

U.S. Customs and Border Protection



AVAILABILITY OF ELECTRONIC VIEWING OF CERTAIN BILLS IN THE AUTOMATED COMMERCIAL ENVIRONMENT AND THE ADOPTION OF AN ENHANCED BILL FORMAT

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

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) is making available to the public an option to electronically view certain bills, specifically supplemental bills, certain reimbursable bills, and nonreimbursable/ miscellaneous bills. CBP will deploy a new report within the Automated Commercial Environment (ACE) that will allow importers of record, licensed customs brokers, and other ACE account users to electronically view unpaid, open bills starting at the time that physical bills are created until the bills are paid. Additionally, this document announces that CBP will transition from the current bill format, known as CBP Form 6084, to a new CBP Bill Form that is enhanced to include additional information for the public. CBP's adoption of the new CBP Bill Form will enable the public to identify the legal authority for the bill, the origin of the bill, contact information for additional questions about the bill, and the consequences for not paying the bill.

DATES: The deployment of the electronic viewing functionality for certain bills, as announced in this document, will become operational on October 18, 2021. Additionally, the transition to the new CBP Bill Form will be implemented on October 18, 2021.

ADDRESSES: Comments concerning this notice may be submitted at any time via email to the ACE Collections Team, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, at ACECollections@cbp.dhs.gov, with a subject line identifier reading "Updates to Bill Notice."

FOR FURTHER INFORMATION CONTACT: Steven J. Grayson, Program Manager, Investment Analysis Office, Office of Finance, U.S. Customs and Border Protection, at (202) 579-4400, or steven.j.grayson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Ongoing Modernization of the Collections System at U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) is modernizing its collections system, allowing CBP to eventually retire the Automated Commercial System (ACS) and transfer all collections processes into the Automated Commercial Environment (ACE). This modernization effort, known as ACE Collections, includes the consolidation of the entire collections system into the ACE framework, which will enable CBP to utilize trade data from ACE modules, benefitting both the trade community and CBP with more streamlined and better automated payment processes. The new collections system in ACE will reduce costs for CBP, create a common framework that aligns with other initiatives to reduce manual collection processes, and provide additional flexibility to allow for future technological enhancements. ACE Collections will also provide the public with more streamlined and better automated payment processes with CBP, including better visibility into data regarding specific transactions.

ACE Collections supports the goals of the Customs Modernization Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act), of modernizing the business processes that are essential to securing U.S. borders, speeding up the flow of legitimate shipments, and targeting illicit goods that require scrutiny. ACE Collections also fulfills the objectives of Executive Order 13659 (79 FR 10655, February 25, 2014), to provide the trade community with an integrated CBP trade system that facilitates trade, from entry of goods to receipt of duties, taxes, and fees.

CBP is implementing ACE Collections through phased releases in ACE. Release 1, which was deployed on September 7, 2019, dealt with statements integration, the collections information repository (CIR) framework, and ACH (automated clearinghouse) processing. See 84 FR 46749 and 84 FR 46678 (September 5, 2019), and 84 FR 49650 (September 23, 2019). Release 2 was deployed on February 5, 2021, and focused on non-ACH electronic receivables and collections, for Fedwire and Pay.gov, that included user fees, Harbor Maintenance Fee (HMF), and Seized Assets and Case Tracking System (SEACATS) payments. All of the changes in Release 2 were internal to CBP and did not affect the trade community. Release 3 was deployed on May 1, 2021, and primarily implemented technical changes to the liquidation process, and deferred tax bills, that were internal to CBP. Release 3

also harmonized the determination of the due date for deferred tax payments with the entry summary date, streamlined the collections system, and provided importers of record with more flexibility and access to data when making deferred payments of internal revenue taxes owed on distilled spirits, wines, and beer imported into the United States. *See* 86 FR 22696 (April 29, 2021).

As explained more fully below, Release 4 will be deployed on October 18, 2021, and focuses on the billing processes for supplemental bills, certain reimbursable bills, and nonreimbursable/miscellaneous bills issued by CBP to the public. Release 4 includes mainly internal, technical changes to the production and management of certain bills by CBP, but also makes available to importers of record, licensed customs brokers, and other ACE account users, an option to electronically view unpaid, open bill details as reports in ACE Reports and adopts a new, enhanced format for bills issued by CBP. These enhancements will benefit the public by providing a streamlined and transparent billing process that will improve the accuracy and usefulness of bills. Additional releases for ACE Collections will follow, and any further changes affecting the public will be announced by notice in the **Federal Register**, as needed.

B. Overview of the Billing Process and the Types of Bills Affected by Release 4 of ACE Collections

CBP is authorized to collect duties, taxes, and fees from customs activities. *See* generally 19 U.S.C. 58a, 58b, 58b-1, 58c, 1505, 26 U.S.C. 4461. The regulations found in part 24 of title 19 of the Code of Federal Regulations (CFR) address the financial and accounting procedures for when CBP collects the duties, taxes, fees, interest, and other applicable charges from the public due to customs activities. *See generally* 19 CFR 24.1-24.36. Currently, CBP notifies individuals and entities of monies owed to CBP through a physical bill on the CBP Form 6084, which is sent by mail, in accordance with 19 CFR 24.3(a). Each bill is generated from data elements available within ACE or ACS and/or appearing on certain CBP forms. CBP officials collect, organize, and forward the data elements to a third-party print vendor (the third-party). The third-party uses the data elements to generate the bill and then mails the bill to the corresponding party at the end of the week with a batch of other bills.

CBP collects and manages numerous types of bills and uses several systems and processes to manage them. CBP separates the bills it collects into broad categories. *See generally* 19 CFR 24.3a. The categories include accrual bills, supplemental bills, reimbursable bills, non-reimbursable/miscellaneous bills, debit vouchers, and fines, penalties, and forfeiture bills. Release 4 specifically concerns supplemen-

tal bills, certain reimbursable bills, and nonreimbursable/miscellaneous bills. A more detailed description of these types of bills is provided below. However, it should be noted that Release 4 does not include accrual bills,¹ debit vouchers,² or fines, penalties, and forfeiture bills,³ except where those bills would utilize the enhanced CBP Bill Form. CBP will address these bills in future releases for ACE Collections, as needed.

Supplemental bills are described in 19 CFR 24.3a and constitute the majority of bills CBP generates for collections purposes. These bills arise from the liquidation and reliquidation processes and are generated because of the nonpayment or underpayment of duties, taxes, and fees at the time of entry for imported merchandise. Supplemental bills also include vessel repair duties, consumption duties, antidumping/countervailing duties, as well as any interest that is owed.⁴

Reimbursable bills are described in 19 CFR 24.16–17. Generally, reimbursable bills arise from certain activities and services performed by CBP employees in partnership with private sector entities. The activities include, but are not limited to, agricultural processing or border security, administrative support, and immigration inspection at ports of entry. Reimbursable bills generally cover the salaries of additional staff, overtime hours, administration, and transportation expenses. Most reimbursable bills are already managed through the SAP enterprise resource planning software.⁵ This notice concerns the reimbursable bills that do not use the SAP system, which include, but are not limited to, bills that CBP collects on behalf of certain other

¹ Accrual bills are described in 19 CFR 24.3a and 24.4 and record/recognize revenue transactions during the period service was provided and revenue was technically earned instead of when actual payment was received. The most notable example are deferred tax payments of internal revenue taxes owed on distilled spirits, wines, and beer imported into the United States. The majority of accrual bills were addressed in Release 3.

² Debit vouchers are described in 19 CFR 24.3(e) and 24.3a and arise when a CBP account is debited because of a dishonored or “bounced” check or ACH transaction.

³ Fines, penalties, and forfeiture bills arise from activities governed by other statutes and regulations, such as 19 CFR 133.27, which allows CBP to impose civil fines “on any person who . . . aids and abets the importation of merchandise . . . that bears a counterfeit mark” or 19 CFR 146.81, which allows the assessment of penalties for violating the rules governing foreign trade zones. The full extent of fines, penalties, and forfeiture bills that CBP collects is too numerous and varied to list here.

⁴ CBP assesses interest on the underpayment of estimated duties, taxes, fees, or interest owed by importers of record, as set forth in 19 CFR 24.3a(b)(2).

⁵ For example, CBP services rendered under the Reimbursable Services Program (RSP) are billed through the SAP system. Additional information about the Reimbursable Services Program may be found at <https://www.cbp.gov/border-security/ports-entry/resource-opt-strategy/public-privatepartnerships/reimbursable-services-program>.

government agencies, certain internal revenue tax collections, and baggage declarations on the CBP Collection Receipt Form (Form 368 or 368A).

Non-reimbursable/miscellaneous bills are described in 19 CFR 24.3(e) and 24.3a. These bills are also known as “manual bills” or “manual receivables” and include certain user fees, such as commercial Consolidated Omnibus Budget Reconciliation Act (COBRA) fees, Customs Inspection User Fees (CUF), and other non-tariff debts. This is a catchall category that covers unique and varied bills.

CBP has determined that providing a new option to electronically view these bills in ACE, as described in more detail below, will provide the public with more transparency and tools to manage certain outstanding bills. CBP has reviewed and assessed the collections requirements from fiscal year (FY) 2018, and after a thorough evaluation, identified the requirements and modernization opportunities to support users of CBP’s collections system. Throughout this evaluation, CBP has collaborated with stakeholders within CBP, as well as members of the trade community, and received valuable feedback, which was incorporated in the new ACE Collections requirements for billing. The resulting benefits to the public that are announced in this document will be implemented on October 18, 2021.

II. Enhancements to the Billing Process

CBP is announcing two enhancements to the billing process for the public as part of Release 4. The first enhancement is the creation of a new report for the types of bills that are affected by Release 4. This new report will enable ACE account users to view their unpaid, open bill details in ACE Reports, which is the data repository for ACE Collections. The second enhancement is the replacement of the current bill format (as set forth on the CBP Form 6084), in all instances when the current bill format is used, with a new CBP Bill Form, which will provide the public with additional information to better facilitate the billing process.

A. Availability of an Option for Electronic Viewing of Certain Bills in ACE

Currently, CBP sends physical bills on the CBP Form 6084, via mail to officially notify the public of amounts owed for duties, taxes, fees, and other charges. Given timing considerations, the public often relies upon their own recordkeeping systems to track amounts owed and make prompt payments to CBP. CBP’s deployment of Release 4 will enable ACE to pull, organize, and process data elements appearing in other CBP systems and forms necessary to produce bills in

ACE. As such, CBP now has the capability to organize and turn that processed data into a report that displays unpaid, open bill details, which ACE account users may view in ACE Reports. This new option to view consolidated bills in ACE Reports will, *inter alia*, reduce the amount of time that importers of record and licensed customs brokers spend for identifying and tracking individual entries of imported merchandise and determining the total amounts they owe to CBP. Moreover, the accuracy of the billing and collection processes will be improved because the public will be able to identify, prepare for, and then address a physical bill during the time that it is in transit through the mail.

Within a business day after initial processing of billing data, ACE will reproduce the bill data in ACE Reports. The data elements appearing in a consolidated report, which covers all unpaid, open bill details for a particular debtor, will include: The debtor's name, the bill number, the bill version, the bill date,⁶ the last notice date, the port of service/charge name, the Center of Excellence and Expertise (Center) associated with the bill, the team associated with the bill, the date of the transaction that produced the bill, the transaction identification number, reference name, the type of charge, the amount owed, the interest accrued to date, the full amount due upon receipt, the due date, the amount due after the due date, the surety code, the date the associated interest rate becomes effective, the interest rate, and the address and special addresses where the physical bill was mailed. Specific bill numbers and data will be removed from the unpaid, open bill detail report as early as two business days after the corresponding bill is paid and has been processed by CBP.

As bills are processed in ACE, the same bill data will appear in a consolidated format alongside all other outstanding and unpaid bills attributed to the same debtor number⁷ that appears on the physical bill. The unpaid, open bill details will be viewable only in ACE Reports.⁸ It is important to note that CBP will continue its current processes for mailing physical bills. The CBP Bill Form for the physi-

⁶ The bill date is the date upon which the bill and the CBP Bill Form, described below, are generated by ACE. Thirty days after the bill date is the bill due date for most bills, except for bills resulting from dishonored checks or dishonored ACH transactions, which are due within 15 days of the date of issuance of the bill (19 CFR 24.3(e)).

⁷ A unique identifying number, the debtor number, is assigned to each party, by CBP's Finance Division, that owes or owed money for customs activity. The debtor number is used by CBP to identify parties, their payment histories, their outstanding debts, and the number appears on all mailed CBP Form 6084s, and, in the future, CBP Bill Forms.

⁸ The unpaid, open bill details report will not include the deferred tax consolidated bill details which are instead accessible in ACE Reports as a separate report. The consolidated deferred tax bill was announced, and more information can be found, in Release 3, 86 FR 22696 (April 29, 2021).

cal bills, subject to the enhancements described elsewhere in this document, will remain the primary source of legal notice of monies owed due to customs activity, as required by 19 CFR 24.3(a). Information and data that appear on the physical bill will supersede the data elements that appear in ACE Reports and the public should continue to consult the physical bill to ensure the proper payments of bills.⁹

Only members of the public who have an ACE Portal account will be able to view their unpaid, open billing details in the new report that will be available in ACE Reports. CBP encourages affected members of the public (including, but not limited to, importers of record and licensed customs brokers) who do not already have an ACE Portal account to apply for access to be able to view the necessary data to make timely bill payments.¹⁰ CBP will provide any needed support for setting up ACE Portal accounts. The public may access the ACE Reports application through the ACE Secure Data Portal at <https://ace.cbp.dhs.gov>.¹¹ Within ACE Reports, ACE account users may navigate to and access their unpaid, open bill detail report (the report) in the Workspace Module. The Workspace Module is a window in ACE Reports that provides ACE account users access to their standard reports categorized by subject area (such as Cargo Release, Entry Summary, Manifest, etc.) and includes a navigation list (a folder structure of standard reports) and a viewer that displays the report selected.¹²

B. Adoption of an Enhanced CBP Bill Form To Replace the Current CBP Form 6084

Pursuant to 19 CFR 24.3(a), any bill or account for money due the United States must be rendered by an authorized CBP officer or employee on an official form. A bill informs the recipient of the amount owed on a given date, the reason for the amount, the port of service/charge, the late payment date, and the interest rate, among other information, and it also includes a “bill number” to allow for its unique identification. The required contents of the bill, which are

⁹ A debtor may request an electronic copy of a mailed CBP Form 6084 by calling the appropriate port of entry or CBP’s Finance Division at (317) 614–4811.

¹⁰ The step-by-step instructions to apply for an ACE Portal account are available online at: <https://www.cbp.gov/trade/automated/getting-started/portal-applying>.

¹¹ For more information about accessing, navigating, and personalizing ACE Reports, please review the ACE Reports Trainings at <https://www.cbp.gov/trade/ace/training-and-reference-guides>.

¹² For additional information about the Workspace Module, please consult the specific ACE Report training at <https://www.cbp.gov/trade/ace/training-and-reference-guides> or the quick reference card at <https://www.cbp.gov/document/guidance/ace-reports-qc-navigating-workspace-module>.

captured on the current CBP Form 6084, are described in 19 CFR 24.3a(d) and additional requirements for certain bills described in 19 CFR 24.4(f) and 24.4(h).

As part of Release 4, CBP is replacing the current CBP Form 6084 with a new CBP Bill Form to provide the public with additional information to identify the authenticity of the bill and status information, as well as better access to CBP resources to address questions. The new CBP Bill Form will have the same structure as the current CBP Form 6084, and it will contain all of the same information.¹³ However, the new CBP Bill Form will be enhanced with additional language to inform the recipient that the bill is produced pursuant to 19 CFR 24.3a(d) and the inclusion of three new data fields to identify the “Center ID” and “Team Number” that produced the bill, as well as the date the bill was printed.¹⁴ CBP is also adding email and internet addresses alongside the existing telephone number to better enable the bill recipient to address questions related to billing directly with CBP. For overdue bills only, CBP is including a warning message concerning the consequences of continued nonpayment or a formal demand for payment and information about sanctions pursuant to 19 CFR 142.26.

The CBP Bill Form will also have a specific version dedicated to the recipients of bills for deferred payments of internal revenue taxes owed on distilled spirits, wines, and beer imported into the United States. This new deferred tax CBP Bill Form (CBP Bill Form (DT)), will have the same format as the CBP Bill Form, but it will inform the recipient that, in accordance with 19 CFR 24.4, this bill is being issued for the deferred tax payment on imported alcoholic beverages and that any accrued interest for late payment will be assessed on a separate bill as required by 19 CFR 24.4(f)(2). As bills for deferred tax payments are subject to specific regulations that do not apply to other bills, importers of record who pay deferred taxes will benefit from a more customized CBP Bill Form.¹⁵

The new CBP Bill Form and CBP Bill Form (DT) will provide the public with additional clarity about the billing process. The recipients

¹³ Additionally, the CBP Bill Form will harmonize the presentation of interest accrued before liquidation, and determined at liquidation, appearing on supplemental bills. The CBP Bill Form will present a summary of that interest accrued as a single, consolidated amount for all items appearing on the bill. This is separate from the interest itemized and accruing as a result of delinquency.

¹⁴ The print date is the date upon which the third-party print vendor, described above, prints, and mails the CBP Bill Form. The print date reflects the date of mailing of notice of demand for payment against the bond pursuant to 19 U.S.C. 1514(c)(3).

¹⁵ For additional information about changes to the payment of deferred taxes on imported alcoholic beverages, please see the **Federal Register** notice published for Release 3, 86 FR 22696 (April 29, 2021).

of bills will know under what authority the bill is produced through the addition of citations to regulations, and they will be able to identify the origin of the bill more easily because of the new data fields. Moreover, the recipients of bills will be able to better address billing questions because the bill will list additional informational resources and the recipients will be better advised as to the consequences for failing to timely pay.

The enhanced CBP Bill Form, as described herein, may be found on CBP's website at <https://www.cbp.gov/trade/priority-issues/revenue/bill-payments> and will be adopted by CBP on October 18, 2021. Please note that this CBP Bill Form will continue to also be identifiable as the CBP Form 6084 unless and until the associated numerical designation of 6084 becomes obsolete under a future rule-making that would be published in the **Federal Register**.

Dated: October 6, 2021.

JEFFREY CAINE,
Chief Financial Officer,
U.S. Customs and Border Protection.

[Published in the Federal Register, October 13, 2021 (85 FR 56968)]

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS
(NO. 07 2021)**

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

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in July 2021. A total of 113 recordation applications were approved, consisting of 4 copyrights and 109 trademarks.

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

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

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

CBP IPR RECORDATION — JULY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 01-00352	07/02/2021	02/14/2031	ACCU-CHEK	ROCHE DIABETES CARE	No
TMK 02-01014	07/02/2021	05/26/2031	ADVIL	PF CONSUMER HEALTHCARE 1 LLC	No
TMK 03-00022	07/22/2021	07/31/2031	DODGERS	LOS ANGELES DODGERS LLC	No
TMK 04-00992	07/02/2021	01/17/2031	Stanley Cup Design	National Hockey League	No
TMK 04-00993	07/02/2021	04/23/2031	STANLEY CUP	National Hockey League	No
TMK 07-00495	07/02/2021	07/17/2031	DICKIES & Horseshoe Design (b&w)	W-D APPAREL COMPANY, LLC	No
TMK 07-00568	07/08/2021	07/07/2031	YAMAHA	YAMAHA CORPORATION	No
TMK 08-00419	07/02/2021	08/22/2031	IL POGGIONE	PATERNO WINES INTERNATIONAL	No
TMK 10-01213	07/08/2021	01/02/2031	LOUIS VUITTON MALLETTIER A PARIS & DESIGN	LOUIS VUITTON MALLETTIER SOCIÉTÉ FRANCE	No
TMK 11-00369	07/02/2021	07/12/2031	SPECK	SAMSONITE IP HOLDINGS S.A.R.L.	No
TMK 11-00410	07/02/2021	07/12/2031	(*)	SAMSONITE IP HOLDINGS S.A.R.L. LUXEMBOURG	No
TMK 11-00411	07/02/2021	07/12/2031	SPECK AND DESIGN	SAMSONITE IP HOLDINGS S.A.R.L.	No
TMK 11-00576	07/02/2021	07/05/2031	Configuration of a handbag (KELLY BAG)	Hermes International	No
TMK 11-01156	07/01/2021	06/29/2031	FLUFF MONKEY	FLUFF MONKEY ENTERPRISES, LLC	No
TMK 11-01193	07/21/2021	06/30/2031	POKE BALL (STYLIZED)	Nintendo of America Inc. CORPORATION	No
TMK 12-00266	07/02/2021	06/27/2031	REBLJECT	Merck KGaA	No
TMK 12-00853	07/08/2021	04/11/2031	SWEETANGO	Regents of the University of Minnesota	No
TMK 12-00855	07/08/2021	04/04/2031	SWEETANGO	Regents of the University of Minnesota CORPORATION	No
TMK 12-01296	07/02/2021	04/29/2031	WALKERS AND DESIGN	WALKER'S SHORTBREAD LTD	No
TMK 12-01464	07/08/2021	08/10/2031	CHROME SERIES	Performance Fabrics, Inc.	No
TMK 13-00544	07/02/2021	08/10/2031	TIPOSI	Tifosi Optics, Inc.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 13-01152	07/02/2021	07/19/2031	MACADAMIA NATURAL OIL & DESIGN	MACADAMIA BEAUTY, LLC	No
TMK 14-00805	07/02/2021	12/21/2030	SAHARA NIGHTS	Sobel Westex	No
TMK 14-01226	07/18/2021	07/12/2031	Configuration of a Watch	OFFICINE PANERAI A.G. SWITZERLAND	No
TMK 15-00023	07/18/2021	08/10/2031	AFG	Magpul Industries Corp	No
TMK 15-00036	07/18/2021	10/12/2031	GOVERNOR	SMITH & WESSON INC.	No
TMK 15-00400	07/01/2021	06/29/2031	TRUE BLUE POWER	Mid-Continent Instrument Co., Inc.	No
TMK 16-00559	07/18/2021	09/26/2022	HTH & Design	INNOVATIVE WATER CARE, LLC	No
TMK 16-00663	07/02/2021	09/26/2030	RANGERS	NEW YORK RANGERS, LLC	No
TMK 16-01157	07/01/2021	06/29/2031	PARLEE	Parlee Cycles, Inc.	No
TMK 19-00231	07/21/2021	10/19/2031	BALTIMORE & DESIGN	Baltimore Orioles Limited Partnership	No
TMK 19-00248	07/21/2021	10/19/2031	CHICAGO (STYLIZED)	Chicago Cubs Baseball Club, LLC	No
TMK 19-00506	07/18/2021	08/03/2031	OCB (STYLIZED)	REPUBLIC TECHNOLOGIES (NA) LLC	No
TMK 19-01087	07/02/2021	08/17/2031	RAINBOW & DESIGN	Rexair LLC	No
TMK 19-01091	07/02/2021	08/17/2031	RAINBOW	Rexair LLC	No
TMK 19-01207	07/08/2021	08/21/2031	KERDI	SCHLUTER-SYSTEMS KG	No
TMK 20-00793	07/02/2021	03/14/2031	YAMAHA (Stylized)	Yamaha Motor Co., Ltd.	No
TMK 20-01126	07/18/2021	07/12/2031	NEW YORK (STYLIZED)	Sterling Mets, L.P.	No
TMK 21-00596	07/02/2021	05/28/2027	Configuration of the Upper of a Croc Shoe (Only Toe/Vamp Design)	CROCS, INC.	No
TMK 21-00597	07/02/2021	12/10/2029	OTHER FURNITURE	OTHER FURNITURE CORP.	No
TMK 21-00598	07/02/2021	04/07/2030	Butterfly Design	Checkerspot, Inc.	No
TMK 21-00599	07/02/2021	06/20/2022	Clean & Clear & DESIGN	JOHNSON & JOHNSON CORPORATION	No
TMK 21-00600	07/02/2021	03/23/2025	RIO	MIAMI HAIR WORLD, INC.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00601	07/02/2021	10/29/2030	DUCT BOOSTER	TJERNLUND PRODUCTS, INC.	No
TMK 21-00602	07/02/2021	07/27/2031	BURBERRY	Burberry UNITED KINGDOM	No
TMK 21-00603	07/02/2021	09/08/2031	TB & DESIGN	Burberry UNITED KINGDOM	No
TMK 21-00604	07/02/2021	03/24/2030	CHECKERSPOT	Checkerspot, Inc.	No
TMK 21-00605	07/02/2021	06/24/2030	WNRD	Checkerspot, Inc.	No
TMK 21-00606	07/02/2021	04/07/2030	DESIGN (Owl)	Checkerspot, Inc.	No
TMK 21-00607	07/02/2021	03/03/2026	MITOKU	MITOKU CO., LTD.	No
TMK 21-00608	07/02/2021	06/17/2030	FISKER	FISKER INC.	No
TMK 21-00609	07/02/2021	02/24/2026	MITOKU	Mitoku Co., Ltd JAPAN	No
TMK 21-00610	07/02/2021	10/31/2029	INSIGNIA	JOSEPH PHELPS VINEYARDS LLC	No
TMK 21-00611	07/02/2021	07/06/2031	7 Tumrawt & Design	7 Tumrawt LLC	No
TMK 21-00612	07/02/2021	11/04/2029	DUO	Guantanamo Cigars Company	No
TMK 21-00613	07/06/2021	11/29/2027	Configuration of the Upper of a Croc Shoe (including toe/vamp design, heel design, and heel strap design)	CROCS, INC.	No
TMK 21-00614	07/08/2021	03/24/2030	ZERO CARBON	ZeroCarbon LLC	No
TMK 21-00615	07/08/2021	09/22/2031	OTHA & DESIGN	Nash, Jmael INDIVIDUAL	No
TMK 21-00616	07/08/2021	01/23/2023	ZEN	BBK TOBACCO & FOODS, LLP DBA HBI INTERNATIONAL	No
TMK 21-00617	07/08/2021	06/05/2022	ZEN	BBK TOBACCO & FOODS, LLP	No
TMK 21-00618	07/13/2021	06/13/2022	JUNIPER NETWORKS	Juniper Networks, Inc.	No
TMK 21-00619	07/13/2021	04/10/2026	JUNIPER NETWORKS	Juniper Networks, Inc.	No
TMK 21-00620	07/13/2021	09/22/2029	JUNIPER NETWORKS	JUNIPER NETWORKS INC.	No
TMK 21-00621	07/13/2021	07/17/2022	JUNIPER	Juniper Networks, Inc.	No

CBP IPR RECORDATION — JULY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00622	07/13/2021	07/03/2022	JUNIPER	Juniper Networks, Inc.	No
TMK 21-00623	07/13/2021	06/06/2028	RUNNING JUNOS & DESIGN	Juniper Networks, Inc.	No
TMK 21-00624	07/14/2021	05/16/2031	SABRE	Ernie Ball, Inc.	No
TMK 21-00625	07/14/2021	12/28/2030	CUBS & DESIGN	Chicago Cubs Baseball Club, LLC	No
TMK 21-00626	07/16/2021	06/22/2026	CONTRAIL	Juniper Networks, Inc.	No
TMK 21-00627	07/16/2021	06/27/2022	JUNIPER NETWORKS (STYLIZED)	Juniper Networks, Inc.	No
TMK 21-00628	07/16/2021	08/09/2026	JUNIPER NETWORKS & DESIGN	Juniper Networks, Inc.	No
TMK 21-00629	07/16/2021	01/25/2025	VIPER	BLUBLOCKER, LLC	No
TMK 21-00630	07/16/2021	09/19/2022	Junos Burst	Juniper Networks, Inc.	No
TMK 21-00631	07/16/2021	09/29/2031	The Kundalini Serpent & DESIGN	The Kundalini Serpent LLC	No
TMK 21-00632	07/16/2021	06/13/2022	JUNOS	Juniper Networks, Inc.	No
TMK 21-00633	07/16/2021	08/13/2028	JUNOS	Juniper Networks, Inc.	No
TMK 21-00634	07/16/2021	02/12/2030	VB & DESIGN	Vera Bradley Designs, Inc.	No
TMK 21-00635	07/16/2021	01/02/2029	COPPERTONE & DESIGN	BEIERSDORF AG GERMANY	No
TMK 21-00636	07/16/2021	01/16/2029	Girl & Dog Facing Right	BEIERSDORF AG GERMANY	No
TMK 21-00637	07/16/2021	01/30/2029	PURE & SIMPLE	BEIERSDORF AG GERMANY	No
TMK 21-00638	07/16/2021	02/06/2029	S SPORT & DESIGN	BEIERSDORF AG GERMANY	No
TMK 21-00639	07/16/2021	04/01/2028	ULTRA GUARD	BEIERSDORF AG GERMANY	No
TMK 21-00640	07/16/2021	11/18/2027	WATER BABIES	BEIERSDORF AG GERMANY	No
TMK 21-00641	07/16/2021	03/31/2030	Cat Silhouette	Exploding Kittens, Inc.	No
TMK 21-00642	07/16/2021	12/22/2030	EXTREME OUTDOOR EDITION	Exploding Kittens, Inc.	No
TMK 21-00643	07/16/2021	12/15/2030	POETRY FOR NEANDERTHALS	Exploding Kittens, Inc.	No

CBP IPR RECORDATION — JULY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00644	07/16/2021	09/29/2031	RED CIRCLE ABOVE RED RIBBON LOGO	(REGISTRANT) Calomar LLC DBA Calomar, LLC DocUmeant Publishing LIMITED LIABILITY COMPANY FLORIDA 1730 Rainbow Dr Clearwater FLORIDA 33755	No
TMK 21-00645	07/16/2021	09/29/2031	V2018	Ultima Industries, LLC	No
TMK 21-00646	07/16/2021	01/19/2023	GERSON	Louis M. Gerson Co., Inc.	No
TMK 21-00647	07/16/2021	09/29/2031	READY GUNNER	Currey Consulting LLC DBA Ready Gunner	No
TMK 21-00648	07/16/2021	03/22/2031	BRAVE BRAND	Law, Andrew	No
TMK 21-00649	07/16/2021	10/09/2029	PPI PPI2PASS.COM A KAPLAN COMPANY	DF Institute, LLC	No
TMK 21-00650	07/16/2021	09/15/2031	THEGENIELAB	TheGenieLab LLC	No
TMK 21-00651	07/21/2021	10/06/2031	UTX-85	Microtech Knives, Inc.	No
TMK 21-00652	07/21/2021	09/15/2031	NU HOANG RONG NHO	Nu Hoang Rong Nho Sea Grapes LLC TA Nu Hoang Rong Nho Sea Grapes LLC	No
TMK 21-00653	07/21/2021	09/15/2031	QUEEN SEA GRAPES	Nu Hoang Rong Nho Sea Grapes LLC TA Nu Hoang Rong Nho Sea Grapes LLC	No
TMK 21-00654	07/21/2021	11/11/2030	AIMÉ LEON DORE	AIMÉ LEON DORE HOLDINGS LLC	No
TMK 21-00655	07/21/2021	10/23/2029	AIMÉ LEON DORE	AIMÉ LEON DORE HOLDINGS LLC	No
TMK 21-00656	07/21/2021	02/05/2030	CAFÉ LEON DORE (STYLIZED)	AIMÉ LEON DORE HOLDINGS LLC	No
TMK 21-00657	07/21/2021	02/11/2025	AIMÉ LEON DORE (STYLIZED)	AIMÉ LEON DORE HOLDINGS LLC	No
TMK 21-00658	07/21/2021	09/22/2031	AIMÉ LEON DORE (STYLIZED)	AIMÉ LEON DORE HOLDINGS LLC	No
TMK 21-00659	07/21/2021	09/15/2031	MODERN BRIDGE CFOS	Modern Bridge CFOs LLC	No
TMK 21-00660	07/21/2021	03/15/2031	San Benito The Resaca City & Design	City of San Benito municipal corporation	No

CBP IPR RECORDATION — JULY 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00661	07/21/2021	02/13/2029	ROYAL GOLD	Royal Gold LLC	No
TMK 21-00662	07/21/2021	01/08/2030	PPI A KAPLAN COMPANY	DF Institute, LLC	No
TMK 21-00663	07/21/2021	04/19/2031	CROWN JEWELS	Royal Gold LLC	No
TMK 21-00664	07/22/2021	04/11/2025	SGS & Design	SGS GROUP MANAGEMENT SA	No
TMK 21-00665	07/22/2021	05/10/2024	SGS and Design	SGS GROUP MANAGEMENT SA	No
TMK 89-00379	07/18/2021	12/20/2028	BLUBLOCKER	BLUBLOCKER, LLC	No
COP 21-00052	07/02/2021	07/02/2041	PILOTWINGS RESORT	Nintendo of America Inc.	No
COP 21-00053	07/07/2021	07/07/2041	Cherry Blossom.	Old Shanghai Online, LLC.	No
COP 21-00054	07/07/2021	07/07/2041	Peony & Butterfly	Old Shanghai Online, LLC.	No
COP 21-00055	07/07/2021	07/07/2041	Kiku	Old Shanghai Online, LLC.	No

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS
(NO. 08 2021)**

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

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in August 2021. A total of 244 recordation applications were approved, consisting of 4 copyrights and 240 trademarks.

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

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

ALAINA VAN HORN

Chief,

*Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade*

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 02-00138	08/03/2021	07/31/2031	ABSOLUT BOTTLE Configuration & seal	THE ABSOLUT COMPANY AKTIEBO-LAG	No
TMK 02-00197	08/24/2021	06/02/2031	RED BULL	RED BULL GMBH	No
TMK 02-00270	08/05/2021	07/31/2031	MARY KITCHEN	HORMEL FOODS, LLC	No
TMK 02-00334	08/03/2021	07/31/2031	RED SOX	BOSTON RED SOX BASEBALL CLUB LIMITED PARTNERSHIP	No
TMK 02-00337	08/03/2021	01/23/2032	METS & Design	STERLING METS, L.P.	No
TMK 02-00765	08/13/2021	11/08/2031	TREE (Air Freshener Design)	JULIUS SAMANN LTD.	No
TMK 04-00526	08/06/2021	12/21/2029	UNDER ARMOUR	UNDER ARMOUR, INC.	No
TMK 05-00336	08/11/2021	09/27/2021	OLD TIMER	AOB PRODUCTS COMPANY	No
TMK 05-00402	08/04/2021	09/12/2031	ROADRANGER	EATON CORPORATION	No
TMK 05-00429	08/13/2021	02/10/2032	CAMTREAD	Cambro Manufacturing Company CORPORATION	No
TMK 05-00455	08/05/2021	08/07/2031	B (STYLIZED)	LOS ANGELES DODGERS LLC	No
TMK 05-00854	08/03/2021	07/31/2031	Elf Head Design	BALTIMORE ORIOLES LIMITED PART- NERSHIP	No
TMK 05-01049	08/05/2021	08/15/2031	ESCAPE	FORD MOTOR COMPANY	No
TMK 07-00009	08/23/2021	07/21/2031	BB & DESIGN	TEXAS INSTRUMENTS TUCSON COR- PORATION	No
TMK 07-00267	08/27/2021	09/13/2031	SENSODYNE	BLOCK DRUG COMPANY, INC.	No
TMK 08-00474	08/11/2021	02/18/2027	UNCLE HENRY	AOB PRODUCTS COMPANY	No
TMK 08-00589	08/04/2021	03/16/2028	SCHRADE	AOB PRODUCTS COMPANY	No
TMK 08-00598	08/11/2021	08/29/2021	CUTTIN' HORSE & DESIGN	AOB PRODUCTS COMPANY	No
TMK 08-01142	08/24/2021	06/11/2027	ADVANTAGE	ELANCO US INC.	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 09-00345	08/23/2021	02/20/2031	SKIN SUCCESS	E. T. BROWNE DRUG CO., INC.	No
TMK 10-01047	08/11/2021	12/21/2029	UNDER ARMOUR	UNDER ARMOUR, INC.	No
TMK 10-01192	08/03/2021	07/19/2028	DOCKERS	LEVI STRAUSS & CO.	No
TMK 11-00011	08/03/2021	01/15/2032	CRAFT INC.	Craft, Inc. CORPORATION	No
TMK 11-00343	08/06/2021	07/22/2027	Configuration of Explorer Guitar Body	GIBSON BRANDS, INC.	No
TMK 11-00344	08/06/2021	10/20/2023	Configuration of Les Paul Guitar Body	GIBSON GUITAR CORP.	No
TMK 11-00346	08/11/2021	08/27/2026	Guitar Body (DESIGN)	GIBSON BRANDS, INC.	No
TMK 11-00347	08/06/2021	12/16/2025	Guitar Peg Head Design	Gibson Brands, Inc.	No
TMK 11-00351	08/06/2021	01/14/2026	Bell-Shaped Truss Cover Plate	Gibson Brands, Inc.	No
TMK 11-00352	08/03/2021	03/21/2031	J-200 Pick Guard Design	Gibson Brands, Inc.	No
TMK 11-00364	08/06/2021	07/15/2027	Configuration of Flying V Guitar Body	GIBSON BRANDS, INC.	No
TMK 11-00366	08/06/2021	04/05/2029	Configuration of SG Guitar Body	Gibson Brands, Inc.	No
TMK 11-00385	08/06/2021	07/15/2025	Pineapple Shaped Peghead Inlay	Gibson Brands, Inc.	No
TMK 11-00409	08/03/2021	06/15/2031	SG	Gibson Guitar Corp.	No
TMK 11-00424	08/20/2021	10/06/2030	POLO PLAYER DESIGN	PRL USA Holdings, Inc.	No
TMK 11-00427	08/13/2021	04/04/2031	DESIGN (Guitar Peghead - Doves In Flight)	Gibson Brands, Inc. CORPORATION	No
TMK 11-00428	08/03/2021	04/18/2031	Dove Bridge Design	Gibson Guitar Corp.	No
TMK 11-00429	08/06/2021	07/15/2025	Diamond Design	GIBSON BRANDS, INC.	No
TMK 11-00431	08/03/2021	03/14/2031	Hummingbird Pick Guard	Gibson Brands, Inc	No
TMK 11-00439	08/13/2021	03/21/2031	DOVE PICK GUARD DESIGN	Gibson Brands, Inc. CORPORATION	No
TMK 11-00440	08/13/2021	04/18/2031	Doves In Flight Pick Guard Design	Gibson Brands, Inc. CORPORATION	No
TMK 11-00445	08/03/2021	10/18/2030	Epiphone Mustache Peghead Design (Guitar Peghead)	GIBSON BRANDS, INC.	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 11-00448	08/13/2021	02/14/2026	Guitar Peghead (DESIGN)	Gibson Brands, Inc.	No
TMK 11-00449	08/13/2021	11/15/2025	Guitar Bridge (DESIGN)	Gibson Brands, Inc.	No
TMK 11-00450	08/13/2021	02/19/2027	GIUITAR PEGHEAD (DESIGN)	Gibson Brands, Inc.	No
TMK 11-00455	08/13/2021	09/07/2029	GIBSON (STYLIZED)	Gibson Brands, Inc.	No
TMK 11-00596	08/27/2021	06/15/2031	VALLEYS & DESIGN	Greenland Trading Corp.	No
TMK 11-00634	08/13/2021	08/15/2031	MICROMASSAGE MAGIC BY SOLIDEA	CALZIFICIO PINELLI S.R.L. LIMITED LIABILITY COMPANY ITALY	No
TMK 11-00814	08/04/2021	07/05/2031	CONSTANZA	La Tabacalera, C. por A.	No
TMK 11-00929	08/11/2021	11/02/2031	INSANITY THE ASYLUM	BEACHBODY, LLC	No
TMK 11-01149	08/03/2021	10/08/2030	XANAX	UPJOHN US 2 LLC	No
TMK 11-01382	08/05/2021	08/05/2031	COPPER & BLACK RECTANGULAR BATTERY DEVICE	DURACELL U.S. OPERATIONS, INC.	No
TMK 11-01438	08/27/2021	08/31/2031	CONVOY	Kesseböhmer Holding KG KG FED REP GERMANY	No
TMK 11-01452	08/03/2021	07/12/2031	TIMELESS DESIGNS	CDC Distributors, Inc.	No
TMK 12-00060	08/04/2021	03/15/2030	SOMA INTIMATES	CHICO'S BRANDS INVESTMENTS, INC.	No
TMK 12-00217	08/18/2021	08/17/2031	SS & Design	USB IMPLEMENTERS FORUM, INC. CORPORATION	No
TMK 12-00318	08/31/2021	12/04/2031	GOLIGHT	GoLight, Inc.	No
TMK 12-00582	08/03/2021	07/16/2031	EAGLE & DESIGN	WILHELM HAUFFMANN & COMPANY PTD. LTD., CORPORATION SINGAPORE	No
TMK 12-00598	08/18/2021	03/25/2031	NINTENDO	NINTENDO OF AMERICA INC.	No
TMK 12-00616	08/11/2021	08/16/2031	SALISBURY PINK	ROCK OF AGES CORPORATION	No
TMK 12-00733	08/25/2021	08/26/2031	TITLEIST (STYLIZED)	Acushnet Company	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 12-01154	08/27/2021	02/27/2032	COFIGURATION OF EMECO NAVY CHAIR	EMECO Industries, Inc.	No
TMK 13-01078	08/03/2021	05/19/2031	MITSUBISHI DIAMOND logo	MITSUBISHI DENKI KABUSHIKI KAISHA DBA MITSUBISHI ELECTRIC CORPORATION	No
TMK 13-01094	08/03/2021	08/26/2028	INFINITI	NISSAN JIDOSHA KABUSHIKI KAISHA TANISSAN MOTOR CO., LTD.	No
TMK 14-00735	08/27/2021	06/15/2031	SOBELCALE	Sobel Westex CORPORATION	No
TMK 14-00743	08/04/2021	11/24/2030	O.T.	Sobel Westex	No
TMK 14-00772	08/27/2021	12/14/2020	BELLA COSA	Sobel Westex CORPORATION	No
TMK 14-00803	08/04/2021	11/24/2030	SPLASH	Sobel Westex	No
TMK 14-00804	08/04/2021	11/10/2030	SOL Y MAR	Sobel Westex	No
TMK 14-00806	08/04/2021	12/07/2030	SOCHIC	Sobel Westex	No
TMK 14-00826	08/17/2021	07/24/2031	ACDELCO	GENERAL MOTORS LLC	No
TMK 14-00827	08/03/2021	07/03/2021	ACDELCO & DESIGN	GENERAL MOTORS LLC	No
TMK 14-00861	08/17/2021	07/24/2031	ACDELCO & DESIGN	GENERAL MOTORS LLC	No
TMK 14-00863	08/03/2021	07/03/2031	ACDELCO & DESIGN	GENERAL MOTORS LLC	No
TMK 14-00868	08/17/2021	07/24/2031	ACDELCO (STYLIZED)	GENERAL MOTORS LLC	No
TMK 14-00985	08/05/2021	08/10/2031	SMARTIRE	Bendix Commercial Vehicle Systems, LLC	No
TMK 15-00071	08/27/2021	09/04/2031	SEALPROOF	Superflex Ltd. CORPORATION	No
TMK 15-00084	08/05/2021	09/08/2031	MOTORCRAFT	FORD MOTOR COMPANY	No
TMK 15-00794	08/27/2021	02/26/2032	JONES NEW YORK	ABC-Jones, LLC	No
TMK 16-00184	08/03/2021	07/26/2031	O WITH CROWN Design	Pandora Jewelry, LLC	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 16-00583	08/19/2021	04/19/2031	PHILLIPS (Stylized)	Koninklijke Philips N.V., NETHERLANDS	No
TMK 16-00716	08/03/2021	05/01/2031	RELIAMARK	RUBY INDUSTRIAL TECHNOLOGIES LLC	No
TMK 16-01183	08/03/2021	08/03/2031	HORSERAIL	John Wall, Inc.	No
TMK 16-01409	08/05/2021	09/02/2031	AMERICAN ORTHODONTICS	American Orthodontics Corporation	No
TMK 17-00512	08/27/2021	08/22/2031	J'ADORE PACKAGING DESIGN	Parfums Christian Dior, S.A. CORPORATION FRANCE	No
TMK 17-00518	08/04/2021	11/24/2030	THE POREFESSIONAL	BENEFIT COSMETICS LLC	No
TMK 17-00793	08/27/2021	08/29/2031	NF NIGHTFORCE PRECISION OPTICS & Design	LIGHTFORCE U.S.A., INC.	No
TMK 18-00150	08/18/2021	07/09/2023	SERESTO	BAYER ANIMAL HEALTH GMBH	No
TMK 18-00668	08/19/2021	05/01/2031	PHILLIPS	KONINKLIJKE PHILIPS ELECTRONICS N.V., NETHERLANDS	No
TMK 18-00747	08/06/2021	01/20/2030	UNDER ARMOUR	Under Armour, Inc.	No
TMK 18-00750	08/06/2021	09/23/2029	UNDER ARMOUR	Under Armour, Inc.	No
TMK 18-00751	08/06/2021	02/17/2030	UNDER ARMOUR	Under Armour, Inc.	No
TMK 18-00989	08/27/2021	07/05/2031	DR. MARTENS & CROSS DESIGN	"Dr. Martens" International Trading GmbH GERMANY	No
TMK 18-01007	08/27/2021	07/19/2031	ISDIN	ISDIN, S.A.	No
TMK 19-00002	08/18/2021	04/04/2031	EILEEN FISHER	Eileen Fisher, Inc. CORPORATION	No
TMK 19-00269	08/11/2021	11/16/2031	KANSAS CITY	KANSAS CITY ROYALS BASEBALL CLUB, LLC	No
TMK 19-01193	08/11/2021	08/17/2031	SULWHASOO	Amorepacific Corporation	No
TMK 20-01076	08/13/2021	01/27/2030	FLIPPER	FLIPPER LLC	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tmm	Owner Name	GM Restricted
TMK 21-00424	08/24/2021	08/31/2031	BOSULIF	WYETH LLC	No
TMK 21-00666	08/03/2021	10/06/2031	LUCKYSOMM	Luckysomm, LLC	No
TMK 21-00667	08/03/2021	08/14/2029	TANZO	American Orthodontics	No
TMK 21-00668	08/03/2021	02/26/2030	ICONIX	American Orthodontics Corporation	No
TMK 21-00669	08/03/2021	08/21/2029	MINI MASTER	American Orthodontics	No
TMK 21-00670	08/03/2021	01/27/2026	VIVINO	VIVINO ApS	No
TMK 21-00671	08/03/2021	08/21/2029	MASTER SERIES	American Orthodontics Corporation	No
TMK 21-00672	08/03/2021	08/05/2030	NT3	American Orthodontics Corporation	No
TMK 21-00673	08/03/2021	02/19/2024	IFIT	American Orthodontics Corporation	No
TMK 21-00674	08/03/2021	10/14/2030	SBA4	NST Global, LLC DBA SB Tactical	No
TMK 21-00675	08/03/2021	01/31/2026	HUMMINGBIRD	GIBSON BRANDS, INC.	No
TMK 21-00676	08/03/2021	11/14/2022	WRISTWIDGET	Medeiros, Wendy Taylor INDIVIDUAL	No
TMK 21-00677	08/03/2021	03/14/2031	WONDFO (STYLIZED)	GUANGZHOU WONDFO BIOTECH CO., LTD.	No
TMK 21-00678	08/03/2021	02/20/2023	M & DESIGN	MKT Enterprises	No
TMK 21-00679	08/03/2021	02/21/2028	NPOCMO BKCYHBRE & Pumpkin design	Agrosoyuz	No
TMK 21-00680	08/03/2021	10/24/2028	SPECIAL AREVIK & DESIGN	Agrosoyuz LIMITED LIABILITY COMPANY RUSSIAN FED	No
TMK 21-00681	08/03/2021	02/21/2028	NPOCMO BKCYHBRE & DESIGN	Agrosoyuz	No
TMK 21-00682	08/03/2021	01/31/2027	MAESTRO	Gibson Brands, Inc.	No
TMK 21-00683	08/03/2021	10/21/2021	FLOSSAID	Floss Aid Corporation	No
TMK 21-00684	08/03/2021	10/21/2025	ARCADE	Arcade Belts Inc.	No
TMK 21-00685	08/03/2021	08/28/2029	MICKEY SOCRATES FERDYNAND	Molina, Carlos	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00686	08/03/2021	08/10/2026	GOLDEN GIFT & DESIGN	Obschestvo s ogranichennoi otvetstvennostiyu RUSSIAN FED.	No
TMK 21-00687	08/03/2021	03/26/2027	NEW ORLEANS WATER METER SEWERAGE & WATER BOARD IOGO	Sewerage & Water Board of New Orleans	No
TMK 21-00688	08/03/2021	12/30/2023	LP	AMERICAN ORTHODONTICS	No
TMK 21-00689	08/03/2021	10/13/2031	3R TECHNOLOGY	3R Technology LLC	No
TMK 21-00690	08/03/2021	05/07/2027	TAMBOVSKY VOLK	Obschestvo s ogranichennoi otvetstvennostiyu "AgroSoyuz"	No
TMK 21-00691	08/03/2021	06/08/2026	STANICHNIE BAYKI & Design	Obschestvo s ogranichennoi otvetstvennostiyu "AgroSoyuz"	No
TMK 21-00692	08/03/2021	05/07/2027	TAMBOVSKY VOLK TEBE TOVA-RISHCH & DESIGN	Obschestvo s ogranichennoi otvetstvennostiyu "AgroSoyuz" RUSSIAN FED.	No
TMK 21-00693	08/03/2021	03/11/2029	FIREBIRD	Gibson Brands, Inc.	No
TMK 21-00694	08/03/2021	04/20/2025	VINE ESSENCE PILL & DESIGN	Madison One Acme, Inc.	No
TMK 21-00695	08/03/2021	01/21/2026	VELOX	ETABLISSEMENTS VELOX SIMPLIFIED JOINT-STOCK COMPANY FRANCE	No
TMK 21-00696	08/03/2021	10/05/2031	THUNDERBIRD	Gibson Brands, Inc.	No
TMK 21-00697	08/03/2021	02/26/2024	701 & CHINESE CHARACTERS DESIGN	Madison One Acme, Inc.	No
TMK 21-00698	08/03/2021	10/06/2031	Leaf Only & Design	Leaf Only, LLC	No
TMK 21-00699	08/03/2021	03/29/2031	VIDL	Summit Project, LLC	No
TMK 21-00700	08/03/2021	07/27/2031	FLIP FLOP Design	City of Folly Beach	No
TMK 21-00701	08/03/2021	08/22/2028	NASALCARE and Design	DrNaturalHealing Inc. DBA DrHealing	No
TMK 21-00702	08/03/2021	12/01/2030	4As & Playing card design	Lauture, Webens	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21-00703	08/03/2021	06/16/2031	MARTIN	(REGISTRANT) "Dr. Maertens" Marketing GmbH GmbH FED REP GERMANY An der Ach 3 82402 Seeshaupt FED REP GERMANY	No
TMK 21-00704	08/04/2021	07/24/2028	SQUISHMALLOW	KELLYTOY WORLDWIDE, INC.	No
TMK 21-00705	08/04/2021	01/12/2025	KENMORE	KCD IP, LLC	No
TMK 21-00706	08/05/2021	02/13/2028	RADIANCE	AMERICAN ORTHODONTICS CORPORATION	No
TMK 21-00707	08/05/2021	05/16/2031	SYNTAX	Martens, Douglas	No
TMK 21-00708	08/05/2021	03/15/2031	ATMOS	American Orthodontics Corporation	No
TMK 21-00709	08/05/2021	02/26/2024	SHINOLA	SHINOLA/DETROIT, LLC	No
TMK 21-00710	08/05/2021	10/27/2031	BEARD REMIX	Beard Remix LLC	No
TMK 21-00711	08/05/2021	10/06/2031	PACIFIC DISTILLERY	Pacific Distillery LLC	No
TMK 21-00712	08/06/2021	10/21/2030	DETECTIVE PIKACHU	Nintendo of America Inc. CORPORATION	No
TMK 21-00713	08/06/2021	04/05/2031	FRANKLIN	FRANKLIN SPORTS, INC.	No
TMK 21-00714	08/06/2021	12/24/2021	FRANKLIN	FRANKLIN SPORTS, INC.	No
TMK 21-00715	08/06/2021	08/25/2031	FRANKLIN FUTURE CHAMPS	Franklin Sports, Inc.	No
TMK 21-00716	08/06/2021	09/29/2031	KINGSTONE CAPITAL DESIGN	Kingstone Capital Lic	No
TMK 21-00717	08/06/2021	02/05/2030	MYX FITNESS	Myx Fitness, LLC	No
TMK 21-00718	08/06/2021	09/01/2031	MAVRAS	Mediterranean Specialty Supplies, LLC	No
TMK 21-00719	08/11/2021	08/21/2023	Q SGS US (STYLIZED)	SGS NORTH AMERICA, INC.	No
TMK 21-00720	08/11/2021	09/11/2023	C Q SGS US (STLIZED)	SGS NORTH AMERICA, INC. CORPORATION	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00721	08/11/2021	02/15/2026	PRODUCT CONFIGURATION TRADE DRESS FOR CATALYTIC CONVERTER RIBS	Car Sound Exhaust System, Inc. CORPORA-TION	No
TMK 21-00722	08/11/2021	02/22/2026	PRODUCT CONFIGURATION TRADE DRESS FOR CORNER FLANGES OF CATALYTIC CONVERTERS	Car Sound Exhaust System, Inc. CORPORA-TION	No
TMK 21-00723	08/11/2021	11/20/2023	Q SGS US (STYLIZED)	SGS NORTH AMERICA, INC.	No
TMK 21-00724	08/11/2021	01/16/2029	BARE BONE	McColgan, Justin INDIVIDUAL	No
TMK 21-00725	08/11/2021	09/08/2031	MOTORCRAFT	FORD MOTOR COMPANY CORPORA-TION	No
TMK 21-00726	08/11/2021	09/11/2023	C Q SGS US & Design	SGS NORTH AMERICA, INC.	No
TMK 21-00727	08/11/2021	08/20/2028	MULTIFIX	Advanced Bio/Tech LLC	No
TMK 21-00728	08/13/2021	02/21/2030	Guitar Peghead (DESIGN)	GIBSON BRANDS, INC.	No
TMK 21-00729	08/13/2021	03/22/2031	BURBERRY CHECK	Burberry Limited Limited Company	No
TMK 21-00730	08/13/2021	09/29/2031	REPUGRADE	Global Marketing Resources, LLC DBA GMR Web Team	No
TMK 21-00731	08/13/2021	02/14/2028	CURLS DYNASTY & DESIGN	Curis Dynasty, LLC	No
TMK 21-00732	08/13/2021	10/13/2031	KIMBRETТА	Clay, Kimbretta	No
TMK 21-00733	08/13/2021	05/16/2031	PATIO PLACE	A.T.P. SKI ASSOCIATES, INC.	No
TMK 21-00734	08/13/2021	05/05/2029	TERLATO & DESIGN	Paterno Imports, Ltd.	No
TMK 21-00735	08/13/2021	08/13/2024	TERLATO WINES INTERNATIONAL	Paterno Imports, Ltd.	No
TMK 21-00736	08/13/2021	07/29/2024	TERLATO FAMILY VINEYARDS	Paterno Imports, Ltd.	No
TMK 21-00737	08/13/2021	02/03/2031	I WISH I DIDN'T KNOW	What Do You Meme, LLC	No
TMK 21-00738	08/13/2021	10/13/2031	SPRINGTREE HEALTH	SpringTree Health, LLC DBA SpringTree Health	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00739	08/13/2021	02/10/2031	OVER-RATED	What Do You Meme, LLC	No
TMK 21-00740	08/13/2021	05/25/2030	PARTY BOWL	What Do You Meme, LLC	No
TMK 21-00741	08/13/2021	01/27/2031	COMMENT BELOW	What Do You Meme, LLC	No
TMK 21-00742	08/13/2021	12/08/2030	SLIDE IN THE DMS	What Do You Meme, LLC	No
TMK 21-00743	08/13/2021	03/15/2031	SCANDICA & DESIGN	Obshchestvo s ogranichennoy otvetstvennostyu "Scandica" LIMITED LIABILITY COMPANY RUSSIAN FED.	No
TMK 21-00744	08/13/2021	07/17/2022	Epiphone (STYLIZED)	Gibson Guitar Corp. CORPORATION	No
TMK 21-00745	08/13/2021	10/17/2023	Epiphone (Stylized)	GIBSON, INC. CORPORATION	No
TMK 21-00746	08/13/2021	06/24/2025	Design (Fern Peg Head)	Gibson Brands, Inc. CORPORATION	No
TMK 21-00747	08/13/2021	02/12/2024	MAESTRO (Stylized)	Gibson Guitar Corp.	No
TMK 21-00748	08/13/2021	09/01/2031	Wovanna-NATURE'S GIFTS DELIVERED BY HAND & DESIGN	Planetsun Innovations LLC DBA Wovanna	No
TMK 21-00749	08/18/2021	06/06/2022	Configuration of a Guitar Body (Gibson Thunderbird)	Gibson Brands, Inc. CORPORATION	No
TMK 21-00750	08/18/2021	03/17/2030	BULLS	Chicago Professional Sports Limited Partnership	No
TMK 21-00751	08/18/2021	05/09/2031	Flaming Basketball and Hoop Design (Miami Heat Logo)	Miami Heat Limited Partnership	No
TMK 21-00752	08/18/2021	10/16/2029	GOLDEN STATE WARRIORS & DESIGN	Golden State Warriors, LLC	No
TMK 21-00753	08/18/2021	12/10/2023	Only A Gibson Is Good Enough & DESIGN	Gibson Guitar Corp. CORPORATION	No
TMK 21-00754	08/18/2021	09/01/2031	SCOTBIO	ScotBio CORPORATION SCOTLAND	No
TMK 21-00755	08/18/2021	08/27/2024	Eagle Design (Gibson Thunderbird Logo)	Gibson Brands, Inc. CORPORATION	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00756	08/18/2021	12/24/2029	HORSE HEAD DESIGN (Dallas Mavericks Logo)	Dallas Basketball Limited	No
TMK 21-00757	08/18/2021	12/10/2023	T & DESIGN (Tobias Guitars Logo)	Gibson Guitar Corp.	No
TMK 21-00758	08/18/2021	03/15/2031	MILWAUKEE BUCKS & DESIGN	MILWAUKEE BUCKS, LLC	No
TMK 21-00759	08/18/2021	02/17/2026	Configuration of Guitar Headstock / Peg-head (Toby)	Gibson Brands, Inc. CORPORATION	No
TMK 21-00760	08/18/2021	05/12/2025	VALLEY ARTS GUITAR & DESIGN	GIBSON BRANDS, INC.	No
TMK 21-00761	08/18/2021	06/09/2031	REPUTALLY	Global Marketing Resources, LLC	No
TMK 21-00762	08/18/2021	09/09/2029	EILEEN FISHER	Eileen Fisher, Inc. CORPORATION	No
TMK 21-00763	08/18/2021	11/04/2030	ACL (STYLIZED)	Advanced Couplings Limited limited company (Ltd.) UNITED KINGDOM	No
TMK 21-00764	08/18/2021	04/07/2024	Configuration of a Spring-Loaded Glass Breaking Device	Colasse, Laurent INDIVIDUAL	No
TMK 21-00765	08/18/2021	02/10/2031	PURPLY (stylized)	Freestone Forest Products, LLC	No
TMK 21-00766	08/18/2021	11/03/2031	MYREADYMX	Vulcan Materials Company CORPORATION	No
TMK 21-00767	08/18/2021	11/10/2031	The Dynasty k3 & DESIGN	The Dynasty K3	No
TMK 21-00768	08/20/2021	12/18/2027	FAIR INDIGO	Fair Indigo, LLC	No
TMK 21-00769	08/20/2021	04/29/2023	Configuration of Broad Band around a Plant Container	Monrovia Nursery Company CORPORATION	No
TMK 21-00770	08/20/2021	11/18/2028	MONROVIA & Flower DESIGN	Monrovia Nursery Company CORPORATION	No
TMK 21-00771	08/20/2021	06/26/2022	Design of a Basketball Player Silhouette (NBA Logo)	NBA Properties, Inc. CORPORATION	No
TMK 21-00772	08/20/2021	06/09/2031	JAMBYS	Jambys, Inc. CORPORATION	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00773	08/20/2021	11/10/2031	EKOGEAR	Olsen, Neal INDIVIDUAL	No
TMK 21-00774	08/20/2021	04/16/2028	SPURS	San Antonio Spurs, LLC	No
TMK 21-00775	08/20/2021	11/07/2028	Design of a Horse Spur (San Antonio Spurs Logo)	San Antonio Spurs, LLC	No
TMK 21-00776	08/20/2021	06/02/2031	G (Stylized)	Gucci America, Inc. CORPORATION	No
TMK 21-00777	08/20/2021	02/22/2026	NAVY CHAIR	Emeco Industries, Inc. CORPORATION	No
TMK 21-00778	08/20/2021	10/03/2028	EL CIPITTO & HAT DESIGN	ERTLL, RANDY J. DBA ERTLL PUBLISHERS INDIVIDUAL	No
TMK 21-00779	08/20/2021	11/10/2031	SYBIL JOY EHNINGER HIGH	Ehninger High, Sybil Joy DBA Sybil Joy Ehninger High INDIVIDUAL	No
TMK 21-00780	08/23/2021	08/08/2028	RED SILK ESSENTIALS	Raleigh & Raleigh, LLC	No
TMK 21-00781	08/23/2021	10/20/2031	KOVÉ	Montelbano, Alexander M INDIVIDUAL	No
TMK 21-00782	08/25/2021	11/17/2031	LA & DESIGN	The Los Angeles Rams LLC	No
TMK 21-00783	08/27/2021	01/13/2031	SPLASH	Tail Chasers, LLC	No
TMK 21-00784	08/27/2021	12/23/2023	HR HALDIRAM'S & DESIGN	M/s. Haldiram India (Pvt.) Ltd.	No
TMK 21-00785	08/27/2021	10/13/2031	INDYEVA	Approz Distribution Inc.	No
TMK 21-00786	08/27/2021	01/17/2028	BRUIN	Industrias Tres Americas, de Responsabilidad Limitada GUATEMALA	No
TMK 21-00787	08/27/2021	10/20/2031	BAKED IN NASHVILLE	Riches, Tiffany E. DBA Baked in Nashville	No
TMK 21-00788	08/27/2021	11/03/2031	NAKEDADE	Naked Whey Inc.	No
TMK 21-00789	08/27/2021	09/08/2031	PRSTN	TENR, LLC	No
TMK 21-00790	08/27/2021	11/10/2031	SSGMVC	Special Services Group, LLC	No
TMK 21-00791	08/27/2021	11/10/2031	MVC	Special Services Group, LLC	No

CBP IPR RECORDATION — AUGUST 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21-00792	08/27/2021	09/15/2031	NAKED KETO	Naked Whey, Inc.	No
TMK 21-00793	08/27/2021	12/01/2030	NAKED GREENS	Naked Whey Inc	No
TMK 21-00794	08/27/2021	07/14/2030	NAKED ONE TO ONE	Naked Whey Inc	No
TMK 21-00795	08/27/2021	01/20/2031	COMCAST	Comcast Corporation	No
TMK 21-00796	08/27/2021	08/21/2029	X (STYLIZED)	Comcast Corporation	No
TMK 21-00797	08/27/2021	11/29/2027	COSMO	Weiss Chemie + Technik GmbH & Co. KG	No
TMK 21-00798	08/27/2021	07/29/2024	XFINITY	Comcast Corporation	No
TMK 21-00799	08/27/2021	09/22/2031	PERFECT TO A TEE	Celeste Lefeuue	No
TMK 21-00800	08/27/2021	01/22/2030	STOCKX	StockX LLC	No
TMK 21-00801	08/27/2021	01/22/2030	StockX & DESIGN	StockX LLC	No
TMK 21-00802	08/27/2021	11/23/2026	StockX & DESIGN	STOCKX LLC	No
TMK 21-00803	08/27/2021	11/23/2026	STOCKX	STOCKX LLC	No
TMK 21-00804	08/27/2021	09/15/2031	NAKED MILK	Naked Whey, Inc.	No
TMK 21-00805	08/27/2021	07/07/2025	HALO	BIG IP OpCo, LLC	No
TMK 21-00806	08/27/2021	11/10/2031	D.C.M.I	D.C.M.I	No
TMK 99-00664	08/11/2021	12/01/2028	S.W.A.T.	AOB PRODUCTS COMPANY	No
COP 02-00034	08/05/2021	08/05/2041	The legend of Zelda	Nintendo of America, Inc.	No
COP 02-00035	08/05/2021	08/05/2041	The legend of Zelda	Nintendo of America, Inc.	No
COP 21-00056	08/03/2021	07/29/2041	Cake Design Logo.	AK FUTURES LLC	No
COP 21-00057	08/13/2021	08/12/2041	BUZZED	What Do You Meme, LLC.	No

U.S. Court of International Trade

Slip Op. 21–133

OCTAL INC., and OCTAL SAOC-FSZ, Plaintiffs, v. UNITED STATES, Defendant, and ADVANCED EXTRUSION, INC., et al, Defendant-Intervenors.

Before: Timothy M. Reif, Judge
Court No. 20–03698
PUBLIC VERSION

[The Final Injury Determination of the United States International Trade Commission is sustained.]

Dated: September 30, 2021

Daniel L. Porter and *James P. Durling*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., argued for plaintiffs OCTAL Inc. and OCTAL SAOC-FSZ. With them on the brief were James Beaty and Ana Amador.

Jason F. Miller, Attorney-Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant United States. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Brooke M. Ringel and *Paul C. Rosenthal*, Kelley Drye & Warren LLP, of Washington, D.C., argued for defendant-intervenors Advanced Extrusion, Inc., Ex-Tech Plastics, Inc. and Multi-Plastics Extrusions, Inc. With them on the brief were *Kathleen W. Cannon* and *Elizabeth C. Johnson*.

OPINION

Reif, Judge:

Before the court is a U.S. Court of International Trade (“USCIT”) Rule 56.2 motion for judgment on the agency record filed by plaintiffs OCTAL SAOC FSZ (“OCTAL SAOC”), the sole producer/exporter of subject merchandise from Oman, and OCTAL Inc., the sole importer of subject merchandise from Oman (collectively, “OCTAL” or “plaintiffs”). See Pls.’ Br. in Supp. of Mot. for J. on Agency R. (“Pls. Br.”), ECF No. 25. By its motions, plaintiffs contest the final affirmative material injury determination by the U.S. International Trade Commission (“Commission”) in its antidumping duty investigation of polyethylene terephthalate (“PET”) sheet from the Republic of Korea (“Korea”) and the Sultanate of Oman (“Oman”). See *Polyethylene Terephthalate (PET) Sheet From Korea and Oman* (Sept. 10, 2020) (“Final Injury Determination”), PR 140; see also the accompanying views of the Commission in *Polyethylene Terephthalate (PET) Sheet from Korea and Oman: Investigation Nos. 731-TA-1455 and 731-TA-1457 (Final)* (Sept. 2020) (“Views”), CR 403, PR 141.

The Commission opposes plaintiffs' motion and asks the court to sustain the Commission's Final Injury Determination. Def.'s Opp'n to Pl.'s Mot. for J. on Agency R. ("Def. Br."), ECF No. 28.

Defendant-intervenors, Advanced Extrusion, Inc., Ex-Tech Plastics, Inc. and Multi-Plastics Extrusions, Inc., join the Government in opposing plaintiffs' motion. See Def.-Intervenors' Resp. in Opp'n to Pls.' Mot. for J. on Agency R., ECF No. 29.

For the reasons set forth below, the court sustains the Final Injury Determination.

BACKGROUND

On August 19, 2019, the U.S. Department of Commerce ("Commerce") initiated antidumping investigations on PET sheet from Oman and Korea in response to petitions filed by the U.S. domestic industry on July 9, 2019. See *Polyethylene Terephthalate Sheet from the Republic of Korea, Mexico, and the Sultanate of Oman: Initiation of Less-Than-Fair-Value Investigations*, 84 Fed. Reg. 44,854 (Dep't of Commerce Aug. 27, 2019).

On September 13, 2019, the Commission issued its preliminary injury determinations finding that there was a "reasonable indication that an industry in the United States is materially injured by reason of imports of [PET] sheet from Oman and Korea . . ." *Polyethylene Terephthalate (PET) Sheet from Korea, Mexico, and Oman*, USITC Pub. 4970, Inv. Nos. 731-TA-1455-1457 (Preliminary) (Sept. 2019) ("Preliminary Injury Determination") at 1.

On February 25, 2020, Commerce published its affirmative preliminary determinations in the antidumping duty investigations of imports of PET from Korea and Oman. *Polyethylene Terephthalate Sheet From the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 Fed. Reg. 12,500 (Dep't of Commerce Mar. 3, 2020); *Polyethylene Terephthalate Sheet From the Sultanate of Oman: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 Fed. Reg. 12,513 (Dep't of Commerce Mar. 3, 2020). On July 16, 2020, Commerce announced its affirmative final determinations in the antidumping duty investigations of imports of PET from Korea and Oman, determining that PET was being sold at less than fair value and finding dumping margins ranging 7.19 to 52.01 percent for subject imports from Korea, and a dumping margin of 4.74 percent for subject imports from Oman. See *Polyethylene Terephthalate Sheet from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 44,276,

44,277 (Dep't of Commerce July 22, 2020); *Polyethylene Terephthalate Sheet from the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 44,278 (Dep't of Commerce July 22, 2020).

On September 3, 2020, the Commission issued its unanimous conclusion that subject imports of PET sheet from Korea and Oman, which were sold at less than fair value, materially injured the domestic industry in the United States. Final Injury Determination; Views at 3. The Commission published its Final Injury Determination in the *Federal Register* on September 10, 2020. See Final Injury Determination.

STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018), and 28 U.S.C. § 1581(c) (2018).¹ This Court is required to assess the factual and legal findings underpinning the Commission's determinations and "hold unlawful any determination, finding, or conclusion . . . unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The Supreme Court has defined "substantial evidence" as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citation omitted). "The 'whole record' means that the Court must consider both sides of the record. It is not sufficient to merely examine the evidence that sustains the agency's conclusion." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)).

In reviewing the whole record, "[i]t is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Id.* (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the Commission's determinations, findings, or conclusions are supported by substantial evidence." *ITG Voma Corp. v. U.S. Int'l Trade Comm'n*, 41 CIT __, __, 253 F. Supp. 3d 1339, 1347 (2017) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006)), *aff'd without op.*, 753 F. App'x 913 (Fed. Cir. 2019).

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

LEGAL FRAMEWORK

The Commission is charged under the Tariff Act of 1930 with determining whether a U.S. domestic industry is “materially injured” or is “threatened with material injury . . . by reason of” unfairly dumped or subsidized imports. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). “There are two components to an affirmative material injury determination: ‘a finding of present material injury or a threat thereof, and a finding of causation.’” *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006). “Material injury” is defined as “harm which is not inconsequential, immaterial, or unimportant.” 19 U.S.C. § 1677(7)(A). A finding of causation requires that the Commission conclude that the material injury to the domestic industry is “by reason of [the subject] imports.” *Id.* § 1677(7)(B)(ii); see also *ITG Voma Corp.*, 41 CIT at __, 253 F. Supp. 3d at 1348 (“The Court of Appeals for the Federal Circuit has interpreted the ‘by reason of’ statutory language to require the Commission to consider the volume of subject imports, their price effects, their impact on the domestic industry, and to establish whether there is a causal connection between the imported goods and the material injury to the domestic industry.” (citing *Swift-Train Co. v. United States*, 793 F.3d 1355, 1361 (Fed. Cir. 2015))).

In making its preliminary and final determinations the Commission is required to consider:

- (I) the volume of imports of the subject merchandise,
- (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and
- (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States

19 U.S.C. § 1677(7)(B)(i)(I)-(III). The Commission is permitted to consider also “such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.” *Id.* § 1677(7)(B)(ii). This Court and the U.S. Congress have been clear that “[n]o single factor is dispositive and ‘the significance to be assigned to a particular factor is for the [Commission] to decide.’” *ITG Voma Corp.*, 41 CIT at __, 253 F. Supp. 3d at 1348 (quoting S. Rep. No. 96-249, at 88 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 474).

“To provide a reasoned explanation [in its determinations], the Commission must ‘make the necessary findings and have an adequate evidentiary basis for its findings’ and ‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”

Chemours Co. FC, LLC v. United States, 44 CIT __, __, 443 F. Supp. 3d 1315, 1321 (2020) (quoting *In re NuVasive, Inc.*, 842 F.3d 1376, 1382 (Fed. Cir. 2016)).

DISCUSSION

Plaintiff challenges the Final Injury Determination in several respects by arguing that: (1) the Commission was required to consider the volume effects of the subject imports instead of absolute and relative increases of the volume of the subject imports; (2) the Commission’s finding of adverse price effects, in the absence of price depression or price suppression, was not supported by substantial evidence; and, (3) the Commission failed to address in its adverse impact analysis (a) the correlation between subject import volume and the domestic industry’s financial performance and (b) the magnitude of the dumping margin. Pls. Br. at 5–6, 10.

I. Whether the Commission’s volume determination is supported by substantial evidence and is otherwise in accordance with law

A. Legal framework

The Commission is directed to “consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” § 1677(7)(C)(i). “[T]he statute provides that an affirmative volume analysis may conclude that the *absolute* volume of subject imports, or increases in the *relative* subject import volume (i.e., the market share), is significant.” *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1212, 431 F. Supp. 2d 1302, 1308 (2006) (citing 19 U.S.C. § 1677(7)(C)(i) (1999)). Any of the approaches provided for in the statute — for example, a consideration of whether the *absolute* volume of subject imports, or any increase in that volume, is significant, or whether the volume of the subject imports *relative* to production or consumption in the United States is significant — may be sufficient to support for a finding of injury. In sum, “Any one of these calculations is sufficient to support a finding of injury under the statute [E]ven if the calculation for [one measure of volume] is invalid, the injury determination [may] nevertheless [be] supported by substantial evidence” so long as one calculation is valid. See *Hyundai Elecs. Indus. Co. v. United States*, 21 CIT 481, 485 (1997). The Commission must evaluate what is “significant” in a volume determination on a case-by-case basis. See *Arlanxeo USA LLC v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1330, 1338 (2019). “The statute does not define what is considered ‘significant’ [in a volume determi-

nation] because, “[f]or one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.” *Id.* (quoting S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474).

B. Analysis

The court starts with the Commission’s determination on volume. First, the court will address the issue of cumulation. Second, the court will address plaintiffs’ argument that the Commission was required to consider OCTAL’s non-price explanations for growing volumes before rendering a finding on volume. Third, the court will review whether the Commission’s conclusion that the volume of subject imports is significant was reasonable.

1. Cumulation

In plaintiffs’ briefs, plaintiffs seek to focus on the Omani imports instead of the cumulated Omani and Korean imports addressed in the Commission’s Views. The statute states that “the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which [] petitions were filed . . . on the same day.” 19 U.S.C. § 1677(7)(G)(i). In the instant case, petitioners filed the antidumping duty petitions with respect to subject imports from Korea and Oman on the same day, July 9, 2019, and the Commission cumulated the subject imports from Korea and Oman for its material injury analysis. Views at 16. The Commission found that the subject imports met the criteria established by the statute and stated that “accordingly [it would] consider subject imports from Korea and Oman on a cumulated basis for [its] analysis of whether the domestic industry is materially injured by reason of subject imports.” *Id.* at 18. Further, OCTAL did not oppose or contest the cumulation of the subject imports for purposes of the Commission’s material injury determination. *Id.* at 15. Therefore, this Court will look to the Omani and Korean import data as discussed in the Views — not solely the Omani data — in assessing whether the Commission acted reasonably in its findings with respect to import volumes.

2. Whether non-price explanations are required to be considered in the Commission’s volume analysis

In making a volume determination, the Commission is directed to “consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.” 19 U.S.C. § 1677(7)(C)(i). There is no dispute between the parties that the

volume of the subject imports increased in absolute terms and in terms of market share over the Period of Investigation (“POI”). The Commission found that cumulated subject imports increased in the merchant market by more than [[]] percent during the POI — from [[]] pounds in 2017 to [[]] pounds in 2019. Views at 30–31.

Plaintiffs acknowledge that the volume of the subject imports increased both in absolute and relative terms. *See* Pls. Br. at 11 (“Although subject imports increased and gained market share”); *see also* Pls. Reply Br. in Supp. of Mot. for J. on Agency R. (“Pls. Reply Br.”) at 5, ECF No. 31 (“There was no question that OCTAL increased its market share — based solely on the *volume* of subject imports sold — over the investigation period examined.”). However, plaintiffs assert that the Commission’s finding that the volume of the imports was “significant” may not, in this case, be based on volume alone. Pls. Br. at 10. Rather, plaintiffs assert, the Commission’s analysis was not based on substantial evidence because the Commission did not take into account whether there were other reasons that subject imports may have increased. *Id.* at 10–11.

Plaintiffs claim that the facts in the instant case do not meet the statutory standard for “significant” because import volumes should “not be considered in a vacuum” and, therefore, should “not [] have a ‘significant’ effect regardless of the surrounding circumstances.” *Id.* Plaintiffs argue that the key question is *why* OCTAL’s market share increased. *Id.* at 11.

The Government disagrees, asserting that plaintiffs “seek[] to rewrite the statute” to require that the “*effects* of subject imports” be considered in evaluating volume. Def. Br. at 15–16. The Government argues that plaintiffs’ interpretation is incorrect for two seminal reasons: (1) the heading in 19 U.S.C. § 1677(7)(B) indicates that volume and effects are separate inquiries; and, (2) the USCIT disposed of the same argument in *ITG Voma Corp. v. U.S. International Trade Commission*. Def. Br. at 16.

First, the Government points out that the heading in 19 U.S.C. § 1677(7)(B) is “[v]olume and consequent impact,” which “bifurcates the Commission’s injury assessment between an analysis of ‘volume,’ on the one hand, and its ‘*consequent* impact’ (*i.e.*, its effects), on the other.” Def. Br. at 16 (quoting 19 U.S.C. § 1677(7)(B)). This Court has confirmed that volume and consequent impact are separate inquiries. *See Taiwan Semiconductor Indus. Ass’n v. United States*, 23 CIT 410, 412, 59 F. Supp. 2d 1324, 1327 (1999) (“The Commission evaluates

the volume and price effects of the subject imports and their consequent impact on the domestic industry by applying the standards set forth in 19 U.S.C. § 1677(7)(C).”).

Second, the Government cites *ITG Voma Corp. v. U.S. International Trade Commission* to demonstrate that the Commission does not need to consider effects in its volume analysis. See *ITG Voma Corp. v. U.S. Int’l Trade Comm’n*, 41 CIT __, __, 253 F. Supp. 3d 1339, 1357 (2017), *aff’d without op.*, 753 F. App’x 913 (Fed. Cir. 2019) (“ITG Voma’s argument presumes incorrectly that the Commission is required by law to consider the domestic industry’s condition and financial performance in its volume analysis. Rather, the Commission must consider the domestic industry’s condition and financial performance when analyzing whether subject imports adversely impacted the domestic industry.” (citing 19 U.S.C. § 1677(7)(C)(iii))).

In sum, the statute does not require that the Commission consider the effects of subject imports in its volume analysis. See 19 U.S.C. § 1677(7)(C)(i). In fact, the statute instructs that a finding that the volume of imports is “significant” may be based on increased volume alone because the statute allows for a determination based on “absolute terms.” See *id.* Further, the Court in *ITG Voma Corp. v. U.S. International Trade Commission* expressly addressed this point, stating clearly that the Commission is not required to consider effects on the domestic industry in assessing the significance of import volume.² See *ITG Voma Corp.* at 1357.

3. Whether the Commission’s conclusion that the volume of subject imports is significant was reasonable

The court now turns to addressing whether the Commission’s finding that the volume of subject imports was “significant” was reasonable. The Commission found “that the volume of cumulated subject imports, and the increase in that volume, are significant in both absolute terms and relative to consumption” in the United States. Views at 32. The statute requires that the Commission determine whether the volume of subject imports increased significantly “in

² In *ITG Voma Corp. v. U.S. International Trade Commission*, ITG Voma asserted that “the Commission failed to explain why the volume of subject imports was significant in light of the domestic industry’s strong financial performance and capacity constraints.” *ITG Voma Corp. v. U.S. Int’l Trade Comm’n*, 41 CIT __, __, 253 F. Supp. 3d 1339, 1357 (2017), *aff’d without op.*, 753 F. App’x 913 (Fed. Cir. 2019). ITG Voma wanted the Commission to consider subject imports’ effect on the domestic industry in making its volume determination. *Id.* In response, the Court stated that “ITG Voma’s argument presumes incorrectly that the Commission is required by law to consider the domestic industry’s condition and financial performance in its volume analysis. Rather, the Commission must consider the domestic industry’s condition and financial performance when analyzing whether subject imports adversely impacted the domestic industry.” *Id.* (citing 19 U.S.C. § 1677(7)(C)(iii)).

absolute terms *or* relative to production or consumption in the United States.” 19 U.S.C. § 1677(7)(C)(i) (emphasis supplied); *see also Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1212, 431 F. Supp. 2d 1302, 1308 (2006). The Commission here found both. *See Views* at 32.

The Commission supported its findings with information on the record. First, the Commission found that the cumulated subject imports’ volume in the merchant market increased overall by [[]] percent from [[]] pounds in 2017 to [[]] pounds in 2019. *Views* at 30–31. Second, the Commission found that the subject imports’ share of the U.S. market increased from [[]] percent in 2017 to [[]] percent in 2019. *Id.* at 31. As the Commission noted, this increase of [[]] percentage points allowed the subject imports to capture more than half of the U.S. market. *Id.* Further, the Commission concluded that the “increase in market share came at the direct expense of the domestic industry, which experienced a [[]] percentage point decrease in market share in the merchant market from 2017 to 2019.” *Id.*

“The court will uphold the Commission’s volume determination unless it is unsupported by substantial evidence in the record.” *Ar-lanxeo USA LLC v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1330, 1338 (2019), *aff’d*, 819 F. App’x 925 (Fed. Cir. 2020) (internal citation omitted). As explained above, the Commission must evaluate what is “significant” in a volume determination on a case-by-case basis. *See id.* Whether a particular volume of imports is “significant” varies across industries and circumstances. Here, the Commission concluded that subject imports increased [[]] percentage points to capture over half of the U.S. merchant market. *Views* at 31. The Commission found further that this gain “came at the direct expense of the domestic industry.” *Id.* These findings are supported by the record and are reasonable. Accordingly, the Commission’s conclusion that “the volume of cumulated subject imports, and the increase in that volume, are significant in both absolute terms and relative to consumption” was reasonable. *Id.* at 32.

II. Whether the Commission’s conclusion of significant adverse price effects is supported by substantial evidence and otherwise in accordance with law

A. Legal framework

The statute provides that the Commission “*consider*” whether:

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii) (emphasis supplied).

B. Analysis

Plaintiffs allege that the Commission found “adverse effects based solely on price underselling while ignoring the evidence about price depression and price suppression that contradicted the existence of any adverse price effects.” Pls. Br. at 2. On this basis, plaintiffs argue that the Commission’s conclusion that the subject imports caused “[a]dverse [p]rice [e]ffects [i]s [n]ot [s]upported [b]y [s]ubstantial [e]vidence and [i]s [n]ot [i]n [a]ccordance [w]ith [l]aw.” *Id.* at 24.

Defendant argues that the statute does not require that the Commission find *either* price depression or price suppression to determine that subject imports have had adverse price effects on the domestic industry. Def. Br. at 35. Defendant asserts that “[t]he Commission’s finding . . . [of] adverse price effects . . . is supported by substantial evidence” because the Commission’s found that there was “pervasive” underselling and that the domestic industry lost sales due to the lower prices of subject imports. *Id.* at 28.

The court will address (1) the extent to which the statute requires that the Commission consider whether there has been significant price depression and significant price suppression in determining whether there are significant adverse price effects, and (2) whether the Commission’s finding of significant adverse price effects was reasonable.

1. The requirement to consider price depression and price suppression

Plaintiffs argue that “[t]he structure of the statute puts underselling in one provision and price depression/suppression in another provision. But the statutory term ‘and’ means that all of these factors must be considered.” Pls. Br. at 33.

Defendant argues that plaintiffs “seek to add a limitation to the statute that does not exist, [and that plaintiffs’ interpretation] is also wrong because it reads a specific provision – the price underselling provision – out of the statute.” Def. Br. at 35 (citing 19 U.S.C. § 1677(7)(C)(ii)(I)).

This Court has made clear that “the plain language of the statute” provides that an analysis of underselling, on the one hand, and price suppression and price depression, on the other, are “two statutorily-mandated discrete inquiries.” *Altx, Inc. v. United States* (“*Altx I*”), 25 CIT 1100, 1109–10, 167 F. Supp. 2d 1353, 1366 (2001)³; *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1328, 1335 (2018).⁴ Further, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) and this Court have made clear that the Commission may rely on evidence *either* of significant underselling *or* significant price suppression or depression to support a finding for adverse price effects. *See Grupo Indus. Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996) (upholding the Commission’s final determination of negative price effects — lost market share and lost sales — based on the Commission’s finding of underselling alone); *see also Companhia Paulista De Ferro-Ligas v. United States*, 20 CIT 473, 478 (1996) (“[T]o require findings of underselling would be inconsistent with the proposition that price suppression or depression is sufficient.” (quoting *Cemex, S.A. v. United States*, 16 CIT 251, 261, 790 F. Supp. 290, 299 (1992), *aff’d without op.*, 989 F.2d 1202 (Fed. Cir. 1993))). In *ITG Voma Corp.*, the Court stated that “[plaintiff’s] argument presumes incorrectly that price depression or suppression is required to find that imports have had an adverse effect on domestic prices.” *ITG Voma Corp. v. U.S. Int’l Trade*

³ In *Altx, Inc.*, domestic producers challenged the Commission’s final negative determination in an antidumping case involving circular seamless stainless steel hollow products from Japan. *Altx, Inc. v. United States*, 25 CIT at 1100, 167 F. Supp. 2d at 1357. “The Commission determined that underselling was not significant and that subject imports caused neither price depression nor price suppression.” *Id.* at 1109, 167 F. Supp. 2d at 1365. The court remanded the case holding that “[s]ection 1677(7)(C)(ii) requires the Commission to undertake two distinct analyses to examine (1) the significance of underselling and (2) the causal connection between subject imports and price depression and/or suppression.” *Id.* at 1109–10, 167 F. Supp. 2d at 1366. The court concluded that the Commission “may not simply refer to its conclusion regarding the effect of underselling on price depression and/or suppression as a basis for finding underselling not to be significant . . . [as doing so] collapses the two statutorily-mandated discrete inquiries and is therefore contrary to the plain language of the statute.” *Id.*

⁴ In *United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC*, a domestic labor union challenged the Commission’s final negative determination in an antidumping and countervailing duty case involving truck and bus tires from China. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1328, 1331 (2018). In that case, “the Commission found that underselling was pervasive” but not significant because underselling did not cause price suppression or depression. *Id.* at __, 348 F. Supp. 3d at 1335. The court held that substantial evidence did not support the Commission’s price effects finding because “[b]y merely relying on its finding for price suppression and price depression, the Commission conflated the two-pronged analysis mandated by the statute.” *Id.*

Comm'n, 41 CIT __, __, 253 F. Supp. 3d 1339, 1361 (2017), *aff'd without op.*, 753 F. App'x 913 (Fed. Cir. 2019).

In sum, the Commission may find adverse price effects without a finding of significant price depression or price suppression. However, the Commission is required by statute to *consider both* underselling, and price suppression and depression. The court now turns to whether the Commission's finding of significant adverse price effects due to underselling, without a finding that there was significant price depression or suppression, was reasonable. In that analysis, the court focuses on whether the Commission considered adequately price depression and price suppression.

2. Whether the Commission's finding of significant adverse price effects was reasonable

a. Substitutability

The Commission began its discussion of price effects by recalling its finding that there was a "high degree of substitutability between the domestic like product and cumulated subject imports, and that price is an important factor in purchasing decisions for PET sheet." Views at 33. The Federal Circuit has previously identified the close nexus between substitutability, price and underselling. *See NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352, 1367 (Fed. Cir. 2013) ("[T]he Commission . . . stressed that there is a high degree of substitutability among domestic [products], subject imports, and non-subject imports, making price a very important factor in purchasers' decision-making. With respect to the likely impact of revocation of the orders on pricing and competition, the Commission determined that 'subject imports were likely to significantly undersell the domestic products and were likely to have significant adverse effects on domestic prices upon revocation of the orders.'" (quoting *Certain Ball Bearings and Parts thereof from Japan and the United Kingdom*, USITC Pub. 4131, Inv. Nos. 731-TA-394-A and 399-A (Second Review) (Second Remand) (Jan. 2010) at 57)).

The Commission found that "substantial majorities of responding market participants, in comparisons between and among PET sheet from Korea and Oman and the domestic like product, reported that such PET sheet is always or frequently interchangeable . . ." Views at 27 (citing *Final Staff Report*, at II-21 tbl.II-10, CR 403 (Int'l Trade

Comm'n Aug. 6, 2020), ECF No. 17–1 (“*Staff Report*”).⁵ The Commission found also that “majorities or pluralities of purchasers reported that the domestic like product and subject imports from Oman were comparable in 15 of 22 purchasing factors” *Id.*

In its discussion of substitutability, the Commission noted the importance of price in purchasing decisions and summarized the record supporting this conclusion:

Nearly all responding purchasers (16 of 17) reported that price is a very important factor⁶ in their PET purchasing decisions. Moreover, as discussed, majorities of U.S. producers and importers, and at least half of responding purchasers, reported that non-price differences were only sometimes or never significant in purchasing decisions for PET sheet in comparisons between and among the domestic like product and subject imports from Korea and Oman. In the same vein, the majority of purchasers (11 of 17) reported that they usually purchase the lowest-priced PET sheet, and more purchasers (20 firms) ranked price as among the top three factors they consider in their purchasing decisions for PET sheet than any other factor besides quality (21 firms).

Id. at 29. The Commission concluded, “[t]hus, while other factors may also be important, the record clearly indicates that price is an important factor in purchasing decisions for PET sheet.” *Id.*

Plaintiffs challenge substitutability on two grounds: (1) that other qualities of D-PET — such as its “superior quality” and market perception of the product, not only price — are driving purchasing decisions; and, (2) that price is not “the most important factor.” *Pls. Br.* at 15–16 (quoting *Staff Report* at I-18), 26.⁷

⁵ Table II-10 shows that 16 of 21 U.S. producers, six of seven U.S. importers and six of nine purchasers reported that the domestic like product and subject imports from Oman were always or frequently interchangeable. *Staff Report* at II-21 tbl.II-10. Additionally, Table II-10 shows that sixteen of seventeen U.S. producers, nine of 10 U.S. importers and two of two purchasers reported that the domestic like product and subject imports from Korea were always or frequently interchangeable. *Id.*

⁶ Question III-24 on the purchasers’ questionnaire asked purchasers to “[p]lease rate the importance of the following factors in your firm’s purchasing decisions for PET sheet.” U.S. Purchasers’ Questionnaire at 16, PR 85. Purchasers were able to rate each of the twenty-two factors as “Very important,” “Somewhat Important,” or “Not Important.” *Id.*

⁷ The citation provided in Plaintiffs’ Rule 56.2 Motion for Judgment on the Agency Record appears to cite incorrectly to page I-18 of the *Staff Report*. See *Pls. Br.* at 16. The cited material appears to come instead from page V-18 of the *Staff Report*. See *Staff Report* at V-18.

i. Plaintiffs' other factors argument

Plaintiffs argue that “[t]he Commission improperly ignored or dismissed . . . evidence that [OCTAL’s] largest customers perceived . . . D-PET [sheet] differently” than PET sheet. Pls. Br. at 19. Notably, OCTAL raised similar arguments during the investigation. *See generally* Pre-Hearing Brief of OCTAL SAOC FZC and OCTAL Inc. (July 7, 2020) at 23, CR 362, PR 108. The Commission considered the argument and responded that it is “unpersuaded by OCTAL’s argument that purchases of PET sheet from Oman increased mainly for non-price reasons.” Views at 35.

Plaintiffs argue that OCTAL’s D-PET is “a superior product that provides better physical performance characteristics.” Pls. Br. at 13. Plaintiffs tout that D-PET is produced from a patented production process. *Id.* at 12. Plaintiffs quote the Commission’s Staff Report as support: “Purchasers identified the superior quality of D-PET as the main *non-price reason* for purchasing imported rather than U.S. produced product.” *Id.* at 16 (original emphasis removed, emphasis supplied) (quoting *Staff Report* at I-18).⁸ Further, plaintiffs point to excerpts from the questionnaire responses of two sizeable U.S. purchasers expressing their opinions that D-PET sheet is superior to traditional PET sheet. *Id.* at 17–18. Plaintiffs also note that OCTAL’s customers “that explicitly stated that the ability to purchase D-PET was ‘very important’ to their purchasing decision accounted for 82.2 percent of all D-PET sheet purchases from OCTAL.” *Id.* at 22.

In its Views, the Commission stated that it “do[es] not find that D-PET’s physical qualities or its other characteristics meaningfully limit the substitutability between subject imports from Oman and the domestic like product.” Views at 28. “In particular, majorities of purchasers found the domestic like product comparable to subject imports from Oman in factors of product clarity, product formability, and quality meets industry standards, each of which was deemed very important by at least 14 of 17 reporting purchasers.” *Id.* The Commission continued, “[b]y contrast, most purchasers (12 of 17) rated ‘PET is D-PET’ as not important or only somewhat important as a purchasing factor.” *Id.*

ii. Price is an important factor

Plaintiffs maintain that price is not the “most important factor” for purchasers when making purchasing decisions. Pls. Br. at 26. However, and as defendant points out, the Commission did not find that price was the “most important factor,” but rather “an important

⁸ *See supra* note 7.

factor.” Views at 29; *see also* Def. Br. at 23 n.10. Additionally, the Commission stated that “other factors may also be important.” Views at 29.

In Commission determinations, price does not need to be the *most* important factor to be a *very important* factor and potentially even a *determining* factor to a purchasing decision. *See Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1059 (1995).⁹ Plaintiffs argue that “[i]t is undisputed that those U.S. customers accounting for [] percent of total purchases of OCTAL PET informed the Commission (in response to a specific Commission question) that price was not the most important factor for purchasing OCTAL PET sheet.” Pls. Reply Br. at 6–7 (citing OCTAL Pre-Hearing Brief (July 7, 2020) at Ex. 3, CR 362).¹⁰ However, plaintiffs’ [] percent figure fails to take into account that almost all of those who responded to the questionnaire listed price as a key factor in their purchasing decisions. OCTAL Post-Hearing Brief (July 21, 2020) at Ex. 3, CR 370.¹¹

The Commission expressly addressed OCTAL’s arguments that factors other than price were driving purchasing decisions. *See* Views at 35 n.150 (“The only possible adverse effect of the underselling is market share. But . . . the shifts in market share are . . . demonstrably unrelated to price. Such shifts in market share cannot be linked to the underselling” (quoting OCTAL Post-Hearing Brief (July 21, 2020) at 4–5, CR 370)). After considering OCTAL’s arguments, the Commission weighed the evidence and concluded:

⁹ In *Acciai Speciali Terni, S.p.A.*, Acciai Speciali argued that “the Commission’s findings as to the importance of price [were] exaggerated, because . . . two large purchasers . . . noted . . . that factors other than price were also important to their purchase decisions.” *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1059 (1995). The court rejected plaintiffs’ argument because “[both] purchasers . . . indicated . . . that a [five] to 10 percent rise in import price would cause them to purchase domestic products,” and “one of the two large purchasers stated that it found the quality of domestic and imported products to be comparable.” *Id.* at 1059–60. Therefore, although some “purchasers did not list price as the *most* important factor, price was listed as a *very* important factor.” *Id.* at 1059 (emphasis supplied).

¹⁰ The citation provided in Plaintiffs’ Reply Brief in Support of Rule 56.2 Motion for Judgment on the Agency Record appears to cite incorrectly to Exhibit 3 of the OCTAL Pre-Hearing Brief. *See* Pls. Reply Br. at 6–7; OCTAL Pre-Hearing Brief (July 7, 2020) at Ex. 3, CR 362. The cited material appears to come instead from Exhibit 3 of the OCTAL Post-Hearing Brief. *See* OCTAL Post-Hearing Brief (July 21, 2020) at Ex. 3, CR 370.

¹¹ Question III-23 on the purchasers’ questionnaire asked purchasers to “[p]lease list, in order of their importance, the main factors your firm considers in deciding from whom to purchase PET sheet (examples include availability, extension of credit, contracts, price, quality, range of supplier’s product line, traditional supplier, etc.)” U.S. Purchasers’ Questionnaire at 15. Purchasers were given three blank lines to write their main factors as well as an opportunity to “list any other factors that are very important in your purchase decisions.” *Id.*

We are unpersuaded by OCTAL's argument that purchases of PET sheet from Oman increased mainly for non-price reasons. We acknowledge that the record contains statements from certain firms that they purchased subject imports from Oman for non-price reasons, such as quality or carbon footprint. However, we find that these statements do not outweigh the aggregate data from market participants as a whole, which, as discussed above, reflects that price is an important factor in purchasing decisions for PET sheet and that most purchasers usually purchase the lowest-priced product. Further, OCTAL itself testified at the hearing as to the importance of price in purchasing decisions for PET sheet from Oman, and the questionnaire responses of the same firms indicating that they purchased subject imports from Oman for non-price reasons reflect that they consider price as very important in their purchasing decisions for PET sheet. Moreover, all five firms reporting price as a primary reason for their purchase of subject imports rather than the domestic like product purchased subject imports exclusively from Oman, which, as explained above, pervasively undersold the domestic like product.

Because the record as a whole indicates that price is an important factor in purchasing decisions for PET sheet, including PET sheet from Oman, and that the domestic industry lost sales due to price to lower-priced subject imports, we find that this underselling caused the shift in market share from the domestic like product to cumulated subject imports over the POI. We thus find the underselling by cumulated subject imports to be significant.

Views at 35–38 (citations omitted).

“It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process.” *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). The Commission's finding that price was an important factor was reasonable and supported by the record, and was sufficient to support the Commission's finding of significant adverse price effects.

b. Price effects

The Commission found that “data indicate[d] that cumulated subject imports pervasively undersold the domestic like product throughout the POI by significant margins.” Views at 34. The Commission

observed that “between 2017 and 2019, cumulated subject imports undersold the domestic like product in 74 of 76 possible quarterly comparisons,” or 97.4 percent.¹² *Id.* The record shows that the “average underselling margin [was] 16.6 percent.” *Id.*

The Commission determined that the “underselling by cumulated subject imports caused the [U.S.] domestic industry to lose sales.” *Id.* The Commission pointed to two sources of information in the record to support this finding: (1) purchaser questionnaires where five out of the ten purchasers “reported price as a primary reason for their purchase of the subject imports [over] the domestic like product”; and (2) “contemporaneous documentation of price negotiations” between U.S. producers and purchasers demonstrating that certain U.S. producers were losing sales because they could not match OCTAL’s lower prices. *Id.*

The Commission also found that “there was a market share shift from the domestic industry to cumulated subject imports over the POI.” *Id.* at 35. The Commission described this shift as “[c]onsistent with lost sales due to underselling by subject imports,” *id.* at 35, and referenced its volume determination where the “cumulated subject imports gained [[]] percentage points . . . at the domestic industry’s expense in the merchant market.” *Id.* at 35 n.149. As described by the court above, the Commission concluded that the underselling was “significant.” *Id.* at 37.¹³

The Commission then addressed the “price trends for the domestic like product and subject imports.” *Id.* at 37–38. The Commission did “not find that cumulated subject imports depressed [or suppressed] prices for the domestic like product to a significant degree.” *Id.* at 38. The Commission concluded that the “cumulated subject imports had significant adverse price effects on the domestic industry” based on the Commission’s finding “that subject imports significantly undersold the domestic like product, gaining sales and market share at the domestic industry’s expense due to their lower prices.” *Id.*

Plaintiffs raise two principal types of arguments to challenge the Commission’s adverse price effects finding. First, plaintiffs argue that the Commission “ignore[d] the record evidence” with regard to price depression and suppression. Pls. Br. at 31–32. Had the Commission considered price depression and suppression, plaintiffs argue, the Commission would not have found that there were adverse price

¹² “[[]] pounds of subject imports [were] reported in those quarters.” Views at 34. In the two quarters in which the cumulated subject imports oversold the domestic like product, “[[]] pounds of subject imports [were] reported, and [the] average overselling margin [was] [[]] percent.” *Id.*

¹³ See *supra* Section 2(a)(ii).

effects. *See id.* (“The Commission apparently believes the statute gives them a series of alternative boxes, and that checking any one of those boxes is enough. But the Commission must consider all of the evidence, including the evidence that might undermine the conclusion the Commission is contemplating.”). Second, plaintiffs argue that “[i]nstead of identifying any adverse price effects, the Commission turned to various measures of volume. The Commission pointed to individual lost sales and an overall market share shift.” *Id.* at 35 (emphasis omitted) (citing Views at 34–35). Defendant disagrees and states that “the record confirms” that “the market [share] shift from domestic product to imports from Oman” is due to lower prices. Def. Br. at 29.

“[T]o determine the substantiality of the evidence, the court must also take into account ‘whatever in the record fairly detracts from its weight.’” *Nippon Steel Corp. v. United States*, 27 CIT 1856, 1864, 301 F. Supp. 2d 1355, 1364 (2003) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the court from holding that the Commission’s determinations, findings, or conclusions are supported by substantial evidence.” *ITG Voma Corp. v. U.S. Int’l Trade Comm’n*, 41 CIT __, __, 253 F. Supp. 3d 1339, 1347 (2017) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006)), *aff’d without op.*, 753 F. App’x 913 (Fed. Cir. 2019).

The Commission’s finding of pervasive underselling is supported by the record. “[C]umulated subject imports undersold the domestic like product” 97.4 percent of the time in quarterly comparisons between 2017 and 2019 — “with an average underselling margin of 16.6 percent.” Views at 34. The Court has upheld cases in which the Commission found significant underselling, but no significant price depression or suppression, in instances in which there was underselling in substantially less than 97.4 percent of quarterly comparisons. *See Cleo Inc. v. United States*, 30 CIT 1380, 139698, 1402 (2006) (stating that “combined data” demonstrating underselling in 33 of 45 quarters or 73.3 percent supported the Commission’s underselling determination), *aff’d*, 501 F.3d 1291, 1303 (Fed. Cir. 2007).¹⁴ Further, the Commission has found adverse price effects in other investigations where the Commission did not find significant price depression or suppression and found underselling in fewer quarterly compari-

¹⁴ The Federal Circuit affirmed, albeit with reference only to data from three of four products, for a total of 29 of 41 quarters or 70.7 percent with underselling. *Cleo Inc. v. United States*, 501 F.3d 1291 (Fed. Cir. 2007).

sons. See *Certain Aluminum Extrusions from China*, USITC Pub. 4229, Inv. Nos. 701-TA-475 and 731-TA-1177 (Final) (May 2011) at 22 (finding that “subject imports undersold the domestic like product in 43 of 58 quarterly comparisons, or 74 percent of the time, at margins ranging from 1.6 to 66.1 percent”); see also *Aluminum Foil from China*, USITC Pub. 4771, Inv. Nos. 701-TA-570 and 731-TA-1346 (Final) (Apr. 2018) at 30 (finding “[t]he pricing data show that subject imports undersold the domestic like product in 40 of 77 instances, or 52 percent of comparisons, at margins ranging from 1.2 percent to 23.0 percent”).

Regardless of the Commission’s finding on underselling, the Commission is still required to consider price depression and suppression in its price effects analysis. See 19 U.S.C. § 1677(7)(C)(ii). Plaintiffs do not dispute the Commission’s finding that the subject imports did not significantly depress or suppress the domestic industry’s prices. Plaintiffs’ dispute boils down to questioning whether the Commission “consider[ed]” price depression and suppression “[i]n evaluating the effect of [subject] imports . . . on [domestic] prices.” *Id.*

The Commission found that the “cumulated subject imports [did not] depress[] prices for the domestic like product to a significant degree” because, among other reasons, “[p]rices for all four domestically produced pricing products were higher in the fourth quarter of 2019 than in the first quarter of 2017.” Views at 37-38. The Commission determined also that “cumulated subject imports [did not] prevent[] price increases . . . to a significant degree.” *Id.* at 38. The Commission reached this conclusion by looking at the domestic industry’s ratio of cost of goods sold to net sales and determining that “the domestic industry’s price increases were sufficient to cover its rising costs on a per unit basis in the merchant market over the course of the POI.” *Id.* In conclusion, the Commission considered price depression and suppression in its price effects analysis in the instant case. The fact that the Commission did not find significant price depression or suppression does not mean that the Commission’s adverse price effects finding is unsupported by substantial evidence.

Plaintiffs’ second argument is that “the Commission’s approach [for finding price effects] relies twice on adverse volume effects.” Pls. Br. at 36. Plaintiffs maintain that in “blaming underselling for the shift in market share[, the Commission] largely ignores contrary record evidence For example, in its submissions to the Commission, OCTAL . . . [argued] . . . that the vast majority of the shift in market share occurred for reasons demonstrably unrelated to prices.” *Id.* at 37. As discussed by the court above, the Commission considered

OCTAL's arguments and determined otherwise. Views at 35. Having considered OCTAL's positions, the Commission disagreed:

Notwithstanding some improvements in the industry's performance, which occurred as apparent U.S. consumption increased over the POI, cumulated subject imports had adverse effects on the domestic industry. Cumulated subject imports, as discussed above, captured sales and took market share from the domestic industry during the POI due to their lower prices.

Id. at 42.

The Commission found that the underselling by the cumulated subject imports caused adverse price effects — lost sales and lost market share — to the U.S. domestic industry. *Id.* at 34–35. As noted above, the Commission pointed to two sources of information in the record to support its finding of lost sales: (1) purchaser questionnaires; and (2) “contemporaneous documentation of price negotiations” between U.S. producers and purchasers. *Id.* at 34. This Court has determined that the Commission may rely on purchaser questionnaire responses to determine that price sensitivity affects the domestic industry especially when subject imports and the domestic like product are substitutable, as the subject merchandise was found to be in the instant case. See *Chefline Corp. v. United States*, 26 CIT 878, 891, 219 F. Supp. 2d 1303, 1316 (2002); *Swiff-Train Co. v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1336, 1343 (2013).

The Commission relied also on the record to determine that “there was a market share shift from the domestic industry to the cumulated subject imports over the POI.” Views at 35. In conclusion, the Commission considered the record as a whole, and its finding of adverse price effects was reasonable based on the information in the record.

III. Whether the Commission's conclusion of significant adverse impact is supported by substantial evidence and is otherwise in accordance with law

A. Legal framework

The third consideration in an antidumping injury determination is the impact of the subject imports on the domestic industry. 19 U.S.C. § 1677(7)(C). In evaluating this impact, the Commission “shall evaluate all relevant economic factors which have a bearing on the state of the [domestic] industry.” *Id.* § 1677(7)(C)(iii). These factors include, but are not limited to:

(I) actual and potential decline in output, sales, market share, [] profits, . . . ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,

- (II) factors effecting domestic prices,
- (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investment,
- (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, . . . and
- (V) . . . the magnitude of the margin of dumping.

Id. The Commission is instructed to “evaluate all relevant economic factors described in [19 U.S.C. § 1677(7)(C)(iii)] within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” *Id.* As such, while profit can be an important indicator, “[t]he Commission may not determine that there is no material injury . . . to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved.” *Id.* § 1677(7)(J).

B. Analysis

The Commission’s finding of significant adverse impact is supported by substantial evidence. The Commission weighed the evidence, noted some improvements in the performance of the domestic industry as apparent U.S. consumption increased over the POI, and found that “the domestic industry’s production, shipments, and revenues were lower than they would have been [without the lower priced subject imports].” *Id.* at 42–43. Additionally, the Commission pointed to the record, which shows that total net sales decreased from 2017 to 2019 by approximately 24.7 million pounds, or in terms of value, 15.6 million dollars. *Id.* at 44 (citing *Staff Report* at F-5 tbl.F-3).

Plaintiffs challenge the Commission’s adverse impact determination on two grounds: (1) the Commission failed to establish a correlation between subject import flows and the condition of the domestic industry; and (2) the Commission did not evaluate properly OCTAL’s low dumping margin. *Pls. Br.* at 2–3. The court will consider each of these challenges in turn.

1. Whether the Commission’s finding of correlation between the increased volumes of imports and the domestic industry’s injury was reasonable

The Commission considered properly the record information, including financial performance, and concluded reasonably that the domestic industry suffered an adverse impact. Plaintiffs argue that the Commission’s analysis erred in failing to “consider the relationship between [the increase in] subject imports and the [improving]

condition of the domestic industry.” Pls. Br. at 40. Plaintiffs assert that the evidentiary record before the Commission demonstrated the lack of “correlation between [the] increase in the subject imports and changes in domestic industry profitability.” *Id.* at 41.

Specifically, plaintiffs challenge correlation on two grounds: (a) the Commission in its affirmative impact determination ignored and failed to reconcile positive industry performance indicia, such as the industry’s increase in operating profits; and (b) the Commission failed to consider the record as a whole and, therefore, failed to establish causation — that the domestic industry’s condition was “by reason of” the subject imports. *Id.* at 41 (quoting 19 U.S.C. § 1673d(b)), 43.

a. Whether the Commission addressed properly the positive industry performance indicia on the record

Plaintiffs argue first that the Commission did not take into account positive industry performance indicia — particularly, the financial performance of the industry — in the Commission’s conclusion that the domestic industry was suffering material injury. *See* Pls. Br. at 39–43. Plaintiffs assert, without offering any support, that this case stands in contrast to the “vast majority of injury cases [in which] a domestic industry . . . suffers decreasing profitability over the period.” *Id.* at 39. In the instant case, plaintiffs maintain, “the domestic industry was consistently profitable, at a high level, and with improving profitability.” *Id.* Plaintiffs emphasize that, “[a]s subject imports increased [their] market share, the domestic industry [increased its operating profits].” *Id.* at 42 (citing *Staff Report* at C-11 to C-12).

The Commission noted that the profitability of most domestic producers deteriorated over the POI. Views at 44 (citing *Staff Report* at F-5 to F-15 tbl.F-3).¹⁵ In addition, the Commission concluded that, although there are some industrywide data suggesting a positive profitability trend, the “domestic industry as a whole would have performed materially better in the absence of the dumped imports.” *Id.*

Plaintiffs point out that the Commission noted that “[m]easures of the domestic industry’s output were mixed over the POI” and found several positive performance indicators, such as improving employment metrics. *Id.* at 39; Pls. Br. at 39, 43 (citing Views at 41). Plaintiffs assert that the Commission is required to explain “how it reconciles the [] positive indicia [on the record] with its finding of [an]

¹⁵ Table F-3 shows the “[s]elect results of operations of U.S. producers, merchant market, by company, 2017–19.” *Staff Report* at F-5 tbl.F-3. The total net sales lost by all firms from 2017 to 2019 was approximately 24.7 million pounds, or in terms of money, 15.6 million dollars. *Id.*

adverse impact” — and that the Commission’s failure, in plaintiffs’ view, to do so renders the Final Injury Determination not in accordance with law. Pls. Br. at 43–44.

The statute requires that the Commission consider all the factors set out in section 1677(7)(C)(iii) in determining the condition of the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). The Federal Circuit has explained that:

[Section 1677(7)(C)(iii)] list[s] factors which the Commission “shall,” not may, consider and evaluate in determining the effect on the domestic industry. Depending on the circumstances, the Commission may not need or be able to consider each listed factor; it may also consider other relevant factors, such as the intent of the importer or the effect on competition. However, the Commission cannot *ignore or bypass* the core factors directed by the statute.

Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB, 975 F.2d 807, 814 (Fed. Cir. 1992) (emphasis supplied); *accord Coalition for Fair Trade of Hardwood Plywood v. U.S. Int’l Trade Comm’n*, 40 CIT __, __, 180 F. Supp. 3d 1137, 1172 (2016).

In considering the five categories of impact factors, the Commission is required to “tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Suramerica de Aleaciones Laminadas, C.A v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). However, “the significance to be assigned to a particular factor is for the [Commission] to decide,” and none of the factors on its own is dispositive. S. Rep. No. 96–249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474; *ITG Voma Corp. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1339, 1358 (2017), *aff’d without op.*, 753 F. App’x 913 (Fed. Cir. 2019).

The statute directs the Commission to evaluate using a variety of factors, such as domestic sales, profit, market share and capacity utilization, whether subject imports have had an adverse impact on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). In considering this range of factors in this case, the Commission expressly discussed both positive and negative indicia — for example, the Commission noted that capacity, domestic employment and gross profits all improved over the POI. Views at 39–41.

However, the Commission also discussed that other indicia, such as U.S. shipments, capacity utilization and market share, declined. *Id.* at 40. The Commission emphasized that subject imports “captured sales and took market share from the domestic industry during the

POI.” *Id.* at 42. In addition, “the quantity and value of the domestic industry’s commercial U.S. shipments, and the revenues from its commercial sales, decreased over the POI, despite the [[]] percent increase in apparent U.S. consumption in the merchant market over this period.” *Id.* at 43.

After considering all of these indicators, the Commission concluded that “[n]otwithstanding some improvements in the industry’s performance, which occurred as apparent U.S. consumption increased over the POI, cumulated subject imports had adverse effects on the domestic industry.” *Id.* at 42. In sum, the Commission considered all the information on the record, including information that arguably conflicted with the Commission’s conclusion that the domestic industry suffered material injury as a result of the subject imports. The Commission’s analysis on its face makes clear that it did not “ignore or bypass” any key factor in its analysis. *Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed. Cir. 1992).

As previewed above, plaintiffs focus heavily on the industry’s financial performance over the POI. *See* Pls. Br. at 39 (stating that “the domestic industry was consistently profitable, at a high level, and with improving profitability at the end of the period”). However, as the Commission explained, neither profit nor any other factor is dispositive in the Commission’s analysis. Views at 44 (discussing 19 U.S.C. § 1677(7)(J)). Further, it is well established that when positive data on profitability conflict with other negative industry trends, the Commission may find adverse impact as a result of the subject imports so long as the Commission’s determination makes clear that the Commission considered the record as a whole. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. United States*, 44 CIT __, __, 425 F. Supp. 3d 1374, 1380 (2020) (“Even though the domestic industry’s profit increased, the Commission characterized the profit increase as ‘modest’ in light of the significant increase in demand and decline of raw material costs Because the record shows that the domestic industry had fewer shipments and obtained lower revenues even during a period of increased demand, the court concludes that it was reasonable for the Commission to conclude that the subject imports significantly impacted the domestic industry.”); *see also ITG Voma Corp.*, 41 CIT at __, 253 F. Supp. 3d at 1358–59 (upholding the Commission’s affirmative impact determination because, although the industry had strong financial performance, other indicia, such as domestic shipments, employment and net sales, experienced an overall decline during the POI).

In addition, in the instant case, the Commission’s Final Injury Determination makes clear that the industrywide profit data are not as straightforward as plaintiffs’ argument may suggest. *See Views* at 44. In particular, the Commission pointed out that (1) nine of 13 U.S. merchant market producers suffered operating losses in 2019, (2) “14 of 22 [U.S.] producers reported that the subject imports had negative effects on [their] investment[s], and (3) 13 of 22 U.S. producers reported that the subject imports had “negative effects on [their] growth and development.” *Id.* The Commission also found that one producer, [[]], which produces a “niche product that may not compete directly with subject imports,” likely drove the positive profitability trend. *Id.* This single producer “had far better operating performance than any other domestic producer each year of the POI,” and “the other producers overall had lower operating margins in 2019 than in 2017.” *Id.*

In sum, the Commission’s examination of the industry’s profitability trends taken in conjunction with the findings on industry declines in other areas, such as market share, shipments and capacity utilization, demonstrate that the Commission considered the range of industry performance data and made a reasonable impact determination.

b. Whether the Commission adequately established that the impact to the domestic industry was “by reason of” the subject imports

Plaintiffs next contend that the Commission failed to establish a correlation between the “increase in the subject imports and [the] changes in the domestic industry profitability” and that the record information “suggests that the condition of the domestic industry is not ‘by reason of’ the subject imports as required by the statute.” *Pls. Br.* at 41 (quoting 19 U.S.C. § 1673d(b)). Overall, plaintiffs maintain that “the Commission’s decision does not address [the lack of correlation] evidence at all” and that “the word ‘correlation’ is nowhere to be found in the entire Commission decision.” *Pls. Br.* at 42–43.

Defendant responds that the word correlation is nowhere to be found in the statute, let alone that the statute nowhere requires that the Commission make a finding of a “correlation” between the subject imports and the condition of the domestic industry. *Def. Br.* at 41 (citing 19 U.S.C. § 1677(7)(C)(iii)). Further, defendant maintains that the statute does not require that the Commission apply any “specific methodology” related to the impact analysis. *Id.* Nonetheless, defendant contends that the Commission did evaluate the causation in regard to — as well as correlation between — the increase of subject imports and the condition of the domestic industry, finding “that

cumulated subject import volume increased during the POI while also finding . . . that during this same period, the domestic industry suffered declines in production, shipments, and revenues.” *Id.* (citing Views at 30–31, 42–43).

To issue an affirmative adverse injury determination, the statute requires that the Commission find that an “industry in the United States . . . is materially injured . . . by reason of [the subject] imports.” 19 U.S.C. § 1673d(b)(1). However, the statute does not prescribe any “Procrustean formula for determining whether a domestic injury was ‘by reason of’ subject imports.” *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 879 (Fed. Cir. 2008). Rather, the “by reason of” standard “does not require the Commission to address the causation issue in any particular way The Commission is simply required to give full consideration to the causation issue and to provide a meaningful explanation of its conclusions.” *Id.* at 878; *see also* S. Rep. 96–249 at 75 (“The determination of the [Commission] with respect to causation is . . . complex and difficult, and is a matter for the judgment of the [Commission].”).

In the instant case, the Commission stated expressly its causation finding: “Cumulated subject imports . . . captured sales and took market share from the domestic industry during the POI due to their lower prices. As a result, the domestic industry’s production, shipments, and revenues were lower than they would have been otherwise.” Views at 42–43. The Commission considered also “whether there are other factors that may have had an impact on the domestic industry during the POI to ensure that [the Commission did] not attribut[e] injury from such other factors to [the] subject merchandise.” *Id.* at 45. The Commission determined that “neither demand trends nor [non-subject] imports explain the magnitude of the domestic industry’s sales and market share losses over the POI.” *Id.* at 45–46. Finally, as discussed, the Commission also expressly considered and addressed the question of the positive operating performance of the industry as a whole. *Id.* at 44.

For the foregoing reasons, the Commission gave “full consideration to the causation issue and . . . provide[d] a meaningful explanation of its conclusions.” *Mittal*, 542 F.3d at 878.

2. Whether the Commission evaluated the magnitude of the margins of dumping in assessing subject imports’ impact

Plaintiffs’ final challenge to the Commission’s affirmative impact determination is that “the Commission refused to consider the magnitude of the dumping margin . . . [and, therefore,] never complied with the statutory requirement to [analyze] how the magnitude of the

dumping margin affected the purported adverse impact.” Pls. Br. at 40–41. However, the Final Injury Determination makes clear that the Commission met its statutory obligation to evaluate the magnitude of the dumping margins in assessing the impact of the subject imports on the domestic industry.

The statute requires that the Commission “evaluate all relevant economic factors,” including “the magnitude of the margin of dumping.” 19 U.S.C. § 1677(7)(C)(iii). The magnitude of the dumping margin is not dispositive in the Commission’s impact evaluation. See *Consol. Fibers, Inc. v. United States*, 32 CIT 855, 863, 574 F. Supp. 2d 1371, 1380 (2008) (“The statute only requires the Commission to evaluate antidumping margins as one of many relevant economic factors.”).

This Court has held on several occasions that “[n]othing in the statutory scheme compels [the Commission] to reach a certain conclusion concerning the dumping margins -- the statute only compels [the Commission] to consider such margins.” *Asociacion de Productores de Salmon y Trucha de Chile AG v. U.S. Int’l Trade Comm’n*, 26 CIT 29, 45, 180 F. Supp. 2d 1360, 1376 (2002). Therefore, the statute requires that the Commission consider the magnitude of the dumping margins; however, the statute does not require that the Commission “demonstrate that dumped imports, through the effects of particular margins of dumping, are causing injury.” *Whirlpool Corp. v. United States*, 37 CIT 1775, 1798–99 (2013) (quoting *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 48, 758 F. Supp. 1506, 1510 (1991)); accord *Consol. Fibers, Inc.*, 32 CIT at 863, 574 F. Supp. 2d at 1380 (quoting *Iwatsu Elec. Co.*, 15 CIT at 48, 758 F. Supp. at 1510) (citing § 1677(7)(C)(iii)(V)). In the instant case, the Commission discussed the dumping margins primarily in two footnotes. In the first footnote, the Commission acknowledged the statutory requirement to evaluate the magnitude of the dumping margins and identified the specific dumping margins for the subject imports from Korea and Oman. Views at 39 n.162. The Commission then explained:

We take into account in our analysis the fact that Commerce has made final findings that all subject producers in Korea and Oman are selling subject imports in the United States at [lower than fair value]. In addition to this consideration, our impact analysis has considered other factors affecting domestic prices. Our analysis of the significant underselling, described in both the price effects discussion and below, is particularly probative to an assessment of the impact of the subject imports.

Id. In the second footnote, the Commission addressed the extent of its obligation to evaluate the dumping margins. *See Views* at 43 n.184. Specifically, the Commission responded to “OCTAL’s argument that . . . the Commission must find a linkage between material injury and the act of dumping.” *Id.* The Commission emphasized that the “statute does not task the Commission with determining whether the domestic industry is materially injured by reason of *dumping*. Rather, it directs the Commission to determine whether the domestic industry is materially injured by reason of *dumped imports*.” *Id.* (internal citations omitted).

Plaintiffs argue that the Commission failed to meet its statutory obligation under section 1677(7)(C)(iii) because, rather than “evaluate” the magnitude of the dumping margin, the Commission only mentioned “the dumping margins in passing with little more.” *Pls. Br.* at 47. Specifically, plaintiffs argue that the Commission (1) failed to explain how or whether it took this factor into account and (2) failed also to respond to “the unique fact in this case that the dumping margin was just a fraction of the overall margin of underselling the Commission found, which called into question the inferences about adverse impact.” *Pls. Br.* at 49.

Plaintiffs cite *Coalition for Fair Trade of Hardwood Plywood v. U.S. International Trade Commission*, 40 CIT __, __, 180 F. Supp. 3d 1137, 1169 (2016) (“*Hardwood Plywood*”), to support their argument that “the importance of the magnitude of the margins can be enhanced or discounted based upon the specific facts, but in all cases, the role of the magnitude of the margins must be evaluated.” *Pls. Br.* at 47 (quoting *Hardwood Plywood*, 40 CIT at __, 180 F. Supp. 3d at 1173). In *Hardwood Plywood*, this Court found that the Commission failed to evaluate the magnitude of the dumping margin when the Commission simply listed the dumping margins determined in Commerce’s final determination. *Hardwood Plywood*, 40 CIT at __, 180 F. Supp. 3d at 1174–75 (“The Commission’s consideration of this factor amounts to nothing more than the recitation of the dumping margins found by Commerce in a footnote.”).

Still, a requirement to provide more than a recitation does not mean that the Commission must provide any particular type or extent of analysis. *See Altx, Inc. v. United States*, 26 CIT 1425, 1432 (2002) (“noting that while the [Commission] has a statutory obligation to consider the dumping margin, it has little significance if there is no connection between the pricing of the foreign product and the condition of the domestic industry.” (citing *Comm. of Domestic Steel Wire Rope & Specialty Cable Mfrs. v. United States*, 26 CIT 403, 419–21, 201 F. Supp. 2d 1287, 1302–04 (2002))).

In the instant case, the Commission provided more than a mere “recitation of the dumping margins.” *Hardwood Plywood*, 40 CIT at ___, 180 F. Supp. 3d at 1174–75. In footnote 162 the Commission stated, “in addition to this consideration, our impact analysis has considered other factors affecting domestic prices.” Views at 39 n.162. The Commission continued that its analysis of the significant underselling “is particularly probative to an assessment of the impact of the subject imports,” indicating that the magnitude of the margin of dumping was a less probative factor. *Id.* The Commission, therefore, evaluated the magnitude of the dumping margin along with other factors. See *Asociacion de Productores de Salmon*, 26 CIT at 45, 180 F. Supp. 2d at 1376.

Separately, the court is not convinced by plaintiffs’ second argument that the Commission needed to analyze the “unique fact in this case that the [OCTAL] dumping margin was just a fraction of the overall margin of underselling the Commission found, which called into question the inferences about adverse impact.” Pls. Br. at 49. As the court stated above in Section I.B.1, the Commission cumulated the Omani and Korean subject imports as provided in statute. See 19 U.S.C. § 1677(7)(G) (“[T]he Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which . . . petitions were filed . . . on the same day.”). As such, the court finds that the Commission’s consideration of the margin of dumping in this case was reasonable.

The Commission addressed adequately the correlation between subject import volume and the domestic industry’s financial performance and considered properly the magnitude of the dumping margin. For the foregoing reasons, the Commission’s finding of adverse impact was reasonable.

CONCLUSION

Christopher Plummer, the Academy Award-, Tony Award- and Emmy Award-winning actor (and Grammy-nominated singer) opens his autobiography with the sentence: “I was brought up by an Airedale.”¹⁶ The sentence may, at least for Airedale aficionados, potentially rival such other notable opening sentences as, just for instance, “Call me Ishmael.”¹⁷ Without prejudice to which work may arguably hold a firmer place in the annals of American literature, it cannot be gainsaid that an Airedale is (most of the time, at least) a better being

¹⁶ Christopher Plummer, *In Spite of Myself: A Memoir* 3 (2008) (“I won’t deny it, ‘tis the truth and nothing but, Your Honour — a bumbling, oversized, shaggy great Airedale. The earliest memory I have of anything resembling a pater familia, bouncer, male-nurse or God is that dear slobbering old Airedale.”).

¹⁷ Herman Melville, *Moby-Dick; or, the Whale*. 1 (1851).

to host as a *pet* in one's home — or, at a minimum, a somewhat more sensible one — than an 85-foot long, roughly 55-ton sperm whale.

* * *

In conclusion, the Commission's determination in its investigation of *PET* sheet from Korea and Oman is supported by substantial evidence and is otherwise in accordance with law. Therefore, the court sustains the Commission's Final Injury Determination. Judgment will enter accordingly.

Dated: September 30, 2021
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 21–136

ROOT SCIENCES, LLC, Plaintiff, v. THE UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 21–00123

[The court grants Defendant's motion to dismiss.]

Dated: October 7, 2021

John M. Peterson, Neville Peterson LLP, of New York, N.Y., argued for Plaintiff Root Sciences LLC. With him on the briefs were *Richard F. O'Neill*, of Seattle, WA and *Patrick B. Klein*.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney in Charge, International Trade Field Office, *Aimee Lee*, Assistant Director. Of Counsel on the brief were *Mathias Rabinovitch* and *Alexandra Khrebtukova*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION

Katzmann, Judge:

This is a case about a cannabis processor manufactured in Germany that was seized by Customs and Border Protection (“CBP”) as prohibited merchandise, namely drug paraphernalia, not subject to import. Is the dispute regarding that seizure to be adjudicated by the United States Court of International Trade (“CIT”) or the United States District Court? This case addresses the question of whether the CIT has jurisdiction over a deemed exclusion and protest therefrom where CBP seized goods within thirty days of presentation for examination, but Plaintiff did not receive the notice of that seizure

from CBP until bringing a challenge to the court. Plaintiff Root Sciences, LLC, an importer, manufacturer, and distributor of merchandise for the cannabis and hemp processing industry, challenges what it contends is the deemed denial of its protest to exclusion of merchandise for import and argues that the CIT has jurisdiction over the case. Compl. ¶¶ 1–3, Mar. 24, 2021, ECF No. 15. In response, Defendant the United States (“Government”) moves to dismiss this case for lack of jurisdiction, arguing that there has been no exclusion, and no denial of Plaintiff’s protest, because of CBP’s seizure of the merchandise and that jurisdiction is thereby lodged in the district court. Def.’s Mot. to Dismiss, Apr. 23, 2021, ECF No. 27 (“Def.’s Br.”). The court concludes that it does not have jurisdiction over this dispute because CBP seized Plaintiff’s merchandise before a deemed exclusion occurred by operation of law. Accordingly, the case is dismissed.

BACKGROUND

I. Legal Framework and Jurisdiction

The jurisdictional statute 28 U.S.C. § 1581(a) grants the court “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930,” which enumerates certain decisions made by CBP. The exclusion of merchandise is one such protestable decision. 19 U.S.C. § 1514(a)(4). In 1993, Congress passed the Customs Modernization Act (“Mod Act”), which amended 19 U.S.C. § 1499 to create the mechanisms of deemed exclusion and deemed denial of protests. Under 19 U.S.C. § 1499(c)(5)(A), the failure of CBP “to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination . . . shall be treated as a decision of the [CBP] to exclude the merchandise for purposes of section 1514(a)(4) of this title,” i.e., a deemed exclusion. Under CBP’s implementing regulation, 19 C.F.R. § 151.16(b), “merchandise shall be considered to be presented for [CBP] examination when it is in a condition to be viewed and examined by a [CBP] officer.” Presentation for examination requires that “the merchandise itself - not a proxy or summary - be laid out or put before a [CBP] official to look at or otherwise visually inspect.” *Blink Design, Inc. v. United States*, 38 CIT __, __, 986 F. Supp. 2d 1348, 1355 (2014). Under 19 U.S.C. § 1499(c)(5)(B), if CBP fails to respond to a protest of an exclusion within thirty days, that protest will be deemed denied. That denial is then appealable to the court under 28 U.S.C. § 1581(a). Thus, if an importer promptly protests a deemed exclusion, and CBP fails to make a decision to

admit or exclude the importer's goods within sixty days, that importer may challenge the deemed denial to its deemed exclusion before the court.

However, 19 U.S.C. § 1499(c)(4) states that "if otherwise provided by law, detained merchandise may be seized and forfeited." Seizures, unlike exclusions, are not protestable decisions under 19 U.S.C. § 1514(a), and are not appealable to this court. *Int'l Maven, Inc. v. McCauley*, 12 CIT 55, 57, 678 F. Supp. 300, 302 (1988); *Milin Indus., Inc. v. United States*, 12 CIT 658, 659, 691 F. Supp. 1454, 1454 (1988); see also *Ovan Int'l, Ltd. v. United States*, 39 CIT __, __, 49 F. Supp. 3d 1327, 1331 (2015) (The Court's jurisdiction "is limited to appeals of valid and timely protests that have been denied by Customs."). Rather, they are governed by 28 U.S.C. § 1356, which grants to the federal district court in which the merchandise is located exclusive jurisdiction over "any seizure under any law of the United States . . . except matters within the jurisdiction of the [CIT] under section 1582 of this title." Section 1582 refers only to actions commenced by the United States, and so is not applicable to the instant case. Relatedly, 19 C.F.R. § 162.31 states that "[w]ritten notice of . . . any liability to forfeiture shall be given to each party that the facts of record indicate has an interest in the . . . seized property." Notably, the regulation does not state when such notice must be provided, nor that CBP must ensure notice is received. To obtain relief from seizure, the importer may file an administrative petition pursuant to 19 U.S.C. § 1618 and 19 C.F.R. § 171.1; or file a claim pursuant to 19 U.S.C. § 1608 and 19 C.F.R. § 162.47, for referral to the U.S. attorney for the district in which the seizure was made, who shall then institute forfeiture proceedings.

In short, the CIT has jurisdiction over CBP's decision to exclude goods from entry (if properly protested), but the CIT does not have jurisdiction over seized goods.

II. Factual Background

The facts of this case are largely undisputed. In December 2020, Plaintiff attempted to import through the port at Los Angeles/Long Beach, California a German-manufactured component of a Cryo-Ethanol Extraction System, "an all-in-one cryo-extraction, solvent recovery and decarboxylation system designed for the recovery of cannabis crude extract from cannabis biomass," ("Merchandise"). Compl. ¶ 6. In essence, the Merchandise is a component part of a cannabis extraction machine.

According to the Declarations of CBP officials Scott Jarrell and Lee Baxley, the following happened upon presentation of the Merchandise

to CBP: CBP selected the Merchandise for cargo examination on December 16, 2020.¹ Def.'s Br. at 9 (citing Decl. of Scott Jarrell in Supp. of Def.'s Mot. to Dismiss ¶ 9, Apr. 23, 2021, ECF No. 28–1 (“Jarrell Decl.”)). The vessel transporting the Merchandise arrived at the Los Angeles/Long Beach Seaport on December 31, 2020. *Id.* On January 13, 2021, CBP detained the Merchandise as “possible drug paraphernalia,” and issued a notice of detention to Plaintiff’s broker. *Id.* at 10 (citing Jarrell Decl. ¶ 13). On or about January 25, 2021, a CBP official determined that the Merchandise was to be seized as drug paraphernalia, and as such would be subject to forfeiture. *Id.* at 3–4 (citing Jarrell Decl. ¶ 16). On February 10, 2021, CBP seized the Merchandise and updated its records system to reflect the seizure. *Id.* (citing Jarrell Decl. ¶¶ 18–19). That system was updated again on February 11, 2021, to release the “hold” on the Merchandise and reflect that it had been seized. *Id.* (citing Jarrell Decl. ¶ 20). On February 17, 2021, the Merchandise was transferred to CBP’s long-term seizure storage facility where it remains to date. *Id.* at 4 (citing Jarrell Decl. ¶ 20). On March 8, 2021, CBP sent notice of the seizure (“Notice”) to Plaintiff via certified mail using the address listed by Plaintiff’s broker on the entry filing for the Merchandise. *Id.* at 5 (citing Decl. of Lee Baxley in Supp. of Def.’s Mot. to Dismiss ¶ 5, Apr. 23, 2021, ECF No. 28–2 (“Baxley Decl.”)). On March 11, 2021, the United States Postal Service unsuccessfully attempted to deliver the Notice. *Id.* (citing Baxley Decl. at Exh. 3). On March 22, 2021, the Notice was returned to CBP as undeliverable. *Id.* (citing Baxley Decl. ¶ 6). On March 24, CBP re-sent the Notice via regular mail, but this attempt was also returned as undeliverable on April 2, 2021. *Id.* (citing Baxley Decl. ¶ 7).

Plaintiff does not dispute this version of events, but stresses that “Plaintiff could have done nothing more to learn about the alleged administrative seizure in advance of bringing this exclusion case.” Resp. of Pl. in Opp. to Def.’s Mot. to Dismiss 15 n.6, Apr. 30, 2021, ECF No. 29 (“Pl.’s Br.”). Rather, according to the Affirmation of Richard F. O’Neill, counsel to Plaintiff, beginning in late January 2021, Plaintiff repeatedly asked CBP for information about the detention. Pl.’s Br. at 3 (citing Aff. of Richard O’Neill in Supp. of Pl.’s Appl. for an Order to Show Cause, Mar. 24, 2021, ECF No. 14–3 (“O’Neill Aff.”)). Plaintiff received no substantive response to its multiple requests,

¹ Plaintiff’s Complaint mistakenly identifies the date the Merchandise was presented to CBP for examination as December 18, 2020. Compl. at 2. Plaintiff amended this error in responding to the Government’s motion to dismiss, and both parties now agree that the Merchandise was presented to CBP for examination on January 11, 2021. Pl.’s Br. at 3, 10–11; Def.’s Br. at 2.

which continued throughout early February 2021. *Id.* The Government does not dispute Plaintiff's representations of CBP's lack of communication. *See generally* Def.'s Br. Having received no information regarding the detention, and unaware of the seizure of February 11, 2021, Plaintiff acted on its belief that the Merchandise was deemed excluded by operation of 19 U.S.C. § 1499(c)(5)(A) thirty days after the Merchandise was presented to CBP for examination and filed a protest of the deemed exclusion on February 18, 2021. Pl.'s Br. at 3. Plaintiff's protest argued that the Merchandise was not prohibited drug paraphernalia because the Merchandise was subject to an authorization exemption under 21 U.S.C. § 863(f)(1), which allows individuals authorized by local, state, or federal law to import otherwise prohibited merchandise. Plaintiff also argued that because California and Washington states both authorize the use of machinery for processing hemp and marijuana, its importation is allowed under 21 U.S.C. § 863(f)(1). Pl.'s Br. at 4.

Plaintiff, having not received the Notice, and having received no other updates on the status of the detained Merchandise, believed its protest was deemed denied pursuant to 19 C.F.R. § 174.21(b) on March 20, 2021, thirty days after Plaintiff's protest was filed. *Id.* at 4. On March 23, 2021, CBP sent an automated email to Plaintiff stating that its protest had been deemed denied on March 20, 2021. *Id.* at 5. The Government notes this email was automated, related only to the protest, and was triggered by "an import specialist" who "mistakenly believed" that a protest after a seizure could still be deemed denied by operation of law. Def.'s Resps. to the Ct.'s Questions for Oral Arg. at 8, June 28, 2021, ECF No. 41 ("Def.'s Resps. to Ct.'s Questions"); *see also* Def.'s Br. at 6. Eight hours after filing this case, Plaintiff learned of the seizure via an email sent to Plaintiff from Government counsel. Pl.'s Br. at 5.

III. Procedural History

On March 22, 2021, Plaintiff initiated this action and filed a motion for an order to show cause requesting that the court order the Government "to appear and show cause why the [c]ourt should not order (i) the cancellation of the deemed exclusion of, and the release of, the [Merchandise] pursuant to 19 U.S.C. § 1499(c)(5)(C); and/or (ii) the entry of an expedited litigation schedule." Summons, Mar. 22, 2021, ECF No. 1; Compl. at 1; Pl.'s Mot. For an Order to Show Cause, Mar. 24, 2021, ECF No. 14 ("Pl.'s Mot."). The court held a teleconference on March 30, 2021, during which the Government first informed the court of the seizure. Teleconference, Mar. 30, 2021, ECF No. 21. The

court then ordered the parties to file proposed briefing schedules. *Id.* The Government filed a motion to dismiss on April 23, 2021. Def.'s Br. Plaintiff responded in opposition on April 30, 2021. Pl.'s Br. The Government replied on May 12, 2021. Def.'s Reply in Supp. of Mot. to Dismiss, May 12, 2021, ECF No. 30 ("Def.'s Reply"). Oral argument was held on June 30, 2021. Oral Arg., ECF No. 42. Prior to oral argument, the court issued and the parties responded to questions regarding the case. Ct.'s Letter re: Questions for Oral Arg., June 16, 2021, ECF No. 39; Pl.'s Resp. to June 16, 2021 Questions for Oral Arg., June 28, 2021, ECF No. 40 ("Pls.' Resp. to Oral Arg. Questions"); Def.'s Resps. to Ct.'s Questions. As directed by the court, the parties also filed briefs following oral argument. Pl.'s Suppl. Br. in Opp'n to Def.'s Mot. to Dismiss, July 8, 2021, ECF No. 44; Def.'s Post-Arg. Submission, July 8, 2021, ECF No. 43.

STANDARD OF REVIEW

The court's determination of its subject matter jurisdiction is a threshold inquiry. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998); *CR Indus. v. United States*, 10 CIT 561, 562 (1986) ("It is fundamental that the existence of a jurisdictional predicate is a threshold inquiry in which plaintiff bears the burden of proof."). Whether to grant a motion to dismiss for lack of jurisdiction is a question of law. *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000). Where jurisdiction is challenged pursuant to Rule 12(b)(1), the burden rests on the plaintiff to establish the basis for jurisdiction. *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997); see also *Wally Packaging, Inc. v. United States*, 7 CIT 19, 20, 578 F. Supp. 1408, 1410 (1984) (noting that "[w]hen the court's jurisdiction is challenged, the party asserting jurisdiction has the burden of establishing that jurisdiction exists"). If a Rule 12(b)(1) motion controverts factual allegations in the complaint, the allegations in the complaint are not controlling and are subject to factfinding by the court. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993); *Blink Design*, 986 F. Supp. 2d at 1352; *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691–92, 437 F. Supp. 2d 1335, 1339 (2006). In these circumstances, as part of the motion, the court is permitted to "review evidence outside the pleadings to determine facts necessary to rule on the jurisdictional issue." *H & H Wholesale*, 30 CIT at 692, 437 F. Supp. 2d at 1340 (citations and quotations omitted). Accordingly, the court is permitted to review the documents attached to the Motion to Dismiss for purposes of assessing jurisdiction.

DISCUSSION

Root Sciences asserts jurisdiction under 28 U.S.C. § 1581(a), *see* Compl. ¶ 2, which, as noted above, grants the CIT exclusive jurisdiction over “any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” 28 U.S.C. § 1581(a). In disputing jurisdiction, as discussed below, the Government contends that Root Sciences has not challenged the denial of a valid protest because its merchandise was timely seized by CBP, which is not a protestable decision. *See* 19 U.S.C. § 1514(a) (see page 3, *supra*). The Government argues that pursuant to 28 U.S.C. § 1356 (see page 3, *supra*), jurisdiction over seized merchandise lies within the district court. Accordingly, due to the seizure of the merchandise at issue, the Government concludes that Root Sciences cannot satisfy the requirements for subject matter jurisdiction in this court and asks the court to dismiss the instant case for lack of jurisdiction. Def.’s Br. at 1. Plaintiff, however, contends that the court has jurisdiction over the dispute because an uncommunicated seizure cannot prevent the occurrence of a deemed exclusion or subsequently deemed denied protest. Pl.’s Br. at 7–8. Thus, the court must answer two questions in determining whether it has jurisdiction over this case: (1) whether a seizure effected within thirty days of presentment of goods for examination constitutes an admissibility determination that prevents a deemed exclusion from occurring by operation of law; and (2) what effect notice of seizure has on the court’s jurisdiction. The court concludes that a seizure effectuated within thirty days of presentation of the goods to CBP, even if uncommunicated to the importer within those thirty days, will prevent the occurrence of a deemed exclusion. Thus, the court dismisses the case for lack of jurisdiction because Plaintiff’s protest was not valid as there was no deemed exclusion.

I. A Seizure Effected Within Thirty Days of Presentment for Examination Will Prevent a Deemed Exclusion.

The parties first contest whether a seizure by CBP constitutes an “admissibility determination” for purposes of 19 U.S.C. § 1499(c), which precludes a deemed exclusion from occurring. The Government contends that seizure does constitute an admissibility determination, and, because CBP actually seized Plaintiff’s merchandise within thirty days of its presentment for examination, no deemed exclusion occurred in this case. Def.’s Reply at 14. Plaintiff asserts that a “seizure of goods . . . is not an admissibility determination made pursuant to 19 U.S.C. § 1499,” and that “a seizure can be undertaken completely independent of, and without regard to, any determination of admissibility.” Pl.’s Br. at 16.

While the court agrees with Plaintiff that a seizure does not constitute an admissibility decision, it nevertheless concludes that CBP's seizure of the Merchandise did prevent the deemed exclusion from occurring. The statute, CBP's implementing regulation, the legislative history, and the court's case law support this conclusion. First, the statute contains a provision stating that "[i]f otherwise provided by law, detained merchandise may be seized and forfeited." 19 U.S.C. § 1499(c)(4). The implementing regulation, 19 CFR § 151.16(j) elaborates that "[i]n lieu of seizure and forfeiture, where authorized by law, Customs may deny entry and permit the merchandise to be exported, with the importer responsible for paying all expenses of exportation" (emphasis added). In other words, merchandise not already seized may be excluded by CBP. Furthermore, the regulation states that "[a] final determination with respect to admissibility of detained merchandise will be made within 30 days from the date the merchandise is presented for Customs examination. *Such a determination may be the subject of a protest.*" 19 C.F.R. § 151.16(e) (emphasis added). So, while an admissibility determination may be the subject of protest, a seizure is not. *See also Int'l Maven*, 12 CIT at 57, 678 F. Supp. at 302. This distinction is consistent with the court's well-established case law that seizures are not protestable decisions within this court's jurisdiction. *See, e.g., CDCOM (U.S.A.) Intern., Inc. v. United States*, 21 CIT 435, 439, 963 F. Supp. 1214, 1218 (1997) ("since Plaintiff's protest is deemed a protest of a seizure, it is not a 'valid' protest for the purposes of § 1514(a), and, therefore, the matter is not appealable to this [c]ourt"); *H & H Wholesale Servs.*, 30 CIT at 692–93, 437 F. Supp. 2d at 1340 ("[A]n exclusion must take place before a plaintiff may protest it. If only a seizure took place, the court has no jurisdiction.").

Second, the legislative history of the Mod Act, which created the deemed exclusion process, shows that the purpose of 19 U.S.C. § 1499(c) is to afford relief to importers for CBP's inaction. Congress explained that the statute would give CBP "a minimum of 60 days in which to determine whether merchandise initially detained shall be excluded from entry or seized and forfeited if otherwise authorized under other provisions of law." H.R. Rep. No. 103–361, pt. 1, at 111–12 (1993). The use of the word "or" here suggests that Congress intended that exclusions and seizures be mutually exclusive actions. In the instance in which CBP takes no action and a deemed exclusion of merchandise occurs, the burden of proof, typically resting on the complainant, switches to CBP to demonstrate "that it has good cause

for not reaching an admissibility decision.” *Id.* at 110. If a suit is commenced after an admissibility decision has been reached, the burden remains with the complainant in accordance with 28 U.S.C. § 2639. *Id.* “Thus, if, prior to commencement of the action, the Customs Service *determines to exclude the merchandise* from the United States, an importer wishing to challenge that decision shall bear the burden of proof consistent with the provisions set forth in 28 U.S.C. § 2639.” *Id.* at 112 (emphasis added). Congress’s failure to use the term “seizure” here indicates that seizures are not admissibility decisions under section 1499(c)(5). Further, the court notes that the reference to section 2639 includes “any civil action commenced in the [CIT] under section 515, 516, or 516A of the Tariff Act of 1930.” 28 U.S.C. § 2639(a)(1). It makes little sense that a provision intended to shift the burden of proof in cases brought before the CIT would concern seizure, the contesting of which cannot properly be brought before this court but must instead be heard at the appropriate district court, per 28 U.S.C. § 1356. Recent decisions have also relied upon this legislative history in similarly concluding that seizures are not admissibility determinations. *See CBB Grp., Inc. v. United States*, 35 CIT 743, 748, 783 F. Supp. 2d 1248, 1253 (2011) (“Customs failed to make either an admissibility or a seizure determination within the 60-day period established by section 499(c)(5) and addressed in the House Report”); *Blink Design*, 986 F. Supp. 2d at 1359 (quoting *CBB Grp., Inc.*’s discussion of the same legislative history). *But see CD-COM*, 21 CIT at 438–39, 963 F. Supp. at 1217 (“[CBP] made an admissibility determination within the thirty-day statutory period required under 19 U.S.C. § 1499(c)(5)(A), declaring both shipments of the subject merchandise ‘seized.’”).

Thus, the court agrees with Plaintiff that a seizure is not, by itself, an admissibility determination. Rather, an “admissibility decision” means a decision to admit or exclude merchandise by CBP. This conclusion is especially apparent in light of the fact that agencies other than CBP may seize goods that have been presented for examination.

That said, previous decisions of the court make clear that a seizure of merchandise, if effected within thirty days of that merchandise being presented for examination, prevents the occurrence of a deemed exclusion. For example, in *Tempco Marketing v. United States*, the court held that, with respect to the second of three entries at issue, “[s]ince the seizure occurred within thirty days of the presentation for examination, the merchandise was never deemed excluded pursuant to 19 U.S.C. § 1499(c)(5)(A).” 21 CIT 191, 194, 957 F. Supp. 1276, 1279

(1997). In *CDCOM*, the court held that “[u]nder 19 U.S.C. § 1499(c)(5)(A), since both seizures occurred within thirty days of the presentation for examination, the merchandise was never deemed excluded.” 21 CIT at 439 n.7, 963 F. Supp. at 1217 n.7. In *H & H Wholesale*, the court held that “the merchandise in this case was seized within thirty days after it was presented to Customs for inspection. Therefore, no ‘deemed exclusion’ took place.” 30 CIT at 693, 437 F. Supp. 2d at 1341 (citations omitted). Similarly, in *Blink Design*, the court found that CBP “seized each entry more than thirty days after presentation and that, therefore, each entry was deemed excluded prior to seizure.” 986 F. Supp. 2d at 1357.

In sum, the conclusion that a seizure of goods is not an admissibility determination made pursuant to 19 U.S.C. § 1499 is rendered inapposite because whether or not seizure is an “admissibility determination,” it is clear that seizure, if effected within thirty days of the subject merchandise being presented for examination, precludes deemed exclusion. Plaintiff may be correct that “a seizure can be undertaken completely independent of, and without regard to, any determination of admissibility,” in the narrow sense that CBP or another agency may later seize merchandise previously determined to be admissible, but it does not therefore follow that CBP can determine previously seized merchandise to be admissible. Rather, seizure of goods prior to an admissibility determination precludes further decision by CBP on the admissibility of the merchandise because the goods then become subject to forfeiture proceedings, in which case the admissibility of the goods becomes irrelevant. Per Plaintiff’s logic, a seizure executed by another agency would result in a deemed exclusion by CBP in all cases, unless CBP affirmatively issued a declaration that the underlying merchandise is admissible (which is a strange result if the merchandise is seized by another agency), or is excluded, in which case CBP would be making an affirmative exclusion, thereby creating grounds for protest and the importer’s bringing a case to the CIT in every such case. This result is impractical and counter to the Mod Act legislative history described previously.²

² However, where a seizure post-dates a deemed exclusion, the court’s case law is unclear as to whether the later seizure in some way negates, or cancels out, the exclusion. In *R.J.F. Fabrics, Inc., v. United States*, 10 CIT 735, 739, 651 F. Supp. 1431, 1434 (1986), the court considered “the issue of whether this [c]ourt’s jurisdiction over an exclusion ceases upon the seizure of merchandise by [CBP].” Finding that “it is clear that plaintiff protested the exclusion of its merchandise,” the court said it was “unwilling, therefore, to adopt a rule that would divest the [CIT] of jurisdiction simply because plaintiff filed its protest after [CBP] chose . . . to formally seize the subject goods.” *Id.* at 1433. In *International Maven*, the court characterized the holding in *R.J.F. Fabrics* as “enunciat[ing] this [c]ourt’s interpretation that its jurisdiction over protested exclusions did not necessarily cease once the goods were subsequently seized.” 12 CIT at 58; 678 F. Supp. at 302 (citing *R.J.F. Fabrics*, 651 F.

Thus, the court concludes that where a seizure occurs prior to a deemed exclusion by operation of law, a deemed exclusion will not occur.

II. Plaintiff's Merchandise was Seized by CBP on February 10, 2021, and Never Deemed Excluded, Regardless of Notice of the Seizure.

The court next turns to whether, regardless of its conclusion that a deemed exclusion does not occur when goods are seized, notice of seizure must be provided to the importer to complete the seizure of goods. Plaintiff argues that a seizure is effective, at the earliest, upon the date notice of seizure is sent to the importer. Pl.'s Br. at 9–10. Plaintiff further contends that where notice of seizure is sent more than thirty days after the merchandise at issue is presented to CBP for examination, the seizure does not prevent the occurrence of a deemed exclusion. *Id.* Under Plaintiff's view, because CBP first sent notice of seizure on March 8, 2021 — more than thirty days after the Merchandise had been presented for examination (on January 11, 2021) — the seizure did not become legally effective until after the deemed exclusion occurred, and thus the seizure cannot preclude the court's jurisdiction over the deemed exclusion and subsequently denied protest. *Id.* The Government contends that the court ought to give legal effect to the date of actual seizure, here February 10, 2021, and hold that because actual seizure occurred within thirty days of the Merchandise being presented for examination, no deemed exclusion occurred, and therefore the court must dismiss this action for want of subject matter jurisdiction. Def.'s Reply at 6–7. For the reasons discussed below, the court agrees with the Government and concludes that, due to the seizure on February 10, 2021, Plaintiff's Merchandise was never deemed excluded and this court does not have jurisdiction over its subsequent protest.

Supp. at 1433). In *H & H Wholesale*, the court noted that “the court sees no reason to assume that the Mod Act amendments to § 1499 were intended to deprive [CBP] of the authority to issue an express exclusion of merchandise, which might be effective if a later seizure were found defective.” 30 CIT at 693 n.5, 437 F. Supp. 2d at 1341 n.5. Although the court there did not say so, a deemed exclusion that took place prior to seizure might also be effective should the seizure later prove defective. In *Blink Design*, the court held that “it is not clear that the seizures negate the deemed exclusion.” 986 F. Supp. 2d at 1361. The court in that case went on to hold that it retained jurisdiction over deemed exclusions of merchandise later seized by CBP. *Id.* However, a contrary result is found in *PRP Trading Corp. v. United States*, where the court held that, despite the Government conceding that two of the five entries at issue in that case were deemed excluded prior to seizure, “the fact of seizure trumps the fact of deemed exclusion” where the merchandise is seized prior to the commencement of the action. 36 CIT 1354, 1357, 885 F. Supp. 2d 1312, 1314 (2012). Therefore, the court held it did not have subject matter jurisdiction under 28 U.S.C. § 1581(a). *Id.* at 1315. The court notes, but need not here resolve, this further wrinkle in the seizure-exclusion jurisdictional divide.

The applicable regulation, 19 C.F.R. § 162.31, requires that “written notice of . . . any liability to forfeiture shall be given to each party that the facts of record indicate has an interest in the . . . seized property.” The Government argues that the court has held the date of actual seizure, as stated in the notice of seizure, to be controlling in an “overwhelming number of cases.” Def.’s Reply at 7. To the contrary, the case law is mixed on this question.

One line of cases indicates that the court has previously credited the date of actual seizure as the date seizure is given legal effect. In *Tempco Marketing*, with respect to the second entry at issue in that case, the date of actual seizure fell within thirty days of the merchandise being presented for examination, and the notice of seizure was issued after the elapse of those thirty days. 21 CIT at 194, 957 F. Supp. at 1279. The court gave effect to the date of actual seizure when it held that “since the seizure occurred within thirty days of the presentation for examination, the merchandise was never deemed excluded.” *Id.* Similarly, in *PRP Trading Corp.*, CBP seized five entries of merchandise on February 7, 2012, imported at various dates in December 2011 and January 2012, and issued a notice of seizure on March 23, 2012, over six weeks later. 36 CIT at 1355, 885 F. Supp. 2d at 1313. The court found that two of the five entries had been deemed excluded “because [CBP] did not act upon them within the requisite thirty days from the date the merchandise was presented for examination,” but three were not deemed excluded because they “were seized within thirty days.” *Id.* at 1313–14. The time gap between the actual seizure and notice of seizure in *PRP Trading*, indicates that the court there used the date of actual seizure to make this determination. In *CDCOM*, the court similarly found that seizure of the merchandise at issue within thirty days of presentation for examination prevented the occurrence of a deemed exclusion. 21 CIT at 438, 963 F. Supp. at 1217. Thus, the court again gave legal effect to the date of seizure. *See id.*

However, in at least two prior cases, the court seems to credit the date notice of seizure was issued or received. First, in *CBB Grp., Inc.*, the court held that “an internal agency decision to proceed with seizure, which did not ripen into a notice to the importer” cannot affect the court’s jurisdiction. 35 CIT at 751 n.3, 783 F. Supp. 2d at 1255 n.3. A few years later, in *Blink Design*, the court explicitly rejected the notion that the date of actual seizure necessarily controls, refuting the notion that “the date of seizure asserted by [CBP] in its seizure notices marks the time at which the court considers the entries seized.” 986 F. Supp. 2d at 1356. The court found that “case law appears unsettled on whether the court should consider the date

that [CBP] issued a Notice of Seizure or the date a party received the Notice of Seizure to determine whether an entry was deemed excluded prior to seizure.” *Id.* at 1356–57. The court went on to say that it “need not resolve . . . whether the court should consider the date that Customs issued a Notice of Seizure or the date a party received the Notice of Seizure to determine whether an entry was deemed excluded prior to seizure,” because there all notices were issued more than thirty days after the date the merchandise was presented for examination. *Id.* at 1357. The court therefore held that all eight entries of merchandise at issue had been deemed excluded prior to seizure and that the court retained jurisdiction over the case. *Id.*

It is idiomatic that every case turns on its own facts. Faced with the at least seeming divergence in judicial approaches to the legal effectiveness of seizure in relation to notice, the court here concludes that, for the purposes of determining whether the court’s jurisdiction has attached to a deemed exclusion, the date of actual seizure controls. As noted above, 19 U.S.C. § 1499(c)(4) states that “[i]f otherwise provided by law, detained merchandise may be seized and forfeited.” The court concludes that the best reading of the statute regarding the interaction between section 1499(c)(4) and section 1499(c)(5) is that, when section 1499(c)(4) is invoked via a seizure of the subject merchandise within thirty days of that merchandise’s presentation for examination, the mechanism of deemed exclusion embodied in section 1499(c)(5) is inapplicable.

As has been noted, the purpose of section 1499(c)(5) is to afford the importer a remedy where CBP takes no action with respect to detained merchandise. Seizure, while not an admissibility determination, is an action by CBP and is an action over which this court has no jurisdiction. Given the court’s conclusion that seizure under section 1499(c)(4) precludes the operation of a deemed exclusion under section 1499(c)(5), it makes little practical sense to hold that seizure precludes the occurrence of a deemed exclusion only where the notice of seizure is also issued within thirty days of the subject merchandise’s presentation for examination. The case law discussed above shows that the notice of seizure is typically sent two or more weeks after the date of actual seizure. Holding that notice is the final piece to completion of a seizure would result in the occurrence of a deemed exclusion in most instances of seizure, even when the seizure and notice have occurred before the sixty days Congress indicated CBP has to take such an action. *See* H.R. Rep. No. 103–361, pt. 1, at 111–12. An importer might then bring an exclusion case before the court, with the burden of proof laid on the Government as to why it

failed to make an admissibility determination.³ However, CBP would have been precluded from making such a determination by its own previous action, seizure.

Plaintiff contends that it is “unaware of any instance in federal law where a court has recognized the legal effect of an uncommunicated seizure of goods,” and that “[n]otice is an essential requirement for giving legal effect to a seizure.” Pl.’s Post-Oral Arg. Br. at 4–5. Indeed, in accordance with the requirements of due process, issuance of a notice of seizure is required in case of seizure. *See* 19 U.S.C. § 1607(a) (“Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.”). However, the court is not here deciding the validity of CBP’s seizure of Plaintiff’s Merchandise or whether the United States will ultimately take title of the Merchandise.⁴ Rather, it is seeking to determine the nature of CBP’s action and when that action took effect for the purpose of determining whether a deemed exclusion also occurred. Because CBP seized the Merchandise within thirty days of presentation, CBP timely acted and the court has no jurisdiction over a protest based on CBP’s inaction.

In short, due to CBP’s seizure, no deemed exclusion occurred that Plaintiff could properly protest. Thus, the court concludes that it does not have jurisdiction over this dispute.⁵

CONCLUSION

For the reasons stated above, the court concludes that it lacks jurisdiction over this case because no deemed exclusion occurred. As

³ This outcome is consistent with that of *Blink Design*, in which the court stayed the case regarding deemed exclusions of goods for further resolution of the seizure case. 986 F. Supp. 2d at 1361. In both *Blink Design* and *CBB Grp.*, seizure occurred more than thirty days after presentation to CBP, no notice was issued within those thirty days, and in *CBB Grp.* no notice was issued even within sixty days. *See Blink Design*, 986 F. Supp. 2d at 1357 (showing that the dates of seizure were “uniformly more than thirty days after the date the merchandise was presented for examination”); *CBB Grp.*, 35 CIT at 748, 783 F. Supp. 2d at 1253 (explaining that CBP did not seize the goods at issue within sixty days of presentation for examination). Thus, those cases are factually distinct from the situation at bar but support a distinction between instances in which CBP acts before a deemed exclusion can occur and those in which it does not.

⁴ Because the seizure is not before the court, neither is the adequacy of the notice of that seizure. Plaintiff makes a non-frivolous argument about the lack of notice, *see* Pl.’s Br. at 15; Pl.’s Suppl. Br. at 3 (citing CBP’s regulation that a receipt be provided for goods seized), but the merits of that contention should be decided by the appropriate district court. If in fact there was such a deficiency, CBP would then be faced again with making an admissibility determination and Plaintiff could return to this court with further complaints regarding that future admissibility decision.

⁵ Root Sciences is not without a potential remedy. As the Government states, Root Sciences can seek to obtain relief from the seizure by electing to commence an action in the district court pursuant to 28 U.S.C. § 1356. Def.’s Br. at 14.

noted by the court in *CBB Grp., Inc.*, “Section 9 of the Judiciary Act of 1789 provided, inter alia, ‘[t]hat the district courts shall . . . have exclusive original cognizance of all seizures on land . . . and of all suits for penalties and forfeitures incurred, under the laws of the United States.’ Whether 28 U.S.C. § 1356 has any current utility as a jurisdictional provision is unclear.” 35 CIT at 751 n.4, 783 F. Supp. 2d at 1255 n.4 (citations omitted). While there may be reason to re-assess the statute and to lodge within the Court of International Trade jurisdiction over CBP’s seizure decisions, the court’s charge is to apply the statute as written. Re-assessment is not a matter for this court, but for Congress. Accordingly, the court grants the Government’s motion and dismisses the case.

SO ORDERED.

Dated: October 7, 2021

New York, New York

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

Slip Op. 21–137

DIAMOND SAWBLADES MANUFACTURERS’ COALITION, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard Goldberg
Court No. 18–00134

[Sustaining the U.S. Department of Commerce’s scope determination in the anti-dumping duty order covering diamond sawblades and parts thereof from the People’s Republic of China]

Dated: October 7, 2021

Daniel B. Pickard Wiley Rein LLP, of Washington D.C., for plaintiff. With him on brief were *Maureen E. Thorson* and *Stephanie M. Bell*.

John J. Tudor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant. With him on the brief were *Jeanne E. Davidson*, Director and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *Paul K. Keith*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington D.C.

OPINION

Goldberg, Senior Judge:

Before the court is the scope redetermination (“Remand Redetermination”) of the U.S. Department of Commerce (“Commerce,” or the “Department”) filed pursuant to the court’s opinion and order in *Diamond Sawblades Mfrs. Coalition v. United States*, 43 CIT __, 405

F. Supp. 3d 1345 (2019) (“*Diamond Sawblades I*”). Final Results of Remand Redetermination (Feb. 3, 2020), Rem. P.R. Doc. 15,¹ ECF No. 30 (“*Remand Redetermination*”). This litigation involves a challenge to the final scope ruling of Commerce which excludes Lyke Industrial Tools LLC (“Lyke”) cupwheels from an antidumping duty order (the “Order”) on diamond sawblades from the People’s Republic of China (“China” or “PRC”). *Diamond Sawblades and Parts Thereof From the People’s Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57,145 (Int’l Trade Admin. Nov. 4, 2009) (“Order”).

Plaintiff Diamond Sawblades Manufacturers’ Coalition (“DSMC”), an *ad hoc* coalition of producers of diamond sawblades domestic like products in the United States, once again challenges the Department’s determination that the scope of the Order excludes certain cupwheels that Lyke imports into the United States. For the reasons stated herein, the court holds that the Departments’ scope determination adheres to the applicable regulatory framework of 19 C.F.R. § 351.225² and that there is substantial evidence supporting Commerce’s conclusion that Lyke’s cupwheels are not within the scope of the Order. Therefore, Commerce’s Remand Redetermination is affirmed.

I. Background

The court assumes familiarity with the facts as discussed in the prior opinion. *Diamond Sawblades I*, 43 CIT at __, 405 F. Supp. 3d at 1349–51. Commerce issued the antidumping duty order relevant to this litigation in November 2009, pursuant to a petition filed by DSMC. *Order*, 74 Fed. Reg. at 57,145; *see also* Compl. ¶ 5 (July 10, 2018), ECF No. 9 (“Compl.”). Lyke submitted a scope ruling request to Commerce on February 23, 2018, requesting that Commerce determine whether two of its products, diamond sawblades and cupwheels, fell within the scope of the order. *Letter from Pennington, P.A. to Sec’y of Commerce, re: Lyke Industrial Tools, LLC Scope Request: Diamond Sawblades Whose Cores Have Rockwell C Hardness Less Than 25 Prior to the Incorporation of Diamond Segments and Diamond Cupwheels - Diamond Sawblades and Parts Thereof from the People’s Republic of China (A-570-900)* 2 (Feb. 23, 2018), P.R. Doc. 1 (“Lyke

¹ All citations to documents from the administrative record are to public documents. References cited as “P.R. Doc. __” are to documents on the original agency record; references cited as “Rem. P.R. Doc. __” are to documents placed on the record during the Department’s redetermination proceeding.

² All citations to the United States Code herein are to the 2012 edition, except where otherwise indicated. Citations to the Code of Federal Regulations are to the 2020 edition unless otherwise noted.

Scope Request”). Commerce determined that Lyke’s diamond sawblades are within the scope of the Order and that its cupwheels are not. Final Scope Determination for Scope Request from Lyke Industrial Tool, LLC 8–10 (May 17, 2018), P.R. Doc. 23 (“Final Scope Ruling”).

On June 11, 2018, DSMC initiated litigation contesting the Department’s determination that Lyke’s cupwheels are outside the scope of the Order. Summons (June 11, 2018), ECF No. 1; Compl. 1. On November 28, 2018, DSMC moved for judgment on the agency record. Pl.’s Rule 56.2 Mot. for J. on the Agency R. (Nov. 28, 2018), ECF No. 16. In *Diamond Sawblades I*, the court remanded the Department’s Final Scope Ruling. First, the court found that the text of the scope of the Order did not resolve the scope dispute in and of itself because the term “sawblade” was not clearly defined. *Diamond Sawblades I*, 43 CIT at __, 405 F. Supp. 3d at 1352. Second, the court stated that as the scope was susceptible to interpretation, Commerce needed to turn to sources listed in 19 C.F.R. § 351.225(k)(1), which Commerce failed to do in a way that was supported by substantial evidence because the Department’s (k)(1) analysis improperly considered criteria found under 19 C.F.R. § 351.225(k)(2). *Id.* at __, 405 F. Supp. 3d at 1353–54. Third, the court held that “[t]he sources used by Commerce in its (k)(1) analysis do not ‘definitively answer’ the question of whether Lyke’s cupwheels are excluded from the scope of the Order.” *Id.* at __, 405 F. Supp. 3d at 1358. The court ordered Commerce to conduct an analysis under 19 C.F.R. § 351.225(k)(2) to determine whether Lyke’s cupwheels are included in the scope of the Order. *Id.* at __, 405 F. Supp. 3d at 1358.

On October 15, 2019, Commerce invited both DSMC and Lyke to provide further information related to the factors listed in 19 C.F.R. § 351.225(k)(2) and parties commented and submitted rebuttal comments on October 24, 2019 and October 31, 2019. *Mem. from Minoo Hatten, Program Manager, AD/CVD Operations, Off. I to Diamond Sawblades Mfrs. Coal. and Lyke Indus. Tools, LLC* (Oct. 15, 2019), Rem. P.R. Doc. 1; *Letter from Pennington P.A. to Sec’y Commerce, re: Diamond Sawblades and Parts Thereof from the People’s Republic of China (A-570–900): Lyke’s Comments on Remand* (Oct. 24, 2019), Rem. P.R. Docs. 4–5 (“Lyke’s Comments”); *Letter from Wiley Rein LLP to Sec’y Commerce, re: Diamond Sawblades and Parts Thereof from the People’s Republic of China: Comments on (k)(2) Factors* (Oct. 24, 2019), Rem. P.R. Doc. 7 (“DSMC’s Comments”); *Letter from Pennington P.A. to Sec’y Commerce, re: Diamond Sawblades and Parts Thereof from the People’s Republic of China (A-570–900): Lyke’s Rebuttal to Pet’rs’ Remand Comments* (Oct. 31, 2019), Rem. P.R. Doc. 8 (“Lyke’s

Rebuttal Comments”); *Letter from Wiley Rein LLP to Sec’y Commerce, re: Diamond Sawblades and Parts Thereof from the People’s Republic of China: Rebuttal Comments on (k)(2) Factors* (Oct. 31, 2019), Rem. P.R. Doc. 9 (“DSMC’s Rebuttal Comments”).

On February 3, 2020, Commerce issued its Remand Redetermination, addressing the issue of whether Lyke’s cupwheels are within the scope of the Order by conducting a 19 C.F.R. § 351.225(k)(2) analysis. After considering the five additional factors set forth in 19 C.F.R. § 351.225(k)(2), Commerce determined, once again, that Lyke’s cupwheels are not within the scope of the Order. *Remand Redetermination* 59. On March 18, 2020, DSMC filed its public comments, maintaining that it was unnecessary for Commerce to proceed to an analysis under 19 C.F.R. § 351.225(k)(2) as “the scope language unambiguously covers cupwheels,” and that if the language is ambiguous, then the 19 C.F.R. § 351.225(k)(1) factors are dispositive. Pl. Diamond Sawblades Mfrs.’ Coal.’s Comments on Final Results of Redetermination Pursuant to Remand 4 (Mar. 18, 2020), ECF No. 35 (“DSMC’s Remand Comments”). DSMC also states that Commerce’s determination on remand in regards to the (k)(2) factors is flawed and “inadequately explained, unsupported by substantial evidence, are inappropriately divorced from the scope language itself, and rest on an overly narrow interpretation of certain (k)(2) factors.” *Id.* On May 8, 2020, Commerce responded to DSMC’s Remand Comments and requested that the court sustain its Remand Redetermination. Def.’s Resp. to Comments on Remand Results 18 (May 8, 2020), ECF No. 38 (“Def.’s Reply”).

The court now considers the Remand Redetermination.

II. Jurisdiction and Standard of Review

As in the prior opinion and order, the court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the court reviews actions commenced under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a.

The court sustains Commerce’s determinations unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. Nat’l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)), and under this standard, the court will uphold a determination by Commerce provided that Commerce chooses from among the range of

possible and reasonable conclusions based on the record. However, although “Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping duty order,” *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (citation omitted) “[t]his broad deference is not unlimited . . . ‘Commerce cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.’” *Id.* (quoting *Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010)).

III. Discussion

The court sustains the Department’s scope ruling. Commerce has made the determination that Lyke’s cupwheels do not fall within the scope of the Order, and this determination is supported by substantial evidence on the record. The Department correctly applied the regulatory framework of 19 C.F.R. § 351.225(k)(2) in conducting its analysis and has complied with the court’s directives in *Diamond Sawblades I*.

To determine whether a certain product is within the scope of an order, Commerce first must consider the language of the order itself. *See Arcelormittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012). If the scope language of the order does not unambiguously cover or not cover the product in question, Commerce then will take into account the descriptions of the merchandise contained in sources identified in 19 C.F.R. § 351.225(k)(1) (commonly referred to as the (k)(1) sources). *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382–83 (Fed. Cir. 2005). If the descriptions of the merchandise in the (k)(1) sources are not dispositive, Commerce is required to consider five additional factors, enumerated in 19 C.F.R. § 351.225(k)(2). These “(k)(2)” factors are: (i) the physical characteristics of the merchandise; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2). In considering these five factors, “it is well settled” that Commerce has discretion in how to weigh and balance these factors. *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1382 (Fed. Cir. 2017) (citing to *Novosteel SA v. United States*, 25 CIT 2, 15, 128 F. Supp. 2d 720, 732 (2001)) (internal quotation marks omitted). However, when Commerce conducts this inquiry and analysis according to the strictures of 19 C.F.R. § 351.225(k)(1)&(2), the Department’s inquiry still must center on the scope language of the antidumping duty order, for the Department’s role in issuing a scope ruling is to interpret, not

modify, the scope language. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002). As a practical matter, this must include consideration of the record information contained in the scope ruling request, which ordinarily will include, *inter alia*, “[a] detailed description of the product, including its technical characteristics and uses.” 19 C.F.R. § 351.225(c)(1)(i).

In *Diamond Sawblades I*, the court held that the text of the scope of the Order did not resolve the scope dispute in and of itself because the term “sawblade” was not clearly defined and the scope was susceptible to interpretation.³ *Diamond Sawblades I*, 43 CIT at __, 405 F. Supp. 3d at 1352. Thus, Commerce needed to take the “descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the [International Trade] Commission” into account. 19 C.F.R. § 351.225(k)(1). As the court determined the (k)(1) sources were not dispositive in *Diamond Sawblades I*, 43 CIT at __, 405 F. Supp. 3d at 1358, Commerce was required to turn to the (k)(2) factors as well in making its determination.

Upon analyzing the (k)(2) factors, Commerce determined that four of the five factors supported the determination that Lyke’s cupwheels are not covered by the scope of the Order on diamond sawblades from China, and that the last factor, the channels of trade in which the

³ The Order includes within its Scope:

[A]ll finished circular sawblades, whether slotted or not, with a working part that is comprised of a diamond segment or segments, and parts thereof, regardless of specification or size, except as specifically excluded below. Within the scope of these orders are semifinished diamond sawblades, including diamond sawblade cores and diamond sawblade segments. Diamond sawblade cores are circular steel plates, whether or not attached to non-steel plates, with slots. Diamond sawblade cores are manufactured principally, but not exclusively, from alloy steel. A diamond sawblade segment consists of a mixture of diamonds (whether natural or synthetic, and regardless of the quantity of diamonds) and metal powders (including, but not limited to, iron, cobalt, nickel, tungsten carbide) that are formed together into a solid shape (from generally, but not limited to, a heating and pressing process).

Diamond Sawblades and Parts Thereof From the People’s Republic of China and the Republic of Korea, 74 Fed. Reg. 57,145, 57,145 (Int’l Trade Admin. Nov. 4, 2009) (“Order”).

The Order also contains several exclusions to this scope language:

Sawblades with diamonds directly attached to the core with a resin or electroplated bond, which thereby do not contain a diamond segment, are not included within the scope of the order. Diamond sawblades and/or sawblade cores with a thickness of less than 0.025 inches, or with a thickness greater than 1.1 inches, are excluded from the scope of the order. Circular steel plates that have a cutting edge of non-diamond material, such as external teeth that protrude from the outer diameter of the plate, whether or not finished, are excluded from the scope of the order. Diamond sawblade cores with a Rockwell C hardness of less than 25 are excluded from the scope of the order. Diamond sawblades and/or diamond segment(s) with diamonds that predominantly have a mesh size number greater than 240 (such as 250 or 260) are excluded from the scope of the order.

Id. The Order does not define the term “sawblade.”

product is sold, is not dispositive to the analysis. *Remand Redetermination* 59. In response, DSMC asserts that Commerce erred in its analysis and its decision must be overturned. DSMC's Remand Comments 4. Therefore, the court now addresses Commerce's analysis of each of these factors in its Remand Redetermination to determine whether the Department's conclusions are reasonable and supported by substantial evidence on the record.

A. Physical Characteristics of the Product

The first of the (k)(2) factors instructs Commerce to review the physical characteristics of the product to determine whether the product, in this case cupwheels, have the same physical characteristics as the product subject to the Order. 19 C.F.R. § 351.225(k)(2)(i). After looking at the physical characteristics of the cupwheels, Commerce determined that “cupwheels are physically distinguishable from diamond sawblades.” *Remand Redetermination* 18. In concluding this, Commerce relied on the finding that a diamond sawblade must have an “attacking” or “cutting” edge to be considered subject to the Order. *Id.* at 19. “[D]iamond segments must be attached to the outer periphery of the core (creating an ‘attacking edge,’ or ‘cutting edge’) to be within the scope of the [] Order.” *Id.* These “attacking” or “cutting” edges can be one of several types, as detailed in Commerce's questionnaires: “(‘Standard segment with undercut,’ ‘Standard segment without undercut,’ ‘Turbo,’ ‘Continuous,’ ‘Other (please describe),’ or ‘Not applicable (cores)’).”⁴ *Id.* at 20. Commerce found that while diamond sawblades have a “cutting” edge or an “attacking” edge of one of the varieties listed in the questionnaire, cupwheels, due to the fact the diamonds are attached to the bottom of the cup, do not. *Id.* at 18–19. Commerce also found that in regards to the “Other (please describe)” category, “there is no evidence that this option was intended to encompass cupwheels, which are designed to grind flat surfaces and therefore do not have a ‘cutting edge’ to identify.” *Id.* at 38.

The Department's finding that Lyke's cupwheels have diamonds attached to the bottom of the cup and therefore do not have an “cutting” edge is supported by the record evidence. Lyke described its cupwheels, in its scope ruling request, as consisting of a “steel plate

⁴ Commerce also clarified that the “Not applicable (cores)” designation identified in Commerce's antidumping duty questionnaire corresponds to the “Parts Thereof” of the scope of the *Diamond Sawblades Order*, and therefore refers to an unfinished diamond sawblade. Final Results of Remand Redetermination (Feb. 3, 2020), Rem. P.R. Doc. 15, ECF No. 30 (“*Remand Redetermination*”). Neither DSMC nor Lyke argue that Lyke's cupwheels are unfinished products.

that takes the shape of a cup or a hat – the center of the plate is concave and the outside is flat. Diamond segments are installed on the flat surface of the plate.” Lyke’s Scope Request 3; *Remand Redetermination* 5.

DSMC does not disagree that Lyke’s cupwheels have diamonds attached to the bottom of the cup as opposed to an edge but questions the relevance of this physical difference. DSMC’s Rebuttal Comments 11–12. Although Commerce determined that “diamond segments must be attached to the outer periphery of the core (creating an “attacking edge,” or “cutting edge”) to be within the scope of the [] *Order*,” *Remand Redetermination* 19, DSMC argues that this insistence on a diamond sawblade having an “attacking” edge to be within scope of the Order is a requirement engendered by Commerce, and not found in the language of the Order itself, DSMC’s Rebuttal Comments 9–12. DSMC therefore disagrees with Commerce’s assertion that for a product to be a diamond sawblade, it needs to have a “cutting” or “attacking” edge. “In finding that cupwheels are so physically different from subject goods as to constitute non-subject merchandise, Commerce begins from an unsound premise: that subject goods are distinguished by having a ‘cutting’ or ‘attacking’ edge that results from the placement of diamond segments on the outer periphery of the products.” *Id.* at 9.

Commerce directly addresses DSMC’s argument: “Addressing DSMC’s argument that the scope of the *Order* is indifferent to the location of segment placement, Commerce explained that statements from DSMC and the ITC throughout the investigation indicate that a product that does not have an attacking edge that penetrates the material is not subject merchandise.” Def.’s Reply 9–10; *see also Remand Redetermination* 39 (citing *Order*, 74 Fed. Reg. at 57,146 n.9; *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 Fed. Reg. 29,303, 29,305 (Dep’t of Commerce May 22, 2006) (final determ.); *Diamond Products and Parts Thereof from China and Korea: Investigation Nos. 731-TA-1092 and 1093 (Final)* 3, USITC Publication 3862 (July 2006) (“ITC Report”). As further support for this conclusion, Commerce cites language from the Order itself, examining the Order’s exclusions, which include “[c]ircular steel plates that have a cutting edge of non-diamond material, such as external teeth that protrude from the outer diameter of the plate, whether or not finished.” *Order*, 74 Fed. Reg. at 57,145; Def.’s Reply 10; *Remand Redetermination* 39. As Commerce notes, this scope exclusion language lends support to Commerce’s reading in two ways:

First, it supports Commerce's reading that the product must have a "cutting edge" to be considered a sawblade. If the scope was intended to cover merchandise without a cutting edge, the exclusionary language might have instead addressed circular steel plates with a "cutting element" or "working part" of non-diamond material. Second, it supports Commerce's interpretation that a cutting edge is formed by a cutting element on the outer diameter of the core, rather than on the flat surface. Therefore, this language supports Commerce's conclusion that, because Lyke's cupwheels do not have diamond segments attached to the outer diameter of the cores, they do not have a cutting edge and are physically distinguishable from diamond sawblades.

Def.'s Reply 10. Besides relying on the scope language itself, Commerce explains that the initial questionnaires it sent respondents also support the finding that a product must have a "cutting" edge to be within the scope of the Order. Commerce had requested that respondents identify the type of "cutting edge" their merchandise had "for model matching purposes" and "Lyke's cupwheels do not have a cutting edge at all because the diamond segments in cupwheels are attached to the bottom of the cup, not the rim." *Id.* at 9; *see also Remand Redetermination 19.*

Commerce also concluded that there were other physical differences between cupwheels and diamond sawblades. *Remand Redetermination 20.* "For example, we find that with respect to physical form, Commerce's questionnaire provides participating respondents three options to identify the type of physical form of their merchandise, 'finished diamond sawblades,' 'cores,' or 'segment.' Lyke's cupwheels do not have any of the physical forms listed in Commerce's questionnaire." *Id.* at 20.

DSMC disagrees with Commerce's determination that cupwheels are physically distinguishable from diamond sawblades. DSMC's Remand Comments 8–12. DSMC highlights that diamond sawblades are "physically distinguished from all other types of sawblades by the presence of diamonds in the working part of the blade," which work, not by cutting materials, but by "milling" or "grinding" them. DSMC's Rebuttal Comments 5. According to DSMC, as cupwheels have diamonds on the working part of the blade and they also "cut" through materials by grinding them, they meet the description provided in the Petition of subject merchandise. *Id.*; *see also Remand Redetermination 6.* Furthermore, DSMC argues that there are additional physical similarities, such as "[b]oth diamond sawblades and cupwheels consist of a circular steel core and diamond segments that are attached

to the core” and “[b]oth diamond sawblades and cup wheels also have a hole in the center of the core to allow them to be attached to a grinding tool.” DSMC Rebuttal Comments 4–5. DSMC asserts further that, similarly, the cores for cupwheels are typically convex or concave, and therefore there are no differences in the diamond segments used for diamond sawblades and cupwheels. *Id.* at 5; *Remand Redetermination* 7.

Commerce acknowledges these arguments from DSMC but indicates that it does not find them persuasive as these comparisons between cupwheels and diamond sawblades are “overly generalized.” *Remand Redetermination* 20. For instance, under DSMC’s analysis of physical characteristic similarities, a diamond core drill also would be covered by the Order because it consists of a core and diamond segments and has a hole in the center of the core for attaching the core drill bit to a grinding tool, despite the fact that Commerce and the ITC already determined that diamond core drill bits were non-subject merchandise. *Id.* at 21.

Taken altogether, Commerce emphasizes that the location of the diamonds on the product is strongly determinative of whether that product is within the scope of the Order, and that cupwheels and diamond sawblades were physically distinguishable largely based on this difference. *Id.* at 21. Commerce’s decision to rely on the location of the diamonds within the product, and the Department’s finding that to constitute a diamond sawblade within the scope of the Order the product must have an “attacking” or “cutting” edge is not unreasonable, despite plaintiff’s protestations to the contrary. This finding is supported by the record read as a whole, including Commerce’s questionnaires, the language in the Petition, the investigation, the ITC report, and the scope language of the Order. *Id.* at 35–40.

Contrary to what DSMC argues (“[i]ndeed, the Court already found, in the decision remanding this action, that the (k)(1) materials do not support Commerce’s conclusion that cupwheels are out-of-scope products by reason of edge type or segment placement”), DSMC’s Remand Comments 12, the court did not instruct Commerce that the (k)(1) materials did not support Commerce’s conclusions regarding what constitutes a diamond sawblade. Instead, the court found that the (k)(1) analysis, without additional evidence coming from the (k)(2) factors, was not sufficient to uphold the Department’s determination. “Commerce has failed to demonstrate that Lyke’s cupwheels are not within the scope of the order based *solely* on the three sources available under 19 C.F.R. § 351.225(k)(1).” *Diamond Sawblades I*, 43 CIT at ___, 405 F. Supp. 3d at 1353. The court did not instruct Commerce

to ignore the record as a whole or discount evidence in the language of the Order itself or from (k)(1) sources when doing its (k)(2) analysis.

B. Expectations of the Ultimate Purchaser and the Manner in Which the Product is Advertised and Displayed

Commerce analyzes the second and fifth (k)(2) factors, the “expectations of the ultimate purchasers” and “the manner in which the product is advertised and displayed” in tandem. *See* 19 C.F.R. § 351.225(k)(2)(ii), (v). Commerce determined that the record regarding these factors supports a finding that cupwheels and diamond sawblades are advertised and displayed differently, and that the expectations of the ultimate purchaser differ with each product. *Remand Redetermination* 21–25, 46–54.

Commerce reviewed evidence put on the record both by Lyke and by DSMC regarding the expectations of the ultimate purchaser. Commerce analyzed consumer reviews posted to websites, website advertisements and product descriptions, and an affidavit provided by DSMC. *Id.* at 48–53. Commerce compared the reviews posted by consumers who purchased diamond sawblades with reviews posted by consumers who purchased grinding cupwheels and concluded that the consumers have different expectations of each product. *Id.* at 49–50. For instance, Commerce found that the websites and advertisements showed that diamond sawblades are advertised as cutting through hard material and that cupwheels are advertised as tools designed to grind, level or smooth surfaces of hard material. The expectations of the ultimate purchaser similarly differ. “Commerce also observed that the ‘related searches,’ ‘customers also viewed,’ and ‘related items’ features of these websites supported finding that diamond sawblades and cupwheels are distinct products.” Def.’s Reply 14; *Remand Redetermination* 10. In fact, “[n]one of the advertisements placed on the record by parties identify ‘grinding cupwheels’ as a diamond sawblade.” *Remand Redetermination* 50–51. Based on evidence such as this, Commerce permissibly found that the expectation of the end purchaser was different for each product. *Id.* at 23–24.

DSMC’s central argument is that, “in reaching this determination, Commerce has gone beyond its proper role of interpreting the current scope language, and has strayed into the realm of amendment.” DSMC’s Remand Comments 12. DSMC argues that Commerce is making an irrelevant distinction between grinding or polishing material as opposed to cutting it, as the scope language of the Order “does not define subject goods based on spin direction and location of segment placement (or whether these result in a ‘cutting’ or ‘grinding’

action).” *Id.* at 14–15. Additionally, DSMC argues that diamond sawblades and cupwheels are both advertised as being used for cutting, creating that consumer expectation. DSMC’s Comments 5–7, DSMC’s Rebuttal Comments 6–7; DSMC’s Remand Comments 12–13. According to DSMC, both diamond sawblades and cupwheels are expected to grind or abrade material by way of contact between the diamond segments and the material at issue, and that purchasers expect that the diamond sawblades and cupwheels both will be able to maintain its strength during the grinding and abrading process. DSMC’s Rebuttal Comments 5.

Commerce addresses DSMC’s evidence, noting that DSMC put on the record a printout of a website (U.S. Diamond) where it describes diamond sawblades and its uses. *Remand Redetermination* 22–23; DSMC’s Comments Ex. 2. The website excerpt reads: “Are you looking to *cut* block? If so, you’ll want a diamond blade. . . . Diamond saw blades have diamonds *fixed on their edges* which allow for *cutting* hard or abrasive materials. There are many types of diamond blades, and they have many uses, including cutting stone, concrete, asphalt, bricks and many others.” DSMC’s Comments Ex. 2 (emphasis added). The same website states that cup grinding wheels are used for “*grinding and polishing*.” *Id.* (emphasis added). Lastly, the website also lists diamond sawblades and cupwheels separately in its search function, which Commerce took as support for the finding that they are considered distinct, non-fungible products. *Remand Redetermination* 23.

DSMC argues that the Home Depot website describes cupwheels as being used for “cutting,” an argument that Commerce found took the word “cutting” out of context. For instance, Home Depot’s website stated that “the 4-inch Double Row Diamond Cup Wheel” is engineered “for maximum cutting performance,” which DSMC argues supports the determination that the ultimate purchaser’s expectation of cupwheels is to cut into materials. DSMC’s Rebuttal Comments 6, Ex. 2; *Remand Redetermination* 11. However, Commerce, in reviewing the full description of the product in the Home Depot website, noted that the description of the cupwheel includes additional language, such as the cupwheels are “engineered with top-grade industrial diamond for maximum cutting performance and superior grinding life” and that the cupwheels could be used for a range of projects including “shaping and polishing [] concrete surfaces and floors, to fast aggressive concrete grinding or leveling and coating removal.” *Remand Redetermination* 23. The description also noted that the cupwheels have “faster grinding and longer life than standard abrasive grinding wheels,” indicating that this particular cupwheel was

being advertised as superior to other “abrasive grinding wheels,” and not being advertised in relation to its ability to function as a diamond sawblade. *Id.* at 24. Taken all together, Commerce made the reasonable finding that the word “cutting” in the context of the advertisement meant that the cupwheels were being advertised as designed to cut materials in a parallel fashion, grinding or polishing the surface of a material, rather than cutting into a material in a perpendicular fashion as one would expect from a diamond sawblade. *Remand Redetermination* 24.

Lastly, Commerce considers the affidavit submitted by DSMC from an official at a company that manufactures and sells diamond sawblades and cupwheels which claims that “all diamond sawblades and cup wheels are expected to grind or abrade materials by pressing the diamond segments against said materials.” DSMC’s Comments Ex. 1. Commerce discounts this affidavit in light of the other evidence on the record, *Remand Redetermination* 22–23, stating that Commerce “considered this second-hand explanation of the expectations of customers to be less compelling evidence of consumer expectations than the direct reviews posted from consumers themselves,” Def.’s Reply 14.

Commerce ultimately found that the consumer reviews from websites like Home Depot and Lowes, as well as the advertisement printouts from the same, supported Commerce’s finding that the expectations of the ultimate purchasers are different for cupwheels and diamond sawblades, and that the manner in which these products are advertised and displayed also differ by the type of product. *Remand Redetermination* 24–25. “That is, based on the consumer reviews and the advertisements of both diamond sawblades and cupwheels, we find that consumers would, for example, purchase a diamond sawblade if they expected to use the tool to cut a block of concrete from a driveway (diamond sawblades ‘allow for cutting hard or abrasive materials’), and they would purchase a cupwheel if they expected to “grind and polish hard or abrasive materials.” *Id.* at 25.

Because Commerce reviewed the record evidence, acknowledged and addressed both DSMC’s and Lyke’s comments, and came to a conclusion supported by the record, it was not unreasonable for Commerce to conclude that diamond sawblades and cupwheels are advertised differently and that ultimate purchasers have different expectations for each product.

C. Ultimate Use of the Product

With respect to the ultimate use of the product, 19 C.F.R. § 351.225(k)(2)(iii), Commerce found that diamond sawblades were used for cutting hard materials while cupwheels were used for grinding, leveling, or polishing hard materials. *Remand Redetermination* 25. In coming to the conclusion that the products were ultimately used differently, Commerce partly relied on the U.S. Diamond website placed onto the record by DSMC, which indicated that diamond sawblades were used to cut block, while another source provided by DSMC, a printout from Wikipedia describing cupwheels, noted that they were used for grinding concrete and stone or could be used to remove paints or other surface coatings. *Id.* at 26. Commerce also reviewed the end use description used by the ITC stating that diamond sawblades end use was to cut concrete, stone, and other hard materials. *Diamond Sawblades and Parts Thereof from China and Korea, Prehearing Report to the Commission on Investigation Nos. 731-TA-1092-1093 (Final)* (May 2, 2006). Therefore Commerce found that “based on the information on the scope record, the ITC’s description of the end use of the products, and Commerce’s experience in conducting numerous administrative reviews in this proceeding, we find that the ultimate use of Lyke’s cupwheel is not the same as the ultimate use of diamond sawblades.” *Remand Redetermination* 27.

DSMC argues that diamond sawblades “do not actually cut materials, rather, diamond sawblades mill (i.e., grind) them.” DSMC’s Rebuttal Comments 5; *see also* DSMC’s Remand Comments 19–22. According to DSMC, this is also how cupwheels are used, and that to the extent diamond sawblades are used for cutting, so too are cupwheels. DSMC’s Rebuttal Comments 8. “[B]oth diamond sawblades and cupwheels are generally used to grind or abrade materials (i.e., cut) through contacting the diamond segments with the material at issue. Thus, according to DSMC, the ultimate use of diamond sawblades and cupwheels is the same.” *Remand Redetermination* 14 (footnote omitted). Commerce agrees with DSMC that both diamond sawblades and cupwheels, by virtue of their diamonds, do not, in a technical sense, cut materials but instead grind them, but that “the manner in which diamond sawblades cut hard or abrasive materials is by grinding the material in a perpendicular manner at one specific point of the hard or abrasive material, such as how you would use a general purpose saw blade or typical saw. However, based on the information provided on the record, the ultimate use of a grinding cupwheel is to grind the material in a parallel manner similar to what one would expect from a sandpaper power tool.” *Remand Redetermination* 25. Thus, despite both tools working by “grinding” the hard

material, one “cuts” into the material perpendicularly, and the other “polishes” the hard material in parallel. This interpretation is supported by the U.S. Diamond website and the Wikipedia pages put on the record by DSMC. As Commerce’s conclusion is supported by the evidence on the record and it is reasonable to determine that cupwheels are used to polish material while diamond sawblades are used to cut into material, the court finds that Commerce appropriately analyzed this factor to find that cupwheels were ultimately used differently than cupwheels.

D. Channels of Trade in Which the Product is Sold

Commerce agrees with DSMC that both diamond sawblades and cupwheels are sold within similar channels of trade. *See* 19 C.F.R. § 351.225(k)(2)(iv); *Remand Redetermination* 27, 59. Commerce notes that the record evidence shows that both products are sold to distributors (retail outlets such as Home Depot and Lowes) and to end-users. Thus, this (k)(2) factor, unlike the other four, supports a finding that diamond sawblades and cupwheels should both be products within the scope of the Order. However, Commerce permissibly found that the other four factors weighed in favor of finding that Lyke’s cupwheels are not covered by the scope of the Order. Commerce concluded that “[a]lthough we find that the channels of trade are relatively the same for both products, we find that it is not indicative or dispositive that they are subject to the [] *Order* for the reasons outlined above.” *Remand Redetermination* 28. This was appropriate, as it is well settled that Commerce has discretion in how to weigh and balance (k)(2) factors, *Meridian*, 851 F.3d at 1382, and the court finds that it is not unreasonable of Commerce in this case to allocate more weight to four (k)(2) factors than to the one.

IV. Conclusion

As directed to in *Diamond Sawblades I*, Commerce undertook further evaluation of whether cupwheels are within the scope of the antidumping duty order on diamond sawblades from China, pursuant to the factors set forth in 19 C.F.R. § 351.225(k)(2). The Department’s decision that Lyke’s cupwheels are not within the scope of the Order is supported by substantial evidence, is a reasonable interpretation based on the evidence entered in this record, and was determined in accordance with law. In reviewing Commerce’s analysis under 19 C.F.R. § 351.225(k)(2), the court will not “substitute [its] judgment for that of Commerce,” *see Inland Steel Indus., Inc. v. United States*, 188 F.3d 1349, 1359 (Fed. Cir. 1999), but instead will uphold Commerce’s determination provided it chooses from among the range of possible

reasonable conclusions based on the record. *See SKF*, 537 F.3d at 1378. Here, Commerce has done so. Accordingly, the court sustains the Department’s determinations in full.

Judgment will enter accordingly.

Dated: October 7, 2021
New York, New York

/s/ Richard W. Goldberg

RICHARD W. GOLDBERG
SENIOR JUDGE



Slip Op. 21–138

POKARNA ENGINEERED STONE LIMITED, Plaintiff, and M S INTERNATIONAL, INC., Consolidated Plaintiff, v. UNITED STATES, Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 20–00127

[Commerce’s *Final Determination* sustained.]

Dated: October 7, 2021

Jonathan T. Stoel, Jared R. Wessel, and Nicholas R. Sparks, Hogan Lovells US LLP, of Washington, D.C., for Consolidated Plaintiff M S International, Inc.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel were *Vania Wang* and *W. Mitch Purdy*, Attorneys, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

Luke A. Meisner and *Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenor Cambria Company LLC.

OPINION

Gordon, Judge:

This action involves a challenge to the final affirmative determination by the U.S. Department of Commerce (“Commerce”) in the anti-dumping duty (“AD”) investigation of certain quartz surface products (“QSPs”) from India. *See Certain Quartz Surface Products from India*, 85 Fed. Reg. 25,391 (Dep’t of Commerce May 1, 2020) (final affirm. determ.) (“*Final Determination*”), and the accompanying Issues & Decision Memorandum, A-533–889 (Dep’t of Commerce Apr. 27, 2020), <https://enforcement.trade.gov/frn/summary/india/2020–09407–1.pdf> (last visited this date) (“*Decision Memorandum*”). Before the court is the motion for judgment on the agency record of consolidated Plaintiff M S International, Inc. (“MSI”). *See* Pl. MSI’s R. 56.2

Mot. for J. on the Agency R., ECF No. 39 (“MSI Br.”); *see also* Def.’s Resp. in Opp’n to Pls.’ R. 56.2 Mot. for J. on the Agency R., ECF No. 45 (“Def.’s Resp.”); Def-Intervenor’s Resp. in Opp’n to R. 56.2 Mot. for J. on the Agency R., ECF No. 47 (“Def-Int.’s Resp.”); MSI’s Reply Brief, ECF No. 54 (“MSI Reply”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018)¹, and 28 U.S.C. § 1581(c) (2018). To facilitate the efficient disposition of this action, this opinion focuses only on the industry support challenge raised by MSI. *See* Scheduling Order, ECF No. 33 (bifurcating briefing in this matter).² For the reasons set forth below, the court sustains the *Final Determination* with respect to Commerce’s industry support determination.

I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2021). Therefore, when addressing a substantial evi-

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

² Commerce’s underlying industry support determination in this matter was also the basis for the agency’s decision to initiate a countervailing duty (“CVD”) investigation as to QSPs from India, as well as both AD and CVD investigations into QSPs from the Republic of Turkey. *See* MSI Br. at 3. The court has stayed consideration of MSI’s substantively similar challenges to Commerce’s final determinations in these other proceedings until 30 days after the issuance of a final decision in this matter. *See* Order in Court No. 20–00137 (Dec. 23, 2020), ECF No. 27 (Turkey AD Challenge); Order in Court No. 20–00138 (Dec. 23, 2020), ECF 27 (India CVD Challenge); Order in Court No. 20–00139 (Dec. 23, 2020), ECF No. 28 (Turkey CVD Challenge).

dence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2021).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the anti-dumping 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.”).

II. Background

Once Commerce receives a petition, it has 20 days to initiate an investigation. 19 U.S.C. § 1673a(c)(1)(A). In determining whether to commence an investigation, the agency must:

- (i) after examining, on the basis of sources readily available to the administering authority, the accuracy and adequacy of the evidence provided in the petition, determine whether the petition alleges the elements necessary for the imposition of a duty under [19 U.S.C. § 1673] and contains information reasonably available to the petitioner supporting the allegations, and (ii) determine if the petition has been filed by or on behalf of the industry.

Id. As part of that process, Commerce must determine if the petition has the support of the domestic industry. Commerce makes that calculus in one of two ways. Commerce is required first to look at the evidence contained within the petition itself, and determine whether:

- (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A). When the petition is unable to demonstrate support on its face, Commerce must then poll the relevant industry or rely on other information to determine whether support exists. See 19 U.S.C. § 1673a(c)(4)(D).

In May 2019, Commerce received a petition from Cambria Company LLC (“Cambria”), a domestic producer of QSPs, to impose anti-dumping duties on certain QSPs from India. Petition from Schagrin

Associates to Sec’y of Commerce, PR 1–5, CR 1–5 (“Petition”).³ MSI challenged Cambria’s standing to bring the petition for lack of industry support, arguing that domestic fabricators of QSPs are “producers” for industry support purposes and that several fabricators opposed initiation. *See* Letter from Hogan Lovells US LLP to Sec’y of Commerce Pertaining to MSI Comments on Lack of Standing at pts. 1–2, PR 39–40 (“MSI Standing Comments”). Despite MSI’s challenge, Commerce initiated an antidumping investigation into the subject merchandise. *See* Initiation Checklist, PR 46, CR 34, ECF No. 30–7. In deciding to initiate, Commerce did not include fabricators as domestic producers for the purpose of determining industry support. *Id.* at Attach. II, pp. 9–16.

Later in the investigation, MSI renewed its objection to the exclusion of fabricators from Commerce’s industry support analysis. *See Decision Memorandum* at 36. Commerce declined to revise its affirmative industry support determination, explaining that 19 U.S.C. § 1673a(c)(4)(E) did not permit reconsideration of the industry support determination after initiation of an investigation. *Id.* at 37 (“Commerce is statutorily precluded from reconsidering its industry support determination at this stage of the investigation.”); *see also* 19 U.S.C. § 1673a(c)(4)(E) (“After the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered.”).

III. Discussion

A. Commerce’s Interpretation of the Statutory Term “Producers”

MSI challenges Commerce’s interpretation of the term “producers” in determining whether industry support exists to justify the initiation of an antidumping investigation. MSI Br. at 3–19. MSI contends that the plain meaning of “producers” includes the totality of an industry, which in its view includes fabricators. *Id.* at 5–11. The Government maintains that the statute is silent as to the meaning of “producers,” and that Commerce is entitled to deference for its reasonable interpretation of the term under *Chevron* step two. Def.’s Resp. at 9–13. Accordingly, the question before the court is whether “producers” is defined broadly so as to include fabricators for the purposes of Commerce’s industry support analysis under § 1673a(c)(4).

³ “PR” refers to a document contained in the public administrative record. *See* ECF No. 31–2. “CR” refers to a document contained in the confidential administrative record. *See* ECF No. 31–3.

MSI maintains that the plain language of the statute (in conjunction with a contextual analysis of the relevant statutory provisions and the attendant legislative history) conveys a clear Congressional intent as to the meaning of “producers”—namely that fabricators are producers. *See* MSI Br. at 7–16. MSI therefore contends that Commerce’s narrow interpretation is unlawful under *Chevron* step one, and that remand is required for Commerce to redo its industry support analysis. *Id.*

As described above, § 1673a(c)(4) sets forth how Commerce is to determine whether a petition to initiate an antidumping investigation was filed “by or on behalf of the industry.” 19 U.S.C. § 1673a(c)(4). MSI contends that the “unambiguously expressed intent” of Congress was for Commerce to include all producers of the domestic like product in its industry determination, not “a subset of producers hand-picked by a petitioner.” MSI Br. at 10 (citing S. Rep. No. 103–412 (1994), joint report of several Senate Committees on Uruguay Round Agreements Act); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1 (1994), reprinted in 1994 U.S.C.C.A.N. 4040. The joint Senate Report notes that the industry support test is satisfied “if the authorities determine that domestic producers accounting for more than 25 percent of total domestic production of the like product expressly support the petition.” *See* MSI Br. at 10 (quoting S. Rep. No. 103–412 at 35 with added emphasis).

MSI’s central argument is that “‘industry’ means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the like product.” *See id.* at 11 (citing 19 U.S.C. § 1677(4)(A)). MSI contends that, taken together, the statute and joint Senate Report clearly demonstrate that Congress intended Commerce consider *all* producers of the domestic like product when calculating industry support. *Id.* at 10–11.

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) and this Court have rejected MSI’s argument on this issue. *See Eurodif S.A. v. United States*, 411 F.3d 1355, 1360 (Fed. Cir. 2005) (“*Eurodif*”); *USEC Inc. v. United States*, 27 CIT 489, 507–09, 259 F. Supp. 2d 1310, 1327 (2003) (“*USEC I*”); and *USEC Inc. v. United States*, 27 CIT 1419, 1431–33, 281 F. Supp. 2d 1334, 1345–46 (2003) (“*USEC II*”). In *Eurodif*, the Federal Circuit similarly addressed the breadth of the term “producers” in Commerce’s industry support analysis. *Eurodif*, 411 F.3d at 1360–61. In affirming the trial court, the Federal Circuit determined that, under *Chevron* step two, “Commerce’s interpretation of the word ‘producer’ was reasonable and,

thus, in accordance with law.” *Id.*, 411 F.3d at 1360. The Federal Circuit observed that Commerce’s determination to qualify as a “producer” for industry support analysis purposes, “an entity must have a ‘stake’ in the domestic industry in question” was reasonable. *Id.* (noting that “Commerce then defined having a ‘stake’ as undertaking the ‘actual production of the domestic like product’ within the United States.”); see also *USEC I & USEC II* (underlying decisions containing reasoning affirmed in *Eurodif*).

MSI’s efforts to distinguish this action from *Eurodif* are misplaced. It is unable to demonstrate why the Federal Circuit’s legal analysis of Commerce’s interpretation of the term “producers” does not have equal application here. It is evident to the court that the term “producers” is not defined in § 1673a(c)(4). Without a definition, there is no clear statutory answer as to whether “producers” is broadly defined so as to include QSP fabricators for purposes of Commerce’s industry support analysis.

MSI next contends that the statutory scheme provides only two methods for excluding the opinions of “producers.” MSI Br. at 11–16. Under 19 U.S.C. § 1673a(c)(4)(B), Commerce shall disregard producers that are “related to foreign producers” unless their interests “would be adversely affected by the imposition of antidumping duties.” 19 U.S.C. § 1673a(c)(4)(B)(i). Alternatively, Commerce may disregard domestic producers of the domestic like product that also are importers of the subject merchandise. 19 U.S.C. § 1673a(c)(4)(B)(ii). MSI argues that Commerce acted unlawfully by refusing to consider the position of domestic QSP fabricators without first finding that either of these statutory provisions applied. MSI Br. at 12. MSI maintains that, in light of the *expressio unius exclusion alterius* canon, Congress would have provided for alternative methods of excluding the opinion of domestic producers if it intended to do so. *Id.* MSI, however, misses a step: 19 U.S.C. § 1673a(c)(4)(B) applies to those parties considered “producers” of the domestic like product and prescribes limited circumstances for exclusion of their opinions. The statute does not address if or how Commerce should consider the opinions of parties that Commerce finds are not “producers” of the relevant domestic like product. MSI’s reliance on § 1673a(c)(4)(B) is therefore misplaced.

MSI also argues that Commerce was required to poll the industry prior to initiating the investigation as mandated by the “applicable statutory and regulatory requirements.” MSI Br. at 4. MSI’s argument appears to be that Commerce violated 19 U.S.C. § 1673a(c)(4)(D) when it initiated the underlying investigation without polling the industry. Section 1673a(c)(4)(D) directs Commerce to poll

or sample the industry⁴ “if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product.” 19 U.S.C. § 1673a(c)(4)(D). Where Commerce determines that a petition has met the industry support threshold, no such polling is required. *See id.* Because Commerce found the requisite industry support within the petition, it was not required to poll the industry to confirm support. *See Decision Memorandum* at 37 (“As stated in the Initiation Checklist, for India, the information contained in the petition met the requirements of sections 732(c)(4)(A)(i) and (ii) of the Act. Therefore, it was unnecessary for Commerce to poll the industry or rely on other information to determine industry support for the India Petitions.”). MSI fails to identify any legal authority that would require Commerce to poll the industry upon request, despite a finding of sufficient industry support. Accordingly, Plaintiff’s *Chevron* step one arguments fail.

The court therefore will consider whether Commerce’s interpretation of the term “producers” is “based on a permissible construction” (*Chevron* step two) of 19 U.S.C. § 1673a(c). *See Chevron*, 467 U.S. at 843.

To guide its interpretation of “producers” for purposes of its industry support analysis, Commerce employed the “sufficient production-related activities test.”⁵ Defendant maintains that Commerce’s interpretation of the statute was reasonable, explaining that “the statute neither defines the term ‘producer’ nor instructs Commerce on how to determine who qualifies, [and] Commerce has filled the statutory gap by analyzing the extent of entities’ production-related activities.” Def.’s Resp. at 11. Defendant emphasizes that “Congress intended that the standing requirement [for industry support determinations] ‘provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.’” Def.’s Resp. at 14 (quoting S. Rep. No. 96–249, at 47 (1979)). The court agrees. Commerce may reasonably interpret “producers” in the industry support provision to mean entities that have a “stake” in the industry. *See Eurodif*, 411 F.3d at 1361. Plaintiff fails to point to any basis on which the court could conclude that Commerce’s interpretation of who constitutes a producer is unreason-

⁴ The statute also permits Commerce to “rely on other information” to determine that industry support exists in such circumstances. *See* 19 U.S.C. § 1673a(c)(4)(D)(i).

⁵ As Commerce explained, the “sufficient production-related activities” test focuses on six “factors typically examined by Commerce and the ITC to determine whether an entity has sufficient production-related activities to qualify as a domestic producer, including capital investment, training and technical expertise, value added, employment levels, input sourcing, and other production activities.” *See* Initiation Checklist at Attach. II, p. 10.

able. Accordingly, the court sustains Commerce's use of the "sufficient production-related activities" test as a reasonable interpretation of the term "producers" in § 1673a(c)(4).

B. Substantial Evidence Challenges to Commerce's Industry Support Determination

1. Commerce's Decision to Exclude Fabricators from its Industry Support Determination

MSI argues that, even if Commerce's interpretation of "producers" is permissible under *Chevron*, Commerce's application of the "sufficient production-related activities" test in the underlying industry support determination was unreasonable. MSI Br. at 16–26. MSI argued below that QSP fabricators qualify as "producers," emphasizing the fabricators' role in the market, their technology input, and the complexity of the products they produce, as well as promotional materials from Cambria detailing the role of fabricators in QSP finishing. MSI Br. at 16–17; *see also* MSI Standing Comments at 3–6. MSI maintains that Commerce's finding that "fabricators do not perform sufficient production-related activities to be included in the domestic industry for industry support purposes" is not supported by substantial evidence. MSI Br. at 16.

In applying the "sufficient production-related activities" test, Commerce observed that quartz surface product producers create QSPs by "(1) mixing raw materials, (2) combining, (3) dispensing and molding, (4) pressing, (5) curing, (6) cooling, and (7) polishing." Initiation Checklist at Attach. II, p. 15 (citing Petition Volume 1 at 7, PR 1, CR 1). Whereas, Commerce noted that quartz surface product slab fabricators use producer-made QSPs and "(1) consult with customers, (2) develop engineering diagrams, (3) perform intricate cutting, and (4) perform various edge and surface finishing operations" on existing QSPs. *Id.* (citing MSI Standing Comments). Commerce also found that fabricators did not engage in the same complex processes as QSP slab producers. *See id.* at Attach. II, pp. 14–15. Commerce concluded that the six factors of the test did not support the conclusion that fabricators were "producers" of the domestic like product. *Id.* Specifically, Commerce explained:

We have analyzed the information provided by the petitions and find there is reason again to conclude that fabricators do not perform sufficient production-related activities to be included in the domestic industry for industry support purposes. The petitioner provided detailed information to support its argument that fabricators should not be considered part of the domestic

industry for standing, making it clear that there are significant differences in the level of complexity and capital investment, employment, training and technical expertise, production processes, and type of equipment, between quartz and surface product slab producers and fabricators. Based on the information provided by the petitioner, quartz slab production involves highly complex and interconnected machinery and engineering process, and, as a result, requires specialized equipment dedicated to quartz surface products production and a significantly greater amount of capital investment, training and technical expertise, and number of employees than the fabrication process. In contrast, information provided by the petitioner indicates that the fabrication process requires limited equipment that is not dedicated solely to quartz surface products, fewer employees, much less technical expertise, and significantly less capital investment. Information provided by the petitioner further indicates that the fabrication process does not change the fundamental physical characteristics imparted during the slab production process, as fabricators simply convert an existing slab into a geometrical form for its end use or application. In addition, many fabricators rely on imported slabs to produce final fabricated products.

Decision Memorandum at 37–38 (quoting Initiation Checklist at Attach. II, p. 14).

When MSI renewed its objections to Commerce’s industry support analysis prior to the *Final Determination*, Commerce explained that it is not permitted to revisit its industry support determination after initiation. See *Decision Memorandum* at 37 (“Commerce is statutorily prohibited from reconsidering its industry support determination at this stage of the investigation. As a result, we continue to rely on our determination of industry support provided in the Initiation Checklist.”); see also 19 U.S.C. § 1673a(c)(4)(E) (“After the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support *shall not be reconsidered.*” (emphasis added)).

MSI contends that Commerce “only meekly referenced” the materials MSI submitted, arguing that Commerce failed to consider MSI’s comments and to “articulate a satisfactory explanation for its [finding that fabricators are not “producers” for industry support purposes].” MSI Br. at 17, 20. The court disagrees. MSI maintains that Commerce’s conclusion under the “sufficient production-related activities” test cannot be reasonable given that the record details the extensive

capital investment and value added by QSP fabricators. *Id.* at 16–18. While MSI emphasizes certain metrics under the “sufficient production-related activities” test by which fabricators could reasonably be found to be “producers,” its arguments ignore Commerce’s findings and conclusions in the context of a comparison of fabricators to slab producers. *See* Initiation Checklist at Attach. II, p. 14 (noting that “information provided by the petitioner indicates that the fabrication process requires limited equipment that is not dedicated solely to quartz surface products, fewer employees, much less technical expertise, and significantly less capital investment.”). Despite MSI’s contention that Commerce did not consider MSI’s information on the record, Plaintiff is unable to point to anything other than Commerce’s adverse finding that fabricators are not “producers” as evidence of Commerce’s alleged failure to consider the evidence. Consequently, Commerce’s finding that fabricators are not “producers” is reasonable.

MSI also maintains that none of the individual exhibits submitted by Cambria “reveals a rational connection between Commerce’s facts found and the choice made.” MSI Br. at 21. For each exhibit provided by Cambria and relied upon by Commerce in its industry support determination, MSI provides an explanation for why that exhibit does not support Commerce’s findings. *See* MSI Br. at 21–23. Almost all of MSI’s purported explanations, however, challenge the weight Commerce assigned to that evidence. While Commerce could have reasonably reached an alternative finding (*i.e.*, Commerce could reasonably have found fabricators to be producers), Plaintiff fails to demonstrate that its preferred alternative was the one and only reasonable finding that could be reached on the record.

A party’s ability to point to an alternative, reasonable finding on the agency record does not provide a basis for the court to set aside an agency’s determination. *See Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001) (“the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” (quoting *Consolidated Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938))). While this issue presents a close question, for MSI to establish that Commerce’s industry support determination was unreasonable, MSI must demonstrate that its preferred outcome was the “one and only reasonable” conclusion Commerce could reach in light of the record. *See Tianjin Wanhua Co. v. United States*, 41 CIT ___, ___, 253 F. Supp. 3d 1318, 1328 (2017). MSI has failed to meet this burden. Accordingly, the court sustains the *Final Determination*.

2. Challenges to Commerce's and ITC's Differing Findings Regarding the Fabricators' "Production-Related Activities"

MSI further challenges Commerce's determination on the basis that it unreasonably deviates from the findings reached by the U.S. International Trade Commission ("ITC"). See MSI Br. at 17–20, 24–26. MSI highlighted, in its initial comments to Commerce, the fact that the ITC released U.S. Producer questionnaires to fabricators as part of its preliminary investigation into QSPs from India, indicating that the ITC considered fabricators to be within the scope of domestic producers. MSI Br. at 18, 24–25; see also MSI Standing Comments at 3–4. MSI also emphasizes that since Commerce's decision that fabricators do not qualify as "producers" for purposes of the industry support analysis in the underlying investigation, "the ITC has contradicted Commerce on *three* occasions." MSI Br. at 24 (referencing ITC's findings that U.S. QSP industry should be defined to include fabricators in final determination of investigation of QSPs from China, as well as preliminary and final determinations in investigations of QSPs from India and Turkey). Thus, MSI contends, Commerce's conclusion to the contrary is not supported by substantial evidence.

Commerce explained that although the ITC and Commerce both apply the terms "industry," "producer," and "domestic like product" under the statute, "they do so for different purposes and pursuant to a separate and distinct authority." See Initiation Checklist at Attach. II, pg. 1 (further noting that "[a]lthough this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law"). Indeed, "[t]his Court has long recognized the division of labor between [ITC and Commerce] 'even where it has resulted in decisions which are difficult to reconcile.'" *Consol. Fibers, Inc., v. United States*, 32 CIT 855, 860 n.3, 574 F. Supp. 2d 1371 (2008) (quoting *Algoma Steel Corp., Ltd. v. United States*, 12 CIT 518, 523, 688 F. Supp. 639 (1988)); see also *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 634, 693 F. Supp. 1165 (1988). Even when ITC reaches its own conclusion, Commerce may not reconsider its industry support determination after an investigation has been initiated. See 19 U.S.C. § 1673a(c)(4)(E). The court agrees with Defendant that "MSI's arguments that the ITC subsequently determined to include fabricators in the domestic industry for purposes of evaluating injury does not alter the reasonableness of Commerce's determination based on the record at initiation." Def.'s Resp. at 24–25.

Additionally, MSI's argument suffers from a chronological fallacy: for Commerce to rely upon the ITC's fact findings, Commerce would

have to know ITC's determination before reaching its own conclusions. However, it is only after Commerce determines industry support and decides to initiate an investigation that Commerce then notifies ITC of its decision. *See* 19 U.S.C. § 1673a(d). The ITC then proceeds with its phase of the investigation, which does not occur in concert with that of Commerce. *See* 19 U.S.C. § 1673b(a). Therefore, the court sustains as reasonable Commerce's industry support determination in the underlying investigation.

3. Challenge to Commerce's Decision Not to Extend Its Deadline to Initiate an Investigation

Finally, MSI challenges Commerce's failure to extend the deadline to initiate, arguing that "serious factual disagreements among interested parties" made it unreasonable for Commerce to initiate its investigation after only 20 days. MSI Br. at 25–26.

Upon determining that industry support meets the threshold for petitioner standing, Commerce proceeds with an investigation. The investigation must generally commence within 20 days of the petitioner's filing. 19 U.S.C. § 1673a(c)(1)(A). However, Commerce retains the discretion to extend this deadline where it requires more time to determine industry support:

In any case in which the administering authority is required to poll or otherwise determine support for the petition by the industry under paragraph (4)(D), the administering authority may, in exceptional circumstances, apply subparagraph (A) by substituting "a maximum of 40 days" for "20 days".

19 U.S.C. § 1673a(c)(1)(B).

In the underlying investigation, Commerce determined that an extension of the industry support deadline was not necessary, as the agency found sufficient evidence of industry support within the petition. *See* Initiation Checklist at Attach. II. MSI's argument that Commerce should have extended the industry support determination deadline fails for two reasons. First, Commerce found the necessary industry support to proceed without polling, thus making the option for a deadline extension irrelevant. *See Decision Memorandum* at 37 ("There was no need for Commerce to poll the industry, as Commerce properly found that the petition was supported by domestic producers and workers which account for more than 50 percent of the total production of the domestic like product.").

Second, even assuming Commerce could have extended its deadline, doing or not doing so was within the agency's discretion. *See* 19 U.S.C. § 1673a(c)(1)(B) ("the administering authority *may*, in exceptional circumstances," extend investigation initiation deadline to

forty days (emphasis added)); *see also United States v. Rodgers*, 461 U.S. 677 (1983) (“The word ‘may,’ when used in a statute, usually implies some degree of discretion.”). As the statute expressly provides, Commerce’s discretion to extend its deadline is reserved for “exceptional circumstances,” not for “serious factual disagreements among interested parties.” *Compare* 19 U.S.C. § 1673a(c)(1)(B), with MSI Br. at 26. MSI has failed to demonstrate that Commerce acted unreasonably in finding that there were no “exceptional circumstances” to justify an extension under § 1673a(c)(1)(B). Accordingly, Commerce’s decision not to extend its deadline is sustained.

IV. Conclusion

For the foregoing reasons, the court sustains the *Final Determination* as to the challenges raised by MSI. Judgment will be entered accordingly.

Dated: October 7, 2021

New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 21–139

GLOBAL ALUMINUM DISTRIBUTOR LLC, Plaintiff, v. UNITED STATES, Defendant, and TA CHEN INTERNATIONAL, INC., Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 21–00198

[Proposed Plaintiff-Intervenor’s motion to reconsider the court’s denial of its motion to intervene is granted.]

Dated: October 7, 2021

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Plaintiff Global Aluminum Distributor LLC.

Alexander Vanderweide, Senior Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Aimee Lee*, Assistant Director. Of counsel on the brief were *Tamari J. Lagvilava* and *Chelsea Reyes*, Office of the Chief Counsel, U.S. Customs and Border Protection, of New York, N.Y.

Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, D.C., for Defendant-Intervenor Ta Chen International, Inc.

Brady W. Mills, Morris Manning & Martin LLP, of Washington, D.C., for Proposed Plaintiff-Intervenor Kingtom Alumínio S.R.L. With him on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas, III*, and *Jordan L. Fleischer*.

MEMORANDUM AND ORDER

Eaton, Judge:

Before the court is Kingtom Aluminio S.R.L.'s ("Kingtom") motion for reconsideration of the denial of its motion to intervene, ECF No. 44, together with the responses of Defendant-Intervenor Ta Chen International, Inc., ECF No. 45; Plaintiff Global Aluminum Distributor LLC, ECF No. 46; and Consolidated Plaintiff Hialeah Aluminum Supply, Inc., ECF No. 49. Defendant the United States did not file a response to the motion to reconsider. In reaching its decision, the court has considered Kingtom's supplemental briefing and its confidential declaration in further support of its motion to intervene, ECF No. 57 ("Brief") & 57-1 ("Declaration"). Both were filed in response to the court's August 5, 2021 order, ECF No. 50.

BACKGROUND

Here, Plaintiff Global Aluminum Distributor LLC ("Plaintiff"), a U.S. importer, seeks judicial review of a determination by U.S. Customs and Border Protection ("Customs"), issued pursuant to its authority under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018), that Plaintiff entered, through evasion, certain "covered merchandise," *i.e.*, Chinese aluminum extrusions that are subject to antidumping and countervailing duty orders, to avoid paying those duties. *See* 19 U.S.C. § 1517(a)(3), (g); *see also* Notice of Final Determination as to Evasion, EAPA Case No. 7348 (Nov. 2, 2020); and Decision on Request for Admin. Review, EAPA Case No. 7348 (Mar. 18, 2021).

Kingtom is the producer and exporter that sold this merchandise to Plaintiff. *See* Brief 3-4. Kingtom moved to intervene on the side of Plaintiff as a matter of right, or in the alternative with the court's permission.¹ *See* USCIT R. 24(a), (b).

DISCUSSION

Intervention is governed by this Court's Rule 24. Subsection (a) sets out the requirements for intervention "of right," which was revised in 2018 to account for certain aspects of the EAPA (the evasion statute):

On timely motion, the court must permit anyone to intervene who . . . in an action described in [the evasion statute, 19 U.S.C. § 1517(g)], is a person determined to have entered merchandise through evasion or is the interested party that filed the allegation; or claims an interest relating to the property or transaction

¹ It is undisputed that Kingtom's motion to intervene was timely filed.

that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

USCIT R. 24(a)(2)²; *see generally* 19 U.S.C. § 1517. The revised Rule takes into account persons “determined to have entered merchandise through evasion,” *i.e.*, those in Plaintiff's position. None of the changes to the Rule, however, address intervention by an interested party in Kingtom's position as a producer and exporter.³ Thus, if Kingtom has a right to intervene, the basis for intervention must be found in the older remaining language of the Rule providing for intervention by a person who “claims an interest relating to the property or transaction that is the subject of the action.”

In order to intervene of right under the older provisions, the moving party “must claim an interest in the property or transaction at issue that is ‘legally protectable—merely economic interests will not suffice.’” *N. Am. Interpipe, Inc. v. United States*, 45 CIT __, __, 519 F. Supp. 3d 1313, 1323 (2021), *appeal docketed*, No. 2021–2180 (Fed. Cir. July 30, 2021) (quoting *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012)). In addition, “that interest's relationship to the litigation must be ‘of such a *direct* and *immediate* character that the intervenor will either gain or lose by the *direct* legal operation and effect of the judgment.’” *Id.* at __, 519 F. Supp. 3d at 1323. Finally, “the movant must demonstrate that said interest is not adequately addressed by the [existing parties'] participation.” *Id.* at __, 519 F. Supp. 3d at 1323 (citing *Wolfsen*, 695 F.3d at 1315).

² Rule 24(b) provides for permissive intervention. *See* USCIT R. 24(b). The court will not address permissive intervention because it finds Kingtom may intervene of right.

³ Under the evasion statute, an “interested party” is defined as follows:

- (i) a foreign manufacturer, producer, or exporter, or the United States importer, of covered merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise;
- (ii) a manufacturer, producer, or wholesaler in the United States of a domestic like product;
- (iii) a certified union or recognized union or group of workers that is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product;
- (iv) a trade or business association a majority of the members of which manufacture, produce, or wholesale a domestic like product in the United States;
- (v) an association a majority of the members of which is composed of interested parties described in clause (ii), (iii), or (iv) with respect to a domestic like product; and
- (vi) if the covered merchandise is a processed agricultural product, as defined in section 1677(4)(E), a coalition or trade association that is representative of either—
 - (I) processors;
 - (II) processors and producers; or
 - (III) processors and growers.

19 U.S.C. § 1517(a)(6)(A).

Kingtom has demonstrated that it satisfies these requirements.⁴

I. Kingtom's Contractual Arrangements Provide an Interest in the Transaction at Issue That Has a Direct and Immediate Relationship to the Litigation

The court first finds that Kingtom has demonstrated that it has a legally protected interest in the transaction that is the subject of the action. *See* USCIT R. 24(a)(2). The word “transaction,” as traditionally used in customs law, means only the act of entering a product into the United States.⁵ Since the word as used in Rule 24(a)(2) was borrowed⁶ from Federal Rule of Civil Procedure 24, however, it can be presumed that a broader meaning is intended. Thus, for these purposes, the court finds that transaction means the whole transaction by which the merchandise was sold, transported, entered, and paid for.

As Kingtom attests, the transaction at issue here is governed by a contract to, *inter alia*, sell and arrange for shipment of Dominican-origin aluminum extrusions, *that were not subject to antidumping or countervailing duties*, to its customers. *See* Brief 3 (citing Declaration ¶¶ 3–4, 15). According to Kingtom, Customs made a “factual finding . . . that Kingtom did not tender the merchandise agreed upon under contract (*i.e.*, Dominican produced [aluminum extrusions]) and knowingly subjected its customers to additional potential liabilities,” by tendering Chinese-origin aluminum extrusions subject to antidumping and countervailing orders. *See* Brief 3.

As the seller and exporter of the merchandise, Kingtom has a clear interest in disputing Customs' claim that it did not fulfill the terms of its contract. Although demonstrating that it did indeed perform in accordance with the terms of its contract would, no doubt, have some effect on Kingtom's future business, its interest in demonstrating that it fulfilled its obligations gives it an interest in the contract itself, that is not merely economic. That is, Customs' determination necessarily lays Kingtom open to a claim that it breached its contract by failing

⁴ Because the court finds that Kingtom may intervene of right, and seeks the same relief as Plaintiff, *i.e.*, remand of this matter to Customs with instructions to terminate its investigation and order the liquidation of entries without the addition of antidumping and countervailing duties, the requirement of constitutional standing is satisfied here. *See Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017).

⁵ *See, e.g., Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006) (emphasis added) (describing a single “transaction” bond as one that covers the obligation to pay duties, taxes, and charges obligations “arising from one entry”).

⁶ Indeed, prior to the 2018 amendments to Rule 24(a) nearly all of the wording was taken from Federal Rule of Civil Procedure 24(a), and this Court has held that opinions construing that rule are at least persuasive authority for construing the Court of International Trade Rule. *Interpipe*, 45 CIT at ___, 519 F. Supp. 3d at 1323 (citing *Wolfsen*, 695 F.3d at 1315).

to tender and deliver aluminum extrusions *not* subject to the anti-dumping and countervailing duty orders. While it is not known what effect this finding might ultimately have on the contractual arrangements themselves, Kingtom surely has a protectable legal interest in demonstrating it did not breach its contract.

It is also the case that, were Kingtom excluded from this action, as a practical matter its ability to protect that interest would be impaired or impeded. *See* USCIT R. 24(a)(2). Kingtom’s situation is not dissimilar to a person joining in a lawsuit to protect “an interest relating to the subject of the action” where “disposing of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect the interest.” USCIT R. 19(a)(1)(B)(i) (emphasis added); *see also* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1604, at 33 (4th ed. 2019) (observing that “protecting the absent persons from the possible prejudicial effect of deciding the case without them” is among the policies guiding joinder under Federal Rule of Civil Procedure 19(a)). This same policy guides the court in reaching its finding here. Kingtom’s interest in defending itself against claims that it breached its contract is, “as a practical matter,” an interest that directs its intervention in this case.

Finally, the protection of Kingtom’s interest in the contract is of a direct and immediate character such that the company will either gain or lose by the effect of the judgment in the case. Customs’ finding that Kingtom did not tender the aluminum extrusions as provided for in its contract could be used to support a finding that it breached a contract that has been fully performed. Were the court to sustain this finding, its possible use in other negotiations or proceedings would follow immediately.

II. The Existing Parties’ Representation of Kingtom’s Interest Is Inadequate

“The burden of showing inadequacy of representation is ‘minimal,’ requiring only a showing that an existing party’s representation of [the proposed intervenor’s] interests ‘may be’ inadequate as to some aspect of the case at bar.” *Wolfsen*, 695 F.3d at 1315 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Here, Kingtom points out that “[w]hile the importers in this case are on the hook for the payment of the duties for the transactions during the period of investigation, the factual findings themselves are not against them, but against Kingtom.” Brief 8. In addition, Kingtom maintains that its “interests are more expansive than those of the named importers before the Court” in that it has an interest not only in the transaction at issue before the court, but also in transactions with importers not

party to this action, who are under investigation by Customs. *See* Brief 7.

As noted in the court's discussion above, Kingtom has an interest in demonstrating that it fulfilled its contractual obligations. This is quite a different matter from an importer contesting an obligation to pay additional duties, which may rely on different legal theories and different facts taken from the record. The court thus finds Kingtom's interest is not adequately protected by those parties interested primarily in avoiding payment of duties, and this favors Kingtom's intervention as a matter of right.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion for reconsideration is granted; and it is further

ORDERED that Kingtom shall have the status of Plaintiff-Intervenor in this action, pursuant to Rule 24(a)(2).

Dated: October 7, 2021

New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE

Slip Op. 21–140

M S INTERNATIONAL, INC., Plaintiff, and FOSHAN YIXIN STONE COMPANY LIMITED, Consolidated Plaintiff, and ARIZONA TILE LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and CAMBRIA COMPANY LLC, Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Consol. Court No. 19–00140

Dated: October 8, 2021

Jonathan T. Stoel, Craig A. Lewis, Jared R. Wessel, and Nicholas R. Sparks, Hogan Lovells US LLP, of Washington, D.C., for Plaintiff M S International, Inc. and Plaintiff-Intervenor Arizona Tile LLC.

David J. Craven, Craven Trade Law LLC, of Chicago, IL, for Consolidated Plaintiff Bruskin International, LLC.

Matthew T. McGrath, Barnes, Richardson & Colburn, LLP, of Washington, D.C., for Consolidated Plaintiff Foshan Yixin Stone Company, Ltd.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Jesus Saenz*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, D.C.

Luke A. Meisner, Kelsey M. Rule, and Roger B. Schagrín, Schagrín Associates, of Washington, D.C., for Defendant-Intervenor Cambria Company LLC.

OPINION

Gordon, Judge:

Recently the court issued an opinion denying a challenge to the antidumping (“AD”) duty margin assigned to Consolidated Plaintiff Foshan Yixin Stone Company, Ltd. (“Yixin”) by the U.S. Department of Commerce (“Commerce”) in its final determination of the anti-dumping investigation of certain quartz surface products (“QSPs”) from the People’s Republic of China. *See M S Int’l v. United States*, 45 CIT ___, Slip Op. 21–130 (Sep. 24, 2021), ECF No. 92; *see also Certain Quartz Surface Products from the People’s Republic of China*, 84 Fed. Reg. 23,767 (Dep’t of Commerce May 23, 2019) (“*Final Determination*”), and accompanying Issues and Decision Memorandum, A-570–084 (Dep’t of Commerce May 14, 2019), <https://enforcement.trade.gov/frn/summary/prc/2019–10800–1.pdf> (last visited this date). While Yixin’s challenge was consolidated with other parties’ challenges to Commerce’s final affirmative determination in its investigation of QSPs from China, Yixin was the only party to challenge its margin calculation. *See* Consol. Pl. Yixin Mem. in Supp. of Rule 56.2 Mot. for J. on the Agency R., ECF No. 49 (“Yixisn Br.”). Given that the court has decided this issue, the question is whether the court should enter a partial judgment pursuant to USCIT Rule 54(b), sustaining Commerce’s margin calculation for Yixin. For the reasons set forth below, the court will enter a Rule 54(b) partial judgment.

Rule 54(b) provides in part that:

[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

USCIT R. 54(b). Rule 54(b) requires finality—“an ultimate disposition of an individual claim entered in the course of a multiple claims action.” *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956). Additionally, in evaluating whether there is no just reason for delay, the court examines whether the concern for avoiding piecemeal litigation is outweighed by considerations favoring immediate entry of judgment. *See Timken v. Regan*, 5 CIT 4, 6 (1983).

Here, Yixin’s brief solely challenged Commerce’s calculation of its dumping margin in the *Final Determination*. *See generally* Yixin Br. What remains for adjudication is a challenge by M S International and Arizona Tile to Commerce’s finding of industry support to initiate

the underlying investigation. *See* Pl. M S International, Inc.’s & Pl.-Int. Arizona Tile LLC’s Mot. for J. on the Agency R., ECF No. 48. As Yixin did not raise or join that issue, the court’s decision in this matter provides “an ultimate disposition” as to Yixin’s challenge to the *Final Determination*. *See* *Sears, Roebuck & Co.*, 351 U.S. at 436; *see also* *M S Int’l v. United States*, 45 CIT ___, Slip Op. 21–130 (Sep. 24, 2021).

The entry of a Rule 54(b) partial judgment would serve the interests of the parties and the administration of justice by bringing this issue, and Yixin’s role in this litigation, to a conclusion. Partial judgment would also give Yixin the opportunity to immediately appeal if it so chooses. Moreover, there is no threat of piecemeal judicial review as the resolution of the remaining issues presented by the other Plaintiffs does not implicate the final disposition of the *Final Determination* challenge raised by Yixin. Therefore, the court has no just reason for delay.

Based on the foregoing, the court will enter partial judgment pursuant to USCIT Rule 54(b).

Dated: October 8, 2021

New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 21–141

COOPER (KUNSHAN) TIRE CO., LTD. and COOPER TIRE & RUBBER CO., Plaintiffs, ITG VOMA CORP., Plaintiff-Intervenor, and VOGUE TYRE & RUBBER CO., Consolidated-Plaintiff, v. UNITED STATES, Defendant, and the UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INT’L UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Consol. Court No. 20–00113

[Remanding the Final Determination to Commerce.]

Dated: October 12, 2021

Gregory C. Dorris, Troutman Pepper Hamilton Sanders LLP, of Washington, D.C., argued for plaintiffs Cooper (Kunshan) Tire Company, Ltd. and Cooper Tire & Rubber Company.

Andrew T. Schutz, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., argued for consolidated-plaintiff Vogue Tyre & Rubber Company. On the brief was *Jordan C. Kahn*.

Nicholas R. Sparks, Hogan Lovells US LLP, of Washington, D.C., argued for plaintiff-intervenor ITG Voma Corporation. With him on the brief was *Jonathan T. Stael*.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Natalie M. Zink*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Roger B. Schagrin, Schagrin Associates, of Washington, D.C., argued for defendant-intervenor the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. With him on the brief were *Geert De Prest* and *Nicholas J. Birch*.

OPINION AND ORDER

Reif, Judge:

This action involves the final determination of the U.S. Department of Commerce (“Commerce”) in the administrative review of the countervailing duty (“CVD”) order on certain passenger vehicle and light truck tires from the People’s Republic of China for the period of review (“POR”) January 1, 2017, through December 31, 2017. *See Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires From the People’s Republic of China: Final Results of Countervailing Duty Administrative Review; 2017* (“Final Determination”), 85 Fed. Reg. 22,718 (Dep’t of Commerce Apr. 23, 2020) (final determination) and accompanying Issues and Decision Memorandum (Apr. 15, 2020) (“IDM”). Before the court is a United States Court of International Trade (“USCIT”) Rule 56.2 motion for judgment on the agency record filed by plaintiffs Cooper (Kunshan) Tire Co., Ltd. (“Cooper Tire”) and Cooper Tire & Rubber Co. Plaintiffs argue that the determination by Commerce that, based on the application of adverse facts available (“AFA”), Cooper Tire and Shandong Longyue Rubber Co., Ltd. (“Longyue”) used and benefited from the Export Buyer’s Credit Program (“EBCP”), is not supported by substantial evidence. Mem. of Law in Supp. of Pls.’ and Pl.-Intervenor’s Mot. for J. on Agency R. (“Pls. Br.”) at 3–4, ECF No. 38. This court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018), and 28 U.S.C. § 1581(c) (2018).¹ The court remands the Final Determination to Commerce to take the actions as set forth *infra*, Section I.B.3.

BACKGROUND

Commerce initiated the administrative review on October 4, 2018, and selected two Chinese tire producers, Cooper Tire, subsidiary of

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

Cooper Tire & Rubber Co., and Longyue, as mandatory respondents. Resp't Selection Mem. (Feb. 8, 2019), CR 4, PR 49.²

Plaintiffs Cooper Tire, Cooper Tire & Rubber Co., Vogue Tyre & Rubber Co. and plaintiff-intervenor ITG Voma Corp. (collectively "plaintiffs") now challenge Commerce's finding that, based on AFA, the mandatory respondents used and benefited from the EBCP. The EBCP, which is administered by the Export-Import Bank of the People's Republic of China ("China Export-Import Bank"), "provides loans at preferential rates for the purchase of exported goods from China." *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Countervailing Duty Administrative Review, Correction of Notification of Rescission, in Part, 2017* ("Preliminary Determination"), 84 Fed. Reg. 58,685 (Dep't of Commerce Nov. 1, 2019) (preliminary determination) and accompanying Preliminary Decision Memorandum (Oct. 10, 2019) ("PDM") at 25.

On March 1, 2019, Commerce issued its initial questionnaire for the administrative review to both the GOC and the respondent companies. Commerce asked several questions regarding whether the respondent companies and their respective customers had applied for or used the EBCP. Specifically, the questionnaire requested: (1) a list of the U.S. customers to whom the respondents exported during the POR; (2) information on the application process for the EBCP; and (3) details on the type and extent of assistance provided by the EBCP to each customer. *See generally* Initial Questionnaire (Mar. 1, 2019), PR 52. If, in response to the questionnaire, the GOC or the respondent companies asserted non-use of the program, Commerce in the questionnaire asked that the GOC and the mandatory respondents detail the steps that each took to determine that no U.S customers used the EBCP. *Id.*

On April 18, 2019, the GOC and the mandatory respondents submitted their initial questionnaire responses. GOC Initial Questionnaire Resp. (Apr. 18, 2019), CR 9–29, PR 73–87; Cooper Tire Questionnaire Resp. (Apr. 18, 2019), CR 30–45, PR 88–96; Longyue Questionnaire Resp. (Apr. 18, 2019), CR 46–77, PR 97–98. The GOC, Cooper Tire and Longyue all stated in their responses that neither the respondent companies nor their customers had used or benefited from the EBCP during the POR. *See* GOC Initial Questionnaire Resp. at 129; Cooper Tire Questionnaire Resp. at III-31-III-32; Longyue Questionnaire Resp. at 25–26.

² Longyue is not a party to the current case. Plaintiff Vogue Tyre & Rubber Co. and plaintiff-intervenor ITG Voma Corp. were companies in the administrative review that requested review but were not selected as mandatory respondents by Commerce. Resp't Selection Mem. (Feb. 8, 2019), CR 4, PR 49; *see also* Pls. Br. at 8.

Specifically, Cooper Tire stated in its questionnaire response that it “did not apply for, use, or benefit from [the EBCP] during the POR, and did not have any outstanding financing under this program.” Cooper Tire Questionnaire Resp. at III-32. In response to Commerce’s request that Cooper Tire discuss the role it played in assisting customers to obtain buyer credits and to provide documentation, Cooper Tire responded that it

[was] not aware that any of its customers applied for, used or benefited from this alleged program during the POR, and [Cooper Tire] did not provide any assistance to its customers for receiving the export buyer’s credit. [Cooper Tire] did not perform any acts that in any way would permit these customers to receive any export buyer credits on its sales to these customers.

Id.

In response to Commerce’s request that Cooper Tire “explain in detail the steps you took to determine that no customer used the Buyer Credit Facility,” Cooper Tire responded that it “was never contacted by any of its customers to provide any information required to obtain an export buyer’s credit from any Buyer Credit Facility. Accordingly, [Cooper Tire] believes that it is impossible that any of its customers could have possibly received export buyer’s credit.” *Id.* To support its claims of non-use, Cooper Tire provided Commerce with a list of its customers. *Id.*, Ex. 18, CR 36, PR 89.

The GOC, in response to Commerce’s request for details on the type and extent of assistance provided to each U.S. customer, said that the request was “not applicable” because none of the respondent companies’ customers had used the program during the POR. GOC Initial Questionnaire Resp. at 129. The GOC, to bolster its claims of non-use, maintained that it had conducted a search of the China Export-Import Bank system and found that the EBCP was not used by the respondents or any of the respondent companies’ U.S. customers. *Id.* at 129–130. The GOC provided screenshots of the search queries purported to be from the China Export-Import Bank system. *Id.*, Ex. F.1, CR 29, PR 87. In addition, the GOC specified that these screenshots would have shown any record of U.S. customer use of the EBCP, irrespective of the customer’s underlying contract value. *Id.* at 129–130. The GOC claimed further that the screenshots demonstrated that “no disbursement was made through a correspondent or partner bank.” *Id.* at 130.

On June 24, 2019, Commerce issued a supplemental questionnaire to the GOC. GOC Suppl. Questionnaire (June 24, 2019), PR 129. In the questionnaire, Commerce requested that the GOC provide (1) any documents pertaining to the alleged 2013 EBCP revisions, including

those related to the potential elimination of the USD 2 million threshold loan requirement, and (2) a list of partner/correspondent banks involved in the administration of the EBCP. *Id.* at 2–3.³ In requesting information on the threshold requirement, Commerce explained that the record indicated that the administrative measures related to the EBCP were revised in 2013. *Id.* at 2; *see also* IDM at 18. Specifically, Commerce outlined that record information suggesting that the 2013 revisions eliminated the USD 2 million threshold requirement. GOC Suppl. Questionnaire at 2; *see also* IDM at 17. In addition, Commerce noted that it was requesting the list of partner/correspondent banks because of record information indicating that EBCP credits could be distributed directly through those partner/correspondent banks. GOC Suppl. Questionnaire at 2–3; *see also* IDM at 19.

On July 8, 2019, the GOC responded to Commerce’s supplemental questionnaire. Pls. Br. at 7; GOC Suppl. Questionnaire Resp. (July 8, 2019) (“SQR”), PR 135–136. However, the GOC declined still to provide information on the 2013 revisions, stating that the guidelines were “internal to the bank, not public, and not available for release.” SQR at 9. Instead, the GOC provided a copy of the *2000 Administrative Measures of Export Buyer’s Credit of Ex-Im Bank* (“2000 Administrative Measures”), which had also been attached to the GOC’s Initial Questionnaire response on April 18, 2019. SQR at 8; GOC Initial Questionnaire Resp. at 130, Ex. F.2, CR 29, PR 87. The GOC asserted that the 2000 Administrative Measures “continue to be valid and in force,” despite the conflicting record information. SQR at 8. In addition, the GOC stated that it could not provide information related to the partner/correspondent banks because it lacked the “authority or right to force the [China Export-Import] Bank to reveal details of other transactions” *Id.* at 13.

On October 10, 2019, Commerce determined preliminarily that based on AFA Cooper Tire and Longyue used and benefited from the EBCP. PDM at 22. Commerce explained that the application of AFA was warranted because “the GOC [had] not cooperated to the best of its ability in response to Commerce’s specific information requests.” *Id.* Commerce determined that the GOC, “by virtue of its withholding information that was within its control, significantly impeded this proceeding, and failed to cooperate by not acting to the best of its ability.” *Id.*

On April 15, 2020, Commerce reaffirmed and rearticulated its finding from the PDM that based on AFA Cooper Tire and Longyue used

³ Pages cited to the GOC Supplemental Questionnaire refer to pages of the attached questionnaire within PR 129.

and benefited from the EBCP. *See* IDM at 19 (“[W]e find that the GOC, by virtue of its withholding of information and significantly impeding this proceeding, failed to cooperate by not acting to the best of its ability. Accordingly, the application of AFA is warranted.”). Commerce found that the GOC did not respond fully to Commerce’s questionnaires. Specifically, Commerce stated that “the GOC refused to provide [the documents pertaining to the 2013 revisions],” and that “the GOC also refused to provide a list of all partner/correspondent banks involved in the disbursement of [EBCP] credits.” *Id.* at 18–19.

Commerce explained that without the requested information on the 2013 revisions, including information on the USD 2 million threshold loan requirement and the involvement of partner/correspondent banks, Commerce was unable to verify claims of non-use. *Id.* As a result, Commerce found “that the mandatory respondents received countervailable subsidies during the POR.” *Id.* at 1. Commerce determined further that it “did not change the AFA methodology for this program,” and that “[t]he rate for both Cooper [Tire] and Longyue is 4.99 percent *ad valorem*.” *Id.* at 7. “For the companies for which a review was requested, but which were not selected for individual examination, [Commerce used] the mandatory respondents’ CVD rates to determine the applicable rate.” *Id.* at 1.

STANDARD OF REVIEW

The court exercises jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The court must sustain Commerce’s CVD determination unless it is “unsupported by substantial evidence on the record, or [is] otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1). Substantial evidence requires “more than a mere scintilla” of evidence to support the underlying conclusions. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). However, when a statute grants an agency power to administer fact-intensive inquires, the agency’s conclusion should be reversed only if the record is “so compelling that no reasonable factfinder” could reach the same conclusion. *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992).

The court must review the record in its entirety, “including whatever fairly detracts from the substantiality of the evidence.” *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Still, “the possibility of drawing two inconsistent conclusions from the [record] does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966) (citations omitted). Under the substantial evidence standard, the court should uphold the agency

determination as long as “its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency’s conclusion.” *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citations omitted), *aff’d sub nom. Shandong Huarong Gen. Corp. v. United States*, 60 F. App’x 797 (Fed. Cir. 2003).

LEGAL FRAMEWORK

Commerce shall impose a countervailable duty if: (1) Commerce determines that the government or public entity of a foreign country is “providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States”; and (2) the U.S. International Trade Commission determines that “an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of [subject] imports.” 19 U.S.C. § 1671(a). Commerce will find a subsidy countervailable when a foreign government or public entity provides a financial contribution to a specific industry, thereby conferring a benefit. 19 U.S.C. § 1677(5). “The Federal Circuit found that in order to conclude a person received a subsidy, 19 U.S.C. § 1677(5)(B) clearly requires Commerce to ‘determine that a government provided that person with both a financial contribution . . . and a benefit.’” *Acciai Speciali Terni S.P.A. v. United States*, 26 CIT 567, 570, 206 F. Supp. 2d 1344, 1349 (2002) (emphasis omitted) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000)).

DISCUSSION

I. Count I: Whether Commerce’s application of adverse facts available to determine that Cooper Tire used the Export Buyer’s Credit Program was reasonable and in accordance with law

The court remands the Final Determination to Commerce to take the actions as set forth *infra*, Section I.B.3.

A. Legal framework

During a CVD investigation, Commerce requires information from both the foreign government alleged to have provided a subsidy and the respondent companies alleged to have received the subsidy. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–1370 (Fed. Cir. 2014); *see also Essar Steel Ltd. v. United States*,

34 CIT 1057, 1070, 721 F. Supp. 2d 1285, 1296 (2010), *rev'd on other grounds* by 678 F.3d 1268 (Fed. Cir. 2012). The information submitted by the parties during the investigation is subject to verification by Commerce. 19 U.S.C. § 1677m(i)(1). The purpose of verification is “to verify the accuracy and completeness of submitted factual information As part of the verification, [Commerce] will request access to all files, records, and personnel which [Commerce] considers relevant to factual information submitted [on]: (1) [p]roducers, exporters, or importers; . . . or (4) [t]he government of the affected country.” 19 C.F.R. § 351.307(d).

If necessary information is not available on the record or if a responding party (1) withholds information requested by Commerce, (2) fails to provide information in the form and manner requested by the established deadline, (3) significantly impedes a proceeding, or (4) provides unverifiable information, Commerce shall “use the facts otherwise available in reaching the applicable determination.” 19 U.S.C. § 1677e(a). Commerce is also required to “provide, when practicable, an opportunity to the party submitting the information to explain or correct the deficiency [and to] determine whether such explanation or correction is either unsatisfactory or untimely.” *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, 35 CIT 1398, 1402 (2011); *see also* 19 U.S.C. § 1677m(d).

In reaching a determination under 19 U.S.C. § 1677e(a), Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available” only if Commerce “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b).

This court has previously concluded that the GOC failed to cooperate when it did not comply with a request for access involving the EBCP. *RZBC Grp. Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773, at *4 (CIT June 30, 2016) (“Commerce was [] justified in concluding that the GOC had not behaved to the best of its ability, both in refusing to provide sample contracts and documentation [regarding disbursement] and in denying access to the [China Export-Import] Bank’s database.”). When a foreign government fails to cooperate to the best of its ability, Commerce’s application of AFA to the non-cooperating government’s interests may collaterally affect a cooperating respondent company. *See Fine Furniture*, 748 F.3d at 1373 (“Although it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce’s questions, this result is not contrary to the statute or its purposes, nor is it incon-

sistent with this court’s precedent.”). However, while the application of AFA to a non-cooperating government “may adversely impact a cooperating party, [] Commerce should seek to avoid such impact if relevant information exists elsewhere on the record.” *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013); see also *Guizhou Tyre Co. v. United States* (“*Guizhou I*”), 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018) (“To apply AFA in circumstances where relevant information exists elsewhere on the record — that is, solely to deter noncooperation or ‘simply to punish’ — would make the agency’s determination based on an incomplete (and[,] therefore, inaccurate) account of the record; that is a fate this court should sidestep.”) (citation omitted).

“Commerce can apply [AFA] only when it has first made a supported finding under [section] 1677e(a) that information is missing from the record for an enumerated reason, followed by a separate finding under [section] 1677e(b) that there has been a failure to cooperate.” *Guizhou I*, 42 CIT at __, 348 F. Supp. 3d at 1270. In the context of EBCP cases,

the Court has determined that to apply an adverse inference to find that a cooperating party benefitted from the EBCP based on the GOC’s failure to cooperate, “Commerce must: (1) define the gap in the record by explaining exactly what information is missing from the record necessary to verify non-use; (2) establish how the withheld information creates this gap by explaining why the information the GOC refused to give was necessary to verify claims of non-use; and (3) show that only the withheld information can fill the gap by explaining why other information, on the record or accessible by respondents, is insufficient or impossible to verify.”

Guizhou Tyre Co. v. United States (“*Guizhou VI*”), 45 CIT __, __, 523 F. Supp. 3d 1312, 1361 (2021) (quoting *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1333 (2019)).⁴

⁴ *Guizhou Tyre Co. v. United States* (“*Guizhou VI*”), 45 CIT __, 523 F. Supp. 3d 1312 (2021), pertains to a different proceeding than those proceedings in other cases before this Court involving *Guizhou Tyre Co.*, see, e.g., *Guizhou Tyre Co. v. United States* (“*Guizhou I*”), 42 CIT __, 348 F. Supp. 3d 1261 (2018); *Guizhou Tyre Co. v. United States* (“*Guizhou II*”), 43 CIT __, 399 F. Supp. 3d 1346 (2019); *Guizhou Tyre Co. v. United States* (“*Guizhou III*”), 43 CIT __, 415 F. Supp. 3d 1402 (2019); *Guizhou Tyre Co. v. United States* (“*Guizhou IV*”), 43 CIT __, 389 F. Supp. 3d 1315 (2019); *Guizhou Tyre Co. v. United States* (“*Guizhou V*”), 43 CIT __, 415 F. Supp. 3d 1335 (2019).

B. Analysis

The court concludes that Commerce: (1) identified the gap in the record created by the failure of the GOC to provide requested information in regard to key aspects of the functioning of the EBCP; (2) explained reasonably the reason that the missing information pertaining to loan disbursement and partner/correspondent banks was critical to verifying claims of non-use, but failed to explain the reason that the missing information pertaining to the loan threshold was critical to verification; and (3) failed to articulate an explanation as to the reason that Commerce could not verify information on the record from Cooper Tire. As such, the court remands this Final Determination to Commerce to take the actions as set forth *infra*, Section I.B.3.

1. Whether Commerce identified the missing information from the record

Commerce must “define the gap in the record” and “explain[] exactly what information is missing from the record [that is] necessary to verify non-use.” *Guizhou VI*, 45 CIT at __, 523 F. Supp. 3d at 1361 (quoting *Jiangsu Zhongji Lamination Materials Co.*, 43 CIT at __, 405 F. Supp. 3d at 1333). In the instant case, Commerce stated clearly that there were two sets of information related to the 2013 revisions missing from the record: (1) whether “the [China Export-Import] Bank employs threshold criteria, such as a minimum USD 2 million contract value” and (2) whether loans are disbursed under the program through partner/correspondent banks and, if so, the identities for those banks. IDM at 19. Commerce explained that it needs this information to conduct its investigation of the EBCP and to determine whether loans were provided under the program because there is record information indicating that: (1) “the elimination of the USD 2 million threshold is one of the changes effected by the 2013 Revisions,” *id.* at 19 n.69 (citing SQR at 7–8); and (2) “the credits and funds associated with the program are not limited to direct disbursements from the [China Export-Import] Bank.” *Id.* at 19. Commerce asked the GOC for the 2013 revisions and a list of the partner/correspondent banks in the Supplemental Questionnaire issued June 24, 2019, but the GOC refused to provide Commerce with the information. *See* SQR at 9, 13.

With regard to the USD 2 million threshold, the GOC asserted in its initial questionnaire response that the threshold “has been strictly implemented in practice.” GOC Initial Questionnaire Resp. at 130. However, Commerce explained that this undocumented assertion conflicted with other record information: “[A]s noted in [the United Steel Worker’s] Comments . . . (May 2, 2019) at Exhibit 7, according

to officials from the [China Export-Import Bank], the Administrative Measures relating to this program were revised in 2013. This revision eliminated the [USD] 2 million minimum business contract [requirement].” GOC Suppl. Questionnaire at 2. Commerce, therefore, requested in the Supplemental Questionnaire that the GOC clarify the discrepancy and provide a copy of the “[i]nternal guidelines relating to this program that were revised in 2013.” *Id.*

The GOC responded that the “2013 guidelines are internal to the bank, not public, and not available for release.” SQR at 9. The GOC maintained further that it “has no authority or right to force the [China Export-Import] Bank to provide a copy of the 2013 [revisions], and therefore is unable to provide a copy to [Commerce].” *Id.* Rather than providing documentation on the 2013 revisions, the GOC provided a copy of the 2000 Administrative Measures and asserted that the 2000 Administrative Measures “continue to be valid and in force.” *Id.* at 8. Still, the GOC failed to provide any context or explanation in relation to the 2013 revisions. *See generally* SQR at 6–13.

In regard to the EBCP’s use of partner/correspondent banks, Commerce explained in its Supplemental Questionnaire on June 24, 2019, that the EBCP “[2010] Implementing Rules . . . appear to indicate that the borrower is a bank . . . [and] that the credit extended by the China [Export-Import] Bank to the importer is made through a third-party financial institution, rather than from [the] China [Export-Import] Bank directly to the importer.” GOC Suppl. Questionnaire at 3. Commerce therefore asked the GOC to provide more information regarding the involvement and identities of the partner/correspondent banks. *See id.* at 2–3. In particular, Commerce requested that the GOC “provide a list of all partner banks/correspondent banks involved in the disbursement/settlement of export buyer’s credits.” *Id.* at 3. The GOC declined to provide that list and asserted, without any documentation or other substantiation, that the question was not applicable because (1) neither of the respondent companies had used the EBCP and (2) the “GOC has no authority or right to force the [China Export-Import] Bank to reveal details of other transactions.” SQR at 13.

Commerce determined that since the GOC did not provide the requested documents, Commerce was unable to “properly examine [the GOC’s] claims of nonuse.” IDM at 20. Specifically, Commerce found that

information concerning the administration and operation of the [EBCP], such as how exactly loans are disbursed under the program (*e.g.*, the 2013 Revisions), . . . or whether the [China Export-Import] Bank employs threshold criteria, such as a mini-

num USD 2 million contract value[,] . . . is critical to understanding how the [EBCP] operates, and thereby is also critical to Commerce's ability to verify and determine usage of this program.

Id. at 19.

In sum, Commerce identified specifically that information was missing from the record on the threshold requirement and the involvement and identities of partner/correspondent banks. IDM at 19. Commerce asked the GOC for this information in its supplemental questionnaire. GOC Suppl. Questionnaire at 2–3. The GOC refused to provide the requested information to Commerce. *See* SQR at 6–13. Commerce identified sufficiently the gap in the record.

The court notes that in its initial questionnaire response, the GOC provided screenshots, an action that plaintiffs characterize as “evolving cooperation,” Oral Argument Tr. at 43:23, to demonstrate to Commerce the steps it took to determine that respondents’ customers did not use the EBCP, GOC Questionnaire Resp. The screenshots purported to show (1) the results of search queries, (2) run in the China Export-Import Bank system, and (3) using the customer lists of Cooper Tire and Longyue. GOC Questionnaire Resp. at 129–130. The GOC maintained that

[t]hese screenshots show that no [credit under EBCP] was provided to [Cooper Tire], Longyue or their U.S. customer [sic] during [sic] POR, irrespective [sic] the value of the contract (i.e., whether it exceeded USD 2 million or not). Moreover, these results also show that no disbursement was made through a correspondent or partner bank.

Id. at 130. The GOC also asserted that, apart from the screenshots, the exporter was “in a position to verify and confirm the existence, if any, of sales contracts that were supported by the buyer’s export credits or the [China] Ex[port]-Im[port] Bank.” *Id.*

In a follow up to the GOC’s initial questionnaire response, Commerce issued a supplemental questionnaire to the GOC. GOC Suppl. Questionnaire. In the questionnaire, Commerce requested that the GOC provide: (1) any documents pertaining to the alleged 2013 EBCP revisions, including those related to the potential elimination of the USD 2 million threshold loan requirement; and (2) a list of partner/correspondent banks involved in the administration of the EBCP. *Id.* at 2–3. As detailed above, the GOC declined to provide information on the 2013 revisions and the partner/correspondent banks, stating respectively that the 2013 guidelines were “internal to the bank, not public, and not available for release” and that the GOC lacked the

“authority or right to force the [China Export-Import] Bank to reveal details of other transactions” SQR at 9, 13.

Commerce has an obligation to notify a party of a deficiency and to provide the party, when practicable, “an opportunity to remedy or explain the deficiency,” before applying AFA. 19 U.S.C. § 1677m(d). “Commerce may provide this notice and the opportunity to remedy deficiencies through issuance of a supplemental questionnaire.” *Qingdao Sea-Line Int’l Trading Co. v. United States*, 45 CIT __, __, 503 F. Supp. 3d 1355, 1361 (2021).

Plaintiffs maintain that “[t]he GOC fully responded to Commerce’s request . . . [in] its initial questionnaire response,” which included the screenshots. Pls. Br. at 5. However, Commerce notified the GOC of the deficiencies in its initial questionnaire response through the issuance of its supplemental questionnaire, which requested information on the alleged 2013 EBCP revisions and on partner/correspondent banks, as described above. GOC Suppl. Questionnaire at 2–3.

Further, this Court has determined previously that screenshots of the China Export-Import Bank system are not an adequate substitute for access to the Bank’s system for purposes of verification. *See RZBC Grp. Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773, at *4 (CIT June 30, 2016) (holding that “screenshots are incommensurate with database access” because screenshots can be fabricated whereas database access is interactive and would allow Commerce to “request its own queries in real time, [which would make] mucking with the results . . . much more difficult”).

In its IDM in the proceeding below, Commerce referred to its *Citric Acid 2012* Issues and Decision Memorandum, which was at issue in this Court’s decision in *RZBC*.⁵ IDM at 17. In the *RZBC* administrative proceeding, the GOC denied Commerce access to the EBCP database during verification in China, despite Commerce notifying the GOC that it “would seek on-site access to the [China Export-Import] Bank’s database to confirm that none of RZBC’s buyers were listed as beneficiaries of the [EBCP].” *RZBC Grp. Shareholding Co.*, 2016 WL 3880773, at *3. Rather than provide Commerce access to the database, the GOC in *RZBC* offered Commerce screenshots of the results of a database query run by the GOC, which Commerce de-

⁵ Commerce quoted from *Citric Acid 2012* Issues and Decision Memorandum at Comment 6. IDM at 17 n.55 (“[W]e find that the GOC’s refusal to allow the verifiers to examine the [China Export-Import] Bank database containing the list of foreign buyers that were provided assistance under the program during the POR precluded [Commerce] from verifying the non-use claims made by the RZBC Companies and the GOC.” (quoting *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2012*, 79 Fed. Reg. 78,799 (Dep’t of Commerce Dec. 31, 2014) and accompanying Issues and Decision Memorandum at Comment 6)).

clined to review, reasoning that “without real-time database access, Commerce could not sufficiently ‘test and confirm’ RZBC and the GOC’s purported nonuse.” *Id.* (citing *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2012*, 79 Fed. Reg. 78,799 (Dep’t of Commerce Dec. 31, 2014) and accompanying Issues and Decision Memorandum at 74).

As noted, in the instant case, the GOC provided screenshots in response to Commerce’s initial questionnaire. Commerce then issued a supplemental questionnaire to the GOC requesting (1) any documents pertaining to the alleged 2013 EBCP revisions, including those related to the potential elimination of the USD 2 million threshold loan requirement, and (2) a list of partner/correspondent banks involved in the administration of the EBCP. GOC Suppl. Questionnaire at 2–3. The screenshots supplied by the GOC in its initial questionnaire response are not a substitute for the missing information on the record identified by Commerce with regard to the threshold requirement and the involvement and identities of partner/correspondent banks.

2. Whether Commerce explained the reason that the withheld information was necessary to verify non-use

The court turns to examining whether Commerce provided a reasonable explanation as to the reason that the missing information on the threshold criteria and the involvement of the partner/correspondent banks was necessary to verify non-use of the program.

Commerce found that without the information on (1) threshold criteria and (2) the identities of the partner/correspondent banks, Commerce was unable to verify the nonuse information on the record. Specifically, Commerce stated that it

is unable to verify in a meaningful manner the little information on the record indicating non-usage (*e.g.*, the claims of the GOC and emails and certifications from U.S. customers), with the exporters, U.S. customers, or at the [China Export-Import] Bank itself given the refusal of the GOC to provide the 2013 Revisions and complete list of [partner/correspondent] banks.⁶

IDM at 20. Defendant further asserted that

even if Commerce were required to attempt an extremely burdensome verification undertaking, Commerce explained that it

⁶ There are no certifications from U.S. customers on the record in this case. *See generally* Response in Opposition to RZBC’s Motion for Judgment on the Agency Record at 29, *RZBC Grp. Shareholding Co. v. United States* (No. 15–00022), Slip Op. 16–64, 2016 WL 3880773 (CIT June 30, 2016), ECF No. 37 (asserting that “[t]he GOC and RZBC provided no [] record evidence [of statements or certifications from RZBC’s U.S. customers] in th[e] case”).

would be “meaningless” because it would “have no idea as to what documents it should look for, or what other indicia there might be within a company’s loan documentation regarding the involvement of the China Ex-Im Bank.”

Def.’s Resp. to Pl.’s Mot. for J. upon Agency R. (“Def. Br.”) at 14 (quoting IDM at 20), ECF No. 44.

Commerce identified these two categories of information as essential for verification; however, Commerce explained adequately only the reason that information on partner/correspondent banks prohibited Commerce from verifying the non-use information on the record. Commerce did not explain sufficiently the reason that the missing information on the threshold criteria prevented Commerce from verifying the non-use information on the record.

In relation to the threshold information, Commerce stated in its IDM that information, such as whether there is a minimum USD 2 million contract value, is “critical to understanding how the [EBCP] operates, and[,] thereby[,] is also critical to Commerce’s ability to verify and determine usage of this program.” IDM at 19. Commerce stated also that “[t]he record indicates that the elimination of the USD 2 million threshold is one of the changes effected by the 2013 Revisions.” IDM at 19 n.69 (citing SQR at 7–8). However, Commerce did not state the *reason* that the information on the threshold is “critical” to verification.

At oral argument, defendant stated what may amount to a compelling reason — provided that it is buttressed and carefully and fully elucidated — that the threshold information was required for Commerce to conduct verification. Defendant stated that “[t]he [USD 2] million threshold criteria [sic] is important to Commerce’s ability to verify non-usage . . . because it helps Commerce narrow the universe of information down.” Oral Argument Tr. at 16:11–14. Defendant explained further that without this narrowing criterion “it’s not feasible” for Commerce to audit the companies’ records “given the constraints on [Commerce’s] resources” and the fact that “the universe of documents is enormous.” *Id.* at 16:20, 16:24, 17:1.

The Court has found that Commerce’s limited resources may constitute a legitimate constraint to verification. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (“Under the subjective ‘good cause’ standard, [Commerce] is entitled to weigh the need for verification in a particular case against the burden that verification would impose on agency resources.”). Similarly, in

Guizhou VI, the court reiterated that “[a]lthough Commerce appears to have the authority to verify a [third party’s] response as accurate . . . the verification process generally entails a significant burden on Commerce and the responder may choose not to allow verification.” *Guizhou VI*, 45 CIT at ___, 523 F. Supp. 3d at 1369–1370 (alterations in original) (quoting *CS Wind Vietnam Co. v. United States*, 41 CIT ___, ___, 219 F. Supp. 3d 1273, 1284 (2017)).

However, a post-hoc explanation by defendant at oral argument cannot cure the lack of explanation by Commerce in the IDM. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“It is well-established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981))). As such, the court is unable to assess whether Commerce’s determination that information on the threshold was required for verification and determining non-use, was reasonable.

Regarding the second category of information, Commerce explained sufficiently the reason that the missing information on partner/correspondent banks was required for verification of non-use. Commerce emphasized that there was information on the record that showed that credits and funds pertaining to the EBCP were “not limited to direct disbursements from the [China Export-Import] Bank” and “that customers can open loan accounts for disbursements through other banks.” IDM at 19. Commerce then detailed the reasons that it required the information on partner/correspondent banks to conduct verification, explaining that:

Commerce cannot verify claims of non-usage . . . if it does not know the names of the intermediary banks that might appear in the books and records of the recipient of the credit (*i.e.*, the loan) or the cash disbursement made pursuant to the credit. Given the participation of partner/correspondent banks, for which the GOC refused identifying information, even where there is no account in the name “Ex-Im Bank” in the books and records (*e.g.*, subledger, tax return, bank statements) of either the exporter or the U.S. customer, Commerce could not confirm that no loans were provided under the program.

IDM at 19. Commerce was, therefore, explicit — without the names of the partner/correspondent banks, Commerce determined that its verification process would be futile because it would not be able to confirm non-use, even if the books and records made no mention of the China Export-Import Bank.

Plaintiffs argue that neither the 2013 revisions nor the names of possible partner/correspondent banks are needed to determine usage. Pls. Br. at 25–28. Plaintiffs assert that the USD 2 million threshold is irrelevant to whether Commerce may determine usage because Commerce “has never explored this threshold in the countless on-site verifications it has conducted at the China [Export-Import] Bank as a means to determine non-use.” *Id.* at 25–26. With regard to partner/correspondent banks, plaintiffs argue that Commerce failed to link the information requested with the conclusion that Commerce cannot determine or verify use because, “regardless of whether . . . the program could be disbursed through [a partner/correspondent bank], usage could still be determined through [the] China [Export-Import] Bank’s system in China.” *Id.* at 27. Finally, plaintiffs point to comments by the GOC that Commerce could use information from the mandatory respondents to verify whether the purchasers used the EBCP. *Id.* at 6.

The court is unpersuaded by plaintiffs’ arguments. The question before the court is whether Commerce’s explanation is reasonable. *See Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (stating that the court should uphold the agency determination as long as “its factual findings are reasonable and supported by the record as a whole”) (citations omitted), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App’x 797 (Fed. Cir. 2003). Commerce is not precluded from using threshold criteria as a method of narrowing the scope of contracts.⁷ “It is within the discretion of Commerce to determine how to verify [], and due deference will be given to the expertise of the agency.” *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 9 CIT 520, 532, 622 F. Supp. 1071, 1082 (1985).

In addition, plaintiffs’ suggestion that Commerce could have verified the information through the China Export-Import Bank’s system is unpersuasive. Commerce has been denied access repeatedly to the China Export-Import Bank. IDM at 20 n.71 (“Commerce also notes the GOC has a history of refusing to provide Commerce with adequate access to its books and records relevant to understanding this

⁷ In fact, this Court remanded to Commerce in *RZBC* because Commerce did not verify or explain the reason that it could not verify non-use by using information on threshold criteria. *RZBC Grp. Shareholding Co.*, 2016 WL 3880773, at *6. Following the remand, this Court held that Commerce’s application of AFA was “supported by substantial evidence and [] consistent with both the law and this court’s remand order.” *RZBC Group Shareholding Co. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1196, 1201 (2017). Based on the wording of the translation of the 2000 Administrative Measures that was on the record regarding the threshold, the Court held that the “[USD] 2 million threshold is ambiguous, and for that reason Commerce cannot ensure non-use of the [EBCP] simply by examining the value of RZBC’s contracts.” *Id.*

program.”)⁸ In fact, the GOC again in this case stated that “[t]he GOC has no authority or right to force the [China Export-Import] Bank to provide a copy of the 2013 guidelines, and therefore is unable to provide a copy to [Commerce].” SQR at 9. In addition, the GOC’s claim, repeated by plaintiffs, that Commerce is “in a position to verify and confirm the existence, if any, of sales contracts that were supported by” the EBCP or the China Export-Import Bank also is not supported. GOC Questionnaire Resp. at 130; Pl. Br. at 6; see *RZBC Group Shareholding Co. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1196, 1201 (2017).⁹

The Federal Circuit has stated that “Commerce must explain the basis for its decisions . . . [and that] the path of Commerce’s decision must be reasonably discernable to a reviewing court.” *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). The court is able to understand from the explanation that Commerce provided the reason that Commerce is unable to verify the non-use information on the record without the missing information on partner/correspondent banks. The same cannot be said for the missing information on the threshold criteria. The court remands to Commerce to explain the reason that the information withheld by the GOC about the threshold requirement was necessary to verify non-use by describing how the missing information prevents Commerce from taking the steps that it considers necessary to verify non-use.

3. Whether Commerce explained the reason that information on the record was insufficient or impossible to verify

Finally, the court will examine whether Commerce explained the reason that the information on the record from Cooper Tire is unverifiable and whether Commerce’s finding is supported by substantial evidence. The court determines that Commerce did not explain the reason that Cooper Tire’s questionnaire responses were unverifiable.

⁸ This Court has recognized previously this repeated denial of access:

Commerce has previously attempted — on multiple occasions — to verify respondents’ claims of non-use by traveling to China to review the China Export-Import Bank records; however, the GOC has repeatedly denied Commerce access in not one but three separate respects: (1) by not allowing Commerce to go to the China Export-Import Bank, see *RZBC Grp. Shareholding Co. v. United States*, Slip Op. 16–64, 2016 WL 3880773 (CIT June 30, 2016); (2) by asserting that Commerce did not have the “proper authorization” to review the records, *id.*, see also *Changzhou I*, 195 F. Supp. 3d at 1354; and, (3) by asserting that the information explicitly sought by Commerce is “internal to the bank, non-public, and not available for release.” GOC Second Supplemental Questionnaire Response at 2, PD 392 (Sept. 26, 2016). Accordingly, the court is not persuaded that Commerce should expend additional resources to follow this method of verification

Guizhou VI, 45 CIT at __, 523 F. Supp. 3d at 1373–1374.

⁹ See *supra* note 7.

Because Commerce did not address in its IDM whether Cooper Tire's questionnaire responses were sufficient, the court cannot look to whether the determination by Commerce was reasonable. The court remands to Commerce to take the actions as set forth below.

Plaintiffs argue that there is substantial evidence on the record that neither the mandatory respondents nor their U.S. customers used the EBCP. Pls. Br. at 24. Plaintiffs argue that the record includes the

certified responses of [Cooper Tire] and Longyue that: (1) neither they nor any of their customers used the EBCP; and (2) they did not assist their customers in any way to obtain any export buyer's credits under the EBCP. [And that the] evidence also includes the GOC's repeated corroboration that neither [Cooper Tire] nor Longyue, nor any of their customers, used the EBCP.

Id. (internal citations omitted).

Defendant argues to the contrary that "the record contains only scant information provided in the questionnaire responses relating to usage of the program." Def. Br. at 19.

The information in the record provided by Cooper Tire pertaining to non-use is as follows. Cooper Tire stated in its questionnaire response that it "did not apply for, use, or benefit from [the EBCP] during the POR, and did not have any outstanding financing under this program." Cooper Tire Questionnaire Resp. at III-32. Commerce asked Cooper Tire to (1) discuss the role it played in assisting customers to obtain buyer credits and (2) provide to Commerce any documentation that it provided to the China Export-Import Bank in assisting customers to obtain buyer credits. *Id.* at III-31-III-32. Cooper Tire responded that it

[was] not aware that any of its customers applied for, used or benefited from this alleged program during the POR, and [Cooper Tire] did not provide any assistance to its customers for receiving the export buyer's credit. [Cooper Tire] did not perform any acts that in any way would permit these customers to receive any export buyer credits on its sales to these customers.

Id. at III-32.¹⁰

¹⁰ Similarly, the record showed that Longyue responded to the questionnaire by stating that it: emailed its customers to "determine whether [they] used [the EBCP]"; denied "ever be[ing] contacted by the [China Export-Import] Bank or other [state-owned commercial banks] or their export customers to assist in obtaining buyer credits under [the EBCP]," which assistance Longyue asserts is a prerequisite for receipt of benefits under the EBCP; and "did not purchase export credit insurance," which Longyue also claims is

Commerce also asked Cooper Tire to “explain in detail the steps you took to determine that no customer used the Buyer Credit Facility” in the event that Cooper Tire claimed that none of its customers used buyer credits during the POR. *Id.* Cooper Tire responded that it “was never contacted by any of its customers to provide any information required to obtain an export buyer’s credit from any Buyer Credit Facility. Accordingly, [Cooper Tire] believes that it is impossible that any of its customers could have possibly received export buyer’s credit.” *Id.*

Commerce found that “[t]he GOC is the only party that can answer questions about the internal administration of th[e] program” IDM at 20.

The Federal Circuit has made clear that “the burden of creating an adequate record lies with interested parties and not with Commerce.” *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1337–1338 (Fed. Cir. 2016) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)). Further, the Federal Circuit has stated that “[t]he purpose of verification is to verify the accuracy of information already on the record, not to continue the information-gathering stage of the Department’s investigation” *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT ___, ___, 61 F. Supp. 3d 1306, 1349 (2015), *aff’d sub nom. Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017) (internal citations omitted).

However, “[w]hen Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to [a private respondent] . . . it is expected to consider such evidence.” *RZBC*, 2016 WL 3880773, at *2 (quoting *GPX Int’l Tire Corp. v. United States*, 37 CIT 19, 58–59, 893 F. Supp. 2d 1296, 1332 (2013), *aff’d*, 780 F.3d 1136 (Fed. Cir. 2015)). Commerce’s standard approach for cooperating non-government respondents in CVD reviews has been “to analyze the responses provided by a company respondent to determine if the respondent’s information is sufficient to establish as a factual matter non-use of a program without government cooperation.” *Guizhou VI*, 45 CIT at ___, 523 F. Supp. 3d at 1367 (citing *Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 73 Fed. Reg. 9,993 (Dep’t of Commerce Feb. 25, 2008) (final results CVD new shipper review) and accompanying necessary under Article I.(4).1 of the *Detailed Implementation Rules Governing Export Buyers’ Credit of the Export-Import Bank of China* (“Detailed Implementation Rules”). Longyue Questionnaire Resp. at 25 (citing *id.*, Ex. 25, CR 69, PR 98). Accordingly, Article I.(4).1 of the Detailed Implementation Rules states: “In order to utilize export buyers’ credit, the exporter must purchase export credit insurance with the beneficiary being the [China] Export-Import Bank The acquisition of the insurance intent declaration is a prerequisite for the export buyers’ credit application.” *Id.*, Ex. 25, CR 69, PR 98.

Issues and Decision Memorandum at Comment 2; *Certain In-shell Roasted Pistachios from the Islamic Republic of Iran*, 71 Fed. Reg. 27,682 (Dep't of Commerce May 12, 2006) (final results CVD admin. review) and accompanying Issues and Decision Memorandum at Comment 2).¹¹

In the instant case, Commerce did not analyze on the record the responses provided by Cooper Tire to determine if the information was sufficient to establish nonuse of the EBCP given the lack of cooperation of the GOC.

In their briefs, plaintiffs cite to 19 C.F.R. § 351.303(g)(1)(i) and (g)(1)(ii), which requires that the presenter of factual information from a company or government certify that the submission to Commerce is accurate and complete to the best of their knowledge. 19 C.F.R. § 351.303(g)(1)(i)-(ii); Pls. Br. at 5, 8 (quoting § 351.303(g)(1)(ii)), 7 (quoting § 351.303(g)(1)(i)); Pls. Reply Br. at 6 (citing § 351.303(g)(1)(i)). Cooper Tire certified its responses to be “accurate and complete.” *See* Cooper Tire Questionnaire Resp.

This Court recognizes the legitimacy of statements made under penalty of perjury. *See RZBC*, 2016 WL 3880773, at *4 (remanding to Commerce because Commerce should have verified or “explained why it could not verify [] non-use [] by checking the firm’s audited financial statements or other books and records for the value of RZBC’s sales contracts” when “the record indicates that the Buyer’s Credit program is available only with respect to sales contracts valued over [USD] 2 million dollars, and RZBC swore under penalty of perjury that it had no such contracts”).

The recent EBCP cases have involved affidavits or declarations from the respondents’ U.S. customers. *See, e.g., Guizhou Tyre Co. v. United States* (“*Guizhou II*”), 43 CIT __, 399 F. Supp. 3d 1346, 1351–1352 (2019); *Jiangsu Zhongji Lamination Materials Co. v. United States*, 43 CIT __, __, 405 F. Supp. 3d 1317, 1331 (2019). This court has previously remanded a determination by Commerce involving AFA due to its failure to “explain[] how or why the [2013 EBCP] rule change affected the way [Commerce] conducts verification of non-use declarations” or to “address why this challenge is insurmountable.” *Guizhou II*, 43 CIT at __, 399 F. Supp. 3d at 1351. Moreover, this court has also found that Commerce needed to provide a detailed explanation for its determination that the customer affidavits were unverifiable “by carefully connecting the dots between each conclusion made and Commerce’s underlying reasoning for its

¹¹ *See supra* note 4.

findings.” *Guizhou VI*, 45 CIT at ___, 523 F. Supp. 3d at 1377. In this case, customer affidavits were not provided. However, Commerce needs to provide a sufficient explanation as to the reason that Cooper Tire’s responses are unverifiable.

In conclusion, the court remands this Final Determination to Commerce to: (1) explain the reason that the information withheld by the GOC about the threshold requirement and the 2013 revisions was necessary to verify non-use by describing how the missing information prevented Commerce from taking the steps that it considered necessary to verify non-use; (2)(a) explain the reason that the questionnaire statements by Cooper Tire of non-use by its customers are “unverifiable” by describing step-by-step Commerce’s methodology for verifying non-use; (b) describe the extent to which the record would enable Commerce to understand the precise role that the mandatory respondents would play in permitting customers to participate in the EBCP; (c) describe the information that Commerce would need from the mandatory respondents and/or the customers to determine whether either the mandatory respondents or their customers used the EBCP; (3) explain the sources that Commerce would need to look at to complete the process of verification, including any correspondence or communications of any nature (e.g., emails, letters, faxes, telephone calls, text messages) between the mandatory respondents or their customers and the GOC, the China Export-Import Bank and partner/correspondent banks; (4) explain whether it would be feasible — and, if not, why not — for Commerce to solicit and obtain the withheld information about the threshold requirement from the mandatory respondents or their customers; (5) if Commerce were to consider that obtaining and conducting a review of the sources of information identified in “(3)”, above, were unduly burdensome, explain with particularity the reasons for this conclusion; and (6) explain the extent to which Commerce would be able to rely on information from mandatory respondents by explaining how, if at all, such information would be relevant and reliable for Commerce to establish non-use. The court emphasizes that each of the aforementioned instructions for Commerce on remand is a distinct inquiry that requires a distinct individual response as well as clarification from Commerce in its redetermination.

II. Count II: Waiver

The court will not consider Count II in plaintiffs’ complaint because: (1) plaintiffs waived and abandoned Count II when they failed to include Count II arguments in the motion for judgment upon the agency record; and (2) Count II is impermissibly vague.

A. Legal framework

USCIT Rule 56.2(c)(1) provides that a party moving for judgment upon the agency record must state in its brief “the issues of law presented together with the reasons for contesting or supporting the administrative decision.” USCIT R. 56.2(c)(1). A party that fails to raise the issues of law accompanied by its arguments waives the right to assert those claims. *De Laval Separator Co. v. United States*, 1 CIT 144, 146, 511 F. Supp. 810, 812 (1981) (“It is axiomatic that any claim which is not pressed is deemed abandoned.”).

In addition, USCIT Rule 8(a)(2) requires that a claim for relief contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” USCIT R. 8(a)(2). USCIT Rule 8(a)(2) is identical to Federal Rule of Civil Procedure 8(a)(2). USCIT R. 8(a)(2); Fed. R. Civ. P. 8(a)(2). Interpretations of Federal Rule of Civil Procedure 8(a)(2) are, therefore, applicable. *Husteel Co. v. United States*, 43 CIT __, __, 375 F. Supp. 3d 1317, 1321 n.3 (2019). A claim must offer more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of action . . .” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The pleadings must also “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

B. Positions of the parties

Plaintiffs’ Count II alleges that, “[u]pon information and belief, Commerce erred in other aspects of its *Final [Determination]* . . . that will be evident upon review of the administrative record in this case. These additional errors by Commerce are arbitrary, capricious, not supported by substantial evidence, and otherwise are not in accordance with law.” Compl. at 4, ¶¶ 13–14, ECF No. 2.

Defendant and defendant-intervenor both assert that the court should reject plaintiffs’ Count II. Def. Br. at 2 n.2; Resp. Br. of United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Union, AFL-CIO, CLC (“Def.-Intervenor Br.”) at 11, ECF No. 45. Defendant contends that plaintiffs waived and abandoned Count II because they provided arguments only in support of Count I within the motion for judgment upon the agency record. Def. Br. at 2 n.2. Defendant-intervenor asserts further that Count II is impermissibly vague because the count fails to state a claim and fails to provide parties fair notice. Def.-Intervenor Br. at 11–12. Plaintiffs, in their reply brief, state that they are “not pursuing Count II of [the] Complaint, other than to the extent the Court deems Count II necessary to support any part of their argument challenging Commerce’s appli-

cation of AFA to the EBCP.” Pls.’ and Pl.Intervenor’s Reply Br. (“Pls. Reply. Br.”) at 12 n.2, ECF No. 46.

C. Analysis

The court will not consider plaintiffs’ Count II because plaintiffs failed to include arguments to support Count II in the motion for judgment upon the agency record, and the count is impermissibly vague. A plaintiff must raise arguments to support all counts that it seeks to pursue in its motion for judgment upon the agency record. USCIT R. 56.2(c)(1) (providing that briefs submitted upon a motion must include “issues of law presented together with the reasons for contesting or supporting the administrative determination”). Failure to raise arguments in support of a claim waives and abandons that claim. *Timken Co. v. United States*, 26 CIT 1072, 1073 n.2, 240 F. Supp. 2d 1228, 1231 n.2 (2002) (holding that failure to raise arguments to support claim constitutes waiver of that claim).

Plaintiffs contend in Count II that Commerce committed “additional errors,” Compl. at 4, ¶ 14; however, plaintiffs do not offer arguments in support of Count II in their brief. Pls. Br. at 10–32 (discussing only Commerce’s application of AFA to the EBCP). In addition, plaintiffs state in their reply brief that they are “not pursuing Count II of [the] Complaint, other than to the extent the Court deems Count II necessary” Pls. Reply Br. at 12 n.2. Plaintiffs’ expressed intent not to pursue Count II (unless the court “deems [it] necessary”) suggests further waiver and abandonment. *See id.* Therefore, plaintiffs’ Count II is waived and abandoned because plaintiffs’ fail to offer argument in support of Count II and indicate that they are “not pursuing” the count. *Id.*

Even if plaintiffs had raised arguments in support of Count II, however, the count must be set aside for failure to state a claim under USCIT Rule 8. “[A] claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” USCIT R. 8(a)(2). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1062 (Fed. Cir. 2012) (quoting *Twombly*, 550 U.S. at 555).

Plaintiffs contend in Count II that certain errors by Commerce “will be evident” and that “[t]hese additional errors by Commerce are arbitrary, capricious, not supported by substantial evidence, and otherwise are not in accordance with law.” Compl. at 4, ¶¶ 13–14. A complaint that alleges errors that “will become more apparent” fails to provide parties “fair notice” of the scope of the claims and can prevent defendant from dealing appropriately with the allegations.

Husteel Co., 43 CIT at ___, 375 F. Supp. 3d at 1321-1322 (holding that plaintiff's complaint alleging "Commerce's determination may have contained other errors of law and fact that will become more apparent after a full review of the administrative record" failed to state a claim because it did not state a specific error of law or fact and was "vague and open-ended"). Plaintiffs do not specify errors of law or fact within Commerce's Final Determination that they seek to pursue. Instead, they state generally that "additional errors" will become evident. Compl. at 4, ¶ 14. As in *Husteel*, Count II does not provide fair notice to defendants because it does not state existing issues of law or fact, but rather states legal conclusions and future issues that might emerge. For the foregoing reasons, the court will not consider plaintiff's Count II.

CONCLUSION AND ORDER

In the 1995 film *Philadelphia*, attorney Joe Miller (played by Denzel Washington), says — tired and exasperated — to his prospective client, Andrew Beckett (portrayed by Tom Hanks) from behind an old, worn wooden desk: "Explain this to me like I'm a two-year-old."¹²

* * *

While the court does not request that Commerce explain its decisions to the court like a two-year-old, the law requires that Commerce "explain the basis for its decisions" and that "the path of [its] decision must be reasonably discernable." *NMB Sing. Ltd.*, 557 F.3d at 1319. In light of these requirements, the court remands the Final Determination so that Commerce may: (1) explain the reason that the information withheld by the GOC about the threshold requirement and the 2013 revisions was necessary to verify non-use by describing how the missing information prevented Commerce from taking the steps that it considered necessary to verify non-use; (2)(a) explain the reason that the questionnaire statements by Cooper Tire of non-use by its customers are "unverifiable" by describing step-by-step Commerce's methodology for verifying non-use; (b) describe the extent to which the record would enable Commerce to understand the precise role that the mandatory respondents would play in permitting customers to participate in the EBCP; (c) describe the information that Commerce would need from the mandatory respondents and/or the customers to determine whether either the mandatory respondents or their customers used the EBCP; (3) explain the sources that Commerce would need to look at to complete the process of verification, including any correspondence or communications of any nature (e.g.,

¹² PHILADELPHIA (TriStar Pictures 1993).

emails, letters, faxes, telephone calls, text messages) between the mandatory respondents or their customers and the GOC, the China Export-Import Bank and partner/correspondent banks; (4) explain whether it would be feasible — and, if not, why not — for Commerce to solicit and obtain the withheld information about the threshold requirement from the mandatory respondents or their customers; (5) if Commerce were to consider that obtaining and conducting a review of the sources of information identified in “(3)”, above, were unduly burdensome, explain with particularity the reasons for this conclusion; and (6) explain the extent to which Commerce would be able to rely on information from mandatory respondents by explaining how, if at all, such information would be relevant and reliable for Commerce to establish non-use. Accordingly, the court remands the Final Determination to Commerce.

Based on the foregoing reasons, it is hereby

ORDERED that on remand Commerce: (1) explain the reason that the information withheld by the GOC about the threshold requirement and the 2013 revisions was necessary to verify non-use by describing how the missing information prevented Commerce from taking the steps that it considered necessary to verify non-use; (2)(a) explain the reason that the questionnaire statements by Cooper Tire of non-use by its customers are “unverifiable” by describing step-by-step Commerce’s methodology for verifying non-use; (b) describe the extent to which the record would enable Commerce to understand the precise role that the mandatory respondents would play in permitting customers to participate in the EBCP; (c) describe the information that Commerce would need from the mandatory respondents and/or the customers to determine whether either the mandatory respondents or their customers used the EBCP; (3) explain the sources that Commerce would need to look at to complete the process of verification, including any correspondence or communications of any nature (e.g., emails, letters, faxes, telephone calls, text messages) between the mandatory respondents or their customers and the GOC, the China Export-Import Bank and partner/correspondent banks; (4) explain whether it would be feasible — and, if not, why not — for Commerce to solicit and obtain the withheld information about the threshold requirement from the mandatory respondents or their customers; (5) if Commerce were to consider that obtaining and conducting a review of the sources of information identified in “(3)”, above, were unduly burdensome, explain with particularity the reasons for this conclusion; and (6) explain the extent to which Commerce would be able to rely on information from mandatory respondents by explaining how, if at all, such information would be relevant and reliable for Commerce to establish non-use. The court emphasizes that each of the aforementioned instructions for Commerce on remand is

a distinct inquiry that requires a distinct individual response as well as clarification from Commerce in its redetermination; it is further **ORDERED** that the remand results shall be due 90 days following the date of this Opinion and Order; it is further

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

Dated: October 12, 2021
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 21–142

HUNG VUONG CORPORATION, et al., Plaintiffs, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA, et al., Defendant-Intervenors.

Before: M. Miller Baker, Judge

[The court sustains Commerce’s remand results and enters judgment for Defendant and Defendant-Intervenors.]

Dated: October 12, 2021

Robert L. LaFrankie, Crowell & Moring LLP of Washington, DC, submitted comments for Plaintiffs.

Brian M. Boynton, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; and *Kara M. Westercamp*, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, submitted comments for Defendant. Of counsel on the comments was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Jonathan M. Zielinski and *James R. Cannon, Jr.*, Cassidy Levy Kent (USA) LLP of Washington, DC, submitted comments for Defendant-Intervenors.

OPINION

Baker, Judge:

Like comets that orbit the sun, trade cases make periodic return visits to the court. In this return visit after a remand to the Department of Commerce in an administrative review, a Vietnamese fish producer challenges Commerce’s continued application of facts otherwise available with an adverse inference due to the company’s reporting deficiencies and failure to cooperate. The court sustains the Department’s remand results as supported by substantial evidence.

Factual and Procedural Background

This is the sequel to *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321 (CIT 2020), which addressed Hung Vuong’s challenge to Commerce’s final determination in the 14th administrative review of an antidumping order as to certain frozen fish fillets from Vietnam. Summarized, the Department found, *inter alia*, that it could not verify information the company submitted, that the administrative record was incomplete in several respects, and that the information deficiencies resulted from the company’s failure to cooperate to the best of its ability. Commerce therefore rejected all the company’s submissions, resorted to the use of total facts otherwise available with an adverse inference, or total adverse facts available (in the Department’s jargon, “total AFA”), and assigned Hung Vuong a dumping margin of \$3.87 per kilogram, or about 100 percent. *Id.* at 1332–33.

This court sustained most of Commerce’s findings underlying its application of total adverse facts available. Even so, the court remanded the case to Commerce to reconsider whether partial adverse facts available might be necessary because two of the Department’s findings were unsupported by substantial evidence or contrary to law.

First, the Department could not rely on the failure of Hung Vuong’s customers to respond to Commerce’s questionnaires to apply total adverse facts available. *Id.* at 1354–56. But because that finding by the Department was just one of several reasons why it applied total adverse facts available, the court remanded to Commerce to reconsider whether partial adverse facts available might be necessary. *Id.*

Second, the Department’s rejection of Hung Vuong’s factors of production because of concerns over the company’s fish byproducts’ water-weight gain was not supported by substantial evidence in view of Commerce’s failure to address the company’s explanation for the problem. *Id.* at 1365–66. As “Commerce viewed this issue as essential to its analysis,” the court could not sustain the Department’s “decision to apply total facts otherwise available as to Hung Vuong’s factors of production.” *Id.* at 1367. The court therefore remanded for Commerce to address Hung Vuong’s explanation, to consider whether it might be necessary to apply partial, rather than total, facts otherwise available, and by extension “to consider the extent to which its conclusion as to that submission affects its decision on the adverse inference as to the factors of production, including whether a partial or total adverse inference is justified” *Id.*

As the court directed Commerce to reconsider whether application of total facts otherwise available remained reasonable, the court also

directed the Department on remand to reconsider the rate applied to Hung Vuong, which was based on the finding of total adverse facts available. *Id.*

Proceedings on Remand

On remand, Hung Vuong submitted comments to Commerce and included a new “corrected” U.S. sales database it claims addressed the Department’s concerns. ECF 88, at 9–10. Commerce rejected the database as “untimely filed new factual information” and ultimately reaffirmed its original determination applying total facts otherwise available with an adverse inference and an antidumping rate of \$3.87/kg. *See* ECF 75–1, at 9, 30 (remand results).

A. Total versus partial facts otherwise available with an adverse inference

Critically, on remand Commerce concluded that Hung Vuong’s control number reporting deficiencies “and failure to retain documents, *alone*, warranted continued application of total [facts otherwise available with an adverse inference].” *Id.* at 13 (emphasis added). The Department noted that the court had sustained Commerce’s finding that Hung Vuong’s databases were unreliable for calculating a dumping margin. *Id.* “Reliable sales and [factors-of-production] databases form the foundation of Commerce’s dumping analysis, and without them Commerce cannot calculate an accurate dumping margin for [Hung Vuong].” *Id.*

As to Hung Vuong’s reporting deficiencies regarding its customer relationships, the Department continued to find that “total AFA is warranted” even without consideration of the customers’ failure to respond to Commerce’s questionnaires—one of the issues remanded by the court. *Id.* at 15. The Department qualified this determination, however, by *also* relying on the company’s “failure to report accurate [control number] information” to apply total adverse facts available. *Id.*

As to the byproducts issue on which the court also remanded, Commerce stated that although it believed Hung Vuong’s “explanation does not plausibly account for the observed weight difference, we find that [the company’s] other verification failures are so substantial that it is unnecessary to rely on this verification finding in our determination that [the company’s factors-of-production] data are unusable, and that total AFA remains appropriate as a result of those other failures.” *Id.* at 18.¹

¹ Commerce also observed its prior finding of total adverse facts available based on deficiencies in Hung Vuong’s factors of production reporting was based on the water weight

Thus, the Department withdrew its reliance on the “customer questionnaires” and “byproducts” issues, but determined that its overall findings of “numerous deficiencies” that the court already sustained “demonstrate that the application of total AFA is still warranted.” *Id.* at 18. Commerce cited a section of its issues and decision memorandum related to Hung Vuong’s failure to report accurate control numbers (which the court sustained, *see* 483 F. Supp. 3d at 1357–63) that read, in part, “we find that we do not have correct Section C and Section D databases with which to calculate an accurate margin for [Hung Vuong],” ECF 75–1, at 18 (quoting ECF 25–5, at 32), and also cited a discussion of how substantial portions of Hung Vuong’s data were unverifiable because of failure to maintain source documents, *id.* (citing ECF 25–5, at 19–21).

Responding to the parties’ administrative case briefs on remand, the Department rejected Hung Vuong’s arguments that application of partial facts otherwise available (with or without an adverse inference) was a viable way to resolve Commerce’s concerns:

Unverifiable source documents and misrepresentations regarding customers [sic] relationships are not the type of quantifiable deficiencies that can be addressed with modifications to the existing databases—rather, they speak fundamentally to the credibility of the reported data themselves. Because we have determined (and the Court has sustained our determination) that [Hung Vuong’s] data are unusable, it is not possible to use any of [Hung Vuong’s] data to determine its final dumping margin using partial AFA.

Id. at 26.

In short, the Department concluded that it would continue to apply total facts otherwise available with an adverse inference to Hung Vuong despite no longer relying on its findings on the “customer questionnaire” and “byproduct reporting” issues.

B. The rate applied

Commerce then addressed its selection of the \$3.87/kg rate. First, the Department rejected Hung Vuong’s argument that the circumstances under which the rate was calculated—a “new shipper review” from the eighth administrative review of the same antidumping order—rendered the rate inappropriate, noting that the relevant statute allows Commerce to use any dumping margin from any segment

discrepancy *and* deficiencies in the company’s labor reporting, the latter of which the court sustained. ECF 75–1, at 15–16. The Department continued to find Hung Vuong’s labor reporting deficiencies warranted an adverse inference, *id.* at 16, but notably did not apply total adverse facts available based on these deficiencies.

of the proceeding, “including the highest such margin,” without regard to what the margin might have been had the offending respondent fully cooperated and without regard to that respondent’s “alleged commercial reality.” *Id.* at 26–27.

Second, Commerce rejected Hung Vuong’s argument that the \$3.87/kg rate was so high as to be “aberrational” and thus inappropriate, noting that part of the analysis in a “new shipper review” involves “a ‘totality of the circumstances test’ to determine if a sale involved in [a new shipper review] is ‘unrepresentative or extremely distortive,’ so as to suggest the transaction should be excluded as a *non-bona fide* sale,” and explained that in the review leading to the \$3.87/kg rate the Department made no finding that the sales in question “were atypical, aberrational, or distortive, nor that they did not otherwise reflect commercial reality.” *Id.* at 27.

Third, Commerce rejected Hung Vuong’s contention that the Department had failed to “evaluate the situation” as required by 19 U.S.C. § 1677e(d)(2).² ECF 75–1, at 26. Citing *POSCO v. United States*, 335 F. Supp. 3d 1283, 1285–86 (CIT 2018), Commerce stated that it interprets the phrase “evaluation of the situation” to require it, “as part of its determination of applying the highest rate, to review the record to determine if there was something inappropriate or otherwise unreasonable about that rate, given the situation leading to the application of an adverse inference.” ECF 75–1, at 28.

Commerce further explained that it applied total adverse facts available because it could not use Hung Vuong’s information in its calculations, and the company failed to correct the deficiencies despite having the opportunity to do so. Commerce also noted that the statute allows for the selection of any dumping margin from any prior segment of the proceeding, including the highest margin, as an “adverse inference rate.” *Id.* at 29. “Thus, the only question outstanding is if the record suggests that the rate applied to [Hung Vuong], \$3.87/kg, is otherwise inappropriate.” *Id.*

The Department found that no record evidence undermined the rate’s reasonableness and that while the company complained that the rate was extremely high, “suggesting that it was aberrational or distortive, [Hung Vuong] provides no evidence to substantiate that claim.” *Id.* Accordingly, Commerce concluded that it would continue (1) to apply total facts otherwise available with an adverse inference

² This provision directs that Commerce may use any dumping margin from any segment of the proceeding under the applicable antidumping order, “including the highest such rate or margin, based on the evaluation by [the Department] of the situation that resulted in [Commerce] using an adverse inference in selecting among the facts otherwise available.” 19 U.S.C. § 1677e(d)(2) (emphasis added).

to Hung Vuong despite no longer relying on its findings on the “customer questionnaire” and “byproduct reporting” issues and (2) to apply the \$3.87/kg rate. *Id.* at 29–30.

Jurisdiction and Standard of Review

The court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which vest this court with authority over actions contesting Commerce’s final determination in an administrative review of an antidumping duty order. The court is to uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law . . .” 19 U.S.C. § 1516a(b)(1)(B)(i).

“Substantial evidence” has the same meaning it does in a pre-remand proceeding. “[T]he question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce’s conclusion.” *Hung Vuong*, 483 F. Supp. 3d at 1343.

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.

Id. (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003)).

Discussion

Hung Vuong asserts two challenges to Commerce’s remand results. First, the company argues that the Department’s continued application of total facts otherwise available with an adverse inference, or “total AFA,” is unsupported by substantial evidence and contrary to law. ECF 88, at 11–29. Second, Hung Vuong contends that Commerce failed to adequately explain or justify its selection of the \$3.87/kg rate dumping rate. *Id.* at 29–34.

I.

A.

Hung Vuong’s first line of attack on Commerce’s continued finding of total adverse facts available is that because the company submitted a revised and corrected Section C database “resolving the [control number] net weight issues, which was the single biggest deficiency in

its sales and cost databases other than the byproduct” issue, *id.* at 18, the Department could have “determine[d] the feasibility of applying partial AFA.” *Id.* Commerce, however, declined to do so because the database was “unsolicited new factual information.” *Id.* Hung Vuong contends that this rejection was “arbitrary and unreasonable because it could have resolved the main remaining reporting deficiency in the data (*i.e.* [control numbers]), thus rendering the sales and costs data at least partially usable.” *Id.* at 19 (citing Remand Appx1439–1441).

The government, in response, argues that Hung Vuong has offered no authority, nor is the government aware of any, “that would permit a party to *cure* a deficiency in a remand proceeding by submitting untimely new factual information despite the Court already sustaining a finding of an adverse factual inference.” ECF 89, at 19 (emphasis in original) (citing 483 F. Supp. 3d at 1363).

Whether to allow Hung Vuong to submit a revised database was a decision for Commerce, not for the court: “The decision whether to reopen the record is ordinarily one for the agency to make . . .” *GGB Bearing Tech. (Suzhou) Co. v. United States*, 279 F. Supp. 3d 1233, 1251 (CIT 2017). The remand order here neither instructed the Department to reopen the record nor prohibited Commerce from doing so. The Department need not reopen the record with respect to issues the court has already decided. *See Jinxiang Yuanxin Imp. & Exp. Co v. United States*, 71 F. Supp. 3d 1338, 1355 (CIT 2015).

Despite complaining that Commerce did not accept the revised database, Hung Vuong nowhere argues that the Department was obligated to do so, or that Commerce abused its discretion, aside from the five-word conclusory statement “[t]his was arbitrary and unreasonable.” ECF 88, at 19. Contrary to Hung Vuong’s unsupported assertion, Commerce’s exercise of its discretion to decline to receive the company’s new information was neither arbitrary nor unreasonable, as it was for the Department to determine how to conduct proceedings on remand.

B.

Hung Vuong next challenges Commerce’s reliance on the company’s deficiencies in its reported labor factors of production and customer relationship documents for finding total adverse facts available. ECF 88, at 19–22. The company’s arguments, however, are misplaced because the Department’s remand results do not rely on either the labor or customer relationship reporting deficiencies *alone* to apply *total* adverse facts available. *See* ECF 75–1, at 15 (applying total adverse facts available based on the customer reporting deficiencies *coupled with* the company’s “failure to report accurate [control num-

ber] information”); *see also above* note 1 (explaining that Commerce did not apply total adverse facts available based on the labor reporting deficiencies).

C.

Hung Vuong’s third and final challenge to Commerce’s continued application of total adverse facts available is that the Department overlooked all the contrary evidence in the record contradicting its continued application of total adverse facts available based on the company’s control number reporting deficiencies and failure to retain source documents. ECF 88, at 22–77. This line of attack, however, seeks to impermissibly relitigate issues the court already resolved in its prior opinion sustaining Commerce’s findings on those issues.

* * *

The government argues, and the court agrees, that Commerce’s determination that it did not need to rely on the remanded issues to apply total adverse facts available “was consistent with the Court’s remand order.” ECF 89, at 29. The Department reconsidered its determination to apply adverse facts available and explained how the record supported its determination even without reliance on the remanded issues. *Id.* Substantial evidence supports that determination, and therefore the court sustains the Department’s remand results applying total adverse facts available based on Hung Vuong’s control number reporting deficiencies “and failure to retain documents.” ECF 75–1, at 13.

II.

The remaining issue is Commerce’s selection of the \$3.87/kg rate, which Hung Vuong characterizes as “highly punitive.” ECF 88, at 32.³ The company challenges that rate on three grounds.

First, Hung Vuong argues that Commerce violated the statutory requirement that it undertake an appropriate “evaluation of the situation.” ECF 88, at 30 (discussing 19 U.S.C. § 1677e(d)(2)). Citing *POSCO v. United States*, 296 F. Supp. 3d 1320 (CIT 2018), the com-

³ That the \$3.87/kg rate is significantly higher than the \$2.39/kg Vietnam-wide rate is not disqualifying because the Federal Circuit “has made clear . . . that Commerce need not select, as the AFA rate, a rate that represents the typical dumping margin for the industry in question.” *KYD, Inc. v. United States*, 607 F.3d 760, 765–66 (Fed. Cir. 2010); *see also id.* at 766 (“Significantly, we have held that Commerce is permitted to use a ‘common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less.’” (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) (emphasis in *Rhone Poulenc*))).

pany argues that “*some additional evaluation is required beyond that which justified the adverse inference.*” ECF 88, at 31 (double emphasis in the original and quoting *POSCO*, 296 F. Supp. 3d at 1349).

The court reads *POSCO* as holding that Commerce may not simply rely on its adverse inference to select a rate. Instead, the Department must “evaluate the situation that resulted in” the adverse inference. 19 U.S.C. § 1677e(d)(2).

Commerce did that here: “As we explain above . . . [the Department] was unable to use the information [Hung Vuong] provided in its calculations,” and the company “failed to correct its deficiencies when it had the opportunity,” and “otherwise failed to act to the best of its ability.” ECF 75–1, at 28–29; *see also id.* at 26 (“Because we have determined (and the Court has sustained our determination) that [Hung Vuong’s] data are unusable, it is not possible to use any of [that] data to determine its final dumping margin”); *cf. Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1300–01 (Fed. Cir. 2021) (“Commerce considered the unique factual circumstances of Deacero’s situation and its level of culpability and concluded that the highest Petition rate was appropriate.”) (cleaned up).

Second, Hung Vuong complains that Commerce disregarded the extent of the company’s cooperation with the review. The Federal Circuit has emphasized, however, that there is no fixed single formula Commerce must use in deciding what rate is appropriate for an uncooperative respondent—“neither the statute nor the pertinent regulations address the weight to be given to different degrees of cooperation.” *Heveafil Sdn. Bhd. v. United States*, 58 F. App’x 843, 849–50 (Fed. Cir. 2003). In *Heveafil*, the court rejected a respondent’s contention that its *partial* cooperation meant Commerce could not apply the possible highest margin. It follows, therefore, that, in this case, the Department permissibly selected the highest possible rate notwithstanding the company’s production of many documents and participation in an extensive verification on site in Vietnam.

Hung Vuong’s final challenge is that Commerce “failed to look at any other rates.” ECF 88, at 32. Hung Vuong offers no suggestion as to what “range of rates” Commerce should have considered (other than a vague reference to “some other rates,” *id.* at 34) nor any citation to the administrative record that might justify some other figure. *Cf. Shanghai Taoen Int’l Trading Co. v. United States*, 360 F. Supp. 2d 1339, 1348 n.13 (CIT 2005) (“Total facts available is therefore appropriate because Commerce has no reliable factors of production information with which to calculate Taoen’s antidumping margin. Whether another substitute margin would be more rationally

related to the ‘actual’ margin is not before the court because plaintiff has not suggested one, and one is not readily apparent in the record.”).

Here, the statute permitted Commerce to choose “any dumping margin from any segment of the proceeding under the applicable antidumping order.” 19 U.S.C. § 1677b(d)(1)(B). That’s what the Department did: it applied the calculated rate from the eighth administrative review of Commerce’s original antidumping order. *See* ECF 75–1, at 19. Thus, in selecting \$3.87/kg, “Commerce acted within its discretion in its selection of that AFA rate.” *Deacero*, 996 F.3d at 1300.

The administrative record allowed the Department to select \$3.87/kg as a “total adverse facts available” rate for Hung Vuong. The court therefore sustains Commerce’s selection of that rate.

Conclusion

For the reasons explained above, the court **SUSTAINS** Commerce’s remand results. Doing so resolves the outstanding issues in this case, so the court will enter judgment for the government and Catfish Farmers. *See* USCIT R. 58(a).

Dated: October 12, 2021

New York, NY

/s/ M. Miller Baker

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