U.S. Customs and Border Protection

19 CFR PART 12

CBP DEC. 25–02

RIN 1685–AA29

EXTENSION OF IMPORT RESTRICTIONS ON CERTAIN ARCHAEOLOGICAL MATERIAL OF JORDAN

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to extend import restrictions on certain archaeological material from the Hashemite Kingdom of Jordan. The Principal Deputy Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions, which were originally imposed by CBP Decision 20–02. These import restrictions are being extended pursuant to an exchange of diplomatic notes. The CBP regulations are being amended to reflect this further extension through January 14, 2030.

DATES: Effective on March 21, 2025.

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)) (the 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 material. 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)).

On December 16, 2019, the United States entered into a bilateral agreement (2019 Agreement) with the Hashemite Kingdom of Jordan (Jordan) that entered into force on February 1, 2020, to impose import restrictions on certain archaeological material representing Jordan's cultural heritage that is at least 250 years old, dating from the Paleolithic period (approximately 1.5 million B.C.) to the middle of the Ottoman period in Jordan (A.D. 1750). On February 7, 2020, CBP published a final rule (CBP Dec. 20–02) in the **Federal Register** (85 FR 7204), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions, including a list designating the types of archaeological material covered by the restrictions.

On April 24, 2024, the United States Department of State proposed in the **Federal Register** (89 FR 31246) to extend the 2019 MOU. On September 23, 2024, after considering the views and recommendations of the Cultural Property Advisory Committee, the Principal Deputy Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the necessary determinations to extend the import restrictions for an additional five years. Following an exchange of diplomatic notes, concluded on January 14, 2025, the United States and Jordan have agreed to extend the restrictions for an additional five-year period, through January 14, 2030. However, in the absence of a final rule extending enforcement of the restrictions, enforcement of these restrictions ended on February 2, 2025. Enforcement of this extension will begin upon publication of this document in the **Federal Register**.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension and reinstate enforcement of these import restrictions. The restrictions on the importation of archaeological material from Jordan will continue in effect through January 14, 2030. Importation of such material from Jordan continues to 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 of restricted material and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions* by selecting the material for “Jordan.”

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 procedure 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).

Executive Order 12866

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). 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.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

In accordance with Treasury Order 100–20, the Secretary of the Treasury has delegated to the Secretary of Homeland Security the authority related to the customs revenue functions vested in the Secretary of the Treasury as set forth in 6 U.S.C. 212 and 215, subject to certain exceptions. This regulation is being issued in accordance with DHS Directive 07010.3, Revision 03.2, which delegates to the Commissioner of CBP the authority to prescribe and approve regulations related to cultural property import restrictions.

Pete Flores, Acting 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 of 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, U.S. Customs and Border Protection amends part 12 of title 19 of the Code of Federal Regulations, 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 “Jordan” to read as follows:

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

(a) * * *

State party	Cultural property	Decision No.
	* * * * * * *	
Jordan	Archaeological material representing Jordan's cultural heritage from the Paleolithic period (c. 1.5 million B.C.) to the middle of the Ottoman period in Jordan (A.D. 1750).	CBP Dec. 20–02, extended by CBP Dec. 25–02.
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ROBERT F. ALTNEU,
Director, Regulations and Disclosure Law Division, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection.

19 CFR PART 12

CBP DEC. 25–03

RIN 1685–AA30

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL OF ECUADOR AND CORRECTION

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to extend import restrictions on certain archaeological and ethnological material from Ecuador. The Assistant Secretary of State for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions, which were originally imposed by CBP Decision 20–03. These import restrictions are being extended pursuant to an exchange of diplomatic notes. The CBP regulations are being amended to reflect this extension through January 16, 2030.

DATES: Effective on March 26, 2025.

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)) (the 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 material. 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)).

On May 22, 2019, the United States and the Republic of Ecuador (Ecuador) signed the "Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Ecuador Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Ecuador" (the MOU). Following the exchange of diplomatic notes, the MOU entered into force on February 11, 2020. On February 14, 2020, CBP published a final rule (CBP Dec. 20–03) in the **Federal Register** (85 FR 8389),[1] which amended 19 CFR 12.104g(a) to impose import restrictions on categories of archaeological and ethnological material. The designated list identified archaeological material dating from the Pre-ceramic period and into the Colonial period (approximately 12,000 B.C. to A.D. 1769), and ethnological material, including Colonial period ecclesiastical material, and Colonial period secular paintings, documents, and manuscripts, dating from A.D. 1532 to 1822.

On April 24, 2024, the United States Department of State proposed in the **Federal Register** (89 FR 31245) to extend the MOU. On December 2, 2024, after considering the views and recommendations of the Cultural Property Advisory Committee, the Assistant Secretary of State for Educational and Cultural Affairs, United States Department of State, made the necessary determinations to extend the MOU for an additional five years. Following an exchange of diplomatic notes, concluded on January 16, 2025, the United States and Ecuador have agreed to extend the MOU for an additional five-year period, through January 16, 2030. However, in the absence of a final rule extending enforcement of the restrictions, enforcement of these restrictions ended on February 11, 2025. Enforcement of the extension will begin upon publication of this document in the **Federal Register**.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension and reinstate enforcement of these restrictions. The restrictions on the importation of archaeological and ethnological material

[1] On May 22, 2024, this final rule was corrected by CBP Dec. 24–10 to reflect the proper entry into force date for the MOU and adjust the corresponding expiration date of the import restrictions (89 FR 44921).

from Ecuador will continue in effect through January 16, 2030. Importation of such material from Ecuador continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met. Additionally, CBP is clarifying the dates applicable to ethnological material of Ecuador, consistent with the designated list published in CBP Dec. 20–03. As such, CBP is revising the description language in the cultural property column found in 19 CFR 12.104g(a).

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

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 procedure 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).

Executive Order 12866

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). 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.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

In accordance with Treasury Order 100–20, the Secretary of the Treasury delegated to the Secretary of Homeland Security the authority related to the customs revenue functions vested in the Secretary of the Treasury as set forth in 6 U.S.C. 212 and 215, subject to certain exceptions. This regulation is being issued in accordance with DHS Directive 07010.3, Revision 03.2, which delegates to the Commissioner of CBP the authority to prescribe and approve regulations related to cultural property import restrictions.

Pete Flores, Acting 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 of 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 Ecuador to read as follows:

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

(a) * * *

State party	Cultural property	Decision No.
	* * * * * * *	
Ecuador	Archaeological material that is at least 250 years old, dating from the Preceramic period and into the Colonial period (approximately 12,000 B.C. to A.D. 1769), and ethnological material, including Colonial period ecclesiastical material and Colonial period secular paintings, documents, and manuscripts, dating from A.D. 1532 to 1822.	CBP Dec. 20–03, corrected by CBP Dec. 24–10, extended by CBP Dec. 25–03.
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ROBERT F. ALTNEU,
Director, Regulations and Disclosure Law Division, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection.

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FROZEN BAKED GOODS

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

ACTION: Notice of revocation of one ruling letter and of revocation of treatment relating to the tariff classification of frozen baked goods.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of frozen baked goods 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. 59, No. 8, on February 19, 2025. 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 June 9, 2025.

FOR FURTHER INFORMATION CONTACT: John E. Rhea, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0035.

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. 59, No. 8, on February 19, 2025, proposing to revoke one ruling letter pertaining to the tariff classification of frozen baked goods. 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") N284950, dated May 3, 2017, CBP classified two frozen baked goods, "Traditional Dutch Crepes," item number 100516, and "Delicious Mini Pancake Bites," item number 303822, in heading 1905, HTSUS, specifically in subheading 1905.90.10, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa: Other: Bread, pastry, cakes, biscuits, and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery: Frozen: Pastries, cakes and similar sweet baked products." CBP has reviewed NY N284950 and has determined the ruling letter to be in error. It is now CBP's position that frozen baked goods are properly classified, in heading 1905, HTSUS, specifically in subheading 1905.90.90, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other baker's wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N284950 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H293899, 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 H293899
March 24, 2025
OT:RR:CTF:FTM H293899 JER
CATEGORY: Classification
TARIFF NO.: 1905.90.9090

BRENDA J. MIKELL
KUEHNE-NAGEL
10 EXCHANGE PLACE, 20TH FLOOR
JERSEY CITY, NJ 07302

RE: Revocation of NY N284950; Tariff Classification of Frozen Baked Products

DEAR MS. MIKELL:

On May 3, 2017, U.S. Customs and Border Protection ("CBP") issued New York Ruling Letter ("NY") N284950 in response to your March 28, 2017, request for a binding ruling on behalf of Creapan USA Corp., pertaining to the tariff classification of frozen baked goods from Belgium under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). In NY N284950, CBP classified the two frozen baked goods, "Traditional Dutch Crepes," item number 100516, and "Delicious Mini Pancake Bites," item number 303822 , under subheading 1905.90.10, HTSUS, which provides for "Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa: Other: Bread, pastry, cakes, biscuits, and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery: Frozen: Pastries, cakes and similar sweet baked products." CBP has since reviewed NY N284950 and determined that it was incorrect. For the reasons set forth below, CBP is revoking NY N284950 to reflect the correct tariff classification of both frozen baked goods.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on February 19, 2025, in Volume 59, Number 8, of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

NY N284950 described the "Traditional Dutch Crepes" as follows:

> Crepean brand "Traditional Dutch Crepes," item number 100516, is said to contain approximately 37 percent water, 31 percent wheat flower, 14 percent palm oil, 10 percent eggs, 5 percent skimmed milk powder, 3 percent sugar, and less than 1 percent each salt, monocalcium phosphate, and sodium bicarbonate. A box is said to contain 8 crepes individually wrapped in plastic film, 50 grams each, net weight. The consumer instructions state one crepe may be pan fried for 2 minutes over medium heat with a little oil or butter, or microwaved for 40 seconds at 1000 watts.

NY N284950 described the "Delicious Mini Pancake Bites" as follows:

> Creapan brand "Delicious Mini Pancake Bites," item number 303822, is said to contain approximately 32 percent wheat flour, 19 percent eggs, 18 percent palm oil, 13 percent sugar, 11 percent water, 6 percent whey powder, and less than 1 percent each, monocalcium phosphate, sodium

bicarbonate, salt, citric acid, and vanilla milk flavoring. A box is said to contain 30 mini pancakes, 255 grams, net weight. The consumer instructions state 6 mini pancakes may be pan fried for 3 minutes over medium heat with a little butter, or microwaved for 40 seconds at 800 watts, or heated in an oven for 8 minutes at 180° Centigrade.

ISSUE:

Whether the subject crêpes and pancakes are classified under subheading 1905.90.10, HTSUS, or under subheading 1905.90.90, HTSUS.

LAW AND ANALYSIS:

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

The 2025 HTSUS provisions under consideration are as follows:

1905	Bread, pastry, cakes, biscuits and other baker's wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.
	* * *
1905.90	Other:
1905.90.10	Bread, pastries, cakes, biscuits, pudding and similar baked goods
1905.90.90	Other...
1905.90.90.90	Other...

* * * * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the HTSUS at the international level. While not legally binding or 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 (August 23, 1989).

The EN to 1905, HTSUS, provides, in relevant part, as follows:

19.05 – Bread, pastry, cakes, biscuits and other baker's wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products.

1905.10 — Crispbread
1905.20 - Gingerbread and the like
- Sweet biscuits; waffles and wafers:
1905.31 — Sweet biscuits
1905.32 — Waffles and wafers
1905.40 - Rusks, toasted bread and similar toasted products
1905.90 — Other

(A) Bread, pastry, cakes, biscuits and other balers' wares, whether or not containing cocoa.

> This heading covers all bakers' wares. The most common ingredients of such wares are cereal flours, leavens and salt but they may also contain other ingredients such as : gluten, starch, flour of leguminous vegetables, malt extract or milk, seeds such as poppy, caraway or anise, sugar, honey, eggs, fats, cheese, fruit, cocoa in any proportion, meat, fish, bakery "improvers", etc....[.]
>
> * * *
>
> The heading includes the following products :
>
> (1) Ordinary Bread
> (2) Gluten bread
> (3) Unleavened bread
> (4) Crispbread
> (5) Rust, toasted bread, and other similar toasted products
> (6) Gingerbread and the like
> (7) Pretzels
> (8) Biscuits
> a. Plain biscuits
> b. Sweet biscuits
> (9) Waffles and wafers which are light fine bakers' wares baked between patterned metal plates.
> (10) Pastries and cakes, containing ingredients such as flour, starches, butter or other fats, sugar milk, cream, eggs, cocoa, chocolate, coffee, honey, fruit, liqueurs, brandy, albumen, cheese, meat, fish, flavourings, yeast, or other leavening agents.
> (11) Certain bakery products made without flour
> (12) Crêpes and pancakes
> (13) Quiche
> (14) Pizza
> (15) Crisp savory food products

* * * * *

Classification of the goods under heading 1905, HTSUS, is not in dispute. The decision in NY N284950 correctly classified the two baked frozen goods under heading 1905, HTSUS, because based on their description, ingredients, and manner of production the "Traditional Dutch Crepes," and "Delicious Mini Pancake Bites," are described by the terms of the heading. In particular, EN 19.05 A (12) expressly lists crêpes and pancakes as goods that are included in heading 1905, HTSUS. Similarly, based on the terms and construction of the subheadings, both products are provided for under the terms of subheading 1905.90, HTSUS. This is evident based on the terms of the preceding six-digit subheadings which provide for goods *eo nomine* or by specific product type. Similarly, EN 19.05 lists the goods by name under their respective subheadings, none of which include crêpes or pancakes. For instance, subheading 1905.10, HTSUS, provides for crispbread, while subheading 1905.20, HTSUS, provides for gingerbread and sweet biscuits, and 1905.32 provides for waffles and wafers. Crêpes and pancakes not being enumerated *eo nomine* in any of the preceding subheadings can only be classified in the remaining subheading 1905.90 HTSUS, as "Other."

At issue is the tariff classification of the subject crêpes and pancakes. Subheading 1905.90.10, HTSUS, provides for "Bread, pastry, cakes, biscuits and similar baked products and puddings, whether or not containing chocolate, fruit, nuts or confectionery." Because crêpes and pancakes are not bread, pastry, cakes, biscuits or puddings, in order for the subject "Traditional Dutch Crepes" and "Delicious Mini Pancake Bites," to be classified under subheading 1905.90.10, these products would have to be classifiable as "similar baked goods." For purposes of subheading 1905.90.10, HTSUS, to be classified as a "similar baked products" the goods must be baked and the goods must be similar to bread, pastry, cakes, biscuits or puddings. Conversely, for the subject goods to be classified under subheading 1905.90.90, HTSUS, the subject crêpes and pancakes would have to be defined and classifiable as "other bakers' wares."

In Headquarters Ruling Letter ("HQ") H015429, dated December 11, 2007, CBP discussed the definition of "baker's wares" stating that:

> The term "bakers' wares" is not defined in the HTSUS or ENs. As such, we presume the correct meaning to be the same as its common meaning understood in trade and commerce. *See*, *Schulstad USA, Inc., v. United States*, 26 C.I.T. 1347, 240 F. Supp. 2d 1335, 1351 (2002). Since the dictionary does not define the compound term "bakers' wares", we examine the definition of each word individually. The term "baker" is defined as "one that specializes in the making of breads, cakes, cookies, and pastries". The term "wares" is defined as "manufactured articles...offered for sale". *See*, Webster's Third New International Dictionary (Unabridged) (1961). Accordingly, "bakers' wares" can be understood to mean "manufactured articles offered for sale by one that specializes in the making of breads, cakes, cookies, and pastries", such as those articles commonly sold in a bakery.

Similarly, in HQ W968393, dated July 16, 2008, CBP expounded on the definition of "bakers' wares" within the context of the subheading concerning "other bakers' wares," noting that:

> This definition [of baker's wares] was based on the dictionary definition of the word "baker" and the word "wares" since we were unable to find a dictionary that defined the compound term "bakers' wares". The text of heading 1905, HTSUS, provides for "other bakers' wares" which, when read in the context of the entire clause of which this expression is a part, leads us to now find that the term "other bakers' wares" refers to baked goods (or wares) other than the "bread, pastry, cakes, [and] biscuits" specified in the heading. [Emphasis added].

Based on the above definition, "other baker's wares" is distinguishable from bread, pastry, cakes, and biscuits. Likewise, given the structure of the subheadings, it follows that "other baker's wares" is also distinguishable from "similar baked goods" since such baked goods must be similar to bread, pastry, cakes, and biscuits.

Pancakes are defined as "a flat cake made of thin batter and cooked on a griddle on both sides." *See* Pancake, *https://www.merriam-webster.com/dictionary/pancake* (Last visited Nov. 20, 2024). A crêpe is defined as a small, very thin pancake. Both pancakes and crêpes begin as a batter that is poured onto either on a griddle, a skillet or pan cooked over high heat. *See* Crepes v. Pancakes Are They The Same, *https://www.dulcecrepes.com/blog/crepes-vs-pancakes/* (Last visited Nov. 20, 2024); *see also*, The Difference Between Crepes and Pancakes Explained, Allie Sivak, *https://www.chowhound.com/food-news/176459/what-is-the-difference-between-crepes-and-pancakes/*

(Last visited November 20, 2024). *See also*, Crepes vs. Pancakes: What's The Difference?, *https://www.tastingtable.com/677298/crepes-vs-pancakes-whats-the-difference/* (Last visited Nov. 20, 2024). Unlike bread, cakes, pastries, and biscuits, crêpes, and pancakes are not oven baked. *Id*. Instead, they are cooked on a stove top. Similarly, pancakes are not used as a dessert like pastries, cakes, and puddings. Although, crêpes can be used as a dessert, crêpes are also used as a breakfast food or dish to be served during brunch. *Id*. Crêpes can be filled with either a sweetened filing (e.g., fruit, chocolate, creams) or with savory fillings such as vegetables, sauces, meats, sea foods or poultry. *Id*. Because the subject crêpes and pancakes are not oven baked and are not used (or exclusively used) as a dessert, it cannot be said that they are baked goods which are similar to breads, cakes, pastries, or biscuits. Lastly, although subheading 1905.90.10, HTSUS is not limited to dessert products, it does require that its products be oven baked. The decision in *Danish Bakers, Inc. v. United States*, 53 Cust. Ct. 168, 169, C.D. 2490, C.D. 2490 (1964) stated that "frozen foodstuff cannot be classified with baked articles if not in fact baked before freezing." Thus, a batter-based product which is cooked on a griddle, skillet or pan cannot be classified as an oven baked product if it is not baked in an oven. The subject goods are not oven baked and therefore are not classifiable under subheading 1905.90.10, HTSUS.

Instead, crêpes and pancakes are more akin to waffles and wafers, which EN 19.05 (9) describe as being "light fine bakers' wares baked between patterned metal plates." Much like waffles and wafers crêpes and pancakes begin as a batter, which is cooked on a hot metal griddle, skillet, or pan. Like waffles, they are typically served during breakfast and are not oven baked. However, crêpes and pancakes are not classified as a waffles or wafers under subheading 1905.32, HTSUS, since this subheading is specific to waffles and wafers. As previously established, crêpes and pancakes are not classified as baked goods, which are similar to bread, cakes, pastries, biscuits, or puddings in subheading 1905.90.10, HTSUS. Accordingly, when as the case is here, a product is not specifically provided for under a specific subheading, they are classified in a basket provision or residual provision. *See E.M. Industries v. U.S.*, 999 F. Supp. 1473, 1480 (CIT 1998) ("'Basket' or residual provisions of HTSUS headings ... are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading."). The residual provision for "other baker's wares" not specifically provided for is 1905.90.90, HTSUS, which provides for, "Bread, pastry, cakes, biscuits and other baker's wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Other."

Classifying the subject crêpes and pancakes under subheading 1905.90.90, HTSUS, is consistent with previous rulings in which CBP classified crêpes and pancakes under subheading 1905.90.90, HTSUS. For example, in NY R03167, dated March 20, 2006, CBP classified pancakes stuffed with toppings under subheading 1905.90.90, HTSUS. *See also*, NY N114318, dated July 16, 2010 (In which CBP classified frozen pancakes stuffed with potato, rice, and onion in subheading 1905.90.90). Likewise, CBP has previously classified crêpes in subheading 1905.90.90, HTSUS. In NY N244223, dated August 13, 2013, CBP classified crêpes under subheading 1905.90.90, HTSUS. *See also*, NY E89245, dated November 10, 1999, and NY 878340, dated October 8, 1992 (In both rulings, CBP classified crêpes in subheading 1905.90.90, HTSUS).

HOLDING:

By application of GRI 1, the subject “Traditional Dutch Crepes” and “Delicious Mini Pancake Bites,” are classified in heading 1905, HTSUS, specifically, in subheading 1905.90.90, HTSUS, which provides for: “Bread, pastry, cakes, biscuits and other baker’s wares, whether or not containing cocoa; communion wafers, empty cachets of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Other: Other.” The 2024 column one, general rate of duty is 4.5 *% ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N284950, dated May 3, 2017, is REVOKED.

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

REVOCATION OF TWO RULING LETTERS, MODIFICATION OF SEVEN RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE APPLICABILITY OF SUBHEADING 9817.00.96, HTSUS, TO EXTERNAL DEFIBRILLATORS AND EXTERNAL DEFIBRILLATOR COMPONENTS

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

ACTION: Notice of revocation of two ruling letters, modification of seven ruling letters, and revocation of treatment relating to the applicability of subheading 9817.00.96, Harmonized Tariff Schedule of the United States (HTSUS) to certain external defibrillator and external defibrillator components.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C.§ 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking or modifying nine ruling letters concerning the applicability of subheading 9817.00.96, HTSUS, to certain external defibrillators and external defibrillator cases and components. 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. 58, No. 47, on November 27, 2024. 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 June 9, 2025.

FOR FURTHER INFORMATION CONTACT: Teresa M. Frazier, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0139.

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. 58, No. 47, on November 27, 2024, proposing to revoke or modify nine ruling letters pertaining to the applicability of subheading 9817.00.96, HTSUS, to certain external defibrillators and external defibrillator parts. 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 Headquarters Ruling Letter (HQ) 563109, New York Ruling Letter (NY) N011491, NY I80189, NY N071646, and NY N302256, CBP found external defibrillator carrying cases eligible for subheading 9817.00.96, HTSUS, treatment as articles specially designed for the use or benefit of the handicapped. In HQ 563125, CBP found that an AC/DC power adapter and battery pack charger specially designed for a LIFEPAK 12, an advanced resuscitation portable device, was eligible for subheading 9817.00.96, HTSUS, treatment. In NY N075840, and NY N263755, CBP found external chest compression systems eligible for subheading 9817.00.96, HTSUS, treatment. In NY N234669, CBP also found a printed circuit board assembly for a LIFEPAK series external defibrillator eligible for subheading 9817.00.96, HTSUS, treatment. The rulings were mainly based on HQ 563109, which relied on HQ 556243, dated December 2, 1991, and HQ 557302, dated March 17, 1993, pertaining to internal defibrillator pacemakers. It is now CBP's position that external defibrillators are not eligible for subheading 9817.00.96, HTSUS, treatment, and that any components or cases for use with such defibrillators are also not eligible for such treatment.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking HQ 563109 and HQ 563125, modifying NY N011491, NY I80189, NY N071646, NY N302256, , NY N075840, NY N263755 and NY N234669, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H331366, 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 H331366

March 24, 2025
OT:RR:CTF:VS H331366 TMF
CATEGORY: Classification
TARIFF NO.: 9817.00.96

Margaret R. Polino, Esq.
Neville Peterson LLP
17 State Street - 19th Floor
New York, NY 10004

RE: Revocation of HQ 563109 and HQ 563125; Modification of NY N011491, NY I80189, NY N071646, NY N302256, NY N075840, NY N263755, NY N234669; Eligibility of defibrillator cases, AC & DC power adapters, and chest compression systems for duty-free treatment under subheading 9817.00.96, HTSUS; Nairobi Protocol; Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped

Dear Ms. Polino:

This is in reference to Headquarters Ruling Letter ("HQ") 563109, issued to you on October 19, 2004, concerning the eligibility for duty-free treatment under subheading 9817.00.96, Harmonized Tariff Schedule of the United States ("HTSUS"), of imported defibrillators and components. In HQ 563109, U.S. Customs and Border Protection ("CBP") determined certain external defibrillators and components were eligible for duty-free treatment under subheading 9817.00.96, HTSUS. We have since reviewed HQ 563109 and determined it is incorrect. Similarly, we also reviewed the following eight rulings, and find them to be in error: HQ 563125, dated December 27, 2004; New York Ruling Letter ("NY") N011491, dated June 19, 2007; NY I80189, dated April 15, 2002; NY N071646, dated September 10, 2009; NY N302256, dated March 6, 2019; NY N075840, dated September 25, 2009; NY N263755, dated May 1, 2015; and NY N234669, dated November 19, 2012.

It is now CBP's position that defibrillators and components are not eligible for duty-free treatment under subheading 9817.00.96, HTSUS. For the reasons set forth below, we hereby revoke HQ 563109 and HQ 563125, and modify NY N011491, NY I80189, NY N071646, NY N075840, NY N234669, NY N263755, and NY N302256, as to the eligibility under subheading 9817.00.96, HTSUS, as discussed below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182,107 Stat. 2057, 2186 (1993), notice of the proposed action was published on November 27, 2024, in Volume 58, Number 47 of the *Customs Bulletin*. No comments were received in response to this notice.

FACTS:

The defibrillator cases ("cases") in HQ 563109 are made in China and are made of polyester fabric. The dimensions of the cases correspond to the shape of automated external defibrillators they are designed to carry. One sample case has a special side opening to access the battery. This case also features an inside pocket to store electrodes and cables. The other sample has a velcro layer on the inside to secure the defibrillator in place. The cases manufactured for Medtronic are sold only in conjunction with its sale of defibrillators.

NY N011491, NY I80189, NY N071646, and NY N302256, involve various styles of carrying cases for automated external defibrillators (AEDs), such as the Philips IntelliVue MP2/X2 patient monitor and Philips Heartstart Defibrillator MRx/MRx ALS, with dimensions that correspond with the shape of the AEDs that are designed to detect a subject's heart rhythm, and if an irregular rhythm is detected, to administer an electric shock to restore the heart to normal rhythm.

HQ 563125 concerns an AC and DC power adapter that also charges the battery pack of the Physio-Control LIFEPAK 12 defibrillator/monitor series ("LIFEPAK 12"), an advanced resuscitation portable device. NY N234669 concerns printed circuit board assemblies (PCBAs) that contribute to the effective and unique functioning of advanced portable resuscitation devices, specifically the LIFEPAK series defibrillators.

NY N075840, concerns the Lucas chest compression system with accessories, such as a regulator, connector, stabilization strap, and extension hose, and carry bag. NY N263755 concerns additional items that are sold separately with the system, such as a battery charger, a corded auxiliary power supply unit, a unit charger for the car, a back plate, and back plate grip tape. The sole purpose of the Lucas system is to provide automated CPR so that the person can live long enough to obtain proper medical treatment for what caused the arrhythmia in the first place. The system mechanically compresses the chest/heart to cause oxygenated blood to move along the circulatory system, most importantly to the brain.

ISSUE:

Whether the subject articles are eligible for subheading 9817.00.96, HTSUS, treatment.

LAW AND ANALYSIS:

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

Subheading 9817.00.96, HTSUS, covers: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles . . . Other."

Subheading 9817.00.96, HTSUS, excludes "(i) articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or, (iv) medicine or drugs."

U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS.

CBP has previously held that a person suffering from arrythmia, or bradycardia is physically handicapped as defined in U.S. Note 4(a) to Subchapter XVII. In Headquarters Ruling Letter ("HQ") 556243, dated December 2, 1991, and HQ 557302, dated March 17, 1993, CBP held that internal defibrillator pacemakers are eligible for duty-free treatment under subheading

9817.00.96, HTSUS. In HQ 556243, the article under consideration was referred to as a pacer-cardioverter-defibrillator, and although not specifically mentioned in the FACTS portion of HQ 556243, it is a device that is implanted into the chest of the afflicted patient for long-term use. *See https://pubmed.ncbi.nlm.nih.gov/7743010/*. After the issuance of these decisions, HQ 563109 granted a defibrillator case subheading 9817.00.96, HTSUS, treatment, under the mistaken belief that the same type of defibrillators considered in HQ 556243 and HQ 557302 were involved.

Subsequently, although several of the rulings discussed in the FACTS above, referred to U.S. Note 4(b) and the exclusion of subheading 9817.00.96, HTSUS, to articles designed to treat an acute or transient disability, or to diagnostic articles, the rulings relied on the finding in HQ 563109. For example, in NY N075840, although the chest compression system was stated to be strapped around the chest of a victim in order to allow steady compression to the chest for as long as necessary, and that the "sole purpose of this system is to provide automated CPR so that the person can live long enough to obtain proper medical treatment for what caused the arrhythmia in the first place", relying on HQ 563109, subheading 9817.00.96, HTSUS, treatment was granted. Similarly, in NY N011491, pertaining to defibrillator cases for the Phillips Automated External Defibrillator, it was stated that this article is "an electronic device designed to deliver an electric shock to a victim of sudden cardiac arrest" and that its typical use is for storage, ready for use, in case someone suffers a sudden cardiac rest. This type of use would be for acute purposes. In fact, in NY N071646, one of the articles under consideration, the IntelliVue monitors, was denied subheading 9817.00.96, HTSUS, treatment, because there was nothing to show that the article was specially designed to treat those with chronic impairments, as opposed to those with temporary ailments. Rather, the device provided "the ability to have a dedicated monitor for every patient that comes into the hospital, and the decision noted that most patients admitted into a hospital do not suffer from a chronic impairment.

Therefore, after further examination and consistent with the statements made in the ruling requests at issue, we find that, as opposed to internal pacemakers/defibrillators, external defibrillators are primarily used to evaluate and treat an acute or transient disability such as an acute cardiac event. Someone suffering from an irregular heart rhythm or cardiac event, requiring the use of an external defibrillator may go on and live a normal life thereafter. If indeed, further treatment is required necessitating an internal pacemaker/defibrillator, such articles are already granted subheading 9817.00.96, HTSUS, treatment per HQ 556243, and HQ 557302. As such, it is our view that the prior decisions erroneously granted duty-free treatment to all defibrillators and their components, as external defibrillators are designed for acute situations, and they should be modified or revoked.

HOLDING:

The subject defibrillators and components are not eligible for subheading 9817.00.96, HTSUS, treatment.

EFFECT ON OTHER RULINGS:

HQ 563109 and HQ 563125 are **REVOKED**. NY N011491, NY I80189, NY N071646, NY N075840, NY N234669, NY N263755, and NY N302256 are **MODIFIED** as to the application of subheading 9817.00.96, HTSUS.

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

Sincerely,

Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 25–27

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

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

[Sustaining the U.S. Department of Commerce's third remand results for 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: March 21, 2025

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

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Tara K. Hogan*, Assistant Director, and *Elizabeth A. Speck*, Senior Trial Counsel. 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*, *Jordan L. Fleischer*, *Nicholas C. Duffy*, and *Ryan R. Migeed*, Morris, Manning & Martin, LLP, of Washington, DC, for Defendant-Intervenor POSCO.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") third redetermination upon remand. *See* Confid. Final Results of Redetermination Pursuant to Third Ct. Remand ("Third Remand Results"), ECF No. 112–1.

Plaintiff Nucor Corporation ("Nucor") commenced this case challenging Commerce's final results in the 2018 administrative review of the countervailing duty order on certain carbon and alloy steel cut-to-length 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 recission of countervailing duty admin. review, 2018) ("*Final Results*"), ECF No. 18–4, and accompanying Issues and Decision Mem., C-580–888 (Mar. 16, 2021), ECF No.

18–5.[1] For the *Final Results*, Commerce calculated a 0.49 percent *ad valorem* subsidy rate (considered *de minimis*) for POSCO. 86 Fed. Reg. at 15,185. Nucor challenged Commerce's determination not to initiate an investigation into the alleged provision of off-peak electricity for less than adequate remuneration ("LTAR") and Commerce's determination that the transactions between mandatory respondent POSCO and its affiliate POSCO Plantec ("Plantec") were not primarily dedicated to the downstream product such that any subsidies to Plantec would be attributable to POSCO through a cross-owned input supplier analysis. *See generally* Confid. Nucor Corp.'s Mem. In Supp. of its Rule 56.2 Mot. For J. on the Agency R., ECF No. 22.

In *Nucor Corp. v. United States* (*Nucor I*), 46 CIT __, 600 F. Supp. 3d 1225 (2022), the court remanded Commerce's determination not to initiate an investigation into off-peak electricity pricing and remanded in part Commerce's determination with respect to Plantec for reconsideration with regard to the supply of scrap and a converter vessel. On January 31, 2023, Commerce filed its redetermination. Confid. Final Results of Redetermination Pursuant to Ct. Remand ("First Remand Results"), ECF No. 60–1. Therein, Commerce provided further explanation for its determinations and made no changes to POSCO's subsidy rate. *Id.* at 11–33, 38–52, 55–72.

The court sustained Commerce's First Remand Results in part and remanded in part. *Nucor Corp. v. United States* (*Nucor II*), 47 CIT __, 653 F. Supp. 3d 1295, 1304 (2023). With respect to Commerce's determination not to investigate off-peak electricity pricing, the court found that Commerce was "[in]consistent in its statement of the applicable standard and its application of that standard." *Id.* at 1302–03. With respect to Plantec's supply of scrap and the converter vessel, while the court sustained Commerce's identification of factors relevant to the inquiry, the court remanded Commerce's determination with respect to the supply of scrap and a converter vessel. *Id.* at 1307, 1310–13.

On December 19, 2023, Commerce filed its second redetermination. Final Results of Redetermination Pursuant to Second Ct. Remand ("Second Remand Results"), ECF No. 93–1. Therein, Commerce provided further explanation for its determination not to investigate off-peak electricity pricing. *Id.* at 5–15, 24–25. Commerce asserted a different basis for declining to attribute subsidies received by Plantec

[1] The administrative record for the Third Remand Results is contained in a Public Remand Record, ECF No. 115–1, and a Confidential Remand Record, ECF No. 115–2. The parties submitted joint appendices containing record documents cited in their comments. [Confid. 2nd Remand] J.A., ECF No. 102; [Public 2nd Remand] J.A., ECF No. 103.

to POSCO, now finding that the companies were not cross-owned pursuant to 19 C.F.R. § 351.525(b)(6)(vi)[2] because POSCO did not control Plantec's assets during the 2018 period of review. *Id.* at 18–22, 28–30.

The court sustained Commerce's Second Remand Results in part and remanded in part. *Nucor Corp. v. United States* (*Nucor III*), 48 CIT __, 698 F. Supp. 3d 1310, 1320 (2024).[3] The court once again instructed Commerce to reconsider or explain further its decision not to investigate POSCO's purchase of off-peak electricity in isolation from the broader time of usage system. *Id.* at 1320.[4] The court sustained the agency's determination that cross-ownership did not exist between POSCO and Plantec because POSCO did not control Plantec during the period of review. *Id.* at 1319.

On August 15, 2024, Commerce filed the Third Remand Results. Therein, Commerce clarified and further explained its determination not to investigate off-peak electricity pricing in isolation from the time of usage system. Third Remand Results at 16. Commerce discussed the applicable initiation standard and further explained that Nucor did not provide information that was "reasonably available" to Nucor to support its subsidy allegation. *Id.* at 3. Commerce also found that even if Nucor had provided more information to support its allegation, the agency had no obligation to consider such additional information, because the deadline for a new subsidy allegation and for submitting supplemental responses had already passed. *Id.* at 27.

Nucor filed comments opposing Commerce's Third Remand Results. Nucor Corp.'s Cmts. in Opp'n to Third Remand Results ("Nucor's Cmts."), ECF No. 116. Defendant United States ("the Government") and Defendant-Intervenor POSCO each filed comments in support of the Third Remand Results. Def.'s Resp. to Pl.'s Cmts. Regarding the

[2] Commerce's regulation states that

> [c]ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations.

19 C.F.R. § 351.525(b)(6)(vi).

[3] *Nucor I*, *Nucor II*, and *Nucor III* present background information, familiarity with which is presumed.

[4] The court held in both *Nucor II* and *Nucor III* that Commerce did not sufficiently address the information Nucor provided regarding the relationship between the weighted-average off-peak prices paid by POSCO and the Korean authority's cost of acquiring electricity from its lowest cost generator. *Nucor II*, 653 F. Supp. 3d at 1304; *Nucor III*, 698 F. Supp. 3d at 1315–17. That authority, Korea Electric Power Corporation ("KEPCO"), "purchases electricity from generators [through] the Korea Power Exchange . . ., which 'is the system operator[ ] and the supplier' of electricity to KEPCO." *Id.* at 1314 n.7 (second alteration in original) (citation omitted).

Third Remand Redetermination ("Def.'s Cmts."), ECF No. 117; POSCO's Cmts. in Supp. of Commerce's Remand Redetermination ("POSCO's Cmts."), ECF No. 118. For the following reasons, the court sustains Commerce's Third Remand Results.

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),[5] 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).

DISCUSSION

I. Commerce's Initiation Standard

Commerce "shall" initiate a countervailable duty investigation "whenever an interested party" files a petition "on behalf of an industry" that "alleges the elements necessary for the imposition" of a countervailing duty and provides "information reasonably available to the petitioner supporting those allegations." 19 U.S.C. § 1671a(b)(1). Commerce decides whether to initiate an investigation based on the "accuracy and adequacy of the evidence provided in the petition." 19 C.F.R. § 351.203(b)(1); *see also* 19 U.S.C. § 1671a(c)(1)(A).

"[M]ost subsidy petitions are granted unless the allegations 'are clearly frivolous, not reasonably supported by the facts alleged or . . . omit important facts which are reasonably available to the petitioner." *RZBC Grp. Shareholding Co. v. United States*, 39 CIT 1076, 1082, 100 F. Supp. 3d 1288, 1295–96 (2015). In some circumstances, what has sometimes been described as a heightened standard may apply. "When allegations concern a program previously held non-countervailable," 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).

In *Nucor III*, the court noted that Commerce, in the Second Remand Results, claimed that "the initiation standard applied in *RZBC*

[5] 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.

[Group] and *Delverde* are one and the same." 698 F. Supp. 3d at 1314 (quoting Second Remand Results at 9 n.39). Commerce categorized the standards this way because, in the agency's view, "allegations concerning a program that 'is a subset of a previously investigated program' implicates 'more information [that is] reasonably available to the petitioner and the legal standard for initiation requires that the petitioner address or account for that additional information.'" *Id.* (alteration in original) (quoting Second Remand Results at 9).

Commerce had explained that, for the agency to initiate an investigation into off-peak electricity in isolation from the entirety of the time of usage system, Nucor had to "demonstrate how the average price of electricity reflected the price of electricity at off-peak hours, considering potential differences in the generators in terms of operation, usage, etc. at different hours." *Id.* at 1315 (quoting Second Remand Results at 14).

In *Nucor III*, the court noted that Nucor "arguably" provided such an explanation when it compared KEPCO's cost of acquiring electricity from its lowest cost generator to the weighted-average off-peak price paid by POSCO. *Id.* The court instructed Commerce, once again, to address Nucor's off-peak electricity pricing allegation and consider it within the context of the broader market principles involving the Korean electricity market. *Id.*[6]

II. Commerce's Third Remand Results

In the Third Remand Results, Commerce restated that "there is only one standard for initiation of a subsidy allegation and that is the standard enacted by Congress [and] . . . both *RZBC Group* and *Delverde* support this view: the allegation must be supported by information reasonably available to the petitioner." Third Remand Results at 9–10.[7]

Commerce also referenced the Statement of Administrative Action ("SAA"), which provides for Commerce to "examine the accuracy and adequacy of the evidence provided in a petition to determine whether

[6] The court explained that, to the extent that Commerce addressed Nucor's allegation surrounding KEPCO's cost of acquiring electricity from its lowest cost generator to KEPCO's weighted-average off-peak price paid by POSCO, it did so in a "conclusory and confusing fashion" and that the agency "failed to consider Nucor's allegation within" the context of the Korean electricity market. *Nucor III*, 698 F. Supp. 3d at 1316.

[7] The statutory standard, 19 U.S.C. § 1671a(b)1, states:

> A countervailing duty proceeding shall be initiated whenever an interested party . . . files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1671(a) of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations.

the evidence is sufficient to justify initiation of an investigation." *Id.* at 8 (citing Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103–316, vol. 1, at 861 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4192).[8]

Commerce again noted that while the initiation standard is low, the petitioner nevertheless "must support each of the elements of a subsidy with information reasonably available to it." *Id.* at 9. Commerce explained that in *Delverde*, the petitioner had more information reasonably available to it as compared to the petitioner in *RZBC Group*, and the *Delverde* "petitioner was required under the statute to support its allegation with that 'reasonably available' information." *Id.* at 10.

Applying this standard, Commerce again found that Nucor's allegation and evidence were insufficient to warrant initiation of an investigation into off-peak electricity pricing. *Id.* at 29. Commerce found that Nucor's allegation of off-peak electricity for LTAR did not meet the initiation standard because "it was 'not reasonably supported by the facts alleged' and 'omit[ted] important facts'" that were reasonably available to Nucor. *Id.* at 29 & n.100 (alteration in original) (citing *RZBC Grp.*, 39 CIT at 1082, 100 F. Supp. 3d at 1295).

Commerce explained that for Nucor to satisfy the initiation standard and sufficiently support its allegation regarding off-peak electricity for LTAR, Nucor needed to provide evidence satisfying three criteria.[9] *Id.* at 11. Commerce found that Nucor "failed to provide any information" in support of these three criteria sufficient to warrant initiation consistent with the statute and *RZBC Group*. *Id.* at 12.

Commerce also acknowledged that, in its previous redeterminations on remand, it did not "sufficiently focus on the key reason" Nucor's off-peak electricity for LTAR allegation failed to support initiation. *Id.* at 13. That key reason was that "Nucor failed to provide sufficient information that an examination of off-peak electricity in isolation [from] the entire market-based tariff schedule would be consistent with the prevailing market conditions for electricity." *Id.* Commerce further explained that only if Nucor had first made this demonstration would it have been appropriate to investigate off-peak electricity in isolation from KEPCO's overarching tariff schedule. *Id.* at 13, 15–16.

Commerce also asserted an alternative reason for not initiating an investigation on Nucor's allegation. *Id.* at 27. Commerce found that it

[8] Congress expressly approved the SAA as the authoritative interpretation of the statute. 19 U.S.C. § 3512(d).

[9] The three criteria are discussed below in the section IV.

had no obligation to consider Nucor's benefit allegation that was based on the Korea Hydro and Nuclear Power Company Ltd.'s ("KHNP") power trading statistics, because that information was provided "past the deadline for [a new subsidy allegation] and the deadline for submitting supplemental responses." *Id.*; *see also* 19 C.F.R. § 351.301(c)(2)(iv)(B).

III. Parties' Contentions

Nucor contends that Commerce failed to identify and consistently apply a clear legal standard in the Third Remand Results. Nucor's Cmts. at 2. Nucor argues that "there is no basis in the statute, the rules, or agency practice for treating adequacy of remuneration in terms of some degree of consistency with or presence within or outside of the 'prevailing market conditions'" in the relevant country. *Id.* at 4.

Nucor also objects to having been required to demonstrate that KEPCO's off-peak electricity prices conflict with the prevailing market conditions in Korea and argues that the standard should be consistency with "market principles." *Id.* Nucor contends that because KEPCO is the sole electricity provider in Korea, it could not possibly have established that KEPCO's operations were "'outside of' the prevailing market conditions." *Id.* at 5.

Nucor argues that Commerce's chosen initiation standard is vague and reflects the agency's "refusal to consider whether individual prices in a [time of usage] system may be subsidized prices" without considering the overarching tariff schedule. *Id.* at 5–6. Nucor also asserts that Commerce's determination that the benefit allegation based on KHNP's power trading statistics was untimely is "unfounded." *Id.* at 7.

The Government contends that Commerce articulated and applied the correct initiation standard in the Third Remand Results, and Nucor failed to consider the broader time of usage system and KEPCO's tariff schedule in its allegation of off-peak electricity for LTAR. Def.'s Cmts. at 5–6. Consistent with 19 U.S.C. § 1671a(b)(1) and 19 C.F.R. § 351.511, the Government explains that "[f]or Commerce to initiate on a subsidy allegation that involves a portion of a tariff schedule Commerce has already determined necessitates a tier three analysis, the allegation must consider how the overarching electricity system is designed." *Id.* at 6.[10]

The Government further states that Commerce correctly found that "Nucor's allegation was inconsistent with Commerce's prior analysis of known factors in the Korea[n] electricity system," and Nucor ignored "the overarching design of the electricity system in making its allegation." *Id.* at 3. The Government contends that the Third Remand Results comply with the court's order and should be sustained. *Id.* at 7, 11.

POSCO indicates that the court must consider the issue within the context of the Federal Circuit's affirmance of Commerce's finding that KEPCO's aggregated-cost setting methodology was "consistent with market principles." POSCO's Cmts. at 2. POSCO also reiterates that Nucor's allegation neglected to consider the time of usage system in which the off-peak prices exist. *Id.*

IV. Commerce's Third Remand Results Will Be Sustained

With respect to Commerce's finding regarding the initiation standard, Commerce relied upon the standard set forth in the text and legislative history of 19 U.S.C. § 1671a(b)1. The court previously explained that "[t]here need not be a strictly binary choice between the *RZBC Group* standard and the heightened standard of *Delverde*." *Nucor II*, 653 F. Supp. 3d at 1302. In its Third Remand Results, Commerce found that in all cases, the petitioner must support its allegation with information reasonably available to it, based on the circumstances. Third Remand Results at 10. Commerce then applied this standard to Nucor's allegation and continued to find that Nucor did not provide information sufficient to satisfy the initiation standard. *Id.* at 11–12.

In reviewing Commerce's Third Remand Results, the court recognizes that the agency has now addressed an issue the court previously raised, namely, whether the off-peak electricity pricing in KEPCO's tariff schedule constitutes a program that should be investigated in

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[10] With respect to the reference to a tier three analysis, when a world market price is unavailable, as is the case here, adequacy of remuneration is measured by assessing whether the government's price is consistent with market principles. *See* 19 C.F.R. § 351.511(a)(2)(iii).

The Government also references the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *Nucor Corp. v. United States*, 927 F.3d 1243 (Fed. Cir. 2019) ("*Nucor CAFC*"). Def.'s Cmts. at 6. There, the appellate court upheld Commerce's finding that "KEPCO's pricing met familiar standards of cost recovery" and that there was an "absence of preferential rates" in KEPCO's overarching tariff schedule based on the time of usage system. *Nucor CAFC*, 927 F.3d at 1254–55.

isolation from the overarching time of usage system. *See* Oral Arg. at 36:45–37:30 (time stamp from the recording, on file with the court).[11] The court previously asked the Parties to discuss whether KEPCO's off-peak electricity pricing should or could be investigated in isolation from the overarching tariff schedule and time of usage system. *See, e.g.*, *id.* At the time, the Government responded that Nucor had not provided enough detail in its allegation to explain how off-peak electricity pricing itself was a specific benefit and, further, was a benefit provided to steel producers. *Id.* at 36:50–37:10. The Government acknowledged, however, that while this was Commerce's position, such an explanation did not appear in the record. *Id.* at 37:30–37:40. Nucor responded that off-peak electricity was a program separate from the one previously investigated by Commerce because KEPCO's aggregated-cost setting methodology resulted in different pricing throughout the day. *Id.* at 13:12–13:57. POSCO opined that off-peak electricity was a subset of KEPCO's broader time of usage program and Commerce "can't analyze a subset in a vacuum." *Id.* at 50:35–51:14.

In the Third Remand Results, Commerce directly addressed whether KEPCO's off-peak electricity pricing should be investigated separate from KEPCO's overarching time of usage system. Third Remand Results at 10–13. Commerce explained that for Nucor properly to allege that KEPCO's off-peak pricing is inconsistent with market principles, Nucor must address the overall time of usage system and Commerce's finding that the overall system is consistent with market principles. *Id.* at 19–20, 29; *see also Nucor CAFC*, 927 F.3d at 1254 (holding that KEPCO's time of usage cost setting methodology and entire tariff schedule were consistent with market principles).

As discussed above, Commerce had previously determined that KEPCO's overarching time of usage system is consistent with market principles because KEPCO's tariff schedule, which is based on aggregated costs and revenue, fully recovers its costs and produces a profit. Third Remand Results at 29. Commerce acknowledged that, in hindsight, the agency "did not sufficiently focus on the key reason Nucor's [new subsidy allegation] ultimately fails," which is that KEPCO's off-peak electricity pricing should not be investigated without first taking account of the entire market-based tariff schedule, which itself

[11] The court heard oral argument on Nucor's Rule 56.2 motion on September 14, 2022. Docket Entry, ECF No. 49.

was determined to be consistent with market principles and accepted standards of cost recovery. *Id.* at 13.[12]

Commerce explained that to justify a new subsidy investigation of this subset of the broader electricity pricing scheme, Nucor needed to provide information addressing three criteria:

> (1) KEPCO's aggregated cost and revenue methodology used to set its tariff schedule is inconsistent with market principles; (2) KEPCO's aggregated costs and revenue methodology is not an acceptable or recognized methodology for the pricing of electricity; and (3) the only recognized tariff-setting methodology is one where the electricity company establishes tariffs which ensure that at every point during the 24 hours in a day, and for every day of the year, the company is providing electricity at a price which collects revenue to fully cover all of its costs.

Id. at 11.

With respect to the first two criteria, Commerce explained that the Federal Circuit affirmed Commerce's earlier finding that KEPCO's methodology for setting its overall tariff schedule is consistent with market principles, and that KEPCO's aggregated costs and revenue methodology (based on the time of usage system) demonstrated "familiar standards of cost recovery." *Id.* at 14; *see also Nucor CAFC*, 927 F.3d at 1253–55. KEPCO's tariff schedule allowed it to recoup all costs and generate a profit. Third Remand Results at 11. As Commerce noted, "Nucor did not allege that KEPCO provides electricity at 'consistently low prices that no market participant could sustain.'" *Id.* at 15 & n.50 (quoting *Nucor CAFC*, 927 F.3d at 1251). According to Commerce, Nucor did not provide any information that "address[ed] or refute[d]" Commerce's earlier finding, confirmed by the Federal Circuit, that KEPCO's tariff schedule and revenue methodology demonstrated cost recovery. *Id.* at 19. Commerce further confirmed that Nucor's allegation and evidence did not allege that KEPCO's tariff schedule and reliance on the time of usage system were inconsistent with market principles. *Id.* at 12–13, 17.

Commerce then explained that while Nucor also did not provide any evidence in support of the third criterion, even if Nucor had done so, it would have been "without merit." *Id.* at 12. In particular, Nucor did not allege or suggest that the only recognized tariff-setting methodology for the supply of electricity would be one that covered all costs on every sale, twenty-four hours per day, seven days per week. In the

[12] Nucor's allegation of off-peak electricity for LTAR "is part, or a subset of, KEPCO's overall electricity tariff schedule, which . . . has been determined to be consistent with market principles." Third Remand Results at 11.

Third Remand Results, Commerce appears to have taken a holistic view of KEPCO's tariff-setting methodology while suggesting that unspecified, but also unusual, circumstances might give the agency justification to look at a subset of electricity prices within a time of usage system, but that Nucor did not demonstrate, or even attempt to demonstrate, that such circumstances were present here. *See generally id*. at 12–20.

Substantial evidence supports Commerce's consideration of each of the three criteria. First, Nucor did not provide evidence demonstrating that KEPCO's aggregated cost and revenue methodology was inconsistent with market principles. Pursuant to 19 C.F.R. § 351.511(a)(2)(iii), Commerce's analysis of market principles includes: a return on investment, rates of return sufficient to ensure future operations, and a lack of price discrimination. KEPCO's tariff schedule has been found to produce funds sufficient to cover its aggregate costs and produce a profit, and it demonstrated a lack of price discrimination, all of which are consistent with market principles pursuant to 19 C.F.R. § 351.511(a)(2)(iii).[13] Third Remand Results at 17, 29, 38. Because Nucor did not supply evidence with its allegation sufficient to call this earlier finding into question, Commerce's finding with respect to this criterion is supported by substantial evidence.

Second, Nucor did not provide evidence demonstrating that KEPCO's aggregated cost and revenue methodology, as a whole, was not considered a recognized system of cost recovery. *Id.* at 15. When reviewing KEPCO's broader time of usage system, the Federal Circuit held that KEPCO's aggregated cost and revenue methodology used to create the entire tariff schedule met "familiar standards of cost recovery." *Nucor CAFC*, 927 F.3d at 1254. Those familiar standards convey that the price users paid for the electricity reflected the value of the electricity and included returns sufficient to ensure future operations, which is a familiar form of rate-regulation for public utilities. *Id.* Again, Nucor did not provide evidence demonstrating how KEPCO's aggregated cost and revenue methodology, which aligns with accepted principles of cost recovery, is not an acceptable or recognized methodology for electricity pricing and, therefore, Commerce's finding regarding this criterion is supported by substantial evidence.

Third, Nucor did not demonstrate that the only electricity tariff-setting methodology that is consistent with market principles is one

[13] Goods and services provided solely by a government will be assessed for consistency with market principles based on "an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998) (final rule).

in which, at every point during the day and for every day of the year, the utility is providing electricity at a price which collects revenue sufficient to cover all its costs. KEPCO's tariff schedule is based on a time of usage system, and it recovers costs and produces a return on investment, which is consistent with market principles, as well as principles of adequate remuneration pursuant to 19 C.F.R. § 351.511(a)(2)(iii). Third Remand Results at 10–11. Therefore, even if KEPCO's tariff-setting methodology might sometimes allow for individual prices that are not sufficient to recover all costs, the overall methodology remains consistent with market principles. Nucor did not allege or suggest that the only recognized tariff-setting methodology was one that recovers costs twenty-four hours a day, and Commerce's consideration of this criterion is supported by substantial evidence.

Nucor maintains that KEPCO's off-peak electricity pricing should be investigated without considering the market-based tariff schedule and time of usage system in which it exists. Nucor's Cmts. at 7. Commerce determined that the rates in KEPCO's market-based tariff schedule, which includes the off-peak prices, ensure that KEPCO's aggregate revenue covers all its costs, including taxes, and ultimately produces a profit. The court recognizes that such attributes are consistent with market principles and principles of adequate remuneration pursuant to 19 C.F.R. § 351.511(a)(2)(iii). Commerce's requirement that Nucor's allegation take account of this information is consistent with the statute and established case law. *See* 19 U.S.C. § 1671a(b)(1); *RZBC Grp.*, 39 CIT at 1082, 100 F. Supp. 3d at 1295–96; *Delverde*, 21 CIT 1294, 1296–97, 989 F. Supp. 218, 222. Furthermore, KEPCO's tariff schedule does not result in the utility losing money or providing preferential rates to certain industries or enterprises. This attribute is also consistent with market principles pursuant to 19 C.F.R. § 351.511(a)(2)(iii) and has been affirmed by the Federal Circuit. *Nucor CAFC*, 927 F.3d at 1254–55.

Accordingly, substantial evidence supports Commerce's finding that Nucor's allegation of off-peak electricity for LTAR did not satisfy the agency's three criteria. Moreover, Commerce reasonably determined not to investigate KEPCO's off-peak electricity pricing for LTAR in isolation from the broader time of usage system. For these reasons, Commerce's Third Remand Results will be sustained.

Commerce alternatively found that it had no obligation to consider Nucor's benefit allegation that was based on KHNP's power trading statistics because it was provided past the twenty-day deadline for a new subsidy allegation. Third Remand Results at 27. Because the court will sustain Commerce's Third Remand Results based on its analysis pursuant to the three criteria, the court need not further address this aspect of Commerce's determination.

CONCLUSION

For the reasons discussed above, the court will sustain Commerce's Third Remand Results. Judgment will enter accordingly.

Dated: March 21, 2025
New York, New York

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

Slip Op. 25–29

Natural Resources Defense Council, Inc.; Center For Biological Diversity; and Animal Welfare Institute, Plaintiffs, v. Howard Lutnick, in his official capacity as Secretary of Commerce; United States Department of Commerce; Emily Menashes, in her official capacity as Acting Assistant Administrator of the National Marine Fisheries Service; National Marine Fisheries Service; Scott Bessent, in his official capacity as Secretary of the Treasury; United States Department of the Treasury; Kristi Noem, in her official capacity as Secretary of Homeland Security; and United States Department of Homeland Security, Defendants.

Before: Judge Gary S. Katzmann
Court No. 24–00148

[The parties' Motion to Construe their Joint Submission as a Motion to Correct under USCIT Rule 60(a) is granted. The parties' Stipulation and Proposed Order of Voluntary Dismissal with Prejudice was filed under USCIT Rule 41(a)(1)(A)(ii). The proposed Order is issued, and the case is dismissed. In accordance with the parties' Stipulation, the court retains jurisdiction to oversee compliance with the non-monetary terms of the parties' Stipulated Settlement Agreement and to resolve any motions to modify such terms.]

Dated: March 25, 2025

Marissa C. Grenon Gutierrez, Anderson & Kreiger LLP, of Boston, MA, for Plaintiffs Natural Resources Defense Council, Inc.; Center for Biological Diversity, and Animal Welfare Institute. With her on the briefs were *Christina S. Marshall*, *Mina S. Makarious*, *Sean M. Grammel*, Anderson & Kreiger LLP, of Boston, MA; *Sarah Uhlemann*, Center for Biological Diversity, of Olympia, WA; and *Stephen Zak Smith*, Natural Resources Defense Council, of Bozeman, MT.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendants Howard Lutnick, in his official capacity as Secretary Of Commerce; United States Department of Commerce; Emily Menashes, in her official capacity as Acting Assistant Administrator of The National Marine Fisheries Service; National Marine Fisheries Service; Scott Bessent, in his official capacity as Secretary of The Treasury; United States Department of The Treasury, Kristi Noem, in her official capacity as Secretary of Homeland Security, and United States Department of Homeland Security.[1]

OPINION AND ORDER

Katzmann, Judge:

In 1972, Congress enacted the Marine Mammal Protection Act ("MMPA"), Pub. L. No. 92–522, 86 Stat. 1027 (codified as amended at 16 U.S.C. § 1361 *et seq.*), to protect marine mammal species that "are, or may be, in danger of extinction or depletion as a result of man's activities" from "diminish[ing] below their optimum sustainable

[1] Per USCIT Rule 25(d), named officials have been substituted to reflect the current officeholders.

population." *Id.* § 1361(1)–(2). In recent years, the MMPA has been the basis for litigation and adjudication in this court for actions involving the vaquita, the world's smallest porpoise on the verge of extinction, *see Nat. Res. Def. Council, Inc. v. Ross*, 44 CIT __, 456 F. Supp. 3d 1292 (2020) (and opinions noted therein); *see also Ctr. for Bio. Diversity v. Haaland*, 47 CIT __, 639 F. Supp. 3d 1355, 1363 (2023), and the Māui dolphin, one of the world's smallest dolphins also on the verge of extinction, *see Sea Shepherd N. Z. v. United States*, 48 CIT __, 723 F. Supp. 3d 1374 (2024) (and opinions noted therein).

Although invoked in recent litigation, the MMPA's import provisions have yet to be fully implemented since its 1972 enactment. In response to petitions for the implementation of the MMPA's import provisions, the National Marine Fisheries Service ("NMFS")[2] published a final rule in 2016 aiming to protect marine mammals abroad and level the playing field for U.S. fishermen. *See Fish & Fish Prod. Imp. Provisions of the Marine Mammal Prot. Act*, 81 Fed. Reg. 54390 (NMFS Aug. 15, 2016) ("*Final Import Rule*"); 50 C.F.R. § 216.24 (2022). The *Final Import Rule* included a "one-time only" five-year exemption period that has since been extended an additional four years. *See id.*; *Modification of Deadlines Under the Fish & Fish Prod. Imp. Provisions of the Marine Mammal Prot. Act*, 85 Fed. Reg. 69515 (NMFS Nov. 3, 2020) ("*First Modification of Deadlines*"); *Modification of Deadlines Under the Fish & Fish Prod. Imp. Provisions of the Marine Mammal Prot. Act*, 87 Fed. Reg. 63955 (NMFS Oct. 21, 2022) ("*Second Modification of Deadlines*"); *Modification of Deadlines Under the Fish and Fish Prod. Imp. Provisions of the Marine Mammal Prot. Act*, 88 Fed. Reg. 80193 (Nov. 17, 2023) ("*Third Modification of Deadlines*").

On August 8, 2024, Natural Resource Defense Council, Inc., Center for Biological Diversity, and Animal Welfare Institute (collectively, "Plaintiffs")[3] alleged in a complaint before this court that the United States government has failed to implement the import provisions of the MMPA. Compl. ¶ 77. Plaintiffs requested that the court require Defendants (designated United States Departments, constituent

[2] The National Marine Fisheries Service is a federal agency housed within the National Oceanic and Atmospheric Administration ("NOAA"), which is in turn a federal agency within the Department of Commerce. *See NOAA Fisheries*, https://www.usa.gov/agencies/noaa-fisheries (last visited Mar. 20, 2025).

[3] All three Plaintiffs assert that they are not-for-profit organizations whose members have a strong interest in protecting marine mammals and marine life. *See* Compl. ¶¶ 22–23, 25–26, 28–29, Aug. 8, 2024, ECF No. 1. At this procedural stage, the court is satisfied that these assertions meet the requirements for standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring (1) an injury in fact that is (2) traceable to the challenged action and (3) not merely speculative to establish standing).

agency and respective officials) to implement those import provisions and declare that Defendants violated the Administrative Procedure Act ("APA") by failing to provide notice and a period for comment in extending the exemption period. *Id.* at 52–53.

The parties have since reached a settlement agreement and now seek to dismiss this case. They filed a joint Stipulation of Dismissal under USCIT Rule 41(a)(1)(A)(ii) on January 16, 2025. *See* Stipulation of Dismissal, Jan. 16, 2025, ECF No. 29. On February 7, 2025, the parties jointly moved to correct the clerical omission of a "so-ordered" line for the court's signature from the Stipulation of Dismissal. *See* Joint Resp. to Ct.'s Req., Feb. 7, 2025, ECF No. 37. The parties' motion to correct is granted and the case is accordingly dismissed by operation of the parties' filings. In accordance with the Stipulation of Dismissal and the intent of the parties, the court retains jurisdiction to oversee compliance with the non-monetary terms of the parties' Stipulated Settlement Agreement and to resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

LEGAL BACKGROUND

I. The Marine Mammal Protection Act

In response to the growing threat that human activities pose to marine mammals, Congress passed the MMPA to prevent species and populations of marine mammals from diminishing beyond the point at which they can function in their ecosystem. *See* 16 U.S.C. § 1361(1)–(2). With certain exceptions, the MMPA prohibits the "tak[ing]" of marine mammals, defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill." *Id.* § 1362(13); *see also id.* § 1372(a)(1).

To achieve this goal, the MMPA places a general moratorium on taking and importing marine mammals and marine mammal products. *Id.* § 1371(a). The MMPA empowers the "Secretary"—defined elsewhere as the Secretaries of Commerce and the Interior—to "prescribe such regulations with respect to taking and importing of animals . . . as [they] deem[] necessary and appropriate to insure that such taking will not be to the disadvantage of those species . . . ." *Id.* §§ 1373(a), 1362(12).

The MMPA also places restrictions on foreign fisheries that export to the United States, providing that "[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." *Id.* § 1371(a)(2). Additionally, no fish or products from which fish have been caught may be imported into the United States "if such fish was caught in a manner . . . proscribed for persons subject to the jurisdiction of the United States . . . ." *Id.* § 1372(c)(3). To ensure compliance with this mandate, the "Secretary . . . shall insist on reasonable proof from the government" of any importing nation "of the effects on ocean mammals of the commercial fishing technology in use." *Id.* § 1371(a)(2)(A). In short, the MMPA aims to protect marine mammals by setting forth standards applicable to both domestic commercial fisheries and to foreign fisheries that wish to export their products to the United States. *See id.* § 1371(a)(2).

II. Final Import Rule

Though the MMPA was enacted in 1972, NMFS did not promulgate a final rule implementing the Act's import provisions until August 2016. *See Final Import Rule*, 81 Fed. Reg. 54390; 50 C.F.R. § 216.24 (2022). The *Final Import Rule* "addresses intentional mortality and serious injury in fisheries that export to the United States," and "establish[es] procedures and conditions for evaluating a harvesting nation's regulatory program . . . to determine whether it is comparable in effectiveness to the U.S. regulatory program." 81 Fed. Reg. at 54390–91.

Under the *Final Import Rule*, NMFS must create and publish a list of foreign fisheries by "identify[ing] harvesting nations with commercial fishing operations that export fish and fish products to the United States and classify[ing] those fisheries based on their frequency of marine mammal interactions . . . ." *Id.* at 54391. Harvesting nations must apply for and receive "a comparability finding for its fisheries to export fish and fish products to the United States." *Id.* at 54391. NMFS must, under the *Final Import Rule*, identify and prohibit the importation of fish and fish products into the United States from fisheries without comparability findings. *Id.* at 54394.

"To receive a comparability finding . . . the harvesting nation must demonstrate that it has prohibited the intentional mortality or serious injury of marine mammals in the course of commercial fishing operations in the fishery . . . ." *Id.* Each harvesting nation must also demonstrate that it has adopted and implemented regulations governing commercial fishing operations that are "comparable in effectiveness to the U.S. regulatory program." *Id.* NMFS must, according to the *Final Import Rule*, notify each harvesting nation of any fisheries for which NMFS is denying a comparability finding and publish a corresponding notice in the Federal Register. *See id.* at 54393.

III. Exemption Period and Subsequent Extensions

Recall that the *Final Import Rule* initially established a "one-time only" five-year exemption period, through December 31, 2021, before imports would be made subject to any trade restrictions. *See id.* at 54413. Since then, the Department of Commerce and NMFS have issued three modifications to extend the exemption period, which as a result will end on December 31, 2025. *See First Modification of Deadlines*, 85 Fed. Reg. 69515; *Second Modification of Deadlines*, 87 Fed. Reg. 63955; *Third Modification of Deadlines*, 88 Fed. Reg. 80193.[4] NMFS issued each of these extensions without any notice and comment period, citing "the need to provide exporting nations with sufficient advance notice of the additional time to submit their comparability finding applications." *First Modification of Deadlines*, 85 Fed. Reg. at 69516; *see also Second Modification of Deadlines*, 87 Fed. Reg. at 63957; 5 U.S.C. § 553(b)(4) (listing exceptions to notice and comment requirement). NMFS also suggested the extension was not subject to the APA's requirement "because it involves a 'foreign affairs function of the United States' under 5 U.S.C. § 553(a)(1)." *See Third Modification of Deadlines*, 88 Fed. Reg. at 80194; *see also* 5 U.S.C. § 553(b)(4)(B).

PROCEDURAL HISTORY

Plaintiffs filed a complaint on August 8, 2024, alleging that "the federal government has failed to ban the importation of fish or fish products from fisheries that are not meeting U.S. bycatch standards since 1972." Compl. ¶ 77.[5] Plaintiffs requested that the court (1) declare that Defendants have unlawfully withheld and unreasonably delayed implementation of the MMPA import provisions, (2) declare that Defendants' failure to provide notice and an opportunity for comment on the *Third Modification of Deadlines* violates the APA, (3) vacate the *Third Modification of Deadlines*, (4) order Defendants to

[4] During this extended exemption period, NMFS has issued only two comparability findings resulting from litigation and settlement agreements under the emergency rulemaking provision of the *Final Import Rule*. *See* 81 Fed. Reg. at 54395. Under this provision, NMFS "may consider emergency rulemaking to ban imports of fish and fish products" during the exemption period where a fishery "[has] or is likely to have an immediate and significant adverse impact on a marine mammal stock." *Id.* Based on a risk of immediate and significant adverse impact, NMFS issued and then revoked a comparability finding for Mexican fisheries affecting the vaquita, *see* 85 Fed. Reg. 13626 (NMFS Mar. 9, 2020), and in 2024 issued comparability findings for New Zealand fisheries affecting the Māui dolphin, *see Sea Shepherd N.Z. v. United States*, 723 F. Supp. 3d at 1379–80.

[5] Plaintiffs highlight several countries where marine mammal populations may be at risk from fishing operations, but from which the U.S. government has not banned the importation of fish and fish products, including Canada, Ecuador, France, India, Indonesia, Mexico, South Africa, South Korea, and the United Kingdom. *See* Compl. ¶¶ 86–129.

implement the *Final Import Rule* by a certain date, (5) enter an injunction requiring Defendants to ban the importation of fish or fish products that do not meet the requirements of the MMPA, (6) award Plaintiffs costs and attorney's fees, and (7) grant any other relief the court finds proper. *See* Compl. at 52–53.

On November 29, 2024, the parties filed, and the court granted, a joint motion to stay, anticipating that "they could reach an approved and finalized agreement to resolve the dispute . . . in the coming weeks." Joint Mot. to Stay Proceedings, Nov. 29, 2024, ECF No. 25; *see also* Order, Dec. 4, 2024, ECF No. 26.

I. Stipulation of Dismissal and Stipulated Settlement Agreement

The parties filed a Stipulation of Dismissal and Stipulated Settlement Agreement on January 16, 2025. *See* Stipulation of Dismissal; Stipulated Settlement Agreement, Jan. 16, 2025, ECF No. 29, Attach. A. Therein, the parties stipulate that the matter "be dismissed with prejudice," and further "stipulate and respectfully request that the [c]ourt retain jurisdiction to oversee compliance with the non-monetary terms of the parties' Stipulated Settlement Agreement and to resolve any motions to modify such terms." *Id.* at 2 (citing *Kokkonen*, 511 U.S. 375). Under the terms of the Stipulated Settlement Agreement, the parties agree that the United States will implement the *Final Import Rule* in four phases. *See* Stipulated Settlement Agreement ¶ 1.

Under Phase 1, NMFS must issue notifications "to (i) all harvesting nations that did not submit an application for a comparability finding, and (ii) all harvesting nations that the Secretary of Commerce . . . preliminarily determined will be denied a comparability finding for all of their fisheries." *Id.* ¶ 1(a); *see also Final Import Rule*, 81 Fed. Reg. 54417; 50 C.F.R. § 216.24(h)(8)(iii)(A)(1). Under Phase 2, NMFS "will issue notifications to all harvesting nations that NMFS has preliminarily determined will be denied a comparability finding for one or more of their fisheries." Stipulated Settlement Agreement ¶ 1(b); *see also Final Import Rule*, 81 Fed. Reg. at 54417; 50 C.F.R. § 216.23(h)(8)(iii)(A)(1). Additionally, NMFS must provide each harvesting nation "an opportunity to submit reliable information to refute the preliminary denial" in both Phase 1 and Phase 2. Stipulated Settlement Agreement ¶ 1(a), (b); *see also Final Import Rule*, 81 Fed. Reg. at 54417; 50 C.F.R. § 216.23(h)(8)(iii)(A)(2).

Under Phase 3, "NMFS will issue final comparability findings for all harvesting nations and submit such findings to the Federal Register for publication." Stipulated Settlement Agreement ¶ 1(c); *see also Final Import Rule*, 81 Fed. Reg. at 54417; 50 C.F.R. §

216.24(h)(8)(i). Under Phase 4, NMFS "shall identify and prohibit the importation of fish and fish products into the United States from all harvesting nations or fisheries for which NMFS has denied a comparability finding." Stipulated Settlement Agreement ¶ 1(d); *see also Final Import Rule*, 81 Fed. Reg. at 54418–19; 50 C.F.R. § 216.24(h)(9). Finally, the parties agree that "NMFS will publish on a publicly-available website a copy of its final document(s) reflecting the agency's rationale for its final comparability findings . . . ." Stipulated Settlement Agreement ¶ 1(e).

Under the parties' agreed-upon schedule, Phase 1 and Phase 2 were to be completed before the Stipulated Settlement Agreement was submitted to the court, on December 16, 2024, and January 15, 2025, respectively. *See id.* ¶ 1(a)–(b). Phase 3 is to be completed on or before September 1, 2025, *see id*. ¶ 1(c), and Phase 4 is to be completed on or before January 1, 2026, *see id.* ¶ 1(d). The parties agree that "Defendants will confirm to Plaintiffs NMFS's performance of each of Phase 2 and 3 within five business days of performance by providing an attestation of compliance." *Id.* ¶ 2.

Plaintiffs agree that, before January 1, 2026, they "will not initiate any litigation challenging an individual comparability finding issued in Phase 3," will not encourage or support any other person pursuing such litigation, and "release, waive, and abandon all claims against" Defendants. *Id.* ¶ 4. Finally, Defendants agree to "pay Plaintiffs $74,000.000 in full and complete satisfaction of any and all claims, demands, rights, and causes of action for attorney fees and litigation costs . . . ." *Id.* ¶ 5.

In the case that any disagreement arises in the course of the parties' performance under the Stipulated Settlement Agreement, the parties agree to meet and confer before seeking the court's enforcement of compliance with any terms. *See id.* ¶ 8. If the parties do not come to a "mutual agreeable solution . . . within 30 calendar days of a Party's initial request to meet and confer, the parties may seek appropriate relief from the [c]ourt." *Id.*

The court held a status conference on January 23, 2025, to discuss the content of the agreement and discuss the court's retention of jurisdiction. *See* Notice from the Ct., Jan. 17, 2025, ECF No. 30; Notice of Status Conf., Jan. 23, 2025, ECF No. 32. The court subsequently requested joint submissions listing the cases cited during the status conference and written answers to several questions. *See* Letter, Jan. 23, 2024, ECF No. 33; Joint Resp. to Ct.'s Req., Jan. 24, 2025, ECF No. 34; Joint Resp. to Ct.'s Req., Feb. 7, 2025, ECF No. 37.

The parties filed a joint submission on February 7, 2025, specifying that they "intended the Stipulation to be filed under Rule

41(a)(1)(A)(ii) with dismissal conditionally effective only upon the [c]ourt's issuance of an order retaining jurisdiction." Joint Resp. to Ct.'s Request at 1, Feb. 7, 2025, ECF No. 37. The parties consider the court's retention of jurisdiction to be "a material component of their agreement and, absent that retention, the parties will either have to attempt to renegotiate the Agreement or, failing that, proceed to litigation." *Id.* at 2. Accordingly, the parties requested that the court "construe this filing as a motion pursuant to USCIT Rule 60(a) to correct the clerical omission of a 'so-ordered' line for signature by this [c]ourt." *Id.* at 1.

DISCUSSION

I. Voluntary Dismissal and Retention of Jurisdiction

Under USCIT Rule 41(a)(1)(A)(ii), a plaintiff "may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared." A dismissal under this rule allows parties to "dismiss an action without court order." *Id.*[6] Federal courts are of limited jurisdiction and possess only that power authorized by the Constitution and statute. *See Kokkonen*, 511 U.S. at 377; *Willy v. Coastal Corp.*, 503 U.S. 131, 136–37 (1992); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). For this reason, under a motion for dismissal filed under USCIT Rule 41(a)(1)(A)(ii), a court's jurisdiction "cannot extend past the filing date absent an express contingency or extension of jurisdiction, and any further actions by the court are superfluous." *SmallBizPros, Inc. v. MacDonald*, 618 F.3d 458, 463 (5th Cir. 2010) (internal quotation marks and citation omitted). Enforcement of a settlement agreement is "more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *Kokkonen*, 511 U.S. at 378.

Under *Kokkonen*, a federal court may properly retain jurisdiction to enforce a settlement agreement in two ways: first, by including a provision in a dismissal order that explicitly retains jurisdiction over the settlement agreement, or second, by incorporating the terms of the settlement agreement into a dismissal order. *See Kokkonen*, 511 U.S. at 381–82. In such a case, the dismissal still occurs automatically under USCIT Rule 41(a)(1)(A)(ii), but a dismissal order is necessary for the court to retain jurisdiction. Given the automatic nature of a voluntary dismissal under USCIT Rule 41(a)(1)(A)(ii), to ensure that the court retains jurisdiction, the parties must meet "all of the requirements for retaining jurisdiction . . . at the time of filing, or [make] the filing's effectiveness [] contingent upon a future act (such

[6] USCIT Rule 41(a)(1)(A)(ii) is identical to Fed. R. Civ. P. 41(a)(1)(A)(ii).

as the [] court issuing an order retaining jurisdiction)." *SmallBizPros*, 618 F.3d at 463. Here, the parties included a provision, in the Stipulation for Dismissal and in the attached proposed order of dismissal, "stipulat[ing] and respectfully request[ing] that the [c]ourt retain jurisdiction to oversee compliance with the non-monetary terms of the parties' Stipulated Settlement Agreement and to resolve any motions to modify such terms." Stipulation of Dismissal; Corrected Stipulation of Dismissal, Feb. 7, 2025, ECF No. 37–1. Thus, the parties included a provision in their proposed dismissal order that explicitly retains jurisdiction over the Stipulated Settlement Agreement. The parties also incorporated the terms of the Stipulated Settlement Agreement into the proposed dismissal order by attaching the Stipulated Settlement Agreement. *See* Stipulation of Dismissal. Further, the parties indicated their "inten[t that] the Stipulation [] be filed under Rule 41(a)(1)(A)(ii) with dismissal conditionally effective only upon the [c]ourt's issuance of an order retaining jurisdiction," and accordingly moved to correct the omission of a "so-ordered" line from the Stipulation of Dismissal. Joint Resp. to Ct.'s Request at 1; *see also infra* Section II. Accordingly, the court retains jurisdiction to enforce the terms of the Stipulated Settlement Agreement per the parties' Stipulation of Dismissal.[7]

II. Correction of a Clerical Mistake or Omission

Under USCIT Rule 60(a), "the court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or own its own, with or without notice." In considering a motion under USCIT Rule 60(a), the "question before the court" is "whether the alleged error is truly ministerial." *Diamond Sawblades Mfrs. Coal. v. United States*, 34 CIT 211, 216 (2010). A ministerial error "encompasses only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment," or includes "mindless and mechanical mistakes [and] shifting of facts." *Id.* (citing *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 129–30 (3d Cir. 2005)). Additionally, courts have disallowed ministerial corrections where doing so results in procedural unfairness or prejudice. *See id.* (citing

[7] This retention of jurisdiction is limited to overseeing compliance with the non-monetary terms of the Stipulated Settlement Agreement and to resolve any motions to modify such terms. *See* Stipulation of Dismissal at 2. This jurisdiction is limited to resolving disputes regarding Defendant's compliance with any of the deadlines outlined in the Stipulated Settlement Agreement. *See* Joint Resp. to Ct.'s Request at 8. Plaintiffs have agreed that they will not challenge the substance of any of Defendants' determinations with respect to comparability findings as part of this case, but instead have agreed to bring any such claims in a separate lawsuit not to be filed before January 1, 2026. *See id.*; Stipulated Settlement Agreement ¶ 4.

Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001)) (setting aside an EPA Rule amendment on the ground that rule correction, even if ministerial, required proper notice and comment procedure); *NTN Corp. v. United States*, 32 CIT 1283, 1285–86, 587 F. Supp. 2d 1313, 1316 (2008) (considering the court's "obligations to prevent unfairness to any party and to avoid unnecessary delay or expense.").

As noted above, the parties specified that they "intended the Stipulation to be filed under Rule 41(a)(1)(A)(ii) with dismissal conditionally effective only upon the [c]ourt's issuance of an order retaining jurisdiction." Joint Resp. to Ct.'s Request at 1. Here, the inclusion of a "so-ordered" line reflects this intention that the automatic dismissal be conditional upon the court's issuance of an order. The omission of a signature line is a ministerial error that reflects a "mechanical mistake." *Diamond Sawblades*, 34 CIT at 216. Additionally, the correction creates no procedural prejudice or delay as all parties jointly requested that the court correct the error. Therefore, the court grants the parties' request to correct the Stipulation of Dismissal to include a "so-ordered" line.

CONCLUSION

The court **GRANTS** the parties motion to construe their joint submission as a motion to correct the clerical omission of a "so-ordered" line for signature by this court under USCIT Rule 60(a).

A voluntary dismissal by joint stipulation under Rule 41(a)(1)(A)(ii) is effective "automatically." *Versata Software, Inc. v. Callidus Software, Inc.*, 780 F.3d 1134, 1136 (Fed. Cir. 2015) (applying identical Fed. R. Civ. P. 41(a)(1)(A)(ii)). A dismissal order that incorporates the terms of the Stipulated Settlement Agreement will issue accordingly. The court retains jurisdiction to oversee compliance with the non-monetary terms of the parties' Stipulated Settlement Agreement and to resolve any motions to modify such terms in accordance with *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

Dated: March 25, 2025
New York, New York

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

Slip Op. 25–30

ETEROS TECHNOLOGIES USA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 25–00036

[The court denies Plaintiff's Motion to Expedite.]

Dated: March 26, 2025

Richard F. O'Neill, *John M. Peterson*, and *Patrick B. Klein*, Neville Peterson, LLP, of Seattle, WA and New York, N.Y., for Plaintiff Eteros Technologies USA, Inc.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him on the brief were *Michael Granston*, Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney in Charge, International Trade Field Office, *Aimee Lee*, Assistant Director. Of Counsel on the brief *Alexandra Khrebtukova* and *Zachary Simmons*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y.

OPINION AND ORDER

Katzmann, Judge:

Plaintiff Eteros Technologies USA, Inc. moves to expedite the briefing schedule of this action for declaratory relief. *See* Pl.'s Mot. for Entry of Expedited Scheduling Order, Jan. 31, 2025, ECF No. 13 ("Motion to Expedite"). Plaintiff, which previously came before the court in *Eteros Technologies USA, Inc. v. United States*, 46 CIT __, 592 F. Supp. 3d 1313 (2022) ("*Eteros I*"), is a corporation "engaged in the importation, manufacture, and distribution of agricultural machinery for various industries, including the cannabis and hemp processing industry." Compl. ¶ 3, Jan. 29, 2025, ECF No. 2.[1] In the present action Plaintiff primarily[2] seeks a declaration pursuant to the Declaratory

[1] Plaintiff also asserts that it is "organized and existing under the laws of the State of Washington," and that it maintains its U.S. headquarters in Las Vegas, Nevada. *Id.*

[2] Plaintiff also seeks unspecified relief under the All Writs Act, which provides for the federal courts' issuance of "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *see* Compl. ¶¶ 58–64.

Judgment Act[3] that its importation of certain cannabis-related merchandise from Canada into the United States does not violate federal prohibitions on narcotics trafficking and distributing controlled substances. *See* Compl. ¶¶ 41–57 (citing 21 U.S.C. §§ 841, 1907). Plaintiff cites *Eteros I* and another decision of the court (*Keirton USA, Inc. v. United States*, 46 CIT __, 600 F. Supp. 3d 1270 (2022)) in support of allegations that U.S. Customs and Border Protection ("CBP") has unlawfully invoked these federal prohibitions to bar two of Plaintiff's Canadian corporate officers from entering the United States. *See* Compl. ¶¶ 41–57. These officers' ongoing absence from the United States,[4] Plaintiff avers, inflicts a host of economic harms. *See id.* ¶¶ 37–39; Mot. to Expedite at 11–16. Plaintiff contends that this is accordingly an "action that . . . for good cause shown, warrants expedited treatment." USCIT R. 3(g)(5); *see* Mot. to Expedite at 10.

Defendant the United States opposes Plaintiff's motion. *See* Def.'s Resp. to Mot. to Expedite, Feb. 24, 2025, ECF No. 18.

To determine whether "good cause" supports expediting briefing on this matter, the court applies the standard articulated in *Ontario Forest Industries Ass'n v. United States*, 30 CIT 1117, 444 F. Supp. 2d 1309 (2006). Drawing from legislative history, the court explained in that case that good cause exists:

> [1] in a case in which failure to expedite would result in mootness or deprive the relief requested of much of its value, [2] in a case in which failure to expedite would result in extraordinary hardship to a litigant, or [3] actions where the public interest in enforcement of the statute is particularly strong.

[3] The relevant subsection of the Declaratory Judgment Act provides as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id. § 2201(a).

[4] On February 11, 2025, two weeks after the filing of the Complaint, CBP issued a L-1A Nonimmigrant Worker visa to one of these officers. *See* Suppl. Decl. of A. James ¶ 8, Feb. 13, 2025, ECF No. 14; *see also* 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(*l*)(1)(i). This officer declares that she nevertheless remains "concerned that CBP may take an adverse action against [her] at the border," and that she is "assessing [her] next steps and potential risks before traveling to the U.S." Suppl. Decl. of A. James ¶¶ 12, 15.

Id. at 1127 (footnote omitted) (quoting H.R. Rep. No. 98–985, at 6 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5779, 5784); *see generally J.D. Irving, Ltd. v. United States*, 46 CIT __, 570 F. Supp. 3d 1349 (2022) (applying the *Ontario Forest* framework and finding no good cause to expedite). "The decision to grant expedited briefing" is also "a matter left to the Court's discretion." Order at 4, *Husqvarna Constr. Prods. N. Am. v. United States*, Ct. No. 12–00205 (USCIT Aug. 9, 2012), ECF No. 19. A generally-applicable provision of federal law reinforces this standard:

> Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of . . . any . . . action if good cause therefor is shown. For purposes of this subsection, "good cause" is shown if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit.

28 U.S.C. § 1657.

Plaintiff has not shown that good cause exists here. As to *Ontario Forest*'s first basis for good cause, Plaintiff makes no allegation that adherence to a standard briefing schedule—as opposed to an expedited one—"would result in mootness or deprive the relief requested of much of its value." 30 CIT at 1127, 444 F. Supp. 2d at 1319 (quoting H.R. Rep. No. 98–985, at 6). Plaintiff states that "without expedited treatment, Eteros will continue to face operational disruption, financial losses, reputational harm, and erosion of employee morale," and describes a "prolonged inability of Eteros' senior personnel to oversee U.S. operations [that] creates a leadership vacuum." Mot. to Expedite at 10–11. As presented, these are not time-sensitive harms that will become irremediable in the near future. Plaintiff does not explain why the declaration it seeks would offer significant value if obtained in two months, but negligible value if obtained (for example) in five. *Cf.* H.R. Rep. No. 98–985, at 6 n.7 (describing "a case relating to voting rights which would be mooted or partially mooted by an upcoming election").

Plaintiff also does not show that adherence to a standard briefing schedule would cause extraordinary hardship during the interval between the requested sixty-day briefing timeline and a standard timeline. Plaintiff claims to experience a litany of ongoing harms that result from the absence of its corporate officers from the United States. This includes the officers' inability to directly oversee U.S. business operations, supervise U.S.-based staff, and attend industry events. *See* Mot. to Expedite at 11–12. The officers' absence has also allegedly caused "inventory mismanagement" at a Las Vegas facility, required costly "contract services" to fill the officers' roles at U.S.-based functions, harmed relationships with customers, business partners, and employees, thwarted recruitment efforts, and hampered Plaintiff's ability "to rely on predictable enforcement of customs laws . . . ." *See id.* at 12–16.

Even if these asserted harms are not insignificant, Plaintiff fails to show that they amount to extraordinary hardship. *See* USCIT R. 3(g)(5) (requiring "good cause shown"). All Plaintiff shows is that its international business suffers from barriers to international travel. Eteros can continue operating—albeit less efficiently in the U.S. market—during the course of litigation. More importantly, Plaintiff does not show that the hardship it suffers during the pendency of this case, even if significant, is more severe than that suffered by an ordinary plaintiff who awaits possible relief. Initial unremediated harm, after all, is a necessary feature of all litigation in federal court: Article III jurisdiction requires (*inter alia*) that a plaintiff have suffered an injury in fact.[5] *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Even significant hardship that clears this threshold is not necessarily extraordinary. *Compare Ont. Forest*, 30 CIT at 1128, 444 F. Supp. 2d at 1320 ("Although the court can appreciate that the requirement of posting cash deposits may have deleterious effects on the competitive position of a firm (especially over time), this is a problem many (if not all) litigants face before the Court. Therefore, there is nothing 'extraordinary' here that warrants this case taking priority over other cases pending before the court."); *with* H.R. Rep. No. 98–985, at 6 n.8 (describing "a case challenging denial of disability benefits on which the plaintiff is dependent for subsistence" as a basis for extraordinary hardship).

As to the third basis for good cause outlined in *Ontario Forest*, Plaintiff states that an expedited briefing schedule would serve the public interest by resolving an uncertain legal question. Plaintiff states that "[e]nsuring this lawful activity proceeds without the threats of felony prosecution, imprisonment, deportation, or other penalties is essential," and that "[c]onsequently, the interpretation and enforcement of the laws under Title 21 [of the U.S. Code] by this Court is a matter of substantial public interest, warranting the establishment of an expedited scheduling order to govern this litigation." Mot. to Expedite at 18 (footnotes omitted).

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[5] Of course, Plaintiff will also bear the burden of establishing the court's jurisdiction over this matter. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188–89 (1936).

If this were a sufficient basis for good cause, then virtually all cases—and therefore no cases—would receive expedited treatment. Any application or interpretation of the law has some conceivable impact on the public's expectations about rights and obligations going forward. It is not clear from Plaintiff's submissions why the particular interpretation they seek—whenever elicited—would serve the public's reliance interest any more than the interpretations inherent in an ordinary case.

The court construes its rules to "secure the just, speedy, and inexpensive determination of *every action and proceeding*." USCIT R. 1 (emphasis added). If Plaintiff is entitled to any of the relief it seeks, the court will so determine in due course.

It is hereby:

ORDERED that Plaintiff's Motion for Entry of an Expedited Scheduling Order, Jan. 31, 2025, ECF No. 13, is **DENIED**.

Dated: March 26, 2025
New York, New York

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Slip Op. 25–31

UNITED STATES, Plaintiff, v. KOEHLER OBERKIRCH GMBH, f/k/a PAPIERFABRIK AUGUST KOEHLER SE, f/k/a PAPIERFABRIK AUGUST KOEHLER AG; and KOEHLER PAPER SE, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 24–00014

[The court denies Defendants' Motion to Dismiss.]

Dated: March 27, 2025

Luke Mathers, Trial Attorney, U.S. Department of Justice, of New York, N.Y, argued for Plaintiff the United States. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Edward F. Kenny*, Senior Trial Counsel. Of counsel were *Sasha Khrebtukova*, Attorney, and *Brandon T. Rogers*, Senior Attorney, Offices of the Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y. and Indianapolis, IN.

John F. Wood, Holland & Knight LLP, of Washington, D.C., argued for Defendants Koehler Oberkirch GmbH and Koehler Paper SE. With him on the brief were *Andrew McAllister*, *Anna P. Hayes*, and *Stuart G. Nash*.

OPINION

Katzmann, Judge:

Plaintiff the United States ("the Government") aims to collect over a quarter-billion dollars in unpaid antidumping duties and interest from Defendants Koehler Oberkirch GmbH ("Koehler Oberkirch") and Koehler Paper SE ("Koehler Paper"), a pair of affiliated German producers[1] of thermal paper.[2] The Government hopes to obtain that relief through a civil action in this court, which has exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover customs duties." 28 U.S.C. § 1582; *see* Am. Compl. ¶ 1, Feb. 8, 2024, ECF No. 4 ("Complaint").

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[1] The court in its prior opinions has referred to Defendants collectively as "Koehler." *See generally United States v. Koehler Oberkirch GmbH*, 48 CIT __, 728 F. Supp. 3d 1322 (2024) ("*Alternative Service Order*"); *United States v. Koehler Oberkirch GmbH*, 48 CIT __, 731 F. Supp. 3d 1377 (2024) ("*Certification Denial*"). Because the relationship between various "Koehler" entities is now directly at issue, the court will make individualized references to those entities. The court will also make collective references to "Defendants."

[2] Thermal paper is paper that "form[s] an image when heat is applied." *Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China*, 73 Fed. Reg. 70959, 70960 (Dep't Com. Nov. 24, 2008) ("*Antidumping Duty Order*"). While the underlying concept of heat-activated writing dates to antiquity, *see* Nat'l Bureau of Standards, Circular C413, *Inks* at 37 (Dep't Com. 1937) (collecting attestations by Pliny the Elder and Ovid), today thermal paper is "typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts." *Antidumping Duty Orders*, 73 Fed. Reg. at 70960.

Defendants have opposed this effort at every turn. They first contested the Government's request to effect "alternative" service of process through Defendants' U.S.-based counsel. *See* Defs.' Resp. in Opp'n to Mot. for Alt. Serv., May 13, 2024, ECF No. 11. When the court granted that request, *see Alternative Service Order*, 48 CIT __, 728 F. Supp. 3d 1322, Defendants moved for leave to file an interlocutory appeal. *See* Am. Mot. for Certification of Appealability, Sept. 5, 2024, ECF No. 33. After the court denied that motion, *see Certification Denial*, 48 CIT __, 731 F. Supp. 3d 1377, Defendants petitioned the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") for a writ of mandamus that would compel reversal of the order permitting service. The writ did not issue. *See In re Koehler Oberkirch GmbH*, No. 2025–106, 2025 WL 212067 (Fed. Cir. Jan. 16, 2025) (Order).

Defendants now move to dismiss this action, asserting defenses of (1) insufficient service of process as to both Defendants and (2) lack of personal jurisdiction over Koehler Paper. *See* Mot. to Dismiss, Oct. 24, 2024, ECF No. 43 ("Motion to Dismiss"); USCIT R. 12(b)(2), (5). This motion presents issues of due process and civil procedure that—for all their significance to international commerce—are rarely litigated before the U.S. Court of International Trade ("USCIT"). The central issue is this: where a successor entity inherits its corporate predecessor's liabilities, when does it also inherit the predecessor's jurisdictional contacts?

The court concludes that the Government's allegations here, in light of controlling and persuasive authority, support imputing Koehler Oberkirch's jurisdictional contacts to Koehler Paper. For this reason, and for the others that follow, the court denies Defendants' Motion to Dismiss in its entirety.

BACKGROUND

The court first presents the legal, factual, and procedural background relevant to the Motion to Dismiss.

I. Legal Background: Personal Jurisdiction in Proceedings Before the U.S. Court of International Trade

The court's rules[3] provide that "[f]or a claim that arises under federal law, serving a summons . . . establishes personal jurisdiction

[3] The relevant provision is identical to Federal Rule of Civil Procedure 4(k)(2), which the Federal Circuit has described as "a federal long-arm statute[] which allows a district court to exercise personal jurisdiction over a foreign defendant whose contacts with the United States, but not with the forum state, satisfy due process." *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285, 1296 (Fed. Cir. 2009); *see also United States v. Zatkova*, 35 CIT 1059, 1061 n.1, 791 F. Supp. 2d 1305 n.1 (2011) ("USCIT Rule 4 is substantially identical to Federal Rule of Civil Procedure 4; therefore, the court may consider decisions and commentary on Federal Rule of Civil Procedure 4 for guidance.").

over a defendant if: (A) the defendant is not subject to jurisdiction in any of the state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." USCIT R. 4(j)(2).[4] In a case like this, where no state or federal law appears to limit the exercise of personal jurisdiction, this provision means that the limits of personal jurisdiction are coextensive with what due process allows. *See Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) ("California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process."); *see also Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1411 (Fed. Cir. 2009) ("[T]he statutory and constitutional inquiries coalesce into the question whether due process is satisfied by the court's exercise of personal jurisdiction . . . .").

Personal jurisdiction over an out-of-forum defendant satisfies due process only where the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Off. of Unemp. Comp. & Placement*, 326 U.S. 310, 316 (1945) (internal quotation marks and citations omitted) (addressing the due process clause of the Fourteenth Amendment).[5] Relevant here is the subcategory of "specific jurisdiction," which applies where "the suit 'arises out of or relates to the defendant's contacts with the forum.'" *Daimler*, 571 U.S. at 127 (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)) (alterations omitted).

For the purpose of specific jurisdiction, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The Federal Circuit has "outlined a three-factor test for specific jurisdiction, which considers whether (1) the defendant purposefully directed its activities at residents of

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[4] The first of these elements is trivially satisfied here: the court has "*exclusive jurisdiction* of any civil action which arises out of an import transaction and which is commenced by the United States . . . (3) to recover customs duties." 28 U.S.C. § 1582 (emphasis added).

[5] "Because subject matter jurisdiction over [this] action exists by virtue of a federal question, rather than the diversity of the parties, the Due Process Clause that is at issue here is the Due Process Clause of the Fifth Amendment." *Akro Corp. v. Luker*, 45 F.3d 1541, 1544 (Fed. Cir. 1995) (internal quotation marks and citation omitted). But this distinction is immaterial for present purposes. The Federal Circuit has held that *International Shoe*'s minimum-contacts framework applies to both the Fifth and Fourteenth Amendments. *See id.* at 1545.

the forum, (2) the claim arises out of or relates to the defendant's activities with the forum, and (3) assertion of personal jurisdiction is reasonable and fair." *Synthes*, 563 F.3d at 1297 (addressing the standard for patent actions governed by Federal Circuit law). In the importation context, where "[t]he allegations are that defendants purposefully shipped" merchandise into the forum "through an established distribution channel," and where "[t]he cause of action . . . is alleged to arise out of these activities[, n]o more is usually required to establish specific jurisdiction." *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994). The inquiry in this case, which does not concern imports into any particular state, is whether Defendants have minimum jurisdictional "contacts with the nation as a whole." *Synthes*, 563 F.3d at 1296.

II. Factual History

The court next summarizes the facts relevant to the Motion to Dismiss, drawing from the allegations in the Complaint and assuming familiarity with the facts recounted in the *Alternative Service Order*, 48 CIT at __, 728 F. Supp. 3d at 1325–28, and in the *Certification Denial*, 48 CIT at __, 731 F. Supp. 3d at 1378–79.

Between 2008 and 2013, imports of lightweight thermal paper from Germany were subject to an antidumping order imposed by the U.S. Department of Commerce ("Commerce"). *See Antidumping Duty Order*, 73 Fed. Reg. 70959; *Lightweight Thermal Paper from the People's Republic of China and Germany: Continuation of the Antidumping and Countervailing Duty Orders on the People's Republic of China, Revocation of the Antidumping Duty Order on Germany*, 80 Fed. Reg. 5083 (Dep't Com. Jan. 30, 2015). Two of the producers subject to this order at the time of its imposition were Papierfabrik August Koehler AG and Koehler America, Inc. *See Antidumping Duty Order*, 73 Fed. Reg. at 70960.

While the Antidumping Duty Order was in place, Commerce found that Papierfabrik August Koehler was engaged in a scheme of a "serious and egregious nature" to manipulate and conceal certain sales data. Mem. from C. Marsh to P. Piquado, re: Issues and Decision Memorandum at 7, Case No. A-428–840, Bar Code: 3129807–01 (Dep't Com. Apr. 11, 2013). Commerce accordingly made an adverse inference that drove the duty rate on imports of Papierfabrik August Koehler AG's merchandise up to 75.36 percent *ad valorem*. *See Lightweight Thermal Paper from Germany: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 23220, 23221 (Dep't Com. Apr. 18, 2013). That rate now applies with finality to Papierfabrik August Koehler AG's entries of thermal paper for the period between November 2009 and October 2011. *See Alternative Service Order*, 48 CIT at __, 728 F. Supp. 3d at 1326. According to the Government, the unpaid balance of the associated antidumping duty liability (including statutory interest) is $267,530,486.57 as of February 3, 2025. Pl.'s Post-Arg. Submission at 4 n.3, Feb. 5, 2025, ECF No. 54.

Papierfabrik August Koehler AG has allegedly undergone a series of corporate transformations since the entries of the merchandise in question. First, "[i]n 2012, Papierfabrik August Koehler AG became known as Papierfabrik August Koehler SE by converting to a different corporate form." Compl. ¶ 7. Then, in April 2021, Papierfabrik August Koehler SE underwent "what it publicly described as a 'spin-off,' whereby certain assets and liabilities were transferred to a new company called Koehler Paper SE." *Id.* ¶ 29. This transfer included "control over profitable manufacturing subsidiary Koehler Kehl GmbH," *id.* ¶ 35, and it left Papierfabrik August Koehler SE with assets of "less than a quarter of what they were at the close of the prior fiscal year before the 'spin-off.'" *Id.* ¶ 36. "[A]fter the 'spin-off,' paper manufactured by Koehler Kehl GmbH was being sold by Koehler Paper SE rather than [Papierfabrik August] Koehler [SE]." *Id.* ¶ 37. Neither entity's financial statement for Fiscal Year 2021 contained "any mention" of what at the time was "the $193,631,642.08 debt owed to Customs." *Id.* ¶ 41. "As a direct result of the 'spin-off,'" the Government alleges, "Koehler now lacks assets sufficient to pay its debts to Customs . . . ." *Id.* ¶ 42. Finally, "[i]n November 2021, Papierfabrik August Koehler SE became Koehler Oberkirch GmbH through 'a statutory conversion, i.e., the actual business entity continues to be the same.'" *Id.* ¶ 5 (quoting Koehler Paper, *Name-change: "Papierfabrik August Koehler SE" is now "Koehler Oberkirch GmbH"* (Dec. 20, 2021), https://www[.]koehlerpaper[.]com /en/news/publications/name-change_PAK-SE[.]php (last visited Mar. 27, 2025)).

Immediately after the announcement of Papierfabrik August Koehler SE's "conversion" into Koehler Oberkirch, Koehler Paper initiated a separate action before this court to challenge a determination related to a different Commerce antidumping order on imports of thermal paper from Germany. *See* Summons, *Koehler Paper SE v. United States*, No. 21–633 (USCIT filed Dec. 22, 2021), ECF No. 1 ("2021 Summons"). Koehler Paper made the following representation to the court in its summons:

> *Koehler Paper SE is the successor-in-interest to Koehler Oberkirch GmbH* (formerly known as Papierfabrik August Koehler SE) and therefore has standing to commence this action

> pursuant to 19 U.S.C. § 1516a(d) and 28 U.S.C. § 2631(c), as it is the successor-in-interest to a participant in the investigation that gave rise to the contested determination.

Id. at 1 (emphasis added) (footnote omitted). A footnote to this statement elaborated as follows:

> Effective May 3, 2021, Koehler Paper SE acquired Koehler Kehl GmbH, the legal entity that directly owns the facilities that manufacture subject merchandise, from Papierfabrik August Koehler SE. Effective November 26, 2021, Papierfabrik August Koehler SE changed its name and legal form and is now known as "Koehler Oberkirch GmbH[.]" Koehler Oberkirch GmbH is a wholly owned subsidiary of Koehler Paper SE.

Id. at 1 n.1. Koehler Paper's action was eventually consolidated into a single lead case. *See Matra Ams., LLC v. United States*, 48 CIT __, __, 681 F. Supp. 3d 1339, 1357–58 (2024).

To sum up the Government's allegations: Papierfabrik August Koehler AG produced thermal paper and exported it to the United States. It then changed its corporate form to become Papierfabrik August Koehler SE, which in turn participated in a two-step "spin-off" that consisted of (1) the creation of Koehler Paper and (2) the transfer to Koehler Paper of certain assets and liabilities. What remained of Papierfabrik August Koehler SE then underwent a "statutory conversion" to become Koehler Oberkirch. And as of 2021, Koehler Oberkirch is a wholly owned subsidiary of Koehler Paper.

III. Procedural History

On January 24, 2024, the Government initiated this action "against Koehler Oberkirch GmbH and its successor-in-interest, Koehler Paper SE, to recover unpaid antidumping duties and pre-liquidation interest . . . ." Compl. ¶ 1; *see* Summons, Jan. 24, 2024, ECF No. 1; Confidential Am. Compl., Oct. 22, 2024, ECF No. 42. The Government moved for a court order permitting service of the Summons on Defendants through their U.S.-located counsel on April 22, 2024. *See* Mot. for Alternative Service, Apr. 22, 2024, ECF No. 7. The court granted this motion on August 21, 2024, *see Alternative Service Order*, 48 CIT __, 728 F. Supp. 3d 1322, and the Government delivered the Summons to Defendants' counsel in Washington, DC on August 22, 2024, *see* Proof of Service, Aug. 27, 2024, ECF No. 27. Defendants then moved to certify the *Alternative Service Order* for interlocutory appeal to the Federal Circuit pursuant to 28 U.S.C. § 1292, *see* Am. Mot. for Certification of Appealability, and this court denied that motion on October 10, 2024, *see Certification Denial*, 48 CIT __, 731 F. Supp. 3d 1377. Defendants then petitioned the Federal Circuit for a writ of mandamus that would reverse the *Alternative Service Order*. *See* Pet. for Writ of Mandamus, *In re Koehler Oberkirch GmbH*, No. 2025–106 (Fed. Cir. Oct. 31, 2024). The Federal Circuit denied this petition on January 16, 2025, explaining that this court did not clearly exceed its authority in ordering alternative service. *See In re Koehler Oberkirch GmbH*, No. 2025–106, 2025 WL 212067 (Order).

On October 24, 2024, one week before the filing of the mandamus petition, Defendants filed the instant Motion to Dismiss and concurrently filed a motion for oral argument. *See* Mot. to Dismiss; Mot. for Oral Arg., Oct. 24, 2024, ECF No. 44. The Government responded to the Motion to Dismiss on November 27, 2024, *see* Pl.'s Resp. in Opp'n to Mot. to Dismiss, Nov. 27, 2024, ECF No. 46 ("Pl.'s Resp."), and Defendants filed a reply on December 18, 2024, *see* Defs.' Reply in Supp. of Mot. to Dismiss, Dec. 18, 2024, ECF No. 47 ("Defs.' Reply"). The court then granted Defendants' Motion for Oral Argument on December 23, 2024, and scheduled oral argument for January 29, 2025. *See* Order, Dec. 23, 2024, ECF No. 48. The court issued substantive questions to the parties in advance of oral argument and solicited written responses. *See* Letter from the Ct., Jan. 14, 2025, ECF No. 49 ("Ct.'s Oral Arg. Qs."). The parties timely submitted these responses. *See* Pl.'s Resp. to Ct. Order, Jan. 24, 2025, ECF No. 51 ("Pl.'s OAQ Resp."); Defs.' Resp. to Ct. Order, Jan. 24, 2025, ECF No. 52 ("Defs.' OAQ Resp."). At oral argument, which took place as scheduled, the court invited the parties to file post-argument submissions; both parties again responded with timely written submissions. *See* Pl.'s Post-Arg. Submission; Defs.' Post-Arg. Submission, Feb. 5, 2025, ECF No. 55.

With all filings in hand, the court turns to the merits of Defendants' Motion to Dismiss.

JURISDICTION AND STANDARD FOR DETERMINATION

The court has subject matter jurisdiction under 28 U.S.C. § 1582, which vests the U.S. Court of International Trade with exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States . . . (3) to recover customs duties." *See* Compl. ¶ 1.

Defendants' Motion to Dismiss challenges the sufficiency of the allegations of the Complaint as a basis for personal jurisdiction. *See* Mot. to Dismiss at 3–5. In this procedural posture the court "must accept the uncontroverted allegations in the plaintiff's complaint as true and resolve any factual conflicts in the affidavits in the plaintiff's favor." *Elecs. for Imaging, Inc. v. Coyle*, 340 F.3d 1344, 1349 (Fed. Cir. 2003); *see also M-I Drilling Fluids UK Ltd. v. Dynamic Air Ltda.*, 890 F.3d 995, 999 (Fed. Cir. 2018). "[I]n the absence of an evidentiary hearing, a plaintiff need only make a prima facie showing that defendants are subject to personal jurisdiction." *Genetic Veterinary Scis., Inc. v. LABOKLIN GmbH & Co. KG*, 933 F.3d 1302, 1309 (Fed. Cir. 2019).

DISCUSSION

As noted above, Defendants seek dismissal on two grounds. They first argue that dismissal is warranted under USCIT Rule 12(b)(5) because the Government's completion of service of process through Defendants' U.S. counsel "was improper and insufficient." Mot. to Dismiss at 2. They next argue that Koehler Paper is not subject to the court's personal jurisdiction because it lacks the minimum contacts to the forum United States that would satisfy due process. *Id.* at 3–5. The court addresses these arguments in turn.

I. Dismissal for Insufficient Service of Process Is not Warranted

Defendants state that the Government's service was procedurally insufficient. *See* Mot. to Dismiss at 2–3. They accordingly contend that the court should dismiss this action under USCIT Rule 12(b)(5), which provides for a defense of insufficient service of process. *Id.* at 2. Defendants also contend that this asserted service defect warrants dismissal for lack of personal jurisdiction under USCIT Rule 12(b)(2). *Id.* (citing *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)).

Defendants do not support these contentions with any new arguments, opting instead to "incorporate by reference their prior arguments here as a matter of precaution and to avoid any appearance of waiver of this defense." *Id.* Defendants raised these "prior arguments" in their opposition to the Government's Motion for Alternative Service. *See* Defs.' Resp. in Opp'n to Mot. for Alt. Serv. at 3–7.

The Government responds that Defendants, by simply incorporating these arguments by reference, have failed to preserve them. *See* Defs.' Resp. at 6 n.2 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 n.24 (2004)). The Government also points out that "the [c]ourt has already rejected the defendants' arguments" in the opinion accompanying the *Alternative Service Order*. *Id.*

Preserved or not, Defendants' "incorporate[d]" arguments do not persuade. As the court explained at length when it granted the Government's Motion for Alternative Service, the Government's delivery of the Summons to Defendants' U.S. counsel was a proper and sufficient means of effecting service of process. *See generally Alternative Service Order*, 48 CIT __, 728 F. Supp. 3d 1322. Defendants do not offer any reason why the court should repastinate[6] that element of its opinion. Nor do they point to any difference between the procedural postures of the Motion for Alternative Service and the instant Motion to Dismiss that might bear on the court's consideration of whether service through Defendants' U.S.-based counsel was sufficient. As it is "the practice of courts," including this one, "generally to refuse to reopen what has been decided," the *Alternative Service Order* forecloses Defendants' service-related contentions here. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *see also Shenzhen Xinboda Indus. Co. v. United States*, 42 CIT __, __, 357 F. Supp. 3d 1295, 1309 (2018) ("[T]he law of the case doctrine applies to issues that have previously been resolved.").

The court accordingly denies Defendants' Motion to Dismiss insofar as Defendants seek dismissal for insufficient service of process under USCIT Rule 12(b)(5). *See* Mot. to Dismiss at 2–3. The court also denies the Motion to Dismiss insofar as Defendants challenge personal jurisdiction on service-related grounds. *See id.*

II. Koehler Paper SE Is Subject to the Court's Personal Jurisdiction in This Matter

The court next turns to the more fully developed element of Defendants' Motion to Dismiss. Defendants argue that the court lacks specific[7] personal jurisdiction over Koehler Paper because that entity "is not alleged to have taken any action in the United States that gave rise to the allegations in the Complaint." Mot. to Dismiss at 5. Defendants contend that the Government's allegations "arise solely out of the *creation* of Koehler Paper," which was a corporate restructuring that took place within Germany under German law. *Id.* Koehler Paper, they maintain, thus lacks forum contacts that would satisfy due process. *Id.* at 3 (citing *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358–59 (2021)).

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[6] Repastinate" means "[t]o dig or cultivate again in preparation for planting." *Repastinate*, Oxford English Dictionary (rev. July 2009). It was often deployed in a figurative sense by Judge Bruce Selya, *see id.*, who for more than forty years on the United States Court of Appeals for the First Circuit was renowned for his erudition and the extraordinary vocabulary he brought to his opinions. *See* Andrew J. Kerr, *The Perfect Opinion*, 12 Wash. Univ. Juris. Rev. 221, 257–65 (2020); Frederick A. Brodie, *A Guide to 'Selyaisms'*, National Law Journal (Jan 28, 2008, 12:00 AM), https[:]//www[.]law.com/nationallawjournal/almID/1201169140964/; Trip Gabriel, *Bruce M. Selya, Federal Judge Known for Polysyllabic Prose, Dies at 90, N.Y. Times, Mar. 21, 2025, at B11.*

[7] The Government does not argue that either Defendant is subject to the court's general personal jurisdiction.

The Government responds with two reasons why Koehler Paper is subject to specific jurisdiction. *See generally* Pl.'s Resp.

The Government first advances a theory of successor jurisdiction, arguing that Koehler Paper has voluntarily inherited the jurisdictional contacts of Koehler Oberkirch. *See* Pl.'s Resp. at 6–11. This argument begins from the premise that Koehler Oberkirch uncontestedly availed itself of the forum by importing thermal paper into the United States (as Papierfabrik August Koehler AG) and accruing antidumping liability on those imports. Pl.'s Resp. at 7–8 & n.3. The Government further argues that Koehler Paper is Koehler Oberkirch's successor in interest, and finally that an entity is subject to a court's personal jurisdiction if it is the successor in interest to an entity whose forum contacts establish specific jurisdiction. *Id.* at 7–8. On this three-legged stool, the Government rests the contention that Koehler Paper is subject to the court's personal jurisdiction.

The Government's second jurisdictional theory is that Koehler Paper effectively consented to the court's assertion of personal jurisdiction in this action when it initiated a separate action before this court in 2021—an action that was eventually consolidated into the *Matra* litigation. *Id.* at 11–12; *see* 2021 Summons. This, the Government contends, is because "[w]hen a plaintiff has, 'by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.'" Pl.'s Resp. at 11 (quoting *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938)); *see also Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir. 1999) ("[W]here a party seeks affirmative relief from a court, it normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter."). The *Antidumping Duty Order* that gave rise to the unpaid duties at issue in this case has a scope that overlaps with the scope of the determination that Koehler Paper challenged (and continues to challenge) in the *Matra* litigation.[8] This similarity, the Government argues, means that Koehler Paper cannot fairly challenge one determination as a plaintiff without consenting to jurisdiction as a defendant in an action involving the other determination. Pl.'s Resp. at 12. The question this raises is whether Koehler Paper's initiation before the court of a challenge to the 2021 determination is an "action[] of the defendant [that] amount[s] to a legal submission to the jurisdiction of the court" in this action. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 704–05 (1982).

The court finds the first of the Government's theories (relating to successor jurisdiction) persuasive for the reasons set forth below. It is accordingly unnecessary to reach the second.

A. Koehler Oberkirch Undisputedly Has Sufficient Jurisdictional Contacts with the United States.

The first premise of the Government's successor-jurisdiction theory is the simplest: it is that Koehler Oberkirch, as the direct corporate continuation of the importer of record of the subject thermal paper, established sufficient contacts with the United States to render the court's exercise of personal jurisdiction over Koehler Oberkirch consistent with due process. This is correct. For one thing, Defendants have waived any due process objection to personal jurisdiction over Koehler Oberkirch. They state that "Defendants' jurisdictional argument regarding Koehler Oberkirch is limited at this time to the service of process issue." Defs.' OAQ Resp. at 1. That straightforwardly entails waiver. *See* USCIT R. 12(h)(1)(B)(i).

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[8] The scope of the *Antidumping Duty Order*:

> includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of ± 4.0 g/m^2) or less; irrespective of dimensions; with or without a base coat on one or both sides; with thermal active coating(s) on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without a top coat; and without an adhesive backing.

73 Fed. Reg. at 70960 (footnotes omitted). A footnote to this scope description further specifies that "[b]oth jumbo and converted rolls (as well as [lightweight thermal paper] in any other form, presentation, or dimension) are covered by the scope of these orders." *Id.* at 70960 n.1. The determination at issue in the *Matra* litigation, meanwhile, covers "jumbo rolls and converted rolls of thermal paper with or without a base coat . . . on one or both sides; with thermal active coating(s) . . . on one or both sides; with or without a top coat . . . , and without an adhesive backing." *Thermal Paper from Germany: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 86 Fed. Reg. 54152, 54154 (Dep't Com. Sept. 30, 2021). That description also specifies that "[a]ll jumbo rolls are included in the scope regardless of the basis weight of the paper," and that "[a]lso included in the scope are 'converted rolls' with an actual width of less than 4.5 inches, and with an actual basis weight of 70 [g/m^2] or less." *Id.*

Personal jurisdiction over Koehler Oberkirch would likely lie even without waiver. It would be surprising if the importation of 1,462 entries of thermal paper into the United States over the course of two years, for an action that directly concerns those entries, does not establish "certain minimum contacts with [the United States] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316; *see also Beverly Hills Fan*, 21 F.3d at 1565; Compl. ¶ 9.

B. Koehler Paper is Koehler Oberkirch's Successor in Interest.

The second of the Government's jurisdictional premises, by contrast, is a matter of stark disagreement. Defendants maintain that Koehler Paper is not Koehler Oberkirch's successor in interest. Defs.' Reply at 3–4; Defs.' OAQ Resp. at 1. The Government points out that in the 2021 Summons, Koehler Paper affirmed that that it *is* Koehler Oberkirch's successor in interest. *See* Pl.'s Resp. at 8 n.4; 2021 Summons. That prior statement, according to the Government, estops Defendants from now disclaiming the successor-in-interest relationship. *See* Pl.'s OAQ Resp. at 2. The Government also argues that Defendants do not "dispute that the Government's allegations, accepted as true, establish that Koehler Oberkirch's 'spin-off' to Koehler Paper deems it a successor-in-interest to Koehler Oberkirch under federal common law." Pl.'s Resp. at 8.

The court first examines the Government's estoppel contention. The text and context of the 2021 Summons do appear to undercut Defendants' current position. Recall that Koehler Paper stated, in the "[n]ame and standing of plaintiffs" field of its USCIT Form 3 filing, that "Koehler Paper SE is the successor-in-interest to Koehler Oberkirch GmbH." 2021 Summons at 1. Recall as well that Koehler Paper represented in the same filing that "Koehler Oberkirch GmbH is a wholly owned subsidiary of Koehler Paper SE." *Id.* at 1 n.1.

Read in context, this is more than just a statement that Koehler Paper is Koehler Oberkirch's general-purpose successor in interest. It is a specific statement that Koehler Paper is the successor to Koehler Oberkirch's antidumping duty liability. Because Koehler Paper filed the 2021 Summons in an action challenging the amount of antidumping duties on imports of thermal paper from Germany, *see Matra*, 48 CIT at __, 681 F. Supp. 3d at 1357, the only "interest" in the action that Koehler Paper could have inherited from Koehler Oberkirch was an interest in reducing the liability associated with those duties.

Defendants nevertheless answered "[n]o" to the court's question of whether they "maintain that 'Koehler Paper SE is the successor in interest to Koehler Oberkirch GmbH (formerly known as Papierfabrik August Koehler SE).'" Defs.' OAQ Resp. at 1; Ct.'s Oral Arg. Qs. at 3 (quoting 2021 Summons at 1).

This they cannot do. Under the rule of judicial estoppel, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)) (alteration omitted). The Federal Circuit has explained that the rule's application depends on:

> (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (internal quotations, citations, and alterations omitted) (quoting *id.* at 750–51).

Each of these circumstances pertains in this case. Defendants' earlier position that Koehler Paper is Koehler Oberkirch's successor in interest is "clearly inconsistent" with Defendants' express negation of it[9] in support of the Motion to Dismiss. *Id.*; *see* Defs.' OAQ Resp. at 1. Defendants succeeded in maintaining the earlier position in the action that began with the 2021 Summons. That action has proceeded

[9] Defendants reject the notion that the 2021 Summons is inconsistent with the Motion to Dismiss briefing, arguing that "the fact that a party may be a successor-in-interest for certain purposes (such as liability) does not mean that there is automatically personal jurisdiction based on the status of any predecessor." Defs.' Post-Arg. Submission at 2. They further argue that "because the Government's only basis for claiming jurisdiction exists in this case is fraud, and fraud was not the basis for Koehler Paper's 2021 successor-in-interest statement and that issue was never litigated, Koehler Paper has not 'admitted' it is Koehler Oberkirch's successor-in-interest for the purposes of this action." Defs.' OAQ Resp. at 2.

This conflates the issue of whether Koehler Paper is Koehler Oberkirch's successor in interest for the purpose of antidumping duty liability with the issue of whether the alleged successor-in-interest relationship permits imputing Koehler Oberkirch's jurisdictional contacts to Koehler Paper. Although judicial estoppel means that Defendants will not be heard to contradict themselves on the matter of whether a successor-in-interest relationship exists in the first place, Defendants remain free to argue—and have indeed vigorously argued—that the particular relationship here does not support the extension of personal jurisdiction over Koehler Paper. The court finds unpersuasive that latter argument for the non-estoppel-related reasons set forth below. *See infra* Section II.C.

to the stage of motions for judgment on the agency record—the matter is now before Commerce on remand—without any question arising as to the Koehler parties' standing. *See generally Matra*, 48 CIT __, 681 F. Supp. 3d 1339. And Defendants here would no doubt "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. at 751. Defendants asserted a successor-in-interest relationship to establish Article III jurisdiction in one action, and now deny that relationship's existence to contest personal jurisdiction in another. The Government cannot be fairly expected to litigate uphill both ways on the same issue.

Other jurisprudential considerations also warrant estoppel. Defendants raise certain arguments in support of the Motion to Dismiss that are irreconcilable with Defendants' representations in the 2021 Summons. For example, they argue that the Government cannot allege that "there is successor liability because it also alleged that Koehler Oberkirch *still exists*, and if the alleged predecessor 'still exists,' 'there is no successor, and therefore, no successor liability.'" Defs.' Reply at 4 (quoting *Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R.*, 153 F. Supp. 3d 778, 807 (W.D. Pa. 2015)). Does Koehler Oberkirch's continued existence mean that Koehler Paper is not after all "the successor-in-interest to a participant in the investigation that gave rise to the contested determination" in the *Matra* litigation? 2021 Summons at 1. Did Koehler Paper "therefore [lack] standing to commence [that] action"? *Id.* The Government should not bear the burden of exploring the range of these apparent contradictions for the narrow purpose of opposing Defendants' Motion to Dismiss in this action. But neither should the court, by ignoring them, risk "creat[ing] the perception that either the first or the second court was misled." *New Hampshire v. Maine*, 532 U.S. at 750 (internal quotation marks and citation omitted). Judicial estoppel—which the court may invoke "at its discretion"—is the simpler and fairer path. *Id.* (internal quotation marks and citation omitted).

In any event, the allegations in the Complaint amount to a "prima facie showing," *LABOKLIN*, 933 F.3d at 1309, that Koehler Paper is Koehler Oberkirch's successor in interest for the purpose of antidumping duty liability. The Government alleges that:

> [T]he defendants (1) concealed the full amount of Koehler's debts to Customs from their financial statements; (2) shared the same officers and directors at the time of the "spin-off"; (3) conducted the "spin-off" a few months after Koehler's debts to Customs became final and conclusive by law; (4) transferred over three-quarters of Koehler's assets to Koehler Paper SE

> without an equivalent transfer of liabilities or provisions; and (5) left Koehler with insufficient assets to pay its debts to Customs.

Compl. ¶ 50. "Because the 'spin-off' was motivated by the intent to defraud Customs," the Government further alleges, "Koehler Paper SE is liable for Koehler's debts to Customs as Koehler's successor-in-interest." Compl. ¶ 51.

These allegations facially support[10] the notion that Koehler Paper is Koehler Oberkirch's successor in interest as to Koehler Oberkirch's antidumping duty liability. The court has held that under "the majority rule on successor liability," fraud against a creditor is one of the bases for imputing a debt to a successor entity. *United States v. Ataka Am., Inc.*, 17 CIT 598, 600, 826 F. Supp. 495, 498 (1993). "[A] corporate successor is responsible for its predecessor's debts" if (*inter alia*) "the change in corporate form was motivated by the intent to defraud creditors." *Id.*; *see also United States v. Sterling Footwear, Inc.*, 41 CIT __, __, 279 F. Supp. 3d 1113, 1140–41 (2017). And as the Supreme Court explained long ago, "[t]he properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted." *Chicago, Milwaukee & St. Paul Ry. Co. v. Third Nat'l Bank*, 134 U.S. 276, 287 (1890); *see also New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934) (explaining somewhat more recently that the rule of corporate separateness "is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights"). The Bankruptcy Code further illustrates this principle of creditor protection, empowering a trustee to "avoid" a transfer of assets that is made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . ." 11 U.S.C. § 548(a)(1)(A).

The court sees no reason to depart from this settled principle here. In applying it, the court does not address whether the Government will end up demonstrating its entitlement to recover from Koehler

[10] At this procedural juncture, Defendants challenge only the notion that the Government's allegations support a valid legal basis for personal jurisdiction. They do not actively dispute the alleged jurisdictional facts themselves, and attempt instead to reserve such a challenge for a future stage of litigation. *See* Defs.' Reply at 6 ("Though for purposes of a motion to dismiss, the court must accept all well-pleaded allegations, the facts will show that the creation of Koehler Paper was not for the purpose of Koehler Oberkirch's avoidance of liability."); *see also* Oral Arg. at 5:51–6:37 (statements of John F. Wood), *available at* https://www[.]cit.uscourts[.]gov/audio-recordings-select-public-court-proceedings.

Paper—whether on the basis of fraud or on any other theory of successor liability. That question is beyond the scope of the jurisdictional inquiry that Defendants have framed for the court's consideration.[11] For now, it is enough to observe that the Government's allegations amount to a prima facie showing of a fraudulently-motivated corporate spin-off. This in turn establishes as a facial matter that Koehler Paper is Koehler Oberkirch's successor in interest as to the antidumping duty liability incurred by Papierfabrik August Koehler AG (that is, Koehler Oberkirch).

C. The Alleged Successor-in-Interest Relationship Supports Imputing Personal Jurisdiction from Koehler Oberkirch to Koehler Paper.

The court next turns to the Government's attempt to synthesize its showings that (1) Koehler Oberkirch uncontestedly has minimum jurisdictional contacts with the United States and that (2) Koehler Paper is Koehler Oberkirch's successor in interest. According to the Government, "[t]hose two points, put together, are fatal to Koehler Paper's argument that this Court lacks personal jurisdiction over it." Pl.'s Resp. at 8. The Government cites cases, from the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, Seventh, and Tenth Circuits, that with only slight variation state the general principle that "the jurisdictional contacts of a predecessor corporation may be imputed to its successor corporation without offending due process." *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 783 (7th Cir. 2003); *see also* Pl.'s Resp. at 8–9 (citing *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 227 (4th Cir. 2019); *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 653 (5th Cir. 2002); *Est. of Thomson ex rel. Est. of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); and *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1131 (10th Cir. 1991)). The Government also cites *Minnesota Mining and Manufacturing Co. v. Eco Chem, Inc.*, in which the Federal Circuit held that "[w]hen the successor in interest voluntarily steps into the shoes of its predecessor, it assumes the obligations of the predecessor's pending litigation if the court properly assumed jurisdiction over the predecessor and if the successor is properly served . . . ." 757 F.2d 1256, 1263 (Fed. Cir. 1985) (addressing the imputation of jurisdictional contacts in the context of party substitution pursuant to Federal Rule of Civil Procedure 25(c)).

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[11] By the same token, the court's holding that personal jurisdiction lies on account of fraud-based successor jurisdiction—which is limited by the jurisprudential point that one ground for denying the Motion to Dismiss is enough—does not necessarily bar recovery on any other ground of successor liability that the Government may be able to establish at the merits stage of litigation.

Defendants argue that these authorities do not support the Government's particular fraud-based theory of jurisdiction as to Koehler Paper. Although "[t]he Government appears to base its arguments in the Response for successor in interest jurisdiction on cases relying on either a 'mere continuation' or 'de facto merger' standard," they argue, "there is no allegation in the Amended Complaint supporting the notion that Koehler Paper has 'entirely stepped into the shoes' of Koehler Oberkirch to meet either of those tests." Defs.' Reply at 3–4. According to Defendants, "[n]one of [the Government's] allegations relate to any activity by Koehler Paper in the United States." Mot. to Dismiss at 5. Regardless of the "potential inequities that [might] result from a finding of an absence of personal jurisdiction," they further argue, "concerns about the logistics of recouping a judgment do not create the minimum contacts necessary to comport with the Constitution." Defs.' OAQ Resp. at 5 (citation omitted). Defendants also raise a concern that exercising personal jurisdiction over Koehler Paper would offend international comity. Defs.' Reply at 4–5 (first citing *Hawkins*, 935 F.4th at 230–32, and then citing *SEC v. Gastauer*, 93 F.4th 1, 13 (1st Cir. 2024)).

The kernel of Defendants' due-process argument is that cases like *Purdue* describe a closed universe of scenarios in which an entity that succeeds to its predecessor's liabilities will also succeed to that predecessor's jurisdictional contacts. In Defendants' view, this happens only where a corporate restructuring fails in some categorized way to cleave a successor from its predecessor; other uncategorized bases for successor liability, such as fraud, do not permit imputing personal jurisdiction from predecessor to successor.

Defendants propose a distinction without a difference. As the Fourth Circuit has observed, "[t]he great weight of persuasive authority permits imputation of a predecessor's actions upon its successor *whenever* forum law would hold the successor liable for its predecessor's actions." *City of Richmond v. Madison Mgmt. Grp.*, 918 F.2d 438, 454 (4th Cir. 1990) (emphasis in original) (internal quotation marks and citations omitted) (collecting cases). The Tenth Circuit has stated the same principle in similarly general terms: "A corporation's contacts with a forum may be imputed to its successor if forum law would hold the successor liable for the actions of its predecessor." *Williams*, 927 F.2d at 1132; *accord Patin*, 294 F.3d at 653 ("[I]t is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego *or successor of a corporation* that would be subject to personal jurisdiction in that court." (emphasis added)).

None of these authorities suggests a limitation of successor jurisdiction to certain defined sub-categories of successor liability.[12] Nor does the court see a reason to hold what these authorities did not: that each sub-category warrants separate treatment as an island with endemic jurisdictional characteristics. *Cf. Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 419 F.3d 594, 599 (7th Cir. 2005) ("It doesn't matter whether we call St. Clair APM's continuation, or APM's alter ego (the same corporation, just with a different name), or a fraudulent shield interposed between Brandon's claim and the defendants' assets. Under any of these formulations, Brandon is entitled to ignore the formation of St. Clair and treat its assets as if they were APM's." (citations omitted)).

It is Defendants' burden to overcome the "great weight of persuasive authority," *City of Richmond*, 918 F.2d at 454, to establish that imputing Koehler Oberkirch's jurisdictional contacts to its successor in interest "would be constitutionally unreasonable." *3D Sys., Inc. v. Aarotech Lab'ys, Inc.*, 160 F.3d 1373, 1379 (Fed. Cir. 1998). They do not accomplish this by simply pointing out that certain prior articulations of the successor-jurisdiction principle have appeared in cases involving non-fraud bases of successor liability. *See* Defs.' Reply at 3–4. If this factual distinction means that the reasoning adopted in *Purdue* and related cases loses its persuasive force with respect to the alleged fraudulently-motivated conduct here, Defendants do not explain why. *Cf. Moore v. Off. of Pers. Mgmt.*, 113 F.3d 216, 218 (Fed. Cir. 1997) ("Although *Wassenaar* can be distinguished on its facts on the ground adopted by the Board . . . the analysis that the court employed in *Wassenaar* dictates a similar result here.").

Nor would such an explanation take Defendants very far. On a basic level, accepting Defendants' argument would create a fraud exception to the general rule that successor liability begets successor jurisdiction. This exception would reward the very mischief that the rule exists to stamp out. As the Federal Circuit explained in *Minnesota Mining*, successor jurisdiction prevents a scenario where "the owners of the property could merely transfer legal ownership of the assets from one shell corporation to another in a different jurisdiction, putting a party whose initial suit satisfied the jurisdictional require-

[12] The Second Circuit recognized in *U.S. Bank National Ass'n v. Bank of America N.A.* that under New York law, "whether liability as a successor in interest also entails being subject to personal jurisdiction where the actions of the predecessor would have made the predecessor subject—depends on the basis of the successor liability." 916 F.3d 143, 156 (2d Cir. 2019). But even under what seems to be New York's relatively narrow approach, fraud counts among the bases for successor liability that gives rise to successor jurisdiction. *See Lelchook v. Société Générale de Banque au Liban SAL*, 67 F.4th 69, 79 & n.14 (2d Cir. 2023).

ments to the immense burden of chasing the involved assets from courtroom to courtroom." 757 F.2d at 1263.[13]

As Defendants would have it, this conduct would defeat jurisdiction so long as the transfers in question, rather than satisfying the precise elements of a facially legitimate mere continuation or de facto merger, are fraudulent. This would entail that "mere continuation" that "amount[s] to fraud" supports personal jurisdiction but that conduct that is actually fraudulent does not. 15 William Meade Fletcher et al., *Cyclopedia of the Law of Corporations* § 7124.10 (Sept. 2024 Update). Such a paradoxical result would not just elevate form over substance; it would invert the very substantive consideration that form is supposed to reflect.

On a basic level, exercising successor jurisdiction over Koehler Paper satisfies the due-process requirement that "the defendant's conduct and connection with the forum State [be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Koehler Paper is not alleged to be a passive "relief defendant [that] is not accused of any wrongdoing and 'is part of a suit only as the holder of assets that must be recovered in order to afford complete relief.'" *Gastauer*, 93 F.4th at 12 (quoting *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002)). Koehler Oberkirch, for one thing, is Koehler Paper's "wholly-owned subsidiary." 2021 Summons at 1 n.1.

Nor do the Government's allegations suggest that Koehler Paper's "only involvement in the case is [its] receipt of a unilateral transfer of money from a third party." *Id.* To the contrary. The Government alleges that Koehler Paper intentionally participated in a corporate restructuring and subsequent transfer that were "motivated by the intent to defraud Customs" in order to avoid paying a delinquent balance of antidumping duties owed to the United States. Compl. ¶ 51; *see* 19 U.S.C. § 1505(b), (d). Both Defendants allegedly "concealed the full amount of Koehler's debts to Customs from their financial statements," among other acts, in carrying out the transfer. *Id.* ¶ 50. These actions may have taken place in Germany and involved mechanisms of German corporate law, but all due process requires is that Defendants' "intentional, and allegedly tortious, actions were ex-

[13] The Federal Circuit frowned on an analogous pattern of jurisdiction-avoidant behavior in *Dainippon Screen Manufacturing Co. v. CFMT, Inc.*, bestowing a "chutzpah award[]" on a party's suggestion "that a parent company can incorporate a holding company in another state, transfer its patents to the holding company, arrange to have those patents licensed back to itself by virtue of its complete control over the holding company, and threaten its competitors with infringement without fear of being a declaratory judgment defendant." 142 F.3d 1266, 1271 (Fed. Cir. 1998).

pressly aimed at" the forum—which here is the United States. *Calder v. Jones*, 465 U.S. 783, 789 (1984).[14]

That requirement is satisfied here, notwithstanding the fact that "the alleged 'fraud' took place in a foreign country." Defs.' Post-Arg. Submission at 3. Koehler Paper allegedly targeted the United States when it (1) voluntarily assumed, as a successor in interest, the antidumping duty liability that Koehler Oberkirch uncontestedly incurred by importing thermal paper and (2) aimed to defraud a U.S. judgment creditor (indeed, the United States itself) by participating in the "spin-off." Compl. ¶ 51; *see United States v. Islip*, 22 CIT 852, 868, 18 F. Supp. 2d 1047, 1061 (1998) ("As long as Defendant purposefully directed his actions toward the forum state, it does not matter where those actions were taken."); *see also Purdue*, 338 F.3d at 784 ("In the corporate successor context, the successor corporation has chosen to stand in the shoes of its predecessor and has chosen to accept the business expectations of those who have dealt previously with that predecessor. Therefore, it can be expected to be haled into the same courts as its predecessor.").

To put this all in other terms, the Federal Circuit's *Synthes* factors support the extension of fraud-based successor jurisdiction over Koehler Paper. *See* 563 F.3d at 1297. These factors are "whether (1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to the defendant's activities with the forum, and (3) assertion of personal jurisdiction is reasonable and fair." *Id.* As to the first factor, the Government's allegations that Koehler Paper (a) attempted to defraud the United States through the "spin-off," and (b) willingly took on Koehler Oberkirch's assets and liabilities, describe a purposeful direction of activities toward the United States. As to the second factor, Koehler Paper's alleged activities relate to the very heart of the Government's claim under 28 U.S.C. § 1582(3) for the recovery of customs duties. The "spin-off" in which Koehler Paper participated, the Government

[14] For the same reason, Defendants' international comity concern is misplaced. The concern is valid in a general sense: "permitt[ing] the exercise of personal jurisdiction over foreign nonparties based on purely foreign conduct" may indeed cause other nations to "look askance." *Hawkins*, 935 F.3d at 231; *see* Defs.' Reply at 5. But as the court has already explained, Koehler Paper's alleged conduct is not "purely foreign"; it pertains directly to a debt that is a creation of United States law and is owed to the United States. This conduct allegedly targets the United States as both a forum and a judgment creditor. *Hawkins* involved a starkly different set of facts: the acquisition by a group of overseas persons of Hungarian corporate assets that lacked "any real in-forum effect." 935 F.3d at 230. "Nothing in the record," the Fourth Circuit explained, "suggests that the Respondents . . . aimed their conduct at Virginia or, more broadly, the United States as a whole." *Id.* at 231; *see also Gastauer*, 93 F.4th at 11 ("The SEC . . . characterize[es] Gastauer as a sort of successor in interest to his son with respect to the fraudulent funds. But it offers no definition of what constitutes a successor in interest, nor does it provide any explanation as to why Gastauer would meet that definition . . . .").

alleges, was a device to prevent recovery of those duties. *See* Compl. ¶ 50. And as to the third *Synthes* factor, it is most reasonable and fair to extend jurisdiction over a successor in interest that allegedly employs fraud to "voluntarily step[] into the shoes of its predecessor." *Minn. Mining*, 757 F.2d at 1263. If this court's exclusive jurisdiction did not lie in such a circumstance, any corporate judgment debtor could easily thwart the United States's efforts to obtain trade remedies adjudged to be afforded by U.S. law. That is not what fairness demands. "[T]he Due Process Clause," the Supreme Court has instructed, "may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

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The court need go no further. As the Government's showing in support of its primary successor-jurisdiction theory defeats the USCIT Rule 12(b)(2) prong of Defendants' Motion to Dismiss, the court declines at this stage to consider whether personal jurisdiction might also lie on the Government's alternative theory of Koehler Paper's consent through participation in the *Matra* litigation. *See* Pl.'s Resp. at 11–12. The successor-jurisdiction theory is a "sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels [the court] to go no further." *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 124 (2d Cir. 2020) (internal quotation marks and citation omitted). If at some future stage it becomes necessary to decide the consent issue that the Government raises, the court will do so without the need for further briefing on the underlying substantive question.

CONCLUSION

Defendants are not entitled to dismissal on either of the grounds they assert. Their defense of insufficient service of process is unsupported by any new argumentation, and the alleged jurisdictional contacts of both Koehler Oberkirch and Koehler Paper overcome their defense of lack of personal jurisdiction. *See* USCIT R. 12(b)(2), (5). For these reasons, it is hereby

ORDERED that Defendants' Motion to Dismiss, Oct. 24, 2024, ECF No. 43, is **DENIED**.

Dated: March 27, 2025
New York, New York

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

Slip Op. 25–32

OCP S.A., Plaintiff, Eurochem North America Corporation, Consolidated Plaintiff, and PhosAgro PJSC, International Raw Materials Ltd., and Koch Fertilizer LLC, Plaintiff-Intervenors, v. United States, Defendant, and The Mosaic Company and J.R. Simplot Company, Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Consol. Court No. 1:21-cv-00219

[Ordering the United States International Trade Commission to comply with the law and its own regulations regarding confidential treatment of information.]

Dated: March 27, 2025

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OPINION

Vaden, Judge:

The United States International Trade Commission (the Commission) takes a startling position in this litigation. Imagine a company receives a questionnaire from the Commission and, as part of its response, quotes verbatim an article from the front page of a major newspaper. According to the Commission, that publicly available quote is automatically confidential simply because it appeared in a questionnaire response. If anyone involved in the proceeding uses the quote publicly, they could be sanctioned, disbarred from practicing before the Commission, and even referred to the United States Attorney for criminal prosecution. Furthermore, once the Commission closes its record, no court — not this Court, the Federal Circuit, nor even the Supreme Court — can permit the quote's public use during litigation. The Commission believes the Federal Circuit's rules to the contrary are illegal.

The Commission has a practice of automatically treating all information in questionnaire responses as confidential. That practice is inconsistent with statute, regulation, precedent, and common sense. In defending its practice, the Commission claims it is the sole arbiter of what is and is not confidential and that its determination binds even the federal courts that review its determinations. The Commission's decisions have profound effects on the lives of everyday citizens, but the Commission believes it can make those decisions in complete secrecy. That is not the law, and the Commission is not a law unto itself. The Commission's practice led it to improperly redact information in the public Remand Results and the public administrative record it filed with this Court. The Commission must not afford the improperly redacted information confidential treatment.

BACKGROUND

The underlying dispute in this case involves a challenge to the Commission's affirmative injury determination in its investigation of phosphate fertilizers from Morocco and Russia. *OCP S.A. v. United States* (*OCP I*), 47 CIT __, 658 F. Supp. 3d 1297, 1300–01 (2023). The Court received extensive briefing and heard oral argument. *See id.* at 1303–1311 (recounting the proceedings). It remanded the case to the Commission after finding substantial evidence did not support the Commission's determination. *Id.* at 1324. Concerns surrounding confidentiality first appeared during this initial phase of the case. Before holding oral argument, the Court held a conference call with the parties. Audio Recording, Conf. Call Regarding Oral Arg. (Conf. Call) (June 7, 2022), ECF No. 144. During this call, counsel for the Commission urged the Court to hold the entire oral argument in closed session.[1] *Id.* at 24:33–50. The Court declined to do so and instead decided to hold a public oral argument with a confidential session at the end if necessary. *See generally* Oral Arg. Tr., ECF No. 129. The vast majority of the oral argument was held in open court, and the Court's eventual opinion was entirely public. *See id.*; *OCP I*, 47 CIT __, 658 F. Supp. 3d at 1297.

[1] A closed session would bar not only the public and the media but also the corporate officers of the parties to the case from attending.

After the Court's opinion in *OCP I* but before the Commission filed its Remand Results, the Court decided another challenge to an injury determination by the Commission. In *CVB, Inc. v. United States*, 47 CIT __, 675 F. Supp. 3d 1324, 1347 (2023), the Court upheld the Commission's determination under the harmless error standard. Shortly thereafter, the Commission filed a motion asking the Court to retract its opinion in *CVB* because it believed the opinion contained business confidential information. *CVB, Inc. v. United States* (*CVB II*), 48 CIT __, 681 F. Supp. 3d 1314, 1315 (2024). The Court denied that motion on January 8, 2024, in a written opinion. *Id.* at 1323. First, the Court found that the Commission's wholesale failure to comply with USCIT Rule 5(g)'s procedure for identifying confidential information meant that the Commission forfeited any confidentiality claim. *Id.* at 1317–19. Second, the Court found that much of the supposedly confidential information was not entitled to confidential treatment because substantially identical information was publicly available. *Id.* at 1320. This information was publicly available not only in the popular press but also from the Commission's own public hearing. *Id.*

The Commission filed its Remand Results in this case on January 17, 2024, and the administrative record for the remand proceedings on January 31, 2024. ECF Nos. 145–46, 149–50. Alerted by reports that the Remand Results contained heavy redactions, the Court reviewed the record. Order Regarding Confidentiality (Order) at 2–3, ECF No. 158; *see* Jennifer Doherty, *Trade Commission Reaffirms Fertilizer Import Injury*, LAW 360 (Jan. 18, 2024), http://bit.ly/3WbM74R (describing the Remand Results as "heavily redacted"). The Court found "numerous redactions" in both the public Remand Results and public administrative record "that appear to violate the principles elucidated in [*CVB II*]." Order at 2–3, ECF No. 158. The redacted information included broad statements about industry conditions, market prices, and information that is substantially identical to information available on domestic producers' own websites and in mandatory securities filings. *See* Order Ex. 1 at 1–12, ECF No. 159.

The Court ordered the parties to appear at an evidentiary hearing to explain and justify the redactions. Order at 5–7, ECF No. 158. The hearing took place on March 29, 2024. ECF No. 174. The parties had the opportunity to present witnesses and exhibits to explain the redactions and what harm would occur if the redacted information was not afforded confidential treatment. Order at 7, ECF No. 158. All parties waived this opportunity and declined to present witnesses or exhibits. Hr'g Tr. at 9:23–10:8, ECF No. 193.

The hearing began with the Commission explaining how it determines what information to treat as confidential. Counsel for the Commission explained that the Commission has a longstanding practice of automatically treating questionnaire responses as confidential in their entirety. *Id.* at 20:16–22. This practice, the Commission's counsel explained, is not grounded in any statute or regulation, *id.* at 20:23–21:3, but "has been long-established and relied upon by the parties." *Id.* at 35:17–18; *see also id.* at 20:16–19 (Mr. Bianchi: "Information that is submitted through questionnaires has been for decades treated differently by the Commission, as our standard practice of doing so."); *id.* at 140:13–17 (Mosaic's counsel agreeing that the Commission has a practice of treating information in questionnaires as confidential). The Commission admitted it automatically treats all information in questionnaire responses as confidential, even if the information is obviously publicly available. *Id.* at 47:12–13 (Commission's treatment of questionnaire responses is "automatic."); *id.* at 43:13–46:13 (noting the Commission would treat cited quotes from a newspaper article as confidential).

This practice differs from how the Commission treats other information sources. In other submissions, parties must specify the information for which they request confidential treatment and submit a certification affirming that "substantially identical information is not available to the public[.]" *Id.* at 19:20–20:2; *id.* at 20:16–19 (explaining that questionnaires are "treated differently by the Commission"); *see also* 19 C.F.R. § 201.6(b) (describing the procedure for submitting confidential business information to the Commission).

After discussing the Commission's practices surrounding confidentiality, the hearing turned to discussing specific information identified by the Court as publicly available. *See* Hr'g Tr. at 63:10–131:17, ECF No. 193; Order Ex. 1, ECF No. 159. The Commission responded with largely "technical argument[s]" regarding the scope of the Commission's investigation and how the narrow scope means that the information redacted in the Remand Results is more specific than the publicly available information. *See* Hr'g Tr. at 33:21–34:1, ECF No. 193. Even in cases where the redacted information in the Remand Results is publicly available verbatim, the Commission refused to agree to release the information. *See, e.g.*, *id.* at 103:11–104:21. *Compare* Remand Results at 24, ECF No. 145 (treating Mosaic's general distribution information as confidential), *with* The Mosaic Co., Annual Report (Mosaic 2022 Form 10-K) at 15 (Feb. 23, 2022), https://bit.ly/4gmB3cl (publicly describing the company's general distribution network). Two domestic producers, the Mosaic Company (Mosaic) and the J.R. Simplot Company (Simplot), also had the opportunity to present their arguments to the Court. Mosaic indicated that it did not believe some of the redacted items merit confidential treatment and would elaborate further in its supplemental briefing. Hr'g Tr. at 149:14–152:24, ECF No. 193.

The Commission, Simplot, and Mosaic all filed post-hearing supplemental briefs addressing confidentiality. The Commission — in contrast to its repeated statements at the hearing — now argues that its practice of automatically treating questionnaire responses as confidential is consistent with the statutory and regulatory scheme governing confidentiality. Def.'s Suppl. Br. at 14, ECF No. 191. The Commission also argues that, once it closes the administrative record, neither it nor any court can publicly disclose information the Commission treated as confidential. *See id.* at 6–13. To do so, the Commission says, violates the Commission's rules and could result in "disbarment from practice before the Commission, referral to the United States Attorney," or other disciplinary measures. *Id.* at 9; *see also* Hr'g Tr. at 56:6–7, ECF No. 193 (Mr. Bianchi: "I would be subject to ... criminal sanctions...."); *id.* at 161:23–24 (Mr. Greer: "I can't do that. I'll be sanctioned."); *id.* at 162:6 (Mr. Greer: "I would get sanctioned ....").

Simplot's arguments largely echo the Commission's arguments that automatically designating questionnaire responses as confidential is consistent with the statutory and regulatory scheme and that the Court lacks the power to question the Commission's designation of information as confidential. *See* Simplot's Suppl. Br. at 1–11, ECF No. 197. In addition to its legal arguments, Simplot addressed the confidentiality of specific pieces of information identified by the Court. *See id.* at 11–17. Simplot "request[s] that the Court maintain the confidentiality" of all the information related to Simplot identified as potentially publicly available or otherwise not entitled to confidential treatment. *Id.* at 17.

In its brief, Mosaic addressed each piece of information related to Mosaic that the Court identified as potentially publicly available. *See generally* Mosaic's Suppl. Br., ECF No. 195. Mosaic stated that, consistent with statements made by its counsel at the hearing, it "does not claim confidential treatment" for most of the information pertaining to Mosaic that the Court identified as publicly available. *Id.* at 1; *see also* Attach. to Mosaic's Suppl. Br. at 1, ECF No. 195. For example, the Commission redacted information on Mosaic's distribution network that Mosaic "considers ... substantially equivalent to [information] that [is] publicly available." Mosaic's Suppl. Br. at 3, ECF No. 195. Of the eight pieces of information pertaining to Mosaic identified by the Court as possibly public information, Mosaic claims that only three warrant confidential treatment — and one of those only in part. *Id.* at 1. Mosaic explains the information for which it requests confidential treatment is not publicly available and specifies how it would suffer competitive harm if that information were released. *See id.* at 2–4. Having given the parties the opportunity to submit arguments both in writing and at an evidentiary hearing, the Court will clarify the law.

STANDARD OF REVIEW

The interpretation of statutes and agency regulations are questions of law, which this Court reviews *de novo*. *See Welshans v. United States Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008). "In determining the meaning of a statutory provision," this Court "look[s] first to its language, giving the words used their ordinary meaning." *Artis v. District of Columbia*, 583 U.S. 71, 83 (2018) (citation and quotation marks omitted). The Court must stop its inquiry there if a careful examination of the ordinary meaning "yields a clear answer." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019). It will not read legislative history to "'muddy' the meaning of 'clear statutory language.'" *Id.* (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011)). These same interpretive rules apply when construing agency regulations. *See Lengerich v. DOI*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414–15 (1945)). Furthermore, *Chevron* is dead; and courts no longer defer to agencies' interpretations of their governing statutes. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled."). Nor have the parties here claimed such deference is owed. *See generally* Def.'s Suppl. Br., ECF No. 191; Simplot's Suppl. Br., ECF No. 197; Mosaic's Suppl. Br., ECF No. 195.

DISCUSSION

Congress created the International Trade Commission. Congress also passed laws governing the Commission's treatment of information, including laws limiting what information the Commission can treat as confidential and setting certain procedures for designating information as confidential. The Commission imposed further constraints on itself by promulgating regulations. The Commission's practice of automatically treating questionnaire responses as confidential violates both the laws and the regulations governing access to information from proceedings before the Commission.

When the Commission appears in federal court, a new set of rules apply. The federal courts belong to the people and are presumptively open to the public. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 421 (5th Cir. 2021) ('The Judicial Branch belongs to the American people."). Unnecessary claims of confidentiality erode public trust in the judiciary by limiting public access. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring) ("Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."); *cf. TikTok Inc. v. Garland*, 145 S. Ct. 57, 74 (2025) (Gorsuch, J., concurring) ("Efforts to inject secret evidence into judicial proceedings present obvious constitutional concerns."). They also hinder judicial efficiency and slow the administration of justice. *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1360 (Fed. Cir. 2011). To prevent these harms and manage their own dockets, federal courts — including this Court — have the power to release information that parties have inappropriately designated as confidential. *See, e.g.*, 19 U.S.C. § 1516a(b)(2)(B).

The Commission improperly redacted the public Remand Results and public administrative record that it filed with the Court, as both contain information that was erroneously designated as confidential. This information is not entitled to confidential treatment because it meets neither the statutory nor the regulatory standards. It cannot be redacted.

I.

Agencies must follow the law and their own regulations. *See Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020) ("Under deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations.") (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)). Several statutes and regulations govern access to information from Commission proceedings.

The Tariff Act of 1930 governs access to information in proceedings before the Commission. It provides that "information submitted to ... the Commission which is designated as proprietary by the person submitting the information" shall generally be treated as confidential. 19 U.S.C. § 1677f(b)(1)(A). However, it also provides a mechanism to address "unwarranted designation." *Id.* § 1677f(b)(2). The Commission may determine "that designation of any information as proprietary is unwarranted" based on "the nature and extent of the information or *its availability from public sources* ...." *Id.* (emphasis added). The Commission must then notify the person submitting the information. *Id.* Unless the person submitting the information persuades the Commission that the information has been appropriately designated as proprietary, the Commission returns the information to the submitter. *Id.*

19 U.S.C. § 1516a governs judicial review of the Commission's injury determinations in antidumping and countervailing duty cases. Section 1516a also governs how this Court treats information to which the Commission afforded confidential treatment, saying:

> The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. *Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.*

Id. § 1516a(b)(2)(B) (emphasis added).

In addition to the statutes, the Commission has promulgated regulations governing its treatment of confidential information. Chief among these is 19 C.F.R. § 201.6. Section 201.6 defines confidential business information as:

> information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

19 C.F.R. § 201.6(a)(1).

Section 201.6 further states that confidential business information "includes 'proprietary information' within the meaning of [19 U.S.C. § 1677f]" and that "[n]onnumerical characterizations of numerical confidential business information (e.g., discussion of trends) will be treated as confidential business information only at the request of the submitter for good cause shown." *Id.* (quoting 19 U.S.C. § 1677f).

This Court previously held that publicly available information is not entitled to confidential treatment. *See CVB II*, 48 CIT __, 681 F. Supp. 3d at 1319. Further, agreement among the parties to treat information as confidential does not make information confidential. *See id.* at 1316–17. When parties improperly redact information, this Court declines to afford that information confidential treatment and instead treats it as public. *See, e.g., Giorgio Foods, Inc. v. United States*, No. 1:23-cv-00133, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 84, at *5 n.6, *6 n.7 (July 17, 2024) (Baker, J.); *Jiangsu Alcha Aluminum Co. v. United States*, 48 CIT __, 712 F. Supp. 3d 1376, 1381 n.3 (2024); *Officine Tecnosider Srl v. United States*, No. 1:23-cv-00001, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 103, at *28 n.5 (Sept. 17, 2024).

The Federal Circuit limits the use of confidential information in briefs and requires parties to justify their claims of confidentiality. In antidumping and countervailing duty cases arising under 19 U.S.C. § 1516a, parties may only designate up to fifty words as confidential in their briefs. Fed. Cir. R. 25.1(d)(1)(B). The parties cannot choose to designate anything they wish as confidential. Instead, they can only designate information as confidential if it: "(1) is treated as confidential pursuant to a judicial or administrative protective order and (2) such marking is authorized by statute, administrative regulation, or court rule[.]" Fed. Cir. R. 25.1(d)(1). The parties "must be prepared to justify at oral argument any claims of confidentiality" because "[u]nnecessarily designating material in the briefs and appendix as confidential abrogates the right of public access and may hinder the court's preparation and issuance of opinions." Practice Notes to Fed. Cir. R. 25.1; *see also* Practice Notes to Fed. Cir. R. 34; *In re Violation of Rule 28(d)*, 635 F.3d at 1360 (Improper redaction "hampers [the Court's] consideration and opinion writing.").

II.

At the evidentiary hearing, the Court repeatedly asked the Commission's General Counsel if the Commission's automatic treatment of all questionnaire responses as confidential is grounded in statute or the Commission's regulations. Each time, Mr. Bianchi answered no.[2] In its briefs, the Commission backtracks. It now claims its practice of treating all questionnaire responses as confidential is consistent with the governing statute and regulation. Def.'s Suppl. Br. at 14, ECF No. 191. The Commission had it right the first time.

The Commission's practice is inconsistent with the relevant statute and the Commission's own regulation for at least three reasons. First, the Commission's practice results in treating publicly available information as confidential. Second, the Commission's practice results in inconsistent treatment of the same information based solely on how the Commission obtained it. Third, the statute and regulation do not permit the Commission to unilaterally designate information as confidential.

A.

Publicly available information is not entitled to confidential treatment under either the Commission's own regulation or the relevant statute. Any practice that results in treating public information as confidential is therefore inherently at odds with the statutory and regulatory scheme.

Beginning with the law, 19 U.S.C. § 1677f governs access to information in injury investigations before the Commission. Section 1677f provides for the protection of "proprietary information." *See* 19 U.S.C. § 1677f(b). Because publicly available information is not proprietary, Section 1677f provides no protection for publicly available information. Section 1677f recognizes this and provides a mechanism to address unwarranted designation of information as confidential. *Id.* § 1677f(b)(2). The statute explicitly provides that "availability from public sources" is one basis for finding information was improperly classified as proprietary. *Id.*

Proprietary information is information that is owned and privately held by a company. *See Proprietary*, Cambridge Dictionary, https://bit.ly/3XhgdVz (last visited Mar. 27, 2025) (defining proprietary as

[2] Hr'g Tr. at 20:25–21:3, ECF No. 193 (The Court: "Is that practice based on the text of a statute or regulation ...?" Mr. Bianchi: "No, sir."); *id.* at 35:7–12 (The Court: "Does that statute contain an exception or does the regulation contain an exception that says none of the things that we have just listed apply to questionnaires issued by the Commission?" Mr. Bianchi: "Your Honor ... no. It does not."); *id.* at 38:1–13 (The Court: "And I want to ask once again .... can you cite to me a statute or a regulation which says the normal rules regarding confidential information which are laid out in your own regulation and are laid out in the statute and are laid out in caselaw somehow don't apply to questionnaires?" Mr. Bianchi: "[W]e have procedures ... of going back to the submitter to ask the submitter whether or not they can justify it."); *see also id.* at 42:11–18 (The Court: "I'm going to ask you if you can cite to me one [case] where the Federal Circuit, the Supreme Court, [the Court of International Trade], or any other relevant legal authority ... has held that something is automatically confidential ... because it's placed in a questionnaire?" Mr. Bianchi: "No, sir. I cannot cite a case.").

"owned and legally controlled by a particular company."); *Proprietary,* BLACK'S LAW DICTIONARY 1414 (10th ed. 2014) (defining proprietary as "[o]f, relating to, or involving a proprietor" or "[o]f, relating to, or holding as property[.]"). But the courts recognize that publicly available information belongs to the public. For example, in *June Medical Servs., LLC v. Phillips*, the Fifth Circuit considered a challenge to a district court's sealing order. 22 F.4th 512, 515–16 (5th Cir. 2022). The information sealed by the district court included publicly available documents such as a "transcript of proceedings in open court," documents from government websites, and articles in the popular press. *Id.* at 516. As the Fifth Circuit explained, sealing publicly available documents is inappropriate because those documents "belong to the people." *Id.* at 520. Because publicly available information belongs to the public, it cannot be "proprietary" under Section 1677f. The Federal Circuit's rules recognize that publicly available information cannot be confidential; information that "has appeared in a filing without being marked confidential" loses its "status as subject to a protective order." Fed. Cir. R. 25.1(c)(1). In other words, public disclosure renders information non-confidential under the Federal Circuit's rules.

Turning to the Commission's own regulations, publicly available information will never meet the regulatory standard for confidential treatment. 19 C.F.R. § 201.6(a)(1) defines "confidential business information" as "information ... the disclosure of which is likely to" either: (1) "impair[] the Commission's ability to obtain" information, or (2) cause "substantial harm to the competitive position" of the party that provided the information. By definition, public information cannot be confidential. It fails to meet either prong of the test. Publicly referencing material that is already publicly available cannot impede the Commission's ability to collect information or cause competitive harm.

19 C.F.R. § 201.6(b) provides a "[p]rocedure for submitting business information in confidence." It requires that the submitter "provide ... [a] certification in writing under oath that substantially identical information is not available to the public ...." *Id.* § 201.6(b)(3), (b)(3)(iii). The Commission cites this portion of the regulation in its brief. Def.'s Suppl. Br. at 17–18, ECF No. 191. However, it fails to reckon with the language's import, instead asserting that this language somehow does not apply to questionnaire responses. *See id.* This interpretation is unreasonable; nothing in the regulation's text provides for such an exception. *See* 19 C.F.R. § 201.6(b). Despite the Commission's practice to the contrary, the questionnaires themselves state that the information responding companies submit "will be

treated as confidential by the Commission *to the extent that such data are not otherwise available to the public* ....” Blank U.S. Producers’ Questionnaire at 3, J.A. at 20,833, ECF No. 205 (emphasis added). The Commission’s practice is thus at odds with its own regulation and questionnaire — both of which recognize that publicly available information is not confidential.

Confidential business information is, as the name dictates, confidential. The Supreme Court has explained that the word confidential means something that is “secret” or “private.” *Food Mktg. Inst.*, 588 U.S. at 434 (citing WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 174 (1963)). Once information is available publicly, such as on a company’s website or in a public regulatory filing, it is no longer confidential because it is neither secret nor private.[3] The language “information ... the disclosure of which” in the Section 201.6(a)(1) definition further confirms that the regulation does not protect publicly available information. The word disclose means “to make something known publicly.” *Disclose*, CAMBRIDGE DICTIONARY, https://bit.ly/46ZqmJz (last visited Mar. 27, 2025). If something is already public, it cannot be disclosed. Accordingly, public information is not “information ... the disclosure of which” is likely to impair the Commission’s ability to collect information or cause competitive harm. 19 C.F.R. § 201.6(a)(1).

Public information will also never meet the remainder of the two-prong regulatory test in 19 C.F.R. § 201.6(a). Section 201.6(a) makes information confidential only if its disclosure would harm the Commission’s ability to collect information or cause competitive harm. Information is either public or not public. If information is public, nothing the Commission does can make it more or less public. Accordingly, there is no risk of harm — either to the Commission or to the party submitting the information — from how the Commission treats public information. Treating publicly available information as confidential is like trying to put the genie back in the bottle; it is an exercise in futility.

The Commission’s practice of automatically treating all information in questionnaire responses as confidential violates the law and the Commission’s regulations by treating publicly available information as confidential. The Commission repeatedly admits that it treats all information in questionnaire responses as confidential. *See, e.g.*, Def.’s Suppl. Br. at 14, ECF No. 191 (“[T]he Commission automati-

[3] The Commission’s position that any information placed in a questionnaire gains automatic protection leads to an absurd conclusion: Certain disclosures which are required by one agency’s regulations could — though identical — violate another agency’s regulations. *Compare* 17 C.F.R. §§ 229.101, 229.102, 229.303 (requiring an SEC registrant to disclose information about its business to the public), *with* Def.’s Suppl. Br. at 14, ECF No. 191 (“In line with ... the first clause of 19 C.F.R. § 201.6(a), the Commission automatically treats as business proprietary information all information provided in questionnaires ....”).

cally treats as business proprietary information all information provided in questionnaires ....”); Hr’g Tr. at 47:12–13, ECF No. 193 (Commission’s treatment of questionnaire responses is “automatic.”). This is true even if the information is obviously publicly available. *See, e.g.*, Hr’g Tr. at 35:19–36:21, ECF No. 193 (Commission would treat a company’s business address as confidential even if it were on the company’s public website); *id.* at 43:13–46:13 (Commission would treat cited quotes from a newspaper article as confidential).

The Commission knows its practice results in its treating as confidential information that does not meet the statutory or regulatory standard. The Court engaged in a lengthy exchange with the Commission’s General Counsel at the evidentiary hearing about what information in a questionnaire would meet the 19 C.F.R. § 201.6(a) standard for confidentiality. *See id.* at 48:15–49:22, ECF No. 193. The Court gave numerous examples that the Commission conceded would not meet the regulatory standard if anyone questioned them. *See, e.g.*, *id.* at 48:20 (Mr. Bianchi: “It would not [meet the regulatory standard] if it were questioned.”); *id.* at 48:25 (Mr. Bianchi: “If questioned, no.”); *id.* at 49:11 (Mr. Bianchi: “If it was questioned, no.”); *id.* at 49:17 (Mr. Bianchi: “If questioned, no.”); *id.* at 49:21–22 (Mr. Bianchi: “[O]n its face, if questioned, no.”). Yet, the Commission would treat that information as automatically confidential simply because it appeared in a questionnaire response; and the information “will remain confidential” unless questioned during the agency proceeding.[4] *Id.* at 47:20–21, ECF No. 193. This is in violation of the law’s plain text.

B.

The Commission’s practice of automatically treating questionnaire responses as confidential results in inconsistent treatment of the same information. Because the relevant statute and regulation apply to information, not specific documents, this approach is improper. Public information is public regardless of the document in which it appears.

Both the statute and regulation refer to confidential “information.” 19 U.S.C. § 1677f(b); 19 C.F.R. § 201.6(a)(1). Neither give any indication that information’s confidential status varies depending on the document in which it appears. The statute refers to “proprietary information.” 19 U.S.C. § 1677f(b). Whether information is proprietary — that is, whether it is owned by a company and kept from the public — does not depend on whether the Commission receives the

[4] Although the Commission represented to the Court that its processes for challenging confidentiality claims has been used in the past, the Commission admits “this rarely occurs.” Def.’s Suppl. Br. at 15 n.11, ECF No. 191; Hr’g Tr. at 25:6–22, ECF No. 193. It could not provide any examples of such proceedings.

information through a questionnaire, a brief, orally at a hearing, or through some other source. The regulation sets out a two-part test for confidentiality, allowing confidential treatment only if necessary to avoid harm to the submitter or to the Commission's ability to perform its duties. 19 C.F.R. § 201.6(a)(1). Whether releasing information to the public would harm the submitter or the Commission does not depend on how the Commission obtained the information. Instead, it depends on the information itself. Releasing truly confidential information would harm the submitter and the Commission's ability to perform its duties regardless of the source from which the Commission obtained that information.

The statute and regulation make plain that the Commission must determine what "information" is entitled to confidential treatment, not which documents. That is why this Court requires parties submitting confidential information to enclose the confidential information in brackets. USCIT R. 5(g). "Parties cannot protect information *en masse* by stamping a label atop every page" and instead "must excise only that information which is truly confidential, allowing the public to view everything else." *CVB II*, 48 CIT __, 681 F. Supp. 3d at 1316; *see also* Second Notice of Deficiency at 1–2, *PAO TMK v. United States*, No. 21-cv-00532 (CIT July 23, 2024), ECF No. 115 (Baker, J.) (explaining that redacting "entire pages ... because of the presence of some partial bracketing or a header referring to business proprietary information" is "improper"); *accord* USCIT R. 5(g).

The Freedom of Information Act (FOIA) and national security classification regimes provide useful analogues. Both require segregating confidential information at a line-by-line or word-by-word level, making public any information not entitled to confidential treatment. In the FOIA context, agencies have a duty to segregate any non-confidential portion of requested records and withhold only the confidential portion. *See, e.g.*, 5 U.S.C. § 552(b) (flush language) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."); 45 C.F.R. § 5.2(a) ("We also will consider whether partial disclosure of information is possible whenever we determine that a full disclosure of a requested record is not possible. This includes taking reasonable steps to segregate and release nonexempt information."); *Mead Data Cent., Inc. v. Dep't of Air Force,* 566 F.2d 242, 260 (D.C. Cir. 1977) ("The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). Even in the national security context, classification of entire documents is disfavored. Instead, the originating agency should "indicate which portions are classified ... and which portions are unclassified." Exec. Order No. 13,526, 75 Fed. Reg. 707, 710 (Dec. 29, 2009). When only "a small portion of an otherwise unclassified document" is classified, the "classification authority shall, whenever practicable, use a classified addendum" to allow the rest of the document to remain unclassified. *Id.*

As the FOIA and national security regimes show — and the statutory and regulatory schemes dictate — the question is not whether a document is confidential. It is whether *information* is confidential. Confidential information is confidential no matter where it appears. Public information is public no matter where it appears. Information is not afforded confidential status merely because it appears in a specific document, such as a questionnaire response. Only when the information itself meets the requisite test is the information afforded confidential treatment.

In multiple instances in the Commission's Remand Results, the Commission treated information from a questionnaire response as confidential even though the same information is public elsewhere in the Remand Results. One instance involves a description of domestic producers' distribution networks. In the Remand Results, the Commission majority notes that "the domestic industry's ... extensive inventory locations [and] expansive multi-modal distribution network" demonstrate that the domestic industry was "well-positioned to supply the U.S. market in 2019." Remand Results at 33, ECF No. 145. This type of anodyne and nonspecific information does not qualify for confidential treatment, and the Commission appropriately treated it as public in this instance. But in two other locations, the Commission treats substantially identical information as confidential because it is derived from questionnaire responses. *See id.* at 5, 32 (redacting information substantially identical to the public information); Hr'g Tr. at 114:19–116:6, ECF No. 193. Later in the Remand Results, the Commission treats the same information as public and confidential in the same sentence. *See* Remand Results at 67 n.295, ECF No. 145 ("Nutrien [ ] its US production between 2018 and 2019 and this increase was more than sufficient to cover its increase in exports ...."); Hr'g Tr. at 89:16–92:19, ECF No. 193. Although the Commission acknowledged that this "may have been [an] over bracket," it has refused to concede that the Court can release the withheld information. Hr'g Tr. at 89:16–92:19, ECF No. 193; *cf.* Blank U.S. Producers' Questionnaire at 3, J.A. at 20,833, ECF No. 205 ("[G]eneral characterizations of numerical business proprietary information (such as discussion of trends) will be treated as confidential information only at the request of the submitter for good cause shown."); 19 C.F.R. § 201.6(a)(1) (same).

Information that is public anywhere ought to be public everywhere. The Commission must determine whether information is confidential based on the information itself, not based on the type of document in which it appears. The Commission's practice of automatically treating questionnaire responses as confidential causes this problem. As the Commission acknowledged, it treats the same information differently when it appears in a questionnaire response instead of another source. Hr'g Tr. at 20:16–18, ECF No. 193 ("Information that is submitted through questionnaires" is "treated differently by the Commission."). This is illegal.

C.

The Commission's practice of automatically treating questionnaire responses as confidential bypasses the procedural requirements imposed by Congress and the Commission's own regulations. The statute and regulation each provide procedures for submitting confidential information. Both dictate that the party submitting the information — not the Commission — is responsible for designating information as confidential.

19 U.S.C. § 1677f governs access to information in proceedings before the Commission. Section 1677f requires the person submitting information, not the Commission, to designate information as confidential. For example, Section 1677f mandates that "the Commission shall disclose ... any information ... which is not designated as proprietary *by the person submitting it*." 19 U.S.C. § 1677f(a)(4)(B) (emphasis added); *see also id.* § 1677f(b)(1)(A) (The Commission "shall not disclose[]" information "which is designated as proprietary *by the person submitting the information* [.]") (emphasis added). Section 1677f also provides a mechanism for the Commission to address improper designation. *See id.* § 1677f(b)(2). This mechanism allows the Commission to request an explanation from "the person who submitted" the information and return the information to that person "[u]nless that person persuades ... the Commission that the designation is warranted[.]" *Id.* No language in Section 1677f allows the Commission to, on its own initiative, designate information as confidential when the submitting party has not requested confidential treatment. *See generally id.* § 1677f.

Section 1677f also imposes procedural restraints on the submitting party. "[T]he Commission shall require" that a party requesting proprietary treatment for information include two things with the submission of such information. *Id.* § 1677f(b)(1)(B). First, the party must include either a nonconfidential summary of the allegedly confidential information or a statement explaining why a nonconfidential summary is impossible. *Id.* § 1677f(b)(1)(B)(i). Second, the party must include a statement either allowing or not allowing the Commission to release the confidential information under a protective order. *Id.* § 1677f(b)(1)(B)(ii). The Commission's regulation provides a similar "[p]rocedure for submitting business information in confidence." 19 C.F.R. § 201.6(b). The regulation requires the party submitting the information to include a nonconfidential "written description of the ... information," a "justification for the request for its confidential treatment," and a "certification ... that substantially identical information is not available to the public." *Id.* § 201.6(b)(3)(i)–(iii). The Commission's practice of automatically treating information as confidential bypasses all these procedures.

The Commission makes much of concerns that companies will not cooperate with the Commission unless promised complete secrecy for all questionnaire responses. *See, e.g.*, Def.'s Suppl. Br. at 15–16, ECF No. 191. It strains credulity to believe that companies would stop cooperating with the Commission if the Commission began following its own rules. Those rules, after all, allow companies to designate as confidential the information they believe qualifies for confidential treatment. *See* 19 U.S.C. § 1677f; 19 C.F.R. § 201.6(b). If the Commission believes its own rules do not afford adequate protection for confidential information, the Commission is free to promulgate new rules through the appropriate processes. The Commission is not, however, free to disregard its own regulations or the laws passed by Congress. *Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 654 (1990) ("It is a familiar rule of administrative law that an agency must abide by its own regulations."); *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009) ("An agency must follow its own regulations."). And under the current statutory scheme, those laws indicate that a confidential designation is unwarranted for information "availab[le] from public sources." 19 U.S.C. § 1677f(b)(2),

III.

The Commission takes the position that it is the sole arbiter of what qualifies as confidential. This position leaves federal courts powerless to manage their own dockets by deciding what information parties may file under seal. The plain text of the statute the Commission cites for this proposition indicates just the opposite. The relevant context, including the common law right of access to judicial records, federal courts' inherent power to manage their own dockets, and the Federal Circuit's rules on confidentiality, all further disprove the Commission's contention.

19 U.S.C. § 1516a(b)(2)(B) says the following:

> The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. *Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.*

19 U.S.C. § 1516a(b)(2)(B) (emphasis added).

The statutory text states that the Court "may disclose such material under such terms and conditions as it may order." *Id.* On its face, this language allows the Court to disclose information and gives the Court discretion over what terms and conditions, if any, to impose. Section 1516a allows the Court to disclose information under "such terms and conditions as it *may* order." 19 U.S.C. § 1516a(b)(2)(B) (emphasis added). Use of the word "may" is noteworthy because it "customarily connotes discretion." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346 (2005); *see also* A. Scalia & B. Garner, Reading Law: The Interpretation Of Legal Texts (Scalia & Garner) 112 (2012) (explaining that may "is permissive"). That is particularly true when "may" is used alongside "shall," as it is in Section 1516a. *See Jama*, 543 U.S. at 346 (The word may's connotation as discretionary is "particularly apt where, as here, 'may' is used in contraposition to the word 'shall.'"). Elsewhere in Section 1516a, Congress speaks in mandatory terms. For example, "The court *shall* hold unlawful any determination, finding, or conclusion found" not to satisfy the appropriate standard of review. 19 U.S.C. § 1516a(b)(1) (emphasis added). In sum, the statute on its face allows the Court to release information it finds is not entitled to confidential treatment. The relevant context further supports this interpretation.

When Congress passes legislation regarding public access to information in the federal courts, it does so against the background of the longstanding common law right of public access to judicial proceedings. The tradition of public access to judicial proceedings predates the English common law, dating back to Ancient Rome. *Binh Hoa Le*, 990 F.3d at 418 ("The principle traces back to Roman law, where trials were *res publica* — public affairs."). Courts must have the power to enforce the right of public access because the parties have no incentive to maintain transparency. *See id.* at 417. For example, in proceedings before the Commission — as the parties explained — litigants defer to each other's confidentiality designations, even if the information designated as confidential is available from a public source. *See, e.g.*, Hr'g Tr. at 161:10–162:5, ECF No. 193. Simplot's counsel went so far as to say that, if a public *Wall Street Journal* article "refers to information that OCP has bracketed, I'm not going to put *The Wall Street Journal* on rebutting this thing and saying this is public, this is what's in their bracketed information[.]" *Id.* at 161:20–23; *see Binh Hoa Le*, 990 F.3d at 419 (quoting *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 211 (5th Cir. 2019)). The right of public access is all the more important when the case involves a "public entity or official" like the Commission. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *see also Smith v. U.S. Dist. Ct. for S. Dist. of Illinois*, 956 F.2d 647, 650 (7th Cir. 1992) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party ....") (quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)).

Courts apply a presumption against reading statutes to abrogate the common law. *See United States v. Texas*, 507 U.S. 529, 534 (1993); Scalia & Garner at 318–19. "Statutes will not be interpreted as changing the common law unless they effect the change with clarity." Scalia & Garner at 318; *see also Texas*, 507 U.S. at 534. Section 1516a does not do so. The statute's plain text grants courts discretion to release information. The Court will not impose an atextual reading onto the statute, especially when the presumption against change in the common law disfavors such a reading.

Congress also drafted Section 1516a(b)(2)(B) against the background of federal courts' inherent power to control their own dockets. The Court of International Trade has the same inherent powers as any federal district court. *See, e.g.*, *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996) (recognizing the CIT's inherent power); *Heartland By-Prod., Inc. v. United States*, 424 F.3d 1244, 1251–52 (Fed. Cir. 2005) (same); *see also* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of ... a district court of the United States."). That power includes the ability to seal and unseal information filed with the Court. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598–99 (1978) (noting that "[e]very court has supervisory power over its own records and files" and exercise of this power is "best left to the sound discretion of the trial court"); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140–41 (2d Cir. 2004) (applying *Nixon*). This Court has previously recognized its own power to, *sua sponte*, release information that is not legally entitled to confidential treatment. *See, e.g.*, *Jiangsu Alcha*, 48 CIT __, 712 F. Supp. 3d at 1381 n.3 (declining to treat information as confidential after determining the parties forfeited any claim of confidentiality); *Giorgio Foods*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 84, at *5 n.6 (declining to treat information as confidential after determining the parties forfeited any claim of confidentiality); *id.* at *6 n.7 (declining to treat information as confidential after determining it is not entitled to confidential treatment); *Officine*, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 103, at *28 n.5. When interpreting a statute, courts should not "'lightly assume that Congress has ... depart[ed] from established principles' such as the scope of a court's inherent power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). The unambiguous statutory text here is consistent with established principles about the scope of federal courts' inherent powers so that there is no reason to depart from it.

The Federal Circuit's rules recognize federal courts' power to control their own dockets, including by limiting what parties may file under seal. Unnecessary redactions not only "ignore[] the requirements of public access," but also "hamper[] [the Court's] consideration and opinion writing." *In re Violation of Rule 28(d)*, 635 F.3d at 1360. Accordingly, the Federal Circuit's rules limit what parties may file under seal. In most appeals from the Court of International Trade, a party may only redact up to fifty words from its brief. Fed. Cir. R. 25.1(d)(1)(B). The parties do not have free rein to redact anything they wish. Redactions are limited to situations where information: "(1) is treated as confidential pursuant to a judicial or administrative protective order and (2) such marking is authorized by statute, administrative regulation, or court rule." *Id.* R. 25.1(d)(1). The second prong of this rule demonstrates that an agency's unilateral decision to treat information as confidential does not bind the courts. If an agency's treatment of information as confidential is not "authorized by statute, administrative regulation, or court rule," the information cannot be treated as confidential before the Federal Circuit. *Id.* The parties must be prepared to justify any redactions, indicating that the court — not the Commission — has the final say on what is and is not confidential. *See* Practice Notes to Fed. Cir. R. 25.1; Practice Notes to Fed. Cir. R. 34.

Finally, following the Commission's reading to its logical conclusion only further supports reading Section 1516a in accordance with its plain meaning. The Commission's reading has broad practical consequences. The Commission's claims mean it could afford confidential treatment to the whole administrative record, and this Court would be forced to conduct its work of reviewing the Commission's determinations entirely in secret. So too for the Federal Circuit and even the Supreme Court. This is not the first time the Commission has declared that it is a law unto itself. *See Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937–41 (Fed. Cir. 1990) (rejecting the Commission's claim that it could not be ordered to make a redetermination by the CIT). If the federal courts cannot impose procedural restraints on executive branch agencies beyond those required by statute, the reverse is also true: Agencies cannot dictate to the courts how to conduct the judiciary's work. *Cf. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978).

The Commission asks the Court to interpret Section 1516a(b)(2)(B) in a manner that is contrary to the plain text, at odds with the common law background against which Congress legislated, inconsistent with historical understandings of federal courts' inherent powers, would render the Federal Circuit's rules unlawful, and would allow the Commission to unilaterally cloak judicial review of its work in secrecy. The Commission rests its argument on a single sentence in a Senate report that is more than five hundred pages long.[5] *See* S. Rep. No. 96–249 at 248 (1979); Def.'s Suppl. Br. at 9, ECF No. 191 (citing S. Rep. No. 96–249 at 248). But courts must examine "the ordinary meaning and structure of the law itself." *Food Mktg. Inst.*, 588 U.S. at 436. When the text "yields a clear answer, judges must stop." *Id.* Legislative history should "never ... be used to muddy the meaning of clear statutory language." *Id.* (quoting *Milner*, 562 U.S. at 572 (internal quotation marks omitted)). The ordinary meaning of Section 1516a(b)(2)(B) maintains the Court's discretion to release information that the Commission treated as confidential — an ability consistent with historical understandings of both the courts' inherent authority and the common law right of access to judicial proceedings. Because Congress says what it means and means what it says, that is the end of the inquiry. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

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[5] The Senate Report states: "Special provision would be made in [19 U.S.C. § 1516a(b)(2)(B)] for preserving the confidential or privileged status of any materials contained in this record, including, where the court determines it would be appropriate, the disclosure of the privileged or confidential material only under the terms of a protective order." This sentence does nothing more than explain how a court may employ a protective order. Rather than strengthening the Commission's argument, this sentence further emphasizes that it is the Court, and not the Commission, that determines the treatment of confidential information.

IV.

The Court now turns to the specific information identified in Exhibit 1, appended to its Order. *See generally* Order Ex. 1, ECF No. 159.[6] The parties were afforded an opportunity both at the hearing and in written briefing to justify their claims to confidential treatment. *See* Order at 7, ECF No. 158; Minute Order, ECF No. 175 (setting briefing schedule). This included the opportunity to present witnesses and exhibits, which the parties declined. Order at 7, ECF No. 158; Hr'g Tr. at 9:23–10:8, ECF No. 193. The Court finds that all but one piece of the information identified in Exhibit 1 is not entitled to confidential treatment. The information in the chart fits into four categories: (1) publicly available information, (2) general characterizations, (3) stale information, and (4) information that the Court finds may retain its confidential status.

A.

Publicly available information is not entitled to confidential treatment. But in numerous instances, the Commission's Remand Results treat publicly available information as confidential.

Information about domestic producers' expansive distribution and storage networks is publicly available. *See* Order Ex. 1 at 1–3, ECF No. 159; Remand Results at 5, 32–33, ECF No. 145. The Remand Results leave substantially identical information public when drawing from sources other than questionnaire responses. *See* Remand Results at 33, ECF No. 145 (The domestic industry has "extensive inventory locations [and an] expansive multi-modal distribution network[.]"). Furthermore, domestic producers publicly disclose information about their distribution networks on their websites and in annual securities filings. *See, e.g.*, Mosaic 2022 Form 10-K at 14–16 (Feb. 23, 2022), https://bit.ly/4gmB3cl (describing the company's distribution network); Nutrien, 2019 Annual Report at 12 (Feb. 19, 2020), https://bit.ly/4dQ4GBK (same). Because this information is publicly available, it is not entitled to confidential treatment. Furthermore, the anodyne and general description of domestic producers' distribution and storage networks does not risk any harm to the Commission's ability to collect information or to the competitive position of the domestic industry. *See infra* Section IV.B.

Information about Mosaic's distribution network that the company releases in securities filings and on its own website is not confidential,

[6] The Court addresses only the information in Exhibit 1. Having clarified the law, the Court expects the Commission to apply the correct analysis for the pieces of information in Exhibit 2.

but the Commission treated it as such. *See* Remand Results at 22–23, ECF No. 145. Some of the information in the description is publicly available. This includes the location of Mosaic-owned warehouses and that Mosaic uses port terminals to ship fertilizer. Mosaic discloses the location of its warehouses in annual securities filings, documents that publicly traded companies are legally obligated to file and are available to the public. Mosaic 2022 Form 10-K at 14–16, https://bit.ly/4gmB3cl; *see also* 17 C.F.R. § 229.101(c) (generally requiring a registrant to describe and to disclose "revenue-generating activities, products and/or services", "resources material to a registrant's business" such as "sources and availability of raw materials" or "human capital resources ...."); *id.* § 229.102 (requiring registrant to "[s]tate briefly" the "location and general character of the registrant's principal physical properties."). Mosaic also releases information about its Tampa, Florida port terminal on its website, including its address, storage capacity, annual shipment quantities, and the modes of transportation it accommodates. *Tampa Marine Terminal*, Mosaic Co. (May 2022), https://bit.ly/3XhKoeY. Because Mosaic discloses this information — both voluntarily and under legal obligation — the information is not confidential. Indeed, Mosaic concedes that these portions of the redacted material are not confidential. Mosaic's Suppl. Br. at 1, ECF No. 195; *cf.* 19 U.S.C. § 1677f(b) (requiring "the person submitting the information" to designate it as confidential). Mosaic's request that other information about its distribution network remain confidential is addressed later in this opinion. *See infra* Sections IV.C, D.

The number of retail locations Simplot operates is also not confidential, but the Commission redacted this information in its Remand Results. *See* Remand Results at 24, ECF No. 145; Order Ex. 1 at 2, ECF No. 159. On its website, Simplot proclaims that it delivers "top-notch service ... through over 240 locations across North America." *Locations*, Simplot Grower Solutions, https://bit.ly/4dzXASa (Apr. 21, 2024).[7] Simplot's website also contains a map of every retail location in the United States. *Id.* In its supplemental brief, Simplot states that it "defer[s] to the Commission's judgment" that this information is confidential. Simplot's Suppl. Br. at 14–15, ECF No. 197. Simplot does not suggest that it would suffer competitive harm from releasing this information, nor could it reasonably do so. *See id.* It defies common sense to believe that information on how many retail locations a company has could be confidential. Custom-

[7] Simplot's website has since been updated and now indicates the company has "over 260 locations across North America." *Locations*, SIMPLOT GROWER SOLUTIONS, https://bit.ly/4g0zykX (last visited Mar. 27, 2025).

ers, after all, can only purchase from stores if they know where those stores are. Simplot's retail locations are not speakeasies; they are open to the public and their location is broadcast for all to see. Because Simplot intentionally provides this information to the public, it cannot be confidential.

The information identified in Exhibit 1 regarding domestic producers' phosphate rock, ammonia, and sulfur production and purchasing is similarly not confidential. *See* Remand Results at 26, ECF No. 145; Order Ex. 1 at 2, ECF No. 159. For each such piece of information identified in Exhibit 1, substantially identical information is publicly available from the domestic producers themselves. *See* The Mosaic Co., Annual Report (Mosaic 2017 10-K) at 6 (Feb. 21, 2018), https://bit.ly/40DsX9d; Nutrien, 2019 Annual Report at 43, 126 (Feb. 19, 2020), https://bit.ly/4dQ4GBK; *Nutrien Announces Intention to Build World's Largest Clean Ammonia Production Facility*, NUTRIEN (May 18, 2022) https://bit.ly/3Z395ND; *Mining & Manufacturing*, SIMPLOT, https://bit.ly/3yZFn1w (last visited Mar. 27, 2025) (listing mine and plant locations throughout the western United States). Mosaic concedes that the portion of this information pertaining to Mosaic is not confidential. Attach. to Mosaic's Suppl. Br. at 4–5, ECF No. 195. Simplot and the Commission argue that this publicly available information must be redacted to prevent readers from inferring nearby confidential information. *See* Simplot's Suppl. Br. at 15, ECF No. 197; Hr'g Tr. at 110:6–9, ECF No. 193. This argument is unconvincing. The Commission could easily structure its discussion of domestic producers' phosphate rock, ammonia, and sulfur production and purchasing in a manner that protects any confidential information on this topic without redacting public information. Because it can do so, the Commission must do so. *See supra* Section II.B.

That Nutrien increased production in certain years is similarly not confidential. On pages 16 and 67 of the Remand Results, the Commission redacted information indicating — without providing any specific figures — that Nutrien increased its production in certain years. The first piece of information on page 67, a single word describing the trend in Nutrien's U.S. production between 2018 and 2019, is revealed publicly in the same sentence. *See* Remand Results at 67 n.295, ECF No. 145; Order Ex. 1 at 4, ECF No. 159. This trend is also publicly discussed elsewhere in the Remand Results. *See, e.g.*, Remand Results at 12, ECF No. 145 ("From 2017 to 2018, Nutrien increased its capacity and production at its Aurora, North Carolina and White Springs, Florida phosphate facilities."); *id.* at 17 ("[B]etween 2018 and 2019, Nutrien increased its U.S. production ...."). Nutrien also provides detailed information on phosphate production in its annual reports to shareholders. Nutrien, 2018 Annual Report at 55 (Feb. 20, 2019), https://bit.ly/4bYhh6g. This includes providing shareholders with a breakdown of annual production capacity and actual production on a facility-by-facility basis. *Id.* Because the challenged information is publicly available and descriptive of general business trends, it is not entitled to confidential treatment. *See* 19 C.F.R. § 201.6(a)(1) ("Nonnumerical characterizations of numerical confidential business information (e.g., discussion of trends) will be treated as confidential business information only at the request of the submitter for good cause shown.").

The Commission also improperly redacted another piece of information in footnote 295 on page 67. *See* Remand Results at 67 n.295, ECF No. 145; Order Ex. 1 at 4, ECF No. 159. The second piece of information describes what caused Nutrien's 400,000-ton capacity increase between 2017 and 2018. Remand Results at 67 n.295, ECF No. 145. This information was also redacted in footnote 46 on page 12, which is not noted in Exhibit 1. *See id.* at 12 n.46. Nutrien revealed the capacity increase in its 2018 annual report, where Nutrien explained that it restarted a "second MAP train" at its White Springs, Florida phosphate production facility that added ".4 million tonnes of annual capacity." Nutrien, 2018 Annual Report at 55 n.4 (Feb, 20, 2019), https://bit.ly/4bYhh6g.[8] Because this information is publicly available, it is not entitled to confidential treatment.

Finally, market prices are not confidential. The Commission redacted various information about market prices for phosphate fertilizer products, including what the Commission itself described as "public prices." *See* Remand Results at 51 n.228, ECF No. 145; Order Ex. 1 at 3–4, ECF No. 159. The Commission attributes the redacted information to Figure V-5 in its Staff Report. Remand Results at 51 n.228, ECF No. 145. Figure V-5 is unredacted in the Commission's public staff report, which alone makes this information public. Public Staff Report at V-19, J.A. at 18,718, ECF No. 205. Furthermore, Figure V-5 is merely a reproduction of a figure in the February 2020 Market Update published on Nutrien's website, reinforcing that Figure V-5 is public information. *Id.* The Commission also cites Figure V-6 from its Staff Report. Remand Results at 51 n.228, ECF No. 145.[9] Although the Commission claims Figure V-6 is confidential and re-

[8] MAP stands for monoammonium phosphate and is one of several phosphate fertilizer products. *See* Remand Results at 34 n.160, ECF No. 145.

[9] The second citation follows a "see also" introductory signal, indicating that this second figure is an "additional source" and that the public figure cited is a sufficient source for the cited proposition. Remand Results at 51 n.228, ECF No. 145; THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 63 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

dacted a parenthetical description of Figure V-6, the information in Figure V-6 is not confidential; and the description should not have been redacted. *See* Confidential Staff Report at V-20, J.A. at 98,482, ECF No. 202. As the Remand Results state, Figure V-6 shows "public prices." Remand Results at 51 n.228, ECF No. 145. The Commission argues that it can redact this information because it was compiled from multiple copyright-protected subscription publications. *See* Hr'g Tr. at 119:12–14, ECF No. 193 ("The Commission ... treats as proprietary information that's received through paid subscriptions ...."); Confidential Staff Report at V-20, J.A. at 98,482, ECF No. 202 (attributing the information in Figure V-6 to various trade publications). Even assuming this is a valid reason to afford confidential treatment to things like direct quotations, that *public market prices* appear in subscription publications does not transform the public information into confidential information. *Cf. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) ("[F]acts are not copyrightable...."); Fed. Cir. R. 25.1(c)(1) (information that appears in a public filing loses its status as confidential). Because the redacted information about market prices is publicly available, it is not entitled to confidential treatment.

B.

The second category of information is general characterizations. Even when the underlying information may be entitled to confidential treatment, general characterizations of that information are not entitled to confidential treatment. *See* 19 C.F.R § 201.6(a)(1) ("Non-numerical characterizations of numerical confidential business information (e.g., discussion of trends)" are generally not entitled to confidential treatment.); Blank U.S. Producers' Questionnaire at 3, J.A. at 20,833, ECF No. 205 (explaining that "general characterizations ... such as discussion of trends" are typically not entitled to confidential treatment). This is true because general characterizations do not reveal the specific operations of any one company, or, to the extent they do, are sufficiently anodyne to pose no risk of competitive harm. *See* 19 U.S.C. § 1677f(b)(2); 19 C.F.R. § 201.6(a)(1).

In addition to being publicly available, the information on pages 5 and 32 of the Remand Results is too general to qualify for confidential treatment. Remand Results at 5, 32, ECF No. 145. This information discusses in a broad sense domestic producers' distribution and storage networks. *See id.* The anodyne description does not reveal the individual operations of any company or provide an edge to a competing business. Mosaic "does not consider this information to be confidential[.]" Attach. to Mosaic's Suppl. Br. at 1, 4, ECF No. 195; *see* 19 U.S.C. § 1677f(b) (requiring party designation for information to be confidential). Simplot "defer[s] to the Commission's judgment on whether this *general characterization*" must remain confidential but offers no suggestion that Simplot risks competitive harm if the statement is made public. *See* Simplot's Suppl. Br. at 15–16, ECF No. 197 (emphasis added). The parties were given ample opportunity to demonstrate that this information is entitled to confidential treatment and have failed to do so.

Nonnumerical characterizations of market prices are also not confidential. The Commission treated as confidential multiple nonnumeric characterizations of phosphate fertilizer market prices. *See* Order Ex. 1 at 3–4, ECF No. 159; Remand Results at 50–51, ECF No. 145. The first instance, on page 50 of the Remand Results, is a nonnumeric description of trends in the domestic industry's sales prices. Remand Results at 50, ECF No. 145. Although Mosaic maintains that the underlying information is confidential, it concedes that the nonnumerical summary of the information in the Remand Results is sufficiently broad so as not to be confidential. Attach. to Mosaic's Suppl. Br. at 6–7, ECF No. 195. No other domestic producer claims it would suffer harm from the release of this information. *See generally* Simplot's Suppl. Br. at 11–17, ECF No. 197 (addressing other information but not the pricing information from page 50 of the Remand Results). The two redacted statements identified on page 51 of the Remand Results and found to be publicly available in the above section present a similar story. *See supra* Section IV.A, at 39–40; Remand Results at 51, ECF No. 145. Both instances involve broad, nonnumeric discussions of price trends. *See* Remand Results at 51, ECF No. 145. These nonnumeric summaries do not reveal any confidential information and are not entitled to confidential treatment.

Finally, based on the current record, the Court sees no reason to afford confidential treatment to information obtained from subscription-based trade publications. On page 49 of the Remand Results, the Commission redacts several summarizations and quotes from trade publications characterizing the state of the market in December 2019, including ranges of market prices and market conditions. *Id.* at 49; *id.* at 49 n.220. Like the information described in the preceding paragraphs, these characterizations are too general to cause injury to any specific company. Also, they are public by nature. *See supra* Section IV.A, at 39 (explaining that market prices are not confidential). To the extent the Commission argues that revealing this information would violate parties' user agreements with various subscription-based trade publications, it fails to support that claim with evidence. The Commission could have submitted copies of the user agreements or quoted the relevant terms. It has provided nothing of the kind. *See* Hr'g Tr. at 122:9–23, ECF No. 193; *id.* at 122:18–23 (The Court: "Do you have a copy of the subscription service?" Ms. McNamara: "I do not. No ...." The Court: "Is that part of the record?" Ms. McNamara: "No."). Instead, it merely states in its supplemental brief, without record support, that "the Commission's approach to subscription based services ... is to bracket information obtained since it is proprietary to the subscription service." Def.'s Suppl. Br. at 17 n.12, ECF No. 191. Without further explanation, the Commission cannot redact public, generalized information from trade publications. *See* Admin. Hr'g Tr. at 33:10–16, J.A. at 15,529, ECF No. 115 (testimony of Andy Jung, Mosaic's Vice President for Market and Strategic Analysis) ("Pricing is very transparent in this industry. Trade publications report pricing on a weekly or daily basis, so price changes are transmitted throughout the market very quickly."). The Court's finding on this point is limited to the Commission's redaction of summarizations and quotes about publicly available information like market prices and does not apply to any proprietary analysis thereof that a trade publication may have conducted.

C.

Stale information is not entitled to confidential treatment. *See Cal Steel Indus., Inc. v. United States*, No. 1:21-cv-00015, 48 CIT __, 2024 Ct. Intl. Trade LEXIS 138, at *6 (Dec. 13, 2024) ("Information may lose its confidential nature once it becomes stale.") (quoting *AmerGen Energy Co. ex rel. Exelon Generation Co. v. United States*, 115 Fed. Cl. 132, 141 (2014) (internal quotation marks omitted)). For decades, courts have held that information becomes stale — and thereby not confidential — when public disclosure of that information no longer poses a specific, concrete competitive harm. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981) ("An attempt to show that disclosure will indeed work a competitive disadvantage might be undermined if the information sought to be protected were stale."); *AmerGen Energy Co.*, 115 Fed. Cl. at 141 ("[I]t is clear that vague and speculative allegations of injury from the disclosure of years-old information are not sufficient to overcome the strong presumption favoring public access."); *Avtel Servs. v. United States*, 70 Fed. Cl. 173, 191 (2005) ("A claim that disclosure might result in competitive advantage or disadvantage also is contingent upon whether the information or material sought to be protected is stale."); *United States v. Int'l Bus. Machs. Corp.*, 67 F.R.D. 40, 49 (S.D.N.Y. 1975) (five-year old business financial statements are stale and pose no risk of competitive harm). To keep old information confidential, companies must show specific harm beyond "vague and speculative allegations of injury." *AmerGen Energy Co.*, 115 Fed. Cl. at 141.

Mosaic requests that the Court treat as confidential information on pages 22 and 23 of the Remand Results concerning some of its distribution facilities. Mosaic's Suppl. Br. at 2, 4, ECF No. 195. Mosaic believes that public disclosure of this information "would give Mosaic's competitors a roadmap to take away" its business and "would likely also harm Mosaic's ability to enter into certain types of contractual arrangements for distribution facilities[.]" *Id.* at 3. It also argues that publicly available information about its export markets "is not specific to Mosaic's phosphate fertilizer segment and is not substantially equivalent to" the redacted information. *Id.* Mosaic alleges it would be "commercially valuable to competitors to know the complete list of countries to which Mosaic exports phosphate fertilizers" and therefore harmful to it. *Id.* at 4. For both sets of information, Mosaic adds a generic claim that the likelihood of such harm "would impair the Commission's ability to conduct investigations." *Id.* at 3–4. Nutrien has offered no information regarding how disclosure of its old information would harm it.

Here, much of Mosaic's and Nutrien's confidential information noted in Exhibit 1 is stale. The information includes data collected from 2017 to 2022. *See* Order Ex. 1 at 1, ECF No. 159 (citing Remand Results at 11, 12, 17, 22–23, ECF No. 145). Neither Mosaic nor Nutrien will experience specific competitive harm if the information above is released; and the Commission's ability to conduct investigations will also not suffer. Nutrien's information is six years old. *See* Order Ex. 1 at 1, ECF No. 159 (citing Remand Results at 11, 12, 17, ECF No. 145); Nutrien, 2019 Annual Report (Feb. 19, 2020), https://bit.ly/4dQ4GBK. Likewise, the data Mosaic requests to keep confidential is between three and nine years old. *See* Order Ex. 1 at 1, ECF No. 159 (citing to Remand Results at 11, 22–23, ECF No. 145); Mosaic 2022 Form 10-K, https://bit.ly/4gmB3cl; Mosaic 2017 Form 10-K, https://bit.ly/40DsX9d. It is difficult to see the competitive harm these companies would suffer if competitors learn about years-old activities, especially when that same information is publicly available in their annual reports and Form 10-K filings. *See supra* Section IV.A. Mosaic has only claimed generalized "competitive disadvantages" that "could" harm them if the information were publicly disclosed. *See* Mosaic's Suppl. Br. at 3–4, ECF No. 195. Beyond these generalized, vague harms, Mosaic has not alleged any specific competitive harm that is likely to result from the release of the information. *See AmerGen Energy Co.*, 115 Fed. Cl. at 141 (noting "vague and speculative allegations of injury" do not suffice to keep confidential "years-old information"). Mosaic's claim that disclosure will "impair" the Commission's ability to conduct investigations is similarly unsupported. Mosaic's Suppl. Br. at 4, ECF No. 195. Because the data is years old and no party alleges any specific competitive harm, the challenged information is stale and should not be afforded confidential treatment.

D.

Some information identified in Exhibit 1 should remain confidential. *See generally* Order Ex. 1, ECF No. 159.[10] The specific numbers that identify how many customer-owned warehouses and other space arrangements Mosaic has with customers will remain confidential. Remand Results at 22–23, ECF No. 145. Unlike other information in Exhibit 1, these numbers are not publicly available, general characterizations, stale, or reasonably gleaned from Mosaic's publicly available filings. Mosaic has not shared this information on its website, and the contractual relationships are current. Because Mosaic has guarded the types of space arrangements it has with its customers from public view and release of that information would give Mosaic's competitors insight into its private contracts with customers, this information is properly classified as confidential; and the Commission properly treated it as such.

CONCLUSION

The Commission's practice of automatically redacting questionnaire responses is unlawful.[11] This practice is inconsistent with the statutory and regulatory scheme. The Commission's disregard for the legal rules governing confidentiality abrogates the public's right of access to judicial proceedings and impairs the Court's ability to decide cases and issue opinions in a timely manner. This cannot continue.

In further proceedings in the underlying case, the Commission is hereby **ORDERED** to:

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[10] The information the Court allows to remain confidential is the specific numerical information identified in Exhibit 1 from pages 22–23, except for the information Mosaic concedes is not confidential. *See generally* Order Ex. 1, ECF No. 159. The remaining information in Exhibit 1 is not entitled to confidential treatment.

[11] Notwithstanding this finding, the Court imposes no sanctions of any kind on any party or attorney.

1) Treat as public the information identified in Section IV of this opinion as not entitled to confidential treatment; and

2) Consistent with this opinion, abide by the statutes and regulations governing confidential treatment of information in filings of any kind with the Court.

Further directives in this case will follow.

SO ORDERED.

Dated: March 27, 2025
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 25–33

EVOLUTIONS FLOORING, INC. AND STRUXTUR, INC., Plaintiffs, and DUNHUA CITY JISEN WOOD INDUSTRY CO., LTD. et al., Consolidated-Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Consol. Court No. 21–00591

[Sustaining in part and remanding in part Commerce's final results in the eighth administrative review of the countervailing duty order covering multilayered wood flooring from the People's Republic of China.]

Dated: March 27, 2025

Thomas J. Trendl, Steptoe & Johnson LLP, of Washington, D.C., argued for plaintiffs Evolutions Flooring, Inc. and Struxtur, Inc. With him on the briefs was *Gregory S. McCue*.

Sarah M. Wyss, Mowry & Grimson, PLLC, of Washington D.C., argued for consolidated plaintiffs Fine Furniture (Shanghai) Ltd. and Double F Limited. With her on the briefs was *Kristin H. Mowry*.

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

Adams C. Lee, Harris Bricken McVay Sliwoski LLP, of Seattle, WA, argued for consolidated plaintiff Zhejiang Dadongwu GreenHome Wood Co., Ltd.

Kelsey Christensen, Clark Hill PLC, of Washington, D.C., argued for consolidated plaintiffs Yihua Lifestyle Technology Co., Ltd.; Lumber Liquidators Services, LLC; Jiangsu Guyu International Trading Co., Ltd.; Kingman Floors Co., Ltd.; Huzhou Sunergy World Trade Co., Ltd.; Dalian Shengyu Science and Technology Development Co., Ltd.; Jiangsu Simba Flooring Co., Ltd.; Dongtai Fuan Universal Dynamics, LLC; Zhejiang Fuerjia Wooden Co., Ltd.; and Kemian Wood Industry (Kunshan) Co., Ltd. With her on the briefs were *Mark Ludwikowski* and *William Sjoberg*.

Andrew T. Schutz, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of Washington D.C., argued for consolidated plaintiffs Baroque Timber Industries (Zhongshan) Co., Ltd. and Riverside Plywood Corporation. With him on the briefs were *Francis J. Sailer* and *Michael S. Holton*.

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

Theodore P. Brackemyre and *Timothy C. Brightbill*, Wiley Rein LLP, of Washington D.C., argued for defendant-intervenor American Manufacturers of Multilayered Wood Flooring. With them on the brief were *Stephanie M. Bell* and *Paul A. Devamithran*.

OPINION AND ORDER

* * *

Reif, Judge:

Before the court are the motions for judgment on the agency record by plaintiffs Evolutions Flooring, Inc. and Struxtur, Inc. (collectively, "Evolutions" or "plaintiff") and numerous other consolidated plaintiffs.

Plaintiffs invoke this Court's subject matter jurisdiction under 28 U.S.C. § 1581(c) and seek review of the final results of the eighth administrative review by the U.S. Department of Commerce ("Commerce") of the countervailing duty ("CVD") order on multilayered wood flooring ("MLWF" or "subject merchandise") from the People's Republic of China ("China"), published as *Multilayered Wood Flooring from the People's Republic of China: Final Results and Partial Recission of Countervailing Duty Administrative Review; 2018*, 86 Fed. Reg. 59,362 (Dep't of Commerce Oct. 27, 2021) ("*Final Results*"), PR 402.

Plaintiffs maintain that Commerce's Final Results were not supported by substantial evidence on the record and were otherwise not in accordance with law with respect to Commerce's: (1) calculation of the benchmark price for plywood; (2) inclusion of respondent's backboard purchases in the veneers for less than adequate remuneration ("LTAR") program; (3) VAT rate calculation; (4) finding based on adverse facts available ("AFA") of use of the Export Buyers Credit Program ("EBCP"); and (5) benefit calculation under the backboard veneers LTAR program.

For the reasons discussed below, the court sustains in part and remands in part Commerce's Final Results.

BACKGROUND

On December 8, 2011, Commerce issued a CVD order on MLWF from China, *Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order,* 76 Fed. Reg. 76,693 (Dep't of Commerce Dec. 8, 2011), amended by *Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 Fed. Reg. 5,484 (Dep't of Commerce Feb. 3, 2012) ("CVD Order" or "Order").[1]

[1] The amendment consisted of "remov[ing] an incorrect Harmonized Tariff Schedule of the United States ["HTS"] number from the scope of the orders." *Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 Fed. Reg. 5,484 (Dep't of Commerce Feb. 3, 2012).

On December 6, 2019, Commerce issued a notice that interested parties could request an administrative review of the Order. Department of Commerce Preliminary Decision Memorandum (Apr. 23, 2021) ("PDM") at 1, PR 340. On February 6, 2020, Commerce published a notice initiating the review. PDM at 2. The period of review extended from January 1, 2018, to December 31, 2018. PDM at 4.

Commerce selected Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. ("Senmao") and Riverside Plywood Corp. ("Riverside") as mandatory respondents ("Mandatory Respondents") because the two companies accounted for the largest volume of subject merchandise exports during the period of review based on an analysis of Customs and Border Protection data. Department of Commerce Memorandum regarding Respondent Selection (Apr. 22, 2020) at 1, 5, CR 8, PR 74.

On April 23, 2021, Commerce published its preliminary results in which it assigned countervailable subsidy rates of 9.36 percent for Riverside and its cross-owned affiliates, 5.19 percent for Senmao and 8.12 percent to the non-selected companies under review. *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, and Intent to Rescind Review, in Part; 2018,* 86 Fed. Reg. 21,693 (Dep't of Commerce Apr. 23, 2021), PR 351.

On October 27, 2021, Commerce published its Final Results in which it calculated a final subsidy rate of 9.18 percent for Riverside and its cross-owned affiliates, 5.81 percent for Senmao and 8.17 percent for the non-selected companies. *Final Results* at 59,363. The Issues and Decision Memorandum for the Final Results of the 2018 Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China was dated concurrently with and adopted by the same notice. *Id.* at 59,362 n.2; *see* Department of Commerce Issues and Decisions Memorandum (Oct. 27, 2021) ("IDM"), PR 393.

On December 1, 2021, Commerce published its amended Final Results in which it corrected certain ministerial errors. *Multilayered Wood Flooring from the People's Republic of China: Notice of Amended Final Results of Countervailing Duty Administrative Review; 2018,* 86 Fed. Reg. 68,219 (Dep't of Commerce Dec. 1, 2021).

On November 23, 2021, and on December 20, 2021, Evolutions, an importer of record of subject merchandise, filed the summons and complaint, respectively, before the Court seeking judicial review of certain aspects of the Final Results. Summons, ECF No. 1; Complaint at 1, ECF No. 13. On February 14, 2022, the court granted defendant's motion to consolidate Evolutions' action with four other actions involving the same administrative review.[2] Order Def.'s Mot. to Consol., ECF No. 30. On June 24, 2022, plaintiff and consolidated plaintiffs filed seven motions for judgment on the agency record. Mots. for J. on the Agency R., ECF Nos. 43–45, 48–51.[3]

Plaintiffs maintain that Commerce's Final Results were not supported by substantial evidence on the record and were otherwise not in accordance with law with respect to Commerce's: (1) calculation of the benchmark price for plywood; (2) inclusion of respondent's backboard purchases in the veneers for LTAR program; (3) VAT rate calculation; (4) finding based on AFA of use of the EBCP; and (5) benefit calculation under the backboard veneers LTAR program. *See, e.g.,* Baroque Mot. for J. on the Agency R. ("Baroque Br."), ECF No. 51. On November 9, 2023, the court heard oral argument. *See* Oral Arg., ECF No. 83; *see also* Oral Arg. Tr., ECF No. 84.

JURISDICTION AND STANDARD OF REVIEW

The Court exercises jurisdiction pursuant to 28 U.S.C. §1581(c). Section 516A of the Tariff Act of 1930 provides also that the court will hold unlawful any determination, finding or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i)[4]

Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," but it requires "more than a mere scintilla." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). For a reviewing court to "fulfill [its] obligation" to determine whether a determination of Commerce is supported by substantial evidence and in accordance with law, Commerce is required to "examine the record and articulate a satisfactory

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[2] These actions were filed by: (1) Dunhua City Jisen Wood Industry Co., Ltd. and Dalian Shumaike Floor Manufacturing Co., Ltd., (collectively "Dunhua and Dalian"), exporters of subject merchandise (Court No. 21–00599); (2) Baroque Timber Industries (Zhongshan) Co., Ltd. and Riverside Plywood Corporation (collectively "Baroque"), foreign producers/exporters of subject merchandise from the People's Republic of China (Court No. 21–00600); (3) Fine Furniture (Shanghai) Limited and Double F Limited (collectively "Fine Furniture"), manufacturers/exporters of the subject merchandise (Court No. 21–00601); and (4) Zhejiang Dadongwu GreenHome Wood Co. Ltd. ("GreenHome"), foreign producer and exporter of subject merchandise (Court No. 21–00602).

[3] These motions were filed by: (1) Senmao, ECF. No. 43; (2) GreenHome, ECF No. 44; (3) Fine Furniture, ECF No. 45; (4) Evolutions, ECF No. 48; (5) consolidated plaintiffs Yihua Lifestyle Technology Co., Ltd.; Dalian Shengyu Science and Technology Development Co., Ltd.; Dongtai Fuan Universal Dynamics, LLC; Huzhou Sunergy World Trade Co., Ltd.; Jiangsu Guyu International Trading Co., Ltd.; Jiangsu Simba Flooring Co., Ltd.; Kemian Wood Industry (Kunshan) Co., Ltd.; Kingman Floors Co., Ltd.; Lumber Liquidators Services, LLC; and Zhejiang Fuerjia Wooden Co., Ltd. (collectively "Lumber Liquidators"), ECF No. 49; (6) Dunhua and Dalian, ECF No. 50; and (7) Baroque, ECF No. 51.

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

explanation for its action." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016) (quoting *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013)).

Further, Commerce's determination will be sustained if it is "supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citing *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 149 (2001)), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.,* 340 U.S. at 488.

"To be in accordance with law, the agency's decision must be authorized by the statute, and consistent with the agency's regulations." *Yama Ribbons & Bows Co. v. United States,* 36 CIT 1250, 1253, 865 F. Supp. 2d 1294, 1297 (2012).

"It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50 (1983) (citations omitted). A reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 43 (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

"[W]hen a statute grants an agency power to administer fact-intensive inquires, the agency's conclusion should be reversed only if the record is 'so compelling that no reasonable factfinder' could reach the same conclusion." *Cooper (Kunshan) Tire Co. v. United States,* 45 CIT __, __, 539 F. Supp. 3d 1316, 1325 (2021) (quoting *INS v. Elias-Zacarias,* 502 U.S. 478, 484 (1992)).

DISCUSSION

I. Whether Commerce's calculation of the benchmark price for plywood is supported by substantial evidence and otherwise in accordance with law

The court addresses first Baroque's challenge to Commerce's calculation of the plywood benchmark.

A. Additional Background

In the Final Results, Commerce calculated plywood benchmark prices by weight-averaging the UN Comtrade data and the International Tropical Timber Organization ("ITTO") data placed on the record. *See* IDM at cmt. 6.

The UN Comtrade dataset consists of data covering multiple HTS categories of plywood for plywood transactions from more than 100 countries during the period of review. *See* Wiley Rein Letter regarding Administrative Case Brief (June 1, 2021) at 11 14, CR 142, PR 372. The ITTO dataset contains plywood export prices during the period of review from the European Union and Peru specific to C/CC grade plywood. *See* GDLSK Letter regarding Riverside and Baroque's Benchmark Submission (Dec. 7, 2020) at Ex. 1, CR 124, PR 196–200.

B. Legal framework

Under 19 U.S.C. § 1677(5), a countervailable subsidy exists when a foreign government provides a specific financial contribution to a party, and that party *benefits* therefrom. *See* 19 U.S.C. § 1677(5) (emphasis supplied). The countervailing duty statute establishes that a *benefit* is conferred where "goods . . . are provided . . . for less than adequate remuneration," which "[is] determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review." *Id.* § 1677(5)(E)(iv). Prevailing market conditions include "price, quality, availability, marketability, transportation, and other conditions of purchase or sale." *Id.*

To determine whether goods were provided for less than adequate remuneration, "Commerce must determine the proper benchmark price." *Essar Steel Ltd. v. United States,* 678 F.3d 1268, 1273 (Fed. Cir. 2012) (quoting 19 C.F.R. § 351.511).

Commerce regulations establish a hierarchy of three tiers — Tier One, Tier Two and Tier Three — that Commerce follows "in order of preference" to identify the appropriate benchmark that it uses to determine whether the goods or services were provided for less than adequate remuneration, as discussed below. *Beijing Tianhai Indus. Co. v. United States,* 39 CIT __, __, 52 F. Supp. 3d 1351, 1356 n.9 (2015); 19 C.F.R. § 351.511(a)(2)(i)-(iii).

When a Tier 1 benchmark is unavailable — because Commerce cannot "compar[e] the government price to a market-determined price for the good . . . resulting from actual transactions in the country in question," 19 C.F.R. § 351.511(a)(2)(i) — Commerce uses a Tier 2 benchmark. *See Beijing Tianhai Indus. Co.,* 39 CIT at __, 52 F. Supp. 3d at 1356 n.9.

Using a Tier 2 benchmark, Commerce measures the adequacy of remuneration through a world market price that would be available to purchasers in the country in question. 19 C.F.R. § 351.511(a)(2)(ii). When the record presents more than one commercially available world market price, Commerce regulations require that it "average such prices to the extent practicable, making due allowance for factors affecting comparability." *Id.* "These factors ensure that the composite benchmark reflects prevailing market conditions in the home country. The[] [factors] include 'price, quality, availability, marketability, transportation, and other conditions of purchase or sale.'" *RZBC Grp. Shareholding Co. v. United States,* 39 CIT __, __, 100 F. Supp. 3d 1288, 1305 (2015) (quoting 19 U.S.C. § 1677(5)(E)).

C. Analysis

Baroque argues that Commerce should use only the ITTO C/CC grade data in Commerce's plywood benchmark calculation because Baroque's plywood purchases are only of lower-grade plywood. Baroque Br. at 1–2. For the reasons discussed below, the court concludes that Commerce's determination is reasonable and supported by substantial evidence.

In the Final Results, Commerce weight-averaged data from the ITTO and UN Comtrade datasets to calculate a benchmark price for the provision of plywood for LTAR. *See* IDM at cmt. 6. In the IDM, Commerce explained that when the record presents more than one commercially available world market price, Commerce regulations require that it "average such prices to the extent practicable." IDM at cmt. 6 (citing 19 C.F.R. § 351.511(a)(2)(ii)).

Commerce explained further that using only the ITTO data would be inappropriate because Baroque "did not provide any official company documentation to demonstrate that its plywood input was limited to a particular grade." *Id.* Commerce noted that while Baroque provided witness statements that "may be reflective of the industry as a whole," those statements did not "represent dispositive evidence of the type of input used by" Baroque and did not "tie to any of [Baroque's] documentation in this review." *Id.* Last, Commerce asserted that "nothing on the record . . . demonstrates that different grades of plywood cannot be used to produce [the] subject merchandise." *Id.*

Baroque argues that Commerce "failed to provide a reasoned explanation based on substantial evidence for including UN Comtrade data in the Tier 2 plywood benchmark (1) that are not grade specific, (2) where indisputable evidence exists that different plywood grades have *significantly* different prices, and (3) where there is no record evidence that the UN Comtrade data include comparable grades of plywood to that used by Baroque." Consol. Pls. Baroque Timber and Riverside Plywood's Reply Br. ("Baroque Reply Br.") at 1, ECF No. 71. Specifically, Baroque asserts that Commerce failed to address adequately record information demonstrating that Baroque's "plywood input is limited to lower grade purchases," such as purchase documentation and expert witness statements. Baroque Br. at 18–19.

The court concludes that Commerce addressed adequately record information regarding Baroque's plywood purchases and that substantial evidence supports Commerce's inclusion of the UN Comtrade data in the plywood benchmark.

In the IDM, Commerce explained that it included the UN Comtrade data because Baroque failed to provide sufficient documentation in support of its assertion that its plywood purchases consisted of only grade C/D plywood. IDM at cmt. 6. Commerce added that Baroque's witness statements "may be reflective of the industry as a whole," but "do not tie to any of [Baroque's] documentation." *Id.* Therefore, Commerce stated that it had no reason to calculate the plywood benchmark using only ITTO C/CC grade data. *Id.*

The court concludes that Commerce determined reasonably that Baroque failed to demonstrate that its plywood purchases were limited to grade C/D plywood. In its response to Commerce's Third Supplemental Questionnaire, Baroque submitted as documentation of its plywood purchases various purchase orders, monthly purchase summaries and warehouse-in slips. *See* GDLSK Letter regarding Riverside and Baroque's Third Supplemental Response (Mar. 9, 2021) at Exs. TS-2 to TS-4, CR 126, PR 332–334.

None of the documentation submitted by Baroque demonstrates that Baroque purchased exclusively grade C/D plywood. Exhibits TS-2 and TS-3, while documenting Baroque's plywood purchases, do not contain any reference to the specific grade of plywood purchased. *Id.* at Exs. TS-2, TS-3. Further, although Exhibit TS-4 does specify the grade of plywood purchased, the grades listed are not consistent with Baroque's assertion that its plywood purchases were limited to C/D grade. *Id.* at Ex. TS-4. Additionally, Baroque's counsel admitted at oral argument that "none of Baroque's actual purchase documents specify what grade the different plywood should be." Oral Arg. Tr. at 8:1–3.

Accordingly, the court concludes that Commerce's decision to average the UN Comtrade and ITTO data in calculating the plywood benchmark is supported by substantial evidence.

II. Whether Commerce's inclusion of respondents' backboard purchases in the veneers for LTAR program was supported by substantial evidence and otherwise in accordance with law

The court turns next to Fine Furniture's challenge to Commerce's inclusion of backboards within the veneers for LTAR program.

A. Legal framework

"[Commerce] determines [whether] the government of a country or any public entity . . . is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of . . . merchandise" that has entered the United States. 19 U.S.C. § 1671(a)(1).

At the conclusion of an investigation leading to such a determination, Commerce publishes a countervailing duty order that imposes duties on imported merchandise covered by the order, which "includes a description of the subject merchandise, in such detail as the administering authority deems necessary." *Id.* § 1671e(a), (e)(a)(2). Subject merchandise is "the class or kind of merchandise that is within the scope of . . . an order." *Id.* § 1677(25).

To determine whether merchandise is within the scope of a CVD order, "Commerce's inquiry must begin with the order's scope to determine whether it contains an ambiguity and, thus, is susceptible to interpretation. If the scope is unambiguous, it governs." *Meridian Prods., LLC v. United States,* 851 F.3d 1375, 1381–82 (Fed. Cir. 2017) (internal quotation marks and citations omitted). Because of Commerce's expertise concerning the meaning and scope of orders, "Commerce [receives] substantial deference with regard to its interpretation of its own antidumping duty and countervailing duty orders." *Id.* (internal quotation marks and citations omitted).

"[W]hen reviewing scope determinations by the Commerce Department," the Court looks to "whether substantial evidence supports Commerce's determination and whether that determination accords with law." *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002).

B. Analysis

For the reasons discussed below, the court concludes that Commerce's inclusion of backboards in the veneers for LTAR program is supported by substantial evidence.

In the Final Results, Commerce determined that backboards "are a type of veneer used in the production of subject merchandise subject to the *Order* of this review." IDM at cmt. 9. Therefore, Commerce "included backboard purchases . . . in the provision of veneers for LTAR benefit calculation." *Id.* In the IDM, Commerce explained that "Baroque Timber's backboard purchases during the POR are veneers, based on the plain language of the scope." *Id.* Commerce highlighted the language of the scope of the CVD Order, which provides that back plies[5] are included within the scope:

> All multilayered wood flooring is included within the definition of subject merchandise, without regard to: dimension (overall thickness, thickness of face ply, *thickness of back ply*, thickness of core, and thickness of inner plies; width; and length); wood species used for the face, *back* and inner veneers; core composition; and face grade.

Id. (quoting CVD Order at 76,694) (emphases supplied).

Commerce added that the scope of the Order states that MLWF "is composed of an assembly of *two or more layers or plies of wood veneer(s)* in combination with a core," and that "a 'veneer' is a thin slice of wood, rotary cut, sliced or sawed from a log, bolt or flitch. . . . [and] *is referred to as a ply when assembled*." *Id.* (quoting CVD Order at 76,694) (emphases supplied).

Commerce asserted that Baroque did not provide "any information which would indicate that its backboards do not meet the definition of a veneer" in the scope of the Order. *Id.* Commerce noted that although Baroque argued "that its backboard input has 'different unit values, different physical characteristics, different definitions, and different end-uses,' [Baroque] also describe[d] its backboard used in the production of wood flooring as 'one solid piece of wood, which is generally used as the bottom layer.'" *Id.* (quoting GDLSK Letter regarding Riverside's Second Supplemental Response (Oct. 2, 2020) at 1, CR 92, PR 173). Commerce explained that, therefore, "in accordance with the clear language of the scope, Commerce has consistently treated all layers of wood used in the manufacture of subject merchandise as plies/veneers, regardless of where they are placed in the assembly (*e.g.*, face veneers, center or 'core' plies, or backboards)." *Id.*

Fine Furniture argues that Commerce's determination is unsupported by substantial evidence because Commerce "ignored abundant evidence that is contrary to its decision to equate backboards as veneers." Mem. Supp. Rule 56.2 Mot. J. on Agency R. of Fine Furniture ("Fine Furniture Br."), at 7, ECF No. 47.

Commerce explained adequately that the plain language of the Order's scope defines backboard as a type of veneer. Commerce noted that the scope of the Order defines MLWF as an assembly of multiple layers of veneer around a core and, contrary to Fine Furniture's argument, does not limit the definition of veneer to only the top layer

[5] The court refers to back plies and backboards interchangeably.

of MLWF. IDM at cmt. 9. Commerce added that the language of the Order's scope specifically mentions "back ply" and that assembled veneer is referred to as "ply." *Id.*

Accordingly, the court concludes that Commerce's determination that backboards are included within the scope of the CVD Order is supported by substantial evidence.

III. Whether Commerce's VAT calculation is supported by substantial evidence and otherwise in accordance with law

The court turns next to Baroque's challenge of Commerce's determination to add a 17 percent VAT rate to the benchmarks for veneers, plywood, fiberboard, glue and paint. Baroque argues that Commerce should have instead applied a 16 percent VAT rate for the portion of the POR beginning in May 2018. Baroque Br. at 33.

For the reasons discussed below, the court concludes that Commerce's determination was supported by substantial evidence because Commerce articulated a satisfactory explanation for its action. *See CS Wind Vietnam Co.*, 832 F.3d at 1376.

In the IDM, Commerce explained that although Baroque "reported paying 16 percent VAT on the purchases of inputs for LTAR after May 1, 2018, and submitted sample VAT invoices with 16 percent VAT, the GOC reported that 17 percent VAT was applicable to purchases of veneers, plywood, fiberboard, glue and paint during 2018." IDM at cmt. 13.

Baroque argues that Commerce's determination is unsupported by substantial evidence and not in accordance with law because: (1) Commerce ignored "uncontroverted record evidence demonstrating that as of May 2018, [Baroque] paid only 16 percent" VAT; and (2) Commerce "never alerted Baroque to any potential deficiency in its response with respect to the VAT rate that was reported, pursuant to 19 U.S.C. § 1677m(d)." Baroque Br. at 34.

As to Baroque's first argument, Commerce explained adequately its determination to apply the VAT rate reported by the GOC instead of the VAT rate reported by Baroque. IDM at cmt. 13. Commerce explained that the authority responsible for setting the VAT was the GOC, which certified in multiple responses that the applicable VAT for 2018 was 17 percent. *Id.*

In addition, Commerce acknowledged that Baroque "reported paying 16 percent VAT" and "submitted sample VAT invoices with 16 percent VAT," but explained nevertheless that Baroque failed to offer an explanation "as to why [Baroque's reported] VAT rate . . . differed from the VAT rate provided in the GOC's response." *Id.* Commerce, therefore, addressed Baroque's argument and its explanation was reasonable.

As to Baroque's second argument, the court concludes that Commerce's determination did not violate its obligations under § 1677m(d). Section 1677m(d) requires that if Commerce "*determines that a response to a request for information does not comply* with the request," Commerce "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." (emphasis supplied). In other words, Commerce's obligations under § 1677m(d) are triggered only when Commerce determines first that a respondent failed to comply with Commerce's request for information. *See, e.g.*, *Saha Thai Steel Pipe Pub. Co. v. United States*, 46 CIT __, __, 605 F. Supp. 3d 1348, 1361, 1365–66 (2022) ("Having identified . . . deficiencies, Commerce was immediately confronted with its statutory obligation under [§ 1677m(d)] to provide [respondent with] notice and an opportunity to cure.").

In the IDM, Commerce did not conclude that Baroque's submissions were deficient within the meaning of § 1677m(d). *See* IDM at cmt. 13. Instead, Commerce concluded that another respondent, the GOC, provided more reliable information as to the VAT rate during the POR. *Id.* Therefore, Commerce's determination was not made in violation of § 1677m(d).

For the foregoing reasons, the court concludes that Commerce's application of a 17 percent VAT rate to the benchmarks for veneers, plywood, fiberboard, glue and paint is supported by substantial evidence and in accordance with law.

IV. Whether Commerce's application of AFA to find use of the EBCP is supported by substantial evidence and otherwise in accordance with law

The court turns next to Baroque's challenge to Commerce's application of an adverse inference to find that respondents benefited from the EBCP.[6]

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[6] The EBCP is a program of the Export-Import Bank of the People's Republic of China ("China Export-Import Bank"). *Cooper (Kunshan) Tire Co. Ltd. v. United States*, 45 CIT __, __, 539 F. Supp. 3d 1316, 1322 (2021). The program "provides loans at preferential rates for the purchase of exported goods from China." *Id.* (quoting *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Countervailing Duty Administrative Review, Correction of Notification of Rescission, in Part, 2017*, 84 Fed. Reg. 58,685 (Dep't of Commerce Nov. 1, 2019) and accompanying PDM (Dep't of Commerce Oct. 10, 2019) at 25).

A. Legal framework

In its calculation of a countervailing duty, Commerce uses facts otherwise available "[i]f . . . necessary information is not available on the record," 19 U.S.C. § 1677e(a)(1), or if an interested party or any other person: (1) withholds information requested by Commerce; (2) fails to submit the information on time or in the form and manner requested by Commerce; (3) significantly impedes the proceedings; or (4) provides information that cannot be verified by Commerce. 19 U.S.C. § 1677e(a)(2)(A) — (D); *see* 19 C.F.R. § 351.308(a).

In selecting from facts otherwise available, Commerce may use an inference that is adverse to the interests of a party "if [that] party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b)(1)(A); *see* 19 C.F.R. § 351.308(a).

When Commerce uses an inference that is adverse to an interested party, Commerce may rely on information derived from: (1) the petition; (2) a final determination; (3) any previous review; or (4) any information placed on the record. 19 U.S.C. § 1677e(b)(2)(A)-(D).

The Court has repeatedly held that in an EBCP case, Commerce may apply AFA to a cooperative respondent only if Commerce does all the following: (1) defines the gap in the record by explaining exactly what information is missing from the record necessary to verify non-use; (2) establishes how the withheld information creates this gap by explaining the reason that the information the GOC refused to give was necessary to verify claims of non-use; and (3) shows that only the withheld information can fill the gap by explaining the reason that other information, on the record or accessible by respondents, is insufficient or impossible to verify. *Guizhou Tyre Co. v. United States*, 45 CIT __, __, 523 F. Supp. 3d 1312, 1361 (2021) (citing *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019)).

B. Analysis

The court addresses: (1) whether Commerce's use of AFA regarding Baroque's use of the EBCP is supported by substantial evidence and in accordance with law; and (2) whether the court should grant Commerce's remand request to evaluate further its use of AFA regarding Senmao's use of the EBCP.

For the reasons discussed below, the court concludes that Commerce's use of AFA regarding Baroque Timber's use of the EBCP is supported by substantial evidence and in accordance with law. Additionally, the court grants Commerce's voluntary remand request to evaluate further its use of AFA regarding Senmao's use of the EBCP.

1. Whether Commerce's use of AFA regarding Baroque's use of the EBCP is supported by substantial evidence and in accordance with law

The court concludes that Commerce properly: (1) defined the gap in the record created by the GOC's withholding of information; (2) established the reason that the withheld information was necessary to verify non-use; and (3) showed that only the withheld information can fill the gap by explaining the reason that other information on the record is insufficient or impossible to verify. *See Guizhou Tyre Co.*, 45 CIT at __, 523 F. Supp. 3d at 1361.

In the Final Results, Commerce found that necessary information regarding the EBCP was not on the record because the GOC withheld information that Commerce requested. IDM at cmt. 1. On this basis, Commerce drew an adverse inference to determine that Baroque benefited from the EBCP. *Id.*

In the IDM, Commerce explained that a gap in the record existed because the GOC refused to provide: (1) "a list of partner/correspondent banks that are used to disperse funds through this program"; (2) "documents making up the 'paper trail' of a direct or indirect export credit from the China EX-IM Bank" such as "specific applications, correspondence" or other "underlying [loan] documentation;" and (3) "the 2013 revisions to the administrative measures, which provide internal guidelines for how [the EBCP] is administered by the China EX-IM Bank." *Id.*

Commerce noted that it requested the 2013 Administrative Measures and the list of partner/correspondent banks in both the initial and supplemental questionnaires to the GOC and requested the documents making up the paper trail in the supplemental questionnaire to the GOC. *Id.* Commerce asserted that both times, the GOC did not provide the requested information. *Id.*

Commerce added that the GOC stated in response to Commerce's initial questionnaire "that Commerce should reevaluate the information required to establish non-use of the [EBCP], citing recent rulings from the CIT that much of the information Commerce requests regarding this program is not necessary to determine non-use." *Id.* Regarding the 2013 Administrative Measures, the GOC responded "that it does not maintain the 2013 revisions to the Administrative Measures." *Id.* Regarding the list of partner/correspondent banks, the GOC asserted that "the information Commerce requested regarding all partner/correspondent banks involved in disbursement of funds under th[e] EBCP is [] not applicable." *Id.*

Commerce explained that the GOC's refusal to provide this information "constitutes withholding necessary information and impeded

Commerce's ability to analyze the program's operation or *determine how the program could be properly verified*." *Id.* (emphasis supplied).

Regarding the list of partner/correspondent banks, Commerce elaborated that "the available record evidence indicates that under the [EBCP], credits are not direct transactions from the China EX-IM Bank to the U.S customers of the respondent exporters." *Id.* Commerce stated that instead "there can be intermediary banks involved, the identities of which the GOC has refused to provide to Commerce." *Id.* (footnote omitted).

Commerce stated further that "based on our more recent understanding of the [EBCP], . . . performing the verification steps to make a determination of whether the manufacture, production, or export of the company respondents' merchandise has been subsidized would [] require knowing the names of the intermediary banks." *Id.* (internal quotation marks omitted). Commerce explained that it would be the names of the partner/correspondent banks, "not the name 'China Ex-Im Bank,' that would appear in the subledgers of the U.S. customers if they received the credits." *Id.* Therefore, absent a list of the correspondent banks, a "careful verification of the company respondent's customers' non-use of [the EBCP] . . . would be extremely difficult, if not impossible." *Id.*

Commerce elaborated that:

> [b]ecause Commerce does not know the identities of these banks, Commerce's second step of its typical non-use verification procedures (*i.e.*, examining the company's subledgers for references to the party making the financial contribution) could not by itself demonstrate that the U.S. customers did not use the program (*i.e.*, by examining whether there were any correspondent banks in the subledger). Nor could the second step be used to narrow down the company's lending to a subset of loans likely to be the export buyer's credits (*i.e.*, loans from the correspondent banks). Thus, verifying non-use of the program without knowledge of the correspondent banks would require Commerce to view the underlying documentation for all entries from the subledger to attempt to confirm the origin of each loan — *i.e.*, whether the loan was provided from the China EX-IM Bank via an intermediary bank. This would be an extremely onerous undertaking for any company that received more than a small number of loans.

Id.

Regarding the missing "paper trail," Commerce explained that such documents "would be necessary even if the GOC provided the list of correspondent banks." *Id.* Commerce elaborated with the following example:

> For instance, assuming that one of the correspondent banks is HSBC, Commerce would need to know how to differentiate ordinary HSBC loans from loans originating from, facilitated by, or guaranteed by the China EX-IM Bank. In order to do this, Commerce would need to know what underlying documentation to look for in order to determine whether particular subledger entries for HSBC might actually be China EX-IM Bank financing: specific applications, correspondence, abbreviations, account numbers, or other indicia of China EX-IM Bank involvement.

Id. In other words, Commerce asserted that it "would not be able to verify which loans were normal loans versus [EBCP] loans due to its lack of understanding of what underlying documentation to expect to review." *Id.*

Regarding the 2013 Administrative Measures, Commerce stated that such information is required to verify non-usage because "without a thorough understanding of the [EBCP], Commerce might not recognize indicia of [China Export-Import Bank] involvement." *Id.* Commerce elaborated that:

> [b]ecause the [EBCP] changed in 2013 and the GOC has not provided details about these changes, Commerce has outstanding questions about how this program currently functions, *e.g.*, whether the China EX-IM Bank limits the provision of export buyer's credits to business contracts exceeding $2 million, and whether it uses third-party banks to disburse/settle export buyer's credits. Such information is critical to understanding how export buyer's credits flow to and from foreign buyers and the China EX-IM Bank and forms the basis of determining countervailability. Absent the requested information, and without a full understanding of the involvement of third-party banks, the mandatory respondents' (and their customers') claims of non-use are not verifiable.

Id.

Commerce summarized that, absent the requested information, it "simply do[es] not know what to look for when [it] look[s] at a loan to determine whether the China Ex-Im Bank was involved or whether a given loan was provided under the EBC program." *Id.*

Baroque argues that the "missing" information identified by Commerce does not create a gap in the record. Baroque Br. at 21–22.

Baroque states that "[e]ven if this information was [sic] critical to Commerce's 'understanding,' the information was only [sic] critical to *understanding* the operation of the program and not *establishing usage* of this program." *Id.* at 29 (emphases supplied). Baroque asserts that a gap in the record did not exist because "the record of this case contains overwhelming and consistent evidence demonstrating that Baroque's customers did not use the EBCP." *Id.* at 28.

This Court has previously held that "[i]t is within the discretion of Commerce to determine how to verify . . . and due deference will be given to the expertise of the agency." *Cooper (Kunshan) Tire Co. v. United States,* 46 CIT __, __, 610 F. Supp. 3d 1287, 1309 (2022) (alterations in original). Notwithstanding the foregoing, "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." *Id.* (quoting *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009)).

The court concludes that Commerce explained adequately the reason that only the withheld information can fill the gap and that "no other information on the record is sufficient or possible to verify." *Id.* __, 610 F. Supp. 3d at 1311.

In the IDM, Commerce noted that Baroque provided non-use certifications from only a minority of its U.S. customers. IDM at cmt. 1; *see also* GDLSK Letter regarding Riverside's Initial Questionnaire Response (July 13, 2020), Ex. 11a-c, CR 27–50, PR 106. In its briefing, the government explained that "[i]n order for Commerce to determine use (or non-use) of the [EBCP], *all* of the respondent's U.S. customers must be willing to participate in the review because any benefit calculation for this program would need to take all reported U.S. customers into account." Def.'s Resp. to Pls.' Mots. for J. on the Agency R. ("Def. Br.") at 36, ECF No. 59 (emphasis supplied). The government argues that because "the majority of [Baroque's] U.S. customers did not provide such certifications, Commerce reasonably determine[d] that any further evaluation would be insufficient for purposes of verifying non-use." *Id.*

This Court has upheld Commerce's determination to fill the gap of missing information on the record when *all* of a respondent's U.S. customers have provided EBCP non-use declarations and record evidence does not establish that any of these customers used the EBCP. *See Changzhou Trina Solar Energy Co. v. United States,* 41 CIT __, __, 255 F. Supp. 3d 1312, 1317–18 (2017). Here, Baroque has not submitted gap-filling non-use declarations for all its U.S. customers.

Additionally, as outlined above, Commerce explained the reason that the withheld information was necessary to verify non-use of the EBCP.

Accordingly, the court concludes that Commerce's decision to apply AFA to Baroque's use of the EBCP is supported by substantial evidence and in accordance with law.

2. Whether the court should grant Commerce's remand request to evaluate further its use of AFA regarding Senmao's use of the EBCP

The court grants Commerce's voluntary remand request to evaluate further Commerce's use of AFA regarding Senmao's use of the EBCP.

As noted above, "[w]hen Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to the exporter/producer . . . it is expected to consider such evidence." *Cooper (Kunshan) Tire Co.*, 46 CIT at __, 610 F. Supp. 3d at 1312. In prior proceedings, Commerce has found no gap in a record that "consisted of non-use affidavits without any evidence contradicting non-use." *Guizhou Tyre Co. v. United States,* 43 CIT __, __, 399 F. Supp. 3d 1346, 1352 (2019).

Here, Commerce requested that Senmao "report all types of financing provided by the China [EX-IM] Bank" and that Senmao reported that none of its customers used the EBCP. PDM at 19. Commerce explained that to support Senmao's claims of non-use, Senmao provided certifications from all its U.S. customers. IDM at cmt. 1 (citing Letter from Husch Blackwell LLP regarding Senmao's Initial Questionnaire Response (July 6, 2020), Ex. 8).

An "agency may request a remand, without confessing error, to reconsider its previous position." *SKF USA Inc. v. United States,* 254 F.3d 1022, 1028 (Fed. Cir. 2001).

As noted above, this Court has upheld Commerce's determination to fill the gap of missing information on the record when *all* of a respondent's U.S. customers have provided EBCP non-use declarations and record evidence does not establish that any of these customers used EBCP. *Trina Solar,* 41 CIT at __, 255 F. Supp. 3d at 1317–18. This Court has instructed Commerce to reconsider its decision to apply AFA to the use of the EBCP by a respondent's U.S. customers when *all* of those customers submitted non-use declarations without record evidence contradicting non-use. *See Risen Energy Co. v. United States*, 47 CIT __, __, 658 F. Supp. 3d 1364, 1371 (2023) (remanding "for Commerce to consider Risen's rejected filing with the other accepted response as complete non-use certifications"); *Guizhou Tyre Co.,* 43 CIT at __, 399 F. Supp. 3d at 1351.

Here, Commerce has requested that the court remand this case to Commerce "to further evaluate whether there is sufficient information available or that could be requested that may be sufficient to fill the gap of missing record information to verify claims of non-use on behalf of Senmao." Def. Br. at 36. The court grants Commerce's remand request.[7]

V. Commerce's voluntary remand request to correct an inadvertent error in its calculations for backboard veneer

The court turns last to Commerce's request for a voluntary remand to allow Commerce to correct an inadvertent error in its calculation of average unit values ("AUVs") for Baroque's purchases of fiberboard and veneer.

A. Legal framework

"[T]he agency may request a remand because it believes that its original decision was incorrect on the merits and wishes to change the result. . . . Remand to an agency is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or *erroneous calculations*." *SKF USA Inc.,* 254 F.3d at 1028–29 (emphasis supplied).

The Court has "considerable discretion" in deciding whether to grant a request for voluntary remand by Commerce. *Nucor Tubular Prods. Inc. v. United States*, 47 CIT __, __, 619 F. Supp. 3d 1279, 1286 (2023) (citing *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1378 (Fed. Cir. 2011)). "[I]f the agency's concern is substantial and legitimate, a remand is usually appropriate." *SKF USA Inc.*, 254 F.3d at 1029.

An agency's concerns are "substantial and legitimate" if: (1) the agency has provided compelling justification for its remand request; (2) the need for finality does not outweigh the justification for voluntary remand; and (3) the scope of the remand request is appropriate. *See, e.g.*, *Sea Shepherd N.Z. v. United States*, 44 CIT __, __, 469 F.

[7] The court notes that there is no opposition to Commerce's remand request. Reply Br. of Consol. Pl. Senmao at 1, ECF No. 66 (supporting remand request); Reply Br. of Consol. Pl. GreenHome at 1, ECF No. 67 (supporting remand request); Reply Br. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. of Consol. Pls. and Pl.-Intervenors Fine Furniture at 11, ECF No. 69 (supporting remand request); Pls.' Reply Br. to Rule 56.2 Mot. for J. on the Agency R. at 1–2, ECF No. 70 (incorporating by reference the arguments and requests for relief presented in the replies of all other plaintiffs, plaintiff-intervenors and consolidated plaintiffs); *see* Baroque Reply Br. at 15; *see* Pl.-Intervenors' Reply Br. at 5, ECF No. 73 (incorporating by reference the arguments and requests for relief presented in the replies of all other plaintiffs and plaintiff-intervenors in their reply briefs); *see* Consol. Pls.' Reply Br. at 2, ECF No. 74 (incorporating by reference the arguments and requests for relief presented in the replies of all other plaintiffs or consolidated plaintiffs).

Supp. 3d 1330, 1335–36 (2020) (quoting *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005)).

B. Analysis

For the reasons discussed below, the court concludes that Commerce's request for a voluntary remand to correct an inadvertent error in its calculations for backboard veneer is appropriate because Commerce's concerns are "substantial and legitimate." *SKF USA Inc.*, 254 F.3d at 1029. The government has provided sufficient justification for its remand request and the scope of its remand request is limited appropriately to correction of the identified inadvertent error. *See Sea Shepherd N.Z.*, 44 CIT at __, 469 F. Supp. 3d at 1335–36. Further, parties have not raised, and the court cannot identify, any reason that the government's justification for voluntary remand would be outweighed by the need for finality. *See id.*

CONCLUSION

In conclusion, the court sustains in part and remands in part Commerce's Final Results. For the foregoing reasons, it is hereby

ORDERED that Commerce's calculation of the plywood benchmark is sustained; it is further

ORDERED that Commerce's inclusion of backboards within the veneers for LTAR program is sustained; it is further

ORDERED that Commerce's VAT rate application to the benchmarks for veneers, plywood, fiberboard, glue and paint is sustained; it is further

ORDERED that Commerce's decision to apply AFA to Baroque's use of the EBCP is sustained; it is further

ORDERED that Commerce's voluntary remand request to evaluate further its use of AFA regarding Senmao's use of the EBCP is granted; it is further

ORDERED that Commerce's voluntary remand request to correct an inadvertent error in its calculations for backboard veneer is granted; it is further

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

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

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

SO ORDERED.

Dated: March 27, 2025
New York, New York

/s/ Timothy M. Reif
Timothy M. Reif, Judge

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