U.S. Customs and Border Protection

PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN BEVERAGE DISPENSER MACHINES

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

ACTION: Notice of proposed revocation of one ruling letter, and proposed revocation of treatment relating to the tariff classification of certain beverage dispenser machines.

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

DATE: Comments must be received on or before June 9, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Michael Thompson, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–1917.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of certain beverage dispenser machines. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N047175, dated January 13, 2009 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N047175, CBP classified the subject beverage dispenser machines in heading 8481, HTSUS, and held that the machines were

specifically described by statistical reporting number 8481.80.9050, HTSUS Annotated, which provides for "Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof: Other appliances: Other: Other: Other." CBP has reviewed NY N047175 and has determined the ruling letter to be in error. It is now CBP's position that the subject beverage dispenser machines are properly classified, in heading 8481, HTSUS, and are specifically described by statistical reporting number 8481.80.9005, HTSUS Annotated, which provides for "Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof: Other appliances: Other: Solenoid valves."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N047175 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H317696, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

ATTACHMENT A

N047175

January 13, 2009
CLA-2–84:OT:RR:E:NC:N1:102
CATEGORY: Classification
TARIFF NO.: 8481.80.9050

MS. EUNICE MARTINEZ
NORMAN KRIEGER, INC.
9635 HEINRICH HERTZ DRIVE (SUITE 5–8)
SAN DIEGO, CA 92154

RE: The tariff classification of ice/beverage dispensers from Mexico. Correction to New York ruling N044916

DEAR MS. MARTINEZ:

In your letter dated December 15, 2008 on behalf of McCann's Engineering MFG, you provided additional information regarding articles previously considered in New York ruling N044916, which was issued to your client on December 10, 2008. This ruling replaces New York ruling N044916.

In New York ruling N044916 we considered articles described as drop in ice/beverage dispensers, model numbers DI-1522, DI-2323 and DIL-2323. These free standing dispensers are made of stainless steel and are designed to chill and dispense soda and non-carbonated beverages. The dispensers incorporate mixing valves that allow the components of a beverage to be mixed and ultimately dispensed on demand. They can be found in restaurants, supermarkets and cafeterias.

Based on the information initially provided, we classified the ice/beverage dispensers in heading 8418, Harmonized Tariff Schedule of the United States (HTSUS), which provides for soda fountain and beer dispensing equipment incorporating a refrigeration unit. Refrigeration units of this heading are machines or assemblies of apparatus for the production, in a continuous cycle of operations, of low temperatures at an active cooling element, by the absorption of the latent heat of evaporation of liquefied gases.

The information you have now provided indicates that the ice/beverage dispensers in question do not contain a refrigeration unit, but rather rely on a supply of ice from an external source to chill the dispensed beverages. Without benefit of this information, the ice/beverage dispensers were inadvertently misclassified in NY ruling N044916. Ice-chests, insulated cabinets, etc., not fitted or designed for fitting with refrigerating units are excluded from HTSUS heading 8418.

Because the ice/beverage dispensers are essentially an arrangement of valves specifically designed to mix and/or dispense ice and beverages, and do not incorporate a refrigeration unit, we find that the DI-1522, DI-2323 and DIL-2323 dispensers are properly provided for in HTSUS heading 8481, which provides for taps, cocks, valves and similar appliances.

The applicable subheading for the subject ice/beverage dispensers will be 8481.80.9050, HTSUS, which provides for other taps, cocks, valves and similar appliances. The rate of duty will be 2 percent ad valorem.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Brock at (646) 733–3009.

Sincerely,

ROBERT B. SWIERUPSKI
Director
National Commodity Specialist Division

ATTACHMENT B

HQ H317696
CLA-2 OT:RR:CTF:EMAIN H317696 MFT
CATEGORY: Classification
TARIFF NO.: 8481.80.90

MR. J. SCOTT MABERRY
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 PENNSYLVANIA AVE NW, SUITE 100
WASHINGTON, D.C. 20006–6801

ATTN: Ms. Lisa Mays – Sheppard, Mullin, Richter & Hampton LLP

Re: Modification of NY N047175; Classification of beverage dispenser machines

DEAR MR. MABERRY AND MS. MAYS:

This letter is in response to your request, dated March 29, 2021, and filed on behalf of your client Welbilt, Inc., for the modification of New York Ruling Letter ("NY") N047175, issued on January 13, 2009, in which U.S. Customs and Border Protection (CBP) classified certain beverage dispenser machines under subheading 8481.80.90 of the Harmonized Tariff Schedule of the United States (HTSUS), and statistical reporting number 8481.80.9050, HTSUS Annotated (HTSUSA). You request that CBP reclassify the merchandise at issue under statistical reporting number 8481.80.9005, HTSUSA.

We have reviewed NY N047175 and determined that the ruling is in error. For the reasons set forth below, CBP is revoking NY N047175. In reaching this determination, CBP relied on materials included with your submission, supplemental information you provided on March 2, 2023, and information provided during your meeting with CBP, held on April 6, 2023.

FACTS:

The subject request and NY N047175 concern three models of beverage dispenser machines: Model DI-1522, Model DI-2323, and Model DIL-2323. NY N047175 describes the beverage dispenser machines as "drop-in ice/beverage dispensers" and states:

> These free[-]standing dispensers are made of stainless steel and are designed to chill and dispense soda and non-carbonated beverages. The dispensers incorporate mixing valves that allow the components of a beverage to be mixed and ultimately dispensed on demand. They can be found in restaurants, supermarkets and cafeterias.

It is not disputed that the subject beverage dispenser machines "are essentially an arrangement of valves specifically designed to mix and/or dispense beverages."[1] The beverage dispenser machines incorporate the following valves: solenoid valves that allow the beverages to be dispensed; spring check valves that attach to a tap water inlet, prevent carbon dioxide gas from entering a machine's water supply, and allow the machine to dispense plain water; and relief valves (for machines containing an internal carbonator) that

[1] NY N047175. That ruling further noted that the beverage dispenser machines do not contain a refrigeration unit, but instead rely on a supply of ice from an external source (i.e., a cold plate) to cool the beverages before dispensing. Consequently, "other refrigerating equipment" under heading 8418, HTSUS – including "soda fountain equipment" described in statistical reporting number 8418.69.0130, HTSUSA – are not under consideration.

assist with maintaining pressure within a carbon dioxide tank. The solenoid valves can be actuated using one of the following four methods:

1. Autofill Lever: A customer presses a lever to dispense a beverage. When the beverage contacts the lever, an electrical connection turns off the solenoid valve to prevent the customer's cup from overflowing.

2. Sanitary Lever: A customer presses a lever to dispense a beverage. The lever's shape prevents the lip of the customer's cup from touching the lever, thereby making the lever more sanitary.

3. Push Button (Self-Serve): A customer presses a button on a keypad to dispense a beverage, which actuates the solenoid.

4. Portion Control Button: A customer presses a button on a keypad to dispense a beverage. When the keypad is pressed, an electrical circuit actuates a solenoid with timed response programming. The solenoid valve is programmed to close only after a predetermined portion of a beverage is dispensed. Restaurants and other operators may program the portion control to allow the machine to dispense amounts appropriate for various cup sizes.

The technical process for dispensing a beverage begins when a customer pushes down on a lever or button on a beverage dispenser machine. The lever or button triggers an actuator of a solenoid dispensing valve, which in turn closes the switch of an electrical circuit. The electrical circuit sends 24 Volts of electricity to solenoids controlling the water and syrup lines in the beverage dispenser machines. The electricity causes the solenoids to open valves that allow the water and syrup to enter the flow control portion of the solenoid dispensing valve. The flow control portion of the solenoid dispensing valve is preset such that the resulting mixture contains the correct mix of water and syrup to achieve the specified beverage. As this process is underway, syrup is dispensed from a "bag-in-box" (BIB) syrup carton.

ISSUE:

Whether the subject beverage dispenser machines are properly described under statistical reporting number 8481.80.9005, HTSUSA, as solenoid valves, or under statistical reporting number 8481.80.9050, HTSUSA, as other valves.

LAW AND ANALYSIS:

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

The HTSUS headings and subheadings under consideration are as follows:

8481	Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof:
8481.80	Other appliances:
8481.80.90	Other:
8481.80.9005	Solenoid valves
	* * *
	Other:
8481.80.9050	Other

Note 3 to Section XVI, HTSUS, provides as follows:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

> Note 5 to Section XVI, HTSUS, defines the expression "machine" as "any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of chapter 84 or 85."

It is not disputed that the subject beverage dispenser machines consist of "an arrangement of valves." Heading 8481, HTSUS, provides for "valves," and is thus an appropriate heading for the beverage dispenser machines under GRI 1. As such, this matter is governed by GRI 6, which provides as follows:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Given that the subject merchandise consists of multiple valves that are fitted together to form a whole, the beverage dispenser machines constitute "composite machines" under Note 3 to Section XVI via GRI 6. As such, the subject beverage dispenser machines must be classified as if consisting only of that component, or as being that machine, which performs the principal function.

To be properly classified under statistical reporting number 8481.80.9005, HTSUSA, Note 3 to Section XVI requires that the solenoid valves perform the principal function of the beverage dispenser machines. The principal function of these beverage dispenser machines is to mix and dispense ice and beverages, and we find that the solenoid valves are the components that perform this function. The solenoid valves control the water and syrup lines in the beverage dispensing machines, and their actuation by a customer directly causes the machine to release the beverages. No matter which method a customer uses to dispense a beverage – be it the autofill, sanitary lever, push button, or portion control method – the customer will inevitably interact with the actuator of the solenoid valve, which in turn will open valves releasing water and syrup. To be sure, other valves are present in the beverage dis-

penser machines and play important functions, such as preventing carbon dioxide from mixing with tap water and regulating pressure in a carbon dioxide tank. But these functions are secondary to the principal function of dispensing beverages, a function that the solenoid valves directly perform. Thus, statistical reporting number 8481.80.9050, HTSUSA, is inapposite.

Because the solenoid valves perform this principal function, we find that the beverage dispenser machines are to be classified as if consisting of solenoid valves, as described in statistical reporting number 8481.80.9005, HTSUSA.

HOLDING:

By application of GRIs 1 (Note 3 to Section XVI) and 6, HTSUS, the subject beverage dispenser machines are classified under heading 8481, HTSUS, specifically under statistical reporting number 8481.80.9005, HTSUSA, which provides for, Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof: Other appliances: Other: Solenoid valves." The general column one rate of duty is 2% ad valorem.

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

EFFECT ON OTHER RULINGS:

NY N047175, dated January 13, 2009, 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

PROPOSED MODIFICATION OF ONE RULING LETTER AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A TRANSDUCER ARRAY

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

ACTION: Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of a transducer array.

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

DATE: Comments must be received on or before June 9, 2023.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Monique Moore, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Uzma Bishop-Burney, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–3782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of a transducer array. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N319324, dated May 25, 2021 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N319324, CBP classified a transducer array in heading 8543, HTSUS, specifically in subheading 8543.70.45, HTSUS, which provides for "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric

resistors for aircraft: Other." CBP also provided a secondary classification for the transducer array in heading 9817, HTSUS, specifically in subheading 9817.00.96, HTSUS, which applies to articles and parts specifically designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped. CBP has reviewed NY N319324 and has determined the ruling letter to be in error with respect to the secondary classification under 9817.00.96, HTSUS. It is now CBP's position that transducer array is not eligible to be classified in subheading 9817.00.96, HTSUS.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N319324 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H330926, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N319324

May 25, 2021
CLA-2–85:OT:RR:NC:N2:212
CATEGORY: Classification
TARIFF NO.: 8543.70.4500; 9817.00.96

JUAN MORENO
ZISSER CUSTOMS LAW GROUP
9355 AIRWAY ROAD
SAN DIEGO, CA 92154

RE: The tariff classification of transducer arrays from Israel

DEAR MR. MORENO:

In your letter dated May 7, 2021, you requested a tariff classification ruling on behalf of your client, Providien Device Assembly, LLC.

The merchandise under consideration is described as a transducer array used as a part of the Novocure Therapy Delivery System. The subject array consists of multiple interconnected electrical transducers designed to be adhered directly to the head or other area where an individual has been diagnosed with cancer. When connected to the electrical field generator within the system, the transducer arrays create an alternating electrical field that attracts and repels charged proteins during cancer cell division. We note that the transducers do not electrically stimulate nerves or muscles, nor do they heat tissue.

You state that the system, within which the transducer arrays are incorporated, is portable and allows the user to go about their day to day lives while getting treatment for their disease. The introduction of the electrical field effectively inhibits tumor growth, potentially killing existing tumors.

The applicable subheading for the transducer arrays will be 8543.70.4500, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric resistors for aircraft: Other." The general rate of duty will be 2.6% ad valorem.

In your submission, you request consideration of a secondary classification for the subject arrays under subheading 9817.00.96, HTSUS, which applies to articles and parts specifically designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped. Chapter 98, Subchapter XVII, U.S. Note 4(a), HTSUS, defines the term "blind or other physically or mentally handicapped persons" as including "any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking breathing, learning, or working."

You state that the arrays are specifically designed for use with the Novocure Therapy Deliver System. Based on the information provided, this system is intended for use by individuals who suffer from cancer, a disease that can cause chronic pain and substantial limitations to an individual's life activities. It is the opinion of this office that the diseases treated by the therapy delivery system satisfy the description set forth in Chapter 98, Subchapter XVII, U.S. Note 4(a). As such, a secondary classification will

apply to the transducer arrays under 9817.00.96, HTSUS, which affords free duty treatment aside from any additional duties and/or applicable fees upon importation into the United States.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Luke LePage at luke.lepage@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H330926
OT:RR:CTF:VS HQ H330926 UBB
CATEGORY: Classification

STEVE ZISSER
ZISSER CUSTOMS LAW GROUP, STE 1
9355 AIRWAY ROAD
SAN DIEGO, CA 92154

RE: Articles for the handicapped; Subheading 9817.00.96; Transducer arrays

DEAR MR. ZISSER,

This is in reference to one ruling letter issued to your law firm on behalf of your client, Providien Device Assembly, LLC, concerning the tariff classification of a transducer array under the Harmonized Tariff Schedule of the United States ("HTSUS"). Specifically, in New York Ruling Letter ("NY") N319324, dated May 25, 2021, the merchandise was determined to be eligible for subheading 9817.00.96, HTSUS, treatment as an article for the handicapped.

We have reviewed the ruling and find it to be in error regarding the applicability of subheading 9817.00.96, HTSUS, which provides for "articles for the handicapped." For the reasons set forth below, we are modifying the ruling with respect to the classification under 9817.00.96, HTSUS.

FACTS:

NY N319324 addresses the tariff classification of a transducer array used as a part of the Novocure Therapy Delivery System. The ruling describes the array as multiple interconnected electrical transducers designed to be adhered directly to the head or other area where an individual has been diagnosed with cancer. The ruling states that while connected to the electrical field generator within the system, the transducer arrays create an alternating field that attracts and repels charged proteins during cancer cell division. The transducers do not electrically stimulate nerves or muscles, and they do not heat tissue. The ruling further states that the Novocure system (within which the transducers are incorporated) is portable and allows the user to go about their day-to-day life while getting treatment for their disease. The introduction of the electrical field effectively inhibits tumor growth, potentially killing existing tumors. According to the ruling, in your ruling request you had noted that the arrays are specifically designed for use with the Novocure Therapy Delivery System, and that the system was intended for use by individuals who suffer from cancer, a disease that can cause chronic pain and substantial limitations to an individual's life.

NY N319324 classified the transducer arrays under 8543.70.4500, HTSUS, which "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Electric synchros and transducers; flight data recorders; defrosters and demisters with electric resistors for aircraft: Other."

NY N319324 also confirmed a secondary classification for the transducer arrays under subheading 9817.00.96, HTSUS, which applies to articles and parts specially designed or adapted for the use or benefit of the permanently or chronically physically or mentally handicapped. Chapter 98, Subchapter XVII, U.S. Note 4(a), HTSUS, defines the term "blind or other physically or mentally handicapped persons" as including "any person suffering from a permanent or chronic physical or mental impairment which substantially

limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking breathing, learning, or working."

ISSUE:

Whether the transducer arrays are eligible for duty-free treatment under subheading 9817.00.96, HTSUS, as "articles specially designed or adapted for the handicapped."

LAW AND ANALYSIS:

The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials of 1982, Pub. L. No. 97–446, 96 Stat. 2329, 2346 (1983) established the duty-free treatment for certain articles for the handicapped. Presidential Proclamation 5978 and Section 1121 of the Omnibus Trade and Competitiveness Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS.

Subheading 9817.00.96, HTSUS, covers: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other." In *Sigvaris, Inc. v. United States*, 227 F. Supp 3d 1327, 1336 (CIT 2017), *aff'd*, 899 F.3d 1308 (Fed. Cir. 2018), the U.S. Court of International Trade ("CIT") explained that:

> The term "specially" is synonymous with "particularly," which is defined as "to an extent greater than in other cases or towards others." Webster's Third New International Dictionary 1647, 2186 (unabr. 2002). The dictionary definition for "designed" is something that is "done, performed, or made with purpose and intent often despite an appearance of being accidental, spontaneous, or natural." Webster's Third New International Dictionary 612 (unabr. 2002).

Subheading 9817.00.96, HTSUS, excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or, (iv) medicine or drugs." U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS. Thus, eligibility within subheading 9817.00.96, HTSUS, depends on whether the article is "specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons," and whether it falls within any of the enumerated exclusions under U.S. Note 4(b), Subchapter XVII, Chapter 98, HTSUS.

The subject transducer arrays are specially designed for use with the Novocure Therapy Delivery System and are intended for use by individuals who suffer from cancer. While we recognize that cancer can cause chronic pain and substantial limitations to an individual's life activities, we do not agree that it constitutes a permanent or chronic physical or mental impairment, as described by Chapter 98, Subchapter XVII, U.S. Note 4(a), HTSUS. Rather, as a disease that is often treatable, disabilities resulting from the illness fit within the definition of "acute or transient disabilt[ies]," and as such, articles that are designed for acute or transient disability are specifically excluded from Subheading 9817.00.96, HTSUS. U.S. Note 4(b)(i), Subchapter XVII, Chapter 98, HTSUS. Furthermore, materials submitted with

the ruling request note that the Novocure Therapy Delivery System (also referred to as the Tumor Treating Field (TTF) Therapy Delivery System) is specially designed to treat and manage the cancerous tumors, and the description of the operation of the Novocure Therapy Delivery System indicates that it is used to treat the disease. As such, the transducer arrays are also excluded from classification under 9817.00.96 as "therapeutic or diagnostic articles." U.S. Note 4(b)(iii), Subchapter XVII, Chapter 98, HTSUS. Therefore, whether or not the transducer arrays are specially designed or adapted for the use or benefit of the blind or physically and mentally handicapped persons, they are specifically excluded from subheading 9817.00.96, HTSUS, by operation of U.S. Note 4(b)(i) and (iii), Subchapter XVII, Chapter 98, HTSUS.

HOLDING:

The transducer arrays identified in NY N319324 are ineligible for subheading 9817.00.96, HTSUS, which provides for "articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons . . . other."

EFFECT ON OTHER RULINGS:

NY N319324, dated May 25, 2021, is hereby modified to reflect that the transducer arrays identified therein are ineligible for subheading 9817.00.96, HTSUS.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial Trade and Facilitation

PUBLIC MEETING: GREEN TRADE INNOVATION AND INCENTIVES FORUM

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

ACTION: Notice of public meeting; request for presentation proposals and public comments.

SUMMARY: U.S. Customs and Border Protection (CBP) will host a public Green Trade Innovation and Incentives Forum and invites interested parties to participate. CBP is announcing this public meeting to solicit and share ideas related to green trade innovation and incentivization of clean and sustainable supply chains and trade decarbonization. To that end, CBP is collecting public comments in response to this notice to be shared and discussed during the forum, focusing on the following themes: green data as a strategic asset; green trade incentives; and green trade-related research and innovation. CBP is also soliciting proposals from industry volunteers to participate in a Trade Sustainability Leadership Showcase that will be held during the event. This notice provides information on CBP's goals for this public meeting, its commitment to environmental stewardship, and its Green Trade Strategy.

DATES:

Meeting: The Green Trade Innovation and Incentives Forum will be held on Tuesday, July 11, 2023, from 9 a.m. to 5 p.m. EDT.

Pre-registration: Members of the public wishing to attend the meeting, whether in-person or via videoconference, must pre-register as indicated in the **ADDRESSES** section by 5 p.m. EDT, Tuesday, June 20, 2023.

Cancellation of pre-registration: Members of the public who are pre-registered to attend and later need to cancel should do so by 5 p.m. EDT, Tuesday, June 27, 2023. Participants who wish to cancel their pre-registration should email *GreenTradeForum2023@cbp.dhs.gov* to notify CBP of their cancellation.

Showcase presentation proposals: Members of the public who wish to participate in the Trade Sustainability Leadership Showcase must submit a proposal as indicated in the **ADDRESSES** section by 5 p.m. EDT, Monday, May 22, 2023. CBP expects to notify those individuals selected to participate in the Showcase of their selection by Tuesday, June 13, 2023. Showcase participants are expected to attend in-person.

Submission of comments: Members of the public wishing to submit comments in response to the Green Trade Themes, as described in the

SUPPLEMENTARY INFORMATION section, must do so by 5 p.m. EDT, Monday, May 22, 2023, by using one of the methods described in the **ADDRESSES** section. CBP expects to notify those individuals selected to offer comments during the meeting of their selection by Tuesday, June 20, 2023.

ADDRESSES:

Meeting: The Green Trade Innovation and Incentives Forum will be conducted in-person and via videoconference. The in-person meeting will be held at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia 22314. A link to participate via videoconference will be provided to those individuals who pre-register for the virtual attendance option. For information on services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Lea-Ann Bigelow, Office of Trade, U.S. Customs and Border Protection, at *GreenTradeForum2023@cbp.dhs.gov* as soon as possible.

Pre-registration: Meeting participants may attend either in-person or via videoconference after pre-registering using one of the methods indicated below; on-site registration is not permitted.

For members of the public who plan to attend the meeting in-person, please pre-register online at *https://sri-csl.regfox.com/greentradeforum-inperson.*

For members of the public who plan to participate via videoconference, please pre-register online at *https://sri-csl.regfox.com/greentradeforum-virtual.*

Trade Sustainability Leadership Showcase Presentation Proposals: Industry members who wish to be considered for participation in the Trade Sustainability Leadership Showcase should send a presentation proposal no more than five hundred (500) words in length to *GreenTradeForum2023@cbp.dhs.gov.* The proposal should include your name and the name of your organization, a working title for your presentation, and your organization's role in the international trade industry. Please see the **SUPPLEMENTARY INFORMATION** section for more information about additional required contents of the proposal.

Submission of Comments: To facilitate public participation, we are inviting public comment on the three Green Trade Themes described below. In addition to submitting written comments to the docket, participants in the in-person and virtual components of the forum may also be selected for the opportunity to offer a public statement during the meeting. These oral comments are encouraged to stimulate discussion and knowledge sharing among the forum's participants. Please see the **SUPPLEMENTARY INFORMATION** section for more information on the comment themes and submission of

written or oral comments. All comments—whether intended solely for the written docket or for oral presentation during the forum—must be submitted in writing according to the following instructions:

Instructions for Submission of Oral Comments: For those who wish to give a public statement in-person or virtually during the meeting, please send your comments to *GreenTradeForum2023@cbp.dhs.gov,* include the docket number USCBP–2023–0006 in the subject line of the message, indicate your interest in providing oral comment and provide the following information: first and last name; title/position; phone number; email address; name and type of organization; identify the theme to which you wish to speak (each individual will be limited to one public statement on one theme); and provide your comment. CBP will then post your comment on the docket without the personal information. If you wish to give a public statement in-person or virtually during the meeting, please do not send your comments through the Federal eRulemaking Portal, as the identification information is required for CBP to contact you, and all comments sent to the portal will be posted without change. Please do not submit personal information to the Federal eRulemaking portal.

Instructions for Submission of Written-Only Comments: All comments submitted to the docket must include the words "Department of Homeland Security" and the docket number for this action: USCBP–2023–0006. Comments may be submitted by *one* (1) of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.*
- *Email: GreenTradeForum2023@cbp.dhs.gov.* Include the docket number USCBP–2023–0006 in the subject line of the message. CBP will post comments received by email on the docket without change.

Docket: For access to the docket or to read background documents or comments, go to the Federal eRulemaking Portal—*http://www.regulations.gov*—and search for Docket Number USCBP–2023–0006. To submit a comment, click the "Comment" button located on the top-left hand side of the docket page.

FOR FURTHER INFORMATION CONTACT: Ms. Lea-Ann Bigelow, Office of Trade, U.S. Customs and Border Protection, at (202) 863–6000 or at *GreenTradeForum2023@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

CBP Green Trade Strategy Overview

In executing its trade mission, U.S. Customs and Border Protection (CBP) is charged with facilitating legitimate cross-border trade while enforcing U.S. trade laws and keeping the American public safe. This

mission has long encompassed the protection of natural resources and prevention of environmental degradation. Climate change and other environmental challenges are critical considerations for CBP, as it carries out its mission of protecting the American people, safeguarding U.S. borders, and enhancing the nation's economic prosperity. While climate change and other environmental considerations pose significant challenges for CBP's trade mission and the trade participants CBP serves, they also provide new opportunities for innovation and improvement in trade processes, technology and standards, as well as opportunities for enhanced partnerships, collaboration, and knowledge sharing. The United States is pursuing a whole-of-government approach to addressing climate change as articulated in Executive Order 14008 (Jan. 27, 2021).

In recognition of these challenges and opportunities, and its commitment to building a more sustainable future for trade, CBP announced the launch of the CBP Green Trade Strategy at the World Customs Organization (WCO) in Brussels in June 2022. The Green Trade Strategy establishes CBP's vision to build resilience and address environmental and climate-related threats, while capitalizing on opportunities to grow the economy and accelerate innovation in a sustainable way. The Green Trade Strategy aligns with broader Department of Homeland Security (DHS) efforts (such as the DHS Climate Action Plan, which can be found at *www.dhs.gov/dhs-actions-climate-change*) and supports a whole-of-government approach to mitigating risk and seizing opportunities associated with climate change and environmental stewardship. The Green Trade Strategy aims to incentivize green trade, accelerate green innovation, strengthen CBP's environmental enforcement posture, and improve the agency's climate resilience and resource efficiency.

Details of the Strategy can be found at *https://www.cbp.gov/trade/cbp-green-trade-strategy.* Through the Green Trade Strategy, CBP will establish itself as a champion for the green economy and facilitate the global transition to a cleaner, more climate-resilient trading environment. CBP intends to exemplify higher, greener standards for global trade while creating an opportunity for government, industry, and the public to unify efforts in the creation of a more sustainable future.

As we progress further into the 21st century, there is widespread recognition of the challenges that climate change is creating and will continue to create for the international trade community. Recent studies have indicated that global supply chains contribute a significant amount to the world's total carbon emissions. Resource extraction and cultivation methods, production and storage requirements,

the movement of persons and materials, and the transportation of goods represent various points in the supply chain that may generate emissions. Each stage in the supply chain also represents an opportunity for greener, more sustainable practices.

CBP is well positioned to make a positive difference on the path to a cleaner, environmentally-resilient future due to the agency's ability to influence global supply chain practices as well as its ability to enforce against natural resource crimes, but it cannot meet this challenge alone. Greening global supply chains and combatting the negative impacts of climate change and environmental degradation will necessitate innovative partnerships between public and private organizations with a stake in building a more sustainable future for trade.

Agenda

Green Trade Innovation and Incentives Forum

9 a.m.–12 p.m.—Opening Remarks, Keynote Presentations and Trade Sustainability Leadership Showcase

1 p.m.–5 p.m.—Public Statements and Open Public Comment on Green Trade Themes

Trade Sustainability Leadership Showcase

To highlight the various ways that industry organizations within the international trade community are currently leading in their efforts to reduce greenhouse gas emissions, conserve natural resources, and increase overall environmental sustainability within their operations, CBP will be hosting a Trade Sustainability Leadership Showcase during the Green Trade Innovation and Incentives Forum. The Showcase will present an opportunity and platform for selected members of the international trade community to share their successes, best practices, challenges and lessons learned in greening their own operational processes and footprints, as well as discuss the ways they are working with supply chain and other business partners to reduce emissions, protect natural resources, and generate innovative solutions. While the Showcase cannot represent all experiences and perspectives, it is CBP's hope that the sustainability journeys of those organizations featured will inspire further creative thinking, knowledge sharing, and problem solving across the international trade community.

Members of the public who wish to participate in the Trade Sustainability Leadership Showcase should submit a proposal, following

the instructions under the **ADDRESSES** section. The proposal should be no more than five hundred (500) words in length, include your name and the name of your organization, a working title for your presentation, and your organization's role in the international trade industry. The proposal should also provide a summary of how your organization is actively greening its footprint and increasing sustainability of its own supply chain and trade processes, including best practices and lessons learned. CBP will evaluate and select participants and their submissions based upon considerations such as industry experience, sustainability goals and practices, and ability to effectively share their knowledge alongside other panelists, as well as CBP's desire to feature a balanced range of industry perspectives. CBP will notify all individuals selected to participate of their selection by Tuesday, June 13, 2023.

Public Statements and Open Public Comment on Green Trade Themes

Furthermore, CBP invites members of the public to participate through oral and written comments on the themes below. The public may submit written comments to the docket, following the instructions in the **ADDRESSES** section. Members of the public who wish to provide a public statement should likewise follow the instructions under the **ADDRESSES** section. Due to time and content considerations, it is possible that not all persons who express an interest in making a public statement will be able to do so. Speakers will be selected based on time considerations and to ensure that diverse, individual perspectives are highlighted. CBP will select and contact individuals to deliver public statements starting no later than Tuesday, June 20, 2023. Members of the public may submit as many comments as they wish; however, any commenter who is selected to provide an oral public statement during the event will be limited to one statement on one theme, during one timeslot.

CBP has identified three key topics for international trade industry and public input: (1) Green Data as a Strategic Asset; (2) Green Trade Incentives; and (3) Green Trade Research and Innovation. Brief descriptions of each theme are provided in this document along with the request for public comments on questions posed by CBP related to each theme.

(1) Green Data as a Strategic Asset

CBP and industry efforts to reach climate resilience and sustainability goals are anchored on improving decision-making through risk management and greater supply chain visibility. These efforts include not only exploring how to better utilize big data and predictive analytics to drive decision-making, but also the identification of operations-related data and other enterprise, supply chain, and lo-

gistics data that can be applied to optimize business efficiency and—by extension—sustainability.

Public Comment Questions:

- What data have you found useful in greening your trade operations? To what data do you wish you had better access?
- What additional data could CBP potentially provide (in accordance with existing laws) that would most benefit your sustainable decision-making?
- What data or datasets would you like members of the international trade community to be aware of as they continue on their environmental sustainability journeys?

(2) Green Trade Incentives

CBP seeks to develop facilitation benefits and other incentives to promote environmentally-friendly trade practices and supply chains.

Public Comment Questions:

- What are some tangible benefits CBP could provide to trade entities to incentivize their transition to more sustainable trade practices?
- What are the key underlying principles that CBP should follow as we seek to harmonize global green standards?
- What are the major hurdles your organization faces now in pursuing greener practices?

(3) Green Trade Research and Innovation

CBP aims to promote the development and deployment of innovative, sustainable green trade practices and technology by public and private stakeholders to encourage environmentally conscious operations that are informed by cutting-edge research and are able to accommodate on-going changes in global trade.

Public Comment Questions:

- What current opportunities do you see for research and innovation in green trade? How is your organization currently advancing research into green trade topics and/or pursuing innovative technology solutions with the potential to increase the sustainability of global trade flows?
- What specific environmental stewardship and sustainability gaps or issues do you see in the international trade community that could be addressed through investment in emerging technologies, and what are those technologies?
- What challenges do you face in bringing green trade innovation and technology solutions to market or incorporating them on an industry-wide scale?

Dated: April 17, 2023.

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

[Published in the Federal Register, April 21, 2023 (88 FR 24623)]

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING VIDEO SURVEILLANCE AND DATA MANAGEMENT SYSTEM

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of a video surveillance and data management system. Based upon the facts presented, CBP has concluded in the final determination that the imported components of the subject video surveillance and data management system undergo substantial transformation in the United States when made into the final VMS assembly.

DATES: The final determination was issued on April 10, 2023. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within May 26, 2023.

FOR FURTHER INFORMATION CONTACT: Austen Walsh, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0114.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on April 10, 2023, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of a video management and surveillance system for purposes of title III of the Trade Agreements Act of 1979. This final determination, HQ H327997, was issued at the request of Security Lab Inc. ("Security Lab"), under procedures set forth at 19 CFR part 177, subpart B, which implements title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the imported components are substantially transformed in the United States when made into the subject video surveillance and data management system.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: April 21, 2023.

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H327997
April 10, 2023
OT:RR:CTF:VS H327997 AMW
Category: Origin

GENE W. ROSEN, ESQ.,
GENE ROSEN LAW GROUP,
200 GARDEN CITY PLAZA, SUITE 405,
GARDEN CITY, NY 11530

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Security Lab Inc.; Country of Origin of Video Surveillance and Data Management System; Substantial Transformation

DEAR MR. ROSEN:

This is in response to your request of September 21, 2022, on behalf of your client, Security Lab Inc. ("Security Lab"), for a final determination concerning the country of origin of a video management and surveillance system pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). Security Lab is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination.

Facts

Security Lab produces a product described as the "video management and surveillance system" ("VMS"). As outlined in your request, the VMS is a hardware system consisting of a camera array and central computer system designed to conduct and manage video surveillance operations that "is capable of handling up to 64 cameras per server simultaneously and can be used to power hundreds of servers within a single, centrally administered system. . . ."

The VMS comprises foreign-origin components that are assembled in the United States to create hardware that is then combined with U.S.-origin software, including the Security Lab Application Software and Microsoft Windows. The hardware components consist of the following items:

- Chassis (product of Taiwan)
- Partially completed motherboard (product of China)
- Central processing unit ("CPU") (product of Costa Rica, Vietnam, or Malaysia)
- Hard disk drive ("HDD") (product of Singapore or Thailand)
- Optical drive (product of China)
- Memory modules (product of China)
- Graphics cards (product of China)
- Alarm boards (product of China)
- Serial attached technology attachment ("SATA Controller") (product of Taiwan)
- Redundant array independent disk controller ("RAID controller") (product of Singapore)
- Power supply unit ("PSU") (product of China)
- Computer fans (product of China)
- Network interface card ("NIC") (product of Taiwan)
- Network camera (product of Taiwan, the Republic of Korea, or China)

- Computer keyboard (product of China), and
- Computer mouse (product of China)

In addition, you state that the remaining "minor" components (*e.g.,* cables, brackets, bezels, screws, and straps) will be sourced from a variety of countries. Your request indicates that, as explained in further detail below, the items will be assembled into a "computer" unit (*i.e.,* the "system assembly"), which is housed in the chassis, and contains the motherboard, CPU, HDD, memory modules, graphics cards, alarm boards, SATA controller, RAID controller, PSU, fans, and NIC. The computer unit will control the operation of the network cameras, and will be operated by a user utilizing the keyboard and mouse. Of the countries of origin provided for each component, Taiwan, Singapore, Costa Rica, and the Republic of Korea are each TAA-designated countries while Vietnam, Malaysia, and China are not.

The VMS manufacturing process consists of the following five phases: (1) order management; (2) hardware manufacturing; (3) application software, operating system and systems installation, configuration and management; (4) quality control and assurance; and (5) order and system closeout and final checks. In greater detail, these steps occur as follows:

- *Order Management:* After receiving a customer order, Security Lab employees issue a work order for the quantity of VMSs to be assembled, identifying the model number and requirements for the items to be manufactured. Security Lab employees then identify the bill of materials necessary.
- *Hardware Manufacturing:* This phase involves the assembly of the VMS hardware, subassemblies, and components. The process involves the use of an electric screwdriver, hot glue, harness connections, and tie strips. The assembly process involves up to 30 steps and occurs over the course of 60–90 minutes.
- *Application Software, Operating System and Systems Installation, Configuration and Management:* During this phase, Security Lab programmers, developers, testers, and hardware engineers design, develop and code the relevant version of the Security Lab Application Software to configure each system on a build-to-order basis. The software is integrated, installed, and configured into the completed hardware via an 18-step process occurring over the course of 60–90 minutes.
- *Quality Control and Assurance:* This phase involves a Security Lab employee conducting a 14-step quality control check and testing process of each VMS, including testing video and audio performance and network functionality. This phase occurs over the course of approximately 60 minutes.
- *Order and System Closeout/Final Checks:* This phase involves a six-step, 15-minute closeout process in which photographs of the complete VMS are taken and a tamper seal is placed along the VMS chassis.

According to your submission, the Security Lab Application Software is designed and coded in the United States by Security Lab programmers on a C, C++ framework. The software includes the following capabilities: real-time audio, video, and data recording, viewing, listening, playback, storage, information management, situational awareness, and security device control. The Security Lab Application Software functions by receiving "communication" and "interoperability" instructions from the hardware's firmware and application program interfaces ("APIs"). You state that, in this case, the firmware is programming that is written to the hardware device's memory and that an API is a "software intermediary that allows two applications to 'talk' to each other."

Issue

Whether the imported components are substantially transformed when made into the subject VMS in the United States.

Law and Analysis

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21 *et seq.,* which implements Title III, Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.

Emphasis added.

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28, 322 (May 23, 2003).

The rule of origin set forth in 19 U.S.C. 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Acquisition Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

The FAR, 48 CFR 25.003, defines "U.S.-made end product" as:

. . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Section 25.003 defines "designated country end product" as:

a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Once again, we note that the VMS is assembled in the United States with components sourced from a variety of TAA-designated countries (*i.e.,* Taiwan, Singapore, Costa Rica, and the Republic of Korea) as well as several non-TAA countries (*i.e.,* China, Vietnam, and Malaysia).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

A new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. *See Nat'l Hand Tool Corp. v. United States*, 16 CIT 308 (1992), *aff'd,* 989 F.2d 1201 (Fed. Cir. 1993). "For courts to find a change in character, there often needs to be a substantial alteration in the characteristics of the article or components." *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308, 1318 (Ct. Int'l Trade 2016) (citations omitted).

In instances in which component production or assembly occurs in multiple countries and no single country's operations dominate the manufacturing operations, CBP has looked to the location at which final assembly occurs. In CBP Headquarters Ruling ("HQ") H170315, dated July 28, 2011, CBP was asked to determine the country of origin for an imported satellite telephone that contained Malaysian-origin circuit boards and U.K.-origin software and that underwent final assembly and programming in Singapore. In that matter, CBP noted, there existed "three countries under consideration where programming and/or assembly operations take place, the last of which is Singapore." Although the Malaysian-origin boards and U.K.-origin software were important to the function of the device, CBP determined Singapore to be the proper country of origin because it had been the site of the last substantial transformation. Similarly, in HQ H203555, dated April 23, 2012, CBP considered the country of origin of oscilloscopes containing Malaysian-origin circuit boards assembled in Singapore and programmed with U.S.-origin software. Once again, CBP observed that no one country's operations domi-

nated the manufacturing process, but that the final assembly in Singapore completed the oscilloscopes and, therefore, the last substantial transformation occurred in that country.

In the present matter, you argue that the country of origin of the VMS is the United States because you believe that the last substantial transformation occurs in the United States. You state that hardware assembly and the installation of the U.S.-origin software into the U.S.-assembled system assembly results in a new article with a name, character, and use different from the original hardware components.

Here, a plurality of components is sourced from China, although a combined majority is sourced from Taiwan, Singapore, Costa Rica, Vietnam, Malaysia, and Thailand, and elsewhere. Importantly, the major components do not originate from one country, but are instead sourced from a variety of countries: the CPU will originate from either Costa Rica, Vietnam or Malaysia, the partial motherboard from China, and the cameras from either Taiwan, Korea, or China. The assembly in the United States, meanwhile, fully integrates the subassemblies and various component parts into the complete VMS, at which point the U.S.-origin software is installed. No single country's operations dominate the manufacturing operations of the VMS. The CPU manufactured in Costa Rica, Vietnam or Malaysia is important to the function of the VMS, as is the Chinese-origin motherboard and U.S.-origin firmware and software. The assembly in the United States completes the VMS. This matter is therefore analogous to our determination in HQ H203555, dated April 23, 2012, in which we determined Singapore to be the country of origin for oscilloscope where "there are three countries under consideration where programming and/or assembly operations take place, the last of which is Singapore" but "[n]o one country's operations dominate[d] the manufacturing operations." *See also,* HQ H170315, dated July 28, 2011, scenario III.

Based on the foregoing, we find that the last substantial transformation occurs in the United States, and therefore, the VMS is not a product of a foreign country or instrumentality which is not designated pursuant to section 2511(b) of this title (*i.e.,* China, Vietnam, and Malaysia). As to whether the VMS assembled in the United States qualifies as a "U.S.-made end product," you may wish to consult with the relevant government procuring agency and review *Acetris Health, LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020).

Holding

Based on the information outlined above, we determine that the components imported into the United States undergo a substantial transformation when made into the subject video management system by Security Lab.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial

review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL
Executive Director,
Regulations and Rulings Office of Trade.

[Published in the Federal Register, April 26, 2023 (88 FR 25415)]

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING HEIGHT ADJUSTABLE WORKSTATIONS

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of height adjustable workstations. Based upon the facts presented, CBP has concluded that the imported components of the workstations undergo substantial transformation in the United States when made into the final workstations.

DATES: The final determination was issued on April 10, 2023. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than May 26, 2023.

FOR FURTHER INFORMATION CONTACT: Albena Peters, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0321.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on April 10, 2023, U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of height adjustable workstations for purposes of title III of the Trade Agreements Act of 1979. This final determination, HQ H330862, was issued at the request of RightAngle Products, under procedures set forth at 19 CFR part 177, subpart B, which implements title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the imported components are substantially transformed in the United States when made into the subject workstations.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register**within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: April 21, 2023.

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H330862
April 10, 2023
OT:RR:CTF:VS H330862 AP
CATEGORY: Origin

KEELEY BOEVE
KB CONTRACT CONSULTING
4444 132ND AVENUE
HAMILTON, MI 49419

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of Height Adjustable Workstations

DEAR MS. BOEVE:

This is in response to your March 24, 2023 request, on behalf of RightAngle Products ("RightAngle"), for a final determination concerning the country of origin of certain height adjustable workstations pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of Part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). RightAngle is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a) and is therefore entitled to request this final determination.

FACTS

The height adjustable workstations at issue are part of the RightAngle's NewHeights™ series, which include the "Elegante XT," "Eficiente LC," "Bonita ET" electric height adjustable desks and the "Levante" manual height adjustable desk. Each workstation has a laminate desktop and metal legs. The raw materials for the desktop and the legs are sourced from the United States. The laminate desktop is manufactured in the United States from logs which go through a woodchipper and a flaking machine to create particle boards with thermally fused laminate that are cut to size and shape. The metal legs are made and welded together in the United States. The only non-U.S. originating components are the table controller and the digital keyboard for the controller, which are manufactured in Hungary. You explain that these Hungarian components are needed "to move the table up and down as they are the push button and control box that are wired into the tables and cannot be used on their own." The controller will be attached to the bottom of the tabletop by two screws. The square control panels will be mounted from the bottom to the edge of the tabletop in a way that the keys will be easily accessible. The control panels with a cable will be plugged into the connector of the controller.

Issue

Whether the imported components are substantially transformed when made into the height adjustable workstations in the United States.

Law and Analysis

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the

U.S. Government, pursuant to subpart B of Part 177, 19 CFR 177.21–177.31, which implements Title III of the TAA, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, *an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.*

Emphasis added.

The Secretary of the Treasury's authority mentioned above, along with other customs revenue functions, are delegated to CBP in the Appendix to 19 CFR part 0—Treasury Department Order No. 100–16, 68 FR 28, 322 (May 23, 2003).

The rule of origin set forth under 19 U.S.C. 2518(4)(B) states:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

The FAR, 48 CFR 25.003, defines "U.S.-made end product" as:

. . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Section 25.003 defines "designated country end product" as:

a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

As indicated above, the height adjustable workstations are produced with two non-U.S. components, the table controller and the digital keyboard. The desktop and the legs are manufactured in the United States.

In order to determine whether a substantial transformation occurs, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, CBP considers factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process when determining whether a substantial transformation has occurred. No one factor is determinative.

A new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. *See Nat'l Hand Tool Corp.* v. *United States,* 16 CIT 308 (1992), *aff'd,*989 F.2d 1201 (Fed. Cir. 1993). In *Carlson Furniture Indus.* v. *United States,* 65 Cust. Ct. 474, Cust. Dec. 4126 (1970), which involved wooden chair parts, the court held that the assembly operations after importation were substantial in nature and more than a simple assembly of parts. The importer assembled, fitted, and glued the wooden parts together, inserted steel pins into the key joints, cut the legs to length and leveled them, and in some instances, upholstered the chairs and fitted the legs with glides and casters. The assembly operations resulted in the creation of a new article of commerce.

Headquarters Ruling Letter ("HQ") H280512, dated Mar. 7, 2017, considered the origin of a desktop workstation for purposes of U.S. Government procurement. The main components of the sit-to-stand workstation were a Chinese-origin lift assembly of base metal, and a U.S.-originating laminated particle board work surface and keyboard tray. The lift assembly provided user assisted lift functionality by means of spring force to allow adjustment of the workstation between sitting and standing positions. In the United States, the Chinese lift assembly was attached to components fabricated in the United States including the work surface, keyboard tray, right and left keyboard support brackets, and metal support bar to form the workstation. The processes in the United States included sawing, profiling, sanding, hot-pressing and trimming to manufacture the work surface and keyboard tray as well as laser-cutting, bending and painting of the sheet metal components followed by final assembly of the U.S.-origin and the imported components. CBP determined that the imported lift assembly was substantially transformed as a result of the assembly performed in the United States to produce the finished desktop workstation. The decision noted that the lift assembly was not functional to an end user by itself as it did not include the primary features of the U.S.-origin work surface and keyboard tray which allowed the work to be conducted, and without which, the lifting mechanism was incapable of being used as a workstation. CBP found the lift assembly was substantially transformed in the United States into a desktop workstation.

Similar to the lift assembly in HQ H280512, the imported controller and digital keyboard here are substantially transformed when they are mounted to the desktop and when the control panels with a cable are plugged into the

connector of the controller to produce the finished height adjustable workstations. The controller and the digital keyboard are not functional to end users by themselves but they become an integral part of the workstations. To move the workstations up and down, the controller and the digital keyboard need to be attached and wired into the desktop.

Based on the foregoing, we find that the last substantial transformation occurs in the United States, and therefore, the height adjustable workstation is not a product of a foreign country or instrumentality designated pursuant to 25 U.S.C. 2511(b). As to whether the workstation produced in the United States qualifies as a "U.S.-made end product," you may wish to consult with the relevant government procuring agency and review *Acetris Health, LLC* v. *United States,* 949 F.3d 719 (Fed. Cir. 2020).

Holding

Based on the information outlined above, we determine that the components imported into the United States undergo a substantial transformation when made into the subject height adjustable workstations.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

[Published in the Federal Register, April 26, 2023 (88 FR 25413)]

DEATH GRATUITY INFORMATION SHEET

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

ACTION: 30-Day notice and request for comments; a new collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than May 30, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (87 FR 55016) on September 08, 2022, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of

information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Death Gratuity Information Sheet.

OMB Number: 1651–0NEW.

Form Number: N/A.

Current Actions: New collection of information.

Type of Review: New collection of information.

Affected Public: Individuals/ households.

Abstract: When the U.S. Customs and Border Protection (CBP) Commissioner has made the determination that the death of a CBP employee is to be classified as a line-of-duty death (LODD), a Death Gratuity (DG) may become payable to the personal representative of the deceased. After the LODD determination is made, CBP will send the potential personal representative of the deceased a DG Information Sheet. This information sheet aids the involved CBP offices in establishing who the personal representative of the deceased is, approving DG, and subsequently, getting the payment paid to the correct person after CBP Commissioner approval.

Potential personal representatives are provided by/from the deceased CBP employee, through their executed beneficiary forms. However, if there are no beneficiary forms on file, next of kin will be identified via the emergency contact information listed with the agency for that employee in WebTele. Potential personal representatives will be required to provide the following data elements on the DG information sheet:

- Name of Deceased CBP Employee
- Date of Death
- Location of Death
- Name of Claimant/personal representative

- Address of Claimant/personal representative (for payment)
- Phone Number and Email Address of Claimant/personal representative
- Relationship to Employee (*i.e.,* spouse, child, parent, etc.)
- If spouse, date of marriage
- If child or parent, date of birth
- First page of will, if applicable
- Contact information for Executor of Estate, if applicable
- Copy of Marriage Certificate, if applicable
- Copy of Letters of Administration, if applicable

CBP is authorized to collect the information requested on this form pursuant to Public Law 104–208 which allows the agency to pay a DG in some situations of LODD. 110 Stat. 3009–368, Sept. 30, 1996; 5 U.S.C. 8133 note. In order to make this payment, CBP must first identify and obtain the information from the personal representative so it can be known where and to whom the payment should be sent. CBP Retirement and Benefits Advisory Services (RABAS) has the authority designated by the Office of Personnel Management (OPM) to provide retirement, benefits, and survivor counselling and processing. This authority is outlined in detail in the Civil Service Retirement System/Federal Employee Retirement System (CSRS/ FERS) Handbook, Federal Employees Group Life Insurance (FEGLI) Handbook, and Federal Employee Health Benefits (FEHB) Handbook.

Type of Information Collection: Death Gratuity Information Sheet.

Estimated Number of Respondents: 33.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 33.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 8.

Dated: April 24, 2023.

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

[Published in the Federal Register, April 27, 2023 (88 FR 25669)]

DEFERRAL OF DUTY ON LARGE YACHTS IMPORTED FOR SALE

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

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than May 30, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (88 FR 9890) on February 15, 2023, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the

following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Deferral of Duty on Large Yachts Imported for Sale.

OMB Number: 1651–0080.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses and Individuals.

Abstract: This collection of information is required to ensure compliance with 19 U.S.C. 1484b, which provides that an otherwise dutiable yacht that exceeds 79 feet in length, is used primarily for recreation or pleasure, and had been previously sold by a manufacturer or dealer to a retail customer, may be imported without the payment of duty if the yacht is imported with the intention to offer it for sale at a boat show in the United States. The statute provides for the deferral of payment of duty until the yacht is sold but specifies that the duty deferral period may not exceed 6 months. This collection of information is provided for by 19 CFR 4.94a and 19 CFR 4.95, which requires the submission of information to CBP such as the name and address of the owner of the yacht, the dates of cruising in the waters of the United States, information about the yacht, and the ports of arrival and departure.

Type of Information Collection: Deferral of Duty on Large Yachts Imported for Sale.

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 50.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 50 hours.

Dated: April 24, 2023.

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

[Published in the Federal Register, April 27, 2023 (88 FR 25668)]

DECLARATION OF OWNER AND DECLARATION OF CONSIGNEE WHEN ENTRY IS MADE BY AN AGENT

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

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than May 30, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (88 FR 9889) on February 15, 2023, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the

following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Declaration of Owner and Declaration of Consignee When Entry is made by an Agent.

OMB Number: 1651–0093.

Form Number: CBP Form 3347, 3347A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses and Individuals.

Abstract: CBP Form 3347, *Declaration of Owner,* is a declaration from the owner of imported merchandise stating that he/she agrees to pay additional and increased duties, therefore releasing the importer of record from paying such duties. This form must be filed within 90 days after the date of entry. CBP Form 3347 is provided for by 19 CFR 24.11 and 141.20.

When entry is made in a consignee's name by an agent who has knowledge of the facts and who is authorized under a proper power of attorney by that consignee, a declaration from the consignee on CBP Form 3347A, *Declaration of Consignee When Entry is Made by an Agent,* shall be filed with the entry documentation or entry summary. If this declaration is filed, then no bond to produce a declaration of the consignee is required. CBP Form 3347A is provided for by 19 CFR 141.19(b)(2).

CBP Forms 3347 and 3347A are authorized by 19 U.S.C. 1485(d) and are accessible at *http://www.cbp.gov/newsroom/publications/forms.*

Type of Information Collection: Declaration of Owner (Form 3347).

Estimated Number of Respondents: 900.

Estimated Number of Annual Responses per Respondent: 6.

Estimated Number of Total Annual Responses: 5,400.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 540.

Type of Information Collection: Declaration of Importer Form (3347A).

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 6.

Estimated Number of Total Annual Responses: 300.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 30.

Dated: April 24, 2023.

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

[Published in the Federal Register, April 27, 2023 (88 FR 25670)]

U.S. Court of Appeals for the Federal Circuit

COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Plaintiff-Appellee FONTAINE INC., GOVERNMENT OF CANADA, MARCEL LAUZON INC., LES PRODUITS FORESTIERS D&G LTEE, NORTH AMERICAN FOREST PRODUCTS LTD., PARENT-VIOLETTE GESTION LTEE, LE GROUPE PARENT LTEE, SCIERIE ALEXANDRE LEMAY & FILS INC., GOVERNMENT OF QUEBEC, MOBILIER RUSTIQUE (BEAUCE) INC., GOVERNMENT OF THE PROVINCE OF NEW BRUNSWICK, Plaintiffs-Appellants v. UNITED STATES, Defendant

Appeal No. 2022–1021, 2022–1068, 2022–1078

Appeals from the United States Court of International Trade in Nos. 1:19-cv-00122-MAB, 1:19-cv-00164-MAB, 1:19-cv-00168-MAB, 1:19-cv-00170-MAB, Judge Mark A. Barnett.

Decided: April 25, 2023

JY CHEH SOPHIA LIN, Picard Kentz & Rowe LLP, Washington, DC, argued for plaintiff-appellee Committee Overseeing Action for Lumber International Trade Investigations or Negotiations. Also represented by ANDREW WILLIAM KENTZ, NATHANIEL RICKARD, WHITNEY MARIE ROLIG, ZACHARY WALKER, DAVID ALBERT YOCIS.

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Before DYK, REYNA, and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

The United States Department of Commerce initiated a countervailing duty investigation concerning imports of certain softwood lumber products from Canada. Certain Softwood Lumber Products from Canada: Initiation of Countervailing Duty Investigation, 81 Fed. Reg. 93,897 (Dec. 22, 2016). Commerce individually investigated five groups of companies (each group consisting of affiliated companies) that were producers and/or exporters of the covered products, and it ultimately issued a final determination to impose countervailing duties on the products of those companies at company-specific rates ranging from 3.34% to 18.19%. Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances, 82 Fed. Reg. 51,814, 51,815–16 (Nov. 8, 2017). Commerce also determined to impose countervailing duties on products of all other producers and exporters of the products at an "all-others" rate that initially was 14.25%, *id*. at 51,816, and then was modified to be 14.19%, Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. 347, 349 (Jan. 3, 2018).

Starting within a few days of publication of the countervailing duty (CVD) order on January 3, 2018, and continuing until February 5, 2018, almost three dozen Canadian companies that alleged they were subject to the all-others rate asked Commerce to initiate an "expedited review" under 19 C.F.R. § 351.214(k) (now § 351.214(*l*)) to give them individually determined rates, and Commerce initiated that review. Certain Softwood Lumber Products from Canada: Initiation of Expedited Review of the Countervailing Duty Order, 83 Fed. Reg. 9,833 (Mar. 8, 2018). Most of the requesters dropped out of the proceeding before Commerce ruled. Ultimately, as relevant here, Commerce awarded the individual requesters now before us (exporters of the covered products) reduced or de minimis CVD rates. Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Expedited Review, 84 Fed. Reg. 32,121 (July 5, 2019).

A domestic trade group—the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION)—challenged the final results of the expedited review in the Court of International Trade (Trade Court). In particular,

COALITION asked the Trade Court to set aside the results on the ground that Commerce lacked statutory authority to create the expedited-review process. The Canadian exporters now before us and the governments of Canada, Québec, and New Brunswick—collectively, the Canadian parties—intervened in COALITION's action, and some of those parties also filed their own actions in the Trade Court, raising some issues not relevant to this appeal. The Trade Court consolidated the cases, with the (first-filed) COALITION action as the lead case.

The Canadian parties and the United States argued that Commerce had authority to adopt the expedited-review procedures of 19 C.F.R. § 351.214(k) to give exporters a chance to secure individual rates shortly after publication of a CVD order, arguing for the existence of such authority chiefly in various provisions of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103–465, 108 Stat. 4809 (1994). The Trade Court rejected those contentions and held that the Secretary of Commerce lacked statutory authority to adopt the procedures. We hold otherwise, concluding that the Secretary had statutory authority to adopt the expedited-review process as procedures for implementing statutory provisions that authorize individualized determinations in CVD proceedings. See 19 U.S.C. §§ 1667f-1(e), 1677m, 3513(a)(2). We therefore reverse the judgment of the Trade Court and remand for any proceedings necessitated by our holding that statutory authorization exists.

I

A

Pursuant to 19 U.S.C. §§ 2901–2906, the President negotiated eighteen international trade agreements referred to as the Uruguay Round Agreements. At least as relevant here, it is undisputed that those agreements are not "self-executing," *see Medellin v. Texas*, 552 U.S. 491, 516, 525–27 (2008) (discussing notion of non-self-executing treaties)—that is, they "have no legal effect in the United States except insofar as they have been implemented into United States law," U.S. Amicus Br. at 3–4 (citing 19 U.S.C. § 2903(a)(1)). *See* COALITION's Br. at 19 ("It is well-established that [the Uruguay Round Agreements] are not self-executing." (citing 19 U.S.C. § 3512(a))); Canadian Parties' Reply Br. at 5–6 (noting COALITION's position that the Uruguay Round Agreements "are not self-executing" and stating: "No one has argued to the contrary."). The President, following the fast-track legislative procedure of 19 U.S.C. §§ 2903 and 2191–2193, submitted legislation to Congress—along with a statement of administrative action proposed to implement the agree-

ments, H.R. Doc. No. 103–316, vol. 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 (SAA)—that would approve the agreements and create enforceable domestic law implementing them to the extent specified in the legislation. The legislation enacted by Congress at the President's request was the URAA.

Section 101 of the URAA declares that Congress "approves" both the Uruguay Round Agreements and "the statement of administrative action proposed to implement the agreements that was submitted to the Congress." 19 U.S.C. § 3511(a)(1)–(2) (codification of URAA § 101(a)(1)–(2)). Section 102(a) of the URAA then describes the distinction and relationship between the Uruguay Round Agreements and domestic law, providing that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect" and, in addition, that "[n]othing in this Act shall be construed . . . to amend or modify any law of the United States . . . unless specifically provided for in this Act." *Id*. § 3512(a)(1)–(2) (codification of § 102(a)(1)–(2)). Section 102(d) of the URAA defines the role of the SAA, stating that it "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." *Id*. § 3512(d) (codification of § 102(d)).

Section 103 of the URAA addresses the regulatory implementation of the URAA. Subsection (a) provides that "appropriate officers of the United States Government may issue such regulations . . . as may be necessary to ensure that any provision of this Act, or amendment made by this Act . . . is appropriately implemented." *Id*. § 3513(a)(2) (codification of § 103(a)(2)). Subsection (b) provides that "[a]ny interim regulation necessary or appropriate to carry out any action proposed in the statement of administrative action . . . to implement" any of three specified Uruguay Round Agreements "shall be issued" by a certain time. *Id*. § 3513(b) (codification of § 103(b)).

One of the three just-mentioned URAA-approved Uruguay Round Agreements was the Agreement on Subsidies and Countervailing Measures (SCM Agreement). *Id*. § 3511(d)(12). The URAA amended a number of provisions of our domestic law to implement the SCM Agreement, including provisions of 19 U.S.C. §§ 1677f-1 and 1677m that concern, among other things, individual-company treatment in CVD proceedings. The added or amended provisions of those two sections are especially important for present purposes.

First: In § 269 of the URAA—which amended § 777A of the Tariff Act of 1930 (codified at 19 U.S.C. § 1677f-1) by adding subsection (e)—Congress required that Commerce "determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise," 19 U.S.C. § 1677f-1(e)(1), unless Commerce "determines that it is not practicable" to do so "because of the large number of exporters or producers involved in the investigation or review, *id*. § 1677f-1(e)(2).[1] Congress then identified several options (without declaring them exclusive) for what Commerce "may" do if it makes the "not practicable" determination: It may "determine individual countervailable subsidy rates for a reasonable number of exporters or producers," *id*. § 1677f-1(e)(2)(A), by examining "a sample of exporters or producers that [Commerce] determines is statistically valid based on the information available," *id*. § 1677f-1(e)(2)(A)(i), or by examining "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that [Commerce] determines can be reasonably examined," *id*. § 1677f-1(e)(2)(A)(ii), and apply a blanket "all-others" rate to those who were not individually examined, *id*. § 1671d(c)(1)(B), (c)(5)(A); and it may "determine a single country-wide subsidy rate to be applied to all exporters and producers," *id*. §§ 1677f-1(e)(2)(B), 1671d(c)(5)(B).

Second: In § 231 of the URAA—which added § 782 to the Tariff Act of 1930, codified at 19 U.S.C. § 1677m—Congress further addressed individual investigations. Under the new provision, in investigations or administrative reviews in which Commerce has "limited the number of exporters or producers examined, or determined a single country-wide rate," Commerce "shall establish an individual countervailable subsidy rate . . . for any exporter or producer not initially selected for individual examination" that submits certain information—as long as specified conditions are met, including that determining such individual rates will not be unduly burdensome and will not inhibit timely completion of Commerce's task. *Id*. § 1677m(a)(1)–(2).[2]

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[1] The United States in this court and our precedent identify certain pre-URAA regulations that permitted Commerce to exclude individual companies from country-wide rates. *See*, *e.g.*, 19 C.F.R. § 355.38 (1981) (permitting Commerce to exclude "[a]ny firm which does not benefit from a subsidy alleged" from a CVD order); *MacLean-Fogg Co. v. United States*, 753 F.3d 1237, 1245 (Fed. Cir. 2014) (describing history of countervailing duty statute and "all-others" rate and discussing, *e.g.*, 19 C.F.R. §§ 355.14 and 355.20 (1993)).

[2] The requirements of § 1677m(a) quoted in text were part of the 1994 enactment, and they remain so, though the provision has been amended since then in ways not significant to the present appeal. For relevant comments on §§ 231 and 269 of the URAA, see SAA at 872–73, 1994 U.S.C.C.A.N. at 4200–01; H.R. Rep. No. 103–826, pt. 1, at 102–03, 118–20 (1994); S. Rep. No. 103–412 at 83–84, 100 (1994).

One provision, not of the URAA, but of the SCM Agreement itself, has featured in the present dispute. Like the above URAA provisions, it addresses individualized determinations in countervailing duty proceedings. Article 19.3 of the SCM Agreement provides, in pertinent part:

> Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 14, Annex 1A, SCM Agreement, art. 19.3. The SAA describes Article 19.3 as providing that "any exporter" that "was not actually investigated for reasons other than a refusal to cooperate" and is subject to a CVD order "shall be entitled to an expedited review to establish an individual CVD rate for that exporter." SAA at 941, 1994 U.S.C.C.A.N. at 4250.

B

The URAA was enacted on December 8, 1994. 108 Stat. at 4809. On September 12, 1995, the President issued a proclamation declaring that "the Uruguay Round Agreements . . . entered into force for the United States on January 1, 1995." Proclamation No. 6821, 60 Fed. Reg. 47,663, 47,663 (Sept. 12, 1995), *reprinted in* 109 Stat. 1813 (1995); *see* 19 U.S.C. § 3511(b) (giving the President authority to determine the date on which the agreements enter into force).

Months before the entry-into-force date, Commerce, on May 11, 1995, had issued interim regulations, none of which addressed expedited CVD reviews. *See* Antidumping and Countervailing Duties, 60 Fed. Reg. 25,130, 25,130–33 (May 11, 1995). On February 27, 1996, Commerce issued a notice of proposed rulemaking, building on the interim regulations. Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7,308, 7,317–19 (Feb. 27, 1996). "To implement Article 19.3 of the SCM Agreement," Commerce proposed adding 19 C.F.R. § 351.214(k) to "expand[] the new shipper review procedure to cover exporters that were not individually examined in a countervailing duty investigation where the Secretary limited the investigation under . . . the [URAA]." *Id*. at 7,318.

On May 19, 1997, Commerce published the final regulations for implementing the URAA, which included 19 C.F.R. § 351.214(k).[3] Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,321–22, 27,396 (May 19, 1997). Section 351.214(k) contains, *inter alia*, "rules regarding requests for expedited reviews by noninvestigated exporters in certain countervailing duty proceedings and procedures for conducting such reviews." *Id*. at 27,394. Specifically, § 351.214(k) describes a procedure for "[e]xpedited reviews in countervailing duty proceedings for noninvestigated exporters": If Commerce "limited the number of exporters or producers to be individually examined" in a CVD investigation, then, within thirty days of the countervailing duty order's publication in the Federal Register, "an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent may request" an expedited review of the CVD order so that Commerce may establish an individual CVD rate for the requesting company. 19 C.F.R. § 351.214(k)(1) (now § 351.214(*l*)(1)). If Commerce determines that the company's individual rate is de minimis, then Commerce may exclude that company from the CVD order. *Id*. § 351.214(k)(3)(iv) (now § 351.214(*l*)(3)(iii)).

C

As indicated above, Commerce conducted a CVD investigation, starting in late 2016, that led to a final determination in late 2017 calculating individual rates for five investigated companies and an all-others rate of 14.25%. Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances, 82 Fed. Reg. at 51,815–16. Commerce amended the all-others rate to 14.19% for non-investigated companies on January 3, 2018. Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 83 Fed. Reg. at 348. Starting a few days after January 3, 2018, Commerce received numerous requests from Canadian exporters of the covered products asking Commerce to initiate an expedited review to provide the requesters individualized rate determinations, and Commerce initiated the review on March 8, 2018. Certain Softwood Lumber Products from Canada: Initiation of Expedited Review of the Countervailing Duty Order, 83 Fed. Reg. at 9,833. On July 5, 2019, Com-

[3] On September 20, 2021, § 351.214(k) was redesignated as § 315.214(*l*), with no change that is material here. Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws, 86 Fed. Reg. 52,300, 52,373 (Sept. 20, 2021). For consistency with the briefs and prior proceedings in this case, we generally refer to the regulation as § 351.214(k).

merce issued the final results of its expedited review, calculating greatly reduced or de minimis rates for each of the newly investigated Canadian companies that remained in the proceeding by the time of decision. Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Expedited Review, 84 Fed. Reg. at 32,122. In the supporting issues-and-decision memorandum, dated June 28, 2019, Commerce concluded that it had authority to promulgate 19 C.F.R. § 351.214(k) under URAA § 103(a), which it interpreted as authorizing promulgation of regulations to implement obligations under the SCM Agreement, including Article 19.3, even without a specific URAA provision addressed to the particular subject. J.A. 1121–24.

On July 15, 2019, COALITION filed an action in the Trade Court challenging the final results on the ground that Commerce lacked statutory authority to conduct expedited reviews under 19 C.F.R. § 351.214(k). As noted above, several Canadian exporters, plus the Canadian governmental entities (Canada, Québec, and New Brunswick), then either intervened in COALITION's action or filed their own actions challenging the final results on grounds irrelevant to this appeal or did both. The Trade Court consolidated all of the actions. And after denying a preliminary injunction sought by COALITION, *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States*, 393 F. Supp. 3d 1271 (Ct. Int'l Trade 2019) (*Coalition I*), the Trade Court considered the government's motion to dismiss for lack of jurisdiction and concluded that it had jurisdiction under the residual jurisdictional grant made in 28 U.S.C. § 1581(i)(4). *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States*, 413 F. Supp. 3d 1334, 1341, 1343–47 (Ct. Int'l Trade 2019) (*Coalition II*).

On December 19, 2019, COALITION filed a motion for judgment on the administrative record under Trade Court Rule 56.2, arguing that Commerce lacked authority to promulgate § 351.214(k) under the URAA. Commerce, as well as the Canadian governmental entities and the Canadian exporters, opposed the motion. The Trade Court agreed with COALITION's argument that "Commerce exceeded its authority to the extent that it promulgated 19 C.F.R. § 351.214(k) pursuant to URAA § 103(a)." *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States*, 483 F. Supp. 3d 1253, 1263–64 (Ct. Int'l Trade 2020) (*Coalition III*). The Trade Court also concluded that URAA § 103(b)—which authorizes Commerce to issue interim regulations necessary to "to

carry out any action proposed in" the SAA, 19 U.S.C. § 3513(b)—did not authorize the regulation because there was no "action proposed" in the SAA to implement expedited CVD reviews. *Coalition III*, 483 F. Supp. 3d at 1267. The Trade Court decided, however, that it should remand the matter for Commerce to consider whether several particular statutory bases supported the regulation. *Id*. at 1271–73. One such basis, invoked by Canada and Québec, was 19 U.S.C. § 1677f-1, as implemented by Commerce under URAA § 103(a), 19 U.S.C. § 3513(a). *See Coalition III*, 483 F. Supp. 3d at 1272; *see* Joint Brief of Defendant-Intervenors Government of Canada and Government of Québec in Opposition to Plaintiff's Motion for Judgment on the Agency Record at 15–18, 22–29, *Coalition III*, 483 F. Supp. 3d 1253 (No. 19–00122), ECF No. 120.

On remand, Commerce considered the identified sources of potential statutory authority, including 19 U.S.C. § 1677f-1(e), but it concluded without meaningful analysis that this provision (and others) did not provide authority to promulgate 19 C.F.R. § 351.214(k). J.A. 565–67. Returning to the Trade Court, the United States, the Canadian parties, and COALITION filed comments on Commerce's remand decision. The Trade Court accepted Commerce's determinations concerning the lack of statutory authority to promulgate 19 C.F.R. § 351.214(k) outside URAA § 103(a), but in doing so, it stated that the Canadian governmental parties had not renewed their reliance on 19 U.S.C. § 1677f-1, and so the Trade Court did not substantively address that possible basis for the regulation. *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States*, 535 F. Supp. 3d 1336, 1348–52 & n.15 (Ct. Int'l Trade 2021) (*Coalition IV*). The Canadian entities in fact argued that Commerce had only perfunctorily and insufficiently addressed that issue and others, and because Commerce had "not engag[ed] meaningfully with each of the alternative bases," they referred the Trade Court to the earlier submissions on § 1677f-1 and other issues. Comments on Remand Results on Behalf of Consolidated Defendant-Intervenors at 1–2, *Coalition IV*, 535 F. Supp. 3d 1336 (No. 19–00122), ECF No. 183.

Because the Trade Court already had found statutory authority otherwise missing, it held 19 C.F.R. § 351.214(k) unauthorized by law, and it vacated the regulation as well as the final results of expedited review at issue (the vacatur applying only prospectively). *Coalition IV*, 535 F. Supp. 3d at 1355–63. It entered judgment on August 18, 2021.

The Canadian parties timely appealed within the permitted sixty days of the Trade Court's final judgment. Fed. R. App. P. 4(a)(1)(B).

The United States did not file a notice of appeal. On January 19, 2022, it filed a letter indicating that it would not be participating in the appeal, and it filed no brief in the briefing leading up to oral argument. We have jurisdiction under 28 U.S.C. § 1295(a)(5).[4]

II

We have before us and we answer only the question of whether there is statutory authority for § 351.214(k) (now § 314.214(*l*)). *See* 5 U.S.C. § 706(2)(C). That question presents an issue of law, decided de novo, requiring no exercise of discretion that belongs to the agency under *Securities and Exchange Commission v. Chenery Corp*., 318 U.S. 80, 88 (1943), and *Securities and Exchange Commission v. Chenery Corp*., 332 U.S. 194, 196–97 (1947). The challenge to statutory authority is made to § 351.214(k) as a whole, with no components of that regulation singled out for separate challenge.

After hearing oral argument, we solicited the views of the United States as amicus. On February 7, 2023, the government filed its amicus brief, arguing that § 351.214(k) "implements the URAA's provisions establishing general procedures for imposing countervailing duties," specifically relying (as the Canadian parties had in the Trade Court) on the individualized-determination provisions of 19 U.S.C. § 1677f-1(e), which was added to Title 19 by the URAA and therefore comes within the regulatory-implementation authority stated in URAA § 103(a), 19 U.S.C. § 3513(a). U.S. Amicus Br. at 4–6, 17–18. COALITION, the appellee here, does not object to our consideration of this argued ground of decision on its merits.

We agree that statutory authority for the expedited-review process is properly found in the URAA's enactment of § 1677f-1(e) to favor individual-company determinations and the URAA's grant of regulatory-implementation power to Commerce in § 3513(a). Section 1677f-1(e) declares a "[g]eneral rule" that Commerce "shall determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise." 19 U.S.C. § 1677f-1(e)(1). It then allows Commerce to depart from that rule if the large number of exporters or producers makes applying the rule "not practicable," and it states that, in such a circumstance, Commerce "may . . . (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers" (by use of statistically valid sampling or identifying the largest volume that can reasonably be examined) or "(B) determine a single country-wide subsidy rate" for all exporters

[4] We see no reversible error in the Trade Court's conclusion that it had jurisdiction under 28 U.S.C. § 1581(i)(4). *See Coalition II*, 413 F. Supp. 3d at 1343–47. For an action within § 1581(i)(4), the standard of review is "provided in [5 U.S.C. § 706]." 28 U.S.C. § 2640(e); *see Coalition III*, 483 F. Supp. 3d at 1262.

and producers. *Id*. § 1677f-1(e)(2). Commerce's regulation, 19 C.F.R. § 351.214(k), provides one procedure for giving effect to the primary policy of providing individual-company rate determinations.

This procedure fits within the URAA's grant of power to Commerce to adopt "such regulations as may be necessary to ensure that any provision of [the URAA], or amendment made by [the URAA], that takes effect on the date any of the Uruguay Round Agreements enters into force with respect to the United States is appropriately implemented on such date." URAA § 103(a), 19 U.S.C. § 3513(a)(2). The SAA itself makes the connection between the expedited-review process at issue and § 1677f-1(e) as added by the amendment to § 777A of the Tariff Act made by the URAA. Under a heading, "Company-Specific Subsidy Rates and Expedited Reviews," the SAA states: "Article 19.3 of the Subsidies Agreement provides that any exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter." SAA at 941, 1994 U.S.C.C.A.N. at 4250. It immediately adds: "Several changes must be made to the [Tariff] Act to implement the requirements of Article 19.3." SAA at 941, 1994 U.S.C.C.A.N. at 4251. Two brief subsections follow that give specifics, the first of which, "Individual Countervailing Duty Rates," explains that the URAA "eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter or producer individually investigated." *Id*. In that way, the SAA links expedited reviews to § 1677f-1(e).[5] And Commerce, in proposing § 351.214(k), likewise linked Article 19.3 to § 1677f-1(e). *See* Antidumping Duties; Countervailing Duties, 61 Fed. Reg. at 7,318–19.

It is also evident as a logical matter why an expedited-review process "may be necessary to ensure that" the individualized-determination preference of § 1677f-1(e) is "appropriately implemented." 19 U.S.C. § 3513(a)(2). The regulation provides an immediate post-CVD-order process for exporters to use to secure individual determinations, with the just-announced all-others rate giving exporters a concrete basis for deciding whether the costs of seeking their own rates are worth incurring. Some exporters may postpone a decision whether to request an individual rate until after the CVD order and then decide not to make such a request. The availability of this process thus may reduce the number of exporters requesting individual determinations from what that number would be if all

[5] The SAA mistakenly attributes the § 777A amendment to URAA § 265; that amendment was made in URAA § 269. *See Coalition III*, 483 F. Supp. 3d at 1258 n.4.

requests for such determinations had to be made before issuance of the CVD order. The net result may enhance the efficiency of the agency process as a whole, including by making it more practicable for Commerce (with fewer requesters) to make individual determinations in the proceeding before publishing the CVD order.

COALITION makes only one argument against this basis of statutory authority. It argues that § 1677f-1(e) limits Commerce's examination options to just three possibilities: examine all known exporters or producers, 19 U.S.C. § 1677f-1(e)(1); examine a "statistically valid" sample of exporters or producers, *id*. § 1677f-1(e)(2)(A)(i); or examine "exporters and producers accounting for the largest volume of the subject merchandise" that "can be reasonably examined," *id*. § 1677f-1(e)(2)(A)(ii). According to COALITION, the three options are the only permissible ones, and that exclusivity precludes Commerce from individually investigating companies based on their asking for individual determinations. COALITION's Supp. Br. at 13–14.

We reject that argument. Section 1677f-1(e), in introducing options for Commerce if making individual determinations for all producers and exporters is not practicable, uses the word "may." 19 U.S.C. § 1677f-1(e)(2). The permissive "may" by itself does not exclude other options, and nothing else makes the list that follows one that defines all permissible options. Moreover, COALITION's particular contention that § 1677f-1(e) does not give Commerce the option of providing individual determinations based on requests from exporters or producers is not just unsupported but, in fact, runs counter to § 1677m—which sometimes *requires* such action by Commerce. That provision, added by the URAA, declares that, subject to certain conditions, Commerce "shall establish an individual countervailable subsidy rate . . . for any exporter or producer not initially selected for individual examination . . . who submits to [Commerce] the information requested from exporters or producers selected for examination . . . by the date specified" for those selected exporters and producers. *Id*. § 1677m(a)(1). The SAA explained: "Section 231 of [the bill that became URAA] adds section 782(a) to the [Tariff] Act [*i.e.*, § 1677m(a)] which provides that, in cases where Commerce has limited its examination to selected exporters and producers, it nevertheless will calculate an individual dumping margin for any exporter or producer not selected for examination that provides the necessary information on a timely basis . . . ." SAA at 873, 1994 U.S.C.C.A.N. at 4201. COALITION's interpretation of § 1677f-1(e) does not fit the simultaneously enacted § 1677m(a).

Of course, the expedited reviews under § 351.214(k) do not occur during a CVD investigation, but only *after* publication of a CVD order—with requests due within 30 days. But the Trade Court nowhere explained why this timing distinction precludes reliance on § 1677f-1(e) as authority for the expedited-review regulation. And in this court COALITION has not argued that the timing distinction precludes such reliance.

III

For the foregoing reasons, we reverse the Trade Court's decision and hold that Commerce had statutory authority to adopt the expedited review procedures. We remand for such further proceedings as required in the consolidated cases as a result of this holding.

The parties shall bear their own costs.

REVERSED AND REMANDED

U.S. Court of International Trade

Slip Op. 23–58

VIETNAM FINEWOOD COMPANY LIMITED, FAR EAST AMERICAN, INC., AND LIBERTY WOODS INTERNATIONAL, INC., Plaintiffs, and INTERGLOBAL FOREST, LLC, Consolidated-Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR TRADE IN HARDWOOD PLYWOOD, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 22–00049

[Remanding the U.S. Department of Commerce's scope determination for the antidumping duty and countervailing duty orders on certain hardwood plywood from the People's Republic of China; directing Commerce to correct the administrative record; dismissing Plaintiff Vietnam Finewood Company Limited from the action.]

Dated: April 20, 2023

Gregory S. Menegaz and *Vivien J. Wang*, deKieffer & Horgan, PLLC, of Washington, DC, argued for Plaintiffs. With them on the brief were *J. Kevin Horgan*, *Judith L. Holdsworth*, and *Alexandra H. Salzman*.

Thomas H. Cadden, Cadden & Fuller LLP, of Irvine, CA, argued for Consolidated Plaintiff.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Savannah R. Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Stephanie M. Bell, Wiley Rein LLP, of Washington, DC, argued for Defendant-Intervenor. With her on the brief were *Timothy C. Brightbill* and *Tessa V. Capeloto*.

OPINION AND ORDER

Barnett, Chief Judge:

This consolidated action involves a challenge to a U.S. Department of Commerce ("Commerce" or "the agency") scope determination for the antidumping duty and countervailing duty orders on certain hardwood plywood from the People's Republic of China ("China"). *See* Compl., ECF No. 8; Confid. Final Scope Ruling ("Final Scope Ruling"), ECF No. 34–1; *see also Certain Hardwood Plywood Products From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (am. final determination of sales at less than fair value, and antidumping duty order) ("*Plywood AD Order*"); *Certain Hardwood Plywood Products From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (CVD order) ("*Plywood CVD*

Order") (together, "the *Plywood Orders*").[1] The *Plywood Orders* cover, *inter alia*,

> hardwood and decorative plywood, and certain veneered panels as described below. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo.

Plywood AD Order, 83 Fed. Reg. at 512; *Plywood CVD Order*, 83 Fed. Reg. at 515.[2]

Plaintiffs, Vietnam Finewood Company Limited ("Finewood"), Far East American, Inc. ("FEA"), and Liberty Woods International, Inc. ("Liberty") (collectively, "Plaintiffs"), and Consolidated Plaintiff Inter-Global Forest, LLC ("IGF"), challenge Commerce's interpretation of the scope of the *Plywood Orders* to include two-ply panels imported from China into Vietnam and Commerce's determination that hardwood plywood manufactured by Finewood in Vietnam using such Chinese two-ply remains in-scope based on the absence of a substantial transformation. Confid. Pls. Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency R. ("Pls.' Mem."), ECF No. 31–1; Confid. Consol. Pl. [IGF] Rule 56.2 Mem. in Supp. of Mot. for J. Upon the Agency R. ("Consol. Pl.'s Mem."), ECF No. 30–1. Plaintiffs also challenge Commerce's rejection of portions of Finewood's initial scope comments. Pls.' Mem. at 24–27.

Defendant United States ("the Government") and Defendant-Intervenor Coalition for Fair Trade in Hardwood Plywood ("the Coalition") urge the court to sustain Commerce's scope ruling and deny the motions in all other respects. Confid. Def.'s Resp. to Pls.' Rule 56.2

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[1] The administrative record associated with Commerce's scope determination is contained in public and confidential administrative records filed in the antidumping and countervailing proceedings underlying the *Plywood Orders*. *See* ECF Nos. 23–1 through 23–4. Consistent with the parties, and for ease of reference, the court cites to documents contained in the public antidumping record ("PR"), ECF No. 23–1, and the confidential antidumping record ("CR"), ECF No. 23–2. Plaintiffs also filed joint appendices containing record documents cited in Parties' briefs. *See* Confid. J.A. ("CJA"), ECF Nos. 46 (Tabs 1–17), 46–1 (Tabs 18–31); Public J.A., ECF No. 47; Public Revised J.A. Tab 19, ECF No. 54. The court references the confidential documents unless otherwise specified.

[2] When referencing specific scope language that appears in both orders, the court cites to the antidumping duty order.

Mot. for J. on the Agency R. ("Def.'s Resp."), ECF No. 35; Confid. Resp. to Mot. for J. on the Agency R. ("Def.-Ints.' Resp."), ECF No. 38.[3]

For the reasons discussed herein, the court remands Commerce's determination that two-ply panels are covered by the scope of the *Plywood Orders* but sustains Commerce's treatment of Finewood's initial scope comments. The court further finds that certain of IGF's arguments are barred by the doctrines of waiver and administrative exhaustion, and that Finewood must be dismissed from the action.

BACKGROUND

This matter arose following U.S. Customs and Border Protection's ("CBP") issuance of a covered merchandise referral to Commerce as part of EAPA[4] Investigation No. 7252 concerning possible evasion of the *Plywood Orders*. *See* Placement of Covered Merch. Referral Docs. on the R. (Jan. 21, 2020), PR 9–11, CJA Tab 6 (attaching CBP referral letter, dated Sept. 16, 2019 ("CBP Referral")). Section 1517 of Title 19 grants CBP authority to investigate allegations of evasion of antidumping duty or countervailing duty orders. 19 U.S.C. § 1517 (2018).[5] "Evasion" is defined as:

> entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

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

In the underlying proceeding, CBP was unable to determine whether Finewood's "[two]-ply cores of Chinese origin, which are further processed in Vietnam to include the face and back veneers of non-coniferous wood, are within the scope of [the *Plywood Orders*]." CBP Referral at 2. Under those circumstances, the statute directs

[3] FEA, Liberty, and IGF are U.S. importers of hardwood plywood manufactured in Vietnam by Finewood. *See* Final Scope Ruling at 2; Consol. Pl.'s Mem. at 1. The Coalition represents domestic interests and was the petitioner in the investigation underlying the *Plywood Orders*. Final Scope Ruling at 2.

[4] EAPA refers to the Enforce and Protect Act, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016).

[5] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code and all citations to the U.S. Code are to the 2018 edition, unless otherwise specified.

CBP to "refer the matter to [Commerce] to determine whether the merchandise is covered merchandise pursuant to [Commerce's authority] under subtitle IV [of the Tariff Act of 1930]." 19 U.S.C. § 1517(b)(4)(A)(i). On January 17, 2020, Commerce initiated a scope inquiry. *Certain Hardwood Plywood From the People's Republic of China*, 85 Fed. Reg. 3,024 (Dep't Commerce Jan. 17, 2020) (notice of covered merch. Referral and initiation of scope inquiry).

To resolve the covered merchandise referral from CBP, Commerce applied its regulation governing the issuance of scope rulings. *See* Final Scope Ruling at 6–7. That regulation recognizes that, because the descriptions of merchandise covered by the scope of an antidumping or countervailing duty order must be written in general terms, questions may arise as to whether a particular product is included within the scope of an order. *See* 19 C.F.R. § 351.225(a) (2020).[6] In order to resolve such questions, including in the context of CBP covered merchandise referrals, Commerce issues "scope rulings" that clarify whether the product is in-scope. *See id.*; Final Scope Ruling at 6–7. Although there are no specific statutory provisions that govern Commerce's interpretation of the scope of an order, Commerce is guided by case law and agency regulations. *See Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) ("*Meridian 2017*"); 19 C.F.R. § 351.225.

Commerce's inquiry begins with the relevant scope language. *See, e.g.*, *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020). If the scope language is unambiguous, "the plain meaning of the language governs." *Id.* Commerce further interprets the scope "with the aid of" the sources set forth in 19 C.F.R. § 351.225(k)(1) (referred to as a "(k)(1) analysis," "(k)(1) sources," or "(k)(1) materials"). *Meridian 2017*, 851 F.3d at 1382 (citation omitted). Subsection (k)(1) directs Commerce to consider the descriptions of the subject merchandise in the petition, initial investigation, and prior determinations by Commerce (including scope determinations) or the U.S. International Trade Commission ("ITC"). 19 C.F.R. § 351.225(k)(1). If the (k)(1) sources are dispositive, Commerce may issue its ruling based solely on the party's application and the (k)(1) sources. 19 C.F.R. §

[6] Commerce recently revised its scope regulations; however, the revisions apply "to scope inquiries for which a scope ruling application is filed . . . on or after the effective date" of November 4, 2021. *See Regs. To Improve Admin. and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,300, 52,327 (Dep't Commerce Sept. 20, 2021). Thus, the court cites to the prior scope regulations that were in effect when Commerce initiated this scope inquiry. *See* Final Scope Ruling at 6 n.13.

351.225(d).[7] In all other cases, Commerce will initiate a scope inquiry and may consider the factors enumerated in subsection (k)(2) of the regulation. *See Meridian 2017*, 851 F.3d at 1382 (citing 19 C.F.R. § 351.225(k)(2)).[8]

When Commerce "finds that a scope inquiry presents an issue of significant difficulty, the [agency] will issue a preliminary scope ruling" and will allow time for initial and rebuttal comments. 19 C.F.R. § 351.225(f)(3). Commerce issued its preliminary scope ruling in this case on August 26, 2021. Prelim. Scope Ruling (Aug. 26, 2021), CR 128, PR 110, CJA Tab 2. After finding the scope ambiguous and consulting the (k)(1) sources, Commerce preliminarily concluded that the Chinese two-ply panels are within the scope of the *Plywood Orders*. *Id.* at 1. Commerce further determined that hardwood plywood produced by Finewood in Vietnam using Chinese two-ply was not substantially transformed in Vietnam and, thus, entered the United States as a product of China. *Id.*

Commerce allowed interested parties to file comments on the preliminary scope ruling. *See* Prelim. Scope Ruling at 31. Commerce subsequently rejected Finewood's initial comments based on the inclusion of untimely new factual information. *See* Letter Re: [Finewood] Cmts. on the Prelim. Scope Ruling (Dec. 10. 2021) ("Commerce's Dec. 10 Ltr."), PR 136, CJA Tab 30. Finewood refiled its initial comments with those portions omitted under protest. Resubmission of DH Respondents Cmts. on Prelim. Scope Ruling (Dec. 14, 2021) at 3, Attach. ("Pls.' Prelim. Scope Cmts."), CR 134, PR 138, CJA Tab 31.

Commerce rejected and did not retain on the record IGF's initial comments based on procedural errors and untimeliness. *See* Letter Re: [IGF's] Cmts. on the Prelim. Scope Ruling (Oct. 8, 2021), PR 126, CJA Tab 25; Attachments to Oct. 8, 2021 Letter (Oct. 13, 2021), PR 128–31, CJA Tab 27. Commerce rejected and removed from the record IGF's rebuttal comments based on the inclusion of untimely affirmative argument. Letter Re: [IGF's] Rebuttal Cmts. on the Prelim. Scope Ruling (Oct. 15, 2021), PR 134, CJA Tab 29.

On January 21, 2022, Commerce issued its affirmative Final Scope Ruling. Final Scope Ruling at 1. On February 18, 2022, Plaintiffs filed a summons and complaint. Summons, ECF No. 1; Compl. On March 17, 2022, the Coalition intervened. Order (Mar. 17, 2022), ECF No.

[7] To be dispositive, the (k)(1) factors "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007).

[8] The (k)(2) factors include: "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

20. On March 21, 2022, the court consolidated IGF's action under this lead case. Docket Entry, ECF No. 22. Following briefing on the merits, on March 21, 2023, the court heard oral argument. Docket Entry, ECF No. 55; *see also* Oral Arg. (recording on file with the court).[9]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi), and 28 U.S.C. § 1581(c).[10] The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

"[W]hether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law that [the court] review[s] de novo." *Meridian 2017*, 851 F.3d at 1382. Whether a product is covered by the language of the scope is "a question of fact reviewed for substantial evidence." *Id.*; *see also OMG, Inc.*, 972 F.3d at 1363–64 (discussing the standard of review). "Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty orders." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012). Nevertheless, "Commerce cannot 'interpret' an antidumping order so as to change the scope of th[e] order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citation omitted).

DISCUSSION

Plaintiffs and IGF challenge Commerce's determination that the Chinese two-ply panels imported into Vietnam are within the scope of the *Plywood Orders*. Because the court finds that remand is required on that issue, the court does not reach parties' arguments regarding substantial transformation.[11]

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[9] Subsequent citations to the oral argument reflect the timestamp from the recording.

[10] Plaintiffs also alleged jurisdiction pursuant to 28 U.S.C. § 1581(i) based on CBP's premature liquidation of the subject entries. Compl. ¶ 26. However, the Government does not contest jurisdiction in this case pursuant to section 1581(c). Remote Teleconf. (March 17, 2022) at 00:40–1:40 (time stamp from the recording, on file with the court). Plaintiffs protested the liquidation of their entries, and CBP has suspended action on the protests. Compl. ¶¶ 12, 16–17, 23; Compl. ¶¶ 13, 17, 23, *InterGlobal Forest LLC v. United States*, Court No. 22-cv-00053 (Feb. 2, 2022), ECF No. 7.

[11] Parties agree that the court need not address Commerce's substantial transformation analysis if the court finds two-ply panels beyond the scope of the *Plywood Orders*. Pls.' Mem. at 27–28; Oral Arg. 1:53:00–1:54:30.

I. Commerce's Scope Interpretation

Commerce determined there was an ambiguity in the written scope description requiring a (k)(1) analysis. Final Scope Ruling at 9–11. Plaintiffs and IGF challenge Commerce's finding of ambiguity and Commerce's analysis of the (k)(1) sources to include the Chinese two-ply panels within the scope of the *Plywood Orders*.

As previously stated, the scope of the *Plywood Orders* states:

> The merchandise subject to this investigation is hardwood and decorative plywood, *and certain veneered panels as described below*. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood *or other veneered panel, consisting of two or more layers or plies of wood veneers and a core*, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo.

Plywood AD Order, 83 Fed. Reg. at 512 (emphasis added). Upon review of this language, Commerce found that the scope "cover[s] two general types of merchandise"—hardwood and decorative plywood[12] and certain veneered panels—but that the second scope sentence defines only hardwood plywood. Final Scope Ruling at 9; *see also id.* at 11. Commerce explained that a contrary interpretation of the second sentence to describe certain veneered panels would render "the express inclusion of 'certain veneered panels' in the first sentence of the scope" superfluous. *Id.* at 11. Commerce concluded that "the scope is ambiguous with regard to 'certain veneered panels,'" *id.* at 10 (footnote omitted), and thus, it is unclear "whether all in-scope merchandise must be made of a minimum of three layers," *id.* at 11.

With respect to the (k)(1) materials, Commerce first reviewed the final injury investigation report prepared by the U.S. International Trade Commission ("ITC") and concluded that it provided no basis to exclude two-ply from the scope of the orders. Final Scope Ruling at 12–14.[13] Commerce explained that investigation documents provided to the ITC referenced "certain veneered panels"; the ITC found that the domestic like product was coextensive with the scope; and the ITC did not expressly exclude two-ply panels from its investigation. *Id.* at 13–14.

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[12] For ease of reference, the court refers to "hardwood and decorative plywood" as "hardwood plywood."

[13] Relevant portions of the ITC's report are reproduced in or appended to various record filings. *See, e.g.*, Final Scope Ruling at 13 & n.54 (citing two such filings). For ease of reference, the complete citation is Hardwood Plywood from China, Inv. Nos. 701-TA-565 and 731-TA-1341, Pub. 4747 (Dec. 2017) (final) ("ITC Report").

Next, Commerce considered language in the Petition and revisions to the scope prior to initiation. *Id.* at 14. As part of the revisions, Commerce noted that the phrase "veneer core platforms," a term defined in the Petition to include two-ply, was removed from the scope and the phrase "certain veneered panels" was added. *Id.* at 14–15. Commerce explained that the record of the investigation fails to indicate the reason for the change but maintained that the change was not intended to remove two-ply from the scope. *Id.* at 15.

Commerce also explained that, in the preliminary scope memorandum filed in the underlying investigation ("Preliminary Investigation Scope Memo"), the agency defined "certain veneered panels" to mean "a veneer of hardwood which has been affixed to a base (including the core) of inferior wood or a non-wood product." *Id.* at 16 & n.81 (citing Rebuttal to Substantial Transformation Info. (May 4, 2021), Ex. 1 (Scope Cmts. Decision Mem. for the Prelim. Determination (Apr. 17, 2017) ("Prelim. Inv. Scope Mem.")) at Cmt. 4, CR 126, PR 102, CJA Tab 21). Commerce further explained that an example of a three-ply panel provided by the Coalition and referenced in the Preliminary Investigation Scope Memo described a hardwood plywood product, not a veneered panel. *Id.* at 19 & n.99 (citing, *inter alia*, Prelim. Inv. Scope Mem. at Cmt. 4). Commerce stated that its "current understanding of the phrase 'veneered panels' means 'a veneer of hardwood affixed to a base, usually of inferior wood, by gluing under pressure, in accordance with the explanatory notes of the [Harmonized Tariff Schedule ("HTS")].'" *Id.* at 17 & n.85 (citing Prelim. Scope Ruling at 14).

Commerce also addressed Finewood's argument that the product characteristics memorandum from the investigation ("Product Characteristics Memo") supported its view that Commerce did not intend to capture two-ply in the scope. *Id.* at 19. Commerce explained that the Product Characteristics Memo "did not instruct respondents *not* to report two-ply panels." *Id.* at 19 (emphasis added). Commerce went on to explain that the Product Characteristics Memo "directed respondents to report the number of plies of the product, with the option to create their own two-digit codes (e.g., respondents could have reported '02' for a two-ply product) for any product with a number of plies not listed." *Id.* at 19 & n.100 (citing Finewood Sur-Rebuttal to Pet'r's May 4, 2021 Rebuttal Cmts. (May 13, 2021), Ex. SR-2 ("Prod. Characteristics Mem."), CR 127, PR 107, CJA Tab 22). Commerce further explained that "the number of plies was not a physical characteristic used to define the reported products (also known as control numbers or 'CONNUMs'); instead, it was merely an 'additional prod-

uct characteristic' not included in the CONNUM." *Id.* at 19 & n.101 (citing Prod. Characteristics Mem.).

A. Parties' Contentions

Plaintiffs contend that Commerce erred in finding the scope ambiguous with respect to the phrase "certain veneered panels" because the scope explicitly states that such products are "described below." Pls.' Mem. at 11. They are, Plaintiffs contend, because the second scope sentence uses the phrase "other veneered panel." *Id.* at 12 (emphasis omitted). Plaintiffs assert that instead of clarifying the scope, Commerce has impermissibly expanded it. Pls.' Reply at 1–4; *see also* Consol. Pl.'s Mem. at 14, 17 (advancing similar arguments). Plaintiffs further contend that record evidence undermines Commerce's (k)(1) analysis. Pls.' Mem. at 14–24; Pls.' Reply at 4–14; *see also* Consol. Pl.'s Mem. at 17–19.

The Government urges the court to sustain Commerce's ambiguity finding based on the lack of any explicit definition of "certain veneered panels." Def.'s Resp. at 12. Regarding Commerce's (k)(1) analysis, the Government contends that Plaintiffs merely invite the court to reweigh the evidence and that Commerce's findings should be sustained. *Id.* at 16–20.

The Coalition contends that Commerce met the "low threshold" applicable to ambiguity findings. Def.-Int.'s Resp. at 9–10 (discussing *Laminated Woven Sacks Comm. v. United States*, 34 CIT 906, 914, 716 F. Supp. 2d 1316, 1325 (2010)).[14] In addition to supporting the Government's arguments, *see id.* at 12, the Coalition further contends that the (k)(1) materials reflect their intent to include two-ply in the scope of the *Plywood Orders*, *id.* at 13–17.

B. Together, the Scope Language and the (k)(1) Sources Confirm the Unambiguous Scope of the *Plywood Orders*

Further background on the nature of the court's review of Commerce's scope ruling is helpful to the analysis. In this case, Commerce characterized the existence of ambiguity in the scope language as "a condition precedent" for Commerce to consider the (k)(1) sources—

[14] The Coalition argues that the phrase "as described below" following "certain veneered panels" could instead be interpreted to refer to the "14 additional paragraphs following the first paragraph, all of which provide information regarding the covered merchandise." Def.-Int.'s Resp. at 11. However, like the second scope sentence, subsequent scope paragraphs describing what is included in the scope are prefaced with the phrase "hardwood plywood." The Coalition's argument that subsequent scope paragraphs may describe certain veneered panels is entirely inconsistent with its position that the second scope sentence *does not* describe certain veneered panels.

effectively finding what some have inferred to be a "(k)(0)" step built into the agency's scope analysis (i.e., prior to (k)(1) and (k)(2)). Final Scope Ruling at 11 n.45 (citing, *inter alia*, *Meridian 2017*, 851 F.3d at 1381). Commerce's approach finds some support in the case law, *see, e.g.*, *OMG*, 972 F.3d at 1363, but, elsewhere, courts have acknowledged that Commerce's review of the scope language is inseparable from consideration of the (k)(1) sources, *see, e.g.*, *Meridian Prods. v. United States*, 890 F.3d 1272, 1277 (Fed. Cir. 2018) ("*Meridian 2018*") (stating that "the plain language of an antidumping order is 'paramount,'" but that "[i]n reviewing the plain language of a duty order, Commerce must consider [the (k)(1) sources]") (citation omitted); *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1354 (Fed. Cir. 2015) (describing "a two-step process" in which "Commerce must [first] consider the scope language contained in the order itself, the descriptions contained in the petition, and how the scope was defined in the investigation and in the determinations issued by Commerce and the ITC"); *ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012) ("[T]he first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous, and thus requires analysis of the regulatory factors [i.e., the (k)(1) sources] previously outlined. If it is not ambiguous, the plain meaning of the language governs.").

Despite what some might consider to be conflicting indications, the above-referenced case law simply suggests there is no bright line, that Commerce's scope analysis (and the court's corresponding review of that analysis) is "highly fact-intensive and case-specific." *King Supply*, 674 F.3d at 1345. Thus, in some cases, an order's scope, by itself, may be sufficiently plain in relationship to a particular product that no resort to the (k)(1) sources is necessary.[15] In other cases, however, it may be necessary to consider the (k)(1) sources to confirm that the scope language plainly speaks to the inclusion or exclusion of a particular product. *See, e.g.*, *Meridian 2017*, 851 F.3d at 1383–84 (reviewing the scope language and finding that Commerce's interpretation of such language was supported by earlier scope rulings) (citation omitted); *ArcelorMittal*, 694 F.3d at 89–90 (finding a scope unambiguous "when read in light of industry practice" and "Commerce's previous [scope] decision").

[15] In a similar vein, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has recognized that CBP effectively applies the scope language as it determines, "for every imported product, whether the product falls within the scope of an antidumping or countervailing duty order." *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1320 (Fed. Cir. 2020) (en banc). In recognizing CBP's authority to do so when an order is ambiguous, the Federal Circuit also recognized that CBP makes such determinations when "order[s] [are] clear and unambiguous." *Id.* at 1318. Similarly, Commerce may find an order unambiguous such that any further scope inquiry is unnecessary.

Whether resort to the (k)(1) sources is necessary to interpret the scope of an order, the court reviews Commerce's ambiguity determination *de novo*. *See Meridian Prods. 2017*, 851 F.3d at 1382. Thus, when the court finds that a scope is unambiguous, Commerce may not deviate from the court's holding in that regard. *See ArcelorMittal*, 694 F.3d at 90 (stating the plain meaning of the scope language in terms of the court's holding). This case falls into the scenario in which the scope language, when read together with (k)(1) sources, unambiguously establishes that the *Plywood Orders* do not include Chinese two-ply panels.

Commerce rested its determination that the phrase "certain veneered panels" was ambiguous on the agency's view that the second scope sentence (and, thus, the remainder of the scope) defined only hardwood plywood. Final Scope Ruling at 9. From the outset, Commerce's interpretation of the scope to include two "distinct and separate" products,[16] only one of which is described, is problematic in light of applicable statutory provisions and Commerce's regulation. Sections 1671e(a)(2) and 1673e(a)(2) require Commerce to include in antidumping and countervailing duty orders "a description of the subject merchandise." 19 U.S.C. §§ 1671e(a)(2), 1673e(a)(2). While that description need only contain "such detail as the [agency] deems necessary," *id.*, Commerce's regulation presupposes at least a "general" description of the subject merchandise, 19 C.F.R. § 351.225(a).[17] These provisions serve to implement "the primary purpose" of any unfair trade order, which "is to place foreign exporters on notice of what merchandise is subject to duties." *OMG*, 972 F.3d at 1364 (quoting *ArcelorMittal*, 694 F.3d at 88).[18] Commerce not only failed to address the consequences of its ambiguity determination in the context of these important considerations but took an interpretive approach which was at odds with them.

[16] Commerce described hardwood plywood and certain veneered panels as "distinct and separate" products in its (k)(1) analysis. Final Scope Ruling at 13.

[17] For this reason, cases cited by the Coalition involving ambiguities in general scope descriptions are inapposite. *See* Def.-Int.'s Resp. at 9. In *Laminated Woven Sacks*, for example, the court sustained Commerce's clarification of general scope language covering subject merchandise "printed with three colors or more in register" to mean the number of inks used in printing and not the number of colors visible on the merchandise. 34 CIT at 913–15, 716 F. Supp. 2d at 1325–26. Here, however, Commerce claimed that the ambiguity was related to the absence of any description of certain veneered panels and sought to describe such merchandise in the first instance in a scope ruling. *See* Final Scope Ruling at 11.

[18] Commerce acknowledged the "fundamental principle that merchandise subject to an order must be the *type of merchandise described in the order* and from the particular country covered by the order," Prelim. Scope Ruling at 11 (emphasis added), but then failed to recognize the incongruity of its position that the *Plywood Orders* nowhere describe "certain veneered panels," *see id.* (stating that "the scope does not define 'certain veneered panels,'" or provide examples thereof).

Commerce supported its determination that the second sentence of the scope defined only hardwood plywood by claiming that if that sentence "were intended to also define 'certain veneered panels,' the express inclusion of 'certain veneered panels' in the first sentence of the scope . . . would be unnecessary." Final Scope Ruling at 11. Accepting Commerce's position, however, would render the phrase "as described below" in the first sentence superfluous because certain veneered panels would not be described below. The Government's suggestion that "as described below" applies to hardwood plywood, Oral Arg. 05:45–06:55, does not remedy this problem because subsequent scope descriptions are prefaced with an identifying phrase such that this forecast of a description is unnecessary. Thus, Commerce's sole basis for finding that the second scope sentence does not describe certain veneered panels is unpersuasive.

Plaintiffs, on the other hand, read the first scope sentence as prefatory—introducing the products covered by the scope—while the second scope sentence serves to define the totality of the products, "[f]or purposes of this proceeding," as plywood or other veneered panels with coextensive definitions under the umbrella term of hardwood plywood. Pls.' Mem. at 11–12; *see also* Pls.' Reply at 1–2. The comma placement after "plywood" in the first scope sentence supports reading the phrase "and certain veneered panels as described below" to consist of a single independent clause such that the certain veneered panels *are* the "other veneered panel[s]" that Commerce "described below." *See Plywood AD Order*, 83 Fed. Reg. at 512. However, it is not necessary to resolve this matter based on the scope language alone because the (k)(1) sources establish the unambiguous meaning and show that Plaintiffs' interpretation aligns with Commerce's intent at the time the agency issued the *Plywood Orders*.

Before turning to the (k)(1) sources, one additional point bears mentioning. During oral argument, the Coalition asserted that finding the second scope sentence unambiguously applicable to certain veneered panels does not end the inquiry. Oral Arg. 1:54:30–2:01:10. According to the Coalition, the second scope sentence should also be interpreted to describe a two-ply—not a three-ply—minimum requirement.[19] *Id.* However, the Coalition presented this argument to

[19] Commerce looked to the (k)(1) sources for guidance on whether "veneered panels" may constitute "two-ply panels," and resolved that question in the affirmative. Prelim. Scope Ruling at 13; Final Scope Ruling at 11. Commerce's singular focus on the minimum ply requirement is problematic insofar as it ignores that all other characteristics of certain veneered panels would remain undefined because—according to Commerce—the scope describes only hardwood plywood. Commerce's approach thus leaves open the possibility of piecemeal scope rulings (and litigation) concerning other aspects of subject veneered panels, including, for example, core composition (if any), surface coatings, and dimension. *See Plywood AD Order*, 83 Fed. Reg. at 512.

Commerce during the scope inquiry, *see* Final Scope Ruling at 10 (summarizing the Coalition's arguments),[20] and Commerce impliedly rejected this interpretation. Commerce's statement that, "without a clear definition of certain veneered panels . . . it is unclear whether *all in-scope merchandise* must be made of a minimum of three layers," *id.* at 11 (emphasis added), indicates Commerce's understanding that at least *some* in-scope merchandise "must be made of a minimum of three layers."[21] If Commerce had agreed with the Coalition that the second scope sentence encompassed two-ply panels, Commerce's review of the (k)(1) sources for a definition of certain veneered panels would have been unnecessary because there would be no distinction between the two types of subject merchandise. *But cf.* Final Scope Ruling at 13. Thus, to the extent the Coalition intended to suggest that Commerce must further address the meaning of the second scope sentence if the court finds that "certain veneered panels" are described in that sentence, the court disagrees that any further consideration by Commerce is necessary.

As discussed below, the (k)(1) sources show both that Commerce intended to include subject merchandise with a minimum of three plies in the scope of the investigations *and* that Commerce only intended to include such merchandise—in other words, that the second scope sentence applies to all subject merchandise and that the second scope sentence unambiguously covers products of three or more plies.

1. Revisions to the Proposed Scope Language Prior to Initiation

Commerce's review of the Coalition's revisions to the proposed scope language prior to initiation of the investigations were cited in the agency's conclusion that certain veneered panels include two-ply panels. Final Scope Ruling at 15. Commerce's explanation is, however, circular, and unsupported by the record.

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[20] The Coalition argued that the second scope sentence "is more reasonably read" to define hardwood plywood as "consist[ing] of two or more layers or plies of: (1) wood veneer; and (2) a core." Final Scope Ruling at 10. The Coalition's argument is, however, premised on the omission of the plural form of "wood veneers" that Commerce used in the scope along with the singular "core." *See Plywood AD Order*, 83 Fed. Reg. at 512 (referring to "two or more *layers or plies* of wood *veneers anda core*") (emphasis added). The argument is further undermined by the Coalition's clear statement in its petition underlying the original investigation that "[h]ardwood plywood is comprised of a core sandwiched between two veneers," clearly describing a three-ply product. Finewood Suppl. Questionnaire Resp. – Part IV and Info. on Substantial Transformation (Apr. 20, 2021) ("Finewood Suppl. Resp."), Ex. SQ1–25 ("Petition") at 7, CR 117–23, PR 91–92, CJA Tab 18.

[21] Further in, Commerce referred to a product containing face and back veneers and a core as a hardwood plywood product "as described in the scope definition of hardwood plywood." Final Scope Ruling at 19.

Revisions to the proposed scope of the investigations prior to initiation show that the Coalition added the phrase "certain veneered panels" to the first scope sentence when it added "other veneered panel[s]" to the second scope sentence. *See* Finewood Suppl. Resp., Ex. SQ1–26 (containing Exhibit 1 to the Coalition's Dec. 6, 2016, letter to Commerce revising the proposed scope ("Revised Proposed Scope")). Prior to the revisions, the proposed scope language stated, in relevant part:

> The merchandise subject to this investigation is hardwood and decorative plywood. Hardwood and decorative plywood is a flat panel composed of an assembly of two or more layers or plies of wood veneers in combination with a core. The veneers, along with the core, are glued or otherwise bonded together to form a finished product. . . . For products that are entirely composed of veneer, such as Veneer Core Platforms, the exposed veneers are to be considered the face and back veneers . . . .

Petition at 4–5. Later in the Petition, though not in the section containing the proposed scope language, the Coalition explained that "[v]eneer core 'platforms' are included in the definition of subject merchandise" and that veneer core platforms are "defined as two or more wood veneers that form the core of an otherwise completed hardwood plywood product." *Id.* at 7.

The Coalition's revised proposed scope language included "certain veneered panels" and removed all references to "veneer core platforms." *Compare* Revised Proposed Scope at 1, *with, e.g.*, *Plywood AD Order*, 83 Fed. Reg. at 512; *see also* Pls.' Mem. at 15–16 (summarizing the changes). While Commerce did not address the fact that the Coalition added "certain veneered panels" to the proposed scope language at the same time it added "other veneered panel[s]," to the court it appears anomalous for Commerce to have accepted those additions but now disclaim any relationship between the nearly identical terms. *See* Final Scope Ruling at 15. Instead, Commerce focused on the Petition's definition of the deleted term "veneer core platforms" to include a two-ply panel. *See id.* at 15 & n.70 (citing, *inter alia*, Petition at 7). Commerce went on to accept the Coalition's position that the proposed scope language therefore covered two-ply panels. *See id.* at 15 (stating that, "[a]s the petitioner notes, 'the removal of the phrase veneer core platforms did not change the scope to remove two-ply panels'"). Commerce believed this fact to be "confirmed" by the addition of the reference to "certain veneered panels" and Commerce's decision, discussed in more detail below, to retain the phrase

"certain veneered panels" in the scope over requests to delete the term. *Id.*

While the Petition "may provide valuable guidance as to the interpretation of the final order," the Petition "cannot substitute for language in the order itself." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002); *see also id.* at 1096–98 (invalidating a scope ruling in which Commerce relied on language in a petition that did not appear in the final order). Commerce's explanation rests on finding an equivalence between veneer core platforms and certain veneered panels. *See* Final Scope Ruling at 15. However, as Commerce stated, "the record of this proceeding contains *no information* relating to why the reference to veneer core platforms was removed from the scope and certain veneered panels was added." *Id.* (emphasis added). Thus, Commerce's explanation has no basis in the record and the Petition's references to veneer core platforms are of little, if any, value.

Moreover, Commerce's assumption that the original scope language proposed in the Petition covered two-ply panels is unsupported. While the Coalition provided a definition of veneer core platforms that included two-ply panels, *see* Petition at 7, the actual scope language proposed by the Coalition specified products consisting of "two or more layers or plies of wood veneers in combination with a core," *id.* at 4 (further stating that "[t]he veneers" (plural) are "glued or otherwise bonded" to "the core"). Thus, while the Coalition may have defined veneer core platforms generally to consist of at least two plies, the proposed scope language did not expressly include two-ply veneer core platforms themselves and, instead, the scope appeared to require at least three plies. *See id.*[22]

[22] The change from "veneers in combination with a core" to "veneers and a core" is immaterial. While the hardwood plywood investigation was ongoing, Commerce issued an interpretive note in the antidumping and countervailing duty proceedings concerning multilayered wood flooring ("MLWF") from China clarifying that the phrase "two or more layers or plies of wood veneer(s) in combination with a core" means "wood flooring products with a minimum of three layers." *Multilayered Wood Flooring From the People's Republic of China*, 82 Fed. Reg. 27,799, 27,800 n.11 (Dep't Commerce June 19, 2017) (final clarification of the scope of the antidumping and countervailing duty orders); *see also* Final Scope Ruling at 24 & n.133 (citing an earlier yet substantively identical clarification of the MLWF orders). Thus, the original scope language proposed by the Coalition in the Petition, which incorporated the same language, reasonably must be read to require a minimum of three plies. By their own terms, subsequent revisions to the proposed scope language by the Coalition were intended to clarify—not change—the scope of the investigations. *See* Revised Proposed Scope at 1–2; *cf.* Def.-Int.'s Resp. at 13 (in reference to the revisions, stating that "[t]he Coalition did not state that it was modifying the universe of merchandise covered nor does anything on the record indicate that this was the Coalition's intent").

2. Commerce's Preliminary Investigation Scope Memo

As indicated above, in the Final Scope Ruling, Commerce also referenced its decision during the investigations not to remove the reference to certain veneered panels from the scope language. Final Scope Ruling at 15. By way of further background, following initiation of the investigations, an interested party submitted comments on the proposed scope language. Prelim. Inv. Scope Mem. at Cmt. 4. That interested party argued that the phrase "'certain veneered panels' should be removed" based on possible "confusion on covered products" given the lack of any "specific description of the physical characteristics or uses that define 'certain veneered panels' as distinct from the specifically defined 'hardwood and decorative plywood.'" *Id.* According to Commerce, the Coalition responded as follows:

> Petitioners argue that the reference to "veneered panels" was included because the term "veneered panels" is a term used in the HTSUS and by the World Customs Organization (the WCO). Petitioners state that the WCO defines plywood as being "three or more sheets of wood glued and pressed one on the other and generally disposed so that the grains of successive layers are at an angle." Petitioners state that [the] WCO defines a veneered panel, on the other hand, as a veneer of wood (in this case a hardwood) which has been affixed to a base (including the core) of inferior wood or a non-wood product. Petitioners state that an example of a veneered panel could be a three-ply hardwood panel with oak front and rear faces and with a core of particle board or a core of medium-density fiberboard (MDF).

Id. (footnotes omitted). Based on this response, Commerce retained certain veneered panels in the scope and expressly determined that "this phrase means, in the context of this investigation, a veneer of hardwood which has been affixed to a base (including the core) of inferior wood or a non-wood product." *Id.*

Commerce's discussion of this information from the investigation in the Final Scope Ruling suffers from several flaws. First, Commerce's attempt to dismiss the Coalition's earlier example of a three-ply panel as "a hardwood plywood product, rather than a veneered panel," Final Scope Ruling at 19, is unsupported by both the text and context of the Preliminary Investigation Scope Memo. Indeed, the Government does not defend this finding. *See* Def.'s Resp. at 14–17. The Coalition explicitly characterized the example as "a veneered panel"; the example followed the Coalition's explanation of the WCO's defi-

nition of a veneered panel; and the entire discussion was intended to justify why Commerce should retain certain veneered panels in the scope. *See* Prelim. Inv. Scope Mem. at Cmt. 4.

Additionally, in the Final Scope Ruling, Commerce clearly altered its definition of certain veneered panels without explaining the basis for the changes or why the changes should not be considered an impermissible enlargement of the scope. Commerce explained that its altered "definition is generally consistent with the definition" used "in the explanatory notes of the HTS." Final Scope Ruling at 16. While that may be true, Commerce failed to explain why its "current understanding" of certain veneered panels, *id.* at 17, comports with Commerce's understanding of the phrase during the investigation.[23]

In fact, Commerce's definition of certain veneered panels in the investigation appears to reconcile the scope language with the WCO's definition of relevant terms. The WCO defines "veneered panels" as "a thin veneer of wood affixed to a base, usually of inferior wood, by glueing [sic] under pressure." Finewood Suppl. Resp., Ex. SQ1–50. The WCO defines plywood as "three or more sheets of wood glued and pressed one on the other and generally disposed so that grains of successive layers are at an angle." *Id.* Commerce's scope, which provides for a core layer consisting of "a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard," *Plywood AD Order*, 83 Fed. Reg. at 512, is inconsistent with the WCO's definition insofar as hardwood plywood defined by Commerce in the scope may contain a non-wood core. Any such inconsistency is remedied, however, by the inclusion of "certain veneered panels" when such products are generally understood to have a core of an inferior wood or non-wood layer, *see* Finewood Suppl. Resp., Ex. SQ-50, and by Commerce's use of limiting language defining hardwood plywood solely "[f]or purposes of this proceeding," *Plywood AD Order*, 83 Fed. Reg. at 512.

3. Commerce's Product Characteristics Memo

Commerce maintained that the Product Characteristics Memo from the investigation supported the finding that certain veneered panels "include products composed of two or more plies." Final Scope Ruling at 19. It does not. Taken as a whole, Commerce's Product Characteristics Memo substantiates an intent to include three-ply—and only three-ply—in the scope of the investigations.

[23] At oral argument, the Government explained that Commerce considered the meaning of the phrase certain veneered panels "more extensively" in the context of the scope inquiry than it apparently had during the investigation. Oral Arg. 21:07–22:30. Regardless, counsel's explanation does not, however, operate to tie Commerce's current understanding of the phrase to the Commerce's intent when it issued the *Plywood Orders*.

In the Product Characteristics Memo, Commerce required respondents to report a face veneer (fields 3.1 through 3.3); a back veneer (fields 3.4 through 3.5); and a core (field 3.6). Prod. Characteristics Mem. at 1–5. Commerce considered these characteristics necessary for CONNUM[24] purposes. *See id.* at 1. In field 3.6, Commerce used the "other" option to instruct respondents to report "core layer[s] . . . made of multiple materials," but did not instruct respondents to use this option to report the absence of a core layer. *Id.* at 5. In contrast, Commerce used the code "00" for "No Surface Coating" in field 3.10 and "None" for "Minor Processing" in field 3.11, reserving "Other" for reporting existent, but unspecified, information. *Id.* at 7–8. The Product Characteristics Memo therefore indicates that Commerce did not contemplate respondents reporting the absence of a core layer, as would be the case for two-ply panels.

For the number of plies, Commerce instructed respondents to report anywhere from three to 10 or more plies. *Id.* at 9. Commerce's assertion in the Final Scope Ruling that the Product Characteristics Memo contained "the option [for respondents] to create their own two-digit code" for an unlisted number of plies, such as "02" for two plies, is unsupported by the record. Final Scope Ruling at 19. The Product Characteristics Memo listed codes for products with three to ten plies and contemplated the creation of codes for "10-n" plies, i.e., more than 10 plies, but not for less than three plies. Prod. Characteristics Mem. at 9. Commerce's explanation again fails to account for Commerce's approach in other fields, which included "less than" options when necessary. *See id.* at 3, 6, 8. While "the number of plies was not a physical characteristic used to define the reported products," Final Scope Ruling at 19, Commerce offers no explanation for the lack of an explicit option to report two plies if, in fact, as Commerce now contends, two-ply panels were always considered to be in-scope.

4. The ITC Report

Lastly, the ITC Report indicates that the ITC understood the subject merchandise to include three-ply products generally referenced as hardwood plywood. The ITC Report stated:

> In our preliminary determinations, we defined *a single domestic like product, coextensive with the scope of these investigations. We found that all hardwood plywood consisted of two or more layers of wood veneer glued to a core* and was used in a range of interior applications.

[24] CONNUM refers to "control number," which is a number designed to reflect the "hierarchy of certain characteristics used to sort subject merchandise into groups" and allow Commerce to match identical and similar products across markets. *Bohler Bleche GmbH & Co. KG v. United States*, 42 CIT __, __, 324 F. Supp. 3d 1344, 1347 (2018).

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> Information in the final phase of these investigations about the characteristics of hardwood plywood is the same as that in the preliminary phase. Accordingly, we again define a single domestic like product corresponding to the scope.

Pls.' Prelim. Scope Cmts. at 8–9 (quoting ITC Report at 9–10).[25] The ITC Staff Report also described U.S. producers' hardwood plywood production to include the pressing of face and back veneers to a core. *See* Resp. to the Dep't's Request for Add'l Info. (Apr. 20, 2021), Ex. 2, PR 94, CJA Tab 19 (reproducing ITC Report at I-16).

Commerce dismissed Finewood's arguments concerning the ITC's three-ply definition of hardwood plywood as "irrelevant" based on its theory that certain veneered panels and hardwood plywood "are distinct and separate" products. *See* Final Scope Ruling 13. Commerce also deemed it insignificant that the ITC Report contained no references to two-ply panels. *See id*. Commerce explained that the scope description provided to the ITC referenced "certain veneered panels" and the ITC found the domestic like product to be coextensive with the scope. *Id.* Commerce also stated that the ITC did not expressly exclude two-ply panels from its investigation. *Id.* at 13–14.

The lack of an express exclusion is beside the point. The purpose of a scope ruling is, first and foremost, to ascertain whether the scope can "reasonably be interpreted to include" the contested merchandise. *Duferco*, 296 F.3d at 1905. Thus, "Commerce cannot find authority in an order based on the theory that the order does not deny authority" to include two-ply as a result of an express exclusion. *Id.* at 1096. With respect to whether the ITC Report supports including two-ply in the scope, Commerce's reasoning is entirely circular. The issue is not whether the ITC referenced "certain veneered panels" in the report but whether the ITC understood the phrase to mean, and thus clearly

[25] While Commerce maintained that it cited only to portions of the ITC Report that parties had placed on the record, *see* Final Scope Ruling at 12–13, Commerce later acknowledged that no party placed page 9 of the ITC Report on the record, *see* Confid. Def.'s Post-Arg. Submission at 1, ECF No. 56. Nevertheless, Commerce cited to page 9 of the ITC Report to support its preliminary ruling, *see* Prelim. Scope Ruling at 21 & n.122; Commerce did not reject Finewood's subsequent citations to that page or any other page of the ITC Report, *see* Commerce's Dec. 10 Ltr. at 2; and, in the Final Scope Ruling, Commerce reiterated the ITC's finding of a single like product coextensive with the scope of the investigations, *see* Final Scope Ruling at 13 & n.57 (citing Pls.' Prelim. Scope Cmts. at 8–9, in turn citing ITC Report at 9–10). It is therefore clear that Commerce considered at least this additional portion of the ITC Report that was apparently never placed on the record. The court will therefore direct Commerce to correct the administrative record such that it includes "all information presented to or obtained by the [agency]" pursuant to 19 U.S.C. § 1516a(b)(2)(A)(i) and CIT Rule 73.2(a)(1) or explain why correction is inappropriate.

investigated, two-ply panels. *See* Pls.' Mem. at 21–22. Commerce points to no affirmative record evidence that the ITC did so. In the absence of any such affirmative evidence, either of inclusion or exclusion of two-ply panels, the court finds that the ITC Report is inapposite to whether two-ply panels were included in the scope of its injury investigation.[26]

5. Summary and Conclusion

When read in light of the (k)(1) sources, it is clear that the scope of the *Plywood Orders* unambiguously covers hardwood plywood and certain veneered panels that, for purposes of the underlying proceeding, and from the second scope sentence onward, are collectively described as hardwood plywood "consisting of two or more layers or plies of wood veneers and a core," i.e., at least three plies. Commerce's Final Scope Ruling is therefore not in accordance with the law and will be remanded for Commerce to issue a ruling consistent with this opinion.

II. Commerce's Rejection of Finewood's Citations to (k)(1) Sources

Commerce rejected portions of Finewood's comments on the preliminary scope ruling. Commerce's Dec. 10 Ltr. Commerce took issue with Finewood's references to sections of the Coalition's scope comments from the investigation that were not previously included in the factual submissions. *Id.* at 2.

A. Parties' Contentions

Plaintiffs contend that "Commerce must consider [the Coalition's] submissions during the initial . . . investigation regardless of whether any party put portions of the investigation materials on the record of the scope inquiry." Pls.' Mem. at 25; *see also* Pls.' Reply at 12–13.[27] Plaintiffs base their argument on language in the regulation stating

[26] The Coalition's argument that the ITC's definition of the domestic like product should not be read to include the universe of covered products is not persuasive. Def.-Int.'s Resp. at 16–17 (asserting that the ITC only referenced "gluing" when the scope provides that subject merchandise "may be glued *or otherwise bonded together*"). The ITC acknowledged that hardwood plywood products may be differentiated by, among other things, "the type of adhesive used in the manufacturing process." Pls.' Prelim. Scope Cmts. at 27 (quoting ITC Report at I-14).

[27] Plaintiffs' argument appears to be two-fold: 1) that Commerce unlawfully rejected Finewood's citations to the Coalition's scope comments, and 2) that Commerce was required to consider the complete ITC Report regardless of whether the ITC Report was placed on the record in its entirety. *See* Pls.' Mem. at 24–25; Oral Arg. 1:06:00–1:07:05. Because Commerce did not take any adverse action with respect to Finewood's extra-record citations to the ITC Report and Plaintiffs do not point to any specific parts of the ITC Report that Commerce failed to address, the court leaves open the question whether the ITC Report, which is a public document, should be treated differently from other (k)(1) sources.

that Commerce "*will* take into account" the (k)(1) sources, Pls.' Mem. at 25 (quoting 19 C.F.R. § 351.225(k)(1)), and on case law they assert supports their position, *id.* at 26 (citing *Meridian 2018*, 890 F.3d at 1272; *TMB 440AE, Inc. v. United States*, 43 CIT __, 399 F. Supp. 3d 1314 (2019); *Saha Thai Steel Pipe Pub. Co. v. United States*, 45 CIT __, 547 F. Supp. 3d 1278 (2021)). Plaintiffs contend that the (k)(1) sources constitute "legal authority that Commerce must consult." *Id.* at 27.

The Government argues that Commerce was within its discretion to reject the untimely new factual information. Def.'s Resp. at 31–33. The Coalition contends that Plaintiffs' cited cases are inapposite. Def.-Int.'s Resp. at 29–30.

B. The Court Will Sustain Commerce's Determination

At issue is the following language from Commerce's scope regulation: "in considering whether a particular product is included within the scope of an order or a suspended investigation, [Commerce] *will* take into account the following [sources.]" 19 C.F.R. § 351.225(k)(1) (emphasis added). A review of the surrounding provisions and other relevant regulations, along with case law, supports Commerce's characterization of the (k)(1) sources as factual information and application of corresponding deadlines.

Subsection (c) of 19 C.F.R. § 351.225 explains the process for parties to apply for a scope ruling. That provision states that a party applying for a scope ruling must include "[a]ny *factual information* supporting this position, including excerpts from portions of [Commerce's] or the Commission's *investigation*, and relevant prior *scope rulings*." 19 C.F.R. § 351.225(c)(ii)(C) (emphases added). These sources, which Commerce identifies as factual information, encompass those listed in subsection (k)(1). *See id.* § 351.225(c)(ii)(C), (k)(1). Additionally, 19 C.F.R. § 351.102(21) defines "[f]actual information" broadly as "[e]vidence." The (k)(1) sources are considered evidence of Commerce's understanding of the scope of its order at the time it issued the order. *See, e.g.*, *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014) (stating that "(k)(1) sources are afforded primacy in the scope analysis . . . because interpretation of the language used in the orders must be based on the meaning given to that language during the underlying investigations").

Plaintiffs' reliance on Commerce's use of the term "will" in the regulation is not persuasive of a different interpretation. *See* Pls.' Mem. at 25. While terms such as "will" or "shall" often "convey a command rather than a discretionary choice," *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*,

16 CIT 1008, 1012, 808 F. Supp. 841, 845 (1992), courts have recognized that, when used "against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest," *id.* (quoting *Barnhart v. United States*, 5 CIT 201, 203, 563 F. Supp. 1387, 1389 (1983), in turn quoting *Cairo & F.R. Co. v. Hecht*, 95 U.S. 168, 170 (1877)).

Further, "[a]s with a statute, the intent of a regulation may best be determined by its language." *Id.* Plaintiffs overlook Commerce's consistent use of "will" in subsection (k)(2) of the regulation, which states: "[w]hen the above criteria are not dispositive, [Commerce] *will* further consider [additional factors.]" 19 C.F.R. § 351.225(k)(2) (emphasis added). The materials listed in subsection (k)(2) consist of factual information. *See id.* (listing "physical characteristics of the product[,]" "channels of trade in which the product is sold[,]" and the "manner in which the product is advertised and displayed"). Consequently, the term "will" in both subsections (k)(1) and (k)(2) must be considered and applied in light of the factual record. It would be inconsistent to construe "will" in subsection (k)(1) to require Commerce to consider extra-record materials while construing "will" in subsection (k)(2) to hold a more limited meaning. *Cf. Mil.-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1147 (Fed. Cir. 2021) ("[I]t is a well-established canon of statutory construction that Congress is presumed to have intended for 'identical words used in different parts of the same act . . . to have the same meaning.') (citation omitted).[28]

Lastly, Plaintiffs' case citations are misplaced. While courts frequently recite the regulatory steps Commerce must follow for the issuance of a scope ruling and may direct Commerce to consider the (k)(1) sources, none of the cited cases addressed the question whether Commerce must consider extra-record information. *See Meridian 2018*, 890 F.3d at 1277 (clarifying the legal framework); *TMB 440AE, Inc.,* 399 F. Supp. 3d at 1322 (remanding for Commerce to conduct a (k)(1) analysis); *Saha Thai*, 547 F. Supp. 3d at 1290 (same).

Accordingly, Commerce's decision on this issue will be sustained.

III. Commerce's Rejection of IGF's Scope Comments

As previously stated, Commerce rejected IGF's initial and rebuttal scope comments. IGF did not challenge those decisions in its com-

[28] While this presumption may be overcome, *see, e.g.*, *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1445 (Fed. Cir. 1998), Plaintiffs offer no arguments in this regard.

plaint or its moving brief.[29] In its response brief, the Government argued that Commerce's rejection of IGF's scope comments meant that any arguments of IGF that differed from Plaintiffs were not exhausted before Commerce, no exception to the exhaustion doctrine applies, and, therefore, those arguments should not be considered by the court. Def.'s Resp. at 34 (citing Consol. Pl.'s Mem. at 16–17, 19–20, 43, 46–49); *see also* Def.-Int.'s Resp. at 30–31 (advancing similar arguments).

In its reply brief, IGF purports to address the issues of waiver and exhaustion. *See* Consol.-Pl.'s Reply at 1 (summarizing the issues). IGF does not, however, address these issues. Instead, IGF presents new substantive arguments against Commerce's rejection of its initial and rebuttal scope comments. *Id.* at 2–10.

The court declines to consider IGF's arguments. It is well-established "that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006). This principle is also reflected in the court's rules, which require movants to include in their Rule 56.2 briefs "the authorities relied on and the conclusions of law deemed warranted by the authorities." U.S. Court of International Trade ("CIT") Rule 56.2(c)(2). Because IGF did not contest Commerce's rejection of IGF's initial and rebuttal scope comments in its moving brief, IGF waived any such arguments offered for the first time in its reply brief.

Without any basis for remanding Commerce's rejection of IGF's scope comments, IGF failed to exhaust its administrative remedies with respect to arguments raised for the first time in its moving brief. "[T]he [CIT] shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). While exhaustion is not jurisdictional, *Weishan Hongda Aquatic Food Co., Ltd. v. United States*, 917 F.3d 1353, 1363–64 (Fed. Cir. 2019), the statute "indicates a congressional intent that, absent a strong contrary reason, the [CIT] should insist that parties exhaust their remedies before the pertinent administrative agencies," *id.* at 1362 (quoting *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017)) (alteration in original). IGF does not present any reasons—let alone strong reasons—why the court should decline to apply the exhaustion doctrine here. Further, while certain exceptions to this general rule exist, none would appear to apply in this instance. Accordingly, to the

[29] In its statement of the case, IGF asserted that "Commerce falsely claimed that it need consider only information that either Commerce or the parties put on the record." Consol. Pl.'s Mem. at 6. IGF did not, however, support its assertions of falsehood with substantive argument.

extent IGF raises arguments not otherwise raised before Commerce by Plaintiffs and considered herein, the court does not consider those arguments.

IV. Finewood's Participation In This Case

In their moving brief, Plaintiffs asserted that Finewood ceased operations in November 2018 and dissolved in September 2019. Pls. Mem. at 6. Based on that representation, at oral argument, the court requested parties to address Finewood's capacity to sue in this court, whether any such challenges have been waived, and Finewood's standing to remain in the action. Letter to Counsel (Mar. 16, 2023) at 3, ECF No. 52. The court noted that Rule 17 "states that capacity to sue is determined, for corporations, 'by the law under which it was organized,' and 'for all other parties, by the law of the appropriate state,'" *id.* (quoting CIT Rule 17(b)(2)–(3)), and that Rule 9 requires opposing parties to "raise any issues regarding capacity 'by a specific denial' and with 'supporting facts that are peculiarly within the party's knowledge,'" *id.* (quoting CIT Rule 9(a)(2)). The court further noted that "[c]apacity to sue is distinct from standing, which is a jurisdictional requirement that must be maintained throughout the action." *Id.*

Plaintiffs chose not to provide substantive arguments supporting Finewood's presence in this action, explaining that the action would continue under the named importer plaintiffs regardless of Finewood's participation. Oral Arg. 1:32:00–1:32:25. Noting that Finewood alleged incorporation under the laws of Vietnam, the Government stated that it was unable to take a position based on the lack of information regarding Finewood's status under Vietnamese law. *Id.* 1:32:30–1:33:20; *see also* Compl. ¶ 1.

The court need not take a position on the issue of capacity (or waiver in relation thereto) because it finds that Finewood must be dismissed for lack of standing. In order to have standing, a "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent"; the injury must be "fairly traceable" to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992). Additionally, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Finewood failed to identify any interest that is legally protected in light of the company's dissolution or otherwise to

establish the possibility of redress.[30] Thus, Finewood will be dismissed from the action and the clerk will be directed to recaption the action accordingly.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Final Scope Ruling is remanded for Commerce to issue a scope ruling concerning Finewood's two-ply panels that is consistent with the unambiguous meaning of the *Plywood Orders* discussed herein; it is further

ORDERED that Commerce's treatment of Finewood's initial scope comments and its rejection of IGF's initial and rebuttal scope comments are sustained; it is further

ORDERED that, on or before May 4, 2023, Commerce must correct the administrative record or provide an explanation as to why correction is inappropriate, consistent with footnote 25 of this opinion; it is further

ORDERED that Finewood is dismissed from the action and the clerk is directed to amend the caption of this action accordingly; it is further

ORDERED that Commerce shall file its remand redetermination on or before June 20, 2023; it is further

ORDERED that subsequent proceedings shall be governed by CIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 3,000 words.

Dated: April 20, 2023
New York, New York

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

[30] In parallel litigation challenging CBP's affirmative EAPA determination, the court denied Finewood's motion to intervene on similar grounds, finding that Finewood had failed to establish a legally protected interest in the action as required pursuant to CIT Rule 24(a)(2). *See* Order, *Far East Am., Inc. v. United States*, Consol. Ct. No. 22-cv213 (Oct. 7, 2022), ECF No. 33.

Slip Op. 23–59

LA MOLISANA S.P.A., Plaintiff, and VALDIGRANO DI FLAVIO PAGANI S.R.L., Consolidated Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 21–00291

[The final results of the U.S. Department of Commerce's twenty-third administrative review of the antidumping duty order on pasta from Italy are sustained.]

Dated: April 24, 2023

David L. Simon, Law Offices of David L. Simon, PLLC, of Washington, D.C., argued for Plaintiff La Molisana S.p.A. and Consolidated Plaintiff Valdigrano di Flavio Pagani S.r.L. On the brief was *David J. Craven*, Craven Trade Law LLC, of Chicago, IL.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Kirrin A. Hough*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Eaton, Judge:

This consolidated action involves the final results of the U.S. Department of Commerce's ("Commerce" or the "Department") twenty-third administrative review of the antidumping duty order on certain pasta from Italy ("Order"). *See Certain Pasta From Italy*, 86 Fed. Reg. 28,336 (Dep't Commerce May 26, 2021) ("Final Results") and accompanying Issues and Decision Mem. (May 20, 2021) ("Final IDM"), PR 277; *see also Certain Pasta From Italy*, 61 Fed. Reg. 38,547 (Dep't Commerce July 24, 1996) (Order).

Plaintiff La Molisana S.p.A. ("La Molisana"), a mandatory respondent,[1] and Consolidated Plaintiff Valdigrano di Flavio Pagani S.r.L.

[1] The only other mandatory respondent was a collapsed entity comprised of Ghigi 1870 S.p.A. and Pasta Zara S.p.A. Neither company is a party to this action. "Commerce's practice has devolved to the point where it regularly chooses only two (and sometimes one) mandatory respondents to be 'representative' of unexamined respondents for the purpose of calculating the [separate] rate in a review, a [practice] that this Court has regarded with some skepticism." *Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1224, 1236 (2021) (footnote omitted) (first citing *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 33 CIT 1125, 637 F. Supp. 2d 1260 (2009); and then citing *Carpenter Tech. Corp. v. United States*, 33 CIT 1721, 662 F. Supp. 2d 1337 (2009)). "There can be little question that, if Commerce were to change its method and name more than two mandatory respondents, separate rate companies would receive more accurate rates, and a great deal of litigation would be avoided." *Xiping Opeck Food Co. v. United States*, 45 CIT __, __, 551 F. Supp. 3d 1339, 1356–57 (2021). The Federal Circuit has expressed similar concerns. *See, e.g.*, *YC Rubber Co. (N. Am.) LLC v. United States*, No. 21–1489, 2022 WL 3711377, at *3–4 (Fed. Cir. Aug. 29, 2022) (not reported in the Federal Reporter) (holding that "Commerce unlawfully restricted its examination to a single mandatory respondent" under 19 U.S.C. § 1677f-1(c)(2)).

("Valdigrano"), a non-examined respondent, (collectively, "Plaintiffs") are Italian producers and exporters of the subject pasta. By their motion for judgment on the agency record, Plaintiffs challenge Commerce's determination not to adjust its model-match method with respect to coding for the pasta's protein content. *See* Pls.' Mem. Supp. Mot. J. Agency R., ECF No. 27–1 ("Pls.' Br."); *see also* Pls.' Reply Br., ECF No. 34. For Plaintiffs, the existing model-match method must be adjusted because it results in the comparison of Italian pasta products with those produced in the United States that are physically dissimilar in terms of their protein content.

Defendant the United States ("Defendant"), on behalf of Commerce, urges the court to sustain the Final Results. *See* Def.'s Resp. Opp'n at 8, ECF No. 30 ("The evidence and arguments placed on the record by plaintiffs do not sufficiently demonstrate that Commerce's instructions for reporting the protein content of finished pasta, in place for more than a decade, result in price-to-price comparisons between physically dissimilar pasta or fail to reflect market reality such that Commerce must alter them.").

The court has jurisdiction under 28 U.S.C. § 1581(c) (2018) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018). For the following reasons, Plaintiffs' motion is denied, and the Final Results are sustained.

BACKGROUND

In September 2019, Commerce initiated the twenty-third review of the Order, covering the period of review from July 1, 2018, to June 30, 2019. *See Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 84 Fed. Reg. 47,242 (Dep't Commerce Sept. 9, 2019). Commerce selected La Molisana as a mandatory respondent. Valdigrano was not selected for examination but participated in the review by filing an administrative case brief.

The primary controversy in this case involves the method that Commerce requires respondents to use when reporting the protein content of pasta sold in the home market (PROTEINH) and in the United States (PROTEINU). Protein content is one of several physical characteristics of pasta that are used to compose a control number, or CONNUM, for each unique pasta product.[2] CONNUMs are comprised of digits, and each digit is a "code" for a physical characteristic of the product. Commerce uses CONNUMs in its model-match method to identify "like" products to compare.

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[2] The protein content of pasta "is an important determinant of the quality of the product." Pls.' Br. at 3 (citing Pls.' Br. attach. B (Market Report) Ex. H). "The protein content in pasta comes from semolina flour—the main input of pasta—which is made from durum wheat." *Ghigi 1870 S.p.A. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1332, 1337 n.7 (2021).

In November 2019, Commerce issued its initial antidumping questionnaire to La Molisana. *See* Antidumping Questionnaire (Nov. 1, 2019), PR 66. The questionnaire instructions asked the respondent to "[i]dentify the percentage of protein in the pasta sold, as stated on the label of the respective product." *Id.* at B-9 (home market sales), C-7 (U.S. sales). Pasta with a protein content of 12.5% or more was to be coded as "1" (premium), and pasta with a protein content of 10.00–12.49% was to be coded as "2" (standard), based on the protein content listed on the nutrition label of the packaging.[3] The "1" or "2," in turn, would become a digit in the CONNUM for a particular product.

Here, La Molisana complied with Commerce's instructions and coded the protein content of its pasta as "1" or "2," using the percentage of protein stated on the nutrition label. But in its questionnaire response La Molisana also stated that "due to the nature of the nutrition facts panel and other incontrovertible facts, [the reported code] is not necessarily an accurate representation of the Protein Content." La Molisana Sec. B Resp. Ex. B-2 (Jan. 3, 2020), PR 120. In other words, La Molisana complied with Commerce's instructions but also in its narrative response questioned whether Commerce's method of coding protein content (i.e., as premium "1" or standard "2") would lead to comparisons of products that were dissimilar in terms of protein.

After the preliminary results were published, in which Commerce applied its usual model-match method, Valdigrano and La Molisana filed administrative case briefs. In their respective briefs, each pressed its arguments for why the model-match method, with respect to coding for protein content, must be adjusted to ensure that Commerce compared physically similar pasta products: premium with premium and standard with standard.

Specifically, Valdigrano argued that the 12.5% breakpoint between standard and premium pasta does not reflect current market reality. The company relied on a report that presented price and protein content information for a sample of pasta products sold in the Italian and U.S. markets ("Market Report"). *See* Valdigrano Case Br. (Jan. 26, 2021), PR 257; *see also* Pls.' Br. attach. B (Market Report). The Market Report was prepared by Plaintiffs' counsel based on pasta purchased in one food retail chain in Italy and four food retailers in a

[3] Commerce has used the same coding method, i.e., "1" for premium pasta with a minimum protein content of 12.5% and "2" for standard, based on the percentage listed on the nutrition label, since protein content was introduced as a physical characteristic of pasta in the twelfth administrative review. *See* Final IDM at 7; *see also Certain Pasta from Italy*, 75 Fed. Reg. 6,352, 6,353 (Dep't Commerce Feb. 9, 2010) (final results of twelfth administrative review). To determine the 12.5% breakpoint, Commerce "relied on the breakpoints of *three* separate Italian commodity exchanges." Final IDM at 12 (emphasis in original).

suburb of Washington, D.C. Also, part of the information in the report was a screenshot of a website that, for Plaintiffs, demonstrated that a grain exchange in Bologna, Italy "has updated the breakpoint between standard and premium semolina, which now occurs at 13.5% protein content." Market Report at 7 (citing Ex. K). The report concluded that pasta with 12.5% protein content is standard, not premium pasta. *Id.* at 4.

For its part, La Molisana argued that using the nutrition label as the basis to report protein content leads to comparisons of physically dissimilar products because of differences in protein measurement standards in Italy and the United States. Specifically, La Molisana pointed out the countries' different "nitrogen-to-protein" conversion numbers[4] and the rounding requirement under U.S. Food and Drug Administration ("FDA") rules,[5] for which there is no equivalent in Italy. *See* La Molisana Case Br. (Jan. 26, 2021), PR 259.

In the Final Results, Commerce declined to adjust its model-match method with respect to coding for protein and continued to apply its usual method to identify like products, including classifying pasta with a protein content of 12.5% or more as premium pasta, and 10.00–12.49% as standard pasta. Final IDM at 6–12. Ultimately, Commerce determined a weighted average dumping margin for La Molisana of 15.72% and applied the same margin to Valdigrano, as the all-others rate. *See* Final Results, 86 Fed. Reg. at 28,337. Plaintiffs timely commenced this action to bring their objections before the court. Plaintiffs ask the court to remand this matter to Commerce with instructions to adjust its model-match method for coding protein content and revise La Molisana's and Valdigrano's rates accordingly.

STANDARD OF REVIEW

Commerce's Final Results will be sustained 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).

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[4] Under U.S. Food and Drug Administration regulations, protein content is calculated by multiplying the nitrogen content of the finished product by 6.25. *See* Market Report at 5 (citing Ex. B). Under the Italian standard, protein content is calculated by multiplying the nitrogen content by 5.7. *Id.* at 6 (citing Ex. F). For Plaintiffs, the difference in these multipliers obscures the "real" protein content of products in the U.S. and Italian markets. *See* Pls.' Br. at 35–36 (setting out mathematical calculations of protein content under different nitrogen conversion factors).

[5] Under FDA food labeling regulations, protein content must be rounded to the nearest gram. *See* 21 C.F.R. § 101.9(c)(7) (2019). Under these rules, Plaintiffs argue, the percentage of protein reported on the nutrition label of a product sold in the United States could be artificially inflated or reduced. For instance, without rounding, pasta with 6.51 grams of protein (or 11.63%) would be considered standard, but with rounding, that same pasta has 7 grams of protein (or 12.5%) and must be coded as premium. *See* Pls.' Br. at 5.

LEGAL FRAMEWORK

In an antidumping case, Commerce compares the price at which subject merchandise is sold in the United States with normal value. *See* 19 U.S.C. § 1677b(a). Normal value is "the price at which the *foreign like product* is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country." *Id.* § 1677b(a)(1)(B)(i) (emphasis added). The antidumping statute defines "foreign like product" as merchandise that is either identical with, or similar to, subject merchandise, according to a hierarchy of characteristics.[6] *Id.* § 1677(16)(A)-(C).

Commerce uses its model-match method to make "[d]eterminations of both identical and like/similar (i.e., non-identical but capable of comparison) merchandise." *Manchester Tank & Equip. Co. v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1309, 1314 (2020). Products may be considered identical "despite the existence of minor differences in physical characteristics, if those minor differences are not commercially significant." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001). Determining whether a physical difference between products is commercially significant, i.e., one "that merits distinguishing between identical and similar products," is a fact-intensive inquiry. *See Manchester Tank*, 44 CIT at __, 483 F. Supp. 3d at 1316, 1317 ("Considering the record as a whole, Commerce has supported with substantial evidence its decision to accept as commercially significant the distinction between zinc and non-zinc coatings because zinc coating requires unique production processes, is specifically requested by customers, and leads to price variations."). This inquiry may involve a consideration of whether and to what extent the industry at large treats the difference as significant. *See Pesquera Mares*, 266 F.3d at 1384–85 (cleaned up) (affirming Commerce's finding that "the differences between super-premium and

[6] The statute lists these characteristics, in order of preference:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—
(i) produced in the same country and by the same person as the subject merchandise,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—
(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16)(A)-(C).

premium salmon do not warrant separate classification in an antidumping analysis," where Commerce relied on record evidence of the "commercial practice of the world's largest salmon farming countries whose salmon industries also exported to" the third-country market, Japan). Relying on industry-wide data, instead of a smaller, company-specific dataset, avoids the risk of manipulation of sales information by the respondent. *See id.* at 1385 ("Indeed, if Commerce were to limit itself to consideration of the small volume of 'premium' sales of the particular exporter, it would risk market manipulation for antidumping purposes.").

This Court and the Federal Circuit "have looked for 'compelling reasons' when Commerce [itself] modifies a model-match methodology in a review after having used that methodology in previous segments of the proceeding." *Manchester Tank*, 44 CIT at __, 483 F. Supp. 3d at 1315 (first citing *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1380 (Fed. Cir. 2008); then citing *Koyo Seiko Co. v. United States*, 31 CIT 1512, 1517–18, 516 F. Supp. 2d 1323, 1331–32 (2007), *aff'd* 551 F.3d 1286 (Fed. Cir. 2008); and then citing *Fagersta Stainless AB v. United States*, 32 CIT 889, 894–95, 577 F. Supp. 2d 1270, 1276–77 (2008)). "'Compelling reasons' require the agency to provide 'compelling and convincing evidence that the existing model-match criteria are not reflective of the merchandise in question, that there have been changes in the relevant industry, or that there is some other compelling reason' requiring the change." *Id.* (quoting *Fagersta*, 32 CIT at 894, 577 F. Supp. 2d at 1277). So too, must respondents provide a compelling reason to change the model-match criteria by presenting their proposed modifications and supporting evidence to Commerce during the administrative process. *See Ghigi 1870 S.p.A. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1332, 1349 (2021).

DISCUSSION

Plaintiffs' main argument is that Commerce's refusal to adjust its model-match method with respect to protein coding lacks the support of substantial evidence, because the information presented in their Market Report is compelling and unrebutted. Pls.' Br. at 3 ("[U]nrebutted substantial evidence showed that pasta with protein content 12.5% was standard pasta, not premium pasta, in both the U.S. market and the Italian market."). Plaintiffs also challenge Commerce's refusal to adjust its method for scalar differences and

rounding rules, instead of coding protein content based solely on the nutrition label.[7] *Id.*

In the Final Results, Commerce found the Market Report data provided unreliable and insufficient evidence of an industry-wide change to a 13.5% breakpoint between standard and premium pasta to justify adjusting its model-match method for reporting protein content:

> The U.S. section of the Market Report consists of labels and receipts for pasta purchased from Washington DC metro area supermarkets along with charts illustrating the relationship between protein content and price. Valdigrano asserts that these data show 12.5 percent protein content is a floor for pasta sold in the U.S. market, and that the true breakpoint between standard and premium pasta is 13.5 percent protein content. We do not find this evidence sufficient to change our existing coding for protein content. The Market Report data cited to in the case brief consist of pasta purchases from four supermarkets in a small geographic region of the United States. *No attempt is made in the Market Report to address the potential for manipulation in choice of purchases or to support a claim that these purchases are reflective of the entire U.S. market for pasta products*. As such, we do not find these data to be a "compelling reason" to change the instructions for reporting protein content.
>
> For Italy, Valdigrano cites to a screenshot in the Market Report of the Bologna Grain Exchange's website defining "superior" semolina as having 13.5 percent or greater protein content to assert that the industry standard for defining premium and standard semolina has changed and, thus, that there is a "compelling reason," . . . for Commerce to change the breakpoint for reporting protein content. However, in the [memorandum that supported the 12.5 percent breakpoint, i.e., the Wheat Code Memo], Commerce relied on the breakpoints of *three* separate Italian commodity exchanges. The plain meaning of "industry-wide" connotes an *entire* industry or, at the very least, predominance or prevalence within an industry. *We find that the Market Report's citation to a single exchange's breakpoint is not sufficient evidence of an industry-wide change in standards from semolina*

[7] *See supra* notes 4 and 5. As noted, Plaintiffs assert that the scalar differences stem from the differences in the nitrogen multiplier required by U.S. and Italian regulations: "U.S. FDA rules calculate protein content by multiplying the nitrogen content by 6.25 while the Italian standard calculates protein content by multiplying the same nitrogen content by 5.7." Pls.' Br. at 43. Under FDA rounding rules, Plaintiffs argue, the percentage of protein reported on the nutrition label of a product sold in the United States could be artificially inflated or reduced. *See id.* at 5.

> *and thus that it is not a compelling reason to change the instructions for reporting protein content*.

Final IDM at 11–12 (emphasis added) (citations omitted).

Regarding Plaintiffs' contention that Commerce must adjust its method for scalar differences and rounding rules, instead of coding protein content based solely on the nutrition label, Commerce stated:

> Commerce has considered and rejected the claims regarding rounding and nitrogen conversion factors in prior reviews and in doing so has repeatedly emphasized the importance of transparency and consistency. We do the same here. Given that the protein content physical characteristic was created, in part, based on the finding that "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages," we find that relying on values not shown on the packaging label for this physical characteristic would detract from the consistency and transparency of defining each product (*i.e.*, CONNUM), which in turn implicates the accuracy of the product comparisons (*i.e.*, the identification of identical or similar merchandise sold in the Italian market based on whether the pasta sold in each market is premium or not).

Id. at 10 (citing comment 1 in final decisional memorandum accompanying final results of twelfth administrative review). Put another way, Commerce declined, when it was constructing CONNUMs, to rely on information other than that displayed on the packaging label because doing so would result in less transparency and consistency than by using the label.

Additionally, Commerce found there was no evidence that the differences in Italian and U.S. protein measurement standards were commercially significant:

> Given that we have found "there is not a clearly defined method of identifying premium pasta other than the protein content marked on the packages," we do not see a basis to find the discrepancy in protein measurement standards between the U.S. and Italian markets as commercially significant when the market perception of premium pasta or non-premium pasta relies on information readily available to consumers, namely the packaging label associated with the pasta in the marketplace.

Id. at 11. That is, the information on packaging labels allows consumers to readily distinguish premium and standard pasta and make

purchasing decisions. For Commerce, there was no evidentiary basis to conclude that differences in nitrogen multipliers and rounding rules, which is not information readily available to consumers, mattered in the marketplace. Thus, Commerce found that the differences were not commercially significant.

The court finds, based on this record, that Commerce did not err when it declined to adjust its existing model-match method. Plaintiffs have failed to demonstrate by "'compelling and convincing evidence that the existing model-match criteria are not reflective of the merchandise in question, that there have been changes in the relevant industry, or that there is some other compelling reason' requiring the change." *Manchester Tank*, 44 CIT at __, 483 F. Supp. 3d at 1315 (quoting *Fagersta*, 32 CIT at 894, 577 F. Supp. 2d at 1277).

First, the court cannot fault Commerce for finding that the Market Report was insufficient to support Plaintiffs' claim that the 12.5% breakpoint is out of step with current industry-wide standards because no serious argument can be made that the report is representative of the entire industry either in the United States or in Italy. When Commerce has reconsidered its model-match criteria in the past, it has stated that for data to be "industry-wide" it must be public, published information. *See* Letter from Kelley Drye & Warren to Sec'y of Commerce (Dec. 20, 2019) Ex. 2, at 6, PR 108 ("Wheat Code Mem.") ("Because we strive to identify a universal set of criteria which apply to all respondents in this proceeding, we looked to publicly available information and published industry standards for guidance."). In contrast, the report here was prepared for presentation to Commerce, and bears no indicia of having been publicized or published to or by the industry at large. Rather, the report presents the retail prices of pasta products of different shapes that were sold by several different brands, which Plaintiffs' counsel purchased from four supermarkets in the suburbs of Washington, D.C. (Safeway, Giant, Harris Teeter, and Balducci's) and at one Italian supermarket (Pam Panorama S.p.A.). *See* Market Report Exs. M & L.

The report also contains a screenshot of a website page of a single grain exchange in Bologna, which is cited as evidence of market-wide acceptance of 13.5% as the new minimum for premium pasta. *See* Market Report Ex. K. But there is nothing in the report that indicates that this single Bologna exchange represents the entire market or even a large portion of it. Indeed, while in the past this particular grain exchange was one of three Italian exchanges considered by Commerce, alongside one commodity exchange in Bologna and another in Milan, no evidence from the other two exchanges is included in the report. For this reason, Commerce reasonably found the Mar-

ket Report insufficient to support a change in the standard-to-premium breakpoint from 12.5% to 13.5%.

The report itself is neither public, nor published outside of this litigation, nor is there a basis to conclude that it is objectively reliable. As Commerce stated:

> No attempt is made in the Market Report to address the potential for manipulation in choice of purchases or to support a claim that these purchases are reflective of the entire U.S. market for pasta products. As such, we do not find these data to be a "compelling reason" to change the instructions for reporting protein content.

Final IDM at 12. Further, Commerce found:

> [T]he Market Report's citation to a single exchange's breakpoint is not sufficient evidence of an industry-wide change in standards from semolina and thus that it is not a compelling reason to change the instructions for reporting protein content.

Id. Indeed, Plaintiffs do not deny the report's limitations. Instead, they appear to argue that, limited as it might be, the Market Report is the only evidence on the record: "The Market Report was unrebutted. It was submitted near the outset of the proceeding, and the petitioners had ample opportunity to submit rebuttal factual evidence. Instead, petitioners were silent." Pls.' Br. at 13; *id.* at 33 ("Petitioners' failure to provide any evidence of such different treatment in different commodity exchanges compels Commerce to accept the finding of the Market Report. There is simply no reason to disbelieve the exhibit in the Market Report, and indeed, Commerce does not dispute its correctness.").

Just because evidence is unrebutted, however, does not make it substantial. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It cannot be said that the Market Report reasonably supports the conclusion that *industry-wide* the minimum protein content of premium pasta is 12.5% in the United States or that the industry in Italy has recognized a protein minimum of 13.5% because (1) the report does not represent the entire U.S. industry but, at best, only the experience of a handful of stores in the Washington, D.C. suburbs, and (2) a single screenshot from one grain exchange in Italy that states (as translated from the Italian in Exhibit L of the Market Report), "semolina with characteristics superior to the regulation – minimum protein 13.5%," cannot reasonably be understood to mean that the entire Italian

industry as a whole has increased the minimum protein content of premium pasta from 12.5% to 13.5%. This is not to say that information from exchanges in Italy cannot be the source of industry-wide data, but, as Commerce indicated in the Final IDM, it must be representative, i.e., the data of more than one exchange. Again, the 12.5% breakpoint was established by three exchanges. *See* Final IDM at 12 (emphasis in original) ("[I]n the [original report that supported the 12.5 percent breakpoint, i.e., the Wheat Code Memo], Commerce relied on the breakpoints of *three* separate Italian commodity exchanges. The plain meaning of 'industry-wide' connotes an *entire* industry or, at the very least, predominance or prevalence within an industry." (citing Wheat Code Mem.)); *see also Manchester Tank*, 44 CIT at __, 483 F. Supp. 3d at 1315 (quoting *Fagersta*, 32 CIT at 894, 577 F. Supp. 2d at 1277) ("'Compelling reasons' require the agency to provide 'compelling and convincing evidence . . . that there have been changes in the relevant industry['] . . . requiring the change.").

Moreover, the court finds no error with respect to Commerce's conclusion that differences in Italian and U.S. protein measurement standards and rounding rules were not commercially significant. It is unrebutted that consumers rely on packaging information when making pasta purchasing decisions, and that coding for protein content based on the nutrition label fosters transparency and consistency in CONNUM-building.[8] Where the parties disagree is whether the Market Report constitutes substantial record evidence that differences in Italian and U.S. protein measurement standards were commercially significant. For the reasons discussed above, it does not.

Even if the court were to take into account the pricing data in the Market Report, remand would not be required here, because at best, Plaintiffs have offered an alternative conclusion to the one reached by Commerce. Plaintiffs have failed to demonstrate that Commerce's conclusion—that values other than those readily available to consumers on the packaging label were not commercially significant—was unreasonable. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (describing substantial evidence as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Therefore, the court sustains Commerce's Final Results.

[8] Though unrebutted, the court notes that Commerce's reliance on the finding that customers make purchasing decisions based on information found on a pasta product's packaging departs from the relevant inquiry, which focuses on the physical characteristics of the product, not its packaging.

CONCLUSION

Based on the foregoing, the court denies Plaintiffs' motion and sustains the Final Results. Judgment will be entered accordingly.

Dated: April 24, 2023
New York, New York

/*s*/ *Richard K. Eaton*
JUDGE

Slip Op. 23–60

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

Before: M. Miller Baker, Judge
Court No. 20–00109

[The court denies the motions for judgment on the agency record filed by Plaintiff and Plaintiff-Intervenor, grants judgment on the agency record to Defendant and Defendant-Intervenor, and sustains the Department of Commerce's remand results.]

Dated: April 24, 2023

Jeffrey S. Neeley and *Stephen W. Brophy*, Husch Blackwell, LLP, of Washington, DC, on the papers for Plaintiff.

Mark Ludwikowski, *R. Kevin Williams*, and *William Sjoberg*, Clark Hill, PLC, of Washington, DC, on the papers for Plaintiff-Intervenor.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Ioana Cristei*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the papers for Defendant. Of counsel for Defendant was *W. Mitch Purdy*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Luke A. Meisner, Schagrin Associates of Washington, DC, on the papers for Defendant-Intervenor.

OPINION

Baker, Judge:

In this antidumping case, the court sustains the Department of Commerce's application of total facts otherwise available with an adverse inference as to a Chinese producer of wooden cabinets and vanities.

I

This is the sequel to *Dalian Meisen Woodworking Co. v. United States*, 571 F. Supp. 3d 1364 (CIT 2021), where Commerce punished Plaintiff and antidumping investigation respondent Dalian Meisen for false advertising by imposing the steepest possible antidumping rate, 262.18 percent. Holding that "the Department lacks jurisdiction to police false advertising violations," *id.* at 1368, the court granted judgment on the agency record to Meisen and its supporting Plaintiff-Intervenor, Cabinets to Go. The accompanying remand instructions directed Commerce to

> reconsider its application of facts otherwise available with an adverse inference, including whether and to what extent it will use Plaintiff's submitted information in its antidumping calcu-

> lations. Insofar as Commerce chooses to use Plaintiff's information, it must then undertake verification. Insofar as the Department recalculates Plaintiff's antidumping rate, it must also recalculate the rate for Plaintiff-Intervenor's suppliers accordingly.

ECF 72, at 1–2.[1]

II

On remand, Commerce "re-examined" Meisen's original responses and "issued four supplemental questionnaires to Meisen identifying deficiencies in, and requesting clarification regarding, its previous responses." ECF 80–1, at 6. The Department then verified the company's new responses by issuing another questionnaire, which requested "documentation to support Meisen's record submissions." *Id.* at 6–7.[2]

In reviewing the company's responses, Commerce concluded that Meisen may have failed to disclose U.S. affiliates in Florida and New York. The Department then placed "new factual information" on the record and allowed the parties to comment. *Id.* at 7.

After receiving the parties' comments, Commerce issued a thorough 147-page remand determination reaffirming the imposition of the 262.18 percent antidumping duty. *See* ECF 79–1 (confidential), ECF 80–1 (public). The Department again applied total facts otherwise available with an adverse inference (total AFA),[3] but for reasons unrelated to false advertising.

The Department found that Meisen's reported information could not be verified and was so unreliable that it could not be used to calculate a dumping margin. ECF 80–1, at 7. Commerce further found that Meisen failed to provide "critical information" in its response to the verification questionnaire—including source documentation the Department expressly requested—and that the submission also revealed "significant, and pervasive, problems throughout Meisen's reported data, including the fact that Meisen's U.S. sales database contains many errors." *Id.* at 7–8. The Department also found that Meisen had failed to disclose all of its U.S. affiliates. *Id.* at 8.

Based on these findings, Commerce concluded that Meisen withheld requested information, significantly impeded the proceeding,

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[1] [T]he rate for Plaintiff-Intervenor's suppliers" refers to the statutory mechanism for calculating antidumping margins for successful separate-rate applicants in non-market economy proceedings. *See Dalian Meisen*, 571 F. Supp. 3d at 1374–75 & n.7.

[2] Normally, Commerce conducts verification on site in the exporting country. In this case, pandemic travel restrictions required verification via written questionnaire.

[3] For background on AFA, *see Dalian Meisen*, 571 F. Supp. 3d at 1370–71.

and reported data that could not be verified, thus requiring use of facts otherwise available under 19 U.S.C. § 1677e(a)(2)(A), (C), and (D). *Id.* The Department also determined that Meisen's failure to cooperate to the best of its ability warranted application of an adverse inference under § 1677e(b). *Id.*

III

The court has subject-matter jurisdiction under 28 U.S.C. § 1581(c).

In 19 U.S.C. § 1516a(a)(2) actions such as this, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record, taken as a whole, permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

In addition, Commerce's exercise of discretion in § 1516a(a)(2) cases is subject to the default standard of the Administrative Procedure Act, which authorizes a reviewing court to "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Solar World Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020) (explaining that in § 1516a cases, i.e., cases brought under section 516A of the Tariff Act of 1930, APA "section 706 review applies since no law provides otherwise") (citing 28 U.S.C. § 2640(b)).

IV

In substance, Meisen challenges the Department's final determination on three grounds: (1) Commerce erred in finding that Meisen failed to provide requested source documents, ECF 95, at 16–18; (2) the Department should have issued a supplemental verification questionnaire, *id.* at 14–16; and (3) in any event, the deficiencies Commerce identified did not warrant the application of total AFA, *id.* at

13–14, 19–32. Related to the third ground, Cabinets to Go asserts that even if the Department correctly applied total AFA, the rate Commerce selected was too high and was not supported by adequate explanation. ECF 99, at 6–10.

A

For verification purposes, the Department selected two of Meisen's U.S. resellers—J&K Georgia and J&K Illinois—"and requested that Meisen provide source documentation supporting the worksheets it used to reconcile the total sales by these resellers during the [period of investigation] to their tax returns." ECF 80–1, at 12. Specifically, Commerce directed Meisen to submit "screenshots from [its] accounting system" to support every step of the reconciliation process, as well as other supporting documents to include "printouts and Excel versions of each companies' [sic] profit and loss statements, trial balances, and sales ledgers." *Id.* at 12–13 (emphasis removed). The Department also requested "[a] detailed narrative explaining how all worksheets and supporting documentation tie together." *Id.* at 13 (emphasis removed).

Commerce's remand determination explains that Meisen did not produce any of the requested screen-shots or printouts from its accounting system, nor any source documentation to verify the figures provided in its Excel worksheets. *Id.* at 14–15 (J&K Georgia), 23–24 (J&K Illinois). The Department noted that without source documentation, "the source of the data in each of these Excel files is unclear," *id.* at 20, and explained that it was impossible to reconcile the numbers seen in the Excel worksheets with other numbers in, for example, the company's profit and loss statements, *id.* at 17–18.

The Department emphasized that "Meisen failed to provide the requested source documentation necessary to verify that Meisen accurately and completely reported J&K [Georgia]'s total U.S. sales, as well as individually-selected sales made by J&K [Georgia] in November 2018 and J&K [Illinois] in October 2018." *Id.* at 27. Commerce further found that the record was clear that both companies had the necessary information available to them such that they could have produced it. *Id.* As a result, the Department found, citing 19 U.S.C. § 1677e(a)(2)(D), that it was necessary to resort to facts otherwise available because all of J&K Georgia's and J&K Illinois's sales were unverifiable because of the lack of source documentation, and the Department also elected to apply an adverse inference because

Meisen "failed to act to the best of its ability by failing to provide source documentation that it had in its possession." *Id.* at 28.[4]

Meisen's challenge to these findings is unavailing. The company first argues that it submitted over 5000 pages of material in response to the verification questionnaire and had previously submitted copious amounts of other material. ECF 95, at 16. That begs the question whether any of those materials were responsive to the Department's questionnaire.

Meisen also calls Commerce's concern about the company's provision of Excel spreadsheets instead of the requested screenshots unfounded: "[T]he [E]xcel files were in fact extracts from Quickbooks, the accounting system used by the companies. Given that it was providing such extracts, Meisen reasonably believed that there was no need for the companies to also submit a screenshot of the computer screen which could only show parts of the information in the [E]xcel files." *Id.* at 17. There are two problems with that argument.

To begin with, Commerce instructed Meisen to provide *screenshots*. If a respondent cannot provide the requested material, that party must notify Commerce, in advance, that it is "unable to submit the information requested in the requested form and manner." 19 U.S.C. § 1677m(c)(1). It must provide "a full explanation and suggested alternative forms in which the party is able to submit the information" so that the Department can consider modifying its instructions. *Id*.

The company admits it failed to do that: "Commerce argues that Meisen should have contacted Commerce for instructions, but it is simply not reasonable for [the company] to contact Commerce and wait for a reply for each and every product where there are complications given the sheer number of product variations and the limited time available to respond to the questionnaires." ECF 95, at 23. But the statute itself requires that a party either respond as Commerce directs or else ask permission to proceed differently—a party cannot unilaterally decide that it will provide something different. In sum, a respondent cannot simply make up its own preferred way to respond and then say, "It's Commerce's problem to figure it out."

Moreover, while Meisen contends that its Excel spreadsheets *are* its source documentation, the following admission in its post-remand

[4] Elsewhere, Commerce noted that the record showed that (1) the J&K Companies could have provided screenshots from the Quickbooks software they used for accounting purposes and (2) the feature allowing for such screenshots was distinct from the feature Meisen used to export data to Excel spreadsheets, thus confirming that "Meisen could have supplied other information, outside of Excel reports and worksheets, such as the screenshots or printouts we requested, but it decided not to do so." *Id.* at 80.

comments before this court undercuts that argument: "*To the extent that Meisen added additional cells and formulas to the [E]xcel file*, it was merely to ensure that the Department understood Meisen's calculations." *Id.* at 18 (emphasis added). Meisen *admits* it *modified* what it calls its "source documentation"—meaning, in turn, that it was no longer source documentation at all. That is exactly why Commerce can insist on screenshots and other actual source documentation: The agency is entitled to (indeed, *needs to*) review something the respondent has not (and cannot have) modified. "As the Federal Circuit has noted, Commerce is entitled to insist on the original records because 'failure to submit primary source documentation' means that Commerce is 'unable to verify the accuracy of the information submitted.' " *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1349 (CIT 2020) (quoting *Thyssen Stahl AG v. AK Steel Corp.*, No. 97–1509, 1998 WL 455076, at *5 (Fed. Cir. July 27, 1998)).

Meisen's failure to produce the required screen-shots therefore supports Commerce's findings that the company withheld requested information and provided information that could not be verified. Either of those findings was a sufficient reason to resort to facts otherwise available. Meisen's admissions that it disregarded Commerce's instructions and deliberately modified the Excel spreadsheets it did submit support the Department's finding that the company did not act to the best of its ability to cooperate, thereby allowing the use of an adverse inference.

B

Meisen asserts that once Commerce found its verification response inadequate, the Department was obligated to issue a supplemental verification questionnaire. The company argues that "[i]n an in-person verification, questions and follow-up questions would have been raised verbally and answers would have been provided along with supplemental documentation if needed." ECF 95, at 14. The company contends that the Department may not dispense with such "follow-up" procedures. *Id.* Relatedly, Meisen argues that not issuing a supplemental verification questionnaire violated 19 U.S.C. § 1677m(d), which requires that if Commerce determines that a "response to a request for information" is deficient, it must give the respondent notice and an opportunity to cure.

The Federal Circuit has held that Commerce has the authority "to derive verification procedures ad hoc," *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343 (Fed. Cir. 2021), and that the statute gives

the Department "wide latitude in its verification procedures," *Stupp Corp. v. United States*, 5 F.4th 1341, 1350 (Fed. Cir. 2021). Thus, there is no requirement for any sort of "give-and-take" in verification.

And more specifically, when a respondent fails to provide requested substantive information during an investigation, at verification Commerce has the discretion to decline to accept the late submission of that information. *See Goodluck India*, 11 F.4th at 1342–43 (upholding Commerce's practice "to accept corrective information at verification only for minor corrections to information already on the record") (cleaned up). It necessarily follows that if the Department need not *accept* corrective substantive information at verification as to deficiencies in a respondent's *original* submissions, it need not *seek* corrective substantive information when *verification* responses are deficient. Thus, the Department had no duty to issue a supplemental verification questionnaire to Meisen.[5]

C

1

Meisen argues that the various errors the Department found were not enough to warrant total AFA and that "Commerce should have considered alternatives, . . . including the use of partial facts available, with or without an adverse inference." ECF 95, at 13.

The company fails to specify what sort of "partial facts available" it contends Commerce should have employed but argues that any errors "have to be considered in light of the unsophisticated accounting system employed by Meisen's U.S. affiliates and the number of sales that they had to report." *Id.* at 19. It claims that "Commerce does not establish that any errors resulted in a lower dumping margin than otherwise would have been calculated or benefited Meisen in any way." *Id.* The company, however, cites no authority to establish that the Department needed to make such a finding.

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[5] *Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375 (Fed. Cir. 2022), does not support Meisen's argument. There, "Commerce changed the way it was evaluating the data" and "found Hyundai's original submissions inadequate to determine the service-related revenue in this adjusted manner." *Id.* at 1380. The Department, however, rejected Hyundai's § 1677m(d) request to submit additional information. The Federal Circuit noted inconsistencies in Commerce's analysis. The Department at first found that Hyundai reported its data properly but then reversed course, found Hyundai uncooperative, and blamed Hyundai for not submitting—during the original proceeding under the old protocol—information compliant with the Department's new protocol. *Id.* at 1383–84. The court found that "the statutory entitlement to notice and opportunity to remedy any deficiency is unqualified *in the circumstances of this case*." *Id.* at 1384, *as amended on denial of reh'g*, No. 2020–2114, Dkt. #77, Order, at 2 (Fed. Cir. Nov. 23, 2022) (emphasis added). The court construes the words "in the circumstances of this case" as limiting *Hitachi*'s holding to its facts.

Meisen further says it provided source documentation of sales terms, so Commerce was wrong in saying the company failed to do so. *Id.* at 20. But the Department actually found that Meisen failed to show that the information submitted was accurate. ECF 80–1, at 30–34.

Meisen then disputes Commerce's finding that for five of nine sales selected for verification, the ZIP Code in the database did not match the ZIP Code in the sales invoices provided, sometimes in very significant ways, and argues that any error was *de minimis*. ECF 95, at 21–22. But the Department found that the information could not be verified because the many glaring errors—including one example in which the database gave a ZIP Code about 1500 miles away (by road) from the ZIP Code listed on the sales invoice—left Commerce with "no confidence" that Meisen correctly reported the information for the non-examined sales in its U.S. sales database. ECF 80–1, at 37. That conclusion is plainly reasonable.

Next, Meisen asserts that Commerce didn't give the company sufficient instructions on how to develop its list of consolidated customer codes, such that any errors in that respect were the Department's fault and not Meisen's. ECF 95, at 22–23. Again, that argument fails to address the company's statutory obligation to ask Commerce for help if instructions are unclear. As a matter of law, it is unacceptable for a respondent to guess at how to respond and then blame the Department if that guess is wrong.

Meisen contends that its method of reporting control numbers reflecting its product characteristics was reasonable and Commerce's method was not. *Id.* at 23. That argument is much like one the court rejected in *Hung Vuong*, where the plaintiff argued that it had "devised a completely new and more precise methodology." 483 F. Supp. 3d at 1362. The court found that to be a concession that the company ignored instructions, justifying the noncooperation finding. *Id.*

As to two other issues (calculation of price adjustments and freight expenses), Meisen states that neither it nor its affiliates record data in the way Commerce wanted information reported, so the Department cannot complain about their responses. ECF 95, at 27–28, 30. But again, Meisen fails to demonstrate that it contacted Commerce in advance to explain the difficulty and to request permission to report data via different means. The company's argument boils down to, "Commerce didn't ask us the question in the way we wanted it asked, so we win." It doesn't work that way.

Finally, Meisen admits that it failed to report all its U.S. affiliates but quibbles about whether it matters. *Id.* at 31 ("The failure to report this affiliate sooner was clearly a minor oversight resulting from the

fact that the company was not involved in the sale of subject merchandise."). Commerce noted, however, that the company acknowledged in its questionnaire responses that it had to report all affiliated companies, regardless of their involvement in the sale of subject merchandise. ECF 80–1, at 57 (citing Appx083309, on which Meisen quoted Commerce's instructions). Meisen therefore admits that it withheld requested information. Moreover, as to finding a lack of cooperation, Commerce aptly explained, "Rather than clearly identifying all companies involved in the sale and/or distribution of subject merchandise (affiliated or not) and clearly identifying all customer relationships, Meisen put forth a Gordian knot of information regarding its relationships and left it for Commerce to unravel." *Id.* at 130.

The government correctly summarizes the problem:

> Meisen's arguments minimize the impact of the errors by taking them out of context, or by ignoring large portions of Commerce's analysis regarding each error in the remand results. . . . For many of the individual errors and omissions addressed in its comments, Meisen does not even dispute the fact that it made the errors and omissions. Instead, Meisen simply argues that these errors are too minor or insignificant to justify total AFA.

ECF 98, at 23–24. The issue is not any one individual error. The issue is the errors in their totality, which the Department reasonably determined warranted the application of total AFA.

2

Meisen does not challenge the 262.18 percent adverse inference rate Commerce selected for the company, but Cabinets to Go contends that "Commerce failed to articulate any rationale for why the highest transaction-specific margin on the record was an appropriate AFA rate." ECF 99, at 6. It further argues that the rate was "unduly punitive," although its rationale is that Meisen was responsive and was "trying to cooperate with Commerce." *Id.* Because the court sustains the finding that Meisen was not cooperative, the sole issue remaining is whether the Department sufficiently explained its choice of rate.

Commerce's explanation mainly consists of the following paragraph:

> In deciding which facts to use when determining the AFA rate, section 776(b) of the Act [i.e., 19 U.S.C. § 1677e(b)] and 19 CFR 351.308(c)(1) authorized Commerce to rely on information derived from: (1) the petition; (2) a final determination in the

> investigation; (3) any previous review or determination; or (4) any information placed on the record. In the underlying investigation, we determined that the Petition dumping margin of 262.18 percent, which was the highest corroborated dumping margin on the record, was the most appropriate margin to select for the application of adverse inference. Therefore, in this final remand determination we continue to find 262.18 percent to be the appropriate margin to assign as AFA.

ECF 80–1, at 75.

In commenting on the draft remand results, Meisen argued—as Cabinets to Go does here—that the rate was too punitive. Commerce responded that no interested party had suggested that a different margin would be appropriate and that the 262.18 percent margin was "the AFA-margin already selected for the China-wide entity." *Id.* at 144. "[T]he assignment of the Petition dumping margin as the total AFA rate to Meisen, as a result of significant pervasive discrepancies and errors discovered in sampled sales of Meisen's [verification questionnaire response], Meisen's failure to tie sales data to its books and records, *and* the finding that Meisen failed to identify all of its U.S. affiliates involved in the sale and/or distribution of subject merchandise, is not overly punitive, but is supported by record information, Commerce's practice, and court precedent." *Id.* at 144–45 (emphasis in original). Commerce also explained—though not as part of its discussion of the selected rate—that Meisen's failing verification "resulted in the finding that its U.S. sales database is entirely unusable. Without a U.S. sales database, we cannot calculate a dumping margin." *Id.* at 143.

The court has found an explanation of that sort satisfactory because the Federal Circuit has emphasized that "there is no one fixed single formula Commerce must use in deciding what rate is appropriate for an uncooperative respondent." *Hung Vuong Corp. v. United States*, Ct. No. 19–00055, Slip Op. 21–142, at 15, 2021 WL 4772962, at *6 (CIT Oct. 12, 2021) (citing *Heveafil Sdn. Bhd. v. United States*, 58 F. App'x 843, 849–50 (Fed. Cir. 2003) (rejecting claim that *partial* cooperation meant Commerce could not apply highest possible margin)). Because the Federal Circuit has sustained the highest possible rate as to a *partially* cooperative respondent, it must be permissible for the Department to apply such a rate to a *totally* uncooperative respondent.

Commerce may use "any dumping margin from any segment of the proceeding under the applicable antidumping order," 19 U.S.C. §

1677e(d)(1)(B), and may apply "the highest such rate or margin based on the evaluation by [Commerce] of the situation that resulted in the [Department] using an adverse inference," *id.* § 1677e(d)(2). That is what Commerce did here. The 262.18 percent rate has been applied to the China-wide entity, so "Commerce acted within its discretion in its selection of that AFA rate." *Hung Vuong*, Slip Op. 21–142, at 16, 2021 WL 4772962, at *7 (quoting *Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1300 (Fed. Cir. 2021)). As a result, the court sustains the Department's rate selection.

* * *

For all these reasons, the court **SUSTAINS** Commerce's remand results insofar as they relate to Meisen. Doing so resolves the outstanding issues in this case, so the court will enter judgment on the agency record for the government and the Alliance. *See* USCIT R. 56.2(b). A separate judgment will issue. *See* USCIT R. 58(a).

Dated: April 24, 2023
New York, New York

/s/ M. Miller Baker
JUDGE

Slip Op. 23–62

KAPTAN DEMIR CELIK ENDUSTRISI VE TICARET A.S., Plaintiff, ÇOLAKOĞLU DIS TICARET A.S. AND ÇOLAKOĞLU METALURJI A.S., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, BYER STEEL GROUP, INC., COMMERCIAL METALS COMPANY, GERDAU AMERISTEEL U.S. INC., NUCOR CORPORATION, AND STEEL DYNAMICS, INC., Defendant-Intervenors.

Before: Gary S. Katzmann, Judge
Court No. 21–00565

[The court remands the Department of Commerce's final determination.]

Dated: April 26, 2023

Andrew T. Schutz, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., argued for Plaintiff Kaptan Demir Celik Endustrisi Ve Ticaret A.S. With him on the brief were *Kavita Mohan*, *Jordan C. Kahn*.

Matthew M. Nolan, *Nancy A. Noonan*, *Diana Dimitriuc Quaia*, *Jessica R. DiPietro* and *Leah N. Scarpelli*, ArentFox Schiff LLP, of Washington, D.C., for Plaintiff-Intervenors Colakoglu Dis Ticaret A.S. and Colakoglu Metalurji A.S.

Sosun Bae, Senior 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 brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director. Of counsel on the briefs was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Maureen Thorson, Wiley Rein, LLP, of Washington, D.C., argued for Defendant-Intervenor Rebar Trade Action Coalition and its individual members. With her on the briefs were *Alan H. Price* and *John R. Shane*.

OPINION AND ORDER

Katzmann, Judge:

Plaintiff Kaptan Demir Celik Endustrisi ve Ticaret A.S. ("Kaptan"), a Turkish producer and exporter of steel concrete reinforcing bar ("rebar"), in its Motion for Judgment on the Agency Record, challenges certain aspects of the final results of the U.S. Department of Commerce ("Commerce") in the 2018 administrative review of the countervailing duty order on rebar from Turkey published in *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of Countervailing Duty Administrative Review and Rescission, in Part; 2018*, 86 Fed. Reg. 53279 (Dep't Com. Sept. 27, 2021), P.R. 288 ("*Final Results*"), and the accompanying Issues and Decision Memorandum, Mem. from J. Maeder to C. Marsh, re: Issues and Decision Memorandum For the Final Results of the Countervailing Duty Administrative Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; 2018 (Dep't Com. Sept. 21, 2021), P.R. 283 ("IDM").

Plaintiff-Intervenors Çolakoğlu Metalurji A.S. and Çolakoğlu Dis Ticaret A.S. ("Colakoglu"), a foreign manufacturer and foreign exporter of rebar from Turkey, also moved for judgment on the agency record.

Defendant United States ("the Government") and domestic producers, Defendant-Intervenors Rebar Trade Action Coalition, Byer Steel Group, Inc., Commercial Metals Company, Gerdau Ameristeel U.S. Inc., Nucor Corporation, and Steel Dynamics, Inc., ("Domestics"), oppose Kaptan's motion. The Government and Domestics submit that Commerce's *Final Results* are supported by substantial evidence and in accordance with law. The Government and Domestics, however, do not object to Colakoglu's motion for a separate rate adjustment should Kaptan succeed in securing a recalculation of its overall subsidy rate as a result of this action.

For the reasons articulated below, the court finds that with respect to Commerce's attribution to Kaptan of subsidies of Nur Gemicilik ve Tic. A.S. ("Nur"), a ship building company affiliated with Kaptan, Commerce has not provided adequate explanation in the *Final Results* regarding its determination that Nur was a "cross-owned input supplier" of primarily dedicated inputs under 19 C.F.R. § 351.525(b)(6)(iv). The court thus remands the *Final Results* for further review and explanation.

FACTUAL AND LEGAL BACKGROUND

I. Regulatory and Legal Framework

Countervailing duties ("CVDs") are duties imposed on merchandise imported into the United States to "countervail" or offset the effect of subsidies granted by foreign governments. *See* 19 U.S.C. § 1671(a). Foreign governments sometimes subsidize domestic industries to benefit the production or exportation of merchandise and thereby confer an advantage in the trading system. If the International Trade Commission determines that the advantage causes material injury to the relevant domestic producers or domestic industry, Commerce calculates the amount of benefit conferred and may issue a CVD order to offset this unfair advantage. *See Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1203 (Fed. Cir. 2014) ("The congressional intent behind the enactment of countervailing duty and antidumping law generally was to create a civil regulatory scheme that remedies the harm unfair trade practices cause.").

One of the core questions in CVD investigations is whether a subsidy is "countervailable," or the subsidy meets the statutory and regulatory definition of an actionable subsidy. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014).

The Tariff Act of 1930 ("Tariff Act") provides that before Commerce may impose a CVD on merchandise imported into the United States, it must determine that "the government of a country or any public entity within the territory is providing, directly or indirectly, a *countervailable subsidy* with respect to the manufacture, production, or export of that merchandise." 19 U.S.C. § 1671(a)(1) (emphasis added). "Except as provided in paragraph (5B), a countervailable subsidy is a subsidy described in [paragraph (5)(B)] which is specific as described in paragraph (5A)." *Id.* § 1677(5)(A).

Thus, the determination of CVDs ultimately rests on whether a subsidy meets the "descriptions" contained in section 771 of the Tariff Act, as codified in Chapter 19 of the United States Code, section 1677. In general, a countervailable subsidy is described as follows:

> A subsidy is described in this paragraph in the case in which an authority—
>
> **(i)** provides a financial contribution,
>
> **(ii)** provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or
>
> **(iii)** makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments,
>
> to a person and a benefit is thereby conferred. For purposes of this paragraph and paragraphs (5A) and (5B), the term "authority" means a government of a country or any public entity within the territory of the country.

19 U.S.C. § 1677(5)(B). In short, the key elements are (1) a foreign authority, (2) making a financial contribution (or any form of income or price support, or payment), (3) to a person, and (4) a benefit conferred thereby.

These elements, appearing deceptively simple upon first glance, pose complex challenges when applied in real practice. One such issue is the attribution of subsidies to a "person" in cases of subsidies given to a cross-owned input supplier. Considering that corporations are often cross-owned, or part of larger conglomerate groups, the economic effect of subsidies granted to one legally separate corporation (and thus a separate legal "person") may in practice benefit

another corporation that did not formally receive the subsidy. Consequently, Commerce has developed practices on attributing subsidies received by one company to the total sales of a related company.

Commerce explains, in its preamble to the final rule on CVDs promulgated in 1998 that "[t]he underlying rationale for attributing subsidies between two separate corporations [with cross-ownership] is that the interests of those two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits)." *Countervailing Duties; Final Rule*, 63 Fed. Reg. 65348, 65401 (Dep't Com. Nov. 25, 1998) ("*CVD Preamble*"). The 1998 regulations were adopted following the enactment of the Uruguay Round Agreement Acts that necessitated systematic revision of the regulatory framework. *See id.* The interpretations given in the *CVD Preamble* should be given deference as an official regulatory interpretation that expresses authoritative departmental position to an interpretation of its underlying regulation. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).

Commerce's regulations accordingly contain rules on attribution of subsidies for cross-owned corporations. One such provision concerns input suppliers:

> (iv) Input suppliers. If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

19 C.F.R. § 351.525 (2013). Per the *CVD Preamble*, this regulation was adopted to address situations involving "an input producer whose production is dedicated almost exclusively to the production of a higher value added product -- the type of input product that is merely a link in the overall production chain." *CVD Preamble* at 65401. Commerce explained that "in situations such as these, the purpose of the subsidy provided to the input producer is to benefit the production of both the input and downstream products." *Id.* The regulation does not define "primarily dedicated." *See* 19 C.F.R. § 351.525 (2013).

II. Factual and Procedural History

Kaptan is a Turkish producer and exporter of rebar that became the subject merchandise of Commerce's CVD order in 2014. Kaptan was selected as a mandatory respondent[1] in the 2018 administrative review of the CVD order.

In the 2018 administrative review, Kaptan reported purchasing steel scrap used in its manufacturing operations from a cross-owned affiliate, Nur. *See* Mem. from J. Maeder to C. Marsh, re: Decision Memorandum for the Preliminary Results of Countervailing Duty Administrative Review at 8 (Dep't Com. Mar. 19, 2021), P.R 222 ("PDM"). Commerce preliminarily determined that this scrap was "primarily dedicated to the production of the downstream product,"[2] such that any countervailable subsidies that received by corporations in the "Kaptan Group," including Martas Marmara Ereglisi Liman Tesisleri A.S., Aset Madencilik A.S., and Nur, should be included in the subsidy analysis. Id.

Kaptan submitted comments to Commerce, challenging the finding in the PDM. Kaptan submitted that unlike the other corporations, Nur's primary business was shipbuilding rather than scrap production and further argued that the quantity of scrap sold to Kaptan was de minimis. Letter from Kaptan to G. Raimondo, Sec'y of Com., re: Administrative Case Brief: Administrative Review of the Countervailing Duty Order on Steel Concrete Reinforcing Bar from the Republic of Turkey (C-489–815) (POR: 2018) (July 28, 2021), P.R. 264, C.R. 211, at 5–6, 12 ("Kaptan's Comm. Sub."). Kaptan also noted that it used Nur's scrap to manufacture non-subject merchandise in addi-

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[1] In CVD investigations or administrative reviews, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(e)(2), which provides:

> If the administering authority determines that it is not practicable to determine individual countervailable subsidy rates under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may —
>
> (A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to —
>
> (i) a sample of exporters or producers that the administering authority determines is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the administering authority determines can be reasonably examined; or
>
> (B) determine a single country-wide subsidy rate to be applied to all exporters and producers.
>
> The individual countervailable subsidy rates determined under subparagraph (A) shall be used to determine the all-others rate under section 1671d(c)(5) of this title.

[2] 19 U.S.C. § 1677f-1(e)(2).

tion to rebar. *Id.* Kaptan argued that, given these circumstances, Commerce's precedent did not support treatment of the scrap from Nur's shipbuilding activity as "primarily dedicated" to the production of downstream products. *Id.* at 6–12.

Despite Kaptan's comments, Commerce continued to treat Nur as Kaptan's cross-owned supplier of an input "primarily dedicated" to downstream production in the *Final Results*. IDM at 25–27. Commerce explained that in previous segments of the proceeding it had considered scrap as an "input that is primarily dedicated to downstream steel production, regardless of the amount of scrap purchased," and noted the court's approval of this finding in an appeal of a prior review involving the other mandatory respondent. *Id.* at 25–26 (citing *Icdas Celik Enedi Tersane ve Ulasim Sanayi A.S. v. United States*, 43 CIT __, __, 498 F. Supp. 3d 1345, 1364 (2021)). Commerce also explained that Nur produced steel scrap, which Nur sold to Kaptan, and which Kaptan then used in making downstream steel products including subject goods. *Id.* Further, Commerce found that there was no evidence of Nur selling its scrap product to anyone else. *Id.* at 26. Accordingly, Nur's scrap supply was "devoted to Kaptan's downstream steel production." *Id.*

Kaptan brought this action before the court on October 19, 2021. *See* Complaint, Oct. 19, 2021, ECF No. 6. Presently, Kaptan moves for judgment on the agency record pursuant to Rule 56.2 of the U.S. Court of International Trade. *See* Pl.'s Mot. for J. on Agency R., Apr. 5, 2022, ECF No. 33 ("Pl.'s Br."). Kaptan challenges two aspects of the *Final Results* in its Motion for Judgment on the Agency Record: (1) Commerce's finding that Nur was a "cross-owned input supplier" under 19 C.F.R. § 351.525(b)(6)(iv); and (2) Commerce's finding that Nur's land rent exemption program with the local government, allowing Nur to use land without paying rent in exchange for meeting certain investment and employment criteria, constituted a countervailable subsidy within the meaning of section 771 of the Tariff Act, 19 U.S.C. § 1677. *Id.* at 1–3.

Kaptan offers four reasons for its position: (1) Commerce's cross-owned input supplier finding does not meet the substantial evidence standard because Commerce did not properly conduct the "primarily dedicated" analysis in 19 C.F.R. § 351.525(b)(6)(iv); (2) Nur's rent-free land benefit was not a countervailable subsidy because it does not meet the statutory definition of "regionally specific" under 19 U.S.C. § 1677(5A)(D)(iv); (3) even if countervailable, the land rent benefit should have been calculated as "revenue forgone" under 19 U.S.C. § 1677(5)(D)(ii), rather than a good for less than adequate renumeration ("LTAR") program under 19 U.S.C. § 1677(5)(D)(iii); and (4) even

if the land rent exemption program was an LTAR program, Commerce should have made adjustments to the benchmark by removing rent attributed to buildings rather than land only. *Id.* at 8–42.

Plaintiff-Intervenors Colakoglu also moved for judgment on the agency record. Colakoglu's motion presents the sole issue of whether Commerce should recalculate Colakoglu's assigned subsidy rate at the all-others rate if Kaptan's rate changes pursuant to the litigation. *See* Pl.-Inters.' Mem. of Law in Support of Mot. for J. on Agency R., Apr. 5, 2023, ECF No. 31. Colakoglu's argument is that to the extent that Commerce recalculates Kaptan's rate as a result of this litigation, Commerce must redetermine a separate rate for Colakoglu in accordance with 19 U.S.C. § 1671d(c)(5)(A)(i). *Id.* at 3–4.

The Government opposes Kaptan's motion. *See* Def.'s Opp. to Pl.'s Mot. for J. on Agency R., Aug. 4, 2023, ECF No. 41 ("Def.'s Br."). First, the Government argues that in previous segments of the investigation, scrap has been found to be "an input primarily dedicated to the production of the downstream steel production, regardless of the amount of scrap purchased from the cross-owned company." *Id.* at 5, 13–17. The Government further argues that the facts on the record demonstrate that Nur produced scrap, sold that scrap to Kaptan, and Kaptan then used that scrap to produce downstream product in the form of rebar. *Id.* at 17. Thus, according to the Government, Nur's production of scrap as an input product is primarily dedicated to Kaptan's product of downstream product, and Commerce appropriately attributed Nur's subsidies as a cross-owned input supplier. *Id.* Second, the Turkish law under which Nur received the land, Law 5084, is limited to specifically designated geographic regions, and is thus regionally specific pursuant to 19 U.S.C. § 1677(5A)(D)(iv). *Id.* at 18–22. This provision of land for use constituted a provision of a good for LTAR, pursuant to 19 U.S.C. § 1677(5)(D)(iii), and a benefit was thereby conferred upon Nur under 19 U.S.C. § 1677(5)(E)(iv). *Id.* The Government, however, does not object to Plaintiff-Intervenor Colakoglu's argument that to the extent that Commerce recalculates Kaptan's overall subsidy rate as a result of this litigation, it must also recalculate Colakoglu's separate rate. *Id.* at 22–23.

Domestics also oppose Kaptan's motion. *See* Rebar Trade Action Coalition's Resp. Br., Aug. 4, 2023, ECF No. 40. Domestics submit that Commerce properly treated Nur as Kaptan's cross-owned supplier of an input primarily dedicated to Kaptan's production of downstream goods. *Id.* at 8–13. Domestics further argue that the court should affirm Commerce's (1) finding that Nur obtained regionally specific benefits, (2) measurement of the benefits using a LTAR meth-

odology associated with measuring the benefit obtained through a government's provision of goods or services, and (3) selection of the benchmark for measuring the benefits. *Id.* at 13–24. Domestics, however, do not object to Plaintiff-Intervenor Colakoglu's contention that the net subsidy rate should be adjusted to the extent that Kaptan's margin is adjusted. *Id.* at 1. Nevertheless, Domestics submit that there is no reason for Kaptan's rate to be adjusted. *Id.*

Kaptan filed a reply brief on October 11, 2022. *See* Pl.'s Reply Br., Oct. 11, 2022, ECF No. 45. Kaptan reiterated its positions and argued that Commerce's approach is "an oversimplification [that] ignores both the *[CVD] Preamble* and Commerce precedent." *Id.* at 2. Kaptan also noted that it is not pursuing its claim that the land agreement was not made pursuant to Law 5084. *Id.* at 13 n.7.

The court held oral argument on January 24, 2023. Domestics filed a post-argument submission on January 31, 2023. Rebar Trade Action Coalition's Post-Arg. Subm., Jan. 31, 2023, ECF No. 60 ("Def.-Inters.' Post-Arg. Br."). On the same day, Kaptan filed its post-argument submission. *See* Pl.'s Post-Arg. Subm., Jan. 31, 2023, ECF No. 61.

On February 2, 2023, Kaptan filed a notice of supplemental authority. *See* Notice of Supp. Auth., Feb. 2, 2023, ECF No. 62. The Government filed a response to the notice of supplemental authority on February 8, 2023. *See* Def.'s Resp. to Pl.'s Supp. Br., Feb. 8, 2023, ECF No. 63 ("Def.'s Post-Arg. Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iv) and (vi). The standard of review is set forth in the statutory language of 19 U.S.C. § 1516a(b)(1)(B)(i): "[t]he court shall hold unlawful any determination finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence refers to "such evidence that a reasonable mind might accept as adequate to support a conclusion." *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 840 (Fed. Cir. 2020) (internal quotation marks and citation omitted).

DISCUSSION

Kaptan does not raise a facial challenge to section 351.525(b)(6)(iv). Instead, Kaptan argues that Commerce has developed a certain practice in applying the regulation, namely in determining whether an input is "primarily dedicated" to the production of the downstream product. Therefore, the focus of the analysis is on whether such practice exists, and if so, whether Commerce adequately explained its

changes or reversals in policy. *See Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) ("[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983))); *see also SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) ("When an agency changes its practice, it is obligated to provide an adequate explanation for the change." (citing *Motor Vehicle Mfrs.*, 463 U.S. at 42)).

For the reasons set forth below, the court finds that Commerce has not offered a satisfactory explanation on the cross-owned input supplier issue and the primarily dedicated analysis. *See Motor Vehicle Mfrs.*, 463 U.S. at 42. The court thus remands the *Final Results* for further explanation and review.

In the three pages of the IDM devoted to the finding of Nur as a cross-owned input supplier, Commerce offered only one substantive reason for its decision. Commerce's position is that because it had previously found that "scrap" is an input product primarily dedicated to the production of downstream steel products, and because such finding was upheld by this court, it is a matter of routine. IDM at 25, 27. According to Commerce, as long as scrap has been sold exclusively, the issue requires no further inspection. Specifically, Commerce reasoned that:

> Regardless of the amount of steel scrap manufactured by Nur and regardless of the fact that it was manufactured as a byproduct rather than as Nur's primary production activity, as previously stated, *steel scrap has been found, in previous segments of this proceeding to be a product that is primarily dedicated to the production of downstream steel products*. Nothing Kaptan argues changes that fact.

IDM at 27 (emphasis added). Commerce further cites to a previous opinion of this court, *Icdas Celik Enedi Tersane ve Ulasim Sanayi A.S. v. United States*, 43 CIT __, 498 F. Supp. 3d 1345 (2021) ("*Icdas*"), in support of its position. The remainder of the IDM on the cross-owned input supplier issue focuses on distinguishing the prior Commerce determinations that Kaptan has raised, "because the nature of input and downstream products and production processes vary among cases." IDM at 26.

Commerce's reliance on determinations in prior segments, and this court's opinion in *Icdas*, is misplaced. Commerce's determinations are based "upon the record of the relevant segment of the proceeding, not

previous segments." *Hyundai Steel Co. v. United States*, 41 CIT __, __, 279 F. Supp. 3d 1349, 1372 (2017) (internal quotation marks omitted) (quoting *Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1134, 724 F. Supp. 2d 1327, 1342 (2010)). "[E]ven assuming Commerce's determinations at issue are factually identical [to a prior segment], as a matter of law a prior administrative determination is not legally binding on other reviews before this court." *Id.* (quoting *Alloy Piping Prods., Inc. v. United States*, 33 CIT 349, 358–59 (2009)). Commerce's conclusions from earlier segments "do not serve as precedent controlling its conclusions in the instant review." *Pakfood*, 34 CIT at 1138, 724 F. Supp. 2d at 1345.

In the prior segments, the determinations were made with respect to different companies within the Kaptan group. These determinations did not involve Nur, nor the specific factual circumstances surrounding Nur's generation of scrap and the sale of these products to Kaptan, and the use of the inputs in Kaptan's productions. Likewise, *Icdas* only involved the specific factual circumstances of a different entity, Içdaş Elektrik, selling scrap to Içdaş Celik Enerji Tersane ve Ulasim Sanayi A.S. *Icdas*, 498 F. Supp. 3d. at 1363–64. *Icdas* does not stand for the proposition that all cross-owned vendors of scrap, by definition, would be considered a supplier of input primarily dedicated to the production of steel products. Commerce needs to explain further why the input product in question, i.e., scrap metal generated by Nur, is in fact primarily dedicated to the production of downstream products in this case. This is especially true considering record evidence that the scrap may have been used for the production of products other than the subject merchandise.[3]

The IDM also attempts to distinguish prior Commerce decisions cited by Kaptan. IDM at 26. Commerce, however, does not adequately address or explain why in some of these prior decisions, the department considered factors such as the byproduct nature of the scrap, and why it has declined to do so in the instant case. *Id.* Nor does it adequately address Kaptan's contention that although there is no de minimis standard, Commerce has previously found that ingots and scrap sold in miniscule amounts are not "primarily dedicated" to the production of the downstream product. Instead, it merely repeats its

[3] Also of note is the *CVD Preamble*'s language on the "type of input product that is merely a link in the overall production chain," and its reasoning given that in such scenarios it may deem "the purpose of the subsidy provided to the input producer is to benefit the production of both the input and downstream products." *CVD Preamble* at 65401. Indeed, as the Government recognizes, "evidence of a vertically integrated supply chain" or evidence that the scrap "was used exclusively by the downstream producer in its production of downstream product" are all factors that Commerce has considered in relevant determinations. Def.'s Post-Arg. Br. at 3. Yet Commerce here has failed to offer any analysis on whether the scrap sold by Nur was a link in the overall production chain.

position that if scrap has been generated in any form, and if that scrap has been sold by a cross-owned entity, and subsequently used in the production of downstream products, it is primarily dedicated. *Id.*

It is "well-established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001). Although the court recognizes that the determination in question "depends on the specific factual situations presented to Commerce," IDM at 26, the court finds that Commerce has offered insufficient explanation as to how the specific factual situations in this case support the conclusion that Nur was a cross-owned input supplier.

Domestics raise several points on the nature of rebar and Commerce's familiarity with rebar production. Def.-Inters.' Post-Arg. Br. at 2–3. As these reasons were not given in the IDM, they may be deemed post hoc rationalizations not permissibly before the court for consideration. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."); *see also Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1099 (Fed. Cir. 1996) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." (internal quotation marks omitted) (quoting *Chenery*, 318 U.S. at 87)). But even if they were considered, such general trends cannot explain why Nur's generation of scrap and subsequent sale to Kaptan in the instant case is a production of input product primarily dedicated to the production of a downstream product. As Commerce, the Government, and Domestics point out repeatedly, the analysis called for under the regulation "depends on the specific factual situations." IDM at 26; *see also* Def.'s Br. at 10, 14, 17; Def.-Inters.' Post-Arg. Br. at 1. Commerce "cannot simply ignore the facts of a particular record on the basis that it has seen similar situations in the past," Def.-Inters.' Post-Arg. Br. at 1, as "each decision is highly record-dependent," Def.'s Post-Arg. Br. at 2; *see also* Def.'s Br. at 10, 14, 17. Based upon the record before this court, Commerce has not provided adequate explanation addressing such fact-specific circumstances in this segment of the investigation. Therefore, Commerce's finding that Nur is a cross-owned input supplier for the purposes of subsidy attribution is remanded for further explanation and review.[4]

[4] The court does not reach the other arguments raised by the parties as the arguments are contingent on the court upholding Commerce's finding that Nur was a cross-owned input supplier. *See* Pl.'s Br. at 24.

CONCLUSION

In light of the above, the court remands Commerce's *Final Results* for further explanation and review on Commerce's finding that Nur was a cross-owned input supplier of input products primarily dedicated to the production of downstream products. It is hereby

ORDERED that Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order; and it is further

ORDERED that the deadlines provided by USCIT Rule 56.2(h) shall govern thereafter.

SO ORDERED.

Dated: April 26, 2023
New York, New York

/s/ Gary S. Katzmann
JUDGE

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