U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY
19 CFR Part 12

CBP Dec. 23–10

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IMPORT RESTRICTIONS ON ETHNOLOGICAL MATERIAL OF PERU

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect the addition of several categories of ethnological material of Peru to the existing import restrictions and to clarify descriptions of certain categories of archaeological and ethnological material of Peru. The United States has entered into an agreement with Peru that supersedes the prior agreement and amends the import restrictions that became effective on June 9, 2022. The restrictions, originally imposed by Treasury Decision 97–50, and recently extended by CBP Decision 22–11 for an additional five-year period, will continue with the addition of these categories of ethnological material through June 9, 2027, and the CBP regulations are being amended to reflect these additions. The Designated List of archaeological and ethnological material of Peru to which the restrictions apply is reproduced below.

DATES: Effective September 13, 2023.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in § 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

In certain limited circumstances, the CPIA authorizes the imposition of restrictions on an emergency basis (19 U.S.C. 2603). The emergency restrictions are effective for no more than five years from the date of the State Party's request and may be extended for three years where it is determined that the emergency condition continues to apply with respect to the covered material (19 U.S.C. 2603(c)(3)). These restrictions may also be continued pursuant to an agreement concluded within the meaning of the CPIA (19 U.S.C. 2603(c)(4)). Additionally, after any agreement enters into force either through an agreement or emergency action, CBP will by regulation promulgate (and when appropriate revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such emergency action (19 U.S.C. 2604).

On May 7, 1990, the former United States Customs Service published Treasury Decision (T.D.) 90–37 amending 19 CFR 12.104g(b) to reflect the imposition of emergency restrictions on the importation of archaeological materials from the Sipán Archaeological Regions, forming part of the remains of the Moche culture. Subsequently, on June 27, 1994, the former United States Customs Service published T.D. 94–54, amending 19 CFR 12.104g(b) to reflect the extension of these emergency import restrictions for an additional three-year period.

On June 9, 1997, the United States entered into the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru" (1997 MOU). The 1997 MOU provided for import restrictions on certain categories of archaeological and ethnological material and also continued to include archaeological material then subject to the emergency restrictions.

On June 11, 1997, the former United States Customs Service published T.D. 97–50 in the **Federal Register** (62 FR 31713), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions and included a list designating the types of archaeological and ethnological materials covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years.

The import restrictions were subsequently extended five times, and the designated list amended twice, in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a). On June 6, 2002, the former United States Customs Service published T.D. 02–30 in the **Federal Register** (67 FR 38877), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years. On June 6, 2007, CBP published CBP Decision (CBP Dec.) 07–27 in the **Federal Register** (72 FR 31176), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years. On June 7, 2012, CBP published CBP Dec. 12–11 in the **Federal Register** (77 FR 33624), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years. On June 7, 2017, CBP published CBP Dec. 17–03 in the **Federal Register** (82 FR 26340), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years and to revise the designated list to reflect the addition of Colonial period documents and manuscripts to the list of ethnological material.

On September 13, 2021, the United States Department of State proposed in the **Federal Register** (86 FR 50931), to extend the 1997 MOU. On March 15, 2022, after consultation with and recommendation by the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the determinations necessary to extend and amend the 1997 MOU. The extension and amendment of the MOU was implemented in two stages. First, the 1997 MOU was extended for an additional five years via an exchange of diplomatic notes, with effect from June 9, 2022. On June 9, 2022, CBP published

CBP Dec. 22–11 in the **Federal Register** (87 FR 34775), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years.

Second, on September 30, 2022, the Governments of the United States and Peru signed an agreement to include additional categories of ethnographic materials, titled "Agreement Between the Government of The United States of America and the Government of The Republic of Peru Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Peru" (2022 Agreement). The 2022 Agreement supersedes the 1997 MOU. Following an exchange of diplomatic notes, the 2022 Agreement entered into force on April 27, 2023. Pursuant to the 2022 Agreement, the existing import restrictions on archaeological and ethnological materials remain in effect through June 9, 2027, and the importation of additional categories of ethnological material is restricted through June 9, 2027.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the amendment of the Designated List of cultural property, described in CBP Dec. 17–03, with the addition of certain categories of ethnological material of Peru and clarification of descriptions of pre-Columbian pottery and textile styles, ecclesiastical objects, and prints to which the import restrictions apply. The restrictions on the importation of archaeological and ethnological material will be in effect through June 9, 2027. Importation of such material of Peru, as described in the Designated List below, will be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions* by selecting the material for "Peru."

Designated List of Archeological and Ethnological Material of Peru

The Designated List contained in CBP Dec. 17–03, is amended to add certain categories of ethnological material of Peru and to clarify descriptions of pre-Columbian pottery and textile styles, ecclesiastical objects, and prints to which the import restrictions apply. For the reader's convenience, CBP is reproducing the Designated List contained in CBP Dec. 17–03 in its entirety with these changes. Note that the Designated List also subsumes those categories of Moche objects from the Sipán Archaeological Region of Peru for which import restrictions have been in place since 1990 (*see* T.D. 90–37).

The Designated List includes archaeological and ethnological materials. Archaeological material ranges in date from approximately

12,000 B.C. to A.D. 1532. Ethnological material dates to the Colonial period (A.D. 1532—1821) and includes objects directly related to the pre-Columbian past, ecclesiastical objects, and manuscripts and documents.

The list is divided into the following categories of objects:

I. Archaeological Material

A. Pre-Columbian Textiles
B. Pre-Columbian Metals
C. Pre-Columbian Ceramics
D. Pre-Columbian Lithics
E. Pre-Columbian Perishable Remains
F. Pre-Columbian Human Remains

II. Ethnological Material

A. Objects Directly Related to the Pre-Columbian Past
B. Ecclesiastical Objects
C. Colonial Manuscripts, Documents, and Prints

Approximate chronology used to describe cultural periods of Peru.

	Rowe	Lumbreras
A.D. 1532–1821	Colonial Period/Viceroyalty of Peru	
A.D. 1440–1532	Late Horizon	Inca Empire.
A.D. 1100–1440	Late Intermediate Period ...	Regional states and kingdoms.
A.D. 600–1100	Middle Horizon	Huari (Wari) Empire.
200 B.C.–A.D. 600 ...	Early Intermediate Period .	Regional Cultures.
1000–200 B.C	Early Horizon	Middle and Late Formative.
1800–1000 B.C	Initial Period	Early Formative.
2500–1800 B.C	Late Pre-ceramic	Late Archaic.
4500–2500 B.C	Middle Pre-ceramic	Middle Archaic.
6000–4500 B.C	Early Pre-ceramic	Early Archaic.
12,000–6000 B.C	Early Pre-ceramic	Hunter-Gatherers.

I. Archaeological Material

A. Pre-Columbian Textiles

Examples of pre-Columbian textiles include, but are not limited to, the following:

1. Chimú

a. Pillows—Piece of cloth sewn into a bag shape and stuffed with cotton or plant fibers. Generally, the cloth is made in tapestry technique. Usually 60 cm. x 40 cm.

b. Painted Cloths—Flat cloth of cotton on which designs are painted. Range between 20 cm. and 6.1 m.

c. Headdresses—Headdresses are usually made of feathers, especially white, green, and dark brown, which are attached to cloth and fitted to a cane or basketry frame. Feathers on the upper part are arranged to stand upright.

d. Feather Cloths—Decorated with bird feathers, especially panels and tunics. They vary in shape and size; generally they depict geometric motifs and volutes. Vary from 20 cm.–3 m. in length, and may be up to 1.5 m. in width.

e. Panels—Chimú panels may be of two types: tapestry weave or plain-weave cotton. Isolated anthropomorphic designs predominate and may be associated with zoomorphic motifs. Vary from 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

f. Belts and Sashes—Generally made in tapestry technique, and predominantly of red, white, ocher, and black. As with other Chimú textiles, they generally depict human figures with rayed headdresses. Up to 2.20 m. in length.

2. Chancay

a. Looms—Commonly found in Chancay culture, sometimes with pieces of the textile still on the loom. Often these pieces of cloth show varied techniques and are referred to as "samples." Usually 50 cm. x 20 cm.

b. Loincloths—Triangular panels of cloth with woven tapestry borders.

c. Dolls—Three dimensional human figures stuffed with plant fiber to which hair and other decorations are added. Sometimes they depict lone females; in other cases they are arranged in groups. Most importantly, the eyes are woven in tapestry technique; in fakes, they have embroidered features. Usually 20 cm. tall and 8 cm. wide.

d. False Heads—In Chancay culture, false heads are made on a cotton or plant fiber cushion covered with plain-weave cloth, decorated with shells, beads, metal, wood, or painting to depict facial features. They sometimes have real hair. Usually 30 cm. x 35 cm.

e. Unkus/Tunics—Varied sizes and styles. Some are in plain weave, others in gauze, still others are in tapestry technique or brocade. They are recognized by their iconography such as geometric motifs, birds, fish, plants, and human figures. Miniatures are tiny; regular size examples are about 50 cm. x 50 cm.

f. Belts—Chancay belts are multicolored, with geometric motifs rendered in tapestry technique. Sometimes the ends are finished in faux-velour technique. Usually 2 m. x 5 cm.

g. Panels—Chancay panels may be made in tapestry technique or may be painted on plain weave cloth. In these latter cases, the panels may depict fish, parrots, monkeys, viscachas, felines, foxes, and human figures. Vary in size from miniatures to 4 m. x 2 m.

h. Standards—Chancay standards are supported on a frame of straight reeds covered with cotton cloth, which is painted in anthropomorphic designs in ochers and black. Sometimes they have a handle. Usually 20 cm. x 20 cm.

i. Gauzes—Pieces of cloth made in openwork gauze technique, with very fine cotton threads. May have embroidered designs in the same thread that depict birds or other flora and fauna. Usually 80 cm. x 80 cm.; some are smaller.

3. Nazca

a. Three-Dimensional Cloths—Figures of many bright colors needle-knitted into long strips. Motifs include, but are not limited to, birds, flowers, humans, and mythical figures. Each figure is approximately 5 cm. long x 2 cm. wide.

b. Unkus/Tunics—These include miniature and regular-sized tunics. They are generally of one color, mostly light brown. The neck edges, hem, and fringes have multicolored geometric designs. Fringes end in woven braids. Vary in size from miniatures up to approximately 1.5 m. x 0.8 m.

c. Bags—There are bags of many sizes, from miniatures to large ones, generally with a narrow opening and a wide pouch. Some are decorated with fringe. Their iconography resembles the unku (tunic), stylized designs in yellow, red, and dark and light blue.

d. Sashes—Nazca sashes are made on special looms. Their ends are decorated with plied fringe.

e. Tie-Dye (Painted) Cloths—Most common are those made in the tie-dye technique, in which the textile is knotted and tied before it is dyed, so that when it is untied, there are negative images of diamonds, squares, and concentric dots. Most common are orange, red, blue, green, and yellow colors. Vary from approximately 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

f. Patchwork Cloths—Variant of the Tie-Dye cloth, in which little panels are made and later sewn together so that the resulting textile includes rectangles of tie-dyed panels of different colors. The cloth may have a decorative fringe. Vary from 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

g. Waras/Loincloths—Generally made of a flat piece of cloth with colorful borders depicting stylized geometric motifs. They terminate in fringe. Usually 50 cm. x 30 cm.

h. Fans—Feathers inserted into a plant fiber frame of twisted cords. Commonly two colors of feathers are attached, such as orange and green, or yellow and blue. Usually 30 cm. x 20 cm.

4. Huari (Wari)

a. Panels—Characterized by a complex and abstract iconography. Made in tapestry technique with a range of colors such as browns, beiges, yellows, reds, oranges, and greens. Vary from 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

b. Unkus/Tunics—Large with abstract and geometric iconography. Commonly the designs repeat in vertical bands. Generally, tunics have a cotton warp and camelid fiber weft. Some are so finely woven that there are 100 threads per cm^2. Vary in size from miniatures up to 1.5 m. x 80 cm.

c. Caps—Most common are the "four-corner hats" made in a faux-velour technique that results in a velvety texture. On the base cloth, small tufts of brightly-colored wool are inserted.

d. Vinchas/Headbands or Sashes— These garments are made in tapestry weave or faux-velour technique and depict geometric motifs.

e. Bags—Bags have an opening somewhat narrower than the body, with designs depicting felines, camelids, human faces, and faces with animal attributes.

5. Paracas

a. Esclavinas/Small Shoulder Ponchos—Paracas esclavinas are unique for their decoration with brightly-colored images in Paracas style, such as birds, flowers, animals, and human figures. Vary in size from miniatures up to 60 cm. x 30 cm.

b. Mantles—Paracas mantles can be divided into five types, based on their decoration. All are approximately 2.5 m. x 1.6 m.

i. Mantles with a plain field and woven borders;

ii. Mantles with decorative (embroidered) borders and plain field;

iii. Mantles with decorative (embroidered) borders and a decorative stripe in the center field;

iv. Mantles with embroidered borders and center field embroidered in checkerboard-fashion;

v. Mantles with embroidered borders and alternating diagonals of embroidered figures in the center field.

c. Gauzes—Paracas gauzes are made of one color, such as lilac, yellow, red, or gray. They are generally rectangular and have a soft and delicate texture. Approximately 1 m. x 1 m.

d. Panels—Paracas panels are generally of cloth and may have been used for utilitarian purposes. They are generally undecorated. Vary from 20 cm. x 20 cm. to 2 m. x 1.8 m.

e. Skirts—Paracas skirts are of two types: some are plain, made of cotton with decoration reserved for the ends; there are others that are elaborately embroidered with colorful images rendered in wool. These often form sets with mantles and other garments. Skirts are rectangular and very wide, with two fringed ties. Usually 3 m. long and 70 cm. wide.

f. Waras/Loincloths—Made of cotton, not as large as skirts, and may have embroidered edges.

g. Slings—Paracas slings are decorated in Cavernas style, made of plant fiber, and are of small size, generally 1.5 m. x 5 cm.

h. Furs—There are numerous examples of animal skins reported from Paracas contexts, including, but not limited to, the skins of the fox, viscacha, and guinea pig. Most are poorly preserved.

6. Moche

a. Bags—Moche bags are usually square, small, and have a short handle. They are made in tapestry technique with brightly-woven designs. Principal colors used are white, black, red, light blue, and ocher.

b. Panels—Recognizable by their iconography, these tapestry-technique panels may show people on balsa-reed rafts surrounded by a retinue. They are rendered in a geometric fashion and are outlined in black and shown in profile. Scenes of marine life and fauna predominate. Vary from 20 cm. x 20 cm. to 2 m. x 1.8 m.

c. Ornamental Canes—Small canes are "woven" together in a twill technique using colorful threads that depict anthropomorphic designs. Approximately 10 cm. x 10 cm.

7. Lambayeque Panels—Lambayeque panels are small, made in tapestry technique, of cotton and wool. Vary from 20 cm. x 20 cm. to 2 m. x 1.8 m.

8. Inca

a. Slings—There are two types of Inca slings. Ceremonial slings are oversize and elaborately decorated with geometric motifs, with long fringes. Utilitarian slings are smaller and almost always with decoration only on the pouch and far ends. The decoration is geometric and the slings have fringed ends.

b. Unkus/Tunics—Inca tunics are well-made and colorful, mostly in red, olive green, black, and yellow. Decorative elements may be arrayed checkerboard fashion and are found on the upper and lower part of the garment. Vary in size from miniatures up to approximately 1.5 m. x 80 cm.

c. Bags—Recognized by their bright colors, they have an opening that is narrower than the body and a wide pouch with long fringe and handle. Vary in size from miniatures up to 30 cm. x 20 cm.

d. Panels—Some are made of cotton using the double-cloth technique, based on light brown and beige. Lines of geometrically-rendered llamas predominate. Vary in size from 20 cm. x 20 cm. to 2 m. x 1.8 m.

e. Mantles—Inca mantles are of standard dimensions, sometimes more than a meter long, generally rectangular. They are multi-colored and made of cotton warp and wool weft. Most common colors are dark red, olive green, white, and black. Generally 2.5 m. x 1.6 m.

f. Khipus/Quipus—Inca khipus (knotted string recording devices) are made of cotton and wool cords, sometimes with the two fibers plied together. Rarely is their original color preserved, though sometimes one sees light blues and browns. Some are wrapped with colorful threads on the ends of the cords. 80 cm. x 50 cm.

9. Chiribaya Tunics, Bags, Panels, and Hats—Chiribaya textiles are mostly plain-weave warp-faced technique with complementary warps made with wool yarn in natural colors such as dark brown, black, white, and beige; and dyed yarn in red, green, or blue. The natural-colored yarns are usually weft yarns, and the dyed yarns appear as warp yarns. Designs include, but are not limited to, simple or alternating vertical stripes of varied widths with hook and rhombus designs, snakes, two-headed felines, and an anthropomorphic creature with human, cat, and lizard features.

10. Chuquibamba

a. Ponchos, Mantles, and Tunics—Chuquibamba ponchos and tunics are made of camelid fibers and decorated with tapestry and weft-patterned geometric patterns and figures inset in squares occurring in horizontally divided vertical stripes. Mantles and shawls may have fold lines and zones of different patterns. Designs typically are eight pointed stars, birds, snakes, cats, frogs, and llamas.

b. Loincloths—Small rectangular cloths with four ties on the longer sides. Designs are in patterned bands, and some have end borders or patterned bands in the center.

c. Belts—A long, narrow textile with ties at each end. Belts usually have a single-colored background with designs in a rectangular grid. Some belts are two layers of fabric seamed together to form a pouch with an opening in the upper side.

d. Bags—Large and small square or trapezoidal bags are created from a single rectangle of fabric, folded with seamed sides, with cords attached at the mouth, and sometimes the bottom corners, to form straps. May have lavish fringe hanging from the bottom edge. Finely woven tapestry or weft-pattern designs are typically in bands or within squares.

11. Sihuas

a. Mantles, Tunics, and Panels—Cotton and camelid fibers in highly varied weaving techniques such as warp-face, slit tapestry, cross-looping, and tubular edging. Designs include the Rayed Head, Step Platform, anthropomorphic, zoomorphic, and geometric designs, often with zig-zagging lines and borders. May have stripes of alternating colors. Designs may be woven or tie-dyed. Colors often are red, blue, green, and yellow. May have long fringes.

B. Pre-Columbian Metal Objects

Examples of pre-Columbian metal objects include, but are not limited to, the following:

1. Idols—Anthropomorphic or zoomorphic figures, some hollow and others solid. They may be made of gold and silver, they may be gilded, or of copper, or bronze. Sizes vary from 2 cm.–20 cm. in height.

2. Small Plaques—Thin sheets of gold, silver, copper, or gilded copper used to cover the body and made in pieces. They have repoussé or punched designs on the edge and middle of the sheet. Average 0.6 cm in height.

3. Axes—Almost always T-shaped and solid. There are also axes in a traditional axe-head shape. May be made of bronze or copper.

4. Mace Heads—These come in a great variety of shapes such as star-shaped, flat, or of two or three levels. They may be made of copper or bronze. Most have a central hole through which a wooden handle was affixed.

5. Musical Instruments

a. Trumpets—Wind instrument with a tubular body and flaring end, fastened at the joint. May be made of copper or bronze.

b. Bells—Of varying shapes and varying materials such as gold, silver, copper, or silver-plated copper.

c. Conos—Instrument shaped from a sheet of hammered metal, with or without a clapper. Commonly made of copper or silver. Up to 0.5 m. in height.

d. Rattles—Musical instrument with a central hole to accommodate a handle. May be made of copper or bronze. Vary from 6 cm.–25 cm. in height.

e. Jingle Bells—Spherical bells with an opening on the lower part and a handle on the upper part so they can be suspended from a sash or other garment. They contain a small stone or a little ball of metal. The handles may be decorated. Jingle bells may decorate another object, such as rhythm sticks, and may be of gold, silver, or bronze. Used in all pre-Columbian cultures of Peru.

f. Chalchachas—Instruments shaped like a bivalve with repoussé decoration. Made of copper.

g. Quenas (flutes)—Tubular instruments, generally made of silver, with perforations to vary the tone.

6. Knives—Knives vary depending on their provenance. They can have little or no decoration and can be of different metals or made of two metals. The best-known are the *tumis* from the Sicán culture, which have a straight or trapezoidal handle and a half-moon blade. The solid handle may have carved or stamped designs. Generally made of gold, silver, or copper. In ceremonial examples, the blade and upper part may depict an anthropomorphic figure standing or seated, or simply a face or mask with an elaborate headdress, earspools, and inset semi-precious stones. Tumi handles can be triangular, rectangular, or trapezoidal, and blades can be ovaloid or shaped like a half-moon.

7. Pins—With a straight shaft and pointed end, pins can be flat or cylindrical in cross-section. Most are hammered, and some are hollow. They can be made of gold, silver, copper, bronze, gold-plated silver, or of two metals. Some pins are zoomorphic, others have floral images, and still others depict fish. Some have a round head; others have a flat, circular head; still others have the shape of a half-moon. There are hollow-headed rattle pins; others have solid anthropomorphic images. Most are up to 50 cm. in length, with heads that are up to 10 cm. in diameter. The small pins are about 5 cm. in length.

8. Vessels—There are a variety of metal vessels; they may be made of gold, silver, gilded silver, gilded copper, silver-covered copper, or bronze. There are miniatures, as well as full-size vessels. Such vessels are known from all cultures. Often formed as beakers, bowls, open plates, globular vessels, and stirrup-spout bottles. The exact form and surface decoration varies from culture to culture. Shapes include, but are not limited to beakers, bowls, and plates. Average 0.3 m.–0.5 m. in height.

9. [Reserved]

10. Masks—May be made of gold, silver, gilded silver, copper, gilded copper, silver-covered copper, or may be made of two metals. They vary greatly in shape and design. The best-known examples come from the following cultures: Moche, Sicán, Chimú, Huari (Wari), Inca, Nazca, and Chincha. The northern coast examples often have insets of shell, precious or semi-precious stones, and may have plant resins to depict the eyes and teeth. Almost all examples that have not been cleaned have a surface coloring of red cinnabar. Examples from Sicán measure up to 49 cm. in width by 29 cm. in height. Miniature examples can measure 7 cm. x 5 cm. Miniature masks are also used as decorations on other objects. Copper examples generally show heavy oxidation.

11. Crowns—Thin or thick sheets of metal made to encircle the head. They may be made of silver, gold, copper, gilded silver, silver-covered copper, or may be made of two metals. Some examples have a curved central part and may be decorated with pieces of metal and real or artificial feathers that are attached with small clamps. Found in all cultures.

12. Penachos (Stylized Metal Feathers)—Stylized metal feathers used to decorate crowns. May be made of gold, silver, copper, or silver-covered copper.

13. Tocados (Headdresses)—Headdress ornaments which may be simple or complex. They may be made of one part, or may include many pieces. Found in all cultures. They may take the form of crowns, diadems, or small crowns. They may have two stylized feathers to decorate the crown and to hold it to the hair (especially the Chimú examples). Paracas examples generally have rayed appendages, with pierced disks suspended from the ends of the rays.

14. Turbans—Long pieces of cloth that are wrapped around the head. Metal ornaments may be sewn on turbans. Found in all cultures; the metal decorations and the cloth vary from culture to culture.

15. Spoons—Utilitarian objects made of gold, silver, or copper.

16. Lime Spatulas—Miniature spatula: a straight handle has a slightly spoon-shaped end. The handle may have an anthropomorphic figure. Made of gold, silver, or copper.

17. Ear Spools—Ear spools are generally made of a large cylinder that fits through the earlobe with an even larger disk or decorative sheet on one side. The disk may be decorated with repoussé, stamped, or engraved designs, or may have inset stone or shell. May be made of gold, silver, copper, or made of two metals. Ear spools are found in all cultures. The largest measure up to 15 cm. height; typical diameter: 5 cm.–14 cm.

18. Nose Ornaments—Of varied shapes, nose ornaments can be as simple as a straight tube or as complex as a flat sheet with repoussé design. In the upper part, there are two points to attach the ornament to the septum. They may be of gold, silver, or copper, or may be made of two metals.

19. Earrings—Decoration to be suspended from the earlobes.

20. Rings—Simple bands with or without designs. Some are two bands united by filigree spirals. Some have inset stones. May be made of silver, gold, copper, or alloys.

21. Bracelets—Bracelets are made of sheets of metal, commonly in a straight or slightly trapezoidal shape, with stamped or repoussé designs. Some are simple, narrow bands. Found in all cultures and

with varied designs. May be made of gold, silver, bronze, or alloys of copper. Generally 4 cm.–14 cm. in width.

22. Necklaces—Necklaces are made of beads and/or small carved beads. May be made of shell, bone, stone, gold, silver, copper, or bronze. The beads are of varied shapes. All beads have two lateral perforations to hold the cord.

23. Tweezers—Made in one piece, with two identical ends and a flexed central handle. They typically are triangular, trapezoidal, and ovaloid in shape. The middle of the handle may have a hole so the tweezers can be suspended from a cord.

24. Feather Carriers—Conical objects with a pointed, hollow end, into which feathers, llama skin, or monkey tails are inserted and held in place with tar. They may be made of gold, silver, or gilded or silver-plated copper.

C. Pre-Columbian Ceramics

Examples of pre-Columbian ceramics include, but are not limited to, the following:

1. Chavín

a. *Date:* 1200–200 B.C.

b. *Characteristics:*

i. *Decoration:* A gray-black color. Incised, modeled, and high and low-relief are combined to work out designs in grays and browns. The surface may also juxtapose polished and matte finish in different design zones.

ii. *Forms:* Bottles, plates, and bowls.

iii. *Size:* Generally 5 cm.–30 cm.

iv. *Identifying:* Characteristic traits of Cupisnique and Chavín ceramics are globular body with a flat base and stirrup spout; thick neck with an obvious and everted lip. Chavín style also includes long-necked bottles, bowls with flaring walls, and highly-polished relief-decorated surfaces.

v. *Styles:* Chavín influence is seen in Cupisnique, Chongoyape, Poemape, Tembladera, Patapo, and Chilete styles.

2. Vicuús

a. *Date:* 900 B.C.–A.D. 500

b. *Characteristics:*

i. *Decoration:* Geometric designs in white on red, made using negative technique. There are also monochrome examples.

ii. *Forms:* Anthropomorphic, zoomorphic, and plant-shaped vessels. Some have a double body linked by a tube or common opening.

iii. *Size:* Generally 30 cm.–40 cm. tall.

3. Virú or Gallinazo

a. *Characteristics:*

i. *Decoration:* Negative technique over orange background.

ii. *Forms:* Faced anthropomorphic and zoomorphic vessels, face bottles for daily use in dwellings, and "cancheros" (type of pot without a neck and with a horn-shaped handle).

iii. *Size:* Up to 15 cm. tall.

iv. *Identifying:* The surface is basically orange; the vessels have a truncated spout, an arched bridge (like a tube) as handle, and geometric symbols in negative technique (concentric circles, frets and wavy lines). When the vessels represent a face, the eyes are like "coffee beans," applied on the surface and with a transverse cut.

4. Pucara

a. *Date:* 300 B.C.–A.D. 300.

b. *Characteristics:*

i. *Decoration:* Slip-painted and incised. Modeled elements include stylized felines and camelids, along with an anthropomorphic image characteristically depicted with a staff in each hand. Vessels are typically decorated in yellow, black, and white on the red background of the vessel. Designs are characteristically outlined by incision. There may be modeled decoration, such as feline heads, attached to the vessels.

ii. *Shapes:* Tall bowls with annular ring bases predominate, along with vessels that depict anthropomorphic images.

iii. *Size:* Bowls are up to 20 cm. in diameter and 20 cm. in height.

5. Paracas

a. *Date:* Developed around 200 B.C.

b. *Characteristics:*

i. Vessels are typically incised, with post-fired resin painting on a black background.

ii. *Size:* 10 cm.–15 cm. tall.

6. Nazca

a. *Date:* A.D. 100–600.

b. *Characteristics:*

i. *Color:* Typically very colorful, with a range of slips including cream, black, red, violet, orange, gray, all in a range of tones.

ii. *Slip:* Background slip is generally cream or orange.

iii. *Shapes:* Cups, bowls, beakers, plates, double-spout-and-bridge bottles, anthropomorphic figures, and musical instruments.

iv. *Decoration:* Realistic drawings of fantastic creatures, including the "Flying God." In late Nazca, bottles are broader and flatter and the designs are arrayed in broad bands. Typically have decorations of trophy heads, geometric motifs, and painted female faces.

v. *Size:* Generally 5 cm.–20 cm.

7. Recuay

a. *Date:* A.D. 100–700.

b. *Characteristics:*

i. *Slip:* Both positive and negative slip-painting is found, generally in colors of black, cream and red.

ii. *Shapes:* Sculptural, especially ceremonial jars known as "Paccha", which have an elaborate outlet to serve a liquid.

iii. *Decoration:* Usually show groups of religious or mythical personages.

iv. *Size:* Generally 20 cm.–35 cm. in height.

8. Pashash

a. *Date:* A.D. 1–600.

b. *Characteristics:*

i. *Decoration:* Positive decoration in black, red, and orange on a creamy-white background. Some show negative painting.

ii. *Shapes:* Anthropomorphic vessels, bottles in the form of snakes, bowls with annular base, and large vessels with lids.

iii. *Size:* The anthropomorphic vessels are up to 20 cm. in height, serpent bottles are around 25 cm. wide x 10 cm. tall, and lidded vessels are more than 30 cm. in height.

iv. *Motifs:* The decorations are rendered in positive or negative painting in zones that depict profile-face images of zoomorphic figures, serpents, or worms, seen from above and with trapezoidal heads.

9. Cajamarca

a. *Date:* A.D. 500–900.

b. *Characteristics:*

i. *Decoration:* Pre-fired slip-painting with geometric designs such as stepped triangles, circles, lines, dots, and rows of volutes. They may include, but are not limited to, stylized birds, felines, camelids, batrachians, and serpents. Spiral figures may include a step-fret motif in the base of the bowls.

ii. *Shapes:* Pedestal base bowls, tripod bowls, bottles with annular ring base, goblets, spoons with modeled handles, and bowls with carinated edges.

10. Moche

a. *Date:* A.D. 200–700.

b. *Characteristics:*

i. *Forms:* Stirrup-spout vessels, vessels in the shape of humans, animals, or plants.

ii. *Colors:* Generally red and white.

iii. *Manufacture:* Often mold-made.

iv. *Size:* Generally 15 cm.–25 cm. in height.

v. *Decoration:* Wide range of images showing scenes of real life or mythical scenes depicting gods, warriors, and other images.

11. Tiahuanaco (Tiwanaku)

a. *Date:* A.D. 200–700.

b. *Characteristics:*

i. *Decoration:* Pre-fired slip-painting on a highly polished surface. Background is generally a red-orange, with depictions of human, animal, and geometric images; generally outlined in black and white lines.

ii. *Shapes:* Plates, cups, jars, beakers, open-backed incense burners on a flat base.

12. Lima

a. *Date:* A.D. 200–700.

b. *Characteristics:*

i. *Decoration:* Pre-fired slip-painting with interlocking fish and snake designs, and geometric motifs such as zig-zags, lines, circles, and dots.

ii. *Shapes:* Breast-shaped bottles, cups, plates, bowls, and cook pots.

iii. *Styles:* Related to Playa Grande, Nievera, and Pachacamac styles.

13. Huari (Wari)

a. *Date:* A.D. 500–1000.

b. *Characteristics:*

i. *Colors:* Orange, cream, violet, white, black, and red.

ii. *Motifs:* Anthropomorphic, zoomorphic, and plant shapes, both stylized and realistic. In Pachacamac style one finds vessels with a globular body and long, conical neck. In Atarco style, there is slip-painting that retains Nazca motifs, especially in the full-body felines shown running.

iii. *Slip:* Background slip is commonly cream, red, or black.

iv. *Styles:* Related to Vinaque, Atarco, Pachacamac, Qosqopa, Robles Moqo, Conchopata, and Caquipampa styles.

v. *Size:* Most are around 25 cm. tall. Robles Moqo urns may be up to 1 m. in height.

14. Santa

a. *Date:* Derived from Huari (Wari) style, around A.D. 800.

b. *Characteristics:*

i. *Decoration:* Slip-painted with figures and designs in black and white on a red background. There are also face-neck jars.

ii. *Shapes:* Effigy vessels, face-neck jars, double-body vessels.

iii. *Sizes:* Generally 12 cm.–20 cm. tall.

iv. *Shapes:* Jars have a globular body and face on the neck. The border may have black and white checkerboard. The body sometimes

takes the shape of a stylized llama head. Common are white lines dotted with black. Double-body vessels generally have an anthropomorphic image on the front vessel, and a plain back vessel.

15. Chancay

a. *Date:* A.D. 1000–1300.

b. *Characteristics:*

i. *Treatment:* Rubbed surface.

ii. *Slip:* White or cream with black or dark brown designs.

iii. *Molds:* Molds are commonly used, especially for the anthropomorphic figures called "cuchimilcos," which represent naked male and female figures with short arms stretched to the sides.

iv. *Size:* 3 cm.–1 m.

16. Ica-Chincha

a. *Date:* Began to be developed in A.D. 1200.

b. *Characteristics:*

i. *Decoration:* Polychrome painting in black and white on red.

ii. *Designs:* Geometric motifs combined with fish and birds.

iii. *Shapes:* Bottles with globular bodies and tall necks and with flaring rims. Cups and pots.

iv. *Size:* Generally 5 cm.–30 cm. high.

17. Chimú

a. *Date:* A.D. 900–1500.

b. *Characteristics:*

i. *Slip:* Monochrome. Usually black or red.

ii. *Shapes:* Varied shapes. Commonly made in molds. They may represent fish, birds, animals, fruit, people, and architectural forms. One sees globular bodies with a stirrup spout and a small bird or monkey at the base of the neck.

iii. *Size:* Between 30 cm.–40 cm. in height.

18. Lambayeque

a. *Date:* A.D. 700–1100.

b. *Characteristics:*

i. *Color:* Generally black; a few are cream with red decoration.

ii. *Shapes:* Double spout and bridge vessels on a pedestal base are common. At the base of the spout one sees modeled heads and the bridge also often has modeled heads.

iii. *Size:* 15 cm.–25 cm. in height.

19. Inca

a. *Date:* A.D. 1300–1500.

b. *Characteristics:*

i. *Decoration:* Slip-painted in black, red, white, yellow, and orange.

ii. *Designs:* Geometric designs (rhomboids and triangles) and stylized bees, butterflies, and animals.

iii. *Sizes:* 1 cm. to 1.5 m. in height.

20. Chiribaya

a. *Date:* A.D. 1000–1476.

b. *Characteristics:*

i. *Shapes:* Bowls, cups, beakers, urns, jars, bottles, and pitchers.

ii. *Decoration:* Polychrome geometric pattern motifs in red, white, cream, black, orange, and brown. White dots are common.

21. Chuquibamba

a. *Date:* A.D. 1000–1476.

b. *Characteristics:*

i. *Shapes:* Pumpkin-shaped bowls, cups, canteens, and ceramic slabs.

ii. *Decoration:* Dark red slip decorated with black lines and polychrome paint. Linear designs include, but are not limited to camelids, birds, eight-pointed stars, cross-hatched and angular designs, sometimes delimited with rectangles. Slabs are decorated with geometric designs and anthropomorphic and zoomorphic figures.

22. Teatino

a. *Date:* A.D. 600–1000.

b. *Characteristics:*

i. *Shapes:* Open and closed vessels including mammiform jugs, canteens, spherical jars, and tripod vessels.

ii. *Decoration:* Reddish brown paste decorated with engraving, incising, and punctation.

23. Pativilca

a. *Date:* A.D. 600–1000.

b. *Characteristics:*

i. *Shapes:* Jugs and bottles.

ii. *Decoration:* Orange monochrome mold-made pottery. Molds created stamped designs of monkeys, toads, birds, and anthropomorphic mythical creatures.

24. Huaura

a. *Date:* A.D. 600–1000

b. *Characteristics:*

i. *Shapes:* Cups, jars, and plates.

ii. *Decoration:* Red to orange paste decorated with polychrome geometric, anthropomorphic, and zoomorphic designs.

D. Pre-Columbian Lithics

Examples of pre-Columbian lithics include, but are not limited to, the following:

1. *Chipped Stone:* Projectile Points

a. Paiján Type Points

i. *Size:* Generally 8 cm.–18 cm.

ii. *Shape:* Triangular or heart-shaped.

iii. *Color:* Generally reddish, orange, or yellow. Can be made of quartz.

b. Leaf-Shaped Points.

i. *Size:* Generally 2.5 cm.–15 cm..

ii. *Shape:* Leaf-shaped. Can be ovaloid or lanceolate..

iii. *Color:* Generally bright reds, yellows, ochers, quartz crystals, milky whites, greens, and blacks.

c. Paracas Type Points

i. *Size:* 0.3 cm.–25 cm.

ii. *Shape:* Triangular and lanceolate. Show marks of pressure-flaking. Often they are broken.

iii. *Color:* Generally black.

d. Chivateros Type Blanks

i. *Size:* Generally 0.8 cm.–18 cm.

ii. *Shape:* Concave indentations on the surface from working.

iii. *Color:* Greens, reds, and yellows.

2. *Polished Stone*

a. Bowls—Vessels of dark colored-stone, sometimes streaked. They have a highly polished, very smooth surface. Some show external carved decoration. Diameters range from 12 cm–55 cm.

b. Cups—Vessels of dark-colored stone. Generally, have flaring sides. Typical of the Late Horizon. They are highly polished and may have external carved designs or may be in the shape of heads. 18 cm.–28 cm. in height.

c. Conopas—Small vessels in the form of camelids with a hollow opening on the back. They are black to greenish-black and highly polished. 0.8 cm.–16 cm. in length.

d. Idols—Small anthropomorphic figurines, frequently found in Middle Horizon contexts. The almond-shaped eyes with tear-bands are characteristic of the style. Larger examples tend to be of lighter-colored stone while the smaller ones are of dark stones. 12 cm.– 28 cm. in height.

e. Mace Heads—Varying shapes, most commonly are doughnut-shaped or star-shaped heads, generally associated with Late Intermediate Period and Inca cultures. Commonly black, gray, or white, 0.8 cm.–20 cm. in diameter.

f. Metalworking Hammers—Elongated shapes, frequently with one flat surface; highly polished. Generally, of dark-colored stone, 3 cm.–12 cm.

3. Carved Material

a. Tenon Heads—These heads have an anthropomorphic face, prominent lips, and enormous noses. Some, especially those carved of diorite, have snake-like traits. The carved surface is highly polished.

b. Tablets—With high-relief design. The upper surface has a patina. They range from 20 cm. to more than 1 m. in length.

E. Pre-Columbian Perishable Remains

Examples of pre-Columbian perishable remains include, but are not limited to, the following:

1. Wood

a. Keros (Beakers)—The most common form is a bell-shaped beaker with a flat base, though some have a pedestal like a goblet. Decoration varies with the period:

i. *Pre-Inca:* Very rare, they have straight sides and incised or high-relief decoration. Some have inset shells.

ii. *Inca:* Generally, they are incised with geometric designs on the entire exterior.

iii. *Colonial Inca:* Lacquer painted on the exterior to depict scenes of daily life, nature, and war.

b. Staffs—Objects of ritual or ceremonial use made of a single piece of wood. They can be distinguished on the basis of two or three of the following traits:

i. On the lower third, the staff may have a metal decoration.

ii. The body itself is cylindrical and of variable length.

iii. The upper third may have decorations such as inset shell, stone, or metal. Some staffs function as rattles and, in these cases, the rattle is in the upper part.

c. Carvings—Worked blocks of wood, such as wooden columns (or-cones) to support the roofs of houses: Prevalent in Chincha, Chimú, and Chancay cultures. Individuals may be depicted standing or seated on a pedestal. In the upper part there is a notch to support the beams, which generally has a face, sometimes painted, at the base of the notch. Their length varies, but they are generally at least a meter or more.

d. Boxes—Small lidded boxes, carved of two pieces of wood. Generally the outer surface of the box and lid are carved in relief. Prevalent in Chimú-Inca cultures. They measure approximately 20 cm. x 10 cm.

e. Mirrors—Wooden supports for a reflective surface of polished anthracite or pyrite. In some cases the upper part of backs of mirrors are worked in relief or have insets of shell. Prevalent in Moche culture.

f. Paddles and Rudders—Large carvings made of a single piece of wood. Paddles have three parts: the blade, the handle (sometimes

decorated), and an upper decorated part, which can have metal plaques or decorative painting. Rudders have two parts: the blade and the handle, which may be carved in relief. Prevalent in Chincha culture. Paddles can be 2.30 m. in length and rudders are up to 1.4 m.

g. Utensils—Bowls and spoons made of wood decorated with zoomorphic or anthropomorphic motifs.

h. Musical Instruments—Trumpets and whistles. Trumpets can be up to 1.2 m. long and are generally decorated on the upper third of the instrument. Whistles vary a great deal, from the undecorated to those decorated with human forms. Prevalent in Moche, Huari (Wari), and Inca cultures.

2. Bone

a. Worked Bone—Tools, ornaments, and other items made from bone. Examples include, but are not limited to weaving tools, spoons, ornaments, and Chavín pieces with incised decorations. The bones are generally the long bones of mammals. They vary from 10 cm.–25 cm. in length.

b. Balance Weights—Flat rectangles of bone about 10 cm. in length. Prevalent in Chincha culture.

c. Musical Instruments—Quenas (flutes) and antaras (panpipes) in various shapes. Prevalent in Paracas, Chincha, and Ancon cultures.

3. Gourds

a. Vessels—Bowls, pots, and holders for lime (for coca chewing). May have carved or pyro-engraved decoration. Produced from the Preceramic onward.

b. Musical Instruments—Ocarinas, small flutes, and whistles. Inca examples may have incised decoration or decoration with cords and feathers.

4. Canes

a. Musical Instruments—Flutes (especially in Chancay culture), panpipes, and whistles. Flutes are often pyro-engraved. Panpipes can have one or two tiers of pipes, which may be lashed together with colored thread. Prevalent in Nazca culture.

5. Straw Weaving Baskets—Basketry over a cane armature, in the shape of a lidded box. Sometimes the basketry is made of several colors of fiber to work out geometric designs. Some still hold their original contents: needles, spindle whorls, spindles, balls of thread, loose thread, etc. Prevalent in Chancay culture.

6. Shell

a. Musical Instruments—Instruments made from marine shells such as *Strombus galeatus, Malea ringens,* etc. Some, especially those from the Formative Period, with incised decoration.

b. Jewelry—Small beads and charms worked of shell, chiefly *Spondylus princeps,* used mainly in necklaces and pectorals. Prevalent in Moche, Chimú, and Inca cultures.

7. False Shrunken Heads—False shrunken heads can be recognized because they are made of the skin of a mammal, with some of the fur left where the human hair would be. The skin is first smoked, then pressed into a mold to give it a face-like shape. The eyes, nose, mouth and ears are simple bumps without real holes. Further, the skin is very thin and yellowish in color. Often the "heads" have eyebrows and mustaches formed by leaving some of the animal hair, but these features are grotesque because they appear to grow upside down.

F. Pre-Columbian Human Remains

Examples of pre-Columbian human remains include, but are not limited to, the following:

1. Mummies—Peruvian mummies were formed by natural mummification due to the conditions of burial; they have generally not been eviscerated. Usually found in a flexed position, with extremities tied together, resulting in a fetal position. In many cases, the cords used to tie the body in this position are preserved.

2. Modified Skulls—Many ancient Peruvian cultures practiced cranial modification. Such skulls are easily recognized by their unnatural shapes.

3. Skulls Displaying Trepanation—Trepanation is an operation performed on a skull; the resulting cuts, easily visible on a bare skull, take various forms. Cuts may be less easily distinguished if skin and hair are present:

a. Principal Techniques.

i. *Straight cuts:* these cuts are pointed at the ends and wider in the center. Openings made this way have a polygonal shape.

ii. *Cylindrical-conical openings:* the openings form a discontinuous line. The resulting opening has a serrated edge.

iii. *Circular:* generally made by a file. The resulting hole is round or elliptical, with beveled or straight edges. This is the most common form of trepanation.

4. Pre-Columbian Trophy Heads—Trophy heads can be identified by the hole made in the forehead to accommodate a carrying cord. When the skin is intact, the eyes and the mouth are held shut with cactus thorns. Finally, the occiput is missing since that is how the brain was removed when the trophy head was prepared.

5. Shrunken Trophy Heads from the Amazon—These heads have had the bones removed and then have been cured to shrink them. They are recognizable because they conserve all the traits of the

original skin, including hair and hair follicles. The mouth is sewn shut and generally there are carrying cords attached. There may be an obvious seam to repair the cuts made when the skin was removed from the skull. Finally, the skin is thick (up to 2.5 mm.) and has a dark color. Trophy heads vary between 9.5 cm. and 15.5 cm. in height.

6. Tattoos—Tattooing in pre-Columbian Peru was practiced mainly on the wrists. Most common are geometric designs, including bands of triangles and rhomboids of a bluish color.

II. Ethnological Material

A. Objects Directly Related to the Pre-Columbian Past

1. Colonial Indigenous Textiles

a. *Predominant materials:* Cotton and wool.

b. *Description:* These textiles are characterized by the cut of the cloth, with the four borders or selvages finished on the same loom. Clothes are untailored and made from smaller pieces of convenient sizes that were then sewn together. Colonial indigenous textiles of the period are differentiated from pre-Columbian textiles primarily by their decoration: western motifs such as lions, heraldic emblems, and Spanish personages are incorporated into the designs; sometimes fibers distinct from cotton or wool (threads of silver, gold, and silk) are woven into the cloth; and the colors tend to be more vivid because the fabrics were made more recently. Another important characteristic of the clothing is the presence of tocapus or horizontal bands of small squares with anthropomorphic, zoomorphic, phytomorphic, and geometric ideographs and designs. Characteristic textiles include, but are not limited to, the following:

i. Panels—Rectangular or square pieces of various sizes.

ii. Anacus—Untailored woman's dress consisting of two or three long horizontal pieces of cloth sewn together that was wound around the body and held in place with "tupus" (pins).

iii. Unkus/Tunics—Men's shirt with an opening for the head. Sometimes has sleeves.

iv. Lliclla s/Shoulder Mantles—Rectangular piece of cloth that women put over their shoulders and held in place by a tupu; standard size: 1 m. x 1.15 m. Generally has a tripartite design based on contrasting panels that alternate bands with decoration and bands with solid colors.

v. Chumpis/Belts—A woven belt, generally using tapestry technique.

2. Tupus

a. *Material:* Silver, gilded silver, copper, bronze. May have inlays of precious or semi-precious stones.

b. *Description:* Tupus were used to hold in place llicllas and anacus. They are pins with a round or elliptical head, with piercing, repoussé, and incised decorations. The difference between pre-Columbian and ethnological tupus can be seen in the introduction of Western designs, for example bi-frontal eagles and heraldic motifs.

3. Keros

a. *Material:* Wood.

b. *Description:* The most common form is a beaker-like cup with truncated base. After the Conquest, keros started to be decorated with pictorial scenes. The most frequently used techniques include incision, inlaying pigments in wood, and painting. Motifs include, but are not limited to, geometric designs, figures under a rainbow (an Inca symbol), ceremonial rituals, scenes of war, and agricultural scenes. Sometimes are in the form of human or zoomorphic heads.

4. Cochas or Cocchas

a. *Material:* Ceramic.

b. Description: Ceremonial vessels with two or more concentric interior compartments that are linked. Often decorated with volutes representing reptiles.

5. Aribalos

a. *Material:* Ceramic.

b. *Description:* The post-Conquest aribalos have a flat base, often using a glaze for finishing, and the decoration includes Inca and Hispanic motifs.

6. Pacchas

a. *Material:* Stone, ceramic.

b. *Description:* One of the characteristics of pacchas is that they have a drain, which is used to sprinkle an offering on the ground. They have pictorial or sculpted relief decorations symbolizing the benefits hoped for from the ritual.

B. Ecclesiastical Objects

In Colonial paintings and sculptures, European religious themes were reinterpreted by indigenous and mestizo artists who added their own images and other characteristics to create a distinct iconography.

Examples of ecclesiastical objects include, but are not limited to, the following:

1. Sculpture

Types of sculptures include, but are not limited to, the following:

a. Three-Dimensional Sculpted Images—In the Peruvian Colonial period, these were made of maguey (a soft wood) and occasionally of cedar or walnut.

b. Images Made of a Dough Composed of Sawdust, Glue, and Plaster—After they were sculpted, figures were dressed with cloth dipped in plaster.

c. Images to be Dressed—These are wooden frames resembling mannequins, with only the head and arms sculpted in wood (cedar or maguey). The images were dressed with embroidered clothes and jewelry. Frequently other elements were added, such as teeth and false eyelashes, wigs of real hair, eyes of colored glass, and palates made of glass.

2. Paintings—Catholic priests provided indigenous and mestizo artists with canvases and reproductions of European works of art, which the artists then "interpreted" with their own images and other indigenous characteristics. These may include symbolically associating Christian religious figures with indigenous divinities or rendering the figures with Andean facial characteristics or in traditional Andean costume. In addition, each church, convent, monastery, and town venerated an effigy of its patron or tutelar saint, some of them native to Peru.

3. Furniture

a. Altarpieces or Retablos—Architectonic structures made of stone, wood, or other material that are placed behind the altar and include attached paintings, sculptures, or other religious objects.

b. Reliquaries and Coffins—Containers made from wood, glass, or metal hold and exhibit sacred objects or human remains.

c. Church Furnishings—Furnishings used for liturgical rites include, but are not limited to pulpits, tabernacles, lecterns, confessionals, pews, choir stalls, chancels, baldachins, and palanquins.

4. Liturgical Objects

a. Objects Used for the Mass—Chalices, cibaries, candelabras, vials for christening or consecrated oil, reliquaries, vessels for wine and water (cruets), incense burners (censers), patens, monstrances, pelican sculptures, and crucifixes. Made out of silver, gold or gilded silver, often inlaid with pearls or precious stones. Techniques: casting, engraving, piercing, repoussé, filigree.

b. Fixtures for Sculpted Images—Areoles, crowns, scepters, halos, halos in the form of rays, and books carried by religious scholars and founders of religious orders.

c. Ecclesiastical Vestments—Some ecclesiastical vestments were commissioned by indigenous individuals or communities for the celebrations of their patron saint and thus are part of the religious legacy of a particular town. In such cases, the vestment may have the name of the donor, town, and/or church as well as the date.

d. Votive Offerings—These are representations of miracles or favors received from a particular saint. They can be made of different materials, usually metal or wood, and come in a variety of forms according to the type of favor received, usually representing parts of the human body in reference to the organ healed or agricultural products in recognition of a good harvest or increase in a herd.

C. Colonial Manuscripts, Documents, and Prints

1. Manuscripts and Documents—Original handwritten texts of limited circulation dating to the Colonial period (A.D. 1532–1821) made primarily on paper, parchment, and vellum. These include, but are not limited to, notary documents (*e.g.,* wills, bill of sales, contracts), ecclesiastical materials, and documents of the city councils, Governorate of New Castile, the Governorate of New Toledo, the Vice Royalty of Peru, the Real Audiencia and Chancery of Lima, or the Council of the Indies. These can include single folios, collections of related documents bound with string, and music scores. Documents may contain a seal or ink stamp denoting a public or ecclesiastical institution. Because many of these documents are of an institutional or official nature, they may have multiple signatures, denoting scribes, witnesses, and/or other authorities. Documents are generally written in Spanish but may be composed in an indigenous language such as Quechua or Aymara.

2. Printed Texts and Images—Printed books, pamphlets, maps, and sheets of limited circulation made in small workshops during the Colonial period (A.D. 1532—1821). Prints were primarily produced using xylography (woodcuts) and chalcography (metal plates) on paper. Topics include, but are not limited to, government laws and ordinances, religious texts (sermons, manuals, prayer books, devotional sheets, etc.), grammar, and dictionaries. Common images include, but are not limited to, religious imagery, allegorical imagery, portraits, coats of arms, celebrations, funerals, tombs, architecture, and ornamental elements such as flowers, columns, volutes, and urns. Texts are generally written in Spanish but may be composed in an indigenous language such as Quechua or Aymara.

3. Printing Stamps and Plates—Stamps and plates include fonts, text, and images produced primarily using xylography (woodcuts) and chalcography (metal plates).

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public proce-

dure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, and Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Peru to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) ***

State party	Cultural property	Decision No.
* * * * * * *		
Peru	Archaeological material of Peru ranging from approximately 12000 B.C. to A.D. 1532, and ethnological material of Peru ranging from approximately A.D. 1532 to 1821.	CBP Dec. 23–10
* * * * * * *		

* * * * *

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

Approved:

THOMAS C. WEST, JR.,
Deputy Assistant
Secretary of the Treasury for Tax Policy.

[Published in the Federal Register, September 13, 2023 (88 FR 62696)]

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ALUMINUM FOIL LIDDING STOCK

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

ACTION: Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of aluminum foil lidding stock.

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 modifying one ruling letter concerning tariff classification of aluminum foil lidding stock under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 57, No. 28, on July 19, 2023. No comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 26, 2023.

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), a notice was published in the *Customs Bulletin*, Vol. 57, No. 28, on July 19, 2023, proposing to modify one ruling letter pertaining to the tariff classification of aluminum foil lidding stock. 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 NY N316780, CBP classified aluminum foil lidding stock in heading 7607, HTSUS, specifically in subheading 7607.11.60, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Not backed: Rolled but not further worked: Of a thickness not exceeding 0.15 mm: Of a thickness exceeding 0.01 mm." CBP has reviewed NY N316780 and has determined the ruling letter to be in error. It is now CBP's position that the aluminum foil lidding stock is properly classified in heading 7607, HTSUS, specifically in subheading 7607.20.50, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N316780 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H318471, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H318471
August 30, 2023
OT:RR:CTF:CPMMA H318471 AJK
CATEGORY: Classification
TARIFF NO: 7607.20.50

MR. RANDY RUCKER
FAEGRE DRINKER BIDDLE & REATH LLP
191 N. WACKER DRIVE, SUITE 3700
CHICAGO, IL 60606

RE: Modification of NY N316780; Classification of Aluminum Foil Lidding Stock

DEAR MR. RUCKER:

This letter is in response to your correspondence, dated May 4, 2021, on behalf of Winpak Heat Seal Corporation (Winpak), in which you request reconsideration of New York Ruling Letter (NY) N316780, issued on February 4, 2021, concerning the classification of aluminum foil lidding stock under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N316780, U.S. Customs and Border Protection (CBP) classified the aluminum foil lidding stock in subheading 7607.11.6090, HTSUSA (Annotated), as aluminum foil that is not backed and is rolled but not further worked. In your reconsideration request, however, you assert that the merchandise is properly classified in subheading 7607.20.5000, HTSUSA, as backed aluminum foil, and you corrected the information regarding the manufacturing process of the subject merchandise. We have reviewed NY N316780, together with the information in your request for reconsideration, and found the ruling letter to be incorrect only with respect to the classification of the subject merchandise.

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 of the proposed action was published in the Customs Bulletin, Vol. 57, No. 28, on July 19, 2023. No comment was received in response to this notice.

FACTS:

The subject merchandise was described in NY N316780 as follows:

> The product under consideration is heat-sealable lidding stock that is made using an aluminum foil base upon which other materials are added. You have described the product as a three-layered lidding stock. The inner side of the aluminum, the surface that will be in contact with food, is coated with a polymeric layer that provides sealability to a rigid container. The outer layer is coated with a thinner polymeric layer that protects the foil from corrosion and provides adherence for printed inks.
>
> According to your submission, the foil base is imported into Canada in various thicknesses of less than 0.2 mm. You have stated that the foil will be sourced from various countries, but for the purposes of this ruling, you have requested that we consider foil that originates specifically in Luxembourg. The remaining materials are imported into Canada from Norway, Mexico, and the United States (U.S.) and are used to produce both

> the outer layer and the inner layer of the final product. In Canada, the bare foil is unwound and, in a continuous process line, the foil goes through a coating station where a liquid coating is applied to the outer side of the foil. The semi-finished heat-sealable lidding stock is then subjected to a hot air drying system which removes any residual solvent or water and dries the coating. You state the inner layer is made from a solid material which is melted and then applied to the middle (foil) layer in a molten form. The resultant product is then imported into the U.S. where it is shipped to the lid producer for production of heat-sealable lids from this heat-sealable lidding stock.

On January 27, 2021, Winpak's former counsel participated in a call with CBP's National Commodity Specialist Division (NCSD) and explained that the inner layer was applied to the foil in a molten form. In your reconsideration request, however, you describe the co-extrusion process of the inner layer as follows:

> Unlike the outer layer (further discussed below), the inner layer is applied to the aluminum foil base as a solid form *(i.e.*, a solid plastic film) by a co-extrusion process. During this process, plastic resin is subjected to heat and pressure inside the barrel/cylinder of an extruder to become molten and then forced by the extruder screw through the narrow slit of the extrusion die. The slit in the exclusion die is straight, so the molten resin emerges from the extruder as a solid film prior to application onto the aluminum foil. The adhesive that is co-extruded with the inner layer film is also solid (consisting of an ethylene acrylic acid copolymer).

Due to this conflicting information about the co-extrusion process, CBP requested additional information from Winpak on April 4, 2022. On May 27, 2022, you submitted additional evidence to support your claim that the inner layer is applied in solid, not molten, form.

ISSUE:

Whether the aluminum foil lidding stock is classified in subheading 7607.11.60, HTSUS, as "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Not backed: Rolled but not further worked: Of a thickness not exceeding 0.15 mm: Of a thickness exceeding 0.01 mm"; or subheading 7607.20.50, HTSUS, as "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: Other."

LAW AND ANALYSIS:

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

* * * * * *

The HTSUS provisions at issue are as follows:

7607	Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm:
	Not backed:
7607.11	Rolled but not further worked:
	Of a thickness not exceeding 0.15 mm:
7607.11.60	Of a thickness exceeding 0.01 mm
7607.20	Backed:
7607.20.50	Other

Note 9(d) to section XV, which includes chapter 76, HTSUS, provides as follows:

> 9. For the purposes of chapters 74 to 76 and 78 to 81, the following expressions have the meanings hereby assigned to them:
>
> * * * * *
>
> (d) *Plates, sheets, strip and foil*
>
> Flat-surfaced products (other than the unwrought products), coiled or not, of solid rectangular (other than square) cross section with or without rounded corners (including "modified rectangles" of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel) of a uniform thickness, which are:
>
> -of rectangular (including square) shape with a thickness not exceeding one-tenth of the width;
>
> ...
>
> Headings for plates, sheets, strip, and foil apply, *inter alia*, to plates, sheets, strip, and foil with patterns (for example, grooves, ribs, checkers, tears, buttons, lozenges) and to such products which have been perforated, corrugated, polished or coated, provided that they do not thereby assume the character of articles or products of other headings.
>
> * * * * *

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).

The General ENs to chapter 72 provides, in pertinent part:

(C) Subsequent manufacture and finishing

> The finished products may be subjected to further finishing treatments or converted into other articles by a series of operations such as:
>
> ...
>
> (2) **Surface treatments** or other operations, including cladding, to improve the properties or appearance of the metal, protect it against rusting and corrosion, etc. Except as otherwise provided in the text of

certain headings, such treatments do not affect the heading in which the goods are classified. They include:

...

(d) Surface finishing treatment, including;

...

(v) coating with non-metallic substances, e.g., enamelling, varnishing, lacquering, painting, surface printing, coating with ceramics or plastics, including special processes such as glow discharge, electrophoresis, electrostatic projection and immersion in an electrostatic fluidised bath followed by radiation firing, etc.

The General ENs to chapter 76 provides, in pertinent part:

Products and articles of aluminium are frequently subjected to various treatments to improve the properties or appearance of the metal, to protect it from corrosion, etc. These treatments are generally those referred to at the end of the General Explanatory Note to Chapter 72, and do not affect the classification of the goods.

EN 76.07 provides, in pertinent part:

This heading covers the products defined in Note 9(d) to Section XV, when of a thickness not exceeding 0.2 mm.

The provisions of the Explanatory Note to heading 74.10 relating to copper foil apply, *mutatis mutandis*, to this heading.

EN 74.10, HTSUS, provides, in pertinent part, as follows:

Other foil, such as that used for making fancy goods, is often backed with paper, paperboard, plastics or similar backing materials, either for convenience of handling or transport, or in order to facilitate subsequent treatment, etc.

* * * * *

There is no dispute that the subject aluminum foil lidding stocks—which contain layers of polymer—are properly classified in heading 7607, HTSUS, which is an *eo nominee* provision that provides for aluminum foil of a thickness not exceeding 0.2 mm. *See* ENs to chapter 76; ENs to chapter 72; EN 76.07; Note 9(d) to section XV; EN 74.10. Accordingly, the classification analysis herein is applicable only at the 8-digit subheading level.

In NY N316780, CBP classified the subject aluminum foil lidding stock in subheading 7607.11.60, HTSUS, as not backed, rolled but not further worked aluminum foil. We disagree. We find that this incorrect classification, however, resulted in part due to Winpak's submission of erroneous information regarding the manufacturing process of the merchandise. First, Winpak's former counsel incorrectly stated that the outer layer of the merchandise is coated with a polymeric layer and that the inner layer of polymer is also applied to the foil in a molten form. Based on this information, CBP concluded in NY N316780 that both sides of the foil are coated and thus, do not constitute "backing" for classification purposes. Second, CBP held that the subject merchandise was an aluminum foil that was "not further worked." This finding, however, is inconsistent with past CBP practice and case law from the Court of International Trade (CIT). In accordance with the CIT's

finding in *Winter-Wolff, Inc. v. United States*, 22 CIT 70, 78 (1998), CBP held in HQ 965999, dated December 19, 2002, that coatings on aluminum foil constitute "further working." *See also*, HQ 966004, dated Dec. 19, 2002; HQ 965976, dated Dec. 19, 2002. Accordingly, the classification of the subject aluminum foil lidding stock under subheading 7607.11.6090, HTSUSA, as aluminum foil that is not backed and is rolled but not further worked, was incorrect.

In your reconsideration request, you contend that that the subject merchandise is properly classified in subheading 7607.20.50, HTSUS, because the plastic film, which forms the inner side of the aluminum foil, is applied to the foil in a solid—not solvent—form. You also state that the plastic film strengthens and supports the aluminum foil by limiting the tearability and facilitating further processing of the merchandise. Upon our review of the new information provided, we agree. Neither the HTSUS nor the ENs define the terms "backed" and "backing." In *Amcor Flexibles Singen GMBH v. United States*, however, the CIT held that "in the context of Heading 7607, 'backed' is most appropriately construed to mean 'supporting.'" 425 F. Supp. 3d 1287, 1298 (Ct. Int'l Trade 2020). As evidenced by the functions and purpose of the inner layer of plastic film, we find that the solid plastic film provides sufficient support to the aluminum foil and thus, constitutes "backing" for classification purposes. By application of GRI 6, therefore, the subject aluminum foil lidding stocks are classified under subheading 7607.20.50, HTSUS, as backed aluminum foil.

HOLDING:

In accordance with the above analysis and by application of GRI 1, the aluminum foil lidding stock is classified in heading 7607, HTSUS, and, by application of GRI 6, is specifically classified in subheading 7607.20.50, HTSUS, which provides for "Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: Other." The 2023 column one, general rate of duty is free.

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

EFFECT ON OTHER RULINGS:

NY N316780, dated February 4, 2021, is hereby modified in part with respect to the classification of aluminum foil lidding stock only.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A PAPERBOARD COSMETIC CONTAINER WITH SLEEVE FROM CHINA

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

ACTION: Notice of modification of one ruling letter and revocation of treatment relating to the tariff classification of a paperboard cosmetic container with sleeve from China.

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 modifying one ruling letter concerning tariff classification of a paperboard cosmetic container with sleeve from China under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin, Vol. 57, No. 28, on July 19, 2023. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 26, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Nicholas A. Horne, Chemicals, Petroleum, Metals and Miscellaneous Articles Branch, Regulations and Rulings, Office of Trade, at (202) 325–7941.

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 modify one ruling letter pertaining to the tariff classification of a paperboard cosmetic container with sleeve from China. 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) N302628, dated April 21, 2016, CBP classified a paperboard cosmetic container with sleeve from China in heading 4823, HTSUS, specifically in subheading 4823.90.6700, HTSUSA (Annotated), which provides for "[o]ther paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other." CBP has reviewed NY N302628 and has determined the ruling letter to be partially in error. It is now CBP's position that a paperboard cosmetic container with sleeve from China is properly classified in heading 4819, HTSUS, specifically in subheading 4819.50.4040, HTSUSA, which provides for "[c]artons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N302628 and revoking any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (HQ) HQ H315829, set forth as attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H315829
September 8, 2023
OT:RR:CTF:CPMMA H315829 NAH
CATEGORY: Classification
TARIFF NO: 4819.50.4040

MR. SAMUEL FOCARINO
COMET CUSTOMS BROKERS, INC.
587 W. MERRICK RD.
VALLEY STREAM, NY 11580

RE: Modification of NY N302628; tariff classification of a paperboard cosmetic container with sleeve from China

DEAR MR. FOCARINO:

This letter is in reference to New York Ruling Letter (NY) N302628, dated and issued to you on March 18, 2019, concerning the country of origin marking and tariff classification of a paperboard cosmetic container with sleeve from China. In NY N302628, U.S. Customs and Border Protection (CBP) classified the subject merchandise in subheading 4823.90.6700, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other." We have reviewed NY N302628 and determined that the ruling is partially in error with respect to the tariff classification of the subject merchandise. Accordingly, for the reasons set forth below, CBP is modifying NY N302628.

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 of the proposed action was published in the Customs Bulletin, Vol. 57, No. 28, on July 19, 2023. No comment was received in response to this notice.

FACTS:

The subject merchandise was described in NY N302628 as follows:

> The product under consideration is a printed paperboard container that will be filled with a pan of cosmetic powder blush after importation into the United States. The container, constructed of coated paperboard, folds closed like a book, and includes a mirror on one interior side and a depression to hold the blush pan on the other. The container, when closed, slips into a four-sided paperboard sleeve that holds the container in the closed position. . . . The container is manufactured in China.

ISSUE:

Whether a paperboard cosmetic container with sleeve from China is classified under subheading 4823.90.6700, HTSUSA, as "Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers: Other: Other: Other: Of coated paper or paperboard: Other" or under subheading 4819.50.4040, HTSUSA, as "Cartons, boxes, cases, bags

and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons."

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 the goods cannot be classified solely based on 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.

GRI 6 provides that for legal purposes, classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable.

* * * * *

The 2023 HTSUS subheadings under consideration are the following:

4819	Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like:
4819.50	Other packing containers, including record sleeves:
4819.50.40	Other:
	Other:
4819.50.4040	Rigid boxes and cartons.
	* * *
4823	Other paper, paperboard, cellulose wadding and webs of cellulose fibers, cut to size or shape; other articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers:
4823.90	Other:
	Other:
	Other:
	Of coated paper or paperboard:
4823.90.6700	Other.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 48.19 states, in pertinent part, as follows:

> This group covers containers of various kinds and sizes generally used for the packing, transport, storage or sale of merchandise, whether or not also having a decorative value. . .
>
> ***

The heading includes folding cartons, boxes and cases. These are:

- cartons, boxes and cases in the flat in one piece, for assembly by folding and slotting (e.g., cake boxes); and
- containers assembled or intended to be assembled by means of glue, staples, etc., on one side only, the construction of the container itself providing the means of forming the other sides, although, where appropriate, additional means of fastening, such as adhesive tape or staples may be used to secure the bottom or lid.

***

The articles of this heading may also have reinforcements or accessories of materials other than paper (e.g., textile backings, wooden supports, string handles, corners of metal or plastics).

EN 48.23 states, in pertinent part, as follows:

This heading includes :

(A) Paper and paperboard, cellulose wadding and webs of cellulose fibers, not covered by any of the previous headings of this Chapter:

***

(B) Articles of paper pulp, paper, paperboard, cellulose wadding or webs of cellulose fibers, not covered by any of the previous headings of this Chapter nor excluded by Note 2 to this Chapter.

Thus the heading includes:

(1) Filter paper and paperboard (folded or not). Generally, these are in shapes other than rectangular (including square), such as circular filter papers and boards.

(2) Printed dials, other than in rectangular (including square) form, for self-recording apparatus.

(3) Paper and paperboard, of a kind used for writing, printing or other graphic purposes, not covered in the earlier headings of this Chapter, cut to shape other than rectangular (including square).

* * * * *

Turning to the subject merchandise, the paperboard cosmetic container with sleeve from China is meant to be filled with a pan of cosmetic powder after importation, to be sold to end users from a retail seller. The ENs to heading 48.19 explain that the subheading is meant to cover containers such as boxes, cartons, or cases "generally used for the packing, transport, storage or sale of merchandise, whether or not also having a decorative value." Additionally, the ENs to heading 48.23 explain that the subheading is only meant for paper and paperboard products that do not fit into other subheadings. The subject merchandise is made of paperboard, but it is also a container meant for packing, transport, storage, and sale of cosmetics. Accordingly, CBP wrongly classified the subject merchandise in heading 4823, HTSUS.

Moreover, CBP has consistently classified similar merchandise in subheading 4819.50.40, HTSUS. *See e.g.* NY N105303, dated June 2, 2010 (classifying an empty cosmetic compact made of paperboard with a mirror on the flap in

subheading 4819.50.40, HTSUS); NY N003219, dated December 6, 2006 (classifying an empty cosmetic compact made of paperboard with a hinged lid, magnetic closure, and covered with a film laminated colored paper in subheading 4819.50.40, HTSUS); NY G86039, dated January 5, 2001 (classifying an empty paperboard cosmetic gift box with a hinged lid and mirror on the underside of the lid in subheading 4819.50.40, HTSUS). As such, the subject paperboard cosmetic container with sleeve from China in NY N302628 is properly classified in subheading 4819.50.40, HTSUSA, as "Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons."

HOLDING:

By application of GRIs 1 and 6, the paperboard cosmetic container with sleeve from China is classified in heading 4819, HTSUS, and specifically in subheading 4819.50.4040, HTSUSA, which provides for "Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibers; box files, letter trays and similar articles, of paper or paperboard of a kind used in offices, shops or the like: Other packing containers, including record sleeves: Other: Other: Rigid boxes and cartons." The 2023 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 at https://hts.usitc.gov/.

EFFECT ON OTHER RULINGS:

NY N302628, dated March 18, 2019, is hereby modified.

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

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

GRANT OF "LEVER-RULE" PROTECTION

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

ACTION: Notice of grant of "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "*Lever*-Rule" protection to Intel Corporation for foreign made engineering samples of electronics parts bearing the federally registered and recorded "SQUARE SPARK LOGO DESIGN" trademark and the "INTEL" word mark. Notice of the receipt of an application for "*Lever*-Rule" protection was published in the Vol. 57, No. 32 issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Zachary Keegan, Intellectual Property Enforcement Branch, Regulations & Rulings, Zachary.Keegan@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "*Lever*-Rule" protection for imported engineering samples of electronics parts intended for sale in the United States, bearing the "SQUARE SPARK LOGO DESIGN" trademark (CBP Rec. No. 23–01547) and the "INTEL" word mark (CBP Rec. No. 23–01551), owned by Intel Corporation, which also bear the designation "Engineering Sample," "Intel Confidential," or a product code commencing with the letter "Q."

In accordance with the holding of *Lever Bros. Co. v. United States*, 951 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the gray market engineering samples differ physically and materially from their correlating products authorized for commercial sale in the United States with respect to the following product characteristics: circuitry, functionality, regulatory requirements, and warranty.

ENFORCEMENT

Importation of the above-referenced engineering samples, not intended for commercial sale in the United States is restricted, *unless* the labeling requirements of 19 CFR § 133.23(b) are satisfied.

Dated: September 12, 2023

ALAINA VAN HORN
Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of
International Trade

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 08 2023)

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

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in August 2023. A total of 175 recordation applications were approved, consisting of 4 copyrights and 171 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229–1177, or via email at *iprrquestions@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Zachary Ewing, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325–0295.

ELIZABETH JENIOR
Acting Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 23–00128	8/4/2023	8/4/2043	The Legend of Zelda: Tears of the Kingdom Art Book	Nintendo of America Inc., Transfer: By written agreement.	No
COP 23–00129	8/4/2023	8/4/2043	Kirby's Return to Dream Land Deluxe Artwork	HAL Laboratory, Inc., Transfer: By written agreement. Address: KANDA SQUARE 2–2-1, Kandanishiki-Cho, Chiyoda-Ku, Tokyo, 101–0054, Japan.	No
COP 23–00130	8/16/2023	8/16/2043	PD EMBOSSED EMBLEM.	Olem Shoe Corp	No
COP 23–00131	8/31/2023	8/31/2043	WEDNESDAY STYLE GUIDE 2022.	MGM TELEVISION ENTERTAINMENT INC.	No
TMK 04–00585	8/3/2023	5/22/2033	TIFFANY & CO.	TIFFANY (NJ) LLC.	No
TMK 04–00684	8/3/2023	5/22/2033	TIFFANY	TIFFANY (NJ) LLC.	No
TMK 04–00718	8/29/2023	8/6/2033	FIERCE	Abercrombie & Fitch Trading Co..	No
TMK 04–00912	8/23/2023	9/22/2033	KINDERGUARD (STYLIZED)	SECURE CARE PRODUCTS, INC.	No
TMK 05–00117	8/15/2023	5/1/2033	VINCE LOMBARDI TROPHYONS & DESIGN	NFL PROPERTIES LLC	No
TMK 05–00439	8/25/2023	11/23/2033	M & DESIGN	THE BASEBALL CLUB OF SEATTLE LP	No
TMK 07–00210	8/16/2023	3/1/2033	AQUAPHOR	Beiersdorf Aktiengesellschaft	No
TMK 08–00172	8/7/2023	8/13/2033	DESIGN OF APPLE	Apple Inc.	No
TMK 08–00603	8/2/2023	6/4/2033	VCA and Design	Van Cleef & Arpels SA	No
TMK 08–00739	8/1/2023	10/29/2033	Green Handle Design	Miller Manufacturing Company	No
TMK 11–01047	8/17/2023	10/22/2033	TOP	Top Tobacco L.P.	No
TMK 11–01241	8/17/2023	10/22/2033	Top & Design	Top Tobacco L.P.	No
TMK 12–00468	8/2/2023	8/27/2033	JOHNSON'S (Stylized)	KENVUE INC.	No
TMK 13–00286	8/7/2023	5/8/2033	DUREX	LRC PRODUCTS LIMITED	No
TMK 13–00353	8/17/2023	4/29/2033	DESIGN OF PATRIOT	New England Patriots LLC	No
TMK 13–00873	8/25/2023	11/13/2033	RW & DESIGN	Rockwood Products, Inc.	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 14–00186	8/15/2023	8/14/2033	IGUY	SPECULATIVE PRODUCT DESIGN, LLC	No
TMK 15–00046	8/7/2023	8/6/2033	MAGNUM	SMITH & WESSON CORP.	No
TMK 15–00068	8/31/2023	11/13/2033	DESIGN OF GUN LIGHT	Streamlight, Inc.	No
TMK 15–00775	8/3/2023	8/24/2033	VISLON	YKK CORPORATION	No
TMK 15–00826	8/4/2023	8/7/2033	TRUSTED TROJAN QUALITY and Seal Design	CHURCH & DWIGHT CO., INC.	No
TMK 15–00912	8/9/2023	8/28/2033	ARIA	Fitbit, Inc.	No
TMK 15–00913	8/9/2023	8/28/2033	FITBIT	Fitbit, Inc.	No
TMK 17–00688	8/15/2023	9/4/2033	PETZL	Big Bang	No
TMK 18–00536	8/24/2023	8/28/2033	CHROME OASIS	Performance Fabrics, Inc.	No
TMK 18–00556	8/16/2023	8/27/2023	ENFAMIL	MEAD JOHNSON & COMPANY, LLC	No
TMK 18–00584	8/24/2023	8/28/2033	RIG LIZARD ARCTIC	Performance Fabrics, Inc.	No
TMK 19–00017	8/7/2023	8/25/2033	CELINE	Celine	No
TMK 19–00771	8/15/2023	11/13/2033	FLOWFORM	Phoenix Wheel Co., Inc.	No
TMK 19–01157	8/1/2023	9/17/2033	Shirt Pocket Tab Design	LEVI STRAUSS & CO.	No
TMK 20–00080	8/24/2023	9/24/2033	PlayStation (STYLIZED)	SONY INTERACTIVE ENTERTAINMENT INC.	No
TMK 20–00543	8/22/2023	8/21/2033	HEMP LOVE	HEMP LOVE, LLC	No
TMK 20–00687	8/25/2023	8/28/2033	EYLURE	Original Additions (Beauty Products) Ltd	No
TMK 20–01149	8/8/2023	11/6/2033	PITTSBURGH (STYLIZED)	Pittsburgh Associates	No
TMK 20–01210	8/15/2023	11/13/2033	CINCINNATI (Stylized)	The Cincinnati Reds LLC	No
TMK 20–01211	8/15/2023	11/13/2033	CINCINNATI (Stylized)	The Cincinnati Reds LLC	No
TMK 21–00049	8/29/2023	11/27/2033	O'S & Design	Baltimore Orioles Limited Partnership	No
TMK 21–00053	8/21/2023	8/21/2033	STABLELOAD	Tork Lift Central Welding of Kent, Inc.	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21–00719	8/16/2023	8/21/2023	Q SGS US (STYLIZED)	SGS NORTH AMERICA, INC.	No
TMK 21–00726	8/24/2023	9/11/2033	C Q SGS US (Stylized)	SGS NORTH AMERICA, INC.	No
TMK 21–00931	8/1/2023	10/15/2033	HANDY PAINT PAIL	Bercom International, LLC	No
TMK 22–00728	8/8/2023	11/3/2033	KOTEX	Kimberly-Clark Worldwide, Inc.	No
TMK 22–00937	8/24/2023	9/17/2033	PS (STYLIZED)	SONY INTERACTIVE ENTERTAINMENT INC.	No
TMK 23–01953	8/1/2023	10/18/2033	PHILIPS	KONINKLIJKE PHILIPS	No
TMK 23–01954	8/1/2023	6/19/2033	Dress on Mannequin Design	GUERLAIN SOCIETE ANONYME	No
TMK 23–01955	8/1/2023	6/19/2033	Dress on Mannequin Design	GUERLAIN SOCIETE ANONYME	No
TMK 23–01956	8/1/2023	5/12/2033	ABEILLE ROYALE (STYLIZED)	GUERLAIN S.A.	No
TMK 23–01957	8/1/2023	11/7/2027	VICHY	L'Oreal	No
TMK 23–01958	8/1/2023	8/19/2030	LIFE SUTRA	Shopping Sutra LLC	No
TMK 23–01959	8/1/2023	10/23/2033	AQUAPAK	ClearH2O, Inc.	No
TMK 23–01960	8/1/2023	10/28/2032	ODYSSEY	CALLAWAY GOLF COMPANY	No
TMK 23–01961	8/1/2023	12/28/2029	CHAR	Charlotte Pipe and Foundry Company	No
TMK 23–01962	8/1/2023	4/7/2024	SLINGSHOT	Stewart Cellars, LLC	No
TMK 23–01963	8/4/2023	4/30/2026	GLOFISH	GLOFISH LLC	No
TMK 23–01964	8/4/2023	8/23/2033	PIKACHU DESIGN	Nintendo of America Inc.	No
TMK 23–01965	8/4/2023	8/13/2024	CIVIL REGIME	Civil Clothing Inc.	No
TMK 23–01966	8/8/2023	9/6/2033	SUPER MARIO (STYLIZED)	Nintendo of America Inc..	No
TMK 23–01967	8/7/2023	8/24/2032	QUIKTEA	Quikfoods, Inc.	No
TMK 23–01968	8/8/2023	7/12/2031	RADIUS 360°	Full Circle International, Inc.	No
TMK 23–01969	8/7/2023	9/17/2028	QUIK TEA	QUIKFOODS, INC.	No
TMK 23–01970	8/9/2023	6/8/2032	CREATE SOME ISH	Love, Lynia	No
TMK 23–01971	8/9/2023	1/29/2029	KARAOKE USA & DESIGN	John Strauser	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01972	8/8/2023	6/16/2031	THE NOZEBOT & DESIGN	DR. NOZE BEST, LLC	No
TMK 23–01973	8/8/2023	6/16/2031	DR. NOZE BEST	BeeClear, LLC	No
TMK 23–01974	8/8/2023	9/6/2033	Mario Design	Nintendo Co., Ltd.	No
TMK 23–01975	8/11/2023	12/1/2028	WANT~WANT & DESIGN	I LAN FOODS IND. CO., LTD. TAIWAN	No
TMK 23–01976	8/11/2023	7/7/2029	BYREDO	Byredo AB BOX SWEDEN	No
TMK 23–01977	8/11/2023	2/22/2033	HOLLYWOOD PRO	Shaheen, Zafar	No
TMK 23–01978	8/11/2023	2/12/2034	HAY PILLOW	Warren, Monique	No
TMK 23–01979	8/11/2023	5/17/2028	MOROSO	Moroso Performance Products, Inc.	No
TMK 23–01980	8/14/2023	10/15/2028	MOROSO	Moroso Performance Products, Inc.	No
TMK 23–01981	8/14/2023	2/29/2032	CONFIGURATION OF KEZNO PERFUME BOTTLE	KENZO	No
TMK 23–01982	8/14/2023	6/15/2026	KENZO WORLD	KENZO FRANCE	No
TMK 23–01983	8/14/2023	11/19/2034	KENZO JEU D'AMOUR	KENZO FRANCE	No
TMK 23–01984	8/14/2023	6/22/2031	Configuration of KENZO bottle	KENZO, FRANCE	No
TMK 23–01985	8/14/2023	5/26/2028	SALAD GIRL (STYLIZED)	SALAD GIRL, INC.	No
TMK 23–01986	8/15/2023	11/8/2033	ACTAJET	Actasys, Inc.	No
TMK 23–01987	8/15/2023	5/21/2033	SWIMS (STYLIZED)	Swims IP LLC	No
TMK 23–01988	8/16/2023	11/15/2033	GLYKON	Microtech Knives, Inc.	No
TMK 23–01989	8/16/2023	12/13/2032	Q-POWER	NORTHQUIP INC.	No
TMK 23–01990	8/16/2023	8/9/2033	DONKEY KONG	Nintendo of America Inc.	No
TMK 23–01991	8/16/2023	5/14/2027	COW POWER	NORTHQUIP INC.	No
TMK 23–01992	8/16/2023	1/5/2032	3E	NORTHQUIP INC. CANADA	No
TMK 23–01993	8/16/2023	6/24/2030	ARROWQUIP	Northquip Inc.CANADA	No
TMK 23–01994	8/16/2023	5/7/2027	Q-CATCH	NORTHQUIP INC.	No
TMK 23–01995	8/16/2023	12/20/2026	BUDFLOW	NORTHQUIP INC.	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–01996	8/16/2023	12/20/2026	BEEF BUDDY	NORTHQUIP INC.	No
TMK 23–01997	8/16/2023	7/18/2027	EASY FLOW	NORTHQUIP INC.	No
TMK 23–01998	8/16/2023	8/16/2033	PIKACHU	Nintendo of America Inc.	No
TMK 23–01999	8/16/2023	1/16/2029	ARROW CATTLEQUIP & DESIGN	NORTHQUIP INC..CANADA	No
TMK 23–02000	8/16/2023	5/27/2028	ARROW CATTLEQUIP	NORTHQUIP INC. CANADA	No
TMK 23–02001	8/16/2023	6/21/2033	LIVESTOCK EQUIPMENT DESIGN	Northquip Inc	No
TMK 23–02002	8/16/2023	6/21/2033	DESIGN OF LIVESTOCK MACHINE	Northquip Inc. CANADA	No
TMK 23–02003	8/16/2023	10/4/2033	Arrowhead Design	Northquip Inc.	No
TMK 23–02004	8/17/2023	9/13/2033	ZELDA	Nintendo of America Inc	No
TMK 23–02005	8/17/2023	9/27/2033	YOSHI	Nintendo of America Inc.	No
TMK 23–02006	8/17/2023	9/13/2033	SPLATOON	Nintendo of America Inc.	No
TMK 23–02007	8/18/2023	8/27/2028	X300	SureFire LLC	No
TMK 23–02008	8/18/2023	2/5/2032	KINGSTON TECHNOLOGY	KINGSTON TECHNOLOGY CORPORATION	No
TMK 23–02009	8/18/2023	10/28/2032	KINGSTON	Kingston Technology Corporation	No
TMK 23–02010	8/21/2023	9/27/2033	OFFICIAL NINTENDO LICENSED PRODUCT & DESIGN	Nintendo of America Inc.	No
TMK 23–02011	8/21/2023	5/1/2032	DELINA FRESH DELICIOUS NATURALLY & DESIGN	Delina, Inc.	No
TMK 23–02012	8/22/2023	5/22/2030	CHARLOTTE	Charlotte Pipe and Foundry Company	No
TMK 23–02013	8/22/2023	4/25/2030	CHARLOTTE PIPE	Charlotte Pipe and Foundry Company	No
TMK 23–02014	8/22/2023	1/22/2030	CHARLOTTE PIPE & FOUNDRY	Charlotte Pipe and Foundry Company	No
TMK 23–02015	8/22/2023	4/25/2030	CHARLOTTE PLASTICS	Charlotte Pipe and Foundry Company	No
TMK 23–02016	8/22/2023	5/18/2030	CHARLOTTE SEAL	Charlotte Pipe and Foundry Company	No
TMK 23–02017	8/22/2023	11/8/2026	CPF	Charlotte Pipe & Foundry Company	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–02018	8/22/2023	11/23/2032	EDGE HP	Charlotte Pipe and Foundry Company	No
TMK 23–02019	8/22/2023	9/7/2032	EDGE HP IRON	Charlotte Pipe and Foundry Company	No
TMK 23–02020	8/22/2023	5/22/2024	Configuration of Pipe Fitting	Charlotte Pipe and Foundry Company	No
TMK 23–02021	8/22/2023	4/15/2032	THE PIPELINE	Charlotte Pipe and Foundry Company	No
TMK 23–02022	8/22/2023	10/27/2031	CHARLOTTE (STYLIZED)	Charlotte Pipe and Foundry Company	No
TMK 23–02023	8/22/2023	3/21/2030	CHARLOTTE PIPE AND FOUNDRY COMPANY	Charlotte Pipe and Foundry Company	No
TMK 23–02024	8/22/2023	6/26/2032	YOU CAN'T BEAT THE SYSTEM	Charlotte Pipe and Foundry Company	No
TMK 23–02025	8/22/2023	7/6/2031	Storage Box Design	Deere & Company Global Intellectual Property Services	No
TMK 23–02026	8/22/2023	5/11/2030	YOU CAN'T BEAT THE SYSTEM. & DESIGN	Charlotte Pipe and Foundry Company	No
TMK 23–02027	8/22/2023	10/4/2033	ARROWQUIP & DESIGN	Northquip Inc. CANADA	No
TMK 23–02028	8/22/2023	5/11/2030	CHARLOTTE PIPE AND FOUNDRY COMPANY & DESIGN	Charlotte Pipe and Foundry Company	No
TMK 23–02029	8/23/2023	1/20/2031	SS SILVIA STRAUSS & Design	Bemaras Strauss, Abraham Elias	No
TMK 23–02030	8/23/2023	6/2/2029	GREENTEETH	Green Manufacturing, Inc.	No
TMK 23–02031	8/24/2023	11/22/2033	S (STYLIZED)	Full Tech Co., CHINA	No
TMK 23–02032	8/24/2023	10/28/2030	TUMI	Tumi, Inc.	No
TMK 23–02033	8/23/2023	7/24/2028	PRETTYHIGH	PrettyHigh, LLC	No
TMK 23–02034	8/24/2023	4/3/2032	LA PETITE ROBE NOIRE	Guerlain S.A.	No
TMK 23–02035	8/25/2023	2/15/2033	Illustration of a Moose	Abercrombie & Fitch Trading Co.	No
TMK 23–02036	8/28/2023	11/22/2033	COUGAR XR7 G & DESIGN	Spahitz, Michael	No
TMK 23–02037	8/25/2023	2/15/2033	Illustration of a Seagull	Abercrombie & Fitch Trading Co.	No
TMK 23–02038	8/25/2023	12/6/2031	DESIGN OF SEAGULL	Abercrombie & Fitch Trading Co.	No
TMK 23–02039	8/25/2023	6/8/2031	DESIGN OF MOOSE	Abercrombie & Fitch Trading Co.	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–02040	8/28/2023	11/24/2024	CONFIGURATION OF A MANUAL TRIGGER SPRAYER	SUN&L; CO., LTD.	No
TMK 23–02041	8/28/2023	12/25/2028	TUSHBABY	TUSHBABY, INC.	No
TMK 23–02042	8/28/2023	12/28/2031	TUSHBABY & DESIGN	TushBaby, Inc.	No
TMK 23–02043	8/25/2023	4/15/2032	A & F	ABERCROMBIE & FITCH TRADING CO.	No
TMK 23–02044	8/28/2023	12/27/2032	900 SERIES	Green Manufacturing, Inc.	No
TMK 23–02045	8/25/2023	4/1/2032	1892	ABERCROMBIE AND FITCH TRADING CO.	No
TMK 23–02046	8/25/2023	9/12/2033	TRAC II	THE GILLETTE COMPANY LLC	No
TMK 23–02047	8/25/2023	4/23/2033	ABERCROMBIE & FITCH	ABERCROMBIE & FITCH TRADING CO.	No
TMK 23–02048	8/28/2023	1/23/2028	APEX PRO	Princeton Tectonics, Inc.	No
TMK 23–02049	8/28/2023	2/7/2027	APEX	Princeton Tectonics, Inc.	No
TMK 23–02050	8/29/2023	8/5/2030	XANCUDO	TransEquatorial Solutions, Inc.	No
TMK 23–02051	8/29/2023	12/24/2029	ZANCUDO	TransEquatorial Solutions, Inc.	No
TMK 23–02052	8/29/2023	3/9/2025	AVISPA	TransEquatorial Solutions, Inc	No
TMK 23–02053	8/29/2023	1/2/2031	ESEE	TRANSEQUATORIAL SOLUTIONS, INC.	No
TMK 23–02054	8/29/2023	5/2/2030	IZULA	TRANSEQUATORIAL SOLUTIONS, INC.	No
TMK 23–02055	8/29/2023	2/15/2026	SUPERSMILE	Robell Research, Inc.	No
TMK 23–02056	8/29/2023	11/22/2033	GIANTS & DESIGN	New York Football Giants, Inc.	No
TMK 23–02057	8/29/2023	11/22/2033	BILLS	Buffalo Bills, LLC	No
TMK 23–02058	8/30/2023	2/24/2031	38	Fox Factory, Inc.	No
TMK 23–02059	8/30/2023	1/6/2031	SUPERBIRD	SUPERBIRD HOLDINGS, INC.	No
TMK 23–02060	8/29/2023	11/29/2033	TWIN FLAMES	Microtech Knives, Inc.	No
TMK 23–02061	8/30/2023	8/1/2032	34	FOX FACTORY, INC.	No

CBP IPR RECORDATION — AUGUST 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 23–02062	8/30/2023	3/29/2030	5.11 + TACTICAL SERIES	5.11, Inc.	No
TMK 23–02063	8/30/2023	10/13/2033	DIEHARD	Advance Stores Company, Incorporated	No
TMK 23–02064	8/31/2023	7/25/2033	SUPERBIRD	Superbird Holdings, Inc.	No
TMK 23–02065	8/31/2023	5/28/2033	BATTLESHIELD	SAMTECH, LLC	No
TMK 23–02066	8/31/2023	2/8/2033	ILLUSTRATION OF CANOPIES MATERIALS	SHIBUMI SHADE, INC.	No
TMK 23–02067	8/31/2023	5/15/2032	ILLUSTRATION OF CANOPIES COLORS	Shibumi Shade, Inc.	No
TMK 23–02068	8/31/2023	9/16/2030	SHIBUMI & DESIGN	SHIBUMI SHADE, INC.	No
TMK 23–02069	8/31/2023	8/26/2030	SHIBUMI	SHIBUMI SHADE, INC.	No
TMK 23–02070	8/31/2023	8/24/2026	BATTLESHIELD X	Samtech, LLC	No
TMK 23–02071	8/31/2023	8/24/2026	BATTLESHIELD X	Samtech, LLC	No
TMK 23–02072	8/31/2023	1/8/2034	MASSIF (STYLIZED)	SAMTECH, LLC	No
TMK 23–02073	8/31/2023	2/1/2034	MASSIF	SAMTECH, LLC	No
TMK 23–02074	8/31/2023	10/5/2031	MASSIF & DESIGN	SAMTECH, LLC	No
TMK 23–02075	8/31/2023	10/5/2031	MASSIF (STYLIZED)	SAMTECH, LLC	No
TMK 23–02076	8/31/2023	9/14/2031	MASSIF	Massif Mountain Gear Company, LLC	No
TMK 23–02077	8/31/2023	8/6/2028	MASSIF	SAMTECH, LLC	No
TMK 23–02078	8/31/2023	5/12/2028	MASSIF	SAMTECH, LLC	No
TMK 23–02079	8/31/2023	8/26/2028	WILEY	JOHN WILEY & SONS, INC.	No
TMK 23–02080	8/31/2023	5/4/2025	WILEY	JOHN WILEY & SONS, INC.	No

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: U.S. Customs and Border Protection (CBP) is revising the notice published in the **Federal Register** on August 30, 2023, which announced that the next meeting of the Commercial Customs Operations Advisory Committee (COAC) will be held on Wednesday, September 20, 2023. This notice revises the August 30, 2023 notice to reflect the addition of a new working group to the Secure Trade Lanes Subcommittee which will provide proposed recommendations for COAC's consideration at the September 20, 2023 COAC Public Meeting. As a result, CBP is republishing the August 30, 2023 notice, with amendments reflecting the addition of the De Minimis Working Group. 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 to 5 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 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: https://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: On August 30, 2023, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register** (88 FR 59933), announcing that the Commercial Customs Operations Advisory Committee (COAC) meeting will be held on Wednesday, September 20, 2023. The August 30, 2023 notice complied with the 15-calendar-day requirement to provide the public with notice of the agenda and topics to be discussed. *See* section 102–3.150(a) of title 41 of the Code of Federal Regulations (41 CFR 102–3.150(a)). This notice amends the agenda published in the August 30, 2023 notice, to note the addition of a new working group, the De Minimis Working Group, to the Secure Trade Lanes Subcommittee. This notice is published less than 15 calendar days before COAC's public meeting. Pursuant to 41 CFR 102–3.150(b), CBP believes that there are exceptional circumstances warranting less-than-15-days' notice. Due to the recent creation of the De Minimis Working Group it was not clear its work would be developed sufficiently to present it at the public meeting. However, CBP has been informed that the subcommittee will have additional proposed recommendations to offer to COAC at the public meeting based on the work from the new working group. Because CBP considers the working group's activity to be of significant interest to the public and the government, CBP does not want to delay COAC's ability to deliberate publicly upon the additional proposed recommendations.

For ease of reference, CBP is republishing the entirety of the August 30, 2023 notice, with the changes described.

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 reason-

able 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: *https://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 proposed 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 Working 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 proposed 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 proposed 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 proposed recommendation for the committee's consideration. The USMCA Chapter 7 Working Group meets bi-weekly with the expectation that proposed 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 six active working groups: the Export Modernization Working Group, the In-Bond Working Group, the Trade Partnership and Engagement Working Group, the Pipeline Working Group, and the Cross-Border Recognition Working Group and the newly formed De Minimis 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 recommendations. 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 will submit proposed recommendations 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. The De Minimis Working Group held their first meeting on August 22 and the group will submit proposed recommendations for the committee's consideration. Emerging risks have necessitated changes to operational priorities. There-

fore, the De Minimis Working Group met on an aggressive schedule to develop proposed recommendations for the September 20, 2023, COAC meeting. 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: *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

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

[Published in the Federal Register, September 12, 2023 (88 FR 62583)]

AGENCY INFORMATION COLLECTION ACTIVITIES; REVISION OF AN EXISTING COLLECTION OF INFORMATION; ADVANCE TRAVEL AUTHORIZATION (ATA)

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

ACTION: 60-Day notice and request for comments.

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 November 13, 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 1651–0143 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: Advance Travel Authorization (ATA).

OMB Number: 1651–0143.

Form Number: N/A.

Current Actions: Revision to an existing collection of information with an increase in total annual burden.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: The Department of Homeland Security (DHS) established new parole processes to allow certain noncitizens and their qualifying immediate family members to request advance authorization to travel to the United States to seek a discretionary grant of parole, issued on a case-by-case basis. To support these processes, U.S. Customs and Border Protection (CBP) developed the Advance Travel Authorization (ATA) capability, which allows individuals to submit information within the CBP One ™ application as part of the process. Through an emergency approval, CBP established the ATA collection. Initially, this capability was utilized by Venezuelan citizens and their qualifying immediate family members seeking authorization to travel to the United States under the DHS-established parole process for Venezuelans.[1] DHS later developed similar parole processes for citizens of Cuba,[2] Haiti,[3] and Nicaragua[4] and their qualifying immediate family members. The four processes are collectively known as CHNV. There is no numerical cap on the number of noncitizens from these four countries who may apply; however, there is a 30,000 limit on the number of travel authorizations DHS may issue each month across all four processes. Additionally, participation is limited in the ATA capability to those individuals who meet certain

[1] 87 FR 63507 (Oct. 19, 2023); *see also* 88 FR 1279 (Jan. 9, 2023).

[2] 88 FR 1266 (Jan. 9, 2023); *see also* 88 FR 26329 (Apr. 28, 2023).

[3] 88 FR 1243 (Jan. 9, 2023); *see also* 26 FR 327 (Apr. 28, 2023).

[4] 88 FR 1255 (Jan. 9, 2023).

DHS-established criteria, including but not limited to, possession of a valid, unexpired passport, as well as having an approved U.S.-based financial supporter.

ATA requires the collection of a facial photograph via CBP One ™ from those noncitizens who voluntarily elect to participate in the process to provide accurate identity information for completion of vetting in advance of issuance of a travel authorization.

Advance Travel Authorization (ATA)

The facial biometrics collected from the noncitizens will be linked to biographic information provided by the individual to U.S. Citizenship and Immigration Services (USCIS). This information collection will facilitate the vetting of noncitizens seeking to obtain advance authorization to travel. This collection will also give air carriers that participate in CBP's Document Validation (DocVal) program the ability to validate an approved advance authorization to travel, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

CBP One™ allows the user to capture the required biometrics, currently limited to a live facial photograph, and confirm submission after viewing the captured image. If the user is not satisfied with the image captured, the user can retake the image. If the image capture is unsuccessful, CBP One™ will provide the user with an error message stating that the submission was unsuccessful and permitting the user to try again. If the user continues to experience technical difficulties, the CBP One™ application provides a help desk email to request assistance.

CBP conducts vetting to determine whether the individual poses a security risk to the United States, and to determine whether the individual is eligible to receive advance authorization to travel to the United States to seek a discretionary grant of parole at the port of entry (POE). In the event that an advance authorization to travel may be denied because of a facial photograph match found in criminal databases or if there is a mismatch that limits the ability to confirm identity, then the match or mismatch will be verified by a CBP officer before the advance travel authorization is officially denied. Currently, ATA collects certain limited biographic and biometric information, and biometric collection is limited to the collection of a live facial photograph.

If the advance travel authorization is denied, the individual will not be authorized to travel to the United States to seek parole under this process. In the event that the user is not authorized to travel under this process, the user may still seek entry to the United States through another process, including by filing a request for consider-

ation of parole with USCIS or applying with the Department of State (DOS) to obtain a visa. If travel authorization is approved, the approval establishes that the individual has obtained advance authorization to travel to the United States to seek a discretionary grant of parole, consistent with 8 CFR 212.5(f), but does not guarantee boarding or a specific processing disposition at a POE. Upon arrival at a U.S. POE, the traveler will be subject to inspection by a CBP officer, who will make a case-by-case processing disposition determination.

This collection of information is authorized by 8 U.S.C. 1103 and 1182(d)(5), and 8 CFR 212.5(f). DHS has also publicly announced the policy and accompanying collection on its website and has also published a **Federal Register** notice for each of the named countries.

CBP One™ collects the following information from the individual submitting a request for an advance authorization to travel to the United States to seek parole under this process:

1. Facial Photograph
2. Photo obtained from the passport or Chip on ePassport, where available
3. Alien Registration Number
4. First and Last Name
5. Date of Birth
6. Passport Number

Additionally, CBP further revised this collection through another emergency submission to allow individuals seeking to travel to the United States as part of the Family Reunification Parole (FRP) processes for certain nationals of Cuba,[5] Haiti,[6] Colombia,[7] Guatemala,[8] Honduras,[9] and El Salvador[10] to use the existing ATA capability to submit information to CBP. The FRP processes begin with an invitation being sent to a petitioner who previously received an approved Form I–130, *Petition for Alien Relative,* on behalf of the potential principal beneficiary, and if applicable, the beneficiary's accompanying derivative beneficiaries. The petitioner then submits a Form I–134A, *Online Request to be a Supporter and Declaration of Financial Support,* on behalf of the potential principal beneficiary, and if applicable, the beneficiary's accompanying derivative beneficiaries. For those petitioners whose Form I–134A is confirmed by USCIS, the

[5] 88 FR 54639 (Aug. 11, 2023).

[6] 88 FR 54635 (Aug. 11, 2023).

[7] 88 FR 43591 (July 10, 2023).

[8] 88 FR 43581 (July 10, 2023).

[9] 88 FR 43601 (July 10, 2023).

[10] 88 FR 43611 (July 10, 2023).

beneficiaries will receive an email with instructions to create an online account with myUSCIS. There, the potential beneficiary will confirm their biographic information and complete attestations, and then receive instructions to download the CBP One™ mobile application to continue through the process. USCIS will send the biographic information to CBP. Additionally, once the beneficiary completes their CBP One™ submission, utilizing the ATA capability, CBP will conduct vetting, and if appropriate, issue an advance authorization to travel. The information collected as part of these new processes is the same as that which is already collected from other populations through ATA. This information collection will facilitate the vetting of noncitizens seeking to obtain advance authorization to travel and will give air carriers that participate in CBP's DocVal program the ability to validate an approved travel authorization, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

New Changes

1. *Adding Uniting for Ukraine (U4U) respondent group to collection:* In response to the President's commitment to welcome 100,000 Ukrainian citizens and others fleeing Russia's aggression, DHS, in coordination with DOS, established the Uniting for Ukraine[11] (U4U) parole process on April 25, 2022. This process allows Ukrainian citizens and their qualifying family members the ability to submit certain personal information to USCIS and CBP to facilitate the issuance of an advance authorization to travel to the United States to seek parole. At the time U4U was implemented, full ATA capability was not yet developed and CBP uses different processes to screen and vet Ukrainians seeking parole. Currently, individuals seeking to travel under U4U do not utilize CBP One™ or the ATA capability during their process. To align U4U with the other DHS parole processes, including CHNV and FRP, the ATA capability will be implemented for those individuals requesting authorization to fly directly to the United States to seek a discretionary grant of parole. The ATA capability will be added as part of a step in the U4U process to facilitate the vetting of noncitizens seeking to obtain advance authorization to travel and will give air carriers that participate in CBP's DocVal program the ability to validate an approved travel authorization, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

[11] *See* Implementation of the Uniting for Ukraine Parole Process, 87 FR 25040 (Apr. 25, 2022).

2. *Adjusted Burden:* Furthermore, coinciding with USCIS, CBP has added to the burden estimate for this collection, to account for any potential expansion(s) that align with new or revised policies or processing capacity over the next three years.

3. *New Data Element:* This revision also adds a new data element to this collection; the physical location (longitude/latitude) at the time of any biometric information submission. This data element will further secure the submission process and provide accurate identity information for completion of vetting in advance of issuance of a travel authorization.

CBP invites comments from the public on all changes established by previously approved emergency submissions and the new proposed revisions listed in this FRN.

Type of Information Collection: Advance Travel Authorization (ATA).

Estimated Number of Respondents: 562,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 562,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 93,667.

Dated: September 7, 2023.

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

[Published in the Federal Register, September 13, 2023 (88 FR 62810)]

U.S. Court of Appeals for the Federal Circuit

Full Member Subgroup of the American Institute of Steel Construction, LLC, Plaintiff-Appellant v. United States, Cornerstone Building Brands, Inc., BlueScope Buildings North America Inc., Jinhuan Construction Group Co., Ltd., Wison (Nantong) Heavy Industry Co., Ltd., Shanghai Matsuo Steel Structure Co., Ltd., Yanda (Haimen) Heavy Equipment Manufacturing Co., Ltd., Shanghai Cosco Kawasaki Heavy Industries Steel Structure Co., Ltd., Modern Heavy Industries (Taicang) Co., Ltd., Dickerson Enterprises, Inc., Steel Construction Group, LLC, Defendants-Appellees Exxon Mobil Chemical Company, A Division of Exxon Mobil Corporation, Gulf Coast Growth Ventures, LLC, Defendants

Appeal No. 2022–1176

Appeal from the United States Court of International Trade in No. 1:20-cv-00090-CRK, Judge Claire R. Kelly.

Decided: September 7, 2023

THOMAS M. JOHNSON, JR., Wiley Rein, LLP, Washington, DC, argued for plaintiff-appellant. Also represented by STEPHEN JOSEPH OBERMEIER, ALAN H. PRICE, ADAM MILAN TESLIK, ENBAR TOLEDANO, CHRISTOPHER B. WELD.

JOHN DAVID HENDERSON, Office of General Counsel, United States International Trade Commission, Washington, DC, argued for defendant-appellee United States. Also represented by ANDREA C. CASSON.

DANIEL MARTIN WITKOWSKI, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, argued for defendant-appellees Cornerstone Building Brands, Inc., BlueScope Buildings North America Inc., Jinhuan Construction Group Co., Ltd., Wison (Nantong) Heavy Industry Co., Ltd., Shanghai Matsuo Steel Structure Co., Ltd., Yanda (Haimen) Heavy Equipment Manufacturing Co., Ltd., Shanghai Cosco Kawasaki Heavy Industries Steel Structure Co., Ltd., Modern Heavy Industries (Taicang) Co., Ltd., Dickerson Enterprises, Inc., Steel Construction Group, LLC. Cornerstone Building Brands, Inc., also represented by MATTHEW R. NICELY.

DANIEL L. PORTER, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, for defendant-appellee BlueScope Buildings North America Inc. Also represented by JAMES BEATY, CHRISTOPHER A. DUNN.

NED H. MARSHAK, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, New York, NY, for defendants-appellees Jinhuan Construction Group Co., Ltd., Wison (Nantong) Heavy Industry Co., Ltd., Shanghai Matsuo Steel Structure Co., Ltd., Yanda (Haimen) Heavy Equipment Manufacturing Co., Ltd., Shanghai Cosco Kawasaki Heavy Industries Steel Structure Co., Ltd., Modern Heavy Industries (Taicang) Co., Ltd., Dickerson Enterprises, Inc., Steel Construction Group, LLC. Also represented by MAX F. SCHUTZMAN; JORDAN CHARLES KAHN, Washington, DC.

Before REYNA, BRYSON, and CUNNINGHAM, *Circuit Judges*.

REYNA, *Circuit Judge*.

Appellant appeals from the judgment of the United States Court of International Trade that affirms a final negative determination reached by the United States International Trade Commission in an antidumping duty investigation. On March 1, 2020, the Commission issued a final negative determination that the U.S. (domestic) fabricated structural steel ("FSS") industry was not materially injured or threatened with material injury by reason of sales in the United States of certain FSS imports from, among other countries, China. Appellant appealed to the Court of International Trade, raising three principal issues: (1) that the Commission erred by declining to resolve a purported ambiguity in the scope of the investigation in view of the parties' dispute, (2) that the Commission legally erred in its determination that the captive production exception in 19 U.S.C. § 1673d(b)(1)(A)(i) did not apply in the investigation, and (3) that the Commission erred in its price effects analysis under 19 U.S.C. § 1677(7)(C)(ii). The Court of International Trade upheld the Commission's final negative determination, and Appellant appealed to this court. We conclude that the Commission's determination as to the issues raised on appeal is reasonable, supported by substantial evidence, and in accordance with the law. On that basis, we affirm the judgment of the Court of International Trade.

BACKGROUND

Appellant, Full Member Subgroup of the American Institute of Steel Construction, LLC ("AISC"), is an association of U.S. producers and manufacturers of fabricated structural steel ("FSS") products. In February 2019, AISC filed antidumping duty petitions before the United States International Trade Commission ("Commission") and the United States Department of Commerce ("Commerce"), alleging unfair trade practices involving the importation and sales in the United States of FSS from Canada, China, and Mexico. *See* [*FSS*] *from Canada, China, & Mexico*, USITC Inv. Nos. 701-TA-615 and 701-TA-616 (Mar. 1, 2019).[1] This appeal only involves the investigation on FSS imports from China.

[1] In general, antidumping duty investigations are commensurately, but separately, conducted by Commerce and the Commission. The object of Commerce's investigation is to determine the extent to which imports of the goods under investigation are sold in the United States at less than fair value, *i.e.*" dumped." *See Cleo Inc. v. United States*, 501 F.3d 1291, 1294 (Fed. Cir. 2007). An early task of Commerce is to define the goods, or merchandise, that are subject to its investigation, the "subject merchandise." *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1374–75, 1374 n.2 (Fed. Cir. 2001); *see also* 19 U.S.C. § 1677(25).

The Commission does not investigate whether sales are at less than fair value. Rather, the Commission investigates whether a U.S. industry that produces goods or products that are like the products under investigation by Commerce (these products are referred to as

On February 4, 2019, the Commission initiated its preliminary phase of its investigation. *See Institution Notice for* [*FSS*] *From Canada, China, & Mexico*, 84 Fed. Reg. 3245 (Int'l Trade Comm'n Feb. 11, 2019). The period of investigation was set for January 2015 through September 2018. [*FSS*] *from Canada, China, & Mexico*, Investigation Nos. 701-TA-615–617 and 731-TA-1432–1434 (Prelim.) at 12, USITC Pub. 4878, (Mar. 2019). The Commission issued questionnaires to, among other entities, the AISC membership, other domestic producers, U.S. importers, and Chinese producers and manufacturers, seeking information and data related to production, shipment, consumption, and pricing of products under investigation during the period of investigation.

The Commission received questionnaire responses providing trade and commercial data, composed of proprietary and business confidential material. *See* [*FSS*] *from Canada, China, & Mexico*, USITC Inv. Nos. 701-TA-615 and 701-TA-616, at *5 (Mar. 1, 2019).

During the preliminary phase of the investigation, the interested parties in the investigation addressed issues pertinent to the methodologies they used for reporting the data, as well as comment and argument regarding the Commission's analysis and treatment of the data. For example, AISC requested that the Commission adopt a domestic like product determination that was coextensive with the subject merchandise definition adopted by Commerce, which expressly excluded pre-engineered metal building systems, or "PEMBs."[2] J.A. 120–21.

"domestic like product") are materially injured or threatened with material injury. *Cleo*, 501 F.3d at 1294–95.

Central to both investigations, and this appeal, are the agencies' respective definitions or identification of the products under their respective investigation. These determinations are critical because they define both the scope of the investigations and the scope of any resulting trade relief, such as the assessment of antidumping duties. *See, e.g.,* 19 C.F.R. § 351.202(b)(5) ("[T]he subject merchandise . . . defines the requested scope of the investigation."); 19 U.S.C. § 1675(a)(2)(C) ("The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."); *Hitachi Metals, Ltd. v. United States*, 350 F. Supp. 3d 1325, 1341 (Ct. Int'l Trade 2018), *aff'd*, 949 F.3d 710 (Fed. Cir. 2020) ("Commerce's scope rulings assess factors in relation to the foreign like product and subject merchandise produced in the country(ies) subject to investigation, whereas the [Commission's] domestic like product determinations assess factors in relation to the production and sale of domestic like product by the domestic industry.").

[2] Commerce defined the subject merchandise scope as "carbon and alloy" FSS that "have been fabricated for erection or assembly into structures, including, but not limited to, buildings." J.A. 2495–96. Commerce's subject merchandise determination provided several categories of exclusions, such as completed PEMBs. J.A. 2496; J.A. 8363–64.

For purposes of this appeal, PEMBs are "defined as complete metal buildings that integrate steel framing, roofing and walls to form one, pre-engineered building system and are designed and manufactured to [meet] Metal Building Manufactures Association guide specifications." J.A. 111. PEMBs "are typically limited in height to no more than 60 feet or two stories." *Id*.

Relevant to this appeal, AISC also argued for the Commission to disregard certain data provided by two U.S. producers. According to AISC, NCI Group, Inc. ("NCI") and BlueScope Buildings North America, Inc. ("BlueScope") submitted information for products that were not "domestic like products" and thus should be rejected by the Commission. J.A. 8331–33 & n.47. AISC argued, in the alternative, that to the extent that the data were not rejected, the NCI and BlueScope data should be excluded under the captive production provision set out in 19 U.S.C.§ 1677(7)(C)(iv). J.A. 8800 & n.180.

On January 30, 2020, Commerce reached a final affirmative determination, concluding that FSS from China was sold in the United States at less than fair value. *Certain* [*FSS*] *from [China]*, 85 Fed. Reg. 5376, 5379 (Dep't of Commerce Jan. 30, 2020).

On March 1, 2020, the Commission issued the final negative determination, concluding that the domestic FSS industry was not materially injured or threatened with material injury by imports of subject FSS from China. [*FSS*] *from Canada, China, & Mexico*, USITC Inv. No. 701-TA616 (Mar. 1, 2020).[3] The Commission reached the following determination relevant to this appeal.

First, the Commission took steps to exclude purportedly out-of-scope domestic industry data provided by NCI and BlueScope. J.A. 8418 n.304. Second, the Commission determined that the captive production provision was inapplicable because there was no "production of a downstream article," as required by the statute. J.A. 8800–8801. And third, the Commission determined that "[t]he record consequently does not support a finding that the subject imports significantly undersold the domestic like product." J.A. 8415. The Commission also concluded that there was "no evidence of price depression on th[e] record." *Id*.

AISC appealed the Commission's final negative determination to the United States Court of International Trade ("Court of International Trade"). *Full Member Sub. of the Am. Inst. of Steel Constr., LLC v. United States*, 547 F. Supp. 3d 1211 (Ct. Int'l Trade 2021). On appeal before the Court of International Trade, AISC moved for judgment on the agency record based on four arguments: that the Commission erred by (1) failing to exclude NCI and BlueScope domestic industry data related to PEMB material, (2) determining that the captive production provision is inapplicable, (3) failing to seek out additional pricing product data, and (4) concluding that there were no significant price effects by FSS imports. *Id.* at 1218–31.

[3] Three Commissioners voted in the negative and two Commissioners voted in the affirmative.

In September 2021, the Court of International Trade sustained the Commission's final negative determination. *Id.* at 1233. AISC timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

STANDARD OF REVIEW

We review *de novo* the Court of International Trade's judgments on the agency record. *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1354 (Fed. Cir. 2005). In doing so, we apply the same standard of review applied by the Court of International Trade when it reviews the Commission's antidumping determinations. *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 65 F.4th 1364, 1369 (Fed. Cir. 2023). As such, we review whether the Commission's determination is supported by substantial evidence or otherwise not in accordance with the law. *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1369 (Fed. Cir. 2015)."Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. (cleaned up).

DISCUSSION

On appeal, AISC argues that the Commission erred by (1) declining to resolve a purported ambiguity in the definition of the domestic like product scope, (2) determining that the captive production exception is not applicable, and (3) concluding that there were no significant price effects by FSS imports.

I. Domestic Like Product

We first address AISC's argument concerning the Commission's domestic like product determination. AISC frames this issue as "[w]hether the Commission lawfully declined to resolve an ambiguity in the definition of the domestic like product." Appellant Br. 2. Specifically, AISC asserts that the Commission is required "to resolve whether disputed products in fact met the definition of the domestic like product." Reply Br. 2. AISC further argues that the Commission must "articulate a reason for any such determination" and that the Commission erroneously failed to do so in this case. *Id*.

The domestic like product determination is critical to the framework of antidumping duty investigations. The statute charges the Commission with determining whether a domestic industry is materially injured or threatened with material injury by reason of imports sold in the United States at less than fair value. 19 U.S.C. § 1671(a). To do so, the Commission investigates the economic and commercial health of a domestic industry, defined as "producers as a whole of a

domestic like product." *Id*. § 1677(4)(A). The statute defines "domestic like product" as a product "which is like or . . . most similar in characteristics and uses with, the article subject to an investigation." *Id*. § 1677(10). Consequently, whether a U.S. producer is a member of the pertinent domestic industry is determined on the basis of whether it produces a domestic like product. If it does, then the Commission typically seeks data from that company to assist it in gauging whether the domestic industry is injured. If a company does not produce a domestic like product, then it is not part of the relevant domestic industry, and its data is not used in the investigation. *See Pokarna Engineered Stone Ltd. v. United States*, 56 F.4th 1345, 1348 (Fed. Cir. 2023) ("The term 'industry' is defined in the statute as 'the producers. . . of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.' 19 U.S.C. § 1677(4)(A)."). To be clear, the Commission does not decide which products or merchandise *are subject to the investigation*, that task belongs to Commerce. *See supra* note 1.

The foregoing is important to understand because AISC's arguments are directed to both the domestic like product and the subject merchandise determinations. Specifically, AISC frames its argument in terms of the Commission's determination related to the domestic like product, *see* Appellant Br. 22–28, but the core issue AISC raises is more appropriately framed in terms of Commerce's determination related to the subject merchandise.

First, AISC argues that the Commission is legally obligated to redefine the like product definition whenever a dispute arises about whether a product in fact meets the domestic like product definition. Appellant Br. 2; Reply Br. 2. AISC asserts that in addition to redefining the domestic like product, the Commission is obligated to articulate a reason for why any disputed product does or does not fall within the domestic like product scope. Appellant Br. 27; Reply Br. 2. AISC claims that the Commission erred by not addressing an "ambiguity" in the domestic like product definition because "[i]t does not follow . . . that every piece of fabricated steel in a structure is necessarily fabricated *structural* steel." Appellant Br. 28 (citations omitted) (emphasis in original).

We observe that the Commission is not obligated as a matter of law to expressly redefine its domestic like product determination simply because a party disputes whether a particular product falls within the definition. *See Hitachi Metals, Ltd. v. United States*, 949 F.3d 710, 717 (Fed. Cir.2020) (concluding that Commission was not "required to compare tool steel to products outside of Commerce's subject mer-

chandise determination"); *cf*. Rules of Practice and Procedure, 63 Fed. Reg. 30,599, 30,602 (Int'l Trade Comm'n, June 5, 1998) ("[T]he Commission may revisit its like product determination when there have been significant changes in the products at issue since the original investigation."). Nor does a purported "ambiguity" require the Commission to modify the domestic like product scope to expressly articulate whether a single or multiple goods are included or excluded from the scope. AISC identifies no regulation, law, or precedent to the contrary—and we find none.

Second, we conclude that the focus of AISC's argument is not the domestic like product definition, but rather the subject merchandise scope. Indeed, AISC concedes that it does not challenge the domestic like product definition on appeal. Reply Br. 2 ("Nor does AISC take issue with the Commission's defining the domestic like product coextensively with the scope, thereby challenging an issue as to which AISC prevailed below."). As a result, we do not address whether the domestic like product definition itself is defective or otherwise ambiguous.

AISC further argues that the Commission's determination is infirm and should be reversed because the Commission included in its investigation certain information and data pertaining to products that did not meet the domestic like product definition. *See* Appellant Br. 25–26. AISC argues that the Commission failed to resolve its argument during the investigation or to articulate the resolution of the issue in its final determination. *Id*. at 26. We disagree.

AISC asserts that the Commission should not have sought and received information and data from two U.S. companies: NCI and BlueScope. According to AISC, the NCI and BlueScope submissions included "significant volumes of non-subject merchandise in their data." *Id*. at 15. AISC asserts that NCI "reported data for complete PEMBs, which are expressly out-of-scope, and both NCI and BlueScope appeared to have reported data for substantial volumes of *non-FSS components* of PEMBs (meaning [fabricated] steel that was used in a PEMB[], but which AISC did not believe met the criteria for the domestic like product)." *Id*. (emphasis added). AISC notes that the PEMB components at issue on appeal, e.g., insulated metal panels, roof panels, and trim, "were never contemplated as FSS" by the Commission or the parties. Reply Br. 4.

The record belies AISC's argument. As to the purported "complete PEMBs" in NCI and BlueScope's data, AISC's argument hinges on equating "complete PEMBs"—which are the completed buildings—with PEMB kits. J.A. 3741. We disagree with that premise. The Commission concluded that PEMB kits are in scope, and thus were

permissibly included in NCI and BlueScope's data. J.A. 8774–76. The record reflects that NCI and BlueScope accordingly did not include complete PEMBs in their data, onlykits. *See, e.g.*, J.A. 8801 & nn.186–87; J.A. 3132; J.A. 5345; J.A. 3429

As to the non-structural FSS, the record again runs counter to AISC's argument on appeal. At Commerce, AISC's proposed definition of subject merchandise prevailed. Commerce defined the subject merchandise scope as "carbon and alloy" FSS that "have been fabricated for erection or assembly into structures, including, but not limited to, buildings." J.A. 2495–96. Other parties argued that the FSS scope should be limited to FSS that only "provide structural support" and "can bear certain loads or weight." J.A. 5135. AISC disagreed with that narrowing, arguing that "the scope was not intended to cover only FSS that becomes the structure" or that are "essential to support the design loads of the structure," i.e., load bearing. *Id*. Commerce agreed with AISC. It concluded that the subject merchandise scope had "no limitations regarding whether or not the FSS is essential to support the design loads of the structure." J.A. 5136. As a result, non-load bearing FSS was included within the subject merchandise scope. This matters because, per AISC's request, the Commission defined the domestic like product as coextensive with the subject merchandise determination. Thus, a decision by the Commission that non-load bearing FSS was within the domestic like product scope is supported by substantial evidence and in accordance with the law.

The record also supports the government's argument that the Commission did not consider out-of-scope data incoming to its final determination, and that the Commission's domestic like product determination was supported by substantial evidence. *See* Appellee Br. 18–24. The Commission conducted a thorough and detailed investigation, including with respect to its domestic like product determination. For example, it issued domestic producer questionnaires to 495 firms and reviewed over 100 questionnaires from domestic producers. J.A. 7969; J.A. 8821–22 n.304. It issued importer questionnaires to 245 firms believed to be importers of FSS. J.A. 7910. The Commission issued a preliminary determination, providing its preliminary analysis of the data and its preliminary domestic like product scope. J.A. 2167–2200; J.A. 2173 (noting that AISC argues the domestic like product scope should be coextensive with Commerce's subject merchandise scope). Before coming to its final determination, the Commission considered AISC's concerns regarding the out-of-scope data by seeking additional information from producers, J.A.6612–13; J.A. 8521 n.9, providing instructions on how data

should be reported, *see, e.g.*, J.A. 5883–87, and then reviewing that data to ensure they did not include out-of-scope products, J.A. 8821–22 n.304. This record demonstrates that the Commission's investigation was thorough, and that its domestic like product determination is supported by substantial evidence.

The Commission's domestic like product analysis is also in accordance with the law. The Commission—as required by statute, 19 U.S.C. § 1677(10)—properly considered Commerce's "subject merchandise" determination as the starting point of its domestic like product analysis. *Hitachi*, 949 F.3d at 717 ("The statute requires the Commission to consider Commerce's subject merchandise determination in reaching its own like product determination."); *see, e.g.*, J.A. 8765–71; J.A. 8822 n.304. It then conducted the required six-factor inquiry set out in *Cleo Inc. v. United States*, 501 F.3d 1291, 1294–95, 1298 (Fed. Cir. 2007) to evaluate whether the subject FSS corresponds with a single domestic like product or multiple domestic like products. J.A. 8773–80. Based on Commerce's scope and the *Cleo* inquiry, the Commission similarly concluded that "FSS components of PEMBs" are in scope, and "complete PEMBs" are "excluded from the scope." J.A. 8774. In support of these findings, the Commission relied on evidence related to how FSS and FSS components of PEMBs are produced, J.A. 8775, how they are distributed (e.g., in kits), J.A. 8776, and how they are priced, *id*.

Finally, we are not persuaded that the Commission relied on inconsistent data that corrupted its investigative database. Appellant Br. 2. AISC vaguely contends that the Commission considered "nonstructural PEMB components," *id*. at 24, yet does not identify what those precise components are or which data it is referring to. AISC contends that it "did not believe [these components] met the definition of fabricated *structural* steel." *Id*. (emphasis in original). To the extent that AISC is referring to non-load bearing FSS, that argument fails for the reasons articulated above. Otherwise, its mere belief overturns neither the Commission's thorough investigation nor its analysis and conclusion, which the record establishes is supported by substantial evidence and in accordance with the law.

For the above reasons, we hold that the Commission's domestic like product determination was reasonable, supported by substantial evidence, and in accordance with the law. We find nothing on this record that suggests that the Commission declined to address the issue, or that the Commission was obligated in this case to redefine the domestic like product scope merely in light of the parties' disagreement.

II. Captive Production Provision

We turn to AISC's argument that the Commission erred in determining that the captive production provision under 19 U.S.C. § 1677(7)(C)(iv) is inapplicable. According to AISC, the captive production provision applies because "PEMB producers 'internally transferred' significant quantities of FSS to make PEMBs," which are downstream articles. Appellant Br. 30. We are not persuaded.

Section 1677(7)(C)(iv) provides that:

> If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that—
>
> (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, and
>
> (II) the domestic like product is the predominant material input in the production of that downstream article,
>
> then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

Generally, the Commission considers the state of the domestic industry as a whole in its injury analysis. *See* 19 U.S.C. § 1673d(b)(1)(A)(i). An exception to this rule is the captive production provision, which provides that, if certain conditions are met, the Commission must "focus primarily on the merchant market for the domestic like product" when determining market share and assessing economic factors. *See* 19 U.S.C. § 1677(7)(C)(iv). The captive production provision addresses situations in which U.S. producers internally transfer a significant volume of the domestic like product for further internal processing into a separate, distinct downstream article. *See id*. The rationale is that internally transferred domestic like products neither compete with, nor are injured by, the imported merchandise subject to the investigation. When this provision applies, the Commission's investigation excludes pertinent data received from a producer that internally consumes its domestic like product to create a downstream product. *See id*.

A downstream article is an article distinct from the domestic like product but that is produced from the domestic like product. *See* Uruguay Round Agreements Act: Statement of Administrative Action,

H. Doc. 103–316, at 852–53 (1994) ("SAA").[4] Thus, the captive production provision does not apply where both domestic like product and the purported downstream article both fall within the domestic like product scope. *See id*.

We conclude that the Commission correctly determined that the captive production provision does not apply here. The Commission reasonably determined that complete PEMBs are fully assembled buildings that are out-of-scope, whereas PEMB kits containing FSS components of PEMBs that are later assembled into complete PEMBs are in scope. *See, e.g*., J.A. 8371; J.A. 8398; J.A. 8801. Because both FSS components of PEMBs and PEMB kits are within the domestic like product scope, *see, e.g*., J.A. 8371; J.A. 8398; J.A. 8801, neither can qualify as a downstream article under the captive production provision, SAA at 852–53. The only product that could qualify as a downstream article is the complete PEMB, which is out of scope. Accordingly, as AISC concedes, for the captive production provision to apply here, the producer that produces FSS components of PEMBs (or PEMB kits) must also internally transfer and process those domestic like products to produce the complete PEMB. *See* Appellant Br. 30–31. A "producer" must have sufficient product-related activities such that it has a "stake," e.g., it actually makes the product in the domestic industry at issue. *Pokarna*, 56 F.4th at 1350–51.

Those circumstances, however, do not exist here. NCI and BlueScope are both FSS and PEMB-kit producers. *See, e.g*., J.A. 8334. But they do not assemble the PEMB kits into complete PEMBs. Rather, the record establishes that unrelated third parties assemble the FSS components from the PEMB kits to make a building—the complete PEMB. J.A. 8801 & nn.186–87; J.A. 3132; J.A. 5345; J.A. 3429. These third-party builders are therefore complete-PEMB producers. *See* J.A. 5345–46 (referring to builders of PEMB kits as "PEMB builders"). Thus, the Commission properly concluded that the aggregation of components into PEMB "kits," without assembly by a third-party builder to make a complete PEMB, is neither an "internal[] transfer" nor the "production of a downstream article" within the meaning of the captive production under the statute. J.A. 8397–98 & n.180 (citing 19 U.S.C. § 1677(7)(C)(iv)).

For these reasons, we are unpersuaded by AISC's argument that "the Commission's construction of the statute was arbitrary and not

[4] The SAA is an authoritative expression concerning the interpretation and application of the Uruguay Round Agreements Act. 19 U.S.C. § 3512(d); *see* Oral Arg. 29:55– 30:21; *see also* Uruguay Round Agreements Act: Statement of Administrative Action, H. Doc. 103–316, at 656 (1994)("[S]ince this Statement will be approved by the Congress at the time it implements the Uruguay Rounds agreements, the interpretations of those agreements included in this Statement carry particular authority."); J.A. 26 n.15.

supported by the statute's plain language" because "the statute imposes no limit on who, in the internal transfer chain, must perform the final production/assembly, nor would such a limitation make sense." Appellant Br. 34. We find no such ambiguity. The SAA is clear on this issue. The term "internally transfer[red]" for the "production of a downstream article" is defined to mean "processed into a higher-valued downstream article *by the same producer.*" SAA at 852 (emphasis added). Because FSS components of PEMBs, PEMB kits, and complete PEMBs are not made by the same producer, there is no internal transfer as required by the captive production provision.

AISC also argues that "the Commission's determination undermines the statute's clear purpose" when it "fixated arbitrarily on the word 'production.'" Appellant Br. 33–34. This argument is forfeited because it was not made before the Court of International Trade. *Full Member Sub group of Am. Inst. of Steel Constr., LLC v. United States*, 547 F. Supp. 3d 1211, 1225 (Ct. Int'l Trade 2021) ("[AISC]does not contend that the threshold condition is unambiguous or that the Commission's construction of the threshold condition is contrary to the clear intent of Congress."). Absent exceptional circumstances, we will not consider forfeited arguments on appeal. *In re Google Tech. Holdings LLC*, 980 F.3d 858, 863 (Fed. Cir. 2020). AISC offers no argument that exceptional circumstances exist here.

We also find unpersuasive AISC's argument that the Commission's purported inconsistent labeling of certain parties as PEMB producers resulted in a final determination that is unsupported by substantial evidence and not in accordance with the law. AISC points to the preliminary investigation where the Commission generically referred to both PEMB-kit producers and FSS-of-PEMB-components producers as "PEMBs producers." Appellant Br. 33. But there is no dispute that the entities the Commission referenced were not the actual builders that assembled the kits to construct the complete buildings. The Commission's determination in this regard is supported by substantial evidence.

For the above reasons, we hold that the Commission's determination that the captive production provision is inapplicable is supported by substantial evidence and in accordance with the law.

III. Price Effects

AISC argues on appeal that the Commission erred in its determination that the record does not support a finding that imports of FSS from China significantly undersold the domestic like product, or depressed prices of the domestic like product under 19 U.S.C. §§ 1677(7)(C)(ii)(I)–(II). Appellant Br. 32, 38; J.A. 8410–15.

In evaluating the price effects of subject imports, the Commission assesses the impact on domestic like product prices by first establishing whether "there has been significant price underselling by the imported merchandise as compared with the price of the domestic like products." 19 U.S.C. § 1677(7)(c)(ii)(I). If the Commission finds there is significant underselling, it must consider whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." *Id*. § 1677(7)(c)(ii)(II).

According to AISC, the Commission should have compared initial and final itemized bid data from purchasers and producers instead of relying on pricing data of FSS. Appellant Br. 37–38. AISC claims that where prices were not itemized, the Commission should have collected bid data from the FSS fabricators. *Id*. AISC contends that the Commission's failure to obtain this information rendered the record inadequate and hobbled the Commission's analysis, and as a result, the determination is unsupported by substantial evidence. *Id*. at 40. Alternatively, AISC argues that even on the existing record, the Commission's price effects determination is not supported by substantial evidence. *Id*. at 43–55.

Specifically, AISC contends that the Commission failed to consider the entirety of the record, and if it had, it would have found significant underselling and price depression. *Id*. at 43–48, 54. AISC claims that any limitation posed by any single data source alone (e.g., total bid data, average unit values ("AUV") data, non-FSS component bid data) could be overcome by weaving together all the various data to find significant underselling. *Id*. at 47. We are not persuaded.

The Commission was not obligated to collect the additional data that AISC points to, especially because the Commission found that data unreliable and unhelpful to the price effects inquiry. Once the Commission satisfies its obligation to conduct investigative activities under 19 C.F.R. § 207.20(b),[5] a decision not to collect additional information does not alone render the Commission's final determination unsupported by substantial evidence. *See Hitachi*, 949 F.3d at 718–19. "The Commission does indeed enjoy discretion to conduct its

[5] The regulation states:

> The Director shall circulate draft questionnaires for the final phase of an investigation to parties to the investigation for comment. Any party desiring to comment on draft questionnaires shall submit such comments in writing to the Commission within a time specified by the Director. All requests for collecting new information shall be presented at this time. The Commission will disregard subsequent requests for collection of new information absent a showing that there is a compelling need for the information and that the information could not have been requested in the comments on the draft questionnaires.

19 C.F.R. § 207.20(b).

investigation and gather data it deems relevant." *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1373 (Fed. Cir. 2002). But "[t]here is no statutorily designated minimum standard that requires a particular degree of thoroughness in the Commission's investigation." *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n*, 26 F. Supp. 3d 1338, 1348 (Ct. Int'l Trade 2014). Moreover, "[i]t is not for this court on appeal to reweigh the evidence or to reconsider questions of fact anew." *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 815 (Fed. Cir. 1992). And "[e]ven if it is possible to draw two inconsistent conclusions from evidence in the record" this does not necessarily mean that the Commission's determination is unsupported by substantial evidence. *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001).

We hold that the Commission's price effects analysis was reasonable and supported by substantive evidence. After considering product data, overall bid data, itemized bid data, AUV data, and lost sales, the Commission determined that "[t]he record consequently does not support a finding that the subject imports significantly undersold the domestic like product." J.A. 8415. The Commission first found that most FSS is sold in a multi-stage competitive bidding process. J.A. 8404. But the Commission ultimately determined, after requesting additional data, that overall and itemized bid data for these bidding processes was not reliable for several reasons. First, "while there is some correlation between the lowest total bidder and . . . the successful bidder, lowest total bids do not always win the sale." J.A. 8410. Second, "the available data concerning total bids do not provide sufficient information to permit [the Commission] to make a conclusion about the relative price levels of the domestic and subject FSS included in the bids." *Id*. Third, it is not possible to "conclude that differences in total bid values necessarily reflect differences in the value of FSS included in the bid." J.A. 8411–12. This is primarily because purchasers do not receive itemized bids that permit assessing the value of any standalone FSS. *Id*.

The Commission also concluded that there was "no evidence of price depression on th[e] record." J.A. 8415. The Commission considered AUVs, cost of goods sold ("COGS"),and raw material costs, but found each data set provided insufficient support to establish price depression. J.A. 8415–17. For example, AUV data showed higher shipments and net sales within the domestic industry. J.A. 8415. As to COGS, the data suggested that "the industry's revenues increased by more than its COGS on both an overall and per-unit basis." J.A. 8415–16. And on raw materials, "the domestic industry as a whole was able to pass on the vast majority of its increases in raw material costs." J.A.

8417. These findings are supported by substantial evidence of no significant underselling and price depression and inform the reasonableness of the conclusion of no injury. We decline AISC's invitation to reweigh the Commission's factual findings.

We hold that the Commission satisfied its obligation under 19 C.F.R. § 207.20(b) to conduct investigative activities and to collect data necessary to conduct its analysis under the statute. It issued questionnaires and sought comment and argument on the best method to evaluate the pricing of the domestic like product. J.A. 8407–08. It then weighed the evidence it received, determined that the additional evidence promoted by AISC would not provide better clarity, and determined that the evidence did not support a finding of significant underselling or price suppression. J.A. 8408. "It is of course well within the [Commission's] discretion to discount or dismiss incomplete or unreliable data." *Chr. Bjelland Seafoods A/S v. United States*, 19 C.I.T. 35, 54 n.22 (1995). On this record, the Commission's refusal to seek out additional data as requested by AISC was reasonable and supported by substantial evidence.

The remainder of AISC's arguments are at their core requests for this court to reweigh the evidence, which is outside this court's purview. *See Trent Tube*, 975 F.2d at 815; *see also Am. Silicon Techs*., 261 F.3d at 1376. Again, we decline the invitation to reweigh the evidence considered by the Commission. Given the Commission's extensive review and analysis of the record, its determination that it lacked sufficient evidence to support a finding of underselling or price suppression is reasonable and supportedby substantial evidence.

CONCLUSION

We have considered AISC's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the judgment of the Court of International Trade.

AFFIRMED

COSTS

Each party shall bear its own costs.

U.S. Court of International Trade

Slip Op. 23–119

NUCOR CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and POSCO, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 21–00182
PUBLIC VERSION

[Remanding the U.S. Department of Commerce's Remand Results filed in connection with the 2018 administrative review of the countervailing duty order on certain carbon and alloy steel cut-to-length plate from the Republic of Korea.]

Dated: August 21, 2023

Alan H. Price, *Christopher B. Weld*, *Maureen E. Thorson*, *Adam M. Teslik*, Wiley Rein LLP, of Washington, DC, for Plaintiff.

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

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, *Jordan L. Fleischer*, and *Nicholas C. Duffy*, Morris, Manning & Martin, LLP, of Washington, DC, for Defendant-Intervenor.

OPINION AND ORDER

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon remand. *See* Confid. Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 60–1. Plaintiff Nucor Corporation ("Nucor") challenged Commerce's final results in the 2018 administrative review of the countervailing duty ("CVD") order on certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Republic of Korea ("Korea"). Compl., ECF No. 5; *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 86 Fed. Reg. 15,184 (Dep't Commerce Mar. 22, 2021) (final results and partial rescission of [CVD] admin. review, 2018) ("*Final Results*"), ECF No. 18–4, and accompanying Issues and Decision

Mem., C-580–888 (Mar. 16, 2021) ("I&D Mem."), ECF No. 18–5.[1] In *Nucor Corp. v. United States* ("*Nucor I*"), 46 CIT __, 600 F. Supp. 3d 1225 (2022),[2] the court remanded Commerce's determination not to initiate an investigation into the alleged provision of off-peak electricity for less than adequate remuneration (sometimes referred to as "LTAR") and Commerce's determination that mandatory respondent POSCO and its affiliate POSCO Plantec ("Plantec") do not meet the requirements necessary to find a cross-owned input supplier relationship with respect to the supply of scrap and a converter vessel.

On January 31, 2023, Commerce filed the Remand Results. Therein, Commerce provided further explanation for its determinations, which otherwise remain unchanged. Remand Results at 11–33, 38–52, 55–72.

Nucor filed comments opposing Commerce's Remand Results. Confid. Nucor Corp.'s Am. Cmts. on Final Results of Redetermination Pursuant to Ct. Remand ("Pl.'s Opp'n Cmts."), ECF No. 74. Defendant United States ("the Government") filed comments in support of the Remand Results. Confid. Def.'s Resp. to Pl.'s Cmts. Regarding the Remand Redetermination ("Def.'s Supp. Cmts."), ECF No. 70.[3]

For the following reasons, the court remands again the matters addressed in Commerce's redetermination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[4] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

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[1] The administrative record for the Remand Results is contained in a Public Remand Record ("PRR"), ECF No. 62–1, and a Confidential Remand Record ("CRR"), ECF No. 62–2. The administrative record for the *Final Results* is likewise contained in a Public Administrative Record ("PR"), ECF No. 18–1, and a Confidential Administrative Record ("CR"), ECF No. 18–2. The parties submitted joint appendices containing record documents cited in their comments. [Conf. Remand] J.A. ("CRJA"), ECF No. 76; [Public Remand] J.A., ECF No. 77. The court references the confidential record documents, unless otherwise specified, including, when necessary, those provided in the confidential joint appendix that accompanied parties' Rule 56.2 briefs. *See* Confid. J.A. ("CJA"), ECF No. 43.

[2] *Nucor I* presents background information, familiarity with which is presumed.

[3] POSCO filed comments incorporating by reference the Government's arguments and made no additional arguments. Def.-Int POSCO's Cmts. in Supp. of the Agency's Remand Determination, ECF No. 72.

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

DISCUSSION

I. Nucor's Allegation Concerning Electricity for Less Than Adequate Remuneration

A. Background

During the investigation underlying the order on CTL plate from Korea, the Korean government explained that "if one consumes electricity when the load factor is low, e.g., at night, the electricity tariff decreases since electricity could be generated by those using cheap fuels, e.g., nuclear generators." New Subsidy Allegations (Nov. 4, 2019) ("Allegation") at 9 & n.34, CR 182–84, PR 76–78, CRJA Tab 5 (citing the Government of Korea's July 15, 2016, response filed in the original investigation, attached to the Allegation as Exhibit 6). Nucor's allegation in this review pointed to news reports and KPX data demonstrating that electricity demand was more "evenly divided between on-peak and off-peak hours." *Id.* Nucor relied, in part, on the absence of fluctuation in the system marginal price ("SMP")[5] and information indicating that lower cost generators, such as coal or nuclear power, established the SMP "less than 4 [percent] of the time even during off-peak hours." *Id.* at 11 & n.41 (citing Allegation, Ex. 10). To demonstrate benefit, Nucor initially compared POSCO's weighted average off-peak electricity price for one plant[6] to the average off-peak SMP in the amount of 93.17 KRW/kWh and the KPX's annual average cost of sale in the amount of 106 KRW/kWh. *Id.* at 14–15.

Commerce issued a supplemental questionnaire, in which it stated: "According to . . . KEPCO's Form 20-F . . . there are other factors that determine the price for electricity other than the SMP. Based on these factors, please explain how the SMP only impacts pricing at off-peak hours." New Subsidy Allegations Suppl. Questionnaire (Dec. 20, 2019) ("Suppl. Questionnaire") at 3, PR 90, CRJA Tab 7. Nucor responded that the KPX pricing formula accounts for an adjusted coefficient and the fixed capacity price, but that Nucor did not understand

[5] The Korea Electric Power Corporation ("KEPCO") purchases "electricity from the [Korea Power Exchange ("KPX")], which "sets prices via merit order depending on estimated hourly power demand." Remand Results at 41. Generators with lower variable costs (such as nuclear and coal power) "are the first to have their bids accepted and comprise the base load, i.e., electricity intended to operate on a 24-hour basis." *Id.* Thereafter, generators with higher variable costs (such as oil and liquified natural gas) "comprise the non-base load and may or may not have their bids accepted depending on their bid price and the KPX's estimated level of electricity demand." *Id.* Commerce explained that the KPX accepts bids in ascending order of price "until the projected demand for electricity for such hour is met." *Id.* The "maximum bid value" for a given hour is the SMP. *Id.*

[6] The weighted average off-peak electricity price for POSCO's [[ ]] was [[ ]] Korean Won ("KRW") per kilowatt hour ("kWh").

those values to "affect the actual prices that end-users pay KEPCO for electricity." New Subsidy Allegations Suppl. Questionnaire Resp. (Dec. 31, 2019) ("Suppl. Allegation") at 4, PR 94, CRJA Tab 8. Nucor went on to describe the adjusted coefficient as an "ad hoc means of adjusting the distribution of profits or losses among KEPCO and its generating subsidiaries" and that it may ultimately be relevant to a benefit calculation. *Id.* Nucor explained, however, that it "discussed the SMP for two reasons. First, since it reflects the variable cost of electricity generation, it serves as a reasonably available and conservative proxy for what the price of electricity should be at any specific time of day." *Id.* Nucor further stated that "because [the SMP] is theoretically tied to demand, it should fall significantly if, as the Korean government has asserted, substantially lower off-peak electricity prices for certain end users simply reflect lower off-peak end-use demand for electricity," but that "this is not the case." *Id.* at 5.

The statute provides that Commerce "shall" initiate a CVD investigation "whenever an interested party" files a petition[7] "on behalf of an industry" that "alleges the elements necessary for the imposition of the duty imposed by section 1671(a) of this title" and provides "information reasonably available to the petitioner supporting those allegations." 19 U.S.C. § 1671a(b)(1). In this case, however, Commerce declined to initiate an investigation. *See* Decision Mem. on New Subsidy Allegations (Apr. 1, 2020), PR 144, CRJA Tab 9. Commerce found that Nucor had not adequately accounted for the adjusted coefficient and capacity price, stating that "any cost-based, market benchmark . . . should include these factors, because . . . KEPCO's cost of electricity is based on that formula." *Id.*

Nucor requested Commerce to reconsider its decision. Request for Recons. of New Subsidy Allegation (Apr. 9, 2020) ("Req. for Recons."), CR 254, PR 148, CRJA Tab 10. In the request for reconsideration, Nucor argued, *inter alia*, that even assuming that the Korean government's pricing formula results in a suitable benchmark, "the record still presents evidence of a benefit to POSCO." *Id.* at 7 (underline omitted). To support this assertion, Nucor pointed to "unit prices for each KEPCO generator and for each fuel type" for the period of review ("POR"). *Id.* Nucor explained that the "[t]he lowest unit price was KRW 67.38" per kWh, which was "[[

]]." *Id.* at 7–8.

Thus, Nucor argued, Commerce's decision not to initiate an investigation lacked record support "even assuming that the lowest-cost

[7] The statute also permits Commerce to self-initiate an investigation. 19 U.S.C. § 1671a(a).

generator supplied 100 [percent] of off-peak electricity, with fair value measured as whatever price results from the KPX's pricing formula for that specific generator." *Id.* at 8.

For the *Final Results*, Commerce rejected both the average off-peak SMP and KPX's cost-of-sale data as benchmarks, reasoning that "neither . . . reflect the average price of off-peak electricity for [less than adequate remuneration]." I&D Mem. at 22. With respect to cost recovery, Commerce did not find "one year without cost recovery sufficient to demonstrate that a government-owned entity is not recovering its costs." *Id.* at 23. Commerce did not address Nucor's comparison between the POR average unit price paid to the lowest cost generator and KEPCO's off-peak tariff rates. *See id.* at 20–26.

The court remanded Commerce's determination, explaining that although "Commerce appeared to question the propriety of examining a segment of a time-of-use system, its discussion in this regard is cursory." *Nucor I*, 600 F. Supp. 3d at 1233 (further noting the Government's concession that "Commerce did not explicitly address whether the off-peak supply of electricity within such a system may constitute a distinct subsidy program"). The court also found that Commerce had faulted Nucor for failing to provide information that Commerce did not identify as being reasonably available to Nucor. *Id.* at 1234.

B. Commerce's Remand Results

In the Remand Results, Commerce framed the issues identified by the court as "(1) whether the pricing of off-peak electricity could constitute a subsidy program distinct from Nucor's previous allegation regarding the sale of electricity for LTAR; and (2) whether Nucor's allegation met the threshold for initiating an investigation into any such program." Remand Results at 7. With respect to the first issue, Commerce clarified that it treated Nucor's allegation regarding the off-peak supply of electricity "as a separate subsidy program" distinct "from the previously investigated provision of electricity for LTAR program." *Id.* at 11. Commerce stated that it applied the standard for initiating an investigation set forth in *RZBC Group Shareholding Co. v. United States*. *See id.* at 12 & n.41 (citing *RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1295 (2015)).

In *RZBC Group*, the court explained that a petition or subsequent subsidy allegation functions "like a civil complaint" and is intended "to alert the agency to the possibility of a subsidy." 100 F. Supp. 3d at 1292. Thus, "most subsidy petitions are granted unless the allega-

tions are clearly frivolous, not reasonably supported by the facts alleged or omit important facts which are reasonably available to the petitioner." *Id.* at 1295 (citation and ellipsis omitted). On remand, Commerce again found that "Nucor's subsidy allegation did not provide a sufficient allegation of benefit because it omitted reasonably available facts that contradicted the basis of its pricing comparison." Remand Results at 12.

In reaching this conclusion, Commerce explained that Nucor's allegation rested on two separate bases: first, that "KEPCO's off-peak tariffs did not recover costs"; and second, that KEPCO's on-peak tariffs "cross-subsidize[] large industrial companies . . . who move production to off-peak hours." *Id.* at 15–16. Commerce addressed cross-subsidization before addressing cost recovery. *See id.* at 16.

With respect to cross-subsidization, Commerce maintained that "Nucor conflates benefit and specificity" because "[t]he hours at which POSCO . . . chose to purchase electricity based on the existing tariff schedule are . . . immaterial unless the tariff schedule itself is found to be inconsistent with market principles." *Id.* Commerce next addressed its earlier findings regarding the Korean electricity market. *Id.* at 16–17. To that end, Commerce explained that Nucor had failed to provide information "that would either call into question Commerce's previous determination that the Korean electricity system was consistent with market principles or demonstrate that the provision of electricity at specific, off-peak hours was inconsistent with market principles, including Commerce's previous findings of KEPCO's cost recovery." *Id.* at 17.

Regarding KEPCO's alleged failure to recover the costs of supplying off-peak electricity, Commerce explained that Nucor's "primary allegation focused on the SMP." *Id.* Commerce stated that Nucor failed to address available "[i]nformation on how the KPX developed the SMP price and how an adjusted coefficient was applied to certain generators' prices prior to the purchase by KEPCO" even after Commerce gave Nucor the opportunity to remedy deficiencies in the allegation. *Id.* at 17–18. According to Commerce, "[t]he SMP is relevant to the cost of generating electricity and, thus, relevant for a comparison to the prices in the GOK's tariff schedule, only insofar as it is utilized in the KPX's pricing formula by which the KPX sets the prices at which KEPCO compensates electricity generators." *Id.* at 42.[8] Commerce stated that the SMP does not reflect KEPCO's cost of electricity

[8] The per-unit variable cost of generating electricity that KEPCO pays is calculated as follows: "Per Unit Cost = Variable Cost + (SMP – Variable Cost) * (Adjusted Coefficient)." Remand Results at 42.

because lower cost generators receive less than the SMP and, "as a maximum price, the SMP does not account for the quantity of electricity provided by each generation type." *Id.* at 43.

Commerce acknowledged that "the hourly SMP information provided by Nucor demonstrates that off-peak electricity was operating above base load" and "that the highest bid prices for electricity at on- and off-peak hours" reflect a four KRW/kWh difference. *Id.* at 44. However, Commerce found that such information only showed "that certain generators are in use and is not an accurate estimate of KEPCO's costs" because differences in the amount of electricity generated at the SMP bid price "affects KEPCO's overall cost of supply." *Id.* Commerce pointed to evidence regarding "the actual prices paid to the generation subsidiaries" that were "below the 93.17 KRW/kWh SMP" but which "include[d] both the marginal price and capacity price of electricity (i.e., variable and fixed costs)." *Id.* at 46 & nn.147, 149 (citing Suppl. Allegation, Ex. 1 at 38 (reflecting the annual average unit prices paid to each GENCO)). Commerce addressed Nucor's reliance on news articles tending to show "a shift of industrial users toward the off-peak timeframe," *id.* at 39, but found "a myriad of possibilities that may explain why light load pricing may not be recovering costs during the POR," *id.* at 40.

C. Parties' Contentions

Nucor contends that Commerce applied a heightened standard that required Nucor to address Commerce's previous determinations concerning the Korean electricity market and provide a more precise benchmark value. Pl.'s Opp'n Cmts. at 4–5. Nucor asserts that it relied on the SMP to rebut the Korean government's reliance on purportedly lower consumption rates to explain cheaper off-peak electricity, *id.* at 9, explaining that the lack of variation in the SMP means that KEPCO's cost of supply likewise does not vary because "other variables in the KPX formula are static and do not change over the course a day," *id.* at 10 (citing Allegation at 10–11; Suppl. Allegation, Ex. 1 at 35–36). Nucor further asserts that it addressed Commerce's concern about variations in KEPCO's cost of supply through its demonstration that KEPCO acquired electricity from its lowest-cost generator type at prices that were [[ ]]. *Id.* at 11–12. Nucor also contends that Commerce's references to additional publicly available information that it asserts Nucor should have addressed are nonspecific and do not undermine the evidence Nucor relied on. *Id.* at 14.

The Government contends that Nucor's allegation "did not satisfy the standard set forth in *RZBC Group*" because the allegation failed to account for "Commerce's prior findings on the Korean electricity market" and factors affecting KPX's pricing besides the SMP. Def.'s Supp. Cmts. at 8–9; *see also id.* at 10–11 (arguing that Nucor failed to address Commerce's prior decisions finding no benefit in the Korean electricity system). The Government further contends that, insofar as Nucor claims that KEPCO recovers its costs by inflating its on-peak prices, Nucor conflates benefit and specificity because "the price POSCO pays for electricity at other hours is irrelevant except for the purposes of conducting a *de facto* specificity analysis." *Id.* at 16. According to the Government, Commerce is solely "concerned with whether Nucor provided sufficient evidence of a benefit by reasonably demonstrating that the price KEPCO paid for off-peak electricity is higher than the prices it charges consumers." *Id.*

D. Analysis

With respect to the standard used to evaluate Nucor's benefit allegation, Commerce claims to have applied the framework set forth in *RZBC Group*. *See* Remand Results at 11–12. In reviewing Commerce's remand determination, however, the court considers what Commerce said and what it did. To that end, as discussed below, there is inconsistency between the two.

This court has previously recognized that, in some circumstances, a heightened standard may apply. "When allegations concern a program previously held noncountervailable," Commerce may "require[ ] a petition to contain evidence of changed circumstances . . . before an investigation is initiated." *Delverde, SrL v. United States*, 21 CIT 1294, 1296–97, 989 F. Supp. 218, 222 (1997), *vacated on other grounds by Delverde SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000); *see also Bethlehem Steel Corp. v. United States*, 25 CIT 307, 315, 140 F. Supp. 2d 1354, 1363 (2001) (applying this standard).

Commerce asserted that this heightened standard did not apply because it accepted Nucor's allegation to raise the existence of a subsidy program distinct from Commerce's prior examination of the provision of electricity for less than adequate remuneration. *See* Remand Results at 11. Nevertheless, the agency clearly recognized that Nucor's allegation implicated a substantial amount of information previously examined by Commerce in connection with its investigations into the Korean electricity market. *See id.* at 12–15.

There need not be a strictly binary choice between the *RZBC Group* standard and the heightened standard of *Delverde*; however, the agency must be consistent with respect to the standard it articulates

and that which it applies. Here, when Nucor has previously alleged a countervailable subsidy through the provision of electricity to POSCO, without success,[9] Commerce may reasonably require Nucor to take account of the agency's prior findings when Nucor seeks to have the agency again examine the provision of electricity for less than adequate remuneration, albeit limited to a particular time of day. Whether Commerce applies the *RZBC Group* standard, the *Delverde* standard, or some hybrid standard, that decision is for Commerce to articulate in the first instance; however, the agency must be consistent in its statement of the applicable standard and its application of that standard. Because the Remand Results instead reflect inconsistency in this regard, as discussed below, the court must remand the determination for Commerce to further evaluate and explain its decision.

At the outset, Commerce appeared to accept the premise of Nucor's allegation, i.e., that a particular time period within a time-of-use system could be examined as a separate subsidy program. Nevertheless, certain statements within Commerce's discussion of Nucor's benefit allegation suggest otherwise. Commerce stated, for example, that the time period during which POSCO purchased electricity is relevant to a specificity analysis rather than a benefit analysis. Remand Results at 16.[10] Commerce further stated that Nucor did not provide information regarding off-peak prices that negated Commerce's prior determination that the Korean electricity system as a whole was consistent with market principles, or that would "demonstrate that the provision of electricity at specific, off-peak hours was inconsistent with market principles, including Commerce's previous

[9] While, in one case, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") remanded Commerce's determination that electricity was not sold for less than adequate remuneration in the investigation concerning cold-rolled steel, the appellate court based its decision to remand on Commerce's failure to adequately investigate the role of the KPX in the Korean electricity market. *See POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020). Commerce's remand redetermination, in which the agency continued to find no countervailable subsidy from the price of electricity, was sustained by the CIT and is pending review before the Federal Circuit. *See POSCO v. United States*, 46 CIT __, 557 F. Supp. 3d 1290 (2022), *appeal filed* (Fed. Cir. Mar. 25, 2022). Similar agency determinations in other proceedings involving subject merchandise from Korea have likewise been sustained by the CIT. *See, e.g.*, *Nucor Corp. v. United States*, 47 CIT __, 633 F. Supp. 3d 1302 (2023); *Nucor Corp. v. United States*, 47 CIT __, 633 F. Supp. 3d 1225 (2023). Nucor has also dismissed recent appeals challenging Commerce's determinations regarding the Korean electricity market. *See* Stip. of Dismissal, *Nucor Corp. v. United States*, Court No. 23-cv-00003 (CIT June 14, 2023); Stip. of Dismissal, *Nucor Corp. v. United States*, Court No. 22-cv-00170 (CIT June 13, 2023).

[10] A countervailable subsidy "exists when . . . a foreign government provides a financial contribution . . . to a specific industry" that confers "a benefit" on "a recipient within the industry." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)).

findings of KEPCO's cost recovery." *Id.* at 17. These statements suggest some reluctance by the agency to examine time-period specific pricing. However, instead of providing further explanation in this regard, Commerce, seeking to apply the *RZBC Group* standard, faulted Nucor for failing to address certain reasonably available information, such as the capacity price and the per-unit variable cost, as modified by the adjustment coefficient, that are relevant to KEPCO's costs in addition to the SMP. *Id.* at 42–43, 47.

To that end, in its allegation, Nucor acknowledged that the adjusted coefficient may bear upon Commerce's benefit calculation. *See* Suppl. Allegation at 4. Nucor argued, nevertheless, that the adjusted coefficient has no bearing on the similarity of SMPs apparent across the 24-hour time period, the constancy of which suggested a certain constancy in KEPCO's costs as compared to the three-fold difference between on-peak and off-peak pricing. *See id.* at 4–5; Allegation at 8–11.

Commerce addressed this when it discussed how the adjusted coefficient impacts the price paid to the generators and, moreover, the fact that the SMP represents the cap, or the maximum price paid to a generator for the variable cost of electricity for any given time. *See* Remand Results at 41–42. Based on the information available to Commerce, the agency reasonably found that Nucor overlooked relevant information about the Korean electricity pricing system, such as the fact that the KPX accepts specific variable bid prices below the SMP and the fact that lower cost producers would provide a higher percentage of the electricity during off-peak hours despite similarities in SMP as compared to on-peak hours. *See id.* at 40–44. In finding Nucor's allegation insufficient, Commerce compared the POR average off-peak SMP to the POR average unit prices paid to the two largest generation subsidiaries to assert that KEPCO paid certain generators for electricity at prices that were lower than the SMP. *Id.* at 46–47. This is consistent with Commerce's explanation that certain generators "are paid a variable price of electricity well below the SMP." *Id.* at 47.

Nucor did, however, provide additional information regarding KPX's pricing formula that appears to indicate that KEPCO's weighted-average off-peak prices paid by POSCO [[ ]] KEPCO's cost of acquiring electricity from its lowest cost generator. *See* Req. for Recons. at 7–8; *see also* Pl.'s Opp'n Cmts. at 11–12 (noting the same result with respect to KEPCO's cost of "acquir[ing] electricity from the lowest-cost generator type, nuclear generators"). This information appears responsive to Commerce's request that Nucor go beyond its arguments based on the off-peak SMP and directly address

electricity pricing during off-peak hours, regardless of whether Nucor addressed the consistency of the pricing system with market principles as a whole. Commerce did not respond to this particular aspect of the allegation or explain why it constituted insufficient evidence of a benefit for Commerce to investigate the off-peak pricing in particular pursuant to the low standard of *RZBC Group*. In the absence of a clearly articulated standard and an application of that standard to the entirety of the allegation made by Nucor, the court remands this issue for reconsideration or further explanation.

II. Issues Regarding Plantec

A. Background

The provision of countervailable subsidies by a foreign government may be direct or indirect "with respect to the manufacture, production, or export" of subject merchandise to the United States. *See* 19 U.S.C. § 1671(a)(1). Commerce has promulgated rules addressing the attribution of subsidy benefits to a respondent based on corporate cross-ownership. 19 C.F.R. § 351.525(b)(6). With respect to inputs, when "there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, [Commerce] will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)." *Id.* § 351.525(b)(6)(iv).

Commerce has explained that the regulation is intended to capture situations in which "a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,401 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*" or "*Preamble*") (providing as examples "stumpage subsidies on timber that was primarily dedicated to lumber production and subsidies to semolina primarily dedicated to pasta production"). Conversely, when inputs "are not primarily dedicated to the downstream products," Commerce will not "assume that the purpose of a subsidy to the input product is to benefit the downstream product." *Id.* (noting, by way of example, that "it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles").

In the underlying proceeding, Commerce initially declined to attribute to POSCO subsidies received by Plantec based on Plantec's

supply of scrap because Plantec generated scrap as a by-product and sold it through an intermediary, POSCO Daewoo Corporation ("PDC"). *See* I&D Mem. at 34. Commerce also declined to attribute subsidies based on Plantec's supply of various raw materials, fixed assets, and services based on Commerce's findings that the inputs were not produced by Plantec or used in POSCO's steelmaking. *See id.* at 33.[11]

The court remanded Commerce's determination regarding Plantec's supply of scrap, explaining that "various prior Commerce determinations appear to support the arguments of both Plaintiff and Defendant-Intervenor" and, thus, "it is incumbent upon Commerce to go beyond simply identifying one set of prior decisions in support of its determination." *Nucor I*, 600 F. Supp. 3d at 1238.[12] The court sustained Commerce's determination regarding the raw materials, fixed assets, and services except with respect to the converter vessel. *Id.* at 1239–41. The court explained that Commerce had failed to adequately explain its decision in light of record evidence indicating that POSCO used the converter vessel in steelmaking. *Id.* at 1241.

B. Commerce's Remand Results

In its redetermination, Commerce explained that agency decisions as to whether inputs are primarily dedicated such that a subsidy provided to the input producer is intended to benefit production of the input and the downstream product "are case-specific" and guided by the *Preamble* accompanying the CVD regulations. Remand Results at 22 & n.64 (citing *CVD Preamble*, 63 Fed. Reg. at 65,378). Commerce listed several factors the agency considers relevant to the analysis. *See id.* at 26. Those factors are:

- Whether an input supplier produced the input;
- Whether the input could be used in the production of downstream products including subject merchandise, regardless of whether the input is actually used for the production of the subject merchandise;

[11] Commerce did not address the parties' arguments regarding whether Plantec was cross owned by POSCO based on its resolution of the arguments concerning Plantec's provision of scrap and other materials. *See* Decision Mem. for the Prelim. Results (July 20, 2020) at 13, PR 161, CJA Tab 15; *see also* I&D Mem. at 31–36 (not addressing the issue).

[12] The court declined to sustain Commerce's determination on the basis of the Government's argument that the volume of Plantec's sales of scrap was small in relation to total sales by Plantec to POSCO, finding the argument impermissibly *post hoc*. *Nucor I*, 600 F. Supp. 3d at 1237. In the Remand Results, Commerce clarified that it "does not consider the amount of the input provided to be one of the factors" it uses to determine "whether an input is primarily dedicated." Remand Results at 26.

- Whether the input is merely a link in the overall production chain, as stumpage is to lumber production or semolina is to pasta production as described in the *Preamble*, or whether the input is a common input among a wide variety of products and industries and it is not the type of input that is merely a link in the overall production chain, as plastic is to automobiles;
- Whether the downstream producers in the overall production chain are the primary users of the inputs produced by the input producer and whether the production of the inputs by the input producers is exclusively for the overall production chain; and
- Examining a company's business activities to assess whether an input supplier's production is "dedicated almost exclusively to the production of a higher value-added product" in the manner suggested by the *Preamble* such that the purpose of any subsidy provided to the company would be "to benefit the production of both the input and downstream products."

Id. at 26, 59. The court addresses Commerce's findings in relation to these factors for both scrap and the converter vessel, and the parties' arguments relevant thereto, in turn.

C. Scrap

Commerce again determined that the scrap provided by Plantec "was not primarily dedicated to the production of POSCO's downstream product." *Id.* at 27. Commerce noted that Plantec "generated" the scrap and that the scrap was "used in the production of downstream product." *Id.* However, Commerce "compare[d] the scrap provided by . . . Plantec with the scrap processing services provided by POSCO's cross-owned input supplier, Pohang Scrap Recycling Distribution Center Co., Ltd. (Pohang SRDC)." *Id.* Commerce explained that, whereas Plantec "did not alter or otherwise process the scrap it generated for use as a steel input or specifically in the production of POSCO's downstream product," *id.*, "Pohang SRDC *processed* scrap by means such as loading and unloading, storage, guillotining (cutting), pressing to adjust size, *etc.*, on behalf of [PDC], which then provided the processed scrap to POSCO," *id.* at 28 (further stating that "[t]he scrap provided by Pohang SRDC was processed in a way that was specifically repurposed for POSCO's steel production").

Commerce explained that the sale of scrap through an intermediary "is relevant because it is an indication that . . . Plantec's sales of scrap only incidentally end up as part of POSCO's production of subject

merchandise." *Id.* Additionally, Commerce found "no record evidence indicating that POSCO's steel production is the primary use for the scrap produced [or] that the production of the scrap is exclusively for POSCO's steel production." *Id.* at 28–29; *see also id.* at 61 (noting that "Plantec sold scrap only to PDC during the POR, not POSCO, and there is no evidence that the scrap was intended for POSCO upon its generation by POSCO Plantec").

With respect to business activities, Commerce identified "Plantec's primary business purpose" as "the construction of industrial plants," which went beyond the scope of "steelmaking or constructing steelmaking plants." *Id.* at 30. Commerce analogized this case to *Glass Containers From China*, a case in which Commerce "found that an input supplier's broad business scope demonstrates that the input supplier's production is not 'dedicated almost *exclusively* to the production of a higher value-added product.'" *Id.* at 30–31 & n.86 (citing Decision Mem. for Certain Glass Containers from the People's Republic of China, C-570–115 (May 11, 2020) at Cmt. 12 ("Glass Containers Mem."), https://access.trade.gov/Resources/frn/summary/prc/2020–11070–1.pdf (last visited Aug. 21, 2023)).

1. Parties' Contentions

Nucor contends that Commerce's "holistic" examination is at odds with Commerce's prior determinations involving POSCO in which Commerce found scrap to be primarily dedicated to POSCO's steel production. Pl.'s Opp'n Cmts. at 18–19 (collecting cases). Nucor further contends that Commerce has, for the first time in the Remand Results, distinguished processed scrap from unprocessed scrap. *Id.* at 20. Nucor asserts that Commerce's consideration of the presence of an intermediary "is not meaningful" because Pohang SRDC also sold scrap to POSCO through PDC. *Id.* at 22 (citing Pohang SRDC's Initial Questionnaire Resp. (Sept. 26, 2019) ("Pohang's Questionnaire Resp.") at 1, 6, 9, CR 141, PR 45, CRJA Tab 3). Nucor argues there is no evidence that Plantec's scrap was sold to anyone other than POSCO, and that affirmative evidence of exclusivity is not necessary for attribution. *Id.* at 22–23. Lastly, Nucor contends that primary business activity was relevant in *Glass Containers From China* only insofar as Commerce used that information to apply adverse inferences. *Id.* at 23 (citing Glass Containers Mem. at 68–70).

The Government contends that Commerce's analysis accords with the law. Def.'s Supp. Cmts. at 18. The Government argues that Nucor merely disagrees with Commerce's determination and such disagreement is not a basis for another remand. *Id.* at 20. With respect to scrap, the Government contends that Plantec's sale of scrap through

the intermediary PDC and lack of processing together "suggest[] that the scrap to steel production relationship in this case is similar to the plastic to automobile production example in the *Preamble*." *Id.* at 23.

2. Analysis

Commerce is correct that neither the statute nor the agency's regulations define "primarily dedicated." Remand Results at 22. The court "recognizes that decisions regarding attribution are fact specific and Commerce may reach different conclusions in different cases in relation to the same input." *Nucor I*, 600 F. Supp. 3d at 1238. Nucor offers no substantive arguments against Commerce's consideration of various factors beyond noting that Commerce has reached different decisions in certain other proceedings involving scrap supplied to POSCO. *See* Pl.'s Opp'n Cmts. at 18–19. That alone is not a basis for remand. Commerce explained its methodological approach by way of reference to the *CVD Preamble* and prior agency determinations. Remand Results at 24–25. Except to the extent discussed further in, the chosen factors appear at least facially relevant to determining whether "the purpose of a subsidy provided to the input producer is to benefit the production of both the input and downstream products." *CVD Preamble*, 63 Fed. Reg. at 65,401. Commerce must, of course, "explain the basis for its decisions." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). With respect to the attribution matters considered on remand, Commerce was required to identify the facts on which it seeks to rely and explain their relevance to the inquiry.[13]

Regarding scrap, Commerce acknowledged that Plantec generated the scrap[14] and that POSCO used the scrap in production of the downstream product. Remand Results at 27. Commerce therefore

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[13] In the Remand Results, Commerce distinguished the agency's decision in *Rebar From Turkey 2018* in which it found scrap primarily dedicated to production of the downstream product. *See, e.g.*, Remand Results at 25 & n.73 (citing Decision Mem. for Steel Concrete Reinforcing Bar from the Republic of Turkey, C-489–819 (Sept. 21, 2021) at Cmt. 5, https://access.trade.gov/Resources/frn/summary/turkey/2021–20906–1.pdf (last visited Aug. 21, 2023)). That decision has since been remanded by the court. *See Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States*, 47 CIT __, 633 F. Supp. 3d 1276 (2023). On remand, Commerce reversed its decision and found that scrap was not primarily dedicated. Final Results of Redetermination Pursuant to Ct. Remand, *Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States*, Ct. No. 21-cv-00565 (CIT July 24, 2023) ("2018 Rebar Remand"). Commerce's remand redetermination pursuant to *Kaptan Demir* is pending before the court. Thus, unless they are otherwise relevant, the court disregards Commerce's and the parties' statements made in reliance on Commerce's original determination in *Rebar From Turkey 2018*.

[14] While, for the *Final Results*, Commerce distinguished the by-product nature of scrap from intentional production, I&D Mem. at 34, Commerce did not repeat that distinction in the Remand Results, *see* Remand Results at 27.

based its decision not to attribute subsidies received by Plantec on other considerations. *See id.* at 27–31, 60–66.

Among those considerations Commerce concluded that Plantec's primary business activity, "the construction of industrial plants," along with its "diverse" business functions, is insufficiently tied to "steelmaking or constructing steel-making plants." *Id.* at 30. Nucor does not dispute these underlying facts or that Commerce has considered business activities in other proceedings even if Commerce ultimately resolved the question on a different basis. *See* Pl.'s Opp'n Cmts. at 23.[15] Nucor's principal argument instead rests on Commerce's treatment of primary business activities in the 2018 and 2019 administrative reviews of the CVD order on rebar from Turkey. *See id.* at 21–23. As noted, however, Commerce has issued a revised determination in *Rebar From Turkey 2018*, *see* 2018 Rebar Remand, and Commerce's determination in the 2019 review is nonfinal pending judicial review, *see Kaptan Demir Celik Endustrisi ve Ticaret A.S. v. United States*, 46 CIT __, 592 F. Supp. 3d 1332, 1335 (2022) (declining to enter a stay in litigation concerning the 2019 review pending review of the 2018 Rebar Remand). Commerce has offered reasoned analysis supporting its consideration of primary business activities, noting that such consideration helps the agency to determine "whether an input supplier's production is 'dedicated almost exclusively to the production of a higher value-added product' in the manner suggested by the *Preamble* such that the purpose of any subsidy provided to the company would be 'to benefit the production of both the input and downstream products.'" Remand Results at 30 & n.83 (quoting *CVD Preamble*, 63 Fed. Reg. at 65,401). In other circumstances, Commerce may examine subsidies in the context of the upstream subsidy statutory provision. *See CVD Preamble*, 63 Fed. Reg. at 65,401 ("Where we are investigating products such as appliances and automobiles, we will rely on the upstream subsidy provision of the statute to capture any plastics benefits which are passed to the downstream producer.").

Other aspects of Commerce's analysis of scrap, however, require further consideration.

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[15] In *FEBs From Germany*, Commerce referenced its consideration of business activities in its preliminary determination. Decision Mem. for Forged Steel Fluid End Blocks from Germany, C-428–848 (Dec. 7, 2020) at 58, https://access.trade.gov/Resources/frn/summary/germany/2020–27335–1.pdf (last visited Aug. 21, 2023). However, Commerce based its final determination on "the quantities and types of materials that" were supplied to the respondent. *Id.* at 59. In *Glass Containers From China*, Commerce declined to apply adverse inferences to a respondent for the nonresponse of a cross-owned company after finding that Commerce did not request such a response. Glass Containers Mem. at 69. Commerce explained that the cross-owned company did not meet the criteria for attribution regarding the supply of certain machinery and materials based on the range of business activities that went beyond the scope of glass equipment manufacturing. *Id.* at 69–70.

In examining the role of scrap in the production chain, Commerce distinguished processed scrap from unprocessed scrap and, on that basis, distinguished its decisions vis-à-vis Plantec and Pohang SRDC. Remand Results at 27–28, 60.[16] Commerce, however, failed to support its finding that the unprocessed scrap at issue here is more "generic" than processed scrap. *See id.* at 27 (asserting that "unprocessed scrap is a common input among a variety of products and industries" without citing evidence that processed scrap is less common). Commerce points to no evidence that Plantec's scrap required processing to be used in POSCO's production process such that it was less suited for use than processed scrap.[17] *See id.* at 27–28. Further, Commerce offered no evidence to support the assertion that Pohang SRDC's scrap "was specifically repurposed for POSCO's steel production." *Id.* at 28. Pohang SRDC's questionnaire response noted that the company "processed inputs that *could have been used* by POSCO," Pohang's Questionnaire Resp. at 5 (emphasis added), and stated that such processing was performed "on behalf of PDC," *id.* at 6. There is no indication that POSCO provided any specifications or criteria to either PDC or Pohang SRDC.

Commerce's determination further suggests that the agency considers knowledge of the downstream destination relevant. Commerce stated that Plantec's sale of scrap through PDC implies that the scrap "only incidentally end[s] up as part of POSCO's production of subject merchandise." Remand Results at 28; *see also id.* at 61 (stating that "there is no evidence that the scrap was intended for POSCO"). Insofar as Commerce finds the presence of an intermediary relevant

[16] Alluding to the language in the *Preamble*, Commerce found that the "scrap in this case is not merely a link in the overall production chain." Remand Results at 27. Because Commerce did not, however, dispute that POSCO used Plantec's scrap it its production chain, *see id.*, the scrap does appear to be some sort of link in the production chain. Commerce's finding with respect to scrap (and likewise with the converter vessel discussed further in) is an example of how a potential typographic error or poor wording choice in the *CVD Preamble* impacts the meaning of the sentence. The *Preamble* states: "The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is *merely* a link in the overall production chain." *CVD Preamble*, 63 Fed. Reg. at 65,401 (emphasis added). The term "merely" is a minimizing term, such that the sentence would make more sense if "merely" was preceded by "not." Indeed, the examples that follow indicate that attribution may be appropriate when inputs are *not* mere links in a production chain (as plastic arguably is to an automobile), but instead serve a more crucial role in downstream production (such as timber used in lumber production). The notion that Commerce attributes subsidies when inputs are not mere links in the production chain is also consistent with Commerce's efforts in the Remand Results to explain the relevance of factors beyond an input's use in production. Thus, on remand, Commerce may want to reevaluate the meaning that should be afforded to the language in the *Preamble*.

[17] The significance of the processing may be overstated to the extent that it is characterized as including "loading and unloading" and "storage." *See* Remand Results at 28.

but not dispositive, Commerce's position appears to be that attribution may be appropriate when the record reflects intentional distribution through the intermediary to the downstream producer. *See id.* at 28, 61.

Commerce's position suffers from two flaws. First, Commerce distinguished this scenario from those in which "multiple companies are involved in the provision of scrap to the downstream producer, which may imply that the production of scrap by those companies is part of an overall production chain to provide scrap to the affiliated downstream producer." *Id.* at 28. Here, however, at least two companies—Plantec and Pohang SRDC—are involved in supplying scrap to POSCO through PDC in some fashion. Commerce does not explain why this is insufficient to find an "overall production chain" supplying scrap to POSCO. Second, because, as discussed above, Commerce failed to demonstrate that Pohang SRDC processed scrap specifically *for* POSCO, Commerce's differential treatment of Pohang SRDC and Plantec appears arbitrary. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (stating that it is "well-established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently").

Commerce's statement that there is insufficient evidence that "POSCO is the primary user" of Plantec's scrap does not save its determination. Remand Results at 61. Commerce acknowledged that Plantec sold scrap only to PDC, *see id.*, and the record indicates that Plantec's scrap was then resold by PDC to POSCO, *see* Resp. to the Affiliated Cos. Sec. of the Initial Questionnaire (Aug. 19, 2019) at 12 ("Aff. Cos. Resp."), CR 4–15, PR 20–23, CRJA Tab 1 (stating that Plantec's scrap "was just sold to PDC, which then resold it to POSCO"). In response to Nucor's argument that there is no indication "that the steel scrap that Plantec generated was sold to companies other than POSCO," Cmts. on Draft Results of Redetermination (Jan. 3, 2023) at 24, CRR 3, PRR 5, CRJA Tab 14, Commerce misconstrued the issue as whether Plantec sold to companies other than POSCO and asserted that Nucor's argument "is not supported by the record" because Plantec sold scrap to PDC, not POSCO, Remand Results at 61.

To the extent that Commerce finds relevant information missing from the record, it is incumbent on Commerce to solicit that information from the party in possession of the information, i.e., POSCO. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) ("The burden of production [belongs] to the party in possession of the necessary information.") (quoting *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)

(alteration in original)). And "[w]hile the burden of creating an adequate record lies with [interested parties], Commerce must, nonetheless, support its decision with substantial evidence." *SeAH Steel VINA Corp. v. United States*, 950 F.3d 833, 847 (Fed. Cir. 2020) (internal citations omitted) (alteration in original). Commerce essentially relied on speculation to conclude that this factor disfavored attribution, but "[g]uesswork is no substitute for substantial evidence." *Id.* (quoting *China Nat'l Arts & Crafts Imp. & Exp. Corp. v. United States*, 15 CIT 417, 424, 771 F. Supp. 407, 413 (1991)).

Because Commerce's evaluation of certain factors considered on remand is unsupported by substantial evidence and reasoned explanation, this issue will be remanded for reconsideration or further explanation.

D. The Converter Vessel

Commerce also found that the converter vessel "is not primarily dedicated to the production of downstream product." Remand Results at 66. Commerce reached this conclusion despite finding that the converter vessel "could be used in the production of downstream product." *Id*. at 67.

Commerce explained that the record did not support the finding that Plantec produced the converter vessel. *Id.* at 68–69. Commerce pointed to evidence demonstrating that Plantec's primary business purpose is "the construction of industrial plants," "steel producing facilities" and other "infrastructure." *Id.* at 68. Commerce also noted that Plantec provided the converter vessel along with other inputs that "can be used in the production of many different products in different industries." *Id.* at 69. Commerce distinguished this case from *Cold-Rolled Steel From Brazil*, in which the respondent "provided 'only steel mill equipment and services' to the producer." *Id.* at 71 & n.222 (quoting Decision Mem. for Cold-Rolled Steel from Brazil, C-351–844 (July 20, 2016) at Cmt. 16, https://access.trade.gov/Resources/frn/summary/brazil/2016–17952–1.pdf (last visited Aug. 21, 2023)). Here, Commerce explained, "Plantec provided a variety of types of equipment, the rest of which we found not primarily dedicated on the basis that it was generic and not related to the production of downstream product." *Id.* at 71.

1. Parties' Contentions

Nucor contests Commerce's conclusion that the record failed to establish that Plantec produced the converter vessel, pointing to evidence that Plantec constructs "steel producing facilities," the converter vessel is used to produce steel, and that, during the investiga-

tion, Plantec produced steel-making equipment. Pl.'s Opp'n Cmts. at 24–25. Nucor further contends that evidence indicates that POSCO used the converter vessel in its production process. *Id.* at 25 (citing POSCO's Initial Questionnaire Resp. (Sept. 26, 2019) ("POSCO's Initial Questionnaire Resp."), Ex. 12, CR 120–40, PR 39–44, CRJA Tab 2). Nucor argues that Commerce's attempt to distinguish *Cold-Rolled Steel From Brazil* fails because, in this case, Plantec also supplied POSCO with scrap, which is "a direct input into its subject production." *Id.* at 26.

The Government contends that Nucor's arguments are based on "outdated" information from the investigation and that Commerce supported its determination with record evidence showing that Plantec was not engaged in the production of steelmaking equipment during the POR and did not produce the converter vessel. Def.'s Supp. Cmts. at 26–27. The Government further contends that substantial evidence supports Commerce's determination to treat the converter vessel as non-primarily dedicated given Plantec's provision of the converter vessel along with several other items Commerce found not to be primarily dedicated to steel production. *Id.* at 27–29. The Government asserts that Commerce properly distinguished *Cold-Rolled Steel From Brazil*. *Id.* at 29.

2. Analysis

In *Nucor I*, the court found substantial evidence to support Commerce's determination that Plantec did not produce the converter vessel. 600 F. Supp. 3d at 1240. The court, however, remanded Commerce's determination because the agency went beyond that consideration to base its determination on the finding that the converter vessel was not used in steelmaking when the record suggested otherwise. *See id.* at 1238, 1240–41.

On remand, Commerce considered the aforementioned factors, i.e., whether Plantec produced the converter vessel; whether the converter vessel could be used in production of the downstream product; whether the converter vessel is a link in the overall production chain; whether POSCO was the primary user of the converter vessel; and Plantec's business activities. Remand Results at 26, 32–33, 66–72. Commerce also stated that "[t]hese factors are not in hierarchical order." *Id.* at 26. As part of its analysis, Commerce again found that substantial evidence did not support the finding that Plantec produced the converter vessel, Remand Results at 68, and Nucor offers nothing new to disturb that decision, *see* Pl.'s Opp'n Cmts. at 24–25 (offering mere disagreement with Commerce's evaluation of the evidence).

Commerce's redetermination raises squarely the question whether the agency's attribution regulation *requires* the supplier to produce the input, such that when the supplier is not the producer, consideration of other factors is unnecessary.[18] In the Remand Results, Commerce emphasized the relevant portions of the regulation, explaining:

> that, "if there is cross-ownership between an input supplier and a downstream producer, and *production* of the input product is *primarily dedicated to production* of the downstream product, the Secretary will attribute subsidies received by *the input producer* to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)[.]"

Remand Results at 67–68 (emphasis in original) (quoting 19 C.F.R. § 351.525(b)(6)(iv)). The *CVD Preamble* likewise discusses the purpose behind the regulation, which is to account for "subsidy provided to the *input producer*" that is intended "to benefit the *production* of both the input and downstream products." 63 Fed. Reg. at 65,401 (further referencing "input and downstream production [that] takes place in separately incorporated companies with cross-ownership"). Commerce, however, characterized the question "whether an input supplier produced the input" as just "one of the factors [it] considered." Remand Results at 68. Commerce therefore appeared to give equal weight to the factors. Because it is not the court's role to assign weight or reweigh the evidence, remand is necessary for Commerce to explain why this factor is not dispositive of the inquiry. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015); *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (the court "may not reweigh the evidence or substitute its own judgment for that of the agency").

Remand is also necessary because additional agency findings lack reasoned explanation. Thus, to the extent that Commerce, on remand, finds consideration of these additional factors necessary, the agency must address the following issues.

First, Commerce appeared to equivocate on whether the converter vessel was used in steelmaking. The agency acknowledged record evidence demonstrating that the converter vessel "*could* be used in the production of the downstream steel product," Remand Results at 32 & n.89 (citing POSCO's Resp. to Nucor's New Subsidy Allegations

[18] The court does not mean to imply that "production" may require intentional production as compared to the byproduct nature of scrap. Rather, the court's question is directed to the situation where a supplier may have instead [[ ]] inputs given Commerce's finding that Plantec was engaged in [[ ]]. *See* Remand Results at 68.

(Nov. 21, 2019) ("POSCO's Resp. to Allegation") at 10, CR 185, PR 88, CRJA Tab 6) (emphasis added), but did not address additional evidence indicating that the converter vessel was in fact used in POSCO's production process, *see* POSCO's Initial Questionnaire Resp., Ex. 12.[19] Moreover, notwithstanding this evidence, Commerce continued to give some weight to POSCO's assertion that the converter vessel "is not actual machinery or equipment used to produce the downstream product" without explaining how much weight or why it did so. Remand Results at 69.

Next, Commerce relied on Plantec's provision of the converter vessel along with other fixed assets that Commerce found to be too "generic" to be primarily dedicated to the production of the downstream product. *Id.* at 33, 69. The court sustained Commerce's determination with respect to the other fixed assets because "such equipment could not 'be tied specifically to the production of any steel products' and was instead of a type 'used in a typical manufacturing process.'" *Nucor I*, 600 F. Supp. 3d at 1240 (citation omitted). That was not the case with respect to the converter vessel, however. Insofar as Commerce found that production of the input was not essential to attribution, Commerce did not explain the significance of Plantec's provision of the converter vessel with the other more "generic" fixed assets sufficient for the court to discern why that fact matters.[20]

Finally, Commerce relied on the absence of "evidence demonstrating that POSCO's steel production is or could be the primary user of [the converter vessel]," or that Plantec supplied the converter vessel "exclusively for POSCO," to disfavor attribution. Remand Results at 33. As with scrap, however, Commerce's consideration of these factors—and corresponding inference favorable to POSCO—rests on speculation.[21]

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[19] This exhibit contains a CTL plate production chart in which the first step begins with a "Converter" that appears to be a vessel containing molten steel.

[20] Commerce explained that the converter vessel "was provided as part of [Plantec's] business functions related to [[

]]." Remand Results at 70. Commerce did not contrast the supply of inputs as part of a business but not manufacturing function, and instead went on to state that an examination of the converter vessel "separate from the other equipment and services [Plantec] provided" would not account for "relevant facts" in the record. *Id.* at 70–71. Commerce did not, however, explain why the supply of multiple inputs is "relevant" to whether any particular input is "primarily dedicated."

[21] As with scrap, Commerce found that Plantec's primary business activities did not support attribution based on the converter vessel. *See* Remand Results at 70. Nucor's only argument on this point is its disagreement with Commerce's distinction between the underlying facts and those of *Cold-Rolled Steel From Brazil*. Pl.'s Opp'n Cmts. at 26. Nucor instead seeks to analogize the proceedings based on Plantec's indirect provision of scrap. *See id.* Commerce, however, relied on the full range of Plantec's business functions and its decision in this regard is supported by substantial evidence. *See* Remand Results at 70 & n.220 (citing POSCO's Resp. to Allegation at 10–11).

In sum, Commerce must reconsider or further explain its reasons for considering factors other than "whether the supplier produced the input" and, if necessary, reconsider or further explain its decision on several other factors consistent with the foregoing.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are remanded; it is further

ORDERED that, on remand, Commerce shall reconsider or further explain its determination not to investigate the alleged off-peak sale of electricity for less than adequate remuneration; it is further

ORDERED that, on remand, Commerce shall reconsider or further explain its determination not to treat Plantec as a cross-owned input supplier in connection with the supply of scrap and the converter vessel; it is further

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

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); if, however, Commerce determines to investigate whether off-peak electricity is provided for less than adequate remuneration, the Parties may instead file a joint status report addressing the timing of any necessary further administrative proceedings; and it is further

ORDERED that any comments or responsive comments must not exceed 4,000 words.

Dated: August 21, 2023
New York, New York

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

Slip Op. 23–128

AMERICAN HONEY PRODUCERS ASSOCIATION AND SIOUX HONEY ASSOCIATION, Plaintiffs, v. UNITED STATES, Defendant, and ALLIED NATURAL PRODUCT AND AMBROSIA NATURAL PRODUCTS (INDIA) PVT. LTD., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00195

[Denying Plaintiffs' motion for judgment on the agency record and sustaining the U.S. Department of Commerce's final determination in the less-than-fair-value investigation of raw honey from India]

Dated: September 1, 2023

Joshua Morey, Kelley Drye & Warren LLP, of Washington, DC, argued for Plaintiffs. With him on the brief were *R. Alan Luberda*, *Melissa M. Brewer*, and *Matthew G. Pereira*.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reggie T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jared M. Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Robert G. Gosselink, Trade Pacific PLLC, of Washington, DC, argued for Defendant-Intervenors Allied Natural Product and Ambrosia Natural Products (India) Pvt. Ltd. With him on the brief were *Jonathan M. Freed* and *Aqmar Rahman*.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") final affirmative determination in the less-than-fair-value ("LTFV") investigation of raw honey from India, for the period of investigation from April 1, 2020, through March 31, 2021. *See Raw Honey From India*, 87 Fed. Reg. 22,188 (Dep't Commerce Apr. 14, 2022) (final affirmative determination of sales at less than fair value and final negative determination of critical circumstances) ("*Final Determination*"), ECF No. 16–5, and accompanying Issues and Decision Mem., A-533–903 (Dep't Commerce Apr. 7, 2022) ("I&D Mem."), ECF No. 16–6.[1]

Plaintiffs American Honey Producers Association and Sioux Honey Association (together, "Plaintiffs" or "American Honey") challenge

[1] The administrative record is divided into a Public Administrative Record ("PR"), ECF No. 16–2, a Confidential Administrative Record ("CR"), ECF No. 16–3, and a Non-Releasable Administrative Record, ECF 16–4. Parties filed joint appendices containing record documents cited in their briefs. *See* Public J.A. ("PJA"), ECF No. 35; Confid. J.A. ("CJA"), ECF No. 34. Citations are to the CJA unless stated otherwise.

two aspects of the *Final Determination*, namely: (1) Commerce's decision to calculate antidumping duty margins for respondents Allied Natural Product ("Allied") and Ambrosia Natural Products (India) Pvt. Ltd. ("Ambrosia") rather than rely on total adverse facts available ("total AFA")[2] due to what Plaintiffs consider to be inadequate financial statements, and (2) Commerce's decision to use acquisition costs as a proxy for the cost of production ("COP") of the subject merchandise, raw honey. *See* Confid. Pls.' Rule 56.2 Mem. of Law in Supp. of Mot. for J. Upon the Agency R. ("Pls.' Mem."), ECF No. 20–1; Confid. Pls.' Reply Br. ("Pls.' Reply"), ECF No. 32. Defendant United States ("the Government") and Defendant-Intervenors[3] support Commerce's determination. Def.'s Resp. in Opp'n to Pls.' Mot. for J. Upon the Agency R. ("Def.'s Resp."), ECF No. 28; Def.-Ints.' Resp. in Opp'n to Pls.' Mot. for J. Upon the Agency R. ("Def.-Ints.' Resp."), ECF No. 31.

For the following reasons, Commerce's *Final Determination* will be sustained.

BACKGROUND

On May 18, 2021, Commerce initiated LTFV investigations concerning raw honey from Argentina, Brazil, Ukraine, Vietnam, and as relevant here, India. *Raw Honey From Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam*, 86 Fed. Reg. 26,897 (Dep't Commerce May 18, 2021) (initiation of LTFV investigations) ("*Initiation Notice*"). Commerce initiated the investigations following receipt of antidumping duty petitions filed on behalf of Plaintiffs, trade associations representing domestic producers of raw honey. *Id.* at 26,897. The petitions alleged that imports of raw honey were being sold at less than fair value, causing material injury to the domestic raw honey industry. *Id*.

On November 17, 2021, Commerce issued an affirmative preliminary determination. *Raw Honey from India*, 86 Fed. Reg. 66,528 (Dep't Commerce Nov. 17, 2021) (prelim. affirmative determination of

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[2] Commerce uses total adverse facts available to determine dumping margins when the conditions for making an adverse inference have been met and "none of the reported data is reliable or usable." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted); *see also Nat'l Nail Corp. v. United States*, 43 CIT _, _, 390 F. Supp. 3d 1356, 1374 (2019) (explaining that "Commerce uses 'total adverse facts available'" when it applies "adverse facts available not only to the facts pertaining to specifical sales or information ... not present on the record, but to the facts respecting all of respondents' production and sales information that the [agency] concludes is needed for an investigation or review") (citation omitted).

[3] Defendant-Intervenors consist of Allied and Ambrosia (together, "Defendant-Intervenors," or, when in reference to the underlying agency proceeding, "Respondents").

sales at less than fair value, prelim. neg. determination of critical circumstances, postponement of final determination, and extension of provisional measures) ("*Prelim. Determination*"), PR 273, CJA Tab 53, and accompanying Decision Mem. ("Prelim. Mem."), PR 259, CJA Tab 48. For the *Preliminary Determination*, Commerce used Respondents' acquisition costs as a proxy for COP. Prelim. Mem. at 16.

Commerce published the *Final Determination* on April 14, 2022. 87 Fed. Reg. at 22,188. For the *Final Determination*, Commerce relied on Respondents' financial statements rather than total AFA and continued to rely on acquisition costs as a proxy for COP. *See* I&D Mem. at 19–34.

This appeal followed and the court heard oral argument on August 15, 2023. *See* Docket Entry, ECF No. 40.

JURISDICTION AND STANDARD OF REVIEW

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) (2018) and 28 U.S.C. § 1581(c) (2018).[4] The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While Commerce's conclusions must be supported by substantial evidence, 19 U.S.C. § 1516a(b)(1)(B), "the possibility of drawing two different conclusions from the evidence does not prevent [Commerce's] finding from being supported by substantial evidence," *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

DISCUSSION

Commerce imposes an antidumping duty on foreign merchandise that "is being, or is likely to be, sold in the United States at less than its fair value," and results in material injury or threat of injury to a U.S. domestic industry. 19 U.S.C. § 1673. The antidumping duty imposed is "an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id*. Here, Plaintiffs' arguments implicate Commerce's decisions to use Respondents' financial statements and acquisition costs as a proxy for COP in its normal value calculations. Each issue is discussed, in turn.

[4] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise specified.

I. Commerce's Reliance on Respondents' Financial Statements

A. Legal Background

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce, "fails to provide" requested information by the submission deadline, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a). Once Commerce determines that the use of facts otherwise available is warranted, if Commerce also "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). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275–76 (Fed. Cir. 2012).

B. Factual Background

Commerce issued antidumping questionnaires to Respondents in which Commerce requested financial statements for fiscal year ("FY") 2019–2020 and FY 2020–2021. *See* Initial Questionnaire (June 8, 2021) ("Allied Initial Questionnaire") at A-10, PR 63–64, CJA Tab 5; Initial Questionnaire (June 8, 2021) ("Ambrosia Initial Questionnaire") at A-10, PR 65–66, CJA Tab 6. Respondents each provided the FY 2019–2020 financial statements but informed Commerce that financial statements for FY 2020–2021 were not yet available. *See* Section A Questionnaire Resp. (July 13, 2021) at A-22, Ex. A-9(b), CR 44–47, PR 89–90, CJA Tab 12 ("Allied Section A Questionnaire Resp."); Resp. to Section A of Original Antidumping Duty Questionnaire (July 14, 2021) at A-19, Ex. A-9(b), CR 48–55, PR 92–98, CJA Tab 13 ("Ambrosia Section A Questionnaire Resp.").

Commerce later renewed its request for the FY 2020–2021 financial statements, adding that "[i]f these financial statements are not yet available, provide year end unaudited financial statements or the year end accounting trial balance." Suppl. Questionnaire (Aug. 23, 2021) at 4–5, CR 87, PR 136, CJA Tab 23 ("Ambrosia Suppl. Questionnaire"); Section A–C Suppl. Questionnaire (Aug. 19, 2021) at 4,

CR 86, PR 134, CJA Tab 22 ("Allied Section A–C Suppl. Questionnaire"). Respondents subsequently provided their respective trial balances for FY 2020–2021, explaining that the requested financial statements were not ready because of delays related to the global COVID-19 pandemic. *See* Section ABC Suppl. Questionnaire Resp. (Sept. 9, 2021) at Exs. S1–3, S1–5, S1–4, CR 95–102, PR 156, CJA Tab 25 ("Allied Section ABC Suppl. Questionnaire Resp."); Resp. to First Suppl. [Q]uestionnaire for Section A, B & C of Original Antidumping Duty Questionnaire (Sept. 16, 2021) at Exs. S1–1–S1–2, S1–4, S1–1(d), S1–6(a), CR 124–30, PR 173–76, CJA Tab 32 ("Ambrosia Section ABC First. Questionnaire Resp."); Resp. to First Suppl. Section D Questionnaire (Sep. 24, 2021) at Ex. S2–1, CR 135–38, PR 186, CJA Tab 34 ("Ambrosia Resp. to First Suppl. Section D Questionnaire"). Respondents continued to inform Commerce of the delay in finalizing the audited financial statements. Resp. to [S]econd Suppl. Section D Questionnaire (Oct. 28, 2021) at SD2–1, CR 168–69, PR 224, CJA Tab 42 ("Ambrosia Resp. to Second Suppl. Section D Questionnaire"); 2nd Sections ABC Suppl. Questionnaire Resp. (Nov. 5, 2021) at SuppABC2–1, CR 194–209, PR 246, CJA Tab 47 ("Allied 2nd Sections ABC Suppl. Questionnaire Resp").

On January 6, 2022, Commerce issued questionnaires to Respondents in lieu of conducting on-site verification. In-Lieu of Verification ("ILOV") Questionnaire (Jan. 6, 2022), CR 248, PR 292, CJA Tab 55 ("Allied ILOV Questionnaire"); [ILOV] Questionnaire (Jan. 6, 2022), CR 247, PR 291, CJA Tab 54 ("Ambrosia ILOV Questionnaire"). Therein, Commerce requested the final audited FY 2020–2021 financial statements, if they had been finalized, and required Respondents to reconcile the financial statements to the trial balances previously submitted. *See* Allied ILOV Questionnaire at 3; Ambrosia ILOV Questionnaire at 6. In response, Allied provided audited FY 2020–2021 financial statements finalized in December 2021, *see* [ILOV] Questionnaire Resp. (Jan. 18, 2022) ("Allied ILOV Questionnaire Resp.") at ILOV-3–4, Ex. SVE-11, CR 267–78, PR 297, CJA Tab 57, and Ambrosia submitted audited financial statements finalized in mid-November 2021, *see* Ambrosia Resp. to [ILOV Questionnaire] (Jan. 18, 2022) ("Ambrosia ILOV Questionnaire Resp.") at 15, Ex. VD-10(a), CR 249–66, PR 296, CJA Tab 56. The submitted financial statements did not include an auditor's report; however, they did include markings from directors and auditors indicating that the financial statements had been reviewed. *See* Allied Verification Questionnaire Resp., Ex. SVE-11; Ambrosia Verification Questionnaire Resp., Ex. VD-10(a). Commerce subsequently determined that Re-

spondents had complied with its requests and did not "impede the proceeding by withholding any information." I&D Mem. at 34.

C. Parties' Contentions

Plaintiffs contend that Commerce's acceptance of the financial statements was not supported by substantial evidence because Respondents withheld those statements after they were finalized and, even then, did not provide complete statements, inclusive of the notes and auditors' reports, thus impeding Commerce's investigation.[5] Pls.' Mem. at 12–19. Plaintiffs further argue that the late submission of the statements denied Plaintiffs the opportunity to rebut, clarify, or correct those statements as required by Commerce's regulations. *See id.* at 19–21. Plaintiffs assert that Commerce's determination that Respondents acted to the best of their abilities is unsupported by the record and the alleged shortcomings should have resulted in the use of total AFA. *See id.* at 21–32.

The Government contends that Respondents complied with Commerce's requests and acted to the best of their abilities. *See* Def.'s Resp. at 30–43. In particular, the Government notes that Respondents timely submitted audited financial statements for FY 2019–2020 and informed Commerce about delays in finalizing the FY 2020–2021 financial statements. *Id*. at 30–31. The Government further contends that Commerce considered and rejected the argument that the financial statements lacked key components when the agency accepted Respondents' explanation that, under Indian law, financial statements must include only certain items that Respondents provided. *See id.* at 32.

Defendant-Intervenors echo the Government's position that Commerce properly relied on the financial statements and declined to apply adverse facts available. Def.-Ints.' Resp. at 7–12. Defendant-Intervenors contend that they timely filed their FY 2020–2021 audited financial statements consistent with the deadlines provided in Commerce's regulations. *See id.* at 7.

D. Analysis

Commerce's initial questionnaire asked for Respondents' audited financial statements and specified that such request included "any footnotes and auditor's opinion." Ambrosia Initial Questionnaire at

[5] Plaintiffs identify six deficiencies with the financial statements: (1) the lack of an independent auditor's report, (2) missing annexures and the Report on Internal Financial Controls, (3) the lack of an auditor's signature, (4) the lack of an auditor's stamp, (5) the lack of both directors' signatures on several pages of the statements, and (6) various other missing forms required under Indian law. *See* Pls.' Mem. at 12–16.

A-10; *see also* Allied Initial Questionnaire at A-10. Plaintiffs aver that this definition of "financial statements" as inclusive of the footnotes and auditor's opinion persisted throughout the investigation. *See* Pls.' Mem. at 12, 21, 24; Pls.' Reply Br. at 7–8. Commerce, on the other hand, explained that it did not explicitly request any accompanying audit report in its questionnaire in lieu of verification but instead asked Respondents to demonstrate how the values in those financial statements corresponded to the previously submitted trial balances. *See* I&D Mem. at 32.

In light of the express language used by the agency, Commerce's determination that its "verification questionnaire requested the audited 'financial statements,' but did not explicitly specify that the accompanying audit report be provided" is supported by substantial evidence. *Id.* at 32. Commerce's determination is consistent with the purpose of the questionnaires, which Commerce explained was to "collect additional or supporting documentation related to information that [Respondents] have already submitted in this investigation" and was "not a request for new information." Ambrosia ILOV Questionnaire at 1; Allied ILOV Questionnaire at 1.

Commerce's determination that Respondents "did not impede the investigation," I&D Mem. at 32, is also supported by substantial evidence. Commerce explained that Respondents informed Commerce of the delays in completing their FY 2020–2021 financial statements due to the pandemic, timely submitted trial balances to Commerce in lieu of the financial statements, and reconciled those trial balances to the audited financial statements. *See id.* at 32–34.

Plaintiffs' arguments to the contrary are without merit. Plaintiffs argue that the submitted financial statements are deficient because the statements missed "integral parts," namely the presence of an independent auditor's report. *See* Pls.' Mem. at 25, 27–28. As discussed above, Commerce reasonably concluded that Respondents were not required to submit an auditor's report. Moreover, Commerce found that the statements were audited given the "directors' and auditor's signatures and stamps that are present on the income statements." I&D Mem. at 32; *see also* Ambrosia Verification Questionnaire Resp. at Ex. VS-1, Ex. VS-2 (i), Ex. VS-2 (ii), Ex. VS-3; Allied Verification Questionnaire Resp. at Ex. SVE-1, Ex. SVE-2. While Commerce acknowledged that the financial statements provided by Ambrosia were "missing certain data when compared to the prior period audited financial statements that were submitted," I&D Mem.

at 32–33, Commerce determined that the missing data were "not critical for Commerce's use for this investigation,"[6] *id*. at 33.

Plaintiffs also claim that Respondents impeded the investigation by withholding their financial statements from Commerce. Pls.' Mem. at 12–19. There is no dispute that Respondents' financial statements for FY 2020–2021 were delayed as a result of the COVID-19 pandemic. *See* I&D Mem. at 34. Respondents reported these delays to Commerce along with the Indian Government's extensions of the deadlines for completing the financial statements. *Id.*; *see also* Ambrosia Resp. to First Suppl. Section D Questionnaire at S1–2; Allied Suppl. Section D Questionnaire Resp. at SuppD-12 (Sept. 28, 2021), CR 142–45, PR 191, CJA Tab 35. Plaintiffs' argument rests on the fact that the financial statements were completed almost two months prior to submission. *See* Pls.' Mem. at 15–16. Commerce rejected Plaintiffs' argument based on the timeline discussed herein as a result of the pandemic and in acknowledgement of the fact that the financial statements were not completed until after the submission of all of Respondents' supplemental questionnaire responses. *See* I&D Mem. at 34. While Plaintiffs would have preferred that Commerce concluded differently, Plaintiffs provide no basis for the court to disturb the agency's weighing of the facts. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015) (explaining that the court may not reweigh the evidence).

Plaintiffs further assert they did not have an adequate opportunity to rebut or comment on the financial statements because Respondents provided the statements in response to the verification questionnaire. *See* Pls.' Mem. at 19–21. As Commerce explained, the agency accepted the financial statements as part of its verification exercise, not as new factual information, but, rather, for purposes of verifying the accuracy of the trial balances that Respondents previously submitted. *See* I&D Mem. at 34. Moreover, as noted by the Government, Plaintiffs had an opportunity raise arguments regarding those trial balances throughout the course of the proceeding and, thus, the court finds that they were not deprived of an opportunity to

[6] Plaintiffs also argue that Commerce improperly relied on Ambrosia's characterization of the financial statements as meeting the requirements of the Indian Companies Act of 2013 Section 2(40), which Plaintiffs aver was not placed on the record of the investigation. *See* Pls.' Mem. at 27–28. Most of the agency's discussion of the Indian Companies Act is in the form of restatement of Ambrosia's assertion, without express adoption by Commerce. *See* I&D Mem. at 32–33. Any reliance by Commerce on the requirements of Indian law, even if erroneous, was harmless in light of the additional reasoning provided by Commerce for finding that the financial statements, as provided by Respondents in response to the ILOV questionnaires, were adequate to verify the contents of the trial balances.

comment on Respondents' financial information.[7] *See id.* at 28–34; Def.'s Resp. at 35–36; 19 C.F.R. § 351.301(c)(1)(v) (listing various opportunities parties have to rebut, clarify, or correct questionnaire responses).

Finally, Plaintiffs cite *Assan Alumniyum Sanayi ve Ticaret A.S. v. United States* ("Assan"), 47 CIT __, __, 624 F. Supp. 3d 1343, 1377 (2023), to support their argument that Respondents impeded the investigation and Commerce made "[c]onclusory statements that the Respondents cooperated to the best of their ability," Pls.' Reply at 15. Plaintiffs' reliance on *Assan* is misplaced, however, because the facts in the present case are distinct from the facts in *Assan*. There, the court held that Commerce's finding that "Assan . . . cooperated with Commerce's requests for . . . information[] and . . . answered each request for . . . information to the best of its ability" did not accord with law because Commerce did not explain the basis for its conclusion. *Assan*, 624 F. Supp. 3d at 1377 (alterations in original). Here, as discussed above and in Commerce's Issues and Decision Memorandum, Commerce clearly justified its conclusion that Respondents did not impede the investigation. *See* I&D Mem. at 31–34.

In sum, Commerce responded to each of the objections raised by Plaintiffs and explained its decision to accept and rely on the financial records provided by Respondents. The court will not reweigh this evidence. *See Downhole Pipe & Equip., L.P.*, 776 F.3d at 1376–77. Accordingly, Commerce's decision to rely on the Respondents' audited financial statements to conduct their antidumping analysis and to decline the use of AFA was supported by substantial evidence.

II. Commerce's Decision to Use Respondents' Acquisition Costs to Calculate the Cost of Production

A. Legal Background

To determine whether subject merchandise is being sold at LTFV, Commerce compares the export price of the subject merchandise to its

[7] Plaintiffs also claim that "there were discrepancies among the reported cost figures" discovered at verification. Pls.' Mem. at 18–19. Commerce found that Respondents had reconciled these figures by providing "audited financial statements to the general ledger accounts, as maintained in their financial accounting system, and a cost allocation summary worksheet . . . which reconciled with the costs reported in the respondents' databases." I&D Mem. at 33. Commerce determined that none of "the examples cited demonstrate that the respondents' data are incomplete, or inaccurate, or that the responses were otherwise not in accordance with the information Commerce requested." *Id.* at 33 & n.183. Thus, Commerce considered Plaintiffs' concerns with the financial statements and explained how it used multiple sources to reconcile Respondents' reported data.

normal value.[8] *See generally* 19 U.S.C. 1673, *et seq.* Normal value is "the price [of the foreign like product] at a time reasonably corresponding to the time of the sale used to determine the export price." *Id.* § 1677b(a)(1)(A). Commerce calculates the normal value of the subject merchandise on the basis of home market sales that are made "in the ordinary course of trade." *Id.* § 1677b(a)(1)(B)(i). Commerce, therefore, may disregard sales at prices that are less than the COP, *id*. § 1677b(b)(1), because those sales are not made in the ordinary course of trade, *see id*. § 1677(15)(A). The COP "equal[s] . . . the sum of . . . the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business." *Id*. § 1677b(b)(3)(A).

The statute specifies that Commerce should normally base its calculation of COP "on the records of the exporter or producer," if those "records are kept in accordance with the generally accepted accounting principles," and "reasonably reflect" the cost of merchandise. *Id.* § 1677b(f)(1)(A). However, the statute does not require Commerce to rely upon actual cost data, but instead provides Commerce the discretion to rely upon the actual production costs of unaffiliated suppliers of subject merchandise instead of acquisition costs. *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1371 (Fed. Cir. 2011).

In the context of a respondent selling raw, unprocessed agricultural products, Commerce previously has relied on the cost of producing the raw goods as the respondent's COP, even when the respondent is not the producer. *See, e.g*., *Fresh and Chilled Atl. Salmon from Norway*, 56 Fed. Reg. 7,661, 7,672 (Dep't Commerce Feb. 25, 1991) (final determination of sales at less than fair value) (non-affiliated salmon farmers' costs used as a proxy for COP for salmon exporter); *Greenhouse Tomatoes From Canada*, 67 Fed. Reg. 8,781, 8,782–84 (Dep't Commerce Feb. 26, 2002) (final determination of sales at less than fair value) (farmer's costs relied upon as exporters' COP). Most relevant for the present case, Commerce used this same methodology in an earlier proceeding covering honey from Argentina. *See, Honey From Argentina*, 76 Fed. Reg. 2,655, 2,659 (Dep't Commerce Jan. 15, 2011) (prelim. results of antidumping duty admin. review) (independent beekeepers' cost of producing honey used as COP for honey exporters) (unchanged for the final results).

[8] When, as here, the subject merchandise is sold or offered for sale "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price," normal value is determined on the basis of home market sales. 19 U.S.C. § 1677b(a)(1)(B).

B. Relevant Factual Background

In the underlying proceeding, Commerce determined that, due to the large number of beekeepers in India producing raw honey, and the fact that many of them are small, unsophisticated operations with few or no accounting records, obtaining data from a random sample of beekeepers that is statistically valid would not be possible. I&D Mem. at 25. Commerce also determined that because the Indian beekeeping operations were generally small in comparison to the size of Respondents, even selecting the largest suppliers to evaluate would not capture a representative sample of the raw honey being supplied to Respondents. *Id*. Commerce also took account of its experience in *Honey from Argentina*, in which it selected a dozen honey producers out of some twenty-five thousand producers and none of them responded to Commerce's inquiries. *See id*. at 24–25. Taking account of this experience and the facts of this case, Commerce determined that its resource constraints, difficulty in acquiring information from small and oftentimes unsophisticated raw honey producers, and the sheer number of producers in the Indian marketplace supported a different approach to determining COP. I&D Mem. at 25–26.

Here, Commerce determined to have Respondents report their acquisition costs and to obtain information from a subset of their suppliers to confirm that those acquisition costs were reliable. *See id.* Commerce identified the largest honey suppliers for each respondent and selected the suppliers "with the lowest sales prices to Allied and Ambrosia." *Id*. at 26. In doing so, Commerce chose to collect COP information from "two of Allied's middlemen-suppliers and two beekeeper-suppliers to those middlemen" and from "Ambrosia's one direct beekeeper-supplier, one middleman and its beekeeper-supplier." *Id.* Commerce reasoned "that these were the suppliers with the highest risk to be selling at below their COP . . . and were actual suppliers to the exporter-respondents" and, thus, "Commerce could reasonably determine that reliance on acquisition costs would not result in missing costs." *Id*.

Commerce compared these beekeepers' COP to the respective acquisition costs paid by Respondents to ensure that the raw honey was not obtained below the suppliers' COP. *See id.* at 26–27. In each case, Commerce found that the acquisition costs paid by Respondents exceeded the COP incurred by raw honey suppliers. *See id.* at 19–20 & n.131 (citing Prelim. Mem. at 17). Commerce further reasoned that the reliance on acquisition costs would "ensure[] the capture of all costs, expenses, and profits of the beekeepers and middlemen involved in the production and collection of raw honey" because "it can

reasonably be shown that the upstream beekeeper-producers are not selling below cost" and is thus consistent with Commerce's obligations under the Tariff Act. *Id*. at 27.

C. Parties' Contentions

Plaintiffs contend that Commerce's reliance on acquisition costs is contrary to the agency's practice because that practice is to rely on the beekeeper and supplier costs when they are available and, in the alternative, Commerce should have relied upon Plaintiffs' data from the National Horticultural Board of India ("NHBI"). *See* Pls.' Mem.at 32–40. Plaintiffs further claim that Commerce's reliance on acquisition costs is unsupported by substantial evidence. *See id*. at 40–48.

The Government contends that Commerce's experience in *Honey from Argentina* was informative for this investigation. *See* Def.'s Resp. at 16–18. The Government argues that this experience, coupled with the reality of smaller beekeepers having limited records, informed the agency's decision to change its practice here, which the agency explained and justified. *See id.* at 18–19. The Government maintains that Commerce adopted a "pragmatic approach to collecting limited beekeeper COP information."[9] *Id.* at 19 (quoting I&D Mem. at 26). The Government further contends that Commerce was not obligated to rely on, and was reasonable in declining, the NHBI data. *Id*. at 24–25, 28.

Defendant-Intervenors add that Plaintiffs failed to demonstrate that Commerce's approach here deviated from its goal of calculating accurate dumping margins. *See* Def.-Ints.' Resp. at 3–6.

D. Analysis

Commerce's reliance on acquisition costs as a proxy for COP is in accordance with law and supported by substantial evidence because Commerce provided adequate reasoning for its decision and was not obligated to rely on Plaintiffs' NHBI data.

Commerce acknowledged that in prior investigations of raw agricultural goods, including raw honey, it had sought to rely on the costs of the growers/producers when determining COP, but explained why the agency decided to alter that practice here and, instead, rely upon acquisition costs as a proxy for COP. *See* I&D Mem. at 22–27. Agencies are permitted to deviate from past practices provided that they explain the reasoning behind the deviation. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808

[9] As discussed above, Commerce selected suppliers with the lowest sales prices to Respondents because those suppliers posed the highest risk of selling at below their COP and thus Commerce could reasonably determine that reliance on the acquisition costs would not result in any missing costs.

(1973); *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1373 (Fed. Cir. 2003) ("Commerce is permitted to deviate from [its] past practice, at least where it explains the reason for its departure." (citing *Atchison*, 412 U.S. at 808)).

Here, Commerce adequately explained its decision to apply a new methodology. *See* I&D Mem. at 27. That explanation included reference to the agency's less-than-ideal experience in *Honey from Argentina* and Commerce's comparison between Respondents' acquisition costs and the costs of production from the largest honey suppliers with the lowest sales prices to Respondents. *See* I&D Mem. at 27; Prelim. Mem. at 16–17. Through this analysis, Commerce concluded that Respondents' acquisition costs were above the COP of their suppliers such that the acquisition costs provided a reasonable proxy for the COP of the raw honey and that no costs were being omitted. *Id*. As discussed herein, Plaintiffs' arguments simply ask the court to reweigh the evidence, which the court will not do. *See Downhole Pipe & Equip., L.P.*, 776 F.3d at 1376–77.

Having adopted a reasonable methodology for testing Respondents' acquisition costs, Commerce was not obligated to rely upon Plaintiffs' NHBI data. As the Government noted, Commerce is under no statutory requirement to "explicitly discuss every piece of record evidence that is" placed before the agency in a proceeding, *see* Def.'s Resp. at 28–29 (quoting *Allegheny Ludlum Corp. v. United States*, 24 CIT 452, 479, 112 F. Supp. 2d 1141, 1165 (2000)), and is instead only required to consider issues material to its determination, *see Allegheny Ludlum Corp.* 112 F. Supp. 2d at 1165. Plaintiffs' mere disagreement with Commerce's findings and methodology is not sufficient to remand Commerce's *Final Determination*.

To the extent Plaintiffs object that Commerce should have done more to verify the costs of the beekeepers and middlemen suppliers, those objections are without merit. Here, it appears that Commerce considered the information it received from the beekeepers and middlemen suppliers to be self-verifying to the extent that Commerce recognized that these small beekeeper operations "typically had limited records, or limited access to technology due to their remote locations." I&D Mem. at 24. Commerce also noted these operations are not required "to maintain books and records, prepare financial statements, or file tax returns." *Id*. at 38–39. Rather than engage in a seemingly pointless verification exercise of asking the beekeeper and supplier operations to resubmit their limited records as part of an in-lieu-of-verification questionnaire response, Commerce carefully reviewed the details of the information provided by the beekeepers and suppliers to ensure completeness and filled any gaps in that informa-

tion with data provided by Plaintiffs. *See id.* at 38–43. Notwithstanding the above adjustments, the costs attributed to the beekeepers and suppliers by Commerce were *still* below the acquisition costs of Allied and Ambrosia, and Commerce determined that no further verification was appropriate. *See id.* Based on the foregoing, the court finds that the agency adequately explained the basis for its decision, and while Commerce may not have expressly responded to Plaintiffs' argument about verifying the beekeeper information, the court is able to discern the agency's reasons for finding further verification unnecessary. *See NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").

Finally, the court acknowledges its recent decision in *Nexco S.A. v. United States* dealing with Commerce's decision to rely upon acquisition costs as a proxy for COP in the parallel investigation of raw honey from Argentina. Slip Op. 23–85, 2023 Ct. Int'l Trade LEXIS 87 (CIT June 7, 2023).[10] There, the plaintiff was the respondent in that investigation and argued that the acquisition costs were not a reasonable proxy for COP because they were too high. *See id.* at *3. The *Nexco* court, like this court, agreed that Commerce reasonably explained its decision to deviate from its prior practice and consider acquisition costs as a proxy for COP. *Id.* at *10–11. The *Nexco* court, however, agreed with the plaintiff that Commerce did not adequately explain how that methodology was not "overinclusive" of costs such that it potentially overstated COP, when the acquisition costs were two to three times higher than the beekeepers' COP. *Id.* at *12–14. Here, when the challenge to the methodology is from domestic party plaintiffs, there is no concern that the acquisition costs potentially overstate the COP of the raw honey, and Commerce has otherwise explained its decision.[11]

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[10] Note that the previous references to *Honey from Argentina* refer to an antidumping duty order issued in 2001. *See Notice of Antidumping Duty Order; Honey From Argentina*, 66 Fed. Reg. 63,672 (Dep't Commerce Dec. 10, 2001). That order was subsequently revoked pursuant to *Honey from Argentina*, 77 Fed. Reg. 77,029 (Dec. 31, 2012) (final results of antidumping and countervailing duty changed circumstances reviews; revocation of antidumping and countervailing duty orders). As referenced in the Background section above, Commerce initiated a new investigation of honey from Argentina coincident with this investigation. *Initiation Notice*, 86 Fed. Reg. at 26,897.

[11] In *Nexco*, the plaintiff's concern related to acquisition costs that were potentially overinclusive such that those costs inflated the normal value and, thus, the dumping margin, to the plaintiff's detriment. By contrast, here, Plaintiffs object that the acquisition costs understate COP, thereby potentially understating the normal value and the dumping margin. As discussed above, Commerce has reasonably explained its determination that the acquisition costs capture the full cost of producing the raw honey.

For these reasons, Commerce's reliance on acquisition costs as a proxy for COP is supported by substantial evidence and is otherwise in accordance with the law.

CONCLUSION

For the foregoing reasons, the court will sustain Commerce's *Final Determination*. Judgment will enter accordingly.

Dated: September 1, 2023
New York, New York

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

Slip Op. 23–129

AM/NS CALVERT LLC, Plaintiff, v. UNITED STATES, Defendant.

Court No. 21–00005

CALIFORNIA STEEL INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 21–00015

VALBRUNA SLATER STAINLESS, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 21–00027
Before: M. Miller Baker, Judge

[In three APA suits challenging Commerce's denials of Section 232 duty exclusions, the court (1) denies Defendant's motions to dismiss on mootness grounds as to finally liquidated entries; (2) treats Defendant's alternative motions to dismiss for failure to state a claim and for judgment on the pleadings as motions for partial summary judgment as to such entries, which the court denies; and (3) grants Defendant's motions for voluntary remand, subject to conditions.]

Dated: September 6, 2023

Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant in all three matters. With her on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Tara K. Hogan*, Assistant Director; *Stephen C. Tosini*, Senior Trial Counsel; and *Kyle S. Beckrich*, Trial Attorney. Of counsel on the papers for Defendant in all three matters was *Kimberly Hsu*, Office of Chief Counsel for Industry & Security, U.S. Department of Commerce of Washington, DC.

Paul C. Rosenthal, Kelley Drye & Warren LLP of Washington, DC, for Plaintiff AM/NS Calvert LLC in Court No. 21–00005. With him on the briefs were *R. Alan Luberda*, *Joshua Morey*, and *Julia A. Kuelzow*.

Sanford Litvack, Chaffetz Lindsey LLP of New York, NY, for Plaintiff California Steel Industries, Inc., in Court No. 21–00015. With him on the briefs were *Andrew L. Poplinger*, *R. Matthew Burke*, and *Rebecca Meyer*.

Craig A. Lewis, Hogan Lovells US LLP of Washington, DC, for Plaintiff Valbruna Slater Stainless, Inc., in Court No. 21–00027. With him on the briefs were *H. Deen Kaplan*, *Maria A. Arboleda*, *Nicholas W. Laneville*, and *Molly B. Newell*.

OPINION AND ORDER

Baker, Judge:

Invoking this court's residual jurisdiction, three domestic importers bring Administrative Procedure Act challenges to the Department of Commerce's refusal to exclude certain steel products from national security tariffs and seek court-ordered refunds of duties that they paid. Defendant moves for voluntary remand without confessing error, representing that the Department's reconsideration might afford Plaintiffs the relief they seek and make adjudication of their APA claims unnecessary.

Plaintiffs object, pointing to recent litigation in which the government argued that no relief is available as a matter of law for entries that have finally liquidated. They explain that under the government's theory, remand would be pointless as to most of their entries at issue, which so liquidated after Commerce denied their exclusion requests.

To resolve that threshold issue, the court ordered the parties to address whether any relief is available as to Plaintiffs' finally liquidated entries. In response, the government argues that these cases are largely, if not entirely, moot because the court lacks authority to order reliquidation (refunds) as to such entries as a matter of law or at least on these facts. The government belatedly acknowledges that under its theory, remand—whether voluntary without confessing error or court-ordered after a finding of an APA violation—would not provide any practical relief to Plaintiffs as to their finally liquidated entries.

As explained below, Defendant's challenge to the court's authority to order reliquidation is not a mootness question but instead goes to the merits. Viewing that challenge as a motion for partial summary judgment, the court denies it. Upon a finding of unlawful agency action in a case properly brought under the CIT's residual jurisdiction, the APA authorizes injunctive relief requiring reliquidation of finally liquidated entries because no "other statute . . . expressly or impliedly forbids" such relief. 5 U.S.C. § 702. The government also fails to show how ordinary equitable principles bar such relief here.

Finally, the court grants Defendant's requested voluntary remands, subject to certain conditions. One of them is that if Commerce issues the requested exclusions, it must make Plaintiffs whole. To do so, the Department must instruct U.S. Customs and Border Protection to honor the exclusions as to any entries that had not finally liquidated when those requests were originally denied. The court imposes this condition to prevent Defendant from using voluntary remand to dodge relief that Plaintiffs could obtain by successfully litigating their APA claims.

I

A

Federal law requires Customs to classify all imported merchandise under the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202. *See* 19 U.S.C. § 1500(b) (requiring Customs to "fix the final classification and rate of duty applicable to [imported] merchandise"). Customs's classification "is critical because the applicable duty, or tariff, can vary considerably depending on which HTSUS

subheading applies." *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1346 (CIT 2021), *aff'd*, 47 F.4th 1370 (Fed. Cir. 2022).

To assist Customs with classification, the regulatory scheme requires an importer to file a statement—an "entry"—declaring the "value, classification[,] and rate of duty applicable to the merchandise." 19 U.S.C. § 1484(a)(1)(B). Concurrent with making an entry, "the importer must deposit estimated duties and fees with Customs" based on the information supplied in the declaration. *ARP*, 520 F. Supp. 3d at 1347.

Later, "Customs 'liquidates' the entry to make a final computation or ascertainment of duties owed on that entry of merchandise." *Id.* (cleaned up) (citing 19 C.F.R. § 159.1 and 19 U.S.C. § 1500). Liquidation is a true-up process following which "Customs either collects any additional amounts due, with interest, if the importer's deposit was lower than the final assessment or refunds any excess deposit, with interest, if the deposit was higher than the final assessment." *Id.* (citing 19 U.S.C. § 1505(b)).

If Customs does not liquidate an entry, liquidation occurs after one year by operation of law. *See* 19 U.S.C. § 1504(a)(1) (providing that an entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record" unless, within one year of entry, Customs liquidates the entry, or liquidation is either extended[1] or suspended[2]).

If an importer believes Customs erred in liquidating an entry or that a deemed liquidation was incorrect, the importer must file a protest within 180 days, *see* 19 U.S.C. § 1514(c)(3)(A), or else lose the right to challenge the liquidation results, *see id.* § 1514(a). As used in this opinion, "finally liquidated" means a liquidated entry that was not timely protested.

A timely "protest challenging classification may lead to 'reliquidation.' " *ARP*, 520 F. Supp. 3d at 1347. "[R]eliquidation is the recalculation [by Customs] of the duties . . . accruing on an entry." *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1310 n.8 (Fed. Cir. 2004) (cleaned up). If that re-calculation determines that the importer overpaid duties, Customs refunds them. *See* 19 U.S.C. § 1520(a)(1).

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[1] Customs may "extend the period in which to liquidate an entry" in certain circumstances, including when an importer "requests such extension and shows good cause therefor." 19 U.S.C. § 1504(b)(2); *see also* 19 C.F.R. § 159.12(a)(1)(ii) (providing that an importer shows "good cause" for extending the liquidation period upon demonstrating "that more time is needed to present to [Customs] information which will affect the pending action, or there is a similar question under review by [Customs]").

[2] Suspension stops the liquidation clock until "remov[ed]" by the relevant agency or "a court with jurisdiction over the entry." 19 U.S.C. § 1504(d). Suspension occurs only when "required by statute or court order." *Id.*; *see also* 19 U.S.C. § 1504(a)(1) (same).

On the other hand, if Customs denies a timely protest, an importer's only recourse is to timely bring an action in this court. *See* 19 U.S.C. § 1514(a) (authorizing suit in the CIT to challenge protest denials); 28 U.S.C. § 2631(a) (same).

B

Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods "so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). The President exercised that authority in 2018 to impose a 25 percent tariff on imports of certain steel products. *See* Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

Proclamation 9705 also directs the Secretary of Commerce to exclude imports from the tariff if they meet certain criteria. *Id.* at 11,627 cl. 3. Such relief may be granted "only after a request for exclusion is made by a directly affected party located in the United States." *Id*.

The President later amended Proclamation 9705 to make granted exclusions retroactive to entries made on or after "the date the request for exclusion was posted for public comment." Proclamation 9711 of March 22, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 13,361, 13,364 cl. 7 (Mar. 28, 2018). He also amended Proclamation 9705 to make such retroactive relief available only for entries "with respect to which liquidation is not final." Proclamation 9777 of August 29, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 45,025, 45,028 cl. 5 (Sept. 4, 2018).

Commerce duly issued an interim final rule allowing U.S. importers to request an exclusion from Section 232 duties for imports satisfying criteria set by the President. *Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106, 12,110 (Dep't Commerce Mar. 19, 2018); *see* 15 C.F.R. Pt. 705, Supp. 1. When the Department approves an exclusion request under this rule, "[c]ompanies are able to receive retroactive relief on granted requests dating back to the date of the request's submission on unliquidated entries." 15 C.F.R. Pt. 705, Supp. 1 (h)(2)(iii)(A).

Exclusions are not self-executing, because Commerce "does not provide refunds on tariffs." 15 C.F.R. Pt. 705, Supp. 1 (h)(2)(iii)(B). Instead, the Department assigns a product exclusion number, which

an importer can "rely" upon to seek relief from Customs effective five business days after the grant of an exclusion. 15 C.F.R. Pt. 705, Supp. 1 (h)(2)(iii)(A).

Armed with an exclusion number, an importer must "provide any information that may be required, and in such form, as is deemed necessary by [Customs]." Proclamation 9705, *Annex (U.S. Note 16(d))*, 83 Fed. Reg. at 11,630 cl. 16(d); *see* 15 C.F.R. Pt. 705, Supp. 1 (h)(3)(ii). This information enables Customs "to determine whether an import is within the scope of an approved exclusion request." 15 C.F.R. Pt. 705, Supp. 1 (h)(3)(ii).

Customs advises an importer with exclusion numbers to submit a post-summary correction[3] "to request a refund on applicable previous imports of excluded products," so long as the relevant entry has not liquidated. U.S. Customs and Border Protection, Cargo Systems Messaging Service,[4] *CSMS #18–000378—UPDATE: Submitting Imports of Products Excluded from Duties on Imports of Steel or Alumin[um]* (June 12, 2018).[5] "If the entry has already liquidated, importers may protest the liquidation." *Id.* Customs also explains that exclusions may be used only for "unliquidated entries and for entries that are liquidated but where the liquidation is not final and the protest period has not expired." U.S. Customs and Border Protection, Cargo Systems Messaging Service, *CSMS #42566154—Section 232 and Section 301—Extensions Requests, PSCs, and Protests* (May 1, 2020).[6]

Four features of this scheme are salient here. First, Customs has a purely ministerial role except as to determining whether a given entry "is within the scope of an approved exclusion request." 15 C.F.R. Pt. 705, Supp. 1 (h)(3)(ii). Second, an importer cannot seek relief from Customs for Section 232 duties until Commerce grants an exclusion, because the importer needs an exclusion number to either present a post-summary correction (as to unliquidated entries) or file a protest (as to liquidated entries where the 180-day protest period has not yet run). Third, after the Department denies an exclusion request, an importer has no administrative means to prevent an entry's liquida-

[3] Customs explains that a post-summary correction allows the importer "to electronically correct entry summaries prior to liquidation." U.S. Customs and Border Protection, *Post Summary Corrections*, https://www.cbp.gov/trade/programs-administration/entry-summary/post-summary-correction. Thus, an importer that successfully obtains a Section 232 exclusion from Commerce may submit a post-summary correction to Customs amending the applicable HTSUS heading assigned at entry.

[4] According to the government, "[t]he CSMS is a messaging system that [Customs] uses to inform subscribing members of the trade community about technical news and updates on [Customs]'s automated systems used to process merchandise entered into the United States." Case 21–5, ECF 62, at 7 n.2.

[5] https://content.govdelivery.com/accounts/USDHSCBP/bulletins/1f6cce3.

[6] https://content.govdelivery.com/accounts/USDHSCBP/bulletins/289820a.

tion from becoming final pending litigation challenging that denial.[7] Finally, Customs will not honor an exclusion as to entries that have finally liquidated by the time an importer seeks relief.

II

Plaintiffs, three domestic importers that paid Section 232 tariffs, allege that Commerce violated the APA in denying their exclusion requests by not considering relevant factors and evidence and by not providing adequate explanations for its decisions. *See* Case 21–5, ECF 2, at 17–19 (Calvert); Case 21–15, ECF 2, at 16–20 (California Steel); Case 21–27, ECF 4, at 21–22 (Valbruna).

For relief, Plaintiffs seek either a declaration that Commerce's exclusion denials violated the APA and an order requiring that Commerce instruct Customs to refund the Section 232 tariffs covered by the exclusions or a remand to the Department for further proceedings. *See* Case 21–5, ECF 2, at 19 (Calvert); Case 21–15, ECF 2, at 20 (California Steel); Case 21–27, ECF 4, at 23 (Valbruna).

Soon after Plaintiffs brought these suits, the government moved for voluntary remands without confessing error. Case 21–5, ECF 46; Case 21–15, ECF 44; Case 21–27, ECF 30. Plaintiffs opposed. Case 21–5, ECF 50; Case 21–15, ECF 47; Case 21–27, ECF 39. They observed that the government recently reversed its long-held position that in cases within the CIT's residual jurisdiction, the court has authority to order re-liquidation of finally liquidated entries. According to Plaintiffs, if the government's new theory is correct, any remand for reconsideration would be futile as to such entries.[8] They

[7] Although Customs will extend the liquidation period at an importer's request for "good cause," *see above* note 1, in the context of litigation challenging duties imposed by the United States Trade Representative under Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411(a)(1), Customs advised importers that "pending litigation . . . is not sufficient to show good cause." U.S. Customs and Border Protection, Cargo Systems Messaging Service, *CSMS #50264295—Guidance for Liquidation Extension Requests and Protests Based on Pending Section 301 Litigation In re Section 301 Cases, Court of International Trade No. 21–00052* (Dec. 2, 2021), https://content.govdelivery.com/accounts/USDHSCBP/bulletins/2fef8e7. The government has not suggested that Customs would apply any different policy in the context of litigation challenging Commerce's denials of Section 232 exclusions. *Cf.* 19 C.F.R. § 159.51 ("Liquidation of entries shall not be suspended simply because issues involved therein may be before the [CIT] in pending litigation, since the importer may seek relief by protesting the entries after liquidation.").

[8] The extent to which the entries at issue have finally liquidated is neither alleged in the pleadings nor indicated in the agency record. According to admissions in Plaintiffs' supplemental briefing, all of Calvert's and California Steel's entries at issue have finally liquidated. *See* Case 21–5, ECF 64 and ECF 70; Case 21–15, ECF 75. Many, but not all, of Valbruna's entries at issue have also finally liquidated. *See* Case 21–27, ECF 68. It appears that most, if not all, of Plaintiffs' entries that are finally liquidated did so after Commerce denied their exclusion requests.

Although in APA cases the court is ordinarily confined to considering facts in the agency record, *see Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379–80 (Fed. Cir. 2009),

therefore asked the court to resolve that threshold question before entertaining the government's remand motions. *See* Case 21–5, ECF 50, at 13–14 (Calvert); Case 21–15, ECF 47, at 26–27 (California Steel); Case 21–27, ECF 39, at 21–27 (Valbruna).

The court then directed the government to address whether injunctive relief is available as to finally liquidated entries and whether remand serves any purpose if such relief is not available. Case 21–5, ECF 51.[9] In response, the government asserted that "the remedy of reliquidation is not available in these case[s] under the relevant statutory framework." ECF 54, at 6. The government further suggested that it is "not aware of what real-world value or practical benefit a plaintiff might derive from a granted exclusion, in the absence of any unliquidated entries that an importer could seek to apply the exclusion against." *Id*. at 20.

After an unsuccessful referral to mediation, the court ordered the parties to address whether these cases are moot as to Plaintiffs' finally liquidated entries. ECF 61. The government responded that such claims are moot, *see* ECF 62, at 15, which Plaintiffs disputed, *see* ECF 63. The court heard oral argument and received supplemental briefing on the relevant implications, if any, of *Voestalpine USA Corp. v. United States*, 578 F. Supp. 3d 1263 (CIT 2022). *See* ECF 77 (Plaintiffs), ECF 78 (government).

III

Defendant's supplemental briefing, which the court treats as motions to dismiss for lack of subject-matter jurisdiction, *see* USCIT R. 12(b)(1), or for failure to state a claim and for judgment on the pleadings,[10] *see* USCIT R. 12(b)(6), USCIT R. 12(c), in effect raises two questions: Are these cases moot as to finally liquidated entries? If not, do Plaintiffs state a cognizable claim for injunctive relief for those entries?

Plaintiffs' admissions bear on the *relief* that the court may order and thus may be considered for that limited purpose. *See CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 483–84 (2013) (explaining that in APA cases "evidence [respecting relief] is admitted, not as a supplement to the administrative record, but as part of this court's record" for purposes of determining whether equitable relief is appropriate).

[9] For the rest of this opinion, citations to documents identical on all three dockets refer only to the filing in Case 21–5.

[10] The parties consent to treating the government's supplemental briefing as motions for judgment on the pleadings under USCIT R. 12(c) in Cases 21–5 and 21–15, where the government has answered, and as a motion to dismiss under USCIT R. 12(b)(6) in Case 21–27, where the government has not answered. *See* ECF 77, at 10 (Plaintiffs); ECF 78, at 2 (government).

A

"Subject-matter jurisdiction" is "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis in original); *see also ARP*, 520 F. Supp. 3d at 1354 n.25 (quoting *Umanzor v. Lambert*, 782 F.2d 1299, 1301 n.2 (5th Cir. 1986) (Gee, J.) ("Whether there exists an Article III case or controversy, and thus Constitutional subject-matter jurisdiction, is analytically distinct from whether the pertinent . . . statutes confer statutory subject-matter jurisdiction.")).

Although the government only contests whether a case or controversy within the meaning of Article III exists as to Plaintiffs' finally liquidated entries, *see Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("There is thus no case or controversy, and a suit becomes moot, when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (cleaned up), the court nevertheless has an independent duty to assure itself that it also has statutory subject-matter jurisdiction. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."). Before turning to mootness, the court first considers its statutory jurisdiction, a question that also bears on the merits for reasons explained below.

1

Plaintiffs' complaints invoke 28 U.S.C. § 1581(i) for statutory subject-matter jurisdiction.[11] *See* Case 21–5, ECF 2, at 6 (Calvert); Case 21–15, ECF 2, at 6 (California Steel); Case 21–27, ECF 4, at 7 (Valbruna). This provision facially confers jurisdiction, as Plaintiffs assert claims that arise from Section 232 national security duties, which the President imposed "on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B).

Section 1581(i), however, "is a jurisdictional grant of last resort."

[11] Section 1581(i) provides in relevant part:

> (1) In addition to the jurisdiction conferred upon the [CIT] by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the [CIT] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (A) revenue from imports or tonnage;
>
> (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (C) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section.

ARP, 520 F. Supp. 3d at 1356. "When relief is prospectively and realistically available under another subsection of 1581, invocation of subsection (i) is incorrect. Where another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show that the remedy would be manifestly inadequate." *Sunpreme, Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018).

Thus, to determine whether § 1581(i) jurisdiction exists, the court must first "consider whether jurisdiction under a subsection other than § 1581(i) [is] available." *ARP*, 520 F. Supp. 3d at 1356 (quoting *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019)). If such jurisdiction is available, the court must then "examine whether the remedy provided under that subsection is 'manifestly inadequate.' If the remedy is not manifestly inadequate, then jurisdiction under § 1581(i) is not proper." *Id*. (quoting *Erwin Hymer Grp.*, 930 F.3d at 1375).

The only other arguable basis for jurisdiction in these cases is § 1581(a), which gives the CIT "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). Section 515 (19 U.S.C. § 1515), in turn, provides for administrative review of protests of "decisions of the Customs Service." 19 U.S.C. § 1514(a).

"[J]urisdiction under § 1581(a) turns on whether Plaintiffs challenge an 'actual Customs decision' for purposes of 19 U.S.C. § 1514(a)(2), or instead challenge a decision of . . . something else." *ARP*, 520 F. Supp. 3d at 1358 (citation and parentheses omitted) (quoting *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 365 (1998)).

To determine whether a plaintiff challenges an actual Customs decision, the court must "discern *the particular agency action* that is the source of the alleged harm . . . . This determination depends upon the attendant facts asserted in the pleadings." *Id.* at 1358–59 (cleaned up; emphasis in original) (quoting *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1360 (Fed. Cir. 2016)).

The facts asserted in the pleadings establish that Commerce's exclusion denials are the source of the alleged harm. *See, e.g.*, Case 21–5, ECF 2 ¶¶ 13, 14 (alleging that Commerce "denied each of Calvert's exclusion requests with cursory" analysis and that consequently the company "has paid millions of dollars in duties on imports . . . covered by the exclusion requests"); Case 21–15, ECF 2 ¶ 3 (alleging that Commerce, "in complete disregard of the record evidence and of its own regulations, denied each of" California Steel's exclusion requests, "causing [it] to pay tariffs it should not have had to pay"); Case 21–27, ECF 4 ¶¶ 13, 14 (alleging that Commerce

"summarily denied [Valbruna's] exclusion requests with . . . identical cursory language" causing the company "to pay nearly ten million dollars in Section 232 duties").

Protesting Customs's liquidation of their entries and challenging the denial of those protests in a § 1581(a) case would have been futile because the agency had to follow Commerce's instructions imposing Section 232 duties. *See Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1276 (Fed. Cir. 2006) (holding that § 1581(a) jurisdiction was inadequate where Customs had no authority to overturn or disregard duties imposed by the United States Trade Representative because "Customs would have no authority to grant relief in a protest action challenging the imposition of the duty").[12] The court therefore concludes that § 1581(a) jurisdiction was unavailable or was "manifestly inadequate," such that § 1581(i) provides statutory jurisdiction over Plaintiffs' challenges to Commerce's exclusion denials.

2

A case is moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin*, 568 U.S. at 172 (quoting *Knox v. Serv. Emps.*, 567 U.S. 298, 307 (2012)). The government argues that Plaintiffs' claims as to their finally liquidated entries are moot because the court may not order Commerce to instruct Customs to reliquidate those entries. *See* ECF 62, at 3; *see also id*. at 15–45.

A case is not necessarily moot, however, simply because "the District Court lacks the authority to [grant relief] either under [the statute creating the cause of action] or pursuant to its inherent equitable powers." *Chafin*, 568 U.S. at 174. "[T]hat argument—which goes to the meaning of the [statute creating the cause of action] and the legal availability of a certain kind of relief—confuses mootness with the merits." *Id*. Unless a claim for relief can "be dismissed as so implausible that it is insufficient to preserve jurisdiction," *id*. (citing *Steel Co.*, 523 U.S. at 89), the "prospects of success are . . . not pertinent to the mootness inquiry." *Id*.

Here, the government does not—nor could it—characterize Plaintiffs' claim that the court may order Commerce to instruct Customs to

[12] In *ARP*, by contrast, because the plaintiffs challenged classification decisions by Customs at liquidation applying Section 301 duties that Commerce's exclusion *grants* rendered invalid, § 1581(a) jurisdiction attached because those decisions were protestable. *See* 520 F. Supp. 3d at 1360–61. Similarly, in *Environment One Corp. v. United States*, where a plaintiff challenged Customs's classification decision that failed to apply a Section 301 exclusion, "the source of Plaintiff's harm" was "Customs' classification decision and Plaintiff's path to relief [was] to challenge [that] decision through the protest procedure." 627 F. Supp. 3d 1349, 1361 (CIT 2023).

reliquidate their finally liquidated entries as "immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous." *Steel Co.*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)). As explained below, there is substantial authority—far more than necessary under the permissive standard of *Bell*—that the court possesses such authority under the APA in cases properly brought under § 1581(i).

Whatever questions may exist as to the court's authority under the APA to order reliquidation as to finally liquidated entries, *cf. In re Section 301 Cases*, 524 F. Supp. 3d 1355, 1366 (CIT 2021) (stating that the Federal Circuit "has raised doubts about the CIT's authority" to do so), they do not render a claim for such relief so insubstantial as to deprive the court of its constitutional jurisdiction. *Cf. Voestalpine*, 578 F. Supp. 3d at 1275 (concluding that a challenge to "reliquidation as a form of relief" is a merits question that should not be viewed "through the lens of mootness"). The court therefore denies Defendant's motions to dismiss Plaintiffs' claims for injunctive relief as to finally liquidated entries for lack of subject-matter jurisdiction.

B

Because the government's argument that relief is unavailable as to finally liquidated entries implicates the merits, the court turns to Defendant's motions (so construed) to dismiss for failure to state a claim under USCIT R. 12(b)(6) and for judgment on the pleadings under USCIT R. 12(c). Since the parties rely on undisputed admissions outside the pleadings that some or all of Plaintiffs' entries at issue have finally liquidated in each of these cases, *see above* note 8, the court treats the motions as being for partial summary judgment under USCIT R. 56.[13]

[13] When the court considers whether to grant equitable *relief* in an APA action, it does so de novo, and thus does not sit as an appellate court as it does when it reviews agency action. *Cf. CW Gov't Travel*, 110 Fed. Cl. at 483–84. In that context, USCIT R. 56 (governing summary judgment in de novo proceedings) rather than USCIT R. 56.1 (governing judgment on the agency record in APA proceedings) necessarily applies to challenges to the court's authority to grant equitable relief. Because the parties have presented "matters outside the pleadings," the court "must" treat the government's motions for failure to state a claim and for judgment on the pleadings as being for partial summary judgment under USCIT R. 56. *See* USCIT R. 12(d); *cf. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1430 & n.6 (7th Cir. 1996) (a district court that relies on admissions outside the pleadings in considering a motion to dismiss must treat the motion as one for summary judgment).

1

The government argues that the court lacks authority to order Commerce to instruct Customs to reliquidate entries in all cases brought under this court's residual § 1581(i) jurisdiction. *See* ECF 62, at 16–34. The government asserts that the Federal Circuit's opinion in *Shinyei* recognizing the availability of such relief was wrongly decided and that later circuit precedent calls that decision into doubt. Essentially, the government contends that *Shinyei* should be confined to its facts pending its overruling by the Federal Circuit, which the government plainly intends to seek. The court first examines *Shinyei* and then considers how the court of appeals has since treated it.

a

According to the government, the "rule of finality of liquidation is not limited to protestable [Customs] decisions" under 19 U.S.C. § 1514(a). *Id*. at 18. Relying on *Zenith Radio Corp. v. United States*, which held that in a § 1581(c)[14] action challenging antidumping or countervailing duties the "statutory scheme has no provision permitting reliquidation," 710 F.2d 806, 810 (Fed. Cir. 1983), the government contends that "reliquidation generally should not be available in a successful [APA] challenge under section 1581(i) either." ECF 62, at 20.

The government argues that the deemed liquidation provisions of 19 U.S.C. § 1504(a)(1) "broadly codif[y] the rule of finality with respect to liquidations" because the statute " 'has no provision permitting re-liquidation after . . . liquidation . . . .' " *Id.* at 21 (quoting *Zenith*, 710 F.2d at 810). The government asserts that given this "rule of finality" in § 1504(a)(1), "Congress'[s] decision to codify the rule of finality" in §§ 1514(a) (governing protests of decisions of Customs) and 1516a (antidumping and countervailing duty cases) "should not be interpreted as *limiting* the rule of finality *only* to those circumstances." *Id*. at 22 (emphasis in original). Based on this reading of the statutory scheme, the government contends that the Federal Circuit's opinion in *Shinyei*, though binding, was "wrongly decided." *Id.* at 26.

Shinyei arose out of an administrative review of an antidumping order in which Customs, at Commerce's erroneous direction, liquidated certain entries at a higher rate than set in the Department's final determination and approved by the CIT's final judgment. *See*

[14] This provision confers exclusive jurisdiction on the CIT "of any civil action commenced under section 516A [(19 U.S.C. § 1516a)] or 517 [(19 U.S.C. § 1517)] of the Tariff Act of 1930." 28 U.S.C. § 1581(c).

355 F.3d at 1303. Shinyei filed a § 1581(i) action under the APA[15] alleging that Commerce's instructions violated 19 U.S.C. § 1675(a)(2)(C) and seeking re-liquidation at the correct rate. *See* 355 F.3d at 1305 (observing that Shinyei's cause of action was brought under APA § 702).

The government conceded statutory subject-matter jurisdiction[16] but contended that no relief was available under APA § 702 because section 516A of the Tariff Act as construed in *Zenith* and the protest statute (§ 1514) barred the CIT "from granting the requested relief." *Id*. at 1306; *see also id*. (quoting 5 U.S.C § 702, which precludes relief "*if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought*") (emphasis in original).

The court of appeals rejected the government's *Zenith* argument, reasoning that an action challenging Commerce's "instructions on the ground that they do not correctly implement" the results of an administrative review "is not an action defined under section 516A of the Tariff Act." *Id*. at 1309 (quoting *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003)). "Section 516A is limited on its face to the judicial review of 'determinations' in countervailing duty and antidumping duty proceedings" and "provides the injunction and liquidation remedies" addressed in *Zenith*. *Id*. That statutory scheme was "inapplicable" to Shinyei's "APA challeng[e]" to "Commerce instructions as in violation of section 1675(a)(2)(C)." *Id*.

The Federal Circuit similarly dispatched the government's reliance on the protest statute, reasoning that no provision in the Tariff Act

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[15] Section 1581(i) merely confers residual jurisdiction on the CIT; it does not create a cause of action. As *Shinyei* recognized, *see* 355 F.3d at 1305, plaintiffs properly invoking § 1581(i) challenge agency action under the cause of action created by the APA's general statutory review provisions. *See* 28 U.S.C. §§ 2631(i) (authorizing "any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5" to bring a "civil action" under the CIT's residual § 1581(i) jurisdiction), 2640(e) (requiring the CIT to apply the standard of review in 5 U.S.C. § 706 in civil actions brought under § 1581(i)); *see also* 5 U.S.C. §§ 701–06; 33 Wright & Miller, *Federal Practice & Procedure* § 8302 (2d ed. Apr. 2023 update); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011) (explaining that the APA, *inter alia*, "creates a right of judicial review, even in the absence of a review-authorizing statute, for 'final agency action' for which there is no other adequate remedy in a court").

[16] The Federal Circuit observed that Shinyei properly invoked the CIT's residual jurisdiction because the only other arguable bases for jurisdiction, §§ 1581(a) and 1581(c), were inapplicable. Commerce, not Customs, made the challenged decision (thus foreclosing § 1581(a) jurisdiction), and that decision was not a "reviewable determination" under the antidumping and countervailing duty statute, section 516A of the Tariff Act (thereby precluding § 1581(c) jurisdiction). *Id.* at 1304–05. The CIT's residual jurisdiction therefore attached because Shinyei's challenge to Commerce's liquidation instructions was a challenge to "administration and enforcement" of the Department's final results in an antidumping proceeding. *Id.* at 1305 (quoting 28 U.S.C. § 1581(i)(4) (now § 1581(i)(1)(D)). The government did "not argue that jurisdiction under section 1581(i) was improper," *id*., but rather that the CIT's "jurisdiction . . . was divested by liquidation of the subject entries," *id*., i.e., moot for purposes of constitutional subject-matter jurisdiction.

"provides that liquidations are final except within the narrow confines of section 1514; the statute's discussion of finality relates to decisions of Customs." *Id*. at 1311. Because nothing "in the statute or legislative history . . . would support such a reading," the court further rejected "the suggestion that the statute's silence as to reliquidation in the context of Commerce error can be construed as a prohibition of reliquidation in such cases." *Id*. at 1311–12. Indeed, the legislative history "suggest[ed] quite the opposite." *Id.* at 1311 n.9.

Moreover, reading an implied prohibition of court-ordered reliquidation into the statute would conflict with the CIT's "broad remedial powers." *Id*. at 1312.[17] It would also "preclude enforcement of court orders as to duty determinations as soon as entries subject to those orders had liquidated, even where liquidation" failed to "implement[ ] the court['s] determinations." 355 F.3d at 1312.

In sum, the court of appeals held that "[b]ecause the [Tariff Act] does not '*impliedly forbid* the [reliquidation] relief which [Shinyei] sought' under the APA, the action is not moot." *Id*. (brackets omitted and emphasis added) (quoting 5 U.S.C. § 702). The court remanded for the CIT to "reach the merits . . . to determine if Shinyei is indeed entitled to the requested relief." *Id*.[18]

Shinyei thus turned on its reading of APA § 702, which "generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.' " *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (quoting 5 U.S.C. § 702). But that "waiver of immunity . . . does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." *Id*. (quoting 5 U.S.C. § 702). Thus, plaintiffs may not "exploit[] the APA's waiver to evade limitations on suit contained in other statutes." *Id*.

Like Shinyei, Patchak sought relief under the APA, alleging that the Interior Department's decision to take title to certain land in trust on behalf of an Indian tribe violated the Indian Reorganization Act. *Id*. at 211–12. The government contended that another statute, the Quiet Title Act (QTA), barred such relief. The QTA waives the gov-

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[17] *See* 28 U.S.C. §§ 2643(c)(1) (as relevant here, authorizing the CIT to "order any other form of relief that is appropriate in a civil action"), 1585 (stating that the CIT "shall possess all the powers in law and equity of, or as conferred by statute upon, a district court").

[18] The Federal Circuit later extended its reasoning in *Shinyei* to entries deemed liquidated under 19 U.S.C. § 1504(a)(1). *See Shinyei Corp. of Am. v. United States*, 524 F.3d 1274, 1284 (Fed. Cir. 2008) ("Nothing in the deemed-liquidation statute forbids [reliquidation] relief on the facts as alleged.").

ernment's sovereign immunity for suits "asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Id*. at 215 (quoting 28 U.S.C. § 2409a(d)). But it also contains an exception, one that restored the government's immunity as to "trust or Indian lands." *Id*. (quoting § 2409a(a)). The government argued that this exception "satisfie[d] the APA's carve-out [in § 702] and so forb[ade] Patchak's suit." *Id.*

The Supreme Court disagreed, reasoning that the "QTA's 'Indian lands' clause does not render the Government immune because the QTA addresses a kind of grievance different from the one Patchak advances." *Id*. at 217; *see also id.* at 216 ("When a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit.") (quoting H.R. Rep. No. 94–1656, p. 28 (1976), 1976 U.S.C.C.A.N. 6121, 6148 (May 10, 1976, letter of Asst. Atty. Gen. A. Scalia)). Patchak's suit "lack[ed] a defining feature of a QTA action" because he did not seek to possess the land in question. *Id*. at 220. Because his suit was not a "disguise[d]" QTA action, "the QTA's limitation of remedies ha[d] no bearing," and the "APA's general waiver of sovereign immunity instead applie[d]." *Id*. at 220–21.

Patchak vindicates *Shinyei*'s reading of APA § 702. Because neither section 516A of the Tariff Act, 19 U.S.C. § 1516a, nor the protest statute, *id*. § 1514, is "addressed to the type of grievance" that Shinyei asserted—Commerce's issuance of erroneous liquidation instructions—the APA authorized an injunction requiring the Department to instruct Customs to reliquidate the company's entries.[19] *See* 5 U.S.C. § 703 (authorizing "mandatory injuncti[ve]" relief in APA actions); *see also* 33 Wright & Miller, *Federal Practice and Procedure* § 8385 (2d ed. Apr. 2023 update) ("Plaintiffs using the [APA's] scheme of general statutory review to challenge agency action commonly seek injunctive and/or declaratory relief, as authorized by § 703 of the APA.").

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[19] Although the government did not argue in *Shinyei*, as it does here, that the liquidation provisions of 19 U.S.C. § 1504 preclude court-ordered reliquidation in APA actions, *Patchak* forecloses that argument. Unlike § 1516a, which as *Shinyei* noted allows for "judicial review of 'determinations' in countervailing duty and antidumping duty proceedings," 355 F.3d at 1309, and § 1514, which provides for administrative protests of decisions of Customs, § 1504 does not create a judicial or administrative remedy and thus does not address *any* grievance. *Cf*. 5 U.S.C. § 702 ("Nothing herein . . . confers authority to grant relief *if any other statute that grants consent to suit* expressly or impliedly forbids the relief which is sought.") (emphasis added). Rather than authorizing a remedy—much less *limiting* any such remedy—for any "grievance," § 1504 is a mere administrative housekeeping provision that ensures that liquidation is not delayed indefinitely by any failure of Customs to liquidate an entry.

Along with vindicating *Shinyei*, *Patchak*'s logic necessarily means that in *all* cases properly brought under this court's residual jurisdiction, equitable relief, including an injunction requiring reliquidation, is available under the CIT's "broad remedial powers." *Shinyei*, 355 F.3d at 1312. That's because when a plaintiff properly invokes the CIT's § 1581(i) jurisdiction, no other statute *can* be "addressed to the type of grievance" for which the plaintiff seeks relief. *Patchak*, 567 U.S. at 216.[20] Contrary to the government's argument, *see* ECF 62, at 35–36, an order requiring Commerce to instruct Customs to reliquidate a plaintiff's entries *is* available "as a garden variety remedy" in any case properly brought under § 1581(i). *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.") (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

But to say that equitable relief is available under the APA in all § 1581(i) cases does not mean that such relief is available as of right. Instead, such relief is subject to ordinary equitable principles, no more and no less. *See Webster v. Doe*, 486 U.S. 592, 604–05 (1988) (observing that "traditional equitable principles" govern "equitable remedies sought" in APA cases) (citing *Romero-Barcelo*); *see also* 3 Koch & Murphy, *Administrative Law & Practice* § 8:31 (3d ed. 2020) ("[I]njunctive relief under the APA is controlled by principles of equity . . . ."); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (same); *cf. Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) ("[W]hile the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.").

As explained above, Plaintiffs here properly invoked § 1581(i) jurisdiction, necessarily meaning that no other statute is "addressed to the type of grievance" they assert. Under *Patchak* and *Shinyei*, Plaintiffs therefore state a claim under the APA for injunctive relief requiring reliquidation, subject to ordinary equitable principles. The court considers those principles below.

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[20] Even if another statute speaks to "the same type of grievance the plaintiff asserts in his suit," for the APA § 702 carve-out to apply the statute must "deal 'in particularity' with the claim" and "afford the 'exclusive remedy' for that type of claim/grievance." *Cambranis v. Blinken*, 994 F.3d 457, 463 (5th Cir. 2021) (citing *Patchak*, 567 U.S. at 216). When a case is properly brought under the CIT's residual § 1581(i) jurisdiction, these additional requirements are irrelevant because no other statute can be addressed to the same type of grievance the plaintiff asserts.

b

The government contends that three later Federal Circuit decisions "confirm that the scope and application of *Shinyei* is unclear." ECF 62, at 29. The government primarily relies on *Ugine & Alz Belgium v. United States*, 452 F.3d 1289 (Fed. Cir. 2006), an APA case brought under the CIT's residual § 1581(i) jurisdiction. There, the plaintiff sought a preliminary injunction to prevent Customs from liquidating entries according to Commerce's allegedly erroneous instructions. *Id.*

In response to the argument that preliminary relief was unnecessary because *Shinyei* permitted reliquidation, the Federal Circuit equivocated: "It is unclear . . . whether the rule of *Shinyei*" applies when a plaintiff asserts any APA claim *other than* "a violation of 19 U.S.C. § 1675(a)(2)(C) . . . ." *Id.* at 1296. The court of appeals then contrasted *Shinyei* with the facts before it, where the plaintiffs "did not cite section 1675(a)(2)(C)," but rather asserted a different violation. *Id*. "The difference between the two cases—and the possibility that *Shinyei* will not be interpreted to encompass the sort of claim at issue here—raises doubt whether [plaintiff] will have the opportunity to obtain reliquidation once its entries are liquidated . . . ." *Id.*

Because neither the CIT nor the plaintiff addressed the issue of *Shinyei* relief, and because the government would not take a position on its availability, the Federal Circuit reversed the denial of a preliminary injunction, reasoning that it was "not clear at this juncture that *Shinyei* would provide an adequate vehicle for [plaintiff] to litigate its claims before" the CIT. *Id*. at 1297. Rather than decide the issue with less than full briefing, the court reserved the question until it could be "litigated by the parties and decided by the trial court." *Id*.

As it did not reach the merits, *Ugine* does not call into doubt the availability of *Shinyei* relief, properly understood. *Shinyei* holds that in APA cases, equitable relief is available to remedy unlawful agency action so long as some other statute "does not 'impliedly forbid' " such relief. 355 F.3d at 1312 (brackets omitted) (quoting 5 U.S.C. § 702). If the plaintiff in *Ugine* properly invoked the CIT's § 1581(i) jurisdiction—a question the Federal Circuit did not address—no other statute *could* have been "addressed to the type of grievance" for which the plaintiff sought relief, *Patchak*, 567 U.S. at 216, much less "impliedly forbid" such relief.[21] In that case, reliquidation would have been available, subject to the application of ordinary equitable prin-

[21] Thus, the distinction between the alleged APA violations in *Shinyei* and in *Ugine* is no more relevant than the distinction between the imports at issue in those two cases. What matters under *Shinyei* is not the nature of the alleged APA *violation*, but whether any other statute " 'impliedly forbid[s]' " reliquidation as a remedy for that violation. 355 F.3d at 1312 (quoting 5 U.S.C. § 702).

ciples. As the government would have it, *Shinyei* is on life support, but *Patchak* instead confirms that *Shinyei* is alive and well.[22]

2

The government further argues that "regardless of *Shinyei*'s scope," ECF 62, at 26, "its holding does not extend to the facts presented in these cases for three reasons," *id*. at 34. The court considers each in turn.

a

The government first contends "that in light of *Zenith*, 'so-called *Shinyei* relief' is best understood as relief that is necessary to protect a judgment of this Court." *Id*. (citing *Shinyei*, 355 F.3d at 1312). "Alternatively," the government argues, " '*Shinyei* relief' could be understood as limited to circumstances where Commerce issues liquidation instructions that are clearly inconsistent with its final determination." *Id*. at 35 (citing 19 U.S.C. § 1675(a)(2)(C) and *Ugine*, 452 F.3d at 1296).

The government ignores *Shinyei*'s "reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020). *Shinyei*'s holding—that ordering reliquidation to remedy Commerce's erroneous liquidation instructions is "not barred by the statute, in particular sections 516A and 1514," 355 F.3d at 1312, rests on its reading of APA § 702. Under that provision, relief is available unless "*any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought*." *Id*. at 1306 (emphasis in original) (quoting 5 U.S.C. § 702); *see also id*. at 1312 (stating that the court's holding was "*[b]ecause* the statute does not 'impliedly forbid[ ] the relief which is sought' under

[22] The government contends that *American Signature, Inc. v. United States*, 598 F.3d 816 (Fed. Cir. 2010), and *Sumecht NA, Inc. v. United States*, 923 F.3d 1340 (Fed. Cir. 2019), also cast doubt on *Shinyei*. ECF 62, at 32–34. In *American Signature*, a § 1581(i) case challenging liquidation instructions, the Federal Circuit followed *Ugine* and without any further explanation found that the "uncertain[ty]" of *Shinyei* relief supported a finding of irreparable harm for purposes of a preliminary injunction barring liquidation. 598 F.3d at 828–29. Like *Ugine*, *American Signature* simply declined to address the scope of *Shinyei* relief. More importantly, *Patchak* eliminates any uncertainty about such relief.

In *Sumecht,* the Federal Circuit observed that neither *Ugine* nor *American Signature* "is a model of clarity for establishing when *Shinyei* relief may be unavailable in § 1581(i) actions . . . ." 923 F.3d at 1348. Even so, the court did not read those two decisions "as creating a presumption that, in the preliminary injunction context, *Shinyei* relief is uncertain for purposes of irreparable harm in § 1581(i) actions because such a presumption runs counter to *Shinyei*'s holding that the CIT has 'broad remedial powers,' including the ability to order reliquidation." *Id*. (quoting *Shinyei*, 355 F.3d at 1312). If anything, *Sumecht* only reinforces *Shinyei*. In any event, *Patchak* supersedes the lack of clarity in *Ugine* and *American Signature*.

the APA") (emphasis added, brackets in original) (quoting 5 U.S.C. § 702). That reasoning applies with equal force here because, as Plaintiffs argue, "Congress has not in any way constrained [the CIT]'s ability to exercise its remedial powers" in *any* case properly brought under the court's residual § 1581(i) jurisdiction. ECF 63, at 10.

b

Second, the government argues that "regardless of *Shinyei*'s scope, the equitable relief afforded" in that case "does not apply here." ECF 62, at 37. Relying on *Mukand International, Ltd. v. United States*, 412 F. Supp. 2d 1312 (CIT 2005), *aff'd*, 502 F.3d 1366 (Fed. Cir. 2007), the government asserts that Plaintiffs should have filed these suits immediately after learning that Commerce denied their exclusion requests, "and obtained injunctive relief against liquidation before Customs liquidated their entries." ECF 62, at 39–40 (brackets omitted) (quoting *Mukand*, 412 F. Supp. 2d at 1318). According to the government, Plaintiffs needed to seek such preliminary relief because "there is a 'strong presumption against reliquidation of entries.' " *Id*. at 40 (quoting *Mukand*, 412 F. Supp. 2d at 1319). By not doing so, the government charges, Plaintiffs slept on their rights. *See id*. at 40–41.

The court disagrees with *Mukand*'s suggestion that in actions properly brought under § 1581(i) there is a "presumption" against reliquidation of entries.[23] As explained above, in such actions there is no statutory limitation on the CIT's authority to grant equitable relief to remedy APA violations. The court may not apply judicially divined presumptions to deny relief otherwise authorized by the APA and consistent with ordinary equitable principles. *Cf. Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999) (rejecting a judicially created "default rule" beyond "the broad boundaries of traditional equitable relief"); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.") (citation omitted); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667

[23] The court observes that in affirming *Mukand*, the Federal Circuit did not endorse the proposition that there is any "presumption" against reliquidation in actions properly brought under § 1581(i). *See* 502 F.3d 1366.

(2014) ("[C]ourts are not at liberty to jettison Congress's judgment . . . .").[24]

As explained above, injunctive relief under the APA is subject to ordinary equitable principles, no more and no less. *See Romero-Barcelo*, 456 U.S. at 313. The government makes no contention that Plaintiffs fail to state a claim for such relief under those principles—that (1) they will suffer an irreparable injury absent reliquidation, i.e., loss of duties paid; (2) that Plaintiffs have no adequate remedy at law for that loss; (3) that, considering the balance of hardships between both sides, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (outlining requirements for permanent injunctive relief).

Instead, in substance the government invokes—though it shrinks from using the technical term—laches, "a defense developed by courts of equity . . . ." *Petrella*, 572 U.S. at 678. That defense, however, is not a free-floating doctrine allowing us to deny at will equitable relief authorized by Congress by merely pronouncing a plaintiff guilty of "sleeping on its rights" or declaring such relief vaguely not "appropriate." *Cf.* 28 U.S.C. § 2643(c)(1) (authorizing the CIT to award "any other form of relief that is *appropriate* in a civil action") (emphasis added).

For this court to properly apply laches or otherwise withhold injunctive relief as not "appropriate," it must ground its decision in the specific "requirements of equity practice with a background of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989) ("Only by announcing rules do we hedge ourselves in."). In the case of the laches defense, those requirements mean satisfying its elements.

The first element of the laches defense is "delay by the claimant" that is "unreasonable and unexcused." *Cornetta v. United States*, 851 F.2d 1372, 1377–78 (Fed. Cir. 1988). Plaintiffs have not unreasonably delayed, as seeking preliminary injunctive relief would have been futile due to the absence of irreparable injury. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish," *inter alia*, "that he is likely to suffer irreparable harm in the absence of preliminary relief . . . ."). As

[24] In any event, *Mukand* is also distinguishable. In that case, the plaintiff waited over a year to seek mandamus relief after Commerce failed to issue a required scope determination in an administrative review, and the plaintiff could have sought such relief earlier. *See* 502 F.3d at 1369. Here, Plaintiffs do not seek mandamus relief, and as discussed below there was no alternative remedy available because in cases properly brought under the CIT's § 1581(i) jurisdiction, liquidation is not irreparable injury because of the court's authority to order reliquidation.

explained above, *Patchak*'s logic establishes that reliquidation *is* available in cases properly brought under § 1581(i) if such relief adheres to ordinary equitable principles.[25] Because "[t]he law does not require a vain and useless thing," *McMicking v. Schields*, 238 U.S. 99, 103 (1915), Plaintiffs were not required to first seek a preliminary injunction to prevent liquidation from becoming final.

Even if the government had shown that Plaintiffs had unreasonably delayed in seeking injunctive relief, it would still have to demonstrate prejudice, the second element of the laches defense. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967) (stating in APA action for declaratory and injunctive relief that "[t]he defense of laches could be asserted if the Government is prejudiced by a delay"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). "[T]he burden of proving prejudice rests with the defendant." *Cornetta*, 851 F.2d at 1380.

"There are two types of prejudice that may stem from delay in filing suit." *Cornetta*, 851 F.2d at 1378. The first, "defense prejudice," is some impairment to the government's ability to mount a defense. *Id*. The second, "economic prejudice, centers on consequences, primarily monetary, to the government should the claimant prevail." *Id*. Such prejudice "may arise where a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit." *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992) (en banc), *abrogated on other grounds by SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328 (2017). Because the government has not carried its burden of showing either type of prejudice, its laches defense fails even if Plaintiffs unreasonably delayed in seeking injunctive relief.

c

Finally, the government contends that "an order directing [Customs] to reliquidate entries is beyond the scope of relief available in this cause of action." ECF 62, at 42. Although it acknowledges that the court can require Commerce to reconsider Plaintiffs' exclusion requests, the government argues that so doing would be of little

[25] As late as 2020, the government acknowledged that under *Shinyei*, the CIT possesses the authority to order reliquidation in § 1581(i) cases. *See J. Conrad LTD v. United States*, 457 F. Supp. 3d 1365, 1379 (CIT 2020). In May 2021, however, the government for the first time announced it had "taken a close look at the issue of the availability of reliquidation under *Shinyei*" and reconsidered its position. *See In re Section 301 Cases*, Case 21–52–3JP, ECF 304, at 36 (CIT May 14, 2021).

practical value as to entries that have finally liquidated.[26] The government explains that the Department's scheme for administering Section 232 only permits Customs to apply exclusions to entries that have not so liquidated at the time an importer seeks a refund, which the importer cannot seek until Commerce grants an exclusion. *See id.* at 41–45; ECF 78, at 3–8. According to the government, because the Department has structured its administrative scheme this way, if the court remands after finding an APA violation it is nevertheless powerless to *also* order Commerce to direct Customs to apply any granted exclusions to entries that have finally liquidated. ECF 62, at 41–45; ECF 78, at 3–8.

The government relies on *Voestalpine*, in which the plaintiffs challenged Commerce's grants of defective Section 232 exclusions that Customs would not honor. *See* 578 F. Supp. 3d at 1269–70, 1276. Even though the Department nominally granted the requested exclusions, they were worthless—the administrative equivalent of bounced checks. By the time the plaintiffs detected the errors and obtained corrected exclusions, the entries in question had finally liquidated. *Id*. at 1266. Under Commerce's administrative scheme, Customs would not apply the corrected exclusions to the plaintiffs' entries. *Id*. at 1277–78.

Voestalpine held that a court-ordered "remand to [Commerce] is unnecessary" because the Department "provided all the relief it could when it issued the revised exclusions." *Id*. at 1277. The court further held that "court-ordered reliquidation" was not "an appropriate remedy." *Id*. In so holding, the court distinguished *Shinyei*, reasoning that the plaintiff's claim in that case arose out of 19 U.S.C. § 1675(a)(2)(C). *Id*. at 1278 (citing *Shinyei*, 355 F.3d at 1303, 1306). By contrast, the *Voestalpine* plaintiffs' "claims relate[d] to the Section 232 exclusion process established by the Executive Branch." *Id*. at 1277.

The court disagrees with *Voestalpine*. To repeat: The relevant question under *Shinyei* is not whether a plaintiff's APA claim is founded on an alleged violation of 19 U.S.C. § 1675(a)(2)(C), but instead whether some other statute " 'impliedly forbid[s]' " the reliquidation relief sought. *Shinyei*, 355 F.3d at 1312 (quoting 5 U.S.C. § 702); *see also above* note 21. In neither *Voestalpine* nor *Shinyei* did any statute forbid the relief sought, for as explained above, in any APA case properly brought under this court's residual § 1581(i) jurisdiction, no other statute *can* be "addressed to the type of grievance which the plaintiff seeks to assert." *Patchak*, 567 U.S. at 216.

[26] Apart from Plaintiffs' admissions, the government notes that it believes that "most or all of the entries of merchandise that are the subject of plaintiffs' claims" had finally liquidated when it sought remand. *Id.* at 14.

Voestalpine further found that injunctive relief in the form of an order requiring reliquidation was not "appropriate," 578 F. Supp. 3d at 1277, but failed to tether that conclusion to the applicable equitable principles governing such relief. *See eBay*, 547 U.S. at 391. It appears to the court that injunctive relief was appropriate in *Voestalpine* because (1) the plaintiffs there were threatened with irreparable injury absent reliquidation, i.e., loss of duties paid, *see id*.; (2) they had no adequate remedy at law for that loss, *see id*.; (3) considering the balance of hardships, a remedy in equity was warranted, *see id*.; and (4) the public interest would not have been disserved by such relief, *see id*.

In short, injunctive relief was available to the *Voestalpine* plaintiffs if Commerce's issuance of defective exclusions violated the APA.[27] As Plaintiffs here argue, *see* ECF 63, at 38, Commerce may not structure its scheme to administer Section 232 exclusions to thwart effectual judicial review of unlawful agency action.

"[O]ur Government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'" *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.)). Thus, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, *federal courts may use any available remedy to make good the wrong done*." *Id*. (cleaned up, emphasis added) (quoting *Bell*, 327 U.S. at 684). This presumption is rebutted only when there is "clear direction to the contrary by Congress." *Id.* at 70–71.

In the APA context, that means that a district court is "justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights." *Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001); *cf*. *United States v. Morgan*, 307 U.S. 183, 190–95 (1939) (holding that after an agency takes new action following a court challenge, a district court has the equitable authority to make injured parties whole even if the agency itself lacks authority to do so); *Benten v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992) ("In cases where administrative misuse of procedure has delayed relief, the courts have the equitable power to order relief tailored to the situation . . . .") (citing *Ford*, 305 U.S. at 373).

Thus, if the court determines that the challenged exclusion denials violated the APA, it may order Commerce—insofar as the Depart-

[27] The court expresses no opinion on whether the *Voestalpine* plaintiffs stated a cognizable APA claim, especially given that their own negligence contributed to Commerce's issuance of the defective exclusions. *See* 578 F. Supp. 3d at 1270.

ment issues any exclusions on remand[28]—to instruct Customs to make Plaintiffs whole by restoring them to the positions they would have occupied had their original requests been granted.[29] The court thus rejects the government's *Voestalpine* argument that even if Plaintiffs prevail on their APA challenges, Commerce's administrative scheme renders the court helpless to "make good the wrong." *Franklin*, 503 U.S. at 66 (quoting *Bell*, 327 U.S. at 684).

IV

"Having reached the end of what seems like a long front walk," *Steel Co.*, 523 U.S. at 102, the court finally turns back to Defendant's motions for voluntary remand. In so moving "without confessing error," Case 21–5, ECF 46, at 7, the government states that Commerce "proposes, on remand, to reconsider the exclusion requests by engaging in new and independent review," *id*. at 8. In such a review, the Department "will issue new determinations to either: (1) grant the requests excluding some or all of these products from the scope of the Section 232 measure on steel imports; or (2) deny the exclusion requests." *Id*. at 1–2.

The government offers three reasons for a voluntary remand. First, in *JSW Steel (USA) Inc. v. United States*, the court reviewed an administrative record the government characterizes as "similar in reasoning and scope of analysis" to the records here and found Commerce's denial of exclusion requests to be "devoid of explanation and [to] frustrate judicial review." 466 F. Supp. 3d 1320, 1330 (CIT 2020);

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[28] "[M]ak[ing] good the wrong" does not ordinarily mean "directing *how* [the agency] shall act" after its action is set aside. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in original and quoting *Attorney General's Manual on the Administrative Procedure Act* 108 (1947)). If agency action violates the APA, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Here, any exercise of the court's equitable powers to make Plaintiffs whole depends on the Department granting the exclusions upon reconsideration.

The principle that upon a finding of unlawful agency action a court should remand for reconsideration has "limitations." *Greene v. Babbitt*, 943 F. Supp. 1278, 1287 (W.D. Wash. 1996). Where it would serve no valid purpose, a court "is not obligated to remand. Rather than subjecting the party challenging the agency action to further abuse, it may put an end to the matter by using its equitable powers to fashion an appropriate remedy." *Id*. at 1288. Thus, in *Voestalpine*, Commerce's issuance of corrected exclusions meant that remand was pointless. If the CIT determined the Department's issuance of defective exclusions violated the APA, *see above* note 27, the court could have ordered Commerce to direct Customs to honor the corrected exclusions without remanding.

[29] Any relief the court might issue must be limited to entries that had not finally liquidated by the fifth business day following the Department's denial of any given exclusion—the first day Plaintiffs could have sought relief from Customs if Commerce had granted their requests. *See* 15 C.F.R. Pt. 705, Supp. 1 (h)(2)(iii)(A). As described above, even if the Department had issued the exclusions, under the administrative scheme Customs would have denied refunds for entries that had finally liquidated before the importer sought relief.

see also Case 21–5, ECF 46, at 7 (government's discussion of *JSW*). The government states that "Commerce wishes to reconsider the exclusions and to provide additional reasoning or explanation, as necessary." Case 21–5, ECF 46, at 7.

Second, the government expresses concern that the absence of documentation of Commerce's *ex parte* communications with interested parties means that "the Court may . . . conclude that the existing record is incomplete." *Id.* at 7–8. The Department therefore proposes to conduct "a new and independent review of a record limited to: (1) the original exclusion request; (2) the parties' original objections, rebuttals[,] and sur-rebuttals[;] and (3) any other information that the decision-maker considers, which will be documented in the record." *Id.* at 8. The government contends that such a procedure would mitigate any concern about what materials the Department considered and any claims that it relied on *ex parte* communications. *Id.*

Third, the government notes that because Plaintiffs seek to overturn Commerce's denials of their exclusion requests, and on remand the Department might grant some or all of those requests, "remanding for reconsideration now essentially expedites relief that [the plaintiffs] seek[ ] and may obviate the necessity for remand (or, perhaps, any proceedings) later." *Id.* at 9 (quoting *Borusan Mannesmann Pipe U.S. Inc. v. United States*, Ct. No. 20–00012, Slip Op. 20–90, at 11, 2020 WL 3470104, at *4 (CIT June 25, 2020)).

When the government "request[s] a remand (without confessing error) in order to reconsider its previous position," this court "has discretion over whether to remand." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). "A remand may be refused if the agency's request is frivolous or in bad faith. . . . Nevertheless, if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.*

Setting aside for the moment whether voluntary remand on the government's terms would deny Plaintiffs any meaningful relief as to finally liquidated entries, the government's remand requests are otherwise "substantial and legitimate." *See Borusan*, Slip Op. 20–90, at 9, 2020 WL 3470104, at *4. Commerce points to the need to provide additional explanation and the possibility that its original decisions may have been influenced by undocumented *ex parte* communications or other extra-record considerations. Case 21–5, ECF 46, at 7–8.

Plaintiffs, moreover, do not seriously dispute that remand is inevitable even if they prevail. The ordinary remedy for unlawful agency conduct is a remand for reconsideration. *See Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 46 n.1 (D.C. Cir. 2013) (per curiam) ("Usually, where a district court reviews agency action under the APA, it acts as

an appellate tribunal, so the appropriate remedy for a violation is simply to identify a legal error and then remand to the agency.") (cleaned up); *see also above* note 28. The court, at least at this early stage where it has not previously remanded these matters to the Department, therefore has no power to affirmatively order Commerce to *grant* the requested exclusions.

Thus, Plaintiffs' primary objection to voluntary remand is that it threatens to deny them any meaningful relief as to finally liquidated entries, hence their request for the court to first address that question. As the government belatedly admits, voluntary remand on the terms it proposes would indeed prejudice Plaintiffs by denying them the real-world relief they seek as to finally liquidated entries—refund of their Section 232 duties. Even if Commerce granted the exclusions on voluntary remand, Customs would not honor them as to finally liquidated entries.[30]

That prejudice—denying Plaintiffs the real-world relief that they could get from the court after prevailing on the merits—justifies denying remand on the government's requested terms. *Cf. Lutheran Church-Mo. Synod v. F.C.C.*, 141 F.3d 344, 349 (D.C. Cir. 1998) (Silberman, J.) (denying voluntary remand where the agency "has not confessed error" and proposed agency action on remand would not grant relief to plaintiff); *Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (stating that voluntary remand may be denied when it "would unduly prejudice the nonmoving party"); *Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017) (Kavanaugh, J.) (noting that voluntary remand should not be granted when it "may instead function . . . as a dismissal of a party's [APA] claims"); Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev. 361, 365 (2018) ("[V]oluntary remands—which give agencies carte blanche to proceed without judicial supervision—are an administrative law remedy uniquely at risk of abuse.").

Critically, however, the court's remand to an agency is an exercise of its equitable powers. *See Ford*, 305 U.S. at 373 ("The jurisdiction to review the orders of [an agency] is vested in a court with equity

[30] Following the Department's grant of any exclusions on unconditional voluntary remand, the court would appear to be powerless to instruct Customs to honor those exclusions as to finally liquidated entries, for at that point there would be no legal "wrong" to "make good." *Franklin*, 503 U.S. at 66 (quoting *Bell*, 327 U.S. at 684); *cf. Hedges v. Dixon County*, 150 U.S. 182, 192 (1893) ("[E]quity follows the law . . . ."); *see also* Toni M. Fine, *Agency Requests for "Voluntary" Remand: A Proposal for the Development of Judicial Standards*, 28 Ariz. St. L.J. 1079, 1107 (1996) (observing that a court forgoes any opportunity for "shaping actions taken by the agency in the remanded proceedings . . . when agency requests for remand are unqualifiedly ordered").

powers . . . ."); *see also Keltner v. United States*, 148 Fed. Cl. 552, 557 (2020) ("The early case law recognized that the power of the courts to remand a challenged agency action back to the agency for review was equitable in nature."). *Cf.* Ronald M Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 323 (2003) ("For more than sixty years, courts have drawn upon the traditions of equity to support a broad understanding of the remedial powers of federal courts in administrative law cases . . . .").

As an exercise of its equitable powers, when remanding a court can "adjust its relief to the exigencies of the case" to protect the interests of the agency in reconsidering its position, the parties and the court in judicial economy, and the plaintiffs in obtaining the ultimate relief they seek. *Ford*, 305 U.S. at 373; *cf. Hecht*, 321 U.S. at 329–30 ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.").

In this context, that flexibility allows the court to condition remand on requiring Commerce, if it grants any exclusions on reconsideration, to instruct Customs to restore Plaintiffs to the same positions they would have occupied had the Department originally granted their requests, even if the relevant entries have since finally liquidated.[31] *Cf. Cook Inletkeeper v. U.S. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) (granting voluntary remand with conditions). In doing so, the court can ameliorate the prejudice Plaintiffs would otherwise suffer from remands on the government's proposed terms.

Beyond Plaintiffs' concern with being denied any effective remedy, they object to the duration of the government's proposed remands.[32] They also seek to bar agency officials involved in the Department's challenged decisions from participating in reconsideration of the exclusion requests.

"Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978) (cleaned up). "Accordingly, absent such constraints or circum-

[31] The court acknowledges that the predicate for imposing this condition is its conclusion that if Plaintiffs prevailed on the merits of their APA claims, the court could order Commerce to require Customs to honor exclusions even for entries that have finally liquidated since the Department denied Plaintiffs' requests. If the government's contrary argument were correct, then the court could not impose such a condition under its equitable powers, because Plaintiffs would not suffer any prejudice from unconditional remands.

[32] The government seeks 225 days in *Calvert*, *see* Case 21–5, ECF 46, proposed order at 1–2; 250 to 325 days in *California Steel*, *see* Case 21–15, ECF 44, proposed order at 2; and 360 days in *Valbruna*, *see* Case 21–27, ECF 30, proposed order at 2.

stances, courts will defer to the judgment of an agency regarding the development of the agency record. To do otherwise would run the risk of propelling the courts into the domain which Congress has set aside exclusively for the administrative agency." *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012) (cleaned up) (citing *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976)).

Moreover, the presumptions of regularity and good faith to which an administrative agency's decision-makers are entitled are not limited to retrospective review of an agency's original decision. "The possibility that some individuals working on new determinations may have worked on prior determinations in the same case is not enough to overcome the presumption of a decision-maker's honesty and integrity." *NLMK Pa., LLC v. United States*, 558 F. Supp. 3d 1401, 1406 (CIT 2022) (citing *FTC v. Cement Inst.*, 333 U.S. 683, 700–03 (1948)). Therefore, the court will not require the Department to exclude certain officials from involvement in reconsideration of Plaintiffs' requests. *Cf. id.* at 1407 n.7 ("Plaintiff's proposal seems to invite the court to supervise and thus co-author the determination with Commerce and then review that determination. The court declines the invitation.").

That said, at argument the court asked the government's counsel whether "you're in agreement with restricting and confining the record to the existing record without expanding it." Case 21–5, ECF 76, at 25:1–4. Counsel did agree: "That's right. Commerce has no intention of reopening the record." *Id.* at 25:5–6. The court accepts that representation as sufficient to bind Defendant.

Finally, the review period for new exclusion requests is normally 106 days. 15 C.F.R. Pt. 705, Supp. 1(h)(3)(i). The government characterizes Commerce's efforts on remand as "engaging in a new and independent review." Case 21–5, ECF 46, at 8.[33] Taking the government at its word, therefore, and given the government's representation that Commerce will limit the scope of the remand to the existing administrative record, the court can see no reason why a "new and independent review" should be subject to anything other than the

[33] An agency has two options on remand. First, it may offer a more complete explanation of the reasoning it employed at the time of its action. "This route has important limitations. When an agency's initial explanation indicates the determinative reason for the final action taken, the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907–08 (2020) (cleaned up). Second, "the agency can deal with the problem afresh by taking *new* agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.* at 1908 (emphasis in original) (cleaned up).

standard period prescribed by the regulations. Therefore, the court grants the Department 106 days to issue its remand determinations.[34]

* * *

For the reasons explained above, the court **DENIES** Defendant's motions to dismiss Plaintiffs' claims for injunctive relief as to finally liquidated entries for lack of jurisdiction, **DENIES** Defendant's motions for partial summary judgment as to those claims, and **GRANTS** Defendant's motions for voluntary remand, subject to the conditions outlined in a separate judgment. *See* USCIT R. 58(a).[35]

Dated: September 6, 2023
New York, NY

/s/ M. Miller Baker
JUDGE

[34] The government represents that concurrent with any remand, the government will allow Plaintiffs to confer with Customs as necessary to resolve HTSUS "administrability issue[s]" in connection with certain requests by submitting new HTSUS codes to Commerce. *See* Case 21–5, ECF 46, at 10; *see also* Case 21–27, ECF 30, at 11. The court therefore also includes that condition in its remand order.

[35] Although a remand is ordinarily interlocutory, the condition that Plaintiffs be made whole if Commerce grants their exclusion requests appears to render the court's order a "final decision" for purposes of 28 U.S.C. § 1295(a)(5). *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). As required by Rule 58(a), the court therefore enters the remand order as a separate judgment.

Slip Op. 23–130

GOPRO, INC. Plaintiff, v. UNITED STATES Defendant.

Before: Timothy M. Reif, Judge
Court No. 20–00176

MEMORANDUM AND ORDER

The following order concerns the challenge by plaintiff GoPro, Inc. ("plaintiff" or "GoPro") of the classification of subject merchandise by U.S. Customs and Border Protection ("Customs") of eight camera housing models under subheading 4202.99.9000 of the Harmonized Tariff Schedule of the United States. The subject merchandise encompasses GoPro's eight models of camera housings ("camera housings") for use with GoPro's HERO 3, HERO 3+, HERO 4 action cameras and HERO 5, 6, 7 Black action cameras ("action cameras").

Below, the court identifies questions of material fact that are allegedly not in dispute but as to which the opposing party has not admitted. In consideration of oral argument,[1] record evidence and parties' submissions to the court in support of their cross-motions for summary judgment, the parties are ordered to file supplemental briefing in response to the court's questions concerning potential outstanding material facts in dispute in the parties' U.S. Court of International Trade ("USCIT") Rule 56.3 Statements. *See generally*, Pl.'s Stmt. Facts ("Pl. Stmt. Facts"), ECF No. 29–1; Def.'s Stmt. Facts ("Def. Stmt. Facts"), ECF No. 33; Def.'s Resp. Pl.'s Stmt. Facts ("Def. Resp. Pl. Stmt. Facts"), ECF No. 33; Pl.'s Resp. Def. Stmt. Facts ("Pl. Resp. Def. Stmt. Facts"), ECF No. 37–1; Pl.'s Reply Def.'s Resp. Pl.'s Stmt. Facts ("Pl. Reply Def. Resp. Pl. Stmt. Facts"), ECF No. 37–3.

BACKGROUND

Plaintiff and defendant filed cross-motions for summary judgment in which each states that there is "no genuine issue as to any material fact." Pl.'s Mot. Summ. J. ("Pl. Br.") at 6, ECF No. 29 (citing USCIT R. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Def.'s Cross-Mot. Summ. J. ("Def. Br.") at 13, ECF No. 33 (citing USCIT R. 56(c);[2] *Celotex,* 477 U.S. at 317, 322 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

[1] Oral argument concerning the cross-motions for summary judgment for classification of the subject merchandise was held on March 15, 2023. Oral Arg., ECF No. 46.

[2] Plaintiff and defendant cite incorrectly to USCIT Rule 56(c) to support the standard for summary judgment. Pl. Br. at 6; Def. Br. at 13. The court directs parties to USCIT Rule 56(a) as the apposite rule for summary judgment. USCIT R. 56(a).

The court concludes that each party's disputes and denials with respect to the other party's USCIT Rule 56.3 Statement demonstrate that there may be outstanding issues of material facts, despite parties' repeated assertions to the contrary. Pl. Resp. Def. Stmt. Facts at 1 (stating that "[a]lthough Plaintiff objects to some of the Defendant's statements in that they are immaterial or inaccurately reflect the record/the evidence cited, nothing in Defendant's Statement raises a genuine dispute as to any material fact for the purposes of Plaintiff's Motion for Summary Judgment."); Def. Br. at 11. The classification of subject merchandise is a fact-intensive inquiry for the court. *See ADC Telecommunications, Inc. v. United States*, 916 F.3d 1013, 1017 (Fed. Cir. 2019) (describing the two-step inquiry of classification of merchandise: "[the court] ascertain[s] the meaning of the terms within the relevant tariff provision, which is a question of law, and, second, [the court] determine[s] whether the subject merchandise fits within those terms, which is a question of fact.") (citing *Sigma-Tau Health-Sci., Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). The two-step inquiry "collapses into a question of law" when there is no genuine dispute as to the nature of the subject merchandise. *LeMans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011). In the instant action, the court directs parties to confirm their positions regarding the nature of the subject merchandise to confirm that the action is ripe for summary judgment.

Accordingly, parties are directed to: (A) come to an agreement on each fact noted below that they state is "undisputed" and state clearly the undisputed fact; or (B) state clearly that certain facts are not agreed and are disputed.

The court notes finally that, with respect to each material fact discussed below, the potential dispute raised by each party to the other's Rule 56.3 Statement is not sufficiently precise to understand the dispute as to a material fact or in some cases even whether there is a genuine dispute. In this respect, the parties have not provided the court with sufficient guidance in their respective Rule 56.3 Statements.[3]

Under USCIT Rule 56(e)(1), the court may offer parties an opportunity to address facts that appear to remain outstanding on summary judgment. USCIT R. 56(e)(1) ("If a party fails to properly support an assertion of fact or fails to properly address another party's

[3] USCIT Rule 56.3 states in relevant part:

> On any motion for summary judgment filed pursuant to Rule 56, the factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

USCIT R. 56.3(a).

assertion of fact as required by Rule 56(c), the court may give an opportunity to properly support or address the fact"). Accordingly, the court directs parties to answer in a short and concise manner Questions 1, 2 and 3 below. For ease of reference, the court directs parties to their initial submissions, responses and replies thereto to highlight the potentially disputed fact before the court.

I. Questions for parties concerning factual issues

Question 1: Do the camera housings feature lens coverings that obstruct or inhibit use of the action camera as a camera when enclosed within the camera housings?

In its Rule 56.3 Statement, plaintiff states that the camera housings do not feature a protective lens covering, a fact that the government denies in its response and contradicts in its own Rule 56.3 Statement for its cross-motion for summary judgment:

> 29. The Camera Housings do not feature a protective lens covering for storage or transport of the action camera.[4]
>
> Government's Response: *Denies. See P-18 which states "The Camera Housings consist of a ridged plastic water-sealed shell made out of the polycarbonate, with hardened flat glass over the lens assembly." The hardened flat glass is part of the protective container which protects the Hero Action Camera's lens. Avers that GoPro also offers lens covers for the Standard housing based models and Dive Housing which not only cover the housing lens but also obstructs the housings "pass-thru" "on" button, precluding any accidental activations during storage or transport.*
>
> **NO GENUINE DISPUTE** – Plaintiff's factual proposition that the Camera Housings do not feature a protective lens cover for storage and transport of action camera is uncontroverted. The government's averred facts do nothing to controvert this factual assertion. With respect to lens cover, the government ignores record evidence that Lens Cover is an optional standalone accessory for one model of camera housing. Offered precisely because that housing' lens assembly can be damaged in transport. It did not ship with the products at issue in this lawsuit.

Pl. Reply Def. Resp. Pl. Stmt. Facts at ¶ 29.[5]

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[4] For purposes of this discussion, citations to the relevant paragraph number are included and parties' internal citations to record evidence have been omitted throughout.

[5] Defendant submitted a separate Rule 56.3 Statement to support its cross-motion for summary judgment, which features a directly contradictory fact, controverted by plaintiff in its response thereto:

Question 2: Is the action camera functional as a camera (photography and videography purposes) while within the camera housing?

Plaintiff and defendant, respectively, use the terms "fully functional" and "retain[s] 100% functionality" and then disagree on what it means for the action camera to be "fully functional" or to "retain 100% functionality" inside the camera housings. The question to which the court seeks an answer is whether the camera is "functional as a camera (photography and videography purposes) while within the camera housing":

> 32. The GoPro HERO action camera remains fully functional while housed inside the Camera Housing, so that it may be used while inside the housing.
>
> Government's Response: *Denies. The Hero Action cameras do not retain 100% functionality when inserted into the GoPro waterproof housings. The Hero Action cameras without the housings have capabilities of great image quality and great audio quality. When the Hero Action cameras are inserted in the GoPro waterproof housings, the audio quality is degraded and muffled. Improved audio quality is one of the reasons GoPro came up with the Skeleton Housing, which is the only housing at issue which is not waterproof mainly because it has ports (holes) and cut-outs in the sides and back of the housing. Further, when a Hero camera is placed inside the tight-fitting GoPro housing, the camera heats up when operating as it is fairly power hungry. While a heat sink on the camera housing helps dissipate heat buildup, the camera sealed inside the waterproof housing can overheat under certain conditions resulting in a shutdown. Additionally, once the Hero Action camera is enclosed in a GoPro waterproof housing there is no access to the camera's HDMI and microphone ports, which are preferable for media or TV and movie production. For these reasons the Hero action camera does not retain 100% functionality when enclosed in the GoPro Waterproof Housings.*
>
> **NO GENUINE DISPUTE** – The government factual assertion that the GoPro action camera is not fully functional when enclosed in the GoPro waterproof housing misstates record evidence. The cited evidence does not support the fact that the audio performance is "degraded" and does not deliver acceptable performance when the action camera is enclosed in the water-

36. The GoPro Housings have covers which both cover the lens and the power button on the housings which have the power button and lens on the front of the housings, *i.e.*, the Dive Housing, Wrist Housing, Camo Housing, Standard Housing and Skeleton Housing. Pl. Resp. Def. Stmt. Facts at ¶ 36.

> proof housing during intended extreme activities. The record evidence shows that the Skeleton housing is only recommended where IMPROVED audio is desirable, i.e., professional media applications where access to the HDMI/Mic ports is preferred. The cited evidence also does not support the asserted fact that the camera is susceptible to overheating while enclosed in the housing any more than any other consumer electronic device (i.e., cell phone or laptop) under the direct sunlight and no airflow. The government does not (and cannot) dispute that the GoPro action camera is fully functional when enclosed in the Camera Housings at issue in this litigation during filming in active environments as intendeds – it is waterproof, shockproof, mountable, captures great video and acceptable audio.

Pl. Reply Def. Resp. Pl. Stmt. Facts at ¶ 32.

Question 3(a): Are the spring buttons[6] on the camera housing designed to resist, to some degree, pressure so as to minimize accidental turning on or off of the camera?

Question 3(b): Do the spring buttons on the camera housing correspond to the buttons on the action camera both to enable the user to turn the camera on while it is in the housing and to provide some degree of protection to the camera?

Question 3(c): Are the parties in agreement with the following statement: if the camera housings were to be used as the primary storage solution for the action camera, the spring buttons could be fouled by dirt and grime?

Plaintiff and defendant dispute the degree to which the buttons on the camera housings are affected by the environment in which they are used:

> 35. The resistance of the springs of the housing's "press-thru" buttons which control some of the camera's functions were tested to ensure the buttons were capable of "resist[ing] accidental presses".
>
> Plaintiff disputes this assertion as stated with respect to the characterization [sic] the product and marketing requirements regarding resistance of the housing's buttons. . . . Regardless, the asserted fact is immaterial. It is undisputed that "If the Camera Housing were to be used as the primary storage solu-

[6] In their Rule 56.3 Statements and briefs, parties refer interchangeably to the buttons on the camera housings as "spring-loaded buttons," "press-thru" buttons, "pass-through button plungers" and "exposed functional button assemblies." Pl. Resp. Br. at 5; Def. Stmt. Facts ¶¶ 35, 11. The court uses the term "spring buttons" to refer to the feature on the camera housings to which parties refer as the buttons on the camera housings that correspond to the power and functional buttons on the action cameras.

> tion, the user would risk scratching the lens assembly and the action camera could be rendered unusable. Also, the entire camera optical system is subject to damage if dropped on the lens glass while in the housing. Similarly, if the Camera Housing were to be used as the primary storage solution, the exposed functional button assemblies could be fouled by dirt and grime and, if bumped, the buttons could inadvertently power the camera on, or actuate the shutter, consuming the battery and valuable microSD memory card storage space. To the contrary, camera cases are specifically designed to protect both cameras and lenses alike from all of the above."

Pl. Resp. Def. Stmt. Facts ¶ 35 (quoting Pl. Stmt. Facts ¶ 38).[7]

Both parties' responses and replies to the respective opposing party's statements of fact in the quoted excerpts above from party submissions are referenced along with the court's questions to provide guidance to parties so that they may avoid repeating themselves in their answers.

CONCLUSION

In the absence of adequate guidance through Rule 56.3 Statements and contradictory assertions from both parties therein, the court directs parties to address through their answers to the foregoing questions whether there are any outstanding material facts in dispute or whether the instant action is ripe for summary judgment.

Accordingly, it is hereby

ORDERED that each party file within 30 days of this order a responsive supplemental USCIT Rule 56.3 Statement in response to the court's questions.

ORDERED that each supplemental responsive statement is limited to 200 words per question for each party.

SO ORDERED.

Dated: September 11, 2023
New York, New York

/s/ Timothy M. Reif
JUDGE

[7] Plaintiff cites to its own Rule 56.3 Statement of Facts, claiming that the fact is "undisputed." Pl. Reply Def. Resp. Pl. Stmt. Facts ¶ 38. The court notes that plaintiff's characterization that this fact is "undisputed" is inaccurate: defendant denies this fact in its response to plaintiff's statement, stating, "denies that the buttons would likely be fouled by dirt and grime." Def. Resp. Pl. Stmt. Facts ¶ 38.

Slip Op. 23–131

HISTEEL CO., LTD., Plaintiff, and DONG-A-STEEL CO., LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 22–00142

[Counts 2 and 3 of the Complaint are dismissed as nonjusticiable. Nucor's Motion to Stay Proceedings is granted. Plaintiffs' Motion for Judgment on the Agency Record is stayed with respect to Count 1 until the resolution of appellate proceedings in *Stupp Corp. v. United States*, No. 23–1663 (Fed. Cir. docketed Mar. 27, 2023).]

Dated: September 12, 2023
As Amended: September 12, 2023

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OPINION AND ORDER

Katzmann, Judge:

In this case, the court is tasked again with evaluating the reasonableness of the U.S. Department of Commerce's ("Commerce") use of the Cohen's *d* test, a statistical test that measures effect size, in antidumping duty calculations. Plaintiff HiSteel Co., Ltd. ("HiSteel") and Plaintiff-Intervenor Dong-a-Steel Co., Ltd. ("DOSCO") (together, "Plaintiffs"), challenge the final results of Commerce's administrative review of the antidumping duty order on heavy-walled rectangular ("HWR") welded carbon steel pipes and tubes from the Republic of Korea. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2019–2020*, 87 Fed. Reg. 20390 (Dep't Com. Apr. 7, 2022) ("*Final Determination*"). Defendant-Intervenor Nucor Tubular Products Inc. ("Nucor") also joined the action as an interested party. HiSteel's Complaint contests three aspects of the *Final Determination* in separate counts: (1) Commerce's use of the Cohen's *d* test; (2) Commerce's application of the Transactions Disregarded Rule to HiSteel's reported costs of slitting services; and (3) Commerce's adjustment of HiSteel's reported scrap offset.

Before the court are three motions. First is Nucor's Motion to Dismiss Counts 2 and 3 for Lack of Subject Matter Jurisdiction; the court dismisses Counts 2 and 3 as nonjusticiable.[1] Next are Nucor's Motion to Stay Proceedings and HiSteel's Motion for Judgment on the Agency Record, both of which are now narrowed only to Count 1—the Cohen's *d* issue. The court grants Nucor's motion and stays the Motion for Judgment on the Agency Record with respect to Count 1 pending the resolution of appellate proceedings in *Stupp Corp. v. United States* ("*Stupp V*"), No. 23–1663 (Fed. Cir. docketed Mar. 27, 2023), which is likely to affect the ultimate analysis and disposition of the Cohen's *d* issue in this case.

BACKGROUND

I. Legal Background

"Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). Such sales, which permit foreign producers to undercut domestic companies by selling products below reasonable fair market value, amount to unfair competition with American industry. *Id.* To remedy this issue, Congress enacted the Tariff Act of 1930, as amended, which empowers Commerce to investigate potential dumping and to issue orders instituting duties on subject merchandise as necessary. *Id.* at 1047. In concluding that duties are appropriate, Commerce must determine the "margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Commerce imposes antidumping ("AD") duties on foreign goods if it determines that the goods are being, or are likely to be, sold at less than fair value, and the International Trade Commission concludes that the sale of the merchandise below fair value materially injures, threatens to materially injure, or impedes the establishment of an industry in the United States. *See* 19 U.S.C. § 1673; *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Merchandise is sold at less than fair value when its normal value ("NV") is greater than the price charged for the product in the United States. *See* 19 U.S.C. § 1673. Commerce traditionally determines NV by reference to market prices in the exporting country, *id.* §

[1] Because Nucor's motion as presented was technically untimely, the court will not formally grant the motion to dismiss. *See infra* note 4.

1677b(a)(1)(B)(i), or in a third country, *id.* § 1677b(a)(1)(B)(ii). If there does not exist a viable home market or third-country market to serve as the basis for NV, Commerce may use constructed value as the basis for NV. *See id.* § 1677b(a)(4). Once NV is determined, Commerce calculates the weighted average dumping margin. In general, the agency "compar[es] . . . the weighted average of the normal values with the weighted average of the exported prices (and constructed export prices) for comparable merchandise," termed the average-to-average ("A-to-A") method, "unless the Secretary determines another method is appropriate in a particular case." 19 C.F.R. § 351.414(b)(1), (c)(1); *see also* 19 U.S.C. § 1677f–1(d)(1)(A)(i).

"The [A-to-A] method, however, sometimes fails to detect 'targeted' or 'masked' dumping, because a respondent's sales of low-priced 'dumped' merchandise would be averaged with (and offset by) sales of higher-priced 'masking' merchandise, giving the impression that no dumping was taking place." *Stupp Corp. v. United States*("*Stupp III*"), 5 F.4th 1341, 1345 (Fed. Cir. 2021) (internal quotation marks and citation omitted); *see also Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26720, 26721 (Dep't Com. May 9, 2014). Commerce is therefore authorized to use two alternative methods to address the kind of targeted dumping that the A-to-A method may fail to detect. *Stupp III*, 5 F.4th at 1345. First, Commerce may compare the NVs of individual transactions to the export prices of individual transactions, a method known as the transaction-to-transaction ("T-to-T") method. 19 U.S.C. § 1677f–1(d)(1)(A)(ii). The T-to-T method is employed only in "unusual" situations, such as "when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2). Second, Commerce may use the average-to-transaction ("A-to-T") method, which "involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." *Id.* § 351.414(b)(3). The A-to-T method is appropriate only if "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and if Commerce "explains why such differences cannot be taken into account" using alternative methods. 19 U.S.C. § 1677f-1(d)(1)(B).

To determine whether to apply the A-to-T or T-to-T methods instead of the A-to-A method, Commerce conducts a series of statistical tests called the differential pricing analysis. *Apex Frozen Foods Priv. Ltd.*

v. United States, 862 F.3d 1337, 1342 & n.2 (Fed. Cir. 2017); *see also Stupp III*, 5 F.4th at 1346–47. Commerce's differential pricing analysis consists of three steps:

1. The Cohen's *d* Test. Commerce first segments export sales into subsets based on region, purchasers, and time periods. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26722. Commerce then applies the Cohen's *d* test, a statistical test that determines the extent of the difference in the means between a test group and comparison group of prices ("effect size"), to each subset. *Id.* The Cohen's *d* test is meant to evaluate the extent to which prices differ significantly among purchasers, regions, or time periods. *See id.* Commerce implements a statistical cutoff of 0.8, which it explains "provides the strongest indication that there is a significant difference between the means of the test and comparison groups." *Id.*; *see also Stupp III*, 5 F.4th at 47. If the Cohen's *d* coefficient is 0.8 or greater, the sales in the group "pass" the Cohen's *d* test and are subjected to the subsequent ratio and meaningful difference tests. *See id.*

2. The Ratio Test. Commerce next applies the "ratio test" on the aggregated results of the Cohen's *d* test on each subset to assess the extent of the significant price differences for all sales. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26722. If less than 33 percent of the value of total sales passes the Cohen's *d* test, Commerce will use the A-to-A method to calculate the weighted-average dumping margin. *See id.* at 26723. If more than 33 percent but less than 66 percent of the value of total sales pass the Cohen's *d* test, Commerce has the discretion to apply a hybrid method, wherein it applies the A-to-A method to sales which do not pass the Cohen's *d* test, and the A-to-T method to sales which pass the Cohen's *d* test. *See id.* And if more than 66 percent of the value of total sales pass the Cohen's *d* test, Commerce tentatively applies the A-to-T method to all sales because the data suggests an "identified pattern of export prices that differ significantly." *See id.* at 26722–23.

3. The Meaningful Difference Test. Finally, Commerce applies the "meaningful difference" test, which compares the AD margins resulting from different methodologies, to examine whether using only the A-to-A method can appropriately account for price differences. *See* 19 U.S.C. § 1677f–1(d)(1)(B)(ii); *Stupp III*, 5 F.4th at 1347; *Differential Pricing Analysis*, 79 Fed. Reg. at 26723. Commerce compares the dumping margin that results from applying only the A-to-A method with the dumping margin that results from applying the alternative method that is tentatively selected based on the Cohen's *d* and ratio tests. *See Differential Pricing Analysis*, 79 Fed. Reg. at 26723. A difference in the weighted average dumping margins is considered meaningful if (1) there is a 25 percent relative change and both rates are above the *de minimis* threshold of two percent, or (2)

the A-to-A weighted average dumping margin is below the *de minimis* threshold and the alternative margin is above. *See id.* Commerce uses the alternative approach to calculate AD margin if it concludes there is a meaningful difference; absent a meaningful difference, Commerce will apply the A-to-A method. *See id.*

II. Factual Background

HiSteel is a producer and exporter of HWR pipes and tubes from Korea, Compl. ¶ 3, June 8, 2022, ECF No. 18, and DOSCO is a producer of the same, Pl.-Inter.'s Mot. to Intervene ¶ 2, July 7, 2022, ECF No. 26. Commerce initiated an administrative review of the antidumping duty order on HWR pipes and tubes from Korea.[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 68840 (Dep't Com. Oct. 30, 2020), P.R. 21. Commerce named HiSteel and DOSCO as mandatory respondents. *See* Mem. from A. Maldonado to J. Pollack, re: Selection of Respondents for Individual Review at 1 (Dep't Com. Dec. 3, 2020), P.R. 21.

Commerce published its preliminary results in the administrative review on October 6, 2021. *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2019–2020*, 86 Fed. Reg. 55582 (Dep't Com. Oct. 6, 2021), P.R. 210 ("*Preliminary Results*"); Mem. from S. Fullerton to C. Marsh, re: Decision Memorandum for the Preliminary Results (Dep't Com. Sept. 30, 2021), P.R. 207 ("PDM"). In calculating the preliminary dumping margin, Commerce had "applied the transactions-disregarded rule to HiSteel's reported costs to reflect the higher of the transfer price or

[2] Because "the United States has a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. . . . , the most frequently used procedure for determining final duty liability is the administrative review procedure under section 751(a)(1) of the Act." 19 C.F.R. § 351.213(a) (2022). The statute requires in relevant part:

> At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping duty order . . . , [Commerce], if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall . . .
>
> (B) review, and determine . . . the amount of any antidumping duty, . . .
> and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed [or] estimated duty to be deposited . . . .

19 U.S.C. § 1675(a)(1).

market price of slitting services obtained from an affiliated supplier."[3] PDM at 19. Commerce also "adjusted HiSteel's reported scrap offset to account for scrap sales to an affiliated customer that we determined were not made at arm's length prices." *Id.*

Having conducted the differential pricing analysis, Commerce preliminarily found that 99.48 percent of the value of HiSteel's U.S. sales and 96.85 percent of the value of DOSCO's U.S. sales passed the Cohen's *d* test, which "confirm[ed] the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods." *Id.* at 7. Commerce, having determined in DOSCO's case that the A-to-A method and alternative method straddle the *de minimis* threshold and in HiSteel's case that the A-to-A method and alternative method yield a 25 percent relative change, then applied the A-to-T method to all U.S. sales for each respondent. *See id.* Commerce preliminarily calculated weighted-average dumping margins of 1.62 percent for DOSCO and 10.24 percent for HiSteel. *Preliminary Results*, 86 Fed. Reg. at 55583.

After a round of interested party comments, Commerce issued its final results. *See Final Determination*, 87 Fed. Reg. 20390; Mem. from J. Maeder to L. Wang, re: Issues and Decision Memorandum for the Final Results (Dep't Com. Apr. 1, 2022), P.R. 241 ("IDM"). In all aspects relevant to this case, Commerce's determination remained the same. Commerce continued to apply the Transactions Disregarded Rule to HiSteel's reported costs to reflect the average market price of slitting services and corrected related clerical errors. IDM at 55–56. Commerce also continued to adjust HiSteel's reported scrap offset. IDM at 57. Finally, Commerce again determined in its differ-

[3] The Transactions Disregarded Rule, 19 U.S.C. § 1677b(f)(2), is used for the calculation of CV. As the court has previously explained:

> When Commerce considers price data reflecting transactions between an exporter and its affiliated supplier, the agency must apply the Transactions Disregarded Rule . . . in order to ensure that the price used in the CV calculation most accurately reflects the value of the input. The underlying concern is that simply relying on the transaction purchase price for an input from an affiliated supplier ("transfer price"), without testing it against external measures of value, could be reflective of exporters' cost-sharing arrangements with affiliates or like distortions.

Best Mattresses Int'l Co. v. United States, 47 CIT __, __, 622 F. Supp. 3d 1347, 1359 (2023). The text of the Transactions Disregarded Rule states:

> A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2).

ential pricing analysis that 99.48 percent of the value of HiSteel's U.S. sales and 96.85 percent of the value of DOSCO's U.S. sales passed the Cohen's *d* test. *Id.* at 14. The A-to-A method could not account for such differences for either supplier, and Commerce applied the A-to-T method to all U.S. sales to calculate the weighted-average dumping margin for each respondent. *Id.* at 14–15. Commerce calculated final weighted-average dumping margins of 1.61 percent for DOSCO and 10.24 percent for HiSteel. *Final Determination*, 87 Fed. Reg. at 20391.

III. Procedural History

HiSteel timely filed the Complaint on June 8, 2022, and this litigation ensued. *See* Compl. DOSCO moved to intervene shortly thereafter, *see* Pl.-Inter.'s Mot. to Intervene, July 7, 2022, ECF No. 26, which the Government opposed, *see* Def.'s Resp. in Opp'n to Mot. to Intervene, July 28, 2022, ECF No. 36. DOSCO was granted leave to file a reply, *see* Order, Aug. 11, 2022, ECF No. 38, and its reply was filed, *see* Reply to Def.'s Comments, Aug. 11, 2022, ECF No. 39. Holding that DOSCO had standing to intervene and was entitled to intervene as of right, the court granted DOSCO's motion to intervene on September 22, 2022. *See HiSteel Co. v. United States*, 47 CIT __, 592 F. Supp. 3d 1339 (2022), ECF No. 42. In parallel with those proceedings, Nucor moved to intervene with all parties' consent, *see* Def.-Inter.'s Consent Mot. to Intervene, July 8, 2022, ECF No. 30, which the court granted, *see* Order, July 13, 2022, ECF No. 34.

Three motions are currently pending before the court. First, HiSteel and DOSCO moved for judgment on the agency record under USCIT Rule 56.2 on October 17, 2022. *See* Pl.'s Mot. for J. on the Agency R., Oct. 17, 2022, ECF No. 44; Pl.'s Br. in Supp., Oct. 17, 2022, ECF No. 44–1 ("Pl.'s Br."); Pl.-Inter.'s Mot. for J. on the Agency R., Oct. 17, 2022, ECF No. 45; Pl.-Inter.'s Br. in Supp., Oct. 17, 2022, ECF No. 45–1. The Government and Nucor filed responses, *see* Def.'s Resp., Dec. 21, 2022, ECF No. 50; Def.-Inter.'s Resp., Dec. 21, 2022, ECF No. 48, to which HiSteel replied, *see* Pl.'s Reply, Jan. 18, 2023, ECF No. 52.

Second, Nucor moved to stay proceedings and filed a notice of supplemental authority on March 9, 2023. *See* Def.-Inter.'s Notice of Suppl. Authority & Mot. to Stay Proceedings, Mar. 9, 2023, ECF No. 57 ("Mot. to Stay"). Nucor noted this court's recent decision in *Stupp Corp. v. United States* ("*Stupp IV*"), 47 CIT __, 619 F. Supp. 3d 1314 (2023), and requested a stay pending the final resolution of that case. *See* Mot. to Stay at 1–2. HiSteel and DOSCO opposed Nucor's motion,

see Pl.'s & Pl.-Inter.'s Resp. in Opp. to Def.-Inter.'s Mot. to Stay, Mar. 20, 2023, ECF No. 61 ("Pl.'s Resp. to Mot. to Stay"), and the Government defers to the court, *see* Mot. to Stay at 4. The judgment in *Stupp IV* was appealed on March 22, 2023. *See* Notice of Appeal, *Stupp IV*, 619 F. Supp. 3d 1314 (No. 15–00334), ECF No. 258.

Considering those two open motions, the court issued questions in advance of oral argument on March 13, 2023. *See* Letter to Parties, Mar. 13, 2023, ECF No. 60. The parties filed responses. *See* Pl.'s & Pl.-Inter.'s Resp. to Ct.'s Letter, Mar. 27, 2023, ECF No. 64; Def.'s Resp. to Ct.'s Letter, Mar. 27, 2023, ECF No. 63; Def.-Inter.'s Resp. to Ct.'s Letter, Mar. 27, 2023, ECF No. 65. Oral argument was held on March 29, 2023. *See* Oral Arg., Mar. 27, 2023, ECF No. 66. The court invited the parties to submit post-argument briefing, and all parties did so. *See* Pl.'s & Pl.-Inter.'s Post-Arg. Subm., Apr. 5, 2023, ECF No. 67; Def.'s Post-Arg. Subm., Apr. 5, 2023, ECF No. 68; Def.-Inter.'s Post-Arg. Subm., Apr. 5, 2023, ECF No. 69.

Third, Nucor moved to dismiss Counts 2 and 3 of the Complaint for lack of subject matter jurisdiction on April 24, 2023, after briefing and oral argument were completed on the merits for both counts. *See* Def.-Inter.'s Mot. to Dismiss, Apr. 24, 2023, ECF No. 71. HiSteel opposed the Motion to Dismiss on the merits and also as untimely. *See* Pl.'s Resp. in Opp., May 30, 2023, ECF No. 72. The Government and DOSCO did not brief the issue.

DISCUSSION

In Count 1 of its Complaint, HiSteel argues that Commerce's use of the Cohen's *d* test is contrary to well-recognized statistical principles and that the agency failed to provide an adequate explanation of the reasonableness of applying the Cohen's *d* test to data that allegedly did not meet the underlying statistical requirements for the test. *See* Compl. ¶ 6(1); Pl.'s Br. at 5–13. Counts 2 and 3 of the Complaint allege that Commerce's application of the Transactions Disregarded Rule to HiSteel's reported costs to reflect the average market price of slitting services and Commerce's adjustment to HiSteel's reported scrap offset, respectively, were not supported by substantial evidence. *See* Compl. ¶ 6(2)–(3); Pl.'s Br. at 13–23.

As has been noted, three motions are before the court: HiSteel's Motion for Judgment on the Agency Record, Nucor's Motion to Stay Proceedings, and Nucor's Motion to Dismiss Counts 2 and 3 for Lack of Subject Matter Jurisdiction. Counts 2 and 3 are first dismissed for lack of standing. The court next holds that the Motion for Judgment on the Agency Record is stayed with respect to Count 1—the only remaining claim—pending the resolution of appellate proceedings in

Stupp V. The court does not reach the merits of HiSteel's Motion for Judgment on the Agency Record.

I. Counts 2 and 3 Are Dismissed as Nonjusticiable

The court first assesses its jurisdiction to hear HiSteel's claims, which is a "threshold matter." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Nucor argues that even if HiSteel were to prevail on Counts 2 and 3 of the Complaint, a correction of Commerce's alleged calculation errors would not result in a changed published dumping margin. *See* Mot. to Dismiss at 1. Because HiSteel's alleged harm in Counts 2 and 3 is a bare procedural violation and not sufficiently concrete, Counts 2 and 3 are dismissed for lack of standing.[4]

For HiSteel, Commerce calculated a 10.24 percent margin using the A-to-T method and a 7.34 percent margin using the A-to-A method. To test the impact of Commerce's alleged errors in adjusting for slitting charges and scrap sales, Nucor ran four scenarios:

> (1) the status quo, where Commerce applied an adjustment under the transactions disregarded rule to account for undervalued slitting charges from an affiliate ("transactions disregarded adjustment") and an adjustment to account for a small amount of scrap sold to an affiliate at an above-market rate ("scrap adjustment");
>
> (2) HiSteel prevails on Count 3 only, and Commerce applies only the "transactions disregarded adjustment" but not the "scrap adjustment";
>
> (3) HiSteel prevails on Count 2 only, and Commerce applies only the "scrap adjustment" but not the "transactions disregarded adjustment";

[4] A motion to dismiss for lack of subject matter jurisdiction "must be made before pleading if a responsive pleading is allowed." USCIT R. 12(b). In cases arising under 28 U.S.C. § 1581(c), like this one, answers are permitted but not required. *See id.* R. 12(a)(1)(A)(i). Moreover, Plaintiffs note that Nucor had ten months before oral argument to file its motion, "well before Plaintiff, Defendant, and the Court expended time and resources briefing, arguing, and analyzing these issues." *Id.* Nucor's motion was filed on April 24, 2023, after oral argument and briefing on the other motions had been completed.

Nucor's motion was indeed untimely raised. That said, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." USCIT R. 12(h)(3); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." (citation omitted)). The court instead interprets Nucor's untimely 12(b)(1) motion as a "suggestion" to the court that it lacks subject matter jurisdiction, which may be "made at any time." *S.J. v. Hamilton Cnty.*, 374 F.3d 416, 418 n.1 (6th Cir. 2004). Having considered the substance of Nucor's filing, the court dismisses Counts 2 and 3 as nonjusticiable.

(4) HiSteel prevails on Counts 2 and 3, and Commerce applies neither the "transactions disregarded adjustment" nor the "scrap adjustment."

Mot. to Dismiss ex. 1, at 1–2. All of the margins calculated in the above four scenarios, using either the A-to-T or A-to-A methods, were identical to the hundredths place. *Id*. at 1–2. The Government has also stated that "the slitting and scrap accounting issues will not affect the rate of HiSteel Co. Ltd. (HiSteel) even if Commerce were to calculate the two issues as HiSteel argues Commerce should." Def.'s Post-Arg. Subm. at 1. In short, the antidumping margin will remain the same regardless of whether HiSteel prevails on Counts 2 or 3 of the Complaint. Nucor's calculations are summarized in the chart below:

No.	Count 2: Transactions Disregarded Adjustment	Count 3: Scrap Adjustment	Margin	
			A-to-A Method	A-to-T Method
1.	Yes	Yes	7.34%	10.24%
2.	Yes	No	7.34%	10.24%
3.	No	Yes	7.34%	10.24%
4.	No	No	7.34%	10.24%

Mot. to Dismiss ex. 1, at 2.

The federal judicial power, sourced in Article III of the U.S. Constitution, is limited to "actual cases or controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (internal quotation marks omitted) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting *Raines*, 521 U.S. at 819). The irreducible constitutional minimum of standing requires a plaintiff to show "(i) that [they] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S. Ct. at 2203; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Moreover, "an injury in fact must be both concrete *and* particularized," and "[a] 'concrete' injury must be 'de facto'; that is, it must actually exist." *Spokeo*, 578 U.S. at 341 (emphasis in original).

HiSteel does not have standing to bring Counts 2 and 3. Because the antidumping margin will remain the same even if HiSteel prevails on Counts 2 or 3, the alleged harm of potentially miscalculated adjustments to normal value amounts to a "bare procedural violation" and does not "entail a degree of risk sufficient to meet the concrete-

ness requirement." *Id.* at 341–43; *see also, e.g.*, *Best Mattresses*, 622 F. Supp. 3d at 1367–69 (finding no concrete injury where the alleged error in Commerce's differential pricing analysis would not have materially impacted the result of the dumping margin). Plaintiff's injury is therefore "too 'divorced from any concrete harm' to establish Article III standing." *Best Mattresses*, 622 F. Supp. 3d at 1368 (quoting *Spokeo*, 578 U.S. at 341). Lacking a concrete injury-in-fact, Counts 2 and 3 of HiSteel's Complaint must be dismissed.

Appearing to not contest the mathematics of Nucor's calculations, HiSteel instead argues that "Commerce may change its methodology on remand to use a different cutoff [in the Cohen's *d* test]," referring to its objection to Commerce's calculation in Count 1. Pl.'s Resp. at 4. In turn, "the effect of reversing the adjustments to HiSteel's costs and scrap offset on that revised margin may very well move the needle." *Id.* at 4–5. That argument appears to bootstrap standing for Counts 2 and 3 to a hypothetical victory in Count 1. But in order to secure injunctive relief for an alleged injury in the future, the risk of harm must be "sufficiently imminent and substantial" in order to establish standing. *TransUnion*, 141 S. Ct. at 2210 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). HiSteel has not made the showing, nor can it, that Commerce is imminently implementing a change in its differential pricing analysis that would allow the alleged errors in Counts 2 and 3 to affect the antidumping margin. HiSteel's basis for future injury depends on a favorable outcome in this litigation; even then, it is not guaranteed that the adjustments to HiSteel's costs and scrap offsets will sufficiently "move the needle." HiSteel's alleged injuries, therefore, are more "conjectural or hypothetical" than "actual or imminent."[5]

Counts 2 and 3 of the Complaint are accordingly dismissed as nonjusticiable. That dismissal is without prejudice to a potential future showing of concrete injury if the *Final Determination* is eventually remanded for reconsideration.

[5] HiSteel also argues that "a party does not need to demonstrate a present injury . . . if the action being challenged is capable of repetition yet evading review." Pl.'s Resp. at 6. That argument invokes an exception to mootness where Nucor alleges that HiSteel *never* had standing to bring its claims. Where, as the court finds here, "a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000).

II. With Respect to Count 1, the Motion for Judgment on the Agency Record Is Stayed Pending the Resolution of Appellate Proceedings in Stupp V

Noting that jurisdiction over Count 1 is established under 28 U.S.C. § 1581(c), the court next considers Nucor's Motion to Stay Proceedings. Nucor argues that the latest iteration of litigation before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in *Stupp V*, No. 23–1663 (Fed. Cir. docketed Mar. 27, 2023), warrants a stay in this case. The court agrees and stays the case pending the resolution of appellate proceedings in *Stupp V* for two reasons. First, the *Stupp V* squarely presents the same issue of whether Commerce's use of the Cohen's *d* test is reasonable on a more developed record than exists here and is therefore likely to affect the analysis and disposition of HiSteel's claim. Second, staying this case will promote uniformity and reduce legal uncertainty in a hotly contested area of international trade law.

"There is no talismanic formula for the determination of when a motion to stay proceedings should be granted." *Kaptan Demir Celik Endustrisi v. Ticaret A.S.*, 46 CIT __, __, 592 F. Supp. 3d 1332, 1339 (2022). Indeed, "[w]hen and how to stay proceedings is within the sound discretion of the trial court." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citing *Landis v. North Am. Co.*, 299 U.S. 248, 254–55 (1936)); *see also Procter & Gamble Co. v. Kraft Foods Glob., Inc.*, 549 F.3d 842, 849 (Fed. Cir. 2008) (citing *Landis*, 299 U.S. at 254–55). That discretion is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. But "[a] court's discretion to stay proceedings is not without bounds." *Kaptan*, 592 F. Supp. 3d at 1336 (citing *Cherokee Nation*, 124 F.3d at 1416). The court "must weigh competing interests and maintain an even balance," *Landis*, 299 U.S. at 254–55, and may not order a stay so "immoderate or indefinite" as to be an abuse of discretion, *Cherokee Nation*, 124 F.3d at 1416.[6]

Before turning to the propriety of the stay, the court briefly summarizes the most recent developments in the *Stupp* litigation. In

[6] Plaintiffs rely on the four-part standard for a motion for stay pending appeal to evaluate a motion to stay proceedings. *See* Pls.' Resp. to Mot. to Stay at 6. A stay pending appeal is meant to stay the enforcement of an order or judgment pending the outcome of an appeal of that particular order or judgment. *See Nken v. Holder*, 556 U.S. 418, 421 (2009); *see also* USCIT R. 62. That standard is inapplicable here, where Nucor has moved for a stay of proceedings. The case that Plaintiffs cite for the four-part standard itself does not apply that standard. *See Georgetown Steel Co. v. United States*, 27 CIT 550, 552–53, 259 F. Supp. 2d 1344, 1346–47 (2003) ("[T]he traditional factors that govern stay of an order pending appeal . . . may not directly determine defendant's instant motion . . . .").

Stupp III, the Federal Circuit reviewed the question of whether Commerce had "misused the Cohen's *d* test in its differential pricing analysis." 5 F.4th at 1357. Specifically, the appellant in that case argued that "the data in [that] case did not satisfy the conditions required to achieve meaningful results from the Cohen's *d* test: in particular, the requirements that the test groups and the comparison groups be normally distributed, of sufficient size, and of roughly equal variances." *Id.* The Federal Circuit "agree[d] that there [were] significant concerns relating to Commerce's application of the Cohen's d test in [that] case." *Id.* Specifically:

> Commerce's application of the Cohen's *d* test to data that do not satisfy the assumptions on which the test is based may undermine the usefulness of the interpretive cutoffs. In developing those cutoffs, including the 0.8 cutoff, Professor Cohen noted that "we maintain the assumption that the populations being compared are [1] normal and [2] with equal variability, and conceive them further [3] as equally numerous."

Id. at 1357–58 (quoting Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* 21 (2d ed. 1988)).[7] "Violating those assumptions"—by using the Cohen's *d* test to measure effect size on sets of prices with nonnormal distribution, low variance, or low population size—"can subvert the usefulness of the interpretive cutoffs, transforming what might be a conservative cutoff [of 0.8 in the Cohen's *d* test] into a meaningless comparator." *Id.* at 1359–60. The Federal Circuit remanded for Commerce to potentially explain whether those assumptions were satisfied in that case or "whether those limits need not be observed when Commerce uses the Cohen's *d* test in less-than-fair-value adjudications"; it invited "Commerce to clarify its argument that having the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's *d* test." *Id.* at 1360. The Federal Circuit did not, however, hold that Commerce's methodology in that case was unreasonable.

In its remand redetermination following *Stupp III*, Commerce defended its practice in greater detail. The U.S. Court of International Trade ("CIT") in *Stupp IV* determined that Commerce's further explanation satisfied the Federal Circuit's concerns and held that Com-

[7] The court also cited "[o]ther literature confirm[ing] those assumptions." *Id.* (citing Robert J. Grissom & John J. Kim, *Effect Sizes for Research: Univariate and Multivariate* 66 (2d ed. 2012); Robert Coe, *It's the Effect Size, Stupid: What Effect Size Is and Why It Is Important* 14, Ann. Conf. of the Brit. Educ. Rsch. Ass'n (Sept. 12–14, 2002), https://www.cem.org/attachments/ebe/ESguide.pdf; David M. Lane et al., *Introduction to Statistics* 645, https://onlinestatbook.com/Online_Statistics_Education.pdf (last visited Aug. 30, 2023)).

merce's Cohen's *d* methodology was reasonable. 619 F. Supp. 3d at 1328. Regarding the assumptions of population size and normalcy, the court held that "Commerce reasonably explains that Cohen's d test does not operate in a vacuum, but as part of the differential pricing analysis as a whole." *Id.* at 1324. The ratio test and meaningful difference test, also components of the differential pricing analysis, "compensate for inaccuracies" "even if the Cohen's *d* values of small test groups were less accurate than for large test groups." *Id.* at 1325. The court also found that Commerce's use of the 0.8 threshold was reasoned and that the agency's selected methodology was within its statutory authority "to determine where a price difference is significant." *Id.* at 1327 ("Commerce's reference to Cohen's work does not circumscribe its discretion to choose the same values in a new context, because that choice is itself reasonable."). As for the Federal Circuit's variance concerns, the court again sustained Commerce's reasoning: the Cohen's *d* test looks simply for "significant price differences," whereas "the ratio test determines whether a pattern exists." *Id.* Moreover, "the meaningful difference test compensates for a specific concern with low-variance sales which the Court of Appeals identified." *Id.* at 1328. The court made clear that the operative question was "not whether it is possible to construct an unusual scenario where Cohen's *d* test can result in an alternative comparison method," but "whether Commerce's use of Cohen's test, when applied as a component of its differential pricing analysis, is reasonable." *Id.*

Stupp IV was appealed to the Federal Circuit on March 22, 2023. *See* Notice of Appeal, *Stupp IV*, 619 F. Supp. 3d 1314 (No. 15–00334), ECF No. 258; Notice of Docketing, *Stupp V*, No. 23–1663 (Fed. Cir. filed Mar. 27, 2023). Appellate briefing is now underway, with the appellant having filed its opening brief, *see* Appellant Br., *Stupp V*, No. 23–1663 (Fed. Cir. filed July 25, 2023), and the Government of Canada and members of the Canadian softwood lumber industry having filed a brief as amici curiae, *see* Br. as Amici Curiae in Supp. of Def.-Appellant & Urging Reversal, *Stupp V*, No. 23–1663 (Fed. Cir. filed Aug. 1, 2023). The first issue presented by the appellant is "[w]hether it is reasonable for Commerce to use a statistical test in a manner inconsistent with the limitations on the methodology described by the methodology's creator and relevant academic literature, and without any mathematical, logical, or empirical explanation why such a method may properly be used in the manner Commerce proposes." Appellant Br. at 3, *Stupp V*, No. 23–1663.

Where a pending case before the Federal Circuit raises the "same general issue" and "is likely to affect the disposition of [the] plaintiffs' claim" in the instant case, a stay is likely to serve the interest of

judicial economy and conserve the resources of the parties. *SKF USA, Inc. v. United States*, 36 CIT 842, 844 (2012); *see also NSK Bearings Eur. Ltd. v. United States*, 36 CIT 854, 856 (2012) (same); *RHI Refractories Liaoning Co. v. United States*, 35 CIT 407, 411, 774 F. Supp. 2d 1280, 1285 (2011) (staying the case because a pending Federal Circuit decision "may render moot the questions related to the countervailing duty proceeding").[8] That said, Federal Circuit decisions may be relevant, but not dispositive, to the underlying claims at issue. *See, e.g.*, *NLMK Pa., LLC v. United States*, 45 CIT __, __, 553 F. Supp. 3d 1354, 1366 (2021) (declining a stay despite an ongoing Federal Circuit appeal that was relevant to intervention in Section 232 cases but would "not resolve any part of [the] Complaint"), *appeal vol. dismissed*, No. 2022–1448, 2023 WL 581649 (Fed. Cir. Jan. 27, 2023).

The ongoing litigation before the Federal Circuit in *Stupp* is likely to affect the analysis and disposition of Count 1. The primary—and only live—issue here is HiSteel's facial challenge to Commerce's use of the Cohen's *d* test as part of the differential pricing analysis. In HiSteel's own words, "Commerce has applied the Cohen's *d* test in the same manner in this case as in *Stupp [III]*, and the issues with that calculation raised by the *Stupp [III]* court are present in this case as well." Pl.'s Br. at 13. And HiSteel's counsel has represented that "[i]f the Federal Circuit rules in favor of Commerce in *Stupp V* . . . , then this issue would become moot." Oral Arg. at 24:06–:15. Because *Stupp* "serves as the keystone that will dictate the future course of [this] litigation," *RHI Refractories*, 35 CIT at 411, 774 F. Supp. 2d at 1285, a stay will conserve judicial economy and the resources of the parties. The stay will be limited to the resolution of appellate proceedings in *Stupp V* so as not to be impermissibly "immoderate or indefinite." *Cherokee Nation*, 124 F.3d at 1416 (concluding that an indefinite stay without a "pressing need" was an abuse of discretion). And given the number of recently decided cases at the CIT evaluating the implica-

[8] Pending litigation that proceeds before the CIT—or another tribunal with persuasive, rather than binding, authority—may invite a different calculus of judicial economy; the outcome of the pending litigation is less likely to be dispositive to the claims at bar. *Compare Kaptan*, 592 F. Supp. 3d at 1337 (declining to stay the case in part because "the Federal Circuit is not currently reviewing a common legal issue that may determine the outcome of the two cases in issue here," and "both actions filed by Kaptan are pending before this very court"), *with An Giang Agric. & Food Imp. Exp. Co. v. United States*, 28 CIT 1671, 1675–76, 350 F. Supp. 2d 1162, 1166 (2004) (staying the case in light of parallel CIT proceedings and noting that if "the effect of a stay might be to narrow and sharpen the issues," "that point counsels entry . . . of the stay").

tions of *Stupp III*,[9] a stay until *Stupp V* is resolved would better cohere with the uniformity value underpinning international trade adjudication.

Plaintiffs' arguments against a stay here are unconvincing. Their principal objection is that the *Final Determination* in this case "did not rely on the justifications set forth in the remand redetermination before the [CIT] in *Stupp IV*." Pl.'s Resp. to Mot. to Stay at 5. Put differently, Commerce will need to come back after remand with the same reasoning that the CIT considered in *Stupp IV* for a stay to be potentially warranted. *See id.* That frames the court's discretion too narrowly. If the Federal Circuit holds that Commerce's application of the Cohen's *d* test is reasonable, then HiSteel's challenge "may [be] render[ed] moot." *RHI Refractories*, 35 CIT at 411, 774 F. Supp. 2d at 1285; *see also* Oral Arg. at 24:06–:15. And even if the Federal Circuit does not sustain Commerce's reasoning in *Stupp V*, the parties will have the benefit of updated, on-point authority. Proceeding on a track parallel to *Stupp V* and obliging Commerce to formulate a remand redetermination, by contrast, would not promote judicial economy. An intervening Federal Circuit decision may spur a request for voluntary remand during the next iteration of this litigation, "metamorphose any intermediate decision of this court into a superfluous moot opinion, or at the very least complicate any appeal from this court." *RHI Refractories*, 35 CIT at 411, 774 F. Supp. 2d at 1285.

Plaintiffs next contend that the Federal Circuit "has held that other decisions by Commerce must also be remanded when the use of Cohen's *d* in the differential pricing analysis in the proceeding presents 'identical concerns' as to those raised in *Stupp III*." Pl.'s Resp. to Mot. to Stay at 5 (quoting *NEXTEEL Co. v. United States*, 28 F.4th 1226 (Fed. Cir. 2022)). But the Federal Circuit did not go beyond the case at bar and somehow prohibit the CIT from staying future cases presenting "identical concerns"; it instead held that "[b]ecause Commerce's use of Cohen's *d* here presents identical concerns to those in *Stupp*, we vacate . . . and remand to the Court of International Trade to reconsider in view of *Stupp*." *NEXTEEL*, 28 F.4th at 1239. New

[9] *See, e.g.*, *NEXTEEL Co. v. United States*, 47 CIT __, __, 633 F. Supp. 3d 1190, 1201 (2023) (remanding to Commerce because its explanation in the remand redetermination did "not resolve the CAFC's concerns raised in *Stupp*"); *Marmen Inc. v. United States*, 47 CIT __, __, 627 F. Supp. 3d 1312, 1322 (2023) (concluding that Commerce's explanation on remand that its "use of a population, rather than a sample, in the application of the Cohen's *d* test sufficiently negates" the concerns in *Stupp III*), *appeal docketed*, No. 23–1877 (Fed. Cir. May 11, 2023); *SeAH Steel Corp. v. United States*, 47 CIT __, __, 619 F. Supp. 3d 1309, 1313 (2023) (denying motion for reconsideration of judgment because "Commerce's use of a population, rather than a sample, in the application of the Cohen's *d* test sufficiently negates the questionable assumptions about thresholds that were raised in *Stupp*").

authority on the Cohen's *d* issue may be imminent in this case, and thus the court's decision to stay proceedings is warranted here.

Plaintiffs also state that they are harmed by a stay because they entitled to a "just, speedy and inexpensive determination of every action and proceeding." Pls.' Resp. to Mot. to Stay at 9 (quoting USCIT R. 1). But Plaintiffs identify no particular harm of a stay apart from a delay in the final resolution of the case. *See* Pls.' Resp. to Mot. to Stay at 9. A delay in final resolution, without another particular harm, was insufficient to overcome weightier considerations of judicial economy and resources of the parties in prior CIT cases where a potentially dispositive Federal Circuit was pending. *See SKF USA*, 36 CIT at 844; *NSK Bearings*, 36 CIT at 856; *RHI Refractories*, 35 CIT at 411, 774 F. Supp. 2d at 1285. These cases are all consistent with the directive of Rule 1. A stay, rather than continued litigation, best ensures a just, speedy, and inexpensive determination of this case. *Cf. Landis*, 299 U.S. at 254.[10]

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED that Counts 2 and 3 of the Complaint are dismissed as nonjusticiable, without prejudice to a potential future showing of concrete injury in this case if the *Final Determination* is eventually remanded for reconsideration; and it is further

ORDERED that the above-captioned proceeding is **STAYED** pending the final resolution of all appellate review proceedings in *Stupp Corp. v. United States*, No. 23–1663 (Fed. Cir. docketed Mar. 27, 2023), including any further appeal therefrom; and it is further

ORDERED that the parties shall submit a joint status report to the Court no later than 30 days after such final resolution.

SO ORDERED.

Dated: September 12, 2023
New York, New York

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

[10] Moreover, "if there is even a fair possibility that the stay for which [the movant] prays will work damage to [someone] else," Nucor "must make out a clear case of hardship or inequity in being required to go forward." *Id.* at 255. But "absent a showing that there is at least a fair possibility that the stay will work damage to someone else," which is the case here, "there is no requirement that the movant make a strong showing of necessity or establish a clear case of hardship or inequity to warrant the granting of the requested stay." *RHI Refractories*, 35 CIT at 411, 774 F. Supp. 2d at 1284–85 (cleaned up) (quoting *An Giang*, 28 CIT at 1677, 350 F. Supp. 2d at 1167).

Index

Customs Bulletin and Decisions
Vol. 57, No. 35, September 27, 2023

U.S. Customs and Border Protection
CBP Decisions

General Notices

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade
Slip Opinions

GPO U.S. G.P.O.: 2023—423-106/30041