

U.S. Customs and Border Protection



DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 21-16

EXTENSION AND AMENDMENT OF IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL OF GREECE

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

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Customs and Border Protection (CBP) Regulations to reflect an extension and amendment of import restrictions on certain archaeological and ecclesiastical ethnological material of the Hellenic Republic (Greece). The restrictions, which were originally imposed by CBP Dec. 11-25 and last extended in CBP Dec. 16-21, are due to expire on November 21, 2021. The Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions that previously existed, and the Government of the United States and the Government of Greece entered into a new agreement to reflect the extension of these import restrictions. The new agreement, which enters into force on November 21, 2021, supersedes the existing Memorandum of Understanding (MOU) that became effective on November 21, 2016, and enabled the promulgation of the existing import restrictions. Accordingly, the import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this extension until November 21, 2026. To fulfill the terms of the new MOU, the Designated List of cultural property, which was described in CBP Dec. 11-25, is amended in this document to correct certain typographical errors, to add certain coins from the Byzantine and Medieval periods, to clarify pottery styles, and to include post-Byzantine ethnological material dating up to A.D. 1830.

DATES: Effective November 21, 2021.

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

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the Convention on Cultural Property Implementation Act, Public Law 97-446, 19 U.S.C. 2601 *et seq.* (hereinafter, “the Cultural Property Implementation Act”), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter, “the Convention” (823 U.N.T.S. 231 (1972))), the United States entered into a bilateral agreement with Greece on November 21, 2011. The Memorandum of Understanding (MOU) enabled the promulgation of import restrictions on archaeological material representing Greece’s cultural heritage from the Upper Paleolithic (beginning approximately 20,000 B.C.) through the 15th century A.D., and ecclesiastical ethnological material representing Greece’s Byzantine cultural heritage (approximately the 4th century through the 15th century A.D.).

On December 1, 2011, U.S. Customs and Border Protection (CBP) published CBP Dec. 11-25, in the **Federal Register** (76 FR 74691), which amended 19 CFR 12.104g(a) to indicate the imposition of these restrictions and included a list designating the types of archaeological and ecclesiastical ethnological material covered by the restrictions. The restrictions were subsequently extended in 2016. CBP published a final rule (CBP Dec. 16-21) in the **Federal Register** (81 FR 84458), following the exchange of diplomatic notes, extending the import restrictions for a period of five years until November 21, 2021.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists. Since the initial notice was published on December 1, 2011, the import restrictions have been extended once. Following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 16-21) in the

Federal Register (81 FR 84458), to extend the import restrictions for a period of five years to November 21, 2021.

On August 20, 2020, the United States Department of State proposed in the **Federal Register** (85 FR 51544), to extend the MOU between the United States and Greece concerning the import restrictions on certain categories of archeological and ecclesiastical ethnological material of Greece. On March 21, 2021, the Acting Assistant Secretary for Educational and Cultural Affairs, Department of State, after consultation with and recommendations by the Cultural Property Advisory Committee, determined that the cultural heritage of Greece continues to be in jeopardy from pillage of certain archaeological and ecclesiastical ethnological material, and that the import restrictions should be extended for an additional five years.

Subsequently, on September 22, 2021, the Governments of the United States and Greece entered into a new agreement, titled “Memorandum of Understanding between the Government of the United States of America and the Government of the Hellenic Republic Concerning the Imposition of Import Restrictions on Categories of Certain Archaeological and Ethnological Materials of the Hellenic Republic,” which is effective on November 21, 2021. The new MOU supersedes the existing MOU that first entered into force on November 21, 2011. Pursuant to the new MOU, the import restrictions will remain in effect for an additional five years.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions. The restrictions are to continue in effect until November 21, 2026. Importation of such material of Greece, as described in the Designated List below, shall be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

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

Designated List of Archaeological and Ecclesiastical Ethnological Material of Greece

The Designated List contained in CBP Dec. 11–25, which describes the types of articles to which the import restrictions apply, is amended to reflect the addition of certain archaeological and ecclesiastical ethnological material to the Designated List. To fulfill the terms of the new MOU, the Designated List of cultural property is amended in this document to add certain coins from the Byzantine and Medieval periods, to clarify pottery styles, and to include post-Byzantine ethnological material dating up to A.D. 1830, as well as clarify certain provisions of the Designated List contained in CBP

Dec. 11–25 by making minor revisions to the language, organization, and numbering of the Designated List. For the reader's convenience, CBP is reproducing the Designated List contained in CBP Dec. 11–25 in its entirety, with the changes, below.

The Designated List includes archaeological material from Greece ranging in date from approximately the 3rd millennium B.C. to 15th century A.D., and ecclesiastical ethnological material from Greece from the Early Christian, Byzantine, and post-Byzantine periods, including objects made from A.D. 324 through 1830.

Categories of Archaeological and Ethnological Ecclesiastical Material

I. Archaeological Material

- A. Stone
- B. Metal
- C. Ceramic
- D. Bone, Ivory, Wood and Other Organics
- E. Glass and Faience
- F. Textile
- G. Papyrus Documents
- H. Paintings
- I. Mosaics

II. Ecclesiastical Ethnological Material

- A. Stone
- B. Metal
- C. Ceramic
- D. Bone and Ivory Objects
- E. Wood
- F. Glass
- G. Textile
- H. Parchment and Paper
- I. Painting
- J. Mosaics

I. Archaeological Material

The archaeological materials represent the following periods, styles, and cultures: Upper Paleolithic, Neolithic, Minoan, Cycladic, Helladic, Mycenaean, Submycenaean, Geometric, Orientalizing, Archaic, Classical, Hellenistic, Roman, Byzantine, and Medieval.

A. Stone

1. Sculpture

a. Architectural Elements—In marble, limestone, gypsum, and other kinds of stone. Types include acroteria, antefixes, architrave, base, basin, capital, caryatid, coffer, column, crowning, fountain, frieze, pediment, pilaster, mask, metope, mosaic and inlay, jamb, tile, triglyph, tympanum, wellhead, revetment, cut stone paving, tiles. Approximate date: 3rd millennium B.C. to 15th century A.D.

b. Monuments—In marble, limestone, and other kinds of stone. Types include menhir, “horns of consecration,” votive statues, funerary and votive stelae, and bases and base revetments, and columnar grave monuments. These may be painted, carved with relief sculpture, and/or carry dedicatory or funerary inscriptions. Approximate date: 3rd millennium B.C. to 15th century A.D.

c. Sarcophagi—In marble, limestone, and other kinds of stone. Some have figural scenes painted on them, others have figural scenes carved in relief, and some just have decorative moldings. Approximate date: 3rd millennium B.C. to 15th century A.D.

d. Large Statuary—Primarily in marble, also in limestone and sandstone, including fragments of statues. Subject matter includes human and animal figures and groups of figures in the round. Common types are largescale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual). The style may be naturalistic, as in the Classical Period, highly stylized, as in the Bronze Age culture of the Cyclades, or somewhere in between. Approximate date: 4th millennium B.C. to 15th century A.D.

e. Small Statuary and Figurines—In marble and other stone. Subject matter includes human and animal figures and groups of figures in the round. These range from approximately 10 cm to 1 m in height. The style may be naturalistic, as in the Classical Period, highly stylized, as in the Bronze Age culture of the Cyclades, or somewhere in between. Approximate date: 20,000 B.C. to 15th century A.D.

f. Reliefs—In marble and other stone. Types include carved slabs with figural, vegetative, floral, or decorative motifs, sometimes inscribed, and carved relief vases. Used for architectural decoration, funerary, votive, or commemorative monuments. Approximate date: 3rd millennium B.C. to 15th century A.D.

g. Furniture—In marble and other stone. Types include tables; thrones; beds; and altars, round or rectangular. Approximate date: 12th century B.C. to 15th century A.D.

2. Vessels—In marble, steatite, rock crystal, and other stone. These may belong to conventional shapes such as bowls, cups, jars, jugs, and

lamps, or may occur in the shape of an animal or human, or part of an animal or human. Approximate date: 7th millennium B.C. to 15th century A.D.

3. Tools and Weapons—In flint/chert, obsidian, and other hard stones. Chipped stone types include blades, small blades, borers, scrapers, sickles, cores, arrow heads, and spindle whorls. Ground stone types include grinders (*e.g.*, mortars, pestles, millstones, whetstones), choppers, axes, hammers, and mace heads. Approximate date: 20,000 B.C. to 15th century A.D.

4. Seals and Beads—In marble, limestone, and various semiprecious stones including rock crystal, amethyst, jasper, agate, steatite, and carnelian. Approximate date: 6th millennium B.C. to 15th century A.D.

B. Metal

1. Sculpture

a. Large Statuary—Primarily in bronze, including fragments of statues. Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual). Approximate date: 2nd millennium B.C. to A.D. 324.

b. Small Statuary and Figurines—Subject matter includes human and animal figures, groups of figures in the round, masks, and plaques. These range from approximately 10 cm to 1 m in height. Approximate date: 3rd millennium B.C. to A.D. 324.

c. Inscribed or Decorated Sheet Metal—In bronze, lead, and gold. Engraved inscriptions, “curse tablets,” “Orphic/Dionysiac tablets,” and thin metal sheets with engraved or impressed designs often used as attachments to furniture and clothing. Approximate date: 4th millennium B.C. to 15th century A.D.

2. Vessels—In bronze, gold, and silver. These may belong to conventional shapes such as bowls, cups, jars, jugs, strainers, cauldrons, and lamps, or may occur in the shape of an animal or part of an animal. Approximate date: 5th millennium B.C. to 15th century A.D.

3. Personal Ornaments—In bronze, gold, and silver. Types include rings, beads, pendants, belts, belt buckles, earrings, diadems, spangles, straight and safety pins (*fibulae*), necklaces, mirrors, wreaths, cuffs, and funerary masks. Approximate date: 7th millennium B.C. to 15th century A.D.

4. Tools—In copper, bronze, iron, and lead. Types include hooks, weights, axes, scrapers, (*strigils*), trowels, keys; the tools of crafts-persons such as carpenters, masons and metal smiths; and medical

tools such as needles, spoons, lancets, and forceps. Approximate date: 4th millennium B.C. to 15th century A.D.

5. Weapons and Armor—In copper, bronze, iron and lead. Types include both launching weapons (spears and javelins) and weapons for hand-to-hand combat (swords, daggers, etc.). Armor includes body armor, such as helmets, cuirasses, shin guards, and shields, and horse armor often decorated with elaborate engraved, embossed, or perforated designs. Approximate date: 6th millennium B.C. to 30 B.C.

6. Seals and Tokens—In lead, tin, copper, bronze, silver, and gold. Types include rings, amulets, and seals with shank. Approximate date: 4th millennium B.C. to 15th century A.D.

7. Coins—Many of the mints of the listed coins can be found in B.V. Head, *Historia Numorum: A Manual of Greek Numismatics* (London, 1911) and C.M. Kraay, *Archaic and Classical Greek Coins* (London, 1976). Many of the Roman provincial mints in Greece are listed in A. Burnett *et al.*, *Roman Provincial Coinage I: From the Death of Caesar to the Death of Vitellius (44 BC– AD 69)* (London, 1992) and *id.*, *Roman Provincial Coinage II: From Vespasian to Domitian (AD 69–96)* (London, 1999).

a. Greek Bronze Coins—Struck by city-states, leagues, and kingdoms that operated in the territory of the modern Greek state (including the ancient territories of the Peloponnese, Central Greece, Thessaly, Epirus, Crete and those parts of the territories of ancient Macedonia, Thrace and the Aegean islands that lay within the boundaries of the modern Greek state). Approximate date: 5th century B.C. to late 1st century B.C.

b. Greek Silver Coins—This category includes the small denomination coins of the city-states of Aegina, Athens, and Corinth, and the Kingdom of Macedonia under Philip II and Alexander the Great. Such coins weigh less than approximately 10 grams and are known as obols, diobols, triobols, hemidrachms, and drachms. Also included are all denominations of coins struck by the other city-states, leagues, and kingdoms that operated in the territory of the modern Greek state (including the ancient territories of the Peloponnese, Central Greece, Thessaly, Epirus, Crete, and those parts of the territories of ancient Macedonia, Thrace and the Aegean islands that lie within the boundaries of the modern Greek state). Approximate date: 6th century B.C. to late 1st century B.C.

c. *Roman Coins Struck in Greece*—In silver and bronze, struck at Roman and Roman provincial mints that operated in the territory of the modern Greek state (including the ancient territories of the Peloponnese, Central Greece, Thessaly, Epirus, Crete, and those parts of the territories of ancient Macedonia, Thrace and the Aegean islands

that lie within the boundaries of the modern Greek state). Approximate date: late 2nd century B.C. to 3rd century A.D.

d. *Coins from the Byzantine and Medieval Periods*—This category includes coin types such as those of the Byzantine and medieval Frankish and Venetian states that circulated primarily in Greece, ranging in date from approximately the 3rd century A.D. to the 15th century A.D.

C. Ceramic

1. Sculpture

a. Architectural Elements—Baked clay (terracotta) elements used to decorate buildings. Elements include acroteria, antefixes, painted and relief plaques, metopes, cornices, roof tiles, revetments, and brick. Approximate date: 3rd millennium B.C. to 30 B.C.

b. Large Statuary—Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual). Approximate date: 3rd millennium B.C. to 30 B.C.

c. Small Statuary—Subject matter is varied and includes human and animal figures, human body parts, groups of figures in the round, shrines, houses, and chariots. Includes Mycenaean and later Tanagra figurines. These range from approximately 10 cm to 1 m in height. Approximate date: 7th millennium B.C. to A.D. 324.

d. *Sarcophagi*—Block- or tub-shaped chests, often painted, known as *larnax* (*plural, larnakes*). Approximate date: 3rd millennium B.C. to 30 B.C.

2. Vessels

a. Neolithic Pottery—Handmade, often decorated with a lustrous burnish, decorated with appliqué and/or incision, sometimes with added paint. These come in a variety of shapes from simple bowls and vases with three or four legs to handled scoops and large storage jars. Approximate date: 7th millennium B.C. to 3rd millennium B.C.

b. Minoan, Cycladic, and Mycenaean Pottery—Handmade and wheelmade pottery in shapes for tableware, serving, storing, and processing, with lustrous burnished, matte, appliqué, incised, and painted decoration; includes local styles such as Kamares ware, Pictorial Style, and extraordinary shapes such as “frying pans” and “kernoi.” Approximate dates: 4th millennium B.C. to 12th century B.C.

c. “Submycenaean” and Pottery of the Geometric Period (including “sub-Geometric”)—Handmade and wheelmade pottery that succeeds the styles of the Late Bronze Age and is produced in decorated and

undecorated styles, often reflecting that of the Late Bronze Age but predominately using compasses for circles and linear “geometric” decoration, as well as schematic representations of humans, animals and birds. This category also includes Proto-Attic Black and White style pottery. Approximate dates: 12th century B.C. to 7th century B.C.

d. Attic Black Glaze, Black Figure, Red Figure and White Ground Pottery—These are made in a specific set of shapes (*e.g.*, amphorae, kraters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground). Approximate date: 6th century B.C. to 4th century B.C.

e. Corinthian Pottery—Painted pottery made in Corinth in a specific range of shapes for perfume and unguents and for drinking or pouring liquids. The very characteristic painted and incised designs depict human and animal figural scenes, rows of animals, and floral decoration. Approximate date: 8th century B.C. to 6th century B.C.

f. West Slope Ware—This ware is named after a type of pottery from the west slope of the Athenian Acropolis. It has a black-glaze with relief and polychrome decoration and was produced first in Athens in the fourth century B.C., but the style is also manufactured elsewhere, such as at Corinth, Macedonia and Crete down to the first century B.C. Approximate date: 4th century B.C. to 1st century B.C.

g. Moldmade Bowls—These bowls with relief decoration were developed in Athens in the late third century B.C. and soon manufactured elsewhere, such as in Corinth and Argos. Patterns include pine-cone scales, leaves, petals, or figural scenes. They have black glaze, often with a metallic sheen. Approximate date: 3rd century B.C. to 1st century B.C.

h. Utilitarian Ware—Includes undecorated plates, cooking pots, water jars (plain and incised), plain perfume jars (unguentaria), and transport amphorae (often with stamped handles). Approximate date: 6th century B.C. to A.D. 324.

i. Byzantine Pottery—Includes undecorated plain wares, utilitarian, tableware, serving and storage jars, special shapes such as pilgrim flasks, and can be matte painted or glazed, including incised “sgraffito” and stamped with elaborate polychrome decorations using floral, geometric, human, and animal motifs; it is generally locally manufactured, though places like Corinth were major producers. Approximate date: 324 A.D. to 15th century A.D.

3. Inscriptions—These are typically unbaked and should be handled with extreme care, even when hard-fired through accidental

burning. They typically take the form of tablets shaped like leaves of rectangular or square shape and they are often lined, with incised, and sometimes stamped, characters known as "Linear A" and "Linear B." Approximate date: 2nd millennium B.C. to 12th century B.C.

4. Lamps—Can be handmade, wheelmade, or moldmade. Shapes include open with a pinched nozzle, partially enclosed with a rim, or covered with a decorated disc. Athens and Corinth were major producers. Approximate date: 7th century B.C. to A.D. 324.

5. Loom Weights—Shapes include conical, pyramidal, disc or rings. Can be stamped, incised, or glazed. Approximate date: 7th millennium B.C. to 15th century A.D.

D. Bone, Ivory, Wood and Other Organics

1. Small Statuary and Figurines—Subject matter includes human and animal figures and groups of figures in the round. These range from approximately 10 cm to 1 m in height. Approximate date: 7th millennium B.C. to 15th century A.D.

2. Personal Ornaments—In bone, ivory, and spondylus shell. Types include amulets, combs, pins, spoons, small containers, bracelets, buckles, and beads. Approximate date: 7th millennium B.C. to 15th century A.D.

3. Seals and Stamps—Small devices with at least one side engraved with a design for stamping or sealing; they can be discoid, cuboid, conoid, or in the shape of animals or fantastic creatures (*e.g.*, a scarab). Approximate date: 7th millennium B.C. to 2nd millennium B.C.

4. Musical Instruments—In bone, ivory and tortoise shell. Types include pipe and flute. Approximate date: 3rd millennium B.C. to 15th century A.D.

5. Ostrich Egg Vessels—Often decorated with an incised scene (*e.g.*, geometric, animal, human, etc.). Approximate date: 3rd millennium B.C. to 2nd millennium B.C.

6. Furniture—Bone and ivory furniture inlays and veneers. Approximate date: 2nd millennium B.C. to 15th century A.D.

E. Glass and Faience

1. Vessels—Shapes include small jars, bowls, animal shaped, goblet, spherical, candle holders, perfume jars (*unguentaria*). Approximate date: 2nd millennium B.C. to 15th century A.D.

2. Beads—Globular and relief beads. Approximate date: beginning in 2nd millennium B.C.

3. Small Statuary—Includes human and animal figures in the round, scarabs, and other imitations of eastern themes. These range from approximately 3 to 20 cm in height. Approximate date: 2nd millennium to 7th century B.C.

F. Textiles

Clothing or fragments of clothing or carpets or cloth for hanging. Approximate date: 1100 B.C. to 15th century A.D.

G. Papyrus Documents

Documents made from papyrus and written upon in ink; these are often rolled, fragmentary, and should be handled with extreme care. Approximately 7th century B.C. to A.D. 324.

H. Paintings

1. Domestic and Public Wall Painting—These are painted on mud-plaster, lime plaster (wet—*buon fresco*—and dry—*secco fresco*); types include simple applied color, bands and borders, landscapes, scenes of people and/or animals in natural or built settings. Approximate date: 3rd millennium B.C. to A.D. 324.

2. Tomb Paintings—Paintings on plaster or stone, sometimes geometric or floral but usually depicting gods, goddesses, or funerary scenes. Approximate date: 2nd millennium B.C. to A.D. 500.

3. Panel Paintings on wood depicting gods, goddesses, or funerary scenes. Approximate date: 1st millennium B.C. to A.D. 324.

I. Mosaics

Floor mosaics including landscapes, scenes of humans or gods, and activities such as hunting and fishing. They are made from stone, tile, or glass cut into small bits (*tesserae*) and laid into a plaster matrix. There may also be vegetative, floral, or decorative motifs. Approximate date: 5th century B.C. to A.D. 500.

II. Ecclesiastical Ethnological Material

The ecclesiastical ethnological materials represent the Early Christian and Byzantine, and post-Byzantine periods and include objects made from A.D. 324 through 1830.

A. Stone

1. Architectural Elements—In marble and other stone, including upright “closure” slabs, circular marking slabs *omphalion*, which may be decorated with crosses, human, or animal figures.

2. Monuments—In marble and other stone; types such as funerary inscriptions.

3. Vessels—Containers for holy water.

4. Reliefs—In marble and other stone, used for architectural decoration. May be carved as icons in which religious figures predominate in the figural decoration.

5. Furniture—In marble and other stone. Types include thrones and altars.

B. Metal

1. Reliefs—Cast as icons in which religious figures predominate in the figural decoration.

2. Boxes—Containers of gold and silver, used as reliquaries for sacred human remains. Carved and engraved decoration includes religious figures, scenes from the Bible, floral and geometric designs.

3. Vessels—Containers of lead, which carried aromatic oils and are called “pilgrim flasks.”

4. Ceremonial paraphernalia—In bronze, silver, and gold including asterisks, censers (incense burners), communion chalices and disks, book covers, lances, liturgical items like ciborium (*artophorion*), book covers, benediction or processional crosses, bishop’s crowns, buckles, and chests. These are often decorated with molded or incised geometric motifs or scenes from the Bible, inscriptions in Greek, and encrusted with semi-precious or precious stones. The gems themselves may be engraved with religious figures or inscriptions. Ecclesiastical treasure may include all of the above, as well as rings, earrings, and necklaces (some decorated with ecclesiastical themes) and other implements (*e.g.*, spoons).

C. Ceramic

Vessels which carried aromatic oils and are called “pilgrim flasks.”

D. Bone and Ivory Objects

Ceremonial paraphernalia including boxes, reliquaries (and their contents), plaques, pendants, candelabra, stamp rings, crosses. Carved and engraved decoration includes religious figures, scenes from the Bible, and floral and geometric designs.

E. Wood

Wooden objects include architectural elements such as painted wood screens (iconostasis) and *lypira*; carved doors, crosses, painted wooden beams from churches or monasteries, and monastery seals;

furniture such as thrones, pulpit bases (*proskinitaria*), lecturns (*analogia*); chests, and other objects, including musical instruments. Religious figures predominate in the painted and carved figural decoration. Ecclesiastical furniture and architectural elements may also be decorated with geometric or floral designs and/or inlaid with glass or other material.

F. Glass

Vessels of glass include lamps, candle sticks, and other ritual vessels.

G. Textile

Ecclesiastical garments and other ritual textiles, including robes, vestments (*sakkos*, *phelonion*, *omophorion*, *epitrachelion*, *epigonation*), and altar clothes. They are often of a fine fabric and richly embroidered in silver and gold. Embroidered designs include religious motifs and figures, floral, and geometric designs.

H. Parchment and Paper

Documents such as illuminated manuscripts occur in single leaves or bound as a book or “codex” and are written or painted on animal skins (cattle, sheep/goat, camel) known as parchment. Illuminated manuscripts, printed books used for religious/ritual purposes, and icons may also be printed on paper in the post-Byzantine period.

I. Paintings

1. Wall paintings—On various kinds of plaster and which generally portray religious images and scenes of Biblical events. Surrounding paintings may contain animal, floral, or geometric designs, including borders and bands.

2. Panel Paintings (Icons)—Smaller versions of the scenes on wall paintings, and may be partially covered with gold or silver, sometimes encrusted with semi-precious or precious stones and are usually painted on a wooden panel, often for inclusion in a wooden screen (iconostasis).

J. Mosaics

Wall mosaics generally portray religious images and scenes of Biblical events. Surrounding panels may contain animal, floral, or geometric designs. They are made from stone and glass cut into small bits (tesserae) and laid into a plaster matrix.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure; see 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

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

Executive Order 12866

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

Signing Authority

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

Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

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

Amendment to CBP Regulations

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

PART 12—SPECIAL CLASSES OF MERCHANDISE

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

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

* * * * *

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

* * * * *

■ 2. In § 12.104g, the table in paragraph (a) is amended by revising the entry for Greece (Hellenic Republic) to read as follows:

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

(a) * * *

State party	Cultural property	Decision No.
* * *	* * *	* * *
Greece (Hellenic Republic)	Archeological materials representing Greece's cultural heritage ranging in date from approximately 3rd millennium B.C. to 15th century A.D., and ecclesiastical ethnological material from Greece from the early Christian, Byzantine, and post-Byzantine periods, including objects made from A.D. 324 through 1830.	CBP Dec. 21–16.
* * *	* * *	* * *

* * * * *

Dated: November 17, 2021.

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

TIMOTHY E. SKUD,
Deputy Assistant
Secretary of the Treasury.

[Published in the Federal Register, November 22, 2021 (85 FR 66164)]



**CUSTOMS BROKER PERMIT USER FEE PAYMENT
FOR 2022**

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

ACTION: General notice.

SUMMARY: This document provides notice to customs brokers that the annual user fee that is assessed for each permit held by a broker,

whether it may be an individual, partnership, association, or corporation, is due by January 31, 2022. Pursuant to fee adjustments required by the Fixing America's Surface Transportation Act (FAST ACT) and U.S. Customs and Border Protection (CBP) regulations, the annual user fee payable for calendar year 2022 will be \$153.19.

DATES: Payment of the 2022 Customs Broker Permit User Fee is due by January 31, 2022.

FOR FURTHER INFORMATION CONTACT: Melba Hubbard, Broker Management Branch, Office of Trade, (202) 325-6986, or melba.hubbard@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 111.96 of title 19 of the Code of Federal Regulations (19 CFR 111.96(c)), U.S. Customs and Border Protection (CBP) assesses an annual user fee for each customs broker district and national permit held by an individual, partnership, association, or corporation. CBP regulations provide that this fee is payable for each calendar year in each broker district where the broker was issued a permit to do business by the due date. *See* 19 CFR 24.22(h) and (i)(9). Broker districts are defined in the General Notice entitled, "Geographic Boundaries of Customs Brokerage, Cartage and Lighterage Districts," published in the **Federal Register** on March 15, 2000 (65 FR 14011), and corrected, with minor changes, on March 23, 2000 (65 FR 15686) and on April 6, 2000 (65 FR 18151).

Sections 24.22 and 24.23 of title 19 of the CFR (19 CFR 24.22 and 24.23) provide for and describe the procedures that implement the requirements of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114-94, December 4, 2015). Specifically, paragraph (k) in section 24.22 (19 CFR 24.22(k)) sets forth the methodology to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary. The customs broker permit user fee is set forth in Appendix A of part 24. (19 CFR 24.22 Appendix A.) On July 29, 2021, CBP published a **Federal Register** notice, CBP Dec. 21-12, which among other things, announced that the annual customs broker permit user fee would increase to \$153.19 for calendar year 2022. *See* 86 FR 40864.

As required by 19 CFR 111.96 and 24.22, CBP must provide notice in the **Federal Register** no later than 60 days before the date that the payment is due for each broker permit. This document notifies customs brokers that for calendar year 2022, the due date for payment of the user fee is January 31, 2022.

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

[Published in the Federal Register, November 23, 2021 (85 FR 66573)]

**APPLICATION FOR FOREIGN-TRADE ZONE ADMISSION
AND/OR STATUS DESIGNATION, AND APPLICATION FOR
FOREIGN-TRADE ZONE ACTIVITY PERMIT**

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 24, 2022) 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 1651-0029 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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: Application for Foreign-Trade Zone Admission and/or Status Designation, and Application for Foreign-Trade Zone Activity Permit.

OMB Number: 1651-0029.

Form Number: 214, 214A, 214B, 214C, and 216.

Current Actions: Extension without change.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Foreign trade zones (FTZs) are geographical enclaves located within the geographical limits of the United States but for tariff purposes are considered to be outside the United States. Imported merchandise may be brought into FTZs for storage, manipulation, manufacture, or other processing and subsequent removal for exportation, consumption in the United States, or destruction. A company bringing goods into an FTZ has a choice of zone status (privileged/non-privileged foreign, domestic, or zone-restricted), which affects the way such goods are treated by Customs and Border Protection (CBP) and treated for tariff purposes upon entry into the customs territory of the United States.

CBP Forms 214, 214A, 214B, and 214C, which make up the *Application for Foreign-Trade Zone Admission and/or Status Designation*, are used by companies that bring merchandise, except in certain circumstances including, but not limited to, domestic status merchandise, into an FTZ to register the admission of such merchandise into FTZs and to apply for the appropriate zone status. Form 214A is not filled out separately by respondents; it is simply a copy of Form 214 that CBP gives to the Census Bureau. Form 214B is a continuation sheet for Form 214 that respondents use when they need more room to add line items to the form. Form 214C is a continuation sheet for Form 214A that respondents use when they need more room to add line items to the form.

CBP Form 216, *Foreign-Trade Zone Activity Permit*, is used by companies to request approval to manipulate, manufacture, exhibit, or destroy merchandise in an FTZ.

These FTZ forms are authorized by 19 U.S.C. 81 and provided for by 19 CFR 146.22, 146.32, 146.35, 146.36, 146.37, 146.39, 146.40, 146.41, 146.44, 146.52, 146.53, and 146.66. These forms are accessible at: <http://www.cbp.gov/newsroom/publications/forms>.

This collection of information applies to the importing and trade community who are familiar with import procedures and with CBP regulations.

Type of Information Collection: Form 214.

Estimated Number of Respondents: 6,749.

Estimated Number of Annual Responses per Respondent: 25.

Estimated Number of Total Annual Responses: 168,725.

Estimated Time per Response: 15 minutes (0.25 hours).

Estimated Total Annual Burden Hours: 42,181.

Type of Information Collection: Form 216.

Estimated Number of Respondents: 2,500.

Estimated Number of Annual Responses per Respondent: 10.

Estimated Number of Total Annual Responses: 25,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 4,167.

Dated: November 18, 2021.

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

U.S. Court of International Trade

Slip Op. 21–156

TRANS TEXAS TIRE, LLC, Plaintiff, and ZHEJIANG JINGU COMPANY LIMITED, Consolidated Plaintiff, v. UNITED STATES, Defendant, and DEXSTAR WHEEL, Defendant-Intervenor.

Before: Gary S. Katzmman, Judge
Consol. Court No. 19–00188

[The court sustains Commerce’s Final Results of Redetermination.]

Dated: November 18, 2021

Jordan C. Kahn, Ned H. Marshak, Alan R. Klestadt, and Max F. Schutzman. Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., argued for Plaintiff Trans Texas Tire, LLC.

Ting-Ting Kao, Walter J. Spak and Jay C. Campbell, White & Case LLP, of Washington, D.C. and New York, N.Y., argued for Consolidated Plaintiff Zhejiang Jingu Company Limited.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton,* Acting Assistant Attorney General, *Jeanne E. Davidson,* Director, and *L. Misha Preheim,* Assistant Director. Of Counsel *Shelby M. Anderson,* Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Nicholas J. Birch, Roger Schagrin and Geert De Prest Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Dexstar Wheel.

OPINION

Katzmann, Judge:

Plaintiffs Trans Texas Tire, LLC (“TTT”) and Zhejiang Jingu Company Limited (“Jingu”) (together, “Plaintiffs”) brought this action to contest a final scope ruling by the United States Department of Commerce (“Commerce”). Compl. of Trans Texas Tire at 1–2, Nov. 1, 2019, ECF No. 10 (“Pl.’s Compl.”); *see also* Compl. of Zhejiang Jingu, *Zhejiang Jingu Co. Ltd. v. United States*, No. 19-cv-00187 (CIT Nov. 1, 2019), ECF No. 13 (“Consol.-Pl.’s Compl.”). Plaintiffs alleged that Commerce erred by including steel trailer wheels coated in chrome through a physical vapor deposition (“PVD”) process (“PVD chrome wheels”) in the final antidumping duty (“AD”) determination, and further challenged Commerce’s assessment of duties on PVD chrome wheels retroactive to the date of Commerce’s preliminary determination. Pl.’s Compl. at 5–6; *see generally* Commerce’s *Order on Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China*, 84 Fed. Reg. 45,952 (Dep’t Commerce Sept. 3, 2019), P.R.

308 (“AD Order”). Following Plaintiffs’ motions for judgment on the agency record, the court sustained Commerce’s scope determination but concluded that Commerce did not provide adequate notice of the inclusion of PVD chrome wheels prior to publication of its revised scope determination. *Trans Texas Tire, LLC v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1275, 1288–89 (2021) (“*Trans Texas I*”). Accordingly, the court remanded to Commerce for reformulation of its instructions to U.S. Customs and Border Protection (“CBP”) consistent with the court’s opinion. As detailed below, the court concludes that Commerce’s Final Results of Redetermination Pursuant to Court Remand, Jun. 15, 2021, ECF No. 62–1 (“*Remand Results*”) are supported by substantial evidence and in accordance with law.

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Trans Texas Tire, LLC v. United States*, 519 F. Supp. 3d 1275. Information relevant to the instant opinion is set forth below.

On August 8, 2018, Dexstar Wheel Division of Americana Development, Inc. (“Dexstar”), a domestic producer of trailer wheels, filed AD and CVD petitions on certain steel trailer wheels from the People’s Republic of China. Petitions for the Imposition of AD and CVD Duties on Behalf of Dexstar Wheel Division of Americana Development, Inc. Re: Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China, P.R. 50, 52 (“Petition”). Commerce initiated its AD investigation on September 5, 2018. *Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People’s Republic of China: Initiation of Less Than Fair Value Investigation*, 83 Fed. Reg. 45,095 (Dep’t Commerce Sept. 5, 2018), P.R. 72 (“*Initiation Notice*”). The *Initiation Notice* provided that “[e]xcluded from this scope are the following: . . . (3) certain on the road steel wheels that are coated entirely with chrome.” *Id.* at 45,100. On April 15, 2019, Commerce issued its preliminary scope decision memorandum, stating that certain on-the-road steel wheels “coated entirely in chrome” were excluded from the scope of its investigation. Mem. from E. Begnal to G. Taverman, re: Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China: Preliminary Scope Decision Memorandum 2 (Dep’t Commerce Apr. 15, 2019), P.R. 252. On April 22, 2019, Commerce published its preliminary AD determination finding that certain steel wheels from China were being sold in the United States for less than fair value, and again stating that “certain on-the-road steel wheels that are coated entirely in chrome” were

outside the scope of the investigation. *Certain Steel Wheels 12 to 16.5 Inches from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Affirmative Determination of Critical Circumstances*, 84 Fed. Reg. 16,643, 16,646 (Dep't Commerce Apr. 22, 2019), P.R. 255 (“*Preliminary Determination*”).

On July 1, 2019, Commerce issued its final scope decision memorandum, which clarified that the exclusion from ADs would in fact be “limited to chrome wheels coated entirely in chrome and produced through a chromium electroplating process, and [would] not extend to wheels that have been finished with other processes, including but not limited to Physical Vapor Deposition (PVD).” Mem. from E. Begnal to J. Maeder, re: *Certain Steel Wheels from the People's Republic of China: Final Scope Decision Memorandum for the Final Antidumping Duty and Countervailing Duty Determinations 5* (Dep't Commerce Jul. 1, 2019), P.R. 301. Shortly thereafter, on July 9, 2019, Commerce published its final affirmative determination in which it stated that the *AD Order* would cover PVD chrome wheels, and exclude only electroplated chrome wheels. *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 Fed. Reg. 32,707, 32,710 (Dep't Commerce July 9, 2019), P.R. 302 (“*Final Determination*”). On September 3, 2019, Commerce issued its AD order imposing duties on certain steel wheels from China. *AD Order*.

This action was initiated by TTT on October 3, 2019, and a complaint was timely filed. Summons, ECF No. 1; Compl. On November 22, 2019, Dexstar joined the action as a defendant-intervenor. Order Granting Consent Mot. to Intervene, Nov. 22, 2019, ECF No. 15. Foreign producer Jingu, which had challenged the scope of Commerce's *AD Order* and the retroactive assessment of duties in a concurrent litigation, then joined TTT's action as a consolidated plaintiff. Consol.-Pl.'s Compl.; Order Granting Mot. to Consolidate, Dec. 11, 2019, ECF No. 21. On April 28, 2020, TTT and Jingu each filed Rule 56.2 motions for judgment on the agency record, alleging that Commerce (1) unlawfully expanded the scope of its AD investigation by including PVD chrome wheels; and (2) improperly assessed ADs retroactively to the preliminary determination date without adequate notice. Pl.'s Mot. for J. on the Agency R. 26, 37, Apr. 28, 2020, ECF No. 29; Consol.-Pl.'s Mot. for J. on the Agency R. 18, 39, Apr. 28, 2020, ECF No. 30. Defendant the United States (“Government”) and Defendant-Intervenor Dexstar opposed Plaintiffs' motions, responding that (1) Commerce's authority to determine the scope of its orders

controlled; (2) Commerce properly assessed duties retroactively; and (3) the chrome wheel exclusion was never intended to encompass PVD chrome wheels. Def.'s Resp. to Pl.'s Mot. for J. on Agency R. 12, 27, 30, Aug. 10, 2020, ECF No. 35; Resp. Br. of Dexstar 9, 16, 24, Aug. 10, 2020, ECF No. 34. Oral argument was held on January 25, 2021. Oral Arg., Jan. 25, 2021, ECF No. 56. Upon consideration of the parties' arguments the court concluded that, while Commerce permissibly included PVD chrome wheels in the scope of the *AD Order*, Commerce's retroactive assessment of duties was unlawful because Plaintiffs had no notice of the inclusion of PVD chrome wheels at the time of the *Preliminary Determination*. *Trans Texas I*, 519 F. Supp. 3d at 1289. Accordingly, the court remanded to Commerce for revision of its instructions to CBP. *Id.*

Commerce filed its *Remand Results* on June 15, 2021. *Remand Results*. On remand, Commerce prepared revised instructions to CBP "provid[ing] that imports of PVD chrome wheels entered, or withdrawn from warehouse, for consumption between the date of publication of Commerce's *Preliminary Determination* and the day before the date of publication of Commerce's *Final Determination* are outside the scope of the investigation."¹ *Id.* at 8. Commerce further noted that the instructions will not be issued to CBP until Commerce publishes a notice of court decision not in harmony with Commerce's determination and the period of appeal expires (or an appeal is filed and resolved) ("Timken notice"). *Id.* at 8–9. Until the expiration of the period of appeal, or until a final and conclusive decision is issued on appeal, Commerce indicated that it will "order the continuation of the suspension of liquidation of the entries at issue" but also instruct CBP to "give effect to [*Trans Texas I*] by allowing for the importer to seek refunds pursuant to 19 U.S.C. 1520(a)(4)." *Id.* at 9.

Following issuance of the *Remand Results*, Dexstar submitted comments on July 15, 2021, requesting that the court sustain Commerce's redetermination in its entirety. Def.-Inter.'s Comments on Final Results of Redetermination, ECF No. 65. The Government filed its response to the parties' comments on August 12, 2021, and further requested that the *Remand Results* be sustained. Def.'s Resp. to Comments on Remand Results, ECF No. 66. While Plaintiffs did not file comments on the *Remand Results*, they each submitted letters to Commerce affirming their support of the redetermination. *See Remand Results* at 6 n.22 (citations omitted).

¹ As the court stated in *Trans Texas I*, notice was in this case provided by publication of the revised language clarifying the inclusion of PVD chrome wheels. 519 F. Supp. 3d at 1288. Commerce accordingly determined on remand that the notice date was July 9, 2019, at which time the *Final Determination* was published in the Federal Register.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” See *Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

The court concludes that Commerce’s *Remand Results* are supported by substantial evidence and in accordance with law. As instructed by the court in *Trans Texas I*, Commerce has reformulated its instructions to CBP to reflect the fact that adequate notice of the inclusion of PVD chrome wheels was not provided to Plaintiffs until publication of the *Final Determination* on July 9, 2019, and therefore duties may not be assessed retroactively beyond that date. *Trans Texas I*, 519 F. Supp. at 1288–89; *Remand Results* at 10; Att. A–B. Furthermore, the proposed draft notices filed by Commerce are in compliance with the Federal Circuit’s decision in *Timken Co v. United States*, 893 F.2d 337 (Fed. Cir. 1990) which provides that “[i]f the CIT . . . renders a decision which is not in harmony with Commerce’s determination, then Commerce must publish notice of that decision . . . regardless of the time for appeal or of whether an appeal is taken” and that, “Commerce should suspend liquidation” pending a “conclusive court decision,” whether obtained by expiry of the appeal period or resolution of an appeal. 892 F.2d at 341–42; see also *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374, 1382 (Fed. Cir. 2010) (clarifying Commerce’s obligations following issuance of a *Timken* notice). Finally, the draft reformulated instructions properly ensure access to interim remedies pursuant to 19 U.S.C. § 1520(a)(4). As Commerce’s redetermination is supported by substantial evidence and in accordance with law, and as it further complies with the court’s instruction in *Trans Texas I* that Commerce revise its instructions to CBP, the court sustains Commerce’s *Remand Results*.

CONCLUSION

For the foregoing reasons, Commerce’s *Remand Results* are sustained. Judgment will enter accordingly in favor of Defendant.

SO ORDERED.

Dated: November 18, 2021
New York, New York

/s/ Gary S. Katzmann
JUDGE

Slip Op. 21–157

TRANS TEXAS TIRE, LLC, Plaintiff, and ZHEJIANG JINGU COMPANY LIMITED, Consolidated Plaintiff, v. UNITED STATES, Defendant, and DEXSTAR WHEEL, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Consol. Court No. 19–00189

[The court sustains Commerce’s Final Results of Redetermination.]

Dated: November 18, 2021

Jordan C. Kahn, Ned H. Marshak, Alan R. Klestadt, and Max F. Schutzman. Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, N.Y. and Washington, D.C., argued for Plaintiff Trans Texas Tire, LLC.

Ting-Ting Kao, Walter J. Spak and Jay C. Campbell, White & Case LLP, of Washington, D.C. and New York, N.Y., argued for Consolidated Plaintiff Zhejiang Jingu Company Limited.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton,* Acting Assistant Attorney General, *Jeanne E. Davidson,* Director, and *L. Misha Preheim,* Assistant Director. Of Counsel *Shelby M. Anderson,* Senior Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Nicholas J. Birch, Roger Schagrin and Geert De Prest Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Dexstar Wheel.

OPINION

Katzmann, Judge:

Plaintiffs Trans Texas Tire, LLC (“TTT”) and Zhejiang Jingu Company Limited (“Jingu”) (together, “Plaintiffs”) brought this action to contest a final scope ruling by the United States Department of Commerce (“Commerce”). Compl. of Trans Texas Tire at 1–2, Nov. 1, 2019, ECF No. 10 (“Pl.’s Compl.”); *see also* Compl. of Zhejiang Jingu, *Zhejiang Jingu Co. Ltd. v. United States*, No. 19-cv-00187 (CIT Nov. 1, 2019), ECF No. 13 (“Consol.-Pl.’s Compl.”). Plaintiffs alleged that Commerce erred by including steel trailer wheels coated in chrome through a physical vapor deposition (“PVD”) process (“PVD chrome wheels”) in the final countervailing duty (“CVD”) determination, and further challenged Commerce’s assessment of duties on PVD chrome wheels retroactive to the date of Commerce’s preliminary determina-

tion. Pl.’s Compl. at 5–7; *see generally* Commerce’s *Order on Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China*, 84 Fed. Reg. 45,952 (Dep’t Commerce Sept. 3, 2019), P.R. 608 (“CVD Order”). Following Plaintiffs’ motions for judgment on the agency record, the court sustained Commerce’s scope determination and AFA rate assessment for TTT supplier Xingmin Intelligent Transportation Systems (“Xingmin”), but concluded that Commerce did not provide adequate notice of the inclusion of PVD chrome wheels prior to publication of its revised scope determination. *Trans Texas Tire, LLC v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1289, 1307–08 (2021) (“*Trans Texas I*”). Accordingly, the court remanded to Commerce for reformulation of its instructions to U.S. Customs and Border Protection (“CBP”) consistent with the court’s opinion. As detailed below, the court concludes that Commerce’s Final Results of Redetermination Pursuant to Court Remand, Jun. 15, 2021, ECF No. 69–1 (“*Remand Results*”) are supported by substantial evidence and in accordance with law.

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Trans Texas Tire, LLC v. United States*, 519 F. Supp. 3d 1289. Information relevant to the instant opinion is set forth below.

On August 8, 2018, Dexstar Wheel Division of Americana Development, Inc. (“Dexstar”), a domestic producer of trailer wheels, filed AD and CVD petitions on certain steel trailer wheels from the People’s Republic of China. Petitions for the Imposition of AD and CVD Duties on Behalf of Dexstar Wheel Division of Americana Development, Inc. Re: Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China, P.R. 47, 49 (“Petition”). Commerce initiated its CVD investigation on September 5, 2018. *Certain Steel Wheels 12 to 16.5 Inches in Diameter From the People’s Republic of China: Initiation of Countervailing Duty Investigation*, 83 Fed. Reg. 45,100 (Dep’t Commerce Sept. 5, 2018), P.R. 162 (“*Initiation Notice*”). The *Initiation Notice* provided that “[e]xcluded from this scope are the following: . . . (3) certain on the road steel wheels that are coated entirely with chrome.” *Id.* at 45,104. In February of 2019, Commerce issued its preliminary decision memorandum and published its preliminary determination, each of which also stated that “certain on-the-road steel wheels . . . coated entirely in chrome” were excluded from the scope of the investigation. *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 84 Fed. Reg. 5,989,

5,991 (Dep't Commerce Feb. 25, 2019) (“*Preliminary Determination*”); see also Mem. from J. Maeder to G. Taverman, re: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China (Dep’t Commerce Feb. 14, 2019), P.R. 457.

On July 1, 2019, Commerce issued its final scope decision memorandum, which clarified that the exclusion from CVDs would in fact be “limited to chrome wheels coated entirely in chrome and produced through a chromium electroplating process, and [would] not extend to wheels that have been finished with other processes, including but not limited to Physical Vapor Deposition (PVD).” Mem. from E. Bernal to J. Maeder, re: Certain Steel Wheels from the People’s Republic of China: Final Scope Decision Memorandum for the Final Antidumping Duty and Countervailing Duty Determinations 5 (Dep’t Commerce Jul. 1, 2019), P.R. 602. Shortly thereafter, on July 9, 2019, Commerce published its final affirmative determination, in which it stated that the *CVD Order* would cover PVD chrome wheels, and exclude only electroplated chrome wheels. *Certain Steel Wheels 12 to 16.5 Inches in Diameter from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, and Final Affirmative Determination of Critical Circumstances*, 84 Fed. Reg. 32,723 (Dep’t Commerce July 9, 2019), P.R. 603 (“*Final Determination*”). On September 3, 2019, Commerce issued its CVD order imposing duties on certain steel wheels from China. *CVD Order*.

This action was initiated by TTT on October 3, 2019, and a complaint was timely filed. Summons, ECF No. 1; Compl. On November 22, 2019, Dexstar joined the action as a defendant-intervenor. Order Granting Consent Mot. to Intervene, Nov. 22, 2019, ECF No. 15. Foreign producer Jingu, which had challenged the scope of Commerce’s *CVD Order* and the retroactive assessment of duties in a concurrent litigation, then joined TTT’s action as a consolidated plaintiff. Consol.-Pl.’s Compl.; Order Granting Mot. to Consolidate, Dec. 11, 2019, ECF No. 21. On April 28, 2020, TTT and Jingu each filed Rule 56.2 motions for judgment on the agency record, alleging that Commerce (1) unlawfully expanded the scope of its CVD investigation by including PVD chrome wheels; (2) unlawfully imposed a punitive AFA rate on TTT’s supplier, Xingmin; and (3) improperly assessed CVDs retroactively to the preliminary determination date without adequate notice. Pl.’s Mot. for J. on the Agency R. 27–44., Apr. 28, 2020, ECF No. 31; Consol.-Pl.’s Mot. for J. on the Agency R. 22–23, Apr. 28, 2020, ECF No. 32. Defendant the United States (“Government”) and Defendant-Intervenor Dexstar opposed Plaintiffs’ mo-

tions, responding that (1) Commerce’s authority to determine the scope of its orders controlled; (2) the AFA rate applied to Xingmin reflected a permissible aggregation of the highest subsidy rates pursuant to statute; (3) Commerce properly assessed duties retroactively; and (4) the chrome wheel exclusion was never intended to encompass PVD chrome wheels. Def.’s Resp. to Pl.’s Mot. for J. on Agency R. 16, 29, 30–35, Aug. 10, 2020, ECF No. 35; Resp. Br. of Dexstar 18, 24, 26–29, Aug. 10, 2020, ECF No. 34. Oral argument was held on January 25, 2021. Oral Arg., Jan. 25, 2021, ECF No. 62. Upon consideration of the parties’ arguments the court concluded that, while Commerce permissibly included PVD chrome wheels in the scope of the *CVD Order*, and reasonably assessed a 386.45% AFA rate for Xingmin, Commerce’s retroactive assessment of duties was unlawful because Plaintiffs had no notice of the inclusion of PVD chrome wheels at the time of the *Preliminary Determination*. *Trans Texas I*, 519 F. Supp. 3d at 1305. Accordingly, the court remanded to Commerce for revision of its instructions to CBP. *Id.* at 1307–08.

Commerce filed its *Remand Results* on June 15, 2021. *Remand Results*. On remand, Commerce prepared revised instructions to CBP “provid[ing] that imports of PVD chrome wheels entered, or withdrawn from warehouse, for consumption between February 25, 2019[, the date of the *Preliminary Determination*], and June 24, 2019, are excluded from the scope of the investigation.”¹ *Id.* at 2. Commerce further noted that the instructions will not be issued to CBP until Commerce publishes a notice of court decision not in harmony with Commerce’s determination and the period of appeal expires (or an appeal is filed and resolved) (“*Timken* notice”). *Id.* at 8–9. Until the expiration of the period of appeal, or until a final and conclusive decision is issued on appeal, Commerce indicated that it will “order the continuation of the suspension of liquidation of the entries at issue” but also instruct CBP to “give effect to [*Trans Texas I*] by allowing for the importer to seek refunds pursuant to 19 U.S.C. 1520(a)(4).” *Id.* at 9.

Following issuance of the *Remand Results*, Dexstar submitted comments on July 15, 2021, requesting that the court sustain Commerce’s redetermination in its entirety. Def.-Inter.’s Comments on Final Results of Redetermination, ECF No. 72. The Government filed its response to the parties’ comments on August 12, 2021, and further

¹ While the court noted in *Trans Texas I* that notice was in this case provided by publication of the revised language clarifying the inclusion of PVD chrome wheels, 519 F. Supp. 3d at 1288, Commerce clarifies on remand that duties were only assessed on PVD chrome wheels until June 24, 2019, at which point provisional measures permitting the imposition of CVDs expired pending publication of the *Final Determination*. *Remand Results* at 7–8.

requested that the *Remand Results* be sustained. Def.'s Resp. to Comments on Remand Results, ECF No. 73. While Plaintiffs did not file comments on the *Remand Results*, they each submitted letters to Commerce affirming their support of the redetermination. *See Remand Results* at 6 n.23 (citations omitted).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” *See Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

DISCUSSION

The court concludes that Commerce’s *Remand Results* are supported by substantial evidence and in accordance with law. As instructed by the court in *Trans Texas I*, Commerce has reformulated its instructions to CBP to reflect the fact that adequate notice of the inclusion of PVD chrome wheels was not provided to Plaintiffs before the publication of the *Final Determination* on July 9, 2019. *Trans Texas I*, 519 F. Supp. at 1288–89; *Remand Results* at 10; Att. A–B. In this case, as Defendant notes, retroactive duties were only assessed up to June 24, 2019 (prior to publication of the *Final Determination*) due to the expiration of the four-month “provisional measures” period afforded by 19 U.S.C. § 1671b(d) during which importers could be required to post security. *Remand Results* at 7, *see also* 19 C.F.R. § 351.205. The reformulated instructions therefore appropriately state that duties shall not be assessed retroactively between the date of the *Preliminary Determination* and June 24, 2019. *Remand Results* at 7–8. Furthermore, the proposed draft notices filed by Commerce are in compliance with the Federal Circuit’s decision in *Timken Co v. United States*, 893 F.2d 337 (Fed. Cir. 1990) which provides that “[i]f the CIT . . . renders a decision which is not in harmony with Commerce’s determination, then Commerce must publish notice of that decision . . . regardless of the time for appeal or of whether an appeal is taken” and that, “Commerce should suspend liquidation” pending a “conclusive court decision,” whether obtained by expiry of the appeal period or resolution of an appeal. 892 F.2d at 341–42; *see also Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374, 1382 (Fed. Cir. 2010) (clarifying Commerce’s obligations following issuance

of a *Timken* notice). Finally, the draft reformulated instructions properly ensure access to interim remedies pursuant to 19 U.S.C. § 1520(a)(4). As Commerce's redetermination is supported by substantial evidence and in accordance with law, and as it further complies with the court's instruction in *Trans Texas I* that Commerce revise its instructions to CBP, the court sustains Commerce's *Remand Results*.

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are sustained. Judgment will enter accordingly in favor of Defendant.

SO ORDERED.

Dated: November 18, 2021
New York, New York

/s/ Gary S. Katzmann
JUDGE

Slip Op. 21–158

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

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

[Granting Plaintiff's motion for judgment on the agency record and remanding for further administrative proceedings.]

Dated: November 18, 2021

Stephen W. Brophy, Husch Blackwell, LLP, of Washington, DC, for Plaintiff. With him on the briefs were *Jeffrey S. Neeley* and *Nithya Nagarajan*.

Mark Ludwikowski, Clark Hill PLC of Washington, DC, for Plaintiff-Intervenor. With him on Plaintiff-Intervenor's written submission were *Courtney Gayle Taylor*, *R. Kevin Williams*, and *William Sjoberg*.

Ioana Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant. With her on the brief were *Bryan M. Boynton*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *W. Mitch Purdy*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Luke A. Meisner, Schagrin Associates of Washington, DC, for Defendant-Intervenor. With him on the brief was *Roger B. Schagrin*.

OPINION

Baker, Judge:

It's often said that bad facts make bad law. This case, which involves the Department of Commerce's imposition of hefty antidumping duties on ersatz maple cabinets imported from China, certainly has bad facts.

Commerce’s investigation revealed that a Chinese producer markets and sells its wooden cabinets in the United States as maple even though they are made of birch, a less costly grade of wood. To borrow a metaphor that could have been written for this case, the producer’s advertising in the United States is a “complete fraud from bark to core.” *Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1373 (Fed. Cir. 2001).

Less than amused, the Department applied “total adverse facts available”—trade law jargon for imposing the steepest possible anti-dumping duties because a producer has not been forthcoming in an investigation. Here, however, the producer did exactly what it was supposed to do: truthfully respond to Commerce’s questions and otherwise fully cooperate. That the producer defrauded consumers is of no moment for antidumping purposes, as the Department lacks jurisdiction to police false advertising violations.

The court accordingly remands so that Commerce can rethink this one. In the meantime, the Federal Trade Commission, state Attorneys General, and the plaintiffs’ class action bar may wish to take a close look at the producer’s swindling of its U.S. customers.

Statutory and Regulatory Background

The Tariff Act of 1930, as amended, provides a mechanism to combat dumping—the sale of imported merchandise in the United States at “less than its fair value.” 19 U.S.C. § 1673(1). Under that statute, domestic producers and other affected entities can petition Commerce and the International Trade Commission to investigate alleged dumping and its effects on U.S. industry. *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334 (CIT 2020). If the Department determines that dumping is occurring, and the ITC determines that the dumping harms domestic industry, Commerce can impose anti-dumping duties on top of any other applicable duties. 19 U.S.C. §1673. These duties are “in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.” *Id.*

To determine whether dumping is occurring, the Tariff Act requires the Department to make “a fair comparison . . . between the export price or constructed export price and normal value.” *Id.* § 1677b(a). Thus, Commerce’s dumping determination also establishes the amount of the applicable duty so long as other statutory conditions are satisfied.

A. Normal value

“Normal value” is generally “the price a producer charges in its home market.” *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353

(Fed. Cir. 2010); *see also* 19 U.S.C. § 1677b(a)(1)(B)(i) (defining normal value by reference to home market sales “in the ordinary course of trade”). In cases (such as this) involving imports from nonmarket economies,¹ the statute generally requires Commerce to determine normal value based on “the value of the factors of production utilized in producing the merchandise,” combined with general overhead costs, profit, and certain other costs and expenses. *See* 19 U.S.C. § 1677b(c)(1). “Factors of production” include, but are not limited to, labor, raw material inputs, energy, and capital costs. *Id.* § 1677b(c)(3).

B. Export price and constructed export price

The “export price” to which Commerce compares the import’s “normal value” is the foreign producer/exporter’s price for unaffiliated U.S. customers. *See id.* § 1677a(a). The “constructed export price” that the Department alternatively uses for this comparison is the price that the foreign producer/exporter’s affiliated seller in turn charges U.S. customers. *See id.* § 1677a(b); *see also U.S. Steel Corp.*, 621 F.3d at 1353; *Hung Vuong*, 483 F. Supp. 3d at 1353 n.34 (citing *Mid Continent Steel & Wire, Inc. v. United States*, 203 F. Supp. 3d 1295, 1298–99 (CIT 2017)).² This case involves a constructed export price—the price the foreign producer’s affiliate first charged U.S. purchasers.

C. Control numbers

To ensure that the normal value can accurately be compared to the export price or constructed export price for the same product, Commerce assigns what it calls “control numbers” to products based on “specified physical characteristics determined in each antidumping proceeding.” *Hung Vuong*, 483 F. Supp. 3d at 1340 (quoting *GODACO Seafood Joint Stock Co. v. United States*, 435 F. Supp. 3d 1342, 1348 n.1 (CIT 2020)). “All products whose product hierarchy characteristics are identical are deemed to be part of the same control number and are regarded as identical merchandise for the purposes of comparing export prices to normal value.” *Id.* (cleaned up) (quoting *Am. Tubular Prods., LLC v. United States*, Slip Op. 15–98, at 5 n.1, 2015 WL 5236010, at *2 n.1 (CIT Aug. 28, 2015)).

¹ A “nonmarket economy” is “any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” 19 U.S.C. § 1677(18)(A).

² Commerce makes certain statutory adjustments to the price of goods to reflect various costs involved in preparing them for sale in the United States, and the adjustments to constructed export price are more extensive than the adjustments to export price. *See* 19 U.S.C. § 1677a(c) (listing adjustments to both), (d) (listing additional adjustments to constructed export price).

The Department insists that respondents tie their factors of production to control numbers because it uses them to calculate the value of the imported product “to ensure that a fair comparison is made between the U.S. price and normal value.” *Thuan An Prod. Trading & Serv. Co. v. United States*, 348 F. Supp. 3d 1340, 1353 (CIT 2018) (cleaned up). The use of a control number thus allows the Department to add up the cost of the particular factors of production used to manufacture a particular imported product and to then compare the sum of those costs to the U.S. price (export price or constructed export price) for that product.

D. “Adverse facts available”

In certain circumstances, Commerce must supply facts not in the administrative record to complete its antidumping investigation. If “necessary information is not available on the record,” 19 U.S.C. § 1677e(a)(1), “or” if

(2) an interested party or any other person—

(A) withholds information that has been requested by [Commerce] . . . under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

[Commerce] . . . shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

Id. § 1677e(a)(2) (emphasis added).

Because the use of “facts otherwise available” is a means for filling in gaps in the record, see *Bebitz Flanges Works Private Ltd. v. United States*, 433 F. Supp. 3d 1309, 1316–17 (CIT 2020), Commerce sometimes refers to using “total” or “partial” facts otherwise available. The distinction relates to whether portions of the respondent’s data are usable. “Depending on the severity of a party’s failure to respond to a request for information . . . , Commerce may select either partial or total [facts otherwise available].” *Fresh Garlic Producers Ass’n v. United States*, 121 F. Supp. 3d 1313, 1324 (CIT 2015).

Once Commerce finds it necessary to resort to facts otherwise available—whether partial or total—the Department may (but need

not) take the second step of determining whether the respondent “failed to cooperate by not acting to the best of its ability to comply” with Commerce’s “request for information.” 19 U.S.C. § 1677e(b). If the Department affirmatively determines that the respondent has failed to cooperate, it may then apply an “adverse inference” by selecting “facts otherwise available” that are most unfavorable to the respondent. *See id.*; *see also Hung Vuong*, 483 F. Supp. 3d at 1336.

The statute, however, allows the use of an adverse inference only for purposes of “selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A). This means that Commerce’s use of an adverse inference in any matter is limited by how Commerce employs facts otherwise available. If Commerce applies “total” facts otherwise available, though, it may apply a correspondingly “total” adverse inference if it also determines that the respondent failed to cooperate. If the Department does this, the result is “total adverse facts available,” or “total AFA.”

E. Verification

Under the statute, Commerce “shall verify all information relied upon in making . . . a final determination in an investigation.” *Id.* § 1677m(i)(1). Commerce’s regulations provide for on-site visits to producers and exporters “in order to verify the accuracy and completeness of submitted factual information.” 19 C.F.R. § 351.307(d)(1)–(3). “Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness.” *Bomont Indus. v. United States*, 733 F. Supp. 1507, 1508 (CIT 1990) (cleaned up).

Factual and Procedural Background

A.

This case stems from an antidumping investigation that Commerce undertook at the request of the American Kitchen Cabinet Alliance, which describes itself as a group “of domestic producers of wooden cabinets and vanities.” ECF 18, at 2. The Alliance’s petition alleged that Chinese producers were dumping wooden cabinets and vanities in the U.S. market to the detriment of domestic industry. *Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 84 Fed. Reg. 12,587, 12,587 (Dep’t Commerce Apr. 2, 2019).

In response, the Department began an antidumping investigation covering the period from July 1, 2018, through December 30, 2018. *Id.* Commerce selected the three largest Chinese producers/exporters of

wooden cabinets and vanities as mandatory respondents, including Plaintiff Dalian Meisen Woodworking Co., Ltd. Appx001123.

As a mandatory respondent, Meisen had to respond to questionnaires and other informational requests from Commerce. As relevant here, those questionnaires included three separate areas of inquiry.

Commerce's Section C questionnaire, seeking information necessary for the Department to establish the export price or constructed export price, asked Meisen to provide its U.S. sales database with prices. Argument at 8:30–9:15. Meisen reported the dollar value of each U.S. sale, and its database coded each U.S. sale with the control number "4" for a birch product.³ *Id.*; see also Appx082808–082816 (Exhibit C-1 to Schedule C questionnaire); ECF 55, at 15 (the Alliance's acknowledgment that Meisen used the control number for birch in its sales database).

Commerce's Section D questionnaire, seeking information on the factors of production, asked Meisen what type of wood the company used. See Appx082664 (questionnaire request to "[r]eport each raw material used to produce a unit of the merchandise under consideration"). Meisen responded that it used birch for the face of its cabinets. Appx082707; see also ECF 55, at 15 (the Alliance's acknowledgment that Meisen "reported that all of its cabinets were produced from birch wood").⁴

Commerce's Section A questionnaire asked Meisen to report general company information, including price lists and promotional and advertising materials. Appx080038; Appx080041. Meisen's responses revealed that much, if not all, of its promotional, advertising, and sales materials characterized its products as manufactured with maple, a higher-grade wood than birch.⁵

Because Meisen's Section C (sales database with prices) and D (factors of production) questionnaire responses said the company's cabinets were birch, but its Section A (customer-facing advertising, sales, and promotional materials) questionnaire responses characterized those same products as maple, the Alliance "conducted a factual

³ Commerce's questionnaire instructed Meisen to code its products by type of wood used in the manufacturing. As relevant here, Commerce required Meisen to assign "Code 4" to products manufactured with birch (considered a "common-grade hardwood") and "Code 5" to products manufactured with maple (considered a "middle-grade hardwood"). Appx001195 (citing the questionnaire).

⁴ Meisen's Schedule D questionnaire response apparently also included the control number "Code 4" for birch, but the relevant pages are not included in the parties' Joint Appendix. See also ECF 57, at 3–4 (Meisen brief explaining that the company reported "that it only used birch wood in its production").

⁵ A catalog from J&K Cabinetry, for example, described the first step in the production process for Meisen's cabinets: "The finest solid maple wood is sanded until smooth and vacuumed." Appx084945; ECF 46, at 15–16 (Alliance citing Appx084945); ECF 58, at 8 (Meisen quoting the same statement and citing Appx084967).

investigation” that it provided to the Department. Appx086547. That investigation revealed (consistent with Meisen’s own submission) that the company’s promotional and advertising materials represented its products as made of maple, which is much more expensive than birch. *Id.*; see also Appx086276, Appx086281, Appx086286, Appx086349.

In view of the representations in Meisen’s advertising, promotional, and sales materials, Commerce preliminarily determined that Meisen sold maple rather than birch cabinets in the United States. Appx001049. The Department further preliminarily determined that the company “did not accurately report its [factors of production]” because its submission “only includ[ed] factors of production] data for the consumption of birch wood.” Appx001049–001050. Commerce declared that it would not rely on any of the company’s factors-of-production data because the data all related solely to birch wood:

A complete and accurate accounting of all [factors of production] used in the production of the merchandise under consideration is required for the calculation of [normal value], and so we cannot calculate [normal value]. Because [normal value] is in turn required for the calculation of an [antidumping] margin, we also cannot calculate Meisen’s weighted-average dumping margin using the data it reported.

Appx001050.

Commerce therefore found that “Meisen failed to provide complete and accurate information regarding its production process and [factors of production], withheld information, failed to provide information in the form or manner requested, and significantly impeded this investigation” for purposes of 19 U.S.C. § 1677e(a)(2)(A), (B), and (C). The Department also determined that these failures required applying total facts otherwise available. Appx001049.

Commerce then chose to apply a total adverse inference under 19 U.S.C. § 1677e(b), finding that Meisen failed to cooperate by not acting to the best of its ability to comply with the Department’s “requests for information regarding its inputs.” Appx001049. As a result, rather than calculating the company’s dumping margin based on its factual submissions, Commerce preliminarily assigned Meisen a dumping margin of 262.18 percent, the highest possible rate. Appx001050.

Even so, the Department stated that it would “continue to consider the application of [adverse facts available] to Meisen based on any rebuttal factual information provided by Meisen and, if appropriate, any further information requested by Commerce after this preliminary determination.” Appx001050.

B.

After Commerce issued its preliminary determination, it suspended verification and issued two “postpreliminary” questionnaires to Meisen probing the discrepancy between the company’s representations to the Department (“we sell birch cabinets”) and its representations to its customers (“we sell maple cabinets”). Appx086551 (first post-preliminary supplemental questionnaire); Appx087931 (second post-preliminary questionnaire). Meisen’s responses confirmed that the company’s original submissions were correct: the company manufactures its cabinets using birch but (falsely) markets and promotes them as maple. *See* Appx086572; Appx087951.

After receiving these responses, Commerce informed Meisen that the Department would not verify any of the company’s questionnaire responses and would continue to apply total facts otherwise available with an adverse inference. Commerce referred to “[t]he dissonance between what Meisen marketed to its customers and what Meisen reported to Commerce” and asserted that the company should have flagged its false advertising to the Department early in the investigation. Appx001107.

Commerce then issued an “issues and decision memorandum” affirming the bottom-line result of its preliminary determination—application of total adverse facts available with a 262.18 percent dumping margin, Appx001193—but its factual conclusion changed dramatically. Whereas the preliminary determination found that Meisen lied to the Department, *see* Appx001049–001050, Commerce belatedly realized—after reviewing the company’s post-preliminary questionnaire responses—that the company’s original questionnaire responses were truthful after all. Meisen didn’t lie to the Department—it lied to its U.S. customers: “[T]here can be no question that [the company] is intentionally misleading its customers into believing that they are purchasing maple cabinets and that [the company’s] customers believe that they are paying for products made of maple wood.” Appx001196.

Reflecting its changed understanding of the background facts, Commerce offered completely different reasons for applying total adverse facts available against Meisen.

First, the Department asserted that through false advertising, the company created the “potential of masking dumped sales.” Appx001197. Because the company sold its birch products as maple cabinets, “the degree to which Meisen may be selling at [less-than-fair value] is effectively obscured.” *Id.* “[B]y misrepresenting the product being sold,” the company “subverted Commerce’s intent and

process” and “thereby distort[ed] the comparison [the Department] is tasked with making.” *Id.* (emphasis added). As a result, Commerce could not “calculate an accurate margin with the data reported by Meisen,” *id.*, and “verification of the accuracy of the [company]’s reported data” would not “resolve the discrepancy.” *Id.* The Department accordingly rejected any use of Meisen’s data “for this final determination.” *Id.*

Second, Meisen’s “U.S. sales database is comprised of sales of merchandise priced under [control numbers] [for maple] that are not included in its [factors-of-production] database,” Appx001197, and “Meisen’s U.S. [control numbers] do not represent the maple cabinets it purported to sell and the record does not contain [factors of production] data for the products Meisen represented selling in the U.S. market,” *id.* Because of this discrepancy, Commerce asserted that it could not “calculate an accurate dumping margin with the data reported by Meisen,” *id.*, and “verification of [the company]’s reported data” would not “resolve the discrepancy.” *Id.* This provided another reason for the Department to reject Meisen’s data. *Id.*

Third, the Department faulted the company for not flagging and explaining in its initial questionnaire responses “the discrepancy between its wood consumption and marketing materials that appeared to directly contradict its consumption claims.” Appx010199. Because Meisen failed to do so, Commerce “was forced to delay verification and issue two supplemental questionnaires before [the company] directly addressed the issue.” *Id.*

Finally, the company “gave conflicting and unconvincing reasons as to why its marketing materials misrepresented the species of wood used in its cabinets.” Appx001200.

Commerce then found that Meisen withheld information, failed to report information on time, and significantly impeded the investigation, such that Commerce had to resort to facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(A), (B), and (C). Appx001200. Commerce did not, however, directly explain the applicability of these provisions to its four reasons set forth above.

Commerce also found that Meisen’s failure to affirmatively flag its false advertising for the Department’s attention reflected a failure to cooperate justifying an adverse inference pursuant to 19 U.S.C. § 1677e(b)(1)(A). Appx001200. Commerce thus applied “total AFA,” or total adverse facts available. That meant that rather than using the company’s information to calculate Meisen’s dumping margin, Commerce supplied other information, and in so doing selected from “adverse” information in a way that maximized the company’s duties

at 262.18 percent. Appx001116–001117.⁶ The Department later published this result in the Federal Register. *See Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China: Corrected Notice of Final Affirmative Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 17,855 (Dep’t Commerce Mar. 31, 2020).

C.

Meisen timely sued under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and 1516a(a)(2)(B)(i) to contest Commerce’s final determination. ECF 12. The complaint asserted that the Department’s decisions not to verify the company’s data and “to assign Meisen a margin based on total adverse facts available” were not supported by substantial evidence and were not in accordance with law. *Id.* ¶¶ 10, 12. The company asked the court to remand this case with instructions to verify Meisen’s data and recalculate the antidumping margin. *Id.* at 5.

Cabinets to Go, LLC, intervened as a matter of right as a plaintiff. ECF 17. It described itself as an importer of subject merchandise that participated in the proceedings before Commerce, ECF 13, at 1, and stated that the antidumping rate for its suppliers is based on the rates assigned to the mandatory respondents, including Meisen, so any change in the latter’s rate could affect the rate for those suppliers. ECF 13, at 2.⁷ Although Cabinets to Go stated that it intended to support Meisen’s challenge “to certain aspects of Commerce’s final results in this investigation,” *id.*, its intervention motion failed to identify what relief, if any, it seeks from the court.

⁶ Commerce also stated that it “shared relevant public information” about Meisen’s “untruthful [advertising] to consumers in the United States” with the Federal Trade Commission for “further investigation, and if appropriate, enforcement action.” Appx001200.

⁷ The Tariff Act requires that importers of record pay duties assessed, 19 U.S.C. § 1505, and by regulation Commerce prohibits exporters from reimbursing their importers. 19 C.F.R. § 351.402(f)(1)(i); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 925 F. Supp. 2d 1367, 1375 (CIT 2013) (explaining that “the non-reimbursement regulation exists to ensure that the antidumping duty order’s incentive for importers to buy at non-dumped prices is not negated by exporters who sell at dumped prices while removing the importer’s exposure to antidumping liability”).

In this case, that means Cabinets to Go, as importer of record, must pay the duties assessed on its exporter suppliers, who were successful separate-rate applicants that were not individually investigated. Their rate was based on the weighted average of the rate assigned to investigated mandatory respondents, excluding entities with zero and *de minimis* margins and margins (such as Meisen’s here) based entirely on facts otherwise available. *See* 19 U.S.C. § 1673d(c)(5)(A); *see also New Am. Keg v. United States*, Slip Op. 21–30, at 7–9 (CIT 2021) (discussing how Commerce calculates the rate of successful separate-rate applicants that are not individually investigated). Thus, if the court were to remand for recalculation of Meisen’s rate as the company requests, the court could also order the Department to recalculate the rate for Cabinets to Go’s suppliers as long as Meisen’s new rate did not fall within one of the exceptions discussed above. That recalculation, in turn, might affect the rate ultimately paid by Cabinets to Go as importer of record.

Finally, the Alliance (whose petition sparked the Department's investigation) intervened as of statutory right to support Commerce's decision. ECF 22.

Meisen then filed the pending Rule 56.2 motion for judgment on the agency record. ECF 57 (confidential); ECF 58 (public); *see* USCIT R. 56.2. Cabinets to Go stated that it would neither file a Rule 56.2 motion nor take any position on Meisen's motion for judgment. ECF 32, at 1. The government (ECF 54) and the Alliance (ECF 55, public; ECF 56, confidential) oppose Meisen's motion. Meisen replied, ECF 59, and the court heard oral argument.

Jurisdiction and Standard of Review

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

In actions such as this brought under 19 U.S.C. § 1516a(a)(2)(A)(i)(II), “[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law” 19 U.S.C. § 1516a(b)(1)(B)(i).

As to evidentiary issues, the question is not whether the court would have reached the same decision on the same record, but rather whether the administrative record as a whole permits Commerce's conclusion—even if the court might have weighed the evidence differently:

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

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

As to legal questions, the familiar framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous”).

Discussion

I.

Commerce concluded that Meisen withheld information, failed to timely report information, and significantly impeded the investigation such that the Department was compelled to apply facts otherwise available under 19 U.S.C. § 1677e(a)(2)(A), (B), and (C). The court considers each provision in turn.

A.

Commerce must apply facts otherwise available when it determines that a respondent “withholds information that has been requested by [the Department] . . . under this subtitle.” 19 U.S.C. § 1677e(a)(2)(A). Of the four grounds the Department articulated for its decision, only the last—Meisen’s “conflicting and unconvincing reasons as to why its marketing materials misrepresented the species of wood used in its cabinets,” Appx001200—might constitute “withholding of information” from Commerce.⁸

The Department cited three passages in Meisen’s post-preliminary questionnaire response as evidence of “conflicting and unconvincing” reasons:

The marketing materials are not a reflection of the actual material used in the production of the wooden cabinets during the POI but rather a reflection of the “look” of the cabinets. They have been marketed as maple.

The J&K companies advertise their cabinets as solid maple wood as there is no optical difference in the finished good between maple and birch once the cabinet is finished.

[A]ll our cabinets are made of solid maple wood door and frames with plywood constructed box . . . solid maple wood is the main wood species we use for cabinet door, frames, molding decoration parts, and drawers.

Appx001200 n.496.

The final cited passage is easily disposed of, because it appears in the company’s (false) advertising *disclosed* to the Department. *See* Appx087953. As a result, the Department could not reasonably characterize it as evidence of Meisen’s withholding of information. *Cf. Ad Hoc Shrimp Trade Action Comm. v. United States*, 70 F. Supp. 3d

⁸ For example, Commerce’s faulting of Meisen for not affirmatively flagging its false advertising for the Department’s attention could hardly be characterized as “withhold[ing] information that has been requested by [Commerce] . . . under this subtitle.” 19 U.S.C. § 1677e(a)(2)(A) (emphasis added).

1328, 1335 (CIT 2015) (“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and the substantial evidence standard of review can be translated roughly to mean is the determination unreasonable?”) (cleaned up) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006)).

The first two passages cited by the Department were responses, respectively, to these questions:

Please directly address why your marketing materials state that “the finest solid maple wood is sanded until smooth and vacuumed” if the cabinets sold during the period of investigation were, in fact, made of birch.

Please explain why you only advertise cabinets made of solid maple wood in the catalog used by all of your U.S. affiliates when maple is not the “type of wood that comprise [sic] the construction” and “the products were in fact made of birch with a maple look and are not maple.”

Appx087951. Commerce essentially asked Meisen why it lied to customers, and the Department found the company’s responses “evasive and conflicting.”

Even accepting Commerce’s characterization, the Department lacks any authority to investigate why antidumping respondents engage in false advertising, just as it lacks the authority to ask respondents why they violate environmental or antitrust laws, or why their executives are disreputable people. Commerce’s authority is circumscribed by statute, which permits the Department to apply facts otherwise available when a respondent “withholds information . . . requested by [Commerce] *under this subtitle*.” 19 U.S.C. § 1677e(a)(2)(A) (emphasis added). “[T]his subtitle” refers to Subtitle IV of the Tariff Act of 1930, as amended, which authorizes the Department to levy countervailing and antidumping duties. In asking Meisen *why* it lied to its customers, a subject the statute does not address, Commerce exceeded its regulatory writ. The Department’s invocation of § 1677e(a)(2)(A) was therefore contrary to law.

B.

Subject to a qualification not relevant here, Commerce must apply facts otherwise available when it determines that a respondent “fails to provide such information [requested by the Department] by the deadlines for submission of the information or in the form and man-

ner requested.” *Id.* § 1677e(a)(2)(B). Although Commerce also invoked this provision, it did so unreasonably, as Meisen timely responded and provided information in the “form and manner requested.” Therefore, Commerce’s invocation of facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B) is both unsupported by substantial evidence and contrary to law.

C.

The final statutory basis Commerce invoked for applying facts otherwise available is § 1677e(a)(2)(C), which requires the Department to apply facts otherwise available when a respondent “*significantly impedes a proceeding under this subtitle.*” *Id.* § 1677e(a)(2)(C) (emphasis added). The court presumes that in citing this provision Commerce relied on three of its reasons.

First, Commerce faulted Meisen for not flagging its false advertising in the company’s original questionnaire responses, which caused the Department to waste time and resources ascertaining whether Meisen lied to Commerce or lied to its customers. Appx010199. The Department appears to have reasoned that by so causing this delay and expense, Meisen “significantly impeded” its work.

The problem with this reasoning, however, is that Commerce acknowledges that Meisen fully and truthfully complied with the Department’s original questionnaires. In Section D of the company’s original questionnaire responses, Meisen certified⁹ that it manufactured its cabinets using birch. In section C of those responses, Meisen certified that it sold birch cabinets at certain prices. And in Section A of its responses, which Meisen also certified, the company produced promotional and marketing materials and sale invoices in which it told its customers that the cabinets were maple.

Meisen’s responses established *prima facie* that the company lied to its customers, a point the Department emphasized: “[T]here can be no question that [the company] is intentionally misleading its customers into believing that they are purchasing maple cabinets and that [the company’s] customers believe that they are paying for products made of maple wood.” Appx001196. That point is critical. It’s not that the Commerce couldn’t make sense of Meisen’s information because of the discrepancy between what the company told the Department and what it told its customers. To the contrary, after reviewing the com-

⁹ Meisen certified that its questionnaire responses were truthful. Appx001004; *see also* 19 C.F.R. § 351.303(g) (requiring parties submitting factual information to Commerce to certify the accuracy of such submissions using a form acknowledging that “U.S. law . . . imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government”).

pany's post-preliminary questionnaire responses, the Department fully understood the implications of the discrepancy, and was (understandably) appalled.

But when a respondent fully and truthfully complies with Commerce's information requests on subjects that the Department is allowed to investigate under the Tariff Act—and here no party seriously disputes that Meisen truthfully complied and that its responses were not materially misleading—as a matter of law a respondent does not “*significantly* impede[] a proceeding *under this subtitle*.” 19 U.S.C. § 1677e(a)(2)(C) (emphasis added). Insofar as Commerce relied on Meisen's failure to flag its false advertising to determine that the company “*significantly impede[d]*” the Department's work, that determination was contrary to law.

Of course, the discrepancy between what Meisen told Commerce (“we make birch cabinets”) and what it told its customers (“we make maple cabinets”) was a legitimate area of inquiry for the Department. After all, if the company lied to Commerce (rather than its customers), then Meisen's factors of production and sales databases (which used the control number for birch) would not have been correct, and any dumping margin based on such data would be understated. The Department appropriately probed the issue with post-preliminary questionnaires and concluded that Meisen's *advertising* was false, not its responses to Commerce. That should have resolved the issue.

Commerce, though, complained that because of Meisen's failure to flag the discrepancy, the Department “*was forced to delay verification and issue two [post-preliminary] questionnaires before [the company] directly addressed the issue.*” Appx010199 (emphasis added). But Commerce was not “forced to delay” anything; the Department *chose* not to verify. Verification seeks to confirm the accuracy of respondents' information submissions, which Commerce may not take on faith. See 19 U.S.C. § 1677m(i)(1). Had the Department verified Meisen's initial questionnaire responses, it could have confirmed that Meisen's representations to Commerce were true (and conversely, that its representations to its customers were false). In effect, the Department substituted its post-preliminary questionnaires for verification, and any resulting delay was Commerce's fault, not Meisen's.

It appears that the second basis for Commerce's conclusion that Meisen “*significantly impeded*” the investigation was the Department's finding that the company's false advertising “*effectively obscured*” the “*degree to which*” the company might have been “*selling at [less than fair value].*” Appx001197. Because antidumping duties are based on the difference between the U.S. export price or con-

structed export price and the home market price, artificially raising the U.S. price would mitigate, if not entirely eliminate, the effect of such duties.

In calculating an antidumping margin based on the export price or constructed export price, however, the statute requires (as relevant here) Commerce to use the “*price at which the subject merchandise is first sold (or agreed to be sold) in the United States.*” 19 U.S.C. § 1677a(1), (b) (emphasis added). The statute also allows the Department to adjust that price in various specified circumstances, *see id.* § 1677a(c), (d), none of which include a respondent’s manipulation of the price through otherwise illegal activity. Contrary to the government’s argument, *see* ECF 54, at 22 (“Commerce reasonably concluded that Meisen’s U.S. sales price does not represent the U.S. sales price of birch cabinets”), a respondent’s otherwise illegal manipulation of the U.S. sales price of its products is statutorily irrelevant for antidumping purposes.

A respondent might illegally manipulate the U.S. sales price of its products in any number of ways. It might fix prices in violation of the antitrust laws. Or it might constrain supply by hiring cyber hackers to disable its competitors’ production operations. Or, as here, it might increase demand by falsely advertising the nature of its product. In all these contexts, the law provides remedies for illegal conduct that manipulates prices, but they are outside the Tariff Act and beyond the Department’s antidumping jurisdiction. Insofar as Commerce relied on Meisen’s illegal manipulation of the U.S. sales price for its products to determine that the company “significantly impede[d]” the investigation, that determination was contrary to law.

Finally, the court presumes that the third and final basis for Commerce’s conclusion that Meisen “significantly impeded” the investigation was the Department’s finding that the company’s lies to its customers prevented Commerce from using the proper control number to match the raw material used in production (birch) with the products actually marketed by the company (maple). *See* Appx001197.

At argument, however, the parties clarified that Meisen’s responses to Commerce’s Section C (sales database) and D (factors of production) questionnaires *both* proffered the control number for birch. That is, Meisen’s control numbers for its sales database and factors of production *matched*. Counsel for the government candidly explained that the Department still declined to accept the control number for birch in the sales database because Meisen *marketed* its cabinets as maple. Argument at 31:30–34:20.

In view of this concession about the record, Commerce’s finding that Meisen’s questionnaire responses prevented the Department from matching control numbers in the sales database with the reported factors of production is not supported by substantial evidence. Rather than accepting the company’s truthful information, the Department instead refused to use that information because Meisen lied to its customers, a subject beyond Commerce’s statutory authority. As a result, Commerce’s assertion that it could not use the control number for birch to match the company’s raw material input with its product sales is unsupported by substantial evidence because *no* evidence on the record supports it.¹⁰ The Department’s assertion is also contrary to law because the Department rejected Meisen’s birch control numbers based on the company’s false advertising, a subject beyond Commerce’s regulatory authority.

* * *

Commerce’s reasons for rejecting Meisen’s information and supplying facts otherwise available do not withstand scrutiny. The court therefore remands for the Department to reconsider whether and to what extent it will use the company’s information in its antidumping calculations. Insofar as the Department chooses to use Meisen’s information, it must then undertake verification. *See* 19 U.S.C. § 1677m(i)(1).

II.

Commerce also found that Meisen’s failure to affirmatively flag its false advertising for the Department’s attention reflected a failure to cooperate warranting an adverse inference under 19 U.S.C. § 1677e(b)(1)(A). Appx001200. A necessary (but not sufficient) condition to Commerce so applying an adverse inference, however, is the Department’s lawful determination to apply facts otherwise available. *See* 19 U.S.C. § 1677e(b). Because the court finds that Commerce’s application of facts otherwise available is contrary to law and unsupported by substantial evidence, the court also remands for the Department to reconsider its application of an adverse inference.

¹⁰ Not only is Commerce’s position devoid of any support in the record, it conflicts with the Department’s position in the parallel countervailing duty proceeding, where it stated that “Meisen purchased only birch sawn wood *Regardless of Meisen’s representations to its customers, we obtained verifiable data*” from the company. *Issues and Decision Memorandum, Comment 9, Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China*, 85 Fed. Reg. 11,962 (Dep’t Commerce Feb. 28, 2020), *quoted in* ECF 57, at 42–43 (emphasis added).

III.

As noted above, Plaintiff-Intervenor Cabinets to Go failed to request any relief in its intervention motion or at the merits stage. In view of this failure, the court ordered the company to explain why it should not be dismissed from the case. ECF 66. In response, Cabinets to Go belatedly clarified that it requests relief after all in the form of an order directing Commerce, if ordered to recalculate Meisen's rate, to also recalculate the rate for Cabinets to Go's suppliers. ECF 67, at 1; *see also above* note 7.

Because Cabinets to Go, an intervenor, seeks relief different from the relief sought by Meisen, it must possess independent constitutional standing. *See Prime-Source Bldg. Prods., Inc. v. United States*, 494 F. Supp. 3d 1307, 1319–20 (CIT 2021) (Baker, J., concurring) (discussing *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645 (2017), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020)). Although Cabinets to Go plainly suffers injury-in-fact (it pays the import duties charged to its suppliers), the company acknowledges it is unknowable whether Commerce's recalculation of its suppliers' rates would reduce those rates (and thus what Cabinets to Go ultimately pays). *See* ECF 67.

Such uncertainty over the efficacy of the relief sought ordinarily defeats standing for lack of redressability. *See, e.g., Consumer Watchdog v. Wis. Alumni Rsch. Found.*, 753 F.3d 1258, 1261 (Fed. Cir. 2014) (for constitutional standing, a "party must show that it is likely, rather than merely speculative, that a favorable judicial decision will redress the injury").

Nevertheless, where "Congress has accorded a procedural right to a litigant, such as the right to appeal an administrative decision, certain requirements of standing—namely immediacy and redressability, as well as prudential aspects that are not part of Article III—may be relaxed." *Id.* For example, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.7 (1992).

Thus, the uncertainty over whether the relief sought by Cabinets to Go will redress its injury does not defeat its standing, because Congress granted the company a procedural right to seek that relief. *See* 19 U.S.C. § 1516a(a)(2)(A) (authorizing any "interested party who [was] a party" in an antidumping proceeding before Commerce to

challenge the result in the CIT); *id.* § 1516a(d) (granting any “interested party” in an antidumping proceeding before Commerce “the right to appear and be heard as a party in interest” before the CIT).

* * *

On remand, Commerce may decide to use some or all of Meisen’s information. If it does, and if it recalculates Meisen’s rate, it must also as necessary recalculate the rate for Cabinets to Go’s suppliers accordingly. *See above* note 7.

Conclusion

For the reasons explained above, the court grants Meisen’s motion for judgment on the agency record and also grants Cabinets to Go the relief it seeks. A separate remand order will issue requiring Commerce to reconsider whether it will use Meisen’s information and, insofar as it recalculates Meisen’s rate, to also recalculate the rate for Cabinets to Go’s suppliers.

Dated: November 18, 2021
New York, NY

/s/ M. Miller Baker
M. MILLER BAKER, JUDGE

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