

U.S. Customs and Border Protection



COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(NO. 03 2022)

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 February 2022. A total of 242 recordation applications were approved, consisting of 4 copyrights and 238 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 — MARCH 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnn	Owner Name	GM Restricted
COP 22-00011	03/04/2022	03/04/2042	Jarvis Kingston Highlights.	Jarvis Kingston	No
COP 22-00012	03/14/2022	09/19/2041	Mario Golf	CAMELOT CO., LTD., Transfer	No
COP 22-00013	03/15/2022	03/15/2042	Metroid Dread	Nintendo of America Inc.	No
COP 22-00014	03/28/2022	02/27/2042	TWO US Design.	Aletta Anderson, Transfer	No
TMK 02-00297	03/11/2022	11/28/2031	ANGELS & DESIGN	ANGELS BASEBALL L.P.	No
TMK 02-00323	03/29/2022	04/22/2032	POKÉ BALL Design	Nintendo of America Inc. CORPORATION	No
TMK 02-00679	03/30/2022	06/19/2032	GAME BOY ADVANCE	Nintendo of America Inc. CORPORATION	No
TMK 02-00949	03/22/2022	07/31/2022	STL (STYLIZED)	St. Louis Cardinals, LLC	No
TMK 03-00655	03/18/2022	06/30/2022	WHITE SOX	CHICAGO WHITE SOX, LTD.	No
TMK 03-00660	03/18/2022	06/24/2032	BLUE JAYS	ROGERS BLUE JAYS BASEBALL PARTNERSHIP CANADA	No
TMK 03-00744	03/01/2022	08/21/2032	3 BALLERINA	Truong Giang Corporation	No
TMK 04-00247	03/10/2022	01/15/2032	GUCCI	GUCCI AMERICA, INC.	No
TMK 04-00248	03/10/2022	12/15/2031	GUCCI	GUCCI AMERICA, INC.	No
TMK 05-00471	03/22/2022	05/07/2025	AEO	RETAIL ROYALTY COMPANY	No
TMK 05-01072	03/15/2022	06/27/2031	TAMIFLU	HOFFMANN-LA ROCHE INC.	No
TMK 06-00164	03/18/2022	02/10/2032	BLACK & MILD	JOHN MIDDLETON CO.	No
TMK 06-00331	03/16/2022	11/30/2027	Music Man & DESIGN	ERNIE BALL, INC. CORPORATION	No
TMK 06-00559	03/22/2022	09/20/2030	AE	RETAIL ROYALTY COMPANY CORPORATION	No

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TMK 06-00578	03/30/2022	06/26/2032	RICELAND	Riceland Foods, Inc. CORPORATION	No
TMK 06-00770	03/29/2022	10/24/2031	Design (Sword with three stars)	TENNESSEE FOOTBALL, INC. CORPORATION	No
TMK 06-00982	03/01/2022	03/11/2032	LUMINOR	OFFICINE PANERAI A.G. CORPORATIONSWITZERLAND	No
TMK 07-00165	03/11/2022	02/26/2032	CHROME HEARTS	Chrome Hearts LLC	No
TMK 07-00657	03/16/2022	07/17/2027	ERNIE BALL	Ernie Ball, Inc. CORPORATION	No
TMK 07-00914	03/25/2022	01/05/2023	HARRIS	L3HARRIS TECHNOLOGIES, INC.	No
TMK 07-00944	03/25/2022	03/16/2026	Gates & Design	GATES CORPORATION	No
TMK 07-00945	03/25/2022	08/30/2029	Gates & DESIGN	GATES CORPORATION CORPORATION	No
TMK 07-00956	03/25/2022	09/11/2024	POLY CHAIN (STYLIZED)	GATES CORPORATION	No
TMK 08-00174	03/04/2022	01/03/2032	MAZOLA	ACH Food Companies, Inc.	No
TMK 09-00014	03/18/2022	01/26/2032	KRAKUS Design	SQUARE ENTERPRISES CORPORATION	No
TMK 09-00114	03/22/2022	07/08/2027	AMERICAN EAGLE OUTFITTERS	RETAIL ROYALTY COMPANY CORPORATION	No
TMK 09-00118	03/18/2022	11/07/2027	1977	Retail Royalty Company	No
TMK 09-00122	03/22/2022	11/12/2028	AERIE	RETAIL ROYALTY COMPANY	No
TMK 09-00123	03/22/2022	03/09/2029	AMERICAN EAGLE	Retail Royalty Company	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 09-00136	03/22/2022	11/12/2027	AMERICAN EAGLE OUTFITTERS	RETAIL ROYALTY COMPANY CORPORATION	No
TMK 09-00185	03/21/2022	03/18/2032	MICHAEL KORS	MICHAEL KORS, L. L. C.	No
TMK 09-00288	03/22/2022	04/09/2031	LAUREN	PRL USA Holdings, Inc.	No
TMK 09-01059	03/22/2022	03/27/2026	AMERICAN EAGLE	Retail Royalty Company CORPORATION	No
TMK 09-01071	03/22/2022	09/09/2029	AMERICAN EAGLE	Retail Royalty Company	No
TMK 11-00381	03/22/2022	04/09/2031	LAUREN	PRL USA Holdings, Inc.	No
TMK 11-00418	03/22/2022	02/27/2031	RALPH LAUREN	PRL USA HOLDINGS, INC.	No
TMK 11-00628	03/22/2022	02/16/2031	FLYING EAGLE DESIGN	Retail Royalty Company	No
TMK 11-00714	03/28/2022	04/01/2028	OXO & DESIGN	Helen of Troy Limited CORPORATION	No
			BARBADOS		
TMK 12-00025	03/04/2022	04/02/2032	GM Logo Design	GENERAL MOTORS LLC	No
TMK 12-00078	03/04/2022	02/06/2032	POKÉ BALL Design	Nintendo of America Inc. CORPORATION	No
TMK 12-00088	03/10/2022	03/31/2032	POISE	KIMBERLY-CLARK WORLDWIDE, INC.	No
TMK 12-00094	03/04/2022	02/20/2032	POKÉ BALL Design	Nintendo of America Inc. CORPORATION	No
TMK 12-00234	03/16/2022	02/06/2032	PAPER MARIO	Nintendo of America Inc.	No
TMK 12-00416	03/30/2022	05/31/2032	NINTENDO3DS	Nintendo of America Inc. CORPORATION	No
TMK 12-00437	03/10/2022	03/06/2032	HAWAIIANAS & DESIGN	ALPARGATAS S.A. CORPORATION BRAZIL	No

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TMK 12–00668	03/11/2022	02/05/2032	LSI	LSI Industries Inc.	No
TMK 12–01063	03/18/2022	11/11/2031	SAMSUNG	SAMSUNG ELECTRONICS AMERICA, INC.	No
TMK 13–00267	03/28/2022	02/08/2032	MICHAEL KORS	Michael Kors, L.L.C.	No
TMK 13–00274	03/10/2022	12/11/2031	FAR NIENTE	FN Cellars, LLC	No
TMK 13–00287	03/28/2022	02/23/2031	PUR & DESIGN	HELEN OF TROY BARBADOS	No
TMK 13–00323	03/11/2022	01/11/2032	TRIJICON & DESIGN	Trijicon, Inc.	No
TMK 13–00330	03/18/2022	01/11/2032	TRIJICON & DESIGN	Trijicon, Inc.	No
TMK 13–00334	03/22/2022	04/12/2029	AE	RETAIL ROYALTY COMPANY CORPORATION	No
TMK 13–00973	03/10/2022	07/18/2026	Beverage Glass DESIGN	Tervis Tumbler Company	No
TMK 13–01000	03/10/2022	09/14/2031	T & DESIGN	Tervis Tumbler Company CORPORATION	No
TMK 13–01073	03/22/2022	05/20/2030	Checkerboard Shoe Design	VANS, INC.	No
TMK 13–01074	03/22/2022	11/04/2028	Sidestripe on Shoe Design	Vans, Inc.	No
TMK 14–00139	03/04/2022	01/09/2032	SUSTIVA	BRISTOL-MYERS SQUIBB PHARMA COMPANY	No
TMK 14–00515	03/17/2022	06/21/2031	LEVITON & DESIGN	LEVITON MANUFACTURING CO.	No
TMK 14–00817	03/04/2022	06/22/2031	BELLAZURE	Sobel Westex	No
TMK 14–00986	03/28/2022	04/10/2022	VERSAJUST	BENDIX COMMERCIAL VEHICLE SYSTEMS LLC	No

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TMK 15—00098	03/04/2022	03/04/2032	OnStar Design (OnStar Button Logo)	ONSTAR, LLC	No
TMK 15—00338	03/11/2022	01/27/2032	Miscellaneous (Wavy Lines) Design	PGI POLYMER, INC.	No
TMK 15—00504	03/16/2022	03/04/2028	PREVAGEN	QUINCY BIOSCIENCE, LLC	No
TMK 15—01177	03/11/2022	03/27/2032	QRT	NORDOST CORPORATION	No
TMK 16—00523	03/28/2022	02/09/2032	WATERPIK	WATER PIK, INC. CORPORATION	No
TMK 16—00538	03/28/2022	03/04/2032	WATERPIK & DESIGN	WATER PIK, INC. CORPORATION	No
TMK 16—00755	03/01/2022	01/09/2032	CFA	CFA INSTITUTE NON-STOCK CORPORATION	No
TMK 16—00781	03/22/2022	10/05/2031	INSTAX	FUJIFILM Corporation Japan	No
TMK 16—00966	03/04/2022	08/24/2031	POLARIS & DESIGN	Polaris Industries Inc. CORPORATION	No
TMK 16—01040	03/04/2022	12/27/2031	SKIMMIES	Jockey International, Inc. CORPORATION	No
TMK 16—01065	03/25/2022	02/01/2032	RZR	Polaris Industries Inc.	No
TMK 17—00054	03/14/2022	01/18/2032	ZELBORAF	Genentech, Inc.	No
TMK 17—00061	03/25/2022	12/20/2031	AMERICAN QUALITY MAVERICK CIGARETTES & DESIGN	ITG BRANDS, LLC	No
TMK 17—00099	03/25/2022	02/28/2032	AMERICAN QUALITY MAVERICK CIGARETTES & Design	ITG BRANDS, LLC	No
TMK 17—00397	03/22/2022	02/15/2032	HYDRO FLASK	HELEN OF TROY LIMITED	No
TMK 17—00868	03/25/2022	03/06/2032	TOPAZ	Topaz Lighting Corp.	No

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TMK 18–001444	03/18/2022	06/13/2032	MJB & DESIGN	MJB Wood Group, Inc. CORPORATION	No
TMK 18–00398	03/10/2022	03/15/2032	JOS. A. BANK	THE JOSEPH A. BANK MFG. CO., INC.	No
TMK 18–00891	03/25/2022	06/09/2030	OXO	Helen of Troy Limited CORPORATION BARBADOS	No
TMK 18–00893	03/28/2022	09/01/2030	OXO	Helen of Troy Limited CORPORATION BARBADOS	No
TMK 18–00896	03/28/2022	03/21/2031	OXO TOT	Helen of Troy Limited CORPORATION BARBADOS	No
TMK 18–00897	03/28/2022	10/30/2031	OXO	HELEN OF TROY LIMITED CORPORATION BARBADOS	No
TMK 18–00899	03/28/2022	04/16/2031	OXO	HELEN OF TROY LIMITED (BARBADOS) CORPORATION BARBADOS	No
TMK 18–01053	03/28/2022	06/09/2030	GOOD GRIPS & DESIGN (STYLIZED)	Helen of Troy Limited CORPORATION BARBADOS	No
TMK 18–01201	03/04/2022	02/22/2032	GOOGLE (STYLIZED)	GOOGLE LLC	No
TMK 18–01236	03/11/2022	02/06/2032	NATURE2 & DESIGN	ZODIAC POOL SYSTEMS LLC	No
TMK 20–00548	03/17/2022	01/02/2032	GATEWAY	ACER INCORPORATED	No
TMK 20–00603	03/10/2022	06/21/2031	ALLEN-BRADLEY	ROCKWELL AUTOMATION, INC.	No
TMK 20–00605	03/04/2022	01/13/2032	ALLEN-BRADLEY	Rockwell Automation, Inc.	No
TMK 20–00606	03/10/2022	06/21/2031	ALLEN-BRADLEY	ROCKWELL AUTOMATION, INC.	No

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TMK 20–00748	03/10/2022	12/06/2031	OUTLAW HELMETS	NANAL, INC.	No
TMK 20–00765	03/28/2022	11/30/2031	GREENCHIP	NXP B.V.	No
TMK 20–00776	03/18/2022	02/01/2032	KINETIS	NXP USA, INC.	No
TMK 20–00833	03/03/2022	03/06/2032	H & DESIGN	HYUNDAI MOTOR COMPANY REPUBLIC OF KOREA	No
TMK 20–00943	03/25/2022	07/14/2032	JERZEES	RUSSELL BRANDS, LLC	No
TMK 20–01246	03/10/2022	05/01/2031	XELEMENT MOTORCYCLE GEAR	NANAL, INC. CORPORATION	No
TMK 22–00157	03/01/2022	10/24/2027	PP2 BY PRO PLAYER & DESIGN	ULC IP HOLDINGS, LLC	No
TMK 22–00158	03/01/2022	05/15/2032	SATORI PETS	Orbital Research LLC	No
TMK 22–00159	03/01/2022	01/31/2028	FIRE LION	Holloway Kerith INDIVIDUAL	No
TMK 22–00160	03/01/2022	06/05/2029	FIFTH AND WELSHIRE	Bleu Reverie, LLC	No
TMK 22–00161	03/01/2022	01/06/2026	PRO PLAYER	ULC IP HOLDINGS, LLC	No
TMK 22–00162	03/01/2022	02/09/2025	PRO PLAYER	ULC IP HOLDINGS, LLC	No
TMK 22–00163	03/01/2022	12/18/2022	PRO PLAYER	ULC IP HOLDINGS, LLC	No
TMK 22–00164	03/01/2022	02/07/2031	P & DESIGN	ULC IP HOLDINGS, LLC	No
TMK 22–00165	03/02/2022	02/16/2032	PRO PLAYER LEGACY COLLECTION	ULC IP HOLDINGS, LLC	No
TMK 22–00166	03/02/2022	07/23/2029	NEOSAN LABS	NeoSan Labs Inc.	No
TMK 22–00167	03/04/2022	08/17/2026	DENTALIFE	Societe des Produits NestleSWITZERLAND	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Thm	Owner Name	GM Restricted
TMK 22-00168	03/04/2022	08/03/2026	ONE	Societe des Produits Nestle S.A. SWITZERLAND	No
TMK 22-00169	03/04/2022	06/30/2032	GUSHERS	GENERAL MILLS MARKETING, INC.	No
TMK 22-00170	03/04/2022	07/26/2026	Orange With Two Leaves Design (Color)	Sunkist Growers, Inc. CORPORATION	No
TMK 22-00171	03/04/2022	07/04/2022	Orange With Two Leaves Design (BLACK AND WHITE)	SUNKIST GROWERS, INC.	No
TMK 22-00172	03/04/2022	09/01/2024	K & DESIGN	KNOWLES ELECTRONICS, LLC	No
TMK 22-00173	03/04/2022	12/09/2024	KNOWLES	Knowles Electronics, LLC	No
TMK 22-00174	03/10/2022	09/24/2027	KAREEM ABDUL-JABBAR	Ain Jeen, Inc.	No
TMK 22-00175	03/10/2022	04/18/2032	Supreme Logo & DESIGN	Chapter 4 Corp. DBA SUPREME CORPORATION	No
TMK 22-00176	03/10/2022	05/15/2032	CREST PRODUCTS	CREST Corporation	No
TMK 22-00177	03/10/2022	06/01/2032	IVY BARK & DESIGN	Bryant Marlina A SOLE PROPRIETOR-SHIP	No
TMK 22-00178	03/10/2022	12/02/2024	DUTCH BROS	DUTCH BROS., LLC	No
TMK 22-00179	03/10/2022	11/20/2023	SY40BE	McCONWAY & TORLEY, LLC	No
TMK 22-00180	03/10/2022	05/05/2029	DUTCH BROS COFFEE & DESIGN	Dutch Bros., LLC	No
TMK 22-00181	03/10/2022	02/28/2027	Windmill Design	DUTCH BROS., LLC	No
TMK 22-00182	03/10/2022	09/25/2029	Shark MOUTH DESIGN	SPRAY MORET, LLC	No
TMK 22-00183	03/11/2022	06/17/2022	SY40	MCCONWAY & TORLEY, LLC	No

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TMK 22-00184	03/11/2022	10/14/2025	SPRAYGROUND (STYLIZED)	SPRAY MORET, LLC	No
TMK 22-00185	03/11/2022	10/07/2030	SPRAYGROUND & DESIGN	Spray Moret, LLC	No
TMK 22-00186	03/11/2022	04/10/2032	SPRAYGROUND	SPRAY MORET, LLC	No
TMK 22-00187	03/11/2022	09/22/2030	SPRAYGROUND	SPRAY MORET, LLC	No
TMK 22-00188	03/11/2022	09/25/2029	Shark Mouth	SPRAY MORET, LLC	No
TMK 22-00189	03/11/2022	02/01/2025	KIRBY MICRON MAGIC	KIRBY OPCO, LLC	No
TMK 22-00190	03/11/2022	06/01/2032	Miscellaneous Design (Animal Crossing Leaf)	Nintendo of America Inc. Corporation	No
TMK 22-00191	03/11/2022	08/13/2030	KIRBY	KIRBY OPCO, LLC	No
TMK 22-00192	03/14/2022	11/27/2029	MONCLER & DESIGN	MONCLER S.p.A. ITALY	No
TMK 22-00193	03/15/2022	05/15/2032	LATIN GIRLS IN REAL ESTATE	Sasha Abreu Ramos INDIVIDUAL	No
TMK 22-00194	03/15/2022	06/01/2032	EASTERN SHED COMPANY	Eastern Shed Company, Inc.	No
TMK 22-00195	03/15/2022	02/17/2031	XOLOTZCUINTLE	Aguirre, Ernesto, Edmundo IV INDIVIDUAL	No
TMK 22-00196	03/15/2022	09/23/2030	CORE ARMOR	Spigen Korea Co., Ltd. CORPORATION	No
				REPUBLIC OF KOREA	
TMK 22-00197	03/15/2022	12/23/2024	ULTRA HYBRID	Spigen, Inc.	No
TMK 22-00198	03/15/2022	06/01/2032	NUTTY ONE BY NATURE	Nutty One By Nature	No
TMK 22-00199	03/15/2022	08/20/2024	GAME & WARIO	Nintendo of America Inc.	No
TMK 22-00200	03/15/2022	06/08/2032	THE BACKFIRES	Gomez, Alexander H DBA The Backfires	No

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TMK 22-00201	03/16/2022	01/18/2027	AMERICAN LIGHTING BRIGHT IDEAS INNOVATIVE SOLUTIONS	American Lighting, Inc.	No
TMK 22-00202	03/16/2022	02/24/2026	XENOBLADE CHRONICLES	Nintendo of America Inc. CORPORATION	No
TMK 22-00203	03/16/2022	05/23/2026	AMIIBO	Nintendo of America Inc. CORPORATION	No
TMK 22-00204	03/16/2022	04/05/2026	MAKE MEMORIES LAST A LIFETIME	Quincy Bioscience, LLC	No
TMK 22-00205	03/16/2022	08/31/2026	LEVITON & DESIGN	LEVITON MANUFACTURING CO.	No
TMK 22-00206	03/16/2022	12/04/2022	NEUSLEEP	Quincy Bioscience, LLC	No
TMK 22-00207	03/16/2022	05/19/2023	CLEARER THINKING	Quincy Bioscience, LLC	No
TMK 22-00208	03/16/2022	05/10/2025	NEUROSHAKE	Quincy Bioscience, LLC	No
TMK 22-00209	03/16/2022	10/19/2026	PREVAGEN THE NAME TO REMEMBER.	Quincy Bioscience, LLC	No
TMK 22-00210	03/16/2022	08/25/2031	PREVAGENERATION	Quincy Bioscience, LLC	No
TMK 22-00211	03/16/2022	02/12/2030	PREVAGEN, HEALTHIER BRAIN. BETTER LIFE.	Quincy Bioscience, LLC	No
TMK 22-00212	03/16/2022	07/14/2025	LEVITON & DESIGN	LEVITON MANUFACTURING CO.	No
TMK 22-00213	03/16/2022	10/22/2024	LEVITON & DESIGN	LEVITON MANUFACTURING CO.	No
TMK 22-00214	03/16/2022	06/06/2028	LEVITON & DESIGN	LEVITON MANUFACTURING CO.	No
TMK 22-00215	03/18/2022	05/15/2032	ROSELLI TRADING COMPANY	Roselli Trading Company LLC	No
TMK 22-00216	03/18/2022	04/10/2026	Orange-colored power saws for cutting wood	CMT UTENSILI S.P.A. CORPORATION ITALY	No

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TMK 22-00217	03/18/2022	08/14/2029	POLO BEAR	PRL USA Holdings, Inc.	No
TMK 22-00218	03/18/2022	02/16/2032	CULTURED BEAUTY	Cultured Beauty LIMITED LIABILITY COMPANY	No
TMK 22-00219	03/18/2022	01/26/2032	CHOYA	CHOYA UMESHU CO., LTD. JAPAN	No
TMK 22-00220	03/18/2022	12/18/2028	POLO BEAR	PRL USA Holdings, Inc.	No
TMK 22-00221	03/18/2022	10/28/2030	POLO BEAR	PRL USA Holdings, Inc.	No
TMK 22-00222	03/18/2022	07/20/2031	BLAUX	Make Great Sales Limited	No
TMK 22-00223	03/18/2022	05/08/2032	KOREFOCUS	MAKE GREAT SALES LIMITED	No
TMK 22-00224	03/18/2022	09/30/2030	KOREPULSE	MAKE GREAT SALES LIMITED	No
TMK 22-00225	03/18/2022	01/20/2031	KORESCALE	MAKE GREAT SALES LIMITED	No
TMK 22-00226	03/18/2022	09/23/2030	KORESPHERE	MAKE GREAT SALES LIMITED CORPORATION	No
TMK 22-00227	03/18/2022	05/08/2032	KORETENSE	MAKE GREAT SALES LLC	No
TMK 22-00228	03/18/2022	08/11/2031	KORESURGE	MAKE GREAT SALES LIMITED CORPORATION	No
TMK 22-00229	03/18/2022	04/18/2031	77	Retail Royalty Company	No
TMK 22-00230	03/18/2022	03/22/2031	1977	Retail Royalty Company	No
TMK 22-00231	03/18/2022	12/11/2032	FROG BRAND (Stylized/Design)	King Technology, Inc.	No
TMK 22-00232	03/22/2022	11/30/2031	AMERICAN EAGLE OUTFITTERS	Retail Royalty Company CORPORATION	No
TMK 22-00233	03/22/2022	04/19/2031	UNSUBSCRIBED	Retail Royalty Company CORPORATION	No

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TMK 22-00234	03/22/2022	09/01/2031	BALD EAGLE DESIGN	Retail Royalty Company	No
TMK 22-00235	03/22/2022	06/08/2032	BALD EAGLE DESIGN	Retail Royalty Company	No
TMK 22-00236	03/22/2022	08/11/2030	AERIE	RETAIL ROYALTY COMPANY	No
TMK 22-00237	03/22/2022	06/16/2031	SUNBURST DESIGN	Retail Royalty Company	No
TMK 22-00238	03/22/2022	09/05/2028	NATURALS	Northland Aluminum Products, Inc.	No
TMK 22-00239	03/22/2022	10/12/2031	AMERICAN EAGLE	Retail Royalty Company	No
TMK 22-00240	03/22/2022	07/12/2026	@EASE (stylized)	King Technology Inc.	No
TMK 22-00241	03/22/2022	02/23/2032	REAL GOOD	Retail Royalty Company	No
TMK 22-00242	03/22/2022	06/23/2031	AE	Retail Royalty Company CORPORATION	No
TMK 22-00243	03/22/2022	03/26/2026	AMERICAN EAGLE	RETAIL ROYALTY COMPANY	No
TMK 22-00244	03/22/2022	02/16/2032	NATURALS	Northland Aluminum Products, Inc. CORPORATION	No
TMK 22-00245	03/22/2022	06/28/2027	BUNDT (STYLIZED)	NORTHLAND ALUMINUM PRODUCTS, INC. CORPORATION	No
TMK 22-00246	03/22/2022	09/23/2030	FRESH MINERAL WATER & DESIGN	King Technology, Inc.	No
TMK 22-00247	03/22/2022	06/29/2026	SMARTCHLOR	King Technology Inc.	No
TMK 22-00248	03/22/2022	08/14/2029	FROG SERENE & DESIGN	King Technology, Inc. CORPORATION	No
TMK 22-00249	03/22/2022	12/13/2025	AMERICAN EAGLE	RETAIL ROYALTY COMPANY	No

CBP IPR RECORDATION — MARCH 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00250	03/22/2022	12/11/2027	HOMAGE	HOMAGE, LLC LIMITED LIABILITY COMPANY OHIO 4480 Bridgeway Avenue Columbus OHIO 43219	No
TMK 22-00251	03/22/2022	12/05/2027	H (STYLIZED) AND DESIGN	Homage, LLC 19	No
TMK 22-00252	03/22/2022	12/14/2030	HOMAGE	Homage, LLC	No
TMK 22-00253	03/22/2022	06/15/2032	KYROH	Microtech Knives, Inc. CORPORATION	No
TMK 22-00254	03/22/2022	02/01/2027	Checkerboard Shoe Configuration	VANS, INC. CORPORATION	No
TMK 22-00255	03/22/2022	06/08/2032	PROMAG	Pyrotek Incorporated	No
TMK 22-00256	03/22/2022	10/03/2028	POLO RALPH LAUREN	PRL USA Holdings, Inc.	No
TMK 22-00257	03/22/2022	09/28/2025	CREST	PROCTER & GAMBLE COMPANY, THE	No
TMK 22-00258	03/25/2022	07/15/2023	Orange Router Bit	CMT UTENSILI S.P.A.	No
TMK 22-00259	03/25/2022	01/22/2030	CREDELIO & DESIGN	ELANCO US INC.	No
TMK 22-00260	03/25/2022	07/12/2031	TRIFEXIS	ELANCO US INC. CORPORATION	No
TMK 22-00261	03/25/2022	12/14/2031	LET'S MEAT LESS	NormanTheCow.com, Inc.	No
TMK 22-00262	03/25/2022	02/12/2027	INTERCEPTOR	ELANCO TIERGESUNDHEIT AG SWITZERLAND	No
TMK 22-00263	03/25/2022	06/26/2029	BEARBACK & DESIGN	BEARBACK, LLC	No
TMK 22-00264	03/25/2022	12/28/2031	FROSTED MINI-WHEATS	KELLOGG COMPANY CORPORATION	No
TMK 22-00265	03/25/2022	11/27/2023	MICRO-V (STYLIZED)	GATES CORPORATION	No

CBP IPR RECORDATION — MARCH 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00266	03/25/2022	07/30/2029	BMW GROUP	Bayerische Motoren Werke Aktiengesellschaft AKTIENGESELLSCHAFT (AG)	No
TMK 22-00267	03/25/2022	05/03/2031	GATES	GATES CORPORATION CORPORATION	No
TMK 22-00268	03/25/2022	06/18/2028	POLY CHAIN	Gates Corporation	No
TMK 22-00269	03/25/2022	01/29/2030	Gates & DESIGN	Gates Corporation CORPORATION	No
TMK 22-00270	03/25/2022	09/05/2027	MICRO-V	Gates Corporation	No
TMK 22-00271	03/25/2022	11/25/2029	Gates & Design	Gates Corporation	No
TMK 22-00272	03/25/2022	10/08/2028	GATES	Gates Corporation CORPORATION	No
TMK 22-00273	03/25/2022	01/29/2030	GATES	Gates Corporation CORPORATION	No
TMK 22-00274	03/28/2022	05/15/2032	GOYARD (STYLIZED)	GOYARD ST FRANCE	No
TMK 22-00275	03/28/2022	03/20/2027	GT40 & DESIGN	Safir GT 40 Spares LIMITED LIABILITY COMPANY	No
TMK 22-00276	03/28/2022	09/30/2030	GT40	Safir GT 40 Spares LIMITED LIABILITY COMPANY	No
TMK 22-00277	03/28/2022	06/17/2025	DUDE WIPES	Dude Products, Inc. CORPORATION	No
TMK 22-00278	03/28/2022	11/25/2025	I EXTREME & DESIGN	Bora Creations S.L.SPAIN	No
TMK 22-00279	03/28/2022	01/27/2026	CATRICE (Stylized)	Bora Creations S.L. SPAIN	No
TMK 22-00280	03/28/2022	09/24/2024	GYM SHARK DESIGN ONLY	Gymshark Limited British Company UNITED KINGDOM	No
TMK 22-00281	03/28/2022	10/21/2025	LASH PRINCESS	Bora Creations SPAIN	No

CBP IPR RECORDATION — MARCH 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00282	03/28/2022	09/24/2024	GYM SHARK	Gymshark Limited UNITED KINGDOM	No
TMK 22-00283	03/28/2022	06/15/2026	GYM SHARK	Gymshark Limited COMPANY UNITED KINGDOM	No
TMK 22-00284	03/28/2022	08/24/2026	GYMSHARK DESIGN ONLY	Gymshark Limited UNITED KINGDOM	No
TMK 22-00285	03/29/2022	12/28/2030	PLAYSEAT	F. SMIT HOLDING B.V. CORPORATION NETHERLANDS	No
TMK 22-00286	03/30/2022	06/22/2032	PG PAYNE GLASSES (STYLIZED)	Jaycee Inc Limited	No
TMK 22-00287	03/30/2022	04/18/2032	L3HARRIS	L3HARRIS TECHNOLOGIES, INC.	No
TMK 22-00288	03/30/2022	02/16/2032	L3HARRIS & Design	L3HARRIS TECHNOLOGIES, INC.	No
TMK 22-00289	03/30/2022	06/13/2024	GARFIELD	PAW INCORPORATED	No
TMK 22-00290	03/30/2022	01/26/2032	SHORLA PHARMA	Shorla Pharma Limited private company limited by shares (prc) IRELAND	No
TMK 22-00291	03/30/2022	11/14/2028	CLEANER CLEARER SOFTER AND EASIER	King Technology Inc. CORPORATION	No
TMK 22-00292	03/31/2022	12/28/2031	BODY VISION LOS ANGELES	Body Vision Jewelry, Inc.	No
TMK 22-00293	03/31/2022	12/28/2031	BVLA	Body Vision Jewelry, Inc.	No
TMK 22-00294	03/31/2022	06/30/2031	DL.MD	DLMD Enterprises, Inc. CORPORATION DELAWARE c/o Baranov & Whittenberg	No
TMK 22-00295	03/31/2022	04/11/2032	ASTRA OPTIX	JP Sports Optics LLC	No
TMK 97-00516	03/22/2022	08/21/2026	AEO	RETAIL ROYALTY COMPANY	No

CBP IPR RECORDATION — MARCH 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmkt/Thm	Owner Name	GM Restricted
TMK 99-00127	03/25/2022	10/26/2028	AUTO GAGE (STYLIZED)	AUTO METER PRODUCTS, INC.	No

REPORT OF DIVERSION (CBP FORM 26)

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

ACTION: 30-Day notice and request for comments; extension with change of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than May 5, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

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

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 71652) on December 17, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed

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

Overview of This Information Collection

Title: Report of Diversion.

OMB Number: 1651–0025.

Form Number: CBP Form 26.

Current Actions: CBP plans to automate CBP Form 26. No change to the information being collected and no change to burden hours previously reported.

Type of Review: Extension with change of an existing information collection.

Affected Public: Businesses.

Abstract: CBP Form 26, *Report of Diversion*, is used to track vessels traveling coastwise from U.S. ports to other U.S. ports when a change occurs in scheduled itineraries. This form is initiated by the vessel owner or agent to notify and request approval by CBP for a vessel to divert while traveling coastwise from a U.S. port to another U.S. port, or a vessel traveling to a foreign port having to divert to a U.S. port when a change occurs in the vessel itinerary. CBP Form 26 collects information such as the name and nationality of the vessel, the expected port and date of arrival, and information about any related penalty cases, if applicable. This information collection is authorized by 46 U.S.C. 60105 and is provided for in 19 CFR 4.91. CBP Form 26 is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=26>.

Proposed Change: This form is anticipated to be submitted electronically as part of the maritime forms automation project through the Vessel Entrance and Clearance System (VECS), which will eliminate the need for any paper submission of any vessel entrance or clearance requirements under the above referenced statutes and

regulations. VECS will still collect and maintain the same data but will automate the capture of data to reduce or eliminate redundancy with other data collected by CBP.

Type of Information Collection: CBP Form 26.

Estimated Number of Respondents: 1,400.

Estimated Number of Annual Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 2,800.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 233.

Dated: March 30, 2022.

SETH D. RENKEMA,
Branch Chief,

*Economic Impact Analysis Branch,
U.S. Customs and Border Protection.*

[Published in the Federal Register, April 5, 2022 (85 FR 19693)]

U.S. Court of International Trade

Slip Op. 22-27

WIND TOWER TRADE COALITION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 20-03692
PUBLIC VERSION

[Sustaining in part and remanding in part Commerce's Final Determination.]

Dated: March 24, 2022

Maureen E. Thorson and Derick G. Holt, Wiley Rein, LLP, of Washington, D.C., argued for plaintiff Wind Tower Trade Coalition. On the brief were *Alan H. Price*, *Daniel B. Pickard*, *Robert E. DeFrancesco, III* and *Laura El-Sabaawi*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. With him on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

* * *

Reif, Judge:

This action pertains to the final determination of the U.S. Department of Commerce (“Commerce”) in the countervailing duty (“CVD”) investigation on utility scale wind towers from the Socialist Republic of Vietnam (“Vietnam”) for the period of investigation (“POI”) January 1, 2018, through December 31, 2018. See *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Negative Determination of Critical Circumstances* (“Final Determination”), 85 Fed. Reg. 40,229 (Dep’t of Commerce July 6, 2020) (final affirm. countervailing duty deter. and negative deter. of critical circumstances) and accompanying Issues and Decision Memorandum (“IDM”), PR 215.

Plaintiff Wind Tower Trade Coalition (“WTTC” or “plaintiff”), “an association of domestic utility scale wind tower producers” qualifying as an “interested party” under 19 U.S.C. § 1677(9)(E), Compl. ¶ 3, ECF No. 6, challenges Commerce’s Final Determination in a motion for judgment on the agency record with respect to: (1) the denominator Commerce used in its subsidy calculation; and (2) Commerce’s acceptance of certain steel plate documentation for its subsidy calcula-

lation for the Import Duty Exemptions on Imports of Raw Materials for Exporting Goods program (“Import Duty Exemptions program”). WTTC’s Mem. in Supp. of Rule 56.2 Mot. for J. upon Agency R. (“Pl. Br.”) at 2, ECF No. 13. Defendant United States (“Government”) asserts that Commerce: (1) followed its regulations to apply the appropriate denominator in its subsidy calculation; and (2) reached a reasonable determination and was correct to not apply adverse facts available (“AFA”) as related to documentation for the Import Duty Exemptions program. Def’s Resp. in Opp’n. to Pl.’s Mot. for J. upon Admin. R. (“Def. Br.”) at 5–6, 11, ECF No. 15.

As discussed herein, the court sustains the Final Determination with respect to Commerce’s decision not to apply AFA as related to the Import Duty Exemptions program and remands the Final Determination with respect to Commerce’s failure to address the evidence and argument related to manipulation for the benefit calculation and Commerce’s failure to substantiate its finding as to the origin of the steel plate in question.

BACKGROUND

On July 9, 2019, WTTC filed a petition regarding utility scale wind towers from Vietnam. Pet’r’s Letter, “Petitions for the Imposition of Antidumping and Countervailing Duties on Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam” (July 9, 2019), CR 1–18, PR 1–18. On July 29, 2019, Commerce initiated the CVD investigation, and, on August 19, 2019, Commerce selected CS Wind Tower Co., Ltd. (“CSWT”) as the mandatory respondent. Respondent Selection Mem., CR 31, PR 57 (Aug. 19, 2019). However, in 2008, CSWT and CS Industries Ltd. (“CSI”) merged to form CS Wind Vietnam Co., Ltd. (“CS Wind Vietnam”),¹ a wholly owned subsidiary of CS Wind Corporation (“CS Wind Korea”).² Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec’y Commerce, re: *CS Wind Affiliation Response: Countervailing Duty Investigation of Utility Scale Wind Towers from*

¹ Documents in the record also refer to CS Wind Vietnam Co., Ltd. as “CSWV.”

² CSWT and CSI were both Vietnamese companies. Oral Argument Tr. at 7:10–16; Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec’y Commerce, re: *CS Wind Initial Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-522-826)* (Oct. 9, 2019) (“Initial Questionnaire Resp.”) at 2, CR 55–67, PR 103–104; Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec’y Commerce, re: *CS Wind Affiliation Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-522-826)* (Sept. 3, 2019) (“Affiliation Resp.”) at 4, CR 32–33, PR 67. The effective date of the merger was January 1, 2009. Initial Questionnaire Resp. at 2. The reason that Commerce selected CSWT as the mandatory respondent is unclear since it no longer existed as a corporate entity; however, the issue over identification appears to have been resolved because it appears based on the record that CS Wind Vietnam is the entity that provided questionnaire responses.

Vietnam (C-522-826) (Sept. 3, 2019) (“Affiliation Resp.”) at 4, CR 32–33, PR 67; Memorandum from John McGowan and Julie Geiger, International Trade Analysts, Office VI, Antidumping and Countervailing Duty Operations, to The File, re: *Verification of the Questionnaire Responses of CS Wind Vietnam Co., Ltd., Countervailing Duty Investigation of Utility Scale Wind Towers from the Socialist Republic of Vietnam* (Mar. 18, 2020) (“Verification Mem.”) at 6, CR 105, PR 186. Therefore, CS Wind Vietnam responded to Commerce’s investigation. See, e.g., Affiliation Resp.

On August 20, 2019, Commerce issued its initial questionnaire. IDM at 3. On September 3, 2019, and September 20, 2019, CS Wind Vietnam provided affiliation responses. See Affiliation Resp.; Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec’y Commerce, re: *CS Wind Supplemental Affiliation Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam* (C-522-826) (Sept. 20, 2019) (“Suppl. Affiliation Resp.”), CR 35, PR 76. In its first response, CS Wind Vietnam reported no sales through any export trading company in Vietnam nor any affiliates in Vietnam, but instead explained that “all of . . . [CS Wind Vietnam]’s export sales are made through [it]s parent company, CS Wind Corporation, in Korea.” Affiliation Resp. at 2.

As to its affiliates, CS Wind Vietnam further explained: “Several of its overseas affiliates provide the company with raw materials, including CS Wind [Vietnam]’s parent corporation, CS Wind Corporation, which provides a majority of the company’s inputs free-of-charge under a tolling operation agreement.”³ *Id.* at 3. CS Wind Vietnam also noted that it “falls within [Commerce]’s meaning of cross-ownership.” *Id.* In addition, CS Wind Vietnam clarified that “[a]ll exports (to the United States and other markets) during the POI were made by CS Wind Corporation. All subject merchandise sales to [sic] U.S. during the POI were carried out by negotiation between the customer and CS Wind Corporation.” Suppl. Affiliation Resp. at 1. CS Wind Vietnam and CS Wind Korea utilized “tolling agreements” for all sales in the POI.⁴ *Id.*

³ “Toll manufacturing,” also called “toll processing,” is “[a]n arrangement under which a customer provides the materials for a manufacturing process and receives the finished goods from the manufacturer. . . . The same party owns both the input and the output of the manufacturing process. This is a specialized form of contract manufacturing.” *Toll Manufacturing*, *Black’s Law Dictionary* (11th ed. 2019).

⁴ CS Wind Vietnam and its predecessor companies used tolling agreements with CS Wind Korea as early as 2007 and 2008. Verification Mem. at 6 (noting the existence of processing agreements between CS Wind Vietnam and CS Wind Korea from January 1, 2009), 9 (noting the existence of processing agreements for 2007 and 2008); see also Oral Argument Tr. at 6:11–25.

On October 9, 2019, CS Wind Vietnam provided its initial questionnaire response. Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec'y Commerce, re: *CS Wind Initial Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam* (C-522-826) (Oct. 9, 2019) ("Initial Questionnaire Resp."), CR 55-67, PR 103-104. CS Wind Vietnam explained that its "sales revenue is not based on invoice prices or amounts of wind towers sold to unaffiliated U.S. customers (or the entered value of such merchandise), but the tolling processing fees issued to [its] parent company (equating to the latter's tolling expenses)." *Id.* at 5. CS Wind Vietnam further noted:

Under the per-project processing contract between CSWV and CS Wind Corporation, CS Wind Corporation supplies all main materials — steel plate, flange, steel plate for door frame and internal mounting items — from outside of Vietnam for the production of the wind towers. Therefore, most of [sic] raw materials are exported to Vietnam by CS Wind [Korea].

Id. at 21.

Regarding the materials, CS Wind Vietnam reported that it "merely imports them and then re-exports them" without ever purchasing anything from CS Wind Korea. *Id.* CS Wind Vietnam further provided: "Because of the processing contracts and the fact that all final goods are being exported, Vietnam Customs permits [CS Wind Vietnam] to be exempt from import duties for all imported raw materials according to Article 10 of Decree 134 [of the Government of Vietnam ("GOV")]." *Id.*

On October 23, 2019, WTTC requested that Commerce ask CS Wind Vietnam for clarification regarding its purchases of steel plate from [[]], based on [[]]

[[]]. Letter from Wiley Rein LLP to Sec'y Commerce, re: *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Comments on CS Wind's Initial Questionnaire Response* (Oct. 23, 2019) ("Comments on CS Wind Initial Questionnaire Resp.") at 8, CR 71; *see also* Oral Argument Tr. at 58:24-59:2. On November 8, 2019, CS Wind Vietnam provided to Commerce a list of suppliers of raw materials that CS Wind Vietnam used to produce internal components; the list included steel plate supplied by "[[]]" in [[]] and purchased by [[]], as well as steel plate supplied by [[]].

Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y Commerce, re: *CS Wind First Supplemental Questionnaire Response – Remaining Questions: Countervailing Duty Investi-*

gation of Utility Scale Wind Towers from Vietnam (C-552-826) (Nov. 8, 2019) (“First Suppl. Questionnaire Resp. – Remaining Questions”) at 1, Ex. SQ2-6a, CR 83–84.

On November 6, 2019, CS Wind Vietnam also noted that it “imports steel plate In addition, some steel scrap is generated from steel plates sourced from Vietnamese suppliers (for internal components) and comingled.” Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec’y Commerce, re: *CS Wind First Supplemental Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-552-826)* (Nov. 6, 2019) (“First Suppl. Questionnaire Resp.”) at 9, CR 76–82, PR 122–128. Moreover, CS Wind Vietnam stated: “Tracking the steel scrap generated from imported steel plate . . . is not necessary since the import duty, without the exemption, is zero because of the various Free Trade Agreements in place.” *Id.*

On November 26, 2019, CS Wind Vietnam expanded upon this response, noting that there is a zero percent duty on the Harmonized Tariff Schedule (“HTS”) codes for its steel plate imports under most favored nation (“MFN”) treatment, as CS Wind Vietnam confirmed through a search of those HTS codes on the Vietnam Customs website. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec’y Commerce, re: *CS Wind Second Supplemental Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-552-826)* (Nov. 26, 2019) (“Second Suppl. Questionnaire Resp.”) at 1–2, PR 143. CS Wind Vietnam described:

This search confirms that the most favored nation (“MFN”) tariff for each of these HTS provisions is 0%, even without any applicable free trade agreements. Thus, steel plate imports do not need to be exempt under the import processing provision or subject to a free trade agreement to have a 0% duty.

Id. at 2 (emphasis omitted). CS Wind Vietnam also provided the tariff reduction schedules of the free trade agreements, denoting the zero percent duty rates. *Id.*

In addition, CS Wind Vietnam expressed confusion as to the relevance of Commerce’s question as to the “reason behind” its tolling agreements with CS Wind Korea. First Suppl. Questionnaire Resp. at 3. Still, CS Wind Vietnam clarified that, “[s]ince CS Wind [Korea] handles all of the sales, including the negotiations with those sales, it decided to establish tolling agreements with CS [Wind Vietnam] so that it could better control costs.” *Id.*

On December 6, 2019, Commerce determined preliminarily that the GOV provided countervailable subsidies to producers and exporters of the subject goods and that there was a 2.43 percent preliminary subsidy rate. *Utility Scale Wind Towers From the Socialist Republic of Vietnam*, 84 Fed. Reg. 68,104, 68,105 (Dep’t of Commerce Dec. 13, 2019) (prelim. affirm. countervailing duty deter. and alignment of final deter. with final antidumping duty deter.) and accompanying Preliminary Decision Memorandum (“PDM”) at 13, PR 152. Further, Commerce stated that “CS Wind Korea did not receive countervailable subsidies from the GOV attributable to CS Wind [Vietnam] during the POI.” PDM at 5 (citing First Suppl. Questionnaire Resp. at 7).

As to the denominator used for the subsidy rate, Commerce explained the reason that it used CS Wind Korea’s sales values:

[G]iven the circumstances of the unique relationship between the parent and respondent, the sales denominator reflects the value of subject merchandise that is entering the United States [W]e have used, where appropriate, the reported POI sales values of CS Wind Korea’s sales of CS Wind [Vietnam]’s merchandise, which includes sales of subject merchandise, in the denominator of the subsidy calculations, as well as, where appropriate, the values reported by CS Wind [Vietnam].

Id. at 6. Therefore, Commerce “preliminarily f[ou]nd that no further adjustments to CS Wind [Vietnam]’s entered value are appropriate.”

Id. at 13.

Commerce further pointed out that under the GOV’s Import Duty Exemptions program, “[t]he amount of the exemption is equal to the amount of the duty corresponding to the value of imported materials actually used in the production of the finished goods that are exported.”⁵ *Id.* at 9. As to the import duty exemptions that CS Wind Vietnam received, Commerce “preliminarily determine[d] a net countervailable subsidy rate of 2.12 percent *ad valorem* for CS Wind [Vietnam].” PDM at 9, 12 (citing Memorandum, “CS Wind Tower Co., Ltd. Calculations for the Preliminary Determination” (Dec. 6, 2019)).

From February 24, 2020, through February 27, 2020, Commerce conducted verification of CS Wind Vietnam’s questionnaire responses. Verification Mem. at 1. The verification memorandum stated: “[CS Wind Vietnam] [o]fficials explained that if the supplier is from outside

⁵ “Under the [Import Duty Exemptions] program, import duty exemptions are provided for imported raw materials that are incorporated into exported goods, or directly used in the production of such goods.” PDM at 9 (citing GOV’s Letter, “Utility Scale Wind Towers from Vietnam, Case No. C-552-826: Government of Vietnam’s Initial Questionnaire Response” (Oct. 3, 2019) at Ex. E-1).

of Vietnam, but the raw materials are sourced from inside Vietnam, then these raw material inputs still need to be entered into the E-customs system even if they are ultimately not imported.” *Id.* at 16 (citing Verification Exs. at VE-15 at 68–75). Commerce added that it reviewed sales reconciliation information for CS Wind Vietnam and CS Wind Korea and “confirmed that the reported sales information did not include sales to affiliates, service income, sales from merchandise produced outside of the country, etc.” *Id.* at 9.

On June 29, 2020, Commerce issued its Final Determination with the applicable subsidy rate of 2.84 percent. See Final Determination, 85 Fed. Reg. at 40,230 and accompanying IDM. As to the denominator issue, Commerce recited WTTC’s concern about manipulation as a result of its reading of CS Wind Vietnam’s business practices. IDM at 28; *see also* Oral Argument Tr. at 46:19–47:13. Commerce noted also WTTC’s request, were Commerce to maintain the use of CS Wind Korea’s sales value in the denominator, that Commerce

should modify the attribution of benefit from this program to reflect the products produced by the corporation that received the subsidy, *i.e.*, CS Wind in Vietnam, in accordance with the multinational tying rule under 19 CFR 351.525(b)(7), even though no record evidence indicates that this subsidy is tied to more than domestic production.

Id. at 29 (citing Petitioner’s Comments at 36; 19 C.F.R. § 351.525(b)(7)). The Government asserts: “Commerce explained why its regulations required the calculations be on the value and not the tolling fee.” Oral Argument Tr. at 47:11–13.

Commerce ultimately determined that the relationship between CS Wind Vietnam and CS Wind Korea “does not lend itself to the typical situation in which the respondent sells subject merchandise to the United States” due to the tolling arrangement. IDM at 29. Therefore, Commerce used CS Wind Korea’s sales value for the denominator “consistent with the intent of Commerce’s regulations and the normal subsidy calculation methodology.” *Id.* at 29–30. Commerce explained: “The sales value used in the denominator of our subsidy calculations is limited to sales of subject merchandise produced by CS Wind [Vietnam] and sold by its parent company, CS Wind Korea, in the United States.” *Id.* at 30. Further, Commerce determined that its multinational firm regulation was inapplicable because “[t]he mandatory respondent in this investigation which received subsidies is CS Wind [Vietnam], located in Vietnam,” and CS Wind Vietnam is not itself multinational. *Id.* *See generally* 19 C.F.R. § 351.525(b)(7).

With respect to the Import Duty Exemptions program, Commerce summarized WTTC’s argument that CS Wind Vietnam did not “iden-

tify the ultimate supplier and country of origin of domestic steel purchases,” and, therefore, required the application of AFA. IDM at 11–12 (citing Petitioner’s Letter, “Utility Scale Wind Towers from the Socialist Republic of Vietnam: Case Brief,” dated Apr. 6, 2020); *see* IDM at 16–17 (“With respect to the petitioner’s argument that Commerce should apply AFA for CS Wind [Vietnam]’s identification of certain raw material inputs as having been supplied by Vietnam, we disagree that AFA is warranted. . . . [T]he petitioner claims that CS Wind [Vietnam] did not properly identify the supplier of those inputs.”). Commerce also stated CS Wind Vietnam’s comment in the investigation on rebuttal that, contrary to WTTC’s assertion, “CS Wind [Vietnam] responded to all questions concerning the steel plate, including country of origin.” *Id.* at 14. Commerce noted further the GOV’s comment that “there is no basis to countervail the raw material imports made by CS Wind [Vietnam] during the POI because all of CS Wind [Vietnam]’s imports of steel plate are duty free.” *Id.* Commerce also highlighted CS Wind Vietnam’s assertion in its rebuttal brief in the investigation that “[t]here exists no information on the record to contradict the fact that the steel place [sic] could have been substantially transformed prior to purchase.” *Id.* at 15; *see* Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec’y Commerce, re: *CS Wind Rebuttal Brief: Countervailing Duty Investigation on Utility Scale Wind Towers from Vietnam (C-552-826)* (Apr. 20, 2020) (“CS Wind Rebuttal Br.”) at 17–19, CR 112, PR 200. *But see* Oral Argument Tr. at 91:1–12 ([[]]).

In addition, Commerce noted CS Wind Vietnam’s conclusion: “Thus, even if Commerce disagreed with the country of origin as being Vietnam, the record demonstrates a duty exemption rate of zero percent for this input under the Most Favored Nations (MFN) status.”⁶ IDM at 15; *see* CS Wind Rebuttal Br. at 17–19. Commerce determined not to apply AFA as related to the Import Duty Exemptions program based on CS Wind Vietnam’s “merely over-report[ing] raw material inputs in its questionnaire response.” IDM at 16–17.

⁶ Commerce stated later in its IDM:

Pursuant to Commerce’s questionnaire, we requested that CS Wind submit to Commerce a schedule of all inputs of raw materials used in the production of subject merchandise during the POI for which import duty exemptions were received. In its questionnaire response, CS Wind reported all imports of raw materials during the POI, which included the imports of raw materials sourced from outside and from within Vietnam. We examined all purchases at verification and found no discrepancy. We also examined sourced documentation pertaining to the inputs of raw materials sourced from within Vietnam. In addition to the verbal explanation provided by company officials as to why those purchases were included in the spreadsheet, we examined source documentation supporting those purchases that were made from within Vietnam.

On August 20, 2020, Commerce issued its CVD order for utility scale wind towers from Vietnam. *Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam*, 85 Fed. Reg. 52,543 (Dep’t of Commerce Aug. 26, 2020) (amended final affirm. countervailing duty deter. and countervailing duty orders).

Plaintiff brought this action on September 25, 2020, Summons (Sept. 25, 2020), ECF No. 1, seeking a remand of the Final Determination, Compl. at 6.

STANDARD OF REVIEW

The court exercises jurisdiction pursuant to sections 516A(a)(2)(A)(i)(II) and (a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(i) (2018), and 28 U.S.C. § 1581(c) (2018).⁷

The Court will hold a CVD determination by Commerce to be unlawful if 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). To meet the substantial evidence standard, there must be “more than a mere scintilla” of evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)); *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (quoting *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). However, the standard “is satisfied by ‘something less than the weight of the evidence.’” *Altx, Inc.*, 370 F.3d at 1116 (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (internal quotation marks and citations omitted)). In addition, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Id.* (quoting *Matsushita Elec. Indus. Co.*, 750 F.2d at 933) (internal quotation marks and citations omitted)). “A reviewing court must consider the record as a whole, including that which ‘fairly detracts from

Contrary to the petitioner’s assertions, the supporting documentation, including invoices and packing lists, showed the origin of certain raw materials to be within Vietnam. That is, the sales of these certain raw materials were made through CS Wind Korea, but only on paper; the raw material for those transactions was sourced from a supplier within Vietnam. As stated in the verification report, “these raw material inputs still need to be entered into the E-customs system even if they are not ultimately imported.” Thus, for these transactions at issue, we find that CS Wind provided relevant and accurate documentation that identified the country of origin for these transactions. Further, documentation examined at verification demonstrated that CS Wind paid the appropriate amount of duties on its raw material purchases. Therefore, we find that there is nothing missing from the record, as alleged by the petitioner; accordingly, it is not appropriate to apply AFA to any of CS Wind’s raw material inputs.

IDM at 17 (footnotes omitted).

⁷ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

its weight’, to determine whether there exists ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477–478 (1951) (quoting *Consol. Edison Co.*, 305 U.S. at 229)); *see Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (“[T]he Court will not disturb an agency determination if 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.”) (citation omitted), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App’x 797 (Fed. Cir. 2003).

Importantly, “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 50 (1983) (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)); *see SKF USA Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–286 (1974) (citing *Chenery Corp.*, 332 U.S. at 196) (noting the court “may not supply a reasoned basis for the agency’s action that the agency itself has not given”).

An agency’s final determination must provide “an explanation of the basis for its determination that addresses relevant arguments, made by interested parties . . . , concerning the establishment of . . . a countervailable subsidy, or the suspension of the investigation, with respect to which the determination is made.” 19 U.S.C. § 1677f(i)(3)(A); *see NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1320 (Fed. Cir. 2009) (citing *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005)) (“[Section] 1677f(i) is . . . a partial codification of the Supreme Court’s standard for judicial review of administrative decisions from *State Farm*.”). Moreover, “§ 1677f(i) does not require [the Court] to invalidate a decision . . . if Commerce failed to explicitly address a party’s non-dispositive argument.” *NMB Sing. Ltd.*, 557 F.3d at 1323 (citing *Timken*, 421 F.3d at 1357).

“When an agency changes its practice, it is obligated to provide an adequate explanation for the change.” *SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011) (citing *State Farm*, 463 U.S. at 42). “The more complex the statute, the greater the obligation on the agency to explain its position with clarity.” *Id.* (quoting *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001)). Moreover, “Commerce also has an ‘obligation’ to address important factors

raised by comments from petitioners and respondents.” *Id.* at 1374 (quoting *Timken*, 421 F.3d at 1358).

Still, the Court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp. Inc.*, 419 U.S. at 286); *see also NMB Sing. Ltd.*, 557 F.3d at 1319, 1326 (stating that Commerce’s “explanations do not have to be perfect” but that there should be “a reasonable way to consider the data as a whole and arrive at Commerce’s conclusion”).

LEGAL FRAMEWORK

Commerce will impose a countervailing duty when: (1) Commerce determines that a “government . . . or any public entity . . . 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 (“Commission”) determines that a U.S. industry is “materially injured” or “threatened with material injury” or “the establishment of a[] [U.S.] industry is materially retarded” due to the imports. 19 U.S.C. § 1671(a). A subsidy is countervailable when a government or public entity “provides a financial contribution” to a person that confers a benefit. 19 U.S.C. § 1677(5)(B). A countervailable subsidy confers a benefit when a recipient receives such benefit. *Id.* § 1677(5)(B), (5)(E).

DISCUSSION

The court concludes that Commerce did not act inconsistently with its regulations and with the prior determinations presented by the parties in deciding to use CS Wind Korea’s sales value as a denominator for the subsidy calculation. However, the court remands because Commerce failed to explain adequately its position with respect to the evidence and relevant argument on manipulation raised by WTTC. In addition, the court remands because Commerce’s determination regarding CS Wind Vietnam’s steel plate documentation for the subsidy calculation for the Import Duty Exemptions program was not based on substantial evidence. However, the court sustains Commerce’s decision not to apply AFA for the Import Duty Exemptions program.

I. Whether Commerce's use of CS Wind Korea's sales value as the denominator for the subsidy calculation is supported by substantial evidence and is in accordance with law

The court concludes that Commerce's Final Determination is not inconsistent with its regulations or with the prior determinations presented by the parties. However, the court remands the Final Determination with respect to Commerce's failure to address the evidence and argument related to manipulation for the benefit calculation.

A. Legal framework

To calculate the "ad valorem subsidy rate" in a CVD investigation, [Commerce] will . . . divid[e] the amount of the benefit allocated to the [POI] . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy Normally, [Commerce] will determine the sales value of a product on an f.o.b. (port) basis (if the product is exported) However, if [Commerce] determines that countervailable subsidies are provided with respect to the movement of a product from the port . . . to the place of destination (e.g., freight or insurance costs are subsidized), [Commerce] may make appropriate adjustments to the sales value used in the denominator.

19 C.F.R. § 351.525(a).

"Ad valorem" is defined as "that is in proportion to value; proportional." *Ad Valorem*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/2882> (last visited Mar. 4, 2022). In cases of corporations with cross-ownership, "[Commerce] normally will attribute a subsidy to the products produced by the corporation that received the subsidy." 19 C.F.R. § 351.525(b)(6)(i).

Further, in the context of multinational firms, the Code of Federal Regulations ("CFR") states:

If the firm that received a subsidy has production facilities in two or more countries, the Secretary will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy. However, if it is demonstrated that the subsidy was tied to more than domestic production, the Secretary will attribute the subsidy to multinational production.

Id. § 351.525(b)(7). The CFR defines a "firm" as "the recipient of an alleged countervailable subsidy, including any individual, company, partnership, corporation, joint venture, association, organization, or

other entity.” *Id.* § 351.102(b)(23). In the *CVD Preamble*, Commerce provides a clarification as to the applicability of the regulation:

In all other sections of these regulations, the term “firm” is used to describe the recipient of the subsidy. However, for purposes of certain attribution rules, where we are describing how subsidies will be attributed within firms, “firm” is too broad. Therefore, for the purposes of paragraphs (b)(5) and (b)(6), we are using the term “corporation.”

Countervailing Duties, 63 Fed. Reg. 65,348, 65,400 (Dep’t of Commerce Nov. 25, 1998) (final rule).

There is no CVD regulation that governs tolling arrangements specifically. Oral Argument Tr. at 17:17–18:20. *See generally* 19 C.F.R. §§ 351.501–528.

B. Positions of the parties

Plaintiff asserts that “Commerce unreasonably and unlawfully used the sales revenue of . . . CS Wind Korea . . . as the denominator in calculating the subsidy benefits received by CS Wind Vietnam.” Pl. Br. at 2 (citing 19 C.F.R. § 351.525(b)(6)(i), (b)(7)). Plaintiff argues that Commerce’s decision in this respect was “inconsistent with its past practice and regulations.” *Id.* Plaintiff also declares that Commerce’s “unreasonable conclusion that its ‘multinational company’ regulation was inapplicable in this case . . . was also unsupported by substantial evidence and contrary to law.” *Id.* at 2–3. In furtherance of these points, plaintiff raises three primary arguments to which the Government responds. *See* Pl. Br. at 17–24; Def. Br. at 5–24.

1. Whether Commerce acted consistently with its regulations

First, plaintiff asserts that “Commerce erred by attributing the subsidies received by CS Wind Vietnam within Vietnam to the value of sales by CS Wind Korea, in a manner inconsistent with its regulations.” Pl. Br. at 17. Plaintiff considers Commerce’s use of CS Wind Korea’s sales value in the denominator to be contrary to the language of 19 C.F.R. § 351.525(b)(6)(i) and (b)(7). *Id.* at 17–18. As to subsection (b)(7), which addresses subsidy attribution for multinational firms as described *supra*, Section I.A., plaintiff also raises language in the *CVD Preamble* that notes in part: “The government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purposes of supporting, assisting or encouraging domestic manufacturing or production and related activities” *Id.* at 18 (quoting *Countervailing Duties*, 63 Fed. Reg. at 65,403).

On this basis, plaintiff insists that Commerce's actions were also "inconsistent with its understanding of the purpose of foreign government subsidies." *Id.* Instead, plaintiff contends that Commerce "mixes and matches" a denominator based on Vietnamese and Korean activities with a numerator based on only Vietnamese activities. Oral Argument Tr. at 45:10–14. Plaintiff argues that "both [the numerator and denominator] should have reflected only Vietnamese activities." Oral Argument at 57:28–32. Further, plaintiff argues that the sales value is not "reflective of the full value of that wind tower" because some inputs are received "free of charge." Oral Argument Tr. at 53:10–17, 54:12–13. *But cf.* First Suppl. Questionnaire Resp. at 3 ("Normally, the sales price of wind towers comprises of material costs and processing costs.").

Plaintiff also argues that Commerce should have but did not follow its "normal" method of attribution" under 19 C.F.R. § 351.525(b)(6)(i) and instead selected CS Wind Korea's sales value as the denominator. Wind Tower Trade Coalition's Reply Brief ("Pl. Reply Br.") at 7, ECF No. 17. Plaintiff asserts that Commerce should not have changed its method because "the specific circumstances under which Commerce may depart from the 'normal' method" are described only in 19 C.F.R. § 351.525(b)(6)(ii) through (vi) and do not apply here.⁸ *Id.*

The Government argues to the contrary that "the actions [Commerce] took flow directly from the regulation." Oral Argument Tr. at 9:14–15, 10:8–10 (discussing 19 C.F.R. § 351.525(a) and (b)(6)). Namely, the Government asserts:

As a result of the tolling arrangement in this case, the sales of subject merchandise produced by CS Wind [Vietnam] are negotiated and made by CS Wind Korea. Thus, Commerce properly attributed the subsidy to those sales and used them in the benefit calculation denominator. Consistent with its regulation, Commerce based the denominator on the "sales value" of United States sales made by CS Wind Korea, rather than on the amount of the tolling fee that CS Wind [Vietnam] received from its parent company for processing services.

Def. Br. at 6. The Government points to two textual aspects of 19 C.F.R. § 351.525 to support its position that Commerce attributed properly the subsidies to the sales value of the products: (1) the use of the word "normally" in the subsection discussing subsidy attribution "to the products produced by the corporation that received the sub-

⁸ Provisions (ii) through (vi) pertain to situations involving multiple corporations producing the same product, a holding or parent company receiving a subsidy, input suppliers, subsidy transfers and the definition of cross-ownership, respectively. 19 C.F.R. § 351.525(b)(6)(ii)-(vi).

sidy,” which, the Government maintains, denotes a built-in “degree of flexibility or discretion” for Commerce; and (2) the subsection discussing subsidy calculation directs Commerce to use “the sales value” of the product to which Commerce attributes the subsidy” as the denominator — rather than attributing subsidies to an entity such as CS Wind Korea. *Id.* at 16 (first quoting 19 C.F.R. § 351.525(b)(6)(i); then quoting 19 C.F.R. § 351.525(a)) (emphases omitted).

The Government describes the dispute as follows:

The disagreement between Commerce and WTTC thus boils down to a straightforward question of whether the subsidy should have been attributed to the “sales value” of *products* produced by CS Wind [Vietnam] and exported by CS Wind Korea (as Commerce’s regulations require and as Commerce did), or to an amount of a tolling fee for processing services paid by CS Wind Korea to CS Wind [Vietnam], as WTTC advocates.

Id. at 17. As further support, the Government explains that the processing services value would have been *underinclusive* and therefore inaccurate. *Id.* at 17–18. By contrast, the Government explains that the sales value that Commerce used was not *overinclusive* as the sales value “is limited to sales of subject merchandise produced by CS Wind [Vietnam] and sold by its parent company.” *Id.* at 17 (citing IDM at 30).⁹ The Government closes its argument by contending that Commerce took a “reasonable approach” that warrants deference by the court. *Id.* at 24.¹⁰

Countering what plaintiff calls Commerce’s “conclusory statement” that CS Wind Vietnam is not a multinational firm under 19 C.F.R. § 351.525(b)(7), plaintiff insists that “[i]t does not logically follow from CS Wind Vietnam’s status as a subsidiary that it could not also be [sic] multinational firm.” Pl. Br. at 18–19 (citing IDM at cmt. 6). Plaintiff supports its argument by pointing out that “CS Wind Vietnam is part of the multinational CS Wind conglomerate.” Pl. Reply

⁹ At oral argument, plaintiff raised “selling expenses” and the Government raised “purchasing raw materials and engaging in selling activities” as the cost elements from CS Wind Korea going toward the wind towers. Oral Argument Tr. at 19:14–21:2. CS Wind Vietnam also reported that “CS Wind Corporation has only sales and administrative functions in Korea.” First Suppl. Questionnaire Resp. at 3.

¹⁰ At oral argument, the Government also asserted that Commerce’s cross-border regulation covers tolling arrangements in the absence of a separate CVD tolling regulation. Oral Argument Tr. at 17:22–18:2. Plaintiff countered by raising a preliminary decision memorandum in another case to highlight the way in which, plaintiff asserted, Commerce stated that it perceived similarities between a situation involving tollers and situations involving a trading company under 19 C.F.R. § 351.525(c). Oral Argument Tr. at 18:9–20; see *Steel Concrete Reinforcing Bar From the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Intent To Rescind the Review in Part; 2016 (“Turkey Rebar 2018”)*, 83 Fed. Reg. 63,472 (Dep’t of Commerce Dec. 10, 2018) and accompanying PDM (“Turkey Rebar 2018 PDM”); see also IDM at 10.

Br. at 7; *see also* Oral Argument Tr. at 13:23–14:2. Plaintiff also alleges: “With regard to Korea, CS Wind Vietnam reported that its Korean parent company was created in 2008 ‘by the merger of two factories,’ which then came under the sole ownership of CS Wind Korea.” Pl. Reply Br. at 8 (quoting Affiliation Resp. at 4).¹¹ Plaintiff concludes that “[subsidies] were not attributed to the value of that Vietnamese production,” *id.* (citing Def. Br. at 18–19), but that “[t]hey were instead attributed to the sales of a Korean company in Korea, contrary to the multinational corporation provision,” *id.*

The Government retorts that “by its express terms, the [multinational firm] regulation applies only if ‘the firm that received a subsidy has production facilities in two or more countries.’” Def. Br. at 18 (quoting 19 C.F.R. § 351.525(b)(7) (emphasis supplied)). In this case, Commerce found that “CS Wind [Vietnam] ‘does not have operations, such as production facilities, in any countries other than in Vietnam.’”¹² *Id.* (quoting IDM at 30). The Government concludes that, as Commerce determined, the provision does not apply in this case. Def. Br. at 18–19 (citing IDM at 30); IDM at 30; *cf.* Oral Argument Tr. at 12:5–7, 16:15–17:14 (asserting that Commerce still acted consistently with 19 C.F.R. § 351.525(b)(7), notwithstanding that Commerce maintained, and the Government argues, that the subsection is inapplicable).

2. Whether Commerce acted consistently with its past practice

Plaintiff’s second argument is that Commerce “unacceptably departed from its past practice” without providing a “reasonable explanation” when it used the CS Wind Korea sales value (rather than the CS Wind Vietnam processing services value) in the denominator. Pl. Br. at 19 (citing *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003)). To support its argument, plaintiff discusses several administrative proceedings in its briefs and at oral argument and asserts that “Commerce made no attempt to distinguish these cases.” *Id.* at 19–21.

For instance, plaintiff describes that in *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China*, which involved a

¹¹ Plaintiff’s statement confuses the facts. The correct facts are that in 2008, two Vietnamese companies merged to form CS Wind Vietnam; CS Wind Korea “became the sole owner of the company at that time.” Affiliation Resp. at 4. CS Wind Korea existed before the merger. *See id.*; Initial Questionnaire Resp. at 1–2 (“CSI and CSWT merged at the end of 2008 and the company was renamed CSWV. Both the old entities and the new entity were 100% owned by CS Wind Corporation in Korea.”).

¹² CS Wind Vietnam has only two production facilities, both in Vietnam. Initial Questionnaire Resp. at 1.

Chinese respondent and a Hong Kong affiliate, but no tolling arrangement, Commerce used an unconsolidated sales value as the denominator, to the exclusion of the Hong Kong sales data. *Id.* (citing *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* ("Woven Ribbons from China"), 75 Fed. Reg. 41,801 (Dep't of Commerce July 19, 2010) (final affirm. countervailing duty deter.) and accompanying IDM at cmt. 4); see Pl. Reply Br. at 10 (describing the facts as "still analogous," despite the lack of a tolling arrangement, such that the case is pertinent).

The Government counters that "*Woven Ribbons from China* did not address the issue of whether it is appropriate to attribute the subsidy to the sales value of the product (as Commerce did), or merely to the amount of a processing/tolling fee (as WTTC advocates)." Def. Br. at 20.

Plaintiff also discusses *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China* ("Pressure Pipe"), in which plaintiff summarizes that Commerce granted an entered value adjustment ("EVA")¹³ and again used a Chinese respondent's sales

¹³ Commerce noted in the instant case: "The purpose of an EVA is to ensure that assessment on the U.S. value of imported subject merchandise is at the appropriate *ad valorem* rate." IDM at 30. In its PDM in the instant case, Commerce also explained the circumstances under which it has granted an EVA, which adjusts the subsidy calculation described in 19 C.F.R. § 351.525(a) to account for certain variations. *Utility Scale Wind Towers from the Socialist Republic of Vietnam*, 84 Fed. Reg. 68,104 (Dep't of Commerce Dec. 13, 2019) (prelim. affirm. countervailing duty deter. and alignment of final deter. with final antidumping duty deter.) and accompanying PDM at 13. Specifically, Commerce described as follows the discrepancy between the sales value and the entered value of the goods and the six additional elements required for Commerce to grant an EVA:

Commerce's practice is to use the [free on board or] FOB sales value for the denominator in its subsidy calculations. However, in limited circumstances, Commerce has adjusted the calculation of the subsidy rate when the sales value used to calculate that subsidy rate does not match the entered value of the subject merchandise, e.g., where subject merchandise is exported to the United States with a mark-up from an affiliated company, and where the respondent can demonstrate that: 1) the price on which the alleged subsidy is based differs from the U.S. invoiced price; 2) the exporters and the party that invoices the customer are affiliated; 3) the U.S. invoice establishes the customs value to which the CVD duties are applied; 4) there is a one-to-one correlation between the invoice that reflects the price on which subsidies are received and the invoice with the mark-up that accompanies the shipment; 5) the merchandise is shipped directly to the United States; and 6) the invoices can be tracked as back-to-back invoices that are identical except for price.

Commerce has generally limited the sales adjustment to instances where a respondent can demonstrate that all of its sales to the United States met the six criteria listed above.

Id. (footnotes omitted). In other words, Commerce can grant an EVA to address a mismatch between the sales value and the entered value when each of these criteria are met. *See id.* The court notes that there has been other litigation before this court pertaining to an inconsistency in the way in which Commerce calculates generally an EVA. *See Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1394–99 (2021). Still, this case differs in that no mark-up existed that would have necessitated an EVA, and Commerce states that it did not grant one. *See* IDM at 30.

value for the denominator and not that of a Hong Kong affiliate — despite the affiliate making the sales. Pl. Br. at 20 (citing *Pressure Pipe*, 74 Fed. Reg. 4,936 (Dep’t of Commerce Jan. 28, 2009) (final affirm. countervailing duty deter.) and accompanying IDM at cmt. 3); *see also* Oral Argument Tr. at 27:14–28:1; Pl. Reply Br. at 11–12 (insisting the facts of *Pressure Pipe* are still related despite an EVA and mark-up by the affiliate).

The Government emphasizes that *Pressure Pipe* involved “an adjustment to include a ‘mark-up’ charged by the Hong Kong affiliate,” whereas this case did not involve a mark-up by CS Wind Korea. Def. Br. at 20–21 (citing *Pressure Pipe* IDM at cmt. 3; IDM at 30). Citing this difference, the Government concludes that *Pressure Pipe* “does not require Commerce to allocate the subsidy to the amount of the processing fee rather than the sales value of a product.” *Id.* at 21 (citing 19 C.F.R. § 351.525(a)); *see also* Oral Argument Tr. at 28:18–23 (stressing that the *Pressure Pipe* dispute involved *which* sales value or values to use, not *whether* to use the sales value at all).

Next, plaintiff raises *Certain Tool Chests and Cabinets from the People’s Republic of China*, in which the denominator was based on the value of a Chinese respondent’s sales to a Macau affiliate and not the value of the Macau affiliate’s export sales. Pl. Br. at 20–21 (citing *Certain Tool Chests and Cabinets from the People’s Republic of China (“Tool Chests”)*, 82 Fed. Reg. 56,582 (Dep’t of Commerce Nov. 29, 2017) (final affirm. countervailing duty deter.) and accompanying IDM at cmt. 14). Here, plaintiff’s point is that “utilizing the value of CS Wind Vietnam’s sales to CS Wind Korea”¹⁴ would be analogous to Commerce utilizing the Chinese respondent’s sales value in the denominator in *Tool Chests*. *Id.* at 21; *see also* Pl. Reply Br. at 12.

The Government, by contrast, seeks to distinguish *Tool Chests* by pointing out that it “did not involve a tolling arrangement, and thus did not address the issue of whether it is appropriate to allocate a subsidy to the amount of the tolling/processing fee rather than the sales value of the product.” Def. Br. at 21 (citing *Tool Chests*, 82 Fed. Reg. 56,582 and accompanying IDM at cmt. 14).

The last case to which plaintiff cites to establish that Commerce had a practice in this area is *Certain Fabricated Structural Steel from Canada*. *See* Pl. Br. at 21 (quoting *Certain Fabricated Structural Steel*

¹⁴ This value would be CS Wind Vietnam’s “toll processing fees, or revenue.” IDM at 29; *see* Initial Questionnaire Resp. at 5 (describing CS Wind Vietnam’s sales revenue as “the tolling processing fees issued to CSWV’s parent company (equating to the latter’s tolling expenses”); *see also* Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec’y Commerce, re: *CS Wind Rebuttal Brief: Countervailing Duty Investigation on Utility Scale Wind Towers from Vietnam (C-552-826)* (Apr. 20, 2020) at 29, CR 112, PR 200 (noting that “CSWV’s sales revenue is processing service income”).

from Canada (“*Fabricated Structural Steel*”), 85 Fed. Reg. 5,387 (Dep’t of Commerce Jan. 30, 2020) (final neg. countervailing duty deter.) and accompanying IDM at cmt. 3); Pl. Reply Br. at 13. In that case, Commerce “remove[d] the revenue associated with post-exportation activities from the sales denominators of the respondents” due to a lack of evidence that “the governments that provided these subsidies intended to subsidize activities outside their territories.” Pl. Br. at 21 (quoting *Fabricated Structural Steel* IDM at cmt. 3); accord Pl. Reply Br. at 13 (citation and emphasis omitted); see also Oral Argument Tr. at 50:22–51:3.

The Government counters that the facts in *Fabricated Structural Steel* are readily distinguishable from those in this case. Def. Br. at 22 (quoting *Fabricated Structural Steel* IDM at cmt. 3). In particular, the Government notes that, unlike the extensive post-importation assembly activities in the United States in *Fabricated Structural Steel*, “there is no evidence that a significant portion of CS Wind [Vietnam]’s production assembly occurred in the United States.” *Id.*¹⁵ Accordingly, the Government argues that *Fabricated Structural Steel* dealt with peculiar and divergent facts such that it does not support plaintiff’s point. *Id.* at 21–23.

In any event, the Government adds that Commerce, in reliance on the *CVD Preamble*, explained in *Fabricated Structural Steel* that its attribution rules were not exhaustive. *Id.* at 22 (quoting *Fabricated Structural Steel* IDM at cmt. 3).¹⁶ Based on Commerce’s description of this flexibility within the rules, the Government argues that a “rigid approach” would lead to an inappropriate attribution result here. *Id.* at 22–23.

Overall, plaintiff concludes that “Commerce made no attempt to distinguish these cases,” Pl. Br. at 21, which collectively “establish[] a practice that Commerce failed to follow in this case,” Pl. Reply Br. at 12.¹⁷

¹⁵ In its determination, Commerce noted that “a significant amount of activity occurs outside of Canada following importation into the United States.” *Certain Fabricated Structural Steel from Canada*, 85 Fed. Reg. 5,387 and accompanying IDM at cmt. 3. Commerce also explained specifically that “[t]his is not a sales situation that [it] normally encounter[s] in a CVD proceeding.” *Id.*

¹⁶ Commerce stated: “[T]he *CVD Preamble* makes clear that our attribution rules do not account for all situations that may arise because, if Commerce tried to account for all possible permutations, the result would be an extremely lengthy set of rules that could prove unduly rigid.” *Id.*

¹⁷ At oral argument, plaintiff raised one additional case, *Turkey Rebar 2018*, to argue that Commerce has previously “viewed tolling arrangements through the lens of [the trading company regulation].” Oral Argument Tr. at 18:9–20; see *Turkey Rebar 2018* PDM (citing *Turkey Rebar 2017* IDM at 12). There, Commerce described an earlier investigation of Turkish rebar:

The Government, as noted previously, comments on each of the four prior Commerce determinations presented by plaintiff and presents one additional determination in support of its view that Commerce in this case acted consistently with its past practice — in particular, consistent with “prior decisions in cases involving similar tolling arrangements.” Def. Br. at 19. Specifically, the Government raises *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China*. *Id.* (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China* (“*Coated Paper*”), 75 Fed. Reg. 59,212 (Dep’t of Commerce Sept. 27, 2010) (final determ.) and accompanying IDM at cmt. 32). In that case, the Government states: “Commerce addressed a situation in which a respondent had a tolling arrangement, and consistent with this case, *declined* to attribute the subsidy to the amount of the tolling/processing fee, instead attributing it to the sales value of the finished products.” *Id.* (citing *Coated Paper*, 75 Fed. Reg. 59,212, and accompanying IDM at cmt. 32).¹⁸

Plaintiff seeks to distinguish *Coated Paper* by recalling that the determination in that case stated: “[A]lthough the actual sales rev-

In the second CVD investigation of rebar from Turkey ([*Turkey Rebar 2017*]), we found that it was appropriate to attribute subsidies received by certain tolling companies to a company respondent when the relationship between the tolling company and the respondent is akin to the relationship between a producer and its trading company under 19 CFR 351.525(c) (i.e., the tolling company performs all production activities and the respondent sells the finished product).

Turkey Rebar 2018 PDM at 8 (citing *Steel Concrete Reinforcing Bar from the Republic of Turkey, Final Affirmative Countervailing Duty Determination* (“*Turkey Rebar 2017*”), 82 Fed Reg. 23,188 (May 22, 2017) and accompanying IDM at 12 (explaining that Commerce was “cumulating” subsidies provided to Habas’ toller under similar circumstances”), and accompanying PDM at 13–14).

However, in this case, Commerce found that the comparison to the trading company scenario was inapposite. See IDM at 10 (finding that *Turkey Rebar 2017* differed from the current scenario). As Commerce also explained, “[i]n this case, sales of the subject merchandise did not go through any trading companies.” *Id.* at 30. The court notes plaintiff’s argument regarding the Turkish rebar cases, *supra* note 10.

¹⁸ In *Coated Paper*, to follow 19 C.F.R. § 351.525(a), Commerce explained:

[A]lthough the [] companies do not have title to the raw materials, the production of the subject merchandise is occurring in [China] using these materials. Thus, the export product leaving [China] for which subsidies should be attributed is not just the processing fee, but also the actual product produced.

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China (“*Coated Paper*”), 75 Fed. Reg. 59,212 (Dep’t of Commerce Sept. 27, 2010) (final determ.) and accompanying IDM at cmt. 32. Commerce concluded:

[T]he most effective manner to attribute the subsidies is to remove toll processing fees . . . and replaced [sic] it [sic] with the sales values reported by [two affiliated trading companies]’ reported sales of each of the paper producers’ products. Using this methodology comes closest to ensuring that the amount of subsidies assigned to the [tolling] companies is reflected in the calculated CVD rate because it is the actual value by which the merchandise enters the United States.

venue may be collected outside the [People's Republic of China or] PRC, [Commerce is] calculating a subsidy rate using the sales price set or sales value of the product from the PRC" Pl. Reply Br. at 9–10 (quoting *Coated Paper* IDM at cmt. 32)); *see also* Oral Argument Tr. at 24:17–25:4, 25:18–22. Plaintiff argues that in the instant case, by contrast, "[t]here is no evidence that CS Wind Vietnam set, within Vietnam, the ultimate price of the wind towers." Pl. Reply Br. at 10.

3. Plaintiff's manipulation concerns

Plaintiff's third concern is that "allowing foreign producers with multiple global affiliates to restructure sales transactions and thereby themselves select which affiliate's sales denominator will be used in U.S. CVD cases opens a significant and concerning loophole for subsidy margin manipulation." Pl. Br. at 22 (citing Letter from Wiley Rein LLP to Sec'y Commerce, re: *Utility Scale Wind Towers From The Socialist Republic of Vietnam*: Case Brief (Apr. 3, 2020) ("WTTC Case Br.") at 25–31, CR 107–108, PR 194). In this respect, plaintiff takes issue with four points: (1) CS Wind Vietnam and CS Wind Korea started to use toll processing agreements in 2018 "just as [CS Wind Vietnam] was excluded from a prior antidumping duty order through appeal litigation"¹⁹; (2) CS Wind Korea [[

]], which plaintiff claims as evidence that CS

Wind Korea [[]]; (3) CS Wind Korea [[]]; and (4) according to plaintiff, CS Wind Vietnam provided an insufficient rationale for using toll processing agreements to “better control costs.” *Id.* at 22–23 (quoting Initial Questionnaire Resp. at Ex. 13.1; First Suppl. Questionnaire Resp. at 3; Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec’y Commerce, re: *CS Wind Verification Exhibits in the Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam* (C-552-826) (Mar. 4, 2020) (“Verification Exs.”) at VE-4 at 59, CR 101–104) (citing Suppl. Affiliation Resp. at Exs. SA-2 and SA-3; *CS Wind Viet. Co. v. United States*, 721 F. App’x 993 (Fed. Cir. 2018)) (emphasis omitted); see Pl. Reply Br. at 8 (insisting that “CS Wind[] [has a] well-established record of restructuring its subsidiaries for the purpose of avoiding antidumping and subsidy duties”), 13–15. Therefore, plaintiff concludes that “there was important evidence on the record indicating that CS Wind entered

¹⁹ Despite the timing plaintiff alleges, Pl. Br. at 22, the use of toll production agreements dates to at least 2008, based on the record, and as later acknowledged by plaintiff at oral argument, Verification Mem. at 6, 9; Oral Argument Tr. at 6:11–25, 84:10–12; see also *supra* note 4.

into this sales structure with its affiliates in order to manipulate its potential duty liability.” Pl. Br. at 23. Plaintiff asserts that Commerce “never actually *addressed* the argument” in the IDM. Pl. Reply Br. at 15.²⁰

In response, the Government notes that “the party alleging manipulation must substantiate its allegations with more than speculation and conjecture.” Def. Br. at 23 (citing *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460 (Fed. Cir. 1990)). The Government adds that plaintiff’s points — “e.g., the existence of a tolling arrangement, exclusion from a prior antidumping order, and other events that occurred prior to this investigation” — were both addressed by Commerce and insufficient to establish manipulation. *Id.* (citing IDM at 28).

Plaintiff also raises the Supreme Court case of *United States v. Eurodif S.A.* to support its point that margin manipulation presents a real risk, which Commerce should have addressed.²¹ Pl. Br. at 23. Plaintiff summarizes *Eurodif*: “The Court noted that exempting uranium contracts from antidumping duties solely because they are structured as to provide services would result in injury to the domestic industry by making such contracts ‘untouchable.’” *Id.* (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 307 (2009)). Accordingly, plaintiff contends that in that case “Commerce erred by allowing the respondent to replace its contracts for goods with a control [sic] for processing services, allowing it to use such creativity to craft a substantially lowered subsidy margin.” *Id.* Further, plaintiff asserts that Commerce “failed to even mention the WTTC’s argument” in its IDM and, therefore, “unreasonably and unlawfully failed to address significant arguments of the WTTC that seriously undermined the agency’s reasoning and conclusions.” *Id.* at 24 (citing *Altx, Inc. v. United*

²⁰ Plaintiff points earlier to Commerce’s discussion of a future manipulation concern that was raised in *Coated Paper*. Pl. Reply Br. at 9 n.2 (quoting *Coated Paper* IDM at cmt. 32). There, Commerce recognized the petitioner’s concern about the companies involved being able to change the sales price to their trading companies and agreed that manipulation “may be an issue to examine in future reviews”; however, Commerce determined ultimately that this concern was “not a basis to deny the [entered value] adjustment given that without an adjustment [Commerce] would not collect the correct amount of duties.” *Coated Paper* IDM at cmt. 32.

²¹ In *United States v. Eurodif S.A.*, the Supreme Court held that Commerce’s decision to treat uranium enrichment transactions as contracts for goods (instead of contracts for services) was valid in the antidumping context under 19 U.S.C. § 1673, which covers only sales of goods. *United States v. Eurodif S.A.*, 555 U.S. 305, 308 (2009); see 19 U.S.C. § 1673 (defining when an antidumping duty must be imposed). In reaching this conclusion, the Court referenced the untracked and fungible nature of the uranium, as well as its substantial transformation during the transaction, as indicators of transfer of ownership and, therefore, reflective of a sale of goods. *Eurodif S.A.*, 555 U.S. at 319–22.

States, 25 CIT 1100, 1117–18, 167 F. Supp. 2d 1353, 1374 (2001)). But see IDM at 28 (acknowledging manipulation concern in the “Petitioner’s Comments” section).

The Government argues that *Eurodif* is inapposite because it concerned whether Commerce should even apply the law, which is not at issue here:

There is no dispute that wind towers are a product subject to countervailing duties. The only issue is what amount properly represents the value of the exported product to which the subsidy should be attributed, the sales value of the exported product (as [sic] Commerce’s contends), or the tolling fee paid for processing services (as WTTC argues).

Def. Br. at 24. Therefore, the Government argues that plaintiff’s point regarding *Eurodif* is not relevant to the present dispute. *Id.*

C. Analysis

For the reasons discussed below, the court concludes that Commerce’s choice of denominator for the benefit calculation is not inconsistent with its regulations or with the prior determinations presented by the parties. However, as discussed *infra*, Section I.C.3, the court remands because Commerce did not discuss or address the evidence that WTTC presented as related to manipulation or address the relevant argument on manipulation in explaining its decision to use CS Wind Korea’s sales value as the denominator for the subsidy calculation. The court considers plaintiff’s main arguments in turn: (1) whether Commerce acted consistently with its regulations; (2) whether Commerce acted consistently with its past practice; and (3) whether Commerce considered manipulation and addressed adequately plaintiff’s manipulation claims.

1. Whether Commerce acted consistently with its regulations

The first issue before the court is whether Commerce acted in a manner consistent with its regulations in using the sales value of the wind towers sold by CS Wind Korea — the parent corporation — in the denominator of the benefit calculation, instead of using the value of the tolling services by its subsidiary CS Wind Vietnam. See Pl. Br. at 2; Def. Br. at 17 (citing IDM at 30). The court concludes that Commerce’s decision is consistent with its regulations.

The ad valorem subsidy rate regulation states that “[Commerce] will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the

sales value during the same period of the product or products to which the Secretary attributes the subsidy.” 19 C.F.R. § 351.525(a) (second emphasis supplied). Further, in cases of cross-owned corporations, “[Commerce] normally will attribute a subsidy to the *products* produced by the corporation that received the subsidy.” 19 C.F.R. § 351.525(b)(6)(i) (emphasis supplied).

In this case involving a cross-owned corporation, Commerce’s regulations require that Commerce attribute the subsidy to the “*products*,” which were the wind towers produced by CS Wind Vietnam, which — as a “corporation” under Commerce’s regulations, 19 C.F.R. § 351.102(b)(23); *Countervailing Duties*, 63 Fed. Reg. at 65,400 — received the subsidy from the GOV.²² 19 C.F.R. § 351.525(b)(6)(i). Therefore, the denominator of the subsidy rate calculation was required to — and did — reflect the “*sales value*” of the wind towers. 19 C.F.R. § 351.525(a).

Moreover, the court does not find persuasive plaintiff’s argument that because CVD rules — in particular, 19 C.F.R. § 351.525(b)(6)(ii) through (v) — do not expressly apply to the tolling circumstance that, therefore, Commerce’s denominator selection is contrary to its regulations. *See Pl. Reply Br.* at 6–7. Here, the CVD rules do not address tolling arrangements. *See generally* 19 C.F.R. §§ 351.501–.528. In fact, Commerce specifically foresaw that situations could vary, including from subsections (ii) through (v). *See Countervailing Duties*, 63 Fed. Reg. at 65,399–65,400. Consequently, Commerce did not limit the applicability of its regulations, but rather drafted its regulations to be able to accommodate such variation. *See id.* For example, in the *CVD Preamble*, as described by the Government, *see supra*, Section I.B.2., Commerce made clear that it was crafting “general rules of attribution” in 19 C.F.R. § 351.525(b)(2) through (b)(7) because “[i]f [it] tried to account for all the possible permutations in advance, the result would be an extremely lengthy set of rules that might prove unduly rigid,” *Countervailing Duties*, 63 Fed. Reg. at 65,399. Similarly, Commerce noted that its goal was to elaborate rules that were “sufficiently

²² Plaintiff states that Commerce “attribut[ed] the subsidies to CS Wind Korea.” Wind Tower Trade Coalition’s Reply Brief (“Pl. Reply Br.”) at 6, ECF No. 17 (citing Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec’y Commerce, re: *CS Wind First Supplemental Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-552-826*) (Nov. 6, 2019) (“First Suppl. Questionnaire Resp.”) at 7, CR 76–82, PR 122–128). Contrary to this assertion, Commerce stated that “[t]he mandatory respondent in this investigation which received subsidies is CS Wind, located in Vietnam.” *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Negative Determination of Critical Circumstances (“Final Determination”)*, 85 Fed. Reg. 40,229 (Dep’t of Commerce July 6, 2020) (final affirm. countervailing duty deter. and negative deter. of critical circumstances) and accompanying IDM at 30, PR 215. Moreover, the Government discusses that Commerce “attribute[d] the subsidy to the sales value of the product.” Def. Br. at 20.

precise that parties can predict with a reasonable degree of certainty how [Commerce] will attribute subsidies to particular products in a given factual scenario,” while “recognizing that unique and unforeseen factual situations may make complete harmony among these rules impossible.” *Id.* at 65,399–65,400.

In this case, Commerce elucidated in the IDM the reasons that Commerce used CS Wind Korea’s sales value as the denominator for specific programs. *See* IDM at 4 (citing Memorandum from Davina Friedmann, Senior Case Analyst, AD/CVD Operations, Off. VI, to Erin Kearney, Program Manager, AD/CVD Operations, Off. VI, re: *Final Determination of Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam: Calculation Memorandum for CS Wind Vietnam Co., Ltd.* (June 29, 2020) (“Calculation Mem.”), CR 120–121, PR 217), 29–30. Commerce explained the basis for its preliminary decision to use the sales value: “Because CS Wind [Vietnam] served as a toller of the subject merchandise, [Commerce] relied upon CS Wind Korea’s sales value of subject merchandise produced by CS Wind [Vietnam], rather than CS Wind [Vietnam]’s tolling revenue, as the appropriate denominator in [its] subsidy calculations for the final determination.” *Id.* at 29 (citing PDM at 13, 5). In addition, the calculation used only the values that corresponded to the wind towers produced by CS Wind Vietnam. *Id.* at 30; *see* Verification Mem. at 9 (“[Commerce] confirmed that the reported sales information did not include sales to affiliates, service income, sales from merchandise produced outside of the country, etc.”).²³ Therefore, instead of using CS Wind Vietnam’s “toll processing fees, or revenue,” Commerce continued in its Final Determination to use CS Wind Korea’s sales value. IDM at 29–30.

Despite plaintiff’s argument above that using CS Wind Korea’s sales value distorts the attribution of the subsidy, the court concludes that, on the contrary, using the processing value alone would not reflect adequately the sales value of the wind towers and would, therefore, be inconsistent with Commerce regulations. *See* 19 C.F.R. § 351.525(a), (b)(6)(i); *see also* Def. Br. at 17 (“The value of processing services does not include, among other things, the value of raw material inputs, and thus does not properly represent the sales value of the products.”). Moreover, since CS Wind Vietnam never owns but merely manufactures the wind towers, there is no CS Wind Vietnam sales value to use. *See* Verification Mem. at 4; Oral Argument Tr. at 10:13–18 (“[T]he sales value of those products is recorded in CS Wind

²³ “[A] subsidy provided by a government for a specific product is attributed only to sales of that product for which the subsidy was provided (and any downstream products produced from that product), as it reduces the costs of a firm’s sales of those products.” *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,400 (Dep’t of Commerce Nov. 25, 1998).

Korea's books, not in CS Wind Vietnam's books because CS Wind Vietnam is not being paid the sales value of the product. They are simply being paid a processing fee for their services.”). By using the sales value of the wind towers in the denominator, Commerce acted consistently with its regulations.

Further, Commerce reasoned that, because no trading company was involved, no mark-up of the wind towers occurred, and so no EVA was warranted:

Consistent with the intent of Commerce’s regulations and the normal subsidy calculation methodology, we determine it appropriate to use CS Wind Korea’s FOB sales value of the subject merchandise that it [sic] was produced by CS Wind [Vietnam], as it is the parent company that sold the merchandise to the United States. The sales value used in the denominator of our subsidy calculations is limited to sales of subject merchandise produced by CS Wind [Vietnam] and sold by its parent company, CS Wind Korea, in the United States. That is, there was no mark-up by an affiliated company, for instance, that would require an entered value adjustment to the sales of merchandise under investigation.

IDM at 29–30 (discussing 19 C.F.R. § 351.525(a)). Commerce concluded: “CS Wind Korea’s sales value is consistent with the entered value of the subject merchandise upon entry into the United States.” *Id.* at 30. Therefore, Commerce explained adequately the reason that an EVA — which is used to rectify situations in which the entered value does not reflect the actual value of the goods, *see* PDM at 13 — was not called for, and instead demonstrated a “rational connection” between the facts pertaining to the sales value and toll processing fees and Commerce’s decision to use CS Wind Korea’s sales value. *Bowman Transp. Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines*, 371 U.S. at 168); *see* IDM at 29–30; *see also* *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376–1377 (Fed. Cir. 2016).

Finally, plaintiff asserts that Commerce should have applied the multinational firm provision, 19 C.F.R. § 351.525(b)(7), because CS Wind Vietnam is “part of the multinational CS Wind conglomerate.” Pl. Reply Br. at 7; *see* Pl. Br. at 18–19. Commerce, in the IDM, described the reason that it determined that the multinational firm provision did not apply in this case: “As CS Wind [Vietnam] is a subsidiary, and not a multinational company, it does not have operations, such as production facilities, in any countries other than in Vietnam.” IDM at 30.

The record supports Commerce’s conclusion that CS Wind Vietnam — “the firm that received a subsidy” under 19 C.F.R. § 351.525(b)(7)

— does not itself have production facilities outside of Vietnam. *See* IDM at 30; Oral Argument Tr. at 32:14-33:2; *see* 19 C.F.R. § 351.525(b)(7).²⁴ Moreover, Commerce confirmed previously in the administrative review that CS Wind Korea did not receive any subsidies. PDM at 5 (citing Suppl. Questionnaire Resp. at 7). Commerce considered “the relevant factors” as to which entity received the subsidy and committed no “clear error of judgment” in determining the multinational firm provision to be inapplicable.²⁵ *State Farm*, 463 U.S. at 30–31. Therefore, Commerce’s Final Determination was reasonable.²⁶

Commerce’s application of its regulations, which is clearly explained in the IDM, is “reasonable and supported by the record as a whole” and comports with a plain reading of the text of the regulations in the absence of a separate tolling provision. *Shandong Huarong Gen. Corp.*, 25 CIT at 837, 159 F. Supp. 2d at 718 (citations omitted), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp.*, 60 F. App’x 797; *see* IDM at 29–30.

“To survive judicial scrutiny, however, ‘an agency’s construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation [A] court must defer to an agency’s reasonable interpretation of a statute even if the court might have preferred another.’” *Shandong Huarong Gen. Corp.*, 25 CIT at 838, 159 F. Supp. 2d at 719 (citations omitted), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp.*, 60 F. App’x 797 (quoting *U.S. Steel Grp. v. United States*, 225 F.3d 1284, 1287 (Fed. Cir. 2000); *NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994)). Here, the use of CS Wind Korea’s sales value in the denominator of Commerce’s calculation is fully consistent with the regulations. Commerce explained that it used CS Wind Korea’s sales value because CS Wind Korea effected the sales of the wind towers in the United States instead of

²⁴ As defined in the regulations, the meaning of “firm is used to refer to the recipient of an alleged countervailable subsidy, including any . . . corporation.” 19 C.F.R. § 351.102(b)(23).

²⁵ The Government noted that when a subsidiary itself has facilities in multiple countries, the provision would apply. Oral Argument Tr. at 31:14–19. However, the parties were aware of no instances in which Commerce had determined previously that the subsidiary — which lacks its own multinational operations — of a foreign parent company is itself a multinational firm under 19 C.F.R. § 351.525(b)(7). Oral Argument Tr. at 31:14–19, 31:22–32:1.

²⁶ Even if the multinational firm provision were to apply to CS Wind Vietnam under the CS Wind Korea umbrella, Commerce still attributed appropriately the subsidy to the wind towers at issue under the plain language of the regulation, which directs Commerce to “attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy.” 19 C.F.R. § 351.525(b)(7); Def. Br. at 18–19. In this case, as aligned with the regulation, Commerce attributed the subsidy to the wind towers produced by the firm within Vietnam to which the GOV granted the subsidy. *See* IDM at 30 (noting CS Wind Vietnam received subsidies).

merely acting as the “toller,” as had CS Wind Vietnam. IDM at 29–30. In addition, Commerce explained the reason that it found the multi-national firm provision to be inapplicable based on CS Wind Vietnam’s domestic-only operations and status as the only subsidy recipient. *Id.* at 30. Accordingly, the court concludes that Commerce’s Final Determination is consistent with its regulations.

2. Whether Commerce acted consistently with its past practice

Next, the court considers plaintiff’s argument that Commerce acted inconsistently with its past practice. “Commerce’s practice is to use the FOB sales value for the denominator in its subsidy calculations.” PDM at 13 (citing 19 C.F.R. § 352.525(a)). The parties present six prior Commerce determinations in their arguments with respect to a prior practice.²⁷ The court examines each in turn and concludes that Commerce’s actions in this case are not inconsistent with its actions in those cases.²⁸

In *Coated Paper*, Commerce attributed subsidies to the product using a sales value from another country rather than the processing fee. *Coated Paper* IDM at cmt. 32. Plaintiff seeks to distinguish *Coated Paper* on the basis that the respondents’ paper producers set the price in the country that produced the subject goods, *id.*, whereas here, CS Wind Korea set the price in Korea, Verification Mem. at 9 (“CS Wind Korea internally estimates the price of each project based on estimates for tolling, materials, profit, etc. on a per

²⁷ The six Commerce determinations are: (1) *Coated Paper*, 75 Fed. Reg. 59,212 (Dep’t of Commerce Sept. 27, 2010) (final determ.) and accompanying IDM at cmt. 32; (2) *Pressure Pipe*, 74 Fed. Reg. 4,936 (Dep’t of Commerce Jan. 28, 2009) (final affirm. countervailing duty deter.) and accompanying IDM at cmt. 3; (3) *Fabricated Structural Steel*, 85 Fed. Reg. 5,387 (Dep’t of Commerce Jan. 30, 2020) (final neg. countervailing duty deter.) and accompanying IDM at cmt. 3; (4) *Tool Chests*, 82 Fed. Reg. 56,582 (Dep’t of Commerce Nov. 29, 2017) (final affirm. countervailing duty deter.) and accompanying IDM at cmt. 14; (5) *Narrow Woven Ribbons with Woven Selvedge from the People’s Republic of China*, 75 Fed. Reg. 41,801 (Dep’t of Commerce July 19, 2010) (final affirm. countervailing duty deter.) and accompanying IDM at cmt. 4; and (6) *Turkey Rebar 2018*, 83 Fed. Reg. 63,472 (Dep’t of Commerce Dec. 10, 2018) and accompanying PDM.

²⁸ With respect to the *Turkey Rebar 2017* and *Turkey Rebar 2018* cases (“*Turkey Rebar* cases”), *see supra* notes 10 and 17, the court finds the comparison to the trading company scenario inapposite. The trading company provision, 19 C.F.R. § 351.525(c), is inapplicable to the facts in this case. Unlike in the *Turkey Rebar* cases, no trading company is involved in this case. *See* IDM at 30. In addition, in this case the tolling company *is* the respondent; therefore, the relationship between the tolling companies and the respondent in the *Turkey Rebar* cases does not resemble this scenario. There, the benefits received by the tolling companies and the respondent were added in the numerator. *See id.* at 10; *Turkey Rebar 2018* PDM. Here, there are no such benefits from tolling companies to CS Wind Vietnam to add. *See* IDM at 10. Moreover, as Commerce explained, the *Turkey Rebar* cases did not involve a foreign parent-subsidiary tolling relationship as in this case. *See id.*; *Turkey Rebar 2018* PDM. Given the factual differences between these cases, the court concludes that Commerce did not act inconsistently with the *Turkey Rebar* cases in respect of its selection of the denominator in this case.

MT basis.”). This distinction is not pertinent to a consideration of plaintiff’s core argument that Commerce should have used the processing fees rather than the sales value as the denominator. Commerce’s actions in this case are not inconsistent with its actions in *Coated Paper*.

In *Pressure Pipe*, Commerce relied on a respondent’s sales value for the denominator without adding an affiliate’s sales value. *Pressure Pipe* IDM at cmt. 3. The affiliate bought finished goods from the respondent and consigned materials to the respondent (and another affiliate of the respondent) for manufacturing before the affiliate eventually sold the goods. *Id.* at 9.²⁹ Unlike in the instant case, however, in *Pressure Pipe*, Commerce applied an EVA due to the affiliate’s mark-up of the sales value. *See id.* at cmt. 3. By contrast, Commerce determined that CS Wind Korea did not charge a mark-up in this case and, therefore, Commerce did not grant an EVA. *See* IDM at 30.

Plaintiff uses *Pressure Pipe* to argue that Commerce should not have used CS Wind Korea’s sales value. However, *Pressure Pipe* differs in that Commerce’s determination in that case discussed which sales values to use, not whether to use processing fees or a sales value, and applied an EVA that addressed the affiliate’s sales value. *See* Def. Br. at 20–21; Oral Argument Tr. at 28:18–23. In this case, by contrast, Commerce considered the difference between using processing fees and a sales value and found an EVA to be unwarranted because CS Wind Korea’s sales value matched the value upon entry into the United States. *See* IDM at 29–30. Commerce’s actions in this case are not inconsistent with its actions in *Pressure Pipe*.

In *Tool Chests* and *Woven Ribbons from China*, plaintiff notes that Commerce likewise excluded the sales values of non-Chinese affiliates that exported the subject goods and relied for the sales value instead on the respondents’ sales to the affiliates alone. Pl. Br. at 19–21. However, the entities in those cases did not use tolling arrangements. *See* Def. Br. at 20–21 (citing *Woven Ribbons from China* IDM at cmt. 4; *Tool Chests* IDM at cmt. 14). This difference is critical because the tolling arrangement in this case caused the transactions between the parent and the subsidiary to reflect only toll processing fees and not the actual sales value of the wind towers. *See* IDM at 29. Given this distinction, the court concludes that Commerce’s actions in this case are not inconsistent with either *Tool Chests* or *Woven Ribbons from China*.

²⁹ Commerce described the transaction for the materials as following “the ‘processing trade’ mode of consignment.” *Pressure Pipe* IDM at cmt. 2.

Further, plaintiff raises the *Fabricated Structural Steel* case to argue that post-exportation revenue should not be included in the denominator. Pl. Br. at 21. However, Commerce proclaimed in that determination itself that *Fabricated Structural Steel* was an unconventional case. *Fabricated Structural Steel* IDM at cmt. 3 (noting the “unique facts presented in th[e] investigation”); *see also* Def. Br. at 21–22 (noting unusual “sales situation” involving activities in the United States). In particular, *Fabricated Structural Steel* featured extensive U.S.-based production activities. *Fabricated Structural Steel* IDM at cmt. 3. By contrast, the record in this case does not state that either CS Wind Vietnam or CS Wind Korea relied on U.S.-based activities to produce the wind towers. Def. Br. at 22. Accordingly, Commerce’s actions in the instant case are not inconsistent with *Fabricated Structural Steel*.

Only two of the six determinations raised by the parties — *Coated Paper* and *Pressure Pipe* — have facts that resemble the instant case. *But cf. Guizhou Tyre Co. v. United States*, 45 CIT __, __, 523 F. Supp. 3d 1312, 1341–1342 (2021) (finding that Commerce had a past practice when plaintiff cited eight pertinent determinations and Commerce in the relevant IDM recognized that its practice existed and also “evolved”). Further, one of the two determinations, *Pressure Pipe*, addressed a slightly different question. Commerce still reached different conclusions in *Coated Paper* and *Pressure Pipe*, to the extent that those determinations are analogous. Therefore, the court concludes that Commerce did not “change[] its practice” such that an “adequate explanation” would be required. *SKF USA Inc.*, 630 F.3d at 1373. Accordingly, Commerce’s actions in this case are not inconsistent with the determinations presented by the parties.

3. Whether Commerce adequately addressed petitioner’s manipulation concerns

The court turns finally to plaintiff’s argument that Commerce did not respond adequately to plaintiff’s concerns about manipulation. *See* Pl. Br. at 22–24; WTTC Case Br. at 25–31. In its IDM, Commerce explained the reason that it used CS Wind Korea’s sales value for the denominator in its subsidy calculation and the reason that the sales value was appropriate. IDM at 4, 29–30 (noting the denominator “is limited to sales of subject merchandise produced by CS Wind [Vietnam] and sold by . . . CS Wind Korea”). Commerce also included in its IDM plaintiff’s comments that CS Wind Vietnam’s activities “permit manipulation of the CVD duty

rate”³⁰ and that CS Wind Vietnam should have but did not “explain why it modified its business practices such that it shifted a majority of its revenue and profits from Vietnam to Korea.” *Id.* at 28. *But see* First Suppl. Questionnaire Resp. at 3 (“Since CS Wind Corporation handles all of the sales, including the negotiations with those sales, it decided to establish tolling agreements with CSWV so that it could better control costs.”).

Commerce responded to the broader allegation that the denominator might have been inaccurate. *See* IDM at 29–30. Commerce explained the reason that its subsidy rate calculation effectively and appropriately accounted for the sales value of the subsidized wind towers from Vietnam, as stated above. *See id.* However, Commerce did not respond to the argument that CS Wind Vietnam manipulated the duty rate. Commerce merely acknowledged plaintiff’s concerns about manipulation. *See* IDM at 28–30.

The court is required to sustain a determination that is “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.*, 25 CIT at 837, 159 F. Supp. 2d at 718 (citations omitted), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp.*, 60 F. App’x 797. Further, the court need not invalidate a determination even if Commerce did not “explicitly address a party’s non-dispositive argument,” *NMB Sing. Ltd.*, 557 F.3d at 1323 (citing *Timken*, 421 F.3d at 1357), if Commerce nonetheless provided “an explanation of the basis for its determination that addresses relevant arguments,” 19 U.S.C. § 1677f(i)(3)(A).³¹ However, in this case, Commerce did not address petitioner’s (now plaintiff’s) argument that using CS Wind Korea’s sales value in the denominator could allow CS Wind Vietnam to manipulate the CVD rate.

In reviewing a material injury determination by the Commission, this Court has explained: “While the [Commission] need not address every argument and piece of evidence, it must address significant arguments and evidence which seriously undermines its reasoning and conclusions.” *Altx, Inc.*, 25 CIT at 1117–18, 167 F. Supp. 2d at

³⁰ Commerce summarized plaintiff’s point:

CS Wind [Vietnam] has a well-established record of restructuring its subsidiaries for the purpose of avoiding AD/CVD duties and taxes. The record demonstrates that CS Wind [Vietnam] changed its purchasing and sales pattern to game the system in anticipation of the filing of this case. CS Wind also has a history of arbitrarily setting transfer prices. CW [sic] Wind [Vietnam]’s tolling arrangement and transfer pricing schemes permit manipulation of the CVD duty rate.

IDM at 28.

³¹ “We have previously held that § 1677f(i) does not require us to invalidate a decision of Commerce if Commerce failed to explicitly address a party’s non-dispositive argument.” *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1323 (Fed. Cir. 2009) (citing *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1357 (Fed. Cir. 2005)).

1374, *aff'd*, 370 F.3d at 1116 (internal citation omitted); *see Husteel Co. v. United States*, 39 CIT __, __, 98 F. Supp. 3d 1315, 1359 (2015) (quoting *Altx, Inc.*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374) (applying the standard in *Altx, Inc.* but concluding “Commerce did not err in failing to specifically address” an “argument and accompanying evidence [that] were not significant”); *see also Usinor v. United States*, 26 CIT 767, 784 (2002) (finding that the Commission needed to address evidence that was “not peripheral or ancillary” because it had “direct and material bearing” on the issue at hand and “call[ed] the accuracy and legitimacy of the Commission’s findings and conclusions squarely into question”); *cf. CP Kelco US, Inc. v. United States*, 38 CIT 1511, 1528, 24 F. Supp. 3d 1337, 1352 (2014), *aff'd*, 623 F. App’x 1012 (Fed. Cir. 2015) (finding segment-specific evidence to be not “significant, undermining evidence” because the Commission was tasked with “look[ing] to the industry as a whole”).

Here, Commerce explained the reason that it did not grant an EVA and the basis for its selection of the denominator. *See IDM* at 29–30. Commerce explained that it has typically assessed whether there is a mark-up and whether six additional factors have been shown in its EVA analysis. *See PDM* at 13; *supra* note 13; *see also IDM* at 30 (finding no mark-up). Potential manipulation is not one of those factors described by Commerce here. *See PDM* at 13. Even considering that there may be a shift in the way in which Commerce calculates an EVA, *see Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1394–99 (2021), Commerce found no mark-up here, *see IDM* at 30 (“[T]here was no mark-up by an affiliated company, for instance, that would require an entered value adjustment”). In addition, in this case, Commerce summarized plaintiff’s manipulation argument in the “*Petitioner’s Comments*” subsection of Comment 6 of the *IDM*. *See IDM* at 28.

Nonetheless, plaintiff during the review presented four reasons that, it asserted, CS Wind Vietnam’s tolling arrangement and business practices — and Commerce’s consequent utilization of CS Wind Korea’s sales value in the denominator of Commerce’s subsidy calculation — permitted “the potential of subsidy margin manipulation” by CS Wind Vietnam.³² Pl. Reply Br. at 15; *see Pl. Br.* at 22–24 (citing WTTC Case Br. at 25–31); WTTC Case Br. at 25–31. This set of

³² These four reasons are set forth *supra*, Section I.B.3 at pp. 33–34. They include CS Wind Vietnam and CS Wind Korea starting to use toll processing agreements in 2018, CS Wind Korea [[]], and [[]], CS Wind Korea [[]], and CS Wind Vietnam’s rationale for using toll processing agreements. Pl. Br. at 22–23 (quoting Initial Questionnaire Resp. at Ex. 13.1; First Suppl. Questionnaire Resp. at 3; Verification Exs. at VE-4 at 59) (citing Suppl. Affiliation Resp. at Exs. SA-2 and SA-3; *CS Wind Viet. Co.*, 721 F. App’x 993) (emphasis omitted); *see Pl. Reply Br.* at 8, 13–15.

arguments, which raised concerns about the potential impact of manipulation on Commerce's subsidy calculation, warranted a response by Commerce. See Statement of Administrative Action, accompanying H.R. Rep. No. 103–826(I), at 892, reprinted in 1994 U.S.C.C.A.N. 4040, 4216 ("[Commerce] must specifically reference in [its] determination[] factors and arguments that are material and relevant or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument."); *Altx, Inc.*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374, aff'd, 370 F.3d 1108; *SKF USA Inc.*, 630 F.3d at 1373–74 (quoting *Timken*, 421 F.3d at 1358); *Coated Paper* IDM at cmt. 32; *supra* note 32.

Plaintiff cites Commerce's discussion of manipulation in *Coated Paper* as support for plaintiff's contention that Commerce should have further addressed manipulation in this case. Pl. Reply Br. at 9 n.2 (citing *Coated Paper* IDM at 106). In that case, Commerce noted a petitioner's concern with respect to potential manipulation, but then went on to explain why Commerce did not agree with the concern:

We acknowledge petitioner's concern about the Gold companies' ability to manipulate the CVD rate in the future by adjusting its sales price to GEHK or CU. However, this is not a basis to deny the adjustment given that without an adjustment we would not collect the correct amount of duties. Instead, we agree that this may be an issue to examine in future reviews, and, if this investigation results in a CVD order, we will carefully monitor the continued basis for making this adjustment in those future proceedings in order to avoid any such manipulation.

Coated Paper IDM at cmt. 32 (emphasis supplied). Similarly, in this case, the court does not conclude that WTTC's arguments to Commerce were necessarily persuasive; rather, the court concludes that the evidence presented and arguments warranted a response from Commerce to demonstrate that its CVD methodology was supported by substantial evidence.

As support for its contention that margin manipulation could occur and should be prevented, plaintiff also raises the Supreme Court's decision in the *Eurodif* case. Pl. Br. at 23 (citing *Eurodif S.A.*, 555 U.S. at 307). The court does not find plaintiff's reliance on *Eurodif* to be persuasive. In that case, the Court first noted the unique nature of the product — uranium — and then affirmed that Commerce was reasonable to treat uranium enrichment contracts as contracts for the sale of goods rather than contracts for services. *Eurodif S.A.*, 555 U.S. at 319–22. To do otherwise, the Court added, would lead to the

“absurd result” that “antidumping duties would primarily chastise the uncreative.” *Id.* at 321–22.

In this case, there is no comparable “absurd result” that could lead to nonapplication of the CVD law. Nevertheless, Commerce — unlike the Supreme Court in its consideration in *Eurodif* of the unique circumstances raised by uranium processing problems that could arise from restructuring due to a company’s use of processing services, *id.* at 319–22 — does not discuss the risk of CVD margin manipulation.

In sum, the court concludes that Commerce did not discuss or address the evidence that WTTC presented or address the relevant argument on manipulation. The court remands for Commerce to: (1) discuss and address the evidence that WTTC presented as related to manipulation; (2) address WTTC’s manipulation argument as to the denominator used in the benefit calculation; and (3) explain whether Commerce considered manipulation in reaching its determination, or if it did not, why it did not.

II. Whether Commerce’s acceptance of CS Wind Vietnam’s steel plate documentation for the Import Duty Exemptions program is supported by substantial evidence

The court remands Commerce’s finding as to the origin of the steel plate in question for Commerce to address its treatment of evidence that the steel plate in question was not sourced from Vietnam as set forth *infra*, Section II.C. However, the court sustains Commerce’s decision not to apply AFA for the Import Duty Exemptions program.³³

A. Legal framework

Commerce “shall . . . use the facts otherwise available in reaching the applicable determination” if the record lacks “necessary information” or if a party: (1) withholds requested information; (2) fails to provide timely information in the form and manner requested; (3) “significantly impedes a proceeding”; or (4) provides unverifiable information. 19 U.S.C. § 1677e(a). If Commerce finds that a party “failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce may use an adverse inference and need not make or employ any assumptions about information a party would have otherwise provided. *Id.* § 1677e(b); see *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (“Compliance with the ‘best of its ability’ standard is deter-

³³ See *supra* note 5 for background on the Import Duty Exemptions program.

mined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation.”).

B. Positions of the parties

Plaintiff argues that “Commerce erred in concluding that CS Wind Vietnam properly reported the country of origin of a portion of its steel plate purchases as Vietnam and thus in not calculating a benefit received on those purchases under the Import Duty Exemptions program.” Pl. Br. at 13 (citing IDM at cmt. 2). Plaintiff presents three supporting and related arguments.

First, plaintiff argues that Commerce “improperly disregarded evidence contrary to its conclusion” when it “apparently ignored the substantial record evidence that CS Wind Vietnam’s steel plate was not in fact produced in Vietnam, but was imported.” *Id.* Specifically, plaintiff insists that CS Wind Vietnam “effectively stated” that it imported the steel plate. Pl. Reply Br. at 3. As CS Wind Vietnam responded to Commerce during the underlying investigation, “CS Wind Corporation supplies all main materials — steel plate, flange, steel plate for door frame and internal mounting items — from outside of Vietnam for the production of the wind towers. Therefore, most of [sic] raw materials are exported to Vietnam by CS Wind Corporation.” Initial Questionnaire Resp. at 21; see Pl. Br. at 13; Def. Br. at 13. Plaintiff also notes that CS Wind Vietnam reported the steel plate purchases within the exhibit that details import duty exemptions. Pl. Br. at 13–14 (citing Initial Questionnaire Resp. at Exs. C-3³⁴, C-4.2).

Moreover, plaintiff points to evidence that its supplier, [[]], lacked a steel production facility in Vietnam and that CS Wind Vietnam entered all of its plate inputs into the GOV’s E-customs system, “further indicating that they were imported.” *Id.* at 14 (citing Comments on CS Wind Initial Questionnaire Resp. at 8–9 and Exs. 6, 7; Verification Mem. at 16). Plaintiff argues that CS Wind Vietnam did not dispute its evidence [[]] and chose not to provide mill test certificates to prove country of origin. *Id.* (quoting WTTC Case Br. at 17).

In addition, the parties disagree over the source documentation. Plaintiff explained at oral argument that the [[]] that

³⁴ The court notes that there are two other spreadsheets on the record that are similar to Exhibit C-3. See Initial Questionnaire Resp. at Exs. C-3; First Suppl. Questionnaire Resp. at Ex. SQ2-20; Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI.” In each of these spreadsheets, it appears that many lines are relevant, but that defendant and the record occasionally though not consistently refer to specific lines. See, e.g., *infra* pp. 62–63 and notes 41 & 45.

CS Wind Vietnam provided stated: “[]” followed by both “[[]]” and “[[]].”

Oral Argument Tr. at 85:25–86:14 (quoting First Suppl. Questionnaire Resp. at Ex. SQ2–18); *see also* First Suppl. Questionnaire Resp. at Ex. SQ2–18 (noting “[[]]”).³⁵

Plaintiff concludes that “Commerce merely accepted CS Wind Vietnam’s deficient and contradictory reporting,” [[]]. Pl.

Br. at 14–15 (citing IDM at cmt. 2; Verification Exs. at VE-15 at 68–75). At oral argument, however, the Government responded that [[]] and that the

same source documentation listed the country of origin as “VN - VIETNAM.” Oral Argument Tr. at 72:25–73:7 (citing First Suppl. Questionnaire Resp. at Ex. SQ2–18), 86:24–87:11.

Further, the Government asserts that CS Wind Vietnam’s statement that “most of [its] raw materials are exported to Vietnam,” Initial Questionnaire Resp. at 21; *see* Def. Br. at 13, is “consistent with how CS Wind reported its purchases of steel plate” from both within and beyond Vietnam. Def. Br. at 13–14 (citing First Suppl. Questionnaire Resp. at Ex. SQ2–20).

The second line of reasoning that plaintiff presents to buttress its argument that Commerce erred in its consideration of whether CS Wind Vietnam used the Import Duty Exemptions program for certain inputs is that Commerce did not “adequately address relevant arguments of the parties” by “failing to fully investigate” the origin of the steel plate inputs. Pl. Br. at 15 (citing 19 U.S.C. § 1677f(i)(3)(A); *Altex, Inc.*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374, *aff’d*, 370 F.3d at 1116). Plaintiff asserts that country-of-origin information was “critically important” for Commerce to calculate a subsidy rate for the Import Duty Exemptions program, but that Commerce did not require CS Wind Vietnam to provide such information despite WTTC’s requests. *Id.* at 16 (citing Comments on CS Wind Initial Questionnaire Resp. at 9; Letter from Wiley Rein LLP to Sec’y Commerce, re: *Utility Scale Wind Towers from Socialist Republic of Vietnam: Petitioner’s Pre-Verification Comments* (Feb. 19, 2020) (“WTTC Pre-Verification Comments”) at 13, CR 98, PR 181). Plaintiff also notes that CS Wind Vietnam raised a possibility on rebuttal that its supplier imported steel and then processed it into steel plate, changing its country of origin to Vietnam. *Id.* (citing CS Wind Rebuttal Br. at 17–19). Plaintiff maintains that, as a result of this late statement and

³⁵ The court notes that Exhibit SQ2–18 appears in the Confidential Joint Appendix at bar code 3907984–05 and in the Non-Confidential Joint Appendix at bar code 3908090–06.

insufficient investigation by Commerce, “whether and to what extent CS Wind Vietnam’s steel plate was merely further processed in Vietnam was never explored, and whether that further processing was in fact sufficient to transform the country of origin of the plate.” *Id.* at 17; *see Pl. Reply Br.* at 3–4.

The Government asserts that Commerce considered WTTC’s arguments, verified CS Wind Vietnam’s transactions and “found no material discrepancies.” Def. Br. at 12–13 (citing IDM at 11–12, 15–17; Verification Mem. at 17; Verification Exs. at VE-15 at 68–75). As to the country of origin, “CS Wind [Vietnam] reported all imports of raw materials during the POI, which included the imports of raw materials sourced from outside and from within Vietnam.” IDM at 17 (citing Second Suppl. Questionnaire Resp. at Ex. SQ-2–20); *see also* Def. Br. at 11–12. The Government adds that Commerce reviewed CS Wind Vietnam’s documentation and responses from company officials and concluded that “the supporting documentation, including invoices and packing lists, showed the origin of certain raw materials to be within Vietnam.” IDM at 17 (citing Verification Exs. at VE-15 at 68–75); *see also* Def. Br. at 12.

Regardless, the Government notes that “Vietnam imposes a zero percent import duty on all MFN imports of steel plate,” which CS Wind Vietnam explained through screenshots of its entry of the applicable HTS numbers into Vietnam’s customs webpage. Def. Br. at 14–15 (citing Second Suppl. Questionnaire Resp. at 1–2 & Exs. 1–3)). Therefore, the Government concludes that “there is no benefit for countervailing duty purposes.” *Id.* at 15. The Government states that, given this conclusion, it is “unnecessary to resolve” the issue of the steel plate’s country of origin. *Id.* at 15 n.6.

However, plaintiff insists that Commerce should have but failed to discuss this reasoning in its IDM. Pl. Reply Br. at 5 (quoting *State Farm*, 463 U.S. at 50). Plaintiff also reiterates that Commerce should have further ascertained the country of origin, and, by not doing so, “improperly disregarded evidence contrary to its ultimate conclusion.” *Id.* at 2.

Plaintiff’s third argument with respect to the Import Duty Exemptions program is that Commerce should have applied partial AFA because CS Wind Vietnam withheld information, impeded significantly the CVD proceeding and provided unverifiable information. Pl. Br. at 15 n.3 (citing WTTC Case Br. at 14–21) (asserting that CS Wind Vietnam submitted “unclear and contradictory reporting” as to the country of origin of the steel plate); Oral Argument Tr. at 55:10–14 (citing 19 U.S.C. § 1677e(a)(2)(A), (a)(2)(C)-(D)); *see Pl. Reply Br.* at 2. Further, plaintiff states that “CS Wind failed to identify the

ultimate supplier and country of origin of its steel plate, and thus that the record did not contain information to determine whether import duties should have been required on those purchases.” Pl. Br. at 6 (citing Letter from Wiley Rein LLP to Sec’y Commerce, re: *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Petitioner’s Pre-Preliminary Comments* (Nov. 20, 2019) at 18, CR 87, PR 138).

The Government defends Commerce’s decision not to apply AFA by making two points. First, the Government disputes plaintiff’s argument that CS Wind Vietnam provided insufficient information, countering that CS Wind Vietnam “fully cooperated,” “provided detailed questionnaire responses,” and “provided all necessary information for determining the import duty exemption program’s benefit.” Def. Br. at 11. In its IDM, Commerce responded to WTTC’s point by finding that AFA was not warranted because “CS Wind [Vietnam] merely over-reported raw material inputs in its questionnaire response.” IDM at 17. The Government notes that “applying AFA would be improper” based on such over-reporting. Def. Br. at 12.

The Government makes a second point, explaining that “the record evidence demonstrates that the MFN import duty rate for steel plate in Vietnam is zero percent.” *Id.* at 6; see IDM at 17 n.66 (citing Second Suppl. Questionnaire Resp. at Ex. SQ2-20).³⁶ The Government adds that “regardless of whether the steel plate was produced in Vietnam or imported,” CS Wind Vietnam did not receive ultimately any benefit for the steel plate through the Import Duty Exemptions program. Def. Br. at 6; *see also* Oral Argument Tr. at 68:9.

Plaintiff’s second and third arguments with respect to the Import Duty Exemptions program relate to WTTC’s request during the investigation that Commerce instruct CS Wind Vietnam to “explain who are the ultimate suppliers of the [raw material inputs in question].”³⁷ Comments on CS Wind Initial Questionnaire Resp. at 9; see Pl. Br. at 16. WTTC also requested that Commerce “evaluate the country of origin reported by CS Wind for its imported raw materials.” WTTC Pre-Verification Comments at 13. Plaintiff insists that CS Wind Vietnam “did not provide the ultimate supplier of the material at issue,” Oral Argument Tr. at 58:9–11, and that there is “no infor-

³⁶ The court notes that Exhibit SQ2-20 is part of CS Wind Vietnam’s first supplemental questionnaire response, not its second supplemental questionnaire response as noted incorrectly by Commerce. See First Suppl. Questionnaire Resp. at Ex. SQ2-20; IDM at 17 n.66 (citing Second Suppl. Questionnaire Resp. at Ex. SQ2-20).

³⁷ Plaintiff asserts that Commerce requested that CS Wind Vietnam identify its “ultimate suppliers” on page 2 of the first supplemental questionnaire response. Oral Argument Tr. at 57:15–20. Page 2 is not included in the Joint Appendix. See First Suppl. Questionnaire Resp.

mation on the record to make that determination [of the country of origin of the steel plate], so from there, we don't know what the country of origin is," *id.* at 64:11–16.

The Government points out, however, that CS Wind Vietnam provided spreadsheets with information about the suppliers of each raw material purchase for the wind towers and that these spreadsheets included the country of origin for the steel plate at issue, which is listed as Vietnam. Def. Br. at 14 (citing First Suppl. Questionnaire Resp. at Exs. SQ2–18 at 18–19 and SQ2–20 (comparing lines 3948–51, 4002, 4073, 4075, 4104, 4105, 4107–09, 4136–37, 4139–40, 4144–47, 5520, 9826, 10288, 10394 with line 12940); First Suppl. Questionnaire Resp. – Remaining Questions at 1 and Ex. SQ2–6a); *see First Suppl. Questionnaire Resp. at Ex. SQ2–20; First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a; see also Oral Argument Tr. at 56:1–25, 57:11–12.* In addition, CS Wind Vietnam listed [[]]] as the supplier of its steel plate of Vietnamese origin and noted an MFN tariff rate. First Suppl. Questionnaire Resp. at Ex. SQ2–20; *see also Calculation Mem. at attach. II, tab "Raw Materials.Rev.ATT2.BPI."*³⁸ CS Wind Vietnam provided also a "List of [sic] Supplier by material type," which included steel plate from "[[]]] with country "VN" purchased by [[]].

First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a. The Government points further to the verification memorandum and a verification exhibit that showed a commercial invoice [[]], in addition to various other parts of the record supporting its contention about the country of origin of the steel plate. Oral Argument Tr. at 87:20–89:22 (citing Verification Exs. at VE-15 at 68–75; Verification Mem. at 16–17; First Suppl. Questionnaire Resp. at Ex. SQ2–18; First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a; IDM at 17); Def. Br. at 14 (citing First Suppl. Questionnaire Resp. at Exs. SQ2–18 at 18–19 and SQ2–20 (comparing lines 3948–51, 4002, 4073, 4075, 4104, 4105, 4107–09, 4136–37, 4139–40, 4144–47, 5520, 9826, 10288, 10394 with line 12940); First Suppl. Questionnaire Resp. – Remaining Questions at 1 and Ex. SQ2–6a; Verification Exs. at VE-15 at 68–75); First Suppl. Questionnaire Resp. at Ex. SQ2–18.

Moreover, the Government details that CS Wind Vietnam's verification memorandum accounts satisfactorily for the reason that materials sourced from within and beyond Vietnam — amounting to

³⁸ This spreadsheet is entitled "VAT and Import Tariff Exemptions Template." *See First Suppl. Questionnaire Resp. at Ex. SQ2–20.*

“overinclusive” reporting — were reported to E-customs. Def. Br. at 11–12 (citing IDM at 17). Specifically, CS Wind Vietnam responded at verification that “if the supplier is from outside of Vietnam, but the raw materials are sourced from inside Vietnam, then these raw material inputs still need to be entered into the E-customs system even if they are ultimately not imported.” Verification Mem. at 16 (citing Verification Exs. at VE-15 at 68–75); *see* IDM at 15. The verification exhibit shows an invoice and packing list both listing []].³⁹

Verification Exs. at VE-15 at 68–75. Commerce found “no discrepancy.” IDM at 17; *see also* Verification Mem. at 17. Further, Commerce found that “CS Wind provided relevant and accurate documentation that identified the country of origin for these transactions.” IDM at 17.

C. Analysis

The court remands the Final Determination to Commerce for it to take the actions set forth in this section but sustains Commerce’s decision not to apply AFA.

“[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Altx, Inc.*, 370 F.3d at 1116 (quoting *Matsushita Elec. Indus. Co.*, 750 F.2d at 933) (internal quotation marks and citations omitted)). Yet, “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp.*, 340 U.S. at 488; *see Nippon Steel Corp.*, 458 F.3d at 1351. It is possible that Commerce’s conclusion that “the raw material [at issue] was sourced from a supplier within Vietnam” was reasonable. IDM at 17. However, the court does not have a basis in the record to reach this conclusion because Commerce did not: (1) substantiate its conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce’s conclusion that were presented by WTTC; (2) state the salience, if any, of the MFN rate to its determination that the raw material inputs in question came from Vietnam; and (3) explain why it has listed an MFN tariff rate in its calculations of the Import Duty Exemptions program for the line entries of the raw material inputs in question that also are listed as having a country of origin of Vietnam. *See* Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI.”

³⁹ The Government concedes that there is nothing in the record to determine whether the unaffiliated supplier itself imported the steel plate that it provided to CS Wind Vietnam. Oral Argument Tr. at 74:3–6, 77:16–17.

Plaintiff's first argument is that Commerce "improperly disregarded" relevant evidence pertaining to the country of origin of some of the steel plate. Pl. Br. at 13. Plaintiff's second argument is that Commerce did not "adequately address" plaintiff's arguments because it failed to investigate fully the ultimate country of origin of the steel plate inputs that CS Wind Vietnam purchased from a supplier in Vietnam. Pl. Br. at 15. These arguments are related. Accordingly, the court addresses them together.

Commerce stated that it reviewed all purchases of the raw material inputs, the verbal explanation from CS Wind Vietnam officials and the supporting source documentation. IDM at 17; *see, e.g.*, discussion and record citations, *supra* note 6 and Section II.B at pp. 57–60, 62–64. Commerce explained that it sought, received and examined reporting on "all imports of raw materials during the POI, which included the imports of raw materials sourced from outside and from within Vietnam," and examined "sourced documentation pertaining to the inputs of raw materials sourced from within Vietnam." IDM at 17 (emphasis supplied). In addition, Commerce found that CS Wind Vietnam provided all requisite documentation for the inputs as to the supplier and country of origin. *Id.*

However, Commerce did not address its treatment of all of the evidence raised by plaintiff that detracts from Commerce's conclusion as to the import status of the steel plate.⁴⁰ *See Universal Camera Corp.*, 340 U.S. at 488. Instead, Commerce addressed some but not all information pertaining to country of origin in the IDM, including information and related argumentation that appeared to be contrary to its conclusion that the steel plate was not imported. IDM at 17; *see also Nippon Steel Corp.*, 458 F.3d at 1351 (internal quotations omitted).

The record references several times Vietnam as the country of origin of the steel plate in question. *See* Initial Questionnaire Resp. at Exs. C-3 & C-4.2; First Suppl. Questionnaire Resp. at Ex. SQ2–18; First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a; Verification Exs. at VE-15 at 68–75; First Suppl.

⁴⁰ *See supra* Section II.B; Pl. Br. at 13–17. This evidence includes: CS Wind Vietnam's questionnaire statements that "all main materials," including steel plate, were provided by CS Wind Korea from outside of Vietnam and that CS Wind Vietnam imports steel plate; the conflicting language on the [[]], as to [[]], []; and the evidence that [[]], Initial Questionnaire Resp. at 21; First Suppl. Questionnaire Resp. at 9 and Ex. SQ2–18; Letter from Wiley Rein LLP to Sec'y Commerce, re: *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Comments on CS Wind's Initial Questionnaire Response* (Oct. 23, 2019) at 8–9 and Exs. 6, 7.

Questionnaire Resp. at Ex. SQ2–20; *see also* Verification Mem. at 16–17.⁴¹ Commerce verified the questionnaire responses of CS Wind Vietnam that identified the country of origin of the raw material inputs in question as Vietnam. IDM at 17. Based on its verification, Commerce found that “the sales of these certain raw materials were made through CS Wind Korea, but only on paper; the raw material for those transactions was sourced from a supplier within Vietnam.”⁴² *Id.*; *see also* First Suppl. Questionnaire Resp. at 3.

Plaintiff insists that there was “no information on the record” for Commerce to determine the country of origin of the steel plate. Oral Argument Tr. at 64:11–16. That conclusion is not correct. As the court has noted, CS Wind Vietnam provided spreadsheets that listed the country of origin for the steel plate at issue as Vietnam. *See* First Suppl. Questionnaire Resp. at Ex. SQ2–20; First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a; *see also* Oral Argument Tr. at 56:1–25, 57:11–12. Moreover, [[

]]. Verification Exs. at VE-15 at 68–75; *see also* Initial Questionnaire Resp. at Ex. C-4.2 Verification Mem. at 17; First Suppl. Questionnaire Resp. at Ex. SQ2–18; *see* First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a, discussed *supra*. In addition, it is uncontested that CS Wind Vietnam

⁴¹ The Verification Memorandum states:

We traced selected line items reported in Exhibit C-3 of CS Wind’s October 9, 2019 [Initial Questionnaire Response or] IQR to the company’s accounts and source documents. Specifically, we requested that company officials prepare documentation for raw material purchases/imports on-site during verification. This included purchase numbers [[]]. We noted no discrepancies other than those reported in minor correction 3, above.

Verification Mem. at 17. [[]]. Initial Questionnaire Resp. at Ex. C-3 at l. 11729. Further, the Verification Memorandum states:

According to Ms. Ahn, a member of the logistics team, company officials manually enter raw materials for re-export following processing in Vietnam’s E-customs system on a project-by-project basis. *See, e.g.*, pages 6–10 of VE-15. We asked company officials to explain why Vietnam is listed as a country of origin for certain raw material purchases in Exhibit C-3 of its October 9, 2019 IQR. Officials explained that if the supplier is from outside of Vietnam, but the raw materials are sourced from inside Vietnam, then these raw material inputs still need to be entered into the E-customs system even if they are ultimately not imported. *See, e.g.*, pages 68–75 of VE-15.

Verification Mem. at 16. Commerce addressed this explanation in its IDM. *See* IDM at 17 (“In addition to the verbal explanation provided by company officials as to why those purchases were included in the spreadsheet, we examined source documentation supporting those purchases that were made from within Vietnam.” (citing Verification Exs. at VE-15 at 68–75)).

⁴² The IDM states: “Contrary to the petitioner’s assertions, the supporting documentation, including invoices and packing lists, showed the origin of certain raw materials to be within Vietnam. . . . Thus, for these transactions at issue, we find that CS Wind provided relevant and accurate documentation that identified the country of origin for these transactions.” IDM at 17 (footnote omitted).

does receive some other [[]] from [[]]. See First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a.⁴³

Nonetheless, the document notations on the [[]] forms, which plaintiff raises, also refer to [[]]

[[]] at the same time that they list [[]] as the country of origin. First Suppl. Questionnaire Resp. at Ex. SQ2–18. Commerce does not reference explicitly this evidence or clarify its conclusion as to whether or how it considered this evidence in its IDM. See *supra* note 6; IDM at 16–19.⁴⁴ In addition, Commerce does not address the evidence that is presented by WTTC that the seller, [[]], could not have produced the steel plate in Vietnam, which calls into question the accuracy of Commerce’s conclusion as to the country of origin of the steel plate that CS Wind Vietnam received. See Comments on CS Wind Initial Questionnaire Resp. at 8–9 and Exs. 6, 7.

Based on Commerce’s decision, the court is unable to conclude that Commerce’s finding as to the origin of the steel plate in question is supported by substantial evidence. It was reasonable for Commerce to accept CS Wind Vietnam’s explanation of the reason that it submitted its domestic information in an import duty exemptions spreadsheet to E-customs, as Commerce noted in the IDM. See *supra* note 41; Verification Mem. at 16; Initial Questionnaire Resp. at Exs. C-3, C-4.2.

Nevertheless, Commerce did not address other important evidence raised by WTTC. That evidence raised concerns about the potential impact of a different country of origin of the steel plate in question on Commerce’s subsidy calculation and, therefore, could seriously undermine Commerce’s reasoning and conclusions. See *supra* note 40; *Altx, Inc. v. United States*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374, *aff’d*, 370 F.3d at 1116 (internal citation omitted); *SKF USA Inc.*, 630 F.3d at 1374 (quoting *Timken*, 421 F.3d at 1358); Pl. Br. at 13. Commerce said that it found no discrepancy in the source documentation, IDM at 17; however, there is information in the record that suggests a discrepancy, see *supra* Section II.B and note 40. Therefore, Commerce needs to explain its conclusion considering the core arguments and evidence, including those raised by WTTC, as to the country of

⁴³ CS Wind Vietnam also noted that “some steel scrap is generated from *steel plates sourced from Vietnamese suppliers* (for internal components) and comingled.” First Suppl. Questionnaire Resp. at 9 (emphasis supplied).

⁴⁴ Commerce does not cite this exhibit, First Suppl. Questionnaire Resp. at Ex. SQ2–18, in the IDM and it is unclear to the court whether the document notations in Exhibit SQ2–18 otherwise appear in the verification exhibit that is cited by Commerce, Verification Exs. at VE-15 at 68–75, [[]], *id.* at 69–70.

origin. *See Altx, Inc. v. United States*, 25 CIT at 1117–18, 167 F. Supp. 2d at 1374 (concluding the Commission “must address significant arguments and evidence which seriously undermines its reasoning and conclusions”), *aff’d*, 370 F.3d at 1116. The court does not conclude that the evidence was necessarily persuasive; rather, the court concludes that it is necessary for Commerce to demonstrate that its conclusion on country of origin for these transactions was supported by substantial evidence considering the record as a whole.

In addition, plaintiff argues that Commerce did not explain the salience of the MFN zero percent rate to the determination. *See Pl. Reply Br. at 5* (citing Def. Br. at 4-5); *id.* (quoting *State Farm*, 463 U.S. at 50). Commerce recited CS Wind Vietnam’s comment on rebuttal in the underlying investigation about the MFN rate. *See IDM at 15* (“[E]ven if Commerce disagreed with the country of origin as being Vietnam, the record demonstrates a duty exemption rate of zero percent for this input under the Most Favored Nations (MFN) status.”). However, the court agrees that Commerce did not explain the salience, if any, of the MFN zero percent rate to its determination. *See Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI.”* In a footnote, Commerce cited an exhibit provided by CS Wind Vietnam containing information to support that there would have been a zero percent tariff rate on the steel plate in question even if it had been imported. *See IDM at 17 n.66* (citing Second Suppl. Questionnaire Resp. at Ex. SQ2–20); *see First Suppl. Questionnaire Resp. at Ex. SQ2–20.*⁴⁵⁴⁶ Commerce also stated that “documentation examined at verification demonstrated that CS Wind paid the appropriate amount of duties on its raw material purchases.” *IDM at 17* (citing Verification Mem. at 16–17; Verification Exs. at VE-15; Initial Questionnaire Resp. at Ex. C-3). Within the footnote for that sentence, Commerce included a citation to a spreadsheet that was provided by CS Wind Vietnam that is similar to Exhibit SQ2–20. *See IDM at 17 n.71* (citing Initial Questionnaire Resp. at Ex. C-3).

However, Commerce did not actually discuss the salience of the MFN zero percent tariff rate that is listed for the relevant purchases

⁴⁵ As the Government raised at oral argument, Commerce noted also an import duty rate of zero percent as a part of its calculations. Oral Argument Tr. at 91:17–24 (citing Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI,” ll. 11729 & 12940); *see Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI”*; *see also* Def. Br. at 5 (citing Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI,” ll. 11729 & 12940).

⁴⁶ The court is also not swayed by plaintiff’s argument that there would have been a non-zero import rate for the subject inputs had they come from Japan, for instance. Oral Argument Tr. at 60:2–6 (citing Verification Exs. at VE-15). First, there is no evidence on the record that the steel plate in question came from Japan. In addition, the record shows [[]]. Verification Exs. at VE-15 at 75.

in these spreadsheets or address contrary evidence regarding the import status of the steel plate in question. Without more, Commerce's explanation and footnote citations do not permit the court to reasonably discern the agency's path to its conclusion that the origin of the steel plate was Vietnam, *see* IDM at 17, or whether Commerce relied upon the apparent MFN tariff rate in reaching its decision, *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp. Inc.*, 419 U.S. at 286); *see* Calculation Mem. at attach. II, tab "Raw Materials.Rev.ATT2.BPI."

The court turns next to plaintiff's contention that Commerce should have applied AFA for the Import Duty Exemptions program. The court concludes that Commerce's decision not to apply AFA was supported by substantial evidence because CS Wind Vietnam did not withhold requested information, impede significantly the CVD proceeding or provide unverifiable information. *See* 19 U.S.C. § 1677e(a)(2)(A), (a)(2)(C)-(D).

As described above, CS Wind Vietnam satisfied Commerce's requests for information about where CS Wind Vietnam acquired its inputs. IDM at 17; *see* Oral Argument Tr. at 90:2–3 ([[

]]). *See generally Certain Fabricated Structural Steel from Canada*, 85 Fed. Reg. 5,387 and accompanying IDM at cmt. 3 ("There is no requirement for the respondents to report subsidies received by unaffiliated parties."). As noted, CS Wind Vietnam did not withhold information, but rather "over-reported" information about its raw material inputs, including supplier and country of origin. IDM at 17; *see, e.g.*, Initial Questionnaire Resp. at Ex. C-3; First Suppl. Questionnaire Resp. – Remaining Questions at Ex. SQ2–6a.

In addition, CS Wind Vietnam did not impede the proceeding or verification. On the contrary, Commerce reviewed the information from CS Wind Vietnam, whose officials cooperated with Commerce on the question of country of origin. Verification Mem. at 16–17. In its IDM, Commerce concluded that "CS Wind provided relevant and accurate documentation that identified the country of origin" and "paid the appropriate amount of duties" and that "there is nothing missing from the record."⁴⁷ IDM at 17 (citing Verification Mem. at 16–17; Verification Exs. at VE-15; Initial Questionnaire Resp. at Ex. C-3). The court concludes that Commerce's decision not to apply AFA is supported by substantial evidence and is consistent with law. *See* 19 U.S.C. § 1677e(a)(2)(A), (a)(2)(C)-(D).

⁴⁷ There is no information in the record to support the conclusion that the identity of a supplier to a supplier to CS Wind Vietnam is relevant to Commerce's investigation of the Import Duty Exemptions program. *See* Oral Argument Tr. at 61:6–62:23.

Accordingly, the court cannot conclude that “the record as a whole” supported Commerce’s conclusion as to the supplier and country of origin due to Commerce’s failure to: (1) substantiate its conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce’s conclusion that were presented by WTTC, discussed above; (2) state the salience, if any, of the MFN rate to its determination that the raw material inputs in question came from Vietnam; and (3) explain why it has listed an MFN tariff rate in its calculations of the Import Duty Exemptions program for the line entries of the raw material inputs in question that also are listed as having a country of origin of Vietnam. *Shandong Huarong Gen. Corp.*, 25 CIT at 837, 159 F. Supp. 2d at 718 (citations omitted), *aff’d sub nom. Shandong Huarong Gen. Grp. Corp.*, 60 F. App’x 797; *see* IDM at 17; Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI.” However, with respect to AFA, the court concludes that CS Wind Vietnam cooperated fully with Commerce and, accordingly, Commerce’s decision on this basis to not apply AFA was reasonable.

For the reasons set forth above, the court remands for Commerce to: (1) substantiate its conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce’s conclusion that were presented by WTTC; (2) state the salience, if any, of the MFN rate to its determination that the raw material inputs in question came from Vietnam; and (3) explain why it has listed an MFN tariff rate in its calculations of the Import Duty Exemptions program for the line entries of the raw material inputs in question that also are listed as having a country of origin of Vietnam. *See* Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI.” In addressing these points, Commerce is to explain: (4)(a) if CS Wind Vietnam were the importer of record, would it be eligible to receive a benefit under the Import Duty Exemptions program; (4)(b) if CS Wind Korea were the importer of record and transferred the raw material inputs to CS Wind Vietnam, would either CS Wind Vietnam or CS Wind Korea be eligible to receive a benefit under that program; and (4)(c) if an unaffiliated third entity were the importer of record and sold the raw material inputs to CS Wind Korea for processing by CS Wind Vietnam, would CS Wind Vietnam be eligible to receive a benefit under that program.

As noted, the court sustains Commerce’s decision not to apply AFA for the Import Duty Exemptions program.

CONCLUSION

“Good fortune is guiding our affairs better than we could have desired, for there you see, friend Sancho Panza, thirty or more enormous giants with whom I intend to do battle and whose lives I intend to take, and with the spoils we shall begin to grow rich, for this is righteous warfare, and it is a great service to God to remove so evil a breed from the face of the earth.”

“What giants?” said Sancho Panza.”

“Those you see over there,’ replied his master, ‘with the long arms; sometimes they are almost two leagues long.’”

“Look, your grace,’ Sancho responded, ‘those things that appear over there aren’t giants but windmills, and what looks like their arms are the sails that are turned by the wind and make the grindstone move.”

“It seems clear to me,’ replied Don Quixote, ‘that thou art not well-versed in the matter of adventures: these are giants; and if thou art afraid, move aside and start to pray whilst I enter with them in fierce and unequal combat.”⁴⁸

* * *

For the foregoing reasons, the court concludes that Commerce’s choice of denominator for the benefit calculation is not inconsistent with its regulations or with the prior determinations presented by the parties. However, the court remands Commerce’s Final Determination for Commerce to: (1) discuss and address the evidence that WTTC presented as related to manipulation; (2) address WTTC’s manipulation argument as to the denominator used in the benefit calculation; and (3) explain whether Commerce considered manipulation in reaching its determination, or if it did not, why it did not.

In addition, the court remands Commerce’s Final Determination for Commerce to: (4) substantiate its conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce’s conclusion that were presented by WTTC; (5) state the salience, if any, of the MFN rate to its determination that the raw material inputs in question came from Vietnam; and (6) explain why it has listed an MFN tariff rate in its calculations of the Import Duty Exemptions program for the line entries of the raw material inputs in question that also are listed as having a country of origin of Vietnam. *See Calculation Mem. at attach. II, tab “Raw Materials.Rev.ATT2.BPI.”* In addressing these points, Commerce is to explain: (7)(a) if CS Wind Vietnam were the importer of record, would it be eligible to receive a benefit under the Import Duty Exemptions

⁴⁸ Miguel de Cervantes, *Don Quixote* 58 (Edith Grossman trans., Ecco 2003) (1605).

program; (7)(b) If CS Wind Korea were the importer of record and transferred the raw material inputs to CS Wind Vietnam, would either CS Wind Vietnam or CS Wind Korea be eligible to receive a benefit under that program; and (7)(c) if an unaffiliated third entity were the importer of record and sold the raw material inputs to CS Wind Korea for processing by CS Wind Vietnam, would CS Wind Vietnam be eligible to receive a benefit under that program. Commerce had the opportunity to provide clear explanations in its IDM so as to “explain the basis for its decisions,” but failed to do so. *NMB Sing. Ltd.*, 557 F.3d at 1319. In addition, the court sustains Commerce’s decision not to apply AFA for the Import Duty Exemptions program. Accordingly, the court grants in part and denies in part plaintiff’s motion for judgment on the agency record and sustains in part and remands in part Commerce’s Final Determination.

Based on the foregoing reasons, it is hereby

ORDERED that plaintiff’s motion is GRANTED in part and DENIED in part; it is further

ORDERED that Commerce’s Final Determination is sustained in part and remanded in part; it is further

ORDERED that on remand Commerce: (1) discuss and address the evidence that WTTC presented as related to manipulation; (2) address WTTC’s manipulation argument as to the denominator used in the benefit calculation; and (3) explain whether Commerce considered manipulation in reaching its determination, or if it did not, why it did not; it is further

ORDERED that on remand Commerce: (4) substantiate its conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce’s conclusion that were presented by WTTC; (5) state the salience, if any, of the MFN rate to its determination that the raw material inputs in question came from Vietnam; and (6) explain why it has listed an MFN tariff rate in its calculations of the Import Duty Exemptions program for the line entries of the raw material inputs in question that also are listed as having a country of origin of Vietnam. In addressing these points, Commerce is to explain: (7)(a) if CS Wind Vietnam were the importer of record, would it be eligible to receive a benefit under the Import Duty Exemptions program; (7)(b) If CS Wind Korea were the importer of record and transferred the raw material inputs to CS Wind Vietnam, would either CS Wind Vietnam or CS Wind Korea be eligible to receive a benefit under that program; and (7)(c) if an unaffiliated third entity were the importer of record and sold the raw material inputs to CS Wind Korea for processing by CS Wind Vietnam, would CS Wind Vietnam be eligible to receive a benefit under that program; it is further

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

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

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

Dated: March 24, 2022

New York, New York

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

Slip Op. 22-32

IN RE SECTION 301 CASES

Before: Mark A. Barnett, Claire R. Kelly, and Jennifer Choe-Groves, Judges
Court No. 21-00052-3JP

[Remanding the Office of the United States Trade Representative's determinations with respect to List 3 and List 4A; granting in part and denying in part Defendants' Motion to Correct the Administrative Record.]

Dated: April 1, 2022

Pratik Shah, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., argued for Plaintiffs HMTX Indus. LLC, Halstead New England Corp., Metroflor Corp., and Jasco Prods. Co. LLC. With him on the brief were *Matthew R. Nicely*, *James E. Tysse*, *Devin S. Sikes*, *Daniel M. Witkowski*, and *Sarah B. W. Kirwin*.

Justin R. Miller, Attorney-In-Charge, International Trade Field Office, *Elizabeth A. Speck*, Trial Attorney, and *Jamie L. Shookman*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants. With them on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, *L. Misha Preheim*, Assistant Director, *Sosun Bae*, Senior Trial Counsel, and *Ann C. Motto*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of Counsel on the brief were *Megan Grimaldi*, Associate General Counsel, *Philip Butler*, Associate General Counsel, and *Edward Marcus*, Assistant General Counsel, Office of General Counsel, Office of the U.S. Trade Representative, of Washington, D.C., and *Paula Smith*, Assistant Chief Counsel, *Edward Maurer*, Deputy Assistant Chief Counsel, and *Valerie Sorensen-Clark*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

Joseph R. Palmore, Morrison & Foerster LLP, of Washington, D.C., argued for Amici Curiae Retail Litigation Center, *et al.* With him on the brief was *Adam L. Sorensen*.

Christine M. Streiffeld, Baker McKenzie LLP, of Washington, D.C., argued for Amici Curiae Am. Trailer World Corp., *et al.* With her on the brief was *Kevin M. O'Brien*, as well as *Nancy A. Noonan* and *Angela M. Santos*, Arent Fox LLP, of Washington, D.C.

George W. Thompson, Thompson & Associates, PLLC, of Washington, D.C., for Amici Curiae Ecolab Inc., *et al.*

OPINION AND ORDER

Barnett, Chief Judge:

Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases (the “Section 301 Cases”)¹ contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative (“the USTR” or “the Trade Representative”) pursuant to section 301 of the Trade Act of 1974 (“the Trade Act”), 19 U.S.C. § 2411, *et seq.* See generally Am. Compl., HMTX Indus. LLC v. United States, Court No. 20-cv-00177 (CIT Sept. 21, 2020), ECF No. 12 (“20–177 Am. Compl.”).

Defendants United States, *et al.* (“the Government”) move to dismiss Plaintiffs’ claims as non-justiciable pursuant to U.S. Court of International Trade (“USCIT”) Rule 12(b)(6) or, alternatively, for judgment on the agency record pursuant to USCIT Rule 56.1. Defs.’ Mot. to Dismiss or, Alternatively, Mot. for J. on the Agency R. (“Defs.’ Mot.”), ECF No. 314. Plaintiffs cross-move for judgment on the agency record. Pls.’ Cross-Mot. for J. on the Agency R., and accompanying Mem. in Supp. of Pls.’ Cross-Mot. for J. on the Agency R. and Resp. to Defs.’ Mot. to Dismiss/Mot. for J. on the Agency R. (“Pls.’ Cross-Mot. & Resp.”), ECF No. 358.

The Government also moves to correct the administrative record. Defs.’ Mot. to Correct the R. (“Defs.’ Mot. Correct R.”), ECF No. 441. Plaintiffs oppose that motion, in part. Pls.’ Partial Opp’n to Defs.’ Mot. to Correct the Agency R. (“Pls.’ Opp’n Correct R.”), ECF No. 442.

For the following reasons, the court remands the contested USTR determinations and grants in part and denies in part the Government’s motion to correct the record.

BACKGROUND

I. Legal Framework

Article I, Section 8 of the U.S. Constitution vests Congress with the “Power To lay and collect Taxes, Duties, Imposts and Excises” and to “regulate Commerce with foreign Nations.” U.S. Const. art. I, § 8, cl. 1, 3. Section 301 of the Trade Act, which governs actions taken in response to a foreign country’s violation of a trade agreement or conduct that is otherwise harmful to U.S. commerce, constitutes a congressional delegation of some of that authority to the Executive

¹ This figure reflects the approximate number of cases assigned to this panel. As of March 31, 2022, there are approximately 318 unassigned cases raising similar claims that are stayed pursuant to Administrative Order 21–02.

Branch. *See* 19 U.S.C. § 2411 (2018).² Specifically, section 301 sets out the circumstances under which action by the USTR is mandatory (subject to certain exceptions), *see id.* § 2411 (a)(1)–(2),³ and when such action is discretionary, *see id.* § 2411(b).

This case concerns the latter scenario. Pursuant to section 301(b), the USTR has discretion to act when it determines that “(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and (2) action by the United States is appropriate.” *Id.* When both conditions are met, the USTR

shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

Id. § 2411(b)(2).

Subsection (c) describes the actions the USTR may take in order to implement mandatory or discretionary actions under subsections (a) and (b). *Id.* § 2411(c). For investigations not involving a trade agreement, the USTR must make its determination as to whether conduct is actionable under section 301(a) or (b) and, if so, what action to take, no later than “12 months after the date on which the investigation [was] initiated.” *Id.* § 2414(a)(2)(B). Generally, such actions must then be implemented within 30 days of the date of the determination. *Id.* § 2415(a)(1).

Central to this litigation, section 307 of the Trade Act governs the modification or termination of the USTR’s actions taken pursuant to section 301. *See generally id.* § 2417. The statute provides, *inter alia*:

(a) In general

² Citations to the United States Code are to the 2018 version, unless otherwise specified.

³ When the USTR finds that “the rights of the United States under any trade agreement are being denied” or that “an act, policy, or practice of a foreign country--(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce,” the USTR “shall take action,” 19 U.S.C. § 2411(a)(1), unless an exception exists pursuant to section 301(a)(2), *id.* § 2411(a)(2).

- (1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—
- (A) any of the conditions described in section 2411(a)(2) of this title exist,
 - (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
 - (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

Id. § 2417(a)(1).

II. Factual Background

On August 14, 2017, the President of the United States issued a memorandum instructing the USTR to consider, consistent with section 302(b) of the Trade Act, initiating an investigation addressing the Government of the People’s Republic of China’s (“China”) “laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development.” *Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007, 39,007 (Aug. 17, 2017). The USTR initiated such an investigation on August 18, 2017. *Initiation of Section 301 Investigation; Hearing; and Request for Public Comment: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 82 Fed. Reg. 40,213 (Aug. 24, 2017) (“*Initiation Notice*”).

On March 22, 2018, the USTR published a report announcing the results of the investigation. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) (“USTR Report” or “the Report”), [https://ustr.gov/sites/default/files/ Section 301 FINAL.PDF](https://ustr.gov/sites/default/files/Section_301_FINAL.PDF). The Report summarizes the ways in which China’s conduct in the areas subject to the investigation was unreasonable and burdened U.S. commerce. See *id.* Also on March 22, 2018, the President issued a memorandum directing the USTR, *inter alia*, to “take all appropriate action” pursuant to section 301 “to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce” and to “consider whether such action should include increased tariffs on goods

from China.” *Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 13,099, 13,100 (Mar. 27, 2018). In that memorandum, the President further instructed the USTR to “publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum,” subject to notice and comment pursuant to section 304(b), and, “after consultation with appropriate agencies and committees,” to “publish a final list of products and tariff increases, if any, and implement any such tariffs.” *Id.*

On April 6, 2018, the USTR published notice of its determination “that the acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation covered in the investigation are unreasonable or discriminatory and burden or restrict U.S. commerce.” *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14,906, 14,906 (Apr. 6, 2018) (“USTR Determination”). Accordingly, the USTR proposed tariffs on products worth “approximately \$50 billion in terms of estimated annual trade value” in 2018. *Id.* at 14,907. The USTR considered the size of the action to be “appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China’s harmful acts, policies, and practices.” *Id.*

On June 20, 2018, the USTR published notice of a final list of products “with an approximate annual trade value of \$34 billion” that would be subject to an additional duty of 25 percent *ad valorem*, referred to as “List 1.” *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28,710, 27,711 (June 20, 2018) (“Final List 1”). On August 16, 2018, the USTR published notice of an additional list of products with an approximate annual trade value of \$16 billion that would be subject to an additional duty of 25 percent *ad valorem*, referred to as “List 2.” *Notice of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823, 40,823–24 (Aug. 16, 2018).

During the time between the USTR’s finalization of List 1 and List 2, the President directed the USTR to identify \$200 billion worth of Chinese goods on which to impose an additional duty of 10 percent *ad valorem* “after the legal process is complete” if China refused to

change its practices. Statement from the President Regarding Trade with China (June 18, 2018) (“June 2018 Presidential Statement”), ECF No. 441–1; *see also* USTR Robert Lighthizer Statement on the President’s Additional China Trade Action (June 18, 2018), PR 27.⁴ In accordance with that direction, the USTR identified 6,031 tariff sub-headings comprising goods imported from China, referred to as “List 3.” *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33,608, 33,608–09 (July 17, 2018) (“List 3 NPRM”). In proposing the additional duties, the USTR relied on its authority to modify the action pursuant to section 307(a)(1)(C) of the Trade Act. *Id.* at 33,609. The USTR explained that China had responded “to the initial U.S. action in the investigation by imposing retaliatory tariffs on U.S. goods[] instead of addressing U.S. concerns” regarding the unfair practices identified in the investigation. *Id.* at 33,608. The USTR also explained that “a supplemental \$200 billion action is appropriate” because China had failed to respond favorably to the \$50 billion action and instead imposed “retaliatory duties” in the amount of \$50 billion on U.S. products. *Id.* at 33,609.

The USTR later extended the public comment period concerning the List 3 duties after the President directed the USTR “to consider increasing the proposed level of the additional duty from 10 percent to 25 percent.” *Extension of Public Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 38,760, 38,760–61 (Aug. 7, 2018) (“List 3 Cmt. Extension”).

On September 17, 2018, the President directed the USTR to impose an additional duty of 10 percent *ad valorem* on \$200 billion worth of Chinese goods, to take effect on September 24, 2018, and to increase the additional duty to 25 percent *ad valorem* on January 1, 2019. Statement from the President (Sept. 17, 2018) (“Sept. 2018 Presidential Statement”), PR 4. On September 21, 2018, the USTR published final notice of List 3 duties at a rate of 10 percent *ad valorem* with an effective date of September 24, 2018. *Notice of Modification of Action Pursuant to Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*,

⁴ The administrative record associated with the contested List 3 and List 4A duties is divided into a Public Administrative Record (“PR”), ECF No. 297, and a Confidential Administrative Record (“CR”), ECF No. 298. For record documents available online, the indices contain hyperlinks to their location. *See PR; CR.* The Government also filed an appendix of record documents provided to the court in advance of oral argument. *See [Partial] Index to the Admin. R.*, ECF Nos. 447, 447–1 (PR 1–12), 447–2 (PR 13–20) 447–3 (PR 21–25), 447–4 (PR 26–36).

83 Fed. Reg. 47,974 (Sept. 21, 2018) (“*Final List 3*”). In accordance with the President’s direction, the rate of additional duty on products covered by List 3 was set to increase to 25 percent *ad valorem* on January 1, 2019. *Id.* at 47,974.

As authority for the List 3 duties, the USTR relied on section 307(a)(1)(B) and (C). *See id.* at 47,974–75. The USTR explained that “the burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase” and, further, that “China’s unfair acts, policies, and practices include not just its specific technology transfer and IP polices [*sic*] referenced in the notice of initiation in the investigation, but also China’s subsequent defensive actions taken to maintain those policies.” *Id.* at 47,974. The USTR noted that China had “impose[d] approximately \$50 billion in tariffs on U.S. goods” to persuade the United States to end the section 301 action and to protect the investigated practices, which led to “increased harm to the U.S. economy.” *Id.*

With respect to subsection (C), the USTR explained that “[t]he term ‘appropriate’ used in that provision links to section 301(b), which authorizes the USTR to “take all appropriate and feasible action” in order “to obtain the elimination of [the] act, policy, or practice.” *Id.* (quoting 19 U.S.C. § 2411(b)). According to the USTR, the action that will achieve that aim “is a matter of predictive judgment, to be exercised by the [USTR], subject to any specific direction of the President.” *Id.* at 47,974–75. While the USTR previously judged that “a \$50 billion action would be effective in obtaining the elimination of China’s policies[,] China’s response . . . ha[d] shown that the current action no longer [was] appropriate.” *Id.* at 47,975.

The USTR also explained that, during the public comment period, it had received more than 6,000 written submissions and held a six-day public hearing. *Id.* at 47,974. The USTR stated that it had “carefully reviewed the public comments and the testimony from the six-day public hearing” and, consequently, removed “certain tariff subheadings” from the list. *Id.* at 47,975. The final list identified “5,745 full and partial tariff subheadings.” *Id.*

After several extensions of the effective date of the increase in List 3 duties issued in connection with ongoing trade negotiations, List 3 duties increased to 25 percent *ad valorem* in May or June of 2019, based on the date of export. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 20,459 (May 9, 2019); *Implementing Modification to Section 301 Action:*

China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 21,892 (May 15, 2019); *Additional Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 26,930 (June 10, 2019).

After the List 3 duties increased to 25 percent, the USTR established an exclusion process pursuant to which importers could request exclusion of their products from List 3 duties. *Procedures for Requests to Exclude Particular Products From the September 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019). Plaintiffs obtained exclusions for certain of their imports, effective September 24, 2018, through August 7, 2020. See, e.g., *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 61,674, 61,675–76. (Nov. 13, 2019); 20–177 Am. Compl. ¶¶ 49–50.

On May 17, 2019, the USTR announced its intent, at the direction of the President, to modify again the section 301 action by imposing additional duties of up to 25 percent *ad valorem* on products from China covered by 3,805 additional tariff subheadings, referred to as “List 4.” *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 22,564 (May 17, 2019) (“List 4 NPRM”); see also Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (May 10, 2019), PR 30. The USTR explained that the United States and China had engaged in several rounds of negotiation regarding issues covered by the section 301 investigation, but that China had “retreated from specific commitments made in previous rounds” and “announced further retaliatory action against U.S. commerce.” *List 4 NPRM*, 84 Fed. Reg. at 22,564. The USTR proposed modifying the action pursuant to section 307(a)(1)(B) and (C). *Id.*

On August 20, 2019, the USTR published final notice of the List 4 duties in the amount of 10 percent *ad valorem* on certain products identified in *List 4 NPRM. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019) (“Final List 4”). Within *Final List 4*, the tariff subheadings were segregated into List 4A and List 4B with separate effective dates (September 1, 2019 and December 15, 2019, respectively). *Id.* at 43,305.

Referencing the language of section 307(a)(1)(B), the USTR explained that “[t]he burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase.” *Id.* at 43,304. The USTR also explained that “China’s unfair acts, policies, and practices include not just its technology transfer and IP polices [*sic*] referenced in the notice of initiation in the investigation, but also China’s subsequent defensive actions taken to maintain those unfair acts, policies, and practices.” *Id.* (referencing China’s retaliatory imposition of “tariffs on approximately \$110 billion worth of U.S. goods” and other “non-tariff measures”).

In reference to section 307(a)(1)(C), the USTR stated that “China’s response has shown that the current action no longer is appropriate.” *Id.* The USTR noted China’s retreat from certain negotiated commitments, retaliatory actions, and currency devaluation. *Id.* at 43,305.

Lastly, the USTR stated that it had considered “the public comments” it had received “and the testimony from the seven-day public hearing, as well as the advice of the interagency Section 301 committee and appropriate advisory committees.” *Id.* In response to that information, the USTR removed “[c]ertain tariff subheadings” from the final List 4 duties “based on health, safety, national security, and other factors,” and staggered the effective dates for the List 4A and List 4B duties. *Id.* Thereafter, the USTR provided notice of its intent to increase the additional duty rate applicable to List 4A and List 4B from 10 percent *ad valorem* to 15 percent *ad valorem*. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 45,821 (Aug. 30, 2019).

On December 18, 2019, the USTR indefinitely suspended the additional duties of 15 percent *ad valorem* on List 4B, but not List 4A, “[i]n light of progress in the negotiations with China.” *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 69,447, 69,447 (Dec. 18, 2019).

On January 22, 2020, the USTR halved the additional duty on products covered by List 4A from 15 percent *ad valorem* to 7.5 percent *ad valorem*. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 85 Fed. Reg. 3741 (Jan. 22, 2020).

III. Procedural History

On September 10, 2020, Plaintiffs commenced an action challenging the section 301 duties imposed pursuant to List 3 and List 4A.

Summons, Compl., *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Sept. 10, 2020), ECF Nos. 1, 2. Count one alleges that the USTR exceeded its authority pursuant to section 307 of the Trade Act when it imposed the duties and seeks a declaratory judgment to that effect. 20-177 Am. Compl. ¶¶ 63–70. Count two alleges violations of the Administrative Procedure Act (“APA”). *Id.* ¶¶ 71–75. Specifically, Plaintiffs allege that USTR exceeded its authority “in promulgating List 3 and List 4A,” *id.* ¶ 73, and “promulgated List 3 and List 4A in an arbitrary and capricious manner,” *id.* ¶ 75.

On February 5, 2021, Plaintiffs’ action, among others, was assigned to this panel. *See, e.g.*, Order, *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Feb. 5, 2021), ECF No. 43. On February 10, 2021, the panel designated a “master case” under the name “*In Re Section 301 Cases*” to function as the primary vehicle by which the court would manage the litigation of the Section 301 Cases. Std. Procedural Order No. 21-01 (Feb. 10, 2021), ECF No. 1. After receiving input from the Parties, on March 31, 2021, the court designated Plaintiffs’ case as “the sample case for purposes of the court’s initial consideration and resolution of Plaintiffs’ claims.” Std. Procedural Order 21-04 (Mar. 31, 2021), ECF No. 267. The court stayed all other Section 301 Cases and appointed a Plaintiffs’ Steering Committee to aid the court’s adoption of case management procedures and coordinate the preparation of consolidated briefs and court submissions. *Id.*; *see also* Std. Procedural Order 21-02 (Feb. 16, 2021), ECF No. 82 (explaining the duties of the steering committee). On April 12, 2021, the Parties filed a Joint Status Report with a proposed briefing schedule governing disposition of the merits of the sample case. Joint Status Report (Apr. 12, 2021), ECF No. 274. The following day, the court entered a Scheduling Order. *See* Scheduling Order (Apr. 13, 2021), ECF No. 275.⁵

On June 1, 2021, the Government filed its opening motion. Defs.’ Mot. On August 2, 2021, Plaintiffs filed their cross-motion and response to the Government’s motion. Pls.’ Cross-Mot. & Resp. On August 9, 2021, several interested parties that are plaintiffs in ac-

⁵ On July 6, 2021, a divided panel granted Plaintiffs’ motion for a preliminary injunction suspending liquidation of unliquidated entries subject to the contested tariffs. *In re Section 301 Cases*, 45 CIT __, __, 524 F. Supp. 3d 1355, 1357–72 (2021); *see also id.* at 1372–83 (Barnett, C.J., dissenting); Order (July 6, 2021), ECF No. 330 (temporarily restraining liquidation; establishing a process for implementing the preliminary injunction; and allowing the Government to instead “stipulate to refund any duties found to have been illegally collected”). On September 8, 2021, the court acknowledged the Government’s acceptance of “the option to stipulate” to a refund of unlawfully collected duties “without prejudice to the issue of whether . . . refunds will be limited to [importers of record]” and ordered Defendants to liquidate subject entries “in the ordinary course.” Order (Sept. 8, 2021) at 1–2, ECF No. 408.

tions that were stayed behind this sample action filed an *amicus* brief on whether any potential relief is limited to an importer of record. Amicus Br. of Interested Parties (“Interested Parties’ Br.”), ECF No. 362. On August 31, 2021, the court granted two additional motions for leave to file an *amicus* brief. Order (Aug. 31, 2021), ECF No. 396; Order (Aug. 31, 2021), ECF No. 397; *see also* Proposed Br. of Amici Curiae Retail Litigation Center, Inc., *et al.* (“RLC’s Br.”), ECF No. 373–2; Br. of Proposed Amici Curiae Ecolab Inc., *et al.* in Supp. of the Cross-Mot. for J. on the Agency R. Submitted by Pls.’ HMTX Indus. LLC *et al.* (“Ecolab’s Br.”), ECF No. 374. On October 1, 2021, the Government filed its joint response to Plaintiffs’ cross-motion and the *amicus* briefs and a reply in support of its opening motion. Defs.’ Reply in Supp. of Their Mot. to Dismiss, Resp. to Pls.’ Cross-Mot. for J. on the Agency R., and Resp. to *Amicus Curiae* Supporting Brs. (“Defs.’ Resp. & Reply”), ECF No. 412.⁶ On November 15, 2021, Plaintiffs filed their reply. Pls.’ Reply in Supp. of Their Cross-Mot. for J. on the Agency R. (“Pls’ Reply”), ECF No. 425. The court heard oral argument on February 1, 2021. Docket Entry, ECF No. 440.

Following oral argument, on February 15, 2022, the Government filed a partial consent motion to correct the administrative record. Defs.’ Mot. Correct R. On February 16, 2022, Plaintiffs filed their response. Pls.’ Opp’n Correct R.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018 & Supp. II 2020), which grants the court “exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.”

The court may properly dismiss a claim pursuant to USCIT Rule 12(b)(6) when the plaintiff’s factual allegations, assumed to be true, fail to raise a legally cognizable claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327 (Fed. Cir. 2006). USCIT Rule 56.1 provides for judgment on the agency record in an action that is before the court pursuant to 28 U.S.C. § 1581(i). The APA directs the court to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of

⁶ On October 18, 2021, the court granted the Government’s motion to correct citation errors in their opening and reply briefs. Order (Oct. 18, 2021), ECF No. 415; *see also* Defs.’ Consent Mot. to Correct Minor Citation Errors, Ex. B, ECF No. 413–2 (corrected pages).

an agency action.” 5 U.S.C. § 706; *see also* 28 U.S.C. § 2640(e). Additionally, the “court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . (C) in excess of statutory . . . authority; [or] . . . (E) unsupported by substantial evidence.” 5 U.S.C. § 706(2).

DISCUSSION

The court first considers the Government’s motion to dismiss Plaintiffs’ claims based on non-justiciability. As discussed below, because the court finds that the claims are reviewable, the court turns next to the cross-motions concerning the USTR’s authority pursuant to section 307 of the Trade Act and alleged procedural violations. Lastly, the court considers the Government’s partial consent motion to correct the administrative record.

I. Reviewability of Plaintiffs’ Claims

1. Whether List 3 and List 4A Constitute Unreviewable Presidential Action

a. Parties’ Contentions

The Government contends that Plaintiffs seek to challenge presidential—as opposed to agency—action because at each step in the modification process, “the USTR acted at ‘the specific direction . . . of the President.’” Defs.’ Mot. at 22 (quoting 19 U.S.C. § 2417(a)(1)). When the President “exercise[s] his discretion to direct action” pursuant to section 307(a)(1), the Government contends, “the action constitutes presidential action.” Defs.’ Resp. & Reply at 5. Thus, the Government contends, Plaintiffs’ claims arising out of the APA must fail “because the President is not an ‘agency’ within the meaning of the APA.” Defs.’ Mot. at 22 (citing, *inter alia*, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

Plaintiffs contend that the promulgation of List 3 and List 4A constitute final agency action because sections 301 and 307 of the Trade Act authorize the USTR—not the President—to act, and relevant *Federal Register* notices reflect the USTR’s determination to take the specified actions. Pls.’ Cross-Mot. & Resp. at 47 (citing *Final List 3*, 83 Fed. Reg. at 47,974, and *Final List 4*, 84 Fed. Reg. at 43,304). Plaintiffs also point to legislative history accompanying the 1988 amendments to the Trade Act that transferred authority from the President to the USTR. *Id.* (citing H.R. REP. NO. 100–576 at 511 (1988) (conf. report)). Plaintiffs further contend that judicial precedent supports reviewing the USTR’s actions even when taken pur-

suant to Presidential direction. *Id.* at 48–49 (citing, *inter alia*, *Invernergy Renewables LLC v. United States*, 43 CIT __, __, 422 F. Supp. 3d 1255, 1282–83, 1294 (2019), and *Gilda Indus., Inc. v. United States* (“*Gilda II*”), 622 F.3d 1358, 1363 (Fed. Cir. 2010)).

b. List 3 and List 4A Implicate Agency Actions That Are Judicially Reviewable

While “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review,” 5 U.S.C. § 704, presidential action is non-reviewable under the APA, *Franklin*, 505 U.S. at 800–01. The Government’s arguments for dismissal raise the question whether agency action taken in accordance with presidential direction pursuant to section 307 constitutes non-reviewable presidential action.

For purposes of this case, the answer to that question is “no.” *Franklin* held that the APA did not apply to a challenge to reapportionment because the President, not the Secretary of Commerce, sent the final apportionment to Congress and thus took the final step “affecting the States.” 505 U.S. at 796–801. Accordingly, *Franklin*’s bar on judicial review generally is “limited to those cases in which the President has final constitutional or statutory responsibility for the *final step* necessary for the agency action directly to affect the parties.” *Pub. Citizen v. USTR*, 5 F.3d 549, 552 (D.C. Cir. 1993) (emphasis added)⁷ (declining APA review over a challenge to the North American Free Trade Agreement (“NAFTA”) because Congress gave the President “the discretion to renegotiate NAFTA before submitting to Congress or to refuse to submit it at all” and it was, therefore, the President’s action, not the USTR’s, that affected members of the plaintiff-organization).⁸

⁷ The opinions of the U.S. Court of Appeals for the D.C. Circuit are not binding on this court. However, the court finds judicial precedent from the D.C. Circuit instructive in light of the court’s expertise in the area of administrative law. See, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 535 n.14 (1978) (observing that “the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit]”); see generally Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779 (2002). The U.S. Court of Appeals for the Federal Circuit has also relied on D.C. Circuit precedent. See *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1379–81 (Fed. Cir. 2001) (“NOVA”) (following *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993)).

⁸ In *Franklin*, the Court considered the importance of the President’s role in the “integrity of the [reapportionment] process” in reaching its decision. 505 U.S. at 800. Likewise, in *Public Citizen*, the appellate court noted that the President was considered “essential to the integrity of international trade negotiations” as evidenced by “the requirement that the President, and not [the USTR], initiate trade negotiations and submit trade agreements and their implementing legislation to Congress.” 5 F.3d at 552. The D.C. Circuit left open the possibility that “APA review of otherwise final agency actions may well be available” when “the President’s role is not essential to the integrity of the process.” *Id.*

Here, the Government extends *Franklin* beyond its holding when it argues, in effect, that *antecedent* presidential direction lacking any direct effect on relevant parties renders List 3 and List 4A non-reviewable presidential actions. The Government cites no authority to support such a broad reading. Indeed, in an analogous context, courts review agency action taken to implement Presidential proclamations and Executive orders—each of which are forms of presidential direction—pursuant to the APA. See, e.g., *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) (conducting APA review over agency action taken to implement an Executive order); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996) (surmising that agency regulations based on an Executive order issued by the President would be reviewable under the APA had plaintiffs brought such a claim); *Tate v. Pompeo*, 513 F. Supp. 3d 132 (D.D.C. 2021) (reviewing agency action taken to implement a Presidential proclamation). Thus, although “actions involving discretionary authority delegated by Congress to the President” may be non-reviewable under the APA, such cases are distinct from those “involving authority delegated by Congress to an agency.” See *Detroit Int’l Bridge Co. v. Gov’t of Can.*, 189 F. Supp. 3d 85, 98–105 (D.D.C. 2016).⁹

This case concerns the latter circumstance. Congress delegated to the USTR authority over modifications to section 301 actions. See 19 U.S.C. § 2417(a)(1); H.R. REP. NO. 100–576 at 551 (recognizing the USTR’s authority to decide and implement section 301 actions and noting that “[t]he President would not retain separate authority to take action”).¹⁰ Consistent with the statute, the USTR engaged in a

⁹ The *Detroit International* court declined to review the U.S. Department of State’s (“USDS”) issuance of a permit to build a bridge across an international boundary because Congress had vested discretionary authority over bridge approvals in the President, who had, in turn, delegated certain ministerial responsibilities to USDS by Executive Order). 189 F. Supp. 3d 85, 98–105. In noting the significance of the recipient of Congress’ delegation, however, the court explained that “an unreviewable presidential action must involve the exercise of discretionary authority *vested in the President*; an agency acting on behalf of the President is not sufficient by itself” to avoid APA review. 189 F. Supp. 3d at 104 (emphasis added). For this proposition, the court cited Justice Elena Kagan, then Visiting Professor at Harvard Law School, who wrote:

When the challenge is to an action delegated to an agency head but directed by the President, . . . the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern. Nothing in *Franklin*’s interpretation of the APA or in its—or any other case’s—underlying discussion of separation of powers issues is to the contrary.

Id. (quoting Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001)).

¹⁰ When Congress transferred authority over section 301 actions from the President to the USTR in the 1988 amendments to the Trade Act and gave the USTR the authority to modify section 301 actions, Congress gave some indication of its reasons for preserving a role for the President. Addressing the phrase “subject to the direction, if any, of the President,”

rulemaking process, the results of which—List 3 and List 4A—“directly affect[ed] the parties.” *Franklin*, 505 U.S. at 797.

The court thus concludes that Plaintiffs’ claims are not non-reviewable pursuant to the APA by virtue of the President’s involvement.¹¹ Accordingly, the court denies the Government’s motion to dismiss Plaintiffs’ claims on this basis.

2. Political Question Doctrine

a. Parties’ Contentions

The Government contends that Plaintiffs’ claims are non-justiciable pursuant to the political question doctrine because they implicate the President’s discretionary determinations that modification of the original section 301 action was merited. Defs.’ Mot. at 25. Specifically, the Government contends, Plaintiffs seek to challenge the President’s determinations (1) that the original action “was ‘no longer appropriate’” and “whether new tariffs [are] ‘appropriate’”; and (2) that China’s retaliatory conduct “increased the burden on the United States

which did not include the term “specific” as ultimately enacted, the House Ways and Means Committee Report recognized “that the President could provide broad policy direction or endorse the USTR decision,” but that the “details of particular actions would remain with the USTR, including modification and termination of prior retaliatory action.” H.R. REP. NO. 100–40 at 59 (1987). Additionally, the Committee Report “recognize[d] that if there is a policy issue of major magnitude, the President could direct the USTR to take a different course of action.” *Id.* at 59–60. However, “[t]he Committee expect[ed] that the interagency committee advisory process prior to the decision by the USTR [would] virtually eliminate the instances in which any specific direction from the President would be appropriate.” *Id.* at 59–60. Thus, although Congress envisioned the President retaining a role with respect to broad policy direction or directing the USTR to take action relating to issues of extraordinary importance, *see id.*, Congress generally gave the USTR authority over the detailed decision-making process required by statute, *see* 19 U.S.C. § 2411, *et seq.*

Of course, what Congress envisioned is not as important as what the statute allows. At least in this case, however, and with respect to List 3, the evidence of record is consistent with the legislative history (the record lacks evidence of presidential direction with respect to List 4A beyond the USTR’s assertions in the relevant notices). While the President offered “broad policy direction,” and specifically directed the USTR regarding the size of the modification, the level of tariffs, and the date of implementation and directed the USTR to take the final action, *see* June 2018 Presidential Statement; Sept. 2018 Presidential Statement, at the hearing, the Government acknowledged that the record does not contain evidence that the President had final authority in the process of approving the final list of tariff subheadings covered by the determinations, Oral Arg. 7:50–9:40, available at <https://www.cit.uscourts.gov/sites/cit/files/020122-21-00052-3JP.mp3> (time stamp from the recording). Thus, while the USTR’s modification authority is subject to the specific direction of the President, it is still the USTR that is acting for purposes of the APA.

¹¹ While the Parties dispute the applicability of *Gilda II*, that case is not dispositive of the issues raised by the Government. *Gilda II* addressed the automatic termination provision set forth in section 307(c)(1), 622 F.3d at 1362–67. That provision does not preserve a role for presidential direction. *See* 19 U.S.C. § 2417(c)(1). Further, in that case, the appellate court addressed the effect on section 307(c)(1) of the USTR’s *failure to act* in accordance with the notice requirement set forth in section 307(c)(2). *Gilda II*, 622 F.3d at 1364–65. The court did not address whether any action by the USTR, had it occurred, would be subject to the APA.

economy.” *Id.* at 26–27 (citations omitted). According to the Government, the “highly discretionary nature of what is ‘appropriate’” under the circumstances means that “the statute lacks a ‘judicially discoverable and manageable standard[].’” *Id.* at 27 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (alteration in original); *see also id.* at 28 (discussing *Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320, 1326–27 (Fed. Cir. 2013)); Defs.’ Resp. & Reply at 9–10. The Government also contends that “prudential considerations” disfavor judicial review. Defs.’ Mot. at 29. To that end, the Government contends that “[P]laintiffs invite competing policies and statements regarding United States trade policy from the Judicial Branch, potentially disrupting the conduct of United States foreign relations,” such as ongoing trade negotiations with China. *Id.*

Plaintiffs contend that their claims implicate matters of statutory interpretation and compliance with the APA, both of which present judicially manageable standards. Pls.’ Cross-Mot. & Resp. at 50–51. Thus, Plaintiffs contend, their claims neither “challenge discretionary determinations committed to the Executive Branch,” *id.* at 51, nor seek judicial pronouncements on trade policy, *id.* at 52. Plaintiffs rely on *Almond Brothers* to contend that the court may resolve arguments regarding statutory interpretation while declining to address discretionary USTR determinations. *Id.* (citing *Almond Bros.*, 721 F.3d at 1326–27).

b. Plaintiffs’ Claims Do Not Implicate a Non-Justiciable Political Question

A controversy may involve a political question when there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. While the doctrine precludes judicial review of “controversies which revolve around policy choices and value determinations constitutionally committed” to the Legislative or Executive Branches, “it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.”

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986). The court may not “shirk [its] responsibility” to ascertain the proper interpretation of a statute “merely because [its] decision may have significant political overtones.” *Id.*; see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (explaining that resolution of the plaintiff’s claim did not turn on “the courts’ own unmoored determination of what United States policy toward Jerusalem should be,” but instead on the “familiar judicial exercise” of deciding whether the plaintiff’s “interpretation of the statute is correct, and whether the statute is constitutional,” such that the political question doctrine did not apply).

The “decision that a question is nonjusticiable is not one courts should make lightly.” *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004). Here, however, the court readily concludes that Plaintiffs’ claims do not raise non-justiciable political questions.

Plaintiffs allege, *inter alia*, that the USTR exceeded the authority provided by section 307(a)(1)(B) and (C) of the Trade Act when it promulgated List 3 and List 4A. 20–177 Am. Compl. ¶¶ 68–70, 73. It is clear from the court’s discussion, *infra*, that such claims require the court to engage in the “familiar judicial exercise” of statutory interpretation in order to ascertain whether the factual predicate for the modifications fell within the purview of subsection (B), and whether subsection (C) is limited to reductions in, or termination of, trade actions. See *Zivotofsky*, 566 U.S. at 196.

The court is not questioning the USTR’s determination that China’s subsequent defensive conduct increased the burden on U.S. commerce, Defs.’ Mot. at 27–28, indeed, Plaintiffs concede that it did, Pls.’ Cross-Mot. & Resp. at 31. Instead, the issue before the court is whether that conduct increased the burden on U.S. commerce *in a legally relevant way*. That inquiry requires the court to interpret the meaning of the statutory terms, “the acts, policies, and practices[] that are the subject of such action,” in relation to this modification action. 19 U.S.C. § 2417(a)(1)(B). Likewise, the court is not reviewing the USTR’s discretionary decisions regarding the appropriateness of certain actions pursuant to subsection (C). See Defs.’ Mot. at 26.

For these reasons, the Government’s reliance on *Almond Brothers* is misplaced. Resolution of that case turned on the appellate court’s application of the APA’s narrow exception to judicial review for “agency action [that] is committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), to the plaintiff’s challenges to the terms of an

agreement the USTR entered into with Canada, *see Almond Bros.*, 721 F.3d at 1322, 1325–27. While finding the substance of the terms of the agreement to fall within the USTR’s discretionary authority such that there was “no law to apply,” *id.* at 1327 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)), the court nevertheless considered, and rejected, the plaintiff’s argument that the agreement failed to meet other applicable statutory requirements, *id.*

The Government’s motion does not discuss the political question doctrine in relation to Plaintiffs’ claims concerning the USTR’s compliance with the procedural requirements set forth in the APA. *See* Defs.’ Mot. at 25–30; 20–177 Am. Compl. ¶¶ 74–75. In its reply brief, the Government asserts that, “[i]f a case presents an unreviewable political question, then no review of those claims is available under the APA.” Defs.’ Resp. & Reply at 10 (citing *Heckler v. Chaney*, 470 U.S. 821, 828 (1985), and *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 97 (D.D.C. 2016)) (emphasis added). The cited cases are inapposite because each addressed the unavailability of APA review of substantive—as opposed to procedural—claims. *See Heckler*, 470 U.S. at 837–38 (finding that an agency’s discretionary decision not to undertake an enforcement action was not subject to judicial review pursuant to 5 U.S.C. § 701(a)(2)); *Mobarez*, 187 F. Supp. 3d at 92 (declining to undertake APA review of the plaintiff’s claim that the U.S. government failed to fulfill its alleged duty to evacuate U.S. citizens from Yemen and distinguishing such claims from reviewable “garden-variety” claims requiring statutory interpretation).

Simply put, the policy-laden questions to which the USTR directed its discretionary authority are not before the court. *See* Defs.’ Mot. at 29 (arguing that “plaintiffs invite competing policies and statements regarding United States trade policy from the Judicial Branch”). Matters of statutory interpretation and compliance with procedural requirements are independent questions the court is well-equipped to answer. Thus, the court is not risking “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217. Accordingly, the court denies the Government’s motion to dismiss Plaintiffs’ claims based on purported non-justiciability and now turns to the merits of those claims.

II. Whether the USTR Exceeded its Modification Authority Pursuant to Section 307 of the Trade Act

1. Standard of Review

a. Parties' Contentions

The Government contends that, even if the contested actions are those of the USTR, a heightened standard of review applies, namely, whether there has been “a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” Defs.’ Mot. at 30–31 (quoting *Gilda II*, 622 F.3d at 1363). The Government asserts that the USTR conducts “[a]ll functions . . . under the direction of the President,” *id.* at 30,¹² meaning that the court must “afford[] substantial deference to decisions of the [USTR] implicating the discretionary authority of the President in matters of foreign relations,” *id.* (quoting *Gilda II*, 622 F.2d at 1363).

Plaintiffs contend that the court “is the final authority on issues of statutory construction,” Pls.’ Cross-Mot. & Resp. at 39 (quoting *Gilda II*, 622 F.3d at 1363), and resolving this case requires applying the *Chevron* framework, *id.* at 39–40 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)). Plaintiffs further contend that the statute is unambiguous, but that even if it were not, the USTR’s interpretation merits no deference. *Id.* at 41–42. Plaintiffs also contend that the Government has misconstrued the authorities upon which it seeks to rely. Pls.’ Reply at 3–5.

b. Analysis

In cases arising under the court’s jurisdiction pursuant to 28 U.S.C. § 1581(i), the court applies the standard of review set forth in the APA. 28 U.S.C. § 2640(e). The “court must ‘decide all relevant questions of law, interpret constitutional and statutory provisions,’ and ‘hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Gilda II*, 622 F.3d at 1363 (quoting 5 U.S.C. § 706) (alteration in original).

While the Government seeks to distinguish *Gilda II* based on the underlying statute at issue,¹³ see Defs.’ Resp. & Reply at 6, that

¹² The Government identifies 19 U.S.C. § 2171(a) as the source for this quotation, but the phrase is instead found in *Reorganization Plan No. 3 of 1979*, 44 Fed. Reg. 69,273, 69,274 (1979) (reorganization of functions relating to international trade, section 1(b)(4)).

¹³ *Gilda II* addressed the USTR’s interpretation of 19 U.S.C. § 2417(c)(1), the statutory provision governing automatic termination of retaliatory duties. 622 F.3d at 1362. That provision does not involve presidential direction.

distinction is inapposite here. *Gilda II* recognizes that although the “court affords substantial deference to decisions of the Trade Representative implicating the *discretionary authority* of the President in matters of foreign relations,” *id.* (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (emphasis added), “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent,” *id.* (quoting *Chevron*, 467 U.S. at 843 n.9 (1984)) (alteration in original)). Thus, when “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* (quoting *Chevron*, 467 U.S. at 842–43). Accordingly, the appellate court distinguished matters implicating presidential discretion from those requiring statutory interpretation. See *Gilda II*, 622 F.3d at 1363.

Here, resolving Plaintiffs’ substantive claims requires the court first to interpret the relevant statutory provisions; thus, the court “must first carefully investigate the matter to determine whether Congress’s purpose and intent on the question at issue is judicially ascertainable.” *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). Accordingly, the court turns to its examination of “the statute’s text, structure, and legislative history,” applying, if necessary, “the relevant canons of interpretation.” *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)).¹⁴

Because the court finds that the statute is unambiguous, the court need not and does not address what, if any, deference the USTR’s interpretation of the statute would be given if the statute was ambiguous.

¹⁴ The Government’s reliance on *Maple Leaf Fish Co.*, 762 F.2d 86, *Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018), and *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), cert. denied, 2022 WL 892108 (U.S. Mar. 28, 2022), is also unpersuasive. See Defs.’ Mot. at 30–31; Defs.’ Resp. & Reply at 11–13. *Silfab Solar* and *Maple Leaf Fish Co.* address, respectively, the extent to which the court may review findings of fact by the President or the U.S. International Trade Commission in preparation for presidential action. *Silfab Solar*, 892 F.3d at 1349; *Maple Leaf Fish Co.*, 762 F.2d at 89–90. In *Transpacific*, the appellate court addressed the timeliness of presidential action pursuant to section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, 4 F.4th at 1318–19. That inquiry required the court to interpret the meaning of the term “action” pursuant to 19 U.S.C. § 1862(c)(1)(B). *Id.* at 1322. In so doing, the court considered the statute’s ordinary meaning, *id.* at 1319–22, “relevant statutory context,” *id.* at 1322, and the statute’s “legal and historical backdrop,” *id.* at 1324 (citation omitted), before concluding that Congress’ intent was plain with respect to the operative term. These cases thus lend support for the distinction between review of discretionary decisions and statutory interpretation recognized in *Gilda II*.

2. The USTR's Authority Pursuant to Section 307(a)(1)(B)

a. Parties' Contentions

The Government contends that “China’s subsequent actions”—retaliatory tariffs and other measures such as currency devaluation—“were not separate and distinct from their unfair trade practices investigated under section 301” but “were directly related” to the investigation and intended to permit and defend the continuation of the investigated practices. Defs.’ Mot. at 32.¹⁵ The Government further contends that Plaintiffs’ interpretation of the statute would prevent the President and the USTR from “respond[ing] to a trading partner’s refusal to eliminate its unfair trade practices” and retaliatory actions. *Id.* at 33. Such an interpretation, the Government contends, is inconsistent with both the USTR’s authority to take “all ‘appropriate and feasible action’ within the power of the President” to eliminate the unfair practices pursuant to section 301(b)(2), *id.*, and legislative history surrounding the 1988 amendments to section 301 indicating congressional desire for vigorous action in response to unfair trade practices, *id.* at 37–38.

Drawing a temporal line in the sand, Plaintiffs contend that the phrase “the subject of such action” in subsection (B) cannot encompass China’s defensive actions “because those actions had not yet transpired when the investigation was initiated or when USTR determined that remedial action was ‘appropriate.’” Pls.’ Cross-Mot. & Resp. at 31. Thus, Plaintiffs contend, “[t]he increased burden cannot come from other subsequent ‘defensive’ actions.” *Id.* at 32; cf. Ecolab’s Br. at 8–12 (advancing similar arguments). Plaintiffs contend that any congressional intent to permit the USTR “to prosecute a limitless trade war” would have been stated in clearer terms, “not through the tailored language of Section 307(a)(1)(B).” Pls.’ Cross-Mot. & Resp. at 31–32. Plaintiffs also contend that the existence of explicit retaliation authority pursuant to section 306(b)(2) disfavors interpreting subsection (B) to allow the USTR to retaliate against a trading partner’s actions under the guise of modification. See *id.* at 32–33.

The Government counters that the USTR “made the required finding that the burden on U.S. commerce had increased as a result of China’s unfair trade practices, *and* its ‘subsequent defensive actions

¹⁵ Indeed, the Government contends that China’s defensive actions permitted the USTR to modify the section 301 action under both subsections (B) and (C). Defs.’ Mot. at 33. The Government asserts, and Plaintiffs agree, that each subsection—(B) and (C)—constitutes “an independent basis for action” and failure as to one is not a basis to overturn the action. Defs.’ Mot. at 36 n.6; Oral Arg. 1:55:10–1:55:30 (colloquy with Plaintiffs during which they agreed that each statutory basis provides independent authority for the modifications).

taken to maintain’ those practices.” Defs.’ Resp. & Reply at 14 (citing *Final List 3*, 83 Fed. Reg. at 47,974, and *Final List 4*, 84 Fed. Reg. at 43,304) (emphasis added).¹⁶ The Government contends that the court should reject Plaintiffs’ characterization of the initial investigation as “limited and discrete,” *id.* at 16, because the investigated practices covered “China’s massive ‘top-down national strategy[]’ unfairly to acquire U.S. technology,” which required “the mobilization and participation of all sectors of [Chinese] society,” *id.* at 15–16 & n.4 (quoting USTR Report at 11). The Government also contends that section 306(b)(2) applies in different circumstances and “is irrelevant here.” *Id.* at 16. While recognizing that resort to legislative history is unnecessary when a statute is plain, Defs.’ Mot. at 5 n.2, the Government contends that the legislative history behind the 1988 amendments to the Trade Act supports interpreting subsection (B) to allow the USTR to respond to defensive conduct, Defs.’ Resp. & Reply at 18 (citing 133 CONG. REC. 20,486 (1987) (statement of Sen. Lautenberg); S. REP. No. 100–71 (1987), at 73–74).

In their Reply, Plaintiffs contend that the Government’s assertions of an increased burden on U.S. commerce from the investigated practices are conclusory and unavailing. Pls.’ Reply at 7–8. Plaintiffs contend that the Government’s “true argument” for reliance on subsection (B) remains China’s subsequent defensive conduct that is distinct from the “the four discrete categories of intellectual property and technology transfer conduct that USTR actually investigated.” *Id.* at 8. Plaintiffs further contend that the Government’s reliance on the USTR Report constitutes a *post hoc* rationalization for the USTR’s action. *Id.* at 10. Lastly, Plaintiffs contend that the Government’s dismissal of the relevance of section 306 misses the point. *Id.* at 10 n.3. Plaintiffs argue that the existence of “section 306 shows that Congress understood how to authorize ‘retaliation’ explicitly against another country’s response to trade proceedings or actions where it wanted to.” *Id.*

b. In Promulgating List 3 and List 4A, the USTR Properly Exercised Its Authority Pursuant to Section 307(a)(1)(B)

The court begins with the language of the statute. The statute permits the USTR to “modify or terminate *any action*, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if— . . . the *burden*

¹⁶ In that regard, the Government also points to a statement regarding China’s acquisition of hybrid vehicle technology from Toyota. Defs.’ Resp. & Reply at 15 (quoting Mem. from USTR General Counsel Stephen Vaughn to USTR Robert Lighthizer (Sept. 17, 2018) (“Sept. 2018 Vaughn Mem.”) at 6, PR 1).

or restriction on United States commerce . . . of the acts, policies, and practices, that are the subject of such action has increased or decreased." 19 U.S.C. § 2417(a)(1)(B) (emphasis added). This case requires the court first to interpret the meaning of the phrase, "the subject of such action," because the Parties disagree about whether retaliatory actions taken by China can be the source of burden from the acts, policies, and practices that were the subject of the original action.

Plaintiffs contend that the relevant phrase refers to the subject of the original investigation. Pls.' Cross-Mot. & Resp. at 32; Pls.' Reply at 7–9. The plain meaning of the terms supports that interpretation. Black's Law Dictionary¹⁷ defines "subject," when used as a noun, as "[t]he matter of concern over which something is created; something about which thought or the constructive faculty is employed," for example, "the subject of the statute." Black's Law Dictionary at 1465 (8th Ed. 2004); cf. Subject (noun), The Oxford English Dictionary, Vol. XVII at 29 (2nd Ed. 1989) ("A thing affording matter for action of a specified kind; a ground motive or cause."). The phrase "such action," when read in context, refers to the "action" referenced in the introductory clause of section 307(a)(1). See 19 U.S.C. § 2417(a)(1)(B); cf. *Solar Energy Indus. Ass'n v. United States*, Slip Op. 21–154, 2021 WL 5320790, at *9 (Nov. 16, 2021) (stating that the term "'such' is typically read to 'refer[] back to something indicated earlier in the text'" (citation omitted) (alteration in original)). The term "action," in the introductory clause, constitutes a reference to the action taken pursuant to section 301, i.e., the initial action. See 19 U.S.C. § 2417(a)(1) (cross-referencing 19 U.S.C. § 2411). Thus, to rely on the authority provided by subsection (B), the USTR must act based on increased harm to U.S. commerce from the acts, policies, and practices that constituted the subject of the original investigation. Indeed, the Government does not present a different textual view of the provision. The court thus finds the text of the statute plain with respect to subsection (B) and need not resort to legislative history or other tools of statutory interpretation.

Interpreting the meaning of the phrase does not, however, end the inquiry. Instead, the Parties dispute what *was* the subject of the action and whether China's defensive conduct, occurring subsequent to the original investigation, can properly be considered the basis for an increase in the harm stemming from the subject of the action. See, e.g., Pls.' Cross-Mot. & Resp. at 32; Defs.' Resp. & Reply at 15–16.

¹⁷ Courts have long considered dictionary definitions to discern the ordinary meaning of a term. See, e.g., *Nix v. Hedden*, 149 U.S. 304, 306–07 (1893); *Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020).

Plaintiffs argue that the subject of the action must be limited to “the investigated intellectual property practices themselves.” Pls.’ Cross-Mot. & Resp. at 25 (emphasis omitted); *see also* Pls.’ Reply at 8 (distinguishing China’s retaliation from the conduct “that USTR actually investigated”). The Government argues that China’s retaliatory conduct was “not separate and distinct from” the investigated acts and was instead “directly related” to the acts, policies, and practices that were the subject of the investigation. Defs.’ Mot. at 32; Defs.’ Resp. & Reply at 15.

Upon review of the record of the agency’s proceedings and the arguments of the Parties, the court finds that the link between the subject of the original section 301 action and China’s retaliation is plain on its face. The USTR’s initial determination was statutorily required to be designed to lead to the elimination of the unfair acts, policies, and practices, but without any requirement for the action to be focused on the same or similar industries. *See* 19 U.S.C. § 2411(b)(2). Thus, by imposing duties on \$50 billion in trade, the USTR intended to disrupt the trade flow into the United States in such amount necessary to lead to the elimination of China’s unfair practices. By directly offsetting the duties on the \$50 billion in trade with its own duties on \$50 billion in trade from the United States, China directly connected its retaliation to the U.S. action and to its own acts, policies, and practices that the U.S. action was designed to eliminate. *See Final List 3*, 83 Fed. Reg. at 47,974; *cf. Final List 4*, 84 Fed. Reg. at 43,304 (noting China’s decision to impose tariffs on \$110 billion worth of U.S. goods).

Plaintiffs’ arguments that China’s retaliatory conduct cannot be part of “the subject of” the action because that conduct post-dates the initial investigation and determination are not persuasive. Pls.’ Cross-Mot. & Resp. at 31; *see also* Pls.’ Reply at 8 (“As a temporal and logical matter, the ‘subject of’ the section 301 action does not encompass all ‘subsequent defensive measures’ China might take in retaliation for U.S. tariffs.”). Modifications are based on activity increasing (or decreasing) the burden on U.S. commerce after the initial determination. 19 U.S.C. § 2417(a)(1)(B). Plaintiffs’ argument thus turns on whether the USTR found that China’s retaliatory conduct caused an increased burden on U.S. commerce from the acts, policies, and practices that constituted the subject of the action. Because, as discussed below, the court concludes that it did, Plaintiffs’ timing-based argument must fail.¹⁸

¹⁸ Plaintiffs also argue that “[t]he magnitude of the responsive List 3 and List 4A actions . . . underscores their distinct nature.” Pls.’ Reply at 8. According to Plaintiffs, the USTR deemed \$50 billion “commensurate” to the harms resulting from the “investigated

In determining whether the USTR reasonably considered China’s retaliatory actions to be within the purview of the “subject of the action,” the court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Nevertheless, the court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

Beyond the clear connection between the defensive, retaliatory actions and the acts, policies, and practices they seek to defend, List 3 and List 4A reference the USTR’s prior determinations concerning the investigation and subsequent actions. See *Final List 3*, 83 Fed. Reg. at 47,974; *Final List 4*, 84 Fed. Reg. at 43,304. Given that List 3 and List 4A constitute modifications to those actions, the court also looked to the cited determinations to consider further the USTR’s position regarding the scope of the subject of the original action. The USTR broadly defined the investigation as addressing “China’s Acts, Policies, and Practices *Related to* Technology Transfer, Intellectual Property, and Innovation.” *Initiation Notice*, 82 Fed. Reg. at 40,213 (emphasis added). Thus, the investigation covered China’s conduct *related to* the identified matters and not simply, as Plaintiffs contend, the acts *constituting* the identified matters. See *id.* Additionally, while the USTR specified four categories of acts, policies, and practices that it deemed actionable in its initial determination, the USTR described the Report as a “comprehensive” account of “the acts, policies, and practices under investigation.” *USTR Determination*, 83 Fed. Reg. at 14,907. The Report, which is both public and contemporaneous with the USTR’s initial section 301 determination, may also be considered. See *United States v. Sci. Applications Int’l Corp.*, 502 F. Supp. 2d 75, 78 (D.D.C. 2007) (“Generally, ‘when a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as if it were set out in full.’”) (quoting *Air Line Pilots Ass’n, Int’l v. Delta Air Lines*, 863 F.2d 87, 94 (D.C. Cir. 1988)).

practices.” *Id.* The USTR explained that a \$50 billion action was initially “appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China’s harmful acts, policies, and practices.” *USTR Determination*, 83 Fed. Reg. at 14,907. The USTR is not, however, statutorily required to quantify any increase in burden or otherwise show that the increase in tariffs is commensurate to the increased harm. See 19 U.S.C. § 2417(a)(B); compare *id.* § 2411(a)(3) (stating that mandatory actions taken pursuant to section 301(a)(1) “shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce”), with *id.* § 2411(b) (governing discretionary actions taken pursuant to section 301(b), which does not contain any such limitation).

In addition to summarizing the specific acts, policies, and practices related to technology transfer, intellectual property, and innovation under investigation, the USTR Report provided the historical context in which those actions arose. The Report explained that “[c]oncerns about a wide range of unfair practices of the Chinese government . . . related to [those matters] are longstanding.” USTR Report at 4. The Report noted that the investigation covered the Chinese government’s use of “a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, *and other mechanisms* to regulate or intervene in U.S. companies’ operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies.” *Id.* at 5 (emphasis added). Indeed, as noted by the Government, China’s “top-down national strategy” for acquiring technology “requires the mobilization and participation of all sectors of [Chinese] society.” *Id.* at 11.

In addition to these concerns, the Report specifically explained the reluctance among U.S. companies to “complain about China’s unfair trade practices” because of concerns about “Chinese retaliation.” *Id.* at 9. “Other mechanisms” used to regulate U.S. companies’ operations in China thus included the lack of “effective recourse” for U.S. companies wanting to report “informal pressures for fear of retaliation and the potential loss of business opportunities.” *Id.* at 21. According to the USTR, “concerns about retaliation have enabled China’s technology transfer regime to persist for more than a decade.” *Id.*; *see also id.* at 21 n.106.

The foregoing discussion of retaliation in the USTR Report provides context and explanation regarding the reasons why individual companies were unable and unwilling to pursue their own complaints against the underlying Chinese practices. This recognition of the challenges faced by individual companies led the USTR, consistent with the direction of the President, to initiate the section 301 action in order to protect U.S. companies without them filing their own petitions and incurring the consequences of targeted retaliation. *See id.* at 10. Thus, even if the retaliatory actions by China were not otherwise clearly related to the acts, policies, and practices that China sought to defend from the USTR’s section 301 action, the USTR Report provides a basis for regarding China’s retaliatory actions as within the scope of the acts, policies, and practices that were the subject of the original action.

The USTR’s rationale for List 3 and List 4A reflects this understanding of the agency’s authority pursuant to subsection (B). As the

USTR explained, China's retaliation against the initial imposition constitutes conduct that is related to the specified unfair trade policies because it is intended to "maintain those policies." *Final List 3*, 83 Fed. Reg. at 47,974; *see also Final List 4*, 84 Fed. Reg. at 43,304. That retaliation consisted of China's imposition of tariffs on \$50 billion worth of U.S. goods, *Final List 3*, 83 Fed. Reg. at 47,974, later increased to \$110 billion worth of U.S. goods, *Final List 4*, 84 Fed. Reg. at 43,304, and "non-tariff measures," *id.*, including devaluing China's currency, *id.* at 43,305. China's retaliation also caused increased harm to U.S. commerce; a point that Plaintiffs concede. *See, e.g.*, Pls.' Cross-Mot. & Resp. at 31. Together, these notices reflect the USTR's recognition that Chinese retaliation was similarly directed against the effort to challenge its unfair acts, policies, practices, just as the threats to retaliate against individual companies were directed at maintaining those same practices. Accordingly, the USTR properly found an increased burden on U.S. commerce arising from the acts that formed part of the subject of the original action.¹⁹

For these reasons, the court finds that the USTR exercised its authority consistent with section 307(a)(1)(B) when it promulgated List 3 and List 4A. Because subsections (B) and (C) each provided an independent basis for the determinations, the court need not and does not reach the Parties' arguments concerning the USTR's authority to issue the determinations pursuant to section 307(a)(1)(C).

III. Procedural Claims Pursuant to the APA

The court first addresses the Government's arguments that the promulgation of List 3 and List 4A is exempt from the APA's procedural requirements and, finding those arguments non-meritorious, next addresses Plaintiffs' APA claims.

1. Foreign Affairs Exemption

a. Parties' Contentions

The Government contends that the promulgation of List 3 and List 4A falls under the foreign affairs exception to the APA because they "were part of the negotiation of an international trade agreement" and "relate[d] to the President's 'overall political agenda concerning relations with another country.'" Defs.' Mot. at 42–43 (quoting *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)).

¹⁹ For the same reasons, the court rejects Plaintiffs' argument that the USTR violated the substantive provisions of the APA by failing to point to evidence of an "increased burden" from the investigated practices. *See* Pls.' Reply at 23–24.

Plaintiffs contend that the promulgation of List 3 and List 4A does not fall under the foreign affairs exception because “the public rule-making” process “would [not] ‘provoke definitely undesirable international consequences.’” Pls.’ Cross-Mot. & Resp. at 61–62.

b. The Foreign Affairs Exemption Does Not Apply

The APA exempts a rulemaking from notice and comment procedures when the agency action involves a “foreign affairs function of the United States.” 5 U.S.C. § 553(a)(1) (stating that section 553 applies, “except to the extent that” a foreign affairs function “is involved”).²⁰ In other words, the foreign affairs exemption is intended to allow an agency to “dispense with [the] notice-and-comment procedures” set forth in section 553. *E.B. v. U.S. Dep’t of State*, 2022 WL 343505, at *4 (D.D.C. 2022) (emphasis added); *see also* H.R. REP. No. 79–1980 at 257 (1946) (foreign affairs functions are “exempt[] from all of the requirements” set forth in section 553) (emphasis added).

When invoked, the exemption “will be construed narrowly and granted reluctantly,” and “only to the extent that the excepted subject matter is clearly and directly involved in a foreign affairs function.” *Mast Indus., Inc. v. Regan*, 8 CIT 214, 231, 596 F. Supp. 1567, 1582 (1984) (quotations and citation omitted). “The purpose of the exemption [is] to allow more cautious and sensitive consideration of those matters which ‘so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.’” *Am. Ass’n of Exps. & Imps.*, 751 F.2d at 1249 (quoting H.R. REP. No. 79–1980 at 257).²¹

In this case, the USTR did not invoke the foreign affairs exemption to relieve the agency from any rulemaking procedures that may apply in addition to the requirements of section 307.²² *See Final List 3*, 83

²⁰ The Government concedes that, in the event the court finds the promulgation of List 3 and List 4A to constitute agency action, the USTR’s actions are subject to informal rulemaking procedures set forth in 5 U.S.C. § 553(b)–(c) unless the court finds that the foreign affairs exception applies. Defs.’ Mot. at 39.

²¹ Consistent with its use as an example, meeting the “definitely undesirable international consequences” standard may be enough to invoke the foreign affairs exemption but is not necessary. *See Mast*, 8 CIT at 230, 596 F. Supp. 2d at 1581 (noting that such a finding “has not been considered necessary by courts” and, if it were, “would render the ‘military or foreign affairs function’ superfluous since the ‘good cause’ exception [set forth in section] 553(b)(B), would apply”).

²² The foreign affairs exemption “[does] not relieve an agency from any requirements imposed by law apart from this bill. H.R. REP. No. 79–1980 at 257. Section 307(a)(2) and (b) require the USTR to “consult with the petitioner, if any, and with representatives of the domestic industry concerned” and to “provide [an] opportunity for the presentation of views by other interested persons affected by the proposed modification or termination” before publishing “the reasons [for]” any modification in the *Federal Register* and providing a report to Congress. 19 U.S.C. § 2417(a)(2)–(b). At the hearing, the Government suggested that the only additional requirement found in the APA as compared to section 307 is the

Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05. Indeed, at each step in the processes that resulted in List 3 and List 4A, the USTR, generally consistent with both 19 U.S.C. § 2417(a)(2)–(b) and 5 U.S.C. § 553(b)–(c), published notices of its intended actions, accepted comments from the public, and held public hearings prior to publishing its determinations. See *supra* Background Sec. II. Thus, the Government’s invocation of the exemption is entirely *post hoc* and inconsistent with the manner in which the USTR conducted the modification processes.²³

While the statute does not explicitly require an agency to invoke the foreign affairs exemption in a final rule, the USTR’s failure to make such an invocation combined with the manner in which the USTR conducted these processes suggests that the USTR did not intend to invoke the exemption and, at best, provides the court with an unclear record as to whether the USTR in fact intended to invoke the exemption. Cf., e.g., *Mast*, 8 CIT at 229, 596 F. Supp. at 1580 (documenting explicit invocation of the foreign affairs exemption). The court, however, need not decide whether the foreign affairs exemption may properly be invoked solely by counsel *post hoc*, because the court finds unconvincing the Government’s argument that USTR’s actions “fall squarely within the foreign affairs . . . exception.” Defs.’ Mot. at 44. Unlike in *Mast*, for example, on which the Government seeks to rely in connection with the implementation of international agreements, the United States and China did not enter into any trade agreement until after the USTR promulgated *Final List 3* and *Final List 4*. See Defs.’ Mot. at 41 (citing *Mast*, 8 CIT at 232, 596 F. Supp. 3d at 1582).²⁴

Moreover, courts have recognized that the foreign affairs exemption does not apply simply because a rule relates to ongoing negotiations. See, e.g., *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 776 (9th Cir. 2018) (holding that the foreign affairs exemption did not apply to an interim rule suspending asylum for certain persons when the government claimed that the rule “directly related to ongoing

requirement for a reasoned explanation, such that applying the foreign affairs exemption would relieve the court from analyzing the sufficiency of the USTR’s response to public comments. Oral Arg. 59:15–1:01:00. In other words, the Government appears to interpret section 307 to provide at least some opportunity for public comment without requiring the USTR to engage with the comments it receives to the extent required by the APA.

²³ Plaintiffs do not allege facial non-compliance with section 553 but, rather, deficiencies with respect to the USTR’s notice-and-comment procedures. See 20–177 Am. Compl. ¶¶ 74–75.

²⁴ While *Mast* states that “the negotiation of agreements with foreign governments . . . ‘clearly and directly’ involve[d] a ‘foreign affairs function,’” that statement was made in the context of negotiations under section 204 of the Agricultural Act of 1956, which expressly granted the President power to issue regulations in conjunction with the negotiation of international agreements limiting certain imports. 8 CIT at 217, 232, 596 F. Supp. at 1570, 1582.

negotiations with Mexico” absent any explanation why immediate publication of the rule furthered the negotiations). This is particularly true when, as here, some form of notice, opportunity to comment, and explanation is otherwise required. *See* 19 U.S.C. § 2417(a)(2)–(b). The Government has failed to explain how the foreign affairs exemption would “allow more cautious and sensitive consideration of [the] matters” addressed in the contested determinations. *See Am. Ass’n of Exps. & Imps.*, 751 F.2d at 1249.

While the court recognizes the circuit split as to whether an agency action must have “definitely undesirable international consequences” to qualify for the foreign affairs exemption, *see Mast*, 8 CIT at 230 & n.20, 596 F. Supp. at 1581 & n.20, the court is bound by Federal Circuit precedent, which at least considers whether an action would have such consequences in determining whether the foreign affairs exception should apply, *see Am. Ass’n of Exps. & Imps.*, 751 F.2d at 1249. The Government has not pointed to any such consequences, which would prove difficult given the considerable public airing of the proceedings.²⁵ *See supra* Background Sec. II; *Zhang v. Slattery*, 55 F.3d 732, 744–745 (2d Cir. 1995) (holding that the foreign affairs exemption did not apply to an interim immigration rule because the record lacked evidence that subjecting the rule to notice and comment would have undesirable international consequences and because the focus of the rule had been at the center of a national debate for more than six months prior to the issuance of the rule).

Accordingly, the court turns to the merits of Plaintiffs’ APA claims.

2. Response to Comments

a. Parties’ Contentions

Plaintiffs contend that the USTR failed to respond to comments in a reasoned manner using two lines of argument. *See* Pls.’ Cross-Mot. & Resp. at 59–60; Pls.’ Reply at 25–27. First, Plaintiffs assert that the USTR’s failure to address the “overwhelming[] opposition” to the imposition of List 3 and List 4A was arbitrary and capricious. Pls.’ Reply at 26 (quoting Defs.’ Resp. & Reply at 38) (alteration in original). Second, Plaintiffs fault the USTR for failing to explain “which comments, and what concerns raised in those comments, caused it to withdraw certain tariff headings and products but not others.” Pls.’ Cross-Mot. & Resp. at 59–60.

²⁵ At the hearing, the Government argued that responding to each of the thousands of comments would provoke undesirable international consequences but did not explain why or specify the nature of the consequences. Oral Arg. 1:00:30–1:01:00. As discussed below, however, a “comment-by-comment” response is not the standard required by the APA.

Amici Curiae Retail Litigation Center, Inc. and others (collectively, “RLC”) likewise contend that the USTR neither considered, nor took sufficient time to consider, substantial objections to the modifications. RLC’s Br. at 12–15. While framing its arguments in terms of the APA, RLC contends that the USTR’s actions are more troubling given the statutory requirement to provide opportunity for the public to comment. *Id.* at 13–14 (citing 19 U.S.C. § 2417(a)(2)). RLC argues that the USTR failed to engage meaningfully with comments expressing concerns that the modification actions would harm the U.S. economy, “act[] as a hidden tax for consumers on everyday products,” *id.* at 14, and disrupt “the supply chains of U.S. retailers, manufacturers, and producers,” *id.* at 15.

The Government contends that the USTR considered the factors relevant to the statutory determinations pursuant to section 307(a)(1)(B) and (C). Defs.’ Mot. at 46–47, 58–59. The Government further contends that the *Federal Register* notices associated with List 3 reflect the USTR’s consideration of comments in its determinations to omit certain tariff subheadings, delay the onset of the increase in the level of List 3 duties from 10 percent to 25 percent, and establish an exclusion process. *Id.* at 58–59. With respect to List 4A, the Government contends that the USTR responded to comments by stating the bases upon which it removed certain tariff subheadings, separating the subheadings into two lists and staggering the effective date of List 4B, and establishing an exclusion process. *Id.* at 59; *see also* Defs.’ Resp. & Reply at 41. The Government also contends that policy issues raised by RLC fail to provide a basis to “overturn[] the tariffs.” Defs.’ Resp. & Reply at 42.

b. The USTR Failed to Respond Adequately to Comments

The APA requires agencies conducting notice and comment rulemaking to “incorporate in the rules adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c). An agency’s explanation of the basis and purpose for its action must demonstrate a “consideration of the relevant factors,” *State Farm*, 463 U.S. at 43 (citation omitted), and “must offer a rational connection between the facts found and the choice made,” *id.* at 52 (quotations and citation omitted). The standard that an agency’s response must meet “is not particularly demanding.” *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (per curiam) (quotations and citation omitted). A court will not, however, undertake a “laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of

their resolution.” *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). For “judicial review . . . to be meaningful,” the agency’s explanation must enable the court “to see *what major issues of policy were ventilated* by the informal proceedings and why the agency reacted to them as it did.” *Id.* (emphasis added). Conclusory statements that do not explain how a determination was reached are therefore insufficient. *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010).

The enabling statute informs the court’s examination of an agency’s basis and purpose statement and the relevance of comments received by an agency. Agency action through notice and comment rulemaking must be tethered to the statute. *See, e.g., State Farm*, 463 U.S. at 43 (explaining that an agency cannot rely on factors “which Congress has not intended it to consider”). Additionally, “[t]he basis and purpose statement is inextricably intertwined with the receipt of comments.” *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (footnote citation omitted). An agency “must respond in a reasoned manner to those [comments] that raise significant problems.” *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quotations and citation omitted). “Significant comments are those ‘which, if true, raise points relevant to the agency’s decision *and which, if adopted, would require a change in an agency’s proposed rule.*’” *City of Portland, Oregon v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)). “[F]ailure to respond to comments is significant only insofar as it demonstrates that the agency’s decision was not based on a consideration of the relevant factors.” *Sherley*, 689 F.3d at 784 (quotations and citations omitted). “[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” *Id.* (quotations and citation omitted).

The statute permits the USTR to “modify or terminate any action” that is being taken pursuant to section 301 “subject to the specific direction, if any, of the President.” 19 U.S.C. § 2417(a)(1). Thus, in accordance with *State Farm*, 463 U.S. at 43, the President’s specific direction, if any, is a statutory consideration for which the agency must account. The statute also requires the USTR to consider whether the burden on U.S. commerce for which action was taken pursuant to section 301 has increased or decreased, or whether the prior action taken pursuant to section 301(b) is no longer appropriate. *See* 19 U.S.C. § 2417(a)(1)(B), (C). Relatedly, section 301(b) informs the agency’s rationale by providing that the USTR is to exercise its discretionary authority to take all “appropriate and feasible action” when a foreign country is engaging in “an act, policy, or practice” that

is “unreasonable or discriminatory and burdens or restricts United States commerce” with the aim of obtaining the elimination of the unfair act, policy, or practice. *Id.* § 2411(b). Thus, statutory factors relevant to the USTR’s determination of whether and how to modify its action include ensuring that appropriate action is taken to eliminate discriminatory and burdensome acts and the President’s specific direction, if any.

The notices of proposed rulemaking (“NPRM(s)”) reflected these considerations. In *List 3 NPRM*, the USTR explained that the proposed supplemental action accorded with the President’s direction as reflected in his statement “direct[ing] the United States Trade Representative to identify \$200 billion worth of Chinese goods for additional tariffs at a rate of 10 percent” that would “go into effect” following completion of “the legal process.” 83 Fed. Reg. at 33,609 (citing June 2018 Presidential Statement). The notice also requested public comments:

with respect to *any* aspect of the proposed supplemental action, including

- The specific tariff subheadings to be subject to increased duties, including whether the subheadings listed in the Annex should be retained or removed, or whether subheadings not currently on the list should be added.
- The level of the increase, *if any*, in the rate of duty.
- The appropriate *aggregate level* of trade to be covered by additional duties.

Id. (emphases added); see also *List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761 (extending comment period following President’s direction to consider increasing the tariff rate to 25 percent and specifically seeking comment on “the possible increase in the rate of additional duty”). In *List 4 NPRM*, the USTR likewise explained that the proposed supplemental action accorded with the President’s direction and requested public comments on “any aspect” of the proposal, including the abovementioned points. 84 Fed. Reg. at 22,564–65.

Consistent with the NPRMs, submitted comments raised concerns regarding the legality and efficacy of the tariffs, the potential for damage to the U.S. economy, and whether alternative measures would be more effective. See, e.g., Pls.’ Cross-Mot. & Resp. at 14–15, 20–21 (citing comments); RLC’s Br. at 14–16 (same); Comments of Nat’l Foreign Trade Council, USTR-2018-0026-1843 (Aug. 22, 2018), PR 1891 (arguing that the tariffs will not be effective and will “create

a new status-quo of higher trade barriers”);²⁶ Comments of U.S. Chamber of Com., USTR-2018-0026-1391 (Aug. 20, 2018), PR 1439; Comments of HP Inc., USTR-2019-0004-1701 (June 17, 2019), PR 7877 (citing section 337 of the Tariff Act of 1930 as an alternative tool for accomplishing the administration’s goals without the economic costs of section 301 tariffs).

Some comments also argued that certain products should be added to or removed from the proposed lists. *See, e.g.*, Comments of Ams. for Free Trade Coal., USTR-2018-0026-6132 (Sept. 26, 2018), PR 6163 (noting that List 3 needed an exclusion process and that “the criteria for inclusion or removal from the final list were not made public”); Comments of Rheem Mfr’g Co., USTR-2018-0026-3884 (Sept. 5, 2018), PR 3930 (supporting the retention of subheadings for air conditioners on List 3 while urging the USTR to add a subheading covering “parts” under which the indoor and outdoor components of air conditioners enter when shipped separately, even if fully assembled); Comments of Retail Indus. Leaders Ass’n, USTR-2018-0026-5887 (Sept. 6, 2018), PR 5924 (urging the removal of parts used in U.S. manufacturing); Comments of U.S. Steel Corp. USTR-2018-0026-5447 (undated), PR 5492 (arguing for the inclusion of advanced steel products (tin mill plate) as an appropriate response to the cyber-hacking covered by the USTR Report, including of U.S. Steel itself).

Other comments requested no increased duties on imported parts and inputs while supporting the duties on finished goods that compete with domestically manufactured goods. *See, e.g.*, Comments of Whirlpool Corp., USTR-2018-0026-3867 (Sept. 5, 2018), PR 3913 (requesting the removal of several subheadings for parts that it uses in its U.S. manufacturing operations and the addition of a subheading for completed dishwashers competing with Whirlpool’s products).

The statute, the NPRMs, and the comments responsive to the NPRMs frame this court’s review of the USTR’s concise statements of basis and purpose. While “[a]n agency need not respond to every comment,” it must explain how it “resolved any significant problems raised by the comments.” *Action on Smoking*, 699 F.2d at 1216. Thus, the USTR was required to address comments regarding any duties to be imposed, the aggregate level of trade subject to the proposed duties, and the products covered by the modifications, all in light of section 301’s statutory purpose to eliminate the burden on U.S. com-

²⁶ The court cites the date of the record document, which is not necessarily the same as the date the USTR associates with the document on the administrative record indices filed with the court.

merce from China's unfair acts, policies, and practices and subject to the specific direction of the President, if any.

With respect to the “wisdom of the enterprise,” i.e., whether to proceed with any increase in duties, the USTR explained its decisions by way of reference to China’s unfair practices and stated that the increase in duties and level of trade affected by the modifications are consistent with the specific direction of the President. *See Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05. The September 2018 Presidential Statement, in turn, provided relevant context, stating that China’s unfair policies and practices relating to U.S. technology and intellectual property “plainly constitute a grave threat to the long-term health and prosperity of the United States economy.” Sept. 2018 Presidential Statement.

The USTR’s statements of basis and purpose thus indicate why the USTR deemed China’s ongoing and retaliatory conduct actionable; however, those statements fail to apprise the court how the USTR came to its decision to act and the manner in which it chose to act, taking account of the opposition and support for the increased duties and the inclusion or exclusion of particular subheadings, the concerns raised about the impact of the duties on the U.S. economy, and the potential availability of alternative courses of action, within the context of the specific direction provided by the President.

While the USTR pointed to the specific direction of the President in September 2018 in *Final List 3* and the specific direction of the President more generally in *Final List 4*, and, while the President’s direction is statutorily significant, the USTR’s invocation of the President’s direction does not obviate the USTR’s obligation to respond to significant issues raised in the comments. *Cf. Sherley*, 689 F.3d at 784–85.²⁷ In *List 3 NPRM*, for example, the USTR noted the President’s desire for a 10 percent tariff on \$200 billion worth of Chinese

²⁷ *Sherley* involved a challenge to the National Institutes of Health’s (“NIH”) issuance of guidelines concerning embryonic stem-cell (“ESC”) research and its failure to address comments objecting to ESC research. 689 F.3d at 784. The D.C. Circuit held that because the guidelines implemented an Executive Order with the primary purpose of removing limitations on funding human ESC research, it was not arbitrary and capricious for the NIH not to respond to comments “diametrically opposed to the direction of the Executive Order.” *Id.* at 784–785. *Sherley* is, however, distinguishable. There, the NIH explicitly stated its overarching position that comments “advocating a blanket ban on all funding for [human ESC] research” were “not relevant” to the issuance of the guidelines. *Id.* at 790 (Brown, J., concurring). The NIH’s dismissal of such comments was consistent with its notice of proposed rulemaking, which requested comments specific to the guidelines’ implementation of the Executive order, not the wisdom of human ESC research generally. *See Draft [NIH] Guidelines for Human Stem Cell Research Notice*, 74 Fed. Reg. 18,578 (Apr. 23, 2009). Thus, the NIH did not arbitrarily ignore comments that attempted to “reopen a debate that, as a practical matter, has been foreclosed for more than a decade.” *Sherley*, 689 F.3d at 790 (Brown, J., concurring). Here, however, the NPRMs characterized the imposition of List 3 and List 4 tariffs as “[propos[als]]” and expressly invited comments on “any aspect of the proposed supplemental action,” including several points that arguably go to

imports, 83 Fed. Reg. at 33,609 (citing June 2018 Presidential Statement), but did not treat that direction as dispositive in light of the USTR’s solicitation of comments on a broad range of issues that could—and, indeed, did—result in comments at odds with the President’s direction, *see id.*; *cf. List 4 NPRM*, 84 Fed. Reg. at 22,564–65. In other words, although the USTR indicated its willingness to consider factors other than the President’s direction in the respective NPRMs, the final determinations do not explain whether or why the President’s direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President’s direction.²⁸ Having requested comments on a range of issues, the USTR had a duty to respond to the comments in a manner that enables the court to understand “why the agency reacted to them as it did.” *Auto. Parts & Accessories Ass’n*, 407 F.2d at 338. The USTR could have explained its rationale with respect the comments in light of the specific Presidential directives it was given. What the USTR could not do was fail to provide a response to the comments it solicited when providing the rationale for its final determinations.

With respect to List 3, the USTR indicated that it chose the products subject to the tariffs at the direction of the President. *Final List 3*, 83 Fed. Reg. at 47,975 (noting that the USTR, “at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the [List 3 NPRM]”). At Oral Argument, however, the Government acknowledged that the record does not reflect the President’s final approval of the list of products covered by the determinations. Oral Arg. 7:50–9:40. The Government argues that the USTR’s response to comments also is evidenced by the USTR’s subsequent decisions to delay the List 3 increase from 10 percent to 25 percent and to establish an exclusion process. Defs.’ Mot. at 58–59. Those arguments cannot prevail, however, because neither of the referenced decisions are contained in *Final List 3*, which constitutes the “final agency action” at issue in this case. *See* 5 U.S.C. § 704; *Final List 3*, 83 Fed. Reg. at 47,974–95 (stating a definitive date for the increase to 25 percent and providing no indi-

whether to impose additional duties at all. *List 3 NPRM*, 83 Fed. Reg. at 33,609; *List 4 NPRM*, 84 Fed. Reg. 22,564. Thus, the USTR treated the imposition of increased duties at the NPRM stage as an open question, and not one that was predetermined based on the direction of the President. *See id.*

²⁸ Indeed, it would be anomalous to find that *Final List 3* and *Final List 4A* constitute agency actions subject to the APA’s procedural requirements while finding that references invoking the President’s direction, without more, satisfy the APA’s requirement for a concise statement of basis and purpose.

cation of an exclusion process).²⁹ The USTR's assertion that it removed certain products from List 3 following its review of the comments and hearing testimony fails to apprise the court of the rationale for the product selection and how that rationale is responsive to the comments.

With respect to List 4A, the USTR stated that “[c]ertain tariff subheadings proposed in the [List 4 NPRM] have been removed from the final list of tariff subheadings subject to additional duties, based on health, safety, national security, and other factors.” *Final List 4*, 84 Fed. Reg. at 43,305. The USTR also segregated the tariff subheadings into two lists with staggered effective dates and indicated that an exclusion process would be forthcoming. *See id.* While the USTR explained that it separated the tariffs based on “China’s share of U.S. imports,” *id.*, that statement does not address the composition of the list of subheadings in the first place. As with List 3, the USTR also failed to connect the removal of subheadings to the comments or address comments that, for example, urged the USTR to distinguish between parts and finished goods.³⁰

Thus, *Final List 3* and *Final List 4* require reconsideration or further explanation regarding the USTR’s rationale for imposing the

²⁹ While the USTR stated that it is “maintaining the prior action,” *Final List 3*, 86 Fed. Reg. at 47,975, when read in context, that statement appears to mean that it is imposing the additional duties while maintaining the List 1 and List 2 duties already in place. That statement does not clearly indicate to the public or the court that the USTR will establish an exclusion process specific to the List 3 duties.

³⁰ The Government also argued that the USTR’s rationale for modifying the section 301 action can be ascertained by examination of certain internal memoranda between USTR General Counsel and USTR Lighthizer. *See* Defs.’ Mot. at 58–59 (citing Mem. from USTR General Counsel Joseph Barloon to USTR Robert Lighthizer (Aug. 14, 2019) at 1, 5–6, PR 9; Mem. from USTR General Counsel Joseph Barloon to USTR Robert Lighthizer (May 7, 2019) at 2, PR 8; Mem. from USTR General Counsel Stephen Vaughn to USTR Robert Lighthizer (Dec. 14, 2018) at 2, PR 6; and Sept. 2018 Vaughn Mem. at 7–9); *see also* Oral Arg. 2:45:00–2:50:00. The APA requires the USTR to “incorporate in the rules adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c) (emphasis added). While the statute does not preclude the court from reviewing an agency’s explanation that is external to the *Federal Register* notice, *see, e.g., Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 711 (D.C. Cir. 1977) (explaining that “[t]he enquiry must be whether the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes the rules”), the USTR did not incorporate by reference the cited memoranda in the contested determinations and the public was not alerted to the reasoning offered therein given the nonpublic nature of the memoranda. If, on remand, the USTR seeks to rely on the contents of the memoranda as evidence of the USTR’s reasons for acting when and how it did such that a future rationale is not *post hoc*, the USTR must explain why that reliance is justified in light of *Invenenergy Renewables LLC v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1323, 1347 (2020) (holding that a contemporaneous but nonpublic memorandum “cannot be considered as part of the grounds invoked by the [USTR] when it acted” because “adequate explanation of the agency’s decision has to be made public somewhere or in some manner allowing interested parties to review and scrutinize it”).

tariffs and, as necessary, the USTR’s reasons for placing products on the lists or removing products therefrom.³¹

c. Remedy

During the hearing, Plaintiffs opined that the Government has waived any request for a remand instead of outright vacatur, a position with which the Government disagreed. Oral Arg. 2:36:30–2:37:00, 2:38:53–2:43:43, 2:46:42–2:46:59. For their part, Plaintiffs did not present arguments for vacatur until filing a notice of supplemental authority and, even then, only summarily discussed vacatur in reference to a prior court opinion. *See* Pls.’ Suppl. Authority at 2 (discussing *Invenergy Renewables LLC v. United States*, 45 CIT __, __, 552 F. Supp. 3d 1382, 1400, 1404 (2021)). The Government, in turn, sought to distinguish that case and, in so doing, argued for a different outcome. *See* Defs.’ Resp. Suppl. Authority at 2–3. In a case arising under the APA, the court may—and regularly will—remand for reconsideration deficient agency action when further explanation is required. *See* 5 U.S.C. § 706(2)(A); *see also*, e.g., *NOVA*, 260 F.3d at 1379–80. Thus, the court declines to find that the doctrine of waiver precludes remand here.

The court turns next to the question whether vacatur is merited in the interim notwithstanding remand to the USTR. In certain circumstances, the court may remand agency action for further consideration while allowing the action to remain in effect. *See NOVA*, 260 F.3d at 1367–68, 1379–81. In *NOVA*, the Federal Circuit adopted the standard first set forth by the D.C. Circuit as to whether agency action should remain in effect when the action is remanded for further consideration. *id.* at 1380 (“[A]n inadequately supported rule . . . need not necessarily be vacated.”) (second alteration in original) (quoting *Allied-Signal*, 988 F.2d at 151). In deciding whether to vacate, the court considers “the seriousness of the [rule’s] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal*, 988 F.2d at 150–51 (quotations and citation omitted); *see also NOVA*, 260 F.3d at 1380 (declining to vacate when the “validity” of the contested action was “open to question” and given the “disruptive consequences” of vacatur).

While the USTR’s failure to explain its rationale in the context of the comments it received leaves room for doubt as to the legality of its chosen courses of action, as in *NOVA*, the court weighs heavily the

³¹ To the extent the USTR decides, on remand, that certain products should have been added to or omitted from the determinations from the beginning, the USTR should also establish and describe a lawful process for implementing that decision.

disruptive consequences of (potentially interim) vacatur. *Final List 3* and *Final List 4* constitute modifications of a prior section 301 action taken to exert leverage on China to cease unfair trade actions burdening U.S. commerce and to do so in a manner that China may no longer attempt to offset that leverage with retaliatory measures of its own. Thus, they are part of a continuum of actions taken in conjunction with ongoing negotiations with China. In addition to impacting the United States' ability to impose and retain List 3 and List 4A duties, vacating the determinations would disrupt a complex and evolving process that was designed by Congress to allow for ongoing negotiations. For now, the court declines to try to unscramble this egg. *Cf. Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002) (declining to vacate unlawful agency action when it was possible for the relevant agency to cure the defect).

At the hearing, Plaintiffs invoked *Dept of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), to argue that the court must vacate USTR's List 3 and List 4 determinations. Oral Arg. 2:38:53–2:43:43; 2:51:15–2:51:37. In *Regents*, the U.S. Supreme Court held that the Department of Homeland Security's (“DHS”) Acting Secretary Duke's explanation of her decision to rescind the Deferred Action for Childhood Arrivals (“DACA”) program relied only on the Attorney General's explanation that DACA's provision of entitlement benefits to certain categories of aliens was unlawful; however, that explanation was insufficient to justify DHS's rescission of DACA's grant of forbearance of enforcement of removal proceedings against the covered classes of persons.³² 140 S. Ct. at 1912–14. The twin prongs of DACA, i.e., benefits and forbearance, were established by DHS's implementation of DACA, and, therefore, in rescinding DACA, DHS had to address both prongs. *See id.* at 1913. The Court refused to consider subsequent reasoning provided by Acting Secretary Duke's successor, Secretary Nielsen, after concluding that the Secretary's reasoning was almost entirely *post hoc*. *See id.* at 1908–09. While Acting Secretary Duke's contemporaneous explanation rested solely upon illegality, Secretary Nielsen pointed to the need to foster confidence in the rule of law by rejecting “legally questionable” policies and a preference for legislative solutions in addition to DACA's illegality. *See id.* at 1908.

³² The Supreme Court declined to address the adequacy of DHS's explanation that it relied on the Attorney General's decision that DACA was unlawful because Acting Secretary Duke was statutorily bound by that decision. *See Regents*, 140 S. Ct. at 1910–11. Instead, the Supreme Court found that Duke failed to address the portion of DACA's legality (forbearance) that was within Duke's discretion. *See id.*

Regents, like *State Farm*, requires the court to review the USTR's statements of basis and purpose to ensure that important policy issues are ventilated and to understand the USTR's determinative reasons for its actions. *Regents* also constitutes a warning to agencies regarding the impermissibility of *post hoc* reasoning as much as it constrains the court's review of such reasoning provided pursuant to a remand. 140 S. Ct. at 1908 (citing *Overton Park*, 401 U.S. at 420, for the proposition that a subsequent explanation "must be viewed critically" for impermissible *post hoc* reasoning and noting that, for example, while "[l]egal uncertainty is, of course, related to illegality[,] . . . the two justifications are meaningfully distinct"). "When an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Id.* (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). Thus, while we may remand to the USTR to further explain its determinations, *Regents* cautions that the USTR may only further explain the justifications it has given for the modifications. *See id.* It may not identify reasons that were not previously given unless it wishes to "deal with the problem afresh" by taking new agency action. *Id.* (quoting *Chenery*, 332 U.S. at 201).³³

3. Plaintiffs' Remaining Arguments³⁴

Plaintiffs also raise arguments regarding the extent of notice provided with respect to List 3, the deadlines set for the submission of comments and the permissible scope of those comments, and the amount of time the USTR allowed interested parties to testify at the hearings. None of these arguments present additional grounds for remand or vacatur.

a. Notice of the Legal Basis for List 3

Plaintiffs first argue that the USTR failed to provide adequate notice of the legal basis for List 3 because although the NPRM cited to section 307(a)(1)(C) exclusively, the USTR ultimately relied on section 307(a)(1)(B) and (C). Pls.' Cross-Mot. & Resp. at 55–56;

³³ Plaintiffs also argue that the USTR failed to consider factors relevant to the statute when it based List 3 and List 4A on China's retaliatory conduct. Pls.' Cross-Mot. & Resp. at 60–61. Because the court finds that China's conduct was relevant to the USTR's determinations pursuant to section 307(a)(1)(B), *see supra*, Plaintiffs' related procedural argument must fail.

³⁴ Because the court is remanding *Final List 3* and *Final List 4*, the court need not further address the issue of remedy in relation to Plaintiffs or *Amici Curiae* at this time. *See generally* Interested Parties' Br. (arguing that non-importer plaintiffs in other cases that bore the cost of the section 301 duties have both constitutional and statutory standing to challenge the USTR's actions and the court's authority to provide relief is not limited to importers of record).

Pls.' Reply at 24–25. The Government argues that the NPRM for List 3 complied with statutory requirements. Defs.' Resp. & Reply at 35–37.

Section 553(b) requires an agency engaged in rulemaking to publish in the *Federal Register* a “reference to the legal authority under which the rule is proposed” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(2)–(3).³⁵ This notice “need not specify every precise proposal” that an agency “may ultimately adopt,” but must “fairly apprise interested parties of the issues involved.” *Mid Continent Nails Corp. v. United States*, 846 F.3d 1364, 1373 (Fed. Cir. 2017) (quotations and citations omitted). Notice is deemed adequate for purposes of the APA if “an agency’s final rule is a ‘logical outgrowth’ of the agency’s notice of proposed rulemaking. *Id.* (citation omitted). “A final rule is a logical outgrowth of [a] proposed rule ‘only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’” *Veteran Justice Grp., LLC v. Sec’y of Veterans Affairs*, 818 F.3d 1336, 1344 (Fed. Cir. 2016) (citation omitted) (alteration in original).

The USTR’s failure to cite to section 307(a)(1)(B) in *List 3 NPRM* as an additional or alternative authority for the modification is not fatal to its rulemaking. The notice is clear that the USTR proposed to modify the section 301 action by setting increased duties on additional specified imports from China and requested comments on various aspects of the proposal. See *List 3 NPRM*, 83 Fed. Reg. at 33,609. In explaining the basis for the modification, the USTR also explained that China had failed to “address[] U.S. concerns with the unfair practices found in the investigation,” *id.* at 33,608, and “refus[ed] to change its acts, policies, and practices,” such that “it ha[d] become apparent that U.S. action at this level is not sufficient to obtain the elimination of China’s acts, policies, and practices covered in the investigation,” *id.* at 33,609. Anyone wanting to comment on such findings, either to support or rebut the notion that China’s unfair practices continued to burden U.S. commerce, and whether such burden continued apace or had increased or decreased relative to the investigation, had notice of the opportunity to do so.

Thus, Plaintiffs argument that the “USTR’s defective notice . . . left a record-vacuum” rings hollow. See Pls.’ Cross-Mot. & Resp. at 56. The

³⁵ Plaintiffs do not specify the precise subsection of section 553(b) they believe the USTR violated. Because the NPRM contained a “reference to the legal authority under which the rule is proposed,” i.e., section 307(a)(1)(C), Plaintiffs appear to argue that the USTR’s failure to cite section 307(a)(1)(B) rendered the NPRM deficient pursuant to section 553(b)(3).

USTR “fairly apprise[d] interested parties of the issues involved,” and the USTR’s reliance on subsection (B) in addition to subsection (C) in the final rule constituted a “logical outgrowth” of the proposed rule. *See Mid Continent*, 846 F.3d at 1373.

b. Comment Deadlines and Time to Testify

Plaintiffs next argue that the USTR failed to provide meaningful opportunity to comment on List 3 by setting a simultaneous deadline for written and post-hearing rebuttal comments and limiting testimony at the public hearings to five minutes per person. *See Pls.’ Cross-Mot. & Resp.* at 56–57. Plaintiffs raise similar arguments with respect to List 4A, while noting that, for that proceeding, post-hearing rebuttal comments were due one week after the hearing. *See id.*; *cf. RLC’s Br.* at 10–12 (advancing similar arguments). Plaintiffs also argue that, by explicitly limiting rebuttal comments to “rebutting or supplementing testimony at the hearing” in the NPRM for List 4A, the USTR arbitrarily departed from its practice with respect to List 1, List 2, and List 3. *Pls.’ Cross-Mot. & Resp.* at 57–58 (citation omitted); *see also List 4 NPRM*, 84 Fed. Reg. at 22,565.

The Government argues that the simultaneous deadlines with respect to List 3 resulted from the USTR providing an extension of time for all comments, *Defs.’ Mot.* at 52 (citing *List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761), and the USTR intended the post-hearing rebuttal comments to be responsive to arguments raised at the hearing, not the written submissions, *Defs.’ Mot.* at 53; *Defs.’ Resp. & Reply* at 38. In any event, the Government contends, the APA does not require any opportunity for the submission of rebuttal comments or an in-person hearing during informal rulemaking proceedings; thus, the USTR’s procedures in that regard could not have violated the APA. *Defs.’ Mot.* at 53–54.

Plaintiffs’ arguments lack merit. The APA did not require the USTR to provide interested parties with an opportunity to submit rebuttal comments. *See 5 U.S.C. § 553(c)*. More importantly, the NPRM for List 3 clearly limited rebuttal comments to “post-hearing rebuttal comments.” *List 3 NPRM*, 83 Fed. Reg. at 33,609. Thus, the USTR was within its discretion to set simultaneous deadlines for “written” and “post-hearing rebuttal comments” when it extended the deadlines for all List 3 comments. *See Vt. Yankee*, 435 U.S. at 543 (“Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”) (quotations and citations omitted).

The USTR's decision to limit oral testimony to five minutes per person also did not violate the APA, which gives agencies discretion as to whether a rulemaking will involve an "opportunity for oral presentation." 5 U.S.C. § 553(c). Absent a statutory directive, the amount of time allowed for each person to testify is the type of line-drawing exercise best left to the USTR. *See, e.g., Vt. Yankee*, 435 U.S. at 543. The public hearings for List 3 and List 4 ran for six and seven days, respectively, demonstrating ample opportunity for public participation. *See Final List 3*, 83 Fed. Reg. at 47,975; *Final List 4*, 84 Fed. Reg. at 43,304.

The USTR also did not arbitrarily depart from past practice when it cautioned that post-hearing rebuttal comments for List 4 "should be limited to rebutting or supplementing" hearing testimony. *List 4 NPRM*, 84 Fed. Reg. at 22,565. The *Federal Register* notices for List 1, List 2, and List 3 likewise provided for "post-hearing rebuttal comments" and, thus, did not explicitly provide for replies to written comments. *See List 3 NPRM*, 83 Fed. Reg. at 33,609; *Final List 1*, 83 Fed. Reg. at 28,712; *USTR Determination*, 83 Fed. Reg. at 14,908. Indeed, with respect to List 3, given the simultaneous deadlines for written and post-hearing rebuttal comments, there was no need for the USTR to have articulated such a limitation. *See List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761.

Accordingly, the USTR did not have an established practice of allowing replies to written comments that it departed from with respect to List 4. *See Ranchers-Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) (explaining that identification of an "agency practice" is predicated upon the existence of "a uniform and established procedure . . . that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the established practice or procedure"). Even if the USTR had such a practice, the USTR's cautionary language used nonmandatory terms. *See List 4 NPRM*, 84 Fed. Reg. 22,565 (post-hearing rebuttal comments for List 4 "should be limited to rebutting or supplementing" hearing testimony) (emphasis added); *see also AT&T v. United States*, 307 F.3d 1374, 1379–80 (Fed. Cir. 2002) (stating that "[a] caution, however, is not a prohibition"). Thus, interested parties were not explicitly precluded from responding to another party's written submission.

Courts, recognizing that "[w]ith more time most parties could improve the quality of their comments," ask whether there is evidence that a party would provide more meaningful comments if given more time or opportunity. *Sichuan Changhong Elec. Co. v. United States*,

30 CIT 1886, 1892, 466 F. Supp. 2d 1323, 1328 (2006); *see also Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (finding that seven-day comment period did not violate APA where plaintiff “failed to identify any substantive challenges it would have made had it been given additional time”). Plaintiffs have pointed to no such evidence in connection with the foregoing arguments. Indeed, as the Government asserts, Plaintiffs fail to “explain *why* they would need to rebut any of the initial written comments (or, for that matter anything discussed at the hearing), when, as the administrative record demonstrates, the written commenters and hearing participants overwhelmingly *agreed* with the plaintiffs’ position, that the tariffs should not go into effect.” Defs.’ Resp. & Reply at 38.³⁶

Thus, for the reasons discussed above, Plaintiffs’ additional procedural arguments do not provide any further basis to remand or vacate the USTR’s determinations.

IV. The Government’s Motion to Correct the Administrative Record

The Government seeks to correct the administrative record by adding two documents (and provide an accompanying certification): The June 2018 Presidential Statement and a supplemental section 301 report titled Update Concerning China’s Acts, Policies, And Practices Related To Technology Transfer, Intellectual Property, And Innovation (2018) (“Supplemental 301 Report”). Defs.’ Mot. Correct R. at 1, Ex. B. The Government contends that “[t]he U.S. Trade Representative was aware of the contents of both of these documents and they would have been considered when making the challenged decisions.” *Id.* at 2–3.³⁷ Plaintiffs “take no position on the motion with respect to [the June 2018 Presidential Statement]” given the Parties’ and the USTR’s respective references to that document. Pls.’ Opp’n Correct R. at 1. Plaintiffs contend that the court should deny the motion with respect to the Supplemental 301 Report because it post-dates the USTR’s consideration of the List 3 duties, was not cited by the USTR in the contested determinations or by the Parties in their litigation briefs, and the Government failed to demonstrate the USTR’s consideration of the document. *Id.* at 1–2.

³⁶ Because the court finds that Plaintiffs’ arguments lack merit, the court does not reach the Government’s argument that the court should account for the asserted “urgent need for action” when examining the adequacy of the USTR’s procedures. See Defs.’ Mot. at 55; Defs.’ Resp. & Reply at 39–40.

³⁷ The Government also states that “the USTR considered . . . the facts contained in the [Supplemental 301 Report],” Defs.’ Mot. Correct R. at 3, but that assertion goes further than the declaration attached to the Government’s motion, which asserts that the USTR “was aware of the contents of [the Supplemental 301 Report]” and it “would have been considered” by the USTR. Decl. by Megan Grimball ¶ 6 (Feb. 15, 2022), ECF No. 441–3.

The court will grant the Government's motion with respect to the June 2018 Presidential Statement and the accompanying certification but will deny the motion with respect to the Supplemental 301 Report.

For purposes of APA review, the administrative record consists of "all documents and materials directly or indirectly considered by agency decisionmakers." *Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999) (quoting *Thompson v. U. S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). The obvious corollary to this rule is that "materials that were neither directly nor indirectly considered by agency decisionmakers," even if relevant, "should not be included" in the record. *Id.* (citation omitted). To correct the record, the movant must "show that the documents to be included were before the agency decisionmaker." *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006). That showing requires the movant to "put forth concrete evidence and identify reasonable, non-speculative grounds for [its] belief that the documents were considered by the agency." *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018) (quotations and citation omitted) (alteration in original) (granting motion to correct the record to include 39 documents indirectly considered by an agency when the documents were referenced in a letter directly considered by the agency in reaching its final decision).

The Supplemental 301 Report could not have been directly or indirectly considered by the USTR in reaching its decision to issue *Final List 3* because the document did not exist at the time. The Government argues instead, with respect to both List 3 and List 4A, that the "contents" of the Supplemental 301 Report "would have been considered" by the USTR. Defs.' Mot. Correct R. at 1–2 (emphasis added). The Government offers no authority for including in the record a document that was not, itself, directly or indirectly considered by the USTR, even if its "contents" were, in some unexplained fashion, considered. On that point, however, the Government makes no showing that the contents of the Supplemental 301 Report *were* considered by the USTR; the Government merely surmises that they "would have been."³⁸

³⁸ That the Supplemental 301 Report was published on the USTR's website in November 2018, see Defs.' Mot. Correct R. at 2, alone does not demonstrate the USTR's direct or indirect consideration of the facts contained therein when deciding whether to impose the List 3 or List 4A duties.

Thus, the court will grant the Government's motion with respect to the June 2018 Presidential Statement and the accompanying certification and deny the Government's motion with respect to the Supplemental 301 Report.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that the Government's motion to dismiss (ECF No. 314) is **DENIED**; it is further

ORDERED that the Government's motion for judgment on the agency record (ECF No. 314) and Plaintiffs' cross-motion for judgment on the agency record (ECF No. 358) are each **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that *Final List 3* and *Final List 4* are remanded to the USTR for reconsideration or further explanation consistent with this opinion; it is further

ORDERED that the USTR shall file its remand results on or before June 30, 2022; it is further

ORDERED that, within 14 days of the USTR's filing of the remand results, the Parties shall file a joint status report and proposed schedule for the further disposition of this litigation; and it is further

ORDERED that the Government's partial consent motion to correct the administrative record (ECF No. 441) is **GRANTED IN PART** and **DENIED IN PART**.

Dated: April 1, 2022

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

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