U.S. Customs and Border Protection

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE IMPORTATION OF GROW ACE'S PROPAGATION EQUIPMENT

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

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the importation of GrowAce's propagation equipment, including GrowAce Yield Lab Propagation Trays, Grow Ace Propagation Domes, the Grow Ace Air Duct Fan Vent System, and the Grow Ace 6 Inch Purifier Activated Charcoal Filter.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning the importation of GrowAce's propagation equipment. Comments on the correctness of the proposed actions are invited.

EFFECTIVE DATE: This action is for merchandise entered or withdrawn from warehouse for consumption on or after July 24, 2022.

FOR FURTHER INFORMATION CONTACT: Janelle Gordon, Cargo Security, Carriers & Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, at (202) 325–0087.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section

484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the Customs Bulletin, Vol. 56, No. 11 on March 23, 2022, proposing to revoke one ruling letter pertaining to the importation of GrowAce propagation equipment. 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 revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ H321671, dated November 5, 2021, CBP determined that the GrowAce propagation equipment was drug paraphernalia" pursuant to 21 U.S.C. § 863 and therefore prohibited from importation into the United States. CBP has reviewed HQ H321671 and has determined the ruling letter to be in error. It is now CBP's position that the subject propagation equipment is not drug paraphernalia.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke HQ H321671 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed H322151, set forth as Attachment A 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.

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

Dated:

CHARLES R. STEUART,
Director
Border Security &Trade Compliance Division

Attachment

HQ H322151

May 3, 2022

OT: RR: BSTC: CCR H322151 JLG

PAUL S. ANDERSON
THE ANDERSON LAW FIRM, LLC
111 BARCLAY BOULEVARD, SUITE 206
LINCOLNSHIRE, IL 60069

Re: Reconsideration of HQ H321671 (November 5, 2021); Niche Webstores, Inc. d/b/a GrowAce; propagation equipment; 21 U.S.C. § 863

DEAR MR. ANDERSON: :

This is in response to your November 22, 2021, correspondence on behalf of Niche Websters, Inc. (Niche) and its division GrowAce, in which you request a reconsideration of ruling HQ H322151 (November 5, 2021) filed pursuant to 19 C.F.R. § 177 et. seq.[1] Our decision follows.

FACTS:

The facts outlined in HQ H322151 are incorporated herein by reference and will not be repeated. However, briefly stated, on October 6, 2021, Niche, operating under the trade name GrowAce, requested a binding ruling regarding the correct tariff classification of four horticultural products it plans to import. The products at issue in the ruing request were: GrowAce's Yield Lab Propagation Trays, Propagation Domes, the Air Duct Fan Vent System, and the 6 Inch Purifier Activated Charcoal Filter. This office did not determine the tariff classification, because we found the products were inadmissible as drug paraphernalia pursuant to 21 U.S.C. § 863.

The products at issue are as follows:

(1) GrowAce Yield Lab 10x20-inch Propagation Tray[2]

(2) GrowAce Yield Lab 7-inch Propagation Dome[3]

[1] In your request for reconsideration, you have asked this office for "confidential treatment" of certain data analytics regarding GrowAce's website and YouTube traffic and the practices of its users. If this office receives a Freedom of Information Act request for your submission, pursuant to U.S. Custom and Border Protection ("CBP") regulations in 19 C.F.R. § 103.35 et. seq., regarding the disclosure of business information CBP will provide business submitters with prompt written notice of receipt of FOIA requests or appeals that encompass their commercial information provided the business submitter has in good faith designated the information as commercially or financially sensitive information. We accept your request for confidential treatment as a good faith request.

[2] *https://growace.com/products/yield-lab-10-x-20-inch-propagation-tray-5-pack* (last visited December 30, 2021).

[3] *https://growace.com/products/yield-lab-7-inch-propagation-domes-5-pack* (last visited December 30, 2021).

(3) GrowAce Yield Lab 6-inch 440 CFM Air Duct Fan Vent System[4]

(4) Yield Lab 6 Inch Purifier Activated Charcoal Filters[5]

ISSUE:

Whether GrowAce's Yield Lab Propagation Trays, Yield Lab Propagation Domes, Yield Lab Air Duct Fan Vent Systems, and Yield Lab 6 Inch Purifier Activated Charcoal Filters are drug paraphernalia as defined in 21 U.S.C. § 863, such that they are prohibited from entry into the United States.

LAW AND ANALYSIS:

The Federal Drug Paraphernalia Statute, 21 U.S.C. § 863, which is part of the Controlled Substances Act ("CSA") defines drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance."[6] Thus, Section 863(d) identifies two categories of drug paraphernalia: items "primarily intended" for use with controlled substances and items "designed for use" with such substances.

---

[4] *https://growace.com/products/yield-lab-6-inch-440-cfm-air-duct-fan-vent-system* (last visited December 30, 2021).

[5] *https://growace.com/products/yield-lab-6-inch-purifier-activated-charcoal-filter* (last visited December 30, 2021).

[6] 21 U.S.C. § 863(d) (emphasis added).

The U.S. Supreme Court examined the meaning of "drug paraphernalia" pursuant to 21 U.S.C. § 863 in *Posters 'N' Things v. United States*, 511 U.S. 513 (1994), and considered both the "primarily intended for use" and "designed for use" categories. The Court concluded that the "primarily intended for use," category should be analyzed objectively and refers generally to an item's likely use[7]. In addition, the Court noted that this phrase "is a relatively particularized definition, reaching beyond the category of items that are likely to be used with drugs by virtue of their objective features."[8]. The Court also stated that "it is the likely use of customers generally, not any particular customer, that can render a multiple-use item drug paraphernalia."[9] Therefore, items having multiple possible uses may constitute drug paraphernalia for purposes of 21 U.S.C. § 863 if the *likely use* by customers of the seller of the items is for use with illegal drugs.[10]

With respect to the "designed for use" category, the Court referred to its decision in *Village of Hoffman Estates et al v. The Flipside, Hoffman Estate, Inc.*, 455 U.S. 489 (1982), where it stated that this standard should also be understood objectively as it refers to an item's objective characteristics.[11] The Court opined that "[a]n item is 'designed for use'...if it 'is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer....The objective characteristics of some items establish that they are designed specifically for use with controlled substances. Such items, including bongs, cocaine freebase kits, and certain kinds of pipes, have no other use besides contrived ones (such as use of a bong as a flower vase). Items that meet the 'designed for use' standard constitute drug paraphernalia irrespective of the knowledge or intent of one who sells or transports them."[12]

As stated in HQ H321671, the four products at issue are not "designed for use" with controlled substances as it is evident that the physical characteristics of the items are nor per se fashioned for use with drugs. Therefore, this determination addresses whether the products are "primarily intended for use" in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing a controlled substance into the human body. As previously discussed, the "primarily intended for use" test considers the stated purpose of multiple-use items while examining whether the "likely use of customers generally . . . can render a multiple-use item drug paraphernalia." Therefore, we consider the factors in 21 U.S.C. § 863(e) in determining whether an item constitutes drug paraphernalia, including "descriptive materials accompanying the item which explain or depict its use," "national and local advertising concerning its use," "the manner in which the item is displayed for sale," and the "existence and scope of legitimate uses of the item in the community."[13] We will also determine whether any exemption in 21 U.S.C. 863(f) applies.

---

[7] *Posters 'N' Things*, 511 U.S. 513, 521 (1994).

[8] *Id.* at 521 n.11.

[9] *Id.* at 521 n.11.

[10] *Id*.

[11] *Village of Hoffman Estates et al v. The Flipside, Hoffman Estate, Inc.*, 455 U.S. 489, 501 (1982).

[12] *See Id*.

[13] 21 U.S.C. § 863(e).

In your November 22, 2021, correspondence, you assert that CBP's application of certain factors in 21 U.S.C. § 863(e) was incorrect resulting in the wrongful determination that GrowAce products are primarily intended to produce controlled substances because its website advertises "100% discreet shipping" for all of its products, its activated charcoal filter purifier is advertised as the "most effective way to eliminate odors," and its YouTube page features "fonts and graphics reminiscent of marijuana" and a "Grow 420 Guide" video under its "Partners and Collaborators" tab. You present the following arguments to rebut CBP's determination.

Discreet Shipping

You argue that advertising 100% discreet shipping for GrowAce products is not an indication that GrowAce is shipping illicit substances, or products intended to be used with illicit substances, as CBP alleges. Rather, you assert that as a company that is primarily engaged in e-commerce with products shipped directly to customers without signature confirmation or in-home delivery, GrowAce uses discreet and inconspicuous packaging to decrease the amount of package thefts. To support this argument, you submit the results of C+R Research's "2020 Package Theft Statistics Report," which found that 43% of polled respondents have had a package stolen in 2020, compared to 36% in 2019.[14] You also provide screenshots of common household items sold on Amazon's website with warning notifications indicating when products will not be packaged in a discreet manner. Specifically, the notifications state: "Item arrives in packaging that shows what's inside. To hide it, choose Ship Amazon packaging." Because the discreet shipping advertisement may be misinterpreted, you state that you have removed this notice from GrowAce's site and plan to display a warning regarding plain packaging similar to Amazon's warning.

Removal of Odors

You argue that in HQ H321671, CBP did not provide an accurate and complete impression of the purification benefits of activated charcoal filters because the ruling included only a partial quote from GrowAce's website regarding the elimination of odors. You also claim that CBP incorrectly determined that most plants grown indoors do not emit a strong odor like marijuana; therefore, the Yield Lab 6 inch Activated Charcoal Filter is not necessary for any other plant except marijuana.

You provide the complete quote from GrowAce's website, which states that "The grow room filter is the most effective way to eliminate odors, filter particulates, and purify the air to provide both you and your plants with a clean and fresh environment." You point out that GrowAce's website does not emphasize odor removal over the other features of the filter, thus it was inappropriate for CBP to take this advertisement out of context and create a connection to marijuana. Moreover, you claim that most worthwhile air filters on the market generally claim to remove odors and are likely not considered drug paraphernalia. An example of a high-quality air filter advertised as effective in removing odors, among other things was included in support of this argument.

---

[14] *www.crresearch.com/blog/2020-package-theft-statistics-report* (last visited January 2, 2022).

Next, you provide articles from the University at Albany[15] and HortiDaily.com[16] to support your claim that most plants produce strong smells as part of their natural defense system against pests, such as the tomato plant, a popular plant grown indoors, and that a carbon filter is beneficial for healthy indoor vegetable and herb gardens. You maintain that one of the primary advantages to growing vegetables and herbs indoors compared to outdoors, is to have full control over the growing environment. However, you caution that it is still imperative to have the cleanest and purest environment when growing indoors given that many indoor grows are in urban areas where plants can be negatively affected by pollutants that can come from things such as car smog, pet dander, oil and odor particles from cooking, mold, and mildew spores.[17] You state that the Activated Charcoal Filter is used for filtration of both incoming, outgoing, and recirculating air in order to remove odors, pathogens, disease-causing mold spores, bacteria and contaminants from entering from the outside environment into any grow room, which is not limited to marijuana plants.[18]

In further support of your argument, you provide a link of a YouTube video from Everest Fernandez of Urban Garden Magazine, an industry expert and educator in the indoor gardening who is well-regarded and well-known as someone who grows vegetables and herbs and does *not* grow or promote the cultivation of cannabis. In his YouTube video, titled *Carbon Scrubbers - Grow Room Scrubbing 1015*, Everest explains the benefit of using a carbon filter in a vegetable and herb indoor garden. He states, "if you are serious about having clean produce, you absolutely need a carbon scrubber in your life . . . you might well be surprised with how much dust is filtered over the course of a growing cycle. All that dust has the potential of getting stuck in your crop, especially if its resinous and can potentially give fungal spores a base to colonize"[19]. Everest further explains that carbon filters are effective in removing ethylene gas, which extends the ripening period and ultimately increases the yields of fruits and vegetables. You also warn that the odors from plants grown indoors with no filters can negatively affect those with allergies and other sensitivities.

Finally, you state that gardening applications, similar to the products at issue in this ruling, are sold by Amazon and Home Depot, reputable businesses that have long-standing restrictions[20] against the sale of drugs and drug paraphernalia, further demonstrating that these products are not used or intended for use with drugs. You provide an example of the HydroCrunch

---

[15] *https://www.albany.edu/news/66493.php* (last visited December 31, 2021).

[16] *https://www.hortidaily.com/article/9330447/why-do-tomato-plants-smell-like-that/* (last visited January 3, 2022).

[17] Niche Webstores/Grow Ace Request for Reconsideration, Exhibit 2. As an example, you also state that when "growing microgreens such as alfalfa, beets, kale, pea shoots and kohlrabi, there is a particular concern for mold, mildew, and fungus . . .[and] [w]ithout proper air flow and filtration, these mold spores will start to grow on the plant itself and ultimately ruin the entire crop."

[18] *Id*.

[19] *https://www.youtube.com/watch?v=hrKy2errkTw* (last visited December 31, 2021).

[20] *https://sellercentral.amazon.com/gp/help/external/help.html?itemID=200164490* (last visited January 3, 2022).

4-inch Ducting Hydroponic Ventilation Kit advertised for sale on Amazon,[21] as well as the HydroCrunch Centrifugal Inline Duct Fan System for Indoor Grow Room Ventilation advertised for sale on Home Depot's website[22].

GrowAce's YouTube Page

You argue that the GrowAce YouTube page channel does not market or advertise its products for use with marijuana as CBP claims. The "Grow 420 Guide" referenced in HQ H321671 with "fonts and graphics reminiscent of marijuana," as well as the video under GrowAce's "Partners and Collaborators" tab with a Grow 420 Guide account listed as part of "The Team" was completed by a separate company that is not owned or related to GrowAce. You also challenge CBP's claims that GrowAce does not have any videos on how to grow other plants and submit examples of three videos on GrowAce's YouTube account regarding indoor planting. The first video titled *Window Farm Installation Tutorial |DIY Window Hydroponics for Any Horticulture Garden*,[23] explains how to create a window farm " which can produce about a salad a week. The second and most recent video titled *Best LED Grow Light Bar and Stand for Clones, Germination, and Micro-green 2019*,[24] which is produced by GrowAce, clearly indicates in both the title and description that the video is about microgreen planting. The third video, *14W Advance Spectrum LED Grow Light Panels*,[25] GrowAce explains how the subject product is optimal for growing cucumbers, lettuce, and chrysanthemum plants.

In addition, you note that GrowAce has not actively managed or produced video content for its YouTube channel in years. You also provide data verifying that the number of people that visit and/or make a purchase on GrowAce website after viewing its YouTube channel is minimal.

Upon careful review of the record, including the additional arguments in your reconsideration request, we find that the four GrowAce products at issue are not drug paraphernalia as defined in 21 U.S.C. § 863. There is sufficient evidence establishing that the subject products sold on the GrowAce website are both primarily designed and intended for general gardening use. While it is possible that GrowAce customers may purchase these products to grow marijuana, there is adequate evidence to show that its customers are likely using these items for legitimate reasons, to grow plants, vegetables, and herbs. Specifically, there are no written or oral instructions with the products that refer to marijuana cultivation (21 U.S.C. § *863(e)(1)*), we found no descriptive materials included with the items that explain or depict the products' use with marijuana *(21 U.S.C. § 863(e)(2))*, and each of the four items are displayed for sale on GrowAce's website in a manner that is consistent for use with lawful products (21 U.S.C. § 863(e)(4)).

CBP research further reveals that a "discreet shipping" label is not always indicative of a shipment of illegal or suspicious products. Furthermore, our

---

[21] *https://www.amazon.com/Hydro-Crunch-Booster-Hydroponic-Ventilation/dp/B0759TV7V4/* (January 3, 2022).

[22] *https://www.homedepot.com/p/Hydro-Crunch-677-CFM-8-in-Centrifugal-Inline-Duct-Fan-with-8-in-Booster-Fan-Complete-System-for-Indoor-Grow-Room-Ventilation-VENTKIT-B08IN1/303726869* (last visited January 3, 2022).

[23] *https://www.youtube.com/watch?v=igWJ_8uq_y4&t=12s* (January 3, 2022).

[24] *https://www.youtube.com/watch?v=3pQmAFWMivU* (last visited January 3, 2022). .

[25] *https://www.youtube.com/watch?v=jK6DygqTYyM&t=70s* (last visited January 3, 2022).

research indicates that there are legitimate indoor gardening businesses that discuss the use of charcoal filters;[26] therefore, Activated Charcoal Filters sold by a legitimate garden supply or hydroponics company is not intrinsically used for illicit substances. As for GrowAce's YouTube page and channel, we determine that under these circumstances, the "Grow 420 Guide" under the "Partners & Collaborators" tab on the GrowAce YouTube channel is not significant given the data regarding the modest number of visitors to its channel and GrowAce's own lack of use of its YouTube channel.

DECISION:

In conformity with the foregoing, it is our position in the particular circumstances of the instant matter, that the record supports a finding that the subject merchandise, GrowAce's Yield Lab Propagation Trays, Yield Lab Propagation Domes, Yield Lab Air Duct Fan Vent Systems, and Yield Lab 6 Inch Purifier Activated Charcoal Filters, does not constitute drug paraphernalia pursuant to the statutory definition set forth in 21 U.S.C. § 863.

Sincerely,

CHARLES STEUART,
Director
Border Security and Trade Compliance Division
Regulations and Rulings Directorate
Office of Trade
U.S. Customs and Border Protection

PROPOSED REVOCATION OF A RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A TIMING CHAIN TENSIONER

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of a timing chain tensioner.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a timing chain tensioner under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treat-

[26] *See* https://gardensynthesis.com/how-to-clean-carbon-filters-for-grow-room/ (last visited January 3, 2022); *See* https://todaysgardener.com/how-long-do-carbon-filters-last/ (last visited January 3, 2022).

ment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before June 24, 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: Nataline Viray-Fung, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@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 a ruling letter pertaining to the tariff classification of a tensioner arm assembly. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N264870, dated June 1, 2015 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been

specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N264870, CBP classified a timing chain tensioner in heading 8708, HTSUS, specifically in subheading 8708.99.81, HTSUS, which provides for "Parts and accessories of motor vehicles of heading 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other." CBP has reviewed NY N264870 and has determined the ruling letter to be in error. It is now CBP's position that the timing chain tensioner is properly classified, in heading 8409, HTSUS, specifically in subheading 8409.91.50, HTSUS, which provides for "Parts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Suitable for use solely or principally with spark-ignition internal combustion piston engines (including rotary engines): Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N264870 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H316286, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N264870

June 1, 2015
CLA-2–87:OT:RR:NC:N1:106
CATEGORY: Classification
TARIFF NO.: 8708.99.8180

YOUNG-BIN OH
HYUNDAI MOTOR COMPANY
231, YANGJAE 2-DONG,
SEOCHO-GU, SEOUL
SOUTH KOREA

RE: The tariff classification of a tensioner assembly-timing chain from South Korea

DEAR YOUNG-BIN OH,

In your letter dated May 19, 2015, you requested a tariff classification ruling.

The item under consideration has been identified as a Tensioner Assembly-Timing Chain (Item Code 244102E000). In your request, you state that the Tensioner Assembly-Timing Chain is used to manually open and close the air intake and exhaust valves of an automobile engine. The cam shaft is operated by the timing chain. With the continued use of the timing chain, it is gradually stretched, and the opening and closing time of the valve will be changed accordingly. Therefore, to prevent this from happening, the tensioner is needed to control the tension automatically. By controlling the tension of the timing chain, it performs a dampening function, maintaining the stretched chain stable during the operation by controlling the tension of the timing chain. The Tensioner Assembly-Timing Chain contains an aluminum housing, a locking pin and a tension unit. The tension unit consists of a steel housing, a spring, a rachet ring and a plunger.

The applicable subheading for the Tensioner Assembly-Timing Chain (Item Code 244102E000) will be 8708.99.8180, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Parts and accessories of motor vehicles of heading 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other: Other." The general rate of duty will be 2.5%.

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, please contact National Import Specialist Matthew Sullivan at *matthew.sullivan@cbp.dhs.gov*.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H316286
CLA-2 OT:RR:CTF:EMAIN H316286 NVF
CATEGORY: Classification
TARIFF NO.: 8409.91.50

YOUNG-BIN OH
HYUNDAI MOTOR COMPANY
231, YANGJAE 2-DONG,
SEOCHO-GU, SEOUL
SOUTH KOREA

RE: Revocation of NY N264870; Timing chain tensioner

DEAR YOUNG-BIN OH:

This ruling is in reference to New York Ruling Letter ("NY") N264870, dated June 1, 2015, regarding the classification of a timing chain tensioner under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N264870, U.S. Customs and Border Protection ("CBP") classified the timing chain tensioner in subheading 8708.99.81, HTSUS, which provides for, "Parts and accessories of motor vehicles of heading 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other." Upon reconsideration, CBP has determined that NY N264870 is in error.

FACTS:

In NY N264870 the subject merchandise is described as used to control the tension in a timing chain and consisting of a steel housing, a spring, a rachet ring and a plunger. In controlling the tension of the timing chain, the tensioner performs a dampening function, maintaining the stability of stretched chain during operation. In NY N264870, CBP classified the timing chain assembly in subheading 8708.99.81, HTSUS as a part of a motor vehicle.

ISSUE:

Whether the timing chain tensioner is classified as a part of an engine under heading 8409, HTSUS, or as a part of a motor vehicle under heading 8708, HTSUS.

LAW AND ANALYSIS:

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

The HTSUS subheadings under consideration are as follows:

8409 Parts suitable for use solely or principally with the engines of heading 8407 or 8408

8708 Parts and accessories of the motor vehicles of headings 8701 to 8705

Note 2(e) to Section XVII, which includes Chapter 87, states in pertinent part that:

> The expressions "parts" and "parts and accessories" do not apply to the following articles, whether or not they are identifiable for the goods of this section: Machines or apparatus of headings 8401 to 8479, or parts thereof, other than the radiators for the articles of this section.

Therefore, before we can classify the timing chain tensioner under heading 8708, we must first determine whether it is classified under heading 8409 as a part of an engine.

The term "part" is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct but reconcilable tests for determining whether a particular item qualifies as a part for tariff classification purposes. *See Bauerhin Technologies Limited Partnership, & John V. Carr & Son, Inc. v. United States*, 110 F.3d 774 (Fed. Cir. 1997). Under the first test, articulated in *United States v. Willoughby Camera Stores*, 21 C.C.P.A. 322 (1933), an imported item qualifies as a part only if can be described as an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Bauerhin*, 110 F.3d at 779. Pursuant to the second test, set forth in *United States v. Pompeo*, 43 C.C.P.A. 9 (1955), a good is a "part" if it is "dedicated solely for use" with a particular article and, "when applied to that use...meets the Willoughby test." *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int'l Trade 1999) (holding that a purported part must satisfy both the *Willoughby* and *Pompeo* tests). An item is not a part if it is "a separate and distinct commercial entity." *Bauerhin*, 110 F.3d at. 779.

For tariff classification purposes, a spark-ignition internal combustion engine of heading 8407 consists only of certain components. *See* HQ 963386 (June 16, 1999) (accelerator and throttle cables are not part of an engine). The primary components of an engine of heading 8407 generally consist of: a cylinder, piston, connecting-rod, crankshaft, flywheel, inlet and exhaust valves. In order for an engine to function, the piston compresses a mixture of air and fuel in the cylinder and the fuel mixture ignites inside the cylinder. Thus, parts of engines of heading 8407 are limited to the components that directly contribute to the function of internal combustion.

In this case, you state that the cam shaft in an engine is used to manually open and close the air intake and exhaust valves of an automobile engine, and that the cam shaft is operated by the timing chain. With the continued use of the timing chain, it is gradually stretched, and the opening and closing time of the valve will be changed accordingly, eventually causing engine failure. To prevent this from happening, the tensioner is needed to control the tension of the timing chain and prevent it from causing engine failure. Therefore, the timing chain tensioner is an integral, constituent part of an engine of heading 8407. If the timing chain does not function properly, power cannot be transferred to the camshafts in the precise ratio that is required.[*] Similarly, without the precise functioning of the timing chain, the engine valves will not open and close properly and the engine will fail. Without the timing chain tensioner, the timing chain cannot function, and the engine cannot properly ignite the fuel mixture inside the cylinder. Therefore, the timing chain tensioner is a part of an engine of heading 8407.

[*] A timing chain performs the same function as a timing belt but is made of metal rather than rubber.

In light of the foregoing, we find that the timing chain tensioner is classified under heading 8409 as a part of an engine and is therefore excluded from classification under heading 8708 by operation of Note 2(e) to Section XVII, *supra*.

HOLDING:

By application of GRIs 1 and 6, the timing chain tensioner is classified in heading 8428, subheading 8409.91.50, HTSUS which provides for "Parts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Suitable for use solely or principally with spark-ignition internal combustion piston engines (including rotary engines): Other: Other." The column one, general rate of duty is 2.5% *ad valorem*.

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

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

Sincerely,

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF A RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A TENSIONER ARM ASSEMBLY

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of a tensioner arm assembly.

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

DATE: Comments must be received on or before June 24, 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: Nataline Viray-Fung, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at nataline.viray-fung@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 a ruling letter pertaining to the tariff classification of a tensioner arm assembly. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N264869, dated June 1, 2015 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice

memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N264869, CBP classified a tensioner arm assembly in heading 8708, HTSUS, specifically in subheading 8708.99.81, HTSUS, which provides for "Parts and accessories of motor vehicles of heading 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other." CBP has reviewed NY N264869 and has determined the ruling letter to be in error. It is now CBP's position that the tensioner arm assembly is properly classified, in heading 8409, HTSUS, specifically in subheading 8409.91.50, HTSUS, which provides for "Parts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Suitable for use solely or principally with spark-ignition internal combustion piston engines (including rotary engines): Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N264869 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H316285, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N264869

June 1, 2015
CLA-2–87:OT:RR:NC:N1:106
CATEGORY: Classification
TARIFF NO.: 8708.99.8180

YOUNG-BIN OH
HYUNDAI MOTOR COMPANY
231, YANGJAE 2-DONG,
SEOCHO-GU, SEOUL
SOUTH KOREA

RE: The tariff classification of a tensioner arm assembly-timing chain from South Korea

DEAR YOUNG-BIN OH,

In your letter dated May 19, 2015, you requested a tariff classification ruling.

The item under consideration has been identified as a Tensioner Arm Assembly-Timing Chain (Item Code 24420–2G101). In your request, you state that the Tensioner Arm Assembly-Timing Chain is attached to the timing chain which maintains its constant and regular orbit. As one end of the item is fixed to an automobile engine with a bolt, the other end of the item transmits pressure from the timing tensioner to chain and maintains its tension. The Tensioner Arm Assembly-Timing Chain contains a shoe which is made of plastic and attached to the timing chain directly. It prevents the chain from getting off of its track. The Tensioner Arm Assembly-Timing Chain also contains a mold base which is also made of plastic. It is fixed to the engine with bolts and attached to the timing tensioner.

The applicable subheading for the Tensioner Arm Assembly-Timing Chain (Item Code 24420–2G101) will be 8708.99.8180, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Parts and accessories of motor vehicles of heading 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other: Other." The general rate of duty will be 2.5%.

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, please contact National Import Specialist Matthew Sullivan at *matthew.sullivan@cbp.dhs.gov*.

Sincerely,

GWENN KLEIN KIRSCHNER
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H316285
CLA-2 OT:RR:CTF:EMAIN H316285 NVF
CATEGORY: Classification
TARIFF NO.: 8409.91.50

YOUNG-BIN OH
HYUNDAI MOTOR COMPANY
231, YANGJAE 2-DONG,
SEOCHO-GU, SEOUL
SOUTH KOREA

RE: Revocation of NY N264869; Tensioner Arm Assembly

DEAR YOUNG-BIN OH:

This ruling is in reference to New York Ruling Letter ("NY") N264869, dated June 1, 2015, regarding the classification of a tensioner arm assembly under the Harmonized Tariff Schedule of the United States ("HTSUS"). In NY N264869, U.S. Customs and Border Protection ("CBP") classified the tensioner arm assembly in subheading 8708.99.81, HTSUS, which provides for, "Parts and accessories of motor vehicles of heading 8701 to 8705: Other parts and accessories: Other: Other: Other: Other: Other." Upon reconsideration, CBP has determined that NY N264869 is in error.

FACTS:

In NY N264869 the subject merchandise is described as comprising of a plastic shoe and base which together attach to the timing chain and maintain its constant and regular orbit. One end of the item is fixed to an automobile engine with a bolt, the other end of the item transmits pressure from the timing tensioner to chain and maintains its tension. The shoe is attached to the timing chain directly and prevents the chain from getting off of its track. The mold base is fixed to the engine with bolts and attaches to the timing tensioner. In NY N264869, CBP classified the timing chain assembly in subheading 8708.99.81, HTSUS as a part of a motor vehicle.

ISSUE:

Whether the tensioner arm assembly is classified as a part of an engine under heading 8409, HTSUS, or as a part of a motor vehicle under heading 8708, HTSUS.

LAW AND ANALYSIS:

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

The HTSUS subheadings under consideration are as follows:

8409 Parts suitable for use solely or principally with the engines of heading 8407 or 8408

8708 Parts and accessories of the motor vehicles of headings 8701 to 8705

Note 2(e) to Section XVII, which includes Chapter 87, states in pertinent part that:

> The expressions "parts" and "parts and accessories" do not apply to the following articles, whether or not they are identifiable for the goods of this section: Machines or apparatus of headings 8401 to 8479, or parts thereof, other than the radiators for the articles of this section.

Therefore, before we can classify the tensioner arm assembly under heading 8708, we must first determine whether it is classified under heading 8409 as a part of an engine.

The term "part" is not defined in the HTSUS. In the absence of a statutory definition, the courts have fashioned two distinct but reconcilable tests for determining whether a particular item qualifies as a part for tariff classification purposes. *See Bauerhin Technologies Limited Partnership, & John V. Carr & Son, Inc. v. United States*, 110 F.3d 774 (Fed. Cir. 1997). Under the first test, articulated in *United States v. Willoughby Camera Stores*, 21 C.C.P.A. 322 (1933), an imported item qualifies as a part only if can be described as an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Bauerhin*, 110 F.3d at 779. Pursuant to the second test, set forth in *United States v. Pompeo*, 43 C.C.P.A. 9 (1955), a good is a "part" if it is "dedicated solely for use" with a particular article and, "when applied to that use...meets the Willoughby test." *Bauerhin*, 110 F.3d at 779 (citing *Pompeo*, 43 C.C.P.A. at 14); *Ludvig Svensson, Inc. v. United States*, 63 F. Supp. 2d 1171, 1178 (Ct. Int'l Trade 1999) (holding that a purported part must satisfy both the *Willoughby* and *Pompeo* tests). An item is not a part if it is "a separate and distinct commercial entity." *Bauerhin*, 110 F.3d at. 779.

For tariff classification purposes, a spark-ignition internal combustion engine of heading 8407 consists only of certain components. *See* HQ 963386 (June 16, 1999) (accelerator and throttle cables are not part of an engine). The primary components of an engine of heading 8407 generally consist of: a cylinder, piston, connecting-rod, crankshaft, flywheel, inlet and exhaust valves. In order for an engine to function, the piston compresses a mixture of air and fuel in the cylinder and the fuel mixture ignites inside the cylinder. Thus, parts of engines of heading 8407 are limited to the components that directly contribute to the function of internal combustion.

In this case, the tensioner arm assembly is an integral, constituent part of an engine of heading 8407. If the timing chain does not function properly, power cannot be transferred to the camshafts in the precise ratio that is required.[*] Similarly, without the precise functioning of the timing chain, the engine valves will not open and close properly and the engine will fail. The tensioner arm shoe holds the timing chain in place and in addition to enabling the timing chain to function, also prevents it from coming into direct contact the engine block or the engine head. The base of the tensioner arm assembly connects the shoe to the engine. Without the tensioner arm assembly, the timing chain cannot function, and the engine cannot properly ignite the fuel mixture inside the cylinder. Therefore, the tensioner arm assembly is a part of an engine of heading 8407.

[*] A timing chain performs the same function as a timing belt but is made of metal rather than rubber.

In light of the foregoing, we find that the tensioner arm assembly is classified under heading 8409 as a part of an engine and is therefore excluded from classification under heading 8708 by operation of Note 2(e) to Section XVII, *supra*.

HOLDING:

By application of GRIs 1 and 6, the tensioner arm assembly is classified in heading 8428, subheading 8409.91.50, HTSUS which provides for "Parts suitable for use solely or principally with the engines of heading 8407 or 8408: Other: Suitable for use solely or principally with spark-ignition internal combustion piston engines (including rotary engines): Other: Other." The column one, general rate of duty is 2.5% *ad valorem*.

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

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

Sincerely,

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

DOCUMENT IMAGING SYSTEM (DIS) PILOT FOR USED SELF-PROPELLED VEHICLES EXPORT DOCUMENT SUBMISSION

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) plans to conduct a pilot to promote paperless processing of export documentation for used self-propelled vehicles (USPVs). Generally, USPVs include any vehicle that can be driven on land but not rail. The CBP regulations require a person attempting to export a USPV to present original vehicle ownership documentation to CBP at the port of exportation. In an effort to expedite and modernize the document submission and review process, CBP will be operating a voluntary pilot in which participants will submit the required vehicle ownership documentation to CBP electronically via the Document Imaging System (DIS). This voluntary pilot will evaluate the feasibility of using the DIS for the purpose of obtaining and reviewing vehicle ownership documentation for USPVs. This notice includes a description of the pilot, the eligibility requirements for participation, and invites public comment on any aspect of the pilot.

DATES: This voluntary pilot will begin no earlier than June 9, 2022 and will run for approximately two years. The pilot will apply to the export of all USPVs regardless of the mode of transportation. Implementation of the pilot for each mode of transportation and/or port participation will be staggered and will be announced to the public through the Cargo Systems Messaging Service (CSMS).[1] The CSMS message will include the start date for accepting ownership documentation via the DIS. Comments concerning this notice and all aspects of the announced pilot may be submitted at any time during the pilot period.

ADDRESSES: Interested parties should contact their local CBP vehicle export processing office and express their interest and intent to participate in the DIS pilot. Written comments concerning the program, policy, and technical issues may be submitted at *UsedVehicleDISTEST@cbp.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Stephan Keating, Cargo and Conveyance Security (CCS), Office of Field Operations (OFO), U.S. Customs and Border Protection, at 202–344–2847 or via email at *Stephan.D.Keating@cbp.dhs.gov* and David Garcia, Cargo and Conveyance Security (CCS), OFO, CBP at *David.USCS.Garcia@cbp.dhs.gov* and 202–344–3277.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose of the Pilot

A. Current Requirements for Export of Used Self-Propelled Vehicles

In 1984, Congress enacted the Motor Vehicle Theft Enforcement Act, Public Law 98–547, 98 Stat. 2754 codified at 19 U.S.C. 1627a (1984 Act), which makes it unlawful to import or export, or attempt to import or export, any stolen self-propelled vehicle, vessel, or aircraft. Pursuant to the 1984 Act, the Department of Homeland Security is authorized to promulgate regulations for the export of used self-propelled vehicles. The 1984 Act allows CBP to share relevant information with such Federal, State, local, and foreign law enforcement or governmental authorities, and with such organizations engaged in theft prevention activities, as may be designated by the Secretary.

In 1992, Congress imposed additional requirements on the export of used vehicles, with the enactment of the Anti Car Theft Act, Public Law 102–519, 106 Stat. 3400, codified at 19 U.S.C. 1646b—1646c (1992 Act). The 1992 Act requires all persons or entities exporting

[1] Archived public CSMS messages can be accessed at: *https://www.cbp.gov/trade/automated/cargo-systems-messaging-service.*

used automobiles, by air or vessel, including automobiles exported for personal use, to provide CBP with certain information including the Vehicle Identification Number (VIN) and proof of ownership of the vehicle at least 72 hours prior to exportation. The 1992 Act authorizes the Commissioner of CBP to establish risk-based targeting criteria for automobiles being exported, and to check the VIN of targeted automobiles against the information in the National Crime Information Center (NCIC) to determine whether the vehicle has been reported stolen. *See* 19 U.S.C. 1646c.

The implementing regulations for the above statutes are set forth in part 192 of title 19 of the Code of Federal Regulations (19 CFR part 192). Among other things, part 192 includes regulations pertaining to procedures for the lawful exportation of USPVs. In general, a self-propelled vehicle is any vehicle that can be driven on land but not on rail. Specifically, 19 CFR 192.1 defines *self-propelled vehicle* as any automobile, truck, tractor, bus, motorcycle, motor home, self-propelled agricultural machinery, self-propelled construction equipment, self-propelled special use equipment, and any other self-propelled vehicle used or designed for running on land but not on rail. Section 192.1 defines *used* as any self-propelled vehicle the equitable or legal title to which has been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser. Finally, section 192.1 defines *export* as the transportation of merchandise out of the U.S. for the purpose of being entered into the commerce of a foreign country.

19 CFR 192.2 requires that in the case of a vehicle being exported by vessel or aircraft, both the required documentation describing the vehicle and the vehicle must be presented to CBP at least 72 hours prior to export, and in the case of a vehicle being exported at a land border crossing (by rail, highway, or under its own power), the required documentation must be submitted at least 72 hours prior to export, and the vehicle must be presented at the time of export. The required documentation includes the VIN or, if the vehicle does not have a VIN, the product information number (PIN). Section 192.2(b) specifies the type of documents that must be submitted in different circumstances. Exportation of a vehicle is permitted only upon compliance with these requirements unless, as per section 192.2(a), the vehicle was entered into the United States under an in-bond procedure, or under a carnet or Temporary Importation Bond (TIB). Such vehicles are exempt from these requirements.

B. Authorization for the Pilot

The test described in this notice is authorized pursuant to 19 CFR 101.9(a), which grants the Commissioner of CBP the authority to

impose requirements different from those specified in CBP regulations for purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise.

C. Purpose of Pilot

CBP is implementing this voluntary Document Imaging System (DIS) pilot in order to expedite and modernize the document submission and review process for the export of used self-propelled vehicles.

During Fiscal Years 2018–2020, there was an annual average of 1.4 million, used self-propelled vehicles exported from the United States. Under the current regulatory export procedures, the person who is attempting to export a used self-propelled vehicle must present to CBP both the vehicle and specified paper documents. This paper process is a drain on limited CBP staffing resources at ports with significant traffic because it requires CBP to devote numerous hours to review vehicle export paperwork.

The pilot will allow CBP to test the mechanisms through which the required documentation may be submitted electronically, as a preliminary step towards moving to a more automated and efficient export reporting system for export of used self-propelled vehicles. Having the required documentation available electronically will enable CBP to institute better risk-based targeting of exports. This will be accomplished by making electronic document and information submission the primary means for meeting export reporting requirements and reserving field inspection of vehicles and examination of original ownership documentation only for cases where targeting and risk assessment have identified a need for additional scrutiny. The receipt of the electronic ownership documentation will also improve CBP's ability to target and identify high-risk vehicle exports predeparture while facilitating the process for legitimate exportation through a more streamlined and efficient port procedure. Considering the high volume of vehicle exports, it is expected that the electronic submission of the required documentation will have a significant impact on the speed and efficiency of vehicle export processing. The pilot will allow CBP to assess the effectiveness of these procedures and will allow the agency to test the functionality of the systems required for electronic submission. The results of the pilot will help CBP determine whether to eventually require through rulemaking the electronic submission of vehicle ownership documentation using the DIS.

II. Description of Pilot

In this voluntary pilot, participants will submit the required ownership documentation as set forth in 19 CFR part 192 through the DIS in ACE, using either the Electronic Data Interchange (EDI) via an Approved Broker Interface (ABI), or via email (at *docs@cbp.dhs.gov*). Participants will be required to submit the documentation in accordance with existing regulatory timeframes depending on the mode of export.[2] Participation in the pilot will not alter the requirements for presentation of the vehicle to CBP. *See* 19 CFR 192.2(c), (d).

Under the pilot, the electronically submitted documents will be linked to the Electronic Export Information (EEI)[3] filing in the Automated Export System (AES) via the Internal Transaction Number (ITN) generated at the time of the EEI submission. Participants will be required to transmit a valid ITN number to CBP with the DIS submission. Participants will have to submit EEI prior to submitting the vehicle documents to DIS. CBP will request original documentation and conduct a physical examination of the vehicle when necessitated by the results of targeting and risk assessment.

The sections below describe the pilot, including specific instructions on how to participate in the pilot (section D), in more detail.

A. Procedures for the Export of Used Self-Propelled Vehicles Under the Pilot

As discussed in section I.A., 19 CFR 192.2 requires a person attempting to export a used self-propelled vehicle to present the vehicle and certain required documents at the port of exportation. The documentary requirements vary by type of vehicle,[4] and the timeframes for presenting the documents and vehicle vary by manner of export.[5] The DIS pilot changes only the *manner* in which the required documents are submitted to CBP. For pilot participants, CBP will waive

[2] For export by ocean or air, participants must submit the documents at least 72 hours prior to export, but only after the vehicle is delivered to the port in preparation for departure from the United States; for export by land or rail, participants must submit documentation 72 hours prior to arriving at the border for departure from the United States. 19 CFR 192.2(c).

[3] The Electronic Export Information (EEI) is required pursuant to the Census Foreign Trade Regulations (FTR). 15 CFR part 30, subpart E. 19 CFR part 192 also sets forth CBP's requirements pertaining to the Automated Export System (AES), implemented by FTR. The AES is the electronic system of record for collecting EEI from persons exporting goods from the United States to foreign countries. The EEI for all used self-propelled vehicles must be filed via AES regardless of value or country of destination 72 hours prior to export. 15 CFR 30.2(a)(1)(iv)(H), (b)(5).

[4] For example, U.S. titled vehicles, vehicles with title that evidences third-party ownership/claims, foreign titled vehicles, etc. *See* 19 CFR 192.2(b).

[5] *See* 19 CFR 192.2(c).

the requirement in 19 CFR 192.2 to present original physical copies of the documents and require the documents to be submitted electronically using the DIS (EDI or email) instead. However, CBP will retain the right to request original documents on an as-needed basis. All other requirements of 19 CFR part 192, including the requirement to present the vehicle, will remain unchanged.[6]

Pilot participants agree to provide via electronic means, and in accordance with timeframes that apply by mode of transportation, the documentation required under 19 CFR 192.2. Pilot participants agree to submit the documentation required for the export of used self-propelled vehicles via the DIS, using either the EDI via an approved ABI or by submitting the documents in PDF format to the email address *docs@cbp.dhs.gov.* Participants will receive an automated response in the format in which the required documents were submitted, EDI or email, confirming that the document submission was received.[7] The participants will be able to use the automated response together with the AES-generated ITN to show that they complied with CBP's reporting requirements. The documentation submitted via the DIS will be used by CBP to review and process vehicles pending export to ensure compliance with U.S. laws and regulations. CBP reserves the right to request original (paper) documentation at any time. Consequently, pilot participants must continue to have access to the documentation in its original form for the entire time from submission to clearance by CBP, in the same manner as required by 19 CFR part 192.

For vehicles to be transported by ocean or air, the required documents must be submitted at least 72 hours prior to export, and only after the vehicle is delivered to the port in preparation for departure from the United States. For vehicles to be transported by land or rail, the documents must be submitted 72 hours prior to the vehicle's arriving at the border for departure from the United States. These are the same timeframes that apply under the current regulations, and CBP anticipates that these timeframes will provide adequate time for CBP to perform proper risk assessment, while minimizing disruption to the flow of goods. Consistent with current standard

[6] The pilot does not change the specific documents required for any particular type of vehicle, nor does it change the timeframes by which the documentation must be submitted. The pilot also does not change the requirement to present the vehicle to CBP, as set forth in 19 CFR 192.2(c) and (d). 19 CFR part 192 exempts certain categories of vehicles from the EEI filing requirement of the Census Foreign Trade Regulations (15 CFR part 30, subpart E). The EEI filing requirements remain unchanged under this pilot.

[7] This is different from the current process whereby CBP ports of export stamp the original documentation provided by the exporter and the exporter then uses the stamped documentation as evidence that CBP cleared the vehicle prior to departure from the United States.

operational procedures, the inspections could potentially take place at any time prior to departure from the United States.

Pilot participants agree to adhere to established operational security protocols that correspond to their local CBP vehicle export processing office. Pilot participants also agree to participate in any teleconferences or meetings called by CBP, to ensure that any challenges, or operational or technical issues regarding the pilot are properly communicated and addressed.

Participation in the pilot does not alter participants' obligations to comply with any other applicable statutory or regulatory requirements. Participants will continue to be subject to applicable penalties for non-compliance. In addition, submission of documentation using the DIS under the pilot does not exempt the participant from any CBP or other U.S. Government agency program requirements or any statutory sanctions in the event that a violation of U.S. export control laws occurs or prohibited articles are discovered with a vehicle presented for export from the United States.

B. Duration and Scope of Pilot

Participants must be individually approved by CBP in order to participate in the pilot, and the pilot may be limited to a single or small number of ports until any operational, training, or technical issues on the trade or government side are established and/or resolved. The start date for the pilot will be no earlier than June 9, 2022. Implementation of the pilot for each mode of transportation and/or participating port will be staggered and will be announced to the public through the CSMS. The CSMS message will include the start date for accepting ownership documentation via the DIS. The pilot will run for approximately two years from the start date.

C. Eligibility Requirements

Eligibility is limited to parties who are responsible for submitting the documentation required by 19 CFR 192.2 as part of the export transaction and who have access to the ITN for the AES commodity filing. In addition, participants must agree to submit the required documentation via the DIS, as described above.

D. Application Process and Acceptance

Parties interested in participating in this pilot should, as a preliminary matter, submit a request to receive *Export* updates via the CSMS. Requests may be made at *https://www.cbp.gov/trade/automated/cargo-systems-messaging-service.* The CSMS will be used to provide pilot participants with technical and operational updates

and guidance throughout the pilot, and may be used to announce technical, non-substantive changes to the pilot. CBP will utilize the CSMS to announce the implementation of the pilot for each mode of transportation and/or participating port. Only once the pilot has been extended to their mode of transportation and participating port, will an interested party be able to participate in the pilot.

Once the pilot has been implemented for their mode of transportation and port, interested parties should then contact their local CBP vehicle export processing office and express their interest and intent to participate in the DIS pilot. Detailed instructions for participation in the pilot can be found in the DIS Instructional Guide for the Exportation of Used Self-Propelled Vehicles located on the CBP website, at *https://www.cbp.gov/trade/basic-import-export/export-docs/motor-vehicle.* There is no specific application for participation in the pilot. However, interested participants must communicate their interest and intent to the relevant port before taking any other action. The port will further direct potential pilot participants. Prospective participants will be asked to submit the first submission of ownership documents and contact their local CBP vehicle processing office to verify that their first transmission of ownership documents is successful, prior to being granted participation in the pilot. Once this review and verification is complete, participants will be permitted to participate fully in the pilot.

Participation in the pilot is open to all eligible parties that have been approved to participate, subject to the discretion of the Port Director at the port from which parties intend to export the USPVs.

E. Technical Specifications

Ownership documents must be submitted via the DIS, either using the EDI via an approved ABI or via email at *docs@cbp.dhs.gov,* in a PDF format up to 10MB. Detailed instructions for participation in the pilot can be found in a document named DIS Instructional Guide for the Exportation of Used Self-Propelled Vehicles located on the CBP website, at *https://www.cbp.gov/trade/basic-import-export/export-docs/motor-vehicle.*

F. Costs to Pilot Participants

Participants are responsible for all costs incurred as a result of their participation in the pilot.

G. Benefits to Pilot Participants

While the benefits to individual pilot participants may vary, advantages to joining in the pilot include:

- Reducing the costs associated with paper processing;
- Expediting review and release of USPVs by CBP;
- Providing input into CBP's efforts to establish, test and refine the interface between government and industry communication systems in order to enable paper-free processing of USPV export requirements;
- Facilitating corporate preparedness for possible future mandatory implementation of electronic submission of documentation using the DIS; and
- Facilitating the efficient processing of legitimate USPV exports across all modes of transportation.

H. Evaluation of the Pilot

While the pilot is ongoing, CBP will evaluate the effectiveness of using the DIS and will determine if any extensions or modifications are needed. Technical modifications will be announced using the CSMS. Any substantive changes to the pilot, including extensions, will be announced in the **Federal Register**.

The results of the pilot will help CBP analyze and evaluate the effectiveness of using the DIS or some other method to collect export documentation for USPVs. When sufficient analysis and evaluation have been conducted, CBP will decide whether to require electronic submission of ownership documentation using the DIS or some other method. Any changes to the regulations will be done through rulemaking.

I. Confidentiality

All data submitted and entered into ACE is subject to the Trade Secrets Act (18 U.S.C. 1905) and is considered confidential, except to the extent as otherwise provided by law. However, participation in this or any ACE pilot is not confidential and upon a written Freedom of Information Act (FOIA) request, the name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

III. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the implementation of this pilot.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(a)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not

conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collection of information regarding Exportation of Self-Propelled Vehicles was previously reviewed and approved by OMB in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under OMB Control Number 1651–0054. No new information is being collected under this pilot. Therefore, no new information collection or update to the existing information collection is required at this time.

V. Misconduct Under the Pilot

A pilot participant may be subject to civil and criminal penalties, administrative sanctions, liquidated damages, or discontinuance from participation in the pilot for any of the following:

(1) Failure to comply with the rules, procedures, or terms and conditions of this pilot;

(2) Failure to exercise reasonable care in the execution of participant obligations; or

(3) Failure to abide by the applicable laws and regulations that have not been waived.

An intentional violation of an obligation under the pilot will result in the immediate removal of the participant from the pilot, and the violator may be subject to penalties or seizure of the vehicle(s). Continuous technical violations will also result in the participant's being removed from the pilot. Additionally, CBP has the right to suspend or remove a pilot participant based on a determination that an unacceptable compliance risk exists, or where public health interests or safety so require.

If CBP finds that there is a basis to suspend or remove a participant from the pilot, the pilot participant will be provided a written notice informing the participant of immediate suspension or removal from the program. The pilot participant will be offered the opportunity to appeal the decision in writing. Any appeal must be addressed to the Outbound Enforcement and Policy Branch Chief and submitted via email to *cbpvehicleexports@cbp.dhs.gov* within 15 business days of notification of suspension or removal from the program. The appeal must address the facts or conduct charges contained in the notice and state how the participant has or will achieve compliance. CBP will notify the participant within 30 business days of receipt of an appeal whether the appeal is granted. The participant will not be permitted to participate in the pilot while an appeal is pending and may not become active in the pilot again until CBP approves the participant's

reinstatement. If no timely appeal is received, the notice becomes the final decision of the Agency as of the date that the appeal period expires.

PETE FLORES,
Executive Assistant Commissioner,
Office of Field Operations,
U.S. Customs and Border Protection.

[Published in the Federal Register, May 10, 2022 (85 FR 28022)]

PROPOSED REVOCATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A FLUORESCENCE CONFOCAL MICROSCOPE

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of a fluorescence confocal microscope.

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

DATE: Comments must be received on or before June 24, 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: Patricia Fogle, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0061.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a fluorescence confocal microscope. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N300518, dated October 10, 2018 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise

issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N300518, CBP classified a fluorescence confocal microscope in heading 9012, HTSUS, specifically in subheading 9012.10.00, HTSUS, which provides for "Microscopes other than optical microscopes; diffraction apparatus; parts and accessories thereof: Microscopes other than optical microscopes; diffraction apparatus." CBP has reviewed NY N300518 and has determined the ruling letter to be in error. It is now CBP's position that a fluorescence confocal microscope is properly classified, in heading 9018, HTSUS, specifically in subheading 9018.19.40, HTSUS, which provides for "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Electrodiagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof: Other: Apparatus for functional exploratory examination, and parts and accessories thereof."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N300518 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H311645, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N300518

October 10, 2018
CLA-2–90:OT:RR:NC:N1:105
CATEGORY: Classification
TARIFF NO.: 9012.10.0000

SCOTT CASSELL
JAS FORWARDING USA, INC.
1000 CENTRE GREEN WAY, SUITE 200
CARY, NC 27513

RE: The tariff classification of a fluorescence confocal microscope from France

DEAR MR. CASSELL:

In your letter dated September 11, 2018, on behalf of Mauna Kea Technologies, Inc., you requested a tariff classification ruling.

The product at issue, identified as the Cellvizio NOVA, is described as a standalone fluorescence confocal microscope. Per the information provided, the Cellvizio NOVA utilizes a confocal laser system with fiber optic probes that allow for the imaging of the internal microstructure of tissue. The instrument consists of a wheeled platform that incorporates the requisite laser imaging system, a touchable user interface (TUI), connectors for the fiber optic probes, and other peripheral equipment, such as a thermic printer. The Cellvizio NOVA is said to be suitable for use in a variety of applications, including gastroscopy, colonoscopy, bronchoscopy, and uteroscopy, among others.

The Cellvizio NOVA utilizes its confocal laser system to generate endomicroscopic images that a physician can view (via the TUI) and print. Based on the information provided, the Cellvizio NOVA operates in a manner similar to the confocal laser scanning microscopes described in Headquarters Ruling Letter H089002, dated June 27, 1991.

The applicable subheading for the Cellvizio NOVA will be 9012.10.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Microscopes other than optical microscopes; diffraction apparatus. 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 the World Wide Web at https://hts.usitc.gov/current.

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 Evan Conceicao at evan.m.conceicao@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity
Specialist Division

ATTACHMENT B

HQ H311645
CLA-2 OT:RR:CTF:EMAIN H311645 PF
CATEGORY: Classification
TARIFF NO.: 9018.19.40

SCOTT CASSELL
JAS FORWARDING USA, INC.
1000 CENTRE GREEN WAY, SUITE 200
CARY, NC 27513

RE: Revocation of NY N300518; Classification of a fluorescence confocal microscope

DEAR MR. CASSELL:

This is in reference to New York Ruling Letter (NY) N300518, dated October 10, 2018, issued to you on behalf of your client Mauna Kea Technologies, Inc., concerning the tariff classification of a fluorescence confocal microscope, under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N300518 and find it to be in error. For the reasons set forth below, we hereby revoke NY N300518.

FACTS:

In NY N300518, CBP described the merchandise as follows:

> The product at issue, identified as the Cellvizio NOVA, is described as a standalone fluorescence confocal microscope. Per the information provided, the Cellvizio NOVA utilizes a confocal laser system with fiber optic probes that allow for the imaging of the internal microstructure of tissue. The instrument consists of a wheeled platform that incorporates the requisite laser imaging system, a touchable user interface (TUI), connectors for the fiber optic probes, and other peripheral equipment, such as a thermic printer. The Cellvizio NOVA is said to be suitable for use in a variety of applications, including gastroscopy, colonoscopy, bronchoscopy, and uteroscopy, among others.
>
> The Cellvizio NOVA utilizes its confocal laser system to generate endomicroscopic images that a physician can view (via the TUI) and print.

In addition, your ruling request stated that the Cellvizio NOVA was used by physicians in the clinical practice to obtain endomicroscopic images.

In NY N300518, U.S. Customs and Border Protection (CBP) classified the subject product under heading 9012, HTSUS, which provides for "Microscopes other than optical microscopes; diffraction apparatus; parts and accessories thereof."

ISSUE:

Whether the fluorescence confocal microscope is classifiable in heading 9012, HTSUS, as microscopes other than optical microscopes, or in heading 9018, HTSUS, as instruments and appliances used in medical, surgical, dental or veterinary sciences.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is 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. 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 may then be applied.

The HTSUS provisions under consideration are as follows:

9012	Microscopes other than optical microscopes; diffraction apparatus; parts and accessories thereof:
9012.10.00	Microscopes other than optical microscopes; diffraction apparatus
	* * *
9018	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof:
	Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof:
9018.19	Other:
9018.19.40	Apparatus for functional exploratory examination, and parts and accessories thereof.

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

In NY N300518, the merchandise at issue was a fluorescence confocal microscope, also known as a probe-based Confocal Laser Endomicroscopy system. The instant Cellvizio NOVA used a confocal laser system with fiber optic probes that allowed for the internal imaging of the internal microstructure of tissue. Accordingly, the Cellvizio NOVA is *prima facie* classifiable in heading 9012, HTSUS, as a microscope. However, the Cellvizio NOVA is designed to enter the body of a person or an animal for purposes of examining and obtaining endomicroscopic images and is suitable for use in a variety of applications, including gastroscopy, colonoscopy, bronchoscopy, and uteroscopy, among others. Therefore, it is also *prima facie* classifiable in heading 9018, as an instrument and appliance used in medical, surgical, dental or veterinary sciences.[1]

[1] We note that EN 90.18 excludes microscopes of heading 9012, HTSUS. However, the ENs are not meant to restrict the tariff terms and can be read in conjunction with the legal text. Notably, EN 90.18 indicates that the legal text of heading 9018 "...covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc." EN 90.18 references endoscopes among the products that are covered by the legal text. In this case, the Cellvizio NOVA, which is a probe-based endomicroscope, meets the terms of the legal text of heading 9018 given that it is used for endoscopy (albeit to visualize the microstructure of tissue) in professional practice.

According to GRI 3(a):

> When, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> The heading which provides the most specific description shall be preferred to headings providing a more general description....

Where articles can be classified under two HTSUS headings, under GRI 3(a) the classification "turns on which of these two provisions are more specific." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). To do so, CBP will "look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food*, 140 F.3d at 1441 (*internal citations omitted*).

Under a GRI 3(a) analysis, heading 9018, HTSUS, prevails over heading 9012, HTSUS. The tariff terms "[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences" heading are more specific than the tariff term "microscopes." Accordingly, heading 9018, HTSUS is the most difficult provision to satisfy as it covers a narrower set of items than heading 9012, HTSUS. By application of GRI 3(a), we find that the Cellvizio NOVA is classified under heading 9018, HTSUS.

CBP has classified similar products in heading 9018, HTSUS. *See* NY N287815, dated July 21, 2017 (Cellvizio 100 Series – probe-based laser endomicroscopy system); NY N287804, dated July 19, 2017 (probe-based confocal laser endomicroscope designed for in-vivo imaging of small animals); NY N238114, dated March 5, 2013 (Cellvizio probe-based Confocal Laser Endomicroscope designed for in-vivo imaging of small animals); and N052415, dated March 13, 2009 (Cellvizio/Leica systems using Confocal Endomicroscopy and/or Fluorescence Optical Imaging). Since the Cellvizio NOVA is an endomicroscopy system that is designed to be used by physicians in clinical practice during gastroscopy, colonoscopy, bronchoscopy, and uteroscopy procedures, among others, it is also properly classified in heading 9018, HTSUS, which provides for "[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences."

HOLDING:

By application of GRI 1 and GRI 3(a), we find the subject fluorescence confocal microscope is classified heading 9018, HTSUS. By application of GRI 6, it is specifically provided for under subheading 9018.19.40, HTSUS, which provides for "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof: Other: Apparatus for functional exploratory examination, and parts and accessories thereof." The column one, general rate of duty is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9018.19.4000, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 9018.19.4000, HTSUS, listed above.

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

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

EFFECT ON OTHER RULINGS:

NY N300519, dated October 10, 2018, is hereby REVOKED.

Sincerely,

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 22–43

TAIZHOU UNITED IMP. & EXP. CO. LTD., Plaintiff, and GUANGZHOU JANGHO CURTAIN WALL SYSTEM ENGINEERING CO., LTD., JANGHO GROUP CO., LTD., BEIJING JIANGHEYUAN HOLDING CO., LTD., BEIJING JANGHO CURTAIN WALL SYSTEM ENGINEERING CO., LTD., JANGHO CURTAIN WALL HONG KONG LTD., SHANGHAI JANGHO CURTAIN WALL SYSTEM ENGINEERING CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 16–00009

[Commerce's *Final Results* sustained.]

Dated: May 10, 2022

Douglas J. Heffner and *Richard P. Ferrin*, Drinker Biddle & Reath LLP of Washington, DC, for Plaintiff Taizhou United Imp. & Exp. Co. Ltd.

J. Kevin Horgan, *Alexandra H. Salzman*, *Gregory S. Menegaz*, and *John Joseph Kenkel*, deKieffer & Horgan, PLLC of Washington, DC, for Consolidated Plaintiffs Guangzhou Jangho Curtain Wall System Engineering Co., Ltd., Jangho Group Co., Ltd., Beijing Jiangheyuan Holding Co., Ltd., Beijing Jangho Curtain Wall System Engineering Co., Ltd., Jangho Curtain Wall Hong Kong Ltd. and Shanghai Jangho Curtain Wall System Engineering Co., Ltd.[1]

Douglas G. Edelschick, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades Jr.*, Assistant Director. Of counsel on the brief was *Kirrin Hough*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Alan H. Price, *Robert E. DeFrancesco, III*, and *Elizabeth S. Lee*, Wiley Rein LLP of Washington, DC, for Defendant-Intervenors Aluminum Extrusions Fair Trade Committee.

OPINION

Gordon, Judge:

This action involves the final results of the 2013 administrative review conducted by the U.S. Department of Commerce ("Commerce") of the countervailing duty ("CVD") order on aluminum extrusions

[1] In July 2020, approximately three months after the conclusion of briefing the USCIT Rule 56.2 motion for judgment on the agency record, Jangho replaced their former counsel at Sandler, Travis & Rosenberg, PA with their current counsel. *See* ECF No. 96 (Form 12 Substitution of Attorney filed by J. Kevin Horgan to appear in place of Kristen S. Smith).

from the People's Republic of China ("PRC"). *See Aluminum Extrusions from the People's Republic of China*, 80 Fed. Reg. 77,325 (Dep't of Commerce Dec. 14, 2015) (final results admin. rev.) ("*Final Results*"); *see also* accompanying Issues and Decision Memorandum, C-570–968 (Dep't of Commerce Dec. 7, 2015), available at https://enforcement.trade.gov/frn/summary/prc/2015–31425–1.pdf ("*Decision Memorandum*"); *Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 30,653 (Dep't of Commerce May 26, 2011) ("*CVD Order*").

The court presumes familiarity with the history of this action. *See Taizhou United Imp. & Exp. Co. v. United States*, 46 CIT ___, 2022 WL 500665 (Feb. 18, 2022) ("*Taizhou II*"); *Taizhou United Imp. & Exp. Co. v. United States*, 44 CIT ___, 475 F. Supp. 3d 1305 (2020) ("*Taizhou I*"); *see also Shenyang Yuanda Aluminum Eng'g Co. v. United States*, 41 CIT ___, 279 F. Supp. 3d 1209 (2017), *aff'd*, 918 F.3d 1355 (Fed. Cir. 2019) (affirming Commerce's determination that curtain wall units imported under contract for entire curtain wall are subject to *CVD Order*); *Shenyang Yuanda Aluminum Industry Eng'g Co. v. United States*, 38 CIT ___, 961 F. Supp. 2d 1291 (2014), *aff'd*, 776 F.3d 1351, 1358 (Fed. Cir. 2015) (affirming Commerce's determination that parts of curtain wall units are subject to the *CVD Order*); *Antidumping Duty and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China* (Dep't of Commerce Mar. 27, 2014) (final scope ruling on curtain wall units produced and imported as part of contract to supply curtain wall), *available at* https://enforcement.trade.gov/download/prcae/scope/38-curtain-wall-units-7apr14.pdf.

In *Taizhou I*, the court sustained the *Final Results* as to almost all the issues raised by Plaintiffs; however, the court remanded Commerce's determinations to countervail subsidized purchases of glass and aluminum extrusions for further explanation and reconsideration. *Id.* "Because the court remand[ed] Commerce's determination that it may countervail glass and aluminum extrusions as inputs to the subject merchandise .... the court d[id] not reach Plaintiffs' alternative arguments as to whether Commerce reasonably found that the statutory requirements of § 1677(5) were met with respect to Plaintiffs' aluminum extrusion and glass purchases." *See Taizhou I*, 44 CIT at ___, 475 F. Supp. 3d at 1311. On remand, Commerce clarified and further explained why its determinations to countervail subsidized purchases of glass and aluminum extrusions were reasonable and in accordance with law, and the court sustained Commerce's remand results. *See Taizhou II*, 46 CIT ___, 2022 WL 500665.

Accordingly, what remains before the court[2] are Plaintiffs' challenges to Commerce's application of the statutory requirements in finding that there were countervailable subsidies on glass and aluminum extrusions in the *Final Results*. Specifically, Plaintiffs challenge Commerce's finding that the suppliers of the glass and aluminum extrusions at issue constitute governmental "authorities" under 19 U.S.C. § 1677(5)(B),[3] as well as Commerce's findings that the provision of glass and aluminum extrusions for less than adequate remuneration ("LTAR") constituted "specific" subsidies as defined under 19 U.S.C. § 1677(5A)(D)(iii). *See* Consolidated PIs.' Mem. in Supp. of its Mot. for J. on the Agency R. at 28–38, ECF No. 82–1 ("Jangho Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R. at 25–35, ECF No. 88 ("Def.'s Resp."); Def.-Intervenors' Resp. in Opp'n to Mots. for J. on the Agency R., ECF No. 89; Consolidated PIs.' Reply Br., ECF No. 93 ("Jangho Reply").[4] The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)[5], and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court denies Plaintiffs' motions, sustains the *Final Results* as to these remaining issues, and will enter judgment accordingly.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might

[2] Upon consideration of Plaintiffs' motion for rehearing, *see* ECF No. 122, the court vacated a judgment it entered after *Taizhou II* to allow it to consider Plaintiffs' remaining arguments. *See* Order Vacating Judgment, ECF No. 129.

[3] As Commerce explained, "when a respondent purchases an input from a trading company or non-producing supplier, [Commerce will find that] a subsidy is conferred if the producer of the input is an 'authority' within the meaning of [§ 1677(5)(B)] and that the price paid by the respondent for the input was for LTAR." *See Decision Memorandum* at 28, 34.

[4] Plaintiff Taizhou United Imp. & Exp. Co. Ltd. ("Taizhou") joins and incorporates by reference the arguments raised and briefed by Consolidated Plaintiffs Guangzhou Jangho Curtain Wall System Engineering Co., Ltd., Jangho Group Co., Ltd., Beijing Jiangheyuan Holding Co., Ltd., Beijing Jangho Curtain Wall System Engineering Co., Ltd., and Shanghai Jangho Curtain Wall System Engineering Co., Ltd. (collectively, "Jangho").

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

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

Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2022). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, National Courts § 3.6 (5th ed. 2021).

II. Discussion

A. Authorities

In its Post-Preliminary Analysis, Commerce determined "that the [Government of China ("GOC")] failed to cooperate by not acting to the best of its ability, and had withheld certain information with regard to all producers of primary aluminum, aluminum extrusions, and glass, and applied [facts available with an adverse inference ("AFA")], finding all producers to be 'authorities' within the meaning of [19 U.S.C. § 1677(5)(B)]." *See Decision Memorandum* at 110. In reaching its *Final Results*, Commerce continued to find that the application of AFA was warranted, and accordingly determined that the suppliers of aluminum extrusions and glass to Plaintiffs were "authorities" under § 1677(5)(B). *Id.* Plaintiffs challenge Commerce's application of AFA and its resulting determination as unreasonable. *See* Jangho Br. at 29; Jangho Reply at 11–14.

Specifically, Plaintiffs maintain that "the administrative record demonstrates that both Jangho and the GOC fully cooperated with Commerce and responded to all requests for information to the best of their ability, providing thousands of pages of information and documentation." Jangho Br. at 29. Plaintiffs acknowledge that certain requested information was not provided, but contend that "[w]here information was missing, the GOC informed Commerce that it did not have the information or was not able to obtain it." *Id.* Plaintiffs also argue that it is "unreasonable to apply punitive AFA facts in this

proceeding to Jangho for information that the GOC did not possess or was unable to obtain." *Id.*[6]

Commerce explained that to facilitate its analysis of whether producers of glass and aluminum extrusions sold to respondents during the POR were "authorities" within the meaning of § 1677(5)(B), it asked "the GOC to provide information regarding the specific companies that produced [aluminum extrusions and glass] which the Jangho Companies purchased during the POR." *See Decision Memorandum* at 28, 34. In both the New Subsidy Allegation ("NSA") questionnaire and a supplemental questionnaire, Commerce asked the GOC specific questions regarding the ownership and control of the primary producers of aluminum extrusions and glass for Jangho during the period of review ("POR"). *See id.* Commerce also asked the GOC to respond to the Input Producers Appendix for each producer of the input purchased by respondent companies. *See id.* at 28, 35.

Contrary to Plaintiffs' representation that "both Jangho and the GOC fully cooperated with Commerce and responded to all requests for information to the best of their ability," *see* Jangho Br. at 29, Commerce found that the GOC only provided partial and incomplete information in response to these requests. *See Decision Memorandum* at 32, 38 ("[W]ith respect to the majority of the producers-suppliers identified by the Jangho Companies, the GOC failed to provide the relevant Input Producer Appendix, and further failed to request an extension for additional time to respond. With respect to the two producers-suppliers which the GOC identified as non-majority government-owned, the GOC did not provide complete responses to our numerous requests for information, including requests for information pertaining to ownership or control by CCP officials."). The GOC maintained that it could not obtain the requested information from its local offices responsible for collecting such information, and it was allegedly awaiting that information, Commerce noted that the GOC never submitted any extension requests to provide the requested information at a later time. *See id.* at 32, 36. With respect to the two producers-suppliers of glass and aluminum extrusions for which the GOC did provide some information, Commerce found that the GOC "did not provide key information (*e.g.*, business license(s), business group registration, tax registration certificate, and annual reports) for the Department to perform an analysis to trace ownership of the enterprises in question back to the ultimate individual

[6] The court observes that these comments from Plaintiffs constitute the entirety of Plaintiffs' argument in their USCIT Rule 56.2 motion challenging the reasonableness of Commerce's finding that the suppliers of glass and aluminum extrusions were "authorities" under § 1677(5)(B).

owners." *Id.* at 31–32, 37–38. Commerce further determined that this missing information was necessary for its analysis under § 1677(5)(B) as to whether the producers-suppliers of Plaintiffs' glass and aluminum extrusions were "authorities." *Id.* ("The information we requested regarding the ultimate owners of the producers of the primary input(s) and the role of government/CCP officials and CCP committees in the management and operation of the input producers, which sold inputs to the respondents, is necessary to our determination of whether the producers are 'authorities.'").

As a result, Commerce concluded that, because this necessary information was not on the record, it "must rely on 'facts otherwise available' in reaching a determination in this respect." *Id.* at 32, 38. Commerce also found that an adverse inference was warranted in the application of facts available because "the GOC failed to cooperate by not acting to the best of its ability to comply with requests for information regarding the producers of [glass and aluminum extrusions] from which the Jangho Companies purchased during the POR because the GOC did not provide the requested information." *Id.* Ultimately, as AFA, Commerce determined that "all of the producers that produced the [glass and aluminum extrusions] purchased by the Jangho Companies during the POR are 'authorities' within the meaning of [§ 1677(5)(B)]." *Id.*

Commerce rejected the GOC's argument "that it does not play a role in any ordinary business operations, including those in which the state holds an ownership interest," noting that Commerce "provided the GOC an opportunity to provide requested information to enable the Department's 'authorities' analysis under [§ 1677(5)(B)], which the GOC refused to do." *Id.* at 111. Commerce explained that it had "previously concluded that producers in the PRC that are majority-owned by the government possess, exercise, or are vested with governmental authority." *Id.* Commerce elaborated that its "finding in this regard is based on the fact that record evidence indicates that the GOC exercises meaningful control over these entities and uses them to effectuate its goals of upholding the socialist market economy, allocating resources, and maintaining the predominant role of the state sector." *Id.* In particular, Commerce noted that it "also disagree[d] with the GOC that it has cooperated to the best of its ability," highlighting that Commerce "provided the GOC multiple opportunities to provide the requested information, which, as discussed above, was relevant and necessary to the Department's 'authorities' analysis under [§ 1677(5)(B)]." *Id.* at 112.

Commerce further found that "[t]he limited information that was provided by the GOC was not sufficient, in light of the remaining

missing information." *Id.* Commerce observed that "by stating that the information is not relevant, the GOC has placed itself in the position of the Department; however, it is the prerogative of the Department, not the GOC to determine what information is relevant to our proceedings." *Id.* Therefore, Commerce determined that with respect to the "authorities" analysis, "the request for such information was necessary and warranted, and the GOC's failure to provide such information rendered the application of AFA appropriate." *Id.* Commerce also emphasized that "the GOC's attempted justification for failing to provide all of the requested information on the basis that its own local offices failed to respond simply demonstrates an unwillingness to provide information in this review." *Id.* Commerce further noted that "claims about the number of producers and suppliers and the burden of responding fully with regard to all producers is an insufficient explanation, given that the GOC failed to provide any producer appendices responses on its first opportunity, and failed to provide a single complete producer appendix response, and provided only five incomplete producer appendix responses." *Id.*

Given Commerce's analysis and explanation, the court cannot agree that the record supports Plaintiffs' contention that "both Jangho and the GOC fully cooperated with Commerce and responded to all requests for information to the best of their ability." *See* Jangho Br. at 29. To the contrary, while Plaintiffs highlight the information that GOC did provide in response to Commerce's requests, Plaintiffs' argument ignores the significant gap in the record left by the GOC's failure to act to the best of its ability to provide all the information requested by Commerce. Accordingly, the court sustains as reasonable Commerce's finding that the application of AFA was warranted as well as Commerce's determination that all the producers that produced the glass and aluminum extrusions purchased by Plaintiffs during the POR are "authorities" within the meaning of § 1677(5)(B).

B. Benefit & Specificity[7]

Before Commerce may countervail a subsidy, it must find that the subsidy at issue is specific in law or fact as provided under 19 U.S.C. § 1677(5A)(D). The statute provides that a subsidy may be "specific as

[7] While Plaintiffs maintain that "The Administrative Record Does not Support a Finding of Benefit or Specificity," it appears that Plaintiffs' argument focuses solely on Commerce's specificity analysis under § 1677(5A)(D). *See* Jangho Br. at 29. Given that Plaintiffs develop no argument challenging Commerce's "Benefit" analysis under § 1677(5)(E), the court concludes that any challenge by Plaintiffs to Commerce's finding of a "Benefit" is waived. *See Home Prods. Int'l, Inc. v. United States*, 36 CIT 33, 37, 810 F. Supp. 2d 1373, 1378–79 (2012); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F. Supp. 2d 1303, 1308–09 (2009); *Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1078, 638 F.

a matter of fact" if "[t]he actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." *See* 19 U.S.C. § 1677(5A)(D)(iii)(I). Here, Commerce, relying on facts available with an adverse inference, found that the aluminum extrusions for LTAR program was specific, noting that "the GOC did not provide a list of industries which purchase these inputs or provide the quantity and value purchased by each industry, withheld the information, and failed to explain why it had withheld the information." *See Decision Memorandum* at 116. "With respect to glass for LTAR, [Commerce] relied on the information available to find the program specific under [§ 1677(5A)(D)(iii)(I)] because the GOC did not provide a list of industries which purchase these inputs or provide the quantity and value purchased by each industry. Therefore, [Commerce] based [its] analysis on the industries identified by the GOC and Petitioner, finding that the industries identified were limited and the glass for LTAR program specific." *Id.*

Plaintiffs challenge the reasonableness of Commerce's determinations under § 1677(5A)(D)(iii)(I) that the recipients of the aluminum extrusions and glass for LTAR were "limited in number." *See* Jangho Br. at 29–37 (maintaining that "the administrative record in this proceeding demonstrates that no benefit was provided to a specific industry or group of industries, and that both glass and aluminum extrusions are widely consumed in China," and listing a wide variety of products produced in China containing aluminum extrusions and glass); *see also* Jangho Reply at 14–16[8].

With respect to glass, Plaintiffs contend that the GOC's NSA Questionnaire response, along with the language of the *CVD Order*, "demonstrate that glass serves various applications and industries," and that it is unreasonable for Commerce to find that the provision of glass for LTAR was "limited" where the record shows that "glass is

Supp. 2d 1325, 1350 (2009); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."). Accordingly, this section of the opinion solely addresses Plaintiffs' challenge to Commerce's findings of specificity under § 1677(5A)(D).

[8] In their reply, Plaintiffs state that "the record evidence in this administrative review shows that the *primary aluminum*, aluminum extrusions and glass at LTAR are not specific under 19 U.S.C. § 1677(5A)(D)(iii)(I) as these inputs are used too broadly." *See* Jangho Reply at 16 (emphasis added). However, Plaintiffs' motion for judgment on the agency record focused on Commerce's determinations as to aluminum extrusions and glass, and made no reference to Commerce's determination with respect to primary aluminum. *See generally* Jangho Br. Accordingly, the court concludes that Plaintiffs have waived any argument with respect to Commerce's determination as to primary aluminum. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1276–77 (Fed. Cir. 2006) ("Arguments raised for the first time in a reply brief are not properly before this court." (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) ("a party waives arguments based on what [does not] appear[ ] in its brief")).

widely consumed in China." *See* Jangho Br. at 30–31 (citing GOC's NSA Questionnaire Response at 10–11, PR[9] 276, CR 132 ("NSA Response")). Plaintiffs make similar arguments regarding Commerce's determination as to the specificity of aluminum extrusions for LTAR. *See id.* at 31–37 ("Similar to glass, and unlawfully, Commerce ignored record evidence demonstrating that [aluminum extrusions are] widely available in China.").

1. Glass

To determine which industries use glass, Commerce asked the GOC to provide a list of industries in China that purchased glass directly and to provide the amounts (volume and value) purchased by each of those industries. *See Decision Memorandum* at 63. The GOC responded that "[t]here are a vast number of uses for either tempered plate glass or laminated glass[,] [and] [t]he types of consumers that may purchase either tempered plate glass or laminated glass are highly varied within the economy...." *See id.* (quoting NSA Response at 8). The GOC further stated that "it is commonly known that tempered glass, and to some extent also laminated glass, are used in a variety of downstream sectors, including but not limited to doors and windows building, construction model forging, curtain wall, internal decoration, furniture and ancillaries, television, air-conditioning, refrigerator, toaster, oven, electronics, watch, mobile phone, musical players, cars and land transportation vehicles, home instrument, among others." *Id.* (quoting NSA Response at 10–11). However, Commerce observed that "the GOC provided none of the information requested concerning amounts purchased by individual industries, stating that 'to the best of the GOC's knowledge, neither tempered plate glass nor laminated glass producers compile their sales volume and value by the industry in which the mandatory respondent companies operate, as well as the totals purchased by every other industry.'" *Id.*

Commerce noted that the petitioner's new subsidy allegation "provided information demonstrating that users of tempered and laminate glass are limited to a number of enterprises and industries (*e.g.*, construction and automobile)." *Id.* Commerce found that while the GOC identified several "uses" for glass, it had not "not classified these 'uses' into industries or otherwise identified the industries which cover these various uses." *Id.* Commerce further found that an analysis of the types of end uses described by the GOC "would imply the

[9] "PR ___" refers to a document contained in the public administrative record, which is found in ECF No. 29–2 unless otherwise noted. "CR ___" refers to a document contained in the confidential administrative record, which is found in ECF No. 29–3 unless otherwise noted.

existence of at least four industries." *Id.* Given the GOC's failure to provide data supporting its claim that "there are vast 'uses' of glass" and its contention that it is "common knowledge that glass is 'used in a variety of downstream sectors[,]'" Commerce found that the "GOC's claims lack evidentiary value, as they are based on the GOC's opinions or on what the GOC claims is common knowledge, and not on any express or specific evidence." *Id.* Accordingly, Commerce, "taking into consideration the information provided by Petitioner and the GOC," determined that the "recipients of glass are limited in number to at least two and possibly four industries, and that the provision of glass is therefore *de facto* specific within the meaning of [§ 1677(5A)(D)(iii)(I)]." *Id.*

Plaintiffs' arguments here echo those raised by the GOC in the underlying proceeding. While Plaintiffs highlight the wide variety of "uses" of glass, Plaintiffs do not engage with Commerce's analysis of the record nor its resulting finding that "recipients of glass are limited in number to at least two and possibly four industries." *See Decision Memorandum* at 63; *cf.* Jangho Br. at 30–31. Plaintiffs maintain that Commerce's finding of specificity is unreasonable in light of Commerce's prior determination in *Chlorinated Isocyanurates from the People's Republic of China*, 79 Fed. Reg. 56,560 (Dep't of Commerce Sept. 22, 2014) ("*Chlorinated Isocyanurates*"), in which Commerce found an alleged urea LTAR program not to be specific because there were nine separate industries that consumed urea. *See* Jangho Br. at 37; *see also Decision Memorandum* at 118. Plaintiffs, however, again fail to engage with Commerce's explanation for why *Chlorinated Isocyanurates* was distinguishable and inapplicable here. Commerce explained that the "GOC has provided no verifiable[] evidence, and indeed no evidence, of any industries consuming glass." *Decision Memorandum* at 118. Commerce further noted that even in the hypothetical circumstance where there was "verifiable information on the record indicating that the GOC's list of purported users of glass was accurate, that list would not reflect the diversity of users which were found to consume urea in *Chlorinated Isocyanurates from the PRC*." *Id.* Commerce also highlighted that "the GOC's assertion and argument [did not] attempt [to] address the issue of whether the construction industry is a predominant or disproportionate user of glass." *Id.* Having failed to engage with the merits of the analysis of Commerce's challenged determination, Plaintiffs are unable to demonstrate that Commerce acted unreasonably in finding the provision of glass for LTAR to be specific under § 1677(5A)(D)(iii)(I).

2. Aluminum Extrusions

As for aluminum extrusions, Commerce similarly asked the GOC to provide a list of industries that purchased aluminum extrusions directly and to provide the amounts (volume and value) purchased by each of the industries. *See Decision Memorandum* at 32. In response, the GOC again failed to provide the requested information; instead, the GOC responded that "[t]here are a vast number of uses for aluminum extrusions," and that the "type of consumers that may purchase aluminum extrusions is highly varied within the economy." *See id.* (quoting NSA Response at 4). The GOC further stated that "[a]s the Department is aware, aluminum extrusions are used in a variety of downstream sectors, as evidenced by the comprehensive coverage and large number of HTS codes and the wide variety of scope rulings with respect to the subject merchandise of this proceeding." *Id.* at 32–33.

Commerce observed that information placed on the record by petitioner regarding aluminum extrusions "identified three consuming industries[:] transportation, machinery, and equipment." *Id.* at 117. Commerce requested additional detail on this issue from the GOC in its Third Supplemental Questionnaire, noting that "the GOC claimed in [two other proceedings covering solar cells] that there were six industries that consumed aluminum extrusions in 2012: construction industry, transportation industry, mechanical and electrical equipment industry, consumer durable goods industry, electricity, and other industries." *Id.* at 33, 117. While the "GOC endorsed that information, it claimed it was unable to provide updated information for the POR 'in this timeframe of this NSA investigation,' without explaining why it was not able to do so in the allotted timeframe or what efforts it made to collect the information." *Id.* at 33 (citing GOC Third Supplemental Questionnaire Response at 66 and 67, PR 317). Commerce further noted that "[u]ltimately, the GOC provided none of the information requested concerning amounts of aluminum extrusions purchased by individual industries." *Id.*

Commerce found that it must rely on "facts available" as "necessary information is not available on the record" due to the GOC's failure to cooperate and refusal to act to the best of its ability to comply with Commerce's request for information. *Id.* Consequently, Commerce found that an adverse inference was warranted, and in applying AFA, Commerce found that the "GOC's provision of aluminum extrusions is specific within the meaning of [§ 1677(5A)(D)(iii)(I)]." *Id.* Commerce explained that it "found the program to be specific based on AFA because the GOC declined to provide a list of industries on the record of this review, despite evidence that they had done so in the past.

Further the GOC's contention that it lacked sufficient time to do so, within the deadline of our supplemental questionnaire, is insufficient. Our AFA determination merely noted that evidence available on the record indicates no more than the existence of three industries according to Petitioner and the GOC's endorsement of six U.S. industries, including the construction industry, that supported the determination in *Crystalline Silicon Photovoltaic Cells*." *Id.* at 117.

Plaintiffs maintain that Commerce's application of AFA here effectively "ignore[d] evidence on the record that demonstrates that aluminum extrusions are widely available." Jangho Br. at 31. Plaintiffs reiterate the wide variety of products in which aluminum extrusions may be found, arguing that Commerce's scope rulings as to these products "demonstrate that extrusions are used in a virtually innumerable variety of industries." *Id.* at 32–37. Plaintiffs' contentions lack merit. As Commerce explained, "the various scope rulings or the scope of the *Orders* do not indicate a precise number or list of consuming industries different from the sets of three or six indicated on the record." *See Decision Memorandum* at 117. Commerce noted that while the GOC had "pointed to the large number of products which are within the scope of the order, the GOC has not suggested these products fall under additional industries not considered." *Id.* Plaintiffs' recitation of the various scope rulings and products containing aluminum extrusions does not engage with Commerce's determination that it "cannot base its analysis on information which the GOC failed to place on the record." *Id.* In reaching its determination, Commerce emphasized that "the GOC has not provided the quantity and value of aluminum extrusions consumed by the three to six industries identified on the record, or any other industries." *Id.*

Plaintiffs again suggest that Commerce's finding of specificity as to the provision of aluminum extrusions in this proceeding is inconsistent with Commerce's negative finding in *Chlorinated Isocyanurates*. As explained above, Plaintiffs' argument fails to address the distinctions between this proceeding and Commerce's findings in *Chlorinated Isocyanurates* regarding the wide variety of industries consuming the subsidized input. *See Decision Memorandum* at 118 (distinguishing record in *Chlorinated Isocyanurates* with GOC's failure to provide verifiable evidence on record). Plaintiffs' reliance on *Chlorinated Isocyanurates* is also misplaced because Commerce relied on AFA to reach its specificity finding as to aluminum extrusions for LTAR here, whereas Commerce did not have to resort to AFA in *Chlorinated Isocyanurates* in finding no specificity regarding urea for LTAR. *See Decision Memorandum* at 118.

Overall, the court cannot agree with Plaintiffs that Commerce acted unreasonably in determining that the GOC failed to act to the best of its ability and withheld necessary information on the record. Accordingly, the court sustains Commerce's decision to apply AFA, and its subsequent determination that the industries consuming aluminum extrusions are limited and that the aluminum extrusions for LTAR program is "specific" under § 1677(5A)(D)(iii)(I).

III. Conclusion

For the foregoing reasons, the court denies Plaintiffs' remaining challenges to the *Final Results*. Judgment will be entered accordingly.

Dated: May 10, 2022
New York, New York

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

Slip Op. 22–44

RISEN ENERGY CO., LTD., Plaintiff, JINGAO SOLAR CO., LTD., et al., Consolidated Plaintiffs, SHANGHAI BYD CO., LTD., TRINA SOLAR CO., LTD., et al., Intervenor Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 20–03912

[Commerce's Final Results in the Sixth Administrative Review of Commerce's Countervailing Duty order on crystalline silicon photovoltaic cells from the People's Republic of China are partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: May 12, 2022

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiffs. With them on the brief was *James K. Horgan*.

Sarah M. Wyss and *Wenhui (Flora) Ji*, Mowry & Grimson, PLLC, of Washington, D.C., argued for Consolidated Plaintiffs. With them on brief were *Jeffrey S. Grimson*, *Bryant P. Cenko*, *Jill A. Cramer*, and *Kristin H. Mowry*.

Craig A. Lewis, *Jonathan T. Stoel*, and *Lindsay K. Brown*, Hogan Lovells US LLP, of Washington, D.C., for Intervenor Plaintiffs Shanghai BYD Co., Ltd.

Jonathan M. Freed, *Kenneth N. Hammer*, *MacKensie R. Sugama*, and *Robert G. Gosselink*, Trade Pacific PLLC, of Washington, D.C., for Intervenor Plaintiffs Trina Solar Co., Ltd.

Ann C. Motto, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., argued for the Defendant. Of counsel on the brief was *Spencer Neff*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the final determination made by the United States Department of Commerce ("Commerce") in the Sixth 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 ("GOC") covering the period from January 1, 2017, to December 31, 2017.

Plaintiffs, Consolidated Plaintiffs, and Plaintiff-Intervenors ("Plaintiffs") request that the court hold aspects of Commerce's final determination unsupported by substantial evidence or otherwise not in accordance with law. The United States ("Government") asks that the court sustains Commerce's Final Results of its Sixth Administrative Review.

BACKGROUND

Commerce published a countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules

("solar cells") from the GOC on December 7, 2012. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012). In March 2019, Commerce began its Sixth Administrative Review of this countervailing duty order, covering the period from January 1, 2017, to December 31, 2017. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 9,297 (Dep't Commerce Mar. 14, 2019). On November 5, 2019, the U.S. International Trade Administration selected JA Solar Co., Ltd. and Risen Energy Co., Ltd. as mandatory respondents ("Mandatory Respondents") in this review. *See Dep't Commerce, Respondent Selection Memorandum*, P.R. at 1–2 (Nov. 5, 2019).

Commerce published its preliminary results on February 11, 2020, *see Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 7727 (Dep't Commerce Feb. 11, 2020), along with the accompanying Preliminary Issues and Decision Memorandum, *Decision Memorandum for the Preliminary Results of the Countervailing Duty Administrative Review, Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, C, POR: 01/01/2017–12/31/2017 (Dep't Commerce) ("*PDM*").

Commerce published its final determination on December 9, 2020. *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; 2017*, 85 Fed. Reg. 79,163 (Dep't Commerce Dec. 9, 2020) ("*Final Results*"); *see also Issues and Decision Memorandum for Final Results of the 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*, C-570–980, POR 01/01/2017–12/31/2017 (Dep't Commerce Nov. 27, 2020) ("*I&D Memo*").

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)(i) (2021). The court will uphold Commerce's determinations in a countervailing duty proceeding unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" *19 U.S.C.* § 1516a(b)(1)(B)(i).

DISCUSSION

I. Export Buyer's Credit Program

As in prior reviews, Mandatory Respondents here reported that none of their customers received assistance under the GOC's Export Buyer's Credit Program ("EBCP"), and that they did not assist any customers in using the program. *See Risen Energy Section III Questionnaire Response,* P.R. 144–162, C.R. 109–276 at 27–28, Ex. 19 (Dec. 30, 2019); *see Questionnaire Response of JA Solar and Affiliates*, Volume 1, P.R. 132–38, C.R. 31–103 at III 38–40 (Dec. 30, 2019). Both also provided customer declarations certifying non-use of the EBCP. *Risen Unaffiliated Supplier II, Section III Questionnaire Response*, P.R. 164, C.R. 277 at 23, Ex. 15 (Jan. 6, 2020); *Questionnaire Response of JA Solar and Affiliates* at Ex. 25. Commerce claimed, as it has previously, that it cannot verify the certifications of non-use because it lacks necessary information regarding the operation of the EBCP and applied adverse facts available ("AFA") to determine that Mandatory Respondents used the EBCP. *I&D Memo* at 34–35. After arguing in favor of Commerce's position in briefing and oral argument, the Government, without explanation, now requests remand on the issue of EBCP "to reconsider its application of adverse facts available for its program." *See Def.'s Motion For Voluntary Remand*, (March 28, 2022), ECF No. 83, at 5.

Repeatedly, the Government has included the EBCP in its subsidy calculations. *See, e.g.*, *Clearon Corp. v. United States*, 44 CIT ___, ___, 474 F. Supp. 3d 1339, 1353 (2020); *Guizhou Tyre Co. v. United States*, 43 CIT ___, ___, 415 F. Supp. 3d 1335, 1344 (2019); *Both-Well Steel Fittings, Co., Ltd., v. United States*, 557 F. Supp. 3d 1327, 1338 (2022). Repeatedly, the court has ordered Commerce on remand to conduct verification before rejecting respondent's proof of non-use. *See, e.g. Clearon Corp.,* 474 F. Supp. 3d at 1354; *Guizhou Tyre*, 415 F. Supp 3d at 1344; *Both-Well*, 557 F. Supp. 3d at 1337. Repeatedly, the Government has removed the EBCP from the calculation under protest without attempting verification. *See, e.g.*, *Clearon Corp. v. United States*, Slip Op. 21–56, 2021 WL 1821448, at *2–3 (CIT 2021); *Changzhou Trina Solar Energy Co. v. United States*, 44 CIT ___, ___, 466 F. Supp. 3d 1287, 1291–93 (2020). Repeatedly, the Government has also not appealed the court's decisions on the issue. The result is the continual collection of deposits which are not owed. This situation is untenable and inequitable.

The court grants the request for remand but with restrictions appropriate to this history. On remand, the Government may attempt to verify the customer certifications of non-use. If the Government de-

cides to remove the EBCP 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.

II. Land Value Benchmark

Prior to finding a countervailable subsidy, Commerce must establish that an authority provided a financial contribution, and a benefit was thereby conferred. 19 U.S.C. § 1677(5)(B). A foreign government's provision of goods to a respondent for less than adequate remuneration constitutes a benefit. *Id.* § 1677(5)(E)(iv)). In such circumstances, Commerce determines the amount of the subsidy by comparing remuneration actually paid with adequate renumeration with a market-determined price for the goods or services, under "a three-tiered hierarchy" employed by Commerce "to determine the appropriate remuneration benchmark." *Changzhou Trina Solar Energy Co. v. United States*; 42 CIT ___, ___, 352 F. Supp 3d 1316, 1332 (2018) ("*Changzhou Trina I*"); *see* 19 C.F.R. § 351.511(a)(2)(i)–(iii) (2021). Commerce derives a tier-one benchmark "by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i).

In the absence of such a benchmark, Commerce turns to a tier-two benchmark "by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." *Id.* § 351.511(a)(2)(ii). "If there is no world market price available to purchasers in the country in question," however, Commerce moves on to a tier-three analysis and "measures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii). If Commerce determines that the government price is not consistent with market principles it will look to construct an external benchmark. *Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1389 n.6 (2021) ("*Canadian Solar III*").

At issue here is Commerce's decision to utilize its chosen tier-three benchmark, the 2010 Coldwell Banker Richard Ellis Asian Marketview Report for Thailand Industrial Land Report to assess the value of land-use rights. *See Dep't Commerce, Asian Marketview Report*, P.R. 202 (Jan. 31, 2020) ("2010 CBRE Report"). Plaintiffs claim that: (1) Commerce erred by rejecting JA Solar's proffered tier-two bench-

mark, JA Solar Br. at 22–24; Risen Br. 22; *see also Letter on Behalf of JA Solar to Dep't of Commerce re: Benchmark Submission*, P.R. 166–168, C.R. 284296 at Exs. 6A-B (Jan. 13, 2020) ("JA Solar Benchmark"); (2) Commerce erred by rejecting tier-three data from Mexico and Brazil in the JA Solar Benchmark, JA Solar Br. at 31; Risen Br. 22–23; and (3) Commerce erred by rejecting the supplemental Nexus Reports as a tier-three benchmark, JA Solar Br. at 37–38; *see also Letter on Behalf of JA Solar to Dep't of Commerce re: Land Benchmark Submission*, P.R. 192 at Ex. 1 (Feb. 18, 2020) ("*Nexus Reports*").

First, Commerce determined that neither a tier-one nor a tier-two benchmark were appropriate land benchmarks on this record. *See I&D Memo* at 51; Memorandum, *Benchmark Analysis of the Government Provision of Land-Use Rights in China for Countervailing Duty Purposes* at 2, 26–27 (April 28, 2021) ("*Land Use Memo*"). Commerce relied upon past practices to determine that no tier-one benchmarks exist because "Chinese land prices are distorted by the significant government role in the market." *I&D Memo* at 51 (citing *Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Determination*, 74 Fed. Reg. 67,893, 67906–08 (Dep't Commerce Dec. 3, 2007) ("*Sacks from China*").[1] Commerce determined that a tier-two world-market price was not appropriate because "land in other countries is not available to a purchaser located in China." *I&D Memo* at 51; *see Land Use Memo* at 2, 26–27. Commerce considered the nature and scope of the market for land and determined that land, as an *in situ* property, is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market. *Land Use Memo* at 27 (internal quotations omitted); *see Sacks from China*, 72 Fed. Reg. at 67, 908 (finding that Commerce cannot apply a tier-two benchmark for land). This determination was reasonable and Commerce properly rejected the JA Solar Benchmark as a tier-two benchmark. *See Canadian Solar III*, 537 F. Supp. 3d at 1390 (holding that Commerce's rejection of a tier-two world-wide average price for land was reasonable).

Next, Plaintiffs argue that Commerce erroneously rejected the JA Solar Benchmark as a tier-three benchmark for two reasons. *See* JA Solar Br. at 36; Risen Br. at 22–24. First, Plaintiffs contend that the JA Solar Benchmark is more contemporaneous than the 2010 CBRE

[1] Plaintiffs do not challenge Commerce's determination that a tier-one benchmark is inappropriate. JA Solar Br. at 30. *See* JA Solar Br. at 30; *see generally* Risen Br. at 22–24

Report. *See* JA Solar Br. at 36; Risen Br. at 22. Second, Plaintiffs assert that Commerce erroneously rejected comparable benchmark data from Mexico and Brazil. *See* JA Solar Br. at 32–34; JA Solar Benchmark at Ex. 6A-B.

Commerce conducted a tier-three analysis, based on the 2010 CBRE Report which utilized land prices in Thailand to evaluate adequate remuneration for land in China.[2] *PDM* at 18. Commerce rejected the JA Solar Benchmark under a tier-three analysis because it omitted factors of comparability required to evaluate the report's usability, including "national income levels, population density, and producers' perceptions that Thailand is a reasonable alternative to China as a location for *Asian production*." *I&D Memo* at 52 (emphasis added). Commerce rejected the Mexico and Brazil data because it determined that geographic proximity to China was a heavily weighted factor in the tier-three land benchmark analysis. *See Land Use Memo* at 30; *Sacks from China*, 72 Fed. Reg. at 67,909. The court has previously sustained Commerce's reliance on geographic proximity to reject data outside of the Asian geographic region. *See Canadian Solar III*, 537 F. Supp. 3d at 1390 (finding that Commerce's determination to reject land benchmark data from Mexico and Brazil on the grounds of geographic proximity was reasonable).

The court is not convinced, however, that Commerce may continue to rely on aging data from Thailand in the 2010 CBRE Report without further explanation. Several factors warrant the reconsideration of the land benchmark data. First, Plaintiffs properly note that the 2010 CBRE Report is stale compared to more contemporaneous benchmark data and becomes staler with each successive administrative review. *See* 2010 CBRE Report at 3–10. Second, in antidumping determinations, Commerce has considered both Mexico and Brazil to be surrogate countries to China for economic development, specifically comparing Gross National Income levels.[3] Third, since the 2010 CBRE Report was released, it appears that Thailand and China have

[2] The court has previously found that Commerce's reliance on the tier-three 2010 CBRE Report indexed to the period of review was lawful and supported by substantial evidence. *See Canadian Solar III*, 537 F. Supp. 3d at 1390 ("Commerce's use of an indexed 2010 Thailand industrial land price survey as a tier-three benchmark for land prices in China was reasonable and supported by substantial evidence."); *see also Sacks from China*, 74 Fed. Reg. 67,906–08 (Commerce selected the 2010 CBRE Reports as a tier-three land benchmark to evaluate land prices in China); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances*, 77 Fed. Reg. 63,788 (Dep't Commerce Oct. 17, 2012), and accompanying Issues and Decisions Memorandum at 13 (Commerce found that the 2010 CBRE Report, appropriately indexed, was a suitable land benchmark).

[3] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018*, 85 Fed. Reg. 7,531

diverged in terms of comparable national income levels and population density. Commerce has not adequately explained how long it can continue to rely on 2010 CBRE Report while the gap between Thailand and China's comparability metrics widen each successive year. Given these factors, the record does not adequately explain why Commerce granted controlling weight to geographic proximity in evaluating the land benchmark data, while disregarding other factors.

Finally, Plaintiffs challenge Commerce's rejection of the 2018 Nexus Report as a tier-three benchmark. JA Solar Br. at 37. In the Preliminary Results, Commerce stated that it would continue to examine land benchmark prices on a case-by-case basis and would evaluate the proposed benchmarks based on comparability factors. *PDM* at 18. Plaintiffs proffered the 2018 Nexus Reports as an alternative benchmark which provided land price information for factories and warehouses in Thailand. *See Nexus Reports* at Ex. 1. In the Final Results, Commerce rejected the Nexus Reports because the prices reflected "rental Rates for Ready Built Factories and Ready Built Warehouses in Thailand and did not include sales prices for *industrial land*." *See I&D Memo* at 52 (emphasis added); *Nexus Reports* at Ex. 1. Here, Commerce's rejection of the Nexus Reports was contained to this single conclusory sentence. *See I&D Memo* at 52. Compared to the multi-factor analysis of the JA Solar tier-three benchmark, Commerce does not provide sufficient record evidence to reasonably reject the Nexus Reports. The court accepts that there is a distinction between the price of rental properties and the sales price for industrial land, but without further explanation, the court is unable to determine whether that distinction is reasonably considered here where one would expect both types of property to be involved.

Commerce's use of an indexed 2010 CBRE Report for Thailand industrial land price as a tier-three benchmark for land prices in China thus was not supported by substantial evidence. The court remands for reconsideration or further explanation of Commerce's reliance on of geographic proximity in the land benchmark analysis. Further, if relevant, Commerce should consider whether land values in Thailand remain a suitable benchmark to determine the value of

(Dep't Commerce Feb. 10, 2020); *see also* Preliminary Decision Memorandum at 57 (finding Brazil, Kazakhstan, Malaysia, Mexico, Romania, and Russia as surrogate countries to China); *Antidumping Duty Investigation of Certain Aluminum Foil From the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 Fed. Reg. 50,858 (Dep't Commerce Nov. 2, 2017), *see also* Preliminary Decision Memorandum at 57 (finding Brazil, Bulgaria, Mexico, Romania, South Africa, and Thailand as surrogate countries to China based on per capita 2015 Gross National Income data). Commerce posits that AD and CVD reviews are different proceedings for different purposes, and thus the surrogate value country selection is not applicable. *I&D Memo* at 52.

Chinese land. Finally, Commerce should provide a more robust analysis explaining why it rejected the Nexus Report rental data based on the record evidence.

III. Ocean Freight Benchmark

a. Background

Under the countervailing duty statute, "[a] benefit shall normally be treated as conferred" by the Department "where goods or services are provided, if such goods or services are provided for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). As discussed above, Commerce applies a tier-two benchmark "by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). "Where there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable, making due allowance for factors affecting comparability." *Id.* Commerce also "adjust[s] the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." *Id.* § 351.511(a)(2)(iv).

Commerce's regulations for tier-two benchmarks do not require the comparable product and market be identical in order to for a benchmark to appropriately represent the world market price. *See Id.* § 351.511(a)(2)(ii); *see also Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 52 F. Supp. 3d 1351, 1369 (2015) ("[T]here is nothing that requires that [Commerce] use prices for merchandise that are identical.") (emphasis omitted); *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273–74 (Fed. Cir. 2012) (holding that Australia iron ore prices were an appropriate tier-two benchmark for India iron ore). At the same time, "[a]n import benchmark's comparability means it must bear a reasonably realistic resemblance to the importing market's reality or it will not be in accordance with the statute." *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1341 (2015) (internal quotation marks omitted).

At issue is the benchmark set by Commerce in assessing the value of ocean freight. Plaintiffs argue that Commerce's use of a tier-two benchmark, sourced from the average of two datasets, was unlawful and unsupported by substantial evidence because: (1) the Descartes data reflected only carrier prices from the United States to China as opposed to the Xeneta data's wider breadth, *see* JA Solar Br. at 41–42; Risen Br. at 16–17; (2) the Descartes data did not reflect what Plaintiffs would reasonably pay for imported inputs of glass, aluminum,

and polysilicon, *see* JA Solar Br. at 43–44; Risen Br. at 16; and (3) the Descartes data was flawed by failing to account for market conditions, the container load, and inland transportation, *see* Risen Br. at 18–21. Further, Plaintiffs argue that, if Commerce properly relied on the Descartes data, then Commerce's simple average of the routes was not supported by substantial evidence because the Descartes data only should have been averaged with Xeneta's United States to China route data. *See* Risen Br. at 21–22.

Commerce maintains that its ocean freight benchmark determination is lawful because "world market price" would include the Descartes data when those rates were available to Chinese purchasers and the regulations did not require accounting for the commercial reality of respondents, *see* Def.'s Response in Opposition to Pls.' Mots. For J. on the Agency Record at 19–22, ECF No. 56 (Oct. 22, 2021), and the benchmark accounted for a world market by averaging the Xeneta and Descartes data together, *see id.* at 21–22. Commerce also argues that its decision to perform a simple average of the data was reasonable because it was consistent with past practice. *See id.* at 22.

Prior to the final results, JA Solar submitted data relevant to benchmark price calculations for ocean freight, which provided "monthly ocean freight data for shipping a 20-foot standard container to Shanghai" from multiple ports. *JA Solar, Benchmark Submission*, C.R. 284–94, P.R. 166–68 at Ex. 7C (Jan. 13, 2020). The data was sourced from Xeneta. *Id.* The Xeneta data reflected the prices from various points across the world to Shanghai, China, including Japan, Barcelona, Busan, Singapore, Jakarta, Los Angeles, Rotterdam, and Mumbai. *Id.* The average ocean freight rate per container ranged from $380.51 to $414.59. *Id.*

At the same time, SunPower Manufacturing submitted monthly freight quotes for 2017 from Descartes for shipping rates to Shanghai, China, for solar glass, aluminum extrusions, and polysilicon inputs for solar cells. *Petitioner, Submission of Benchmark Information*, P.R. 170–175 at Ex. 5 ("SunPower Benchmark Submission"). The Descartes data reflected the freight rate for the solar glass from Long Beach, California; Los Angeles, California; Oakland, California; Portland, Oregon; San Francisco, California; Seattle, Washington; and Tacoma, Washington. *Id.* The data stated that the average freight cost per standard dry container from each city was $5,775.75. *Id.* The specific data behind those numbers were all sourced from "Tariff Code: 005338–001" and freight forwarder code "2845–30–0000–01." *Id.* at Ex. 6. The data also stated that the container size was, "LTL," or less than a container load. *Id.*

The rates for aluminum extrusions were from Chicago, Illinois for $2,565 per standard container; Los Angeles, California for $13,941.22; Murrieta, California for $1,660; Portland, Oregon for $13,941.22; San Francisco, California for $13,941.22; Seattle, Washington for $13,938.81; and Tacoma, Washington for $13,941.22. *Id.* at Ex. 5. The routes from Los Angeles, Portland, San Francisco, Seattle, and Tacoma all had the same tariff code, "006053002," and freight forwarder identification, "0260–70–1000–0001." *Id.* at Ex. 7.[4] The rates for polysilicon were from Atlanta, Georgia for $6,224.61, and Long Beach, California for $3,135. *Id.* at Ex. 5. Similarly to the other data, all of the polysilicon data had the same tariff code and freight forwarder code. *Id.* at Ex. 8.

Commerce accepted submissions of the Descartes data from SunPower and the Xeneta data from JA Solar as tier-two benchmarks for ocean freight. *I&D Memo* at 55. Over Plaintiffs' objection, Commerce determined that the Descartes data qualified as a tier-two benchmark. *See id.* at 56. Commerce acknowledged that the regulations did not define "world market price," but stated that the Descartes prices qualified because they were prices for ocean freight from the United States to China. *Id.*; *see* 19 C.F.R. § 351.511(a)(2)(ii). Commerce explained that the Descartes prices were representative of prices that "would be available" to Plaintiffs, and thus found that they were appropriate as a tier-two benchmark. *I&D Memo* at 56; *see* 19 C.F.R. § 351.511(a)(2)(ii). Commerce also rejected Plaintiffs' argument that the Descartes rates were more expensive than they would have paid because the regulations did not require the benchmark to "match the particular commercial reality of the companies." *I&D Memo* at 56; *see* 19 C.F.R. § 351.511(a)(2)(ii). Finally, Commerce stated it would use "a simple average" of all the shipping routes from the two data sets instead of treating the Descartes data as a single route to average with the Xeneta date. *See I&D Memo* at 55–56.

b. Analysis

Commerce's selection of a tier-two benchmark is not in dispute, and the only issues are whether Commerce erred in using the Descartes data and in performing a simple average between it and the Xeneta data. The regulations do not define "world market price," and Commerce generally has discretion to interpret its regulations. *See* 19 C.F.R. § 351.511(a)(2)(ii). In some contexts, Commerce's choice might be viewed as a world market price. Here, however, the Descartes data

[4] Murrieta and Chicago have different tariff codes and freight forwarder identification numbers from the other cities. *See* SunPower Benchmark Submission, at Ex. 7.

likely does not add to the accuracy of the benchmark calculation when there is the clearly acceptable Xeneta data available.

The Descartes data appears to be sourced from limited samples because many of the shipments use the same tariff codes and freight forwarder codes. *See* SunPower Benchmark Submission, at Exs. 6, 7, 8. Risen asserts that this reflects that the provided prices are "only one actual rate from only one company." Risen Br. at 18. Further, some of the data is marked as an "LTL" rate, which is a less than a container load shipment rate and that is more expensive than a normal commercial shipment rate. *See* SunPower Benchmark Submission, at Exs. 6, 7, 8. Additionally, some of the routes are from inland American cities such as Chicago, Murrieta, and Atlanta, which would incur additional fees not associated with ocean freight or found in the Xeneta data. *See* SunPower Benchmark Submission, at Ex. 5. Commerce's analysis does not presently address any of these potential flaws.

Thus, the court remands to Commerce to reconsider the flaws raised by Plaintiffs. The court acknowledges that in some contexts, such data might result in a reasonably determination of the world market price. Here, however, Commerce should also consider the language and purpose of the controlling regulation to decide whether it is necessary to use the Descartes data to arrive at a "world market price" and discuss the identified flaws in the data. Presently, the analysis does not consider these flaws and whether the resulting Descartes data reasonably "reflect[s] the price a firm actually paid or would pay if it imported the product." 19 C.F.R. § 351.511(a)(2)(iv); *see also Borusan Mannesmann Boru Sanayi ve Ticaret A.S*, 61 F. Supp. 3d at 1341.

Finally, Commerce has offered no logical reason to perform its current simple average of the datasets. Absent such a reason, if Commerce concludes that it is necessary to use the Descartes data to represent a world market price, Commerce must average the Descartes data with the United States to China routes data from Xeneta before combining it with the remainder of the Xeneta data or otherwise utilize another methodology that does not skew the calculation by overvaluing the United States to China route data. Such methodology should prevent the Descartes US-focused routes from having an oversized impact on the calculation, represent a more accurate world market price for ocean freight and avoid a ballooning of the average price. *See* 19 C.F.R. § 351.511(a)(2)(ii) ("Where there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable, making due allowance for fac-

tors affecting comparability."); *see also RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1309 (2015) (explaining that Commerce's simple average involving "[h]igh prices from small transactions can balloon the average to absurd proportions").

IV. Electricity Subsidy

In the Final Results, Commerce applied AFA to determine that Plaintiffs received regionally specific electricity subsidies subject to countervailing duties under 19 U.S.C. § 1677(5A)(D)(iv). *Final Results* at cmt. 4; *I&D Memo* at 38–39, 41. Plaintiffs argue that Commerce: (1) impermissibly relied on AFA to determine that the NDRC is the central price-setting authority, (2) failed to designate a subsidized geographic region, and (3) relied on unreasonably high benchmark rates for electricity. *See* JA Solar Br. at 20; Risen Br. at 12–15. The court sustains Commerce's electricity subsidy determination because it is supported by substantial evidence.

First, Plaintiffs challenge Commerce's application of AFA. JA Solar Br. at 23; Risen Br. at 4. Commerce is entitled to apply AFA where an interested party declines to provide 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). The Federal Circuit has previously affirmed Commerce's application of AFA where the GOC has not provided sufficient data to establish a benchmark price for electricity and refused to provide verification concerning "how the electricity process and costs varied among the various provinces that supplied electricity to industries within their areas." *Canadian Solar Inc. v. United States*, 23 F.4th 1372, 1378 (Fed. Cir. 2022) ("*Canadian Solar CAFC Opinion*")[5] (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372 (Fed. Cir. 2014)); *see also Changzhou Trina III*, 466 F. Supp. 3d. at 1302.

Plaintiffs argue that since 2015 the provincial governments, and not the NDRC, have been responsible for setting electricity sales process and that "a competitive system" exists to create prices that are tied to market fluctuations. JA Solar Br. at 25; *see GOC, Initial Questionnaire Response*, P.R. 140–143, C.R. 104–108 at 73 (December 30, 2019) ("GOC December 30, 2019 QR"). Commerce counters that

[5] In the fourth administrative review of Commerce's countervailing duty order, the Federal Circuit held that Commerce reasonably relied on adverse inferences to fill two critical information gaps raised in the record. *Canadian Solar CAFC Opinion*, 23 F.4th at 1379. In the present case, Commerce relied on AFA to fill the same gaps in the record. *See I&D Memo* at 38. ("What has been at issue in Commerce's numerous determinations countervailing the provision of electricity is why prices vary from province to province and who makes the decision–ultimately–to set or allow distinct prices in each province.").

the GOC failed to provide information required to evaluate the cooperation between the provinces and the NDRC for electricity price adjustments. *PDM* at 32; *Dep't Commerce, Countervailing Duty Questionnaire*, P.R. 95 (November 5, 2019). Specifically, Commerce claims that the GOC failed to provide "provincial price proposals for each of the relevant provinces that might demonstrate that the provinces are the authorities setting prices or that there are market- or cost-based reasons underlying the variation in prices among provinces." *I&D Memo* at 40; *see* GOC December 30, 2019 QR at 73, Ex. II E.24. Commerce explained that this information was required to understand the "nature of cooperation between the NDRC and the provinces in deriving price adjustments," stating that it could not confirm whether variances in prices among the provinces were "in accordance with market principles or cost differences." *PDM* at 34, 36. For the following reasons, Commerce's determination is supported by substantial evidence.

Here, as in the fourth administrative review of the Commerce's countervailing duty order, Commerce reasonably found that the GOC did not comply to the best of its ability to fill informational gaps in the record. *I&D Memo* at 40; *see* GOC December 30, 2019 QR at 74; *Canadian Solar CAFC Opinion*, 23 F.4th at 1378. Commerce requested the original provincial price proposals and the GOC did not provide the requested information. GOC December 30, 2019 QR at 73–74. Further, Commerce specifically relied on Notice 748 and the Guangdong Price Catalogue to support its determination that the NDRC is the central price-setting authority. *I&D Memo* at 40.

Article 6 of Notice 748 requires each provincial price department to develop and issue a "specific adjustment plan of electricity and sales price" and to report this plan to the NDRC for record. GOC December 30, 2019 QR at Ex. II E.23. The court has previously sustained Commerce's determination, in view of Notice 748. *See Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1136–38 (2019); *Canadian Solar Inc. v. United States*, Slip Op. 20–149, 2020 WL 6129754 *5 (CIT Oct. 19, 2020) ("*Canadian Solar II*"), *aff'd*, 23 F.4th 1372. Notice 748 supports Commerce's determination that the NDRC is still involved in price setting because Article 6 directs provinces to report their plans to the NDRC. Here too, the court sustains Commerce's determination. *See* GOC December 30, 2019 QR at Ex. II E.23. Next, Commerce's determination relied on the Guangdong Price Catalog. *See I&D Memo* at 40. The document is the basis for the provincial government's price regulation, and it states that it was "reviewed and approved by the

provincial government and the NDRC." *I&D Memo* at 40–41; GOC December 30, 2019 QR at 76 at Ex. II E.38. Finally, Plaintiffs' supplemental evidence does not deprive Commerce's determination of substantial evidence.[6] Plaintiffs' supplemental information fails to fill the gaps in the record Commerce reasonably identified as critical—the provincial price proposals for each of the relevant provinces.

Because the GOC did not act to the best of its ability in responding to Commerce's requests, Commerce was authorized to apply an adverse factual inference to fill the relevant gaps. *See Deacero S.A.P.I. de C.V.*, 996 F.3d at 1297. On the totality of the record, Commerce reasonably considered record evidence to support the finding that the NDRC is the ultimate price-setting authority for electricity prices. *See I&D Memo* at 40. Commerce's determination to use AFA is thus supported by substantial evidence.

Next, Plaintiffs argue that Commerce failed to identify a designated region that received subsidized electricity prices. JA Solar Br. at 20–23. "Subsidies provided by a central government to particular regions (including a province or a state) are specific regardless of the degree of availability or use within the region." Uruguay Round Agreements Act, Statement of Administrative Action, H. R. Rep. No. 103–316, vol. 1, at 932 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4242. The court has previously held that "no additional showing of specificity is required if Commerce finds that a central government is providing subsidies based on region." *Changzhou Trina III*, 466 F. Supp. 3d at 1303 n.12 (citing *Royal Thai Gov't v. United States*, 30 CIT 1072, 1079, 441 F. Supp. 2d 1350, 1358 n.5 (2006)).

Plaintiffs' contention that Commerce failed to designate a subsidized geographic region has been previously raised before the court and rejected. *Canadian Solar CAFC Opinion* 23 F.4th at 1380–81. The Federal Circuit held that Commerce may find a countervailable regionally specific subsidy "where documents support the inference [that] the central [GOC] was involved in provincial electricity pricing that results in regional price variability." *Id.* at 1380; *see also Royal Thai Gov't*, 30 CIT at 1709, 441 F. Supp. 2d at 1385 (affirming Commerce's determination that regional specificity was reasonable even when every region in the subject country received uniform electricity prices); *Changzhou Trina III*, 466 F. Supp. 3d at 1303 n.12 ("[N]o additional showing of specificity is required if Commerce finds that a central government is providing subsidies based on region.") (internal citations omitted).

[6] Plaintiffs submitted two supplemental documents to address whether the GOC provided electricity for LTAR: GOC December 30, 2019 QR at Ex. II E.19 (Completing Price Linkage Mechanism Between Coal and Electricity), and GOC December 30, 2019 QR at Ex. II E.34 (Pricing Catalogues of Central Government).

Contrary to Plaintiffs' argument, Commerce was not required to identify a particular subsidized region. As summarized above, Commerce reasonably applied AFA to determine that the NDRC is the centralized price-setting authority for electricity. Commerce reasonably found that the NDRC provided subsidies to the region, thus no "additional showing of specificity is required." *See Changzhou Trina III*, 466 F. Supp. 3d at 1290 n.12 (internal citations omitted). Moreover, "even if a particular electricity subsidy is provided to more than one province, so long as it is provided to less than all regions or varies by region, that subsidy can be fairly regarded as regionally specific under the statute." *Id.* No further inquiry is required, and Plaintiffs' regional specificity argument fails.

Finally, Plaintiffs argue that Commerce's benchmark calculations were unreasonable. JA Solar Br. at 26. Plaintiffs once more raise arguments that were considered, and rejected, before the court and the Federal Circuit. *See id.*; *Canadian Solar CAFC Opinion*, 23 F.4th at 1381. Here, as in as in the fourth administrative review of the Commerce's countervailing duty order, Commerce calculated the amount of electrical subsidy as the difference between what the respondent companies paid, and the highest tariffs set for any province. *I&D Memo* at 41; *Canadian Solar CAFC Opinion*, 23 F.4th at 1381. The court found Commerce's methodology to be reasonable, and the Federal Circuit sustained. *Canadian Solar II*, 2020 WL 6129754 *6, *aff'd*, 23 F.4th at 1372. On this analogous factual record, the court finds no reason to deviate from its prior decisions that Commerce's benchmark calculations were reasonable and supported by substantial evidence.

Accordingly, the court sustains Commerce's determination regarding the countervailable subsidization of electricity in China.

CONCLUSION

The court sustains Commerce's determination regarding the specificity finding for electricity for LTAR program. For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on the remaining issues. The remand shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

Dated: May 12, 2022
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 56, No. 20, May 25, 2022

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

U.S. G.P.O.: 2022—419-479/80239