U.S. Customs and Border Protection

8 CFR PART 235

CBP DEC. NO. 23–09

INTERPRETATION OF THE TERM KIOSK FOR GLOBAL ENTRY

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

ACTION: Interpretive rule.

SUMMARY: This interpretive rule provides guidance to the public on U.S. Customs and Border Protection's interpretation of the term "kiosk" as used in the Global Entry regulations.

DATES: This rule is effective on August 29, 2023.

FOR FURTHER INFORMATION CONTACT: Rafael E. Henry, Branch Chief, Office of Field Operations, (202) 344–3251, *Rafael.E.Henry@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

U.S. Customs and Border Protection (CBP) operates the Global Entry program, a voluntary international trusted traveler program, at designated airports to provide certain pre-approved travelers dedicated processing into the United States. Members of Global Entry are vetted travelers who have voluntarily applied for membership, have paid a required application fee, and have provided certain personal data to CBP. Travelers with active membership in Global Entry are considered to be a low risk, because CBP conducts vetting both when the participant applies to the Global Entry program and on an ongoing basis after the participant becomes a Global Entry member.

Upon arrival at a designated airport, Global Entry members can use a self-service process to report their arrival and facilitate their inspection. The Global Entry arrival procedures are set forth in section 235.12(g) of title 8 of the Code of Federal Regulations (8 CFR 235.12(g)). That regulation requires that an arriving passenger utilize a Global Entry kiosk, follow the on-screen instructions, and

declare all articles brought into the United States. The term "kiosk" is not defined in the regulations; however, the kiosks used by CBP until now have been machines that are permanently installed in airports and that print paper receipts for verification of the traveler's arrival ("legacy kiosks"). Participants must physically go to the legacy kiosk in order to be processed using the Global Entry program.

To facilitate their inspection, Global Entry members utilize the legacy kiosks to have their photographs and fingerprints taken, submit identifying information, and answer several automated questions about items that they are bringing into the United States. When using the legacy kiosks, participants are required to declare all articles that they are bringing into the United States, pursuant to 19 CFR 148.11.

CBP is in the process of transitioning from the legacy kiosks to Global Entry portals and the Global Entry Mobile application. CBP expects all the legacy kiosks to be retired at the end of calendar year 2023. The portals are already being used in some locations and are essentially mobile processing units, similar to a tablet, with screens and cameras. The portals are enabled with Wi-Fi to allow CBP the flexibility to position the portals anywhere inside an airport Federal Inspection Station (FIS) to optimize traveler processing. Global Entry participants physically approach the portals for processing in a manner similar to the legacy kiosks. However, instead of issuing a paper receipt to travelers, the portals will transmit an electronic file to the CBP officers at egress for review and verification of the traveler's arrival. In addition to the portals, advancing technology will now allow CBP to perform the same processing for Global Entry members through use of the Global Entry Mobile application. The Global Entry Mobile application will be deployed at 5 airport locations across the United States (Los Angeles, Miami, Houston, Fort Lauderdale, and Washington Dulles) starting in the summer of 2023. The portal or the mobile application will take the traveler's facial image and match it with the existing image from the application process. With these new processes, travelers will now make a verbal declaration to a CBP officer instead of responding to on screen questions that were previously asked during processing at the legacy kiosk. All of the technologies that will now be included in CBP's interpretation of "kiosk" assign a class of admission and provide a paper or electronic record that is given to a CBP officer stationed within the Federal Inspection Service area for verification that the traveler was processed for admission into the United States.

For this reason, the Department of Homeland Security (DHS) is issuing this interpretive rule to clarify its interpretation of the unde-

fined term "kiosk" to include the currently available technology as well as future advances in processing technology for Global Entry participants to be processed by CBP for entry into the United States.

DHS is issuing this interpretive rule as an interim measure prior to publication of a final rule that will remove the term "kiosk" from the Global Entry regulations entirely. On September 9, 2020, DHS published a notice of proposed rulemaking (85 FR 55597) in the **Federal Register** entitled "Harmonization of the Fees and Application Procedures for the Global Entry and SENTRI Programs and Other Changes" (the NPRM). In the NPRM, DHS proposed to remove references to "kiosk" from the regulations. As noted above, "kiosk" is not a defined term in the regulations, and DHS proposed to remove that term in order to make the regulations more inclusive of developing technologies. The final rule promulgating the proposed change is expected to publish in 2024.

II. Interpretation of "Kiosk"

For the purposes of 8 CFR 235.12, CBP interprets the term "kiosk" to include the following:[1]

1. Legacy kiosks (machines that are permanently installed in airports and that print a paper receipt);
2. Receipt-less Facial Kiosks (RFK) (modified legacy kiosks that send an electronic record to a CBP officer);
3. Global Entry Portals (Wi-Fi enabled mobile processing units with a screen and camera); and
4. the Global Entry Mobile application or any successor technology for processing Global Entry members at ports of entry.

III. Effective Date

Because this rule is solely interpretive, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the Administrative Procedure Act.[2] Therefore, this rule is effective on August 29, 2023, the same date that it is published in the **Federal Register**.

Regulatory Analysis

Executive Orders 12866, 13563, and 14094 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, pub-

[1] All of the technologies included in the CBP's interpretation of "kiosk" assign a class of admission and provide a paper or electronic record that is given to a CBP officer stationed within the Federal Inspection Service area for verification that the traveler was processed for admission into the United States.

[2] 5 U.S.C. 553(d).

lic health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a "significant regulatory action," under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulation.

This rule merely explains to the public how CBP interprets a certain term used in an existing regulation, 8 CFR 235.12. This rule imposes no new requirements on the public and simply clarifies its interpretation of a kiosk to include other forms of technology, broadening the public's processing options. As such, there are no costs to this interpretive rule. To the extent that this rule results in processing time savings for the public, there may be some unquantified benefits to this interpretive change.

As an interpretive rule, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[3] Because no notice of proposed rulemaking is required, analysis under the Regulatory Flexibility Act is not required.[4]

An agency may not conduct or sponsor, and an individual is not required to respond to a collection of information unless it displays a valid OMB control number. This collection of information has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB control number 1651–0121.

ALEJANDRO N. MAYORKAS,
Secretary of Homeland Security.

[3] 5 U.S.C. 553(b).

[4] 5 U.S.C. 603(a), 604(a).

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A FROZEN BURI FISH COLLAR

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

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the tariff classification of a frozen buri fish collar.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning the tariff classification of a frozen buri fish collar under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 28, on July 19, 2023. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 19, 2023.

FOR FURTHER INFORMATION CONTACT: Tatiana Salnik Matherne, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0351.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 28, on July 19, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of a frozen buri fish collar. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N306583, dated November 18, 2019, CBP classified the frozen buri fish collar at issue in heading 0304, HTSUS, specifically in subheading 0304.99.9190, HTSUSA, which provides for "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen: Other, frozen: Other: Other: Ocean." CBP has reviewed NY N306583 and has determined the ruling letter to be in error. It is now CBP's position that the subject frozen buri fish collar is properly classified in heading 0303, HTSUS, specifically in subheading 0303.89.0080, HTSUSA, which provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304: Other fish, excluding edible fish offal of subheadings 0303.91 to 0303.99: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N306583 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H330112, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

N306583
November 18, 2019
CLA-2–03:OT:RR:NC:N2:231
CATEGORY: Classification
TARIFF NO.: 0304.99.9190

MS. ASHLEY HONG
NISSIN INTERNATIONAL TRANSPORT USA, INC.
1540 W. 190TH STREET
TORRANCE, CA 90501

RE: The tariff classification of Frozen Fish Collar from Japan

DEAR MS. HONG:

This is a response to your letter dated October 8, 2019, requesting a tariff classification ruling on behalf of your client, Wismettac Asian Foods, Inc. (Santa Fe Springs, CA). You provided pictorial representation of the product at issue.

The subject merchandise is the frozen collar of the fish Buri, also known as, Japanese Amberjack or Yellowtail (Seriola quinqueradiata). According to the manufacturing process, the fish will be beheaded, eviscerated, the collar retrieved, rinsed, cooled, wiped dry, packaged, vacuum sealed, labeled, measured and frozen. The finished product, "Frozen Buri Collar" will be imported in bulk quantities of 12 pieces per each airtight bag and sold to the food service industry.

The applicable subheading for the Frozen Buri Collar will be 0304.99.9190, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen: Other, frozen: Other: Other: Ocean." The rate of duty will 6 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 the World Wide Web at https://hts.usitc.gov/current.

Please note that seafood is subject to the Mandatory Country of Origin Labeling ("COOL") requirements administered by the USDA's Agricultural Marketing Service (AMS), we advise you to check with that agency for their further guidance on your scenario. Contact information for AMS is as follows:

USDA-AMS-LS-SA
Room 2607-S, Stop 0254
1400 Independence Avenue, SW
Washington, DC 20250–0254
Tel. (202) 720–4486
Website: www.ams.usda.gov/COOL
Email address for inquiries: COOL@usda.gov

This merchandise is subject to The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (The Bioterrorism Act), which is regulated by the Food and Drug Administration (FDA). Information on the Bioterrorism Act can be obtained by calling the FDA at 301–575–0156, or at the Web site, www.fda.gov/oc/bioterrorism/bioact.html.

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 Ekeng Manczuk at ekeng.b.manczuk@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK
Director
National Commodity Specialist Division

HQ H330112
August 28, 2023
OT:RR:CTF:FTM H330112 TSM
CATEGORY: Classification
TARIFF NO: 0303.89.0080

MS. ASHLEY HONG
NISSIN INTERNATIONAL TRANSPORT USA, INC.
1540 W. 190TH STREET
TORRANCE, CA 90501

RE: Revocation of NY N306583; Tariff Classification of Frozen Buri Fish Collar

DEAR MS. HONG:

This letter is to inform you that U.S. Customs and Border Protection ("CBP") has reconsidered New York Ruling Letter ("NY") N306583, which was issued to Wismettac Asian Foods, Inc. on November 18, 2019. In NY N306583, CBP classified frozen collar of the fish buri, also known as Japanese amberjack or yellowtail (Seriola quinqueradiata), under subheading 0304.99.9190, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for: "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen: Other, frozen: Other: Other: Ocean." We have reviewed NY N306583 and found it to be incorrect. For the reasons set forth below, we are revoking this ruling.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published in the *Customs Bulletin*, Vol. 57, No. 28, on July 19, 2023, proposing to revoke NY N306583, and to revoke any treatment accorded to substantially identical transactions. No comments were received in response to the notice.

FACTS:

In NY N306583, the merchandise was described as follows:

> The subject merchandise is the frozen collar of the fish Buri, also known as, Japanese Amberjack or Yellowtail (Seriola quinqueradiata). According to the manufacturing process, the fish will be beheaded, eviscerated, the collar retrieved, rinsed, cooled, wiped dry, packaged, vacuum sealed, labeled, measured and frozen. The finished product, "Frozen Buri Collar" will be imported in bulk quantities of 12 pieces per each airtight bag and sold to the food service industry.

ISSUE:

What is the tariff classification of the frozen buri fish collar at issue?

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all

purposes. GRI 1 requires that classification be determined first 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 heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The 2023 HTSUS headings at issue are as follows:

0302 Fish, fresh or chilled, excluding fish fillets and other fish meat of heading 0304

* * *

0303 Fish, frozen, excluding fish fillets and other fish meat of heading 0304

* * *

0304 Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTS and are thus useful in ascertaining the proper classification of the merchandise. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 03.03 states, in pertinent part, the following:

> The provisions of the Explanatory Note to heading 03.02 apply, *mutatis mutandis*, to the products of this heading.

* * *

EN 03.02 states, in pertinent part, the following:

> This heading covers fish, fresh or chilled, whether whole, headless, gutted, or in cuts containing bones or cartilage. However, the heading **does not include** fish fillets and other fish meat of **heading 03.04**. The fish may be packed with salt or ice or sprinkled with salt water as a temporary preservative during transport.
> Fish slightly sugared or packed with a few bay leaves remains in this heading.
>
> Edible fish offal separated from the rest of the body of the fish (e.g., skins, tails, maws (swim bladders), heads and halves of heads (with or without the brains, cheeks, tongues, eyes, jaws, or lips), stomachs, fins, tongues), as well as livers, roes and milt, fresh or chilled, are also classified in this heading.

* * *

EN 03.04 states, in pertinent part, the following:

> This heading covers:
>
> (1) **Fish fillets.**
>
> For the purposes of this heading the term **fish fillets** means the strips of meat cut parallel to the backbone of the fish and constituting the right or left side of a fish insofar as the head, guts, fins (dorsal, anal, caudal, ventral, pectoral) and bones (spinal column or main backbone, ventral or costal bones, branchial bone or stapes, etc.) have been

removed and the two sides are not joined together, for example by the back or belly.

The classification of these products is not affected by the possible presence of the skin, sometimes left attached to the fillet to hold it together or to facilitate subsequent slicing. Classification is similarly unaffected by the presence of pin bones or other minor bones which may not have been completely removed.

Fillets cut in pieces are also classified as fillets in this heading.

Cooked fillets, and fillets merely covered with batter or bread crumbs, whether or not frozen, are classified in **heading 16.04**.

(2) **Other fish meat** (whether or not minced), i.e., fish meat from which the bones have been removed. As in the case of fish fillets, classification of fish meat is unaffected by the presence of minor bones which may not have been completely removed.

* * *

This heading covers fish fillets and other fish meat (whether or not minced) in the following states only:

(i) Fresh or chilled, whether or not packed with salt or ice or sprinkled with salt water as a temporary preservative during transport.

(ii) Frozen, often presented in the form of frozen blocks.

Fish fillets and other fish meat (whether or not minced) slightly sugared or packed with a few bay leaves remain in this heading.

* * *

EN 03.04 states in relevant part that heading 0304 covers "fish fillets," which are strips of meat cut parallel to the backbone of the fish, constituting the right or left side of fish, insofar as the head, guts, fins, and bones have been removed and the sides are not joined together. EN 03.04 further provides for "other fish meat" from which the bones have been removed. Additionally, EN 03.04 explains that classification of "fish fillets" and "other fish meat" in heading 0304 is unaffected by the presence of minor bones which may not have been completely removed.

We note that the term "minor" is not defined by the HTSUS or within the ENs. When a term is not defined within the HTSUS, then the common and commercial meaning may be determined by consulting dictionaries to ascertain its meaning.[1] The *Merriam-Webster Dictionary* defines "minor" as "infe-

[1] When, as in this case, a tariff term is not defined by the HTSUS or its legislative history, "the term's correct meaning is its common meaning." *See Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) citing *Lynteq, Inc. v. United States*, 976 F.2d 693 (Fed. Cir. 1992). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989) citing *Nippon Kogaki (USA), Inc. v. United States*, 69 C.C.P.A. 89, 673 F.2d 380, 382 (1982). To ascertain the common meaning of a term, a court may consult "dictionaries, scientific authorities, and other reliable information sources" and "lexicographic and other materials." *See C. J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (CCPA 1982) citing *Schott Optical Glass, Inc. v. United States*, 612 F.2d 1283 (CCPA 1979); *Simod*, 872 F.2d at 1576.

rior in importance, size, or degree: comparatively unimportant."[2] The *Cambridge Dictionary* defines "minor" as "having little importance, influence, or effect, especially when compared with other things of the same type."[3] *Dictionary.com* defines "minor" as "lesser, as in size, extent, or importance, or being or noting the lesser of two" and "not serious, important, etc."[4] The above dictionary definitions demonstrate that the term "minor" describes objects that are inferior in size, importance, and effect. Consistent with these definitions, we conclude that in reference to fish bones, "minor bones" are bones that are of little significance due to their size. The referenced definitions are also consistent with EN 03.04, which refers to "minor bones" as "bones which may not have been completely removed," thereby describing them as small fractions of bones left over after bone removal.

EN 03.04 defines "fish fillets" and "other fish meat" as fish meat from which the bones have been removed, with the exception of minor bones which have not been completely removed. Upon review, we find that the frozen buri fish collar at issue in NY N306583, is not "fish fillet" or "other fish meat," as defined in EN 03.04. In contrast, the manufacturing process for the frozen buri fish collar at issue is described in relevant part as follows: the fish will be beheaded, eviscerated, the collar retrieved, rinsed, cooled, wiped dry, packaged, vacuum sealed, labeled, measured and frozen. Based on the description of the manufacturing process, we find that the frozen buri fish collar at issue contains all of its bones as bone removal is not identified as part of the manufacturing process. Because the bones are not removed, the "minor bone" exception is not applicable. Therefore, we conclude that the frozen buri fish collar is not "fish fillet" or "other fish meat," within the meaning of EN 03.04. As such, it is not classified in heading 0304, HTSUS, which provides for "Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen."

Heading 0303, HTSUS, provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304." EN 03.03 provides that the provisions of EN 03.02 apply, *mutatis mutandis*, to the products of this heading. In relevant part, EN 03.02 provides that the heading covers fish, whether whole, headless, gutted, or in cuts containing bones or cartilage, but does not include fish fillets and other fish meat of heading 03.04. Based on the described manufacturing process, the buri fish collar at issue is frozen, beheaded, eviscerated, and contains bones. As such, it meets the relevant terms of EN 03.02 and EN 03.03, and is provided for in heading 0303, HTSUS. Specifically, the buri fish collar is classified under subheading 0303.89.0080, HTSUSA, which provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304: Other fish, excluding edible fish offal of subheadings 0303.91 to 0303.99: Other: Other."

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[2] *Minor*, Merriam-Webster, *https://www.merriam-webster.com/dictionary/minor* (last visited February 17, 2023).

[3] *Minor*, Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/minor* (last visited February 17, 2023).

[4] *Minor*, Dictionary.com, *https://www.dictionary.com/browse/minor* (last visited February 17, 2023).

HOLDING:

Under the authority of GRIs 1 and 6, the frozen buri fish collar is classified under heading 0303, HTSUS, and specifically under subheading 0303.89.0080, HTSUSA, which provides for "Fish, frozen, excluding fish fillets and other fish meat of heading 0304: Other fish, excluding edible fish offal of subheadings 0303.91 to 0303.99: Other: Other." The column one general rate of duty is Free.

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

EFFECT ON OTHER RULINGS:

NY N306583, dated November 18, 2019, is hereby REVOKED.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

PROPOSED REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SILDENAFIL CITRATE IN BULK FORM

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

ACTION: Notice of proposed revocation of two ruling letters and revocation of treatment relating to the tariff classification of Sildenafil Citrate in bulk form.

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 two ruling letters concerning tariff classification of Sildenafil Citrate in bulk form 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 October 20, 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. 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. Arrangements to inspect submitted comments should be made in advance by calling Ms. Monique Moore at (202) 325–1826.

FOR FURTHER INFORMATION CONTACT: Ms. Arim J. Kim, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–0266.

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 two ruling letters pertaining to the tariff classification of Sildenafil Citrate in bulk form. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) H83763, dated July 19, 2001 (Attachment A), and NY B87488, dated August 18, 1997 (Attachment B), 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 two 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 H83763 and NY B87488, CBP classified Sildenafil Citrate in bulk form in heading 2933, HTSUS, specifically in subheading 2933.59.53, HTSUS, which provides for "Heterocyclic compounds with nitrogen hetero-atom(s) only: Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure: Other: Drugs: Aromatic or modified aromatic: Other." CBP has reviewed NY H83763 and NY B87488 and has determined the ruling letters to be in error. It is now CBP's position that Sildenafil Citrate in bulk form is properly classified in heading 2935, HTSUS, specifically in subheading 2935.90.60, HTSUS, which provides for "Sulfonamides: Other: Other: Drugs: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY H83763 and NY B87488, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H261406, set forth as Attachment C 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

NY H83763

July 19, 2001
CLA-2–29:RR:NC:2:238 H83763
CATEGORY: Classification
TARIFF NO.: 2933.59.5300

MS. LISA M. CONZO
INTERCHEM CORPORATION
120 ROUTE 17 NORTH
P.O. BOX 1579
PARAMUS, NJ 07653–1579

RE: The tariff classification of Sildenafil Citrate (CAS-171599–83–0), imported in bulk form, from India

DEAR MS. CONZO:

In your letter dated July 6, 2001, you requested a tariff classification ruling.

The subject product, Sildenafil Citrate, is indicated for use in the treatment of erectile dysfunction.

The applicable subheading for Sildenafil Citrate, imported in bulk form, will be 2933.59.5300, Harmonized Tariff Schedule of the United States (HTS), which provides for "Heterocyclic compounds with nitrogen hetero-atom(s) only: Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure: Other: Drugs: Aromatic or modified aromatic: Other." Pursuant to General Note 13, HTS, the rate of duty will be free.

This merchandise may be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the U.S. Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number 301–443–1544.

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 Harvey Kuperstein at 212–637–7068.

Sincerely,

ROBERT B. SWIERUPSKI
Director,
National Commodity Specialist Division

NY B87488
August 18, 1997
CLA-2–29:RR:NC:2:238 B87488
CATEGORY: Classification
TARIFF NO.: 2933.59.5300

MS. KATHLEEN GOULDING
PFIZER INC.
100 JEFFERSON ROAD
PARSIPPANY, NJ 07054

RE: The tariff classification of Sildenafil Citrate (CAS-171599–83–0), also known as Sildenafil (CAS-139755–83–2), imported in bulk form, from Ireland

DEAR MS. GOULDING:

In your letter dated July 1, 1997, you requested a tariff classification ruling.

The subject product, Sildenafil Citrate, is the United States adopted name ("USAN") for Sildenafil, which is Sildenafil Citrate's international nonproprietary name ("INN"). It is indicated for use in the treatment of male erectile dysfunction.

The applicable subheading, when imported in bulk form as Sildenafil Citrate, or as Sildenafil, will be 2933.59.5300, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Heterocyclic compounds with nitrogen hetero-atom(s) only: Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure: Other: Drugs: Aromatic or modified aromatic: Other." The rate of duty will be 6.7 percent ad valorem. We note that, at the time of issuance of this ruling, the subject product is not listed in Tables 1 or 3 of the Pharmaceutical Appendix to the Tariff Schedule.

This merchandise may be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the U.S. Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

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 Cornelius Reilly at 212–466–5770.

Sincerely,

GWENN KLEIN KIRSCHNER
Chief, Special Products Branch
National Commodity Specialist Division

HQ H261406
OT:RR:CTF:CPMMA H261406 AJK
CATEGORY: Classification
TARIFF NO: 2935.90.6000

MS. LISA M. CONZO
INTERCHEM CORPORATION
120 ROUTE 17 NORTH
P.O. BOX 1579
PARAMUS, NJ 07653–1579

RE: Revocation of NY H83763 and NY B87488; Classification of Sildenafil Citrate in Bulk Form (CAS No. 171599–83–0)

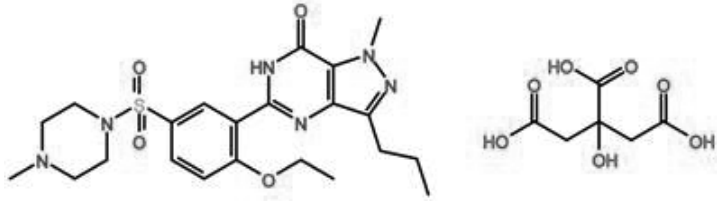
DEAR MS. CONZO:

This letter is in reference to your New York Ruling Letter (NY) H83763, dated July 19, 2001, concerning the tariff classification of Sildenafil Citrate (CAS No. 171599–83–0) under the Harmonized Tariff Schedule of the United States (HTSUS). In NY H83763, U.S. Customs and Broder Protection (CBP) classified the subject merchandise in heading 2933, HTSUS, as a heterocyclic compound with nitrogen heteroatoms only. We have reviewed NY H83763 and have determined that the classification of the subject merchandise was incorrect.

We have also reviewed NY B87488, dated August 18, 1997, concerning the tariff classification of substantially similar Sildenafil Citrate that is imported in bulk, and have determined that the ruling letter was incorrect. For the reasons set forth below, we are revoking both of these rulings.

FACTS:

Sildenafil Citrate (CAS No. 171599–83–0) is a drug that produces vasodilation (*i.e.*, the dilatation of blood vessels) and it is used to treat erectile dysfunction and pulmonary arterial hypertension (*i.e.*, high blood pressure in the lungs). The International Union of Pure and Applied Chemistry (IUPAC) name of Sildenafil Citrate is 5-[2-ethoxy-5-(4-methylpiperazin-1-yl) sulfonylphenyl]-1-methyl-3-propyl-6*H*-pyrazolo[4,3-d]pyrimidin-7-one;2-hydroxypropane-1,2,3-tricarboxylic acid.[1] Its molecular formula is $C_{28}H_{38}N_6O_{11}S$. Sildenafil Citrate has the following chemical structure where the SO_2 group is directly attached to organic chemical compounds with carbon atoms, and other atoms:



[1] NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, PUBCHEM COMPOUND SUMMARY FOR CID 135413523, SILDENAFIL CITRATE (2023), https://pubchem.ncbi.nlm.nih.gov/compound/Sildenafil-Citrate (last visited August 8, 2023).

ISSUE:

Whether Sildenafil Citrate is classified in heading 2933, HTSUS, as a heterocyclic compound with nitrogen heteroatoms only, or heading 2935, HTSUS, as a sulfonamide.

LAW AND ANALYSIS:

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

* * * * * *

The 2023 HTSUS provisions at issue are as follows:

2933	Heterocyclic compounds with nitrogen hetero-atom(s) only:					
		Compounds containing a pyrimidine ring (whether or not hydrogenated) or piperazine ring in the structure:				
2933.59			Other:			
				Drugs:		
					Aromatic or modified aromatic	
2933.59.5300						Other
2935	Sulfonamides:					
2935.90		Other:				
			Other:			
				Drugs:		
2935.90.6000						Other

Note 3 to chapter 29 states, in pertinent part, as follows:

> Goods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

* * * * * *

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

Prior to 2007, EN 29.35 provided that "[s]ulphonamides have the general formula ($R.SO_2NH_2$) where R is an organic radical of varying complexity" and did not explicitly list sildenafil citrate as an example. In 2007, however, the Harmonized System Committee to the World Customs Organization changed EN 29.35 to the following:

> Sulphonamides have the general formula ($R^1SO_2NR^2R^3$) where R^1 is organic radical of varying complexity having a carbon atom directly attached to the SO_2 group and R^2 and R^3 are either: hydrogen, another

atom or an inorganic or organic radical of varying complexity (including double bonds or rings). Many are used in medicine as powerful bactericides. They include, *inter alia:* ...

(6) Sildenafil citrate ....

* * * * * *

Pursuant to the change in EN 29.35, Sildenafil Citrate in bulk form is now classifiable in heading 2935, HTSUS, because it has the structure of a sulfonamide containing an SO_2 group directly attached to a carbon atom and the other requisite functional groups. As the instant pharmaceutical product is classifiable in both headings of 2933 and 2935, HTSUS, we find that it is properly classified in heading 2935, HTSUS, which is the heading that appears last in numerical order, according to note 3 to chapter 29.

HOLDING:

By application of GRI 1, Sildenafil Citrate is classified in heading 2935, HTSUS, and, by application of GRI 6, is specifically classified in subheading 2935.90.60, HTSUS, which provides for "Sulfonamides: Other: Other: Drugs: Other." The 2023 column one general rate of duty is 6.5 percent *ad valorem*. However, Sildenafil and Citrate are enumerated in Tables 1 and 2, respectively, of the Pharmaceutical Appendix to the Tariff Schedule and the column one special rate of duty for subheading 2935.90.60, HTSUS, contains the symbol "K" in parentheses. Pursuant to General Note 13 of the HTSUS, therefore, the subject merchandise is duty free.

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

EFFECT ON OTHER RULINGS:

NY B87488, dated August 18, 1997, and NY H83763, dated July 19, 2001, are hereby revoked.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

CC: Ms. Kathleen Goulding
Pfizer Inc.
100 Jefferson Road
Parsippany, NJ 07054

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE (COAC)

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

ACTION: Committee management; notice of Federal advisory committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, September 20, 2023. The meeting will be open to the public via webinar only. There is no on-site, in-person option for the public to attend this quarterly meeting.

DATES: The COAC will meet on Wednesday, September 20, 2023, from 1:00 p.m. to 5:00 p.m. EDT. Please note that the meeting may close early if the committee has completed its business. Comments must be submitted in writing no later than September 15, 2023.

ADDRESSES: The meeting will be open to the public via webinar only. The webinar link and conference number will be posted by 5:00 p.m. EDT on September 19, 2023, at *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.* For information or to request special assistance for the meeting, contact Ms. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440 as soon as possible. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for Docket Number USCBP–2023–0021. To submit a comment, click the "Comment" button located on the top left-hand side of the docket page.
- *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2023–0021 in the subject line of the message.

Comments must be submitted in writing no later than September 15, 2023, and must be identified by Docket No. USCBP–2023–0021. All submissions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov.* Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice, which is available via a link on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection,

1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov.*

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

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

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

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

There will be multiple public comment periods held during the meeting on September 20, 2023. Speakers are requested to limit their comments to two minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

Agenda

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

1. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups. The Antidumping/Countervailing Duty (AD/CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD requirements. The Intellectual Property Rights (IPR) Process Modernization Working Group will report on, and anticipates providing recommendations for the committee's consideration relating to, the development of a portal on the CBP IPR web page and other enhancements in communications between CBP, rights holders, and the trade community regarding enforcement actions. The Bond Working Group will report on the ongoing discussions and status updates for eBond requirements. The Forced Labor Work-

ing Group (FLWG) has been working on the implementation of recommendations and updates, as well as revisions to its statement of work. The FLWG will also provide updates and anticipates making recommendations for the committee's consideration at the September public meeting.

2. The Next Generation Facilitation Subcommittee will provide updates on its working groups. There will be an update and potential recommendations for the committee's consideration from the Automated Commercial Environment (ACE) 2.0 Working Group regarding progress on the ACE 2.0 initiative resulting from the working group's recent in-person sessions held to review the CBP ACE 2.0 Concept of Operations processes. The Customs Interagency Industry Working Group (CII) (formerly the One U.S. Government Working Group) will provide an update on the work accomplished this quarter, which includes discussions with Partner Government Agencies and an update on ACE 2.0. The Passenger Air Operations (PAO) Working Group has been focusing its discussions on CBP security seal processing and access to international aircraft and passengers, landing rights, and elimination of outdated or obsolete forms, and will provide an update on those discussions.

3. The Rapid Response Subcommittee will provide updates from the Broker Modernization Working Group and the United States-Mexico-Canada Agreement (USMCA) Chapter 7 Working Group. The Broker Modernization Working Group currently meets monthly and continues to focus on the 19 CFR part 111 final rules relating to Modernization of the Customs Broker Regulations and Continuing Education for Licensed Customs Brokers, as well as Customs Broker Licensing Exams matters. The subcommittee anticipates the Broker Modernization Working Group will provide one recommendation for the committee's consideration. The USMCA Chapter 7 Working Group meets bi-weekly with the expectation that recommendations will be developed and submitted for consideration at an upcoming COAC public meeting. The current focus of this working group is to review the Chapter 7 articles of the USMCA and identify gaps in implementation between the United States, Mexico, and Canada.

4. The Secure Trade Lanes Subcommittee will provide updates on its five active working groups: the Export Modernization Working Group, the In-Bond Working Group, the Trade Partnership and Engagement Working Group, the Pipeline Working Group, and the Cross-Border Recognition Working Group. The Export Modernization Working Group has continued its work on the electronic export manifest pilot program. The In-Bond Working Group has continued its focus on the implementation of previously submitted recommenda-

tions. The Trade Partnership and Engagement Working Group has focused its work on implementing previous recommendations for Customs Trade Partnership Against Terrorism (CTPAT) Trade Compliance partners and is working to update its statement of work to include CTPAT security. The Pipeline Working Group expects to submit a recommendation for the committee's consideration that CBP develop a pilot to use Distributed Ledger Technology to enhance transparency in supply chains for pipeline-borne goods. Although the Cross-Border Recognition Working Group did not meet this quarter, it remains an active working group within the subcommittee and will resume meetings next quarter.

Meeting materials will be available by September 11, 2023, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

Dated: August 25, 2023.

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

[Published in the Federal Register, August 30, 2023 (88 FR 59933)]

VESSEL ENTRANCE CLEARANCE SYSTEM (VECS)

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

ACTION: 60-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 (CBP) 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 October 30, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0019 in the subject line and the agency name. Please use the following method to submit comments: Email. Submit comments to: *CBP_PRA@cbp.dhs.gov.*

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of

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

Overview of This Information Collection

Title: Vessel Entrance and Clearance System (VECS).

OMB Number: 1651–0019.

Form Number: CBP Form 1300.

Current Actions: Extension.

Type of Review: Extension.

Affected Public: Individuals.

Abstract: CBP Form 1300, Vessel Entrance or Clearance Statement, is used to collect essential commercial vessel data at time of formal entrance and clearance in U.S. ports, allows the master to attest to the truthfulness of all CBP forms associated with the manifest package, and collects relevant information about the vessel and cargo. The form was developed through agreement by the United Nations Intergovernmental Maritime Organization (IMO) in conjunction with the United States and various other countries. The form was developed as a single form to replace the numerous other forms used by various countries for the entrance and clearance of vessels. CBP Form 1300 is authorized by 5 U.S.C. 301, and 19 U.S.C. 66, 1415, 1624, 2071, 1431, 1433, and 1434, as well as 46 U.S.C. 501, 60105 and provided for by 19 CFR 4. This form is accessible at: *http://www.cbp.gov/newsroom/publications/forms?title=1300&=Apply.*

This form is currently submitted in paper format and is anticipated to be submitted electronically as part of CBP's efforts to automate maritime forms through the Vessel Entrance and Clearance System (VECS), which will reduce the need for paper submission of any vessel entrance or clearance requirements under the above referenced statutes and regulations. VECS will still collect and maintain the same data as CBP Form 1300 but will automate the capture of data to reduce or eliminate redundancy with other data collected by CBP.

Respondents are enabled to create a new ACE Account type for Vessel Agencies through the ACE Portal. The new account type within ACE will operate as a portal that leads to the Vessel Entrance and Clearance System (VECS), which will run as its own independent system.

Vessel Agents will be required to provide identifying information such as; their name, their employer identification number (EIN), company address, and their phone numbers, which will be requested at the time Vessel Agents apply for the new ACE account type.

After creating an ACE account, Vessel Agencies, Vessel Operating Common Carriers (VOCCs), and their designees are able to use the new Vessel Entrance and Clearance System (VECS) as part of the ongoing pilot program to test the functionality of VECS, and will be able to file vessel entrance, clearance, and related data to CBP electronically.

CBP is currently running a small public VECS Pilot on several ports. VECS will automate and digitize the collection and processing of the data and filing requirements for which the CBP Form 1300 is used. CBP plans to run an initial public pilot to test the system. All users who obtained a Vessel Agency Account through the ACE Portal will be automatically enrolled into the VECS public pilot. Initially, the pilot began at one of eleven ports where VECS was previously internally tested. CBP is providing training to each CBP port and the Vessel Agency personnel at each port, prior to beginning/expanding the public pilot in another port.

The VECS public pilot will continue to expand to additional ports, in an effort to progressively test and implement the system nationwide. There will be no change to the paper format of CBP Form 1300, and CBP Form 1300 in paper format will continue to be accepted.

New Submission

The VECS Pilot will be live for 51 port codes as of August 2023 enabling fully electronic processing of vessel entrance and clearance. The public pilot has allowed CBP to identify areas for additional enhancement and automation, fix minor errors with the system's operation, and simultaneously deploy to new locations while continuing to test fixes and new capabilities. VECS pilot will continue to expand to other port codes while implementing training for port staff.

Type of Information Collection: CBP Form 1300.

Estimated Number of Respondents: 2,624.

Estimated Number of Annual Responses per Respondent: 72.

Estimated Number of Total Annual Responses: 188,928.

Estimated Time per Response: 30 minutes (0.5 hours).

Estimated Total Annual Burden Hours: 94,464.

Dated: August 25, 2023.

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

[Published in the Federal Register, August 30, 2023 (88 FR 59932)]

Slip Op. 23–126

JIANGSU SENMAO BAMBOO AND WOOD INDUSTRY CO., LTD., Plaintiff, and LUMBER LIQUIDATORS SERVICES, LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 22–00190

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the 2019–2020 antidumping duty administrative review of multilayered wood flooring from the People's Republic of China.]

Dated: August 25, 2023

Jeffrey S. Neeley and *Stephen W. Brophy*, Husch Blackwell LLP, of Washington, D.C., for Plaintiff Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.

Mark Ludwikowski and *Kelsey Christensen*, Clark Hill PLC, of Washington, D.C., for Plaintiff-Intervenor Lumber Liquidators Services, LLC.

Tara K. Hogan, Assistant Director, and *Kelly M. Geddes*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Christopher Kimura*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Timothy C. Brighthill and *Stephanie M. Bell*, Wiley Rein, LLP, of Washington, D.C., for Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Plaintiff" or "Senmao") filed this action pursuant to 19 U.S.C. § 1675 contesting the final results of the U.S. Department of Commerce ("Commerce") in *Multilayered Wood Flooring from the People's Republic of China* ("*Final Results*"), 87 Fed. Reg. 39,464 (Dep't of Commerce July 1, 2022) (final results of antidumping duty admin. review; 2019–2020) and accompanying Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Multilayered Wood Flooring from the People's Republic of China; 2019–2020 (Dep't of Commerce June 24, 2022) ("Final IDM"), PR 245.[1]

[1] Citations to the administrative record reflect the public administrative record ("PR") document numbers. ECF Nos. 47, 48.

Before the Court is Plaintiff's Motion for Judgment upon the Agency Record Pursuant to USCIT Rule 56.2. Pl.'s R. 56 Mot. J. Agency R. Pursuant to USCIT R. 56.2 ("Plaintiff's Motion" or "Pl.'s Mot."), ECF No. 38; *see also* Mem. Supp. Pl.'s R. 56.2 Mot. J. Agency R. ("Pl.'s Br."), ECF No. 38–1. Also before the Court is Plaintiff-Intervenor Lumber Liquidators Services, LLC's ("Plaintiff-Intervenor" or "Lumber Liquidators") Rule 56.2 Motion for Judgment on the Agency Record. Pl.-Interv.'s R. 56 Mot. J. Agency R. ("Plaintiff-Intervenor's Motion" or "Pl.Interv.'s Mot."), ECF No. 39; *see also* Pl.-Interv.'s Mem. Law Supp. Pl.-Interv.'s R. 56.2 Mot. J. Agency R. ("Pl.-Interv.'s Br."), ECF No. 39. Defendant United States ("Defendant") filed Defendant's Response in Opposition to Plaintiff's and Plaintiff-Intervenor's Motions for Judgment upon the Agency Record. Def.'s Resp. Opp'n Pl.'s Pl.-Interv.'s Mots. J. Agency R. ("Def.'s Resp."), ECF No. 41. Defendant-Intervenor American Manufacturers of Multilayered Wood Flooring ("Defendant-Intervenor" or "AMMWF") filed Defendant-Intervenor's Response to Motion for Judgment on the Agency Record. Def.-Interv.'s Resp. Mot. J. Agency R. ("Def.-Interv.'s Resp."), ECF Nos. 42, 43. Plaintiff filed Reply Brief of Plaintiff Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. Pl.'s Reply Br. ("Pl.'s Reply"), ECF Nos. 44, 45. Plaintiff-Intervenor filed Reply Brief in Support of Rule 56.2 Motion for Judgment on the Agency Record by Plaintiff-Intervenor. Pl.-Interv.'s Reply Br. Supp. R. 56.2 Mot. J. Agency. R. ("Pl.-Interv.'s Reply"), ECF No. 46. The Court held oral argument on May 31, 2023. Oral Argument (May 31, 2023), ECF No. 52.

For the following reasons, the Court sustains in part and remands in part the *Final Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination to select Brazil as the primary surrogate country, while using Malaysian data for log inputs, is supported by substantial evidence and in accordance with law;

2. Whether Plaintiff-Intervenor's argument that Malaysian data are aberrational is waived;

3. Whether Commerce's determination to revise the Brazilian surrogate value data for plywood is supported by substantial evidence and in accordance with law;

4. Whether Commerce's calculation of the Brazilian financial ratios is supported by substantial evidence and in accordance with law; and

5. Whether Commerce's denial of Plaintiff's by-product offset is in accordance with law.

BACKGROUND

Commerce conducted an administrative review for the period from December 1, 2019 through November 30, 2020. Initiation of Antidumping and Countervailing Duty Admin. Review, *Multilayered Wood Flooring from the People's Republic of China*, 86 Fed. Reg. 8166, 8169–71 (Dep't of Commerce Feb. 4, 2021). Commerce selected Senmao as the mandatory respondent in the investigation. *See* Commerce's Antidumping Administrative Review of Multilayered Wood Flooring from the People's Republic of China; 2019–2020: Respondent Selection Mem. ("Resp. Selection Mem.") (Mar. 9, 2021), PR 112.

Prior to Commerce issuing the preliminary results, Senmao proposed that Commerce should use Brazilian surrogate value data to value its factors of production and Defendant-Intervenor proposed that Commerce should use Malaysian surrogate values. Senmao's Surrogate Value Cmts. (July 29, 2021),[2] PR 176–77; AMMWF's Surrogate Value Cmts. (July 29, 2021), PR 179–82.

On December 27, 2021, Commerce published its preliminary determination. *Multilayered Wood Flooring from the People's Republic of China* ("*Preliminary Results*"), 86 Fed. Reg. 73,252 (Dep't of Commerce Dec. 27, 2021) (prelim. results of the antidumping duty admin. review, prelim. determination of no shipments, and rescission of review, in part; 2019–2020), and accompanying Decision Memorandum for the Preliminary Results of Antidumping Administrative Review (Dec. 17, 2022) ("Preliminary Determination Memo" or "PDM"), PR 213. In the Preliminary Determination Memo, Commerce selected Brazil as the primary surrogate country, valued Senmao's logs with surrogate values from the secondary surrogate country of Malaysia, determined that the financial data of Duratex were appropriate to calculate Senmao's financing costs of the subject merchandise, and denied an offset to the reported factors of production for Senmao's by-product. PDM at 17, 24–25. Commerce calculated an antidumping margin of zero for Senmao. *Id.* at 14.

Following the *Preliminary Results*, the parties to the investigation submitted additional briefing. Senmao's Admin. Case Br. (Feb. 7, 2022), PR 228; Lumber Liquidators' Letter in Lieu of Admin. Case Br. (Feb. 7, 2022), PR 229; AMMWF's Admin. Case Br. (Feb. 7, 2022), PR 230; Senmao's Admin. Rebuttal Br. (Feb. 17, 2022), PR 233; Lumber

[2] Senmao's Surrogate Value Comments are incorrectly dated as July 29, 2020. Senmao's Surrogate Value Cmts. at 1.

Liquidators' Admin. Rebuttal Br. (Feb. 17, 2022), PR 234; AMMWF's Admin. Rebuttal Br. (Feb. 17, 2022), PR 235.

Commerce published its *Final Results* on July 1, 2022. *Final Results*, 87 Fed. Reg. 39,464; *see also* Final IDM. In the Final IDM, Commerce continued to select Brazil as the primary surrogate country, value Senmao's logs with Malaysian surrogate values, and deny Senmao a by-product offset, but Commerce revised the surrogate values for plywood and revised its calculation of surrogate financial ratios. *See* Final IDM at 5, 9–10, 22–23, 26–28. Commerce calculated Senmao's antidumping duty margin at 39.27%. *Final Results*, 87 Fed. Reg. at 39,465.

Plaintiff filed this action timely pursuant to 19 U.S.C. § 1675 contesting Commerce's *Final Results*. *See* Compl., ECF No. 7.

JURISDICTION

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination 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).

DISCUSSION

I. Legal Framework

Antidumping duties are calculated as the difference between the normal value of subject merchandise and the export price or the constructed export price of the subject merchandise. 19 U.S.C. § 1673. To determine the normal value of the subject merchandise in a non-market economy, Commerce must calculate surrogate values using "the best available information regarding the values of such factors in a [comparable] market economy." 19 U.S.C. § 1677b(c). In doing so, Commerce relies on one or more market economy countries that are (1) "at a level of economic development comparable to that of the non[-]market economy country," and (2) "significant producers of comparable merchandise." *Id.* § 1677b(c)(4). Commerce's task is to "attempt to construct a hypothetical market value" of the subject merchandise in the non-market economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999). When Commerce determines that there is more than one country at the same level of economic development as the non-market economy country and is a significant producer of comparable merchandise, Commerce will consider the quality and availability of the surrogate value data. *See Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1075, 638 F. Supp. 2d 1325, 1347 (2009).

Commerce's regulatory preference is to value all factors of production with surrogate values from a single surrogate country. 19 C.F.R. § 351.408(c)(2); *see Jiaxing Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016). However, Commerce may use a second surrogate country if data from the primary surrogate country are unavailable or unreliable. *See* Import Admin. Policy Bull. No. 04.1: Non-Market Economy Surrogate Country Selection Process (Dep't of Commerce Mar. 1, 2004) ("Policy Bulletin No. 04.1"). When the data from a single surrogate country are "demonstrably aberrational as compared to certain benchmark prices, and alternative data sources could be better corroborated," Commerce's preference for using data from a single country is deemed unreasonable. *Peer Bearing Co.-Changshan v. United States*, 35 CIT 103, 119, 752 F. Supp. 2d 1353, 1369–72 (2011).

II. Selection of Surrogate Country

Plaintiff and Plaintiff-Intervenor argue that Commerce's determination to select Brazil as the primary surrogate country, while also rejecting or adjusting Brazilian data for the primary inputs (valuing Plaintiff's log inputs using Malaysian data, adjusting Brazilian plywood data, and revising the Brazilian financial ratios) is not in accordance with law or supported by substantial evidence. Pl.'s Br. at 16–19; Pl.-Interv.'s Br. at 17–20. Plaintiff-Intervenor asserts that Commerce's use of Malaysian log data is not in accordance with law because Commerce deviated from its established methodology and caused an aberrational result. Pl.-Interv.'s Br. at 20–25. Plaintiff and Plaintiff-Intervenor contend that Commerce erred by not valuing all factors of production from a single surrogate country because the record in this case does not support a determination that Brazilian data are unavailable or unreliable. *See* Pl.'s Br. at 16–20; Pl.-Interv.'s Br. at 19–20. Plaintiff-Intervenor challenges Commerce's determination to use both Brazilian and Malaysian data as a departure from Commerce's established practice of using a single surrogate country. Pl.-Interv.'s Br. at 17–20.

If Commerce has a routine practice for addressing similar situations, it must either apply that practice or provide a reasonable explanation regarding why Commerce has deviated from that practice. *See SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("An agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently." (internal citation omitted)); *see also M.M. & P. Mar. Advancement, Training, Educ. & Safety Program v. Dep't of Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984) ("An agency is obligated to follow precedent, and if it

chooses to change, it must explain why."); *see also Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) ("Commerce can reach different determinations in separate administrative reviews but it must employ the same methodology or give reasons for changing its practice.").

19 C.F.R. § 351.408(c) provides that, "[f]or purposes of valuing the factors of production, . . . [Commerce] normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c), (c)(2). Commerce explained when promulgating its regulations that the preference for a single country is meant to prevent parties from "margin shopping," and Commerce may depart from its regulatory preference for a single surrogate country when Commerce determines that the "accuracy of available information regarding prices for particular factors in the surrogate country is 'highly questionable,'" in which case Commerce may reject the questionable values and use data from a second country. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7345 (Feb. 27, 1996). Commerce may use a secondary surrogate country if financial data are "inadequate or unavailable." *See* Policy Bulletin 04.1 ("After all, a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable.").

In evaluating surrogate value data, Commerce considers several factors, including whether the surrogate values are publicly available, contemporaneous with the period of review, representative of a broad market average, tax and duty-exclusive, and specific to the inputs being valued. *See* Policy Bulletin No. 04.1; *see also Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014) (citing the same factors). Commerce explained that comparable merchandise is determined on a case-by-case basis, the meaning of a significant producer can differ from case to case, and fixed standards have not been adopted in Commerce's surrogate country selection process. *See* Policy Bulletin No. 04.1. In assessing whether a country is a significant producer of comparable merchandise, Commerce considers whether all of the potential surrogate countries have significant exports of comparable merchandise, but does not consider levels of significance in comparison with other countries. *See id.*

Commerce determined that Romania, Russia, Malaysia, Turkey, Mexico, and Brazil were economically comparable to China. PDM at 15. Commerce selected Brazil as the primary surrogate country for valuing all of Senmao's factors of production, except for the log inputs. Final IDM at 9. In reaching this determination, Commerce considered three financial statements that were placed on the record to

calculate the financial surrogate values: (1) Brazilian company Eucatex S.A. Industria e Comercio ("Eucatex"); (2) Brazilian company Duratex S.A. ("Duratex"); and (3) Malaysian company Focus Lumber Berhad ("Focus Lumber"). *See* PDM at 15, 17; Senmao's Surrogate Value Cmts. at Ex. 13 (financial statement of Eucatex); AMMWF Surrogate Value Cmts. at Ex. 10 (financial statement of Focus Lumber); AMMWF's Additional Surrogate Value Cmts. (Nov. 8, 2021) at Ex. 3B, PR 200 (financial statement of Duratex). Commerce considered whether the financial statements were publicly available, contemporaneous with the period of review, representative of broad market averages, tax- and duty-exclusive, and specific to the inputs being valued. *Id.* at 17. Commerce considered the financial data from the Brazilian and Malaysian companies, and determined that the Brazilian company Duratex's data were preferable because Duratex was a producer of identical or comparable merchandise (laminate flooring), the data were contemporaneous with the period of review, and the data were not questioned by its auditors. *Id.* In comparison, Commerce determined that the Brazilian company Eucatex's data were less reliable because although the data were contemporaneous with the period of review and related to laminate flooring, Eucatex's auditors provided a qualified opinion, thereby calling into question the reliability of the financial data. *Id.* Upon reviewing the various financial data from Brazil, Commerce selected Brazil as the primary surrogate country because Commerce determined that the Brazilian data contained useable data for valuing all of Senmao's factors of production "except for the log inputs." *Id.* Commerce failed, however, to cite any record evidence demonstrating that the Brazilian data on log inputs was highly questionable, inadequate, or unavailable, and would therefore warrant a departure from a single surrogate country.

With respect to the log inputs using Malaysian data, Commerce failed to provide a reasonable explanation to depart from its established practice of using one surrogate country and failed to support its determination with substantial evidence. For example, Commerce reviewed the Malaysian company Focus Lumber's financial data and determined that the Malaysian financial statements were publicly available, contemporaneous with the period of review, representative of broad market averages, tax- and duty-exclusive, and specific to the inputs being valued. *Id.* In explaining why Commerce selected Malaysian import data specific to oak log inputs, Commerce stated:

> [W]e find it appropriate to select Brazil as the primary surrogate country because the record contains usable Brazilian data for valuing all of Senmao's [factors of production] except for the log inputs. . . . While it is Commerce's preference to value all inputs

> from a single surrogate country, we determine that record evidence demonstrates that the log inputs reported by Senmao are more accurately valued using Malaysian [surrogate values].

Id. Notably, Commerce failed to cite any record evidence to support its determination that Brazil's data on log inputs were either "highly questionable" or "inadequate or unavailable," or that Malaysian data were more accurate to value log inputs. Although Commerce made a conclusory statement in the Preliminary Determination Memo that "*record evidence demonstrates* that the log inputs reported by Senmao are more accurately valued using Malaysian [surrogate values]," Commerce only cited generally to "[AMMWF's Additional Surrogate Value Comments]" in support of its determination and did not cite to any specific documents on the record. *Id.* (emphasis added) (citing AMMWF's Additional Surrogate Value Comments).

In the Final IDM, Commerce also did not cite to any evidence to support its determination, stating only that:

> Commerce continues to value Senmao's oak logs using Malaysian [surrogate values] 4403.91.1000 and non-oak logs using Malaysian basket category 4403.99.00, as these [surrogate values] constitute the best available information on the record. . . . For Malaysia, the petitioner provided [Global Trade Atlas ("GTA")] import data for logs classified under Malaysian HS 4403.91.1000 and HS 4403.99. Thus, the record includes import data from Malaysia that explicitly differentiates oak and other species of logs, as well as import data from Brazil that does not explicitly differentiate by log species. . . . Thus, considering the record evidence in its entirety, we have continued to value all of Senmao's logs using Malaysian [surrogate values] in the final margin calculation.

Final IDM at 22–23. Although Commerce referred generally to GTA import data, Commerce failed to cite any specific documents on the record to support its determination, despite its general declarations that the record includes evidence. In the Final IDM, Commerce stated, "*See* [Preliminary Surrogate Value Memorandum (Dec. 17, 2021), PR 210–11]" generally, but did not cite to any record evidence. *Id.* at 18 n.94.

In the Preliminary Surrogate Value Memorandum, Commerce stated that:

> Commerce has determined that the Brazilian [surrogate values] on the record for the material inputs appear complete and viable in terms of the criteria set out above and we selected Brazil as

> the primary surrogate country. However, as also noted in the Preliminary Determination Memorandum, Commerce has determined that Malaysian [surrogate values] on the record are more specific to Senmao's log inputs than are the Brazilian [surrogate values].

Prelim. Surrogate Value Mem. at 2 (citing AMMWF's Additional Surrogate Value Cmts.; PDM). Notably, in the Preliminary Surrogate Value Memorandum, Commerce attached various documents as exhibits, but failed to identify any particular record documents on which Commerce relied. *See* Prelim. Surrogate Value Mem.

In summary, Commerce in its Final IDM attempted to support its determinations with citations to record evidence, but Commerce referred only to GTA import data generally without citations to any particular documents; referred to the Preliminary Surrogate Value Memorandum without citations to any particular documents; referred to AMMWF's Additional Surrogate Value Comments without citations to any particular documents; and referred to various court decisions and Policy Bulletin No. 04.1. *See* Final IDM at 18, 22–23. Because Commerce failed to identify any record evidence on which it relied, the Court holds that Commerce's determinations are not supported by substantial evidence.

Commerce noted in its Final IDM that "[i]t is not Commerce's responsibility to build an adequate record for parties." *Id.* at 22. Similarly, the Court notes that it is not the Court's responsibility to sift through the record to attempt to identify which documents, if any, support Commerce's determinations. Because Commerce failed to cite any record evidence demonstrating that the Brazilian data on log inputs were highly questionable, inadequate, or unavailable, and any evidence demonstrating that Malaysian data on log inputs were "the best available information" under 19 U.S.C. § 1677b(c)(1), the Court concludes that Commerce did not provide a reasonable explanation for departing from its established practice of using a single surrogate country. The Court holds that Commerce's determinations to select Brazil as the primary surrogate country and to value Plaintiff's log inputs using Malaysian data are not in accordance with law and not supported by substantial evidence. The Court remands this issue for further explanation or reconsideration by Commerce.

III. Waiver of Plaintiff-Intervenor's Argument That Malaysian Data Are Aberrational

Plaintiff-Intervenor argues that Commerce's determination to select Malaysia as a secondary surrogate country is unlawful because Commerce's use of Malaysian log data caused an aberrational result

and the margin of 39.27% in the *Final Results* "defies commercial and economic reality," focusing on Plaintiff's low margins in prior reviews and the margin of 0% in the *Preliminary Results*. *See* Pl.-Interv.'s Br. at 20–25. Defendant contends that Plaintiff-Intervenor waived this argument because of its failure to exhaust administrative remedies. Def.'s Resp. at 18–20.

Before commencing suit in the U.S. Court of International Trade, an aggrieved party must exhaust all administrative remedies available to it. "In any civil action . . . the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (citations omitted). 19 C.F.R. § 351.309(c)(2) requires that, "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the . . . final determination or final results." 19 C.F.R. § 351.309(c)(2). There are limited exceptions to the exhaustion requirement. *See Pakfood Pub. Co. v. United States*, 34 CIT 1122, 1145–48, 724 F. Supp. 2d 1327, 1351–53 (2010) (listing futility for the party to raise its argument at the administrative level and issues fully considered by Commerce as two generally recognized exceptions to the exhaustion doctrine); *see also Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992) ("[E]xhaustion may be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it."). Incorporation by reference to another party's administrative argument is also among the exceptions this court has recognized to the exhaustion requirement. *See Meihua Grp. Int'l Trading (Hong Kong) Ltd. v. United States*, 47 CIT __, __, 633 F. Supp. 3d 1203, 1213 (2023).

Plaintiff-Intervenor Lumber Liquidators filed a letter in lieu of an administrative case brief and raised objections by incorporating by reference the arguments made in Plaintiff's administrative briefs. *See* Pl.-Interv.'s Reply at 8–9; Lumber Liquidators' Letter in Lieu of Admin. Case Br. at 2; Lumber Liquidators' Admin. Rebuttal Br. at 2. Plaintiff did not raise the argument, however, of Malaysian data being aberrational. *See* Senmao's Admin. Case Br.; Senmao's Admin. Rebuttal Br. The Court concludes that the exception of incorporation by reference does not exist because Plaintiff did not argue during the administrative proceeding that the Malaysian data were aberrational and thus Plaintiff-Intervenor waived this argument.

In addition, Plaintiff-Intervenor argued for the first time during oral argument that the futility exception applies in this case because

the high margins did not yet exist in the *Preliminary Results*. Recording of Oral Argument at 13:58–15:03, ECF No. 53. While this argument may have been persuasive if properly raised, the Court concludes that Plaintiff-Intervenor waived this argument because it did not include this argument in its moving or reply briefs. Issues raised for the first time at oral argument are waived. *See Shell Oil Co. v. United States*, 35 CIT 673, 702, 781 F. Supp. 2d 1313, 1338 (2011), *aff 'd*, 688 F.3d 1376 (Fed. Cir. 2012) (holding that party's argument was waived because it was raised for the first time at oral argument).

The Court concludes, therefore, that Plaintiff-Intervenor waived the issue of Malaysian data being aberrational and cannot raise it before this Court.

IV. Adjustment of Surrogate Value Data for Plywood

Plaintiff argues that Commerce's determination to revise the Brazilian surrogate value data for plywood is not supported by substantial evidence and not in accordance with law because Commerce deviated from its practice when it adjusted Brazilian plywood values to remove a line item reflecting Brazilian imports of plywood from Spain and did not provide any evidence that the Brazilian surrogate value for plywood is "aberrational in the aggregate." Pl.'s Br. at 14–15.

Defendant and Defendant-Intervenor contend that Commerce only applies the "aberrational in the aggregate" test when Commerce is deciding to exclude a large amount of data that appear unusually high or low, not when Commerce can readily determine that data are inaccurate, such as in this administrative review. Def.'s Resp. at 20–23; Def.-Interv.'s Resp. at 16–17. Plaintiff replies that this is the first time to its knowledge that the Government has made a distinction between "aberrational data" and "incorrect data." Pl.'s Reply at 8.

As noted previously, if Commerce has a routine practice for addressing similar situations, it must either apply that practice or provide a reasonable explanation regarding why Commerce has deviated from that practice. *See SKF USA, Inc.*, 263 F.3d at 1382.

Commerce stated that it did not apply the "aberrational in the aggregate" test when it revised the Brazilian surrogate data for plywood, reasoning that:

> [T]here is prima facie evidence that the January 2020 Spanish import component of the Brazilian [surrogate value] is incorrect. Therefore, the concerns underlying Commerce's practice of evaluating [surrogate values] in the aggregate are not present here. In this regard, Commerce evaluates [surrogate values] on an aggregate basis out of administrative convenience—to avoid

> the "impossible task" of identifying and defining "what is and what is not aberrational among . . . thousands of data points spread along a vast spectrum of relatively high and low values"—and to discourage the cherry-picking and manipulation of data.

Final IDM at 10. Commerce determined that the data were inaccurate because "the Spanish import data in the Brazilian [surrogate value] for the month of January 2020 reported the same quantity figures for M^3 [or cubic meters] as it does for kg, we conclude that this particular component of the Brazilian [surrogate value] is clearly incorrect." *Id.* at 9.

The Court concludes that Commerce has a standard practice of considering whether the average unit value ("AUV") is aberrational in the aggregate for the economically comparable surrogate countries or as compared to historical AUVs of the surrogate country at issue. *See SolarWorld Americas, Inc. v. United States*, 42 CIT __, __, 320 F. Supp. 3d 1341, 1351–52 (2018) ("Commerce explains that its practice is to assess aberrationality by examining HTS data both across potential surrogate countries and within the surrogate country over multiple years. . . . [and] considers import data to be aberrationally high if that data is 'many times higher than import values from other countries.'"). Interested parties need to demonstrate that the import data are aberrational in the aggregate. *Id.*

Defendant asserts, however, that Commerce did not apply the "aberrational in the aggregate" test in this case, but rather disregarded clearly incorrect data as required by 19 U.S.C. § 1677b(c)(1) to value the factors of production based on the best available information regarding the values of such factors in order to determine the antidumping margins as accurately as possible. Def.'s Resp. at 22; *see* 19 U.S.C. § 1677b(c)(1).

Commerce determined that the data were clearly inaccurate because "the Spanish import data in the Brazilian [surrogate value] for the month of January 2020 reported the same quantity figures for M^3as it does for kg," explaining that:

> M^3 and kg are discrete units of measurement where M^3 is a measurement of volume and kg is a measurement of mass. Accordingly, it is illogical for the Spanish import data to report the same quantity in these two different units of measure. Because this component of the Brazilian [surrogate value] is incorrect, we conclude that the January 2020 Spanish import component in the Brazilian plywood [surrogate value] should be disregarded.

Final IDM at 9 (citing AMMWF's Surrogate Value Cmts at Ex. 9). Commerce states that Exhibit 9 "contains information on the density of certain wood species and wood products," AMMWF's Surrogate Value Cmts. at 3, but the Court observes that this document was apparently never placed on the record filed with the Court. The Court notes that AMMWF's Surrogate Value Comments on the record contain only Exhibits 1, 10A, and 10B, but do not include Exhibit 9. Because Commerce only cited to evidence that is not on the record to support its determination and the Court cannot review the exhibit, the Court concludes that Commerce's explanation for its adjustment of the plywood measurement figures as clearly incorrect is neither in accordance with law nor supported by substantial evidence. The Court remands the issue of the plywood surrogate value data adjustment for further explanation or reconsideration by Commerce.

V. Calculation of Financial Ratios

Plaintiff argues that Commerce's calculation of the Brazilian financial ratios is not supported by substantial evidence because (1) Commerce's treatment of "transport expenses" as manufacturing overhead constituted double-counting; and (2) Commerce incorrectly excluded certain interest income reported by Duratex to offset financial expenses. Pl.'s Br. at 19–21.

In calculating the financial ratios, Commerce relied on data from Duratex's 2020 annual report and preliminarily did not include a line item for "transport expenses" in Duratex's total selling, general, and administrative ("SG&A") expenses to avoid double-counting outbound freight expenses that were accounted for elsewhere in the margin calculation, but revised the surrogate financial ratio to include Duratex's "transport expenses" line item as part of its manufacturing overhead in the *Final Results*. Final IDM at 14. Commerce also preliminarily included the full amount of Duratex's reported interest income as an offset to its financial expenses when calculating Duratex's net financial expenses for the wood division, but revised the surrogate financial ratio calculation to exclude this value from the offset to financial expenses in the *Final Results*. *Id.* at 15.

A. "Transport Expenses"

Plaintiff contends that Commerce's treatment of "transport expenses" as overhead expenses constituted double-counting and unreasonably increased the financial ratios because "the estimated transport expenses are based on wood division selling expenses, which Commerce treats as SG&A and selling expenses" and are already included in the financial ratio calculations. Pl.'s Br. at 19.

Plaintiff asserts that inventory value of raw materials includes freight expenses incurred on raw material purchases unless otherwise specified, and estimated freight expenses do not need to be included because those costs are included in the cost of products sold in Duratex's financial statement. *Id.* at 20.

Defendant and Defendant-Intervenor argue that it was reasonable for Commerce to assume that freight-in expenses were already included in the raw material expenses in Duratex's financial statement and that "transport expenses" referred to transportation costs distinct from outbound freight and freight-in because this assumption is based on standard accounting practice. Def.'s Resp. at 27; Def.-Interv.'s Resp. at 24.

Commerce explained that:

> [A]ccounting practice prescribes generally that raw materials inventory . . . is to be valued at a cost that includes all necessary expenditures to acquire and bring them to the desired condition and location for use . . . that includes not only the purchase price of the raw material, but also freight charges (most commonly referred to as "freight-in expenses") on incoming materials and other miscellaneous expenses.

Final IDM at 14. Commerce excluded the "transport expenses" line item in its calculation because:

> [W]e relied on the Duratex 2020 annual report submitted by the petitioner to calculate the surrogate financial ratios, using data for Duratex's "wood division." Regarding the "transport expenses" line item, we excluded this amount in our calculation of total SG&A expenses in the surrogate financial ratio calculation to avoid potentially double counting outbound freight expenses that were accounted for elsewhere in the margin calculation. However, we have reconsidered this approach for the final results because there is no indication, either on the face of the income statement itself or in the accompanying notes, as to what specifically this item includes or to what activities it relates.

Id. (citing Prelim. Surrogate Value Mem. at 6, Att. 1).

Commerce relied on the surrogate financial ratios calculated from Duratex's financial statement based on Duratex's reported wood division, with overhead expenses at 16.01%, SG&A expenses at 14.19%, and profit at 12.72%. Prelim. Surrogate Value Mem. at 6 (citing AMMWF's Additional Surrogate Value Cmts. at Exs. 3A (Duratex's 2020 annual report) & 3B (Duratex's financial statement)).

In the Final IDM, Commerce considered Senmao's argument in its administrative rebuttal brief that raw material inventory values do not include freight-in expenses and determined that "transport expenses" in Duratex's financial statement did not include outbound freight expenses, stating that:

> It is reasonable for our purposes to presume that the "raw materials and consumption materials" line item in Duratex's financial statement includes freight-in expenses, and that the "transport expenses" line item represents a distinct cost element. In this case, we find that it is both reasonable and solidly grounded in accounting practice and procedure to classify the "transport expenses" line item as overhead, as it likely relates to other factory activities (*e.g.,* within-factory transportation, vehicles used by factory management, etc.), and because the raw material value likely includes incoming freight. Moreover, treating "transport expenses" as an overhead is consistent with our practice in other cases involving similar line items, such as *Activated Carbon from China 2012–13* ("travel and transportation" expenses) and *Steel Tie Wire from China* ("transportation" expenses).

Final IDM at 14.

In *Certain Activated Carbon From the People's Republic of China*, Commerce noted that its:

> Accounting practice prescribes generally that raw materials inventory on a company's balance sheet is to be valued at a cost that includes all necessary expenditures to acquire such materials and bring them to the desired condition and location for use in the manufacturing process[, where this] valuation includes not only the purchase price of the raw material, but also freight charges (most commonly referred to as "freight-in") on incoming materials and other miscellaneous expenses such as handling or insurance incurred by the buyer related to the purchase. . . . Accordingly, for the final results, we continue to treat "travel and transportation" expenses . . . under cost of goods sold as an overhead item in our surrogate financial ratio calculations.

Certain Activated Carbon From the People's Republic of China, 79 Fed. Reg. 70,163 (Dep't of Commerce Nov. 25, 2014) (final results of antidumping duty admin. review; 2012–2013), and accompanying Issues and Decision Memorandum. In *Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China*, Commerce confirmed its

established practice of including transportation expenses as manufacturing overhead, especially when the financial statement contains a separate transport expenses line item. *Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China*, 79 Fed. Reg. 25,572 *(* Dep't of Commerce May 5, 2014) (final determination of sales at less than fair value), and accompanying Issues and Decision Memorandum.

The Court concludes that there is an established accounting practice to include transportation expenses as part of manufacturing overhead in the SG&A expenses. Commerce provided a reasonable explanation based on evidence of Duratex's financial statement and made a determination consistent with established accounting practices. The Court concludes that Commerce's treatment of the "transport expenses" line item as an overhead expense and its determination that that the raw material value likely included incoming freight in the financial ratio calculations are in accordance with law and supported by substantial evidence.

B. Interest Income

Plaintiff contends that only the income for remuneration on financial investments is potentially not related to short-term, while the other line items are all short-term in nature—foreign exchange variances (related to net gains and losses on transactions denominated in foreign currencies during fiscal year), indexation arguments (effectively adjust asset values for impact of inflation or other factors during fiscal year), and interest and discounts obtained (related to revenue received from lenders on bank deposits)—and should have been included as an offset to financial expenses in Commerce's calculations. Pl.'s Br. at 21.

Defendant asserts that Plaintiff does not deny that the line item for remuneration on financial investments is potentially a long-term financial activity, that it was reasonable for Commerce to exclude the line item due to uncertainty, and that there is insufficient information in Duratex's financial statement and record evidence for Commerce to determine whether these categories of interest income were long-term or short-term in nature. Def.'s Resp. at 29–30. Defendant-Intervenor argues that Plaintiff fails to cite record evidence to support its assertions about the short-term nature of the line items. Def.-Interv.'s Br. at 26. Plaintiff replies that Commerce cites only one case in support of its alleged practice and cites no record evidence in support of its conclusions. Pl.'s Reply at 16–17.

The first question in calculating an offset is whether the interest income is short-term or derived from current assets or working capi-

tal accounts. *Pakfood Pub. Co.*, 34 CIT at 1152, 724 F. Supp. 2d at 1357. The burden of proof is on the respondent to substantiate and document the nature of accounts when making a claim for an offset, and Commerce will not allow an offset when a respondent cannot demonstrate that the interest income in question is short-term in nature. *Id.*; *see also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 77 Fed. Reg. 14,495 (Dep't of Commerce Mar. 12, 2012) (final results of the 2009–2010 antidumping duty admin. review and final recission, in part), and accompanying Issues and Decision Memorandum at Cmt. 7 ("The Department's well-established practice is to allow an offset to interest expenses with short-term interest income . . . [and it] is the Department's practice to exclude interest income generated from long-term financial assets.").

Commerce preliminarily included the full amount of Duratex's reported interest income as an offset to its financial expenses when calculating Duratex's net financial expenses for the wood division, but revised the surrogate financial ratio calculation to exclude this value from the offset to financial expenses in the final determination. Final IDM at 14–15 (citing PDM; Prelim. Surrogate Value Mem. at Att. 1). Duratex's annual report included five line items: "renumeration on financial investments," "foreign exchange variances," "indexation adjustment," "interest and discounts obtained," and "other." *See* Final Surrogate Value and Calculation Mem. (June 24, 2022), PR 246–47; AMWWF's Additional Surrogate Value Cmts. at Ex. 3A.

In the Final IDM, Commerce explained that:

> We also excluded additional line items for which we cannot determine whether interest income is long-term or short-term in nature. Commerce cannot assume that this interest income is short-term because there is no additional description in the surrogate financial statement on interest income, and it is Commerce's practice not to look behind surrogate financial statements.

Final IDM at 15 (citing Final Surrogate Value and Calculation Mem.). Commerce provided the same explanation in the Final Surrogate Value and Calculation Memorandum. Final Surrogate Value and Calculation Mem. at 2 (citing AMWWF's Additional Surrogate Value Cmts. at Ex. 3B, "Note 27 – Financial Income").

Commerce excluded interest income generated from long-term financial assets because it determined based on a review of record evidence of Duratex's financial statement that such income was re-

lated to long-term investing activities. Final IDM at 15. Commerce also excluded line items for which it could not determine whether the interest income was long-term or short-term in nature. *Id.* The Court concludes that Commerce's determinations in this case were consistent with its established practice as described in *Pakfood Pub. Co.* because Commerce did not allow offsets when it could not determine whether the interest income in question was short-term in nature.

The Court concludes that Commerce's calculation of financial ratios is in accordance with law and supported by substantial evidence. Accordingly, the Court sustains Commerce's calculation of financial ratios.

VI. Denial of By-Product Offset

Plaintiff argues that Commerce's denial of its by-product offset is not in accordance with law because (1) Commerce's determination is inconsistent with Commerce's past treatment of Plaintiff and (2) Commerce should have provided Plaintiff with an additional opportunity to submit information regarding its claimed by-product offset. Pl.'s Br. at 22–26.

Commerce denied Plaintiff's claim for a by-product offset, explaining that "[i]n [non-market economy] proceedings specifically, because we rely upon [a factors of production] methodology, we do not grant claims for a by-product offset where the companies are not able to provide data for their by-product production during the [period of review]." Final IDM at 26. It is generally Commerce's practice to grant an offset to normal value, for sales of by-products generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process. *Arch Chems, Inc. v. United States*, 35 CIT 424, 426 (2011) (citing *Ass'n of Am. School Paper Suppliers v. United States*, 32 CIT 1196, 1205 (2008)). The burden rests on the respondents to substantiate by-product offsets by providing Commerce with sufficient information to support their claims. *Id.* (citation omitted).

The Section C and D Questionnaire included the following language regarding by-product offsets:

> By-product/co-product offsets are only granted for merchandise that is either sold or reintroduced into production during the [period of review], up to the amount of that by-product/co-product actually produced during the [period of review]. If you are claiming a by-product or co-product offset in your [factors of production] database, please report each by-product or co-product in a separate field.

See Jiangsu Senmao's Sec. C and D Questionnaire Resp. (April 29, 2021) at 17, PR 145. In its questionnaire response, Plaintiff stated that it "does not track the quantity of the wood scrap generated during the [period of review] and only records the quantity of wood scrap sold [and it] did not record the actual consumption of wood scrap as fuel to generate steam." *Id.* Plaintiff also stated that it could not provide production records because it does not track actual wood scrap quantity generated. *Id.* at 18.

Commerce explained that it denied the by-product offset due to Commerce's practice:

> [I]n considering a by-product offset, Commerce examines whether the by-product was produced from the quantity of the [factors of production] reported and whether the respondent's production process for the merchandise under consideration actually generated the amount of the by-product claimed as an offset. Commerce has stated that "{s}crap sold but not produced during the [period of investigation] should not be included within the scrap offset because it would be unreasonable to offset the cost during the [period of investigation] for scrap produced prior to the [period of investigation]." Furthermore, Commerce's practice ensures that a respondent does not receive a by-product offset for products generated in the production of non-subject merchandise. Commerce's methodology ensures the accuracy of its dumping calculations in [non-market economy] proceedings. Therefore, we are following this methodology for these final results, consistent with our general practice in [a non-market economy] proceeding.

Final IDM at 26–27.

A. Previous Administrative Reviews

Plaintiff asserts that Commerce's denial of its by-product offset is inconsistent with Commerce's treatment of Plaintiff in previous administrative reviews and that Commerce failed to explain why its practice of requiring production records to grant a by-product offset was not followed in prior administrative reviews because there are not new facts to justify different treatment in this administrative review. Pl.'s Br. at 22–25; Pl.'s Reply at 18–19.

Defendant and Defendant-Intervenor assert that Commerce reasonably denied a by-product offset because Plaintiff lacked production records indicating the quantity of scrap during the period of review and each administrative review is independent in nature. Def.'s Resp. at 31–34; Def.-Interv.'s Resp. at 27–30.

Commerce denied Plaintiff a by-product offset for wood scrap generated through wood flooring production because Plaintiff reported that it did not track the quantity of the wood scrap generated, only the quantity sold, during the period of review. *See* Final IDM at 26; PDM at 25; *see* Jiangsu Senmao's Sec. C and D Questionnaire Resp. at 17–18. Plaintiff contends that Commerce has an established practice because it did not deny a by-product offset in prior reviews despite a lack of production records. Pl.'s Br. at 22–23 (citing *Multilayered Wood Flooring from the People's Republic of China* ("*Final Results 2014–2015 Admin. Review*"), 82 Fed. Reg. 25,766 (Dep't of Commerce June 5, 2017) (final results of antidumping duty admin. review, final determination of no shipments, and final partial rescission of antidumping duty admin. review; 2014–2015), and accompanying Issues and Decision Memorandum ("Senmao's 2014–2015 Admin. Review IDM"); *Multilayered Wood Flooring from the People's Republic of China* ("*Final Results 2015–2016 Admin. Review*"), 83 Fed. Reg. 35,461 (Dep't of Commerce July 26, 2018) (final results of antidumping duty admin. review, final determination of no shipments, and partial rescission; 2015–2016), and accompanying Issues and Decision Memorandum ("Senmao's 2015–2016 Admin. Review IDM"); *Multilayered Wood Flooring from the People's Republic of China* ("*Preliminary Results 2018–2019 Admin. Review*"), 86 Fed. Reg. 22,016 (Dep't of Commerce Apr. 26, 2021) (prelim. results of the antidumping duty admin. review, prelim. determination of no shipments, prelim. successor-in-interest determination, and rescission of review, in part; 2018–2019), and accompanying Decision Memorandum ("Senmao's 2018–2019 Admin. Review PDM"); *Multilayered Wood Flooring From the People's Republic of China* ("*Final Results 2018–2019 Admin. Review*"), 86 Fed. Reg. 59,987 (Dep't of Commerce Oct. 29, 2021) (final results of antidumping duty admin. review, final successor-in-interest determination, and final determination of no shipments; 2018–2019), and accompanying Issues and Decision Memorandum ("Senmao's 2018–2019 Admin. Review IDM").

Commerce's practice is to grant an offset to normal value for sales of by-products generated during the production of subject merchandise if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process. *Arch Chems.*, 35 CIT at 426. Commerce determined in this administrative review that Senmao lacked production records, and denied a by-product offset because Plaintiff was unable to demonstrate that the by-product was either resold or had commercial value and re-entered Plaintiff's production process. Final IDM at 26.

In the 2014–2015 administrative review, Commerce determined that Senmao was entitled to a by-product offset despite a lack of production records because "[a]t verification, the Department not only observed how wood scrap was generated and collected, but also how the reported by-product (*i.e.*, wood scrap) sales could be tied to the sales general ledger for other income with sales invoices, sales [value added tax] invoices, receipts, accounting vouchers, and warehouse-in/out slips" and "Senmao produced no products during the [period of review] which were not subject merchandise; and thus, all wood scrap sold would be a by-product from subject merchandise." *Final Results 2014–2015 Admin. Review*, 82 Fed. Reg. 25,766; Senmao's 2014–2015 Admin. Review IDM at Cmt. 13. Commerce determined that Senmao was eligible for a scrap offset based on Commerce's observations during verification. *Id.*

Commerce denied a by-product offset for Senmao in the 2012–2013 administrative review because Senmao was unable to substantiate that it produced any of the scrap that it sold during the period of review, but Commerce determined that the facts in the 2014–2015 administrative review were different from the facts in the 2012–2013 administrative review. Senmao's 2014–2015 Admin. Review IDM; *see Multilayered Wood Flooring from the People's Republic of China*, 80 Fed. Reg. 41,476 (final results of antidumping duty admin. review and final results of new shipper review; 2012–2013) (Dep't of Commerce July 15, 2015), and accompanying Issues and Decision Memorandum.

In the 2015–2016 administrative review, Commerce again determined that Senmao was entitled to a by-product offset despite a lack of production records because "[a]lthough we did not conduct verification of Jiangsu Senmao's questionnaire responses during this segment of the proceeding, we did so during the immediately preceding (*i.e.*, the 2014–2015) review." *Final Results 2015–2016 Admin. Review*, 83 Fed. Reg. 35,461; Senmao's 2015–2016 Admin. Review IDM at Cmt. 4.

In the administrative reviews during the years 2016–2017, 2017–2018, and 2018–2019, no party argued that Senmao's by-product offset should be denied. *See Multilayered Wood Flooring from the People's Republic of China*, 84 Fed. Reg. 38,002–01 (Dep't of Commerce Aug. 5, 2019) (final results of antidumping duty admin. review and final results of new shipper review; 2016–2017), and accompanying Issues and Decision Memorandum ("Senmao's 2016–2017 Admin. Review IDM") (determination did not discuss the issue of Senmao's by-product offset); *Multilayered Wood Flooring from the People's Republic of China*, 85 Fed. Reg. 78,118 (Dep't of Com-

merce Dec. 3, 2020) (final results of antidumping duty admin. review and final results of new shipper review; 2017–2018), and accompanying Issues and Decision Memorandum ("Senmao's 2017–2018 Admin. Review IDM") (determination in which Senmao was not selected as a voluntary respondent); *Preliminary Results 2018–2019 Admin. Review*, 86 Fed. Reg. 22,016; Senmao's 2018–2019 Admin. Review PDM (determination in which Commerce made an offset to Senmao's reported factors of production for by-product because "Senmao provided production records demonstrating it reported recovered quantities of the by-product and that it later sold these recovered quantities."); *Final Results 2018–2019 Admin. Review*, 86 Fed. Reg. 59,987; Senmao's 2018–2019 Admin. Review Final IDM (no changes made to by-product offset determination).

In the 2018–2019 administrative review, Senmao provided Commerce with production records demonstrating that it reported recovered quantities of the by-product and that it later sold these recovered quantities during the 2018–2019 period of review, and Commerce granted an offset as a result. *See* Senmao's 2018–2019 Admin. Review PDM; Senmao's 2018–2019 Admin. Review Final IDM.

The Court does not agree with Plaintiff's assertion that an established practice exists that Commerce will grant a by-product offset to Senmao despite a lack of evidence, based only on two administrative reviews granting the offset after verification, followed by three years of no by-product offsets being granted on such basis. *See* Senmao's 2016–2017 Admin. Review IDM; Senmao's 2017–2018 Admin. Review IDM; Senmao's 2018–2019 Admin. Review PDM; Senmao's 2018–2019 Admin. Review Final IDM.

The Court concludes that an existing practice does not exist and it was reasonable for Commerce to deny a by-product offset because Plaintiff failed to provide information to substantiate a by-product offset. The Court sustains Commerce's denial of an offset due to a lack of evidence as reasonable and in accordance with law.

B. Opportunity to Submit Additional Information

Plaintiff contends that Commerce should have provided Plaintiff with an opportunity to submit additional information regarding its claimed by-product offset because Plaintiff has a substantial "reliance interest" in the required reported practices pursuant to 19 U.S.C. § 1677m(d). Pl.'s Br. at 25–26. 19 U.S.C. § 1677m(d) states:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority

> or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, *to the extent practicable*, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. § 1677m(d) (emphasis added). Defendant and Defendant-Intervenor assert that Commerce is not obligated to ask additional questions when the respondent states that it does not possess the requested information. Def.'s Resp. at 34–35; Def.-Interv.'s Resp. at 29–30.

The Court concludes that Commerce was reasonable in not providing another opportunity for Plaintiff to submit the missing production records. The operable language in 19 U.S.C. § 1677m(d) is "to the extent practicable," and Plaintiff already stated that it did not track the quantity of wood scrap generated during the period of review. Thus, even if Commerce allowed another opportunity for Plaintiff to produce the requested information, Plaintiff already stated that it did not keep records of the quantity of wood scrap necessary to demonstrate that it was entitled to a by-product offset. Accordingly, Commerce's denial of an offset by-product is reasonable and in accordance with law.

CONCLUSION

For the foregoing reasons, the Court remands for further consideration consistent with this Opinion: (1) Commerce's determination to select Brazil as the primary surrogate country while using data for log inputs from the secondary surrogate country of Malaysia, and (2) Commerce's determination to revise the Brazilian surrogate value data for plywood. The Court sustains Commerce's calculation of the Brazilian financial ratios and Commerce's denial of Plaintiff's by-product offset. Plaintiff-Intervenor waived its argument that the Malaysian data were aberrational.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Judgment upon the Agency Record Pursuant to USCIT Rule 56.2, ECF No. 38, is granted in part and denied in part; and it is further

ORDERED that Plaintiff-Intervenor's Rule 56.2 Motion for Judgment on the Agency Record, ECF No. 39, is granted in part and denied in part; and it is further

ORDERED that that this case shall proceed according to the following schedule:

(1) Commerce shall file its remand determination on or before October 25, 2023;

(2) Commerce shall file the administrative record on or before November 8, 2023;

(3) Comments in opposition to the remand determination shall be filed on or before December 8, 2023;

(4) Comments in support of the remand determination shall be filed on or before January 8, 2024; and

(5) The joint appendix shall be filed on or before January 22, 2024.

Dated: August 25, 2023
New York, New York

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

Slip Op. 23–127

YAMA RIBBONS AND BOWS CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 21–00402

[Ordering remand of an agency determination in a countervailing duty proceeding on certain woven ribbons from the People's Republic of China]

Dated: August 25, 2023

John J. Kenkel, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff Yama Ribbons and Bows Co., Ltd. With him on the briefs was *Judith L. Holdsworth*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief is *Leslie M. Lewis*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Yama Ribbons and Bows Co., Ltd. ("Yama") contests an administrative determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") concluding the eighth periodic administrative review of a countervailing duty ("CVD") order on certain woven ribbons from the People's Republic of China ("China" or the "PRC"). Finding merit in one of the claims plaintiff raised in contesting the Final Results, the court remands the Final Results to Commerce for reconsideration in accordance with this Opinion and Order. On other claims, the court allows supplementation of the administrative record in response to a request of defendant.

I. BACKGROUND

A. The Contested Determination

The contested determination (the "Final Results") was published as *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2018*, 86 Fed. Reg. 40,462 (Int'l Trade Admin. July 28, 2021) ("*Final Results*").

B. Proceedings before Commerce

On September 1, 2010, Commerce issued a countervailing duty order (the "Order") on narrow woven ribbons with woven selvedge from China (the "subject merchandise"). *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642 (Int'l Trade Admin.) ("*Order*").[1] In November 2019, Commerce published a notice of initiation of the eighth administrative review of the Order ("eighth review"), which pertained to a period of review ("POR") of January 1, 2018 to December 31, 2018. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 61,011, 61,016 (Int'l Trade Admin. Nov. 12, 2019).

Commerce published the preliminary results of the eighth review ("Preliminary Results") in early 2021, preliminarily determining for Yama, the sole reviewed respondent, a total net CVD subsidy rate of 42.20%. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2018*, 86 Fed. Reg. 7,264, 7,265 (Int'l Trade Admin. Jan. 27, 2021) ("*Preliminary Results*"). Commerce incorporated an explanatory document. *Decision Memorandum for Preliminary Results of 2018 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* (Int'l Trade Admin. Jan. 19, 2021), P.R. Doc. 162 ("*Prelim. Decision Mem.*").[2]

In the Final Results, Commerce determined a final total net CVD subsidy rate of 42.20% for Yama. *Final Results*, 86 Fed. Reg. at 40,462. Commerce incorporated by reference an explanatory memorandum, the "Final Issues and Decision Memorandum." *Issues and Decision Memorandum for the Final Results of 2018 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* (Int'l Trade Admin. July 22, 2021), P.R. Doc. 174 ("*Final I&D Mem.*"). Commerce calculated the 42.20% rate by adding individual "program rates" for what it considered to be countervailable subsidies arising from 24 govern-

[1] The subject merchandise is defined generally in the countervailing duty order as woven ribbons twelve centimeters or less in width, and of any length, that are composed in whole or in part of man-made fibers and that have woven selvedge. Some exclusions apply. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642, 53,642–43 (Int'l Trade Admin. Sept. 1, 2010). The term "selvedge" refers to "the edge on either side of a woven or flat-knitted fabric so finished as to prevent raveling." *Selvage or selvedge*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002).

[2] Documents in the Joint Appendix (June 17, 2022), ECF Nos. 42 (Conf.), 43 (Public) are cited herein as "P.R. Doc. __." All citations to record documents are to the public versions of those documents.

ment programs. *Id*. at 3–5.

In this action, Yama contests the Department's inclusion of the following three subsidy rates in the 42.20% total subsidy rate: a rate of 10.54% for the Export Buyer's Credit Program ("EBC Program" or "EBCP"), which is an export-promoting loan program administered by the Export Import Bank of China; a rate of 27.74% for the provision of synthetic yarn for less than adequate remuneration ("LTAR"); and a rate of 0.27% for the provision of caustic soda for LTAR.

C. Proceedings in the Court of International Trade

Yama commenced this action in August 2021. Summons (Aug. 12, 2021), ECF No. 1; Compl. (Aug. 12, 2021), ECF No. 7. Before the court is Yama's motion for judgment on the agency record under USCIT Rule 56.2 and accompanying brief. Pl. Yama Ribbons and Bows Co., Ltd.'s Rule 56.2 Mot. for J. Upon the Agency R. (Feb. 4, 2022), ECF Nos. 27 (Conf.), 28 (Public); Mem. of Law in Supp. of Pl. Yama Ribbons and Bows Co., Ltd's 56.2 Mot. for J. Upon the Agency R. (Feb. 4, 2022), ECF No. 27–1 (Conf.), 28–1 (Public) ("Pl.'s Br.").

Defendant United States opposes Yama's motion for judgment on the agency record. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. (Apr. 22, 2022), ECF No. 37 ("Def.'s Br."). Plaintiff replied to defendant's submission. Pl. Yama Ribbons and Bows Co., Ltd.'s Reply to Def.'s Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. (June 3, 2022), ECF No. 41 ("Pl.'s Reply").

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court subject matter jurisdiction of actions commenced under section 516A of the Tariff Act of 1930, *as amended* (the "Tariff Act"), 19 U.S.C. § 1516a, including actions contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *Id*. § 1516a(a)(2)(B)(iii).[3]

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373,

[3] All citations to the United States Code herein are to the 2018 edition.

1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

B. Countervailing Duties under the Tariff Act

When certain conditions are met, the Tariff Act provides for a "countervailing duty" to be assessed on imported merchandise to redress the effect of a subsidy provided by the government of the exporting country. Section 701(a) of the Tariff Act, 19 U.S.C. § 1671(a), provides for imposition of a countervailing duty if: (1) Commerce determines that an "authority," defined as either the government of a country or any public entity within the territory of the country, *id*. § 1677(5)(B), "is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States"; and (2) the U.S. International Trade Commission determines that an industry in the United States is materially injured or threatened with material injury by reason of the subsidized imports.

A "countervailable subsidy" exists, generally, where an authority provides a financial contribution to a person and a benefit is thereby conferred, and the subsidy meets the requirement of "specificity," as determined according to various rules set forth in the statute. *Id.* §§ 1677(5), (5A). When subsidies consist of the provision of goods or services rather than the provision of monies directly, a benefit is conferred if those goods or services are provided for less than adequate remuneration. *Id.*§ 1677(5)(E)(iv).

C. Use of Facts Otherwise Available and Adverse Inferences when the Exporting Country Government Fails to Cooperate in a CVD Proceeding

In the Final Results, Commerce invoked its authority to use "the facts otherwise available" under section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), and "adverse inferences" under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), with respect to the EBCP and the provision of synthetic yarn and caustic soda. When using both the "facts otherwise available" and the "adverse inference" provisions, Commerce describes its action by using the term "adverse facts available" ("AFA").

Commerce may resort to the use of the facts otherwise available when, for example, "an interested party or any other person" withholds requested information, 19 U.S.C. § 1677e(a)(2)(A), or "significantly impedes a proceeding," *id*. § 1677e(a)(2)(C). Commerce also may use the facts otherwise available if Commerce finds that an

interested party provides requested information "but the information cannot be verified as provided in section 1677m(i) of this title [19 U.S.C. § 1677m(i)]." *Id*. § 1677e(a)(2)(D).

If Commerce finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply" with a request for information, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id*. § 1677e(b)(1)(A).

In some circumstances arising in a countervailing duty investigation or review, Commerce may use an inference adverse to the interests of a party in the proceeding in the event of non-cooperation by the government of the exporting country in responding to the Department's requests for information, even if the result is a collateral adverse effect upon a fully cooperative party. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014); *see also Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1325 (2018) (quoting *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013)) ("Commerce may apply AFA even if the collateral effect is to 'adversely impact a cooperating party.'"). But in such circumstances, Commerce should "seek to avoid such impact if relevant information exists elsewhere on the record." *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1325 (citation omitted).

Commerce did not find that Yama withheld any information or failed to cooperate in responding to the Department's information requests. Commerce, instead, based its use of the facts otherwise available and adverse inferences entirely on its findings of non-responsiveness and non-cooperation on the part of the government of China (the "GOC").

D. The Export Buyer's Credit Program

Commerce found that the Export Buyer's Credit Program provides medium and long-term loans at preferential, low interest rates. *Final I&D Mem*. at 30. The program is administered by a government entity, the Export Import Bank of China (the "EX-IM Bank"). *See id*. at 35.

Commerce did not find from record evidence that Yama participated in the EBCP, and the only record evidence relevant to that issue supports a finding that Yama did not do so. Had one or more of Yama's customers received preferential loans under the EBCP and used the proceeds to purchase Yama's subject merchandise during the POR, a benefit indirectly would have been "conferred" upon Yama. But in this case, Commerce did not find as a fact that any Yama customer actu-

ally received a loan under the program. Here again, the record lacked evidence that such an event occurred during the POR and contained record evidence that it did not.

Commerce began its analysis by stating a negative finding, as follows: "Consistent with the *Preliminary Results* and Commerce's practice, we continue to find that the record of the instant review does not support a finding of non-use regarding the EBC program for Yama." *Final I&D Mem*. at 30 (footnote omitted). This is not an affirmative finding under 19 U.S.C. § 1677(5) that Yama was conferred a "benefit" as a result of participation in the EBCP by one or more of its customers. Instead, it is a "double negative," i.e., a conclusion that the record does *not* support a "finding" that Yama did *not* benefit from the EBCP.

Nevertheless, defendant argues that "Commerce's determination that Yama used the EBC program, and its selection of an adverse rate for that program, are supported by substantial evidence and otherwise in accordance with law." Def.'s Br. 11. Because Commerce did not actually "determine" from record evidence (substantial or otherwise) that Yama used the EBC program, defendant's argument misstates what Commerce actually decided.

Applying 19 U.S.C. § 1677e(a), Commerce found that "the GOC withheld necessary information that was requested of it." *Final I&D Mem*. at 42. It concluded from this finding that the withholding of information "resulted in necessary information not being available on the record of this review" and that "the GOC significantly impeded the proceeding." *Id*. Referring to record information submitted by Yama and some of its customers to demonstrate that no customer of Yama used the EBCP, Commerce found that information about the operation of the EBCP it considered to be necessary but missing from the record "prevents complete and effective verification of the customers' certifications of non-use." *Id*. at 41.

Commerce concluded, further, that "an adverse inference is warranted in the application of facts available, pursuant to section 776(b) of the Act [19 U.S.C. § 1677e(b)] because the GOC did not act to the best of its ability in providing the necessary information to Commerce." *Id*. at 42. As adverse inferences, Commerce asserted that "we continue to find this program provides a financial contribution, is specific, and provides a benefit to Yama within the meaning of sections 771(5)(D), 771(5A), and 771(5)(E) of the Act, respectively [19 U.S.C. §§ 1677(5)(D), (5A), and (5)(E), respectively]." *Id*.

In some situations, the serious and pervasive nature of the noncooperation of the exporting government may prevent any meaningful inquiry by Commerce and justifies an adverse inference against a

cooperative party. For example, in *Yama Ribbons & Bows Co., Ltd. v. United States*, 46 CIT __, 611 F. Supp. 3d 1394 (2022), this Court sustained an adverse inference that Yama benefited upon the government of China's inadequately responding to the Department's questionnaire by providing, essentially, nothing beyond a copy of the GOC's questionnaire response for the previous review, which was unresponsive to the Department's request.

This case presents a different situation. Here, the Chinese government provided requested information that pertained specifically to the operation of the EBCP in the eighth review and explained the basis for its response to Commerce that neither Yama nor its customers were EBCP participants. Although Commerce permissibly found that the GOC failed to provide certain requested information about the EBCP, the essential finding Commerce drew from that failure, which was that the lack of the requested information prevented it either from determining, or from verifying, that Yama did not benefit from the EBCP, was unsupported by substantial evidence on the record.

As the court noted previously, Commerce in some circumstances may use an inference adverse to a cooperative party when the exporting government fails to act to the best of its ability to respond to information requests but should "seek to avoid such impact if relevant information exists elsewhere on the record." *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1325 (citation omitted). Commerce did not adhere to this principle in inferring, adversely, that Yama benefited from the EBCP.

1. Record Evidence that Yama Did Not Benefit from the EBCP

In response to a request in the Department's initial questionnaire, Yama provided Commerce, as Exhibit 13 to its response to the Department's initial questionnaire, a "list of U.S. customers to which Yama exported during the POR," along with their shipment addresses. *Narrow Woven Ribbons With Woven Selvedge from People's Republic of China, Antidumping Duty: Response to Section III Questionnaire* at 18 and Ex. 13 (Jan. 10, 2020), P.R. Doc. 40 ("*Yama Initial Questionnaire Resp.*") (list of customers and addresses). The list contained the names of a large number of U.S. retailers. In response to the Department's directive that Yama "discuss in detail the role your company plays in assisting your customers in obtaining buyer credits" under the EBCP, Yama stated that it "did not provide any assistance to its customers in obtaining buyer credits." *Id*. at 18. Yama further stated that it "contacted all of its U.S. customers listed in Exhibit 13 and confirmed that no customer obtained buyer credits

from China Ex-IM Bank during the POR." *Id*. at 19. Yama added that, in response to a request it sent to all customers, "certain U.S. customers provided written declaration certifying that they did not use buyer credits from Ex-IM Bank during the POR." *Id*. Yama submitted for the record the customer certifications it received from approximately 28% of the customers on its customer list. *Id*. at Exs. 14–1 and 14–2.

The Chinese government made statements paralleling those of Yama. *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China, Case No. C-570–953: Initial Questionnaire Response* at 34 (Jan. 10, 2020), P.R. Doc. 17–39 ("*GOC Initial Questionnaire Resp*.") ("The GOC determined that none of the customers of Yama used this program through a process in which Yama provided its customer list to the GOC. The EX-IM Bank then searched its records to confirm that these customers did not receive credits under the Export Buyer's Credit program.").

Other record evidence further detracts from a conclusion that Yama benefited from the EBCP. The "Administrative Measures of Export Buyer's Credit of EBCP," provided in original and translated form as Exhibit D-2 to the GOC's response to the Department's Initial Questionnaire and Exhibit D-4 to the GOC's response to the Department's First Supplemental Questionnaire (the "Administrative Measures"), states in Article 3: "Except for the government special approval, export buyer's credit is mainly used for supporting the export of capital goods, (such as Chinese electromechanical products, complete sets of large scale equipment) and High-tech products and services." *GOC Initial Questionnaire Resp*. at Ex. D-2 and *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China, Case No. C-570–953: First Supplemental Questionnaire Response* at Ex. D-4 (Apr. 17, 2020), P.R. Doc. 140 ("*GOC First Suppl. Questionnaire Resp*.") ("*Administrative Measures*"). Although not precluding the possibility that woven ribbon exports would receive an EBCP benefit, Article 3 indicates that exports such as Yama's are not the focus of the program. The same document provides evidence that the providing of credits under the EBCP, which is intended to promote exports, does not occur without the participation of the exporter. *Id.* at Article 4.

2. The Government of China's Responses to the Department's Initial and First Supplemental Questionnaires

The record does not contain evidence that the GOC failed to respond to any requests for information or documentation about the EBCP in its response to the Initial Questionnaire. The questionnaire contained seven questions the GOC was required to answer "regard-

ing Export Buyer's Credits provided to all U.S. customers *of the mandatory company respondents* [sic] (including all responding cross owned affiliated companies) during the POR." *GOC Initial Questionnaire Resp*. at 32. Commerce wrote the questionnaire so as to direct the GOC to skip the seven questions unless the GOC was reporting that EBCP credits were provided to customers of Yama (the sole "mandatory company respondent"). The GOC reported that none of Yama's U.S. customers used the EBCP, and hence the questions were not applicable. The GOC responded "Not applicable" to four of the questions but responded voluntarily to the other three questions and attached documents identified in two of them.

The GOC's response to the First Supplemental Questionnaire contains evidence to support the Department's finding that the GOC failed to cooperate by not acting to the best of its ability to respond to certain of the Department's requests for information. In response to the request for "the 2013 revisions to the Administrative Measures of Export Buyer's Credits of the Ex-Im Bank of China," the GOC responded that "[t]he GOC does not maintain the requested document, as the Export Buyer's Credit Program is a commercial, financial product offered by the bank." *GOC First Suppl. Questionnaire Resp.* at 20. The answer provided by the GOC, read literally, is nonsensical. If interpreted to mean that only banks, and not a government entity (such as the EX-IM Bank) maintain the document, the GOC's answer begs the question of why the government, the apparent originator of the document, could not locate a copy anywhere.

In the First Supplemental Questionnaire, Commerce also requested "a list of all partner/correspondent banks involved in disbursement of funds under the Export Buyer's Credit Program," to which the GOC responded that "[s]ince none of the customers of the mandatory respondent obtained Export Buyer's Credits during the POR, the GOC understands that this question is not applicable." *Id*. The GOC's "understanding" was correct as to the Department's request for this list in the Initial Questionnaire but was incorrect as to the same request in the First Supplemental Questionnaire. The second iteration of the request was not specific to Yama or its customers.

3. The Department's Invalid Finding that It Requested Information It Considered Essential to Its Verifying the "Non-Use" of the EBCP by Yama's Customers

Commerce permissibly found inadequate the GOC's responses to the request for the 2013 revisions to the Administrative Measures and the list of what it termed "partner/correspondent banks." Commerce also found, but impermissibly, that the GOC failed to provide certain other requested information that it considered essential to its

verifying the "non-use" of the EBCP by Yama's customers. As shown by the questionnaires it sent to the GOC, Commerce did not request that other information but proceeded as if it had.

Commerce found that "the GOC's refusal to provide the 2013 revisions, *as well as other requested information, such as key information and documentation pertaining to the application and approval process,* and partner/correspondent banks, impeded Commerce's ability to conduct its investigation of this program and to verify the claims of non-use by Yama's customers." *Final I&D Mem*. at 37 (emphasis added). The GOC provided "information and documentation pertaining to the application and approval process" when it submitted the Administrative Measures and the "Detailed Implementation Rules Governing Export Buyer's Credit of the Export-Import Bank of China," (the "EBCP Implementation Rules"), which the GOC provided, in original and translated form, as Exhibit D-3 to its response to the Initial Questionnaire and as Exhibit D-5 to its response to the First Supplemental Questionnaire. *GOC Initial Questionnaire Resp*. at Ex. D-3 and *GOC Suppl. Questionnaire Resp*. at Ex. D-5 ("*EBCP Implementation Rules*").

Commerce found, further, that even had the GOC provided the "list of correspondent banks," it still could not determine whether loans obtained by a U.S. customer of Yama were "loans originating from, facilitated by, or guaranteed by the China EX-IM Bank." *Final I&D Mem*. at 38. Commerce reached this finding even though it made no attempt to conduct a verification by examining the record of bank loans of any U.S. customer of Yama, concluding that it would have been futile to do so. *Id*. at 39. Commerce stated that in order to differentiate ordinary bank loans, such as a loan from the private bank HSBC, from government-benefited loans under the EBCP:

> Commerce would need to know what underlying documentation to look for in order to determine whether particular subledger entries for HSBC might actually be China EX-IM Bank financing: specific applications, orrespondence, abbreviations, account numbers, or other indicia of China EX-IM Bank involvement. As explained above, the GOC failed to provide Commerce with any of this information.

Id. at 38–39. The reference "[a]s explained above" apparently pertains to the allegation of "the GOC's failure to provide other requested information, such as a sample application, and other documents making up the 'paper trail' of a direct or indirect export credit from the China EX-IM Bank, discussed above." *Id*. at 38. The Initial Questionnaire requested that the GOC submit "a sample buyer's credit appli-

cation along with the application's approval and the agreement between the respondent's customer and the bank, which establish the terms of the assistance provided under the facility," but this request was one of the seven requests applicable only if the GOC was reporting that Export Buyer's Credits were provided to U.S. customers of the mandatory respondent. *GOC Initial Questionnaire Resp*. at 33. As noted above, that request was inapplicable, the GOC, like Yama, having reported that no U.S. customer of Yama was provided an Export Buyer's Credit.

Commerce did not repeat in its First Supplemental Questionnaire its request for "a sample buyer's credit application along with the application's approval and the agreement between the respondent's customer and the bank, which establish the terms of the assistance provided under the facility." Other than the inapplicable request in the Initial Questionnaire, the questionnaires Commerce relies upon made no request for documents comprising a "paper trail" and do not request "specific applications, correspondence, abbreviations, account numbers, or other indicia of China EX-IM Bank involvement." In short, Commerce concluded that it could not verify the "non-use" of the EBCP by Yama's customers because it lacked this additional, unrequested information. As a result, the Department's decision to infer adversely a benefit to Yama from the EBCP was critically flawed, Commerce having based that adverse inference on its reliance on "missing" information from the GOC that it never requested. According to the record evidence, the information Commerce requested of the GOC but did not receive was limited to the list of correspondent banks and the 2013 revisions to the Administrative Measures.

In defense of the Department's drawing an adverse inference that Yama benefited from the EBCP, defendant argues that "[i]n its supplemental response, the government [of China] . . . failed to explain with supporting documentation the steps it had taken to determine that none of Yama's customers had used the EBC program during the review period, which Commerce specifically requested." Def.'s Br. 14 (citing the *GOC First Suppl. Questionnaire Resp.* at 17, which requested "documentation from the Ex-Im Bank of China to support the GOC's claims that it searched it [sic] records and confirmed that Yama's customers did not receive credits under this program during the POR"). This argument is unsupported by, and is instead refuted by, the record evidence.

The GOC provided an explanation of the steps taken to determine that no customer on Yama's list obtained credits under the EBCP.

GOC First Suppl. Questionnaire Resp. at 17–20. The "supporting documentation" part of the question was satisfied by the GOC's submitting (a second time) the Administrative Measures and the EBCP Implementation Rules. Both clarify that the borrower may be an importer or a private bank, but these documents, read together and in the entirety, are record evidence supporting a finding that in either event the EX-IM Bank necessarily would have in its records required documentation submitted by, and to, the exporter. *See*, *e.g.*, *Administrative Measures* at Article 14 (requiring submission of the "commercial contract draft or letter of intent" and "the credit materials and related supporting document of the borrower, guarantor, importer, exporter, and financial statement of the borrower and guarantor"); *EBCP Implementation Rules* at I(3) (providing for issuance of a letter to the exporter "to enable the export enterprise to engage in further commercial negotiations"), III(1) ("After the loan agreement has been signed and officially taken effect, the Export-Import Bank of China shall notify the export enterprise in writing."). Further, the EX-IM Bank's procedures require that the EX-IM Bank have recourse in the event of default and that the exporter obtain export credit insurance. *See, e.g.*, *EBCP Implementation Rules* at I(4); *Administrative Measures* at Article 20 (specifying that the EX-IM Bank has the "right to recourse against borrower, loan guarantor or export credit guarantor according to loan agreement.").

The GOC's response to the First Supplemental Questionnaire, the Administrative Measures, and the EBCP Implementation Rules are sufficient to refute any finding or inference that Yama or any of its customers could have benefited from the EBC program without Yama's participation and, further, without any record of that participation being recorded in the EBCP's required recordkeeping. Defendant's argument might be read to imply that some further "documentation" of the record search should have been provided, but it is puzzling whether, or how, the EX-IM Bank could have provided additional "supporting documentation" about a record search that it reported as having undertaken when it also reported that search as having uncovered no pertinent documents, i.e., none identifying Yama or any of the companies on Yama's customer list as participants in the program. *See GOC First Suppl. Questionnaire Response* at 17 ("The GOC also checked with the China Ex-Im Bank and confirmed that none of the U.S. customers of the mandatory respondent used the Export Buyer's Credits during the POR"); *see also EBCP Implementation Rules* at V (requiring retention of complete project files). It is not clear how defendant expects the EX-IM Bank to have further

"explained with supporting documentation" the EX-IM Bank's determination that EBCP "documentation" pertaining to Yama or its customers did not exist.

Defendant argues, also, that "the EBC program involves a complicated loan disbursement structure, the parameters of which the Chinese government has yet to identify, despite repeated requests, and Commerce required certain information from the government to understand the program so that it could verify the accuracy of non-use claims." Def.'s Br. 25 (citing *Final I&D Mem.* at 37–41). This argument also disregards record evidence. The EBCP Implementation Rules provide procedures that describe the "parameters" under which the EX-IM Bank operates the program through a settlement bank. *See EBCP Implementation Rules* at III ("Usage of the loan"), IV ("Repayment of the loan"). Nothing in those "parameters" supports a conclusion or inference that Yama could have benefited from the EBCP without being aware of it or without its participation having been documented in the required EBCP recordkeeping.

4. The Department's Determination of an EBCP Benefit to Yama Was Not Supported by the Existing Administrative Record

The court rejects the Department's basing its adverse inference of a benefit to Yama on the GOC's failure to provide a list of correspondent banks. The absence from the record of that list did not affect the Department's ability to determine, or to conduct a verification on, whether Yama benefited from the EBCP.

According to the Department's own findings and reasoning, that list would not have enabled Commerce to determine whether a loan from a private bank to a U.S. customer of Yama was a loan originating from the EX-IM Bank under the EBCP unless Commerce also was provided the "paper trail" information it insisted it needed. *Final I&D Mem*. at 38 ("This same 'paper trail' would be necessary even if the GOC provided the list of correspondent banks."), 40 ("In short, because the GOC failed to provide Commerce with information necessary to identify a paper trail of a direct or indirect export credit from the China EX-IM Bank, we would not know what to look for behind each loan in attempting to identify which loan was provided by the EX-IM Bank via a correspondent bank under the EBC program."). In other words, Commerce found that the list of correspondent banks would have been of no use to Commerce absent other specific information, which Commerce failed to request from the GOC. Therefore, if the list of correspondent banks—although being withheld information within the meaning of 19 U.S.C. § 1677e(a)(2)(A)—had been present on the record, Commerce would not have used this informa-

tion in determining whether Yama had been provided an EBCP benefit. For the same reason, the GOC, in failing to provide that list, cannot correctly be said to have significantly impeded the proceeding for purposes of 19 U.S.C. § 1677e(a)(2)(C). For these reasons, and because Commerce disregarded "relevant information" that "exists elsewhere on the record," *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1325 (citation omitted), the absence of that information from the record did not permit Commerce to draw an adverse inference that Yama received an EBCP benefit.

Moreover, Commerce made no attempt during the review to verify the statement by Yama, or that of any individual U.S. customer of Yama, that the EBCP was not used. Even without the list of correspondent banks it sought from the GOC, Commerce could have attempted to verify the negative response of at least some customers and, for example, could have made inquiries to the financial institutions as to the nature of any loans those customers used to buy Yama's subject merchandise. Commerce illogically reasoned that unless it could verify the non-EBCP origin of all the loans of all the customers, it could not so verify any loan of any customer. In that respect, the Department's presumption that no verification was possible amounts, on the record evidence, to unsupported speculation. On that evidence, it was impermissible for Commerce to punish Yama simply because Yama happened to sell its subject merchandise to a relatively large number of U.S. customers during the POR.

The GOC's failure to provide the 2013 amendments to the Administrative Measures is also insufficient, either alone or in combination with the failure to provide the list of correspondent banks, to support an adverse inference of a benefit to Yama from the EBCP. The GOC submitted the Administrative Measures and the EBCP Implementation Rules in response to the GOC's request for the current procedures governing the EBCP. Commerce incorporated a finding from a previous review, the "Silica Fabric Investigation," that the 2013 revisions "provide internal guidance for how this program is administrated by the EX-IM Bank." *Final I&D Mem*. at 34 (citing *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China* at 12 (Int'l Trade Admin. Jan 25, 2017)). If this finding is presumed correct, i.e., that the 2013 revisions are "internal guidance," then it would be inconsistent to presume also that they effected substantive, external modifications to the Administrative Measures under which it could be inferred that Yama benefited from the EBCP. Commerce engaged in speculation that the 2013 document related, in some undefined way, to the issue of

whether Yama received an EBCP benefit. Commerce alluded to a finding from the Silica Fabric Investigation that the 2013 document "may have eliminated the USD 2 million contract minimum associated with this lending program." *Id*. at 34. In this proceeding, Commerce inquired as to whether the $2 million threshold was in effect, and the GOC responded that it was. *GOC First Suppl. Questionnaire Resp*. at 18 (stating that "for a business contract to be supported by the Export Buyer's Credits, the contract amount must be more than 2 million U.S. dollars.").

In summary, the record does not support the Department's conclusion that the information that Commerce requested and that the GOC failed to provide prevented Commerce from determining that Yama did not benefit from the EBCP. While lacking the list of correspondent banks and the 2013 revisions, Commerce had before it a large body of evidence, provided by Yama as well as by the GOC, supporting a finding that Yama did not do so. Commerce impermissibly ignored this "relevant information" that "exists elsewhere on the record," *Changzhou Trina*, 42 CIT at __, 352 F. Supp. 3d at 1325 (citation omitted), on its finding—itself unsupported by substantial record evidence—that the two items of requested but missing information prevented it from finding "non-use" or verifying information that the record contained.

For the reasons the court has discussed, the administrative record does not contain substantial evidence to support a finding that Yama benefited from the EBCP. Nor does it contain substantial evidence to support the Department's finding that the record did not allow Commerce to *determine* whether a benefit to Yama occurred or its finding that it could not conduct any verification of Yama's or its customers' "non-use" of that program.

The Department's determination as to the EBCP was a final agency decision that has been subjected to judicial review and found to be unsupported by substantial evidence on the administrative record the agency collected and assembled during the CVD review proceeding. That determination, therefore, must be remanded for reconsideration.

The remaining question is whether Commerce may reopen the record. Ordinarily, an agency remains free to reopen the record unless the court rules otherwise. *NTN Bearing Corp. of Am. v. United States*, 25 CIT 118, 124, 132 F. Supp. 2d 1102, 1107 (2001), *aff'd*, 295 F.3d 1263 (Fed. Cir. 2002) ("As long as the Court does not forbid Commerce from considering new information, it remains within Commerce's discretion to request and evaluate new data."). In some cases a deficiency in the record can be remedied in a way that is expeditious and

fair, but this is not the situation here. Rather, the record as it exists cannot support an imposition of countervailing duties for the EBCP for multiple reasons. Moreover, repeating the entire review as to the EBCP would be highly prejudicial and unfair, in terms of both time and expense, for the plaintiff, Yama, who was a fully cooperative respondent. *See, e.g., Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012) ("To allow constant reopening and supplementation of the record would lead to inefficiency and delay in finality.").

Because Commerce, in including a rate for the EBCP, disregarded critical record evidence (including, in particular, the Administrative Measures and EBCP Implementation Rules), because of the need to ensure fairness to both parties, and in the interest of finality, the court will not exercise its discretion so as to authorize Commerce to reopen the record upon remand. Commerce must reconsider its EBCP determination on the basis of the existing record and reach a new determination that is in accordance with this Opinion and Order.

E. Provision of Synthetic Yarn and Caustic Soda for Less-Than-Adequate Remuneration

When an "authority," which the Tariff Act defines as a "government of a country or any public entity within the territory of the country," 19 U.S.C. § 1677(5)(B), confers a benefit upon a person by providing goods "for less than adequate remuneration," *id*. § 1677(5)(E)(iv), a countervailable subsidy may be found if the "specificity" requirement set forth in the statute, *id*. §§ 1677(5)(A), (5A), is satisfied.

In the eighth review of the Order, Commerce stated that "we continue to find that, in the synthetic yarn and caustic soda markets: (1) Chinese prices are significantly distorted by the involvement of the GOC; and (2) privately-owned input suppliers of synthetic yarn and caustic soda are 'authorities' within the meaning of section 771(5)(B) of the Act [19 U.S.C. § 1677(5)(B)]." *Final I&D Mem*. at 14. Commerce stated, further, that "[w]e have also reexamined the specificity of both the synthetic yarn and caustic soda for LTAR and now find that provision of these inputs is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act [19 U.S.C.§ 1677(5A)(D)(iii)(I)]." *Id*.

Concluding that the Chinese government did not provide certain requested information and failed to cooperate by not acting to the best of its ability to respond to its information requests, Commerce used facts otherwise available and drew adverse inferences that: (1) Yama's suppliers of synthetic yarn and caustic soda were "authorities," *id*. at 16–19, and that the provision of these inputs was "specific," *id*. at 19–22. Adopting without change the LTAR determinations it made in the Preliminary Results, Commerce calculated a 27.74% subsidy rate for synthetic yarn, *id*. at 3, 23, and a subsidy rate of 0.27% for

caustic soda, *id*. at 3.

In contesting the LTAR determinations for the two inputs, Yama claimed that the record did not support a finding that the markets for them were distorted by either the GOC or the Chinese Communist Party, Pl.'s Br. 40, and that the record also failed to support the Department's treating its suppliers as authorities, *id*. at 44–46. While arguing that the issue of specificity was, therefore, moot, Yama argued in the alternative that the provision of synthetic yarn and caustic soda was not "specific" because "synthetic yarn and caustic soda have a wide range of uses, including, but not limited [to], use in the narrow woven ribbon industry." *Id*. at 46 (citations omitted).

Further to the issue of specificity, Yama argued that "[t]here is no evidence on the record to even remotely suggest that any LTAR subsidy is specific either as a matter of law or fact" and that "Commerce did not place anything on the record to suggest otherwise." *Id*. at 47. Defendant stated, in response, that "Yama is correct that Commerce did not place information on the record to support its *de facto* specificity finding." Def.'s Br. 46. Defendant explained that "in determining that the subsidy is *de facto* specific, Commerce relied on information from the petitioner's new subsidy allegation in the 2015 segment of this administrative review" but "inadvertently did not place the 2015 New Subsidy Allegation information on the record of this review." *Id*. (citations omitted). Noting that interested parties did not have the opportunity to comment on that information as specified in 19 U.S.C. § 1677m(g), defendant requested that the court "remand this issue to Commerce so that Commerce may place the information on the record of the review and allow parties the opportunity to comment, and if necessary, reconsider its *de facto* specificity determination." *Id*. (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–31 (Fed. Cir. 2001)). Defendant requests that the court "grant our motion for voluntary remand for the *de facto* specificity issue, deny plaintiff's motion in all other respects, and sustain Commerce's final results." *Id*. at 47.

Plaintiff opposes defendant's motion for a remand on the grounds that the LTAR issue is "moot," that the material sought to be added (characterized by plaintiff as the "Public Bodies Memorandum") is speculation, not evidence, adding nothing to the discussion of this issue, and that the interest of finality dictates against allowing supplementation of the record. Pl.'s Reply 12–13.

The court does not agree with plaintiff's argument that it should preclude supplementation of the record in the limited way that defendant proposes. Defendant having pointed out that Commerce considered the information it seeks to add to the record but inadvertently

omitted it when assembling that record, the court views as reasonable the request to reopen the record for the sole purpose defendant identifies. If the information was used in the agency's decision-making process, then the addition to the record of that information should have been accomplished in the ordinary course, and the apparent procedural error should be corrected. Plaintiff may raise its objections to the relevance and probativity of the new information once that information has been placed on the record and provided to it.

Beyond the request to reopen and supplement the record, defendant's request for a remand is unsatisfactory in two respects. First, if the court allows Commerce to supplement the record and to reconsider its determination on specificity as to the provision of synthetic yarn and caustic soda, the court at the same time cannot, as defendant urges, "sustain Commerce's final results." Second, the court declines to adopt defendant's piecemeal approach to the litigation of the LTAR issues, under which defendant would have Commerce consider only the specificity question and have the court "deny plaintiff's motion in all other respects."

The court will allow Commerce to add to the record the information from the petitioner's new subsidy allegation in the 2015 segment of this administrative review, upon which, according to defendant's statement to the court, Commerce relied in making its specificity determinations as to synthetic yarn and caustic soda. Commerce shall allow plaintiff to submit comments to it that address this new information. To avoid a piecemeal approach, Commerce shall reconsider its LTAR determinations for these two inputs, in the entirety, based on the supplemented record and the comments plaintiff submits. Plaintiff then will have the opportunity to comment on the redetermination upon remand that Commerce submits to the court.

III. CONCLUSION AND ORDER

A remand of the Final Results to Commerce is required in this case for reconsideration of the Department's determination as to the EBCP and to allow a limited supplementation of the record with respect to the Department's LTAR determinations.

Upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Yama Ribbons and Bows Co., Ltd.'s Rule 56.2 Motion for Judgment on the Agency Record (Feb. 4, 2022), ECF Nos 27 (Conf.), 28 (Public) be, and hereby is, granted in part; it is further

ORDERED that Commerce shall submit to the court a redetermination upon remand ("Remand Redetermination") that reconsiders, based on the existing record, the Department's determination on the

EBCP program and reaches a new determination that is in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall supplement the administrative record with the "2015 New Subsidy Allegation information" that, according to defendant's statement to the court, Commerce inadvertently failed to place on the record of the administrative review, shall provide that information to plaintiff upon doing so, and shall allow plaintiff to submit to Commerce comments on this new information; it is further

ORDERED that in the Remand Redetermination, Commerce shall reconsider its LTAR determinations for synthetic yarn and caustic soda in the entirety, based on the supplemented administrative record; it is further

ORDERED that Commerce shall submit the Remand Redetermination to the court within 60 days of the date of this Opinion and Order; it is further

ORDERED that plaintiff shall have 30 days from the date of submission of the Remand Redetermination to submit to the court comments thereon; and it is further

ORDERED that defendant shall have 15 days from the submission of plaintiff's comments on the Remand Redetermination to submit to the court a response to those comments.

Dated: August 25, 2023
New York, New York

/s/ Timothy C. Stanceu
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