

U.S. Customs and Border Protection



GENERAL NOTICE

19 CFR PART 177

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF DIGITAL CAMERA INSPECTION SYSTEMS

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

ACTION: Notice of revocation of two ruling letters and revocation of treatment relating to the tariff classification of digital camera inspection systems.

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 two ruling letters concerning the tariff classification of digital camera inspection systems 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. 54, No. 38, on September 30, 2020. 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EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 7, 2021.

FOR FURTHER INFORMATION CONTACT: Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at suzanne.kingsbury@cbp.dhs.gov.

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. 54, No. 38, on September 30, 2020, proposing to revoke two ruling letters pertaining to the tariff classification of digital camera inspection systems. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N107616, dated June 23, 2010, CBP classified a digital camera inspection systems in heading 8528, HTSUS, specifically subheading 8528.59.25, HTSUS, which provides for "[M]onitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: Other monitors: Other: Color: With a flat panel screen: Other: With a video display diagonal not exceeding 34.29 cm." In NY N225535, dated July 26, 2012, CBP classified a digital camera inspection systems in subheading 8528.59.15, HTSUS, which provides for "[M]onitors and projectors, not incorporating television reception ap-

paratus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: Other monitors: Other: Color: With a flat panel screen: Incorporating video recording or reproducing apparatus: With a video display diagonal not exceeding 34.29 cm.” CBP has reviewed NY N107616 and NY N225535 and has determined the ruling letters to be in error. It is now CBP’s position that digital camera inspection systems are properly classified in heading 8525, HTSUS, specifically under subheading 8525.80.30, HTSUS, which provides for “[T]ransmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders: Television cameras, digital cameras and video camera recorders: Television cameras: Other...”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N107616 and NY N225535 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H270703, 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*.

Dated:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H270703

November 4, 2020

CLA-2 OT:RR:CTF:EMAIN H270703 SKK

CATEGORY: Classification

TARIFF NO.: 8525.80.30

MS. DONNA L. HILTPOLD
STANLEY BLACK & DECKER
480 MYRTLE ST.
NEW BRITAIN, CT 06053

RE: Revocation of NY N107616 and NY N225535; Digital camera inspection system; Inspection scope; Videoscope

DEAR Ms. HILTPOLD:

This ruling is in reference to New York Ruling Letter (NY) N107616, dated June 23, 2010, issued to Stanley Black & Decker, regarding the classification of a digital camera inspection system under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N107616, U.S. Customs and Border Protection (CBP) classified the subject article in heading 8528, HTSUS, specifically subheading 8528.59.25, HTSUS, which provides for “[M]onitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: Other monitors: Other: Color: With a flat panel screen: Other: With a video display diagonal not exceeding 34.29 cm.” Since the issuance of that ruling, we have determined NY N107616 to be in error.

CBP has also reviewed NY N225535, dated July 26, 2012, which involves the classification of a substantially similar video inspection system in subheading 8528.59.15, HTSUS, which provides for “[M]onitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus: Other monitors: Other: Color: With a flat panel screen: Incorporating video recording or reproducing apparatus: With a video display diagonal not exceeding 34.29 cm.” As with NY N107616, we have determined that the tariff classification of the subject merchandise in NY N225535 is incorrect.

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, a notice proposing to revoke NY N107616 and NY N225535 was published on September 30, 2020, in Volume 54, Number 38 of the Customs Bulletin. No comments were received in response to the proposed action.

FACTS:

The merchandise at issue in NY N107616 is identified as the “Visioval colour digital camera,” part number 2940. The product is described as a portable video system for inspecting difficult-to-access spaces that consists of a camera, monitor, cables, power supply, guidance ball, and guidance sleeve. In NY N107616, the subject article is described as not possessing recording capabilities. We note, however, that the manufacturer’s website contradicts this description and describes the merchandise as capable of photo and

video recording. See <http://www.virax.com/index.php/en/p/34011/pipe-inspection/colour-digital-inspection-camera-visioval-vx> (site last visited April 2020).

In NY N225535, CBP classified an article identified as the “Video Scope, Digital, Wireless,” part number BK8000, which is used for automotive and industrial video inspection. The BK8000 consists of a battery-powered handle attached to a television type camera that transmits video images using wireless 802.11 protocols to a battery-powered LCD monitor that is connected to the camera via a cable. The LCD monitor has a diagonal screen size of 4.3 inches and contains inbuilt internal recording capability. The BK8000 is described on an industry website as a “Digital Wireless Video Scope from Snap-on [that] offers exceptional capabilities for inspecting hard-to-see places.” See <http://www.fiberoptictoolsupply.com/blog/snap-on-bk8000-digital-wireless-video-scope/> (site last visited April 2020).

LAW AND ANALYSIS:

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

The following HTSUS provisions are under consideration:

- 8525 Transmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders
- 8528 Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus

Section XVI Note 3 provides:

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

In NY N107616, the subject inspection system was classified as a retail set. CBP determined that as both the camera and monitor components contributed equally to the system’s overall function, and neither imparted the “essential character” to the subject article, classification pursuant to GRI 3(b) was inapplicable. Consequently, it was determined that classification was proper under heading 8528, HTSUS, pursuant to GRI 3(c).

Similarly, in NY N225535, CBP classified the subject inspection system as a composite machine of heading 8528, HTSUS, pursuant to GRI 3(c).

The subject merchandise at issue in NYs N107616 and N225535 are composite machines in that they consist of two or more machines of Section XVI, specifically cameras of heading 8525, HTSUS, and monitors of heading 8528, HTSUS, that are fitted together to form a whole. As such, pursuant to

Section XVI Note 3, cited *supra*, they are to be classified as if consisting only of that component that performs the principal function.

The product literature available on the website links set forth above indicates that the subject articles are designed and marketed as camera inspection systems (or “scopes”) for difficult-to-access spaces. As such, the camera components perform the essential function of capturing images that enable visual inspection. As the monitors merely display the captured images, and images recorded on a SD storage card may be displayed on devices other than the monitor, the monitors do not perform the principal function of the subject inspection systems and their role is subsidiary to that of the cameras. In this regard, we find that the display component of the instant inspection system functions the same as the optical viewfinder or LCD commonly found on digital video cameras of heading 8525, HTSUS. See Explanatory Note 85.25(B).¹ Accordingly, pursuant to Section XVI Note 3, the subject composite articles are to be classified under heading 8525, HTSUS, as if consisting only of the camera components.

Classification of the subject merchandise in heading 8525, HTSUS, is consistent with NY N209179, dated March 30, 2012 (well inspection camera that transmits images through a coaxial cable to a location outside the camera for viewing or remote recording); NY H81870, dated May 30, 2001, (digital still image camera with Internet access and data management/recording capability), and; N245401, dated September 12, 2013 (underwater video camera housed in a remotely operated vehicle).

We further note that the subject articles at issue in NYs N107616 and N225535 are distinguished from the industrial videoscopes with optical measuring features classified in NYs N262187, N262178, and N262184, all dated March 30, 2015, and NYs N262197 and N262176, both dated April 1, 2015, under heading 9031, HTSUS, specifically subheading 9031.49.90, HTSUS, which provides for other optical measuring or checking instruments. In addition to a camera and monitor, the articles at issue in those rulings also featured “Stereo Measurement Technology” that enables quantitative three-dimensional defect measurement via eight different measurement modes for accurate evaluation of inspection targets as well as real-time tip-to-target measurement capability.

HOLDING:

By application of GRI 1 and Section XVI Note 3, the “Visioval colour digital camera” (part number 2940) and the “Video Scope, Digital, Wireless” (part number BK8000) are classified under heading 8525, HTSUS, specifically under subheading 8525.80.30, HTSUS, which provides for “[T]ransmission apparatus for radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras, digital cameras and video camera recorders: Television cameras, digital cameras and video camera recorders: Television cameras: Other:.” The applicable rate of duty is free. Duty rates are provided for your conve-

¹ In understanding the language of the HTSUS, the Explanatory Notes of the Harmonized Commodity Description and Coding System, which constitute the official interpretation of the HTSUS at the international level, may be utilized. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

nience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N107616, dated June 23, 2010, and NY N225535, dated July 26, are hereby 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,

GREGORY CONNOR

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

CC: Mr. Andrew Donaldson
Perceptron, Inc.
47827 Halyard Drive
Plymouth, MI 48170



**PROPOSED REVOCATION OF TWO RULING LETTERS
AND PROPOSED REVOCATION OF TREATMENT
RELATING TO THE TARIFF CLASSIFICATION OF EMPTY
COSMETIC CONTAINER WITH BRUSH**

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

ACTION: Notice of proposed revocation of two ruling letters and proposed revocation of treatment relating to the tariff classification of an empty cosmetic container with a brush.

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

DATE: Comments must be received on or before January 8, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229-1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke two ruling letters pertaining to the tariff classification of an empty cosmetic container with a brush. Although in this notice, CBP is specifically referring to New York Ruling Letters (NY) I82716, dated June 21, 2002 (Attachment A), and NY D88064, dated February 22, 1999 (Attachment B), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the two identified. No further rulings have been found. Any party

who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY I82716, CBP classified an empty mascara cosmetic container with a brush in heading 9603, HTSUS, specifically in subheading 9603.29.40, HTSUS, which provides for brushes, other, valued not over 40 cents each. Similarly, in NY D88064, CBP classified a similar merchandise in heading 9603, HTSUS. There, CBP held that the merchandise is classifiable under three different subheadings, which provide for "[a]rtists' brushes, writing brushes and similar brushes for the application of cosmetics": (1) 9603.30.20, HTSUS, if valued not over five cents each; (2) 9603.30.40, HTSUS, if valued over 5 cents each but not over 10 cents each; and (3) 9603.30.60, HTSUS, if valued over 10 cents each. CBP has reviewed NY I82716 and NY D88064, and has determined the ruling letters to be in error. It is now CBP's position that the empty cosmetic container with a brush, which is expected to be filled with the cosmetic after importation to the United States, is properly classified, in heading 3923, HTSUS, specifically in subheading 3923.90.00, HTSUS, which provides for articles for the conveyance or packing of goods, of plastics, other.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY I82716 and NY D88064, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H313938, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: October 31, 2020

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

PD I82716

June 21, 2002

CLA-2-96:CL:PD:CO:TEB:F01

CATEGORY: Classification

TARIFF NO.: 9603.29.4090

SARA BARNES
PHOENIX INTERNATIONAL
18900 – 8TH AVENUE SOUTH
SUITE 500
SEA TAC, WA 98148

RE: The tariff classification of a mascara brush/case from China.

DEAR Ms. BARNES:

In your letter dated May 29, 2002, filed on behalf of Benefit Cosmetics, LLC, 725 A 85th Avenue, Oakland, California, you requested a tariff classification ruling.

The imported item is a mascara brush/case. It consists of a molded plastic and metal tube container with an applicator eyelash brush. When the cap of the tube container is unscrewed, the cap serves as the brush handle. The tube will be filled with mascara after importation. A representative sample of this item was submitted with your request. This sample will be retained for official purposes.

Classification is based upon the General Rules of Interpretation. For classification purposes, the mascara brush/case is considered a composite good comprised of a mascara eyelash brush with container, or tube. GRI 3(b) states in part that “goods made up of different components which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character.” The essential character of the subject article is imparted by the eyelash brush.

The applicable subheading for the mascara brush/case will be 9603.29.4090, Harmonized Tariff Schedule of the United States (HTSUS), which provides for toothbrushes, shaving brushes, hair brushes, nail brushes, eyelash brushes and other toilet brushes for use on the person, including such brushes constituting parts of appliances: other: valued not over 40 cents each: other. The rate of duty will be 0.2 cents each, plus 7 percent ad valorem.

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

A copy of this ruling letter or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

If you have any questions regarding the ruling, contact Field National Import Specialist Sharon Browarek at 440-891-3824 or National Import Specialist Lawrence Mushinske at 646-733-3036.

Sincerely,

JOHN M. REGAN
*Service Port Director
Cleveland, Ohio*

NY D88064

February 22, 1999

CLA-2-96:RR:NC:SP:233 D88064

CATEGORY: Classification

TARIFF NO.: 9603.30.2000; 9603.30.4000;
9603.30.6000; 3923.50.0000

MR. ARLEN T. EPSTEIN
TOMPKINS & DAVIDSON, LLP
ONE ASTOR PLAZA
1515 BROADWAY
NEW YORK, NY 10036-8901

RE: The tariff classification of "Line and Define Mascara Pen Components" from the United Kingdom.

DEAR MR. EPSTEIN:

In your letter dated February 10, 1999, on behalf of Avon Products, Inc., you requested a tariff classification ruling.

The merchandise at issue, PP 176168, is components for a mascara pen and consists of a hollow molded plastic tube and applicator brush. The tube will be filled with mascara after importation. The molded plastic cover will be imported separately. A representative sample of the merchandise was submitted with your request.

Your sample is being returned as requested.

Classification is based upon the General Rules of Interpretation. For classification purposes, the mascara pen is considered a composite good comprised of a mascara applicator brush with plastic container, or tube. GRI 3(b) states in part that "goods made up of different components which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character." The essential character of the subject article is imparted by the applicator brush.

The applicable subheading for "Line and Define Mascara Pen Components," if valued not over 5 cents each, will be 9603.30.2000, Harmonized Tariff Schedule of the United States (HTS), which provides for artists' brushes, writing brushes and similar brushes for the application of cosmetics. The rate of duty will be 2.6 percent ad valorem. If valued over 5 cents each but not over 10 cents each, the applicable subheading will be 9603.30.4000, HTS. If valued over 10 cents each, the applicable subheading will be 9603.30.6000. Merchandise classifiable within subheading 9603.30.4000 or 9603.30.6000, HTS, is free of duty.

The applicable subheading for the plastic cover, if imported separately, will be 3923.50.0000, HTS, which provides for stoppers, lids, caps and other closures, of plastics. The rate of duty will be 5.3 percent ad valorem.

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212-637-7061.

Sincerely,
ROBERT B. SWIERUPSKI
Director,
National Commodity
Specialist Division

HQ H313938
OT:RR:CTF:CPMMA H313938 AJK
CATEGORY: Classification
TARIFF NO: 3923.90.00

MS. SARA BARNES
PHOENIX INTERNATIONAL
18900 — 8TH AVENUE SOUTH
SUITE 500
SEA TAC, WA 98148

MR. ARLEN T. EPSTEIN
TOMPKINS & DAVIDSON, LLP
ONE ASTOR PLAZA
1515 BROADWAY
NEW YORK, NY 10036-8901

RE: Revocation of NY I82716 and NY D88064; Classification of Empty
Cosmetic Container with Brush

DEAR MS. BARNES AND MR. EPSTEIN:

This letter is reference to New York Ruling Letters (NY) I82716, dated June 21, 2002, and NY D88064, dated February 22, 1999, concerning the tariff classification of an empty cosmetic container with a brush. In NY I82716 and NY D88064, U.S. Customs and Broder Protection (CBP) classified the merchandise in heading 9603, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the aforementioned rulings, and have determined that the classification of an empty cosmetic container with a brush in heading 9603, HTSUS, was incorrect.

FACTS:

The subject merchandise was described in NY I82716 as follows:

The imported item is a mascara brush/case. It consists of a molded plastic and metal tube container with an applicator eyelash brush. When the cap of the tube container is unscrewed, the cap serves as the brush handle. The tube will be filled with mascara after importation.

The subject merchandise was described in NY D88064 as follows:

The merchandise at issue ... is components for a mascara pen and consists of a hollow molded plastic tube and applicator brush. The tube will be filled with mascara after importation. The molded plastic cover will be imported separately.

ISSUE:

Whether the empty cosmetic container with a brush is classified in heading 3923, HTSUS, as a plastic article for the conveyance or packing of goods, or heading 9603, HTSUS, as a brush.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be

classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

GRI 3(b) states, in pertinent part:

Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * * * *

The HTSUS provisions at issue are as follows:

- 3923: Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics.
- 9603: Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees).

Note 2 to Chapter 39, HTSUS, provides, in pertinent part:

2. This chapter does not cover:

...

- (z) Articles of chapter 96 (for example, brushes, buttons, slide fasteners, combs, mouthpieces or stems for smoking pipes, cigarette holders or the like, parts of vacuum flasks or the like, pens, mechanical pencils, and monopods, bipods, tripods and similar articles).

* * * * *

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

EN RULE 3(b) provides as follows:

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

EN 39.23 provides, in pertinent part, as follows:

This heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products. The articles covered include:

- (a) Containers such as boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks.

* * * * *

As a preliminary matter, we wish to clarify the difference between the subject merchandise in NY I82716 and NY D88064, and the exclusion pro-

vision for Chapter 39. First, the empty cosmetic containers with a brush in NY I82716 and NY D88064 have one minor distinguishable character. In NY I82716, the brush of the merchandise is designed for two purposes: (1) to serve as a cap for the molded plastic container while the merchandise is being stored, and (2) to be utilized as a tool to apply the cosmetic that is packed inside the container. The brush in NY D88064, however, is attached to the top of the molded plastic container. As further explained below, the difference in the two subject merchandise does not effectuate change in our analysis.

Note 2 of Chapter 39, which excludes “[a]rticles of chapter 96”, including brushes, from classification under heading 3923, HTSUS, as plastic articles for the conveyance or packing of goods, does not apply to the empty cosmetic container with a brush. Note 2 excludes an item that is classified in chapter 96 at GRI 1; however, heading 9603, HTSUS, only describes the brush portion of the entire good. Thus, the subject merchandise is not excluded from heading 3923, HTSUS, by Note 2 to Chapter 39.

In NY A85166, dated July 2, 1996; and NY N018435, dated October 23, 2007, we found that a mascara container and cap with brush insert was classified in heading 3923, HTSUS as a plastic container for the conveyance of goods. The instant merchandise is substantially similar to that in described in those rulings. As stated in the General EN to Chapter 39, chapter 39 encompasses “all articles of plastics commonly used for the packing or conveyance of all kinds of products.” See *S.C. Johnson & Son, Inc. v. United States*, 415 F. Supp. 3d 1373 (Ct. Int’l Trade 2019). As such, the empty container here is classifiable in heading 3923, HTSUS, even though the cap, which is classified with the container, includes a brush.

Even if resort to GRI 3 is necessary to account for the brush, in order to classify the subject merchandise under GRI 3(b), CBP must identify the component of the subject merchandise that imparts the merchandise with its essential character. “The ‘essential character’ of an article is ‘that which is indispensable to the structure, core or condition of the article, i.e., what it is.’” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). As explained above, the core function of the subject merchandise is to contain and store cosmetics in the molded plastic container upon importation into the United States. The utility of the brush is not realized until the product is filled with the mascara and it is applied to the user’s eyelashes. As imported, however, the good is a container with a brush attached to its cap or body. Hence, the role of the container in relation to the use of the entire good, to convey mascara and its applicator to the purchaser, imparts the essential character of the subject merchandise. Moreover, the molded plastic container accounts for the bulk of the merchandise. Thus, even under the analysis of GRI 3(b), the empty cosmetic container with a brush is classified in heading 3923, HTSUS.

Pursuant to GRI 1 and GRI 3(b), the empty cosmetic container with a brush is classifiable in heading 3923, HTSUS, as “[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther.” This conclusion is consistent with prior CBP rulings classifying other empty cosmetic containers with a brush and similar articles under heading 3923, HTSUS.

HOLDING:

By application of GRI 1, the empty cosmetic container with a brush is classified in heading 3923, HTSUS, specifically subheading 3923.90.00, HTSUS, which provides for “[a]rticles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics: [o]ther.” The 2020 column one, general rate of duty is three percent *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY I82716, dated June 21, 2002, and NY D88064, dated February 22, 1999, are hereby revoked.

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division



GENERAL NOTICE

19 CFR PART 177

**REVOCAION OF ONE RULING LETTER AND
REVOCAION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF FOOTWEAR**

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 footwear.

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 footwear 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. 54, No. 41, on October 21, 2020. 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 February 7, 2021.

FOR FURTHER INFORMATION CONTACT: Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0062.

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. 54, No. 41, on October 21, 2020, proposing to revoke one ruling letter pertaining to the tariff classification of footwear. 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") N279073, dated September 30, 2016, CBP classified certain footwear in heading 6404, HTSUS, specifically in subheading 6404.19.20, HTSUS, which provides for "Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Footwear with open toes or open heels;

footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper: Other: Other.” CBP has reviewed NY N279073 and has determined the ruling letter to be in error. It is now CBP’s position that the certain footwear is properly classified, in heading 6404, HTSUS, specifically in subheading 6404.11.90, HTSUS, which provides for “Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N279073 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H285615, 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*.

Dated:

For
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H285615
November 23, 2020
OT:RR:CTF:FTM H285615 TJS
CATEGORY: Classification
TARIFF NO.: 6404.11.90

MR. SEAN CONNOR
UNDER ARMOUR, INC.
1020 HULL STREET
BALTIMORE, MD 21230

RE: Reconsideration of NY N279073; Tariff Classification of footwear
from China

DEAR MR. CONNOR:

This letter is in response to your request of February 28, 2017, for reconsideration of New York Ruling Letter (“NY”) N279073, dated September 30, 2016, issued to Under Armour, Inc., as it pertains to the tariff classification of certain footwear under the Harmonized Tariff Schedule of the United States (“HTSUS”). In that ruling, U.S. Customs & Border Protection (“CBP”) classified the subject footwear in heading 6404, HTSUS, and subheading 6404.19.20, HTSUS, which provides for: “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Other: Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper: Other: Other.” For the reasons stated below, we are revoking NY N279073. In reaching this decision, we have also considered arguments presented in a supplemental submission submitted by your legal counsel on August 16, 2017. This decision is also based on our inspection of samples included with your original ruling request and with your reconsideration request.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Vol. 54, No. 41, on October 21, 2020. No comments were received in response to the notice.

FACTS:

In NY N279073, the merchandise was described as follows:

[T]he submitted sample, identified as style number/name 1288065 UA W Drift RN Mineral, is a woman’s, light-weight, closed-toe/closed-heel, below-the-ankle shoe, with a flexible outer sole of rubber or plastics. The external surface area of the upper is predominantly textile material. It is a slip-on shoe that does not have a separately attached tongue. The mostly unsecured leather overlay, which incorporates the eye stays and threaded laces, is stitched to the upper with a few stitches on the medial and lateral sides. It is lasted at the sole, extends toward the heel of the shoe, and is stitched near the back of the heel. This semi-attached overlay constitutes an accessory or reinforcement and not considered in the ex-

ternal surface area measurements. The shoe features a rubber/plastic toe cap, a leather heel patch, and a pull tab. The shoe does not have a foxing-like band. The rubber or plastics outer sole accounts for more than 10 percent of the total weight of the shoe. You provided an F.O.B. value of \$21.41 per pair.

In addition to the features described above, the samples contain a cushioned collar and a midsole made of ethylene-vinyl acetate (EVA), a lightweight and soft foam. The outsole is made of durable rubber material and incorporates rubber pods and four rows of flex grooves. In your supplemental submission, you state that the shoes are designed and marketed as running shoes.

ISSUE:

What is the tariff classification of the subject footwear?

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 GRI 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

- 6404: Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials:
 - Footwear with outer soles of rubber or plastics:
 - 6404.11: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like:
 - Other:
 - 6404.11.90: Valued over \$12/pair:
 - For women:
 - 6404.11.9050: Other.
- 6404.19: Other:
 - Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, the foregoing except footwear of subheading 6404.19.20 and except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper:
 - Other:
 - 6404.19.39: Other:
 - Other:
 - 6404.19.3960: For women.

Additional U.S. Note 2 to Chapter 64, HTSUS, provides as follows:

For the purposes of this chapter, the term “*tennis shoes, basketball shoes, gym shoes, training shoes and the like*” covers athletic footwear other than sports footwear (as defined in subheading note 1 above), whether or not principally used for such athletic games or purposes.

* * * * *

Treasury Decision (“T.D.”) 93–88, which provides “Footwear Definitions,” states, in pertinent part, that “athletic” footwear includes:

“Athletic” footwear (sports footwear included in this context) includes:

1. Shoes usable only in the serious pursuit of a particular sport, which have or have provision for attachment of spikes, cleats, clips or the like.
2. Ski, wrestling & boxing boots; cycling shoes; and skating boots w/o skates attached.
3. Tennis shoes, basketball shoes, gym shoes (sneakers), training shoes (joggers) and the like whether or not principally used for such athletic games or purposes.

It does not include:

1. Shoes that resemble sport shoes but clearly could not be used at all in that sporting activity. Examples include sneakers with a sequined or extensively embroidered uppers.
2. A “slip-on”, except gymnastic slippers.
3. Skate boots with ice or roller skates attached.

Footwear Definitions, Treas. Dec. 93–88, 27 Cust. B. & Dec. No. 46 (Oct. 25, 1993).

T.D. 93–88 further provides that a “slip-on” includes:

1. A boot which must be pulled on.
2. Footwear with elastic gores which must be stretched to get it on or with elastic sewn into the top edge of the fabric of the upper.
3. Footwear with a shoe lace around the top of the upper which is clearly not functional, i.e., the lace will not be tied and untied when putting it on or taking it off.

It does not include any boot or shoe with any laces, buckles, straps, snaps, or other closure, which are probably closed, i.e. tied, buckled, snapped, etc., after the wearer puts it on.

Id.

* * * * *

In your request for reconsideration, you state that while you agree with the majority of the assessment in NY N279073, you assert that the shoe is not a “slip-on.” You state that while the shoe is not designed with a separate tongue, the shoelaces are an essential element to the function of the shoe. You further state that the shoe is designed to be used as a running shoe and the shoelaces serve as a tightening mechanism, which are necessary to secure the foot and prevent the runner from injuring his or her ankle. You assert

that the shoe is properly classified in subheading 6404.11.90, HTSUS, which provides for “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair.”

The dispute is at the six-digit level of classification. The footwear is described by the terms of heading 6404, HTSUS, which provides for “[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials.” At issue here is whether the footwear under consideration is “athletic” footwear within the meaning of Additional U.S. Note 2 to Chapter 64, HTSUS, and classified in subheading 6404.11, HTSUS, as “tennis shoes, basketball shoes, gym shoes, training shoes and the like,” or whether the footwear is classified in subheading 6404.19, HTSUS, as “other” footwear.

Subheading 6404.11, HTSUS, provides for “tennis shoes, basketball shoes, gym shoes, training shoes and the like.” The principle of *ejusdem generis* applies to provisions containing the phrase “and the like.” In an *ejusdem generis* analysis, “where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.” *Deckers Corp. v. United States*, 752 F.3d 949, 952 n.3 (Fed. Cir. 2014) (“*Deckers II*”) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994)). In *Deckers Corp. v. United States* (“*Deckers I*”), 532 F.3d 1312 (Fed. Cir. 2008), *aff’d*, *Deckers II*, 752 F.3d 949, on the issue of whether Teva Sport Sandals were classified in subheading 6404.11 as “athletic footwear,” the Court of Appeals for the Federal Circuit stated that to determine the essential characteristic of the specified enumerated articles, “courts may consider attributes such as the purpose, character, material, design, and texture.” *Deckers I*, 532 F.3d at 1316. In regard to the particular exemplars of heading 6404.11, HTSUS, the court determined that “the fundamental feature that the exemplars share is the design, specifically the enclosed upper, which contains features that stabilize the foot, and protect against abrasion and impact.” *Id.* at 1317.

Additional U.S. Note 2 to Chapter 64 states that athletic footwear is classified in subheading 6404.11, HTSUS, “whether or not principally used for such athletic games or purposes.” CBP has interpreted this Note to mean that shoes need not be used solely for athletic purposes, but also those shoes that share appearance, qualities, and character with the named exemplars are classified there. See Headquarters Ruling Letter (“HQ”) H236274 (Sept. 17, 2015) (classifying “athleisure” shoes as athletic); and HQ 953882 (Sept. 24, 1993) (holding that hiking boots were not “like” the exemplars). Still, it has been CBP’s position that in order for footwear to be classified as athletic footwear under subheading 6404.11, HTSUS, it must be constructed for an activity that requires fast footwork or extensive running. See HQ 964625 (Sept. 10, 2001) (“All the exemplars are used in sports which require fast footwork or extensive running.”); and NY N154085 (Apr. 4, 2011). Thus, when determining whether footwear is classified as athletic footwear under subheading 6404.11, HTSUS, CBP looks at various features and characteristics including, but not limited to, overall appearance, materials, and construction of the upper and outer sole. Some of the features or characteristics of athletic footwear CBP has consistently included are: a lightweight upper, a lightweight, flexible outer sole that provides traction, lace-up, or some other

type of secure closure, underfoot cushioning, collar (padded or not), tongue (padded or not), toe bumpers, heel counters/stabilizers, and ventilation holes. See HQ H265479 (Mar. 28, 2016); NY N310350 (Mar. 26, 2020); NY N020906 (Jan. 9, 2008); and NY M82301 (May 26, 2006). However, athletic footwear need not exhibit all of these features. See NY N218203 (June 6, 2012); and NY N154085 (Apr. 4, 2011).

T.D. 93–88 excludes “slip-ons” from the definition of athletic footwear. It also states that shoes with laces, which are probably tied after the wearer puts them on, are not considered “slip-ons.” In *Deckers Outdoor Corp. v. United States*, 844 F. Supp. 2d 1324 (CIT 2012), concerning the classification of UGG boots, the Court of International Trade (“CIT”) determined that “[t]he lack of laces or fasteners is the essential characteristic uniting each dictionary definition for “slip-on” and “[t]he definitions, as a whole, indicate that it is this lack of any kind of fasteners that allows for the characteristic ease with which slip-ons can be put on and taken off.” *Deckers Outdoor Corp. v. United States*, 844 F. Supp. 2d 1324, 1332 (CIT 2012), *aff’d*, 714 F.3d 1363 (2013). The CIT further found that the definition of “slip-on” in T.D. 93–88 is persuasive and warrants deference, and is “centered around the characterization of slip-ons as footwear that lacks functional fasteners.” *Id.* Therefore, whether the shoes under consideration are “slip-ons” depends on the functionality of the shoelaces such that the shoes can be put on and taken off with ease regardless of whether the shoelaces are tied. Pursuant to T.D. 93–88, CBP considers shoelaces that do not need to be tied or untied in order to put on or remove the shoe as non-functional. See NY N285586 (May 30, 2017); NY N284080 (Apr. 4, 2017); and NY N283616 (Mar. 15, 2017) (determining that laces were non-functional because the wearer needed only to spread apart the upper to put on or remove the shoe). However, shoelaces that are tied after the shoe is put on are considered functional, as they impede the wearer’s ability to easily slip-on and off the shoe.

While the absence of a separately attached tongue is often a feature of a slip-on shoe, it does not preclude classification as “athletic” footwear. For example, in NY N281527, dated January 20, 2017, CBP classified a man’s shoe, identified as style # 54358, and a women’s shoe, identified as style # 14811, in subheading 6404.11.90, HTSUS. Style # 54358 was a man’s closed toe/closed heel, below-the-ankle shoe with a foxing-like band and an outer sole of rubber/plastics. The style had a general athletic appearance. The external surface area of the upper was predominantly textile (approximately 72%) and had a lace-up closure with five pairs of textile eyelet stays. The shoe had no separately defined tongue, rather, the extra material under the functional laces formed a type of gusseted tongue when tied. CBP determined that the extra material forming the gusseted tongue rendered a loose fit if worn without tightening the laces. Style #14811 was a woman’s, closed toe/closed heel, below-the-ankle, athletic shoe with a foxing-like band and an outer sole of rubber or plastics. This shoe also featured a gusseted tongue under a functional lace-up closure. Because the laces needed tightened for both styles to be used properly, the shoes were not considered slip-ons.

Like the shoes in NY N281527, the subject footwear can be slipped on and off while the laces remain untied. Although a gusseted tongue does not form when the shoelaces of the subject footwear are tied, we find that the shoelaces are functional because they are tightened after the wearer puts on the shoe. The shoelaces must be untied to put the shoe on the foot because the shoe does not easily slip on and off while the shoelaces are tightened. This is due

to the leather overlay, which incorporates the eye stays and threaded laces, and is stitched to the upper on the medial and lateral sides. Importantly, the leather overlays do not stretch such that when the laces are tied, the overlays are taut and secure. Furthermore, the shoelaces are not futile. When tightened, they provide functionality by further securing the shoe to the wearer's foot so that the user has sufficient support and can engage in activities requiring extensive running or fast footwork without worrying about the shoe slipping off the foot. In light of the forgoing, we do not consider these shoes "slip-ons" and, as such, they are not precluded from classification as athletic footwear.

Upon review and examination of the footwear at issue in NY N279073, we conclude that it has the general appearance and many of the construction features present in athletic footwear. In particular, the shoe has a breathable textile upper and a lightweight, flexible outer sole that is treaded to provide traction. It also has foot cushioning with the EVA midsole, padding at the collar, a rubber/plastic toe cap, and a plastic heel counter. In addition to the lace closure system that secures the footwear to the foot, the upper with the leather overlays help keep the foot in place when the shoelaces are tightened to enable the wearer to engage in athletic activity. The footwear is also marketed as running shoes. We find that the footwear at issue is indeed *ejusdem generis* with the named exemplars in subheading 6404.11, HTSUS.

In view of the foregoing, we find that the subject footwear, 1288065 UA W Drift RN Mineral, is athletic footwear of subheading 6404.11, HTSUS. Specifically, the subject footwear is classified under subheading 6404.11.9050, HTSUS, which provides for "[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair: For women: Other." Therefore, we revoke NY N279073.

HOLDING:

By application of GRI 1 and Additional U.S. Note 2 to Chapter 64, HTSUS, we find that the subject footwear is classified under subheading 6404.11.9050, HTSUS, which provides for "[f]ootwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials: Footwear with outer soles of rubber or plastics: Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like: Other: Valued over \$12/pair: For women: Other." The column one, general rate of duty is 20% *ad valorem*.

EFFECT ON OTHER RULINGS:

NY N279073, dated September 30, 2016, is hereby **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,
For

CRAIG T. CLARK,
Director

Commercial Trade Facilitation Division

19 CFR CHAPTER I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Standard Time (EST) on November 22, 2020 and will remain in effect until 11:59 p.m. EST on December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Carl Jaigobind, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of the Secretary’s decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID-19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID-19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Canada posed a “specific threat to human life or national interests.”

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of the Secretary’s decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

The Secretary later published a series of notifications continuing such limitations on travel until 11:59 p.m. EST on November 21, 2020.²

The Secretary has continued to monitor and respond to the COVID–19 pandemic. As of the week of November 15, there are over 53 million confirmed cases globally, with over 1.3 million confirmed deaths.³ There are over 11.1 million confirmed and probable cases within the United States,⁴ over 287,000 confirmed cases in Canada,⁵ and over 997,000 confirmed cases in Mexico.⁶

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁷ I have determined that land ports

² See 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary’s decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Nov. 17, 2020), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update--17-november-2020>.

⁴ CDC, COVID Data Tracker (last updated Nov. 17, 2020), available at <https://covid.cdc.gov/covid-data-tracker/>.

⁵ WHO, COVID–19 Weekly Epidemiological Update (Nov. 17, 2020).

⁶ *Id.*

⁷ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to

of entry along the U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and

respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (e.g., sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on December 21, 2020. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.⁸

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

CHAD R. MIZELLE,
Senior Official
Performing the Duties of the General Counsel,
U.S. Department of Homeland Security.

[Published in the Federal Register, November 23, 2020 (85 FR 74603)]

⁸ DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions in the future and support U.S. border communities.

19 CFR CHAPTER I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Standard Time (EST) on November 22, 2020 and will remain in effect until 11:59 p.m. EST on December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Carl Jaigobind, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of the Secretary’s decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a “specific threat to human life or national interests.”

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of the Secretary’s decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

The Secretary later published a series of notifications continuing such limitations on travel until 11:59 p.m. EST on November 21, 2020.²

The Secretary has continued to monitor and respond to the COVID–19 pandemic. As of the week of November 15, there are over 53 million confirmed cases globally, with over 1.3 million confirmed deaths.³ There are over 11.1 million confirmed and probable cases within the United States,⁴ over 287,000 confirmed cases in Canada,⁵ and over 997,000 confirmed cases in Mexico.⁶

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁷ I have determined that land ports

² See 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary’s decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (Nov. 17, 2020), available at <https://www.who.int/publications/m/item/weekly-epidemiological-update--17-november-2020>.

⁴ CDC, COVID Data Tracker (last updated Nov. 17, 2020), available at <https://covid.cdc.gov/covid-data-tracker/>.

⁵ WHO, COVID–19 Weekly Epidemiological Update (Nov. 17, 2020).

⁶ *Id.*

⁷ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to

of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and

respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. *See* Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EST on December 21, 2020. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.⁸

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

CHAD R. MIZELLE,
Senior Official
Performing the Duties of the General Counsel,
U.S. Department of Homeland Security.

[Published in the Federal Register, November 23, 2020 (85 FR 74604)]

**COMMERCIAL CUSTOMS OPERATIONS ADVISORY
COMMITTEE (COAC)**

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

⁸ DHS is working closely with counterparts in Mexico and Canada to identify appropriate public health conditions to safely ease restrictions in the future and support U.S. border communities.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, December 16, 2020. The meeting will be open to the public via webinar only. There is no on-site, in-person option for this quarterly meeting.

DATES: The COAC will meet on Wednesday, December 16, 2020, from 1:00 p.m. to 5:00 p.m. EST. Please note that the meeting may close early if the committee has completed its business. Comments must be submitted in writing no later than December 15, 2020.

ADDRESSES: The meeting will be held via webinar. The webinar link and conference number will be provided to all registrants by 10:00 a.m. EST on December 16, 2020. For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344-1440, as soon as possible.

FOR FURTHER INFORMATION CONTACT: Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229; telephone (202) 344-1440; or Mr. Jon B. Perdue, Designated Federal Officer, at (202) 344-1440.

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

Pre-registration: For members of the public who plan to participate via webinar, please register online at <https://teregistration.cbp.gov/index.asp?w=213> by 5:00 p.m. EST by December 15, 2020. For members of the public who are pre-registered to attend the webinar and later need to cancel, please do so by December 15, 2020, utilizing the following link: <https://teregistration.cbp.gov/cancel.asp?w=213>.

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

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

Comments must be submitted in writing no later than December 15, 2020, and must be identified by Docket No. USCBP–2020–0064, and may be submitted by one (1) of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* tradeevents@cbp.dhs.gov. Include the docket number in the subject line of the message.
- *Mail:* Ms. Florence Constant-Gibson, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229.

Instructions: All submissions received must include the words “Department of Homeland Security” and the docket number (USCBP–2020–0064) for this action. Comments received will be posted without alteration at <http://www.regulations.gov>. Please do not submit personal information to this docket.

Docket: For access to the docket or to read background documents or comments, go to <http://www.regulations.gov> and search for Docket Number USCBP–2020–0064. To submit a comment, click the “Comment Now!” button located on the top-right hand side of the docket page.

There will be multiple public comment periods held during the meeting on December 16, 2020. Speakers are requested to limit their comments to two (2) minutes or less to facilitate greater participation. Please note that the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page, <http://www.cbp.gov/trade/stakeholder-engagement/coac>.

Agenda

The COAC will hear from the current subcommittees on the topics listed below and then will review, deliberate, provide observations, and formulate recommendations on how to proceed:

1. The Secure Trade Lanes Subcommittee will present updates related to the four active working groups as follows: Trusted Trader Working Group will present recommendations on the newly issued CBP White Paper for the Implementation of CTPAT Trade Compliance Requirements for Forced Labor; the In-Bond Working Group will provide an update on the ongoing work with the technical enhancements that is being shared with the Trade Support Network; the Export Modernization Working Group will report on the progress of the development of the White Paper mentioned during the October COAC meeting and present additional recommendations; and, the Remote and Autonomous Cargo Processing Working Group will pro-

vide an update on the progress reviewing the various modes of conveyance and automation opportunities.

2. The Intelligent Enforcement Subcommittee will discuss the kick-off of the Intellectual Property Rights Process Modernization Working Group that will leverage prior recommendations by formulating recommendations to address automation and data sharing. The Bond Working Group will report on continued work with CBP on the Monetary Guidelines for Setting Bond Amounts as part of a larger risk-based bonding initiative. The Anti-Dumping and Countervailing Duty (AD/CVD) Working Group will report on their continued work with CBP related to the growing number of complex AD/ CVD cases. The Forced Labor Working Group will report on progress toward prioritized recommendations and future scope of work.

3. The Next Generation Facilitation Subcommittee will provide an update on the progress of the One U.S. Government Working Group and work-to-date on the Global Business Identifier initiative. The subcommittee will also report on their progress with Partner Government Agencies regarding advancement in Trusted Trader initiatives. There will be an update by the Emerging Technologies Working Group regarding their assessment of various technologies such as quantum computing evaluated this past quarter that could be adapted for use by CBP and the trade. The subcommittee will provide an update on the 21st Century Customs Framework initiative.

4. The Rapid Response Subcommittee will discuss the work that has been done by the Broker Exam Modernization Working Group regarding resolving challenges encountered during the recent October exam and continuing efforts to modernize and improve the quality and experience of future broker exams.

Meeting materials will be available by December 14, 2020, at: <http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings>.

Dated: November 19, 2020.

JON B. PERDUE,
Executive Director,
Office of Trade Relations.

[Published in the Federal Register, November 25, 2020 (85 FR 75346)]

AGENCY INFORMATION COLLECTION ACTIVITIES:

Declaration of Person Who Performed Repairs or Alterations

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

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted no later than January 22, 2021 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0048 in the subject line and the agency name.

Please submit comments via email to *CBP_PRA@cbp.dhs.gov*. Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

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

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

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

Overview of This Information Collection

Title: Declaration of Person Who Performed Repairs or Alterations.

OMB Number: 1651-0048.

Form Number: N/A.

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

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The "Declaration of Person Who Performed Repairs or Alterations," as required by 19 CFR 10.8, is used in connection with the entry of articles entered under subheadings 9802.00.40 and 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS, <https://hts.usitc.gov/current>). Articles entered under these HTSUS provisions are articles that were temporarily exported from the United States for repairs or alterations, and are returned to the United States. Upon their return, duty is only assessed on the value of the repairs or alterations performed abroad and not on the full value of the article. The declaration under 19 CFR 10.8 includes information, such as (1) a description of the article and the repairs or alterations, (2) the value of the article and the repairs or alterations, and (3) a declaration by the owner, importer, consignee, or agent having knowledge of the pertinent facts. The information in this declaration is used by CBP to determine the value of the repairs or alterations, and to assess duty only on the value of those repairs or alterations.

These requirements apply to the trade community who are required by law to provide this declaration.

Type of Information Collection: Declaration for Repairs or Alterations.

Estimated Number of Respondents: 10,236.

Estimated Number of Annual Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 20,472.

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

Estimated Total Annual Burden Hours: 10,236.

Dated: November 18, 2020.

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

[Published in the Federal Register, November 23, 2020 (85 FR 74741)]



AGENCY INFORMATION COLLECTION ACTIVITIES:

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

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

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted no later than January 25, 2021 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0136 in the subject line and the agency name.

Please submit comments via email to *CBP_PRA@cbp.dhs.gov*. Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number

202–325–0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 1651–0136.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours.

Type of Review: Extension (without change).

Affected Public: Individuals and businesses.

Abstract: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. In order to work continuously to ensure that our programs are effective and meet our customers’ needs, U.S. Customs and Border Protection (CBP) (hereafter “the Agency”) seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that

provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

This collection of information is necessary to enable CBP to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with CBP's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between CBP and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Type of Collection: Comment Cards

Estimated Number of Respondents: 10,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10,000.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 500 hours.

Type of Collection: Customer Surveys

Estimated Number of Respondents: 290,000.

Estimated Numbers of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 290,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 24,490.

Dated: November 19, 2020.

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

U.S. Court of International Trade

Slip Op. 20–165

HYUNDAI HEAVY INDUSTRIES Co., LTD., Plaintiff, and HYOSUNG CORPORATION and ILJIN ELECTRIC Co., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and ABB ENTERPRISE SOFTWARE INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Consol. Court No. 18–00066

Public Version

[Remanding the U.S. Department of Commerce’s remand redetermination of the final results of the fourth administrative review of the antidumping duty order on large power transformers from the Republic of Korea. Denying as moot Consolidated Plaintiff’s motion for leave to file supplemental brief.]

Dated: November 18, 2020

Ron Kendler, White & Case LLP, of Washington, DC, argued for Plaintiff Hyundai Heavy Industries, Co., Ltd. With him on the brief were *David E. Bond* and *William J. Moran*.

Daniel R. Wilson and *Henry D. Almond*, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for Consolidated Plaintiff Hyosung Corporation. With them on the brief were *J. David Park* and *Leslie C. Bailey*.

Amrietha Nellan and *Jeffrey M. Winton*, Winton & Chapman PLLC, of Washington, DC, argued for Consolidated Plaintiff ILJIN Electric Co., Ltd. With them on brief was *Vi N. Mai*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Melissa M. Brewer and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenor ABB Enterprise Software Inc. With them on the brief was *R. Alan Luberda*.

OPINION AND ORDER

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) remand redetermination of the final results of the fourth administrative review (“AR4”) of the antidumping duty order on large power transformers (“LPTs”) from the Republic of Korea for the period of review (“POR”) August 1, 2015,

to July 31, 2016.¹ See Final Results of Remand Redetermination Pursuant to Court Remand (“Remand Results”), ECF No. 91–1; see generally *Hyundai Heavy Indus. v. United States* (“HHI (AR4) I”), 43 CIT ___, 393 F. Supp. 3d 1293 (2019); *Large Power Transformers From the Republic of Korea*, 83 Fed. Reg. 11,679 (Dep’t Commerce Mar. 6, 2018) (final results of antidumping duty admin. review; 2015–2016) (“Final Results”), ECF No. 19–5, and accompanying Issues and Decision Mem., A-580–867 (Mar. 9, 2018) (“I&D Mem.”), ECF No. 19–6.

On October 14, 2016, Commerce initiated this fourth administrative review. See *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 81 Fed. Reg. 71,061, 71,063 (Dep’t Commerce Oct. 14, 2016), PR 6, CJA (Vol. III) Tab 6 (“Initiation Notice”). Commerce limited its examination to Plaintiff Hyundai Heavy Industries Co., Ltd. (“HHI”)² and Consolidated Plaintiff Hyosung Corporation (“Hyosung”). See Respondent Selection Mem. (Jan. 3, 2017) (“Selection Mem.”) at 6, PR 22, CJA (Vol. III) Tab 8. Consolidated Plaintiff ILJIN Electric Co., Ltd. (“Iljin”) was one of the non-individually examined respondents. See *Initiation Notice*, 81 Fed. Reg. at 71,063; Selection Mem. at 6.

For the *Final Results*, Commerce assigned Hyosung and HHI weighted-average dumping margins of 60.81 percent based on total adverse facts available (or “total AFA”). 83 Fed. Reg. at 11,680.³ Commerce assigned the same rate to the non-individually examined respondents (including Iljin). See I&D Mem. at 3.

Hyosung, HHI, and Iljin each filed motions for judgment on the agency record challenging different aspects of Commerce’s decision. See *HHI (AR4) I*, 393 F. Supp. 3d at 1299–1300. The Government, on behalf of Commerce, moved to remand the matter in its entirety. *Id.*

¹ The administrative record for this case is divided into a Public Administrative Record (“PR”), ECF No. 19–4, and a Confidential Administrative Record (“CR”), ECF Nos. 19–2, 19–3. For the court’s review of the *Final Results*, the Parties submitted joint appendices containing record documents cited in their briefs. See Public J.A., ECF Nos. 61–1 (Vol. I), 61–2 (Vol. II), 61–3 (Vol. III), 61–4 (Vol. IV); Confidential J.A. (“CJA”), ECF Nos. 60–1 (Vol. I), 60–2 (Vol. II), 60–3 (Vol. III), 60–4 (Vol. IV). The administrative record associated with the Remand Results is contained in an Amended Public Remand Record (“RPR”), ECF No. 125–2, and an Amended Confidential Remand Record (“RCR”), ECF No. 125–3. Parties submitted public and confidential joint appendices containing record documents cited in their briefs on the Remand Results. See Public Index to Remand J.A., ECF No. 132–1; Confidential Index to Remand J.A. (“RCJA”), ECF No. 131–1. Citations are to the confidential joint appendices unless stated otherwise.

² Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to HHI. Ltr. from David E. Bond, Attorney, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 32.

³ Commerce selected the 60.81 percent rate on the basis that it was the AFA rate assigned to HHI in the third administrative review (“AR3”). Decision Mem. for Prelim. Results of Antidumping Duty Admin. Review (Aug. 31, 2017) (“Prelim. Mem.”) at 6 & n.22, PR 260, CJA (Vol. IV) Tab 5.

at 1298. The court denied the Government's motion, *id.* at 1301–02, and remanded the *Final Results* for reconsideration or further explanation regarding Commerce's reliance on total AFA for both Hyosung and HHI, *id.* at 1310–12, 1318–20. Relevant to this discussion, with respect to Hyosung, the court was not able to discern Commerce's reasoning for finding that a certain invoice series covering multiple sales across multiple review periods was unreliable, *id.* at 1308–10, and held that the agency failed to support adequately its finding that Hyosung's reporting of certain price adjustments and discounts was grounds for total AFA, *id.* at 1310–12.

With respect to HHI, the court found that substantial evidence did not support the agency's reliance on total AFA based on HHI's reporting of accessories. *See id.* at 1313–17. The court also found that while substantial evidence supported Commerce's finding that the record was ambiguous regarding whether HHI reliably and accurately reported home market gross unit prices, the court directed Commerce to revisit this issue on remand because it appeared to be related to the accessories issue. *Id.* at 1317–18. The court deferred ruling on Iljin's motion because the issues raised therein could become moot on remand. *Id.* at 1321.

On remand, with respect to Hyosung, Commerce continued to rely on total AFA based on Hyosung's failure to report reliably price adjustments associated with U.S. sales. Remand Results at 11–15. However, the agency found that Hyosung's overlapping invoice series was not grounds for total AFA. *See id.* at 45–50. With respect to HHI, Commerce determined that HHI had inconsistently reported certain parts as foreign like product in reporting the gross-unit prices of home market sales. *Id.* at 16–18. Thus, the agency found HHI's home market sales database was unreliable, warranting reliance on total AFA. *Id.* at 18–19. Finally, Commerce continued to assign Iljin an all-others rate based on the average of the AFA margins of the individually examined respondents. *Id.* at 24.

Hyosung and HHI each filed comments challenging Commerce's reliance on total AFA to determine each of their margins. *See Hyosung's Cmts. on Final Reman Results* ("Hyosung Opp'n Cmts."), ECF No. 100; *Confidential Pl.'s Cmts. in Opp'n to the Final Results of Redetermination Pursuant to Court Remand* ("HHI Opp'n Cmts."), ECF No. 103. Defendant-Intervenor ABB Enterprise Software Inc. ("ABB") filed comments supporting Commerce's reliance on total AFA for Hyosung and HHI. *See Confidential Def.-Int. ABB's Cmts. in Supp. of Remand Redetermination* ("ABB Supp. Cmts."), ECF No. 121. Iljin filed comments arguing that Commerce may not determine the all-others rate by averaging the rates of individually examined

respondents when each of which was determined using total AFA. *See* Cmts. of [Iljin] (“Iljin Opp’n Cmts.”), ECF No. 97. Iljin subsequently filed a motion to supplement its comments with a brief addressing additional authority. *See* Mot. of Pl. [Iljin] for Leave of Court to File Suppl. Br. and accompanying proposed Suppl. Br., ECF No. 139.

ABB filed comments contending that substantial evidence does not support Commerce’s finding that Hyosung’s overlapping invoice series was reliable and challenging Commerce’s findings that HHI had reliably reported information concerning service-related revenue, spare parts, and cost of production. *See* Confidential ABB’s Cmts. in Opp’n to Remand Results (“ABB Opp’n Cmts.”), ECF No. 101. In response, Hyosung and HHI filed comments supporting Commerce’s Remand Results with respect to these issues. *See* Confidential Hyosung’s Cmts. in Supp. of Final Remand Results Regarding Overlapping Invoice Issue (“Hyosung Supp. Cmts.”), ECF No. 116; Confidential Pl.’s Am. Responsive Cmts. in Supp. of the Final Results of Redetermination Pursuant to Court Remand (“HHI Supp. Cmts.”), ECF No. 129.

The Government filed comments in support of the Remand Results. Confidential Def.’s Resp. to Cmts. on Remand Redetermination (“Gov’t Resp.”), ECF No. 114.

For the reasons discussed below, Commerce’s Remand Results are remanded to Commerce to clarify or reconsider its decision not to issue a supplemental questionnaire to Hyosung and its reliance on total AFA for HHI. Because Commerce may choose not to rely on total AFA for Hyosung and/or HHI on remand, the court defers ruling on Iljin’s arguments and denies Iljin’s Motion to file a Supplemental Brief as moot. The agency’s Remand Results are otherwise sustained.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁴ and 28 U.S.C. § 1581(c) (2018). 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). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *Solar World Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014)).

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

DISCUSSION

I. Legal Framework

When necessary information is not available on the record, or an interested party withholds information requested by Commerce, fails to provide requested information by the submission deadline, significantly impedes a proceeding, or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce “shall . . . use the facts otherwise available.” 19 U.S.C. § 1677e(a). Commerce’s authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d) and (e). *Id.* Pursuant to section 1677m(d), if Commerce determines that a respondent has not complied with a request for information, it must promptly inform that respondent of the nature of the deficiency and, to the extent practicable in light of statutory deadlines, provide “an opportunity to remedy or explain the deficiency.” Pursuant to subsection (e), Commerce “shall not decline to consider information that is submitted by an interested party” and that satisfies the following requirements:

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
- (5) the information can be used without undue difficulties.

Id. § 1677m(e). Commerce does not violate 19 U.S.C. § 1677m(e) when it rejects information that does not meet all five requirements. *See Papierfabrik Aug. Koehler SE v. United States*, 843 F.3d 1373, 1382–83 (Fed. Cir. 2016).

If Commerce determines that the party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b). “Compliance with the ‘best of its ability’ standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and

complete answers to all inquiries in an investigation.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce uses total adverse facts available when “none of the reported data is reliable or usable,” such as when all of the “submitted data exhibit[] pervasive and persistent deficiencies that cut across all aspects of the data.” *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citing *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 487, 149 F. Supp. 2d 921, 928–29 (2001)).

II. Issues Concerning Hyosung

A. Application of Total AFA

1. Additional Background

Commerce determined that Hyosung failed to report price adjustments⁵ reliably and accurately (i.e., interest payments, and discounts) for U.S. sales and to act to the best of its ability to comply with Commerce’s information requests. Remand Results at 11–15. While Hyosung supplied the information that Commerce cites as the basis of the reporting deficiency more than two months before issuing the *Preliminary Results*,⁶ the agency did not provide Hyosung an opportunity to remedy or explain the deficiency before resorting to total AFA. *See id.* at 14–15. The court has previously recognized that Hyosung’s reporting of price adjustments and interest charges was deficient. *See HHI (AR4) I*, 393 F. Supp. 3d at 1311 (finding that substantial evidence supports “Commerce’s finding that Hyosung’s reporting of gross unit prices as well as discounts and interest charges was deficient”).

⁵ The Remand Results use the terms “price adjustment” and “sales adjustment” interchangeably in discussing Hyosung’s reporting. *See, e.g.*, Remand Results at 14, 55. To avoid confusion, the court refers to these adjustments as “price adjustments.”

⁶ On May 31, 2017, Commerce issued the “Third Supplemental Questionnaire,” seeking supplemental information on Hyosung’s response to the Initial Sections B and C Questionnaire. *See* Hyosung Third Suppl. Questionnaire. Hyosung submitted its response to that questionnaire on June 21, 2017. *See* Resp. of Hyosung Corp. to the Dep’t’s May 26, 2017 Third Sales Suppl. Questionnaire (June 21, 2017) (“Hyosung 3SQR”), CR 449, PR 216, RCJA Tab 16. The court notes that the cover page to the response (as compared to the cover letter) refers to Commerce’s “May 26, 2017 Second Sales Supplemental Questionnaire.” *Cf.* Remand Results at 12 n.45 (referring to Commerce’s Third Supplemental Questionnaire, dated May 26, 2017, as the “Second Sales Supplemental Questionnaire”). The court’s review of the administrative record indices filed in this case indicates that Commerce’s Third Supplemental Questionnaire was the second supplemental questionnaire issued in relation to Hyosung’s sales information (inclusive of Section A), but was the first supplemental questionnaire specific to Hyosung’s Sections B and C Questionnaire response. *See, e.g.*, Public Index to Admin. R. at 10, 13, ECF No. 19–4. Nevertheless, the court refers to this document as Hyosung’s response to the Third Supplemental Questionnaire.

In the Initial Section C Questionnaire, Commerce instructed Hyosung to report discounts separately from the gross unit prices of LPTs for U.S. sales. *See* Request for Information (Jan. 5, 2017) (“Hyosung Initial Questionnaire”) at C-19, PR 25, RCJA Tab 4. Commerce also instructed Hyosung to identify interest payments tied to any U.S. sales, *id.* at C-17, and report warehousing expenses incurred in the United States, *id.* at C-26. In response, Hyosung reported that its U.S. affiliate, HICO America, did not provide any discounts. *See* Response of Hyosung Corp. to the Dep’t’s Jan. 5, 2017 Sec. [C] Questionnaire (Feb. 27, 2017) (“Hyosung CQR”) at C-25 to C-26, CR 158, RCJA Tab 8; *id.* at C-21 to C-23 (Hyosung reporting gross unit prices without reference to any discounts). Although Hyosung reported that it did not incur warehousing expenses in the United States, *see id.* at C-32, it reported warehousing revenue associated with U.S. sales. *see id.* at C-23 to C-24.

In the Third Supplemental Questionnaire, Commerce instructed Hyosung to explain the “circumstances under which Hyosung charged U.S. customers for storage.” Third Suppl. Questionnaire (May 26, 2017) (“Hyosung Third Suppl. Questionnaire”) at 10, PR 177, CR 328, CJA Tab 7. This questionnaire also requested information regarding Hyosung’s reported storage revenue and requested that Hyundai explain if HICO America provided and charged for storage services in the United States. *Id.* at 10–11. Commerce also requested “complete sales and expense documentation” for certain U.S. sales. *Id.* at 5.

In response, Hyosung reported that for six U.S. sales,⁷ HICO America stored the subject LPTs in a warehouse at the U.S. port. Hyosung 3SQR at 30; *see also id.*, Ex. SBC-9 (containing invoices indicating storage at the U.S. port). Accordingly, Hyosung reported storage expenses in the United States. *See* Draft Results of Redetermination Pursuant to Court Remand (Nov. 21, 2019) (“Draft Results”) at 17, RCR 1, RPR 1, RCJA Tab 31. Commerce did not request, and Hyosung did not report, any new information regarding discounts or interest. *See id.*

Upon review of the sales documentation provided for the U.S. sales, Commerce found that Hyosung had provided, but not separately reported, discounts for two U.S. sales and charged, but not separately reported, interest associated with a third sale. *Id.* at 17–18; *see also* Hyosung 3SQR, Ex. SBC-9. Thereafter, Commerce did not, however, provide Hyosung an opportunity to address and correct these unre-

⁷ These transactions, identified by U.S. sales sequence numbers (“SEQUs”), are SEQUs [[]]. Hyosung 3SQR at 27–28.

ported price adjustments. *See* Draft Results at 18–19; I&D Mem. at 31–32. In its previous opinion, the court found that substantial evidence supported Commerce’s conclusion that Hyosung failed to report adequately discounts and interest charges; however, the court remanded the agency’s reliance on total AFA, explaining that Commerce did not adequately support its refusal to issue a supplemental questionnaire or its finding that Hyosung failed to act to best of its ability. *See HHI (AR4) I*, 393 F. Supp. 3d at 1311–12.

On remand, Commerce again found that Hyosung’s failure to report properly price adjustments for U.S. sales warranted total AFA. *See* Remand Results at 14–15. According to Commerce, Hyosung had the opportunity to report price adjustments in response to the Initial Section C Questionnaire and the Third Supplemental Questionnaire,⁸ the latter of which “requested clarification of a deficiency regarding sales adjustments that [Commerce] identified in review of the original questionnaire response.” *Id.* at 55. The agency explained that it was unable to conclude that the “the reported gross unit prices are accurate,” which undermined the reliability of the U.S. sales database. *Id.* at 56.

Commerce relied on the court’s holding in *ABB Inc. v. United States (“ABB (AR2) II”)*, 42 CIT ___, 355 F. Supp. 3d 1206 (2018), to find that the agency was not obligated to issue a supplemental questionnaire. *Id.* at 54. Commerce explained that it is not obligated to issue a supplemental questionnaire if it lacks a basis to suspect a reporting deficiency. *Id.* at 54 & n.279 (citing *ABB (AR2) II*, 355 F. Supp. 3d at 1222). Commerce stated that it did not have any reason to believe that Hyosung’s reporting was deficient prior to Hyosung’s response to the Third Supplemental Questionnaire and, thus, the agency stated that it was not obligated to issue a supplemental questionnaire. *Id.* at 55.

Commerce found that Hyosung’s conduct warranted an adverse inference because Hyosung failed to provide complete and accurate price adjustment information even though it possessed the information and Commerce specifically requested it. *Id.* at 14–15, 56–61.

2. Parties’ Arguments

Hyosung contends that Commerce’s reliance on total AFA is not in accordance with law because the agency did not comply with 19

⁸ While Commerce in this instance refers to “the first supplemental questionnaire,” the court understands Commerce’s explanation to pertain to the first supplemental questionnaire specific to Hyosung’s Sections B and C questionnaire response, i.e., the Third Supplemental Questionnaire. *See supra* note 6; Remand Results at 12–13 (explaining that Commerce issued the Third Supplemental Questionnaire in response to Hyosung’s response to the initial Sections B and C Questionnaire).

U.S.C. § 1677m(d). Hyosung Opp'n Cmts. at 5–6. Hyosung argues that the agency erroneously construed the court's holding in *ABB (AR2) II* to support its failure to issue a supplemental questionnaire. *Id.* at 6–8. Hyosung further contends that nothing in the Third Supplemental Questionnaire would have informed Hyosung that Commerce was seeking information regarding discounts or interest charges so as to fulfill Commerce's obligations pursuant to 19 U.S.C. § 1677m(d). *Id.* at 9–10. Hyosung also argues that its failure to separately report discounts and interest charges “could not have affected Commerce's margin calculation to Hyosung's advantage” and was not systemic so as to warrant total AFA. *See id.* at 12 (citing *Ferro Union, Inc. v. United States*, 23 CIT 178, 201, 44 F. Supp. 2d 1310, 1332 (1999)). Finally, Hyosung avers that Commerce failed to support its use of an adverse inference. *Id.* at 11–12.

The Government contends that Commerce properly relied on *ABB (AR2) II* because “Commerce cannot know that a questionnaire response is incomplete or inaccurate if the respondent has submitted a seemingly complete response.” Gov't Resp. at 37. The Government argues that Commerce did not have notice that Hyosung inconsistently reported price adjustments until Hyosung responded to the Third Supplemental Questionnaire, by which point it was “only two months before the preliminary results were issued.” *Id.* at 36; *see also* *ABB Supp. Cmts.* at 2–4. The Government also contends that there is no requirement for Hyosung's reporting to be “riddled with unexplained deficiencies” to justify total AFA. *See* Gov't Resp. at 40 (citation omitted). Citing *Hyundai Heavy Industries v. United States (“HHI (AR3) IP”)*, 43 CIT ___, ___, 399 F. Supp. 3d 1305, 1313–14 (2019), the Government argues that the failure to reliably report U.S. sales “is sufficient for Commerce to resort to [total AFA].” *Id.*; *see also* *ABB Supp. Cmts.* at 10–11.

3. Commerce's Failure to Issue a Supplemental Questionnaire was not in Accordance with 19 U.S.C. § 1677m(d)

Pursuant to 19 U.S.C. § 1677m(d), if Commerce finds that a party's response to an information request is deficient, Commerce “shall promptly inform the [party] submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that [party] with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the investigation or review.” The Government argues that, pursuant to *ABB (AR2) II*, if a respondent provides a seemingly complete response to a questionnaire, Commerce is not expected to issue a supplemental question-

naire. Gov't Resp. at 37. In *ABB (AR2) II*, Commerce sought information regarding the respondent's reporting of service-related revenue. 355 F. Supp. 3d at 1217–18. “[Respondent] provided a seemingly complete response to Commerce’s initial questionnaire, and responded to Commerce’s supplemental questionnaire stating that it separately reported service-related revenues and expenses consistent with the original investigation.” *See id.* at 1222. Only when reviewing documentation during verification did Commerce discover that the respondent had not properly reported service-related revenue. *Id.* at 1221–22. The court found that, under those circumstances, Commerce was not obligated to issue another questionnaire pursuant to 19 U.S.C. § 1677m(d) at or after verification because the respondent’s responses to the supplemental questionnaires did not alert the agency to a potential reporting deficiency. *Id.* at 1222–23.

Here, unlike in *ABB (AR2) II*, the Government acknowledged that Hyosung provided the information that ultimately alerted Commerce of Hyosung’s reporting deficiencies two months before Commerce issued the *Preliminary Results*. *See* Gov’t Resp. at 36; *see also* Remand Results at 55 (stating that Commerce became aware of the reporting deficiencies “after receiving Hyosung’s response” to the Third Supplemental Questionnaire). While the Government rejects Hyosung’s effort to distinguish *ABB (AR2) II*, claiming that its holding is not limited to a situation in which Commerce conducts verification, neither the Government nor Commerce, in the first instance, address the relevant statutory standard: “practicability.”⁹ Regardless of whether verification occurs, the relevant inquiry is whether it was practicable for Commerce to provide Hyosung an opportunity to remedy or explain the deficiency. *See* 19 U.S.C. § 1677m(d). In *ABB (AR2) II*, Commerce became aware of the deficiency based upon information reviewed at verification; thus, the court accepted that it was not practicable for Commerce to provide the respondent an opportunity to remedy or address the deficiency. 355 F. Supp. 3d at 1221–23. In contrast, here, Commerce received the deficient response two months before the *Preliminary Results* and the agency provides no basis for finding that it was not practicable to have provided the respondent an opportunity to remedy or explain the deficiency. The court cannot fill that gap in the agency’s reasoning. Simply put, absent a reasonable explanation for why it was impracticable for Commerce to provide

⁹ While the Government contended that when Commerce learned of Hyosung’s reporting deficiency it was too late in the review for Commerce to issue a supplemental questionnaire, Gov’t Resp. at 36, at oral argument, the Government conceded that Commerce did not provide such reasoning in the Remand Results. *See* Oral Arg. at 08:20–9:23 (time stamp from the recording). Thus, the court rejects this argument as inappropriate *post-hoc* reasoning of counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

Hyosung with an opportunity to remedy or explain its failure to report properly its discounts and interest charges, Commerce's rejection of Hyosung's entire database in favor of the use of total adverse facts available is not in accordance with law.

The court also rejects Commerce's assertion that its requests for warehousing revenue and expense data in the Third Supplemental Questionnaire satisfied the agency's obligation to alert Hyosung of reporting deficiencies concerning price adjustments. *See* Remand Results at 54–55. A request for warehousing revenue and expense data is not a request for interest charges and discounts. Moreover, given that Commerce stated that it was not aware of reporting deficiencies concerning discounts and interest payments until it received Hyosung's Third Supplemental Questionnaire Response, *id.* at 55 & nn.284–85 (citations omitted), the agency's asserted reliance on the warehousing questions in the Third Supplemental Questionnaire to meet its obligations pursuant to 19 U.S.C. § 1677m(d) is disingenuous, at best.

Commerce did not provide any other explanation supporting its failure to issue a supplemental questionnaire. Thus, the court finds that Commerce's determination to rely on the facts otherwise available is not in accordance with law because Commerce did not comply with 19 U.S.C. § 1677m(d). The court remands this issue to Commerce for reconsideration in accordance with this opinion. The court defers consideration of Commerce's use of total AFA (as opposed to partial AFA) and its use of an adverse inference under either scenario because these issues may become moot upon redetermination.

B. Overlapping Invoice Series

1. Additional Background

ABB challenges Commerce's determination that an invoice series covering certain of Hyosung's sales that overlap two administrative review periods was not grounds for total AFA. *See* ABB Opp'n Cmts. at 2–9; *see generally* Remand Results at 45–50. For the *Final Results*, Commerce concluded that it was unclear how multiple sales across two administrative reviews could be contained in one invoice and found that this issue supported the application of total AFA. I&D Mem. at 30–31. The court remanded Commerce's determination because it could not discern the path of Commerce's reasoning. *HHI (AR4) I*, 393 F. Supp. 3d at 1309–10. In the Draft Remand Results, Commerce identified concerns regarding the number of line items as compared to the number of corresponding LPTs in the invoices and the fact that the invoice series covers multiple sales in AR4 and AR3

and, on these bases, preliminarily found that these invoices supported the use of total AFA. Draft Results at 12–15.

Hyosung explained that the discrepancy between the line items and LPTs was due to a technical error that caused duplicate line items to appear in certain invoices. *See* Cmts. on Draft Remand Redetermination (Dec. 5, 2019) (“Hyosung Remand Case Br.”) at 8–10, RCR 2, RPR 4, RCJA Tab 32. Hyosung further explained that, consistent with the purchase order, the invoices represent progress payments and no single invoice represents payment in full for an LPT. *See id.* at 6–10. While the sum of the invoices on the record did not equal the total due under the purchase order, Remand Results at 47, Hyosung explained that one invoice was not on the record and had not been requested by Commerce, Hyosung Supp. Cmts. at 13–14. Consistent with the terms of the purchase order, the amount due on the missing invoice would reconcile the invoice totals to the purchase order total. *See* Gov’t Resp. at 29; Hyosung Supp. Cmts. at 13–14. Hyosung also clarified that one of the invoices in the series covered U.S. inland freight for the LPTs covered by the purchase order and not in satisfaction of the purchase order total. Hyosung Remand Case Br. at 11.

In the Remand Results, Commerce accepted Hyosung’s explanations as reasonable and found that the overlapping invoice series was not grounds to rely on total AFA. Remand Results at 45–48. Commerce thus rejected ABB’s arguments that the invoices were not reliable. *See id.* at 48–50.

2. Substantial Evidence Supports Commerce’s Acceptance of the Invoice Series

ABB raises several challenges to Commerce’s acceptance of the invoices. First, ABB argues that Commerce’s findings in AR3 undermine Commerce’s reliance on the invoices. *See* ABB Opp’n Cmts. at 3. Second, ABB asserts that inconsistencies between Commerce’s findings and the reported invoices undermine Commerce’s determination that the invoice series covers a certain number of LPTs; instead, ABB argues that Commerce should have found that the invoice series covers the sale of an additional LPT. *See id.* at 3–4. Third, ABB argues that Commerce incorrectly found that the payments reconcile to the total amount of the purchase order. *See id.* at 7–9. Finally, ABB avers that the payments identified in the invoices cannot be related to the purchase order because, by the time they were issued, one of the LPTs in the purchase order had been damaged and scrapped. *Id.* at 8–9.

In reviewing whether substantial evidence supports Commerce’s determination, the court considers whether there was “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Huaiyin Foreign Trade Corp. (30) v. United States*, 322

F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). This standard requires Commerce to “examine the record and articulate a satisfactory explanation for its action.” *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013).

Substantial evidence supports Commerce’s conclusion that Hyosung properly documented and explained the overlapping invoices. See Remand Results at 47–50. Commerce considered ABB’s arguments and explained that Hyosung sufficiently explained the contents of the invoices and reconciled them with the purchase order. See *id.* ABB’s arguments to the court ignore that Commerce did not request the missing invoice¹⁰ and the agency credited Hyosung’s explanations that the invoice series was reliable even though it was not complete. See *id.* at 48 & n.239 (discussing the agency’s reasoning in AR3). Hyosung has provided, and Commerce accepted, a rational explanation addressing each of ABB’s concerns. The court will not reweigh this evidence. See *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015). For these reasons, the court sustains Commerce’s finding with respect to the overlapping invoice series.

III. Issues Concerning HHI

A. Application of Total AFA

1. Additional Background

Commerce found that HHI failed to include certain LPT parts as foreign like product in two home market sales, thereby understating the gross unit price for those sales.¹¹ Remand Results at 25–28. The

¹⁰ Hyosung provided the invoices in response to Commerce’s request to reconcile the number of LPT units sold during the POR to the number of units entered into the United States. See Suppl. Questionnaire Resp. (May 8, 2017) at S-1, CR 274, PR 166, CJA (Vol. II) Tab 6. Hyosung explained that one LPT was entered into the United States but not reported as a sale because the LPT unit was damaged and scrapped during the shipping process. See *id.* at S-1. Hyosung entered a replacement LPT unit after the POR but did not collect payment from the customer, thus explaining the difference between the number of LPT units sold and entered during the POR. See *id.* Hyosung provided the invoices in question as documentation supporting this explanation. See *id.* at S-2, Ex. S-1 (Exhibit S-1 was not included in the appendix associated with the *Final Results* but was included in the appendix associated with the Remand Results at Tab 10). Commerce did not subsequently request the missing invoice.

¹¹ The Parties and Commerce interchangeably use the terms “subject merchandise” and “foreign like product” in describing the parts at issue. See, e.g., I&D Mem. at 3; HHI Opp’n Cmts. at 4; Gov’t Resp. at 11. The court uses the term “foreign like product.” See 19 U.S.C. § 1677(16) (defining “foreign like product” when referring to home-market sales and the term “subject merchandise” when referring to U.S. sales).

agency did not issue a supplemental questionnaire concerning the gross unit prices following the agency's discovery of the reporting issue. *See id.* at 16–17. Nevertheless, based on HHI's reporting deficiency, the agency applied total AFA. *See id.* at 18–20.

Commerce's Second Sales Supplemental Questionnaire requested that, for certain home-market transactions, HHI provide pricing documentation and a narrative explaining HHI's classification of the parts as foreign like product or non-foreign like product. Second Suppl. Questionnaire (May 19, 2017) ("HHI Second Suppl. Sales Questionnaire") at 10–11, CR 319, PR 168, RCJA Tab 11. HHI provided the requested documents with annotations explaining its "categorization of the listed items." Second Sales Suppl. Resp. (June 19, 2017) ("HHI 2SSQR") at 24–25, CR 392–445, PR 207–14, RCJA Tab 15; *see also id.*, Attach. 2nd SS-22. HHI reported gross home market prices using values provided in "an initial contract," despite a later revised contract that identifies different values. Remand Results at 17. HHI asserted that the revised values were related to a part that was non-foreign like product and did not affect the gross unit price of the foreign like product. *Id.*

Among those transactions subject to Commerce's request, identified by home-market sales sequence numbers ("SEQHs"), was SEQH 52. *See* HHI Second Suppl. Sales Questionnaire at 10. The contract covering SEQH 52 also covered SEQH 53, and HHI included documentation for SEQH 53 even though it had not been requested. *See* Cmts. on the Dep't's Draft Results of Redetermination Pursuant to Court Remand (Dec. 5, 2019) ("HHI Remand Case Br.") at 14, RCR 2, RPR 5, RCJA Tab 33; HHI 2SSQR, Attach. 2nd SS-22, ECF p. 398.¹² The pricing breakdown for SEQH 53 indicated that two parts sold with the LPT were part of the main transformer, hereinafter referred to as Parts A and B.¹³ HHI 2SSQR, Attach. 2nd SS-22, ECF p. 398.

Commerce explained that the scope of the antidumping duty order covers:

any other part attached to, imported with or invoiced with the active parts of LPTs. The 'active part' of the transformer consists of one or more of the following when attached to or otherwise

¹² The two project codes provided in the price breakdown at issue, *see* HHI 2SSQR, Attach. 2nd SS-22, ECF p. 398–99, match those provided for SEQHs 52 and 53 in other documentation. *See* HHI Opp'n Cmts. at 6 n.4; *see also* 2nd Suppl. Sales Resp. to Questions 42, 47–50, 52, 54, 55, and 77 [Attach. 94] (June 27, 2017) ("HHI Attach. 94"), ECF p. 641, CR 473–82, PR 223–24, RCJA Tab 18 (referencing the project numbers for SEQHs 52 and 53).

¹³ Part A is an [[]], and Part B is an [[]]. Remand Results at 27.

assembled with one another: the steel core or shell, the windings, electrical insulation between windings, the mechanical frame for an LPT.

Remand Results at 26. Commerce found that Part A was “clearly identified as [foreign like product] in the home market sample sales and expense documentation.” *Id.* at 18 & n.68 (citing HHI Attach. 94). Commerce further explained that HHI “confirmed that Part A is [foreign like product] in its reporting of another home market sale.” *Id.* at 27.¹⁴ Commerce also claimed that “many of [HHI’s] own record documents for [SEQH 53] demonstrate that Part B falls within the scope language of the order.” *Id.* at 27–28. Thus, Commerce determined that Parts A and B are foreign like product and that HHI had not consistently reported them as such. *See id.*

Because Commerce lacked the “the documentation to determine the accuracy of the sales prices for all of the other home market sales,” the agency found that HHI’s home market sales database was not reliable and used total facts otherwise available. *Id.* at 18. Commerce further found that HHI had not acted to the best of its ability in responding to Commerce’s requests for gross home market price information and applied an adverse inference. *Id.* at 18–19.

2. Parties’ Arguments

HHI argues that Commerce ignored “significant” evidence demonstrating that Parts A and B were properly not reported as foreign like product. HHI Opp’n Cmts. at 4–11. Moreover, HHI contends, substantial evidence does not support the agency’s use of facts available because there was not an information gap in the record. *Id.* at 11. HHI further contends that Commerce’s use of facts available is unlawful because the agency did not provide HHI a chance to resolve any deficiencies in its reporting. *Id.* at 12–14. HHI avers that, even if there is an information gap in the record, it is not so pervasive as to

¹⁴ Commerce did not clearly identify in which home market sale HHI reported Part A as foreign like product. *See* Remand Results at 18 & n.68 (citing to HHI Attach. 94, which covers several home market sales in their entirety); *id.* at 27 & n.116 (citing “[HHI 2SSQR] at Exhibit [SS-]8, page 9,” when Exhibit SS-8 lacks a page nine). According to HHI, SEQH 39 is the only sampled home market sale besides SEQH 52/53 that included Part A. *See* HHI Opp’n Cmts. at 11. However, at oral argument, the Government cited evidence that HHI sold Part A in SEQH 50. *See* Oral Arg. at 1:33:30–1:34:05 (discussing HHI 2SSQR, Attach. 2nd SS-21, ECF p. 376). Commerce stated that Part A “[]” Remand Results at 27. This description matches the description of Part A in documents underlying SEQH 50. *See* 2SSQR, Attach. 2nd SS-21, ECF p. 376 (identifying Part A’s function as “[]” and indicating that Part A is “[]”). Thus, the court discerns that SEQH 50 is the “[]other home market sale [in which HHI] stated that Part A” is foreign like product. Remand Results at 27.

warrant the use of total AFA. *Id.* at 14–15. HHI also argues that Commerce did not sufficiently justify its use of an adverse inference. *Id.* at 16–17.

The Government argues that Commerce correctly found that Parts A and B fall within the scope of subject merchandise, and thus, that they are foreign like product. Gov't Resp. at 10–11. The Government contends that Commerce did not ignore evidence that the parts were non-foreign like product; rather, Commerce was persuaded by other evidence that the parts were foreign like product. *Id.* at 11–13; *see also* ABB Supp. Cmts. at 14–15 (arguing that the annotations on the sales contract cannot override the contract itself, which provides that the parts are part of the main transformer).¹⁵

The Government also contends that HHI did not argue that there is no gap in the record before Commerce and, thus, the argument should be deemed waived. Gov't Resp. at 15. Further, the Government argues that there is a gap in the record with respect to Parts A and B because HHI's inconsistent reporting called into question the reliability of HHI's home market sales database. *Id.* at 15–16. The Government avers that Commerce was not required to issue a supplemental questionnaire because HHI's response to the agency's initial information request was seemingly complete and Commerce did not discover the reporting deficiency until preparing the *Preliminary Results*. *Id.* at 18–19. The Government avers that HHI's failure to report accurately Parts A and B justify the agency's reliance on total AFA. *Id.* at 20–23.

3. Analysis

a. Substantial Evidence Supports Commerce's Determination that Parts A and B are Foreign Like Product

In the Remand Results, Commerce explained that Parts A and B fall within the scope of the order (insofar as they are foreign like product) despite being sold as unattached to the main transformer. Remand Results at 26–27. Commerce further explained that “[s]everal parts and components are separate from the main body [of the transformer] and then attached to the mechanical frame at the installation site.” *Id.* at 27. Commerce found that a document that HHI prepared for a customer identifies Parts A and B as part of the main transformer. *See id.* at 27 & n.114 (citing HHI 2SSQR, Attach. 2nd

¹⁵ ABB agrees with the Government's position “as to why (1) the application of total facts available is supported by substantial evidence and in accordance with law; (2) Commerce had no obligation to issue further questionnaires on this issue; and (3) an adverse inference was warranted in this case.” ABB Supp. Cmts. at 15–16.

SS-22); *see also* HHI 2SSQR, Attach. 2nd SS-22 at ECF pp. 398–99. Commerce also appears to have relied on documentation underlying SEQH 50 to find that HHI identified Part A as foreign like product for another sale. *See supra* note 14. Thus, the court finds that substantial evidence supports the agency’s conclusion that Parts A and B are foreign like product. *See* Remand Results at 27–28.

HHI has failed to demonstrate that Commerce’s determination is unsupported by substantial evidence.¹⁶ First, HHI repeats arguments rejected by Commerce. *Compare id.* at 24–25, 27 & n.113 (rejecting the arguments contained in HHI Remand Case Br. at 6–12), *with* HHI Opp’n Cmts. at 3–11 (repeating the same arguments). The court declines HHI’s “invitation to reweigh the evidence in order to reject Commerce’s conclusions, which were well-supported and fully explained.” *Downhole Pipe*, 776 F.3d at 1378. Second, HHI argues that substantial evidence supports a finding that Parts A and B are not foreign like product. *See* HHI Opp’n Cmts. at 5–9. “That [HHI] can point to evidence of record which detracts from the evidence which supports the [agency’s] decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive.” *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). Commerce’s findings that Parts A and B are foreign like product and that HHI failed to report them as such are supported by substantial evidence and the court will not disturb them.

b. Commerce’s Refusal to Issue a Supplemental Questionnaire is Supported by Substantial Evidence

As discussed above in connection with Commerce’s treatment of Hyosung’s response, when a respondent provides a response that does not comply with the request, Commerce “shall promptly inform the [party] submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that [party] with an opportunity to remedy or explain the deficiency.” 19 U.S.C. § 1677m(d). In this case, HHI challenges Commerce’s failure to provide HHI with an

¹⁶ In *HHI (AR4) I*, Commerce’s finding that the record was “ambiguous” regarding whether Parts A and B are foreign like product was found to be supported by substantial evidence. 393 F. Supp. 3d at 1318. HHI asserts that Commerce’s prior finding is incompatible with Commerce’s finding on remand that Parts A and B are foreign like product. HHI Opp’n Cmts. at 5 (asserting that “ambiguous evidence that is contradicted by other evidence is not substantial evidence”). The court ordered Commerce to “clearly explain the basis for each finding and any extent to which the finding supports the use of any facts available, with or without an adverse inference,” *if* the agency continued to find fault with HHI’s “reporting of . . . particular parts[s] as between U.S. and home markets.” *HHI (AR4) I*, 393 F. Supp. 3d at 1318. Thus, Commerce was permitted to come to a different conclusion if it provides a reasonable explanation supported by substantial evidence.

opportunity to remedy or explain the deficiency in its reporting of home market sales of Parts A and B; however, substantial evidence supports Commerce's conclusion that it was impracticable to do so.

For the *Final Results*, Commerce found that the record was unclear whether HHI underreported gross home market prices based, in part, on the agency's finding that HHI did not report sales prices inclusive of accessories. See I&D Mem. at 15–17. Commerce explained that it discovered discrepancies concerning HHI's reporting of its gross home market prices after issuing the *Preliminary Results* and while evaluating the accessories issue. *Id.* at 17. The court found that substantial evidence supported Commerce's finding that the record was unclear whether HHI properly reported home market prices but remanded Commerce's use of an adverse inference for this issue because it appeared related to Commerce's findings regarding accessories. See *HHI (AR4) I*, 393 F. Supp. 3d at 1317–18.

On remand, Commerce resolved the accessories issue and distinguished it from issues concerning HHI's reporting of gross home market prices. Remand Results at 16, 19–20. Commerce did not repeat or reference its reasoning regarding the impracticability of issuing a supplemental questionnaire, see *id.* at 16–18, 31–32, however, Commerce also did not disavow that prior reasoning. Instead, Commerce focused its discussion on asserting that it was not obligated to issue a supplemental questionnaire because it provided HHI with “multiple opportunities to report its gross unit prices accurately,” but HHI's responses were deficient. *Id.* at 31.

Substantial evidence supports Commerce's failure to issue a supplemental questionnaire based on the reasoning Commerce provided for the *Final Results*. Commerce explained that it discovered the reporting deficiencies concerning Parts A and B after it issued the *Preliminary Results*. See I&D Mem. at 17. “At that point in time, in light of [Commerce's] statutory deadlines to complete the review, it became impractical to send [] another supplemental questionnaire” regarding the home market price issue. *Id.* Indeed, there was nothing unclear about Commerce's request that HHI report its gross unit prices for home market sales of foreign like product and HHI fails to identify any basis to reject Commerce's reasoning regarding the orderly conduct of the review. In fact, 19 U.S.C. § 1677m(d) is not meant to “override the time-limits for completing investigations or reviews, [or to allow parties to submit continual clarifications or corrections of information or to submit information that cannot be evaluated adequately within the applicable deadlines.” Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), H.R. Doc. No.

103–316, vol. 1, at 865 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199.¹⁷ Thus, Commerce adequately supported its decision not to issue a supplemental questionnaire to HHI.

HHI contends that, despite Commerce’s reasoning for the *Final Results*, Commerce could have issued a supplemental questionnaire after issuing the *Preliminary Results* or during the remand proceedings. *See* HHI Opp’n Cmts. at 13 (asserting that Commerce could have issued a supplemental questionnaire “between the *Preliminary Results* and *Final Results*” and Commerce “had four-and-a-half months during the remand proceedings to issue a deficiency notice”). “Commerce prepares its questionnaires to elicit information that it deems necessary to conduct a review, and the respondent bears the burden to respond with all of the requested information and create an adequate record.” *ABB (AR2) II*, 355 F. Supp. 3d at 1222. Here, Commerce requested the information at issue in the Second Sales Supplemental Questionnaire, the response to which contained deficiencies, and Commerce explained that it was impracticable to issue a subsequent questionnaire. Again, section 1677m(d) is not meant to allow an interested part “to submit information that cannot be evaluated adequately within the applicable deadlines.” SAA at 865.

Thus, the court sustains Commerce’s determination not to issue HHI a supplemental questionnaire concerning home market gross unit prices.

c. Commerce’s Reliance on Total AFA is not Supported by Substantial Evidence

As discussed above, Commerce may use facts otherwise available when a respondent “fails to provide [necessary] information by the deadlines for submission of the information or in the form and manner requested;” however, that authority is subject to section 1677m(e).¹⁸ 19 U.S.C. § 1677e(a)(2)(B). In relying on total facts otherwise available,¹⁹ Commerce must “examine the record and articulate a satisfactory explanation for its action.” *Yangzhou Bestpak*, 716

¹⁷ The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements Act.” 19 U.S.C. §3512(d).

¹⁸ Commerce did not specify which subsection of 19 U.S.C. § 1677e(a) provided the basis for its resort to total facts available to determine HHI’s antidumping duty margin. In light of the fact that HHI provided the information regarding its sales of Parts A and B, albeit excluding that data from its home market sales database, it appears that Commerce’s basis is found in section 1677e(a)(2)(B) based on the “form and manner” in which HHI reported these parts.

¹⁹ Commerce found that HHI’s failure to reliably report gross home market prices warranted total facts otherwise available. *See* Remand Results at 19, 29–32.

F.3d at 1378. The agency may not base its decision on speculation. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009) (“It is well established that speculation does not constitute ‘substantial evidence.’”) (quoting *Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1276 (Fed. Cir. 2002) (Dyk, J., dissenting)).

Here, Commerce’s decision to disregard HHI’s entire U.S. and home market databases and, instead, rely on total facts otherwise available is not supported by substantial evidence because it is based on speculation. Commerce infers that HHI’s entire home market sales database was unreliable based solely on HHI’s failure to report properly its inclusion of Parts A or B in just two of its home market sales.²⁰ *See* Remand Results at 30–31. Indeed, Commerce had documentation for several other home market sales which did not include Parts A or B. *See* HHI 2SSQR, Attachs. 2nd SS-21, SS-22. Not only are the two sales at issue a limited portion of the document-supported home market sales, it is not clear how these two sales undermined the reliability of other documented sales which did not include Parts A or B. Commerce’s finding that it had “no basis in the record for determining what [the] home market gross unit prices should be for the overwhelming majority of sales” is simply unsupported speculation and not based on substantial evidence. Remand Results at 30–31. The reporting deficiencies identified by Commerce, the failure to report the sales of two parts, are limited to “discrete categories of information.” *Cf. HHI (AR3) II*, 399 F. Supp. 3d at 1314 (affirming Commerce’s use of total AFA when the deficiencies “were not limited to discrete categories of information but included service-related revenues, the LPT part, and sales related documentation”).

Pursuant to section 1677m(e) Commerce may not disregard information that is “necessary to the determination” when certain criteria are satisfied. 19 U.S.C. § 1677m(e). Commerce failed to address whether HHI’s home market sales information did not meet these criteria. Moreover, HHI’s failure to include these two parts as foreign like product does not, by itself, suggest that all of HHI’s home market sales information “[could not] be verified,” was “so incomplete that it [could not] serve as a reliable basis for reaching the applicable determination,” or could not “be used without undue difficulties.” *Id.*

²⁰ HHI’s home market sales database contains [] observations covering [] LPTs. HHI Remand Case Br. at 17.

§ 1677m(e)(1)–(3), (5).²¹ Thus, Commerce’s decision to disregard all of HHI’s home market sales information²² is inconsistent with 19 U.S.C. § 1677m(e).

Likewise, substantial evidence does not support the agency’s use of an adverse inference. To support a finding that a respondent has not acted to the best of its ability, Commerce must show that the respondent’s failure to fully respond to Commerce’s information requests was the result of its failure “to put forth maximum efforts to investigate and obtain the requested information from its records.” *Nippon Steel*, 337 F.3d at 1383–84.

Here, Commerce did not support its conclusion that HHI failed to put forth maximum effort. Instead, the agency’s reasoning “mischaracterized record facts and largely restated its reasons for using *neutral* facts available.” *Pro-Team Coil Nail Enter. v. United States*, 43 CIT ___, ___, 419 F. Supp. 3d 1319, 1333 (2019). Commerce faulted HHI for not providing information concerning gross home market prices in response to Commerce’s requests when “sample sales documentation demonstrate[d that HHI] possessed the information.” Remand Results at 18–19. However, it appears that HHI provided the information to Commerce but disagreed with the agency as to whether it related to foreign like product. *See id.* at 16–17 (describing HHI’s response to Commerce’s questionnaire with respect to Parts A and B).

Moreover, Commerce’s finding that HHI’s failure to report gross home market prices “impeded Commerce’s conduct of the review,” *id.* at 19, merely repeats the agency’s reasons for relying on facts available, *see id.* at 17–18 (explaining the agency’s decision to rely on total facts otherwise available). “Commerce must do more than simply restate its findings ostensibly supporting the use of neutral facts available to support the use of adverse facts available.” *Pro-Team*, 419 F. Supp. 3d at 1333.

“[T]he antidumping laws are remedial not punitive.” *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (citation omitted). The purpose of an adverse inference is to incentivize a respondent “to cooperate with Commerce’s investigation, not to im-

²¹ For the reasons discussed *infra*, substantial evidence does not support a finding that HHI failed to act “to the best of its ability in providing information and meeting requirements established by” Commerce, as provided in 19 U.S.C. § 1677m(e)(4).

²² The court also rejects the Government’s contention that HHI failed to exhaust its administrative remedies in arguing that there is no gap in the record with respect to HHI’s reporting of Part A. *See* Gov’t Resp. at 15 (citing Remand Results at 30). Here, HHI indicated in its remand case brief that its arguments that there was no gap in the record with respect to Part B also applied to Part A. *See* HHI Remand Case Br. at 13 nn.52, 53. Indeed, Commerce provided a detailed analysis of whether there was a gap in the record with respect to Part A. *See* Remand Results at 27–28, 30–31.

pose punitive damages.” *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012). And while the standard “does not by its terms set a willfulness or reasonable respondent standard,” or require “motivation or intent,” *Nippon Steel*, 337 F.3d at 1383, it recognizes that “mistakes sometimes occur,” *id.* at 1382. “Commerce must devise a non-arbitrary way of distinguishing among errors’ that merit an adverse inference and errors that do not.” *Pro-Team*, 419 F. Supp. 3d at 1333 (quoting *Nippon Steel Corp. v. United States*, 25 CIT 377, 382 n.10, 146 F. Supp. 2d 835, 841 n.10 (2001)).

Here, the record does not support Commerce’s characterization of HHI’s reporting errors as sufficient to warrant an adverse inference. Commerce requested and HHI provided documentation for certain home market sales, including “a complete break-down between foreign like product and non-foreign like product along with detailed narrative explanation and supporting documentation” for the relevant categorization. I&D Mem. at 16–17; Remand Results 31. HHI explained that for some home market sales it reported price values in an initial contract, not those in a revised contract, because the “changes to the contract values between the initial and revised contract were related to a non-subject part.” Remand Results at 18 (citation omitted). Only after issuing the *Preliminary Results* did Commerce question whether the parts at issue were foreign like product. *See* I&D Mem. at 17. Indeed, in the Issues and Decision Memorandum, Commerce had concluded that “the record [was] unclear” regarding the requested information and could not definitively “determine whether Hyundai understated [its] home market gross unit prices.” *Id.* Thus, the record indicates that HHI did not report Parts A and B as foreign like product in the two sales at issue based on its good faith position on an issue about which even Commerce previously acknowledged ambiguity. *See id.* While substantial evidence supports Commerce’s contrary determination regarding the classification of Parts A and B, substantial evidence does not support Commerce’s decision that HHI failed to act to the best of its ability.

For the reasons stated above, the court remands Commerce’s reliance on total AFA for HHI.

B. Issues Raised by ABB

ABB argues that substantial evidence does not support Commerce’s findings that: (1) HHI reliably reported service-related revenue for two SEQUs; (2) HHI reported the cost of spare parts as the agency requested; and (3) HHI’s reported cost of production was reliable. ABB Opp’n Cmts. at 10–17; *see generally* Remand Results at 33–35. ABB’s arguments are not persuasive.

First, substantial evidence supports Commerce's determination that HHI reported all service-related revenue. *See* Remand Results at 33. Commerce considered ABB's arguments that HHI failed to separately report revenues and prevented Commerce from applying its capping methodology (i.e., ensuring that service related revenues did not exceed their associated expenses). *See id.* at 32 & n.144 (citation omitted); Pet'r's Cmts. on the Draft Remand Redetermination (Dec. 5, 2019) ("ABB Remand Case Br.") at 28, RCR 4, RPR 6, RCJA Tab 34. Commerce explained that the activities at issue were properly not reported as service related revenues because they were not services performed on subject merchandise. Remand Results at 33. Commerce also rejected ABB's contention that HHI failed to reconcile revenues and expenses for separately negotiated services for two U.S. sales. *See id.* at 34; ABB Remand Case Br. at 28. Commerce explained that the revenues could be associated with individual expense fields even though the expenses for various services were combined under a single project. Remand Results at 34. Thus, Commerce reasonably concluded that HHI properly reported the revenues and expenses associated with those services. *See id.* Before the court, ABB does not identify evidence that Commerce did not consider or demonstrate any flaw in the agency's reasoning. For these reasons, Commerce's reliance on HHI's service related revenues is supported by substantial evidence.

Second, ABB disputes Commerce's finding that HHI reliably reported the cost of spare parts. ABB Opp'n Cmts. at 14–15. ABB contends that Commerce found HHI's reporting of spare parts deficient in response to the Initial Sections B & D Questionnaires but accepted the same response as sufficient in response to a supplemental questionnaire. *See id.* ABB's argument is premised on an assumption that Commerce's issuance of a supplemental questionnaire containing a question similar to one posed in the initial questionnaire establishes that Commerce found the response to the initial question deficient. This argument lacks merit. Similarities in questions between the initial and supplemental questionnaire alone do not serve as evidence that Commerce found the initial questionnaire response deficient. ABB otherwise provides no basis to dispute Commerce's decision with respect to spare parts and the court finds that decision is supported by substantial evidence. *See* Remand Results at 34.

Third, ABB contends that for two similar products which differed in cost of production, HHI inaccurately explained the reason for the cost difference such that HHI's reported cost of production is not reliable. ABB Opp'n Cmts. at 15–17. ABB raised this issue in the remand proceeding and the agency was not persuaded that the inconsisten-

cies provided grounds to reject HHI's response. *See* Remand Results at 34–35. ABB's argument to the court amounts to nothing more than an invitation for the court to reweigh the evidence, which the court will not do. *See Downhole Pipe*, 776 F.3d 1369, 1377. ABB also appears to challenge Commerce's methodology for calculating HHI's cost of production. ABB Opp'n Cmts. at 16–17. However, ABB's suggestion that Commerce should have used a different methodology, even if that methodology would have been reasonable, is insufficient to demonstrate that the methodology Commerce used is inconsistent with the statute. *See JMC Steel Grp. v. United States*, 38 CIT ___, ___, 24 F. Supp. 3d 1290, 1301 (2014). For these reasons, the court rejects ABB's cost of production arguments.

In conclusion, Commerce's Remand Results with respect to these three issues are supported by substantial evidence.

IV. Issues Concerning Iljin

There is no statutory provision that directly addresses how Commerce is to determine the dumping margin for non-examined companies in an administrative review. However, 19 U.S.C. § 1673d(c)(5) addresses such determinations in investigations and Commerce uses this provision as a guide for determining dumping margins for non-examined companies in a review. *See, e.g., Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 & n.6 (Fed. Cir. 2016). Pursuant to this practice, the "all-others rate" assigned to non-examined companies is determined as "the weighted average of the estimated weighted average dumping margins" assigned to individually-examined companies, "excluding any zero and de minimis margins, and any margins determined entirely" on the basis of the facts available, including adverse facts available. 19 U.S.C. § 1673d(c)(5)(A). If, however, the dumping margins assigned to all individually-examined companies are zero, de minimis, or based entirely on facts available, Commerce "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.* § 1673d(c)(5)(B).

Further guidance on the determination of the all-others rate is found in the SAA. When the dumping margins for all individually examined respondents "are determined entirely on the basis of the facts available or are zero or de minimis," the expected method of determining the all-others rate is to "weight-average the zero and de minimis margins and margins determined pursuant to the facts

available, provided that volume data is available.” SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201. “Commerce may use ‘other reasonable methods,’ but only if Commerce reasonably concludes that the expected method is ‘not feasible’ or ‘would not be reasonably reflective of potential dumping margins.’” *Albemarle*, 821 F.3d at 1352 (quoting SAA at 873, *reprinted in reprinted in* 1994 U.S.C.C.A.N. at 4201).

In this case, Commerce assigned both individually-examined respondents dumping margins of 60.81 percent based on total AFA, and consistent with 19 U.S.C. § 1673d(c)(5) and the SAA, Commerce used the expected methodology to assign this same margin to Iljin. I&D Mem. at 35. Iljin challenged this margin, but the court deferred ruling on this issue because the court remanded Commerce’s reliance on total AFA for Hyosung and HHI, meaning that Iljin’s claim could become moot depending on the remand results. *HHI (AR4) I*, 393 F. Supp. 3d at 1321. On remand, Commerce continued to rely on total AFA to determine the rate for the mandatory respondents and assigned all non-examined companies the same margin. Remand Results at 1, 23–24.

Iljin continues to challenge Commerce’s assignment to it of the same AFA margin assigned to the two individually examined respondents as unsupported by substantial evidence and not in accordance with law. *See* Iljin Opp’n Cmts. However, because the court again remands the agency’s reliance on total AFA to determine the individually-examined respondents’ dumping margins, the court defers consideration of the rate assigned to Iljin pending the agency’s redetermination on remand for the same reasons provided in *HHI (AR4) I*, 393 F. Supp. 3d at 1321.²³

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce’s Remand Results are remanded in part and sustained in part; it is further

ORDERED that, on remand, Commerce shall reconsider its determination not to issue a supplemental questionnaire to Hyosung in accordance with this opinion; it is further

ORDERED that, on remand, Commerce shall reconsider its determination to rely on total adverse facts available to determine HHI’s margin in accordance with this opinion; it is further

ORDERED that Commerce’s Remand Results are sustained in all other respects; it is further

²³ The arguments and authorities in Iljin’s proposed Supplemental Brief concern the lawfulness of the method Commerce used to assign Iljin’s rate. Because the court defers consideration of these arguments, the court denies Iljin’s motion for leave to file the Supplemental Brief as moot.

ORDERED that Commerce shall file its remand redetermination on or before February 16, 2021; it is further

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

ORDERED that any comments or responsive comments must not exceed 5,000 words; and it is further

ORDERED that Iljin's Motion for Leave to File a Supplemental Brief (ECF No. 139) is denied as moot.

Dated: November 18, 2020

New York, New York

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

Slip Op. 20–166

INVENERGY RENEWABLES LLC, Plaintiff, and SOLAR ENERGY INDUSTRIES ASSOCIATION, CLEARWAY ENERGY GROUP LLC, EDF RENEWABLES, INC. and AES DISTRIBUTED ENERGY, INC., Plaintiff-Intervenors, v. UNITED STATES OF AMERICA, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES TRADE REPRESENTATIVE ROBERT E. LIGHTHIZER, U.S. CUSTOMS AND BORDER PROTECTION, AND ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION MARK A. MORGAN, Defendants, and HANWHA Q CELLS USA, INC. and AUXIN SOLAR, INC, Defendant-Intervenors.

Before: Judge Gary S. Katzmann
Court No. 19–00192

[The court denies Plaintiffs' motion for leave to file second supplemental complaints and denies Plaintiffs' motion to modify preliminary injunction.]

Dated: November 19, 2020

Amanda Shafer Berman, John Brew and Larry F. Eisenstat, Crowell & Moring LLP, of Washington, DC and New York, NY, argued for plaintiff, Invenergy Renewables LLC and plaintiff-intervenors, Clearway Energy Group LLC and AES Distributed Energy, Inc. With them on the briefs were Frances Hadfield and Leland P. Frost.

Matthew R. Nicely and Daniel M. Witkowski, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, DC, argued for plaintiff-intervenor, Solar Energy Industries Association. With them on the brief was Julia K. Eppard.

Kevin M. O'Brien, Baker & McKenzie LLP, of Washington, DC, argued for plaintiff-intervenor, EDF Renewables, Inc. With him on the brief was Christine M. Streatfeild.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With him on the briefs were Jeffrey Bossert Clark, Acting Assistant Attorney General, Jeanne E. Davidson, Director, Tara K. Hogan, Assistant Director, and Joshua E. Kurland, Attorney.

John M. Gurley, Dianna Dimitriuc-Quaia, Taniel E. Anderson, Friederike S. Gorgens, and Jessica R. DiPietro, Arent Fox LLP, of Washington, DC, argued for defendant-intervenors, Hanwha Q CELLS USA, Inc. and Auxin Solar Inc. With them on the briefs were Aman Kakar and Russell A. Semmel.

OPINION

Katzmann, Judge:

In the most recent hearing in this ongoing litigation, counsel for the plaintiffs described the predicament of her clients as something akin to Whack-a-Mole. Counsel for the United States said it was more analogous to a game of PacMan. We need not choose between the two characterizations here but can say that this litigation has taken many twists and turns. The court for the fifth time addresses issues related to attempts to withdraw an exclusion from safeguard duties on imported bifacial solar modules, duties which the President imposed by proclamation to protect the domestic industry.¹

In its prior decisions, without reaching the merits of the underlying challenges to the safeguard duties, the court determined that the actions of the Office of the United States Trade Representative (“USTR”) in October 2019 and April 2020 to withdraw the exclusion of bifacial panels from the safeguard measure on solar products likely violated procedural requirements of the Administrative Procedure Act (“APA”). *See* Order and Op. Granting Mot. for Prelim. Inj., *Invenergy Renewables LLC v. United States*, 43 CIT __, 422 F. Supp. 3d 1255 (2019), ECF No. 113 (“*Invenergy I*”); Order and Op. Den. Mot. to Show Cause, *Invenergy Renewables LLC v. United States*, 44 CIT __, 427 F. Supp. 3d 1402 (2020), ECF No. 149 (“*Invenergy II*”); Order and Op. Den. Mot. to Dissolve Prelim. Inj., Mot. to Dismiss and Granting Mot. to Suppl. Compl., *Invenergy Renewables LLC v. United States*, 44 CIT __, 450 F. Supp. 3d 1347 (2020), ECF No. 185 (“*Invenergy III*”); Order and Op. Den. Mot. to Dissolve Prelim. Inj., Mot. to Stay, Granting Mot. to Modify Prelim. Inj., Mot. to Complete Administrative R., and Vacating USTR Decision, *Invenergy Renewables LLC v. United States*, 44 CIT __, Slip Op. 20–144 (Oct. 15, 2020), ECF No. 252, 253 (“*Invenergy IV*”). Accordingly, the court issued a preliminary injunction (“PI”) to enjoin implementation of withdrawals of *Exclusion of Particular Products From the Solar Products Safeguard Measure*, 84 Fed. Reg. 27,684–85 (USTR June 13, 2019) (“*Exclusion*”). In the most recent development, the President on October 10, 2020, announced his decision to withdraw by proclamation an exclusion for bifacial solar panels from safeguard duties and to increase duties on certain crystalline silicon photovoltaic (“CSPV”) cells in year four of the safeguard measure from the originally scheduled fifteen percent to eighteen percent. *Proclamation 10101 of October 10, 2020, To Further Facilitate Positive Adjustment to Competition From Imports of Cer-*

¹ For purposes of this opinion, the term “solar modules” and “solar panels” are used interchangeably.

tain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products), 85 Fed. Reg. 65,639 (Oct. 16, 2020) (“*Proclamation 10101*”). Thus, with *Proclamation 10101*, bifacial solar panels are set to be subjected to safeguard duties once again.

Plaintiff Invenergy Renewables LLC (“Invenergy”), a renewable energy company,² joined by Plaintiff-Intervenors Solar Energy Industries Association (“SEIA”), Clearway Energy Group LLP (“Clearway”), EDF Renewables, Inc. (“EDF-R”), and AES Distributed Energy, Inc. (“AES DE”) (collectively, “Plaintiffs”), challenged that October 2020 action under the umbrella of the prior litigation by seeking to incorporate *Proclamation 10101* into their complaints and to the court’s previously issued PI enjoining USTR from withdrawing its *Exclusion*. Pls.’ Mot. for Leave to File Second Suppl. Compls., Oct. 17, 2020, ECF No. 257 (“Pls.’ Mot. to Suppl. Compls.”); Pls.’ Emergency Appl./Mot. for Prelim. Inj. Modification or in the Alternative TRO, Oct. 20, 2020, ECF No. 263 (“Pls.’ Mot. to Modify PI”). The United States, USTR, U.S. Trade Representative Robert E. Lighthizer, U.S. Customs and Border Protection (“CBP”), and CBP Acting Commissioner Mark A. Morgan (collectively, “the Government”), joined by Defendant-Intervenors Hanwha Q CELLS USA, Inc. (“Hanwha Q CELLS”) and Auxin Solar Inc. (“Auxin Solar”) (collectively, “Defendant-Intervenors”), oppose Plaintiffs’ challenge. The court temporarily restrained the re-implementation of safeguard duties on bifacial solar products so that it could consider Plaintiffs’ challenge. Order Granting Mot. for TRO, Oct. 24, 2020, ECF No. 270 (“First TRO Order”); Order Extending TRO, Nov. 6, 2020, ECF No. 283 (“Second TRO Order”). The court now denies both of Plaintiffs’ motions and lifts its previously issued TRO. The parties may seek further recourse by filing separate actions.

BACKGROUND

I. Prior Proceedings

The statutory framework at issue here is that of the APA and of Sections 201, 203 and 204 of the Trade Act of 1974, 19 U.S.C. §§ 2251–54. As the court noted in *Invenergy I*, the APA sets out procedural requirements for notice-and-comment rulemaking by government agencies with respect to certain legal or policy decisions. 433 F. Supp. 3d at 1297. The Trade Act lays out procedures by which the executive branch may implement temporary safeguard measures to

² Invenergy describes itself as “the world’s leading independent and privately-held renewable energy company.” Invenergy’s Comp. ¶ 14, Oct. 21, 2019, ECF No. 13.

protect a domestic industry from harm. *Id.* at 1265–66 (citing 19 U.S.C. §§ 2251–54). Section 202 dictates that, upon petitions from domestic entities or industries, the International Trade Commission (“ITC”) may make an affirmative determination that serious injury or a threat of serious injury to that industry exists. 19 U.S.C. § 2252. The President is then permitted to authorize discretionary safeguards to provide temporary relief to the at-risk domestic industry. *Id.* § 2253. The statute prescribes in Section 203 certain factors which the President must consider before issuing safeguard measures and limits the duration of such measures. *Id.* § 2253(a)(2), (e)(1). The statute also outlines certain limits on Presidential action, including by limiting new action following the termination of safeguard measures regarding certain articles. *E.g., id.* § 2253(e). Further, the safeguard statute mandates that the President “shall by regulation provide for the efficient and fair administration of all actions taken for the purpose of providing import relief.” *Id.* § 2253(g)(1). Section 204 sets procedural forth procedural requirements and requires certain findings to be made by the President before a safeguard action can be modified. *Id.* § 2254.

In January 2018, the President issued *Presidential Proclamation 9693 To Facilitate Positive Adjustment to Competition From Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled Into Other Products) and for Other Purposes*, 83 Fed. Reg. 3,541–51 (Jan. 25, 2018) (“*Proclamation 9693*”), announcing a safeguard measure against imports of solar products after an affirmative determination of injury by the ITC. These duties were to remain in effect for a four-year period that began on February 7, 2018. The President delegated the process of “exclusion of a particular product from the safeguard measure” to USTR. *Proclamation 9693*, 83 Fed. Reg. at 3,543. After a lengthy process, USTR decided to exclude bifacial solar panels from safeguard duties. *Exclusion*. Four months later, in October 2019, Invenergy initiated litigation to enjoin the Government from implementing the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244–45 (USTR Oct. 9, 2019) (“*First Withdrawal*”), which would have ended the *Exclusion*. Invenergy’s Mot. for Prelim. Inj., Nov. 1, 2019, ECF No. 49. On December 5, 2019, the court issued a PI to enjoin USTR from reinstating safeguard duties on certain bifacial solar panels through implementation of the *First Withdrawal*. *Invenergy I*, 422 F. Supp. 3d at 1294. On April 14, 2020, the Government filed a status report to inform the court of the issuance of USTR’s *Determination on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497–99 (USTR

Apr. 17, 2020) (“*Second Withdrawal*”), which, like the *First Withdrawal*, constituted a withdrawal of the *Exclusion* of bifacial solar panels from safeguard duties. Def.’s Status Report, ECF No. 155. On May 27, 2020, the court issued a decision in which it granted Plaintiffs’ motion to supplement their complaints to include the *Second Withdrawal* and denied the Government’s motion to dissolve the preliminary injunction because it had not proved sufficiently changed circumstances. *Invenergy III*, 450 F. Supp. 3d at 1365.³ After further filings and another oral argument, on October 15, 2020, the court granted Plaintiffs’ cross-motion to modify the PI to enjoin the *Second Withdrawal* and simultaneously vacated the *First Withdrawal*. *Invenergy IV*, Slip Op. 20–144 at 44–45. As with the initial injunction, the modified injunction was granted upon finding a likelihood of success on the merits of the two APA counts alone. *See id.* at 22 (“[T]he court concludes that Plaintiffs . . . [showed] that the *Second Withdrawal* was likely arbitrary and capricious and that they would suffer from the same procedural harm through a decision that did not comply with APA requirements.”). The court there observed:

The court notes that if presented with an adequate record and explanation of USTR’s action, the court could proceed, in accordance with well-established administrative law standards, to review USTR’s decision to withdraw it previously granted exclusion from safeguard duties on imported bifacial solar modules. However, various procedural missteps by USTR mean that the court cannot reach that point now. As the court has stated, “[t]he court acknowledges the Government and Defendant-Intervenors’ concern that domestic industries may face a threat of material injury due to USTR’s decision to exclude bifacial solar products from safeguard duties. The court also acknowledges the concerns of Plaintiffs (consumers, purchasers and importers of utility-grade bifacial solar panels), who oppose safeguard duties that they claim increase the cost of bifacial solar panels.” *Invenergy III*, 450 F. Supp. 3d at 1365 (citations omitted). The court takes no position on the efficacy of safeguard duties in providing protection to the domestic solar industry or of a decision to exclude products from those safeguard duties. *Id.* Once again, the court merely continues to require the Government to follow its own laws when it acts.

Invenergy IV, Slip Op. 20–144 at 45. The court further ordered that the Government complete the administrative record by December 3,

³ On August 5, 2020, the Government filed an appeal of this decision in United States Court of Appeals for the Federal Circuit. *Invenergy III*, appeal docketed No. 2020–2130 (Fed. Cir. Aug. 5, 2020), ECF No. 240.

2020 and that the parties confer and submit a joint status report on the status and schedule of further briefing by December 11, 2020. Order Granting Def.'s Consent Mot. for Extension of Time to File Administrative R., Nov. 2, 2020, ECF No. 275; Order Granting Def.'s Consent Mot. for Extension of Time to File Joint Status Report, Nov. 13, 2020, ECF No. 290.

II. Proclamation 10101 and Ensuing Litigation

When the President has taken a safeguard measure to address serious injury to the domestic industry under Section 201 of the Trade Act of 1974, Section 204 of the Trade Act directs the ITC to monitor developments with respect to the domestic industry protected by the safeguard. *See* 19 U.S.C. § 2254(a). When, as here, the safeguard measure the President imposes under Section 203 of the Trade Act exceeds three years, the statute requires the ITC to submit a report with the results of its monitoring efforts to the President and to Congress not later than the date that is the midpoint of the initial period during which the action is in effect. *See id.*

Pursuant to these statutory requirements and for the purpose of preparing a mid-term report regarding the safeguard measure imposed by *Proclamation 9693*, the ITC initiated a monitoring investigation on July 25, 2019, held a public hearing, and accepted written submissions from interested parties to prepare the required report. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Monitoring Developments in the Domestic Industry Institution and Scheduling Notice for the Subject Investigation*, 84 Fed. Reg. 37,674 (ITC Aug. 1, 2019). The ITC then issued its mid-term monitoring report in February 2020. *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully Assembled Into Other Products: Monitoring Developments in the Domestic Industry*, USITC Pub. 5021, Inv. No. TA-201-075 at 1 (Feb. 2020). The report found “a number of significant developments” in the domestic industry for CSPV products,” including an expanded U.S. module industry, “changes in import volumes, and generally decreased prices.” *Id.*

Additionally, in March 2020, the ITC issued a report pursuant to a request from USTR under Section 204, 19 U.S.C. § 2254(a)(4), regarding the probable economic effect on the domestic solar cell and module manufacturing industry of modifying the safeguard measure to increase the level of the tariff-rate quota (“TRQ”) on solar cells. *Crystalline Silicon Photovoltaic Cells, Whether or Not Partially or Fully*

Assembled Into Other Products: Advice on the Probable Economic Effect of Certain Modifications to the Safeguard Measure, USITC Pub. 5032, TA-201-075 (Mar. 2020).

After receipt of the ITC's reports, Section 204 authorizes the President to reduce, modify, or terminate an action he has taken under Section 203. 19 U.S.C. § 2254(b)(1). On October 10, 2020, pursuant to that Section, the President issued *Proclamation 10101*. In the proclamation, the President noted the ITC's findings that: (1) the exclusion of bifacial modules from the safeguard measure will likely result in substantial increases in imports of bifacial modules if the *Exclusion* remains in effect; (2) such modules will likely compete with domestically produced CSPV products in the United States; and (3) the benefits to domestic CSPV module producers from an increased TRQ discussed elsewhere in the proclamation would likely be limited if the bifacial module exclusion remained in place. *Proclamation 10101*, 85 Fed. Reg. at 65,640 ¶ 6. He additionally noted the ITC's further finding that bifacial modules are likely to account for a greater share of the market in the future and can substitute for monofacial products in the various market segments, such that exempting imports of bifacial modules from the safeguard tariff would apply significant downward pressure on prices of domestically produced CSPV modules. *Id.* The President also stated that he had received a petition "from a majority of the representatives of the domestic industry with respect to each of the following modifications." *Id.* ¶ 7.

The President found that the "domestic industry has begun to make positive adjustment to import competition, shown by the increases in domestic module production capacity, production, and market share." *Id.* Invoking his authority under Section 204 to "reduce, modify, or terminate an action taken under Section 203 of the Trade Act when the President determines that the domestic industry has made a positive adjustment to import competition," the President determined that "it is necessary to revoke th[e] exclusion and to apply the safeguard tariff to bifacial panels" because that exclusion "has impaired and is likely to continue to impair the effectiveness of the action [he] proclaimed in *Proclamation 9693*." 85 Fed. Reg. at 65,640 ¶¶ 7, 9(a). He further determined that to "achieve the full remedial effect envisaged by *Proclamation 9693*," it was necessary to increase "the duty rate of the safeguard tariff for the fourth year of the safeguard measure to proclaimed" in that Proclamation. *Id.* at 65,640 ¶ 9(b). The President modified the Harmonized Tariff Schedule of the United States ("HTSUS") accordingly, setting October 25, 2020, as the effective date for the modifications. *Id.* at 65,640-42 cls. (1), (4), Annex.

On October 12, 2020, the Government notified the court of *Proclamation 10101*.⁴ Def.'s Status Report, Oct. 12, 2020, ECF No. 251. Plaintiffs responded by filing a motion to supplement their complaints to include a challenge to *Proclamation 10101*. See Pls.' Mot. to Suppl. Compls.⁵ They then filed an emergency motion to modify the PI to explicitly enjoin *Proclamation 10101*, and, in the alternative, for a TRO to temporarily enjoin *Proclamation 10101* until a hearing could be held on their outstanding motions. Pls.' Mot. to Modify PI at 1. Simultaneously, Defendant-Intervenors filed a conditional motion for a three-judge panel in the event that the court granted Plaintiffs' motion to supplement their complaints. Conditional Mot. of Def.-Inters. for a Panel of Three Judges, Oct. 20, 2020, ECF No. 264. The court ordered the Government and Defendant-Intervenors to respond to Plaintiffs' motion, Order Directing Resp. by Def. and Def.-Ints., Oct. 21, 2020, ECF No. 265, which those parties did on October 23, 2020, Def.'s Resp. to Pls.' Mot. to Amend the Ct.'s Prelim. Inj. or for a TRO, ECF No. 269 ("Def.'s Resp. to Mot. to Modify PI"); Def.-Inters.' Resp. to Pls.' Emergency Mot. to Modify Prelim. Inj., ECF No. 268 ("Def.-Inters.' Resp. to Mot. to Modify PI").

The court issued the TRO on October 24, 2020 to temporarily enjoin *Proclamation 10101*, as it affected bifacial solar panels, in order to preserve the status quo as the court considered Plaintiffs' allegations that *Proclamation 10101* violated the PI and Plaintiffs' motions to supplement their complaints and modify the PI. First TRO Order. On November 3, 2020, the Government and Defendant-Intervenors responded to Plaintiffs' motion to supplement their complaints. Def.'s Resp. to Pls.' Mot. for Leave to File Second Suppl. Compl., ECF No. 277 ("Def.'s Resp. to Suppl. Compl."); Def.-Inters.' Resp. to Pl. and Pl.-Inters.' Mot. for Leave to File Second Suppl. Compl., ECF No. 279 ("Def.-Inters.' Resp. to Suppl. Compl."). After a hearing on November 5, 2020, the court extended the TRO for an additional fourteen days while the court took Plaintiffs' motions and the Government's and Defendant-Intervenors' responses under advisement. Second TRO Order. At the request of the court, the parties filed supplemental briefs on November 10, 2020. Pl. Invenergy's and Pl.-Inters. Clearway

⁴ *Proclamation 10101* was published in the Federal Register on October 16, 2020. 85 Fed. Reg. 65,639 (Oct. 16, 2020).

⁵ Plaintiffs collectively filed a motion for leave to supplement their complaints and accompanying memorandum of support. See Pls.' Mot. to Suppl. Compls. However, each plaintiff filed separate proposed supplemental complaints. See Pls.' Mot. to Suppl. Compls., Attach. 1, Oct. 17, 2020, ECF No. 257 ("Invenergy's Proposed Second Suppl. Compl."); Pl. Clearway's Proposed Second Suppl. Compl., Oct. 19, 2020, ECF No. 258; Pl.-Inter. SEIA's Proposed Second Suppl. Compl., Oct. 19, 2020, ECF No. 259; Pl.-Inter. AES DE's Proposed Second Suppl. Compl., Oct. 19, 2020, ECF No. 260; Pl.-Inter EDF-R's Proposed Second Suppl. Compl., Oct. 19, 2020, ECF No. 261.

and AES DE's Suppl. Br. in Supp. of Emergency Mot. to Modify PI, ECF No. 286 ("Invenergy's Suppl. Br."); Pl.-Inters. SEIA and EDF-R's Suppl. Br. in Supp. of Emergency Mot. to Modify PI, ECF No. 288 ("Pl.-Inters.' Suppl. Br."); Def.'s Suppl. Br., ECF No. 285; Def.-Inters.' Post-Hearing Submission, ECF No. 287 ("Def.-Inters.' Suppl. Br.").

JURISDICTION

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), which provides that the court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . [the] administration and enforcement" of tariffs and duties.

DISCUSSION

The court denies both Plaintiffs' Motion for Leave to File Second Supplemental Complaints and Plaintiffs' Motion to Modify the PI. The court addresses each motion in turn.

I. Plaintiffs' Motion for Leave to File Second Supplemental Complaints

Plaintiffs request leave to file second supplemental complaints to "incorporate facts related to, and expand their claims to encompass," the President's withdrawal of the *Exclusion* in *Proclamation 10101*. Pls.' Mot. to Suppl. Compls. at 2. The proposed second supplemental complaints add, *inter alia*, allegations that *Proclamation 10101* "violates the Trade Act's restrictions on the imposition and modification of safeguard measures and does not comply with the process prescribed by that Act for Presidential action," and that "[i]nsofar as Section[s] 203–04 of the Trade Act allows Defendants to impose a safeguard measure pursuant to [*Proclamation 10101*], they violate Plaintiffs' due process rights." Pls.' Mot. to Suppl. Compls., Attach. 1 ¶¶ 101, 112, Oct. 17, 2020, ECF No. 257 ("Invenergy's Proposed Second Suppl. Compl."). The proposed second supplemental complaints further allege that "[i]nsofar as [*Proclamation 10101*] must be implemented by Defendants through subsequent actions, such actions also violate the . . . APA procedural requirements," and must be set aside because they are "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Id.* at ¶¶ 83, 90. Plaintiffs ask that *Proclamation 10101* be declared unlawful and the Government be enjoined from implementing the proclamation, including by collecting duties on merchandise covered by the *Exclusion* or modifying the HTSUS. *Id.* at 28 (Prayer for Relief). In addition, SEIA's complaint also challenges the modification of the safeguard in year four to

reduce the duty rate on modules to eighteen percent. SEIA's Proposed Second Suppl. Compl. ¶ 50, Oct. 19, 2020, ECF No. 259.

Relying on the fact that *Proclamation 10101* withdraws the same exclusion of bifacial solar panels at issue in this litigation and claiming that *Proclamation 10101* is "unlawful for many of the same reasons as USTR's prior withdrawal actions," Plaintiffs argue that supplementation would be both permissible and efficient. Pls.' Mot. to Suppl. Compls. at 2. They specifically identify Sections 203 and 204 of the Trade Act as key considerations in the court's analysis of both their initial claims regarding the *First Withdrawal* and *Second Withdrawal* and their proposed supplemental claims regarding *Proclamation 10101*. *Id.* at 9. The Government and Defendant-Intervenors oppose Plaintiffs' motion to supplement their complaints, arguing instead that the President's revocation of the *Exclusion in Proclamation 10101* represents a "separate Executive action from USTR's administrative determinations at issue in this lawsuit." Def.'s Resp. to Suppl. Compls. at 8; Def.-Inters.' Resp. to Suppl. Compls. at 11–12.

While leave to amend the pleadings shall, under USCIT Rule 15, be freely granted, the decision of whether to permit the filing of a supplemental complaint falls within the discretion of the court after consideration of all relevant factors. *Intrepid v. Pollock*, 907 F.2d 1125, 1128–29 (Fed. Cir. 1990) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Among those factors properly informing the court's discretion are the relationship between the initial cause of action and the proposed amendments and the risk of prejudice to the parties. *Id.* In particular, where "later events are directly related to those averments" constituting the basis of the original claims and there is "no substantive prejudice" to the nonmovant, both the Federal Circuit and the Supreme Court have held that amendment is proper. *Id.* at 1129, 1131; *Foman*, 371 U.S. at 179, 181 (finding motion to amend was improperly denied where there was no prejudice to defendant and supplemental complaint asserted a second claim against same defendant and relating to same transaction); *Griffin v. School Board*, 377 U.S. 218, 227 (1964) (finding amendment proper where there was no prejudice to defendant and supplemental claims were "part of the same old cause of action").

The court is not persuaded by Plaintiffs' arguments that the existing action and proposed second supplemental complaints are sufficiently related to justify amendment. Plaintiffs' proposed second supplemental complaints do not "directly relate[]" to the claims and actions forming the basis of the existing action. *Intrepid*, 907 F.3d at 1129. Rather, they involve actions undertaken by the President, a party not implicated in Plaintiffs' complaints or supplemental com-

plaints and seek relief against the President not contemplated by Plaintiffs' prior pleadings. Those earlier pleadings allege that USTR violated Plaintiffs' due process rights by failing to provide adequate notice and opportunity for comment under the APA, and by failing to defer to Presidential authority and procedural requirements under Sections 203 and 204 of the Trade Act. Invenergy's Suppl. Compl. ¶¶ 77–81, May 27, 2020, ECF No. 187. In contrast, the proposed Second Supplemental Complaints allege that *Proclamation 10101* violates the APA only "insofar as [it] must be implemented by Defendants," and that the President's own actions violated the procedural requirements of the Trade Act. Invenergy's Proposed Second Suppl. Compl. ¶¶ 91, 101. The USTR's administrative proceedings at issue in the existing complaints are entirely separate from the ITC's midterm review of the safeguard which led to the modification of the safeguard by the President in issuing *Proclamation 10101*, now challenged by Plaintiffs. In short, the core issues are different.⁶

Plaintiffs argue that their claims regarding *Proclamation 10101* constitute "the same statutory and constitutional claims" as their existing allegations against USTR and involve "legal and factual issues" which "overlap substantially." Invenergy's Suppl. Br. at 3. With respect to the Trade Act, Plaintiffs' previous pleadings allege that by withdrawing the *Exclusion* USTR violated Section 203's requirement that the President "provide for the efficient and fair administration of all actions taken for the purpose of providing import relief under this part," 19 U.S.C. § 2253(g), and Section 204's requirements for Presidential action prior to the modification of a safeguard action, 19 U.S.C. § 2254(b). Invenergy's Proposed Second Suppl. Compl. at ¶¶ 78, 79. In their proposed amended pleading, Plaintiffs argue that *Proclamation 10101* also violates Section 203 by reimposing a safeguard measure less than two years after the prior measure terminated and violates Section 204 insofar as it fails to satisfy that Section's requirement that the President only "reduce modify or terminate" safeguard measures upon finding "positive adjustments to import competition" and following industry request. Invenergy's Proposed Second Suppl. Compl. at ¶¶ 97–101.

The court finds that the current and proposed claims are not directly related such that they warrant amendment sought by Plaintiffs. Although Plaintiffs' proposed supplemental claims under Sections 203 and 204 of the Trade Act involve the same statutory scheme

⁶ SEIA's proposed second supplemental complaint is further removed from the core issue in the underlying APA litigation by adding a challenge to the rate of duty in year four of the safeguard, a determination that does not affect the bifacial exclusion in any way and is entirely unrelated to the underlying litigation – but is still the subject of *Proclamation 10101*. SEIA's Proposed Second Suppl. Compl. ¶ 50.

as the existing complaints, they are far from the same statutory claims. Rather, as noted, the proposed second supplemental complaints introduce a new cause of action against the President for violation of his own statutory duties under the Trade Act. Invenergy's Proposed Second Suppl. Compl. at ¶¶ 96–101. This new claim is distinct from Plaintiffs' original allegations that USTR overstepped statutory bounds and exercised authority "not delegated to USTR" by the President by issuing the *First Withdrawal* and *Second Withdrawal*. Invenergy's Suppl. Compl. at ¶ 79.

Nor is there a compelling argument that Plaintiffs' proposed additional claims under the APA are adequately related to the existing complaints to require the court to grant Plaintiffs' motion. With respect to the APA, Plaintiffs' original claims hinge on the procedural rulemaking requirements imposed on agencies by the APA, and USTR's alleged failure to afford due process to Plaintiffs by complying with those requirements. Plaintiffs' proposed supplemental claims address the APA only with respect to USTR's likely implementation of *Proclamation 10101*, Invenergy's Proposed Second Suppl. Compl. at ¶¶ 83, 91. As the President is not himself subject to the APA, *Franklin v. Massachusetts*, 505 U.S. 788, 801–801 (1992), this attempt to formulate claims under the APA regarding *Proclamation 10101* is too tenuous a connection to warrant granting of Plaintiffs' motion.

Finally, there is no evidence that Plaintiffs will be prejudiced by denial of their motion to amend. Rather, *Proclamation 10101* involves a distinct and separate action governed by different procedures. As such, the court finds that efficient resolution of Plaintiffs' claims regarding *Proclamation 10101* is most likely to be achieved in a separate proceeding. Rather than requiring the parties to "separately litigat[e] many of the same merits issues" across multiple actions, Pls.' Mot. to Suppl. Compls. at 11, recognizing the distinct nature of Plaintiffs' claims stemming from *Proclamation 10101* will promote efficient resolution of the already-pleaded issues surrounding the *First Withdrawal* and *Second Withdrawal* without prejudice to Plaintiffs' ability to re-file their supplemental claims as a separate action.

For these reasons, the court acts within its discretion in denying Plaintiffs' Motion for Leave to File Second Supplemental Complaints.

II. Plaintiffs' Motion to Modify the Preliminary Injunction

Plaintiffs move for modification of the PI to further enjoin the President's decision in *Proclamation 10101* to end the *Exclusion*. Pls.' Mot. to Modify PI at 13. Plaintiffs claim that *Proclamation 10101* attempts to implement the same withdrawal of the exclusion for bifacial solar panels under the safeguard measure on CSPV products

that the court previously enjoined. *Id.* at 2. Plaintiffs contend that *Proclamation 10101* constitutes a change in circumstances that should be enjoined “in order to continue to protect Plaintiffs from harm pending final adjudication of the lawfulness of the government’s actions.” *Id.* at 13. Citing the court’s recent opinion in *Invenergy IV* that noted the court must preserve the status quo during the pendency of an appeal, Plaintiffs’ further argue modification of the PI to include *Proclamation 10101* is necessary. *Id.* at 16. Plaintiffs then argue that, even though they need not re-prove each factor of the PI, they nevertheless are likely to succeed on the merits of their challenge to the withdrawals of the *Exclusion*, *id.* at 17–35, Plaintiffs face irreparable procedural and economic harms from implementation of *Proclamation 10101*, *id.* at 26–41, and the balance of equities and public interest weigh in favor of enjoining *Proclamation 10101*, *id.* at 41–42.

Plaintiffs alleged in their initial response to the Government’s status report regarding *Proclamation 10101*, Pls.’ Resp. to Def.’s Status Report at 3, Oct. 15, 2020, ECF No. 254, and in their motion to modify the PI that *Proclamation 10101* constituted a violation of the previously issued PI by “seek[ing] to bypass the [c]ourt’s review – and to circumvent the [c]ourt’s PI,” Pls.’ Mot. to Modify PI at 1. Further, in their motion, Plaintiffs noted the Government’s previous statements to the court that “it would not make a withdrawal of the *Exclusion* effective, and would not impose safeguard duties on bifacial panels, unless and until the [c]ourt lifted its PI.” *Id.* at 14. Plaintiffs also claimed that “[p]roperly construed, the extant PI should be all that is necessary to prevent [*Proclamation 10101*]’s withdrawal of the *Exclusion* from becoming effective.” *Id.* at 15. At oral argument, Plaintiffs clarified that, while they claimed that *Proclamation 10101* violates the PI, they moved to modify the PI “so that there can be no question going forward at least that defendants are barred from entering the proclamation into effect and imposing the safeguard measure on bifacial panels under the proclamation or under USTR’s prior withdrawal actions.” Tr. of Hr’g of Nov. 5, 2020 at 14, Nov. 6, 2020, ECF No. 284.

The Government and Defendant-Intervenor responded in opposition to Plaintiffs’ motion. The Government summarized *Proclamation 10101* as “a new determination, by the President, under a different statutory authority than that on which USTR relied, which is not subject to the procedural requirements of the APA that this [c]ourt has found lacking with respect to USTR’s actions.” Def.’s Resp. to Mot. to Modify PI at 2. Thus, the Government argues that modification of

the PI to include *Proclamation 10101* would not be appropriate in light of the narrower standard of review over Presidential actions and Plaintiffs' failure to meet the four factors necessary for injunctive relief. *Id.* at 2–3. Further, the Government explains that, “[b]ecause *Proclamation 10101* provides an additional and wholly distinct basis for applying the safeguard duties to bifacial products, [P]laintiffs’ likelihood of success on their challenge to the Proclamation cannot rest on their challenges to the USTR’s prior actions.” *Id.* at 10. Thus, the Government argues that Plaintiffs would be required to prove each of the injunctive factors anew as they relate to *Proclamation 10101*. *Id.* at 11–12. Defendant-Intervenors similarly argue that Plaintiffs “have not met their burden to warrant modification of the [PI]” and dispute Plaintiffs’ characterization of the status quo as inclusive of the withdrawal.⁷ Def.-Inters.’ Resp. to Mot. to Modify PI at 13–15. The Government and Defendant-Intervenors then argue that Plaintiffs have not carried their burden of proving their success on the injunctive factors. Def.’s Resp. to Mot. to Modify PI at 12–29; Def.-Inters.’ Resp. to Mot. to Modify PI at 16–42.

As to Plaintiffs’ claims of a violation of the PI, the Government responded that, despite its representations on behalf of USTR, it “never represented that the President would withhold issuance of a midterm proclamation, or decline to use his authority under section 204 to take action in response to congressionally-mandated ITC issue[d] midterm reports.” Def.’s Resp. to Mot. to Modify PI at 9. Further, at oral argument, the Government stated that the PI could not be construed to cover hypothetical, future Presidential action. Tr. of Hr’g of Nov. 5, 2020 at 44–45. Finally, the Government argues that the President’s action, resulting from the ITC’s midterm review that began in July 2019 before the initiation of this litigation, does not circumvent the PI. *Id.* at 45.

As the court noted in *Ad Hoc Shrimp Trade Action Committee v. United States*, in order for the court to modify a PI, the moving party must show that (1) “a change in circumstances of the parties from the time the injunction would issue that would make the modification

⁷ Defendant-Intervenors now argue that the *Exclusion* is one of the contested agency decisions within this litigation. See Def.-Inters.’ Resp. to Mot. to Modify PI at 14; Tr. of Hr’g of Nov. 5, 2020 at 82–84; Def.-Inters.’ Suppl. Br. at 7–8. The court rejects this characterization. Defendant-Intervenors have never filed a separate action or cross-complaint within this action challenging the *Exclusion* before the court. See also Tr. of Hr’g of Nov. 5, 2020 at 47 (the Government explaining that it nor any other party has challenged the *Exclusion*). Thus, the court does not have subject-matter jurisdiction over review of the *Exclusion* and would have no basis for ruling on the procedural or substantive merits of Defendant-Intervenors’ grievances with the *Exclusion*. If Defendant-Intervenors’ wish to expressly challenge the merits of the *Exclusion*, then they may do so by initiating such a challenge following the rules of this court.

necessary”; and (2) continuation of the unmodified PI would be inequitable. 32 CIT 666, 670, 562 F. Supp. 2d 1383, 1388 (2008). The first requirement is based on the Supreme Court’s decision in *Sys Fed’n No. 91 v. Wright*, in which it stated that “[t]he source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.” 364 U.S. 642, 647 (1961); *see also United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968) (holding that if an injunction has failed to achieve its intended results, the court has the power to modify the order). The court thus addresses whether modification of the PI is required in order to fulfill its original objective and to avoid inequity to Plaintiffs.⁸

The court denies Plaintiffs’ motion to modify the PI because it determines that *Proclamation 10101* does not constitute a change in circumstances requiring modification. As the court noted in *Invenergy IV*, the purpose of the PI, as originally issued and as modified, is “to shield Plaintiffs from the effects of an agency decision that was undertaken in violation of the APA.” Slip Op. 20–144 at 20. Fundamentally, the President is neither an agency nor subject to the APA under well-settled, long-standing decisions by the Supreme Court. *See Franklin*, 505 U.S. at 800–01 (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”). Thus, there is no way in which modification of the PI to include *Proclamation 10101* would shield Plaintiffs from an agency decision that runs afoul of the APA.⁹ The court also con-

⁸ Plaintiffs propose that the court may modify the PI in order to preserve the status quo. Pls.’ Mot. to Modify PI at 16. However, as the court noted in its past opinion, that standard applies in the context of modification of a PI while an appeal is pending. *Invenergy IV*, Slip Op. 20–144 at 18 (“The caselaw is clear that a court may exercise continuing supervision over a PI while an interlocutory appeal is pending to the extent necessary to maintain the status quo.” (citing *Amado v. Microsoft Corp.*, 517 F.3d 1354, 1358 (Fed. Cir. 2008); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 578 (5th Cir. 1996)). Because the court declines to modify the PI further, the court need not address the impact of the pending appeal on the present decision. Further, for the reasons stated below, the court concludes that *Proclamation 10101* does not impact that status quo set by the PI.

⁹ None of Plaintiffs’ cited cases require modification of a PI to include wholly separate action by a different government actor under different legal authority, but merely explain that a court has the power to modify a PI to preserve the status quo, in the event of changed circumstances, or where it is necessary to achieve the PI’s purpose. *See* Pls.’ Mot. to Modify PI at 14–16 (citing *SKF USA Inc. v. United States*, 28 CIT 170, 184, 316 F. Supp. 2d 1322, 1335–36 (2004); *Sys. Fed’n No. 91*, 364 U.S. 642, 647 (1961); *Transgo Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1030 (9th Cir. 1985); *Pro Edge L.P. v. Gue*, 411 F. Supp. 2d 1080 (N.D. Iowa 2006); *1250 24th Street Associates Ltd. v. Brown*, 684 F. Supp. 326, 329–30 (D.D.C. 1988)). *See also* *Invenergy’s* Suppl. Br. at 7. *Proclamation 10101* is not analogous to any of the situations addressed in those cases.

cludes that *Proclamation 10101* is not a violation of the PI despite directing re-implementation of safeguard duties on bifacial solar products, the same effect of USTR's enjoined actions. Because the President acted to withdraw the *Exclusion* under different statutory authority than that delegated to the USTR, any implementation of safeguard duties on bifacial products does not violate the court's PI, which was premised solely upon legislative restrictions imposed on USTR by the APA.¹⁰ Any inequity faced by Plaintiffs is not implicated by the protection of the PI or within the scope of the current litigation. Plaintiffs are not without recourse to have those alleged inequities addressed by this court but, because the court denies the motion to file second supplemental complaints, Plaintiffs must do so under a separate action. Thus, the Plaintiffs' motion to modify the PI is denied.

CONCLUSION

Because *Proclamation 10101* constitutes a distinct action related to the safeguard measure that presents questions of law and fact separate from USTR's action at issue in the present case, the court exercises its discretion and denies Plaintiffs' Motion to File Second Supplemental Complaints. For similar reasons, the court also denies Plaintiffs' Motion to Modify the PI.

SO ORDERED.

Dated: November 19, 2020
New York, New York

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

Slip Op. 20–167

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

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

¹⁰ Plaintiffs contend that *Proclamation 10101* was issued to circumvent the PI. *See, e.g.*, Invenergy's Suppl. Br. at 7 (“[T]he obvious intent of the 2020 Proclamation is to circumvent this [court's PI . . .]”). The court notes that the midterm investigation and review of the safeguard was commenced pursuant to statute in July 2019 prior to the initiation of this litigation which resulted in the PI. *See* Background, *supra*, Sec. II. The court thus declines to conclude on the record now before it that *Proclamation 10101* is a deliberate circumvention of the court's past decisions directed at the actions of USTR.

[Remanding the U.S. Department of Commerce's final results in the countervailing duty expedited review of certain softwood lumber products from Canada for reconsideration of the statutory basis upon which Commerce promulgated 19 C.F.R. § 351.214(k).]

Dated: November 19, 2020

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OPINION AND ORDER

Barnett, Judge:

In this case, the court considers whether the U.S. Department of Commerce (“Commerce” or “the agency”) was authorized to create an expedited review process to determine individual countervailing duty (“CVD”) rates for exporters not individually examined in an investigation.¹ This process is distinct from annual reviews, new shipper reviews, and sunset reviews that readers may often encounter and that are expressly provided for by statute. Here, Commerce estab-

¹ For ease of reference, the court characterizes the type of proceeding at issue in this case as a “CVD expedited review.”

lished the expedited review process by regulation and the court must determine whether the statutory authority identified by Commerce provides a legal basis for that regulation. As discussed herein, the court concludes that the answer is no and remands the determination for Commerce to either identify an alternative basis for the regulation or take other action in conformity with this opinion.

This consolidated case is before the court on a motion for judgment on the agency record pursuant to U.S. Court of International Trade (“USCIT”) Rule 56.2 filed by Plaintiff Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“Plaintiff” or “the Coalition”). Confidential Pl.’s Rule 56.2 Mot. for J. on the Agency R. and accompanying Confidential Mem. in Supp. of Pl.’s Rule 56.2 Mot. for J. on the Agency R. (“Coalition Br.”), ECF No. 101. Plaintiff, an association of domestic manufacturers, producers, and wholesalers of softwood lumber products, Compl. ¶ 9, ECF No. 2, challenges Commerce’s final results in the CVD expedited review of certain softwood lumber products from Canada, *see Certain Softwood Lumber Products From Canada*, 84 Fed. Reg. 32,121 (Dep’t Commerce July 5, 2019) (final results of CVD expedited review) (“*Final Results of Expedited Review*”), ECF No. 99–5, and accompanying Issues and Decision Mem. (“I&D Mem.”), C-122–858 (June 28, 2019), ECF No. 99–6.² Plaintiff argues, *inter alia*, that Commerce exceeded the congressional grant of rulemaking authority set forth in section 103(a) of the Uruguay Round Agreements Act (“URAA” or “the Act”), Pub. L. No. 103–465, 108 Stat. 4809 (1994), when the agency promulgated the regulation governing CVD expedited reviews, 19 C.F.R. § 351.214(k), pursuant to that statutory provision. Coalition Br. at 14–32; *see also* Pl. [Coalition’s] Reply Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R. (“Coalition Reply”) at 2–12, ECF No. 127.

For the reasons discussed herein, the court agrees that Commerce exceeded its relied-upon authority and remands the matter to the agency for Commerce to reconsider the statutory basis for its regulation.³

² The administrative record is divided into a Public Administrative Record, ECF No. 99–2, and a Confidential Administrative Record, ECF Nos. 99–3, 99–4. Parties submitted joint appendices containing record documents cited in their briefs. *See* Public J.A., ECF No. 148; Confidential J.A., ECF No. 149.

³ Because the validity of the regulation underlying Commerce’s *Final Results of Expedited Review* remains open to question, the court declines to resolve Plaintiff’s additional argument that the cash deposit and liquidation instructions that Commerce issued following the *Final Results of Expedited Review* violated 19 C.F.R. § 351.214(k)(iii). *See* Coalition Br. at 32–33. The court also declines to resolve the various challenges to Commerce’s calculation of individual cash deposit rates raised by Plaintiff in its motion and by Consolidated Plaintiffs in their respective motions. *See id.* at 33–47; Mot. for J. Upon the Agency R. Under Rule 56.2 of Consol. Pl. Mobilier Rustique (Beauce) Inc., ECF No. 100, and accompanying Pl.’s Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 100–1; Rule 56.2 Mot. of

BACKGROUND

I. The Uruguay Round Agreements Act

Congress enacted the URAA on December 8, 1994. Pub. L. No. 103–465, 108 Stat. 4809 (1994). The Act, which became effective on January 1, 1995, amended the domestic antidumping (“AD”) and CVD laws in connection with several international trade agreements referred to as the Uruguay Round Agreements. *See* 19 U.S.C. §§ 3511(a)(1), (d), & 3501(7). Relevant here, one such agreement is the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). *Id.* § 3511(d)(12); *see generally* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 14, Annex 1A, SCM Agreement. Pursuant to Article 19.3 of the SCM Agreement:

When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. *Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.*

SCM Agreement, art. 19.3 (emphasis added).

The Statement of Administrative Action (“SAA”) accompanying the URAA discussed the statutory amendments to Title VII of the Tariff Act of 1930 considered necessary to implement Article 19.3. *See* URAA, SAA, H.R. Doc. No. 103–316, vol.1, at 941–42 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4250–51. Prefacing those changes, the SAA explained that, under pre-URAA law, “Commerce normally calculate[d] a country-wide [CVD] rate applicable to all exporters unless there [was] a significant differential in CVD rates between companies or if a state-owned company [was] involved.” *Id.* at 941, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4250. The SAA further explained that, pursuant to Article 19.3 of the SCM Agreement, an

Fontaine[] Inc.[] for J. on the Agency R., ECF No. 103, and accompanying Confidential Corrected Mem. in Supp. of Rule 56.2 Mot. of Fontaine[] Inc.[] for J. on the Agency R., ECF No. 150; Consol. Pl. Gov’t of Can.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 105, and accompanying Consol. Pl. Gov’t of Can.’s Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 156; Consol. Pl. Gov’t of Que.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 106, and accompanying Consol. Pl.’s Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 145.

“exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter.” *Id.* The SAA then discussed several changes to U.S. trade laws effected by sections 264, 265, and 269⁴ of the URAA. *Id.* at 941–42, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4251. Those changes included Commerce’s calculation of individual CVD rates for exporters and producers that were individually investigated in an investigation or administrative review, an all-others rate for those that were not individually examined, and, in certain circumstances, a countrywide CVD rate. *See id.* The SAA did not, however, discuss any implementation of CVD expedited reviews.⁵

Congress expressly approved the SAA in the URAA. *See* 19 U.S.C. § 3511(a)(2). Further, the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act [i.e., the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application.” *Id.* § 3512(d).

II. Implementing Regulations

Section 103 of the URAA delegated authority to Commerce, among others, to promulgate interim and final regulations implementing the provisions of the Act. 19 U.S.C. § 3513. This section provides:

(a) Implementing actions

After December 8, 1994—

- (1) the President may proclaim such actions, and
- (2) other appropriate officers of the United States Government may issue such regulations,

⁴ The SAA misattributes changes made by URAA § 269 to URAA § 265. *See* SAA at 941–42, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4251; URAA § 269(a) (amending 19 U.S.C. § 1677f-1 to add new subsection (e)).

⁵ The portion of the SAA dedicated to discussing the statutory changes necessary to implement the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (otherwise referred to as “the Antidumping Agreement”) contains a section regarding “new shipper reviews.” SAA at 875–76, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4203. “New shippers are defined as exporters and producers . . . that . . . : (1) did not export the merchandise to the United States . . . during the original period of investigation; and (2) are not affiliated with any exporter or producer who did . . . , including those not examined during the investigation.” SAA at 875, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4203. During the Uruguay Round negotiations, “[t]he United States agreed . . . to provide new shippers with an expedited review” in order to “establish individual dumping margins for such firms on the basis of their own sales.” *Id.* Expedited reviews for new shippers apply to determinations of both AD and CVD duties. *See* 19 U.S.C. § 1675(a)(2)(B). However, such new shipper reviews are distinct from the CVD expedited review at issue here. *See Comm. Overseeing Action for Lumber Int’l Trade Investigations or Negots. v. United States (“Lumber II”),* 43 CIT ___, ___, 413 F. Supp. 3d 1334, 1343–45 (2019) (discussing the differences).

as may be necessary to ensure that *any provision of this Act, or amendment made by this Act*, that takes effect on the date any of the Uruguay Round Agreements enters into force with respect to the United States *is appropriately implemented on such date*. Such proclamation or regulation may not have an effective date earlier than the date of entry into force with respect to the United States of the agreement to which the proclamation or regulation relates.

(b) Regulations—

Any interim regulation necessary or appropriate to carry out any action proposed in the statement of administrative action approved under section 3511(a) of this title to implement an agreement described in section 3511(d)(7), (12), or (13) of this title shall be issued not later than 1 year after the date on which the agreement enters into force with respect to the United States.

Id. (emphasis added).⁶

On May 11, 1995, Commerce issued interim regulations. *See Antidumping and Countervailing Duties*, 60 Fed. Reg. 25,130 (Dep't Commerce May 11, 1995) (interim regulations; request for cmts.). Commerce did not address CVD expedited reviews in those interim regulations. *See id.* at 25,130–33 (discussing the regulations).

On May 19, 1997, Commerce published its final agency regulations concerning the implementation of the URAA. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296 (Dep't Commerce May 19, 1997) (final rule) (“*Preamble*”). These regulations finalized new provisions governing new shipper reviews. *Id.* at 27,318–22 (discussing 19 C.F.R. § 351.214). Subsection (k) of the new shipper regulation further provided for Commerce’s implementation of CVD expedited reviews. *See* 19 C.F.R. § 351.214(k) (1998); *Preamble*, 62 Fed. Reg. at 27,321.

Subsection (k) of the new shipper regulation permits a respondent that was not selected “for individual examination” or accepted “as a voluntary respondent” in a CVD investigation in which Commerce “limited the number of exporters or producers to be individually examined” to “request a review . . . within 30 days of the date of

⁶ With respect to implementing regulations, the SAA states:

In practice, the Administration will endeavor to amend or issue the regulations required to implement U.S. obligations under the Uruguay Round [A]greements as soon as practicable after the time the obligations take effect. Section 103(a) of the [the URAA] provides the authority for such new or amended regulations to be issued, and for the President to proclaim actions implementing the provisions of the Uruguay Round [A]greements, on the date they enter into force for the United States.

SAA at 677, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4055–56.

publication in the Federal Register of the [CVD] order.” 19 C.F.R. § 351.214(k)(1). A company requesting a CVD expedited review must certify that:

- (i) The requester exported the subject merchandise to the United States during the period of investigation;
- (ii) The requester is not affiliated with an exporter or producer that the [agency] individually examined in the investigation; and
- (iii) The requester has informed the government of the exporting country that the government will be required to provide a full response to the [agency’s] questionnaire.

Id. § 351.214(k)(1)(i)–(iii). If requested, an expedited review will be initiated “in the month following the month in which a request for review is due.” *Id.* § 351.214(k)(2)(i). Additionally, the expedited review will be conducted “in accordance with the provisions of this section applicable to new shipper reviews,” subject to certain exceptions. *Id.* § 351.214(k)(3).⁷

III. The CVD Order and Expedited Review of the Order

On January 3, 2018, following affirmative determinations of countervailable subsidization and material injury, Commerce published the CVD order on certain softwood lumber products from Canada. *See Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347 (Dep’t Commerce Jan. 3, 2018) (am. final aff. [CVD] determination and [CVD] order) (“*CVD Order*”). On March 8, 2018, in response to requests filed by certain Canadian producers, Commerce initiated an expedited review of the *CVD Order*. *See Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 9,833 (Dep’t Commerce March 8, 2018) (initiation of expedited review of the [CVD Order]) (“*Initiation Notice*”). The companies subject to the expedited review (and their affiliates) are companies that were not selected for individual examination during the investigation and that had been assigned the

⁷ Those exceptions are:

- (i) The period of review will be the period of investigation used by the [agency] in the investigation that resulted in the publication of the countervailing duty order;
- (ii) The [agency] will not permit the posting of a bond or security in lieu of a cash deposit under paragraph (e) of this section;
- (iii) The final results of a review under this paragraph (k) will not be the basis for the assessment of countervailing duties; and
- (iv) The [agency] may exclude from the countervailing duty order in question any exporter for which the [agency] determines an individual net countervailable subsidy rate of zero or de minimis . . . , provided that the [agency] has verified the information on which the exclusion is based.

19 C.F.R. § 351.214(k)(3) (citation omitted).

“all-others” rate of 14.19 percent. *CVD Order*, 83 Fed. Reg. at 348–49. The “period of review” for the CVD expedited review was January 1, 2015, through December 31, 2015 (the same as the period of investigation in the original investigation). *Initiation Notice*, 83 Fed. Reg. at 9,833.

On July 5, 2019, Commerce issued the *Final Results of Expedited Review*, pursuant to which the agency calculated reduced or *de minimis* rates for the eight companies as follows: (1) Les Produits Forestiers D&G Ltée and its cross-owned affiliates (“D&G”): 0.21 percent; (2) Marcel Lauzon Inc. and its cross-owned affiliates (“Lauzon”): 0.42 percent; (3) North American Forest Products Ltd. and its cross-owned affiliates (“NAFP”): 0.17 percent; (4) Roland Boulanger & Cie Ltée and its cross-owned affiliates (“Roland”): 0.31 percent; (5) Scierie Alexandre Lemay & Fils Inc. and its cross-owned affiliates (“Lemay”): 0.05 percent; (6) Fontaine Inc. and its cross-owned affiliates (“Fontaine”): 1.26 percent; (7) Mobilier Rustique (Beauce) Inc. and its cross-owned affiliates (“Rustique”): 1.99 percent; and (8) Produits Matra Inc. and Sechoirs de Beauce Inc. and their cross-owned affiliate (“Matra”): 5.80 percent. 84 Fed. Reg. at 32,122.

The rates calculated for D&G, Lauzon, NAFP, Roland, and Lemay are considered *de minimis*; therefore, Commerce stated it would instruct CBP “to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by” those companies that were entered on or after July 5, 2019; “liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by” those companies; and “refund all cash deposits of estimated countervailing duties collected on all such shipments.” *Id.* As to the companies receiving a lower—but not *de minimis*—rate (Fontaine, Rustique, and Matra), Commerce stated it would instruct CBP “to collect cash deposits of estimated countervailing duties” at the lower rates calculated in the *Final Results of Expedited Review*. *Id.*

In the Issues and Decision Memorandum accompanying the *Final Results of Expedited Review*, Commerce explained that section 103(a) of the URAA authorized the agency to promulgate 19 C.F.R. § 351.214(k) and conduct CVD expedited reviews. I&D Mem. at 18–20. According to Commerce, section 103(a) affords Commerce “the authority to promulgate regulations to ensure that remaining obligations under the URAA which were not set forth in particular statutory provisions were set forth in the Code of Federal Regulations.” *Id.* at 19; *see also id.* at 20 (explaining that the regulation “ensures that United States law is consistent with [international] obligations”).

IV. Procedural History of This Case

Plaintiff commenced this action on July 15, 2019. Summons, ECF No. 1. Plaintiff alleged jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) (2018)⁸ or, alternatively, 28 U.S.C. § 1581(c).⁹ Compl. ¶¶ 3–6.

On July 26, 2019, the court vacated a temporary restraining order requested by the Coalition barring U.S. Customs and Border Protection (“CBP”) from liquidating unliquidated entries of softwood lumber produced or exported by certain Canadian companies that received reduced or *de minimis* rates in the *Final Results of Expedited Review. Comm. Overseeing Action for Lumber Int’l Trade Investigations or Negots. v. United States*, 43 CIT ___, 393 F. Supp. 3d 1271 (2019). The court also denied Plaintiff’s motion for a preliminary injunction seeking the same relief. *See id.*

On November 4, 2019, the court denied the Government’s motion to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction. *Lumber II*, 413 F. Supp. 3d at 1347. While exercising jurisdiction pursuant to 28 U.S.C. § 1581(i)(4), the court entered an order instructing, *inter alia*, that “the disposition of these cases shall follow the procedures set forth in Rule 56.2” of the rules of this court. Order (Nov. 4, 2019), ECF No. 92.¹⁰

On November 12, 2019, the court consolidated Court Nos. 19–00122, 19–00154, 19–00164, 19–00168, and 19–00170 under this lead action and set a scheduling order. Order (Nov. 12, 2019), ECF No. 93 (consolidation); Order (Nov. 12, 2019), ECF No. 94 (scheduling); *see also* Order (Apr. 6, 2020), ECF No. 113 (amending the scheduling order). Plaintiff subsequently filed the instant motion on December 19, 2019. *See* Coalition Br. Thereafter, Defendant United States (“Defendant” or “the Government”) and Defendant-Intervenors filed their respective responses to the Coalition’s arguments. Confidential Def.’s Resp. [to] Pls.’ Mots. For J. on the Agency R. (“Gov’t Resp.”), ECF No. 110; Joint Br. of Def.-Ints. Gov’t of Can. and Gov’t of Que. in Opp’n to

⁸ Pursuant to 28 U.S.C. § 1581(i)(4):

[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for ... administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

⁹ Pursuant to 28 U.S.C. § 1581(c), “[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930,” i.e., 19 U.S.C. §§ 1516a, 1517.

¹⁰ Relatedly, the court waived the requirement for the Government to file an Answer in this case. Docket Entry (Nov. 19, 2019), ECF No. 98; *see also* USCIT Rule 7(a)(2) (requiring an “answer to a complaint” to be filed in any action other than one “described in 28 U.S.C. § 1581(c)”).

Pl.'s Mot. for J. on the Agency R. ("CGP Resp."), ECF No. 120;¹¹ *see also* [Resp.] of Def.-Ints. Les Produits Forestiers D&G Ltée and Marcel Lauzon Inc. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("D&G/Lauzon Resp."), ECF No. 117;¹² Resp. of Def.-Int. Scierie Alexandre Lemay & Fils Inc. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Lemay Resp."), ECF No. 119;¹³ Def.-Int. [NAFP's] Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 125;¹⁴ Resp. of Def.-Int. Gov't of N.B. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF No. 141.¹⁵ The Coalition has filed a reply. *See* Coalition Reply.

On September 16, 2020, the court heard oral argument on Commerce's authority to promulgate 19 C.F.R. § 351.214(k). *See* Docket Entries, ECF Nos. 166, 168.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(i)(4). The court reviews an action commenced pursuant to 28 U.S.C. § 1581(i)(4) in accordance with the standard of review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, as amended. *See* 28 U.S.C. § 2640(e). Section 706 directs the court, *inter alia*, to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

DISCUSSION

Section 103(a) of the URAA delegates authority to "appropriate officers of the United States Government [to] issue such regulations, as may be necessary to ensure that any provision of this Act, or amendment made by this Act, . . . is appropriately implemented." 19 U.S.C. § 3513(a)(2). At issue in this case is the scope of rulemaking authority granted by section 103(a). Statutory interpretation requires the court to "carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). That inquiry involves an examination of "the statute's text, structure, and legislative history," applying, if necessary,

¹¹ CGP stands for "Canadian Governmental Parties." The Canadian Governmental Parties consist of Defendant-Intervenors Government of Canada and Government of Québec. *See* CGP Resp. at 1.

¹² D&G and Lauzon support the arguments made by the CGP regarding Commerce's authority to promulgate 19 C.F.R. § 351.214(k) and offered no additional arguments on that issue. D&G/Lauzon Resp. at 1-2.

¹³ Lemay adopted by reference the arguments made by other parties and raised no additional arguments. Lemay Resp. at 2.

¹⁴ The NAFP did not comment on the issue addressed herein.

¹⁵ The Government of New Brunswick did not comment on the issue addressed herein.

“the relevant canons of interpretation.” *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)). When, as here, the court concludes that Congress’s intent is clear, “that is the end of the matter,” and the court “must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).¹⁶

I. Parties’ Contentions

The Coalition contends that Commerce’s authority pursuant to section 103(a) is limited to enacted provisions and, because there is no statutory provision authorizing Commerce to establish CVD expedited reviews, Commerce exceeded its rulemaking authority when it promulgated 19 C.F.R. § 351.214(k). Coalition Br. at 14–19. The Coalition further argues that Commerce’s interpretation of section 103(a) nullifies sections 123 and 129 of the URAA, which govern U.S. implementation efforts in response to adverse findings by a dispute settlement panel of the World Trade Organization (“WTO”) or the WTO Appellate Body regarding the United States’ compliance with the provisions of the Uruguay Round Agreements. *Id.* at 20. With respect to the legislative history, Plaintiff contends that “[t]he SAA summarized the changes Congress felt necessary to conform U.S. law to Article 19.3 of the SCM Agreement,” *id.* at 22, and, thus, demonstrates that Congress considered the issue and decided against the establishment of CVD expedited reviews, *id.* at 22–23.

The Government concedes that the URAA does not contain an explicit provision for the administration of CVD expedited reviews. *See* Gov’t Resp. at 7. Nevertheless, the Government contends that section 103(a) authorized Commerce to promulgate regulations implementing both the URAA and the international trade agree-

¹⁶ Because the court finds that Congress’s intent respecting the scope of rulemaking authority set forth in URAA § 103(a) is unambiguous, the court does not resolve what level of deference, if any, would apply to Commerce’s interpretation of section 103(a) if congressional intent were ambiguous. Commerce does not administer the statutory provision and shares rulemaking authority with other “appropriate officers of the United States Government,” all of whom may construe section 103(a) differently. 19 U.S.C. § 3513(a)(2) (codified in Title 19, Chapter 22 (Uruguay Round Trade Agreements), Subchapter 1); 19 U.S.C. § 1677(1) (defining Commerce as the “administering authority” for the domestic trade laws contained in Title 19, Chapter 4 (Tariff Act of 1930), Subtitle IV); *cf. City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 301 (2013) (holding that *Chevron* applies to an agency’s “construction of a[n] ambiguous] jurisdictional provision of a statute it administers”) (citation omitted) (emphasis added); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”). For the same reason, the court does not address Parties’ arguments implicating deference under *Chevron* prong two. *See, e.g.*, Gov’t Resp. at 6, 12–14; CGP Resp. at 4–5, 7–10.

ments the Act approved. *Id.* at 7–8. The Government rejects the Coalition’s arguments implicating the procedural requirements of sections 123 and 129 as inapposite to an understanding of Commerce’s authority under section 103(a). *Id.* at 9. The Government also disagrees with Plaintiff as to the significance of the relevant language in the SAA. According to the Government, the SAA represents evidence that Congress, through section 103(a), intended for Commerce to promulgate regulations implementing Article 19.3 of the SCM Agreement. *See id.* at 7–8.

The Canadian Governmental Parties advance substantially similar arguments to those of Defendant. CGP Resp. at 5–6, 10–12, 19. The Canadian Governmental Parties further assert that the text of section 103(b) authorizing interim regulations supports Commerce’s interpretation of section 103(a). *Id.* at 12–13. The Canadian Governmental Parties also contend that Congress has acquiesced to Commerce’s interpretation of section 103(a) as authorizing Commerce to conduct CVD expedited reviews. *Id.* at 18 n.11.

II. Analysis

Examination of the statutory text, structure, and legislative history compel the court to conclude that Commerce exceeded its authority to the extent that it promulgated 19 C.F.R. § 351.214(k) pursuant to URAA § 103(a). The court further finds that Congress has not acquiesced to Commerce’s interpretation of section 103(a).

A. Statutory Text

The plain language of section 103(a)—specifically, the statutory reference to “this Act, or amendment made by this Act”—refers to the URAA. *See* URAA § 1 (“This Act may be cited as the ‘Uruguay Round Agreements Act.’”).¹⁷ The text therefore grants Commerce regulatory authority with respect to enacted provisions, but extends no further to encompass perceived international obligations that Congress did not implement through the URAA.¹⁸ In matters of statutory interpretation, “courts must presume that a legislature says in a statute

¹⁷ Notwithstanding the Government’s and the Canadian Governmental Parties’ respective arguments in support of Commerce’s regulation, this interpretation of the text is not contested. The Canadian Governmental Parties explicitly concede that “this Act” refers to the URAA. *See* CGP Resp. at 6 (“[T]he language refers to ‘any’ provision of the URAA or ‘any’ amendment made by the URAA.”).

¹⁸ The Canadian Governmental Parties attempt to convert the court’s analysis of the statutory language into one pursuant to *Chevron* prong two through the observation that “section 103(a) of the URAA is silent or ambiguous regarding how Congress intended for Commerce and other relevant administrative agencies to implement the general provisions of the URAA.” CGP Resp. at 6. The court must not, however, be too quick to “throw up [its] hands and declare that Congress’s intent is unclear.” *Timex*, 157 F.3d at 882 (citation omitted). In this case, the focal point for the court’s inquiry is whether Commerce had the

what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Otherwise, “[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress,” which the court cannot do. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374–75 (1986).

Louisiana Public Service Commission addressed the lawfulness of the Federal Communication Commission’s (“FCC”) ruling that section 220 of the Communications Act of 1934 permitted the FCC to prescribe depreciation practices that served to preempt inconsistent state regulations. 476 U.S. at 362, 369. The Court held that a separate provision, section 152(b) of the Communications Act of 1934, constrained the FCC from displacing state law in that regard. *Id.* at 369–76. While that case involved “a congressional denial of power,” the broader principle that “an agency literally has no power to act . . . unless and until Congress confers power upon it,” *id.* at 374 (emphasis omitted), is applicable here. The opinion of the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) in *FAG Italia S.p.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002) is instructive in this regard.

FAG Italia addressed Commerce’s position that the agency had the authority to conduct a duty absorption inquiry¹⁹ with respect to an antidumping duty order issued before January 1, 1995²⁰ in years other than the second or fourth year after publication of the transition order at issue. *Id.* at 808. As authority for its position, Commerce relied on the absence of an explicit statutory prohibition and corresponding silence in the legislative history “as to whether Commerce can conduct duty absorption inquiries in years other than years [two] and [four].” *Id.* at 815.

The Federal Circuit squarely rejected this view of agency authority. The appellate court explained that Congress only provided for duty absorption inquiries during an administrative review “initiated [two] years or [four] years after the publication of an antidumping duty

authority to develop a methodology for conducting CVD expedited reviews in the first instance, not the reasonableness of Commerce’s chosen method of conducting the reviews. Thus, the Canadian Governmental Parties’ argument lacks merit.

¹⁹ Duty absorption inquiries are governed by 19 U.S.C. § 1675(a)(4), which provides:

During any review under this subsection initiated 2 years or 4 years after the publication of an antidumping duty order under section 1673e(a) of this title, [Commerce], if requested, shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter. . . .

²⁰ Orders entered before January 1, 1995 are referred to as “transition orders.” 19 U.S.C. § 1675(c)(6)(C). Commerce issued the order in question on May 15, 1989 and conducted the duty absorption review as part of its seventh administrative review, the results of which were published in 1997. *FAG Italia*, 291 F.3d at 812.

order,” *id.* at 814 (quoting 19 U.S.C. § 1675(a)(4) (2000)), and Commerce could not convert congressional silence regarding the administration of duty absorption reviews in other years into an authority to do so, *id.* at 815. The Federal Circuit reasoned that

no case of which we are aware holds that an administrative agency has authority to fill gaps in a statute that exist because of the absence of statutory authority. To the contrary, the Supreme Court has noted that “an agency literally has no power to act . . . unless and until Congress confers power upon it,” *La. Pub. Serv. Comm’n* [, 476 U.S. at 374 (1986)], and has cautioned that “[t]o supply omissions [within a statute] transcends the judicial function[.]” *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 250–51 (1926)).

Id. at 816 (first, third, and fourth alterations original); *see also id.* at 818 n.18 (stating that Commerce “lack[ed] general authority to act” in its chosen manner).²¹

The appellate court has since reaffirmed the principle that Commerce may not rely on statutory silence as a source of authority. *See Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1033 (Fed. Cir. 2007) (addressing 19 U.S.C. § 1675(a)(4) and stating that, “while Congress may not have affirmatively intended to bar Commerce from conducting a duty absorption inquiry under the facts presented here, Congress also did not authorize Commerce to do so, and under settled principles of statutory construction, the effect is the same, as ‘an agency literally has no power to act . . . unless and until Congress confers power upon it’”) (quoting *La. Pub. Serv. Comm’n*, 476 U.S. at 374) (emphasis added). Applying the foregoing principle to the issue at hand compels the court to conclude that section 103(a), which limits Commerce’s rulemaking authority to the URAA, does not provide a basis upon which Commerce may issue a regulation that fills a perceived gap between the United States’ international obligations and domestic legislation.

Indeed, contrary to the Government’s argument, *see Gov’t Resp.* at 8, the notion of gap-filling refers to explicit and implicit legislative delegations of authority to an agency for the purpose of clarifying

²¹ The Government attempts to distinguish *FAG Italia* on the basis that, in that case, both the statute and legislative history were silent as to whether Congress intended for Commerce to conduct duty absorption reviews on transition orders. *Gov’t Resp.* at 11. Although the Federal Circuit noted, in passing, the absence of pertinent legislative history, the appellate court reached its ruling based primarily, if not entirely, on the absence of statutory authority. *See FAG Italia*, 291 F.3d at 814–17.

ambiguous—yet extant—statutory provisions, *see Chevron*, 467 U.S. at 843–44. Effectuating international obligations that Congress has not enacted into domestic law is not a permissible use of Commerce’s gap-filling authority. *See id.* Accepting Commerce’s interpretation of section 103(a) would significantly enlarge Commerce’s authority beyond what the provision supports and turn *Chevron* on its head.²²

The court’s conclusion is, moreover, consistent with the non-self-executing nature of the Uruguay Round Agreements.²³ *See* 19 U.S.C. § 2903(a)(1) (providing the conditions pursuant to which certain trade agreements, including the Uruguay Round Agreements, “shall enter into force with respect to the United States”);²⁴ S. Rep. 103–412, at 13 (1994) (explaining that the Uruguay Round Agreements “are not self-executing and thus their legal effect in the United States is governed by implementing legislation”). Thus, absent legislation implementing Commerce’s interpretation of the requirements of Article 19.3, section 103(a) does not authorize Commerce to effectuate

²² At oral argument, the Government of Canada argued that interpreting *FAG Italia* to preclude agency action not expressly authorized by Congress contravenes the requirement for *Chevron* deference in the face of statutory silence. Oral Arg. 44:16–45:16 (reflecting the time stamp from the recording), <https://www.cit.uscourts.gov/audio-recordings-select-public-court-proceedings>. The court disagrees. *Chevron* deference may apply when “the statute is silent or ambiguous with respect to the specific issue.” 467 U.S. at 843 (emphasis added). Thus, for example, the court may accord deference when a statute is silent or ambiguous as to the methodologies Commerce must employ in calculating the duties contemplated by that statute. *See, e.g., U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1360–61 (Fed. Cir. 2010). Statutory silence regarding a specific issue is not, however, the same as the absence of statutory authority for an agency activity, in this case, CVD expedited reviews. *See Marine Harvest (Chile) S.A. v. United States*, 26 CIT 1295, 1309, 244 F. Supp. 2d 1364, 1379 (2002) (characterizing *FAG Italia* as drawing “a distinction between ambiguous statutory language that creates a ‘gap’ in the statute that an agency could reasonably fill and a silence in the statute from which an agency cannot create authority”). Accordingly, *FAG Italia*, and the court’s interpretation thereof, is not inconsistent with *Chevron*.

²³ The Government agrees that the Uruguay Round Agreements are not self-executing. Oral Arg. 30:20–30:26.

²⁴ The URAA was enacted in accordance with 19 U.S.C. § 2903. *See* 19 U.S.C. § 3511(a). Pursuant to section 2903, certain trade agreements “shall enter into force with respect to the United States if (and only if) enumerated conditions are met. *Id.* § 2903(a)(1). Those conditions consist of the following:

- (A) the President, at least 90 calendar days before the day on which he enters into the trade agreement, notifies the House of Representatives and the Senate of his intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register;
- (B) after entering into the agreement, the President submits a document to the House of Representatives and to the Senate containing a copy of the final legal text of the agreement, together with—
 - (i) a draft of an implementing bill,
 - (ii) a statement of any administrative action proposed to implement the trade agreement, and
 - (iii) the supporting information described in paragraph (2); and
- (C) the implementing bill is enacted into law.

Id.

that interpretation. *See, e.g., La. Pub. Serv. Comm'n*, 476 U.S. at 357 (“As we so often admonish, only Congress can rewrite this statute.”).²⁵

The judicial canon of statutory construction referred to as the *Charming Betsy* doctrine does not compel a different outcome. *See generally Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). *But see* CGP Resp. at 27–28. *Charming Betsy* instructs, *inter alia*, that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” 6 U.S. at 118. Section 103(a) does not, however, directly implement the United States’ international obligations. Instead, the provision authorizes actions otherwise provided for in the URAA. Thus, *Charming Betsy* is inapposite to the court’s interpretation of section 103(a).

In sum, section 103(a) provides limited rulemaking authority to Commerce which does not encompass CVD expedited reviews. Further examination of the statutory structure and legislative history do not demonstrate a contrary intent.

B. Statutory Structure

The statutory scheme does not demonstrate congressional intent either to establish CVD expedited reviews specifically or, more broadly, to permit Commerce to promulgate regulations untethered to the URAA. Parties’ arguments in this regard focus on sections 103(b), 123, and 129 of the URAA.

As noted, section 103(b) authorized the issuance of “[a]ny interim regulation necessary or appropriate to carry out any action proposed in the [SAA] . . . to implement an agreement described in section 3511(d)(7), (12), or (13) of [Title 19].” 19 U.S.C. § 3513(b). The Canadian Governmental Parties argue that the reference to expedited reviews pursuant to Article 19.3 in the SAA constitutes a “proposed action” implementing the SCM Agreement which is identified in 19 U.S.C. § 3511(d)(12). CGP Resp. at 12. The Canadian Governmental Parties argue that it is therefore “reasonable to interpret the specific authorization to issue interim regulations as authorizing such final regulations.” *Id.* at 12–13. The premise of the Canadian Governmental Parties’ argument fails, however, because the SAA does not propose any action to implement CVD expedited reviews.

²⁵ The Canadian Governmental Parties argue that if “the provisions of the URAA had been intended to spell out everything that was required by international agreements, there would have been no need for the SAA,” discussed *infra*, “to speak to both the interpretation and application of those provisions.” CGP Resp. at 11–12. The court disagrees. The completion of the SAA was a statutory requirement in accordance with the legislative mechanism utilized for congressional enactment of the Uruguay Round Agreements. *See* 19 U.S.C. § 2903(a)(1). Thus, the existence of the SAA cannot justify or excuse the absence of statutory implementing legislation.

While the SAA provides that “[s]everal changes must be made to the Act to implement the requirements of Article 19.3 of the [SCM Agreement],” the subsequent discussion does not propose any actions to implement expedited reviews. *See* SAA at 941–42, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4251.

Sections 123 and 129 of the URAA govern the implementation of adverse findings by a WTO dispute settlement panel or the WTO Appellate Body regarding the United States’ compliance with the provisions of the Uruguay Round Agreements. *See* 19 U.S.C. §§ 3533(f)–(g), 3538(b). Generally, sections 123 and 129 prohibit Commerce from implementing such an adverse decision until, among other things, specified consultations with congressional committees, and others, have taken place. *See Corus Staal BV v. Dept of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005). Both sections 123(g) and 129(b), in particular, prescribe several steps that must precede the publication of any final rule or modification to agency practice or determination of Commerce to render a prior action not inconsistent with WTO obligations. 19 U.S.C. §§ 3533(g)(1), 3538(b). In each case, Commerce and other trade officials are required to consult with relevant congressional committees prior to taking action in response to such an adverse WTO dispute settlement report. *See id.*

As the Government correctly notes, in this case, there is no adverse WTO dispute settlement report that would trigger the consultation and other requirements in sections 123 and 129. *See* Gov’t Resp. at 9. Nevertheless, while Commerce’s interpretation of section 103 as authorizing implementation of WTO obligations not otherwise provided for in the URAA might not nullify sections 123 and 129 of the URAA (particularly when such a WTO report occurs), the consultation requirements of those sections are consistent with the broader statutory scheme of preserving Congress’s role in the implementation of WTO obligations. Section 102 of the URAA provides both that “[n]o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect,” 19 U.S.C. § 3512(a)(1), and the converse, that “[n]othing in this Act shall be construed . . . to amend or modify any law of the United States . . . unless specifically provided for in this Act,” *id.* § 3512(a)(2). Thus, while the respective arguments are not outcome determinative either way, the court does find limited merit in the Coalition’s argument that sections 123 and 129 of the URAA counsel against the Government’s expansive interpretation of section 103 of the URAA.

C. Legislative History

Parties' disagreements respecting the legislative history focus on the significance of the SAA's reference to the second sentence of Article 19.3 entitling a non-investigated exporter to "an expedited review to establish an individual CVD rate for [that] exporter." SAA at 941, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4250.²⁶ As noted, the Government and Canadian Governmental Parties point to that reference as evidence that Congress intended for Commerce to conduct CVD expedited reviews. Gov't Resp. at 7–8; CGP Resp. at 10–11. The Coalition argues that the SAA demonstrates congressional awareness of the requirements of Article 19.3 and a rejection of the notion that CVD expedited reviews were needed to fulfill U.S. obligations. Coalition Br. at 23–24.

This dispute is tangential, however, to the court's inquiry, which is to discern congressional intent respecting the scope of section 103(a). On that point, the SAA speaks to the timing of the implementing regulations promulgated pursuant to section 103(a), noting that the provision provides the authority for regulations to be issued on the date the provisions of the Uruguay Round Agreements enter into force for the United States. SAA at 677, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4055–56. Nothing in the relevant portion of the SAA suggests that section 103(a) is intended to authorize regulatory action beyond the substantive provisions otherwise included in the URAA.

Moreover, accepting the Government's position would require the court to accept the proposition that Article 19.3 requires CVD expedited reviews. During oral argument, however, Parties agreed that interpreting the text and requirements of Article 19.3 is beyond the scope of this litigation. Oral Arg. 52:50–54:48. For that reason, congressional intent is best discerned from the SAA's discussion of the actual statutory changes considered relevant to implementing the requirements of Article 19.3. As previously noted, that discussion is devoid of any provision explicitly providing for CVD expedited reviews. This omission—both in the statute and the SAA—is consistent with other legislative history indicating that, regardless of any unarticulated congressional view as to whether Article 19.3 required additional procedures, Congress did not include any such procedures in the implementing legislation. *See* S. Rep. 103–412, at *98 (1994) (explaining that URAA § 264, which requires Commerce "to deter-

²⁶ The SAA was prepared by the Executive Branch, *see* SAA at 656, *reprinted in* 1994 U.S.C.C.A.N. 4040 at 4040, and approved by Congress "as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act," *see* 19 U.S.C. § 3512(d). The court may therefore consult the SAA for indications of congressional intent.

mine an estimated countervailable subsidy rate for each exporter and producer individually investigated, and an estimated ‘all-others’ rate for those not individually investigated and for new exporters and producers, . . . implement[s] the requirements of Article 19.3 of the [SCM] Agreement”).

Accordingly, on balance, the legislative history supports Plaintiff’s interpretation of the text of section 103(a). To the extent the legislative history is ambiguous as to Congress’s views on the administration of CVD expedited reviews, that ambiguity cannot override Congress’s clear statutory limitation on Commerce’s rulemaking authority. *See Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011) (stating that while “clear evidence of congressional intent” in the legislative history “may illuminate ambiguous [statutory] text,” the court cannot “allow[] ambiguous legislative history to muddy clear statutory language”).

D. Congressional Acquiescence

The Canadian Governmental Parties argue that congressional acquiescence to Commerce’s interpretation provides evidence that Congress intended Commerce to conduct CVD expedited reviews. CGP Resp. at 18 n.11. The Canadian Governmental Parties assert that Commerce has conducted CVD expedited reviews since 2003, and Congress did not prohibit CVD expedited reviews in recent amendments to the Tariff Act of 1930. *Id.* (discussing the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016)). At oral argument, the Government likewise pressed the court to sustain Commerce’s regulation in light of congressional acquiescence. Oral Arg. 26:50–28:45.

Assuming, *arguendo*, that subsequent congressional acquiescence is relevant to discerning prior congressional intent, *see Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (stating that circumstances in which “Congress has frequently amended or reenacted the relevant provisions without change” in response to an agency’s interpretation “provide further evidence . . . that Congress intended [that agency’s] interpretation, or at least understood the interpretation as statutorily permissible”),²⁷ “the Supreme Court has repeatedly made clear that an important foundation of acquiescence is that Congress as a

²⁷ The U.S. Supreme Court has also stated that “the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting *ambiguous* statutory provisions.” *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533–534 (1947) (emphasis added); *see also Helvering v. Reynolds*, 313 U.S. 428, 431–32 (1941) (stating that the doctrine of congressional acquiescence to an agency’s construction of a statutory term “is no more than an aid in statutory construction” and, “[w]hile it is useful at times in resolving statutory *ambiguities*, it does not mean that the prior [agency] construction has become so embedded in the law that only Congress can effect a change”) (emphasis added).

whole was made aware of the administrative construction or interpretation and did not act on contrary legislation despite having this knowledge,” *Schism v. United States*, 316 F.3d 1259, 1297 (Fed. Cir. 2002) (en banc) (discussing cases); see also, e.g., *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1311–12 & n.10 (Fed. Cir. 2001). “Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.’” *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)) (alterations original).

Here, there is no indication that Commerce’s administration of CVD expedited reviews or Commerce’s interpretation of URAA § 103(a) as permitting the agency to regulate matters outside the URAA has been brought to Congress’s attention. Nevertheless, at oral argument, the Government pointed to two U.S. Supreme Court cases as taking a purportedly different view and further argued that the existence of 19 C.F.R. § 351.214(k) gives rise to a presumption of congressional awareness regarding Commerce’s administration of CVD expedited reviews. Oral Arg. 26:42–28:03, 28:30–28:51 (mentioning *Haig v. Agee*, 453 U.S. 280 (1981), and *Norwegian Nitrogen Prods. v. United States*, 288 U.S. 294, 304 (1933)). The referenced cases do not compel a different outcome.

Haig concerned the Secretary of State’s authority to promulgate rules in relation to the granting, issuance, and verification of passports pursuant to the Passport Act of 1926, 22 U.S.C. § 211a (“the 1926 Act”). 453 U.S. at 289–90. The Secretary of State had issued a regulation authorizing the revocation of passports on grounds related to national security and foreign policy, and the recipient of a revocation notice challenged the regulation as statutorily unauthorized. *Id.* at 286–87. The Court relied on the “broad rule-making authority granted in the [1926] Act,” *id.* at 291 (citation omitted) (alteration original), to support the proposition that “a consistent administrative construction of that statute must be followed by the courts unless there are compelling indications that it is wrong,” *id.* (citation omitted). In finding that the construction was not wrong, the Court pointed to the Secretary’s consistent application of the challenged regulation when circumstances called for revocation and relevant legislative action, which included an amendment to the Passport Act of 1926 that omitted any changes to the scope of the statute’s rule-making authority. *Id.* at 300–03.

Norwegian Nitrogen addressed whether language contained in the Tariff Act of 1922 requiring the United States Tariff Commission

(“Tariff Commission”), *inter alia*, to “give reasonable public notice of its hearings” and a “reasonable opportunity to parties interested to be present, to produce evidence, and to be heard” before changing duty rates required the Tariff Commission to disclose business confidential information to an affected importer. 288 U.S. at 302–03. The Court found that neither the text of the statute, which afforded the Tariff Commission discretion in this regard, nor the legislative history of the statute, required such extensive disclosure. *Id.* at 304–08. The Court further pointed to administrative practice pre- and post-enactment in 1922 and congressional attention directed towards the role and function of the Tariff Commission to find that Congress had acquiesced to the challenged practice. *Id.* at 311–15.

Haig and *Norwegian Nitrogen* are readily distinguished. First, both cases addressed administrative practice closely connected to the authorizing statute the respective entities administered and pursuant to which they each exercised substantial discretion. *Haig*, 453 U.S. at 289–91; *Norwegian Nitrogen*, 288 U.S. at 302–03. Here, Commerce does not rely on any statute it administers as authority for CVD expedited reviews; rather, as noted, it relies on the general grant of rulemaking afforded U.S. government agencies in connection with the URAA. I&D Mem. at 19 & n.123 (citing 19 U.S.C. § 3513(a)).

More importantly, while the Government and the Canadian Governmental Parties urge the court to find that Congress has acquiesced to the administration of CVD expedited reviews specifically, that argument loses sight of the inquiry before the court—discerning congressional intent with respect to the scope of section 103(a). In other words, the court must consider whether Congress has acquiesced to the agency’s construction of section 103(a) as permitting Commerce to conduct CVD expedited reviews. Although Commerce has been conducting CVD expedited reviews since at least 2003, *see Certain Softwood Lumber Products from Canada*, 68 Fed. Reg. 24,436 (Dep’t Commerce May 7, 2003) (final results of [CVD] expedited reviews), Commerce only recently announced its reliance on section 103(a) as authority for the regulation governing such reviews, *see Irving Paper Ltd., et al. v. United States, et al.*, Court No. 17-cv-00128 (Jan. 30, 2018), ECF No. 53 (the United States’ response to the court’s questions concerning the court’s jurisdiction to entertain an action challenging the results of a CVD expedited review and Commerce’s authority to promulgate 19 C.F.R. § 351.214(k)).²⁸ Thus, in contrast to

²⁸ Plaintiffs dismissed *Irving Paper* prior to the court’s resolution of the matters raised in the court’s questions to the parties. *See Irving Paper Ltd., et al. v. United States, et al.*, Court No. 17-cv-00128 (July 31, 2018), ECF No. 76 (Order of Dismissal).

Haig and *Norwegian Nitrogen*, there has been little time or opportunity for Congress to acquiesce to Commerce's interpretation of section 103(a) particularly when, as here, that interpretation was only announced after the most recent set of amendments to the Tariff Act of 1930.

Lastly, and perhaps most importantly, the court cannot find congressional acquiescence to an agency's construction of a statute when "there are compelling indications that [the construction] is wrong." *Haig*, 453 U.S. at 291. "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction." *Norwegian Nitrogen*, 288 U.S. at 315; *see also Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("A regulation's age [alone] is no antidote to clear inconsistency with a statute . . ."). Here, as discussed, section 103(a) plainly limits Commerce's rulemaking authority to the implementation of the relevant provisions of the URAA. Under these circumstances, any argument for a more expansive interpretation of section 103(a) that is grounded in congressional acquiescence lacks merit.

In view of the foregoing, the court finds that Congress unambiguously constrained the scope of rulemaking authority conferred by section 103(a) to the enacted provisions of the URAA. Commerce therefore exceeded its statutory authority pursuant to section 103(a) when it promulgated 19 C.F.R. § 351.214(k). *See* 5 U.S.C. § 706(2)(C).

E. The Final Results of Expedited Review are Remanded for Reconsideration

In briefing and during oral argument, the Government and Canadian Governmental Parties offered various *post hoc* justifications for Commerce's regulation and the agency's administration of CVD expedited reviews. *See, e.g.*, Gov't Resp. at 9–10 (arguing that 19 C.F.R. § 351.214(k) may properly be characterized as an "interim regulation[]" issued pursuant to URAA § 103(b)); Gov't Resp. at 12–13 (pointing to Commerce's inherent authority "to reconsider previously closed proceedings"); CGP Resp. at 7–10 (arguing that section 103(a) authorized Commerce to issue 19 C.F.R. § 351.214(k) in order to ensure that URAA § 101, which reflects congressional approval of the Uruguay Round Agreements and their entry into force, is appropriately implemented); CGP Resp. at 15–18, 22–27 (discussing 19 U.S.C. §§ 1671d, 1675, and 1677f-1 as alternate statutory authorities for CVD expedited reviews).

At oral argument, the Government requested a remand to the agency for consideration of these alternative bases in the event the court concludes that section 103(a) did not authorize Commerce to promulgate 19 C.F.R. § 351.214(k). Oral Arg. 1:44:40–1:46:14 (re-

questing the court to afford Commerce one further attempt to articulate a lawful basis for the regulation before invalidating the regulation). The court agrees that a remand to the agency for consideration of these alternative bases for the regulation is more appropriate than judicial review of *post hoc* justifications. See *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (explaining that when the court cannot sustain an agency action, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation”).²⁹ Further, in certain circumstances, the court may remand a regulation for further consideration while allowing the regulation to remain in effect. See *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs* (“NOVA”), 260 F.3d 1365, 1367–68, 1379–81 (Fed. Cir. 2001).³⁰ Accordingly, the court remands the *Final Results of Expedited Review* to Commerce for reconsideration of the statutory basis authorizing the agency’s promulgation of 19 C.F.R. § 351.214(k). The court declines to invalidate Commerce’s regulation pending Commerce’s remand redetermination.

CONCLUSION & ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce’s *Final Results of Expedited Review* are remanded to the agency for reconsideration consistent with this opinion; it is further

ORDERED that Commerce shall file its remand results on or before February 17, 2021; it is further

²⁹ The U.S. Supreme Court in *Florida Power & Light* made this statement in the course of evaluating whether initial review of a decision by the Nuclear Regulatory Commission to deny, without holding a hearing, a petition requesting a proceeding to suspend an operating license should be located in the appropriate district court or court of appeals. 470 U.S. at 731. In locating initial review in the court of appeals, the Court explained that the fact-finding capacity of the district court was unnecessary because in the event the record did not support the agency action, the “proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Id.* at 744. Although the Court was not conducting APA review of the challenged action, its comments are nevertheless instructive.

³⁰ In *NOVA*, the Federal Circuit adopted the standard first set forth by the U.S. Court of Appeals for the D.C. Circuit as to whether a regulation should remain in effect when the regulation is remanded for further consideration. 260 F.3d at 1380 (“[A]n inadequately supported rule . . . need not necessarily be vacated.”) (second alteration original) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993)). In deciding whether to vacate, the court considers “the seriousness of the [regulation’s] deficiencies . . . and the disruptive consequences of an interim change that may itself be changed.” *Id.* (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995)); see also *Allied-Signal*, 988 F.2d at 150–51. Parties have not briefed this issue. Nevertheless, while the court has serious questions about the validity of the regulation, the disruptive consequences of invalidation appear likely to be significant, particularly when the possibility remains, however slight, that the regulation may ultimately be upheld. Thus, the court declines to vacate the regulation at this time.

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

ORDERED that any comments or responsive comments must not exceed 5,000 words.

Dated: November 19, 2020
New York, New York

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

Slip Op. 20–168

HYUNDAI STEEL COMPANY, Plaintiff, and SEAH STEEL CORPORATION,
Consolidated Plaintiff, v. UNITED STATES, Defendant, and
WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 18–00154

[Sustaining in part and remanding in part the U.S. Department of Commerce’s remand results following the 2015–2016 administrative review of the antidumping duty order on circular welded non-alloy steel pipe from the Republic of Korea.]

Dated: November 23, 2020

J. David Park, Henry D. Almond, Daniel R. Wilson, and Kang Woo Lee, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., for Plaintiff Hyundai Steel Company.

Joshua E. Kurland, Trial Attorney, and *L. Misha Preheim*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Elio Gonzalez*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Roger B. Schagrin and *Paul W. Jameson*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Wheatland Tube Company.

OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff Hyundai Steel Company (“Hyundai Steel”) and Consolidated Plaintiff SeAH Steel Corporation (“SeAH”) challenge the final determination in the 2015–2016 administrative review of the antidumping duty order covering circular welded non-alloy steel pipe (“CWP”) from the Republic of Korea (“Korea”). *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea (“Final Results”)*, 83 Fed. Reg. 27,541 (Dep’t Commerce June 13, 2018) (final results of antidumping duty administrative review; 2015–2016), ECF No. 22; see also Issues and Decision Mem. for the Final Results of Antidumping Duty Admin. Review of Circular Welded Non-Alloy Steel Pipe from

the Republic of Korea; 2015–2016 (Dep’t Commerce June 7, 2018), ECF No. 22, PD 314 (“Final IDM”).¹ Before the court are the Final Results of Redetermination Pursuant to Court Remand (“*Remand Results*”), ECF No. 73–1, which the court ordered in *Hyundai Steel Co. v. United States* (“*Hyundai Steel I*”), 43 CIT ___, 415 F. Supp. 3d 1293 (2019).

Hyundai Steel argues that the U.S. Department of Commerce (“Commerce”) failed to comply with the court’s remand instructions when Commerce re-evaluated the record and repeated its particular market situation determination in the *Remand Results*. Pl. [Hyundai Steel]’s Comments Opp’n Remand Redetermination (“Hyundai Cmts.”) 2, ECF No. 75. Hyundai Steel contends that Commerce’s determination that a particular market situation existed as to costs of production was not authorized by statute without a threshold determination that the costs were outside the ordinary course of trade based on a comparison to the reported costs. *Id.* at 4–5. Hyundai Steel also faults the particular market situation determination as unsupported by the record. *Id.* at 7–22. Hyundai Steel argues that a cost-based adjustment for purposes of the sales-below-cost test is contrary to law. *Id.* at 27–29. SeAH did not file comments.

For the following reasons, the court sustains in part and remands in part the *Remand Results*.

BACKGROUND

The court presumes familiarity with the facts and procedural history of this case and recites the facts relevant to the court’s review of the *Remand Results*. *Hyundai Steel I*, 43 CIT at ___, 415 F. Supp. 3d at 1295–1301. In the *Final Results*, Commerce determined that a particular market situation in Korea distorted the cost of production of CWP based on the cumulative impact of four factors: (1) Korean subsidies of hot-rolled steel coil; (2) Korean imports of hot-rolled steel coil from China; (3) strategic alliances between Korean hot-rolled steel coil producers and CWP producers; and (4) distortions in the Korean electricity market. Final IDM 23. Commerce applied an upward adjustment to the cost of production based on the subsidy rate of hot-rolled steel coil. *Id.* (citing *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 53,439 (Dep’t Commerce Aug. 12, 2016) (final affirmative determination), *as amended*, 81 Fed. Reg. 67,960 (Dep’t Commerce Oct. 3, 2016)). Commerce conducted a sales-below-cost test and disregarded certain sales made at prices below the cost of production.

¹ Citations to the administrative record reflect the public record (“PD”) document numbers.

See Decision Mem. for the Prelim. Results of Antidumping Duty Admin. Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: 2015–2016 (“Prelim. DM”) 19–20, PD 275 (Dec. 1, 2017); Final IDM 3 (noting that Commerce used the same calculation methodology for the *Final Results* as explained in the Prelim. DM). Commerce calculated normal value from the remaining above-cost home market sales for mandatory respondents Hyundai Steel and Husteel. Prelim. DM 20. Commerce also calculated a combined assessment rate for Hyundai Steel’s importers. Final IDM 29. In *Hyundai Steel I*, the court concluded that the particular market situation determination was unsupported by substantial evidence because Commerce relied only on record documents submitted previously in the administrative review of oil country tubular goods from the Republic of Korea for the 2014–2015 period of review, which the court determined in *NEXTEEL Co. v. United States*, 43 CIT __, __, 392 F. Supp. 3d 1276, 1287–88 (2019), were insufficient to support Commerce’s particular market situation determination in that administrative review. *Hyundai Steel I*, 415 F. Supp. 3d at 1301.

Commerce conducted a new review of the record on remand and determined that a particular market situation distorted the cost of hot-rolled steel coil in the Korean market. *Remand Results* 4–5. In addition to the four factors Commerce considered previously, Commerce added a fifth factor to its particular market situation analysis, namely steel industry restructuring efforts by the Korean Government. *Id.* at 6, 7–15. Commerce adjusted the cost of hot-rolled steel coil based on the subsidy rate in *POSCO v. United States*, 43 CIT __, 378 F. Supp. 3d 1348 (2019), for purposes of the sales-below-cost test. See *Remand Results* 4, 29–30. Commerce assigned importer-specific assessment rates to Hyundai Steel’s importers, based on Commerce’s redetermination that the record failed to establish potential manipulation. *Id.* at 15.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The court will uphold Commerce’s determinations unless they are unsupported by substantial record evidence, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The court also reviews determinations made on remand for compliance with the court’s remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014), *aff’d*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Particular Market Situation

A. Waiver

Hyundai Steel argued for the first time on remand that Commerce’s determination contravened the statute by adjusting the cost of production for purposes of the sales-below-cost test. *Remand Results* 24. Commerce declined to respond to Hyundai Steel’s allegation, asserting that a response was unwarranted because Hyundai Steel did not raise the argument prior to remand and Commerce was not required by the court in *Hyundai Steel I* to address this legal argument. *Id.* at 39. Hyundai Steel raises this argument for the first time before this court. Hyundai Cmts. 27–29. Defendant United States (“Defendant”) contends that Hyundai Steel waived the argument by failing to raise it in its opening or reply briefs prior to remand. Def.’s Resp. Pl.’s Comments Regarding Remand Redetermination (“Def. Resp.”) 30, 31, ECF No. 78.

Generally, “arguments not raised in the opening brief are waived.” *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (citation omitted). Courts may exercise discretion to depart from the general rule, however, on a case-by-case basis. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1040 (Fed. Cir. 2017). The U.S. Court of Appeals for the Federal Circuit has recognized that consideration of an argument raised for the first time on appeal is appropriate “when there is a change in the jurisprudence of the reviewing court . . . after consideration of the case by the lower court[.]” *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1323 (Fed. Cir. 2008) (internal quotation marks and citation omitted). “[A]ppellate courts may [also] apply the correct law even if the parties did not argue it below[.]” *Id.* (internal quotation marks and citation omitted).

Here, departure from the general rule of waiver is warranted for both reasons. While there has not been an opinion from the U.S. Court of Appeals for the Federal Circuit on whether cost-based particular market situation determinations and subsequent adjustments are in accordance with the law, the jurisprudence of this Court was clarified after the court remanded the *Final Results* to Commerce in *Hyundai Steel I* on December 13, 2019, before Hyundai Steel filed its comments in opposition to the *Remand Results* on April 13, 2020. *See* Order, ECF No. 65; Hyundai Cmts. The Court of International Trade issued *Saha Thai Steel Pipe Pub. Co. v. United States*, 43 CIT ___, 422

F. Supp. 3d 1363 (2019), on December 18, 2019; *Husteel Co. v. United States*, 44 CIT __, 426 F. Supp. 3d 1376 (2020), on January 3, 2020; and *Borusan Mannesmann Boru Sanayi Ve Ticaret A.Ş. v. United States* (“*Borusan*”), 44 CIT __, 426 F. Supp. 3d 1395 (2020), on January 7, 2020. The Court addressed the lawfulness of the cost-based particular market situation analysis and adjustment for the first time in *Saha Thai Steel Pipe Pub. Co.*, 43 CIT at __, 422 F. Supp. 3d at 1368–70. The Court concluded consistently in all three opinions that the statute does not authorize a cost-based particular market situation analysis or adjustment for purposes of the sales-below-cost test. *Id.*; *Husteel Co.*, 44 CIT at __, 426 F. Supp. 3d at 1383–89; *Borusan*, 44 CIT at __, 426 F. Supp. 3d at 1411–12.

In addition, this court has discretion to consider the issue in order to apply the correct law. The cost-based particular market situation issue is strictly a legal question of statutory interpretation as to whether the statute permits the actions taken by Commerce. The court may consider the cost-based particular market situation issue to clarify the meaning of the statute and apply it to Commerce’s actions irrespective of whether Hyundai Steel raised the argument in its opening brief. The court exercises discretion to consider whether Commerce’s particular market situation determination and adjustment are in accordance with the law.

B. Governing Law

Commerce determines antidumping duties by calculating the amount by which the normal value of subject merchandise exceeds the export price or the constructed export price for the merchandise. 19 U.S.C. § 1673. When reviewing antidumping duties in an administrative review, Commerce must determine: (1) the normal value and export price or constructed export price of each entry of the subject merchandise, and (2) the dumping margin for each such entry. *Id.* § 1675(a)(1)(B), (a)(2)(A). The statute dictates the steps by which Commerce may calculate normal value “to achieve a fair comparison” with export price or constructed export price. *Id.* § 1677b(a).

First, the statute specifies the methodology for Commerce to determine which sales should be considered and disregarded in calculating normal value. Normal value is “the price at which the foreign like product is first sold . . . in the exporting country . . . in the ordinary course of trade.” *Id.* § 1677b(a)(1)(B)(i). Sales outside the ordinary course of trade are excluded from normal value. “Ordinary course of trade” is defined in Section 1677(15) as excluding: (1) sales made at less than the cost of production, and (2) sales that cannot be compared properly with the export price or constructed export price due to a

particular market situation. *Id.* § 1677(15)(A), (C). To determine whether “sales . . . have been made at prices that represent less than the cost of production,” the statute directs Commerce to conduct the sales-below-cost test. *Id.* § 1677b(b)(1). The cost of production is defined by statute to include the cost of materials and processing, amounts for selling, general, and administrative expenses, and the cost of all containers and expenses incidental for shipment. *Id.* § 1677b(b)(3). Sales that Commerce determines, by application of the sales-below-cost test, were made at prices below the cost of production or that Commerce determines were made in a particular market situation, are outside the ordinary course of trade and are disregarded from the calculation of normal value. *See id.* § 1677b(b)(1), (a)(1)(B)(i). “Whenever such sales are disregarded, normal value shall be based on the remaining sales of the foreign like product in the ordinary course of trade.” *See id.* §§ 1677b(a)(1)(B)(i), (b)(1); 1677(15)(A), (C).

Second, when using market prices to determine normal value, Commerce may make certain adjustments to the remaining home market prices. The statute lists authorized adjustments for incidental shipping, delivery expenses, and direct taxes, and for differences between the subject merchandise and foreign like products in quantity, circumstances of sale, or level of trade. *Id.* § 1677b(a)(6), (7).

Third, when using home market sales for normal value, if Commerce cannot determine the normal value of the subject merchandise based on home market sales, then Commerce may use qualifying third-country sales or a constructed value as a basis for normal value. *Id.* § 1677b(a)(4), (a)(1)(B)(ii), (b)(1). Constructed value represents: (1) the cost of materials and fabrication or other processing of any kind used in producing the merchandise; (2) the actual amounts incurred and realized for selling, general, and administrative expenses, and for profits, in connection with the production and sales of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; and (3) the cost of packing the subject merchandise. *Id.* § 1677b(e). When calculating constructed value, if Commerce determines that a particular market situation exists “such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, [then] [Commerce] may use . . . any other calculation methodology.” *Id.*

C. Adjustment to the Cost of Production for the Sales-Below-Cost Test

For purposes of determining whether sales were made at less than cost, on remand Commerce adjusted the reported costs of production

of hot-rolled steel coil, a primary CWP input, based on Commerce's determination that a particular market situation in Korea continued to distort the cost of hot-rolled steel coil. *See Remand Results 4; see also* Prelim. DM 19–20; Final IDM 3. Commerce cited Section 1677b(e) for the authority to adjust the cost of hot-rolled steel coil as an alternative calculation methodology after determining that a particular market situation existed as to the cost of production. *Remand Results 4–5; see also* Def. Resp. 7, 8. Hyundai Steel counters that a particular market situation adjustment for purposes of the sales-below-cost test is not permitted by the applicable statute. Hyundai Cmts. 27. As this Court has held repeatedly, the statute does not authorize an adjustment to the cost of production when Commerce applies the sales-below-cost test to determine which home market sales to exclude from the calculation of normal value. *See Saha Thai Steel Pipe Pub. Co.*, 43 CIT at __, 422 F. Supp. 3d at 1368–70; *Husteel Co.*, 44 CIT at __, 426 F. Supp. 3d at 1383–89; *Borusan*, 44 CIT at __, 426 F. Supp. 3d at 1411–12; *Dong-A Steel Co. v. United States*, 44 CIT __, __, Slip Op. 20139, at *29–35 (Sept. 29, 2020); *Husteel Co. v. United States*, 44 CIT __, __, Slip Op. 20–147, at *9–14 (Oct. 19, 2020); *Saha Thai Steel Pipe Pub. Co. v. United States*, 44 CIT __, __, Slip Op. 20–148, at *7–12 (Oct. 19, 2020).

Commerce cited Section 1677b(e) for the authority to adjust the cost of production for the sales-below-cost test as an alternative calculation methodology, but did not address Hyundai Steel's comments contesting Commerce's authority to make the adjustment. *Remand Results 5; see id.* at 24, 39. The court remands for Commerce to explain its position regarding the statutory authority to adjust the cost of production for purposes of the sales-below-cost test of Section 1677b(b). Commerce should address how its statutory interpretation and reasoning comply with the opinions of the Court of International Trade in the cases listed above.

D. Particular Market Situation Determination

In *Hyundai Steel I*, the court concluded that Commerce's determination of a particular market situation was unsupported by substantial evidence. 43 CIT at __, 415 F. Supp. 3d at 1301. Commerce asserts that it reconsidered "the totality" of the record on remand and, upon adding the fifth factor of steel industry restructuring, determined that the existence of a particular market situation was supported by the record. *Remand Results 6–7*. Hyundai Steel counters that because Commerce neither reopened the record, nor gathered additional facts on remand, Commerce did not fill the "evidentiary void" identified by

the court in *Hyundai Steel I*. *Hyundai Cmts. 2* (quoting *Hyundai Steel I*, 43 CIT at __, 415 F. Supp. 3d at 1301). Defendant responds that on remand “Commerce examined ...the record, including documents and information on which it did not previously rely, to re-evaluate, further explain, and support its findings.” Def. Resp. 5.

Commerce based its remand particular market situation determination on distortions in the cost of hot-rolled steel coil, a primary CWP input. *Remand Results* 6–7. Commerce explained:

Section 504 of the Trade Preferences Extension Act (TPEA) added the concept of a [particular market situation] in the definition of the term “ordinary course of trade,” for purposes of constructed value under section [1677b(e)], and through these provisions for purposes of the [cost of production] under section [1677b(b)(3)]. Section 773(e) of the TPEA states that “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.” Thus, under section 504 of the TPEA, Congress has given Commerce the authority to determine whether a [particular market situation] exists within the foreign market from which the subject merchandise is sourced and to determine whether the cost of materials, fabrication, or processing of such merchandise fail to accurately reflect the [cost of production] in the ordinary course of trade.

Id. at 5. Commerce made the particular market situation determination under Section 1677b(e) by asserting that Section 1677b(e)’s reference to “ordinary course of trade” incorporates Section 1677b(e) into the cost of production calculation in Section 1677b(b)(3).

The court remands for Commerce to explain its position regarding the statutory authority to conduct a particular market situation analysis based on alleged distortions to the cost of production when Commerce is not calculating constructed value. Commerce should address how its statutory interpretation and reasoning comply with the opinions of the Court of International Trade in the cases listed above.

II. Affiliated Importer Rates

The court remanded Commerce’s calculation of a combined assessment rate for Hyundai Steel’s affiliated importers, Hyundai Steel

USA and Hyundai Corporation USA. *Hyundai Steel I*, 43 CIT at ___, 415 F. Supp. 3d at 1302–03. Commerce assigned individually-assessed rates for Hyundai Steel’s affiliated importers on remand. No parties opposed. See Hyundai Cmts.; Def.-Intervenor’s Comments Supp. Remand Redetermination, ECF No. 77.

Pursuant to 19 C.F.R. § 351.212(b)(1), Commerce “normally will calculate an assessment rate for each importer of subject merchandise covered by the review.” 19 C.F.R. § 351.212(b)(1); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101, 8103 (Dep’t Commerce Feb. 14, 2012). Notwithstanding Commerce’s regular practice of calculating an assessment rate for each importer consistent with 19 C.F.R. § 351.212(b)(1), Commerce calculated a combined assessment rate in the *Final Results* for two of Hyundai Steel’s affiliated importers. Final IDM 29. Commerce cited its practice of calculating a combined assessment rate when two or more importers are affiliated with one another and a foreign exporter to prevent affiliated importers from manipulating individual assessment rates. *Id.*; Def. Resp. 38–39. The court found that Defendant failed to establish that Commerce’s practice of calculating combined assessment rates for affiliated importers extended to cases in which the record did not reflect a potential for manipulation. *Hyundai Steel I*, 43 CIT at ___, 415 F. Supp. 3d at 1302. The court noted that Defendant failed to explain how such a practice would be reasonable in light of 19 C.F.R. § 351.212(b)(1). *Id.* at 1302–03.

Commerce determined on remand that nothing in the record indicated a potential for manipulation, and thus calculated importer-specific rates for Hyundai Steel’s affiliated importers. *Remand Results* 15. The court concludes that Commerce’s decision to reverse its combined assessment rate and assign importer-specific rates is reasonable in the absence of evidence of potential manipulation and complies with the court’s order in *Hyundai Steel I*.

CONCLUSION

The court remands Commerce’s cost-based particular market situation determination and subsequent adjustment for further explanation consistent with this opinion. The court sustains Commerce’s determination to assign importer-specific assessment rates to Hyundai Steel’s affiliated importers.

Accordingly, it is hereby

ORDERED that the *Remand Results* are remanded for Commerce to explain the statutory authority to conduct a cost-based particular market situation analysis when normal value is based on home mar-

ket sales and to adjust the cost of production for purposes of the sales-below-cost test of 19 U.S.C. § 1677b(b), specifically within the context of relevant caselaw from the Court of International Trade; and it is further

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

- (1) Commerce must file the second remand redetermination on or before January 15, 2021;
- (2) Commerce must file the administrative record on or before January 29, 2021;
- (3) Comments in opposition to the second remand redetermination must be filed on or before February 26, 2021;
- (4) Comments in support of the second remand redetermination must be filed on or before March 26, 2021; and
- (5) The joint appendix must be filed on or before April 9, 2021.

Dated: November 23, 2020
New York, New York

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

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