U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF PROCESSED BREWER'S SAVED GRAINS

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of processed Brewer's Saved Grains.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of processed Brewer's Saved Grains under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after **[60 DAYS FROM PUBLICATION DATE].**

FOR FURTHER INFORMATION CONTACT: Marie J. Durané, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0984.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 33, on September 13, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of processed Brewer's Saved Grains. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N307210, dated October 9, 2020, CBP classified processed Brewer's Saved Grains in heading 1102, HTSUS, specifically in subheading 1102.90.60, HTSUS, which provides for "Cereal flours other than of wheat or meslin: Other: Other: Other." CBP has reviewed NY N307210 and has determined the ruling letter to be in error. It is now CBP's position that processed Brewer's Saved Grains is properly classified, in heading 2106, HTSUS, specifically in subheading 2106.90.99, HTSUS, which provides for "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N307210 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H322361, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H322361
November 21, 2023
OT:RR:CTF:FTM H322361 MJD
CATEGORY: Classification
TARIFF NO.: 2106.90.99

MR. RICHARD MOJICA
MILLER & CHEVALIER CHARTERED
900 16TH STREET NW
WASHINGTON, DC 20006

Re: Reconsideration of NY N307210; Classification of Processed Brewer's Saved Grains

DEAR MR. MOJICA:

This is in reference to your correspondence, dated December 14, 2021, requesting reconsideration of New York Ruling Letter ("NY") N307210, dated October 9, 2020, on behalf of your client, EverGrain Ingredients LLC (hereinafter "EverGrain") of two types of products made from processed Brewer's Saved Grains ("BSG") under the Harmonized Tariff Schedule of the United States ("HTSUS"). After reviewing NY N307210, we have found that ruling to be in error. For the reasons set forth below, we are revoking NY N307210.

You have asked that certain information submitted in connection with this request be treated as confidential, pursuant to 19 C.F.R. § 177.2(b)(7). Your request for confidentiality is approved. Specifically, the images and exhibits included in your submission will not be released to the public.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on September 13, 2023, in Volume 57, Number 33, of the Customs Bulletin. No comments were received in response to this notice.

FACTS:

In NY N307210, the products were described as follows:

> The subject merchandise are BarleyVita Fibra and BarleyVita Pro. You have stated that both products are derived from brewing spent grains, barley and corn, respectively. The products, which are in powder form, are produced from drying and milling brewing or distilling dregs and waste. The products are separated into finer and coarser particles. BarleyVita Pro represents the former, and BarleyVita Fibra characterizes the latter. Both products will be sold for use as fiber and/or protein ingredients in baked goods and other food applications.

NY N307210 also details U.S. Customs and Border Protection ("CBP") New York laboratory findings on samples of the products via laboratory report # NY20191820, dated October 1, 2020, which provides as follows:

> Based on the laboratory review, the samples fail to meet the Chapter 11, Note 2(A) starch/ash content requirements for classification within that chapter of the Harmonized Tariff Schedule of the United States (HTSUS). However, the samples meet the Note 2(B) sieve-test requirement for flours of heading 1102.

In your request for reconsideration, you explain that at the time the ruling request for NY N307210 was made, the products were named "BarleyVita Pro" and "BarleyVita Fibra," and now they are named "EverVita Prima" and "EverVita Fibra," respectively, (or "the EverVita products"). The EverVita products are made from BSG, specifically the BSG of barley and corn. BSG are the by-product of the beer brewing process. To create the EverVita Prima and EverVita Fibra, the BSG are dried using a ring drying technology during which hot air gets passed through the BSG and removes moisture so that the moisture content is less than 10 percent. Then the BSG are milled using a pin mill technology which helps to make a non-homogenous particle size distribution. Lastly the BSG are fractionated using air classification which separates the milled product into two fractions, one with smaller and lighter particles ("EverVita Prima") and one with larger and heavier particles ("EverVita Fibra"). Afterwards the two products are packed into 20kg bags and palatalized.

The EverVita Prima consist of more than 33 percent protein and more than 35 percent natural dietary fiber. It can be used as a fiber/protein additive and used in baking and other food applications. The EverVita Fibra contain as least 55 percent natural dietary fiber and 15 percent protein. It is used a fiber/protein additive in snacks and other food applications. Neither the EverVita Prima nor the EverVita Fibra can be consumed as is and must be added to other ingredients and cooked to be edible.

In NY N307210, CBP classified the EverVita products under heading 1102, HTSUS. Specifically, the BarleyVita Fibra (now "EverVita Fibra") was classified in subheading 1102.20.0000, HTSUS Annotated ("HTSUSA"), which provides for "Cereal flours other than of wheat or meslin: Corn (maize) flour," and the BarleyVita Pro (now the "EverVita Prima") was classified in subheading 1102.90.6000, HTSUSA, which provides for "Cereal flours other than of wheat or meslin: Other: Other: Other."

According to your submission, you argue that the EverVita products are classified in subheading 2303.30.0000, HTSUSA, which provides for "Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets: Brewing or distilling dregs and waste."

ISSUE:

What is the tariff classification of the EverVita Prima and the EverVita Fibra?

LAW AND ANALYSIS:

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

The 2023 HTSUS provisions under consideration are as follows:

1102 Cereal flours other than of wheat or meslin:

* * *

2106 Food preparations not elsewhere specified or included:

* * *

2302 Bran, sharps (middlings) and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants:

* * *

2303 Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets:

* * *

Note 2 to Chapter 11, HTSUS, provides in pertinent part:

(A) Products from the milling of the cereals listed in the table below fall within this chapter if they have, by weight on the dry product:

(a) A starch content (determined by the modified Ewers polarimetric method) exceeding that indicated in column (2); and

(b) An ash content (after deduction of any added minerals) not exceeding that indicated in column (3).

Otherwise, they fall in heading 2302. However, germ of cereals, whole, rolled, flaked or ground is always classified in heading 1104.

(B) Products falling within this chapter under the above provisions shall be classified in heading 1101 or 1102 if the percentage passing through a woven metal wire cloth sieve with the aperture indicated in column (4) or (5) is not less, by weight, than that shown against the cereal concerned.

Otherwise, they fall in heading 1103 or 1104.

Cereal	Starch content (microns)	Ash content (microns)	Rate of passage through a sieve with an aperture of— 315 micrometers	500 micrometers
(1)	(2)	(3)	(4)	(5)
	Percent	Percent	Percent	Percent
Wheat and rye ...	45	2.5	80	-
Barley	45	3	80	-
Oats	45	5	80	-
Corn (maize) and grain sorghum ..	45	2	-	90
Rice	45	1.6	80	-
Buckwheat	45	4	80	-

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The ENs to heading 2106, HTSUS, provides in pertinent part as follows:

> **Provided that they are not covered by any other heading of the Nomenclature,** this heading covers:
>
> (A) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk, etc.), for human consumption.
>
> (B) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption. The heading includes preparations consisting of mixtures of chemicals (organic acids, calcium salts, etc.) with foodstuffs (flour, sugar, milk powder, etc.), for incorporation in food preparations either as ingredients or to improve some of their characteristics (appearance, keeping qualities, etc.) (see the General Explanatory Note to Chapter 38).

* * *

The ENs to heading 2302, HTSUS, provides in pertinent part as follows: This heading covers:

> (A) **Bran, sharps and other residues from the milling of cereal grains**. This category essentially comprises by-products from the milling of wheat, rye, barley, oats, maize (corn), rice, grain sorghum or buckwheat, which do not comply with the requirements of Note 2 (A) to Chapter 11 as regards starch content and ash content.
>
> ...
>
> (B) **Residues from the sifting or other working of cereal grains**. Sifting residues, obtained during pre-milling operations, consist essentially of:
>
> ...
>
> (C) **Residues and waste of a similar kind resulting from the grinding or other working of leguminous plants**.

The ENs to heading 2303, HTSUS, provides in pertinent part as follows:

> . . .
>
> (E) **Brewing or distilling dregs and waste** comprise in particular:
>
> (1) Dregs of cereals (barley, rye, etc.), obtained in the manufacture of beer and consisting of the exhausted grains remaining after the wort has been drawn off.
>
> . . .

* * *

In NY N307210, CBP classified the EverVita products in heading 1102, HTSUS, which provides for "Cereal flours other than of wheat or meslin." CBP stated that based on the results in the CBP laboratory report, tested samples of the EverVita products "faile[d] to meet the Chapter 11, Note 2(A) starch/ash content requirements for classification within that chapter of the Harmonized Tariff Schedule of the United States (HTSUS)." However, CBP opined that while the samples did not meet the specifications for Note 2(A) to Chapter 11, HTSUS, they did meet the "Note 2(B) sieve-test requirement for flours of heading 1102." Note 2(B) to Chapter 11, HTSUS, provides that

"**Products falling within this chapter under the above provisions shall be classified in heading 1101 or 1102** if the percentage passing through a woven metal wire cloth sieve with the aperture indicated in column (4) or (5) is not less, by weight, than that shown against the cereal concerned." (Emphasis added). Thus, to meet the requirements of Note 2(B) to Chapter 11, HTSUS, a product must first meet the requirements of Note 2(A) to Chapter 11, HTSUS. As a result, because the EverVita products failed to meet the starch and ash requirements of Note 2(A) to Chapter 11, HTSUS, resorting to Note 2(B) to Chapter 11, HTSUS, is incorrect. Therefore, we find that the EverVita products are not classified in Chapter 11, HTSUS, because they are excluded from classification therein because of Note 2(A) to Chapter 11, HTSUS.

Note 2(A) to Chapter 11, HTSUS, however, directs classification to heading 2302, HTSUS, when products from the milling of cereals fail to meet the starch and ash requirement of Note 2(A) to Chapter 11, HTSUS. Specifically, Note 2(A) to Chapter 11, HTSUS, provides, in pertinent part, that "Products from the milling of the cereals listed in the table below fall within this chapter if they have [a specific starch and ash content] ... Otherwise, they fall in heading 2302." Heading 2302, HTSUS, provides for "Bran, sharps (middlings) and other residues, whether or not in the form of pellets, derived from the sifting, milling or other working of cereals or of leguminous plants." The ENs to heading 2302, HTSUS, provide that the heading covers primarily three types of products, "bran, sharps and other residues from the milling of cereal grains," "residue from the sifting or other working of cereal grains," and "residues and waste of a similar kind resulting from the grinding or other working of leguminous plants." None of these categories, however, describe the EverVita products at issue here. Therefore, we find that the EverVita products are also not classified in heading 2302, HTSUS.

Next, we turn to heading 2303, HTSUS, which provides for "Residues of starch manufacture and similar residues, beet-pulp, bagasse and other waste of sugar manufacture, brewing or distilling dregs and waste, whether or not in the form of pellets." The ENs to heading 2303, HTSUS, provide that the "Brewing or distilling dregs and waste" comprise of "Dregs of cereals (barley, rye, etc.), obtained in the manufacture of beer and consisting of the exhausted grains remaining after the wort has been drawn off." *See* EN 23.03(E). In the instant case, the BSG produced as a result of the beer making process are precisely described by heading 2303, HTSUS, and the ENs to heading 2303, HTSUS, as they are the left-over remnants from the beer brewing process. However, while the BSG is properly described by heading 2303, HTSUS, the EverVita products are not. The EverVita products are processed BSG and while you explain that the products are minimally processed, we find that the processing of the BSG, i.e. the drying, milling, and fractionation, further advances the BSG to a different product. Thus, we find that the EverVita products are also not classified in heading 2303, HTSUS.

You argue that the EverVita products are classified in heading 2303, HTSUS and that minimally processing the BSG through drying, milling, and the fractionation that sorts the BSG by particle size does not advance the EverVita products into a different product. You cite to NY L81574, dated February 2, 2005, where CBP determined that Fibrex®, a dietary fiber derived from sugar beets, was classified in heading 2303, HTSUS. Fibrex® is produced by drying sugar beet pulp under pressure with overheated steam, and milling the dried pulp to different particle sizes. The Fibrex® is "sold as a fiber

additive for use in bakery products, in other food applications and as a vegetable fiber in health food products." However, in that case the product was dried with overheated steam, and milled to different particle sizes, whereas the EverVita products are not only dried and milled, but also fractionated to achieve different particle size. This fractionation process for the EverVita products yields products are further advanced into a different product unlike the Fibrex® in NY L81574.

You also cite to Headquarters Ruling Letter ("HQ") H311471, dated March 11, 2021, where CBP found that a pea protein product that "results as a side stream product from the production of pea starch," and is further processed by separating the starch from the product which results in a fruit water that is "coagulated, separated, and dried," was classified as a "vegetable waste" or "vegetable product in heading 2308, HTSUS. However, in that ruling, CBP specifically mentioned that the pea protein was not a product of heading 2303, HTSUS, because it was not a "residue within the meaning of heading 2303, HTSUS," and that the product was "further advanced into a different product by coagulation and drying." Similarly, we find that the EverVita products are advanced from BSG into a different product by the drying, milling, and fractionation process, and as a result are not classified in heading 2303, HTSUS.

Likewise, in HQ H039339, dated November 18, 2009, which you cite to, CBP found that two oat bran products, OatWell 14 and OatWell 22, were classified in heading 2306, HTSUS, as "oilcake and other solid residues." In reaching that decision, CBP first excluded the products from heading 2302, HTSUS, which provides for "Bran, sharps (middlings) and other residues . . ." CBP stated that heading 2302, HTSUS, does not cover the "by-products that result from the milling process and that have undergone 'further processing." Similarly, we find that heading 2303, HTSUS, does not provide for the by-products of heading 2303, HTSUS, that have undergone further processing, including a drying, milling, and fractionation process such as the process used to produce the EverVita products.

Instead, we find that that the EverVita products are properly classified in heading 2106, HTSUS, which provides for "Food preparations not elsewhere specified or included." Classification in heading 2106, HTSUS, depends on the product being a food preparation and a failure to find any prior tariff provision which meets the characteristics and use of the product. EN 21.06 provides two definitions for the phrase "food preparation". *See* EN (A) and EN (B) to 21.06. One of the definitions for the phrase "food preparation" is "Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption." *See* EN (B) 21.06. The EverVita products at issue are not classified under any other tariff provision and are made wholly of foodstuffs used in the making of food preparations like baked goods and other food applications for human consumption. Therefore, we find that the EverVita products at issue are food preparations within the meaning of EN 21.06, and are properly classified in heading 2106, HTSUS.

Accordingly, we find that the EverVita Prima and EverVita Fibra are classified in heading 2106, HTSUS, specifically, these products are classified in subheading 2106.90.9998, HTSUSA, which provides "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other: Other."

HOLDING:

In accordance with GRI 1, the EverVita Prima and EverVita Fibra are classified in heading 2106, HTSUS, specifically, they are classified in subheading 2106.90.9998, HTSUSA, which provides "Food preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other: Other: Other: Other." The column one general rate of duty is 6.4%.

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

EFFECT ON OTHER RULINGS:

NY N307210, dated October 9, 2020, is hereby **REVOKED**.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 23–161

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

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

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

Dated: November 17, 2023

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for plaintiff Risen Energy Co., Ltd. With them on the brief was *Judith L. Holdsworth*.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, for consolidated plaintiff JingAo Solar Co., Ltd. With him on the brief were *Sarah M. Wyss*, *Bryan P. Cenko*, *Jill A. Cramer*, *Yixin (Cleo) Li*, and *Ronalda G. Smith*.

Craig A. Lewis, Hogan Lovells US LLP, of Washington DC, for plaintiff-intervenor Shanghai BYD Co., Ltd.

Jonathan M. Freed, Trade Pacific PLLC, of Washington DC, for plaintiff-intervenor Trina Solar Co., Ltd. With him on the brief were *Robert G. Gosselink* and *Kenneth N. Hammer*.

Joshua E. Kurland, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Spencer Neff*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION AND ORDER

Restani, Judge:

Before the court are the second remand results of the U.S. Department of Commerce ("Commerce") pursuant to the court's order in *Risen Energy Co. v. United States*, Slip Op. 23–48, 2023 WL 2890019 (CIT Apr. 11, 2023) ("*Risen II*"), in the Sixth Administrative Review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules ("solar cells"), from the People's Republic of China, covering the period from January 1, 2017, to December 31, 2017. *See* Final Results of Redetermination Pursuant to Court Remand Order, ECF Nos. 115–116 (July 12, 2023) ("*Second Remand Results*"). Plaintiff Risen Energy Co., Ltd. ("Risen") and

Consolidated Plaintiffs JingAo Solar Co., Ltd. ("JA Solar") (collectively, "Plaintiffs")[1] challenge the Second Remand Results as unsupported by substantial evidence or otherwise not in accordance with law.

BACKGROUND

While the court presumes familiarity with the facts as set out in *Risen Energy Co. v. United States*, 46 CIT __, __, 570 F. Supp. 3d 1369, 1372 (2022) ("*Risen I*") and in *Risen II*, the court briefly summarizes the relevant record evidence for ease of reference. In March 2019, Commerce began the Sixth Administrative Review of the countervailing duty order on solar cells from the People's Republic of China. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 9297, 9303–04 (Dep't Commerce Mar. 14, 2019). On November 5, 2019, the U.S. International Trade Administration selected JA Solar and Risen as mandatory respondents in this review. *See Department of Commerce, Respondent Selection Memorandum* at 1–2, P.R. 98 (Nov. 5, 2019).

Commerce published its preliminary results on February 11, 2020, *see Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Rescission of Review, in Part; 2017*, 85 Fed. Reg. 7,727 (Dep't Commerce Feb. 11, 2020), along with the accompanying Preliminary Issues and Decision Memorandum, *Decision Memorandum for the Preliminary Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2017*, C-570–980, POR 01/01/2017–12/31/2017 (Dep't Commerce Jan. 31, 2020) ("*PDM*").

Commerce published its final determination on December 9, 2020. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017*, 85 Fed. Reg. 79,163 (Dep't Commerce Dec. 9, 2020); *see also Issues and Decision Memorandum for the Final Results of the Administrative Review of the Countervailing Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China; 2017*, C-570–980, POR 01/01/2017–12/31/2017 (Dep't Commerce Nov. 27, 2020) ("*IDM*").

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[1] Plaintiff-intervenors Shanghai BYD Co., Ltd. ("Shanghai BYD") and Trina Solar Co., Ltd. ("Trina") are non-examined parties who seek the benefits of whatever relief the court grants. *See*; Trina's Comments on Second Remand Results, ECF No. 120 (Aug. 11, 2023) ("Trina Br."); Shanghai BYD's Comments on Second Remand Results, ECF No. 119 (Aug. 11, 2023) ("Shanghai BYD Br.").

In *Risen I*, the court upheld Commerce's determination that Plaintiffs received regionally specific electricity subsidies subject to countervailing duties. *See* 570 F. Supp. 3d at 1382. The court remanded to Commerce to reconsider (1) the benchmark for land prices in China and (2) the benchmark for determining the cost of ocean freight for subsidy calculations involving provisions of raw materials for less than adequate remuneration. *Id.* at 1376, 1379. Additionally, the court granted the United States' request for remand on the Government of China's ("GOC") Export Buyer's Credit Program ("EBCP") but instructed Commerce to attempt to verify or to explain the reason that the court "should not provide some form of equitable relief." *Id.* at 1373.

After the first remand, Commerce found that it was able to verify JA Solar's non-use of the EBCP program. Final Results of Redetermination Pursuant to Court Remand Order at 15–20, ECF No. 94 (Oct. 7, 2022) ("*First Remand Results*"). Commerce continued to use adverse facts available ("AFA"), however, to find that Risen had benefited from EBCP. *Id.* As to land subsidies, Commerce modified its land benchmark by simple averaging 2021 data from Malaysia that Commerce placed on the record ("Malaysian data") with Commerce's original data source ("2010 CBRE data"). *Risen II*, 2023 WL 2890019 at *7. Commerce adjusted its ocean freight benchmark to attempt to counter concerns about double counting and use of data sets that contained shipping routes not comparable to those actually used by the Plaintiffs. *Id.* at *8. After considering the results of the first remand, the court remanded again for reconsideration on all three issues. *Id.* at *9. In the second remand, the court ordered Commerce to attempt to verify Risen's non-use of the EBCP program. *Risen II*, at *5. It additionally ordered Commerce to either explain its use of the 2010 CBRE data, which it held was not supported by substantial evidence due to staleness issues, or to use only the Malaysian data in the benchmark calculation. *Id.* at *7. On ocean freight, the court likewise ordered Commerce to either explain why Commerce's choice of data was supported by substantial evidence, or to replace that data with the JA Solar's proposed data set ("Xeneta data"). *Id.* at *9.

On remand, Commerce reopened the record and began the verification process, but ceased verification processes entirely when one of Risen's customers declined to participate in in-person verification proceedings. *See Second Remand Results* at 5–6. For the land benchmark issue, Commerce changed its calculation method entirely. *Id.* at 8–10. Instead of simple averaging the data sets to get one benchmark, Commerce's new formula uses whichever data set is most contempo-

raneous to the purchase year of a piece of land for use as the benchmark for that land transaction, simple averaging the two data sets for transactions where neither source is contemporaneous. *Id.* On ocean freight, Commerce decided to rely on the Xeneta data alone for the ocean freight calculation. *Id.* at 11–12. All parties are satisfied with the new ocean freight calculation. *Id.* at 26–27. Risen continues to contest Commerce's EBCP finding and JA Solar continues to contest Commerce's land benchmark. Risen Comments on Second Remand Results at 1, ECF No. 118 (Aug 11, 2023) ("Risen Br."); JA Solar Comments on Second Remand Results at 2, ECF No. 123 (Aug 11, 2023) ("JA Solar Br.").

The Second Remand Results do not adequately address all of the court's concerns in *Risen II* and they are not supported by substantial evidence. Accordingly, the court once again remands with further instructions.

JURISDICTION & STANDARD OF REVIEW

The court's jurisdiction continues pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court sustains Commerce's final redetermination results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(a)(2)(B)(i).

DISCUSSION

I. Export Buyer's Credit Program

The GOC's EBCP promotes exports by providing credit at preferential interest rates to qualifying foreign purchasers of GOC goods. *See Clearon Corp. v. United States*, 359 F. Supp. 3d 1344, 1347 (2019). During the review, Risen reported that none of its customers used the EBCP during the Period of Review ("POR") and confirmed that it had never been involved in assisting customers in obtaining loans under the program;[2] it also provided certifications of non-use from its U.S. customers attesting to this fact. *See Risen Section III Questionnaire Response*, Ex. 19 at 23–24, P.R. 144–162, C.R. 109–276 (Dec. 30, 2019); *Risen Unaffiliated Supplier II, Section III Questionnaire Response* at 23, Ex. 15, P.R. 164, C.R. 277 (Jan. 6, 2020). The GOC, however, did not provide all of the initially requested information to Commerce, stating that the questions were inapplicable because "the GOC believes that none of the respondents under review applied for, used, or benefitted from the alleged program." *GOC Initial Question-*

[2] *See GOC Initial Questionnaire Response* at 126, C.R. 104–108, P.R. 140–143 (Dec. 30, 2019); *see also id.* at Ex F-2 (indicating exporters are involved in the process).

naire Response at 126, C.R. 104–108, P.R. 140–143 (Dec. 30, 2019); *see IDM* at 27.

Previously, the court remanded Commerce's application of AFA to Risen. *See Risen II*. The court concluded that Risen had provided sufficient information from its customers to potentially eliminate any gap in the record caused by the GOC's non-compliance with Commerce's questionnaire. *Id.* at *5. The court therefore ordered Commerce to attempt to verify the information provided by Risen, and stated that, if verification were successful, Commerce "should either accept the *pro rata* adjustment sought by Risen or conclude that the EBCP was not used at all." *Id.* at *5.

On remand, Commerce had Risen gauge each of its customers' availability for in-person verification. *Second Remand Results* at 5. Risen has already stated that none of its customers used the EBCP, that its customers supplied non-use certifications that accounted for almost all sales, and that all of its significant customers provided their own financial records to Commerce. *See IDM* at 27–28; *see also IDM* at Ex. 19; *see also Risen EBC Questionnaire Response*, P.R. 12, C.R. 2–4 (Sept. 29, 2023); *see also Risen EBC Questionnaire Response*, P.R. 12, C.R. 2–4 (Oct. 19, 2022). In addition to these earlier requests, Commerce now had Risen ask each certifying customer to participate in expensive and time-consuming in-person verification lasting one to two days. *Second Remand Results* at 5. All but one of Risen's certifying customers consented to participate in such verification proceedings, but because that one customer refused to participate, Commerce declined to initiate any verification proceedings. *Id.* at 5–6. Commerce argues that because the one customer who refused to participate in in-person verification accounts for a significant portion of Risen's sales during the POR, verification of non-use of the EBCP program is impossible because the "unverified" information from that one customer would leave an insurmountable gap in the record. *Id.* at 6. Though the customer that declined in-person verification proceedings had submitted financial records prior to the in-person verification request, Commerce rejected all the financial records as unverifiable without in-person verification proceedings. *Second Remand Results* at 16–17. As a result, Commerce did not conduct any type of verification proceedings and continued to apply AFA because, in its view, in the absence of such successful verification, Risen could not fill the gap caused by the GOC's non-compliance with Commerce's earlier questionnaire about use of the EBCP program. *Id.* at 20

Now, Risen objects to the Second Remand Results, arguing that Commerce has ignored the court's directions to attempt verification.

Risen Br. at 8. The clear implication of the court's direction was to conduct so much verification as was appropriate to these particular proceedings. *See Risen II* at *5. Risen asserts that Commerce has made increasingly unreasonable demands from unaffiliated customers long after the POR and that Commerce was only seeking to delay the proceedings. Risen Br. at 8–9. Risen contends that the record contained sufficient information to demonstrate non-use through the provided customer financial information and certifications. *Id.* at 10. Risen now asks that the court order Commerce to either find non-use or assign a *pro-rata* rate so that Commerce may not delay Risen's relief again. *Id.*

If "necessary information is not available on the record" or if a responding party "withholds information" requested by Commerce, Commerce shall "use the facts otherwise available in reaching the applicable determination . . . ." 19 U.S.C § 1677e(a). Commerce may use AFA only when information is missing from the record because a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. 19 U.S.C. § 1677e(b). The application of adverse facts that collaterally impact a cooperating party is disfavored. *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1211 n.10, 865 F. Supp. 2d 1254, 1262 n.10 (2012), *aff'd*, 748 F.3d 1365 (Fed. Cir. 2014). "When Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer, however, it is expected to consider such evidence." *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 59, 893 F. Supp. 2d 1296, 1332 (2013), *aff'd*, 780 F.3d 1136 (Fed. Cir. 2015) (citing *Fine Furniture*, 36 CIT at 1216, 865 F. Supp. 2d at 1265); *see also Guizhou Tyre Co. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) ("To apply AFA in circumstances where relevant information exists elsewhere on the record — that is, solely to deter non-cooperation or 'simply to punish' — . . . that is a fate this court should sidestep.") (citation omitted). Use of AFA is only appropriate where information is otherwise not available on the record, and should not be used "simply to punish" a non-cooperative party. *Guizhou Tyre*, 42 CIT at __, 348 F. Supp. 3d at 1270 (2018) (citations omitted).

Here, the relevant information was submitted. Commerce must show that such information is not reasonably verifiable before it applies AFA. *See Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1327 (2018) (citing 19 U.S.C. § 1677m(e)); *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1382–83 (Fed. Cir. 2016) (holding that if the requirements of § 1677m(e) are not met, Commerce need not consider information sub-

mitted by an interested party). Verification is undefined by the statute, and the statute does not describe what processes Commerce should use to verify information. *See* 19 U.S.C. § 1677e(b). In order to find that information is not verifiable, however, Commerce must at least attempt to complete verification. *See Guizhou Tyre Co. v. United States*, 43 CIT __, __, 415 F. Supp. 3d 1402, 1405 (2019) ("The adverse use of facts otherwise available can only be used to fill gaps necessary to complete the factual record . . . . But until these reasons are grounded in facts supported by the record—that is, until the Department *actually attempts* verification and adequately confronts these (purportedly) insurmountable challenges, there is little for the Department to hang its hat on when it 'continues to find a "gap" in the record.'") (citations omitted) (emphasis in original).

Risen itself has filled the gap caused by the GOC's non-compliance with Commerce's questionnaire. It has both certified its non-involvement in the program and produced non-party customer certifications and back-up financial data from those customers, all demonstrating non-use. *See Second Remand Results* at 5; *see also First Remand Results* at 6; *see also* Risen Br. at 10. For the reasons set forth below, the court concludes that Commerce did not attempt a reasonable level of further verification of that information. In considering this issue, the court is mindful that Risen's customers are unaffiliated businesses sharing sensitive information years after relevant transactions with Risen may have ended. *See* Department of Commerce, Export Buyer's Credit Supplemental Questionnaire at Ex. 2, P.R. 1–2 (Sept. 29, 2023). The court is also mindful that asking a private entity with no legal obligation to do so to allow government officials to inspect its records is asking for something that can be both expensive and time consuming.[3] This new request for in-person verification, coming more than six years after the POR, has already caused one customer to decline to participate in unlimited verification proceedings. *See Second Remand Results* at 5–6; *see also* Risen Br. at 5. At this point, the gap that Commerce alleges exists—the unverifi-

[3] There are many reasons, utterly unrelated to the current litigation, why a private non-party business entity might be reluctant to submit to one to two day in-person verification proceedings several years after the POR. The decision not to participate does not logically imply that the company used EBCP. A government inspection of any kind will necessarily involve legal fees, time spent preparing matters, and almost always presents the risk that the company, which is currently under no obligation to participate, may open the door to further liability on other matters. Asking to verify the financial records of independent customers presents a high hurdle, one for which the Respondent must rely heavily on business relationships to attempt to fulfill the requirement. As time since the POR passes, the likelihood that those relationships may have shifted since the transactions at issue took place increases. *See* Risen Br. at 5. By drawing this process out, Commerce increased the odds that the Respondent would be unable to fill the gap to Commerce's satisfaction.

able information from the drop-out customer that is a result of non-compliance with Commerce's verification request—is a new circumstance that has emerged late in the process as a result of Commerce's newly crafted verification requirements. When the process of verification itself becomes the source of new non-compliance, courts should consider whether the process, as laid out by Commerce, is reasonably necessary or whether it has become so onerous as to impede good faith efforts by respondents to comply. Here, the factors laid out all together—non-use certificates and supporting records followed by requests for in-person visits of several days and government intrusion into all financial records on the premises of U.S. customer companies, all taking place six years after the POR, nearly four years after submission of the certificates, and in a world in which no verification efforts have ever produced evidence of the use of this program[4]—add up to an onerous unnecessary level of verification.

Risen produced non-use certificates two years after the POR, in early 2020. *See Risen Section III Questionnaire Response*, P.R. 144–162, C.R. 109–276 (Dec. 30, 2019). Those certificates have been on the record since that time. *Id.*[5] Commerce also has the financials of each of the third-party customers that produced a non-use certificate. *See Risen EBC Questionnaire Response*, P.R. 12, C.R. 2–4 (July 8, 2022); *see also Risen Verification Response*, P.R. 7, C.R. 2, (May 17, 2023). Commerce has expressed no doubts about the financials. Both the non-use certificates and the financial records produced by the third-parties represent evidence of non-use that supports Risen's own statement that its sales were not involved in the EBCP program. No evidence presented to the court suggests that these statements are not punishable under 18 U.S.C. § 1001 if either Risen or a customer

[4] *Risen Energy Co., Ltd. v. United States*, Slip Op. 23–148, 2023 WL 6620508, at *8 n.2 (CIT Oct. 11, 2023).

[5] Particularly crucial in this case is the lapse in time between the POR and the current verification efforts. The process of contesting anti-dumping determinations is by design already drawn out; Risen produced non-use certificates two years after the POR, in 2019. Litigation on the POR has drawn out since that production. In the nearly four intervening years of litigation, Risen lost at least one customer, who, reasonably, no longer wishes to participate in this proceeding. It is impossible to evaluate how a full verification would have gone had it been attempted four years ago, but that it was not attempted four years ago is not Risen's fault. If Commerce wishes to apply AFA, it must ensure that its processes are timely, particularly as even when the system is operating in as timely a manner as possible it already asks respondents to go back to customers over two years after any sales. New, invasive verification efforts begun six years after the POR and three remands later is not a timely verification process.

is lying.[6] Commerce, nonetheless, sought to complete burdensome verification procedures presumably in order to determine whether or not the statements are true. Commerce has presented no evidence to the court that these companies are lying about their financials.[7] Commerce has presented no evidence to indicate that the companies do not know what they are talking about.[8] At this stage, every piece of evidence presented to Commerce and to the court supports the conclusion that Risen's sales were not aided by the EBCP. In the face of substantial evidence of non-use from Risen and its customers, and no evidence of use supported by actual evidence or any reasonable AFA inference, Commerce must not include a subsidy amount for EBCP.[9]

II. Land Benchmark[10]

For simplicity's sake, the court assumes a basic level of familiarity with the facts of its earlier rulings on the benchmark land issue. *See Risen I*; *see also Risen II*. The current issue before the court is whether Commerce complied with the court's remand order that it either provide a "compelling reason for its continued use of the stale 2010 CBRE report or otherwise use the Malaysian data only." *Risen II*, at *7. Commerce has now satisfactorily explained its use of the 2010 CBRE report, but has exceeded the scope of the remand by implementing a new method of calculating the benchmark. The court therefore will remand to Commerce to use the method from the last remand stage, as that method is now explained.

"The court reviews remand determinations for compliance with the court's order." *Nakornthai Strip Mill Public Co. Ltd. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008) (citations omitted); *accord Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014). "Deviation from the court's remand order in the subsequent administrative

[6] 18 U.S.C. § 1001 punishes false official statements with up to five years imprisonment. In this additional layer of verification, Commerce is questioning Risen's U.S. based customers, who are in turn speaking to the United States government. Ordinarily, these statements would be within the scope of 18 U.S.C. § 1001.

[7] Commerce has also never found any evidence that any U.S. company has used EBCP. *Risen Energy Co. v. United States*, Consol. Court No. 22–00231, slip op. at 8 n.2 (CIT Oct. 11, 2023).

[8] *See Yama Ribbons and Bows Co. v. United States*, Slip Op. 23–127, 2023 WL 5501536 at *14 (CIT Aug. 25, 2023).

[9] The court is aware from previous oral argument that Commerce rejects a pro-rata approach. Additionally, Commerce confirms in briefs that it is not willing to consider a pro-rata approach. Gov't Br. at 18.

[10] The benchmark is set in order to determine whether lease payments constitute less than adequate remuneration ("LTAR").

proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989).

On remand, the court ordered Commerce to either justify its use of the 2010 CBRE report data in its land benchmark formula, or eliminate use of the 2010 CBRE report data in favor of the alternatively proposed Malaysian data. *Risen II*, at *7. The remand order presented Commerce with two clear options. *See id.* Instead of electing to execute either of those two options, Commerce elected to invent a third option: change the formula used to calculate the land benchmark, and then explain why the 2010 CBRE report data made sense for use in the new formula. *Second Remand Results* at 10; Commerce's Comments on Second Remand Results at 19, ECF No. 128 (Sept. 29, 2023) ("Gov't Br."). JA Solar argues that changing the land benchmark formula entirely now is outside of the scope of the remand, and that changing the formula at such a late stage unfairly denied JA Solar the opportunity to comment appropriately on the new proposed calculation method and to present appropriate data for the new benchmark methodology. JA Solar Br. at 2–5. Commerce argues that the court did not bar Commerce from changing its method on remand, and that because, absent a bar from the court, Commerce generally has broad discretion to reopen matters on remand, its new determination should be upheld. Gov't Br. at 26. The progress of this litigation, however, makes clear why the new methodology was indeed barred.

At the outset, prior to any remand, Commerce stated that the 2010 CBRE data was "indexed to the POR". *IDM* at 51. In its explanation of its method, Commerce cited to an earlier review of a different product from China, *Laminated Woven Sacks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 72 Fed. Reg. 67,893, 67906–08 (Dep't Commerce Dec. 3, 2007) ("*Sacks from China*"). *IDM* at 51; *PDM* at 18. In *Sacks from China*, Commerce apparently indexed data to the purchase year, not the POR. *Sacks from China*, 72 Fed. Reg. at 67,909. But Commerce did not specifically note that aspect of *Sacks from China*. When laying out its land benchmark calculation method here, Commerce did not claim that it was focusing on the dates of leases or indexing the data to the year of the lease. *IDM* at 51; *PDM* at 18. Instead, Commerce referenced indexing the 2010 CBRE data to "the POR." *IDM* at 51. Among other disputes affecting the land LTAR benchmark, a dispute about the

staleness of the 2010 CBRE data for indexing to the POR then came to the court. *See Risen I; see also Risen II*.

JA Solar has multiple leases with different purchase years that Commerce needed to evaluate. *See Second Remand Results* at 10–11. This is not the fact pattern of *Sacks from China*. *See Sacks from China*, 72 Fed. Reg. at 67,909. Apparently, Commerce's method of handling multiple leases was not fully developed when it initially analyzed the land subsidy in this case. Commerce started with the simplest method to assess the LTAR for multiple leases, and used the 2010 CBRE data for all land rights regardless of purchase year.[11] *See IDM* at 51–52. When, taking Commerce at its word that contemporaneity to the POR was the issue, the parties disputed Commerce's use of the 2010 CBRE data,[12] Commerce then decided on remand to include the Malaysian data in its calculation as well, which was more contemporaneous to both the POR and some lease purchase data. *See First Remand Results* at 22–23. Commerce averaged the 2010 CBRE data with the Malaysian data. *First Remand Results* at 11. Although it was asked to provide an explanation of why it was using both data sets, Commerce did not explain what it was doing. *See Risen II* at *7. Looking at the record through the lens of Commerce's latest explanation, the court can now glean that the range of years contained within the 2010 CBRE data and the Malaysian data when combined together made the data set as a whole a more accurate representation of the range of purchase dates at issue in this case.

It seems that Commerce did not offer the court this explanation at the time because it likely was focusing on the geographical and economical suitability of the two countries for benchmark data. It did not say that because it was addressing multiple leases that were initiated over a range of years neither data set alone was more suitable than the other. By choosing a new methodology that focuses on the time of the lease, Commerce has implicitly explained this now and the court does not find it to be an unreasonable method based on the litigation as it stood at the time.

The scope of the remand was limited. No party suggested another methodology might be appropriate. This fact and the prejudice of further delay resulted in the limited remand. Nonetheless on remand, Commerce changed its calculation method and in doing so it exceeded the remand's scope. The court's either or remand must be read in context of the Supreme Court's language in *Regents*. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

[11] Presumably, the desire for simplicity also led to indexing to the POR.

[12] *See IDM* at 48–50.

In *Regents*, the Supreme Court highlighted that, when explanation of agency action is insufficient, courts may remand either for the agency to offer "a fuller explanation of the agency's reasoning *at the time of the agency action*," or for the agency to "'deal with the problem afresh' by taking new agency action." *Regents*, 140 S. Ct. at 1907–08 (2020) (citations omitted) (emphasis in original). The court here remanded to Commerce for the narrow purposes of further *explanation* or use of only one data set, not for Commerce to deal with the problem afresh and change its calculation methodology. That was an option Commerce did not propose to the court prior to remand.[13]

Commerce could have sought a new remand here that allowed it to "deal with the problem afresh"[14] but parties then would have had an opportunity to argue against a broad remand or to seek the opportunity to present new data matched to the new methodology.[15] Commerce did not return to the court for the required direction and the court finds it would now needlessly prolong this case to start again, solicit new data, and rebrief the case. Interests in finality supports making a decision on the record as it is whenever possible. "To allow constant reopening and supplementation of the record would lead to inefficiency and delay in finality." *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012).[16] The late stage of litigation here makes it particularly inappropriate to start this case again.[17]

The remand order the court gave instructed Commerce to explain or drop the 2010 CBRE data. The court finds that Commerce has now adequately explained its reasoning at the time of the first remand

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[13] General principles of administrative law that allow the agency flexibility must give way to the litigation posture of the parties. One could argue that government waived the option of starting again by not seeking a broad remand. One might also observe that the underlying trade laws provide time limits for agency action. Starting again late in a case does not advance the preference of the statute for prompt action.

[14] *Regents*, 140 S. Ct. 1891, 1908 (2020) (citations omitted).

[15] JA Solar has argued that, were Commerce to have adopted this method of calculation at the outset, it might have proposed different benchmark data. JA Solar Br. at 5. The interests of proper process would require Commerce to allow JA Solar to submit data matching any new methodology. *See Regents*, 140 S. Ct. 1891, 1908 (2020) ("An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.").

[16] The holding of *Essar* only restricts what the court may do, not what Commerce may do. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012). Nonetheless, its general concern for finality applies.

[17] Of course, Commerce did reopen the record on remand, for the purposes of beginning verification on the EBCP issue. But Commerce did not solicit new data on the land benchmark issue. The court is called on to decide what the correct relief is now at this stage, not what Commerce might have done that it did not do.

results. The court accordingly remands for application of the first remand results for the land benchmark.[18]

III. Ocean Freight

On remand, all parties agree that Commerce has complied with the court's remand instruction on this issue and request that Commerce's determination in this matter be upheld. Gov't Br. at 11; Risen Br. at 1; JA Solar Br. at 2; Trina Br. at 4; Shanghai BYD Br. at 5. The court affirms Commerce's findings on this issue.

CONCLUSION

For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on the issues. As this remand does not require time for reopening of the record or reconsideration, the government remand shall be issued within 20 days hereof. Comments may be filed 10 days thereafter and any response 5 days thereafter.

Dated: 17 November 2023
New York, New York

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

[18] Both Risen and JA Solar had challenged the first remand results as to the land benchmark, seeking the elimination of the 2010 CBRE data. Risen Comments on First Remand Redetermination at 8, ECF 98, (Nov. 7, 2022); JA Solar Comments on First Remand Redetermination at 4–9, ECF 96, (Nov. 7, 2022). The court has now rejected those challenges.

Slip Op. 23–162

EXPORT PACKERS COMPANY LIMITED, HONEY HOLDING I, LLP DBA HONEY SOLUTIONS, SUNLAND TRADING, INC., NATIONAL HONEY PACKERS & DEALERS ASSOCIATION (NHPDA), Consolidated Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION, SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 22–00188
PUBLIC VERSION

[Sustaining ITC's final affirmative critical circumstances determination.]

Dated: November 17, 2023

Gregory Husisian, Foley & Lardner, LLP, of New York, N.Y., argued for Plaintiff Sweet Harvest Foods and Consolidated Plaintiffs Export Packers Company Limited, Honey Holding I, LLP DBA Honey Solutions, and Sunland Trading, Inc. With him on the briefs was *Jenlain C. Scott*.

Michael K. Haldenstein, Attorney Advisor, U.S. International Trade Commission, of Washington, D.C., argued for Defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel.

Melissa M. Brewer, Kelley Drye & Warren, LLP, of Washington, D.C., argued for Defendant-Intervenors American Honey Producers Association and Sioux Honey Association. With her on the brief were *R. Alan Luberda* and *Kathleen W. Cannon*.

OPINION

Gordon, Judge:

This consolidated action involves the final affirmative determination of critical circumstances by the U.S. International Trade Commission ("ITC" or "Commission") resulting from the investigation on raw honey from Vietnam. *See Raw Honey from Argentina, Brazil, India, and Vietnam*, 87 Fed. Reg. 33,831 (Int'l Trade Comm'n June 3, 2022) ("*Final Determination*"); *see also Views of the Commission*, USITC Pub. 5327, Inv. No. 701-TA-1564 (Final) (June 3, 2022), ECF No. 21–1 ("*Views*"); *Separate Views of Commissioner David S. Johanson* ("*Dissenting Views*"), ECF No. 21–2; Final Staff Report, ECF No. 21–3 ("*Staff Report*"); *Raw Honey from Argentina, Brazil, India, and Vietnam*, 87 Fed. Reg. 35,501 (Dep't of Commerce June 10, 2022) ("*AD Orders*").

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiff Sweet Harvest Foods ("Sweet Harvest") and Consolidated Plaintiffs Export Packers Company Limited,

Honey Holding I, LLP DBA Honey Solutions, Sunland Trading, Inc., and the National Honey Packers & Dealers Association ("NHPDA")[1] (collectively, Plaintiffs). *See* Pls.' Mot. For J. on the Agency R., ECF No. 27[2] ("Pls.' Br."); *see also* Def.'s Resp. to Pls.' Mot. For J. on the Agency R., ECF No. 29 ("Def.'s Resp."); Def.-Int.'s Resp. to Pls.' Mot. For J. on the Agency R., ECF No. 34 ("Def.-Int.'s Resp."); Pls.' Joint Reply Brief, ECF No. 37 ("Pls.' Reply"). The court has jurisdiction pursuant to Section 516a of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and 1516a(a)(2)(B)(i).[3] For the reasons set forth below, the court sustains the ITC's final affirmative critical circumstances determination.

I. Background

The statutory scheme governing unfair trade investigations requires a determination by the Commission on whether imported merchandise within the scope of a particular investigation has materially injured a domestic industry. *See* 19 U.S.C. § 1673. After its investigation, the ITC unanimously found that imports of raw honey from Vietnam were materially injuring a domestic industry. *See Views* at 74. Having reached that determination, the Commission noted that the U.S. Department of Commerce ("Commerce") had found in its investigation that "critical circumstances exist with respect to certain producers/exporters in Argentina and Vietnam." *Id.* at 61 (citing *Raw Honey From the Socialist Republic of Vietnam*, 87 Fed. Reg. 22,184 (Dep't of Commerce Apr. 14, 2022)(final affirm. AD determ. & crit. circum. determ.)[4]). The ITC then explained that, given Commerce's determination, coupled with the affirmative material injury determination, the statute required the Commission to further determine "whether the imports subject to the affirmative [Commerce critical circumstances] determination ...are likely to undermine seriously the remedial effect of the antidumping [and/or countervailing duty] or-

[1] "Although all cases concerning the Vietnamese critical circumstances determination are consolidated into a single action, the NHPDA is represented by its own counsel, attorneys from White & Case LLP," of Washington, D.C. Pls.' Br. at 1. The NHPDA did not file a separate brief, and supports the arguments raised by the other Plaintiffs. *Id.* Neither did NHPDA appear for oral argument.

[2] All citations to parties' briefs and the agency record are to their confidential versions unless otherwise noted.

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

[4] In its final determination, Commerce noted that "because we continue to find that critical circumstances exist, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of raw honey from Vietnam, ... which were entered, or withdrawn from warehouse, for consumption on or after August 25, 2021, which is 90 days prior to the date of publication of the affirmative *Preliminary Determination* in the Federal Register." 87 Fed. Reg. at 22,186.

der[s] to be issued." *Id.* (citing 19 U.S.C. § 1673d(b)(4)(A)(i)).

In making a critical circumstances determination, the statute directs the Commission to consider, among other relevant factors, "(I) the timing and the volume of the imports, (II) a rapid increase in inventories of the imports, and (III) any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined." 19 U.S.C. § 1673d(b)(4)(A)(ii). As part of its analysis, the Commission is to identify "the appropriate period for comparison of pre-petition and post-petition levels of subject imports from ... Vietnam." *Views* at 66. The ITC explained that, in the past, it has "relied on a shorter comparison period when Commerce's preliminary determination applicable to the subject imports at issue fell within the six-month post-petition period the Commission typically considers." *Id.* Here, however, the ITC noted that the petitions were filed on April 21, 2021 and that "Commerce's preliminary determinations were issued on November 17, 2021, after the last month in the six-month post-petition period of May 2021 through October 2021." *Id.* at 66–67. As a result, the ITC decided to "compare the volume of subject imports six months prior to the filing of the petitions (November 2020-April 2021) with the volume of subject imports in the six months after the filing of the petitions (May 2021-October 2021)." *Id.* at 67.

Based on the timing and volume of imports, the rapid increase in and size of inventories, and the continued underselling of the domestic like product by wide margins, the Commission reached an affirmative determination of critical circumstances. *Id.* at 73. As the ITC highlighted, "[a]n affirmative critical circumstances determination by the Commission, in conjunction with an affirmative determination of material injury by reason of subject imports, [results] in the retroactive imposition of duties for those imports subject to the affirmative Commerce critical circumstances determination for a period 90 days prior to the suspension of liquidation." *Views* at 62. Consequently, duties on entries of raw honey from Vietnam were made retroactive and payable on entries after August 25, 2021, rather than after the date of publication of Commerce's preliminary determination on November 23, 2021. *See AD Orders*, 87 Fed. Reg. at 35,502. One Commissioner disagreed, finding that the record lacked evidence that "could resolve the exact size of any diminished amount of unfairly traded merchandise that might remain." *See Dissenting Views* at 9–10 (noting that record lacked evidence "regarding final inventory levels of most importers and purchasers, the propensity of end users

to hold inventory, actual consumption, and the rate at which fairly traded imports arrived immediately before the order to replace unfairly traded ones").

Plaintiffs then challenged the ITC's affirmative critical circumstances determination, maintaining that the ITC focused on the incorrect period to evaluate whether critical circumstances existed. Plaintiffs raise several legal and factual arguments that all share a fundamental theme, namely, that the ITC failed to consider or afford adequate weight to the most recent data on the record, which, in turn demonstrated that the critical circumstances imports were not "likely to undermine seriously" the *AD Orders*.

Plaintiffs first argue that the ITC's determination was not in accordance with law because the agency issued its determination without analyzing contemporaneous inventory information as required by § 1673d(b)(4)(A). *See* Pls.' Br. At 2–3. Plaintiffs maintain that the Commission failed to correctly interpret § 1673d(b)(4)(A)(i), as well as § 1673d(b)(4)(A)(ii)(II). *See id.* at 8 (highlighting standard for ITC critical circumstances analysis that Commission must find that subject imports are "likely to *undermine seriously* the remedial effect of the antidumping order to be issued"); *id.* at 12 (emphasizing that "[i]t is the methodology and determination of the Majority relating to [§ 1673d(b)(4)(A)(ii)(II)] that is the subject of this appeal. Merely analyzing whether there is an increase of imports does not complete the analysis; as the statute requires, there also must be evidence to show that those imports would have a specific effect, which is to seriously undermine the remedial effect of the order."); *see also* Pls.' Reply at 2–11 (substantially developing argument that ITC erred by failing to properly interpret phrase "order to be issued" in § 1673d(b)(4)(A)(i)).

Plaintiffs alternatively maintain that, even if the ITC's determination is in accordance with law, the ITC incorrectly applied the statute by relying upon unreasonable assumptions to fill in missing inventory data, ignored contrary evidence on the record, and ultimately reached an unreasonable determination based on incomplete and outdated data. *See* Pls.' Br. at 2–4, 18–35.

II. Standard of Review

The court sustains the Commission's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determination, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as

a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2023). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2023).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–845 (1984), governs judicial review of the Commission's interpretation of the Tariff Act. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

A. Legal Arguments

As a threshold matter, Plaintiffs challenge the Commission's interpretation of 19 U.S.C. § 1673d(b)(4)(A)(i), which provides that "[t]he final determination of the Commission shall include a finding as to whether the imports subject to the affirmative determination under subsection (a)(3) are likely to undermine seriously the remedial effect of the antidumping duty order to be issued under section 1673e of this title." *See* 19 U.S.C. § 1673d(b)(4)(A)(i). Specifically, Plaintiffs argue that the plain meaning of the words "order to be issued" in the statute clearly demonstrates congressional intent to require the ITC to engage in a forward-looking analysis to determine whether any increased critical circumstances imports at the time of the issuance of the order are in a position to "undermine seriously" the impact of the final antidumping duty order. *See* Pls.' Br. at 14–16, 18 (concluding that "[t]he statute specifically requires that the Commission evaluate inventory levels as a means of determining whether, at the time of the

issuance of the order, there are sufficient levels of the critical circumstances entries in existence to 'undermine seriously' the remedial effect of the order. With the record containing no information regarding the inventory levels of the critical circumstances entries at the time of the order, or any information regarding the inventories held by end-users, the Dissent correctly concluded that there was no basis to determine that the statutory standard was met."); *see also* Oral Argument at 00:04:05–00:04:50 (July 18, 2023), ECF No. 50 (Plaintiffs' opening argument, relying on *Chevron*, is that "this case, at its heart, is a case about statutory construction.... [which] starts and stops with the plain language of the statute"); Pls.' Reply at 2–11 (substantially developing argument that ITC erred by failing to properly interpret phrase "order to be issued" in § 1673d(b)(4)(A)(i)).

Plaintiffs' legal arguments are presented in a confusing manner, with Plaintiffs initially arguing that the meaning of the statute is clear, before conceding shortly thereafter that the statute is silent as to the specific timing issue challenged here. *Compare* Pls.' Br. at 12 (arguing that "where 'Congress has directly spoken to the precise question at issue,' *as it has here*, the agency is required to follow that directive" (emphasis added)), *with id.* at 14 (conceding that "[t]he time period to be used in evaluating inventory levels is not specified in the statute."). When asked to square this apparent contradiction, Plaintiffs maintained that their legal argument consists of two parts, with the first focusing on the clear "general intent" of the language in § 1673d(b)(4)(A)(i), and in particular, the remedial effect of the "order to be issued." *See* Oral Arg. at 00:06:06–00:07:17 (explaining that argument should be considered under *Chevron* step 1); *see also* Pls.' Reply Br. at 7–11 (arguing "the Statute, the Legislative History, and Recent Precedent of this Court" with respect to the statutory phrase "Remedial Effect of the Order to Be Issued"). Plaintiffs' counsel then explained that its concession as to statutory silence related to a different provision, namely § 1673d(b)(4)(A)(ii) not § 1673d(b)(4)(A)(i). Oral Arg. at 00:07:17–00:08:04, 00:15:15–00:19:41 (explaining that this more specific argument should be considered under *Chevron* step two). Unfortunately, counsel's attempt at oral argument in clarifying Plaintiffs' legal position does not accurately reflect the arguments made in their briefs. Regardless, Plaintiffs' clarification fails to persuade the court that their statutory interpretation is meritorious.

Beyond reciting the *Chevron* step one standard that an agency must follow a statutory directive where "Congress has directly spoken to the precise question at issue," Plaintiffs' arguments do not demonstrate how Congress has spoken directly, nor how the plain language of § 1673d(b)(4)(A) compels their desired outcome. *See* Pls.' Br. at 12

(providing sole citation to *Chevron* in all of Plaintiffs' briefing); *see also* Oral Arg. at 00:06:10–00:08:02 (describing "general intent" of § 1673d(b)(4)(A)(i) as "clear," while acknowledging that § 1673d(b)(4)(A)(ii) is silent as to precisely what inventory data that ITC should be considering). In developing their argument regarding § 1673d(b)(4)(A)(i), Plaintiffs characterize the dispute as "whether the Commission should examine the level of the critical circumstances inventories: (1) at the time that the suspension of liquidation occurs (*i.e.*, November 25, 2021, which is fairly close to the time period actually considered by the Commission majority); or (2) based on updated inventory and other data found in the record for the final phase of the investigation (as urged by Plaintiffs)." Pls.' Reply Br. at 7–8. Plaintiffs contend that the ITC is acting unreasonably in determining that the agency need not examine "*any* inventory data that is after the suspension of liquidation (November 25, 2021), because the 'remedial effect of the order ... began upon collection of duties in November 2021." *Id.* at 8 (citing Def.'s Resp. at 3). Plaintiffs maintain that the ITC ignored the plain language of the statute since the relevant provision specifies that the agency's critical circumstances analysis is to focus on whether the critical circumstances entries are likely to "undermine seriously the remedial effect *of the antidumping order to be issued.*" *Id.* (quoting § 1673d(b)(4)(A) with added emphasis).

Defendant urges the court to reject Plaintiffs' view and maintains that the ITC's statutory interpretation is correct. Defendant argues that the plain language of § 1673d(b)(4)(A), when read in the context of the statute as a whole, demonstrates that the "remedial effect of the order" refers to final duties that are effective as of suspension of liquidation. *See* Def.'s Resp. at 11. Defendant notes that the Commission focuses its critical circumstances inquiry on the imports that entered after the filing of the petition and prior to the suspension of liquidation, at which time relief becomes effective. *Id.* Defendant emphasizes that "[t]he legislative history explains that the critical circumstances provision was designed 'to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by [Commerce].'" *Id.* (quoting *ICC Indus., Inc. v. United States*, 812 F.2d 694, 700 (Fed. Cir. 1987) (quoting H.R. Rep. No. 317, 96th Cong., 1st Sess. 63 (1979)), *aff'g*, 10 CIT 181, 632 F. Supp. 36 (1986)).

Defendant specifically notes that the "Statement of Administrative Action [("SAA")] accompanying the Uruguay Round Agreements Act

indicates that the Commission should analyze the period prior to the effective date of the order as the Commission's critical circumstances determination is focused 'on whether an order's effectiveness is undermined by increasing shipments prior to the effective date of the order.'" *Id.* (citing H.R. Rep. 103–316, vol. I at 877 (1994)). Based on this material, Defendant concludes that the ITC's analysis of "the likely effects of the surge in imports entering *prior* to suspension of liquidation that are normally not subject to antidumping duties" is consistent with the congressional mandate to analyze whether the imports are likely to seriously undermine the remedial effect of the order. *Id.* (highlighting that SAA similarly directs Commerce to examine "the imports that entered after the filing of the petition and prior to suspension of liquidation").

Plaintiffs also cite to the SAA emphasizing that the statutory intent is for the ITC "to focus 'on whether *an order's effectiveness* is undermined by increasing shipments *prior to the effective date of the order*." Pls.' Reply at 8 (quoting the SAA, H.R. Rep. 103–316, Vol. I at 877, with added emphasis). Thus, while Plaintiffs and Defendant apparently agree that the statute directs the ITC to focus on the time period right before the "effective date of the order," the parties diverge on precisely what constitutes the "effective date" of the order. According to Plaintiffs, Defendant's determination that the "effective date of the order to be issued" commences with the suspension of liquidation is unreasonable in that it wrongfully equates the commencement of provisional measures (*i.e.*, the suspension of liquidation following the publication of the preliminary determinations of Commerce and the ITC), with the issuance and publication of the AD order (as well as the corresponding issuance of final duties) following the final determinations of Commerce and the ITC. *See* Pls.' Reply at 7–11. Plaintiffs' argument is undercut, while the Commission's interpretation is further bolstered, by the language of the *AD Orders* that provides that duties are collected on or after suspension of liquidation on November 23, 2021, except for duties on raw honey from Vietnam, which were made retroactive by 90 days from November 23, 2021, to August 25, 2021. *See AD Orders*, 87 Fed. Reg. at 35,502. Thus, the *AD Orders* are, by their own terms, applicable to duties after suspension of liquidation rather than after the date of issuance of the order itself.

Plaintiffs' focus on the absence of the term "provisional measures," as well as the forward-looking nature of the phrase "order to be issued," is misplaced in light of the full context of § 1673d(b)(4)(A). *See* Def.'s Resp. at 27–29. Given the above, Plaintiffs are unable to persuade the court that the phrase "order to be issued" conveys a clear congressional intent to require the ITC to consider more contempo-

raneous data, *i.e.*, data from after the suspension of liquidation.

Plaintiffs raise a separate argument relating to the interpretation of § 1673d(b)(4)(A)(i), contending that "[t]he issue before the Commission is to consider whether the exact entries of raw honey from Vietnam that entered during the ninety-day critical circumstances period are in a position to 'undermine seriously' the remedial effect of the order." Pls.' Br. at 11. In their reply, Plaintiffs develop this argument more fully, maintaining that "[t]he Statute Plainly States that the Entries 'Subject to the Department's Affirmative' Critical Circumstances Finding Are Exactly the Same as the Entries Where Liquidation Is Suspended Ninety Days Early." *See* Pls.' Reply at 3–7. Plaintiffs make this argument purportedly in response to Defendant's contentions that Plaintiffs have confused "the 90-day retroactive application of duties with the entries subject to Commerce's finding of critical circumstances." *Id.* at 3 (quoting Def.'s Resp. at 2). Plaintiffs begin by describing in detail Commerce's critical circumstances determination, and conclude that Defendant has apparently "confused the time period analyzed by the Department to determine whether subject imports were 'massive' (*i.e.*, the period between April of 2021 and November of 2021) with the actual critical circumstances entries that are "subject to the affirmative determination" (*i.e.*, the ones that were subjected to antidumping duties by virtue of the Department's affirmative critical circumstances finding)." *Id.* at 6. Plaintiffs therefore contend that "there is no basis for Defendant to conclude that the Commission was supposed to analyze [whether] critical circumstances [existed] based on 'imports ... entering during a longer period {than ninety days}, the period between the filing of petitions and suspension of liquidation.'" *Id.* at 7.

As Defendant explains, "Commerce makes its finding of critical circumstances concerning imports in the post-petition period prior to suspension of liquidation." Def.'s Resp. at 15 (citing 87 Fed. Reg. 2,127, 2,129–30 (Jan. 13, 2022) (preliminary determination of critical circumstances for Vietnam), and 87 Fed. Reg. 22,184, 22,185 (Apr. 14, 2022) (final determination of critical circumstances)). Here, the "post-petition period started in April 2021 with the filing of the petitions and ran until suspension of liquidation in November 2021." *Id.* The SAA directs the ITC "to determine whether the surge in imports prior to the suspension of liquidation, rather than the failure to provide retroactive relief, is likely to seriously undermine the remedial effect of the order." *Id.* (quoting SAA at 877). Given this, the court agrees that "the issue for the Commission was not, as Plaintiffs also incorrectly state, whether the remedial effect of the order would be seriously undermined without the retroactive application of duties for 90

days. Instead, the issue for the Commission was, as it properly analyzed, whether the subject imports entering during the period after the filing of the petition and prior to suspension of liquidation were likely to seriously undermine the remedial effect of the antidumping duty order." *Id.* (internal citations omitted). This conclusion is logical given the purpose of the critical circumstances provision and the overall statutory scheme.

Plaintiffs fail to explain how or why the statute would limit the time period for the Commission's critical circumstances analysis to only the 90-day retroactive period rather than having it mirror the same period reviewed by Commerce in its critical circumstances analysis. *Cf.* 19 U.S.C. § 1673d(a)(3). Not only is Plaintiffs' contention that the Commission must examine current inventory levels unsupported by the statutory critical circumstances requirements, it also appears practically unworkable given the statutory deadlines and time constraints imposed on the Commission. As Defendants point out, there is a limit on the time period for which the Commission can gather data from interested parties given the statutory deadline to which it is subject and given the statutory requirements that information be released to parties and parties be permitted to comment on all record information. *See* Def.'s Resp. at 32–33 (explaining that Plaintiffs' demand for collecting and reviewing 2022 data "is incompatible with the Commission's final phase investigations which utilized a POI ending in September 2021," and emphasizing limitations imposed by statutory deadlines); Def.-Int.'s Resp. at 5 n.3. Overall, Plaintiffs' argument is unpersuasive as the court concludes that the ITC's statutory interpretation was not at odds with the plain language of § 1673d(b)(4)(A)(i).

Alternatively, Plaintiffs contend that the ITC misinterpreted 19 U.S.C. § 1673d(b)(4)(A)(ii)(II). *See* Pls.' Br. at 12. Specifically, Plaintiffs argue that, under this provision, the ITC is required to evaluate both historical data on import levels and contemporaneous data on inventory levels, and that the ITC failed to do the latter. Pls.' Br. at 14–16. Notably, Plaintiffs do not dispute that there was a substantial increase in the "timing and volume of the imports" relevant to the ITC's critical circumstances analysis under § 1673d(b)(4)(A)(ii)(I). *See* Pls.' Br. at 12 (conceding that "Plaintiffs do not challenge the Commission's methodology or conclusions [under § 1673d(b)(4)(A)(ii)(I)] relating to whether imports increased."); Oral Arg. at 00:23:48–00:23:55 ("We don't disagree that there was a big increase in imports."). Again, the court returns to the *Chevron* framework to evaluate Plaintiffs' legal argument under § 1673d(b)(4)(A)(ii)(II), and

again the court must conclude that Plaintiffs have failed to demonstrate how they can prevail under this standard.

As previously noted, Plaintiffs correctly recite the first step of *Chevron*, explaining that where "where 'Congress has directly spoken to the precise question at issue,' ... the agency is required to follow that directive." Pls.' Br. at 12 (arguing that Congress has indeed directly indicated its intent under § 1673d(b)(4)(A)). However, not more than two pages later in their opening brief, Plaintiffs expressly concede that the "time period to be used in evaluating inventory levels is not specified in the statute." *Id.* at 14. Following this concession, Plaintiffs appear to abandon their arguments under *Chevron* and do not address whether the ITC's interpretation comports with the statute. Instead, Plaintiffs maintain in a conclusory manner that "logically" the forward-looking nature of the critical circumstances inquiry demands that the Commission review contemporaneous information as to the inventory levels specified in § 1673d(b)(4)(A)(ii)(II). *Id.* at 14–15. Plaintiffs fail to support this argument with legislative history or other sources demonstrating that their "logical" conclusion as to the statutory interpretation renders the ITC's interpretation impermissible.

To the contrary, Defendant provides the court with legislative history that corroborates the ITC's interpretation of § 1673d(b)(4)(A)(ii)(II). *See* Def.'s Resp. at 28–29. Defendant highlights that the ITC's focus of its critical circumstances analysis, "with respect to imports and inventories in the post-petition period prior to suspension of liquidation," makes sense given that the statute directs Commerce to focus its critical circumstances analysis on the same time period. *Id.* at 28; *see also* Def.-Int.'s Resp. at 4–5 (highlighting that § 1673d(b)(4)(A)(ii)(II) directs ITC to consider existence of "increase" in inventories, not "what the *remaining level* of inventories are at some point in time after the imposition of provisional measures leading up to the Commission's vote"). Defendant further notes that the "SAA confirms that the effective date of the antidumping duty order, rather than its issuance date, is the proper time for the Commission's analysis." Def.'s Resp. at 28 (citing SAA at 877). Specifically, the SAA provides that the ITC is required to determine "whether, by *massively* increasing imports prior to the *effective date* of relief, the importer shave seriously undermined the *remedial effect* of the order." *Id.* at 29 & n.7 (quoting, with emphasis, SAA at 877, and noting that "[t]he language quoted above from the SAA appears in nearly 100 Commission critical circumstances determinations (by Westlaw's count) indicating that it has consistently been the effective date of relief that is important in the Commission's analysis").

Given Plaintiffs' concession, there is no dispute that the interpretation of § 1673d(b)(4)(A)(ii)(II) should be resolved under *Chevron* step two because the statute is silent as to what time period the ITC should use in conducting its critical circumstances inventory analysis. Additionally, as Plaintiffs have not provided any support for their argument as to why the ITC's interpretation is impermissible under *Chevron* step two, the court agrees with Defendant that Plaintiffs cannot prevail on this issue. As Defendant explains:

> The statute provides additional guidance to the Commission, directing it to consider whether there has been "a rapid increase in inventories of the imports." 19 U.S.C. § 1673d(b)(4)(A)(ii)(II). The Commission must therefore evaluate the *increase* in inventories of the imports subject to Commerce's determination. The statute does not direct the Commission to evaluate the remaining level of inventories subject to Commerce's determination several months later when Commerce finally issues the antidumping duty order. The statute's specific reference to the increase in inventories indicates the Commission should evaluate their increase prior to provisional duties and not the manner in which the inventories are later sold.

Def.'s Resp. at 28.

In sum, Plaintiffs have failed to demonstrate that the ITC's interpretation of the plain language of the statute violated express congressional intent. *See supra* at pp. 8–15. Furthermore, Plaintiffs have not shown that the ITC impermissibly interpreted the statute by focusing its critical circumstances analysis on the period prior to suspension of liquidation in evaluating whether subject imports are "likely to undermine seriously the remedial effect of the antidumping duty order to be issued." Accordingly, the court sustains the ITC's interpretation of § 1673d(b)(4)(A).

B. Substantial Evidence Arguments

Plaintiffs maintain that, even if the court rejects their legal challenges to the Commission's interpretation of § 1673d(b)(4)(A), the court should nevertheless remand the ITC's affirmative determination of critical circumstances as unsupported by substantial evidence. *See* Pls.' Br. at 13–35. Specifically, Plaintiffs contend that it was unreasonable for the ITC to reach its findings without the record containing information about "the inventory levels of the critical circumstances entries at the time of the [issuance of the] order, or any

information regarding the inventories held by end-users." *Id.* at 16–17. Plaintiffs further insist that given the state of the record, the Commission's conclusions as to the inventory levels of critical circumstances entries were "pure guesswork." *Id.* at 18–29.

Plaintiffs also contend that the Commission ignored "two other key pieces of evidence: (1) information demonstrating that the U.S. industry was experiencing severe shortages and the inability to supply customers at the end of the period of investigation; and (2) information demonstrating that the U.S. producers, which do not make raw honey that directly competes with the Vietnamese imports, would not be losing any sales opportunities at the bakers who rely on Vietnamese imports." *Id.* at 29–35. In making these arguments, Plaintiffs rely heavily on Commissioner Johanson's dissent and urge the court to remand to allow the ITC to reach a negative final determination following the dissent's reasoning. *See id.* at 16–34, 36.

Before addressing the merits of Plaintiffs' substantial evidence arguments, the court will review the findings made by the Commission in reaching its affirmative critical circumstances determination. The ITC found that:

> [R]aw honey imports from Vietnam from all Vietnamese producers/exporters are subject to Commerce's affirmative critical circumstances determination. These imports increased from 48.0 million pounds in the pre-petition period to 87.9 million pounds in the post-petition period, an increase of 83.2 percent. The 87.9 million pounds of subject imports in the post-petition period are equivalent to 19.1 percent of apparent U.S. consumption in the interim 2021 period. The volume of subject imports from Vietnam in four of the six months of the post-petition period (July, August, September, and October 2021) significantly exceeded the volume of subject imports from Vietnam recorded in any prior month of the POI. In addition, subject imports from Vietnam increased rapidly in each of the first four months of the post-petition period, reversing a downward trend from December 2020 to April 2021.

Views at 69–70 (footnotes omitted). Further, the ITC highlighted that importers' inventories of imports from Vietnam subject to Commerce's affirmative determination increased almost threefold from April 30, 2021 (the last month of the pre-petition period) to October 31, 2021 (the last month of the post-petition period). *Id.* at 70–71 (noting that "[s]everal importers increased their inventories of subject imports from Vietnam from April 2021 to October 2021 before provisional duties came into effect in November 2021").

The ITC emphasized that it viewed the "timing of subject imports from Vietnam in the post-petition period as significant and probative." *Id.* at 72 (reviewing import data and explaining its finding that "[t]his timing, together with the associated volume of subject imports in the post-petition period, suggest that the volume of imports was ... a deliberate effort to enter product into the U.S. market in substantial and increasing volumes while evading potential exposure to the retroactive application of antidumping duties"). The Commission further noted that "[w]hile apparent U.S. consumption was higher in interim 2021 than interim 2020 by 15.2 percent, importers' U.S. shipments of subject imports from Vietnam were only 2.8 percent higher, a modest increase that does not explain why importers would sharply increase their imports from Vietnam during the post-petition period." *Id.* It also observed that "notwithstanding higher prices, the domestic industry continued to report losses even with higher prices in interim 2021." *Id.* at 74. The ITC thus concluded that "[g]iven the volume and timing of imports, including the sharp increase in the volume of post-petition imports prior to the retroactive liability period under the critical circumstances provision, the rapid increase in and size of inventories, and the continued underselling of the domestic like product by wide margins, we find that the remedial effect of the antidumping duty order with respect to subject imports from Vietnam will likely be seriously undermined." *Id.*

The ITC next considered and rejected Plaintiffs' contentions that importers had sold off most of their inventory. In fact, the data available on the record did not support Plaintiffs' assertions. *See Views* at 73–74 & n. 306. The ITC was unconvinced by Plaintiffs' arguments that critical circumstances cannot exist when importers have "sold off" their inventories, explaining that "regardless of where the imported honey is in the supply chain, the volume associated with these inventories is large and increased substantially in the post-petition period and is likely to place downward pressure on prices until it is consumed by end users, particularly given the continued underselling by subject imports from Vietnam at wide margins." *Id.* at 73. While Plaintiffs maintain that the ITC's conclusion here was based on "assumptions" and guesswork, *see* Pls.' Br. at 18–20, 26–29, the ITC emphasized that the record did not support Plaintiffs' fundamental contention. *See Views* at 73 n.306. Specifically, the Commission noted that:

> One of the largest importers of subject imports[,] and the supplier of raw honey from Vietnam to [Customer X], [] provided an affidavit stating 'we are not aware of any real build-up of raw honey from Argentina and Vietnam, whether in the inventories

> of packers such as our company or in the inventories of our customers.' However, this statement is not consistent with the inventories it reported. [This large importer] reported inventories of subject imports from Vietnam of [X] million pounds in March 2022—over twice their April 2021 level and only 7.9 percent lower than their level in October 2021.

Id. (internal citations to Pls.' administrative post-hearing brief omitted).

The ITC acknowledged that the record lacked information as to "raw honey held downstream," since even though downstream "Ingredient Purchasers fully participated in the final phase of these investigations," [[

]]." *Id.*

While Plaintiffs urge the court to conclude that this downstream inventory data was essential for the ITC's analysis, the court is not persuaded that the Commission acted unreasonably in reaching a final affirmative critical circumstances determination on the record presented. As pointed out by Defendant and Defendant-Intervenors, "Plaintiffs never requested that the Commission collect the data they now claim is crucial to the critical circumstances analysis." *See* Def.-Int's. Br. at 10; Def.'s Br. at 19–22 (responding to Plaintiffs' argument that "the Commission should have gathered 2022 inventory information from U.S. importers and end users concerning their holdings of raw honey from Vietnam" by noting that "Plaintiffs, however, did not ask the Commission to collect this information for 2022"). The court agrees that if Plaintiffs believed this information to be essential to the ITC's critical circumstances analysis, Plaintiffs' failure to request the addition of this data to the record strongly undercuts their argument that the ITC's determination was unreasonable.[5]

Plaintiffs remaining arguments are without merit. With respect to Plaintiffs' contention that the ITC unreasonably ignored "information demonstrating that the U.S. industry was experiencing severe shortages and the inability to supply customers at the end of the period of

[5] At Oral Argument, the parties addressed this issue and Plaintiffs confirmed that they are no longer pressing the argument that the record was incomplete and that the ITC should have collected 2022 inventory data. *See* Oral Arg. at 02:10:27–02:12:18 (Plaintiffs' counsel confirming that the collection of data issue is no longer a "live issue," maintaining that Plaintiffs remaining argument about 2022 inventory data is that ITC failed to consider data that Plaintiffs had placed on the record); *cf.* Pls.' Reply at 15 (acknowledging that "importers and packers provided a full set of inventory data relating to inventory levels of the critical circumstances entries," while also suggesting that "it would have been preferable for the Commission to gather such information as part of its questionnaire process").

investigation," *see* Pls.' Br. at 29–33, the record simply does not support Plaintiffs' position. Plaintiffs start by explaining the logic of their argument, noting that "[t]he entire purpose of the critical circumstances determination is to determine whether there are sufficiently large inventories of subject merchandise, entering prior to the imposition of provisional measures (and thus subject to no antidumping duties), to show that it is 'likely' that those exact entries will undermine the remedial effect of the antidumping duty order." *Id.* at 30. Plaintiffs reason that "[i]n light of this goal, it is critical to examine whether the U.S. industry is awash in unsold product (which would make it more 'likely' that it would lose sales to any remaining critical circumstances entries, and thus push the Commission towards issuing an affirmative critical circumstances determination) or, in the alternative, is experiencing shortages (which pushes in the opposite direction)." *Id.* Plaintiffs therefore maintain that because the record reflects evidence of shortages of domestically produced honey, the Commission's failure to address and account for the impact of such shortages in its affirmative critical circumstances determination is unreasonable.

Plaintiffs point to some record evidence as demonstrating support for the conclusion that the domestic industry was experiencing "severe shortages" that would indicate that increased levels of critical circumstances entries would not be likely to undermine seriously the remedial effect of the *AD Orders*. *Id.* at 30–31. First, Plaintiffs cite to the discussion in the *Staff Report* of U.S. importers' and producers' responses to questions about supply constraints. *Id.* ("When asked about supply constraints after the filing of the petition on April 21, 2021, 6 U.S. producers and 14 importers reported that they refused or declined to supply due to adverse climate conditions and increased logistics costs and delays. *Fifteen of 20 responding purchasers reported being declined supply after the filing of the petition citing [{Petitioner} SHA's] inability to supply dark amber honey*, COVID-related disruptions such as logistics, labor shortages, and lockdowns, and uncertainty in the market resulting from the petition. *Four purchasers reported that [{Petitioner} SHA] declared a force majeure and was unable to fill orders in 2021.*" (quoting Pre-Hearing Staff Report, CR[6] 744 at II-9 (March 29, 2022))). Second, Plaintiffs contend that "this information was amply corroborated" by the questionnaire responses of consumers like [[ ]], "one of the largest bakers and consumers of raw honey in the United States." Id. at 31

[6] "PR" refers to a document in the public administrative record, which is found in ECF No. 22, unless otherwise noted. "CR" refers to a document in the confidential administrative record, which is found in ECF No. 21, unless otherwise noted.

(quoting [[ ]] questionnaire response that "[[

]]"). Plaintiffs further cite to the testimony of another U.S. purchaser confirming a similar experience with Sioux Honey. *Id.* Plaintiffs conclude that "the failure of the Majority to take into account this highly relevant U.S. producer shortage and inventory information provides further evidence that the Majority's analysis is unsupported by substantial evidence." *Id.* at 33.

Defendant persuasively explains why Plaintiffs' arguments about shortages are without merit. *See* Def.'s Resp. at 36–39. Critically, "[n]one of th[e] evidence relied upon by Plaintiffs to show 'severe shortages' even pertains to domestically produced honey." *Id.* at 37. Rather, as was detailed in the *Staff Report*, the claim of *force majeure*, relied upon by Plaintiffs as evidence of shortages, was *not* the result of shortages of domestically produced honey. Instead, it resulted from the fact that "certain shipments of *imported* raw honey that failed quality testing." *Id.* (quoting, with added emphasis, *Staff Report* at II-9 n.21). Similarly, Plaintiffs' reliance on the questionnaire response of [[ ]] is misplaced as "[[

]]." *Id.* (quoting *Staff Report* at III-13(b)). Given the full context, the court does not agree with Plaintiffs that the record reflected evidence of "severe shortages" that the Commission failed to address in its analysis.

Turning to Plaintiffs' contention that the ITC failed to consider "information demonstrating that the U.S. producers, which do not make raw honey that directly competes with the Vietnamese imports, would not be losing any sales opportunities at the bakers who rely on Vietnamese imports," *see* Pl.'s Br. at 29–30, the court again concludes that Plaintiffs' argument is unpersuasive as it does not accurately reflect the record. Plaintiffs maintain that "The Majority Ignore[d] Uncontradicted Evidence That Any Remaining Inventories of the Critical Circumstances Entries Could Not 'Substantially Undermine' the Remedial Effect of the Order Because They Do Not Compete with U.S. Production." *See* Pl.'s Br. 33–35; *see also* Pl.'s Reply at 18–20. Plaintiffs argue that the Commission erred in finding that U.S. and Vietnamese raw honey were substitutable (*i.e.*, similar products that compete with each other in the market). Pl.'s Br. at 33 (explaining that "the more substitutable the two types of raw honey are, the more the Commission is pushed in the direction of an affirmative critical

circumstances, because this would increase the likelihood that any remaining inventories of the critical circumstances entries would replace U.S. sales."). Plaintiffs insist that the record demonstrates that "Vietnamese raw honey has different uses than U.S.-produced raw honey, which largely relegate them to different end uses." *Id.* Specifically, Plaintiffs point out that "In 2020, [a very large] percent of Vietnamese imports are light amber or amber or darker honey." *Id.* (citing Pre-Hearing Staff Report, CR No. 744 at E-9 (Table E-6) (March 29, 2022); NHPDA Pre-Hearing Brief, CR No. 747, at 55, n. 214 (April 5, 2022)). "In direct contrast, in 2020, only [a very small] percent of U.S. production accounted for amber and dark amber honey." *Id.* at 34 (citing Pre-Hearing Staff Report, CR 744, at E-4 (Table E-1) (March 29, 2022); NHPDA Pre-Hearing Brief CR No. 747, at 47, 54 (April 5, 2022)). Given this information, Plaintiffs conclude that "whatever small remaining inventories of critical circumstances raw honey existed at the time of the order were not in a position to displace sales of U.S.-produced raw honey or to push down prices for U.S.-produced raw honey, which is not even suitable for use in the baking sector that relies on Vietnamese raw honey." *Id.* Plaintiffs urge the court to remand the ITC's affirmative critical circumstances determination as unreasonable given "[t]he failure of the Majority to take into account this highly material information on the record." *Id.* at 35.

Defendant, in response, maintains that Plaintiffs' substitutability argument is meritless and relies on a misstatement of the record. *See* Def.'s Resp. at 41–43. As Defendant explains:

> Plaintiffs first manipulate the data by comparing the share of shipments of raw honey from Vietnam that was *light amber or darker* ([a very large] percent) with the share of shipments of domestically produced honey that was *amber or darker* [a very small] percent to argue that there was no overlap in shipments of honey types. In fact, the share of domestically produced honey that was *light amber or darker* was 20.1 percent in 2020. The 20.1 percent figure for *light amber or darker* shipments of domestically produced honey is appropriately compared to the [very large] percent of *light amber or darker* shipments of raw honey from Vietnam.

Def.'s Resp. at 41–42 (internal citations omitted). Moreover, as Defendant points out "[t]he Commission also discussed the overlap, observing that large producers' U.S. shipments were between 18 and 20 percent light amber from 2018 to 2020." *Id.* at 42 (citing *Views* at

58 n.248); *see also Views* at 58 n.248 ("Respondents assert that product from Vietnam is required in the market because of its dark color. However, over half of the product from Vietnam was of light amber honey during the POI, a product the domestic industry produces. Most of importers' shipments of subject imports were light amber or lighter as were the domestic industry's shipments. Further, the greatest increase in subject imports from 2018 to 2020 was in light amber, followed by extra light amber, and then the darkest honey, amber. Thus, it was not "dark" honey leading the increase in subject imports. Eighty percent of the increase in subject imports was in light amber and extra light amber. These two colors accounted for over 40 percent of the domestic industry's shipments." (internal citations omitted)). In light of the above, the court cannot agree that the ITC unreasonably failed to consider or address Plaintiffs' substitutability arguments.

Defendant also points out that its critical circumstances analysis in another action was recently sustained against a similar challenge. *See* Def.'s Notice of Supp. Auth., ECF No. 32 (Mar. 22, 2023) (citing *MTD Products, Inc. v. United States*, Court No. 21–264, Slip Op. 23–34, 2023 WL 2535885 (Mar. 16, 2023) ("*MTD Products*"), and noting that "[a]pplying the substantial evidence standard, the Court in *MTD Products* upheld an affirmative critical circumstances determination in which the Commission considered inventories prior to the imposition of provisional duties.").

In *MTD Products*, a domestic importer filed suit challenging the Commission's affirmative critical circumstances determination resulting from the AD and CVD investigations of small vertical shaft engines from China. Plaintiff there argued that the Commission had relied on faulty data, and further argued that the majority's review of the record was unreasonable and that the dissenting view by Commissioner Johanson, *i.e.*, that the ITC should reach a negative critical circumstances determination, was the only reasonable outcome on the record. *MTD Products*, 2023 WL 2535885 at *3, *6. After reviewing the record and considering Plaintiff's arguments, the court ultimately sustained the ITC's affirmative critical circumstances determination, concluding that the ITC's findings were reasonably supported by the record. *MTD Products*, 2023 WL 2535885 at *7.

Plaintiffs respond that *MTD Products* actually supports their position because in that matter "the Commission consider[ed] the potential impact of any increased critical circumstances entries on U.S. sales that would occur long after the imposition of provisional measures, [and] the CIT explicitly affirmed the Commission on that basis." Pls.' Reply at 11–12. Specifically, Plaintiffs emphasize that the

ITC in *MTD Products* made its affirmative critical circumstances determination after considering the impact of critical circumstances imports on "future sales" (*i.e.*, sales made after imposition of provisional measures imposed as part of investigation). *Id.* at 12 (citing ITC's determination in *Small Vertical Shaft Engines from China*, Inv. Nos. 701-TA-643 and 731-TA-1493 (Final), USITC Pub. 5185 (Apr. 2021) at 50).

While Plaintiffs are correct that the ITC engaged in a forward-looking analysis in *Small Vertical Shaft Engines from China*, Plaintiffs have failed to persuade the court that the ITC failed to engage in a similar analysis here. *Cf.* Def.'s Resp. at 31 (highlighting how ITC did in fact evaluate "likely" impact of critical circumstances imports in forward-looking analysis based off of inference from 2021 import and apparent consumption level data). Plaintiffs further fail to recognize that the court in *MTD Products* considered Commissioner Johanson's dissent as part of its analysis under the substantial evidence standard. *See MTD Products*, 2023 WL 2535885 at *7; *cf.* Pls.' Reply at 11 (arguing that "The *MTD Products* Determination Confirms that Defendant and Defendant-Intervenor Have Advanced a Flawed Statutory Construction"). Plaintiffs thus err in concluding that "[b]oth the Commission's approach (considering the impact of the increased imports on the next selling season, after the issuance of the order) and the terms of this Court's affirmance (endorsing the analysis and emphasizing that the Commission is statutorily required to analyze future events '*in advance*'[)] demonstrates how the Commission should have proceeded in this matter." Pls.' Reply at 13–14.

As in *MTD Products*, the Commission here faced a record that demonstrated a substantial increase in inventories prior to the initiation of suspension of liquidation. In reviewing the record, Commissioner Johanson found that "the record contains clear evidence that the increase in unfairly traded subject imports in the six-month period following the petition was largely if not entirely eliminated in the next six months before the order, and the domestic industry's condition sharply improved." *Dissenting Views* at 9. Further, Commissioner Johanson observed that "[t]he record lacks evidence that could resolve the exact size of any diminished amount of unfairly traded merchandise that might remain, such as evidence regarding final inventory levels of most importers and purchasers, the propensity of end users to hold inventory, actual consumption, and the rate at which fairly traded imports arrived immediately before the order to replace unfairly traded ones." *Id.* at 9–10. Commissioner Johanson then concluded that although it was "possible that enough [unfairly traded subject imports] remained [in importers' inventories] to have

an impact," his review of the record did not permit him to reach an affirmative critical circumstances finding as he could not conclude that the imports subject to the Department of Commerce's critical circumstances determination were "likely" to "undermine seriously" the order's remedial effect. *Id.* at 10.

Given the record and the majority's analysis in both matters, the court determines that the reasoning and conclusion in *MTD Products* apply equally here:

> The Commission amply explained the reasons for its conclusion that a surge in subject imports threatened to seriously undermine the duty orders' remedial effects. And although [Plaintiffs] dispute[] the evidentiary sufficiency of those findings, and urge[] the court to adopt the dissenting views of Commissioner Johanson, substantial evidence review does not permit the court to re-weigh the evidence as [Plaintiffs] propose[]. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1372 (Fed. Cir. 2015) (cleaned up) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). Although the court agrees with [Plaintiffs] that the conclusion drawn by Commissioner Johanson is supported by the record, the conclusion drawn by the Commission majority— considering the record as a whole and the evidence that detracts from that conclusion—is also supported by the record. Under the substantial evidence standard, ties go to the agency.

MTD Products, 2023 WL 2535885 at *7. While Plaintiffs urge the court to adopt the conclusions of Commissioner Johanson's dissent as the only reasonable outcome based on the record, the court is not persuaded that the majority's determination here was unreasonable. Overall, the four corners of the record do not support Plaintiffs' arguments that the ITC's affirmative critical circumstances determination was unreasonable.

IV. Conclusion

Based on the foregoing, the court sustains the ITC's affirmative critical circumstances finding as to raw honey from Vietnam in the *Final Determination*. Judgment will enter accordingly.

Dated: November 17, 2023
New York, New York

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

Slip Op. 23–163

COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Plaintiff, and FONTAINE INC., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and FONTAINE INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 19–00122

[Granting motion to reinstate exclusion from countervailing duty order.]

Dated: November 20, 2023

Andrew W. Kentz, *Sophia J.C. Lin*, *Jessica M. Link*, *Nathaniel Maandig Rickard*, *Whitney M. Rolig*, *Zachary J. Walker*, and *David A. Yocis*, Picard Kentz & Rowe LLP, of Washington, DC, for Plaintiff Committee Overseeing Action for Lumber International Trade Investigations or Negotiations.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Nikki Kalbing*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Yohai Baisburd, *Jonathan M. Zielinski*, and *James E. Ransdell*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Defendant-Intervenor Scierie Alexandre Lemay & Fils Inc.

Edward M. Lebow, Haynes and Boone, LLP, of Washington, DC, for Defendant-Intervenors Les Produits Forestiers D&G Ltée and Marcel Lauzon Inc.

Rajib Pal, *James Mendenhall*, and *Justin R. Becker*, Sidley Austin LLP, of Washington, DC, for Defendant-Intervenors North American Forest Products Ltd., Parent-Violette Gestion Ltée, and Le Groupe Parent Ltée.

OPINION AND ORDER

Barnett, Chief Judge:

This matter is before the court on motion by defendant-intervenors Scierie Alexandre Lemay & Fils Inc. ("Lemay"), Les Produits Forestiers D&G Ltée ("D&G"), Marcel Lauzon Inc. ("MLI"), and North American Forest Products Ltd. and its cross-owned affiliates Parent-Violette Gestion Ltée and Le Groupe Parent Ltée (together, "NAFP") (collectively, "movants") for relief from a final judgment pursuant to U.S. Court of International Trade ("CIT") Rule 60(b)(5). Mot. to Reinstate Exclusion from Countervailing Duty Order Pending Resolution of Litigation ("Mot."), ECF No. 222. Plaintiff, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("the Coalition"), opposes the motion. Pl.'s Resp. in Opp'n to [Mot.] ("Pl.'s Resp."), ECF No. 223. Defendant, United States ("the Government"), does not oppose the motion or the terms of the

proposed order. Def.'s Resp. to the Ct.'s Order to Respond to [Mot.] ("Def.'s Resp."), ECF No. 228. For the following reasons, the court grants the motion.

BACKGROUND

At issue in this case is the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the countervailing duty ("CVD") expedited review of certain softwood lumber products from Canada. *See Certain Softwood Lumber Prods. From Canada*, 84 Fed. Reg. 32,121 (Dep't Commerce July 5, 2019) (final results of CVD expedited review) ("*Final Results*"), ECF No. 99–5.[1] In the *Final Results*, and relevant to this motion, Commerce calculated *de minimis* rates for D&G, MLI, Lemay, and NAFP.[2] 84 Fed. Reg. at 32,122. Commerce therefore stated that it would instruct U.S. Customs and Border Protection ("CBP") "to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by" those companies that were entered on or after July 5, 2019; "liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by" those companies; and "refund all cash deposits of estimated countervailing duties collected on all such shipments." *Id.* In other words, effective July 5, 2019, the *Final Results* provided a basis for excluding the movants from the *CVD Order*. *See id.*

Presently, Commerce's *Final Results* are the subject of five judicial opinions; four from this court and one from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). *See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* ("*Coalition I*"), 43 CIT __, 393 F. Supp. 3d 1271 (2019) (vacating a temporary restraining order requested by Plaintiff that had barred CBP from liquidating unliquidated entries of softwood lumber produced or exported by Canadian companies that received reduced or *de minimis* rates in the *Final Results* and denying the Coalition's corresponding request for a preliminary injunction); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* ("*Coalition II*"), 43 CIT __, 413 F. Supp. 3d 1334 (2019) (denying the Government's motion to dismiss and finding jurisdiction pursuant to 28 U.S.C. § 1581(i)); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* ("*Coalition III*"),

[1] The *Final Results* followed Commerce's issuance of the underlying order, styled as *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (am. final affirmative CVD determination and CVD order) ("*CVD Order*").

[2] Commerce also calculated a *de minimis* rate for Roland Boulanger & Cie Ltée and its cross-owned affiliates, but they are not a party to this litigation.

44 CIT __, 483 F. Supp. 3d 1253 (2020) (remanding the *Final Results* for Commerce to reconsider the statutory basis for its promulgation of 19 C.F.R. § 351.214(k) (2020)[3] and conduct of CVD expedited reviews); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States* ("*Coalition IV*"), 45 CIT __, 535 F. Supp. 3d 1336 (2021) (following remand, vacating 19 C.F.R. § 351.214(k) and vacating, prospectively, Commerce's *Final Results*); *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 66 F.4th 968 (Fed. Cir. 2023) ("*Coalition V*") (reversing and remanding *Coalition IV* after finding statutory authority for 19 C.F.R. § 351.214(k)).

In the judgment accompanying *Coalition IV*, the court ordered Commerce to "issue a *Timken*-like Notice rescinding the [*Final Results*], consistent with the requirements set forth in 19 U.S.C. § 1516a(c)(1); reinstate the excluded companies in the *CVD Order* prospectively; and, for all companies that were covered by the [*Final Results*], impose a cash deposit requirement based on the all-others rate from the investigation or the company-specific rate determined in the most recently completed administrative review in which the company was reviewed." [CIT] J., ECF No. 194.[4] Commerce issued a corresponding notice and instructions to CBP, with an effective date of August 28, 2021. *See Certain Softwood Lumber Prods. From Canada*, 86 Fed. Reg. 48,396 (Dep't Commerce Aug. 30, 2021) (notice of ct. decision not in harmony with the [*Final Results*]; notice of rescission of [*Final Results*]; notice of am. cash deposit rates) ("*Notice of Ct. Decision*"); Def.'s Resp., Ex. 1 (CBP Message No. 1244401). In the notice, Commerce explained that the agency was "reinstating the *CVD Order*" for the movants and "reassigning the cash deposit rate for the companies covered by the [*Final Results*]." *Notice of Ct. Decision*, 86 Fed. Reg. at 48,396.

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[3] Effective October 20, 2021, subsection (k) was redesignated as subsection (l) without material change. *See Regulations to Improve Admin. and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,371, 52,373–74 (Sept. 20, 2021). For consistency with prior proceedings in this case, the court refers to 19 C.F.R. § 351.214(k). Section 351.214 governs new shipper reviews. Subsection (k) permits a respondent to "request a review . . . within 30 days of the date of publication in the Federal Register of the [CVD] order" if that respondent was not "select[ed] for individual examination" or "accept[ed] as a voluntary respondent" in a CVD investigation in which Commerce "limited the number of exporters or producers to be individually examined." *Id.* § 351.214(k)(1).

[4] Section 1516a(c)(1) requires Commerce to publish in the Federal Register "a notice of a decision of the [CIT], or of the [Federal Circuit], not in harmony with [the underlying] determination . . . within ten days from the date of the issuance of the court decision." 19 U.S.C. § 1516a(c)(1). Such notice may be referred to as a "*Timken* Notice" pursuant to *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990).

The CIT's judgment was later reversed by the Federal Circuit. *Coalition V*, 66 F.4th at 971. While litigation concerning other aspects of the *Final Results* remains pending, movants seek reinstatement of their exclusion from the *CVD Order*. Mot. at 1–2.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(D) (2018 & Supp. II 2020).

CIT Rule 60(b) permits the court, "[o]n motion and just terms," to "relieve a party or its legal representative from a final judgment, order, or proceeding" when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." CIT Rule 60(b)(5). A motion filed pursuant to Rule 60(b)(5) "must be made within a reasonable time." CIT Rule 60(c)(1).

For Rule 60(b)(5), "each of the provision's three grounds for relief is independently sufficient." *Horne v. Flores*, 557 U.S. 433, 454 (2009).[5] The second clause, which concerns a final judgment that "is based on an earlier judgment that has been reversed or vacated," CIT Rule 60(b)(5), "is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion," *Pirkl v. Wilkie*, 906 F.3d 1371, 1381 n.6 (Fed. Cir. 2018) (quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863 (3d ed. 2012)). In other words, because a second final judgment that is based on an earlier judgment "will stand as *res judicata*" even though "the first judgment [was] subsequently reversed," *United States v. Canex Int'l Lumber Sales Ltd.*, 35 CIT 1025, 1028 (2011) (quoting *Reed v. Allen*, 286 U.S. 191, 199 (1932)), Rule 60(b)(5) provides a procedural mechanism for litigants to obtain relief from the second judgment.

The third clause of Rule 60(b)(5) is principally applied to injunctions. *See* Wright et al., § 2863; *cf. Invenergy Renewables LLC v. United States*, 44 CIT __, __, 450 F.Supp.3d 1347, 1361–63 (2020) (denying motion to dissolve a preliminary injunction when the defendant failed to show changed circumstances or inequity). This clause is not, however, limited to injunctions; it "applies to any judgment that has prospective effect," Wright et al., § 2863, and "is rooted in the 'traditional power of a court of equity to modify its decree in light of changed circumstances,'" *Tapper v. Hearn*, 833 F.3d 166, 170 (2nd Cir. 2016) (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

[5] While *Horne* addresses Federal Rule of Civil Procedure 60(b), CIT Rule 60(b) "is identical and the court may refer for guidance to the rules of other courts." *United States v. Univar USA, Inc.*, 40 CIT __, __, 195 F. Supp. 3d 1312, 1317 (2016) (citing CIT Rule 1).

Regardless of the basis, any relief provided by these rules is discretionary. *See Lazare Kaplan Int'l, Inc. v. Photoscribe Tech., Inc.*, 714 F.3d 1289, 1295 (Fed. Cir. 2013).

DISCUSSION

I. The Second Clause of Rule 60(b)(5) is Not an Appropriate Basis for Relief

Movants contend that relief is merited pursuant to the second clause of Rule 60(b)(5) because the court "Orders" directing Commerce to reinstate the companies in the *CVD Order* and "impose cash deposit requirements were 'based on an earlier judgment that has been reversed' by the [Federal Circuit]." Mot. at 1; *see also id.* at 5. In so arguing, however, movants misconstrue the operation and purpose of this clause. As discussed above, Rule 60(b)(5) provides for relief from a final judgment that *itself* was "based on an earlier judgment that has been reversed or vacated," CIT Rule 60(b)(5), and would, without the benefit of the rule, remain in effect, *see Pirkl*, 906 F.3d at 1381 n.6; *Canex Int'l*, 35 CIT at 1028. That is not the case here. Movants do not seek relief from a judgment that was based on a distinct, now-reversed, judgment; instead, movants seek relief from the judgment entered in this case that was *subsequently* reversed by the Federal Circuit.[6] Accordingly, the second clause of Rule 60(b)(5) is not an appropriate basis for granting this motion.

II. The Third Clause of Rule 60(b)(5) Provides an Appropriate Basis for Relief

In the alternative, movants seek relief on the basis that enforcement of the court's judgment "is no longer equitable." Mot. at 7 (quoting CIT Rule 60(b)(5)). Movants contend that the Federal Circuit's reversal of the judgment constitutes changed circumstances meriting relief; there is no undue administrative burden in effectuating relief; and denying the instant motion would effectively grant the Coalition the preliminary injunction suspending liquidation the court previously denied. *Id.* at 6–8 (citing *Coalition I*, 393 F. Supp. 3d at 1278). Movants seek relief on this basis in the alternative on the

[6] Movants appear to separate the actions the court ordered Commerce to take from the judgment in which the court set out those orders, such that the latter "orders" are based on an "earlier judgment" that has since been reversed. *See* Mot. at 1, 5. There is no such distinction, however, because the orders and the judgment are one and the same. *See* [CIT] J. For its part, the Government characterizes the Federal Circuit's "judgment" as "reversing or vacating" "an earlier judgment" for purposes of applying this provision. Def.'s Resp. at 8. While the Government's characterization is accurate, the second clause of Rule 60(b)(5) does not apply to these circumstances.

view that any relief from the judgment would be prospective only. *See id.* at 7 n.3.

The Government agrees that the Federal Circuit's decision in *Coalition V* provides the requisite changed circumstances because this court's judgment no longer authorizes Commerce to suspend liquidation and collect or retain cash deposits on any "shipments of softwood lumber produced and exported by D&G, MLI, NAFP, and Lemay." Def.'s Resp. at 8–9. The Government therefore contends that the movants "should not be included" in the *CVD Order* and does not oppose this court ordering reinstatement of the exclusion. *Id.* at 9. The Government acknowledges that resolution of the remaining claims "may result in changes to the margins initially determined for [the movants], in which case Commerce will give effect to those changes once they are subject to a final court decision." *Id.*

The court agrees that movants are entitled to relief on the basis that applying the judgment "prospectively is no longer equitable." CIT Rule 60(b)(5). This provision "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne*, 557 U.S. at 447 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). The Federal Circuit's reversal of this court's judgment constitutes a sufficient change in the factual and legal basis for retaining movants in the *CVD Order*, and the Government's consent to the request for relief demonstrates that continued enforcement of this court's judgment following reversal by the Federal Circuit is not necessary to protect the public interest.

The Coalition's arguments to the contrary are not persuasive. Plaintiff contends that movants failed to establish that continued enforcement of the judgment results in inequity. Pl.'s Resp. at 5–6 (citing *Ashland Oil, Inc. v. Delta Oil Prods. Corp.*, 806 F.2d 1031, 1033–34 (Fed. Cir. 1986)). In *Ashland*, the Federal Circuit, applying the law of the Seventh Circuit, found that the plaintiff was not entitled to relief pursuant to Federal Rule of Civil Procedure 60(b)(5) or (6) because it had not shown that a change in the law meant that an earlier judgment would prejudice the plaintiff in subsequent litigation. 806 F.2d at 1033. The appellate court noted that the plaintiff had successfully defended against an estoppel claim in another lawsuit and, thus, had not shown that "continued operation of the [] judgment will result in inequity." *Id.* at 1033–34. The circumstances here, however, are different: imports of subject merchandise produced and exported by movants are currently subject to cash deposits of estimated countervailing duties and, potentially, liquidation at those

rates. *See* Mot. at 6 n.2. Accordingly, continued enforcement of the now-reversed judgment has a direct and inequitable effect.

The court must now decide whether movants are entitled to relief as of the August 28, 2021, effective date of the movants' reinstatement in the *CVD Order* or only from the date of this Opinion and Order. The court finds that relief may be effective as of August 28, 2021.

While the rule refers to relief from a final judgment when "applying it prospectively is no longer equitable," CIT Rule 60(b)(5), such language has been interpreted to mean that relief is limited to "the class of judgments having prospective application (sometimes referred to as 'prospective force')," *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 28 (1st Cir. 2009). "[A] final judgment or order has prospective application for purposes of Rule 60(b)(5) only where it is executory or involves the supervision of changing conduct or conditions." *Tapper*, 833 F.3d at 170–71 (citation omitted). The court's judgment was prospective for purposes of this rule. It not only imposed the remedy of reinstating movants in the *CVD Order* prospectively but also imposed an *ongoing* "cash deposit requirement based on the all-others rate from the investigation or the company-specific rate determined in the most recently completed administrative review in which the company was reviewed." [CIT] J. at 2.

In any case, the court sees no reason to limit movants' relief to the date of this Opinion and Order. As the court previously observed in its decision to vacate the *Final Results* prospectively only, "[t]he interplay between the tripartite interests of domestic producers, foreign exporters/producers, and the U.S. government is a characteristic of trade cases and sets trade cases apart from other cases addressing the principle of retroactivity in which the proponent of retroactivity has a direct stake in its application." *Coalition IV*, 535 F. Supp. 3d at 1362. In other words, when it comes to assessing the appropriate scope of relief in a given circumstance, the court must account for the distinctive way in which trade cases operate at both the administrative and judicial levels. With respect to this motion, excluding movants from the *CVD Order* as of the date of this Opinion and Order would require the same mechanism—a Federal Register notice and set of Commerce instructions to CBP—as would excluding movants from the *CVD Order* as of August 28, 2021. *See* Def.'s Resp. at 9 (explaining how Commerce would effectuate relief). Given that the Federal Circuit reversed the very basis upon which movants were

included in the *CVD Order* as of August 28, 2021, the court will afford movants relief as of that date.[7]

CONCLUSION AND ORDER

In accordance with the foregoing, the court, after due deliberation, having considered the motion to reinstate the exclusion from the *CVD Order* pending resolution of this litigation, and all responses thereto, it is hereby:

ORDERED that the motion (ECF No. 222) is **GRANTED**; it is further

ORDERED that Commerce issue a *Timken*-like notice excluding Lemay, MLI, D&G, and NAFP from *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347, 348 (Dep't Commerce Jan. 3, 2018) (am. final affirmative CVD determination and CVD order); it is further

ORDERED that Commerce instruct CBP to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by Lemay, MLI, D&G, and NAFP, entered, or withdrawn from warehouse, for consumption on or after August 28, 2021, the effective date of *Certain Softwood Lumber Products From Canada*, 86 Fed. Reg. 48,396 (Dep't Commerce Aug. 30, 2021) (notice of ct. decision not in harmony with the [*Final Results*]; notice of rescission of [*Final Results*]; notice of am. cash deposit rates); and it is further

ORDERED that Commerce instruct CBP to liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by Lemay, MLI, D&G, and NAFP.

Dated: November 20, 2023
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

[7] CIT Rule 60(b)(6) provides for relief from a final judgment "for any other reason," i.e., any reason other than the reasons listed in Rule 60(b)(1)–(5), "that justifies relief." CIT Rule 60(b)(6). Rule 60(b)(6) requires a party to demonstrate "extraordinary circumstances." *Marquip, Inc. v. Fosber America, Inc.*, 198 F.3d 1363, 1370 (Fed. Cir. 1999) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993)). "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949). Movants did not seek relief pursuant to CIT Rule 60(b)(6), and the court finds that relief is merited pursuant to CIT Rule 60(b)(5). Thus, the court need not address whether this provision provides an additional avenue for relief.

Slip Op. 23–164

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

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

[Judgment on the agency record is entered for Commerce.]

Dated: November 21, 2023

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

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

R. Alan Luberda, Kelley Drye & Warren, LLP, of Washington, D.C., argued for Defendant-Intervenors ArcelorMittal Tubular Products, Michigan Seamless Tube, LLC, PTC Alliance Corp., Webco Industries, Inc., Zekelman Industries, Inc., and Plymouth Tube Co., USA. With him on the briefs were *David C. Smith, Jr.* and *Julia A. Kuelzow*.

OPINION

Katzmann, Judge:

At the heart of this case is a challenging and uncommon question of trade administration and procedure: what obligation does a foreign exporter or producer have in requesting ongoing administrative reviews ("ARs") when, pending a final court decision after a *Timken* notice, that entity has been provisionally exempted from paying antidumping duties?[1] Plaintiff Goodluck India Limited ("Goodluck") brings this action to challenge administrative action stemming from the assessment of antidumping duties by Commerce on entries of certain cold-drawn mechanical tubing of carbon and alloy steel

[1] A *Timken* notice is a notice published by the U.S. Department of Commerce ("Commerce") of any court decision that is "not in harmony" with a final antidumping or countervailing duty determination. *See infra* p. 7. *Timken* notices may, pending a final court decision, provisionally change the rights and obligations of parties subject to the final duty determination. *See id.*

("CDMT")[2] from the Republic of India. Defendant the United States ("the Government") opposes, as do Defendant-Intervenors ArcelorMittal Tubular Products, Michigan Seamless Tube, LLC, PTC Alliance Corp., Webco Industries, Inc., Zekelman Industries, Inc., and Plymouth Tube Co., USA (collectively, "Domestics").

In April 2018, Commerce assigned Goodluck, a producer and exporter of Indian CDMT, a final antidumping duty rate of 33.7 percent after conducting a less-than-fair-value investigation. In so doing, Commerce rejected Goodluck's submission of supplemental data and relied on adverse facts available ("AFA") under 19 U.S.C. § 1677e(b). Goodluck promptly filed suit in the U.S. Court of International Trade ("CIT") to challenge Commerce's final determination. Holding for Goodluck, the CIT concluded that Commerce unlawfully rejected Goodluck's supplemental data. The CIT remanded to Commerce for reconsideration, and on remand, Commerce recalculated Goodluck's dumping margin as zero percent under respectful protest. In April 2020, the CIT sustained that remand redetermination and entered judgment for Commerce, after which Commerce issued a *Timken* notice. Domestics timely appealed the CIT's judgment to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). In August 2021, the Federal Circuit reversed the CIT and concluded that Commerce's initial duty rate of 33.7 percent was indeed lawful. The CIT entered judgment for the 33.7 rate in November 2021.

What's past is prologue. The subject of current controversy is a notice that Commerce issued in December 2021 following the Federal Circuit's decision. *See Notice of Second Amended Final Determination; Notice of Amended Order; Notice of Resumption of First and Reinstatement of Second Antidumping Duty Administrative Reviews; Notice of Opportunity for Withdrawal; and Notice of Assessment in Third Antidumping Duty Administrative Review*, 86 Fed. Reg. 74069 (Dep't Com. Dec. 29, 2021), P.R. 12 ("*December 2021 Notice*"). Goodluck contests two particular agency actions in this notice. First, Commerce instructed U.S. Customs and Border Protection ("Customs") to liquidate certain of Goodluck's entries, entered from June 1, 2020, through May 31, 2021, at the 33.7 percent rate rather than the zero percent rate because Goodluck did not timely file an AR request

[2] Per the U.S. International Trade Commission ("ITC"):

> CDMT are steel tubular products with a circular cross-section shape that have been cold-drawn or otherwise cold-finished in a manner that changes the product's diameter, wall thickness, or both. The characteristics imparted by cold-drawing or cold-finishing make CDMT suitable for a variety of applications, including mechanical parts in automobiles, trucks, aircraft, construction, agricultural and drilling equipment, and hydraulic cylinders.

Cold-Drawn Mechanical Tubing from China and India at 8, Inv. Nos. 701-TA-576–577 (Final), USITC Pub. 4755 (Jan. 2018) (footnotes omitted).

during the anniversary month; during the anniversary month, however, the duty on goods produced and exported by Goodluck was provisionally zero percent. *Id.* at 74070. Second, Commerce designated September 10, 2021, as the effective date for collecting cash deposits at the 33.7 percent rate. *Id.* at 74070–71. Goodluck attempted to administratively challenge the *December 2021 Notice*, and Commerce determined that Goodluck was entitled to no relief soon thereafter. *See* Mem. from N. James to S. Thompson, re: Notice of Second Amended Final Determination at 4–6 (Dep't Com. Jan. 19, 2022), P.R. 16 ("January 2022 Memorandum"). Goodluck moves for judgment on the agency record to contest the *December 2021 Notice* and January 2022 Memorandum, arguing that Commerce's actions violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

The court first sustains Commerce's instruction to Customs to liquidate certain of Goodluck's entries. Commerce's *December 2021 Notice* was a reasonable exercise of procedural discretion that did not contravene the Constitution, statute, regulation, or established agency practice. The court next concludes that any error regarding the cash deposit effective date would be harmless because an AR that encompasses any of the alternative dates is already underway. Judgment on the agency record is accordingly entered for Commerce.

BACKGROUND

I. Legal Background

Dumping refers to the practice of selling foreign products for less than fair value in the United States. *See Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011). Commerce identifies dumping by assessing whether the export price of an investigated product, as measured by U.S. sales price, is lower than the product's normal value, as typically measured by the price of the product in the home market. *See Maverick Tube Corp. v. Toscelik Profil*, 861 F.3d 1269, 1271 (Fed. Cir. 2017); *see also* 19 U.S.C. § 1677b(a)(1)(B)(i). Where Commerce identifies dumping, and where the ITC makes the additional requisite finding that the sale of foreign merchandise below fair value is materially injuring, threatening, or impeding the establishment of an industry in the United States, *see Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.2d 1304, 1306 (Fed. Cir. 2017), the agency imposes antidumping duties on such merchandise proportionate to the amount by which normal value exceeds the export price, *see* 19 U.S.C. §§ 1673, 1677(35)(A).

Within seven days of notification of the ITC's final affirmative determination, Commerce must publish an antidumping order that instructs Customs to assess an antidumping duty. *See* 19 U.S.C. §§ 1673d, 1673e(a); 19 C.F.R. § 351.210(d); *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F. 3d. 1374, 1376 (Fed. Cir. 2010). Because the United States uses a retrospective system, final antidumping duties are assessed after merchandise is imported. 19 C.F.R. § 351.212; *see also* 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(c)(3). Specifically, Commerce instructs Customs to require cash deposits for the assessed duties for each entry of the subject merchandise. *See* 19 U.S.C. § 1673d(c)(1)(B)(ii); 19 C.F.R. § 351.210(d); *Diamond Sawblades*, 626 F. 3d. at 1376. "Cash deposits . . . are considered estimates of the duties that the importer will ultimately have to pay as opposed to payments of the actual duties." *Sioux Honey*, 672 F.3d at 1047.

Three interrelated administrative procedures following the publication of a final determination are at play in this case. Each is summarized below.

A. Administrative Reviews

As part of the retrospective system, the final computation or ascertainment of duties on entries—called liquidation—occurs later. *See* 19 C.F.R. § 159.1. The duties to be assessed at liquidation are generally determined through an independent process: the AR of an antidumping order. *See* 19 C.F.R. § 351.212; *see also* 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(c)(3). At least once every twelve months beginning on the one-year anniversary of the publication of the antidumping order, Commerce publishes a notice of opportunity to request an AR, which allows interested parties to file requests for reviewing the duties on merchandise entered during a particular period of review ("POR"). *See* 19 U.S.C. § 1675(a)(1); *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1298 (Fed. Cir. 2019). During the anniversary month, "an exporter or producer covered by an order" specifically "may request in writing that the Secretary conduct an administrative review of only that person." 19 C.F.R. § 351.213(b)(2).[3]

If Commerce receives a timely request for an AR, it publishes a notice of initiation of AR in the *Federal Register*. *See BMW*, 926 F.3d at 1298. Commerce then gathers pertinent information by "distribut-[ing] or mak[ing] available questionnaires to those entities Commerce designated in the notice of [i]nitiation." *Id.* (quoting *Transcom, Inc. v. United States*, 24 CIT 1333, 1335, 123 F. Supp. 2d 1372, 1374 (2000)).

[3] Commerce may also choose to conduct an AR "on the Secretary's own initiative when appropriate." 19 C.F.R. § 351.221(b).

Finally, Commerce "determines the antidumping duty rates applicable to each entry or type of entries and publishes these determinations in the *Federal Register*." *Id.* This final antidumping "rate obtained through the administrative review is called the liquidation rate." *Sioux Honey*, 672 F.3d at 1047. Following the final determination of duties published in the *Federal Register*, 19 C.F.R. § 351.221(b)(5), Commerce subsequently transmits liquidation instructions to Customs. 19 C.F.R. § 351.221(b)(6); *Sioux Honey*, 672 F.3d at 1047. These instructions direct Customs to liquidate cash deposits for the POR at the liquidation rate and instruct Customs to collect cash deposits on future entries at the revised duty rate.[4] 19 C.F.R. § 351.221(b)(6)–(7).

If Commerce does not receive a timely request for an administrative review, it instructs Customs, "without additional notice," to (1) assess duties at "rates equal to the cash deposit of . . . estimated antidumping duties . . . required on that merchandise at the time of entry" and (2) continue to collect cash deposits at the existing rate. 19 C.F.R. § 351.212(c)(1)(i)–(ii). If an administrative review is not conducted, the cash deposit rate from the final determination in the underlying investigation or the most recently completed administrative review will be the basis for the final duty assessed. *See id.* ; *Sioux Honey*, 672 F.3d at 1047.

B. Suspension of Liquidation Pending Judicial Review

Interested parties may appeal a final determination to the CIT. 19 U.S.C. § 1516a(a). Unless the CIT or the Federal Circuit rules otherwise, Commerce's antidumping determinations are presumed to be correct. *See Timken Co. v. United States*, 893 F.2d 337, 342 (Fed. Cir. 1990). But "if the CIT or this court renders a decision which is contrary to that determination, the presumption of correctness disappears" until a conclusive court decision is reached.[5] *Id.* at 342. The Federal Circuit explained:

> Thereafter, Commerce should suspend liquidation until there is a conclusive court decision which decides the matter, so that subsequent entries can be liquidated in accordance with that conclusive decision. We also note that this scheme avoids the

[4] "If the [cash] deposit rate (i.e., the estimated rate calculated during the antidumping investigation) is higher than the final liquidation rate, then the importer overpaid and is entitled to a refund. If the [cash] deposit rate equals the liquidation rate, then the importer's previous deposit satisfies its duty obligation." *Sioux Honey*, 672 F.3d at 1047; *see also* 19 U.S.C. § 1673f.

[5] A "conclusive court decision" is reached when all "judicial review proceedings of the antidumping order have been completed." *Diamond Sawblades*, 626 F.3d at 1381; *see also* 19 U.S.C. § 1516a(e).

> "yo-yo" effect . . . . In particular, because an adverse CIT decision merely suspends liquidation, no "flip-flop" takes place if this court subsequently reverses the CIT.

Id. at 342 (citing *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 934 (Fed. Cir. 1984)). Commerce must publish a notice of any such court decision that is "not in harmony" with a final antidumping determination—called a "*Timken* notice"—within ten days of the decision. *Diamond Sawblades*, 626 F.3d at 1381 (quoting *Timken*, 893 F.2d at 341); *see also* 19 U.S.C. § 1516a(c)(1). If, at the end of the litigation, the cause of action challenging Commerce's determination is sustained in whole or in part by a decision of the CIT or the Federal Circuit, entries "shall be liquidated in accordance with the final court decision in the action." 19 U.S.C. § 1516a(e). Commerce must publish notice of the final court decision within ten days of its issuance. *Id.*

C. Correction of Ministerial Errors

Parties may file comments concerning ministerial errors in Commerce's calculations following Commerce's "disclosure" of the details of its antidumping duty calculations in administrative reviews and final antidumping duty orders. *See* 19 C.F.R. § 351.224(a)–(c). A ministerial error is "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error." *Id.* § 351.224(f). The parties' comments must identify and explain the alleged error, point to applicable evidence in the official record, and suggest an appropriate correction. *Id.* § 351.224(d). After analyzing comments, Commerce will "correct any significant ministerial error by amending the preliminary determination[] or correct any ministerial error by amending the final determination or the final results of review." 19 C.F.R. § 351.224(e).

II. Factual Background

On April 19, 2017, Domestics filed antidumping petitions with Commerce alleging that CDMT was being imported into the United States from India, among other countries, at less than fair value. *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From the Federal Republic of Germany, India, Italy, the Republic of Korea, the People's Republic of China, and Switzerland: Initiation of Less-Than-Fair-Value-Investigations*, 82 Fed. Reg. 22491, 22491 (Dep't Com. May 16, 2017). Commerce ultimately issued a final affirmative determination of sales at less than fair value and assigned Goodluck a 33.7 percent antidumping duty rate on the basis of total AFA. *See Final Affirmative Determination of Sales at Less Than Fair Value*, 83 Fed.

Reg. 16296, 16296–97 (Dep't Com. Apr. 16, 2018), P.R. 2 ("*Final Determination*").[6]

Timely filing suit in the CIT, Goodluck challenged Commerce's application of AFA in the *Final Determination*. *See Goodluck India Ltd. v. United States* ("*Goodluck I*"), 43 CIT __, __, 393 F. Supp. 3d 1352, 1363–70 (2019). The court concluded that the calculated duty rate of 33.7 percent was unlawful because Commerce had impermissibly refused to consider certain data revisions submitted by Goodluck and had instead relied on total AFA. *See id.* The *Final Determination* was accordingly remanded to Commerce for reconsideration. *Id.* at 1369–70. Following remand, Commerce recalculated Goodluck's antidumping duty rate as zero percent. *See Final Results of Redetermination Pursuant to Court Remand* (Dep't Com. Dec. 23. 2019), ECF No. 55 ("*Remand Results*"). The court issued judgment sustaining the *Remand Results* on April 30, 2020, *see Goodluck India Ltd. v. United States* ("*Goodluck II*"), 44 CIT __, __, 439 F. Supp. 3d 1366, 1370 (2020), and Domestics appealed to the Federal Circuit.

On May 27, 2020, Commerce published a *Timken* notice following the final CIT judgment for Goodluck and revoked its *Final Determination*, in part, with respect to entries produced and exported by Goodluck, effective from May 10, 2020. *See Notice of Court Decision Not in Harmony with Final Determination of Sales at Less Than Fair Value; Notice of Amended Final Determination Pursuant to Court Decision; and Notice of Revocation of Antidumping Duty Order, in Part*, 85 Fed. Reg. 31742, 31742–43 (Dep't Com. May 27, 2020), P.R. 5 ("*May 2020 Timken Notice*"). The *May 2020 Timken Notice* stated in relevant part:

> Because there is now a final court decision, Commerce is amending its *Final Determination* with respect to Goodluck [to a zero percent rate] . . . .
>
> As a result of this amended final determination, in which Commerce has calculated an estimated weighted-average dumping margin of 0.00 percent for Goodluck, Commerce is hereby excluding merchandise produced and exported by Goodluck from the [*Final Determination*]. Accordingly, Commerce will direct [Customs] to release any bonds or other security and refund cash deposits pertaining to any suspended entries from Goodluck. Pursuant to *Timken*, the suspension of liquidation must continue during the pendency of the appeals process. Addition-

[6] Commerce determined the estimated weighted-average dumping margin to be 33.8 percent and the effective cash deposit rate, adjusted for offsets, to be 33.7 percent. *See id.* at 16297. The court refers to the effective 33.7 percent cash deposit rate, rather than the estimated 33.8 percent rate, throughout the opinion.

> ally, we will instruct [Customs] to suspend liquidation of all unliquidated entries from Goodluck at a cash deposit rate of 0.00 percent which are entered, or withdrawn from warehouse, for consumption on or after May 10, 2020, which is ten days after the CIT's final decision, in accordance with section 516A of the Act. In the event the CIT's ruling is not appealed, or if appealed and upheld by the [Federal Circuit], Commerce will instruct [Customs] to terminate the suspension of liquidation and to liquidate entries produced and exported by Goodluck without regard to antidumping duties.

Id. at 31743 (footnotes omitted).

Prior to the *May 2020 Timken Notice*, Commerce had initiated its first administrative review ("AR1") of the *Final Determination*, covering the period of November 22, 2017, to May 31, 2019. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 36572 (Dep't Com. July 29, 2019). In light of the CIT's rulings in *Goodluck I* and *Goodluck II*, Commerce stated the following in its preliminary AR1 results:

> On May 27, 2020, Commerce published a notice of a court decision not in harmony with a final determination in the less-than-fair-value (LTFV) investigation of cold-drawn mechanical tubing from India. At that time, Commerce amended its final determination in the LTFV investigation and revised the antidumping duty margin calculated for Goodluck India Limited (Goodluck). Additionally, in the *Timken Notice*, Commerce stated that it was implementing a partial exclusion from the [*Final Determination*] for merchandise produced and exported by Goodluck. As a result, we are hereby discontinuing this review with respect to Goodluck because Goodluck only made sales to the United States of merchandise that it produced and exported.

Preliminary Results of Antidumping Administrative Review, Partial Rescission of Review, and Partial Discontinuation of Review; 2017–2019, 85 Fed. Reg. 66930, 66931 (Dep't Com. Oct. 21, 2020), P.R. 7 (footnotes omitted).

Moreover, on June 2, 2020, Commerce announced an opportunity to request review of CDMT sales in the second administrative review ("AR2"), covering the period of June 1, 2019, to May 31, 2020. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 85 Fed. Reg. 33628, 33629 (Dep't Com. June 2, 2020). Goodluck requested

such review of its sales on June 30, 2020. *See* Letter from Goodluck to W. Ross, Sec'y of Com., re: Request for Administrative Review at 2 (June 30, 2020), P.R. 8 ("AR2 Request Letter"). In its request, Goodluck stated that "[a]lthough the [*May 2020 Timken Notice*] effectively revoked the [*Final Determination*] with respect to Goodluck, it also continues to suspend entries from Goodluck pending any appeals. As such, we are requesting this review in order to preserve the review of Goodluck's entries." *Id.* at 2 n.2. A few weeks later, Commerce stated in its AR2 initiation notice:

> Commerce is only reviewing entries that were produced, but not exported, by Goodluck India Limited (Goodluck), and/or entries that were exported, but not produced, by Goodluck. Pursuant to a Court of International Trade decision, effective May 10, 2020, Commerce excluded from the antidumping duty order certain cold-drawn mechanical tubing of cargon and allowy steel that was produced and exported by Goodluck.

See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 85 Fed. Reg. 47731, 47733 n.5 (Dep't Com. Aug. 6, 2020), P.R. 9. Later, in its preliminary AR2 results, Commerce further stated:

> The administrative review remains active with respect to the two remaining companies for which a review was initiated, [including] Goodluck India Limited (Goodluck) . . . .
>
> We preliminarily determine that Goodluck had no shipments of the subject merchandise to the United States during the POR. Consistent with its practice, Commerce finds that it is not appropriate to preliminarily rescind the review with respect to Goodluck, but rather to complete the review and issue appropriate instructions to [Customs] based on the final results of this review.
>
> As noted in the Timken Notice regarding Goodluck, the suspension of liquidation of Goodluck's entries must continue during the pendency of the process of appealing the [CIT]'s ruling. If the ruling is upheld by the [Federal Circuit], Commerce will instruct [Customs] to terminate the suspension of liquidation and liquidate entries produced and exported by Goodluck without regard to antidumping duties.

Preliminary Results of Antidumping Duty Administrative Review; 2019–2020, 86 Fed. Reg. 33980, 33980–81 (Dep't Com. June 28, 2021) ("*AR2 Preliminary Results*").

Finally, on June 1, 2021, Commerce announced an opportunity to request review of CDMT sales in the third administrative review ("AR3"), covering the period from June 1, 2020, to May 31, 2021. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 86 Fed. Reg. 29240, 29241 (June 1, 2021). Neither Goodluck nor any other party requested review of Goodluck's CDMT sales in AR3. On August 3, 2021, Commerce initiated AR3 for another company included in the *Final Determination*, but not for Goodluck. Compl. ¶¶ 13–14, Jan. 27, 2022, ECF No. 2.

On August 31, 2021, the Federal Circuit held that Commerce's initial determination to reject Goodluck's revisions to the record was supported by substantial evidence and otherwise not contrary to law. *See Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1344 (Fed. Cir. 2021) ("*Goodluck III*"). The Federal Circuit reversed the CIT's judgment and remanded for further proceedings. *Id.* On November 18, 2021, the CIT vacated its previous remand order and judgment, entered judgment for the Government, and sustained Commerce's initial *Final Determination* that assigned Goodluck a 33.7 percent antidumping duty rate. *See* Order at 1, *Goodluck India Ltd. v. United States*, No. 18–162 (CIT Nov. 18, 2021), ECF No. 74.

Accordingly, on December 29, 2021, Commerce published a notice reinstating the Final Determination and AD order with respect to Goodluck. *See December 2021 Notice*, 86 Fed. Reg. at 74070. The December 2021 Notice further announced: (1) the resumption of AR1 with respect to Goodluck; (2) the initiation of AR2 with respect to Goodluck; and (3) a fourteen-day window for parties to withdraw either request for an administrative review. *Id.* In addition, Commerce directed Customs to liquidate Goodluck's AR3 entries because Commerce had not received a request concerning Goodluck for AR3. *Id.* Commerce stated in relevant part:

> As a result of this amended final determination, in which Commerce assigned a dumping margin of 33.80 percent to Goodluck, Commerce is reinstating the [Final Determination] with respect to Goodluck.
>
> Commerce did not receive a request for an administrative review of the antidumping duty order with respect to Goodluck for the period of June 1, 2020, through May 31, 2021, i.e., the third administrative review. Therefore, in accordance with 19 CFR 351.212(c), we will instruct [Customs] to liquidate all entries for Goodluck and to assess antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption at

> 33.70 percent, the cash deposit rate that would have prevailed in the absence of the now-vacated CIT decision.

Id. at 74070. Commerce also stated that it would revise the cash deposit instructions—reflecting a cash deposit rate of 33.7 percent—with an effective date of September 10, 2021. *Id.*

On January 3, 2022, Goodluck filed a letter asking Commerce to withdraw its liquidation instructions with respect to AR3 and to modify the effective date for collecting cash deposits at the 33.7 percent rate to December 29, 2021. *See* Letter from Goodluck to G. Raimondo, Sec'y of Com., re: Goodluck's Request to Correct Errors in the December 29, 2021 Reinstatement Notice at 6, 9 (Jan. 3, 2022), P.R. 13. On January 19, 2022, Commerce issued a memorandum that construed Goodluck's letter to be a request for correction of ministerial errors pursuant to 19 CFR § 351.224. January 2022 Mem. at 3. In that memorandum, Commerce denied both of Goodluck's proposed changes because they did not constitute "ministerial error as defined by 19 C.F.R. [§] 351.224(f)," meaning "an error in addition, subtraction, or other arithmetic function, [or] another type of unintentional error." *Id.* at 4, 6.

III. Procedural History

On January 27, 2022, Goodluck timely filed its Complaint before this court to contest Commerce's *December 2021 Notice* and January 2022 Memorandum. *See* Compl. On April 1, 2022, the Government filed a partial motion to dismiss for lack of subject matter jurisdiction. *See* Def's Partial Mot. to Dismiss for Lack of Jurisdiction, Apr. 1, 2022, ECF No. 23. Determining that subject matter jurisdiction may attach under 19 U.S.C. § 1581(i), the court denied that motion. *See Goodluck India Ltd. v. United States* ("*Goodluck IV*"), 47 CIT __, __, 605 F. Supp. 3d 1343, 1348 (2022), ECF No. 37.

On January 3, 2023, Goodluck filed a Rule 56.1 motion for judgment on the agency record, arguing that Commerce's final determination was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence on the record, and otherwise not in accordance with law. *See* Pl.'s Mot. for J. on Agency R. at 1, Jan. 3, 2023, ECF No. 43 ("Pl.'s Br."). The Government and Domestics filed their respective responses in opposition to Goodluck's motion on April 3, 2023, *see* Def.'s Resp. to Pl.'s Mot. for J. on Agency R., Apr. 3, 2023, ECF No. 50; Def.-Inters.' Resp. Br., Apr. 3, 2023, ECF No. 49, to which Goodluck replied on May 15, 2023, *see* Pl.'s Reply, May 15, 2023, ECF No. 54 ("Pl.'s Reply").

The court issued a letter posing questions in advance of oral argument, *see* Letter re: Qs. for Oral Arg., July 17, 2023, ECF No. 57, to which the parties responded, *see* Pl.'s Resp. to Oral Arg. Qs., July 28, 2023, ECF No. 59; Def.'s Resp. to Oral Arg. Qs., July 28, 2023, ECF No. 60; Def.-Inters.' Answers to Oral Arg. Qs., July 28, 2023, ECF No. 61. Oral argument was held on August 1, 2023. *See* Oral Arg., Aug. 1, 2023, ECF No. 65. The court invited parties to file post-argument submissions and issued supplemental questions, *see* Letter re: Supp. Qs., Aug. 1, 2023, ECF No. 66, and all parties made such submissions, *see* Pl.'s Post-Hearing Br., Aug. 8, 2023, ECF No. 68; Def.'s Post-Arg. Subm., August 8, 2023, ECF No. 69; Defs.-Inters.' Post Oral Arg. Cmts. & Resp. to Ct's Qs., Aug. 8, 2023, ECF No. 67.

DISCUSSION

Jurisdiction exists under 28 U.S.C. § 1581(i)(1). *See Goodluck IV*, 605 F. Supp. 3d at 1348. Under that provision, the CIT may hear civil actions arising out of federal laws providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B). In cases arising under § 1581(i), the court applies "the standard of review set forth by the Administrative Procedure Act and will 'hold unlawful and set aside [agency] action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1331 (Fed. Cir. 2008) (quoting 5 U.S.C. § 706(2)).

Agency action is arbitrary and capricious when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or made a decision "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An abuse of discretion "occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005). Ultimately, the record supporting an agency's decision must support a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Goodluck argues that two specific agency actions in the *December 2021 Notice* are unlawful under the APA and Due Process Clause: (1) Commerce's instruction to liquidate its AR3 entries at 33.7 percent because Goodluck did not submit an AR3 request during the anniversary month was unlawful under the APA and Due Process Clause, and (2) Commerce's designation of September 10, 2021, as the effective date for cash deposits.

The court first holds that Commerce's AR3 instruction was lawful. The court then concludes that Commerce's effective date designation, if erroneous, would be harmless error.

I. Commerce's Instruction to Liquidate Goodluck's AR3 Entries at 33.7 Percent Was Lawful

In the *December 2021 Notice*, Commerce concluded:

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

86 Fed. Reg. at 74070. Goodluck's challenge to this instruction is two-tiered. First, Goodluck advances three arguments against Commerce's exercise of procedural discretion in ordering the automatic liquidation of the AR3 entries: (1) Commerce's decision deprived Goodluck of its right to have its AR3 entries subject to administrative review; (2) even if Goodluck did not have the right to request AR3 review, Goodluck's AR3 entries should have been liquidated duty free, rather than at a 33.7 percent rate; and (3) Commerce deprived Goodluck of its due process rights to notice and opportunity to be heard. *See* Pl.'s Br. at 14–41. Second, even if it was lawful for Commerce to instruct automatic liquidation of the AR3 entries, Goodluck insists that the entries should have been liquidated at the zero percent rate rather than the 33.7 percent rate.

Considering each argument in turn, the court concludes that Commerce's instruction was lawful under the APA and the U.S. Constitution.

A. Commerce's Exercise of Procedural Discretion Was Lawful

In its first tier of argument, Goodluck challenges Commerce's exercise of discretion in ordering the automatic liquidation of the AR3 entries. As a general matter, "Commerce enjoys 'broad discretion' to promulgate and enforce its procedural rules." *Goodluck III*, 11 F.4th at 1344 (quoting *Stupp Corp. v. United States*, 5 F.4th 1341, 1350–51 (Fed. Cir. 2021)); *see also Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970) ("[An agency] is entitled to a measure of discretion in administering its own procedural rules . . . ."). Indeed, "agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250, 1261 (Fed. Cir. 2023) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978)). But Commerce's discretion is not boundless. An agency's procedural action may be unlawful if it is contrary to the Constitution, statute, or regulation, *see* 5 U.S.C. § 706(2); *Royal Brush Mfg.*, 75 F.4th at 1261, or under other "extremely compelling circumstances," *Royal Brush Mfg.*, 75 F.4th at 1261 (quoting *Vermont Yankee*, 435 U.S. at 543), such as if the procedural action is "egregiously removed from fairness," *Doty v. United States*, 53 F.3d 1244, 1251 (Fed. Cir. 1995). But "[s]hort of a showing that Commerce's enforcement of its procedural rules is so haphazard or unreasonable as to be arbitrary or capricious . . . [,] Commerce's failure to apply those rules with Procrustean consistency in every case does not deprive it of the authority to enforce those rules in any case." *Stupp*, 5 F.4th at 1350–51.

"There is no . . . statutory" or regulatory "scheme that addresses the effect of an adverse decision on an administrative review." *BMW*, 926 F.3d at 1298–99. That said, there are a few statutory and regulatory guardrails bounding Commerce's actions in this case. First, "an exporter or producer covered by an order" has the right, "[d]uring the [anniversary] month," to request an AR of "only that person." 19 C.F.R. § 351.213(b)(2); *see also* 19 U.S.C. § 1675(a)(1) (referencing the existence of "a request"). Second, where no administrative review is conducted, Commerce must instruct Customs, "without additional notice," to assess duties at "rates equal to the cash deposit of . . . estimated antidumping duties . . . required on that merchandise at the time of entry." 19 C.F.R. § 351.212(c)(1)(i)–(ii). And third, once a *Timken* notice is issued, only a final and conclusive court decision may permanently modify a *Final Determination* with regard to the subject matter of the litigation. *See Timken*, 893 F.2d at 342 (interpreting 19

U.S.C. § 1516a(c)(1), (e)). Suspension of liquidation after a *Timken* notice is crucial so that "subsequent entries"—referring to entries after the *Timken* notice, such as entries subject to subsequent ARs—"can be liquidated *in accordance with* that conclusive decision." *Id.* (emphasis added). That system prevents an undesirable "yo-yo" or "flip-flop" effect, wherein entries are liquidated at duty rates that arbitrarily vary depending on the stage of litigation and the court order in effect at the time. *See id.*

The parties offer two competing procedures for requesting ARs after a *Timken* notice, which the court calls the "retroactive" and "contemporaneous" approaches:

1. **Retroactive Approach.** This is Goodluck's preferred procedure. Under this approach, a producer or exporter whose entries are provisionally excluded from the antidumping duty order is not required to request review on the anniversary month. If the order gets reinstated as to that entity, Commerce will then allow the producer or exporter the opportunity to request review, even if the reinstatement occurs after the anniversary month.

2. **Contemporaneous Approach.** This is Commerce's and Domestics' preferred procedure. Under this approach, a request to review a producer or exporter whose entries are provisionally excluded from the antidumping duty order must be still filed on the anniversary month. The request may very well be denied due to the provisional revocation, but the review request preserves the right to AR. If the order gets reinstated as to that entity, Commerce resumes or starts the AR.

Both approaches comply with *Timken*'s basic directives and do not frustrate effective judicial review. In either scenario, the post-*Timken* entries would be suspended for the pendency of ongoing litigation, and the undesirable yo-yo effect is avoided. Moreover, "an invalid antidumping determination [would not] serve as a legal basis for the imposition of antidumping duties." *Andaman Seafood Co. v. United States*, 34 CIT 129, 134, 675 F. Supp. 2d 1363, 1369 (2010). The difference between the two approaches is that the contemporaneous approach requires a producer or exporter to preserve the right to an AR by timely filing a request, while the retroactive approach allows for untimely AR requests. Commerce chose the former approach; Goodluck insists that it should have chosen the latter.

Goodluck broadly argues against Commerce's automatic liquidation of its AR3 entries, *see* Compl. ¶ 22, but the more precise challenge is to Commerce's determination that no timely AR request was filed and

that no later opportunity to request AR was available. *See December 2021 Notice*, 86 Fed. Reg. at 74070. Automatic liquidation was indeed the result of Commerce's action, but automatic liquidation depends on whether a timely AR request was filed. *See* 19 C.F.R. § 351.212(c) (automatic liquidation occurs "[i]f [Commerce] does not receive a timely request for an [AR]"). Commerce's decision concerning timeliness, then, is the real crux of the dispute. Moreover, questions of timeliness generally implicate Commerce's procedural, not policy-making, discretion.[7] *See, e.g.*, *Stupp Corp.*, 5 F.4th at 1349–51 (treating Commerce's dismissal of an untimely factual submission as an exercise of procedural discretion); *In re Makari*, 708 F.2d 709, 710 (Fed. Cir. 1983) (characterizing the Commissioner of Patents's dismissal of an untimely petition as procedural). Commerce's procedural discretion is broad—but not unreviewable or unbounded. *See Royal Brush Mfg.*, 75 F.4th at 1261; *supra* pp. 15–16.

Goodluck marshals three bases for its position that Commerce abused its procedural discretion. First is the contention that Commerce's action is inconsistent with the plain text of 19 C.F.R. § 351.213(b)(2); because Goodluck was no longer "covered by" the *Final Determination* after the *May 2020 Timken Notice* had issued, Goodluck had no right to request AR during the anniversary month and was otherwise deprived of a right to request it after reinstatement. *See* Pl.'s Reply at 9–11. Second, Goodluck argues that Commerce has a practice of allowing similarly situated parties to submit untimely AR requests following an antidumping duty order's reinstatement by the Federal Circuit, and that Commerce failed to justify its deviation from that practice here. *See* Pl.'s Br. at 15–16. Third is a constitutional argument: Commerce deprived Goodluck of its Fifth Amendment due process rights to notice and an opportunity to be heard by automatically liquidating the AR3 entries without allowing AR3 requests. None of these arguments ultimately warrant remand here.

[7] To the extent that Goodluck characterizes this case as disputing a "right" to request AR of its entries, *see* Pl.'s Br. at 14, that framing casts the net too broadly. Rights granted by regulation are often bounded by procedural requirements. *See Stupp*, 5 F.4th at 1348–49 (discussing the regulations that allow a party to file new factual information but subject to certain procedural requirements). The precise question here is whether Commerce's administration and enforcement of the procedural requirements for the right to request ARs was lawful.

1. Goodluck Had the Right to Request AR3 on the Anniversary Month but Did Not Avail Itself of That Right

Goodluck first argues that the text of 19 C.F.R. § 351.213 prohibits Commerce's instruction to liquidate the AR3 entries without affording an opportunity to request AR. The regulation reads in relevant part:

> During the same month, an exporter or producer covered by an order . . . may request in writing that the Secretary conduct an administrative review of only that person.

19 C.F.R. § 351.213(b)(2). Goodluck was no longer "covered by" the *Final Determination* after the *May 2020 Timken Notice* had issued, so it says; it therefore had no right to request AR during the anniversary month. *See* Pl.'s Reply at 9–11. Implicit in this argument is that when the right to request was unavailable during the anniversary month, Goodluck was otherwise entitled to a right to request at some other time. Not so, on both counts.

First, Goodluck's provisional exclusion did not make it no longer "covered by" the *Final Determination*. As an initial matter, the applicable regulations and statutes do not define the meaning of "covered by." Under its plain meaning, to "cover" means "to have sufficient scope to include or take into account." *Cover*, Merriam Webster, https://www.merriamwebster.com/dictionary/cover (last updated Nov. 1, 2023). Second, the text of the regulation makes clear that the object of coverage is an "exporter or producer," rather than the entries of the exporter or producer. 19 C.F.R. § 351.213(b)(2). That reading is further clarified by the regulation's specification of administrative review of "that person," rather than of that person's entries. *Id.* The antidumping duty order must, therefore, have sufficient scope to include or take into account a particular exporter or producer in order for that exporter or producer to request AR.

Commerce's statements in the *Federal Register* indicate that Goodluck was still covered. In the *May 2020 Timken Notice*, Commerce stated that "Commerce is hereby excluding merchandise produced and exported by Goodluck from the AD Order" under a header titled "Partial Exclusion from Antidumping Duty Order." *May 2020 Timken Notice*, 85 Fed. Reg. at 31743. Goodluck reads the word "exclud[e]" to mean that it was no longer included in, or "covered by," the *Final Determination*. But the direct object of "excluding" in Commerce's sentence is "merchandise produced and exported by Goodluck," not "Goodluck." Goodluck's reading elides the difference between excluding a particular producer or exporter, versus excluding particular

entries of that producer or exporter. That distinction is crucial in a case like this, where Goodluck was still covered beyond its capacity as both a producer *and* an exporter. Commerce reaffirmed that point twice: first when it discontinued AR1 in part, and second when it responded to Goodluck's AR2 request. In both instances, Commerce continued the AR for entries that were either produced or exported, but not both produced and exported, by Goodluck. *See AR1 Preliminary Determination*, 85 Fed. Reg. at 66931 ("[W]e are hereby discontinuing this review with respect to Goodluck because Goodluck only made sales . . . of merchandise that it produced and exported. . . . [E]ntries that were produced, but not exported, by Goodluck, and/or entries that were exported, but not produced, by Goodluck are not covered by the exclusion [in the *May 2020 Timken Notice*]."); *AR2 Initiation Notice*, 85 Fed. Reg. at 47733 ("Commerce is only reviewing entries that were produced, but not exported, by [Goodluck], and/or entries that were exported, but not produced, by Goodluck. Pursuant to a [CIT] decision, effective May 10, 2020, Commerce excluded from the antidumping duty order certain [CDMT] that was produced and exported by Goodluck."); *AR2 Preliminary Results*, 86 Fed. Reg. at 33980–81 ("The administrative review remains active with respect to . . . Goodluck . . . . We preliminarily determine that Goodluck had no shipments of the subject merchandise to the United States during the POR. Consistent with its practice, Commerce finds that it is not appropriate to preliminarily rescind the review with respect to Goodluck, but rather to complete the review . . . ."). Commerce's view that Goodluck remained covered by the *Final Determination* was therefore not contrary to the plain meaning of the words "covered by" in 19 C.F.R. § 351.213(b)(2), which makes clear that it is producers and exporters, not their entries, that are subject to coverage.

The holding here is a narrow one. The court expresses no view on whether a full provisional exclusion from an antidumping duty order in a *Timken* notice would, for the purposes of 19 C.F.R. § 351.213(b)(2), render a producer or exporter no longer "covered by" that order, and if so, whether Commerce would owe additional process.[8] Moreover, because it has not been argued that Commerce is entitled to deference to its interpretation, the court does not reach that question. *Cf. Kisor v. Willkie*, 139 S. Ct. 2400, 2416–18 (2019) (requiring that the regulatory interpretation be "the agency's 'authoritative' or 'official position,' rather than any more ad hoc state-

[8] The court also notes that the inquiry here is limited to the meaning of "covered by" as used in 19 C.F.R. § 351.213. Any relief associated with partial or full exclusions that are provisional will depend on the particular agency action and procedural posture of each case. *See, e.g.*, *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 47 CIT __, __, Slip Op. 23–163, at 5, 12–13 (Nov. 20, 2023).

ment not reflecting the agency's views," and that the court "decline to defer to a . . . 'post hoc rationalization advanced' to 'defend past agency action against attack'" (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012))). Addressing Goodluck's argument as presented, *see* Pl.'s Reply at 9–11, the court concludes only that the agency action in this case does not conflict with the plain meaning of "covered by" in 19 C.F.R. § 351.213(b)(2).

Second, Goodluck is incorrect to suggest that it is entitled to a right to request at some time other than the anniversary month. The regulation's grant of a procedural right to request AR is only "[d]uring the [anniversary] month." 19 C.F.R. § 351.213(b)(2). Even assuming arguendo that Goodluck was provisionally no longer "covered by" the *Final Determination*, it is unclear to the court why the regulation would authorize Goodluck to request AR at any point apart from the anniversary month. And Goodluck does not offer any other statutory or regulatory authority for an enduring right to request AR.[9] *See* 19 U.S.C. § 1675 (referencing a "request for such a review" without specifying that it must be enduring); 19 C.F.R. §§ 351.212–13 (limiting the default conditions for such requests to the anniversary month). What is clear, however, is that where no valid request is received, Commerce is not required to conduct an AR and may instruct Customs to automatically assess duties. *See* 19 C.F.R. § 351.212(a), (c). In short, Goodluck did remain "covered by" the *Final Determination*, but Goodluck did not timely avail itself of the right to request AR under 19 C.F.R. § 351.213, and Goodluck did not have an otherwise enduring right to AR premised in 19 C.F.R. § 351.213. Commerce's instruction to automatically liquidate the AR3 entries therefore did not contravene 19 C.F.R. § 351.213.

2. No Past Agency Practice Required Commerce to Accept an Untimely AR Request from Goodluck

Goodluck next argues that Commerce has an established practice of allowing untimely AR requests after a party whose entries were provisionally excluded was reinstated pursuant to a conclusive court decision. It points to two prior decisions to establish that practice. *See Ball Bearings and Parts Thereof from Japan and the United Kingdom: Notice of Reinstatement of Antidumping Duty Orders, Resumption of Administrative Reviews, and Advance Notification of Sunset Reviews*, 78 Fed. Reg. 76104 (Dep't Com. Dec. 16, 2013) ("*Ball Bearings Reinstatement*"); *Xanthan Gum from the People's Republic of China: Notice of Third Amended Final Determination Pursuant to*

[9] To the extent that Goodluck argues that the agency has an established practice of allowing the filing of untimely AR requests that gives rise to a right to untimely AR requests under similar circumstances, that is also unavailing. *See infra* section I.A.2.

Court Decision, 85 Fed. Reg. 40967 (Dep't Com. July 8, 2020) ("*Xanthan Gum Reinstatement*"). Because Commerce did not justify its deviation from that alleged practice in the *December 2021 Notice*, Goodluck contends that Commerce's decision to automatically liquidate the AR3 entries were unlawful. *See id.* at 22–23.

Agency action that deviates from prior policy decisions or established practice without reasoned justification is arbitrary and capricious. *See Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007); *In re Section 301 Cases*, 46 CIT __, __, 570 F. Supp. 3d 1306, 1347 (2022). But to identify an established agency practice, the party challenging administrative action must show "the existence of 'a uniform and established procedure . . . that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the established practice or procedure.'" *In re Section 301 Cases*, 570 F. Supp. 3d at 1347 (quoting *Ranchers–Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999)). Conversely, an agency's exercise of discretion on a "case-by-case" and fact-specific basis "complicates any efforts to divine 'rules' from past agency practice." *Fujian Yinfeng Imp & Exp Trading Co., Ltd. v. United States*, 46 CIT __, __, 607 F. Supp. 3d 1301, 1316 (2022).

Goodluck's two cases, however, do not constitute a uniform and established agency practice. In Goodluck's first case, *Ball Bearings*, Commerce revoked antidumping orders on ball bearings and parts thereof from Japan and the United Kingdom following a determination by the ITC that such revocation was "not likely to lead to the continuation or recurrence of material injury." *Ball Bearings and Parts Thereof from Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41761, 41762 (Dep't Com. July 15, 2011) ("*Ball Bearings Timken Notice*"). That provisional revocation applied to all producers and exporters who were previously covered. *Id.* Commerce simultaneously announced that it was "discontinuing all unfinished administrative reviews immediately and [would] not initiate any new administrative reviews of the orders." *Id.* Following a conclusive decision by the Federal Circuit, Commerce reinstated the AD orders, resumed suspended administrative reviews, and provided interested parties the opportunity to request administrative reviews for two PORs where the anniversary month had passed while the order was revoked. *See Ball Bearings Reinstatement*, 78 Fed. Reg. at 76104.

In the second case, *Xanthan Gum*, Commerce excluded merchandise from two producers and exporters, collectively termed "Fufeng," from an antidumping order on xanthan gum from China following a CIT decision. *See Xanthan Gum from the People's Republic of China: Notice of Court Decision Not in Harmony with Amended Final Determination in Less Than Fair Value Investigation; Notice of Amended Final Determination Pursuant to Court Decision; Notice of Revocation of Antidumping Duty in Part; and Discontinuation of Fourth and Fifth Antidumping Administrative Reviews in Part*, 83 Fed. Reg. 52205, 52205–06 (Dep't Com. Oct. 16, 2018). Commerce discontinued the fourth and fifth ARs with respect to Fufeng and stated that it would "not initiate any new [ARs] of Fufeng's entries pursuant to the antidumping order." *Id.* at 52206. On the sixth anniversary month, Commerce published a notice of the opportunity to request review, *see Antidumping or Countervailing Duty Order, Finding or Suspended Investigation; Opportunity to Request Administrative Review*, 84 Fed. Reg. 31295, 31295 (Dep't Com. July 1, 2019), and review of Fufeng's entries was requested, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 47242, 47250 (Dep't Com. Sep. 9, 2019). Fufeng subsequently withdrew its AR6 request. *See Preliminary Results of the Antidumping Administrative Review, and Partial Rescission; 2018–2019*, 85 Fed. Reg. 74686, 74686 (Dep't Com. Nov. 23, 2020). Finally, following the Federal Circuit's reversal of the CIT decision, Commerce resumed the fourth and fifth administrative reviews with respect to Fufeng but did not provide Fufeng with an opportunity to request additional administrative reviews. *See Xanthan Gum Reinstatement*, 85 Fed. Reg. at 40967.

Ball Bearings and *Xanthan Gum* each involved a situation-specific exercise of procedural discretion. The underlying order in *Ball Bearings* had been revoked in its entirety—not merely with respect to a particular entity—so Commerce did not provide any interested parties the opportunity to request AR until after the order had been reinstated.[10] In *Xanthan Gum*, by contrast, the ARs that Commerce resumed after reinstatement had all been timely requested on the anniversary month during the pendency of the Federal Circuit litigation; Commerce did not provide Fufeng with a later opportunity to request review of Fufeng's entries during the AR6. *See Xanthan Gum Reinstatement*, 85 Fed. Reg. at 40967. From these examples alone, it is difficult to extrapolate a broader principle about a party's right to

[10] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 77 Fed. Reg. 25679, 25680 (Dep't Com. May 1, 2012); *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 78 Fed. Reg. 25423, 25424 (Dep't Com. May 1, 2013).

AR requests after reinstatement considering the procedural facts unique to each case.[11] Instead, Goodluck asks the court to pick the parts of each decision that it prefers—(1) the opportunity to request AR after reinstatement in *Ball Bearings*, while ignoring the full revocation and lack of opportunity for any party to request timely AR, and (2) the partial revocation of the antidumping duty order in *Xanthan Gum*, while ignoring the fact that timely request was filed—and to carefully glue them together to form an established agency practice.

That is not the law. As noted above, Commerce has significant leeway in exercising its procedural discretion. *See, e.g.*, *Royal Brush Mfg.*, 75 F.4th at 1261; *Goodluck III*, 11 F.4th at 1344; *Stupp Corp.*, 5 F.4th at 1350–51. Bounding that discretion is a requirement that Commerce explain deviations from "a uniform and established procedure." *In re Section 301 Cases*, 570 F. Supp. 3d at 1347. The rationale is that an established agency practice puts parties on notice that Commerce will act pursuant to that practice again. *See id.* But agency decisions that share overlapping attributes, yet lack a clear and principled common outcome or reasoning, do not give rise to those notice concerns with equal force. Efforts to thread the needle between such decisions, as Goodluck attempts here, risk curtailing Commerce's discretion for no good reason. *See Fujian*, 607 F. Supp. 3d at 1316 ("case-by-case" exercises of discretion "complicate[] any efforts to divine 'rules' from past agency practice"). Because *Ball Bearings* and *Xanthan Gum* lack a clear and principled common outcome, they are better read as two distinct case-by-case efforts to administer the statutes and regulations governing ARs.

Not only are *Ball Bearings* and *Xanthan Gum* sufficiently different from one another, but they are jointly distinguishable from this case in one crucial aspect. In both of those cases, Commerce stated that it would not initiate ARs after the *Timken* notice and during the pendency of Federal Circuit litigation. *See Ball Bearings Revocation*, 76 Fed. Reg. at 41762 ("[T]he Department is discontinuing all unfinished administrative reviews immediately and will not initiate any new administrative reviews of the orders."); *Xanthan Gum Revocation*, 83

[11] In this case, Commerce discontinued the AR1 and limited the entries under review for AR2. *See AR1 Preliminary Determination*, 85 Fed. Reg. at 66931; *AR2 Initiation Notice*, 85 Fed. Reg. at 47733 n.5. Goodluck argues that Commerce's actions here are an extension of its practice in *Ball Bearings* and *Xanthan Gum*, and that Goodluck was justified in relying on that AR2 determination when deciding not to request AR3. *See* Pl.'s Br. at 19–22. But assuming arguendo that there is an agency practice of discontinuing ongoing ARs after a *Timken* notice is issued, it is unclear to the court why that practice would necessarily entail an agency practice of allowing untimely requests for ARs initiated after the *Timken* notice is issued.

Fed. Reg. at 52206 ("Commerce . . . will not initiate any new administrative reviews of Fufeng's entries pursuant to the antidumping order." (footnote omitted)). But Commerce made no such statement anywhere in this case's administrative record. Even if *Ball Bearings* and *Xanthan Gum* did represent an established agency practice of allowing untimely AR requests, it would be cabined to circumstances in which Commerce made clear that it would not initiate ARs during the pendency of Federal Circuit litigation.[12] Having failed, then, to identify a "uniform and established" exercise of procedural discretion that would allow Goodluck to "reasonably . . . expect" an opportunity

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[12] Goodluck stresses that prior to the *May 2020 Timken Notice*, Commerce issued at least nine *Timken* notices that excluded certain or all respondents from antidumping orders and included similar "will not initiate" language. *See Ball Bearings Timken Notice*, 76 Fed. Reg. 41761; *Polyvinyl Alcohol From Taiwan: Notice of Court Decision Not in Harmony With Final Determination of Sales at Less Than Fair Value and Revocation of Antidumping Duty Order*, 79 Fed. Reg. 4442, 4442–43 (Dep't Com. Jan. 28, 2014); *Drill Pipe From the People's Republic of China: Notice of Court Decision Not in Harmony With International Trade Commission's Injury Determination, Revocation of Antidumping and Countervailing Duty Orders Pursuant to Court Decision, and Discontinuation of Countervailing Duty Administrative Review*, 79 Fed. Reg. 78037, 78038 (Dep't Com. Dec. 29, 2014); *Certain Steel Nails From the United Arab Emirates: Notice of Court Decision Not in Harmony with Final Determination and Amended Final Determination of the Less Than Fair Value Investigation*, 80 Fed. Reg. 77316, 77318 (Dep't Com. Dec. 14, 2015); *Utility Scale Wind Towers From the Socialist Republic of Vietnam: Notice of Court Decision Not in Harmony With the Final Determination of Less Than Fair Value Investigation and Notice of Amended Final Determination of Investigation*, 82 Fed. Reg. 15493, 15494 (Dep't Com. Mar. 29, 2017); *High Pressure Steel Cylinders From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Determination in Less Than Fair Value Investigation, Notice of Amended Final Determination Pursuant to Court Decision, Notice of Revocation of Antidumping Duty Order in Part, and Discontinuation of Fifth Antidumping Duty Administrative Review*, 82 Fed. Reg. 46758, 46760–61 (Dep't Com. Oct. 6, 2017); *Xanthan Gum From the People's Republic of China: Notice of Court Decision Not in Harmony with Amended Final Determination in Less Than Fair Value Investigation; Notice of Amended Final Determination Pursuant to Court Decision; Notice of Revocation of Antidumping Duty Order In Part; and Discontinuation of Fourth and Fifth Antidumping Duty Administrative Reviews in Part*, 83 Fed. Reg. 52205, 52206 (Dep't Com. Oct. 16, 2018); *Certain Corrosion-Resistant Steel Products From India: Notice of Court Decision Not in Harmony With Amended Final Determination in Less Than Fair Value Investigation; Notice of Amended Final Determination Pursuant to Court Decision; and Notice of Revocation of Antidumping Duty order, in Part*, 85 Fed. Reg. 69994, 69995 (Dep't Com. Jan. 8, 2020); and *Certain Hot-Rolled Steel Flat Products From Turkey: Notice of Court Decision Not in Harmony With the Amended Final Determination in the Less-Than-Fair-Value Investigation; Notice of Amended Final Determination, Amended Antidumping Duty Order; Notice of Revocation of Antidumping Duty Order in Part; and Discontinuation of the 2017–18 and 2018–19 Antidumping Duty Administrative Reviews, in Part*, 85 Fed. Reg. 29399, 29401 (Dep't Com. Mar. 15, 2020).

Goodluck argues that these prior *Timken* notices establish that Commerce's decision not to include such "will not initiate" language also requires that Commerce have afforded Goodluck a later opportunity to file AR. Goodluck asserts that "[t]here is no plausible basis for Commerce to justify initiating AR3 as to Goodluck but not to all of the excluded respondents in the decisions specified above based on the absence of an express 'will not initiate' statement." Pl.'s OAQ Resp. at 3.

or a right[13] to file its AR3 request after reinstatement, *see In re Section 301 Cases*, 570 F. Supp. 3d at 1347, Commerce's action was not unlawful for failure to explain a deviation from agency practice.

3. Commerce Afforded Goodluck Sufficient Due Process

Under the Due Process Clause of the Fifth Amendment, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Int'l Custom Prods., Inc. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)). "[T]he Constitution does not provide a right to import merchandise under a particular classification or rate of duty, or even afford a protectable interest to engage in international trade." *Id.* (internal quotation marks omitted) (quoting *A Classic Time v. United States*, 123 F. 3d 1475, 1476 (Fed. Cir. 1997); *Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir.

It is hard to see why. Commerce's decision not to initiate AR for "all of the excluded respondents in the decisions specified above," as Goodluck puts it, is not directly relevant to the inquiry here. The question on review is whether Commerce was *required* to accept *untimely* AR requests. In seven out of the nine notices above, the Federal Circuit affirmed rather than reversed the CIT's decision; that question simply was not presented. The two decisions that remain are *Ball Bearings* and *Xanthan Gum*. As the court has explained, *see supra* pp. 22–26, those decisions were case-specific exercises of Commerce's procedural discretion.

Moreover, excluding the proceedings here, Commerce has issued at least two *Timken* notices without such "will not initiate" language where it provisionally revoked an antidumping duty order as to certain or all respondents. *See Electroluminescent High Information Content Flat Panel Displays and Display Glass Therefor From Japan; Court Decision and Suspension of Liquidation*, 59 Fed. Reg. 23690, 23691 (Dep't Com. May 6, 1994); *Multilayered Wood Flooring from the People's Republic of China: Notice of Court Decision Not in Harmony With the Second Amended Final Determination and Notice of Third Amended Final Determination of the Antidumping Duty Investigation*, 83 Fed. Reg. 35217, 35217–19 (Dep't Com. July 15, 2018). Where a statute or regulation is not expressly controlling on a procedural question, Commerce's lack of "Procrustean consistency in every case does not deprive it of the authority to enforce those rules in any case." *Stupp*, 5 F.4th at 1351.

Finally, the court notes that Goodluck's challenge is limited to the automatic liquidation order in the *December 2021 Notice*. Goodluck does not challenge Commerce's decision not to include the "will not initiate" language in the *May 2020 Timken Notice* as itself arbitrary and capricious. *See* Compl. ¶¶ 21–28. To the extent Goodluck tries to merge those two distinct challenges in its response to the court's oral argument questions, *see* Pl.'s OAQ Resp. at 3, the latter challenge is insufficiently presented for decision. *See United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived." (citations omitted)).

[13] *See supra* note 9.

1985)). "Nor does the [C]onstitution recognize a right to rely on the maintenance of a duty rate." *Id.* (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933)). But these holdings do "not preclude a protected interest in the proper assessment of tariffs on goods already imported." *Nereida Trading Co., Inc. v. United States*, 34 CIT 241, 248, 683 F. Supp. 3d. 1348, 1355 (2010); *cf. Am. Ass'n of Exporters*, 751 F.2d at 1250 (finding no protected interest where the agency "has not taken from [importers] any merchandise which they have already purchased" but "has merely limited the amounts which the importers can purchase in the future").

Once a cognizable property interest is established, and assuming that civil penalties or monetary sanctions are not at issue, the Due Process Clause generally guarantees only those procedures "set forth in the antidumping statute or in the agency regulations implementing that statute." *Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1039, 981 F. Supp. 630, 652 (1997) (citing *Kemira Fibres Oy v. United States*, 18 CIT 687, 694, 858 F. Supp. 229, 235 (1994)). That said, "[t]he right to due process does not depend on whether statutes and regulations provide what is required by the [C]onstitution." *Royal Brush Mfg., Inc. v. United States*, 75 F.4th 1250, 1260 (Fed. Cir. 2023). For instance, participants in antidumping duty order proceedings are entitled to the "due process right . . . 'to notice and a meaningful opportunity to be heard,'" *PSC VSMP-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)), which may extend beyond Commerce's statutory and regulatory obligations, *cf. Transcom, Inc. v. United States*, 24 CIT 1253, 1272, 121 F. Supp. 2d 690, 708 (2000), *aff'd*, 294 F.3d 1371 (Fed. Cir. 2002) (ultimately finding that the regulation afforded sufficient process). "[N]otice is constitutionally sufficient if it is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Transcom*, 294 F.3d at 1380 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). And the opportunity to be heard must be afforded "at a meaningful time and in a meaningful manner." *Royal Brush Mfg., Inc. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1294, 1306 (2020) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

As a threshold matter, Goodluck has a protected property interest in the proper assessment of antidumping duties on its AR3 entries. Goodluck challenges Commerce's treatment of its exports entered during the AR3 POR, from June 1, 2020, through May 31, 2021. *See Antidumping or Countervailing Duty Order, Finding, or Suspended*

Investigation; Opportunity to Request Administrative Review, 86 Fed. Reg. at 29241. Goodluck's opportunity to request AR3 began on June 1, 2021, which was after the POR. *See id.* Because Goodluck's goods have already been imported, due process protections attach to Commerce's actions in evaluating AR3. *See Nereida Trading*, 34 CIT at 248, 683 F. Supp. 3d. at 1355; *cf. Am. Ass'n of Exporters*, 751 F.2d at 1250.

Commerce afforded Goodluck sufficient due process. This is not a case where "[n]either the statute nor Commerce's regulations gave any hint that [Commerce's decided-upon procedure] would be used." *Transcom, Inc. v. United States*, 182 F.3d 876, 881 (Fed. Cir. 1999). Commerce met its regulatory and statutory obligations of notice here. Most importantly, Goodluck's right to request AR3 in June 2021 was noticed through public regulation. *See* 19 C.F.R. 351.213(b)(2). As explained above, it was clear, ex ante, that the right to request AR was not unavailable or otherwise postponed. The text of the *May 2020 Timken Notice*, the *AR1 Preliminary Determination*, and the *AR2 Initiation Notice* all indicated that Goodluck's exclusion related to only those entries produced *and* exported by Goodluck, leaving it "covered by" the *Final Determination*; and the right to request AR was expressly limited to "during the anniversary month." *See supra* pp. 19–21. To the extent that Commerce had any statutory or regulatory obligation to afford notice and the opportunity to be heard, Commerce did so here. Goodluck, by contrast, that did not avail itself of that option.

Second, Goodluck has not shown that additional process, beyond the statutory and regulatory requirements here, was due after the original order was reinstated in the *December 2021 Notice*. From the *May 2020 Timken Notice* onward, Goodluck was aware of the possibility of reinstatement pending Federal Circuit review. 85 Fed. Reg. at 31743 (suspending liquidation "during the pendency of the appeals process"). Commerce further caveated that the provisional zero percent rate may not prevail by stating that "[i]n the event that CIT's ruling is not appealed, or if appealed and upheld by the [Federal Circuit], Commerce will instruct [Customs] to terminate the suspension of liquidation and to liquidate entries produced and exported by Goodluck without regard to antidumping duties." *Id.* Goodluck was also a party to the ongoing Federal Circuit litigation, so it had actual notice that an ultimate disposition could impact the assessment of duties. Commerce's notice, which "apprise[d] interested parties of the pendency of the action," was therefore constitutionally sufficient. *Transcom*, 294 F.3d at 1380 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Furthermore, Goodluck

itself—in its AR2 request, which was filed after the *May 2020 Timken Notice* and covered a POR that encompassed in part the three weeks following the *May 2020 Timken Notice*—stated that "although the [*Timken*] notice effectively revoked the Order with respect to Goodluck, it also continues to suspend entries from Goodluck pending any appeals. As such, we are requesting this review in order *to preserve the review* of Goodluck's entries." AR2 Request Letter at 2 n.2 (emphasis added). In short, Goodluck filed an AR2 request with the stated intention of preserving Commerce's review but did not do so for AR3.[14] That action, in addition to Commerce's *May 2020 Timken Notice*, indicates that 19 C.F.R. 351.213(b)(2) gave Goodluck the opportunity to be heard "at a meaningful time and in a meaningful manner." *Royal Brush*, 483 F. Supp. 3d at 1306 (quoting *Mathews*, 424 U.S. at 333). Goodluck simply did not avail itself of that opportunity. Where reinstatement following Federal Circuit review was a well-noticed possibility, Goodluck's failure to request AR3 does not entitle it to additional process after the *December 2021 Notice*.

That conclusion also forecloses Goodluck's challenge to the January 2022 Memorandum, wherein Goodluck requested changes to the *December 2021 Notice* and Commerce declined because Goodluck's revisions were not ministerial in nature. *See supra* pp. 11–12. Goodluck argues that "[i]t is entirely disingenuous for Commerce to treat Goodluck's challenge to the *December 2021 . . . Notice* as a ministerial error allegation without having previously afforded Goodluck an opportunity to make substantive arguments"; the regulation on ministerial revisions, 19 C.F.R. § 351.224, "presupposes that interested parties have already had the opportunity to make substantive arguments." Pl.'s Br. at 33. But as explained above, Goodluck had constitutionally sufficient notice and opportunity to make substantive arguments during the AR3 anniversary month. Commerce was well within its discretion to treat the *December 2021 Request* as an "amended final determination" of a less-than-fair-value investigation and, in turn, to review Goodluck's objections under a permissible procedural mecha-

[14] Goodluck argues that this was a "conservative action" that should not be "twist[ed]" into suggesting that "Goodluck deliberately forfeited all rights to contest liquidation at the 33.70% AFA ADD rate." Pl.'s Reply at 8. It notes that it had filed the AR2 request because most of the covered entries had entered with cash deposits at the 33.7 percent rate (because those entries preceded the *Timken* notice). *See id.* But the court's inquiry is whether Commerce's procedure was unlawful, not whether Goodluck's conduct was reasonable. Moreover, it is hard to distinguish why, on a principled basis, Goodluck can engage in the use of AR requests as a method of preserving rights and still challenge Commerce's position that Goodluck preserve all of its rights during all AR anniversary months.

nism. *See* 19 C.F.R. § 351.224(c) (allowing parties to "submit comments concerning any ministerial error" in "disclosed calculations performed in connection with a final determination or the final results of a review").

Ultimately, much confusion arises from the lack of express statutory or regulatory guidance in this case. But the standard of review is nonetheless exacting and straightforward. Unless Commerce's instruction in the *December 2021 Notice* either runs afoul of constitutional, statutory, or regulatory guardrails, or is otherwise arbitrary and capricious, Commerce's choice of procedure is not an abuse of discretion. *See Stupp*, 5 F.4th at 1350–51. And because Commerce's actions here did not run afoul of either 19 C.F.R. § 351.213, prior agency practice, or the Due Process Clause of the Fifth Amendment, Commerce's instruction to automatically liquidate the AR3 entries in the December 2021 Notice was lawful.

B. Commerce's Instructions to Liquidate the AR3 Entries at 33.7 Percent, Rather Than a Zero Percent Rate, Was Lawful

In its second tier of argument, Goodluck contends that 19 C.F.R. § 351.212(c) required automatic liquidation of Goodluck's AR3 entries at a zero percent AD duty rate. Pl.'s Br. at 25–30. Recall that if Commerce does not receive a timely AR request, it instructs Customs, "without additional notice," to (1) assess duties at "rates equal to the cash deposit of . . . estimated antidumping duties . . . required on that merchandise at the time of entry" and (2) continue to collect cash deposits at the existing rate. 19 C.F.R. § 351.212(c)(1). Goodluck's argument is, in turn, relatively straightforward. Because the "estimated antidumping duties . . . at the time of entry" during the AR3 POR was zero percent, Commerce should have instructed Customs to automatically liquidate the AR3 entries at zero percent. *See* Pl.'s Br. at 26.

The court uses "the same interpretive rules to construe regulations as [it] do[es] statutes; [it] consider[s] the plain language of the regulation, the common meaning of the terms, and the text of the regulation both as a whole and in the context of its surrounding sections." *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017). The threshold question in interpreting regulations is whether, after "resort[ing] to all the standard tools of interpretation," the regulation is genuinely ambiguous. *Kisor*, 139 S. Ct. at 2414. "If the regulatory language is clear and unambiguous, no further inquiry is usually required." *Aqua Prods.*, 872 F.3d at 1316. But if the language at issue is ambiguous, then Commerce's reasonable interpretation may be

entitled to deference if it otherwise meets the high bar of *Kisor*. *See* 139 S. Ct. at 2414–18.

Goodluck relies on the plain meaning of "at the time of entry" to contend that the zero percent rate was the appropriate cash deposit rate. *See* Pl.'s Br. at 26. But that reading of § 351.212 brings it in conflict with the statute governing judicial review of antidumping duty orders. Recall that the statute requires that relevant merchandise "be liquidated in accordance with the final court decision" in an action. 19 U.S.C. § 1516a(e). Interpreting that provision, the Federal Circuit has clearly held that once a *Timken* notice is issued, liquidation is suspended so that "*subsequent* entries can be liquidated *in accordance with* that conclusive decision." 893 F.2d at 342 (emphasis added). Moreover, the Federal Circuit in *Goodluck III* determined that the original 33.7 percent was lawful and reversed the CIT's prior decision sustaining a zero percent rate. To grant Goodluck's request now would authorize liquidation for entries subsequent to the *May 2020 Timken Notice* at a rate that is not in accordance with a final decision. That not only would defy the final decision, *see* 19 U.S.C. § 1516a(e); *cf. Andaman Seafood*, 34 CIT at 134, 675 F. Supp. 2d at 1369 ("[A]n invalid antidumping determination [cannot] serve as a legal basis for the imposition of antidumping duties."), but also would give rise to the undesirable "yo-yo" or "flipflop" effect that the *Timken* court discouraged, 893 F.2d at 342. Under Goodluck's proposed reading, merchandise entered during the AR3 POR would have arbitrarily benefitted from a provisional period in judicial review, and—assuming as a hypothetical that no other AR request was filed—all other entries would have been liquidated pursuant to a final court decision requiring a different duty rate. Goodluck's singular focus on the automatic liquidation instructions of 19 C.F.R. § 351.212(c) is therefore inconsistent with Commerce's obligations flowing from 19 U.S.C. § 1516a(e). To the extent that Goodluck's reading of Commerce's regulation compels liquidation at the time of entry notwithstanding a *Timken* notice, it conflicts with the antidumping statute. And when a regulation and statute come into conflict, the statute must prevail. *See Norman v. United States*, 942 F.3d 1111, 1118 (Fed. Cir. 2019); *cf. King v. Burwell*, 576 U.S. 473, 497 (2015) ("In this instance, the [statutory] context and structure . . . compel[s] us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.").

Goodluck relies heavily on this court's decision in *Mittal Canada, Inc. v. United States* to support its interpretation. *See* 30 CIT 1565, 461 F. Supp. 2d 1325 (2006); *see also* Pl.'s Br. at 28–30. In that case, exporter Ispat Sidbec Inc. was in 2002 assigned a 3.86 percent cash deposit rate in the antidumping duty order in steel wire rod from Canada. *Id.* at 1566, 461 F. Supp. 2d at 1327. The company subsequently changed its name to Mittal Canada, Inc. ("Mittal"). *Id.* Since Mittal did not have its own rate, Customs required that Mittal make cash deposits at the "all others" rate of 8.11 percent rate. *Id.* Mittal requested a changed circumstances review ("CCR") to recognize its successor-in-interest status, which Commerce granted in July 2005 for all future entries. *See id.* at 155–56. Commerce then instructed Customs to assess duties at the cash deposit rate in effect at the time of entry for all merchandise that had entered between October 1, 2004, and September 30, 2005; those entries preceding Commerce's CCR determination were liquidated at the 8.11 percent "all others" rate in effect at the time, pursuant to 19 C.F.R. § 351.212(c). Among other challenges, Mittal argued that liquidation at the 8.11 percent rate was proper because subsection (a) of the same regulation requires liquidation at the rate "*applicable* at the time the merchandise was entered," 19 C.F.R. § 351.212(a) (emphasis added), which would be the rate that Commerce determined was proper after the CCR. *See Mittal Canada*, 30 CIT at 1575, 461 F. Supp. 2d at 1335. The court rejected that interpretation:

> Mittal's interpretation of "applicable at the time merchandise was entered" would gloss over the regulation's obvious temporality. In this case, the rate "applicable at the time the merchandise was entered" must be the "all others" cash deposit rate of 8.11 percent for one simple reason: at the time of entry, it was impossible for Commerce to know that the former Ispat was operating as Mittal, and that Mittal entries were potentially entitled to a lower rate. . . . By introducing the backward-looking language, the regulation links the assessment rate to Commerce's "state of mind," or the allocation of information, at the moment of entry. Mittal's interpretation amounts to reading the regulation as referring to "the rate applicable at the time of entry, as determined by a later review"; such an interpretation is nearly unintelligible, and in no way could such a reading be countenanced as required by the statute. Instead, the rate "applicable at the time merchandise was entered" is the rate that a correct application of the U.S. antidumping laws and regulations would yield at the moment of entry. It would be absurd to

> hold Commerce to a standard of omniscience such that the rate "applicable at the time merchandise was entered" refers to the correct rate in light of information that was not in Commerce's possession.

Id. at 1575–76, 461 F. Supp. 2d at 1335. Goodluck urges the court to adopt the same reasoning here. Per Goodluck, applying the 33.7 percent rate—which was finalized after the merchandise was entered in the *December 2021 Notice*—would impermissibly "gloss over the regulation's obvious temporality" and adopt a reading of "applicable" that the *Mittal* court already rejected. *See* Pl.'s Br. at 30.

But *Mittal* does not compel a different outcome here. Whereas the basis for changing the rate in that case was a subsequent CCR determination by Commerce, the basis for changing the rate here was noticed well in advance. Of course, before the AR3 POR even began, Commerce had issued the *May 2020 Timken Notice* indicating that liquidation was suspended pending a decision by the Federal Circuit. Goodluck's cash deposit rate at the time of the AR3 entries was only provisionally, not conclusively, set to zero percent. In turn, it could hardly be said that either Commerce or Goodluck was being held "to a standard of omniscience" for "information that was not in Commerce's possession." *Mittal*, 30 CIT at 1575–76, 461 F. Supp. 2d at 1335. Indeed, "the regulation links the assessment rate to Commerce's 'state of mind,' or the allocation of information, at the moment of entry." *Id.* And what was Commerce's "state of mind" or allocation of information at the moment of entry for the AR3 merchandise? That Goodluck's suspension of liquidation and zero percent cash deposit rate was subject to "the pendency of the appeals process." *May 2020 Timken Notice*, 85 Fed. Reg. at 31743.

In short, although the later-vacated zero percent rate existed "at the time merchandise was entered," it was merely provisional. 19 C.F.R. § 351.212(c). The statutory scheme establishing judicial review of antidumping duty orders, as further interpreted by the Federal Circuit in *Timken*, required Commerce to order automatic liquidation at 33.7 percent. To the extent that Goodluck urges the court to adopt a more expansive reading of "duties . . . at the time of entry" to undermine effective judicial review, the court declines to do so in

order to prevent such a conflict with the statute. *See* 19 C.F.R. § 351.212(c); *cf. Norman*, 942 F.3d at 1118.[15]

II. If Erroneous, Commerce's Selection of the Effective Date for Goodluck's Cash Deposit Rate Is Harmless Error

The second aspect of the *December 2021 Notice* at issue is Commerce's designation of September 10, 2021, as the effective date for cash deposits. Commerce stated in relevant part:

> Commerce will issue revised cash deposit instructions to [Customs]. Effective September 10, 2021, Goodluck's cash deposit rate will be 33.70 percent.

86 Fed. Reg. at 74070. Commerce did not provide any further explanation for its decision. Goodluck argues that the appropriate cash deposit dates should have been December 29, 2021, or alternatively November 28, 2021; at the very least, Commerce's failure to explain the cash deposit date of September 10, 2021, was arbitrary and capricious. *See* Pl.'s Br. at 38–41.

While Commerce enjoys discretion in matters of antidumping duty administration and procedure, *see Shanxi Hairui Trade Co. v. United States*, 39 F.4th 1357, 1361 (Fed. Cir. 2022); *Goodluck III*, 11 F.4th at 1344, its actions must be accompanied by "a satisfactory explanation for its action[s]," *see State Farm*, 463 U.S. at 29, or otherwise be reasonably discernible to the reviewing court, *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *State Farm*, 463 U.S. at 43 (1983)). Moreover, when reviewing administrative action under the APA, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706; *see also Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings.").

Commerce has initiated a fourth AR with respect to Goodluck that covers the period from June 1, 2021, through May 31, 2022. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 Fed. Reg. 48459, 48462 (Dep't Com. Aug. 9, 2022). Goodluck was recently preliminarily assigned a 0.58 percent antidumping duty rate in the ongoing AR4, and Goodluck's AR4 entries are sus-

[15] The court also notes that subsection (a) of the regulation states that "[i]f a review is not requested, duties are assessed at . . . the cash deposit rate *applicable* at the time merchandise was entered." 19 C.F.R. § 351.212(a) (emphasis added). And "when interpreting statutes or regulations, '[t]he plain meaning that [the court] seek[s] to discern is the plain meaning of the whole statute [or regulation], not of isolated sentences.'" *Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1327 (Fed. Cir. 2020) (quoting *Beecham v. United States*, 511 U.S. 368, 372 (1994)). That said, because the parties did not raise the language in subsection (a), the court does not reach that argument. *See Great Am. Ins. Co.*, 738 F.3d at 1328.

pended pending the final determination of the AR. *See Preliminary Results of Antidumping Duty Administrative Review; 2021–2022*, 88 Fed. Reg. 43295, 43296 (July 7, 2023). Commerce is expected to issue a final determination in AR4 on November 21, 2023. *See* Mem. from A. Cherry to S. Fullerton, re: Extension of Deadline for the Final Results of Antidumping Duty Administrative Review at 2 (Dep't Com. Oct. 26, 2023), ACCESS No. 4453990–01.

Goodluck argues that it remains prejudiced by Commerce's choice of a September 2021 effective date, but an error regarding that cash deposit date would be harmless. *See* Pl.'s OAQ Resp. at 16–17. Once the final AR4 rate is published, Goodluck's cash deposits will either be returned (if the final rate is below 33.7 percent) or count toward the higher rate (if the final rate is above 33.7 percent), *see* 19 U.S.C. § 1673f(b); *Diamond Sawblades*, 626 F.3d at 1380, together with interest as provided by 19 U.S.C. § 1677g. All of the dates in dispute—September 2021, November 2021, or December 2021—fall within the AR4 POR from June 1, 2021, through May 31, 2022. In short, whether the cash deposit date is set in September 2021 (as Commerce has done) or December 2021 (as Goodluck prefers most), Goodluck will be subject to Commerce's AR4 rate, and its cash deposits will be balanced with its AR4 duties.

Goodluck also notes that the lack of access to a greater amount of funds, "tied up in unlawful [antidumping duty] cash deposits," is a source of continuing prejudice. Pl.'s OAQ Resp. at 17. But "prejudice . . . means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo*, 83 F.3d at 396. There is no indication that Goodluck's access to funds already deposited as estimated antidumping duties, when it is certain that those funds will be either returned or balanced, is a cognizable interest under the antidumping statutory scheme. *See* 19 U.S.C. §§ 1673b(d), 1673d(c)(1)(B)(ii), 1673e(a), 1675, 1673f(b)(2), 1677g; *see also Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1384 (Fed. Cir. 2017) (finding prejudice where "[t]here is considerable uncertainty as to the effect of th[e] failure"); *cf. Diamond Sawblades Mfrs.' Coal. v. United States*, 39 CIT __, __, 2015 WL 4978726, at *16 (Aug. 20, 2015) ("[A]ny interested private party would only be inconvenienced by a delay in liquidation. If any refunds of duties are ultimately owed to private parties, they will receive the amounts with interest, thereby compensating for any delay." (citation omitted)).[16] Accordingly, be-

[16] Goodluck does not otherwise state that it should have been compensated at a pre-liquidation interest rate higher than that afforded by 19 U.S.C. § 1677g, nor would that appear to be a cognizable interest under the antidumping statutory scheme.

cause any error regarding the cash deposit rate would not be, in this case, "prejudicial to the party seeking to have the action declared invalid," remand is not appropriate. *Intercargo*, 83 F.3d at 394; *see also Vermont Yankee*, 435 U.S. at 558 ("Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute . . . .").[17]

CONCLUSION

The court concludes that because Commerce's exercise of procedural discretion in this case did not contravene 19 C.F.R. § 351.213, prior agency practice, or the Due Process Clause of the Fifth Amendment, Commerce's instruction to automatically liquidate the AR3 entries without offering a later opportunity to file an AR request in the *December 2021 Notice* was lawful. Moreover, Commerce's instruction to automatically liquidate at the 33.7 percent rate, rather than the zero percent rate, was consistent with the plain text of 19 C.F.R. § 351.212(c) and the statutory scheme establishing the judicial review of antidumping duty orders. Finally, Commerce's selection of the effective date for cash deposits in the *December 2021 Notice* is, if in error, harmless in light of the forthcoming AR4 final results.

Judgment on the agency record will accordingly enter for Commerce.

SO ORDERED.

Dated: November 21, 2023
New York, New York

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

[17] Goodluck also argues that Commerce failed to afford Goodluck sufficient process regarding the effective date. *See* Pl.'s Br. at 41. But the court need not reach that argument because "any due process violation was harmless," and any additional notice or opportunity to be heard would have no effect on the fact that the final AR4 rate will soon govern. *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 303 & n.4 (2007). Moreover, the alleged due process violation here is distinguished from *Royal Brush*, where the due process violation was premised on the "denial of access to new and material information upon which an agency relied." 75 F.4th at 1262 (concluding that no additional showing of prejudice was required).

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

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

ACTION: Committee management; Notice of Open Federal advisory committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, December 13, 2023, in Washington, DC. The meeting will be open for the public to attend in person or via webinar. The in-person capacity is limited to 75 persons for public attendees.

DATES: The COAC will meet on Wednesday, December 13, 2023, from 1:00 p.m. to 5:00 p.m. EST. Please note that the meeting may close early if the committee has completed its business. Registration to attend and comments must be submitted no later than December 8, 2023.

ADDRESSES: The meeting will be held at the CBP Office of Training and Development, 1717 H Street NW, Washington, DC 20229—Classroom 7300A. For virtual participants, the webinar link and conference number will be posted by 5:00 p.m. EST on December 12, 2023, at *https://www.cbp.gov/trade/stakeholder-engagement/coac.* For information or to request special assistance for the meeting, contact Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440, as soon as possible.

Comments may be submitted by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Search for Docket Number USCBP–2023–0029. To submit a comment, click the "Comment" button located on the top-left hand side of the docket page.

• *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2023–0029 in the subject line of the message.

Comments must be submitted in writing no later than December 8, 2023, and must be identified by Docket No. USCBP–2023–0029. All submissions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov.* Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice, which is available via a link on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, Title 5 U.S.C., ch. 10. The Commercial Customs Operations Advisory Committee (COAC) provides advice to the Secretary of the Department of Homeland Security, the Secretary of the Department of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

Pre-Registration: Meeting participants may attend either in person or via webinar. All participants who plan to participate in person must register using the method indicated below:

For members of the public who plan to participate in person, please register online at *https://cbptradeevents.certain.com/profile/15391* by 5:00 p.m. EST on December 11, 2023. For members of the public who are pre-registered to attend the meeting in person and later need to cancel, please do so by 5:00 p.m. EST on December 11, 2023, utilizing the following link: *https://cbptradeevents.certain.com/profile/15391.*

For members of the public who plan to participate via webinar, the webinar link and conference number will be posted by 5:00 p.m. EST on December 12, 2023, at *https://www.cbp.gov/trade/stakeholder-engagement/coac.*

The COAC is committed to ensuring that all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Mrs. Latoria Martin at (202) 344–1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the AGENDA section below.

There will be a public comment period after each subcommittee update during the meeting on December 13, 2023. Speakers are requested to limit their comments to two minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is

posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

Agenda

The COAC will hear from the current subcommittees on the topics listed below:

1. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups as well as present proposed recommendations for COAC's consideration. The Antidumping/Countervailing Duty (AD/ CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. The Bond Working Group will report on the ongoing discussions and status updates for eBond requirements and new guidance that CBP is developing for the trade community on setting bond amounts. The Intellectual Property Rights (IPR) Process Modernization Working Group will report on the development of a portal on the CBP IPR web page and other enhancements in communications between CBP, rights holders, and the trade community regarding enforcement actions, and anticipates providing proposed recommendations for the committee's consideration regarding these matters. The Forced Labor Working Group (FLWG) will report on the progress of the implementation of prior recommendations made by COAC and anticipates providing new proposed recommendations for the committee's consideration.

2. The Next Generation Facilitation Subcommittee will provide updates on its working groups. The Passenger Air Operations (PAO) Working Group continues focusing its discussions on CBP security seal processing (E-seals and badges), elimination of outdated or obsolete forms, and global entry/trusted traveler programs and will provide an update on those discussions. The Customs Interagency Industry Working Group (CII) continues to work on identifying data redundancies to improve efficiencies for the government and the trade. Although the Automated Commercial Environment (ACE) 2.0 Working Group has been on hiatus, they plan to meet during the quarter to have an internal review and will provide an update on ACE 2.0 and the remaining business case scenario status.

3. The Rapid Response Subcommittee will provide updates from the Broker Modernization Working Group and the United States-Mexico-Canada Agreement (USMCA) Chapter 7 Working Group. The Broker Modernization Working Group meets regularly and continues to focus on Continuing Education for Licensed Customs Brokers and the Customs Broker Licensing Exams. The USMCA Working Group meets bi-weekly with the expectation that proposed recommendations will be developed and submitted for consideration at the COAC public

meeting. The current focus of this working group is to review the Chapter 7 articles of the USMCA and identify gaps in implementation between the United States, Mexico, and Canada.

4. The Secure Trade Lanes Subcommittee will provide updates on its six active working groups: the Export Modernization Working Group, the In-Bond Working Group, the Trade Partnership and Engagement Working Group, the Pipeline Working Group, the Cross-Border Recognition Working Group, and the De Minimis Working Group. The Export Modernization Working Group has continued its work on the electronic export manifest pilot program and recently brought in colleagues from the Canadian Border Services Agency to discuss required data elements. The In-Bond Working Group has continued its focus on the implementation of prior recommendations made by COAC. The Trade Partnership and Engagement Working Group has begun its work on the elements of the Customs Trade Partnership Against Terrorism (CTPAT) security program. The Pipeline Working Group has been discussing the most appropriate "next step" commodities and potential users of Distributed Ledger Technology to engage once the pilot for tracking pipeline-borne goods deploys. The Cross-Border Recognition Working Group began to meet again to develop tasks specific to its statement of work. The De Minimis Working Group has continued its work on strengthening the supply chain and mitigating risks in the low-value package environment.

Meeting materials will be available on December 4, 2023, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

Dated: November 15, 2023.

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

Index

Customs Bulletin and Decisions
Vol. 57, No. 45, December 6, 2023

U.S. Customs and Border Protection

General Notices

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2023—427-373/30051