.S.C. § 1677e(a), and to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" when the party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). *See Nat'l Nail Corp. v. United States*, 390 F. Supp. 3d 1356, 1373 (Ct. Int'l Trade 2019) ("[T]he use of 'facts otherwise available,' to fill in gaps, applies when necessary information is lacking, regardless of the reason for its absence . . . An adverse inference, on the other hand, may only be drawn where the reason underlying the absence of necessary information was the respondent's failure to cooperate to 'the best of its ability,' that is, where the respondent failed to do the maximum it was able to do.") (citation omitted).

Commerce is authorized to draw an adverse inference and to apply the highest dumping margin when the respondent fails to do the maximum. *See Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017) (adverse inference based on adverse facts available may be appropriate when an interested party has been notified of a defect in its questionnaire response yet continues to provide a defective response).

Section 1677e(a)(2)(D) requires that the authorization to rely on adverse facts available is subject to § 1677m(d),which requires Commerce to provide notice and an opportunity to remedy a deficiency. Commerce has no authority to apply adverse facts and inferences unless the respondent has failed to provide requested information when notified of the deficiency, and has not acted to the best of its

ability in responding to such requests. 19 U.S.C. § 1677e(a). *See also Canadian Solar Inc. v. United States*, 537 F. Supp. 3d 1380, 1398 (Ct. Int'l Trade 2021) (holding that "Commerce must give Canadian Solar an opportunity to correct any deficient information"); *Shelter Forest Int'l Acquisition, Inc. v. United States*, 497 F. Supp. 3d 1388, 1401 (Ct Int'l Trade 2021) ("Commerce must raise identified deficiencies such as this one and provide respondents with an opportunity to explain, correct or supplement it.").

Commerce is permitted by 19 U.S.C. § 1677e(b)(1)(A) to draw adverse inferences "in selecting from the facts available" when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Taian Ziyang Food Co. v. United States*, 637 F. Supp.2d 1093, 1118 (Ct. Int'l Trade 2009). To this end, Commerce "must make a finding that a party has failed to act to the best of its ability when complying with a request for information from Commerce." *Id.* Here, Commerce made adverse inferences and relied on adverse facts, although there was no refusal to provide the information whose absence created a gap that required the use of facts available. Hyundai explains how this error increased the dumping margin:

> [B]ecause it rejected Hyundai's request to submit additional information, the Department was unable to determine whether there was SRR for the remaining sales. As partial adverse FA, the Department reduced all other U.S. gross unit prices "by the *highest* percentage difference between service-related revenue and the service-related expenses from the SEQUs with usable service-related expenses" on the record. This substantially increased the dumping margin.

Hyundai Br. 29 (*internal citations omitted*). "Before making adverse inference, Commerce must examine a respondent's actions and assess the extent of the respondent's abilities, efforts, and cooperation in responding to Commerce requests for information." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed Circ. 2003). Commerce made no such examination, and on this appeal, the only excuse offered for Commerce's failure to provide Hyundai with a notice of deficiency and the opportunity for remedy, was that Commerce "discovered" the deficiency only on "verification." This argument does not track Commerce's prior position that the deficiency arose when Commerce changed its methodology to satisfy a prior remand from the Court of International Trade.

The government does not assert that Hyundai withheld information, or committed any of the transgressions in § 1677e(a)(1) or (2).

The government agrees that Commerce changed its methodology, and the government acknowledges that "Commerce's analysis has evolved in this proceeding." Gov't Br. 29.

The Court of International Trade affirmed Commerce's departure from the statute, and departed from its own precedent; *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1345–48 (Ct. Int'l Trade 2015), *aff'd sub nom Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017) (Commerce must provide a sufficiently detailed explanation of the "nature of the deficiency" and must permit the respondent to correct the deficiency).

The record herein provides no basis for an adverse inference and recourse to adverse facts available. It is undisputed that any incompleteness of sales data and information could have been remedied by the proffered information, but for Commerce's refusal to permit Hyundai to provide this information. No reasonable justification has been offered for that refusal despite Hyundai's repeated requests. The invocation of adverse inferences and use of partial facts available is unsupported by substantial evidence in the record.

CONCLUSION

Commerce erred in law, refusing to permit Hyundai to supplement the record with information concerning service-related revenue. Commerce thus relied on incomplete data to determine antidumping duties. The Court of International Trade erred in ratifying that refusal. We vacate the Court of International Trade's affirmance on this issue, and we vacate the court's affirmance of Commerce's recourse to adverse inferences and partial facts available, for that action was a result of the erroneous exclusion of information. We remand with instructions for redetermination of any dumping margin, on complete information provided in conformity with law.

VACATED AND REMANDED

COSTS

U.S. Court of International Trade

Slip Op. 22–45

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

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

[Final Determination is remanded.]

Dated: May 12, 2022

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

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

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., for Plaintiff-Intervenor Cabinets to Go, LLC. With him on the brief were *Courtney Gayle Taylor*, *R. Kevin Williams*, *William Sjoberg*.

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

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

OPINION AND ORDER

Eaton, Judge:

This case involves the U.S. Department of Commerce's ("Commerce" or the "Department") affirmative final determination in the countervailing duty investigation of wooden cabinets and vanities from the People's Republic of China ("China"). *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 85 Fed. Reg. 11,962 (Dep't Commerce Feb. 28, 2020) ("Final Determination") and accompanying Issues and Decision Mem. (Feb. 21, 2020) ("Final IDM"), PR 846.

Plaintiff Dalian Meisen Woodworking Co., Ltd. ("Meisen") and Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. ("Ancientree") are producers and exporters of subject merchandise and were man-

datory respondents in the investigation. Plaintiff-Intervenor Cabinets to Go, LLC is a U.S. importer of the subject wooden cabinets and vanities. Meisen, Ancientree, and Cabinets to Go ("Plaintiffs") have each filed a motion for judgment on the agency record. *See* Meisen's Mem. Supp. Mot. J. Agency R., ECF Nos. 38–1 (conf.) and 39–1 (public) ("Meisen Br."); Meisen's Reply, ECF Nos. 45 (conf.) and 46 (public); Ancientree's Mem. Supp. Mot. J. Agency R., ECF No. 42 ("Ancientree Br."); Ancientree's Reply, ECF No. 47; Cabinets to Go, LLC's Mem. Supp. Mot. J. Agency R., ECF No. 40 ("CTG Br.").

By their respective motions, Plaintiffs challenge Commerce's finding, based on adverse facts available, that Meisen and Ancientree each received a benefit under China's Export Buyer's Credit Program. Plaintiffs contend that this finding lacks the support of substantial evidence and is otherwise not in accordance with law. Plaintiffs thus ask the court to direct Commerce to exclude the subsidy rate, determined for the program, from the calculation of Meisen's and Ancientree's individual countervailing duty rates, and the "all-others" rate.[1] *See* Meisen Br. at 8–17; Ancientree Br. at 6–17; CTG Br. at 3–6.

Additionally, Meisen argues that Commerce erred when selecting different benchmarks to measure the "benefit" that Meisen and Ancientree each received under the "plywood for less-than-adequate-remuneration" program.[2] According to Meisen, the company and Ancientree purchased identical plywood, so Commerce should have used data under the same Harmonized Tariff Schedule ("HTS") subheading for both companies. *See* Meisen Br. at 14.

The United States ("Defendant") on behalf of Commerce and Defendant-Intervenor the American Kitchen Cabinet Alliance oppose the motions. *See* Def.'s Resp. Opp'n Pls.' Mots. J. Agency R., ECF No. 43 ("Def.'s Resp."); Def.-Int.'s Resp. Opp'n Meisen's Mot. J. Agency R., ECF No. 44.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2018).

For the reasons stated in this Opinion and Order, the court remands Commerce's calculation of Meisen's and Ancientree's indi-

---

[1] The countervailing duty rates calculated for Meisen, Ancientree, and a third mandatory respondent, Rizhao Foremost Woodwork Manufacturing Co., Ltd., which is not a party in this action, formed the basis of the "all-others" rate, under 19 U.S.C. § 1671d(c)(5) (2018). U.S. importer Cabinets to Go alleges that its Chinese suppliers are subject to the "all-others" rate. *See* CTG Br. at 3.

[2] Commerce's regulations provide that "a benefit exists to the extent that . . . goods or services are provided for less than adequate remuneration." 19 C.F.R. § 351.511(a)(1) (2019). Commerce measures the amount of the benefit by comparing a respondent's reported costs for the good or service with a benchmark, *i.e.*, a market-determined price "that could have constituted adequate remuneration." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014); *see also* 19 C.F.R. § 351.511(a)(2) (defining adequate remuneration).

vidual countervailing duty rates and directs the Department to either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers (*see infra* note 9); or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly. The Department's plywood benchmarking determination for Meisen is sustained.

BACKGROUND

In response to a petition filed by Defendant-Intervenor the American Kitchen Cabinet Alliance, Commerce initiated an investigation of thirty-six programs by which the Chinese government allegedly provided countervailable subsidies to the wooden cabinet industry in China. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 84 Fed. Reg. 12,581 (Dep't Commerce Apr. 2, 2019) (initiation notice). The period of investigation was January 1, 2018, through December 31, 2018. *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 84 Fed. Reg. 39,798, 39,798 (Dep't Commerce Aug. 12, 2019) ("Preliminary Determination") and accompanying Decision Mem. (Aug. 5, 2019) ("PDM"), PR 623. Among the programs investigated were (1) the Export Buyer's Credit Program, and (2) a program under which China allegedly provided plywood to producers for less-than-adequate remuneration. Both programs are at issue in this appeal of the Final Determination.

I. The Export Buyer's Credit Program

The Export Buyer's Credit Program is a state-subsidized loan program, administered by China's state-owned Export Import Bank. *See Clearon Corp. v. United States*, 44 CIT __, __, 474 F. Supp. 3d 1339, 1343 (2020) (citation omitted). Under the program, the Chinese government provides credit at preferential rates to foreign purchasers of goods exported by Chinese companies. *See id.* at __, 474 F. Supp. 3d at 1343.

As with other cases involving the Export Buyer's Credit Program that have come before this Court, the record in this case shows that Commerce sent initial and supplemental questionnaires to China, asking for information that, according to Commerce, would allow it to understand the operation of the program. *See id.* at __, 474 F. Supp. 3d at 1350–51 & nn.10–12 (collecting cases). Among the specific pieces of information sought by Commerce were the identities of any third-party banks involved in the disbursement of buyer's credits

through the program, and copies of internal guidelines believed to have revised certain aspects of the Export Buyer's Credit Program in 2013.[3] *See* Final IDM at 26.

As in prior cases, here, China provided some, but not all, of the operational information that Commerce requested. For example, China failed to provide "a list of all partner/correspondent banks involved in the disbursement of funds under the [Export Buyer's Credit] program." *See* Final IDM at 26. Instead, China responded that the requested information was "not applicable" because the program was not used by respondents or their U.S. customers. *See* PDM at 17; Final IDM at 26.

With respect to the program revisions, China responded that the information was internal to the Export Import Bank, not public, and not available for release, and further that it could not compel the Export Import Bank to give the information to Commerce.[4] China further responded that it "had confirmed that 'none of the U.S. customers of the mandatory respondents has been provided with loans under this program,'" and, thus, answers to Commerce's questions were "not required." *See* Final IDM at 26.

For their part, in response to Commerce's questionnaires, Meisen and Ancientree stated that they did not benefit from the Export Buyer's Credit Program. In support of this claim, they placed on the record declarations by their respective U.S. customers stating that "[Meisen's U.S. customer] has not financed any purchases from [Meisen] through the use of the export buyer's credit program, directly or indirectly from the Import-Export Bank of China . . . [and] has never, directly or indirectly, used the Import-Export Bank of China (i.e. Buyer's Credit program) in any way."). *See, e.g.*, Meisen's Sec. III Quest. Resp. (July 11, 2019) Ex. 14, PR 500.

After the Preliminary Determination was issued, Commerce conducted verification in China at the offices of Meisen and Ancientree. Though it verified the "non-use" of some of the subsidy programs under investigation, Commerce did not attempt to verify the respondents' claims that they did not receive a benefit under the Export Buyer's Credit Program. *See, e.g.*, Ancientree Verification Rep. (Jan. 7, 2020) at 9, PR 808. Instead, Commerce stated that it was "unable to verify in a meaningful manner what little information there is on

[3] For example, Commerce asked for "translated copies of the laws and regulations pertaining to the [Export Buyer's Credit Program]; a description of the agencies and types of records maintained for administration of the program; a description of the program and the application process; program eligibility criteria; and program usage data." Final IDM at 26.

[4] The court need not credit China's claim that the Export Import Bank is separate from the Chinese government to reach its conclusions.

the record indicating non-use . . . with the exporters, U.S. customers, or at the China [Export Import] Bank itself, given the refusal of [China] to provide the 2013 revision and a complete list of correspondent/partner/intermediate banks." Final IDM at 34.

Based on this claimed inability to verify non-use, Commerce concluded that there were "gaps" in the record because "necessary" information was missing that would permit it to verify the claims of non-use by the respondents' U.S. customers:

> In short, because [China] failed to provide Commerce with information necessary to identify a paper trail of . . . direct or indirect export credits from the China Ex-Im Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the China Ex-Im Bank via a correspondent bank under the [Export Buyer's Credit] program. This necessary information is missing from the record *because such disbursement information is only known by the originating bank, the China Ex-Im Bank*,[5] which is a government-controlled bank. Without cooperation from the China Ex-Im Bank and/or [China], we cannot know the banks that could have disbursed export buyer's credits to the company respondents' customers. Therefore, there are gaps in the record because [China] refused to provide the requisite disbursement information.

Final IDM at 34 (footnote omitted). Accordingly, Commerce found that because China "withheld necessary information that was requested of it and significantly impeded [the] proceeding," it "must rely on facts otherwise available . . . pursuant to [§ 1677e(a)(1), (2)(A) and (C)]." Final IDM at 36.

Additionally, Commerce concluded that "an adverse inference [was] warranted in the application of facts available, pursuant to [§ 1677e(b)], because [China] did not act to the best of its ability in providing the necessary information to Commerce." Final IDM at 36. Thus, Commerce found that "under [the Export Buyer's Credit] program [China] bestowed a financial contribution and provided a benefit to Ancientree . . . and Meisen within the meaning of" the countervailing duty statute. *See* Final IDM at 36.

As an adverse facts available rate for the Export Buyer's Credit Program, Commerce selected "10.54 percent *ad valorem*, the highest rate determined for a similar program" in a separate proceeding

[5] It is fair to wonder if this statement can possibly be true. Surely, the China Export Import Bank does not make a loan to a U.S. purchaser of Chinese goods without the purchaser completing some paperwork demonstrating that it has or will purchase qualifying merchandise. Thus, the U.S. purchasers would be another source of the needed disbursement information.

involving China. *See* Final IDM at 37–38; *see also* 19 U.S.C. § 1677e(d).

II. Program for the Provision of Plywood for Less-Than-Adequate Remuneration

In addition to the Export Buyer's Credit Program, Commerce investigated a program by which it claims China allegedly supplied plywood—an input in the production of the subject wooden cabinets and vanities—to producers for less-than-adequate remuneration. By way of questionnaires, the Department sought benchmarking information from Meisen and Ancientree to measure the benefit received by the respondents under this program.

In Meisen's benchmark submission, the company identified the HTS subheading that it believed applied to the plywood that it purchased during the period of investigation—HTS subheading 4412.**33**[6]—and supplied data from the United Nations Comtrade Database ("U.N. Comtrade")[7] for that subheading. *See* Final IDM at 58–59 (Meisen provided "data from UN Comtrade for use in the valuation of plywood using *the HTS code applicable to the plywood purchased by . . . Meisen* which has a face and back of birch."). The data consisted of 2018 weighted-average monthly global export prices for Port of Dayaowan, China for HTS subheading 4412.33. *See* Meisen Benchmark Submission (July 18, 2019) attach. 1, PR 571–576, CR 336–337.

In Ancientree's benchmarking submission, the company identified HTS subheading 4412.**32**,[8] as well as HTS subheading 4412.33, as

---

[6] The HTS or Harmonized System is an "international product nomenclature developed by the World Customs Organization." World Customs Organization, http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (last visited May 2, 2022). The parties' briefs do not identify the version of the HTS on which they relied when answering Commerce's questionnaires. The 2017 version of subheading 4412.33 is a basket provision ("Other") that covers plywood "with at least one outer ply of non-coniferous wood" of certain tree species, *i.e.*, alder, ash, beech, birch, cherry, chestnut, elm, eucalyptus, hickory, horse chestnut, lime, maple, oak, plane tree, poplar and aspen, robinia, tulipwood or walnut. *See* HS Nomenclature 2017 Edition, World Customs Organization, http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.as px (click on link 0944–2017E under Section IX, Chapter 44 for Wood and articles of Wood; wood charcoal) (last visited May 2, 2022); *see also* Meisen Benchmark Submission (July 18, 2019) attach. 1, PR 571–576, CR 336–337.

[7] U.N. Comtrade "is a repository of official international trade statistics and relevant analytical tables" that is available for free online. *See* U.N. COMTRADE DATABASE, https://comtrade.un.org/ (last visited May 2, 2022).

[8] Subheading 4412.32, like subheading 4412.33, was a basket provision ("Other") that covered plywood "with at least one outer ply of non-coniferous wood." Unlike subheading 4412.33, however, 4412.32 did not list any particular species of wood that were covered by the subheading. *See* HS Nomenclature 2012 Edition, World Customs Organization, http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hsnomenclature_previous_editions/hs_nomenclature_table_2012.aspx (click on link 0944–2012E under Section IX, Chapter 44 for Wood and articles of Wood; wood charcoal) (last visited May 2, 2022); *see also* Ancientree Suppl. Quest. Resp. (July 22, 2019) at 3, PR 599, CR 345–353.

provisions that could possibly describe the plywood it used in making the subject wooden cabinets and vanities. *See* Ancientree Benchmark Submission (July 18, 2019), PR 588–590. Ultimately, however, it categorized its purchases under HTS subheading 4412.**32**. *See* Ancientree Suppl. Quest. Resp. at 3; *see also* Final IDM at 59.

Thus, both Meisen and Ancientree identified HTS subheading 4412.33 as a possible source of benchmarking information, but in the end, Ancientree stated that its period of investigation purchases of plywood should be categorized under subheading 4412.32.

In the Preliminary Determination, Commerce valued plywood using U.N. Comtrade data for the HTS subheading identified by each respondent in its benchmarking submission as applicable to its plywood purchases—4412.33 for Meisen, and 4412.32 for Ancientree—to determine the amount of the benefit each respondent received on its plywood purchases under the program.

Despite Commerce's use of the HTS subheading that Meisen itself had identified as applicable to its plywood purchases, Meisen argued in its case brief, submitted after the Preliminary Determination, that Commerce erred by using different HTS subheadings for Ancientree and Meisen because the two companies purchased the same type of plywood. *See* Final IDM at 58 (citing Meisen's Case Brief (Jan. 21, 2020) at 2–3, PR 821).

In the Final Determination, Commerce rejected this argument, stating that the respondents are in the best position to know the characteristics of the plywood that each had purchased during the period of investigation, so it was reasonable for the Department to rely on the HTS subheadings identified by each respondent in its benchmarking submission. *See* Final IDM at 59.

Plaintiffs timely appealed Commerce's rulings to this Court.

STANDARD OF REVIEW

The court will sustain a determination by Commerce 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).

LEGAL FRAMEWORK

Under the countervailing duty statute, if Commerce determines that a foreign government or public entity "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," a duty will be imposed in an amount equal to the net countervailable

subsidy. *See* 19 U.S.C. § 1671(a). A subsidy is countervailable when (1) a foreign government provides a financial contribution (2) to a specific industry, and (3) a recipient within the industry receives a benefit as a result of that contribution. *See id.* § 1677(5).

With respect to the benefit element, where the subsidy is a government loan program, a "benefit" is conferred "if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." *Id.* § 1677(5)(E)(ii); *see also* 19 C.F.R. § 351.505(a) (2019) (same).

Where the subsidy is goods or services, Commerce's regulations provide that "a benefit exists to the extent that such goods or services are provided for less than adequate remuneration." 19 C.F.R. § 351.511(a). Commerce measures the adequacy of remuneration by comparing a respondent's reported costs for the good or service with a benchmark, *i.e.*, a market-determined price "that could have constituted adequate remuneration." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1368 (Fed. Cir. 2014); *see also* 19 C.F.R. § 351.511(a)(2) (defining adequate remuneration).

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

Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts only if it makes the requisite additional finding that that party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1). When considering if a respondent has failed to cooperate to the best of its ability, the Department must perform two tasks:

> First, it must make an objective showing that a reasonable and responsible [respondent] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. . . . Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Nippon Steel, 337 F.3d at 1382–83 (citation omitted).

Generally, only after Commerce has determined that there is information missing, creating a gap in the record, is it permitted to apply an adverse inference when selecting from among the facts otherwise available. *See Nippon Steel*, 337 F.3d at 1381. The application of adverse facts available is, then, in most cases a two-step process. *See id.* ("The statute has two distinct parts respectively addressing two distinct circumstances under which Commerce has received less than the full and complete facts needed to make a determination."). "The focus of subsection (a) is respondent's *failure to provide information*. The reason for the failure is of no moment." *Id.*

The application of an adverse inference depends on an assessment of a respondent's behavior. *See id.* ("As a separate matter, subsection (b) permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' only if Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.' The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability,* not its failure to provide requested information." (alteration in original)). Importantly, the use of facts available generally requires a finding of missing information. The application of an adverse inference is based on a respondent's efforts to comply with Commerce's requests for information. The purpose of the application of adverse facts available is to encourage respondents to comply with Commerce's requests. *See Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1239–40 (2021) (discussing use of adverse facts available as an "inducement" for compliance).

In a countervailing duty investigation, "Commerce often requires information from the foreign government allegedly providing the

subsidy." *Fine Furniture*, 748 F.3d at 1369–70 (citation omitted). Where the foreign government fails to provide requested information, its behavior may result in the application of an adverse inference to a respondent's missing information. *See id.* at 1371. Under such circumstances, the Federal Circuit has upheld the use of adverse facts available even where it may adversely impact a cooperating party, *e.g.*, respondents that have cooperated with Commerce's requests for information. *See id.* at 1371–73 (citing *KYD, Inc. v. United States*, 607 F.3d 760 (Fed. Cir. 2010)). This Court and the Federal Circuit have stated, though, that "Commerce should seek to avoid such impact if relevant information exists elsewhere on the record." *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013) (citation omitted); *see also Fine Furniture*, 748 F.3d at 1372 (emphasis added) (upholding the application of adverse facts available where Commerce did "not apply adverse inferences *to substitute for any information that was actually submitted by the cooperating respondents*.").

DISCUSSION

I. Substantial Evidence Does Not Support Commerce's Facts Otherwise Available Finding with Respect to the Export Buyer's Credit Program

Plaintiffs argue that Commerce erred in its application of adverse facts available to find that Meisen and Ancientree used and received benefits under the Export Buyer's Credit Program. *See* Meisen Br. at 5; Ancientree Br. at 6. For Plaintiffs, there were no relevant facts missing from the record with respect to any alleged benefit: "Meisen . . . provided evidence that it and its customers did not receive a financial contribution or benefit under the Export Buyer's Credit Program, including uncontroverted declarations from its [U.S.] customers that they did not finance any purchases from Meisen through the program." Meisen Br. at 5; Ancientree Br. at 8 (similar argument with respect to Ancientree).

For its part, Defendant argues that "Commerce determined that the government of China did not cooperate to the best of its ability by failing to provide information requested, and as a result, Commerce was unable to verify claims of the mandatory respondents' non-use of the Export Buyer's Credit Program." Def.'s Resp. at 5–6. In particular, Defendant maintains: "Without information about the potential involvement of third-party banks and a full understanding of the administrative measures governing the program, Commerce cannot identify the correct issues, or verify use of the program." Def.'s Resp. at 6. Thus, for Defendant, Commerce "reasonably determined that

information was missing from the record because of the government of China's failure to cooperate to the best of its ability," and "appropriately relied on adverse facts available." Def.'s Resp. at 6.

The court finds that substantial evidence does not support Commerce's finding under § 1677e(a) that the use of "facts otherwise available" was required because necessary information was missing from the record. Here, both respondents certified that their customers did not take advantage of the program and supported this certification with declarations. The declarations placed on the record by Meisen and Ancientree show that their U.S. customers did not use the program to finance their purchases (*i.e.*, there can be no "benefit" received under the program by Meisen or Ancientree), and there is no record evidence to the contrary. Commerce, however, disregarded the non-use statements, not by failure to verify them or even attempting to verify them, but instead by finding that it would have been unreasonably burdensome to attempt to verify them without information that China withheld, *i.e.*, operational information about the role of third-party banks in disbursing credits and revisions to the program in 2013.

As this Court has found in prior cases with similar records, it is difficult to see how missing operational information about the program is "necessary" or relevant in the face of Plaintiffs' non-use evidence. *See, e.g.*, *Guizhou Tyre Co. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) (remanding to Commerce, noting that although "information as to the functioning of the Program was missing, this finding was rendered immaterial by responses from both Guizhou and [China] as to the Program's use. This defect proves fatal to Commerce's imposition of [adverse facts available]"); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 399 F. Supp. 3d 1346, 1353 (2019) (remanding, noting that "Commerce has failed to demonstrate why the 2013 [Export Buyer's Credit Program] rule change [allegedly impacting the functioning of the program] is relevant to verifying claims of non-use, and how that constitutes a 'gap' in the record"); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1402, 1405 (2019) (sustaining Commerce's conclusion that "Plaintiffs did not use the [Export Buyer's Credit Program] based on the record evidence"); *see also, e.g.*, *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1315, 1329 (2019) (remanding, noting that "the Department's decision to apply [adverse facts available] as to the Export Buyer's Credit Program based on an alleged lack of cooperation was unlawful because Commerce demonstrated no gap in the record, the respondents submitted evidence of non-use of the Program, and the Department's findings of unverifiability of necessary

information [were] unsupported by record evidence"); *Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1335, 1343 (2019) (remanding, noting that "[t]here is evidence in the record that squarely detracts from Commerce's inference that Plaintiffs used and benefited from the [Export Buyer's Credit Program]. Commerce may not simply declare that the evidence cannot be verified and therefore, a gap exists. That is not how it works. Commerce must attempt verification *in order to conclude* that a gap exists related to that inquiry"); *Guizhou Tyre Co. v. United States*, 44 CIT, __, __, 447 F. Supp. 3d 1373, 1376 (2020) (sustaining Commerce's conclusion "that the factual record in this case indicates that there was no use of the [Export Buyer's Credit Program] by Guizhou").

Where there is a gap in the record, the Federal Circuit has held that Commerce must use facts otherwise available. *See Fine Furniture*, 748 F.3d at 1370. The Court has not, however, sanctioned the substitution of "facts otherwise available" for relevant evidence that was placed on the record by the cooperative respondents. *Id.* at 1371; *Archer Daniels*, 37 CIT at 767, 917 F. Supp. 2d at 1342. Indeed, under § 1677e(a) the use of facts otherwise available is a method by which Commerce shall fill gaps in the record. It does not authorize the creation of gaps to be filled with information of Commerce's choosing. Yet, it appears that Commerce disagrees. Here, as in other cases, to justify the substitution of relevant evidence placed on the record by cooperating respondents with facts available, Commerce has constructed an argument that is difficult to credit—*i.e.*, that operational information was withheld by China and therefore there are gaps regarding the use of the program. The problem with this argument is that the withheld information is (at best) only indirectly related to alleged actual use of the program by Meisen's and Ancientree's U.S. customers. Moreover, Commerce's argument that the operational information is necessary to verify the accuracy of the non-use information because without it, verification is unreasonably burdensome using its typical procedure, rings hollow when Commerce fails to even try.

Despite this Court's repeated rejection of Commerce's interpretation of § 1677e(a) to require the use of facts otherwise available even when relevant evidence on the record exists, here the Department again found that the program conferred a benefit on cooperative respondents Meisen and Ancientree, even though there is evidence of non-use of the program by their customers on the record.[9] Thus, here, as this Court has done in prior cases, the court holds that Commerce's

[9] As noted in prior cases, Commerce has never appealed this Court's rejection of the Department's facts otherwise available determination in the context of the Export Buyer's

finding that necessary information is missing from the record, such that there is a gap in the factual record that requires the use of "facts otherwise available" under § 1677e(a) is contrary to the statute and lacks the support of substantial evidence.

Because Commerce's use of facts otherwise available to find that Meisen's and Ancientree's U.S. customers used the Export Buyer's Credit Program was unlawful, the first step of the two-step process has not been satisfied, and the Department's adverse facts available finding that Meisen and Ancientree benefitted from the program cannot be sustained. Thus, the inclusion of an adverse facts available rate for the program when calculating individual countervailing duty rates for Meisen and Ancientree is not supported by substantial evidence and is otherwise not in accordance with law. On remand, Commerce shall either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers (*see supra* note 9); or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly.

II. Substantial Evidence Supports Commerce's Plywood Benchmarking Determination

As noted, Commerce valued plywood using U.N. Comtrade data for the HTS subheading identified by each respondent in its benchmarking submission as applicable to its plywood purchases—4412.33 for Meisen, and 4412.32 for Ancientree—to determine the amount of the benefit each respondent received on its plywood purchases under the "plywood for less-than-adequate-remuneration" program. Plaintiff Meisen argues that substantial evidence does not support Com-

Credit Program. *See Clearon*, 44 CIT at __, 474 F. Supp. 3d at 1353 n.13 ("It is worth noting that, despite Commerce's respectful protest, the United States elected not to file an appeal in any of the aforementioned cases."). Nonetheless, there are signs that Commerce is reconsidering its procedure for verifying claims of non-use of the program. *See, e.g.*, *Certain Mobile Access Equipment and Subassemblies Thereof From the People's Republic of China*, 86 Fed. Reg. 57,809 (Dep't Commerce Oct. 19, 2021) and accompanying Issues and Decision Mem. (Oct. 12, 2021) at 49–50 ("[C]onsidering court precedent, Commerce developed supplemental questionnaires issued to mandatory respondents and their U.S. customers requesting additional information regarding its financing activities to probe claims of non-use for the Export Buyer's Credit program."); *see also Risen Energy Co. v. United States*, 46 CIT __, Slip Op. 22–44 at 5 (May 12, 2022) (granting voluntary remand so that "the Government may attempt to verify the customer certifications of non-use," and directing that "[i]f the Government decides to remove the [Export Buyer's Credit Program] from its subsidy calculation under protest but does not intend to appeal, it must explain on remand why the Court should not provide some form of equitable relief, such as the immediate return of deposits, or an injunction of the continued inclusion of the program with no attempt at verification that results in the temporary collection of funds that ultimately are not owed.").

merce's decision "to use a different benchmark for Meisen than it used for [Ancientree] to measure the benefits received under the plywood for less than adequate remuneration program." Meisen Br. at 6. In particular, Meisen contends that "[t]he record evidence demonstrated that [Meisen and Ancientree] used the same type of plywood and Commerce failed to provide sufficient reasons for treating similar situations differently." Meisen Br. at 6.

For its part, Defendant asserts that Commerce explained its reasons for choosing the HTS subheadings it used for Meisen and Ancientree. With respect to Meisen, Commerce "used HTS [sub]heading 4412.**33** . . . because it was the [sub]heading Meisen reported to Commerce as applicable to [its] plywood purchases." Def.'s Resp. at 6. Defendant maintains its reliance on the HTS subheading reported by Meisen was reasonable because Meisen "was in the best position to determine the HTS classification describing its input." Def.'s Resp. at 6.

Commerce further found, with respect to the type of plywood purchased by Ancientree, that the company "categorized its purchases under HTS subheading 4412.32." Final IDM at 59. Thus, Commerce found it "appropriate to use HTS subheading 4412.**32** to measure the adequacy of remuneration for Ancientree's plywood purchases." Final IDM 59–60.

The court sustains Commerce's plywood benchmarking determination for Meisen because the Department's use of the HTS subheading Meisen identified for its own purchases of plywood to measure the benefit it received is supported by substantial evidence. Meisen does not dispute that it identified only subheading 4412.**33** as applicable to its plywood purchases. Nor does it dispute that Ancientree identified subheading 4412.**32** as applicable to its plywood purchases. Rather, Meisen argues that "Commerce cannot simply accept the classifications suggested by the parties without considering their accuracy." Meisen Br. at 15. Meisen neither cites any authority for this assertion, nor does it suggest a method of "considering the accuracy" of the classifications. It only states that Meisen was not "aware that Commerce has ever [accepted proposed classifications] before." Meisen Br. at 15.

There is nothing unreasonable about Commerce trusting the certified responses of the mandatory respondents as to the proper classification of the inputs they used to produce subject merchandise. Again, the court notes that Meisen does not argue that the HTS subheading it identified, and Commerce used, is inaccurate, but only that identical subheadings should have applied to Ancientree's plywood because, for Meisen, the purchases reported by the two companies were "identical." The record, however, fails to support Meisen's claim. A review of the companies' questionnaire responses as to the

type of plywood each used does, indeed, show that both companies coded their input as "type 3" ("Not bamboo and not tropical, with at least one outer ply of non-coniferous wood"), but the responses are not identical. The narrative responses of Meisen described its purchases as having "a face and back ply of birch" and "a poplar core," while Ancientree reported that it purchased different products.[10] *See* Meisen Suppl. Quest. Resp. (July 22, 2019) at 2 & Ex. 3, PR 601. Maybe there was an overlap among the products purchased by the two companies, but substantial evidence does not show that the two companies reported purchases of identical plywood products.

Although Meisen argues that Commerce has failed to explain adequately its selection of HTS subheadings for Meisen and Ancientree, the record indicates otherwise. *See, e.g.*, Meisen's Prelim. Calc. Mem. (Aug. 5, 2018) at 3 n.5, PR 643, CR 375–376; Ancientree Prelim. Calc. Mem. (Aug. 5, 2018) at 4 n.27, PR 668, CR 377–378. Commerce used the HTS subheading each respondent certified that used to make its product. Nothing more is needed. Accordingly, Commerce's benchmarking determination and selection of HTS subheadings are sustained.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Commerce's plywood benchmarking determination and selection of HTS subheadings are sustained; it is further

ORDERED that Commerce shall submit a redetermination upon remand that complies in all respects with this Opinion and Order; it is further

ORDERED that, on remand, Commerce shall either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers; or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly; and it is further

ORDERED that Commerce's remand results shall be due ninety (90) days following the date of this opinion; any comments to the remand results shall be due thirty (30) days following the filing of the remand results; and any responses to those comments shall be filed fifteen (15) days following the filing of the comments.

Dated: May 12, 2022
New York, New York

/s/ Richard K. Eaton
JUDGE

[10] Ancientree reported purchasing pine plywood, poplar plywood, and birch plywood. *See* Ancientree Suppl. Quest. Resp. at 1–3.

Slip Op. 22–48

QINGDAO SENTURY TIRE CO., LTD., SENTURY TIRE USA INC., SENTURY (HONG KONG) TRADING CO., LIMITED, Plaintiffs, and PIRELLI TYRE CO., LTD., PIRELLI TYRE S.P.A., and PIRELLI TIRE LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00079

[Sustaining the third remand results of the U.S. Department of Commerce determining that Consolidated Plaintiff Pirelli Tyre Co., Ltd. rebutted the presumption of *de jure* and *de facto* government control for the period at issue and is entitled to separate rate status.]

Dated: May 19, 2022

Plaintiffs Qingdao Sentury Tire Co., Ltd., Sentury Tire USA Inc., and Sentury (Hong Kong) Trading Co., Limited filed no comments on the remand results.

Daniel L. Porter and *Ana M. Amador Gil*, Curtis, Mallet-Prevost, Colt & Mosle, LLP, of Washington, D.C., for Consolidated Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

Ashley Akers, 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, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Ayat Mujais*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

OPINION

Choe-Groves, Judge:

This action arises from the administrative review by the U.S. Department of Commerce ("Commerce") of certain passenger vehicle and light truck tires from the People's Republic of China ("China"). *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* ("*Final Results*"), 83 Fed. Reg. 11,690 (Dep't of Commerce Mar. 16, 2018) (final results of antidumping duty administrative review and final determination of no shipments; 2015–2016); *see also* Certain Passenger Vehicle and Light Truck Tires from People's Republic of China: Issues and Decision Mem. Final Results 2015–2016 Antidumping Duty Admin. Review (Mar. 9, 2018) ("Final IDM"), ECF No. 15–5; Decision Mem. Prelim. Results Antidumping Duty Admin. Review: Certain Passenger Vehicle and Light Truck Tires from People's Republic of China (Aug. 31, 2017), PR 420.[1]

[1] Citations to the administrative record reflect the public record ("PR") document numbers filed in the Public Joint Appendix in *Shandong Yongtai Group Co. v. United States*, (formerly consolidated) Court No. 18–00077 ("*Shandong Yongtai* Docket"), ECF No. 48.

Before the Court are the Final Results of Redetermination Pursuant to Court Order ("*Third Remand Results*"), ECF Nos. 33, 34, ordered in *Qingdao Sentury Tire Co. v. United States* ("*Qingdao Sentury*"), 45 CIT __, 539 F. Supp. 3d 1278 (2021) ("Remand Order").[2] The *Third Remand Results* concern only Consolidated Plaintiffs Pirelli Tyre Co., Ltd. ("Pirelli Tyre Co."), Pirelli Tire LLC, and Pirelli Tyre S.p.A. ("Consolidated Plaintiffs"), which filed comments thereon. Consol. Pls.' Comments Supp. Remand Redetermination Results ("Consolidated Plaintiffs' comments" or "Consol. Pls.' Cmts."), ECF No. 36. Defendant United States ("Defendant") filed a response to Consolidated Plaintiffs' comments. Def.'s Comments Supp. Remand Redetermination ("Def.'s Cmts."), ECF No. 37. For the following reasons, the Court sustains the *Third Remand Results*.

ISSUES PRESENTED

On third remand, this case presents the following issues on the question of whether Pirelli Tyre Co. was wholly foreign-owned or located in a market economy prior to the China National Chemical Corporation ("Chem China") acquisition:

1. Whether a separate rate analysis should be conducted for Pirelli Tyre Co. for the period of January 2015 to October 2015;
2. Whether the presumption of Chinese government control applies to Pirelli Tyre Co. prior to the Chem China acquisition; and
3. If so, whether there was *de jure* or *de facto* Chinese government control over Pirelli Tyre Co. prior to the Chem China acquisition.

BACKGROUND

The Court assumes familiarity with the underlying facts and procedural history of this case and recites the facts relevant to the Court's review of the *Third Remand Results*. *See Qingdao Sentury*, 45 CIT at __, 539 F. Supp. 3d at 1280–82; *see also Shandong Yongtai II*, 44 CIT at __, 487 F. Supp. 3d at 1344–46; *Shandong Yongtai Grp. Co. v. United States* ("*Shandong Yongtai I*"), 43 CIT __, __, 415 F. Supp. 3d 1303, 1306–07, 1312–18 (2019); *Shandong Yongtai Severance*, 45 CIT at __, 493 F. Supp. 3d at 1344–45.

Consolidated Plaintiffs applied for separate rate status in the administrative review, but Commerce determined that Pirelli Tyre Co.

[2] This action was severed and reconsolidated from *Shandong Yongtai Group Co. v. United States*, (formerly consolidated) Court No. 18–00077. *See Shandong Yongtai Grp. Co. v. United States* ("*Shandong Yongtai Severance*"), 45 CIT __, __, 493 F. Supp. 3d 1342, 1345–46 (2021); *see also Shandong Yongtai Grp. Co. v. United States* ("*Shandong Yongtai II*"), 44 CIT __, 487 F. Supp. 3d 1335 (2020) (ordering second remand).

did not qualify for separate rate status because of *de facto* Chinese government control through Chem China's ownership of Pirelli S.p.A. *Shandong Yongtai I*, 43 CIT at __, 415 F. Supp. 3d at 1316; *see also* Final IDM at 27–28; Consolidated Plaintiffs' Separate Rate Application (Nov. 17, 2016) ("Consol. Pls.' SRA"), PR 192–93. Commerce also denied Pirelli Tyre Co. separate rate status for the segment of the period of review before Chem China's acquisition of Pirelli Tyre Co. in October 2015 because Commerce asserted that Consolidated Plaintiffs had not provided complete ownership information as to Pirelli Tyre Co.'s intermediate and ultimate owners from January through October 2015. *Shandong Yongtai I*, 43 CIT at __, 415 F. Supp. 3d at 1317–18; *see also* Final IDM at 28. Commerce determined that Pirelli Tyre Co.'s separate rate status claim for the period of time before Chem China's acquisition was not supported by evidence on the record. *Shandong Yongtai I*, 43 CIT at __, 415 F. Supp. 3d at 1317–18; *see also* Final IDM at 28. Commerce assigned Consolidated Plaintiffs the China-wide entity rate for the entire period of review. *Shandong Yongtai I*, 43 CIT at __, 415 F. Supp. 3d at 1318. The Court remanded Commerce's denial of Consolidated Plaintiffs' separate rate status for Commerce to reconsider the criteria for *de jure* and *de facto* governmental control. *Id.* at __, 415 F. Supp. 3d at 1317. The Court did not reach the issue of Consolidated Plaintiffs' request for separate rate status for the period before Chem China's acquisition. *Id.* at __, 415 F. Supp. 3d at 1318.

In the Final Results of Redetermination Pursuant to Remand ("*Shandong Yongtai Remand Results*"), *Shandong Yongtai* Docket, ECF Nos. 71, 72, Commerce maintained its determination of *de facto* Chinese government control and denied separate rate status to Pirelli Tyre Co. *See Shandong Yongtai II*, 44 CIT at __, 487 F. Supp. 3d at 1344–45. Commerce examined the record and noted that Chinese government-owned entities had majority ownership of Pirelli Tyre Co. *Id.* at __, 487 F. Supp. 3d at 1345; *see also Shandong Yongtai Remand Results* at 40. Commerce determined that Pirelli Tyre Co. failed to satisfy the third criterion of the *de facto* test, whether the respondent has autonomy from the government in making decisions regarding the selection of management. *Shandong Yongtai II*, 44 CIT at __, 487 F. Supp. 3d at 1345–46; *see also Shandong Yongtai Remand Results* at 28–29, 40–41. The Court sustained Commerce's determination denying separate rate status to Pirelli Tyre Co. *Shandong Yongtai II*, 44 CIT at __, 487 F. Supp. 3d at 1346. On second remand, Commerce did not address Consolidated Plaintiffs' separate rate status before Chem China's acquisition, nor did Consolidated Plaintiffs comment on Commerce's draft remand results. Final Results of Re-

determination Pursuant to Court Order ("*Second Remand Results*") at 2–3, ECF No. 21–1.

Consolidated Plaintiffs requested a ruling from the Court on Consolidated Plaintiffs' alternate claim of partial separate rate status for the first ten months of the period of review prior to Chem China's acquisition of Pirelli Tyre Co. *Qingdao Sentury*, 45 CIT at __, 539 F. Supp. 3d at 1282. Consolidated Plaintiffs argued that they had provided documentation of corporate ownership prior to Pirelli Tyre Co.'s acquisition by Chem China, including a Sales and Purchase and Co-investment Agreement showing that Pirelli Tyre Co. was an Italian company prior to the Chem China acquisition in October 2015. *Id.* at __, 539 F. Supp. 3d at 1283 (citing Consol. Pls.' Br. Supp. Mot. J. Agency R. at 50, *Shandong Yongtai* Docket, ECF Nos. 23, 24; Consol. Pls.' SRA at 50–51, Attach. G(1)). For the period of review prior to Chem China's acquisition of Pirelli Tyre Co., the Court concluded that Commerce's separate rate analysis of Consolidated Plaintiffs was at odds with Commerce's stated practice regarding companies that are wholly foreign-owned or located in a market economy. *Id.* at __, 539 F. Supp. 3d at 1284. The Court remanded for Commerce to determine: (1) whether Consolidated Plaintiffs were wholly foreign-owned or located in a market economy prior to the Chem China acquisition; (2) whether a separate rate analysis should be conducted for the period from January 2015 through October 2015; (3) whether the presumption of Chinese governmental control applies to Consolidated Plaintiffs prior to Chem China's acquisition; and if so, (4) whether there was *de jure* or *de facto* Chinese governmental control over Consolidated Plaintiffs before Chem China's acquisition. *Id.* at __, 539 F. Supp. 3d at 1284.

STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). The Court will uphold any determinations unless they are unsupported by substantial evidence on the record or are otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

Commerce has statutory authority to determine if a country is a nonmarket economy pursuant to 19 U.S.C. § 1677(18); *see also Sigma Corp. v. United States,* 117 F.3d 1401, 1404–06 (Fed. Cir. 1997) In proceedings involving a nonmarket economy, such as China, Com-

merce employs a rebuttable presumption that all companies within the country are subject to government control and should be assigned a single, country-wide antidumping duty rate. *See Sigma Corp.*, 117 F.3d at 1405. An exporter will receive the country-wide rate by default, unless it demonstrates affirmatively that the exporter maintains both *de jure* and *de facto* independence from the government. *See id.* The burden of rebutting the presumption of government control rests with the exporter. *See id.* at 1405–06.

On remand, in order to acquire the necessary information to comply with the Court's remand order, Commerce issued a questionnaire to Pirelli Tyre Co. on November 1, 2021. See Letter Commerce to Foley Lardner Pertaining to Consol. Pls.' Supplemental Questionnaire ("Supplemental Questionnaire") (Nov. 1, 2021), Remand PR 2.[3] Consolidated Plaintiffs submitted their response on November 10, 2021. Consol. Pls.' Resp. Supplemental Questionnaire (Nov. 10, 2021), Remand PR 5–7.

Consistent with the Court's remand order, Commerce's analysis on remand concerned Consolidated Plaintiffs' separate rate eligibility during the period from January 27, 2015 through October 19, 2015. *Third Remand Results* at 5–6. Commerce first distinguished between Pirelli Tyre Co., the producer and exporter of subject merchandise, Pirelli Tyre LLC, a sales affiliate located in the United States, and Pirelli Tyre S.p.A., an entity located in Italy and an indirect owner of Pirelli Tyre Co. *Id.* at 6. Commerce determined that the information on the record showed that Pirelli Tyre Co. was located in China during the period from January 27, 2015 through October 19, 2015, and Pirelli Tyre Co.'s supplemental questionnaire response showed that it was not wholly foreign-owned during that period. *Id.* Commerce therefore initially determined that Pirelli Tyre Co. was properly subject to a separate rate analysis. *Id.* Because Pirelli Tyre LLC was located in the United States and Pirelli Tyre S.p.A. was located in Italy, Commerce determined that neither of those companies was subject to a separate rate analysis. *Id.*

Commerce then determined that the information submitted on the record by Pirelli Tyre Co. in response to its November 1, 2021 questionnaire demonstrated that there was neither *de jure* nor *de facto* government control of Pirelli Tyre Co. during the relevant period of review. *Id.* at 6–7. Specifically under its *de jure* test, Commerce determined that Pirelli Tyre Co. had: (1) no restrictive stipulations

[3] Citations to documents filed during the third remand proceeding reflect the public record ("Remand PR") document numbers filed with the *Third Remand Results*, ECF. Nos. 35–3, 38.

associated with its exporter's business and export licenses; (2) no legislative enactments decentralizing it; and (3) no formal measures by the government decentralizing control of it. *Id.* at 7.

Regarding its *de facto* test, Commerce determined that Pirelli Tyre Co.'s ownership structure during the period of review from January 27, 2015 through August 10, 2015 was materially the same as its ownership structure during the underlying investigation, when Commerce granted separate rate status and found that Pirelli Tyre Co. rebutted the presumption of *de jure* and *de facto* government control. *Id.* (citation omitted). Commerce concluded that none of Pirelli Tyre Co.'s intermediate or ultimate shareholders during the time period from January 27, 2015 through August 10, 2015 were Chinese government entities or were supervised by Chinese government entities. *Id.* at 8. Thus, while Commerce determined that the presumption of Chinese government control applied to Pirelli Tyre Co. during the period from January 27, 2015 through August 10, 2015 (i.e., prior to the Chem China acquisition) because of its location in China, Commerce determined that there was no information on the record indicating that any Chinese government entity, including Chem China, had any direct or indirect ownership or control of Pirelli Tyre Co. prior to August 10, 2015. *Id.* Commerce's review of Pirelli Tyre Co.'s articles of association, purchase agreements, board of directors meeting minutes and/or resolutions, as well as company financial statements for the period prior to August 11, 2015, showed no Chinese government involvement in how Pirelli Tyre Co.: (1) set export prices; (2) negotiated and signed contracts and other agreements; (3) selected management; or (4) retained the proceeds of its export sales and made decisions regarding disposition of profits or financing of losses. *Id.* at 8–9 (citations omitted). Commerce determined this to be the case even though Chem China and another Chinese shareholder became indirect owners of Pirelli Tyre Co. during the period from August 11, 2015 through October 19, 2015 through an investment in Pirelli Tyre Co.'s ultimate parent company, Pirelli & C. S.p.A., which meant that during that period Pirelli Tyre Co.'s ownership structure was no longer the same as its ownership structure during the underlying investigation. *Id.* at 9–10. In other words, Commerce found no information on the record to indicate that the Government of China's minority shareholding in Pirelli & C. S.p.A. or its ability to appoint a small number of Pirelli & C. S.p.A.'s board members enabled any Chinese government entity to control Pirelli Tyre Co. directly or indirectly during the period from August 11, 2015 through October 19, 2015. *Id.* at 10. Accordingly, Commerce determined that Pirelli

Tyre Co. rebutted the presumption of *de jure* or *de facto* Chinese government control for the period from August 11, 2015 through October 19, 2015. *Id.* The revised weighted average dumping margin for Pirelli Tyre Co. during the period from January 27, 2015 through October 19, 2015 for passenger tires from China was determined to be 1.45%. *Id.* at 11.

Consolidated Plaintiffs assert that Commerce's *Third Remand Results* accurately reflect the information submitted by Consolidated Plaintiffs during the third remand proceeding, and that Commerce's conclusion is supported by substantial evidence and in accordance with the law. Consol. Pls.' Cmts. at 3. Consolidated Plaintiffs also agree with the new separate rate set forth in the *Third Remand Results*. *Id.* Consolidated Plaintiffs' position is that Commerce's *Third Remand Results* comply with the Court's remand order and they ask the Court to sustain Commerce's Third Remand Results. Id. Defendant also asks the Court to sustain the *Third Remand Results*. Def.'s Cmts. at 2. No Party filed comments in opposition to the *Third Remand Results*.

CONCLUSION

The Court holds that Commerce's determination is supported by substantial evidence. Because the Court concludes that the *Third Remand Results* are supported by substantial evidence and comply with the Court's remand order, the Court sustains the *Third Remand Results*. Judgment will be entered accordingly.

Dated: May 19, 2022
New York, New York

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

Slip Op. 22–49

CANADIAN SOLAR INC., et al., Plaintiffs, CHANGZHOU TRINA SOLAR ENERGY CO., LTD. et al., Consolidated Plaintiffs, JINKO SOLAR CO., LTD. et al., Intervenor Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 19–00178

[Commerce's Remand Results in the Fifth Administrative Review of Commerce's Countervailing Duty Order on crystalline silicon photovoltaic cells from the People's Republic of China are sustained.]

Dated: May 19, 2022

Bryan P. Cenko and *Sarah Wyss*, Mowry & Grimson, PLLC, of Washington D.C., for Plaintiffs. With them on the brief was *Jeffrey S. Grimson*.

Robert G. Gosselink, *Jonathan M. Freed*, and *Kenneth N. Hammer*, Trade Pacific, PLLC, of Washington, D.C., for Consolidated Plaintiffs.

Jordan C. Kahn, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for Intervenor Plaintiffs Jinko Solar Co., Ltd., Jinko Solar Import & Export Co., Ltd., Zhejang Jinko Solar Co., Ltd. With him on the brief were *Andrew T. Schutz* and *Kavita Mohan*.

Richard L.A. Weiner, *Rajib Pal*, *Shawn M. Higgins*, and *Justin R. Becker*, Sidley Austin, LLP, of Washington, D.C., for Intervenor Plaintiffs Yingli Green Energy Holding Co., Ltd., Baoding Tianwei Yingli New Energy Resources Co., Ltd., Tianjin Yingli New Energy Resources Co., Ltd., Hengshui Yingli New Energy Resources Co., Ltd., Lixian Yingli New Energy Resources Co., Ltd., Baoding Jiasheng Photovoltaic Technology Co., Ltd., Beijing Tianneng Yingli New Energy Resources Co., Ltd., Hainan Yingli New Energy Resources Co., Ltd., Shenzhen Yingli New Energy Resources Co., Ltd., Yingli Green Energy International Trading Co., Ltd., Yingli Green Energy Americas, Inc., Yingli Energy (China) Co., Ltd.

Craig A. Lewis, Hogan Lovells U.S. LLP, of Washington D.C., for Intervenor Plaintiff Shanghai BYD Co., Ltd.

Justin R. Miller, International Trade Field Office, U.S. Department of Justice, of New York, NY, for the Defendant. With him on the brief was *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Paul K. Keith*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Restani, Judge:

This action concerns the remand redetermination made by the United States Department of Commerce ("Commerce") in the Fifth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China ("PRC"), covering the period from January 1, 2016 to December 31, 2016. *See Final Results of Redetermination Pursuant to Court Order*, ECF No. 130 (Dec. 13, 2021) ("*Remand Results*").

Plaintiffs Canadian Solar Inc., Canadian Solar International, Ltd., Canadian Solar Manufacturing (Luoyang) Inc., Canadian Solar Manufacturing (Changshu) Inc., Canadian Solar (USA) Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solar Power Group Co. Ltd., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., CSI New Energy Holding Co., Ltd., CSI-GCL Solar Manufacturing (YanCheng) Co., Ltd., Changshu Tegu New Materials Technology Co., Ltd., Changshu Tlian Co., Ltd., Suzhou Sanysolar Materials Technology Co., Ltd. (collectively, "Canadian Solar"), Intervenor Plaintiffs Jinko Solar Co., Ltd., Jinko Solar Import & Export Co., Ltd., Zhejang Jinko Solar Co., Ltd. (collectively, "Jinko"), and Intervenor Plaintiff Shanghai BYD Co., Ltd. (together, "Plaintiffs") challenge part of Commerce's Remand Results as unsupported by

substantial evidence or otherwise not in accordance with law. *See Objections to Remand Results of Plaintiffs Canadian Solar*, ECF No. 132 (Jan. 12, 2022) ("*Canadian Solar Br.*"); *Plaintiff-Intervenor Shanghai BYD Co.'s Objections to Remand Results*, ECF No. 134 (Jan. 12, 2022) ("*Shanghai BYD Br.*"); *Jinko Comments on Remand*, ECF No. 131 (Jan. 12, 2022) ("*Jinko Br.*")

BACKGROUND

The court presumes familiarity with the facts of this case and recounts them only as necessary. Commerce published its final determination in the Fifth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules from the PRC on August 28, 2019. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review and Recession of Review in Part; 2016*, 84 Fed. Reg. 45,125 (Dep't Commerce Aug. 28, 2019) ("*Final Results*"), as amended by *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Results of Countervailing Duty Administrative Review; 2016*, 84 Fed. Reg. 68,102 (Dep't Commerce Dec. 13, 2019) ("*Amended Final Results*"); *see also Decision Memorandum for Final Results of Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C-570–980, POR: 01/01/2016–12/31/2016 (Dep't Commerce Aug. 19, 2019) ("*I&D Memo*").

In *Canadian Solar, Inc. v. United States*, the court sustained in part and remanded in part aspects of the Amended Final Results. 46 CIT __, 537 F. Supp. 3d 1380 (2021) ("*Canadian Solar*"). The court granted Commerce's request for remand on three issues: 1) Commerce's calculation of the benchmark for aluminum extrusions, 2) Commerce's determination of the benchmark for solar grade polysilicon, and 3) Commerce's use of adverse facts available ("AFA") in its specificity finding for the provision of electricity for less than adequate renumeration ("LTAR"). *Id.* at 1386–87. The court noted that the administrative records of the Third, Fourth, and Fifth Administrative Reviews and the Government's legal rationales are similar and instructed Commerce to consult prior opinions in these reviews in reevaluating its decisions. *Id.* The court also remanded for Commerce to reconsider its determination not to grant an entered value adjustment ("EVA") and its determination regarding the Export Buyer's Credit Program ("EBCP"). *Id.* at 1399, 1403.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2021) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2021). The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" *Id.* § 1516a(b)(1)(B)(i). Remand redeterminations are "also reviewed for compliance with the court's remand order." *Xingjiamei Furniture (Zhangzhou) Co., v. United States*, 38 CIT __, 968 F. Supp. 2d 1255, 1259 (2014) (internal citation omitted).

DISCUSSION

I. Electricity Subsidy

In its original determination, Commerce found that the provision of electricity was a specific subsidy after applying AFA. *I&D Memo* at 50–53. As with other issues, the Government requested remand to reconsider its subsidy determination in the light of the Third and Fourth Administrative reviews. *See Canadian Solar*, 46 CIT at __, 537 F. Supp. 3d at 1386–87. On remand, Commerce found the provision of electricity for LTAR to be regionally specific consistent with its remand redeterminations in the Third and Fourth Administrative Reviews. *See Remand Results* at 20; *Canadian Solar Inc., v. United States*, 2020 WL 6129754 at *4 (2020) ("*Canadian Solar II*"), *aff'd* 23 F.4th 1372, 1378 (Fed. Cir. 2022) ("*Canadian Solar CAFC*"); *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT __, 466 F. Supp. 3d 1287, 1299–1300 (2020) ("*Changzhou Trina III*"). Canadian Solar challenges this finding, arguing that (1) Commerce is required, per 19 U.S.C. § 1677(5A)(D)(iv), to identify a geographical region that received subsidized electricity prices and failed to do so; (2) Commerce's reliance on AFA was not supported by substantial evidence because no gap existed in the record; (3) Commerce's benchmark construction demonstrated that it failed to designate a subsidized geographical region; (4) Commerce should have designated a geographical region based on the information in the record; and (5) Commerce's benchmark construction was arbitrary and capricious because it "nonsensically treat[ed] a single factory as located in multiple locations." *See generally Canadian Solar Br.*; *see also Jinko Br.* at 3, *Shanghai BYD Br.* at 4–5. Commerce's electricity subsidy remand redetermination is supported by substantial evidence and is sustained.

Canadian Solar argues that Commerce's reliance on AFA was not supported by substantial evidence because no gap on the record

existed to warrant the application of adverse facts. *Canadian Solar Br*. at 13–19. Canadian Solar acknowledges that the court has previously rejected this argument on "nearly identical facts" in the Third Administrative Review. *Canadian Solar Br.* at 19. So too did this court and the Federal Circuit reject this argument in the Fourth Administrative Review. *Canadian Solar CAFC*, 23 F.4th at 1378 (explaining that "[t]his court has specifically upheld the application of adverse facts available where 'the government of China refused to provide information as to how the electricity process and costs varied among the various provinces that supplied electricity to industries within their areas,' 'did not provide the data sufficient to establish the benchmark price for electricity' and noting that there were 'comparable informational gaps in this case'") (internal citations omitted).

Commerce's analysis and the record here is largely the same as in prior reviews. The GOC claimed in this review that provincial pricing authorities, not the NDRC, set electricity prices in the provinces in accordance with market principles since 2015. *See GOC Initial Questionnaire Response*, P.R. 73–76, at 68–69 (June 19, 2018) ("*GOC IQR*"). Commerce found that the GOC failed to provide information necessary to verify this claim, refusing, for example, to provide provincial price proposals that might demonstrate that the provinces are price-setting authorities or that there are market or cost-based reasons underlying regional price variations. *Remand Results* at 20–21; *GOC IQR* at 70. Commerce found that the GOC did not comply to the best of its ability to fill informational gaps on the record. *Remand Results* at 20–21. Without the requested information, Commerce concluded that it could not "confirm that market and commercial principles explain the variation in electricity prices" nor "determine the price-setting authority." *Id.* at 21.

Commerce determined that other record evidence, including NDRC Notice 2090 and NDRC Notice 748, demonstrated that the NDRC continued to set provincial electricity prices. *Id.* at 21–24; *Memorandum Placing Information on the Record Regarding Electricity*, Remand P.R. 1, at Attachment 1 (Sept. 24, 2021); *GOC IQR* at Ex. II E.22. The court has repeatedly sustained Commerce's determination that Notice 748 demonstrates that the NDRC is involved in price-setting in some capacity. *See Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1136–38 (2019); *Canadian Solar II*, 2020 WL 6129754 at *5.

Commerce is entitled to apply AFA where an interested party declines to provide relevant requested information and fails to cooperate with an investigation to the best of its ability. *See* 19 U.S.C. §

1677e(b); *Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1297 (Fed. Cir. 2021). Because the GOC here refused to provide requested information necessary to support its assertion that the NDRC does not set provincial electricity prices, Commerce was entitled to apply AFA. *GOC Initial IQR Response* at 68–70. Commerce's use of AFA is thus supported by substantial evidence, as it was in the Third and Fourth Administrative Reviews. *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1303; *Canadian Solar II*, 2020 WL 6129754 at *4–5; *Canadian Solar CAFC*, 23 F.4th at 1380.

Canadian Solar further argues that Commerce failed to identify a geographic region that received subsidized electricity prices, in violation of its statutory obligations. *See Canadian Solar Br.* at 5–12. The court rejected this argument in the Third and Fourth Administrative Reviews and continues to find it unavailing here. *See Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at n.12 (noting that "no additional showing of specificity is required if Commerce finds that a central government is providing subsidies based on region") (internal citation omitted); *see also Canadian Solar II*, 2020 WL 6129754 at *5, *aff'd* 23 F.4th 1372. The Federal Circuit has also held that Commerce may find a countervailable regionally specific subsidy "where documents support the inference that the central government of China was involved in provincial electricity pricing that results in regional price variability." *Canadian Solar CAFC*, 23 F. 4th at 1380. As Commerce reasonably applied AFA to determine that the NDRC is the centralized price-setting authority for electricity and reasonably found that the NDRC provided subsidies to the region, Commerce was not required to identify a particular geographic region that received an electricity subsidy.

Canadian Solar next argues that Commerce's benchmark construction fails to designate a subsidized geographical region. *Canadian Solar Br.* at 19–25. Canadian Solar posits that Commerce's AFA construction "essentially determined that all areas in China received subsidized electricity rates," which undercuts Commerce's position that the program is regionally specific. *Id.* at 19. Here, as in the Fourth Administrative Review, Commerce compared each of Canadian Solar's electricity rates to the highest provincial rate for the relevant category. *Remand Results* at 24 (noting "[t]he amount of the subsidy we infer to be the difference between what the respondent is paying, and the highest tariffs set for any province."); *Canadian Solar CAFC*, 23 F.4th at 1381. Here too, Commerce explained that this issue only arises because the GOC declined to provide information that would have permitted Commerce to identify an unsubsidized

province or unsubsidized rates. *Remand Results* at 47–48 (stating "Commerce cannot identify which provinces are being subsidized by the GOC, due to the GOC's failure to provide Commerce with the requested information."); *see also Canadian Solar CAFC*, 23 F.4th at 1381. Commerce's inference that the highest rate in each category was unsubsidized was reasonable, and Plaintiff's argument that this benchmark renders all regions subsidized fails as "Commerce's rate calculation does not undermine the separate conclusion that the electricity subsidies are geographically specific because the rates depend on the province in which an enterprise is located." *Canadian Solar CAFC*, 23 F.4th at 1381.

Canadian Solar next argues that even if Commerce were to infer some adverse facts, Commerce could have selected a subsidized geographical region based on information of record. *See Canadian Solar Br.* at 25–29. Where, as here, the GOC's non-compliance prevented Commerce from identifying which regions are subsidized, and Commerce appropriately used AFA to establish that prices vary by region, Commerce need not designate the geographical region being subsidized. *See Canadian Solar II*, 2020 WL 6129754 at *4–5; *Canadian Solar CAFC*, 23 F.4th at 1378–81. Plaintiff's contention that Commerce arbitrarily used benchmarks from multiple provinces to measure the subsidy benefit received by one factory in one geographic location, and that the benchmark calculation is thus not in accordance with law, is similarly meritless. *See Canadian Solar Br*. 29–31. "Commerce's goal in setting a benchmark rate is to best approximate the market rate of electricity, not to choose the rate respondents were most likely to pay in an electricity market." *See Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, 352 F. Supp. 3d 1316, 1343 (2018). As the court has previously explained, "Commerce can apply an adverse inference to the GOC's electricity rate submissions and select the highest rates for each electrical category and use those to set a benchmark." *Id.* (citing 19 U.S.C. § 1677e(b); 19 C.F.R. § 351.511(a)(2)(iii); *Fine Furniture (Shanghai) Ltd. v United States*, 36 CIT 1206, 865 F. Supp. 2d 1254, 1260–62 (2012). Overall, Commerce's benchmark calculations were reasonable and supported by substantial evidence. The court sustains Commerce's remand redetermination regarding the countervailable subsidization of electricity in China.

II. Benchmark for Aluminum Extrusions

In the Third and Fourth Administrative Reviews of this proceeding, Commerce initially used an average of two data sets, IHS Technology ("IHS") and UN Comtrade ("Comtrade") to establish the benchmark

for aluminum extrusions for LTAR. *See Canadian Solar II*, 2020 WL 6129754 at *4; *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1293–94. On remand in these prior reviews, Commerce relied solely on the IHS data in computing the benchmark for aluminum in compliance with the court's decision, which had expressed concern that the Comtrade data included the prices of other products unrelated to solar frames. *See Canadian Solar II*, 2020 WL 6129754 at *4; *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1294. The court sustained the use of the IHS data alone. *Canadian Solar II*, 2020 WL 6129754 at *4; *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1295. Here, Commerce also initially used the average of IHS and Comtrade data to establish the benchmark for aluminum extrusions, *see I&D Memo* at 46, and the court remanded for Commerce to consider its benchmark determination in the light of opinions from the Third and Fourth Administrative Reviews. *See Canadian Solar*, 46 CIT at __, 537 F. Supp. 3d at 1386–87.

On remand, Commerce relied solely on IHS data to establish a benchmark for aluminum extrusions. *Remand Results* at 7. No parties object to this approach. *See generally Canadian Solar Br.*; *Jinko Br*. at 3; *Shanghai BYD Br.* at 3. The use of IHS data alone is in accordance with Commerce's regulatory obligations and addresses the court's prior concerns that the Comtrade data included unrelated products. *See Canadian Solar II* , 2020 WL 6129754 at *4. The court holds, as it has in prior reviews, that the use of the IHS data as a benchmark for aluminum extrusions is supported by substantial evidence and sustains Commerce's remand redetermination on this issue. *See Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1295; *Canadian Solar II*, 2020 WL 6129754 at *4.

III. Polysilicon Benchmark

In the Third and Fourth Administrative Reviews of this proceeding, the court instructed Commerce to sufficiently explain how the GOC's participation in the solar-grade polysilicon industry led to the price-distortion of solar-grade polysilicon and rendered the data provided by Canadian Solar as a tier one metric unreliable. *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1297; *Canadian Solar II*, 2020 WL 6129754 at *6. The court remanded this issue to Commerce in this review to consult these prior opinions and reevaluate its determinations accordingly. *See Canadian Solar*, 46 CIT at __, 537 F. Supp. 3d at 1386–87.

In previous remands, Commerce determined based on facts otherwise available that the GOC's participation in the polysilicon market

in addition to other factors created a distorted polysilicon market in the China such that Canadian Solar's import data is unusable as a tier one benchmark. *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1297–98; *Canadian Solar II*, 2020 WL 6129754 at *6. Commerce made the same determination on remand here and explained its reasoning in accordance with *Canadian Solar* and prior reviews. *Remand Results* at 7–19. Commerce first explained the significance of the record evidence on which it initially relied to show that the Chinese market for solar-grade polysilicon was distorted. *See id.* at 10–11. Commerce also supplemented the record and expanded its analysis to provide a "broader analysis of the solar grade polysilicon market." *Remand Results* at 8. It explained on remand that the supplemented record demonstrated that the PRC solar-grade polysilicon market is distorted; for example, GCL-Poly's 2016 Annual Report, the largest Chinese solar-grade polysilicon producer, indicates that polysilicon pricing remained stable in 2016 due to an "Import Duty Levy" on foreign imports, "especially those from the United States." *Id.* at 14; *Memorandum Placing Information on the Record Regarding Polysilicon*, Remand P.R. 2 (Sept. 28, 2021) at Attachment III, p.26.

Canadian Solar does not object to Commerce's determination on remand. *See Canadian Solar Br.* at 1–2 (noting "Canadian Solar objects to Commerce's remand redetermination related to the electricity program and does not object to Commerce's remand redetermination on the remaining issues."). Jinko and Shanghai BYD both state their opposition to Commerce's remand redetermination regarding polysilicon, but neither develop arguments in support of this position and rather state that they incorporate by reference arguments made by Canadian Solar on this issue. *See Jinko Br.* at 3; *Shanghai BYD Br.* at 3–4. Such arguments do not exist in Canadian Solar's briefing. *See generally Canadian Solar Br.* As Jinko and Shanghai BYD failed to provide arguments to support their objections, the objections are waived.[1] *See United States v. Great American Ins. Co.,* 738 F.3d 1320, 1328 (Fed. Cir. 2013) (noting "arguments that are not appropriately developed in a party's briefing may be deemed waived.")

As the court has previously ruled on similar records, the new information provided by Commerce on remand in addition to Commerce's more detailed explanation of various of their initial submissions is sufficient to support Commerce's determination that GOC participation in the polysilicon market creates market distortion. *See*

[1] If Jinko and Shanghai BYD intended to refer to comments made by Canadian Solar before the agency, that is insufficient.

Canadian Solar II, 2020 WL 6129754 at *6; *Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1299. The remand redetermination regarding polysilicon is supported by substantial evidence and accordingly sustained.

IV. Entered Value Adjustment

Commerce initially denied Canadian Solar's request for an EVA on its sales made through an affiliated company, finding that Canadian Solar did not submit sufficient information to meet the requirements for such an adjustment. *See IDM* at 72–76. In ordering remand, the court found that Commerce erred in denying Canadian Solar's request for an EVA for these sales and instructed Commerce to either (1) grant the EVA to Canadian Solar because sufficient record evidence existed to complete the calculation, or (2) clarify its methodology and evidentiary requirements for granting an EVA and give Canadian Solar the opportunity submit additional evidence in accordance with these requirements. *See Canadian Solar*, 46 CIT at __, 537 F. Supp. 3d at 1398–99. Commerce granted the EVA to Canadian Solar and recalculated Canadian Solar's subsidy calculations accordingly, noting that it intends to re-evaluate its EVA methodology and the circumstances under which an EVA may be granted in future segments of the proceeding. *Remand Results* at 26–27. Plaintiffs do not object to Commerce's EVA redetermination. *See Canadian Solar Br.* at 1–2; *Shanghai BYD Br.* at 5. Commerce's redetermination regarding the EVA complies with *Canadian Solar* and is sustained.

V. Export Buyers Credit Program

In its original determination, Commerce applied AFA to find that respondents benefitted from the EBCP. *I&D Memo* at 38–39. Commerce maintained, as it has in prior reviews, that the application of AFA was warranted because respondents' evidence of non-use was unverifiable given the GOC's failure to provide certain information regarding the operation of the EBCP. *Id.*; *see, e.g. Changzhou Trina III*, 44 CIT at __, 466 F. Supp. 3d at 1291*; Canadian Solar II*, 2020 WL 6129754 at *2. In ordering remand, the court found that Commerce's claims that respondents' statements of non-use were unverifiable were not supported by substantial evidence and remanded for Commerce to attempt verification of respondents' evidence of non-use or accept that evidence. *See Canadian Solar*, 46 CIT at __, 537 F. Supp. 3d at 1402–03.

On remand, Commerce maintains that attempting to verify respondents' evidence of non-use "would be unlikely to yield accurate or meaningful results" without a more complete understanding of the

operation of the EBCP. *Remand Results* at 6. Under protest, however, Commerce found that respondents had not used the EBCP and revised the total subsidy rates applicable to the respondents accordingly. *Id.* Canadian Solar maintains that Commerce's determination that it could not conduct verification of the EBCP was unreasonable, but it agrees with Commerce's ultimate determination. *Canadian Solar Br.* at 2. As Commerce's determination on remand complies with the court's order and no other party objects to the finding of non-use of the EBCP, the court sustains Commerce's remand redetermination regarding the EBCP. *Jinko Br*. at 2–3; *Shanghai BYD Br*. at 2–3.

CONCLUSION

For the foregoing reasons, Commerce's Remand Results are sustained. Judgment will enter accordingly.

Dated: May 19, 2022
New York, New York

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

Slip Op. 22–51

MIDWEST-CBK, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00154

[Denying Plaintiff's motion for partial summary judgment and granting Defendant's cross-motion for partial summary judgment regarding whether sales of giftware, houseware, and decorative items imported by Plaintiff were "for exportation to the United States" and whether certain subject entries should have been deemed liquidated by operation of law.]

Dated: May 20, 2022

John M. Peterson and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., argued for Plaintiff Midwest-CBK, LLC. With them on the reply brief was *Richard F. O'Neill*.

Monica P. Triana and *Brandon A. Kennedy*, Trial Attorneys, International Trade Field Office, U.S. Department of Justice, of New York, N.Y., argued for Defendant. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel on the brief was *Mathias Rabinovitch*, Office of Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection. With them on the reply brief was *Patricia M. McCarthy*, Director.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Midwest-CBK, LLC ("Plaintiff") is a Minnesota-based retailer and wholesaler of Christmas ornaments, nutcrackers, wood carvings, and similar decorative articles that are manufactured in China. Plaintiff commenced this action to contest the denial by U.S. Customs and Border Protection ("Customs") of Plaintiff's protest against liquidation and reliquidation of subject merchandise imported into the United States. Compl. at 1, ECF No. 8. Plaintiff contends that Customs appraised its merchandise improperly on the basis of transaction value because Plaintiff's sales to customers were not "for exportation to the United States" under 19 U.S.C. § 1401a(b)(1), erred in its calculation during liquidation, and failed to liquidate certain entries that should have been deemed liquidated by operation of law. *Id.* at 7–12.

At the request of the Parties, this case was bifurcated into two phases. Order (May 10, 2021) ("Bifurcation Order"), ECF No. 52. Phase One is limited to the questions: (1) whether Plaintiff's import transactions reflect a sale "for exportation to the United States" and (2) whether the subject entries became deemed liquidated by operation of law. *Id.* at 1. Whether a sale is "for exportation to the United States" is a threshold question for determining the appropriate method of valuation. *See* 19 U.S.C. § 1401a. Phase Two will encompass all remaining issues, including the determination of the proper method of valuing the subject merchandise and whether Customs' calculation of the transaction value during liquidation was correct. Bifurcation Order at 1.

Plaintiff filed a Motion for Partial Summary Judgment arguing that its subject merchandise cannot be appraised on the basis of transaction value because Plaintiff's sales to customers within the United States were not "sales for exportation to the United States." *See* Pl.'s Mot. Partial Summ. J. ("Plaintiff's Motion" or "Pl.'s Mot."), ECF No. 56; Pl.'s Mem. P. & A. Supp. Mot. Partial Summ. J. ("Plaintiff's Brief" or "Pl.'s Br."), ECF No. 56–1. Defendant United States ("Defendant") filed a Cross-Motion for Partial Summary Judgment arguing that Plaintiff's sales were "for exportation to the United States" under 19 U.S.C. § 1401a(b)(1), that transaction value is the proper basis of appraisal for the subject merchandise, and that the subject entries should not have been deemed liquidated by operation of law. *See* Def.'s Cross-Mot. Partial Summ. J. ("Defendant's Cross-Motion" or "Def.'s Cross-Mot."), ECF No. 61; Def.'s Mem. Opp'n Pl.'s Mot. Partial

Summ. J. and Supp. Def.'s Cross-Mot. Partial Summ. J. ("Defendant's Brief" or "Def.'s Br."), ECF No. 61.

The Court concludes that under Phase One of the bifurcated action, Plaintiff's sales of the subject merchandise were sales "for exportation to the United States" and the subject entries should not have been deemed liquidated by operation of law. The proper method of valuing the subject merchandise is not a question within the scope of Phase One of this action. Accordingly, the Court denies Plaintiff's Motion for Partial Summary Judgment and grants Defendant's Cross-Motion for Partial Summary Judgment.

BACKGROUND

The Parties have submitted separate statements of undisputed material facts. *See* Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s SMF"), ECF No. 56–2; Def.'s Statement of Undisputed Material Facts ("Def.'s SMF"), ECF No. 61–1; Def.'s Resp. Pl.'s Statement of Material Facts ("Def.'s Resp."), ECF No. 61–2; Pl.'s Resp. Def.'s Statement of Material Facts ("Pl.'s Resp."), ECF No. 64–1.

The following facts are not in dispute:

Plaintiff is a Delaware limited liability company. Pl.'s SMF ¶ 1 at 1; Def.'s Resp. at 1. Plaintiff was founded as Midwest of Cannon Falls, Inc. in 1953 as a wholesaler of seasonal items. Pl.'s SMF ¶ 2 at 1; Def.'s SMF ¶ 1 at 1; Def.'s Resp. at 1–2; Pl.'s Resp. at 1. Midwest of Cannon Falls, Inc. maintained its headquarters and warehouse facility in Cannon Falls, Minnesota. Def.'s SMF ¶ 2 at 1; Pl.'s Resp. at 1. Merchandise was imported from foreign suppliers and sold to customers in the United States through a catalogue and staff of sales representatives. Pl.'s SMF ¶ 3 at 1–2; Def.'s SMF ¶¶ 3–4 at 1–2; Def.'s Resp. at 2; Pl.'s Resp. at 1.

In 2009, Midwest of Cannon Falls, Inc. was acquired by Blyth, Inc. and merged with CBK Holdings Group, forming Midwest-CBK, Inc. Pl.'s SMF ¶ 4 at 2; Def.'s Resp. at 2. Midwest-CBK, Inc. maintained its headquarters, operations, and sales offices in Cannon Falls, Minnesota and relocated its warehouse and inventory to Union City, Tennessee. Pl.'s SMF ¶ 4 at 2; Def.'s Resp. at 2. In December 2012, the assets of Midwest-CBK, Inc. were acquired by the Ganz family, a group of Canadian investors. Pl.'s SMF ¶ 6 at 2; Def.'s SMF ¶ 7 at 2; Def.'s Resp. at 2–3; Pl.'s Resp. at 2. The assets of Midwest-CBK, Inc. were transferred to Plaintiff Midwest-CBK, LLC. Pl.'s SMF ¶ 6 at 2; Def.'s SMF ¶ 8 at 2; Def.'s Resp. at 2–3; Pl.'s Resp. at 2.

Following its acquisition by the Ganz family, Plaintiff maintained its corporate office in Cannon Falls, Minnesota, which housed the product development, supply chain, procurement, purchasing, com-

pliance, financial analysis, planning, accounting, and sales management departments. Def.'s SMF ¶ 13 at 3; Pl.'s Resp. at 3. Plaintiff relocated its inventory, distribution, warehousing, invoicing, and order control departments to Ontario, Canada, where it leased a warehouse, storage space, and a two-story office building from other entities controlled by the Ganz family. Def.'s SMF ¶¶ 14–18 at 3–4; Pl.'s Resp. at 3–4. Plaintiff also operated a data center and showroom in Ganz-owned properties in Ontario, Canada. Def.'s SMF ¶¶ 23–25 at 5; Pl.'s Resp. at 5. Approximately twenty-two employees worked in the Ontario, Canada facility in the order processing, inventory control, customer service, key accounts, information technology, and customer accounts departments. Def.'s SMF ¶ 19 at 4; Pl.'s Resp. at 4. Plaintiff opened Canadian bank accounts for payroll, rent, and other expenses associated with its Canadian operations. Pl.'s SMF ¶ 8 at 3; Def.'s Resp. at 3.

Plaintiff's business model involved purchasing merchandise from foreign suppliers for exportation to Canada. Pl.'s SMF ¶ 11 at 3; Def.'s SMF ¶ 27 at 5; Def.'s Resp. at 4; Pl.'s Resp. at 6. Merchandise was imported into Canada at the Port of Vancouver, British Columbia and transported to Plaintiff's Ontario, Canada warehouse. Pl.'s SMF ¶ 11 at 3; Def.'s SMF ¶ 27 at 5; Def.'s Resp. at 4; Pl.'s Resp. at 6. Plaintiff employed a United States sales staff to solicit orders from customers within assigned geographic territories. Pl.'s SMF ¶ 14 at 4; Def.'s SMF ¶ 30 at 6; Def.'s Resp. at 5; Pl.'s Resp. at 6. Sales representatives accepted orders using electronic devices loaded with two point-of-sale software systems, Enum and WhereOWare. Def.'s SMF ¶¶ 31–32 at 6; Pl.'s Resp. at 7. When a completed order was accepted into either system, it was made available to Plaintiff's personnel in Cannon Falls, Minnesota and Ontario, Canada. Def.'s SMF ¶ 33 at 6; Pl.'s Resp. at 7. Purchase orders provided to customers included the language: "All prices [Free on Board ("FOB")] Buffalo, New York as defined by the New York State Uniform Commercial Code." Def.'s SMF ¶¶ 36–38 at 7; Def.'s Resp. at 7–8.

Purchase orders were usually first accessed and reviewed by Plaintiff's Order Processing Department in Canada. Def.'s SMF ¶ 35 at 7; Pl.'s Resp. at 7; *see also* Pl.'s Mot. Partial Summ. J., Ex. B ("Pl.'s Basis of Appraisement Letter") at 4, ECF No. 56–3. Employees at the Canadian facility confirmed the availability of merchandise located in Canada in an inventory control system, collected merchandise from the Canadian warehouse, packaged merchandise for shipment, attached waybills for customers' designated domestic carriers, and

loaded shipments onto trucks for transport to the United States. Pl.'s SMF ¶¶ 18, 20–22, 24 at 5, 6; Def.'s SMF ¶¶ 41, 43–51 at 7–8; Def.'s Resp. at 6–7; Pl.'s Resp. at 8–10.

Plaintiff engaged a third-party overland truck carrier to transport merchandise from its facility in Ontario, Canada to Buffalo, New York. Pl.'s SMF ¶¶ 23, 25 at 5, 6; Def.'s Resp. at 7. Plaintiff acted as the importer of record for the merchandise and was responsible for all duties. Pl.'s SMF ¶ 26 at 6; Def.'s SMF ¶ 59 at 10; Def.'s Resp. at 7; Pl.'s Resp. at 11. Upon arrival in Buffalo, New York, merchandise was delivered to domestic carriers designated by Plaintiff's customers or to a facility rented by Plaintiff from United Parcels Service ("UPS"). Pl.'s SMF ¶ 27 at 6; Def.'s Resp. at 7–8. UPS employees deconsolidated shipping boxes, scanned shipping labels, and shipped merchandise to Plaintiff's United States customers. Def.'s SMF ¶¶ 60–61 at 10–11; Pl.'s Resp. at 12.

Invoices were prepared in Ontario, Canada and couriered to Buffalo, New York for mailing. Def.'s SMF ¶¶ 63–65, 67 at 11; Pl.'s Resp. at 12, 13. Customers were directed to remit physical payments to a post office box in Buffalo, New York. Def.'s SMF ¶ 68 at 11; Pl.'s Resp. at 13. Plaintiff engaged a bank's lockbox service to collect and deposit the payments. Def.'s SMF ¶ 69 at 12; Pl.'s Resp. at 13.

The Parties do not dispute whether Plaintiff imported the subject merchandise into the United States. Plaintiff advised Customs in 2013 that Plaintiff imported merchandise from foreign manufacturers into Canada, where merchandise was stored until sold. Pl.'s Basis of Appraisement Letter at 2–4; Pl.'s SMF ¶ 34 at 7; Def.'s SMF ¶ 73 at 12; Def.'s Resp. at 9; Pl.'s Resp. at 14. After receiving a sales order, merchandise was transported from Plaintiff's Canadian warehouse to the United States for delivery to customers with shipments designated as FOB Buffalo, New York. Pl.'s Basis of Appraisement Letter at 2–4; Pl.'s SMF ¶ 34 at 7; Def.'s SMF ¶ 73 at 12; Def.'s Resp. at 9; Pl.'s Resp. at 14. Plaintiff described the same process in 2015 when it requested that Customs seek internal advice on the proper method of valuation. Def.'s Cross-Mot. Partial Summ. J., Ex. 20 ("Def.'s Request for Internal Advice"). At oral argument, Defendant offered a similar description of Plaintiff's importation process of subject merchandise:

> [Plaintiff] purchased [the] merchandise at issue from a manufacturer in China and it was imported directly from China to [Plaintiff's] facilities in Canada. The merchandise remained at [Plaintiff's] Canadian facilities until a sale was made. And when a sale was made to a specific U.S. customer, [Plaintiff] caused the goods to be picked, packed, and labeled for that specific U.S. customer in Canada and [Plaintiff] would export the merchan-

> dise out of Canada and into the United States for the first time based on that specific sale. [Plaintiff] arranged for this exact process to apply to each of the sales that are at issue here.

Oral Arg. at 28:22–29:00, Mar. 22, 2022, ECF No. 70. This description of Plaintiff's importation process is also consistent with the Parties' written submissions to the Court. Compl. at 2–5; Pl.'s Br. at 8–12; Def.'s Br. at 6–13. Neither Party has disputed Plaintiff's sale and importation of the subject merchandise at issue in this case. It is also undisputed that the sales transactions for the relevant entries involved FOB Buffalo, New York shipping terms. Pl.'s SMF ¶ 33 at 7; Def.'s Resp. at 9. The Court finds that the following facts are undisputed: (1) the subject merchandise was imported from foreign countries to Canada; (2) the subject merchandise was based in Canada at the time of sale; (3) the subject merchandise was packaged and sent from Canada to the United States after sales orders were received; (4) the subject merchandise was clearly destined for the United States at the time of sale; and (5) the subject merchandise was sold and exported from Canada to customers based in the United States.

In 2013, Plaintiff advised Customs that Plaintiff had changed its operations model and would enter merchandise on the basis of its deductive value, in accordance with 19 U.S.C. § 1401a(d).[1] Pl.'s Basis of Appraisement Letter; Pl.'s SMF ¶ 34 at 7; Def.'s SMF ¶ 73 at 12; Def.'s Resp. at 9; Pl.'s Resp. at 14. Customs subsequently extended the deadline for liquidation of Plaintiff's entries and initiated a Regulatory Audit to determine the proper basis of valuation. Pl.'s SMF ¶¶ 35–36 at 7–8; Def.'s SMF ¶¶ 75–77 at 12–13; Def.'s Resp. at 9–10; Pl.'s Resp. at 14. The audit involved multiple steps, including a risk assessment of the relevant issues, the issuance of a questionnaire, a walkthrough of import practices or entries, interviews with Plaintiff's personnel, and the issuance of a final report. Def.'s SMF ¶ 80 at 13; Pl.'s Resp. at 15; *see also* Def.'s Cross-Mot. Partial Summ. J., Ex. 19 ("Conrad Decl."), ECF No. 61–4 (describing audit process). Customs requested information from Plaintiff and conducted an on-site visit at the Ontario, Canada facility. Def.'s SMF ¶¶ 81–82 at 13; Pl.'s Resp. at 15. The auditor's fieldwork also involved matching customer invoices with specific line items on Plaintiff's entry paperwork. Def.'s SMF ¶ 85 at 14; Pl.'s Resp. at 16. More than 560 entries were subject to the audit. Def.'s SMF ¶ 86 at 14; Pl.'s Resp. at 16. Customs completed its fieldwork on October 14, 2014. Def.'s SMF ¶ 89 at 14; Pl.'s Resp. at 16–17.

---

[1] The deductive value method bases valuation on the price of sale adjusted for certain considerations, including transportation and insurance costs, duties and taxes, and other general expenses. 19 U.S.C. § 1401a(d); 19 C.F.R. § 152.105.

Customs' auditors issued a Draft Audit Report on July 1, 2015, concluding that transaction value was the proper basis of appraisal for the subject merchandise. Pl.'s Mot. Partial Summ. J., Ex. Q ("Draft Audit Report"), ECF No. 56–3; Pl.'s SMF ¶ 36 at 8; Def.'s SMF ¶ 99 at 16; Def.'s Resp. at 10; Pl.'s Resp. at 18. Plaintiff submitted responsive comments on July 8, 2015. Pl.'s Mot. Partial Summ. J., Ex. R ("Pl.'s Resp. Draft Audit Report"), ECF No. 56–3; Pl.'s SMF ¶ 37 at 8; Def.'s SMF ¶ 100 at 15; Def.'s Resp. at 10; Pl.'s Resp. at 18. No additional information was requested from Plaintiff. Pl.'s SMF ¶ 38 at 8; Def.'s Resp. at 10. On August 20, 2015, Plaintiff requested advice from Customs' Office of Regulations and Rulings pursuant to 19 C.F.R. § 177.11 regarding the proper basis for valuation of the subject merchandise. Def.'s SMF ¶¶ 103–04 at 16; Pl.'s Resp. at 19. Customs issued a Final Audit Report to Plaintiff on February 24, 2016, stating that the subject merchandise should be valued on the basis of transaction value. Pl.'s Mot. Partial Summ. J., Ex. S ("Final Audit Report"), ECF No. 56–4; Pl.'s SMF ¶ 39 at 8; Def.'s SMF ¶ 101 at 16; Def.'s Resp. at 10–11; Pl.'s Resp. at 19. On July 1, 2016, Customs issued Headquarters Ruling H275056, which also determined that valuation on the basis of transaction value was proper. HQ H275056 (July 1, 2016); Pl.'s SMF ¶ 40 at 9; Def.'s SMF ¶ 114 at 18; Def.'s Resp. at 11; Pl.'s Resp. at 21.

On March 28, 2016, Customs officials at the Port of Buffalo, New York issued a Form 29 Notice of Action indicating that Customs would liquidate certain entries and that transaction value would be calculated using the original entered values plus a 123.18% adjustment. Pl.'s Mot. Partial Summ. J., Ex. U, ECF No. 56–4; Pl.'s SMF ¶ 42 at 9; Def.'s SMF ¶ 110 at 17; Def.'s Resp. at 11; Pl.'s Resp. at 20. Plaintiff requested information from Customs about the basis of the appraisal and requested an extension of the liquidation deadline. Pl.'s Mot. Partial Summ. J., Ex. V, ECF No. 56–4; Pl.'s SMF ¶ 43 at 10; Def.'s SMF ¶ 111 at 17; Def.'s Resp. at 11–12; Pl.'s Resp. at 21. Customs responded that the calculation was based on financial information provided by Plaintiff for the year 2013. Pl.'s Mot. Partial Summ. J., Ex. W, ECF No. 56–4; Pl.'s SMF ¶ 44 at 10; Def.'s Resp. at 12. Plaintiff submitted a response and argued that the proposed method of calculation was based on multiple errors. Pl.'s Mot. Partial Summ. J., Ex. X, ECF No. 56–4; Pl.'s SMF ¶ 45 at 10–11; Def.'s SMF ¶¶ 112–13 at 17; Def.'s Resp. at 12; Pl.'s Resp. at 21. Three hundred thirty-six entries were liquidated using the method described in Customs' March 28, 2016 notice, including the application of a 123.18% upward adjustment. Def.'s SMF ¶ 117 at 18; Pl.'s Resp. at 22. Plaintiff protested the liquidation of these entries. Pl.'s Mot. Partial Summ. J., Ex.

Y, ECF No. 56–4; Pl.'s SMF ¶ 46 at 11; Def.'s SMF ¶ 120 at 18–19; Def.'s Resp. at 12; Pl.'s Resp. at 22. Customs approved the protests in part and reduced the adjustment to 75.75%. Pl.'s Mot. Partial Summ. J., Ex. Z, ECF No. 56–4; Pl.'s SMF ¶¶ 47–48 at 11; Def.'s SMF ¶ 118 at 18; Def.'s Resp. at 12–13; Pl.'s Resp. at 22. Plaintiff protested the reliquidation. Pl.'s Mot. Partial Summ. J., Ex. AA, ECF No. 56–4; Pl.'s SMF ¶ 49 at 11; Def.'s SMF ¶ 122 at 19; Def.'s Resp. at 13; Pl.'s Resp. at 23. Customs denied Plaintiff's protest. Pl.'s SMF ¶ 50 at 11; Def.'s SMF ¶¶ 122–23 at 19; Def.'s Resp. at 13; Pl.'s Resp. at 23.

Plaintiff filed three cases in June and November 2017 contesting Customs' denial of Plaintiff's protests. Summons, ECF No. 1; Summons, *Midwest-CBK, LLC v. United States*, Court No. 17–00155, ECF No. 1; Summons, *Midwest-CBK, LLC v. United States*, Court No. 17–00272, ECF No. 1. Plaintiff filed Complaints in March 2019 in two of the cases. Compl.; Compl., Court No. 17–00155, ECF No. 9. The third case remained on the Court's Customs Case Management Calendar. Order (Oct. 16, 2019), Court No. 17–00272, ECF No. 9. The Court consolidated the three cases in May 2020 at the request of the Parties. Pl.'s Mot. Consol., ECF No. 25; Pl.'s Consol. Compl., ECF No. 26; Order (May 21, 2020), ECF No. 27.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court will grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. USCIT R. 56(a). To raise a genuine issue of material fact, a party cannot rest upon mere allegations or denials and must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984).

DISCUSSION

Plaintiff argues that Customs appraised the subject merchandise improperly based on transaction value because the sales were domestic and not for exportation to the United States. Pl.'s Br. at 14–32. Plaintiff also contends that certain subject entries should have been deemed liquidated by operation of law because Customs had no authority to extend the deadline for liquidation after June 14, 2015. *Id.* at 34–38. Defendant counters that the subject merchandise was destined for export to the United States at the time of sale, there is no requirement for an international sale, and transaction value is the

appropriate method of appraising the subject merchandise. Def.'s Br. at 21–38. Defendant also argues that Customs' extensions of the liquidation deadline were proper. *Id.* at 39–44.

I. "For Exportation to the United States"

In order to determine appropriate duties, Customs appraises merchandise at the time of entry to ascertain its value. 19 U.S.C. § 1500. Transaction value is the default method of appraising the value of imported merchandise. *Id.* § 1401a(a)(1); *see also Trimil S.A. v. United States*, 43 CIT __, __, 419 F. Supp. 3d 1307, 1311 (2019) ("Whenever possible, Customs appraises imported merchandise on the basis of its 'transaction value.'"). Transaction value is defined by statute as the "price actually paid or payable for the merchandise when sold for exportation to the United States," plus other considerations enumerated by statute. 19 U.S.C. § 1401a(b).

Appraisal on the basis of transaction value has two requirements: (1) that the merchandise is sold and (2) that the sale is for exportation to the United States. *Id.*; *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1338–39 (Fed. Cir. 1999). Only if transaction value cannot be determined or used should merchandise be appraised by "looking to the secondary valuation methods in the order listed in [section] 1401a(a)(1) until an appraisal is obtained." *VWP of Am., Inc.*, 175 F.3d at 1330 (citing 19 U.S.C. § 1401a(a)(1)). Neither party contests that a bona fide sale of merchandise occurred in this case. *See* Pl.'s Br. at 15; Def.'s Br. at 22.

The Court determines whether merchandise is sold "for exportation to the United States" based on a fact-specific inquiry that requires case-by-case analysis. *E.C. McAfee Co. v. United States*, 842 F.2d 314, 319 (Fed. Cir. 1988). The relevant factual inquiry for the Court is to examine "the reality of the transaction" between the parties to the sale. *Id.* When goods are clearly destined for the United States at the time of sale, the sale is for exportation to the United States. *Id.*

After conducting a fact-specific inquiry of whether the sales were for exportation to the United States under 19 U.S.C. § 1401a(b)(1), the Court concludes that the undisputed evidence demonstrates that Plaintiff's sales were for exportation to the United States at the time of sale. It is undisputed that when Plaintiff's sales representatives accepted sales orders from customers within the United States, the subject merchandise was stored in a warehouse facility in Ontario, Canada at the time of sale. Pl.'s SMF ¶¶ 7, 14, 17 at 3, 4, 5; Def.'s SMF ¶¶ 14–16, 30 at 3–4, 6; Def.'s Resp. at 3, 5–6; Pl.'s Resp. at 3–4, 6. The sales orders were transmitted electronically and were usually first accessed and reviewed by Plaintiff's Order Processing Department in

Canada. Def.'s SMF ¶¶ 31–35 at 6–7; Pl.'s Resp. at 7. Plaintiff's employees in Canada confirmed the availability of the subject merchandise located in the Canadian warehouse, then collected, packaged, and prepared the goods for shipment from the Canadian warehouse to United States customers. Pl.'s SMF ¶¶ 18–22 at 5; Def.'s SMF ¶¶ 43–49 at 8–9; Def.'s Resp. at 6–7; Pl.'s Resp. at 9–10. It is undisputed that upon receiving orders from customers based in the United States, the subject merchandise was transported from Plaintiff's Ontario, Canada warehouse to Buffalo, New York, where the merchandise was delivered to domestic carriers for distribution to United States customers. Pl.'s SMF ¶¶ 23–25, 27 at 5–6; Def.'s Resp. at 7–8. Based on the undisputed evidence and a fact-specific analysis of the record, the Court concludes that the reality of the transaction establishes that the subject merchandise was based in Canada at the time of sale, was clearly destined for the United States at the time of sale, and Plaintiff's sales of the subject merchandise were for exportation to the United States under 19 U.S.C. § 1401a(b)(1).

Plaintiff argues that a sale "for exportation to the United States" imposes an additional requirement that the sale must have occurred abroad or have an international character.[2] Pl.'s Br. at 16–18. Plaintiff contends that the individual sales were negotiated and agreed to within the United States, that Plaintiff retained title to the subject merchandise when the goods were shipped from Canada and imported into the United States, and under the FOB shipping terms included by Plaintiff on the purchase orders, that title transferred to the United States customers only after the goods were imported into the United States and delivered to domestic carriers in Buffalo, New York for delivery, thus reflecting domestic sales within the United States. *Id.* at 16–23.

In support of its argument that there was no transfer of property until after importation and thus no possible export or international sale to the United States from which to calculate transaction value, Plaintiff relies mainly on *Orbisphere Corp. v. United States* ("*Orbisphere*"), 13 CIT 866, 726 F. Supp. 1344 (1989). The Court notes at the outset that *Orbisphere* is a thirty-three-year-old case from the U.S. Court of International Trade that applies an outdated statute that was amended in 1979. In *Orbisphere*, the court considered the method of valuation for oxygen analyzing devices manufactured in Geneva, Switzerland by Orbisphere Laboratories, a subsidiary of Orbisphere Corporation. *Orbisphere*, 13 CIT at 867, 726 F. Supp. at 1344. Orders accepted from customers in the United States were forwarded to

[2] Plaintiff uses the terms "international" and "abroad" interchangeably to describe a sale that occurred outside of the United States.

Orbisphere Laboratories in Geneva for manufacture. *Id.*, 726 F. Supp. at 1344–45. Completed orders were shipped to New Jersey, where they were unpacked, inspected, repackaged, and shipped to customers. *Id.*, 726 F. Supp. at 1345.

The court in *Orbisphere* reasoned that a determination of whether transaction value may be used "depends substantially upon where the sales of the merchandise are deemed to have occurred." *Id.* at 872, 726 F. Supp. at 1348. The *Orbisphere* court relied on the Court of Customs and Patent Appeals' analysis in *United States v. Massce & Company* ("*Massce*"), 21 CCPA 54 (1933), a case decided under a predecessor to the current valuation statute. *Orbisphere*, 13 CIT at 875, 726 F. Supp. at 1350. Relying on the 1933 *Massce* case, the *Orbisphere* court analogized "transaction value" and "deductive value" under 19 U.S.C. § 1401a to "export value" and "United States value" as they were used under the predecessor statute. *Id.* at 875–76, 726 F. Supp. at 1350–51.[3] The *Massce* court concluded that "where offers of sale, agreements to sell, and sales are all made in the United States, and none in a foreign country, there can not [sic] be an export value of the exported merchandise involved in such transactions." *Massce*, 21 CCPA at 60. The court in *Orbisphere* reasoned that the determinative factor between the use of "export value" and "United States value" was whether the sale occurred within or outside of the United States. *Orbisphere*, 13 CIT at 876, 726 F. Supp. at 1351. Though acknowledging that the definitions of "export value" and "transaction value" are not identical, the court concluded that they were sufficiently similar to both require a "sale abroad for export to the United States." *Id.* at 875, 726 F. Supp. at 1350–51.

This Court does not find *Orbisphere* persuasive due to its reliance on the 1933 *Massce* case pre-dating the relevant statutory amendments in the Trade Agreements Act of 1979 that abandoned export value in favor of transaction value. *See* Trade Agreements Act of 1979, Pub. L. No. 96–39, § 201(a), 93 Stat. 144, 194–201 (1979). Signifi-

[3] "Export value" under the predecessor statute was defined as:

> the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States . . . .

Id. at 873–74, 726 F. Supp. at 1349 (quoting 19 U.S.C. § 1401a(b) (1964)).

"United States value" was defined as:

> the price at which such or similar imported merchandise is freely offered for sale, packed ready for delivery in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise, in the usual wholesale quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery . . . .

Id. at 874, 726 F. Supp. at 1349–50 (quoting 19 U.S.C. § 1401a(b) (1964)).

cantly, this Court notes that the language of the current statute does not expressly require that a sale be international or occur abroad. The 1979 revision removed all references to foreign markets in which merchandise might be traded. As the Senate Committee on Finance noted in its report on the Trade Agreements Act of 1979:

> The use of transaction value as the primary basis for customs valuation will allow use of the price which the buyer and seller agreed to in their transaction as the basis for valuation, rather than having to resort to the more difficult concepts of "freely offered," "ordinary course of trade," "principal markets of the country of exportation," and "usual wholesale quantities" contained in existing U.S. law.

S. Rep. No. 96–249, at 119 (1979). The U.S. Court of Appeals for the Federal Circuit has also recognized that transaction value is a departure from the complexities of export value. *See Generra Sportswear Co. v. United States*, 905 F.2d 377, 381 (Fed. Cir. 1990); *see also VWP of Am., Inc.*, 175 F.3d at 1334–35 (recognizing the difference between "export value" and "transaction value" and that the Trade Agreement Act of 1979 effectively repealed the prior valuation statute).

Moreover, Plaintiff's contention that a sale "for exportation to the United States" requires an international sale or a sale abroad is contrary to existing case law. In *VWP of America, Inc. v. United States*, 175 F.3d 1327, 1338–39 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit considered a three-tier system involving a Canadian manufacturer that sold fabric to its wholly-owned United States subsidiary for resale to buyers within the United States. *VWP of Am., Inc.*, 175 F.3d at 1331. The *VWP* court held that the sales between the Canadian manufacturer and United States distributor were sales for exportation to the United States that served as the basis for transaction value, but noted that the sales between the United States distributor and its domestic buyers could provide an alternative basis for transaction value. *Id*. at 1334.

The Court concludes that 19 U.S.C. § 1401a(b)(1) does not require an international sale or sale abroad, but rather requires a sale for exportation to the United States based on a fact-specific analysis of the reality of the transaction. As noted previously, the undisputed evidence establishes that at the time of sale when customers in the United States placed orders electronically with Plaintiff's sales representatives, the subject merchandise was located in Canada and was shipped from the Canadian warehouse to customers in the United States. Thus, a sale for exportation to the United States occurred based on the undisputed facts.

Plaintiff argues that the Court should consider the intentions of Plaintiff and its customers in determining whether the sales were "for exportation to the United States." *See* Pl.'s Br. at 23–24; Oral Arg. at 7:39–8:57, 1:01:10–1:01:30, Mar. 22, 2022, ECF No. 70. Plaintiff cites the existence of the shipping term "FOB Buffalo, New York" printed on purchase orders as evidence of the intention of Plaintiff and its customers to engage in domestic sales. *See* Pl.'s Br. at 23–24.

The term "FOB" means "free on board" and denotes a "method of shipment whereby goods are delivered at a designated location, usually a transportation depot, at which legal title and thus the risk of loss passes from seller to buyer." *Litecubes, LLC v. N. Lights Prods., Inc.*, 523 F.3d 1353, 1358 n.1 (Fed. Cir. 2008). The U.S. Court of Appeals for the Federal Circuit has held that a sale does not necessarily occur at the location where the title to the goods passes under FOB shipping terms, and that the location of a sale can be established by record evidence notwithstanding an FOB shipping term. *See, e.g., SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1375 (Fed. Cir. 2010) (recognizing in a patent infringement case that an FOB shipping term is not dispositive when considering whether a sale took place inside or outside the United States, while noting that examination of the record evidence is critical to determining where the sale took place); *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1377 (Fed. Cir. 2005) (in a patent infringement case, finding that a sale occurred in Japan when all the essential activities of a sale occurred outside the United States and noting that despite an FOB delivery term, "the criterion for determining the location of a 'sale' . . . is not necessarily where legal title passes"); *N. Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994) (noting that appellee failed to explain why the criterion for where a sale occurred should be the place where legal title passes rather than the "more familiar places of contracting and performance"); *see also E.C. McAfee Co.*, 842 F.2d at 319 (concluding that a lack of knowledge that goods were destined for the United States by one party to a transaction was irrelevant when determining whether transaction value was appropriate). Accordingly, this Court does not consider the existence of the delivery term "FOB Buffalo, New York" to be dispositive evidence that sales of the subject merchandise were domestic and not for export to the United States.

The Court concludes that Plaintiff's emphasis on the term "FOB Buffalo, New York" is misplaced. The record does *not* establish that Plaintiff's customers in the United States intended to make a domestic purchase because there is no evidence on the record that Plaintiff's customers were aware of the location of the products when placing

their orders. Similarly, Plaintiff contends that the shipping terms were "explicitly selected" but the record is silent on whether Plaintiff's customers negotiated the FOB Buffalo, New York terms of delivery. Pl.'s Br. at 23.

The Court rejects Plaintiff's argument that inclusion of the term "FOB Buffalo, New York" is dispositive evidence that Plaintiff and its customers intended the sales to be domestic and not for export to the United States. Because the undisputed facts establish that the subject merchandise was destined for the United States at the time of sale when the customers based in the United States first submitted their sales orders electronically to Plaintiff's Order Processing Department in Canada, the Court holds that the sales of the subject merchandise are "for exportation to the United States" pursuant to 19 U.S.C. § 1401a(b).

II. Deemed Liquidated By Operation of Law

Plaintiff contends that Customs' extensions of the liquidation deadline after June 14, 2015 were unlawful and that entries subject to those extensions should be deemed liquidated by operation of law pursuant to 19 U.S.C. § 1504. Pl.'s Br. at 34–38. Defendant opposes Plaintiff's liquidation contentions. Def.'s Cross-Mot. at 3; Def.'s Br. at 39–44. The Court concludes that Customs' extensions of the relevant deadlines were in accordance with the law and that the subject entries should not be deemed liquidated by operation of law.

Merchandise entered for consumption not liquidated within one year of entry are "deemed liquidated" by operation of law at the duty rate asserted by the importer at the time of entry. 19 U.S.C. § 1504(a)(1). Customs may extend the deadline for liquidation for one year at the request of the importer of record or if additional information is needed for a proper assessment or classification of the merchandise. *Id.* § 1504(b); 19 C.F.R. § 159.12(a)(1).

The Parties disagree as to what standard the Court should apply in reviewing Customs' extensions of liquidation. Defendant posits that the Court should apply an abuse of discretion standard. Def.'s Br. at 40. Plaintiff contends that a plain reading of 19 U.S.C. § 1504(b) does not confer discretion to Customs but establishes an objective rule. Pl.'s Reply Br. at 29. Under Plaintiff's interpretation of the statute, Customs has no discretion to extend the deadline for liquidation in order to obtain additional information necessary for its appraisement. *Id.* at 29–30.

Plaintiff's argument runs contrary to the precedent of this Court holding that Customs' decisions regarding liquidation extensions are reviewed for arbitrariness and abuse of discretion, and whether Cus-

toms acted in accordance with the law. *See Int'l Fid. Ins. Co. v. United States*, 41 CIT __, __, 227 F. Supp. 3d 1353, 1362 (2017) ("This Court reviews the validity of Customs' liquidation extensions to determine whether they are proper under the statute, and are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (internal quotation omitted)); *Int'l Cargo & Sur. Ins. Co. v. United States*, 15 CIT 541, 542, 779 F. Supp. 174, 176 (1991); *Detroit Zoological Soc. v. United States*, 10 CIT 133, 137–38, 630 F. Supp. 1350, 1356 (1986). The only authority offered by Plaintiff in support of its position is *North Dakota v. United States*, 480 F. Supp. 3d 917 (D.N.D. 2020), in which the U.S. District Court for the District of North Dakota considered whether the Army Corps of Engineers was able to assert the discretionary function exception as a defense to claims brought under the Federal Tort Claims Act ("FTCA"). The FTCA provides a limited waiver of the Government's sovereign immunity for claims seeking monetary damages for injuries resulting from a negligent or wrongful act or omission by a Government employee. 28 U.S.C. § 1346(b). A statutory exception to this waiver is recognized for claims based on a Government employee's exercise of or failure to exercise a discretionary function or duty. *Id.* § 2680(a). In determining whether the discretionary function exception was applicable, the district court noted that "if the statutes and regulations impose a mandatory obligation upon the government[,] there is no discretion to act contrary to or ignore such an obligation." *North Dakota*, 480 F. Supp. 3d at 923.

The only relevant commonality between the FTCA claims considered by the U.S. District Court for the District of North Dakota and the issues currently before this Court is the presence of a Government action. The Court is not persuaded that this minor similarity warrants deviating from well-established precedent. There is no statutory ambiguity in Customs' discretion to determine how to best collect import duties or extend liquidation deadlines. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 768 (Fed. Cir. 1993). Accordingly, the Court reviews Customs' extensions of liquidation deadlines under the standard of whether Customs abused its discretion and acted in accordance with the law. *Int'l Fid. Ins. Co.*, 41 CIT at __, 227 F. Supp. 3d at 1362–63; *Ford Motor Co. v. United States*, 157 F.3d 849, 855 (Fed. Cir. 1998). Plaintiff carries the burden of proving by a preponderance of the evidence that Customs abused its discretion in granting the extensions. 28 U.S.C. § 2639(a)(1); *St. Paul Fire & Marine Ins. Co.*, 6 F.3d at 768–69.

Plaintiff contends that Customs had no reasonable basis for extending liquidation after June 14, 2015 because Plaintiff provided all

requested information on or before June 14, 2014, and Customs' final appraisement calculation was based on Plaintiff's submissions from before June 14, 2014. Pl.'s Br. at 34–36. Defendant argues that the extensions were justified because Customs required additional internal information in order to determine the appropriate method of appraisement and to liquidate the subject entries. Def.'s Br. at 41–44.

"Information" under section 1504(b) includes "whatever is reasonably necessary for proper appraisement or classification of the merchandise involved." *Detroit Zoological Soc.*, 10 CIT at 138, 630 F. Supp. at 1356. In acquiring necessary information, Customs is not limited to information provided by the importer and may seek additional information internally. *Ford Motor Co.*, 157 F.3d at 856. As this Court has previously noted, "[section] 1504(b)(1) should be construed sufficiently broadly for Customs to perform its obligations in a competent manner." *Int'l Cargo & Sur. Ins. Co.*, 15 CIT at 546, 779 F. Supp. at 179.

The Court observes that James Conrad, an auditor at the Port of Buffalo, New York, described Customs' audit process in his declaration. Conrad Decl. The auditor's fieldwork began on February 24, 2014 and continued to October 14, 2014. *Id.* ¶¶ 8a, b, & f at 2–3; Def.'s SMF ¶ 89 at 14; Pl.'s Resp. at 16–17. Documents were prepared by auditors based on fieldwork and reviewed by Customs personnel. Conrad Decl. ¶ 8f at 3. Following review of the documents, a senior auditor prepared an Audit Document Review Sheet on December 1, 2014. *Id.* ¶¶ 8f–g at 3. On March 10, 2015, an Audit Report Review Sheet was completed to ensure that the report satisfied Customs' internal standards and Generally Accepted Government Auditing Standards ("GAGAS"). *Id.* ¶ 8i at 3. The report was then submitted to a Report Referencing Review to confirm its accuracy, which was completed on April 1, 2015. *Id.* ¶ 8j at 3–4. A Field Quality Assurance Program review was completed on April 8, 2015 to ensure compliance with GAGAS. *Id.* ¶ 8k at 4. The Draft Audit Report was issued on July 1, 2015. Draft Audit Report; Pl.'s SMF ¶ 36 at 8; Def.'s SMF ¶ 99 at 16; Def.'s Resp. at 10; Pl.'s Resp. at 18. Plaintiff provided its reply to the Draft Audit Report on July 8, 2015. Pl.'s Resp. Draft Audit Report; Pl.'s SMF ¶ 37 at 8; Def.'s SMF ¶ 100 at 16; Def.'s Resp. at 10; Pl.'s Resp. at 18. On August 20, 2015, Plaintiff requested internal advice from Customs' Office of Regulations and Rulings pursuant to 19 C.F.R. § 177.11 with respect to the proper basis of appraisement for the subject merchandise. Def.'s Request for Internal Advice; Def.'s SMF ¶¶ 103–04 at 16; Pl.'s Resp. at 19. The Final Audit Report was issued on February 24, 2016. Final Audit Report; Pl.'s SMF ¶ 39 at 8; Def.'s SMF ¶ 101 at 16; Def.'s Resp. at 10–11; Pl.'s Resp. at 19.

Customs Headquarters Ruling H275056 was issued on July 1, 2016. HQ H275056; Pl.'s SMF ¶ 40 at 9; Def.'s Resp. at 11. The subject entries were liquidated between April and October 2016. Def.'s SMF ¶ 116 at 18; Pl.'s Resp. at 22.

Plaintiff characterizes Customs' review as a "lassitude" or "prolonged internal deliberation." Pl.'s Br. at 38. While extensions solely for the purpose of excusing or facilitating prolonged periods of inaction or actions unrelated to appraisement might be an abuse of discretion, *see Ford Motor Co.*, 157 F.3d at 855–57, the record reflects that Customs was actively engaged throughout the audit process in collecting and reviewing the information needed to determine the proper method of appraisement. The fact that Customs' final determination and calculations appear to be based mainly on information obtained early in the audit process does not support a conclusion that Customs abused its discretion or acted contrary to law by granting extensions to collect information, to confirm the accuracy of that information, or to verify the appropriateness of the application. Because Customs had a reasonable basis for extending liquidation in order to complete the audit process, ensure its accuracy, and comply with established standards, the Court concludes that Customs acted in accordance with the law and did not abuse its discretion. The Court holds that the subject entries should not have been deemed liquidated by operation of law pursuant to 19 U.S.C. § 1504(a)(1).

CONCLUSION

The Court holds that there are no genuine issues of material fact in dispute regarding whether Plaintiff's import transactions were sales for exportation to the United States and whether certain entries became deemed liquidated by operation of law. Partial summary judgment is therefore appropriate as a matter of law. Upon consideration of Plaintiff's Motion for Partial Summary Judgment, Defendant's Cross-Motion for Partial Summary Judgment, and all other papers and proceedings in this action, it is hereby

ORDERED that Plaintiff's Motion for Partial Summary Judgment, ECF No. 56, is denied; and it is further

ORDERED that Defendant's Cross-Motion for Partial Summary Judgment, ECF No. 61, is granted as it pertains to Plaintiff's transactions qualifying as sales "for exportation to the United States" under 19 U.S.C. § 1401a(b) and to the subject entries not having been deemed liquidated by operation of law; and it is further

ORDERED that the remaining issues relating to the proper methods of valuation are reserved for Phase Two and that the Parties shall submit a joint status report and scheduling order by June 21, 2022 regarding Phase Two of this action.

Dated: May 20, 2022
New York, New York

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

Slip Op. 22–52

GREENFIRST FOREST PRODUCTS INC. AND GREENFIRST FOREST PRODUCTS (QC) INC., Plaintiff, v. UNITED STATES Defendant.

Before: Claire R. Kelly, Judge
Court No. 22–00097

[Denying the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations' motion to intervene.]

Dated: May 20, 2022

Zachary J. Walker, *Andrew W. Kentz*, *David A. Yocis*, *Nathaniel Maandig Rickard*, *Whitney M. Rolig*, and *Sophia J.C. Lin*, Picard, Kentz & Rowe, LLP, of Washington, D.C., for proposed defendant-intervenor.

Sarah E. Shulman, *Yohai Baisburd*, and *Jonathan Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for plaintiffs.

OPINION AND ORDER

Kelly, Judge:

Before the court is the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations' (the "COALITION") motion to intervene as a defendant-intervenor in the above-entitled action. Mot. to Intervene, Apr. 25, 2022, ECF No. 12; *see also* Memo. of Law in Supp. of the [COALITION's] Mot. to Intervene, Apr. 25, 2022, ECF No. 12 ("COALITION Br."). Plaintiffs GreenFirst Forest Products Inc. and GreenFirst Forest Products (QC) Inc. (collectively, "GreenFirst") commenced this action challenging the U.S. Department of Commerce's ("Commerce") decision not to conduct a changed circumstances review ("CCR") of Commerce's countervailing duty ("CVD") order covering softwood lumber from Canada after GreenFirst Forest Products (QC) Inc. allegedly acquired Rayonier A.M. Canada G.P.'s ("RYAM") lumber and newsprint businesses. Compl., ¶¶ 1–3, 11, Mar. 25, 2022, ECF No. 2; *see also Certain Softwood Lumber Products from Canada*, 82 Fed. Reg. 51,814 (Dep't Commerce Nov. 8, 2017) (Final Affirmative [CVD] Determination, and Final Neg. Determination of Critical Circumstances), as amended by *Certain Softwood Lumber Products from Canada*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (Amended Final Affirmative [CVD] Determination and [CVD] Order) ("*Softwood Lumber from Canada*").

The COALITION contends that it has the right to intervene because it (i) participated in the administrative proceeding at the agency level; (ii) has a legally protectable interest as the intended beneficiary of the *Softwood Lumber from Canada* order; (iii) has an interest "in ensuring that Commerce's CCR process is not selectively deployed by Canadian exporters and producers to manipulate their cash deposit rate"; and (iv) may lose market share if GreenFirst ultimately succeeds in this action.[1] COALITION Br. at 6–7; *see also* CIT Rule 24(a)(2). Alternatively, the COALITION contends that it should be permitted to intervene because it shares Defendant United States' presumed defense that Commerce properly denied GreenFirst's request for a CCR.[2] *Id.* at 11–12; *see also* CIT Rule 24(b)(1)(B).

GreenFirst opposes the motion on the grounds that the COALITION's interest in this action is not direct or legally protectable because the only relief GreenFirst seeks is for Commerce to conduct a CCR. Pls.' Opp'n to the [COALITION's] Mot. to Intervene, 2–3, Apr. 29, 2022, ECF No. 13 ("Pl. Br."). GreenFirst asserts that it is not asking the court to find that Commerce should have applied RYAM's CVD cash deposit rate to GreenFirst's entries, but only that Commerce improperly denied GreenFirst's request for a CCR. *Id.* at 2. Thus, according to GreenFirst, the COALITION does not have a direct interest in this action because the COALITION would only be affected if Commerce were to ultimately apply RYAM's rate to GreenFirst after conducting the CCR. *Id.* at 2–3. Defendant filed no response to the motion, and the COALITION asserts that Defendant "does not oppose" the motion. Mot. to Intervene at 3. For the following reasons, the COALITION's motion to intervene as a right or permissively is denied.

BACKGROUND[3]

On November 8, 2017, Commerce issued its final determination that the Canadian government provided countervailable subsidies for certain softwood lumber products from Canada, and on January 3, 2018, Commerce issued the amended *Softwood Lumber from Canada*

[1] The COALITION concedes that it does not have a statutory right to intervene pursuant to CIT Rule 24(a)(1) and 28 U.S.C. § 2631(j)(1)(B) because GreenFirst did not commence this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a. COALITION Br. at 4; *see also* 28 U.S.C. § 2631(j)(1)(B).

[2] The United States has not yet filed any response to the Complaint.

[3] Certain facts in the Background section are taken from the Complaint, and, although the COALITION admits certain of these facts in its proposed answer, such facts are allegations at this stage of the case. Nothing in this Opinion and Order shall be construed as the court accepting GreenFirst's factual allegations as true or making any finding of fact where the facts are or may be disputed.

CVD order. *Softwood Lumber from Canada*, 83 Fed. Reg. at 347 and n.1. GreenFirst alleges that at the time Commerce initially imposed CVDs on softwood lumber from Canada, RYAM was a Canadian softwood lumber producer and exporter, and was therefore subject to the CVD order. Compl. ¶ 2. However, RYAM was not examined as a respondent, so it was subject to the "all-others rate" of 14.19%. *See Softwood Lumber from Canada*, 83 Fed. Reg. at 348–49. In subsequent administrative reviews of the CVD order, Commerce did not select RYAM as a respondent, but RYAM requested to be reviewed and was assigned the "non-selected companies rate." *See* Compl. ¶ 2; *Certain Softwood Lumber Products from Canada*, 85 Fed. Reg. 77,163, 77,164, 77,167 (Dep't Commerce Dec. 1, 2020) (Final Results of the [CVD] Admin. Review, 2017–2018) (2017 non-selected rate of 7.26%, 2018 non-selected rate of 7.42%); *Certain Softwood Lumber Products from Canada*, 86 Fed. Reg. 68,467 (Dep't Commerce Dec. 2, 2021) (Final Results of the [CVD] Admin. Review, 2019), as amended by *Certain Softwood Lumber Products from Canada*, 87 Fed. Reg. 1,114, 1,115, 1,117 (Dep't Commerce Jan. 10, 2022) (Notice of Amended Final Results of the [CVD] Admin. Review, 2019) ("*Softwood Lumber from Canada 2019 Review*") (non-selected rate of 6.32%); *see also Certain Softwood Lumber Products from Canada*, 87 Fed. Reg. 6,500, 6,502, 6,504 (Dep't Commerce Feb. 4, 2022) (Prelim. Results, Partial Rescission, and Prelim. Intent to Rescind, in Part, the [CVD] Admin. Review, 2020) (non-selected rate of 6.88%).

Companies that import merchandise subject to CVD orders must pay cash deposits for entries subject to ongoing administrative reviews at the rate assigned to them during the most recently completed administrative review. *See* 19 U.S.C. § 1675(a); 19 C.F.R. § 351.212(a). As the *Softwood Lumber from Canada* order is currently subject to an ongoing administrative review, companies that import merchandise subject to *Softwood Lumber from Canada* must pay cash deposit at the rates assigned to them during the most recently completed administrative review. *See Initiation of Antidumping and [CVD] Admin. Reviews*, 87 Fed. Reg. 13,252, 13,259–62 (Dep't Commerce Mar. 9, 2022) (initiating, inter alia, administrative review of *Softwood Lumber from Canada* for 2021); *see also* 19 U.S.C. § 1675(a); 19 C.F.R. § 351.212(a). RYAM's cash deposit rate is 6.32% based on the most recently completed administrative review. *Softwood Lumber from Canada 2019 Review*, 87 Fed. Reg. at 1,115–17.

GreenFirst contends that it did not produce lumber prior to August 2021, but that it acquired RYAM's lumber and newsprint businesses on August 28, 2021. Compl. ¶¶ 2–3, 12. GreenFirst further alleges that because it acquired RYAM's entire lumber and newsprint busi-

ness, including RYAM's mills, inventory, employees, customers, and vendor relationships, GreenFirst is the successor-in-interest to RYAM. *Id.* ¶¶ 3–4. On October 4, 2021, after allegedly acquiring RYAM's lumber and newsprint business, GreenFirst requested that Commerce conduct a CCR to determine that GreenFirst is RYAM's successor-in-interest. *Id.* ¶¶ 4, 13, Attach. A; *see also* Answer to Complaint of [COALITION], ¶¶ 4, 13, Apr. 25, 2022, ECF No. 121 ("Proposed Answer"). If Commerce determines that GreenFirst is RYAM's successor-in-interest, GreenFirst would be subject to RYAM's cash deposit rate of 6.32% rather than the all-others rate of 14.19% from Commerce's initial investigation. Compl. ¶ 4; Proposed Answer ¶¶ 11, 13.

However, on November 16, 2021, Commerce denied GreenFirst's request to initiate a CCR. Compl. ¶ 14, Attach. A; *see also* Proposed Answer ¶ 14. Commerce stated that its practice is to conduct a CCR only when there is no evidence of a significant change that could have affected the nature and extent of subsidization. Compl., Attach. A (citing *Certain Pasta from Turkey*, 74 Fed. Reg. 47225, 47227–28 (Dep't Commerce Sept. 15, 2009) (Prelim. Results of [CVD CCR]), unchanged in *Certain Pasta From Turkey*, 74 Fed. Reg. 54022 (Dep't Commerce Oct. 21, 2009) (Final Results of [CVD CCR])). Thus, Commerce will only conduct a CCR, in which it might find that "the respondent company is the same subsidized entity for CVD cash deposit purposes as the predecessor company," where there are no significant changes such as the "purchase or sales of significant productive facilities." *Id.* Commerce found that GreenFirst's acquisition of RYAM's lumber and newsprint businesses constituted a significant change. *Id.* On January 18, 2022, GreenFirst requested that Commerce reconsider its refusal to initiate a CCR. Compl. ¶ 15; Proposed Answer ¶ 15. On February 24, 2022, Commerce denied GreenFirst's request for reconsideration, again finding that a significant change had taken place, and therefore, according to its practice, determined not to conduct a CCR. Compl., ¶ 18, Attach. A; Proposed Answer ¶ 18.

On March 25, 2022, GreenFirst commenced this action, requesting that the court find Commerce's refusal to initiate a CCR to be arbitrary and capricious. Compl. ¶¶ 24, 27. The COALITION now moves to intervene as a defendant-intervenor. Mot. to Intervene at 3.

DISCUSSION

The COALITION does not have a right to intervene in this action under CIT Rule 24(a)(2). The COALITION does not have a legally protectable interest in the outcome of this action, any interest the COALITION does have in this action is not of such a direct and

immediate character that the COALITION will gain or lose by the direct legal operation and effect of the judgment, and the COALITION fails to demonstrate that Defendant will not adequately represent the COALITION's interest in this action. The court also declines to permit the COALITION to intervene in this action under CIT Rule 24(b)(1)(B) because the COALITION has not demonstrated that it shares a defense with Defendant.

I. Intervention as of Right

CIT Rule 24(a)(2) provides, in relevant part, "On a timely motion, the court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." CIT Rule 24(a)(2). The court will grant a motion to intervene under CIT Rule 24(a)(2) when the movant establishes: (1) the motion is timely; (2) the movant asserts a legally protectable interest in the property at issue; (3) the movant's interest is "of such a *direct* and *immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment"; and (4) the movant's interest will not be adequately represented by the government. *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fisherman's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012) (internal quotation marks omitted).

Here, although the COALITION's motion is timely, it fails to meet the other three conditions.[4] Specifically, the COALITION has not met its burden in demonstrating a direct, immediate, or legally protectable interest in this case or that the Defendant will not adequately represent the COALITION's interests. The COALITION asserts four interests in this case: (1) a participatory interest based on its participation in the proceedings before Commerce; (2) a beneficiary interest in enforcing the *Softwood Lumber from Canada* order; (3) an economic interest in ensuring GreenFirst pays the all-others rate rather than RYAM's most recent rate because the COALITION's members may lose market share to GreenFirst if GreenFirst pays a lower cash

[4] The COALITION also contends that it has standing to intervene because it "intends to seek the same relief as that sought by the Defendant." COALITION Br. at 11. However, standing is not a requirement for parties seeking to intervene as a defendant-intervenor unless they invoke the court's jurisdiction by seeking some sort of affirmative relief. *See NLMK Pennsylvania, LLC v. United States*, 553 F. Supp. 3d 1354, 1364 n.12 (citing, inter alia, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019) (defendant-intervenor "did not need to establish standing" to participate in district court, but did need standing to appeal); *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980 (7th Cir. 2011) (proposed defendant-intervenor required to demonstrate standing to assert cross-claim)).

deposit rate; and (4) an interest in protecting the integrity of Commerce's CCR procedures. COALITION Br. at 6–7. GreenFirst contends that (1) there was no administrative proceeding below because Commerce refused to initiate a CCR, and the COALITION will have the right to participate if the court orders Commerce to conduct such an administrative proceeding; (2) GreenFirst is not challenging Commerce's *Softwood Lumber from Canada* order; (3) GreenFirst's cash deposit rate will not be affected by the outcome of this action; and (4) GreenFirst is not attempting to manipulate its cash deposit rate, but the COALITION will have the opportunity to assert such claims if Commerce conducts a CCR. Pl. Br. at 5–7.

The COALITION does not have a legally protectable interest in this action because this action is limited to the question of whether Commerce arbitrarily or capriciously decided not to conduct a CCR. The only relief GreenFirst stands to gain in this action is an order remanding Commerce's decision not to conduct a CCR. *See* Compl., ¶¶ 28–31. Thus, even assuming the COALITION has the interests it claims to have, the COALITION fails to reconcile its purported interests in this action with what GreenFirst seeks. The COALITION may have a beneficiary interest in defending *Softwood Lumber from Canada*, but GreenFirst is not attacking *Softwood Lumber from Canada*, so the COALITION's beneficiary interest is not relevant to this action. The COALITION may have an economic interest in GreenFirst's cash deposit rate, but GreenFirst's cash deposit rate is not at issue in this action. *See also Am. Maritime Transp., Inc. v. United States*, 870 F.2d 1559, 1562 (Fed. Cir. 1989) (economic interests are insufficient to intervene). The COALITION may have an interest in protecting the integrity of Commerce's CCR procedures against manipulation, but the only issue in this case is whether Commerce should have initiated a CCR at all, not GreenFirst's purported manipulation of the CCR procedures to affect its cash deposit rate. Indeed, GreenFirst's cash deposit rate will remain unchanged regardless of the outcome of this action. Finally, the COALITION may have an interest in challenges to a CCR in which it participates, but there was no CCR here. Commerce decided not to conduct a CCR, which is the administrative proceeding in which the COALITION would participate. Having not conducted the relevant administrative proceeding, the COALITION has no participatory interest that is relevant to GreenFirst's action.

The only statutes the COALITION cites in support of its purported participatory interest do not apply to intervening in an action challenging Commerce's refusal to initiate a CCR. *See* COALITION Br. at 4 (citing 19 U.S.C. § 1516a(a)(2)(B)(iii) (permitting interested parties

to commence actions challenging final determinations made under 19 U.S.C. § 1675),[5] 7 (citing 28 U.S.C. § 2631(j)(1)(B) (applicable to civil actions commenced under 19 U.S.C. § 1516a, which, as the COALITION concedes, is not the statute under which GreenFirst commenced this action, *see* Mot. to Intervene at 2)). Commerce's regulations make clear that the COALITION's ability to participate in a CCR begins once Commerce decides to initiate such a review. *See* 19 C.F.R. § 351.216(d) ("If the Secretary decides that changed circumstances sufficient to warrant a review exist, the Secretary will conduct a changed circumstances review in accordance with § 351.221 [setting forth procedures for conducting a review, including the rights of interested parties to participate]"). Indeed, Commerce is not obligated to seek input from the domestic industry. *Id.* § 351.221(c)(3)(iii). Thus, the COALITION does not have a participatory right stemming from Commerce's refusal to initiate a CCR.

Moreover, whatever interests the COALITION does have in relation to this action will not be directly affected by the judgment. As discussed, the only relief that GreenFirst stands to gain is an order remanding Commerce's decision not to initiate a changed circumstances review. Thus, the judgment in this action will have no direct or immediate consequences for the COALITION or its members. *See Wolfsen*, 695 F.3d at 1315. The judgment will not affect the COALITION's ability to defend the *Softwood Lumber from Canada* order. The judgment will not affect the COALITION's participation in any CCR or prevent it from making whatever arguments it wants in order to protect the CCR process against any purported manipulation. The judgment will not have any effect on GreenFirst's cash deposit rate, and therefore the COALITION and its members will not be impacted economically. The only direct and immediate impact a judgment in this action will have is whether Commerce will conduct a CCR with respect to GreenFirst's acquisition of RYAM's lumber and newsprint businesses. Therefore, any effect on the COALITION will be indirect and attenuated.

Finally, the COALITION's interest "in the robust enforcement and administration of the trade remedy laws," *see* COALITION Br. at 10, is adequately represented by Defendant. The COALITION contends that its interest in the enforcement of the trade remedy laws differs from Commerce's because Commerce "acts as an impartial decision-

[5] Commerce's decisions not to initiate a CCR are not reviewable under 19 U.S.C. § 1516a(2)(B)(iii). *See Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010) (decisions by Commerce not to initiate a CCR are not reviewable under 19 U.S.C. § 1516a because they are not published in the Federal Register).

maker." *Id.* However, it is not clear what distinction the COALITION is drawing between its interest and the Defendant's.[6] Even taking the COALITION's construction of the relevant interests at face value, there does not appear to be any incongruence between "the robust enforcement and administration of the trade remedy laws" and "an impartial decision-maker" enforcing and administering those laws. *See id.* The COALITION's Proposed Answer demonstrates that it seeks to defend Commerce's decision not to initiate a CCR. *See generally* Proposed Answer. The Defendant is perfectly capable of defending Commerce's decision, and the COALITION does not point to any aspect of the case in which its position differs from the Defendant's.[7] The COALITION fails to meet its burden to demonstrate that it has a right to intervene.

II. Permissive Intervention

The court also declines to permit the COALITION to intervene. The court may permit a party to intervene under CIT Rule 24(b)(1)(B) if the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." If a proposed intervenor satisfies the requirements of CIT Rule 24(b)(1)(B), the court has discretion as to whether to permit intervention, and "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." CIT Rule 24(b)(3). The court considers three factors on a motion for permissive intervention under CIT Rule 24(b)(1)(B): "a) whether the intervenor's [defense] has a question of law or fact in common with the [defendant]; b) whether the application is timely; and c) whether the intervention will unduly delay or prejudice the adjudicative rights of the original parties." *Manuli Autoadesivi, S.p.A. v. United States*, 9 CIT 24, 26, 602 F. Supp. 96, 98 (1985). Moreover, intervention is "subject to the limitations in 28 U.S.C. § 2631(j)." *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 365, 738 F. Supp. 541, 542 (1990). The statutory limitation relevant here provides that, "[a]ny person who would be adversely affected or ag-

[6] The COALITION contrasts its interests with those of Commerce, not the United States. COALITION Br. at 10. The United States is defending Commerce's decision, so the United States is not acting as a neutral decision maker, but rather is in the same position as the COALITION seeks to be. Therefore, the COALITION's argument that its interests will not be adequately represented is incorrect.

[7] As discussed, Defendant has not yet responded to the Complaint. The COALITION and GreenFirst presume that the Defendant will defend Commerce's decision not to initiate a CCR. *See* COALITION Br. at 10 n.5; Pl. Br. at 9. Even if the Defendant ultimately takes a position different than the COALITION's, the COALITION has not met its burden to intervene as of right for the reasons stated above.

grieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action." 28 U.S.C. §§ 2631(j)(1)(B), (2); *see also Manuli*, 9 CIT at 25–26.

Here, the COALITION claims that it meets the standard under CIT Rule 24(b)(1)(B) because it shares a common defense with the Defendant.[8] COALITION Br. at 11–12. However, the COALITION fails to adequately demonstrate that it shares a defense to GreenFirst's claims because it does not sufficiently allege that it will be adversely affected or aggrieved by a decision in this action. The COALITION relies on its Proposed Answer in support of its position that both it and the Defendant share the defense that "Commerce properly rejected GreenFirst's request for a CCR." *Id.* at 12. Without more, that argument is insufficient because the COALITION does not explain why it has an interest in this action such that it has a defense to GreenFirst's claims that it should be permitted to assert. *See* 28 U.S.C § 2631(j)(1)(B). Simply mimicking the Defendant's defense of its own interest falls short of this standard. *Id.* Indeed, the COALITION does not have a defense to GreenFirst's claims because the COALITION will not be "adversely affected or aggrieved" as a result of the court's resolution of GreenFirst's claims in this action. *Id.*; *see also* Compl., ¶¶ 28–31. The COALITION has not shown that it will add anything or that Defendant will not adequately defend its position and therefore the court need not address whether intervention "will unduly delay or prejudice the adjudication of the original parties' rights." CIT Rule 24(b)(3). The motion for permissive intervention is denied.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the Motion to Intervene is DENIED.

Dated: May 20, 2022
New York, New York

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

[8] The COALITION does not claim a conditional statutory right to intervene under 28 U.S.C. § 2631(j). Nonetheless, as stated in *Manuli*, 28 U.S.C. § 2631(j) limits permissive intervention in all cases to parties who would be adversely affected or aggrieved. *See Manuli*, 9 CIT at 25–26. As discussed below, without such a limitation, any potential party could claim a shared defense by mimicking the defense asserted by the defendant.

Slip Op. 22–53

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

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

[Remanding U.S. Customs and Border Protection's determination of non-evasion of antidumping duties, denying defendant-intervenors' motion for supplemental briefing, and issuing a protective order to apply to the remand proceedings.]

Dated: May 23, 2022

Nathaniel Maandig Rickard, Picard, Kentz & Rowe, LLP, of Washington, D.C., argued for plaintiff. Also on the briefs was *Zachary J. Walker*.

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

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

OPINION AND ORDER

Kelly, Judge:

Before the court is plaintiff Ad Hoc Shrimp Trade Enforcement Committee's ("AHSTEC") motion for judgment on the agency record brought pursuant to Rule 56.2 of the U.S. Court of International Trade and Defendant-Intervenors MSeafood Corporation's ("MSeafood US") and Minh Phu Seafood Joint Stock Company's ("Minh Phu Vietnam") (MSeafood US and Minh Phu Vietnam are referred to collectively as "Minh Phu Group") Motion for Supplemental Briefing. *See* Rule 56.2 Mot. for J. on Agency R., Aug. 30, 2021, ECF No. 34 ("Pl. Mot."); *see also* [AHSTEC's] Non-Confidential Memo. in Supp. of Rule 56.2 Mot. for J. on Agency R., Aug. 30, 2021, ECF No. 34 ("Pl. Br."); Mot. for Supp. Briefing, Apr. 22, 2022, ECF No. 54. AHSTEC challenges the administrative determination made by the U.S. Customs and Border Protection ("CBP") Office of Trade ("OT") Office of Regulations and Rulings ("ORR") in an administrative proceeding conducted pursuant to the Enforce and Protect Act of 2015, 19 U.S.C. § 1517 ("EAPA"), reversing the CBP OT Trade Remedy & Law Enforcement Directorate's ("TRLED") determination that MSeafood US evaded antidumping duties ("ADD") by transshipping Indian frozen warmwater shrimp through the Socialist Republic of Vietnam ("Viet-

nam").[1] *See* Pl. Br. at 2–4; *see also Enforce and Protect Act ("EAPA") Case Number 7356; 19 U.S.C. § 1517; Minh Phu Group*, PD 233, CD 219 (Feb. 11, 2021) ("*ORR Decision*"); *Notice of Determination as to Evasion*, PD 220–221, CD 217 (Oct. 13, 2020) ("*TRLED Decision*") (the *ORR Decision* and the *TRLED Decision* are referred to collectively as the "*CBP Decisions*").[2] AHSTEC asserts (i) ORR's determination that MSeafood US did not evade the U.S. Department of Commerce's ("Commerce") antidumping order on frozen warmwater shrimp from India by transshipping Indian shrimp through Vietnam is unsupported by substantial evidence on the record; (ii) the *ORR Decision* is based on an incomplete review of the administrative record; and (iii) TRLED did not comply with CBP's regulations which require public summarization of confidential documents submitted to CBP during the course of an EAPA evasion proceeding. Pl. Br. at 31–40; *see also* Reply of Pl. in Supp. of [Pl. Mot.], 4–21, Jan. 10, 2022, ECF No. 44. Defendant United States and Minh Phu Group oppose Pl. Mot. on the grounds that the record supports ORR's determinations, and ORR and TRLED adequately performed their obligations in accordance with law and CBP's regulations. Def.'s Resp. in Opp'n to [Pl. Mot.], 18–28, Dec. 3, 2021, ECF No. 41 ("Def. Br."); Resp. Br. of [Minh Phu Group] in Opp'n to [Pl. Mot.], 23–42, Dec. 6, 2021, ECF No. 43 ("MPG Br.").[3] Oral argument was held on April 5, 2022. *See* ECF No. 52 ("Oral Arg."). Following oral argument, Minh Phu Group filed a motion for supplemental briefing, claiming it only became aware of deficiencies in the record transmitted from TRLED to ORR at oral argument. Mot. for Supp. Briefing at 1. Alternatively, Minh Phu Group seeks a limited remand to correct the record deficiencies. *Id.* at 2. AHSTEC opposes the motion for supplemental briefing on the grounds that it explicitly argued that ORR did not review the entire record and Minh Phu Group chose not to address the legal ramifications of ORR's incomplete review. [AHSTEC's] Resp. to Def.-Intrvnrs.' Mot. for Supp. Briefing, 4–5, May 13, 2022, ECF No. 55 ("Pl. Opp. to Mot. for Supp. Br.").

---

[1] AHSTEC also challenges certain procedural determinations made by TRLED related to public summarization of allegedly confidential documents which could not be reviewed until this point. Pl. Br. at 3–4; *see also* 19 U.S.C. § 1517(g)(1).

[2] On May 17, 2021, and June 30, 2021, Defendant filed indices and supplemental indices, respectively, to the public and confidential administrative records underlying Commerce's final determination. *See* ECF Nos. 20, 21–1, 29–1, and 30–1. Citations to administrative record documents in this opinion are to the numbers CBP assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

[3] Any confidential information in Pl. Br., Def. Br., or MPG Br. referenced in this opinion may be found at the corresponding page of the confidential versions of Pl. Br., Def. Br., or MPG Br., ECF Nos. 34, 40, and 50, respectively.

For the following reasons, the court remands the *CBP Decisions*, denies Minh Phu Group's motion for supplemental briefing, and issues a protective order to apply to the remand proceedings.

BACKGROUND

On February 1, 2005, Commerce imposed ADD orders on certain frozen warmwater shrimp from India and Vietnam. *Certain Frozen Warmwater Shrimp from India*, 70 Fed. Reg. 5,147 (Dep't Commerce Feb. 1, 2005) (Notice of Amended Final Determination of Sales at Less Than Fair Value and [ADD] Order) ("*India Order*"); *Certain Frozen Warmwater Shrimp from [Vietnam]*, 70 Fed. Reg. 5,152 (Dep't Commerce Feb. 1, 2005) (Notice of Amended Final Determination of Sales at Less Than Fair Value and [ADD] Order) ("*Vietnam Order*"). Minh Phu Vietnam was a mandatory respondent in Commerce's ADD investigation into frozen warmwater shrimp from Vietnam. *See Vietnam Order*, 70 Fed. Reg. at 5,153–55. However, on July 22, 2016, Commerce revoked the *Vietnam Order* with respect to Minh Phu Vietnam and its affiliates. *Certain Frozen Warmwater Shrimp from [Vietnam]*, 81 Fed Reg. 47,756 (Dep't Commerce July 22, 2016) (Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the [ADD] Order) (the "*Revocation Order*"). The *Revocation Order* only permits Minh Phu Group to enter certain frozen warmwater shrimp without ADDs to the extent that such shrimp is "produced and exported by the Minh Phu Group."[4] *Id.* at 47,757–58. Furthermore, the *Revocation Order* requires Minh Phu Group to certify that the shrimp it imports into the United States is produced and exported by Minh Phu Group and its affiliates and thus no longer subject to the *Vietnam Order*. *Id.* at 47,758.

To comply with the *Revocation Order*, Minh Phu Group instituted what it describes as "a comprehensive tracing system for all of the [s]hrimp it exports to the United States to ensure that it is all Vietnam-origin."[5] MPG Br. at 3. Additionally, Minh Phu Group provides "traceability documents" to the U.S. National Oceanic and Atmospheric Administration's ("NOAA") Seafood Import Monitoring

[4] "Minh Phu Group," as used in the *Revocation Order*, refers to 15 entities that appear to be affiliated with Defendant-Intervenors, but are not parties to this action. *See Revocation Order*, 81 Fed. Reg. at 47,756 n.9. However, the parties agree the *Revocation Order* applies to Defendant-Intervenors even though they are not mentioned. *See* Pl. Br. at 4–5; Def. Br. at 3; MPG Br. at 2–3.

[5] The *Vietnam Order* continues to apply to certain frozen warmwater shrimp from Vietnam that are not produced and exported by Minh Phu Group; however, as discussed *infra*, AHSTEC's evasion allegation only applies to alleged evasion of the *India Order*. *See Revocation Order*, 81 Fed Reg. at 47,758.

Program ("SIMP"), pursuant to which Minh Phu Group must trace all shrimp imported into the United States from farm to each export shipment that enters the United States. *Id.*; *EAPA Case No. 7356: Minh Phu Request for Info. to Manufacturer Questionnaire Resp.*, 30, PD 246, CD 330 (March 23, 2020) ("*Minh Phu Vietnam RFI Resp.*"); *EAPA Case No. 7356: MSeafood Request for Info. to Importer Questionnaire Resp.*, 9, PD 244, CD 229 (March 19, 2020) ("*MSeafood US RFI Resp.*"). NOAA's National Marine Fisheries Service Office of International Affairs and Seafood Inspection performed audits of Minh Phu Group's SIMP tracing paperwork related to certain entries of frozen warmwater shrimp from Vietnam and determined that Minh Phu Group sufficiently traced the shrimp it imported into the United States to Vietnamese farms.[6] *MSeafood US RFI Resp.* at 9 and Ex. 3.

Nevertheless, on July 17, 2019, AHSTEC alleged to CBP pursuant to 19 C.F.R. § 165.11 that Minh Phu Group was evading the *India Order* by importing into the United States commingled Indian-origin and Vietnam-origin shrimp. AHSTEC – EAPA Allegation Final (02) (7356), PD 2 (July 17, 2019). On August 30, 2019, September 30, 2019, and October 8, 2019, AHSTEC filed supplemental allegations with TRLED in support of AHSTEC's original evasion allegation. *See* AHSTEC – EAPA Allegation Supplemental Submission – (7356), PD 4 (Aug. 30, 2019); AHSTEC – EAPA Allegation Second Supplemental Submission – (7356), PD 7, CD 2–3 (Sept. 30, 2019); AHSTEC – EAPA Allegation Third Supplemental Submission – (7356), PD 8 (Oct. 8, 2019). On March 4, 2020, AHSTEC filed additional information from Commerce's administrative review of the *India Order*. AHSTEC – Submission of NFI, PD 238–41 (March 4, 2020).

CBP acknowledged receipt of AHSTEC's EAPA complaint on September 18, 2019. TRLED – Official Receipt Email, PD 5 (Sept. 18, 2019). On October 9, 2019, TRLED initially determined that AHSTEC submitted sufficient factual material to reasonably suggest that Minh Phu Group evaded the *India Order*, and therefore TRLED initiated an investigation pursuant to 19 U.S.C. § 1517(b)(1) and 19 C.F.R. § 165.15. Initiation of Investigation for EAPA Case Number 7356 – MSeafood Corporation, 4–5, PD 10 (Oct. 9, 2019). On January 5, 2020, TRLED commenced a formal investigation into MSeafood US and imposed interim measures against Minh Phu Group's imports into the United States, including subjecting such imports to duties

[6] NOAA found certain discrepancies between the filings with CBP and the tracing paperwork; however, those discrepancies do not implicate country-of-origin. *MSeafood US RFI Resp.* at 9 and Ex. 3.

and cash deposits pursuant to the *India Order*. Notice of Initiation of Investigation and Interim Measures – EAPA Case 7356, 1, 7–8, PD 12*, CD 6 (Jan. 5, 2020) ("Imposition of Interim Measures").[7]

On January 31, 2020, Minh Phu Group filed a voluntary response to AHSTEC's allegation, which Minh Phu Group claimed it had originally filed on September 13, 2019. *Re-Filing of September 13, 2019 Submission: EAPA Case No. 7356*, PD 13, CD 7 (Jan. 31, 2020) ("MPG Voluntary Resp."). In its voluntary submission, Minh Phu Group denied AHSTEC's allegations and offered evidence in support of its contention that it did not transship Indian shrimp through Vietnam to evade the *India Order*. *See* MPG Voluntary Resp. at Attach. 2. AHSTEC responded to the MPG Voluntary Resp. on February 28, 2020, asserting that Minh Phu Group's designation of information as business confidential was overly broad and Minh Phu Group had not properly summarized material that it had designated as business confidential. *See generally* AHSTEC – Alleger Comments – (7356), PD 16 (Feb. 28, 2020) ("AHSTEC Resp. to MPG Voluntary Submission").

TRLED sent Minh Phu Vietnam and MSeafood US each a request for information ("RFI") on February 25, 2020. [RFI] from Manufacturer/Supplier concerning [EAPA] investigation on whether MSeafood [US] has evaded the [*India Order*], with entries of merchandise into the United States, PD 14, CD 8 (Feb. 25, 2020); [RFI] to Importer concerning the [EAPA] investigation of whether MSeafood [US] has evaded the [*India Order*] with entries of merchandise into the United States, PD 15, CD 9 (Feb. 25, 2020). MSeafood US and Minh Phu Vietnam responded to TRLED's RFIs on March 19, 2020, and March 23, 2020, respectively. *MSeafood US RFI Resp.*; *Minh Phu Vietnam RFI Resp.* AHSTEC submitted its response to Minh Phu Group's filings on March 25, 2020, and March 31, 2020, again complaining that Minh Phu Group did not comply with CBP's regulations regarding treatment of confidential information and public summarization. AHSTEC – Comments on Minh Phu's March 19 Claims for BC Treatment and NFI Combined – (7356), PD 18 (March 25, 2020) ("AHSTEC March 25th Resp."); EAPA Case No. 7356 – Comments of AHSTEC on Minh Phu [Vietnam] March 23rd Resp. to CBP, PD 19 (March 31, 2020) ("AHSTEC March 31st Resp."). On May 1, 2020, Minh Phu Group voluntarily submitted additional factual information. *EAPA Case No. 7356: Voluntary Submission of Supplemental Info.*, PD 38, CD 26 (May 1, 2020) ("MPG May 1st Voluntary Submission"); *see also* MPG May 1st Voluntary Submission, Exhibits, PD 21–37, 39–63, CD 10–25, 27–60 (May 1, 2020). AHSTEC filed a

[7] TRLED filed the public version of the Imposition of Interim Measures on January 14, 2020. *See* Imposition of Interim Measures, PD 12*.

rebuttal to Minh Phu Group's additional factual information on May 7, 2020, again arguing that Minh Phu Group did not comply with the requirements of 19 C.F.R. § 165.4(a). EAPA Case No. 7356 – Comments of AHSTEC on Minh Phu [Vietnam] May 1 Submission to CBP, PD 64 (May 7, 2020) ("AHSTEC May 7th Rebuttal"). On June 3, 2020, June 11, 2020, and June 12, 2020, Minh Phu Group filed supplemental responses to TRLED's requests for information.[8] *EAPA Case No. 7356: MSeafood [US] Resp. to Supplemental Importer [RFI]*, PD 66, CD 62 (June 13, 2020) ("*MSeafood US Supplemental RFI Resp.*"); *EAPA Case No. 7356: Minh Phu [Vietnam] Resp. to Supplemental Importer [RFI]*, PD 217, CD 213 (June 11, 2020) ("*Minh Phu Vietnam Supplemental RFI Resp.*").[9]

On September 14, 2020, Minh Phu Group submitted its written argument to TRLED, and AHSTEC filed its rebuttal written argument on September 28, 2020. *EAPA Case No. 7356: Minh Phu Written Argument*, PD 218, CD 214 (Sept. 14, 2020); EAPA Case No. 7356: [AHSTEC's] Resp. to Written Arguments, PD 219 (Sept. 28, 2020) ("AHSTEC Written Arg."). AHSTEC continued to argue that Minh Phu Group did not comply with CBP's regulations. AHSTEC Written Arg. at 4–7. On October 13, 2020, TRLED issued the *TRLED Decision*, in which it imposed an adverse inference against MSeafood US for failing to produce reports tracking all shipments of shrimp Minh Phu Group imported into Vietnam from the bill of lading through a specific export sale, and thus determined that MSeafood US entered Indian shrimp into the United States by means of evasion without paying ADDs pursuant to the *India Order*. *TRLED Decision* at 9–10. Minh Phu Group submitted a timely request to ORR to conduct a *de novo* administrative review of the *TRLED Decision* on November 10, 2020. *EAPA Case No. 7356: Minh Phu Request for Admin. Review*, PD 227, CD 218 (Nov. 10, 2020). AHSTEC filed its response to Minh Phu Group's request for administrative review on November 25, 2020. HQ Case Number H314879: [AHSTEC's] Resp. to Request for Admin. Review (EAPA Case No. 7356), PD 230 (Nov. 25, 2020) ("AHSTEC

[8] On May 20, 2020, TRLED issued supplemental requests for information to Minh Phu Group; however, those requests are not part of the administrative record filed with the court. *See* TRLED – Supp. RFI Ext. Resp., PD 67 (June 9, 2020) (in granting Minh Phu Group's request for an extension of time to file responses, TRLED refers to its May 20, 2020, supplemental requests for information).

[9] MSeafood US filed the public version of *Minh Phu Vietnam Supplemental RFI Resp.* on June 12, 2020. The confidential version of the *Minh Phu Vietnam Supplemental RFI Resp.* erroneously uses the same title as the *MSeafood US Supplemental RFI Resp.*, but that is corrected in the public version to reflect Minh Phu Vietnam's response to the supplemental manufacturer/supplier RFI, rather than MSeafood US' response to the supplemental importer RFI.

ORR Resp."). On February 11, 2021, ORR issued the *ORR Decision*, in which it found that Minh Phu Group had adequately complied with TRLED's requests for information such that TRLED erred in imposing an adverse inference against MSeafood US. *ORR Decision* at 8–10. ORR thus concluded that there was not sufficient information on the record to find that Minh Phu Group entered Indian shrimp into the United States by means of evasion. *Id.* at 10. AHSTEC now challenges the *CBP Decisions*.

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),[10] and 28 U.S.C. § 1581(c), which grant the court jurisdiction over actions contesting determinations of non-evasion pursuant to EAPA. The court shall determine "(A) whether [CBP] fully complied with all procedures under [19 U.S.C. §§ 1517(c) and (f)]; and (B) whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(2)(A)–(B). CBP's determination of whether an importer evaded ADDs must be supported by substantial evidence on the record. *Id.* § 1517(c)(1)(A).

DISCUSSION

AHSTEC challenges three aspects of the *CBP Decisions*: (1) ORR's substantive determination of non-evasion; (2) ORR's purported failure to review the entire administrative record in support of the *ORR Decision*; and (3) TRLED's alleged failure to follow CBP's regulations requiring public summary of confidential documents or explanations of why such summary is impossible. Pl. Br. at 31–40. At oral argument, Defendant conceded that ORR did not review the entire administrative record in reaching the *ORR Decision*. Oral Arg., 4:53–6:33. Therefore, remand is required. Additionally, it is unclear how TRLED enforced compliance with the requirements to provide public summaries or explanations of why such summaries could not be provided. Defendant fails to clarify the standard CBP must meet in administering its regulations relating to public summarization of allegedly confidential information, and further fails to explain how TRLED met that standard in light of seemingly inconsistent treatment of information that is in certain places alleged to be not suitable for public summarization and in others apparently publicly summarized. The court thus also remands TRLED's determinations regarding public summarization of confidential information for further ex-

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

planation. Given CBP's procedural shortcomings in making the *CBP Decisions*, the court does not reach AHSTEC's substantive arguments.

I. Review of the Entire Administrative Record

Defendant argued in its brief that ORR had and reviewed the entire administrative record developed by TRLED; however, at argument, Defendant abandoned that position and conceded that TRLED failed to transmit the entire record to ORR. Def. Br. at 19–20; Oral Arg. at 4:53–6:33. Although Defendant and Minh Phu Group each attempted to downplay the materiality of the documents missing from the record that TRLED transmitted to ORR, even a cursory review of the list of documents demonstrates that ORR could not possibly have complied with its obligation to conduct a *de novo* review of the entire administrative record. The court remands the *ORR Decision* to CBP for consideration of the entire administrative record.

"It has long been established that government officials must follow their own regulations, even if they were not compelled to have them at all, and certainly if directed to promulgate them by Congress." *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988) (citing *Service v. Dulles*, 354 U.S. 363, 388 (1957)). EAPA was enacted as Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. 114–125 (2016) ("TFTEA"), which amended the Tariff Act of 1930 to include the EAPA provisions set forth in 19 U.S.C. § 1517, and to amend 28 U.S.C. § 1581(c) to include in this court's jurisdiction actions challenging a determination made pursuant to EAPA. *See* TFTEA § 421(a)–(b). Section 421(d) of TFTEA directed the Secretary of Homeland Security to "prescribe such regulations as may be necessary to implement the amendments made by this section." TFTEA § 421(d). The Department of Homeland Security, CBP's parent organization, issued such regulations, which are codified at Chapter I, Part 165 of Title 19 of the Code of Federal Regulations. *See* 19 C.F.R. §§ 165.0 *et seq.*; *see also Investigation of Claims of Evasion of Antidumping and Countervailing Duties*, 81 Fed. Reg. 56,477 (Dep't Homeland Security [CBP]; Dep't Treasury Aug. 22, 2016). Under EAPA, when an importer or an interested party requests ORR to conduct an administrative review of a determination by TRLED as to evasion, ORR must conduct such a review *de novo*. 19 U.S.C. § 1517(f)(1). CBP's regulations specify that a *de novo* review under 19 U.S.C. § 1517(f)(1) requires ORR to "review the entire administrative record upon which the initial determination was made," inter alia. 19 C.F.R. § 165.45.

Here, having included a requirement for ORR to review "the entire administrative record" in the regulations that Congress directed CBP to promulgate, ORR was not permitted to make the *ORR Decision* based on a review of only part of the administrative record. *Voge*, 844 F.2d at 779. Moreover, the portion of the administrative record that ORR did not review is significant. In addition to correspondence between the parties, requests for extensions, and responses to such requests, TRLED failed to transmit Minh Phu Vietnam's and MSeafood US' entire responses to TRLED's initial RFIs. *See* Supplemental Index of Administrative Record, June 30, 2021, ECF No. 30–1 (pertaining to CD 220–330). The public and confidential versions of these documents amount to approximately 17,000 pages, the vast majority of which is comprised of Minh Phu Group's business records, which Minh Phu Group contends demonstrate that it did not evade the *India Order* by importing India-origin shrimp into the United States via transshipment through Vietnam. *See MSeafood US RFI Resp.*; *Minh Phu Vietnam RFI Resp.* Regardless of whether Minh Phu Group re-submitted some of that material in response to subsequent requests for information, as Minh Phu Group contended at argument, Minh Phu Group failed to submit evidence that ORR possessed all of the missing documents in its administrative review. *See* Oral Arg. at 11:31–12:36, 1:17:34–1:17:55. Moreover, the missing documents are repeatedly cited in the *TRLED Decision* and are therefore material. *See TRLED Decision* at 2, 4 n.31, 5 n.38, 6 n.47, 8 n.60, 9 n.62. Unsurprisingly, ORR does not cite the missing documents in the *ORR Decision*. *See generally ORR Decision*. ORR could not have properly reviewed the *TRLED Decision*, or the record upon which the *TRLED Decision* was based, without reviewing the missing documents. Because the *ORR Decision* was made following a procedure contrary to that prescribed in CBP's own regulations and was based on a review of an incomplete record missing thousands of pages of documents, the *ORR Decision* must be remanded.

Minh Phu Group argues that prior to oral argument neither it nor AHSTEC were aware that ORR did not review the entire record and asks the court to order further briefing on the issue. Mot. for Supp. Briefing at 1–2. AHSTEC responds that it was aware that ORR did not review the entire record and in fact argued as much in its opening brief. Pl. Opp. to Mot. for Supp. Br. at 4 – 5 (citing, inter alia, Pl. Br. at 37–38).[11] Nonetheless, accepting Minh Phu Group's statement that it only learned at oral argument that ORR could not have possibly

[11] The court also issued written questions to the parties prior to oral argument which asked Defendant how it could be certain ORR had reviewed the entire record. Ltr. Filed by the Hon. Claire R. Kelly Concerning *Oral Arg. Questions*, 4–5, Mar. 21, 2022, ECF No. 51.

reviewed the entire record, the salient point is that ORR could not possibly have reviewed the entire record.

In its proposed supplemental brief, Minh Phu Group argues that the missing information was immaterial. Post-Hearing Br. of [Minh Phu Group], 8–10, Apr. 22, 2022, ECF No. 53–1. However, as discussed above, the missing documents are repeatedly cited in the *TRLED Decision* and contain Minh Phu Group's confidential business records that Minh Phu Group relied on in support of its substantive arguments against a finding of evasion, and thus the missing documents are material.[12] Moreover, ORR must conduct a *de novo* review of the entire record. 19 U.S.C. § 1517(f)(1); 19 C.F.R. § 165.45. Because ORR did not review the entire record, remand is required, and as discussed below, because CBP's explanations of how its treatment of confidential information and the public summaries of such information complied with CBP's regulations were inadequate, a limited remand would not suffice. Therefore, Minh Phu Group's Motion for Supplemental Briefing is denied.

II. Public Summarization

AHSTEC also challenges TRLED's treatment of Minh Phu Group's confidential information and compliance with CBP's regulations requiring adequate public summarization of confidential documents or explanation of why such summarization is not possible. Pl. Br. at 31–35; *see also* 19 C.F.R. § 165.4(a). Although Defendant attempts to frame this as a constitutional due process issue, *see* Def. Br. at 25, there is no need for the court to analyze what if any constitutional right AHSTEC has in participating in an EAPA proceeding or whether any such right was violated. CBP's regulations require CBP to treat only certain information as confidential and to ensure any such confidential information is accompanied by a public version that adequately summarizes the confidential information or else an explanation of why such summary is not possible. 19 C.F.R. § 165.4(a). Because CBP fails to adequately explain why it accepted Minh Phu Group's assertions regarding confidential information or how CBP evaluated the sufficiency of public summarization or explanation of the inability of Minh Phu Group to publicly summarize the purportedly confidential documents, the court remands the *CBP Decisions* for further explanation or reconsideration.

Pursuant to the Administrative Procedure Act, agencies engage in rule making and adjudication. *See* 5 U.S.C. §§ 553–54. "[A]djudication

[12] Even at this point in the litigation, it is not clear that the court has the entire record. *See* FN 8, *supra*. Rather than assessing the materiality of missing documents *post hoc*, the agency should simply review entire record and then transmit the entire record to the court.

means agency process for the formulation of an order." *Id.* § 551(7) (internal quotation marks omitted). "[O]rder means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6) (internal quotation marks omitted). Although informal agency adjudications are not subject to notice and comment procedures or a hearing that the Administrative Procedure Act imposes on agency rulemaking or formal adjudication, respectively, *see Neustar, Inc. v. Fed. Comms. Comm'n*, 857 F.3d 886, 893 (D.C. Cir. 2017), informal adjudications under EAPA may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(2)(B). Moreover, a court must evaluate the legality of agency action based on the agency's explanation at the time it acted. *Board of Trustees of Leland Stanford Junior Univ. v. Chinese Univ. of Hong Kong*, 860 F.3d 1367, 1376 (Fed. Cir. 2017) (citing *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis")). A court will uphold an agency action when the explanation is of less-than-ideal clarity; however, the explanation must come from the agency, not counsel's *post hoc* rationalization of agency action. *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1274 (Fed. Cir. 2017).

EAPA provides that the court "shall examine—(A) whether [CBP] fully complied with all procedures under subsections (c) and (f)." 19 U.S.C. § 1517(g)(2)(A). Subsection (c)(2) permits CBP to collect information from interested parties. *Id.* § 1517(c)(2). CBP's regulations provide further specifications regarding the procedures set forth in 19 U.S.C. §§ 1517(c), (f). Specifically, CBP's regulations permit parties to an EAPA proceeding to request confidential treatment for certain "business confidential information" they file with CBP. 19 C.F.R. § 165.4(a). Only "trade secrets and confidential or financial information obtained from any person, which is privileged or confidential" is business confidential information for the purposes of EAPA proceedings. *Id.* To obtain confidential treatment for its information, a party must request CBP treat the information as confidential by bracketing any such information and explaining why the party believes the information to be confidential. *Id.* § 165.4(a)(1). A party requesting confidential treatment of its information must also submit a public

version of the document. *Id.* § 165.4(a)(2). The public version of the document must include "a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information" or else "a full explanation of the reasons supporting" a claim that the bracketed information cannot be publicly summarized. *Id.* "CBP will reject a submission that includes a request for business confidential information that does not meet the requirements of [19 C.F.R. § 165.4(a)]." *Id.* § 165.4(b). As discussed, CBP is required to comply with its own regulations in administering EAPA. *See Voge*, 844 F.2d at 779.

Here, despite AHSTEC complaining in multiple submissions about the lack of public summarization and the inconsistent treatment of allegedly business confidential information, TRLED did not even mention the issue in the *TRLED Decision*, let alone explain how it complied with CBP's regulations. *See generally TRLED Decision*. AHSTEC repeatedly complained about inconsistent treatment of allegedly confidential information, claims that confidential information was not subject to public summarization when such information was summarized elsewhere in Minh Phu Group's submissions, and the terse, boilerplate explanations for why allegedly confidential information was not subject to public summarization. AHSTEC Resp. to MPG Voluntary Submission, 6–18; AHSTEC March 25th Resp., 4–12; AHSTEC March 31st Resp., 4–14; AHSTEC May 7th Rebuttal, 3–4; AHSTEC Written Arg., 4–7. Nowhere does TRLED or ORR address CBP's regulations governing public summarization, AHSTEC's specific complaints, or how CBP evaluated Minh Phu Group's treatment of purportedly confidential information, assertions that such information is not susceptible to public summarization, and explanations in support of those assertions.[13] The court cannot evaluate CBP's action without any explanation of CBP's obligations with respect to allegedly confidential information or the reasons for CBP's decisions in this investigation. Therefore, the court remands the *CBP Decisions* for reconsideration or further explanation regarding confidential treatment and public summarization of allegedly confidential information.

In opposition, Defendant argues that AHSTEC did not have a constitutional right to access Minh Phu Group's business confidential information. Def. Br. at 23–28. This argument not only mischaracterizes AHSTEC's claim but also ignores CBP's obligation to comply with its own regulations that require adequate public summarization or

[13] AHSTEC also raised the issues surrounding Minh Phu Group's and CBP's treatment of allegedly business confidential information to ORR, but ORR did not address these issues. *See* AHSTEC ORR Resp., 17–18 and n.64; *ORR Decision*.

explanation of why such summarization is not possible. At argument, counsel argued that the public summarizations were adequate and that CBP could not have required any further information apart from column headings on certain Excel files.[14] *See* Oral Arg. at 50:47–53:35. However, counsel's *post hoc* rationalization of agency action is insufficient where, as here, CBP fails to address how its action complies with applicable regulations, particularly when the substance of such *post hoc* rationalization is offered for the first time at argument.

III. Determination of Non-Evasion

Because the procedure underlying the *CBP Decisions* was conducted contrary to CBP's regulations and TRLED did not adequately explain how it determined the public summaries of confidential documents complied with CBP's regulations, the court declines to consider ORR's substantive findings. On remand, CBP must make a determination as to evasion that is based on a review of the entire record and in compliance with CBP's procedural regulations.

IV. Continuation of Judicial Protective Order on Remand

EAPA does not provide for an administrative protective order ("APO") during administrative proceedings. *See* 19 U.S.C. § 1517; 19 C.F.R. § 165. Thus, there was no APO for the proceedings before CBP in this case, which is why the issue of adequate public summarization is before the court. However, the parties to this action all have access to the confidential record, subject to the terms of the judicial protective order ("JPO") issued by the court. *See* Order, May 14, 2021, ECF No. 19. At oral argument, AHSTEC suggested that if the court were to remand the *CBP Decisions*, it would essentially pretend that it did not have access to the confidential record and make arguments based on the information it had access to during the administrative proceeding. Oral Arg. at 53:52–55:04.

Now that the parties have access to the confidential record, the court sees no reason for pretense. The genie is out of the bottle and subject to the protections of a JPO. Therefore, the court will order that the JPO, or some version of it, will extend to the administrative remand proceedings to allow parties to make arguments based on the

[14] Defendant devoted one sentence in its brief to defending the public summarizations, arguing that AHSTEC's "robust comments . . . demonstrate[] that Minh Phu Group's public summaries provided 'information in sufficient detail to permit a reasonable understanding of the substance of that information.'" Def. Br. at 27 (quoting 19 C.F.R. § 165.4(a)(2)).

entire record.[15] *See* 28 U.S.C. § 2643(c)(1). The parties shall meet and confer in order to submit any proposed revisions for the JPO in accordance with the court's order.

CONCLUSION

For the foregoing reasons, it is

ORDERED Minh Phu Group's Motion for Supplemental Briefing is denied; and it is further

ORDERED that the *CBP Decisions* are remanded for further proceedings in accordance with this Opinion and Order; and it is further

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

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days thereafter to file their replies to 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 CBP shall file the administrative record within 14 days of the filing of its remand redetermination; and it is further

ORDERED that the parties shall meet and confer to propose a JPO to apply during the remand proceedings and submit such proposed JPO to the court within two weeks of the date of this Opinion and Order; and it is further

ORDERED that the court will schedule a conference regarding the proposed JPO if, upon review of the parties' proposal, the court deems such a conference to be necessary.

Dated: May 23, 2022
New York, New York

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

[15] Although the court will enter a JPO and all parties will have access to the confidential record on remand, CBP must ensure that its regulations regarding treatment of information as confidential and public summarization are followed and explain how CBP's decisions regarding confidential information and public summarization comply with those regulations.

Index

Customs Bulletin and Decisions
Vol. 56, No. 22, June 8, 2022

U.S. Customs and Border Protection
CBP Decisions

General Notices

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2022—419-479/80241