# U.S. Customs and Border Protection

## TRADE FACILITATION AND CARGO SECURITY SUMMIT 2023

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

**ACTION:** Notice of 2023 Trade Facilitation and Cargo Security Summit.

**SUMMARY:** This document announces that U.S. Customs and Border Protection (CBP) will convene the 2023 Trade Facilitation and Cargo Security (TFCS) Summit in Boston, MA, on April 17–19, 2023. The 2023 TFCS Summit will be open for the public to attend in person or via webinar. The 2023 TFCS Summit will feature CBP personnel, members of the trade community, and members of other government agencies in panel discussions on CBP's role in international trade initiatives and programs. Members of the international trade and transportation communities and other interested parties are encouraged to attend.

**DATES:** Monday, April 17, 2023 (opening remarks and general sessions, 8:00 a.m.–5:00 p.m. EDT), and Tuesday, April 18 and Wednesday, April 19, 2023 (breakout sessions, 8:00 a.m.–5:00 p.m. EDT).

**ADDRESSES:** The 2023 Trade Facilitation and Cargo Security Summit will be held at the Omni Boston Hotel at the Seaport at 450 Summer St, Boston, MA 02210. Directional signage will be displayed throughout the event space for registration, the sessions, and the exhibits.

*Registration* is open and will close on Thursday, April 6 at 4:00 p.m. EDT. Registration information may be found on the event web page at *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.* All registrations must be made online and will be confirmed with payment by credit card only. The registration fee to attend in person is $320.00 per person. The registration fee to attend via webinar is $24.00. Interested parties are requested to register immediately as space is limited. Members of the public who are pre-registered to attend and later need to cancel, may do so by using the link from their confirmation email or sending an

email to *TFCSSummit@cbp.dhs.gov.* Please include your name and confirmation number with your cancellation request. Cancellation requests made after Friday, March 24, 2023, will not receive a refund.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Daisy Castro, Office of Trade Relations, U.S. Customs and Border Protection at (202) 344–1440 or at *TFCSSummit@cbp.dhs.gov.* The most current 2023 TFCS Summit information can be found at *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.*

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, please contact Mrs. Daisy Castro, Office of Trade Relations, U.S. Customs and Border Protection at (202) 344–1440 or at *TFCSSummit@cbp.dhs.gov,* as soon as possible.

**SUPPLEMENTARY INFORMATION:** This document announces that U.S. Customs and Border Protection (CBP) will convene the 2023 Trade Facilitation and Cargo Security (TFCS) Summit in Boston, MA on April 17–19, 2023. The format of the 2023 TFCS Summit will consist of general sessions on the first day and breakout sessions on the second and third days. The 2023 TFCS Summit will feature panels composed of CBP personnel, members of the trade community, and members of other government agencies. The panel discussions will address the Customs Trade Partnership Against Terrorism (CTPAT), the Uyghur Forced Labor Prevention Act (UFLPA), the 21st Century Customs Framework (21CCF), the Automated Commercial Environment (ACE) 2.0, and other topics. The 2023 TFCS Summit agenda can be found on the CBP website: *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.*

Hotel accommodations have been made at the Omni Boston Hotel at the Seaport at 450 Summer Street, Boston, MA 02210. Hotel room block reservation information can be found on the event web page at *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.*

Dated: March 21, 2023.

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

# U.S. Court of International Trade

Slip Op. 23–41

JIANGSU ZHONGJI LAMINATION MATERIALS CO., LTD.; JIANGSU ZHONGJI LAMINATION MATERIALS CO., (HK) LTD.; SHANTOU WANSHUN PACKAGE MATERIAL STOCK CO., LTD.; JIANGSU HUAFENG ALUMINIUM INDUSTRY CO., LTD.; ANHUI MAXIMUM ALUMINIUM INDUSTRIES COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION TRADE ENFORCEMENT WORKING GROUP AND ITS INDIVIDUAL MEMBERS; JW ALUMINUM COMPANY; NOVELIS CORPORATION; REYNOLDS CONSUMER PRODUCTS LLC, Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 21–00133
PUBLIC VERSION

[Sustaining in part and remanding in part Commerce's Final Results in its first administrative review of the countervailing duty order on certain aluminum foil from the People's Republic of China.]

Dated: March 21, 2023

*Sarah M. Wyss* and *Yixin (Cleo) Li*, Mowry & Grimson, PLLC, of Washington, D.C., argued for plaintiffs Jiangsu Zhongji Lamination Materials Co., Ltd.; Jiangsu Zhongji Lamination Materials Co., (HK) Ltd.; Shantou Wanshun Package Material Stock Co., Ltd.; Jiangsu Huafeng Aluminium Industry Co., Ltd.; and Anhui Maximum Aluminium Industries Company Limited. With them on the briefs were *Jeffrey S. Grimson* and *Bryan P. Cenko*.

*Sosun Bae*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Catharine M. Parnell*, Trial Attorney. Of counsel were *Jesus N. Saenz* and *Ian A. McInerney*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Grace W. Kim*, Kelley Drye & Warren LLP, of Washington, D.C., argued for defendant-intervenors Aluminum Association Trade Enforcement Working Group; JW Aluminum Company; Novelis Corporation; and Reynolds Consumer Products LLC. With her on the brief was *John M. Herrmann*.

## *OPINION AND ORDER*

* * *

**Reif, Judge:**

Jiangsu Zhongji Lamination Materials Co., Ltd., Jiangsu Zhongji Lamination Materials Co., (HK) Ltd., Shantou Wanshun Package Material Stock Co., Ltd., Jiangsu Huafeng Aluminium Industry Co., Ltd., and Anhui Maximum Aluminium Industries Company Limited (collectively, "plaintiffs" or the "Zhongji Respondents") challenge the

final results of the first administrative review ("AR 1") by the U.S. Department of Commerce ("Commerce") of the countervailing duty ("CVD") order on certain aluminum foil from the People's Republic of China ("China"). *See Certain Aluminum Foil from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017–2018* ("*AR 1 Final Results*"), 86 Fed. Reg. 12,171 (Dep't of Commerce Mar. 2, 2021) and accompanying Issues and Decision Memorandum ("IDM") (Dep't of Commerce Feb. 24, 2021); *see also Certain Aluminum Foil from the People's Republic of China: Preliminary Results of the Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017–2018* ("*AR 1 Preliminary Results*"), 85 Fed. Reg. 38,861 (Dep't of Commerce June 29, 2020) and accompanying Preliminary Decision Memorandum ("PDM") (Dep't of Commerce June 17, 2020); *Certain Aluminum Foil from the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order* ("*Aluminum Foil Order*"), 83 Fed. Reg. 17,360 (Dep't of Commerce Apr. 19, 2018).

Plaintiffs move for judgment on the agency record pursuant to Rule 56.2 of the U.S. Court of International Trade ("USCIT" or the "Court") and challenge the AR 1 Final Results with respect to four issues: (1) Commerce's rejection of the benchmark submission of the Zhongji Respondents dated May 18, 2020; (2) Commerce's calculation of the benchmark for the primary aluminum for less than adequate remuneration ("LTAR") program ("primary aluminum program"); (3) Commerce's selection of data to calculate the benchmark for the aluminum plate and/or sheet and strip for LTAR program ("aluminum plate/sheet program"); and (4) Commerce's selection of data to calculate the benchmark for the land for LTAR program ("land program"). *See* Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. upon the Agency R. of Pls. ("Pls. Br."), ECF No. 30; Reply Br. in Supp. of Rule 56.2 Mot. for J. upon the Agency R. on Behalf of Pls. ("Pls. Reply Br."), ECF No. 40; *see also* Compl., ECF No. 10.

The United States ("defendant") as well as the Aluminum Association Trade Enforcement Working Group, JW Aluminum Company, Novelis Corporation and Reynolds Consumer Products LLC (collectively, "defendant-intervenors" or the "petitioners") oppose plaintiffs' motion. *See* Def.'s Resp. to Pl.'s Mot. for J. on the Admin. R. ("Def. Br."), ECF No. 35; Def.-Intervenors' Resp. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Admin. R. ("Def.-Intervenors Br."), ECF No. 45.

For the reasons discussed below, the court sustains in part and remands in part the AR 1 Final Results.

## BACKGROUND

Jiangsu Zhongji Lamination Materials Co., Ltd. is a foreign producer of the subject merchandise and Jiangsu Zhongji Lamination Materials Co., (HK) Ltd. is a foreign exporter of the subject merchandise. *See* Compl. ¶ 5. Shantou Wanshun Package Material Stock Co., Ltd., Jiangsu Huafeng Aluminium Industry Co., Ltd., and Anhui Maximum Aluminium Industries Company Limited are "cross-owned companies" of Jiangsu Zhongji Lamination Materials Co., Ltd. *Id.*

On April 19, 2018, Commerce published the Aluminum Foil Order. *See Aluminum Foil Order*, 83 Fed. Reg. 17,360. On June 13, 2019, Commerce initiated an AR 1 of the Aluminum Foil Order. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 27,587, 27,595 (Dep't of Commerce June 13, 2019). The period of review ("POR") for this AR 1 was from August 14, 2017, through December 31, 2018. *See* IDM at 1. On April 1, 2020, the Zhongji Respondents and petitioners filed with Commerce their respective benchmark submissions. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Benchmark Submission (Apr. 1, 2020) ("Zhongji Benchmark Submission"), PR 311–314, CR 205–209, 215–217; Letter from Kelley Drye & Warren LLP, to Sec'y of Commerce, re: First Administrative Review of the Countervailing Duty Order on Certain Aluminum Foil from the People's Republic of China — Petitioners' Submission of Factual Information to Measure Adequacy of Remuneration (Apr. 1, 2020) ("Pet'rs Benchmark Submission"), PR 307–310. On April 13, 2020, the Zhongji Respondents filed their rebuttal benchmark submission. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Rebuttal Benchmark (Apr. 13, 2020) ("Zhongji Rebuttal Benchmark Submission"), CR 222.

On April 24, 2020, "[i]n response to operational adjustments due to COVID-19," Commerce "decided to uniformly toll deadlines for all . . . administrative reviews . . . by 50 days." Letter from U.S. Dep't of Commerce, re: Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID-19 (Apr. 24, 2020) ("Tolling Mem."), PR 332. Prior to Commerce's publication of the Tolling Memorandum, the deadline for Commerce to publish the AR 1 Preliminary Results was April 29, 2020. *See* PDM at 5. The Tolling Memorandum shifted this deadline to June 18, 2020. *See id.*

On May 18, 2020, the Zhongji Respondents submitted for inclusion in the record additional benchmark information for consideration by

Commerce. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Additional Benchmark Submission (May 18, 2020) ("May 18 Benchmark Submission"), PR 336, CR 223. On May 22, 2020, Commerce rejected the May 18 Benchmark Submission as untimely. *See* Letter from Sec'y of Commerce, to Mowry & Grimson, PLLC, re: Countervailing Duty Administrative Review of Aluminum Foil from the People's Republic of China (May 22, 2020) ("May 22 Rejection Letter"), PR 338. On May 26, 2020, the Zhongji Respondents requested that Commerce reconsider its decision to reject the May 18 Benchmark Submission. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Objection to Commerce's Rejection of Additional Benchmark Submission and Request for Reconsideration (May 26, 2020), PR 340. On June 2, 2020, however, Commerce stated that it "continue[d] to find that [the May 18 Benchmark Submission] should be rejected because it was untimely filed." Letter from Sec'y of Commerce, to Mowry & Grimson, PLLC, re: Countervailing Duty Administrative Review of Aluminum Foil from the People's Republic of China (June 2, 2020) at 2, PR 341.

On June 17, 2020, Commerce published its PDM and, subsequently, the AR 1 Preliminary Results. *See* PDM at 1; *AR 1 Preliminary Results*, 85 Fed. Reg. 38,861. On July 2, 2020, the Zhongji Respondents requested clarification as to whether they would be permitted to submit new factual information ("NFI") with respect to the benchmark for the land program. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Request for Clarification and Extension to Submit Land Benchmark Information (July 2, 2020) ("Zhongji Req. for Clarification"), PR 353. On July 6, 2020, Commerce notified the Zhongji Respondents that "parties [were] not permitted to submit" NFI with respect to the benchmark for the land program. Letter from Sec'y of Commerce, to Mowry & Grimson, PLLC, re: Land Benchmark Comments (July 6, 2020) ("Commerce Resp. to Zhongji Req. for Clarification"), PR 354; *see* IDM at 33. Notwithstanding Commerce's response, on July 9, 2020, the Zhongji Respondents submitted for inclusion in the record an additional land benchmark submission, *see* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Additional Land Benchmark Information (July 9, 2020) ("July 9 Benchmark Submission"), PR 357, CR 230, which Commerce rejected as

untimely. *See* Letter from Sec'y of Commerce, to Mowry & Grimson, PLLC, re: Countervailing Duty Administrative Review of Aluminum Foil from the People's Republic of China (July 17, 2020) ("July 17 Rejection Letter"), PR 358.

On March 2, 2021, Commerce published the AR 1 Final Results. *See AR 1 Final Results*, 86 Fed. Reg. 12,171. On March 24, 2021, plaintiffs commenced the instant action.

## JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c). Plaintiffs bring the instant action pursuant to sections 516A(a)(2)(A)(i)(I) and (a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii) (2018).[1] *See* Compl. ¶ 2.

The court will sustain a determination by Commerce unless the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i). The "substantial evidence" standard requires "more than a mere scintilla" of evidence, *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)), "but is satisfied by 'something less than the weight of the evidence.'" *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has stated that for a reviewing court to "fulfill [its] obligation" to evaluate whether a determination by Commerce is supported by substantial evidence and in accordance with law, Commerce is required to "examine the record and articulate a *satisfactory explanation* for its action." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (emphasis supplied) (quoting *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)); *cf. Risen Energy Co. v. United States*, 46 CIT __, __, 570 F. Supp. 3d 1369, 1376 (2022); *Habas Sinai v. United States*, 43 CIT __, __, 413 F. Supp. 3d 1347, 1361 (2019).

In addition, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). However, the court will "uphold a decision of less than ideal clarity if the agency's

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

path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *see also NMB Sing. Ltd. v. United States,* 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").

## LEGAL FRAMEWORK

Commerce is required to determine that a countervailable subsidy exists in circumstances in which: (1) an authority provides a financial contribution; (2) a benefit is thereby conferred; and (3) the subsidy is specific. *See* 19 U.S.C. § 1677(5)-(5A); *see also Guizhou Tyre Co. v. United States*, 45 CIT __, __, 523 F. Supp. 3d 1312, 1378 (2021). In circumstances in which the financial contributions at issue are goods or services, the statute indicates that a benefit is conferred "if such goods or services are provided for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv).

Commerce's regulations provide a methodology to measure the adequacy of remuneration that is based on a three-tiered hierarchy. *See Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1332 (2018); *see generally Countervailing Duties*, 63 Fed. Reg. 65,348 (Dep't of Commerce Nov. 25, 1998). Commerce's methodology requires the selection of an "appropriate remuneration benchmark" — i.e., a Tier 1, Tier 2 or Tier 3 benchmark — to determine the adequacy of remuneration. *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1332; *see* 19 C.F.R. § 351.511(a)(2)(i)-(iii).

With a Tier 1 benchmark, Commerce will "seek to measure the adequacy of remuneration 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 a Tier 1 benchmark, Commerce will turn to a Tier 2 benchmark, with which Commerce "will seek to measure the adequacy of remuneration 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). In the absence of a Tier 1 or Tier 2 benchmark, Commerce will consider a Tier 3 benchmark, with which Commerce will "measure the adequacy of remuneration by assessing whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii); *see Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1389–92 (2021).

## DISCUSSION

### I. Commerce's rejection of the May 18 Benchmark Submission

#### A. Legal framework

19 C.F.R. § 351.301(c)(3)(ii), which regulates time limits for the submission to Commerce of factual information, provides that "[a]ll submissions of factual information . . . to measure the adequacy of remuneration under § 351.511(a)(2), are due no later than 30 days before the scheduled date of the preliminary results of review." 19 C.F.R. § 351.301(c)(3)(ii).

#### B. Positions of the parties

Plaintiffs contend that Commerce acted unreasonably in rejecting as untimely the May 18 Benchmark Submission. *See* Pls. Br. at 11–18. Plaintiffs argue that "the Tolling Memorandum reset the thirty-day [submission] deadline" for the Zhongji Respondents, *id.* at 13; 19 C.F.R. § 351.301(c)(3)(ii), and that Commerce's past practice supports this position. *See* Pls. Br. at 14–15; Pls. Reply Br. at 3–4. Separately, plaintiffs maintain that Commerce abused its discretion in rejecting the May 18 Benchmark Submission. *See* Pls. Br. at 15–18.

Defendant and defendant-intervenors argue that Commerce rejected reasonably the May 18 Benchmark Submission. *See* Def. Br. at 26–28; Def.-Intervenors Br. at 2–6. According to defendant, plaintiffs' position that the Tolling Memorandum "increased the time for benchmark submissions and simultaneously allowed parties a second opportunity for rebuttal benchmark comments . . . is [not] supported by Commerce's regulations." Def. Br. at 26; *see* Def.-Intervenors Br. at 3–4. Further, defendant-intervenors challenge plaintiffs' argument that Commerce deviated from a past practice in rejecting the May 18 Benchmark Submission. *See* Def.-Intervenors Br. at 4–5; *see also* Oral Arg. Tr. at 14:01–16, ECF No. 58. Defendant-intervenors contend also that Commerce did not abuse its discretion in rejecting the May 18 Benchmark Submission. *See* Def.-Intervenors Br. at 5–6 (citing Pls. Br. at 17–18); Oral Arg. Tr. at 17:02–09.

#### C. Analysis

The court concludes that Commerce's decision to reject the May 18 Benchmark Submission as untimely was reasonable and is supported by substantial evidence. *See* IDM at 22–23, 26–27.

Commerce's publication of the Tolling Memorandum did not toll the deadline for the Zhongji Respondents to file a benchmark submission

in this review. *See* Tolling Mem. On April 24, 2020, Commerce published the Tolling Memorandum, in which Commerce stated that "[i]n response to operational adjustments due to COVID-19," Commerce would "uniformly toll deadlines for all . . . administrative reviews . . . by 50 days." *Id.* Specifically, Commerce indicated that the Tolling Memorandum "applie[d] to every AD/CVD administrative review segment before [Commerce] as of" April 24, 2020, as well as "*pending* deadlines for actions by parties to administrative reviews."[2] *Id.* (emphasis supplied).

In the instant case, the deadline for the Zhongji Respondents to file a benchmark submission was no longer "pending" on the date that Commerce published the Tolling Memorandum. *Id.* 19 C.F.R. § 351.301(c)(3)(ii) provides that "[a]ll submissions . . . to measure the adequacy of remuneration under § 351.511(a)(2), are due *no later than 30 days before* the scheduled date of the preliminary results of review." 19 C.F.R. § 351.301(c)(3)(ii) (emphasis supplied). Prior to Commerce's publication of the Tolling Memorandum, the scheduled date for Commerce to publish the AR 1 Preliminary Results was April 29, 2020. *See* PDM at 5. Accordingly, the deadline for the Zhongji Respondents to submit factual information was "no later than 30 days before" April 29, 2020. 19 C.F.R. § 351.301(c)(3)(ii). The Zhongji Respondents complied with this deadline in filing their benchmark submission.[3] *See* Zhongji Benchmark Submission.

On this basis, the submission deadline for the Zhongji Respondents was not "pending" on the date that Commerce published the Tolling Memorandum. Tolling Mem. Consequently, Commerce's tolling decision as set forth in the Tolling Memorandum did not apply with respect to the submission deadline for the Zhongji Respondents.

Moreover, the Tolling Memorandum did not "reset" the submission deadline for the Zhongji Respondents. *See id.*; IDM at 23, 26–27. Commerce did not indicate in the Tolling Memorandum that it would reset submission deadlines that already had passed; rather, as discussed, Commerce stated that it would "uniformly toll . . . pending deadlines" by 50 days. Tolling Mem. Further, 19 C.F.R. §

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[2] *See Pending*, BLACK'S LAW DICT. (11th ed. 2019) ("Remaining undecided; awaiting decision."); *Pending*, COLLINS ENGLISH DICT. https://www.collinsdictionary.com/us/dictionary/english/pending (last visited Mar. 16, 2023) ("If . . . a legal procedure is pending, it is waiting to be dealt with or settled."); *Pending*, AM. HERITAGE DICT., https://www.ahdictionary.com/word/search.html?q=pending (last visited Mar. 16, 2023) ("Not yet decided or settled; awaiting conclusion or confirmation . . . [i]mpending; imminent.").

[3] The Zhongji Respondents filed their benchmark submission on April 1, 2020, *see* Zhongji Benchmark Submission, after Commerce provided interested parties with a two day extension to submit benchmark information. *See* Letter from U.S. Dep't of Commerce, re: Grant Partial Extension for Benchmark Deadline, Message No. 3958816 (C-570–054) (Mar. 27, 2020); 19 C.F.R. § 351.301(c)(3)(ii).

351.301(c)(3)(ii) does not provide a legal basis for the reset of a party's submission deadline should Commerce decide to toll the "scheduled date" for the publication of its preliminary results. 19 C.F.R. § 351.301(c)(3)(ii).

Plaintiffs cite to several administrative determinations to support the contention that the Tolling Memorandum reset the submission deadline for the Zhongji Respondents.[4] *See* Pls. Br. at 14–15; Pls. Reply Br. at 3–4. However, these determinations do not demonstrate that Commerce deviated from a "past practice" in concluding that the Tolling Memorandum did not reset the submission deadline and, consequently, in rejecting the May 18 Benchmark Submission. Pls. Br. at 14. Rather, the cited determinations involve circumstances in which Commerce decided specifically to extend the deadline to publish a preliminary determination in the respective proceedings pursuant to statutory provisions that were neither invoked nor applicable with respect to Commerce's publication of the Tolling Memorandum — i.e., 19 U.S.C. § 1675(a)(3) in the cited administrative reviews, and 19 U.S.C. § 1671b(c)(1) in the cited CVD investigations. *See* 19 U.S.C. § 1675(a)(3) (providing for the extension of the deadline to publish a preliminary determination in an administrative review by up to an additional 120 days should Commerce determine that it is "not practicable to complete the review within" 245 days); 19 U.S.C. § 1671b(c)(1) (providing for the extension of the deadline to publish a preliminary determination in a CVD investigation by up to an additional 65 days in "extraordinarily complicated" cases).

By contrast, in this circumstance Commerce did *not* extend the deadline to publish the AR 1 Preliminary Results pursuant to 19 U.S.C. § 1675(a)(3) or 19 U.S.C. § 1671b(c)(1). Rather, Commerce in the Tolling Memorandum invoked Commerce's authority (and discre-

[4] The administrative determinations to which plaintiffs cite are *Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent to Rescind the Review, in Part; 2016*, 84 Fed. Reg. 5,051 (Dep't of Commerce Feb. 20, 2019) and accompanying IDM (Dep't of Commerce Feb. 12, 2019) at 3–4; *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Preliminary Results of Countervailing Duty Administrative Review and Preliminary Intent to Rescind in Part; Calendar Year 2013*, 80 Fed. Reg. 18,809 (Dep't of Commerce Apr. 8, 2015) and accompanying IDM (Dep't of Commerce Mar. 31, 2015) at 3–4, n.16; *Certain Uncoated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 80 Fed. Reg. 36,971 (Dep't of Commerce June 29, 2015) and accompanying IDM (Dep't of Commerce June 22, 2015) at 3; *Fine Denier Polyester Staple Fiber from India: Preliminary Results of Countervailing Duty Administrative Review; 2020*, 87 Fed. Reg. 12,936 (Dep't of Commerce Mar. 8, 2022) and accompanying IDM (Dep't of Commerce Mar. 1, 2022) at 12 n.56; and *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 Determination*, 77 Fed. Reg. 63,788 (Dep't of Commerce Oct. 17, 2012) and accompanying IDM (Dep't of Commerce Oct. 9, 2012) at 37.

tion) to "respond[] to operational adjustments due to COVID-19 . . . [to] make[] available resources and personnel needed to continue performing [Commerce's] other functions" and to "reduc[e] the overall disruption . . . [and] the burden on interested parties."[5] Tolling Mem.; *see* Oral Arg. Tr. at 14:13–16. Accordingly, the cited determinations are not apposite and do not demonstrate that Commerce deviated from a past practice in concluding that the Tolling Memorandum did not "reset" the submission deadline for the Zhongji Respondents. *See* IDM at 23, 26–27; *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370–71 (2007).

The court concludes next that Commerce did not abuse its discretion in rejecting the May 18 Benchmark Submission. Commerce has "broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Yantai Timken*, 31 CIT at 1755, 521 F. Supp. 2d at 1370–71 (quoting *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002)); *see Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1040, 981 F. Supp. 630, 653 (1997). Here, as discussed, Commerce provided a reasonable explanation of its rejection of the May 18 Benchmark Submission as untimely. *See* IDM at 22–23, 26–27; *Maverick Tube Corp. v. United States*, 39 CIT __, __, 107 F. Supp. 3d 1318, 1331 (2015) ("Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision." (citing *Dongtai Peak Honey Indus. Co. v. United States*, 38 CIT 334, 340, 971 F. Supp. 2d 1234, 1242 (2014), *aff'd*, 777 F.3d 1343 (Fed. Cir. 2015))).

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[5] Commerce previously has exercised its authority (and discretion) to "uniformly toll[]" administrative deadlines in circumstances similar to those presented in the instant action. *See, e.g.*, Letter from U.S. Dep't of Commerce, re: Deadlines Affected by the Partial Shutdown of the Federal Government, Message No. 3788676 (Jan. 28, 2019) (stating that Commerce would "exercis[e] its discretion to toll all deadlines for the effective duration" of the "partial Federal Government shutdown"); Letter from U.S. Dep't of Commerce, re: Tolling of Administrative Deadlines as a Result of the Government Closure During Snowstorm 'Jonas', Message No. 3435686 (Jan. 27, 2016) (tolling deadlines to minimize the impact of the "Government closure during Snowstorm 'Jonas'"); Letter from U.S. Dep't of Commerce, re: Tolling of Administrative Deadlines as a Result of the Government Closure During Hurricane Sandy, Message No. 3104680 (Oct. 31, 2012) (tolling deadlines to minimize the impact of the "Government closure during Hurricane Sandy").

Further, the Court previously has stated that Commerce has an "interest[] in finality and efficiency" with respect to Commerce's administration of the statute. *Jinan Yipin Corp. v. United States*, 35 CIT 357, 369, 774 F. Supp. 2d 1238, 1249 (2011). In the instant case, these considerations support further Commerce's decision that it would respond to the "disruption" that resulted from the onset of the COVID-19 pandemic to "over 200 pending administrative reviews" by tolling only pending deadlines, rather than deadlines that already had passed. Tolling Mem. ("The simple rule we are adopting for all administrative reviews will permit parties to such reviews to know immediately the status of applicable deadlines, thus reducing the overall disruption.").

Moreover, Commerce's decision to reject the May 18 Benchmark Submission was consistent with 19 U.S.C. § 1677m(d). *See* Pls. Br. at 16 ("Commerce erred in rejecting the May 18 Benchmark Submission when this submission only attempted to correct certain deficiencies on the record of which Commerce itself failed to notify [the Zhongji Respondents]."). 19 U.S.C. § 1677m(d) provides:

> (d) DEFICIENT SUBMISSIONS. If [Commerce] determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d). Commerce previously has stated that a submission by an interested party is "deficient" within the meaning of 19 U.S.C. § 1677m(d) if the submission does not provide Commerce with "sufficient information" to conduct its review or investigation. *Certain Glass Containers from the People's Republic of China: Final Affirmative Countervailing Duty Determination* ("*Glass Containers from China*"), 85 Fed. Reg. 31,141 (Dep't of Commerce May 22, 2020) and accompanying IDM (Dep't of Commerce May 11, 2020) at cmt. 10; *cf. Certain Steel Nails from the Sultanate of Oman: Final Affirmative Countervailing Duty Determination*, 87 Fed. Reg. 51,335 (Dep't of Commerce Aug. 22, 2022) and accompanying IDM (Dep't of Commerce Aug. 15, 2022) at cmt. 4. Further, Commerce has identified the following considerations in evaluating whether a submission is deficient: (1) whether the submission results in "unexplained discrepancies" in the record;[6] (2) whether the submission is nonresponsive or

[6] *See, e.g.*, *Aluminum Wire and Cable from the People's Republic of China: Final Affirmative Determination of Sales at Less than Fair Value*, 84 Fed. Reg. 58,134 (Dep't of Commerce Oct. 30, 2019) and accompanying IDM (Dep't of Commerce Oct. 18, 2019) at cmt. 2.

"unusable" as to Commerce's request;[7] and (3) whether the submission contains information that "cannot be verified."[8]

Commerce acted consistently with 19 U.S.C. § 1677m(d) in the instant case. Contrary to plaintiffs' argument, *see* Pls. Br. at 16, Commerce determined neither that the submissions of the Zhongji Respondents failed to provide Commerce with "sufficient information" to conduct its review and benchmark analysis, nor that the submissions suffered from any of the foregoing inadequacies. *Glass Containers from China* IDM at cmt. 10. Rather, Commerce in its questionnaires requested information regarding the purchases of the Zhongji Respondents, to which the Zhongji Respondents provided "sufficient" responses in their submissions.[9] *Id.*; *see* IDM at 23, 26–27. The fact that these submissions did not include certain information that may have resulted in a more favorable benchmark selection from the perspective of the Zhongji Respondents does not demonstrate that the submissions were "deficient" or that Commerce acted unlawfully in failing to provide the Zhongji Respondents with an opportunity to "remedy or explain" the submissions. 19 U.S.C. § 1677m(d); *see PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761 (Fed. Cir. 2012); *AA Metals, Inc. v. United States*, 47 CIT __, Slip Op. 23–29 (Mar. 10, 2023), at 16 ("AA Metals appears to read 'deficient' [in 19 U.S.C. § 1677m(d)] to mean 'in conflict with the desires of the company under investigation.' Such an understanding would twist the meaning of the statute beyond recognition.").

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[7] *See, e.g.*, *Certain Carbon and Alloy Steel Cut-to-Length Plate from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 Fed. Reg. 62,871 (Dep't of Commerce Sept. 13, 2016) and accompanying IDM (Dep't of Commerce Sept. 6, 2016) at sec. IX.B.2; *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 Fed. Reg. 35,303 (Dep't of Commerce June 2, 2016) and accompanying IDM (Dep't of Commerce May 24, 2016) at sec. VII.A.

[8] *See, e.g.*, *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Results of Antidumping Duty Administrative Review; 2020–2021*, 88 Fed. Reg. 1,184 (Dep't of Commerce Jan. 9, 2023) and accompanying IDM (Dep't of Commerce Jan. 3, 2023) at cmt. 2.

[9] *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Section III Questionnaire Response by Jiangsu Zhongji Lamination Materials Co., Ltd. and Affiliates (Sept. 20, 2019), vol. I at 16–18, Ex. I-12, vol. III at 13–15, Ex. III-11, vol. 5 at 14–15, Ex. V-10, PR 181–182, CR 33–53; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Second Supplemental Section III Questionnaire Response (Nov. 25, 2019) at 13, 26, 42, Exs. SQ2–19, SQ2–35, SQ2–59, PR 231–232, CR 87–127; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: New Subsidy Allegation Questionnaire Response (Nov. 25, 2019) at Exs. NSA-1, NSA-2, CR 128–132; Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: New Subsidy Allegation Supplemental Questionnaire Response (Feb. 6, 2020) ("New Subsidy Allegation Supp. Questionnaire") at Exs. NSAS-1, NSAS-2, CR 148–149.

In sum, Commerce was not required to accept the May 18 Benchmark Submission, as the Tolling Memorandum neither obligated Commerce to do so nor did the Tolling Memorandum "reset" the submission deadline for the Zhongji Respondents. *See* Tolling Mem.; IDM at 22–23, 26–27. Further, Commerce's decision was consistent with 19 U.S.C. § 1677m(d).

## II. Commerce's calculation of the benchmark for the primary aluminum program

In the instant case, the Zhongji Respondents presented for inclusion in the record data from the London Metal Exchange ("LME") to calculate the benchmark for the primary aluminum program. *See* PDM at 18; Zhongji Benchmark Submission at 2–3, Ex. 4. Xiamen Xiashun Aluminum Foil Co., Ltd. ("Xiashun"), another respondent in this AR 1, submitted the Comtrade data source, which covers subheadings 7601.10 ("[a]luminum, not alloyed") and 7601.20 ("[a]luminum alloys") of the Harmonized Tariff Schedule ("HTS"). *See* Letter from Mayer Brown LLP, to Sec'y of Commerce, re: Aluminum Foil from the People's Republic of China: Final — Benchmark Submission (Apr. 1, 2020) at 2, Ex. 3, PR 315–326, CR 211. Xiashun also submitted a summary table of primary aluminum prices contained in the LME data source. *See id.* at 2, Ex. 4; *see also id.* at 2, Ex. 5; PDM at 18. The petitioners submitted data from the Global Trade Atlas ("GTA"), which covers HTS subheadings 7601.10 and 7601.20. *See* PDM at 18; Pet'rs Benchmark Submission at 4–6, attach. 1.

In the AR 1 Final Results, Commerce relied upon a "weighted average" of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. IDM at 26–27.

### A. Positions of the parties

Plaintiffs challenge Commerce's use of a weighted average of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. *See* Pls. Br. at 27–30. Plaintiffs point to information contained in their May 18 Benchmark Submission and argue that Commerce should have but did not select "the LME data, or, alternatively, GTA and Comtrade data under [only] HTS subheading 7601.10" to calculate the benchmark for the primary aluminum program. *Id.* at 28. Defendant and defendant-intervenors challenge plaintiffs' arguments and contend that Commerce's benchmark selection is supported by substantial evidence. *See* Def. Br. at 28, 31–32; Def.-Intervenors Br. at 14–17.

**B. Analysis**

The court concludes that Commerce's calculation of the benchmark for the primary aluminum program was reasonable and is supported by substantial evidence. *See* IDM at 26–27. As discussed, Commerce determined in this AR 1 that it would rely upon a "weighted average" of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. *Id.* at 26.

The record in this AR 1 does not include the information to which plaintiffs refer in support of their position on Commerce's calculation of the benchmark for the primary aluminum program. *See* Pls. Br. at 27–30; *Ass'n of Am. Sch. Paper Suppliers v. United States*, 34 CIT 31, 33, 683 F. Supp. 2d 1317, 1320 (2010) ("[T]his court's review of Commerce's determination is limited to the record before it . . . because the administrative record contains all information which was presented to, or obtained by, Commerce during the course of the administrative review." (citing 19 U.S.C. § 1516a(b)(2)(A)) (other citations omitted)). This information — which pertains to the aluminum content of the primary aluminum purchases of the Zhongji Respondents — was contained in the May 18 Benchmark Submission, which Commerce declined reasonably to include in the record. *See supra* Section I.C; May 22 Rejection Letter.

The information that is included in the record demonstrates that Commerce's calculation of the benchmark for the primary aluminum program was reasonable and is supported by substantial evidence.[10] *See* IDM at 26–27. Based on the record, Commerce rejected reasonably the proposed LME data source of the Zhongji Respondents. *See id.* Commerce explained that it declined to rely upon the LME data on the basis that these data contain only a "cash price" for primary aluminum purchases that have a "minimum aluminum content of 99.7 percent." *Id.* at 26 (quoting PDM at 18). Commerce stated that the record in this AR 1 did not indicate that the Zhongji Respondents purchased "only primary aluminum with a minimum aluminum content of 99.7 percent." *Id.*

Further, Commerce decided reasonably to use a weighted average of the GTA and Comtrade data sources, covering both HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary

[10] Plaintiffs stated at oral argument that "factual support" with respect to their position on Commerce's calculation of the benchmark for the primary aluminum program was contained in the May 18 Benchmark Submission and that they did "not challenge the primary aluminum benchmark calculations in any other respects." Oral Arg. Tr. at 22:03–06.

aluminum program. *See id.* The Zhongji Respondents argued in the administrative proceedings that should Commerce decide to use a weighted average of the GTA and Comtrade data sources, Commerce should use *only* those data that correspond to HTS subheading 7601.10, as this subheading is more specific than subheading 7601.20 with respect to the primary aluminum purchases of the Zhongji Respondents. *See* Letter from Mowry & Grimson, PLLC, to Sec'y of Commerce, re: Certain Aluminum Foil from the People's Republic of China: Case Brief (Aug. 10, 2020) ("Zhongji Case Br.") at 35–36, CR 231. However, the data upon which the Zhongji Respondents relied to substantiate this argument were not in the record; those data were contained in the May 18 Benchmark Submission, which Commerce rejected reasonably. *See id.*; *supra* Section I.C; May 22 Rejection Letter. Based on the record, Commerce determined reasonably that "there [was] no evidence demonstrating that the respondents only purchased primary aluminum under HTS subheading 7601.10, and not under HTS subheading 7601.20." IDM at 26. Commerce explained that "the GTA and Comtrade data better reflect the range of inputs the respondents purchased" and, consequently, concluded that it would "weight average the GTA and Comtrade data," covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program. *Id.*

The Zhongji Respondents argued also in the administrative proceedings that Commerce should have selected the GTA data, covering *only* HTS subheading 7601.10, to calculate the benchmark for the primary aluminum program, as Commerce did in the underlying investigation. *See* Zhongji Case Br. at 34–35; *see also* Pls. Br. at 30; *Countervailing Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Final Affirmative Determination*, 83 Fed. Reg. 9,274 (Dep't of Commerce Mar. 5, 2018) and accompanying IDM (Dep't of Commerce Feb. 26, 2018) at cmts. 15–16; IDM at 26 n.134. However, there is no requirement that Commerce follow its decision in the underlying investigation. *See Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1134–35, 724 F. Supp. 2d 1327, 1342–43 (2010). "[E]ach CVD proceeding is based on its own unique record of factual evidence and arguments presented to the agency." *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 161 F. Supp. 3d 1343, 1348 (2016)); *see E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32–33 (1998).

Commerce explained specifically that the record before it in the underlying investigation was different from the record before it in this AR 1. *See* IDM at 26. Commerce noted in particular that in the investigation it had "verified information demonstrating that the

respondents' purchases were limited to unalloyed aluminum ingots" and, consequently, determined that it was appropriate to calculate the benchmark with reference only to HTS subheading 7601.10. *Id.* In contrast, Commerce explained that the record in this AR 1 did *not* include any information to indicate that the Zhongji Respondents "only purchased primary aluminum under HTS subheading 7601.10, and not under HTS subheading 7601.20." *Id.* Consequently — and notwithstanding Commerce's benchmark selection in the underlying investigation — Commerce evaluated the record here and determined reasonably that it would "weight-average the GTA and Comtrade data," covering HTS subheadings 7601.10 and 7601.20. *Id.*

Accordingly, the court concludes that Commerce's use of a weighted average of the GTA data source and the Comtrade data source, covering HTS subheadings 7601.10 and 7601.20, to calculate the benchmark for the primary aluminum program was reasonable and is supported by substantial evidence. *See id.* at 26–27.

## III. Commerce's selection of data to calculate the benchmark for the aluminum plate/sheet program

With respect to the benchmark for the aluminum plate/sheet program, the Zhongji Respondents presented for inclusion in the record the Commodities Research Unit ("CRU") Report, which provides pricing data for aluminum alloy products classified under grade 1050 ("alloy 1050"). *See* Zhongji Benchmark Submission at 3–5, Ex. 7; *see also* Zhongji Rebuttal Benchmark Submission at 2–3. The Zhongji Respondents also submitted certain GTA data. *See* Zhongji Benchmark Submission at 3–5, Ex. 6. The petitioners submitted data from the Trade Data Monitor ("TDM"), which covers HTS subheading 7606.12, to calculate the benchmark for the aluminum plate/sheet program. *See* Pet'rs Benchmark Submission at 5–6, attach. 1; PDM at 19.

In the AR 1 Final Results, Commerce determined that it would select the TDM data source to calculate the benchmark for the aluminum plate/sheet program. *See* IDM at 21–24.

### A. Legal framework

The Federal Circuit previously has stated that Commerce's selected remuneration benchmark is required to be "comparable" to the input used in the production of the subject merchandise. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273–74 (Fed. Cir. 2012); *see* 19 U.S.C. § 1677(5)(E)(iv). Further, it is Commerce's practice to "consider factors affecting comparability, such as product quality and similarity, in determining the appropriate benchmark to measure the adequacy of

remuneration." *Circular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2018*, 86 Fed. Reg. 6,866 (Dep't of Commerce Jan. 25, 2021) and accompanying IDM (Dep't of Commerce Jan. 13, 2021) at cmt. 1.

**B. Positions of the parties**

Plaintiffs argue that Commerce decided unreasonably to select the TDM data source and to reject the submissions of the Zhongji Respondents to calculate the benchmark for the aluminum plate/sheet program. *See* Pls. Br. at 18–27. Defendant and defendant-intervenors challenge plaintiffs' argument and contend that Commerce's benchmark selection is supported by substantial evidence. *See* Def. Br. at 28–31; Def.-Intervenors Br. at 7–14.

**C. Analysis**

The court concludes that Commerce did not explain adequately its decision to select the TDM data source and to reject the submissions of the Zhongji Respondents to calculate the benchmark for the aluminum plate/sheet program. *See* IDM at 21–24. Accordingly, the court is not able to ascertain whether Commerce's selection is supported by substantial evidence, and the court remands this selection for further explanation or reconsideration.

Commerce explained in its IDM that the TDM data source was "more representative" than the submissions of the Zhongji Respondents with respect to "all the types of aluminum" that they purchased. *Id.* at 22. Specifically, Commerce stated that there was "wider variation" between the alloy 1050 products referenced in the CRU Report and the purchases of the Zhongji Respondents "with respect to the chemical composition of other elements included in one or the other product" than there was between the products referenced in the TDM data source and the purchases of the Zhongji Respondents. *Id.* Commerce stated also that it would reject the CRU Report because this data source included alloy 1050 product prices that were "based on LME data." PDM at 19; *see* IDM at 22. Commerce explained that "[i]n prior cases, [it] has declined to use" LME data on the basis that these data "contain[] only a cash price for primary aluminum . . . with a minimum aluminum content of 99.7 percent." IDM at 22 (quoting PDM at 18) (internal quotation marks omitted).

Moreover, Commerce rejected the argument that the Zhongji Respondents raised in the alternative — i.e., that Commerce should "narrow" the TDM data source to use data "only from the countries that produce and export aluminum plate/sheet." *Id.* at 23–24; *see* Zhongji Case Br. at 32–34. Commerce stated that it would not narrow

the TDM data source because the Zhongji Respondents had submitted only one affidavit — unsubstantiated by any other record evidence — with information on "countries that produce and export aluminum foil stock similar to the type" that the Zhongji Respondents used. IDM at 24; *see* Zhongji Benchmark Submission at 5–6, Ex. 11.

Commerce did not explain adequately its determination that the TDM data source corresponded more closely to the purchases of the Zhongji Respondents than did their own benchmark submissions. *See* IDM at 21–24. In particular, Commerce did not explain adequately its conclusion that there was "*wider* variation between" the alloy 1050 products referenced in the CRU Report and the purchases of the Zhongji Respondents than there was between the products referenced in the TDM data source and the purchases of the Zhongji Respondents. *Id.* at 22 (emphasis supplied). Commerce cited to two exhibits in the record to substantiate its "wider variation" conclusion. *Id.* at 22 n.104 (citing New Subsidy Allegation Supp. Questionnaire at Exs. NSAS-1, NSAS-2). However, Commerce did not explain the relevance of these exhibits to that conclusion. *See id.*; *Wind Tower Trade Coal. v. United States*, 46 CIT __, __, 569 F. Supp. 3d 1221, 1258 (2022).

Notably, defendant-intervenors at oral argument provided an explanation with respect to their chemical analysis of the aluminum plate/sheet purchases of the Zhongji Respondents to support Commerce's selection of the TDM data source. *See* Oral Arg. Tr. at 35:08–13, 20–23. However, Commerce itself did not offer any such explanation to buttress that selection. *See generally* PDM at 18–19; IDM at 21–24; Letter from U.S. Dep't of Commerce, re: Final Results Calculations for Jiangsu Zhongji Lamination Materials Co., Ltd., Jiangsu Zhongji Lamination Materials Co., (HK) Ltd., Jiangsu Huafeng Aluminum Industry Co., Ltd, Shantou Wanshun Material Stock Co., Ltd., and Anhui Maximum Aluminum Industries Company Limited (Feb. 24, 2021), PR 392, CR 235. A "post-hoc explanation by [defendant-intervenors] at oral argument cannot cure the lack of explanation by Commerce." *Cooper (Kunshan) Tire Co. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1316, 1332 (2021); *see State Farm*, 463 U.S. at 50 ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." (citations omitted)).

Further, Commerce did not explain adequately its conclusion regarding the relevance of LME data with respect to Commerce's rejection of the CRU Report. *See* IDM at 22. Specifically, Commerce did not elucidate whether one or both of its particular findings regarding the LME data — (1) that these data contain only a "cash price" for primary aluminum or (2) that this cash price pertains only to primary aluminum with a "minimum aluminum content of 99.7 percent" —

provided the basis for Commerce's rejection of the CRU Report. *Id.* (quoting PDM at 18). Without such an explanation, Commerce failed to demonstrate that these findings supported the decision to select the TDM data source and to reject the CRU Report on the basis that the latter did not provide an "appropriate remuneration benchmark" for the aluminum plate/sheet program. *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1332; *see* IDM at 21–24.

Accordingly, the court is not able to ascertain whether Commerce's decision is supported by substantial evidence and remands this decision for further explanation or reconsideration. *See* IDM at 21–24. Should Commerce determine on remand to continue to select the TDM data source to calculate the benchmark for the aluminum plate/sheet program, the court directs Commerce to explain further or reconsider whether Commerce's evaluation of the affidavit that the Zhongji Respondents provided in support of their alternative argument to "narrow" the TDM data source was consistent with Commerce's past practice. *See id.* at 23–24; Zhongji Case Br. at 32–34; Zhongji Benchmark Submission at 5–6, Ex. 11.

## IV. Commerce's selection of data to calculate the benchmark for the land program

The Zhongji Respondents presented for inclusion in the record for purposes of a benchmark for the land program Coldwell Banker Richard Ellis ("CBRE") reports from 2016 through 2018 ("2016 to 2018 CBRE Reports"). *See* Zhongji Benchmark Submission at 6–7, Ex. 13. The Zhongji Respondents also submitted reports compiled by Nexus Innovative Real Estate Solutions ("Nexus Reports"). *See id.* at 7, Ex. 14. Commerce placed in the record the CBRE Asian Marketview Reports, which contain data from Thailand for 2010 ("2010 CBRE Report"). *See* Letter from U.S. Dep't of Commerce, re: Countervailing Duty Administrative Review of Aluminum Foil from the People's Republic of China: Asian Marketview Report (July 29, 2019) ("2010 CBRE Report"), PR 57–58; Letter from U.S. Dep't of Commerce, re: Countervailing Duty Administrative Review of Aluminum Foil from the People's Republic of China: Land Analysis Memo (July 29, 2019) ("Land Analysis Mem."), PR 59–72.

In the AR 1 Final Results, Commerce selected the 2010 CBRE Report as a Tier 3 benchmark to value the land program. *See* IDM at 31–33.

### A. Positions of the parties

Plaintiffs contend that Commerce's selection of data to calculate the benchmark for the land program is not supported by substantial

evidence. *See* Pls. Br. at 30–45. Plaintiffs advance three arguments with respect to this issue. First, plaintiffs argue that Commerce was unreasonable its rejection as untimely NFI of the July 9 Benchmark Submission. *See id.* at 40–45. Second, plaintiffs assert that Commerce determined unreasonably that it would not rely upon a Tier 2 benchmark to value the land program. *See id.* at 31–37. Third, plaintiffs contend that Commerce decided unreasonably to select the 2010 CBRE Report as a Tier 3 benchmark and, consequently, to reject the 2016 to 2018 CBRE Reports and the Nexus Reports. *See id.* at 37–40; *see also* Pls. Reply Br. at 15–21.

Defendant and defendant-intervenors argue that Commerce's benchmark selection for the land program is supported by substantial evidence and respond in sequence to plaintiffs' three arguments. *See* Def. Br. at 18–28; Def.-Intervenors Br. at 18–25. First, defendant-intervenors maintain that Commerce rejected reasonably the July 9 Benchmark Submission. *See* Def.-Intervenors Br. at 21–25; Zhongji Req. for Clarification; *see also* Oral Arg. Tr. at 59:07–60:04. Second, defendant and defendant-intervenors assert that Commerce determined reasonably that neither a Tier 1 nor a Tier 2 benchmark was appropriate to value the land program. *See* Def. Br. at 19–21; Def.-Intervenors Br. at 18–19. Third, defendant and defendant-intervenors contend that Commerce decided reasonably to select the 2010 CBRE Report as a Tier 3 benchmark and, consequently, to reject the 2016 to 2018 CBRE Reports and the Nexus Reports. *See* Def. Br. at 21–26; Def-Intervenors Br. at 19–20.

**B. Analysis**

The court concludes that Commerce did not explain adequately its selection of data to calculate the benchmark for the land program. *See* IDM at 31–33. Accordingly, the court is not able to ascertain whether Commerce's selection is supported by substantial evidence, and the court remands this selection for further explanation or reconsideration.

The court addresses first Commerce's rejection of the Zhongji Respondents' July 9 Benchmark Submission as untimely NFI. *See id.* at 33; Commerce Resp. to Zhongji Req. for Clarification; July 17 Rejection Letter. The court then addresses Commerce's determination that neither a Tier 1 nor a Tier 2 benchmark was appropriate to value the land program, before turning to Commerce's selection of data to calculate a Tier 3 benchmark for the land program. *See* IDM at 31–33.

### 1. Commerce's rejection of the July 9 Benchmark Submission

The court concludes that Commerce was reasonable in its rejection as untimely NFI of the July 9 Benchmark Submission, which contains information related to the land program. *See id.* at 33.

Following Commerce's publication of the AR 1 Preliminary Results, the Zhongji Respondents requested clarification from Commerce as to whether they would be permitted to submit additional NFI to buttress their earlier benchmark submissions for the land program. *See* Zhongji Req. for Clarification. The Zhongji Respondents requested this clarification in view of their position that the AR 1 Preliminary Results were "not clear [as to] whether the parties [would be] allowed to provide [NFI] or only submit comments on the record information" subsequent to Commerce's publication of the AR 1 Preliminary Results. *Id.* Addressing this request for clarification, Commerce informed the Zhongji Respondents that they were not permitted to submit additional NFI with respect to the land program, but that they were permitted to "submit land benchmark *comments* to rebut, clarify, or correct information *on the record*." Commerce Resp. to Zhongji Req. for Clarification (emphasis supplied). Specifically, Commerce explained that the AR 1 Preliminary Results did not provide a basis to permit the Zhongji Respondents to submit additional NFI because Commerce "ha[d] not placed any new land benchmark information on the record . . . in reaching these preliminary results." *Id.* Notwithstanding Commerce's clarification, however, the Zhongji Respondents submitted for inclusion in the record the July 9 Benchmark Submission, which Commerce rejected as untimely NFI. *See* July 9 Benchmark Submission; July 17 Rejection Letter.

Commerce was reasonable in its rejection of the July 9 Benchmark Submission. *See* IDM at 33; *see also Gulf States Tube*, 21 CIT at 1040, 981 F. Supp. at 653 ("Commerce's policy of setting time limits on the submission of factual information is reasonable because Commerce 'clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information.'" (quoting *Bowe-Passat v. United States*, 17 CIT 335, 339 (1993))). Commerce notified the Zhongji Respondents that "parties [were] not permitted to submit [NFI] relating to Commerce's Land Benchmark Memo or land benchmark analysis" subsequent to Commerce's publication of the AR 1 Preliminary Results. Commerce Resp. to Zhongji Req. for Clarification; *see Gold Star Co. v. United States*, 12 CIT 707, 712, 692 F. Supp. 1382, 1386 (stating that Commerce "adequately corrected" a point of ambiguity in its determination through the issuance of a clarification

letter). Contrary to plaintiffs' assertion, *see* Pls. Br. at 42, Commerce was not required to amend the AR 1 Preliminary Results to provide the Zhongji Respondents with adequate clarification as to this inquiry. *See Gold Star*, 12 CIT at 712, 692 F. Supp. at 1386.

Further, Commerce also did not abuse its discretion in rejecting the July 9 Benchmark Submission. The Federal Circuit previously has stated that Commerce reasonably exercises its discretion to reject an untimely submission so long as interested parties are "afforded both notice and a meaningful opportunity to be heard." *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1353 (Fed. Cir. 2015). In the instant case, Commerce provided the Zhongji Respondents with such notice as well as the opportunity to submit information in response to the 2010 CBRE Report and Commerce's Land Analysis Memorandum, which Commerce placed in the record on July 29, 2019 — nearly 11 months prior to Commerce's publication of the AR 1 Preliminary Results. *See* 2010 CBRE Report; Land Analysis Mem; *see also* IDM at 33. The Zhongji Respondents filed their land benchmark submissions on April 1, 2020. *See* Zhongji Benchmark Submission at 6–7, Exs. 12–14.

Accordingly, in view of the fact that the deadline for the Zhongji Respondents to submit NFI already had passed, *see* 19 C.F.R. § 351.301(c)(3)(ii), Commerce did not abuse its discretion in rejecting the July 9 Benchmark Submission. *See Maverick Tube*, 39 CIT at __, 107 F. Supp. 3d at 1331 ("Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision." (citation omitted)).

**2. Commerce's determination that neither a Tier 1 nor a Tier 2 benchmark was appropriate**

Commerce determined reasonably that neither a Tier 1 nor a Tier 2 benchmark was appropriate to value the land program. *See* IDM at 31–32.

Commerce explained adequately its determination that a Tier 1 benchmark was not appropriate in this review.[11] *See id.* at 31. Commerce stated that in view of the "significant government role in the [Chinese] market," land prices are "distorted . . . and hence, no usable tier one benchmarks exist." *Id.* (citing PDM at 16; Land Analysis Mem. at attach. 1) (internal quotation marks omitted); *see Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative*

[11] Plaintiffs do not challenge Commerce's decision not to select a Tier 1 benchmark in this review. *See generally* Pls. Br. at 30–45; Compl.

*Determination of Critical Circumstances, in Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 72 Fed. Reg. 67,893, 67,906–08 (Dep't of Commerce Dec. 3, 2007).

Commerce also explained adequately its determination that a Tier 2 benchmark was not appropriate in this review "because 'land is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market.'" IDM at 31–32 (quoting PDM at 16–17). Hence, Commerce was not able to rely on "world prices" to construct a Tier 2 benchmark for the land program. *Id.*; *see Risen Energy*, 46 CIT at __, 570 F. Supp. 3d at 1374–75 (sustaining Commerce's rejection of a Tier 2 benchmark to value land in China on the basis that Commerce had evaluated reasonably "the nature and scope of the market for land and determined that land . . . is generally not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market" (citations omitted)).

**3. Commerce's selection of a Tier 3 benchmark**

Commerce did not explain adequately its decision to: (1) select for a Tier 3 benchmark the 2010 CBRE Report and (2) reject the 2016 to 2018 CBRE Reports and the Nexus Reports. *See* IDM at 31–33; 2010 CBRE Report; 2016 to 2018 CBRE Reports; Nexus Reports.

Commerce based its selection of the 2010 CBRE Report primarily on what Commerce considered to be the "geographic proximity" and "economic comparability" of Thailand to China. IDM at 32; *see* 2010 CBRE Report; Land Analysis Mem. at attach. 1. Commerce explained that the 2016 to 2018 CBRE Reports, which contain "data for Mexico and Brazil as tier three benchmarks," were not "superior to the 2010 CBRE Report . . . [because] unlike Thailand, Mexico and Brazil are oceans apart from, and thus not geographically proximate to, China." IDM at 32. Commerce stated further that the Zhongji Respondents did not demonstrate that Mexico and Brazil "are more economically comparable to China than [is] Thailand." *Id.* Finally, Commerce asserted that the Nexus Reports did not provide an "explanation of [their] methodology," thereby preventing Commerce from being able to "evaluate the scope and quality of the [Nexus Reports'] data." PDM at 17; *see* IDM at 32–33.

The Zhongji Respondents argued in the administrative proceedings that: (1) the 2010 CBRE Report was "fatally outdated," whereas the 2016 to 2018 CBRE Reports and the 2018 Nexus Reports were more "contemporaneous" with the POR (August 14, 2017, through Decem-

ber 31, 2018), Zhongji Case Br. at 6–10; (2) Commerce's practice is to evaluate the contemporaneity of data sources in the record with reference to the relevant period of review, *see id.* at 6–7; (3) contrary to Commerce's conclusion, *see* PDM at 17, the Nexus Reports "clearly set forth that their data consist of price information for 'ready built factory' and 'ready built warehouse' land prices in different regions in Thailand," Zhongji Case Br. at 12; (4) the Nexus Reports indicated that "the source of their data [was] Nexus's own 'real estate advisory'" and that the "credibility of [these] data" was supported by the provision of "economic indicators concerning the price of industrial land in Thailand," *id.* at 12 (citing Zhongji Benchmark Submission at Ex. 14); and (5) Commerce's conclusion that it would not use the Nexus Reports for failure to "expla[in] . . . [their] methodology," PDM at 17, was inconsistent with Commerce's selection of the 2010 CBRE Report, which did not provide "context or references to the source of its data." Zhongji Case Br. at 12 (citing 2010 CBRE Report).

The foregoing points that the Zhongji Respondents raised were not adequately addressed by Commerce. Commerce did not explain its purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased*. *See* IDM at 32 (stating that Commerce's selection of the 2010 CBRE Report was reasonable because this report "correspond[ed] more closely to the years in which [the Zhongji Respondents] *purchased* land-use rights" (emphasis supplied)). Commerce did not address adequately the argument of the Zhongji Respondents that the 2016 to 2018 CBRE Reports and the Nexus Reports were more appropriate data sources because they corresponded more closely to the POR in the instant case. *See* Zhongji Case Br. at 6–10. And, further, Commerce did not address the arguments of the Zhongji Respondents that the Nexus Reports provided information with respect to the methodology and sourcing of their data as well as "other economic indicators concerning the price of industrial land in Thailand," *id.* at 11–12 (citing Zhongji Benchmark Submission at Ex. 14), and that Commerce's decision not to use the Nexus Reports was inconsistent with Commerce's selection of the 2010 CBRE Report, which did not provide "context or references to the source of its data." *Id.* at 12 (citing 2010 CBRE Report); *see SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001), *aff'd*, 332 F.3d 1370 (Fed. Cir. 2003) ("[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)) (internal quotation marks omitted)). "[W]hen a party properly raises an argument before an agency, that agency is required to address the argu-

ment in its final decision." *Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1350, 1371 (2016) (citing *SKF USA Inc. v. United States*, 630 F.3d 1365, 1374 (Fed. Cir. 2011)).

In view of the foregoing, the court directs Commerce on remand to explain further or reconsider its evaluation of the contemporaneity of data sources in the record — particularly Commerce's purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased* — with respect to Commerce's selection of a Tier 3 benchmark for the land program. *See* IDM at 32. Based on Commerce's explanation with respect to any such practice in evaluating the contemporaneity of data sources, the court further directs Commerce to explain the reasons that its selected benchmark on remand is consistent with such a practice. Moreover, should Commerce decide on remand to select more than one data source to calculate the benchmark for the land program, the court directs Commerce to explain the reasons that *each* selected data source is consistent with Commerce's practice in determining whether a data source provides an "appropriate remuneration benchmark." *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1332. In addition, the court directs Commerce on remand to explain further or reconsider its selection of the 2010 CBRE Report specifically with reference to the adequacy, context and references for the data in that report in comparison to Commerce's criticism of the adequacy, context and references for the data in the Nexus Reports.

## CONCLUSION

"I don't compare 'em, I just catch 'em."[12] Willie Howard Mays, Jr., is considered by many to be the greatest baseball player who ever lived. Mays played for the Birmingham Black Barons of the Negro American League in 1948, and then for the New York and San Francisco Giants, and the New York Mets, from 1951 to 1973. A guest at the White House or on Air Force One of three U.S. Presidents — Gerald Ford in 1976, George W. Bush in 2006, and Barack Obama in 2009 and 2015, when he bestowed on Mays the Presidential Medal of Freedom — Mays' records and additional honors are too numerous to list.

* * *

For the reasons discussed, the court sustains in part and remands in part the AR 1 Final Results. Specifically, the court remands the AR 1 Final Results with respect to Commerce's selection of data to cal-

[12] *Say Hey Said*, ESPN CLASSIC (Nov. 19, 2003), https://www.espn.com/classic/s/000725williemaysquote.html.

culate the benchmark for the aluminum plate/sheet program and Commerce's selection of data to calculate a Tier 3 benchmark for the land program.

Accordingly, it is hereby

**ORDERED** that the AR 1 Final Results are sustained with respect to Commerce's decision to reject the May 18 Benchmark Submission; it is further

**ORDERED** that the AR 1 Final Results are sustained with respect to Commerce's calculation of the benchmark for the primary aluminum program; it is further

**ORDERED** that the AR 1 Final Results are remanded to Commerce for further explanation or reconsideration, consistent with this decision, of Commerce's selection of data to calculate the benchmark for the aluminum plate/sheet program; it is further

**ORDERED** that the AR 1 Final Results are sustained with respect to Commerce's determination that neither a Tier 1 nor a Tier 2 benchmark was appropriate to calculate the benchmark for the land program; it is further

**ORDERED** that Commerce's selection of a Tier 3 benchmark for the land program is remanded for Commerce to: (1) explain further or reconsider its evaluation of the contemporaneity of data sources in the record — particularly Commerce's purported practice to select data sources that correspond most closely to the point in time at which land use rights were *purchased*; (2) explain the reasons that Commerce's selected benchmark on remand is consistent with such a practice in evaluating the contemporaneity of data sources; (3) explain the reasons that *each* data source that Commerce may decide to select on remand — should Commerce select more than one data source — is consistent with Commerce's practice in determining whether a data source provides an appropriate remuneration benchmark; and (4) explain further or reconsider its selection of the 2010 CBRE Report specifically with reference to the adequacy, context and references for the data in that report in comparison to Commerce's criticism of the adequacy, context and references for the data in the Nexus Reports; it is further

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

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

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

Dated: March 21, 2023
New York, New York

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

Slip Op. 23–42

KENT INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant,

Before: Leo M. Gordon, Judge
Court No. 15–00135

[Plaintiff's motion for summary judgment granted; Defendant's cross-motion for summary judgment denied.]

Dated: March 24, 2023

*Patrick C. Reed*, Simons & Wiskin of Manalapan, N.J., argued for Plaintiff Kent International, Inc. With him on the briefs were *Philip Yale Simons* and *Jerry P. Wiskin*.

*Monica P. Triana*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, N.Y.

## OPINION

**Gordon, Judge:**

This action involves a challenge by Plaintiff Kent International, Inc. ("Kent") to the denial of a protest by U.S. Customs and Border Protection ("Customs" or "CBP") regarding the classification of Kent's "WeeRide" child safety seats for bicycles ("subject merchandise") under heading 8714 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The action has been the subject of five prior court decisions, the latest of which remanded this matter for further consideration of whether the treatment provision in Section 625(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1625(c),[1] governs the classification of the subject merchandise. *See Kent Int'l, Inc. v. United States*, 17 F.4th 1104 (Fed. Cir. 2021) ("*Kent V*"); *see also Kent Int'l, Inc. v. United States*, 44 CIT ___, 466 F. Supp. 3d 1361 (2020) ("*Kent IV*") (denying Kent's motion for summary judgment on treatment, and established and uniform practice ("EUP") claims); *Kent Int'l, Inc. v. United States*, 43 CIT ___, 393 F. Supp. 3d 1218 (2019) ("*Kent III*") (ruling for Defendant on merits of classifying Plaintiff's child bicycle safety seats under HTSUS heading 8714 as bicycle accessories); *Kent Int'l, Inc. v. United States*, 41 CIT ___, 26 F. Supp. 3d 1340 (2017) ("*Kent II*") (denying Defendant's motion to dismiss Kent's treatment and EUP claims); *Kent Int'l, Inc. v. United States*, 40 CIT ___, 161 F. Supp. 3d 1340 (2016) ("*Kent I*") (addressing various procedural mat-

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

ters). In *Kent V*, the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") upheld this Court's decision on Kent's EUP claim, but vacated and remanded the denial of its treatment claim.

Now before the court are the parties' renewed cross-motions for summary judgment on the remanded issue. *See* Pl.'s Post-Remand Suppl. Br. ("Pl.'s PR Br."), ECF No. 74; Def.'s Suppl. Mem. of Law in Further Support of its Mot. for Summ. J. as to Count 3 of Compl., ECF No. 75 ("Def.'s PR Br."); Pl.'s Resp. Br. After Remand, ECF No. 78 ("Pl.'s PR Resp."); Def.'s Resp. to Pl.'s Suppl Submission, ECF. No. 77 ("Def.'s PR Resp."); *see also* Pl.'s Amended Mot. for Summ. J., ECF No. 52 ("Pl.'s Br."); Def.'s Cross-Mot. for Summ. J. and Opp. to Pl.'s Mot. for Summ. J., ECF No. 55 ("Def.'s Br."); Pl.'s Reply & Resp. to Def.'s Cross-Mot. for Summ. J., ECF No. 58–2 ("Pl.'s Resp."); Def.'s Reply in Supp. of Cross-Mot. for Summ. J., ECF No. 59 ("Def.'s Reply"). Underlying this action is Customs' decision to classify the subject merchandise as "Parts and accessories of vehicles of heading 8711 to 8713: . . . Other: . . . Other" under HTSUS subheading 8714.99.80, at a 10% duty rate. Plaintiff contends that Customs violated the treatment provision in § 1625(c), and that the subject merchandise is classifiable as "Seats. . . Other" under HTSUS subheading 9401.80, duty-free. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The parties do not dispute the material facts; therefore, this matter is again ripe for summary judgment. For the reasons set forth below, the court grants Plaintiff's motion for summary judgment and denies Defendant's cross-motion for summary judgment.

## I. Background

The court presumes familiarity with the prior decisions and the undisputed facts in this matter. *See generally* Plaintiff's Statement of Material Facts Not in Dispute, ECF No. 51–4 ("Pl.'s Facts Stmt."); Defendant's Response to Plaintiff's Statement of Material Facts, ECF No. 55–2 ("Def.'s Resp. to Facts"); Defendant's Statement of Undisputed Material Facts, ECF No. 55–1 ("Def.'s Facts Stmt."); Plaintiff's Response to Defendant's Statement of Undisputed Material Facts, ECF No. 58–1 ("Pl.'s Resp. to Facts"). To aid the reader, the following is a recap of the relevant undisputed facts.

### A. Newark Entries

In August 2005, Customs issued ruling NY L86862 ("2005 Ruling") classifying Kent's child safety seats for bicycles under HTSUS heading 8714.99.80. Pl.'s Facts Stmt. ¶ 1; Def.'s Resp. to Facts ¶ 1. Starting in April 2008 through at least October 2010, Kent submitted multiple protests, including two separate applications for further review

("AFRs"), to Customs at the Port of New York/Newark ("Newark Customs"), seeking reclassification and reliquidation under HTSUS heading 9401 of the subject merchandise. *See* Def.'s Facts Stmt. ¶¶ 8–14; Pl.'s Resp. to Facts ¶¶ 8–14. Also in October 2010, Kent made requests for post-entry amendments ("PEAs") as to nine unliquidated entries of "bicycle child carrier seats and parts thereof," seeking to amend each entry on the basis that the correct tariff classification was under HTSUS heading 9401. Def.'s Facts Stmt. ¶ 15; Pl.'s Resp. to Facts ¶ 15.

Between August 2008 and November 2010, Newark Customs approved Kent's initial 14 protests and the nine PEAs, classifying the subject child safety seats under HTSUS heading 9401, but made no determination on Kent's two Newark AFRs. Def.'s Facts Stmt. ¶¶ 8–15; Pl.'s Resp. to Facts ¶¶ 8–15. Plaintiff continued to make entries of its merchandise with Newark Customs through 2015. Def.'s Facts Stmt. ¶ 16; Pl.'s Resp. to Facts ¶ 16. Beginning with Kent's protest covering entries made in December 2010, Newark Customs stopped granting, and instead began suspending consideration of, Kent's protests challenging the classification of its child safety seats under HTSUS heading 8714. Def.'s Facts Stmt. ¶ 18; Pl.'s Resp. to Facts ¶ 18.

### B. Long Beach Entries

Kent also made 45 entries of its child safety seats with Customs at the Port of Long Beach ("Long Beach Customs") between December 2008 and March 2014. These entries were liquidated via the "bypass"[2] procedure between October 2009 and February 2015 under HTSUS heading 8714. *See* Def.'s Facts Stmt. ¶ 20; Pl.'s Resp. to Facts ¶ 20. Kent then filed 17 protests, all of which were subsequently denied, covering those 45 entries. *See* Def.'s Facts Stmt. ¶ 21; Pl.'s Resp. to Facts ¶ 21. The 17 protests (and the attendant entries) constitute the res of this action.

For several protests filed in 2009 and 2010, Kent requested that Long Beach Customs suspend its consideration of them until CBP made a determination on the second AFR filed with Newark Customs. Def.'s Facts Stmt. ¶ 22; Pl.'s Resp. to Facts ¶ 22. Despite the 2010 approval of Kent's protests by Newark Customs, including the protest in which Kent filed its second AFR, Long Beach Customs informed Kent in early 2011 that CBP planned to deny the pending protests and uphold the classification of the subject merchandise under HTSUS heading 8714, consistent with the 2005 Ruling. Def.'s Facts

[2] CBP's bypass liquidation procedure accepts entries "as entered" by the importer. *See, e.g.*, *Brother Int'l Corp. v. United States*, 27 CIT 1, 9, 46 F. Supp. 2d 1318, 1326 (2003).

Stmt. ¶¶ 23, 24; Pl.'s Resp. to Facts ¶¶ 23, 24. In April 2011, Kent filed another protest, along with a third AFR ("April 2011 AFR"), with Long Beach Customs regarding the subject merchandise. Def.'s Facts Stmt. ¶ 25; Pl.'s Resp. to Facts ¶ 25.

In February 2015, in response to the April 2011 AFR, CBP issued HQ H170637 ("2015 Ruling"), determining that "Kent's child bike seats are properly classified under heading 8714, HTSUS, as accessories to bicycles," and also denied, among other things, Kent's claims that Customs violated "a treatment previously accorded."[3] Def.'s Facts Stmt. ¶ 34; Pl.'s Resp. to Facts ¶ 34. Customs reasoned that "since an interpretive ruling which provides CBP's official position on the tariff classification of Kent's merchandise has been issued to Kent, Kent is precluded from making a claim for treatment." *See* Pl.'s Br. at 8 (quoting 2015 Ruling).

Plaintiff then filed this action, challenging the denial of its protests by Long Beach Customs. In *Kent IV*, the court concluded that Plaintiff had "failed to demonstrate that Customs denied Kent the benefit of a treatment under § 1625(c) when the agency classified the subject merchandise under HTSUS heading 8714," and granted Defendant's cross-motion for summary judgment. *Kent IV*, 44 CIT at ___, 466 F. Supp. 3d at 1369–70. That decision was based, in relevant part, on this Court's consideration of the significance of the requirement in 19 C.F.R. § 177.12(c) of consistent classification on a national basis *vis-à-vis* the inconsistent position taken by Long Beach Customs in classifying the subject entries not under heading 9401, but under heading 8714. *Id.* at ___, 466 F. Supp. 3d at 1367. *Kent V* reversed *Kent IV* because the Long Beach entries were liquidated via the bypass procedure, and therefore, could not serve as a basis of "a treatment previously accorded" under § 177.12(c)(1)(ii). *Kent V*, 17 F.4th at 1110.

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[3] Prior to the issuance of HQ H170637, during 2007 to 2011, CBP issued ruling letters to three of Kent's competitors, Bell Sports, Todson, Inc., and Britax Child Safety Inc., classifying their respective child safety seats for bicycles as duty free under HTSUS heading 9401. *See* NY Ruling Letter NY N016953 (Sept. 21, 2007) ("Bell Sports Ruling"), NY Ruling Letter N066722 (July 16, 2009) ("Todson Ruling"), and NY Ruling Letter N166197 (June 6, 2011) ("Britax Ruling"); *see also* Pl.'s Facts Stmt. ¶ 23; Def.'s Resp. to Facts ¶ 23 (Bell Sports Ruling); Pl.'s Facts Stmt. ¶ 21; Def.'s Resp. to Facts ¶ 21 (Todson Ruling); Pl.'s Facts Stmt. ¶ 22; Def.'s Resp. to Facts ¶ 22 (Britax Ruling). In June 2014, following notice and comment, Customs issued ruling HQ H180103 revoking the Bell Sports, Todson, and Britax rulings. Def.'s Facts Stmt. ¶ 33; Pl.'s Resp. to Facts ¶ 33. In HQ H180103, Customs determined, consistent with the 2005 Ruling, that "the child bicycle seat designed for attachment to an adult bicycle is classified in heading 8714, HTSUS," dutiable at 10 percent ad valorem. *Id.* This revocation was subsequently published in the *Customs Bulletin and Decisions*, with an effective date of September 22, 2014. *Id.*

## II. Standard of Review

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). USCIT Rule 56 permits summary judgment when "there is no genuine issue as to any material fact." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In deciding whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

## III. Legal Framework

19 U.S.C. § 1625 governs the promulgation of interpretative rulings and decisions by Customs. In general, a ruling letter represents CBP's official position with respect to the particular transaction or issue described in the ruling. It is binding on all CBP personnel until modified or revoked, and is effective on the date issued. It may be applied to all entries that are unliquidated, or other transactions with respect to which Customs has not taken final action as of the date of issuance. *See* 19 C.F.R. § 177.9(a).

Section 1625(c) provides that an interpretative ruling, which (1) modifies or revokes a prior interpretive ruling or decision in effect for at least 60 days, or (2) has the effect of modifying "a treatment previously accorded" by Customs to substantially identical transactions, shall take effect 60 days after publication following a notice and comment period. 19 U.S.C. § 1625(c). What gives rise to "a treatment previously accorded by [Customs] to substantially identical transactions" is not defined in the statute. However, the implementing regulation, 19 C.F.R. § 177.12(c), provides a three-pronged test for establishing what is meant by that language. Specifically, the regulation requires evidence sufficient to establish that:

> (A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;
>
> (B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and
>
> (C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues.

19 C.F.R. § 177.12(c)(1)(i).

Customs engages in a case-by-case analysis to determine whether particular transactions demonstrate sufficient review by Customs to form the basis of "a treatment previously accorded." *Id.* § 177.12(c)(1)(ii). Specifically, CBP focuses on past transactions to see "whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations." *Id.* In so doing, no weight is afforded "to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review." *Id.* The person seeking the benefit of "a treatment previously accorded" bears the burden of demonstrating the existence of a previous treatment by Customs. *Id.* § 177.12(c)(1)(iv).

## IV. Discussion

### Kent's Claim of Treatment

For purposes of 19 U.S.C. § 1625(c)(2), "a treatment previously accorded" flows from, and is a consequence of, a substantially consistent course of meaningful action with respect to the imported merchandise over a period of time. *See, e.g.*, *Kahrs Int'l, Inc. v. United States*, 33 CIT 1316, 1353–61, 645 F. Supp. 2d 1251, 1286–92 (2009). It is CBP's actions, not its position or policy, that determine whether a treatment towards those transactions exists subject to § 1625(c)(2). *See Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1043–44, 116 F. Supp. 2d 1350, 1377 (2000). An importer seeking to establish a treatment must, at a minimum, show Customs formally taking significant action in a particular and consistent manner with respect to the importer's prior transactions. *See id.*; *see also Administrative Rulings*, 67 Fed. Reg. 53,483, 53,489–90 (Customs Service, Aug. 16, 2002) (providing for "a statutory protection against abrupt changes made by Customs without adequate prior notice, particularly where the change is to a ruling or decision issued by Customs, or to a pattern of actions taken by Customs on import transactions, on which a party has reasonably relied in pursuing its Customs transactions"). A treatment therefore requires a "showing that Customs took a conscious, intentional and knowledgeable action that created an impression that could give rise to an expectation as regards future action by Customs." *Kent V*, 17 F.4th at 1119 (quoting 67 Fed. Reg. at 53,491).

The court initially focuses on the first two prongs of the 19 C.F.R. § 177.12(c)(1)(i) test, namely, that there was (1) an actual determination made by a CBP official regarding the claimed treatment and (2) that that official had responsibility for the subject matter over which the determination was made. Kent argues that Customs established a treatment of classifying Kent's child safety seats as seats under HTSUS heading 9401 by disregarding the contrary 2005 Ruling that had classified the subject merchandise under HTSUS heading 8417. The heading 9401 treatment, Kent maintains, is reflected in the approval by Newark Customs of 14 protests covering 35 entries between August 2008 and October 2010, plus the PEAs covering nine other entries in November 2010. *See* Pl.'s Br. at 13.

Kent contends that the approval of these protests and PEAs were the only actual determinations made by Customs on the classification of Kent's merchandise between August 2008 and November 2010. Plaintiff further argues that no other decisions or actions were taken by CBP anywhere in the country regarding Kent's child safety seats, nor were any other interpretive rulings or decisions made with respect to Plaintiff's merchandise. *See id.* at 12–13.

Defendant concedes that there were actual determinations made by responsible CBP officials regarding the subject merchandise. *See* Def.'s PR Br. at 7 ("[w]e agree that these were 'actual determinations' by [Newark Customs]"). Given this, the court concludes there is no dispute that actual determinations were made by a CBP officer with responsibility for the classification of the subject merchandise, thus satisfying the first two prongs of § 177.12(c)(1)(i).

The third prong of the § 177.12(c)(1)(i) test focuses on whether there are (1) substantially identical transactions for which there was a claimed treatment (2) on a national basis (3) over a 2-year period immediately preceding the claimed treatment. 19 C.F.R. § 177.12(c)(1)(i)(C). As to the first element of this prong, the parties do not dispute that Plaintiff's imports involved substantially identical transactions. *See, e.g.*, Compl. ¶ 5 ("[t]he merchandise in issue is Kent International Inc.'s WeeRide Kangaroo child bicycle seat, which is described on the commercial invoices as a Kangaroo Carrier"); *id.* at ¶ 48 ("[f]rom August 2008 through November 2010, all of Plaintiff's protests and PEAs on which CBP took action were approved"); Pl.'s Br. at 16 ("[t]he merchandise that was the subject of the Long Beach protests was identical to the merchandise that was the subject of the more-than-two-year Newark Customs treatment, *i.e.*, Kent's child bicycle seats") (referencing Pl's Br. at Ex.1); *see also* Def.'s Facts Stmt. ¶ 1 ("This case concerns the tariff classification of the WeeRide Kan-

garoo Ltd. Center-Mounted Bicycle-Child Carrier (Kangaroo Child Carrier or Carrier)") (referencing Entry Papers; Ex. 1 (sample filed with court)).

The parties, however, diverge on the second and third elements, namely (1) whether the claimed treatment was on a national basis and (2) whether that claimed treatment occurred over a 2-year period immediately preceding the claim. The term national basis was inserted into the regulation to replace the phrase "a consistent pattern of decisions" as to liquidations of entries or reconciliations "to ensure that a treatment does not result from a geographically narrow application of a determination that is different from the action taken by Customs on that person's substantially identical transactions at other locations." *Administrative Rulings*, 67 Fed. Reg. at 53,494.

As Plaintiff previously noted, between August 2008 and November 2010, only Newark Customs, and no other official or office within Customs, made determinations on Kent's protests and PEAs, or took an action regarding the classification of Kent's merchandise. These determinations consistently approved Plaintiff's claims that the subject merchandise should be classified under HTSUS heading 9401, duty free. It is Kent's position that the national basis element does not require the treatment to have been previously accorded at more than one port, only that different ports may not take inconsistent actions. Pl.'s PR Br. at 2.

Defendant disagrees, maintaining that Plaintiff's claimed treatment did not exist on a national basis. Specifically, Defendant contends that "[d]eterminations made solely at the Port of New York/ Newark are not reflective of a CBP determination applied on a national basis." *See* Def.'s PR Br. at 7 (notably not citing authority for proposition). While Defendant concedes that the only actual determinations on Kent's claims occurred between August 2008 and November 2010 at Newark Customs, it argues that this circumstance resulted from Kent's request that Long Beach Customs suspend consideration of Kent's 2009 and 2010 protests. *See id.* at 7–8 (citing *Kent IV*, 44 CIT at ___, 466 F. Supp. 3d at 1363). Defendant recognizes that the court is precluded by *Kent V* from considering the liquidations of the Long Beach entries as they were not "actual determinations" under the regulation. Nevertheless, Defendant contends that § 177.12(c)(1)(ii) requires the court to consider the fact that there were entries and protests regarding the subject merchandise at a port of entry other than Newark (*i.e.*, Long Beach). *Id.* at 8. Defendant also points out that in early 2011, shortly after the 2010 approvals of Kent's protests and PEAs by Newark Customs classifying Kent's

merchandise in HTSUS heading 9401, Long Beach Customs informally notified Kent that its protests would be denied, resulting in the classification of Kent's merchandise under HTSUS heading 8714. *Id.* (referencing *Kent IV*, 44 CIT at ___, 466 F. Supp. 3d at 1363–64).

While the court is cognizant of the existence of Kent's Long Beach entries and protests, it rejects Defendant's arguments that the informal contact between Long Beach Customs and Kent's counsel in early 2011 regarding how CBP would rule in the future on Kent's protests constitutes "action" by Customs under § 177.12(c). Following the directive in *Kent V*, this Court cannot afford any weight to CBP's consideration of Kent's Long Beach entries that were liquidated through the bypass procedure. Consequently, since no other port or office within CBP took a contrary position or action, the court agrees with Plaintiff that the determinations by Newark Customs constitute "action" as contemplated by the regulation. Thus, the determinations by Newark Customs here satisfy the national basis element of the third prong of the treatment test.

The court now turns to the last element of the third prong, namely, that the claim of treatment must occur over a 2-year period immediately preceding the claim. A "claim" is defined as "[t]he aggregate of operative facts giving rise to a right enforceable by court." *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1273, 1283–84 (2015) ("*American Fiber*"). Alternatively, a claim can be defined as "the assertion of an existing right." *Id.* at ___, 121 F. Supp. 3d at 1283. That is different from the administrative mechanism (protest) in which the claim is asserted. *Id.* at ___, 121 F. Supp. 3d at 1285.

"Inasmuch as a 'claim of treatment' is an assertion of a right, made up of its operative facts, so too is the 2-year period immediately preceding it defined by that assertion and those facts." *Id.* at ___, 121 F. Supp. 3d at 1284. The court in *American Fiber* observed that a "claim of treatment" arose on the date an importer first entered merchandise that was not afforded the treatment sought. *Id.* at___, 121 F. Supp. 3d at 1287. There, the court determined that the date of entry was "the inflection point when Plaintiff's claimed treatment changed." *Id.* Thus, "the two years immediately preceding Plaintiff's claim of treatment are the two years immediately preceding its earliest affected entry (*i.e.*, the first entry that does not receive the anticipated, relied upon treatment)." *Id.*

Here, Defendant maintains that Kent first asserted a "claim of treatment" with respect to an entry made at the Port of Long Beach on December 4, 2008 (earliest entry in case). *See* Def.'s PR Br. at 10 (referencing Protest No. 2704–09–103402). Relying on a literal read-

ing of *American Fiber*, Defendant contends that the court must look to the two years immediately preceding the earliest entry at issue to determine whether CBP consistently applied a specific classification determination on a national basis. It is, in Defendant's view, that earliest entry that is the key to the commencement of the appropriate 2-year period. Consequently, Defendant argues that "[b]ecause CBP's first action resulting in classification of the merchandise under heading 9401 occurred with the approval of the first protest at [Newark Customs] in August of 2008, only four months prior to its first entry of merchandise on December 4, 2008, Kent cannot satisfy the two-year regulatory requirement as to that entry." *Id.* (citing 19 C.F.R. § 177.12(c)(1)(i)(C)).

Kent contends that Defendant's focus on entry dates is misplaced because the claimed treatment in this matter arose from Customs' protest approvals rather than how the entries were initially classified. Pl.'s PR Br. at 3–4. Kent argues for application of *American Fiber* by analogy, and maintains that the relevant 2-year time frame for its claim of treatment is August 2008 through November 2010. *Id.* ("The reasoning in *American Fiber* applies to Kent's case *mutatis mutandis*, using protest approval dates instead of entry dates."). Kent explains that this timeframe establishes treatment "based on Kent's own entries and is reflected in 14 protest approvals, resulting in reliquidation of 35 entries, as well as Post-Entry Amendment ('PEA') approvals for nine entries, that classified Kent's child safety seats in HTSUS heading 9401 between August 2008 and November 2010." *Id.* at 1. Kent further notes that "[t]he protest and PEA approvals covering these 44 entries account for every Customs action in the United States in actual, reasoned decisions by a Customs official that determined the proper application of the law to Kent's merchandise during the two-year period from August 2008 to November 2010." *Id.* at 1–2.

The court agrees with Plaintiff. The basis for treatment in this matter arises from CBP's grant of Kent's protests rather than how the entries were initially classified. *See* Oral Argument at 20:35–21:15, ECF No. 80 (Dec. 14, 2022) (Plaintiff arguing for application of *American Fiber* "by analogy," using protest approvals rather than entries); *cf. American Fiber* at ___, 121 F. Supp. 3d at 1287; *see also* Def.'s PR Br. at 7 (acknowledging that "the only 'actual determinations' made [by CBP as to Kent's child safety seats] between August 2008 and November 2010 occurred at the Port of New York/Newark"); Def.'s PR Resp. at 6 ("The actions that the Court must consider in the treatment claim are not entries made and liquidated in heading 8714, but the protest approvals classifying merchandise in heading 9401, which

first occurred in August 2008."). Applying the guidance of *American Fiber* to the circumstances of this matter, the court concludes that the protest and PEA approvals by Newark Customs from August 2008 through November 2010 satisfy the consistent "2-year period" element of the third prong of the treatment test under § 177.12(c)(1)(i)(C).

Plaintiff further contends that November 2010 is the "date for accrual for Kent's claim of treatment" because that is when CBP "stopped its consistent previous practice of approving Kent's protests." *See* Pl.'s PR Br. at 3–4.[4] Defendant, however, argues that "not approving a protest – or suspending a protest – is not an action that [triggers] a claim for relief [under § 177.12(c)]." *See* Def.'s PR Resp. Br. at 4 n.2. On this point, Defendant is correct. Based on the "look-back" rationale of *American Fiber* and § 177.12(c)(1)(i)(C), the inflection point for Kent's claim of treatment was February 11, 2015, the date on which Customs Headquarters issued HQ H170637, taking a conscious, intentional, and knowledgeable action by ruling that the proper classification of the subject child safety seats for bicycles was in HTSUS heading 8714. It is uncontested that from November 2010 until the issuance of HQ H170637 in February 2015 Customs was silent, with no other *actions* occurring on Kent's merchandise.

As to the period of treatment, § 177.12(c) does not limit consideration of the 2-year treatment period to two consecutive years only. It is apparent from the regulation that consideration may extend to as many consecutive years as the treatment period covers. *Cf.* 19 C.F.R. § 177.12(c)(1)(i)(C) ("Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues."). In the court's view, there is little doubt that Plaintiff has identified a set of operative facts based on CBP's protest and PEA approvals that give rise to a claim for treatment for the classification of the subject merchandise under HTSUS heading 9401. Thus, the issuance of the 2015 Ruling that Kent's child bike seats are properly classified under HTSUS heading 8714, as accessories to bicycles, contravened the prior afforded treatment for Kent's entries for which Customs consistently granted protests for reclassification under heading 9401 since August 2008.

Having established the *existence* of a treatment, there remains a

[4] *But cf.* Pl.'s PR Br. at 3 (recognizing that "[t]he 2015 Headquarters Decision denying Kent's pending protests represents 'an interpretative ruling or decision' [as] it 'effectively modified' the 2008–2010 treatment of classifying Kent's seats as seats." (internal citation omitted)).

final issue as to which of Kent's entries may be entitled to the *benefit* of that treatment. During oral argument, both Plaintiff and Defendant agreed that if Kent had established a claim of treatment, that claim accrued by November 2010. *See* Oral Arg. at 14:07–14:30 ("Since Kent's claim is based on protest approvals, we look to the dates of the protest approvals, and it is in November of 2010 that Customs had consistently approved protests for more than two years."); *id.* at 1:03:35–1:05:00, 1:07:15–1:07:45 (Government conceding that if court finds existence of treatment here, accrual of treatment would be November 2010).[5]

Plaintiff maintains that "[t]he Government has conceded here and before the Federal Circuit that if Kent has established a claim of treatment at all, the treatment applies to Kent's entries filed after November 2010, which represent the majority of Kent's entries in this case (31 of 45 entries)." Pl.'s PR Br. at 4 (citing language supporting conclusion from Government's brief on appeal to Court of Appeals as well as Government's initial (pre-appeal) summary judgment reply brief). "The dispute over applying the 'seat' classification involves, therefore, the 14 entries that were filed before November 2010 and whose liquidations were not final at that time. The disputed entries consist of seven entries against whose liquidations Kent filed protests before November 2010, and seven entries against whose liquidations Kent filed protests after November 2010." *Id.* at 4–5; *see also* Pl.'s PR Resp. at 5.[6]

Kent contends that its accrued treatment claim extends to the entries "against whose liquidations Kent protested before November 2010." Pl.'s PR Resp. at 5. Kent maintains that "an accrued treatment is a binding administrative precedent that applies to all pending liquidations, all pending protests, and all future entries, until the

[5] While technically a 2-year period measured from August 2008 would end in August 2010, the court agrees that it is appropriate to consider the period from August 2008 through November 2010 in order to address the full scope of CBP's actions regarding Kent's protests during this (over) 2-year period. *See* Pl.'s Facts Stmt. ¶¶ 2–16 (providing a timeline of approvals of Kent's protests and PEAs, of which a large majority occurred in November 2010); Def.'s Resp. to Facts ¶¶ 2–16 (correcting certain typographical errors, but confirming this general timeline).

[6] The court notes that there is an apparent inconsistency in the parties' discussion of these contested entries. As described above, Plaintiff argues that there are "*14* entries that were filed before November 2010" with seven entries protested prior to November 2010, and with seven entries protested after November 2010. Pl.'s PR Br. at 4–5 (emphasis added). Defendant, however, argues that *15* entries at issue "were made before November 2010 – prior to the time plaintiff's asserted treatment claim even accrued." Def.'s PR Resp. Br. at 4. As explained above, because Kent's claim of treatment is predicated on CBP's consistent actions in granting Kent's protests since August 2008, the court concludes that Kent's entries *protested after November 2010* qualify for relief under the statutory and regulatory provisions governing "treatment."

treatment is validly revoked prospectively." *Id.* This argument is unpersuasive as § 177.12(c)(1)(i)(C) requires a consistent "2-year" period to establish the accrual of treatment. As noted above, that period is based off of CBP's consistent grant of Kent's protests that concluded in November 2010. As a result, only Kent's entries that were protested after November 2010, *i.e.*, the 2-year period of consistent Customs' actions in granting Kent's protests since August 2008, qualify for relief under Kent's claim for treatment. Accordingly, the court concludes that Kent has established the existence of a treatment regarding its child safety seats for bicycles that were the subject of protests filed with Customs after November 2010. In reaching this conclusion, the court also holds that Customs violated that treatment in issuing the 2015 Ruling without the notice and comment required by 19 U.S.C. § 1625(c).

## IV. Conclusion

For the foregoing reasons, the court concludes that Kent is entitled to a treatment of duty-free entry under heading 9401, HTSUS, for its Long Beach entries that were protested after November 2010 through February 2015 pursuant to 19 U.S.C. § 1625 and 19 C.F.R. § 177.12(c). Judgment will enter accordingly.

Dated: March 24, 2023
New York, New York

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

Slip Op. 23–43

OTTER PRODUCTS, LLC, Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Claire R. Kelly, Judge
Court No. 22–00033

[Dismissing for lack of jurisdiction plaintiff's action for interest on customs duty over payments made in connection with prior disclosures.]

Dated: March 29, 2023

*Louis S. Mastriani* and *Lydia C. Pardini*, Polsinelli PC, of Washington, DC for plaintiff Otter Products, LLC.

*Beverly A. Farrell*, Senior Trial Attorney, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for defendants United States, U.S. Customs and Border Protection, and Chris Magnus in his capacity as Commissioner of U.S. Customs and Border Protection. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Sabahat Chaudhary*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

## *OPINION*

**Kelly, Judge:**

Before the court is plaintiff Otter Products, LLC's motion for judgment on the agency record challenging the refusal of defendants United States, U.S. Customs and Border Protection ("CBP"), and CBP Commissioner Chris Magnus (collectively "Defendants") to pay interest on Otter's duty overpayments. [Otter's] Mot. J. on the Agency R. ("Pl. Mot.") and accompanying Mem. Supp. [Pl. Mot.] ("Pl. Br."), Sept. 12, 2022, ECF Nos. 28–29; *see also* [Otter's] Reply Supp. [Pl. Mot.], Feb. 16, 2023, ECF No. 40. Otter claims that CBP's refusal to pay interest on its duty overpayments made in connection with its prior disclosures is contrary to law, arbitrary, capricious, an abuse of discretion, and contrary to equity.[1] Pl. Mot. at 1. Defendants argue Congress did not provide for interest on duty overpayments in connection with prior disclosures. Defs.' Resp. to [Pl. Mot.] at 3, 6–17, Dec. 15, 2022, ECF No. 34 ("Def. Br."). For the following reasons, the court dismisses the case for lack of subject matter jurisdiction.

## BACKGROUND

Otter is the importer of record of the Commuter and Defender Series cell phone cases. Starting in 2010, Otter discovered that it (i)

[1] A "prior disclosure" is an administrative mechanism permitting an importer to voluntarily disclose its violations of customs law to limit its liability for penalties. *See* 19 U.S.C. § 1592(c)(4).

had failed to declare the value of certain assists[2] in connection with the valuation of its products and (ii) had inconsistently classified those products. Specifically, at the time of entry, Otter had classified its cases under both 3926.90.9980 of the Harmonized Tariff Schedule of the United States (2012) ("HTSUS"), subject to a 5.3 percent duty rate and 4202.32.9560, HTSUS, subject to a 17.6 percent duty rate, instead of under 4202.99.9000, HTSUS, at a 20 percent duty rate. Letter to CBP at 2, AK 1661–66 (May 16, 2012), ECF No. 46–3.[3] In connection with these errors, Otter later filed several prior disclosures to limit its potential penalty exposure.[4]

First, on November 17, 2010, Otter submitted a prior disclosure, which covered assists it provided since 2006 in connection with its finished durable protective covers.[5] *See* Letter to Commissioner of Customs at 1–2, AK 27–29 (Nov. 17, 2010), ECF No. 46; *see also* CBP Mem., AK 14 (Apr. 24, 2019), ECF No. 46. Between September 29, 2011 and July 30, 2012, Otter submitted interim duty payments

[2] An "assist" is one of the following a buyer of imported merchandise provides free of charge or at reduced cost for use in producing or exporting the merchandise to the United States:

(i) Materials, components, parts, and similar items incorporated in the imported merchandise.
(ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.
(iii) Merchandise consumed in the production of the imported merchandise.
(iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

19 U.S.C. § 1401a(h)(1)(A).

[3] Defendants initially filed certain documents in the administrative record under seal. *See* ECF Nos. 24–25. In a letter to the parties on March 3, 2023, the court required the parties to inform the court which documents are no longer confidential and to refile the documents remaining confidential after marking the specific confidential information in each document. *See* ECF No. 41. On March 17 and 20, 2023, the parties complied with the court's request. *See* ECF Nos. 43, 45–64. Citations to the administrative record in this opinion are to documents the parties made public. Additionally, the page numbers of these citations have been shortened. For example, "AK PUBLIC 001661–66" is written as "AK 1661–66."

[4] An importer makes a prior disclosure orally or in writing to a CBP officer and tenders any actual loss of duties, taxes and fees, or actual loss of revenue. 19 C.F.R. § 162.74(a)(1).

[5] At the time Otter submitted its prior disclosures, CBP had liquidated the entries related to each prior disclosure. *See, e.g.*, Table of Prior Disclosures at 1, LB 472, ECF No. 47; CBP Mem. Ex. A at 3, AK 106–12 (June 1, 2020), ECF No. 46. Otter imported the goods related to the second prior disclosure from 2007 to 2012, *see* Letter to CBP, Ex. A, AK 1677 (July 9, 2012), ECF No. 46–3, and it appears that CBP liquidated those entries between 2008 and 2013. The second prior disclosure covers hundreds of entries between 2007 and 2012, and it is unclear from the record exactly when each of them liquidated. *See* Letter to CBP, Ex. B, AK 1679–715 (July 9, 2012),ECF No. 46–3. However, it is likely those entries liquidated prior to one year after the last entry in 2012. *See* 19 C.F.R. § 159.11(a) (CBP must liquidate entries within one year of entry or the entries will be deemed liquidated by operation of law unless the time is validly extended). Otter imported the merchandise related to the third prior disclosure from July 1, 2011 through April 30, 2014, and CBP liquidated those entries on May 10, 2012; May 11, 2013; March 12, 2014; May 11, 2014, September 11, 2014; and January 9, 2015. *See, e.g.*, Table of Prior Disclosures at 1, LB 472, ECF No. 47.

related to the value of the assists it received for entries in the time period from January 1, 2006 to May 2, 2012 ("PD Payment 1"). Letter to CBP at 1–3, AK 31–34 (Feb. 17, 2011), ECF No. 46 (covering assists from January 1, 2006 to December 21, 2010); Letter to CBP at 1, AK 136–38 (Sept. 29, 2011), ECF No. 46 (covering assists from January 1, 2011 to August 31, 2011); Letter to CBP at 1–2, AK 143–47 (May 7, 2012), ECF No. 46 (payment for assists from January 1, 2006 to December 31, 2011); Letter to CBP at 1, AK 149–153 (July 30, 2012), ECF No. 46 (payment for assists from January 1, 2012 to May 2, 2012); *see* Letter to CBP at 1–2, AK 132–34 (Mar. 23, 2011), ECF No. 46 (proposing quarterly interim duty payments). PD Payment 1 reflected the additional duty due as a result of applying the ad valorem rate of duty associated with subheading 4202.99.9000, HTSUS, i.e., 20 percent as applied to the value of the assists that had not been properly declared. *See* Letter to CBP at 2, AK 136–38 (Sept. 29, 2011), ECF No. 46 (discussing accounting for assists and calculation of loss of revenue). After tendering PD Payment 1 and CBP approved its reconciliation applications, Otter began flagging entries for value reconciliation on May 3, 2012 going forward, to account for the value of assists.[6] Letter to CBP at 2, AK 149–153 (July 30, 2012), ECF No. 46; *see also* Letter to CBP at 2, AK 136–38 (Sept. 29, 2011), ECF No. 46 (at the direction of CBP, Otter applied to participate in reconciliation, while making periodic interim duty payments on assists).

On May 16, 2012, Otter submitted its second prior disclosure concerning certain errors, including both classification and valuation errors, on its duties of durable protective covers entered between 2007 and March 2012.[7] Letter to CBP at 1–2, Ex. A, AK 1668–77 (July 9, 2012), ECF No. 46–3; Letter to CBP at 1–3, AK 1661–66 (May 16, 2012), ECF No. 46–3. Otter, in this second prior disclosure letter, informed CBP that Otter had protested CBP's classification of its merchandise under the subheading 4202.99.9000, HTSUS, at the 20 percent duty rate, instead of the subheading 3926.90.9980, HTSUS, at the 5.3 percent duty rate, which could ultimately impact the duty

[6] Reconciliation is an electronic process permitting an importer to delay providing to CBP certain elements of entry, other than those related to admissibility. 19 U.S.C. § 1401(s). Reconciliation is an entry for purposes of liquidation, reliquidation, recordkeeping, and protest. *Id.*

[7] Otter informed CBP of the following errors:

> (1) misclassification of certain of its finished cases under 3926.90.9980, HTSUS, at a 5.3 percent rate of duty or under 4202.32.9560, HTSUS, at a 17.6 percent rate of duty;
> (2) misclassification of certain component parts of cases under 4202.99.9000, HTSUS, at a 20 percent rate of duty;
> (3) incorrect transcription of invoice values onto CBP Form 7501; and
> (4) incorrect invoice prices.

*See* Letter to CBP at 2–3, AK 1661–66 (May 16, 2012), ECF No. 46–3.

rate of the entries underlying that prior disclosure.[8] *See* Letter to CBP at 3 n.1, AK 1668–77 (July 9, 2012), ECF No. 46–3. On July 9, 2012, Otter submitted its additional duty payment in connection with the errors for its entries from 2007 to March 2012 ("PD Payment 2"). Letter to CBP at 1, Att. A, AK 1668–77 (July 9, 2012), ECF No. 46–3; *see also* Check No. 22080, AK 1675 (July 5, 2012), ECF No. 46–3.

On May 13, 2013, TreeFrog Developments, Inc. d/b/a LifeProof ("LifeProof") submitted a prior disclosure concerning assists it provided for finished durable protective covers entered between July 2011 and April 30, 2013. Letter to CBP at 1, LB 37–39 (Nov. 23, 2016), ECF No. 47; Letter to CBP at 1, 4, Exs. A, B, LB 41–51 (May 13, 2013), ECF No. 47. On June 3, 2013, LifeProof amended its prior disclosure naming Otter the importer of record for its entries when one of Otter's companies purchased LifeProof. *See* Letter to CBP at 1–2, LB 92–93 (June 3, 2013), ECF No. 47; *see also* Ex. A: Pre-Penalty Statement, LB 458–60, ECF No. 47 ("LifeProof started importing under the Otter Products LLC Importer of Record Number in 2014, which is why some prior disclosure tenders were made by LifeProof and some were made by Otter Products, LLC"). Between May 14, 2013 and September 29, 2014, Otter submitted interim duty payments in connection with the value of the assists LifeProof provided during the time period of January 2013 to April 30, 2014 ("PD Payment 3"). *See* Letter to CBP at 1, LB 99–100 (Sept. 11, 2013), ECF No. 47; Letter to CBP at 1, LB 121–22 (July 29, 2014), ECF No. 47; Letter to CBP at 1, LB 145–46 (Sept. 29, 2014), ECF No. 47.

On July 2, 2013, after filing its prior disclosures and its entry into the reconciliation program, Otter protested CBP's classification of its merchandise in connection with four entries in 2012.[9] Summons at 1, *Otter Products, LLC v. United States*, 70 F. Supp. 3d 1281 (Ct. Int'l Trade 2015) (No. 13–00269) ("*Otter Products I*"), ECF No. 1. Otter claimed CBP should classify Otter's merchandise under subheading 3926.90.9980, HTSUS, instead of subheading 4202.99.9000, HTSUS. *Otter Products I*, 70 F. Supp. 3d at 1284. CBP denied Otter's protest on August 1, 2013. Summons at 1, *Otter Products I*, 70 F. Supp. 3d 1281 (No. 13–00269), ECF No. 1.

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[8] These protests Otter filed beginning June 2011 are distinct from those involved in the first court action Otter filed later on July 2, 2013. *See* Letter to CBP at 2 n.2, AK 1661–66 (May 16, 2012), ECF No. 46–3 (stating that three of the protests filed beginning on June 28, 2011 were at CBP Headquarters for review); Summons at 1, *Otter Products, LLC v. United States*, 70 F. Supp. 3d 1281 (Ct. Int'l Trade 2015) (No.13–00269), ECF No. 1 (showing protest filed on July 2, 2013 for entries dated April 23 to July 11, 2012).

[9] Otter's subject merchandise in *Otter Products I* entered between April 23, 2012 and July 11, 2012 under Entry Numbers 112–7334796–8, 112–7391483–3, 112–7967525–5, 112–8546857–0. *Otter Products I*, 70 F. Supp. 3d at 1284.

Otter filed its complaint in *Otter Products I* on August 2, 2013. *Otter Products I*, 70 F. Supp. 3d at 1284. In *Otter Products I* in addition to reclassification of the subject entries, Otter sought the refund of overpaid duties in connection with the value of the assists it provided for the subject merchandise in that case. *Id.* at 1284, 1285 n.2. While that case was pending before this court, Otter informed CBP, which was reviewing Otter's prior disclosures, of its court challenge to CBP's classification of similar products. Letter to CBP at 2, LB 121–22 (July 29, 2014), ECF No. 47; *see also* Letter to CBP at 2, LB 145–46 (Sept. 29, 2014), ECF No. 47. After being informed of the classification challenge, CBP held the prior disclosure submissions in abeyance.[10] *See, e.g.*, Email to Page Hall, LB 9 (Aug. 17, 2015), ECF No. 22–1; *see also* CBP Mem. at 1, Ex. A, AK 2–7 (June 1, 2020), ECF No. 46 (closing out prior disclosures); CBP Mem. at 1, Ex. A, LB 247–49 (July 13, 2020), ECF 47 (closing out prior disclosure). This court granted judgment in favor of Otter, determining that its merchandise should be reclassified under subheading 3926.90.9980, HTSUS. *Otter Products I*, 70 F. Supp. 3d at 1295, 1298. The Court of Appeals affirmed. *Otter Products, LLC v. United States*, 834 F.3d 1369, 1381 (Fed. Cir. 2016) ("*Otter Products II*").

After the Court of Appeals affirmed this court's holding in *Otter Products I*, Otter moved this court to enforce its judgment in *Otter Products I* by reopening a prior disclosure, which Otter had filed on December 5, 2013 and CBP had closed out on November 18, 2014. *Otter Products, LLC v. United States*, 532 F. Supp. 3d 1345, 1347 (Ct. Int'l Trade 2021) ("*Otter Products III*"). On August 18, 2021, the court denied Otter's motion to enforce because the judgment in *Otter Products I* applied only to the entries included in the protest at issue in that case. *Id.* at 1347, 1351–53.

On June 1 and July 13, 2020, CBP closed out the three prior disclosures (involving PD Payments 1, 2, and 3) for processing. *See* CBP Mem. at 1, Ex. A, AK 2–7 (June 1, 2020), ECF No. 46; CBP Mem. at 1, Ex. A, LB 247–49 (July 13, 2020), ECF 47. CBP re-classified Otter's merchandise consistent with *Otter Products I* and *Otter Products II* under the subheading 3926.90.9980, HTSUS, at a duty rate of 5.3 percent, compared the amounts of duty due at that rate to duties Otter had paid including PD Payments 1–3, and subsequently

[10] Typically, when CBP receives a prior disclosure submission, it calculates the actual loss of duties, taxes, and fees or actual loss of revenue and notifies the importer, who then has 30 days to tender any additional duties. *See* 19 C.F.R. § 162.74(c).

refunded the difference.[11] *See* CBP Mem. at 1, Ex. A, AK 2–7 (June 1, 2020), ECF No. 46; CBP Mem. Ex. A, LB 247–49 (July 13, 2020), ECF No. 47; CBP Emails at 1, Attachment, AK 435–37 (Sept. 10, 2020), ECF No. 46–2; Letter to Mr. Mastriani at 1, LB 887 (Sept. 17, 2020), ECF No. 47–1. However, CBP did not pay Otter interest on the overpayments it made, stating that "[t]here is no provision in the statute or the regulations that calls for the assessment of interest on refunds associated with prior disclosures." Email to Mr. Mastriani at 1, AK 455 (Oct. 20, 2020), ECF No. 46–2.

In this case, Otter seeks interest on its duty overpayments in connection with its three prior disclosures of assists and errors on merchandise it entered between January 2006 and April 2014.[12] Otter filed its complaint on February 1, 2022. Compl., Feb. 1, 2022, ECF No. 2. Defendants filed their answer on June 23, 2022. Answer, June 23, 2022, ECF No. 15. On September 12, 2022, Otter filed its motion for judgment on the record. Pl. Mot. Defendants filed their response on December 15, 2022. Def. Br.

## JURISDICTION AND STANDARD OF REVIEW

Otter asserts jurisdiction under 28 U.S.C. § 1581(i) (2018). "[B]ecause claims brought under 28 U.S.C. § 1581(i)[] require a waiver of sovereign immunity, the court must strictly construe the jurisdictional statute." *Wuxi Seamless Oil Pipe Co. v. United States*, 37 C.I.T. 172, 176 (2013) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). "The limits of the waiver of sovereign immunity define a court's jurisdiction to entertain suit." *Id.* (citing *Hercules, Inc. v. United States*, 516 U.S. 417, 422–23 (1996)). Further, a plaintiff fails to state a claim unless, when taking the facts in the complaint as true, its claim is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

## DISCUSSION

Otter demands interest on its duty overpayments pursuant to 19 U.S.C. §§ 1520(a)(3), 1505(b), (c), arguing it tendered those payments involuntarily, pursuant to CBP's erroneous classification of Otter's merchandise. Pl. Br. at 21. Defendants argue that neither 19 U.S.C.

[11] The refunds CBP paid in connection with the prior disclosures are distinct from the refund CBP issued in accordance with this court's judgment to reliquidate the four entries at issue in *Otter Products I*. *See* J., *Otter Products I*, 70 F. Supp. 3d 1281 (No.13–00269), ECF No. 57; *Otter Products I*, 70 F. Supp. 3d at 1284.

[12] The parties do not dispute the material facts concerning the prior disclosures. Def. Br. at 6 ("there are times Otter claims to have 'perfected' its prior disclosure on a date certain . . . when further payments were made later. Nevertheless, we do not dispute the critical facts concerning the prior disclosures discussed at pages 5 through 12 of Otter's brief"); *see* Pl. Br. at 5–12.

§§ 1520(a)(3) nor 1505(b), (c) waive sovereign immunity for interest on duty overpayments made in connection with prior disclosures. Def. Br. at 7–17. For the following reasons, the action is dismissed for lack of subject matter jurisdiction.

Under the doctrine of sovereign immunity, the United States is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The terms of the United States' consent to be sued define the Court's jurisdiction. *Hercules, Inc. v. United States*, 516 U.S. 417, 422–23 (1996). The "no-interest rule" precludes suits for interest against the government, absent an express waiver of sovereign immunity. *Library of Congress v. Shaw*, 478 U.S. 310, 314–15 (1986), *superseded by statute in part*, Civil Rights Act of 1991, § 114, *as recognized in Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

Although the Administrative Procedure Act ("APA") waives sovereign immunity for challenges to agency action, the "no-interest rule" precludes suits for interest in connection with agency action unless there is a specific waiver of sovereign immunity.[13] *Sandstrom v. Principi*, 358 F.3d 1376, 1379–80 (Fed. Cir. 2004). In *Sandstrom v. Principi*, the Court of Appeals held the APA did not waive sovereign immunity in connection with suit for interest on retroactive veterans' disability payments:

> Controlling legal authority is directly on point. Under the long-standing "no-interest rule," sovereign immunity shields the U.S. government from interest charges for which it would otherwise be liable, unless it explicitly waives that immunity: The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the govern-

[13] Conversely, this Court in a series of cases concluded the APA waived sovereign immunity where Congress provided for the collection of duties to be distributed to affected domestic producers ("ADPs"), and the question was whether CBP should include importers' interest payments in the ADPs set aside for distribution. *See Adee Honey Farms v. United States*, 577 F. Supp. 2d 1362 (Ct. Int'l Trade 2022); *Am. Drew v. United States*, 579 F. Supp. 3d 1372 (Ct. Int'l Trade 2022); *Hilex Poly Co., LLC v.United States*, 581 F. Supp. 3d 1319 (Ct. Int'l Trade 2022). In those cases, the agency action was whether CBP should pay interest into an account as part of the collection of duties ordered by Congress, not whether a plaintiff could sue the government for interest. *See Adee Honey Farms*, 577 F. Supp. at 1364–65; *Am. Drew*, 579 F. Supp.at 1374; *Hilex Poly Co.*, 581 F. Supp. at 1320–21.

> ment stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.

*Sandstrom*, 358 F.3d at 1379–80 (internal quotations omitted) (quoting *Angarica v. Bayard*, 127 U.S. 251, 260 (1888)); *see also Shaw*, 478 U.S. at 314–15. A claim for interest is a claim for damages flowing from the time value of money. *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages"); *see also Dep't of the Army v.* Blue Fox, Inc., 525 U.S. 255, 262 (1999) ("Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" (emphasis in original) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)).

Liquidation or reliquidation triggers the statutory waiver of sovereign immunity for suits seeking interest on the overpayment of duties. Specifically, § 1505(c) provides for interest upon monies due in connection with a liquidation or reliquidation:

> Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation. The Secretary may prescribe an alternative mid-point interest accounting methodology, which may be employed by the importer, based upon aggregate data in lieu of accounting for such interest from each deposit data provided in this subsection.

19 U.S.C. § 1505(c).[14] Liquidation is the final computation of duties on entries. 19 C.F.R. § 159.1.

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[14] Section 1520 does not make any provision for interest, rather it authorizes the government to refund duties for excess deposits upon liquidation or prior to liquidation.

> (1) Excess deposits
> Whenever it is ascertained on liquidation or reliquidation of an entry or reconciliation that more money has been deposited or paid as duties than was required by law to be so deposited or paid.

19 U.S.C. § 1520(a)(1).

Congress specifically provides for the liquidation and reliquidation of entries. CBP liquidates merchandise within one year from the date of entry or the date of final withdrawal of all merchandise in a warehouse entry,[15] or the entries will be deemed liquidated by operation of law.[16] 19 U.S.C. § 1500(d); 19 C.F.R. § 159.11(a). Pursuant to 19 U.S.C. § 1501, CBP may voluntarily reliquidate to correct errors in appraisement, classification, or any other element of the liquidation, including misinterpretation of law, within 90 days of liquidation or reliquidation. 19 U.S.C. § 1501; 19 C.F.R. § 173.3(a). Under 19 U.S.C. § 1509(g)(2)(C), CBP may reliquidate within two years of liquidation in cases where an importer claiming preferential duty treatment fails to supply supporting records. Further, CBP may reliquidate under 19 U.S.C. § 1520(d) within one year of liquidation where an importer failed to claim preferential treatment under a Free Trade Agreement and the importer petitions for reliquidation. Finally, after a court decision, CBP may reliquidate goods in accordance with that decision—60 days after the date of this court's decision and 90 days after the date of a decision by the Court of Appeals. 19 C.F.R. § 176.31; *see* 19 U.S.C. § 1514(a) (following judgment of the court, CBP "shall take action accordingly").

In contrast, the processing of a prior disclosure does not effectuate a liquidation or reliquidation. Rather, once liquidation of entries is final, an importer subject to penalties for false or material statements or material omissions may limit its liability by filing a "prior disclosure" with CBP. *See* 19 U.S.C. § 1592(a), (c). CBP calculates the actual loss of duties, taxes and fees, or actual loss of revenue and notifies the importer. 19 C.F.R. § 162.74(c). The importer may tender the amount of its unpaid duties when it makes a prior disclosure or within 30 days after CBP notifies the importer in writing of CBP's calculation. *Id.* CBP refunds any reductions in duties to the importer. *Id.* Thus, when CBP accepts, processes, and ultimately closes out a submitted prior disclosure, it does not reliquidate the merchandise. *See* 19 U.S.C. § 1592(c)(4) (silent on liquidation); 19 C.F.R. § 159.2 (silent on liquidation for prior disclosures); *see also United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1361 (Fed. Cir. 2007) ("Congress chose not to include violations of section 1592(a) in the carefully carved out exceptions to the finality of liquidations").

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[15] Upon entry the importer of record files the entry summary for its merchandise, including classification and valuation of the merchandise. See 19 C.F.R. § 142.11; CBP Form 7501, https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501. The importer pays estimated duties on its merchandise based on the entry summary. 19 C.F.R. §§ 141.103, 141.105; see 19 U.S.C. § 1505(a).

[16] CBP notifies the importer by posting the notice of liquidation on its website. 19 C.F.R. § 159.9(a).

The court must dismiss Otter's suit because Congress has not waived sovereign immunity for a suit seeking interest on duties refunded in connection with a prior disclosure. The "no-interest rule" bars Otter from sustaining an action for interest here absent an express waiver. *See Shaw*, 478 U.S. at 314–15. Section 1505(c) provides for the payment of interest calculated from the deposit or claim date to when goods are liquidated, meaning when CBP calculates the final duties, and, if different from the deposited duties, the difference is refunded or paid, and CBP determines any interest due. *See* 19 U.S.C. § 1505(b), (c). Section 1520 authorizes CBP to refund duties that have been deposited in excess. *Id.* § 1520(a)(1). Without mentioning interest, § 1520(a) authorizes refund of duties when, inter alia, it has been "ascertained that excess duties, fees, charges, or exactions have been deposited or paid." *Id.* § 1520(a)(4). Neither section addresses duties paid in connection with prior disclosures. *See id.* § 1505(b) (CBP shall "refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation"); *id.* § 1520(a)(4); *see also id.* § 1505(c) ("Interest on excess money deposited shall accrue . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation"); 19 C.F.R. § 24.36(a)(1) ("the refund shall include interest [accruing] to the date of liquidation or reliquidation of the applicable entry"). Although § 1592 requires an importer to submit interest for loss of duties, 19 U.S.C. § 1592(c)(4)(B), an importer does not receive interest on its overpayments in connection with prior disclosures because the statute does not provide for interest on duty overpayments, *see id.* §§ 1505(b), (c), 1520(a); 19 C.F.R. § 162.74(c). Rather, the waiver of sovereign immunity for suits seeking interest on overpayments exists only in connection with liquidation or reliquidation. *See* 19 U.S.C. § 1505(c).

In this case Otter failed to account for the assists and misclassified entries resulting in underpaid duties. After its entries liquidated, Otter filed three prior disclosures and tendered PD Payments 1–3 to compensate for the loss of duties. Otter then protested the classification of its merchandise on four entries that had liquidated but for which the time to protest the liquidation had not expired. *See* Summons at 1, *Otter Products I*, 70 F. Supp. 3d 1281 (No. 13–00269), ECF No. 1. When CBP denied its protest, Otter filed a summons and complaint with this Court. While Otter's case challenging the denial of its protest was ongoing, CBP held open Otter's prior disclosures for the entries that had already liquidated and for which liquidation had become final. *See Otter Products III*, 532 F. Supp. 3d at 1351–52; Pl.'s Mot. Enforce Ct.'s J. at 4, *Otter Products III*, 532 F. Supp. 3d 1345 (No.

13–00269), ECF No. 71; *see, e.g.*, Email to Page Hall, LB 9 (Aug. 17, 2015), ECF No. 22–1. After this court issued judgment for Otter and the Court of Appeals affirmed, CBP closed out the prior disclosures and refunded the additional duties tendered resulting from CBP's misclassification. Although CBP refunded duty overpayments under 19 C.F.R. § 162.74(c) for the prior disclosures that had been held in abeyance, it did not, and could not, reliquidate the entries, and therefore no authority provides for interest on those overpayments. Section 1505's express waiver of interest payments unambiguously applies only to interest on deposits in connection with liquidated entries. Thus, without a specific waiver of sovereign immunity, the Court lacks subject matter jurisdiction over Otter's claim for interest in connection with its overpayments on tendered prior disclosures under the no-interest rule.

Otter cites this court's previous opinion in *Otter Products I* for its proposition that it is entitled to interest on duty overpayments because it made those payments involuntarily. Pl. Br. at 21–22; *see Otter Products I*, 70 F. Supp. 3d at 1296–98. However, the voluntariness of payments is inapposite here. *Otter Products I* sustained Otter's allegation that CBP had improperly classified Otter's merchandise. The court's ruling did not depend upon the voluntariness of Otter's payment, but rather upon whether its entries had liquidated. *See Otter Products I*, 70 F. Supp. 3d at 1297 (the classification "is not yet final and conclusive because it is the subject of a valid protest"). In *Otter Products I* the entries had been protested and thus had not liquidated. In this case, Otter seeks interest on the refund it received in connection with a prior disclosure for entries that had already liquidated and not been protested.

Otter also argues that Defendants' misclassification of Otter's entries provided Defendants an unjust monetary benefit. Pl. Br. at 20, 26–29. The classification and valuation of merchandise is a shared responsibility of CBP and the importer. H.R. Rep. 103–361, at 136 (describing requirement in section 637 of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 1484, that importers use reasonable care in making entries establishes a "shared responsibility" between CBP and the trade community). Otter imported its merchandise under thousands of entries since 2006, which CBP liquidated before Otter discovered its failure to account for assists and misclassification errors in those entries. Otter failed to identify its errors or protest the misclassification of its entries for years. Addressing those assists and errors for entries that had already liquidated, Otter filed three prior disclosures to limit its liability for its violations of § 1592(a), which CBP held in abeyance pending this

court's decision in *Otter Products I* and thus allowing Otter to obtain refunds of duty overpayments tendered in connected with those prior disclosures. However, Otter does not contest that the entries underlying those prior disclosures have long since liquidated. It is unclear to the court why, when Otter shares responsibility for the entry process and the duty payments made in connection with that process, the result here is unjust. More importantly, without jurisdiction the court cannot address the question.

## CONCLUSION

In accordance with the foregoing, Otter's complaint is dismissed for lack of subject matter jurisdiction. Otter's motion for judgment on the record is denied as moot. The court will issue judgment separately.

Dated: March 29, 2023
New York, New York

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

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